

No.

---

In the Supreme Court of the United States

---

WARREN DOUGLAS VANN, PETITIONER.

v.

UNITED STATES OF AMERICA, RESPONDENT.

---

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

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Barry L. Derryberry  
First Assistant Federal Public Defender  
Okla. Bar Assn. No. 13099  
Office of Federal Public Defender  
Northern District of Oklahoma  
One West Third Street, Ste. 1225  
Tulsa, Oklahoma 74103  
Phone: (918) 581-7656/ Fax: (918) 581-7630  
[barry.derryberry@fd.org](mailto:barry.derryberry@fd.org)  
Counsel of record for Petitioner

January 11, 2023

---

## **QUESTION PRESENTED**

Whether, for purposes of a certificate of appealability, it is debatable that reasonable jurists would find that equitable tolling applies to the Petitioner's § 2255 motion, where an attorney he retained to file a motion expressly advised him that the one-year deadline did not apply because of a jurisdictional claim that the attorney intended to present in the § 2255 motion, which continued to mislead the Petitioner during the lengthy time period preceding the § 2255 motion he filed in the case below.

## **PARTIES TO THE PROCEEDINGS**

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

## **RELATED PROCEEDINGS**

*United States v. Vann*, No. 21-7057, 2022 WL 7366286 (10th Cir. Oct. 13, 2022)

*United States v. Vann*, 728 Fed. App'x. 877 (10th Cir. 2018) (unpublished)

*United States v. Vann*, 123 Fed. App'x. 898 (10th Cir. 2005) (unpublished)

*Vann v. United States*, No. 6:17-cv-00292-Raw, ECF 59 & 62 (E.D. Ok. Oct. 28, 2021).

## TABLE OF CONTENTS

	Page
Question Presented.....	i
Parties to the Proceedings .....	ii
Related Proceedings .....	iii
Table of Authorities .....	v
Opinions Below .....	1
Jurisdiction.....	1
Statutory Provisions Involved .....	2
Procedural History .....	3
Reasons for Granting the Writ .....	9
Conclusion .....	14

## TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Holland v. Florida</i> , 560 U.S. 631 (2010) .....	10, 13
<i>United States v. Vann</i> , 123 F. App'x 898 (10th Cir. 2005) .....	4
Statutes	
18 U.S.C. § 922(g) .....	3
18 U.S.C. § 924(a)(2) .....	3
18 U.S.C. § 924(c) .....	5
18 U.S.C. § 924(c)(1)(A)(iii) .....	3
18 U.S.C. § 924(j) .....	3, 5
18 U.S.C. § 1111(a) .....	3
18 U.S.C. § 1151 .....	3
18 U.S.C. § 1153 .....	3
28 U.S.C. § 1254(1) .....	1
28 U.S.C. § 2241 .....	4, 7-9, 12
28 U.S.C. § 2255 .....	4-14
28 U.S.C. § 2255(f) .....	2
28 U.S.C. § 2255(f)(1) .....	9
Rules	
Fed.R.Civ.P. Rule 59 .....	5
Rule 29 of the Federal Rules of Criminal Procedure .....	3
U.S. Sup. Ct. R. 10 .....	9

## **OPINIONS BELOW**

The decision of the court of appeals, No. 21-7057, 2022 WL 7366286 (10th Cir. Oct. 13, 2022), is not reported.

The decision of the district court, 6:17-cv-00292-Raw, ECF 62 (E.D. Ok. Oct. 28, 2021), is unreported.

## **JURISDICTION**

The decision of the court of appeals was entered October 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

28 U.S.C. § 2255(f) states:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

## PROCEDURAL HISTORY

### **Initial Proceedings**

Mr. Vann was indicted in the Eastern District of Oklahoma of four counts stemming from the shooting death of Billy Dean Johnson. Specifically, Count One, Murder in the First Degree in Indian Country, in violation of 18 U.S.C. §§ 1111(a), 1151, and 1153; Count Two, Use of a Firearm in the Commission of a Violent Crime, in violations of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 924(j); Count Three, Possession of a Firearm After Former Conviction of a Felony, in violation of 18 U.S.C. §§ 922(g) and 924(a)(2); and Count Four, Possession of Ammunition After Former Conviction of a Felony, in violation of 18 U.S.C. §§ 922(g) and 924 (a)(2).

A jury convicted Mr. Vann on October 3, 2003. The district court sentenced him to: Count One, life in prison; Count Two, life in prison; Count Three, 120 months in prison; and Count Four, 120 months in prison. The district court ordered the sentence for Count Two to run consecutively to the sentences for Counts One, Three, and Four. The sentence for Count Four was ordered to run concurrently with the sentences for Counts One and Three.

### **Post-Conviction**

After perfecting Mr. Vann's direct appeal to the Tenth Circuit, appointed counsel filed an *Anders* brief identifying two potential appellate issues: (1) that the trial court erred by overruling Mr. Vann's motion to suppress a photo line up presented to a witness; and (2) the trial court erred in failing to dismiss the charges under Rule 29 of the Federal Rules of Criminal Procedure due to insufficient evidence.

The Tenth Circuit granted appointed counsel’s motion to withdraw and dismissed the appeal on February 16, 2005. *United States v. Vann*, 123 F. App’x 898 (10th Cir. 2005). The direct appeal became final on May 17, 2005.

Charlotte Grimmett, Mr. Vann’s mother, retained Todd Hembree to file a petition for relief under 28 U.S.C. § 2255 on her son’s behalf. Mr. Hembree never filed a § 2255 motion. After several years, Mr. Hembree refunded \$7,000 to Ms. Grimmett and resigned from further representation of Mr. Vann on January 23, 2012.

Mr. Vann filed a pro se 28 U.S.C. § 2241 motion on August 8, 2012, where he was incarcerated in Florida. This motion alleged that the sentencing court lacked jurisdiction. The motion was denied on July 17, 2015, by written order on the ground that a § 2255 motion was the appropriate avenue of relief for Mr. Vann. Mr. Vann filed a “Request for Prosecutorial Relief Pursuant to the ‘Holloway Doctrine’” on December 27, 2016, in the Eastern District of Oklahoma. That motion was denied on September 14, 2017.

### **§ 2255 Motion**

Mr. Vann filed a pro se § 2255 motion on July 28, 2017. This motion raised the following issues: (1) “Conviction(s)/Sentence(s) Obtained in Violation of Right of ‘Assistance of Counsel; violation 6th Amendment.” (2) “Conviction(s)/Sentence(s) Obtain in Violation of ‘Effective’ Assistance of Counsel; violation of 6th Amendment.” (3) “Conviction(s)/Sentences for Murder in ‘Indian Country’ Obtained in Violation of Due Process; violation 5th Amendment and Jurisdictional Issue.” (4) “Conviction(s)/Sentences for Murder by ‘Indian’ in ‘Indian Country’ Obtained in

Violation of Due Process and Equal Protection of the Laws; 5th Amendment.” (5) “Conviction(s)/Sentences Obtained in Violation of Due Process; 5th Amendment violation.” (6) “Conviction/Sentence for 924(c)(j) Offense Obtained in Violation of Due Process; 5th Amendment.” (7) “Miscarriage of Justice; Claims Not Barred By Procedural Bar or Statute of Limitations: Actual Innocence and Equitable Tolling.”

The government filed a motion to dismiss the § 2255 motion as untimely. The Honorable James Payne entered an order denying Mr. Vann’s § 2255 motion as untimely on February 12, 2018, with judgment entered on the same day.

Mr. Vann filed a pro se motion to set aside or vacate the district court’s judgment pursuant to Fed.R.Civ.P. Rule 59 on February 26, 2018. The motion was denied on the same day. Upon receipt of a Notice of Appeal from Mr. Vann, the Tenth Circuit directed the district court to consider whether a certificate of appealability should issue on April 13, 2018. The district court denied a certificate of appealability on April 17, 2018.

The Tenth Circuit granted a certificate of appealability “as to whether Mr. Vann is entitled to equitable tolling” on June 21, 2018. *See Ex. 2.* On remand, the district court found that the Tenth Circuit’s order contemplated an evidentiary hearing. The court referred the case to a magistrate judge to conduct the hearing and submit findings of fact and recommendations. The Federal Public Defenders office was appointed to represent Mr. Vann at this time.

At the evidentiary hearing on April 5, 2019, Mr. Vann and Charlotte Grimmett testified in support of Mr. Vann’s claim of equitable estoppel.

During the hearing the following facts were supported by testimony. Mr. Vann testified that while an *Anders* brief was pending in his direct appeal, he told his mother, Charlotte Grimmett, that he needed her to hire someone. Ms. Grimmett hired her longtime friend, attorney Todd Hembree, to file a § 2255 motion after her son's direct appeal was final. She had been advised by Mr. Vann's trial counsel that there was a one-year statute of limitations on filing the § 2255 motion. When Mr. Vann spoke to Mr. Hembree, they discussed the one-year limitation. Mr. Hembree advised Mr. Vann and Ms. Grimmett that "there was no limit" because he would be arguing jurisdiction and assured them that he knew what he was doing. Ms. Grimmett was advised by three other attorneys of the one-year limitation, but there is no indication that she discussed with them the jurisdictional issue which Mr. Hembree had told her would be an exception to any deadline.

Ms. Grimmett visited Mr. Hembree's office weekly, sometimes six or seven times a month, to check on the status of the case. Mr. Hembree consistently told her that he was working on it. Mr. Vann talked to Mr. Hembree when he could from prison and sent letters. When he raised the one-year limitation, Mr. Hembree insisted that jurisdiction could be raised at any time. Mr. Hembree would also report that he was almost done or putting the finishing touches on the motion. After years without movement on the case, Ms. Grimmett demanded a refund of the thousands of dollars she had given to Mr. Hembree. Mr. Hembree never filed anything on Mr. Vann's behalf. He agreed to refund all the money he had received. In 2011 Mr. Vann filed a bar complaint against Mr. Hembree after learning of his resignation.

In 2012 Mr. Vann filed a 28 U.S.C. § 2241 motion in Florida, where he was imprisoned. He learned in 2015 that it had been dismissed. In the time between the dismissal of the § 2241 motion and filing the § 2255 motion, Mr. Vann was gathering the necessary paperwork, including the indictment, complaint, land deed, and titles to support his motion.

At the hearing a PACER report of every case in the district courts and courts of appeal in the United States in which Todd Hembree was counsel of record. It reflected that Mr. Hembree had never filed a § 2255 motion in federal court.

On September 30, 2021, the magistrate judge recommended the dismissal of the § 2255 motion as untimely in its “Findings and Recommendation”. *See Ex. 5.* magistrate judge characterized Mr. Hembree’s failure to file a § 2255 motion as no worse than professional negligence and therefore short of the threshold demanded by equitable tolling (i.e., egregious attorney misconduct or extraordinary circumstances). Mr. Vann filed an objection to the recommendation in which he took exception to numerous facts omitted by the magistrate judge. He also challenged the conclusion that the attorney error did not rise to the level required for equitable tolling. The government filed a brief in support of the recommendation.

The district court affirmed and adopted the magistrate judge’s recommendations dismissing Mr. Vann’s § 2255 motion as untimely. *See Ex. 4.*

## Appeal

On February 15, 2022, Mr. Vann appealed to the Tenth Circuit, requesting a certificate of appealability regarding his eligibility for equitable tolling where the attorney he retained expressly advised him that no deadline applied due to a jurisdictional claim that the attorney intended to raise in the § 2255 motion.

In review of Mr. Vann's claim to equitable tolling, the Tenth Circuit focused first on whether he had demonstrated an extraordinary circumstance based upon the misconduct of Mr. Hembree. The Tenth Circuit indicated that it would toll the limitations period only until the circumstance preventing timely filing is removed in accordance with other circuits.

Finding that reasonable jurists could find Mr. Hembree's misconduct was significant, the Tenth Circuit assumed equitable tolling to be appropriate during the period of Mr. Hembree's representation of Mr. Vann. However, the Tenth Circuit questioned whether Mr. Vann continued to act upon the advice of Mr. Hembree after he resigned. Emphasizing conflicting advice from three other attorneys and fellow inmates, the Tenth Circuit failed to acknowledge evidence in the record that Mr. Vann was still relying on the advice that no statute of limitations existed for his § 2255 motion.

The Tenth Circuit found a lack of reasonable diligence on Mr. Vann's part after Mr. Hembree's resignation. Questioning the time elapsed between the denial of Mr. Vann's § 2241 application and the filing of his § 2255 motion, the Tenth Circuit opined that his efforts to obtain land records to support his jurisdictional claim should have

commenced years before even while the § 2241 application was pending. The Tenth Circuit entered an *Order Denying Certificate of Appealability* on October 13, 2022, stating that reasonable jurists could not debate the district court’s dismissal of Mr. Vann’s § 2255 motion as untimely. *See* Ex. 1.

## **REASON FOR GRANTING A WRIT**

Certiorari is appropriate when “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[.]” S. Ct. R. 10(c). The decision submitted for review is an important question of federal law that should be settled by this Court, because the Tenth Circuit erred in imposing a rigid standard in determining “reasonable diligence” in its determination that Mr. Vann was not eligible for equitable tolling. This rigid standard is tied to the termination of legal representation without consideration of the incorrect legal advice in this case which convinced Mr. Vann that there was no deadline for his § 2255 motion. In light of the egregious legal misconduct of Mr. Hembree both in failing to pursue Mr. Vann’s timely § 2255 motion and providing grossly incorrect legal advice, Mr. Vann seeks an order declaring that he is eligible for equitable tolling and should be permitted to pursue his § 2255 motion.

Pursuant to 28 U.S.C. § 2255(f)(1), a § 2255 motion was due for filing no later than one year from the date that the judgment of conviction became final. The deadline for a § 2255 motion was May 17, 2006. Mr. Vann filed his § 2255 motion on July 28, 2017. Equitable tolling can save a tardy motion from dismissal if the movant can show “(1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010). “The diligence required for equitable tolling purposes is reasonable diligence, ...not maximum feasible diligence.” *Id.* at 653 (citations and quotation marks omitted). Contrary to *Holland* and the aims of equity, the Tenth Circuit denied Mr. Vann the benefit of equitable tolling by applying rigid standards while discounting key facts, amounting to a demand that the Petitioner show more than “reasonable diligence”.

In his appeal to the Tenth Circuit, Mr. Vann described how Charlotte Grimmett, his mother, hired Mr. Hembree as counsel well in advance of the deadline for a § 2255 motion, and made several payments to Hembree over a span of years. During these years the attorney assured both Mr. Vann and Ms. Grimmett that the one-year deadline for a § 2255 motion did not apply because there was a jurisdictional issue, and that he was working on a motion. The Tenth Circuit stated that it could be assumed that equitable tolling was appropriate during Mr. Hembree’s representation of Mr. Vann but questioned whether equitable tolling was appropriate after he resigned. Ex. 1 at 6. In doing so, the Circuit failed to credit the ongoing practical effect of the inept legal advice that convinced Mr. Vann that there was no deadline for his § 2255 motion.

The continuing impact of this legal advice is apparent in Mr. Vann’s attempts to pursue his rights. Contrary to the Tenth Circuit’s finding, the record is clear that Mr. Vann continued to rely on Mr. Hembree’s advice after his resignation. Mr. Vann repeatedly attempted to raise the jurisdictional arguments that Mr. Hembree advised

were exempt from any statute of limitations. The influence of this grossly erroneous legal advice was a continuing extraordinary circumstance that extended well beyond Mr. Hembree's resignation. The reasonableness of Mr. Vann's diligence in pursuing his § 2255 motion must also be viewed in light of this circumstance, which was not done in the court of appeals' opinion.

The Tenth Circuit rejected Mr. Vann's claim that he could not be expected to reject his attorney's advice, pointing to evidence that Mr. Vann and his mother were told by three attorneys that there was a one-year deadline. Ex. 1 at 6. This was an unreasonable analysis of the facts of the case and unreasonable application of the diligence standard, because the record contains no sign that the jurisdictional issue was mentioned by any of the attorneys, or was mentioned by Ms. Grimmett or Mr. Vann. The testimony did not provide any reason to conclude that Ms. Grimmett discussed the jurisdiction issue with any other attorney, or asked any of the attorneys about Hembree's theory for bypassing the time limitation. In other words, there is no record support for concluding that Ms. Grimmett, and in turn Mr. Vann, had a good reason to conclude that Hembree was wrong based on the other attorneys' advice.

The Tenth Circuit also unreasonably applied the diligence standard when it concluded that Mr. Vann no longer relied on Mr. Hembree's advice after Hembree's resignation from the case. *Id.* The court supported this conclusion with a bar complaint that Mr. Vann filed against Hembree. This failed to credit Mr. Vann's testimony that he filed a bar complaint because he believed that Mr. Hembree had "drug" the case out to the point that he "lost" the "2255." In light of all of the

circumstances—that Hembree was paid to file a § 2255 motion and failed to do so for several years—Mr. Vann was referring to Mr. Hembree's indolence. Even if the evidence could be reasonably bypassed in the appellate decision, the record did not support a finding that the bar complaint was filed on the ground that Mr. Hembree was wrong about the jurisdictional exception to the deadline.

The Tenth Circuit additionally pointed to the fact that Mr. Vann filed a § 2241 motion after fellow inmates told him that the limitation period had run on a § 2255 motion. *Id.* Mr. Vann filed a § 2241 petition on August 8, 2012, which was not long after parting ways with Hembree. It was a reasonable time for a pro se person to prepare a motion, who had to rely on a jailhouse lawyer to do the drafting. In the motion, he presented an issue regarding the crimes' occurrence on Indian Country, asserting that the trial court lacked subject matter jurisdiction. This shows that he continued to rely on Mr. Hembree's flawed advice that the issue could be raised at any time. The Tenth Circuit's opinion omitted this key fact.

Another reason cited by the Tenth Circuit to reject Mr. Vann's diligence claim was his failure to file a § 2255 motion during a five-year period during which Vann presumably sought to acquire property records relating to the jurisdictional issue. *Id.* at 7. This conclusion is incompatible with the record before the Tenth Circuit, and is an unreasonable application of the diligence standard. To begin with, it is quite normal for clients to believe their attorneys' advice for long periods of time, given the expertise and training that attorneys have. The bad advice cannot reasonably be assumed to have had a transitory impact on Mr. Vann.

As this Court stated in *Holland*, equitable tolling must be decided on a case-by-case basis to relieve hardships caused by adherence to mechanical rules. *Holland* at 649-50. By contrast, the Tenth Circuit applied a rule that did not contemplate the continuing influence of prior counsel's egregiously incorrect legal advice in determining that Mr. Vann had not been reasonably diligent and therefore not entitled to equitable tolling. Additionally, in the seventh ground presented in Mr. Vann's § 2255 motion, he claimed that the district court lacked jurisdiction because the victim was not murdered on Indian land. Addressing timeliness, he stated that "the so-called 'statute of limitations' is NOT a 'jurisdictional' bar but is a mere claim processing rule which is subject to equitable tolling and to the miscarriage of justice exception." This advances essentially the same thing that Mr. Hembree said in 2006: jurisdiction can be raised at any time, and can be raised despite the statute of limitation. Mr. Vann's § 2255 motion never said that Hembree did not file a motion because Hembree knew or found out jurisdiction could not be raised. Vann characterized Hembree as abandoning Vann. Thus, even up to the time when the § 2255 motion was filed, Vann was banking on his attorney's advice.

The Tenth Circuit's misapplication of the diligence standard in a rigid, deeply flawed, and unreasonable way, resulted in a defective conclusion that reasonable jurists could not debate the district court's dismissal of the § 2255 motion.

## CONCLUSION

For the reasons set forth above, Mr. Vann requests that the petition for a writ of certiorari be granted, and that the Tenth Circuit's Opinion be reversed and remanded with instructions to grant a certificate of appealability.

Respectfully submitted,

s/Barry L. Derryberry  
Barry Derryberry  
Okla. Bar. Assn. No. 13099  
First Assistant Federal Public Defender  
barry.derryberry@fd.org  
Counsel of Record for Petitioner

Office of Federal Public Defender  
Northern District of Oklahoma  
One West Third St., Suite 1225  
Tulsa, Oklahoma 74103-3532  
(918) 581-7656