No._____

IN THE

Supreme Court of the United States

WILLIAM DIXON,
Petitioner

v.

STATE OF NEW YORK,
Respondent

On Petition For Writ Of Certiorari

SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

William Dixon
Pro se Defendant / Petitioner
Eastern NY Correctional Facility
Box 338
Napanoch, N.Y. 12458-0338

QUESTION(S) PRESENTED

Whether a Federal Court Can Stay and hold in Abeyance a 28 USC § 2254 Petition for Habeas Corpus to Permit Petitioner to Exhaust Claims in State Court and Upon Completion Arbitrarily Exclude those Claims to Render Decision?

Whether the Court in Determining What Constitutes the Substantial showing Apply Reasonable, Fair and Obtainable Standards to Indigent and Pro Se Applicants?

Whether Open-File Discovery Restrains Defense Motion Practice and Mandate the Court to Resolve All Incidents and Matters of Relief?

Whether an Undisclosed Conflict of Interest in Representation is Automatically Removed Upon Recusal Without the Prospects of Any Prejudicial Effects?

LIST OF PARTIES

Office of the Attorney General
Department of Law
The Capitol, Albany 12224-0341

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinions of the United States Court of Appeals appears at Appendix ___A___ to the petition and is

[✓] reported at 2018 WL 2095739; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States District Court appears at Appendix ___B___ to the petition and is

[✓] reported at 2017 WL 4402439; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

[ ] For cases from **state courts**:

The opinions of the highest states court to review the merits appears at Appendix ___E___ to the petition and is

[✓] reported at 21 NY 3d 1073; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Appellate Division Second Department court appears at Appendix ___F___ to the petition and is

[✓] reported People v Dixon, 107 AD 3d 735 [N.Y. App Div. 2013] or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 6, 2018.

[ ] No petition for rehearing was timely filed in my case,

[ ] A timely petition for rehearing was denied by the United States Court of appeals on the following date: _____, and a copy of the Order denying rehearing appears as Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on N/A (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court denied my case was Sept. 10, 2013. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ _____, and a copy of the Order denying rehearing appears as Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on N/A (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Sixth Amendment

In its pertinent part, the Sixth Amendment, states:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory proceed for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article I, Section 9 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 2254 of Title 28 0f the United States Code provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution of laws and treaties of the United States.

(b)(1) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant exhausted the remedies available in the courts of the State ...

STATEMENT OF THE CASE

Petitioner William Dixon was convicted in a Brooklyn state court for third degree robbery and sentenced to fifteen years to life.

Dixon appealed to the Second Judicial Department, Appellate Division raising contentions in Attorney's Brief and Pro Se Supplemental Brief.

Despite discrepancies in racial identification by person of different ethnicities this and the abuse in sentencing was denied, along with petitioner's being deprived of effective assistance of counsel claim, based upon the record as a whole (People v Dixon, 107 AD 3d 735 [N.Y. App. Div. 2013]). The Court of Appeals rejected Leave Application, 21 NY 3d 1073 (Sept. 23, 2013).

On Sept. 29, 2013, petitioner sought information and or court records from the attorney initially appointed for representation. The attorney in a Oct. 7, 2013 response asserted to filing Omnibus motion w/ motion to dismiss indictment 'Orally' and based on agreement with Kings County DA to consent to motions without requiring them to be in writing; and that once case is arraigned in Brooklyn Supreme Court the first adjournment is for the People to turn over discovery and provide the court with a copy of the Grand Jury minutes so the court can decide ... the attorney's inspect and dismiss motion and to the best of her recollection, that procedure was followed in the case, (though the evidence required the charges be reduced or dismissed, they were not).

Pursuant to petitioner's Oct. 14, 2013 request, the original attorney in a Oct. 23, 2013 response stated: "We do not have transcripts of any of petitioner's court appearances." Attached please find a copy of the discovery stipulation entered by the Legal Aid Society in Brooklyn and the Brooklyn District Attorney's Office (although it was a blank template). The attorney added that "As a matter of practice we do not actually make a formal oral application; rather the judge will automatically inspect the minutes and consider dismissal of any counts unsupported by the evidence presented in the Grand Jury" (which did not occur). Further, that "The request for Wade hearing as well as decision about whether to demand a Bill of Particulars and motion for sanctions, would have been made by the attorney who represented you at hearings and trial" (despite the attorney's claim of Omnibus Motion and their inspect and dismiss motion). Finally, alleging to have informed petitioner of [their law firms] request to be relieved and that new counsel be appointed, before ... application was made to the court (void of any record or application to the court).

Petitioner in a Nov. 21, 2013 reply requested case file and conveyed the fact of not being informed of the reason for the attorney's removal at the time, due to their approaching the bench absent petitioner presence at and during the sidebar. Also, petitioner made a continuous request that "If it was not to much to ask can you tell me why?" (with no response).

On a Dec. 26, 2013 petitioner sent a follow-up letter reiterating not being informed on the matter and requesting the reason why the attorney was removed.

Petitioner in a Jan. 28, 2014 notice requested an affidavit from the attorney clarifying: (1) The reason there was no discovery demand or bill of particulars obtained. (2) Why the attorney opted

not to file an omnibus motion. (3) Neglecting to seek sanctions for the police failure, to properly voucher the evidence or property (4) Not preparing in writing, Motion to Dismiss Indictment and to inform petitioner of the arguments raised, with the prosecutor's response and the court's decision. Also not informing petitioner of all agreements made. (5) The reason for the attorney's removal and all effort taken to notify alternate counsel of the current status of the case and to assure that any stipulations were carried out as a duty and obligation to petitioner.

On Feb. 6, 2014 one of the attorney's supervisor replied "I received your letter dated Jan. 28 asking her several questions. I'll do my best to respond to them." Question 1 & 2: In Brooklyn, it is standard practice not to file a Demand for Discovery, Request for Bill of Particulars, or Omnibus Motion. Instead, the District Attorney provides us with Open File discovery (OFD) and consent to any necessary hearings. Written filings are necessary only if the DA is not giving us what we're entitled to get. We agree to OFD and hearings because we generally get more information, we get that information faster, and we do hearings and trial faster this way. Question 3: Lawyers seek sanctions at the right time, which is generally pretrial suppression hearings or a trial. I don't know enough about your case to know whether sanctions were even appropriate, let alone whether they should have been requested when Ms. Murray represented you. Question 4: In Brooklyn, it is standard practice not to file Motion to Inspect and Dismiss. Judges, of their own accord, look at the grand jury minutes and decide if the indictment should be dismissed. New York law doesn't require us to make a formal request for them to do this. There would have to be novel issue requiring a legal brief for a lawyer to file papers. I don't know if this was true in your case, let alone whether Ms. Murray was your lawyer at the time such papers were appropriate. I am not aware of any "agreements made" "pertaining to the evidence and matters of law" of which you were not informed. I see that Ms. Murray did keep you informed during the plea bargaining process (void of the facts or proof), and that she relieved relatively early on during the pendency of your case. Question 5: The only reason I know that we were relieved is that there was a "conflict." (But) I don't know the nature of that conflict (evasively in deliberate denial). I do know that your newly assigned counsel was given all your paperwork.

In a Feb. 25, 2014 letter imploring the attorney to apprise petitioner of the particulars concerning case and to provide files; and in a Feb. 28, 2014 response the Supervisor stated the attorney was out of the office and that they ordered petitioner's files and unfortunately all paperwork was turned over to subsequent counsel. The supervisor also instructed petitioner "For the third time, you should contact the appeals lawyer or have him/her contact me if you need more information.

Petitioner in a March 25, 2014 reply conveyed to the attorney the need for the Judge's decision on motion pertaining to Open File Discovery and hearings, clearly stating "While there's other avenues or channels to pursue before taking ... case to the Federal Court" (exhaustion) and being that the attorney relieved herself she should be the one to state the reason for [her] recusal.

On Aug. 4, 2014 after not receiving any response to prior reply, petitioner forwarded a request to the Supervisor to clarify, if there is a "gag order" on the attorney, prohibiting further correspondence. Also asking the supervisor's position in the matter and for a copy of the Stipulations and Decision(s) rendered in regard to Omnibus Motion (with no response). Petitioner unable to obtain the needed information and or case/file for other state court motions

and relief was constrained to submit the Writ of Habeas Corpus on Dec. 1, 2014, which the prosecution Affirmation in Opposition classified the Writ as a mixed petition with exhausted & unexhausted claims and in a March 16, 2015 letter to Pro Se Office in the Eastern District, request to hold the Writ of Habeas Corpus in Abeyance was made by petitioner and in a later May 12, 2015 re-application.

The District Court in a Memorandum and Order on June 10, 2015 stated in the conclusion, that Petitioner is ordered to show cause by August 10, 2015 why this petition should not be dismissed as a mixed petition; and in a Aug. 4, 2015 plea to the Court petitioner complied, outlining the merits and explaining with the abovementioned letters, received after the Direct Appeal and Leave Application were denied; all while beseeching the Court and awaiting order to hold in abeyance and giving notice of the 440.10 and the exhaustion of claims in the state court. The District Court in a September 29, 2016 Order indicated that petitioner last represented that he was attempting to exhaust those claims in a motion filed in state court under N.Y. Crim. Law § 440.10 ("Section 440 motion") (ECF No.18 at 1), but has not since communicated the status of the Section 440 motion. Petitioner was ordered to notify the Court by December 2, 2016 of the status of his Section 440 motion, (thus allowing the stay and abeyance).

Following petitioner notifying the Court in a Oct. 8, 2016 letter of the full exhaustion, the Court unfairly and mistakenly determined in the Sept. 29, 2017 Memorandum and Order (p.10) that issued on June 15, 2015 the Court directed petitioner to either (1) Show Cause why his petition should not be dismissed as a mixed petition or (2) indicate whether he would prefer to (a) withdraw his entire application while pursuing his unexhausted grounds and proceed with only the exhausted grounds (ECF No.16 at 4). While the Memorandum and Order dated June 10, 2015 noted: Petitioner is advised that the one-year limitation period applicable to habeas petition would generally bar him from filing another habeas petition in federal court. Adding, Failure to respond and affirmatively withdraw petitioner's unexhausted claims by this deadline will result in dismissal of the entire petition.

Despite the writ of habeas corpus application (p14) briefly clarifying the matter and respondent's March 10, 2015 affidavit in Opposition to petition for writ of habeas corpus (p.2-3) stating: Petitioner's direct appeal became final on December 9, 2013, which was ninety days after petitioner's application for leave to appeal to the New York Court of Appeals was denied. See Ross v Artuz, 150 F3d 97, 98 (2d Cir.1998) (Where certiorari to the United States Supreme Court was not sought, convictions are deemed final on the date on which the time to seek certiorari expires); Rule 13 of the Rules of the Supreme Court of the United States (petitioner has ninety days after entry of judgment denying discretionary review of state court of last resort to file within one year from, insofar as is relevant here, the date on which petitioner's conviction became final by the conclusion of direct review. 28 USC § 2244 (d)(1)(A). Consequently, petitioner had one year from Dec. 9, 2013 in which to file a timely habeas petition. Petitioner habeas petition is dated Dec. 1, 2014. Hence, petitioner waited to file his habeas petition till the (1) yr. period during which could file a timely petition had almost expire.

Accordingly, if petitioner chooses to exhaust his claim of ineffective assistance of counsel, the state asks this Court to limit petitioner to a reasonable period of time in which to commence the state court proceeding and reasonable period of time in which to reactivate the petition because it contains an unexhausted claim. See Rose v Lundy, 455 US 509, 522 (1982) (agreeing to stay). The Judge ultimately determined, through misinterpretation, after previously giving a designated deadline for notifying the Court to the (considered) disposition of the very motion (CPL 440.10) facilitating the processing of said issues already exhausted in Aug, 25, 2016, that [p.10 & 11] In response, petitioner repeated his request to stay his petition and alternatively, asked that the court review his exhausted arguments. (ECT No.18) In support of this (third) request to stay his petition, Petitioner again failed to show good cause for not exhausting the 10 new grounds underlying his claim of ineffective assistance of counsel stating only that he had been attempting to exhaust those issues in state collateral proceedings. Because petitioner failed to show good cause, and because his stay has been twice before denied for the same reason, the Court construes his response as a request to withdrawn the unexhausted grounds for claiming ineffective assistance of counsel and to proceed with the exhausted grounds only. Therefore, the unexhausted grounds are deemed withdrawn, and only petitioner's exhausted arguments are addressed... totally ignoring petitioner's full representation in the Aug. 4, 2015 request motion which included (as exhibits) the letters with their substantive content concerning counsel representation and the undisclosed conflict of interest.

SUMMARY ARGUMENT

The stay of exhausted claims of a mixed §2254 habeas corpus petition is appropriate in addressing circumstances where AEDPA statute of limitation runs before withdrawing the application, descending to the court of first instance, exhausting all claims till completion and returning to resubmit the petition.

I. STAY AND ABEYANCE EFFECTUATES CLEAR OBJECTIVE OF ROSE V LUNDY.

Under such conditions it reconciles the total exhaustion requirement of Rose v Lundy, 455 US 509 (1982), with the statutory and constitutional right of a §2254 petition to have federal court review of exhausted claims, where a stay is the method by which a federal court with jurisdiction make way for state court proceedings.

Acting consistently with the constitutional protection of habeas corpus, congress has granted federal jurisdiction over claims of deprivation of constitutional rights arising out of state court convictions and sentences 28 USC §2254(a); US Const. Art. I §9. Congress has made exhaustion

of claims in state court a procedural prerequisite to a grant of habeas corpus relief. 28 USC §2254(b)(i) ... the exhaustion requirement controls when federal claims will be heard in §2254 cases, not whether they will be heard and an order staying the action is a wise and productive discharge of the court's judicial duty.

The exhaustion requirement as defined by this court and codified in §2254(b) was not designed to trap unwary prisoners and strip them of any opportunity for federal review (see. Rose, 455 at 520). When a timely filed federal claim is endangered by a statute of limitations issue, the granting of a stay of a mixed petition is the way that a court should defer "action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers ... have had an opportunity to pass on the matter."

Moreover, the stay-and-abeyance procedure does not contravene that a petition "shall not be granted" review of newly exhausted claims. Refusal to consider is to unreasonably impair the prisoner's right to relief, disregarding the grounds behind the total exhaustion rule.

Rose v Lundy, 455 US 509, 532-33, 102 S.Ct. 1198 (1982) (Brennan, J., Joined by Marshall, J., Concurring in part and dissenting in part) states: ("I disagree with the plurality's view ... that a habeas petitioner must 'risk forfeiture consideration of his unexhausted claims in federal court' if he 'decides to proceed only with his exhausted claims and deliberately set aside his unexhausted claims' in the face of the district court's refusal to consider his 'mixed' petition.

At 522 in Rose, Justice BLACKMUN, concurring in the judgment (in part) asserted, What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, ante, at 1202-1203, only by sheer force; that it operates as a trap for the undereducated and indigent pro se prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than alleviate, the caseload

burdens on both state and federal courts. to use the old expression, the Court's ruling seems to me to "throw the baby out with the bath water." While (White, J., concurring in part and dissenting in part) in Rose at 538 saying ("[I]f the [district] judge rules on those issues that are ripe and dismiss those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.")

a. STAY AND ABEYANCE ARE SENSIBLE PROCEDURES SAFEGUARDING AGAINST ABUSE AND UNFAIRNESS.

Regarding the decision in petitioners case or writ as stated partially in Clark v Tansy, 13 F3d 1407, 27 Fed. R. Serv. 3d 887 (10th Cir.1993) certain aspects to habeas corpus law, ... mandate more than a superficial review of such [a] denial. Instead, we must carefully review the denial in order to ensure that the petitioner's ability to present claims of constitutional violations is not abridged merely because the petitioner has unwittingly fallen into a procedural trap created by the intricacies of habeas corpus law," at 1409.

In respect of the matter, Justice O'Connor responded concerning the petitioner's choice to wait for complete exhaustion or to proceed immediately on the exhausted claims, that it had as one of its basis the desire to frame clearly the choice for the habeas petitioner, and was firmly grounded in the 'deliberate bypass standard for abuse of writ which the Court established in Fay v Noia, 372 US 391 (1963). Adding that the petitioner's entitle[ment] to resubmit a petition with only exhausted claims or to exhaust the remainder of [his] claims,' Rose, 455 US at 520, thus operated in tandem with the 'deliberate bypass' test to ensure that the habeas process flowed smoothly without creating an artificial need for piecemeal adjudication of claims, and without unfairly depriving habeas petitioner of their ability to present claims of constitutional violations," Clark at 1409. Also acknowledging in Haines v Kerner, 404 US 519, 520 (1972) ... in stating, it applies to petitioner that "We must be especially careful where as here, we have an uneducated

appellant, unrepresented by counsel, filing the initial habeas corpus motion. While the question of whether a claim is exhausted often can be difficult for lawyers and judges, let alone pro se habeas corpus petitioners to discern. See, e.g., Evicci v Comissioner of Corrections, 266 F3d 26, 28 (1st Cir.2000); Morgan v Bennett, 204 F3d 360, 369-372 (2nd Cir.2000),; Bear v Boone, 173 F3d 782, 784-785 (10th Cir.1999). Similarly, in certain aspects to Clark, the petitioner will likely be foreclosed from pursuing his excluded claims in a later habeas proceeding, and as it was determined we must carefully review the district court's decision ... so too should be required for Mr. Dixon.

b. A STAY PURSUANT TO EXHAUSTION SERVED THE RULES ESTABLISHING FILING OF MIXED PETITION TO SUSTAIN FEDERAL REVIEW

The combined effect of Rose and AEDPA's limitation enacted by Congress subsequent to the Court's decision in the case is that if a petitioner comes to federal court with a mixed petition towards the end of the limitation period a dismissal of his mixed petition could result in the loss of all of his claims, including those already exhausted – because the limitations period could expire during the time a petitioner returns to state court to exhaust any unexhausted claims. Addressing this Ninth Circuit has held that a district court may employ a stay-and-abeyance procedure, with advisory and questions of warnings which consequently raise concerns of district courts potential to mislead pro se habeas petitioner[s]. Further recognized in dissent 'district judges often will not be able to make such calculations based solely on the face of habeas petitions, for as noted petitioners are not required by 28 USC §2254 or the Rules Governing §2254 Cases to attach to their petitions or to file separately state court records See Pliler v Ford, 542 US 255, 125 S.Ct. 2441 at 2447.

Circuit courts have considered the stay-and-abeyance procedure recognizing the comity and the longstanding constitutional interest in making habeas corpus available to state prisoners

('[V]irtually ... holding that following the ADEPA, while it is usually within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action where an outright dismissal could jeopardize the timeliness of a collateral attack. [Crews v Horn, 360 F3d 146, 152 (3rd Cir.2004); see also Nowaczyk v Warden, 299 F3d 69, 79 (1st Cir.2002); Palmer v Carlton, 276 F3d 777, 781 (6th Cir.2002); Zarvela v Artuz, 254 F3d 374, 381 (2d Cir,2001); Freeman v Page, 208 F3d 572, 577 (7th Cir.2000)] See also Duncan v Walker, 533 US 167, 121 S.Ct. 2120 (2001) at 182-183 (Steven J., concurring in part and in judgment) ('[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies'); id., at 192 (Breyer, J., dissenting) in relevant part ("Given the importance of maintaining a prisoner's access to a federal habeas court and the comparatively minor interference that the Ninth Circuit's procedure creates with comity or other AEDPA concerns, I would find use of the stay-and-abeyance procedure legally permissible .. at 240).

In Rhines v Weber, 544 US 269, 125 S.Ct. 1528 (2005) (Justice O'Connor who delivered the opinion of the Court pronounces "We granted certiorari to resolve a split in the circuits regarding the propriety of the District Court's stay and abeyance procedure ... compare, e.g./ Crews v Horn, 360 F3d 146, 152 (3d Cir.2004); and Zarvela v Artuz, 254 F3d 374, 381 (2d Cir.2001) with 346 F3d 799 (8th Cir.2003); Fourteen years before Congress enacted AEDPA we held in Rose v Lundy, 455 US 509, 102 S.Ct. 1198 (1982), that federal district courts may not adjudicate mixed petitions containing both exhausted and unexhausted claims, we reasoned that in the interest of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims;" at 273. "Accordingly, we imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement by dismissing mixed petitions without

prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance ... when we decided Lundy, there was no statute of limitations on the filing of the federal habeas corpus petitions. As a result, petitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitions with relative case.

Reiterating the courts ... in an attempt to solve the problems some districts ... have adopted a version of the stay-and-abeyance procedure under which rather than dismiss the mixed petition pursuant to Lundy, a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Once the petitioner exhausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court," Rhines at 275-76.

...stay and abeyance is ... appropriate when ... there is good cause for ... petitioner's failure to exhaust his claims first in state court; and unexhausted claims had merit. Even where stay-and-abeyance is appropriate ... the district court discretion is to place reasonable time limits on petitioners to state court and back see, e.g., Zarvela, 254 F3d at 381.

The better approach is for district courts simply to stay mixed petitions in their entirety. As. compared to tripartite "dismiss, stay and amend" procedure, a one-step stay has a decided advantage in terms of judicial economy: there is no initial dismissal of unexhausted claims and because all originally-filed claims are held in abeyance, there is no need for a prisoner to file an amended petition – itself a significant undertaking in many habeas cases – to add subsequently exhausted claims when he returns to federal court. As a result, there is also no need for litigation on the ancillary issue of amendment. see Crews, 360 F3d at 154 n.5 (stay of entire petition "will conserve judicial resources by avoiding litigation" over which claims may be added by

amendment). Stay may be appropriate precisely because it would avoid what otherwise would be a statute of limitation problem. see e.g., Wilton v Seven Falls Co., 515 US 277 , 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "stay will often be the prefer[red] course, because it assures that the federal action can proceed without risk of time bar").

II. CAUSE AND PREJUDICE EXIST WHERE CLAIMS ARE PREVENTED FROM BEING MADE AND THE ERROR UNDERMINED CONFIDENCE IN THE RESULT.

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss the mixed petition, if petitioner had good cause for his failure to exhaust, [and] his unexhausted claims are potentially meritorious, and there is no indication that petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district should stay, rather than dismiss, the mixed petition. See Lundy, 455 US., at 522 (the total exhaustion requirement was not intended to unreasonably impair the prisoner's right to relief'); Pliler v Ford, 542 US 225, 124 S.Ct. 2441 at 2445 (2004) (describing "stay and abeyance" procedure). The authority to stay, like the authority to permit amendment, is discretionary. But if AEDPA's limitation periods is likely to bar the filing of a perfected petition after exhaustion, then the denial of a stay generally will constitute an abuse of discretion (which is apparent in petitioner's case).

Justice Stevens, joined by Justice Ginsburg and Breyer, concurred in the matter where it states: "While I join the Court's opinion, I do so on the understanding that its reference to good cause for failing to exhaust state remedies more promptly ... is not intended to impose the sort of strict and inflexible requirements that would 'trap the unwary pro se prisoner.' Rose v Lundy, 455 US 509, 520, 102 S.Ct. 1198 (1982). This Court has consistently construed governing habeas law to protect the right of a prisoner who files a mixed petition to return to federal court once he has fully exhausted state remedies. See also Slack v McDaniel, 529 US 473, 487, 120 S.Ct. 1595

(2000) ," at 279 (citation and internal quotation marks omitted); While Justice Souter joined by Justice Ginsburg and Breyer, concurred in part and concurred in the judgment: "I join the Court's opinion with one reservation, not doctrinal but practical. Instead of conditioning stay-and-abeyance on 'good cause' for delay, ... I would simply hold the order unavailable on a demonstration of intentionally dilatory litigation tactics' ... The trickiness of some exhaustion determinations promises to infect issues of good cause, when a court finds a failure to exhaust; pro se petitioners (as most habeas petitioners are) do not come well trained to address such matters. I fear that threshold enquires into good cause will give district courts too much trouble to be worth the time; far better to wait for the alarm to sound when there is some indication that a petitioner is gaming the system," at 279 (citation omitted).

Further adding in Jiminez v Graham, No. 11CV6468, at *4 (SDNY.2011) finding that petitioner had demonstrated good cause for failure to exhaust when the evidence was only recently discovered ... (as in the attorney's informal oral omnibus motion); Quinones v Miller, 244 Fed.Appx. 44 (2nd Cir.2007) "To establish a violation of this [Sixth Amendment] right, a habeas petitioner must demonstrate that counsel actively represented conflicting interest and that the actual conflict of interest (which the supervisor admitted there was in her letter) adversely affected his lawyer performance" (demonstrated in the ineffective assistance during pretrial and trial) See Strickland v Washington, 466 US 688, 692, 104 S.Ct. 2052 (1984) ; quoting Cuyler v Sullivan, 446 US 335, 350, 100 S.Ct. 1708 (1980) if the above showing is made prejudice is presumed. Id.); Pace v Digielmo, 54 US 408, 416, 125 S.Ct. 1807 (2005) ... A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute "good cause" for him to file in federal court.) all relevant to circumstances in petitioner's case.

a. When Evidence Viewed As a Whole The Ineffective Assistance of Counsel Claim Raised on Direct Appeal Met the Standards of Exhaustion.

In Myers v Collins, 919 F2d 1074, 1075-77 (5th Cir.1990) (holding that ... defendant who had raised a claim of ineffective assistance of counsel both on direct appeal and in a petition for discretionary review by the highest criminal court did not have to seek state post-conviction relief in order to exhaust state judicial remedies; stating: "Castille v Peoples, 489 US 346, 109 S.Ct. 1056 (1989) held that raising a claim for the first and only time in a petition for discretionary review does not satisfy the exhaustion requirements of 28 USC §2254 ... The [Supreme] Court did not, however, intimate that a petitioner whose appeal is discretionarily denied after an appeal of right to an intermediate state court must proceed through the state courts on habeas in order to exhaust state remedies," at 1075 (emphasis in original); "We do not read Castille to require futile repetitive efforts in the state courts in order to satisfy the exhaustion doctrine ... "Because the exhaustion doctrine is designed to give state courts a full and fair opportunity to resolve federal constitutional claims before the claims are presented to the federal courts, we conclude that state prisoner must give the state courts on full opportunity to resolve any constitutional issue by invoking one complete round of the state's established appellate review process. see e.g., O'Sullivan v Boerekel, 526 US 838, 119 S.Ct. 1728 (1999) ... in the words of the statute, state prisoners have the right ... to raise their claims through a petition for discretionary review in the state's highest court. 2254(c).

According to Footman v Singletary, 978 F2d 1207 (11th Cir.1992) ("[A] habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously," at 1211; "we decline to address the continuing vitality of the doctrine that a petitioner need not present all instances of ineffective assistance of counsel to the

state court before proceeding to federal court when the state court has reviewed the entire record to evaluate the ineffective assistance claim. See e.g., Vela v Estelle, 708 F2d 954 (5th cir.1983).

b. The Court's Open-File Discovery Was Violative of Defendant's Substantive and Procedural Due Process.

Pursuant to the original attorney and her supervisor's claim in correspondence, concerning the Open-File Discovery and the alleged Oral Omnibus Motion, the later insinuation of not being constrained to file any motion and the attorney's recusal for a conflict of interest, shows in reality that the application was or was not presented by design, but only because petitioner was denied the opportunity to move formally on papers. Where there were issues concerning arrest without Miranda Warning; a unduly suggestive Show-Up identification and discrepancy with description given and petitioner's appearance; illegal disclosure of property under statutory law, CPL 180.80 violation with contentions of speedy trial and also insufficient evidence at the grand jury to meet the standards of robbery one & two, the significance of counsel performance was crucial at critical stage.

In People v Boomer, 220 AD2d 833 (1995), the primary issue was whether defendant is entitled to a reversal and dismissal of the indictment upon the grounds that the IAS court's directive regarding omnibus motions was violative of defendant's substantive and procedural due process ... concluded that the IAS directive did not prohibit the filing of Omnibus Motions and explicitly reserved the right of either party to submit written motions. Moreover, the directive neither conditioned the submission of pretrial motions on prior judicial approval, a practice which has been uniformly condemned (see Matter of Hochberg v Davis, 171 AD 2d 192, 195, 575 NYS 2d 311 (1st Dept.1991), amended 179 AD 2d 372 [1992]) (... we nonetheless must again caution the courts to ensure that the fundamental rights in which a litigant is entitled are not ignored, "no matter how pressing the need for the expedition of cases." (Id.). As noted by

Professor Seigel: "As to who may move for what, there is one grand rule of thumb: any order the court can make, an interested party may move for" (Seigel, New York Practice., §243 at p.299). Adding further it states: Even though the practice of conditioning the making of motions on prior judicial approval may in some instances, discourage the filing of frivolous motions, it may also prevent a party from exercising the option to move for relief to which he or she may be entitled (as in the petitioner). "A judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law ..." (22 NYCRR § 100.3(a)(4)). Moreover, the conditioning motion practice on prior approval from the court may also run afoul of certain statutory provisions ... Denying a party permission to engage in motion practice hinders the performance of counsel who are encouraged and, in fact are required to be zealous in their representation of their clients (Code of Professional Responsibility § EC7-1). Thus, petitioner's case, the attorney and the law firm's supervisor operating under the impression they were not constrained to file any motion and that the judge would automatically resolve all issues, indicates a misunderstanding of the law and or the court's directive, where neither of the two occurred it deprived him of his constitutional right to effective assistance of counsel, according to the Sixth Amendment; and absent records and or transcripts concerning the proceedings (when oral application was made) and court decisions according to CPLR 2219(A) (from the pretrial hearings and the actual Discovery Stipulation which may be considered a Omnibus Motion for 30.30 purposes) undermining petitioner's appeal. (see Matter of Grisi v Shainswit, 119 AD2d 418, 422 (1986) A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record thereby foreclosing the opportunity for appeal review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion the denial of

which would be otherwise appealable had the record reflected the respective positions of the parties on the particular issues and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination. Grisi notes ... that the Uniform Civil Rules of the Supreme Court and the County Court make provision for thae transcript "shall have the force and effect of an order of the court" (22 NYCRR 202.12[e]). So that there will be no question as to the appealability of such disposition, however, we would also require that where a party presents a written order embodying the court's determination spread on the transcripts that such order be signed. The decision required that when requested to make a formal motion is refused or the motion is considered on the merits, but orally, a record ... be made.

Where in People v Lawrence, 64 NY2d 200, 485 NYS 2d 233 (NY 1984) a motion to dismiss for violation of CPL 30.30 was pursuant to a judicial ruling deferred until after trial, held that "[n]either the court nor the parties may restructure the statute to adopt a procedure that is more convenient for them at the moment by waiving its clear provisions" (id. at 207) see People v Mezon, 80 NY 2d 155, 589 NYS2d 838 (NY1992) [HN6] stating in respect of this "Finally, although the Appellate Division (Second Department) correctly concluded that the oral motion should not have been entertained the court erred when it went on to consider and dispose of defense's (suppression) motion on the merits. Inasmuch as the motion was not made in accordance with the dictates of CPL article 710, it was, in effect a nullity. Thus for purposes of determining the proper relief on appeal, the Appellate Division should have treated the motion as if it had been never made. Once the Court determined that the suppression motion should not have been considered, it should have placed the parties in the position they occupied before the

motion was made by simply reversing the order of suppression *842 and remitting for further proceedings, including a new motion to suppress if appropriate.

CONCLUSION

Petitioner Dixon request that the judgment of the United States Court of Appeals for the Second Circuit in this case be reversed and that Court hold that the district court err in excluding the petitioner exhausted claims from the Section 440 Motion in denying Dixon's federal habeas corpus petition.

William Dixon
Petitioner Pro Se

Sworn to before me on
5th day of July 2018
Karen Haight
NOTARY PUBLIC
cc.:

KAREN HAIGHT
Notary Public, State of New York
No. 01HA6342990
Qualified in Ulster County
My Commission Expires 05/31/20 20