

No. _____

I N T H E
SUPREME COURT OF THE UNITED STATES
October Term, 2017

SAMUEL GASCA DURAN,

Petitioner

-vs-

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

PETITION FOR WRIT OF CERTIORARI
T O T H E
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SAMUEL G. DURAN, pro se
Robertson Unit, TDCJ No. 1529734
12071 FM 3522
Abilene, Texas 79601-8799

Petitioner

QUESTIONS PRESENTED

- I. Does it violate the United States Constitution to arbitrarily extinguish a defendant's right to a statute of limitations when the State enacts a revision to the statute that completely removes and abolishes the statute of limitations, where the defendant had been entitled to a statute of limitations at the time the evidence shows that the offense had been committed?
- II. Where Duran had raised an issue under and through Trevino v. Thaler, that alleged that his trial counsel had been ineffective in failing to raise the issues that it violated the federal constitution to completely remove the statute of limitations in his case, and that the trial court erred by defaulting to the most recent prior version of the statute rather than to the version that was in effect when the offense was committed; did the courts below err in concluding that Trevino was inapplicable to Duran's case, and that he could not use it to excuse his procedural default even though he had not been represented by counsel in his initial state habeas proceeding?

LIST OF PARTIES

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

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

SAMUEL GASCA DURAN, Petitioner

-vs-

LORIE DAVIS, Director, T.D.C.J., C.I.D., Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Samuel Gasca Duran ("Duran"), pro se, to respectfully petition this Honorable Court for a writ of certiorari to review the correctness of the United States Court of Appeals for the Fifth Circuit's refusal to grant Duran a certificate of appealability for appealing the district court's denial of his petition for habeas relief.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, but a copy is attached hereto at APPENDIX A.
2. The opinion of the United States District Court is unpublished, but a copy is attached hereto at APPENDIX B.

JURISDICTION

1. The date on which the United States Court of Appeals denied Duran's Petition for a Certificate of Appealability was December 1, 2017.
2. Duran did not file a petition for rehearing as he was unable to notify the inmate assisting him in sufficient time to prepare the petition following the date on which Duran received the Fifth Circuit's order denying him a certificate of appealability.
3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. UNITED STATES CONSTITUTION, Amendment XIV

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

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

B. CONSTITUTION OF THE STATE OF TEXAS, Article III, Section 36

No law shall be revised or amended by reference to its title; but in such case the act revised, or the section or sections amended, shall be reenacted and published at length.

C. CONSTITUTION OF THE STATE OF TEXAS, Article III, Section 43

(a) The Legislature shall provide for revising, digesting, and publishing the laws, civil and criminal; provided, that in the adoption of and giving effect to any such digest or revision, the Legislature shall not be limited by sections 35 and 36 of this article.

(b) In this section, "revision" includes a revision of the statutes on a particular subject and any enactment having the purpose, declared in the enactment, of codifying without substantive change statutes that individually relate to different subjects.

D. TEXAS CODE OF CRIMINAL PROCEDURE, Article 12.01

Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

(1) No limitation

(A) murder and manslaughter;

(B) sexual assault under Section 22.011(a)(2), Penal Code, or aggravated sexual assault under Section 22.021(a)(1)(B), Penal Code;

(C) sexual assault, if during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained;

(D) continuous sexual abuse of a young child under Section 21.02, Penal Code;

(E) indecency with a child under Section 21.11, Penal Code;

STATEMENT OF THE CASE

The Petitioner, Samuel Gasca Duran ("Duran") was convicted of the charge of aggravated sexual assault of a child. He had been indicted by a grand jury of Collin County, Texas, on September 25, 2007, for an offense that was shown at trial to have been committed no later than August 31, 1997, when the limitations period in effect at the time of the offense was ten years.

The Texas Legislature amended the applicable statute of limitations, so that, on September 1, 1997, the effective limitations period was ten years after the victim's eighteenth birthday; and amended the period again, so that beginning September 1, 2007, the statute of limitations was completely removed.

Duran raised the issue in the courts below, that it violates the United States Constitution to completely remove a statute of limitations where he had been entitled to one at the time the offense was shown to have occurred. However, each of the courts below have avoided deciding the ultimate question that had been presented in this case -- When a statute of limitations is completely removed, does the case default to the statute of limitations that had been applicable on the date the evidence shows that the offense had occurred?

Duran had also urged that the United States District Court consider this issue under the authority of the Supreme Court's Trevino v. Thaler decision, but both, the District Court and the Fifth Circuit, decided that Trevino could not apply to Duran's case.

SUMMARY OF THE ARGUMENTS

I. Duran has presented an issue regarding the statute of limitations that is completely different and distinguished from the limitations question he raised on direct appeal. In his instant habeas petition, he argues that according to Supreme Court precedent, it violates the United States Constitution to remove a statute of limitations completely, where one had been applicable at the time the offense is shown to have occurred. If it violates the constitution to completely remove a statute of limitations, then his case should have defaulted to the ten-year limitations period that had been in effect at the time the offense had been committed. This is an issue that this Court should consider res nova, as no court of competent jurisdiction has yet considered this issue, and this Court had commented in Stogner v. California that in just such a case as Duran brings here, the time has now come to revisit the question of giving retroactive effect to the extension of unexpired limitations periods.

II. The District Court refused to consider Duran's statute of limitations issue under Trevino v. Thaler, on the basis that he had raised A statute of limitations issue on direct appeal, but ignored the fact that the habeas claim was based on a legal theory completely distinguished from that which was raised on direct appeal. However, where Duran demonstrated to the District Court that he was arguing a legal theory under the Supreme Court's Stogner v. California decision, the court ruled that he could not do so "because the abuse-of-writ doctrine would prevent him from returning to state court [to] exhaust[] the claim under Stogner." But it was **THIS** very claim that Duran had attempted to present under Trevino in the first place! The District Court was patently wrong where it would not permit Duran to assert his Stogner argument under and through Trevino, in which this Court has held that the procedural default of failing to exhaust is excused.

The Fifth Circuit did not consider whether the District Court's procedur-

al ruling was correct concerning the applicability of Trevino v. Thaler, as it had determined that "Duran has not made the requisite showing" of the denial of a constitutional right. But the legal theory underlying Duran's statute of limitations issue was that removing the statute of limitations completely had violated his constitutional rights, and by not defaulting to the limitations period that had been in effect at the time the offense was shown to have been committed, was a constitutional violation as well. The Supreme Court held in its Wilson v. Iseminger decision, that where a statute completely removes a statute of limitations, it violates the United States Constitution.

REASONS FOR GRANTING THE WRIT

- I. DOES IT VIOLATE THE CONSTITUTION TO ARBITRARILY EXTINGUISH A DEFENDANT'S RIGHT TO A STATUTE OF LIMITATIONS WHEN THE STATE ENACTS A REVISED STATUTE THAT COMPLETELY REMOVES THE STATUTE OF LIMITATIONS, WHERE THE DEFENDANT HAD BEEN ENTITLED TO HAVING A STATUTE OF LIMITATIONS AT THE TIME THE CRIME IS SHOWN TO HAVE BEEN COMMITTED; AND THE TRIAL COURT FAILS TO DEFAULT TO THE STATUTE OF LIMITATIONS THAT HAD BEEN APPLICABLE WHEN THE OFFENSE OCCURRED?

Duran had been indicted on September 25, 2007, by a Collin County, Texas, Grand Jury, alleging that he had committed the charged offense "on or about the 1st day of May, 1999." However, the evidence presented during the trial in the testimony of the complainant herself, showed that the offense had to have been committed prior to August 31, 1997. This being the case, the statute of limitations that would apply in Duran's case, barring prosecution, was "ten years from the date of the offense." TEX. CODE CRIM. PROC. ANN. art. 12.01 (Vernon's 1995). On September 1, 2007, a new law took effect that completely did away with, and abolished, the statute of limitations for the offense of which Duran had been charged as having violated. The trial court, however, instructed the jury erroneously on the applicable statute of limitations, informing the jurors that the statute that applied was the one that had been replaced by the September 1, 2007, revision of the law, rather than the statute that had been in effect on the date that the evidence showed that the offense had occurred. It is the general rule that an amended statute of limitations applies in cases where the original limitations period has not yet expired. However, this application is subject to at least one restriction -- the Supreme Court of the United States has held that "[i]f a statute completely removes a statute of limitations, it is a violation of the constitution." Wilson v. Iseminger, 185 U.S. 55, 22 S.Ct. 573, 575 (1902); see also Burlington Northern & Santa Fe Ry. Co. v. Poole Chemical Co., 419 F.3d 355, 359-60 (5th Cir. 2005); United States v. Flores, 135 F.3d 1000, 1004 (5th Cir. 1998). In Iseminger, the Supreme Court held that a statute can-

not bar existing rights, for if it did so, "it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever may be the purport of the provision." If it is unconstitutional to arbitrarily extinguish Duran's right to having a statute of limitations, after the September 1, 2007, statute removing the statute of limitations became effective, when he was indicted on September 25, 2007, twenty-four days later, what version of the statute of limitations should apply to his case?

The limitations that had been in effect prior to the enactment of the 2007 amendment was that which had become effective September 1, 1997, which tolled the running of a ten-year limitations until the date of the victim's eighteenth birthday, when the period would begin running. However, under Texas law, when a law is amended, the entire law must be reenacted, and the prior version of the law is repealed. See TEX. CONST. ANN. art. III, §§ 36; 43 (Vernon's 2009). Once the statute has been reenacted, the original provision appearing in the amended act are to be regarded as having been law since they were first enacted, and speak from that time; however, new provisions are to be construed as enacted at the time the amendment takes effect. See McLendon v. Allen, 752 S.W.2d 731, 733 (Tex.App.-Corpus Christi 1988). The repealed law is void -- codifications enacted by the Legislature are the law of the land, and not the prior repealed law. See Texas Workers' Compensation Comm'n v. City of Eagle Pass -- Texas Municipal League Workers' Compensation Ins. Fund, 14 S.W.3d 801, 805 (Tex.App.-Austin 2000). The principle that statutes of limitations are to be liberally interpreted in favor of repose, buttresses a conclusion that the limitations period made applicable by the 1987 amendment, barring a prosecution after ten years should apply in Duran's case. Cf. United States v. Seale, 542 F.3d 1033, 1039 (5th Cir. 2008) (quoting Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858 (1970)). So, where a 2007 amendment that entirely removes a statute of limitations cannot be applied in Duran's case without violating the retro-

activity prohibition of the Constitution -- and where the 1997 provision had been repealed -- the United States Supreme Court has held that in such situations and circumstances, a "default" application is required; thus, it is the 1987 version of Article 12.01 of the Texas Code of Criminal Procedure that was to have been applied to the alleged offense where the evidence adduced at trial through the complainant's testimony, affirmatively established that if the alleged offense had actually occurred, it had been committed prior to August 31, 1997, before the effective date of the 1997 amendment. See Bridges v. United States, 346 U.S. 209, 225, 73 S.Ct. 1055 (1953).

The issue on which Duran seeks a petition for writ of certiorari is an important question of Constitutional law that is so novel that it will require a res nova review, as a matter of first impression, for it has not yet been considered by ANY court. The questions presented -- whether it is a constitutional violation to completely extinguish a statute of limitations in a case where a defendant had the benefit of a statute of limitations when the offense was committed; and when a statute of limitations is completely removed, should the case default to the original statute of limitations that had been in effect on the date the offense was committed -- could be debated by jurists of reason, as the Supreme Court has already spoken of the debatability of issues such as Duran now presents:

We add that whatever the exact count of categories of cases that we cite, ..., it is not surprising that most of these cases involve dicta, while only a handful involve clear holdings. Where the law has long been accepted as clearly settled, few cases are likely to arise, and cases that do arise involve bordering areas of law, such as new limitations statutes enacted prior to the expiration of pre-existing limitations periods. Consistent with this expectation, one commentator noted in 1993 that questions of whether to give retroactive effect to the extension of unexpired limitations periods "had become timely due to state legislature amendments ... that lengthen the limitations period for the crimes of rape and sexual intercourse with a child."

Stogner v. California, 539 U.S. 607, 629-30, 123 S.Ct. 2446, 2459 (2003) (citing C. Corman, Limitations of Actions § 1.6, p. 36 (1993 Supp.)). Just as Justice

Breyer stated in Stogner, there are virtually no cases whatsoever for Duran to cite to support his argument and questions he presents. This is probably because the offenses that historically have never had a limitations period are murder, manslaughter, and homicide. It was only very recently that the Legislature began to add offenses to Article 12.01(1)'s "no limitation" provision, offenses that had long had a limitations period. In light of the foregoing authorities, however, this Honorable Supreme Court should determine that the courts below should have issue a Certificate of Appealability on this issue.

II. THE MISAPPLICATION OF THE CAUSE STANDARD OF TREVINO AND MARTINEZ IN THE COURTS BELOW, WARRANTS THIS COURT'S ATTENTION.

The Fifth Circuit and District Court misapplied the Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012), and Trevino v. Thaler, 569 U.S. ___, 133 S.Ct. 1911 (2013), holdings regarding cause for excusing a procedural default in regard to an ineffective assistance of counsel claim.

Duran filed his federal habeas petition on May 4, 2012. At that time, he could not change his statute of limitations claim because an independent and adequate state-ground (namely his failure to raise the issue in his state postconviction proceeding), barred the federal court from considering the modified statute of limitations claim. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.Ct. 2456 (1991). It was this procedural bar upon which the District Court had based its ruling that the court would not consider the "changed" limitations period claim. On May 28, 2013, the Supreme Court had held in Trevino v. Thaler that:

"a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."

569 U.S. at ___, 133 S.Ct. 1911 (quoting Martinez, 566 U.S. at ___, 132 S.Ct. at 1318). When Duran filed his reply to the Director's answer, he informed the District Court that he "relies on Trevino for the proposition that his [modified

statute of limitations] claim is **NOT** procedurally barred," he brought the claim asserting that his trial counsel had been ineffective for not competently, correctly, and properly presenting and arguing the complete removal of the statute of limitations issue in the trial court. Duran had asked that the District and Appellate Courts reach the merits of his modified statute of limitations claim, brought under Trevino, as mandated by the Supreme Court. As constitutionally inferior courts, the courts below were compelled to faithfully follow a directly controlling Supreme Court precedent, and permit Duran to bring his modified statute of limitations claim in accordance with the Supreme Court's Trevino and Martinez decisions. Cf. Hopwood v. State of Texas, 84 F.3d 720, 722 (5th Cir. 1996). Trevino was an application of the equitable rule that the Supreme Court established in Martinez v. Ryan, and did not establish a new rule of constitutional law. See In re Sepulvado, 707 F.3d 550, 554 (5th Cir.), cert. denied, 134 S.Ct. 420 (2013); Adams v. Thaler, 679 F.3d 312, 322 n.6 (5th Cir. 2012). Accordingly, the Teague v. Lane Rule will not apply; instead, the Trevino/Martinez Rule is of the type where a court must apply it "at the time it renders its decision." Landgraf v. USI Film Products, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501 (1994) (quoting Bradley v. School Board of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974)). The District Court's Postjudgment Order (See APPENDIX B) was entered after the Supreme Court's Trevino decision came out, so, under Landgraf and Bradley, the court was required to allow Duran's modified statute of limitations claim that he had presented under and through Trevino.

In light of the foregoing cases of the Supreme Court and Fifth Circuit, jurists of reason could find debatable whether the courts below had been correct in refusing to consider Duran's modified statute of limitations claim on its merits.

C O N C L U S I O N

For the reasons set forth herein, Duran respectfully prays that this Honorable Supreme Court of the United States will grant a writ of certiorari, and

will order the parties to submit briefing on the issues herein presented.

Most Respectfully Submitted,

Samuel G. Duran

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