No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

FRANCISCO ALMANZA-GARCIA,

Petitioner,

v.

RICK COURSEY,
Superintendent,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves important and recurring access to justice issues in the context of habeas corpus rights under the Antiterrorism and Effective Death Penalty Act. Under the AEDPA, a state prisoner must file for federal habeas corpus relief within one year of state proceedings becoming final, excluding "[t]he time during which a properly filed application for State post-conviction or other collateral review" is pending. In the present case, after his unsuccessful state post-conviction proceeding at the trial court level, which would ordinarily not be appealable under state law, the petitioner moved in the Oregon Court of Appeals for a determination of whether the appellate court had jurisdiction. The state appellate court granted the petitioner's motion to determine jurisdiction, describing the lower court's ruling as "a hodgepodge of legal mumbo jumbo." The appellate court then denied jurisdiction based on arguments made in opposition to the petitioner's motion. The federal district court dismissed his subsequent habeas corpus petition as untimely, concluding that the state appellate court's determination regarding jurisdiction had consumed the one-year federal statute of limitations. The question presented is:

> Does the plain meaning of "properly filed" in 28 U.S.C. § 2244(d) include a timely filed motion for the determination of the state appellate court's jurisdiction to review the lower court's post-conviction denial?

PARTIES TO THE PROCEEDINGS

The petitioner, Francisco Almanza-Garcia, is a state prisoner in the custody of the Oregon Department of Corrections. The respondent, Rick Coursey, the Superintendent of the Eastern Oregon Correctional Institution, is named as the petitioner's custodian in his official capacity, substituting for the formerly named respondent pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure and Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

RELATED PROCEEDINGS

There are no proceedings that should be deemed related.

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No. _____

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The petitioner, Francisco Almanza-Garcia, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 3, 2021, affirming the dismissal of his federal habeas corpus petition as untimely filed.

1. Opinions Below

The federal district court denied habeas corpus relief in an opinion dismissing the petition as untimely filed on March 12, 2020 (Appendix 5). The Ninth Circuit affirmed the dismissal of the federal habeas corpus petition in a memorandum opinion on March 3, 2021

(Appendix 1). The Ninth Circuit denied panel and en banc rehearing on April 12, 2021 (Appendix 15).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

The federal habeas corpus statute provides for relief from state convictions for violation of federal constitutional rights after exhaustion of state remedies:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254. The full statute is set out in the Appendix at 33.

The statute of limitations in the Antiterrorist and Effective Death Penalty Act states:

> (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;

* * * *

> (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). The statute in full is set out in the Appendix at 31.

The Constitution guarantees the writ of habeas corpus in the Suspension Clause, which states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

The state court statute regarding jurisdiction to review post-conviction judgments states:

> (1) The court may, on its own motion or on the motion of the defendant, enter a judgment denying a meritless petition brought under ORS 138.510 to 138.680.
>
> (2) As used in this section, "meritless petition" means one that, when liberally construed, fails to state a claim upon which post-conviction relief may be granted.
>
> (3) Notwithstanding ORS 138.650, a judgment dismissing a meritless petition is not appealable.
>
> (4) A dismissal is without prejudice if a meritless petition is dismissed without a hearing and the petitioner was not represented by counsel.

Or. Rev. Stat. § 138.525. Under the Oregon appellate rules, "A party may raise an issue of the jurisdiction of the appellate court by motion at any time during the appellate process." Or. R. App. P. 7.05(1)(c).

4. Summary of Reasons for Granting the Writ of Certiorari

This Court should grant the writ of certiorari to hold that the plain meaning of "properly filed" in 28 U.S.C. § 2244(d) includes timely filed motions for the determination of the appellate court's jurisdiction. The issue is a recurring one in Oregon and other jurisdictions with similar post-conviction statutes and, for petitioners like Mr. Almanza-Garcia, implicates the severe consequence of foreclosing all federal review of federal constitutional claims. Because he sought a timely determination of the appellate court's jurisdiction, and the appellate court granted his motion to determine jurisdiction, Mr. Almanza-Garcia should have obtained federal review under the AEDPA of his claims that his state court convictions resulted from violation of his federal constitutional rights.

There are three fundamental reason for the Court to clarify this area of law. First, the lower court rulings ignored this Court's repeated injunction that jurisdiction always exists to determine whether a court has jurisdiction. Although the Court articulated the jurisdictional principle in the context of federal courts, the question whether state litigation was "properly filed" is solely a question of federal law. Thus, a timely filed motion to a state court of appeals to determine jurisdiction is "properly filed" for purposes of the statute of limitations applicable to federal habeas corpus petitions.

Second, the plain meaning and purpose of the statute are well served by construing "properly filed" to include a petitioner's efforts to establish appellate jurisdiction over a denial of relief by the state post-conviction court. The state court of appeals granted the motion, dismissing the lower court's ruling as "legal mumbo jumbo with citations to cases

and legal principles that have nothing to do with the present case." Although ultimately ruling against the petitioner on the jurisdictional merits, the court of appeals provided the ruling that the federal courts would have considered if they had reached the merits because it was the state court's last statement on the issues. Under the logic of the Ninth Circuit's ruling, though, the federal court would have only considered the "legal mumbo jumbo" of the lower court's ruling. This Court should hold that the timely state court litigation was "properly filed" as within the plain meaning of the statute and as consistent with the purpose and design of the AEDPA.

Third, the Court should not tolerate the Ninth Circuit's denial of access to the federal writ of habeas corpus under the circumstances of this case. The Oregon courts provided appointed counsel for the petitioner to litigate his claim that appellate review was appropriate. The Oregon appellate court granted the petitioner's motion and rendered a reasoned decision that recognized merit in the petitioner's claim regarding defects in the proceeding below. Any reasonable prisoner would have confidence that he or she had "properly filed" the correct motion to obtain review of the lower court's defective decision. By deeming the state appellate litigation not to be "properly filed," the Ninth Circuit unfairly barred the diligent petitioner from access to the federal courts for the purposes of obtaining the habeas corpus review guaranteed by statutory and constitutional law.

5. Statement of the Case

Initial Criminal Proceedings Through Direct Appeal

In August 2007, Mr. Almanza-Garcia was charged with sexual offenses against a minor relative. He was initially convicted at a September 2008 bench trial, but the Oregon Court of Appeals reversed his conviction, ordering a new trial based on a plain evidentiary error. *State v. Almanza-Garcia*, 242 Or. App. 350, 255 P.3d 613 (2011). The case then was tried to a jury. Mr. Almanza was convicted unanimously and sentenced to three consecutive prison terms of 300 months. Appellant's Excerpts of Record, *Almanza-Garcia v. Hendrix*, No. 20-35260 (9th Cir. filed July 17, 2020) (Docket No. 10 at 19) (hereafter ER).

Mr. Almanza-Garcia again appealed, claiming that the trial court erred in excluding evidence, that his sentence violated the Eighth Amendment, and that the trial court erred in instructing the jury that its verdict did not need to be unanimous. The Oregon Court of Appeals affirmed without opinion. *State v. Almanza-Garcia*, 271 Or. App. 377, 353 P.3d 618 (2015). Mr. Almanza-Garcia petitioned for Oregon Supreme Court review, but review was denied. *State v. Almanza-Garcia*, 358 Or. 248, 364 P.3d 1001 (2015). The appellate judgment for the direct appeal was effective on December 15, 2015. ER 38.

State Post-Conviction Proceedings and Appeal

On April 14, 2016, less than four months later, Mr. Almanza-Garcia, representing himself, sought post-conviction relief, challenging his conviction and sentence on several grounds, including that trial counsel provided ineffective assistance when he failed to investigate and raise appropriate objections. ER 39. Although the state court appointed

counsel, Mr. Almanza-Garcia's counsel filed an affidavit asserting that the petition could not be amended to state a ground for relief. ER 46. However, contradicting that assertion, counsel stated in the affidavit that three of the petitioner's pro se claims "appear to have merit sufficient to warrant an examination." ER 47. The appointed counsel's affidavit then argued against those claims, professing to have reviewed the record and concluding that the claims lacked substantive merit. ER 50-56. Counsel did not present the claims in an amended petition, investigate them beyond the record, nor file a supporting brief and evidence for a decision by the post-conviction court. The State moved to dismiss Mr. Almanza-Garcia's pro se petition for failure to state a claim, citing counsel's declaration. ER 52-56.

On February 2, 2017, the post-conviction trial court issued a lengthy and dense form order largely untethered to Mr. Almanza-Garcia's case, granting the State's motion. ER 58-69 (Appendix 16). On February 28, 2017, the post-conviction court entered its judgment dismissing the post-conviction petition:

> This matter came before the Honorable Judge Daniel J. Hill on petitioner's postconviction relief attorney's filing under ORS 138.590(5) and defendant's oral Motion to Dismiss.
>
> The Court having previously granted defendant's oral Motion and dismissed the Petition for Post-Conviction Relief by an Order entered separately in this case,
>
> NOW, THEREFORE, IT IS ADJUDGED that the Petition for Post-Conviction Relief is dismissed with prejudice and judgment is entered in favor of defendant.

ER 70. Under Oregon law, meritless post-conviction actions are not appealable. Or. Rev. Stat. § 138.525.

On February 27, 2018, Mr. Almanza-Garcia filed a motion to determine jurisdiction along with his appeal, arguing that the post-conviction court's opinion was ambiguous and "a hodgepodge of legal mumbo jumbo." ER 71. The State filed a responsive brief arguing that the denial of the post-conviction petition as meritless was correct, negating appellate court jurisdiction. ER 107. On March 28, 2018, the Appellate Commissioner issued an order stating, "The motion for determination of appealability is granted." ER 112 (Appendix 28). At the outset of the short opinion, the Appellate Commissioner explained the procedure leading to the decision to grant the motion to determine appealability:

> Petitioner appeals the trial court's judgment dismissing his petition for post-conviction relief, and moves for a determination of whether the judgment is not appealable under ORS 138.525(3) because dismissal was based on the trial court's determination that petitioner's petition failed to state a claim on which post-conviction relief may be granted. The motion for determination of appealability is granted.

Id. The Appellate Commissioner then agreed with the petitioner that ruling by the post-conviction court made no sense:

> Petitioner characterizes the trial court's order as "a hodgepodge of legal mumbo jumbo with citations to cases and legal principles that have nothing to do with the present case." *The court concurs with that characterization.* The order appears to be a form order that the trial court has employed in other post-conviction relief cases, including but not limited to *Breece v. Amsberry*, 279 Or App 648, 650-51, 381 P3d 1086 (2016), *Corona v. Amsberry*, 284 Or App 414, 417, 393 P3d 248 (2017), *Knight v. Myrick*, Court of Appeals No. A162804, and *Etheridge v. Popoff*, Court of Appeals No. A164345.

Id. (emphasis added). The Appellate Commissioner then determined that, under its review of the record, the order was not appealable because the lower court had correctly determined the petition failed to state a claim for post-conviction relief:

> Nevertheless, as respondent asserts, the trial court's judgment ultimately is based on the trial court's determination that the petition did not allege a claim for post-conviction relief, as reflected in the trial court's order granting respondent's motion to dismiss, which, in turn, was based on a failure to allege a claim for post-conviction relief.
>
> The court concludes that the judgment is not appealable under ORS 138.525(3) and, on that ground, dismisses the appeal.

Id. In April 2018, Mr. Almanza-Garcia moved for reconsideration, and, on May 11, 2018, the appellate court denied reconsideration. ER 153-54.

After filing the federal petition, Mr. Almanza-Garcia continued to pursue his state post-conviction appeal. Through appointed counsel, he petitioned the Oregon Supreme Court for review in July 2018. ER 155. hat court denied review on August 30, 2018. ER at 77. The appellate judgment concluding the post-conviction appeal became effective on October 10, 2018. ER at 179.

Federal Habeas Corpus Proceedings and Decisions Below

Well before the issuance of the state-court appellate judgment, Mr. Almanza-Garcia had signed, and by virtue of the mailbox rule, filed, his pro se federal habeas corpus petition, which was filed on September 25, 2018. ER 180 (signed June 25, 2018). Pursuant to an order of the district court, Mr. Almanza-Garica, through appointed counsel, filed an amended petition, which the State eventually answered, claiming the federal petition was

untimely. The district court explained the State's argument that the entire time for the state post-conviction appellate ruling counted against and exceeded the federal statute of limitations:

> [T]hat although Petitioner properly filed his initial-level [post-conviction relief] action, the AEDPA's statute of limitations began to run when the [post-conviction relief] court issued its non-appealable judgment on February 21, 2017. As a result, the one-year statute of limitations ran unabated for 469 days until Petitioner signed his original, pro se Petition for Writ of Habeas Corpus on June 5, 2018.

ER 8 (Appendix 10). The district court also spelled out the petitioner's assertion that his effort to determine the state appellate court's jurisdiction was "properly filed":

> Petitioner counters that his motion to determine jurisdiction was properly filed in the Oregon Court of Appeals, that it was entirely proper for him to seek appellate review of the [post-conviction] court's dismissal of his case, and that his case is timely because statutory tolling necessarily continued until October 10, 2018 when his [post-conviction relief] Appellate Judgment became effective after the Oregon Supreme Court denied review.

Id.

The district court concluded that no time lapsed between Mr. Almanza-Garcia's direct appeal and the initiation of his post-conviction-relief action. *Id.* The district court also held that Mr. Almanza-Garcia's state post-conviction trial court proceeding was "properly filed" and tolled the limitations period until that court's final judgment was issued on February 2, 2017. However, relying on *Ramirez v. Yates*, 571 F.3d 993 (9th Cir. 2009), the district court concluded that Mr. Almanza-Garcia's appeal from the adverse post-conviction decision was not "properly filed" because the lower court's ruling was ultimately deemed to be not appealable: "[J]ust as in *Ramirez*, the lower court's decision

was not appealable under state law." Appendix 11. With regard to equitable tolling, the district court held that the petitioner could not demonstrate he had diligently pursued his federal remedy:

> While the procedural posture Petitioner faces is unfortunate, he cannot demonstrate that he diligently pursued his federal habeas corpus remedy and was only unable to timely file this action due to extraordinary circumstances. Equitable tolling is therefore not appropriate.

Appendix 13. The district court concluded Mr. Almanza-Garcia had not demonstrated actual innocence and also denied an evidentiary hearing. Appendix 13-14.

On appeal, Mr. Almanza-Garcia argued that his habeas corpus petition was timely because he "properly filed" the state court appeal under the plain meaning of § 2244(d), citing to this Court's authority establishing that a court always has jurisdiction to determine its own jurisdiction. Appellant's Opening Brief, *Almanza-Garcia v. Hendrix*, No. 20-35260 (9th Cir. filed July 17, 2020) (Docket No. 9 at 19-20) (citing *United States v. Ruiz*, 536 U.S. 622, 626-28 (2002), *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), and *United States v. Mine Workers*, 330 U.S. 258, 291 (1947)). Based on an earlier Ninth Circuit case involving an untimely appeal, the Ninth Circuit denied relief, stating: "[A] petitioner is not entitled to tolling during the pendency of an appeal from a non-appealable order because such an appeal is not a 'properly filed' application for post-conviction relief." *Id.* at Docket No. 37 at 2 (Appendix 2) (citing *Ramirez*, 571 F.3d at 999). "Here, the order Almanza attempted to appeal was non-appealable because under Oregon law, 'a judgment dismissing a meritless petition is not appealable,' and a meritless petition is

defined as one that 'fails to state a claim upon which post-conviction relief may be granted.'" Appendix 2-3 (citing Or. Rev. Stat. § 138.525(2) and (3)).

Mr. Almanza-Garcia petitioned for rehearing and rehearing en banc. The Ninth Circuit denied rehearing and rehearing en banc on April 12, 2021. Appendix 15.

6. Reasons for Granting the Writ

This case implicates core reasons for the grant of the writ of certiorari. The lower court decision runs counter to this Court's authority that a court always has jurisdiction to determine its jurisdiction. The plain meaning of "properly filed" as well as the purposes of the AEDPA's requirements are undermined by the failure to recognize that a motion to determine jurisdiction that was *granted* in the state court appropriately provided the federal court with the last reasoned judgment upon which the federal courts should have based review on the merits. The lower courts' interpretation of "properly filed" to exclude normal state court review processes operated as an irrational trap for the unwary that foreclosed consideration of the federal habeas corpus petition. Such an irrational procedural obstacle undermines the purposes and procedures for determining federal constitutional rights under the statutory and constitutional writ of habeas corpus.

A. The Lower Courts Deviated From Statutory Text In Failing To Follow This Court's Precedent Holding That A Court Always Has Jurisdiction To Determine Its Own Jurisdiction.

Mr. Almanza-Garcia's state appeal constituted a "properly filed" effort to have the state court determine its jurisdiction. "[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628

(2002) (citing *United States v. Mine Workers*, 330 U.S. 258, 291 (1947)); *accord Brownback v. King*, 141 S. Ct. 740, 750 (2021). State courts also routinely recognize the logical necessity of a party being able to challenge an adverse jurisdictional ruling. *See, e.g.*, *In re Marriage of Flores & Martinez*, 231 Ariz. 18, 20-21, 289 P.3d 946, 948-49 (Ct. App. 2012) ("[A] court always has jurisdiction to determine its own jurisdiction . . . And an appellate proceeding, including one in which an appeal is dismissed for lack of jurisdiction, does not terminate until the appellate court's mandate issues."); *Barry v. State Bar of California*, 2 Cal. 5th 318, 326, 386 P.3d 788, 793 (2017) ("[A] court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance."); *Rutter v. Oakwood Living Centers of Virginia, Inc.*, 282 Va. 4, 710 S.E. 2d 460, 464 (2011) ("[A] court always has jurisdiction to determine its jurisdiction, even when determining jurisdiction first requires analysis of the merits of an issue.").[1] A motion to determine the appellate court's jurisdiction constitutes a "properly filed" state post-conviction review proceeding because the petitioner followed available procedures to seek appellate court review. The relevant decisions of this Court, and the consensus among state courts, establish the principle that a court always has jurisdiction to determine its jurisdiction.

The district court and Ninth Circuit decisions here, which held that Mr. Almanza-Garcia's effort to obtain appellate review of the jurisdictional ruling was not "properly

[1] Other examples of state courts recognizing the authority for a court to determine its own jurisdiction are listed in the Appendix at 29.

filed," warrant this Court's review because they "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The question whether a pleading is "properly filed" within the meaning of the AEDPA is a question of federal law. *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005); *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000). The state appeal at issue in this case directly challenged the lower state court's ruling that purported to deprive the appellate court of jurisdiction, and directly invoked the appellate court's jurisdiction to determine its own jurisdiction. By deeming the petitioner's effort to challenge the lower court's jurisdictional ruling to be improperly filed, the federal courts below interpreted the AEDPA inconsistently with this Court's established rule that a court always has jurisdiction to determine its own jurisdiction.

For the purposes of the AEDPA statutory tolling mechanism, "[a]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8 (emphasis in original) (describing requirements such as "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee"). The application in the present case was timely and complied with filing requirements, even resulting in appointment of counsel to assist with the litigation. With assistance of counsel, Mr. Almanza-Garcia's appeal was successful to the extent that the Appellate Commissioner granted his motion to determine jurisdiction and concluded that the lower court had not provided any valid rationale for precluding appeal. Appendix 28.

Motions to determine jurisdiction are regular motions in the Oregon appellate court when a party perceives ambiguity or error surrounding a jurisdictional question. Or. R. App. P. 7.05(1)(c) ("A party may raise an issue of the jurisdiction of the appellate court by motion at any time during the appellate process."). An essential and explicit duty of the Appellate Commissioner is to determine whether the appellate court has jurisdiction over a matter. Oregon Court of Appeals, *Office of the Appellate Commissioner*, https://www.courts.oregon.gov/courts/appellate/coa/Pages/oac.aspx ("The Appellate Commissioner and staff work closely with the Records Section of the Office of the Appellate Court Administrator . . . in screening appeals for jurisdictional and non-jurisdictional defects and otherwise enforcing the Oregon Rules of Appellate Procedure."). Motions to determine jurisdiction are one of the most frequently decided matters resolved by the Appellate Commissioner. *Id.*

Because the state court had jurisdiction to decide the motion to determine jurisdiction, Mr. Almanza-Garcia's situation is not one where "an application [was] erroneously accepted by a court lacking jurisdiction[.]" *Artuz*, 531 U.S. at 8. The Oregon appellate court had jurisdiction to determine its jurisdiction under both established state procedures and this Court's recognition that a court always has authority to determine its jurisdiction.

This Court should hold that, within the meaning of the AEDPA, a petitioner has "properly filed" a timely application when the motion's purpose is to determine the validity of the lower court's ruling that purported to foreclose appeal. In holding that Mr. Almanza-

Garcia's application was not "properly filed," the Ninth Circuit contravened the principle that courts have the jurisdiction to determine their own jurisdiction. This Court should grant certiorari to bring the federal courts into compliance with this Court's precedent.

B. Application Of The AEDPA Statute Of Limitations To Jurisdictional Litigation Violated The Plain Meaning And Purpose Of The Tolling Provision For "Properly Filed" State Proceedings.

The present case involves a state appeal that has all the markers of being "properly filed": the appeal was timely, the appellate court appointed counsel, and the appellate court granted the motion to review the jurisdictional ruling. "[W]hen the meaning of the statute's terms is plain, our job is at an end." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020). The present case involves the plain meaning of "properly filed" recognized by this Court in *Artuz*, which requires adherence to applicable laws and rules surrounding the delivery and acceptance of a filing. 531 U.S. at 8. If a petition conforms to the procedural requirements surrounding a filing, and is subsequently accepted by the clerk of court, it is "properly filed"; alternatively, "[i]f, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction or is erroneously accepted without the requisite filing fee, it will be pending, but not properly filed." *Id.* at 9.

Within the common meaning of "properly filed," Mr. Almanza-Garcia's timely filing conformed to all procedural requirements for a motion to determine jurisdiction. His motion was accepted by the state court based on the state court's jurisdiction to determine its own jurisdiction, and his motion was subsequently decided by the appellate court. *See Pace*, 544 U.S. at 413 ("As in *Artuz*, we are guided by the 'common usage' and "commo[n]

underst[anding]" of the phrase 'properly filed.'") (quoting *Artuz*, 531 U.S. at 8, 9). Further, the petition must be deemed "properly filed" as a motion in conformity with the state procedural rules, because the appellate court granted the motion to determine jurisdiction: "The motion for determination of appealability is granted." The fact that the Appellate Commissioner agreed with the State's response and dismissed the appeal for lack of jurisdiction (on different grounds than those asserted by the lower court) does not change the fact that the appeal for determination of jurisdiction was "properly filed." Nothing about "properly filed" means that the petitioner must prevail on the merits. The litigation regarding the lower court's jurisdiction must have been "properly filed" because Mr. Almanza-Garcia received a ruling on the question at hand. *See Rice v. Bowen*, 264 F.3d 698, 701 (7th Cir. 2001) ("If the courts considered the claim on the merits, it was properly filed; if they dismissed it for procedural flaws such as untimeliness, then it was not properly filed.").

The plain meaning of "properly filed" serves perfectly in the context of the AEDPA, because it does not require the federal court to defer to a lower state court decision superseded by an appellate ruling. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Under the AEDPA, the federal court is to look to the last state court decision and defer to the reasons articulated by that court in deciding the federal constitutional question. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). In the

present case, the state appellate court agreed with the petitioner: the lower state court's decision was "legal mumbo jumbo." But if the appellate court's jurisdictional ruling resulted from a motion deemed improperly filed, then the lower court's "mumbo jumbo" would provide the last state decision to which the federal court would have had to defer.

As a matter of comity, there is no federal interest in preventing the state court from correcting erroneous lower court rulings before the case is subjected to federal scrutiny. As a matter of efficiency and conserving federal resources, federal courts should not wade through an incomprehensible state post-conviction ruling when the appellate court has provided a clarifying ruling on appeal. The plain meaning of "properly filed" requires it to include cases where a state appellate court properly grants a motion to determine its own jurisdiction, even if the motion is denied on the merits.

C. The Decision Of The District Court And The Ninth Circuit Irrationally Blocks Diligent Petitioners From Receiving The Federal Review Guaranteed By The Statutory And Constitutional Writ Of Habeas Corpus.

For a petitioner like Mr. Almanza-Garcia, who litigated and won the point that the state post-conviction court's ruling was "legal mumbo jumbo," the decision of the district court and the Ninth Circuit to bar the federal courthouse door irrationally and arbitrarily blocked review through the federal writ of habeas corpus. The AEDPA does not expressly prohibit the petitioner's effort to obtain review of the lower state court's jurisdictional ruling. This Court has "counsel[ed] hesitancy" before blocking federal habeas corpus review when the AEDPA does not do so explicitly:

> The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

Holland v. Florida, 560 U.S. 631, 649 (2010); *see Dretke v. Haley*, 541 U.S. 386, 393-94 (2004) (applying the doctrine of constitutional avoidance to construe the AEDPA as providing a potential vehicle for relief on remand rather than resolving constitutional questions regarding actual innocence of a sentencing enhancement).

Mr. Almanza-Garcia timely moved the state appellate court to review the lower court's jurisdictional decision. The court appointed counsel to assist him, then granted his motion. Although the ultimate jurisdictional ruling went against him, the appellate court agreed that the lower court's ruling had to be superseded. No reasonable petitioner would believe that, by seeking timely review of a jurisdictional decision, and winning its review because the lower court opinion was so inadequate, he or she would be foreclosed from exercising rights under the federal habeas corpus guarantee. By interpreting the AEDPA's requirement of "properly filed" to allow the AEDPA statute of limitations to run under these circumstances, the lower federal courts arbitrarily thwarted this Court's articulated purposes and goals for federal habeas corpus review.

7. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 20th day of August, 2021.

Stephen R. Sady
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

MAR 3 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO ALMANZA-GARCIA, Petitioner-Appellant, v. BRIDGETT AMSBERRY, Respondent-Appellee.	No. 20-35260 D.C. No. 2:18-cv-01704-HZ MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Submitted March 1, 2021**
Portland, Oregon

Before: PAEZ and WATFORD, Circuit Judges, and TUNHEIM,*** District Judge.

Francisco Almanza-Garcia appeals the district court's judgment dismissing his federal habeas petition as untimely. We affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

1. A federal habeas petition challenging a state court conviction must be filed within one year of the date on which the conviction became final. 28 U.S.C. § 2244(d)(1). The one-year statute of limitations is tolled, however, during the pendency of a "properly filed" application for state post-conviction relief. *Id.* § 2244(d)(2). Almanza's convictions became final on December 15, 2015. Under the prison mailbox rule, Almanza was deemed to have filed his petition for state post-conviction relief prior to December 15, 2015, so tolling began immediately. On February 21, 2017, the state post-conviction court denied Almanza's petition for failure to state a claim for relief. Almanza did not file his federal habeas petition until June 5, 2018, more than a year later. Almanza claims that tolling continued after February 21, 2017, while he appealed the state post-conviction court's denial of his petition, and that tolling did not end until October 10, 2018, when the denial of this appeal became effective.

We reject Almanza's argument. This court has held that a petitioner is not entitled to tolling during the pendency of an appeal from a non-appealable order because such an appeal is not a "properly filed" application for post-conviction relief. *Ramirez v. Yates*, 571 F.3d 993, 999 (9th Cir. 2009). Here, the order Almanza attempted to appeal was non-appealable because under Oregon law, "a judgment dismissing a meritless petition is not appealable," and a meritless petition

is defined as one that "fails to state a claim upon which post-conviction relief may be granted." Or. Rev. Stat. § 138.525(2), (3).

2. In the alternative, Almanza argues that he is entitled to equitable tolling. A petitioner seeking to invoke equitable tolling must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Almanza alleges that his post-conviction counsel rendered ineffective assistance, constituting an "extraordinary circumstance." He bases this claim on his post-conviction attorney's filing of an affidavit stating that he had reviewed the case and did not believe the petition could be amended to state a ground for relief. But in doing so, Almanza's counsel was simply abiding by Oregon law, which explicitly requires a post-conviction attorney to file such an affidavit if he believes the petition cannot state a valid claim. Or. Rev. Stat. § 138.590(5).

3. Finally, Almanza requests that we either remand to the district court with instructions to stay his petition pending the Supreme Court's decision in *Edwards v. Vannoy*, No. 19-5807, or authorize him to pursue a claim under *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), in a second or successive petition. We are not in a position to order the district court to stay the petition because it was properly dismissed as untimely. And while the Supreme Court is considering whether

Ramos should apply retroactively in *Edwards*, it has not yet ruled on the matter, so to authorize a second or successive petition now would be premature.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANCISCO ALMANZA-GARCIA,

Petitioner,

v.

BRIGITTE AMSBERRY,

Respondent.

Case No. 2:18-cv-01704-HZ

OPINION AND ORDER

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HERNANDEZ, District Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state convictions for Rape and Sodomy. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (#13) is dismissed as untimely.

BACKGROUND

In 2007, the Marion County Grand Jury indicted Petitioner on two counts of Rape in the First Degree and one count of Sodomy in the First Degree for crimes he committed against a minor female when she was between seven and eight years old. Following a bench trial, the Marion County Circuit Court convicted Petitioner of all three charges and sentenced him to consecutive sentences totaling 900 months in prison. Trial Transcript, pp. 201-03.

Petitioner took a direct appeal where he asserted that his convictions improperly rested upon a medical diagnosis of sexual abuse that was unsupported by any physical evidence.[1] Although Petitioner had not preserved his claim of error in the trial court, the Oregon Court of Appeals found the medical opinion testimony constituted plain error and remanded Petitioner's case

[1] In *State v. Southard*, 347 Or. 127, 218 P.3d 104 (2009), the Oregon Supreme Court concluded that a medical diagnosis of sexual abuse in the absence of corresponding physical evidence "does not tell the jury anything that it could not have determined on its own" such that the diagnosis is inadmissible under OEC 403 because its risk of prejudice outweighs the probative value of the diagnosis. 347 Or. at 142.

for a new trial.[2] *State v. Almanza-Garcia*, 242 Or. App. 350, 255 P.3d 613 (2011).

On remand, Petitioner opted for a jury trial. The jury unanimously found him guilty of all three charges, and the trial court once again imposed an aggregate 900-month prison term. Trial Transcript, pp. 462-63, 480-82.

Petitioner directly appealed his new judgment raising claims pertaining to evidentiary rulings, the trial court's jury instructions, and the duration of his sentence. Respondent's Exhibit 108. The Oregon Court of Appeals affirmed the trial court's decision without issuing a written opinion, and the Oregon Supreme Court denied review. *State v. Almanza-Garcia*, 271 Or. App. 377, 353 P.3d 618, *rev. denied*, 358 Or. 248, 364 P.3d 1001 (2015).

Before his direct appellate judgment issued, Petitioner filed for post-conviction relief ("PCR") in Umatilla County.[3] He initiated the action with a *pro se* PCR Petition, and the PCR court appointed counsel to represent him. After reviewing the case, counsel filed an affidavit wherein he described his efforts to identify a meritorious claim. Counsel concluded, "After careful review of the facts of the case, it is my belief that the

[2] ORAP 5.45(1) provides a mechanism whereby an unpreserved claim may still be considered on appeal--"the appellate court may consider an error of law apparent on the face of the record." This provision allows the Oregon Court of Appeals to consider unpreserved errors of law which are "obvious" and "not reasonably in dispute." *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 381, 823 P.2d 956 (1991).

[3] Under the "prison mailbox rule," a prisoner's documents are deemed filed at the moment the prisoner delivers them to prison authorities for forwarding to the clerk of the court. *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000). Petitioner signed his PCR Petition on September 9, 2015, and his direct appellate judgment did not issue until December 15, 2015.

original petition cannot be construed to state a ground for relief under ORS 138.510 to 138.680, and cannot be amended to state a ground for relief." Respondent's Exhibit 114.

The State subsequently moved to dismiss the case for failure to state a claim upon which relief could be granted. Following a brief hearing, the PCR court granted the State's motion. Respondent's Exhibits 115, 116. The dismissal for failure to state a claim was an event of jurisdictional significance because it precluded Petitioner from appealing the PCR court's judgment. *See* ORS 138.525(3) ("a judgment dismissing a meritless petition is not appealable."); *see also* (ORS 138.525 (2) ("'meritless petition' means one that, when liberally construed, fails to state a claim upon which post-conviction relief may be granted.").

Petitioner nevertheless proceeded to file a motion in the Oregon Court of Appeals in an attempt to establish jurisdiction, arguing that the PCR court did not unambiguously dismiss the PCR Petition for failure to state a claim. Respondent's Exhibit 118. The Appellate Commissioner disagreed and determined that, as a matter of state law, "the judgment [was] not appealable under ORS 135.525(3) and, on that ground, dismisse[d] the appeal." Respondent's Exhibit 120. Petitioner moved for reconsideration of the Appellate Commissioner's decision, but the Chief Judge for the Oregon Court of Appeals denied the motion. Respondent's Exhibit 122. Thereafter, Petitioner unsuccessfully sought review in the Oregon Supreme Court. Respondent's Exhibit 124.

On September 25, 2018, Petitioner filed this 28 U.S.C. § 2254 habeas corpus case. With the benefit of appointed counsel, Petitioner filed an Amended Petition raising claims of trial court error, ineffective assistance of trial counsel, and actual innocence. Respondent asks the Court to deny relief on the Petition because: (1) Petitioner failed to timely file this case; (2) many of Petitioner's claims are procedurally defaulted; and (3) Petitioner's claims lack merit.

DISCUSSION

I. Statute of Limitations and Statutory Tolling

Pursuant to the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), a federal habeas corpus petitioner must generally challenge his state convictions within one year of the time those convictions become final upon the conclusion of his direct review. 28 U.S.C. § 2244(d)(1)(A); *see also Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (the period of direct review also includes the 90-day period within which a petitioner can file a petition for writ of certiorari with the United States Supreme Court, whether or not he actually files such a petition). Once a litigant's direct appeal proceedings have concluded, the one-year statute of limitations begins to run. If he files a proper state PCR action, however, the limitation period is tolled during the pendency of the PCR proceedings so long as they are properly filed. *See* 28 U.S.C. § 2244(d)(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.").

As mentioned in the Background of this Opinion, Petitioner had already initiated his PCR action in Umatilla County (by signing his PCR Petition) prior to the effective date of his direct appellate judgment. Consequently, zero days elapsed between the conclusion of his direct appeal and the initiation of his PCR proceedings.

Respondent argues that although Petitioner properly filed his initial-level PCR action, the AEDPA's statute of limitations began to run when the PCR court issued its non-appealable judgment on February 21, 2017. As a result, the one-year statute of limitations ran unabated for 469 days until Petitioner signed his original, *pro se* Petition for Writ of Habeas Corpus on June 5, 2018. Petitioner counters that his motion to determine jurisdiction was properly filed in the Oregon Court of Appeals, that it was entirely proper for him to seek appellate review of the PCR court's dismissal of his case, and that his case is timely because statutory tolling necessarily continued until October 10, 2018 when his PCR Appellate Judgment became effective after the Oregon Supreme Court denied review. Respondent's Exhibit 125.

The Ninth Circuit addressed a very similar question in *Ramirez v. Yates*, 571 F.3d 993 (9th Cir. 2009). The petitioner in *Ramirez* filed a coram nobis petition in California state court seeking collateral relief from a criminal judgment. The coram nobis petition was a proper filing such that it tolled the

AEDPA's statute of limitations under 28 U.S.C. 2244(d)(2). When Mr. Ramirez did not obtain the desired relief, he sought review in the California Court of Appeal. However, the denial of coram nobis relief was not appealable under California law, thus the Ninth Circuit concluded that "[b]ecause the denial of the writ was determined to be not appealable in this case, Ramirez's appeal was not properly filed and the pendency of the appeal did not toll the limitations period." *Id* at 999.

In this case, Petitioner properly filed his PCR Petition thereby tolling the AEDPA's one-year statute of limitations pursuant to 28 U.S.C. § 2244(d)(2). However, just as in *Ramirez*, the lower court's decision was not appealable under state law. In this respect, Petitioner's PCR appeals were not properly filed so as to invoke statutory tolling under § 2244(d)(2) during the pendency of those appeals. The fact that Petitioner filed a motion verifying the absence of appellate jurisdiction in the Oregon Court of Appeals does not affect this analysis. Where § 2244(d)(2) tolling extends only to the time Petitioner's initial-level PCR proceeding was pending, it is evident that he failed to file this federal habeas corpus challenge.

II. Equitable Tolling

In the alternative, Petitioner asks the Court to equitably toll the statute of limitations on the basis that his appointed PCR attorney had a conflict of interest with him and rendered ineffective assistance of counsel. Specifically, he faults counsel for filing an affidavit with the PCR court stating that

Petitioner's claims lacked merit, and for making similar representations during the PCR hearing.

Equitable tolling is available to toll the one-year statute of limitations applicable to 28 U.S.C. § 2254 habeas corpus cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). A litigant seeking to invoke equitable tolling must establish: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance prevented him from timely filing his petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). A petitioner who fails to file a timely petition due to his own lack of diligence is not entitled to equitable tolling. *Tillema v. Long*, 253 F.3d 494, 504 (9th Cir. 2001). Petitioner bears the burden of showing that this "extraordinary exclusion" should apply to him. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002)..

Oregon law required counsel to advise the PCR court if he felt that the PCR Petition did not, and could not, state a valid claim. ORS 138.590(5). Counsel's adherence to this statute does not justify equitable tolling. Moreover, even though counsel advised the PCR court that Petitioner could not state a meritorious claim, this representation did not prevent Petitioner from timely filing for federal habeas corpus relief; he still had one year in which to file the current action. However, instead of proceeding to file the current action, he attempted to establish appellate jurisdiction where there was none, sought reconsideration of the decision advising him that there was no jurisdiction, and proceeded to petition the Oregon Supreme Court

for review after having twice learned that the PCR court's decision was not appealable.

While the procedural posture Petitioner faces is unfortunate, he cannot demonstrate that he diligently pursued his federal habeas corpus remedy and was only unable to timely file this action due to extraordinary circumstances. Equitable tolling is therefore not appropriate.

III. Actual Innocence and Evidentiary Hearing

Finally, Petitioner asks the Court to excuse his untimely filing on the basis that he is actually innocent of the offenses for which he was indicted and convicted. A petitioner who fails to comply with the AEDPA's one-year statute of limitations may overcome the default if he is able to show that he is actually innocent of his underlying criminal conduct. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). In order to make a gateway showing of actual innocence, a petitioner must present "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial" which establishes that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995).

In this case, although Petitioner claims that he is actually innocent, he fails to identify any new evidence to support his conclusory allegation of innocence. Instead, he asks the Court to conduct an evidentiary hearing at which he can develop unspecified evidence of his innocence. Petitioner's bare claim of

innocence "has failed to show what . . . an evidentiary hearing might reveal of material import on his assertion of actual innocence." *Gandarela v. Johnson*, 286 F.3d 1080, 1087 (9th Cir. 2002). Accordingly, Petitioner's request for an evidentiary hearing is denied. Because he fails to demonstrate that no reasonable juror would have convicted him in light of newly presented evidence, he is unable to pass through the gateway of actual innocence to excuse his untimely filing.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#13) is denied. The Court allows a Certificate of Appealability limited to the issue of whether Petitioner is entitled to 28 U.S.C. § 2244(d)(2) tolling during the pendency of his PCR appeals.

IT IS SO ORDERED.

DATED this 12 day of March, 2020.

Marco Hernandez

Marco A. Hernandez
United States District Judge

FILED

APR 12 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO ALMANZA-GARCIA, Petitioner-Appellant, v. BRIDGETT AMSBERRY, Respondent-Appellee.	No. 20-35260 D.C. No. 2:18-cv-01704-HZ District of Oregon, Pendleton ORDER

Before: PAEZ and WATFORD, Circuit Judges, and TUNHEIM,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge Paez and Judge Watford vote to deny the petition for rehearing en banc, and Chief Judge Tunheim so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed March 17, 2021, is DENIED.

* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

FRANCISCO ALMANZA-GARCIA, Petitioner, v. JERI TAYLOR, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION, Defendant.	Case No. CV160560 COURT'S ORDER REGARDING SUFFICIENCY NOTICE & MOTION TO DISMISS - GRANTED

THIS MATTER comes to the court on January 17, 2017 for review and hearing on petitioner's post-conviction relief attorney's filing under ORS 138.590 and ORCP 21A(8) for failure to state a claim.[1] The court heard from counsel and petitioner, and taking judicial notice of the file and records of the case, took the matter under advisement.

For the reasons set forth herein, and the not inconsistent reasons set forth in the PCR counsel's affidavit and the defendant, the motion to dismiss is granted, petition dismissed, and the defendant to prepare the judgment.

APPLICATION OF LAW OF SUFFICIENCY NOTICE

If a post-conviction petitioner's attorney cannot identify a meritorious claim then ORS 138.590 specifically allows dismissal after hearing. ORS 138.590(5) states in part that "[i]f appointed counsel believes that the original petition cannot be construed to state a ground for relief, counsel shall, in lieu of moving to amend the petition, inform petitioner and notify the

circuit court of counsel's belief and the reasons therefore . . . ." Upon hearing the court may consider the affidavit of PCR counsel in considering the sufficiency of the claims. Combined with a motion to dismiss, the court considers the sufficiency under ORCP 21A(8).

ANALYSIS OF LAW OF FAILURE TO STATE A CLAIM

As a motion to dismiss under ORCP 21(8), the matter is brought requesting judgment on the pleadings. Under ORCP 21(8) a defendant may move the court to dismiss for "failure to state ultimate facts sufficient to constitute a claim." Furthermore, a motion to dismiss making for this reason "shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Under section (8) no "affidavits, declarations and other evidence" are required and the court relies on the pleadings. ORCP 21. As such, though petitioner has not proved the allegation of facts to be true, the court must assume their veracity for the purposes of deciding the ORCP 21 motion to dismiss. Doe v. Lake Oswego Sch. Dist., 353 Or. 321, 297 P.3d 1287 (Or., 2013), citing to See Juarez v. Windsor Rock Products, Inc., 341 Or. 160, 163, 144 P.3d 211 (2006) (on review of motion to dismiss, court assumes the truth of well-pleaded facts).

Application of Preclusion and Law of the Case Generally

"The doctrines of claim preclusion[2], issue preclusion[3], and law of the case have the shared purposes of preventing harassment by successive proceedings, preventing inconsistent adjudications, and promoting economy of resources in the adjudicative process. See D'Amico v. Ellinwood, 209 Or.App. 713, 717–18, 149 P.3d 277 (2006), rev. den.,342 Or. 473, 155 P.3d 51 (2007) (addressing purposes of issue preclusion and claim preclusion); State v. Metz, 162

Or.App. 448, 454, 986 P.2d 714 (1999), rev. den.,330 Or. 331, 6 P.3d 1101 (2000) (addressing foundation of law of the case doctrine). Those doctrines bind the parties to an action and those in privity with them. Bloomfield v. Weakland, 339 Or. 504, 511, 123 P.3d 275 (2005)." Or. Educ. Ass'n v. Or. Taxpayers United, 253 Or.App. 288, 291 P.3d 202, 210 (2012). "Issue preclusion applies "when the parties to a prior action subsequently, in a different action, again litigate issues actually litigated and determined in the prior action." D'Amico, 209 Or.App. at 718, 149 P.3d 277 (internal quotation marks and citations omitted). In contrast, the law of the case doctrine "precludes relitigation or reconsideration of a point of law decided at an earlier stage of the same case." Bloomfield v. Weakland, 224 Or.App. 433, 440, 199 P.3d 318 (2008), rev. den.,346 Or. 115, 205 P.3d 887 (2009). (Emphasis added.)" Or. Educ. Ass'n v. Or. Taxpayers United, 253 Or.App. 288, 291 P.3d 202, 210, 211 (2012). The issue preclusion branch of preclusion by former adjudication, formerly called collateral estoppel, precludes future litigation on a subject issue only if the issue was "actually litigated and determined" in a setting where "its determination was essential to" the final decision reached.(fn4) North Clackamas School Dist. v. White, 305 Or 48, 53, 750 P2d 485, modified 305 Or 468, 752 P2d 1210 (1988); Restatement (Second) of Judgments § 17(3) (1982); see also id. at § 27. "If a claim is litigated to final judgment, the decision on a particular issue or determinative fact is conclusive in a later or different action between the same parties if the determination was essential to the judgment." North Clackamas School Dist. v. White, supra, 305 Or at 53. Issue preclusion applies to an issue of either fact or law. Restatement (Second) of Judgments § 27 ("[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive"). Compare Heller v. Ebb Auto Co., 308 Or 1, 6, 774 P2d 1082 (1989) ("[w]ithout any reason to think that the referee was aware of that legal

issue, no decision on that issue can be implied from the denial of compensation") with § 27. In State v. Krueger, 170 Or. App. 12 (2000), the court discussed issue preclusion as a bar to future litigation between the same parties on an issue that was "'actually litigated and determined'" in a setting where its determination was essential to the final decision reached. Drews v. EBI Companies, 310 Or. 134, 139, 795 P.2d 531 (1990), quoting North Clackamas School District v. White, 305 Or. 48, 53, 750 P.2d 485, modified 305 Or. 468, 752 P.2d 1210 (1988).

The ""law of the case" is a concept that may arise in a number of different contexts "in which a ruling or decision has been made in a case and the same legal problem arises a second time in the same case." Vestal, 1967 Utah L Rev. at 4." Kennedy v. Wheeler, 356 Or 518, 341 P.3d 728 (2014). This court has described the "law of the case" doctrine as precluding relitigation of an appellate court holding after remand and on subsequent appeal:

"It is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review."" Additionally, Jury Instructions are law of the case. Kennedy v. Wheeler, 356 Or 518, 341 P.3d 728, 732-734 (2014). State v. Pratt, 316 Or. 561, 569, 853 P.2d 827 (1993) (quoting Simmons v. Wash. F.N. Ins. Co., 140 Or. 164, 166, 13 P.2d 366 (1932)). The policies underlying that doctrine "essentially parallel those served by the doctrines of stare decisis and res judicata * * *, i.e., consistency of judicial decision, putting an end to litigation of matters once determined, and preserving the court's prestige." Koch v. So. Pac. Transp. Co., 274 Or. 499, 511–12, 547 P.2d 589 (1976) (citing *Allan D. Vestal, Law of the Case: Single–Suit Preclusion*, 1967 Utah L Rev. 1 (1967)).

APPLICATION OF COMPARITIVE LAW OF CHURCH V. GLADDEN

This court reviews the sufficiency submission by PCR counsel similarly to matters in *Church v. Gladden*, when appropriate. Almost invariably, any sufficiency notice will be objected to by a petitioner in some form, writing via *Church* notice or presentation in court. In particular, with counsel finding no meritorious claim, the court seeks to see if (1) there is a claim and (2) whether petitioner identifies lawful claims in the nature of that allowed under *Church*. Therein, if PCR counsel fails to assert a ground for relief, the petitioner must bring that fact before the court to avoid the effect of ORS 138.550(3)[4]. Johnson v. Premo, 355 Or 866 (2014); see, Church v. Gladden, 244 Or 308 (1966) (Petitioner's filing herein referred to as a *Church* notice). Upon a sufficiency notice by PCR counsel, and the notification to petitioner, a petitioner would clearly have the opportunity to file their *Church* notice, and essentially, if they have not are waiving that opportunity prior to dismissal, if granted.

The court looks to see if Petitioner provides legal sufficiency for additional asserted claims to be legally legitimate for inclusion, and in the alternative considers whether counsel should be replaced. Johnson (2014); Bailey v. Nooth, 247 Or.App. 240 (2011); ORS 138.590.

The court also considers whether Petitioner is seeking to be self-represented, or wants a new attorney if the claims are not included.[5]

In this the court examines the court file and the amended or supplemental matters submitted by the petitioner on the provided *Church v. Gladden* notice, or upon the similarly argued matters presented by petitioner in the sufficiency hearing.

Typically, the court sees most *Church* notices containing arguments on issues not brought up at trial. A post-conviction court can consider arguments not made at trial where counsel was

incompetent or guilty of bad faith, where the right subsequently sought to be asserted was not generally recognized to be in existence at the time of trial; where counsel was excusably unaware of facts which would have disclosed a basis for the assertion of the right; and where duress or coercion prevented assertion of the right. Palmer v. State of Oregon, 318 Or 352, 354, 867 P2d 1368 (1994).

In the analysis this court believes that with the claims that petitioner makes, that the court must " . . . assume the truth of well-pleaded factual allegations in plaintiff's complaint. Doe v. Lake Oswego School District, 353 Or. 321, 323, 297 P.3d 1287 (2013)." Cannon v. Or. Dep't of Justice, 261 Or.App. 680, 322 P.3d 601 (2014).

To the extent that the *Church* hearing is evidentiary, the court may make findings of credibility. See, Gable v. State, 353 Or. 750, 305 P.3d 85 (2013). The pleading of inconsistent facts not plead in the alternative or claims contradicted by evidence submitted in support of the claim by petitioner does not fit within the requirements of ORCP 16 and 17.

A petitioner's *Church* notice and the claim presented must still fit within the scope of post-conviction relief.

APPLICATION OF POST-CONVICTION RELIEF LAW GENERALLY

Oregon courts apply a two-part test to determine whether a petitioner's right to effective assistance of counsel was violated: Generally, for a claim in post-conviction relief the court has some general rules for the possibility of relief. "'First, we must determine whether petitioner demonstrated by a preponderance of the evidence that [his lawyer] [237 Or.App. 283] failed to exercise reasonable professional skill and judgment. Second, if we conclude that petitioner met that burden, we further must determine whether he proved that counsel's failure had a tendency to affect the result of his trial.' " Burdge v. Palmateer, 338 Or. 490, 492, 112 P.3d 320 (2005)

(quoting Lichau v. Baldwin, 333 Or. 350, 359, 39 P.3d 851 (2002)). That is, to be entitled to relief on a claim of denial of the right to effective assistance of counsel, a post-conviction petitioner must demonstrate by a preponderance of the evidence that (1) counsel performed deficiently and (2) counsel's deficient performance prejudiced the petitioner, that is, that it had a tendency to affect the result of the trial. "Whether a petitioner has demonstrated prejudice is a question of law that, in turn, may depend on the post-conviction court's findings of fact." Wyatt v. Czerniak, 223 Or.App. 307, 311, 195 P.3d 912 (2008).[6]

As noted, see 237 Or.App. at 278 n. 1, 239 P.3d at 1025 n. 1, the federal standard has been stated similarly. To prevail on a Sixth Amendment claim of ineffectiveness of counsel, a petitioner must demonstrate that his trial counsel's performance "fell below an objective standard of reasonableness * * * under prevailing professional norms" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). That is, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. 2052." Montez v. Czerniak, 237 Or App 276, 283-283, 239 P.3d 1023 (2010).

APPLICATION OF THE ISSUE OF SUFFICIENCY IN RELATIONSHIP TO FAILURE TO STATE A CLAIM UNDER ORCP 21A(8)

The inclusion of a claim into the formal complaint to be heard merely allows a claim to go forth and does not certify it for inclusion at trial. It is still subject to the processes under the Oregon Rules of Civil Procedure, such as motions to dismiss or motion for summary judgment.

Thus, the court considers whether the petitioner has brought a cognizant claim for relief, a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition, under ORCP 16 and 18, which while "liberally construed with a view of substantial justice" under ORCP 12, which is based on the petitioners "reasonable knowledge, information and belief", are supported by the evidence or if they are not then so state or that further discovery will support the claims and how, representing are claims that "are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law and are " not "being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" under ORCP 17. A claim not able to be so certified causes the petitioner or a petitioner's attorney to be subject to sanctions.

If a claim meets the substantial requirements under ORCP then the court must consider why the claim is brought now under *Palmer* and then whether the claim asserts a claim of Trial Defense Counsels' ineffectiveness and whether there is a tendency towards prejudice then to the petitioner as generally outlined in *Montez*. Overall then the court must consider multiple legal issues to determine if the claim asserted should be included in the formal petition. First, the claim must be capable of review under ORCP, and for that then when liberally construed, does the claim sufficiently provide a cognizant, plain and concise statement certifiable under ORCP.

Secondly, if the issues were not raised at trial then is the claim brought for a reason allowed under *Palmer?* Third, within the four corners of the claim, does the claim sufficiently allege ineffective assistance of counsel under the Oregon and or US Constitution given a presumption of truth of the well plead facts asserted subject however to findings of inconsistent facts provided by petitioner self-refuting the claim, and findings of credibility by the court where evidence is provided in support of the claim and there is basis for the findings? Fourth, within a claim meeting those prerequisites, does the claim present a reasonable claim of a tendency for prejudice to the petitioner for the results at trial, or with a guilty plea affect the knowing, voluntary and intelligent basis for the plea? If such are shown then a claim should go forward to the realm of due process in the petition.

In cases of sufficiency notices, PCR counsel has identified no legal way to submit a meritorious claim with the amendment of the petition.

APPLICATION TO PETITONER'S CLAIMS

A restatement of the causes for insufficiency stated in the affidavit and motion to dismiss are unnecessarily redundant and incorporated by the court as the basis for decision herein.

Petitioner's claims and any supplemental matters or reasons to make the claims viable fail to present a claim for relief. The petitioner's claim(s) is/are not a plain and concise statement presenting a cognizant and understandable claim(s), are not supported by assertions and matters petitioner has provided, is not legitimately certifiable under ORCP 17, and there is no basis under *Palmer* to present the claim. Petitioner's claim does not present a cognizable claim for post-conviction relief, does not present a claim under the Oregon or US Constitution, and does not provide any basis for a tendency for prejudice.

Thus, petitioner has not shown that the claims are legally legitimate for inclusion, nor are they able to be amended to be made legal claims[7]. The court declines to remove/replace counsel, who is demonstrating the skills and experience commensurate with the nature of the case, and has proceeded ethically in submitting the sufficiency notice/affidavit. Johnson (2014); Bailey v. Nooth, 247 Or.App. 240 (2011)(requisite skills); ORS 138.590(authorizing sufficiency affidavit). Moreover, such claims if pursued could then be considered upon analysis as to whether they are without merit and subject to being dismissed under ORS 138.525 or frivolous under ORS 138.527, which the court finds they otherwise would be, and would be subject to motions to dismiss under ORCP 21 or motions for summary judgment.

Dismissal is granted as requested and the state to prepare the judgment with any necessary findings and conclusions. Defendant, ex rel State of Oregon, is the prevailing party.

Signed: 2/1/2017 08:37 AM

SO ORDERED

Daniel J. Hill, Circuit Court Judge

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[1] Typically, these matters arise either by way of the PCR attorney's notice of insufficiency, with a motion to dismiss, or a notice of insufficiency by the PCR attorney and a motion to dismiss by the defendant. The review and outcome is the same either way.

[2] "The doctrine of claim preclusion, also referred to as res judicata, prevents a plaintiff from raising a claim that was or could have been raised in a prior suit. New York law has adopted a "transactional approach" to claim preclusion. See, e.g., Gargiul v. Tompkins, 790 F.2d 265, 269 (2d Cir.1986) (citing Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 379 N.E.2d 172 (1978)). "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transaction are barred. . . ." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158 (1981).

Under Rule 8 of the Federal Rules of Civil Procedure, which governs general pleading rules in federal court, "[p]reclusion . . . is not a jurisdictional matter." Exxon Mobil, 544 U.S. at 293, 125 S.Ct. 1517 (citing Fed.R.Civ.P. 8(c), which lists claim preclusion as an affirmative defense). As such, the defense of claim and issue preclusion may be waived by the parties, see Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 526 (2d Cir.2004) ("Generally a failure to plead an affirmative defense results in a waiver." (internal citations and quotation marks omitted)); Scherer v. Equitable Life Assurance Soc'y, 347 F.3d 394, 398 (2d Cir. 2003) ("The preclusion doctrines . . . are waiveable affirmative defenses."); Curry v. City of Syracuse, 316 F.3d 324, 330-31 (2d Cir.2003) ("[C]ollateral estoppel, like res judicata, is an affirmative defense. . . . [I]t normally must be pled in a timely manner or it may be

waived."), and we are under no obligation to raise the issue nostra sponte, Scherer, 347 F.3d at 398 n. 4 (noting that although a court is "free to raise that defense sua sponte, even if the parties have seemingly waived it," there is "no obligation on the part of a court to act sua sponte and interpose the defense if it has not been raised"). Indeed, our court has recognized that sua sponte application of claim preclusion is "not always desirable." Id." McKithen v. Brown, 481 F.3d 89, 104 (2nd Cir., 2007).

"To show issue preclusion, appellees must prove four elements: 1) The issue sought to be precluded must be the same as that involved in the prior litigation; 2) the determination of the issue must have been actually litigated; 3) the determination of the issue must have been essential to the final judgment; and 4) the party against whom issue preclusion is invoked must have been fully represented in the prior action. Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th Cir.1994)." Gentry v. Duckworth, 65 F.3d 555, 561 (C.A.7 (Ind.), 1995).

[3] "Issue preclusion bars litigation of an issue already "litigated and determined" in a context where "its determination was essential to" the final decision. Drews v. EBI Companies, 310 Or. 134, 137, 795 P.2d 531 (1990). Issue preclusion applies only where the following five requirements are met:

"1. The issue in the two proceedings is identical.

"2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceedings.

"3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.

"4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

"5. The prior proceeding was the type of proceeding to which this court will give preclusive effect." Nelson v. Emerald People's Utility Dist., 318 Or. 99, 104, 862 P.2d 1293 (1993) (citations omitted); see also State Farm Fire and Cas. Co. v. Reuter, 299 Or. 155, 158-59, 700 P.2d 236 (1985)." Stevens v. Horton, 984 P.2d 868, 161 Or App 454 (1999).

[4] . . . . [A]ny grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably been raised in the original or amended petition." ORS 138.550(3). Petitioner asserts his issues that he/she wishes to pursue that counsel does not see as legally viable for the court to examine given the evidence presented by the petitioner, and if not shown as viable may not then be pursued by counsel under a Church v. Gladden order. The court sees preclusive effect to the denial of the inclusion of the asserted claims under ORS 138.550(4).

[5] Self-representation would not insure petitioner that his asserted claims, those determined to not have legal validity here, would be tried since they do not carry lawful merit for inclusion as a claim. Such claims if pursued could then be considered upon analysis as to whether they are without merit and subject to being dismissed under ORS 138.525 or frivolous under ORS 138.527.

[6] In context of a guilty plea, ""[u]nder Oregon law, a petitioner claiming inadequate assistance of counsel must prove that his or her trial counsel failed to exercise reasonable professional skill and judgment and that, because of that failure, the petitioner suffered prejudice." Pereida-Alba, 356 Or at 661-62. He also acknowledges that, to establish prejudice, a post-conviction petitioner generally must show that the inadequacy of his trial counsel "had a tendency to affect the result of the petitioner's prosecution." Real v. Nooth, 268 Or App 747, 752, 344 P3d 33, rev den, 357 Or 550 (2015). Thus, for example, petitioners who claim that their trial lawyers did not adequately advise them of the consequences of pleading guilty must "prove by a preponderance of the evidence that they would not have pleaded guilty had they received adequate assistance of counsel." Cox v. Howton, 268 Or App 840, 842, 343 P3d 677 (2015). Essentially, the petitioner must establish that the inadequate performance of counsel tended to affect the outcome of the criminal proceeding." Lambert v. Premo, 274 Or App 380, 385 (2015). See also, Green v. Franke, 357 Or 301 (2015), fn13. "[A] post-conviction petitioner could claim that she had received ineffective legal assistance of trial counsel in deciding whether to accept a guilty plea. To prevail on that claim, the petitioner would

have to prove (1) that counsel had failed to provide her with legal assistance that was constitutionally adequate to enable her to make an informed decision about whether to plead guilty and (2) that she was prejudiced by counsel's deficient representation. In such a case, prejudice can be shown by proving that the petitioner would not have pleaded guilty and, instead, would have proceeded to trial. See Moen v. Peterson, 312 Or. 503, 513, 824 P.2d 404 (1991)." Datt v. Hill, 188 P.3d 384, 220 Or. App. 657, 662 (2008). Moreover, even if for the guilty plea trial defense counsel had provided petitioner the additional information alleged as not investigated, the petitioner must still provide support that such would have changed the outcome, the decision to enter into the guilty plea. See, Datt v. Hill, 188 P.3d 384, 220 Or. App. 657 (2008).

[7] ORS 138.550(4).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRANCISCO ALMANZA-GARCIA,
Petitioner-Appellant,

v.

JERI TAYLOR, Superintendent, Eastern Oregon Correctional Institution,
Defendant-Respondent.

Umatilla County Circuit Court No. CV160560

Court of Appeals No. A164880

ORDER DISMISSING APPEAL

Petitioner appeals the trial court's judgment dismissing his petition for post-conviction relief, and moves for a determination of whether the judgment is not appealable under ORS 138.525(3) because dismissal was based on the trial court's determination that petitioner's petition failed to state a claim on which post-conviction relief may be granted. The motion for determination of appealability is granted.

Petitioner characterizes the trial court's order as "a hodgepodge of legal mumbo jumbo with citations to cases and legal principles that have nothing to do with the present case." The court concurs with that characterization. The order appears to be a form order that the trial court has employed in other post-conviction relief cases, including but not limited to *Breece v. Amsberry*, 279 Or App 648, 650-51, 381 P3d 1086 (2016), *Corona v. Amsberry*, 284 Or App 414, 417, 393 P3d 248 (2017), *Knight v. Myrick*, Court of Appeals No. A162804, and *Etheridge v. Popoff*, Court of Appeals No. A164345.

Nevertheless, as respondent asserts, the trial court's judgment ultimately is based on the trial court's determination that the petition did not allege a claim for post-conviction relief, as reflected in the trial court's order granting respondent's motion to dismiss, which, in turn, was based on a failure to allege a claim for post-conviction relief. The court concludes that the judgment is not appealable under ORS 138.525(3) and, on that ground, dismisses the appeal.

James W. Nass
JAMES W. NASS
APPELLATE COMMISSIONER
3/28/2018 7:47 AM

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS
Prevailing party: Respondent Costs: Allowed, payable by petitioner

c: Jason L Weber
Ryan P Kahn ej

ORDER DISMISSING APPEAL

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
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Case No. 2:18-cv-01704-HZ

Additional State Opinions On A Court's Ability To Determine Its Own Jurisdiction

1. *Jefferson Cnty. Comm'n v. Edwards*, 32 So. 3d 572, 583 (Ala. 2009) ("[T]he authority is clear to the effect that every court of general jurisdiction has judicial power to determine the question of its own jurisdiction.") (internal quotations omitted).

2. *Connery v. Gieske*, 323 Conn. 377, 388, 147 A.3d 94, 100 (2016) ("[I]t is axiomatic that courts, including courts of limited jurisdiction, have jurisdiction to determine [their] own jurisdiction once [it] has been put in issue.") (internal quotations omitted).

3. *Rodriguez v. State*, 239 So. 3d 147, 150 (Fla. Dist. Ct. App. 2018) ("We have jurisdiction to both question our own jurisdiction and to determine that question.")

4. *State by Off. of Consumer Prot. v. Joshua*, 141 Haw. 91, 95, 405 P.3d 527, 531 (2017) ("A court always has jurisdiction to determine whether it has jurisdiction over a particular case.") (internal citations omitted).

5. *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011) ("Courts have the power to inquire into their own jurisdiction. Courts are obligated to ensure their own subject matter jurisdiction and must raise the issue sua sponte if necessary.").

6. *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729, 730 (Iowa 1985) ("Every court has inherent power to determine whether it has jurisdiction of the controversy before it.").

7. *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 980, 453 P.3d 304, 308 (2019) ("Appellate courts exercise unlimited review over jurisdictional issues and have a duty to question jurisdiction on their own initiative.").

8. *In re Adoption of Anisha*, 89 Mass. App. Ct. 822, 828 n.6, 55 N.E.3d 986, 992 n.6 (2016) ("We also note that courts in the Commonwealth have both the power and the obligation to resolve questions of subject matter jurisdiction whenever they become apparent.") (internal quotations omitted).

9. *Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss.*, 269 So. 3d 1235, 1239 (Miss. Ct. App. 2018) ("[E]very court has jurisdiction to determine its own jurisdiction.").

10. *Al-Hawarey v. Al-Hawarey*, 460 S.W.3d 40, 41 (Mo. Ct. App. 2015) ("In every appeal, this Court must determine whether we have jurisdiction.").

11. *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) ("[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action [sua sponte] when subject matter jurisdiction is lacking.").

12. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 2008-Ohio-3917, ¶ 11, 119 Ohio St. 3d 301, 304, 893 N.E.2d 824, 827 ("Trial courts determine their own jurisdiction.").

13. *State v. Steffensen*, 2020 S.D. 36, 945 N.W.2d 919, 920 n. 3 ("A court always has jurisdiction to determine its own jurisdiction") (internal quotations omitted).

14. *New v. Dumitrache*, 604 S.W.3d 1, 20 (Tenn. 2020) ("We begin with an obvious proposition— a court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance.") (internal quotations omitted).

15. *The Houston Aeronautical Heritage Soc'y Inc. v. Graves*, No. 01–12–00443–CV, 2013 WL 6506301 *3 (Tex. App. 2013) ("This court has the jurisdiction to determine its own jurisdiction").

16. *Amundsen v. Univ. of Utah*, 2019 UT 49, ¶ 26, 448 P.3d 1224, 1231 ("A district court has jurisdiction to determine its own jurisdiction.").

17. *Matter of Est. of Reugh*, 10 Wash. App. 2d 20, 43, 447 P.3d 544, 558, review denied, 194 Wash. 2d 1018, 455 P.3d 128 (2020) ("Nevertheless, a court always has jurisdiction to determine whether it has jurisdiction over a particular case.").

28 U.S.C. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and

the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(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. § 2254

§ 2254. State custody; remedies in Federal courts

a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.