

22-5871

NO.21-C-0033
IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY STEEL,
Petitioner

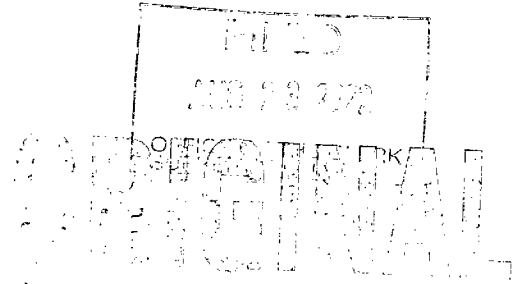
Vs.

DAN WINKLESKI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS A PETITIONER ENTITLED TO BE PROVIDED THE EFFECTIVE ASSISTANCE OF SUCCESSOR COUNSEL IN ACCORD WITH DUE PROCESS OF LAW, THEREBY OVERCOMING THE ONE-YEAR STATUTE OF LIMITATIONS UNDER 2244(d), TO FILE A 2254 WRIT OF HABEAS CORPUS, IF BOTH THE APPELLATE COURT AND THE PETITIONERS COURT APPOINTED COUNSEL FAILED TO IDENTIFY THE EXISTENCE OF AN ISSUE OF ARGUABLE MERIT WHILE DECIDING A DIRECT APPEAL UNDER ANDERS V. CALIFORNIA, 386 U.S. 736 (1967) ?
2. IS A LEGAL ERROR COMMITTED BY THE STATE COURT WHILE DECIDING A DIRECT APPEAL UNDER ANDERS V. CALIFORNIA, 386 U.S. 736 (1967), AN EXTERNAL IMPEDIMENT BEYOND THE PETITIONERS CONTROL WHICH WOULD PROVIDE GROUNDS FOR EQUITABLE TOLLING ?
3. DID THE LOWER COURTS ERR BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY ?

PARTIES IN COURT BELOW

Other than the present petitioner and Respondent, there was no other parties in the lower Court's

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JURISDICTION

The United States District Court, Eastern District of Wisconsin entered Judgment on May 24, 2021 (A:1). A timely petition for rehearing was denied by the United States Court of Appeals on the following date of July 7, 2022, and a copy of the order denying the rehearing appears at Appendix 2. This Courts jurisdiction is invoked under 28 U.S.C. 1254(1) , 1291 and Supreme Court rules 13.1 and 18. As he did below, Mr. Steel asserts the deprivation of his right to due process secured by the United States Constitution.

STATEMENT OF THE CASE

On November 13, 2000 Steel pleaded guilty to one count of felony murder as a party to a crime with the underlying crime of armed robbery. On December 5, 2000, the trial Court sentenced him to 37 years of initial confinement and 20 years of extended supervision.

After sentencing, Steel's appointed counsel filed a no-merit appeal pursuant to Wisconsin's procedure for complying with *Anders v. California*, 386 U.S. 736 (1967). Counsel's no-merit report (A:4) identified two potential issues and concluded that neither had arguable merit : (1) whether Steel was entitled to withdraw his guilty plea because the plea was not knowing and voluntary, and (2) whether the trial Court imposed an excessive sentence. On January 16, 2002, the Wisconsin Court of Appeals accepted the no merit report and relieved] counsel of further representation (A:5). As to the first issue discussed in the report, the Court concluded that Steel entered his guilty plea knowingly and voluntary. The Court found that the trial Court "explained the various constitutional rights waived by the plea, the elements of the crime, and the maximum penalty Steel faced. As to the second issue, the Court found that the trial Court properly exercised its discretion in imposing the sentence and did not impose a sentence that was excessive or unduly harsh. The Court also stated that it had conducted an independent review of the record as required by *Anders* and found no other issues that counsel could have raised. The Court discharged Steel's counsel and summarily affirmed Steel's conviction.

Proceeding pro se, Steel filed a petition for review in the

Wisconsin Supreme Court. When Steel failed to file a statement in support of his petition, the Supreme Court summarily dismissed it. The order dismissing the petition was entered on April 8, 2002. (A:6). Steel did not seek certiorari review by the Supreme Court of the United States.

In April 2017, Steel filed a post conviction motion in the trial Court. In this motion, he argued that his sentence exceeded the maximum term authorized by the statutes under which he was charged. The trial Court denied the motion in a written order, finding that Steel's understanding of the relevant statutes was erroneous. Steel did not appeal.

In November 2017, Steel filed another post conviction motion in the trial Court. Once again, he argued that his sentence exceeded the maximum statutory term. The trial Court entered a written order denying the motion for the same reasons it gave in its order denying Steel's previous motion. This time, Steel appealed. On December 18, 2018, the Wisconsin Court of Appeals affirmed. It reasoned that Steel's sentence satisfied all requirements of the relevant statutes. In its written opinion however, the Court alluded to another potential issue that the State had identified in its response brief. The Court noted that, during the plea colloquy in November 2000, the trial Court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80. The Court of appeals stated that it would not consider this issue because Steel had neither raised it in his motion nor responded to the State's identification of the issue in his reply brief.

On March 11, 2019, Steel filed another post conviction motion

in the trial Court. This time, he argued that he was entitled to withdraw his guilty plea because, during the plea colloquy, the trial Court mis-informed him that the maximum sentence was 60 years rather than 80. Steel also argued that the colloquy was deficient because the Court did not ensure that he understood the nature of the felony murder charge and the elements of the crime. Finally, Steel argued that his appointed appellate counsel was ineffective for failing to raise these two issues on direct appeal, and that the Court of appeals, which failed to identify these issues during the no-merit appeal, must have failed to conduct an independent review of the record, as Anders requires. The trial Court denied the motion. Steel then filed a motion for reconsideration, which the trial Court denied.

On February 24, 2020, the Wisconsin Court of appeals affirmed the denial of Steel's March 11, 2019 Post conviction motion. It affirmed based on the procedural rule of *State v. Escolona-Naranjo*, 185 Wis.2d 168 (1994), which holds that, absent a "sufficient reason", a defendant cannot raise an issue in a post conviction motion that could have been raised either in a prior post-conviction motion or on direct appeal. The Court concluded that this rule barred Steel's latest post conviction motion because it raised issues that could have been raised in Steel's prior post conviction motions and Steel had not shown a sufficient reason for failing to raise his current issues in those motions. Thus, the Court affirmed the denial of Steel's post conviction motion without reaching the merits of his claims. Steel filed a petition for review in the Wisconsin Supreme Court, which the Court denied on July 15, 2020.

Steel filed his federal petition for a writ of habeas corpus on

January 8, 2021. He alleged two grounds for relief. First, he contended that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the issues involving the plea colloquy, i.e. - that the trial Court stated the wrong maximum sentence, failed to identify the elements of the crime, and failed to ensure that Steel understood the nature of the crime. Second, he contended that, when on direct appeal the Wisconsin Court of appeals accepted counsel's no-merit report and summarily affirmed his conviction, it rendered a decision that was contrary to, or involved an unreasonable application of, *Anders v. California*. Steel argued that because the Court failed to identify the issues involved with the plea colloquy as having arguable merit it must have failed to conduct the independent review of the record that *Anders* requires.

In his response to the motion to dismiss, Steel did not dispute that he failed to meet his one year deadline under 2244(d). Instead, Steel argued that he is entitled to equitable tolling. A habeas petitioner is entitled to equitable tolling only if he shows : (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Here, Steel developed an argument as to both prongs.

Steel argued that the Wisconsin Court of Appeals handling of his no-merit appeal qualifies as an extraordinary circumstance that prevented him from filing a timely petition. *Holland v. Florida*, 560 U.S. Steel argued that because the Court of appeals did not notice that the plea colloquy was defective, it must have failed to independently review of the record, as *Anders* requires. The District Court had further concluded

that a legal error committed by the State Court while deciding the direct appeal does not interfere with a petitioners ability to raise that error in a timely federal habeas petition.

The District Court stated that although Steel did not have the assistance of counsel during this one-year period, lack of counsel and lack of knowledge are not, by themselves, extraordinary circumstances. The District Court cited to *Socha v. Boughton*, 763 f.3d 674, 685 (7th Cir 2014) ; *Tucker v. Kingston*, 538 F.3d 732,735 (7th Cir.2008).

ARGUMENT 1

IS A PETITIONER ENTITLED TO BE PROVIDED THE EFFECTIVE ASSISTANCE OF SUCCESSOR COUNSEL IN ACCORD WITH DUE PROCESS OF LAW, THEREBY, OVERCOMING THE ONE-YEAR STATUTE OF LIMITATIONS UNDER 2244(d), TO FILE A 2254 WRIT OF HABEAS CORPUS, IF BOTH THE APPELLATE COURT AND THE PETITIONERS COURT APPOINTED COUNSEL FAILED TO IDENTIFY THE EXISTENCE OF AN ISSUE OF ARGUABLE MERIT WHILE DECIDING A DIRECT APPEAL UNDER *ANDERS V. CALIFORNIA*, 386 U.S. 736 (1967) ?

A. * APPLICABLE STANDARD OF REVIEW :

The no⁴merit appeal procedure has its origins in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In *Anders*, the United States Supreme Court addressed "the extent of the duty of a Court - appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigents appeal". Id at 739, 87 S.Ct.1396. The Court held that :

[I] counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the Court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might

arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the Court-not counsel- then proceeds, after a full examination of all proceedings, to decide whether the case is wholly frivolous.

Id at 744, 87 S.Ct 1396 (emphasis added).

In Wisconsin, the no-merit procedure set forth in Anders is codified and explained in Wis.Stat.RULE 809.32. First, appointed counsel must examine the record and prepare a report that "shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks lacks merit". RULE 809.32(1)(a). Counsel must provide the defendant with a copy of the report and advise the defendant of his right to respond. RULE 809.32(1)(b)2. Next, the defendant has the opportunity to respond to the no^umerit report and raise additional issues. RULE 809.32(1)(e). Then, the appellate Court not only examines the no-merit report but also conducts its own scrutiny of the record to find out whether there are any potential appellate issues of arguable merit. Anders, 386 U.S. at 744. Finally, the appellate Courts no^umerit decision sets forth the potential appellate issues and explains in turn why each has no arguable merit. RULE 809.32(3).

In this case, it is undisputed that Steel was informed by his appellate counsel of his right to file a response to the no^umerit report and that Steel did not file a response. However, it is equally undisputed that Steels appellate counsel failed to raise the fact that during the plea colloquy in November 2000, the trial Court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80, could

be a meritorious issue, and on the contrary, stated that no issues of arguable merit existed.

Similarly, it is also clear that the Wisconsin Court of Appeals did not identify that, during the plea colloquy in November 2000, the trial Court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80, as a potential appellate issue. This is corroborated by the following:

In Steel's appeal, the Wisconsin Court of appeals in its written opinion dated December 18, 2018, noted that, during the plea colloquy in November 2000, the trial Court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80. Therefore, the Wisconsin Court of appeals written opinion in this regard shows that the Wisconsin Court of appeals in Steels no-merit decision overlooked the plea colloquy issue.

B THE WISCONSIN COURT OF APPEALS, DURING STEELS NO-MERIT DECISION,
UNREASONABLY APPLIED THE PRINCIPLES OF ANDERS V. CALIFORNIA, 386 U.S.
736 to his case

This Court should find that the Wisconsin Court of Appeals unreasonably applied anders v. california to Steels case when the Court failed to identify the existence of a meritorious plea withdrawal issue identified, supra (emphasis added).

Steels decision dated December 18, 2018 identified that the trial Court erroneously informed him that he faced a maximum sentence of 60 years rather than 80, so the Wisconsin Court of appeals during Steels no-merit appeal should have identified this issue as having arguable merit. It is for these reasons that Anders was unreasonably applied to Steel's case.

C. STEEL HAD NOT RECEIVED THE TYPE OF ASSISTANCE CONSTITUTIONALLY REQUIRED TO RENDER HIS FIRST APPEAL FAIR

In *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct.830, 83 L.ED. 2d 821 (1985), the United States Supreme Court held that a first Appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. The Court held that this result is hardly novel. The petitioners in both *Anders v. California*, and *Entsminger v. Iowa*, 386 U.S. 748, claimed that although represented by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair.

In this case, Steel submits that he had not received the effective assistance of appellate counsel constitutionally required to render his no-merit appeal proceedings fair. This is because had Steels appellate counsel performed the requisite "conscientious examination" of the case, *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, he would have identified that, during the plea colloquy in November 2000, the trial Court erroneously informed Steel that he faced a maximum sentence of 60 years rather than 80, as a potential issue and would not have filed a no-merit report, asserting that any further appeal would be frivolous.

D. A PETITIONER SUCH AS STEEL SHOULD BE ENTITLED TO BE PROVIDED THE *EFFECTIVE ASSISTANCE OF COUNSEL IN ACCORD WITH DUE PROCESS OF LAW

Under the circumstances of this present case, this Court should settle this issue by concluding that when both the appellate Court and the petitioners Court appointed counsel fails to identify the existence of an issue of arguable merit while deciding a direct appeal under *Anders v. Califor* that the petitioner should be entitled to the effective assistance of

successor counsel in accord with due process of law.

Likewise, this Court should also find that the one-year time limit imposed by AEDPA's 2244(d) statute of limitations should be tolled, thereby allowing the petitioner to argue in a 2254 writ of habeas corpus the constitutional issue of his Court appointed counsel being ineffective and that the State Court unreasonably applied the principles of *Anders v. California*.

In the alternative, if this Court needs a record fully developed on this issue before making a discretionary decision on whether or not it would grant the writ, that this Court order that this case be remanded back to the lower Federal Court. This Court should find it appropriate to order the 7th Circuit Court of appeals to issue a certificate of appealability on this issue.

ARGUMENT 2

IS A LEGAL ERROR COMMITTED BY THE STATE COURT WHILE DECIDING
A DIRECT APPEAL UNDER *ANDERS V. CALIFORNIA*, 386 U.S. 736 (1967),
AN EXTERNAL IMPEDIMENT BEYOND THE PETITIONERS CONTROL WHICH WOULD
PROVIDE GROUNDS FOR EQUITABLE TOLLING ?

To, qualify for equitable tolling, Steel must show that some barrier beyond his control prevented him from filing his federal petition on time. See, *Holland v. Florida*, 560 U.S. at 631.

Steel submits that the Wisconsin Court of appeals failing to identify the existence of the plea colloquy being defective as having arguable merit is a legal error committed by the Wisconsin Court of appeals. This legal error was a barrier beyond Steels control. Because "both Steel's appellate attorney and the appellate Court have far more training and experience in identifying appellate issues than [him]", Steel should not be faulted for his reliance on his appellate counsel's assertion in the no-merit

report that there was no issues of arguable merit.

Likewise, because there is a one-year statute of limitations to timely file a 2254 habeas petition as set forth under 2244(d), this one-year should be tolled when the petitioner has finally identified a issue of arguable merit that both his appellate counsel and the appellate Court has overlooked.

This Court should therefore find that a legal error committed by the State Court while deciding a direct appeal under *Anders v. California* is an external impediment far beyond the petitioners control. Based on this external impediment, a petitioner such as Steel would not be able to timely raise, within one year as set forth under 2244(d), a meritorious issue overlooked by both the petitioners appellate attorney and the appellate Court Why? (emphasis added).

Because the appellate Court, when finding no issues of arguable merit, during the no-merit appeal proceedings, relieves the petitioners appellate attorney from any further representation, leaving the petitioner without the assistance of effective counsel. This would therefore leave a petitioner who has limited knowledge in the law to conduct legal research and to be able to identify the overlooked issue within the one year statute of limitations under 2244(d). (emphasis added).

Steel recognizes that many petitioners faced with this current circumstance, will not have the assistance of counsel during this one-year period, and that the 7th Circuit in *Socha v. Boughton*, 763 F.3d 674, and *Tucker v. Kingston*, 538 F.3d 732, 735 has found that lack of counsel and lack of legal knowledge are not, by themselves, extraordinary circumstances. However, the 7th Circuit's finding in this regard is contrary to this Courts

holding in *Evitts v. Lucey*, 469 U.S. 387 (1985). In *Evitts v. Lucey*, this Court held that a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.

It should be noted that in *Socha v. Boughton*, *supra* the Court held that a petitioner is not entitled to counsel during post-conviction proceedings. In Steel's case, Steel was under a direct appeal as of right when his no-merit report was filed.

In sum, Steel asks this Court to settle this issue by finding that a legal error committed by a State Court while deciding a direct appeal under *Anders* is an external impediment beyond the petitioners control which could provide grounds for equitable tolling.

ARGUMENT 3

DID THE LOWER COURTS ERR BY FAILING TO GRANT A CERTIFICATE OF APPEALABILITY

Steel submits that he diligently sought a certificate of appealability in both the district Court and the 7th Circuit Court of appeals but to no avail. Steel therefore asks this Court to find that the lower Courts erred in failing to grant a certificate of appealability on the issues identified in this writ.

As the record reflects, Steel argued that reasonable jurists could find that equitable tolling should be applied to the issues identified herein.

This Court should therefore find it appropriate to remand this case back to the lower Courts, ordering that a certificate of appealability should issue on the claims identified here-in.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the due process clause of the 14th Amendment to the United States Constitution which provides : No State shall ... deprive any person of life, liberty or property without due process of law. U.S. Const. Amend 14

This petition also concerns the construction and application of the right to counsel of the sixth Amendment to the United States Constitution which provides :

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel in his defense ... U.S. Const. Amend 6

REASONS FOR GRANTING THE WRIT

The writ should be granted as the questions presented involve questions of exceptional importance. This court, nor the lower courts, have never addressed the questions presented in this writ.

Addressing the questions presented in this writ would preserve many litigants due process rights, thereby eliminating the need for litigants to file unnecessary motions, petitions, writs, etc. Addressing the questions presented herein would also save judicial time and resources of the lower courts.

CONCLUSION

For the reasons set forth here-in, Steel asks this Court to issue the respected writ.

Dated this 8th day of August 2022

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RESPECTFULLY SUBMITTED

