

No. 21-7695

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ALLEN WAYNE HATCHER, Petitioner

v.

ANNA VALENTINE, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Allen Wayne Hatcher
Petitioner, KSR #189303
3001 W. Hwy 146
LaGrange, Kentucky 40032

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QUESTIONS PRESENTED

- I. Under Holland v. Florida, 560 U.S. 631 (2010) can extraordinary circumstances be established by the same facts that establish a prisoner's diligence?
- II. Is the filing of a "bare bones" habeas petition that lacks any information or factual substance procedurally sufficient to stop the limitations period under 28 U.S.C. § 2244(d)(1)?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Allen Wayne Hatcher respectfully prays that a Writ of Certiorari issue to review the United States Court of Appeals for the Sixth Circuit Order denying Certificate of Appealability under the mistaken belief that facts constituting diligence cannot equally establish extraordinary circumstances under Holland v. Florida and, a "bare-bones" habeas petition lacking any information or factual substance is procedurally sufficient to stop the limitation period of 28 U.S.C. § 2244(d)(1).

OPINIONS BELOW

The Order of the U.S. Court of Appeals for the Sixth Circuit Order denying Certificate of Appealability (COA) appears at Appendix A to the petition and is unpublished.

The Order of the U.S. Court of Appeals for the Sixth Circuit Order denying Petition for Rehearing appears at Appendix C to this petition and is unpublished.

The Order of the U.S. Court of Appeals for the Sixth Circuit Order denying Petition for Rehearing En Banc appears at Appendix D to this petition and is unpublished.

The Memorandum Opinion and Order of the U.S. District Court

appears at Appendix B to this petition and is unpublished.

The United States Magistrate's Findings of Fact, Conclusions of Law, and Recommendation to deny writ of habeas corpus appears at Appendix E to this petition and is unpublished.

JURISDICTION

The date on which the U.S. Court of Appeals for the Sixth Circuit denied COA was October 12, 2021, and appears at Appendix A.

A timely petition for re-hearing en banc was denied by the U.S. Court of Appeals for the Sixth Circuit on December 2, 2021, and appears at Appendix D.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part: "Congress shall make no law ... abridging the freedom ... or right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I

The relevant federal statutory provision, 28 U.S.C. § 2244, provides in relevant part: "A 1-year period of limitations shall apply to an application for 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 ... of the United States is removed, if the applicant was prevented from filing by such State action;"

STATEMENT OF THE CASE

Approximately six (6) months before the expiration of Hatcher's § 2244 limitations period, he fell ill, had to have surgery, was placed in a restrictive medical unit for recovery and all his legal documents were lost during a pack-up by correction officials. Hatcher repeatedly wrote the Kentucky Department of Advocacy for assistance due to these reasons. He also repeatedly wrote the property room officer for him to take the looking for his legal documents more seriously as he had an absolute deadline to file his post-conviction motion.

Hatcher received no response from the DPA. However, the property room officer wrote back twice stating he was looking for his legal materials. Finally in December 2017, yet well after his deadline, Hatcher's legal materials were found, however, it would not be until early January 2018 before he could get them as they had been sent to the legal which was closed during the holidays and new year.

In April 2020, Hatcher filed a § 2254 petition in the district court. The respondent moved to dismiss Hatcher's petition, arguing the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(A) expired before Hatcher even sought state post-conviction relief in January 2018. Hatcher argued, however, that he was entitled to equitable tolling of the statute of limitations because the Kentucky Department of Corrections (DPA) failed to respond to his numerous requests for assistance in filing his Rule 11.42 motion. Additionally, Hatcher argued that

he was prevented from pursuing state post-conviction relief in a timely fashion because he was separated from his legal materials while waiting to undergo a medical procedure and a corrections officer was slow to locate them in the prison property room. Opinion, App. A, p2

Hatcher objected only to the magistrate judge's conclusion that he was not entitled to equitable tolling. The district court overruled Hatcher's objection, finding, as did the magistrate judge, that he could have proceeded without access to his legal materials by filing a "bare bones" habeas petition. In support of that conclusion, the district court noted that Hatcher, despite being in a restricted area because of his surgical procedure, was still able to correspond with the DPA and the corrections officer who was searching for his legal materials. To the district court, Hatcher's ability to write and send outside communications showed that no extraordinary circumstance prevented him from seeking federal habeas relief in a timely fashion. The court therefore adopted the report and recommendation and dismissed Hatcher's petition as being barred by the statute of limitations. The court declined to grant Hatcher a COA. Id., pp.2-3

Factual Background

In 2005, Hatcher was found guilty by a jury in Edmonson County, Kentucky of murder, tampering with physical evidence and several drug charges. Hatcher was sentenced to thirty (30)

years. Hatcher's conviction was affirmed by the Kentucky Supreme Court (KYSC) in August 2006.

Hatcher filed a post-conviction motion in the state court asserting multiple claims of ineffective assistance of counsel (IATC). The trial court denied relief and Hatcher prosecuted an appeal to the Kentucky Court of Appeals (KYCA) which agreed that Hatcher had received IATC and reversed his conviction remanding for a new trial. See, Hatcher v. Commonwealth, 310 S.W.3d 691 (Ky. App. 2010).

Hatcher's second trial began in January 2015, and once again he was found guilty of murder, however, this time he received a life sentence. The KYSC affirmed the conviction in June 2016.

In January 2017, Hatcher wrote his appellate attorney for a second time requesting assistance from the DPA to prepare and file his post-conviction motion. In March 2017, having not received any response from his appellate attorney, Hatcher wrote the DPA post-conviction branch requesting assistance in filing his post-conviction motion as he was having health issues and unable to do so on his own.

In June 2017, not receiving any response from the DPA regarding his previous letters, Hatcher wrote the DPA once again stressing the need for assistance in filing his post-conviction motion as his time was running, and due to being placed in a restrictive Nursing Care Facility on May 24, 2017, with no access to the yard or legal office and, that in preparation for surgery all his legal materials had been lost during the pack-up of his property. No one from the DPA ever responded to any of Hatcher's letters.

In August 2017, Hatcher wrote the property room officer regarding his legal materials that had been lost requesting that he find them. Not receiving any response, Hatcher wrote the property room officer again in September 2017, stressing the same as he had a deadline.

The property room officer responded this time stating that he "would look for his legal work when he had the time and would let him know when he found it."

Not hearing anything, Hatcher in November 2017, wrote the property room officer again expressing his anger that it should not be that hard to find his legal materials as it they had to be in the property room. Again, not hearing anything, Hatcher wrote the property room officer in December 2017, expressing his previous sentiments and that he really needed his legal materials now.

In response, the property room officer wrote Hatcher back on December 19, stating that he had found his legal material and sent them to the legal office. The legal office was closed from December 20, 2017 and remained so until January 4, 2018.

When Hatcher was finally able to retrieve his legal materials, he began working aggressively on his post-conviction motion which he filed on January 23, 2018, raising numerous IATC claims. While it was pending Hatcher subsequently filed a supplement post-conviction motion asserting a double jeopardy violation. Both motions were denied and were consolidated on appeal to the KYCA which affirmed the denials in March 2020.

In April 2020, Hatcher filed his § 2254 petition. In

response to the respondent's motion to dismiss as untimely and Hatcher's reply, the magistrate judge found that Hatcher had been diligent in pursuing his rights under Holland and that "it appeared that Hatcher may have pleaded a case for extraordinary circumstances," yet went on to ultimately find that Hatcher was unable to meet the second prong that some extraordinary circumstance stood in his way recommending that his petition be dismissed as untimely.

Hatcher argued in his objections that the facts that established he had been diligently pursuing his legal rights equally established that some extraordinary circumstance stood in his way as required by Holland.

Hatcher further argued in his objections that there was no way for him to have filed a "bare bones" petition as he had no idea what his issues were that had been presented, or how, on direct and had no idea what potential issues he may have had for post-conviction relief, because Rhines v. Weber, 544 U.S. 269 (2005) still requires that any contemplated and or unexhausted claims must be presented to the district court.

The district court rejected Hatcher's objections, adopted the report and recommendation, dismissed his habeas petition as untimely and denied COA.

Proceedings Below

On April 23, 2020, Hatcher filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the District Court in Bowling Green, Kentucky, presenting five (5) claims of IATC and one double

jeopardy claim.

On July 30, 2021, the Respondent filed a motion to dismiss asserting that Hatcher's petition was time barred pursuant to 28 U.S.C. § 2244(d)(1(A)),(d)(2) being filed outside the prescribed period.

On September 2, 2020, Hatcher responded to the Respondent's contentions asserting that he was entitled to equitable tolling under Holland due to a time line of events outside his control regarding his failing health and need for surgery, his property pack up resulting in the loss of all his legal documents and subsequent restrictive housing prevented him from timely filing his RCr 11.42 motion, that ultimately prejudicially impacted his ability to timely file his habeas petition.

In support of equitable tolling Hatcher asserted the following facts and copies of documents:

- A) On January 2, 2017, Hatcher wrote his appellate attorney Gerhart Landon (Landon) a second time requesting assistance from the DPA to prepare and file his RCr 11.42 motion.
- B) On March 8, 2017, having not received any responses from DPA Landon, Hatcher wrote the DPA requesting assistance in filing his RCr 11.42 motion as he was having health issues and was unable to do so on his own.
- C) On June 14, 2017, having not heard any response regarding his letters in #A-B, Hatcher wrote the DPA again stressing the need for assistance in filing his RCr 11.42 motion as his time was running, that he had been placed in Nursing Care Facility on May 24, 2017, in preparation for surgery, and he was in a restricted dorm where there is no access to the yard or legal office, and that all his legal materials had been lost during his medical packup.
- D) On August 16, 2017, Hatcher wrote Lt. Pollick, the property room officer regarding his legal documents that got lost, reminding him, as instructed, to look for them.
- E) On September 12, 2017, not hearing anything from Lt.

Pollick, Hacther wrote him again stressing that he needed his legal documents for RCr 11.42 motion before his time ran out.

- F) On September 14, 2017, Lt. Pollick hand wrote on the letter in ¶E that "he would look for his legal work when he had the time, and would let him know when he found it."
- G) On November 1, 2017, Hatcher wrote Lt. Pollick expressing his anger as it should not be that hard to find his legal documents as they had to be in the property room.
- H) On December 4, 2017, not hearing from Lt. Pollick, Hatcher wrote him again not trying to be disrespectful but stating there is no reason why his legal documents can't be found and he needed them now.
- I) On December 19, 2017, Lt. Pollick hand wrote on the letter in ¶H stating that "he had found his legal documents and sent them to the legal office.
- J) The legal office was closed for the holidays from December 20, 2017 and remained so until January 2, 2018.
- K) On January 4, 2018, Hatcher was finally able to retrieve his legal documents.
- L) On January 23, 2018, after obtaining assistance from a legal aide Hatcher was able to file his RCr 11.42 motion.

On December 14, 2020, the Magistrate filed his Findings of Fact, Conclusions of Law and Recommendations (FCR). Applying the two-part analysis required for equitable tolling as held in Holland, the Magistrate assessed all the facts, documents and timeline of events that prevented Hatcher from timely filing his RCr 11.42 motion and found that Hatcher "had been diligent in pursuing his rights" under Holland, and "it appears that Hatcher may have pleaded a case for extraordinary circumstances." DN 20,

PID #319

However, the Magistrate looking at each timelined event in isolation found that Hatcher "was unable to meet the second prong that some extraordinary circumstance stood in his way," DN 20,

PID #320-321 and recommended that Hatcher's petition be dismissed as time barred.

On December 22, 2020, Hatcher filed his Objections to the FCR contending that the same facts set forth in ¶¶A-L that established that he had been diligently pursuing his rights, equally established that some extraordinary circumstances prevented him from timely filing his RCr 11.42 motion, thus, ultimately his habeas petition.

In response to the FCR statement that Hatcher could have filed a "bare-bones" habeas petition, he argued that there was no way he could have filed any "bare-bones" petition as he did not know what his issues were or how they had been presented on direct appeal, and had no idea what his potential RCr 11.42 issues could be, thus, he could not even file a motion to hold the habeas proceedings in abeyance under Rhines v. Weber, 544 U.S. 269 (2005) because that still required that any contemplated or unexhausted claims be presented to the District Court.

On March 3, 2021, the District Court adopted the FCR, dismissed Hatcher's habeas petition as untimely and denied COA. Exhibit B

On May 13, 2021, Hatcher presented the following issue for COA in the Sixth Circuit:

Whether the District Court correctly determined under Holland that Hatcher's set of facts establishing that he had been diligently pursuing his rights, did not equally establish the extraordinary circumstances entitling him to equitable tolling.

On October 12, 2021, the Sixth Circuit denied COA stating:

The district court overruled Hatcher's objection, finding,

as did the magistrate judge, that he could have proceeded without access to his legal materials by filing a "bare bones" habeas petition. In support of that conclusion, the district court noted that Hatcher, despite being in a restricted area because of his surgical procedure, was still able to correspond with the DPA and the corrections officer who was searching for his legal materials. To the district court, Hatcher's ability to write and send outside communications showed no extraordinary circumstances prevented him from seeking federal habeas relief in a timely fashion. The district court therefore adopted the report and recommendation and dismissed Hatcher's petition as being barred by the statute of limitations. the court declined to grant Hatcher a COA. Exhibit A, pp.2-3

As ground for equitable tolling, Hatcher also cited the unavailability of his legal materials once he went into medical segregation and the corrections officer's delay in retrieving them from the property room. But as just mentioned, Hatcher had his legal materials at hand for almost a full year before he was separated from them, and he failed to point to an extraordinary circumstance that prevented him from filing his petition during that time. [] Id. p.4

In summary, reasonable jurists could not debate the district court's conclusions that Hatcher was not entitled to equitable tolling. Accordingly, the court DENIES Hatcher's COA application [], Ibid.

On October 25, 2021, Hatcher filed for Rehearing En Banc asserting that the Sixth Circuit's denial of COA conflicted with a decision of this Court and several of the Sixth Circuit's.

Therein, Hatcher pointed out that the Sixth Circuit made an error of law by upholding the District Court's absurd claim that he could have filed a "bare bones" petition, because 28 U.S.C. § 2242 and Federal Habeas Corpus Rules (FHCR) Rule 2(c) in toto required him to "specify all the grounds for relief which are available to [him] and of which he has or by the exercise of reasonable diligence should have knowledge and [to] set forth in summary form the facts supporting each of the grounds thus specified," and "(1) specify all the grounds for relief to

petitioner; (2) state the facts supporting each ground," respectively - which was an impossibility having no legal documents from which to present any claims in a "bare bones" petition.

Citing McFarland v. Scott, 512 U.S. 849 (1994), Hatcher asserted that this fact pleading requirement mandates that he "must allege the factual underpinnings of [his] claims," Id. 860, and citing decades of Sixth Circuit precedent for the same contention that "the petition is expected to state facts that point to a 'real possibility of a constitutional error,'" Bustle v. Engle, 644 F.2d 884 (6th Cir. 1981).

Hatcher had none of his legal documents and the required facts therein for which to even present any "non-speculative" allegation, and required any "bare bones" petition to be dismissed pursuant to FHCR Rule 4, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition ..." See, McFarland at 856, "federal courts [must] dismiss summarily any habeas petition that appears legally insufficient on its face."

On November 17, 2021, the Sixth Circuit denied Hatcher's petition for rehearing. Exhibit C

On November 2, 2021, the Sixth Circuit denied Hatcher's petition for rehearing en banc.

REASONS FOR GRANTING WRIT OF CERTIORARI

First, this case presents a question left open in Holland whether the same set of facts that establish diligence can equally establish extraordinary circumstances.

Secondly, this Court has never defined what constitutes a "bare-bones" habeas petition for which could be filed as required by the Sixth Circuit to stop the Anti-Terrorism and Effective Death Penalty Act (AEDPA) time period.

I. The Sixth Circuit's decision has raised the question left open in Holland whether extraordinary circumstances can be established by the same facts that establish a prisoner's diligence.

Hatcher's 1-year period ended on September 14, 2017, however, due to State action and circumstances beyond his control, he was not able to file his post-conviction motion until January 28, 2018. This late filing ultimately effected Hatcher's ability to timely file his habeas petition.

The magistrate judge reviewed the facts set forth above and found that Hatcher had been diligent in pursuing his rights under Holland, and preliminarily conceded that "it appears that Hatcher may have pleaded a case for extraordinary circumstances." Ex. B, DN 20, PID #319 This in itself should have warranted the grant of COA, however, using federal district court decisions, reviewed these facts each in isolation arriving at the conclusion that hatcher was unable to meet his burden under Holland.

Holland set forth a two-prong framework for which a

petitioner may obtain equitable tolling of 28 U.S.C. § 2244(d)(1). Hatcher must prove: 1) that he had been pursuing his rights diligently and, 2) that some extraordinary circumstances stood in his way. Id. 649

Here, review of the actual time line of the extraordinary circumstances were in fact mostly created by State action that prevented Hatcher from timely filing his post-conviction motion, thus, his habeas petition: his health was failing and he needed surgery, he went out for surgery, all his legal documents were packed up and lost, upon release from the hospital he was placed in a restrictive housing unit not having any access to legal services and it took a greater part of five (5) months before his legal documents were finally located and returned to him. Each of these individually and in concert equally establish the necessary Holland extraordinary circumstances and fit squarely within the rubic of 28 U.S.C. § 2244(d)(1)(B) as being an "impediment to filing an application created by State action in violation of the Constitution of the United States, if the applicant was prevented from filing by such action."

The violation here was Hatcher's First Amendment right to access the courts, that was contractively denied by Corrections officials misplacing all his legal documents during a medical pack-up.

While this Court has yet to answer the question whether facts establishing the diligence element can equally satisfy the extraordinary element of Holland, this Court in Menominee Indian Tribe of Wisconsin v. U.S., 136 S.Ct. 750, 756 (2016) held that

the "reasonable diligence prong ... covers affairs within the litigant's control, the extraordinary circumstances prong by contrast is meant to cover matters outside his control."

The Sixth Circuit by refusing to extend this Court's precedent principles of Holland and Menominee in toto to the facts presented here, demonstrates that this Court needs to exercise its jurisdiction to answer the question of whether the same set of facts that establish reasonable diligence can equally establish extraordinary circumstances under Holland, to promote a more harmonious judiciary by providing the necessary guidance that the Sixth Circuit lacked.

II. The Sixth Circuit has imposed an impossible standard that a habeas petitioner can file a "bare bones" habeas petition that lacks any information and factual substance which would be deemed procedurally deficient to stop the limitations period under 28 U.S.C. § 2244(d)(1), a standard for which this Court has never declared and for which abrogates the specific fact pleading requirement of McFarland.

The Sixth Circuit adopting the district court's ruling found that Hatcher could have filed a "bare bones" habeas petition to stop the clock under 28 U.S.C. § 2244(d)(1), and for that reason he was not entitled to equitable tolling either. The lower courts absurdly justified this finding by stating since Hatcher was able to write letters to the DPA and the property room officer, nothing prevented him from filing a "bare bones" habeas petition.

As Hatcher adamantly contended in the proceedings below all his legal documents had been lost from May 2017 through December 2017, thus, there was no way to justly conclude, as a matter of law under McFarland that he could have filed a "bare bones" habeas petition.

The issue of what constitutes a "bare bones" habeas petition has never been clearly established by this Court, and this case demonstrates the need for defining such. As shown here, and argued in the Sixth Circuit, several federal appeals and district courts have arrived at conclusions of what constitutes a "bare bones" habeas petition, opposing that of the Sixth Circuit.

In Cottrell v. Clarke, 2016 U.S. Dist. LEXIS 135131, at *4, (E.D. Vir. 2016) the district court found: "to the extent Cottrell's current claims were presented to the Supreme Court of Virginia in his bare bones petition the claims are exhausted."

In contrast, had Hatcher had his appellate brief to the KYSC on direct he could have submitted those facts in claim in a "bare bones" habeas petition which would have met the minimal requirements, as that document contained his legal claims and their factual underpinnings.

However, the unrefutable fact is, Hatcher did not have any of his legal documents, including his direct appeal brief making it impossible to file a "bare bones" habeas petition. The Sixth Circuit makes light of this stating that "Hatcher had his legal materials at hand for almost a full year before he was separated from them," thus, "he had sufficient time to file his [petition] before he was on lock down and before prison officials

misplaced his legal materials." Ex. A, p.4

This finding is not entirely correct. Although Hatcher may have had his legal documents for some period of time, he wrote the DPA in January 2017, a little after three (3) months requesting assistance in filing his RCr 11.42 motion. He remained diligent in doing so, because he could not identify, research, prepare and submit his post-conviction motion on his own - yet, never the letter was responded to, so there was no meaningful communication as suggested by the Sixth Circuit. Then - his health started failing and continued to deteriorate until he went out for surgery. While he may have had his legal documents doing this period, he was certainly medically incapable of doing his own post-conviction motion. True, it is best to file what ever pleadings at the earliest time to avoid unforeseen delays, however § 2244(d)(1) gives prisoners one (1) year to file their habeas petition - and sometimes extraordinary circumstances happen, as they did here, that prevent timely filings. Section 2244(d)(1) is not, jurisdictional; Holland at 645-46.

In Chavez v. Florida Dept. of Corrections, 647 F.3d 1057, 1961 (11th Cir. 2011) the court held that "a bare bones habeas petition 'require[s] specific non-conclusory allegations.'"

As the immutable facts attest, Hatcher had none of his legal documents for which to even present any "non-speculative allegation." Pursuant to FHCR Rule 4, "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition ..." See, McFarland at 856, "the federal

courts [must] dismiss summarily any habeas petition that appears legally insufficient on its face."

The Sixth Circuit's conclusion that a "bare bones" habeas petition can still be filed without any information or factual substantiation, directly conflicts with McFarland and has set a new, heightened standard for that without this Court's exercise of jurisdiction for clarification, will remain an unreasonable and impossible burden to meet finding sanction in federal habeas corpus jurisprudence that was not envisioned by the AEDPA or this Court's precedent.

CONCLUSION

For the foregoing reasons, Allen Wayne Hatcher respectfully requests that the Court grant his petition for writ of certiorari.

This 28 day of Feburary 2022

Respectfully submitted,

Allen Wayne Hatcher
Allen Wayne Hatcher
Petitioner, KSR #189303
3001 W. Hwy 146
LaGrange, Kentucky 40032

NOTICE

Notice is hereby given that the original plus (9) copies of the foregoing were mailed postage prepaid this 28 - day of Feburary 2022; to the United States Supreme Court Clerk, 1st Street NE, Washington, D.C. 20543-0002.

Allen Wayne Hatcher
Allen Wayne Hatcher

CERTIFICATE OF SERVICE

I certify pursuant to Rule 29 of the Supreme Court Rules, that a true copy of the same was mailed postage prepaid this 28.

day of February 2022; to Hon. James J. Vilt, Counsel for
Respondent, 1024 Capital Center Dr., Frankfort, Kentucky
40601-8204.

Allen Wayne Hatcher
Allen Wayne Hatcher