No. 20-5111

IN THE

SUPREME COURT OF THE UNITED STATES

James Earvin Sanders — PETITIONER
(Your Name)

vs.

Lorie Davis, Director, TDCJ — 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 Earvin Sanders TDCJ-ID# 1579328
(Your Name)

2101 FM 369 North
(Address)

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

Allred Unit
(Phone Number)

QUESTION(S) PRESENTED

If a petitioner can demonstrate that he falls under a built-in tolling provision a described in 28 U.S.C. §2244(d)(1)(A)-(D), does he also need to demonstrate the "extraordinary circumstances" of Holland v. Florida, or the "rare and exceptional circumstances" of Davis v. Johnson?

Is there a limit to how long a petitioner can be protected under provision (B) of the above statute?

LIST OF PARTIES

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

RELATED CASES

- Sanders v. State, no. 02-08-058-CR, 2008 WL 4445644 (Tex.App.-Fort Worth Oct. 2, 2008, no pet.).
- Sanders v. Director, TDCJ-CID, No. 4:19-cv-00236, U.S. District Court for the Eastern District of Texas. Judgment entered July 1, 2019.
- Sanders v. Lorie Davis, Director, No. 19-40633, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Dec. 13, 2019.

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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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
N/A [ ] is unpublished.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,
N/A [ ] is unpublished.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[ ] is unpublished.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 Second District of Tx, Court of Appeals court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished. I believe.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was 12/13/2019.

[ ] 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: _____, 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 May 11, 2020 (date) on March 12,2020 (date) in Application No. 19 A 1008.

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

United States Constitution, 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.

United States Constitution, 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 Jury, 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.

United States Constitution, 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 the defence.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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.

28 U.S.C. § 2244

(d)(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 became final by the conclusion of direct review or the expiration of the 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 the 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.

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SUPREME COURT Rules

Rule 10. **Considerations Governing Review on Certiorari**

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

HISTORY OF THE CASE

On or around November 8, 2006, Mr. Sanders suffered a nervous breakdown that precipitated a string of crimes that occurred over a 10-day period. The initial crime was a stabbing which was done with a screwdriver and culminated in several robberies. Two of those aggravated robberies comprise the cases in this appeal. Mr. Sanders has no recollection of the stabbing.

The Feds also charged Mr. Sanders with a felon in possession of a firearm case in which he received a 300-month sentence. Petitioner received an aggravated LIFE sentence from Denton County, in the instant case, and it was stacked on top of the federal sentence and run consecutively.

Thus, although this case and the felon in possession case (No.19-7498) are NOT directly related under the Supreme Court's definition, the pistol is one and the same, as was the crime spree.

On November 18, 2006, Petitioner was interviewed by Carrollton PD Detective Gregory Fraid. In said interview, Det. Fraid revealed that he and Mr. Sanders attended the same health club, and that he had seen Mr. Sanders in the club playing basketball with his son on numerous occasions. He went on to say that when his investigation led to Mr. Sanders, he knew something was wrong, that Mr. Sanders had suffered a psychological breakdown.

Therefore, he said he was only going to charge Mr. Sanders with aggravated kidnapping rather than attempted murder or attempted capital murder, because it was apparent that there were psychological aspects to the case: and Det. Fraid charged Mr. Sanders accordingly. That case was actually a Dallas County case.

Nonetheless, Det. Fraid made it clear that he gave credence to his

psychological assessment, and mentioned that eyewitness statements supported his belief. This interrogation was recorded in Lewisville PD (See State's Trial Exhibit 4), yet although it was clear that Mr. Sanders had suffered a nervous breakdown, other police departments--including Lewisville--continued to interrogate Mr. Sanders without providing psychiatric care to determine compentency or defense counsel.

Instead, authorities took advantage of Mr. Sanders, who had suffered a nervous breakdown and, ten days later, had still not received any psychiatric treatment whatsoever despite Det. Fraid's assessment. Yet they readily accepted confessions from him. Furthermore, his erratic behavior and poor comprehension was apparent when he ran out of an interrogation room and into the detectives bullpen where a Lewisville PD detective pulled his gun on Mr. Sanders and ordered him to get on the ground. Sanders said shoot me, shoot me, to the detective who holstered his gun and fought Sanders. This incident is chronicled in two separate police reports. See Exhibits 4-C & 5.

Once Mr. Sanders reached Denton County Jail, he visited with his sisters, Phyllis Powell and Sheila Myers, and told them about the Det. Fraid interrogation. Phyllis, a registered nurse, advised Mr. Sanders to tell his attorney about the interrogation, request a psych eval, and ask him to locate the interrogation tape.

In late November of 2006, Joseph Zellmer was appointed as Mr. Sanders's court-appointed counsel, apprised of the nervous breakdown, Det. Fraid's interrogation and psychological assessment, and asked to request a psych eval and locate the interrogation tape. Zellmer was given Fraid's name, the charge, and the city (Carrollton) where it occurred.

Nonetheless, Mr. Sanders repeatedly requested the tape and psych eval at each visit, only to be told by Zellmer that he was looking for the tape but "hadn't located it yet." Thus, in late-March, Mr. Sanders wrote Zellmer a letter to document the requests for the psych eval and the tape.

Zellmer did not reply via mail but rather came to visit Mr. Sanders in Denton County Jail. During this visit, Mr. Sanders, again, asked if Zellmer had located the tape and requested the psych eval. Zellmer then told Mr. Sanders that the interrogation tape "does not exist," and that he "could not come up with a defense to explain to a jury why you committed these crimes." He went on to suggest that Mr. Sanders plead guilty and go to the jury for punishment.

It should be noted that the State's offer was an aggravated LIFE sentence.

Mr. Sanders did not wish to plead guilty and told Zellmer as much. Zellmer then jumped up and went on a tirade about how Mr. Sanders had tied his hands by confessing to the crimes, and if Mr. Sanders wasn't going to listen to his advice, then he was getting off the case as his lawyer.

After more coercion by Zellmer, Mr. Sanders agreed to change his plea to guilty and go to trial for punishment. This decision was based on Zellmer's assertion that the tape did NOT exist, and there was no evidence to build a defense with.

These were blatant lies. Even at this point, late-March of 2007, Mr. Sanders still pushed for the psych eval, which was not conducted until June 26, 2007. This was not only seven months after Sanders's arrest, but it was conducted 'after' Zellmer advised Sanders to plead guilty.

Later, Zellmer would tell his client that the psych eval did not help their case. This was chiefly because there was supposedly no interrogation tape or other psychiatric mitigating evidence for the evaluator to use to determine his state of mind at the time the offenses were committed.

Yet, at trial for punishment, ADA Mary Miller presented the tape as State's Exhibit 4. Mr. Sanders then asked Zellmer, "Isn't that the tape I asked you to find, the one you said didn't exist?" Thus, Zellmer initially objected to the tape, but during the afternoon recess and outside the presence of the jury, he withdrew it. See Trial Excerpt Copy at 94-96 of State's Answer to Applicant's 11.07.

Please note that bailiffs had strapped a shock device around Mr. Sanders's chest and had threatened to shock him, drag him out of the courtroom, and continue the trial without him at the slightest "outburst." Therefore, Mr. Sanders was afraid to say anything.

Zellmer would later tell Mr. Sanders that the DA suppressed the tape, yet when Mr. Sanders asked his court-appointed appeal lawyer, J. Stanley Goodwin, to file on the suppression, he said he could not because:

1) Zellmer did not cite suppression of evidence in the objection; and 2) Zellmer withdrew the objection.

Furthermore, Mr. Sanders filed on the suppression of evidence based on what Zellmer had told him, only to have Zellmer himself defeat the ground for the State by now claiming he had the tape the whole time and viewed it as early as "1-25." See Sworn Affidavit at 2, Attorney response to Applicant's Assertion #1.

Mr. Sanders was convicted on February 1, 2008. Filed the direct appeal and no PDR. He received his discovery from Garland Cardwell,

his federal lawyer, after September 15, 2011, once all his state cases were adjudicated. Yet this was a full three and a half years post-conviction, but Cardwell would not give it to Mr. Sanders until then, while Zellmer and Mr. Sanders's Dallas County court-appointed counsel refused to share the facts of the case with him.

STATEMENT OF THE CASE

Thirty-five years ago, this Court held in United States v. Cronic that "[i]n some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided." 466 U.S. 648.

Under Cronic, prejudice is presumed where there has been the complete denial of counsel, where counsel entirely fails to subject prosecution's case to meaningful adversarial testing, or where circumstances make ineffectiveness impossible. Id. This constitutes a violation of the defendant's Sixth and Fourteenth Amendment rights.

In Faretta v. California, this Court held that "The Sixth Amendment includes a compact statement of the rights necessary to a full defense...[it] constitutionalizes the right in an adversary criminal trial to make a defense." 422 U.S. at 819.

The Court noted also that these and other rights are afforded to the defendant, because it is the accused who must suffer the consequences thereof. Id.

Throughout this criminal proceeding, Mr. Zellmer made no attempt to develop the insanity defense even though it was supported by credible evidence and was the Petitioner's only viable defense. See Davis v. Alabama, 596 F.2d 1214, 1218 (5th Cir. 1979).

Nearly 90 years ago, this Court said:

> "It is not enough to assume that defense counsel thus precipitated into the case (thought) there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate.
>
> Powell v. Alabama, 287 U.S. 45, 58 (1932).

The Psych Eval

"The determination at trial that a defendant was insane at the time of the commission of the crime is just that--a determination of his mental state at the time the act was committed."

Pesch v. State, 524 S.W. 2d 302 (Tex.Crim.App. 1975).

The available psychiatric mitigating evidence should have been provided to Dr. Kelly Goodness, so she would have accurate information of Mr. Sanders's mental state at the time the acts were committed in order to properly assess him. This would've been the same evidence the jury would have evaluated to decide on insanity at the time of the offenses at trial.

Yet Zellmer only provided her with Mr. Sanders's criminal history and one 1-hour interview. Zellmer "made only half-hearted attempts to obtain independent evidence regarding this sanity and abandoned those efforts for no strategic purpose." Loyd v. Whitley, 977 F.2d 145 (5th Cir. 1992).

Furthermore, in United States v. Kauffman, the Third Circuit ruled that failure to conduct any investigation into possible insanity defense was ineffective assistance. 109 F.3d 186 (3rd Cir. 1997).

And the Tenth Circuit agreed, saying, "a failure to timely investigate a client's mental state, let alone a failure to assert a mental state defense at trial, falls well below an objective standard of effectiveness." McLuckie v. Abbott, 337 F.3d 1193,1199 (10th Cir. 2003).

Zellmer committed these same violations which have already been deemed Sixth Amendment violations, but the Eastern District of Texas and the Fifth Circuit decided this §2254 lacked merit and was not taken in "good faith."

Zellmer's actions prejudiced Mr. Sanders's trial because he did not wish to plead guilty and intended to go to trial with the insanity defense, which was supported by credible evidence. Moreover, a positive psych eval, based on the available psychiatric mitigating evidence, would've shifted the burden of proof to the State to prove Mr. Sanders was sane at the time of the offenses. See Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987).

Suppression of Evidence

Zellmer complained about the confessions tying his hands, but he made no attempt to use the available psychiatric mitigating evidence to move for suppression of evidence. See Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985). Especially since Det. Fraid interrogated Mr. Sanders first and revealed his psychological assessment at that time. Therefore, law enforcement could not claim to be ignorant of the fact.

Conflict of Interest

As previously stated, in lying about the existence of crucial psychiatric mitigating evidence and suppressing it throughout the criminal proceeding, Zellmer shows he had no intention of providing a pro bono insanity defense even though it was Mr. Sanders's only viable defense.

The Petitioner initially believed this to be a simple failure to investigate thoroughly, but the submission of Zellmer's Sworn Affidavit proved it to be a Cronic violation because he admits he possessed and viewed the interrogation tape as early as "1-25" or January 25, 2007. See Sworn Affidavit at 2.

This is significant as during this time Mr. Sanders was requesting that tape and a psych eval. A full two months later, as corroborated per Zellmer's Sworn Affidavit, Mr. Sanders wrote him a letter documenting his request for the psych eval and the tape. See Affidavit at 2. Zellmer downplays the letter, but the contents thereof prove that despite the requests, Zellmer withheld the tape and lied about its existence to manipulate Mr. Sanders into pleading guilty.

Zellmer had no intention of putting on a pro bono insanity defense, so he withheld credible psychiatric mitigating evidence, thus creating a conflict of interest: How can Zellmer possibly advocate the defendant's cause per Strickland v. Washington, 466 U.S. 668 (1984), if he withholds crucial evidence from the defense? Where is the strategy in that?

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id.

A police detective, who had numerous opportunities to view Mr. Sanders, unawares, makes a psychological assessment and charges him based on that assessment--and this is on videotape. Then, other police and witness reports support Det. Fraid's conclusions.

How can Zellmer justify not using this evidence to advance the insanity defense, which was Mr. Sanders's only defense?

In Woodard v. Collins, the Fifth Circuit held, "When a lawyer advises his client to plea bargain to an offense which the attorney has not investigated, [s]uch conduct is always unreasonable." 898 F.2d 1027, 1029 (5th Cir. 1990).

These words are definitive. There is not a court out there that hasn't ruled against such actions. Yet they are simply echoing this

Court's ruling in McCarthy v. United States:

> "Because such a 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."
>
> 394 U.S. 459, 466 (1969).

Why then is the Fifth Circuit going against established federal and court of appeals rulings that are "the accepted and usual course of judicial proceedings..." and "decid[ing] an important federal question in a way that conflicts with relevant decisions of this Court?" See Supreme Court Rule 10(a) &(c).

More importantly, why is the Supreme Court allowing such actions to go unchecked and deny relief unjustly?

"[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case ane (the) cornerstones of (the) effective assistance of counsel." Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978).

Zellmer misrepresented "the realities of [the] case" in order to coerce a guilty plea based on disinformation. The method was utilized because Mr. Sanders repeatedly requested the tape and psych eval in pursuit of the insanity defense.

In the United States v. Nahodil, the Third Circuit ruled that an ineffective assistance claim was stated where counsel allegedly advised defendant to plead guilty despite defendant's repeated objections to doing so. 36 F.3d 323 (3d Cir. 1994).

Furthermore, Zellmer's burial of the psychiatric mitigating evidence is also reflected in the fact that he failed to provide any of it to Dr. Kelly Goodness when she performed the psych eval. This failure exacerbated as Zellmer failed to utilize any of the existing psychiatric mitigating evidence in mitigation, despite

the fact that it was only a punishment-phase trial.

Petitioner apologizes to the Court and does not want the Court to think he is stating his appeal. Touching on a number of the violations in the case was necessary before getting to the crux of the petition.

Procedural Bar

28 U.S.C. §2244(d)(1) has four built-in tolling provisions, but for whatever reason, only provision (A) is being used or applied by the Fifth Circuit. This practice, which goes against established equitable-tolling case law and is contrary to the statute itself, is unjustly denying habeas relief.

"After all, the time when a conviction becomes final is only one of four triggering events that Congress described in §2244(d)(1)." Libby v. Magnusson, 177 F.3d 43, 47-48 (1st Cir.1999).

"The statute of limitations begins to run from the latest of several possible events; the date Fisher's state judgment became final is the only relevant event here." Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999). "Fisher relies on our rule that a statute of limitations should be tolled if the plaintiff demonstrates that essential information could not be found by diligent inquiry. We apply this rule to those who could not discover in time the factual predicate of their claim...Congress already has addressed this in AEDPA's statutory tolling provision. See 28 U.S.C. §2244 (d)(1)(D)." Id.

Here it is evident that the Fifth Circuit is talking about a first petition being filed under §2244(d)(1)(D), as §2244(b)(2) pertains to second or successive petitions. Thus, the question is: If a petitioner can demonstrate that he falls under a built-in

tolling provision as described in §2244(d)(1)(A)-(D), does he also need to demonstrate the "extraordinarycircumstances" of Holland v. Florida, 130 S.Ct. 2549 (2010), or the "rare and exceptional circumstances" of Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998)?

Neither the statute nor case law say that a petitioner must do both, but that is the exceedingly high standard the the district court and the Fifth Circuit have placed on the Petitioner. This is because these courts have misapprhended the statute and is therefore misapplying it.

"The present petition was due no later than November 1, 2009, in the absence of tolling provisions. It was not filed until more than nine (9) years later on February 14, 2019." Dkt. 8-Report & Recommendation at 2.

First, the Fifth Circuit held that "In addition, the [AEDPA] limitation period does not establish an absolute outside limit within which suits must be filed," Davis at 811. Yet here the Fifth Circuit goes against its own ruling by upholding the lower court's ruling.

The amount of time elapsed between the conviction and the filing of this appeal is irrelevant because Petitioner Sanders did not file his first petition under §2244(d)(1)(A), but rather under (D). Mr. Sanders received his discovery from his federal court-appointed lawyer, Cardwell, after September 15, 2011--over three and a half years post-conviction. Nonetheless, this constitutes a relevant event under provision (D) as factual predicate or new evidence from this discovery would eventually be used in this appeal.

This situation was further complicated because the U.S. Marshal

(Exhibit 2-A), forced Mr. Sanders to release the discovery documents or lose them when he was placed on the chain back to TDCJ. This action should have triggered provision (B) since it impeded his ability to file his claim. Mr. Sanders had been in possesion of the documents less than two months, and did not have sufficient time to review all of them prior to catching the chain on November 18, 2011.

Any action that hinders or impedes one's ability to access the courts is unconstitutional, violating the First, Fifth and Fourteenth Amendments to the Constitution. Under the First Amendment, you have the right to "petition the government for redress of grievances," and under the Fifth and Fourteenth Amendments, we have a right to "due process of law."

Therefore, upon receiving the discovery, Mr. Sanders should have had one year to file from that date, which is verifiable through Garland Cardwell and Denton County Jail legal mail documentation logs. Upon the forced release of these documents when he was placed on chain, that year should have been suspended pursuant to §2244(d)(1)(B)--not to began again until the impediment was lifted.

Is there a time limit to how long a petitioner can be protected under provision (B)? The Petitioner has not found anything in the statute or case law that limits the amount of time one has to lift or remove the impediment under (B).

Nonetheless, §2244(d)(1) specifically says that the statute of limitations starts from the 'latest' of its provisions, which means a petitioner can have been under more than one of them. The tolling provisions are present and verifiable, but the district abused its authority by not allowing them to trigger as relevant events.

There is nothing a petitioner need do to be under a tolling pro-

vision, either your circumstances dictate it, or they do not. Do you have newly discovered factual predicate to fall under provision (D)? Has the Supreme Court made a ruling under provision (C) that affects your case? If so, then the petitioner should have one year from that date to file a §2254 petition.

Even if a petitioner has never filed a first petition, and it has been over a year since his conviction became final under provision (A), a relevant Supreme Court ruling under (C) should open the gateway in a first petition (or even a second or successive one), correct? Because there is no absolute outside time limit. See Davis at 811.

The Petitioner's circumstances show that he requested the facts of his case and the discovery from not one, but three different court-appointed attorneys between November of 2006 and September of 2011, which surpasses the diligent inquiry standard in Fisher.

Furthermore, because the Petitioner remained diligent after the forced release of the discovery, there is documentary evidence of his diligence in trying to reacquire the discovery thru various sources: family, Cardwell, Dallas and Denton County attorneys, and the Dallas DA's office. Said documentary evidence was submitted as well.

"A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing. Id. at 649. Sanders has shown neither." Dkt. 8 at 3, citing Holland.

Although these things are irrelevant because the aforementioned tolling provisions should have activated based on the circumstances

of the case, there were "extraordinary circumstances" and "rare and exceptional circumstances" in which a home flood destroyed the majority of the discovery documents. Yet, this was a result or byproduct of the forced release of the discovery, and §2244(d)(1)(B) would have already been activated. Furthermore, the circumstances of Holland and Davis pertain to situations where a State action is 'not' present. 'All' state actions that hinder one's ability to file should be covered under provision (B). Otherwise, the forced release of the discovery, which resulted in the majority of it being destroyed in the flood, would constitute "extraordinary" or "rare and exceptional" circumstances.

The facts are the facts. The circumstances of this case warrant the activation of §2244 (d)(1)(A), then (D), and then (B). Once the surviving discovery was located and returned to the Petitioner in September of 2016, he filed his 11.07 on March 22, 2017, and after it was denied on November 14, 2018, Petitioner filed this §2254 three months later on February 14, 2019; so after the removal of provision (B), the filing occurred within the one-year time frame.

REASONS FOR GRANTING THE PETITION

A. To avoid erroneous deprivations of the right to habeas relief, this Court should clarify what triggers a built-in tolling provision in §2244(d)(1), how long provision (B) can last, and use this case as an example of how the statute should function.

The Petitioner fully understands the concept of equitable tolling and the purpose of AEDPA, but "The clearest indication of congressional intent is the words of the statute itself." Davis. Before rulings like Holland and Fisher existed, the statute had its own built-in tolling provisions, and if a petitioner's circumstances warranted it, then the gateway was opened under one of those provisions.

Somewhere along the way, congressional intent has been thwarted, causing habeas relief to be denied. An applicant who uses newly discovered evidence to file a first petition should fall under provision (D). The amount of time that has passed since his conviction should not matter because there is no "absolute outside limit." Davis at 811.

The best example is this: If this Court makes a retroactive ruling, then anyone affected by that ruling can file a petition thereafter, seeking relief. Whether it has been one year, or five years, or twenty years, is irrelevant; they have one year to file from the date of the ruling. The caveat being that those filing a second petition would be judged under the stricter rules of §2244(b)(2)(A) & (B).

And the same goes for those who fall under provision (D) of this statute on a first petition. Not everyone will fit under (D), but those fortunate enough to obtain such factual predicate should not be denied their right to redress, especially when it's inline with

the statute, and this case is.

No. It probably won't grab headlines or set any precedents, but it will serve as an example to the lower courts that an applicant can start under one provision, move into another one and end up in a third. Unless the courts utilize the entire statute, the only result will be the denial of habeas relief.

In Lonchar v. Thomas this Court said, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." 116 S.Ct.1293 (1996).

Petitioner thanks the Court for its time and consideration.

Addendum

I, James Earvin Sanders, the Petitioner, do hereby declare under penalty of perjury that this Petition for Writ of Certiorari for No: 19A1008/USCA5 19-40633 was placed into the Allred Unit mailbox on Thursday, May 7, 2020. Petitioner has no idea why it did not make it to the post office on May 8th or May 11,2020, at the latest. First-class postage, in the form of 18 FOREVER stamps, was used to mail the petition on May 7th, and another 18 will be used to mail it out again.

I, James Earvin Sanders, also declare that I will be placing this petition back into the unit mailing system on June 21, 2020, to be sent Via indigent mail.

CONCLUSION

SIGNED this 21st day of June, 2020.

Respectfully,
James E. Sanders
James E. Sanders

The petition for a writ of certiorari should be granted.

Respectfully submitted,
James E. Sanders
James Earvin Sanders

Date: May 7,2020

PLACED IN UNIT mailing system on May 7, 2020. Mailroom supervisor, Shryl Maulden quoted postage to D.C. as $8.45 on 5/7/20.