No. 22-7416

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD K. PACK,
PETITIONER

V.

JAMES HEIMGARTNER, ET AL,
RESPONDENTS

ON PETITION FOR WRIT OF HABEAS CORPUS
TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF HABEAS CORPUS

Ronald K. Pack 106023
Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504-1568

IN THE SUPREME COURT OF THE UNITED STATES

In re: Ronald Pack,
Petitioner

Case No._____

PETITION FOR WRIT OF HABEAS CORPUS

Constitution and Statutory provisions involved

Article 1, Section 9 of the United States Constitution provides that, "The privilege of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

28 U.S.C. 2244(d)(2), The time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. 2244(d)(1)(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.

Questions presented

1) Does a Federal Court's denial of a State prisoner's right to statutory tolling under 2244(d)(2) or 2244(d)(1)(B) effectively suspend the great writ in violation of Article I, section 9 of the United States Constitution?

2) Did the District Court abuse its discretion by not considering the tolling effect if any of pending applications in State Court?

3) Is the petitioner's "Motion to Reconsider" filed within the AEDPA's (1) year grace period, a properly filed motion that tolls a State prisoner's limitation period under 2244(d)(2)?

4) Did the State Court's failure to enter an appealable order on petitioner's habeas petition constitute an impediment, under 2244(d)(1)(B)?

5) Does the State Court's denial of counsel to appeal habeas petition, in violation of State law (K.S.A. 22-4506(c) and Kansas Supreme Court Rule 183(m), constitute a State created impediment under 2244(d)(1)(B)?

6) Was petitioner's "Notice of Appeal" a properly filed application to toll limitation period under 2244(d)(2)?

7) Does a district court dismissing a State prisoner's original 2254 as untimely - prevent him from challenging timeliness in a subsequent petition?

8) Did petitioner abandon the claims that the district court hold were meritless, focusing instead on claims that the court held were procedurally defaulted?

9) Did the district court err in assessing procedural default, and did the petitioner excuse a procedural default?

List of Parties

Respondent's Attorney General is the proper respondent due to petitioner is under State Court jurisdiction, which has been unconstitutionally obtained.

Opinions Below

Pack v. Heimgartner, 857 Fed. Appx 992 (2021), No. 21-3053 8/31/21
Pack v. Heimgartner, 2021 U.S. Dist. Lexis 19353, Case No. 19-3246-DDC, 2254 Denied on 2/2/21.
State v. Pack, 345 P.3d 295, 2015 Kan. App. Unpub. LEXIS 224, 2015 WL 1513974 (Kan. Ct. App., Mar. 27, 2015)

Pack v. Heimgartner 2021 U.S. Dist Lexis 19353 No. 19-3246-DDC
Pack v. Heimgartner, 857 Fed. Appx 992 (2021) No. 21-3053

Jurisdiction

This Court has original jurisdiction under Article III of the Constitution, and 28 U.S.C. 1254(1) and United States Constitution Amendment II. Accordingly if the petitioner whishes to have the petition considered on the merits, he must pay the docketing fee required by this Court's Rule 38(a) and submit a petition in compliance with Rule 33. Also, under 28 U.S.C. 1651(a).

Statement pursuant to Rule 20.4(A) and 28 U.S.C. 2242

Original Writ of Habeas Corpus 20.4(A) delineates the standard under which "the Court will grant an original Writ of Habeas Corpus. (First), petitioner must show...that adequate relief cannot be obtained in any other form or from any other Court; (Second), the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, (quoting 28 U.S.C. 2242)."

The petitioner here has no avenue to file in the District Court or the Tenth Circuit Court of Appeals, because of the strict requirements of 2244(b) the claim is not within the dispensation that 2244(b)(2) grants for filing second or successive petitions.

Pack cannot satisfy the gatekeeping requirements of 2244(b)-(2), therefore cannot obtain the authorization from the Tenth Circuit to file a second 2254 application as put forth in 2244(b)(3)(A). The Tenth Circuit has also foreclosed relief for Pack from 60(b) challenges to the limitation period, as an avenue for reopening his habeas petition. Pack contends that in this case he can show "exceptional circumstances." (First), that he has a Motion to Reconsider his certificate of appealability that was filed in Nov/Dec of 2021 still pending in the 10th Circuit that he has never received an answer from? pursuant to 2244(d)(2), and that he has further tolling rights separate and distinct pursuant to 2244(d)(1)(B)'s tolling provisions. And (Second), that he can prove timeliness on existing record, which he has never been allowed to do. The facts of this case shows that Pack satisfied the first prong, to trigger tolling - his applications were filed within the (1) year grace period allowed by AEDPA, but the Court did no further analysis.

To determine whether an application for post conviction relief was pending in State Court, the United States Supreme Court has ruled that Federal Courts must determine whether the petition was "properly filed" and timely under State law. Evans v. Chavis, 546 U.S. 189, 198 (2006); also Kholi v. Wall, 582 F.3d 147 (1st C Cir. 2009), cert. granted, 130 S.Ct. 3274 (2010)(granting certiorari to determind whether a State Court motion constitutes an

application for State post-conviction or other collateral review for purpose of 2244 (d)(2).

This Court should recognize that no conceivable benefit can be derived from rights of which one is unaware. The rights to the tolling provisions of 2244(d)(2) and 2244(d)(1)(B) is a mere illusion, because, most times a prisoner will not know whether hi his State filings complied petition erroneous - abused discretion in deeming issue waived and not reaching merits of tolling argument); Rodrigues v. Bennet, 303 F.3d 435 (2nd Cir. 2002)(Where district court did not determine whether petitioner was entitled to statutory or equitable tolling). For the tolling provision to apply 2244(d)(2), requires only that the state application be properly filed. See Artuz v. Bennet, 531 U.S. 4 (2001). Without further determination as to disposition of state applications (which would require the resolution of unsettled legal question), further defelopment is necessary. Pack is left presently with the lasting impression that his petition quite possibly-if not likely, was not, in fact untimely filed. The court has recognized a Due Process Claim under these circumstane. See Logan v. Zimmerman, 455 U.S. 422 (1992).

Inherent in 2244(d)(2) is the obligation of the federal court having jurisdiction to determine if any pending applications in State court tolls limitation period under federal law. See Evans-v. Chavis, 546 U.S. 189 (2006)(To determine whether an application for post conviction relief was pending in state court the U.S. Supreme Court has ruled that Federal Courts [must] determine whether the petition was properly filed. Id 189. The only question that remains is whether the motions are properly filed according to Federal Law. If the court concludes that the applications are properly filed according to Federal Law, Pack is statutorily entitled to tolling under 2244(d)(2) See Weibly v. Kaiser, 50 Fed.-Appx. 399 (10th Cir. 2002) headnote #10.

Equitable Tolling

The court may also find it relevant to the AEDPA's analysis that Pack is bringing an "actual innocence" claim. See e.g., Triestman v. United States, 124 F.3d 361, 377-380 (CA2 1997), (discussing serious constitutional concerns that would arise if

AEDPA were interpreted to bar judicial review of certain innocence claims). Pet. for writ of habeas corpus 20-22 (arguing that congress intended actual innocence claims to have special status under AEDPA).

Even though a petitioner is not entitled to the automatic tolling mandated by 2244(d)(2) under appropriate circumstances a petitioner may be entitled to equitable tolling. Pack had presented both procedural and substantive actual innocence claims. The constitutional claims are based not on his innocence, but rather on his contention that the effectivenss of his counsel denied him the full panoply of protections afforded to criminal defendants by the constitution. Pack may obtain review of his constitutional claims only if he falls within the narrow class of cases, implicating a fundamental miscarriage of justice. His claim of innocence of the charged crime is offered only to bring him within this narrow class of cases. See Schlup v. Delo, 513 U.S. 298, 314-15 (1995).

The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, and evidence tenably claimed to have been wrongly excluded or to have become available only after trial. (See Schlup 513 U.S. at 327-28. Pack presented "new reliable evidence" in the form of two separate court ordered psychiatric evluations, that was never before the jury trial. Pack was precluded from adducing psychiatic evaluation evidence of his inability to form the specific intent necessary to commit 2 counts of rape. cf. Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1998)(The court also held that the exclusion of psychiatric evidence violated the petitioner's U.S. Constitutional Amendment VI, and XIV rights, as it was relevant and competent, and its exclusion was unjustifiable.

In Pack's case, he was actually innocent of the 2 counts of rape. 1) First of all, Pack had evidence of medical records proving that he could not get an erection due to physical inability, so the arousal prong could not be met. 2) Second, Pack was not given a psychiatric/psychological evaluation before jury trial, and 3) There was no physical evidence to prove the victim was

ever raped or that any physical damage was ever done to the hymen, such as penetration of any object or scaring. The only evidence was the testimony of a minor who was coached, groomed, and rehearsed over and over by her mother, and the prosecutor.

4) Trial counsel also failed to suppress the alleged witness's testimony who was a minor coached by the State prosecutor and the victim's Mom to lie against the defendant in order to gain an illegal conviction. 5) Trial counsel also failed to provide the trial court evidence that the alleged victim's Mother lied against the defendant and fabricated false evidence to the police and coached her daughter to lie against the defendant in order to keep her kids from going over to the defendant's family house.

All of this evidence was available to Pack's counsel, but Pack's counsel was ineffective and refused to use it. As in the case of Murray v. Carrier, 477 U.S. 478 (1986), if the procedural default is the result of ineffective assistance of counsel, the 6th Amendment itself, U.S. Const. Amendment VI, requires that responsibility for the default by imputed to the State which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance. Ineffective assistance is cause for a procedural default. Which requires that a claim of ineffective assistance be presented to the State Courts as an independent claim before it may be used to establish cause for a procedural default.

As in the case of Dretke v. Haley, 541 U.S. 386 (2004), Pack had viable and significant claims of ineffective assistance of Counsel which potentially provided the petitioner with appropriate relief. With respect to a State prisoner's attempts to excuse a prior State Court procedural default of a Federal Constitutional claim, when a Federal Court, in a habeas corpus case under 28-USCS & 2254, is faced with allegations by the prisoner of "actual innocence," whether of the sentence or of the crime charged, the Federal Ct must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default: 1) This actual innocence avoidance principle was

implicit in a prior U.S. Supreme Court decision which discussed the actual innocence exception. 2) Even though the availability of other remedies alone would be sufficient Justification for this actual innocence avoidance principles the may threshold legal questions after accompanying actual innocence claims provide additional reason for restraint, for (a) some (although not all) actual innocence allegations will present difficult Federal Constitutional questions that should be avoided if possible; and b) actual innocence allegations are likely to present equally difficult questions regarding the scope of the actual innocence exception.

The petitioner provided the U.S. District Court with the general cause and prejudice requirement for excusing State-Court procedural defaults during his Court order to show cause, but the Court refused to grant and acknowledge it, even when Pack provided a cause & prejudice analysis and provided cause to excuse the procedural default, but was blocked by procedural default due to his ineffective assistance of counsel so the courts refused to hear it. So the big question is whether this exception applies where an applicant asserts "Actual Innocence" of a non-capital sentence, because the district court failed first to consider alternative grounds for relief urged by petitioner, grounds that might obviate any need to reach the actual innocence question.

Cause requires a showing of some external impediment preventing counsel from constructing or raising the claim in an extraordinary case where a Const. violation has probably resulted in the conviction of one who is actually innocent, a Federal Court may grant a writ of Habeas Courpus even in the absence of a showing of cause for the procedural default.

If a procedural default by the defense in a criminal case is the result of ineffective assistance of counsel, the 6th Amendment requires that the responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance. Thus, Ineffective assistance of counsel is cause for a procedural default, for purposes of the Rule that a prisoner who fails to properly raise a federal Constitutional claim in

the ground raised--competency to be excuted had been raised in the original petition. Rather than read the second and successive ban literally, at the expense of a first Habeas Corpus ruling on the issue (implicating constitutional concerns). The Court instead seized upon the fact that the District Court never ruled on the merits of the original claim. Id at 645. This allowed the Court to find that the claim was not successive and permitted the claim to be heard, despite the apparent statutory prohibition. Id.

The tenth circuit stated that Pack did not argue that the district erred in assessing procedural default. Instead, the court said he erred in concluding the default could not be excused, and that it is his burden to establish grounds to excuse a procedural default. This is incorrect, because Pack filed a Cause brief under Coleman v. Thompson, 501 U.S. 722, 750, 11 S. Ct. - 2546, 115 L.Ed. 2d 640 (1991, & Thomas v. Gibson, stating the Cause of his ineffective assistance of counsel and how actual prejudice occurred, but the District Court did not wantto hear it. Pack did make an actual showing that reasonable jurists could debate the issues. Faced with a constitutional collision between AEDPS and a prisoner's right of Habeas review, the Courts chose to avoid it by interpreting 60(b) limits to fit within what the Constitution permits, allowing reopening of Habeas for procedural dismissals, without the need to demonstrate an issue of Constitutional dimension. This result follows from the Court's doctrine of constitutional avoidance. Harris v. United-States, 536 U.S. 545, 555 (2002). Lower Federal Courts have also followed the precedent of this Court's analytical formulations.

The Court recognizing that the alternative left petitioners without Habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It noted that procedurally dismissed cases have never had a merits determination of the petitioner's claims in which miscarriage of justice could be demonstrated. Slack, 529 U.S. at 488. "The fact that this court would be required to answer the difficult question of what the

Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding review was barred entirely." INS. v. St. Cyr, 533 U.S.-289, 301, n.13(2009).

Original Writ of Habeas Corpus and Supreme Court Rule 20.4 (A), delineates the standard under which "the Court will grant an original writ; (first), petitioners must show...that adequate relief cannot be obtained in any other form or from any other Court; (Second), the petitioner must show that exceptional circumstances warrant the exercise of the Courts discretionary power. (Quoting 2242). This case satisfies both of those requirements. Here, the lower courts have foreclosed any adequate relief by, denying Pack's (60(b) motion to reopen Habeas petition on limitation grounds and by refusing to allow a second or successive application, with a strict reading of AEDPA's 2244(b)(1)'s gatekeeping provision. The "second or successive application, with a stict reading of AEDPA's 2244(b)(1)'s gatekeeping provision. The "second and successive" bar of AEDPA, itself has been applied in a manner that renders the habeas remedy ineffective or inadequate.

The above was the only procedural device to prevent injustice and remedy the due process violation. Due process inheres in statutory rights. Denial of due process of law (in a separate context) is a violation of the Fifth Amendment. A Habeas petitioner, such as Pack has a statutory right to a single Federal Habeas Corpus review of his State imprisonment and denial of that right may violate the Fifth Amendment assurance of due process. (See) Anti Fascist Committee v. McGrath, 341 U.S. 123, 165 (1951). Due process and the prohibition on suspending Habeas strongly suggest that the complete preclusion of Federal review predicated on a procedural trap are of arguble unconstitutionality and therefore, represent unsound interpretation of 2244(b)(1). Decisions of lower Courts crashes headon into difficult issues of Constitutional law.

Is Pack's "Motion to Reconsider" filed in the Tenth Circuit, in October/November of 2021-within the AEDPA's one year grace period a properly filed motion that tolls a State Prisoner's limitation time under 2244(d)(2)?

The District Court erred without further analysis of Kansas law if petitioner's motion was properly filed to trigger 2244(d)(2)'s tolling provision. Cf. Noble v. Adams, 676 F.3d 1180 (9th Cir. 2012)(District Court error in concluding, without further analysis of State law if motion was properly filed). Whether an application for State post conviction relief is "pending" for 22-44(d)(2) purposes in an issue of Federal law. Mills v. Norris, 187 F.3d 881 (8th Cir. 1994) cited by Williams v. Gibson, 229 F.-3d 13 10 (10th Cir. 2000). For tolling purpose under 2244(d)(2) a Court determines only whether the petitioner properly filed for such State post-conviction relief. Truelove v. Smith, 9 Fed. Ap-px. 798 (10th Cir. 2001). If application properly filed under State law petitioner is statutorily entitled to tolling of limitation period. See Weibly v. Kaiser, 50 Fed. Appx. 399 (10th Cir. 20002) Head note #10.

To determine whether an application for post conviction relief was pending in State Court, the United States Supreme Court has ruled that Federal Courts [must] determine whether the petition was properly filed and timely under State law. Evans v.-Chavis, 546 U.S. 189, 198; Carey, 536 U.S. at 226.

Kansas Courts consider a Motion to Reconsider to be equal to a Motion to Alter or Amend Judgment. Honeycutt v. City Wichita, 251 Kan. 451, 460, 836 P.2d 1128 (1992). If the language of the motion is proper, it may allow for consideration as a motion under K.S.A. 60-259(f), even if that Statute is not specifically invoked. This Court in United States v. Healy, 376 U.S. 75, 78-79 (1964), expressly recognized that "the consistent practice in civil and criminal cases alike has been to treat timely "motions for reconsideration" as rendering the original judgment nonfinal for purpose of appeal for as long as the motion is pending. U.S.-v. Dieter, 429 U.S. (1976); Hundley v. Pfuetze, 18 Kan. App. 2d 755 (1993)(Therefore by filing a motion to reconsider, a party tolls the running of the appeal period until that motion is decided.); State v. Agrillo, 423 P.3d 1063 (2018)(Recently, out Court entered an order noting that the pending motion to reconsider in the District Court left us without proper jurisdiction to consider the appeal since there was not yet a final judgment.

See K.S.A. 60-2102(a)(4). Case was remanded for a ruling on Agrillo's motion to reconsider. When a trial Court has failed to rule on an incarcerated litigant's pending motion, reviewing Courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on pending motions." Bell v. Todd, 2005 Tenn. App. 206 S.W.d. 86.

Bell reminds the careful practioner that the trial Court must examine and address a pro se litigant's outstanding motions before entering judgment in a case. A state court's failure to rule on a Motion for Reconsideration is a denial of habeas petitioner's due process rights under the 14th Amendment. The due process clause grants an aggrieved party the opportunity to present his case and have its merits fairly judged. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Simmons v. Schriro, 187 Fed. Appx. 753 (2006)(The prisoner presented a viable United States Constitution Amendment XIV due process claim arising out of the State Court's failure to rule on his Reconsideration Motion from denial of his first post-conviction petition) Id. The posture of Simmons case presents the court with a perfect analogy of Pack's case.

For motions filed under 2254, Congress explicity instructs the Federal Courts through the AEDPA'S act of 1996, 2244(d)(2) to toll time spent in State Court. Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998); Gibson v. Klinger, 232 F. 3d 799, 806 (10th Cir. 2000)(determined that the pendency of a post conviction application must be interpreted under Federal law). The court observes that the text of 2244(d)(2), which creates a tolling right to the one year statute of limitations, contains no language restricting the application. To the contrary for the tolling provision to apply 2244(d)(2), requires only that the State application for post conviction or other collateral review be properly filed. See Artuz v. Bennett. The Court concludes that the language of 2244(d)(2) itself is not ambiguous as to the condition that triggers the tolling provisions. As such, the Court is not at liberty to generate an ambiguity as to the meaning of the phrase "properly filed." A Statute may not be modi

modified by judicial construction where its meaning is plain. Rawlins v. Nat. Trans. Sf. Bd., 837 F.2d 1327 (5th Cir. 1998). 2244(d)(2) means what it says. See Iancu v. Brunetti, 588 U.S. 139 S. Ct. 2294 (2019)(As usual when a lower court has invalidated a Federal Statute, we grant certiorari). Bennett, 303 F. 3d 435 (2nd Cir. 2002)(Where District Court did not determine whether petitioner was entitled to statutory tolling); cf. Ellis v. Harrison, 270 Fed. Appx.721 (9th Cir. 2008)(dismissal of 2254 petition erroneously abused discretion in deeming issue waived and not reaching merits of tolling argument); *Kholi v. Wall, 582 F.3d 147 F.3d 147 (1st Cir. 2009) cert. granted, 130 S. Ct. 3274 (2010) (granting certiorari to determine whether a State Court motion constitutes an application for post conviction or other collateral review for purpose 2244(d)(2); Downs v. McNeil, 520 F.3d 1311 1322-25 (11th Cir. 2008)(Vacating the district court order dismissing the petition as untimely and remanding for evidentiary hearing). *Emerson v. Johnson, 243 F.3d 931, 935 (5th Cir. 2001) (Limitation tolled when motion for reconsideration in State court properly filed)(Emphasis Added).

A determination as to what effect the Motion to Reconsider filed on October/November 2021 in the 10th Circuit from the denial of petitioner's certificate of appealability is necessary to enforce 2244(d)(2)'s and 2244(d)(1)(B)'s plain terms. Alternatively, if the state court did not rule on the petition at all, then Pack's motion for reconsideration of his certificate of appealability may have been prematurely rather than untimely filed. See Hough v. Carlton, 339 Fed Appx 520 (6th Cir.)2009).

State Created Impediment's

28 U.S.C. 2244(d)(1)(B). The date on which the impediment to filing an application created by State action in violation of the constitution of laws of the United States is removed, if the applicant was prevented from filing such action. While 2244(d)(1)(B) of the AEDPA says that an exception to the filing deadline will be made when "impediment" to filing created by State action exists, it is not at all clear what exactly such an impediment might be, case law grappling with the doctrine is relatively

sparse. A review of case law shows 2244(d)(1)(B) typically applies when the State thwarts a prisoners access to the Courts. See Sell v. U.S||, 539 U.S|| 166, 176 (2003)(In as much as the 10th Circuit has not yet brought the case to final judgment, ther there is no appealable order); State v. Agrillo, 423 P|| 1063 (Kan. Ct. App. 2018)(Same).

Pack is alleging here that the 10th Circuit's failure to rule on his Motion to Reconsider the denial of his certificate of appealability prevented him from exhausting State remedies.

Which is a prerequisite to Federal Habeas review. And (second), that the denial of his statutory right to appellant Habeas counsel under State law, constitutes separate and distinct impediments under 2244(d)(1)(B)'s tolling provision.

To obtain relief under 2244(d)(1)(B) the petitioner must show a causal connection between the unlawful impediment and his failure to fil|| a timely Habeas petition. Bryant v. Schriro, 499 F.3d 1056, 1060 (9th Cir. 2007). Section 2244(d)(1)(B) requires that the State action constituting the impediment violated the U.S|| Constitution and prevented the inmate from filing his claim. Irons v. Estep, 291 Fed. Appx. 136 (10th Cir. 2008). A State created impediment must, to animate the limitation extending exception "prevent" a prisoner from filing for Federal Habeas relief. That gets the grease from the goose. The verb "prevent," in common parlance means to frustrate hold back, or keep from happening. Heineman v. Murphy, 401 Fed. Appx. 304 (10th Cir. 2010).

Pack contends that the State's failure to appoint him counsel, and for the 10th Circuit to rule a judgment on his certificate of appealability, in violation of State law, constitutes a State created impediment under 2244(d)(1)(B). The Court in Green v. Johnson, 515 F. 3d 290, 304-05 (4th Cir. 2008)(found "impediment" when State failed to replace allegedly ineffective counsel and grant a hearing on prisoner's case). Certainly the total denial of Counsel constitutes an impediment that prevents an inmate from filing.

Furthermore, the State Court's failure to enter an appealable order constitutes an impediment in violation of the U.S.

Constitution. The States failure to rule on Pack's motion for reconsideration was not only a Statutory violation (K.S.A.)60-2103(a), but a Constitutional violation. See Logan v. Zimmerman-Brush Co., 455 U.S. 422, 433, 102 S. Ct. 1148 (1982)(A State Court's failure to rule on a Motion for Reconsidration is a denial of Habeas petitioner's due process rights under the Fourteenth Amendment): Simmons v. Schriro, 187 Fed. Appx. 753 (2006) Headnote #3.

The above coupled together or separately constitutes an insurmountable State created impediment under AEDPA's 2244 (d)(1)-(B), that kept Pack from exhausting State remedies, and prevented him from filing timely Federal Habeas relief. Cf. Critchley-v. Thaler, 586 F.3d 318 (5th Cir. 2008)(Holding that the State Court's failure to file a prisoner's State Habeas petition constituted a State created impediment under AEDPA). AEDPA's limitation period with it's accompanying tolling provisions-ensures t the achievement of the goal of exhaustion of State remedies. These impediments have yet to be removed.

Reason For Granting Writ

The primary reason for granting the writ, is that Pack is actually innocent of the charged crime. First, Pack presented a claim of actual innocence as a gateway to overcome the procedural bar of untimeliness, that otherwise prohibits reaching the merits of his substantive claim. His claims are entitled to consideration of the merits of the motion if the claim meets the standard outlined in Murray v. Carrier, 477, U.S. 478 (1986); Schlup v.-Delo, 513 U.S. 298 (1995). When an inmates motion of reconsideration is untimely, a court must consider whether the inmate is entitled to an equitable tolling of the AEDPA limitation period. Sigala v. Bravo, 656 F.3d 1125 (10th Cir. 2011). This case is a prime example where a State Court without justification, refused to rule on a Constitutional claim that has been properly/timely presented to it.

One of Pack's actual innocence claims is based on an underlying Constitutional violation of ineffective assistance of counsel, which is a violation of the Sixth Amendment. Pack's claim of

innocence would not provide a basis for relief in and of itself.

Relief would be dependent upon his later ability to demonstrate the merits of his substantive claims under Strickland v. Washington, 466 U.S. 668 (1984)(Setting standard for relief for ineffective assistance of counsel); also See House v. Bell, 547 U.S. 518, 543 (2006)(acknowledging that ineffective assistance of counsel in an initial trial is considered a Constitutional error).

In support of this ineffective assistance of counsel claim, Pack presented "newly discovered" evidence in the form of one outstanding Court ordered psychiatric and psychological evaluation. (App. B, Exh-IJ). See Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003)(The Court found that the psychiatirc evidence was "newly presented" rather than "newly discovered" evidence, but could be raised as a basis for actual innocence); Powell v. Florida, 464 So. 2d. 1319 (1985), recognizing that a failure to raise a defendant's competency can be grounds for ineffective assistance of counsel; Saunders v. Florida, 704 So. 2d 224 (1988) (reversing a defendant's conviction due to absence of record refuting claim that counsel was ineffective for failure to investigate defendant's competency); O'Callaghan v. State, 461 So. 2d 1354, counsel's motion for psychiatric examination was granted, but never conducted); Wiggins v. Smith, 539 U.S. 510, 534 (2003) (determining that an attorney's failure to investigate and present mitigating evidence constituted ineffective assistance of counsel); Williams v. Taylor, 529 U.S. 362, 390 (2000)(same). AKE v. Oklahoma, is binding precedent and requires the State to provide the defense with access to a competent psychiatrist who will conduct an appropriate, 1) examination and assist in 2) evaluation, 3) preparation, and 4) presentation of defense. (Quoting AKE, 470 U.S. 68, 83).

Pack's right to a fair trial were violated in this instance by the total lack of a psychiatric examination or hearing to determine competency to stand trial. Cf. Sanders v. State, 950 3d. 1132, 1136 (Miss. Sup. Ct. 2009)(The Court found error where a trial Court failed to conduct a competency hearing, after o

ordering a defendant to undergo a psychiatric exam, while never making an on-the-record finding that the defendant was competent) Jay v. State, 25 So. 3d 257 (Miss 2009)(same). This violation can only be corrected at this time by a new trial. Hansford v. U.S., 365 F. 2d 920 (D.C. Cir. 1966). Pack was precluded from adducing psychiatric evidence of his inability to form the specific intent neccessary to commit 2 counts of rape. cf Hughes v. Mathews, 576 F. 2d 1250 (7th Cir. 1998)(The Court also held that the exclusion of psychiatric evidence violated petitoner's U.S. Constitution Amendment VI, XIV rights, as it was relevant and competent, and its exclusion was unjustifiable). The due process clause requires the State to provide a criminal defendant with "a reasonable opportunity to demonstrate that he is not competent to stand trial. (quoting) Medina, 505 U.S. at 451.

The ends of justice demand consideration of merits of claim on successive petition where there is colorable showing of factual innocence; so the Motion for Reconsideration of petitioner's Certificate of Appealability should be remanded for consideration of whether the ends of justice require consideration on the merits.

Procedural default is excused under actual innocence exception where petitioner's claim, if true, rendered conviction void and could not be legal cause of imprisonment. Gonzales v. Abbot, 967 F. 2d 1499, 1504 (11th Cir. 1992); 967 F.2d 1499, 1504 (11th Cir. 1992); Moore v. Kemp, 824 F. 2d 847 (11th Cir. 1987), cert granted 495 U.S. 1005. If Courts apply AEDPA in such a way that it bars consideration of an actual innocence claim, then AEDPA is "Unconstitutional." Justice Stevens, In Re Sharp, No. 15646 (Sup. Ct. Dec. 2015). The Supreme Court has conceded that prisoners in the Fifth, Tenth, and Eleventh Circuits cannot obtain otherwise adequate relief, because successive petitions are unavailable to prisoners in these circuits. Brief of Opposition at 12 In re Sharp. Pack incorporates as though fully set herein his 28 U.S.C. 2254 petition and the Memorandum In Support of 2254, located at (Appendix A & B). To show that he presented a cognizable, colorable actual innocence claim.

Furthermore, the 10th Circuit never gave a decision on Pack's

Certificate of Appealability without making factual findings as to tolling under 2244(d)(2), and 2244(d)(1)(B), with respect to pending State applications. The Tenth Circuit dismissed Pack's Motion to Reconsider as untimely and denied his rule 60(b) Motion for Relief from that judgment without benefit of Artuz v. Bennett, 531 U.S. 4. However, Pack filed a Motion to Reconsider his certificate of appealability petition within the 1) year grace period allowed by AEDPA, that may have tolled the limitation period of Artuz. (cf. the same) Blackmon v. Money, 531 U.S. 988 (2000)(mem), on remand, 27 Fed. Appx. 546 (6th Cir. 2001).

The Court may excercise its statutory power of transfer and transfer an original writ to a court in the proper jurisdiction to review factual issues. (See) In re Davis, 557 U.S. 952.

The Tenth Circuit Court of Appeals has also held that an original writ to a court in the proper jurisdiction to review factual issues, and an application raising a claim of excessive delay does not count for successive application purposes. Reeves v. Little, 120 F.3d 1136, 1139 (10th Cir.)(per curiam). Pack contends that his inordinate delay claim, asking the Federal Tenth Circuit to be excused from exhausting State remedies, was brought about because the State Court refused to enter an appealable order on State Habeas applications. Therefore, this claim is proper before this court. (see) Turner v. Bagley, 401 401 F. 3d 178 (6th Cir. 2005)(Habeas relief may be unconditionally granted due to inordinate delay); Harris v. Champion, 15 F. 3d 1538, 1558 (10th Cir. 1994)(Protection against unreasonable delay in the appellate process is provided by the due process clause). Mathis v. Hood, 651 F.2d 612, 615 (2nd Cir.)(Federal Habeas review remains available to protect indigents rights to appeal).

The actual innocence claim coupled with the inordinate delay claim (if true) is sufficient grounds for this Honorable Court to evoke its original jurisdiction and grant the writ of Habeas Corpus releasing the petitioner from his Unconstitutional avoidance.

CONCLUSION

The petition for writ of Habeas Corpus should be granted.

Respectfully Submitted,

Ronald K Pack #106023

Ronald Pack # 106023
HCF
P.O. Box 1568
Hutchinson, KS 67501