

No. 20-5422

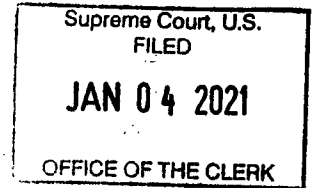
IN THE SUPREME COURT OF THE UNITED STATES

RYS

ERIC MILLER, pro se,
Petitioner,

v.

JAMES DEAL, WARDEN,
Respondent.



*On Petition for Writ of Certiorari
to the Supreme Court of Georgia*

PETITION FOR REHEARING

ERIC MILLER
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Petitioner pro se

QUESTION PRESENTED

Is Georgia state habeas pro se prisoner mailbox rule restriction towards habeas petition miscarriage of justice?

Will the U.S. Supreme Court adopt a mailbox rule under which pro se prisoner's state habeas petition could be deemed filed on the date delivered to prison authorities?

Will every pro se prisoner in the state of Georgia who submit their state habeas petition to the courts before the 4 years toll, reap the consequence of their petition being dismissed as untimely due to the attribution of the clerk?

Did Petitioner submit habeas petition to the clerk for filing 11 days before the four-year deadline for felony habeas petitions according to Exhibit A-2 IR- Petitioner Response To Respondent's Motion To Dismiss Petition As Untimely I, and Exhibit C-2 IR-04-033, page 12 of 19 Motion for Reconsideration I.

TABLE OF CONTENTS

	PAGE
Question Presented - - - - -	ii
Table of Authorities - - - - -	iv
Opinions Below - - - - -	1
Jurisdiction - - - - -	1
Statutory Provisions Involved - - - - -	2
Statement - - - - -	3
Reasons for Granting Petition for Rehearing - -	7
Conclusion - - - - -	19
Certificate of Service - - - - -	20

TABLE OF AUTHORITIES

Cases		
18	<i>Banker's Life & Casualty Co. v. Fenshaw</i> , 486 U.S. 91, 98, n.2 (1988).	-
18	<i>Dewey v. Des Moines</i> , 193 U.S. 197-198 (1899).	-
9	<i>Ferguson v. Freeman</i> , 282 U.S. 180, 182 (1) (646 Fed 186 (2007)).	-
14	<i>Gibson v. Toppin</i> , 370 U.S. 855, 858 (1) (513 Fed 186) (1999).	-
18	<i>Gonzalez v. Sec'y for Dept. of Corr.</i> , 366 F.3d 1253, 1291-92 (11th Cir. 2004).	-
18	<i>Green v. Caldwell</i> , 299 U.S. 650, 651 (1) (193 S.E.2d 847) (1992).	-
18	<i>Griffith v. Quinn-Tech Corp.</i> , 732 F.2d 671, 680 (11th Cir. 1984).	-
15, 16	<i>Hagg v. Florida</i> , 591 S.2d 614, 617 (Fla. 1992).	-
16	<i>Houston v. Lack</i> , <i>supra</i> , 484 U.S. at 291.	-
13	<i>Howard v. Sharpe</i> , 366 U.S. 701 (1) (490 S.E.2d 678) (1996).	-
9, 10, 13, 15, 16	<i>Massaline v. Williams</i> , 544 S.E.2d 720 (Ga. 2010).	-
6	<i>Miller v. Best</i> , No. 2019-HF-48-12 (Ga. July 23, 2019).	-
4	<i>Miller v. Kyparstick</i> , No. 2101044 (Ga. April 12, 2019).	-
3	<i>Miller v. State</i> , No. 09SC54975 (Ga. March 23, 2007).	-
12	<i>Ridge at Red Hawk LLC v. Schneider</i> , 493 F.3d 1174, 1179 (10th Cir. 2007).	-
8, 10, 13, 15-17	<i>Roberts v. Cooper</i> , 691 S.E.2d 895 (Ga. 2010).	-
12	<i>White v. Thynkman</i> , 392 F.358 363 (9th Cir. 2004).	-
17	<i>Yee v. Escondido</i> , 503 U.S. 519, 533 (1992).	-

STATUTES AND RULE

Fed. R. Civ. P Rule 60(b)	7
Fed. R. Civ. P Rule 60(b)(1)-(6)	7
Fed. R. Civ. P Rule 60(c)(1)	7
D.C.G.A § 9-11-1 et seq.	8
D.C.G.A § 9-11-3(a)	8
D.C.G.A § 9-14-42(c)	10, 12, 15
D.C.G.A § 9-14-52(b)	15
Rule 14.1(a)	17
Rule 59(b)	7
Rule 60(b)	7, 11, 18
Rule 60(h)(6)	18
Rule 60(c)	7

OTHER

Black's Law Dictionary	9
Black's Law Dictionary 9th Edition	9, 11
Cambridge English Dictionary	8, 11
Macmillan Dictionary	9

Gen. Const. of 1983, Art. I, Sec. I, Par. XII - - - 13

Gen. Const. of 1983, Art. I, Sec. I, Par. XV - - - 12

OPINIONS BELOW

The decision of the Georgia Supreme Court denying Petitioner's application for a certificate of probable cause to appeal the habeas corpus court's order is not published and is included as Petitioner's Appendix B. A copy of the order denying Petitioner's motion for reconsideration is included as Petitioner's Appendix C. A copy of the order denying Petitioner's motion to stay the remittitur is included as Petitioner's Appendix D.

The order of the habeas corpus court is not published, but is included as Petitioner's Appendix A.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Georgia Supreme Court in the habeas corpus appeal. The petition for certiorari was timely filed within ninety days of that Court's decision denying Petitioner's motion for reconsideration on June 16, 2020.

Respondent filed a brief in opposition on November 9, 2020.

Petition for Writ of Certiorari was denied on December 14, 2020.

STATUTORY PROVISIONS INVOLVED

D.C. G. A § 9-14-42(c): Any action brought pursuant to this article shall be filed with one year in the case of a misdemeanor, except as otherwise provided in Code Section 40-13-33, or within four years in the case of a felony, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of date.

STATEMENT OF THE CASE

Petitioner had prepared Petitioner's initial petition regarding 'ineffective assistance of appellate counsel procedural default' in relations to the O.B.T. S: 00136628634 commercial account in *Miller v. State*, No. 078254975 (Ga. March 23, 2007), and submitted the initial petition ("contract") to the Superior Court Clerk of Fulton County on January 3, 2019 IR-Plaintiff's Original Petition, Certificate of Service, pg. 91, that was eventually postmarked by prison authorities at Smith State Prison on January 7, 2019 IR-Exhibit A-2 Petitioner Response To Respondent's Motion To Dismiss Petition As Untimely; 04-033 Exhibit C-2, pg. 12 of 19, Motion For Reconsideration I.

On January 18, 2019 Appellate Counsel Frier wrote Petitioner regarding the initial petition submitted to appellate counsel on January 3, 2019 IR-04-033 Exhibit C-3, pgs. 13 and 14; Plaintiff's Original Petition, pgs. 8 and 9; Exhibit A-2 Petitioner Response To Respondent's Motion To Dismiss Petition As Untimely I.

On February 12, 2019 the clerk of Fulton county superior court notified Petitioner that the petition was waiting on the judge signature to determine if Petitioner file pauperis before filing the petition in office, that Petitioner had submitted to the clerk on January 3, 2019 IR-Exhibit A-1, pgs. 1-5 Petitioner Response To Respondent's Motion To Dismiss Petition As untimely I.

On March 29, 2019 Petitioner was transferred from the custody of Terence Kilpatrick to James Deal, which Petitioner had wrote the clerk of Fulton county superior court regarding Petitioner's address change on April 1, 2019 IR-04-033 Exhibit C-4, pgs. 1-3 I.

On April 10, 2019 Judge Howard directed the clerk of Fulton county superior court to file the petition in office IR-Order Granting Forma Pauperis I. On April 12, 2019 the clerk filed Petitioner's initial petition in office Miller v. Kilpatrick, No. HC-01044 (Ga. April 12, 2019) IR-Plaintiff's Original Petition I, two month's and 25 days after the four-year deadline expired on January 18, 2019.

Petitioner was unaware that Respondent Kilpatrick had filed a 'Special Appearance Motion To Transfer Case To Tazewell County' with Judge Richardson on July 5, 2019 IR-03-060 Exhibit B-11 I, which Judge Richardson had signed Respondent Kilpatrick prepared order transferring the case to Tazewell county superior court on July 12, 2019 IR- Order of Transfer I.

On July 23, 2019 Petitioner filed a 'Declaration For Entry of Default' on Respondent Kilpatrick IR- Other, No. HC01044 I, and amended it on July 24, 2019 IR- Other. No. HC01044 I. On July 26, 2019 Petitioner filed 'Default Judgment' on Respondent Kilpatrick IR-03-060 Exhibit B-6 I, amended on August 8, 2019 IR-03-060 Exhibit B-7 I.

On August 6, 2019 Petitioner filed a 'Declaration For Entry of Default' on Respondent Smith State Prison IR-03-060 Exhibit B-4 I, and filed 'Default Judgment' on Respondent Smith State Prison on August 20, 2019 IR-03-060 Exhibit B-5 I. Petitioner filed 'Certificate of Default' on September 6, 2019 IR-03-060 Exhibit B-10 I.

On July 23, 2019 Tattnall County Superior Court clerk notified Petitioner that the case had been transferred from Fulton County Superior Court IR-03-060 Exhibit B-151. On August 2, 2019 Respondent Kilpatrick filed a motion to dismiss and 'Answer and Return' under Respondent James Deal to substitute warden Kilpatrick IR-03-060 Exhibit B-16 and B-181, which Judge Stewart ultimately dismissed the petition as untimely without giving Petitioner any appeal instructions in the order to dismiss on August 9, 2019. Mitter v. Deal, No. 2019-HC-48-15 (Gadula 23, 2019) IR-Appendix A1.

REASONS FOR GRANTING PETITION FOR REHEARING

I.

Fed. R. Civ. P. Rule 60(b) permits a court to relieve a party from a final judgment, order, or proceeding for six reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not previously have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a judgment has been satisfied, released, discharged, reversed, or vacated or that would no longer be equitable to apply; or (6) any other reason that justifies relief. Fed. R. Civ. P. Rule 60(b)(1) - (6). As for the timing of the motion, Rule 60(c) states that "[a] motion under Rule 60(b) must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. Rule 60(c)(1).

The Civil Practice Act, D.C. G. A § 9-11-1 et seq., applies in habeas corpus proceedings with regard to questions of pleading and practice. Under the Civil Practice Act, an action is initiated by filing a complaint with the court. D.C. G. A § 9-11-3(a). "A pro se felony habeas petitioner has four years to prepare and submit his initial petition" Roberts v. Cooper, 691 S.E. 2d 895 (Ga. 2010).

As stated in Roberts v. Cooper, a petitioner has four years to prepare and submit his initial petition. Which Petitioner had prepared and submitted Petitioner's initial petition to the court on January 3, 2019 IR- Plaintiff's Original Petition, pg. 11 Certificate of Service; Exhibit A-2 Petitioner Response To Respondent's Motion To Dismiss Petition As Untimely I. Here, Petitioner provide several definition's that define "submit": (1) to give over or yield to the power or authority of another, Cambridge English Dictionary; (2) if you submit a proposal, report, or request to someone you formally send it to them so that

Petitioner will explain how the Massaine's mailbox rule decision contradicts itself in deciding that the rule pertains to appellate jurisdiction. See Ferguson v. Freeman, 282 Ga. 180, 182 (11), (646 S.E.2d 105) (2007); when deciding the merits because it simply explain that "a pro se filing has no petitioner has four years to prepare and submit his initial petition; after a denial of that petition, he has 30 days to prepare and submit his application for a certificate of

Edison.

they can consider if or decide about it, Macmillan Dictionary; (3) To propound, as an advocate submits a proposition for the approval of the court. Applied to a controversy, it means to place it before a tribunal for determination, Black's Law Dictionary; (4) accept or yield to a superior force or to the authority or will of another person, Black's Law Dictionary 9th Edition; (5) subject to a particular process, treatment or condition present (a proposal, application, or other document) to a person or body for consideration or judgment, Black's Law Dictionary 9th.

probable cause in this Court, and to 'prepare and submit' his notice of appeal in the habeas court". See, Massaline v. Williams, 554 S.E.2d 720 (Ga. 2001). If the ruling in Massaline's was made or adopted under 'prepare and submit', it should apply to the initial petition itself as well, because refusing to adopt a mailbox rule for the initial petition itself is miscarriage of justice, after explaining that a pro se felony habeas petitioner has four years to "prepare and submit his initial petition." See, Roberts v. Cooper, 691 S.E.2d 875 (Ga. 2010). By the trial court dismissing Petitioner's initial petition on August 9, 2019 [R-Appendix A], after it has been proven with irrefutable facts that Petitioner had prepared and submitted Petitioner's initial petition to prison authorities on January 3, 2019, which was postmarked on January 7, 2019 [R-04-033, Exhibit C-2, page 12 of 19 Motion for Reconsideration; Exhibit A-2 Petitioner Response To Respondent's Motion to Dismiss Petition as Untimely] approximately 11 days before the four-year deadline regarding O.C.G.A § 9-14-42(c) that became final on January 18, 2019, but was not stamped

until April 12, 2019 I.R. Plaintiff's Original Petition I approximately
three-in-half month's after Petitioner had prepared and
submitted Petitioner's initial petition. See, Cambridge English
Dictionary: "submit" means to give over or yield to the
power or authority of another; see also, Black's Law
Dictionary 9th Edition; "submit" means subject to a
particular process, treatment or condition present /a proposal,
application, or other document) to a person or body for
consideration or judgment.

Petitioner has provided the definition that define "submit",
that Alasatine's mailbox rule was decided under which
consider that a Petitioner whose seeking to appeal the denial
of his initial petition, has to only "submit" his notice of
appeal and application for a certificate of probable cause
on or before the 30 day deadline in order to invoke the prose
prisoner mailbox rule, so why isn't the mailbox rule being
invoked for the initial petition itself, because pursuant to
Rule 60 (b): "relief for violation of federal law will be
granted if the violation rises to the level of a fundamental

two pro se inmates who delivered a document to prison officials at the same time, seeking the same relief, and facing the same court deadline, [are] treated quite differently, based entirely on happenstance. One inmate's petition might make it to the courthouse on time, while the other's might be delayed for unknown reasons. The first would obtain a full hearing, while the second would be denied relief. Such arbitrariness cannot fairly be characterized either as equal protection or equal access to the courts . . . " *Hagg v. Florida*, 591 S.2d 614, 617 (Fla. 1992).

In *Roberts v. Cooper*, case Chief Justice Hunstein gave three reasons why he dissented against the Massaine's mailbox rule shouldn't only pertain to appellate jurisdiction.

When majority opines that the difference between the 30 day deadline for filing a notice of appeal from a habeas ruling See, D.C.G.A. § 9-14-52 (b), and the four-year deadline for filing a habeas petition arising from a felony conviction, See D.C.G.A. § 9-14-42 (c). "appears . . . to have import." Op. at 661 First, Chief Justice Hunstein stated that "the relatively short time

time for filing an appeal was not a consideration in Massatone, supra, 274 Ga. at 552. Second, given the lack of control an inmate has over his habeas petition once it has been delivered to prison authorities, he "can never be sure that it will ultimately get stamped 'filed' on time". Houston v. Lack, supra, 489 U.S. at 291, no matter how early in the four-year period it is submitted. Finally, one seeking to file a habeas petition has the right to utilize the full amount of time provided by statute, and "If the state cannot subtract from that . . . period through the failure to deliver a pro se inmate's petition until after the period has expired, even if the delay is through honest oversight." Hagg, supra, 591 S.2d at 619; Roberts v. Cooper, 691 S.E.2d 895 (Ga. 2010).

So Petitioner cannot be held responsible because the state fail to deliver Petitioner's initial petition until after the four-year period had expired "If the state cannot subtract from that . . . period through the failure to deliver a pro se inmate's petition until after the period has expired, even if the delay is through honest oversight." Roberts

v. Cooper, 691 S.E.2d 875 (Ga. 2010).

II.

Under this Court's Rule 14.1 (a), only questions set forth, or fairly included, in the petition for certiorari are considered. Rule 14.1 (a) is prudential, but is disregarded only where reasons of urgency or economy suggest the need to address the unrepresented question in the case under consideration. The Rule provides the respondent with notice of the grounds on which certiorari is sought, thus relieving him of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unrepresented questions. It also assists the Court in selecting the cases in which certiorari will be granted. See, *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

Here, Petitioner's certiorari questions (1) - (4) is thus properly before the Court. Once a state or federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the

precise arguments they made below. See, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78, n.2 (1988); *Gates*, *supra* at 219-220; *Dewey v. Des Moines*, 173 U.S. 197-198 (1899).

Lastly, Rule 60(b)(6) permits a judgment or order to be set aside or modified for "any other reason" that justifies relief. "Relief under Rule 60(b)(6) is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." *Griffin v. Swin-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Petitioner has demonstrated that exceptional circumstances warrant granting Petitioner relief the habeas trial court order (Appendix A). Rule 60(b) is to allow a court to grant relief when its judgment or order rests upon a defective foundation. See, *Gonzalez v. Sec'y for Dept. of Corr.*, 366 F.3d 1253, 1291-92 (11th Cir. 2004). Habeas corpus is a civil, not a criminal remedy. See, *Green v. Caldwell*, 299 Ga. 650, 651 (1) (193 S.E.2d 847) (1972).

CONCLUSION

Grant Petitioner all the relief that Petitioner is
entitled to by all sought of means.

Respectfully submitted,

By ERIC MINNER
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Respectfully submitted,

On this 4th day of January, 2021