

No. 21-5396

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

AUG 11 2021

OFFICE OF THE CLERK

Joseph Arguella — PETITIONER
(Your Name)

vs.

Jason R. Ravnborg et al RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Arguella # 23102
(Your Name)

1600 North Drive, P.O. Box 5911
(Address)

Souix Falls, SD 57117-0911
(City, State, Zip Code)

N/A
(Phone Number)

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AUG 17 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Whether The eighth Circuit Court of Appeals failed to address Arguello petition on the merits?

Whether petitioner presents, "cause" excusing procedural default by Martinez v Ryan claim presents a substantial one when respondent have not shown insubstantial to US Supreme Court, under contrary to AEDPA?

The issue of statute of limitations is addressed when district court grants dismissal exclusive of memoranda to Judge Duffy report and recommendation. Thus the Martinez v Ryan applies to cause and prejudice? Exhaustion is a defense, not sua sponte hearing when as State asked for 30 days Dec #13 to exhaust, and had unaddressed Martinez v Ryan.

Whether support CUA The issue has as shown to be Federal Constitutional violation of right to appeal ineffective assistance of trial counsel?

Whether Arguello was denied a fair trial guaranteed by the 6th Amendment to the US Constitution, pursuant to the 14th Amendment due process given to the States?

Whether equitable tolling in extra, circumstances made timely filing unfair? And whether Arguello shown diligent effort to raise claim?

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- APPENDIX C petition for rehearing denied by an order June 29, 2021
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□ 2015 SD 103, direct appeal response by South Dak. Supreme Court

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□ motion for writ of Mandamus June 8 2020

□ motion for leave to proceed (filing fees; by motion 28 USC 2254
motion to vacate the judgment and reopen by 60(b)(6); withstanding
evidentiary hearing.

□ June 30, 2020 order by Judge Duffy Doc #7 4:20-cv-04088-KSS
complete standard forms

□ Filed 7/29/20 Application 28 USC 2254

□ May 6, 2020 motion for Disqualification (no disposition)
same entry by State

□ order Doc #9 7/31/20 [conclusion and order]

□ sequence of events 8/12/20. Notable is timing an
arrangement same day Arguella filed motion for COA
State raises motion to dismiss just the application by Doc #13

□ 10/22/20 Doc #17 is Judge Duffy's report and recommendation

□

Legal questions). These issues or qds' co-exist to unison

Whether The Eighth circuit Ct of Appeals failed to address Arguella petition on the merits?

Whether The circumstances require evidentiary hearing? As COA is question of law

to appear as a garden variety claim of neglect excusable. Karen Schreier would have to raised a valid hearing to prove Martinez & Ryan in that their upon initial resolution equitable failing to the one yr statute of limitations. As the statute requires the judge to do so. Not leave the Ct run and to make admonishments.

(see Feb 8th 2020 motion for COA, as will be determining factor where here 8th cir. gives no explanation for its denial.

seen in objections by Arguella to judge Duffy's Doc. 17 Report and Recommendation Doc. 19 is judge Schreier adopting it and dismissing petition. As no ruling to the merits of claims.

Feb 22, 2020. BE advised !!!

No ineffectiveness of State Trial Counsel Failure to object to admonishments see, Bucci v US 662 F3d 18 (1st 2011). [28] n. 9. at [29], is inoperative.

When as here external factor not attributable to Arguella "cause" shown.

Reference Feb 22, 2020 enclosed

Burden of proof 671.02 in Martin v Fayram 849 F3d 691, 698 (8th 2017).

Seen in US v Johnson v US 594 US 295, 309-310.

The requirement of due diligence must therefore demand something more than the dissent, willingness to accept no diligence at all. BE advised !!!

Legal analysis when South Dakota doesn't permit ineffective assistance of counsel on direct appeal.

Here distrust et treated it as procedural maximizing the time the judgment are open to question a rule allowing that kind of delay would thwart one of AEUPH principle purposes, as is shown here

Type Diamond Adams v Ault, 2007 US Dist Lexis 24629 [11], see [13].
Dote Arguella had presentation as independent claim of ineffective assistance. Exhaustion is a defense (State instant case asked for 30 days to exhaust.

Seen Doc #13 enclosed

Whether petitioner presents, "cause" excusing procedural default by Martinez v Ryan claim presents a substantial one when respondent have not shown insubstantial to United States Supreme Court precedent, under AEDPA substandards to 2244(b)(2)?

Thus no standing order that petitioner claim is inceptually tolled. Success reversal is required when merits of Arquello petition on ineffective assistance of counsel under the sixth Amendment required more deference. Harrington v Richter 562 US 696 (2011) was granted (due diligence), 2244(b)(2)(B)(i).

This claim is showing the date on which the factual predicate could have been found under the exercise of due diligence. That's impossible as no way to know. Green v US, 260 F3d 79, 82-83 (2001).

(b)(1) and (b)(2): rare an exceptional circumstances warrant when application was filed May 14, 2018. 2254(e)(2)(A)(i)'s due diligence requirement was satisfied because counsel had not objected and knew Arquello didn't know admonishments and diligent investigation had not been done "cause" is in the principle that petitioner must conduct a reasonable and diligent investigation.

Obvious Judge Dyk found that if Arquello would or could show and present cause and prejudice that would be feasible by Ct had not appointed counsel to do the state habeas claims of ineffectiveness.

Which as the Ct justices knew is as shows independent claim was made by Arquello. Duncan shows 175 post conviction or collateral attack. to Martinez v Ryan rules US v Martin, 408 F3d 1069, 1092 (8th Cir 2005). nor did or does respondent cite case law see Doc# 13 & Doc# 17 id, 1094 Long v Wilson 393 F3d 390, 395-96 cases are in opposite.

Thus contested judge ruling id 1093 Rowse v Lee 2007 F3d 238, 248 (4th Cir 2003) on brief (see Feb 22 2020 enclosed), 249

US v Kosak 2007 US Dist (4th Cir 52710 [6]-[9] timely motion examining instant case showing May 2018 letter by Judge Craig Pfeiffer should have restarted once yr filing under diligence explanation for delay.

Where Arquello was never apprized of the record when he had attorneys (no consultation was made to during before or after). There'd been no sequestering of jurors in the case.

cited, Berry v Ault, 312 F3d 948, 951 (8th Cir 2002). attorney error miscalculation is not the issue as Judge Schreier would have you believe. Here serious attorney misconduct was intended do to admonishments upon jurors

"Jurors are mindful of judges behavior, and absence during trial created a negative impression in minds of jurors to Arquello's detriment."

The issue of Statute of Limitations when Dist. Ct grants dismissal of petition sua sponte before State ever filed a response. (Although State filed a response its only resulted do to Judge Duffy raised it.
It's the State that requested Doc #13 30 days to exhaustion is a defense.

See Nardi v Stewart 354 F.3d 1134 (9th Cir 2004) id 1140-41

2254(b)(3). provides that The State shall not be deemed to have waived the exhaustion requirement... unless The State expressly waives the request there is no similar provision requiring the express waiver of AEDPA's statute of limitations

State waived procedural default argument by failing to raise it in response to petition. B-cuz State asked for thirty days to exhaust and had not addressed Martinez v Ryan. Success, or Judge Duffy's standing order prejudice and cause issues raised by Arguella remain undressed Long v Wilson 393 F.3d 390 at 396.

Franklin v Johnson, 290 F.3d 1223 (9th Cir 2002) id 1231

District Ct can only dismiss... (where here adopted Duffy's standing order), without prejudice when a petitioner's claims are procedurally barred and cannot show cause and prejudice for the default.

contrast, thus 2254(c), procedural default rule barring consideration of Fed claim applies only when a State Ct has been presented with the Fed claim but declined to reach the issue for procedural reasons or it is clear that State Ct would hold claim procedurally barred. [NO standing order barring Arguella period].

Wherefore id 1141 The issue of waiver is irrelevant where district Ct granted magistrate Duffy's standing order. As its in State responses to statute of limitations sua sponte raised by Duffy. State ignored of Martinez v Ryan, as dist Ct adopted Duffy's report and recommendation in whole. Burton v Sachse 2005 US Dist Ct 26986 [8] - [11].

Wherefore, The cause and prejudice is substantial one in Strickland v Washington, application was made (independent claim). Its the fact it never appointed attorney to Arguella application despite timeliness. can be no failure to timely file. page 12 Doc 17 filed by Duffy "period after statutory tolling ends, irrespective is its during presenting Arguella timely filing that tolls equitably Time expires has nothing when actual innocence is shown to record evidence and supported by record.

Begs the question does claim have merit

Franklin Supra. 290 F.3d at 1230. The exhaustion doctrine applies when State Ct has never presented the opport. to consider petition claim and opport. must still be available to the petitioner under State Law.

(State Doc #13 asked for to exhaust State remedy while had not addressed Martinez v Ryan at all. Therefore it is a defense possessed by the habeas respondent alone, and courts may not intervene. id 166 below Remedies still available at time of Fed petition is, Fed Law clearly established id 1231n2 and 1231n4.

As result of proceeding would have been different (under Strickland v Washington id 694. Thus only need show reasonable probability Williams v Taylor 529 US 362.

As Williams v Taylor 529 US 400 432-33. A failure to develop the factual basis of a claim is not established unless there is a lack of diligence or some greater fault, attributable to Arquello or counsel.

Support in Kennedy v Tamm - Royce 504 US 1, 4, 89, Williams Supra, 529 US at 433. TO THE CLAIM AT BAR. Timerson v Kelley 2017 US Dist W. Va. 227845 [41]-[42]. unaware of past admonishments

The motion shows this Ct recognizes cause and prejudice required by Arquello to demonstrate excuse for default before receiving hearing on claim, see US v Randolph, 404 F.3d 155, 166-168

As page 12 Dec #17 Duffy goes further "Arquello did not know

(and generally true) South Dak. does not allow claims of ineffective assistance of counsel on direct appeal. see SD v Craig, if its through Habeas 'credibility of narrators' will find the facts do support. misconduct was intended. Judge Duffy does not reiterate judges acts or justices of SD. 2015 SD 103 # 27351 [11], shows absence of judge creates negative impressions in minds of jurors

In order to establish prejudice id [10], obviously had Arquello attorney objected, changed, as even if Arquello could have discovered in one yr, claim is showing there'd been no counsel appointed to do the State Habeas.

A fact subject to proof or disproof like any other factual issue.

There'd been a facial attack. Factual predicate could not have been discovered when its ineffectiveness of counsel was never held to hearing on merits.

REASONS FOR GRANTING THE PETITION

But there is no ruling on objections to merits when a decision is contrary to. An record shows date no admonishments, As by no objection by attorney Arquello had no fair trial, The facts show Judge Schreier was wrong to conclude equitable tolling, mischaracterized, as clear error of law.

Document 10/22/20 by Judge Duffy shows the notes even though its apparent the Arquello did procedurally default his claims in state trial by failing to seek state relief before SDS if such default is excused when cause and prejudice are as presented (substantial one *Martinez v Ryan*).

But indep. claim is shown to ineffective assistance, credibility of narrators As no ruling on standing order that Arquello was as is showing generally prohibited from raising ineffective assistance of trial counsel claims on direct appeal, or as here failure to appoint counsel by judge.

In fact Judge Schreier adopted report in full. But made no proper rulings' period. *Gray v Netherland*, 518 US 152, 166. No preclusion can ensue

Where there is proven an impediment external factor that prevented Arquello from raising the ineffective assist claim. (see *Huntbach v Dooley* 2016 US Dist Lexis 128576 [9])

Withstanding demonstrative good cause for discovery cited, *Gordon v Nicholas* 2020 US Dist Lexis 250198 [15], *Trivino v Thaler* 569 US 413, 422, 423. Thereby excusing procedural default

Cornes v Zaken, 2021 US Dist Lexis 84587 [13], compelling claim of actual innocence. As cir, extro; enough to invoke equitable tolling have been found when.

(1) The respondent has actively misled Arquello, (2) petitioner was prevented asserting rights, (3) petitioner has timely asserted his rights mistakenly in wrong form. OR (4)

Here, the prevention is due to circumstances obvious beyond Arquello's control.

Id [15] the gateway actual innocence, couldn't be more obvious the alleged victim Hyman was still intact.

Whereby statute of limitations time bar is excused when new discovery available exculpatory evidence but not present at trial due to ineffective assistance. See also *Reeves v Fayette*, 897 F3d 154, 164 under *Martinez v Ryan* claim is a substantial one. State does not oppose. Accord, *Pinkney v Gilmore*, 2019 US Dist Lexis 108057 [9].
Page 584 US 418.

PLEASE See as showing in 7/29/2020 application raises by Arguello see State v Craig, State v Thomas, 2011 SD 15, at P23 now seen [*39]n41 in Blincoe, Court must recognize that procedural rules precluded the fact-finding necessary to adequately present a claim of ineffective assistance of trial counsel. Arguello establishing prejudice prong of Strickland test for ineffective assistance of trial counsel under the actual prejudice prong of Coleman that remains in force after Martinez and Trevino which relate to the "cause" portion of "the cause and prejudice test."

Cited Blincoe v White, 2015 US Dist Lexis 15939[*14], [*29] similar to SD cases it raises Martinez) similarly Arguello asked for attorney May 14 2018, letter affirms this is stood in the way timely filing/ Blincoe at [*14]-[*16].

Bowen v Blaine 243 F Supp 2d 296,303-08(*3rd Cir 2003) idat 320n13.case before you is inopposite. *See Jemerson v Payne 957 F3d 916, 928 (8th Cir 2020), due diligence does not require a defendant to root out info, that State kept secret hidden.*

This showing the rule governs here, SD does not permit ineffective assistance of counsel claim on direct appeal (seen [*29] in Blincoe, See also, Glenn v Wynder, 743 F 3d 402,410(*3rd Cir 2014),

its why 8th Cir is in Blincoe Cited, Sasser v Hobbs, 735 F 3d 883(*8th Cir 2013) idat 851. The Supreme Court created a "narrow exception" to the Coleman rule that ineffective assistance of counsel in a State post-conviction proceeding does not excuse a procedural default.*cf.* Coleman v Thompson, 501 US 722,753-54.

In the Supreme Court expanded this exception in Trevino reasoning a distinction between (1) A State that denies permission to raise [an ineffective assistance of counsel] claim on direct appeal and, as herein. Because Arguello argues appellate counsel should have raised the issue that trial counsel was ineffective for failing to object to trial counsels lack of admonishments.

pg. 13 in Doc # 17 by Judge Duffy pg. 14 State Habeas court refused to appoint counsel in State Habeas proceedings to represent Arguello, "Cause" when prohibited Arguello from filing ineffective assistance of counsel in his direct appeal.

Arguella having not been apprised of the record uncontested
non consultation by attorneys shows unattributable facts kept Arguella from
raising a meritorious non-frivolous claim. Denial of access to attorney
when independent claim of ineffectiveness was presented

B-cuz the narrow exception Trevino 569 US 413 at 421-424 applies

Indeed the right to counsel at trial and direct appeal is foundation
for adversary system. Martinez id at 12, 130 S. Ct. 1309, 182 LEd 2d 272,
284-85. unavailability of factual or legal claim due diligence is required
when as here dist. Ct. treated it as procedural maximizing the time that judgment

Nardi v Stewart 354 F.3d 1134, 1139 - Here its judge Duffy raised it sua sponte.
when its state asked for 30 days to respond. 2253(b)(5) standard is different
when as here dist Ct [has] denied habeas petition on procedural ground without reaching
the petitioners underlying claim.

Slack v McDaniel 529 US 473 484 Two-prong test is met.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

* Joe Arguella

Date: 8-9-2021