No. 22-5485 ORIGINAL

FILED
AUG 24 2022
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN DANIEL CANO — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, Dir. TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Juan Daniel Cano
(Your Name)

815 12 th Street
(Address)

Huntsville, Tx 77348
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Did the Fifth Circuit erred in adapting to the district court finding that petitioner failed to show both that he pursued habeas relief diligently and some extraordinary circumstance prevented timely filing?

Did the Fifth Circuit erred adapting to the district court finding that petitioner was not entitled to equitable tolling or in the alternative an evidentiary hearing on the issue?

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

Cano v. State, 369 s.w.3d 532,533 (Tex.App.Amarillo). Judgment entered March 28,2012.

Cano v. State, No. PD-660-12(Tex.Crim.App.). Jugdment entered June 27,2012.

Cano v. State, 133 S.Ct. 2336. Judgment entered May 13,2013.

Ex parte Cano, No.88,344-01 (Tex.Crim.App.) Judgment entered September 12,2018.

Cano v. Dir., 2021 U.S.Dist.LEXIS 208519,2021 WL 5015504. Judgment entered October 28,2021.

Cano v. Lumpkin, No.21-11176 (5th Cir.2022). Judgment entered May 26,2022.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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

[✓] 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,
[ ] is unpublished.

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

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[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B 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

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

The date on which the United States Court of Appeals decided my case was May 26, 2022.

[✓] 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 _____.

[ ] 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. § 1254(1).

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

The date on which the highest state court decided my case was 9-12-2018. A copy of that decision appears at Appendix B.

[ ] 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

The folling statutory and constitutional provisions are involed 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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 and of the State wherein theyreside. 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 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.

STATEMENT OF THE CASE

In this case, the district court dismissed petition based on procedural grounds without addressing the merits of petitioner's constitutional claims.

The district court denied Petitioner's federal habeas petition as time barred stating that Petitioner is not entitled to equitable tolling because he was aware or should have been aware of the facts supporting his trial related claims at the time and had a copy of his appeal brief. Thus, should have known or could have discovered through the exercise of due diligence at the time, the factual predicate for the claims so therefore, Petitioner did not need a copy of his trial transcript to file his habeas petition within the AEDPA's one-year statute of limitations. (Appx.C,Pg.5). And the Fifth Circuit adopted the district court's findings (Appx-D).

Petitioner's certiorari was denied May 13,2013, his federal petition was due in May 13,2014. On May 1,2014, less than two weeks before the federal habeas was due, Petitioner's attorney wrote him a letter stating that the federal writ was due in late June (incorrect date), and that it would be done and filed by than. (Appx.H,Pg.1). But on June 23,2014, about a month and ahalf past the due date, habeas counsel wrote Petitioner a letter informing him that after further reviewing the case counsel would'nt be filing the habeas petition after all. (Appx.H,Pg.2).

At no time during the period that counsel represented Petitioner did he provide him with a copy of the trial transcript.

Throughout the years before and after Petitioner's extraordinary circumstances he maintained diligent in obtaining trial transcript but was not able by no fault of his own until mid-2017. Counsel's erroneous false claim that he would file a federal habeas petition then refuse to do so, and failure to foreward any portions of the transcript to Petitioner sufficiently an act of deception and abandonment as to constitute an extraordinary circumstance because it later operated to prevent Petitioner from pursuing his rights.

The district court erred in misconstruing the facts that because Petitioner was present during the trial and had a copy of his appeal brief, he should have been aware of the facts supporting his claims on state and federal habeas petition. This Court has stated that "requiring the defendant to rely on memory or notes ... is generally insufficient". Britt v. Carolina, 92 S.Ct. 431,434-35 (1971).

The claims argued on appeal were not the same claims petitioner argued on his habeas petition. Nor, were they anything close. Although, appellant counsel mentioned state's misstatement of key witness's trial testimony, he failed to argue the constitutional error as a claim and failed to mention that the misstatement was made more than once, at least six times, with out any objections from trial counsel. Therefore, had Petitioner used this small piece of information from appeal brief, mentioned as if it had accurred only once, it would have been impossible for Petitioner to adequately and effectively rebut, had the State incorrectly argued that the error was only made once and therefore

was harmless. Evenmore, because of the amount of key witness's testimony and it's many inconsistencies compared to prior statements, it was crucial for Petitioner to review the record in order to discover inaccurate but relevent testimony given by key witness to wrongfully convict Petitioner. This Court has recognized that "adequate and effective appellant review" is impossible without a trial transcript ···. Bounds v. Smith, 97 S.Ct. 1491,1495 (1977).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ADOPTED DISTRICT COURTS FINDINGS WHICH MISAPPLIED THE HOLLAND STANDARD.

At Petitioner's trial, key witness (Mejia) testified that Petitioner was angry when he went to his room to get the gun (Appx.E,Pg.142) and that he could hear Petitioner load the gun (Appx.E,Pg.136) and thatonly after he returned with the gun did decedent retrieve the knife (Appx.E,Pg.144) and said something that angered Ptitioner who replied something like "oh,yeah" or "is that so", then fired the shot. (Appx.E,Pg.161,164). But, in the police report Mejia stated that decedent said something to Petitioner and "then stepped out from behind Luis (Petitioner's brother). This is when Petitioner fired the rifle". (Appx.F,Pg.2). And in a affidavit Mejia stated the following: Decedent kept nagging and then started towards Petitioner. We held Decedent back and Petitioner kept walking back. Decedent kept talking crap to Petitioner and decedent grabbed a knife from the counter and held the knife in his hand and raised the knife up and said, "I'll get you, mother fucker", ... the next thing I know Petitioner went to his room. I did not see the gun. Petitioner kept telling decedent, "chill man". Decedent raised the knife up and Petitioner shot decedent. (Appx.G,Affidavit Pg.2). Further, when Mejia was questioned by defense investigator he stated the following: Petitioner told decedent to chill, decedent started toward Petitioner and he (Mejia) and Luis held decedent back. Mejia said decedent kept cussing at Petitioner, Petitioner kept telling decedent to chill and he did not know if Petitioner went

to his room or if the gun was close to Petitioner, but decedent grabbed a steak knife, raised the knife and acted as if he was going to charge Petitioner. ••• Decedent brought the knife down and then raised the knife up for a second time and Petitioner shot decedent. (Appx.G,Pg.5-6).

Nowhere in state's key witness's prior statements does he mention anything about Petitioner being mad when leaving to get the gun, shooting decedent because he was mad over something that decedent said or that Petitioner said something before the shot was fired. But, in one statement Mejia did say that the only thing said by Petitioner before the shot was,"chill man", (Appx.G,Affidavit Pg.2) and not,"oh,yeah" or " Is that so", like he had testified at trial.

The prior statements from key witness show that decedent was not only the aggressor, but the only one that was angry and tried to get at Petitioner once before, but Mejia and Luis held him back. They also show that the decedent was the first to brandish a weapon, threaten to stab Petitioner before stepping out from behind Luis and make lunging gestures with a raised knife in his hand before the shot was fired.

Because the testimony of the state's key witness provided the basis for establishing all elements necessary to convict Petitioner, it must be presumed that inhibiting Petitioner 's abilitiy to discover all relevant inconsistencies in trial testimony, hempered his (IAC) claims, especially, the failure to impeach claim. (McAeese v. Brennan,483 F.3d 206,216(3rd Cir. 2007) (The factual predicates of the claims are the "vital

facts underlying those claims"); (without a trial transcription of the court reporter's notes from the initial trial, there was no viable way of knowing just how many inconsistanencies existed for impeachment purposes".) (White v. State,823 s.w.2d 296, 299(1992).

Due to the complexity of this case and the numerious material discrepancies between state's key witness's trial testimony and his prior statements, it is apparent that facts to Petitioner's legal arguments would have been impossible for him to have been aware of them all, let alone remember them accuretly as required, especially, vital points in the inconsistencies of state's key witness' testimony. It is "unrealistic to expect [a habeas petitioner] to prepare and file a meaningful petition on his own within the limitations period" without access to his legal file. (Espinoza-Mathews v. Californa,432 F.3d 1021,1027 (9th Cir.2005).

Petitioner by no fault of his own, was not able to obtain a copy of his trial transcript until several years after the AEDPA's time period had expired due to appellant counsel egregious misconduct and Petitioner's indigent status. Equitable tolling ••• is only appropriate in rare and exceptional circumstances. To merit application of equitable tolling, the petitioner must demonstrate that he acted with reasonable diligence during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances beyond his control prevented successful filing during that time. Baldayaque v. U.S.,338 F.3d 145,151 (2nd Cir.2003).

A petitioner is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in the way and prevented timely filing". Holland v. Florida,560 U.S. 631,649 (2010). Also, Section 2244(d)(1)(D) gives defendant the benefit of a later start if vital facts could not have been known by the date the appellant process ended. Owens v. Boyd,235 F.3d 356,359 (7th Cir.2000).

Within a few months of appointment of appellant counsel, Petitioner asked counsel for a copy of the trial transcript but counsel responded that due to the time limit requirement on court reporter's record, he would only have time to quickly review the record but not make copies. A few months later Petitioner wrote the Texas Innocence Project to ask for assistance in obtaining copies of his trial transcripts but they declined. (Appx.I,Pg.1). Thenseveral months later Petitioner wrote at least two family members for assistance in purchasing the transcript but because of financial reasons, they could not assist Petitioner.

On May1,2014, appellate counsel wrote Petitioner stating that the federal writ was due in late June, and it would be done and filed by then. But on June 23,2014, counsel wrote him another letter informing Petitioner that he would'nt be filing the petition after all. This deceptive act by counsel purposely caused Petitioner to get timed-barred and denied him access to any portions of the trial record needed to assist Petitioner in his habeas process and altogether, completely abandoned him.

Almost immediately, after counsel's egregious misconduct Petitioner again wrote counsel asking for the records but never recieved a reply. Petitioner continued for several years to try and convince family members to purchise the records but was unsuccessful and even filed two motions to obtain the record but were denied. Finally, in mid-2017, after convincing a relative that he might be able to do with portions of the record, which would be less expensive, Petitioner successed. "Due diligence ... does not require a petitioner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts". "Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system". Downs v. McNeil,520 F.3d 1311,1323(11th Cir.2008).

In review of the record, the district court did not give a full consideration to the substantial evidence Petitioner put forth in support of the prima facie case. The Court of Appeals accepted without question the district courts evaluation of the petition and denied the application for a COA, applying incorrectly Section 2253(c). See Slack v. McDaniel,120 S.Ct. 1595 (2000). Thus, this Court must grant certiorari.

II. THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUITS

The district court argued that Petitioner has not shown any case law where a court found a petitioner acted with reasonable diligence for equitable tolling purposes by filing "years" after the AEDPA"s one-year limitation had expired due to a extraordinary circumstance. And quotes cases that on the contrary have denied petitioners equitable tolling for being simply a few months late. (Appx.C,Pg.11). But, unlike petitioners in those cases mentioned by the court, Petitioner's attorney in this case failed to file a state or federal habeas petition and never returned any portions of the trial transcript to Petitioner, thus, he could not have known or discovered the factual predicate of his claims before the one-year limitation period expired. Therefore, those cases do not apply to the case at bar. Evenmore, in Baldayaque, petitioner filed his pro se petition more than 30 months late, making him almost 3 years late, yet the court there granted him relief. In this case Petitioner was almost 4 years late. (Lonchar v. Thomas, 116 S.Ct. 1293,1207 (1996) (Holding "it is a paradigmatic abuse of discretion for a court to base it's judgment on an erronious view of the law"). Furthermore, district court erroneously concluded that Petitioner's situation failed to establish complete attorney abandonment simply because counsel communicated with Petitioner a few times until determining that a federal habeas petition would be futile. (Appx. C,Pg.10,FN 3).

District court further erroneously concluded that counsel's deception did not amount to extraordinary circumstances

because that counsel never actually told Petitioner that he filed the petition. (Appx. C,Pg.9,FN2).

The court also argued that Petitioner waited several months to file his state habeas petition after obtaining trial transcripts. And after Petitioner was denied, waited two more months to file his federal petition, (Appx.C,Pg.13) thus, did not exercise due diligence. Yet, Petitioner filed his stated and federal habeas petition within the one-year limitation of §2244(d)(1)(D). A petitioner is not ineligable for equatible tolling simply because he waits until late in the limitations period to file his habeas petition, acting reasonable by filing his petition any time during the applicable one-year period of limitations. Valverde v. Stinson,224 F.3d 129,135-36 (2nd Cir.2000).

Because the Fifth Circuit Court of Appeal's application of the equatable tolling doctrine to instances of professional misconduct conflicts with the approach taken by this Court and other Circuits, the Court should grant the petition. Compare with Holland,130 S.Ct.2549 (2010) (holding egregious attorney misconduct of all stripes may serve as a basis for equitable tolling);(Nara v. Frank,264 F.3d 310,320 (CA3 2001) (ordering hearing as to whether client who was effectively abandoned by lawyer merited tolling); (Calderon,128 F.3d 1283,1289 (CA9 1997) (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); Spitsyn v. Moore,345 F.3d 796,800-802 (CA9 2003) (finding that extraordinary circumstances may warrant tolling where lawyer denied client access to files and failed to prepare a petition.

Petition should not have been denied in light of the pre-existing evidence in the record of extraordinary circumstances due to attorney's outrageous conduct and petitioner's acts of reasonsble diligence. At minimum, this case should have been remanded to the district court to determine after an evidentiary hearing, whether Petitioner's equitable tolling claim was supported by the evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Juan Daniel Cano

Date: August 24, 2022