

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 14, 2011

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. §§ 2241(d)(1) and 2255(f)(1) to provide for equitable tolling of the one year statute of limitations for filing for post conviction relief when the prisoner shows good cause, including situations in which a prisoner who has an attorney has timely requested the attorney to file a § 2254 petition or § 2255 motion, the attorney has failed to do so timely, and the prisoner has exercised appropriate diligence in pursuit of his rights.

REPORT

Overview:

The federal statutes governing collateral attacks on state and federal convictions contain statutes of limitations that require collateral attacks to be made within one year of a conviction becoming final. The provisions applicable to attacks on state convictions under 28 U.S.C. § 2254 and related are complicated because they contain start and stop provisions that make it difficult to be certain whether an imprisoned petitioner's state court post conviction proceedings are "pending" on a given day. As the commentary to Guideline 10.5.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases noted in 2003, "The field is complex and ever-changing. As state and federal collateral proceedings become ever-more intertwined counsel have [sometimes] failed to understand [§ 2254's] implications, and unwittingly forfeited their client's rights to federal habeas corpus review."

Although the statute may be somewhat less confusing as applied to federal movants under § 2255, the fact is that both state and federal prisoners have reduced access to court docket information and are less able to protect their rights than counsel appointed or retained to handle their post-conviction petitions. Both state and federal prisoners who are represented by counsel reasonably rely upon their lawyers to protect them against the running of the limitations period. Given that most prisoners are not legally trained and may not have access to legal materials, it is reasonable to provide equitable tolling of the statute of limitations when the prisoner shows good cause, including situations in which a prisoner who has a post-conviction attorney has timely requested the attorney to file a § 2254 petition or § 2255 motion and the attorney has failed to do so timely, and the prisoner has exercised appropriate diligence in pursuit of his rights. It is fairer and a more efficient use of judicial resources to adjudicate habeas claims on their merits.

Commentary:

In *Holland v. Florida*, 130 S. Ct. 2549, 2561 (U.S. 2010), the Supreme Court squarely held for the first time that equitable tolling is applicable to the AEDPA's filing requirement under 28 U.S.C. § 2244(d)(1). The Court remanded to the Court of Appeals to determine if equitable tolling was warranted by the circumstances of that case. *Holland*, 130 S. Ct. at 2554. In *Holland*, the Petitioner was convicted of first degree murder and sentenced to death in Florida state court. 130 S. Ct. at 2555. His conviction was affirmed by the Florida Supreme Court.

Florida then appointed an attorney to represent Holland in all state and federal postconviction proceedings. Holland's attorney exhausted all state postconviction remedies, but communications between the Petitioner and him broke down, and the attorney failed to heed petitioner's written requests to protect his federal rights by timely filing his federal habeas petition.¹ The Court noted that, as stated in the Brief of Legal Ethics Professors and Practitioners

¹ As stated by the Court, the Petitioner's attorney failed to file the Petitioner's federal habeas petition on time or at all, despite Petitioner's many letters repeatedly emphasizing the importance of his doing so; he apparently did not do the research necessary to find out the proper filing date,

104B

and the Stein Center for Law and Ethics, the attorney's failure to timely file the § 2254 petition violated "fundamental canons of professional responsibility."²

The Petitioner then filed both a pro se federal habeas petition and a motion to dismiss his counsel in the District Court. The District Court noted that the petition was late by approximately five weeks and found that equitable tolling of the filing period was not warranted. *Id.* at 2555. The Eleventh Circuit Court of Appeals affirmed. The United States Supreme Court then granted Certiorari on the issue of the applicability of equitable tolling as it relates to the one year filing period under the AEDPA, 28 U.S.C. § 2244(d)(1). 130 S. Ct. at 2554.

The Supreme Court reversed the holding that the filing of the petition was untimely and remanded to the Court of Appeals to determine if equitable tolling was warranted by the circumstances of that case. *Holland*, 130 S. Ct. at 2554. In doing so, the Court noted that the standard followed by the lower courts was "far too rigid." *Id.* That standard called for "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," beyond ordinary or grossly negligent misconduct in order to satisfy the required level. *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008).

But the Supreme Court did not repudiate the traditional two-part test for equitable tolling: Petitioner must show that (1) he exercised due diligence in pursuing his rights *and* (2) that some extraordinary circumstance stood in his way. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Pace v. Deguglielmo*, 544 U.S. 408, 418 (2005); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The level of diligence required is "reasonable diligence." *See Holland*, 130 S. Ct. at 2565..

In *Holland*, Justice Alito's concurrence asserted that "a rule that distinguishes between ordinary and gross attorney negligence for purposes of equitable tolling analysis would have demonstrably "inequitable consequences." 130 S. Ct. at 2568 (Alito, J., concurring). The resolution adopts this view and recognizes that, while all clients are at the mercy of their lawyers' conduct, prisoners are especially vulnerable because of the difficulties they have in getting access to court dockets and legal materials and their lack of legal training and experience.

despite the Petitioner's letters which identified the applicable legal rules; he failed to inform the Petitioner in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite the Petitioner's many pleas for that information; and he failed to communicate with his client over a period of years, despite various pleas from the Petitioner that he respond to his letters. *Holland*, 130 S. Ct. at 2564.

² Attorneys are to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. *Holland*, 130 S. Ct. at 2564; *See* Brief of Legal Ethics Professors and Practitioners and the Stein Center for Law and Ethics as Amici Curiae Supporting Petitioner, *Holland v. Florida*, 130 S. Ct. 2549 (U.S. 2010).

This Resolution urges Congress to amend §§ 2241(d)(1) and 2255(f)(1) to address equitable tolling. The portions of the proposed amendments providing for equitable tolling due to an attorney's failure to timely file are designed to simplify the analysis by eliminating the courts' inquiry into the state of mind or level of culpability of petitioner's counsel. The attorney's failure caused the default, or it did not. *See* Brief of Legal Ethics Professors et al. as Amici Curiae Supporting Petitioner, *Holland v. Florida*, 130 S. Ct. 2549 (U.S. 2010) (“Under a professional responsibility analysis, whether the lawyer did so totally negligently by simply forgetting or by being distracted or by miscalculating the deadline or, intentionally and wantonly, by acting in total disregard of client instructions would be irrelevant.”)

Under the proposed legislation, to invoke equitable tolling of the filing periods under §§ 2244(d)(1) and 2255(f)(1), the focus is where it appropriately should be, on the equitable situation of the prisoner. The proposal provides that the prisoner must exercise appropriate diligence in pursuit of his rights. One example of appropriate diligence would be sending written notification to the U.S. District Court, as the prisoner in *Holland* did. But there may be other circumstances (e.g. mental illness) calling for a different equitable balancing. Under the proposed legislation the court will determine whether the prisoner is entitled to equitable tolling for good cause.

The standard of the Resolution takes the emphasis off the defendant attorney's conduct or misconduct and shifts the focus to the actual result of that conduct or misconduct. It focuses on equitably curing those circumstances beyond the control of the defendant which bar relief.

Denying a prisoner the opportunity to demonstrate that he is being detained in violation of the Constitution because of an attorney's failure to timely file a § 2254 petition or § 2255 motion amounts to a “forfeiture” without fault by the prisoner. Yet “Equity abhors forfeiture” of rights. *Jones v. New York Guaranty & Indemnity Co.*, 101 U.S. 622, 628 (1879). The state's interest in finality should yield to the habeas petitioner's access to court. Habeas corpus is, after all, the Great Writ, with roots traceable at least to the Magna Carta, as the ABA acknowledged in 1957 by erecting a monument at Runnymede.³

“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of the word.” *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring). Thus, it follows that where a defendant's attorney's acts or omissions cause a petitioner to file late and miss perhaps his sole chance of federal habeas review, the attorney is not acting as his agent in any sense of the word. *See Id.*

In conclusion, equitable tolling is warranted when the prisoner shows good cause,, including situations in which a prisoner who has a post-conviction attorney has timely requested his or her attorney to file a § 2254 petition or § 2255 motion and the attorney has failed to do so timely, and the prisoner has exercised appropriate diligence in pursuit of his rights. At that point,

³http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html.

In 1215, Magna Carta declared *No freeman shall be taken, imprisoned, or in any other way destroyed...except by the lawful judgment of his peers, or by the law of the land. To no one will we sell, to none will we deny or delay, right or justice.*

104B

the prisoner should be given a reasonable amount of time for him or substitute counsel to make the necessary filing. Habeas corpus is “governed by equitable principles.” *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and “When a court exercises its equity powers, its principal concern is to promote justice, acting through its conscience and good faith.” *Hirshfield v. Schwartz*, 110 Cal. Rptr. 2d. 861, 876 (Cal. Ct. App. 2001).

Respectfully submitted,

Bruce Green, Chair
ABA Criminal Justice Section

February 2011

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Bruce Green, Chair

1. Summary of Recommendation(s).

The proposed resolution urges Congress to amend 28 USC §§ 2241(d) and 2255(f)(1) to provide for equitable tolling of the one-year statute of limitations for filing for post-conviction relief when a prisoner who has exercised appropriate diligence in pursuit of his or her post-conviction rights fails to meet the statutory deadline through no fault of his or her own.

2. Approval by Submitting Entity.

The Criminal Justice Section Council at its November 6, 2010 Fall meeting had approved a somewhat narrower resolution focusing on equitable tolling of the one-year statute of limitations when a prisoner's attorney failed to file in a timely manner a petition that the prisoner had requested. Upon request of the ABA Death Penalty Representation Project, the Section's Executive Committee approved this broader resolution on December 10, 2010.

3. Has this or a similar recommendation been submitted to the House or Board previously?

The ABA has long been on record as promoting the opportunity for prisoners to have meaningful access to the courts. ABA Criminal Justice Standard 22-2.4(a) in the *Post-Conviction Remedies Standards* approved by the House in 1978 found that a "specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound." At the 2007 Midyear Meeting, the ABA approved a resolution (#102B) urging all levels of government "to ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights." The resolution specifically urged the repeal or amendment of specific provisions of the Prison Litigation Reform Act, including the repeal of restrictions on the equitable authority of federal courts in conditions-of-confinement cases. Standard 23-9.3 (d) of the *Treatment of Prisoner Standards* approved in February 2010 also urges that "courts should have the same equitable authority in cases involving challenges to conditions of confinement as in other civil rights cases."

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The resolution would build on the above-referenced ABA policies to provide prisoners meaningful access to the judicial process by ensuring that the failures of their attorneys to respond to their requests do not pose insurmountable obstacles to post-conviction relief in the federal courts.

104B

5. What urgency exists which requires action at this meeting of the House
Action of the House of Delegates would be especially timely now in light of the Supreme Court's decision in *Holland v. Florida*, 130 S.Ct. 2549 (2010). That case was decided in June and remanded to the court of appeals for the Eleventh Circuit without specific definition of equitable tolling. That court and the other lower federal courts will be grappling with the issue case by case. It would be more desirable to have a simple, uniform standard for the federal court system.
6. Status of Legislation. (If applicable.)
None known.
7. Cost to the Association. (Both direct and indirect costs.)
Approval of the resolution will result in no direct costs to the Association and the only indirect costs will relate to ordinary ABA lobbying efforts in Congress.
8. Disclosure of Interest. (If applicable.) N/A
9. Referrals.
At the time this recommendation is submitted to the Office of Policy Administration, it is also being e-mailed to the chairs and staff directors of the following ABA entities:
 - Standing Committee on the Federal Judiciary
 - Standing Committee on Legal Aid & Indigent Defendants
 - Death Penalty Representation Project
 - Commission on Immigration
 - General Practice, Solo and Small Firm Division
 - Individual Rights and Responsibilities Section
 - Judicial Division: National Conference of Federal Trial Judges
 - Litigation Section
 - State and Local Government Law Section
10. Contact Person. (Prior to the meeting.)
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EXECUTIVE SUMMARY

A. Summary of Recommendation.

The proposed resolution would urge Congress to amend 28 USC §§ 2241(d) and 2255(f)(1) to provide for equitable tolling of the one-year statute of limitations for filing for post-conviction relief when the prisoner shows good cause, including in situations in which a prisoner who has a post-conviction attorney has timely requested the attorney to file a § 2254 petition or § 2255 motion and the attorney has failed to do so timely, and the prisoner has exercised appropriate diligence in pursuit of his rights.

B. Issue Recommendation Addresses.

The proposed resolution addresses the situation where prisoners have relied upon their attorneys to file requested post-conviction claims in a timely manner but their attorneys have failed to do so.

C. How Proposed Policy Will Address the Issue.

The proposed policy will address the issue by urging federal legislation allowing for equitable tolling of the one-year statute of limitations for filing for post-conviction relief when a prisoner shows good cause.

D. Minority Views or Opposition.

None known.