

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENAN ALLEN,

Petitioner,

v.

DARREL VANNOY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARY TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARY

BY:

KENAN ALLEN, PRO SE

La. DOC # 382599

Louisiana State Prison

Dorm: Falcon-2

17544 Tunica Trace

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~ A Pro Se Petitioner - Pauper

QUESTION PRESENTED

The issue before this Honorable Supreme Court is whether a "Certificate of Appealability" (C.O.A.) should have been issued regarding the matter of equitable tolling of Mr. Allen's filing of his 28 U.S.C. § 2254 petition for a writ of habeas corpus because, as a first time filing, the statutory period of limitation should not have been rigorously applied considering the state court had failed to notify him of a final ruling and because Mr. Allen has been pursuing his rights diligently. Thus, the question presented is:

In light of Willie Frank Jackson v. Lourie Davis, No. 18-10526 (5th Cir. 8-2-19), did the Fifth Circuit Court of Appeals err in denying Mr. Allen a C.O.A. when that court, in the above-referenced case, held that a petitioner was entitled to equitable tolling of the statutory period of limitation when a state court fails to notify the petitioner of its final ruling—especially considering when Mr. Allen's case is no different from the Jackson-case?

STATUTORY AND CONSTITUTIONAL PROVISIONS

ARTICLE 1, SECTION 9, CLAUSE 2 of the ORIGINAL UNITED STATES CONSTITUTION, which grants to Mr. Allen the privilege, as a fundamental constitutional right under the Ninth Amendment to the United States Constitution, to the Writ of Habeas Corpus which "shall not be suspended...." U.S. Const. Art. 1, §9, cl. 2.

28 U.S.C. § 2254 (d)(1), the one-year statutory period of limitation applied to the first time filing of an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.

THE DUE PROCESS CLAUSE OF THE FIFTH & FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS

The Petitioner, KENAN ALLEN, respectfully prays that a writ of certiorary issue to review the judgment and ruling of the Fifth Circuit Court of Appeals, rendered in these proceedings on February 18, 2020.

RULING BELOW

The Fifth Circuit Court of Appeals denied Mr. Allen's C.O.A. request in its Cause No. 19-30393. The ruling is unpublished, and is attached hereto as appendix to this petition; as Exhibit A. The order of the Fifth Circuit Court of Appeals denying rehearing is also attached hereto and marked as Exhibit B.

JURISDICTION

The original ruling and judgment denying a C.O.A. by the Fifth Circuit Court of Appeals was entered on February 18, 2020. The motion for rehearing was denied on March 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

THE PROCEDURAL FACTS

Mr. Allen filed his state post-conviction petition into the District Court of Orleans Parish, Louisiana, on January 4, 2016. Without any evidentiary hearings, ten days later on January 14, 2016, that court denied the petition. The next month, on February 18, 2016, Mr. Allen applied to the Louisiana Court of Appeal, for the Fourth Circuit, seeking a writ of review. Within two months, on April 7, 2016, the state appellate court granted and denied in part his writ of review, thereby remanding the case back to the district court. After six months of waiting for a hearing or final ruling, on October 16, 2016, Mr. Allen sought a writ of mandamus back into the same state appellate court to compel the lower court to issue a ruling on the remand issue. The appellate court responded by stating that the district court had already ruled on the matter back on April 14, 2016. Mr. Allen was never notified by the district court of such ruling and has never received a copy of that ruling, even to this very day.

On January 17, 2017, Mr. Allen applied for writs to the Louisiana Supreme Court regarding these matters but, on August 3, 2018, that court denied relief as untimely. On August 17, 2018, Mr. Allen applied for reconsideration of that denial while at the same time preparing his federal habeas petition; which was then

filed into the Federal Eastern District Court of Louisiana on August 28, 2018. As a part of his federal petition, Mr. Allen sought a stay order. Almost nine months later, on May 9, 2019, the federal district court dismissed the petition as untimely. Mr. Allen then filed his notice of appeal and sought a C.O.A. to the Fifth Circuit Court of Appeals, which denied his C.O.A. request on February 18, 2020. The coronavirus now restricts Mr. Allen's access to the prison law library, as this pandemic has caused the prison to go on shutdown, and now restricts Mr. Allen's ability to litigate pro se.

STATEMENT OF THE CASE

Mr. Allen was convicted of one count of second degree murder and three counts of attempted second degree murder, and was then sentenced to serve Life in prison on the first count and 50 years each on the three remaining counts—to run concurrently with each sentence. Because his convictions and sentences are manifestly unjust and unconstitutional for various reasons, Mr. Allen appealed his convictions and then filed his pro se application for post-conviction relief in state court despite any knowledge or training in the litigation of law. However, at all times, Mr. Allen

has diligently sought, to the best of his abilities, to have his day in court to vindicate various constitutional violations resulting in the convictions and sentences imposed by the trial court, but at every turn has been thwarted. In fact, it can hardly be said to be fair that between the filing of his state post-conviction petition and then, ten days later, the denial thereof, that any due and just consideration of his claims has ever been fully heard. Even when seeking federal habeas relief, his only last resort to a full and fair hearing upon his claims, he has been blocked by the federal district court without consideration of the equitable tolling doctrine. The Fifth Circuit Court of Appeals denial of his C.O.A. request further denies him the relief he is entitled to.

Without a full and fair hearing on his federal habeas petition, Mr. Allen's fundamental rights to due process is violated under the Due Process Clause to the 5th & 14th Amendments of the United States Constitution. Applying the one-year statutory limitation upon the filing of his first federal habeas petition violates the Suspension Clause under the Original United States Constitution. The Fifth Circuit Court of Appeals is in error and must be reversed, and the case remanded to apply the equitable tolling doctrine to the filing of Mr. Allen's federal habeas petition.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN NOT ISSUING A C.O.A. AND THERE, FUNDAMENTALLY ERRED IN NOT REMANDING THE CASE BACK TO THE DISTRICT COURT TO APPLY EQUITABLE TOLLING AND THEREAFTER ADJUDICATE THE MERITS OF MR. ALLEN'S FEDERAL HABEAS PETITION.

At the very heart of the American federal constitutional system of the judiciary is the uncontroversial, though often overlooked, principle that due process guarantees "fair and just procedures" in the adjudication of constitutional rights. See: Case v. Nebraska, 381 U.S. 336, 344 (1965) (Brennan, J., concurring) (addressing the absence of fair post-conviction procedures for the review of a Sixth Amendment claim); Id. at 344 (suggesting that procedural fairness requires, *inter alia*, "full fact hearings" and reasoned legal conclusions); see also, Daniels v. United States, 532 U.S. 374, 386-87 (2001) (Scalia, J., concurring in part) (reflecting on the role that due process might play in ensuring that a claim is adjudicated fully and fairly "Somewhere"). To date, Mr. Allen has not had a "full facts hearing" on his state post-conviction claims.

Indeed, the denial of a C.O.A. and/or a remand back to the district court for application of the

equitable tolling doctrine and to hold the necessary hearings to adjudicate the merits of Mr. Allen's federal habeas claims is, in fact, a denial of due process. The district court erred in not even considering justly or allowing Mr. Allen the benefit of the doubt of equitable tolling and the Fifth Circuit erred in not granting him a C.O.A. See, 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals....").

Because Mr. Allen was denied a C.O.A., he cannot seek equitable tolling of the statutory limitation upon which his federal habeas petition was dismissed. This Court made it clear that a petitioner is not required to prove "that some jurist would grant the petition for habeas corpus" when considering a request for a C.O.A. See, Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). In fact, the Fifth Circuit has ruled in other cases that whenever there is doubt about granting a C.O.A., it should be resolved in favor of the appellant. See: Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir. 1997); Buxton v. Collins, 925 F.2d 816, 819 (5th Cir. 1991). Here, Mr. Allen was not given the benefit of the doubt to resolve this matter in his favor.

The procedural question raised was whether Mr. Allen is entitled to equitable tolling of the one-year statute of limitation because the State court

failed to provide Mr. Allen with notice and a copy of its final ruling upon remand that ultimately denied him post-conviction relief. In fact, state law requires that: "A copy of the judgment granting or denying relief... shall be furnished to the petitioner," La. C.Cr. P. art. 930.1; see also, Davis v. State, 178 So.3d 578 (La. 2015). However, Mr. Allen never did receive that final ruling. Other circuit courts have said that failure to send notice of final ruling can toll the time-limitation period. See: Jenkins v. Jackson, 330 F.3d 1146, 1155 (9th Cir. 2003); Miller v. Collins, 305 F.3d 491, 495-96 (6th Cir. 2002); Knight v. Schofield, 292 F.3d 709, 711 (10th Cir. 2001); see also, Phillip v. Donnelly, 216 F.3d 508, 511 (5th Cir. 2000); Willie Frank Jackson v. Lorie Davis, No. 18-10526 (5th Cir. 8/2/19).

In addition to the substantive and procedural due process rights "to a full and fair hearing," the application of a statutory time-limitation without a full and fair hearing on the issue of equitable tolling—ultimately foreclosing Mr. Allen's right to the writ of habeas corpus—violates the Suspension Clause of U.S. Const. art. 1, § 9, cl. 2. Cf. Boumediene v. Bush, 128 S.Ct. 2229, 2247 (2008) ("The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." (citing Preiser v. Rodriguez, 411 U.S. 475, 484 (1973))); *Id.* at 2248 ("The Court has been careful not to foreclose the possibility

that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." (citing *INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001))).

Because the Fifth Circuit has erred in denying Mr. Allen a C.O.A. (see, Exhibit A), that judgment should be reversed and the case remanded for full consideration of equitable tolling. Additionally, due to the restrictions at the prison as a result of the coronavirus pandemic, the lower federal courts should be instructed to appoint counsel for Mr. Allen so that he may receive a full and fair hearing on all relevant issues and so that such courts may be properly briefed.

In short, the reason this writ should issue is because the Fifth Circuit failed to give reasonable consideration of the equitable tolling doctrine and also rigorously applied a standard contrary to this Court's holding in Pace v. Diguglielmo, 544 U.S. 480 (2005): "A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Id.* at 481.

Mr. Allen can satisfy both elements, and with the appointment of counsel, the courts could be better informed. Therefore, this writ should issue.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and ruling of the Fifth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED:

s/ Kenan Allen

KENAN ALLEN, pro se

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PROOF OF SERVICE

I, KENAN ALLEN, do hereby declare and swear that on this date, 4-10-2020, as required by Supreme Court Rule 29, I have served the Motion For Leave To Proceed In Forma Pauperis and this Petition For Writ of Certiorari upon counsel for respondent by depositing the same into the U.S. Mail, postage prepaid, to: Ms. Donna Rau Andrieu, counsel for Respondent. And thus, I declare under penalty of perjury that the foregoing is true and correct.
→ Executed on: 4-10-2020

s/ Kenan Allen #382599

KENAN ALLEN