

No. 21-8176

IN THE SUPREME COURT OF THE UNITED STATES

MARICE NALLS
Petitioner

v.

STATE OF LOUISIANA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
FILED ON BEHALF OF THE STATE OF LOUISIANA

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**ARGUMENT IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

The State of Louisiana submits this opposition brief primarily in order to comply with its obligations under U.S. Sup. Ct. Rule 15(2), 28 U.S.C.A.

Petition for writ of certiorari is untimely filed:

U.S. Sup. Ct. Rule 13(1) expressly states that, “Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort...is timely filed when it is filed with the Clerk of this Court within 90 days after entry of the judgment.” Given that the claim sought to be reviewed by way of this petition was fully considered and disposed of by the state courts with the November 7, 2014 ruling of the Louisiana Supreme Court, (Petitioner’s Exhibit I) the petitioner had until February 5, 2015 to seek review before this Honorable Court. Petitioner filed his petition more than seven years after the time specified for filing in Rule 13(1), and his petition should be dismissed as untimely.

As support, the State of Louisiana attaches the following documents for review by this Honorable Court:

EXHIBIT 1: Petitioner’s pro se state application for post-conviction relief filed October 11, 2011, alleging in Claim 5 on page 20 that his trial counsel rendered ineffective assistance of counsel by failing to argue that the statute of limitations on the institution of prosecution for armed robbery had expired;

EXHIBIT 2: State’s Procedural Objections, Answer, and Memorandum in Opposition to Application for Post-Conviction Relief, filed February 27, 2012, arguing

in response to Claim 5 that the petitioner failed to show prejudice under the proper standard of review;

EXHIBIT 3: Commissioner's Recommendation issued August 9, 2012 recommending additional briefing by the parties on the issue of ineffective assistance of counsel for failure to argue the statute of limitations on the institution of prosecution for armed robbery had expired;

EXHIBIT 4: Trial court order signed October 3, 2012 ordering additional briefing on whether trial counsel's failure to file a motion to quash (or appeal) the indictment for armed robbery based on untimely prosecution pursuant to La. C.Cr.P. art. 572 could support the claim of constitutionally ineffective assistance of counsel.

EXHIBIT 5: Supplemental brief of the state filed in response to the trial court's order on November 13, 2012.

EXHIBIT 6: Petitioner's counseled brief, submitted in response to the trial court's order of November 13, in support of his pro se application for post-conviction relief, wherein counsel stated that "the only question is whether or not Mr. Nalls was prejudiced by his counsel's failure to file a timely motion to quash" the indictment for armed robbery. (Brief, p. 5) Petitioner further argued therein "***Because of trial counsel's failure to move to quash the armed robbery charge, the jury¹ was allowed to hear and to consider evidence of armed robbery in an aggravated rape trial where the sole defense was consent.*** While we can never know what is in the minds of an individual juror, it is obvious that this added non-consensual

¹ Petitioner's trial was, in fact, a bench trial, petitioner having waived his right to jury trial.

element of the armed robbery served to thwart Mr. Nalls consent defense significantly and the prejudice is obvious on its face.” (Brief, p. 6) (Emphasis added)

EXHIBIT 7: Commissioner’s Recommendation signed January 31, 2013, recommending the dismissal of petitioner’s claim of ineffective assistance of counsel for failure to challenge the armed robbery charge based on untimely prosecution.

EXHIBIT 8: Trial court’s order signed March 15, 2013, dismissing petitioner’s state post-conviction claim of ineffective assistance of counsel for failure to challenge the armed robbery charge based on untimely prosecution.

EXHIBIT 9: Petitioner’s counseled Notice of Intent to File a Writ in the state intermediate appellate court challenging the trial court’s ruling dismissing his state post-conviction claims.

EXHIBIT 10: Petitioner’s counseled writ for supervisory review in the Court of Appeal, First Circuit, State of Louisiana, signed April 15, 2013, arguing in relevant part that, “Because of trial counsel’s failure to move to quash the armed robbery charge, the court was allowed to hear and to consider evidence of armed robbery in an aggravated rape trial where the sole defense was consent.” (p. 10)

EXHIBIT 11: Ruling of Court of Appeal, First Circuit, State of Louisiana, issued July 1, 2013 that the writ would not be considered due to failure to comply with state uniform rules-courts of appeal, and setting a July 30, 2013 deadline by which petitioner must file a new application with the court of appeal.

EXHIBIT 12: Petitioner’s pro se “Motion to Re-File Supervisory Writ According to Instructions From this Court” seeking to refile the counseled writ, pro

se, with the missing information. (It appears that the petitioner incorrectly included the docket number of the writ that was “not considered” in the case caption.) The motion was made July 24, 2013, within the new application deadline.

EXHIBIT 13: Ruling of the Court of Appeal, First Circuit, State of Louisiana, on November 4, 2013, denying petitioner’s writ of review.

EXHIBIT 14: Pro se application for writ of review filed in the state’s court of last resort, on November 26, 2013, including, in relevant part, petitioner’s claim of ineffective assistance of trial counsel for failure to argue that the statute of limitations on the institution of prosecution had expired. (p. 17)

EXHIBIT 15: State’s opposition to application for writ of review in the Louisiana Supreme Court, filed October 9, 2014, submitted pursuant to an informal request for a response by the Louisiana Supreme Court (telephone call) on October 1, 2014.

EXHIBIT 16: Ruling of the Supreme Court of the State of Louisiana, issued November 7, 2014, granting writ “for the sole purpose of vacating relator’s armed robbery conviction and sentence.” The conviction and sentence for aggravated rape was undisturbed by the state supreme court.

Petitioner alleges in application before this court that “Nalls’ petition for a *writ of certiorari* centers around the right to a fair trial, when a defendant is prejudiced at trial on one count because he should have never been tried simultaneously for the second count due to prescription issues.” (Petitioner’s brief, p. 1) The state, in post-conviction proceedings initiated nearly eleven years ago, conceded that trial counsel

was deficient in failing to file a motion to quash the charge of armed robbery because that charge had prescribed. As such, the sole issue in those proceedings became whether counsel's error was "so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). That issue was resolved in favor of the State of Louisiana on November 7, 2014.

Notably, the post-conviction application filed more than five years later raised the same claim: "Mr. Nalls was prejudiced at his trial by his attorney's ineffective assistance of counsel, as determined by the Louisiana Supreme Court, who failed to file a motion to quash the prescribed armed robbery charge, which had the prejudicial effect or influence on the verdict at trial." (Petitioner's Exhibit H, p. 6) In a counseled writ to the state's intermediate appellate court, petitioner attempted to distinguish his claim stating, "This is a separate and distinct claim of ineffective assistance of counsel – not simply that trial counsel failed to file a motion to quash the armed robbery charge which prejudiced Mr. Nalls at his trial for the armed robbery charge, but that Mr. Nalls was additionally prejudiced at his trial for the aggravated rape charge as well." (Counseled writ, attached as state's Exhibit 17, p. 5; note that the state's service copy is missing page 3) Subsequent to that court's writ denial, another attorney with the same firm filed an application for supervisory writs in the Supreme Court of Louisiana, dropping the "ineffective assistance of counsel" label entirely, and explaining that the petitioner's post-conviction claim raised "a new issue that, in light of the Louisiana Supreme Court's ruling, he was denied the right to a fair trial

because the jury was exposed to evidence of the prescribed charge of armed robbery when the jury should have only been tasked with the issue of judging the evidence of the aggravated rape,” and asserting that “That issue has not been fully litigated as the trial court suggested.” (Counseled writ, attached as state’s Exhibit 18, pp. 4-5) Finally, yet another attorney with the same firm filed the present application which frames the issue as “Whether Petitioner’s Constitutional right to a fair trial on his charge of aggravated rape was violated when he was tried simultaneously for armed robbery even though the armed robbery had prescribed.” (Petitioner’s application, p. i)

The state of Louisiana asserts that these claims are identical to those raised in state collateral proceedings nearly eleven years ago. A petitioner should not be allowed to “repackage” an issue resolved years before in order to circumvent the mandatory time delays in 28 U.S.C.A. sec 2101 and U.S.Sup.Ct. Rule 13. As such, petitioner’s writ, filed seven years too late, should not be considered.

Failure to state compelling reasons:

Petitioner states **no** compelling reasons for which this Court should exercise its discretionary review pursuant to U.S.Sup.Ct. Rule 10. At best, the petition asserts a “misapplication of a properly stated rule of law,” upon which grounds “A petition for a writ of certiorari is rarely granted.” However, as discussed above, the state courts’ application of *Strickland v. Washington* became final with the Louisiana Supreme Court’s ruling rendered November 7, 2014. (Petitioner’s Exhibit I) The petitioner’s attempted “reboot,” of his ineffective assistance of counsel claim years

later was unsuccessful, the state courts having declined to review the merits of his claim. (See petitioner's Exhibits E, B and A)

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully requests that this Honorable Court deny petitioner's application for writ of certiorari.

RESPECTFULLY SUBMITTED,

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