

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH REX HEDDLESTEN

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Petitioner

)

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vs.

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No. 21-7693.

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SCOTT CROW, DIRECTOR, D.O.C.

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Respondent

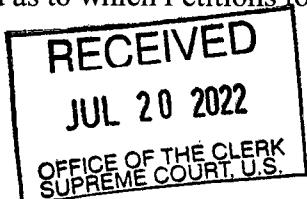
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**PETITION FOR REHEARING OF  
DENIAL OF WRIT OF CERTIORARI**

The Petitioner, Kenneth R. Heddlesten, pro se, moves this Court to reconsider its decision denying Mr. Heddlesten'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.



HEDDLESTEN V. CROW No. 21-7693

Certiorari Denied June 27, 2022

STRICKLAND V CROW No. 21-7671

Certiorari Denied June 27, 2022

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

### **FIRST, FIFTH, and FOURTEENTH AMENDMENTS**

#### **I. ARGUMENT AND AUTHORITY**

##### **A. Concept of ordered liberty.**

The First Amendment guarantees a constitutional right of “redress of grievances” and is grounded in the Privileges and Immunities of the Fifth and Fourteenth 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 (6<sup>th</sup> 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 First Amendment is also a violation of the Fifth and Fourteenth Amendments 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 (4<sup>th</sup> Cir. 1999), “If the claimed violation of substantive due process is by legislative enactment,” i.e. 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 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 is 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 Anti-terrorism and Effective Death Penalty Act adding a new provision that imposed a one-year period of limitation on applications for habeas corpus from state prisoner’s. 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 the 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.

Mr. Heddlesten and Mr. 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 is not significantly less than the mortality rate for habeas petitions since the Anti-terrorism and effective death penalty act (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 and 12.4% of capital cases. Before AEDPA's passage, nearly 40% of capital habeas petitions were granted. 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

criminal defendants' constitutional rights and 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, 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. End of excerpt.

**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.4<sup>th</sup> 689 (10<sup>th</sup> Cir. 2021), "the Fifth Amendment provides individuals with both substantive and procedural due process rights." The Fourteenth Amendment applies that to the states.

1. In *Heddelsten v Crow* and *Strickland v Crow* the U.S. District Court- Western District of Oklahoma 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, Western District of OK, the Honorable 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 (10<sup>th</sup> 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.

**C. What is a substantial showing of denial of a constitutional right?**

In *Slack v McDaniel*, 529 U.S. 473 (2000), *Miller-El v Cockrell*, 537 U.S. 322 (2003) and *Gonzalez v Thaler* 565 U.S. 134 (2012). Each of these cases had been denied a C.O.A. by their respective circuits and Certiorari was granted by this Court. Of these the 10<sup>th</sup> Circuit cited *Slack v McDaniel* to support the denial of Mr. Heddlesten and Mr. Strickland applications for C.O.A. “When the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.’” In *Slack*, Justice Kennedy wrote the majority opinion as follows: “According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss on procedural grounds, would be denied relief. We reject this interpretation. The Writ of Habeas Corpus plays a vital role in protection constitutional rights. In setting forth the pre-conditions for issuance of a COA under 2253(c.), Congress expressed no intention to allow trial court procedural errors to bar vindication of substantial constitutional rights on appeal.” Both Mr. Heddlesten and Mr. Strickland clearly demonstrated in their Habeas Petitions how the trial courts had violated the concept of ordered liberty in obtaining convictions.

**CONCLUSION**

In her order denying a COA Circuit Judge Allison H. Eid stated, “Because reasonable jurists would not dispute the district courts conclusion that a procedural timeliness bar does not deprive

a litigant of due process when it precludes review on the merits, we decline to issue a COA and dismiss this matter.” It is this statement that Mr. Heddlesten challenged in the body of his Certiorari.

Mr. Heddlesten clearly demonstrated that the District Court acted in a manner inconsistent with due process of law in denying Mr. Heddlesten’s Rule 60(b). By showing that the denial of his habeas petition as untimely under 2244(d)(1)(A)’s finality determination, Petitioner presented to the 10<sup>th</sup> Circuit, a debatable claim of the denial of a constitutional right. That right while not identified at the time was established in the First Amendment’s right to redress of grievances

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?

#### **CERTIFICATE OF COUNSEL**

I, Kenneth R. Heddlesten, certify that the above petition is restricted to the grounds specified in U. S. Supreme Court Rule 44.2 and is presented in good faith and not for delay.

Respectfully submitted,

Dated: July 13, 2022.

Kenneth R. Heddlesten.

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