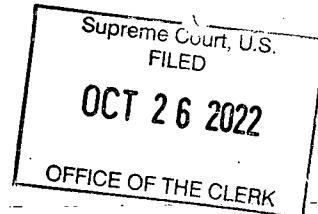


22-5984 No. **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES



KENNETH WILBERT BROWN Pro Se PETITIONER
(Your Name)

vs.

BRAD ADAMS, Et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

6th CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth W. Brown
(Your Name)

Northpoint Training Center
(Address) P.O. Box #479

BURGIN, KENTUCKY 40310
(City, State, Zip Code)

(859) 239-7012
(Phone Number)

QUESTION(S) PRESENTED

- 1) How can a defendant be deemed not to have "Been pursuing his rights diligently," when he is actively litigating 3 cases simultaneously that are all intrisicly related to one another?
- 2) Can almost a decade of reliable communication and sound advice, set a precedent that makes "attorney assusrances" more than "garden variety"?
- 3) When the aforementioned scenerios are at play, coupled with a history of numerous court delays and the affects of the covid-19 pandemic, how can this not be considered an "extraordinary circumstance" that warrants Equitable Tolling?

LIST OF PARTIES

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

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Brad Adamski is the original Respondent in this action, As he was the acting Warden at the time of filing the original action from which Petitioner Appeals to this Court.

The current Acting Warden/Respondent will be Kevin Mazza if this Court allows substitution, or if it is applicable under the current circumstances.

RELATED CASES

Brown v. Commonwealth, 416 S.W. 3d 302 (Ky. Dec. 19, 2013) Writ Denied Brown v. Kentucky, U.S. 909 (June 9, 2014).

Brown v. Commonwealth, No. 2017-CA-1051_MR, 2018 WL 3602783 (Ky. App. July 22, 2018). Disc. rev. denied (Ky. Dec. 5, 2018).

Brown v. Commonwealth, 2019 Ky. App. Lexis 125 (7-26-19)

Brown v. Commonwealth, 2020 Ky. Lexis 16 (2-12-20).

Oldham County Circuit Court Case Number: 16-CR-105.

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STATUTES AND RULES

28 U.S.C. § 2254
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6th and 14th Amendments to the U.S. Constitution.
Ky. SCR 3.130 1.4(a), 1.16(d)

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at Brown v. Adams, 2022 U.S. Dist. Lexis; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

24056

The opinion of the United States district court appears at Appendix C to the petition and is

reported at Brown v. Adams, 2021 U.S. Dist. Lexis; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

152725

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at NONE; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the NONE court appears at Appendix _____ to the petition and is

[] reported at NONE; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8/25/22.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
 An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was None.
A copy of that decision appears at Appendix 0.

A timely petition for rehearing was thereafter denied on the following date: None, and a copy of the order denying rehearing appears at Appendix 0.
 An extension of time to file the petition for a writ of certiorari was granted to and including None (date) on 0 (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

-28 USC § 2254

a) The Supreme Court, a justice thereof, a circuit judge, or a District court shall entertain an application for a writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws, or treaties of the United States.

-28 USC § 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.

"A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) That some extraordinary circumstances stood in his way and prevented timely filing." Holland, 560 U.S. 631, 649.

6th Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

14th AMENDMENT TO THE U.S. CONSTITUTION SECTION (1):

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
CONTINUED

Ky. SCR 3.130 1.4(a)

A Lawyer Shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed informed consent.
- (3) Keep the client reasonably informed about the status of the matter.

1.16(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers, property to which the client is entitled and refunding any advance payment or fee or expenses that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

STATEMENT OF THE CASE

Kenneth Wilbert Brown, A Kentucky prisoner proceeding Pro Se, appeals his decision of the 6th Circuit Court of Appeals judgment dismissing his petition for a writ of Habeas Corpus filed under 28 USC § 2254 as time barred.

In 2012, a jury in Jefferson Circuit Court convicted Brown of Murder, first-degree wanton endangerment (two-counts), Tampering with physical evidence, and trafficking in five pounds or more of Marijuana while in possession of a firearm. The trial court sentenced Brown to 24 years of imprisonment. On Direct Appeal, the Kentucky Supreme Court affirmed Brown's convictions. Brown v. Commonwealth, 416 S.W. 3d 302 (Ky. 2013), Cert denied, 573 U.S. 909 (2014). Brown then filed a motion to vacate, set aside, or correct his sentence pursuant to Kentucky Rule of Criminal Procedure 11.42, which the trial court denied. Brown appealed, and the Kentucky Court of Appeals affirmed the denial of his motion to vacate. Brown v. Commonwealth, No. 2017-CA-1051-MR, 2018 WL 3602783 (Ky. Ct App. 7-27-2018), disc. rev. denied (Ky. Dec. 5, 2018).

Brown filed a § 2254 habeas corpus petition in November 2020. Upon the recommendation of a magistrate judge, the district court dismissed his habeas petition as time barred. Brown v. Adams, 2021 U.S. Dist. Lexis 152725, 2021 WL 3598544 (W.D. Ky. Aug. 12. 2021).

Brown appealed and moved the 6th Circuit for a certificate of appealability, which was granted in part on the sole issue of whether he is entitled to equitable tolling of the one-year limitations period. Brown v. Adams, 2022 U.S. App. Lexis 8879 (4/1/22). The 6th Circuit subsequently affirmed the district court's judgment dismissing Brown's habeas petition as time barred. Brown v. Adams, 2022

STATEMENT OF THE CASE
CONTINUED

U.S. App. Lexis 24056 (8/25/22).

REASONS FOR GRANTING THE PETITION

When is an "extraordinary circumstance" truly "Extraordinary"?

Can the idea of one be placed in a box? or can it be "unusual or remarkable", in turn making the idea too broad to be confined? The answer is obviously the latter, but the 6th Circuit has chosen to make it the former. The case at hand is one of precedent, akin to the issues the petitioner faced in Holland, where this Honorable Court was called upon to provide an oasis for the vast desert known as "Equitable Tolling."

Around the spring of 2010, Albert Holland filed a great writ with this Court after being denied equitable tolling by the 11th Circuit Court of appeals. The Circuit Court held that Holland was not entitled to equitable tolling for "no more than '[p]ure professional negligence' on the part of the petitioner's attorney because such behavior can never constitute an "extraordinary circumstance."

Holland v. Florida, 560 U.S. 631, 643-44. The Circuit Court erroneously made this determination despite the fact that Holland's counsel ignored his letters, did not do proper research for his Federal Habeas Corpus, failed to file his petition on time, and "failed to communicate with his client over a period of years." Id., at 652, from the very beginning, Holland's counsel set a "precedent" of unreliability, which is most likely what prompted him to write his counsel several letters concerning the status of his case years before his state proceedings were adjudicated. Id., at 636. As a result, the Holland Court was forced to officially establish a legal precedent where a counsel's "serious instances of attorney negligence" is more than a "garden variety claim of excusable neglect." Id., at 651-52. In other words, this court saw the level of "professional

REASONS FOR GRANTING THE PETITION
CONTINUED

"NEGLECT" exhibited by Holland's counsel as so "unusual" and "remarkable" that a new standard had to be set! Like Holland, the case at hand is in dire need of similar action in order to further clarify what constitutes one having "been pursuing his rights diligently," and what can be categorized as an "extraordinary circumstances." Id., at 649.

In stark contrast to the counsel in Holland, Kenneth's numerous Public Advocates had set a "precedent" of timely correspondence, case updates, filing motions, and advising him on his next available options in the event of an adverse outcome. Their track record was so strong that the 6th Circuit initially ruled that "....the DPA's history of prompt updates may support a finding of diligence. Before the DPA's failure to inform Brown of the Kentucky Supreme Court's decision, it had-without fail- provided him timely notice of the progress of his case. Given this track record, Brown may have reasonably viewed its----- silence as a lack of news. And although the District Court observed that Brown's regular communication with DPA about his cases 'cuts both ways,' given that receiving no communication would have been 'out of the norm,' this observation implicitly acknowledges that this circumstance could cut in Brown's favor." Brown v. Adams, 2022 U.S. App. Lexis 8879, at 6. Oddly, the 6th Circuit Court took an abrupt turn when it handed down its final ruling by stating, "After this communication with potter in October 2018, Brown did not inquire about his motion for discretionary review until July 2021-21 months later. 'While this court has recognized that attorney assurances and realities of incarceration may justifiably delay a petitioner's request for a case status update,'

REASONS FOR GRANTING THE PETITION
CONTINUED

Waiting over a year and a half to request an update from counsel does not constitute reasonable diligence." Brown v. Adams, 2022 U.S. App. Lexis 24056, at 5. Although the 6th Circuit was correct about the amount of time it took Kenneth to make an inquiry, it failed to consider several other key factors when making its determination.

In his, "Request for permission to Appeal," Kenneth provided the 6th Circuit evidence supporting the fact that almost 18 months after receiving his case, his post-conviction counsel sent him him a letter thanking him for his patience, and explaining that "Because of the size of the case/trial/trial file, it [had] taken some time to get through all the materials." Id., Attachments A1 and A3. Moreover, He also sent evidence supporting that fact that his appellate counsel in another, significantly smaller case, advised him that "It could be anywhere from three months to over a year before we get a decision from the Court." See Reply Brief of Petitioner/Appellant, Attach 12. Furthermore, this very same attorney, like the rest of his public advocates, advised him to notify his office if he were transferred "So there is no delay in communication or lack of notice on the status of your case being delivered to you." Id., In addition, similar to Albert Holland, Brown filed a pro-Se supplemental brief during his direct appeal proceedings, but it was rejected because he was represented by counsel. The fact that it was summarily dismissed left Kenneth apprehensive about reaching out to the courts again without first being absolutely sure of its necessity. In summary, considering the statements/advice from these attorneys, and Kenneth's past experience, the prerequisites for him to inquire about the status of his case had not been met. Kenneth also has to point out that

REASONS FOR GRANTING THE PETITION
CONTINUED

the 6th Circuit did not take into consideration that he was entitled to effective assistance of post-conviction counsel pursuant to Martinez v. Ryan, and his counsel's failure to notify him of the outcome of his proceedings violated Kentucky statutes SCR 3.130 1.4 1.16(d). See Martinez, 566 U.S. 1, at 9; and Ky Bar-Ass'n v. Gevedon, 574 S.W. 3d 739, 743 (2019), See also Miller v. Collins, 305 F. 3d 491, 495-96 (A prisoners lack of knowledge that the state courts have reached a final resolution can provide grounds for equitable tolling). The 6th Circuit further asserted that Kenneth "passively await[ed] decision" and did not practice " reasonable diligence," because he "delayed inquiring about his motion for discretionary review even after he learned about the Kentucky Supreme Court's denial of his [MDR] in one of his other cases, which was filed over a year after his motion in his murder case." Brown, 2022 U.S. App. Lexis 24056, at 5. Kenneth, However, asserts the exact opposite.

As stated earlier, Brown's appellate counsel had advised him that it may take "over a year before "he received a decision from the court with a case that was miniscule in comparison to his murder case. Therefore, Kenneth was not unreasonable to expect the court to exercise its right to take a more thorough in-depth review of his issues, which in turn, would explain a much longer time-line before reaching a decision. Hindsight shows that he was mistaken, but "from a litigant's perspective it is difficult, if not impossible endeavor, to estimate how long a reviewing court will take to decide a particular motion." Miller v. Collins, 305 F 3d 491, 496. Furthermore, "....attorney assurances and the realities of incarceration may justifiably delay a petitioner's request for a case status update,"

REASONS FOR GRANTING THE PETITION
CONTINUED

Id., at 443. Moreover, the 6th Circuit has already acknowledged that "past delays experienced by the petitioner inform the reasonableness of his decision of how long to wait to inquire on the status of his case. See Miller, 305 F. 3d at 496 (a court's five-month period of review justified a later Nine-month delay). Brown, 2022 U.S. App. Lexis 8879, at 5. Kenneth must also remind the Court that he is still experiencing major delays in his other proceedings, So him not being alarmed by the off-timing of the MDR's was reasonable! (Oldham County case #17-CR-014 is currently going before the Ky Court of Appeals in RCr 11.42 proceedings, but Oldham County case # 16-CR-105 has still not gone to trial after almost 7 years!).

In the final portion of its ruling, the 6th Circuit held that covid-19 could not play a factor in Kenneth's delayed inquiry because "while the pandemic might excuse Brown's delay after March 2020, it does not explain his failure to inquire about the motion for discretionary review for more than a year earlier." Brown, 2022 U.S. App. Lexis 24056, at 6. Once again, this ruling completely contradicts its earlier rulings where it held, "Brown asserts that guessing when the court would rule became all the more difficult during the covid-19 pandemic, when courts across the nation began experiencing longer than usual delays in case progression. At least part of the time that Brown waited for notice of his case was during the early days of the pandemic. It therefore might have been reasonable for him to conclude that the Kentucky Supreme Court was taking longer than it typically would to adjudicate his motion." Brown, 2022 U.S. App. Lexis 8879, at 5-6. Brown urges that the initial ruling was correct because the court rightfully factored in the realities of the covid-19 delays with

REASONS FOR GRANTING THE PETITION
CONTINUED

the other credible factors that, justified his delayed inquiry.

This Honorable Court has already held "the 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct.....particular injustices'.....such courts exercise judgment in light of prior precedent, but with awarness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." Holland, 560 U.S. at 650. As stated earlier, the case at hand is one of precedent.

So the question I ask this Honorable Court, Is does the precedent have to be a recurring one for a petitioner to obtain relief? Kenneth's case is not as "cut and dry" as Holland, in that the whole is the sum of its parts. The record shows that Kenneth has always been "diligently pursuing [his] rights" when he attempted to file a supplemental Brief during his direct appeal, timely filed two RCr 11.42 motions, timely filed two writ of certiories, filed a timely Pro-Se MDR in his (intimidation) case, repeatedly played an active role in his trial preperations and appeals, filed his Federal Habeas Corpus petition in a shorter timeline than the one he would have had if he would have received proper notice, filed a timely notice of appeal in his second RCr 11.42 case, and is still actively involved in the preperation of his defense in his pending 3rd case.

If these cases were not intertwined, the 6th Circuit's dismissal of their importance may have merit. But since the "polar opposite" is true, their existence has to be factored when examining Brown's extraordinary circumstances. Although the [6th Circuit] sympathize[d] with the difficulty of managing numerous cases while in prison,

REASONS FOR GRANTING THE PETITION
CONTINUED

It failed to acknowledge that this is a new "precedent" never before navigated by the courts concerning equitable tolling. See Brown, 2022 U.S. App. Lexis 24056, at 6.

The 6th Circuit also chose to penalize Kenneth because his attorney's negligence did not meet the standard set by Holland. But if a particular attorney, or firm, has set a certain standard, would it not be "unusual or remarkable" for them to uncharacteristically fail their client regarding that respect? And if this were so, as it is here, should a defendant be expected to anticipate an attorney's failure when one has never been displayed for almost a decade? This Honorable Court has given the lower courts a "Blueprint" on how to rule when "an attorney's unprofessional conduct [is] so egregious as to create an extraordinary circumstance" (Holland, at 633), but it has never had to advise a court on how to rule when an attorney/attorneys are practically the "polar opposite." Although the representation provided to Brown by his public advocates can sometimes be viewed as "sub-par", they have always been reliable when it comes to correspondence and timely updates. So much so that Potter was the only failure in that respect of 8 lawyers, in over 8 years! So when are "attorney assurances" So strong that the tide cuts the other way, making them more than a "garden variety claim"? In Holland, the level of neglect by his counsel made his situation an "extraordinary circumstance." Kenneth's situation is the "polar opposite", in that his counsel's years of timely updates made Potter's failure to notify him one. Kenneth's dilemma was further exasperated by the fact that he was fighting 3 cases simultaneously while still receiving correspondence and visits from his other DPA

REASONS FOR GRANTING THE PETITION
CONTINUED

attorneys, which made him far more less likely to think anything was amiss by Potter's silence! Kenneth's unprecedented story is germane to someone playing a highstakes game of 3-card mollie with their life, but has no idea that there trusted and dependable friend has already picked their pockets!

Therefore, like this Honorable Court did with Holland, a new, or broader, standard needs to be established in this vast desert known as "equitable tolling." The 6th Circuit gave conflicting rulings partly because they were handed down by different judges, but more importantly there is currently no standard broad enough that allowed them to correctly apply the true meaning of "diligence" and "extraordinary circumstances" to Kenneth's case. In this rapidly evolving and unpredictable world, there will be more cases that do not fit perfectly within the current mold of "extreme circumstances," which is why Kenneth is at the Court's doorstep for a 3rd time. All he ask for is an opportunity to finally be able to properly present his case. And he prays that this Court finally gives him the key.

Thank you and God Bless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth W. Brown

Date: 10-26-22