

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

()

MICHAEL ALEXANDER — PETITIONER
(Your Name)

vs..

CHRISTOPHER MILLER — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL ALEXANDER
(Your Name)

CLINTON CORRECTIONAL FACILITY
(Address)

BOX. 2002, DANNEMORA N.Y. 12929.
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

POINT 1.

WHETHER PETITIONER SHOULD HAVE BEEN REQUIRED TO MOVE FOR A CERTIFICATE OF APPEALABILITY IN THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT, ALTHOUGH A CERTIFICATE WAS ALREADY GRANTED BY THE DISTRICT COURT THAT RENDERED THE JUDGMENT.

POINT 11.

WHETHER PETITIONER HAD SHOWN THAT "JURIST OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING" ON THE UNTIMELINESS OF PETITIONER'S 28U.S.C SECTION 2254 PETITION.

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:

QUEENS COUNTY DISTRICT ATTORNEY OFFICE
ASSISTANT DISTRICT ATTORNEY,
MERRI TURK LASKY
125.01 QUEENS BOULEVARD
KEW GARDENS, 11415

CHRISTOPHER MILLER
GREAT MEADOW CORRECTIONAL FACILITY
PO.BOX 51
COMSTOCK NEW YORK 12821.

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Appellate Rehearing Rule 12-404(A)

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 _____; 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☐ is unpublished.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 B 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☐ is unpublished.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☐ is unpublished.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 July 27, 2017.

☐ 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: October 24, 2017., 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

(1) Petitioner was deprived of substitution of counsel, during pre trial and also on the eve of trial, when trial court denied his request for a change of counsel both times, without making any inquiry with regards to his dissatisfaction with assigned defence counsel. U.S. Const. Amend. 6

(2) Petitioner was deprived of Due process to a fair trial, when the prosecutor used perjured testimony that he knew was false, and put the weight of the prosecutors office behind his main witness, during trial and in summation. U.S. Const. Amend. 5,14.

(3) Petitioner, was deprived of compulsory witnesses for defence, when trial court denied his request to recall a prosecution witness, and to put a witness who was available to testify on his behalf on the witness stand. U.S. Const. Amend. 5,6.

(4) Petitioner, was deprived of his Due process rights, when he was questioned by the police while in custody, without being read his Miranda rights, and statements that he allegedly made was used in court by the prosecutor to procure the conviction. U.S. Const. Amend. 5,6,14th.

(5) Petitioner's legal materials which was relevant for filing for Federal Habeas Corpus and was essential also to exhaust collateral state remedies was confiscated by the correctional officers of the Green Haven Correctional Facility, which caused an impediment for Petitioner to file his application in a timely manner. 28 U.S.C. § 2244 (d)(1)(B).

STATEMENT OF THE CASE

Michael Alexander Petitioner pro se, filed an application for a writ of habeas corpus in the United States District Court, for the Eastern District of New York on June 16, 2016. The district judge, Honorable William F Kuntz II, dismissed the petition as untimely, under the Anti Terrorism Effective Death Penalty Act (AE DPA) one-year statute of limitation. 28 U.S.C §2244(d)(1)(A).

Alexander, filed a timely notice of appeal, which was forwarded to the United States Court Of Appeals for the Second Circuit. That Court sent instructional forms to Alexander, which states on the general Docket, indicating Originating Court Information, that the Date of Judgment: 11/17/2016; Date NOA Filed: 12/02/2016; and the Date COA Rec'd: 12/05/2016. It should be noted that there was no statement pursuant to Rule 11(a) of the Rules Governing 28 U.S.C. § 2254 proceedings.

Alexander filled out the required Acknowledgment and Notice of Appearance Form, along with the motion for In forma pauperis (IFP) status and sent them to the Court of Appeals for the Second Circuit, on December 16, 2016. In addition, Alexander filed a motion (59/60) in the district court for a relief from the judgment which put a stay on the appeal.

Alexander, further filed two motions to the district court, one for a COA, and the other for IFP status on December 27, 2016. This

information was forwarded to the Court of Appeals for the Second Circuit, which issued a 4(a)4 notice on December 28, 2016, and ordered Alexander to alert the Court whenever the district judge had ruled on the 60(B) motion for a relief from the judgment.

Then, on February 6, 2017, Petitioner, received a notice of judgment from the District Court, informing him that Judge Kuntz, had denied the 60 (B) motion, however the judge granted in forma pauperis status for appeal. Alexander, alerted the Court of Appeals immediately.

The Court of Appeals issued an Order on February 16, 2017, stating that under 28 U.S.C. § 2253 an appellant who wishes to appeal a district court's final order, must obtain a COA from the district judge or a circuit, justice. The district judge has denied permission by not issuing a certificate, therefore, effective March 9, 2017, the appeal will be dismissed, unless Petitioner move for motion for a COA in the Court of Appeals, that complies with the statute.

Petitioner, complied with that Court's Order, and filed a motion for a COA in That Court on March 8, 2017, the date when petitioner gave the prison officials his motion papers for posting. Nevertheless, the appeal was dismissed on March 13, 2017, for a failure to file a motion for a COA in the Court Of Appeals , for the Second Circuit.

Thereafter, Alexander pro se filed a motion to reinstate the appeal on April 5, 2017. However, While the motion was pending, district

judge (Kuntz II.) granted a certificate of appealability on March 29, 2017. This information was also sent to the Court of Appeals by letter dated July 4, 2017, indicating that a COA was granted by the district court, a copy of the notice of judgment was also sent to that Court.

Moreover, the motion to reinstate the appeal was granted by the Court of Appeals on April 18, 2017. The official reason given was that the February 16, 2017 order was in error, therefore the appeal would proceed in the normal course.

Alexander, did not get any response from the Court of Appeals, for almost a month later. So because of the ambiguity of the statement in the normal course and the fact that Alexander did not want the appeal to be dismissed again, he filed another motion in the Court of Appeals for a certificate of appealability. However, Alexander wrote a letter as a precautionary measure to the clerk of the Court of Appeals for the Second Circuit, inquiring whether a COA was required in that Court, although a certificate was already issued by the district court?

The clerk of the Court of Appeals replied in a letter that a motion for a COA is still required in that Court (Appendix C). So Alexander then wrote a letter to the United States District Court asking the same question, " whether he should be required to file a motion for COA in the Court of Appeals, although the judge

who rendered the judgment already granted a COA twice. Appendix D.

The Pro Se Office replied that any questions concerning the United States Court of Appeals For the Second Circuit should be directed to that Court. However, the Pro Se Office included some excerpts from the Federal Civil Procedure and Rules as a Courtesy which was informative to Alexander. Appendix D.

These excerpts included; Rule 11 of The Rules Governing Habeas Corpus Proceedings; Federal Rules Appellate Procedure, 22(b); and 28 U.S.C. § 2253, which clearly states that a district judge is empowered to issue a certificate of appealability, therefore, a motion for a COA was not required in the Court of Appeals, when a certificate was already granted by the district court.

Subsequently the motion for a certificate of appealability was denied by the United States Court of Appeals for the Second Circuit, Three Judge Panel, Rosemary S. Pooler; Peter W. Hall; and Susan L. Carney, presiding. The Panel held, that pro se, Appellant moves for a certificate of appealability ("COA"). Upon due consideration, it is Ordered that the IFP motion is denied as unnecessary because the district court has granted IFP status, on appeal. However, the COA motion is denied and the appeal dismissed because Appellant has not shown that "jurist of reason would find it debatable, whether the district court was correct in its procedural ruling" as to the untimeliness of Appellant's 28 U.S.C § 2254 petition. Slack v. McDaniel, 529 U.S. 473, 478(2000)

Petitioner Alexander pro se, filed a timely Petition for Rehearing on August 11, 2017, which was returned as being defective on several occasions, and was finally cured on September 24, 2017. This petition was also denied on October 24, 2017.

Alexander pro se, now seeks a review of this decision by way of a writ of certiorari under § 1254 (1) which provides in relevant parts that; cases in the United States Court Of Appeals may be reviewed by this Court by writ of certiorari.

REASON FOR GRANTING THE PETITION

POINT 1

WHETHER PETITIONER SHOULD HAVE BEEN REQUIRED
TO MOVE FOR A CERTIFICATE OF APPEALABILITY
IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, WHEN A COA WAS ALREADY ISSUED
BY THE DISTRICT JUDGE WHO RENDERED JUDGMENT.

The United States Court of Appeals for the Second Circuit has entered a decision that was not only in conflict with the other Circuits, but also in conflict with relevant decisions of This Court. The Three Judge Panel of the Court of Appeals, Rosemary S. Pooler; Peter W. Hall; and, Susan L. Carney presiding, denied the Petitioner Michael Alexander's pro se motion for a COA And dismissed the appeal on July 27, 2017.

Petitioner Alexander pro se, now seeks a review of the decision by way of a writ of certiorari. This Court has the jurisdiction to review denials of a COA by the Court of Appeals Panel under §1254 (1) Hohn v. United states, 524 U.S. 526 (1998). Under the (AEDPA) Anti Terroism and Effective Death Penalty Act, before the Court of Appeals may entertain an appeal, by a state prisoner who was denied relief by a district court, he must seek and obtain a COA, from a "Circuit Justice or Judge". 28 U.S.C. § 2253(c).

The Three Judge Panel held that, Petitioner pro se moves for in forma pauperis ("IFP") and a certificate of appealability (COA) Upon due consideration it is hereby Ordered that IFP motion is denied as unnecessary because the district court has granted IFP status on appeal. It is further Ordered that the COA motions are denied, because Petitioner has not shown that "jurist of reason

would find it debatable whether the district court was correct in procedural ruling" as to the untimeliness of Petitioner's 28 USC. § 2254 petition. *Slack v. McDaniel*, 529 US. 473, 478 (2000).

Petitioner, pro se filed an application to the United States District Court for the Eastern District of New York, on June 16, 2016. The District Judge Honorable William F. Kuntz II, without discussing the constitutional claims, dismissed the petition as untimely under AEDPA's one-year statute of limitation. 28 USC § 2244(d)(1)(A).

Petitioner filed a timely motion for a notice of appeal, which was forwarded to the Court of Appeals for the Second Circuit, who sent instructional forms to Alexander. On the General Docket, that indicated, Originating Court Information; the docket states that, Date of Judgment: 11/17/2016, Date NOA Filed: 12/02/2016, Date COA Rec'd: 12/05/2016. There was not any statement pursuant to Rule 11(a) of The Rules Governing Habeas Corpus Cases, stating whether a COA was not issued.

Rule 11(a) of the Rules Governing 28 U.S.C. § 2254 proceedings clearly states that the district judge must issue or deny a certificate of appealability (COA) when it enters a final order that is adverse to the applicant. Before entering the final order, the district court may direct the parties to submit arguments on whether the certificate should issue. If the district court denies the COA, then the applicant may apply to the Court of Appeals for a certificate of appealability.

The requirement that the district judge who rendered the order either issue or state why a certificate should issue, has been deleted from subdivision (b)(1) of F. R. App.P. 22. Rule 11(a) now delineates the relevant requirement. Now when an applicant has filed a notice of appeal, the district clerk must transmit the record to the court of appeals. If the district judge has issued a COA, the district clerk must include in the transmission the certificate and the statement of reasons for grant of the COA.

F.R.App.pro. 22(b) provides that an appeal may not be taken in a habeas corpus proceeding where the confinement is under a judgment of a state court, unless the judge who rendered the order in the habeas proceeding or a circuit justice or judge issues a COA, in the interest of insuring that the matter of the certificate will not be overlooked, and if the COA is denied, the reasons for the denial in the first instance will be available on any consequent application. The proposed rule require the district judge to issue the certificate or to state the reasons for its denial.

This Court has also acknowledged that the court of appeals interprets "circuit justice or judge to encompass district judges. see., United States v. Mitchell, 216 F.3d. 1126.1129 (C.A.D.C. 2000). Therefore, there should be no disputing that district judges are empowered to issue a certificate of appealability. Gonzalez v Thaler, 565 U.S. 134 (2010).

Moreover, Alexander pro se filed for a certificate of appealability in the district court on December 27, 2016, which was issued by the district judge William F. Kuntz II, on March 29, 2017. It is inherently apparent that the Court of Appeals for the Second Circuit entered a decision that was in conflict with the other circuits and the relevant decisions of this Court. See Edwards v. United States, 114 F.3d 1083 (11th Cir. 1997) (holding that a district court must consider and rule upon the propriety of the issuing of a COA first, that is, before a certificate will be received or acted upon by court of appeals).

The three Judge Panel, denied the motion for in forma pauperis as unnecessary, because the district judge had already granted IFP status. Likewise, the motion for a certificate of appealability should have been denied as unnecessary also, because, The district judge had granted a COA, whether it was when he entered the final order, pursuant to Rule 11(a) of the Rules Governing § 2254 proceedings, or on March 29, 2017. Appendix C.

The Court of Appeals for the Second Circuit was notified when the motion for IFP status was granted and also when the motion for a certificate of appealability was also granted on March 29, 2017. The bald assertion of the Court of Appeals to suggest that a certificate was required in that Court when a COA was already issued by the district judge who rendered the order, would cause

reasonable minds would beg to differ, considering the evidence of the fact that a Certificate of appealability was already granted by the district judge who rendered the order. Appendix D.

Furthermore, whether the certificate indicated the specific issue or issues that would satisfy the substantial showing of a constitutional violation, required under 28 U.S.C. § 2253(c)(2), and Rule 11(a) of The Rules Governing Habeas Corpus Proceedings. The issuing of the certificate reflects the district judge's judgment, that the appeal should proceed and also supplied the State with notice that the litigation will continue. Gonzalez v. Thaler, 565 U.S. 134 (2000).

This Court held in (Gonzalez) that once a judge has made the determination that a COA is warranted, and resources deployed in briefing, and argument... the COA has fulfilled [its] gatekeeping function. at 650. This Court noted that a defective COA is not the equivalent to the lack of a COA.

In Slack v. Madaniel, This Court also noted that in determining whether a certificate of appealability should issue, where the habeas corpus 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 holdings. See 28 U.S.C. § 2253(C) which mandates that both showings be made before the Court of Appeals may entertain the appeal. 529 U.S. 473 (2000). Clearly the district judge found sufficient showings on each components.

Petitioner pro se application for a certificate of appealability included both components mandated by 28 U.S.C. § 2253(c), that is the substantial showing of a violation of constitutional rights, and whether "jurist of reason would find it debatable, whether the district court was correct in its procedural ruling" as to the untimeliness of petitioner's, 28 U.S.C. § 2254 petition.

By not stating why he granted the certificate, district judge the Honorable William F. Kuntz II, under the circumstances should have been deemed to have issued the COA on the question of both claims. The only reason Petitioner filed the motion for a COA in the Court of Appeals for the Second Circuit, was because that Court's clerk insisted that a motion for COA was required in that Court, although a certificate was already granted by the district judge. Appendix c.

Moreover, Petitioner did not want the appeal to get dismissed for a second time. The Court of Appeals for the Second Circuit had already dismissed the appeal on March 13, 2017, in error, after the Court had Ordered Petitioner to file a motion for a COA, even though the district judge had not initially ruled on the motion for a COA that was filed in the district court by Alexander, on December 27, 2016.

Alexander, herein seeks a review of the decision of the United States Court of Appeals for the Second Circuit, for denying the motion for a certificate of appealability, when a COA was already issued possible twice by the district judge.

Point Two

JURISTS OF REASON WOULD FIND IT
DEBATABLE WHETHER THE DISTRICT
COURT WAS CORRECT IN ITS PROCE-
DURAL RULING, AS TO TIMELINESS
OF PETITIONER'S HABEAS CORPUS
PETITION

The district Judge was incorrect in his procedural rulings as to timeliness of the habeas petition, when he dismissed the petition as time barred, without giving petitioner an opportunity to be heard. Petitioner did not receive any notice of respondent's motion to dismiss pursuant to Rule 5 of the Rules Governing § 2254 Cases ([See also, Fed. R. Civ. Pro. 15[a]]).

Furthermore, the District Court Judge's calculation of the days tolled under [AEDPA's One Year] limitation period was incorrect. Petitioner filed his motion for a writ of error coram nobis on April 9th, 2015, when he gave his litigation papers to prison officials for posting, instead of April of 16th, 2015, when the appellate court received those papers pursuant to the "prison mailbox rule." ([See, Houston v. Lack, U.S. 266 [1982]]).

Moreover, petitioner was entitled to fifteen days for the time he could have filed for a rehearing to the denial of his leave application to the New York Court of Appeals, the court of last resort in New York, pursuant to the appellate rehearing Rule 12 - 404[A].

In addition, even assuming that the habeas petition was late, The District Court Judge could not have been entirely certain from the pleadings in the petition. Petitioner was prevented from filing his habeas corpus petition at an earlier date due to the cumulative-ness of The United States Constitution and laws. ([See, 28 USC § 224

[d][1][B)).

Petitioner's legal materials was confiscated by correction officers at the Green Haven Correctional Facility, and were relevant to not only to exhaust state collateral remedies, but also to file for relief in Federal Court and to demonstrate his innocence. ([See, Valverde v. Stinson, 224 F. 3d at 133]). Petitioner spent a considerable amount of time trying to recover the confiscated legal materials, but his efforts were subjugated by the State, creating an impediment and thus preventing the habeas corpus petition from being filed any sooner.

PROCEDURAL HISTORY

Petitioner, acting pro se, filed an application for writ of habeas corpus in The United States District Court, Eastern District of New York, on June 16th, 2016. The District Court Judge (Kuntz), after determining that the petition should not be dismissed on August 24th, 2016, order that the respondent, The Queens County District Attorney to show cause why the habeas petition should not be granted, by filing an entire answer or other pleadings, within 60 days. Upon filing the answer, respondent should send a copy to the petitioner, who should then file a reply, if any, within thirty days, in response to the order to show cause.

Nonetheless, on November 10th, 2016, after the deadline had passed, petitioner wrote a letter to the Clerk of the District Court to inform them that he he had not received any response from the respondent and that they should be precluded from filing a later answer and setting forth the basis for a motion seeking a default judgment.

On or about the end of November 2016, petitioner received a

Memorandum and Order from the District Court, having been filed on November 17th, 2016, alleging that respondent had filed a motion to dismiss on September 16th, 2016, and that The Court granted the motion to dismiss, and, as a result, the habeas corpus petition was dismissed, while granting petitioner's motion for informia pauperis, and certifying pursuant to ([28 USC § 1915[a][3]), any appeal would not be taken in good faith, and denying informia pauperis for appeal.

Apparently, The District Court had found the one-year statute of limitation under [AEDPA] had since expired, and granting the respondent's motion to dismiss. It is worth knowing that the same District Court Judge later granted informia pauperis for an appeal, and a certificate of appealability to petitioner on March 29th, 2017. (copies were forwarded to this Court on several occasions).

ARGUMENT

There is no principle more fundamental to the adversarial system of judicial administration than that a person is entitled to notice before any adversarial action is taken against him ([See, Fed. R. Civ. Pro. 7[b]), "stating that motion is generally required to be on notice," ([See, Fed. R. Civ. Pro. 65[a]), "stating that notice of motion, supporting affidavits, and memorandum of law must be served by the moving party on all parties that appear in the action."

In petitioner's case, petitioner, who had no knowledge of any motion to dismiss being filed by the respondent, could not be deemed to have waived any objections of the motion to dismiss. Moreover, due process requires notice of pendency of action and an opportunity to be heard.

The United States Supreme Court has made clear that the States

,s burden is one of pleading, not one of proof. Therefore, after the facts supporting a limitation period has been asserted, and with particularity, the burden to disprove the allegations will becomes the petitioner's. ([See, McKlesky v. Zant, 499 U.S. 467, [holding that dismissal of complaint for failure to state a claim improper, unless petitioner is given notice and an opportunity to be heard]]).

Clearly petitioner was not aware of the respondent's motion to dismiss, or why else would he write to The District Court to alert them that he had not heard from the respondent, who had failed to honour The District Court Judge's order. Furthermore, petitioner's motion for default judgment was made before The District Court Judge ruled on the motion to dismiss. ([See, Court Docket Sheet]).

The Second Circuit has consistently held that "the adversely affected party with notice and an opportunity to be heard, plays a most important role in establishing the fairness and reliability of the order. It also avoids the risk that The Court does not overlook valid answers to its perception of defects in the petitioner's case.

Petitioner, acting pro se, who is unlearned and unskilled in the practice of pleading habeas corpus petitions, failed to adequately address the issue of timeliness. Petitioner should not be held to have anticipated the affirmative defense of statute of limitation. The District Court could not have been unmistakably sure from the information in the petition, or that it was definitely untimely. ([See, § 2244[d][1][B][D]; also see, § 2244 [d][2]). The case should be remitted to the District Court on the issue of timeliness alone.

Had petitioner been given notice and an opportunity to be heard, he would have objected to the respondent's allegations by amend-

ing the pleadings and providing documents, including affidavits, and also raising specific facts that support the timeliness of his habeas corpus petition. These facts were not in front of the District Court Judge, and could not possibly come to light unless they were asserted by this pro se petitioner. ([See, Boyd v. Thompson, 147 F. 3d 1124, 1128 [9th Cir. 1998]]["holding that when dealing with pro se petitioners, The Court must make clear the procedural default at issue here, and the consequences of failing to respond]).

Therefore, The District Court was incorrect in its procedural ruling when he dismissed petitioner's habeas corpus petition without giving petitioner notice or an opportunity to be heard, and jurists of reason would find it debatable whether the District Court Judge was correct. ([See, Slack v. McDaniel, 529 U.S. 473 2000]]["admonishing against interpretation of procedural prescriptions in federal habeas corpus cases to trap the unwary pro se petitioner]).

It is worth knowing that the fact that petitioner did not receive any notice of the respondent's motion to dismiss, was in no way and inadvertent mistake on the part of the respondent or prison officials, because this has been a pattern by both party's over a period of time, to deliberately deny petition from having his constitutional claims heard on the merits.

EQUITABLE TOLLING

Petitioner was entitled to equitable tolling under [AEDP's One Year] statute of limitation, which provides tolling whenever a properly filed post conviction or collateral review application is "pending" with respect to the pertinent judgment or claim. ([See, 28 USC § 2244[d][2])). The Second Circuit has held that a state court

application is pending from the time it is first filed, until ["the time it is] finally disposed of and no further appellate review is available under this particular state procedure. ([See, Bennett v. Artuz, 199 F. 3d 116 [2nd Cir. 1999]]).

Other circuits have similarly noted that the time allowed for appeals tolls AEDP's limitation period, including the time for filing a rehearing, even if such motion is not filed. ([See, Jones v. Nagle, 349 F. 3d 1305 [11th Cir. 2003]]["holding that granting of a motion for a rehearing after denial of leave to appeal, shall have the effect of suspending the decision of the court until final determination by the appellate court]]).

The Tenth Circuit has also held that a fifteen day window for the filing of a motion for rehearing after denial of leave to appeal, does toll the AEDPA's statute of limitations. ([See, Serrano v. Williams, 383 F. 3d 1181 [10th Cir. 2004]]["holding pendency of a state post conviction or collateral review application in which limitation period that is applicable to federal habeas corpus petition under AEDPA is tolled, is interpreted under federal law]]).

Here in this case, there were several factors that The District Court Judge could have considered before granting respondent's motion to dismiss. For instance, the respondent asserted that petitioner was convicted on December 30th, 2008, when the actual date was on December 3rd, 2008. Petitioner appealed to the Appellate Division, Second Department, which affirmed the judgment on November 7th, 2012. ([See, People v. Alexander, 100 A.D. 3d 649 [2nd Dept. 2012]]).

Petitioner did not seek a writ of certiorari in the United States supreme Court; thus AEDPA's one-year limitation clock began

to run at latest ninety days after the denial of petitioner's motion for reconsideration.

Petitioner filed a motion for a writ of error coram nobis on April 9th, 2015. ([See, Exhibit A - Disbursement indicating date motion papers were given to prison officials for posting) thus stopping the limitation clock at 304 days, instead of respondent's assertions that the motion was filed on April 16th, 2015, when the B - Copy of Letter From The Court). Petitioner then filed a grievance to the Facility Grievance Committee to complain about the actions of the corrections officer, and also wrote a letter to the Deputy Assistant Superintendent of Administration [Ms. Williams] asking her to look into the matter.

Then on December 26th, 2015, one day after hearing from the Appellate Court, petitioner went to the prison yard for 10:00 am., recreation, when he was called back to his housing block for visit; but instead, placed in "SHU" for a fictitious weapon that was allegedly found on the top shelf of his unlocked locker. Petitioner was adjudged to possess the fictitious weapon and given 180 days at the South-Port Correctional Facility "SHU," where he discovered that legal materials that were in his cell were missing from his property.

These legal materials that were confiscated from petitioner's cell on December 26th, 2015, was essential to further exhaust the state collateral remedies and to file for relief in The Federal Court, and also to demonstrate petitioner's innocence. Therefore, upon being transferred to Southport to do "SHU Time," petitioner wrote a letter to The Queens County District Attorney's [FOIL Records Access Officer, requesting the confiscated legal materials.

Subsequently, on March 15Th, 2017, Ms. Rona Kugler, ADA, informed petitioner that the documents were not discoverable or disclosable, because the disclosure of this would interfere with judicial proceedings, and therefore, the request was denied. Petitioner appealed the [F.O.I.L. Decision], but did not received any response from The District Attorney's Office.

Petitioner was then transferred to The Great Meadow Correctional Facility, where he received a letter dated May 26Th, 2017, from ADA, John M. Castellano, informing petitioner that Ms. Kugler correctly denied the request for documents, and that subsequently The New York Court of Appeals had denied petitioner's leave application on April 4Th, 2016; and therefore they [Records Access Officer] will process the FOIL Request for the documents, and would contact petitioner within sixty days. ([See, EXHIBIT: C - Copy of the Letter]).

It is worth noting that this was the first time petitioner had heard that his leave application was denied by The Court, because notice of judgment went to several other prisons before finally arriving at The Great Meadow Facility. By this time, The AEDPA limitation, which had apparently restarted on April 4Th, 2016, had expired. In any event, petitioner did not hear another word from The District Attorney's Records Access Officer.

Petitioner was caught like a deer in headlights, because he had to choose between filing state collateral motions to stop the AEDPA limitation clock, or file for relief in The federal District Court, which in any event, was already late. However, petitioner chose the later and filed an unpolished petition on June 16Th, 2016.

First and foremost, the severity of the cumulative effect of the circumstances and the insurmountable obstacles impacted petitioner's ability to file any state collateral review proceedings, with regards to the denial of the writ of error coram nobis application. Petitioner could have filed for rehearing, or a ([C.P.L. § 440.10]) application seeking to exhaust the issues underlying the error coram nobis application.

The relevant rehearing rule explicitly states that a motion for rehearing maybe filed fifteen days after denial of leave to appeal. ([See, in Gibson v. Klinger, 232 F. 3d 799 [10th Cir. 2010]]["held that regardless of whether petitioner actually appeals a denial of state post conviction limitation period is tolled]; also See, Rowe v. Lemaster, 225 F. 3d at 1174, ["limitation period is tolled during time he could have sought an appeal under state law]). The term "pending" must be construed more broadly to encompass all the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies.

Herein, petitioner should be entitled equitable tolling for the fifteen days he could have filed for a rehearing of the denial of leave application seeking to appeal the denial of his error coram nobis or to file a ([C.P.L. § 440.10]) application to exhaust underlying issues of the coram nobis application. ([See, Carey v. Safford, 536 U.S. 214 [2002]]).

Indeed, had petitioner been aware that The District Attorney's Records Access Officer would not honour its obligations, or that The notice of judgment showing that The New York Court of Appeals had denied petitioner's leave application would travel first to The Green

Haven Correctional Facility, then to The Southport Correctional Facility, before arriving at The Great Meadow Correctional Facility, where petitioner was transferred to finish serving his "SHU Time," a different course would have been charted.

This case does not present any of the causation concerns where The Courts have found such causation lacking, where petitioners had been neglectful in the preparation of their habeas corpus petitions, and unlike in ([See, Hizullahankhaman v. Walker, 225 F. 3d 65, 67 [2nd Cir. 2001]]), where That Court declined to grant equitable tolling for that petitioner's 22 days in solitary confinement at the beginning of the limitations period.

Here, petitioner was entitled to seven days for the time he placed his writ of error coram nobis into prison officials hands for posting [pursuant to the "prison mailbox rule"] and another fifteen days for the time he could have filed for a rehearing or other collateral remedies. ([See, Serrano v. Williams, 383 F. 3d 1181, 1183 [10 Th. Cir. 2004]]) and section 600.14[a]). If That Court subtracts these twenty-two days from the time calculated by the District Court [384 days] petitioner's habeas corpus petition would have been filed in a timely fashion.

In addition, petitioner was entitled to some equitable tolling during the accumulation of the rare and exceptional circumstances and events out of his control created by the State that prevented petitioner from not only exhausting his State remedies, but also to file his habeas corpus petition on time. ([See, Morello v. James, 810 F. 2d 344, 347 [2nd Cir. 1987]]["the confiscation of petitioners's legal papers by corrections officers is 'extraordinary' as a matter of law]), and clearly warrant equitable tolling under the extraordinary

circumstances.

It is clear that jurists of reason would certainly find The District Court's procedural ruling debatable or wrong. This is the type of case that should be remitted to The District Court for a hearing on petitioner's timeliness under the equitable tolling provisions of AEDPA.

Issuance of a certificate of appealability does not require a showing that the appeal will succeed; accordingly, the Court of Appeals for the Second Circuit should not have denied petitioner's application for a COA merely because it believes that Alexander, would not have demonstrated entitlement to relief on appeal. See, *Millee-El v. Cockrell*, 537 U.S. 332 (2003). 28 U.S.C. §2253(c).

This Court has held that, when a habeas applicant seeks a COA the Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of the claims. (Slack) Standard is satisfied, if the petitioner demonstrate that "jurist of reason could disagree with the district judge's resolution of the case, or that the issue presented were adequate to deserve encouragement to proceed.

Unlike *Slack*, where that petitioner, addressed only the issue of the district judge's procedural ruling, whether it was correct, but failed to address the underlying violation of a constitutional right. Here in this Case, Alexander, addressed both components of 28 U.S.C. § 2253(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Alexander

Date: _____