

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Allan Rencountre Petitioner

Vs.

Colby Braun, Warden North Dakota State Penitentiary, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Allan Rencountre
North Dakota State Penitentiary
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QUESTIONS PRESENTED

Should the Court have granted equitable tolling with regards to the statutory filing deadline due to the ineptitude of Petitioner’s retained counsel so that his application for Habeas Corpus could be considered on the merits?

LIST OF PARTIES

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

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TABLE OF AUTHORITIES CITED

STATUTES AND RULE

- 28 U.S.C. §2244(d)(2)
- 28 U.S.C. §2254
- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 U.S.C. §2244(d)(1)

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 judgement below.

Opinions Below

The opinion of the United States court of appeals is unpublished.

The opinion of the United States district court for North Dakota is unpublished.

JURISDICTION

The United States Court of Appeals decided this case on June 8, 2018. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(d)(2)

28 U.S.C. §2254

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 U.S.C. §2244(d)(1)

Fourteenth Amendment to the United States Constitution

STATEMENT OF CASE

[¶1] Petitioner was charged with attempted murder, a Class A felony, and fleeing or attempting to elude a peace officer, a Class C felony in State District Court in North Dakota. The State also filed a special dangerous offender notice against Petitioner to enhance the maximum penalty. Petitioner's retained attorney requested a mental health evaluation be performed at the State Hospital, and the State joined in the request. The evaluation revealed that Petitioner was competent to stand trial and was not suffering from a mental disease or defect at the time of the

offense. On April 27, 2011, Petitioner pled guilty under a plea agreement to attempted murder. The charge of fleeing or attempting to elude a police officer was dismissed as part of the plea agreement, and the District Court found Petitioner was a special dangerous offender. Petitioner attempted to waive his right to a presentence report and requested that he be sentenced immediately. The State orally advised the court that Petitioner had no prior criminal history. The court sentenced petitioner to 30 years in prison with 10 years suspended, followed by 5 years of supervised probation.

[¶2] Petitioner filed a direct appeal with the North Dakota Supreme Court on May 26, 2011. The North Dakota Supreme Court dismissed his appeal on September 1, 2011, pursuant to a stipulation filed on August 24, 2011. Petitioner then filed an application for post-conviction relief on April 23, 2012. The state district court convened a hearing on the application on January 27, 2014. It subsequently denied the application on May 29, 2014. Its decision was affirmed on appeal by the North Dakota Supreme Court. The mandate was issued on April 15, 2015.

[¶3] Petitioner filed an application for a writ of habeas corpus with the United States District Court for the District of North Dakota on August 8, 2017, asserting the following grounds for relief: GROUND ONE: Ineffective Assistance of Counsel – Attorney failed to file a motion to suppress Defendant’s statements, GROUND TWO: Ineffective Assistance of Counsel – Attorney failed to request a second opinion of competency evaluation, GROUND THREE: Court failed to order and receive a pre-sentence investigation prior to sentencing. Petitioner admitted that his request fell outside the one-year limit prescribed under the AEDPA but requested that the

limitation period be tolled as a matter of equity due to the ineptitude of his retained counsel.

Specifically, Petitioner asserted the following in an affidavit attached to his application for writ of habeas corpus:

“[¶3] I asked the attorney who was representing me in my State Post-Conviction appeal, Benjamin Pulkrabek, to file under 28 U.S.C. § 2254 for a Writ of Habeas Corpus when my appeal was denied in March 2015. I offered to pay Mr. Pulkrabek an additional sum for this service. He state that he would write everything up first and let me know. My family remained in contact with Mr. Pulkrabek, and he stated that he was still working on my petition.

[¶4] On 2/16/16, Mr. Pulkrabek mailed me a letter ... informing me that the time limit had expired to file my Habeas petition, and detailing when my time started and stopped.

[¶5] My family paid Mr. Pulkrabek \$200 for writing the brief that was never filed.

[¶6] I continued trying to find an attorney to file my Habeas Petition and later contacted another law firm; but was again told that my time to file had expired.

[¶7] After discussing my case with others at the Penitentiary, I determined that the statute of limitations for filing had expired while Mr. Pulkrabek said he was working on my case; and that he had 110 days on which to file.

[¶8] Even though I diligently attempted to exercise my right to file a petition for Writ of Habeas Corpus, I was prevented from doing so by my attorney’s failure to file. I continued to attempt to get my petition file, but only recently understood that the statute of limitations expired while my attorney was working on my petition. “

[¶4] On September 27, 2017, respondent filed a motion to dismiss the petition on the ground that it is time-barred. Respondent asserted that counsel was not retained until after the statute of limitations had expired. In support of this claim, Respondent attached a declaration from attorney Pulkrabek in which he stated that (1) he represented Petitioner on the appeal of the state district court’s order denying petitioner’s application for post-conviction relief; (2) his office received a letter from Petitioner on December 2, 2015, requesting his assistance in filing a brief in federal court; (3) he negotiated a fee, which Petitioner’s family paid on February 12, 2016; (4) he determined that the limitation period for filing a federal habeas petition had lapsed prior to being

contacted by Petitioner ; and (5) he thereafter refunded most of his fee to Petitioner's family and advised them of the statute of limitations issue.

[¶5] Petitioner filed a response to the motion in which he asserted that counsel agreed to prepare and file a habeas petition prior to the expiration of the limitations period. Specifically, that he met with counsel in April 2015 that counsel represented to his family during a June 2015 conversation that he would take the case that counsel repeatedly assured him there was ample time to prepare and file a federal habeas petition, and that he relied on counsel's assurances to his detriment. With respect to the letter of December 5, 2017 that counsel mentions receiving, Petitioner asserted that counsel directed him to mail this letter and it was not his initial request for representation.

[¶6] On January 11, 2018, Magistrate Judge Charles S. Miller Jr. issued a recommendation that Respondent's Motion to Dismiss be granted and that Petitioner's § 2254 application be Dismissed with Prejudice. He further recommended that no certificate of appealability be issued. On January 25, 2017, Petitioner filed an Objection to the recommendations. An order adopting the recommendations was issue by Chief Judge Daniel Hovland on January 29, 2018.

[¶7] A Notice of Appeal was filed on 2/16/18. Petitioner filed a request for a certificate of appealability with the United States Court of Appeals for the Eighth Circuit and requested to proceed in forma pauperis. On June 8, 2018 the Appeals Court entered a judgement denying Petitioner's application for a certificate of appealability and finding the motion to proceed in forma pauperis to be moot.

REASONS FOR GRANTING THE PETITION

[¶8] Petitioner demonstrated that he entered into an oral contract with his counsel, Mr. Pulkrabek, in March 2015 immediately after his State Post-Conviction appeal was denied to represent him in Federal Habeas Corpus proceedings (Petitioner's Affidavit 8/4/17 at ¶2). Petitioner's family repeatedly contacted Attorney Pulkrabek inquiring about the status of his Habeas application and brief and were assured that ample time remained and he did not need payment right away (Petitioner's Affidavit 10/10/17 at ¶4). After being paid, Attorney Pulkrabek informed Petitioner by mail that the statute of limitations for filing had expired (Petitioner's Affidavit 8/4/17 at ¶4). The limitation period expired while Attorney Pulkrabek was under contract to represent Petitioner. Petitioner relied on counsel's assurances to his detriment. After being abandoned by counsel, Petitioner continued to seek legal representation but was informed that the statute of limitations for filing had expired (Petitioner's Affidavit 8/4/17 at ¶6). Petitioner was never informed that the option of requesting equitable tolling due to counsel's ineptitude was available. Even after these failed attempts to find replacement counsel, Petitioner began asking others at the Penitentiary for advice regarding getting his petition filed (Petitioner's Affidavit 8/4/17 at ¶7). This resulted in his Habeas Corpus filing and request for equitable tolling. Petitioner diligently pursued his rights, but was prevented from filing by the ineptitude of his retained counsel and the failure of other consulted attorneys to inform him of the availability of equitable tolling.

[¶9] The situations in which equitable tolling is applied vary from district to district and circuit to circuit. There is no clear definition of which cases warrant the application of equitable tolling and which do not. The Court should standardize the situations in which equitable tolling may be

granted. Petitioner believes the instant case to meet the standards required to have the statutory time limit tolled as a matter of equity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Allen W. Remonero

Date: 8/23/18