No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

Dontay A. Taylor,

Applicant-Petitioner,

v.

Christopher LaRose, Warden

Respondent.

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO
THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Application for Certificate of Appealability

John P. Parker (0041243)*
Attorney at Law
988 E. 185th Street
Cleveland, Ohio 44119
216-881-0900
advocateparker@gmail.com

*Counsel of Record
For Mr. Taylor

Table of Contents

Table of Authorities

Case Page

U.S. Code

Application for a Certificate of Appealability

To the Honorable Sonia Sotomayor, Circuit Justice for the United State Court of Appeals for the Sixth Circuit:

Mr. Taylor seeks a certificate of appealability under 28 U.S.C. 2253 (c)(1). A COA has been denied by the Sixth Circuit. See Order of September 20, 2019. Ex. A.

Mr. Taylor was convicted of Murder and other charges after a jury trial and is serving a sentence of 38 years to life. The crimes involved someone shooting a gun into a bar and killing one person and injuring others. Mr. Taylor timely hired counsel to file an application under Ohio App R 26(B) asserting his trial and appellate counsel were constitutionally ineffective.

It is fundamental that the petitioner receive the effective assistance of counsel at trial Strickland v. Washington, 466 U.S. 668 (1984) and on appeal Evitts v. Lucey, 469 U.S. 387 (1985) and even through the first post conviction opportunity. (Morgan v. Eads, 104 Ohio St.3d 142 (2004); Martinez v. Ryan, 132 S. Ct. 1309 (2012).

The Ohio Supreme Court in Morgan v. Eads, supra, clearly holds that an Ohio App R 26(B) application is an initial post conviction proceeding under Ohio law even though it concerns the effectiveness of appellate counsel. As the Ohio Supreme Court made clear:

{¶ 9} An application under App.R. 26(B), whether successful or not, was never intended to constitute part of the original appeal. Creating this remedy in the Murnahan decision, and then codifying the remedy in App.R. 26(B), does not affect its status as a postconviction remedy. Moreover, simply initiating the App.R. 26(B) remedy by an application in the court of appeals, instead of the trial court, does not alter its status as a collateral postconviction remedy. An application for postconviction relief under R.C. 2953.21 is not part of the original trial simply because it begins in the trial court, and an App.R. 26(B) application is not part of the original appeal simply because it is filed in the court of appeals.

{¶ 10} Several reasons support our conclusion that proceedings under App.R. 26(B) are collateral postconviction proceedings and not part of the original appeal process.

Morgan v. Eads at 143.

The U.S. District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals have gravely misapplied this Court's decision in Martinez by holding that it does not apply to an Ohio App R 26(B) application even though the Ohio Supreme Court clearly states that the App R 26(B) application is an initial post conviction remedy. See Morgan v. Eads, supra.

Mr. Taylor's previous counsel failed to timely file a 26(B) application and pursued an unreasonable tolling theory in regards to the due date for the application which had no support in Ohio law; thus, the Ohio courts determined the App R 26(B) application was untimely.

Taylor then hired new counsel to filed a "delayed" application under 26(B) and the "good cause" for its untimeliness was counsel's unreasonable tolling theory. By pursuing an unreasonable tolling theory, counsel abandoned Taylor. In addition, counsel ignored Taylor's letters to him to make sure he timely filed the application. Taylor was abandoned by counsel. Holland v. Florida, 130 S. Ct. 2549 (2010).

The Ohio courts refused to decide the "good cause"issue and simply labeled, incorrectly, the second 26(B) application a "successor" which is not permitted under Ohio law even though there was never a rule compliant "first" application. Neither 26(B) application was decided on the merits.

The Sixth Circuit and District Court simply and incorrectly held that there was no right to the effective assistance of counsel in the Ohio 26(B) application. The Federal courts ignored the Ohio Supreme Court's decision in Morgan v. Eads, supra and this Court's decision in Martinez.

Ohio has squarely held that a 26(B) application is an initial post conviction remedy even though it is filed in the court of appeals and is labeled under the Appellate Rules. In a 26(B) application, one attacks the effectiveness of trial counsel through appellate counsel's failure to raise trial counsel's effectiveness as required by Ohio law. The Sixth Circuit ignored Morgan v. Eads. The Sixth Circuit simply said Martinez does not apply.

Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in [a] collateral proceeding." Bartone v. United States, 375 U.S. 52,54 (1963). Here, the state rule (Ohio App R 26(B)) has not provided a remedy for Taylor to fight his unconstitutional conviction due to the ineffective assistance of trial counsel, appellate counsel and/or 26(B) counsel.

Federal constitutional rights are not subject to the whims of state legislatures or state rule makers. "[A]t the very core of exhaustion doctrine is the requirement that state procedures be adequate and effective, for it is only because these procedures are adequate to vindicate federal constitutional rights that the forbearance of the federal courts from swift consideration of habeas corpus claims is justified." Carter v. Estelle, 677 F.2d 427, 445 (5th Cir. 1982).

In this case, Ohio did not afford Taylor an adequate and effective procedure to vindicate his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments of the federal Constitution.

The Ohio courts refused to review his first untimely Ohio App. 26(B) application and his delayed 26(B) application on the merits or for good cause shown; but such action does not bar a federal court from vindicating Taylor's constitutional rights. See Sorto v. Davis, 859 F.3d 356 (5th Cir. 2017)(Texas procedures inadequate for Atkins claim).

An instructive case is Woodfolk v. Maynard, 857 F.3d 531, 552-53 (4th Cir. 2017)(state procedural bar inadequate to prevent review in federal habeas court).

As the court concluded:

> For nearly 30 years, Woodfolk has contended that his guilty plea was procured by an attorney who served two masters, thereby betraying his duty of loyalty to Woodfolk in exchange for a favorable out-come for Woodfolk's codefendant. No court, state or federal, has ever addressed the substance of these troubling allegations. Having found no time bar or adequate state procedural bar to preclude a review of the claim on its merits, we believe the time has come for a fair adjudication of Woodfolk's claim.

Woodfolk at 554.

Likewise for Taylor, no state court has addressed his claims of ineffective assistance of counsel as detailed in the Petition and Traverse. The Sixth Circuit's dismissal of the case without reviewing the merits of the claims or addressing the arguments and evidence that Ohio provided no adequate procedure for Taylor to have the Ohio courts address these important federal Constitutional rights must be remedied. Neither the U.S. District Court nor the Sixth Circuit would even grant a COA.

Mr. Taylor respectfully requests a COA on the following questions:

1. Does Martinez apply to an Ohio App R 26(B) application?

2. Did the Ohio courts give Taylor a full and fair adjudication of his federal constitutional claims. See Rose v. Lundy, 455 U.S. 509 (1982)

COA Standards

In order to make the showing required to obtain a COA, Mr. Taylor "need not show that he should prevail on the merits...rather he must demonstrate that the issues are debateable among jurists of reason; that a court could resolve the issues [in a different manner]; or that questions are 'adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). See also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

A certificate of appealability should issue if the claims are not "squarely foreclosed by statute, rule or authoritative court decision or .....lacking in any factual bases in the record." Barefoot at 894.

Mr. Taylor must simply prove "something more than the absence of frivolity" or the mere "good faith" on his part. Miller-El at 338.

As held recently

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [citations omitted] This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." [citations omitted]. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

Buck v. Davis, 137 S. Ct. 759, 773 (2017)

Conclusion

Ohio has a confusing set of rules under which one must raise the ineffectiveness of trial and appellate counsel in criminal cases. One of the methods for raising the ineffectiveness of trial counsel is through the direct appeal process; if direct appeal counsel is constitutionally ineffective, i.e. for not raising a valid claim of trial counsel's ineffectiveness, then a 26(B) application must be filed. The Ohio Supreme Court has called this 26(B) procedure a post conviction procedure. See Morgan v. Eads, supra. Under Martinez, Taylor is entitled to the effective assistance of counsel during the 26(B) application. Taylor's original 26(B) counsel abandoned him and failed to timely file his 26(B) application. See Holland v. Florida, supra.

The District Court and Sixth Circuit refuse to discuss or analyze the impact of Morgan v. Eads in the context of Martinez and a 26(B) application. As a result, Taylor has been denied an adequate process to raise his claims of ineffectiveness of counsel.

Taylor must request that a COA be issued to the Sixth Circuit so his constitutional rights are protected.

Respectfully submitted,

/s/John P. Parker

Counsel for Mr. Taylor

Certificate of Service

A copy of the foregoing document has been served by regular U.S. Mail postage prepaid this 18th day of December 2019 on Ms. Mary Anne Reese, Ass't Attorney General, 441 Vine Street, Suite 1600, Cincinnati, Ohio 45202, counsel for Respondent.

/s/ John P. Parker

Counsel for Mr. Taylor