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Habeas Petition Is Granted Despite Lawyer's Missed Deadline

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A CONVICTED MURDERER whose attorney missed the deadline for filing a habeas petition by one day will get a second chance to challenge his conviction, partly because the attorney admitted the mistake.

Chauncey Dillon is serving 30 years to life for the fatal shooting of Eric Mangrum and the wounding of Mr. Mangrum's friend, rapper Freaky Zeeky, following a Manhattan traffic accident and attempted robbery in 2003.

Mr. Dillon claims the trial was unfair and he has evidence of his innocence, but Southern District Magistrate Judge Douglas Eaton recommended that his habeas petition be denied because attorney Richard M. Langone had filed it one day after the one-year statute of limitations deadline.

Judge George Daniels agreed in August 2008 and dismissed the

"Given the lawyer's deeply misleading statement to his client that he would not wait until the last day to file the petition, the specific facts of this case constitute an extraordinary circumstance sufficient to warrant equitable relief."

—Second Circuit panel

Mr. Dillon appealed to the U.S. Court of Appeals for the Second Circuit, where Mr. Langone delivered a mea culpa before Judges Ralph K. Winter, Jose A. Cabranes and Raymond J. Lohier Jr. at oral argument on April 6.

"I basically threw myself on the knife," Mr. Langone said yesterday. "I told the court I screwed up. I thought I had [the deadline] right and I got it wrong and my client should not have to pay for that."

In a per curiam opinion yesterday in *Dillon v. Conway*, 08-4030,

should have ruled that the limitations period was equitably tolled because Mr. Dillon had made a showing of "extraordinary circumstances" needed to overcome the bar.

Mr. Dillon was convicted following a 2004 trial before Manhattan Supreme Court Justice Bonnie Wittner. Evidence at trial showed that, following a minor traffic accident in April 2003 at 22nd Street and Sixth Avenue, Mr. Dillon and two friends tried to grab a medallion from the neck of Freaky Zeeky, a member of the Diplomat rap group whose real name is Ezekial Jiles, setting off a fight that culminated with the shootings.

Mr. Dillon appealed to the Appellate Division, First Department, claiming that inadmissible hearsay was allowed at trial, that a prosecutor impermis-

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➤ The Second Circuit decision

Habeas

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sibly vouched for the credibility of a witness and commented on Mr. Dillon's post-arrest silence to police and that Justice Wittner erred in her jury instructions.

The First Department affirmed the conviction and the New York Court of Appeals denied his appli-

cation for leave to appeal, making his state court conviction final on Nov. 29, 2006.

Mr. Langone was hired to pursue habeas relief nine months later—just three months before the expiration of the one-year deadline under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244(d)(1)(A).

At the time, Mr. Langone, now a solo practitioner in Levittown,

was a partner with David Eldridge at Eldridge & Langone. But shortly after being retained by Mr. Dillon, Mr. Eldridge left the firm, leaving Mr. Langone with about 20 active cases. Mr. Langone told the circuit in papers that, because of his caseload, he did not start to work on the habeas petition until mid-October 2007.

Mr. Langone flew to the Attica Correctional Facility with a 16-page petition for Mr. Dillon to sign on Nov. 13. At Attica, he said in the papers, Mr. Dillon "specifically asked me not to wait until the last day to file the petition" and he reassured his client that he would file it with the district court before Nov. 30.

But the deadline was Nov. 29—exactly one year after Mr. Dillon's conviction became final.

Mr. Langone said he made that assumption that Nov. 30 was the proper date because he had worked as a paralegal for one of the parties in *Geraci v. Senkowski*, 23 F.Supp.2d 246 (E.D.N.Y. 1998), where the court held, in different circumstances, that the limitations period began running the day after a petitioner was denied leave to appeal.

In its opinion, the circuit noted that Mr. Langone worked through

October and through most of November 1997 tracking down a copy of videotape showing part of the incident that was recovered from a security camera at a nearby warehouse. Mr. Dillon claims the tape could help exonerate him.

At first, Mr. Langone was sent the wrong tape by the Legal Aid Society, so he had to spend extra time getting the right tape and then still more time having it enhanced for clarity.

All the while, he told the circuit, Mr. Dillon's wife called him repeatedly to make sure he did not miss the deadline.

The circuit said that, "while the question is a close one—equitable tolling was in fact appropriate in the circumstances presented."

First and foremost, the court said, "There is no question that Dillon 'has been pursuing his rights diligently' as required" by *Holland v. Florida*, 130 S.Ct. 2549 (2010). And Mr. Dillon, the circuit said, had relied on his attorney.

"Although miscalculating a deadline is the sort of garden variety attorney error that cannot on its own rise to the level of extraordinary circumstances...Dillon's case involves more than a simple miscalculation," the court said.

"Langone in effect admitted affirmatively and knowingly misleading Dillon by promising him he would file the petition before November 30, 2007."

"Langone breached that promise when he failed to follow his client's instruction, with disastrous consequences that Dillon could neither have foreseen nor prevented."

Despite the error, the court said the attorney's efforts and Mr. Dillon's insistence on meeting the deadline justified tolling the limitations period by one day.

Mr. Langone said yesterday in an interview that, under the principles of agency, "If the client tells you to do something and you don't do it, the client should not be bound by it."

He added, "This is the first decision where, in the context of equitable tolling, the court has granted relief to the diligent rather than the tardy. I'm very happy for my client."

Michele Hauser represented Mr. Dillon.

Assistant District Attorney Sara M. Zausmer and Karen Schlossberg, of counsel, handled the appeal.

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