

23-5068
No. 3

IN THE
Supreme Court of the United States

LAVOUNT PETERSON,

Petitioner,

v.

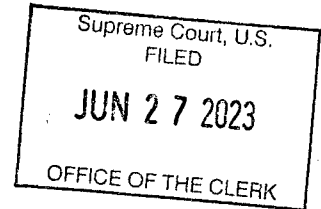
ADMINISTRATOR EAST JERSEY STATE PRISON, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Lavount Peterson, *pro se*
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QUESTIONS PRESENTED

1. Whether the habeas statute of limitations remains tolled after a state post-conviction relief (“PCR”) court dismisses a timely and properly filed PCR petition “without prejudice” and without addressing the merits of the PCR petition which makes it a non-final appealable order?

2. Whether the habeas statute of limitations remains tolled after New Jersey PCR petitioners invoke the equitable tolling that the 1977 Directive from the New Jersey Supreme Court provides to them?

3. Whether the failure of the PCR court to provide a copy of its ruling which results in the expiration of time to file a habeas corpus petition constitutes good cause for equitable tolling?

LIST OF PARTIES

Lavount Peterson, Petitioner

Patrick Nogan, Administrator of East Jersey State Prison

Matthew J. Bruck, Attorney General of New Jersey

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STATUTES

28 U.S.C. § 1254(1)

28 U.S.C. § 2253

OTHER

United States Constitution, First Amendment

United States Constitution, Fourteenth Amendment

New Jersey Supreme Court Directive, published at 100 N.J.L.J. 1208 (1977)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner humbly prays that a writ of certiorari be issued to review the legal matters of major importance involved in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Third Circuit appears as Appendix A, attached to this petition.

The Opinions of the United States District Court appear as Appendices B and C, attached to this petition.

JURISDICTION

The last date on which the United States Court of Appeals for the Third Circuit ruled on this case was April 5, 2023. (Appendix A).

The jurisdiction of this Court is invoke under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment right to access to the courts.

Fourteenth Amendment right to equal protection.

28 U.S.C. § 2253(c).

STATEMENT OF THE CASE

This case presents legal issues of major importance that affects a huge number of state habeas petitioners from the State of New Jersey and around the Country. One of those issues is whether the federal habeas corpus statute of limitations remains tolled after a state PCR court dismisses a timely and properly filed PCR petition without prejudice. The second issue involved in this case is whether the federal habeas corpus statute of limitations remains tolled after New Jersey PCR petitioners invoke the equitable tolling that the 1977 Directive from the New Jersey Supreme Court gives them. The third issue of major concern that needs direction from this Honorable Court is whether the failure of state PCR courts to provide a copy of their rulings which result in the expiration of time to file federal habeas corpus petitions constitutes good cause for equitable tolling.

REASONS FOR GRANTING THE PETITION

I. Rulings From State PCR Courts Dismissing Properly Filed PCR Petitions Without Prejudice Toll The Federal Habeas Corpus Statute of Limitations Thus Petitioner's Habeas Petition Was Not Time Barred

In this case Petitioner filed a properly and timely PCR petition in state court which was dismissed by the PCR court "without prejudice," to be refiled on a non-specified later date if some of the files that were lost could be found. The PCR court's Order dismissing the PCR petition did not set a specific date when the same could be refiled. (Appendix D at 1). The Office of the Public Defender as well as PCR counsel conducted an extensive research to find the missing files that lasted for a few years. During the time that the Public Defender Office and PCR counsel were researching for the missing files Petitioner consistently called them, but each time Petitioner was told that they were still searching. Petitioner even wrote to the Superior Court Judge requesting a status update. Petitioner received a letter from the PCR court assuring him that he will not be prejudiced by the dismissal of his PCR petition. A few months after, Petitioner received a letter from an investigator of the Public Defender Office letting him know that the file has not yet been located, but that a trace was placed on the file to see if it was returned from the Appellate Division. Eventually, Petitioner's file was not located and Petitioner refiled his PCR petition. (Appendix D at 1-5).

All these proceedings and delays amounted to the lapse of 1,532 days, from when Petitioner's PCR petition was dismissed without prejudice until it was re-filed. As a result, the Government argued that the 1,532 days should count against the one-year federal statute of limitations. In contrast, Petitioner argued that the dismissal "without prejudice" from the PCR court provided equitable tolling to avoid the unfairness of preventing Petitioner from asserting his claims on a later date after his file could be found. (Appendices B & C). The District Court declined to decide whether the dismissal "without prejudice" entitles the Petitioner to equitable tolling during the 1,532 days. But the District Court did note that "[t]here is some contrary authority" – although not from this Court - to the Government's argument. See Banks v. Pierce, No. 17-2961, 2018 WL 1446402, at *3 (D.N.J. Mar. 23, 2018), *assuming* that the habeas statute of limitations remained tolled after the PCR court's dismissal without prejudice because the court's order did not address the merits of the PCR petition and therefore the PCR court's order was not final nor appealable. (Appendix B at 6 footnote 2).

The fact that there is some kind of supporting authority – even if it is from a district court - as to Petitioner's entitlement to equitable tolling during the 1,532 days from when his PCR petition was dismissed without prejudice until it was re-filed, raises this case to the level for a Certificate of Appealability ("COA") to be granted. Miller-El v. Cockrell, 537 U.S. 322, 336, (2003), reiterating "reasonable

debate" standard for a COA. Yet, the Third Circuit Court of Appeals declined to issue a COA in direct contradiction of multiple precedents from this Honorable Court that have periodically reminded lower courts not to unduly restrict the COA pathway to appellate review. See, e.g., *Tharpe v. Sellers*, 583 U.S. ___, 138 S. Ct. 545, 199 L. Ed. 2d 424 (2018) (per curiam); *Tennard v. Dretke*, 542 U.S. 274 (2004).

In short, jurists of reason could debate whether the lateness in filing the habeas corpus petition resulted not from Petitioner's neglect, but from the Government's loss of Petitioner's file and the PCR court's dismissal without prejudice. Thus this issue should have been addressed by either the District Court or the Third Circuit Court of Appeals.

II. The 1977 Directive From The New Jersey Supreme Court That Provides Equitable Tolling To State Petitioners Tolls The Federal Habeas Corpus Statute Of Limitations Making Petitioner's Habeas Petition Timely

New Jersey has a state law that provides equitable tolling to state appellants as long as they timely request their attorneys, or the Office of the Public Defender, to file an appeal on their behalf. *New Jersey Supreme Court Directive, published at 100 N.J.L.J. 1208 (1977), hereinafter The Directive*. This fact, as well as the fact that Petitioner was diligent and was not advised that his PCR motion had been denied until years later, toll the federal habeas corpus statute of limitations and

make Petitioner's federal habeas corpus petition timely. (Appendix E at 6-8).

As this Honorable Court has made clear, a litigant seeking equitable tolling bears the burden of establishing that s/he has been pursuing her rights diligently and that some extraordinary circumstance stood in the way. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). In the present case, as to an extraordinary circumstance, the New Jersey PCR court denied Petitioner's PCR motion on October 20, 2015 but failed to serve the same to the parties and notify them. Then, when Petitioner was finally able to found out about the 2015 denial - in 2017, the Office of the Public Defender and PCR counsel failed to file a timely notice of appeal on behalf of Petitioner even though he asked them to. (Appendix E, entirely). *Emphasis added*. It cannot be emphasized enough that the District Court gave no weight to the 2017 evidence presented by Petitioner showing that as soon as he found out that his PCR petition had been denied, he requested the Office of the Public Defender to file a notice of appeal on his behalf. (See Appendices C & E). Plus by denying an evidentiary hearing and appointment of counsel, the District Court prevented Petitioner from obtaining phone records to prove that from 2015 to 2017 Petitioner often call the PCR court as well as the Office of the Public Defender to ask if his PCR petition has been decided. All this, Petitioner humbly argues, shows that he was diligent but in an extraordinary way prevented from asserting his rights timely, and therefore this case meets the second standard required by the ruling of

this Court in Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

As to diligence, the record as a whole shows that Petitioner found out about the denial of his PCR petition due to his own diligence and not from the Office of the Public Defender or the PCR court. The record also demonstrates that as soon as Petitioner became aware about the denial of his PCR petition he timely asked the Office of the Public Defender and his PCR counsel to file a notice of appeal on his behalf which is the only requirement mandated by The Directive. Plus Petitioner ended up filing a *pro se* notice of appeal and a motion to file the same as within time before the Office of the Public Defender did. The actual facts are like this: The PCR court denied Petitioner's PCR petition in 2015 but did not inform the parties. In 2017, during one of the many phone calls to the PCR court, Petitioner found out that his PCR petition has been denied two years earlier, although in many previous phone calls Petitioner was informed that his PCR petition was still pending. Petitioner immediately asked his PCR counsel and the Office of the Public Defender to file a notice of appeal on his behalf and to provide him with a copy of the denial of the PCR opinion. Neither PCR counsel nor the Office of the public Defender complied with Petitioner's requests. So in 2018 Petitioner filed a *pro se* notice of appeal and wrote to the PCR court requesting a copy of its 2015 ruling denying his PCR petition. (Appendices C & E).

This being so, the circumstances present here establish that Petitioner was

indeed reasonably diligent in the state courts, and has been reasonably diligent in the federal courts as well. In fact, as soon as Petitioner found out that Respondents were alleging that the habeas petition was filed late Petitioner started collecting old letters and mail-receipts that were not in his possession or control, and filed these documents in the District Court as soon as it was possible for him to do so.

(Appendix C).

The reality is that based on the equitable tolling that the 1977 Directive provides, as well as the facts that the federal statute of limitations ran out due to the PCR court's failure to serve a copy of its ruling in a timely manner and the office of the Public Defender and PCR counsel failed to file a notice of appeal as soon as Petitioner asked them to do so, jurists of reason would find it debatable whether the District Court was correct in its procedural ruling and whether the petition states a valid claim of the denial of a constitutional right. *Holland v. Florida*, 560 U.S. 631 (2010).

In sum, under the circumstances existing here and the record as a whole this case meets the standard for review in this Honorable Court. Or, at the minimum, this case meets the standard for a COA to be issued.

CONCLUSION

In light of the reasons presented herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

By:



LAVOUNT PETERSON

Date: 6/26/2023