No. 18-6147

In the Supreme Court of the United States

MACKING NETTLES, PETITIONER

v.

CONNIE HORTON, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Nettles, who filed his habeas petition more than 15 years after the AEDPA's statute of limitations expired, is entitled to equitable tolling of the limitations period where there is no per se exception to the statute when a petitioner is presenting substantive claims of mental incompetence or incapacity, and Nettles has not otherwise demonstrated an entitlement to tolling because he has failed to show he suffered from mental incompetence or incapacity during the applicable time periods, that any purported incompetence or incapacity caused his late filing, or that he acted diligently to assert his rights.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The petitioner is Macking Nettles, a Michigan prisoner. The respondent is Connie Horton, warden of a Michigan correctional facility.

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The unpublished order of the U.S. Court of Appeals for the Sixth Circuit denying Nettles a certificate of appealability, Pet. App. A, is not reported, but is available at 2018 WL 6011669. The district court's opinion and order granting his motion to dismiss the petition for writ of habeas corpus and denying Nettles a certificate of appealability, Pet. App. B, is also not reported, but is available at 2018 WL 1035721.

JURISDICTION

The State of Michigan accepts Nettles' statement of jurisdiction and agrees that this Court has jurisdiction over the petition.

STATUTORY PROVISION INVOLVED

The relevant statutory provision in this case is 28 U.S.C. § 2244(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 from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the 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.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

INTRODUCTION

Petitioner Macking Nettles filed his petition nearly 16 years after AEDPA's statute of limitations had expired. He seeks relief in this Court claiming that, when a habeas petitioner is raising a substantive claim of mental incompetence or incapacity, AEDPA's statute of limitations does not apply. But the issue he raises is a garden-variety claim in habeas corpus review, i.e., whether he was entitled to equitable tolling for his mental incapacity. The petition does not present significant questions for this Court to examine. And it raises claims with no arguable merit. This Court should deny the petition for review.

Nettles purports to identify a federal circuit split relevant to his petition, but the circuit split he cites is on the question whether a substantive mental incompetency claim can be *procedurally defaulted*—not whether mental incapacity categorically tolls the AEDPA's statute of limitations. The disagreement among the circuits is distinct from the decision here to reject Nettles' very late filing where he asserted a substantive claim of mental incompetence or incapacity. On this question, no circuit split exists. It is well-established that a court may grant equitable tolling for mental incapacity where that incapacity was the cause for the delay in filing.

For two other reasons, this petition does not present a significant issue for this Court's review. First, even if a court granted Nettles equitable tolling from the date of his sentencing until the date he requested appellate counsel in 2005, which is the period of time he appears to contend he suffered from mental incompetence or incapacity, his habeas filing in 2017 would still be six years too late. The statute of limitations expired one year from the conclusion of appellate proceedings on this first

state collateral motion or, in other words, in 2011. Second, even if a court were to find that Nettles was claiming such incompetence or incapacity for the entire 16 year period of time, his claim for equitable tolling would still fail as Nettles has presented no significant evidence establishing that he ever suffered from mental incompetence or incapacity, that such incompetence or incapacity caused his late filing, or that he was diligent in asserting his rights. There is no basis on which to equitably toll AEDPA's statute of limitations. The issues raised in this petition are ordinary ones that do not merit this Court's review. This Court should deny Nettles' petition.

STATEMENT OF THE CASE

Petitioner Macking Nettles, a prisoner in the Michigan Department of Corrections, was originally charged with first-degree murder, by the Wayne County Prosecutor. The prosecutor alleged that Nettles had strangled Lashonda Miller to death.

In the fall of 1998, Nettles pleaded guilty to an added count of second-degree murder in return for an agreement that he would be sentenced to a term of incarceration of 30 to 60 years. The prosecutor then dismissed the first-degree murder charge. 9/11/98 Guilty Plea Tr. at 2–6. A few weeks later, the trial judge sentenced Nettles to 30 to 60 years in prison based on the sentencing agreement. 9/24/98 Sent. Tr. at 5.

Nettles did not file a direct appeal of his conviction and sentence even though, at sentencing, the state trial judge informed him that he could file a discretionary appeal with the Michigan Court of Appeals and that an attorney would be appointed to represent him if he could not afford one and made his request within 42 days. 9/24/98 Sent. Tr. at 5.

Rather, Nettles waited until October of 2005 to request appellate counsel, a request the state trial court granted. Appointed counsel filed a post-conviction collateral motion (in Michigan called a "motion for relief from judgment") in the trial court in June of 2008, nearly 10 years after his conviction and sentence. Through counsel, Nettles claimed he had been denied his right to the effective assistance of trial counsel in various ways. The trial court denied the motion for relief from judgment. 9/25/08 Trial Ct. Opinion & Order. Nettles appealed to both the Michigan Court of Appeals and the Michigan Supreme Court from the denial of this motion. Both state courts denied Nettles relief in summary orders. *People* v. *Nettles*, No. 293867, Order (Mich. Ct. App. Nov. 23, 2009), *People* v. *Nettles*, 784 N.W.2d 218 (Mich. 2010) (unpublished table decision).

Nettles, now acting pro se, filed a second motion for relief from judgment in late 2011. That motion included additional claims of ineffective assistance of trial counsel and a claim the attorney appointed to represent him during proceedings on his first collateral motion was ineffective. The state trial court shortly thereafter denied the motion, indicating that Nettles had not met the standard for filing a successive motion for relief from judgment, but that his claims failed on the merits in any event. 11/2/11 Trial Ct. Opinion & Order. The Michigan Court of Appeals rejected Nettles' appeal from this decision, noting that the denial of a successive motion for relief from judgment could not be appealed. *People* v. *Nettles*, No. 310787, Order (Mich. Ct. App. Aug. 27, 2012). An appeal to the Michigan Supreme Court likewise

failed for the same reason. *People* v. *Nettles*, 829 N.W.2d 593 (Mich. 2013) (unpublished table decision).

After the trial court denied Nettles' motion to reissue the judgment of sentence and multiple motions for reconsideration, Nettles filed a third motion for relief from judgment in the state trial court in early 2014. The trial court again denied the motion as an improper successive motion for relief from judgment. 4/16/14 Trial Ct. Opinion & Order. This time, Nettles did not appeal that decision.

Some three years later, Nettles filed a pro se petition for a writ of habeas corpus, signed on July 17, 2017, in the United States District Court for the Eastern District of Michigan. The State filed a motion to dismiss the petition under Habeas Rule 4 as untimely under 28 U.S.C. § 2244(d). Nettles filed a reply brief and a self-signed affidavit. The district court issued an opinion and order granting the State's motion and denying Nettles a COA. The district court found that the petition was untimely and neither statutory nor equitable tolling applied. *Nettles* v. *Horton*, 17-12364, 2018 WL 1035721, at *2–5 (E.D. Mich. 2018) (Cleland, J.).

Nettles subsequently filed a notice of appeal from this decision and asked the United States Court of Appeals for the Sixth Circuit to issue him a certificate of appealability. The court of appeals denied Nettles' request a certificate of appealability in an unpublished order. *Nettles* v. *Horton*, No. 18-1310, 2018 WL 6011669 (6th Cir. 2018).

Nettles then filed a petition for a writ of certiorari in this Court. This Court has asked the State to respond.

REASONS FOR DENYING THE PETITION

I. This Court should deny Nettles' petition for a writ of certiorari.

The petition here does not present an issue worthy of this Court's review for three distinct reasons: (1) there is no split of federal circuit authority applicable to this AEDPA statute of limitations case, (2) even if this Court were to grant equitable tolling to Nettles for the period of time he claims he suffered from mental incompetence or incapacity, his federal filing would still be untimely and barred by the statute of limitations, and (3) on the substance of his claim, he has not shown any incompetence or incapacity to support the claim of tolling.

There are two ways to avoid the bar under the AEDPA's statute of limitations.

The first is "statutory tolling" found in 28 U.S.C. § 2244(d). Nettles does not attempt to use statutory tolling to excuse his late filing. As such, statutory tolling is not at issue.

The second is "equitable tolling" and Nettles claims he is entitled to "equitable tolling" because of mental incompetence or incapacity. Nettles frames his petition as one falling in a circuit split on whether a State can assert a procedural default defense when a habeas petitioner is asserting a substantive claim of mental incompetence or incapacity. But that is not the issue here. Rather, the question is whether Nettles has met his burden of showing that his purported mental incompetence or incapacity suffices to allow him to equitably toll AEDPA's statute of limitations. This is a burden that Nettles has consistently failed to meet throughout federal review of his state plea-based conviction.

Stripped of a circuit split that has no relevance to his case, Nettles' petition presents nothing more than an ordinary application of already well-established habeas principles concerning AEDPA's statute of limitations and, specifically, application of this Court's precedents concerning equitable tolling of the statute. As a threshold matter, even if granted equitable tolling for the period of time he claims that he suffered from mental incompetency or incapacity (1998 to 2005), Nettles would still not be entitled to relief as his habeas petition was still filed approximately six years too late. Second, even if Nettles was claiming equitable tolling for the entire period of time between his sentencing in 1998 and the filing of habeas petition in 2017, he has not met his burden under this Court's precedent and that of the Sixth Circuit of demonstrating the entitlement to equitable tolling. This Court should deny his petition.

A. Nettles filed his habeas petition more than 15 years after AEDPA's statute of limitations expired, and there is no circuit split on the question before this Court.

There is no dispute that Nettles filed his petition over 15 years too late under AEDPA's statute of limitations unless statutory or equitable tolling apply. As applied to Nettles' case, 28 U.S.C. § 2244(d)(1)(A) mandates that, to be timely, a habeas petition must be filed within one-year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Here, Nettles did not seek direct review of his conviction and sentence and the period for doing so expired on September 24, 1999, one-year after entry of the state court judgment sentencing him to prison.

AEDPA's statute of limitations began running the following day, and Nettles had one year from that day—or until September 24, 2000—to either file a habeas petition or, under § 2244(d)(1)(D), properly file a collateral attack on his conviction which would toll the statute of limitations. Nettles failed to do either by September 24, 2000. After a flurry of post-conviction collateral motions, motions for reconsideration, and appeals, beginning with Nettles' request for appellate counsel in October of 2005, Nettles finally filed a habeas petition on July 17, 2017,[1] approximately 16 years after AEDPA's statute of limitations had expired.

Nettles does not attempt to argue that statutory tolling applies here, but instead relies on a claim of equitable tolling.

Nettles attempts to meet this Court's standards for certiorari review by citing a circuit split on whether a substantive mental incompetence or incapacity claim can be procedurally defaulted. Specifically, Nettles identifies what he describes as a "major" split concerning the issue whether a *substantive* claim of mental incompetence can be *procedurally defaulted*, and asserts that this split governs this case. Not so. This split has no relevance to the instant case. And there does not otherwise appear to be a split on the actual issue presented, i.e., whether AEDPA's statute of limitations applies at all to claims on habeas review concerning the prisoner's competency during state court proceedings.

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[1] Nettles signed and dated his habeas petition on July 17, 2017. Under the prison mailbox rule, this is the date the petition is deemed filed. *Towns* v. *United States*, 190 F.3d 468, 469 (6th Cir. 1999) (citing *Houston* v. *Lack*, 487 U.S. 266, 270–72 (1988)).

There is a split among the federal circuits on whether a substantive mental incompetency claim can be procedurally defaulted. Some federal circuits have held that substantive mental incompetency claims *can* be procedurally defaulted. See *Hodges* v. *Colson*, 727 F.3d 517, 530–40 (6th Cir. 2013) (holding that "substantive competency claims are subject to the same rules of procedural default as all other claims that may be presented on habeas"); *Laflamme* v. *Hubbard*, 225 F.3d 663, at *2 (9th Cir. 2000) (rejecting a claim by a prisoner that, on habeas review, the procedural default rule cannot preclude federal review of a claim that the prisoner was mentally competent at the time of his conviction); *Noble* v. *Barnett*, 24 F.3d 582, 588 (4th Cir. 1994) (rejecting the prisoner's argument that a substantive claim of incompetency can never be forfeited); *Sawyer* v. *Whitley*, 945 F.2d 812, 823–824 (5th Cir. 1991) (requiring a prisoner asserting a substantive claim of competency to show cause and actual prejudice for his default of the claim).

Other federal circuits have held the opposite—that a state prisoner's substantive claim of mental incompetence or incapacity on federal habeas review *cannot* be procedurally defaulted. See *Lawrence* v. *Secretary*, *Florida Dep't of Corrections*, 700 F.3d 464, 481 (11th Cir. 2012) ("substantive competency claims generally cannot be procedurally defaulted"); *Walker* v. *Gibson*, 228 F.3d 1217, 1229 (10th Cir. 2000), abrogated on other grounds, *Neill* v. *Gibson*, 278 F.3d 1044 (10th Cir. 2001) (holding that a substantive mental competency claim cannot be procedurally defaulted); *Vogt* v. *United States*, 88 F.3d 587, 590 (8th Cir. 1996) (same). Notably, none of these cases involved a petitioner who had run afoul of AEDPA's statute of limitations.

But such a split among the federal circuits does not address the issue of consequence to this case here, which is whether mental incompetency or incapacity can serve to equitably toll the statute of limitations under AEDPA. Consequently, his petition is nothing more than a fact-bound question whether equitable tolling applies so as to excuse Nettles' very late habeas filing.

Here, both the district court and the court of appeals addressed whether Nettles' habeas petition was timely under AEDPA, *not* whether a *substantive* mental competency or incapacity claim can be procedurally defaulted. In other words, the question here is not the same as presented to the Sixth, Ninth, Tenth, and Eleventh Circuits, where the issue was whether a substantive claim of mental incompetence or incapacity can be procedurally defaulted. Since Nettles cannot demonstrate that equitable tolling excuses his late filing, the issue whether the State may raise a procedural default in response to the underlying substantive mental incompetency claim is not joined.

The only case that Nettles cites applying a categorical bar to AEDPA's statute of limitations comes from a district court and that decision only underscores the point that the split Nettles identified is different than the issue here. See *Settle* v. *Florida Dep't of Corrections*, No. 3:12-cv-584-J-32PDB, 2015 WL 5559746 (M.D. Fla. 2015) (Corrigan, J.). The district court in *Settle* followed Eleventh Circuit precedent (specifically *Lawrence*) in finding that substantive competency claims cannot generally be procedurally defaulted.

The court in *Settle*, however, took it a step further and, "in an abundance of caution" *assumed* that the exception also applies to petitions that are untimely under AEDPA's statute of limitations even though the court conceded that it was "unaware of a case applying the Eleventh Circuit's unique exception for substantive incompetency claims to a circumstance where the habeas petition is untimely under the AEDPA statute of limitations." *Settle*, 2015 WL 5559746, at *3, n. 10. In other words, the district court specifically noted that the Eleventh Circuit had *not* applied that rule to the avoid AEDPA's statute of limitations.[2]

In fact, what circuit case law does exist on this point reveals that the circuits that have addressed the actual question presented by this case hold that mental incompetency or incapacity does not *per se* or automatically excuse a violation of AEDPA's statute of limitations. See, *e.g.*, *Bolarinwa* v. *Williams*, 593 F.3d 226, 232 (2d Cir. 2010); *McSwain* v. *Davis*, 287 F. App'x 450, 456 (6th Cir. 2008) (citing *Nara* v. *Frank*, 264 F.3d 310, 320 (3d Cir. 2001), overruled in part on other grounds by *Carey* v. *Saffold*, 536 U.S. 214 (2002)); *Ramey* v. *Lewis*, 189 F. App'x 607, 609 (9th Cir. 2006) (unpublished); *Lake* v. *Arnold*, 232 F.3d 360, 371 (3d Cir. 2000); *Smith* v. *Johnson*, 247 F.3d 240, 2001 WL 43520, at *3 (5th Cir. 2001) (table decision).

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[2] Two additional cases that Nettles referenced in filings in the lower courts, *Simon* v. *Giles*, No. 2:11-cv-1125-WHA, 2015 WL 1292525 (M.D. Ala. 2015) (Moorer, M.J.), and *Medina* v. *Singletary*, 59 F.3d 1095 (11th Cir. 1995), also do not support Nettles' argument. In *Simon*, the district court conducted a standard equitable tolling analysis but did not address whether the statute of limitations applied when a petitioner raises a substantive mental incompetence or incapacity claim. Likewise, *Medina* does not support Nettles' claim. This is because the Eleventh Circuit in that case did not address the issue of AEDPA's statute of limitations at all because the case came to the Eleventh Circuit in a pre-AEDPA posture.

While not automatic, the federal circuits have routinely examined whether a habeas petitioner may merit equitable tolling based on mental incompetence, demonstrating that it was an "exceptional circumstance" that actually caused the untimeliness of the filing. See, *e.g.*, *Roberts* v. *Marshall*, 627 F.3d 768, 772 (9th Cir. 2010) (citing *Laws* v. *Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003)). See also *Ata* v. *Scutt*, 662 F.3d 736, 741 (6th Cir. 2011) (collecting cases from the First, Second, Third, Fourth, Fifth, and Eleventh Circuits). In applying that standard here, the district court denied Nettles relief because "he has presented no evidence of his mental status during the limitations period" and because "[Nettles] has not shown that his mental illnesses were the cause of his untimely filing." *Nettles* v. *Horton*, 2018 WL 1035721, *4 (E.D. Mich., 2018).

In the absence of a circuit split, this case is a run-of-the-mill application of well-established principles of habeas law. Thus, this Court's review is not warranted.

B. Even if Nettles were granted equitable tolling for the period of time up until he requested counsel from the state trial court, his habeas filing would still be six years too late.

Nettles does not appear to claim that he suffered from mental incompetence or incapacity *after* he requested counsel from the state trial court in October of 2005 (a request that was granted). Rather, he implies at various points in his lower court pleadings that he no longer suffered from mental incompetence or incapacity after that date. Based on this point, even if Nettles were granted equitable tolling from the date of his sentencing in 1998 until he requested counsel in October of 2005, his habeas filing would still be six years late.

This is because proceedings on Nettles' first collateral motion concluded at the end of July 2010. That filing is the only one that matters for purposes of AEDPA's statute of limitations as all the others were rejected as improperly filed. See 28 U.S.C. § 2244(d)(2). Nettles would thus have had only one year—or until the end of July 2011—to file his habeas petition. The inquiry could stop here. Any issue about the validity of his claim of equitable tolling for the time period of 1998 to 2005 therefore has no practical bearing on the ultimate outcome of this case.

C. And Nettles cannot demonstrate that he is entitled to equitable tolling of AEDPA's statute of limitations based on mental incompetence or incapacity in any event.

This Court has held that AEDPA's statute of limitations is subject to equitable tolling. *Holland* v. *Florida*, 560 U.S. 631, 649 (2010). Equitable tolling is available to petitioners in habeas challenges to state court convictions only when a litigant can show " '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way . . . .' " *Id.* (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). This Court has suggested that mental incompetence or incapacity can, *if sufficiently demonstrated*, serve to equitably toll AEDPA's statute of limitations. See *Lawrence* v. *Florida*, 549 U.S. 327, 337 (2007); *Ryan* v. *Gonzalez*, 568 U.S. 57, 67 (2013).

In order to establish entitlement to equitable tolling, a petitioner bears the burden of demonstrating both *Holland* factors. *Holland*, 560 U.S. at 649, citing *Pace*, 544 U.S. at 418. Beginning with the first factor—diligence—this Court has said that, while "maximum feasible diligence" is not required, the petitioner must at least

demonstrate "reasonable diligence." *Id*. at 653. As for the second *Holland* factor—that "some extraordinary circumstance stood in [the petitioner's] way and prevented timely filing," this Court has left that determination to be made by the lower federal courts "on a case-by-case basis." *Id*. at 650, quoting *Pace*, 544 U.S. at 418, and *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964) (internal quotation marks omitted).

Nettles failed to demonstrate that he suffered from mental incompetence or incapacity at *any* time during the applicable time periods. Nettles has claimed over the course of his federal filings that he was suffering from mental illness, and specifically depression, suicide attempts, post-traumatic stress disorder, and "warped thinking." But, as noted earlier, the district court found that he "presented no evidence of his mental status during the limitations period." *Nettles* v. *Horton*, 2018 WL 1035721, at *4. He also failed to do so when filing his application for a certificate of appealability in the court of appeals, see *Nettles* v. *Horton*, 2018 WL 6011669, at *2, and again in his filing with this Court.

For example, the only documentation—other than self-prepared documents and assertions included in Nettles' appendix in this Court—are two documents indicating a suicide attempt in 1994, a portion of his presentence investigation report drafted in 1998 during which Nettles claims to the author of the report that he was suffering from various mental illnesses, and random pages of transcripts from hearings held in the state trial court. (Pet. App. C, D, E, F, G1, G2, JI, J2). None of this suffices to satisfy Nettles' heavy burden of proof. And certainly, none of it establishes a lack of mental competency or capacity *following* Nettles' conviction and sentence.

As the Sixth Circuit has held, "a blanket assertion of mental incompetence is insufficient to toll AEDPA's statute of limitations" *Ata*, 662 F.3d at 742. This case presents a standard example of such a "blanket assertion of mental incompetence." Nettles has thus necessarily failed to demonstrate how any purported mental incompetence *caused* his late filing. See *id*. at 741–42.

Finally, as to the requirement that Nettles demonstrate that he has been pursuing his rights diligently, even assuming that he was unable to diligently pursue his rights in the federal courts prior to 2005, Nettles certainly could have been more diligent post-2005. Instead, he chose to file multiple collateral post-conviction motions at all levels of the state courts—many of which were deemed improperly filed—ultimately choosing not to file a habeas petition in federal court until 2017. The inference from this post-2005 activity is that Nettles could have filed a habeas petition, particularly following the denial of his first collateral post-conviction by all levels of the state courts, in 2010, but *chose* not to do so. This is especially so when Nettles kept filing collateral post-conviction motions after the first was denied, despite the fact that the state courts repeatedly rejected those subsequent submissions as not properly filed. This demonstrates a true lack of diligence. And if Nettles were to claim that this choice was the result of his being untrained in the law, such a claim would fail because these mistakes are his own as he is not entitled to the appointment of counsel in habeas. See *e.g. Shoemate* v. *Norris*, 390 F.3d 595, 598 (8th Cir. 2004); *Marsh* v. *Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

In the end, what this case actually presents is nothing more than a simple application of both precedent from this Court and the Sixth Circuit on equitable tolling based on a claim of mental incompetence or incapacity. Viewed as such, Nettles has failed to meet his burden of demonstrating the entitlement to equitable tolling or that either the court of appeals or the district court erred in making this finding. This Court should deny the petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: January 16, 2019