

No. 20-8026

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

FILED

MAR 26 2021

OFFICE OF THE CLERK

Jesus Manuel Moran — PETITIONER
(Your Name)

vs.

Thomas E. Higgins — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jesus Manuel Moran 107586
(Your Name)
ASPC - FLORENCE
PO BOX 5000
(Address)

FLORENCE, ARIZONA 85132
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. This is a question of first impression since AEDPA. When a lawyer fails to give the State Courts, the opportunity to review federal claims, this failure is the proximate cause of the injury as a matter of law, because that review shall never be granted ever. (App. 53-63)

LIST OF PARTIES

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

Jesus Manuel Moran
Petitioner

vs.

DAVID SHINN,
ATTORNEY GENERAL OF AZ.
Respondents

USCA 9th Cir. No. 20-16146

D.C. No. 4:15-CV-00193-JR

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JURISDICTION

8. The Ninth Circuit decisions are unpublished, issued November 23, 2020 and December 9, 2020 and marked EX 2 and 51.
9. The order denying timely petitions for rehearing are marked EX 1 and 50 and were issued April 5, 2021 and are unpublished.
10. 28 U.S.C. 1254 (1) confers jurisdiction.

STATEMENT OF THE CASE

2. After a jury trial Petitioner was convicted and sought PCR relief once his direct appeals were exhausted. (App. 4 to 49)
3. PCR counsel did not seek review of the trial court's decision and lied to Petitioner and his family, stating he sought review. (App. 37-40)
4. Even though the Arizona Court of Appeals directed counsel to ask the trial court or leave to file a delayed petition, counsel failed to do so, thereby denying Arizona courts the opportunity to rule on the federal claims. (App. 64-65)
5. Petitioner filed a diversity claim for malpractice against PCR counsel and also claims with the State Bar (App. 68-70)
6. The trial court found that the failure of trial counsel to afford Arizona Courts the opportunity was not the proximate cause of his injury. (App. 53-63) which the Ninth Circuit upheld on appeal. (App.51-52)
7. A timely petition for rehearing was filed and denied. (App. 50)

REASONS FOR THIS PETITION

WHEN A LAWYER FAILS TO COMPLY WITH THE INTENT OF AEDPA BY FAILING TO ALLOW STATE COURTS THE OPPORTUNITY TO DECIDE ON FEDERAL CLAIMS, THAT FAILURE IS PROXIMATE CAUSE OF THE INJURY BECAUSE THOSE CLAIMS, WILL NEVER BE REVIEWED.

This proceeding involves the following question of exceptional importance due to the mandatory provisions of AEDPA:

- ¶1 When a lawyer fails to exhaust state remedies, thereby, failing to give state courts the opportunity to review federal claims, raised in the PCR proceedings, that failure is the proximate cause of injury as a matter of law.
- ¶2 As the primary responsibility for substantive review now rests with the state courts, the need for federal oversight of the procedures is heightened, when counsel fail to give state courts that opportunity to review federal claims, and that failure to give that opportunity for review, is proximate cause.

FACTS PERTINENT TO CONSIDERATION OF THIS PETITION

¶3. The Magistrate Judge correctly found in her decision that counsel representing Petitioner in the state PCR proceedings, lied to Petitioner and his wife, when he told them that he sought review by the Arizona Court of Appeals, of the decision of the trial court.(App ¶
~~35~~
~~33~~1 (EX A)

¶4. The trial court granted counsel until April 11, 2014 to seek review. However counsel² in violation of Arizona Rules filed a second request with the Appellate Court. On April 15, 2014 the Appellate court dismissed the Petition as being untimely. It however in plain language granted Petitioner leave to file the request with the trial court. Counsel failed to comply with the directives and ask the trial

¹ Application for Certificate of Appealability and paragraph therein.

² Counsel is an experienced criminal defense lawyer in Arizona and knew based on his wealth of experience, that in Arizona motion to file a delayed Petition must be filed with the trial court and is routinely granted.

court to seek review. (App ¶ 31)

¶4. As a consequence, the Arizona Appellate Courts failed to provide the liberal review contemplated by Arizona law. They were not afforded the opportunity to review claims as to ineffective assistance, failure to investigate, failure to dismiss for pre indictment delay, motion to suppress statements, motions as to loss of evidence, relief for juror misconduct (Doc 71 pp 6 Para 20 to page 17 line 11). Attached is the draft habeas in which the entire arguments were laid down by Petitioner.)(EX B)

¶5 Petitioner filed a claim for legal malpractice and the District Court held that counsel's failure to afford Arizona Courts to review the federal claims was not the proximate cause of the injury.

ARGUMENTS WHY THE PETITION SHOULD BE GRANTED

¶6 "Proximate cause," is also known "causal connection." In addition, with other language like "direct causal connection" or "affirmative link"³.

¶5. The differences in the way causation is characterized, from decision to decision, might simply be attributed to the use of different language by the Court. Still, it remains somewhat of an unsettled question as to whether the causation requirement in situations where counsel has failed to afford state courts the opportunity to conduct that review authorized by AEDPA, is intended to be precisely the same as the proximate cause requirement that is used for common law tort cases.

³ City of Canton v. Harris, 489 U.S. 378, 385 (1989) (requiring a direct causal link between conduct and the alleged violation); Oklahoma City v. Tuttle, 71 U.S. 808, 824-25 (1985) (requiring an "affirmative link" between conduct and violation).

¶6. The element of causation poses very sticky questions in prisoner malpractice cases since AEDPA because of the mandatory provisions of AEDPA and liberal state standards of review.

¶7. The Second Circuit's decision in *Townes v. City of New York*⁴ is instructive. The result in *Townes* is, perhaps, controversial. The plaintiff, *Townes*, was a passenger in a taxi. The taxicab was stopped by a police officer, who searched *Townes* and uncovered evidence of a crime. In the state court criminal proceeding, *Townes*' attorney moved to suppress the evidence, claiming that the search violated the Fourth Amendment. The motion to suppress was denied, and *Townes* was convicted and incarcerated. Subsequently, the Appellate Division, First Department, overturned the conviction finding that the search violated the Fourth Amendment, and the motion to suppress should have been granted.⁵

¶8. So what did *Townes* do next? He brought suit in federal court under Section 1983, claiming that his Fourth Amendment rights

⁴ *Townes v. City of New York* 176 F.3d 138 (2d Cir.), cert. denied, 528 U.S. 964 (1999).

⁵ *People v. Victor*, 149 A.D.2d 363, 363-64; 540 N.Y.S.2d 670, 670 (1st Dep't), aff'd as modified by 74 N.Y.2d 874, 547 N.Y.S.2d 831 (1989) (defendant Lamont Victor aka Victor *Townes*, aka Victor Lamont).

were violated.⁶ Here is where it gets interesting. Townes did not seek damages for the unconstitutional search itself, but sought damages for what he claimed was an unconstitutional conviction and incarceration.

¶9 On appeal, the Second Circuit Court of Appeals agreed that the search violated the Fourth Amendment, but held that there was a lack of sufficient causation between the unconstitutional search, on the one hand, and the conviction and incarceration, on the other.

¶10 In describing the lack of causation, the Second Circuit used the phrase "gross disconnect" to say that the chain of causation between the stop and the search and claimed unconstitutional conviction and sentence was too remote.

¶11 There is another way to look at Townes' claim, however. The state trial court's decision to deny the motion to suppress, which turned out to be an erroneous denial of the motion to suppress, could be thought of as being an intervening cause that was not reasonably foreseeable. In other words, the action by the state criminal trial judge, in denying the motion to suppress, was an intervening cause

⁶ Townes v. City of New York, No. 94 Civ. 2647, 1998 U.S Dist. LEXIS 2739, at *1 (S.D.N.Y. Mar. 6, 1998), rev'd in part by 176 F.3d 138. 530.

that broke the chain of causation between unconstitutional search and the conviction and incarceration.

¶12. One of the curiosities about the case is why the plaintiff did not simply seek damages for the unconstitutional search.

¶13. Unlike Townes' this Petitioner cannot go back to Arizona State courts and ask them to review these federal claim due to waiver and preclusion. For now and forever, his state claims are waived.

¶14. The exclusive remedy available is legal malpractice by counsel.

CONCLUSION

¶15. The court should grant the petition and remand the matter for a trial on the merits. This lawyer is very well known in Arizona, and as the settlement conference Magistrate Judge stated, he plays golf with everyone.

¶16. The fact that he plays golf with everyone does not excuse his failure.

¶17. AEDPA mandates lawyers provide the review.

Respectfully submitted, *THIS 7 DAY OF MAY, 2021*

Petitioner *Jesus M. Moran*
Jesus Manuel Moran