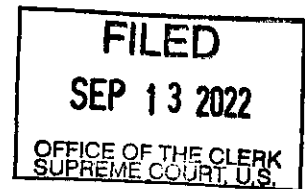


ORIGINAL

No. 22-5673



IN THE  
SUPREME COURT OF THE UNITED STATES

JUAN AMAYA LOZANO - PETITIONER

vs.

UNITED STATES OF AMERICA, - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO:

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JUAN AMAYA LOZANO

# 99724-555

Post Office Box 5000

Pekin, Illinois 61555-5000

QUESTIONS PRESENTED:

- 1) Whether the District Court abused it's discretion after ruling that Juan Lozano, (a limited English Proficiency defendant), required a Spanish Interpreter. Upon this appointment the Court failure to have the Interpreter present during the most critical stages of Lozano defense, such as every court proceeding, every meeting with defense counsel, for review and execution of key documents, namely the PSI, police reports, written waiver of Speedy Trial, and plea agreements. Does this error constitute a violation of Lozano's Sixth Amendment Right to Effective Assistance of Counsel?
- 2) Whether the District Court abused it's discretion by imposing a sentence for the Charge of Terrorism, which was not included in the original charging documents, nor was the defendant indicted for such a charge, and the Court did not prove that the defendant's actions reached the level justifying the crime imposed?
- 3))Whether the sentence rendered, was invalid and illegal because an Interpreter was not provided to assist the Defendant, despite a standing Court Order for an Interpreter and no waiver of an Interpreter by the defendant, in writing or on the record, and the sentence also being illegal due to impermissible consideration of improper information, requiring vacation of the sentence and an Order for re-sentencing.

### 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:

State of Iowa

OPINIONS BELOW:

Appendix A: (Eighth Circuit Court of Appeals)

Reported at No: 22-1325:

Appendix B: (District Court)

Reported at No: 4:21-cv-00099-RP:

Appendix C: (Iowa State Supreme Court)

Reported at: (Refused to Hear)(Submitted under No: 18-1180)

Appendix D: (State of Iowa Appeals Court Ruling)

Reported at No: 18-1180:

Appendix E: (District Court)

Reported at No: PCCF127627:

STATEMENT OF JURISDICTION:

[ ] For cases from state courts:

The date on which the highest state court decided my case was on 7-22-20.

A copy of that decision appears at Appendix D.

[ ☒ ] A timely petition for rehearing was thereafter denied on the following date: 9-15-20, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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).

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 \_\_\_\_\_ 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 \_\_\_\_\_ 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 D to the petition and is

- ☒ reported at NO: 18-1180; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the STATE OF IOWA APPEALS court appears at Appendix D to the petition and is

- ☒ reported at NO: 18-1180; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

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leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)	<u>14,</u>

## Constitutional Amendments:

Fifth Amendment to the United States Constitution	<u>3,4,9,10,11,12,</u>
Sixth Amendment to the United States Constitution	<u>3,4,9,10,11,12,</u>
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Article 1, Section 9 and 10 of the Iowa Constitution	<u>3,4,9,10,11,12,</u>

## Statutory Provisions:

28 U.S.C. § 2244(d)	<u>8</u>
Iowa Code Section § 822.2(1)(9)	<u>3,8,10,13,14,</u>
28 U.S.C. § 2254	<u></u>

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:**

**LOZANO ASSERTS THE FOLLOWING CONSTITUTIONAL GROUNDS PURSUANT  
TO IOWA CODE SECTION 822.2(1)(9);**

Lozano was denied his right to Effective Assistance of Counsel by virtue of the defense counsel failing to perform the following essential duties, in violation of Lozano's constitutional rights to the Effective Assistance of Counsel under the 5th, 6th, and 14th Amendment to the U.S. Constitution, and Article 1, Section 9 and 10 of the Iowa Constitution, which caused Lozano prejudice affecting his substantial rights as set forth below:

1) Defense Counsel was ineffective by failing to adequately explain to Lozano with the assistance of a Spanish interpreter, regarding the process of plea negotiations with the State; Failing to accurately advise regarding practical and legal consequences of his plea and the complex legal procedures involved; Counsel's failure to have the Spanish Interpreter present during key conferences with Defense Counsel, including the execution of a written waiver of a Speedy Trial within 90 days; thereby causing Lozano extreme prejudice. Counsel's actions were a direct violation of Lozano's Constitutional Rights under the 5th, 6th, and 14th Amendment of the United States Constitution and Article 1, Sections 9 and 10 of the Iowa Constitution.

2) Defense Counsel was Ineffective by failing to have the Court appointed Spanish Interpreter present to assist him in reading the PSI in order to challenge, or correct information that Lozano may have deemed incorrect or not factual. Due to the Courts standing Order of a Spanish Interpreter, Counsel's actions were a direct violation of Lozano's Constitutional Rights under the 5th, 6th, and 14th Amendment of the United States Constitution, and Article 1, Section 9 and 10 of the Iowa Constitution.

3) Defense Counsel was Ineffective for not having the Court appointed Spanish Interpreter assistance, present at the Sentencing hearing. Both Counsel and the Court failed to provide a Spanish Interpreter did so impair Lozano from exercising his Right to Allocution, thus denying him the understanding of what was actually being said concerning his liberty. This miscarriage of justice is/was a direct violation of Lozano's Constitutional Rights under the 5th, 6th, and 14th Amendment of the United States Constitution, and Article 1, Section 9 and 10 of the Iowa Constitution.

4) Lozano's Constitutional Rights to Due Process under the 5th, 6th, and 14th Amendments of the United States Constitution and Article 1, Sections 9 and 10 of the Iowa Constitution were violated by the denial of assistance of a Spanish Interpreter contrary to the Court's Operative Order for Interpreter mandating same in this case.



### STATEMENT OF CASE:

1) On or about July 23, 2001, Juan A. Lozano contacted the Davenport Police Department, in Davenport, Iowa; regarding the welfare of Lozano's children; in which Lozano shared joint custody with Veronica Torres. The Davenport Police were reluctant to investigate Lozano's claims of child neglect and child endangerment.

2) On July 28, 2001, Lozano was disappointed that his children were being subjected to alcohol, drugs, sex, and violence. It was on this day that Lozano decided to go and remove his children from such an unhealthy environment. Upon arriving at the Torres residence, Lozano witnessed drugs and alcohol usage in plain view. Lozano attempted to reason with Ms. Torres about the exposure of drugs and alcohol that the children were being subjected to. As a result a heated exchange ensued between Torres and Lozano. Ms. Torres' house guest began to argue and threaten Lozano, at which time Charlie Carillo charged Lozano and the two began to fight. Other affiliates of Carillo's gang assisted, by striking Lozano in the head with a chair. As a result, Lozano momentarily lost consciousness. Once Lozano regained consciousness, Lozano pulled out a gun in order to defend himself. Carillo and his affiliates charged Lozano again, there was a struggle for the firearm, the handgun discharged killing Carillo. It was not Lozano's intentions to harm or kill anyone on July 28, 2001. Lozano's intentions were to save the lives of his children, but unfortunately and regretfully, Mr. Charlie Carillo's life was taken prematurely.

3) On August 9, 2001, Juan A. Lozano was charged by trial information with Count One: 1st Degree Murder; Count Two: Attempt to Commit Murder; and Count Three: Going Armed With Intent. Attorney John Tobey III, was appointed to represent Lozano. Due to Mr. Lozano's inability to read, write, speak, or understand the English language, Counsel made application for a Court appointed interpreter and received a standing Order for same. **Duly Note:** The Spanish Interpreter was never present during client and attorney meetings, **nor** did John Tobey III, speak Spanish.

4) On January 8, 2002, the defense Counsel appeared with the defendant for entry of a guilty plea pursuant to a plea agreement for a lesser included charge of 2nd degree Murder and an Amended charge of Terrorism, a Class C felony. The defendant declares under the penalty perjury that Attorney John Tobey III assured the defendant, that he would only have to serve about 25 years, rather than life in prison; and that he could be transferred to Mexico to serve his sentence. The defendant was so advised by Counsel to convey the truth during the Court's colloquy. The defendant provided the Court with a truthful disclosure of the facts. The Court determined that there was not a factual basis established, and refused to accept the defendant's plea.

5) On January 30, 2002, defense Counsel arranged a plea proceeding before a different Judge, based on an Alford plea with the same terms for 2nd Degree Murder and an amended charge of Terrorism, a Class C felony. However, Counsel's actions in regards to this matter were not discussed with, nor agreed by the defendant.

6) On January 31, 2022, Judge Kelley accepted the plea to 2nd Degree Murder and Terrorism; and a Sentencing Hearing was scheduled.

7) On February 21, 2002, the defendant was sentenced in front of a different Judge, "Bobbi M. Alpers" who sentenced Lozano to the maximum amount of time of 50 years with an 85% mandatory term on the 2nd Degree Murder conviction, and 10 years on the Terrorism conviction to run consecutively. The Court reasoning for the consecutive sentence was stated that Lozano did not co-operate, meaning participate, with the Pre-sentence Investigator. **Duly Note:** that at the time of the interview, there was no Spanish Interpreter present, therefore depriving Lozano the opportunity to co-operate and understand the judicial process at that time.

#### REASONS FOR GRANTING THE WRIT:

The government and the lower Courts have relied upon the Equitable tolling doctrine to further afflict the grave miscarriage of Justice to Foreign National Juan A. Lozano, not only is the error obvious, but the Equitable tolling doctrine provides defendants with an avenue to have their rights heard in a Court of Law. The Supreme Court in Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) held that a petitioner is entitled to Equitable tolling only if he shows; (1) that he has been pursuing his right diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing. The Court also held, the facts and circumstances of the case sub judice are applicable. stating, ...

"That Courts should not be rigid in applying this standard and should "consider each claim for Equitable tolling on a case-by-case basis." The flexibility inherent in Equitable procedure enables courts to meet new situations that deemed equitable intervention, and to accord the relief necessary to correct particular injustices."  
Holland, 130 S. Ct. at 2563.

As explicitly stated above, Iowa Code Section 822.3 provides: All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an Appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

In Holland, the Supreme Court noted, "We have decided that the timeliness provision in the Federal habeas corpus statute is subject to Equitable tolling. See Antiterrorism and Effective Death penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d). We also consider it's application in this case. In the Court of Appeals view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, even if it is "negligent" or "grossly negligent", cannot "rise to the level of egregious attorney misconduct" that would warrant Equitable tolling unless the petitioner offers "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth."  
539 F.3d 1334, 1339 (C.A. 11, 2008)(per curiam).

In our view, this standard is too rigid. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed 2d. 435 (1990); See also, Lawrence v. Florida, 549 U.S. 327, 336, 127 S. Ct. 1079, 166 L.Ed. 2d 924 (2007). We therefore reverse the judgment of the Court of Appeals and Remand for further proceedings.

The Supreme Court further stated, "We have previously made clear that a non-jurisdictional Federal statute of limitations is normally subject to a "rebuttable presumption" in favor "of Equitable tolling." Irwin, 498 U.S. at 95-96, 111 S. Ct. 453; See also, Young v. United States, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L.Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are "customarily subject to "Equitable tolling" (quoting Irwin, supra, at 95, 111 S. Ct. 453)". The Supreme Court further declared that Equitable tolling was implicit as a Due Process exception to statutes of limitation. The Court declared that unless the statute of limitation was explicit and unambiguous in its exclusion of Equitable tolling, such relief was available under the Court's 2-prong test. The Court stressed that flexibility not rigidity was required in the application of the Equitable tolling analysis.

Lozano avers that the Holland case, applying it's 2-prong test for Equitable tolling, establishes the floor or absolute minimum Due Process protection in Iowa for a Petitioner in a PCR case. The U.S. Supreme Court is necessarily binding on State Courts by virtue of the 14th Amendment. **However**, the Iowa Supreme Court has repeatedly insisted that the Due Process clause in Article 1, Section 9 of the Iowa

Constitution allows the Court to provide even greater protections to the citizens of Iowa, than those protections extended under the U.S. Constitution, under appropriate circumstances. The Iowa Supreme Court jealously guards their independence in interpreting the Iowa Constitution. It is Lozano's position that Equitable tolling can also be applied to Section 822.3 pursuant to Due Process guarantees under Article 1, Section 9 of the Iowa Constitution. State v. Bruegger, 773 NW 2d. 862 (Iowa 2009).

The Court of Appeals authorities cited by the State could be distinguished by the simple fact that none of the fact patterns would satisfy the 2-prong test of Holland. Quite simply, the Iowa Supreme Court has not reversed an Iowa District Court or Iowa Court of Appeals ruling rejecting Equitable tolling because an appropriate factual posture has always been lacking to justify reaching the merits of the claim of Equitable tolling. However, none of these cases negate the authority provided pursuant to the Due Process guarantees under the 5th and 14th Amendments to the U.S. Constitution; the ruling in Holland, and subsequent Federal case rulings finding Equitable tolling under similar facts as those pled by Mr. Lozano.

Lozano avers that the remedies provided in the Holland case and other subsequent cases applying equitable tolling involved remanding for evidentiary hearings on the factual assertions supporting equitable tolling, or remanding to the lower courts for an evidentiary hearing on the actual PCR claim after finding Equitable tolling did apply. Lozano cites: Earl v. Fabian, 556 F.3d 717 (8th Cir. 2009);

Bennett v. United States, 521 F.3d 1065 (6th Cir.); Diaz v. Hodges, 515 F.3d 149 (2nd Cir.); Mendoza v. Carey, 449 F.3d 1065 (9th Cir. 2006). In John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 169 L.Ed. 2d 591 (2008), the U.S. Supreme Court noted that most limitations periods are non-jurisdictional affirmative defenses and are subject to Equitable tolling.

The facts alleged in Lozano's case satisfy the 2-prong Holland test. This Honorable Court should grant certiorari in the present case. At issue is the deprivation of substantial rights by Counsel and Court, which involves the integrity and fairness of the American Judicial system. This is a classic case for the Supreme Court review which affects all Foreign Nationals. Juan A. Lozano, is a Foreign National detained, convicted, and sentenced of a crime. In supra, Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977, 41 L.Ed 140 (1896) held that all persons within the territory of the United States are entitled to the protections "guaranteed" by the Fifth and Sixth Amendment. It is these guaranteed protections, the right to a just and fair determination of cause, the right to be heard, the right to fully understand the charges being brought against the defendant, the right to Effective Assistance of Counsel, in which Mr. Lozano declares was not afforded.

In Hartsfield v. Nichols, 511 F.3d 826 (8th Cir. 2008), The Court explained that being actually prevented from filing a complaint or having a complaint dismissed for "lack of legal adequacy" constitutes an actual injury. The same Judicial analysis needs to be applied

concerning Foreign Nationals who do not speak ~~or~~ understand the English language. Clearly the lack of legal adequacy plays a key role in Lozano's constitutional claims. The notion that a Foreign National can be held in custody within the United States for an offense which is punishable by death, have a Court within the United States jurisdiction mandate a ruling that the Foreign National requires a Spanish Interpreter, yet neglects to have the Court-appointed Spanish Interpreter present at the most crucial stages of the defendant defense, which is the conversations and legal strategies between Counsel and defendant.

No reasonable and prudent person can conclude that Mr. Lozano understood and / or comprehended anything that Counsel related to him without the Assistance of the Spanish Interpreter, therefore, Lozano's plea is void of the Factual basis, as well as, the required standards set forth in Rule 11(a)(1), (b)(1)(D)(G) (H) (I) (N) (O) (2) (3), (C)(5)(B)(C), coupled with the fact Lozano did not intelligently understand the English speaking attorney, therefore, the Courts can not base their decision upon Lozano knowingly signed the Alford plea, to add, it is clear that the Court can not state definitively that Lozano voluntarily forfeited his liberty, where the facts of the record shows that it was Counsel who went rogue and started Judge shopping, after Judge Cleve denied the first plea for lack of factual basis.

Counsel's actions demonstrate extraordinary and reckless actions. Counsel was only focused upon securing a conviction and circumventing the Fifth and Sixth Amendment protections guaranteed by the United



States Constitution. The opposite of extraordinary is routine, therefore, the United States is not in the business of routinely denying Foreign Nationals the opportunity to adequately prepare for their defense, nor is the United States routinely in the business of subjecting Foreign Nationals to unfair and unjust procedures.

**Wherefore**, the United States and all of their territories are routinely in the business of providing defendants with a just and fair determination of cause, the right to be heard, as well as, the right to be informed of the charges; and the right to understand the charges brought against them. Counsel's unprofessional conduct places the Court's fairness, integrity, and the public confidence in the Court's reputation in jeopardy. For these reasons, a Writ of Certiorari is warranted in order to correct a grave miscarriage of Justice.

#### CONCLUSION:

Section 822.6 / 822.3 is a criminal statute and it fails to indicate if equitable tolling is or is not applicable to a habeas applicant, thus this is an ambiguous statute, and as the U.S. Supreme Court has explicitly held in a plethora of cases, "where the statute in question is ambiguous, the "Rule of **Lenity**" requires the statute be construed in favor of the defendant." See Muscarello v. United States, 524 U.S. 125, 138-39 (1998) (To invoke the rule, we must conclude that there is "a grievous ambiguity or uncertainty" in the statute); see also, Esquivel-Quintana v. Lynch, 810 F.3d at 1023-24, (6th Cir. 2016)( ... ambiguous statutes must be construed in favor of defendants

under the rule of **lenity**); United States v. Koon, 850 F.3d 973, 978; (8th Cir. 2017)(same).

The rule of **lenity** and the draconian 60 year term of imprisonment coupled with the facts above, and the fact that the U.S. Supreme Court is law of the land, and has unequivocally ruled that equitable tolling is applicable to the appropriate case, (the case sub judice, is a poster card for equitable tolling), should tip the balance in favor of construing § 822.6 to apply equitable tolling to the instant case. See Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

**Wherefore**, Lozano implores this Honorable Court to grant a Writ of Certiorari in favor of granting equitable tolling and rule on the merits of the IAC claims, namely, Defense Counsel being ineffective for not having the Court Appointed Interpreter present during conversations between counsel and defendant. Also Interpreter not being present during the signing of the Second Plea; nor the defendant's PSI interview, or the defendant's sentencing hearing.

Respectfully Submitted,

J. Lozano

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