No. 19A248

19-7498

IN THE

SUPREME COURT OF THE UNITED STATES

James Earvin Sanders — PETITIONER
(Your Name)

ORIGINAL

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James E. Sanders #1579328
(Your Name)

2101 FM 369 N
(Address)

Iowa Park, TX 76367
(City, State, Zip Code)

Allred Unit
(Phone Number)

I. QUESTION(S) PRESENTED

Where counsel lies about the existence of psychiatric mitigating evidence and denies the accused the use of 18 U.S.C. § 3006A(e) in United States v. Fessel, does this constitute a substantial showing of the denial of a constitutional right for COA purposes?

If a petitioner lacks the factual predicate to file under 28 U.S.C. § 2244(d)(1)(A) and the one-year period expires, is he time-barred from filing under (D)?

How does the U.S. Marshal Hold (Exhibit 14) not constitute an unconstitutional State action under 2244(d)(1)(B) when (1) the action thereof hindered access to the courts, and (2) denied "equal protection of the laws?"

When an unconstitutional State action triggers 2244(d)(1)(B), does a petitioner still need to show the "extraordinary circumstances" of Holland v. Florida or the external interference in Coleman v. Thompson?

Once activated, is there a time limit as to how long 2244(d)(1)(B) can last?

Is there any ruling or statute that prohibits a habeas petitioner from starting under 2244(d)(1)(A), activating (D), triggering (B), and then removing (B) by reactivating (D)?

Could the Court clarify the "reasonable diligence" in Holland in relation to this case?

LIST OF PARTIES

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

[ ] 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:

RELATED CASES

- United States of America vs. James Earvin Sanders, No. 4:06CR291, U.S. District Court for the Eastern District of Texas, Sherman Division. Judgment entered Nov. 29, 2007.
- Sanders v. United States, No. 4:17-cv-324, U.S. District Court for the Eastern District of Texas, Sherman Division. Judgment entered Nov. 1, 2018.
- United States v. Sanders, No. 18-41113, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 19, 2019.

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TABLE OF AUTHORITIES CITED

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

[X] 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 UNKNOWN; 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 DC to the petition and is

[ ] reported at UNKNOWN; 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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 6-19-2019.

[X] 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including November 16, 2019 (date) on Sept. 3, 2019 (date) in Application No. 19A248.

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 I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand dury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute, 18 U.S.C.S. § 3006A(e):

(e) Services other than counsel.
(1) Upon request. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding after appropriate inquiry in an ex parte proceeding, that the services are neces-

sary and that the person is financially unable to obtain them, the court, or the United States magistrate [United States magistrate judge] if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

Statute, 28 U.S.C.S. § 2244(d)(1):

(1) A one-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 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.

STATEMENT OF THE CASE

Nearly 45 years ago, this Court held in Faretta v. California that "[T]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." 422 U.S. 820. This Court also stated that "these rights are basic to [our] adversary system of criminal justice," and to deny them is to deny the accused "the due process of law that is guaranteed by the Fourteenth Amendment." Id at 819.

In Strickland v. Washington, this Court created the two-part test for challenging guilty pleas based on ineffective assistance of counsel. Strickland further established that defense counsel conduct reasonable investigations and advocate the defendant's cause, among other duties. 466 U.S. 668.

Yet in the United States v. Cronic, this Court held that a denial of Sixth Amendment rights occurs when "counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing." 104 S.Ct. 2039. Cronic also recognizes that "[i]n some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided."

In the United States v. Edwards, the Fifth Circuit said, "This court has long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." 488 F.2d 1154.

Likewise, in United States v. Fessel, 531 F.2d 1275

they go a step further, saying:

> "When an insanity defense is appropriate, and the defendant lacks funds to secure private psychiatric assistance, it is the duty of his attorney to seek such assistance through the use of 18 U.S.C. § 3006A(e). This assistance is required whenever the services are necessary to the preparation of an adequate defense."

The Eleventh Circuit held in Blanco v. Singletary, 943 F.2d 1503 that:

> "When mental health mitigating evidence was available, and 'absolutely none was presented [by counsel] to the sentencing body, and... no strategic reason [w]as... put forward for this failure,' our court determined that this omission was 'objectively unreasonable.'"

That court also held that "psychiatric mitigating evidence... could significantly weaken aggravating factors." Elledge v. Dugger, 823 F.2d 1439, 1447.

Pertaining to equitable tolling, the First Circuit held in Libby v. Magnusson that "the time when a conviction became final is only one of four triggering events that Congress described in 2244(d)(1)." 177 F.3d 43, 47-48.

In Davis v. Johnson, the Fifth Circuit held that the [AEDPA] limitation period does not establish an absolute outside limit within which suits must be

filed." 153 F.3d at 811.

The Fifth Circuit in Fisher v. Johnson goes on to explain that equitable tolling is appropriate when a plaintiff, through due diligence, is unable to discover information essential to his claim, thus establishing its "diligent inquiry" standard. 174 F.3d 710.

This Court held in Holland v. Florida that "reasonable diligence, not maximum feasible diligence" was required for equitable tolling purposes. Holland also established "extraordinary circumstances beyond [one's] control." 130 S.Ct. 2549.

Furthermore, in Coleman v. Thompson, 501 U.S. 722 this Court said:

> "Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him... 'impeded his efforts to comply with the State's procedural rule.'"

The Fifth Circuit echoes this Court's position in Holland and Coleman with its ruling in Davis, stating, "Equitable tolling is appropriate when an extraordinary factor beyond the plaintiff's control prevents his filing on time." Id at 811. It also sets the "rare and exceptional circumstances" standard.

This case presents the question of whether a defendant's Sixth Amendment rights, as outlined in Faretta, are violated when defense counsel's lies induce his guilty plea. The question is com-

pounded because the lies pertain to the existence and development of psychiatric mitigating evidence, the importance thereof being previously established in Edwards, Fessel, Blanco, and Elledge.

Furthermore, this case presents the question of whether the Fifth Circuit and its lower courts are erroneously denying habeas relief. They are enforcing "an absolute outside limit" contrary to Davis, they refuse to apply 2244(d)(1)'s other tolling provisions in conflict with Libby and the statute itself, and their diligence requirement far exceeds those previously established in Fisher and Holland. Thus, the Fifth Circuit has taken a hard-line stance against any appeal not filed within the one-year limitations period under 2244(d)(1)(A), essentially making the other built-in tolling provisions obsolete.

1. Sanders' arrest and interrogation

On November 18, 2006, James Sanders was arrested by Lewisville PD in connection with an aggravated kidnapping case and a string of robberies that occurred between November 8 and 18, 2006 following a nervous breakdown.

Carrollton PD Detective Gregory Fraid interrogated

Mr. Sanders on November 18. Fraid said they attended the same health club, that he'd seen Mr. Sanders and his son playing basketball there on many occasions, and that when his investigation led to Mr. Sanders he knew something was wrong— that Mr. Sanders "must have suffered a psychological break."

Detective Fraid went on to say that witness statements confirmed his psychological assessment, and therefore he was charging Mr. Sanders with aggravated kidnapping rather than attempted murder or attempted capital murder for a stabbing in which a screwdriver was the weapon. This occurred on November 8, 2006, immediately following the breakdown, and Petitioner has no recollection of the event.

2. Diligent Inquiry and Due Diligence

Upon meeting his federal court-appointed lawyer, Garland Cardwell, in January 2007, Mr. Sanders told him about the nervous breakdown and the interrogation, requesting Cardwell locate the tape and request a psych eval. Cardwell said he would look for the interrogation tape, but he could not request a psych eval because the felon in possession case was not the primary case, the robberies were. Therefore, he said Mr. Sanders would have to ask his state lawyer to request it.

This assertion was untrue and conflicts with 18 U.S.C. § 3006A(e) and Fessel. At a subsequent visit, Cardwell claimed that he could not locate the tape and believed the interrogation was not recorded. This too was a lie. See Exhibits 1 and 2 which reference the tape.

These two lies indicate that Cardwell had no intention of building a defense, indicative of a Cronic violation.

Furthermore, other documents in discovery illustrate Mr. Sanders' state of mind at that time and support Det. Fraid's assessment. See Exhibits 3, 4, 5, and 6. Cardwell withheld these items and ignored requests for discovery. This deprived Mr. Sanders of his Sixth Amendment rights in Faretta and Cronic, and stripped him of the benefits derived from Edwards, Fessel, Blanco, and Elledge.

Nonetheless, Mr. Sanders continued to ask Cardwell to share the discovery. Upon sentencing on November 28, 2007, Mr. Sanders again requested his discovery and Cardwell said, "I cannot give you your discovery until all your state cases are adjudicated." This did not happen until September 15, 2011 in Denton County. See case no. F-2007-0054-E. Shortly thereafter, Cardwell sent the discovery: this was almost four full years post-conviction.

Consequently, between January 2007 and September 15, 2011, Mr. Sanders requested discovery from his Denton and Dallas County court-appointed lawyers as well. All three ignored requests for and lied about the facts in discovery. These lawyers were in communication in 2007. Nonetheless, the fact that he actively requested discovery from three different attorneys before and after this case was adjudicated should satisfy the "diligent inquiry" in Fisher and the "reasonable diligence" of Holland.

There was no direct appeal as Mr. Sanders accepted a plea agreement. The discovery was volumi-

nous, and it was all mixed up and needed to be sorted by case for proper review.

3. Equitable Tolling

Upon receiving the discovery, 2244(d)(1)(D) should have been activated. Then, within two months of receiving it, Mr. Sanders was placed on chain back to TDCJ on November 18, 2011. The U.S. Marshal Hold (Exhibit 14) forced him to release the discovery or lose it outright. This should have activated 2244(d)(1)(B) because (1) it is a State action, (2) it impeded Mr. Sanders' ability to timely file his § 2255 motion, (3) it denied him "equal protection of the laws" (Fourteenth Amendment), and (4) hindered his access to the courts (which encompasses First, Fifth and Fourteenth Amendment violations).

Mr. Sanders was forced to release those documents, under duress, even though he knew from a previous experience in July 2009 that his family was not reliable.

After their release, his family made no attempt to return the papers. Mr. Sanders repeatedly wrote letters imploring his niece, Etasha Sanders, to send the documents back. He also wrote several letters to Garland Cardwell between 2012 and 2014 in an attempt to reacquire the discovery. See Exhibit 7.

On "7-20-12," a full eight months after the release of the documents, Etasha wrote to say she was going to go through the bag of property the papers were in. See Exhibit 15. Thereafter, rather than send-

ing they documents, they were tossed back into the garage where a flood damaged the majority of them. See Exhibit 16. The damaged ones were shredded (Exhibit 17-A), and the surviving documents were stored in a shoebox and misplaced when his youngest niece, Akira Sanders, moved out and mistakenly took the shoebox. This mistake was not discovered until 2016. See Exhibit 22.

Mr. Sanders was still pursuing these documents in February of 2016 (Exhibit 9-A) as he prepared to file a State Bar complaint against Cardwell for not replying to discovery requests and for unfulfilled promises used to induce his guilty plea. See Dkt. 1 at 8 and 17. The complaint brought a reply in which Cardwell denied making the promises. See Exhibit 13.

Mr. Sanders also wrote certified letters to his Dallas lawyer (Exhibit 18), his Denton lawyer (Exhibit 19), and the Dallas DA's Office (Exhibit 21) to reacquire the discovery.

When the surviving documents were eventually located and returned on or around September 6, 2016, 2244(d)(1)(B) should have been removed and/or 2244(d)(1)(D) should have been reactivated because Mr. Sanders had not yet discovered the factual predicate used to support his claims.

Thereafter, Mr. Sanders should have had a year to file his § 2255 motion, and he did so within eight months.

X. REASON FOR GRANTING THE WRIT

A. To avoid the erroneous denial of COA and the deprivation of the habeas corpus rights of Fifth Circuit applicants, it is necessary for this Court to exercise its supervisory power.

The Fifth Circuit is enforcing an absolute outside limit that does not exist in the statute or its own ruling in Davis v. Johnson, 153 F.3d at 811. In doing so, it is punishing applicants for not blindly filing under 28 U.S.C. § 2244(d)(1)(A) even though they lack the factual predicate to support their claims, thus usurping congressional intent. This is precisely why why Congress created 2244(d)(1)(D), as acknowledged in Libby v. Magnusson, 177 F.3d 43, 47-48 and in the Fifth Circuit's own Fisher v. Johnson ruling. 174 F.3d 710.

This makes 2244(d)(1)(D) obsolete because if a petitioner blindly files a first petition under provision (A) and later discovers the factual predicate to support his claims, the second or successive petition would be reviewed under the stricter rules of 2244(b)(2)(B).

So whereas a first petition need only prove the deprivation of a constitutional right, a second or successive requires something more akin to actual innocence. This is exactly why "dismissal of a first habeas petition is a particularly serious matter," Lonchar v. Thomas, 514 U.S. 314, 324.

Furthermore, regardless of whether the circumstances of the case warrant it, the Fifth Circuit refuses to apply 2244(d)(1)'s other tolling provisions. Repeatedly requesting discovery from three different lawyers between 2007 and September 15, 2011 is due diligence, yet the court refused to activate (D).

"[H]e fails to state a constitutional violation." Dkt. 10 at 3.

The U.S. Marshal Hold (Exhibit K) should have triggered provision (B), but the Fifth Circuit's lower court disagreed. Any action that hinders or impedes one's access to the courts is unconstitutional, infringing on the First Amendment right to "petition the government for a redress of grievances," and the Fifth and Fourteenth Amendment right to "due process of law."

Moreover, the fact that it permits those with pending cases to take legal work while prohibiting those trying to perfect appeals on a one-year time limit is discriminating and deprives the latter of "the equal protection of the laws" as guaranteed Fourteenth Amendment.

In this case, the Fifth Circuit has shown it does not respect the rulings of this Court or any of its sister courts, much less its own. This Court's "reasonable diligence" requirement in Holland v. Florida, 130 S. Ct. 2549 and the Fifth Circuit's "dili-

gent inquiry" in Fisher were surpassed by Mr. Sanders' persistence throughout, but it was not acknowledged.

"Movant also fails to show extraordinary circumstances or that he was diligent in preparing his § 2255 motion." Dkt. 10 at 3.

For the record, "extraordinary circumstances" are only necessary in the absence of a built-in tolling provision. Had the court allowed 2244(d)(1)(B) to be triggered by the U.S. Marshal Hold, the only thing the Petitioner would need to show is due diligence.

This Court in Holland said "extraordinary circumstances beyond [one's] control" were required for equitable-tolling purposes. A home flood that destroys factual predicate fits standard as well as this Court's ruling in Coleman v. Thompson, 501 U.S. 722 stating;

> "Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him, ... 'impeded his efforts to comply with the State's procedural rule.'"

Furthermore, in Holland, dustice Alito said, "Common sense dictates that a litigant cannot be held constructively responsible for the actions of an attorney who is not operating as his agent in any

meaningful sense of the word."

My niece, Etasha, did not act as my "agent in any meaningful sense," but I was forced to enlist her services. I could no more control her than the weather that caused the flood, yet despite this Court's rulings in Holland and Coleman, I am penalized.

Lastly, in McCarthy v. United States, 394 U.S. 459, 466 this Court said, "Because such waiver is valid only if made intelligently and voluntarily, an accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by his plea."

Cardwell lied about being unable to request a psych eval and the existence of the interrogation tape. Several police and witness reports (Exhibits 3-6) depict Mr. Sanders' state of mind in November 2006. This discovery came from Cardwell himself, yet nowhere in the proceeding is there documentation of its use: not in requesting a psych eval, a defense, or mitigation.

Yet psychiatric mitigating evidence from credible sources does exist, and insanity was Mr. Sanders' only viable defense.

Cardwell cannot even deny the psych eval was requested because Mr. Sanders requested one again during his PSI interview, which was conducted in Cardwell's presence. See CR Dkt. 25,

p. 12-13 at #49 under Mental and Emotional Health. The PSI report was prepared on April 23, 2007 (CR Dkt. 25 at 1), over six months before Sanders went to court on November 28, 2007.

The State was not asked to explain Cardwell's deficiencies. Cardwell violated countless rulings and Mr. Sanders' Sixth and Fourteenth Amendment rights, yet this did not suffice as a "substantial showing of the denial of a constitutional right."

Is it that easy: All a lawyer has to do is lie to the accused, steer him to a plea, and withhold the discovery for a year thereafter? This is precisely why the one-year limitation starts from the latest tolling provision.

This case is a textbook example of how 2244(d)(1)'s tolling provisions are intended to work. "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." Davis, supra, at 810.

Based on the circumstances, this case could be equitably tolled via 28 U.S.C. § 2244(d)(1), or a combination of the statute and case law, but the district court refused to apply either in favor of tolling. Nonetheless, extraordinary circumstances exist and the reply letters, which span from 2012 until September of 2016, document not only the various events that transpired, but Mr. Sanders'

diligence as well.

Therefore, Petitioner firmly believes "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," Slack v. McDaniel, 529 U.S. 473 because "To establish his entitlement to equitable tolling, a petitioner must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland, supra, at 2562.

Mr. Sanders has shown these requirements.

PLACED in unit mail system on
Thursday, January 2, 2020.

• NOTE: Amended to Friday, January 3, 2020

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James E. Sanders

Date: January 2, 2020