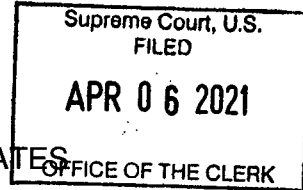


20-7828
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



KEVIN N. MITCHELL — PETITIONER
(Your Name)

vs.

DAVID SHINN ET AL., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KEVIN N. MITCHELL
(Your Name)

FLORENCE-SOUTH P.O. BOX 8400
(Address)

FLORENCE, AZ, 85132
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. DID PETITIONER'S AMENDED MOTION FILED UNDER STATE LAW TOLL THE ONE YEAR TIME FRAME UNDER 28 U.S.C. § 2244 (d)(2) ?
2. DID THE DEATH OF PETITIONER'S RETAINED ATTORNEY, MR. BROWN, DURING POST-CONVICTION RELIEF RULE 32 PROCEEDINGS, ESTABLISH EQUITABLE TOLLING FOR NOT SECURING FEDERAL TOLLING TIMES UNDER 28 U.S.C. § 2254?

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the ARIZONA COURT OF APPEALS court appears at Appendix E to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MAY 7, 2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was JUNE 13, 2018.
A copy of that decision appears at Appendix F.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION'S FIFTH AMENDMENT

UNITED STATES CONSTITUTION'S FOURTEENTH AMENDMENT

28 U.S.C. § 2254

28 U.S.C. § 2244 (d)(2)

28 U.S.C. § 2244 (d)(1)(a)

STATEMENT OF THE CASE

1. IN 2011, A JURY SITTING IN THE SUPERIOR COURT OF ARIZONA FOUND PETITIONER GUILTY OF (i) THREE COUNTS OF SEXUAL ABUSE, A CLASS THREE FELONY AND (ii) NINE COUNTS OF SEXUAL CONDUCT WITH A MINOR, A CLASS 2 FELONY. THE TRIAL COURT SENTENCED PETITIONER TO A TOTAL OF NINETY-FIVE YEARS IN PRISON, FOLLOWED BY LIFETIME PROBATION.

ON JULY 10, 2012, THE ARIZONA COURT OF APPEALS AFFIRMED PETITIONER'S CONVICTIONS AND SENTENCES. ON JANUARY 3, 2013, THE ARIZONA SUPREME COURT DENIED PETITIONER'S FURTHER REQUEST FOR REVIEW. PETITIONER HAD NINETY DAYS FROM JANUARY 3, 2013 (UNTIL APRIL 3, 2013) TO FILE A PETITION FOR WRIT OF CERTIORARI IN THE U.S. SUPREME COURT, BUT PETITIONER DID NOT DO SO. SUP. CT. R. 13. BOWEN V. ROE, 188 F.3d 1157, 1158-59 (9TH CIR. 1999) ("[T]HE PERIOD OF 'DIRECT REVIEW' IN 28 U.S.C. § 2244(d)(1)(A) INCLUDES THE PERIOD WITHIN A PETITIONER CAN FILE A PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT, WHETHER OR NOT THE PETITIONER ACTUALLY FILES SUCH A PETITION"). THE ONE-YEAR STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN, HOWEVER, AS PETITIONER FILED A PCR NOTICE ON SEPTEMBER 13, 2012.

ON FEBRUARY 7, 2014, PETITIONER FILED A PRO-SE PCR PETITION. ON JUNE 6, 2016, THE ARIZONA COURT OF APPEALS GRANTED PETITIONER'S REQUEST FOR REVIEW, BUT DENIED RELIEF. ON JULY 15, 2016, PETITIONER FILED A PRO-SE PETITION FOR REVIEW IN THE ARIZONA SUPREME COURT. THE PETITION WAS DENIED ON DECEMBER 22, 2016. THE COURT OF APPEALS ISSUED ITS MANDATE ON FEBRUARY 28, 2017,

AMENDED MOTION

BEFORE THE ARIZONA SUPREME COURT RULING, AND THE ISSUING OF THE MANDATE ON FEBRUARY 28, 2017,

ON JUNE 23, 2016, PETITIONER FILED AN AMENDED MOTION TO THE ARIZONA SUPERIOR COURT UNDER AZ. R. OF CRIM. P. 32.6(d) (2016). ON JULY 20, 2016 THE SUPERIOR COURT DENIED THE MOTION TO AMEND.

A, THE BASIS FOR PETITIONER'S ATTEMPT TO AMEND THE PCR PETITION WAS BASED ON DISCOVERY OF INFORMATION THAT WAS NOT AVAILABLE TO PETITIONER AT THE TIME OF TRIAL OR AT TIME OF FILING OF THE PCR PETITION, AS HE EXPLAINED IN HIS ATTEMPT TO AMEND HIS PCR PETITION AND IN THE ARIZONA COURT OF APPEALS PETITION FOR REVIEW FILED ON AUGUST 5, 2016. THE COA DENIED THE PETITION FOR REVIEW ON SEPTEMBER 12, 2017 (MORE THAN A YEAR LATER).

B. BASED UPON THE NEWLY DISCOVERED INFORMATION BY AN AUDIO FORENSIC EXAMINER, WHO ANALYZED THE DUPLICATE PLAYED IN TRIAL, PETITIONER HAD REASONABLE GROUNDS TO BELIEVE THAT THE RECORDING OF THE CRITICAL CONFRONTATION CALL HAD BEEN TAMPERED WITH - AND THAT HIS TRIAL ATTORNEY LITTERLY FAILED TO FOLLOW UP ON HAVING THE RECORDING EXAMINED AND ANALYZED AS AGREED TO BEFORE TRIAL: AND THAT HIS PCR ATTORNEY ALSO FAILED TO FOLLOW UP ON THAT SAME INFORMATION LEAVING PETITIONER TO RETAIN THE AUDIO FORENSIC EXAMINER WHILE PROCEEDING IN PRO-PER.

C. BASED UPON THE NEWLY DISCOVERED INFORMATION, PETITIONER HAD REASONABLE GROUNDS TO ASSERT A BRADY VIOLATION FOR FAILURE OF THE STATE TO DISCLOSE AN UN-TAMPERED ORIGINAL RECORDING OF THE CONFRONTATION CALL.

2. EQUITABLE TOLLING

BEFORE THE ONE-YEAR TOLLING TIME EXPIRED ON THE FEDERAL HABEAS CORPUS § 2254, PETITIONER'S FAMILY RETAINED, MR. GUY BROWN (SBN 021002), MR. BROWN WAS RETAINED ON OCTOBER 16, 2017, AND [FOUR] MONTHS BEFORE THE FEB. 28, 2018¹ EXPIRATION DATE OF THE FEDERAL HABEAS CORPUS § 2254 PETITIONS DEADLINE.

IN MARCH OF 2018, MR. BROWN DIED FROM HEART COMPLICATIONS UNEXPECTEDLY AND STILL ON THE RECORD AS PETITIONER'S ATTORNEY.

IN JUNE OF 2018, PETITIONER RECEIVED STAND IN ATTORNEY MR. JACOB FAUSSETTE IN PLACE OF MR. GUY BROWN, AND [FOUR] MONTHS PAST THE AEDPA ONE YEAR TIME FRAME.

1. THE DISTRICT COURT ADOPTED THE MAGISTRATE JUDGES REPORT AND RECOMMENDATION ON PETITIONER'S TOLLING TIME FOR FEDERAL HABEAS CORPUS § 2254 AS TIMELY ON OR BEFORE FEBRUARY 28, 2018.

PETITIONER CORRECTED THE TIME LINE IN A RULE 60(b) MOTION FILED IN THE DISTRICT COURT ON SEPTEMBER 23, 2020, AND THE U.S. DISTRICT COURT DENIED THE MOTION.

REASONS FOR GRANTING THE PETITION

1. THIS CASE IS OF GREAT IMPORTANCE TO THE STATE OF ARIZONA FOR THE MANY CASES THAT FOLLOW, THAT HAVE BEEN UNDER THE SCRUTINY OF "AMENDED MOTIONS" FILED UNDER ARIZONA'S CRIMINAL PROCEDURES, RULE 32.6 (d) 2017, AND VIOLATIONS OF DEFENDANT'S DUE PROCESS UNDER U.S. CONST. 5TH AND 14TH AMEND.

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA) GIVES A STATE PRISONER WHOSE CONVICTION HAS BECOME FINAL ONE YEAR TO SEEK FEDERAL HABEAS CORPUS RELIEF 28 - U.S.C. § 2254.

THE DISTRICT COURT OF ARIZONA, AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED BY FAILING TO TOLL THE STATUE OF LIMITATIONS OF THE AEDPA FROM THE DATE PETITIONER FILED A MOTION IN STATE COURT PURSUANT TO THE ARIZONA RULES OF CRIMINAL PROCEDURE, RULE 32.6 (d) SEE - (EXHIBIT - C). THUS, DENYING PETITIONERS DUE PROCESS RIGHTS GUARANTEED BY THE 5TH AND 14TH AMEND. U.S. CONST.

A. PETITIONER'S MOTION TO AMEND WAS CAPTIONED AS SUCH, AND SUPPORTED BY REQUEST TO AMEND WITHIN THE JURISDICTIONAL STATEMENT, AND IN THE BODY OF THE MOTION, AND LASTLY THE CONCLUSION. BELOW THE CAPTION REQUEST TO AMEND, PETITIONER ASK THE ARIZONA SUPERIOR COURT FOR A MOTION TO RECONSIDER, IN THE EXPLANATION FOR THE REQUEST, PETITIONER ASK THE COURT TO RECONSIDER FOR AN EVIDENTIARY HEARING. SEE (EXHIBIT - C p1). THE MOTION TO AMEND AND THE REQUEST FOR RECONSIDERATION WERE DENIED SIMULTANEOUSLY WITHOUT RESTRICTIONS ON TIME RESTRAINTS ON THE MOTION TO AMEND, OR INSTRUCTIONS TO REFILE THE MOTION DUE TO A COMBINED REQUEST. SEE (EXHIBIT - D).....

B. UPON REVIEW BY THE ARIZONA COURT OF APPEALS ON PETITIONERS PETITION FOR REVIEW, PETITIONER CHALLENGED THE ARIZONA SUPERIOR COURTS DENIAL OF HIS MOTION TO AMEND, AND THE COURT OF APPEALS RULING PLACED A TIME RESTRAINT ON THE ASKING TO RECONSIDER. THIS COURT MISCONCEIVED PETITIONERS "AMENDMENT MOTION" AS A "MOTION FOR RECONSIDERATION".

JUDGE BEENES ORDER STATED, "... HIS MOTION WAS ALSO UNTIMELY UNDER ARIZONA RULE OF CRIMINAL PROCEDURE 32.9(a) (PERMITTING 15 DAYS TO MOVE FOR A REHEARING)." SEE - (EXHIBIT - E). DUE TO THIS COURT'S CONFLICTING RULING PETITIONER RETAINED ATTORNEY MR. GUY BROWN (SBN 021008) SEE (CLAIM 2.) (RETENTION DATE OCTOBER 16, 2017).

C. AS FOR TOLLING, THE ONE YEAR LIMITATIONS PERIOD FOR FILING A § 2254 PETITION IN FEDERAL COURT, IS TOLLED DURING THE TIME IN WHICH 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). AEDPA DOES NOT DEFINE "COLLATERAL REVIEW," BUT THIS COURT HAS DEFINED "COLLATERAL REVIEW" AS "JUDICIAL REVIEW THAT OCCURS IN A PROCEEDING OUTSIDE OF THE DIRECT REVIEW PROCESS" WALL V. KHOLI 562 U.S. 545, 560, 131 S. Ct. 1278, 1289 (2011).

D. THE ISSUE IN THIS CASE IS WHETHER PETITIONER'S AMENDED MOTION FILED UNDER RULE 32.6(d) ON JULY 23, 2016, THAT WAS DISMISSED ON THE REQUEST TO AMEND, AND TIME BARRED ON THE REQUEST TO RECONSIDER FOR REASONS WITHIN THE AMENDED MOTION, TOLLED AEDPA'S STATUTE OF LIMITATIONS. IF IT DID, PETITIONER'S TOLLING TIME HAD NOT BEGIN TO RUN, AS HIS MOTION WAS FILED PENDING REVIEW OF HIS INITIAL PCR IN THE ARIZONA SUPREME COURT. THEREBY, PETITIONER HAD ONE YEAR AFTER THE AZ. SUPERIOR COURT RULED ON HIS MOTION TO FILE HIS § 2254 PETITION, INCLUDING ANY APPEALS FILED IN STATE COURT FROM THE DENIAL OF HIS MOTION TO AMEND. 28 U.S.C. § 2244(d)(2).

E. AMENDMENT OF POST CONVICTION RELIEF PLEADINGS
ARE PERMITTED UPON A SHOWING OF GOOD CAUSE

THE RULES GOVERNING POST CONVICTION RELIEF ACTIONS ALLOWS AMENDMENT OF PLEADINGS, CONDITIONED UPON A SHOWING OF GOOD CAUSE:

AMENDMENT OF PETITION: AFTER THE FILING OF A POST CONVICTION RELIEF PETITION, THE COURT MAY PERMIT AMENDMENTS ONLY FOR GOOD CAUSE. SEE RULE 32.6(d) ARIZ. R. CRIM. P. (2017).

AMENDMENTS TO A POST CONVICTION RELIEF PETITION ARE PERMITTED AT ANY TIME, INCLUDING EVEN AFTER A POST CONVICTION RELIEF PETITION HAS BEEN DENIED.

THE ONLY CONDITION REQUIRED FOR AMENDMENT OF POST CONVICTION RELIEF PLEADINGS IS GOOD CAUSE, AND TIMELINESS IS NOT INCLUDED AS A CONDITION.

IMPORTANTLY, PRIOR TO THE 1992 AMENDMENTS TO POST-CONVICTION RELIEF PROCEDURES, AMENDMENTS WERE PERMITTED ONLY PRIOR TO ENTRY OF JUDGMENT:

BEFORE 1992, RULE 32.6(d) READ, "AMENDMENTS TO PLEADINGS SHALL BE LIBERALLY ALLOWED AT ALL STAGES OF THE PROCEEDING PRIOR TO ENTRY OF JUDGMENT." ARIZ. R. CRIM. P. 32.6(d) (1991) (EMPHASIS-ADDED). THE EMPHASIZED LANGUAGE FROM THIS PRIOR VERSION OF THE RULE, RESTRICTING AMENDMENTS TO THE TIME PERIOD "PRIOR TO ENTRY OF JUDGMENT," WAS DELETED BY THE LEGISLATURE IN 1992.

SCOTT V. SCHRIRO, 567 F.3d 573, 581 (9TH CIR., 2009).

FOLLOWING THE 1992 AMENDMENTS TO POST-CONVICTION RELIEF PROCEDURES, THE ARIZONA SUPREME COURT ALLOWED AMENDMENTS LIBERALLY, CONDITIONED ONLY UPON A SHOWING OF GOOD CAUSE:

ARIZONA COURTS CONTINUE TO CONSTRUE RULE 32.6(d) [ARIZ. R. CRIM. P.] AS LIBERALLY ALLOWING AMENDMENTS, EVEN THOUGH THIS LANGUAGE WAS ALSO DELETED IN THE 1992 REVISIONS. SEE CANION V. COLE, 210 ARIZ. 598, 115 P.3d 1261, 1264 (2005) (HOLDING "RULE 32.6(d), WHICH PERMITS A DEFENDANT TO AMEND HIS PETITION UPON A SHOWING OF GOOD CAUSE, ADOPTS A LIBERAL POLICY TOWARD AMENDMENT OF [POST-CONVICTION RELIEF] PLEADINGS.")

SCOTT V. SCHRIRO, 567 F.3d 573, 581, NOTE 6 (9TH CIR., 2009).

THUS, UNDER THE ARIZONA SUPREME COURT'S CURRENT APPROACH TO AMENDMENT OF PCR PLEADINGS, AMENDMENTS ARE PERMITTED EVEN AFTER A PETITION HAS BEEN DENIED OR DISMISSED:

... AFTER RULE 32.6(d) WAS AMENDED IN 1992, THE ARIZONA COURT OF APPEALS RULED IN 1995 THAT A POST-CONVICTION COURT HAS THE AUTHORITY TO ALLOW THE FILING OF AN AMENDED PETITION UPON A SHOWING OF GOOD CAUSE, EVEN IF THE COURT HAS ALREADY DISMISSED THE ORIGINAL PETITION. SEE RODRIGUEZ, 903 P.2d [639] AT 640-41 (HOLDING THAT GOOD CAUSE WAS SHOWN UNDER RULE 32.6 WHERE A PETITIONER SOUGHT TO FILE A PETITION PRO-SE AFTER THE POST-CONVICTION COURT DISMISSED HIS FIRST PETITION BECAUSE HIS POST-CONVICTION

COUNSEL FAILED TO FILE THE NECESSARY BRIEF EXPLAINING HIS [SIC] CLAIMS IN A TIMELY MANNER). EMBEDDED-

FOOTNOTE 7

EMBEDDED FOOTNOTE 7: ... WE NOTE THAT AFTER SCOTT'S TRIAL, THE ARIZONA SUPREME COURT

FOLLOWED THE REASONING OF RODRIGUEZ AND ISSUED ORDERS ALLOWING DEFENDANTS UPON A SHOWING OF GOOD CAUSE TO FILE AMENDED OR SUPPLEMENTAL PETITIONS AFTER THEIR FIRST PETITIONS HAD BEEN DENIED. SEE ARIZONA V. STOKLEY, NO. CV-97-0203-SA (1999); ARIZONA V. KAYER, NO. CR-94-0694 (1998).

SCOTT V. SCHRIRO, 567 F.3d 573, 581 AND NOTE 7 (9TH CIR., 2009) (BOLD PRINT ADDED).

THEREFORE, IT IS CLEAR THAT THE CONTROLLING ISSUE WITH REGARD TO ANY POTENTIAL REQUEST BY THE DEFENDANT TO AMEND HIS POST CONVICTION PLEADING IS WHETHER GOOD CAUSE EXIST FOR ALLOWING SUCH AMENDMENT, WHICH, OF COURSE IS INTERTWINED WITH THE SUBSTANCE OF ANY AMENDMENT HE MIGHT SEEK TO FILE. HERE, 28 U.S.C. § 2244(d)(2) APPLIES TO THIS CASE.

F. THE COURT OF APPEALS MEMORANDUM DECISION ERRED IN DENYING RELIEF ON THE BASIS OF A LACK OF GOOD CAUSE AND/OR ON THE BASIS OF UNTIMELINESS

THE COURT OF APPEALS RULED THAT :

§3 AFTER THE 2016 DECISION, BUT BEFORE THE MANDATE WAS ISSUED AND FILED, MITCHELL FILED A MOTION TO AMEND / MOTION FOR RECONSIDERATION OF HIS ORIGINAL PETITION FOR POST CONVICTION RELIEF WITH THE SUPERIOR COURT THAT WAS DISMISSED IN HIS ORIGINAL 2012 PETITION. THE SUPERIOR COURT DENIED HIS MOTION. MITCHELL THEN FILED THIS PETITION REQUESTING REVIEW "FROM THE DENIAL OF HIS AMENDED PETITION FOR POST- CONVICTION RELIEF."

§4 THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO AMEND, OR DENYING THE MOTION FOR RECONSIDERATION THAT WAS FILED ALMOST THREE YEARS AFTER THE ORIGINAL PETITION. SEE ARIZ. R. CRIM. P. 32.6(d) ("[N]O AMENDMENTS SHALL BE PERMITTED EXCEPT BY LEAVE OF COURT UPON A SHOWING OF GOOD CAUSE.") HIS MOTION WAS ALSO UNTIMELY UNDER ARIZONA RULE CRIMINAL PROCEDURE 32.9(a) (PERMITTING 15 DAYS TO MOVE FOR A REHEARING).

§5 BASED UPON THE FOREGOING REASONS, WE DENY REVIEW.

SEE EXHIBIT E (9/12/2017 MEMORANDUM DECISION), AT §§ 3, 4, AND 5.

BASED UPON THE ARGUMENT AND CITATIONS PRESENTED EARLIER IN SECTIONS OF THIS PETITION, IT IS CRYSTAL CLEAR THAT UNTIMELINESS IS NOT A LEGITIMATE BASIS FOR DENIAL OF A REQUEST TO AMEND A POST CONVICTION RELIEF PETITION. IT IS INCONTROVERTIBLE THAT THE ISSUE IS ONE OF GOOD CAUSE, NOT ONE OF TIMELINESS.

G. IN A RECENT CASE IN THE ELEVENTH CIRCUIT COURT OF APPEALS, HALL V. SECRETARY, DEPT. OF CORR. - ATTORNEY GENERAL, STATE OF FLORIDA, ___ F.3d ___ (11TH CIR. 2019) (DECISION 9/12/19), THE C.D.A. CITED TO SEVERAL "AMENDED MOTION" CASES FILED IN STATE COURTS TO BE REVIEWED FOR 28 U.S.C. § 2244(d)(2) TOLLING PURPOSES. HURLEY V. MOORE, 233 F.3d 1295 (11TH CIR. 2000) (PER CURIAM); GREEN V. SEC'T, 877 F.3d 1244 (11TH CIR. 2017); AND BOND V. MOORE, 309 F.3d 770, 774 (11TH CIR. 2002).

WHEN THE ABOVE PETITIONER'S AMENDED MOTIONS WERE DISMISSED IN THE LOWER INITIALLY FILED STATE COURTS FOR NON COMPLIANCE OF PROCEDURAL ERRORS, THE LOWER COURT(S) DISMISSED THE MOTION "WITHOUT PREJUDICE" TO REFILE WITHIN 30 DAYS. IN HURLEY (SUPRA) HE CHOSE TO MOVE FORWARD ON APPEAL WITHOUT CORRECTING HIS MOTION IN ACCORDANCE TO THE STATES PROCEDURAL RULES. AFTER HIS CONVICTION BECAME FINAL UNDER AEDPA MORE THAN A YEAR LATER, HURLEY FILED A PROPERLY SWORN RULE 3.850 MOTION, Id AT 1297. BUT BY THEN IT WAS TOO LATE: THE COURT HELD THAT THE ONE YEAR STATUE OF LIMITATIONS UNDER AEDPA WAS NOT TOLLED BECAUSE THE ORIGINAL DEFICIENT MOTION WAS NOT PROPERLY FILED. Id AT 1298.

FIRST, IN PETITIONER'S CASE, NO INSTRUCTIONS TO REFILE A 32.6(d) MOTION WAS ORDERED, SECOND, THE SUPERIOR COURT'S DISMISSAL DID NOT SPECIFY WHETHER THE DENIAL WAS WITH, OR WITHOUT PREJUDICE, OR ANY TIME RESTRAINTS TO THE RULES OF 32.6(d), AS THE RULE REMOVED TIME RESTRAINTS IN 1992. LASTLY, THE ARIZONA COURT OF APPEALS MEMORANDUM DECISION IN REGARDS TO PETITIONER'S MOTION TO AMEND BEING UNTIMELY AS HIS REQUEST TO RECONSIDER HAD TIME RESTRAINTS IS IN ERROR, WHILE CLEARLY PETITIONER'S MOTION TO AMEND IS THE CONTROLLING FACTOR OF THE MOTION, TO REMOVE THOSE TIME RESTRAINTS OF 32.6(d) IS UNLAWFUL. THE AZ. COURT OF APPEALS DECISION WAS ON SEPTEMBER 12, 2017. PETITIONER'S TOLLING TIME UNDER 28 U.S.C. § 2244(d)(2) BEGIN ON SEPTEMBER 12, 2017 AND PETITIONER HAD TO OCTOBER 12, 2018 (AS PETITIONER'S 30 DAYS APPLIED TO A MOTION FILED IN THE AZ. SUPREME COURT) TO FILE HIS 28 U.S.C. § 2254 PETITION IN FEDERAL COURT. SEE (MR. FAUSSETTE 4 PAGE LETTER IN EXHIBIT - H).
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2. EQUITABLE TOLLING

A. ☐ EQUITABLE TOLLING MAY APPLY WHEN THERE IS LAWYER CONDUCT (DEATH) WHICH CAUSES AN EXTRAORDINARY CIRCUMSTANCE. WHEN AN ATTORNEY'S MISTAKES "LIKE MISCALCULATING A FILING DEADLINE," OR "CAUSING A DEADLINE TO BE MISSED, PURPOSELY OR INADVERTENTLY," THE PETITIONER MOST TIMES BEARS THAT RISK, AS THE ATTORNEY IS THE PETITIONER'S AGENT. "BUT," IF ANY OF THE ABOVE WAS THE RESULT OF AN ATTORNEY'S SICKNESS, POOR HEALTH CAUSING HOSPITALIZATION, OR DEATH, AN EXTRAORDINARY CIRCUMSTANCE IN THAT ASPECT CAN OVERCOME ANY UNTIMELINESS. UNFORTUNATELY, THIS HAS NOT BEEN THE CASE FOR PETITIONER, AND THE DEATH OF HIS ATTORNEY, MR. GUY BROWN, IN ORDER TO BETTER UNDERSTAND THIS CASE, IT IS EMINENT TO UNDERSTAND WHEN MR. BROWN WAS RETAINED IN PETITIONER'S CASE.

PCR RULE 32: FEBRUARY 7, 2014, PETITIONER FILED A PRO-SE PCR PETITION.

JUNE 6, 2016, ARIZONA COURT OF APPEALS DENIED REVIEW

★ DECEMBER 22, 2016, ARIZONA SUPREME COURT DENIED REVIEW

FEBRUARY 28, 2017, ARIZONA COURT OF APPEALS ISSUED MANDATE

AFTER THE FILING OF THE PETITION FOR REVIEW IN THE ARIZONA COURT OF APPEALS ABOVE, PETITIONER FILED A MOTION TO AMEND UNDER THE AZ R. CRIM. P. 32.6(d). PETITIONER WAS UNAWARE IF THE MOTION TO AMEND WOULD STOP THE FEDERAL HABEAS TOLLING TIME UNDER THE AEDPA.

AMENDED PETITION: JUNE 23, 2016, PETITIONER FILED AN AMENDED MOTION

SEPTEMBER 12, 2017, ARIZONA COURT OF APPEALS DENIED REVIEW.

★ OCTOBER 16, 2017, RETENTION OF MR. GUY BROWN

DURING RETENTION OF MR. BROWN, 28 U.S.C. § 2254 FEDERAL HABEAS TOLLING TIME HAD BEGIN TO RUN ON THE ORIGINAL PCR, AS THE PETITIONER FILED A PETITION TO THE ARIZONA SUPREME COURT.

B. UPON REVIEW BY THE PETITIONER OF THE RULING BY THE AZ. COURT OF APPEALS, ON THE COURTS DENIAL OF PETITIONERS MOTION TO AMEND, THE COURT OF APPEALS SET A TIME BAR. THE COURT STATED, "... HIS - MOTION WAS ALSO UNTIMELY UNDER AZ.R.CRIM.P. 32.9(a) (PERMITTING 15 DAYS TO MOVE FOR A REHEARING)." "

PETITIONER'S REQUEST TO AMEND MOTION UNDER AZ.R.CRIM.P. 32.6(d) WAS BEING MISCONSTRUED AS A "MOTION FOR RECONSIDERATION" DUE TO A LAYMAN REQUEST TO RECONSIDER FOR REASONS WITHIN THE REQUEST TO AMEND.

THIS CONTROVERSIAL RULING NEEDED THE ASSISTANCE OF A PROFESSIONAL ATTORNEY. THEREFORE, PETITIONER SOUGHT AND RETAINED VETERAN ATTORNEY, MR. GUY BROWN (SBN 021008) ON OCTOBER 16, 2017.

AFTER 3 MONTHS OF INVESTIGATING PETITIONER'S CASE, ON JANUARY 29, 2018, MR. BROWN RESPONDED TO PETITIONER IN A LETTER CONFIRMING HIS COURSE OF ACTION. SEE (EXHIBIT G). MR. BROWN MADE IT CLEAR THAT HE WAS AWARE OF THE COURT (S) REJECTION OF THE "MOTION TO AMEND", AND THAT HE WOULD FILE A PETITION FOR REVIEW IN THE AZ. SUPREME COURT TO CURE THE UNTIMELINESS RULING, AND WOULD FILE NECESSARY MOTIONS TO ASSURE THAT STATE AND FEDERAL TIME FRAMES ARE PRESERVED.

IN MR. BROWN'S DEFENSE, THERE WERE SEVERAL ACTIONS AVAILABLE IN PRESERVING PETITIONER'S FEDERAL HABEAS § 2254 ONE YEAR TIME FRAME. 1ST "IF" PETITIONER'S MOTION TO AMEND QUALIFIES AS COLLATERAL REVIEW FOR TOLLING UNDER 28 U.S.C. § 2244(d)(2), MR. BROWN'S PETITION FOR REVIEW IN THE AZ. SUPREME COURT WOULD TOLL PETITIONER'S FEDERAL TIME PENDING THE RULING AND ORDER OF THE SUPREME COURT, AND 2ND PETITIONER'S TOLLING TIME FOR FEDERAL REVIEW ON HIS ORIGINAL PCR HAD NOT EXPIRED, AND WOULD NOT EXPIRE UNTIL THE AZ. SUPREME COURTS RULING ON PETITIONER'S MOTION FOR RECONSIDERATION, OR THE ISSUANCE OF THE MANDATE. (18. FEBRUARY 28, 2017). THEREFORE, MR. BROWN'S LETTER DATED JANUARY 29, 2018 TO PETITIONER IS PERTINENT TO THIS CASE, AS THIS WOULD BE THE LAST COMMUNICATION FROM MR. BROWN WHO BECAME ILL IN FEBRUARY AND DIED IN MARCH OF 2018.

THE PETITION FOR REVIEW TO THE ARIZONA SUPREME COURT TO BE FILED TO CHALLENGE THE UNTIMELINESS OF THE MOTION TO AMEND BY MR. BROWN, AND THE MOTION TO EXTEND THE FEDERAL TIME FRAME BEFORE FEBRUARY 28, 2018 WAS NEVER FILED DUE TO MR. BROWN'S FEBRUARY HOSPITALIZATION, AND HIS UNFORTUNATE DEATH IN MARCH 2018. THIS WAS UNBEKNOWNST TO PETITIONER UNTIL JUNE 2018.

G. IN DOCUMENT 28 FILED 8/21/19 (MAGISTRATE'S REPORT AND RECOMMENDATION) IN THE U.S. DISTRICT COURT, SEE (EXHIBIT B), ON PAGE 7-8, THE MAGISTRATE COMPLETELY IGNORED THE PETITIONER'S ARGUMENTS OF MR. BROWN'S DEATH CAUSING UNTIMELY TIME FRAMES. (NO MENTIONING OF MR. BROWN'S DEATH).

IN DOCUMENT 38 FILED 11/27/19 (U.S. DISTRICT COURT DECISION) THE DISTRICT COURT ACCEPTED AND ADOPTED THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE, DISMISSING PETITIONER'S § 2254 PETITION AS UNTIMELY. SEE (EXHIBIT B1), AND SEE ALSO (EXHIBIT B DEC 39).

ON 5/7/2020, U.S. COURT OF APPEALS NINTH CIRCUIT DENIED PETITIONER'S REQUEST TO APPEAL. THE COURT REASONS "JURIST OF REASON WOULD NOT FIND (MR. BROWN'S DEATH) DEBATABLE..."

IN DOCUMENT 49 FILED 11/05/20 (U.S. DISTRICT COURT ORDER) (RULE 60(b)), THE COURT ADDRESSED MR. BROWN'S DEATH, ON PAGE 3 LINE 23-28 THE PANEL JUDGE STATED, "NOR DID THE UNFORTUNATE DEATH OF PETITIONER'S FIRST ATTORNEY SAVE HIS HABEAS PETITION FROM BEING DISMISSED AS UNTIMELY. THE ATTORNEY'S DEATH OCCURRED IN MARCH OF 2018, AND PETITIONER ARGUES HE CONSEQUENTLY "WAS ABANDONED FROM MARCH OF 2018 UNTIL JUNE 2018" (DOC 46 AT 6) BUT AGAIN, PETITIONER'S HABEAS PETITION WAS NOT FILED UNTIL OCTOBER 2018, FOUR MONTHS AFTER THE ALLEGED ABANDONMENT. IT WAS NOT ERROR FOR THE R & R TO DISMISS THE PETITION AS UNTIMELY.

THE DISTRICT COURT'S MENTIONING OF PETITIONER'S OCTOBER 3, 2018 FILING, SHOWS THAT THE COURT COMPLETELY DISREGARD PETITIONER'S CASE. ALTHOUGH THE ONLY RELEVENCY IS FROM FEBRUARY 28, 2018 UNTIL MR. BROWN'S DEATH IN MARCH. THE OCTOBER 3, 2018 FILING OF THE PETITION WAS EXPLAINED IN SEVERAL PETITIONS IN THE U.S. DISTRICT COURT, AND THE NINTH CIRCUIT COURT OF APPEALS, AND NOW HERE.

IN EXHIBIT H, ON PAGE 3, PETITIONER WAS ADVISED BY MR. BROWN'S STAND IN ATTORNEY, THAT THE FEDERAL HABEAS WOULD BE TIMELY FILED ON OR BEFORE OCTOBER 12, 2018. AT THE ADVISE OF COUNSEL (EVEN THOUGH THE FEDERAL HABEAS HAD ALREADY PAST) PETITIONER WITH DUE DILIGENCE FILED ON OCTOBER 3, 2018. THE DISTRICT COURT'S MERE MENTIONING OF THE FEDERAL HABEAS FOUR MONTHS AFTER THE DEATH OF MR. BROWN SHOWS JUST HOW EXTRAORDINARY HIS DEATH LEFT PETITIONER'S CASE.

THE PETITIONER'S FEDERAL HABEAS PETITION WAS TOLLED UNTIL FEBRUARY 28, 2018 ACCORDING TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION. MR. BROWN WAS HOSPITALIZED DURING THIS TIME, AND MR. BROWN DIED IN EARLY MARCH OF 2018. "EXTRAORDINARY CIRCUMSTANCE CAN BE PRESUMED."

D. ON JUNE 16, 2018, AND SEVERAL MONTHS PAST THE REPORT AND RECOMMENDATIONS FEBRUARY 28, 2018 FEDERAL TOLLING EXPIRATION DATE, AND MR. BROWN'S DEATH IN MARCH 2018, PETITIONER FIRST LEARNED OF MR. BROWN'S DEATH ON THE ABOVE DATE.

PETITIONER RECEIVED "SEVEN" FILED EXTENSION MOTIONS FROM THE AZ. SUPREME COURT, ALL FILED BY MR. BROWN GIVING HIM EXTENSIONS TO FILE A PETITION FOR REVIEW ON OR BEFORE SPECIFIC TIME FRAMES.

ON JUNE 16, 2018, PETITIONER RECEIVED AN "EIGHTH" EXTENSION MOTION FILED BY A MR. JACOB FAUSSETTE, SEE (EXHIBIT I). PETITIONER CONTACTED FAMILY MEMBERS AND THEY CONTACTED SOMEONE FROM MR. BROWN'S OFFICE WHO RELAYED THE MESSAGE OF MR. BROWN'S DEATH IN MARCH.

IN JULY OF 2018, PETITIONER RECEIVED A DENIAL ORDER FROM THE AZ. SUPREME COURT, THAT DENIED A PETITION FOR REVIEW FILED BY MR. JACOB FAUSSETTE. THE PETITION FOR REVIEW WAS NOT FILED ON THE COURTS RECORD ON TIME, AND THERE WAS A WRONG MEMORANDUM DECISION ATTACHED FROM THE AZ. COURT OF APPEALS DENIAL OF THE PREVIOUS COURTS RULING, SEE (EXHIBIT F).

★ ON FEBRUARY 28, 2018, IT IS A FACT THAT MR. BROWN WAS IN THE HOSPITAL WITH HEART COMPLICATIONS. IT IS ALSO A FACT THAT HE DIED FROM HEART FAILURE IN MARCH OF 2018. THE LAST CONVERSATION BETWEEN MR. BROWN AND PETITIONER WAS JANUARY 29, 2018, CONFIRMING HIS COARSE OF ACTION IN WHICH NEVER HAPPENED DUE TO HIS UNFORTUNATE DEATH. SEE (EXHIBIT G).

★ MR. FAUSSETTE BELIEVED THAT PETITIONERS TOLLING TIME EXPIRED ON OCTOBER 12, 2018, AS HIS BELIEF WAS THAT THE "MOTION TO AMEND" DID IN FACT TOLL PETITIONERS FEDERAL HABEAS CORPUS 28 U.S.C. § 2244 (d)(2) TOLLING TIME FRAME. THIS REASONING WAS EXPLAINED IN A DETAILED 4 PAGE LETTER IN EXHIBIT H, AND PETITIONER AT THE ADVISE OF MR. FAUSSETTE FILED HIS § 2254 PETITION ON OCTOBER 3, 2018, THEREBY, CLARIFYING THE FOUR MONTH DELAY IN REFERENCE TO THE U.S. DISTRICT COURTS ORDER DENYING PETITIONERS FILED RULE 60(b) MOTION IN DOCUMENT 49, SEE (EXHIBIT B).

F. IT IS A PETITIONER'S BURDEN TO ESTABLISH THAT EQUITABLE TOLLING IS WARRANTED. PACE, 544 U.S. AT 418; RASBERRY V. GARCIA, 448 F.3d 1150, 1153 (9TH CIR. 2006) ("OUR PRECEDENT PERMITS EQUITABLE TOLLING OF THE ONE-YEAR STATUE OF LIMITATIONS ON HABEAS PETITIONS, BUT THE PETITIONER

BEARS THE BURDEN OF SHOWING THAT EQUITABLE TOLLING IS APPROPRIATE.")

PETITIONER'S EQUITABLE TOLLING HAS ESTABLISHED THAT: (i) HE HAS BEEN PURSUING HIS RIGHTS DILIGENTLY AND (ii) THAT SOME EXTRAORDINARY CIRCUMSTANCES STOOD IN HIS WAY. THE HOSPITALIZATION IN FEBRUARY AND UNFORTUNATE DEATH OF MR. BROWN IN MARCH OF 2018 WAS, AND STILL IS, AN "EXTRAORDINARY CIRCUMSTANCE" HIS DEATH WAS THE "BUT-FOR AND PROXIMATE CAUSE FOR THE FEBRUARY 28, 2018 UNTIMELINESS OF PETITIONER'S 28 U.S.C. § 2254 PETITION. ALLEN V. LEWIS, 255 F.3d 798, 800 (9TH CIR. 2001) (PER CURIAM); SEE ALSO BAMIREZ V. YATES, 571 F.3d 993, 997 (9TH CIR. 2009).

WHEN HAS DEATH TO EXCUSE A PERSON'S REASONINGS FOR UNTIMELINESS, NOT APPLIED TO AT LEAST 4 TO 5 MONTHS TO ADJUST TO DEATH, WHEN ITS UNEXPECTED AND CAUSES DELAYS? PETITIONER'S ATTORNEY'S DEATH WAS JUST DAYS AFTER FEBRUARY 28, 2018, BUT HIS HOSPITALIZATION WAS BEFORE THAT DATE. THERE EXISTS AN EXTRAORDINARY CIRCUMSTANCE, SEE SPITSYN V. MOORE, 345 F.3d 796, 799 (9TH CIR. 2003) (FOR EQUITABLE TOLLING TO APPLY, A "PRISONER MUST SHOW THAT THE 'EXTRAORDINARY CIRCUMSTANCES' WERE THE CAUSE OF HIS UNTIMELINESS").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kevin Mitchell

Date: 3/12/21