IN THE SUPREME COURT OF THE UNITED STATES

ALAN EUGENE STRICKLAND,	)	
Petitioner	)	
	)	
vs	)	**No. 21-7671 .**
	)	
	)	
SCOTT CROW, DIRECTOR, D.O.C.	)	
Respondent	)	

PETITION FOR REHEARING OF
DENIAL OF WRIT OF CERTIORARI

The Petitioner, Alan Eugene Strickland, pro se, moves this Court to reconsider its decision denying Mr. Strickland's petition for a writ of certiorari. Petitions for rehearing of denial of petitions for certiorari are permitted when limited to "other substantial grounds not previously present." Rule 44.2 Rules of the Supreme Court. Petitioner requests this pleading be viewed under the protection of *Haines v Kerner*, 92 S. Ct. 594 (1972).

Question: Whether the application of 28 U.S.C. 2244(d),(1) (A) to deny a habeas petition as untimely interferes with rights implicit in the concept of ordered liberty.

This question presents a substantial ground for relief in the following case(s) in which final judgments have been rendered by the Tenth Circuit Court of Appeals and as to which Petitions for Certiorari had been filed in this Court.

Certiorari Denied, June 27, 2022

STRICKLAND V CROW No. 21-7671

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These two cases are related to the instant matter in that both present the standard of care applied in a U.S. District Courts review of a Petition for Writ of Habeas Corpus under 2244(d). In *Fay v Noia*, 83 S.Ct. 822 (1963), "Conventional notions of finality in criminal litigation cannot be permitted to defeat manifest federal policy that federal constitutional rights of personal liberty are not to be denied without the fullest opportunity for plenary federal judicial review."

This Petition will address how the Districts Courts reliance on 2244(d),(1),(A) to analyze timeliness of habeas petitions violates substantive due process rights under the 1st, 5th, & 14th Amendments.

I. ARGUMENT AND AUTHORITY

A. Concept of ordered liberty.

The 1st Amendment guarantees a constitutional right of "redress of grievances" and is grounded in the privileges and immunities of the 5th and 14th Amendments due process clause. The right to petition the government for a redress of grievances includes the right of access to the courts; that right is also subject to due process protection in that the opportunity must be at a meaningful time and in **a meaningful manner**. *Broudy v Mather*, 460 F.3d 106, C.A.D.C. 2006. This right is fundamental, deeply rooted in the nation's history, legal traditions, and practices.

In *United States v. Salerno*, 481 U.S. 739, (1987), the due process clause "clothes individuals with the right to both substantive and procedural due process." "This Court has held that the due

process clause protects individuals from two types of government actions. So-called "substantive due process" prevents the government from engaging in conduct that (1) shocks the conscience or (2) **interferes with rights implicit in the concept of ordered liberty**." *Palko v Connecticut*, 302 U.S. 319, (1937).

Substantive due process is "the doctrine that governmental deprivations of life, liberty, or property are subject to limitations regardless of the procedures employed. *Bowers v City of Flint,* 325 f.3d 758, (6th Cir. 2003). "It protects the individual from the exercise of power without any reasonable justification in the service of a legitimate governmental objective" *Daniel v Williams*, 474 U.S. 327, (1986).

In addressing the Petitioners question, a violation of substantive due process that interferes with redress of grievances under the 1st Amend. is also a violation of the 5th & 14th Amend. due process clauses. "If a fundamental right or liberty interest is involved, strict scrutiny is applied when determining if a law impinges on a substantive due process right. Under that standard courts must determine whether the infringement is narrowly tailored to serve a compelling state interest;" such as finality. "One who seeks to challenge a statute on the basis that it infringes upon a fundamental liberty interest bears the burden of demonstrating, at the outset, that he has a constitutionally protected liberty interest at stake. *Schlitter v State,* 488 S.W. 3d 306 (Tex Crim App 2016).

In *Hawkins v Freeman*, 195 F.3d. 732 (4th Cir. 1999), "If the claimed violation of substantive due process is by legislative enactment," i.e. 28 U.S.C. 2244(d),(1),(A), "either facially or as **applied**, the first step is to determine whether the claimed violation involves a fundamental right. If the interest is determined to be fundamental, it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. This review should be conducted on the basis of a careful description of the asserted fundamental liberty interest ... the nation's history,

legal traditions, and practices." In *Le garetta v Macias*, 21-cv-179 MV/GBW, 2022 W.L. 1443014, "The Tenth Circuit applies the fundamental rights approach when the plaintiff challenges legislative action."

Justice Brennan in *Fay v Noia* opined, "The Great Writ has been a part of American jurisprudence since the colonial period." It is recognized in the Federal Constitution, Act 1 s 9, cl 2, and was incorporated in the first grant of federal court jurisdiction in the Act of September 24, 1789. Chief Justice John Marshall declared it to be a "great constitutional privilege.

While it is simply a mode of procedure in form, it has been in inextricably intertwined with fundamental rights regarding personal liberty. It has provided a prompt and efficacious remedy for the restraints imposed by governments found to be intolerable. At its root is the principle that government actions must always be held accountable to judicial review for a man's imprisonment; if the procedures used violate the substance of personal liberty, then the individual is entitled to immediate release. The federal courts provide an avenue for petitioners to challenge violations of procedural as well as substantive due process. The Great Writ offends no legitimate state interest in the enforcement of criminal justice or procedure.

In reviewing the history of the habeas petition, on June 25, 1948, congress enacted legislation delineating a procedure for federal review of habeas petitions; 28 U.S.C., § 2243, issuance of writ. A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. Furthermore, a court must assure itself that the petitioner is not significantly prejudiced by the focus on the cause and determine whether the interests of justice would better be served by addressing the merits.

"The historic rule has been that lapse of time does not bar an application for habeas corpus. There was no statute of limitations and the doctrine of laches did not apply. The passage of time could be taken into account in weighing the credibility of the evidence and the merits of the petitioners claim, but it was not a bar." This rule was ended by the 1996 legislation amending the habeas corpus statutes. In 1996, Congress enacted the AEDPA, adding a new provision that imposed a 1 yr. period of limitations for applications for habeas corpus from state prisoners. This was taken from 17B Fed. Practice and Procedure, Jurisprudence, §4268.2(3d.ed), Federal Practice and Procedure, (Wright and Miller), May 23, 2022; an essay by Vikram David Amar, entitled ***Jurisdiction and Related Matters***. This act was specifically designed to address cases involving terroristic acts and the death penalty. Over the years the AEDPA has become the standard for reviewing all federal and state habeas petitions. Frustratingly, however, because of "the restraints imposed by the AEDPA-the federal statute- robust review is no longer viable in federal habeas proceedings." *Dunn v Madison*, 138 S.Ct. 9, 12 (2017), (Ginsburg, J, concurring). To challenge the constitutionality of that statute would not only be futile, it would guarantee any pleading would be D.O.A. at the Supreme Court. However, issues concerning how 2244(d),(1),(A) had been interpreted, i.e. "final", and applied, fall within the domain of ordered liberty.

In 2006, Justice Ginsburg *in Day v McDonough*, 547 U.S. 198, held that; 1.) District courts are permitted, but not obliged to consider *sua sponte*, the timeliness of a state prisoner's habeas petition. (Abrogating *Scott v Collins*, 286. F3d 423), and 2.) Before acting on its own initiative to dismiss a petition as untimely, the court must accord the parties fair notice and an opportunity to present their position. This ruling expanded the Courts ability to deny habeas relief on strictly procedural due process. At that point the petitioner is prejudiced in being required to address the cause (timeliness); thereby denying the Petitioner access to the court for redress of the merits of

his substantive constitutional claims. This ruling was not unanimous and Justice Scalia, with whom Justice Thomas and Breyer join, dissented. The following expressed the minority opinion. "The Court today disregards the Federal Rules of Civil Procedure in habeas corpus cases, chiefly because it believes that this departure will make no difference. The Civil Rules govern the procedure in the U. S. district courts in all suits of a civil nature; Rule 1. This includes "proceedings for habeas corpus." The federal rules of civil procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules, *Woodford v Garcia*, 538 U.S. 202, and do not contradict or undermine the provisions of the habeas corpus statute. *Gonzalez v Crosby*, 545 U.S. 524.

In sum, applying the ordinary rule of forfeiture to the AEDPA statute of limitations creates no inconsistency with the Habeas Rule. On the contrary; it is the Courts' unwarranted expansion of the timeliness rule enacted by Congress that is inconsistent with the statute, the Habeas Rules, the Civil Rules, and traditional practice. I would hold that the ordinary forfeiture rule, as codified in the Civil Rules, applies to the limitation period of 2244(d). There is, therefore, no support for the notion that the traditional equitable discretion that governed habeas proceedings permitted the dismissal of habeas petitions on the sole ground of untimeliness." End of Justice Scalia's dissent.

Heddlesten and Strickland were denied as untimely and deprived of access to the Court to have the violation of fundamental rights adjudicated on the merits; the court in both cases favored procedural due process over substantive due process. This failure on appeal interferes with the concept of ordered liberty. These cases create a real opportunity for criminal justice reform and real challenges to the Court's discretionary jurisdiction. Procedure - and procedural posture – affects the development of substantive rights. The Supreme Court has to choose between the state's interest in finality and the individual's liberty interest.

REASONS FOR GRANTING CERTIORARI

A. Substantial Federal Question - The principle purpose for which U.S. Supreme Court uses certiorari is to resolve conflicts among Court of Appeals and state courts concerning meaning of provisions of federal law. However, when a federal question is presented on the face of the plaintiff's properly pleaded complaint, federal jurisdiction exists. Heddlesten and Strickland both presented claims on Certiorari that the use of 2244(d),(1),(A) to determine the date of finality did not apply to their habeas petitions. Those petitions were denied as untimely which violated due process.

In this Petition for Rehearing a substantial federal question has been properly presented for the Court's review. While the mortality rate for rehearing petitions is near 100%, it isn't significantly less than the mortality rate for habeas petitions since the AEDPA. The following is taken from the Columbia Law Review, Jan., 2021, 121, Colum. 4, rev. 159, in an essay entitled ***Direct Collateral Review***, by Z. Payvand Ahdout.

"Since AEDPA's passage – and court decisions that have defined its breadth – scholars have lamented that federal habeas review is not adequately suited to the task of remedying unconstitutional confinement. According to one empirical study, since AEDPA's passage, federal habeas relief is afforded in only 0.29% of non-capital cases, & 12.4% of capital cases. Before AEDPA's passage, nearly 40% of capital habeas petitions were granted relief. This rate of federal habeas relief for state prisoners should not be taken as a marker of a properly functioning state criminal justice system.

As Professor Eve Primus put it; "Given the substantial evidence that States systematically violate defendant's constitutional rights & the large number of wrongful state convictions that have come to light, the rate of relief cannot be explained on the grounds that everything is fine."

In other words, the AEDPA bears significant human costs: imprisoned persons whose conviction or confinement is unconstitutional have been deprived, not of some abstract remedy, but of a way to secure their liberty. This baleful situation can only be considered a blatant disregard for due process derived from the court's penchant for abusively proffering procedure over merits.

In granting Certiorari the Supreme Court would re-establish federal supremacy in state habeas proceedings by clearly defining substantive due process, the importance of which has been an intricate part of jurisprudence on direct appeal until 1996. The AEDPA dismantled the federal courts authority to review all state convictions for substantive due process in favor of procedural due process. This Court can establish a 2- prong analysis of due process on appeal that would ensure all accused are convicted and imprisoned in accordance with the concept of ordered liberty. The states should be held accountable to judicial review for man's imprisonment. Are there 4 Justices willing to debate this issue?

B. The Tenth Circuit Court of Appeals **sanctioned the Western Districts departure from the accepted and usual course of judicial proceedings**, as to call for an exercise of this Court's supervisory power. In *United States v Palms,* 21 F.4th 689, (10th Cir. 2021), "the 5th Amendment provides individuals with both substantive and procedural due process rights." The 14th Amend. applies that to the states.

1. In *Heddlesten* and *Strickland* the U.S. Dist. Ct., West. Dist. of Ok. completely overlooked the explanation on the Petition for Writ of Habeas Corpus as 2244(d)(1)(D), the date the factual predicate was or could have been discovered thru due diligence.

In *Hill v Addison,* CIV-04-1728-F, 2005 WL 1077598, West. Dist. of Ok., the Hon. Magistrate Judge Robert wrote about 28 U.S.C. § 2244(d),(1). As a general rule, the period of limitation under this statute runs from the date the judgment became "final" as provided by Section

2244(d)(1)(A), unless the petitioner alleges facts that would implicate the provisions set forth in Section 2244(d)(1) (B), (C), or (D). He cited Preston *v Gibson,* 234 F.3d 1118, 1120, (10th Cir. 2000), to support this conclusion. By emphasizing the distinction of the separate sections of 2244(d)(1), Judge Robert clearly delineated the procedure to be adopted in reviewing for timeliness of Habeas Petitions. This ruling established a "conduct of legal proceedings according to established rules and principles." Since that time the procedure has been followed in the following cases: *Bramlett v Jones,* 2007 WL 2230962, CIV-07-967-D; *Perez v Dowling,* 2012 WL 2131275, CIV-014-1271-R; *Thompson v Dowling,* 2017 WL 4414735, CIV-17-758-F; and *Davis v Crow,* 2022 WL885656, CIV-22-162-F.

CONCLUSION

In this petitioner's case, Judge Mitchell acknowledged 28 U.S.C., § 2244(d)(1) provides 4 alternative starting dates for the limitations period,, then applied 2244(d)(1)(A) as the controlling section of the AEDPA to address timeliness. She determined that petitioner's statutory year to file a habeas began Oct. 11, 2018, & expired a yr. later on Oct. 11, 2019. In the Recommendation & Notice of Right to Object, she stated, "the undersigned recommends that the Court grant respondent's Motion To Dismiss Petitioner's Petition for Habeas Relief as untimely filed under 28 U.S.C. §2244(d)(1)(D). However, as petitioner clearly argued in his Petition for Certiorari, his claim of actual innocence was not adjudicated by the state's highest court, (O.C.C.A.), until Dec. 22, 2020. Allowing for the 90 day Cert. period, the date of finality would actually have been March 21, 2021, thus his habeas **was** timely filed on Jan. 29, 2021.

Petitioner's Request for Certiorari clearly demonstrated the state's role in depriving him of access to the federal courts for the redress of grievances, per the 1st Amend. By failing to review on direct appeal, both procedural & substantive due process, the O.C.C.A. forced him to pursue

other remedies, thus furthering the miscarriage of justice which has occurred as a result of the wrongful conviction of an actually innocent man.

Although petitioner's case is not a capital case, he did receive a life sentence, which is very much tantamount to execution, as petitioner will have to be 96 yrs. old before he is parole eligible, which, of course, will never happen. All because the courts, from the very onset of this case, have chosen to ignore the merits, including the "overwhelming" lack of evidence, as well as the clear & obvious proof which petitioner has provided in support of his actual innocence, in favor of procedures.

If state appellate courts were required to address both forms of due process on direct appeal, by a 2-prong analysis, it would cause the state courts to be more cognizant of a defendant's constitutional rights, both procedurally and substantively, during the course of all proceedings related to criminal justice. However, it will be up to the Federal Courts to hold the state courts to those standards, not vice-versa.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is limited to the grounds specified in Rule 44.2.

Alan E. Strickland