25-6033

Brief of petitioner
Docket No. 23-7694
August 26 , 2024 Held and Entered

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM , 2024

WILLIE FRANK NELSON
petitioner

v.

DOCCS
respondents

On petition for writ of certiorari to the united states court of appeals
SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Willie Frank Nelson
94B2135 Pro Se

QUESTIONS PRESENTED

(RULE 14.1(a)

1. When a court of appeals raises a procedural impediment to disposition not based on the merits , and disposes of the case on some other grounds why is the district courts disposition in the case considered discounted When it instead chooses to resurrect an issue forfeit by respondents ?

2. Did the second circuit court of appeals abuse it's discretion by resurrecting the statute of limitations issue , forfeited by the respondents instead of reviewing the district courts disposition on the merits ?

3. Will this court grant a hearing on the merits under rule 25 Brief on the merits ?

4. Whether the uncharged and unindicted count of auto Grandlarceny 4th , mitigates towards both the insufficiancy of the indictment combined with the absence of the required final pronouncement of the resentencing odered by the appellate court constitute an arrested judgment or an aquittal ?

a. Where does the unindicted count of auto grandlarceny lies if not under the " Arresting Judgment " provisions of the Criminal Appeals Act ? b. Is there a common law analogue and usage of principles of law here that can be enforced under the " All Writs Act 28 U.S.C.A § 1651(a) .

5. Whether the " Complete Miscarriage of justice Standard " is applicable to this case where the scope of the sentencing court in question was beyond its constitutional and statutorial legal authority when it amended sentences in petitioner and Attorney's absence ?

6. Was the Petitioners 14th and 6th amendment rights under the United States violated ? How So ?

7. Whether DOCS/DOCCS actions & ommissions to alter , modify , enhance ,and amend without proper authorization under both federal and new york states' constitutional and statutorial sentencing laws enough to amount to " False Imprisonment ? "

8. Whether any of the laws or Acts of Congress raised here and in petitioners prior appeals under case No. 23-7694 will be enforced at this time , and preserved for the same reason ?

TABLE OF CONTENT

TABLE OF AUTHORITIES

Cases

other authorities

N.Y.S. Const. Art.2 Sec 2/now sec. 3 see 118th congress..
Article 1 section 6
N.Y.S. C.P.L. 380.20 thru to 380.50
Common Law Analogue, see : Thomas E. Dobbs,M.D.,M.P.H. 2021WL3375825

Statutes

28 U.S.C.A. § 1254
28 U.S.C.A. § 1291
28 U.S.C. § 1651
18 U.S.C. § 2241(c)
18 U.S.C. § 2254(d)
18 U.S.C.2254 See:28 U.S.C. § 2403(a) & 28 U.S.C. § 451
28 U.S.C.§ 2403(a)(b)&(c)
18 U.S.C.A. § 242
18.U.S.C.A. § 241

RULES

14.1(d)
14.1(e)(v)
14.1(a)
29.4(b) or (c) May apply.
29.4(a)
13.1
29.2
30.1

OPINION BELOW (RULE 14.1(d)

The opinion , and or dicision and order of the United States Western District Court , which is also the subject of this petition , was reported at NELSON v. DOCCS/PAROLE , 2023 WL 7069544 , W.D.N.Y. October 26, 2023 , declining to issue a certificate of appealability. The Second Circuit Court of Appeals discounted the Western District Courts judgment order When it resurrected the statute of limitations issue sue sponte forfeited by the repondents. Filed and Entered on april, 10 2024 and the mandate was issued on june 14 , 2024 .

JURISDICTIONAL STATEMENT

The Judgment of the 2nd.Circuit Court of Appeals was filed on april 10, 2024 and its mandate issued on june 14, 2024 , here petitioners appeal motion was denied and the appeal was dismissed. Docket No. 23-7694. SEE : both 6:21-cv-06694 DGL.

The United States 2d.Circuit Court of Appeals on june 7th , 2024 in its order and judgment , under Docket No. 23-7694 , again denied the petitioners motion for reconsideration. The panel held that it had determind and considered petitioners request .

The United States Court of Appeals 2d. Court of Appeals on august 26, 2024 the Circuit court denied petitioners motion to recall its mandate and decide the merits of this case. Petitioner also sought for permission to attach his exibits to his motion for reconsideration .

The petitioner filed for writ of certiorari postmarked originally on november 12, 2024 . The petition was filed pursuant to Rule 13.1 within 90 days of the required date , and has been considered to be timely filed by the clerk of this court notice dated july , 29 2025 , with instructions to make correction in accordence with the courts rule 14 and to return petition for certiorari within 60 , days . Being timely filed seeks to invoke this courts appellate Jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651. The Petitioner also seeks this courts Common Law Jurisdiction under the U.S. Constitution ennumerated rights for the sole protection of petitioners common law rights now under question . Notification has been made under Rules 14.1(e)(v) and 29.4(c) of the Rule of this court .

Taken from : Brief of 18 Federal Judges Amici Curiae in support of respondent , 2022 WL 1048923 , Tim Shoop , Warden , Petitioner v. Raymond A. Twyford , III , Respondent , Supreme Court of the United States .

A . The All Writs Act is Applied Expansively in Habeas Corpus Proceedings .

The All Writs Act traces it's roots back to the judiciary Act of 1789 , " The last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself." Sandra Day O'Conner, The judiciary Act of 1789 and the American juducial tradition, 59 U.Cin.L.Rev. 1,3 (1990) .

The Statutes' All writs provision contained [t]he most expansive and open-end language in the , judiciary Act of 1789 , and the invention, of the federal courts' 1998 DUKE L.J. 1421 , 1507, (1989).

That expansive languageis understandable, as the All Writs Act was intended to serve as a necessary gap-filler , a spacies of common Law authority empowering the judiciary to fill statutory voids left by congress . See . William F. Ryan, * 7 Rush to judgment : AConstitutional Analysis of time Limits on judicial decisions , 77 B.U.L. REV. 761, 777n. 66 (1997)(" Congres ... has always recognized that the federal courts would inevitablly encounter procedural gaps, and has in various ways empowered , the courts to fill those voids. This is clearly the purpose of the famous All Writs Act ...").

Indeed, in two Founding-era decisions, this court described the All Writs Act in precisely this manner, characterizing the All Writs Act as a tool for filling " The interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction."

See Pa. Bureau of Corr., 474 U.S. at 41 (discussing McClung v. Silliman , 19 U.S. (6 Wheat)598(1821) , and McIntire v. Wood , 11 U.S. (cranch)504 (1813).

Although the All Writs Act is an important source of a federal court's power in every context , it has proven to be an especially powerful tool for ensuring that inmates have the opportunity to establish their right to a Writ of Habeas Corpus .

STATEMENT OF THE CASE

1. There is no doubt that the original sentencing courts failure and refusual to pronounce the final judgment after an appellate courts remand to retry a returned count while dismissing two other counts and returned for resentencing . Petitioners exibits expose interferences by DOCS/DOCCS , personnel officials , where at times without proper authorization unilaterally , increased the original sentence by 8 to 9 years , considering that the sentence and commitment order amounted to 16 and 2/3rds , when DOCCS personnel changed the sentence to 25 to 50 years in september of 1994 .

2. At another time for the years of 1995 and 1996 , DOCCS has has entered on the records that after a diligent search , no time computation for the two years requested for under the freedom of information made by the petitioner could not be found ?

3. The history here reflects a common Law right , that under both New York's Constitution , as with the United States Constitution , both require that the **final** judgment must be pronounced.

In which a clear distinction was made between a verdict of conviction and the judgment of conviction , as with that also being a constitutional and conditional requirement as argued in petitioners appeals to both federal courts below .

INTRODUCTION

In Addressing the writ of habeas corpus , this court explained that " [t]he very nature of the writ demands that it be administered , with the initiative , and flexibilty essential to insure that miscarriages of justice , within its reach are surfaced and corrected. " Harris , 394 U.S. at 291. The Harris court found that it was the " inescapable obligation , of the courts," to fashion appropreate modes of procedure for " securing facts " That may enable an inmate to determine his right to a writ of habeas corpus . and to be mindful of the fact that the petitioner being in custody , is usually handicapped in developing the evidence needed to support " his claims. Id. at 291 , 299 ; accord Bracy 520 U.S. at 904. The petitioner request that this court take into consideration that the western district court judge clearly forfieted his want of jurisdiction when he ruled that he could not tell if the petitioner had exhausted his state remedies ? See : DECISION AND ORDER 21-CV-6694DGL , October 26 , 2023 page (4) , as with failing to enter a timely judgment , within the statute of limitations raised on appeal to the 2d. circuit court of appeals .

PETITIONERS APPEAL HISTORY

1. People v. Nelson , State of New York , Supreme Court, Appellate Division , Fourth Department , December 30, 1996, 234 A.D.2d 949, **remanded** back to the lower court .

2. This period and what transpired between DOCS/DOCCS & the clerk recorded in documents' Petitioners[EXIBIT 3] , Department of Corr ections' , Memorandum Order , dated january 28 , 1997, 2pgs. see EXIBITS 4 , 5 , & 6 Three seperate Committment judgment Orders of the Original Sentencing Court , see also EXIBIT 7.Reception/Classification.

3. State of New York v. Nelson , State of New York Court of Appeals March 19 , 1997 , 680 N.E.2d 626 , 658 N.Y. 626 , 658 N.Y.S.2d 252 **Leave Appeal Denied.**.

[4]State of New York v. Nelson , April 3, 1998 , Order-Indictment No. 81/94 DNA Denied.

5. Nelson v. New York , Supreme Court of the United States , No - 98-8461 , April 26 , 1999 , 119 S.Ct. 1507 , 526 U.S. 1092 , 143 L.Ed.2d 660 , 67 USLW 3653 **Writ of Certiorari Denied.**

6. Nelson v. Girdich , January 14 , 2003 , Civil Docket Case No. 03-cv-6018 Western District Court , Habeas Corpus **Denied .**

7.Nelson v. Stanford , September 15 , 2017 , 2017WL 4212595, 2019 Slip Op. 86712(U). Supreme Court Appellate Division Third Department New York . Denied - No Opinion issued .

8. Nelson v. Stanford , April 26 , 2018 , 160 A.D. 3d 1310, 72 N.Y.S. 3d. 508 , 2018 N.Y. Slip Op. 02848. **Denied- No Opinion issued .**

9. Nelson v. Stanford , July 05, 2018 , 2018WL 3343037, 2018 N.Y. Slip Op. 77020 (U)., Supreme Court Appellate Division Third Dept. New York . No. Opinion issued .

10. Nelson v. DOCCS/PAROLE , 6:19-cv-6540 , W.D.N.Y. , July 3, 2019 habeas corpus , forwarded to the second Circuit Court of Appeals foe permission to file a second or successive petition on 04/07/2020

11. Nelson v. DOCCS/PAROLE , United States Court of Appeals Second Circuit File Numbers For the petitioner are : **20-1172** date- **june 23, 2020 , 20-4227 date- may 24, 2021 and most recent 23-7694 date August 26, 2024** . These file dates lead to each appeal submitted by petitioner for this courts proper review of what transpired here ?

12. Willie Frank Nelson v. Anthony j. Annucci , Richard De Simone , Margaret Wolcott and Tina Standford **defendants'., case no. 22-cv-6030 -DGL W.D.N.Y.** Filed on 03/29/2022 , 42 U.S.C. § 1983 - altimately was forwarded to Hon. David G. Larimer who's jugment order was **Discounted** by the second circuit court of appeals , when it resurrected an affir mative defense forfeited by the respondents' and instead acted as the court of first instance , [Habeas Corpus Order].

CONSTITUTIONAL AND STATUTORIAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution
In all criminal prosecutions , the accused shall enjoy the right to have Assistance of counsel for his defence.

The Fourteenth 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 any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any state deprive any person of life , liberty , or property , without due process of the law ; nor deny any person within it's jurisdiction the equal protection of the laws.

Section 5. The congress shall have power to enforce , by appropriate legislation the provisions of this article.

28 U.S.C.A. § 1651(a) States: The Supreme Court and all the courts established by Act of congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2254(d) States: The Writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of authority of the united states or is committed for trial before some court thereof ; or

(2) He is in custody for an act done or omitted in pursuance of an act of congress , or an order , process , judgment , or decree of a court or judge of the United States ; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States ; or

(4) He being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alledged right , title , authority , protection , or exemption claimed under the commission , order or sanction of any foreign state or under color thereof , the validity and effect of which depend upon the law of nations ; or

(5) It is necessary to bring him into court to testify or for trial .

U.S.C.A. Const. Art. VI cl. 2 Supreme Law of Land

This Constitution , and the Laws of the United States which shall be made in pursuance thereof , and all Treaties made , or which shall be made under the authority of the United States , shall be the Supreme Law of the Land ; and the judges in every state to the Contrary notwithstanding .

28 U.S.C. § 2254(d) States : An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claimthat was ajudicated on the merits in state court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to , or involved an unreasonable determination of the facts in light of the evidence presented in the state court proceeding ; or

(2) resulted in a decision that was contrary to , or involved an unreasonable determination of the facts in light of the evidence presented in the state court proceeding .

POINT I. A. The relief sought has common law analogue Under Darr v. Burford , at [10] 2d ¶ This court in 1950 on april 9th stated : In this way the record on certiorari in this court is brought to the attention of the trial court. There have been statements made in former opinions of this court as to the effect of denial of petition for habeas , corpus . Records presented to this court on petitions in habeas corpus cases raise many different issues . There may be issues of state procedure , questions of fact regarding the alleged violation of constitutional rights , and issues of law respecting the scope of constitutional rights problems made difficult by the frequent practice of state courts to to dismiss the application without opinion .

Continues through to page [4] .

AT[10] If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in Burk v. state of Georgia, 338 U.S. 941, 70 S.Ct. 422, with an express direction that the petitioner may proceed in the federal court without prejudice from the denial of his petition for certiorari. If the district court feels that error may have accured, it has power to examine the application to see if circumstances exist to justify it in holding a hearing on the *216 merits. Such freedom of action protects the great writ without trivializing it .

POINT II. B. **The All Writs Act empowers federal courts to issue writs "agreeable" to the usages and principles of law. "**

1. to determine whether a writ is "agreeable to the usages and principles of law, " § 1651(a), courts look first to the common law, **United States v. Hayman, 342 U.S. 205,221 n. 35(1952).** At least presumtively , writs without common-law analogue are not agreeable to the usages and principles of law. Here this court in **Tim shoop,warden petitioner, v. Raymond TWYford WL 628249 (2022),** explained on page 11 at B. 3rd. ¶ Another limit on the power conferred by the **All Writs Act** comes from the closing words : Writs must be agreeable to the usages and principles of law. " **§ 1651(a).** Two bodies of law- the common law and statutory law- are especially important to determining whether a Writ is " agreeable to the usages and principles of law. " The agreeable to inquiry' look[s] first to the common law .

In People v. Fabian , court of appeals of New York , september 29 , 1908 , 192 N.Y. 443 , 85 N.E. 672 , the principle rules under consideration , has fixed common law features . At pg. 1 3rd ¶ , begining with the 3rd., line ... The word 'convicted ' in article 2 , section 2 , [now section 3] , of the constitution means the judgment of the court ; the sentence imposed by the court is the judgment ; there having been no sentence here , there was no judgment ; therfore, no conviction .

At pg. 3., 2nd ¶ . . . Bearing in mind the character of the legis lation which the constitutional provision was designed to authorize I think the prevailing rule of the common law as to what sort of 'conviction' served to disqualify a witness indicates what sort of conviction the framers of the Constitution contemplated as such as should cause a citizen to be excluded from the right of suffrage. They were dealing with the question of the disqualification of voters . They proposed to let the legislature disqualify voters who had been or should be convicted of any infamous crime . Under the " common law," Witnesses who had been convicted of infamous crimes were disqualified from testifying , but were not deemed to have been thus convicted **448 unless the record established , the rendition of a judgment upon the verdict. people v. Herrick , 13 johns. 82; people v. whipple, 9 cowen, 707 .) It was the judgment and that only. Which was received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify. (Greenleaf on evidence , § 375 .)

In discussing the rule which thus renders a witness incompetent in the case of Faunce v. People (51 ill. 311) The Supreme Court of illinois has said : An examination of the adjudged cases in various states of the union , where Substantially the same laws are in force will show that it is not the commission of the crime , nor the verdict of guilty , nor the punishment nor the infamous nature of the punishment but the " final judgment " of the court that renders the culprit incompetent, It is true that writers and judges have loosely said that a party is convicted on the finding of a verdict against him. It is true in a sense that he has been convicted by the jury , but not until the judgment is rendered is he convicted by the law ; *449 and the statute only , like the common law , refers to the conviction imposed by law .

At pg., 4 ¶ 6 : states We are of the opinion , said Mr. justice KNOWLTON, that nothing less than a final judgment , conclusively establishing guilt will satisfy the meaning of the word ' conviction ' as here used. At any time before the final judgment of the court a motion in arrest of judgment may be made , or verdict may be set aside upon a motion for a new trial , on the ground of newly discovered evidence , or for other good cause ; and upon further proceeding , it may turn out that the defendant is not guilty.

Accoringly it was held that inasmuch as the verdict of the jury had not been followed by a judgment the defemdant had not been convicted within the meaning of the statute , so as to invalidate his licence .

So it previously been held in commonwealth v. Gorham (99 Mass.420) that a judgment was necessary to constitute a conviction sought to be proven to effect the credibilty of a witness, under a statute , providing that a conviction of crime might be shown for that purpose.

All persons convicted of any felony' are prohibited from voting in texas , both by statute and the constitution of that state. The word 'convicted' as thus means 'that a judgment of final condemnation has been pronounced against ** 452 the accused .'(Gallagher v. state,10 texas Ct. of Appeals 496.)

POINT III C. Justification , necessity and appropriate grounds exist for immediate review of petitioners exibits which are central to his claims

Here petitioner motions this court under Rule 25 , first seeking to justify how necessary and appropriate the grounds in petitioners documents in exibits that were denied below concerning among others a statement and or ' a prejudicial remark' entered on the records that show cause and prejudice , an assertion made by counsel for the respondents marked as exibit M - Taken from respondents' memorandum of law in opposition to petition for a writ of habeas corpus page 9 , lines 16 and 17 , stated ; The mere fact that he was unaware of that "judgment" at the time of the first petition is of no moment. [referring to petitioners 2003 habeas petition.] , Here counsel for the respondents' had referred to what became the judges final judgment amended by the department of corrections . Done in the absence of the petitioner and required attorney addressed in James v. U.S. 348 F.2d 430 (1965) at [1] & [2] There can be no valid pronouncement of judgment and sentence unless the defendant and counsel are before the court . Wilfong v. Johnson , 9 Cir., 156 F.2d 507 (1946).

It is essential under the due process requirement , that the defendant be present when the trial court makes its' final determination of what his sentence is to be under section 4208(b) and fixes his punishment . Behrens v. United States of America , 7 Cir., 312 F.2d 223 (1962). There was no discussion in the Behrens case nor in pollard v. United States , 352 U.S. 354 , 77 S.Ct. 481 , 1 L.Ed.2d 224 (1957), concerning the legal ity , of sentencing a defendant when he is not in court , the court stating that the sentence , even to probation was 'admittedly invalid ' because of petitioners absence .

[3] The trial court had no jurisdiction to impose the sentence of february 7, 1962 in the absence of the defendant , and the order directing the sentence of three years under section 4208(a)(2) Was void . This action by the trial court was not a mere error or irregularity calling for the simple correction of the record . Rather the court went beyond the limits of an essential requirement in the imposition of sentence ; it transcended it's powers' by sentencing the defendant in his absence ; it violated appellants' Constitu tional , rights.

[4][5] Being void , the sentence of february 7 , 1962 , was a nullity it could not become operative . Howell v. United States , 103 F.Supp. 714 aff'd 199 F.2d 366 (4 Cir., 1952). It is well established rule of long standing that final judgment in criminal case does not occure until actual sentence is imposed . Korematsu v. United States, 319 U.S. 432, 63 S.Ct. 1124 , 84 L.Ed. 1494 (1943); Bermin v. United States, 302 U.S. 211, 58 S.Ct. 164 , 84 L.Ed 204 (1937). A void judgment purporting to impose sentence is neither a valid nor or final judgment. Miller v. Aderhold, Warden, 288 U.S. 206, 53 S.Ct. 327 , 77 L.Ed. 702 (1933).

Under U.S. v. Morgan , Supreme Court of the United States , January 4, 1954 , 346 U.S. 502 , 74 S.Ct. 247 , 96 L.Ed. 248 , at [6][7][8] The contention is made that § 2255 of title 28 , U.S.C., 28 U.S.C.A. § 2255 providing that a prisoner 'in custody' may at any time move the court which imposed the sentence to vacate it , if in violation of the Const . or laws of the United States,'should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion. *511 In United States v. Hayman, 342 U.S. 205,219, 72 S.Ct. 263,272, We stated the purpose of § 2255 was 'to meet practicle difficulties' in the admini stration , of federal habeas corpus jurisdiction . We added : Nowhere in the history of section 2255 do we find any purpose to impenge upon prisoners' rights of collateral attack upon their convictions. ' We know of nothing in the legislative history that indicates a different conclusion.We do not think that the enactment of § 2255 is a bar to this motion , and we hold that the district court has power to grant such a motion .

[9][10] Continuation of litigation after final judgment and exhaustion or waiver of any stautory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice . There are suggestions in the Government's brief that the facts that justify coram norbus procedure must have beem unknown to the judge. Since respondent's youth and lack of of counsel was known, it is argued , the remedy of coram nobis is unavailable

One finds similar statements as to the knowledge of the judge occasionally in the literature and cases of coram nobis. such an attitude may reflect the rule that deliberate failure to use a known remedy at the time of trial may be a bar to subsequent relience on the defaulted right . The **253 trial record apparently shows morgan was without counsel. United States v. Morgan, 2 Cir. 202 F.2d 67 , 69. He alleges he was nineteen , without knowledge of law and not advised as to his rights. The record is barren of the reason that brought about a trial without *512 legal representation for the accused . As the plea was 'guilty' no details of the hearing appear . Cf. DeMeerleer v. Michigan , 329 U.S. 663 , 67 S.Ct. 596 , 91 L.Ed. 584 . In this state of the record we cannot know the facts and thus we must rely on respon dent's allegations .

[11][12][13] In the mayer case this court said that coram nobis included errors' of the most fundamental character. Under the rule of Johnson v. Zerbst, 304 U.S.458,468, 58 S.Ct. 1019,1024, 82 L.Ed. 1461, decided prior to respondent's conviction , a federal trial without competent and intel ligent , waiver of counsel bars the conviction of the accused . coram nobis is unavailable in petitioners case , petitioner case requires the Invalidation of the sentencing and procedures used according to case treatment and constitutional provisions raised by the petitioner .

Where it cannot be deduced from the record whether counsel was properly waived, we think,no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court . Otherwise a wrong may stand uncorrected which the available remedy would right . Of course , the absence of a showing of a waiver from the record does not of itself invalidate the judgment. It is presumed the proceedings were correct and the burden rests on the accused to show otherwise . Johnson v. Zerbst , supra, 304 U.S. at page 468, 58 S.Ct. 1024 ; Adams v. U.S. ex rel. McCann, supra, 317 U.S. at page 281, 63 S.Ct. 242; cf. Darr v. Burford, 339 U.S. 200,218, 70 S.Ct. 587 , 597 .

[14] Although the term has been served, the results of the conviction may persist. Subsequent convictions may *513 carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exist we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.

Fay v. Noia , Supreme Court of the United States , march 18, 1963 , 373 U.S. 391 , 83 S.Ct. 822 , 9 L.Ed.2d 837, 24 o.o.2d 12 . at [18] We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of the great constitutional privilege and the requirements of the federal system .

Our survey discloses nothing to suggest that the Federal District Court lacked the power to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of february 5, 1867, and of course our decisions in this court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was imbodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal court's to their Constitutional maximum . Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy . see: whether or not § 2002-6. jurisdiction exhaustion, of other remedies, assertions of rights based on other federal or state laws and pursuit of remedies for enforcement of such right ? The lower district court has proper authorization under § 2002-a combined with 18 U.S.C.A. § 241 Conspiracy against rights , and under the common law analogue that exist between the Habeas corpus writ and the All Writs Act , both U.S. Constitution 14th amend. and the New York State Constitution art. 2 § 2.,(now §3) In support of petitioners violated rights as well as the power and authorization with this court to intervene as this court see's fit ?

In Wade v. Mayo, Supreme Court of the United States, june 14, 1943 334 U.S. 672 , 68 S.Ct. 1270 , 92 L.Ed. 1647 , at [4][5] This court stating : But the reasons for this exhaustion principle cease after the highest state court has rendered a decision on the merits of the federal Constitutional claim . The state procedure has then ended and there is no longer any danger of a collision between federal and state authority . The problem shifts from the consummation of state remedies to the nature and extent of the federal review of the Constitutional issue . The exertion of such review at this point however , is not in any real sense a part of the state procedure. It is an invocation of federal authority growing out of the supremacy , of the federal Constitution and the necessity of giving effect to that supremacy if the state processes have failed to do so.

After state procedure has been exhausted, the concern in with the appropriate federal forum in which to pursue further the Constitutional claim . The choice lies between applying directly to this court for review of the Constitutional issue by certiorari or instituting an oringinal habeas corpus proceeding in a federal district court. Considerations , of prompt and orderly procedure in the federal courts will often dictate that direct review be sought first in this court . And where a prisoner has neglected to seek that review, such failure may be a relavent consideration for a district court in determining whether to entertain a subsequent habeas corpus petition .

At [10] There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. this incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment .

At [11][12] The Circuit Court of Appeals was therefore in error in revers ing , the district court's judgment. It was also in error in assuming that the failure to appoint counsel in a non-capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the state requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not from state statutes. **Betts v. Brady , 316 U.S. 455, 447, 62 S.Ct. 1252 , 1261 , 86 L.Ed. 1595.**

In the present case before this court , the petitioner is able to show that he did exhaust both state and administrative procedures , as with undeniable Constitutional grounds with common law analogue with both the Habeas corpus writ and the All writs Act , the All Writs Act in helping pro se litigant in perfecting the merits for review and relief.

UNDER THE U.S. CONSTITUION

In U.S. v. Moore , Circuit Court , N.D. Alabama, Southern Division may 8, 1904 , 129 F. 630 . . Opinion , JONES, DISTRICT JUDGE(after stating the facts as above). Unquestionably the right of a citizen to organize mines, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement and advancement, or for any other lawful purpose, is a fundamental right of a citizen, protected in every free government worthy of the name. The only issue this case presents is, to what government, under our complex institutions, is committed the duty to protect that right ?

In ascertaining the privileges or immunities of citizens of the United States, as distinguished from the rights which pertain to the citizen of the state as such, and to what governments, respectively, their protection is committed, we must consult the history of our institution s , as well as the language of the Constitution. All Well known-informed persons know that our ancestors brought with them from England tradition ary , privileges, personal and political rights, which had been gained in struggles between commons and king, confirmed by repeated act of parliament and judicial decisions, and so long acquiesced in that time they finally became accepted maxims of government which contitute the British Constitution .

The revolution deprived the people of the colonies of none of these rights, but put them more directly in their own keeping. Their painful experience with the helplessness and inefficiency of the government under the articles of Confederation Convenced the people that their welfare and happiness would be best subserved by committing some of their powers, rights, and liberties to a new government , which as to such matters, should be supreme and independent of the states.

Accordingly the people of the united states, acting through their several state conventions, created the government of the United States with all needful power to conduct their affairs with other nations , to regulate the rights of the states and the rights of citizens of different states as among themselves and with the general government, and some other matters of common concern to the people, and committed to the new goverment all their powers, rights, and liberties as to those carefully enumerated matters, specified in the Constitution of the United States and reserved all the other rights, powers, and liberties theretofore enjoyed by the people of the states to *632 the keeping and protection of the state government, which remained after the adoption of the Constitution, as they were before, sovereign as to them. As there was much apprehension in the conventions which ratified the Constitution, which contained no bill of rights, that the rights of the states and of the people would be unduly trenched upon by the general government , the first congress proposed ten amendments; the resolutions submitting them , reciting that :

'The conventions of a number of states having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of it's powers, that proper declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficient ends of it's creation.' ect.

These amendments denied power to Congress to interfere with certain enumerated rights of the citizen, and gave certain contitutional , guaranties, as to the right of trial by jury, ect. The last two of the ten amendments thus proposed provided that 'the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,'and that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.' It is quite apparent, therefore, that the protection of certain rights of the citizen of a state, although he is by recent amendments made a citizen of the United States and of the state in which he resides, depends wholly upon laws of the state, and that to a great number of matters he muststill look to the states to protect him in the enjoyment of life , liberty , property , and the pursuit of happiness.

POINT IV. D. Petitioner did not waive his right to counsel .

In Moore v. State of Michigan , Supreme Court of the United States December 9, 1957 , 355 U.S. 155 , 78 S.Ct. 191 , 2 L.Ed.2d 167 at [5][6][7] **195 This court stated : However, we may also infer from the record that the michigan courts held that even if petitioner was Constitutionally entitled to the assistance of counsel he waived **161 this right when he told the judge that 'he didn't want one, didn't have one, he wanted to get it over with.' The Constitutional right , of course, does not justify forcing counsel upon an accused who wants none. see Carter v. People of State of Illinois, 329 U.S. 173, 174, 67 S.Ct. 216, 218, 91 L.Ed. 172. But, 'where a person convicted in a state court has not intelligently and understandably waived the benefit of counsel and where the Circumstances show that his rights could not have been fairly protected without counsel, the Due Process Clause invalidates his conviction ***.' Com. of pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116,118, 76 S.Ct. 223,224, 100 L.Ed. 126. Where the right to counsel is such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made . Cf. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019,1023, 82 L.Ed. 680 ; Von Moltke v. Gillies, 332 U.S. 708,723, 68 S.Ct. 316,323, 92 L.Ed. 309. Petitioner was never notified or given an opportunity to be present at the recorded resentencing in petitioners exibits & documents for this courts' review . see exibit no. 7 reception classification system inquiry index at 07 RE- SENTENCE .

In U.S. v. Moore , Circuit Court, N.D. Alabama,Southern Division, may 8, 1904 , 129 F. 630 , the 1904 court of Alabama stated : The power conferred upon congress by the Constitution concerning these rights, in some instances, as under the Fourteenth amendment, is corrective merely of invasion of them by state law or authority. Under other provisions, as under the thirteenth amendment, the power of congress is full,primary, and direct, authorizing not only the annulment of state laws and antagonistic to the right secured but extending as well to legislation for the protection of the right, and punishment of individuals who transgress its laws on the subject. petitioner invokes here title 18 U.S.C.A § 242 ;

It deals with things not merely names. prigg v. pennsylvania, 16 pet. 539, 10 L.Ed. 1060. 'It is clear that this amendment, besides abolishing slavery and involuntary servitude, gives power to congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude except as a punishment for crime, United States v Harris 106 U.S. 540 1 Sup.Ct. 610, 17 L.Ed. 290. Under this amendment Congress has undoubted power to deal not only with the laws which seek to accomplish the forbbiden ends, but also with acts of individuals which bring about the same result. *634 Peonage Cases (D.C.) 123 Fed. 671; Slaughterhouse Cases, 16 Wall. 36,21 L.Ed. 394.

POINT V. E. The district court and circuit court both had proper authorization to have reached the merits of petitioners' claims.

In Hestad v. United States Court of appeals Seventh Circuit November 7, 1969 , 418 F.2d 1063 , the seventh circuit held as a preliminary issue the Government contends that a motion under § 2255 was improper in these cases and should not have been entertained by the district court since the petitioners did not exhaust their right to Appeal . This alleged error the Government maintains , precludes us from reaching the merits of this claim. We disagree .

At [1][2] Convictions in criminal cases are not ordinarily subject to collateral attack for errors which can be correc ted , on appeal. Sunal v. Large , 332 U.S. 174 , 67 S.Ct. 15 88 , 91 L.Ed. 1982 (1974) ; Pelly v. United States , 214 F.2d 597 (7th Cir. 1954). The Government Underestimates , however the power of the district court to remedy it's own errors in exceptional cases and our own power to hear the merits of cases in which relief has been sought bythe wrong procedure in the district court. We think that in the interest of just ice , we should reach the merits of the district courts decisions to grant relief under § 2255.

POINT VI . F. Whether resentencing was required and the petitioner and an attorney presence mandated Under both the U.S. Const. & the N.Y.Constional provisions outlined herein ?

Going to the merits of petitions claim in U.S. v. Munoz-Dela Rosa , 495 F.2d 253 (1974). The court faceing an identical set of facts , issued this statement on page 3 , 4th ¶ , In Chandler , supra, under the indentical set of facts , the issue was raised by a post-judgment motion under 28 U.S.C. § 2255. Here again , the district court entered an amended judgment and commitment , apparently in the absence of the defendant , to conform the written judgment to the judge's original intention. The Fifth Circuit reversed , saying , inter alia :

'Admittedly , the Government is requesting only that a narrow hole be bored in the double jeopardy clause.

We will not , however , allow deeply entrenched constitutional rights to be made subject to claims of 'inadvertent *256 error' and we must plug up the whole, however small , left open by the trial courts auger. We cannot allow even judicial rememberances of things past to dim the constitutional incandescence of the fifth Amendment . "

Here again in the United States Court of Appeals Tenth Circuit, July 21, 1965 , 348 F.2d 430 , Identical fact issues to petitioners case where petitioner and counsel were absent when the sentencing court amended the terms to be imposed contrary to statutory and constitutional provisions , in fact the sentencing court in petitioners case now presently before this court this day of october 2024 , deligated it's sole judicial obligations over to the department of Corrections . The district court failed to identify as a clear factor to be considered in reaching the merits of his decision , instead for whatever reasons off the record chose to exclude it from review .

The Tenth Circuit and the Ninth Circuits' U.S. v. Munoz-Delo Rosa , 495 F.2d 253 (1974), combined with the Fifth Circuits' ruleing quoted in Delo Rosa , where the district court entered an amended judgment and commitment in the absence of the defendant , that violated deeply entrenched constitutional rights and intimated the possible violation of the double jeopardy clause , of the United States Const. see. at [3] from : Yet the difficulties in formulating a principle to establish an exception to well established rules hereinabove stated have led us to the conclusion that the interests of justice , in the light of constitutional double jeopardy protections and the defendant's right to be present

at the time of sentencing (Rule 43 Federal Rules of Crim. Procedure), and to speak on his own behalf (Rule 32(a)(1) Federal Rules of Criminal Procedure), require strict adhe rence , to the axiom that an unambiguous oral pronouncement of a legal sentence must control .

see , Sheldon v. Sill , 49 U.S. 441 , 8 How. 441 , 12 L.Ed. 1147 (1850) at [2] Scope and Extent of jurisdiction in general .,

Courts created by statute can have no jurisdiction but such as the statute confer. also see : U.S. v. Moore , 129 F. 630 (1904) At [2] **Constitutional** Law Key Fundamental Rights . The fourteenth amendment of the federal constitution , which prohibits a state from depriving any person of his life, liberty, or property without due process of law , adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society .

at page 4 , second column at end of 1st ¶ The united states Supreme Court stated : As said in United States v. Cruikshank ,92 U.S. 554, 23 L.Ed. 588: The fourteenth amendment , which prohibits a state from depriving 'any person of life , liberty , or property , without the due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society . Whether these principles belong to the common Law must be construed by this United States Supreme Court , concerning petitioners constitutional rights now before this court

ARGUMENT

1. Under equitable tolling , the circuit court judges had proper authorization and jurisdiction under § 1254 Court of Appeals ; certiorari ; certified questions . § 78aa. jurisdiction of offences and suit . see. 28 U.S.C.A. § 1291 , here showing how broad the , jurisdiction of the circuit courts as well as this United States Supreme Courts' instructions and answers on any proper questions of law. 28 U.S.C.A. § 1254 .

2. whether the second circuit court of appeals abused its' discretion by resurrecting the statute of limitations issue forfeited by respondents' insted of reviewing the district courts' disposition on the merits of the petitioners claim .

3. Constitutional standing and article III Jurisdiction extends to this court under the United States Constitution under § 2 of art. 3 , says the Judicial power shall extend to controvercies between citizens of different states , and in section one of the same article , it says that this judicial power shall be vested in one Supreme Court , and such inferior courts as congress shall from time to time established.

In James v. U.S. 348 F.2d 430 (1965) at [4][5] a void judgment purporting to impose sentence is neither a valid nor final judgment , Miller v. aderhold 288 U.S. 206 , 53 S.Ct. 325 , 77 L.Ed. 702 (1933). Here at [3] The trial had no jurisdiction to impose the sentence of february 7, 1902 , in the absence of the defendant , and the order directing the sentence of three years under section 4308 (a)(2) was void .

This action by the trial court was not a mere error or irregularity calling for the simple correction of the record. Rather in the imposition of the sentence ; it transcended it's powers' by sentencing the defendant in his absence ; it violated appellant's Constitutional rights.

4. " Complete Miscarriage of Justice Standard " , This court in Spencer v. U.S. 773 F.3d 1132 . according to the eleventh circuit at [B] 4th line To be sure , the Supreme Court Has clearly held that an error resulting in an unlawful sentence - i.e., that is beyond the scope of a court's , legal authority - is suffucient to satisfy the complete miscarriage of justice standard .

The spencer court , this court 'went on to state that , [at (9) 1st ¶ line 13 , ' Imposing a sentence without a defendant's counsel present also implicates a defendant's Sixth Amendment right to effective assistance of counsel .

5. In U.S. v. Marquez , 506 F.2d. 620 (1974) At [6] , In Marquez the second circuit had this to say about this court concerning absence during sentencing stating , moreover , as the Supreme Court in Partone indicated , the error , in enlarging the sentence in the absence of a defendant ,is so plain in light of the requirement of Rule 43 , F.R.Crim.P., That Court of Appeals Under their supervisory powers should correct such errors even if they have not been alleged on appeal. 375 U.S. at 53-54 , 84 S.Ct. at 22 .

CONCLUSION

1. Remarks made by respondents counsel exposes that both appellant and attorney were not timely nor or laterly notified of any on goings to resentence appellant , as with both void and non final judgment over the coarse of presently inside an unlawful 30 years , has a remedy as the law so outlines , for every injury , a remedy at law.

2. prior to the statute of limitations implimentation by the circuit court , no appeal lie where final judgment was not pronounce in the presence of appellant and an attorney would render any attempt of appellate review outside taking to the coarse of remedy and damages , triggers the double jeopardy clause , to reinstate what was initionally abandon by the court of original jurisdiction amounts to false imprisonment . Action at [1] marbury v. madison , February 1, 1803 , 1 cranch 137 , 5 U.S. 137 , 1803WL 893 , 2 L.Ed. 60 and at [2] , here at [1] Where there is a legal right , there is also a legal remedy by suit, or action at law , whenever that right is violated . at [2] It is the essential criterion of " appellate jurisdiction " that revises and corrects the proceedings in a cause already instituted and does not create that cause .

This court in Norris v. State of Alabama , april 1, 1935 294 U.S. 587 , 55 S.Ct. 579 , at [2] & [3] stated : The question is of the application of this establish principle to the facts disclosed by the record. that the question is one of fact does not relieve us of the duty to *590 determine whether in truth a " federal right " has been denied .

When a federal right has been specially set up and claimed in a state court , it is our province to inquire not merely whether it was denied in expressed terms but also whether it was denied in Substance and effect . If this requires an examination of evidence , that examination must be made. otherwise , review by this court would fail of it's purpose in safe guarding Constitutional right's .

Thus , whenever a " Conclusion of Law," of a state court as to a federal right and findings of fact are so intermingled that the latter control the former , it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured .

As so , appellant ask the United States Supreme Court to grant certiorari review and determine , whether both the Western District court and the second circuit court of appeals had the proper jurisdiction and failed to grant appellant the right to stautory relief under the Habeas Corpus Statute § 2254 ?

Also , will this court grant Certiorari , and or Habeas relief Under statute herein mentioned , see: Cover page . Appellant calls into evidence the New York State Constitution as cited in People v. Fabian , september 29 , 1908, 192 N.Y. 443 , 85 N.E. 672 . in official citation states : at page [1] 3rd ¶ The word ' Convicted ' in article 2, section 2 , of the Constitution means the Judgment of the court ; the sentence imposed by the court is the judgment ; there having been no sentence here ; there was no judgment; therfore , no conviction. see : Blaufus v. People , 2 Cow.Cr.Rep. 306 (1877) , 3PGS . Here the Fabian court speaks about both the New York States' Constitution in conjunction with the United States Constitution concerning when and how a ' conviction ' ,comes about only by pronouncement of the sentence is the judgment , the conviction entered under statutory law . see 118th congress at [17] 2023 CONG U.S. HR 4494- july 6, 2023 . Ratification of the constitution by the state of New York (july 26,1788)(under these impressions and declaring rights aforesaid cannot be abridged or violated and the Explanations aforesaid are consistant with the said constitution, and in confidence that the amendments which have been proposed to the said Constitution will receive early and mature Consideration : We the said Delegates , In the Name and in sic the behalf of the people of the State of New York do by these presents assent to and Ratify the said Constitution.

In Acosta v Artuz , united states court of appeals , second circuit august 9, 2000 , 221 F.3d 117 at [6]&[7] 4th ¶ The Second Circuit stated : Unlike a cause determination , a finding of actual prejudice is one made on the merits based on the record... it would be incongruous to require prior *125 notice to petitioner in order to dismiss a petition for lack of actual prejudice... while allowing dismissal without notice on the same grounds under [2255 Habeas] Rule 4(b) [or 2254 Habeas Rule 4]...

Cause is quite a different matter. The Supreme Court has identified as possible examples of cause factors such as official interference or reasonable unavailability to counsel of a factual or legal basis for a claim. Such factors are usually outside the record and may be exclusively within the petitioner's knowledge, and thus will only come to light if properly asserted by the petitioner .

... When a prisoner, who may be unlearned in the law and unskilled in pleading , offers a cognizable claim in a second or successive petition that appears to demonstrate actual prejudice , but fails to address adequately, The issue of cause, prior notice is essential . ***

This raises or rather should raise red flags for this court , for in the second circuits' denial order it refused to rule on the merits of petitioner s' , claim ? Is this a signal to this court for instruction ? It is clear in this case cited that the second circuit failed to impliment in the present case before this court ?

con't ,,, id. at 524 (citations omitted).

The "Factors" used to determine "cause" in Femia (i.e., "official interference or the reasonable unavailabilty to counsel of a factual or legal basis for a claim,"47 F.3d at 524) are the same factors giving rise to the "special circumstances" of 28 U.S.C. § 2244(d)(1)(B) ,(C) , and (D), and to equitable tolling. The existence of an unconstitutional impediment to filing a claim, see id. at § 2244(d)(1)(B), is similar to "official interference." A situation where the constitutional right was recognized and made retroactive on collateral review after the date the conviction became final, see id. at § 2244 (d)(1)(C), is similar to "unavailabilty...of a ... legal basis for a claim." And a situation where the factual basis for a claim first became discoverable through the exercise of due diligence after the date the conviction became final, see id. at §2244 (d)(1)(D), is similar to "unavailability ... of a factual ... basis for a claim." Similar factors are used to determine the applicablity of equitable tolling . As the Femia Court noted, these factors are usually outside of the record and often will not be fully addressed in the petition of an unlearned and unskilled pro se petitioner. see 47 F.3d at 524; see also 2254 Habeas Rule 4 Advisory Committee Note (giving procedural grounds for dismiss, such as failure to exhaust and successive petitions, as examples of situations where the court may want to authorize respondent to make a motion to dismiss on notice); Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998) ("When dealing with a pro se petitioner , the court must make clear the procedural default at issue and the consequences of failing to respond [before summarily dismissing petition on basis of procedural default].").

con't Moreover , the problem of unlearned and unskilled pro se petitioners inadequately addressing the statute of limitation in the petition is compounded in this case by the fact that the outdated AO Forms given to these prisoners are not designed to elicit any information concerning these factors . see Snider, 199 F.3d at 114 n. 3 (noting the difficulty presented by the use of an incomplete and confusing standard form that "fails to warn the prisoner that certain answers will lead to the dismissal of the action"). In such circumstances prior notice and an opportunity to be heard is essential." Femia, 47 F.3d at 524.

Thus, unless it is unmistakably clear from the facts alledged in the petition , considering all of the special circumstances enumerated in Section 2244(d)(1), equitable tolling , and any other factor relevent to the timliness of the petition , that the petition is untimely,the court may not dismiss a Section 2254 petition , for untimeliness with out providing petitioner prior notice and opportunity to be heard. see Snider, 199 F.3d at 113; Lugo at 39; cf. Leonhard v. United States 633 F.2d 599,609 n. 11 (2Cir.1980)(approving sua sponte dismissal on ground of statute of limitations where raised in answer and all facts necsssary for defense appeared in complaint).

the petitions in this case do not provide enough information to determine anything more than that petitioners *126 are beyond the limitation period under section 2244(d)(1)(A). The courts below therfore erred in dismissing the petitions without providing petitioners prior notice and opprtunity to be heard in opposition.

con't

III. CONCLUSION

For the foregoing reasons, the judgments of the courts below are vacated and the petitions are remanded for further proceedings consistent with this opinion.

It appears here to be a clear standard comimg from the second circuit court of appeals , if this court takes consideration of the fact , that what holdings it held in Acosta v. Artuz , united states court of appeals second circuit , August 9, 2000 , 221 F.3d. 117 at [6] & [7] Notice and an opportunity To Be Heard , Although the courts below had the authority to raise the AEDPA statute of limitation defense on their own motion , the judgments must nevertheless be vacated because the courts dismissed without affording the petitioners notice and opportunity to be heard. see. Snider, 199 F.3d at 112 ("The problem with the courts' dismissal was not that it was done on the courts own motion, but rather that it was done without affording [petitioner] notice and opportunity To Be Heard.") In the third ¶ - at line six , the second circuit stated : The Court acknowledged that 2254 Habeas Rule 4 "Provides for sua sponte dismissal of habeas petition on it's merits, to be followed by notice , " but noted that there is no provision for sue sponte dismissal without prior notice on the ground of abuse of the writ.

Unless the principle and usages of the law doesn't here apply , petitioner states herein , states , wherfore this court grant to the petitioner what is rightfully due Under the United States Constitution and any other principles of law applicable under the "All Writs Act".

As the Second Circuits' judgment order reflects that it discounted any order coming from the district court when it sua sponte resurrected the statute of limitations forfeited by the respondent' according to the case cited by the circuit court°, Wood v. Milyard , 566 U.S. 463, 473 Under 28 U.S.C. § 2244 (d)(1) , Finality of determination , (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. The limitation period shall run the latiest of , ect, ect,. Here the merits of petitioners argument is more clear . The petitioner nor or an attorney for that matter , neither were notified according to the respondents response made by their counsel under file No. 6:19-cv-6540 petitioners exibit M pages 9 & 10 at (9) counsel stated : The mere fact that he was unaware of that " Judgment " , at the time of the first petition is of no Moment . thus cause and prejudice is here established for petitioner. At the very least it shows that petitioner and attorney were not notified at all nor at any time later thereafter , when resentencing " Judgment ", as mentioned by counsel for the respondents admitted to above ? This would require this court to invalidate the judgment and procedures used all together or remit to the Second Circuit Court of Appeals with instructions to invalidate both the sentence and conviction , according to the United States Constitution Under the 14th Amendment section 5 . At page (10) Again counsel for the respondent (s) , States : Here , although the trial court twice amended petitioners , sentence in 1997 , the original judgment remains the relevant judgment for habeas purposes because both amendments were strictly ministeral .

Here petitioner asserts that neither of the court's haven't ruled on the merits of petitioners claim , i seek to perserve all issues [that] are relavent and applicable for review and proper remedy . see **Magwood v.** Patterson , june 24, 2010 , 561 U.S. 320, 130 S.Ct. 2788 , 177 L.Ed. 529 combined with DOC/DOCCS interferences argued by petitioner,in previous papers that can be recalled for review under certiorari .

Most and of utmost importence is the holdings made in , U.S. **v. Munoz-Dela** Rosa, 495 F.2d 253 (1974) ., REPEATED HERE BY COUNSEL FOR THE RESPONDENS', The court stated ; In Chandler , Supra, under the identical set of facts the issue was raised by a post-judgment motion under 28 U.S.C. § 2255. Here again , the district court entered an amended judgment and commitment , apparently in the absence of the defendant , to conform the written judgment to the judge's original intention. The Fith Circuit reversed , saying , inter alia : 'Admittedly , the Government is requesting questioning only that a narrow hole be bored in the double jeopardy clause. We will not , however , allow deeply entrenched constitutional rights to be made subject to claims of 'inadvertent *256 error ' and we must **plug up the hole , how ever , small , left open by the trial courts auger.** We can not allow even judicial remeberence of the past to dim the constitutional incadescence of of the fifth Amendment. wherefore , petitioner request that this court will not allow this request in exibit M , identicle to Dela-rosas' court and rejected by the Fith Circuit to allow it to pass ? petitioner ask that this court order for the petitioners release Under THE U.S. CONSTITUTION .

Lastly , petitioner believes that it is worth recalling the holdings of this court under U.S. v. Cruishank, Supreme Court of the United States , October 1, 1875 , 92 U.S. 542 , 2 Otto 542 , 1875 WL 17550 23 L.Ed. 588 ," The Fourteenth amendment prohibits a state from denying to any person within it's juridiction the equal protection of the laws; but this provision does not , any more than the one which precedes it , and which we have just considered, add any thing *555 to the rights which one citizen has under the Constitution against another. the equal ity , of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its . . . . . citizens in the enjoyment of this principle, if within it's power. that duty was originally assumed by the states ;and still remains there. The only obligation resting upon the United States is to see that the state (s) , do not deny the right. This the amendment guarantees,but no more. The power of the national government is limited to the enforcement of this guaranty. see people v Fabian , court of appeals of New York, september 29 , 1908 , 192 N.Y. 443 , 85 N.E. 672 . . . The word ' convicted ' in article 2 , section 2 , [now section 3] ; of the constitution means the judgment of the court ; the sentence imposed by the court is the judgment there having been no sentence here , there was no judgment ; therefore , no conviction .

wherefore,petitioner 's prays'that this court order for instructions to the New York State Circuit Court of Appeals, to enforce the usages and principles of the law , under the United States Constitution , granting petitioners release under the Great Writ of the Habeas Corpus statute 28 U.S.C.A. § 2254 State Custody; remedies in Federal Courts.