

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS SENA,
Petitioner

vs.

STEVEN KENNEWAY, SUPERINTENDENT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari to review a decision by the United States Court of Appeals for the First Circuit in conflict with this Court's relevant precedents concerning good cause under *Rhines v. Weber*, 544 U.S. 269 (2005) and to provide guidance on that important federal issue?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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

The petitioner, Dennis Sena, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINION BELOW

The opinion of the panel of the United States Court of Appeals for the First Circuit, dated May 12, 2021, is appended hereto as Appendix A and is reported at *Sena v. Kenneway*, 997 F.3d 378 (1st Cir. 2021).

JURISDICTION

The Court of Appeals issued judgment on May 12, 2021. No petition for rehearing was filed. This petition is being filed within one hundred and fifty days of the First Circuit's opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2244(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

(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;

STATEMENT OF THE CASE

State Proceedings¹

After a mistrial because of a deadlocked jury, petitioner Dennis Sena was convicted by a jury after a second trial of assault and battery with a dangerous weapon causing serious bodily injury, and assault and battery with a dangerous weapon. The second trial took place a few days after the mistrial. (Add. 11, 14)

Evidence at trial established that Zachary Fritz-Kill sustained knife wounds during a brawl involving at least five people. Fritz-Kill testified that Mr. Sena inflicted the wounds. Evidence at trial also established that Fritz-Kill suffered from bi-polar disorder and was at the time being treated for the disorder with medications. He testified that he could not remember whether or not he had taken all of his medications for the disorder, but he had taken one of them that night. That night before the fight he also drank four beers, had two shots, and ingested both

¹ The statement of the case pertaining to state proceedings is taken from the magistrate judge's findings (Addendum to Brief for Petitioner/Appellant in the United States Court of Appeals for the First Circuit, "Add.", 11, 13-16), which were adopted by the district court. (Add. 7).

cocaine and marijuana. Defense counsel repeatedly moved to permit an expert to testify concerning the effects of all of the substances Fritz-Kill had ingested on his mental state and his ability to perceive and recall events. The trial judge denied the motion to permit the expert to testify as untimely and irrelevant. (Add. 13).

On appeal, though appellate counsel raised the expert issue and argued relevance, she failed to address the timeliness issue. The Massachusetts Appeals Court accordingly found the expert issue waived. *Commonwealth v. Senna*², 92 Mass.App.Ct. 1111, 94 N.E.3d 439 (Table), No. 16-P-1205, 2017 WL 4856593 at *2. (Add. 14; Add. 23).

After the appeal, Sena aggressively pursued avenues to present his claim of ineffective assistance of appellate counsel. After the Massachusetts Supreme Judicial Court denied review on December 21, 2017,³ Sena repeatedly contacted Massachusetts's state public defender agency, the Committee for Public Counsel Services ("CPCS") to obtain counsel to file a Rule 30 Motion for a New Trial in Massachusetts state court.⁴ CPCS initially declined to represent him, based on appellate counsel's representation that she had pursued the most meritorious claims. In letters to CPCS dated May 17, 2018 and June 15, 2018, appellate defense counsel stated that she raised the issue of the trial court's denial of the defense's request to admit expert testimony. However, she failed to mention in either of those two letters that she had not addressed the timeliness issue on which the trial judge, in the alternative, based her decision refusing to allow the testimony. (Add. 15).

² Because of inconsistencies in the record concerning the spelling of Mr. Sena's name, the Massachusetts Appeals Court adopted the spelling "Senna." See *Senna*, 2017 WL 4856593 at *1, n.1.

³ *Commonwealth v. Senna*, 478 Mass. 1107, 94 N.E.3d 853 (2017)(Table). (Add. 24)

⁴ Massachusetts state law provides for appointment of post-conviction counsel under MGL c. 211D sec. 6(b), authorizing CPCS to appoint private counsel for indigent post-conviction work.

Upon learning of CPCS's decision not to appoint counsel to file the motion for a new trial, Sena filed a complaint with the Massachusetts Board of Bar Overseers on July 28, 2018 relating to appellate counsel's representation. He then requested that CPCS reconsider its decision, which it did by appointing post-conviction counsel on February 6, 2019 to review his state case. At this point, new counsel would not have had enough time to review the records of both state trials and file a federal habeas petition within the March 21, 2019 expiration of the one year period for filing. (Add. 15).

CPCS counsel determined that there were meritorious issues to raise in a Rule 30 Motion for New Trial, including ineffective assistance of appellate counsel by failing to address the trial judge's ruling that the defense request to admit expert testimony was untimely. (Add. 15-16).

Federal Proceedings

Mr. Sena filed his federal habeas corpus petition two days after the appointment of state post-conviction counsel, on February 8, 2019. On the same day, he filed a Motion for Stay and Abeyance and a Memorandum in Support thereof. Counsel was appointed, and Sena moved for a stay and abeyance in order to exhaust the claim that he received ineffective assistance of appellate counsel, where appellate counsel raised an issue of the denial of expert testimony, but then waived that issue by failing to address one of the two grounds given by the trial court for the denial.

The magistrate judge issued a Report and Recommendation ("R&R") on Sena's motion for stay and abeyance and respondent's motion to dismiss the habeas petition. (Add. 11-21). The magistrate found that Mr. Sena had good cause for not exhausting his claim of ineffective assistance of appellate counsel, that the claim was potentially meritorious, and that Mr. Sena did not attempt to delay the resolution of the ineffective assistance of counsel issue for tactical or any

other reason. (Add. 17-20). The R&R recommended that the district court allow the motion for stay and abeyance with respect to the ineffective assistance of appellate counsel claim. (Add. 20).

The district court issued a Memorandum and Order on March 24, 2020 that adopted the facts and procedural history set out in the R&R, rejected the R&R's determination that petitioner had established "good cause" for the failure to exhaust, otherwise accepted the R&R's findings, and dismissed the petition. (Add. 7). The R&R findings included the finding that the claim was potentially meritorious, and that Mr. Sena did not attempt to delay the resolution of the ineffective assistance of counsel issue for tactical or any other reason. In its rejection of the magistrate's finding of good cause, the court said that proceeding *pro se* does not excuse a petitioner from the exhaustion requirement, and that Mr. Sena could have pursued state court collateral relief while awaiting appointment of counsel. (Add. 5). The district court granted a certificate of appealability, noting it disagreed with the magistrate for reasons it previously stated, "including that proceeding *pro se*, does not, alone, excuse a habeas petitioner's failure to exhaust." (Add. 10).

The First Circuit affirmed. Citing *Rhines*, it stated that review of the district court's good cause determination was for abuse of discretion. *Sena v. Kenneway*, 997 F.3d 378, 385 (1st Cir. 2021). While characterizing the question as "close," it said that the district court was within its discretion to reject the magistrate's finding of good cause on these facts. It noted that the district court cited a seven-month period in which, while Mr. Sena was awaiting response from CPCS after having apprised them of the misleading statements by his former appellate counsel, he could have himself filed a Rule 30 motion *pro se*. The Court of Appeals commented that "'diligence or lack of diligence' often serves as the 'dominant criterion' in a good cause

analysis" *Id.*, at 388-89. It rejected petitioner's argument that the delay did not indicate a lack of diligence where he immediately sought postconviction counsel to file a Rule 30 motion under state law and CPCS delayed its response due to the external circumstance of what petitioner knew to be misleading statements made by his former appellate lawyer. It stated that petitioner was free to file a Rule 30 Motion himself, and had no constitutional right to postconviction counsel. *Id.*, at 387.

While it noted that *pro se* status should be taken into account in assessing whether there was good cause, the Court of Appeals said that the district court supportably found that Mr. Sena was capable of representing himself after he received a rejection of his request for counsel, and that he was informed by CPCS that he could proceed without counsel. *Id.*, at 388. Citing Mr. Sena's capacity to articulate his ineffective assistance of counsel claim, it similarly rejected the argument that *pro se* status is a particularly salient factor where the issue sought to be exhausted is an ineffective assistance of counsel issue. *Id.*⁵

The Court of Appeals rejected the idea that *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), in stating that reasonable confusion about timeliness could provide grounds for good cause, gave guidance about how the "good cause" standard should be applied in this case.. *Sena*, 997 F.3d at 388. It also rejected counting as a factor the risk of proceeding *pro se* first and waiving potential claims when there was reason to believe that counsel would be appointed. It noted that a Rule 30 Motion may be amended, that *pro se* prisoners must navigate the federal

⁵ Mr. Sena had argued that an ineffective assistance of appellate counsel issue, unlike other issues, could not have been litigated by counsel previously in a petitioner's case and so a petitioner would not be aided by earlier counselled litigation of the issue. He further argued that it is an issue that requires a relative assessment of which set of non-frivolous issues are maximally likely to succeed on appeal, so the assessment of whether there is a claim especially calls for the experience of a lawyer.

habeas machinery even if some have more challenging claims than others, and that counting a risk of forfeiting claims as a factor would apply to any *pro se* litigant not represented by counsel. *Id.*, at 388-89.

The court found that weighing the balance of all of the good cause factors, it was susceptible of two rational (though opposite) conclusions as to whether good cause was shown. It concluded that it was not at liberty to reverse the district court in light of evidence of Mr. Sena's competence, the lack of impediment to his proceeding *pro se*, his awareness that a Rule 30 motion had to be filed, and the length of time in which he did not do so. *Sena*, 997 F.3d at 389.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to review a decision by the United States Court of Appeals for the First Circuit in conflict with this Court's relevant precedents concerning good cause under *Rhines v. Weber*, 544 U.S. 269 (2005) and to provide guidance on that important federal issue.

In affirming the district court's finding that petitioner Dennis Sena was not able to establish good cause under *Rhines v. Weber*, 544 U.S. 269 (2005), thereby precluding federal review of his unexhausted claim of ineffective assistance of appellate counsel, the United States Court of Appeals for the First Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

This Court recognized the importance of this issue in *Rhines*, which introduced good cause as part of a standard to apply in order to address "the gravity of the problem" posed by the interaction of the statute of limitations on filing a habeas petition with the requirement that all claims in the habeas petition be exhausted. *Id.* at 275. As the Court said, petitioners who come to court with mixed petitions run the risk of forever losing their opportunity for any federal review

of their unexhausted claims. *Id.* Here, the Court of Appeals decision was inconsistent with the guidance on good cause provided by this Court in *Rhines*, and later in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). *Rhines* and *Pace* indicate that answering the question of whether a petitioner has shown good cause for a failure to exhaust earlier focuses on the reasonableness of a petitioner’s conduct given the circumstances of his case. Review of the First Circuit’s decision would provide an opportunity to give further guidance to the lower courts on this important issue, where this Court has so far only addressed the issue twice, in *Rhines* and *Pace*.

a. Good Cause and the Preservation of Habeas Review

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a 1-year statute of limitations on the filing of a habeas petition by a state prisoner in federal court claiming that he is in custody in violation of the United States Constitution. 28 U.S.C. § 2244(d). AEDPA also requires that a state prisoner exhaust all remedies available in the courts of the state before an application for a writ of habeas corpus may be granted. 28 U.S.C. § 2254(b)(1)(A). The statute tolls the one-year limitations period while a properly filed application for state post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d)(2).

Under AEDPA, a district court retains authority to issue a stay when a petitioner has filed a petition in federal court containing both exhausted and unexhausted claims. This authority permits exhaustion of state remedies in the state court and a return to federal court for review of both exhausted and previously unexhausted claims without running afoul of the limitations period. *Rhines v. Weber*, 544 U.S. 269, 276-77 (2005). This authority is crucial for the preservation of habeas review because, in light of the interaction between the statute of limitations and the exhaustion requirement, petitioners “run the risk of forever losing their opportunity for any federal review of their unexhausted claims.” *Id.* at 275.

Rhines developed criteria for district courts considering whether to issue a stay in order to enable petitioners who had filed “mixed” petitions – i.e., petitions containing both exhausted and unexhausted claims – to return to state court to exhaust unexhausted claims and to return to federal court thereafter. The criteria were developed with the purposes of AEDPA in mind.

Rhines, 544 U.S. at 276.

The purposes of AEDPA are to “further the principles of comity, finality, and federalism.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner’s claims. *Rhines*, 544 U.S. at 273. “The AEDPA statute of limitations promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.” *Day v. McDonough*, 547 U.S. 198, 205-06 (2006).

Considering AEDPA’s purposes, *Rhines* held that, when presented with a § 2254 petition containing exhausted and unexhausted claims, a district court should grant a stay and abeyance where (1) there was good cause for the petitioner’s failure to exhaust his claims first in state court; (2) the unexhausted claims are not plainly meritless; and (3) there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Without providing a definition or detailed guidance, this Court has made statements to guide how a district court should consider whether “good cause” has been met. In a concurring opinion in *Rhines*, Justice Stevens, joined by Justices Ginsburg and Breyer, wrote that he joined the opinion on the understanding that “good cause” for failure to exhaust state remedies before filing a federal petition “is not intended to impose the sort of strict and inflexible requirement that would ‘trap the unwary *pro se* prisoner.’” *Rhines*, 544 U.S. at 279, (Stevens, J., concurring)

quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982) and *Slack v. McDaniel*, 529 U.S. 473, 487 (2000).

After *Rhines*, the Court discussed the stay and abeyance criteria one more time, in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). The issue in *Pace* was whether, to qualify for tolling the statute of limitations under § 2244(d)(2) while a state prisoner was attempting to exhaust state remedies, a state prisoner had “properly filed” an application for state post-conviction relief. The application had been ultimately deemed untimely under a recently enacted state post-conviction statute that provided exceptions for the timeliness conditions. The Court considered the question of whether deeming the petitioner’s untimely filing as not properly filed, and hence the statute of limitations not tolled, was an unfair interpretation. *Id.* at 416. The petitioner argued that a prisoner trying in good faith to exhaust state remedies may litigate in state court for years, only to find out at the end that he was never “properly filed,” and thus that his federal habeas petition is time barred. *Id.* The Court said that this unfair result could be avoided by filing a “protective” habeas petition in federal court, and asking the court to stay and abey the proceedings under *Rhines* until state remedies are exhausted. *Id.* It further stated that “a petitioner’s reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for him to file in federal court.” *Id.*

b. Good Cause analysis under *Rhines* and *Pace*

Guided by this Court’s precedent and the purposes of AEDPA, lower courts have drawn some significant generalizations about how “good cause” should be interpreted. The Ninth Circuit found that the *Rhines* good cause standard is less stringent than that for equitable tolling, which requires that extraordinary circumstances beyond a petitioner’s control be the proximate cause of any delay. *Gonzalez v. Hedgpeth*, No. 12-cv-001244, 2015 U.S.Dist. LEXIS 3871 at

*13 (E.D.Cal. January 13, 2015), citing *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005).

Courts have noted that this finding is supported by *Pace*'s statement that a petitioner's confusion over whether or not his petition would be timely filed was good cause for the petitioner to file his unexhausted petition in the federal court. *See, e.g., Riner v. Crawford*, 415 F.Supp.2d 1207, 1210 (D.Nev. 2006). Confusion over timeliness does not generally qualify as warranting equitable tolling of the statute of limitations. *See, e.g., Trenkler v. United States*, 268 F.3d 16, 25 (1st Cir. 2001)(noting with approval that courts have denied equitable tolling where 28 U.S.C. § 2255 motion filed only one day late because of confusion over applicable deadline).

Courts have also found that the showing required for good cause in the stay and abeyance context is less stringent than that for cause in the procedural default context. *See, e.g., Lockridge v. Ludwick*, No. 09-10145, 2009 U.S.Dist. 12145 at *3 (E.D.Mich. Dec. 28, 2009)(adopting report and recommendation)(holding that "good cause" under *Rhines* is something less than the "cause" needed to excuse procedural default); *Bryant v. Greiner*, No. 02 Civ. 6121, 2006 U.S.Dist. LEXIS 40210 at *5 (S.D.N.Y. June 15, 2006)(same); *Rhines v. Weber*, 408 F.Supp.2d 844, 848-49 (D.S.D. 2005)(on remand)(same); *Brewer v. Davis*, No. 15-CV-50-D, 2018 U.S.Dist. LEXIS 165380 at *10-11 (N.D.Tex. August 7, 2018)(to require showing of cause from procedural default context in order to show *Rhines* "good cause" is inconsistent with *Pace*, *Rhines* and principle of comity). *But see Brawner v. Epps*, No. 07CV16-MPM, 2008 U.S.Dist. LEXIS 116745 at *4 (N.D. Miss. Apr. 11, 2008)(*Rhines* good cause "is analogous to the external 'cause' required to excuse a procedural default").

This lesser degree of stringency is grounded both in principles that underlie AEDPA and in this Court's precedent. In the stay and abeyance context, permitting a stay in order to exhaust gives recognition to the principles of comity and federalism because a petitioner can present his

claims to the state court. In contrast, in the procedural default context, the state court is deprived of an opportunity to reach the issues in the first place. *Rhines*, 408 F.Supp.2d at 848-49. *See also Brewer*, 2018 U.S. Dist. LEXIS 165380 at *10-11.

This Court’s statement in *Pace* that a petitioner’s reasonable confusion about whether his state petition would be timely constitutes good cause also supports the view that good cause is a less stringent standard than the cause required to excuse procedural default. *Rhines* 408 F.Supp.2d at 849; *Lockridge*, 2009 U.S. Dist. 12145 at *3 (adopting report and recommendation); *Brewer*, 2018 U.S. Dist. LEXIS 165380 at *10-11. The Court has characterized “cause” for a procedural default as a showing that “some objective factor external to the defense impeded counsel’s efforts to comply with the state’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner’s reasonable confusion about timeliness would not satisfy this standard.

c. The First Circuit’s decision was inconsistent with this Court’s precedent.

In affirming the district court’s determination of good cause, the First Circuit both failed to consider the guidance that this Court’s precedent offered, and did not fully attend to all of the circumstances in Mr. Sena’s case.

The Court of Appeals cited *Rhines* for the proposition that review of the district court’s good cause determination was for abuse of discretion. This Court, however, did not say that review of a good cause determination is for abuse of discretion. Rather, it suggested that the decision whether to issue a stay is subject to abuse of discretion review. *Rhines*, 544 U.S. at 279. That decision, however, has multiple components, including determinations of whether: (1) there was good cause for the petitioner’s failure to exhaust his claims first in state court; (2) the unexhausted claims are not plainly meritless; and (3) there is any indication that the petitioner

engaged in intentionally dilatory litigation tactics. Questions of law arising within an issue reviewed for abuse of discretion are reviewed *de novo*. The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions. *Koon v. United States*, 518 U.S. 81, 100 (1996). See, also e.g., *United States v. Del Valle-Cruz*, 785 F.3d 48, 58 (1st Cir. 2015) quoting *United States v. Carrasco-De-Jesús*, 589 F.3d 22, 27 (1st Cir. 2009) and *Colon-Cabrera v. Esso Standard Oil Co. (P.R.), Inc.*, 723 F.3d 82, 88 (1st Cir. 2013). The component “good cause” standard of a stay and abeyance decision has embedded questions of law because, as here, determinative questions of the objective reasonableness of a petitioner’s actions are implicated. *Pace*, 544 U.S. at 416 (2005) (petitioner’s reasonable confusion about whether a state filing would be timely can constitute “good cause”). Cf. *Ornelas v. United States*, 517 U.S. 690, 691(1996) (questions of reasonable suspicion should be reviewed *de novo*). The Court of Appeals erred in reviewing the good cause determination for abuse of discretion rather than *de novo*.

Whether *de novo* or abuse of discretion review should have applied, the First Circuit’s decision was inconsistent with this Court’s precedent. The Court of Appeals found the district court’s determination supported by a period of delay in filing a state court motion when Mr. Sena was capable and free to file the motion on his own *pro se*, saying that diligence is an important component of good cause. But this Court’s guidance indicates that a *pro se* petitioner need not present a factor that is a but-for cause of a failure to exhaust in order to show good cause. The measure of good cause is not whether it was possible for a petitioner to have done otherwise and filed earlier. *Pace* and *Rhines* indicate that the touchstone of good cause is reasonableness, rather than external but-for causes and extraordinary circumstances characteristic of procedural default and equitable tolling. See *Pace*, 544 U.S. at 416 (reasonable confusion about whether a state

filings would be timely will ordinarily constitute good cause); *Rhines*, 544 U.S. at 278 (stays should be permitted to avoid “unreasonably impair[ing] the prisoner’s right to relief”, quoting *Lundy*, 455 U.S. at 522).

Application of a reasonableness standard, rather than a stricter standard that merely asks what was possible for the petitioner to do, requires a court to consider the totality of the circumstances faced by the petitioner. The mere absence of an extraordinary circumstance may suffice for a court to conclude that it would have been possible for a petitioner to file in state court before filing a federal petition. However, determining whether there was good reason for a petitioner to file in federal court before filing in state court requires an assessment of the totality of the circumstances facing the petitioner. Neither the district court nor the Court of Appeals did such an assessment. Had they applied the proper standard, the result would have been different.

Here, the totality of circumstances in Mr. Sena’s case demonstrated the reasonableness of his conduct. Upon the finality of his conviction, he promptly sought post-conviction counsel for indigent defendants through state law provisions, and awaited response. When he learned that his request was denied on the basis of misleading statements by prior appellate counsel, he reasonably asked for reconsideration, and awaited an answer. Had counsel been appointed earlier on the basis of accurate information, a delay in filing would likely have been avoided, and if not avoided, would have been unreasonable. Had there been no misstatements by prior appellate counsel, and thus no reason for reconsideration by CPCs, a delay in filing would likely also have been avoided, and if not avoided, unreasonable. But the facts here were otherwise.

That state counsel was ultimately appointed bears out the reasonableness of not filing an uncounseled Rule 30 Motion and risking the forfeiture of claims but rather awaiting the decision on counsel. As the magistrate found, the ineffective assistance of appellate counsel issue was a

potentially meritorious issue, and good cause is supported, among other things, by the fact that CPCS appointed counsel who agreed that the ineffective assistance of appellate counsel claim was worthy of being presented to the state court. (Add. 18).

Moreover, a general concern with diligence on the facts of this case does not support the view that good cause was not shown. The district court adopted the findings of the magistrate that Mr. Sena was not dilatory in failing to file earlier, and that he assiduously sought counsel to file a Rule 30 Motion.

The First Circuit dismissed the concern for forfeiting claims should Mr. Sena proceed *pro se* before appointment of counsel as contributing to a good cause analysis. It said that a Rule 30 Motion can be amended or a second or successive motion may be permitted, and that counting this factor would have the broad implication that any habeas petitioner could justifiably delay his filing for as long as he maintained even the faintest hope of retaining counsel so as to avoid forfeiture of claims. This dismissal fails to take account of the full set of circumstances of the case in assessing whether this factor can contribute to good cause. Permission to amend a Rule 30 Motion is not as of right, but rather is subject to the court's discretion; and a successive Rule 30 Motion only may be allowed where an issue gives rise to a substantial risk of miscarriage of justice. *Commonwealth v. Crawford*, 430 Mass. 683, 684 & n.2, 722 N.E.2d 960, 963 & n.2 (1999), *Commonwealth v. Glover*, 459 Mass. 836, 837, 846, 948 N.E.2d 415, 417, 424 (2011). Counting the risk of forfeiture of claims as a factor here does not have the broad implication that any habeas petitioner could justifiably delay his filing for as long as he maintained even the faintest hope of retaining counsel so as to avoid forfeiture of claims. The prospect of good cause being found broadly on the basis of a faint hope of counsel cannot be extrapolated from a case like Mr. Sena's. A court must take all circumstances of a case into account in assessing

reasonableness and here, the findings were that Mr. Sena's case involved the immediate seeking of counsel on a potentially meritorious issue with no dilatory conduct, and with interference in the process by prior counsel's misleading representations to the agency charged with the decision to appoint counsel.

CONCLUSION

This Court should vacate the judgment of the First Circuit Court of Appeals and rule that Mr. Sena has established good cause for his failure to exhaust his ineffective assistance of appellate counsel claim earlier.

Respectfully submitted,

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