

No. _____

In the Supreme Court of the United States

ELRICK J. GALLOW,

Petitioner,

v.

LYNN COOPER, Warden Avoyelles Parish Correctional Center,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a federal court consider new evidence to support a state prisoner's application for habeas relief under 28 U.S.C. § 2254(d), when the state court record was not developed as a result of incompetent and likely conflicted post conviction counsel.

LIST OF PARTIES

ELRICK J. GALLOW, Petitioner

LYNN COOPER, Warden Avoyelles Parish Correctional Center,
Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Elrick J. Gallow, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Gallow v Cooper*, No. 10-30861 (5th Cir. 2012) (unpublished).

OPINIONS BELOW:

The Fifth Circuit decision sought to be reviewed, *Gallow v Cooper*, No. 10-30861 (5th Cir 2012) (unpublished), is attached as Appendix 1. The district court order adopting the report and recommendations of the Magistrate Judge and from which Mr. Gallow's appeal was taken, *Gallow v Cooper*, No. 6:04-CV-1905 (W.D. La. 8/31/2010) is attached as Appendix 2. The report and recommendations of the Magistrate Judge recommending denial of Mr. Gallow's §2254 petition is attached as Appendix 3.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals affirming the District Court's opinion was entered on August 24, 2010. There was no request for rehearing. This petition is timely filed. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1)

STATUTES/PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance of counsel for his defense." U.S.CONST. amend. VI.

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.” U.S.CONST. amend XIV.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings, unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court or the United States; or (2) resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (A) the claim relies on—(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient by clear and convincing evidence that but for

constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2).

STATEMENT OF THE CASE

On the second day of his jury trial for aggravated burglary, armed robbery and second degree kidnapping, as the State's last and most important witness-the alleged victim- was about to take the witness stand, Elrick Gallow's defense attorney, Mr. Ahmad Muhammad, requested a recess. Muhammad told Gallow that he needed to plead guilty. Muhammad lied to Gallow about evidence available to impeach the witness and talked him into pleading guilty. Muhammad did not tell Gallow that he was laboring under intense personal pressure. Unbeknownst to Gallow, Muhammad had a close familial relationship with this witness and the witness's family. As a result, on November 23, 1999, Gallow pleaded guilty to aggravated battery. In exchange for his plea, the Evangeline Parish District Attorney dismissed the remainder of the charges and Gallow was sentenced to 30 years imprisonment.¹ Muhammad's friend and close associate, Dele Adebamiji, who was also counsel of record for Gallow and who had appeared at pretrial proceedings was not present during the trial.

In February of 2000, apparently feeling guilty for throwing his client under the bus, Muhammad signed an affidavit admitting that he

¹ Gallow's sentencing exposure appears to have been 99 years imprisonment had he been convicted of all counts.

misled Gallow regarding impeachment evidence he had to discredit the witness and admitting that he hid the conflict of interest from Gallow and the court. Using this affidavit, Gallow filed a motion to withdraw his guilty plea. Mr. Adebamiji signed the motion as attorney for Gallow. Adebamiji, asserting that Muhammad was laboring under a conflict of interest and as a result of this conflict and his misrepresentations to Gallow, Gallow's guilty plea was involuntary. The motion was filed with the Evangeline Parish Clerk on February 18, 2000. Someone handwrote "File No Order Per Judge" on the first page of the motion. The motion then disappeared from clerk's record.

On August 28, 2000, Adebamiji files a second, nearly identical Motion to Withdraw Plea of Guilty and attaches a second affidavit of Muhammad, also nearly identical to the first. A hearing is set for December 1, 2000. On November 29, 2000, Adebamiji files a motion to continue the hearing stating he must be in Nigeria "pending other obligations." The court denies the motion. On December 1, 2000, no one appears for Gallow. Gallow is incarcerated and Adebamiji is absent. The court threatens to hold Adebamiji in contempt and defers the motion without date.

On August 29, 2001, Adebamiji files an application for post conviction relief on behalf of Gallow, alleging ineffective assistance of counsel by Muhammad relating to the conflict of interest and misrepresentations and asserts again that the plea of guilty was

involuntary. A hearing was held on November 15, 2001. Adebamiji appeared with Gallow, but Muhammad was absent. The district attorney questioned Adebamiji about his relationship with Muhammad. Adebamiji denied sharing offices with Muhammad, but admitted they helped each other out. He also admitted that although he was not present at the trial, he was enrolled as co-counsel for Gallow.² The court ordered the matter to proceed. Adebamiji refused to go forward because Muhammad declined to attend at the last minute. The court chastised Adebamiji for not having a subpoena issued to ensure Muhammad's attendance. The court ordered the hearing to proceed. Adebamiji continued to refuse to go forward, and moved to continue the hearing. The court adjourned and ordered Muhammad to appear the next day. Of course tomorrow came, and Muhammad did not appear. Adebamiji requested the court accept Muhammad's affidavit as evidence in place of live testimony, but the district attorney objected and the court refused to admit the affidavit. Gallow commented directly to the judge, stating that if a court order did not get Muhammad to appear, what would? The court dismissed the post conviction application.

Gallow attempted to appeal the dismissal of his application. Even though Gallow was incarcerated and had filed an affidavit showing he had no assets or income, the court deemed he was not indigent and

² No one, other than the prosecutor, acknowledged Adebamiji's conflict of interest. As attorney of record during the criminal phase of Gallow's case, he was at least in part responsible for the failure of the representation at trial.

ordered him to pay \$400 for the costs of the appeal. When Gallow could not pay the costs, the court dismissed the appeal. Adebamiji is allowed to withdraw as counsel for Gallow.

On October 10, 2003, Gallow filed a second application for post conviction relief requesting that his case should be reopened. He argued that the original post conviction proceeding was not full and fair, that while Muhammad had failed to appear at the original hearing, Muhammad was now in state custody and within the jurisdiction and power of the court. At some point, Gallow filed a writ with the Louisiana Third Circuit Court of Appeals and on May 11, 2004, the appellate court remanded the matter to the district court ordering it to rule on Gallow's petition within 20 days. An attorney was appointed to represent Gallow, and a hearing was held on July 9, 2004, but again, Muhammad is not subpoenaed, does not appear and no evidence is presented. The application was denied and the Louisiana Supreme Court denied Gallow's writ.

Gallow then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 with the United States District Court for the Western District of Louisiana. He made two claims: first that trial counsel was ineffective and second, that the state court abused its discretion in not issuing a bench warrant for Muhammad after he failed to appear for hearing. Upon initial review the District Court dismissed the claim as time-barred under 28 U.S.C. 2254(d)(1)(A). On July 26, 2005, Gallow

filed an amended motion adding additional claims. The District Court dismissed the claims in the first petition as time-barred and the claims in the amended petition as unfounded. On appeal, the Fifth Circuit Court of Appeals reversed, finding the motion to withdraw the guilty plea was properly filed as a post conviction motion and remanded for further proceedings on the issue of the length of time the motions remained pending.

On remand the district court found that the motion was not time barred, but that Muhammad's conflict of interest was not an "actual conflict" because there was no multiple representation. The district court further found that the plea of guilty was voluntary. The district court also found the affidavits of Muhammad and Gallow were self-serving and conclusory. Gallow again appealed to the Fifth Circuit.

The above recitation is not a complete history of the case. Since 1999, Gallow has consistently and diligently attempted to bring his claim before the state court, by continuously filing documents pro se and urging the court to require Muhammad to appear. The state court and the attorneys who have appeared on behalf of Gallow have either ignored his claims or failed to take them seriously. At the point where Gallow appeals to the Fifth Circuit for the second time, there have been at least seven "evidentiary" hearings, but no evidence has ever been entered into the record other than the court file. No depositions of Muhammad were ever taken and it appears no subpoena was ever served upon him, even

when he was incarcerated.³ Apparently no one saw fit to gain his testimony or even do a cursory investigation to see if Gallow's allegations could be proven, until 2012 when the Fifth Circuit appointed the undersigned counsel to assist Gallow in pursuing his appeal.

Had Gallow's prior attorneys done a simple investigation they would have learned that Muhammad was laboring under a conflict so extreme that Muhammad ceased functioning as an attorney for the accused and began functioning as his judge.

Unbeknownst to Gallow, the district attorney who had prosecuted him, and who resisted Gallow's attempts to withdraw his plea, had removed the missing February 18, 2000 motion to withdraw the plea from the court clerk's record. The district attorney had this original motion in his possession from some time after it was filed, but before the first "evidentiary" hearing. He had it in his possession until March 26, 2001, when he filed a complaint with the Louisiana Attorney Disciplinary Board against Muhammad for ethical violations in connection with the representation of Gallow. The district attorney attached a copy of the missing February 18, 2000 Motion to Withdraw Guilty Plea and Muhammad's first affidavit to the complaint.

Also unbeknownst to Gallow, Muhammad appeared before the Disciplinary Board on October 24, 2001, and gave a sworn statement.

³ Upon information and belief, Muhammad was incarcerated in federal prison as a result of bankruptcy fraud in Mississippi and later in a parish jail for contempt of court, including contempt of the Evangeline Parish court where (and during the time) Gallow's claims were pending.

Muhammad testified that he went forward with representation of Gallow because he felt he had an “ethical obligation to [Gallow] to finish his defense, and also, I — then I had my family reasons.” Muhammad said in the end he could not finish the trial because of some of the things Gallow told him, causing Muhammad serious problems with Muhammad’s “religious beliefs” including things not related to the case. Muhammad testified that he did not bring the conflict to the attention of the trial court because “part of [him] felt that [Gallow] should be punished for what he did, that he should have been punished for a lot of things he had done in the past and gotten away with...[A]t that point, my obligation as a defense lawyer conflicted with my beliefs as a Muslim and what I did was.....I became his ‘Judgor’ instead of his counsel and that made it impossible for me to do.” Muhammad testified that he did not tell Gallow about the conflict of interest or that he could not cross-examine the witness during their discussion concerning the plea negotiations during trial. Muhammad was disbarred by the Louisiana Supreme Court, based on his actions in this case and other matters.

Gallow, upon discovery of this information, requested leave to expand the record to include this new information. The Fifth Circuit granted the motion.

After reviewing Gallow’s filings, the Fifth Circuit Court of Appeals affirmed the dismissal of Gallow’s §2254 petition for three reasons:

1. The exception to the failure to develop the record in state court created by *Martinez*, does not apply because the state court attempted to adjudicate Gallow's claims on the merits, therefore there was no procedural default.

2. It cannot consider the new information contained in the expanded record because the information was not presented to the state court, even though it was "loathe to turn a blind eye to the facts presented in the expanded record."

3. As a result, there is no evidence that Gallow's plea of guilty was involuntary.

REASONS FOR GRANTING THIS PETITION

Certiorari should be granted because the Fifth Circuit Court of Appeals has decided an important question of federal law in a way that conflicts relevant decisions of this Court.

A. The equitable relief available under *Martinez* for procedurally defaulted claims that result from inadequate representation at the initial State court post-conviction stage, should be extended to petitioners like Gallow, whose post-conviction counsel filed the appropriate post-conviction ineffective assistance of counsel claim, but then failed to do anything else of consequence to press those claims.

Both the petitioner in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), came before the federal courts with ineffective assistance of counsel claims that were not properly pursued by post-conviction counsel. The

only real difference between Gallow and Martinez, is that where Martinez's post-conviction counsel failed to assert a claim of ineffective assistance of trial counsel in his initial post-conviction filings, Gallow's counsel filed such a claim, but then utterly failed to take any other steps to present evidence of the claim in the state court. This, the Fifth Circuit said, distinguishes Gallow's claim. The failure to present evidence placed the state court in the position of denying Gallow's claim for lack of evidence, and therefore the state court decision is substantive and not procedural. The exception of *Martinez*, the Fifth Circuit reasoned, does not apply to Gallow's claim as a result.

Martinez, supra, holds that where a state designates the state court initial post conviction proceeding as the appropriate venue to litigate an ineffective assistance of counsel claim, ineffective assistance of post conviction counsel can establish cause to excuse procedural default. *Id.* at 1315. As a general rule, Louisiana defers ineffective assistance of counsel claims to post conviction proceedings. *State v. Bobo*, 77 So.3d 1, (La.App. 2 Cir. 6/8/11) (a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief (PCR) in the trial court than by appeal; this is because PCR creates the opportunity for a full evidentiary hearing). Only when it is clear from the examination of the record, will such a claim be determined on appeal from the criminal conviction. *State v. O'Neal*, 7 So.3d 182 (LA App. 2 Cir. 4/8/09).

Gallow's ineffective assistance of trial counsel claim was not developed before the state court because his counsel was incompetent to the point of also being ineffective. The failure of Adebamiji and subsequent attorneys to investigate and marshal admissible evidence to support the ineffective assistance claim rises to the level of an ineffective assistance of counsel claim in and of itself. Therefore the exception found in *Martinez* should apply to Gallow.

2. The federal courts should consider the expanded record even if it was not presented to the state court because the failure was the fault of obviously incompetent post-conviction counsel and the allegations of ineffective assistance of trial counsel are so egregious that the prosecution initiated a bar complaint based on trial counsel's actions.

The Fifth Circuit Court of Appeals refused to consider evidence in the expanded record that shows that Gallow's trial counsel was suffering under an actual conflict so gross that not only did it infect his ability to advocate zealously for Gallow, but led trial counsel to make sure Gallow was punished. Even though it was "loathe" to do so, the Fifth Circuit found that the language of 28 U.S.C. §2254(e) denying evidentiary hearings where the state court record was not developed, barred the consideration of any new evidence, relying on this Court's decision in *Cullen v Pinholster*, 131 S.Ct. 1388 (2011). *Pinholster* holds that if a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must make his case based using only the record that

was before the state court. However, what if the state court record is undeveloped because of ineffective assistance of post conviction counsel in the first proceeding in which a valid ineffective assistance of trial counsel can be raised?

In order to square *Pinholster* with *Martinez*, there must be an exception. That exception should be that where the new evidence of ineffective assistance of trial counsel was not developed due to the incompetence of post conviction counsel in the first proceeding where such a claim can be made, the federal court should excuse the default and review the evidence. This exception would do no injury to the state courts ability to decide state issues. Especially where, as here, the state court was faced with clearly incompetent and conflicted post conviction counsel who refused to take the necessary steps to present the claim. The is especially true where the ineffective assistance by trial counsel is so great as to cease being counsel for the defense and become judge, jury and executioner. Gallow's trial attorney threw him under the bus. We know the state knew these claims to be credible because the District Attorney found himself duty bound to report trial counsel's failures to the bar.

The state court turned a blind eye to Gallow's struggle to have his case heard by continually allowing not only Muhammad to escape explaining himself, but the attorneys entrusted with representing Gallow before it to shirk their responsibility to not only Gallow, but to the court.

Gallow does not argue that the state court should have taken on the responsibility of championing his claim, however, here, a clear injustice was occurring before the eyes of the state court. The state court, charged with doing justice and with the power to require the attorney's practicing before it to take their duties seriously, utterly failed to do so in this instance. As a result, there is no violence done to the State's ability to decide state issues and the federal court should not look the other way.

3. Gallow's claim of ineffective assistance of trial counsel should not be dismissed for lack of evidence when, as shown above, there is actual, credible evidence to support his claim.

Gallow has found, through due diligence and investigation, evidence that supports his claim. Through no fault of his own, but due to the ineptitude of his attorneys, this evidence was not presented to the state court. As argued above, the federal court should not turn a blind eye to this evidence.

CONCLUSION

Elrick Gallow, through force of will and persistence, repeatedly filed what documents he could from a prison cell keeping his claim alive, even in the face of continuous bumbling by incompetent counsel. He finally comes before this court requesting relief and showing a basis for his claim. For the forgoing reasons this Court should grant Certiorari.

Respectfully Submitted

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Appendix:

1. Fifth Circuit Opinion
2. District Court Order Adopting Report and Recommendations
3. Magistrates Report and Recommendations