No. 20-5731

In The

Supreme Court of the United States

Brent L. Alford,

Petitioner

v.

Sam Cline, "et al",

Respondents

On Petition For Writ Of Habeas Corpus
To The Tenth Circuit Court of Appeals

MOTION FOR REHEARING IN BANC OR IN THE ALTERNATIVE TRANSFER TO THE U.S. DISTRICT COURT

El Dorado Correctional Facility
Southeast Medium Unit
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Oswego, Kansas 67356

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PURSUANT TO RULES OF THE SUPREME COURT RULE 44

The petition shall state its grounds briefly and distinctly.

Petitioner contends that the lower Federal Courts abused their discretion - based on the failure to apply several tolling and grace periods allowed by the Antiterroism and Effective Death Penalty Act of 1996, and violation of the fourteenth amendment right to due process.

The lower courts abused its discretion by not appling the following tolling provisions;

GROUND ONE (1) The automatic statutory tolling of 2244(d)(2), which applies to pending state applications. Which in the present case consists of a motion to reconsider habeas petition, and a separate notice of appeal. See Appendix D.

GROUND TWO (2) Equitable tolling under actual innocence, which applies here because petitioner presented new reliable evidence in the form of two psychological/psychiatric evaluations that was ordered by the court, but was never before the trial jury.

GROUND THREE (3) Statutory tolling under the rarely used 2244(d)(1)(B)'s tolling provision, which a petitioner is entitled to if he was prevented from filing timely petition by state action. This statute is relevant because the state never ruled on pending habeas application and never appointed counsel for habeas appeal - which one or both could be considered a state created impediment under 2244(d)(1)(B) which would allow tolling rights to the petitioner.

A district court abuses it discretion when its decision is (1) arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. (citation omitted).

EXTRAORDINARY INTERVENING CIRCUMSTANCE

In support of grounds (1 and 3); Six years after the U.S. District Court dismissed Alford's petition on procedural grounds (time barred) the Kansas Court of Appeals ruled that Alford was denied his statutory right to habeas counsel in his original petition. See Appendix G. Alford's right to counsel was contingent on him filing a timely notice of appeal - which he did. Since this was a properly filed state application, it was sufficient to evoke Alford's automatic tolling

rights under 2244(d)(2). The courts remedy in Alford v. State, 395 P.3d 841 (2017), was to have Alford reinstate his habeas appeal or seek relief under a separate state habeas petition. These remedies constitute a continuation (reopening) of Alford's state habeas petition.

2244(d)(1)(B), comes into play by the fact that the state court failed to appoint counsel - which prevented filing a timely federal petition. There also is a separate and distinct impediment under this provision, where the state court failed to enter an appealable order on state habeas petition. These are all record based facts that are behind the U.S. District Court's ambiguous ruling - that Alford's petition may not be time barred. Appendix D.

The ruling does not afford certainty, because these grounds have never been addressed by any federal court and because its liable to more than one interpretation. A transfer to the U.S. District Court would allow the proper forum to address these tolling grounds and eliminate due process and other constitutional concerns.

CERTIFICATION

I, Brent L. Alford, certify that pursuant to rule 44 of the Supreme Court that the grounds stated herein are limited to substantial intervening circumstances. That the rarely used tolling rights of 2244(d)(1)(B) has been overlooked and is a substantial ground not previously presented. That these grounds have a controlling effect under the Antiterroism and Effective Death Penalty Act of 19996, as to limitation time to file federal 2254.

Respectfully Submitted,

Brent L. Alford

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IN THE SUPREME COURT OF THE UNITED STATES

In re: Brent L. Alford,

Case No. 20-5731

MOTION FOR REHEARING IN BANC OR IN THE ALTERNATIVE TRANSFER TO THE U.S. DISTRICT COURT

Comes Now, the petitioner, Brent L. Alford, and asks the Court to consider a rehearing and or transfer to the U.S. District Court having jurisdiction to determine facts he believes the Court overlooked or misapprehended;

The Court over looked the fact that the U.S. District Court's last ruling stated "Alfords petition possible may not be time-barred." *See* **Alford v. Cline**, 2020 U.S. Dist. Lexis 90209. This standing alone and legally unexplained should not be sufficient to terminate or not consider statutory tolling under 2244(d)(2). The Ballentine's Law Dictionary definition of Possible is; liable to happen or come to pass; capable of existing or of being conceived or thought of; capable of being done, not contrary to the nature of things.

An inference or presumption of law from the U.S. District Court's ruling, affirmative or negative, in the absence of proof or until absolute proof can be obtained or produced of the two possible constructions is premature. This is not a case where tolling rights were extinguished or denied by law, but suspended by still having a probable chance of happening, because the tolling analysis was never completed, which is susceptible of being revived. Suspension of the

right to tolling fall within the protections of the Suspension clause. Transfer to the U.S. District Court for proof of this particular fact is in line with due process and Alford's right to one Federal

Habeas review. The transfer order will serve the function of removing the possibility that Alford's petition was time barred, and decide or settle the controversy with finality. Without any doubt.

Argument

Statutory Tolling Right Pursuant to 2244(d)(2)

There is no question that Alford filed his state applications within the (1) year limitation period allowed by AEDPA - there is also no question that his state application was never ruled on - at the time the U.S. District Court dismissed his habeas petition as time barred (both are record based findings of fact). *See* Appendix C, D, E, in original. For those reasons, Alford contends his claims were erroneously dismissed as untimely, without benefit of an analysis of 2244(d)(2)'s automatic tolling rights for state prisoners, (*See*) **Artuz v. Bennet**, 531 U.S. 4 (2001).

"In this case, Mr. Alford filed a motion to reconsider the state district courts denial of his state habeas action at the same time he filed a Notice of Appeal on April 1st, 1998, within the AEDPA's limitation period." The state court has never ruled on his motion to reconsider. *See* **Alford v. Cline**, 696 F. Appx at 872. Therefore, it is [possible] that Mr. Alford's petition is not time barred. (quoting) **Alford v. Cline**, 2020 U.S. Dist. Lexis 90209, *4, opinion by Sam A. Crow.

See Appendix C, D.

The U.S. District Court being fully aware of the possibility that Alford's petition may not be time barred - took no further steps to definitively determine whether or not the petition was legally barred under 2244(d)(1). Alford has been deprived of a Federal Court's ruling on the automatic tolling effect of 2244(d)(2) or 2244(d)(1)(B) as to pending state applications. The only fact left to ascertain is whether Alford's applications were properly filed. This can only be decided by a U.S. District Court having the jurisdiction to do so. For tolling purpose under 2244 (d)(2) a Court determines only whether the petitioner properly filed for such State post conviction relief. **Truelove v. Smith**, 9 Fed. Appx. 798 (10th Cir. 2001). The period that an application for post conviction review is pending is not affected or "untolled" merely because a petitioner files additional or overlapping petitions before it is complete. Rather, each time a petitioner files a new habeas petition at the same or a lower level, the subsequent petition has no effect on the already pending application. *See* **Delhomme v. Ramirez**, 340 F.3d 817, 820 (2003). The first round of review remains pending, and tolling does not end until that round is complete. Id.

Both of Alford's motions (motion to reconsider and notice of appeal) were timely filed and both are well known under 2244(d)(2) as tolling motions. *See* **Emerson v. Johnson**, 243 F. 3d 931, 935 (5th Cir. 2001)(limitation tolled when motion for reconsideration in state court properly filed), also **Williams v. Gibson**, 237 F. 3d 1267, 1269 (10th Cir. 2001)(limitation tolled, because

Notice of Appeal properly filed). Failure of the U.S. District Court to apply the tolling and grace period allowed by AEDPA is a depravation of Constitutional right.

In his petition Alford challenges the dismissal of his federal habeas petition, claiming that he is entitled to both statutory and equitable tolling of the AEDPA's one year statute of limitation for filing a federal habeas petition, *See* 28 U.S.C., 2244 (d)(1). The fact that Alford filed his application within AEDPA's one year statute of limitations and applications were never ruled on, should be sufficient to raise grave concern as to his right to one federal habeas petition and right to statutory tolling on that one petition. This court expressly recognizes that "the consistent practice in civil and criminal cases alike has been to treat timely motions for reconsideration" as redering the original judgment nonfinal for purpose of appeal for as long as the motion is pending. U.S. v. Healy, 376 U.S. 75 (1964); **U.S. v. Dieter**, 429 U.S. 6 (1976); **Hundley v. Pfuctze**, 18 Kan. App. 2d 755 (1993)(Therefore, by filing a motion to reconsider, a party tolls the running of the appeal period until that motion is decided); *See* K.S.A. 60-2103(a). In **Carey v. Saffold**, 536 U.S. 214 ("until the application has achieved final resolution through the state's post conviction procedures, by definition it remains pending). Federal Courts have an independent obligation to determine whether a state prisoners applications are properly filed, not whether there's a possibility that they were. *See* **Morales v. Saboarin**, 2004 U.S. Dist. Lexis 3415 (N.Y.S.D.) headnote #3.

Alford has never waived his right to the automatic statutory tolling provided by 2244 (d)(2) for state prisoners. *See* **Ellis v. Harrison**, 270 Fed. Appx 721 (9th Cir. 2008)(dismissing 2254

petition erroneous - abused discretion in deeming issue waived and not reaching merits of tolling argument); **Rodrigues v. Bennett**, 303 F.3d 435 (2nd Cir. 2002)(Where district court did not determine whether petitioner was entitled to statutory or equitable tolling). For the tolling provision to apply 2244(d)(2), requires only that the state application be properly filed. *See* **Artuz v. Bennett**, 531 U.S. 4 (2001). Without further detemination as to disposition of state applications (which would require the resolution of unsettled legal question) further development is necessary. Alford is left presently with the lasting impression that his petition quite possibly-if not likely, was not, in fact untimely filed. The court has recognized a Due Process Claim under these circumstances. *See* **Logan v. Zimmerman**, 455 U.S. 422 (1992).

Inherent in 2244(d)(2) is the obligation of the federal court having jurisdiction to determine if any pending applications in state court tolls limitation period under federal law. *See* **Evans v. Chavis**, 546 U.S. 189 (2006)(To determine whether an application for post conviction relief was pending in state court the U.S. Supreme Court has ruled that Federal Courts [must] determine whether the petition was properly filed. Id 189. The only question that remains is whether the motions are properly filed according to Federal Law. If the court concludes that the applications are properly filed pursuant to Federal Law, Alford is statutorily entitled to tolling under 2244(d)(2) *See* **Weibley v. Kaiser**, 50 Fed. Appx. 399 (10th Cir. 2002) headnote #10.

Equitable Tolling

The court may also find it relevant to the AEDPA's analysis that Alford is bringing an "actual innocence" claim. *See* e.g., **Triestman v. United States**, 124 F.3d 361, 377-380 (CA2 1997),

(discussing serious constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain innocence claims.) Pet. for writ of habeas corpus 20-22 (arguing that congress intended actual innocence claims to have special status under AEDPA).

Even though a petitioner is not entitled to the automatic tolling mandated by 2244(d)(2) under appropriate circumstances a petitioner may be entitled to equitable tolling. Alford had presented both procedural and substantive actual innocence claims. The constitutional claims are based not on his innocence, but rather on his contention that the effectiveness of his counsel denied him the full panoply of protections afforded to criminal defendants by the constitution. Alford may obtain review of his constitutional claims only if he falls within the narrow class of cases, implicating a fundamental miscarriage of justice. His claim of innocence of the charged crime is offered only to bring him within this narrow class of cases. *See* **Schlup v. Delo**, 513 U.S. 298, 314-15 (1995).

The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, and evidence tenably claimed to have been wrongly excluded or to have become available only after trial. *See* **Schlup** 513 U.S. at 327-28. Alford presented "new reliable evidence" in the form of two separate court ordered psychiatric evaluations, that was never before the trial jury. Alford was precluded from adducing psychiatric evidence of his inablility to form the specific intent neccessary to commit first degree murder. cf. **Hughes v. Mathews**, 576 F.2d 1250 (7th Cir. 1998)(The court also held that the exclusion of psychiatric evidence violated

petitioners U.S. Constitutional Amendment VI. and XIV rights, as it was relevant and competent,

and its exclusion was unjustifiable.

In **House v. Bell**, 547 U.S. 518 (2006), the court made clear that the types of new reliable evidence it had previously listed...were not intended to exhaust the possibilities. Id at 537. Because a **Schlup** claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. 547 U.S. at 538-39. A showing of fundamental miscarriage of justice is very difficult to make, because it requires a petitioner to demonstrate that he is actually innocent of the crime for which he was convicted. 2008 U.S. Dist. Lexis 104245, 2008 WL 5397500 at 8. The court noted in **Slack v. McDaniel**, 529 U.S. 473 (2000), that procedurally dismissed cases have never had a merits determination of the petition in which miscarriage of justice could be demonstrated. **Id** at 488.

When an inmate's 2254 petition is untimely, a court must consider whether the inmate is entitled to an equitable tolling of the AEDPA limitation period. **Sigala v. Bravo**, 656 F. 3d 1125 (10th Cir. 2011). Alford claims are entitled to consideration of the merits of the motion if the claim meets the standard outlined in **Murray v. Carrier**, 477 U.S. 478 (1986). The ends of justice demand consideration of merits of claim on successive petition where there is colorable showing of factual innocence; second Habeas peititon should be remanded for consideration of whether the ends of justice require consideration on the merits. Procedural default is excused

under actual innocence exception where petitioners claim, if true, rendered conviction void and

could not be legal cause of imprisonment. **Gonzalez v. Abbott**, 967 F. 2d 1499, 1504 (11th Cir. 1992). The Tenth Circuit Court of Appeals denied Alford permission to file a second habeas petition and never considered his actual innocence claim. App. C. If courts apply AEDPA in a way that it bars consideration of an actual innocence claim, then AEDPA is unconstitutional. The ends of justice would seem to demand a forum for the petitioners claim. **Kuhlman v. Wilson**, 477 U.S. 436 (1986)(plurality opinion of Powell, J.)(noting the clear intent of congress that successive habeas review should be available when the ends of justice so require.)

Conclusion

Where a doubt exists as to a petitioner's right to tolling the failure to conduct the proper inquiry is a deprivation of his constitutional right to due process. (citation omitted). The court held that the record based facts were sufficient to raise a possibility that Alford's petition was not time barred. **Alford v. Cline**, 696 Fed. Appx 871, 872 (19th Cir. 2017); 2020 U.S. Cist. Lexis 90209, #4. Due process inheres in statutory rights. A denial of due process is a violation of the Fifth Amendment. Alford has a right to a single Federal Habeas review of his state imprisonment and denial of that right may violate the Fifth Amendment's assurance of due process. There are no other avenues of judicial review available for Alford's claim that he was denied tolling rights under 2244(d)(2) and denied consideration of equitable tolling, claiming he was legally innocent as a result of previously unavailable new evidence.

Congress gives the court an alternative to denial of petitions involving factual issues by providing that the Supreme Court or any of its justices or any Circuit Judge may decline to entertain an application for a Writ of Habeas Corpus and may transfer the application for a hearing and determination to the District Court having Jurisdiction. *See* **Dallin H. Oaks**, The Original Writ of Habeas Corpus, 1962 Sup. Ct. Rev. 153.

If proof of the facts neccessary to determine statutory and or equitable tolling - are inaccessible its in this court's power and usually fairer to transfer to the district court having jurisdiction. *See* cf. **In re Davis,** 557 U.S. 952, 130 S.Ct. at 2 (2009)(emphasis), also *See* 28 U.S.C. 2241 (b). The lower courts erroneoulsly dismissed Alford's petition as time barred. Then refused to allow forum to disprove that dismissal.

The Original Writ is the last and only procedure device to prevent injustice and vindicate Alford's right to due process. Alford has a due process right to a proper inquiry into his tolling rights, especially here where the district court acknowledged that petition may not have been time barred. These actions fall under the protection of the Suspension clause. A transfer to the U.S. District Court of Kansas would remedy any due process violations and eliminate any chance for constitutional implications.

Alford prays this Honorable Court transfer his petition to the district court for a hearing and determination as to statutory and equitable tolling. The case is comparable to the super precedent this court set in **In re Davis,** 557 U.S. 952 (2009) petitioner cites as leading authority.

Respectfully Submitted

Brent L. Alford

Brent L. Alford, pro se