NO. 08-76

IN THE SUPREME COURT OF THE UNITED STATES

KAREN BRUNSON,
SUPERINTENDENT, CLALLAM BAY
CORRECTIONS CENTER,

Petitioner,

v.

JERRY L. HARRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

1. Harris Does Not Dispute The Primary Reasons For Granting The Writ

The Petition For A Writ Of Certiorari advanced two primary reasons for granting the writ. First, this Court has expressly left open the question of whether equitable tolling applies to the statute of limitations in 28 U.S.C. § 2244(d)(1). *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005), and *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Pet. 13. Second, the decisions of the courts of appeal approving equitable tolling are inconsistent with this Court's jurisprudence. Pet. 15-23. Harris does not take issue with either of these points.

Harris argues that there is no conflict in the circuits about whether equitable tolling applies to § 2244(d)(1), and that there is no conflict about whether equitable tolling is available when a defendant, like Harris, relies to his detriment upon actions and decisions of courts. Br. Opp. 8-15. The petition acknowledged that the First through the Eleventh Circuits of the courts of appeal have ruled that equitable tolling applies to the statute of limitations in § 2244(d)(1). Pet. 13-18. In most cases, the absence of a conflict would be an important reason for denying the writ. However, in this case, there will never be a conflict in the circuits. Thus, if the Court is to resolve the question it has left open, it must grant the writ in the absence of a conflict.

2. Harris Is Not Entitled To Equitable Tolling

Harris argues that the Court should not grant review because the facts of this case clearly justify equitable tolling. Br. Opp. 17. However, as the petition explained, this case deals with more than a controlling decision of a court. Pet. 23-27. *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001), was controlling authority in the Ninth Circuit for the proposition that "if a state's rule governing the timely commencement of state postconviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" But, there was contrary authority in other circuits that such petitions were not properly filed. *Brooks v. Walls*, 279 F.3d 518, 524 (7th Cir. 2002); *Merritt v. Blaine*, 326 F.3d 157, 165 (3d Cir. 2003).

The Court left this question open in *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000). Harris made a tactical decision to rely on *Dictado*—hoping this Court would not reach the issue or would affirm *Dictado*—instead of filing a protective habeas corpus petition.

Harris argues that he could not have easily filed a protective petition and asked that it be stayed while he exhausted his state remedies because there was no procedure for this until *Rhines v. Weber*, 544 U.S. 269 (2005). Br. Opp. 15-16. In fact, the Ninth Circuit had a procedure under which a defendant could file a protective petition and pursue unexhausted claims in state court. *Jackson v. Roe*,

425 F.3d 654, 658-59 (9th Cir. 2005), explained that the Ninth Circuit

> "developed a three-step procedure applicable to petitions that contained both exhausted and unexhausted claims . . . The procedure included (1) allowing a petitioner to amend his petition to remove the unexhausted claims . . . (2) staying and holding in abeyance the amended, fully exhausted petition to allow a petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) permitting the petitioner after completing exhaustion to amend his petition once more to reinsert the newly exhausted claims back into the original petition."

Thus, before *Rhines* was decided, the Ninth Circuit had a procedure akin to stay and abeyance. *Calderon v. United States District Court,* 134 F.3d 981, 986 (9th Cir. 1998) (The district court had authority to delete unexhausted claims, stay the amended petition, and allow amendment to add newly exhausted claims.). The Ninth Circuit also allowed a defendant to stay a petition while exhausting newly discovered claims in state court. *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993) (The district court abused its discretion in denying habeas corpus petitioner's request for stay of resolution of his petition to allow petitioner, who had been sentenced to death, to exhaust his state remedies on newly identified claims.).

This case presents a good vehicle to decide whether equitable tolling applies to the statute of limitations in § 2244(d)(1) because it involves both a controlling court decision and the tactical choices of the defendant.

3. The Fact That The State Did Not Argue That Equitable Tolling Is Not Available In The Ninth Circuit Is Not A Bar To Jurisdiction

Harris argues that review should not be granted because the State did not argue below that equitable tolling did not apply to § 2244(d)(1). Br. Opp. 17-19. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). However, even if "a claim [was] not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon'". *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). In this case, the Ninth Circuit passed on the question. The court stated: "Although the Supreme Court has never explicitly decided whether § 2244(d) allows for equitable tolling, *see Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), we hold that it does, *see, e.g., Espinoza-Matthews*, 432 F.3d at 1026." Pet. 7a n.4. Indeed, the State emphasized that the Court left open the question of availability of equitable tolling. *See, e.g.*, Brief of Respondent-Appellee at 27, *Harris v. Carter,* 515 F.3d 1051 (9th Cir. 2008) (No. 06-35313).

Moreover, "[a]lthough the Court generally declines to review *issues* not pressed or passed upon

by lower courts, it has allowed petitioners to make new *arguments* in support of claims properly presented below." *Supreme Court Practice* (9th ed.), at 465. In this case Harris does not dispute that the State argued that he was not entitled to equitable tolling. The argument that equitable tolling does not apply to § 2244(d)(1) is simply a new argument in support of the State's contention on this point.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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