

IN THE UNITED STATES SUPREME COURT

No. _____

ROBERT BUTTS,

Petitioner-Appellant,

vs.

WILLIAM SPERFSLAGE,

Respondent-Appellee.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER, IN LIGHT OF EXPRESS AFFIDAVIT BY PETITIONER DEMONSTRATING ATTORNEY DECEPTION ABOUT COMPLYING WITH DEADLINE, THIS COURT SHOULD GRANT WRIT TO FURTHER CLARIFY APPLICATION OF HOLLAND V. FLORIDA AS IT APPLIES TO STANDARD FOR GRANTING AN EVIDENTIARY HEARING ON EQUITABLE TOLLING CASES IN SECTION 2254 CASES UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT?

LIST OF PARTIES

1. All parties appear in the caption.

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CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

8th Circuit Court Opinion

Butts v. Sperfslage, No. 20-1602 (8th Cir. Dec. 16, 2020)

District Court Opinion

Butts v. Sperfslage, No. 1:18-CV-00108 (ND Iowa Feb. 21, 2020)

Iowa Court of Appeals Post-Conviction

Butts v. State, No. 16-2023 (Apr. 18, 2018)

Iowa Court of Appeals Direct Appeal Decision

State v. Butts, No. 11-0069 (Nov. 23, 2011)

JURISDICTION

Mr. Butts filed this action under 28 U.S.C. § 2254. Federal question jurisdiction exists under 28 U.S.C. § 1331. This Court has jurisdiction over petitions from federal courts of appeals. 28 U.S.C. § 1254(1).

TIMELINESS

The 8th Circuit denied Mr. Close's final petition for rehearing and en banc review on December 16, 2020. Appx. A. Ordinarily, the Petitions are due 90 days following the denial of relief. See Supreme Court Rule 13; however, per the pandemic, this Court ordered the deadline extended to 150 days during the COVID pandemic. Rule 13 (1) (90 days) and Emergency COVID Order (March 19, 2020). (allowing 150 days). The 150 day deadline fell on a Saturday, moving the actual

deadline to Monday, May 17, 2021. The Petition has been is mailed today, May 14, 2021 via US Post Office First Class Mail and therefore is considered timely. See US Supreme Court Rule 29.2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth *verbatim* in Appendix G)

1. 28 U.S.C. Section 2254

STATEMENT OF THE CASE

Nature of the Case:

This case comes before this Court on appeal from a federal habeas review of a state court conviction under 28 U.S.C. Section 2254. The District Court denied a certificate of appealability. Appx. The District Court out of the Northern District of Iowa dismissed Mr. Butts' Petition without an evidentiary hearing and also did not grant a certificate of Appealability under 28 U.S.C. Section 2253. Appx. C.

A. Underlying conviction.

Mr. Butts appeals state court convictions for second-degree kidnapping, first-degree burglary, going armed with intent, assault while participating in a felony, assault with intent to commit sexual abuse, carrying weapons, and possession of burglar's tools. See Direct Appeal Opinion F-1.

B. Direct Appeal

On November 23, 2011, the Iowa Court of Appeals denied his direct appeal.

Appx. F.

C. Post-conviction Appeal

On November 23, 2018, the Iowa Court of Appeal affirmed his convictions.

Appx. E.

D. Section 2254 Proceedings.

Mr. Butts filed for Section 2254 relief; however, the District Court denied as untimely and denied a certificate. Order; Appx. C.

E. Section 2254 Appeal

On December 16, 2020, the 8th Circuit affirmed the denial.

FACTS

11/23/2011 Iowa Court of Appeals affirms conviction1

12/13/2011 Deadline for seeking further review expires; **CLOCK STARTS**

9/4/2012 Petitioner moves for appointment of state PCR counsel

10/18/2012 State court appoints PCR counsel for plaintiff

12/13/2012 One-year statute-of-limitations expires; **CLOCK STOPS**

12/19/2014 State PCR petition filed

4/18/18 Iowa Court of Appeals affirms district court's denial of PCR
petition⁶

7/16/18 Iowa Supreme Court issues procedendo

10/23/18 Petitioner files Section 2254 petition in federal court

District Court Order Appx. C at p. 7.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO DETERMINE UNDER WHAT CIRCUMSTANCES AN EVIDENTIARY HEARING SHOULD BE GRANTED WHERE THE PETITIONER PRESENTS PRIMA FACIE EVIDENCE THAT HIS ATTORNEY LIED TO HIM ABOUT FILING THE STATE COURT PETITION.

This Court should grant the Writ to further elucidate under which circumstances an evidentiary hearing should be granted where a Petitioner presents prima facie evidence that his attorney lied to him about filing the post-conviction proceeding. The Writ should be granted to clarify this basic question. See US Supreme Court Rule 10 (c) (“a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.”).

In support his request for a hearing on equitable tolling, Mr. Butts furnished

an Mr. Butts' affidavit, which is provided in the attached appendix, outlines two levels of lies by his direct appeal lawyer and post-conviction lawyer. His Appellate lawyer, John Berry, repeatedly promised him that he would seek review. However, he not only missed the deadline, he completely failed to inform Mr. Butts that he was not going to file for further review, leaving Mr. Butts in the complete dark. By the time Mr. Butts learned that the deadline had expired in late December of 2011, it was already too late to seek further review.

Mr. Butts filed his Application for Post-conviction counsel on September 4, 2012. On October 18, 2012, Brian Munnelly was appointed to represent Mr. Butts on his post-conviction, and the Appointment Order was docketed under criminal case. After his appointment, Mr. Butts repeatedly informed Mr. Munnelly about the importance of filing on time, and over the next two years Mr. Munnelly repeatedly informed him that he would file the application on time. See Petitioner

On that record, Mr. Butts requested a simple evidentiary hearing to establish the lies on the record warranted equitable tolling. The Parties had available some 8th Circuit case law. The 8th Circuit has consistently held that repeated lies about filing on time and failing to adequately communicate with client about case progress warrant tolling. *United States v. Martin*, 408 F.3d 1089, 1094–95 (8th Cir. 2005) (equitable tolling found where attorney Lasko consistently lied to Martin and

his wife about the filing deadline; repeatedly lied to Martin and his wife about the status of Martin's case; refused to communicate with Martin or his family; neglected to file any documents, belated or not, on Martin's behalf; and failed to return any of Martin's paperwork to him despite repeated requests and then demands.) and 9th Circuit case law. *Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir.2003) (tolling state habeas petitioner's statute of limitations due to the “extraordinary circumstance” of egregious misconduct on the part of

In denying the evidentiary hearing, the District Court cited 8th Circuit caselaw.

Petitioner could have, but did not, file a state PCR action pro se, which would have stopped the clock and tolled it during the pendency of the state PCR case. Petitioner was in control of this conduct and cannot blame his dilatory behavior on counsel. See *Gordon v. Arkansas*, 823 F.3d 1188, 1195-96 (8th Cir. 2016) (finding a lack of diligence when a petitioner could make no showing of why he failed to act during a nine-month period); *Nelson v. Norris*, 618 F.3d 886, 892-93 (8th Cir. 2010) (petitioner failed to show due diligence when he failed to take any action for nine months); see also *Palacios v. Stephens*, 723 F.3d 600, 607-08 (5th Cir. 2013) (“[w]eigh[ing] heavily” the petitioner’s unexcused seven-month delay in seeking representation when finding a lack of diligence).

Judgment Denying Evidentiary Hearing at p. 7; Appx. D.

In this District Court’s defense, this Court has not really addressed when an evidentiary hearing is warranted in case such as this since *Holland v. Florida*, a capital murder case where an attorney’s repeated lies possibly warranted further development of record on remand. *Holland v. Fla.*, 560 U.S. 631, 652, 130 S. Ct.

2549, 2564, 177 L. Ed. 2d 130 (2010). This precisely the type of case that warrants clarification of this important area of law, especially since Holland is nearly 11 years old. The lack of guidance was precisely what led to the confusion by the District Court in denying a hearing even after Mr. Butts presented clear evidence of deception by his attorney.

It is somewhat premature, but the posture of this case demonstrates that at least a certificate of appealability under 28 U.S.C. 2253.

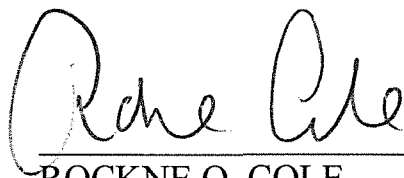
REMEDY

For the above reasons, Mr. Butts seeks a Petition, reversal and remand back to the 8th Circuit Court of Appeals with an order granting a certificate of appealability for full merits briefing.

CONCLUSION

For the above reasons, Mr. Butts asks the Court to grant the Writ.

RESPECTFULLY SUBMITTED,

A handwritten signature in dark ink, appearing to read "Rockne Cole", is written over a horizontal line.

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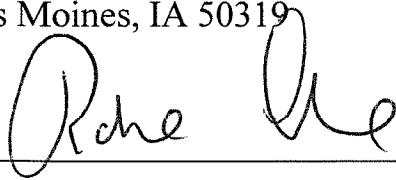
CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Appellant, hereby certify that, May 15, 2021, I mailed an original and 10 copies to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

and one copy to:

Aaron James Rogers
Iowa Attorney General's Office
1305 East Walnut
Des Moines, IA 50319

A handwritten signature in cursive script, appearing to read "Rockne Cole", is written over a horizontal line.