

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER 2017  
\_\_\_\_\_

JOSEPH W. HILL — PETITIONER  
(Your Name)

VS.

LORIE DAVIS, DIR. TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSEPH W. HILL #1801977

(Your Name)

EASTHAM UNIT, 2665 PRISON ROAD

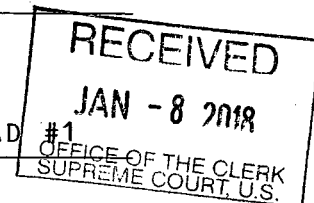
(Address)

LOVELADY, TEXAS 75851

(City, State, Zip Code)

(936) 636-7321

(Phone Number)



## QUESTION(S) PRESENTED

Whether a trial court's grant of an out-of-time appeal, certification of right to appeal, appointment of appellate counsel, and state created constitutional impediment preventing timely presentation of a claim of ineffective assistance of counsel, constitute "extraordinary circumstances" to permit equitable tolling under the AEDPA?

## 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:

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### OTHER

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 \_\_\_\_\_; 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☒ is unpublished.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 \_\_\_\_\_; 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☒ is unpublished.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☐ is unpublished.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 July 11, 2017.

☐ 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: \_\_\_\_\_, 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 January 26, 2018 (date) on December 11, 2017 (date) in Application No. 17 A 620.

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

This case involves Amendment XI to the United States

Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Amendment is enforced by Title 28, Section 2244, United States Code:

Section (d)(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 the 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.

## STATEMENT OF THE CASE

On February 2, 2011, Mr. Hill was indicted by Harris County Grand Jury for the offense of Aggravated Robbery with an allegation of use of a deadly weapon. (Clerk's Record of Trial) (hereafter "CR"), at 53). On April 30, 2012, Mr. Hill waived his right to trial by jury and agreed to enter "open plea" of guilt with the understanding that the State would not make any recommendation as to what sentence the court should impose. (CR., 56-57). Mr. Hill waived his statutory right to a Pre-sentence Investigation. ("PSI"). (CR., at 60, paragraph 6). Also on April 30, 2012, despite the fact that Mr. Hill did not enter into a "plea bargain" with the State, Mr. Hill was given a document to sign which waived his right to appeal his conviction. (CR., at 63). On August 2, 2012, a sentencing hearing was held in Mr. Hill's case, and based on information considered by the sentencing Court contained in a PSI report prepared prior to Mr. Hill's sentencing, Mr. Hill was sentenced to 30 years TDCJ. (CR., at 66). Furthermore, despite Mr. Hill having been led to believe the State would not make any recommendation as to sentencing, at the sentencing hearing on August 2, 2012, the prosecutor altered the waiver of right signed by Mr. Hill and wrote in a recommendation which read "30 yrs. tdc". (CR., at 57).

Despite the fact, that Mr. Hill's trial attorney filed a motion to have the Court Reporter record all of Mr. Hill's hearings, for reasons unknown to Mr. Hill, his sentencing hear-

ing was not recorded in any manner. (CR., at 7)(There is no record of Mr. Hill waiving the recording of his sentencing hearing or any other hearing.).

On April 4, 2013, Mr. Hill filed a series of motions, as follows:

- 1) PRO-SE NOTICE OF APPEAL (CR., at 69)
- 2) OUT OF TIME NOTICE OF APPEAL (CR., at 73)
- 3) OUT OF TIME REQUEST FOR PERMISSION TO APPEAL (CR., at 82)
- 4) OUT OF TIME MOTION TO WITHDRAW A PLEA OF GUILTY CONVICTION (CR., at 86)
- 5) OUT OF TIME MOTION FOR NEW TRIAL (CR., at 88)
- 6) BRIEF IN SUPPORT OF MOTION FOR OUT OF TIME NEW TRIAL (CR., at 94).

On April 9, 2013, in response to Mr. Hill's several motions, the trial court signed the "TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT TO APPEAL". (CR., at 129). On April 17, 2013, Mr. Hill's appeal was assigned to the Fourteenth Court of Appeals. (CR., at 130). Shortly thereafter, Mr. Hill was appointed Harris County Public Defender Bob Wicoff as his appellate counsel.

On May 9, 2013, the Fourteenth Court of Appeals ruled that the appeal be dismissed based on the its lack of jurisdiction to entertain the appeal due to the notice of appeal having been filed late. (See Hill v. State, No. 14-13-00338-CR (Tex. App.-Houston [14th Dist.] 2013).

On June 27, 2013, Mr. Hill filed a Petition for Discretionary

ionary Review with the Texas Court of Criminal Appeal. ("TCCA"). On August 21,,2013, the TCCA refused PDR.

On October 9, 2013, Mr. Hill filedshis original application for a State writ of habeas corpus. On December 11, 2013, the TCCA issued an order advisingthat (See Appendix "C"):

"[Y]our application for writ of habeas corpus has been dismissed. Conviction not final; mandate not issued at time application filed in trial court. See Ex parte Johnson, 12 S.W.3d 472 (Tex.Crim.App. 2000)."

Hill v. State, WR,80,655-01 (Tex.Crim.App. 2013).

On October 10, 2013, the mandate referred to by the TCCA issued.

On July 24, 2014, Mr. Hill filed his second application for a State writ of habeas corpus. On June 3, 2015, the TCCA issued an order that:

"The Court has denied without written order the application for writ of habeas corpus."

Hill v. State, WR,80,655-01 (Tex.Crim.App. 2015).

On June 13, 2015, Mr. Hill filed his federal petition for writ of habeascorpus. On May 23, 2016, the District Court entered an order denying the writ of habeas corpus.

On June 20, 2016, Mr. Hill filed a Notice of Appeal to the Fifth Circuit Court of Appeals. On September 30, 2016, Mr. Hill filed his Application for Certificate of Appealability with the Fifth Circuit Court of Appealsfrom the order of the District Court denying thewapplication for writ of habeas corpus and a

denial of certificate of appealability. On July 11, 2017, the Fifth Circuit denied Mr. Hill a Certificate of Appealability. On July 31, the Fifth Circuit denied Mr. Hill's Motion for Reconsideration.

On December ~~14~~<sup>14</sup>, 2017, an extension of time to file a Petition for Writ of Certiorari was granted by Justice Alito to Mr. Hill.

## REASONS FOR GRANTING THE PETITION

### A. CONFLICT WITH DECISIONS OF OTHER COURTS

The holding of the Fifth Circuit and the lower courts, that the Petitioner is not entitled to statutory and/or equitable tolling, on an ineffective assistance of trial and appellate counsel claim; is directly contrary to the holding of three federal circuits. See *Dodd v. U.S.*, 614 F.3d 512 (8th Cir. 2010); *Campbell v. Henery*, 614 F.3d 1056 (9th Cir. 2010); and *Robertson v. Simpson*, 624 F.3d 781 (6th Cir. 2010). In addition, this Court, in *Holland v. Florida*, 130 S.Ct 2549, 177 L.Ed.2d 130 (2010), has held, where an attorney's conduct rose to the level of an "extraordinary circumstances", equitable tolling of the one-year period of limitation is permitted. See also, *Castillo v. State*, 689 S.W.2d 443, 445 (Tex.Crim.App. 1985) (Belated Notice of Appeal for good cause was implicated approved).

### B. IMPORTANCE OF THE QUESTION PRESENTED

This case presents a fundamental question of the interpretation of this Court's decision in *Jimenez v. Quartman*, 555 U.S. 113, 121, 129 S.Ct 681 (2009). The question presented is of great public importance, because it affects the decisions and judgments of the United States Court of Appeals, the federal district courts, in all 50 states, including the District of Columbia. In light of the vast number of habeas petitions, brought before the federal courts under the Antiterrorism and

Effective Death Penalty Act ("AEDPA"), clear and concise guidance on the term "equitable tolling", as it relates to "extraordinary circumstances" is essential; that those petitioning the federal courts may not burden it with meritless claims, and those presenting meritorious claims be not foreclosed from obtaining relief.

This issue's importance is further enhanced, by the fact that the Fifth Circuit, and its lower district courts have seriously misinterpreted *Jimenez*, supra. This Court held in *Jimenez*, that "finality of judgment" is defined as the conclusion of direct review or the expiration of the time for seeking such review. *Jimenez*, 555 U.S. at 121. The matter is further compounded, when extraordinary circumstances prevent a timely filing. This Court pointed out this fact in *Holland v. Florida*, 130 U.S. 2549, 2550 (2010), that the one-year statute of limitations on petitions for federal habeas relief by state prisoners is subject to equitable tolling in appropriate cases.

In *Holland*, supra, this Court held that a habeas corpus proceeding had to be remanded to the court of appeals to determine whether [conduct] on part of a state prisoner's attorney, in not filing a federal habeas petition in a timely fashion despite the prisoner's many admonitions on the importance of doing so, in apparently not doing the research necessary to ascertain the filing deadline despite the fact that the prisoner's letters went so far as to identify the applicable legal rules, in failing to provide the prisoner with information that

he had requested so that he could monitor the case, and in failing to communicate with the prisoner over a period of years, rose to the level of an "extraordinary circumstance", of the kind sufficient to permit equitable tolling of the one-year period of limitation of the AEDPA. 28 U.S.C. § 2244(d)(1)(B). This was due to the court of appeals' application of overly rigid per se approach.

This was the case in *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010), where the case was remanded so that the district court could exercise its discretion in light of *Holland*, supra.

Nonetheless, in *Jimenez*, this Court held the following:

"[W]here a state court grants a criminal defendant the right to file an out-of-time direct appeal his judgment is not yett "final" for purpose of § 2244(d)(1)(A). In such a case, the date on which the judgment became final by the conclusion of direct review or the expiration of of the time for seeking such review must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal."

*Jimenez v. Quarterman*, 555 U.S. at 121.

The lower court's ruling, that Mr. Hill was not entitled to "equitable tolling", due to "extraordinary circumstance(s)" See § 2244(d)(1)(B), that unfolded in the state court proceedings, in which Mr. Hill was misled into believing he had been granted out-of-time permission to appeal, along with his reliance on appointed appellate counsel, is unpersuasive and contravenes this Court's holding in *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 831 (1985) and *Trevino v. Thaler*, 133 S.Ct 1911,

1917 (2013). In Trevino, this Court reiterated this fundamental basis, in stating:

"[T]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing [cause] for the default and prejudice from a violation of federal law."

Trevino v. Thaler, 133 S.Ct. at 1917.

Most importantly, this Court went on farther to address the Texas procedural framework, in declaring:

"A 'distinction' between (1) a state that denies permission to raise the claim on direct appeal and (2) a state that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference."

Trevino v. Thaler, 133 S.Ct. at 1921.

Nothing in Holland, Evitts, or Trevino, is contrary or conflicts to the Jimenez decision, upholding the AEDPA's goals of promoting comity, finality, and federalism, by giving state courts the first opportunity to review the claim and to correct any constitutional violation. The AEDPA does not add a complete bar to federal habeas relief. See Lafer v. Copper, 132 S.Ct. 1376, 1390 (2012).

Therefore, the court below seriously misinterpreted Jimenez, by failing to qualify Mr. Hill and others for equitable tolling, due to "extraordinary circumstance(s)"; thereby causing significant departure and conflict of this Court's interpretation of the equitable exception to the statute of limitations<sup>1</sup> of the ADEPA, deserving clarification.

1. Pace v. Digugliemo, 544 U.S. 408, 416, n. 6, 125 S.Ct. 1807 (2005), "The subsection then provides one means of calculating the limitation with regards to the "application" as a whole § 2244(d)(1)(A)(Date Final Judgment), but three others that require claim-by-claim consideration. § 2244(d)(1)(B)(Government Interference); § 2244(d)(1)(C)(New Right Made Retroactive); and § 2244(d)(1)(D)(New Factual Predicate)."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Hill

Date: December 27, 2017