2017

Petitioner's Response To The Court's Order To Show Cause, Johnson v. Pfister, Docket No. 1:17-cv-03997 (N.D. Ill. 2017)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORMAN JOHNSON, Petitioner, v. RANDY PFISTER, Warden, Stateville Correctional Center, Respondent.	)))))))))	**Case No: No. 17 C 3997** **Judge John J. Tharp, Jr.**

PETITIONER'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

Petitioner NORMAN JOHNSON, by and through his attorneys at The John Marshall Law School Pro Bono Program & Clinic, files the instant response to this Court's Order to Show Cause as to why Mr. Johnson's Habeas Corpus petition should not be barred by procedural default. In support of Petitioner's Response, Petitioner states as follows:

INTRODUCTION

Mr. Johnson submits that he is not barred because his lack of counsel, while pursuing his state court appeal of his conviction falls under the exception created by the Supreme Court in *Martinez v. Ryan*, 566 U.S. 1, 14, (2012). Further, Mr. Johnson submits that a failure to review these claims would result in a fundamental miscarriage of justice, as Mr. Johnson now presents to the court additional new and reliable evidence establishing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

I. BACKGROUND

Mr. Johnson, a prisoner confined at the Stateville Correction Center, brought this action pursuant to 28 U.S.C. § 2254 challenging his 2011 murder conviction in the Circuit Court of Cook County.

On January 21, 2011, a jury convicted Mr. Johnson of first-degree murder following a trial. On February 9, 2011, the trial court denied Mr. Johnson's motion for a new trial and sentenced him to forty years incarceration in the Illinois Department of Corrections. Mr. Johnson appealed his conviction to the First District Court of Appeals on June 28, 2013. The court affirmed the conviction on July 26, 2013. *People v. Johnson*, 2013 IL App (1st) 11137 ¶ 1. Mr. Johnson did not file a petition for review to the Illinois Supreme Court.

On February 10, 2014, Mr. Johnson filed a *pro se* post-conviction petition alleging, *inter alia*, that trial counsel was constitutionally ineffective for failing to call Andrew Sanford, a potentially exculpatory witness. On May 9, 2014, the trial court dismissed the petition on the basis that Mr. Johnson failed to attach a supporting affidavit from Sanford.

On June 4, 2014, Mr. Johnson filed a *pro se* motion to reconsider. The court denied Mr. Johnson's motion to reconsider on July 8, 2014. Mr. Johnson appealed the dismissal. The First District Court of Appeals affirmed on June 30, 2016. *People v. Johnson*, 2016 IL App (1st) 142544 ¶ 1. The Illinois Supreme Court denied review on November 23, 2016.

This placed Mr. Johnson's appeal of his murder conviction in procedural default. This defect in his appeal has been corrected. Attached to this response is an affidavit from the missing witness, Andrew Sanford, providing reliable eyewitness evidence that Mr. Johnson was not one of the shooters responsible for the death of Jerrell Jackson. (*See* Affidavit of Andrew Sanford, Attached as Exhibit "1")(hereafter, "Sanford Affidavit").

After filing his petition with this Court for the writ of Habeas Corpus, this court ordered Mr. Johnson to show cause as to why his petition should not be dismissed for being in procedural default.

II. MR. JOHNSON SHOULD BE GRANTED CAUSE TO EXCUSE HIS PROCEDRUAL DEFAULT

Although Mr. Johnson is in procedural default, that default may be excused. There are two reasons why this Court should excuse Mr. Johnson's procedural default. First, a procedural default may be excused "where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 14, (2012). Second, if Mr. Johnson is not given cause to excuse his procedural default, a fundamental miscarriage of justice would occur because of new evidence showing his actual innocence such that, more likely than not, "no reasonable juror would have convicted him in light of the new evidence." *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003).

A. Mr. Johnson Qualifies under the Exception Established under *Martinez.*

Although Mr. Johnson is in procedural default for his failure to attach an affidavit in the state court proceedings, his procedural default occurred while self-represented on appeal, and while both he and the witness, Andrew Sanford, were incarcerated. While developing his appeal for ineffective assistance of counsel, Mr. Johnson had no counsel to obtain the affidavit from Mr. Sanford and assist Mr. Johnson in the initial collateral proceeding.

"To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." *Martinez* 566 U.S. at 12. After his imprisonment, Mr. Johnson was in no position to develop the necessary "evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.* When counsel was not appointed for the defendant, a procedural default "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was

ineffective." *Id.* at 17. Mr. Johnson labored without the assistance of any counsel during first-tier post-conviction proceedings, as his appeals were filed *pro se*. As a consequence, he clearly falls under the exception created by *Martinez*, under which a procedural default "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17.

A rule requiring an affidavit from an incarcerated *pro se* defendant pursuing an ineffective assistance of counsel appeal would not be an adequate and independent state ground because an incarcerated defendant could not reasonably comply with such a rule. Rules are not adequate if disproportionate to the ends they serve. "To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney." *Id.* at 12. Mr. Johnson has now filed this affidavit, through assistance of counsel, as soon as able in the forum where his claim is being litigated. *Martinez* confirms Mr. Johnson's right to federal review of his ineffective assistance of counsel claim under these circumstances due to his status as an incarcerated petitioner and his status as a *pro se* litigatant that resulted in his procedural default.

The Seventh Circuit has closely followed *Martinez*, allowing lack of effective assistance of counsel as cause to excuse procedural default for those defendants seeking federal habeas relief. *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017). This ruling hews closely to other Circuits, who have applied *Martinez* to allow defendants to show cause to excuse their procedural default. *See, e.g., Bey v. Superintendent*, 856 F.3d 230 (3d Cir. 2017) (granting relief under *Martinez* where counsel ineffectively failed to object to deficient jury instruction); *McLaughlin v. Laxalt*, 665 Fed. Appx. 590 (9th Cir. 2016) (remanding for *Martinez* hearing

where counsel failed to present viable defense at guilt phase of trial); *Brizendine v. Parker*, 644 Fed. Appx. 588 (6th Cir. 2016) (ordering evidentiary hearing on substantial ineffectiveness claims).

This Court should therefore excuse Mr. Johnson's procedural default because that procedural default occurred in a collateral proceeding that Mr. Johnson undertook without legal representation. Under *Martinez*, a procedural default under these circumstances should be excused by the Court.

B. Mr. Johnson Has Produced New Evidence Such that More Likely Than Not No Reasonable Juror Could Convict Based on the New Evidence.

A procedural default may also be excused under other circumstances. Specifically, a petitioner must either "show cause and prejudice for his failure to exhaust his state claims, or he must show that a failure to review these claims results in a fundamental miscarriage of justice." *Spreitzer v. Schomig*, 219 F.3d 639, 647 (7th Cir. 2000). To show a fundamental miscarriage of justice, an appellant must present evidence of actual innocence, not just legal innocence. A habeas petitioner must "present and must bring 'new reliable evidence . . . that was not presented at trial' and must establish that 'it was more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Nitz v. Sigler*, 2008 U.S. Dist. LEXIS 112556, at *44 (S.D. Ill. Dec. 19, 2008), *quoting Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003).

This new evidence "does not mean 'newly discovered evidence'; it just means evidence that was not presented at trial." *Jones v. Calloway*, 842 F.3d 454, 461 (7th Cir. 2016), *citing Schlup v. Delo*, 513 U.S. 298, 322 (1995). The inquiry considers "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Jones*, 842 F.3d 454, 461, *quoting Schlup* 513 U.S. at 329. The court must "make a probabilistic determination about what reasonable,

properly-instructed jurors would do," based on this new evidence, even if was not newly discovered evidence. *Schlup*, 513 U.S. at 329.

As developed in detail in Mr. Johnson's habeas petition, Andrew Sanford witnessed the murder for which Mr. Johnson was convicted, but was not called to testify at trial. At the scene of the shooting, a stray bullet pierced the window of Sanford's apartment and struck him, causing minor injuries. (Trial Tr. CC-85, DD-30). While neither the State nor the defense called Sanford to testify, a police report established that he observed the shooting.[1] Sanford's affidavit, attached hereto, states that he was overlooking the scene of the shooting, that he had known Mr. Johnson for many years before the shooting and would have recognized him by sight, and that none of the shooters resembled Mr. Johnson, as the shooters were significantly taller than Mr. Johnson. (Sanford Affidavit at 1).

When determining whether new evidence has met the threshold for establishing actual evidence, "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Jones*, 842 F.3d 454, 461, *quoting Schlup*, 513 U.S. at 329. Indeed, Mr. Johnson's claim is a procedural actual innocence claim and satisfies the gateway threshold if "sufficient doubt about [his] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error." *Schlup*, 513 U.S. at 317.

Again, as developed more fully in Mr. Johnson's habeas petition, the State's case against him was rife with contradictory statements by its three main fact witnesses, Douglas Johnson,

[1] The report indicates that a Chicago police officer spoke with an individual identified as "Victim 2" who was indoors when the shooting occurred. "Victim 2" told the officer that he saw three men walk towards the dice game on St. Louis Avenue and then open fire. Seconds later, a bullet struck "Victim 2." While the report redacts the victim's name, Sanford was the only victim shot while inside his home. Hence, "Victim 2" could only be Andrew Sanford.

Margaret Faulkner, and Jason Cooley. Douglas Johnson, known as "Fresh," testified that there were three shooters, a man in a white t-shirt accompanied by two other men wearing black hoodies. (Trial Tr. BB-119). Margaret Faulkner testified that there were only two "boys" wearing dark hoodies that were the shooters. (Trial Tr. BB-61). Faulkner said nothing about a man in a white t-shirt or a "triangle" formation. (Trial Tr. BB-93). Faulkner agreed that "if anybody is saying that there were three people out there, that would be wrong." (Trial Tr. BB-93). On cross-examination, Mr. Cooley admitted to a conversation with Mr. Johnson's defense counsel during which he divulged that *three* other men accompanied him to the crime scene. (Trial Tr. BB-199-200).

"Fresh" also testified he did not see any of the shooters' faces. (Trial Tr. BB-120-21, 141). Instead, he testified that he could only identify Mr. Cooley by the sound of his voice, contradicting his grand jury testimony where he testified that he was able to identity Mr. Johnson by site (Trial Tr. BB-120-21, 136, 141). Two days after the shooting, "Fresh" recalled that police detectives "showed [him] some pictures of some peoples [*sic*]." (Trial Tr. BB-128). He was unable to make any positive identifications from the photographs. (Trial Tr. BB-129). "Fresh" repeatedly stated that he "never" told police that Cooley and Mr. Johnson were the shooters. (Trial Tr. BB-133-34). To the contrary, "Fresh" maintained that the officers "told [him] that" Cooley and Mr. Johnson were the culprits." (Trial Tr. BB-134). "Fresh" described the officers' efforts to persuade him to inculpate the two men as a "script" and a "story." (Trial Tr. BB-136).

Additionally, the testimony of Ms. Faulkner did not fare well under cross-examination. On cross-examination, Faulkner admitted that she expressed concern about the lineup in a meeting with a defense investigator. (Trial Tr. BB 93-94). Faulkner told the investigator that, prior to her identification of Mr. Johnson in the lineup, an officer showed her a photograph of

Mr. Johnson and told her that he was "identified with [Cooley] all the time so [the second shooter] has to be him." (Trial Tr. BB 95-96). Based on those comments, Faulkner believed that the police "were trying to make [her]" identify Mr. Johnson as the second shooter. (Trial Tr. BB 96-97). After Faulkner picked Mr. Johnson, one officer told her, "You did good." (Trial Tr. BB-97).

Finally, Mr. Cooley's testimony contradicted his prior statements that he had made to investigators. Cooley admitted that the disclosure contradicted his prior statements and trial testimony when he claimed that only one other person – an unidentified associate of Mr. Johnson's – was present. (Trial Tr. BB-168, 199). Cooley said that he did not initially inculpate Mr. Johnson in a post-arrest interview, but did so only after the police told him that Mr. Johnson was also a suspect and showed him Mr. Johnson's photograph. (Trial Tr. BB-177, 199). Cooley stated that he knew that the police had arrested Mr. Johnson and released him shortly thereafter. (Trial Tr. BB-208). He (Cooley) suspected that Mr. Johnson named Cooley as the shooter, resulting in Mr. Johnson's quick release from custody. (Trial Tr. BB-208). Cooley confessed that he "lied about a lot of stuff" during various police interrogations. (Trial Tr. BB-178, 193).

Mr. Johnson's attorney, Ruth McBeth ("McBeth"), described Mr. Sanford as having "the best position" to view the shooters. (Trial Tr. BB-18). Yet McBeth did not call Sanford to testify in Mr. Johnson's defense. During her closing argument, she attacked the credibility of the State's witnesses and highlighted the lack of forensic evidence connecting Mr. Johnson to the crime. (Trial Tr. DD-15 – 33). To this end, McBeth reminded the jury, "[W]e don't have any burden of proof" and "[W]e don't have to bring you eyewitnesses to persuade you that Norman didn't do this." (Trial Tr. DD-31). Nevertheless, McBeth again referenced Sanford, characterizing him as "a solid citizen" with "a perfect shot" to view the culprits. (Trial Tr. DD-30). She provided no

explanation for his absence. In its rebuttal, the State seized upon the seeming contradiction, asking jurors, "Where is Andrew Sanford?" (Trial Tr. DD-39). Without Sanford's testimony, the State cautioned, "[t]here is no evidence that you heard that he saw anything. You have no evidence that there is another eyewitness. Nothing." (Trial Tr. DD-39).

Mr. Sanford's testimony was the key piece of evidence in the defense's case whose absence made it possible for the jury to convict Mr. Johnson. Had Mr. Sanford testified as to the facts stated in his affidavit, it is more likely than not that a reasonable juror would have been unable to convict Mr. Johnson. The State's three main witnesses proffered testimony which contained contradictions and who had credibility issues. Their flawed testimony would have been contradicted by another eyewitness who had the best view of the scene. The omission of Mr. Sanford is especially glaring when measured against the State's modest case against Mr. Johnson. The State's trio of eyewitnesses – "Fresh," Faulkner, and Cooley – were significantly biased, of suspect credibility, and factually at odds.

In *Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016), a factually similar case from the Seventh Circuit, is instructive on when a District Court should hold that a defendant has crossed the gateway standard for a procedural actual innocence claim. Like this case, Jones's attorney failed to call a critical witness that provided exonerating evidence for the defendant. *Id.* at 460. Like this case, the prosecutions' witnessed were "all over the map." *Id.* at 462. The District and Appellate Courts both held that Mr. Jones met the threshold for an actual innocence claim, and that he had received a constitutional violation of his Sixth Amendment right to an effective assistance of counsel. *Id.* at 467. "As a general matter, a defense attorney's failure to present a material exculpatory witness of which he was aware qualifies as deficient performance." *Id.* at 464.

Like Jones's attorney, Mr. Johnson's attorney delivered a deficient performance in her defense. In failing to call Mr. Sanford to the stand, McBeth not only failed to deliver on her promises to the jury, she also failed to provide the jury with the most powerful testimony available to contradict the State's chief witnesses. With Mr. Sanford's testimony, it more likely than not than no reasonable juror would have been able to vote to convict him. Accordingly, Mr. Johnson has met the threshold for this Court to grant an excuse for his procedural default because holding otherwise would result in a fundamental miscarriage of justice.

CONCLUSION

WHEREFORE, Mr. Johnson asks this Court to grant excuse for his procedural default under the exceptions created by *Martinez* and also by his production of new evidence demonstrating his actual innocence and for any other relief this Court deems equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on August 24, 2016, the foregoing Response to the Court's Order to Show Cause was filed electronically with the Clerk of the U.S. District Court for the Northern District of Illinois using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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