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Nb. ZO-7821

Supreme Court, U.S.
FILED
JUN 09 2021
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE, TOTH,
PETITIONER,
VS.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENT.

ON PETITION FOR AN EXTRAORDINARY
WRIT OF HABEAS CORPUS IN THE
SUPREME COURT OF THE UNITED STATES

MOTION FOR REHEARING

JOHN A. TOTH
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Sago Palm Re-Entry Ctr.
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Pahokee, FL 33476

PROVIDED TO SAGO PALM
RE-ENTRY CENTER
ON 6-9-2021 FOR MAILING
BY [Signature] CCS

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SUPREME COURT, U.S.

MOTION FOR REHEARING

COMES NOW, the Petitioner, UDHN A. TOTU, pro se, and respectfully requests this Court for rehearing in the above-styled cause of action. The Petitioner files this motion pursuant to Supreme Court Rules 44.2, and in compliance under Rules 33.2 and 34. Mr. Totu files this motion for rehearing in good faith and not to unduly delay this Court, and states the following in support thereof:

PROCEDURAL HISTORY

The Petitioner filed the original 28 U.S.C. § 2254 Petition January 16, 2018, in the U.S. District Court, Southern District of Florida. The U.S. District Court denied the § 2254 on February 14, 2018, as time-barred upon reviewing incomplete and unofficial state court records; without ordering the state to show cause as to verify the time-bar or refuting the Petitioner's claims/merits; and, without giving opportunity to the Petitioner to demonstrate how equitable tolling and due diligence preserved the Petitioner's federal time to file a § 2254 under AEDPA. The merits of the Petitioner's claims were ~~never~~ adjudicated.

The Petitioner approached this Honorable Court in February 2021 with a Petition For An Extraordinary Writ of Habeas Corpus. The 11th Circuit courts have exercised *res judicata* and ignored Rules Governing § 2254 cases Rule 9, 11th Circuit Local Rule 22.1, and 28 U.S.C. § 2244(b)(3)(4) denying the Petitioner Due Process to have his claims properly and lawfully adjudicated. The Petitioner has demonstrated through record proof that he is unlawfully incarcerated in violation of the United States Constitution's, 4th Amendment Fair, that protects United States Citizen's rights to privacy and freedom from unwarranted search and seizure by government officials.

The Petitioner humbly implores this Honorable Court's indulgence in rehearing and remanding of this case to the U.S. District Court for proper adjudication of its merits. In its consideration, the Petitioner requests that this Court reflect on the former Justice Stewart's opinion in Bumper v. North Carolina, 391 U.S. 543, 550, 552, footnote #2, 20 L. Ed 2d 797, 88 S. Ct. 1788 (1968):

"It is suggested in dissent that [e]ven assuming that there was no consent to search and that the [confession] should not have been admitted into evidence the conviction should stand. This

suggestion seems to rest on the 'horrible' facts of the case, and the assumption that the petitioner was guilty. But it is not the function of this Court to determine innocence or guilt, much less apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States... There can be no doubt that the crimes were grave and shocking. There can be doubt that the petitioner was their perpetrator... reversal of this conviction is not a 'penalty' imposed on the state for infringement of federal constitutional rights. Reversal by this Court results as always only from a decision that petitioner was not constitutionally proved guilty and hence there is no legally valid basis for imposition of a penalty upon him... The [plea agreement] is a lawful verdict... only if it is based upon evidence constitutionally admissible."

I. The "Ends Of Justice" Doctrine

The Petitioner submitted the Petition For An Extraordinary Writ of Habeas Corpus to demonstrate that the "Ends Of Justice" have not been served in this case. The 11th Circuit federal courts have failed to adhere to Rules Governing §2254 case Rule 9 and §2244(b)(3)(4) to further develop the facts and record of the case. Sanders v. U.S., 373 U.S. 1, 16-17, 10 L. Ed 2d 148, 83 S.Ct. 1068 (1963).

Although the 1966 revision to the habeas statute (28 U.S.C. §2244) eliminated any reference to an "ends of justice" inquiry, plurality of this Honorable Court in Kholmann v. Wilson, 477 U.S. 436, 454, 91 L. Ed 2d 364, 106 S.Ct. 2616 (1986) held that this inquiry remained appropriate, and required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a "colorable showing of factual innocence." The miscarriage of justice exception to cause serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"; guaranteeing that the ends of justice will be served in full. Stone v. Powell, 428 U.S. 465, 492-493, 11, 31, 49 L. Ed 2d 1067 (1976); McCleskey v. Zant, 499 U.S. 467, 485, 495, 113 L. Ed 2d 517, 545-546 (1991).

Additionally, a federal court must grant an evidentiary hearing to a habeas applicant: (1) if the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding

procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed at the state court hearing; or, (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend v. Sain, 372 U.S. 293, 313, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963).

II. Res Judicata - Abuse Of The Writ Doctrine - Rule 9 (Rules Governing § 2254 cases)

The Petitioner's § 2254 petition and successive habeas petitions have not been properly adjudicated by the federal courts under Rules governing § 2254 case Rule 9. The 11th Circuit did not determine by the review of the incomplete and unofficial files and records of the case alone to be conclusively without merit. The elements of res judicata or a determination made in the U.S. District Court by the State government (28 U.S.C. § 2244(b)(4)) that the Petitioner has abused the writ of Habeas Corpus with adjudicated claims, has never been determined. The government has not had to give official answer to refute or dispute contrary to the Petitioner's claims and records. The 11th Circuit Courts, therefore, have improperly dismissed the Petitioner's § 2254 Petition without specifying abuse of the writ on the Petitioner's behalf. Slack v. McDaniel, 529 U.S. 473, 486-487, 146 L. Ed. 2d 542, 556-557 (2000); Rose v. Lundy, 455 U.S. 509, 510, 520, 71 L. Ed. 2d 379 (1982).

III. Cause And Prejudice

The Petitioner's current petition before this Honorable Court indicates the probability of reasonable doubt of his guilt. Kuhlmann, 477 U.S. at 455; Murray v. Carrier, 477 U.S. 478, 496, 91 L. Ed. 2d 397 (1986). The petition is also sufficient to raise factual questions concerning Petitioner's innocence that cannot be resolved simply by examining the affidavits and the petition. Herrera v. Collins, 506 U.S. 390, 445, 122 L. Ed. 2d 203 (1993). (1) Cause for the failure to develop facts; and, (2) Prejudice resulting from such failure, are in support of Townsend v. Sain, 372 U.S. at 313, that material facts were not developed at the state court level requiring evidentiary hearing in the federal courts. Keeney v. Tomas - Reyes, 504 U.S. 1, 5-8, 118 L. Ed. 2d 318 (1992).

Habeas corpus is, and has for centuries been a "bulwark against

convictions that violate fundamental fairness." Because it is not always easy to discern the difference between "constitutional claims that call into question the reliability of adjudication of legal guilt" to which the cause and prejudice requirement applies, and claims that a constitutional violation "probably resulted in the conviction of one who is actually innocent." However, the caution taken by a court reviewing a claim of actual innocence is plainly unwarranted in a case in which constitutional error has concededly resulted in the imposition of an unlawful sentence. The cause and prejudice requirement "must yield to the imperative of correcting a fundamentally unjust incarceration." Dretke v. Maley, 541 U.S. 386, 397-399, footnote #2, 158 L. Ed 2d 659 (2004); Engle v. Isaac, 456 U.S. 107, 71 L. Ed 2d 783 (1982).

IV. Miscarriage Of Justice

The miscarriage of justice exception applies where a petitioner is "actually innocent" of the crime of which he was convicted or the penalty which was imposed. Sawyer v. Whitley, 505 U.S. 333, 334, 339, 120 L. Ed 2d 269, 276 (1992).

In the Petitioner's current Petition before this Honorable Court, § 2244(d)(1) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence), as it applies to the Petitioner's case. McQuiggin v. Perkins, 569 U.S. 383, 398-399, 185 L. Ed 2d 1012, 1037 (2013); Schlup v. Delo, 513 U.S. 298, 329, 130 L. Ed 2d 808 (1995).

Since the Petitioner's original § 2254 was not adjudicated on the merits and the Petitioner has presented new evidence of his conviction being unlawful and without probable cause, the current petition before this Honorable Court should be treated as a first petition. Mouliz v. U.S., 236 F.3d 122 (2nd Cir. 2001); McCleskey, 499 U.S. at 479-488. As a first petition under § 2254(e)(2)(A)(i)(B), it would permit evidentiary hearings in federal court if "the facts underlying the claim would be significant to establish by clear and convincing evidence that but for the constitutional error no reasonable factfinder would have found the applicant guilty of the underlying offense."

Despite the removal of the reference to the ends of justice

from 28 U.S.C. § 2244(b) in 1966, the miscarriage of justice exception would allow successive petitions to be heard. Sawyer, 505 U.S. at 339. The interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment. Murray v. Carrier, 477 U.S. at 452. Schlup, 513 U.S. at 320.

Relief Sought

The Petitioner humbly requests this Honorable Court to remand In Re Toth, giving notice to both the U.S. District Court and the State of Florida to give answer to the Petitioner's claims; to prevent a fundamental miscarriage of justice that would result without first establishing res judicata or abuse of the writ by denying review of the Petitioner's claims; that are the result of an unjust incarceration contrary to clearly established law as established by the U.S. Constitution, U.S. Supreme Court and Statutes.

No. 20-7821
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IN RE, TOTTH
PETITIONER,

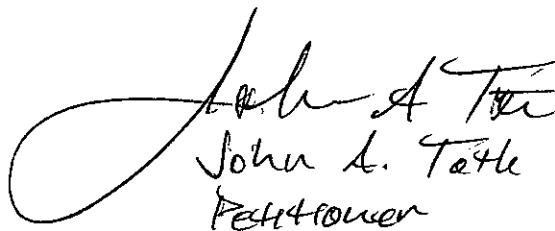
v.

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FLORIDA DEPT. OF CORRECTIONS,
RESPONDENT.

MOTION FOR REHEARING

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 44.2, I, John A. Totth, Petitioner, certify that the grounds for rehearing within this document are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.


John A. Totth
Petitioner

No. 20-7821
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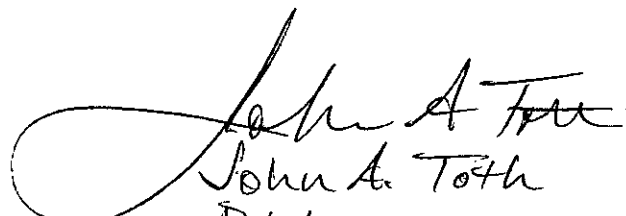
IN RE. TOTTH,
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MARK S. INCH, SECRETARY,
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MOTION FOR REHEARING

CERTIFICATE OF SERVICE

In compliance with Supreme Court Rule 29, I, John A. Toth, Petitioner, pursuant to 28 U.S.C. § 1746, hereby certify under penalty of perjury, that a true and correct copy of the foregoing Motion For Rehearing was placed into an institution official's hands for delivery via prepaid U.S. Mail service to: Office of the Clerk, U.S. Supreme Court, Washington, D.C. 20543, on this 9th day of June 2021.


John A. Toth
Petitioner

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