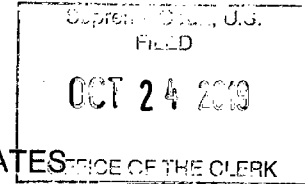


19-6455 ORIGINAL  
No.

IN THE  
SUPREME COURT OF THE UNITED STATES



JOWARSKI RUSSELL NEDD — PETITIONER  
(Your Name)

vs.

HAROLD W. CLARKE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOWARSKI RUSSELL NEDD  
(Your Name)

329 Dellbrook Lane  
(Address)

Independence, Virginia 24348  
(City, State, Zip Code)

(Phone Number)

## QUESTION PRESENTED

Jowarski R. Nedd filed in the district court, below, a petition for a writ of habeas corpus under 28 U.S.C. §2254. Despite the facts alleged in Nedd's §2254 Petition and the proofs he presented in support of his Reply to the Respondent's statute of limitations defense showing that Nedd fully complied with the filing requirements set forth in Va. Code §§ 8.01-654(B)(1) and 8.01-655, and Va.Sup.Ct.R 3A:25, the district court granted the State's Fed.R.Civ.P. 12(b)(6) Motion to Dismiss on statute of limitations grounds, based on its conclusion that Nedd failed to demonstrate that he ever properly filed a petition for a writ of habeas corpus in the state court. In reaching that conclusion, the district court relied upon its arbitrary and baseless finding that the Circuit Court of Accomack County noted that Nedd's State Petition for writ of Habeas Corpus had not been properly prepared. Moreover, in determining that Nedd's §2254 Petition was barred by the statute of limitations, the district court ignored, and failed to address, Nedd's alternative argument for statutory tolling during the time his State habeas corpus petition was pending in the State Circuit Court. This case thus presents the following question:

WHETHER THE DECISIONS OF THE COURTS BELOW OUGHT TO BE SUMMARILY REVERSED AND THE CASE REMANDED TO THE COURT OF APPEALS WITH INSTRUCTIONS TO REMAND THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISPOSE OF NEDD'S §2254 PETITION, AS LAW AND JUSTICE REQUIRE, INCLUDING CONDUCTING APPROPRIATE FACT-FINDING PROCEDURES TO DETERMINE WHETHER NEDD QUALIFIES FOR STATUTORY TOLLING OF THE STATUTE OF LIMITATIONS UNDER 28. U.S.C. §2244 (d)(2).

## LIST OF PARTIES

[X] 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:

## TABLE OF CONTENTS

|                                                        |    |
|--------------------------------------------------------|----|
| OPINIONS BELOW.....                                    | 1  |
| JURISDICTION .....                                     | 2  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 3  |
| STATEMENT OF THE CASE .....                            | 8  |
| REASONS FOR GRANTING THE WRIT.....                     | 13 |
| CONCLUSION .....                                       | 26 |

## INDEX TO APPENDICES

|             |                                                                                                                   |
|-------------|-------------------------------------------------------------------------------------------------------------------|
| APPENDIX A: | Decision of the Fourth Circuit                                                                                    |
| APPENDIX B: | Memorandum and Final Order of the District Court                                                                  |
| APPENDIX C: | Order of the Fourth Circuit denying Nedd's Petition for rehearing                                                 |
| APPENDIX D: | Per Curiam Opinion of the Court of Appeals of Virginia                                                            |
| APPENDIX E: | Order of the Supreme Court of Virginia                                                                            |
| APPENDIX F: | Memorandum Opinion and Order of the District Court denying Nedd's Motion to Alter, Amend, or Reconsider Judgment. |
| APPENDIX G: | Memorandum Order of the District Court                                                                            |
| APPENDIX H: | Memorandum Order of the District Court granting Nedd's Motion to Reopen Appeal Period                             |

## TABLE OF AUTHORITIES CITED

| CASES:                                                                                   | PAGE NO. |
|------------------------------------------------------------------------------------------|----------|
| Aguilera v. Kirkpatrick, 241 F.3d 1086 (10th Cir. 2001).....                             | 15       |
| Aldrich v. McCulloch, 627 F.2d 1036 (10th Cir. 1980).....                                | 16       |
| Alexander Redevelopment & Housing Authority v. Walker,<br>772 S.E.2d 297 (Va. 2015)..... | 21       |
| Artuz v. Bennett, 531 U.S. 4 (2000).....                                                 | 18       |
| Carey v. Saffold, 536 U.S. 214 (2002).....                                               | 17       |
| Day v. McDonough, 547 U.S. 198 (2006).....                                               | 15       |
| Gildon v. Bowen, 384 F.3d 883 (7th Cir. 2004).....                                       | 15       |
| Hill v. Braxton, 277 F.3d 701 (4th Cir. 2001).....                                       | 15       |
| Jones v. Bock, 549 U.S. 199 (2007).....                                                  | 16       |
| Oshiver v. Levin, Fishbein, Sedran & Berman,<br>38 F.3d 1380 (3d Cir. 1994).....         | 16       |
| Pace v. DiGuilmo, 544 U.S. 408 (2005).....                                               | 19       |
| Ray v. Clements, 700 F.3d 993 (7th Cir. 2012).....                                       | 15       |
| Semenova v. Md Transit Admin., 845 F.3d 564 (4th Cir. 2017)...                           | 16       |
| Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002).....                                       | 16       |
| Walker v. Kelley, 589 F.3d 127 (4th Cir. 2009).....                                      | 15       |
| Walker v. True, 399 F.3d 313 (4th Cir. 2005).....                                        | 15       |

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 \_\_\_\_\_; 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.

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 June 20, 2019.

☐ 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: August 23, 2019, and a copy of the order denying rehearing appears at Appendix C.

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

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 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. A.

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

## Constitutional And Statutory Provisions Involved

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### Amendment XIV

#### Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; 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.



28 U.S.C. Sec. 2243

A court, justice, or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law, the person to whom the writ is directed shall be required to produce, at the hearing, the body of the person detained.

The applicant or person detained may, under oath,

deny any of the facts set forth in the Return or allege any other material facts.

The Return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. Sec. 2244(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 review or the expiration of the 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 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 is pending shall not be counted toward any period of limitation under this subsection.

#### 28 U.S.C. Sec. 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right to appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. Sec 2254(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 or laws or treaties of the United States.

## Statement Of The Case

### A. Background Information

Your Petitioner, Towarski R. Nedd ("Nedd") is serving a sentence of life, plus 18 years for Capital Murder, Robbery, and a Firearms offense, pursuant to a judgment of conviction entered against him by the Circuit Court for Accomack County, Virginia Commonwealth v. Nedd, Case Nos. CR09000051 and CR09000086.

### B. Statement of the Facts

On November 22, 2016, Nedd filed in the United District Court for the Eastern District of Virginia a petition for a writ of habeas corpus under 28 U.S.C. Sec. 2254, raising claims that Nedd was denied rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Pet. Petition, at 3-16, para. 12.

The verified petition alleged that on direct review from the pertinent judgment, the Court of Appeals of Virginia affirmed the circuit court's judgment and the Supreme Court of Virginia refused discretionary

review on December 6, 2011, and that Nedd did not seek certiorari review in this Court. See Id., at 1-2, paras 8-9. The revised Petition further alleged:

That Nedd submitted to the "Circuit Court of Accomack County," a petition for a writ of habeas corpus on "November 22, 2012, which was "Not filed."

Id., at 2-3, paras. 10-11.

### Response to Petition

In response to Nedd's Section 2254 Petition, the Respondent submitted a Motion to Dismiss that asserted the affirmative defense of the statute of limitations and averred that Nedd "did not file a petition for a writ of habeas corpus in state court." see Resp. Brief In Support of Motion to Dismiss, at 4-5, paras 7-11; and 2, para. 4.

### Reply to Motion

In Reply to Respondent's Motion to Dismiss, Nedd:

- (1) Re-alleged that he submitted a petition for a writ of habeas corpus to the Accomack County Circuit Court, which the Clerk of that court refused to file, and detailed his unsuccessful efforts to have his state

habeas petition filed, docketed and resolved. See Reply, at 1-3.

Nedd also presented proofs, in the form of letters, showing that the Clerk's Office of the Accomack County Circuit Court "perused" Nedd's state habeas "Petition," for which it had no record of receiving "in 2012." See Reply, Exhibit No. 6 and Exhibit No. 9. Exhibit No. 6 is a letter addressed to Nedd and dated October 7, 2015, by Caretta S. Duncan, a deputy clerk in the Clerk's Office of the Accomack County Circuit Court, in which Ms. Duncan states, in pertinent part, as follows:

"Our office has received your petition," which has not "been properly prepared for the Court. I have enclosed the instructions for filing a 'Writ of Habeas,' please review it and 'Resubmit your petition.'"

Ex. No. 6.

Exhibit No. 9 is a letter addressed to Nedd dated July 20, 2016, by Douglas B. Robelen, the Chief Deputy Clerk of the Supreme Court of Virginia, in which Mr. Robelen states, in pertinent part, as follows:

"This office has been in contact with the Accomack Circuit Court Clerk's Office, which has advised this office that it has 'no record' of

'receiving a habeas corpus petition from you  
'in 2012.'")

Ex. No. 9.

Thereafter, Nedd explained his position as to Respondent's statute of limitations defense, in part, as follows:

"[I]t is my position that the state created an impediment to a timely filing. In the alternative, unless the Respondent can establish how my [State habeas] petition was not properly filed, then it is my argument that the time during which this issue was pending in the state courts should be tolled. . . . "It is my position there should be no time bar . . . and the claims presented should be reviewed on the merits."

Reply, at 4.

Finally, Nedd moved the district court "to deny the Respondent's motion to dismiss, or, in the alternative, conduct a hearing on this matter." Reply, at 5.

### Disposition Without Hearings

The district court, without having conducted any



hearings, granted the Respondent's Motion to Dismiss, dismissed Nedd's claims, denied Nedd's petition for a writ of habeas corpus under 28 U.S.C. Sec. 2254 Petition, denied a certificate of appealability, and dismissed the action, by its Final Order, rendered in accordance with its Memorandum Opinion, Appx. B(2), Final Order.

In its Memorandum Opinion, the district court, without having addressed Nedd's argument for statutory tolling during the pendency of his state habeas petition in the Accomack County Circuit Court, the district court determined, without hearings, that "Nedd's [section] 2254 Petition [was] barred by the statute of limitations," because:

"Nedd ... failed] to demonstrate that he ever 'properly filed' a petition for writ of habeas corpus in the state court," since "the Circuit Court noted in October 2015 that a submission labeled 'Petition for Writ of Habeas ... had not] been 'properly prepared.'"

Appx. B(1), Memo. Op., at 4 n.4

### Court of Appeals.

In Appellate Case No. 18-6795, at issue in this case, the Court of Appeals, following its independent

Review of the record, denied a certificate of appealability, and dismissed the appeal, without analysis or explanation, based upon the Court's conclusion "that Nedd has not made the requisite showing" under 28 U.S.C. Sec. 2253(C)(2) to obtain certificate of appealability, presumably, because Nedd failed "to demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a 'debatable' claim or the denial of a constitutional right." Appx., at 3-4.

## Reasons For Granting The Writ

### I. Importance of the Question Presented

This case presents a fundamental question of the proper application of the Federal Rule of Civil Procedure 12(b)(6) motion-to-dismiss procedure to dispose of a Petition for a Writ of Habeas Corpus filed under 28 U.S.C. Sec. 2254, on statute of limitation grounds, "as law and justice require." 28 U.S.C. Sec. 2243.

In view of the inordinate and indiscriminate use of a Rule 12(b)(6) Motion to Dismiss by the States to raise the statute of limitations defense, rather than raise the defense in a responsive pleading, the question is

of immense importance to state prisoners, because it affects their ability to to receive fair dispositions or their applications for a writ of habeas corpus in a judicial proceeding in which district courts are statutorily Mandated "to hear and determine the facts and dispose of the matter as law and justice require." 28 U.S.C. Sec. 2243.

The issues importance is enhanced in this case, in which the district court disposed of Nedd's Section 2254 Petition, on Respondent's Motion to Dismiss, on Statute of limitations grounds, without hearings to determine facts critical to the fair disposition of Nedd's Section 2254 Petition, as law and justice require.

### Standard Of Dismissal

Federal Statutes do not address the standard for dismissal in habeas corpus proceedings. Thus, the Federal Rules of Civil Procedure apply. See Fed. R. Civ. P. 81(a)(4). The Respondent did not invokes these Rules, but generally argued that Nedd's Section 2254 Petition is barred by the applicable statute of limitations and that "it must be dismissed." *Id.*

In proceedings under Section 2254, "the familiar Standards in Rule 12(b)(6) of the Federal Rules of Civil Procedure apply to the government's motion to dismiss."

Walker v. Kelley, 589 F.3d 127, 138 (4th Cir. 2009). See Aguiar v. Kirkpatrick, 241 F.3d 1086, 1099 (10th Cir. 2001). Under Rule 12(b)(6), the court must dismiss the petition when it fails to state a claim on which relief can be granted. See Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion to dismiss, the court "is obliged to assume all facts pleaded by" the petitioner to be true." Walker v. True, 399 F.3d 315, 319 (4th Cir. 2005) (internal quotation marks and citation omitted).

Respondent's motion to dismiss raised the defense of the statute of limitations, which constitutes an affirmative defense. See Fed. R. Civ. P. 8(c)(1). It is well-settled that AEDPA's statute of limitations is a nonjurisdictional affirmative defense. Ray v. Clements, 700 F.3d 993, 1006 (7th Cir. 2012) (citing Day v. McDonough, 547 U.S. 198, 205 (2006)). See Hill v. Braxton, 277 F.3d 701, 705 (4th Cir. 2001). "Since the period of limitations is an affirmative defense, the state has the burden of showing that the petition is untimely." Gildon v. Bowen, 384 F.3d 883, 886 (7th Cir. 2004).

"While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitation defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made where the [petition] facially shows noncompliance with the limitations period and the

affirmative defense clearly appears on the face of the [petition]." Oshiver v. Levin, Fishbein, Sedran and Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994). See Semenova v. Md. Transit Admin., 845 F.3d 564, 567 (4th Cir. 2017) (A court may grant a Rule 12(b)(6) motion on statute of limitations grounds "only if the time bar is apparent on the face of the [petition]." Thus, "[i]f the allegations [in the petition] . . . show that relief is barred by the applicable statute of limitations, the [petition] is subject to dismissal for failure to state a claim. . . . Jones v. Bock, 549 U.S. 199, 215 (2007). On this issue, the petitioner bears the burden to establish "a factual basis for tolling" "when the dates in the [petition] make clear that the right sued upon has been extinguished." Aldrich v. McCulloch, Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). See Smith v. Duncan, 297 F.3d 809, 814-15 (9th Cir. 2002).

A. Nedd's Section 2254 Petition Was Filed Within The Limitations Period Set Forth In 28 U.S.C. Section 2244(d)(1)

Pursuant to Sec. 2244(d)(1), a one-year period of limitations applies to a state prisoner's application

for a writ of habeas corpus. In this case, the period of limitations started running when Nedd's conviction "became final" either "by the conclusion of direct review or [by] the expiration of the time for seeking such review." *Id.*, Section 2244(d)(1)(A). The statute provides, however, that the period of limitations tolled for "[t]he 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." *Id.* Section 2244(d)(2). An application is pending as long as the ordinary state collateral review process is "in continuance" - i.e., "until the completion of" that process. In other words, until the application has achieved final resolution through the state post-conviction procedures, by definition remains "pending."

Carey v. Saffold, 536 U.S. 214, 219 (2002) (quoting Webster's Third New International Dictionary 1669 (1993)).

1. Nedd's State Application For A Writ Of Habeas Corpus Petition Was Pending, Unresolved, In A State Circuit Court At The Time His Section 2254 Petition Was Filed

Accepting as true the facts alleged in Nedd's Section 2254 Petition, Nedd's one-year clock started on March 5, 2012, when his conviction became final. The clock stopped on November 22, 2012, when Nedd executed, and submitted to the Circuit Court of Accomack County, a petition for a writ of habeas corpus, which was "Not Filed." As a result, Nedd's State habeas corpus petition, which was received by the Clerk's Office of the said Circuit Court, remains pending, unfiled and unresolved, in state court, as shown by Nedd's Reply and Proofs in support.

2. The One-Year Limitations Period Was Statutorily Tolted On November 22, 2012 And Remains Statutorily Tolted Under 28 U.S.C. Section 2244(d)(2)

There is no tolling under Section 2244(d)(2) if the state application for a writ of habeas corpus was not "properly filed." This Court in Artuz v. Bennett, 531 U.S. 4 (2000), ruled that an application for post-conviction relief is "properly filed," within the meaning of the statute when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, which usually prescribe "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged and the requisite filing fee." Artuz,

531 U.S. at 8. The question of whether a pleading was "properly filed is a question of state law. see Pace v. Di Guglielmo, 544 U.S. 408 (2005). The applicable laws and Rules governing the filing of petitions for a writ of habeas corpus in Virginia are set forth, below.

#### (a) The Form of the Document

Va. Code Section 8.01-655 ("Form and contents of petition filed by prisoner"), provides, as follows:

"A. Every petition filed by a prisoner seeking a writ of habeas corpus must be filed on the form set forth in subsection B. The failure to use such form and to comply substantially with such form shall entitle the court to which such petition is directed to return such petition to the prisoner pending the use of and substantial compliance with such form. . . .

"B. Every petition filed by a prisoner seeking a writ of habeas corpus shall be filed on a form to be approved by the office of the Attorney General. . . .

"Id. The statute further provides that "[i]n order for th[e] petition to receive consideration by the Court, it must be legibly handwritten or typewritten by the prisoner and verified before a notary or other officer



authorized to administer oaths. It must set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on an additional page. Petitioner must make it clear to which question any such continued answer refers. The petitioner may also submit exhibits. *Id.*, Instructions.

### (b) The Requisite Filing Fee

Va. Code Section 8.01-655 provides that "[t]he petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit in forma pauperis." *Id.*

### (c) The Court and Office In Which Habeas Corpus Petition Must be lodged.

Va. Code Section 8.01-654(B)(1) provides, in part, that "[w]ith respect to any such petition filed by a petitioner held under criminal process... only the circuit court which entered the original judgment or order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus." *Id.* Ordinarily, in civil proceedings, a pleading is "filed" when it is physically delivered to the clerk of

Court, Alexander Redevelopment and Housing Authority v. Warkner, 290 Va. 150, 154, 772 S.E.2d 297, 300 (2015). However, Va. Sup. Ct. P. 3A:25 ("Special Rule Applicable to Post-Conviction Proceedings: Inmate Filings In The Trial Courts Under [Section] 8.01-654"), provides, in pertinent part, that "[i]n actions brought under [Section] 8.01-654, filed by an inmate confined to an institution, a paper is timely filed if deposited in the institutions internal mail system, with first-class postage prepaid on or before the last day for filing." Timely filing of a paper by an inmate confined to an institution may be established by... (2) an official postmark dated on or before the last day for filing. . . ."

(d) Time Limit Upon Delivery of A Habeas Corpus Petition Under Section 8.01-654

Va. Code Sec. 8.01-654(A)(2), provides, in pertinent part, that "[a] habeas corpus petition attacking a criminal conviction or sentence . . . shall be filed . . . within one-year from either final disposition of the direct appeal in state court or the time for filing such an appeal has expired, whichever is later."

### 3. Nedd's State Habeas Corpus Petition Under Va. Code Sec. 8.01-654 Was Properly Filed

In this case, as previously noted, the district court disposed of Nedd's Section 2254 Petition by granting the state's motion to dismiss on statute of limitations grounds. Instead of assuming the facts pleaded in Nedd's Section 2254 Petition to be true, however, the district court found that Nedd had "failed" to demonstrate that he ever properly filed a petition for writ of habeas corpus in the state court," and - as explained in detail below - reached this conclusion (a) by relying upon an arbitrary and baseless finding, (b) by either ignoring or discounting the factual allegations in the Section 2254 petition, and (c) by ignoring Nedd's argument for tolling during the pendency of his state habeas corpus petition in the state Circuit Court.

The district court's conclusion that Nedd failed to demonstrate that he ever "properly filed" a petition for a writ of habeas corpus "in the state court," rests upon the arbitrary and baseless finding that "the Circuit Court," rather than a deputy clerk of that court "noted" that Nedd's state "Petition for writ

of Habeas" had not been "properly prepared," when, in truth and, in fact, no such finding had been made by the Circuit Court of Accomack County, since it was a deputy clerk of that Circuit Court, who, in a letter dated October 7, 2015, informed Nedd that her "office" had "Received" his "Petition for Writ of Habeas [Corpus]," which had not "been 'properly prepared' for the Court," informed Nedd that she had "enclosed the instructions for filing a 'Writ of Habeas,'" and advised Nedd to "Resubmit" his "petition." Ibid.

In her letter of October 7, 2015, the deputy clerk does explain how Nedd's State habeas corpus petition had not been "properly prepared," but strongly suggests that Nedd failed to comply with portions of the instructions listed on the first page of the Form Required by Va. Code Sec. 8.01-655(B). However, any such suggestion is thoroughly refuted by the Petition for a Writ of Habeas Corpus that Nedd executed, and submitted to the Circuit Court of Accomack County, on November 22, 2012, a copy of which was submitted to the district court, below, as evidence contesting the State's statute of limitations defense.

It must be bore in mind that in this case, the district court, in determining that Nedd's Section

2254 Petition was untimely, "Relied upon the State Court Record" and "Rejected" Nedd's equity arguments to excuse the supposed time bar. See Appx. F, at 4. In addition, in determining that Nedd's Section 2254 Petition was "barred by the statute of limitations," the district court ignored both Nedd's alternative request that the district court "conduct a hearing" on the State's statute of limitations defense and Nedd's alternative argument for statutory tolling of the statute of limitations inferred from Nedd's statement "that the time during which this matter [regarding his state habeas corpus petition] was pending in the state courts should be tolled." See Appx., at 4 and 5.

B. A Hearing Is Required Upon Nedd's Request To Determine Facts Critical To The Fair Disposition Of Nedd's Section 2254 Petition.

Fed. P. Civ. P. 12(i) provides that "[I]f a party so moves, any defense listed in Rule 12(b)(1)-(7) - whether made in a pleading or by motion - and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial."

A hearing is necessary in this case under the facts

and circumstances showing:

That Nedd's State petition for a writ of habeas corpus was "received" by, but "not filed" in, the Clerk's Office of the Circuit Court of Accomack County, and that - despite Nedd's efforts to have his State habeas corpus petition filed by the Clerk and resolved by the Circuit Court - Nedd's State habeas corpus petition had not been filed, nor resolved, at the time Nedd filed his Section 2254 Petition on November 22, 2016 in the federal district court, below.

Specifically, Nedd is entitled to a factual inquiry to determine whether he qualifies for statutory tolling of the statute of limitations under Section 2244(d)(2), which turns on whether Nedd timely submitted his State habeas corpus petition in compliance with the filing requirements of Va. Sup. Ct. R. 3A:25. Because Nedd's State habeas corpus petition was "received" by the Clerk's Office of the Circuit Court of Accomack County, Va., the timeliness of Nedd's State habeas corpus petition can be easily ascertained by the "official postmark" date on the envelope in which Nedd's State habeas corpus petition was received by the Clerk's Office. Va. Sup. Ct. R. 3A:25. Moreover, the date on which Nedd's State habeas corpus petition was received by the Clerk's Office shown appears "on the face" of Nedd's State habeas corpus petition.

Va. Code Sec. 17.1-129 ("Whenever a pleading in any civil action is filed in a circuit court, the clerk or his designee shall stamp or mark the date and time of filing on the face of the pleading.").

For the foregoing reasons, Nedd respectfully submits that in order to attain the ends of justice in this case, the Court should summarily reverse the decisions of the Court's below, and Remand this case to the Court of Appeals with instructions to Remand the case to the district court with instructions to dispose of Nedd's Section 2254 Petition, as law and justice require, including conducting appropriate fact-finding procedures to determine whether Nedd qualifies for statutory tolling, which depends on whether Nedd filed his State habeas corpus petition in compliance with Va. Code Sections 8.01-654(B)(1) and 8.01-655, and Va. Sup. Ct. R. 3A:25.

#### CONCLUSION

The petition for a writ of certiorari should be granted

Dated: October 24, 2019

Respectfully Submitted

Jowarski Nedd

Jowarski R. Nedd,

Petitioner, Pro Se