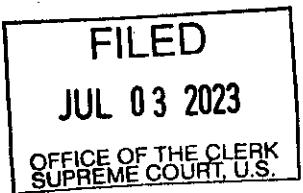


23 - 5420

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

Bruce Wanzo, Jr. — PETITIONER
(Your Name)

vs.

Christian Pfeiffer — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court- Central District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

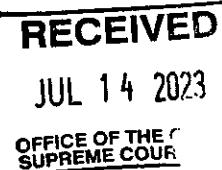
PETITION FOR WRIT OF CERTIORARI

Bruce Wanzo, Jr.
(Your Name)

3000 W. Cecil Ave.
(Address)

Delano, CA 93215
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

1. Whether appointment of counsel on appeal for briefing, and the actions of counsel in detracting from the intended issues raised in the Certificate of Appealability(misconstrued by the Ninth Circuit when drafting the certified issue) may have been deliberate, in violation of Petitioners due process right, or due to incompetence?
2. Whether the Ninth Circuit abused it's discretion allowing counsel on appeal to brief certified issue it misconstrued in reading the Certificate of Appealability, diverting the Courts attention from the real issue of the state-impediment to filing the writ, in this pre-AEDPA homicide case, by trying to suggest/ argue the PC 1170.95 motion reopened the case for tolling purposes, where he informed the Court by motion for reconsideration of it's error- unresponded to todate?
3. Whether "fraud on the court" by the state, claiming no records exist, after prison staff's loss or destruction of Petitioners legal property in the years following the AEDPA's passage, was an impediment to filing habeas petition, within the meaning of 28 USC § 2244(d)(1)(B), constituting an "extraordinary circumstance", entitling Petitioner to equitable tolling, in this pre-AEDPA case involving a conflict, wherein the prosecutor shared familial relations with the victim, he intended to challenge, among other claims?

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:

Christian Pfeiffer, Warden-KVSP
State of California

TABLE OF CONTENTS

OPINIONS BELOW.....	[6]
JURISDICTION.....	7
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	8
STATEMENT OF THE CASE	9-11
REASONS FOR GRANTING THE WRIT	12-14
CONCLUSION.....	15

INDEX TO APPENDICES

APPENDIX A	Ninth Circuit Order Denying Motion For Reconsideration, dated _____;
APPENDIX B	Ninth Circuit Order Affirming DC Dismissal On Timely Grounds, dated 4-3-23;
APPENDIX C	Ninth Circuit Order Granting Certificate Of Appealability, dated 12-20-21;
APPENDIX D	District Court- Central District Order Denying Certificate Of Appealability, dated 9-6-20;
APPENDIX E	District Court- Central District Order Accepting Findings & Recommendation Of U.S Magistrate Judge, dated 9-6-20;
APPENDIX F	District Court- Central District R&R To Dismiss Petition, dated 5-4-20;
APPENDIX G	2nd App. Dist. Court of Appeal Affirming Judgment, dated 4-30-92.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Evitt v. Lucey</u> , 469 US 387, 395, 393-400(1985).....	13
<u>Holland v. Florida</u> , 560 US 631, 649-652, 653-654(2010)....	13
<u>Latshaw v. Trainer Wortham & Co.</u> , 452 F. 3d 1097, 1102-03, 1104(9th Cir. 2007).....	13, 14
<u>Lindh v. Murphy</u> , 521 US 320, 326-36(1997).....	12, 14
<u>Miller v. Cockrell</u> , 537 US 322(2003).....	12(sic)
<u>Pace v. DiGualielmo</u> , 544 US 408, 418(2005).....	13, 14
<u>Slack v. McDaniel</u> , 529 US 473, 481(2005).....	12
<u>Smith v. Robbins</u> , 528 US 259, 285(2000).....	13
<u>Sorce v. Artuz</u> , 73 F. Supp. 2d 292, 299(ED NY 1999).....	13
<u>Warren v. Runnels</u> , 2011 US Dist. LEXIS 41760, *8, 9, 10-12(ND Cal. 2011).....	13

STATUTES AND RULES

• US Const. 14th Amendment- Right To Effective Appellate Counsel	...8
• 28 USC §§ 1254.....	8, 12
2244(d)(1)(B).....	2, 8, 10, 13
§ 102 of the AEDPA, codified at 2253(c).....	8, 12
§ 2254(d)(1).....	12, 14
Rule 11 Governing Section 2255	
• FRAP 22(b), and 40(a).....	13
• 9th Cir. R. 22-1	

OTHER

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

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

The opinion of the United States court of appeals 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 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 _____ 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

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

The date on which the United States Court of Appeals decided my case was 4-3-23

[] 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: 5-16-23, 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 _____. A copy of that decision appears at Appendix _____.

[] 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

- 14th Amendment right to effective assistance of appellate counsel.
 - Due process violated by appointment of incompetent counsel for briefing, on misconstrued issue certified by the Circuit Judge as drafted.
 - Effect of counsels deficient performance on appeal.
 - But for counsels error, the appellant would have prevailed on appeal.
- Construction and Application of AEDPA, 26 A.L.R Fed. 2d 1, *21. Review of ruling on application for Certificate of Appealability.
 - § 102 of the Antiterrorism and Effective Death Penalty Act, codified at 28 USC § 2253(c).
 - See also 28 USC § 1254(1)
 - Circuit judges error interpreting issue sought to be certified.
 - Circuit judges error drafting certified issue.
- Fraud on the court by state, denying records exists required to file petition, as an "extraordinary circumstance", entitling Petitioner to "equitable tolling" under 28 USC § 2244(d)(1)(B).

STATEMENT OF THE CASE

On June 29, 1990 following a jury trial in Los Angeles County Superior Court (Case No. TA001690) Petitioner was convicted of second-degree murder (in violation of Cal. PC § 187(a)), and one count of attempted murder (in violation of Cal. PC § 187(a), and 664), and the jury found true firearm and great bodily injury allegations. The charge arose from allegations that Petitioner shot two individuals at a gas station in Compton on September 20, 1989.

On January 24, 1991 Petitioner was sentenced to 29 years to life in state prison.

Almost 39 years later, on January 3, 2019, Petitioner filed a petition for resentencing in Los Angeles County Superior Court pursuant to California Penal Code Section 1170.95, which was enacted on January 1, 2019, following the passage of California Senate Bill 1437 (amending the felony murder rule, and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, and did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life).

On February 8, 2019, the Superior Court summarily denied Petitioner's Section 1170.95 petition, finding that he was ineligible for resentencing.

On April 23, 2019, Petitioner filed a notice of appeal from the denial order. On June 17, 2019, the California Court of Appeal dismissed the appeal because he failed to file a timely notice of appeal. By Petitioner's own admission he did not seek review of the court of appeal dismissal of his appeal in the California Supreme Court.

On July 2, 2019, Petitioner filed his first pro se federal habeas corpus petition in the Central District challenging his original conviction, bypassing

the state habeas process on account of divestiture of jurisdiction per 28 USC §§ 1455(b), and 1331, given the states role in the impediment to filing...Petitioner asserted three claims for relief: (1) denial of his access to the court; (2) prosecutorial misconduct arising from the trial prosecutor's familial relationship to one of the victims; and (3) ineffective assistance of trial and appellate counsel.

He only brought up the 1170.95 motion to support his argument of fraud on the court as the "extraordinary circumstance" to establish entitlement to equitable tolling- as the state after the loss/ destruction of his legal property by prison officials, around the time of the passage of the AEDPA in 1996, denied transcripts existed, when requested over the years. Although the state used them to respond to the 1170.95 petition.

On May 4, 2020, the Magistrate judge issued a Report and Recommendation that Petitioners petition be dismissed with prejudice as untimely under 28 USC § 2244(d)(1)...reasoning that the statute of limitation for Petitioner petition lapsed on April 24, 1997- the cutoff for federal habeas petitions challenging convictions predating the AEDPA. Because Petitioner filed his petition after this date, he was not entitled to statutory or equitable tolling. The Magistrate judge concluded that Petitioner was untimely under § 2244(d)(1).

On May 19, 2020, Petitioner filed pro se objections to the Report and Recommendation.

On September 6, 2020, the district court issued an order adopting the Magistrate Judge's Report and Recommendation, and entered judgment dismissing Petitioners petition with prejudice. The district court also denied petitioner a certificate of appealability as to any issue.

On September 29, 2020, Petitioner filed a notice of appeal in the form of a request for a certificate of appealability in the Ninth Circuit.

On December 20, 2021, this court granted a certificate of appealability,

Cont. Statement of the Case

Page 3 of 3

erroring in drafting the certified issues, misconstruing Petitioners position, as a claim that the 1170.95 petition was to reopen the case for the purpose of overcoming the 1 year limitation period, rather than arguing that it supported fraud on the court, where the state relied on transcripts and records to overcome it, it long since has denied existed. Wherein the only issue certified would have been Petitioners entitlement to equitable tolling, given that the state fraud on the court was an "extraordinary circumstance" constituting an impediment to filing, yet to lift, which is why he sought mandamus in addition to the habeas.

Appointed counsel through his incompetence, failed to correct the court on the certified issue, and filed a brief on 11-14-22, consistent with the courts misinterpretation.

On 4-3-23, the Ninth Circuit affirmed the district courts dismissal of the petition on untimely, and forfeiture grounds.

On 5-16-23, Petitioner filed a motion for reconsideration on account of the Ninth Circuits error in certifying the issue raised in his Certificate of Appealability, injecting the 1170.95 petition into analysis.

The motion for reconsideration has yet to be ruled on todate.

REASONS FOR GRANTING THE PETITION

When district court assessments of constitutional claims are debatable and wrong, demonstratable by jurist of reason, the Antiterrorism and Effective Death Penalty Act("AEDPA") conditions appeals by Petitioners on their obtaining a "certificate of appealability" The procedures and standards for seeking such a certificate are roughly equivalent to the preexisting rules for obtaining "certificate of probable cause to appeal", except that the certificate must indicate not only that the case as a whole, but also that a specific "issue or issues", satisfy the requisite standard(a "substantial showing of the denial of a constitutional right").

In Lindh v. Murphy the Court held that AEDPA's amendment to 28 USC § 2254, the statute governing entitlement to habeas relief in the district court, applies to cases filed after the AEDPA's effective date. Slack v. McDaniel, 529 US 473, 481(2000).

Congress mandated that a prisoner seeking postconviction relief under 2254 has no automatic right to appeal a district courts dismissal of the petition. Instead, Petitioner must first seek and obtain a Certificate of Appealability. Until COA has been issued, a circuit court lacks jurisdiction to rule on the merits. Miller-El v. Cockrell, 537 US 322, 326-327(2003).

Where although Petitioner who has successfully obtained a COA has no control over how it is drafted by the judge who issues it...§ 102 of the AEDPA, codified as 28 USC § 2253(c), in addition to 28 USC § 1254, serves to ensure the misconstrued claims, challenged under a Petition For Rehearing En Banc, or as a Motion For Reconsideration, suffice.

Petitioners counsel had not attempted to correct the error of the circuit

judge misconstruing the issue he sought to have certified as a claim that the Penal Code Section 1170.95 petition somehow reopened the case for tolling purposes, rather than using the states response to the petition to establish fraud on the court, within the 14 day deadline for filing for rehearing en banc, or by motion for reconsideration, despite being urged by Petitioner to cooect it.

The only precedent on the circuit courts error in certifying issues on Certificate of Appealability was in Warren v. Runnels, 2011 US Dist. LEXIS 41760, *8, 9, and 10-12(ND Cal. 2011)(certified issue error...En Banc-FRAP 35(a), and 40(a)) relying on Latshaw v. Training Wortham & Co., 452 F.3d 1097, 1102-03, 1104(9th Cir. 2007).

Here, the ineffectiveness of counsel, and the appointment by the court of incompetent counsel on appeal Evitt v. Lucey, 469 US 387, 393-400, 395(1985)(14th Amendment due process right to effective assistance of appellate counsel), Smith v. Robbins, 528 US 259, 285(2000)(effect deficient appellate counsels performance had on the appeal of the matter) deprived Petitioner of his last opportunity for a merit decision on the "fraud on the court" claim constituting an extraordinary circumstance entitling him to equitable tolling under 28 USC § 2244(d)(1)(B).

Where fraud on the court in this case by the state denying transcripts existed immediately after the AEDPA's enactment, and after being responsible for the loss and or destruction of Petitioners legal property in the years preceding, only to rely on the same records to respond to his 1170.95 petition, would constitute an extraordinary circumstance entitling him to equitable tolling. Holland v. Florida, 560 US 631, 649-654("extraordinary circumstance", "equitable tolling"...diligence"). See also Sorce v. Artuz, 73 F. Supp. 2d 292(ED NY 1999).

According to Holland, at 649, a Petitioner seeking equitable tolling bears the burden of establishing (1) that he or she has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his/ or her way Pace v. Di-

Guglielmo, 544 US 408, 418(2005)

The deficiency in counsels argument in the brief should have been limited to the issue of "fraud on the court" by the state being an extraordinary circumstance entitling Petitioner to equitable tolling, where Latshaw, at 1104, recognized that fraud on the court can sometimes constitute extraordinary circumstances...such fraud on the court embrace[s] only the species of fraud which does, or attempts, to deprive the court itself, or is a fraud perpetuated by officers of the court...that the judicial machinery can not perform in their unusual manner its impartial task of adjudicating issues that are presented for adjudication. Clearly the issue at bar.

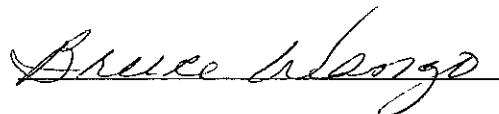
Diligence was shown where Petitioners attorney on direct appeal, and the District Attorney's Office, etc., for years engaged in acts of misconduct, to stop his filing of the writ challenging the claim of the prosecutors familial relation to the victim conflict...immediately after the AEDPA's enactment.

Congresses intent in regard to the factual circumstances present in this case would call into question the constitutionality on Section 2254(d), if the writ won't succeed. Lindh v. Murphy, 521 US 320, 326-36(1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bruce W. Bargo".

Date: 7-3-23