

Trent Brignac
District Attorney

*Thirteenth
Judicial District Court*



*Evangeline Parish
State of Louisiana*

March 14, 2013

Honorable William K. Suter
Office of the Clerk of the Court
United States Supreme Court
Washington, DC 20543-0001

RE: Elrick J. Gallow
v. Lynn Cooper, Warden
No. 12-7516

Dear Sir:

Enclosed please find the original and ten copies of the following:

Certificate of Service
Brief for Respondent

Please file same into the above-captioned matter.

If you require anything further, please let me know.

Sincerely,

Trent Brignac
District Attorney

Enclosure

cc: **Shelley A. Goff, Attorney Appointed for Petitioner**

No. 12-7516

In the Supreme Court of the United States

ELRICK J. GALLOW, *Petitioner*

v.

LYNN COOPER, Warden Avoyelles Parish Correctional Center, *Respondent*

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 29.3, Rules of the United States Supreme Court, I served a copy of the accompanying Brief for Respondent, by depositing same in the United States mail, with first class postage paid, address to:

Shelley A. Goff
Post Office Box 2050
Ruston, LA 71273
Attorney Appointed for Petitioner

On this 14th day of March, 2013.



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No. 12-7516

In the Supreme Court of the United States

ELRICK J. GALLOW, *Petitioner*

v.

LYNN COOPER, Warden Avoyelles Parish Correctional Center, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Brief for Respondent

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ARGUMENT FOR DENYING THE PETITION

Certiorari should not be granted because the Fifth Circuit Court of Appeals ruled in accordance with relevant decisions of this Court.

- 1. The narrow exception carved out by this Court under *Martinez* does not apply to petitioner, whose claim was adjudicated on the merits by the state court.**

Under *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012), this Court reiterated well-settled jurisprudence that give deference to state court judgments. As a result, *Martinez* set forth that claims on the merits of a case will not be reviewed by federal habeas courts if a state court declined to hear the matter due to a failure of a petitioner to adhere to state procedural laws. Furthermore, if the state procedural law is based on non-federal grounds and is sufficient to support the judgment of the state court, then federal review is precluded. *Id.*

The Fifth Circuit Court of Appeals, in its analysis of petitioner's case and the applicability of *Martinez*, determined that petitioner's case was decided on the merits by the district court and not on procedural grounds. Respondent has consistently maintained that petitioner has had several bites at the proverbial apple, and at each attempt has failed to present any admissible evidence to substantiate his claim, resulting in a dismissal based on petitioner's failure to meet the burden of proof. The Fifth Circuit found adequate support for the ruling of the lower court based upon: (1) Louisiana Code of Criminal Procedure Article 930.2 and jurisprudence based upon that article; (2) multiple opportunities afforded petitioner to present evidence to support his claim in the court's attempt to decide his claim on the merits; and (3) the state court's opinion which gave indications that the court determined the case on the merits as opposed to relying on procedural grounds. The Fifth Circuit correctly concluded that the state court's adjudication was substantive and not procedural; therefore, *Martinez* is not applicable to petitioner's claim before the Court and precludes federal review.

2. In light of established federal jurisprudence and petitioner's failure to take advantage of opportunities to present evidence to prove his claim to the state court, federal review should be limited to the record before the state court.

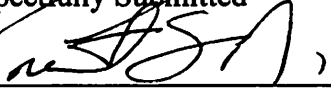
This Court in *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011) opined that under 28 U.S.C. §2254(d)(1) a review of whether: (1) a state court's decision on a claim was contrary to clearly, established federal law; or (2) an unreasonable application of that law, required a look back at the decision of the state court at the time the decision was made. Therefore, following that reasoning, this Court held that the record being reviewed by the federal court is limited to what was before the state court at the time.

Petitioner argues that an exception should be created in his case because the state court's record was inept due to the ineffectiveness of his post conviction attorney. However, as noted by the Fifth Circuit Court of Appeals, both petitioner and his post conviction counsel failed to present any evidence to support his ineffective assistance claim. The Fifth Circuit noted that there were other avenues petitioner and his post conviction counsel could have taken to prove his claim, including, presenting the testimony of other family members to prove that his trial counsel (Muhammad) was operating under a conflict of interest as a result of familial relationships among the parties. Nevertheless, in the absence of Muhammad, petitioner and his post conviction counsel chose not to explore other means of proving his claim. Instead they opted not to present any evidence at all.

CONCLUSION

Certiorari should not be granted because doing so would be a departure from clearly established federal law and jurisprudence.

Respectfully Submitted



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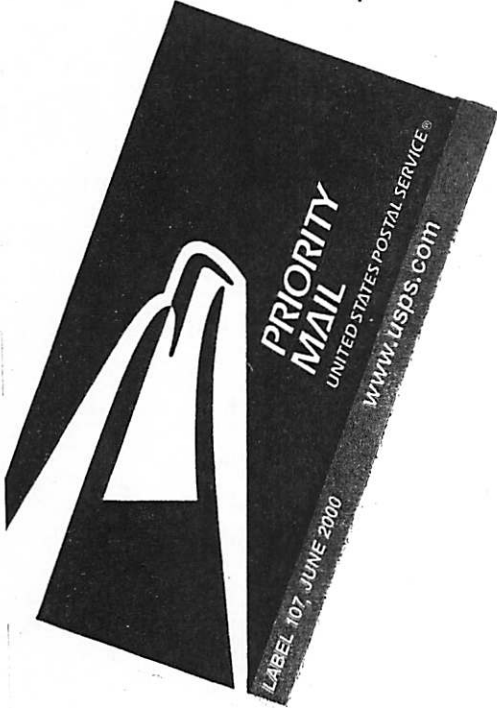
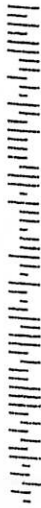
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