No.

IN THE

Supreme Court of the United States

GEORGE KING,

Petitioner,

v.

STEVEN JOHNSON and CHRISTOPHER PORRINO,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Since all available claims could only be raised in a petition for post conviction relief making such proceeding a surrogate direct appeal, does the statutory tolling of Section 2244(d)(1)(A) apply to such surrogate direct appeal?

2. Whether mental illness can serve as a ground for equitable tolling of the one-year statute of limitations for filing habeas petitions; if so, whether Petitioner was entitled to an evidentiary hearing and appointment of counsel to allow him the opportunity to present evidence of his mental disability in support of the claim for equitable tolling?

3. In states where appealing the denial of the first post conviction relief via a second one is part of the state collateral proceedings, does the time allowed by state law to file such appeal count against the one-year federal statute of limitations?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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

The Order of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was September 11, 2017.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1)(A) provides that "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 the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

28 U.S.C. § 2244(d)(2) provides that "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

STATEMENT OF THE CASE

In this case all claims were precluded by state law from being raised on direct appeal making them available to be raised only in a petition for post conviction relief ("PCR"). This made the PCR proceeding a surrogate direct appeal thus the one year limitation period to file a federal habeas petition should run after the expiration of the five years allowed by state law to seek such surrogate direct appeal, pursuant to Section 2244(d)(1)(A). The District Court disregarded the fact that no direct appeal could have been filed. It dismissed the federal habeas petition as untimely concluding that since no direct appeal was filed, the one year to file the federal habeas petition started running after the expiration of the forty five days given by state law to file a direct appeal.

Petitioner has been suffering from severe mental illnesses since childhood. He was, and still is, unable to understand his legal rights or institute legal actions on his own behalf. The District Court refused to conduct an evidentiary hearing and appoint counsel. But then held against Petitioner the lack of medical records from after his judgment became final, even though it was impossible for the inmate who was helping the Petitioner to obtain and present such medical records because he was prohibited by *N.J.A.C.* 10A:22-2.7(d) from obtaining and therefore presenting them to the court. The District Court also held against Petitioner the filing of legal documents in state courts subjecting him to the catch-22 that is affecting thousands of mentally ill inmates across this Nation: if they do not file their state appeals they are denied equitable tolling in federal courts for lack of diligence, and if they file state appeals - even late ones - they are denied equitable tolling for lack of mental impairment.

Petitioner received ineffective legal representation during his PCR petition. So he filed a second PCR petition claiming ineffective assistance of PCR counsel which under New Jersey law is an appeal of the first PCR petition and therefore part of the State collateral proceedings. State law allows one year to file such appeal, and Petitioner filed it within ten months. The District Court concluded the ten months are deductible from the one year to seek federal review despite this Honorable Court's ruling in *Carey v. Saffold*, 536 U.S. 214-222-224 (2002), and Section 2244(d)(2), which support that as long as the intervals between the filing of all state appeals are reasonable they should not be deducted from the federal-year.

REASONS FOR GRANTING THE PETITION

I. The Statutory Tolling Of Section 2244(d)(1)(A) Applies To Surrogate Direct Appeals

Ever since the rulings by this Honorable Court in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 2013 U.S. LEXIS 3980, post-conviction proceedings in states where these two rulings are applicable have augmented in importance and guidance still needed. In this case, no direct appeal could be filed because there were no issues to be raised other than three claims of ineffective assistance of counsel. And the state of New Jersey has a general policy against entertaining such claims on direct appeal because they involve allegations and evidence that lie outside the trial record. *State v. Preciose,* 129 N.J. 451, 460 (1992). Plus a claim of ineffective assistance of counsel is to be raised on direct appeal if the evidence supporting it is in the trial record, which is not the case here. *See State v. Johnson*, 365 N.J. Super. 27, 34 (App. Div. 2003), certif. den., 119 N.J. 372 (2004). So in essence, in this case the petition for post-conviction relief became a surrogate direct appeal. And since under New Jersey law a defendant in this position has five years to seek such surrogate direct appeal, the federal statute of limitations period to file a federal habeas corpus petition should run after the expiration of the five years to comport with Section 2244(d)(1)(A). The need to treat a collateral review proceeding as a direct review in certain cases was recognized by this Honorable Court in

Martinez and *Trevino* to be in accord with the Sixth Amendment right to the United States Constitution. The same concept should be applied here, and in cases like this one, to be in accord with Section 2244(d)(1)(A).

II. Mental Illness Serves As A Ground For Equitable Tolling

In this case Petitioner, like many other inmates across the Country, suffers from extreme mental illnesses. Since childhood Petitioner has been diagnosed with Schizophrenia, Bipolar Disorder, Schizoaffective Disorder, Major Depression (suicide attempts), Atypical Psychosis, Personality Disorders such as Borderline, Anti-Social and Narcissistic. Plus he has been treated at fifteen to twenty different hospitals. (Appendix B at 4). Petitioner's mental problems are so serious that even though his first PCR petition was late by a few months the PCR court found that enforcement of the time-bar-rule would result in a fundamental injustice and considered the petition timely filed.

Petitioner was - and still is - unable to understand his legal rights or institute legal actions on his own behalf. Yet the District Court refused to conduct an evidentiary hearing and appoint counsel, and then held against Petitioner the lack of medical records from after his judgment became final. But it was impossible for the inmate who was helping the Petitioner to obtain and present such medical records because he was prohibited by *N.J.A.C.* 10A:22-2.7(d) which states that "copies of mental health records generated by professional mental health staff, such as evaluative or administrative assessment report ... shall not be provided to inmates without court order or consent protective agreement." The inmate did submit some medical records that were given to him by Petitioner's family that show the severity of Petitioner's mental illnesses and inability to function, but the District Court gave no weight to the documents because they are from before Petitioner's judgment became final. So in reality Petitioner was not afforded the opportunity to prove his entitlement to equitable tolling. (Appendix B at 5-6).

The District Court also held against Petitioner the filing of prior legal documents in the state courts, regardless of the fact that most filings were late as a result of Petitioner's inability to assist those who have represented him due to his severe mental infirmities. Thus Petitioner was subjected to the same catch-22 that is prejudicing thousands of mentally ill inmates across the Nation: if they do not file their state appeals they are denied equitable tolling in federal courts for lack of diligence, and if they do file state appeals - even late ones - they are denied equitable tolling for lack of mental impairment. (Appendix B at 6). Either way mentally ill inmates are being treated extremely unfair despite the fact that this Honorable Court has made it clear that the statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996 is subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 635 (2010).

Both the Opinion of the District Court dismissing Petitioner's habeas petition as untimely without holding an evidentiary hearing to consider all evidence of Petitioner's mental illness, and the Order of the Court of Appeals refusing to grant a certificate for appealability, are contrary to the rulings of other federal appellate courts on similar issues. (Appendices A & B). For example, *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009)(vacating the district court's order and remanding for appointment of counsel and for further investigation and factual development); *Laws v. Lamarque*, 351 F.3d 919, (9th Cir. 2003)(reversing the district court's order and remanding for further factual development);*Bolarinwa v. Williams*, 593 F.3d 226, 332 (2d Cir. 2010)(same).

Furthermore, contrary to the findings from the District Court and the Court of Appeals, this case meets the burden set by this Honorable Court to obtain a certificate of appealability in cases in which the district court denied relief on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473, 484, 146 L.Ed.2d 542 (2000). This is so because the PCR court ruled that Petitioner's mental illnesses excused him from the application of the PCR time-bar-rule which makes it obvious that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling. Plus Petitioner's main claim is that if defense counsel would have not misadvised him as to the maximum time the court could sentence him to, nor failed to explain that the Department of Corrections was not obligated to send him to a mental health facility, he would have not accepted the plea. And according to this Honorable Court this type of claim is a valid claim of the denial of the Sixth Amendment Right to the United States Constitution. *Lafler v. Cooper*, 132 S.Ct 1376, 1384-85 (2012).

A valid claim as well is Petitioner's other claim that his confession would have been suppressed if defense counsel would have moved for it. At the time of the arrest Petitioner was suffering from commanding hallucinations and self-inflicted stab-wounds that were noticeable. Both Petitioner and his then-wife informed the interrogating officers that Petitioner suffers from severe mental problems and had not taken his medications in months. Petitioner repeatedly asked the interrogating officers for his medications and to be taken to a hospital. But they refused, and instead coerced him into waiving his *Miranda* rights in exchange for treatment. Thereafter Petitioner was taken to a hospital where his stab-wounds were treated, and he was immediately transferred to a mental institution. Thus obviously Petitioner's Fifth and Fourteenth Amendments rights to the United States Constitution were violated and there is a reasonable probability that but for defense counsel's failure the confession would have been suppressed. Indeed, in *Blackburn v. Alabama*, 361 U.S. 199 (1960), this Honorable Court held that Due Process is violated when police learn of a defendant's history of mental problems and exploit them with coercive tactics.

III. The Time Allowed By State Law To Fully Appeal A Petition For Post-Conviction Relief Should Not Be Deducted From The One-year Federal Statute Of Limitations

In the state of New Jersey, a second PCR petition claiming ineffectiveness against the attorney of the first PCR petition is an appeal of the first PCR petition and state law allows one year to file such appeal. And since this Honorable Court held in *Carey v. Saffold*, 536 U.S. 214-222-224 (2002) that as long as the intervals between the filing of all state appeals are reasonable they should not be deducted from the federal-year the District Court should have not counted the ten months that took to file the second PCR petition in this case against the one-year of the federal statute of limitations. In fact, if the deduction of the ten months is permitted then the statement in Section 2244(d)(2) that "[t]he time during which a properly filed application for State post-conviction or other collateral review ... is pending shall not be counted toward any period of limitation under this subsection" would be superfluous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

George Lee King, Jr

Date: November 17, 2017