

No. 19-5826

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 08 2019
OFFICE OF THE CLERK

Serry Perez — PETITIONER
(Your Name)

vs.

Lorie Davis — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the 5th Cir...
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Serry Perez
(Your Name)

264 Elm 3478
(Address)

Huntsville, Texas 77320
(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

What is the standard of proof applicable to Habeas petitioners seeking equitable tolling?
?

To what extent are the efforts of a petitioner's family member to be considered in an equitable-tolling analysis?
?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

*United States District Court For The Southern District of
Texas Brownsville Division No. 1:13-cv-67*

*103rd District Court of Brownsville, Texas
No. 13-08-00037-LR Jerry Perez SR V. State of Texas*

*Court of Criminal Appeals of Texas
No. WR-75,851-03*

*The Texas Court of Appeals
No. 13-08-00037-CR, 2009*

*Ken Paxton Attorney General of Texas
300 W. 15th Street Austin, Texas 78701*

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TABLE OF AUTHORITIES CITED

CASES

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Miller-El v. Cockrell, 537 U.S. 300, 336 (2003).
Tennard v. Dretke, 542 U.S. 274, 282 (2004).

STATUTES AND RULES

28 U.S.C. § 2253(c)(3)

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 12, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment one, Congress shall make no law
that will prohibit the people from petitioning
the government for redress of grievances...

Amendment six, In all criminal prosecutions,
the accused shall enjoy the right to have assistance
of counsel for his defense.

Amendment fourteen, No state shall deprive any
person of life, liberty, without due process of law.

STATEMENT OF THE CASE

A Federal Habeas petitioner must obtain a COA as a jurisdictional prerequisite to appealing the district court's denial of Habeas Relief. *Miller-Ed v. Cockrell*, 537 U.S. 322, 336 (2003). A COA will be granted only if the petitioner makes a substantial showing of the denial of a Constitutional Right. *Tennard v. Detke*, 542 U.S. 274, 288 (2004).

A claim can be debatable even though every juror of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *Miller-Ed*, at 338.

The question that serves as the basis for a certificate of appealability here is whether diligence by others on behalf of petitioner can be considered in the analysis...

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has not addressed the applicable standard of proof applicable to a habeas petitioner's burden to show an entitlement to equitable tolling, it has explained, in another context, that the party invoking tolling must establish that it is warranted by a preponderance of the evidence. *Boorne v. Quarterman*, Civil Action No. C-06-221, 2008 WL 1771919, at 19-20 (S.D. Tex. Apr. 15, 2008) citing *United States v. Marshall*, 856 F.2d 896, 899 (5th Cir. 1988).

Other courts to consider the issue in the habeas context have generally applied the preponderance of the evidence standard. See, e.g., *Hutchinson v. Director, TDCJ-CID*, No. 2:05 CV 178, 2006 WL 1408347, at 1, 5 (E.D. Tex. May 18, 2006) unpublished; *Vineyard v. Dretke*, No. 5:01 CV 173 C, 2005 WL 2219272, at *6 (N.D. Tex. Aug. 5, 2005) (unpublished); See also *Holt v. Frank*, No. 15-CV-01302-EMC, 2016 WL 125509, at *4-5, 2016 U.S. Dist. Lexis 3781, at *12-13 (N.D. Cal. Jan 12, 2016) collecting cases applying the preponderance of evidence standard.

The Magistrate Judge recommended that the court apply the preponderance of evidence standard when determining if Perez has demonstrated facts sufficient to justify an equitable tolling of his AEDPA limitations period, it is unclear which standard the court applied, and therefore, a certificate of appealability should issue as to the applicable standard of proof.

To obtain the benefit of equitable tolling, Perez must establish that (1) He pursued Habeas Relief with Reasonable Diligence, and (2) Some extraordinary Circumstance stood in his way and prevented timely filing. *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012).

The diligence required for equitable tolling purposes is Reasonable diligence, not Maximum Feasible Diligence *Holland v. Florida*, 130 S.Ct. at 2565 2010.

Whether diligence is reasonable is an equitable, often fact-intensive inquiry in which Courts are instructed to avoid Mechanical Rules and instead to draw upon decisions made in other similar cases for guidance. *Palacios v. Stephens* 723 F.3d 604-05 (5th Cir. 2013).

The Fifth Circuit has not stated a clear-cut rule as to that question, but has indicated in at least one case that such diligence should be considered. In *Palacios*, the Fifth Circuit commented parenthetically about the significance of a family member's actions on behalf of one **CONCLUSION** petitioner. 723 F.3d at 607.

The petition for a writ of certiorari should be granted.

There is an important federal question that has not been addressed by this Court and needs to be distinguished.

Respectfully submitted,

Jerry Perez Jr

Date: JULY 5, 2019