

No. _____

IN THE
Supreme Court of the United States

—
KELLEY KELLER,

Petitioner,

v.

CHRISTIAN PFEIFFER, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners who seek to have AEDPA's statute of limitations equitably tolled must show (1) they were diligent in preparing their federal habeas petition and (2) extraordinary circumstances caused an untimely filing. In analyzing a request for equitable tolling, should courts employ the "stop clock" method, as the Second, Third, and Tenth Circuits do, or should they require a showing of diligence throughout the entire tolling period—even when the extraordinary circumstance does not arise until days before the statute of limitations expires—as the Ninth, Seventh, Eighth, and Eleventh Circuits do?

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

Kelley Keller (“Keller”) petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit affirming the district court’s denial of habeas relief.

OPINIONS BELOW

Keller attaches the Ninth Circuit’s Order Denying Keller’s Petition for Reconsideration as Appendix A; the Ninth Circuit’s Memorandum denying Keller’s appeal as Appendix B; the Ninth Circuit’s Order granting a Certificate of Appealability (“COA”) as Appendix C; the district court’s judgment as Appendix D; the district court’s denial of a COA as Appendix D; the district court’s judgment and order adopting the magistrate judge’s report and recommendation to dismiss the petition as Appendix E and F; and the magistrate judge’s report and recommendation as Appendix G. The California Supreme Court summarily denied Keller’s petition (App. H).

JURISDICTION

Keller is in state custody at the California Substance Abuse Treatment Facility in Corcoran, California. Keller filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his conviction and sentence in

district court. The district court denied the petition with prejudice and denied a COA. (Apps. E, D.) The Ninth Circuit granted a COA but ultimately affirmed the district court's denial of relief (Apps. C, B). This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 90 days after the entry of judgment pursuant to Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "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."

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"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." 28 U.S.C. § 2244(d)(1).

STATEMENT OF THE CASE

A. Keller's Conviction Became Final on November 25, 2014

On January 17, 2012, a jury found Keller guilty of one count of murder; three counts of attempted murder; three counts of assault on police officer with semiautomatic firearm; one count of evading a police officer causing death; one

count of possession of a firearm by a felon; and two counts of resisting an executive officer. (App. G at 20.)

On May 30, 2012, the trial court sentenced Keller to a term of 123 years to life in prison. Keller appealed. The California Court of Appeal affirmed Keller's conviction, but remanded due to sentencing error. The trial court resentenced Keller to a total term of 139 years to life in state prison. The California Court of Appeal recalled the remittitur and re-filed its opinion. Keller then filed a petition for review, which the California Supreme Court denied on August 27, 2014. (App. G at 21.)

Keller's one-year federal statute of limitations period began running on November 25, 2014, ninety days after the California Supreme Court affirmed the judgment on appeal. *See Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (a conviction becomes final ninety days after the California Supreme Court denies review if petitioner does not file a petition for writ of certiorari).

B. Habeas Proceedings in Superior Court

Keller, a mentally ill inmate with learning disabilities, asked jailhouse lawyer, Arthur Carr, to help prepare his initial state habeas petition. (App. F at 16-18.) Carr agreed to help, but was eventually transferred to a different facility while still in possession of Keller's files. (App. F at 16.) Keller had to begin preparing his petition without Carr's assistance and without the legal files he entrusted to Carr.

In February 2015, Keller attempted to obtain case materials from trial counsel, but counsel never responded. Keller also unsuccessfully attempted to obtain case materials from the District Attorney's Office between March and May

2015. Keller ultimately obtained a copy of his trial transcripts on July 16, 2015, about six months after his separation from Carr. (App. G at 34.)

Between December 2014 and April 2015, Keller had minimal access to the library. Of the six requests Keller submitted, the library granted just three. (App. G at 28-29.)

On November 24, 2015, Keller constructively filed¹ a petition in Los Angeles County Superior Court, one day before the federal statute of limitations expired. The superior court denied the petition on January 4, 2016, on the merits. (App. G at 24.)

C. Habeas Proceedings in the California Court of Appeal

Keller constructively filed his petition in the California Court of Appeal on March 14, 2016—70 days after the superior court denied his petition. The California Court of Appeal summarily denied the petition on March 25, 2016.² (App. G at 24.)

D. Habeas Proceedings in the California Supreme Court

Keller handed his habeas petition to prison officials to be mailed to the California Supreme Court on May 25, 2016, 61 days after his California Court of

¹ Because Keller is a pro se petitioner, the “mailbox” rule applies. *Stewart v. Cate*, 757 F.3d 929, 933 n.3 (9th Cir. 2014). Under the mailbox rule, a petition is considered to be filed on the date a prisoner hands his petition to prison officials for mailing. *Id.*

² In *Robinson v. Lewis*, the California Supreme Court held that any gap period—the period of time between the denial of a petition by a California court and the filing of a petition in a higher court—of 120 days or less is presumptively reasonable. 9 Cal. 5th 883, 901 (2020). The petition was therefore “properly filed” under § 2244(d)(2).

Appeal petition was denied. (App. G at 30.) Due to an administrative mistake, the California Supreme Court mailed it back. Keller's second attempt at mailing his petition was not successful due to issues with the mail. (App. G at 30.) On his third attempt to mail the California Supreme Court his petition, Keller included a request that the court notify him when they receive the petition. The court notified Keller that it received the petition on August 22, 2016. On November 22, 2016, the California Supreme Court denied Keller's habeas petition. (App. G at 31.)

Keller received the California Supreme Court's order denying his petition on November 30, 2016, eight days after the court issued the denial. Keller constructively filed his federal habeas petition on December 1, 2016, one day after he received the order. (App. G at 31.) Respondent then filed a Motion to Dismiss the Petition arguing Keller's petition was untimely. The magistrate judge issued a Report and Recommendation finding Respondent's Motion to Dismiss meritorious. (App. F at 18.) The district court affirmed the findings and dismissed Keller's petition without reaching the merits of his claims. (App. E at 15.)

E. Federal Habeas Proceedings

In its Memorandum denying Keller's appeal, the Ninth Circuit assumed Keller's federal clock was statutorily tolled until the California Supreme Court denied his state habeas petition and that Keller's lack of notice regarding the California Supreme Court's denial of his petition constituted an extraordinary circumstance. (App. B at 3-4); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (a "prisoner's lack of knowledge that the state courts have reached a final resolution can provide grounds for equitable tolling"). The Ninth Circuit nevertheless denied

Keller's equitable tolling claim because it found Keller did not act diligently in the 364-day period *before* the extraordinary circumstance arose. (App. B at 5.) The court faulted Keller for waiting two years to request records and waiting to file his initial state habeas petition until his statute of limitations had nearly run. (App. B at 5.)

THIS COURT SHOULD GRANT THE WRIT

A. The Circuit Courts of Appeal Are Split Over Whether to Apply the Stop-Clock Approach to Equitable Tolling

Title 28 U.S.C. § 2244(d) requires petitioners to file their federal habeas petitions within one year of the date their conviction becomes final on direct review. § 2244(d)(1)(a). AEDPA's statute of limitations may be equitably tolled "in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). A petitioner is entitled to equitable tolling if he shows: (1) he has been pursuing his claims diligently; and (2) some extraordinary circumstance stood in his way and prevented timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

"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." *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991). The Second Circuit consistently applies this "stop-clock" approach to analyzing claims for equitable tolling. In *Harper v. Ecole*, the Second Circuit emphasized that a habeas petitioner seeking equitable tolling need only show reasonable diligence in pursuing his claim *throughout the period he seeks to have tolled*. 648 F.3d 132, 134 (2d Cir. 2011). Once tolling ends and the clock begins running again, a § 2254

petition is timely “as long as it is filed before the total untolled time exceeds one year.” *Id.* The court noted this approach assures habeas petitioners “the full year allowed them by Congress” to file their habeas petitions. *Id.* at 140. The Third and Tenth Circuits appear apply the stop-clock approach as well. *William A. Graham Co. v. Haughey*, 646 F.3d 138, 147 (3d Cir. 2011) (“Time that passes while a statute is tolled does not count against the limitations period”); *United States v. Gabaldon*, 522 F.3d 1121, 1126 (10th Cir. 2008) (holding that petitioners need not show diligence for period preceding the extraordinary circumstance).

In the past, the Ninth Circuit has also endorsed the stop-clock approach, albeit inconsistently. In *Grant v. Swarthout*, the Ninth Circuit found that “when Congress enacts a statute of limitations for filings (as it did in AEDPA),” the equitable tolling analysis should give full effect to that period of time deemed reasonable by Congress. 862 F.3d 914, 919 (9th Cir. 2017); *id.* at 921 (noting that equitable tolling allows habeas petitioners to exercise their “right to use a full 365 days” to file their petitions). As in *Harper*, the Ninth Circuit in *Grant* ruled that diligence need only be shown for the period when an extraordinary circumstance prevented a petitioner from preparing his petition. *Id.* at 923-34. But in other cases, the Ninth Circuit declined to apply the stop clock approach. *See Smith v. Davis*, 953 F.3d 582, 588 (9th Cir. 2020) (noting the Ninth Circuit has “not been particularly clear and point in opposite directions” regarding the proper equitable tolling analysis in the habeas context).

Recently, in *Smith v. Davis*, an en banc panel of the Ninth Circuit formally split ways with the Second, Third, and Tenth Circuits and the stop-clock approach. There, the Ninth Circuit held that a petitioner seeking equitable tolling must show he has been reasonably diligent, not only while an impediment to filing caused by an extraordinary circumstance existed, “but before and after as well, up to the time of filing his claim in federal court.” *Id.* at 599. *Smith* brings the Ninth Circuit in line with other Circuits that reject the stop-clock approach, including the Seventh, Eighth, and Eleventh Circuits. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990) (“We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term”); *Earl v. Fabian*, 556 F.3d 717 (8th Cir. 2009) (denying equitable tolling because petitioner failed to act diligently *after* the extraordinary circumstance lifted); *San Martin v. McNeil*, 633 F.3d 1257 (11th Cir. 2011) (faulting petitioner for waiting almost a year to file his initial state habeas petition).

B. Petitioners in Jurisdictions Where the Stop-Clock Approach Is Not Applied Are Unfairly Deprived of the Full One-Year Period Congress Deemed Appropriate to File Their Petitions

This Court should grant the writ because there is confusion among the circuits about the relationship between equitable tolling and AEDPA’s one-year deadline. *See* Supreme Court Rule 10(a) (in deciding whether to grant a petition for writ of certiorari this Court should consider whether “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”). The unequal application of the equitable tolling doctrine among the circuits unfairly penalizes petitioners in

jurisdictions where the stop-clock approach is not applied. The inequity plays out in full effect in Keller's case.

If the Ninth Circuit applied the stop-clock approach, Keller would only have had to show that he acted diligently during the eight-day period he lacked notice of the California Supreme Court's decision. The record supports a finding that Keller was diligent. Keller attempted to file his petition with the California Supreme Court three times. After mailing the petition out the third time, Keller, in an abundance of caution, included a request that the court notify him when they receive it. The court notified Keller he received the petition in August 2016. Three months after receiving the notice, the California Supreme Court denied the petition. Though Keller did not check on the status of his case during the three months the case was pending, this did not constitute a lack of diligence. *See Fue v. Biter*, 810 F.3d 1114, 1117 (9th Cir. 2016) (finding that a petitioner who waits ten months to contact the California Supreme Court regarding the status of his case to be reasonably diligent). Keller was obviously working on his federal petition while the California Supreme Court was reviewing his petition, given that he managed to constructively file his federal habeas petition just *one day* after receiving actual notice of the denial. Thus under the stop-clock approach, Keller would have been entitled to equitable tolling for the time he lacked notice of the California Supreme Court's decision and to a finding that he filed a timely petition. The Ninth Circuit's application of its rule from *Smith v. Davis*, however, precluded a finding of equitable tolling. Rather than focus on Keller's actions while the impediment to

filings was in place, the court looked to what Keller did in the 364 days before Keller filed his initial state habeas petition.

The Ninth Circuit's approach is flawed in numerous ways. It overrides Congressional intent and deprives petitioners of a full, unencumbered period of 365 days to file petitions. Further, as the Tenth Circuit has noted, the approach penalizes petitioners for taking advantage of the time allotted to him by Congress to research and write his claims in the most compelling manner possible. Instead, it incentivizes petitioners to rush through the process of preparing their petitions. *Gabaldon*, 522 F.3d at 1126. Finally, it improperly puts courts in the "business of deciding how long one should take to prepare and file a federal claim," when Congress has already decided a year is appropriate. *Smith*, 953 F.3d at 614 (Berzon, J., dissent).

Thus Keller should not have been penalized "for failing to file early or take other extraordinary precautions early in the limitations period," *Valverde v. Stinson*, 224 F.3d 129, 136 (2d Cir. 2000)—nor should other petitioners seeking equitable tolling in circuits that decline to apply the stop-clock rule.

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CONCLUSION

Because the circuits are split on the applicability of the stop-clock approach to equitable tolling in the habeas context, and because the approach of the Seventh, Eighth, Ninth, and Eleventh Circuits violate AEDPA, this Court should grant the writ.

Respectfully submitted,

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DATED: May 5, 2021

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