

No. _____

In The
Supreme Court of the United States

LOUIS RICARDO BUTLER,

Petitioner

v.

WENDY KELLEY, Director,
Arkansas Department of Correction

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

LOUIS R. BUTLER

Petitioner, *in forma pauperis*

ADC# 108902

Cummins Unit

P.O. Box 500

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QUESTION PRESENTED

Petitioner has, to the very best of his own abilities, attempted to challenge and seek review of his conviction from the time it was rendered by his jury. His efforts have been consistently hindered along the way by his own ineffective appellate, postconviction and habeas counsel. Petitioner, himself, has played no part in any failure to adequately or timely seek postconviction review of his conviction, yet he is the only party to have suffered any consequence from such failures. The merits concerning his counsel's ineffectiveness have not been considered by the Arkansas state courts or federal courts, due solely to the continued ineffectiveness of his counsel. Thus, the Sixth Amendments guarantee of effective counsel has been denied to Petitioner at every level of meaningful review.

This case presents the following important federal question:

1. Whether state post-conviction counsel's complete failure to act as the "counsel" guaranteed under the Sixth Amendment should serve as cause to excuse a time bar to the filing of a federal habeas petition where counsel's failure was the sole purpose for the existence of the petition's untimeliness.

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:

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Louis Ricardo Butler, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which denied a certificate of appealability seeking review of the order and judgment of the United States District Court for the Eastern District of Arkansas, which dismissed his petition for writ of habeas corpus as time barred.

Opinions Below

The judgment of the Eighth Circuit denying a CoA is unpublished, and appears in the Appendix at App. 1a. The order of the Court of Appeals denying a petition for rehearing is also unpublished and appears in the Appendix at App. 5a. The orders of the District Court dismissing the habeas petition and denying a CoA are also unpublished and appear in the Appendix at App. 22a and 25a, respectively.

Statement of Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals entered its judgment denying a CoA on June 21, 2017. The Court of Appeals denied a timely petition for rehearing on August 22, 2017. The time within which to file this Petition extends through November 20, 2017. No extensions of time have been sought or granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall.... have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was convicted of Unlawful Discharge of a Firearm from a Vehicle on June 9, 2010, in the Pulaski County Circuit Court. The conviction was affirmed on direct appeal by the Arkansas Supreme Court on September 22, 2011. Petitioner did not petition the United States Supreme Court for a writ of certiorari at that time, and his time to do so expired on December 21, 2011.

Petitioner next sought to pursue state postconviction relief and hired attorney J. Brooks Wiggins for the explicit purpose of filing a Petition for Post-Conviction Relief Pursuant to Ark. Rules of Criminal Proc. 37.1. Ms. Wiggins filed a purported petition on December 8, 2011, and later sought to amend the petition on December 30, 2011 in order to correct what she classified as a minor scrivener's errors contained in the original petition. The amended petition was ultimately denied pursuant to a state jurisdictional rule, because it was signed only by Ms. Wiggins and did not contain a verification with Petitioner's own signature on it, as was required by the rule. The petition's denial, and subsequent finding that it was not "properly filed", was due solely to counsel and her failure to attach an appropriate verification to the petition or amended petition. No other reason was cited for the denial.

In addition to that critical error, counsel also failed to notify the court of the petition's filing, as was also required by the Arkansas Rules of Criminal Procedure. Therefore the state circuit court did not even become aware of the filing of the petition until well over one (1) year after its filing. On January 28, 2013 the court received a letter from Petitioner's counsel inquiring as to the status of the case, and only then

did the circuit court become aware that the petitioner was pending. This timing is significant because, whether the petition was properly filed or not, the one year mark from when petitioner could last seek certiorari passed by before the Circuit Court was even aware of the post-conviction petition, and well before they actually denied the petition on July 3, 2013. Thus, an impediment was present which made it impossible for Petitioner to file his federal habeas petition prior to the December 22, 2012 deadline. Petitioner was not responsible in any way for these errors, and he made diligent attempts to ensure that his post-conviction petition was properly filed. Only counsel's errors contributed to this impediment.

From the time that his initial petition was purportedly filed (December 8, 2011) until its ultimate denial, Petitioner was repeatedly led to believe by counsel that his petition was properly filed despite the fact it lacked his verified signature. Petitioner, as a convicted person confined in a correctional facility, relied on the advice of his counsel to his detriment. Even as late as July 10, 2013 (after his Rule 37 petition was dismissed) postconviction counsel continued to lead Petitioner to believe that his petition did not require a verification (which is mandated by Arkansas Law) and further misled him to believe that he could still proceed to Federal Court via a habeas petition in the event that the Arkansas Supreme Court did not reverse the circuit court's dismissal of his postconviction petition. These unconscionably inaccurate misstatements of law came nearly seven months after the December 21, 2012 deadline by which Petitioner was to file his federal habeas petition. Thus, Petitioner was led to believe that in appealing the denial of his state postconviction petition he

was pursuing his rights diligently and that he would be able to file his habeas petition if he was unsuccessful on appeal. Furthermore, by that time Petitioner was no longer able to file a “protective petition” because he was already outside of the one-year period contemplated by §2244.

Petitioner’s appeal of the denial of his postconviction petition was indeed denied by the Arkansas Supreme Court, on September 18, 2014. Because it was determined that his postconviction petition was not “properly filed”, Petitioner’s federal habeas deadline was nearly two years passed by the time his appeal was decided.

While the appeal from the denial of his postconviction petition was pending, Petitioner hired the Kearney Law Office to prepare and file his federal habeas petition. Prior to and following that denial, federal habeas counsel advised Petitioner that he would have one year, from the date his state postconviction appeal was decided, to file his federal habeas petition. At no point was Petitioner informed that using the entire one- year period to prepare and file his habeas petition would either result in the petition being untimely or construed as a failure to exercise diligence. Nor was he informed that his improperly filed postconviction petition would not toll the time he had to file his federal habeas petition. Petitioner, at all times, reasonably relied upon the advice of his federal habeas counsel. Petitioner had no reason to believe that he needed to file his habeas petition any sooner than September 18, 2015 – one year from the date his state postconviction appeal was denied.

Petitioner regularly corresponded with his federal habeas counsel concerning the filing of his habeas petition, maintained regular phone contact and arranged for his Father to regularly call and inquire about the status of his habeas petition. Furthermore, Petitioner took great care in promptly providing counsel with voluminous written materials necessary to prepare a meritorious habeas petition, and in assisting counsel in marshaling the trial court record and records on direct appeal, state postconviction and postconviction appeal. Petitioner did not simply drag his feet during this period. At no point, however, was Petitioner informed that he needed to file a habeas petition prior to September 18, 2015. Petitioner was in fact assured that filing a habeas petition on that date would be timely, and that any untimeliness would be excused due to ineffective assistance of state postconviction counsel.

Petitioner could not have been aware that an improperly filed state postconviction petition would render his habeas petition untimely until October 5, 2015 – the date which the issue of timeliness was first raised by Respondent, Wendy Kelley, in federal district court. Nor could he have been aware of any need to file a diligent, savings petition.

Petitioner's habeas petition was filed on September 9, 2015 in the United States District Court for the Eastern District of Arkansas. Magistrate Judge J. Thomas Ray issued his Recommended Disposition on June 10, 2016, recommended that the petition be denied as untimely. (App. 6a). This was based upon the finding that Petitioner's habeas petition was filed almost three years after the one-year

statute of limitations period, and that his improperly filed state postconviction petition did not toll that period. Petitioner timely filed objections to this recommendation on July 15, 2016. On September 2, 2016 the district court adopted the Magistrate Judge's recommendation and entered its order dismissing the habeas petition with prejudice. (App. 22a). Petitioner's motion to vacate that order was denied on December 20, 2016. (App. 24a). Petitioner's timely motion for a certificate of appealability was denied by the Eighth Circuit Court of Appeals on June 21, 2017. (App. 1a). The Court of Appeals denied a petition for rehearing on August 22, 2017. (App. 5a). No opinion or other reason for denying a certificate of appealability was given by the Court of Appeals.

Petitioner has steadfastly argued, from the district court level to the Court of Appeals, that the untimeliness of his habeas petition should be excused for cause because his state postconviction and federal habeas counsel were ineffective in properly and timely filing his state postconviction petition and federal habeas petition, respectively. The district court erred in finding that counsel's failings in both respects were not sufficient to establish the cause required to excuse an untimely habeas petition. The Court of Appeals erred in affirming that decision, and both courts' treatment of the case goes against the law established by this Court. This Court should now review the matter and provide appropriate relief.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH AMENDMENT REQUIRES THAT EQUITABLE TOLLING BE EXTENDED TO HABEAS PETITIONERS WHO ARE TIME BARRED SOLELY AS THE RESULT OF INEFFECTIVE POST-CONVICTION AND HABEAS COUNSEL

This Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14 (1970). This right has been extended to certain habeas contexts as well. “Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S. Ct. 1309, 1320 (2012). Frankly, Petitioner asks this Court to extend these principles to the habeas petitioner whose federal habeas petition has been time barred as the result of ineffective counsel during the initial-review collateral proceeding. Although the impediment involved is different, the cause of the impediment is still counsel who is ineffective under the Sixth Amendment standard set out in *Strickland v. Washington*. 466 U.S. 668, 104 S.Ct. 2052 (1984). Furthermore, the result is identical – a habeas petitioner who cannot advance to merits review of his criminal conviction only because of mistakes made by his postconviction counsel.

The principles of equity, and equitable tolling should control in this scenario. This Court has held that “§ 2244(d) is subject to equitable tolling in appropriate

cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010). The AEDPA “statute of limitations defense ... is not ‘jurisdictional.’ ” *Day v. McDonough*, 547 U.S. 198, 205, 126 S.Ct. 1675 (2006). It does not set forth “an inflexible rule requiring dismissal whenever” its “clock has run.” *Id.*, at 208, 126 S.Ct. 1675. Indeed, this Court has determined that while AEDPA seeks to eliminate delays in the federal habeas review process, it was created to do so without undermining basic habeas corpus principles while seeking to harmonize the new statute with prior law, under which a petition’s timeliness was always determined under equitable principles. See *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595 (2000) (“AEDPA’s present provisions ... incorporate earlier habeas corpus principles”); see also *Day*, 547 U.S., at 202, n. 1, 126 S.Ct. 1675; *id.*, at 214, 126 S.Ct. 1675 (Scalia, J., dissenting); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 24.2, pp. 1123–1136 (5th ed.2005).

“[A] ‘petitioner’ is ‘entitled to equitable tolling’ if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807 (2017). The district court found that no extraordinary circumstances existed and, even if they had been proven, Petitioner had not diligently pursued his rights. The Court of Appeals summarily refused to review the district court’s findings. This outcome cannot stand in the face of the Sixth Amendment guarantee of *effective* counsel. Petitioner asks this Court to recognize that, should the Sixth Amendment not serve to protect his rights under these circumstances, the guarantee of counsel is a powerless fiction that will fail an entire class of accused persons in the future.

Petitioner's post-conviction counsel explicitly misled him with respect to the law involved in his case, failed to effectively communicate with him concerning the issue of properly filing his petition, filed pleadings on his behalf without consulting him, ignored his requests to address pertinent points of law and fact within the pleadings that were filed, refused calls from Petitioner and his father during times which were crucial to ensuring that his state postconviction petition was properly filed, and generally abandoned her duties to perform as Petitioner's counsel in all respects. Thus, her representation went beyond the typical case of ineffective assistance of counsel, and involved more than a mere failure to attach a verified signature to a petition. The circumstances of her representation were indeed extraordinary. Because the errors she made were tantamount to "utter abandonment" and were the sole cause for the petition having not been "properly filed", the district court should have allowed for equitable tolling of the AEDPA statute of limitation, finding that Petitioner's habeas petition should not have been time barred as a result. No other finding is tenable under the Sixth Amendment.

The district court also found that, even were diligence to be presumed during the time that Petitioner was represented by his post-conviction counsel, "[t]he one-year hiatus between the Arkansas Supreme Court's decision on Petitioner's postconviction appeal and the filing of his *habeas* petition precludes a diligence finding." (App. 22a). Any conclusion which faults Petitioner for failure to pursue his rights diligently during this time is mistaken. Petitioner hired attorney Jason Kearney prior to the Arkansas Supreme Court's denial of his state postconviction

appeal. Prior to and following that denial, Petitioner was informed that he would have one year to file his federal habeas petition. At no point was he informed that using the entire one- year period to prepare and file his habeas petition would either result in the petition being untimely or construed as a failure to exercise diligence. Petitioner, at all times, reasonably relied upon the advice of his federal habeas counsel and should not be penalized for counsel's failings. All said, that is ultimately the disconnect in this case. Petitioner is being held accountable for the mistakes of his counsel, and this unfair penalization of the accused is being legitimized under the requirements set out in *Pace*. Petitioner is said to have not been diligent, when in reality it was his counsel who eschewed diligence. And though postconviction counsel's failure to follow simple state procedural rules has resulted in Petitioner's inability to seek review through the mechanism of federal habeas, that conduct is somehow not ineffective enough to satisfy the *Pace* standard. These outcomes simply make no sense, and are patently unfair to the criminally accused who have historically relied on counsel to ensure that procedural and jurisdictional minutiae are adhered to. Thus, the Sixth Amendment's guarantee of effective counsel requires that this Court review and correct the outcome reached in the lower courts.

CONCLUSION

For the reasons set out herein, the Court should grant the petition for writ of certiorari and give plenary consideration to the question raised herein, or in the alternative grant the petition, vacate the judgment of the Court of Appeals and remand with instructions to issue a certificate of appealability.

November 18, 2017

Respectfully submitted,

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