

No. _____

In The
Supreme Court of the United States

JAMES CHRISTOPHER NORTH,
Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS
DIVISION,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Absent relief from this Court, James North will forfeit federal appellate review of his conviction and life sentence because his lawyers forgot to put a word-count certificate in a state-court brief.

North filed his state habeas application with more than a month remaining in his federal limitations period. The state court dismissed North's application because his lawyers forgot to include a word-count certificate in a supporting brief. But it waited to do so until six weeks after North filed his application. By the time North learned of the defect, his federal limitations period had expired—without him having any idea he needed to do anything more to protect his federal rights.

The Fifth Circuit refused to apply equitable tolling because the state courts said nothing “incorrect” to North and he lacked diligence by waiting eleven months to file the state-court application. But other circuit courts have applied equitable tolling under similar circumstances. And the Fifth Circuit's holding on diligence conflicts with holdings by two other circuit courts—creating a wide-open circuit split. The questions presented are:

1. Does a state court's act lulling a petitioner into believing he has tolled limitations—and resulting in running out his federal limitations period—warrant equitable tolling?
2. Does filing a state-court habeas application in the eleventh month of the AEDPA's limitations period evidence a lack of diligence?

PARTIES TO THE PROCEEDING

The parties are as named on the front cover.

RELATED PROCEEDINGS

Texas Court of Appeals at Eastland, No. 11-11-00338-CR, *James Christopher North v. State of Texas* (judgment entered Jan. 24, 2014).

Texas Court of Criminal Appeals, No. PD-0758-14, *James Christopher North v. State of Texas* (discretionary review denied Sept. 17, 2014).

350th Judicial District Court of Taylor County, Texas, No. 9790-D, *Ex Parte James Christopher North* (denial of writ recommended Nov. 21, 2015).

Texas Court of Criminal Appeals, No. WR-84,239-01, *Ex Parte James Christopher North* (writ application dismissed Jan. 6, 2016).

350th Judicial District Court of Taylor County, Texas, No. 9790-D(2), *Ex Parte James Christopher North* (denial of writ recommended June 30, 2016).

Texas Court of Criminal Appeals, No. WR-84,239-02, *Ex Parte James Christopher North* (writ denied Sept. 21, 2016).

United States District Court for the Northern District of Texas, Abilene Division, No. 1:16-CV-189-C, *James Christopher North v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division* (judgment entered Mar. 2, 2018).

United States Court of Appeals for the Fifth Circuit, No. 18-10306, *James Christopher North v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division* (judgment entered Jan. 22, 2020).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Related Proceedings	ii
Table of Contents	iii
Table of Authorities	v
Opinions and Orders Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Introduction	2
Statement	3
Reasons for Granting the Writ	6
1. This Court should grant the writ to clarify that equitable tolling is warranted where a state court causes a petitioner to miss limitations under the AEDPA	6
2. This Court should grant review to resolve the circuit split over whether a petitioner who files a state-court petition late in the AEDPA clock lacks diligence	11
Conclusion	12
 Appendix	
Opinion of the United States Court of Appeals for the Fifth Circuit (Jan. 22, 2020)	1a

Judgment of the United States Court of Appeals for the Fifth Circuit (Jan. 22, 2020).....	11a
Judgment of the United States District Court for the Northern District of Texas (Mar. 2, 2018)	13a
Order of the United States District Court for the Northern District of Texas (Mar. 2, 2018)	14a

TABLE OF AUTHORITIES

	Page
Cases	
<i>Baldwin Cnty. Welcome Ctr. v. Brown</i> , 466 U.S. 147 (1984).....	9
<i>Brinson v. Vaughn</i> , 398 F.3d 225 (3d Cir. 2005)	8
<i>Diaz v. Kelly</i> , 515 F.3d 149 (2d Cir. 2008)	8
<i>Grant v. Swarthout</i> , 862 F.3d 914 (9th Cir. 2017).....	11
<i>Hazel-Atlas Glass Co. v. Hartford-Empire Co.</i> , 322 U.S. 238 (1944).....	10
<i>Hohn v. United States</i> , 524 U.S. 236 (1988).....	1
<i>Holland v. Florida</i> , 560 U.S. 631 (2010).....	2, 6, 7, 10
<i>Knight v. Schofield</i> , 292 F.3d 709 (11th Cir. 2002).....	8
<i>Pliler v. Ford</i> , 542 U.S. 225 (2004).....	9

<i>Riddle v. Kenma</i> , 523 F.3d 850 (8th Cir. 2008) (en banc), <i>abrogated on other grounds by</i> <i>Gonzalez v. Thaler</i> , 565 U.S. 134 (2012)	9
<i>Valverde v. Stinson</i> , 224 F.3d 129 (2d Cir. 2000)	11
<i>Woodward v. Williams</i> , 263 F.3d 1135 (10th Cir. 2001).....	8
Statutes	
28 U.S.C. § 1254.....	1
28 U.S.C. § 2244.....	1
Tex. R. App. P. 73.1	4
Tex. R. App. P. 73.2.....	4

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Christopher North respectfully submits this petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's panel opinion affirming the district court's judgment (App. 1a–10a) is unreported but available at 2020 WL 370034. The opinion of the district court (App. 14a–37a) is unreported but available at 2018 WL 10246967.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its opinion and entered judgment on January 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). See *Hohn v. United States*, 524 U.S. 236, 241 (1988).

STATUTORY PROVISIONS INVOLVED

Title 28, section 2244(d) of the United States Code provides that:

(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 becomes final by conclusion of direct review or the expiration of the time for seeking such review

INTRODUCTION

This petition involves a prisoner's right to equitable tolling for the period during which a state court's delay in dismissing his habeas application for a defect in form resulted in a failure to meet the AEDPA's limitations period. If equitable tolling applies, his federal petition is timely. If not, he likely will spend the rest of his life in prison.

James North filed his state-court petition well in advance of his federal limitations deadline. He then awaited a decision—secure in the knowledge that his filing had tolled the federal deadline. Everything seemed to be proceeding as usual: the state trial court accepted his application and denied it on the merits, and the Texas Court of Criminal Appeals accepted it for filing.

But six weeks later, the court of criminal appeals dismissed North's application because an accompanying memorandum lacked a word-count certificate. And by then, North's federal limitations period had expired. The Texas court had run out North's federal clock without him having any inkling it was happening or that he needed to do anything more to preserve his federal rights. The doctrine of equitable tolling exists to prevent just this sort of unfair deprivation of federal habeas rights.

This Court has recognized that failure to meet the AEDPA's filing deadline may be excused in extraordinary circumstances by equitable tolling. And it has instructed courts to use a flexible, case-by-case approach in deciding whether to apply such tolling. *Holland v. Florida*, 560 U.S. 631, 649–51 (2010). This

is just such an extraordinary circumstance. But the Fifth Circuit refused to apply equitable tolling.

First, the court said that neither state court told North anything that was “incorrect.” But nothing in the case law of this Court suggests this is a requirement for equitable tolling. And, as this case demonstrates, such a rigid rule violates this Court’s directive in *Holland* to maintain the flexibility necessary to address individual cases of injustice. That explains why other circuit courts have applied equitable tolling in similar situations.

Second, the court said that North’s eleventh-month filing evidenced a lack of diligence. But the Second and Ninth Circuits have rejected this argument, holding that it violates Congress’s clear statutory directive to petitioners that they have the full AEDPA period in which to file their petitions. The decision in this case thus births a wide-open circuit split on an important issue of federal law.

This Court should grant the writ to clarify that a state court’s acts warrant equitable tolling when they prevent the timely filing of a federal petition in a sufficiently extraordinary way, and to resolve the circuit split over the diligence necessary to support equitable tolling.

STATEMENT

A Texas jury found James North guilty of murder and sentenced him to 70 years in prison for shooting a man during a road-rage incident during which they both drew guns. R. 3620. North’s conviction was affirmed on appeal and became final on December 16, 2014. R. 635.

North sought habeas relief in state court alleging ineffective assistance of counsel based on two mistakes by his trial lawyers. First, the lawyers failed to object to an alternate juror's participation in deliberations—a defect numerous courts have held warrants a new trial. Second, they waited until the punishment phase to introduce evidence of a traumatic brain injury North suffered as a teenager that left him in a two-week coma and permanently affected his behavioral and emotional control R. 106, 3216.

But unbeknownst to North, his new habeas lawyers made a critical mistake of their own.

The Texas Rules of Appellate Procedure require habeas applications to be tendered on a state-prescribed form, with the option to file a supporting memorandum. The rules require that a memorandum be prepared in 14-point font and contain a word-count certificate. Tex. R. App. P. 73.1(e), (f). The rules permit—but do not require—dismissal of a non-compliant application. Tex. R. App. P. 73.2. North's habeas lawyers failed to include the required word-count certificate in his memorandum. R. 179.

North filed his state-court application on November 6, 2015. Either not noticing the absence of the certificate or deciding to overlook it, the trial court considered North's application on the merits. On November 21, the trial court recommended that North's application be denied. R. 164–65. North filed objections to that recommendation. R. 167.

Three days later, on November 24, North's application was filed in the Texas Court of Criminal Appeals. On January 6, 2016—*six weeks* after

accepting North's application—the court of criminal appeals dismissed it due to the lack of a word-count certificate. R. 179.

North had filed his state-court application with more than a month left in his federal limitations period. But by the time the court of criminal appeals dismissed the application, North's federal limitations period had expired. The state court had run out North's federal clock—over a word-count certificate.

Realizing they needed the benefit of statutory tolling from their original filing date to resuscitate North's federal limitations period, his habeas lawyers attempted to fix their mistake by filing a motion for reconsideration with the court of criminal appeals, this time tendering the omitted certificate. R. 181. But the court denied that motion. R. 188.

Meanwhile, North's lawyers filed a new state-court application on his behalf. R. 190. The trial court again recommended denying relief. R. 267. On September 21, 2016, the court of criminal appeals denied North's application on the merits. R. 293.

On October 26, 2016, North filed his federal habeas petition in the United States District Court for the Northern District of Texas. R. 367. That court denied North's petition and denied him a certificate of appealability. App. 37a.

On appeal, the Fifth Circuit granted North a certificate of appealability on the issue concerning the alternate juror. App. 2a. When the State raised the issue of limitations, North sought both statutory and equitable tolling. Following briefing and oral argument, the Fifth Circuit rejected North's petition as time-barred.

The court held that North was not entitled to statutory tolling during the pendency of his first state-court application because the absence of the word-count certificate meant it was not “properly filed” under the AEDPA.

The court also rejected North’s argument that he was entitled to equitable tolling due to the actions of the state courts in accepting his initial application, initially addressing it on the merits, and taking six weeks to reject it based on a deficiency in form. The court held equitable tolling was unwarranted because North did not cite any “incorrect statement” by the state courts. App. 8a–9a. The court further held that North’s filing of his state-court application eleven months into the limitations period weighed against a finding of diligence. App. 7a–8a.

REASONS FOR GRANTING THE WRIT

This case presents two interrelated issues important to federal habeas practice, neither of them particularly complicated and one of them implicating a division among the circuit courts. This Court should grant the writ to resolve both issues.

- 1. This Court should grant the writ to clarify that equitable tolling is warranted where a state court causes a petitioner to miss limitations under the AEDPA.**

The AEDPA statute of limitations “does not set forth an inflexible rule requiring dismissal whenever its clock has run.” *Holland*, 560 U.S. at 645 (citation and internal quotation marks omitted). Instead, equitable tolling may be applied where a petitioner shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary

circumstance stood in his way and prevented timely filing.” *Id.* at 649 (citation and internal quotation marks omitted).

In considering equitable tolling, courts should favor flexibility over mechanical rules and make decisions on a “case-by-case basis.” *See Holland*, 560 U.S. at 649–50 (citation omitted). This flexibility enables courts “to meet new situations [that] demand equitable intervention” with the understanding that they must “exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.” *Id.* at 650 (internal quotation marks omitted; alteration in original).

North’s memorandum lacked a word-count certificate. Appellate clerks normally identify such defects in form by referencing a checklist of requirements. Every day, appellate clerks across the country—including, presumably, in this Court—reject filings for defects in form. And they do so at, or soon after, the time of filing—not six weeks later.

But here, the state trial court’s clerk accepted North’s application. The trial court considered it on the merits. Then the appellate clerk accepted it. And the appellate court said nothing about any defect for six weeks—until North’s federal limitations period had expired. These extraordinary circumstances should entitle North to equitable tolling.

The Fifth Circuit refused North’s request for equitable tolling because neither of the state courts told him anything that was “incorrect.” But while equitable tolling certainly may arise from a state

court's incorrect statement to a petitioner, nothing suggests this is a requirement. To the contrary, several cases suggest it is not. There is no circuit split on this issue. But the Fifth Circuit's reasoning is inconsistent with how other courts—including this one—have addressed similar situations.

The Eleventh Circuit applied equitable tolling to such a situation in *Knight v. Schofield*, 292 F.3d 709, 712 (11th Cir. 2002) (per curiam). The Georgia Supreme Court denied a prisoner's state habeas application but sent notice of that denial to the wrong person. By the time the prisoner learned of the denial 18 months later, his federal limitations period had expired. *Id.* at 710. The court held that these circumstances supported equitable tolling. *Id.* at 711. Two other circuit courts also have held that a petitioner's lack of notice of state-court denial can support equitable tolling. *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001) (citation omitted); *Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008).

Similarly, the Third Circuit—in an opinion written by Justice Alito during his tenure as a circuit judge—affirmed the application of equitable tolling where a district court's mistaken dismissal of a petition “prevented [the petitioner] in a sufficiently extraordinary way from asserting his rights under the federal habeas statute.” *Brinson v. Vaughn*, 398 F.3d 225, 231 (3d Cir. 2005). Noting the need for extraordinary circumstances to support equitable tolling, the court explained that “[o]ne such potentially extraordinary situation is where a court has misled a party regarding the steps that the party needs to take to preserve a claim.” *Id.* at 230 (citations omitted).

Finally, the Eighth Circuit has held that a petitioner may receive the benefit of equitable tolling where a court's conduct "lulled the movant into inaction through reliance on that conduct." *Riddle v. Kemna*, 523 F.3d 850, 858 (8th Cir. 2008) (en banc), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012) (citations omitted).

This Court has not addressed squarely whether a court's misleading actions can support equitable tolling. But it has suggested as much.

In *Pliler v. Ford*, 542 U.S. 225 (2004), the Court remanded a case for consideration of equitable tolling based on the possibility that a petitioner "had been affirmatively misled" by a district court. *Id.* at 234. Justice O'Connor noted in her concurrence that "if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate." *Id.* at 235 (O'Connor, J., concurring).

Similarly, in a discrimination claim, this Court recognized that equitable tolling of limitations may be appropriate where a "court has led the plaintiff to believe that she had done everything required of her" to preserve her rights. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984).

Here, there was no misrepresentation. But the state courts unquestionably lulled North into believing he had invoked statutory tolling and protected his federal rights. After all—

- the trial court clerk accepted North's application,
- the trial court addressed it on the merits,
- the appellate court clerk filed it, and

- the appellate court waited six weeks—until the federal limitations period had expired—to dismiss it.

Throughout this entire time, North believed he had timely and properly filed his application—tolling his federal limitations period. North had no reason to believe he needed to file a second state-court petition—or do anything else—to preserve his federal rights. Cumulatively, the actions of the state courts led North to believe his federal rights were protected. And once he found out otherwise, there was nothing he could do. This extraordinary circumstance justifies equitable tolling.

Equitable tolling should apply here beginning with North’s filing of his state-court application and ending with the order by the court of criminal appeals denying his motion to reconsider the dismissal. After all, the motion for reconsideration was the only possible way for North to remedy the blown statute of limitations. Applying equitable tolling for this period renders North’s federal petition timely filed.

Applying equitable tolling here comports perfectly with the purpose of the doctrine to prevent the unjust technical forfeiture of relief in extraordinary circumstances. This Court has long recognized that “courts of equity have sought to ‘relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules, which, if strictly applied, threaten the ‘evils of archaic rigidity.’” *Holland*, 560 U.S. at 650 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

2. This Court should grant review to resolve the circuit split over whether a petitioner who files a state-court petition late in the AEDPA clock lacks diligence.

The Fifth Circuit held that North’s decision to file his state-court petition in nearly the eleventh month of his AEDPA period weighed against a finding of diligence. App. 8a. But the Second and Ninth Circuits have rejected this approach.

The Second Circuit has held that a federal habeas petitioner is “not ineligible for equitable tolling simply because he waited late in the limitations period to file his habeas petition.” *Valverde v. Stinson*, 224 F.3d 129, 135–36 (2d Cir. 2000). Instead, the court held that a petitioner acts reasonably “by filing his petition any time” during the limitations period. *Id.* at 136.

The Ninth Circuit was even more direct, holding that a district court acted improperly in “fault[ing] the petitioner for filing his state petition for postconviction relief late in the statute-of-limitations period” *Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017). The court held that it is “*inherently* reasonable for a petitioner to . . . plan on filing at any point within [the AEDPA] period.” *Ibid.* (emphasis in original).

The Fifth Circuit’s holding on diligence in this case conflicts directly with the holdings of the Second and Ninth Circuits on the same issue. This case presents an ideal opportunity for this Court to resolve the conflict and clarify that a petitioner’s decision to use a substantial portion of the time period

guaranteed to him by Congress does not constitute a lack of diligence.

Issues concerning equitable tolling under the AEDPA are recurrent and important. As of the time this petition was prepared, this Court's decision in *Holland* had been cited in 14,890 judicial decisions in just ten years—an average of nearly 1,500 times a year. These citations occur almost uniformly in the context of constitutional challenges to criminal confinement. And the precise issue presented here—diligence in light of an eleventh-month state-court filing—has been addressed by two circuit courts in the past three years. This recurrent and important issue justifies the grant of discretionary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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