

APPENDIX TO REPLY

Appendix 10: *Jones v. Davis*, 922 F.3d 271, 278 (5th Cir. 2019) (opinion affirming equitable tolling, withdrawn and superceded by *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (affmd funding denial))

 KeyCite Red Flag - Severe Negative Treatment
Opinion Withdrawn and Superseded on Rehearing by [Jones v. Davis](#), 5th Cir. (Tex.), June 18, 2019

922 F.3d 271
United States Court of Appeals, Fifth Circuit.

Quintin Phillippe JONES, Petitioner-Appellant
v.
Lorie DAVIS, Director, Texas Department
of Criminal Justice, [Correctional
Institutions Division](#), Respondent-Appellee

No. 16-70003

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FILED April 15, 2019

Synopsis

Background: Following affirmance on appeal of petitioner's state-court capital murder conviction and death sentence, [119 S.W.3d 766](#), he filed petition for federal habeas relief. The United States District Court for the Northern District of Texas, [Terry R. Means](#), [157 F.Supp.3d 623](#), denied the petition. Petitioner appealed and certificate of appealability (COA) was granted.

Holdings: The Court of Appeals, [Patrick E. Higginbotham](#), Circuit Judge, held that:

[1] petitioner was entitled to equitable tolling of habeas limitations period;

[2] state appellate court's determination that harmless-error analysis applied to petitioner's argument that his [Miranda](#) rights were violated was not contrary to clearly established federal law;

[3] trial court's [Miranda](#) error was harmless beyond a reasonable doubt; and

[4] petitioner was not entitled to investigative funding.

Affirmed.

West Headnotes (18)

[1] **Habeas Corpus**

 Presentation and reservation in lower
habeas court of grounds of review

Director of Texas Department of Criminal Justice did not waive argument on appeal that federal habeas petition filed by petitioner convicted in state court of capital murder and sentenced to death was time-barred, where Director extensively argued that petition was required to be dismissed as untimely and that petitioner was not entitled to equitable tolling of the one-year limitations period for filing habeas petition. [28 U.S.C.A. § 2244\(d\)](#).

[1 Cases that cite this headnote](#)

[2] **Federal Civil Procedure**

 Affirmative Defense or Avoidance

An affirmative defense not set forth in a responsive pleading is generally waived. [Fed. R. Civ. P. 8\(c\)](#).

[3] **Federal Civil Procedure**

 Affirmative Defense or Avoidance

A defendant can avoid waiver of an affirmative defense that was not included in the responsive pleading if (1) the defendant raised the affirmative defense at a pragmatically sufficient time, and (2) the plaintiff was not prejudiced in its ability to respond. [Fed. R. Civ. P. 8\(c\)](#).

[4] **Habeas Corpus**

 Equitable tolling in general

The one-year statutory limitations period for a person in state custody to bring a federal habeas claim is subject to equitable tolling if 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. [28 U.S.C.A. § 2244\(d\)](#).

[5] Habeas Corpus **Equitable tolling in general**

Equitable tolling of the one-year habeas limitations period should only be available in rare and exceptional circumstances. [28 U.S.C.A. § 2244\(d\)](#).

[1 Cases that cite this headnote](#)

[6] Habeas Corpus **Limitations, Laches or Delay**

The statute of limitations for filing a habeas petition must not be applied too harshly because dismissing a habeas petition is a particularly serious matter. [28 U.S.C.A. § 2244\(d\)](#).

[7] Habeas Corpus **Access and assistance****Habeas Corpus** **Diligence**

Petitioner convicted of capital murder and sentenced to death was entitled to equitable tolling of federal habeas limitations period, notwithstanding habeas counsel's untimely filing resulting from negligent miscalculation of filing deadline; petitioner wrote District Court requesting that particular counsel not be appointed as his federal habeas attorney because counsel had previously failed to file timely state postconviction petitions, filed pro se motions to remove counsel and have co-counsel appointed, and sent letter to counsel specifically reminding counsel of filing deadline, showing that petitioner exercised due diligence, and attorney-client relationship between counsel and petitioner had broken down, which was compounded by court order directing counsel to timely file petition, and Court forced continuation of attorney-client relationship, which likely caused petitioner to relax his vigilance regarding filing deadline, showing extraordinary circumstances. [28 U.S.C.A. §§ 2244\(d\), 2254\(d\)](#).

[8] Habeas Corpus **Access and assistance**

A simple miscalculation that leads habeas petitioner's counsel to miss the filing deadline for a federal habeas petition is insufficient to warrant equitable tolling of the limitations period where the attorney's conduct did not cross the line between garden variety neglect and attorney abandonment. [28 U.S.C.A. §§ 2244\(d\), 2254\(d\)](#).

[9] Habeas Corpus **Review de novo**

The Court of Appeals reviews a district court's grant of summary judgment denying federal habeas relief de novo. [28 U.S.C.A. § 2254\(d\)](#).

[10] Habeas Corpus **Federal or constitutional questions**

A state-court decision is "contrary to" clearly established federal law, as may warrant federal habeas relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), if it either applies a rule that contradicts the governing law set forth in the United States Supreme Court's holdings or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. [28 U.S.C.A. § 2254\(d\)](#).

[11] Habeas Corpus **Federal Review of State or Territorial Cases**

A state court "unreasonably applies" clearly established federal law, as may warrant habeas relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), when it identifies the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. [28 U.S.C.A. § 2254\(d\)](#).

[12] Habeas Corpus **Federal Review of State or Territorial Cases**

The remedy of federal habeas relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) does not require state courts to extend the precedent of the United States Supreme Court or license federal habeas courts to treat the state courts' failure to do so as error. [28 U.S.C.A. § 2254\(d\)](#).

[13] Habeas Corpus

🔑 [Review; Post-Conviction Relief and New Trial](#)

Determination by state appellate court that harmless-error analysis applied to habeas petitioner's argument on direct appeal that admission of his unwarned confession to uncharged murders during penalty phase of capital murder trial that resulted in death sentence violated his *Miranda* rights was not contrary to clearly established federal law, and thus, habeas relief on that basis was not warranted, where no United States Supreme Court precedent held that *Miranda* violations were not subject to harmless-error analysis. [U.S. Const. Amend. 5; 28 U.S.C.A. § 2254\(d\)](#).

[14] Sentencing and Punishment

🔑 [Declarations and confessions](#)

Sentencing and Punishment

🔑 [Harmless and reversible error](#)

Trial court's *Miranda* error, in admitting defendant's unwarned written statement confessing to two uncharged murders during penalty phase of capital murder trial that resulted in sentence of death, was harmless beyond a reasonable doubt; evidence other than confession was introduced during penalty phase implicating defendant in the uncharged murders, and considerable evidence of defendant's future dangerousness beyond the uncharged murders was presented, so that the erroneous admission of the confession did not materially contribute to the jury's findings supporting death sentence. [U.S. Const. Amend. 5.](#)

[15] Habeas Corpus

🔑 **Indigent Petitioners**

Habeas petitioner convicted of capital murder and sentenced to death was not entitled to additional funding to conduct investigation to bolster his penalty phase mitigation defense, which was unsuccessful at trial, where defense counsel previously conducted mitigation investigation, and petitioner failed to provide any new information in excess of what was presented during trial, or to show that any mitigation evidence beyond what was already addressed at trial would likely be uncovered by further investigation. [18 U.S.C.A. § 3599\(f\)](#).

[16] Criminal Law

🔑 [Discretion of Lower Court](#)

The Court of Appeals review a district court's denial of funding for investigative, expert, or other reasonably necessary services for abuse of discretion. [18 U.S.C.A. § 3599\(f\)](#).

[17] Costs

🔑 [Expert witnesses or assistance in general](#)

A consideration informing the exercise of the district court's discretion to authorize funding for investigative, expert, or other reasonably necessary services is the likelihood that the contemplated services will help the defense. [18 U.S.C.A. § 3599\(f\)](#).

[18] Habeas Corpus

🔑 **Indigent Petitioners**

Proper application of the reasonably necessary standard under statute authorizing funding for investigative, expert, or other services in a habeas proceeding requires habeas courts to consider the potential merits of the claims that the petitioner wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the petitioner will be able to clear any procedural hurdles standing in the way. [18 U.S.C.A. § 3599\(f\); 28 U.S.C.A. § 2254\(d\)](#).

*274 Appeal from the United States District Court for the Northern District of Texas

Attorneys and Law Firms

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[Tomee Morgan Heining](#), Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, [Jason R. LaFond](#), Office of the Attorney General for the State of Texas, Austin, TX, for Respondent-Appellee.

Before [HIGGINBOTHAM](#), [DENNIS](#), and [ELROD](#), Circuit Judges.

Opinion

[PATRICK E. HIGGINBOTHAM](#), Circuit Judge:

Quintin Phillippe Jones was sentenced to death by a Texas court. He now appeals the district court's denial of his federal application for post-conviction relief, arguing that evidence was erroneously admitted at sentencing in violation of his Fifth Amendment rights and that the district court improperly denied him further investigative funding. We granted a certificate of appealability, and now affirm the district court's judgment and denial of funding.

I

Jones beat his eighty-three-year-old great aunt, Berthena Bryant, to death with a baseball bat after she refused to continue lending him money.¹ Fort Worth police arrested him the next day for outstanding traffic warrants and possession of a controlled substance. They interviewed him twice about Bryant's murder.² The first time, Jones denied involvement. The second time, he waived his *Miranda* rights and confessed to the murder—explaining that he had an alter ego named James who lived in his head and who was responsible for killing Bryant.³

Based on a lead from Jones's sister, the police also investigated Jones's involvement in the murders of Marc Sanders and Clark Peoples.⁴ Nine days after Jones confessed to killing Bryant, a Texas Ranger and sheriff's deputy interrogated Jones about the Sanders and Peoples murders.⁵

Jones told them that he murdered Sanders and Peoples with his close friend Ricky "Red" Roosa. He described how Roosa was the primary decision-maker and directed Jones to take steps like restraining the victims and disposing of their bodies.⁶ Authorities only informed Jones of his *Miranda* rights after this statement was written down and he was about to sign; he proceeded to sign it.⁷ While Jones was only tried for Bryant's murder and this written statement was not introduced at the guilt phase of his trial, it was introduced in the punishment phase.

A Texas jury convicted Jones of capital murder. At the punishment phase of his trial, the jury was asked to answer Texas's two special issues: "1) would appellant probably commit future criminal acts of violence that would constitute a continuing threat to society; and 2) whether, taking *275 into consideration all of the evidence, there are sufficient mitigating circumstances to warrant a life sentence rather than a death sentence."⁸ Based on the jury's findings that Jones was likely to commit future acts of violence and that there were insufficient mitigating circumstances to warrant a life sentence, the trial court sentenced Jones to death.⁹ The Texas Court of Criminal Appeals, or CCA, affirmed his conviction and sentence,¹⁰ and the United States Supreme Court denied certiorari.¹¹

Jones's appointed post-conviction attorney failed to file his state application for habeas corpus. The CCA appointed Jack Strickland as substitute counsel and set a new deadline for Jones's application. Although Strickland filed Jones's application thirty days after the extended deadline had passed, the CCA found that Strickland's workload constituted good cause for the delay and accepted Jones's petition. Throughout the state habeas proceedings, Strickland failed to respond to letters Jones sent urging him to investigate or discuss certain issues; Jones wanted Strickland to raise ineffective assistance of counsel, while Strickland saw this as "casually impugn[ing] the 'integrity [and] competence' of Jones's previous attorneys. Jones twice wrote to the state court asking it to contact Strickland and 'have him ... do his job.' The CCA did not intervene in Strickland's representation of Jones and ultimately denied Jones's habeas application in 2005.¹²

Despite Jones's persistent efforts to have substitute or additional counsel appointed for his federal postconviction proceedings, the district court appointed Strickland in an order that also directed Jones to "timely file his federal petition for writ of habeas corpus" and required "[t]he petition

[to] demonstrate that it is timely filed under 28 U.S.C. § 2244(d)(1)." Jones continued to send Strickland letters about the federal petition and upcoming deadline, which Strickland told Jones was September 14, 2006.

Strickland filed Jones's federal petition on September 14, 2006, exactly. The district court dismissed the petition as time-barred because Strickland had miscalculated the filing deadline. While Strickland thought the deadline fell one year after the state court's denial of Jones's habeas petition, the correct deadline was one year after the denial of Jones's petition for certiorari on direct appeal, with tolling for the pendency of the state habeas proceedings: April 18, 2006.¹³ And, although the federal filing deadline was tolled while Jones's state habeas petition was under consideration, it was not tolled for the 149-day period between when the Supreme Court denied certiorari on direct appeal and Strickland filed Jones's state petition. Jones's federal petition was precisely 149 days late.¹⁴

*276 After Strickland did not contest the dismissal of the petition before the district court or on appeal,¹⁵ the district court appointed new counsel and vacated its dismissal to give Jones a chance to respond. Jones responded, and the district court once again dismissed his petition as time-barred. He appealed, and we vacated and remanded for reconsideration in light of the principles of equitable tolling announced in the Supreme Court's then-recent decision in *Holland v. Florida*.¹⁶ On remand, the district court initially found that no grounds existed for equitable tolling, then was persuaded to reverse course after Jones moved for reconsideration.

Jones filed an amended petition adding claims for relief, and sought additional funding for investigative services. The district court denied Jones's investigative funding request, then denied each of Jones's six claims for relief. It denied Jones a certificate of appealability on all claims. We granted Jones a certificate of appealability on his claim that the trial court violated his Fifth Amendment rights by admitting an unmirandized confession at the punishment phase,¹⁷ and instructed Jones to simultaneously brief his appeal from the district court's denial of investigative funding.¹⁸

We must now resolve three issues: whether Jones's petition is time-barred, whether Jones is entitled to relief on his Fifth Amendment claim, and whether Jones is entitled to investigative funding.

II

AEDPA prescribes a one-year statute of limitations for a person in state custody to bring a federal habeas claim, tolled while the state habeas petition is pending.¹⁹ Accounting for the period between denial of Jones's petition for certiorari on direct appeal and Jones's filing of his state habeas petition, Jones's federal application was 149 days late—absent the equitable tolling applied by the district court.

The Director argues that Jones's entire petition is time-barred and that the district court improperly applied equitable tolling. Jones argues that the Director waived this argument before the district court, and that in any event, the district court did not err in tolling the deadline for his petition.

A

[1] In granting the certificate of appealability, we observed that the Director may have waived her limitations defense, but that we would not decide the issue without further review of the record.²⁰ We now conclude that she did not. After we remanded the case for the district court to consider equitable tolling in light of *Holland*, both parties briefed the issue *277 further, with the Director arguing that *Holland* did not affect the district court's decision to deny equitable tolling. The Director extensively argued that Jones was not entitled to equitable tolling under *Holland* because he had failed to exercise diligence and Strickland's error in calculating the deadline was not an extraordinary circumstance. Following this briefing, the district court once again dismissed Jones's petition as time-barred.

Jones then filed a motion to alter or amend the judgment under *Federal Rule of Civil Procedure 59(e)*. There, he raised for the first time the argument that Jones detrimentally relied on the district court's order appointing Strickland as counsel and directing Jones—and, by extension, Strickland—to timely file his petition and affirmatively demonstrate its timeliness. The Director's response did not directly address this issue, instead arguing that Jones had more generally not met the requirements for relief under *Rule 59(e)*. The district court ordered the Director to submit additional briefing specifically addressing Jones's argument that he was entitled to rely on the district court's order appointing counsel, and the Director did so, making much the same arguments that she has on this appeal. This time, the district court granted Jones's request for equitable tolling.