

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

Bruce William Macon,
Petitioner

V.

Lorie Davis,
Respondent

Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce William Macon, No. 1568331
Coffield Unit
2661 F.M. 2054
Tennessee Colony, Texas 75884

Petitioner, Pro se

QUESTIONS FOR REVIEW

1. Did the District Court and the Fifth Circuit Court Of Appeals error in concluding that Macon is not entitle to statutory tolling under Section 2244(d)(1)(D), based upon their finding that Macon's assertion that he did not learn about the six month plea offer until November 14, 2013, is contradicted by evidence submitted in his fifth state habeas proceeding, an affidavit of his trial counsel dated October, 24, 2013. (See: Findings, Conclusions, and Recommendation of the United States Magistrate Judge, p.6).

2. Did trial counsel provide ineffective assistance of counsel in violation of the Six Amendment of the United States Constitution when he failed to inform Macon that the State had offered him a six month state jail plea bargain agreement on both charges in exchange for his guilty plea. (Federal Petition, Ground No. 1)

LIST OF PARTIES

Petitioner

Bruce William Macon No. 1568331
Coffield Unit
2661 F.M. 2054
Tennessee Colony, Texas 75884

Petitioner, Pro se

Respondent

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STATEMENT OF THE CASE

Macon was indicted with two counts of unlawful restraint with exposure to serious bodily injury, enhanced by two prior felony conviction. Macon pleaded not guilty and proceeded to trial by jury. On April 3, 2009, the jury found Macon guilty as charged in the indictment and sentenced him to forty (40) years in each count to be served concurrently. Macon appealed his convictions to the Fifth District Court Of Appeals, and his convictions was affirmed on October 5, 2010. See Macon V. State, No. 05-09-511-CR and 05-09-512-CR. He did not file a petition for discretionary review.

On January 2, 2012, Macon filed his first state habeas application challenging both convictions which was dismissed by the Texas Court Of Criminal Appeals (hereafter TCCA) on January 25, 2012, for non-compliance. (Writ Nos. 76,956-01 and 76,956-02). On February 28, 2012, Macon filed his second state habeas application challenging both convictions which was dismissed on August 22, 2012, for non-compliance. (Writ Nos. 76,956-03 and 76,956-04). Macon then filed his third state habeas application challenging both convictions which was denied without written order on February 5, 2014 (Writ Nos. 76,956-05 and 76,956-06). Finally, based upon newly discovered evidence received from his third habeas application, Macon filed his fourth state habeas application on October 31, 2014, challenging both convictions which was denied without written order on March 4, 2015. (Writ Nos. 76,956-07 and 76,956-08).

On March 11, 2015, Macon filed this federal habeas corpus petition pursuant to 28 U.S.C. § 2254(d) claiming that his six amendment right to effective assistance of counsel was violated based upon newly discovered evidence from his third state habeas application which was denied by the United States District Court as time-barred on December 30, 2016. Macon then filed a timely notice of appeal and a request for certificate of appealability on January 13, 2017, which was denied

by the district court on February 3, 2017. (See: Order, Civil Action No. 3:15-CV-0855D). Macon then filed a request for certificate of appealability to the Fifth Circuit Court Of Appeals on February 14, 2017, which was denied on October 26, 2017. (See: Order, No. 17-10086). Finally, Macon filed this petition for writ of certiorari on December 14, 2017. This petition is timely filed pursuant to 28 U.S.C. § 2101 (c).

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Petition For A Writ Of Certiorari
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For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bruce William Macon (hereafter "Macon") files this petition for a writ of certiorari to review the judgment of the United States Court Of Appeals For The Fifth Circuit Of Texas, denying Macon's 28 U.S.C. § 2254 petition for writ of habeas corpus as time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A), without reaching the merit of Macon's constitutional claim, that his six amendment guarantee to effective assistance of counsel was violated when trial counsel failed to inform him that the State had offered him a six month state jail plea agreement on both charges in exchange for a guilty plea.

OPINIONS

The opinions of the Fifth Circuit Court Of Appeals (No. 17-10086) and the United States District Court (U.S.D.C. No. 3:15-CV-855) were not published.

JURISDICTION

The judgment of the Court Of Appeals was entered on October 26, 2017 (See Order, No. 17-10086). Therefore this Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTORY AND CONSTITUTIONAL ISSUES FOR REVIEW

Issue Number One: Whether Macon's time calculation should start to run on November 4, 2010, the date on which his direct review became final as provided by 28 U.S.C. § 2244(d)(1)(A), or on November 14, 2013, the date on which the factual predicate of his constitutional claim of ineffective assistance of counsel was discovered as provided by 28 U.S.C. § 2244(d)(1)(D).

Newly Discovered Evidence

Macon maintains that his federal habeas petition was timely filed pursuant to 28 U.S.C. § 2244(d)(1)(D), because the factual basis of his claim did not become available to him until November 14, 2013, when the trial court made its findings of fact and conclusions of law in response to his third state habeas application, which contained a copy of his trial counsel's affidavit informing him of the six month state jail plea offer. (Writ Nos. 76,956-01 and 76,956-02). Therefore, Macon's time calculation for filing his federal petition should start to run on November 14, 2013, and would have expired on November 13, 2014. 28 U.S.C. § 2244(d)(1)(D); (See Petitioner's Federal Memorandum Of Law, p. 4-8).

According to AEDPA's standard of review regarding the procedural bar rule the time limitation period shall run from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution of laws of the United States is removed, if the applicant was prevented from filing by such action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) 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.

See 28 U.S.C. § 2244(d) (West 2015)

Macon argues that his federal petition filed on March 11, 2015 is timely before the court because his claim of ineffective assistance of counsel is based upon newly discovered evidence that he did not discover until November 14, 2013, therefore his time calculation should not start until November 14, 2013 (on the date on which the factual predicate of his claim was discovered) as provided by statutory tolling under 28 U.S.C. § 2244(d)(1)(D). *Goodwin v. Dretke*, 118 Fed. App. 817; *Jimenez v. Quarterman*, 555 U.S. 475, 129 S.Ct. 681(2009); *Holland v. Florida*, 560 U.S. 130, 130 S.Ct. 130(2010); *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641(2005); *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134(2002); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595(2000).

According to 28 U.S.C. § 2244(d)(1)(D), in determining whether a habeas claim based upon newly discovered evidence is time-barred, the proper analysis is under the statutory subsection providing that the time calculation starts to run from the date on which the factual predicate of the claim could have been discovered through the exercise of due diligence, rather than subsection 2244(d)(1)(A) which provides

that the time calculation start to run from the date on which the judgment became final. *Goodwin V. Dretke*, 118 Fed. App. 817. Thus, the record clearly and convincingly shows that the District Court incorrectly determined that Macon's time calculation started to run on November 4, 2010. (See Findings, Conclusions, And Recommendation of the United States Magistrate Judge, p.5-6)& (Order Adopting the Magistrate Judge's Findings, Conclusions, and Recommendation, p.1).

The Supreme Court faced a similar issue in *Jimenez V. Quarterman*, 555 U.S. 475, 129 S.Ct. 681(2009). Jimenez filed his federal habeas petition on July 19, 2005, relying on 28 U.S.C. § 2244(d)(1)(A) to establish his timeliness. Jimenez argued that his judgment became final on January 6, 2004, when his time expired for seeking certiorari review of the decision in his out-of -time appeal, and that his July 19, 2005, petition was timely because the calculation of AEDPA's 1-year limitation period excluded the 355 days during which his properly filed application for state post-conviction review was pending. *Jimenez*, 555 U.S. at 478-79, 129 S.Ct. 681. The District Court dismissed his petition as time-barred ruling that the proper start date for calculating AEDPA's 1-year limitation period under § 2244(d)(1)(A) was October 11, 1996, when petitioner's conviction first became final. *Jimenez*, 555 U.S. at 476-77, 129 S.Ct. 681.

The Supreme Court granted certiorari to address the issue whether the date on which direct review became final was the date the inmate's conviction initially became final, or the date when his out-of -time appeal by the state appellate court became final, and reversed the district court's decision holding that under § 2244 (d)(1)(A)'s plain language, once the Texas Court of Criminal Appeals reopened direct review of petitioner's conviction on September 25, 2002, the conviction was no longer final for § 2244(d)(1)(A) purposes. Rather, the order granting an out-of-time appeal restored the pendency of the direct appeal, and petitioner's conviction was again capable of modification through direct appeal to the State courts and to this Court on certiorari review. Therefore, it was not until January 6, 2004, when

for seeking certiorari review of the decision in the out-of-time appeal expired, that petitioner's conviction became final. *Jimenez*, 555 U.S. at 478-79, 129 S.Ct. 681.

THE UNITED STATES DISTRICT COURT'S ANALYSIS IS ERRONEOUS

In addressing Macon's time-barred issue on federal review the magistrate judge, David L. Horan made a plain error when he erroneously denied Macon's new evidence claim asserting that his allegation is contradicted by evidence submitted in Macon's fifth state habeas proceeding, an affidavit of his trial counsel dated October 24, 2013. A review of the magistrate judge's findings are as follows:

"Macon appears to invoke statutory tolling under Section 2244 (d)(1)(D), the factual-predicate provision, by claiming that he first learned of the six-month plea offer on November 14, 2013, when the trial court made its findings of fact and conclusions of law in response to petitioner's third application for writ of habeas corpus in state court. Dkt. No. 3 at 9. But this assertion is contradicted by evidence submitted in Macon's fifth state habeas proceeding, an affidavit of his trial counsel dated October 24, 2013"...

See Findings, Conclusions, And Recommendation Of The United States Magistrate Judge, p. 5-6.

Macon argues that the magistrate judge's findings that his third application claiming that he learned about the six-month plea offer on November 14, 2013, is contradicted by evidence submitted in Macon's fifth state habeas proceeding, an affidavit of his trial counsel dated October 24, 2013, wherein trial counsel stated that --"Mr. Macon would not accept the plea offers within the state jail range of punishment". (See Findings, Conclusions, And Recommendation Of The Magistrate Judge, p.6)--shows a clear case of plain error because the record clearly shows that trial counsel gave two conflicting statements regarding the plea offer. (See Exhibit No. 1- Affidavit of Roger Lenox, Dated October 24, 2013 and Exhibit No. 2- Affidavit of Roger Lenox, Dated December 17, 2014).

Macon specifically argues that both of trial counsel's affidavits are not entitled

to the presumption of correctness provided by 28 U.S.C. § 2254(e), because the issue regarding whether trial counsel informed Macon of the six-month state jail plea offer is contradicted by trial counsel's conflicting affidavits. See Exhibit No.1- Affidavit of Roger Lenox, Dated October 24, 2013 and Exhibit No.2- Affidavit of Roger Lenox, Dated November 17, 2014).

TRIAL COUNSEL'S FIRST AFFIDAVIT -OCTOBER 24, 2013

The record shows that in trial counsel's first affidavit dated October 24, 2013, while addressing the issue regarding the 180 day state jail offer, Mr. Lenox stated in pertinent part that:

" I promptly met with Mr. Macon and determined that he wanted a jury trial. I met with the prosecutor, Ms. Cresta Lemaster, and discussed the case. Ms. Lemaster made a plea offer within the state jail range. I believe the offer was 180 days in the state jail on both cases, to be run concurrently and credit for any backtime. Mr. Macon was insistant on maintaining his innocence and insisted on a speedy trial. Ms. Lemaster and I met several times. Mr. Macon and I met several times . She would not dismiss the case or reduce to misdemeanors. Mr. Macon would not accept the plea offers within the state jail range of punishment. The cases were set for jury trial on March 30, 2009."

See Exhibit No.1- Affidavit of Roger Lenox, Dated October 24, 2013.

TRIAL COUNSEL'S SECOND AFFIDAVIT- December 17, 2014

The record shows that in trial counsel's second affidavit dated December 17, 2014, while addressing the issue regarding the 180 day state jail offer, Mr. Lenox stated in pertinent part that:

"This affidavit supplements my affidavit dated on or about October 24, 2013.

I was appointed by the Court to represent Mr. Bruce Macon on or about December 01, 2009. Mr. Macon was charged with Unlawful Restraint Under 17 in cause nos. F08-63532 and F08-63533, both state jail felonies. The 180 day state jail plea offer was communicated to Mr. Macon as a temporary offer. I recall it was a today only offer. Mr. Macon rejected the offer straightway and without hesitation.

Mr. Macon was emphatic in his rejection of the offer. I returned to the prosecution and communicated Mr. Macon's rejection of the state jail plea offer. I

remember it well as it was a most generous offer in light of the charges, evidence and potential range of punishment. The entire exchange, offer and rejection began and ended within a matter of a few minutes."

See Exhibit No. 2- Affidavit Of Roger Lenox, Dated December 17, 2014.

The record shows that in trial counsel's first affidavit he stated that--"Ms. Lemaster and I met several times. Mr. Macon and I met several times. She would not dismiss the case or reduce to misdemeanors. Mr. Macon would not accept the offers within the state jail range of punishment". (Exhibit NO.1). But when Macon filed his seventh and eight state habeas application claiming that trial counsel never informed him of the six month state jail offer, and presented the affidavits of his wife, Jeanette Dixon and his sister, Michelle Lankford who also stayed in contact with Mr. Roger Lenox, and stated that he never informed them of the six month state jail offer, Mr. Lenox changed his affidavit to justify his reason for not telling them about the six month state jail plea bargain offer. To justify his action for not telling Mrs. Dixon and Ms. Lankford, Mr. Lenox changed his affidavit to reflect that --"The 180 day state jail plea offer was communicated to Mr. Macon as a temporary offer. I recall it was a "today only" offer." See Exhibit No.2- Affidavit Of Roger Lenox, Dated December 17, 2014.

Macon specifically argues that trial counsel's affidavits are not entitle to the presumption of correctness provided to the state under 28 U.S.C. § 2254(e), because Macon has presented clear and convincing evidence contained in the record showing that Mr, Lenox made conflicting statements regarding the six month plea offer. As the record shows that in his first affidavit dated October 24, 2013, Mr. Lenox stated that he met with Ms. Lemaster and Mr. Macon several times regarding the six month plea offer, but she would not dismiss the case or reduce to misdemeanors, and Mr. Macon would not accept the plea offer within the state jail range of punishment. (Exhibit No.1)

But to justify his action for not informing Mrs. Dixon and Ms. Lankfork trial counsel gave a conflicting statement stating that --"The 180 day state jail plea offer was communicated to Mr. Macon as a temporary offer. I recall it was a "today only" offer. Macon rejected the offer straightway and without hesitation....The entire exchange, offer and rejection, began and ended within a matter of a few minutes." Exhibit No. 2. Macon argues that because his trial counsel made prior inconsistent statements in writing regarding the circumstances of the plea bargain offer, both of his affidavits are inadmissible in any legal proceeding under Rule 608(a) and 613(a)(b)&(c), Texas Rule Of Criminal Evidence. See Micheal V. State, 235 S.W.3d 723(Tex. Crim. App. 2007).

Furthermore, trial counsel's affidavits are contradicted by the affidavits of Jeanette Dixon and Michelle Lankford. A review of the affidavits of Mrs. Dixon and Ms. Lankford are as follows:

Mrs. Dixon presented an affidavit stating that she kept in touch with trial counsel about her husband's case and talked to Mr. Lenox on many occasions. She stated that she even went to Mr. Lenox's office to file a non-prosecution form, and Mr. Lenox informed her that the State had offered Macon a twenty (20) year plea bargain agreement, but Mr. Lenox never informed her that the state had made a six month state jail offer. She further stated that had she been informed of the six month offer, she would have insured that Macon would have accepted the offer. See Exhibit No. 3-Affidavit of Jeanette Dixon.

Michelle Lankford also presented an affidavit stating that she kept in touch with Mr. Lenox and called to talk to Mr. Lenox on many occasions regarding her brother's case. She also stated that Mr. Lenox informed her of the twenty (20) year plea bargain offer, but he never informed her of the six month state jail offer. She further stated that if Mr. Lenox had informed her of the six month state jail offer she would have made her brother accept the offer. Exhibit No.4- Affidavit of Michelle Lankford.

Thus, the record clearly and convincingly shows that the magistrate judge's findings and conclusions stating that Macon's claim that he first learned of the six-month plea offer on November 14, 2013, is contradicted by evidence submitted in Macon's fifth state habeas proceeding, an affidavit of his trial counsel dated October 24, 2013, is clearly erroneous and should be rejected. See Findings, Conclusions, And Recommendation of The Magistrate Judge, p.6.

Nevertheless, on December 30, 2016, the United States District Judge, Sidney A. Fitzwater issued an order adopting the magistrate judge's findings, conclusions, and recommendation finding that --"After making an independent review of the pleadings, files, and records in this case, and the findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct. It is therefore ordered that the finding, conclusion, and recommendation of the magistrate judge are adopted. (See Order, Civil Action No. 3:15-CV-00-855D). The District Court then issued a final judgment stating --"It is ordered and adjudged that petitioner's application for writ of habeas corpus is denied as time barred. (See Judgment, No 3:15-CV-00855D), December 30, 2016)

THE FIFTH CIRCUIT ERRONEOUSLY RELIED UPON THE DISTRICT COURT'S TIME-BAR RULING

In addressing Macon's time-bar issue on a certificate of appealability (COA) the Fifth Circuit Court Of Appeals affirmed the district court's findings and conclusions relying on the district court's findings that Macon's petition is time-barred. Thus, the Fifth Circuit's findings and conclusions holding that --"Because the district court denied relief on procedural grounds and did not reach the merits of Macon's claim, this court will grant him a COA if reasonable jurists would debate whether the district court's time-bar ruling was correct and whether Macon states a valid claim of a constitutional deprivation. See Slack, 529 U.S. at 484; Houser V. Dretke, 395 F.3d 560-62(5th Cir. 2004). Macon has not made the required showing. Accordingly, his motion for a COA is Denied. His motion to proceed in forma pauperis is also Denied." (See Order, p. 2- Appeal No. 17-10086),--Should be reversed.

ISSUE NUMBER TWO: Did trial counsel provide ineffective assistance of counsel in violation of the Six Amendment of the United States Constitution when he failed to inform Macon that the State had offered him a six month state jail plea bargain agreement on both charges in exchange for his guilty plea. (Federal Petition, No.1)

CONSTITUTIONAL ISSUE FOR REVIEW

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense". (U.S.C.A. Amend. 6) The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. Missouri V. Frye, 132 S.Ct. 1399, 1402(2012); Strickland V. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068(1984); Ex Parte Lemke, 13 S.W.3d 791, 795(Tex. Crim.App. 2000). As a general rule, defense counsel has a duty to communicate a formal prosecution's offer to accept a plea on the terms and conditions that may be favorable to the accused, and failure to inform a defendant of a plea offer made by ^{the} State is an omission that falls below the objective standard of professional reasonableness set out in Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, and Frye 132 S.Ct. at 1402-1403. Thus, Macon made a substantial showing of a violation of his constitutional right to effective assistance of counsel guaranteed by the Six Amendment, when he presented factual evidence showing that his trial counsel failed to inform him of the six month state jail plea bargain offer made by the state.

HARM ANALYSIS

In Frye, the Supreme Court held that to show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel, and that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that

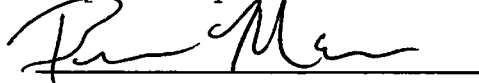
discretion under state law. Frye, 132 S.C.T. at 1402-1403.

Macon argued ^{that} taht he was harmed as a result of trial counsel's deficient performance because had he been given the opportunity to accept the more favorable plea offer of six months in state jail, he would have accepted the offer, but he is now serving two forty (40) year sentences. (See Federal Memorandum Of Law, p. 10). Macon further argued that had he accepted the six month state jail plea offer the plea agreement would have been entered without the prosecution canceling it, or the trial court refusing to accept it, because the record shows that he didn't have any other offenses pending against him that would have given them any reason to withdraw the offer. (Federal Memorandum Of Law, p.10). Thus, Macon also satisfied part two of Strickland's test, because he demonstrated that there is a reasonable probability that but for trial counsel's unprofessionsl error, the outcome of the trial proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.C.T. at 2064; Frye, 132 S.C.T. at 1404; Ex parte Lemke, 13 S.W.3d at 795. Thus, Macon has stated a valid claim of the denial of a constitutiona right that entitled him to relief under 28 U.S.C. § 2254(d). For this reason Macon's conviction should be reversed and remanded back to the trial court for a new trial. Frye, 132 S.C.T. at 1404; Strickland, 466 U.S. at 694-95.

CONCLUSION

For the reasons stated above, Macon respectfully prays ^{that} taht the Supreme Court grants a writ of certiorari and thereafter reverse and remand his conviction back to the trial court for a new trial, or in the alternative order that briefs be filed addressing Macon's constitutional claim of ineffective assistance of counsel on the merit. Macon So Moves The Court.

Respectfully Submitted:



Bruce William Macon No. 1568331

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