

No. _____

IN THE
Supreme Court of the United States

LUIS RIOS,

Petitioner,

v.

PATRICK COVELLO, Warden,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When determining the one-year limitations period under 28 U.S.C. §2244(d)(1)(D) of the Antiterrorism and Effective Death Penalty Act (AEDPA) for an ineffective assistance of counsel claim wherein counsel's alleged deficiency was a failure to investigate, was it possible for petitioner to have the factual predicate for the prejudice prong of his ineffective assistance claim *before* he knew that an investigation by counsel—had it been conducted—would have uncovered evidence to change the outcome of his case?

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LIST OF PRIOR PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

Rios v. Covello, No. 22-55140 (July 17, 2023)

U.S. District Court for the Central District of California

Rios v. Covello, No. 2:20-cv-11678-CJC-MAR (January 20, 2022)

California Supreme Court

In re Rios, No. S262091 (July 15, 2020)

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Luis Rios petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in his habeas corpus action.

OPINIONS BELOW

The Ninth Circuit's memorandum decision affirming the judgment of the district court against Rios is unreported. Pet. App. 1-3. The district court's final judgment dismissing Rios's pro se habeas petition with prejudice is unreported. Pet. App. 4. The magistrate judge's report recommending the dismissal of Rios's petition is unreported. Pet. App. 6-22.

The order by the California Supreme Court denying Rios's state habeas petition is unreported. Pet. App. 23

JURISDICTION

The Ninth Circuit issued its memorandum disposition on July 17, 2023. Pet. App. 1-3. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

[T]he accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2244 provides:

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Luis Rios always suspected that the prosecution in his underlying state case was using false firearm evidence to force him to enter a plea deal. Although Rios informed his counsel of this suspicion, counsel failed to investigate this firearm evidence and instead advised Rios to accept the deal. Fearing that he would get a life sentence if he rejected the offer, Rios followed counsel's advice.

Approximately six years later, however, Rios learned that his counsel could have uncovered evidence that proved his suspicion correct had they investigated the firearm at issue before he entered his plea. Within a year of discovering this new evidence, Rios filed a federal habeas petition alleging, among other things, ineffective assistance of counsel for failure to investigate.

The Ninth Circuit concluded, however, that this petition was untimely under 28 U.S.C. § 2244(d)(1)(D) because Rios was aware of the factual predicate for his ineffective assistance claim *before* he became aware of the evidence that an investigation by his counsel would have uncovered. Rios contends that this conclusion conflicts with this Court's holding in *Strickland v. Washington*, 466 U.S. 668, 687-91, 694 (1984), which establishes that an

ineffective assistance claim requires both a showing that counsel performed deficiently *and* resulting prejudice from that deficient performance.

A. Events Leading Up to Rios's Plea Deal

Sometime around 2012, Rios was living in Pomona, California, which is in Los Angeles County. 1-ER-46; 1-ER-74; 1-ER-165.¹ At the time, Rios was in a romantic relationship with his neighbor, a sixteen-year-old girl. 1-ER-165. The girl's father disapproved of this relationship and one day confronted Rios outside their homes. 1-ER-166; 1-ER-215. Rios, who was armed with a .380 caliber firearm at the time of the confrontation, warned the girl's father that he was carrying a weapon and asked him to "abandon his attacks." 1-ER-166. The girl's father complied and returned to his home. *Id.*

At some point after this incident, Rios moved in with his sister and her husband in Ontario, California, which is in San Bernardino County. 1-ER-167. Shortly thereafter, Rios got in a confrontation with his sister's husband wherein Rios's firearm accidentally discharged when it fell from Rios's waistband. 1-ER-256; 1-ER-167. The police arrived, arrested Rios, and located a .380 caliber firearm that had been dismantled. 1-ER-167-168.

¹ "ER" refers to the excerpts of record filed in the Ninth Circuit case at ECF No. 23.

Rios was charged in San Bernardino County with various crimes arising from the incident with his sister's husband. 1-ER-255-262. In April 2013, Rios plead guilty to an attempted murder charge in his San Bernardino County case and received a sentence of twelve years in exchange for that plea. 1-ER-246-247.

Rios was also charged with several crimes in Los Angeles County relating to his relationship with the sixteen-year-old girl and the incident with her father. 1-ER-213-220. On March 17, 2014, Rios plead no contest to two charges, including attempted murder, and received a sentence of twenty-seven years. 1-ER-204-212.

B. Rios Suspected Prosecutors in His Los Angeles County Case Used False Firearm Evidence to Coerce His Plea Deal

Before Rios agreed to plead no contest in his Los Angeles County case, counsel told Rios that 9mm casings and a firearm were recovered outside his home in Pomona. 1-ER-81; 1-ER-162. When Rios asked to see this evidence, his lawyer showed him a grainy photo of a firearm purported to be a 9mm firearm. 1-ER-35. Rios, however, suspected that this photo depicted the .380 caliber firearm that was recovered in his San Bernardino County case and not a 9mm weapon. 1-ER-35; 1-ER-65; 1-ER-123. Further, Rios knew that it would be impossible for a .380 caliber weapon to fire 9mm shells. 1-ER-123. Rios thus informed his lawyer of his suspicion and asked his lawyer to move

to suppress the firearm evidence in his Los Angeles County case. 1-ER-47. Rios's counsel, however, failed to file that motion or investigate the photographed gun, so Rios fired him. 1-ER-12; 1-ER-19; 1-ER-48.

Rios was then appointed a public defender. Despite being aware of Rios's suspicion, the public defender told Rios that "they have the gun" and advised Rios to "take the deal or [you're] going to get a life sentence." 1-ER-32. Fearing that he would get a life sentence, Rios followed his counsel's advice and took the deal. 1-ER-32; 1-ER-56.

Rios never appealed his Los Angeles County conviction. That conviction therefore became final sixty days later, on May 16, 2014. *See* Cal. R. Ct. 8.308(a).

C. Rios Discovers Chain-of-Custody Evidence that Proved His Suspicion Correct

In January 2020, Rios discovered chain-of-custody evidence that proved the gun depicted in the grainy photo was not a 9mm gun but was instead the .380 caliber firearm that was recovered from his San Bernardino County case. This chain-of-custody evidence had been in Rios's files all along and therefore could have easily been discovered by his attorneys had they investigated the gun before Rios entered his plea. Moreover, given Rios's

particular circumstances, he couldn't have discovered this chain-of-custody evidence before January 2020²:

- Before he entered his plea, Rios never had a chance to review his files because his counsel refused to share them with him. (1-ER-48; 1-ER-57);
- Post-plea, counsel initially ignored Rios's sister's requests for the files. (1-ER-65-66);
- When counsel finally provided the files to Rios's sister in July 2014, Rios's legitimate safety concerns (stemming from the sensitive nature of his crimes) necessitated that the files be kept at his sister's home rather than in his prison cell. (1-ER-145; 1-ER-49; 1-ER-58; *see* AOB³ at 11, 21-23);
- Although Rios's sister immediately attempted to review the files—which were approximately 2,300 pages in length—she couldn't make sense of them and required legal assistance to review them. (1-ER-67; 1-ER-61);

² *See Ford v. Gonzalez*, 683 F.3d 1230, 1235-36 (9th Cir. 2012) (“Although section 2244(d)(1)(D)'s due diligence requirement is an objective standard, a court also considers the petitioner's particular circumstances.”).

³ AOB refers to Rios's opening brief in his Ninth Circuit proceeding at ECF No. 22.

- But given her financial frailty, Rios’s sister was unable to hire someone to review the approximate 2,300 pages of files until she met Jorge Muñoz, a paralegal, in late 2019.⁴ (1-ER-65-70; 1-ER-61; 1-ER-36; 1-ER-51);
- When Muñoz reviewed the 2,300 pages of files in either late 2019 or early 2020,⁵ he discovered the chain-of-custody evidence that proved the photo at issue depicted the .380 caliber handgun from Rios’s San Bernardino case and not a 9mm handgun. (1-ER-61-63);
- When Muñoz informed Rios’s sister of this discovery in January 2020, she sent Rios a letter to inform him that Muñoz had discovered some issues with the evidence from his Los Angeles case. She thus asked Rios to call her so that he can speak with Muñoz.⁶ (1-ER-52; 1-ER-71);

⁴ The district court record—which Rios developed *pro se*—contains discrepancies as to when Rios’s sister met Muñoz.

⁵ The record is also unclear as to when exactly Muñoz reviewed the files. But it appears that he reviewed them within this timeframe.

⁶ The record also contains discrepancies as to when Rios received the letter from his sister instructing him to contact her to learn more about Muñoz’s findings. Rios states this occurred in January 2020 (*see, e.g.*, 1-ER-52), but his sister’s letter is dated “January 2018” (1-ER-71). That said, Muñoz’s declaration is dated March 26, 2020, and states that he informed

- After receiving this letter, Rios called his sister on January 20, 2020 and spoke with Muñoz. On this call, Rios learned for the first time about the chain-of-custody evidence. (1-ER-52; 1-ER-63).

D. Rios Files His Federal Habeas Petition Within a Year of Discovering the Chain-of-Custody Evidence

On December 17, 2020, Rios constructively filed his federal habeas petition alleging, among other things, ineffective assistance of counsel for failure to investigate the firearm in his Los Angeles County case. 1-ER-12; 1-ER-19; 1-ER-32-33; 1-ER-172-17.

E. The Ninth Circuit Finds Rios’s Habeas Petition was Untimely Because He was Aware of the Factual Predicate for His Ineffective Assistance Claim Before He Entered His Plea

In affirming the district court’s denial of Rios’s petition on the grounds that it was untimely under 28 U.S.C. § 2244(d)(1)(D), the Ninth Circuit found that “Rios was aware of the factual predicate for his claims” prior to entering his plea, “well within the AEDPA limitations period[,]” because he stated in the district court proceedings that he “knew the alleged weapon in the [Los

Rios of his findings in “January 2020.” 1-ER-61-63. This suggests that the date in the letter from Rios’s sister is a typo.

Angeles] case was never recovered” and that the photo of the firearm “was that similar to a .380 [caliber], but was not the 9mm used at the [Los Angeles] address he was being charged with.” Pet. App. 3-4.

However, in those same proceedings, Rios repeatedly stated that he merely *suspected* the gun depicted in the photograph was that of the .380 caliber firearm and not a 9mm firearm, and reaffirmed that his suspicion wasn’t verified until he discovered the chain-of-custody evidence in January 2020. 1-ER-27-30; 1-ER-32; 1-ER-35; 1-ER-52; 1-ER-58.

Thus, at the time Rios entered his plea, he did not know that an investigation by his counsel would have uncovered chain-of-custody evidence that confirmed his suspicion. And had Rios then known this chain-of-custody evidence existed, he would have never accepted a plea that included firearm charges. *See* 1-ER-144; 1-ER-35; 1-ER-56; 1-ER-172.

REASONS FOR GRANTING THE WRIT

A. Relevant Law

As relevant here, AEDPA’s one-year statute of limitations period runs from the later of “the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review,” or “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(A), (D).

Regarding Rios's ineffective assistance claim, this Court's decision in *Strickland* teaches that to establish ineffective assistance of counsel, a party must demonstrate (1) that counsel performed deficiently, and (2) that, but for counsel's deficient performance, there is a reasonable probability that the result of the case would have been different. *Strickland*, 466 U.S. at 687-691, 694. Therefore, to have the factual predicate for an ineffective assistance claim, a petitioner must have discovered facts suggesting both deficient performance *and* resulting prejudice. *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001).

B. Rios Did Not Have the Factual Predicate for the Prejudice Prong of His Ineffective Assistance Claim Until He Discovered the Chain-of-Custody Evidence in January 2020

Rios contends that his counsel performed deficiently by failing to investigate the photographed gun purported to be a 9mm firearm (to match the 9mm shell casings allegedly found outside his home in Pomona) but that Rios believed was actually the .380 caliber handgun from his San Bernardino County case. This failure to investigate satisfies *Strickland's* deficient performance prong, and Rios was aware of the factual predicate for this prong as soon as he learned that his counsel failed to investigate the identity of this gun.

To satisfy *Strickland*'s prejudice prong, however, Rios needed to know that—had his counsel investigated the gun—they could have uncovered evidence that would have changed Rios's plea decision. At the time of Rios's plea, however, he did not know the chain-of-custody evidence existed or that his counsel could have easily discovered this evidence through a routine investigation. It was not until January 2020 that Rios learned for the first time that his counsel could have discovered the chain-of-custody evidence had they investigated the gun. And had Rios known that this chain-of-custody evidence existed, he would have never accepted a plea deal that included firearm charges. Rios therefore did not have the factual predicate for the prejudice prong of his ineffective assistance claim until he discovered the chain-of-custody evidence in January 2020.

But the Ninth Circuit concluded that Rios was aware of the factual predicate for his ineffective assistance claim *before* he discovered this chain-of-custody evidence because he stated in the district court proceedings that, prior to entering his plea, he “knew the alleged weapon in the [Los Angeles] case was never recovered” and that the photo of the firearm “was that similar to a .380 [caliber], but was not the 9mm used at the [Los Angeles] address he was being charged with.” Rios's subjective belief about the identity of the photographed gun, however, is irrelevant to his ineffective assistance claim *for failure to investigate*.

Instead, what matters for purposes of Rios's ineffective assistance claim—and specifically for the prejudice prong of his claim—is what his counsel could have discovered to change Rios's plea decision *had they investigating the gun in the photo*. Without knowing that there was something counsel could have discovered to change his plea, Rios could not have had the factual predicate for the prejudice prong of his ineffective assistance claim.


CONCLUSION

Because the Ninth Circuit failed to analyze the timeliness of Rios's ineffective assistance claim under the standard set forth in *Strickland*, this Court should grant Rios's petition for a writ of certiorari.

Respectfully submitted,

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DATED: October 13, 2023

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