

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2019

KELLY FRITHIOF SUNDBERG,

Petitioner,

- v -

HAROLD OREOL,
Executive Director of Patton State Hospital,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Sundberg

Question Presented

Along with the Fifth and Eighth Circuits, the Ninth Circuit requires petitioners that qualify for equitable tolling to show diligence during the period of equitable tolling and dismissed Petitioner Sundberg's Section 2254 habeas corpus petition for a lack of diligence; Sundberg's petition would be timely in the Second and Eleventh Circuits because of their clock-stopping rule. Should this Court resolve these conflicting approaches to equitable tolling?

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:

List of Directly Related Proceedings

1. United States District Court for the Southern District of California, *Sundberg v. Oreol*, 16cv3127-WQH. The district court entered the judgment on March 28, 2018. *See* Appendix C.
2. United States Court of Appeals for the Ninth Circuit, *Sundberg v. Oreol*, No. 19-55371. *See* Appendix A. The Ninth Circuit entered judgment on May 1, 2020, and denied a petition for rehearing and suggestion for rehearing en banc, on June 8, 2020. *See* Appendix B.
3. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

Question Presented	ii
List of Parties	iii
List of Directly Related Proceedings	iv
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
The State Court Record	3
Reasons to Grant the Writ	5
Conclusion	9
Appendix A: Ninth Circuit’s Opinion	10
Appendix B: Order Denying the Petition for Rehearing	16
Appendix C: Judgment	18
Appendix D: Report and Recommendation	20
Appendix E: Involved Federal Law	33
Certificate of Compliance	36
Proof of Service	37

TABLE OF AUTHORITIES

Federal Cases

<i>Am. Pipe & Constr. Co. v. Utah</i> , 414 U.S. 538 (1974)	9
<i>Artis v. District of Columbia</i> , 138 S. Ct. 594, 602 (2018)	7
<i>Cabello v. Fernández-Larios</i> , 402 F.3d 1148, 1156 (11th Cir. 2005)	7
<i>Chardon v. Fumero Soto</i> , 462 U.S. 650, 652 n.1 (1983)	8
<i>Checo v. Shinseki</i> , 748 F.3d 1373, 1380 (Fed. Cir. 2014)	7
<i>CTS Corp v. Waldberger</i> , 573 U.S. 1, 9 (2014)	7
<i>Coulter v. Kelley</i> , 871 F.3d 612, 623 (8th Cir. 2017), <i>judgment vacated upon suggestion of death, appeal dismissed as moot</i> , 876 F.3d 1112 (8th Cir. 2017)	6
<i>Colwell v. Tanner</i> , 79 F. App'x 89 (6th Cir. 2003) (unpublished)	8
<i>Gonzalez v. Hasty</i> , 651 F.3d 318, 324 n. 4 (2d Cir. 2011)	7
<i>Harper v. Ercole</i> , 648 F.3d 132, 136 (2d Cir. 2011)	4, 6, 7
<i>Hardy v. Quarterman</i> , 577 F.3d 596, 598 (5th Cir. 2009)	6
<i>Haekal v. Refco, Inc.</i> , 198 F.3d 37, 43 (2d Cir. 1999)	7
<i>Knight v. Schofield</i> , 292 F.3d 709, 711 (11th Cir. 2002) (per curiam).	4, 6
<i>Layne & Bowler Corp. v. W. Well Works, Inc.</i> , 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923)	5
<i>Smith v. Davis</i> , 953 F.3d 582 (9th Cir. 2020) (en)(banc)	4-5
<i>Sundberg v. Oreol</i> , No. 18-50397, 2020 U.S. App. LEXIS 4960 (9th Cir. Feb. 18, 2020)	1, 2, 4
<i>Jackson v. Davis</i> , 933 F.3d 408, 411 (5th Cir. 2019)	6
<i>Spottsville v. Terry</i> , 476 F.3d 1241, 1246 (11th Cir. 2007)	6
<i>Stroman v. Thaler</i> , 603 F.3d 299, 302 (5th Cir. 2010)	6

<i>United States v. Ibarra</i> , 502 U.S. 1, 4 n. 2 (1991)	7
--	---

Federal Statutes

28 U.S.C. § 1254(1)	2
---------------------------	---

18 U.S.C. § 2244(d)(1)	2
------------------------------	---

42 U.S.C. § 1997e(a)	7
----------------------------	---

Federal Rules

Supreme Court Rule 10	5
-----------------------------	---

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2019

KELLY FRITHIOF SUNDBERG,

Petitioner,

- v -

HAROLD OREOL,
Executive Director of Patton State Hospital,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Kelly Frithiof Sundbert, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered May 1, 2020.

Opinion Below

The decision of the court of appeals, *Sundberg v. Oreol*, No. 18-50397, 2020 U.S. App. LEXIS 4960 (9th Cir. Feb. 18, 2020), appears at Appendix A to this petition and is unpublished.

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on June 8, 2020.¹ This petition is being filed within ninety days.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

18 U.S.C. Section 2244(d)(1):

(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 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.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Statement of the Case

In 2016, Kelly Sundberg filed a federal habeas petition asking for relief from his not guilty by reason of insanity attempted murder conviction for insufficient evidence. The magistrate judge noticed that the petition was filed more than sixteen

¹ *Sundberg v. Oreol*, 803 F. App'x 148 (9th Cir. 2020), is attached in Appendix A.

years after the conviction, and flagged it for dismissal on timeliness grounds. The district court appointed counsel. After objections and a second Report and Recommendation,² the district court found that Sundberg could not establish that he was diligent in pursuing his rights even if he could show other grounds for equitable tolling; the district court granted judgment in favor Respondent Oreol.³

The State Court Record

California authorities arrested Kelly Sundberg for attacking his dad with a hammer. Charged with attempted murder, Sundberg entered a not guilty by reason on insanity plea. After a bench trial, Sundberg was convicted and sent off for evaluation. Sundberg then hired an attorney to appeal his conviction, but the appeal would never be filed and that attorney would subsequently be disbarred.

The records of Sundberg's state court proceeding only have the transcripts of Sundberg's preliminary hearing and the trial court's minutes. The record does not show that Sundberg was advised of what he was giving up by pleading not guilty by reason of insanity. Sundberg's case appears to be an ordinary mens rea defense case: he did not intend to kill his father. By pursuing the not guilty by reason of insanity defense, however, Sundberg conceded his intent for purposes of trial.

According to Sundberg's federal habeas petition, Sundberg believed that he was allowed to contest his factual guilt on appeal but he never got that chance

² See Appendix D, Report and Recommendation.

³ See Appendixt C, Judgment.

because he was abandoned. Sundberg tries to use the state court, but when he files, he is told that it is too late and that he lacks the necessary materials for appeal.

The Ninth Circuit held that even though Sundberg was abandoned by counsel (tolling the clock for four years), Sundberg could not show diligence because he waited another twelve years to file. *Sundberg v. Oreol*, 803 F. App'x 148, 149 (9th Cir. 2020) Sundberg's failure to pursue his rights diligently in these multi-year periods, which collectively lasted a decade, is conclusive that he failed to pursue his rights diligently “up to the time of filing his claim in federal court.” (citing *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en)(banc)).⁴

The Ninth Circuit's diligence requirement is contrary to the rule of two other courts of appeal. *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011); accord *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002) (per curiam). The Second and Eleventh Circuit apply the rule that equitable tolling applies until the condition that cause the tolling has abated. For Sundberg, that would mean that he would get tolling from the period that he was abandoned by counsel through the years of filing state courts habeas petitions which were dismissed as barred. California had no specific timeliness rules for persons like Sundberg that were found not guilty by reason on insanity. Sundberg should receive equitable tolling up to his federal filing because of the equitable tolling circumstance of abandonment.

⁴ Mr. Smith is seeking certiorari review. See *Smith v. Davis*, petition for cert. filed, No. 20-5366 (August 14, 2020).

The full clock-stop rule comports with the ordinary notion of fairness which this Court should rule for and overrule the Ninth Circuit's conflicting approach.

Reasons to Grant the Writ

It is this Court's responsibility to resolve conflicting interpretations of the law by the circuit courts.⁵ Supreme Court Rule 10 identifies a conflict between the circuits as being sufficient grounds to justify certiorari review. Conflicts in the law between the circuits are disreputable to the appearance of justice. *See, e.g., Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (certiorari review is appropriate because real conflicts in the law are embarrassing).

The Ninth Circuit follows the rule that petitioners that qualify for equitable tolling still must satisfy a diligence requirement. *See Smith v. Davis*, 953 F.3d at 599 ("What we make clear is that it is not enough for a petitioner seeking an exercise of equitable tolling to attempt diligently to remedy his extraordinary circumstances; when free from the extraordinary circumstance, he must also be diligent in actively pursuing his rights.")

⁵ *Johnson v. United States*, 576 U.S. 591, 629, 135 S. Ct. 2551, 2576 (2015) (Alito, J. dissenting).

The Ninth Circuit is not alone in its interpretation: the Fifth Circuit also subscribes to the extra-diligence approach.⁶ The Eighth Circuit has a similar requirement to show diligence in addition to whatever the equitable tolling circumstance is.⁷ The Second and Eleventh Circuits follow a different rule in which a clock that is stopped for equitable tolling is simply stopped.⁸ In the words of the Eleventh Circuit: “Tolling means just what it says—the clock is stopped while tolling is in effect.”⁹ The Second and Eleventh Circuit has no independent diligence requirement.

The Second Circuit saw the clock-stopping view of equitable tolling as more in harmony with this Court’s view of equitable tolling.¹⁰ The clock-stopping approach “is consistent with the general rule of equitable tolling articulated by the Supreme Court,” under which “[p]rinciples of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later

⁶ See *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (“This court has also looked to how ‘quickly [a petitioner] pursued federal habeas relief after receiving delayed notice of the denial of his state habeas application.’” (quoting *Williams v. Thaler*, 400 F. App’x 886, 891 (5th Cir. 2010))); *Stroman v. Thaler*, 603 F.3d 299, 302 (5th Cir. 2010) (per curiam) (holding that petitioner “had not shown the due diligence required” after filing his federal habeas petition within seven weeks of learning the state habeas petition had been denied, because “[t]o warrant tolling . . . a petitioner must show that he ‘pursued [habeas relief] . . . with diligence and alacrity’” (quoting *Hardy v. Quartermann*, 577 F.3d 596, 598 (5th Cir. 2009))).

⁷ *Coulter v. Kelley*, 871 F.3d 612, 623 (8th Cir. 2017), *judgment vacated upon suggestion of death, appeal dismissed as moot*, 876 F.3d 1112 (8th Cir. 2017).

⁸ *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011); accord *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002) (per curiam).

⁹ See *Knight v. Schofield*, 292 F.3d at 712; *Spottsville v. Terry*, 476 F.3d 1241, 1246 (11th Cir. 2007).

¹⁰ *Harper v. Ercole*, 648 F.3d 132, 139 (2d Cir. 2011).

event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.” *Harper*, 648 F.3d at 139 (quoting *United States v. Ibarra*, 502 U.S. 1, 4 n. 2 (1991)). And, as the Second Circuit acknowledged, the stop-clock method is consistent with the law’s approach to equitable tolling under other federal statutes. *Id.* at 139–140 (citing *Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999) (observing in context of Commodity Exchange Act filing that “[w]hen equitable tolling is applied, the limitations period is deemed interrupted; when the tolling condition or event has ended, the claimant is allowed the remainder of the limitations period in which to file his action”)); *Gonzalez v. Hasty*, 651 F.3d 318, 324 n. 4 (2d Cir. 2011) (effectively applying same approach to equitable tolling under Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)); *see also Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014) (tolling “the 91 days that [a veteran disability claimant] was homeless . . . with the entire 120–day appeal [limitations] period starting to run upon her receipt of the adverse decision” after her homelessness ended); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1156 (11th Cir. 2005) (holding a claim timely when filed nine years after equitable tolling stopped the beginning of the Alien Tort Claims Act’s ten-year limitations clock).

This Court has consistently held that tolling “stop[s] the limitations clock,” and “ha[s] similarly comprehended what tolling means in decisions on equitable tolling.” *Artis v. District of Columbia*, 138 S. Ct. 594, 602 (2018); *e.g., CTS Corp. v. Waldberger*, 573 U.S. 1, 9 (2014); *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (*per curiam*).

(“Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped”); *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) (explaining that “tolling” means “during the relevant period, the statute of limitations ceases to run”); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (tolling “suspends the applicable statute of limitations”). In *Artis* the full Court agreed that “stop clock tolling” was “standard and off-the-shelf . . . for equitable tolling . . .” 138 S. Ct. at 615 n.10 (Gorsuch, J., dissenting). Put simply, a “statute of limitations can be equitably or statutorily tolled, . . . but tolling does not expand the limitations period beyond its statutorily mandated boundaries; it merely stops the clock from running during the tolling period.” *Colwell v. Tanner*, 79 F. App’x 89 (6th Cir. 2003) (unpublished) (applying a stop-clock calculation for statutory and equitable tolling, but holding a petition was untimely when filed “234 days after . . . the latest possible date on which the limitations period could have run,” even if tolled) (quotation modified);

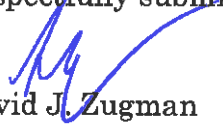
Had Kelly Sundberg’s case arisen in the Second or Eleventh Circuit, he would have received equitable tolling until the equitable tolling circumstance abated. Here, a mentally ill man was left to fend for himself after having hired an attorney to represent him. When he files in state court, he is wrongly told that his filing is out of time and otherwise barred. To further require that this mentally ill man confined to a mental institution should also know to be diligent in his pursuit of his

habeas corpus remedy under federal law is simply unfair. This Court should hold that a stopped clock is a stopped clock for purposes of equitable tolling.

Conclusion

A writ of certiorari is warranted to resolve this conflict in the circuits..

Respectfully submitted,



David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101
Tel: (619) 699-5931
Email: dzugman@gmail.com
Attorney for Sundberg

Dated: August 31, 2020