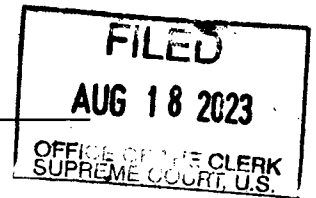


23-5945

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2023



DANA JOVAN JOHNSON, Petitioner

v.
COMMONWEALTH OF PENNSYLVANIA, Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner filed a petition for habeas corpus relief, where he raised a claim of actual innocence, and numerous claims of ineffectiveness of trial counsel, in which his post-conviction counsel caused to be procedurally defaulted; in which the Third Circuit stated "cannot be excused pursuant to Martinez v. Ryan, 566 U.S 1 2012)" The case thus presents the following questions;

1. SHOULD THIS COURT GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS REGARDING AN IMPORTANT QUESTION THAT THIS COURT EXPLICITLY RESERVED IN MARTINEZ V. RYAN, 132 S.Ct. 1309 (2012) - WHETHER INADEQUATE ASSISTANCE OF COUNSEL AT INITIAL-REVIEW COLLATERAL PROCEEDINGS MAY ESTABLISH CAUSE FOR A PRISONER'S PROCEDURAL DEFAULT OF A CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL.
- II. THIS COURT SHOULD GRANT THE WRIT TO SOLVE A CONFLICT BETWEEN THE THIRD CIRCUIT COURT OF APPEAL REGARDING AN IMPORTANT QUESTION THAT THIS COURT EXPLICITLY POINTED OUT IN MARTINEZ V. RYAN, 132 S.CT. 1309 - WHETHER PETITIONER CAN ESTABLISH CAUSE FOR A PROCEDURAL DEFAULT THAT OCCURRED DURING STATE COLLATERAL POST-CONVICTION PROCEEDINGS UNDER §2254(i)
- III. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE STATE AND FEDERAL COURT DEPRIVE PETITIONER OF HIS PROCEDURAL DUE PROCESS WHEN IT DETERMINED THAT HIS NUMEROUS INEFFECTIVE-ASSISTANCE CLAIMS MERITLESS WITHOUT AFFORDING HIM THE OPPORTUNITY TO SUBSTANTIATE HIS CLAIMS AT AN EVIDENTIARY HEARING.

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OCTOBER TERM 2023

DANA JOVAN JOHNSON, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

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

PETITION FOR WRIT OF CERTIORARI

Dana Jovan Johnson, a Pennsylvania prisoner serving a sentence of Life Without the possibility of parole (LWP) respectfully petition this Honorable Court for a writ of certiorari to review the order of the Third Circuit Court of appeals determination that the a certificate of appealability is denied because Petitioner's substantial claims of ineffective assistance is procedurally defaulted and cannot be excused pursuant to Martinez v. Ryan, 566 U.S. 1 (2012). Alternatively, the court found, Petitioner had not shown that, taking account of all the evidence, no reasonable juror would have convicted him.

CITATION TO ORDER BELOW

The Third Circuit Court of Appeals virtually upheld the District Court's order denying Petitioner's federal habeas corpus petition where he raised claims of ineffective-assistance-of-counsel, when it determined that the District Court's order, would not debate the District Court's decision to deny his habeas petition. Dated: October 28, 2022 (Appendix A) A petition for rehearing was denied on March 21, 2023 (Appendix B)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the petition for a writ of certiorari to the Third Circuit Court of Appeals on the basis of 28 U.S.C. Section 125⁴~~7~~. The Third Circuit Court of Appeals issued an order upholding the District Court's order denying Petitioner's habeas corpus petition on October 28, 20~~22~~²³ and denied Petition for Panel Rehearing on March 21, 2023. On May 17, 2023. Petitioner filed for an extension of time in which to file the present Writ of Certiorari, in which was granted, permitting Petitioner until August 18, 2023 to do so.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of the indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; Nor shall an person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel in his defense.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides:

No State shall ... deprive any person of life, [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

On August 28, 2012, Petitioner was charged with first-degree murder, two counts of robbery, and VUFA in connection with the December 31, 2011 shooting death of Donald Russell.

On September 17, 2012, Petitioner turned himself into the authorities, and subsequently, a preliminary hearing was scheduled for September 21, 2012, which was postponed two times by the Commonwealth until October 19, 2012; where then the charges were withdrawn then refiled that same day.

A preliminary hearing was then scheduled for October 26,

2012, but once again, the preliminary hearing was continued two more times by the Commonwealth until November 30, 2012, where then the charges were again withdrawn by the Commonwealth and Petitioner was released from custody.

On December 5, 2012, the identical charges were re-filed and a preliminary hearing was held on December 14, 2012; where all charges were held for court.

On February 26, 2013, the Allegheny County Office of the Public Defenders filed a discovery motion on behalf of Petitioner. On February 27, 2013, Petitioner filed a motion for appointed counsel before Judge Donna Jo McDaniel, raising ineffectiveness issues concerning the Public Defender. Nevertheless, the lower court never ruled on Petitioner's motion and the Public Defender continued representation of Petitioner.

A jury trial was held from September 5, 2013 to September 17, 2013, and Petitioner was found guilty of first-degree murder and acquitted on the robbery charges. The Commonwealth withdrew the VUFA charge. Petitioner was then sentenced to life without the possibility of parole on September 17, 2013. Post sentence motions were filed on September 27, 2013 and denied by the Superior Court on September 30, 2013.

On October 30, 2013, a Notice of Appeal was filed, and on July 10, 2015, the Superior Court affirmed Petitioner's conviction at No. 1748 WDA 2013.

On August 7, 2016, Petitioner, via the Public Defenders Office, filed a Petition for Allowance of Appeal, at 324 WAL 2015,

and on December 29, 2015, allocatur was denied.

On July 25, 2016, Petitioner filed a timely pro se Post-Conviction Relief Act (PCRA) petition, and subsequently, the lower court appointed Thomas Farrell, Esq. to represent Petitioner. However, Petitioner obtained private counsel Chris Eyster to represent him, who then filed an amended PCRA Petition on Petitioner's behalf on July 21, 2017; subtracting many of Petitioner's issues from his initial pro se PCRA petition against Petitioner's adamant wishes and request through correspondence.

On April 16, 2018, the PCRA Court dismissed Petitioner's PCRA petition without a hearing, and on April 26, 2018, a Notice of Appeal was filed. The Superior Court affirmed the denial of Petitioner's PCRA petition without a hearing on September 20, 2019.

On October 7, 2019, Petitioner, through PCRA counsel, filed a Petition for Allowance of appeal in the Pennsylvania Supreme Court, which was denied on February 19, 2020.

On June 30, 2020, Petitioner filed a timely 2254 petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania.

On March 8, 2022, the Magistrate Judge filed its Report and Recommendation that Petitioner's petition for writ of habeas corpus be denied along with a certificate of appealability.

On April 19, 2022, Petitioner filed his objections to the Magistrate Judge order, and on April 27, 2022, after a de novo review of the record, the District Court filed its order denying

Petitioner's habeas corpus petition, and ordered that the Magistrate Judge Report and Recommendation be adopted as the opinion.

On May 19, 2022, Petitioner filed a Notice of Appeal in the Western District of Pennsylvania, appealing the denial of his habeas petition and certificate of appealability.

On October 28, 2022, the United States Court of Appeals issued its entry of judgment affirming the District Court's order that Petitioner did not receive until after he filed a petition for certificate of appealability on November 2, 2022. Subsequently, the court considered Petitioner's Notice of Appeal as his application for a certificate of appealability.

On December 28, 2022, Petitioner filed a Petition for Rehearing En Banc, the Third Circuit Court of Appeals, and March 21, 2023, petition for rehearing was denied.

On June 16, 2023, Petitioner filed for an extension of time to file this Writ of Certiorari petition, in which Justice Alito granted Petitioner for 60 days until August 18, 2013, and now this timely Writ of Certiorari petition is as follows:

REASONS FOR GRANTING THE WRIT

1. SHOULD THIS COURT GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS REGARDING AN IMPORTANT QUESTION THAT THIS COURT EXPLICITLY RESERVED IN MARTINEZ V. RYAN, 132 S.Ct. 1309 2012 - WHETHER INADEQUATE ASSISTANCE OF COUNSEL AT INITIAL-REVIEW COLLATERAL PROCEEDINGS MAY ESTABLISH CAUSE FOR A PRISONER'S PROCEDURAL DEFAULT OF A CLAIM OF INEFFECTIVE ASSISTANCE AT TRIAL.

Prior to Martinez, the Court had held in Coleman v.

Thompson, 501 U.S. 722 (1991), that "an attorney's negligence in a post-conviction proceeding does not establish cause" to excuse procedural default. Martinez, 132 S.Ct. at 1319. In Martinez, the Court "qualifie[d] Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id at 1315. In announcing this narrow exception, the Court reiterated that "[t]he rule of Coleman governs in all but the limited circumstances recognized here.... It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial" Id at 1320. Thus "Martinez, by its terms, applies only to ineffective-assistance-of-trial-counsel claims. Martinez is also limited, again by its own express terms to 'initial-review collateral proceedings,' which it defines as 'collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial.'" Ibarra v. Thaler, 687 F.3d 222, 224 (5th Cir. 2012)(citation omitted)(quoting Martinez, 132 S.Ct. at 1315). Martinez, clearly apply to Petitioner's case. First, Martinez apply because Petitioner raised claims of ineffective assistance of trial counsel in his original or amended habeas petition. Second, because Petitioner raised ineffective assistance of trial counsel in his Post-Conviction Relief Act (PCRA) petition, Martinez serve to excuse any procedurally defaulted claims of Petitioner's because state collateral review

was the first occasion for Petitioner to raise claims of ineffective assistance of counsel.

When the Superior Court denied Petitioner's direct appeal in 2015, Pennsylvania required, "as a general rule", [that] a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Commonwealth v. Grant, 813 A.2d 726 (Pa 2002). Petitioner's trial counsel represent him on appeal, and indeed, the record demonstrates that Petitioner did not raise claims of ineffective assistance of trial counsel in his direct appeal.

Martinez does apply to excuse Petitioner's procedurally defaulted claims because Petitioner allege ineffective assistance of trial counsel claims that could only be raised in an initial-review collateral proceeding.

This Court should grant the writ to resolve this conflict between the Third Circuit Court of Appeal on this important matter. See Supreme Court Rule 10(a)

II. THIS COURT SHOULD GRANT THE WRIT TO SOLVE A CONFLICT BETWEEN THE THIRD CIRCUIT COURT OF APPEAL REGARDING AN IMPORTANT QUESTION THAT THIS COURT EXPLICITLY POINTED OUT IN MARTINEZ V. RYAN, 132 S.CT. 1309 - WHETHER PETITIONER CAN ESTABLISH CAUSE FOR A PROCEDURAL DEFAULT THAT OCCURRED DURING STATE COLLATERAL POST-CONVICTION PROCEEDINGS UNDER §2254(i)

The United States Court of Appeals for the Third Circuit, in denying Petitioner a certificate of appealability under 28 U.S.C. § 2253(c)(1), stated: "Martinez is inapplicable to these claims because it "applies only to attorney error causing procedural default during initial-review collateral proceedings,

, not collateral appeals," and these claim were abandoned on PCRA appeal."

In making this statement, the Third Circuit Court of Appeals was not mindful of this Court's assertion, where it pointed out:

"Arizona contends that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254, bars Martinez from asserting attorney error as cause for a procedural default. AEDPA refers to attorney error in collateral proceedings, but it does not speak to the question presented in this case. Section 2254(i) provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be ground for relief." "Cause," however, is not synonymous with "a ground for relief." A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. In this case, for example, Martinez's "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA does not bar. Martinez relies on the ineffectiveness of his postconviction attorney to excuse his failure to comply with Arizona's procedural rules, not as an independent basis for overturning his conviction. In short, while §2254(i) precludes Martinez from relying on the ineffectiveness of his postconviction attorney as a "ground for relief," it does not stop Martinez from using it to establish "cause." *Holland v. Florida*, 560 U.S. ___, ___ (2010) (Slip op., at 18).

This is simply what Petitioner wanted to do when he filed his federal habeas corpus; if given a meaningful opportunity to do so - that his post-conviction attorney was the cause of his claims being defaulted.

This Court should grant the writ to resolve this conflict between the Third Circuit Court of Appeal on this important matter. See Supreme Court Rule 10(a).

III. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE STATE AND FEDERAL COURT DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS WHEN IT DETERMINED THAT HIS NUMEROUS INEFFECTIVE-ASSISTANCE CLAIMS MERITLESS WITHOUT AFFORDING HIM THE OPPORTUNITY TO SUBSTANTIATE HIS CLAIMS AT AN EVIDENTIARY HEARING.

In his initial-review under Pennsylvania's Post-Conviction

Relief Act (PCRA) statute, Petitioner raised a claim of actually innocence and numerous claims of ineffectiveness-assistance-of-trial counsel, and requested an evidentiary hearing so he could substantiate his claims. Under Pennsylvania's rule (Pa.R.Crim.P) 980(A)(2)) of law, where there are "material issues of fact," an evidentiary hearing is require. See, e.g., Commonwealth v. Williams, 732 A.2d 1167, 1189-90 (Pa. 1999). Nevertheless, the PCRA court made no specific findings of historical fact underlying its conclusion that counsel was effective, and in affirming his PCRA denial, the Superior Court order is conclusory in nature and silent as to Petitioner's s specific factual assertion supporting his ineffective assistance claims. The order also stated that Petitioner did not show actual prejudice, but made no mention why Petitioner was not afforded an evidentiary hearing to establish his claims and make a record to substantiate claims. Thus, its conclusion was not entitled to a presumption of correctness under 2254(d). Therefore, the federal court was not bound by the state court's conclusion.

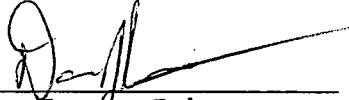
Having alleged claims which, if proven, would entitle him to Habeas relief, Petitioner should have received an evidentiary hearing "[where] the facts are in dispute, ... if [Petitioner] did not receive a full and fair evidentiary hearing in a state court, either at time of the trial or in a collateral proceeding." Townsend v. Sain, 372 U.S. 292 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

The Petitioner avers that the District Court on April 27, 2022 denying Petitioner's habeas corpus petition, and the Third Circuit Court of Appeals order denying Petitioner a certificate of appealability and a final judgment affirming the District Court's order dismissing Petitioner habeas corpus without a hearing, has effectively shut him out of federal court without an adjudication of the merits of his claims as delineated in his petition; its outright unfair and amount to an manifest injustice. As Justice Scalia stated in Gonzales v. Crosby, 125 S.Ct at 2653.: "[d]ismissal of a first federal habeas petition is particularly serious Matter, for the dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." See, Slack v. McDaniel, 529 U.S. 473 (2000)(The writ of habeas corpus play a vital rule in protecting constitutional rights). When a prisoner [such as Petitioner], can show that there is probable merit to his underlying claims, it would be well in keeping with the District Court's discretion under 28 U.S.C. §§ 2241 and Rule 15 for the court to re-open the habeas corpus judgment and give the prisoner the one fair shot at habeas corpus review that Congress intended that he have, after all the 28 U.S.C. § 2254 and Federal Rule of Civil Procedure 60(b) "provides" courts with authority adequate to enable them to vacate judgements whenever such action is appropriate to accomplish justice. Liljeberg v. Health Service Corp., 486 U.S. 847 (1998)(quoting Klappart v. United States, 335 U.S. 601 (1949)).

CONCLUSION

For the reasons stated above this Court should grant the writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dana Jovan Johnson', written over a horizontal line.

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Dated: August 18, 2023