No. 20-6286

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RUBEN G. ARAGON
— PETITIONER
(Your Name)

vs.

THE STATE OF COLORADO
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ruben G. Aragon, #153477
(Your Name)
Arkansas Valley Correctional Facility
12750 Highway 96, Lane 13
(Address)

Ordway, CO. 81034
(City, State, Zip Code)

Unknown
(Phone Number)

QUESTION(S) PRESENTED

1) Is Mr. Aragon entitled to equitable tolling of the statutory limitations set by 28 U.S.C. § 2244(d)(1)(A), due to a state-imposed impediment which prevented him from learning that the terms of his Colorado plea agreement had been violated?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Santobello v. New York, 404 U.S. 257 (1971)

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 25, 2020.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including Nov. 20, 2020 (date) on March 19, 2020 (date) in Application No. ___A_____. See General Order 589 by Court enlarging time to file Petition to 150 days due to COVID-19 concerns.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen:

"[N]o State shall make or enforce any law which shall abridge the privilges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes:

18 U.S.C. § 3584

28 U.S.C. § 2244

28 U.S.C. § 2254

Colorado Revised Statutes:

§ 17-22.5-403, § 17-22.5-405

Colorado Court Rules:

Colorado Rule of Criminal Procedure 35(a)

Colorado Rule of Criminal Procedure 35(c)

STATEMENT OF THE CASE

On Sept. 27, 1997, Mr. Aragon entered a plea of guilty in the U.S. District Court of Colorado, in Case No. 92-cr-422-WYD (United States of America v. Ruben G. Aragon), to one count of distribution/sales of narcotics. As a result of that plea, on Oct. 20, 1997, Mr. Aragon was sentenced to 10-years in the federal prison system, with this sentence being imposed consecutively to any other sentence Mr. Aragon was currently serving (at the time of Mr. Aragon's plea/sentence, Mr. Aragon was serving time for convictions and sentences imposed by the State of Kentucky.) Following imposition of his federal sentence by the U.S. District Court of Colorado, Mr. Aragon was released to Kentucky authorities. Because Mr. Aragon, when in custody of Kentucky authorities had properly requested disposition of both his federal Colorado detainer and his State of Colorado detainer, once his federal sentence was imposed and he was again released to Kentucky officials, they immediately surrendered Mr. Aragon to the State of Colorado authorities, i.e., the County of Arapahoe, State of Colorado, where he was charged with murder and distribution of a controlled substance.

On July 8, 1998, Mr. Aragon entered into a stipulated plea agreement (see Appendix D), with Arapahoe County, State of Colorado officials whereby it was guaranteed that in return for his plea of guilty to one count each of second-degree murder and distribution of a controlled substance, he would receive (respectively), prison sentences of 48 and 22-years (70-years overall), with these two sentences being imposed consecutively to each other, but **concurrently** to his federal sentence in the above referenced case. See Appendix D. Mr. Aragon, upon sentencing by

Arapahoe County, State of Colorado officials, was immediately returned to the custody and control of State of Kentucky officials, where he continued to serve that State's sentences until March 15, 2011, when State of Kentucky officials released him to the State of Colorado authorities, so he could serve the remainder of the sentences they imposed in their custody. (Mr. Aragon's Colorado sentences were imposed concurrently to both his Kentucky, as well as federal sentence, hence he reasonably believed, based upon the engendered governmental promise of Colorado authorities, that once he was released to their custody, i.e., completed the service of his Kentucky sentences, his federal sentence would commence, as it was only imposed consecutively to his Kentucky sentence.)

Mr. Aragon began serving the remainder of his Colorado sentences, all the while understanding, based upon the Arapahoe County, State of Colorado officials' engendered governmental promises, that his federal sentence would commence once he was released from his Kentucky sentences, even though he still had time to serve on his Colorado sentences and had no reason to question otherwise. In addition, when Mr. Aragon was sentenced in 1997 upon his federal distribution charge, federal authorities placed a detainer upon him when they returned him to the custody and control of Kentucky officials (this detainer remained when he was returned to Colorado authorities, and should have remained until he had served 8.5-years in the Colorado prison system where it would be discharged upon completion of the 10-year federal sentence which was allegedly running concurrent to his Colorado sentences, once his Kentucky sentences were discharged.)

Under Colorado law, a criminal defendant's parole eligibility is calculated by reducing the sentence by fifty-percent for good time and another 25% for earned time. See §§ 17-22.5-403(1), 17-22.5-405 C.R.S. In essence, on Mr. Aragon's seventy-year overall Arapahoe County, State of Colorado sentences, Mr. Aragon would be required to serve 26.25-years before becoming parole eligible, provided he has no disciplinary infractions and is program compliant. Given Mr. Aragon's Colorado sentences were imposed concurrently to both his State of Kentucky and federal sentences (the latter of which was believed to have commenced running on the date he was released from Kentucky authorities) Mr. Aragon began serving his Colorado sentences in 1996,[1] when he was sentenced in Kentucky, making him presumptively parole eligible on his Colorado sentences sometime in 2022 (this is provided that Mr. Aragon received earned time on his Colorado sentences while serving time in the custody and control of Kentucky officials, which he eventually was granted by Colorado authorities in 2017, when he requested what is known as a Frank review. See People v. Frank, 30 P.3d 664 (Colo. App. 2000)).

As a result of the receipt of earned time for service of his Colorado sentences while in Kentucky, Mr. Aragon believed he was now eligible to be moved through the Colorado prison system, to a lower custody, where he could receive mandatory drug programming such as "theraputic community" (it should be noted at this point that in 2011, when Mr. Aragon was initially returned to Colorado by Kentucky autorities, Mr. Aragon recognized that he might not be able to move through the Colorado prison system to do such programming if a federal detainer remained

1. Because Mr. Aragon's Colorado sentence was concurrent to his Kentucky sentence it is considered one-continuous sentence that commences in 1996. See § 17-22.5-101 C.R.S.

upon him, so he attempted to have it removed by filing an action in the U.S. District Court of Colorado. This was prior to Mr. Aragon being granted the earned time for service of his Colorado sentence while in Kentucky (approximately 5-years of earned time was awarded in 2017 to Mr. Aragon, thereby moving his parole eligibility date up 5-years) and when he discovered he had not received earned time in 2011, dropped his requests for dismissal of his federal detainer as his Colorado parole eligibility date would not be until late 2027, well after his 10-year federal sentence had been discharged and prior to being within 5-years of his Colorado parole eligibility date, which is what is required for a Colorado prisoner to move through the prison system and participate in mandatory programming. See Colorado Dept. of Corrections Admin. Reg. 600-01 (classification.)

So, in 2017, when Mr. Aragon got the additional earned time awarded to him under Frank supra, he was now approximately within 5-years of his Colorado parole eligiblity date, so he sought his case manager out to discuss the possibility of moving through the Colorado system, especially since he was now also within several years of discharging his federal sentence (initially believed that it would discharge in 2019, 8.5-years after Mr. Aragon's release from Kentucky authorities to Colorado authorities.) It was in 2017, when Mr. Aragon first learned that his federal sentence had not commenced at all, despite his being released to Colorado authorities and their promise that the sentences imposed against him by them would run concurently to his federal sentence. See Appendix D.

Upon learning that the terms of the engendered governmental promise made to him by Arapahoe County, State of Colorado officials had been breached, Mr. Aragon immediately filed a combined Crim.P.Rule 35(a)/35(c) motion, in which he complained that his due process rights afforded to him under the provision of the Fourteenth Amendment to the United States Constitution and this Court's findings in Santobello v. New York, 404 U.S. 257 (1971). This action was summarily denied by the Araphoe County, State of Colorado court in which Mr. Aragon had entered his plea and was sentenced. Mr. Aragon appealed and a division of the Colorado Court of Appeals affirmed that summary denial by making findings that are clearly contrary to the records of the case, that Colorado official's promises that Mr. Argaon's Colorado sentences would run concurrently with his federal sentence was merely a recommendation. See Appendix C, People v. Aragon, Colo. App. No. 2017CA1590 (Jan. 24, 2019). Certiorari was sought and denied by the Colorado Supreme Court, on June 3, 2019.

Immediately following denial of certiorari by the Colorado Supreme Court, Mr. Aragon filed a 28 U.S.C. § 2254 habeas application in the U.S. District Court of Colorado. Recognizing that he was time barred from seeking such relief by 28 U.S.C. § 2244(d)(1)(A), Mr. Aragon simultaneously filed a motion requesting equitable tolling of § 2244(d)(1)(A)'s limitations, under subsection (B) of that statute, i.e., due to a state-imposed impediment, caused by Arapahoe County, State of Colorado officials who had either misunderstood that they lacked the authority to impose their sentences concurrently to Mr. Aragon's federal sentence,

see 18 U.S.C. § 3584, or those officials flat out lied to Mr. Aragon in order to get him to accept a proffer. In that motion, Mr. Aragon set forth the facts of his case and stated that he had acted with all due diligence once he had discovered that the Arapahoe County, State of Colorado officials had breached the terms of his plea agreement.

On Feb. 27, 2020, the Honorable Magistrate Judge Gallagher issued a recommendation that Mr. Aragon's § 2254 habeas application be dismissed as being time barred, i.e., that he was not entitled to equitable tolling of the statutory limitations imposed by § 2244(d)(1)(A), as Mr. Aragon knew a federal detainer existed in 2011, when he was first released by Kentucky authorities to Colorado authorities, as he'd sought to have the detainer quashed in 2011. See Docket No. 25, pp,. 6-8. (Based upon the foregoing, this reasoning is flawed, as a federal detainer had existed on Mr. Aragon since he was sentenced by federal authorities in 1997 and should have remained until Mr. Aragon was released to Colorado authorities and served eighty-five percent of his 10-year federal sentence, which would expire sometime in 2019.) The Honorable Lewis T. Babcock adopted Judge Gallagher's recommendations over Mr. Aragon's timely objections. See Docket No.'s 28, 29. Judge Babcock also denied Mr. Aragon a C.O.A. and forma pauperis status on appeal. See also, Appendix B.

Nonetheless, Mr. Aragon, on June 2, 2020, filed a combined request for issuance of a C.O.A./appeal to the U.S. Court of Appeal for the Tenth Circuit. On June 25, 2020, the U.S. Court of Appeals denied said. See Appendix A.

REASONS FOR GRANTING THE PETITION

1) Is Mr. Aragon entitled to equitable tolling of the statutory limitations set by 28 U.S.C. § 2244(d)(1)(A), due to a state-imposed impediment which prevented him from learning that the terms of his Colorado plea agreement had been violated?

Argument for Relief:

In beginning this argument, there's a couple of factual things that need to be correctly understood, which seem to have escaped all of the lower courts. First, all of the lower courts state that the Arapahoe County, State of Colorado, plea agreement with Mr. Aragon only recommended that his Colorado sentences run concurrently to his 10-year federal sentence. See Appendix A, pp. 4, Appendix C, pp. 5, ¶ 13,; cf., Appendix D [2](mittimus and written plea agreement, which at no point say anything about concurrent sentence being merely a recommendation.) In fact, the U.S. District Court never found that the Arapahoe County, State of Colorado only "recommended' that Mr. Aragon's Colorado sentences run concurrently to his federal sentence, but rather, only that Mr. Aragon should have known about his claim when his federal sentence was imposed, as it was silent as to whether it would run consecutively or concurrently to any future sentence he may receive. See Docket No. 25, pp.6 (recommendation of Magistrate Judge Gallagher); cf., Docket No. 29 (final dismissal by Judge Babcock, that if the failure to understand this could be imputed to state counsel, the one who advised Mr. Aragon that his Colorado sentences would be running concurrently to his federal sentence, at a time when he had a constitutional right to effective assistance of counsel, he must

2. It is patently obvious that the 10th Circuit Court of Appeals did not view the mittimus and plea agreement submitted as exhibits, and simply relied on the erroneous conclusion by the Colorado Court of Appeals.

nonetheless bear the burden of attorney error/negligence. Id, pp. 2).

Secondly, if as inferred above, when there is a constitutional right to receive effective assistance of counsel (a right which applies at all critical stages of a criminal proceedings, including the plea process, see Montejo v. Lousiana, 556 U.S. 778, 786 (2009)) attorney error may be correctly imputed to the state, as in Mr. Aragon's case, it is clear that not only did he rely on counsel's advice that his Colorado sentences would be running concurrently with his federal sentence, but also the promise of the assistant district attorney of Arapahoe County who made the proffer and the trial court which agreed and imposed the concurrent sentences.

With all due respect to the lower courts, what we have is two different reasonings to deny Mr. Aragon the due process protections afforded by the U.S. Constitution, as well as this Court; but we have the same courts either placing the blame on Mr. Aragon (who detrimentally relied on the promises bestowed by three separate Colorado governmental officials), for his failure to discover that his federal sentence was not running once he was returned to Colorado.

Mr. Aragon is at a loss as to how he was supposed to discover this? The lower courts suggest that he should have gone to the law library, researched the issue and he would have found this out. See Appendix A, pp. 4. This raises a question as to what the impetus would have been to do this some 15 years

into service of his Colorado sentence? Isn't ineffective assistance of counsel or having Colorado officials either misunderstand (in turn misadvising a defendant as to what authority they possess), or flat out lie to a defendant sufficient to warrant exception? After all, is it really necessary that every defendant who enters a plea or goes to trial must search out every conceivable statute or constitutional provision that might affect him? Has attorney representation sunk to such a level that a defendant cannot rely on any action of counsel? Couple this with this Court's determination of the limitations of most, if not virtually all pro-se prisoner litigants (see Halbert v. Michigan, 125 S.Ct. 2582, 2592-93 (2005)) and what we're left with is virtually no meaning in the Sixth Amendment's requirement of effective assistance. Assuredly, defense counsel's, as well as the providency court's and district attorney's understanding of what authority they have, i.e., whether they can impose a sentence concurrently to a federal sentence which has already been imposed should be basic law. In turn Mr. Aragon's reliance on the promises of these individuals' should be excusable. (Let's use an anaolgy. You go to a used car lot to buy a car. You find one you like with low mileage. The salesman assures you that even though the mileage seems abnormally low for the year of the vehicle, that this is the actual mileage of the car, because they do inspections and safety checks of all of their vehicles. You get the car home and immediately things start going wrong. As it turns out the odometer, which was supposedly checked has been turned back by its previous owner. The car salesman at best misrepresented his understanding of the low mileage and at worst knew and lied about it. This sale would be actionable as it is fraud. Can we not expect the same from or judicial system or is the individual buying a used car required to

have a second independent safety inspection performed before he/she buys said, even though there are laws in place to protect the consumer? This Court too has determined that the Fourteenth Amendment protects defendants from such fraud and Mr. Aragon submits that when said occurs, there should be a process for review, i.e., equitable tolling should be available to the pro-se prisoner litigant.)

These two things being understood, it is clear that 28 U.S.C. § 2244(d)(1)(A) limits a state prisoner's ability to seek federal review of his state conviction to one-year from the date that conviction becomes final. See e.g., Jimenez v. Quarterman, 555 U.S. 113 (2009). Specifically and as relevant to Mr. Aragon's case, the one-year statutory limitation set by subsection (A), runs from:

> "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, of the applicant was prevented from filing by such State action..."

or

> "the date upon which the factual predicate or the claim of claims presented could have been discovered through the exercise of due diligence."

28 U.S.C. § 2244(d)(1)(B)/(D).

An initial question before this Court is whether the due process protections afforded in Santobello supra, require that when a state, such as Colorado in

Mr. Aragon's case, contract with a defendant that in return for the waiver of his constitutional rights to a jury trial he'll receive a stipulated sentence require that the defendant receive said? This Court has not addressed such a question since Santobello and perhaps it is time.

Another question is whether a state can misrepresent or deceive a defendant as a means to an end, in order that they obtain a conviction? Moreover, if this occurs, (as it did here), is the defendant required to ferret out these misrepresentations or falsehoods within the time limitations set by § 2244(d)(1)(A) or be forever time barred? In other words, if a state can effectively misrepresent or deceive a defendant for sufficient time to allow procedural bar to occur (especially when a state refuses to follow, as it did here, controlling federal law, thereby protecting the defendant's due process rights), should they be allowed to get away with it?

If there ever was a claim that effectively would allow for equitable tolling, this is the one, as Mr. Aragon not only was unable to discover the factual predicate of the claim until 2017 (remembering that, contrary to Judge Gallagher's determinations, a federal detainer was lodged against Mr. Aragon since his federal sentence was imposed in 1997, hence the filing to get it removed in 2011, in an attempt to be able to advance through the Colorado Dept. of Corrections for programming purposes should not be counted against him). Moreover, Mr. Aragon's federal attorney knew about his Colorado detainer and should have advised Mr.

Aragon that any future sentence he received in Colorado would automatically run consecutively to his federal sentence under the statutory provisions of 18 U.S.C. § 3584. When counsel didn't, once again Mr. Aragon was denied his Sixth Amendment right to effective assistance of counsel at a time when he had a constitutional right to said.

Accordingly, Mr. Aragon respectfully submits that given the particulars of his case, he satisfies the requisites for equitable tolling of the statutory limitations set by § 2244(d)(1)(A), under subsection (B) or (D) of § 2244 and thus the lower court's determinations that he was not are in error. Moreover, Colorado's failure to follow federal law and correct the breach of the terms of Mr. Aragon's plea agreement are an assault upon this Court's jurisdiction as well as Mr. Aragon's due process protections. As such, He respectfully moves this Court to grant certiorari on this issue and appoint counsel to represent him. This, as well as all available relief is respectfully requested.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Date: 10/29/20.

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Pro-Se