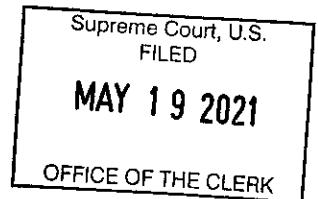


No. 20-8140

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JAMAAL DIGGS -- PETITIONER

vs.

DARREL VANNOY -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR CERTIORARI

JAMAAL DIGGS #486702

CAMP "D" – RAVEN 2 LEFT

LOUISIANA STATE PENITENTIARY



QUESTION(S) PRESENTED

Whether, in pursuit of his first federal habeas corpus petition, Diggs exhibited sufficient diligence to entitle him to equitable tolling during the delay in receiving notice that the Louisiana Supreme Court had denied his state habeas petition.

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:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Diaz v. Kelly, 515 F.3d 149, 155 (2nd Cir. 2008).....	6
Holland v. Florida, 560 U.S. 631, 647 (2010).....	12
Huizar v. Carey, 273 F.3d 1220 (7th Cir. 2012).....	6
Jackson v. Davis, 933 F.3d 408, 411 (5th Cir. 2019).....	6
Lanchar v. Thomas, 517 U.S. 314, 324 (1996).....	8
Phillips v. Donnelly, 216 F.3d 508 (5th Cir. 2000).....	7, 8, 9
Umana v. Davis, 791 Fed. App'x 441 (5th Cir. 2019).....	8
Umana v. Davis, 946 F.3d 281, 282 (5th Cir. 2020).....	8, 10
Umana v. Davis, No. 18-20127, 2019 U.S. App. LEXIS 30542, at *3 (5th Cir. Oct. 11, 2019).....	9
Valverde v. Stinson, 224 F.3d 129 (2nd Cir 2012).....	10

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

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 840 Fed. Appx. 779; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

- reported at 2018 WL 4955867; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ To the petition and is
 reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 1, 2021.

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: February 24, 2021, and a copy of the order denying rehearing appears at Appendix "D".

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. § 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

22 U.S.C. §2244(d) provides:

- (1) A 1 year period of limitations shall apply to an application for a writ of habeas corpus by a person in state 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;
 -
- (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

On October 24, 2012, Jarnaal Diggs was convicted of second-degree murder and sentenced to life in prison without parole. Diggs timely appealed his sentence to the Louisiana Third Circuit Court of Appeal. The Third Circuit affirmed Diggs's conviction and sentence on February 12, 2014. Diggs did not seek direct review from the Louisiana Supreme Court.

On February 11, 2015, Diggs filed a state petition for post-conviction relief in the trial court. The trial court denied petitioner on August 10, 2015. The Third Circuit denied Diggs's timely petition for review on March 14, 2016, and the Louisiana Supreme Court denied Diggs's timely petition for review on September 29, 2017. Due to a "change in staff," the Clerk of Court for the Louisiana Supreme Court failed to forward any notices of court action to Angola prison from approximately August 25, 2017, through October 26, 2017. As a result, Diggs did not receive the final decision of the Louisiana Supreme Court until November 9, 2017.

On December 8, 2017, Diggs delivered his petition for writ of habeas corpus under 28 U.S.C. § 2254 to prison officials for filing in Western District of Louisiana. Diggs stated in his application that the one-year limitation period of 28 U.S.C. § 2244(d) had passed but that "[e]quitable tolling should apply to this case due to the Louisiana Supreme Court['s] failure to send the ruling in a timely fashion."

On February 7, 2018, the federal magistrate judge ordered Respondent Darrel Vannoy to submit a memorandum "fully" addressing "petitioner's claim that although his petition is untimely, he is nevertheless entitled to equitable tolling of the limitation period." On March 4, 2018, the Respondent submitted a memorandum stating—in apparent reliance on an erroneous case citation—that "the petitioner's filing of the instant Federal Writ of Habeas Corpus on

December 11, 2017 does not appear to be time barred.”

On September 18, 2018, the magistrate judge issued her report and recommendation and addressed the issue of equitable tolling sua sponte. ROA. 228, 234. The magistrate judge held Diggs had failed to show that “he acted with sufficient diligence to support the application of equitable tolling in this case,” based on the timings of Diggs’s various filing for relief. The magistrate judge recommended that Diggs’s petition be dismissed with prejudice.

Diggs timely objected to the magistrate’s report and recommendation. On October 12, 2018, the district court overruled the objection and accepted the report and recommendation dismissed the petition for habeas corpus with prejudice.

This Court granted a certificate of appealability on August 30, 2019. After completion of briefings, oral argument was held on December 1, 2020, and the panel issued its opinion on January 11, 2021. In its Opinion, the panel affirmed the district court, stating:

Diggs cannot demonstrate diligence in any of these facets: not on the front end of filing the state habeas petition, not on the back end of filing the federal petition after the state court denial, and not in between those times by inquiring about the status of his pending state habeas petition. Diggs waited 334 days after his conviction became final before mailing his state petition, leaving him only 30 days to file a federal petition once the state habeas proceedings concluded. Then, once he received notice (albeit delayed) that his state petition had been denied, he waited another 29 days to file in federal court. And although more than a year and a half had passed between Digg[s]’s submitting his petition to the Louisiana Supreme Court, and receiving the final decision, he never inquired about the case’s status. The district court thus did not abuse its discretion in concluding that both before and after receiving notification that his state petition was denied, Diggs failed to demonstrate the degree of diligence that warrants tolling the statutory filing deadline.

Op. at 5. Diggs applied for rehearing and rehearing en banc which both were denied on February 24, 2021.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit Court of Appeals affirmed the district court's dismissal of petitioner's petition for habeas corpus relief as untimely. The Court entered a decision that conflicts with decisions of other United States courts of appeal, and the Court departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Court erred in holding that Jamaal Diggs failed to show diligence by "not inquiring about the status of his pending state habeas petition" during the "year and half [that] had passed between Diggs's submitting his petition to the Louisiana Supreme Court," Op. at 5, because based on jurisprudence from Louisiana, Diggs had no reason to know that such inquiries would be necessary, nor would such inquiries have changed the circumstances of his case. Indeed, there is no evidence that the Louisiana Supreme Court failed to rule on his petition in an unusually delayed manner; rather, the evidence showed only that notification of the decision was delayed by 41 days due to a one-time failure of mail room operations.

"What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." Jackson v. Davis, 933 F.3d 408, 411 (5th Cir. 2019). "[C]ourts have not required pro se litigants to send state courts frequent inquires regarding the status of their applications, 'at least until a substantial period of time has elapsed.'" Id. at 412 (quoting Diaz v. Kelly, 515 F.3d 149, 155 (2nd Cir. 2008)). Importantly, there are courts and jurisdictions where a year and a half would not be considered an unusual delay and under such circumstances there would appear no reason to inquire until delay becomes unusual. See e.g. Huizar v. Carey, 273 F.3d 1220 (7th Cir. 2012)

(finding that a twenty-one month delay is “not an unusually long time to wait for a court decision”).

Here, there was no evidence or indication that a “substantial period of time” had elapsed by the standards of the Louisiana Supreme Court, and thus, this Court’s assumption that Diggs failed to make timely intermediate inquires was not based on record evidence nor any other source detailing the typical decision standards of the Louisiana Supreme Court. Indeed, it is quite possible that the Louisiana Supreme Court’s decision in Diggs’s case was well within its typical timeline, such that Diggs would have had no reason to submit intermediate inquires. Diggs respectfully requested that the Fifth Circuit panel conduct a rehearing to consider, on what record basis, it could have determined that his failure to make intermediate inquires showed a lack of diligence under the historical standards of Louisiana. Rehearing was denied. However, the Court departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power when this determination was made without any record support. Accordingly, Mr. Diggs request that this court grant certiorari and remand for a hearing regarding on this specific matter.

Further, the lack of a prior evidentiary hearing is particularly prejudicial to Diggs where the district court made its determination *sua sponte* after the State conceded (wrongly or not) that Diggs’ petition was timely. At a minimum, an evidentiary hearing should have been ordered to more fully develop the facts and circumstances surrounding Diggs’ pursuit of post-conviction and habeas relief. See Phillips v. Donnelly, 216 F.3d 508, 511 (5th Cir. 2000) (remanding to district court to conduct a hearing on question of petitioner’s diligence). Remand for an evidentiary hearing cannot be viewed as an unreasonable remedy where the sole

alternative result is the dismissal of a first federal habeas petition, which “denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” Jackson, 933 F.3d at 410 n.2 (quoting Lanchar v. Thomas, 517 U.S. 314, 324 (1996)).

The Fifth Circuit further departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power where the panel's decision conflicts with other decision of the court itself, and denied En Banc review that was necessary to ensure the uniformity of its decisions. The Fifth Circuit's decision conflicts with other decisions by the court, to wit, Umana v. Davis 791 Fed. App'x 441 (5th Cir. 2019), and Phillips v. Donnelly, 216 F.3d 508 (5th Cir. 2000). In cases of equitable tolling, the Fifth Circuit has frequently determined a petitioner's diligence based on elapsed periods of time for taking actions in furtherance of post conviction relief. Acceptable periods of diligence thus become markers for future cases and future petitioners. Here, Petitioner Diggs matched the elapsed time periods of prior successful petitioners in Umana and Phillips, yet Diggs was denied relief.

The Fifth Circuit recently considered, but declined, en banc review to address the difficult question of equitable tolling in Umana v. Davis 946 F.3d 281, 282 (5th Cir. 2020). The denial of en banc in that decision, however, came with a thorough dissent (Smith, J.) highlighting the uncertain and fortuitous nature of equitable tolling cases in this Circuit. En banc review would have been the proper and appropriate course of action to clarify this area of the law in this Circuit. But since the this Circuit failed to seize the opportunity to clarify this important aspect of law, this court should exercise its supervisory power to clarify this significant area of law.

Petitioner Diggs “matched” the delays of the successful petitioners in Umana and Phillips.

In this case, Petitioner Diggs waited 334 days after his conviction was final to seek post-conviction relief in state courts; and after receiving (delayed) notification of the denial of his state court petition, Diggs waited an additional 29 days to file for federal habeas relief. Thus, without application of equitable tolling, Diggs would have used 363 days of his one-year AEDPA clock.

In Phillips v. Donnelly, 216 F.3d 508, 511 (5th Cir. 2000), this Court held that a petitioner had “pursued the process with diligence and alacrity” because, among other things, he “filed his federal habeas appeal within one month of the denial of the [final state appeal]” (emphasis added). The Court thus held that the alleged “delay in receiving notification... could qualify for equitable tolling.” Id.

In this Court’s most recent case addressing equitable tolling, the panel held that a petitioner had shown diligence even where he filed his state habeas petition “one month prior to the expiration of the AEDPA limitations period.” Umana v. Davis, No. 18-20127, 2019 U.S. App. LEXIS 30542, at *3 (5th Cir. Oct. 11, 2019).

The facts in this case are strikingly similar. Like the petitioner in Umana, Diggs did not immediately file for state habeas relief, but he still left himself with over a month to file a federal petition. And like the petitioner in Phillips, Diggs filed his federal habeas petition within 30 days of learning that his state petition has been denied. Thus, there is no basis for Diggs to be considered delinquent for waiting 334 days to seek state post conviction relief: holding otherwise created an irreconcilable conflict with Umana. And holding that Diggs was delinquent in filing his federal petition within 30 days of receiving notice from the state created

an irreconcilable conflict with Phillips. Because of these conflicts, en banc consideration was appropriate. Because en banc review was denied, it is important for this court to clarify this area of law.

This Court's recent denial of en banc consideration in Umana v. Davis nonetheless demonstrates the need for clarity in this area of the law.

The contradiction between the result in Diggs' and the results in Phillips and Umana show only that, with each successive equitable tolling case, the ultimate result seems to become more fortuitous. Judge Smith, dissenting from denial of en banc in Umana, highlights the "confusing signal the panel sends to the district judges" with an apparently inconsistent result. Umana v. Davis, 946 F.3d 281, 282 (5th Cir. 2020). The same confusion, however, affects petitioners, who may be unable to divine the ultimate standards for demonstrating equitable tolling in this Circuit. Indeed, this Circuit "frequently confronts petitioners such as [Diggs], who seek equitable tolling of AEDPA limitations, so maintaining uniformity is particularly important." Id. at 286 (Smith, J., dissenting). Where a petitioner such as Diggs matches the filing timelines of prior successful petitioners, but is denied relief, en banc consideration is appropriate to clarify equitable standards. Since this Circuit has more than once opted not to clarify this area of law, this Court should do so.

Additionally, this Circuit's decision not only runs afoul of its own prior decisions, but also conflicts with decision of another circuit. Before the extraordinary circumstance, Mr. Diggs filed his state post conviction relief in a timely fashion and left himself reasonable time to pursue habeas corpus relief. In Valverde v. Stinson, 224 F.3d 129 (2nd Cir 2012), the Court found that the petitioner "[was] not ineligible for equitable tolling simply because he waited

until late in the limitations period to file his habeas petition. He would have acted reasonably by filing his petition any time during the applicable one-year period of limitations.” Id. Extraordinary circumstances, cannot “prevent” a petitioner from filing on time if, prior to the occurrence of those circumstances, the petitioner has been so neglectful in the preparation of his petition that even in the absence of the extraordinary circumstances, a reasonable person in the petitioner’s situation would have been unable to file in the time remaining within the limitation period. Id. A petitioner should not be faulted, however, for failing to file early or to take other extraordinary precautions early in the limitations period against what are, by definition, rare and exceptional circumstances that occur later in that period. Id. Accordingly, Jamaal Diggs is entitled to equitable tolling because he diligently pursued habeas corpus relief in state and federal court, and his timely filing was frustrated only by an extraordinary circumstance beyond his control.

In the summer of 2017, for a period of over 60 days, the Clerk of Court of the Louisiana Supreme Court failed to send notices of any court actions to Angola prison, allegedly due to a change in staff. In the midst of this hiatus, the Supreme Court denied Jamaal Diggs’s state habeas petition. By the time that the Clerk’s office discovered its error and resumed mailing, Diggs’s period for filing federal habeas petition had expired. But for the extraordinary circumstance of an administrative breakdown caused by a personnel change in the Clerk’s office, Diggs could have timely filed his federal petition. The district court should have applied equitable tolling. Instead, the district court erroneously dismissed Diggs’s first habeas petition with prejudice and the circuit erroneously affirmed that decision.

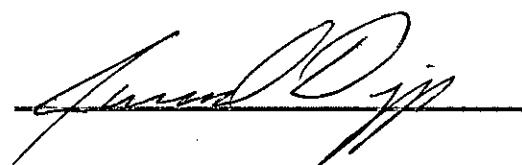
This was error, because Diggs met the standard of reasonable diligence in pursuing his state and federal remedies. Diggs filed a state petition for post-conviction relief with over thirty days remaining in his federal limitations period. This showed diligence, because Diggs left himself ample time both to file his federal petition upon denial of his state petition and to offset the type of routine delays in delivery and receipt that might be expected in a prison mail system. It was not enough time, however, to offset the extraordinary circumstance of a complete cessation of prison correspondence from the Clerk's office. When Diggs finally did receive notice from the Clerk that his state petition had been denied, he promptly filed his federal petition within thirty days.

Equitable tolling is an equitable remedy, and "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home." Holland v. Florida, 560 U.S. 631, 647 (2010). In this case, the failure of the Clerk to send any mail to Angola for over 60 days was the *sine qua non* of Diggs's filing after the statutory deadline. It would therefore be decidedly inequitable to for this court to allow dismissal of petitioner's first and only federal habeas petition to stand on this basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: May 18, 2021