

21_{No.}-5003

IN THE SUPREME COURT OF THE UNITED STATES

DON EDWARD CARTER,
PETITIONER,

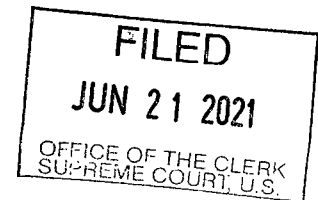
V.

SHAWN PHILLIPS, WARDEN,
RESPONDENT.

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI



Submitted by,
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QUESTION PRESENTED

h6 Whether the Sixth Circuit Court of Appeals decision was 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, whereby petitioner's right to due-process were violated when the state courts declined to equitable toll the statute of limitations, due to his mental incompetence during the applicable time period and thereafter, for filing his post-conviction and federal habeas corpus petitions?

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Don Edward Carter, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the Sixth Circuit Court of Appeals, who rendered the final decision in these proceedings on April 4, 2021.

OPINION BELOW

The Sixth Circuit of Appeals affirmed petitioner's conviction in its case no. 20-6038. The opinion is enclosed in the appendix herein at page 6 . The order of the Sixth Circuit Court of Appeals denying the Motion for Reconsideration En Banc was dated May 24, 2021.

Jurisdiction

The [] decision [] of the Sixth Circuit Court of Appeals was entered on March 4, 2021. A timely Motion for reconsideration En Banc was denied on May 24, 2021 (Enclosed in the Appendix, at page 8 .).

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his

defense.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a 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.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the court of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF CASE

Don Edward Carter was convicted by a McNairy County jury on February 12, 1997, of two counts of murder in the first degree in the shooting deaths of his father and aunt. The trial court sentenced him to life in prison with the possibility of parole.

On June 12, 1997, the trial court denied Petitioner's Motion for New trial. Afterwards, he filed a Direct Appeal to the Court of Criminal Appeals. On August 10, 1998, the Trial Court's decision was affirmed. State v. Carter, No. 02C01-9711-CC-004326 (Tenn.Crim.App. Aug. 10, 1998). On April 17, 2000, the Tennessee Supreme Court affirmed the appeals Court decision. State v. Carter, S.W.3d 762 (Tenn. 2000).

On January 18, 2018, Carter filed a post-conviction petition in the state trial court, arguing in part that the one-year statute of limitation should be tolled due to his mental illness. Finding insufficient evidence to support the tolling claim, the trial court dismissed the petition. The Tennessee Court of Criminal Appeals affirmed, reasoning that Carter had not provided documentation to support his allegation that mental incompetence had prevented him from filing his post-conviction petition for almost eighteen years. Carter v. State, No. W2018-00285-CCA-R3-PC, 2018 WL 6266166 (Tenn. Crim. App. Mov. 30, 2018). On March 28, 2019, the Tennessee Supreme Court denied leave to appeal.

In his Section 2254 petition, placed in the prison mailing system on May 20, 2019, Carter asserted that: (1) his due-process rights were violated when the state courts declined to equitably toll the statute of limitations for filing his post-conviction

petition: (2) he received ineffective counsel at trial and on appeal; and (3) the prosecutor committed misconduct. The state filed a response in opposition on the ground that the petition was time-barred.

After concluding that Carter was not entitled tolling, the district court denied Carter's Section 2254 petition as untimely. The court declined to issue a COA.

Petitioner Carter then filed for COA in the Sixth Circuit Court of Appeals challenging that the Court's decision was contrary to the precedent set forth in Holland v. Florida and Jones v. U.S. Whereby, if a prisoner fails to file a timely Section 2254 petition, the prisoner is entitled to equitable tolling of the limitations period upon a showing that he was diligently pursuing his right but was prevented from timely filing the petition by an extraordinary circumstance. Holland v. Florida, 560 U.S. 631, 649 (2010); Jone v. U.S., 689 F.3d 621, 627 (6th Cir 2012).

Specifically, Carter argued in his COA and the District Court that his Section 2254 was untimely; however, he was entitled to equitable tolling because: (1) appellate counsel failed to advise him that he could file a post-conviction despite knowing of his mental health history and colorable post-conviction claims; (2) his mental incompetence prevented him from pursuing a collateral challenge to his convictions until the time of his post-conviction petition had lapsed; and (3) a prison legal aide incorrectly advised him a few years after the conviction and his direct appeal that he could not timely file a post-conviction petition. Carter alleges that a

different legal aide explained equitable tolling to him and helped prepare his post-conviction petition. Carter does claim that he is innocent of the charges; however, he argued the mental incompetence exception to equitable tolling instead of the actual innocence one because he did not have the evidence to support his actual innocence without a post-conviction hearing and proceedings.

Ultimately, the Sixth Circuit Court of Appeals denied his request for COA March 4, 2021. In general, the court ruled: (1) Carter's ignorance of the law, even if he was mentally incompetent, does not entitle him to equitable tolling; and (2) mental incompetence will equitably toll the limitation period only if the mental incompetence caused the defendant's inability to comply with Section 2244 (d). Carter, however, has failed to make a sufficiently specific allegations to support causation. While Carter has presented evidence of his mental disorder and treatment around the time of his offense and convictions, he has failed to present evidence of subsequent mental incompetence that prevented him from pursuing post-conviction remedies. Further, Carter argues that he cannot obtain his mental health records from the prison system.

To which, the court concluded that Carter does not allege that he requested to examine his records, which prison regulations do permit in some situations. He does not attempt to present his own detailed recollection regarding his mental health after the conclusion of his direct appeal, and he doesn't provide any information on his mental health or behavior from anyone who was around during this

time (which petitioner contends that he did in both his Habeas petition and COA). Thus. Carter has not made a substantial showing that he is entitled to equitable tolling, so his COA was denied.

REASONS FOR GRANTING THE WRIT

Whether the 6th Circuit's decision was 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, whereby petitioner's right to due process were violated when the state Courts declined to equitable toll the statute of limitations for filing his postconviction and federal habeas?

Petitioner understands that his time for filing his Post-conviction expired on or about April 16, 2001; however, he contends that there are extraordinary circumstance that require tolling this statute of limitations to allow him a reasonable opportunity to bring a Post-conviction claim[s] in the interest of due process and justice.

STANDARD OF REVIEW

"Tennessee Courts 'have recognized that in certain circumstance strict application of the statute of limitations would deny a defendant a reasonable opportunity to bring a post-conviction claim and thus, would violate due process. Williams v. State, 44 S.W.3d 464, 468 (Tenn. 2001). When a petitioner fails to timely file a petition for post-conviction relief due to circumstance outside of his control, due process requires tolling of the statute of limitations. Id. at 468-69. Due process concerns may toll the statute of limitations when the petitioner is mentally incompetent or if the petitioner's trial counsel misrepresented to the petitioner that trial counsel was still representing the petitioner, thereby prejudicing the petitioner from filing a pro se petition for post-conviction relief.' Id. at 469 (citing Seals v. State, 23 S.W.3d 272, 279 (Tenn. 2000)). Additionally, 'in certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar petitioner's claim when the grounds for relief whether legal or factual, arise after the final action of the highest state appellate court to which an appeal is taken' or in other words, when the grounds arise after the point at which the limitations period would normally have begun to run.'" Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995)(quoting tenn. Code Ann. § 40-30-102 (a)); also Burford v. State, 845 S.W.2d 204, 210 (Tenn. 1992); all of the above is stated in Davie v. State, 2017 WL 2257704 (C.C.A. of Tennessee at Nashville, may 23, 2017).

"A petitioner is entitled to due process tolling upon a showing (1) that he/she has been pursuing his or her rights diligently and (2) that some extraordinary circumstance stood in his/her way and prevented timely filing." Whitehead v. State, 402 S.W.3d 615, 631 (Tenn. 2013)(citing Holland v. Florida, 560 U.S. 631, 649, (2010). A petitioner can establish the second prong of this test "when the petitioner's attorney of record abandons the interests, such as by actively lying about his/her case that are not true." Id. Additionally, establishing that he has pursued his right diligently "does not require a petitioner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." Baldyague v. U.S., 338 F.3d 145, 153 (2nd Cir. 2003).

Argument

In this case due process should toll the Post-conviction statute of limitations because: (a) Petitioner's Direct Appeal counsel did not advise him of the post-conviction avenue upon completion of his representation of petitioner in those proceedings; (b) Petitioner is, and was, mentally incompetent; and, (c) a prison approved legal-aide provided Petitioner with wrong advise pertaining to filing an untimely post-conviction that led to the lengthy delay.

- (a) Petitioner's Direct Appeal counsel did not advise him of the Post-conviction avenue upon completion of his representation of Petitioner in those proceedings, which caused Petitioner not to file a timely post-conviction.

In Williams v. State, Tennessee Courts recognized that when a Petitioner fails to timely file a petition for post-conviction relief due to circumstances outside of his control, due process requires tolling of the statute of limitations. Williams v. State, 44 S.W.3d 464, 468-69 (Tenn. 2001). Due process concerns may toll the statute of limitations when the Petitioner is mentally incompetent or if the Petitioner's trial counsel misrepresented to the Petitioner that trial counsel was still representing the Petitioner, thereby prejudicing the Petitioner from filing a Pro se Petition for post-conviction relief. Williams at 469 (citing Seals v. State, 23 S.W.2d 272, 279 (Tenn. 2000)).

Adopting this legal principle and applying it to the facts in this case it would seem that due process should toll the statute of limitations if a Direct Appeal attorney fails to tell a mentally incompetent client about the post-conviction avenue for relief, and if necessary assist him/her to file an initial bare-boned petition so counsel will be appointed, upon completion

of representation in Direct Appeal proceedings.

- (1) Direct Appeal counsel knew Petitioner was mentally incompetent and unable to learn of the post-conviction avenue on his own.

The evidence in this case shows the Direct Appeal counsel knew that Petitioner had a history of psychiatric hospitalization, that Petitioner had "been diagnosed as having post traumatic stress syndrome, bi-polar disorder, severe depression and possibly other illnesses", and that Petitioner had "been treated with prozac, valium, and other medications." (See R.53, Appendix at 10). The evidence also shows the Direct Appeal Counsel knew that Petitioner's condition was chronic and "if involuntary treatment [was] not continued [his] condition resulting from mental illness is likely to deteriorate rapidly..." (See R.55, Appendix at 12).

The Direct Appeal Counsel knew that trial counsel described Petitioner's state of mind as often being "confused" and "dazed", as well as trial counsel felt that Petitioner didn't even really know what happened [pertaining to the crimes he was accused of]. (See R.53, Appendix at 8).

Further, the Direct Appeal Counsel knew that Petitioner barely understood the claims presented on Direct Appeal, he had an extremely poor memory, a short attention span, and significant difficulty organizing his thoughts. (See 53 Appendix at 8).

Hence, the evidence shows the Direct Appeal Counsel knew Petitioner's severe mental illnesses would leave him manifestly

unable to take the initiative to learn about what a post-conviction is on his own, and without this information petitioner faced a grave risk of forfeiting his right to seek post-conviction relief, and afterwards a federal habeas corpus.

- (2) The Direct Appeal counsel would have known, even from a cursory review of the case, that petitioner had a number of colorable post-conviction claims.

The Direct Appeal counsel had to know, about the colorable post-conviction claim, that trial counsel provided ineffective assistance of counsel, in that:

- * Trial counsel failed to present an adequate "opening Statement," which effectively left the jury to guess at what petitioner's defenses and theory of case were and how the presented testimony and evidence supported them.
- * Trial counsel failed to present an available involuntary confession defense at trial, or any real defense at all, which prejudiced the outcome thereof.
- * Trial counsel failed to subpoena and present Steve Farese as a witness for the defense at trial.
- * Trial counsel failed to subpoena and present Robert Stacey as a witness for the defense at trial.
- * Trial counsel failed to subpoena and present Rhonda Carter as a witness for the defense at trial.
- * Trial counsel failed to use inconsistent statements made by T.B.I. agent, Terrill Mclean, to discredit his testimony.
- * Trial counsel failed to investigate and present a mental health expert to testify to the detrimental effect of petitioner's mental capacity caused by the jail not providing petitioner with his mental medication and how it would have impacted his decision making ability.
- * Trial counsel failed to investigate, and discuss with petitioner the Pros and Cons of using, "diminished capacity" to establish that the mens rea of this crime

did not exist due to petitioner's mental state, which could have resulted in a verdict of guilt, as to a lesser included offense.

- * Trial counsel failed to present an expert witness or adequate evidence during the penalty phase that petitioner was suffering from a mental condition that significantly reduced his sentence. See T.C.A. §40-35-113 (8).
- * Trial/Appellate counsels failed to provide petitioner with a complete copy of the trial record; specifically, petitioner has not received a copy of the closing argument or the erased portions of the preliminary hearing, which hindered him in filing this post-conviction and it will prejudice him from using it in future litigation.
- * Appellate counsel made several concessions that was detrimental to petitioner's case and could negatively impact future litigation, all without petitioner agreeing to such concessions.
- * The cumulative effect of all the above.

The Direct Appeal counsel also had to know, about the colorable claim, that petitioner's conviction was obtained as a result of prosecutorial misconduct, whereby

- * T.B.I. Agent, Terrill McClain, knowingly made false statements under oath during the preliminary and suppression hearings when he testified that tapes of Petitioner's interview did not exist, in an attempt to withhold favorable evidence from the defense, when he knew that they did exist and that he had given them to the District Attorney.
- * The State destroyed, erased, the part of the preliminary hearing tape that contained the Sheriff's testimony that had numerous inconsistencies in it, which would have brought his credibility into question.
- * The State Agent, the T.B.I., illegally acquired Petitioner's Confidential mental health records, without a Court Order, to use incriminating statements as "probable cause" for everything thereafter.
- * The State arrested Petitioner's younger brother, Randy Carter, for the sole purpose to pressure and coerce Petitioner into making a wrongful confession.

- * The State arrested Petitioner without a warrant and held him for more than 72 hours without bringing him before a magistrate, violating Tenn.R.Crim.P. 5 (a), so they could coerce him into a wrongful confession.
- * The state agent, the jail, blocked petitioner from calling his friend Robert Stacey, which they knew would prevent petitioner from being able to obtain attorney - Steve Farese.
- * The state agent, the jail, intentionally deprived Petitioner of his mental health medication for days prior to the wrongful confession knowing this would make it easier for them to manipulate him into saying what they wanted him to say.
- * The state's agent, the jail, kept petitioner locked-up in a solitary confinement cell with no stimuli and the lights on 24-hours a day to deteriorate Petitioner's mental capacity so they could easily coerce him into a wrongful confession.
- * The cumulative effect of all the above.

Armed with this information and the knowledge that Petitioner was mentally incompetent should have led to him advising Petitioner of the Post-conviction avenue for relief upon completion of counsel's representation of Petitioner in the Direct Appeal proceedings.

- (3) The Direct Appeal counsel should have known that even if Petitioner discovered the post-conviction avenue for relief within the prescribed time he would still be unable to prepare a bare-boned petition that wouldn't be summarily dismissed, which should have inspired counsel to provide minimal initial assistance to prepare a bareboned petition that the courts would accept and appoint counsel to further assist petitioner.

It is idle to suppose that Petitioner, with mental illness, could manage state post-conviction litigation by himself. Especially, since petitions for post-conviction relief often raise issues

which require investigation, analysis and presentation of facts outside the appellate record.

Even for a bare-boned petition to be accepted by the court, were counsel can be appointed, petitioner must present a petition that contains clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. See T.C.A. §40-30-106 (d), Tenn. Sup. Ct. R. 28 5(F)(3), and Arnold v. State, 143 S.W.3d 784 (Tenn. 2004). A bare allegation that a constitutional right has been violated and mere conclusion of law or no colorable claim is stated shall not be sufficient to warrant any further proceedings. See Pewitt v. State, 1 S.W.3d 674 (Tenn. Crim. App. 1999).

Hence, Direct Appeal counsel knew that these tasks can be demanding for a professional, and impossible for petitioner who was mentally incompetent, which should have caused counsel to notify petitioner of the post-conviction avenue of relief, and to provide minimal assistance in initially filing a bare-boned petition that the court would accept and then appoint counsel to further assist petitioner. Instead, counsel just abandoned petitioner.

All of which, demonstrates that Direct Appeal counsel's representation, considering the circumstances herein, was ineffective at best and actually resulted in petitioner, a mentally incompetent client, being abandoned in a critical stage of these proceedings. Therefore, Petitioner's statutory right

to post-conviction, and constitutional right to federal habeas corpus review thereafter, was waived at no fault of Petitioner by circumstances outside of his control, were due process and justice should require, in this extraordinary situation, equitable tolling of the statute of limitations of this post-conviction.

- (b) Petitioner was mentally incompetent during the applicable statute of limitations time period for filing his post-conviction, and thereafter, which caused Petitioner not to file a timely post-conviction and the lengthy delay before he filed and untimely post-conviction.

Similar to the United States Supreme Court and the 6th Circuit, the Tennessee courts have recognized that the one-year limitations period is not a jurisdictional bar and is therefore subject to equitable tolling where petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v Florida, 560 U.S. 631, 649 (2010). Although we have held that equitable tolling should be applied sparingly, "Solomon v. U.S., 467 F.3d 928, 933 (6th Cir. 2006), we have also recognized the needs for flexibility... enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustice." Id. (quoting Holland, 560 U.S. at 650). Thus, although our application of equitable tolling is restrained, we avoid rigid rules and consider equitable-tolling claims on a case-by-case basis. Id. (citing Holland, 560 U.S. at 650).

The United States and Tennessee Supreme courts have recognized that a petitioner's mental incompetence can constitute an extraordinary circumstance under Holland 662 F.2d 736, 742 (6th Cir. 2011): see also McSwain v. Davis, 287 Fed.Appx. 450, 456 (6th Cir. 2008). In so holding, we fashioned the following test: "to obtain equitable tolling of... statute of limitations on the basis of mental incompetence caused his failure to comply with... [the] statute of limitations." Holland, 662 F.3d at 742. In other words, "a causal link between the mental condition and untimely filing is required." Id. Holland,

662 F.3d at 745.

In the context of equitable tolling, causation is not at fact - it is a legal determination based on facts. See Bilbrey v Douglas, 124 Fed. Apprx. 971, 973 (6th Cir. 2004)

The evidence shows:

(1) "That Petitioner was abused as a child, so were other members of his family. He was reared in a broken home (parents divorced or separated) and he himself has gone through a divorce-coming back from Desert Storm to find that his wife... [had] an affair... (Appendix at 7).

(2) On February 13, 1996, Petitioner's discharge summary, by Radwan Haykal M.D., at Charter Lakeside Hospital Behavioral Health System, "prognosis: Fair to good, depending on the patient's compliance with the follow up aftercare plan and adherence to medication." (R. 55, Appendix at 11).

(3) Petitioner's counsel's signed letter dated September 29, 1996, states "Petitioner has a history of psychiatric hospitalization and presently sees a psychologist or psychiatrist." Further, "during my first contact with [petitioner] he was somewhat confused and appeared to be in a daze." (R. 51, Appendix at 8).

(4) In another letter by petitioner's counsel dated November 25, 1996, states that "[Petitioner] has been diagnosed as having post-traumatic stress syndrome, bi-polar disorder, severe depression and possibly other illnesses." The letter also states that [Petitioner] has been treated with prozac, valium and other [mental health] medications." (R. 53, Appendix at 10).

(5) On December 17, 1996, Amin Azimi, Ed.D. a licensed psychologist examined petitioner and made this signed, sworn-certified, prognosis:

- * The person is mentally ill.
- * "The person has threatened or attempted homicide or other violent behavior, or"
- * "The person is unable to avoid severe impairment or injury from specific risks, and there is a substantial likelihood that such harm will occur unless the person is placed under involuntary treatment."
- * [Petitioner's] thoughts are marked by confusion, distractability, and difficulties in concentration."
- * "I certify that if involuntary treatment is not continued the person's condition resulting from mental illness is likely to deteriorate rapidly to the point that the person would be again admissible... (R. 55-56, Appendix at 12).

(6) Also on December 17, 1996, Rokeya Farooque, M.D., a licensed physician examined Petitioner and made this signed, sworn-certified, prognosis:

- * The person is mentally ill.
- * "The person had threatened or attempted suicide or inflict serious bodily harm [or] harm on himself, or"
- * "The person is unable to avoid severe impairment or injury from specific risks, and there is a substantial likelihood that such harm will occur unless the person is placed under involuntary treatment."
- * All available less drastic alternatives to placement in a hospital or treatment resource are unsuitable to meet the needs of the person as shown by the following facts and reasoning: need complete stabilization with medication and therapy to avoid danger to himself and others."
- * I certify that if involuntary treatment is not continued

the person's condition resulting from mental illness is likely to deteriorate rapidly to the point that the person would be again admittable... (R. 56-58, Appendix at).

Hence, the evidence shows that petitioner had a history of mental illness, and his condition is chronic, which means it will effect him for the rest of his life.

Petitioner couldn't present any supportive letters about his mental illnesses, or his mental health records, from the applicable limitations period, or thereafter, because:

(1) Petitioner could not present his mental health records from the applicable time period, or thereafter, because he was in the Tennessee Department of Correction (TDOC) during that time, and at all time thereafter, and TDOC has a policy # 113.52 (B)(3) that prohibits inmates from access to, or the coping of, their mental health records.

(2) Petitioner couldn't get supportive letters of his mental illness, during the applicable time, or thereafter, from family members because he lost contact with his family after he was convicted of killing his father and aunt.

(3) Petitioner couldn't provide supportive letters from an attorney during the applicable time, or thereafter, because he did not have an attorney in that time or thereafter.

(4) Petitioner couldn't get support letters from TDOC staff during the applicable time period, or thereafter, because the department discourages employees from providing letters to

inmates that will be used in legal proceedings.

However, the evidence presented (the two (2) signed letters by Gary F. Antrican petitioner's trial counsel, R. 51-53, Appendix at 8 & 10; the signed discharge summary by Radwan Haykac M.D., R. 55, Appendix 11; the signed, sworn-certified, prognosis of Rokeya Farooque M.D., R. 56-58, Appendix 13; and, the signed, sworn-certified, prognosis of psychologist Amin Azimi Ed.D., R. 55-56, Appendix 12.) are sufficient to prove that petitioner had a history of mental illnesses, in 1996 he suffered from mental illnesses, and these mental illnesses are chronic, which means he was suffering from mental illnesses during the applicable statute of limitations time period and thereafter for the rest of his life.

Further, the evidence shows causation between petitioner's mental incompetence and the fact that petitioner was unable to personally learn of the post-conviction avenue for relief during the applicable time period, and even if he had learned about it he would have been unable to prepare an initial petition and effectuate its filing on his own.

Petitioner's mental incompetence caused him to be less capable at trial to assist in his own defense and caused him to be victimized by the ineffective assistance of counsel [summarized on page 9] and prosecutorial misconduct [summarized on page 10]. This inevitably resulted in an erroneous unconstitutional conviction and sentence. When this occurred,

post-conviction proceedings provided the only possibility for relief.

To seek this relief petitioner, who was mentally incompetent, would have to learn of the post-conviction avenue for relief on his own then prepare and file an initial petition that met the minimal standards so it would not be summarily dismiss.

In other words, petitioner would have to conduct legal research, comprehend that research, to learn of the post-conviction avenue for relief. Then he would have to prepare a bare-boned petition, which would require him to comprehend constitutional and statutory rights, analysis his case to determine which rights have been violated, then prepare those facts in a clear and concise manner, before the court would accept it and appoint counsel. Further, the petition must contain clear and specific statement of the grounds upon which relief is sought, including full discloser of the factual basis of the grounds. See T.C.A. §40-30-106 (b) a bare allegation that a constitutional right has been and mere conclusion of law, or no colorable claim is stated, shall not be sufficient to warrant any further court proceedings. See Pewitt v. State, 1 S.W.3d 674 (Tenn.Crim.App. 1999).

The evidence shows that petitioner with mental illnesses was manifestly unable to take the initiative to learn of Post conviction avenue for relief on his own, or prepare and file a bareboned petition, if he had of learned about post-conviction

proceedings. Specifically,

(1) Petitioner's trial counsel stated that "during his first contact with [petitioner] he was somewhat confused and appeared to be in a daze." See R. 51, Appendix 8.

(2) Petitioner's trial counsel stated that [petitioner] has been treated in psychiatric hospitalization, prior to the alleged murder and thereafter, at Lakeside in Memphis and at Genesis of Jackson... "I have observed [Petitioner's] behavior to vary from one visit to the next. I have observed him in what appeared to be states of depression, states of confusion and states of being normal-- it varies from day to day. Truthfully, I am not sure that he really knows what happened..." See R. 53, Appendix at 10.

(3) Rokeya Farooque, M.D., a licenced physician's professional opinion, based on my experience and the information provided me, I certify that this person is...mentally ill and that if involuntary treatment is not continued the person's condition resulting from mental illness is likely to deteriorate rapidly to the point the person would be again admittable. See R. 55, Appendix at 13.

(4) Amin Azimi, Ed.D., a licenced psychologist, declare that I have personally examined petitioner and it is my professional opinion, based on my examination and information provided me, I certify that this person is...mentally ill...

"his thoughts are marked by confusion, distractability, and difficulties in concentration...and that if involuntary treatment is not continued the person's condition resulting from mental illness is likely to deteriorate rapidly... See R. 55, Appendix at 12.

The evidence shows that petitioner's chronic mental illnesses caused him to be often confused and dazed, easily distracted, a poor memory, difficulty organizing his thoughts, and unable to concentrate, which caused him to be unable to take the initiative to conduct the legal research were he could discover the post-conviction avenue within the applicable time. Further, even if he would have discovered the post-conviction avenue in the applicable time period his mental illness would have caused him to be unable to prepare and effectuate a filing of a petition on his own.

Hence, petitioner has demonstrated from the totality-of-the-circumstance a causal link between his mental condition and the untimely filing of his post-conviction. Petitioner has also shown his mental incompetence was an extraordinary circumstance beyond his control, because his condition caused him to be unable to take the initiative to discover the post-conviction avenue for relief, and if he had of discovered it his mental state would have rendered him unable personally to prepare a post-conviction petition and effectuate its filing. Thus, petitioner's mental illnesses made it impossible

to meet the filing deadline under the totality-of-the-circumstances.

- (c) A prison approved legal-aide provided petitioner with incorrect advice pertaining to filing an untimely post-conviction, which led to the lengthy delay.

The Petitioner, who was mentally incompetent, must show diligence in pursuing the claims to the extent he could understand them. And in this case, evidence has shown that petitioner lacked the ability to take the initiative to discover the post-conviction avenue on his own, or even if he had discovered it petitioner would have been unable to personally prepare a petition and effectuate the filing of it. This demonstrates that petitioner's mental incompetence constituted an extraordinary circumstance that caused his failure to comply with the post-conviction's statute of limitations.

Further, in this case the incorrect advice given by a prison approved legal-aide, Mr. Don McCary, is not insignificant. It actually caused the lengthy delay between the expiration of the statute of limitations and petitioner filing his untimely post-conviction. Specifically,

After the Tennessee Supreme Court had denied his request for permission to appeal the Court of Criminal Appeals decision denying his Direct Appeal, and his Direct Appeal counsel had notified him that his representation of petitioner was complete without telling him about the post-conviction avenue for relief, led petitioner, who was mentally incompetent, to conclude that his case was final and that there were no other avenues for him to challenge his wrongful conviction.

After a couple of years had past, and by accident, petitioner overheard an inmate talking about his post-conviction. Petitioner asked the inmate to explain to him what a Post-conviction is. The inmate explanation left petitioner confused, and he didn't really understand what it was, but he did understand that it was a way to challenge a unconstitutional conviction. Hence, to find out more, and to see if it was something that he could file to challenge his wrongful conviction led to him going to the prison's library and talking to a prison approved legal-aide, Don McCary.

In The Tennessee Department of Correction (TDOC) each prison has inmates that are approved (which means the inmate has passed a basic legal test and been approved by the Warden) to assist other inmates with thier legal filings.

Petitioner asked Don to expalin what a post-conviction is. Don explained, that it is an avenue were a defendant can challenge ineffective assistance of counsel and other constitutional violations that occurred during trial or sentencing proceedings. Petitioner told Don that he felt like his trial counsel had made some mistakes in his case, so Petitioner wanted to know if Don could help him file a post-conviction. Don asked him to wait just a minumute while Don went over to a computer an looked-up Petitioner's litigation history on West Law. Then Don returned and explained that Petitioner's statute of limitations had expired for filing a post-conviction. Hence, he was time-barred and could not

Petitioner did not know until later that Don McCary, was self-taught in law and, had no formal education in law. Further Don only had a GED.

file a post-conviction.

Petitioner had no reason to beleive that Mr. McCary's legal advice was incorrect. And he continued to beleive what Mr. McCary had told him, that he was time-barred and could not file a post-conviction, until one day when he was walking around the Unit's dayroom talking to a prison approved legal-aide that had recently moved into petitioner's unit. This legal-aide, Mr. Nichols, had been an Executive Director of a non-profit organization, who had been to college, before his conviction, as well as he had earned an Associate Degree in Paralegal Studies from Ashworth College after he was locked-up. During their conversation petitioner told Mr. Nichols about his case. Mr. Nichols inquired about the outcome of Petitioner's post-conviction; to which, Petitioner replied that he did not file one. Mr. Nichols asked, why? Petitioner explained, that Mr. McCary had told him that he was time-barred and couldn't file one. Mr. Nichols had Petitioner to come to the Library and Mr. Nichols showed Petitioner that he could have, and still could, file a post-conviction if he met the criteria for tolling the statute of limitations. Unfortunetly, Mr. McCary's incorrect advice resulted in the lengthy delay were petitioner didn't file a post-conviction for over fifteen years after the statute of limiattions had expired.

Within a few weeks of learning that he met the criteria for tolling the statute of limitations, petitioner with the assistance of a prison approved legal-aide filed a untimely post-conviction.

In sum, petitioner used due diligence in that he, a mentally incompetent defendant, sought assistance as soon as he learned of the post-conviction avenue for relief. Then petitioner stopped seeking avenues to challenge his wrongful conviction after Mr. McCary, a prison approved legal-aide, incorrectly advised petitioner that he could not file a post-conviction because he was time-barred. Petitioner had no reason to believe that Mr. McCary was incorrect. Hence, it would have been futile for petitioner to continue to try and file a post-conviction after learning from a prison approved legal-aide that he could not file one.

Further, within a week of learning that Mr. McCary had provided him with incorrect advice and that petitioner met the criteria for tolling the statute of limitations he filed an untimely post-conviction, all of which demonstrates that he was diligent.

Hence, petitioner has done everything within his power and to the extent that he understood his rights to challenge his wrongful conviction, which shows he does meet the due diligence criteria.

All of the foregoing demonstrated by the totality of the circumstance, (a) that petitioner's Direct Appeal counsel did not advise him of the post-conviction avenue upon completion of his representation of petitioner in those proceedings,

(b) that petitioner was mentally incompetent during the applicable time and thereafter, and (c) that a prison approved legal-aid erred in advising petitioner that he could not file a post-conviction because he was time-barred led to the lengthy delay, that demonstrates petitioner had an extraordinary circumstance that stood in the way and prevented timely filing of his post-conviction. Thus, Petitioner meets the criteria for equitable tolling of the statute of limitations for filing his post-conviction.

CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted by,

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