NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

TELLY KAVANTZAS,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Rule 4 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254, which prohibits a district court from dismissing a habeas corpus petition without calling for a response from the State unless "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief," allows the district court itself to research online electronic dockets from the petitioner's state court proceedings, take judicial notice of those dockets, and dismiss the petition as untimely, without ever calling for a response?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Telly Kavantzas v. Secretary, Florida Department of Corrections,
No. 17-81108-Cv-Dimitrouleas/White (November 3, 2017)

United States Court of Appeals (11th Cir.):

Telly Kavantzas v. Secretary, Florida Department of Corrections,
No. 17-15753 (February 14, 2020)

Florida District Court of Appeal (4th Dist.)

Telly Kavantzas v. State of Florida,
93 So.3d 447 (July 18, 2012)

Florida Fifteenth Judicial Circuit

State of Florida v. Telly Kavantzas,
No. 2010-CF-000071-AXX (Oct. 27, 2010)

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PETITION FOR WRIT OF CERTIORARI

Telly Kavantzas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-15753 in that court.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming the district court's dismissal of Petitioner's 28 U.S.C. § 2254 petition is reported at 793 F. App'x 999 and reproduced in Appendix A-1. The district court's decision, as well as the magistrate judge's

report it affirmed and adopted, are both unreported and reproduced in Appendices A-2 and A-3, respectively.

The decision of the Florida Fourth District Court of Appeal affirming Petitioner's conviction and sentence is published at 93 So.3d 447, and reproduced in Appendix A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On February 14, 2020, the court of appeals affirmed the district court's dismissal of Petitioner's habeas corpus petition as untimely. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory provisions:

28 U.S.C. § 2244(d)

Title 28, U.S.C. § 2244(d) provides:

> (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, if the right has been newly 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 or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Rule 4, Rules Governing Section 2254 cases

Rule 4 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254, provides, in pertinent part,

> [i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

STATEMENT OF THE CASE

1. After Veronica Phillips called 911, law enforcement officers found Petitioner in the attic of the home in which Phillips was residing. App. A-4. **A** jury in Palm Beach County, Florida convicted Petitioner of burglary of a dwelling and other offenses. *Id*. The trial court imposed a 25-year term of imprisonment, and the Florida Fourth District Court of Appeal affirmed in a published opinion. *Id*.

2. On September 28, 2017, Petitioner filed a *pro se* 28 U.S.C. § 2254 petition for writ of habeas corpus in the district court stating four grounds for relief. App. A-5. There were no exhibits attached to the petition. *See id.*

a. The "timeliness" section of the petition states, *in toto*, "Petitioner asserts that the instant petition for writ of habeas corpus is timely filed." *Id*. at 23. The allegations in the petition regarding Petitioner's state proceedings, however, supported that assertion, stating that: (1) the mandate on direct appeal issued on August 17, 2014; (2) prior to the issuance of the mandate, on August 8, 2014, Petitioner filed two state postconviction motions; (3) the state trial court denied one of those postconviction motions on June 19, 2015, and he appealed that denial; (4) the trial court denied this second postconviction motion on February 15, 2017, Petitioner also appealed that motion's denial. *Id*. at 4-5.

b. Based on the allegations in the petition, the petition was timely filed. The limitations period begins to run on "the date on which the judgment

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). The petition states that the mandate of the Florida Fourth District Court of Appeal on direct review did not issue until August 17, 2014. App. A-5 at 2. Under Florida law, the mandate of the court of appeals issues "after expiration of 15 days from the date of an order or decision." Fla. R. App. P. 9.340(a). Therefore, the petition alleges that the final order or decision by the court of appeals was entered by that court on August 2, 2014. Accordingly, that is the earliest date on which Mr. Kavantzas's judgment "became final by the conclusion of direct review or the expiration of time for seeking such review."[1]

c. The statute of limitations is tolled "during the time a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The petition alleges that Petitioner filed two separate state postconviction motions on August 8, 2014. App. A-5 at 3, 4. Therefore, according to the allegations in the petition, only 6 days of the limitations period – from August 2d to August 8th, 2014 – elapsed before it was tolled by the filing of these state postconviction motions. The petition alleges further that the first of these state postconviction motions was denied on

[1] Petitioner could have sought discretionary review in the Florida Supreme Court had he sought such review within 30 days, but the petition alleges that he did not do so. Therefore, the "expiration of time for seeking … review" may not have become final for purposes of § 2244(d)(1)(A) until 30 days later. Those additional days are irrelevant to the timeliness of the petition here.

June 19, 2015, and the second on February 15, 2017. *Id.* The limitations period therefore began to run on the later date, and ran an additional 225 days until Petitioner gave the petition to prison officials for mailing on September 28, 2017. *Id*. at 25. *See Houston v. Lack*, 487 U.S. 266, 276 (1988). Based on these allegations in the petition, only 231 days of the one-year limitations period had elapsed when the federal petition was filed.

6. The district court clerk referred the petition to a magistrate judge who recommended that the petition be dismissed as untimely under Rule 4 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (hereinafter "Habeas Rule 4") without calling for a response from the state. App. A-3 at 1. The magistrate judge did not issue an order to show cause "because, on the face of the petition, it is evident the petitioner is entitled to no relief." *Id*.

a. Specifically, the magistrate judge determined the petition was untimely on its face after he "reviewed the petitioner's on-line criminal trial and appellate court documents and relevant pleadings," stating:

> The court may take judicial notice of its own records in habeas proceedings, *McBride v. Sharp*, 25 F.3d 962, 969 (11th Cir. 1994), *Allen v. Newsome*, 79[]5 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found online. *See* Fed. R. Evid. 201; *see also United States v. Glover*, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999) (finding the district court may take judicial notice of the records inferior courts).

App A-3 at 2 & n.2.

b. By separate order, the magistrate judge ordered the district court clerk to enter into the record of Petitioner's habeas proceeding "copies of the state trial court on-line criminal dockets, together with appellate court on-line dockets, and other relevant copies of state court filings" upon which the report relied. App A-3 at 2 & n.2. In response to the magistrate judge's order, the district court clerk thereafter entered into the record eighteen separate on-line state trial and appellate dockets and pleadings gathered by the magistrate judge and attached to the report.

c. The magistrate judge relied on the "on-line state trial and appellate dockets and pleadings" he compiled to conclude that Petitioner's habeas corpus petition was untimely under. § 2244(d). App. A-3 at 3-11. After locating various dates and other information in the online documents he compiled, the magistrate judge calculated that Petitioner failed to file his petition within a year of the date on which his conviction "became final" and therefore was untimely under § 2244(d)(1). App. A- 3 at 3-14. The magistrate judge also rejected any possibility that Petitioner could make a showing of equitable tolling, a "fundamental miscarriage of justice" or "actual innocence" sufficient to overcome the statute of limitations, even though the petition makes no mention of any of those matters. *Id.* at 14-25.

d. The report advised Petitioner that "[o]bjections to this report may be filed with the District Court within fourteen days of receipt of a copy of the report," i*d*. at 27, but Petitioner filed no objections.

7. Like the magistrate judge, the district court did not call for a response from the State. Rather, it relied upon the online documents compiled by the magistrate judge to make findings as to when Petitioner filed various documents in state court and when the state courts issued rulings. *See* App. A-2 at 1-3. The district court relied on those findings to determine that the petition was both untimely and meritless. *Id.* at 3. The district court then adopted the magistrate judge's report, dismissed the petition as time-barred, and, in the alternative, denied it on the merits. *See id*. at 4. Petitioner appealed.

8. While Petitioner's appeal pending, the Eleventh Circuit issued its revised decision in *Paez v. Sec'y, Fla. Dep't of Corr.*, 931 F.3d 1304, *opinion vacated by* 944 F.3d 1327 (11th Cir. 2019), *superseding opinion*, 947 F.3d 649 (11th Cir. 2020), *cert. petition filed* (June 11, 2020) (No. 16-15705). There, as in Petitioner's case, the district court relied on its judicial notice of state court online dockets to dismiss a § 2254 petition as untimely without ordering the state to respond.

a. In its original *Paez* decision, the Eleventh Circuit determined that dates from online state court dockets were judicially noticeable facts under Federal Rule of Evidence 201, and that because petitioner had an opportunity to be heard after the court took judicial notice, the district court had not abused its

discretion when it noticed those facts. 931 F.3d at 1307. However, the court of appeals held further that the district court abused its discretion when it dismissed the petition as untimely without first calling for a response from the state. *Id* at 1311.

b. The *Paez* panel, however, vacated that decision, *see* 944 F.3d 1327, and issued a new one, *see* 947 F.3d 649. The new opinion affirmed the district court in its entirety, holding that the district court could both: (1) take judicial notice of the state court docket, and (2) *sua sponte* dismiss the petition as untimely under Habeas Rule 4 without ordering that state to respond. *Id*. at 651-55.

9. The Eleventh Circuit held that the revised *Paez* decision mandated the result here, and affirmed the district court's *sua sponte* dismissal of the petition as untimely. App. A-1 at 3.

a. First, the court of appeals held that "the district court did not abuse its discretion by taking judicial notice of Kavantzas' electronic state court dockets" because the magistrate judge "made the electronic dockets on which he relied part of the record, and Kavantzas never alleged that he did not receive those dockets," and "did not object, dispute the accuracy of the dockets or the dates the magistrate judge used, or otherwise ask to be heard on the issue of judicial notice." *Id*. at 3-4 (citing *Paez*, 947 F.3d at 651-53).

b. Additionally, the Eleventh Circuit held that under *Paez*, the district court did not "abuse its discretion by *sua sponte* dismissing Kavantzas'

§ 2254 petition as untimely" under Habeas Rule 4 "without requiring a response from the state" because "he would not be entitled to relief if his petition was untimely." *Id*. at 4 (citing *Paez*, 947 F.3d at 653-55). Specifically, the Eleventh Circuit found that Petitioner "was provided notice and an opportunity to argue the timeliness of his petition in his form petition and after the magistrate judge's [report] was issued." *Id*. (citing *Paez*, 947 F.3d at 655). And because the state was provided notice of both the report and the district court's adoption of it, "the state could have indicated its intent to assert or waive its timeliness defense," but did not. *Id*. (citing *Paez*, 947 F.3d at 655).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision is contrary to the express language of Rule 4 of the Rules Governing Section 2254 Cases.

A district court may dismiss a 28 U.S.C. § 2254 petition without first calling for a response only "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254, (hereinafter "Habeas Rule 4"), If the lack of entitlement to relief is not plain from the face of the petition and its exhibits, "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." *Id*.

Here, no exhibits were attached to the petition, but based on the dates alleged in the petition itself, the petition was timely filed under 28 U.S.C. § 2244(d)(1)(A). Therefore, it did *not* "plainly appear from the petition" itself that Petitioner "was not entitled to relief" because the petition was time-barred.

And because the lack of entitlement to relief did not "plainly appear from the petition and any attached exhibits," Habeas Rule 4 mandated that the district court call for a response from the state. This it did not do. Rather, the district court undertook to insert itself into the litigation process, conducted its own research into the on-line state court dockets and documents, and then deemed the dockets and documents it found to be "the petition and . . . attached exhibits" for purposes of Habeas Rule 4 Those actions were contrary to the plain text of the rule.

In *Day v. McDonough*, 547 U.S. 198, 209 (2006), this Court declared that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." But *Day* did not allow a district court to rummage through state court dockets as part of its *sua sponte* consideration. This Court predicated its decision in *Day* on the fact that "[i]nformation essential to the time calculation is often absent. . . until the State has filed, along with its answer, copies of documents from the state-court proceedings." *Id.* at 207 n.6. Indeed, it was this pre-answer lack of information that caused the Court to reject Day's argument that that the *only* procedural posture in which a court could raise the statute of limitations defense *sua sponte* was *before* the State responded to the petition. *Id*. at 207. The Court reasoned, "[w]ere we to accept Day's position, courts would never (or at least hardly ever) be positioned to raise AEDPA's time bar *sua sponte*" due to the absence of "essential" information before the State's response is filed. *Id*. at 207 n.6**.**

The Eleventh Circuit's decision, however, turns *Day*'s considerations on their head, creating a scenario whereby a district court may review state court online dockets *sua sponte* to determine the timeliness of a petition, and do so even in those cases where the petition is timely filed based on the facts alleged on the face of the petition. The decision below is therefore contrary to the express language of Habeas Rule 4, and this Court's intervention is required.

II. The question presented is important.

Since January 7, 2020, when the Eleventh Circuit decided *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649 (11th Cir. 2020), *cert. petition filed* (June 11, 2020) (No. 16-15705), that court has affirmed the summary dismissal of a § 2254 petition as untimely in six cases where district court took judicial notice of state court online dockets, including Petitioner's. *See Silva-Martinez v. Fla. Dep't of Corr.*, 808 F. App'x 846 (11th Cir. 2020); *Guisao v. Sec'y, Fla. Dep't of Corr.*, 806 F. App'x 682 (11th Cir. 2020); *Oliver v. Florida*, 803 F. App'x 305 (11th Cir. 2020); *Ates v. Florida*, 794 F. App'x 929 (11th Cir. 2020); *Montero v. Sec'y, Fla. Dep't of Corr.*, 794 F. App'x 928 (11th Cir. 2020), *cert. petition filed* (U.S. May 21, 2020) (No. 19-8822). The only inference is that in the Eleventh Circuit, it is not an aberration for district courts themselves to research state online dockets to ascertain the timeliness of habeas petitions. Rather, this large number of decisions in so short a period of time reflects the importance of the issue, and the need for it to be addressed by this Court.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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