

United States District Court,
S.D. New York.

Nicholas ROSA, Petitioner,
v.
Daniel SENKOWSKI, Respondent.

No. 97 CIV. 2468 (RWS).

Aug. 1, 1997.

SWEET, J.

*1 Respondent Daniel Senkowski, Superintendent of Clinton Correctional Facility (hereinafter "Senkowski" or the "State"), has moved to dismiss the petition for a writ of habeas corpus filed by Nicholas Rosa ("Rosa").

For the reasons set forth below, the motion will be denied and the State will be directed to respond to the petition within forty (40) days of the date of entry of this order.

The Parties

Rosa is currently confined at Clinton Correctional Facility, New York, pursuant to a judgment of conviction of the Supreme Court of New York County.

Senkowski is the Superintendent of the Clinton Correctional Facility. Pursuant to an agreement between the Office of the Attorney General of the State of New York and the Office of the District Attorney of the County of New York, the New York District Attorney (the "District Attorney") represents Senkowski.

Prior Proceedings and Background

On May 17, 1977, Rosa was convicted of second degree murder after a jury trial and was sentenced to an indeterminate prison term of 20 years to life. On appeal, the Appellate Division, First Department, reversed the conviction and ordered a new trial, but the Court of Appeals reversed the Appellate Division's order, and the conviction was reinstated. See *People v. Rosa*, 80 A.D.2d 527, 436 N.Y.S.2d 9 (1st Dep't 1981) and 99 A.D.2d 963, 473 N.Y.S.2d 410 (1st Dep't 1984), rev'd, 65 N.Y.2d 380 (1985), on remand, 116 A.D.2d 489, 496 N.Y.S.2d 1003 (1st Dep't), appeal denied, 67 N.Y.2d 950 (1986). Rosa's final petition for leave to appeal to the Court of Appeals was denied on April 22, 1986. Rosa's state trial and appellate counsel is deceased.

Acting pursuant to 28 U.S.C. <section> 2254, Rosa filed the instant petition for a

writ of habeas corpus, his first federal petition, on April 8, 1997. In his petition, Rosa asserts six grounds for relief: (1) use of statements obtained in violation of his Sixth and Fourteenth Amendment right to counsel; (2) violation of the privilege against self-incrimination; (3) the admission of prior bad acts depriving Rosa of a fair trial and due process; (4) ineffective assistance of counsel; (5) illegal sentence; and (6) newly discovered evidence. Rosa does not identify the allegedly newly discovered evidence or indicate when such evidence was discovered. Furthermore, Rosa does not specify how his counsel was ineffective or how his sentence was illegal.

Rosa's petition was filed by an attorney. However, Rosa apparently was not represented by counsel until February 1997, when he or his family received money from the settlement of another lawsuit that permitted them to hire counsel. Rosa himself has an 11th grade education and no legal training. Once Rosa retained counsel and was informed of the need to file a petition promptly, the petition was filed within about a month and a half.

By letter dated April 16, 1997, the District Attorney moved to dismiss the petition. Oral argument was heard on May 14, 1997, at which time the motion was deemed fully submitted.

Discussion

I. Rosa's Petition Would Be Time-Barred

*2 On April 24, 1996, President Clinton signed into law the "Antiterrorism and Effective Death Penalty Act of 1996" (hereinafter the "Act" or the "AEDPA"), Public Law 104-132, which imposes new restrictions on habeas corpus petitions. Section 101 of the Act amends 28 U.S.C. <section> 2244 to impose a one-year statute of limitations on habeas corpus petitions brought under 28 U.S.C. <section> 2254. Section 2244(d)(1) provides:

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 from the latest of--

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The limitations provision also excludes from the one-year period the time during

which a state collateral proceeding is pending. 28 U.S.C. <section> 2244(d)(2). The limitations period became effective on the date the Act was signed into law. See *Duarte v. Hershberger*, 947 F.Supp. 146, 147-48 (D.N.J.1996) (AEDPA effective April 24, 1996) (citing *United States v. Ferryman*, 897 F.2d 584, 588-89 (1st Cir.), cert. denied, 498 U.S. 830 (1990)).

The Supreme Court recently held that the Act's amendment adding section 2254(d), which imposes restrictions on review of second and subsequent habeas petitions, does not apply retroactively to petitions filed before the Act took effect. *Lindh v. Murphy*, 117 S.Ct. 2059, 1997 WL 338568, 65 U.S.L.W. 4557 (June 23, 1997). However, the Supreme Court stated that section 2254(d) was "meant to apply to the general run of habeas cases ... when those cases had been filed after the date of the Act." *Id.* at *4.

Here, Rosa filed his petition after the April 24, 1996 effective date of the Act. As indicated in *Lindh*, the Act's provisions, including the new time limitations, presumptively would apply to Rosa's petition. To determine whether Rosa's petition is timely under the new provisions of the Act, it is necessary to calculate one year from the latest of the dates provided for in subsections (A)-(D) of section 2244(d)(1). Rosa's conviction became final on July 22, 1986, the end of the ninety-day period during which an individual can seek direct review in the United States Supreme Court by writ of certiorari. See *Hughes v. Irvin*, 967 F.Supp. 775 1997 WL 357947, *2 (E.D.N.Y. June 25, 1997); Rule 13, Rules of the Supreme Court of the United States. Thus, under subsection (A), Rosa's one-year time to file a habeas petition would have expired on July 22, 1987, nearly ten years before the petition was actually filed. Subsections (B) and (C) do not apply to this case.

*3 Under subsection (D), the court determines the date on which the "factual predicate" for the claim could have been discovered through the exercise of due diligence. Rosa's first three asserted grounds for relief relate to alleged trial errors, all of which Rosa could have discovered twenty years ago. Any ineffective assistance of counsel claim could have been discovered through the exercise of reasonable diligence within a relatively short time after the exhaustion of direct appeals in the state system nearly ten years ago. The purported illegality of the sentence should have been discovered at or shortly after the time of sentencing. The claim of newly discovered evidence is entirely conclusory and does not provide a date of discovery from which the limitations period could be calculated. Rosa has not contended that the evidence was discovered in the past year. Consequently, it appears that the factual predicate for any claim based on newly acquired evidence should have been discovered over one year ago. Thus, Rosa's claim would be barred under subsection (D) as well.

Some courts have concluded that the statutes of limitations contained in the AEDPA apply to bar cases filed more than one year after the event triggering the limitations period, but filed within one year after the Act's effective date. See,

e.g., *Clarke v. United States*, 955 F.Supp. 593, 595-97 (E.D.Va.1997) (applying one year time limit to section 2255 petition filed after effective date of AEDPA); *Curtis v. Class*, 939 F.Supp. 703 (D.S.D.1996) (applying one year time limit to 2254 petition filed after effective date of AEDPA). Under the reasoning of these courts, the new time limits could be applied to cases, such as Rosa's, filed after April 24, 1996 without invoking the presumption against retroactive application of statutes established in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). See *Clarke*, 955 F.Supp. at 596-97 (concluding that application of new statute of limitations does not raise retroactivity concerns because it does not regulate primary conduct).

However, in *Peterson v. Demskie*, 107 F.3d 92 (2d Cir.1997), the Second Circuit held that a state prisoner who files a habeas petition more than one year after the accrual date under the new limitations provision but within a year after the effective date of the AEDPA was entitled to a "reasonable time" after the effective date of the Act to file what would otherwise be a time-barred petition. *Id.* at 93. The Court stated:

Where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a "reasonable time" should be applied with undue rigor.

Id.; see also, *Block v. North Dakota*, 461 U.S. 273, 286 n. 23 (1983)

(Constitution may require states to provide individuals reasonable time to file claims where such claims would be barred by new limitations period). The Second Circuit concluded that a petition filed 72 days after the effective date of the Act was timely. *Peterson*, 107 F.3d at 93; see also, *Holmes v. Wharton*, Civ. No. 3:96-CV-44-JTC, 1997 WL 115837, *3 (N.D.Ga. Feb. 27, 1997) (petition filed one week after effective date filed within "reasonable" time).

*4 The question, then, is whether Rosa's petition, filed on April 8, 1997, over eleven months after the effective date of the Act, was initiated within a "reasonable time" under the circumstances. Although the "reasonable" grace period should not be applied with undue rigor, and eleven-month delay is not "reasonable" when the claims raised could have been brought much earlier. To extend the grace period to eleven months as a matter of routine would undermine *Peterson*'s holding that a petitioner is not entitled to a full year from April 24, 1996 to file. As in *Peterson*, the petitioner here had several years to consider bringing a petition. None of his claims rely upon recently recognized constitutional rights which Rosa would only have been able to assert long after his state appeals were exhausted. Compare *United States v. Ortiz*, No. Civ.A. 97-1250, 1997 WL 214934, *5 (E.D.Pa. April 28, 1997) (applying presumption against retroactivity, <section> 2255 motion filed ten months after Act filed within "reasonable time" and thus not time barred; prisoner made reasonable effort to initiate claim where basis for claim was recognized by Supreme Court in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501 (1995), only one year before).

Rosa contends that he did not have years to "contemplate" bringing this action because he had no legal training, and, until recently, was unrepresented and unable to pay for counsel, and thus could not have known he had a basis for filing a habeas petition until February 1997. There is no dispute that Rosa's attorney was diligent in filing the application after he was retained by Rosa. However, Rosa's lack of legal sophistication or legal counsel does not excuse compliance with filing requirements. The petitioner in Peterson was pro se, and the Court gave no indication his lack of counsel would extend the period within which to file a petition. Indeed, to allow the absence of counsel to extend the filing period would render the "reasonable" time limitation imposed by the Second Circuit void in the substantial number of pro se habeas corpus petitions brought in this district. If Rosa lacked funds to hire an attorney, he could, in the exercise of reasonable diligence, have filed a petition pro se while he continued to seek legal assistance.

Accordingly, Rosa's petition would be time-barred under section 2244(d) and Peterson.

II. A Time Limit Barring Consideration of the Merits of a First Habeas Petition Without a Showing of Prejudice to the State Violates the Constitution

Rosa contends that application of the time limitation to bar his petition would violate the suspension Clause of the Constitution. U.S. Const., Art. 1, Sec. 9, cl. 2. [FN1]

The Suspension Clause provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Rosa contends that the imposition of a one-year statute of limitations constitutes an impermissible suspension of the writ, and that, a fortiori, the imposition of a grace period shorter than one year violates the Suspension Clause.

A. The Evolution of the Writ of Habeas Corpus

*5 The present day writ of habeas corpus, the "common law world's 'freedom writ' " and the "highest safeguard of liberty," *Smith v. Bennett*, 365 U.S. 708, 712 (1961), traces its origins to English laws dating back to 1166 A.D. See Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 *Seton Hall L.Rev.* 1493, 1495-96 (1996) (citing Assize of Clarendon, enacted in reign of King Henry II). "From its earliest days, the Supreme Court has emphasized the central role of the writ of habeas corpus in Anglo-American jurisprudence in protecting individual liberty." *Mojica v. Reno*, 970 F.Supp. 130, 1997 WL 400734, *21 (E.D.N.Y. July 11, 1997). The "great object of [the writ of habeas corpus] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). The writ, along with the right to trial by jury, is among the most

fundamental features distinguishing our free society from a police state, where unbridled and arbitrary imprisonment is used as an instrument of tyranny. See *Johnson v. United States*, 333 U.S. 10, 17 n. 8 (1948).

The early common law writ was employed as a procedural device for securing judicial review of pretrial, executive detention. O'Neill, *supra*, at 1497- 98. The writ was not available to challenge imprisonment imposed pursuant to a conviction entered by a court of competent jurisdiction. *Id.* at 1498. In 1679, the English Parliament enacted a general habeas corpus statute that cured procedural defects in the common law writ and strengthened the power of common law courts to inquire into the sufficiency of asserted grounds of detention; the Habeas Corpus Act of 1679, however, continued to exclude individuals convicted of criminal offenses from the protections of the writ. *Id.*

The common-law writ was recognized in the North American colonies during the Revolutionary period. *Id.* at 1502-03. At that time, the nation's leaders were more concerned about the abuse of centralized power of the kind they had suffered under British rule than about the potential abuse of power by the states. Thus, no federal writ of habeas corpus was enacted in the years immediately following the Revolution, and Articles of Confederation made no provision to protect the common law writ from legislative encroachment. "A federal writ of habeas corpus was unnecessary because not national courts with general jurisdiction had been created and the writ was provided for in some form in all of the states. A citizen could thus rely upon the common law writ as developed in the states to protect himself from the threat of illegal imprisonment." *Id.* at 1503.

When the states convened to create a new constitution, the concern over excessive federal power had been tempered by a recognition of the need for a stronger national government. However, the Framers continued to be anxious about the abuse of governmental power, as reflected in the debates in Philadelphia and during the ratification process. For example, critics of the Constitution faulted the proposed federal charter for its lack of a bill of rights to protect individual liberties from incursions by government officials. In defense of the Constitution, Alexander Hamilton argued that the Suspension Clause's enshrinement of habeas corpus, which effectuated and ensured the right to a trial by jury, provided an adequate safeguard against encroachment on individual liberty. See *The Federalist* No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Constitution that was finally ratified in 1789 included the Suspension Clause, but did not specify whether Congress was forbidden to suspend the availability of the writ for those seeking relief in state courts or in federal courts. While most scholars agree that the Framers understood habeas corpus to permit inquiry only into pretrial detention or the jurisdiction of a sentencing tribunal, academics continue to debate whether the Suspension Clause was originally designed to protect the power of federal courts to issue writs for federal prisoners, the power of state courts to issue writs for federal prisoners, or both. See Jordan Steiker, *Incorporating the*

Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?, 92 Mich.L.Rev. 862, 872-73 (1994). However, the habeas provisions of the Judiciary Act of 1789 created a federal writ only for federal prisoners, undermining the argument that the "original" Suspension Clause mandated federal habeas corpus review of state convictions. See O'Neill, *supra*, at 1506; but see Eric M. Freedman, The Suspension Clause in the Ratification Debates, 44 Buff.L.Rev. 451, 455 (1996) ("[P]articipants in the ratification debates, were they among us today, would support the independent judicial examination on federal habeas corpus of all convictions, state or federal.").

*6 By the time of the Civil War and Reconstruction, federal habeas practice had changed considerably and Supreme Court jurisprudence had provided some answers to questions about the meaning of the Suspension Clause. In *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice John Marshall stated that the habeas provisions of the Judiciary Act were a result of Congress's perceived 'obligation of providing efficient means by which this great constitutional privilege should receive life and activity," *id.* at 95, thus implicitly rejecting the view that the Suspension Clause is intended only to protect the habeas jurisdiction of the states from federal encroachment. See Steiker, *supra*, at 875-76. Marshall's opinion "gives no hint that the Clause rests on federalism, as opposed to individual liberty and separation-of- powers, concerns." *Id.* at 876.

Considerable dispute exists regarding the scope of federal habeas practice in the years leading up to the Civil War. In a highly influential article, Professor Paul Bator contended that federal habeas was available only to challenge pretrial detention or the jurisdiction of the court imposing a sentence of imprisonment, not to challenge a conviction entered by a court of competent jurisdiction. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 466 (1963). More recently, however, scholars have disputed Bator's view, attempting to demonstrate that both the Supreme Court and the lower federal courts in the antebellum period entertained habeas petitions attacking the constitutionality of criminal statutes and convictions, at least where there was no other procedural mechanism to provide federal review of a prisoner's federal claims. See, e.g., James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum.L.Rev.1997, 2059, 2092- 93 (1992).

The failure of pre-Civil War congresses to enact legislation to permit federal courts to review state detentions reflects a continuing belief that the threats to individual liberty posed by state governments could be contained by writs issued by state courts. However, the Civil War and its aftermath persuaded the Reconstruction Congress that federal review of state convictions was necessary to protect individuals, particularly former slaves and Union soldiers, from illegal state imprisonment. The Judiciary Act of 1867 extended the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treat or law of the United States." Judiciary Act, ch. 28,

<section> 1, 14 Stat. 385, 385 (1867). The 1867 Act, "with some important modifications, still provides the basic framework for the current regime of federal habeas review of state convictions. This regime permits, with some recent exceptions, state prisoners to relitigate properly preserved federal issues in federal court after such issues are fully exhausted in the state system." Steiker, *supra*, at 883.

*7 Prior to the passage of the AEDPA, no statute of limitations had ever been imposed on the federal writ of habeas corpus. See *United States v. Smith*, 331 U.S. 469, 475 (1947) ("habeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time."); *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring) (no statutes of limitations).

B. The Application of a Time Limit on Rosa's Petition "Suspends" the Writ in Violation of the Constitution

The application of the time limit to Rosa's first federal habeas petition effectively deprives him of the ability to obtain any collateral review in a federal court of the merits of his claim that his confinement violates his constitutional rights. Such a deprivation constitutes an unconstitutional "suspension" of the writ of habeas corpus.

A restriction or modification of the writ of habeas corpus constitutes a "suspension" if it leaves habeas corpus "inadequate [or] ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (upholding substitution of writ in District of Columbia with post-conviction remedy that provided review only by nontenured judges). In *Felker v. Turpin*, 116 S.Ct. 2333 (1996), the Supreme Court held that the provisions of the Antiterrorism and Effective Death Penalty Act restricting the scope of review of claims raised in successive habeas petitions did not violate the Suspension Clause. *Id.* at 2340. The Court concluded that the new restrictions fell within the scope of the evolving doctrine of abuse of the writ, and thus did not constitute a suspension of habeas corpus. *Id.*

Thus, the time limit imposed by Congress and Peterson is an unconstitutional suspension of the writ if it constitutes an obstacle that renders habeas an "inadequate" or "ineffective" means of testing the constitutionality of Rosa's imprisonment, as opposed to a permissible regulation tailored to curb abuse of the writ.

The Supreme Court has indicated that restrictions on initial federal habeas petitions, such as the restriction at issue here, may invoke closer scrutiny than restrictions on subsequent petitions. In *Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293, 1298 (1996), the Court stated that "[d]ismissal of a first federal

habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." 116 S.Ct. at 1299. Given the practical limitations on the Supreme Court's certiorari jurisdiction, the application of a limitations period to bar a first federal habeas corpus petition deprives a state prisoner of what is likely to be his only federal forum in which to raise a federal constitutional challenge to his incarceration. Cf. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (habeas corpus is "sole federal remedy" for challenging fact or duration of confinement). Unlike the "modified res judicata" provisions upheld in Felker, the application of a statute of limitations to a first federal habeas corpus petition does not fall within the compass of the "abuse of the writ doctrine," which applies only to successive petitions. See McClesky v. Zant, 499 U.S. 467, 470, 493-94 (1991) (adopting "cause and prejudice" standard for second and subsequent petitions where government seeks dismissal for abuse of writ).

*8 The only case to pass directly on the constitutionality of time limits contained in the Antiterrorism and Effective Death Penalty Act concluded that 28 U.S.C. <section> 2263, which imposes a six-month limitation on filing habeas petitions from state death penalty convictions in states that provide counsel in all state capital proceedings, worked an unconstitutional suspension of the writ as applied to a petitioner whose claim accrued more than six months before passage of the Act. Breard v. Angelone, 926 F.Supp. 546, 547-48 (E.D.Val.1996). The district court ruled that the time limit was unconstitutional as applied, because it provided no grace period for such litigants. Id. [FN2]

Some recent case law has suggested that the one-year limitations period would be a reasonable regulation of the writ and does not render the writ an inadequate means of challenging allegedly unconstitutional confinement. See Mosely v. Scully, 908 F.Supp. 1120, 1128-29 (E.D.N.Y.1995) (suggesting that statute of limitations for habeas corpus would be permissible) (citing Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 151, 170-71 (1970)), aff'd, 104 F.3d 356 (2d Cir.1996); see also People v. Wiedemer, 852 P.2d 424, 434 (Colo.1993) (en banc) (under state constitution's suspension clause, state could impose a time limit on state-law collateral attacks on convictions, provided accused had "meaningful opportunity to challenge allegedly unconstitutional convictions."); Davis v. State, 443 N.W.2d 707, 709 (Iowa 1989) (three-year statute of limitations for state post-conviction relief does not violate state constitution's suspension clause). The legislative history indicates that the Act's supporters also viewed the limitations period as a reasonable means of curbing excessive delays in habeas petitions, particularly in death penalty cases. See H.R.Rep. No. 23, 104th Cong., 1st Sess. (1995) at 9-10 ("This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner."); see also, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in

Capital Cases, 45 Crim.L.Rep. 3239 (1989) (recommending limitations period on federal habeas corpus petitions filed by death row inmates, who have incentive to use multiple and delayed petitions to forestall execution, where state provides counsel for post-conviction proceedings).

However, the purpose and history of the writ demonstrate that barring Rosa's first habeas petition as untimely would violate the Suspension Clause. As noted above, there was never previously been a statute of limitations applied to federal habeas corpus petitions. On various occasions, the Supreme Court has ruled that lower courts were obliged to hear habeas corpus petitions, even when they were filed many years after a prisoner's conviction became final. See *Uveges v. Pennsylvania*, 335 U.S. 437, 438-39 (1948) (petition filed seven years after conviction); *Palmer v. Ashe*, 342 U.S. 134, 137 (1951) (eighteen years after conviction); *Herman v. Claudy*, 350 U.S. 116, 123 (1956) (eight years after conviction).

*9 In *Chessman v. Teets*, 354 U.S. 156 (1957), the Court concluded that the passage of seven years between conviction and application for the writ did not bar federal habeas corpus relief. The Court stated:
[T]he overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist.... We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands.
Id. at 165; see also *Herman*, 350 U.S. at 123 ("The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."); Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six- Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U.Rev.L. & Soc. Change 451, 476-77 (1991) ("To apply a statute of limitations to habeas corpus would violate the principle underlying the writ--that it is never too late to discover the truth which would release a person confined either for a cause for which no person should be restrained or by a process by which no person should be convicted.")

As recently as 1996, before the enactment of the AEDPA, the Supreme Court refused to permit the lower federal courts to create a judicial "statute of limitations" on habeas cases by considering "equitable reasons" not specified in the Rules Governing Section 2254 Cases (the "Habeas Rules") to dismiss a first federal habeas petition brought after six years of delay and on the even of execution. *Lonchar*, 116 S.Ct. at 1295; see also *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (where Congress had failed to enact statute of limitations for federal habeas actions, Court declined to create judicial rule achieving same end).

Moreover, before the passage of the Act, a number of courts noted the potential constitutional infirmity of a strict statute of limitations on habeas corpus petitions. In *Strahan v. Blackburn*, 750 F.2d 438 (5th Cir.), cert. denied, 471

U.S. 1138 (1985), for example, the Fifth Circuit indicated that if Rule 9(a) of the Rules Governing Section 2254 Cases had created a statute of limitations, rather than conditioning dismissal of the writ upon a showing that petitioner's delay has prejudiced the state's ability to contest the petition, such a limitations period would "arguably" be prohibited by the Suspension Clause. *Id.* at 441. In *Davis v. Adult Parole Authority*, 610 F.2d 410 (6th Cir.1979), the Sixth Circuit reversed the district court's application of Rule 9(a) as a strict statute of limitations. *Id.* at 414. The court stated that a rule that would operate as a strict statute of limitations on habeas corpus cases, and thus "permit a court to dismiss an action for habeas relief without any consideration of the equities presented renders the habeas corpus process inadequate to test the legality of a person's conviction and, thereby, constitutes a prohibited suspension of the writ." *Id.* The application of a time limit in this case would result in dismissal without consideration of the merits of Rosa's facially-viable claims, one of which produced conflicting decisions in the lower state courts and a divided decision in the New York Court of Appeals. See *Rosa*, 65 N.Y.2d at 381 (four-judge majority opinion, holding no violation of right to counsel); 65 N.Y.2d at 388 (three-judge dissenting opinion). [FN3]

*10 Four former United States Attorneys General have warned that the imposition of time limitations, particularly without a guarantee of counsel to ensure that inmates are aware of the "fatal consequences" of a late petition, could result in an absolute deprivation of federal habeas review of a prisoner's bona fide constitutional claims, in violation of the Suspension Clause. See Letter from Benjamin R. Civiletti, Jr., Edward H. Levi, Nicholas D. Katzenbach & Elliott L. Richardson to President William J. Clinton (Dec. 8, 1995), in 143 Cong.Rec. S379-01, S485 (Jan. 21, 1997) (statement of Sen. Moynihan). [FN4] Applying the time limit to *Rosa*, who was until recently unrepresented, will have precisely the "fatal consequence" of eliminating all federal review of his federal constitutional claims.

It has been argued that the Suspension Clause only forbids abrogation of the limited writ known to the Framers. See, e.g., O'Neill, *supra*, at 1540. Because the Founders viewed federal habeas as a remedy only for individuals held in federal executive custody, this "originalist" argument goes, Congress could completely eliminate all federal habeas review of state convictions. According to the originalist position, since federal review of state convictions resulted from an act of legislative grace, rather than constitutional command, the purported "greater power" to suspend entirely state prisoners' access to the federal writ includes the "lesser power" to limit access to the writ by imposing a statute of limitations.

However, in *Felker*, the Supreme Court stated: "[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." 116 S.Ct. at 2340 (citing *Swain*, 430 U.S. at 385 (Burger, C.J., concurring)). [FN5]

Moreover, the "originalist" argument elides crucial questions about the effect of

the Fourteenth Amendment on the constitutional status of the federal writ. "Diverting one's focus from the Framers of the 'original' Constitution to the framers of the Fourteenth Amendment significantly alters the understanding of the writ." Steiker, *supra*, at 888. Although the original Constitution did not prohibit suspension of the federal writ as to state prisoners, the Fourteenth Amendment "incorporated" the privilege of the writ against the states, extending the federal courts' protection of federal prisoners to state prisoners and reflecting the Reconstruction-era's heightened concern with the supremacy of federal law and the abuse of state power. See Steiker, *supra*, 899-912 (Suspension Clause affords state prisoners constitutional right to federal review of constitutional claims in lower federal courts via incorporation through the Due Process Clause of the Fourteenth Amendment).

The Supreme Court has interpreted the Due Process Clause to "incorporate" various provisions of the Bill of Rights to protect individual liberties against violations by the states, particularly in criminal prosecutions. [FN6] See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Fourth Amendment protection against unreasonable search and seizure applies to states), overruled on other grounds, *Mapp v. Ohio*, 367 U.S. 643 (1961) (excluding from state criminal trial evidence obtained in violation of Fourth Amendment); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (Fifth Amendment privilege against self-incrimination); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (Sixth Amendment right to speedy trial); *In Re Oliver*, 333 U.S. 257, 278 (1948) (public trial); *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (jury trial); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Confrontation Clause); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (right to counsel).

*11 The Eighth Amendment's protection against cruel and unusual punishment has also been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962). The Eighth Amendment permits a convicted criminal to challenge the conditions, but not the fact, of his confinement. See *Preiser*, 411 U.S. at 499-500. "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment ... his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added). In light of the exclusivity of the habeas remedy to challenge a prisoner's confinement and the judicial and statutory expansion of federal habeas preceding adoption of the Fourteenth Amendment, the Due Process clause should be read to include the right of a state prisoner to challenge the constitutionality of the fact of his confinement in a federal habeas corpus proceeding.

Accordingly, dismissal of Rosa's claim for failure to file his petition within eleven months would violate the Suspension Clause.

III. Senkowski Has Not Demonstrated Prejudice Sufficient to Warrant Dismissal

Pursuant to Habeas Rule 9(a)

Habeas Rule 9(a) provides, in relevant part: "A petition may be dismissed if it appears that the state ... has been prejudiced in its ability to respond to the petition by delay in its filing...." Rule 9(a) is not a statute of limitations, but is based on the equitable doctrine of laches. See *Norris v. Lefevre*, No. 82 Civ. 0614, 1982 WL 3107, *3 (S.D.N.Y. Aug. 27, 1982); Rule 9(a) Advisory Committee Notes (1976) ("Committee Notes"). The Rule is permissive rather than mandatory, allowing a district judge to exercise discretion to entertain an application, even where the state has made the required showing of delay and prejudice. Committee Notes.

The Rule has been narrowly construed by the courts. See *Strahan*, 750 F.2d at 443; *Hughes*, 1997 WL 357947 at # 4. A habeas petition may not be dismissed on the grounds of delay alone. *Moseley v. Scully*, 908 F.Supp. at 1130 (E.D.N.Y.1995). Rather, the State bears the burden of making a particularized showing of prejudice and that such prejudice resulted from petitioner's delay. *Hodge v. Walker*, No. 95 Civ. 2873, 1996 WL 363181, *2 (S.D.N.Y. July 1, 1996), report & recommend, adopted, 1996 WL 591247 (S.D.N.Y. Oct. 11, 1996).

The State suggests that because Rosa's state trial and appellate counsel are now dead, it will be prejudiced in defending against the petition by Rosa's eleven-year delay in filing. However, the State has not made a particularized showing of how it would be prejudiced by the death of Rosa's attorney. To be sure, Rosa asserts an ineffective assistance of counsel claim and a claim of newly discovered evidence, and the testimony of the attorney may be relevant to such claims. See *Hodge*, 1996 WL 363181, *2-*3; Committee Notes ("The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of coerced confession, and illegally constituted jury.... It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown"). However, "[p]rejudice to the state may not merely be presumed ... from the absence ... of witnesses necessary to recount the details of a proceeding. Rather, the state must actually be disadvantaged by the absence of such resources in responding to the particular allegations or theories asserted by petitioner as grounds for habeas corpus." *Norris*, 1982 WL 3107, at *4. At this stage of the litigation, the nature of Rosa's ineffective assistance of counsel claim is unclear. It is possible that it can be litigated based solely on the trial and appellate records and the testimony of available witnesses. Moreover, some of Rosa's other claims, most of which were preserved on the trial and appellate records, can probably be litigated without prejudice to the State arising from the death of Rosa's trial attorney. If it should appear later in the proceedings that the State will be prejudiced in defending against any particular claims by Rosa's delay, the State may move again to dismiss those claims pursuant to Rule 9(a).

Conclusion

*12 For the foregoing reasons, Senkowski's motion is hereby denied. The State is hereby ordered to respond to Rosa's petition within forty (40) days of the entry of this order.

It is so ordered.

FN1. Rosa also contends that application of the limitations period and the Peterson "reasonable time" standard violates the Ex Post Facto Clause. U.S. Const., Art. 1, Sec. 9, cl. 3. The application of the time limitation does not violate the Ex Post Facto Clause. The Clause prohibits laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); see also *DiNapoli v. Northeast Regional parole Comm'n*, 764 F.2d 143, 145 (2d Cir.), cert. denied, 474 U.S. 817 (1985). The application of a statute of limitations does not penalize a formerly innocent act committed by Rosa or change the punishment for his crime, and is thus not an ex post facto law. *Collins*, 497 U.S. at 42. Although the Act's limitations period effectively forecloses to Rosa one avenue of review, it does not violate the Ex Post Facto Clause. See *Griffin v. Endicott*, 932 F.Supp. 231, 232 (E.D.Wis.1996).

FN2. As a remedy, the Breard court construed the limitations period to run from the effective date of Act, suggesting that the court may have been implicitly relying on retroactivity analysis, rather than a suspension analysis.

FN3. An unreasonably short statute of limitations "designed to defeat the remedy" for the wrong asserted may also violate the due process clause. See *Edwards v. Kearzey*, 96 U.S. (6 Otto) 595, 603 (1878). Ordinarily, the courts will defer to a legislative determination that the period is reasonable, "unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902). Here, where the remedy that is affected by the statute of limitations is itself of constitutional magnitude, it may be that even if a more generous limitations period would not violate the Suspension Clause, a one-year period would be unreasonably brief to protect the privilege of the writ and thus violate Due Process.

FN4. See also, 142 Cong.Rec. H3605-04, H3614 (April 18, 1996) (statement of Rep. Pelosi) ("The habeas corpus provisions in this bill are dangerous to ordinary citizens.... For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time bound,

they are timeless or they are worthless. The bill before us mandates strict habeas corpus filing deadlines that ordinary citizens, especially those lacking financial resources, may not be able to meet."); *id.* (statement of Rep. Jackson-Lee) (bill imposes "unreasonably" short time limits for filing habeas claims); *id.* at H3615 (statement of Rep. Kennedy) (same); *id.* at H3616 (statement of Rep. Nadler) (expressing view that habeas corpus provisions are unconstitutional and will be invalidated in courts).

FN5. The Court's citation to the concurring opinion in *Swain* results in some ambiguity, since there the Chief Justice stated, without reaching the issue, that he did "not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction." 330 U.S. at 385 (citing *Friendly*, *supra*, at 170 ("[T]he writ protected by the suspension clause is the writ as known to the Framers, not as Congress may have chosen to expand it...")). At a minimum, however, the assumption in *Felker* leaves open the possibility that the Suspension Clause preserves the federal writ for state prisoners.

FN6. The theoretical basis for the "incorporation doctrine," and thus the limits of its application, are still subject to dispute. On ordered liberty" are protected from state interference by the Due Process Clause of the Fourteenth Amendment. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), overruled on other grounds, *Benton v. Maryland*, 395 U.S. 784 (1969). However, given the central role of the Great Writ in safeguarding persona liberty, even this restrictive view of the incorporation doctrine would encompass the protection of habeas corpus.

1997 WL 436484 (S.D.N.Y.)