

No. 19-7043

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNI A. TOTI,
PETITIONER,

VS.

MARK S. INCH, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENTS.

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

MOTION FOR REHEARING

PROVIDED TO AVON PARK
CORRECTIONAL INSTITUTION
ON 6/26/20 FOR MAILING
BY 



JOHNI A. TOTI
DC# B12440

Avon Park C.I. - Work Camp
8100 County Road 64 East
Avon Park, FL 33825

RECEIVED

JUL 10 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR REHEARING

COMES, the Petitioner, JOHN A. TOTI, pro se, and respectfully requests this Court for rehearing in the above-styled cause of action. The Petitioner files this motion pursuant to Rule 44.2 and in compliance with Rules 33.2 and 34. Mr. Toti additionally files this motion for rehearing in good faith and not to unduly delay this Court, and states the following in support thereof.

PROCEDURAL HISTORY

The Petitioner filed the original 28 U.S.C. § 2254 Petition on January 16, 2018, in the U.S. District Court, Southern District of Florida. The U.S. District Court did not request the State of Florida to appear.

The Magistrate issued the Report and Recommendation (Doc #5) on January 25, 2018. The Magistrate stated that the Petitioner was time-barred, exceeding the one-year AEDPA time limitation and that COA should not be granted. The Petitioner filed a timely objection to preserve his claims for appeal purposes. The District Judge issued the Final Order on February 14, 2018, accepting the Magistrate's Report and Recommendation and dismissing the § 2254 as time-barred.

The Petitioner filed a timely Notice of Appeal in the District Court, and appeal taken to the 11th Circuit Court of Appeals. The Petitioner filed an Application For Certificate of Appealability (COA), and COA was granted. The Petitioner filed his Brief on August 3, 2018 and the State filed their Response on September 25, 2018. The 11th Circuit denied the Petitioner's § 2254 on June 13, 2019, stating that Mr. Toti failed to overcome the time-bar question. The Court additionally stated that because of Mr. Toti not properly addressing the time-bar issue that the 11th Circuit was prevented from addressing the merits of the case.

The Petitioner filed in this Court the Petition For Writ of Certiorari, on December 12, 2019.

STATUTORY TIME-BAR

28 U.S.C. § 2244(d)(1)(B)-(D)

The one-year limitation in 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling. The time limitation period begins to run in accordance with individual circumstances that could reasonably affect availability of remedy. Miller v. Mann, 141 F.3d 976, 978 (10th Cir. 1998); citing, Leuchter v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 1298-1299, 1303, 134 L.Ed.2d 440 (1996), this Court additionally stated it disapproved of the statutory rule concerning delayed petitions, Rule 9(a) of the Rules Governing § 2254 cases in the United States District Courts. This Court distinguished between successive petitions and first petitions. This Court held that the dismissal of a first Federal habeas petition is regarded as a serious matter for the dismissal denies the petitioner the protections of the Great Court entirely, risking injury to an important interest in human liberty. As in Petitioner's case, there were circumstances where the limitation period at least raises constitutional questions and possibly renders the habeas remedy inadequate and ineffective.

EQUITABLE TOLLING

The Petitioner can demonstrate, as recently discovered by the records, that the § 2254 petition is timely under Equitable Tolling. In order to qualify, the Petitioner must meet the following prongs established by the U.S. Supreme Court:

1) Petitioner must show that he has been pursuing his rights diligently. Lawrence v. Florida, 549 U.S. 327, 336 (2009); Holland v. Florida, 560 U.S. 631, 649 (2010).

The Petitioner filed a Motion To Compel state court records (Doc #41, State Court Docket History Report, DE #152), during the time period before the conviction became final as of June 9, 2014. The records were for filing the § 2254 Petition and the trial court never rendered disposition on the Motion To Compel.

Properly filed State Court petitions must be pending in order to toll the limitations period. Klebs v. Moore, 199 F.3d 1256,

1258-1260 (11th Cir. 2000). This Court will note in Doc #44, State Court Docket History Report, that Petitioner's Motion To Compel state court records has neither been granted nor denied, even to this day. Thus, Petitioner's § 2254 one-year time limitation is still tolled, as there was no gap in time for the Federal clock to tick. See, Burnett v. New York Central Railroad Company, 380 US 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); and Docket Entries #153, #159, #162, #179, #186, #187, #230 (Motions for records), and, #154, #160, #180, #190 (inquiry or correspondence regarding disposition of records motions), demonstrating continuing diligence despite expired time limitation.

2). Same extraordinary circumstances stood in his way and prevented timely filing. Lawrence and Holland supra.

Mr. Toth was entitled to rely on the state court's constitutional correctness of granting the Petitioner's request for records to facilitate the § 2254 petition. The state court timeliness in disposition of the Motion To Compel was beyond Mr. Toth's control, even with repeated inquiries to the court. King v. Bell, 378 F. 3d 550, 553 (6th Cir. 2004).

3) Extraordinary circumstances that are both beyond his control and unavoidable with diligence. Howell v. Crosby, 415 F. 3d 1250 (11th Cir. 2005); Wade v. Battle, 379 F. 3d 1254, 1260 (11th Cir. 2004).

The Petitioner waited for the court to make a decision to the Motion To Compel court records, even with repeated inquiries. The question here in Petitioner's case is what "due diligence" the Petitioner had to demonstrate when the State Court fails to grant the requested records through the Motion To Compel, which caused the Petitioner to repeatedly request for the records and only finally receiving the records through the District Court four (4) years later. King v. Bell, supra. Mr. Toth had no indication as to what extent the delay would have of the State Court not granting the requested records through the Motion To Compel in a timely manner would affect his time limitation of the § 2254 petition. King v. Bell, supra.

4). The Petitioner must show causal connection between the alleged extraordinary circumstances and the late filing of the Petition.
Lawrence, and Holland, supra

State Docket History Report (Doc #4-1), Docket Entries #153, #159, #162, #179, #186, #187, #230 of motions for court record, with Docket Entries of #154, #160, #180, #190 of correspondence and/or inquiry regarding document requests being ignored or denied by the State court, indicates the Petitioner's due diligence to obtain the state court record. When the U.S. District Court obtained the incomplete and unofficial court file for the § 2254 proceedings the District Court provided Mr. Toth with his first state court record. Burnett v. N.Y. Ctl. R.R. Co., 380 U.S. 424 at 424-427.

5). The District Court failed to afford the Petitioner an opportunity to show why he should not be time-barred.

In Day v. McDonough, 547 U.S. 198, 209-210, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) this Court held that "[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions. Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitations issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time-barred." Therefore, the District Court erred by sua sponte denying the Petitioner's § 2254 without giving notice to the State to show cause, or for Mr. Toth to demonstrate why he was vitually due to equitable tolling. See, Doc #5, Magistrate's R&R on Timeliness, pp. 9-14.

Wherefore, when the District Court rejected Petitioner's § 2254 on procedural grounds, Mr. Toth has now shown that jurists of reason would find it debatable whether the Petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

PROCEDURAL DEFAULT

The Petitioner is not barred from Federal Habeas review, as the

State was contended, by Mr. Toth having accepted a negotiated plea. In Henry v. Mississippi, 379 U.S. 443, 447 (1965); citing, Lovell v. City of Griffin, 303 U.S. 444, 450, this Court held the question of how state procedural default rules can prevent the U.S. Supreme Court of the consideration of a federal question. The state procedural rule ought not be permitted to bar vindication of important federal rights. Id. at 448.

Mr. Toth's plea of guilty does not bar review in Habeas Corpus proceedings of all constitutional claims prior to his guilty plea. A defendant who pleads guilty may challenge "the very power of the State to bring the defendant into court to answer the charge brought against him." Harvey v. Prosser, 462 U.S. 306, 320 (1983); citing, Blackledge v. Perry, 417 U.S. 21, 30 (1974).

Likewise, a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Henry v. Reed, 489 U.S. 255, 263 (1989). See, U.S. District Court Final Order at 3; the Judge notes Mr. Toth's right to appeal his conviction. Compare to Stahl v. State, 972 So.2d 1013 (2nd DCA 2008), where Stahl waived his rights to specific state remedies.

Furthermore, the state procedural bar relied upon by the state in the Petitioner's case does not deny this Court's review of the case. Mr. Toth's conviction is based upon evidence obtained in an unlawful search in violation of the United States Constitution, thereby a federal question. Henry v. Mississippi, 379 U.S. at 454-455. Once a federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. Castille v. Peoples, 489 U.S. 346, 351 (1989); citing, Picard v. Connor, 404 U.S. 270, 275 (1971); Brown v. Allen, 344 U.S. 443, 448-449 (1953).

RELIEF SOUGHT

The Petitioner respectfully requests this Court to grant rehearing on these not previously presented supporting issues to his claims and Petition For writ of Certiorari.

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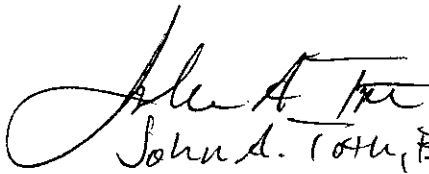
JOHN A. TOTU,
v. PETITIONER,

MARK S. JUCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENTS.

MOTION FOR REHEARING

CERTIFICATE OF SERVICE

In compliance with Supreme Court Rule 29, I, JOHN A. TOTU, Petitioner, pursuant to 28 U.S.C. § 1746, hereby certify under penalty of perjury, that a true and correct copy of the foregoing Motion for Rehearing was placed into an institution official's hands for delivery via prepaid U.S. Mail service to: Office of the Clerk, U.S. Supreme Court, Washington, D.C., 20543; and, Office of the Attorney General, % Amit Agarwal, The Capitol, PL-01, Tallahassee, Florida 32399-1050, on this 26th day of June 2020.


John A. Totu, B12440
Petitioner