

No. 17-8011

IN THE
SUPREME COURT OF THE UNITED STATES

CARLTON J. BLOUNT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING TO THE
SUPREME COURT OF THE UNITED STATES

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PETITION FOR REHEARING TO THE
SUPREME COURT OF THE UNITED STATES

I. PRELIMINARY STATEMENT

On April 16, 2018, this Honorable Court denied the herein filed petition for a writ of certiorari without oral argument or hearing. The instant petition for rehearing is presented in good faith and not for the purpose of delay or hindrance. Petitioner Carlton J. Blount ("Blount") respectfully requests this Court to exercise it's discretion and grant a rehearing to consider:

- (a) The U.S. Court of Appeals decision to deny a Certificate of Appealability ("COA") in a manner and on grounds that are in conflict with the decision of another U.S. Court of Appeals on the same important matter, and
- (b) The U.S. Court of Appeals decision to deny a COA in a manner and on the grounds that has so far departed from the accepted and usual course of judicial proceedings, as well as sanctioned such a departure by the U.S. District Court, as to call for an exercise of this Court's supervisory power, and
- (c) The U.S. Supreme Court's decision to deny the petition for a writ of certiorari in light of the important matters involving an accused's right to a fair trial by jury, to effective assistance of counsel during appellate review, federal habeas corpus review and the right to appeal the denial of habeas relief.

II. PROCEDURAL HISTORY

In February 2001, Blount was unfairly convicted in the District of Columbia Superior Court ("trial court") of murder after submission of jury instructions that eliminated the mens rea which were subsequently held to be unconstitutional. Trial counsel strenuously objected to the use of those instructions and properly preserved the issue for appeal.

On direct appeal to the District of Columbia Court of Appeals ("state appeal court"), new counsel failed and refused to pursue the appeal.

the compelling and properly preserved challenge to the substance of those jury instructions. The state appeal court affirmed Blount's conviction on June 29, 2004 and issued a mandate on October 21, 2004 ending the direct appeal. However, between 2005 and 2012, Blount filed numerous unsuccessful postconviction challenges raising a multitude of claims, including the jury instructional errors and the ineffectiveness of appellate counsel, in both the trial court and state appeal court. The final decision with respect to those claims was made on May 2, 2013 by the state appeal court.

On March 17, 2011, Blount filed his first pro se habeas petition under 28 U.S.C. § 2241 in the United States District Court for the District of Columbia ("district court"), in which he raised claims of actual innocence, jury instructional errors, and ineffective assistance of appellate counsel ("IAAC"). In September 2011, the district court ruled that the IAAC claim had not been exhausted and dismissed the habeas petition for failure to exhaust, and dismissed the remaining claims for lack of jurisdiction. Both the district court and the U.S. Court of Appeals for the District of Columbia Circuit ("U.S. appeal court") denied Blount's request for a COA.

On October 28, 2011, Blount filed a motion to recall the mandate in the state appeal court, which was docketed on November 21, 2011, in which he again presented the IAAC claim to the state courts -- that claim had already been presented in postconviction motions between 2005 and 2012. On October 11, 2012, after entering orders that effectively reopened Blount's trial and direct

appeal records for review, the state appeal court considered the merits of the motion to recall the mandate and then denied relief based on the entire record and evidence at trial.

On September 18, 2013, Blount returned to the district court with a second pro se habeas petition under 28 U.S.C. § 2254, again raising the unconstitutional jury instruction and IAAC claims. On September 25, 2014, the district court dismissed the second habeas petition as being procedurally barred by the one year limitation period imposed by 28 U.S.C. § 2244(d)(1)(A). Both the district court and the U.S. appeal court again denied Blount's request for a COA.

III. ARGUMENT

Blount's first habeas petition should not have been dismissed for failure to exhaust for a number of reasons, but most importantly because the petition was a mixed-petition containing both exhausted and unexhausted claims. The district court should have stayed the proceedings and required Blount to return to the state appeal court to exhaust the single IAAC claim.

While there was a controversy below concerning the filing date of the first habeas petition, the fact remained that the Government conceded the timeliness of the petition, repeatedly. Blount asserts that equitable estoppel should prevent any court from changing that concession, especially after it appeared that Blount's claims had merit and warranted relief.

Blount was entitled, at a minimum, to equitable tolling of the entire period between the filing of the first and second habeas petitions for purposes of calculating the timeliness of

the second habeas petition. Additionally, the U.S. appeal court should have been required to at least justify sufficiently why it relieved the Government of it's concession that Blount's first habeas petition was timely filed. See Wood v. Milyard, 566 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012)(concerning the authority of a federal court, on it's own motion, to raise a statute of limitations defense to a habeas petition).

Assuming that the first habeas petition was timely filed, the second petition was improperly dismissed as time-barred based on an incorrect calculation of the statute of limitations. Because the state appeal court reopened direct review of Blount's conviction and then made a determination on the merits of his motion to recall the mandate, the court's previous judgment affirming the conviction was no longer final. The state appeal court's decision to review the entire trial and appeal record restored the pendency of Blount's direct appeal and rendered his murder conviction and sentence capable of modification. Thus, Blount's conviction and sentence did not become final until October 11, 2012, the date of the decision on the merits of the motion to recall the mandate. See Jimenez v. Quarterman, 555 U.S. 113, 121 & n. 4, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009). Because the clock had been reset for calculating the one year limitation period by the state appeal court, Blount had until October 10, 2013 to file his second habeas petition. Blount suggests that both the district court and the U.S. appeal court should have "looked through" to the preliminary orders and final decision of the state appeal court with respect to the motion to recall the mandate. Had the federal courts

done so, they would have fully understood and been able to respect what the state appeal court actually did, rather than speculate as to what may have occurred. See, e.g., Wilson v. Sellers, 2018 BL 134085, Case No. 16-6855 (U.S. Sup. Ct., Apr. 17, 2018).

As for the equitable tolling issue, the Government conceded that Blount's first habeas petition was timely filed, see Blount v. United States, 860 F.3d 732 (D.C. Cir. 2017)(Gov't Opposition to Motion for COA at 4 n. 5 and Majority Op. at 741), so reasonable tolling would have rendered Blount's second petition timely as well. The administration of justice in this case required the district court and the U.S. appeal court to hold the Government to its consistent concession that the first petition was timely and reach the merits of the second petition and its compelling constitutional claims. See Day v. McDonough, 547 U.S. 198, 208-09, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006).

Blount's second petition, filed on September 18, 2013, raised meritorious constitutional claims involving crucial jury instructions and ineffectiveness of counsel in pursuing that challenge. Blount challenges the determination that his second habeas petition was time-barred. The calculation of the relevant time period was incorrect and the decision to dismiss was improper. Because the state appeal court had reopened Blount's case and decided to deny relief on the merits of the motion to recall the mandate, the clock had been reset for the filing of the second petition and it should not have been dismissed as being time-barred.

Additionally, the one year limitation period for seeking habeas relief is not jurisdictional, and is subject to equitable

tolling, Holland v. Florida, 560 U.S. 631, 645, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), where, as here, a habeas petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id., at 649; see also Norman v. United States, 467 F.3d 773, 775 (D.C. Cir. 2006).

Blount asserted a miscarriage of justice (actual innocence) claim in his first habeas petition. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar [such as the] expiration of the statute of limitations." McQuiggan v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). Blount has consistently challenged the jury's verdict and the submission of the unconstitutional jury instructions that eliminated the crucial mens rea of murder under the theory that was advanced by the Government throughout the month-long trial.

Finally, a COA should have issued with respect to Blount's claims in both habeas petitions. His meritorious constitutional claims were fully exhausted and were ripe for habeas review. A COA should have issued because the second petition stated a "viable claim of the denial of a constitutional right" and the issues presented were "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 475 n. 8, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); see also 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A COA should have issued with respect to the claims in the second petition, which the district court incorrectly concluded

was time-barred, because under the first prong of the applicable two-part standard enunciated in Slack, 529 U.S. at 484-85, "jurists of reason" would find it debatable whether the district court was correct in its procedural ruling. See Blount, 860 F.3d at 743-51. Blount's claims were obviously debatable and deserved review.

Blount asserts that a full-blown merits review at the COA-stage was inappropriate. Such a practice was recently prohibited by this Court in Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017). This Court declared that a COA is a "threshold question" that "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" Id., 137 S.Ct. at 773 (quoting Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)(Scalia, J., concurring)). As stated in Senior Circuit Judge Williams' dissent, "[a] court cannot decide the case on the merits and then use that determination to deny the COA." Blount, 860 F.3d at 744 (citing Buck, 137 S.Ct. at 773).

Blount was entitled to a COA because at least one reasonable jurist, Senior Circuit Judge Williams, could disagree with the district court about the procedural arguments and underlying constitutional claims raised in the second habeas petition. See Slack, 529 U.S. at 478, 120 S.Ct. at 1595. Regardless, the federal courts should not have resolved the procedural issues relating to the habeas petition at the COA stage, and should not have declined to issue the COA merely because they did not believe Blount was entitled to relief on the merits of his habeas claims. See Rhines v. Weber, 544 U.S. at 269, 278, 125 S.Ct. 1528, 161 L.Ed.2d

440 (2005); Miller-El, 537 U.S. at 337, 123 S.Ct. at 1029.

IV. CONCLUSION

Based upon this petition for rehearing, the Brief for Court of Appeals-Appointed Amicus as Amicus Curiae In Support of Petitioner and Appendix, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted



Carlton J. Blount

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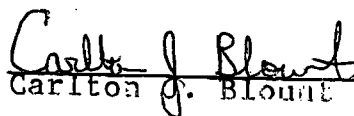
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May 30, 2018

CERTIFICATE OF MAILING

I, Carlton J. Blount, hereby certify that I have, on this 3 day of May, 2018, deposited one copy of the above and foregoing document with the U.S. Postal Service at the United States Penitentiary-Coleman II, with first-class postage prepaid addressed to: United States Attorney's Office, 555 4th Street, NW, Washington, DC 20530.



Carlton J. Blount

**Additional material
from this filing is
available in the
Clerk's Office.**