

Supreme Court, U.S.
FILED

DEC 22 2017

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COREY HOLDER
Petitioner

vs.

M. SEPANEK, WARDEN, USP-Big Sandy
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COREY HOLDER

#12600-035

USP Big Sandy

POST OFFICE BOX 2068

INEZ, KY 41224

QUESTION(S) PRESENTED

- I. Had the Circuit Court of U.S. errored in failing to properly review the record and remand to the district court for consideration and necessary findings, on Holder's prima facie request for an extension of time or excusable neglect for the untimely appeal, prior to the dismissal for lack of jurisdiction?
- II. Had the Circuit Court of U.S. jurisdiction to hear and decide the merits of Holder's ineffective assistance of counsel claims due to excusable neglect?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- (a) Attorney General of Louisiana
- (b) Suzanne Morelock Williams

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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 issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court (order adopting the magistrates report) appears at Appendix B to the petition and

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[] For cases from state court:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is

[] reported at _____; 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[] is unpublished.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 October 4, 2017.

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 at Appendix _____.

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

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the U.S. Court of Appeals for the Fifth Circuit was Title 28 U.S.C. 1291. The jurisdiction of the district court was Title 28 U.S.C. § 2254.

For cases from state courts:

The date on which the highest state court decided my case was _____. 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 at Appendix _____.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process or Procedural Due Process Clause of The Fifth Amendment

STATEMENT OF THE CASE

On August 24, 2012, Holder filed a § 2254 petition on the grounds that counsel rendered ineffective assistance of counsel for failing to file a motion to suppress DNA evidence because the warrant was invalid and also in failing to pursue the Batson claim further. USDC. Rec Doc. 10 and 11. On October 14, 2014, the Warden, United States Penitentiary Pollock filed an answer to Holder's § 2254 petition. USDC Rec. Doc. 31. On October 17, 2014, attorney Suzanne M. Owens filed on behalf of Warden, USP Penitentiary Pollock a manual attachment regarding answer to complaint. USDC Rec. Doc. 31. Holder at this time was housed in the special housing unit (SHU) on lockdown awaiting transfer to USP Big Sandy. On October 30, 2014, Holder had not received the State's answer and filed a request for status of case and the clerk mailed copy of docket sheet. USDC Rec. Doc. 32. On November 19, 2014, Holder filed a letter stating he had not received the State's response or exhibits. USDC Rec. Doc. 34. On November 20, 2014, Warden, USP Pollock responded with a fedex invoice and fedex tracking. USDC Rec. Doc. 35. On December 1, 2014, Holder filed a motion to stay, motion for extension of time to file reply to State's response. USDC Rec. Doc. 37. On December 2, 2014, Holder notified the court that USP Pollock had located the State's answer and exhibits in there warehouse but that he had no access to these materials. USDC Rec. Doc. 38. On December 19, 2014, Holder filed notice of his transfer to USP Atlanta transit awaiting transfer to USP Big Sandy. USDC Rec. Doc. 39. On December 29, 2014, unknown to Holder, a response in opposition to the State's answer to complaint was filed on his behalf. USDC Rec. Doc. 40. On January 9, 2015, Holder filed a notice regarding his transfer to USP Big Sandy and gave notice of change of address. USDC Rec. Doc. 41. On January 26, 2015, Holder had not received his law work from transit and filed for

an extension of time to file response to the State's answer, not knowing that a motion had been filed on his behalf without his knowledge. USDC Rec. Doc. 42. On February 25, 2015, Holder made request for status of case and clerk mailed a copy of docket sheet on February 26, 2015. USDC Rec. Doc. 43. On March 13, 2015, after Holder received and reviewed the docket sheet, noticed Doc. 40 "Response in Opposition;" Holder then filed a motion for extension of time to file a response or supplemental motion. USDC. Rec. Doc. 44. On May 4, 2015, Holder filed a motion to supplement Doc. 40 response in opposition. USDC. Rec. Doc. 47. The magistrate judge then issued a memorandum order for the State to make a diligent search for any warrant, and the State was given an opportunity to supplement the state court record with a copy and related papers. USDC Rec. Doc. 51 at pg. 1. On August 18, 2015, the State filed supplemental exhibits of a search warrant, affidavit and return on search warrant issued from an unrelated and separate case. USDC Rec. Doc. 52. Immediately after the State's filing, the magistrate judge issued a report and recommendation on August 20, 2015, recommending that Holder's petition be denied without affording Holder an opportunity to reply to the State's filing. Appendix B. Holder then submitted a letter response and followed with a request for production of specific documents. USDC Rec. Doc. 56 and 57. United States Mag. Judge Hornsby issued a memorandum order denying the motion as moot stating " the supplemental filing contain the items petitioner request with regard to the authorization to obtain his DNA sample." USDC Rec. Doc. 59. However, Holder's request was made for the authorization given to McWilliams and Smith to search and seize DNA samples from Holder for the purpose of comparing to the evidence from the Thrifty Liquor store armed robbery and not the unrelated and separate Club Dallas altercation. Holder then filed his objections to the magistrate judge's report/recommendations. USDC Rec.

On January 25, 2016, the district judge while concurring with the findings

of the magistrate judge denied both the § 2254 petition and certificate of appealability. Appendix B. On February 2, 2016, eight days after the Judgment and Order was issued prison official A-Unit secretary Mrs. Howard gave Holder the judgment/order and allowed him to review an updated docket sheet. Holder began working on both a motion for reconsideration and appeal. On February 5, 2016, Holder submitted a letter attempting to clarify what was believed to be a missing docket entry. USDC Rec. Doc. 70. Later on February 5, 2016, USP Big Sandy was placed on lockdown and on February 11, 2016, Holder filed for an extension of time to file a motion for reconsideration, although, intend for an extension to notice of appeal as well. USDC Rec. Doc. 72. On February 16, 2016, during USP Big Sandy's lockdown Holder received a "Notice of Motion Setting" from the district court as if a "timely 59(e) motion" had been filed without his knowledge. Appendix F. On February 24, 2016, Holder believing that a timely timely motion had been filed again without his knowledge filed a motion to supplement motion for reconsideration. USDC Rec. Doc. 75. On March 1, 2016, Holder received two Orders from the district court, U.S. Dist. Court Mag. Judge Hornsby's paper electronic order correcting both the docket entry 70 and notice of motion setting; and U.S. Dist. Judge Foote's order denying Holder's motion for an extension of time, both orders dated February 26, 2016, two days after Holder's deadline for a timely notice of appeal or extension of time to file an appeal had expired. Appendix G. Holder after reviewing both orders filed three documents: (1) Motion for Clarification dated March 1, 2016; Appendix C, (2) Motion to Correct/Amend Motion for Clarification dated March 25, 2016; Appendix D, and (3) Notice of Appeal from the Judgment/Order of January 25, 2016; Appendix E. Within these documents Holder gave some excuse and request for an extension of the untimely filing. In which the appeals court failed to review or consider before its decision.

On the following motions Holder could only provide the dates they where filed in the court of appeals and not the docket entry's. On June 22, 2016, after several extensions had been granted, Holder filed his appellant's brief in the United States Court of Appeals for the Fifth Circuit. On October 4, 2017, the U.S. Court of Appeals dismissed Holder's appeal for lack of jurisdiction without addressing or considering excusable neglect or request for extension of time for the untimely appeal, although, presented on the record. Appendix A. On October 16, 2017, Holder filed a timely motion for extension of time to file his petition for rehearing or rehearing en banc, due to the prison official's delivering of the dismissal on October 12, 2017, one day after the lockdown that began on October 11, 2017 thru November 6, 2017, during this time Holder had no access to his law work/materials or law library. On October 29, 2017, Holder filed for another extension of time and gave notice that he had not heard from the court of appeals on his last request. On October 30, 2017, Holder received the court of appeal's denial of his motion for an extension that was filed October 16, 2017. On November 9, 2017, Holder filed a titled motion to recall mandate addressing excusable neglect and good cause. On November 13, 2017, Holder filed a motion to correct title of motion to recall mandate. On November 19, 2017, Holder filed an untimely petition for rehearing or rehearing en banc addressing excusable neglect or good cause for his untimely notice of appeal. On November 22, 2017, the U.S. Court of Appeals granted appellant's motion to correct the title of the motion to recall the mandate. On November 30, 2017, Holder filed a motion to supplement both the titled motion to recall mandate and petition for rehearing en banc. On December 7, 2017, Holder received both denials of his titled motion to recall mandate and motion for leave to file a petition for rehearing or rehearing en banc out of time.

REASONS FOR GRANTING THE PETITION

A) The questions presented are of national importance because they effect the rights to due process and procedural due process of the people. Further, preserving a fair opportunity to be heard or to procedural processes that grant jurisdiction to the circuit courts below to hear the merits of their claims. Especially, when circuit courts below fail to follow the rules and procedures established by Congress, also, the failure to follow its own precedent as well as its fellow circuits. These questions further prevent the people now and in the future from being subject to procedural injustice. Like here where the circumstances warrant procedures and processes that would allow fair opportunity to be heard in a meaningful time and place exist yet ignored. Congress set in place Fed. R. App. P. 4(5)(a), so when timely presented protects the process to proceed on appeal if applicable, further, preventing unwary litigants who are unskilled, unaided by counsel from being trapped or lulled into inactivity. Congress did not set procedural rules in place for the appellants only, while the lower courts violate them, but when timely presented for the courts to follow as well. They were not intended to be used for violating or ignoring the rights of the people. The importance of these questions are heightened by the fact that the Supreme Court is the only Court with the authority to prevent or correct these errors and violations made by the circuit courts below. Therefore, please consider the following:

I. The Circuit Court of the U.S. below declined to take jurisdiction over Holder's appeal. In doing so the court errored because a proper review of the record would have revealed that Holder had several timely filings such as: (1) motion for clarification dated March 1, 2016, USDC Rec. Doc. 76, Appendix C; (2) motion to correct/amend motion for clarification dated March 25, 2016, USDC Rec. Doc. 81, Appendix D; and (3) notice of appeal dated March 21, 2016, USDC

Rec. Doc. 78, Appendix E. The court failed to hear or consider Holder's show of cause for the untimely appeal. These filings had moved for an extension of time to file a notice of appeal and contained an assertion of excusable neglect, for remand to the district court for necessary findings. The district court had not decided the circumstances of which Holder had presented and generally a court should remand to permit that consideration.

The distict court denied the above motions as moot because it had ruled on Holder's motion to supplement motion for reconsideration on the merits as if it were a timely 59(e) moition. USDC Rec. Doc. 87 at p. 2, par. 2: "the Court DENIES both motions [Record Documents 76 and 81] as moot because the Court had denied the Petitioner's motion for reconsideration on the merits." The district court failed in its duty to raise an untimely issue on Holder's notice of appeal. And because of such caused excusable neglect on Holder's part for not briefing the issue within his appellant's brief to the court of appeals when briefing on the merits of his ineffective assistance of counsel claims. The State though served made no response to Holder's motions, notice of appeal or appellant's brief. The lower courts had not fully considered Holder's prima facie showing of excusable neglect or the attempt to extend the time to file his appeal, though, Holder had presented such within his notice of appeal. Thus, Holder contends that the U.S. Court of Appeals for the Fifth Circuit erred when it decided to dismiss Holder's appeal for lack of jurisdiction on its own without first remanding to the district court for further findings consistant with above.

The appellate court intruded upon the domain which Congress has exclusively entrusted to the district court under Federal Rule Appellate Procedure 4(a)(5): which permits the district court, upon a finding of excusable or good cause, to extend the time for Holder to file a notice of appeal by no

more than 30-days from the original 30-days deadline of February 24, 2016. That 30-days period ended on March 25, 2016, Holder's motions and notice of appeal were filed by this date according to the mailbox rule. See Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Therefore, the district court upon a finding of excusable neglect, was authorized to grant an extension for Holder's untimely notice of appeal. Thus, remand to the district court would aid Holder if he showed excusable neglect.

The circuit court below failed to properly review the record and errored by failing to follow its own precedent. By not treating the statements within Holder's motions and notice of appeal as a timely motion to extend the time or for finding excusable neglect or good cause for filing the notice of appeal late. See Walker v. Stephens, 2015 U.S. App. LEXIS 23108 (5th Cir. 2015) ("we treat these statements as a timely motion for finding excusable neglect or good cause for filing the notice of appeal late and remand..."). The matter is important. The error, is a recurring error that puts the Fifth Circuit in conflict with other court of appeals, which generally respect the district court's role as fact-finder by remanding to the district court in similar situations. Because Holder's notice of appeal offered some excuse for his untimeliness and evince some intent to extend the time to file his notice of appeal it should have been construed as a request for an extension of time accompanying his notice of appeal and the court of appeals failed to consider such. See Sovereign v. Fleming, 677 Fed. Appx. 135, U.S. App. LEXIS 3166 (4th Cir. 2017) ("Because Sovereign's notice of appeal offered some excuse for his notice of appeal and untimeliness, we construe it as a request for an extension of time accompanying his notice of appeal and remand"); U.S. v. Zelaya, 565 Fed. Appx. 164, U.S. App. LEXIS 6276 (4th Cir. 2014)(remanded), also see Arriola v.

Philer, 114 Fed. Appx. 879, 2004 U.S. App. LEXIS 25702 (9th Cir. 2004). Here Holder can separate his case from Arriola's, because in Arriola's case even though the district court granted Arriola's motion for extension of time to file a late notice of appeal, finding good cause for the untimely filing. The appeals court on the other hand found that Arriola's motion had been filed after the 30-days allowed after the original 30-days expiration date. Holder's motions and notice of appeal had been filed within the 30-days allowed after the expiration date. See Sanchez v. Board of Regents of Texas Sourthern University, 625 F.2d 521 (5th Cir. 1980)(allowing a late notice of appeal to be treated as a motion...) and Campos v. LeFevre, 825 F.2d 671 (2nd Cir. 1987); citing Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975). Holder can further separate his case from Campos. Although, Campos filed his notice of appeal within the 30-days allowed after the original 30-days expiration, Campos failed to show a prima facie showing of excusable neglect. Here in Holder's case the motions and notice of appeal were timely filed and gave a prima facie showing of excusable neglect. And Holder was not afforded the same procedural process as the above. The circuit court below denied Holder his right to be heard and the right to procedures set in place by Congress allowing the process to remand. The circuit court below should have remanded Holder's case to the district court for necessary findings consistant with Fed. R. App. P. 4(a)(5) before dismissal for lack of jurisdiction. See Appendix A.

To clarify and correct for the Court, Holder made a error within his supporting affidavit attached to his notice of appeal. On p. 2, par. 1, line 3 reads: 1)that the 2-5-16 letter and exhibits were interpreted and construed..., which should have read and was intended to read 1)that the docket entry 70 motion were interpreted and construed.... This is verified throughout Holder's notice of appeal each time he makes a reference to it, it is docket entry 70 or

(Dkt#70) and not letter and exhibits. See Appendix E and F. Holder at the time of typing his affidavit made a mistake by typing out what docket entry 70 actually was due to his knowledge from the district court's correction received on March 1, 2016. Holder at the time of receiving the notice of motion setting had not believed or thought in any way that docket entry 70 was possibly or actually the letter he had wrote to the court. In the alternative had Holder thought or believed that his letter was mistakenly docketed as docket entry 70 Holder would have filed his notice of appeal on February 24, 2016, instead of his titled motion to supplement motion for reconsideration. At the time Holder was typing his notice of appeal and affidavit he was pressed for time and under a lot of pressure to complete the filing before March 25, 2016, and made a honest mistake. Holder also attempted to make this correction in the circuit court below within his motions.

In the circuit court below Holder filed a timely motion for extension of time to file his petition for rehearing or rehearing en banc dated October 16, 2017. Due to several reasons such as: Holder had not received the circuit court's October 4, 2017, dismissal until October 12, 2017, from prison officials while enduring a lockdown that began on October 11, 2017 thru November 6, 2017, and during this time Holder had no access to his law work/materials or the law library all of which was needed. The circuit court denied Holder's request for an extension of time on October 25, 2017, the circuit court had authorization to grant Holder, who is pro se, 30-days to file his petition for rehearing or rehearing en banc under its Fifth Circuit Rule 27 and declined to do so. The circuit court previously granted Holder several extensions on May 2, 2016 and June 13, 2016, while Holder was under the same circumstances during the filing of his appellant's brief. The same should have applied for the latter request for an extension of time for this unwary litigant, unaided by counsel. The

circuit court denied Holder access to rules and procedures that would have allowed the filing of his petition for rehearing or rehearing en banc, which would have allowed Holder the opportunity to point out the record of his intent to evince excusable neglect or an extension of time to file his untimely notice of appeal. In doing so, the circuit court violated Holder's due process and procedural due process.

Holder continued an attempt on pointing out the record of his documents that evince an intent to extend the time or excusable neglect for his untimely notice of appeal. Holder made several filings after November 6, 2017, when the lockdown ended such as: (1) motion to recall mandate dated November 9, 2017, which should have been titled and construed as motion for reconsideration that was denied on November 28, 2017, after noticing that the title may be wrong Holder filed; (2) motion to correct title of motion to recall mandate dated November 13, 2017, that was granted on November 22, 2017; (3) motion for leave to file a petition for rehearing or rehearing en banc out of time dated November 19, 2017, and denied on November 30, 2017; and (4) motion to supplement both titled motion to recall mandate and petition for rehearing or rehearing en banc dated November 30, 2017, the circuit court had already made a final ruling on the matter by then and decline to take any action on this motion on December 5, 2017.

Due to all of the above Holder's due process was violated and he suffered serious procedural injustice violating his procedural due process. Holder is respectfully asking this Honorable Court for a general vacate remand (GVR) to the lower courts for further proceedings consistant with Fed. R. App. P. 4(a)(5). In which, would allow Holder his right to be heard and access to the rules and procedures established by Congress. Furthermore, would aid Holder in having his meritorious ineffective assistance of counsel claims heard.

II. The circuit court's dismissal for lack of jurisdiction without proper cause deprived Holder of his right to have meritorioius constitutional claims heard and decided on appeals. The issues importance is enhanced by the fact that the lower courts in this case have seriously denied Holder due process in direct conflict with this Court's decesion in Pioneer Investment Service Co. v. Brunswick Ltd. Partnership, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993), to determine whether a late filing resulted from "excusable neglect."

On January 25, 2016, the U.S. Dist. Court Judge Foote for the reasons assigned in the report and recommendation of the Magistrate Judge, and concurring with the findings denied Holder's § 2254 petition. See Appendix B. Holder received the judgment and order denying his § 2254 petition and certificate of appealability on Febuary 2, 2016, from prison offical A-Unit secretary Mrs. Howard. Who also allowed Holder a brief look at his docket sheet, which is not allowed to stay in his possession. Holder immediately began to work on both his motion for reconsideraion and appeal. On Febuary 5, 2016, Holder submitted a letter attempting to clarify what he believed was a missing docket entry, in case there needed to be references made on appeal. Unknown to Holder this letter would be docketed as a motion for reconsideration filed within 28-days after the judgment/order of January 25, 2016, as docket entry 70. Later on February 5, 2016, USP Big Sandy was placed on lockdown and on Febuary 11, 2016, Holder filed a motion for extension of time to file a motion for reconsideration, although, his intention was for an extension of time to file a notice of appeal as well. USDC Rec. Doc. 72. On Febuary 16, 2016, Holder while enduring the above lockdown received a notice of motion setting from the distict court as if a timely motion for reconsideration had been filed within 28-days on his behalf. See Appendix F. Holder at this time had 6-days remaining to file a

timely 59(e) motion and 8-days remaining to file a timely motion for extension of time to file a notice of appeal or notice of appeal.

Within Holder's statement of the case, supra at p. 4 - 5, Holder stated the facts surrounding the filing of a motion "response in opposition to the State's answer" in the district court by someone unknown during the time Holder was in transit from USP Pollock to USP Big Sandy and this was done without Holder's knowledge. And because of such Holder had to supplement this filing a titled "supplemental motion to response in opposition." Therefore, Holder believing the same circumstances had occurred, when relying on the information within the notice of motion setting, see Appendix F, which indicated to Holder that: (1) the docket entry 70 motion was a timely motion for reconsideration or 59(e) motion; (2) the 30-days to file a timely notice of appeal had been tolled or extended; (3) the state had within 21-days to file their response and then Holder would have 7-days to reply; and (4) the district court judge was in possession of the motion and would decide on the basis of the record and if there were any facts Holder wanted pointed out before the State's response or the court's grant or dismissal, Holder would need to file a supplemental motion. On February 24, 2016, Holder filed a titled supplemental motion to motion for reconsideration, USDC Rec. Doc. 75, according to the mailbox rule, instead of filing his notice of appeal or motion for extension of time to file a notice of appeal.

On March 1, 2016, Holder received two orders from the district court. The U.S. Dist. Court Mag. Judge Hornsby's electronic order correcting both the docket entry 70 and notice of motion setting, and U.S. Dist. Judge Foote's order denying Holder's motion for a extension of time. Appendix G. Both orders dated February 26, 2016, and issued two days after Holder's original 30-days deadline had expired to file a timely notice of appeal or motion for an

extension of time to file a notice of appeal. See Appendix G. Holder contends that he was lulled into inactivity due to: (1) receiving the notice of motion setting with instructions on how to proceed; (2) the magistrate's correction of docket entry 70 and the notice of motion setting two days after Holder's original 30-days had expired; (3) the district court's denial of Holder's motion for extension of time two days after the original 30-days had expired, especially considering the fact that this pro se, unwary litigant used the words motion for extension of time to file a motion for reconsideration, though the same circumstances warranted an extension for his notice of appeal intended for such as well; and (4) both lower court's failure to address excusable neglect or good cause, which would have allowed Holder's meritorious ineffective assistance of counsel claims to be heard on their merits. Further, had it not been for the above excluding (4), Holder would have filed a timely notice of appeal by February 24, 2016, even had the district court not responded back to the motion for extension of time before the original 30-days had expired.

Holder after reviewing both orders filed a motion for clarification dated March 1, 2016, and motion to correct/amend motion for clarification dated March 25, 2016. Appendix C and D. Holder's motions had evince an intent to extend the time and excusable neglect or good cause due to the USP Big Sandy's lockdown, receiving the notice of motion setting, the corrections made by the magistrate and the court's denial of extension occurring after the original 30-days had expired. See Appendix C and D. The two motions put the district court on notice of Holder's intent to extend the time and excusable neglect or good cause for the untimely notice of appeal. The district court instead of addressing the issues within his two motions ruled them moot while denying both. See USDC Rec. Doc. 87 at p.2, par. 2: "the Court DENIES both motions [Record Documents 76 and

81] as moot because the court had denied the Petitioner's motion for reconsideration on the merits." The district court's failure to address the issue of Holder's excusable neglect or intent to extend the time to file a notice of appeal caused Holder to suffer procedural due process. And the court's failure in its duty to address the issue or raise the untimeliness of Holder's notice of appeal caused excusable neglect on Holder's part for not briefing the issue within his appellant's brief to the Circuit Court of the U.S. when briefing on the merits of his ineffective assistance of counsel claims. However, the circuit court was put on notice of the issue on March 21, 2016, when Holder filed his notice of appeal and IFP motion within 60-days after the judgment/order of January 25, 2016, according to the mailbox rule. Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Within the notice of appeal Holder had again express his intent to extend the time and excusable neglect or good cause for his untimely notice of appeal. See Appendix E. Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980)(allowing a late notice of appeal to be treated as a motion...) and Walker v. Stephens, 2015 U.S. App. LEXIS 23108 (5th Cir. 2015)('we treat these statements as a timely motion for finding excusable or good cause for filing the notice of appeal late and remand...'). The State though served with a copy of each of the above filings made no response. The circuit court like the district court errored when failing to address or hear the issue of excusable neglect under Fed. R. App. P. 4(a)(5), violating Holder's due process and procedural due process, when dismissing Holder's appeal for lack of jurisdiction. See Appendix A. Furthermore, the lower courts have caused Holder to suffer serious procedural injustice.

To clarify and correct for the Court, Holder made an error within his supporting affidavit attached to his notice of appeal. On p. 2, par. 1 line 3 reads: 1)that the 2-5-16 letter and exhibits were interpreted and construed...,

which should have read and was intended to read 1) that the docket entry 70 motion were interpreted and construed.... This is verified throughout Holder's notice of appeal each time he makes a reference to it, it is docket entry 70 or (Dkt#70) and not letter and exhibits. See Appendix E and F. Holder at the time of typing his affidavit made a mistake by typing out what docket entry 70 actually was due to his knowledge from the district court's correction received on March 1, 2016. Holder at the time of receiving the notice of motion setting had not believed or thought in any way that docket entry 70 was possibly or actually the letter he had wrote to the court. In the alternative had Holder thought or believed that his letter was mistakenly docketed as docket entry 70 Holder would have filed his notice of appeal on Febuary 24, 2016, instead of his titled motion to supplement motion for reconsideration. At the time Holder was typing his notice of appeal and affidavit he was pressed for time and under a lot of pressure to complete the filing before March 25, 2016, and made a honest mistake. Holder also attempted to make this correction in the circuit court below within his motions.

In consideration of this Court's precedent in Pioneer, *supra*, and the court's failure to follow such and all of the above Holder respectfully ask this Honorable Court for a general vacate remand (GVR) to the circuit court for further consideration on the merits of his ineffective assistance of counsel claims.

CONCLUSION

Holder respectfully ask this Honorable Court for a general vacate remand (GVR) to protect and perserve the right to due process and procedural due process. This Court's GVR would allow the lower courts an opportunity to address the record on Holder's timely presented issues of excusable neglect under Fed. R. App. P. 4(a)(5), that were ignored, and prevents the people

nationally from suffering the same serious procedural injustice now and the future.

Respectfully submitted,

Craig Hall
C.U. 6-4-18 C.U. 7-31-18
Date: December 22nd, 2017