

18-9450 ORIGINAL

No. _____

Supreme Court, U.S.

FEB 27 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October 2018 Term

ANGELA PIZZARELLI - PETITIONER

(Your Name)

Vs.

SARAH DAVIS - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(NAME OF THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Angela Pizzarelli, # 529043C

(Your Name)

Edna Mahan Correctional Facility, P.O. Box 4004

(Address)

Clinton, N.J., 08809

(City, State, Zip Code)

(908) 735-7111

(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE: DOES THE FAILURE OF THE STATE COURT CLERK'S OFFICE TO NOTIFY PETITIONER OF THE COURT'S DECISION ON APPEAL CONSTITUTE GROUNDS FOR EQUITABLE TOLLING OF HER TIME LIMIT FOR FILING HABEAS RELIEF?

QUESTION TWO: SHOULD EQUITABLE TOLLING BE GRANTED IN A HABEAS APPLICATION WHEN UNUSUAL FACTS ARE PRESENT?

LIST OF PARTIES

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

[X] 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:

- (1) William Anderson (since replaced as Administrator at EMCf by Sarah Davis, P.O. Box 4004, Clinton, N.J., 08809.
- (2) Office of the Attorney General, State of New Jersey, P.O. Box 080, Hughes Justice Complex, 25 West Market St., Trenton, N.J., 08625.

TABLE OF CONTENTS

OPINION(S) BELOW -----	1
JURISDICTION -----	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED -----	3
STATEMENT OF THE CASE -----	4
REASONS FOR GRANTING THE WRIT -----	6
CONCLUSION -----	15

INDEX TO APPENDICES

APPENDIX A: Opinion of the District Court

APPENDIX B Order of the Third Circuit Court of Appeals

TABLE OF AUTHORITIES

CASES

PAGE NUMBER

Arai v. American Bryce Ranches, Inc., 316 F.3d 1068 (CA9 2003)	10
Ayers v. Reynolds, 1995 U.S. App. LEXIS 16076 (CA8 1995)	8
Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491 (1977)	8
Byrd v. Stone, 94 F.3d 217 (CA6 1996)	10
Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134 (2002)	7
Cordon v. Greiner, 274 F.Supp.2d 434 (S.D.N.Y. 2003)	10
Gaston v. Palmer, 417 F.3d 1030 (CA9 2005)	7
Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956)	9
Halbert v. Michigan, 545 U.S. 605, 125 S.Ct. 2582 (2005)	9
Holland v. Florida, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)	13
Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80 (CA3 2013)	13
Kapral v. United States, 166 F.3d 565 (CA3 1998)	6
Lackawana County District Attorney v. Cross, 532 U.S. 394, 121 S.Ct. 1567 (2001)	10
Lindsey v. United States, 101 F.3d 444 (CA5 1996)	10
Lowe v. Letsinger, 772 F.2d 308 (CA7 1985)	11
McCray v. Maryland, 456 F.2d 1 (CA4 1972)	11
Nara v. Frank, 264 F.3d 310 (CA3 2001)	14
Schlueter v. Varner, 384 F.3d 69 (CA3 2004)	13,14
Seitzinger v. Reading Hosp. & Medical Center, 165 F.3d 236 (CA3 1999)	14
Snyder v. Nolan, 380 F.3d 279 (CA7 2004)	11
State v. Pizzarelli, 223 N.J. 281 (2015)	6
United States v. Kennedy, 553 F.Supp.2d 6 (D.D.C. 2008)	11

STATUTES AND RULES

PAGE NUMBER

28 U.S.C. Section 2244(d)(1)(B)	7,12,14
28 U.S.C. Section 2254(b)(1)(A)	9
Fed.R.App.P. 4(a)(6)(B)	10, 11
Fed.R.Civ.P. 77(d)	10
 New Jersey Court Rule 2:12-10	 8

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

☐ For cases from **federal courts**:

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

☐ reported at 2018 U.S. Dist. LEXIS 79841 (D.N.J. 2018) ; 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 _____; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished

☐ For cases from **state courts**:

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

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was

November 29, 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 at Appendix _____.

☐ An extension of time to file the petition for certiorari was granted to and including _____ (date) on _____ (date) in Application Number _____.

☐ 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 Number. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1) U.S. Constitutional Amendment Five (Due Process Clause)
- (2) U.S. Constitutional Amendment Fourteen (Due Process Clause)
- (3) Title 28 U.S.C. Section 2244(d)(1)(B)

STATEMENT OF THE CASE

This action is a petition for certiorari arising from a habeas corpus petition filed under 28 U.S.C. Section 2254, complaining that Petitioner Angela Pizzarelli is confined unlawfully in violation of a federal constitutional right.

To recap the procedural history, and including new facts, petitioner was indicted in Monmouth County New Jersey Superior Court on various felony charges which included conspiracy to commit robbery (N.J.S.A. 2C:5-2; 2C:15-1); robbery (N.J.S.A. 2C:15-1); knowing/purposeful murder (N.J.S.A. 2C:11-3a(1) and (2)); felony murder (N.J.S.A. 2C:11-3a(3)); unlawful possession of a weapon (N.J.S.A. 2C:39-5b); and possession of a weapon for unlawful purpose (N.J.S.A. 2C:39-4a). She was tried before a jury from January 7, 2009 to January 23, 2009. The jury ultimately convicted petitioner on all counts except the knowing/knowing/purposeful murder charge; on that count the jury convicted on a lesser charge of aggravated manslaughter (N.J.S.A. 2C:11-4).

On May 15, 2009, Judge Anthony Mellaci imposed sentence. Petitioner was sentenced to 45 years in prison (subject to the 85% No Early Release Act) and a concurrent five-year sentence with a 2 ½ year parole stipulation for the possession of a weapon for unlawful purpose charge.

Notice of appeal was filed on November 5, 2009. On March 1, 2012, the Superior Court, Appellate Division, affirmed the convictions and sentences. Subsequently, the New Jersey Supreme Court denied the petitioner's request for certification by order dated June 26, 2012.

A petition for post-conviction relief was filed on November 29, 2012. After assignment of counsel, an amended petition was filed on June 13, 2013. After oral argument, but without granting an evidentiary hearing, Judge Mellaci denied the petition in its entirety on November 21, 2013.

Notice of appeal was filed by counsel on March 3, 2014. After briefing and oral argument, the Superior Court, Appellate Division, affirmed the trial court's denial of post-conviction relief on May 13, 2015. A subsequent petition for certification to the New Jersey Supreme Court was denied on October 9, 2015 at 223 N.J. 281 (2015).

However, inadvertently omitted from petitioner's habeas corpus petition was the fact that she had filed a second state post-conviction relief (PCR) petition on or about November 5, 2014,

during the pendency of her appeal from the denial of her first PCR petition. This second PCR petition raised claims of ineffective assistance of counsel on direct appeal and during her first PCR action. The second PCR petition was accepted for filing by the Superior Court, Monmouth County. The second petition was dismissed without prejudice by the Superior Court on June 18, 2015 on the grounds that the appeal from the denial of her first PCR petition was still pending in the appellate court. Petitioner neglected to re-file the second PCR application once her appeal from the first PCR application was decided.

On or about the date of Uncertain, petitioner filed a habeas corpus petition in the District of New Jersey. That petition was dismissed due to untimeliness ground on or about May 11, 2018. See *Pizzarelli v. Anderson*, 2018 U.S. Dist. LEXIS 79841 (D.N.J. 2018). Notice of Appeal was filed on or about June 11, 2018. On appeal, the Third Circuit Court of Appeals declined to issue a Certificate of Appealability to review the matter.

LEGAL ARGUMENT

QUESTION ONE

DOES THE FAILURE OF THE STATE COURT CLERK'S OFFICE TO NOTIFY PETITIONER OF THE COURT'S DECISION ON APPEAL CONSTITUTE GROUNDS FOR EQUITABLE TOLLING OF HER TIME LIMIT FOR FILING HABEAS RELIEF?

The district court dismissed the habeas petition on untimeliness grounds. The court's opinion (1) refused to grant equitable tolling for the time period of some eight months, and (2) the district court refused to recognize that an inadequate prison law library and lack of assistance from the inmate workers therein constituted a "state impediment" to the timely filing of the petition. The Third Circuit refused to grant a certificate of appealability and by doing so implicitly affirmed the district court's decision.

Petitioner's state conviction appears to have become final on the date of September 24, 2012. That is the date on which her 90 days to seek certiorari to the U.S. Supreme Court on direct review expired. See *Kapral v. United States*, 166 F.3d 565,570-71 (CA3 1998). The properly filed petition for state post-conviction relief was filed on or about November 29, 2012. Petitioner's habeas corpus filing fee was thus statutorily tolled from November 29, 2012 until the New Jersey Supreme Court denied certification to hear the appeal from the denial of post-conviction relief. That date was unknown to petitioner until she received the federal district court's order. Only then did petitioner learn that the New Jersey Supreme Court had denied certification to review the post-conviction relief application on October 5, 2015. *State v. Pizzarelli*, 223 N.J. 281 (2015). Petitioner was unaware of this; she was never informed of the State Supreme Court's denial of certification by her assigned lawyer and the Supreme Court did not notify her assigned lawyer of the decision by the Supreme Court. Hence, petitioner could not realistically have filed a habeas corpus petition until she was certain whether the New Jersey

Supreme Court had refused to hear the appeal. Suppose the Supreme Court had granted certification and reversed and remanded? This would then have forced petitioner to withdraw her (hypothetically filed) federal habeas petition and then refile later if the state court's failed to provide relief. This cumbersome procedure entails a waste of judicial economy and great confusion.*

Under Title 28 U.S.C. Section 2244(d)(1)(B):

(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—

(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;

To obtain relief under 2244(d)(1)(B), the petitioner must show a *causal connection* between the unlawful impediment and his failure to file a timely habeas petition. *Gaston v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir. 2005), *amended by* 447 F.3d 1165 (9th Cir. 2006).

The district court's opinion discussed only in passing the issue of failure of the state courts to notify petitioner (or her counsel) of the decision on the appeal of denial of post-conviction relief. The district court used this fact to criticize petitioner for a lack of diligence

* The district court in a footnote states that the state PCR petition was denied by the trial court on 11/21/13 but that notice of appeal was not filed until 3/3/14, and states that this time period should also count against petitioner in the computation of her habeas time period. However, in *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134 (2002), the Supreme Court, held that for the purposes of Section 2244(d)(2), the application for state collateral review remains "pending" during the time between the lower court decision and filing of notice of appeal in a higher state court. Since the Appellate Division ***accepted*** petitioner's as if filed in timely manner and ***ruled on the merits*** of the appeal, there was no procedural default or time bar. Thus, the district court appears to not have applied *Carey v. Saffold* as required.

instead of addressing the paramount issue – whether the failure of court personnel to provide a copy of the court’s order and opinion constituted “state action” which impeded petitioner from the timely filing of her habeas petition. This is a completely separate issue from equitable tolling.

The timeline appears to have proceeded as follows: Petitioner’s last communication from her assigned counsel occurred when she was notified that a petition for certification had been filed on June 2, 2015. Petitioner had been waiting and waiting to be notified and finally decided to file this habeas corpus petition on the assumption that her application for certification to the New Jersey Supreme Court had been denied. This wait for notification is responsible for petitioner’s failure to file her habeas petition in late 2015 or 2016.

New Jersey *Court Rule* 2:12-10 states:

“A petition for certification shall be granted on the affirmative vote of 3 or more justices. Upon final determination of a petition for certification, unless the Supreme Court otherwise orders, ***the clerk*** shall enter forthwith an order granting or denying the certification in accordance with the Supreme Courts determination ***and shall mail true copies thereof to the clerk of the court below and to the parties or their attorneys.*** The date of the order granting certification shall be posted on the Judiciary’s website.” (emphasis added).

This mandatory language seems to leave no discretion; the court personnel MUST notify the parties and/or their attorneys of the results of all litigation. Filing court orders and preparing and transmitting the certified record are functions closely associated with the judicial process.

Ayers v. Reynolds, 1995 U.S.App. LEXIS 16076 (CA8 1995). Access to the judicial process is a constitutional right. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977). It seems apparent that the New Jersey Supreme Court is a State entity. If the court violated the New Jersey Rules of

Court and failed to notify petitioner or her counsel of the court's denial of the petition for certification, then this action by a State government entity would prevent petitioner from filing her federal habeas petition until after she learned of the court's ruling (after expiration of the AEDPA statute of limitations). As noted above, petitioner could not have exhausted her state remedies until she was notified of the State Supreme Court decision. Had she tried to file the federal habeas petition prior to exhausting her State remedies, the habeas action would be subject to dismissal under 28 U.S.C. Section 2254(b)(1)(A) for failure to exhaust the claim.

But is the state court's failure to issue a ruling or to notify the petitioner or counsel of its decision action "in violation of the Constitution or laws of the United States?" A review of Supreme Court jurisprudence suggests that this is so. Combining Supreme Court decisional law with a bit of extrapolation, it is not difficult to conclude that the state court's failure to notify the parties of its decision (thus leaving the defendant languishing) violates the due process constitutional rights of the appellant. See *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956)(states may not constitutionally permit appeals by people with financial resources while prohibiting indigent defendants from appealing due to poverty); *Douglas v. California*, 372 U.S. 353, 83 S Ct 814 (1963)(the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right); *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582 (2005)(Due process and equal protection clauses of Federal Constitution's Fourteenth Amendment held to require appointed counsel for indigent defendants, convicted on pleas, seeking access to Michigan Court of Appeals' first-tier review). If the U.S. Supreme Court holds that indigents must be afforded an opportunity to appeal, just as wealthy defendants are, then it would seem to violate the Court's decisional law to fail to deliver the decision of that court to the

litigant. This is so regardless of which court employee is to blame for the nonfeasance.

Support for petitioner's arguments also comes from the plurality opinion in *Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 405, 121 S.Ct. 1567 (2001), where Justice O'Connor wrote that Section 2244(d)(1)(B) would apply if a State court refused to rule on a constitutional claim that had been properly presented to it.

In the civil context, more support is found. In *Lindsey v. United States*, 101 F.3d 444 (CA5 1996), the Fifth Circuit reversed the dismissal of a civil complaint where the pro se indigent plaintiff's failure to effect service upon the defendants was attributable to the clerk's failure to provide the plaintiff with proper summons form; the failure was due to government personnel who improperly performed their duties. In *Byrd v. Stone*, 94 F.3d 217, 220 (CA6 1996), the Sixth Circuit stated "the utter failure of the clerk and the Marshals Service to accomplish their respective duties to issue and serve process for plaintiff proceeding *in forma pauperis* constitutes a showing of good cause under Fed. R. Civ. P. 4." (citing cases from other circuits). Perhaps more closely on point are the following: *Arai v. Am. Bryce Ranches, Inc.*, 316 F.3d 1066 (CA9 2003) (Where district court clerk failed to send notice, as required by FRCP 77(d), that the defendant debtor's motion to vacate judgment had been denied, district court abused its discretion by denying as meritless the debtor's motion under FRAP 4(a)(6) to reopen time for filing appeal); *Cordon v. Greiner*, 274 F Supp 2d 434. (S.D.N.Y. 2003) (Since, under Fed. R. App. P. 4(a)(6)(B), the defendant did not receive notice of entry of judgment within required time limit to which he was entitled under Fed. R. Civ. P. 77(d), he filed his motion to reopen time to file appeal within 180 days, and State was not prejudiced, motion to reopen appeal in regard to denial of his habeas corpus petition was granted); *United States v. Kennedy*,

553 F Supp 2d 6 (D.D.C. 2008)(Defendant was entitled under Fed. R. App. P. 4(a)(6) to reopen time to file appeal of denial of his petition for writ of *audita querela* because he did not receive proper notice of entry of order under Fed. R. Civ. P. 77(d)).

Nor should the nonfeasance be excused simply because the decision denying certification was listed in a computer database. This is beside the point; the court has a duty to notify parties of the result of a court decision and failed to do so here.

Applied here, Petitioner had a constitutional right to petition the courts for redress of her grievances pertaining to her criminal conviction. The New Jersey Supreme Court's failure to notify her or her attorney of a decision after that decision was entered, or failure to rule on her petition for certification, prevented her from timely filing her federal habeas petition. The clerk's duty to inform the parties about a court ruling is ministerial, not discretionary. See, e.g., *Lowe v. Letsinger*, 772 F.2d 308,313 (CA7 1985)(“..the clerk's duty to type and send notice after entry of judgment is a non-discretionary, ministerial task”); *Snyder v. Nolen*, 380 F.3d 279,286-89 (CA7 2004(*per curiam*))(clerk of court who allegedly refused to file inmate's pleadings was not acting in "functionally comparable" way to judge and breached duty to perform ministerial act of accepting technically sufficient papers; *McCray v. Maryland*, 456 F.2d 1,4 (CA4 1972) (stating “Clerical duties are generally classified as ministerial and the act of filing papers with the court is as ministerial and inflexibly mandatory as any of the clerk's responsibilities.); It is the ministerial, non-discretionary duty of the Supreme Court clerk's office to notify the parties in litigation of the results of the court's ruling, not simply post the result on a website and hope the parties become aware of it through their own devices.

The nonfeasance of the New Jersey Supreme Court personnel constitutes “state action” in

violation of the constitutional due process right of petitioner to appeal her criminal conviction. This meets the standards of 28 U.S.C. Section 2244(d)(1)(B) and the district court should have accepted the habeas petition as timely. Because there is no clear definition of what constitutes an "impediment to filing in violation of the laws or Constitution of the United States" in the Third Circuit (nor evidently from the U.S. Supreme Court), this Court should grant certiorari, assign counsel to represent petitioner, and clarify the matter. This court should grant certiorari, set aside the dismissal order, and remand to the district court for consideration of the habeas petition on its merits.

QUESTION TWO
**SHOULD EQUITABLE TOLLING BE GRANTED IN A
HABEAS APPLICATION WHEN UNUSUAL FACTS ARE
PRESENT?**

In *Holland v. Florida*, 130 S. Ct. 2549, 2554, 2560, 177 L. Ed. 2d 130 (2010), the Supreme Court found that the AEDPA's one-year limitation period is subject to equitable tolling in appropriate cases. The Supreme Court has stated, "generally, a litigant seeking equitable tolling [of the AEDPA's one-year statute of limitations] bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." See also *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 89 (3d Cir. 2013). The diligence required for equitable tolling purposes is **reasonable diligence**, not maximum, extreme, or exceptional diligence. *Holland*, 130 S. Ct. at 2565.26. A determination of whether a petitioner has exercised reasonable diligence is made under a subjective test: it must be considered in light of the particular circumstances of the case. *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004). In this case petitioner's lawyer filed a timely petition for certification with the New Jersey Supreme Court on June 2, 2015. Both petitioner and her lawyer then did the reasonable thing – they waited for the clerk's office to notify them of the court's decision (something the clerk is required to do by court rule) regarding her petition for certification. Should petitioner have been expected to periodically contact the clerk's office and try to ascertain the status of her petition for certification? Should her attorney, who is burdened with hundreds of cases, be expected to do so? Or should they have waited for the clerk to do the task required by rule of court and notify them of the results? Reasonable diligence requires that an attorney file the petition when requested by their client in a timely

manner, not that the attorney constantly badger the court clerk to ascertain the status of the matter.

As to the extraordinary circumstances prong, in some cases an attorney's malfeasance may warrant equitable tolling of the statute of limitations. *Schlueter*, supra, 384 F.3d at 76-77 (citing *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3d Cir. 1999)); see also *Nara v. Frank*, 264 F.3d 310, 320-21 (3d Cir. 2001).

As applied to the instant petition, the extraordinary circumstance preventing appellant from the timely filing of her habeas petition was the failure of the New Jersey Supreme Court clerk to forward a copy of the court's order denying certification to Ms. Pizzarelli or her assigned counsel for an extended period of time after the decision was entered on October 9, 2015. Is it not extraordinary that the clerk's office of the State Supreme Court should fail to perform its ministerial duty and notify the parties in litigation of the court's decision in the matter? Without knowing whether the State Supreme Court would hear her claims, Ms. Pizzarelli had no way to know she needed to file a habeas petition in federal court.

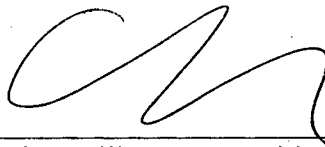
As to the diligent pursuit of her rights prong, appellant was aware the petition for certification had been filed. She was relying on her lawyer to apprise her of the outcome of that petition. Was that unreasonable or not diligent? This case presents a clear reason for the application of equitable tolling.

Petitioner argues that equitable tolling is also applicable in this case. If this court denies relief under Section 2244(d)(1)(B) and the "state action" clause, it should grant equitable tolling for the time from October 9, 2015 until the date on which Ms. Pizzarelli filed her habeas petition.

CONCLUSION

For the foregoing reasons, this court should grant certiorari, assign counsel to represent petitioner, reverse the district court's order dismissing the habeas petition as untimely, and remand for consideration of the habeas petition on the merits.

Dated: 2-21-, 2019



Angela Pizzarelli, *Pro Se* Petitioner