

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

JUSTEN RUSSELL, :

Petitioner, :

-vs- :

LASHANN EPPINGER, Warden, :

Respondent. :

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

PETITION FOR WRIT OF CERTIORARI

FOR PETITIONER:

Justen Russell
Grafton Corr. Inst.
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044

Petitioner, in pro se

FOR RESPONDENT:

Hilda Rosenberg
441 Vine St.
1600 Carew Tower
Cincinnati, Ohio 45202
(513) 852-1564
hilda.rosenberg@ohioattorneygeneral.gov

Assistant Ohio Attorney General

QUESTIONS PRESENTED FOR REVIEW

- I. DOES THE COMPLETE FAILURE BY COURT AND COUNSEL TO ADVISE A DEFENDANT OF HIS RIGHT TO APPEAL AND THE TIME PERIOD IN WHICH TO DO SO CONSTITUTE A "STATE-CREATED IMPEDIMENT" SUFFICIENT TO TOLL THE AEDPA LIMITATIONS PERIOD UNDER 28 U.S.C. §2244(d)(1)(b)?

- II. WHAT LEVEL OF DILIGENCE IS REQUIRED OF A MENTALLY ILL PRISONER DEFENDANT WHO, AFTER BEING LEFT COMPLETELY IGNORANT OF THE EXISTENCE OF AND HIS RIGHT TO ACCESS APPELLATE REMEDIES, IS CONFINED IN A LOCKDOWN MENTAL HEALTH PRISON UNIT WITHOUT LAW LIBRARY ACCESS, TO SATISFY THE "DILIGENCE" REQUIREMENT OF 28 U.S.C. §2244(d)(1)(D) AND FOR EQUITABLE TOLLING UNDER HOLLAND V. FLORIDA (2010) 560 U.S. 631?

<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
Questions Presented for Review.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
List of Parties.....	iv
Opinions Below.....	iv
Basis for Jurisdiction.....	iv
Constitutional and Statutory Provisions Involved.....	iv
Statement of the Case.....	1
<u>Argument</u>	
First Question Presented for Review.....	2
Second Question Presented for Review.....	6
Conclusion.....	8
<u>Appendix</u>	
A. Magistrate's Report and Recommendation, N.D. Ohio, Case No. 1:16-cv-2097, 06/23/2017 (14 pp)	
B. Opinion and Order, N.D. Ohio, Case no. 1:16-cv-2097, 08/24/2017 (4 pp.)	
C. Order Granting Application for Certificate of Appealability, Sixth Circuit Case No. 17-3959, Jan. 18, 2018 (2 pp.)	
D. Order Affirming District Court, Sixth Circuit Case No. 17-3959 July 05, 2018 (3 pp.)	
E. Order denying delayed appeal in State Court, Ninth Ohio App. Dist. No. 15CA0026-M, April 23, 2015, Respondent's Exhibit 15 in Dist. Ct., Page ID#105-106 (2 pp)	
F. Motion for Preparation of Complete Transcript of Proceedings at State Expense filed in State Trial Court, Medina County, Ohio Common Pleas Case No. 12-CR-0210, Respondent's Exhibit 10, Page ID # 84 (5 pp)	

<u>TABLE OF AUTHORITIES</u>	<u>PAGE</u>
Douglas v California (1963) 372 U.S. 353.....	2,4
Entsminger v Iowa (1967) 386 U.S. 748.....	4
Evitts v Lucey (1985) 469 U.S. 387.....	3,4
Felker v Turpin (1996) 518 U.S. 651.....	5
Goodwin v Cardwell (CA 6, 2010) 432 F3d 521.....	3
Granger v Hurt (CA 6, 2003) 84 F. App'x. 500.....	3,4,6
Greene v Brigano (CA 6, 1997) 123 F3d 917.....	4
Griffin v Illinois (1956) 351 U.S. 12.....	2,4
Holland v Florida (2010) 560 U.S. 631.....	6
Jacobs v Mohr (CA 6, 2001) 265 F2d 407.....	3
LaChance v Erickson (1998) 522 U.S. 262.....	2
McIntosh v Hudson (N.D. Oh, 2007) 632 F. Supp. 2d 725.....	3
Pliler v Ford (2004) 542 U.S. 225.....	4
Roe v Flores-Ortega (2000) 528 U.S. 470.....	3
Thompson v Wilson (N.D. Oh. 2007) 523 F. Supp. 2d 626.....	3
Wims v U.S. (CA 2, 2000) 225 F3d 186.....	6
Wolfe v Randle (S.D. Ohio, 2003) 267 F. Supp. 2d 743.....	3
<u>Statutes, Rules</u>	
28 U.S.C. §2244.....	passim
Ohio Criminal Rule 30.....	3

LIST OF PARTIES

All parties to this proceeding are listed in the Caption.

OPINIONS BELOW

Order denying Delayed Appeal, Ninth Ohio App. Dist. Case No. 15CA0026-M, April 23, 2015 (Appendix E)

Report and Recommendation, N.D. Oh. No. 1:16-cv-2097, 06/23/17 (Appendix A)

Opinion and Order, N.D. Oh. No. 1:16-cv-2097, 08/24/16 (App'x. B)

Order Granting Certificate of Appealability, Sixth Circuit Case No. 17-3959, 01/18/18 (Appendix C)

Order Affirming District Court, sixth Circuit No. 17-3959, 07/05/18 (Appendix D)

BASIS FOR JURISDICTION

The date upon which the United States Court of Appeals for the Sixth Circuit affirmed the District Court is July 5, 2018. (See Appendix D)

This timely Petition for Writ of Certiorari is presented under the authority of 28 U.S.C. §§1254(1) and/or 1257(A) which, together with Article III of the United States Constitution, vest jurisdiction in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be deprived of life, liberty or property, without due process of law..."

Fourteenth Amendment, United States Constitution:

"...nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused...shall enjoy... the assistance of counsel for his defence..."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, CONT'D

28 U.S.C. §2244)(d):

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) The date on which the judgment became final by the conclusion of direct appeal review or the expiration of time for seeking such review;

(B) The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

STATEMENT OF THE CASE

Petitioner Justen Russell, who has a documented history of mental illness, entered into a guilty plea to aggravated vehicular homicide and four counts of felonious assault stemming from a traffic accident, in the Medina County, Ohio Common Pleas Court, and, on September 20, 2012, he was sentenced to serve a stated prison term of fifteen (15) years. neither court nor counsel advised him of his appeal rights or the time period in which to do so. He was confined in an "RTU Unit" in prison which is a lockdown mental health unit. Upon eventual discovery from hearing from another prisoner about the existence of appellate remedies, he, with the assistance of the prison law clerks, submitted a form request for Delayed Appeal to the state court, including the form seeking production of the transcripts at state expense. This was filed in March, 2015. He advised the Court that he was never advised of the right to appeal. The court of appeals denied leave to appeal on the basis that Russell did not provide the transcripts (despite having properly requested them) See Appendices E and F) The denial occurred on April 23, 2015. A timely request for selective jurisdiction review was declined by the Ohio Supreme Court on August 26, 2015.

A Petition for Writ of Habeas Corpus raising a single Ground For Relief, being denied an appeal, was filed in the Northern District of Ohio, No. 1:16-cv-2097, on August 18, 2016. On August 24, 2017, the District court, over objection, dismissed the Petition as untimely and denied the issuance of a Certificate of Appealability. (Appendix B)

On January 18, 2018, the Sixth Circuit Court of Appeals

issued a Certificate of Appealability on Russell's Application therefor, limited to the sole question as to timeliness. (Appendix C)

On July 5, 2018, following full briefing, the Court of Appeals affirmed the district Court on the sole basis of the finding that Russell "has not met his burden of showing that he exercised due diligence during the 29-month period between his sentencing in September 2012 and March, 2015." (Appendix D, p. 3) This timely Petition for Writ of Certiorari follows.

ARGUMENT

FIRST QUESTION PRESENTED FOR REVIEW

DOES THE COMPLETE FAILURE BY COURT AND COUNSEL TO ADVISE A DEFENDANT OF HIS RIGHT TO APPEAL AND THE TIME PERIOD IN WHICH TO DO SO CONSTITUTE A "STATE-CREATED IMPEDIMENT" SUFFICIENT TO TOLL THE AEDPA LIMITATIONS PERIOD UNDER 28 U.S.C. §2244(d)(1)(b)?

LAW AND ARGUMENT

This Court long ago established that where a state elects to establish appellate remedies for criminal cases, Due Process mandates that the appellate remedies be made available to all, *Griffin v Illinois* (1956) 351 U.S. 12, and that access thereto and the procedures thereof must comport with due process of law. *Douglas v California* (1963) 372 U.S. 353. Due Process of Law has been established by this Court to include, as the two primary elements, notice, and the opportunity to be heard. *LaChance v Erickson* (1998) 522 U.S. 262. Absent either of these elements, due process has not been provided.

Notice is not only required to be provided by the Court,

under the Model Rules of Criminal Procedure promulgated by the ABA and adopted by virtually every State Court system in the nation, including, specifically, Ohio which mandates Appeal notification be given during sentencing proceedings under Ohio Crim. R. 30, but it is also incumbent upon counsel to ensure that his client is made aware of the right to appeal. See, generally, **Evitts v Lucey** (1985) 469 U.S. 387, for standards relating to determining the effectiveness of counsel on appeal. This duty of counsel can even extend to ensuring that a notice of appeal is timely filed, even if not specifically asked to do so by the defendant, in a case where a reasonable person might want an appeal. **Roe v Flores-Ortega** (2000) 528 U.S. 470.

These controlling decision by this Court have been regularly applied in Ohio in cases where, as here, a defendant is left completely ignorant of the existence of appellate remedies. Denials of delayed appeals in Ohio courts have been grounds for issuance of Habeas Corpus Writs in **Wolfe v Randle** (S.D. Ohio, 2003) 267 F. Supp. 2d 743; **Thompson v Wilson** (N.D. Ohio, 2007) 523 F. Supp. 2d 626; **McIntosh v Hudson** (N.D. Ohio, 2009) 632 F. Supp. 2d 725; **Jacobs v Mohr** (CA 6, 2001) 265 F3d 407, **Goodwin v Cardwell** (CA 6, 2010) 432 F3d 521, and others. The failure of court and counsel to ensure that criminal defendants in Ohio are notified of the existence of appellate remedies and their right to access them is a recurrent problem in Ohio Habeas jurisprudence.

In **Granger v Hurt** (CA 6, 2003) 84 F. App'x. 500, the Sixth Circuit Court of Appeals addressed the implications of failure to notify by court and counsel and determined that it tolls the onset of the limitations period until the discovery of the

appellate remedies. The Granger Court relied expressly upon decisions by this Court in *Griffin, Douglas, and Evitts*, supra, and others. Notably, the courts made no mention of 'due diligence'.

What the Sixth Circuit did not address is the degree to which the failure to notify a defendant constitutes a "State-Created impediment" within the meaning of 28 U.S.C. §2244(d)(1)(b) which provides for tolling due to such a "State-created impediment".

Petitioner submits that the failure to provide Due Process-mandated notice is sufficient, ipso facto, to constitute a "state created impediment" to establish a later start date for the running of the AEDPA limitations period, as the obligation to notify the defendant is clear, obvious and well-settled. This Court has suggested that where a defendant was misled by a court or where procedural instructions "might be misleading", this could be construed as a "State-created impediment", without expressly deciding the question. See, e.g. *Pliler v Ford* (2004) 542 U.S. 225.

In this case, the sole reason for denying leave to proceed with a delayed appeal by the state court was the failure to submit the transcript. (Appendix E) Ohio procedures provide for an indigent appellant to file a Motion for Production of Transcripts at State Expense and a praecipe to the Court Reporter, along with a Notice of Appeal, which Russell did. (Appendix F) The refusal to provide the transcript of proceedings for appellate purposes to an indigent defendant has been squarely addressed by this Court and held to constitute a denial of due process of law. *Entsminger v Iowa* (1967) 386 U.S. 748. That decision is known to Ohio Courts and been applied. See, e.g. *Greene v Brigano* (CA 6, 1997) 123 F3d 917.

The combination of failures by the State Courts in failing to advise Russell that an appeal existed, much less that he had a time limit in which to access it, and by refusing to provide the transcripts for the delayed appeal proceedings, despite the proper request therefor, along with coounsel standing idly by, is sufficient, Russell submits, to constitute the "State-created impediment" contemplated by Congress in enacting the AEDPA revisions to habeas corpus practice which were designed to "regulate rather than to suspend" the writ. See, e.g. *Felker v Turpin* (1996) 518 U.S. 651.

Despite having issued a Certificate of Appealability and the accurate citation to myriad cases from this Circuit demonstrating that the failure to notify of appeal rights has been repeatedly held to be sufficient to warrant habeas relief to require the state to provide an appeal (the only remedy sought herein is to require an appeal) the Sixth Circuit, in denying relief, held that Petitioner "has not met his burden of showing that he exercised due diligence...". (Appendix D, p. 3). Notably, this completely overlooks the fact that Russell did show that he suffers from severe mental illness and was confined in a lockdown mental health unit within the prison without access to legal services until recently. This fact was overlooked by the lower courts.

The question before this Court is whether the failure to notify by court and counsel is sufficient to constitute the "State-created impediment" established by Congress as tolling the limitations period in 28 U.S.C. §2244(d)(1)(b). Russell submits that it does and that this Court should grant Certiorari to

answer this question and to provide uniformity among courts dealing with this issue.

SECOND QUESTION PRESENTED FOR REVIEW:

WHAT LEVEL OF DILIGENCE IS REQUIRED OF A MENTALLY ILL PRISONER DEFENDANT WHO, AFTER BEING LEFT COMPLETELY IGNORANT OF THE EXISTENCE OF, AND HIS RIGHT TO ACCESS APPELLATE REMEDIES, IS CONFINED IN A LOCKDOWN MENTAL HEALTH PRISON UNIT WITHOUT LAW LIBRARY ACCESS, TO SATISFY THE "DILIGENCE" REQUIREMENT OF 28 U.S.C. §2244(d)(1)(D) AND FOR EQUITABLE TOLLING UNDER HOLLAND V FLORIDA (2010) 560 U.S. 631?

LAW AND ARGUMENT

Statutory tolling of the 1-year AEDPA limitations period includes a provision under 28 U.S.C. §2244(d)(1)(D) for tolling through "The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." (id)

In refining the doctrine of equitable tolling regarding its application to Federal Habeas Corpus AEDPA limitations period practice, this Court, in *Holland v Florida* (2010) 560 U.S. 631 held that there are two elements, good cause and due diligence, to be considered in determining whether to apply equitable tolling in a federal habeas corpus action. The question of what does or does not constitute "due" diligence must be determined on a case-by-case basis. Some courts have held that it is defined as "reasonable" diligence, and cannot be stretched to "maximum, feasible diligence". See, e.g. *Granger*, *supra*, citing *Wims v U.S.*

(CA 2, 2000) 225 F3d 186, 190 (n.4).

In the instant Case, Russell provided uncontested facts establishing that, suffering from severe Mental illness, he has been confined in a lockdown mental health "RTU" [Residential Treatment Unit] of the prison system that has no access to the law library or to any legal assistance whatsoever. Upon finding out from a fellow prisoner upon being permitted some small freedoms within the unit that appeals exist, he sent a request for the proper forms and submitted them, never missing a filing deadline since. Russell eventually obtained more mobility and less restrictions upon his movement and obtained the assistance of an experienced paralegal to assist with the preparation of his pleadings, but has shown extraordinary diligence in not missing a single filing deadline, not failing to file a single required pleading, and by rendering appropriate and cogent pleadings with sufficient merit to win the issuance of a Certificate of Appealability over opposition by the state in the Sixth Circuit.

The question before this Court is one that has not been answered in any decision that Russell has been able to find by this Court and deals with narrowing the scope of what does and does not constitute "due" diligence in the context of a prisoner who is kept ignorant of his appellate remedies and the attendant time limits by court and counsel, and who is subjected to confinement that is more stringent than the "ordinary incident of prison life" that delays his ability to discover the existence of appellate remedies.

In deciding this question, there is a point to be made for the inquiry as to whether the prisoner has demonstrated

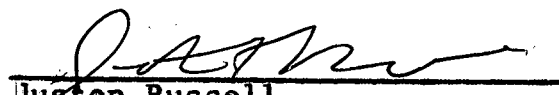
diligence since the discovery of the appeal remedies, as in this case, and whether that has any bearing on determining overall diligence and whether it is sufficiently demonstrated to warrant ordering the issuance of a writ of habeas corpus compelling release or permission to have a simple appeal of which the prisoner was deprived through no fault of his own in the first instance.

This case is ripe for review and warrants the grant of certiorari.

CONCLUSION

For the foregoing reasons, Petitioner Justen Russell submits that a Writ of Certiorari should issue in this case, and he so prays.

Respectfully submitted,


Justen Russell
Reg. No. A531-996
Grafton Corr. Inst.
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044
Petitioner, in pro se