No. 21-5964 ORIGINAL

In The
Supreme Court of the United States

ROBERT L. KELLY,

Petitioner,

v.

GARRETT LANEY, Superintendent,
Oregon State Correctional institution

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert L. Kelly #10670643
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Petitioner *pro se*

Questions Presented

(1) Whether the Court should issue a grant of certiorari, vacatur, and remand to the Court of Appeals for issuance of a certificate of appealability when (1) there was reasonably a dispute between the parties as to whether state procedural requirements were met on federal claims, (2) no state court issued any reasoned opinion addressing either the alleged procedural deficiencies or the merits, and (3) the courts below held that the claims were procedurally time barred?

(2) Whether the Court should issue a grant of certiorari, vacatur, and remand to the Court of Appeals for issuance of a certificate of appealability when Mr. Kelly made a substantial showing that state actors engaged in outrageous conduct to deny Mr. Kelly access to the courts?

(3) Whether equitable tolling should apply to a successive, late petition for habeas corpus when Mr. Kelly had clearly shown that he has been diligently pursuing his claims and extraordinary circumstance stood in his way to access of the courts.

LIST OF PARTIES

Petitioner:
Pro se

ROBERT L. KELLY #10670643
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Respondent:
Represented by:

GARRETT LANEY,
Superintendent,
Oregon State Correctional Institution
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT LESLIE KELLY respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

PROCEDURAL HISTORY AND RELEVANT FACTS

1. Opinion Below

On January 12, 2021, the magistrate recommended:

> The Court should dismiss the Petition for Writ of Habeas Corpus (#1) as untimely, and enter a judgment dismissing the case with prejudice. The Court should also decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 USC. § 2253(c)(2).

After objections by Mr. Kelly, the district court entered a judgment on March 24, 2021 as follows, in relevant part:

> Petitioner timely filed an objection. Petitioner raises a new argument, asserting for the first time that the Court should apply the doctrine of equitable tolling to find his Petition timely. It is within this Court's discretion whether to accept new evidence or argument submitted with objections. *See Jones v. Blanas*, 393 F3d 918, 935 (9th Cir 2004) (discussing the district court's discretion to consider new arguments raised in objections); *Brown v. Roe*, 279 F3d 742, 746 (9th Cir 2002) (rejecting the Fourth Circuit's requirement that a district court *must* consider new arguments raised in objections to a magistrate judge's findings and recommendation); *United States v. Howell*, 231 F3d 615, 621 (9th Cir 2000) (discussing the circuit split on whether a district court must or may consider new evidence when reviewing *de novo* a magistrate judge's findings and recommendation, and concluding that a district court "has discretion, but is not required" to consider new evidence); *see also* 28 USC. § 636(b)(1) (stating that the district court judge "may also receive further evidence"). The Court declines to consider Petitioner's new argument. Before the Magistrate Judge, Respondent raised the timeliness of Petitioner's

> Habeas Petition in Respondent's brief, and Petitioner ignored that argument. Petitioner offers no explanation why he did not raise his equitable tolling argument before Judge Sullivan.
>
> Even if the Court were to consider Petitioner's equitable tolling argument, it would fail. The Ninth Circuit has explained that "equitable tolling is unavailable in most cases and is appropriate only if *extraordinary* circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miranda v. Castro*, 292 F3d 1063, 1066 (9th Cir 2002)(emphasis in original; quotation marks and citation omitted). Petitioner fails to make the requisite showing.
>
> The Court has reviewed *de novo* those portions of Judge Sullivan's Findings and Recommendation to which Petitioner has objected, as well as Petitioner's objections and Respondent's response. The Court agrees with Judge Sullivan's reasoning regarding the timeliness of Petitioner's habeas petition and adopts those portions of the Findings and Recommendation.
>
> For those portions of Judge Sullivan's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.
>
> The Court ADOPTS Judge Sullivan's Findings and Recommendation, ECF 24. The Court DENIES Petitioner's Petition for Writ of Habeas Corpus, ECF 1. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 USC § 2253(c)(2).

On July 21, 2021, the Ninth Circuit Court of Appeals issued an order denying Mr. Kelly's certificate of appealability "because appellant has not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" (citations omitted).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 USC §1254(1).

3. Constitutional Provisions

The federal habeas corpus statute, 28 USC §2241, provides in pertinent:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

The federal habeas corpus statute, 28 USC §2244(d)(1), provides in pertinent:

> (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.

28 USC §2253(c), relating to certificates of appealability, provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court; . . .
>
> . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

4. Statement of the Case

a. Trial

Mr. Kelly was originally charged by indictment in Baker County Case No. 6:17-CV-01767-CL with Using a Child in a Display of Sexually Explicit Conduct (Counts 1 & 2); Encouraging Child Sexual Abuse in the First Degree (Counts 3 & 4); Rape in the First Degree (Count 5); Attempted Sodomy in the First Degree (Count 6 & 7); and Sexual Abuse in the First Degree (Counts 8, 9 & 10), on May 23, 2002. After a plea of guilty on August 28, 2002, Mr. Kelly was convicted of Counts 2, 3, 8 and 10.

b. Original state post-conviction proceedings

Mr. Kelly filed a *pro se* petition for post-conviction relief in the Umatilla County Circuit Court on May 27, 2003, in *Robert L. Kelly v. Anthony Santos,*

Superintendent, Umatilla County Circuit Court Case No. CV030667. Mr. Kelly asserted one claim for relief in his *pro se* placeholder petition.

On July 17, 2003, Mr. Kelly filed a motion compelling discovery. Instead of ruling on that motion, the circuit court issued an order appointing "UMC" as counsel dated August 1, 2003. Mr. Kelly did not move the court for appointment of counsel, indeed made a concerted effort to litigate his case *pro se*.

On August 14, 2003, Mr. Kelly sent the Umatilla County Circuit Court a letter asking who they had appointed to represent him on his post-conviction action and that he needed more time to gather discovery materials so that he could replace the generic placeholder petition he filed with the court with any meritorious claims he might discover after going through the trial court records of the underlying proceeding and trial counsel's files. On August 22, 2003, Mr. Bettis sent Mr. Kelly a letter in regards to his August 14, 2003 letter to the Umatilla County Circuit Court to inform Mr. Kelly that the court had appointed him to represent Mr. Kelly and that he would ask the court for "more time to gather documents and to prepare for [Mr. Kelly's PCR] trial."

On October 8, 2003, Mr. Kelly sent Mr. Bettis a letter requesting that he send him various portions of the record so that he could help prepare and investigate in preparation of filing the amended or formal petition. Mr. Kelly was concerned because Mr. Bettis appeared to not be taking Mr. Kelly's case seriously. In Oregon "[i]t is petitioner's duty, when filing the first petition, to select the issues that he wants to litigate" in a post-conviction action. *Temple v. Zenon*, 124 Or App 388, 392

(1992)(citing *McClure v. Maass,* 110 Or App 119, 124 (1991)). "If petitioner's attorney in the first post-conviction proceeding failed to follow any legitimate request, petitioner could not sit idly by and later complain. He must inform the court at [the] first opportunity of his attorney's failure and ask to have him replaced, or ask to have him instructed by the court to carry out petitioner's request. This is not too great a burden to place upon a petitioner when the attorney's failure to follow legitimate instructions takes place in petitioner's presence" *Church v. Gladden*, 244 Or 308, 311 (1966).

On October 13, 2003, Mr. Kelly sent Mr. Bettis a letter requesting that he send him various portions of the record so that he could help prepare and investigate in preparation of filing the amended or formal petition. Mr. Kelly was concerned because Mr. Bettis appeared to not be taking Mr. Kelly's case seriously. On October 15, 2003, Mr. Betties sent Mr. Kelly a letter that contained some case law heading excerpts that he thought stood for the proposition that there need not be any investigation into whether or not Mr. Kelly's trial counsel did any investigating because Mr. Kelly entered into a stipulated facts plea agreement. This appeared contrary to Mr. Bettis's August 22, 2003 letter informing Mr. Kelly he would "gather documents and [] prepare for trial[,]" and sending requests to Mr. Kelly's trial attorney and trial court for documents. Mr. Bettis' theory was that the sole issue for Mr. Kelly's post-conviction proceeding was whether or not Mr. Kelly entered into his plea intelligently and knowingly made. Mr. Bettis theorized that whether or not trial counsel did a constitutionally adequate investigation so that

counsel could help Mr. Kelly make an informed decision about the stipulated facts plea was of no consequence. Mr. Bettis made no more inquiry into whether or not Mr. Kelly's plea was intelligently and knowingly made despite his protestations that was the sole issue to be decided.

On November 9, 2003, Mr. Kelly sent Mr. Bettis a letter stating that discovery had not arrived, that he needed an extension of time, and a motion for discovery from proper parties. On November 18, 2003, Mr. Kelly sent the Umatilla County Circuit Court a letter that stated:

> Enclosed are copies of correspondences with my court appointed attorney Wade Bettis, Jr. Since I have not received my Discovery Material or the case law I have requested in the past, I have decided to write him again and let the Court know of the delays. I have also made a point to remind him that I am typing the Amended Post-Conviction petition and Memorandum of Law - that he is not to submit any other in my name or on my behalf.

On November 18, 2003, the trial court issued a scheduling order that set trial for March 11, 2004. The same day Mr. Kelly sent Mr. Bettis a letter that stated, among other things that he still had not received the discovery materials he requested so he could compare them to the draft claims for post-conviction relief he had picked out. On November 20, 2003, Mr. Bettis sent Mr. Kelly a letter stating:

> Your October 8, 2003, letter with your discovery requests are not appropriate for your case for three reasons. First you entered a guilty plea and secondly, most of the issues you are raising and the discovery that you are requested is an attempt to re-try your case. Third, most of what you are raising as issues are issues that should have been raised on direct appeal and are not appropriate for post conviction. It is not appropriate for me to seek out and attempt to obtain information that does not benefit us in the prosecution of your case.
>
> The focus must be on whether you made an intelligent and knowing

guilty plea.

In Oregon, in order for a reviewing court to determine whether Mr. Kelly's plea agreement was knowingly and intelligently made, the court must determine if counsel's acts and omissions prior to the signing of the plea contract fell outside the bounds of professional norms so that any advice given to Mr. Kelly afforded him the requisite information to enter into an agreement with the State, with unlimited resources, sufficient enough to satisfy *Santobello v. New York*, 404 US 257 (1971).

On November 23, 2003, Mr. Kelly telephoned Mr. Bettis to inform him that he was trying to obtain the case files so that he could assist in preparing an amended petition so that he could fulfill his obligation under *Church v. Gladden*, 244 Or 308, 311 (1966). On December 7, 2003, Mr. Kelly sent Mr. Bettis a letter stating:

> . . . I am unhappy with your position, and I know of [no] reason why I should accept this.
>
> You were, to my understanding, appointed to assist me in the pursuit of my claims.
>
> I expect my next legal mail incoming to contain the Discovery Material I asked for, or an Order from the Court granting you permission to resign as my counsel.

A copy of the letter was sent to the court.

On January 11, 2004, Mr. Kelly sent Mr. Bettis a 7-page letter along with an amended petition for post-conviction relief that Mr. Kelly wanted counsel to file. On January 20, 2004, Amber Smith, Bettis's assistant, sent Heather Conwell, at the Oregon Department of Justice, an e-mail asking "if you could fax or send me the

transcripts for Robert Kelly's case. He plead guilty so I am hoping they are not very thick. Let me know .....Amber[.]"

On January 21, 2004, Mr. Kelly sent Mr. Bettis a letter informing him that he had received the deposition notice and was wondering what the process entailed as Mr. Bettis had not explained anything to him regarding post-conviction processes. On January 22, 2004, Mr. Kelly sent Mr. Bettis a letter asking if he had received a draft of the proposed amended petition he had sent him. Further, Mr. Kelly requested copies of the amended petition for post-conviction relief Mr. Kelly sent him and an up date on any motions that they had agreed to file.

On January 25, 2004, Mr. Bettis sent Mr. Kelly a letter informing him that *he would file the amended petition for post-conviction relief that Mr. Kelly sent him*, however, he would not seek to obtain any discovery despite Mr. Bettis's file containing a release of information request Mr. Bettis sent to Mr. Kelly's original attorney requesting "discovery."

On January 27, 2004, unbeknownst to Mr. Kelly, Amber Smith, Mr. Bettis' assistant, sent Kathryn Cottrell an email stating:

> I received a 36 page amended petition from Robert Kelly today and he is demanding that we file it as is so Wade is having me submit it and I need your position. The deposition is set for tomorrow and I know it doesn't give you much time but I can fax his amended petition to you if you like. Let me know what you need or decide.

On this same day Kathryn Cottrell answered Amber Smith's e-mail, as set forth above stating:

> The trial is March 11 (memo due in less than a month) so I will most certainly object to an amended petition at this point. [P]articularly a

> 36 page one. Perhaps Wade can call me and we can discuss it
>
> Since the amended petition has not yet been filed, I will conduct the deposition on the most recent filed petition. No need to fax that monster to me!

On February 2, 2004, Mr. Kelly sent Mr. Bettis a letter asking him to withdraw from the case because he had taken no steps to further Mr. Kelly's cause. On February 17, 2004, Mr. Kelly filed a Notice of Counsel's Propensity to Perform Inadequate, along with a supporting affidavit. On February 24, 2004, Mr. Kelly sent Mr. Bettis a letter informing him that he felt Mr. Bettis had done nothing to forward the case and that he was filing a motion to proceed *pro se* and asked Mr. Bettis to file a motion for a continuance so that he could have the time to do the things, like investigating, to adequately prepare for his post-conviction action, "[s]ince [Mr. Kelly] don't have the necessary 'proof' of all [his] allegations of fact listed in [his] Amended Post-Conviction."

On February 25, 2004, Mr. Kelly filed a Motion For Removal of Appointed Counsel and For Compelling Discovery along with an Affidavit in Support of Motions For Removal of Appointed Counsel and Compelling Discovery. Mr. Kelly never asked for Mr. Bettis to represent him on his post-conviction action and was skeptical from the start. The entire time Mr. Bettis was appointed to represent Petition on his post-conviction matter, Mr. Bettis did nothing except thwart Mr. Kelly at every turn, and at the very last moment was allowed to jumped ship, leaving Mr. Kelly without counsel and without any knowledge that Mr. Bettis did not file an amended petition with the issues Mr. Kelly wanted litigated.

On March 02, 2004, the trial court granted Mr. Kelly's motion to proceed *pro se*. Instead of sending that Order to Mr. Kelly, the Court sent the order to Mr. Bettis who no longer represented Mr. Kelly. On March 03, 2004, Michael Gove, Mr. Bettis' investigator, sent a letter to Mr. Bettis informing him that, "Mr. Kelly wants a copy or copies of his amended petition. He wants Amber to let him know if the amended petition even got to court."

On March 04, 2004, Mr. Bettis filed a motion to withdraw from Mr. Kelly's case and he supported this motion with an affidavit. The same date Mr. Kelly sent Mr. Gove, the investigator that Bettis hired, a letter asking if he would send him a copy "of [his] Amended Post-Conviction that Mr. Bettis" had. Mr. Kelly was hoping, because Bettis was not cooperating, that he could gain the petition through a back channel. Mr. Kelly was unaware that Bettis had never filed it.

On March 05, 2004, the Umatilla County Circuit Court denied Mr. Bettis' motion to withdraw as Mr. Kelly's court-appointed attorney, ruling

> Trial is set for March 11, 2004. Trial will proceed on March 11th, 2004, as set. Petitioner will not be allowed a continuance. Petitioner will not be allowed to amend Petition because such filing is not timely made.
>
> If Petitioner is still intent upon terminating the services of counsel, he will be allowed to proceed Pro Se. Receipt of any memorandum and/or Exhibits will be within the discretion of the Trial Judge, even though such submissions are not timely.

Had Mr. Bettis filed the amended petition on January 25, 2004 as he promised, it would have been timely. On March 9, 2004, Mr. Kelly was informed for the first time that Mr. Bettis had been removed from his case and that he would act in *pro se* at his post-conviction trial 2-days later on March 11, 2004. On March 11,

2004, Mr. Kelly proceeded to his post-conviction trial without his chosen claims for relief adequately before the court and was forced to litigate the meritless claims he set forth in his *pro se* placeholder petition.

At the post-conviction hearing, Mr. Kelly asked for confirmation from the court that the amended petition that Mr. Bettis informed would be filed was indeed filed and before the court for trial. The court informed Mr. Kelly, and he learned for the first time, that the amended petition was never filed. The PCR court asked Assistant Attorney General if the State was in possession of Mr. Kelly's amended petition. Ms. Cottrell replied that the "only petition I have is . . . the . . . petition originally filed by Petitioner[,]" on May 27, 2003. Ms. Cottrell, defending the action on behalf of the State, did not inform the court that she knew of the amended petition, nor did she state on the record that she was offered a fax of the amended petition, and that she expected to object to its filing if Mr. Bettis' office filed it.

The PCR court informed Mr. Kelly that he would have to proceed on the original *pro se* placeholder petition he filed on May 27, 2003. Mr. Kelly objected and argued that he should "be allowed one full and fair hearing on all his issues[,]" which were in the amended petition, and then asked for a continuance to retrieve the amended petition that he expected to find filed in court, or an opportunity to amend the existing petition. The court answered, "that's going to be denied." Mr. Bettis never filed the claims in a formal or amended petition for post-conviction relief or the memorandum as he promised Mr. Kelly he would and as he directed his assistant, Amber Smith, to do, as noted above. The Petition for post-conviction relief

was denied by the Umatilla County Circuit Court and a judgment was entered on March 11, 2004.

Mr. Kelly timely appealed the post-conviction judgment denying his claims for relief. The Oregon Court of Appeals affirmed the judgment without opinion on August 9, 2006. *Robert L. Kelly v. Sharon Blacketter,* 207 Or App 320 (2006) (A124216). Mr. Kelly timely submitted a Petition for review to the Oregon Supreme Court. The Oregon Supreme Court denied review on October 31, 2006. *Robert L. Kelly v. Anthony Santos,* Superintendent, 341 Or 579 (2006).

c. District court proceedings

Mr. Kelly timely filed a petition for writ of habeas corpus in the Oregon District Court on December 4, 2006. *Robert L. Kelly v. Sharon Blacketter,* 2009 US Dist Lexis 8632009 (06-1741-CL). On January 7, 2009, the District Court denied Mr. Kelly relief and certificate of appealability.

d. Other State court actions and second post-conviction action

On November 19, 2010, Mr. Kelly filed a motion to amend his judgment in Baker County Case No. 02-312. The Baker County Circuit Court granted Mr. Kelly's motion and amended Mr. Kelly's judgment on February 11, 2011. From February 11, 2011, Mr. Kelly has been serving his prison sentence under an amended, or new judgment. Mr. Kelly has continually, from that date had a state action pending attacking that new judgment.

On July 15, 2016, after several other state actions,[1] Mr. Kelly filed a successive petition for post-conviction relief in the Marion County Circuit Court Case No. 16CV19425. On January 31, 2017, the State filed a motion to dismiss the successive petition under ORCP 21 (8). On April 17, 2017 the circuit court held a hearing on Mr. Kelly's *pro se* motions. At that hearing, the court refused to order court-appointed counsel's removal. At Mr. Kelley's request, the court ordered a hybrid representation wherein Mr. Kelly was free to answer the State's January 31, 2017 Motion to Dismiss and court-appointed counsel would simply remain in the background. On May 5, 2017, Mr. Kelly filed his *pro se* response to the State's January 31, 2017 Motion to Dismiss. On September 11, 2017, the circuit court conducted a status hearing without Mr. Kelly's presence; neither court-appointed counsel nor the circuit court informed Mr. Kelly what took place at this status hearing. Subsequently, the circuit court issued an opinion letter on September 27,

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[1] For example, Mr. Kelly took the following steps:

07/21/11	*Motion To Correct An Erroneous Term in Judgment*, ORS 138.083, BCCC sentencing grid error – denied by Judge Baxter
11/14/11	Letter to Disciplinary Counsel's Office concerning Judge Baxter, case no. 1101744
11/21/11	Plaintiff's letter to Baker County Circuit Court district attorney, primary offense issue
12/21/11	OSB complaint about Judge Baxter
02/13/12	*Motion To Correct An Erroneous Term in Judgment*, ORS 138.083, BCCC primary offense error – denied by Judge Baxter on 8/15/12
05/02/12	Plaintiff's letter to OISC for sentencing calculations
07/13/12	Follow-up letter to BCCC concerning motion to correct sentencing concerning primary offense
09/05/12	Letter to Judge Baxter, decisions are inconsistent; gave list of errors; cc to Chief Justice
09/10/12	Plaintiff's letter to court clerk, and Complaint against Judge Baxter with Ore Sup Ct – all judges
02/25/13	Petition for Writ of Mandamus denied, S061018
10/23/14	Suit for Breach of contract, Tortious Misrepresentation, Conspiracy, & Unlawful Plea: Baker County Circuit Court Case No. 13-739
12/10/14	Appeal of Case No. 13-739; A156420
04/24/15	Petition for Review of A156420

2017 dismissing Mr. Kelly's post-conviction action with prejudice. The Marion County Circuit Court and a judgment was entered on December 4, 2017 by the Honorable Lindsay R. Partridge.

Mr. Kelly timely appealed the post-conviction judgment denying his claims for relief. The Oregon Court of Appeals granted the State's motion for summary affirmance on December 4, 2017. *Robert L. Kelly v. Christine Popoff*, A1666078. The Oregon Supreme Court denied review on August 29, 2019. *Robert L. Kelly v. Garrett Laney*, S06607. The Appellate Judgment was issued on October 7, 2019.

e. Second District Court habeas corpus action

On October 29, 2020, after trying every possible state court remedy, affording the State every possible opportunity to correct Mr. Kelly's alleged errors in his criminal judgment, he filed a petition for writ of habeas corpus. *Kelly v. Laney,* Case No. 6:20-cv-00436-SU. After briefing, the United States Magistrate Judge issued a Findings and Recommendation that Mr. Kelly's petition be dismissed as untimely and recommended that a COA not issue. Mr. Kelly timely submitted objections, and on March 21, 2021, the District Court adopted the magistrate's recommendations. *Kelly v. Laney*, 6:20-cv-00436-SU (D Or 2021). Mr. Kelly timely filed a notice of appeal to the United States Ninth Circuit Court of Appeals. On July 21, 2021, the Court denied Mr. Kelly's request for COA. *Kelly v. Laney,* Case No. 21-35335 (9th Cir 2021).

5. Reasons for Granting the Writ

This case presents three important federal questions. The first question is a question of whether a federal constitutional claim is unreviewable in federal

proceedings when, on state appellate review, the state had asserted a procedural deficiency and none of the state courts provided a reasoned decision stating where the federal claims were affirmed on their merits or on the alleged procedural deficiency. Second is whether outrageous governmental conduct where state actors took covert affirmative steps to ensure Mr. Kelly's right to access to the courts was thwarted. Third, whether, based on the extraordinary circumstances at issue in this case, was the district court required to conduct an equitable tolling analysis? As noted above, the lower court decided that the federal claim was procedurally defaulted because it was time barred and the state courts had not provided any reasoned decision. This Court should grant certiorari because the decision of the Ninth Circuit Court of Appeals on the matters contained herein are in conflict with the decisions of another United States Courts of Appeals on the same important matter, Rule 10(a), and, in any event, the questions presented are a important questions of federal law that have not yet been, but should be, settled by this Court, Rule 10(c).

a. The Ninth Circuit Court of Appeals' decision is in conflict with decisions of other Courts of Appeals in two different manners.

i. The lack of a reasoned decision below should not preclude federal review of Mr. Kelly's claims.

The Ninth Circuit's decision that the state court decisions below, all affirmed without any written opinion, and that it was not required to conduct an equitable

tolling analysis conflicts with decisions of other Courts of Appeals on the same issue.[2]

The Fifth Circuit has created a presumption that, in the absence of any state court opinion, it is presumed that the state court did not affirm based on a state procedural rule. *Cowart v. Hargett,* 16 F3d 642,645 (5th Cir 1994)(where there was no last reasoned opinion on state defendant's claim and therefore no indication that the state court relied upon a procedural bar in denying that claim, court assessed that the state court rejected the claim to some degree on the merits; also holding that if a state court rejects a federal claim on procedural grounds, it must state so or it is otherwise not barred from federal review); *See also Steward v. Cain,* 259 F3d 374 (5th Cir 2001)(where state trial court had found that jury instruction claim was procedurally defaulted, and appellate court affirmed without written opinion on some issues but not the procedural default, district court treated trial court decision as last reasoned decision regarding procedural default); *Lindsey v. Cain,* 2009 US Dist LEXIS 131772 (ED La April 13, 2009)(no procedural bar where there isn't a last reasoned opinion stating that affirmance was based on failure to timely file motion to quash).

The Sixth Circuit has a similar presumption in the absence of express reasoned opinion by the lower courts. *See Williams v. Coyle,* 260 F3d 684 (6th Cir 2001)(unwilling to hold claim procedurally defaulted absent discussion of evidence,

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[2] Petitioner identifies in this section an apparent 2-3 split between five Circuits on the former issue. Petitioner believes that the remaining Circuits may not need to weight in on this issue because it is likely that states in those Circuits routinely issues of at least one reasoned opinion on appellate review. *See* footnote 3, *infra* (listing states that appear to allow affirmances without opinion on non-discretionary appellate review).

specific factual findings or reasoned analysis by appellate court); *Davis v. Jackson,* 1999 US App LEXIS 19896 (6th Cir 1999)(unpublished)(affirming district court decision which reached merits of claim because there was no reasoned decision regarding procedural default from the state court over arguments from state that federal court should not reach merits because the claim was procedurally defaulted); *Goree* v. *Foltz,* 1987 US App LEXIS 3425 (6th Cir 1987)(unpublished) (where state argued both procedural default and merits, and state court decision does not indicate whether court relied on procedural default, procedural default must be regarded as a substantial basis for state court's decision absent a showing of cause and prejudice).

The Ninth Circuit's decision in this case, however, is aligned with other two circuits that are in conflict with the Fifth and Sixth Circuits.[3] For example, the Second Circuit has held that when a lower court has "affirmed without opinion . . . we presume that [such] silence in the face of arguments asserting a procedural bar indicated that the affirmance was on state procedural grounds." *Kirby* v. *Senkowski,* 61 Fed Appx 765, 766 (2nd Cir 2003)(quoting *Quirama v. Michele,* 983 F2d 12, 14 (2nd Cir 1993)).

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[3] One Ninth Circuit decision would appear to align with the Fifth and Sixth Circuits, underscoring the confusion among the circuits and within the Ninth Circuit) on how to approach this issue. In *Nitschke v. Belleque,* the Ninth Circuit held that an Oregon prisoner was procedurally barred on a federal claim "[b]ecause the Oregon Court of Appeals' decision did not reach the merits of Nitschke's federal law claim, and was clearly and expressly based on state law." 680 F3d 1105, 1108 (9th Cir 2008)(emphasis added). Contrary to this announcement in *Nitschke* requiring a statement that the decision was clearly and expressly based on stat law, however, the district court below held that, "*Nitschke* does not stand for the proposition that an unreasoned appellate decision requires federal courts to presume a merits adjudication of any federal issue without any consideration of its deficient procedural history." Given the apparent inter- and intra- circuit confusion on this issue, a remand to the Ninth Circuit would be greatly beneficial to state prisoners by requiring the Ninth Circuit to finally resolve which presumption it intends to apply those prisoners on federal review

Similarly, the Eleventh Circuit has held that when a procedural deficiency is asserted and the state appellate court has not clearly indicated that it considered the merits, the state court's opinion is based on the procedural deficiency; the federal court may presume, in the absence of any evidence to the contrary, that an established default rule was briefed to a state court was applied by that court when it affirmed a conviction without opinion. *Bennett v. Fortner,* 863 F2d 804 (1989)(citing *Sinclair v. Wainwright,* 814 F2d 1516, 1522 (11th Cir 1987)(citing with *approval Campbell* v. *Wainwright,* 738 F2d 1573, 1578 (11th Cir 1984).

ii. The circuits are split on requiring district courts to consider equitable tolling for the first time in objections to magistrate recommendations.

When it comes to requiring district courts to entertain new arguments on objection from magistrate recommendations, the circuits are split. The First, Ninth, and Fifth Circuits say that a district court may, but is not required to, consider evidence presented for the first time in a party's objection to the magistrate judge's recommendation. *See Freeman v. County of Bexar*, 142 F3d 848, 850-53 (5th Cir 1998); *Paterson-Leitch Co, Inc v. Massachusetts Mun Wholesale Elec Co*, 840 F2d 985, 990 (1st Cir 1988)("We hold categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate"); *United States v. Howell*, 231 F3d 615, 622 (9th Cir)("[A] district court has discretion, but is not required, to consider evidence

presented for the first time in a party's objection to a magistrate judge's recommendation . . . ").[4]

The Fourth Circuit, in contrast, maintains that a district court must consider any argument or evidence presented on a timely objection to a magistrate judge's recommendation, so long as it could have been raised before the magistrate judge. *United States v. George*, 971 F2d 1113, 1118 (4th Cir 1992)("The district court cannot artificially limit the scope of its review by resort to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate judge's proposed finding or conclusion has been made and the appellant's right to de novo review by the district court thereby established").

Here, unlike *Howell*, Mr. Kelly was not represented by counsel, and therefore should have been accorded the "benefit of any doubt." *Brown v. Roe*, 279 F3d 742, 746 (9th Cir 2002)(citation omitted). The district court appears to have failed on that count particularly when there is outrageous governmental conduct involved. This Court's guidance is needed on this matter.

b. This case presents important questions that have not yet been, but should be, decided by this Court.

i. This Court has yet to formally decide whether a federal court may review federal claims in the absence of any state court decision declaring that the state court had considered that affirmed claim on its merits and not on a state procedural rule.

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[4] *But see Brown v. Roe*, 279 F3d 742, 744 (9th Cir 2002)(holding pro se prisoner's petition remanded based on district court's failure to exercise discretion as to whether to consider newly-raised equitable tolling argument in objections). Here, it appears that the district court failed to take into consideration Mr. Kelly's pro se status and afford him liberal construction. *Estelle v. Gamble*, 429 US 97, 106 (1976).

This Court has gone to great lengths in at least three significant decisions to set out the circumstances in which federal claims may be reviewed when there is a question of procedural default on state law grounds. This Court has held that affirmances without opinion are reviewable when the state court opinion did not clearly express affirmance on procedural grounds. *Harris v. Reed,* 489 US 255, 263 (1989). This Court has also decided instances in which state court basis, such as state law procedural grounds, would preclude federal review. *Colman v. Thompson,* 501 US 722 (1991). And this Court has established a procedure to determine the state court basis of affirmance when the state court of last resort resulted in an affirmance without opinion on discretionary review. *Ylst v. Nunnemaker,* 501 US 797 (1991).

The question presented here represents one of the remaining cracks through which state prisoners' federal claims may fall: When the state asserts a procedural deficiency for the first time on appellate review and *all* state courts affirm the trial court judgment without expressing whether the basis of affirmance is on state procedural grounds or on the merits of the federal constitutional claim. This is a substantial question because in states, such as Oregon, where use of affirmance without opinion is prevalent,[5] states may subvert a state prisoner's ability to seek federal review of federal constitutional issues by simply asserting inadequate

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[5] Mr. Kelly has reviewed the opinions of Oregon Court of Appeals for the period of 2000-2021. On average, over half of all direct appeals from criminal judgments were affirmed without any written opinion. Petitioner is a *pro se* prisoner and without adequate resources to present equivalent data for other states. If this Court allows review or remands these questions to the Ninth Circuit, petitioner, through counsel, will be better able to present data on Oregon as well as other jurisdictions (such as Alabama, Florida, Louisiana, Mississippi, New York, Ohio, and Texas) that appear to affirm criminal judgments without opinion on non- discretionary appellate review.

preservation in trial court proceedings. In such circumstances, reviewable federal constitutional claims are unfairly cast aside as if the defendant had never argued his claims to the state courts even though the defendant had done just that. This is because, without any clear explanation from the state courts, the federal courts are left without any guidance on whether the state court actually addressed the merits of the argument or stopped short at the alleged procedural deficiency. On one hand, the prisoner would ask the federal court to presume that the state court had considered the merits of his claim because there is no opinion to the contrary. And on the other hand, the respondent would ask the federal courts to presume that the state court never reached the merits of the argument because there is no opinion to the contrary. Such instances of dueling presumptions is especially troublesome in cases where, as here, Mr. Kelly had simply stated in the state courts that he had met all state procedural requirements and briefed the argument on its merits.[6] In other words, despite the fact that a state prisoner had fairly presented his federal claims to the state courts, he may still be denied federal review of those claims simply because the state courts never issued a written opinion clearly affirm the federal claim on its merits.

This Court's opinions in *Harris, Coleman* and *Ylst* expressed a desire to ensure that state prisoners' federal claims are not unfairly cast aside when those arguments were fairly presented to the state courts. The Ninth Circuit's assumption, without further question, that an absence of any statement from the

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[6] As noted in the above, this is a significant question because there is a lack of consistency among the circuits on which party's presumption the federal courts would follow in these circumstances.

state court must mean that the state court affirmed on the basis of a state procedural argument subjects state prisoners to unfairly lost federal claims. This gap left by *Hatis, Coleman* and *Ylst* is deserving of this Court's attention because such process is inconsistent the spirit federal habeas corpus review.

ii. This Court has yet to specify what type of relief is available to a habeas petitioner when government actors take affirmative, secretive steps to ensure that a litigant is denied access to the courts.

This Court has instructed that "meaningful access" to the courts is the touchstone of the Constitution. *Bounds v. Smith*, 430 US 817, 823 (1977)(citing *Ross v. Moffitt*, 417 US 600, 616 (1974)).[7]

Because equity requires a court to deal with the case before it, complete with its unique circumstances and characteristics, courts must take a flexible approach in applying equitable principles. This Court has been clear in this requirement, stating "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 US 360, 375 (1964). And when applying equitable tolling to the AEDPA statute of limitations in *Holland*, this Court stated "[t]he 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to

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[7] The circuits are unanimous on this point. *See e.g., Palmer v. Johnson*, 108 F3d 1379 (7th Cir 1997)(Because "meaningful access to the courts is the touchstone," there exists an opportunity to present claimed violations of fundamental constitutional rights to the courts)(citing Bounds, 430 US at 825); *Petrick v. Maynard*, 11 F3d 991 (10th Cir 1993)("remembering that 'meaningful access' [to the courts] is the touchstone" of the Fourteenth Amendment's guarantee); *Hampton v. Hobbs*, 106 F3d 1281 (6th Cir 1997)("'[M]eaningful access' to the courts is the touchstone"))(citing Bounds, 430 US at 825); *Entzi v. Redmann*, 485 F3d 998 (8th Cir 2007)(same); *Hooks v. Wainwright*, 775 F2d 1433 (11th Cir 1985)(same).

correct . . . particular injustices.'" 560 US at 650 (quoting *Hazel-Atlas Glass Co v. Hartford-Empire Co*, 322 US 238, 248 (1944)).

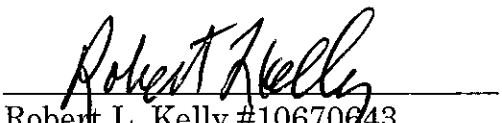
But despite the flexibility that equity requires, "courts of equity must be governed by rules and precedents no less than the courts of law." *Lonchar v. Thomas*, 517 US 314, 323 (1996)(citation omitted). As it applies to equitable tolling, this Court has been clear that one such rule that limits a court's equitable powers is that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wis v. United States*, 577 US 250, 254 (2016)(quoting *Holland*, 560 US at 649). The first element, requiring diligence on the part of the litigant, flows from the traditional notion that courts of equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion. Put differently, "equity aids the vigilant, not those who slumber on their rights." *Pace v. DiGuglielmo*, 544 US 408, 419 (2005)("Equity always refuses to interfere where there has been gross laches in the prosecution of rights")(quoting *McQuiddy v. Ware*, 87 US 14, 19 (1873)(20 Wall)). The second element comes from the fact-specific inquiry equity demands and the flexible remedies that it provides. For if an extraordinary circumstance is not the cause of a litigant's untimely filing, then there is nothing for equity to address.

This Court's decisions, however, have not defined or set a bench mark for reversing convictions based on outrageous governmental conduct, particularly in light of the facts in this case where government actors surreptitiously barred the courthouse doors to Mr. Kelly. *See e.g., United States v. Russell*, 411 US 423, 431 (1973)(observing that the Court "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"); *United States v. Payner*, 447 US 727, 749 n 15 (1980)("Due Process Clause [violations] based on outrageous Government conduct has not yet been settled by this Court").[8] Further instruction from this Court is needed to offer lower courts a brighter-line guidance on the issues presented herein.

CONCLUSION

For those reasons, this Court should issue its writ.

Dated this 1st day of October, 2021.



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[8] Although this Court has not "closed the door entirely" on outrageous governmental conduct claims, the Seventh Circuit has long declined to recognize it. *United States v. Smith*, 792 F.3d 760, 765–66 (7th Cir 2015); *see also United States v. Stallworth*, 656 F.3d 721, 730 (7th Cir 2011)("Outrageous government conduct is not a defense in this circuit."); United States v. White, 519 F3d 342, 346 (7th Cir 2008)("[T]his circuit clearly and consistently has refused to recognize any defense based on . . . outrageous government conduct." (internal quotation marks omitted)). *See also United States v. Combs*, 827 F3d 790, 795 (8th Cir 2016); *United States v. Dunlap*, 593 FedAppx 619, 620–22 (9th Cir 2014).