ORIGINAL

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 2000-2001

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Supreme Court, U.S.
FILED
NOV 27 2000
OFFICE OF THE CLERK

In re DELMAR K. QUEZADA

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, DELMAR K. QUEZADA, In propria persona, respectfully moves this Honorable Court, pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States and 28 U.S.C.A. 1915, for an Order permitting him to proceed in this Court, in forma pauperis, with his **Ex Parte Petition for a Writ of Habeas Corpus.**

In support thereof, petitioner states as follows:

1. On May 03, 1999, in case No. 98-2101, the United States Court of Appeals for the Sixth Circuit denied petitioner's application to file a second petition for writ of habeas corpus under the Antiterrorism Effective Death Penalty Act.

2. Petitioner's request to proceed in forma pauperis in the United States Court of Appeals for the Sixth Circuit was granted.

3. Petitioner's Ex Parte Petition for Writ of Habeas Corpus has been filed contemporaneously with this motion, pursuant to Rule 39.2.

WHEREFORE, Petitioner respectfully urges this Honorable Court to permit him to proceed in forma pauperis in this Court.

ORIGINAL

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 2000-2001

In re DELMAR K. QUEZADA

EX PARTE

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO
28 U.S.C. §2241(a), 28 U.S.C. §1651(a), and S.Ct. Rule 20

BY: Delmar K. Quezada

Delmar K. Quezada #141748
Chippewa Correctional Facility
4387 West M-80
Kincheloe, MI 49784

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QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL. . . . . .

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1651(a), 28 U.S.C.A. §2241(a), Supreme Court Rule 20, and Felker v Turpin, 116 S.Ct. 2333, 2338-39; 518 US 651, 659-63 (1996).

STATEMENT OF THE CASE (PROCEDURAL HISTORY)

Due to the probate court's failure to advise Petitioner of his right to appeal and counsel's failure to perfect an appeal, your Petitioner's attempts for appellate review have been without counsel.

On September 5, 1974 the Isabella County Prosecutor filed a petition pursuant to MCLA 712A.4; MSA 28.3178(598.4) (Supp 1974), requesting the probate court waive its jurisdiction over Petitioner. Said petition alleged that Petitioner had committed murder in the first and second degree. File No. 74-2494.

On September 23, 1974 the late probate court judge BURKE McCLINTIC, entered an Order Waiving Jurisdiction to the 21st Judicial Circuit Court.

On April 17, 1975 seven months after the entry of the Order Waiving Jurisdiction, counsel filed a MOTION TO QUASH arguing that the waiver was improper, said motion was denied by the late Honorable Robert H. Campbell on May 19, 1975.

Subsequently, under advice of counsel, your Petitioner entered a guilty plea to second degree murder and was sentenced on June 16, 1975 to serve a term of Life imprisonment.

It wasn't until November 16, 1982 when your Petitioner sought

appellate review. Petitioner filed an Application for Leave to Appeal in the Michigan Court of Appeals, Case No. 66605. The issues raised therein are:

> 1. WHETHER DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW BY AN ALLEGED NON-COMPLIANCE WITH THE INTER-STATE COMPACT ON JUVENILES.
>
> 2. WHETHER THE JUVENILE COURT ACQUIRED JURISDICTION OVER DEFENDANT.
>
> 3. WHETHER DEFENDANT-APPELLANT'S WAIVER BY THE JUVENILE COURT AND SUBSEQUENT TRIAL AS AN ADULT OFFENDER VIOLATED DEFENDANT'S RIGHT TO BE FREE FROM BEING TWICE PLACED IN JEOPARDY.

This application was denied on May 4, 1983 for lack of merit on the grounds presented.

On January 3, 1983 your Petitioner filed in the Michigan Court of Appeals a Motion To Remand for a Tucker Hearing, this was denied on May 3, 1983.

On June 24, 1983 your Petitioner filed in the 21st Judicial Circuit Court a Motion To Vacate Sentence or In The Alternative Remand For an Evidentiary Hearing. The issues raised are:

> 1. FULL INVESTIGATION (WAIVER NOT PROPER WHICH REQUIRES VACATION OF SENTENCE).
>
> 2. CONVICTIONS CONSTITUTIONALLY INFIRM (WHICH IN THE LEAST REQUIRES VACATION OF SENTENCE AND RESENTENCING).

This motion to vacate was denied on March 13, 1984 by the Honorable TERRANCE R. THOMAS. Petitioner then sought Leave to Appeal in the Michigan Court of Appeals, leave was denied on September 19, 1984 in Case No. 78326. Subsequently, Petitioner sought Leave To Appeal in the Michigan Supreme Court, leave was denied on June 3, 1985 in Case No. 75132.

On November 19, 1985 Petitioner filed a petition for writ of habeas corpus raising the same issues that were raised in his Motion To Vacate. In Case No. G85-1190-CA United States Magistrate STEPHEN W. KARR submitted his Report and Recommendation recommending denial of the writ of habeas corpus. Subsequently, on June 19, 1986 United States District Judge BENJAMIN F. GIBSON approved the Report and Recommendation and adopted same as the opinion of the Court, thereby denying the writ of habeas corpus.

On June 23, 1987 Petitioner, again without having counsel to perfect an appeal as of right, filed a Motion For Reinstatement of Appeal As Of Right From Order Waiving Jurisdiction and Motion For Resentencing. The issues raised therein are:

> 1. WHETHER THE FAILURE OF THE PROBATE COURT JUDGE TO ADVISE DEFENDANT-APPELLANT OF HIS RIGHT TO APPEAL THE ORDER WAIVING JURISDICTION VIOLATED THE GUARANTEE TO EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TWO OF MICHIGAN'S CONSTITUTION 1963.
>
> 2. WHETHER DEFENDANT-APPELLANT IS ENTITLED TO RESENTENCING WHERE THE TRIAL COURT IMPROPERLY SENTENCED HIM TO A FIXED TERM CONTRARY TO THE THEN EXISTING INDETERMINATE SENTENCE ACT OF MICHIGAN FIRST TIME OFFENDERS, BEING PUBLIC ACT No. 193 of 1970.

This was denied on August 7, 1987. Subsequently, on March 30, 1994 Petitioner filed a Motion for Relief From Judgment pursuant to Michigan Court Rules 6.500 et seq. raising the identical issues he raised in his Motion For Reinstatement of Appeal as of Right. No appeal from this denial was ever taken.

On May 23, 1996 Petitioner, in light of the case of People v Whitfield, 214 Mich App 348, 543 NW2d 347 (1995) filed a Motion

For Relief From Judgment raising the following issue:

1. DEFENDANT-APPELLANT WAS DENIED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

This was denied by the trial court on July 16, 1996 citing Petitioner's failure to establish entitlement to relief. Application for Leave to Appeal in the Michigan Court of Appeals was filed and this was denied in Case No. 204135, and Petitioner sought Leave to Appeal in the Michigan Supreme Court, this was denied on September 28, 1998 in Case No. 111396.

Since Petitioner had filed a writ of habeas corpus on November 19, 1985 and since he is now subject to the Antiterrorism Effective Death Penalty Act of 1996, Petitioner sought authorization from the Federal Circuit Court of Appeals (6th Cir.) to file a second petition for writ of habeas corpus on November 4, 1998. This was denied in Case No. 98-2101.

PARTIES INVOLVED

Petitioner is confined due to a state conviction and is under the jurisdiction of the Michigan Department of Corrections. He is presently being held at the Chippewa Correctional Facility in Kincheloe, Michigan. The Warden of said facility if Ms. PATRICA CARUSO. Thus she has custody of Petitioner adn is therefore a party to this Original Petition for Habeas Corpus.

REASONS FOR GRANTING WRIT OF HABEAS CORPUS

The issue involved in this Petition is that:

> THE PETITIONER WAS DENIED REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner is requesting that this Honorable Court finds that counsel rendered ineffective assistance when he failed to file an appeal as of right from the probate court's order waiving jurisdiction; that this Honorable Court reinstate his appeal as of right from the probate court's order waiving jurisdiction and order the appointment of counsel to perfect the appeal. The granting of this petition will aid this Court's jurisdiction in that it will finally settle the law that where an appellate procedure exist a juvenile has not only a Due Process right, but is guaranteed the right under the Sixth Amendment to the effective assistance of counsel on appeal. In support thereof Petitioner sets forth the following argument:

Juvenile law in these United States has taken many years to develop. The first Juvenile Act enacted was in 1895 in Chicago, Illinois. It wasn't until 71-years later, in 1966, when this Court determined that a juvenile was entitled to counsel whenever the

No. 98-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAY 03 1999

LEONARD GREEN, Clerk

In re: DELMAR QUEZADA,

Movant.

ORDER

Before: JONES, NELSON, and NORRIS, Circuit Judges.

Delmar Quezada, a pro se Michigan prisoner, moves for an order authorizing the district court to file a second habeas corpus petition. See 28 U.S.C.A. § 2244 (West 1998). The state has declined to file a response.

As a preliminary matter, we conclude that Quezada's application would be barred as an abuse of the writ under the law in effect at the time of the enactment of the Antiterrorism and Effective Death Penalty Act. See *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991). Therefore, the Act can be applied to Quezada's case without creating an impermissible retroactive effect. See *In re Hanserd*, 123 F.3d 922, 924 (6th Cir. 1997). We also conclude that Quezada has not established the prima facie case necessary under the statutory requirements. See 28 U.S.C.A. § 2244(b)(3)(C) (West 1998). Quezada has not cited a new rule of constitutional law because the case on which he relies, *Evitts v. Lucey*, 469 U.S. 387 (1985), was decided before he filed his previous petition. Moreover, Quezada is only presenting a belated legal claim, and a belated legal claim is not newly discovered evidence. See *United States v. Seago*, 930 F.2d 482, 489-90 (6th Cir. 1991).

Quezada's motion under § 2244 is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, jr
Clerk