

No. _____

◆
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

◆
JUAN GILBERTO MEDRANO,
PETITIONER

v.

ROSEMARY NDOH, Warden
RESPONDENT

◆
ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

◆
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Attorney for Petitioner
JUAN GILBERTO MEDRANO

QUESTIONS PRESENTED

- (1) Was Petitioner's 2016 Petition filed in a timely manner?
- (2) Does the dismissal of a protective federal habeas petition prior to the decision in *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016) ("*Mena*") constitute an extraordinary circumstance sufficient to warrant equitable tolling?
- (3) Is "purely a question of law" presented by the issue of whether dismissal of a protective federal habeas petition pre-*Mena* constitutes an extraordinary circumstance sufficient to warrant equitable tolling?

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

LIST OF PROCEEDINGS

1. United States Court of Appeals for the Ninth Circuit - *Medrano v. Frauenheim*, Case No. 17-56305, unpublished memorandum - Original opinion issued on October 21, 2019 (docket no. 38); Denial of Petition for Rehearing and Rehearing en Banc on December 4, 2019 (docket no. 40);
2. United States District Court for the Central District of California - Order Denying Petition for Writ of Habeas Corpus and Denying Certificate of Appealability, *Medrano v. Frauenheim*, Case No. 2:16-cv-08292-FFM (United States District Court for Central California, July 21, 2017)(docket no. 18);
3. Order Re Summary Denial of Action Without Prejudice, *Medrano v. Frauenheim*, Case No. 2:15-cv-08970 DDP (United States District Court for Central California, December 18, 2015)(docket no. 7); and
4. Motion to Stay and Abey Petition, *Medrano v. Frauenheim*, Case No. 2:15-cv-08970 DDP (United States District Court for Central California, November 18, 2015)(docket no. 3)

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APPENDIX A

Ninth Circuit Memorandum, *Medrano v. Ndoh*, Case No. 17-56305, unpublished, filed October 21, 2019 (9th Cir. 2019)

APPENDIX B

Order Denying Petition for Rehearing and Petition for Rehearing En Banc, *Medrano v. Ndoh*, Case No. 17-56305, filed December 4, 2019.

APPENDIX C

Order Denying Petition for Writ of Habeas Corpus and Denying Certificate of Appealability, *Medrano v. Frauenheim*, Case No. 2:16-cv-08292-FFM (United States District Court for Central California, July 21, 2017)

APPENDIX D

Order Re Summary Denial of Action Without Prejudice, *Medrano v. Frauenheim*, Case No. 2:15-cv-08970 DDP (United States District Court for Central California, December 18, 2015)

APPENDIX E

Motion to Stay and Abey Petition, *Medrano v. Frauenheim*, Case No. 2:15-cv-08970 DDP (United States District Court for Central California, November 18, 2015)

¹ The appendices are filed concurrently under separate cover.

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

◆ _____
STEVEN LIVADITIS,
PETITIONER

V.

RON DAVIS,
RESPONDENT

◆ _____
ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The memorandum opinion of the Ninth Circuit Court of Appeals appears at Appendix ("App.") A to this petition and is unpublished. The order denying the Petition for Rehearing and Rehearing En Banc appears at Appendix B and is unpublished. The order of the United States District Court denying Petition for Writ of Habeas Corpus and Denying Certificate of Appealability appears at Appendix C and is unpublished. The Order re Summary Denial of

Action Without Prejudice by the United States District Court appears at Appendix D and is unpublished. Petitioner's Motion to Stay and Abey Petition appears at Appendix E.

Jurisdiction

The district court had jurisdiction of Petitioner's habeas corpus petition under 28 U.S.C. § 2254. The district court denied a Certificate of Appealability. The Ninth Circuit issued a Certificate of Appealability and had jurisdiction under 28 U.S.C. § 2253(c)(1). The Ninth Circuit judgment was entered on October 21, 2019. App A. A timely petition for rehearing and rehearing en banc was denied on December 4, 2019. App B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

Fourteenth Amendment to the United States Constitution:

[N]or 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.

Statement of the Case

A. Statement of Proceedings

Petitioner was convicted of two counts of second degree murder and one count of assault by means likely to produce great bodily injury in violation of California Penal Code §§ 187 and 245. Petitioner appealed his convictions. The convictions were affirmed by the California Court of Appeal on August 21, 2014. Petitioner filed a Petition for Review in the California Supreme Court which was denied on November 12, 2014.

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court on November 16, 2015. While that petition was pending, petitioner filed a Petition for

Writ of Habeas Corpus in the federal district court on November 18, 2015 in Case No. 15-8970-DDP (FFM) (“2015 Petition”). This 2015 Petition asserted the same claims that were presented in the state habeas petition. Petitioner filed a motion to stay and abey his 2015 Petition on November 18, 2015. App. E. The district court issued a summary denial of the 2015 Petition on December 18, 2015. App. D. The 2015 Petition was dismissed without prejudice on the grounds that none of the claims were exhausted and the same claims were pending in the Los Angeles County Superior Court. App. D, at pp. 2-4. The order dismissing the 2015 Petition without prejudice also denied petitioner’s motion to stay and abey the 2015 Petition. App. D, at p. 4.

On April 28, 2016, the Los Angeles County Superior Court denied petitioner’s state habeas petition on the grounds, *inter alia*, it was untimely and failed to explain the delay in seeking habeas relief. Petitioner filed a state habeas petition in the California Court of Appeal on June 13, 2016. On June 24, 2016, the California Court of Appeal denied the petition with the notation, *inter alia*, that the issues were untimely on June 24, 2016. Petitioner filed a state habeas petition in the California Supreme Court on August 22, 2016. This petition was summarily denied on October 16, 2016.

On November 1, 2016, petitioner filed the Petition for Writ of Habeas Corpus at issue in this petition in the United States District Court for the Central District of California in Case No. 2:16-cv-8292 (“2016 Petition”). On February 9, 2017, respondent filed a motion to dismiss. Petitioner’s opposition to the motion to dismiss was filed on March 17, 2017. Respondent filed a reply on April 3, 2017.

On July 21, 2017, Magistrate Frederick F. Mumm issued an order granting respondent’s motion to dismiss on the grounds that the 2016 Petition was time-barred. The order

further directed that judgment be entered dismissing the 2016 Petition with prejudice and denying a certificate of appealability. App. C, at p. 12. Judgement was entered dismissing the 2016 Petition with prejudice on the same day.

Petitioner's Notice of Appeal was constructively filed on August 18, 2017. On April 2, 2018, the Ninth Circuit granted a certificate of appealability on "whether the district court properly determined that the petition was time barred, including whether appellant is entitled to tolling."

B. Statement of Facts from State Trial

The state habeas petition was dismissed as untimely. The order and judgment make no reference to the facts of petitioner's state trial. As a result, a summary of the state trial facts is not relevant to this petition.

Reasons for Granting the Petition

This Court Should Grant the Petition Because the Ninth Circuit Failed to Apply Ninth Circuit Law and the Ninth Circuit has Decided an Important Question of Federal Law that Has Not, But Should Be, Settled by This Court

A. Alleged Untimeliness of Petitioner's 2016 Petition

To avoid being time-barred, petitioner filed his first federal habeas petition on November 16, 2015 ("2015 Petition"). Aware that the claims in his 2015 Petition were not exhausted, petitioner quickly filed a motion to stay and abey the 2015 Petition while he returned to state court to exhaust his state claims. App. E, at pp. 29-35. The magistrate judge issued an order denying the 2015 Petition without prejudice on December 18, 2015 and also denied petitioner's motion to stay and abey. App. D, at pp. 25-27.

After returning from state court where petitioner had exhausted his claim, petitioner filed a second petition for writ of habeas corpus in the federal district court on November 1, 2016 (“2016 Petition”). Respondent moved to dismiss on the grounds that the 2016 Petition was time-barred. The magistrate judge agreed. The magistrate judge found that the statute of limitations for petitioner began to run on February 10, 2015 and expired on February 10, 2016. Petitioner’s federal habeas petition was filed on November 1, 2016, more than nine months late.² App. C, at pp. 4,12.

B. Petitioner’s 2016 Petition was Untimely Only Because the District Court Erroneously Denied Petitioner’s 2015 Request for a Stay

Petitioner filed a motion to stay and abey his 2015 Petition to avoid precisely what occurred. His federal habeas claims were not exhausted until his state habeas petition was denied by the California Supreme Court on October 16, 2016. Petitioner’s filed his 2016 Petition roughly two weeks later, on November 1, 2016.

By then, without the stay and abey, his 2016 Petition was found to be untimely. If petitioner’s motion to stay and abey filed on November 18, 2015 had been granted, he could have exhausted his state claims and returned to litigate these claims in his federal habeas petition. Petitioner was denied this opportunity to litigate his federal habeas claims because the district court denied his motion to stay and abey his 2015 Petition on the mistaken belief that it did not have the discretion to grant the motion.

² In his original federal habeas petition, petitioner also sought equitable tolling on the grounds that he was denied access to a law library. The claim was denied by the Ninth Circuit. App. A at p. 3. In this petition for writ of certiorari, petitioner is not pursuing this claim.

In denying petitioner's motion to stay and abey the 2015 Petition, the district court found that it could not stay the 2015 Petition because it was completely unexhausted. The district court's decision relied upon *Coleman v. Thompson*, 501 U.S. 772, 731 (1991) and *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). App. D, at pp. 3-4.

Two months after the district court denied petitioner's motion to stay and Abey the 2015 Petition, the Ninth Circuit issued its decision in *Mena v. Long*, 813 F.3d 907 (2016)(“*Mena*”). *Mena* filed a state habeas petition in the California Supreme Court alleging ineffective assistance of trial and appellate counsel. This petition was denied in the state court for failing to state sufficient facts supporting the ineffective assistance of counsel claims. *Mena* then filed a timely *pro se* habeas petition in the Central District of California. Still within the one year statute of limitations, *Mena* filed an amended habeas petition. The amended petition contained all unexhausted claims. *Mena* also filed a motion for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005)(“*Rhines*”). The district court dismissed the petition without prejudice and denied the motion to stay and abey. The motion to stay and abey was denied on the ground that the petition contained only unexhausted claims. *Mena, supra*, at 909.

In *Mena*, the Ninth Circuit granted a certificate of appealability to address whether the stay and abeyance procedure outlined in *Rhines* and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)(“*Pace*”) could be used by the district court to stay and hold in abeyance a habeas petition containing only unexhausted claims. *Mena, supra*, at 909-910. The Ninth Circuit first found that the AEDPA did not limit the district court's discretion to issue stays where proper. *Id.*, at 910. Next the Ninth Circuit noted that *Rhines* did not limit its application to only mixed petitions. The Ninth Circuit observed that in *Pace, supra*, 554 U.S. at 416, the United States Supreme

Court suggested that a petitioner could avoid a federal statute of limitations problem while litigating his state habeas petition by filing a protective federal habeas petition and seeking to stay and abey the federal habeas petition while the state claims were exhausted. No suggestion was made that this procedure could only apply to mixed petitions. *Id.*, at 910-911.

The Ninth Circuit concluded that “a district court has the discretion to stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in *Rhines*.” *Mena, supra*, at 912. When the district court denied *Mena*’s motion to stay and abey, it did so on the grounds that the amended petition contained only unexhausted claims. The Ninth Circuit reversed the dismissal of the petition and remanded the case to the district court to decide whether Mena was entitled to a *Rhines* stay. *Ibid.*

As noted above, the magistrate judge relied upon cited *Raspberry v. Garcia*, 448 F.3d 1150 (9th Cir. 2006)(“*Raspberry*”) as authority to deny petitioner’s motion to stay and abey. App. D, at pp. 3-4. In *Mena*, the Ninth Circuit distinguished *Raspberry* on the grounds that in *Raspberry*, the petitioner was arguing that he was entitled to equitable relief because the district court failed to inform him before dismissing his first petition that he could amend the petition to include two exhausted claims he had omitted and then seek a stay. *Id.* at 1151. Rejecting the petitioner’s argument, we reasoned that it would be “unworkable” to require the district court to intuit that the petitioner had excluded exhausted claims from his petition, then to advise him to add those claims and seek a stay from the court:

District courts have the discretion to hold a mixed petition in abeyance pending exhaustion of the unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1535, 161 L.Ed.2d 440 (2005). We decline to extend that rule to the situation where the original habeas petition contained only unexhausted claims, but the record shows that there were exhausted claims that could have been included. Such an extension would result in a heavy burden on the district court to determine whether a petitioner who files a petition that on its face is unexhausted may have other

exhausted claims that could have been raised.

Id. at 1154.

As the Tenth Circuit correctly noted, our statement in *Raspberry*, "read in light of the case's factual context," concerned only the limited question of whether the district court must inform petitioners that an amendment-and-stay procedure may be available, not the broader question of whether *Rhines* applies to fully unexhausted petitions. See *Doe*, 762 F.3d at 1180.

Mena, supra, at 911-912. With this explanation, the Ninth Circuit clarified that the question of unexhausted claims was not considered in *Raspberry*.

The ruling in *Mena* is directly applicable to petitioner's case here. Petitioner filed a protective federal habeas petition on November 16, 2015 to avoid a future problem with the federal one-year statute of limitations. Two days later, he filed a motion to stay and abey under *Rhines*. The district court denied the *Rhines* motion on the grounds that the 2015 Petition contained only unexhausted claims. As in *Mena*'s case, the district court's decision denying petitioner's motion to stay and abey should have been reversed by the Ninth Circuit because it was based upon the same erroneous assumption that a fully unexhausted petition could not be stayed.

If petitioner's motion to stay the 2015 Petition had been granted, his 2016 Petition would have been filed in a timely manner.³ *See, Mayle v. Felix*, 545 U.S. 644, 664 (2005) ("[s]o long as the original and amended petitions state claims that are tied to a common core of

³ In his 2016 Petition, petitioner asserted a total of twelve claims. The first five claims raised in the 2016 Petition were identical to the five unexhausted claims asserted in the 2015 Petition. Claims six through eleven of the 2016 Petition were based on the claims raised in the state court direct appeals proceeding. Petitioner asserted a twelfth claim but moved to strike this claim on the grounds that it was unexhausted.

operative facts, relation back will be in order.”); *Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013)(“a claim added to a timely filed habeas petition after the expiration of the statute of limitations is timely . . . if the new claim relates back to a properly filed claim contained in the original petition.”).

The district court’s denial of petitioner’s 2015 motion to stay and abey his 2015 Petition entitles him to equitable tolling from the dismissal of his 2015 Petition to the filing of his 2016 Petition. As the district court noted, the one-year statute of limitations under the AEDPA can be equitably tolled “if the petitioner shows that extraordinary circumstances beyond the petitioner’s control prevented him from timely filing of a federal habeas petition *and* the petitioner has acted diligently in pursuing his rights. *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010); *Jefferson v. Budge*, 419 F.3d 1013, 1016 (9th Cir. 2005); *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003); *Fail*, 315 F.3d at 1061-62; *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).” Petitioner has satisfied both the criteria of the existence of extraordinary circumstances and the exercise of diligence.

An extraordinary circumstance is one where an external factor prevents a petitioner from filing his federal habeas petition on time.

We will permit equitable tolling of AEDPA’s limitations period “only if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” *Calderon (Kelly)*, 163 F.3d at 541 (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996), cert. denied, 118 S. Ct. 60 (1997)); *Calderon (Beeler)*, 128 F.3d at 1288-89 (same). When external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate. See *Calderon (Kelly)*, 163 F.3d at 541; *Calderon (Beeler)*, 128 F.3d at 1288-89.

Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

In petitioner's case, the improper denial of his motion to stay and abey his 2015 Petition constituted an extraordinary circumstance. The denial of petitioner's motion to stay his 2015 Petition was beyond his control and made it impossible for petitioner to file his 2016 Petition in a timely manner.

In denying petitioner relief, the Ninth Circuit found that petitioner had waived the argument because it had not been presented to the district court. App. A, at 4. The Ninth Circuit further found that petitioner had not satisfied any of the criteria for considering a claim on appeal that had not been raised below. *Ibid.*

We may exercise discretion to review newly presented issues if: "(1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *Id.* (internal quotations omitted). "Further exception may be made when plain error has occurred and an injustice might otherwise result." *Id.* (internal quotations omitted). *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006).

Ibid.

However, the Ninth Circuit failed to consider whether petitioner had satisfied the criteria by presenting a pure question of law. As Circuit Judge Murguia wrote in her dissent, because the question of whether dismissal of a protective federal habeas petition pre-*Mena* can constitute an extraordinary circumstance sufficient to warrant equitable tolling is "purely a question of law," *Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006), we could have and should have addressed it for the first time on appeal.

App. A, at 7.

C. Conclusion

Petitioner acted with diligence in pursuing federal habeas relief. As recommended in *Pace*, he filed a protective federal habeas petition on November 18, 2015, two days of filing his state habeas petition in the Los Angeles Superior Court. He filed his state habeas petition in the California Court of Appeal forty-six days after the superior court denied his petition. He filed his state habeas petition in the California Supreme Court fifty-nine days after the court of appeal denied his petition. He filed his 2016 Petition fifteen days after the California Supreme Court denied his petition.

Applying *Mena*, petitioner was entitled to stay and abey his 2015 Petition to protect his 2016 Petition from dismissal as time-barred. Petitioner should be entitled to equitable tolling from the date of the dismissal of his 2015 Petition to the date of filing of his 2016 Petition. This Court should grant certiorari to address petitioner's questions.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Dated: March 3, 2020

Respectfully submitted,

By: /s/ *Jan B. Norman*
JAN B. NORMAN

Attorney for Petitioner-Appellant
JUAN GILBERTO MEDRANO

CERTIFICATE OF COMPLIANCE

I certify that pursuant to United States Supreme Court Rules, Rule 33.1(h)2, the attached Petition for Writ of Certiorari is proportionately spaced with a Times New Roman typeface of 12 points, contains 4245 words according to my word processing program.

Dated: March 3, 2020

Respectfully submitted,

By: */s/ Jan B. Norman*
JAN B. NORMAN

Attorney for Petitioner-Appellant
JUAN GILBERTO MEDRANO

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10627 Fitzroy Avenue, Tujunga, California 91042.

On March 3, 2020, I served the within entitled document described as
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, PETITION FOR WRIT OF CERTIORARI and APPENDIX TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by email from janbnorman@gmail.com and placing a true copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid, addressed as follows:

Jonathan M. Krauss
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
email: Jonathan.Krauss@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 3, 2020, at Tujunga, California.

By: */s/ Jan B. Norman*
JAN B. NORMAN