

QUESTION(S) PRESENTED

1. Clear error of judgment
 2. Constitutionally erroneous imposition of order denying COA
 3. Question raised about such considerations goes to the legitimacy of employing en banc rehearings to correct a panel's error in the application of settled law
 4. Determining whether a COA should issue where petition was dismissed on procedural grounds
-
5. Court's failure to follow proper procedure, proper notice not given, violation of due process

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Acosta v Artuz	221 F.3d 117
Ayestas v Davis	138 S.Ct 1080
Boyd v Thompson	147 F.3d 1124, 1128
Buck v Davis	580 U.S. 100
Herbst v Cook	260 F.3d 1039
Lonchar v Thomas	517 U.S. 314
Slack v McDaniel	529 U.S. 473

STATUTES AND RULES

28 USC section 2253
28 USC section 2254 AEDPA

OTHER

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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 _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ 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 _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; 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☐ is unpublished.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 December 16, 2022.

☐ 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: January 25, 2023, 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 _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Determining whether a COA should issue where petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding.

Section 2253 mandates both showings be made before the court of appeals may entertain the appeal.

Petitioner directs attention to address the second component of the 2253(c) inquiry, whether jurists reasonable could conclude that the district court's dismissal on procedural grounds was debatable or incorrect.

Petitioner asserts that as here satisfies one of the requirements for issuance of a COA, because reasonable jurists could conclude that the district court's procedural ruling was wrong, due to the fact that district court must give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal, by issuing an OSC Order to Show Cause, affording petitioner due process of law, which the court failed to do, denying Petitioner his due process rights.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

A court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. Rather, for purposes of determining whether a COA should issue, the question is the debatability of the underlying constitutional claim, not the resolution of the debate.

A litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not "deserve encouragement to proceed further." *Buck v Davis* 580 U.S. 100.

Ayestas v Davis 138 S.Ct. 1080. The U.S. Supreme Court may review the denial of a certificate of appealability (COA) by lower courts. When lower courts deny a COA and the Court concludes that their reason for doing so was flawed, the Court may reverse and remand so that the correct legal standard may be applied.

See, *Slack v McDaniel* 529 U.S. 473.

Statement Of Reasons For Issuance Of COA

1.

The district court erred when it dismissed the petition without first providing Petitioner notice and opportunity to respond.

See, *Herbst v Cook* 260 F.3d 1039...

In *Boyd*:

A district court's use of this summary dismissal power is not without limits. A habeas court must give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal. When dealing with a pro se petitioner, the court must make clear the procedural default at issue and the consequences for failing to respond. In the case, the Magistrate Judge issued an OSC which clearly identified the procedural default and detailed the cause and actual prejudice standard, allowed Boyd an opportunity to respond, and made a thorough and well-reasoned report and recommendation to the district court. (*Boyd v Thompson* 147 F.3d 1124, 1128 (9th Cir. 1998)).

... *Herbst* was afforded no such protection before the court sua sponte dismissed his petition on statute of limitations grounds and summarily affirmed its initial order upon reconsideration. Thus, while the district court has the authority to raise the statute of limitations sua sponte and to dismiss the petition on those grounds, that authority should only be exercised after the court provides the petitioner with adequate notice and opportunity to respond. (See, *Acosta*

v Artuz 221 F.3d 117.)

If the court chooses to raise sua sponte the affirmative defense of failure to comply with the AEDPA statute of limitation, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground. Here, we apply the well-established principle that a person is entitled to notice before adverse judicial action is taken against him.

Petitioner was entitled to adequate notice and opportunity to respond prior to the district court's sua sponte dismissal of his petition on statute of limitations grounds. Acosta, 221 F.3d at 121 (emphasis added).

Petitioner asserts that prior to the district court's sua sponte dismissal of my habeas petition as untimely, I did not receive any (OSC) Order to Show Cause from the U.S. District Court Central District of California Western Division at any time or on any date.

On 7/6/21, Petitioner sent a form CDCR 22 Inmate Request to the mailroom at California Rehabilitation Center, which stated: attn mailroom: I am requesting to have a copy of the legal mail log for incoming mail from March to the present date, due to need as evidence /proof that district court never sent me certain correspondence... (March 2021 - to date).

On or about 7/23/21, Petitioner submitted a CDCR 602 Inmate Appeal / Grievance for: Failure To Answer Request For Legal Mail Log, with action requested: To receive what has been requested previously which is a copy (i.e. certified

copy) of the legal mail log for incoming mail from March 2021 to date. However, that grievance is now pending.

Petitioner asserts that the summarily denial of his petition, Denied him a right to due process of law. Such denials include but are not limited to, denying access to multiple Constitutional rights. The right of due process of law requires before any sort of judgement against an individual, that he has had opportunity to defend himself of any accusation or claim, that has had notice and an opportunity to state his case. Petitioner was not given any notice and opportunity to respond, therefore, his petition was summarily denied in error and should be allowed to proceed and answered.

REASONS FOR GRANTING THE PETITION

Our federal courts and federal courts of appeal should not be in the business of denying petitioners their right to due process of law, cause without due process justice cannot be served or obtained and wrongful convictions could not be made right to free the innocent. Due process' purpose is to cause a result. Due Process is a process. Justice is granted if a procedure is followed. The courts shall take every precaution to insure citizen - petitioners don't get locked out unnecessarily. They can't get into what is called the "doctrine of finality" until the due process "process and procedure" is properly followed. The courts are in place to provide a procedure to take their action to becoming final. The courts must not be allowed to selectively follow proper procedures.

Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court -- without any adjudication of the merits of his claims -- because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v Thomas* 517 U.S. 314, see *Slack v McDaniel* ("The writ of habeas corpus plays a vital role in protecting constitutional rights.") When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived -- contrary to congressional intent -- of his valuable right to one full round of federal habeas review.

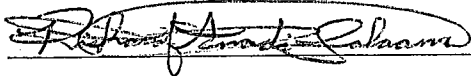
Like all habeas corpus petitions, is meant to remedy constitutional violations, as here, writ of certiorari is designed to cure procedural violations in an early proceeding -- here, a habeas corpus proceeding -- that raised questions about that proceedings integrity.

The District Court's procedural ruling was wrong, this Court would then find that it will be necessary to consider the matter upon any remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert A. Salas", is written over a horizontal line.

Date: 3/27/23