

20-124

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Robert Fusco,

Petitioner,

vs.

State of Tennessee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE UNITED STATES 6TH CIR COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

ROBERT FUSCO #455473
PROSE PETITIONER
WEST TENN STATE PRISION
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ORIGINAL

— Questions Presented —

1) Whether the District court erred by dismissing Petitioners § 2254 as untimely (Doc No. 1 and 2) which conflicts with decisions of other appellate courts on the same issue but also U.S. law under 28 U.S.C § 2244 (d)(1)(b) The date on which the impediment to filing an application created by state action in violation of the constitution of law of the United States is removed, if the applicant was prevented from filing by such state action — The impediment being the complete loss/destruction by Prison Officials of Pro se Petitioners legal material and property during his transfer to three separate prisons within 24 hour period (Please see argument)

2) Whether the District court and Appeals court erred in it's understanding of the facts and submissions presented by Pro se Petitioner and the unreasonable application of established case law which not only conflicts with this court but other courts on the same issue — To where the complete loss/destruction of Pro se Petitioners legal material is extraordinary as a matter of law and is plainly prevented from filing any pleading for some time (Please see argument)

3) Whether the District court and Appeals court erred by not granting Pro se Petitioner a COA, in conflict with decisions of other appellate courts on the same issue to where reasonable jurist could debate whether Pro se petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further — Submissions presented by Pro se Petitioner were debatable and enough to satisfy the two prong test articulated by this court in *Holland v. Florida*, and other controlling precedent (please see argument)

4) Whether a Pro se Petitioner is entitled to equitable tolling, or at a minimum, further factual development with counsel before the District court, where the Petitioner's submissions demonstrate that there are circumstances under which tolling is warranted.

— List of Parties —

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

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Petition for Writ of Certiorari

Robert Fusco petitions for a writ of Certiorari to review the judgments of both the District court and also the United States court of Appeals of the 6th circuit.

This courts guidance is needed to resolve a conflict between the decisions from the 6th circuit and decisions from sister circuits on a issue of critical importance: The circumstances under which the complete loss and destruction of a Pro se litigants legal material by prison officials during the transfer between 3 separate prisons, all within a 24 hour period and, further placement in administrative segregation are indeed extraordinary as a matter of law and is plainly prevented from filing any proceeding for sometime, further warranting equitable tolling or, at a minimum further factual development to petitioners entitlement to equitable tolling to where petitioners submissions support such.

This courts intervention is also needed to correct the 6th circuits doctrinal departure from this courts decisions when it failed to afford Fusco, a Pro se Petitioner an opportunity to have his meritorious claims for habeas corpus relief heard.

Furthermore, this courts intervention is needed to

ensure that Fusco, who is serving a 65 year prison sentence in state prison and, future petitioners like him have the opportunity to present the merits of their habeas petitions, when equitable tolling may be warranted, Here Fusco, as the District Judge states "has a colorable claim of ineffective assistance of trial counsel as well as constitutional claims" (see doc. no. 8) that will never be addressed by the federal courts absent this court's intervention. Given the court's emphasis this court has placed on hearing meritorious habeas petitions, a grant of Writ of Certiorari is warranted.

• ——— Opinions and Orders Below ——— •

Following a jury trial Fusco was convicted of conspiracy to commit aggravated robbery, conspiracy to commit aggravated kidnapping, attempted aggravated robbery, aggravated burglary and two counts of especially aggravated kidnapping (both kidnapping charges were merged) The trial court imposed a total effective sentence of 65 years.

On direct appeal the Tennessee court of appeals affirmed petitioners judgement but remanded the matter to the trial court for the entry of corrected judgements to reflect merger of Fusco's conspiracy convictions (State v. Fusco No. M2010-01724-CCA-B³-CD, 2012 WL 368224)

On May 23, 2012 the Tennessee Supreme Court reversed and remanded the T.C.C.A. decision for reconsideration in light of the recent ruling in State v. White 362 S.W 3^d 559 (2012) upon remand the Tennessee court of Criminal Appeals again affirmed the judgements. Fusco's Attorney could have filed but failed to petition the United States Supreme Court for a writ of Certiorari.

On March 31, 2014 Fusco submitted a Pro se petition for Post-Conviction relief (ecf. 28) after several evidentiary hearings the trial court entered a order

denying the petition (ecf. 38) then on December 11, 2017 the court of criminal appeals later affirms the denial of post conviction relief (ecf. 43) On March 5, 2018 although late Fusco did attempt to file a application for permission to appeal as well as a motion to accept late file application to the Tennessee Supreme Court which was later returned to him on April 5, 2018 as unfiled (ecf. 14 4-5)

On June 20, 2018 Fusco filed a Pro se petition for writ of Habeas corpus under 28 U.S.C § 2254 and on November 28, 2018 the court entered a order directing respondent to provide the state court record and to file a response to the Petition (ecf. 8) The respondent on December 28, 2018 filed a last minute motion for extension of time (ecf 9-10) then on January 22, 2019 the respondent filed a motion to dismiss the petition as untimely (Doc No. 12) and a supporting memorandum of law (Doc No. 13) In response to the motion to dismiss filed, Fusco filed a memorandum of law and facts in support of equitable tolling with attached exhibits (ecf no. 14-15) in which the respondent replied (ecf no. 16)

In an order issued on August 16, 2019 (ecf no. 17) the District Judge disposed of Fusco's petition as untimely, never considering his meritorious claims and further stating that an

evidentiary hearing was not needed in the matter, denying a COA as well (ccf no. 17) Following this order Fusco filed a timely notice to appeal and Fusco's family paid the filing fee.

On October 24, 2019 Fusco filed a application for a COA and supporting memorandum to the U.S court of appeals for the 6th circuit (case no. 19-6054) arguing why a COA should be granted and why he is entitled to equitable tolling. In an order issued February 11, 2020 the U.S court of appeals for the 6th circuit denied Fusco's application for a COA.

Therefore involving this courts jurisdiction to where Fusco timely petitions this court for writ of Certiorari.

• ——— Jurisdiction ——— •

The Tennessee Supreme Court dismissed Fusco's Habeas petition as untimely and further denied to issue a COA on August 16, 2019 (ccf no. 17) Fusco timely appealed to the U.S court of appeals for the 6th circuit, that courts order was issued February 11, 2020 (case no. 19-6054) This court has jurisdiction pursuant to 28 U.S.C § 1254

• — Constitutional and Statutory Provisions Involved — •

The antiterrorism and effective death penalty act of 1996 (AEDPA) provides a one-year statute of limitations that begins to run on the "date on which the judgement became final by the conclusion of direct review or the expiration of the time for seeking such review" 28 U.S.C § 2244 (d)(1)(b) under AEDPA, 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;

• — Amendment to the United States Constitution;

Due process -

U.S. Const. amend iv

U.S. Const. amend vi

U.S. Const. amend XIII

As well as other applicable constitutional and statutory provisions;

Statement of the Case

This case raises serious concern regarding the 6th circuit's application of the equitable tolling doctrine to where Fusco, a pro se petitioner was transferred to (3) separate prisons within a 24 hour period, placed in administrative segregation - during this transfer, prison officials lost or disposed of all of Fusco's legal material and property. Acting Pro se before the district court Fusco made substantial allegations supported by documents submitted of transfer logs, request forms and grievances - All sufficient to demonstrate that equitable tolling was warranted under the standards articulated by this court in *Holland v. Florida*, 560 U.S. 631 (2010) or at minimum, that he was entitled to develop his request for equitable tolling, with counsel.

In other circuits Fusco may have received equitable tolling, but would have almost certainly received the opportunity with counsel to develop his request for equitable tolling through further factual development or an evidentiary hearing, Fusco was denied that opportunity.

Instead, the court of appeals affirmed dismissal of Fusco's habeas petition as untimely. In doing so, the court of appeals failed to reach Fusco's argument that equitable tolling was warranted or that further factual development

was warranted and required by law.

The lower courts erred in its understanding of the facts and evidence submitted by focusing on individual circumstances in isolation and decided that none by itself required equitable tolling. The mistake made by the District court and appeals court was to conceive of the equitable tolling inquiry as the search for a single trump card rather than that of an evaluation of the entire hand that Fusco was dealt. Not using the flexible standard that encompasses all of the circumstances that he faced and the cumulative effect of these circumstances.

The 6th circuits decisions are all the more concerning because Fusco presents powerful constitutional claims in, what the district judge states as "a colorable claim of ineffective assistance of counsel".

To date, Fusco who filed his habeas petition pro se, has never been afforded an opportunity to present the merits of his claims to a federal court. By this petition Fusco seeks to be given the opportunity to develop his entitlement to equitable tolling and explore before a federal court the merits of his habeas claims.

To deny the very possibility of habeas relief here, where the merits are compelling and supported by the record, Fusco has

not been afforded further factual development with the assistance of counsel to demonstrate his entitlement to equitable tolling — Denigrates the power and purpose of the writ of habeas corpus, not only in this case, but also future cases where pro se petitioners make a valid but imperfect showing of entitlement to equitable tolling. See *Murray v. Carrier*, 477 U.S. 478, 500 (1986) (Steven, J. concurring) The central mission of the great writ should be the substance of justice not the form of procedures; *Brown v. Allen*, 344 U.S. 443, 554 (1953) (Black, J. dissenting) It's never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the constitution (citations omitted)

• — State Court Proceedings — •

Fusco's indictment arose out of an alleged November 1, 2007 home invasion of John and Elke Gilreath, who lived in Clarksville, Tennessee and owned a local jewelry store called the Golden Eagle.

Fusco was tried alone and his trial was conducted over a period of 4 days, September 21-24, 2009. On September 24, 2009 Fusco was found guilty of the offenses of - conspiracy to commit aggravated robbery (count 1) (conspiracy

to commit aggravated kidnapping (count 2) Especially aggravated kidnapping of Elthe Gilreath (count 3) Especially aggravated kidnapping of Elthe Gilreath (count 4) Attempt to commit aggravated robbery (count 9) Aggravated burglary (count 10) The (2) especially aggravated kidnapping convictions were merged. Fusco was sentenced to 35 years at 100% on the especially aggravated kidnapping charges to be served consecutively to 10 year concurrent terms imposed on the remaining offenses, for a total sentence of 65 years

The initial arrest of Fusco on November 1, 2007 made the focus of the case simply a burglary/home invasion and/or robbery that went wrong. However, upon arrest and without a warrant, officers searched Fusco's cellphone wherein led to a confession and other evidence resulting in a later obtained search warrant some 18 days later, only after the officers searched his cellphone 2 more separate times without a search warrant, which lead to the numerous substantial charges and ultimate evidence for conviction in the case - at the time of Fusco's arrest he was only charged with Especially aggravated robbery.

On direct appeal, Fusco raised the issues of (1) whether the trial court erred in failing to charge the lesser-included offense of attempted especially aggravated kidnapping (2) whether the assistant district attorney committed prosecutorial misconduct during closing arguments (3) whether the evidence is

sufficient to support his convictions for especially aggravated kidnapping, conspiracy to commit aggravated robbery, and conspiracy to commit aggravated kidnapping (4) whether his dual convictions for especially aggravated kidnapping and attempted aggravated robbery violate due process concerns because the restraint of the victim was not beyond that necessary to complete the robbery (5) whether the trial court erred by not merging the two conspiracy convictions because the offenses were the object of the same agreement (6) whether the trial court erred by using certain out of state convictions to enhance his sentencing range; and (7) whether his sentence was excessive - *State v. Fusco* No. M2010-01724-CCA-R3-CD, 2012 WL 368224 (Tenn. crim. App. Feb 3, 2012) Application for permission to appeal granted by Tennessee Supreme Court May 23, 2012

The Tennessee Supreme Court granted review and issued a summary remand on the issue of jury instructions relative kidnapping and its recent decision in *State v. White*, 362 S.W. 3d 559 (Tenn 2012) On remand, the Tennessee court of appeals affirmed the conviction and sentence and the Tennessee Supreme court denied permission to appeal. *State v. Fusco*, 404 S.W 3d 504 (Tenn. Crim. App Dec 6, 2012) Application for permission to appeal was then denied by the Tennessee Supreme Court April 11, 2013

Fusco subsequently filed a timely petition and amended petition for post-conviction relief, raising claims of ineffective assistance of counsel, among other issues Fusco raised that, counsel failed to move to suppress his pretrial statements, counsel failed to object to the prosecution's untimely notice of enhancement and the improper career offender notice of enhancement, counsel's failure to challenge the prosecution's failure to provide certified copies of his prior conviction's as well as failure to establish that Fusco was represented by counsel or had executed a valid waiver of counsel when Fusco was convicted of the prior convictions, counsel's failure to file a pretrial motion to suppress the cellphone information and related derivative information due to law enforcement's warrantless search 3 separate times/dates prior to getting a warrant 18 days later as such information was obtained in violation of the United States Constitution — whereas a proper preservation of the record would have assured Fusco of a reasonable probability of eventual favorable relief from his conviction and sentence. See Petition and Amended petition For Post Conviction Relief

Evidentiary hearings were held on June 22, 2015 and January 14, 2016. The testimony and evidence attempted to be adduced during his Post-Conviction evidentiary hearings started out with various discussions relative to the state seeking to

stipulate to certain facts.

Several officers and detectives involved with the case testified that once Fusco was arrested he was searched and any items on him were taken, placed in evidence bags, including Fusco's cellphone, no one could recall any concern with Fusco's cellphone being used as a weapon or any harm to them.

Det. Alan Charvis testified that Fusco was very evasive during questioning and further confirms having searched the contents of Fusco's cellphone the night of his arrest, stating that the phone was not of any threat to him or any other member of law enforcement. He further confirms having found information linking Fusco to the crime thereon and having shown Fusco said information. Det. Alan Charvis confirmed that the search was done without a warrant and the contents of the same having led to Fusco's confession.

Next lead Detective of the case Kenny Bradley testified that he interviewed Fusco the night of his arrest. Det. Bradley testified that he did not assist in the initial search of the cellphone (the night of Fusco's arrest) however confirmed the phone did not look like a weapon but was searched in order to obtain information relative the incident. The same was further of no threat to him nor the officers but was simply searched to discover evidence of wrong doing. Det. Bradley confirmed things

of interest were found in the cellphone and that the same resulted of the subsequent confession of Fusco. Det. Bradley further confirmed there was no warrant to search the phone and his own removal of the phone from evidence to be reviewed on November 6, 2007, Det. Bradley further reads Detective Barrett's report of having also removed the phone on November 8, 2007 having taken it to Cingular wireless for charging and or other inquiries. Det. Bradley could not remember why he had not mentioned his November 6, 2007 removal of the phone from evidence in his reports but confirms having possession of the cellphone several times before the search warrant was issued 18 days after the initial search was conducted. Det. Bradley confirmed incident to arrest as being once a suspect was in custody.

Assistant District Attorney, Young further stipulated that the cellphone was taken, it was looked at, and a search warrant was not executed and through search done.

Fusco's trial counsel testified as to there being issues regarding Fusco's cellphone search and recalled there was not a whole lot of case law in Tennessee - the 6th circuit at the time on that specific issue, further stating that - But I do remember looking at that issue and ultimately concluding that, number one, we didn't have a reasonable basis to argue a 4th amendment

violation, but number two, the state did procure a search warrant sometime later, and that could have cured any deficiency they may have put forth in the initial search of the phone. At least that was my analysis at the time. Counsel confirmed that the cellphone information and Fusco's confession was a vital and key piece of information used by the state at trial. Counsel admitted that he did see the 18 days of warrantless searches of the cellphone as an 4th amendment issue and further states the data and evidence obtained during the 18 day period of warrantless searches would be tainted and the fruits thereof, but adopted a position that the later search warrant affidavit would have had to have relied upon such information in order to contribute to a faulty warrant. He confirmed as correct, the fact that the initial warrantless searches revealed information to where they later got the search warrant for them to take pictures of the data in the phone.

Trial counsel further testified a particular big issue with Fusco's sentencing range, including prior offenses and possible enhancement and mitigating factors, but did not find any Blakely issues per se. The enhancement factors used were not presented to or found by the jury.

Counsel testified that he had a legitimate basis under

both the old Anthony and Dixon analysis and then under the new analysis in State v. White 362 S.W.3d 554 (2012) that Fusco's Kidnapping and Robbery charges should have been merged, Further bringing the issue up at trial as to it being a jury question but the state insisting that it is a judge question not jury.

Counsel could not recall whether he objected to Fusco's prior convictions having been introduced as evidence, and did not challenge the validity thereof. Counsel conceded that he should have objected for appeal purposes, but felt the issue was not waived in that the T.C.C.A. renewed the issue of under plain error. Counsel conceded that he did not realize or notice that the priors used to enhance Fusco's range from a 1 to a 2 were silent, did not show that he was represented by counsel or that it was waived until after Fusco was sentenced, in which he attempted to raise on direct appeal.

* This is a brief summary of the testimony during Fusco's Post-conviction hearings. Please see the entire record filed by the respondent in the District Court (ecf No. 11)

On March 31, 2016 Judge William B. Goodman issued an order denying Post-Conviction relief, Fusco timely appealed

this decision to the Tennessee court of criminal appeals, however the denial of Post-Conviction relief was affirmed thereby. State v. Fusco, M2016-00825-CCA-B³-PC, 2017 WL 6316621 #5 (Tenn. crim. app 2017)

After the Tennessee court of criminal appeals decision and during the time to file his application for permission to appeal to the Tennessee Supreme court, Fusco was abruptly shipped from Morgan county correctional complex to Northwest Correctional Complex and then to West Tennessee state prison (within a 24hr period) That in turn resulted in Fusco's application for permission to appeal having been filed late and with a motion requesting the Tennessee Supreme Court to accept his late filed application. That motion and his application were not filed by the court and instead returned to Fusco.

Federal Habeas Proceedings

Petitioner Robert Fusco has been an inmate within the Tennessee Department of Corrections (TDOC) since November of 2009 and has been housed in general open population at Morgan County Correctional Complex (MCCX) since that date as well, as an inmate Fusco has no control over his housing or placement within

TDOC nor does he have control over the day to day routine of the prison in which he is housed.

Fusco has been acting in pro se since the completion of his direct review. During that time and throughout the course of his case Fusco has accumulated an extensive amount of legal material all vital to his case, which consisted of the complete court record, relevant case law, notes, drafts for motions and briefs to file — all of which was stored in the Mccx prison law library.

Following the denial of his post-conviction relief by the court of criminal appeals on December 11, 2017 Fusco immediately started drafting a motion for application for permission to appeal to the Tennessee supreme court. Knowing that the deadline was tight and coupled with the fact that several holidays were coming back to back, meaning prison law library hours would be drastically cut due to these holidays. Fusco took the needed legal material back to his cell so that he can prepare a motion to submit to the courts on his own time without any time restrictions.

During the limitations period, in the early hours on January 10, 2018 before any general movement Fusco was taken from general population in a routine transfer and placed on the prison transport bus. During the intake transfer process at Mccx Fusco

informed officers that his legal material was being stored in the law library. Fusco was told by prison officers that they would be notified and that his legal material would be forwarded to his new prison at Northwest Correctional Complex (NWCX)

The following day on January 11, 2018 Fusco was taken from general open population and transferred to another prison, West Tennessee State Prison (WTSP) upon arrival at WTSP Fusco was informed that he was being placed in Administrative Segregation pending investigation, and that his property will follow at a later date. (Apx F, G)

After several verbal inquires to prison officials as to the location of his property and legal material which contained not only a copy of his motion that was to be filed with the Tennessee Supreme court but other vital documents needed to file any future proceedings. Fusco then filed a grievance on January 19, 2018 requesting that his property be located and returned to him (Apx-M) Fusco also submitted a written inquiry to the intake property room on January 25, 2018 asking about his property and legal material (Apx-H) not satisfied with the answer, Fusco then submitted another written inquiry to the intake property room (Apx-I) on February 5, 2018 where Fusco was basically told that his property had been disposed of.

Despite Fusco's diligent efforts to retrieve his legal material

and property, Fusco still pursued his claims by contacting the law clerk at Mccx on what needed to be completed on the digital copy saved at Mccx, the legal clerk at Mccx finished and submitted the motion and application to the courts by mailing it from Mccx on March 5, 2018. On April 9, 2018 Fusco recieved the motion to accept late filed application and application back from the clerk stamped March 7, 2018 as recieved, but as unfiled.

During this same time that Fusco was painstakingly trying to retrieve his legal Material and property so that he could prepare his federal habeas petition, Fusco's family had been in contact with Attorney Gary L. Anderson. Due to the fact that every single piece of Fusco's legal material were disposed of or lost by prison officials, it was clear that Fusco would be unable to file any proceedings on his own for sometime, so Fusco's family hired Mr. Anderson for the limited purpose of obtaining and preparing the needed documents in order for Fusco to file a thorough and comprehensive pro se writ of habeas corpus (see vol 1 and 2)

Given the short amount of time to obtain the needed documents in order to properly investigate and prepare a thorough and complete pro se writ of habeas corpus (roughly 100 pages) Attorney Gary Anderson delivered a completed petition, after having corrected typos that would have affected the

way it was filed with the courts to Fusco's sister via email June 20, 2018 to where it was immediately signed, dated, a money order was attached for filing fees before placing it certified with the U.S postal service for mailing to the courts.

The events described by Fusco, supported by documents (Apx-F to N) detail the entire hand that Fusco was dealt and his diligent attempts, not just a single trump card to where external forces rather than a lack of diligence account for the failure to file a timely claim.

Fusco, having made a substantial, but imperfect showing. The district and appeals court imposing extraordinary high evidentiary standards on a prose prisoner litigant who has already faced an unusual obstacle beyond their control during the AEDPA limitations period.

• ————— Argument ————— •

Fusco argues that despite the District courts failure to afford him the opportunity, with counsel to further develop the record or an evidentiary hearing, the record before the district court established his entitlement to equitable tolling.

28 U.S.C. § 2244 (d)(1)(b) section, provides that a habeas petition by state prisoner will be considered timely if it is filed within one-year of the "date" on which an impediment to filing an application created by state action in violation of the constitution... was removed if applicant was prevented from filing such state action.

In *Holland v. Florida*, 560 U.S. 631, 645 (2010) this court confirmed that the AEDPA limitations period is subject to equitable tolling in appropriate cases. As this court explained, the statute of limitations is tolled where (1) extraordinary circumstances prevented a timely filing, and (2) the petitioner has diligently pursued his claims. In reaching this conclusion, the *Holland* court emphasized that a sufficiently developed factual record was essential to the equitable tolling determination, and remand for the lower courts "to determine whether the facts in the record entitle the petitioner to equitable tolling or whether further proceedings, including an evidentiary hearing might indicate that petitioner should prevail.

Here the record as it exists leaves no doubt that Fusco has made a sufficient showing to warrant equitable tolling under not only the constitutional provisions set forth by congress but also under the standards articulated by this court in *Holland v. Florida*.

On January 11, 2018 when Fusco was transferred to the third

prison, West Tennessee State prison, intake and property logs show that his property or legal material was never received into that prison on that date and further show that months later still nothing received (Apx-N) the trans being transit, not cell for cell location.

The information request inquires and grievances Fusco filed in regards to his property/legal material (Apx-H,I,M) show that Fusco was diligent in his efforts to recover his property and legal material by not only filing a grievance but two separate request inquires.

Fusco and other prisoners are dependent on prison staff to complete certain tasks necessary - In this case the transportation and handling of an inmates property and legal material during transfers between prisons. Once an inmate is transferred they are separated from their property until they are received into the accepting new prison.

When the state lost-disposed of Fusco's property and legal material during these transfers, they created an impediment that significantly delayed the filing of any motion or petition. The courts have ~~recognized~~ that it is "unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own within the limitations period" without access to his legal files (* 1028 Spitsyn, 345 F.3d @ 801)

The complete loss- disposal of Fusco's legal material was an extraordinary circumstance created by state action, that was beyond petitioners control.

After learning of the complete loss - disposal of all of his legal material and property it was clear that it would be impossible to file any form of pleading. Fusco did not sleep on his rights and continued to diligently pursue his claims by having his family hire attorney Garry Anderson for the sole purpose of obtaining the needed documents necessary to draft not only a complete but thorough pro se habeas petition.

During this same time while Attorney Anderson worked on Fusco's habeas petition, Fusco wrote the law clerk at MCCX explaining what he needed the clerk to finish on the digital copy of his drafted motion to the Tennessee Supreme Court: Although not necessary to exhaust...

Upon completion, the inmate clerk at MCCX submitted it to the mail room at MCCX for mailing on Fusco's behalf (Apr 3, 18) The certificate of service and the postal stamp show that it was sent from Morgan County, the envelope has the name of the inmate law clerk at MCCX that mailed it out. Fusco later received the documents back from the clerk stamped March 7, 2018 as unfiled *Fusco would like to note that the return envelope was from the Attorney general and reporter but the documents contained were from the Clerk of the Appellate court

please see (Apx J-K)

On May 23, 2018 Attorney Anderson wrote Fusco informing him that his habeas petition was complete and was sending it to him to be filed (Apx-L). Several days later, once received by Fusco he noticed critical typos that would have effected the filing of the petition with the courts. On June 18, 2018 Anderson wrote Fusco a letter regarding the revised petition and memorandum. The revised petition and memorandum was emailed to Fusco's sister in Huntsville June 20, 2018 - she signed it, dated it and prepared the petition for mailing to the courts, along with the filing fee on Fusco's behalf.

Although petition was filed late, it was not excessive or inappropriate for the application of equitable tolling for the period of time that Fusco was without his legal material, or upon learning that they were lost - disposed of.

One-year statute of limitations on petitions for habeas relief by state prisoners is not jurisdictional and, does not set forth an inflexible rule requiring dismissal whenever the one year clock has run - *Holland v. Florida* 560 U.S. 631, 649 (quoting *Day v. McDonough* 547, U.S. 198, 205, 126 S.Ct. 1675, 164 L.ed 2d 376 2006).

Furthermore the courts have held that the diligence required for equitable tolling purposes is "reasonable diligence"

see e.g. *Lonchar* 517 U.S. at 366, 116 S.Ct. 1243 - "Not maximum feasible diligence" *Starns v. Andrews* 524 F.3d 612, 618 (C.A.5 2008) quoting *Moore v. Knight* 368 F.3d 936, 940 (C.A.7 2004)

Fusco having exhibited diligence not only before the impediment but after - despite being transferred to 3 separate prisons within a 24 hour period, placement in administrative segregation and the complete loss of all of his property and legal material. Fusco actively pursued his claims demonstrating due diligence, taking steps necessary, attempting to recover his missing property and legal material, all vital to file any such proceeding during the limitations period (Apx. H, I, M) and ultimately hiring an attorney to draft a complete and thorough pro se habeas petition and memorandum, because Fusco was unable to do so without his legal material

Therefore Fusco has satisfied the first element seeking equitable tolling (1) that he has been pursuing his rights diligently -

Argued before the district court and appeals court, Fusco presents to this court that the complete loss and/or disposal of his property and legal material is in fact a state created impediment, constituting an extraordinary circumstance beyond his control and further is plainly prevented from filing any pleading for a period of time.

The 6th circuits application to equitable tolling conflicts with not only this courts decision but other sister circuits

sharing very close similarities to Fusco's case.

The 9th circuit has granted equitable tolling when a prisoner was placed in administrative segregation and denied all access to his legal papers, despite his diligent attempts to retrieve them - *Espinosa - Matthews v. California* 432 F.3d 1021, (9th cir 2005) also see *Lott v. Mueller* 304 F.3d 918 (9th cir 2002) remanding for further fact finding when prisoner was denied access to his legal files during 2 temporary transfers that lasted 82 days.

In *Valverde v. Stinson* 224 F.3d 129 (2nd cir 2000) the second circuit held that "the confiscation of a prisoners legal papers by a correctional officer shortly before the filing deadline may justify equitable tolling and permit the filing of a petition after the statute of limitations ordinarily would have run" - That court found;

The intentional confiscation of a prisoners habeas corpus petition and related legal papers by a correctional officer is "extraordinary" as a matter of law ... And a person is plainly "prevented" from filing a pleading for sometime if he is deprived of the sole copy of that pleading, something that the petitioner asserts happened to him here

Although Fusco has made no showing of intentional misconduct by prison officials with the complete loss-disposal of

all of his property and legal material. The submissions presented do show that his property was never received at the new prison and further show that his property and legal material may have been disposed of (Apx. H, I, M, N)

Fusco's placement in administrative segregation, later resulting in 95 days of disciplinary segregation, unlike the other inmates, Fusco's legal material was not simply confiscated or temporarily held but were in fact completely lost or disposed of — seriously impeding his ability to file any proceedings.

Furthermore, the courts have held that an inmates right to reasonable access to legal material is not conditioned on the type of segregation to which he is assigned — does not distinguish between disciplinary segregation and administrative segregation.

— We believe that the complete confiscation of Mr. Grabaldon's legal material just weeks before his filing deadline would constitute extraordinary circumstances for the purpose of equitable tolling.

U.S. v. Grabaldon 522, F.3d 1121, 1126 (10th Cir 2016)

Looking at the entire hand that Fusco was dealt, not just a single trump card it is clear that he would have met the one-year deadline had prison officials not lost or disposed

of all of his legal material - Fusco's habeas petition was not excessively late, only covering the period in which he was impeded by the disposal of his legal material, forcing him to hire attorney Gary Anderson for the sole purpose of preparing a pro se petition writ of habeas corpus.

Fusco can not be faulted for taking the steps necessary to file a thorough and comprehensive petition, especially given that prisoners have only one chance to file a collateral attack on their convictions.

Unlike the other cases to where those petitioners had the aid of counsel, Fusco here has not, but on his own he has outlined the events that took place and presented documents that supported such, so therefore he can not be faulted for making a substantial yet imperfect showing or held to such a high evidentiary standard.

Fusco's pro se submissions were similar in several key respects to cases where not only the 6th circuit, but other circuits have previously granted equitable tolling.

Despite the district court's failure to afford Fusco the opportunity, with counsel to gather relevant evidence, the record Fusco presented before the courts established his entitlement to equitable tolling.

This court's review is therefore necessary to resolve this

dispute among the district court and court of appeals, which conflicts with this court's decision and other circuits on the same issue.

———— District court and Appeals court ————

The district court erroneously relied on an overly rigid *per se* approach holding *pro se* prisoner to an extraordinary high standard — searching for a single trump card, making improper assumptions, instead of the entire hand and cumulative effect.

Fusco has never disputed that the deadline for filing his habeas corpus petition was May 23, 2018. For the district court to assume Fusco and his attorney miscalculated the deadline as June 20, 2018 is not supported by the record. The deadline before the "state created impediment" was May 23, 2018 but under 28 U.S.C. § 2244 (d)(1)(b) section, provides that a habeas petition by state prisoner will be considered timely if it is filed within one-year of the "date on which an impediment to filing an application created by state action in violation of the constitution... was removed if applicant was prevented from filing such state action".

Petitioners complete loss-disposal of all of his property and legal material during prison transfers was an

unconstitutional impediment to filing created by state action, not petitioner created action that prevented him from filing on time. So for the district court to assume that there was a miscalculation of the deadline is not supported by the record.

Attorney Anderson first reached out to Fusco with interest in his case, in a letter dated January 12, 2018. Anderson sent the letter to Fusco addressed to Morgan County but Fusco had since been transferred, Fusco did not receive the letter at West Tennessee State Prison January 25, 2018 (Apx. L) Fusco has never had any interest in retaining any lawyer as he has been pro se since the completion of his direct review. Since Fusco was having issues trying to locate his property and legal material he and his family was entertaining the possibility of retaining Anderson for the sole purpose of drafting a habeas petition and memorandum — But only if Fusco is unable to retrieve his legal material.

Fusco then took the steps to diligently pursue his legal claims in every possible theory of state and Federal level by, first by attempting to recover his legal material, then by hiring Attorney Anderson mid February to draft a pro se habeas petition and memorandum for him. During this same time Fusco pursued his application (although late) to the Tennessee Supreme Court by writing the law clerk at MCCX asking him to complete the

digital draft stored there on the computer and submit it to the courts on his behalf.

The certificate of service as well as the mailing envelope will show that the application was mailed from Morgan County not by Fusco at West Tennessee state prison as the District court implies. Fusco was without any legal material and was unable to file any legal proceedings on his own, state or Federal. The whole reason he had to hire Attorney Anderson...

The district court falsely implies, assuming Fusco "mistakenly believed the filing to be necessary in order to exhaust state court remedies" - Fusco can not be faulted for being diligent in every way he can, because had the court clerk allowed the filing of Fusco's "motion to accept late filed application" (App'd, 15) (Doc No. 14-15 @ 3-4) the time of it's pendency before the Tennessee supreme court would have tolled the limitations period.

The time period for filing an application for permission to appeal is not jurisdictional in a case arising from the court of criminal appeals and may be waived by the supreme court in the interest of justice (Tenn. R. App. P. 11(b))

The district court stated, even if Fusco "demonstrated a degree of diligence, that diligence was not directed towards filing a timely * 2254 petition" (Doc No. 17 at 7) But Further states "even if the petitioner were deemed to have pursued his

rights with due diligence, he has not demonstrated that some extraordinary circumstance stood in his way and prevented timely filing (Doc no. 17 at 8)

The district court approach is to rigid, diligence is a continuous action, both before the impediment and after. Again Fusco is a pro se prisoner housed in administrative segregation, despite all of this Fusco exhibited the maximum diligence possible and did not sleep on his rights, taking steps necessary to retrieve his legal material and property so that he could file proceedings on his own, as soon as he found that his property and legal material was lost - disposed of Fusco took prompt action to hire Attorney Anderson to do so, because it is unrealistic to expect a pro se prisoner in segregation to file any proceeding on his own without any of his legal material.

In the letter dated May 23, 2018 Anderson advised Fusco that he completed the habeas corpus petition, several days later when Fusco received it he noticed several critical typos that would have effected its filing or possible rejection by the courts, Fusco contacted Anderson to fix these typos - Fusco did not spend the month following his deadline reviewing the drafted petition as the district court implies, completing his 102 page supporting memorandum of law.

The letter dating June 18, 2018 From Anderson saying

the petition can be filed now without delay (in which it was) and the Florida exhibit can be filed at a later date, the Florida documents the district court refers to are a total separate issue in which Anderson was hired and paid to do (1) draft a thorough and complete pro se habeas corpus petition and memorandum of law (2) locate Florida documents that if needed can be used later - but not needed to file a habeas petition.

Fusco did not draft a lengthy legal document (typed) while in segregation - without his legal material. The law clerk at Mccx completed the "application" for the Tennessee supreme court and Attorney Anderson was hired to draft a pro se habeas petition and supporting memorandum.

Lastly, the district court stated that "Fusco reasonably argued before the Tennessee Supreme Court the facts of the case supporting equitable tolling" - Further quoting Solomon v. U.S. 467 F.3d 928 (6th cir 2006) applying equitable tolling where petitioner was transferred without his legal materials to a new prison, placed in administrative detention, then transferred again, all within a month of his filing deadline - applying equitable tolling to where the facts are very similar to Fusco's

But Further states, as it relates to his filing in this court Fusco has not shown that he was prevented from timely

filing by some extraordinary circumstance.

Appeals Court — In the order issued on February 11, 2018 by the U.S 6th circuit court of Appeals (case # 19-6054) incorrectly implies, stating that on June 20, 2018 Fusco filed a 2254 petition raising 4 grounds for relief, this is incorrect, Fusco's habeas petition contained 14 grounds for relief and further incorrectly implies, stating that "Fusco now seeks a COA on all 4 grounds for relief that he raised in his habeas petition" — this is also incorrect, Fusco was seeking a COA for procedural reasons, not on the merits of his petition, which the district judge says are "colorable"

Fusco argues, that based upon the facts of the case and submissions supporting such, the record before the district court — reasonable jurist could debate that Fusco was not only diligent but also his untimely filing was a state created impediment not petitioner created, extraordinary and beyond his control.

Furthermore, the appeals court completely ignored the standards articulated by this court in Holland v. Florida — Never addressing the diligence factor, but only that Fusco failed to demonstrate that some extraordinary circumstance prevented him from filing a timely habeas petition and that reasonable jurist could not debate that. Arguing that Fusco failed to explain how the loss

of his property or legal material delayed the filing of his habeas petition - quoting *Hull v. Warden, Lebanon Corr. Inst.*, the facts of that case are completely different than that of Fusco's, in *Hull* he argued, the lack of trial transcripts and limited access to the law library entitled him to equitable tolling.

In Fusco's case, his property and legal material were lost-disposed of by Correctional officers during a transfer between 3 separate prisons, Therefore without any of his legal material he was unable to file any proceeding, forcing him to hire an attorney to do so. This delay-period in which Fusco was without his legal material, trying to locate it is the same amount of time in which Fusco's habeas petition was late (roughly 30 plus days)

The loss-disposal of Fusco property and legal material was not done so by Fusco or his attorney but rather by correctional officers so therefore it was an extraordinary circumstance beyond Fusco's control, leading to him hiring Anderson, delaying the filing of his habeas petition.

The district court and appeals court erred in its understanding of the facts and submissions in this case. Based upon the record before the court "reasonable jurist could debate otherwise" therefore it can-not be conclusively determined that Fusco is not entitled to equitable tolling - For the time period in which he was without his legal material, for a period to be sufficient to render his petition timely.

• ————— Reasons For Granting the Petition ————— •

This honorable court should grant certiorari for the following reasons :

Fusco was pro se when he filed his habeas petition, and when he responded to the "motion to dismiss" his petition as untimely filed by the respondent, on his own Fusco identified extraordinary circumstances created by state action that impeded his filing - transfers to 3 separate prisons within a 24 hour period, placement in segregation and the complete loss-disposal of all of his legal material and property, which in other cases justified equitable tolling.

Fusco further described the diligence he used in segregation, without his property or legal material to file his petition in the face of those obstacles. The district court found that "even if the petitioner were deemed to have pursued his rights with due diligence, he has not demonstrated that some extraordinary circumstance stood in his way and prevented timely filing".

The district court's decision is overly rigid and holds a pro se petitioner like Fusco to an extraordinary high evidentiary standard, who made a substantial yet imperfect

showing of the facts and supported documents, ignoring that pro se filings like Fusco's must be construed liberally, and a pro se complaint however inartfully pleaded must be held to a less stringent standard than formal pleadings drafted by lawyers.

The record before the courts, although imperfect are similar in several key respects to cases not only in the 6th circuit but other sister circuits as well, to where courts have previously granted equitable tolling.

Unlike Fusco, the petitioners in these cases were appointed counsel, received evidentiary hearings for further factual development and were ultimately granted equitable tolling.

Fusco without counsel, made a substantial showing of his entitlement to equitable tolling for the period he was without his legal material, sufficient to render his petition as timely.

The record before the courts establish that during his transfer between prisons his property and legal material that was being handled by prison officials were lost or disposed of which created an impediment to his filing of any such pleading with the courts. Without his legal material Fusco was plainly prevented from filing any such.

the period in which Fusco was without his legal material is roughly the same amount of time in which not only his application to the Tennessee Supreme court was late but also his habeas petition as well.

The district court faulted Fusco for attempting to file a motion to accept late filed application to the Tennessee Supreme Court by contacting the law clerk at MCCX - during this same period of time Anderson was drafting Fusco's habeas petition, the district court concedes that "if accepted, the application would have tolled the limitations period"

Fusco carried his burden, without counsel - demonstrating the state created impediment was an extraordinary circumstance that was beyond his control and prevented timely filing thus satisfying the second factor articulated by this court in *Holland v. Florida*

The impediment to Fusco's filing of any pleading was created by state action - the loss or disposal of his legal material, it was not petitioner or attorney created. Therefore the blame can-not be shifted to Fusco or his attorney as the district court and appeals court attempts to do.

The time in which Fusco seeks to toll in is not excessive, amounting to in which he was without his legal material, although later determined to be completely lost or

disposed of by correctional officers, which led to Fusco's Family hiring Attorney Anderson - sufficient to render his petition as timely.

Fusco will not be the only pro se petitioner adversely affected by the 6th circuit's decision, the 6th circuit sets a dangerous precedent that pro se petitioners should be treated the same as petitioners represented by counsel, and held to the same pleading standards regardless of the merits of their underlying habeas claims for relief, the 6th circuit's decision, however, virtually ensures that the merits of Fusco's petition are never heard by a Federal Court, even though his claims are in fact meritorious.

This decision departs significantly from this court's guidance and the decisions of other circuits. It should not be allowed to stand.

• ————— Conclusion ————— •

Based upon the facts of the case, supported by Fusco's submissions he would have met the deadline if it wasn't for the loss - disposal of his legal material needed to do such, which was an extraordinary circumstance beyond his control. Fusco

carried his burden showing that he is entitled to equitable tolling or at minimum the opportunity with counsel to further fact findings.

For the foregoing reasons, this petition of writ of certiorari should be granted so that Fusco can proceed in the district court on the merits of his habeas petition.

Respectfully,

Robert J. Juse