

No.

October Term, 2019

In the
Supreme Court of the United States

Fabian Fuentes Rosas,
Petitioner,
v.

**Timothy Filson; Attorney General
for the State of Nevada;**
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

Rene L. Valladares
Federal Public Defender of Nevada
*Jonathan M. Kirshbaum
Assistant Federal Public Defender
Jonathan_Kirshbaum@fd.org
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Petitioner
*Counsel of Record

QUESTION PRESENTED

1. Whether the Ninth Circuit failed to consider and decide one of the certified claims raised in Rosas's appeal, namely an exhausted argument that Rosas was denied his right to due process when the state trial court refused to bar the State from prosecuting him on the murder charges as a result of a negotiated plea agreement in which the State would drop the murder charges if Rosas passed a polygraph test?
2. Whether there should be an equitable exception to 28 U.S.C. § 2254(d)(1) when the factual record on which the state court issued its merits decision contains an intentional, material misrepresentation from the State?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Rosas, No. 99-7647 (4JDC Nev.) (Judgment of Conviction, entered November 29, 2000)

State v. Rosas, No. 37152 (Nev. Sup. Ct.) (Order of Affirmance, issued December, 17, 2001)

State v. Rosas, No. 41728 (Nev. Sup. Ct.) (Order of Affirmance, issued June 22, 2005).

State v. Rosas, No. 57698 (Nev. Sup. Ct.) (Order of Affirmance, issued June 14, 2012)

Rosas v. Filson, No. 3:05-cv-00490-RCJ-VPC (Dist. Nev. August 22, 2017) (order denying 28 U.S.C. § 2254 petition)

Rosas v. Filson, No. 17-16839 (9th Cir. November 15, 2019) (affirming denial of petition)

TABLE OF CONTENTS

| | |
|---|----|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| LIST OF RELATED PROCEEDINGS | ii |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF THE CASE..... | 2 |
| A. Summary of the Trial Evidence and How Charging Rosas for the Domino's Pizza Murder Breached the District Attorney's Plea Agreement | 2 |
| B. Rosas' Forced Return to State Court and the Nevada Supreme Court's Default Ruling | 5 |
| C. Second State Post-Conviction Litigation..... | 6 |
| D. The Federal District Court's Procedural Ruling | 7 |
| REASONS FOR GRANTING THE PETITION..... | 8 |
| A. The Ninth Circuit improperly failed to consider whether the district court inappropriately concluded Ground Two was procedurally defaulted | 8 |
| 1. Rosas Fairly Presented Ground Two to the Nevada Supreme Court before Initiating Federal Habeas Proceedings..... | 8 |
| 2. The District Court's Exhaustion Ruling Lacks Legal and Factual Support | 10 |
| B. There should be an equitable exception to 28 U.S.C. § 2254(d) when the factual record on which the state court issues its merits decision contains a material misrepresentation from the State..... | 12 |
| CONCLUSION | 13 |

TABLE OF AUTHORITIES

Federal Cases

| | |
|---|----|
| <i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011) | 12 |
| <i>Gray v. Netherland</i> , 518 U.S. 152 (1996) | 10 |
| <i>Holland v. Florida</i> , 560 U.S. 631 (2010) | 12 |
| <i>McQuiggin v. Perkins</i> , 569 U.S. 383, (2013) | 12 |
| <i>Picard v. Connor</i> , 404 U.S. 270 (1971) | 10 |
| <i>Santobello v. New York</i> , 404 U.S. 257 (1971) | 5 |

Federal Statutes

| | |
|------------------------|---------------|
| 28 U.S.C. § 1257 | 1 |
| 28 U.S.C. § 2254 | <i>passim</i> |

PETITION FOR WRIT OF CERTIORARI

Petitioner Fabian Fuentes Rosas requests this Court grant his petition for writ of certiorari to review the memorandum of the Court of Appeals for the Ninth Circuit. *See Appendix (“App.”) 02.*

OPINIONS BELOW

The memorandum of the Court of Appeals for the Ninth Circuit, affirming the denial of Rosas’s 28 U.S.C. § 2254 petition is unreported and appears at App. 02.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case pursuant to 28 U.S.C. § 2254. The Ninth Circuit granted a certificate of appealability. *Rosas v. Filson*, No. 17-16839, DktEntry: 7-1 (9th Cir. March 13, 2018). The Ninth Circuit’s memorandum affirming the denial of the petition was issued on November 15, 2019. *See* App. 02. The order denying Rosas’s petition for rehearing was issued on February 3, 2020. *See* App. 01. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

This case involves a murder trial. Rosas's chief contention is that the prosecuting authority, the Elko, Nevada District Attorney's Office executed an agreement not to prosecute Rosas for two murders if he passed a polygraph exam. Rosas passed the exam, but the DA charged him anyway. A jury convicted him at trial.

Rosas contends this breached the DA's agreement. To appreciate the strength of Rosas's claim, a brief rendition of the facts presented at trial are as follows.

A. Summary of the Trial Evidence and How Charging Rosas for the Domino's Pizza Murder Breached the District Attorney's Plea Agreement

In the early morning hours of May 24, 1997, a man walked into the Domino's Pizza in Elko, Nevada. The employees had closed the store but had not yet locked the front door. The individual opened fire and killed two employees, Jerry Spaeth and Ray Wire. A third employee, Travis Green, was in a different area of the store and was unharmed. Later investigation revealed that \$400 was missing from the register. *See ECF No. 14-14 at 57-58.*¹ The exact amount the robber took from the store was important to the DA because there was evidence one of the victims owed Rosas \$400 for a drug debt.

Green called 911 to report the shooting. He did not see the shooter well but told the 911 operator and police that he was medium to dark skinned and African American. *See ECF No. 14-12 at 349.*

The police investigation yielded dozens of suspects: a Domino's employee, the father of an employee's girlfriend, a transient man who had recently arrived in Elko, and another homeless man who had worked for the victims' tree-trimming business,

¹ All ECF citations will be to those in *Rosas v. Filson*, No. 3:05-cv-00490-RCJ-VPC (Dist. Nev.).

among others. *See, e.g.*, ECF No. 33-8. Domino's Pizza offered an \$11,000 reward for information leading to the shooter's arrest. *See* ECF No. 104.

Elko Police eventually identified Fabian Fuentes Rosas as a suspect. At the same time, police charged Rosas with several drug crimes. *See* Excerpts of Record (hereinafter "EOR") 677.²

The police desired to use a polygraph test in order to determine whether Rosas was the shooter. Rosas agreed to the polygraph in exchange for the DA's promise not to charge him with the Domino's murders and take no further actions "with regard to" his current drug trafficking charges, if he passed. *See* ECF No. 33-13; EOR 55. Through Elko County Chief Deputy Public Defender Frederick Leeds, Rosas negotiated a signed agreement with the Elko County District Attorney Gary Woodbury. The agreement reads:

I have been advised that if I take the [polygraph] examination and it shows that I am not involved in the Domino's killings; the Elko County District Attorney's Office has agreed to file no further charges and take no further prosecutorial actions with regard to the charges that I am currently facing.

EOR 55.

On August 21, 1997, Rosas took and passed the polygraph test. EOR 56-60 (polygraph exam and results). On October 17, 1997, Mr. Rosas pleaded guilty in the drug prosecution, in a written agreement which provided that "the State . . . will pursue no further charges arising out of the facts now known to the District Attorney's office." *See* ECF No. 33-3; EOR 61.

The police investigation into the murders went cold. According to Clair Morris, the Elko Chief of police, the investigation "wasn't a priority" until he became the chief

² Citations to the EOR are to the one filed in *Rosas v. Filson*, No. 17-16839, DktEntry: 20 (9th Cir. Oct. 15, 2018).

of police, which was years after the shootings. ECF NO. 33-12; EOR 377. He told Detective Randy Parks to “get into your office and don’t come out until this case is solved.” EOR 377.

Approximately two years after Rosas had passed the polygraph test and the district attorney agreed to “take no further prosecutorial actions,” police arrested Rosas and charged him with the Domino’s murders. *See* ECF NO. 33-3; EOR 71-79. The DA also charged Mike Freed as Mr. Rosas’ co-defendant.

Through counsel, Rosas filed a motion to dismiss the charges based on the polygraph agreement and subsequent written plea agreement. *See* ECF No. 13-1; EOR 159-64. The DA opposed the motion. Woodbury, who had signed the polygraph agreement in 1997, signed an affidavit swearing there was no agreement. *See* ECF No. 13-3; EOR 168-70. During a hearing, Woodbury assured Leeds that there was no signed agreement. Leeds, who could not recall whether there was a signed agreement and was no longer Rosas’s counsel, deferred to Woodbury’s assurances. *See* ECF No. 13-4 at 88; *see also* ECF No. 13-9; EOR 177-95. The trial court denied the motion to dismiss and the case went to trial. EOR 255-56.

The DA presented little physical evidence tying Mr. Rosas to the crime. Police found no DNA or fingerprint evidence. The sole eyewitness initially described the shooter as African American. Rosas is Hispanic. The only evidence against him was the testimony of drug dealers, users, and convicted felons. Despite this, the jury convicted Rosas of murder. EOR 259-60. The trial court sentenced him to multiple terms of life without parole. EOR 266-76.

Rosas appealed to the Nevada Supreme Court. Rosas argued, among other things, that his case should have been dismissed based on the non-prosecution agreement. EOR 287-93. Rosas, however, did not have a copy of the non-prosecution agreement to support his argument. The Nevada Supreme Court rejected this

argument finding the terms of the apparently non-existent agreement did not encompass the murder charges. *See* App. 39.

In federal habeas, Rosas contended this decision was both contrary to, and an unreasonable application of *Santobello v. New York*, 404 U.S. 257 (1971). See 28 U.S.C. § 2254(d)(1) (2012). Further, since the language of the agreement repels the Nevada Supreme Court’s finding, and its analysis assumes that no plea agreement existed, its decision relies on unreasonable determinations of fact. See § 2254(d)(2).

The Nevada Supreme Court revisited the issue on two more occasions. Rosas challenged his conviction in state post-conviction. He again raised the claim, now couched as ineffective assistance of counsel claim, that his charges should have been dismissed based on the non-prosecution agreement. The state district court denied Rosas post-conviction relief. *See* EOR 315-17. Rosas appealed. The Nevada Supreme Court affirmed the district court’s habeas denial on law of the case grounds. *See* Ex. EOR 326.

Rosas then filed a federal habeas petition. *See* EOR 329-32. The lower court appointed the Federal Public Defender (“FPD”). *See* ECF No. 22. An investigator for the FPD located the written non-prosecution agreement in a sealed envelope found in the wrong file stored in a moldy shed behind the Elko County public defender’s office. *See* EOR 373-74.

B. Rosas’ Forced Return to State Court and the Nevada Supreme Court’s Default Ruling

The State moved to dismiss the federal petition on exhaustion grounds. The ensuing litigation was protracted. The State filed its original motion on January 4, 2007. The district granted that motion, in part, on September 13, 2007. *See* EOR 384-407. Rosas moved the court to reconsider its ruling. *See* ECF No. 47.

On July 2, 2008, the court declined to reconsider its ruling and, in the portion of the ruling pertinent to this litigation, directed Rosas to abandon his plea agreement claim or return to state court to exhaust it. *See EOR 408-11.* Rosas elected to file a motion to stay federal proceedings and return to state court. *See ECF No. 60.* On September 16, 2008, the court granted Rosas's request for a stay. *See EOR 412-14.*

Rosas then began the process of presenting the issue to the Nevada Supreme Court for the third time.

C. Second State Post-Conviction Litigation

Rosas filed his state petition for post-conviction relief, with supporting exhibits, on November 3, 2008. *See ECF Nos. 64-1, 64-2, 64-3.*

The state court held an evidentiary hearing and then denied the petition. The district court entered an order on February 1, 2011, denying the petition as untimely. *See EOR 693-95.*

Rosas appealed that order, maintained that his untimely filing was the product of state official interference. The Nevada Supreme Court rejected his arguments. App. 34-35. The court implicitly accepted Rosas's cause premise that the DA caused the delay by falsely denying the existence of the plea agreement. The court nonetheless rejected that ground for cause because Rosas waited nearly two years after the discovery of the agreement before filing a state court petition. *See App. 35.*

Interestingly, the court also found the petition was an "abuse of the writ" because Rosas had already raised, and the court had ruled upon, a same or similar claim in his first post-conviction writ. *See App. 34.* In fact, this was the third time the Nevada Supreme Court had weighed in on the claim. Its 2005 post-conviction opinion cited the court's direct appeal denial as its sole basis for denial. *See EOR 326.* In effect, the Nevada Supreme Court acknowledged Rosas had previously fairly presented his plea agreement breach issue.

D. The Federal District Court’s Procedural Ruling

Rosas requested to reopen federal habeas proceedings shortly after the Nevada Supreme dismissed his post-conviction appeal. Rosas filed a Second Amended Petition. EOR 748-99. Rosas, in an abundance of caution, raised his plea agreement claim in two ways. *See* EOR 761-778. The two grounds allege the same core constitutional claim but Ground Two relied *only* on the factual record available to the Nevada Supreme Court at the time of its direct appeal and first post-conviction decisions. Ground One encompassed the new materials, including the actual plea agreement the FPD unearthed during federal post-conviction proceedings and then presented to the state courts in the successive state petition.

Nevertheless, the district court dismissed the petition finding *both* Grounds One and Two procedurally defaulted. Regarding Ground One, the court found that Rosas should not have waited for its final exhaustion ruling before returning to state court. *See* App. 12-13. The court also found that state officials did not create an impediment to presenting the written plea agreement earlier because the DA and Rosas’ attorney “simply forgot the agreement had been reduced to writing.” *Id.* This ruling is questionable as the evidence suggests the DA deliberately failed to turn over the agreement. It is unlikely that both attorney’s “simply forgot” about the agreement’s existence.

Regarding Ground Two, the court’s order is also incorrect. The Ground, by its plain language, does not rely on the terms of the plea agreement. Instead it mirrors the arguments Rosas made to the Nevada Supreme Court before he was able to find the document. Nevertheless, the court ruled that it was impossible to see through Rosas’s attempted “mental gymnastics” to consider the claim without looking at the later-discovered written agreement. For this reason, the judge divined that the claim was the same as that set forth in Ground One. *See* App. 13-14. This despite the fact

Rosas refashioned the claim to be responsive to the court's concerns about exhaustion.

See EOR 392-93

The court's conclusion is unjustifiable. The plain language of the ground, not the judge's subjective beliefs about Rosas intent, must govern. Setting aside the fact that the Nevada Supreme Court's factual conclusion on direct appeal was eventually shown to be false, Rosas was entitled to relief based on the factual record that was before the Nevada Supreme Court when it decided the direct appeal.

The Ninth Circuit granted a certificate of appealability on the issue of whether the procedural dismissal of Grounds One and Two was appropriate. Rosas argued, among other issues, that the district court improperly concluded Ground Two was procedurally defaulted because it had been decided on direct appeal.

The Ninth Circuit failed to address this argument. Instead, the court implicitly accepted that the Nevada Supreme Court had procedurally defaulted both grounds in its decision on appeal from the second state petition. App. 3-4.

REASONS FOR GRANTING THE PETITION

- A. The Ninth Circuit improperly failed to consider whether the district court inappropriately concluded Ground Two was procedurally defaulted**
 - 1. Rosas Fairly Presented Ground Two to the Nevada Supreme Court before Initiating Federal Habeas Proceedings**

In Ground Two of his Second Amended Petition Rosas asserts that the District Attorney prosecuted him for the Domino Pizza homicides in breach of an immunity agreement and a later drafted written plea agreement which precluded the prosecution. *See EOR 769-78; see also EOR 12* (noting the differences between Grounds One and Two as pleaded in the Second Amended Petition).

Ground Two is the same claim that Rosas raised as Ground One in his First Amended Petition. *See EOR 387-93* (listing and discussing the ground).

In finding the ground unexhausted, the district court determined: “The Nevada Supreme Court’s consideration of whether or not the state district court improperly denied petitioner’s motion to dismiss is not the same legal claim as whether or not the State breached the plea agreement.” EOR 393.

Rosas respectfully asserts that the record indicates otherwise. Rosas fairly presented this claim twice to the Nevada Supreme Court—on direct appeal and in his initial post-conviction proceedings.

Rosas first raised the breach claim, both factually and legally, to the Nevada Supreme Court on direct appeal. *See* EOR 287-93 (Opening Brief); EOR 298-301 (Reply Brief); *see also* App. 39-41.

Review of Rosas’s argument on direct appeal reveals that the focus of the argument pertained directly to the August 21, 1997 polygraph test and immunity agreement as well as to the related October 17, 1997 written plea agreement. *See* EOR 287-89; *see also* EOR 55 (immunity agreement); EOR 61-66 (plea agreement).

As in his federal petition, on direct appeal, Rosas outlined in detail the factual background regarding the polygraph test, and the actions of both district attorneys Gary Woodbury and Rob Lowe with respect to Rosas’ assertion that the DAs broke their promise (made two years prior) to not pursue charges involving the Domino Pizza case if he passed a polygraph. *See* EOR 288.

For legal support as to his assertion, Rosas properly federalized the claim by citing to United States Supreme Court authority as well as Nevada Supreme Court authority which itself was premised on Supreme Court case law.

Rosas explained:

The United States Supreme Court has held that, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea agreement be honored. *Santobello v. New York*, 404 U.S. 257 (1971). When the State enters into a plea agreement,

it “is held to the most meticulous standards both of promises and performance.” The violation of the terms or the spirit of the plea agreement requires reversal. *Citti v. State*, 107 Nev. 89 (1991).

EOR 292.

Review of these pleadings confirms Rosas “fairly presented” his breach of the plea agreement claim to the Nevada Supreme Court. *Cf. Picard v. Connor*, 404 U.S. 270, 276 (1971). Rosas referenced the specific federal constitutional guarantee, “due process”, and cited to leading United States Supreme Court authority, *Santobello v. New York*. Rosas also included an extensive statement of facts describing the District Attorney's breach of its 1997 prior agreement to not prosecute him for the Domino's homicides if he passed a polygraph test. By explicitly referencing Santobello and by providing a detailed description of the operative facts, Rosas complied with the exhaustion doctrine's fair presentation requirement. *Cf. Gray v. Netherland*, 518 U.S. 152, 153 (1996). The Nevada Supreme Court considered the legal theory and operative facts of Ground Two and denied the claim on the merits. *See* App. 39-41.

2. The District Court's Exhaustion Ruling Lacks Legal and Factual Support

Rosas raised the claim of whether the DA breached the plea agreement to the Nevada Supreme Court. The lower court disagreed finding that “whether or not the state district court improperly denied petitioner's motion to dismiss is not the same legal claim as whether or not the State breached the plea agreement.” EOR 393. This ruling is neither legally sound nor supported by the record.

The court's finding places undue emphasis on the “requested remedy” aspect of the overall “breach of plea” claim. The motion to dismiss is the remedy for the breach of the immunity and plea agreements—specific performance.

The two components: 1) the State breached the immunity and plea agreements, therefore; 2) Rosas is entitled to have the agreements enforced by having the charges

dismissed, comprise Ground Two. Rosas did not solely argue to the Nevada Supreme Court that his motion to dismiss should have been granted; he argued that the prosecution violated the plea agreement by prosecuting him for the Domino's homicides in violation of the plea agreement. Rosas wanted the benefit of his bargain, *i.e.* specific performance of the plea agreement. *See* EOR 291-93. Specific performance of the plea agreement is effectuated by having the charges dismissed by way of a motion to dismiss.

The lower court's focus on the motion to dismiss as existing separate and apart from the breach of the plea is belied by a review of the record. The only time the phrase "motion to dismiss" is specifically utilized in Rosas's state court briefing is in the heading and the opening sentence: "The defense filed a pretrial Motion to Dismiss on the grounds that the prosecution was barred due to a prior negotiated plea agreement." EOR 287. The requested remedy of motion to dismiss the charges, *i.e.* specific performance of the plea agreement is not the underlying basis (factually or legally) of the claim. The underlying factual basis of the claim is the breach of the plea agreement by the State. The motion to dismiss is simply the method the court would use to specifically enforce the terms of the plea agreement.

Rosas presented this question squarely to the Ninth Circuit. However, the court overlooked this important issue.

This Court should reverse the Ninth Circuit's decision due to this critical oversight. Further, the Ninth Circuit's decision is factually incorrect in that it presupposes the Nevada Supreme Court found the claim procedurally defaulted. While Rosas did raise Ground One in his second post-conviction proceedings he did not raise Ground Two. *See* EOR 717-29.

This Court should grant this petition because the Ninth Circuit's decision is based on a materially false impression of the record.

B. There should be an equitable exception to 28 U.S.C. § 2254(d) when the factual record on which the state court issues its merits decision contains an intentional, material misrepresentation from the State.

Under 28 U.S.C. § 2254(d)(1), when a claim is adjudicated on the merits in state court, a petitioner can only get relief if he establishes the state court decision was contrary to, or an unreasonable application of, clearly established federal law. The analysis under § 2254(d)(1) is limited to the factual record that was before the state court at the time of the relevant state court decision. *See Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

Here, Rosas presented his polygraph/plea agreement argument to the Nevada Supreme Court on direct appeal. The Nevada Supreme Court rejected the argument, concluding the agreement did not exist. That factual finding was made based on an intentional misrepresentation from the State that it did not exist. EOR 170. Later investigation showed that, not only did the agreement, the prosecutor who said it did not exist had indeed signed it.

Under those circumstances, it is inequitable to limit the § 2254(d)(1) analysis to the state court record in existence at the time of the relevant state court decision. The State should not benefit from its own misconduct.

This Court has created equitable exceptions to the habeas statutes. *See, e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, (2013) (plea of actual innocence can overcome statute of limitations); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (statute of limitations is subject to equitable tolling). “[E]quitable principles have traditionally governed the substantive law of habeas corpus.” *Holland*, 560 U.S. at 646 (internal citations omitted). This Court has stated it “will not construe a statute to displace courts’ traditional equitable authority absent the clearest command.” *Id.*

Equity demands an exception to the factual record limitation under § 2254(d)(1) when there has been intentional misconduct from the State to create an

inaccurate record. And the language of § 2254(d)(1), which does not even mention the contents of the factual record, does nothing to preclude such an exception. Rather, this exception is really more an exception to the judicial interpretation of § 2254(d)(1) in *Pinholster*.

This Court can reach this question in this appeal. As discussed under subsection (A), Ground Two was properly exhausted and should be addressed on the merits by the lower court. This Court can provide guidance on the contours of that merits analysis now to preserve judicial resources so that review can be complete in the first instance.

CONCLUSION

For the foregoing reasons, Rosas respectfully request that this Court grant his petition for writ of certiorari and reverse the judgment of the Court of Appeals for the Ninth Circuit.

Dated this 29th day of June, 2020.

Respectfully submitted,

Rene Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Counsel of Record for Petitioner
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Jonathan_Kirshbaum@fd.org