

No. 09-5327

In The
Supreme Court of the United States

—◆—
ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

—◆—
PETITIONER'S REPLY BRIEF ON THE MERITS

—◆—
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ARGUMENT

A. Equitable Tolling Is Available Under the AEDPA.

Respondent's arguments – which it raises for the first time in this Court¹ – about why equitable tolling is never available under the Antiterrorism and Effective Death Penalty Act (AEDPA) are easily answered.

First, despite acknowledging that 28 U.S.C. §2244(d) is not a jurisdictional provision but instead sets out a statute of limitations, and ignoring the fact that eleven circuits have held that equitable tolling is available under the AEDPA, Respondent contends that equitable tolling “conflicts with AEDPA” because §2244(d) provides for specific instances where the

¹ The availability of equitable tolling under the AEDPA was not a disputed issue at all in the courts below. *Cf. Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (noting that Petitioner and the State of Florida “agree that equitable tolling is available”). In the district court, Respondent's position was that equitable tolling of AEDPA's statute of limitations was available as “an extraordinary remedy which is typically applied sparingly,” DE41 at 5 (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)), and could be established by showing: (1) that Holland had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. DE41 at 5 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The district court assumed that equitable tolling was available based on Eleventh Circuit precedent, J.A. 84-85, and the Eleventh Circuit both assumed equitable tolling was available and concluded that Holland's federal habeas petition “may still be considered timely if he is entitled to equitable tolling.” J.A. 107.

statute of limitations will not “begin to run” (Brief of Resp. at 19, 25) (citing 28 U.S.C. §§2244(d)(1)(B)-(D); (d)(2)). In Respondent’s view, this statutory structure “should be read as limiting the situations where relief was intended.” (Brief of Resp. at 25). This argument

reads too much into any negative inference that may reasonably be drawn from the exceptions. The exceptions in §2244(d)(1)(B)-(D) simply make the writ available to address later arising circumstances, while the exception in §2244(d)(2) ensures that state post-conviction review will be allowed to proceed on course. Without these exceptions, a petitioner could inappropriately be denied the writ altogether, “risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). The inclusion of these statutory provisions does not give rise to the inference that the application of the limitation period must otherwise be absolute, as might be the case if the period were jurisdictional. We therefore conclude that §2244(d) is subject to equitable tolling, at least in principle.

Harris v. Hutchinson, 209 F.3d 325, 329-30 (4th Cir. 2000). *Harris* “is consistent with the decisions of other circuit courts that have addressed the issue.” *Id.* at 330 (citing cases); *see also Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) (“Congress’s inclusion of a few specific exceptions in §2244(d)(1) does not require the inference that the limitations period is, for all other purposes, a jurisdictional bar. Given that

Congress enacted §2244(d)(1) against the backdrop of the *Irwin* [*v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990)] presumption and elected to describe the one-year term as a 'period of limitation,' the better conclusion is that Congress intended to retain the flexibility afforded by the doctrine of equitable tolling.”).

Second, Respondent’s contention that equitable tolling is inconsistent with Congress’s purpose in enacting AEDPA, i.e., curbing delay in capital cases, is unpersuasive. Brief of Resp. at 25-26. “[T]he purpose underlying the one-year limitation period, to curb undue delays and abuse of the writ of habeas corpus, is served by a statute of limitations. Because the statute of limitations can only be [equitably] tolled in certain limited circumstances, *equitable tolling would not undermine the statute’s purpose to curb undue delays and abuse.*” *Dunlap v. United States*, 250 F.3d 1001, 1006 (6th Cir. 2001) (emphasis added); *see also Miller v. New Jersey Dep’t of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998) (AEDPA “provides a one year limitation period that will considerably speed up the habeas process while retaining judicial discretion to equitably toll in extraordinary circumstances.”); *Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (“Equitable tolling will not be available in most cases, as extensions of time will only be granted if ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition on time.

We have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted."); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) ("The court's judicious discretion equitably to toll [AEDPA's statute of limitations] helps safeguard habeas while still fulfilling Congress's express desire to accelerate the process.").

Third, Respondent's purported flood-gate fears are imaginary. Equitable tolling under the AEDPA *already exists nationwide*, it has been completely workable and its invocation rare and limited, and it has not led to "unfettered access to the courts," Amicus Curiae Brief of Texas et al. at 8, or "open-ended judicial tolling." Brief of Resp. at 27. Equitable tolling under the AEDPA is controlled by longstanding equitable principles which require a habeas petitioner to overcome a difficult burden, *i.e.*, establish extraordinary circumstances and diligence, and the lower courts have been underwhelmed by Petitioners' entreaties.

Finally, neither *United States v. Beggerly*, 524 U.S. 38 (1998), nor *United States v. Brockamp*, 519 U.S. 347 (1997), establish the soundness of the Respondent's interpretation of the AEDPA's statutory structure. *See* Brief of Resp. at 27, 29, 30. *Harris* is again instructive:

The State of Maryland contends that §2244(d), even if viewed as a statute of limitations, should not be subject to equitable tolling because “equitable tolling is not permissible where it is inconsistent with the text of the relevant statute.” *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (holding that the limitation period of the Quiet Title Act is not subject to equitable tolling); *see also United States v. Brockamp*, 519 U.S. 347, 352-54 (1997) (holding that equitable tolling does not apply to the time limitations contained in §6511 of the Internal Revenue Code). The statutes at issue in *Beggerly* and *Brockamp*, however, served policy interests that would be adversely affected if the statutory limitations provisions were not strictly adhered to, a factor that is not present here, where the policy of the statute was to curb the abuse of the writ of habeas corpus, while preserving its availability. *See Calderon (Beeler) [v. United States Dist. Court for the Cent. Dist. of Cal.]*, 128 F.3d 1283 (9th Cir. 1997)], 128 F.3d at 1288 n.4 (“*Brockamp* relied heavily on the fact that in administering a tax system, it is sometimes necessary ‘to pay the price of occasional unfairness in individual cases . . . in order to maintain a workable regime.’ While such ‘occasional’ injustices may be a necessary

price of tax administration, they are decidedly not an acceptable cost of doing business in death penalty cases” (citation omitted)).

Harris v. Hutchinson, 209 F.3d at 329.²

B. A Confluence of Factors More Than Establishes Extraordinary Circumstances and Due Diligence Warranting Equitable Tolling.

Respondent argues that if equitable tolling is theoretically available it should not be here because the “essential core of this case” involves matters either within Holland’s control, or establishes a simple “disagreement” between Holland and Collins, or involves mere negligence due to counsel’s misunderstanding about the statute of limitations. Brief for Resp. at 36. Respondent’s depiction of this case is not based on the reality of the record.

With respect to the control Holland should have exercised, glaring in its omission from the Respondent’s Brief is a discussion of its own conduct, *i.e.*, its own repeated, successful efforts striking as nullities all of Holland’s motions in state court. The

² The Amicus Curiae Brief of the ACLU, filed on behalf of Holland’s position, provides more elaboration on this point. Holland will not repeat those arguments except to note the ACLU’s argument that the statute at issue in *Beggerly* involved more of a jurisdictional prohibition rather than a statute of limitations. See Amicus Curiae Brief of ACLU at 26-31.

Respondent acknowledges that Holland sought to proceed *pro se* in the Florida Supreme Court if substitute counsel could not be appointed, Brief of Resp. at 43, but it ignores that it was because of the State of Florida's persistent and repeated efforts to keep Holland from even *filing paperwork in the state courts* that Holland was forced to continue with Collins' representation. Respondent affirmatively prevented Holland from obtaining a new lawyer or from representing himself. See *Lawrence*, 549 U.S. at 337 (noting that petitioner had "not alleged that the State prevented him from hiring his own lawyer or from representing himself."). Respondent fails to articulate exactly what more Holland should have done to be deemed diligent. Brief of Resp. at 46 ("Given that Holland felt his attorney was not competent, it became incumbent upon Holland to act given 'the circumstances he found himself in.'").

With respect to disagreements, Holland instructed Collins to file a federal petition in a timely manner and Collins assured Holland he would do so. There was no disagreement; Collins simply secretly did not do what he had been instructed to do.

Respondent argues that Collins' failure to file Holland's federal habeas corpus petition before the statute of limitations expired was the result of a "misunderstanding" about the tolling period. But even this alleged "misunderstanding" about the tolling period is a moving target. Respondent refers to Collins' explanation to Holland, in a letter *post-dating* the expiration of the statute of limitations, wherein

Collins “implied” that a federal habeas petition would be untimely because Collins was appointed more than a year after Holland’s case became final on direct appeal. Brief of Resp. at 42.³ Yet, earlier, Respondent offered another explanation for why Collins did not timely file a federal petition – Collins had “decided to pursue certiorari review” in this Court after the denial of Holland’s postconviction appeal by the Florida Supreme Court. *See* BIO at 17.

Regardless, neither of these explanations can be reconciled with the fact that Collins repeatedly assured Holland that his state and federal deadlines would be honored, that his procedural and substantive constitutional rights would be asserted to the fullest extent of the law, and Collins repeatedly asked for Holland’s “complete confidence” and “sense of unity.” J.A. 62, 64. **At no time prior to January 18, 2006,⁴ when Holland learned for the first time that the AEDPA statute of limitations had expired, did Collins ever inform Holland of any potential problem with timely filing a federal habeas corpus petition.** The Respondent’s attempt to categorize this case as one involving a mere “misunderstanding of law” should be rejected. *Cf. Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) (observing that

³ The Respondent acknowledges that Collins’ explanation based on this theory was “erroneous.” *Id.* at 9, 42.

⁴ There is a typographical error on page 2 of Holland’s opening brief. The correct date when Holland first learned that the statute of limitations had expired was January 18, 2006, not 2005.

“the ‘strategic decision’ the state courts and respondents all invoke to justify counsel’s limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing”).

C. 28 U.S.C. §2254(i) Does Not Prohibit Equitable Tolling Based on Collateral Counsel’s Conduct.

Relying primarily on *Coleman v. Thompson*, 501 U.S. 722 (1991), Respondent contends that §2254(i),⁵ a section of the AEDPA wholly apart from the statute of limitations section, “inferentially bars” habeas petitioners from “using” the gross ineffectiveness of their collateral counsel as a basis for equitable tolling, which, in Respondent’s view, is a “form of ‘relief’ ” from the statute of limitations. Brief of Resp. at 19, 32.⁶ The Respondent’s argument is wholly without merit.

Coleman involved procedural default, counsel’s late filing of a notice of appeal, and whether counsel’s actions provided cause to excuse the default on federal habeas corpus review. *Coleman* had nothing to do with equitable tolling of AEDPA’s statute of

⁵ 28 U.S.C. §2254(i) provides:

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

⁶ Notably, the Amicus brief from various states filed in support of Respondent’s position makes no such argument.

limitations. The AEDPA, which provides for up to two appointed counsel in a capital habeas action, did not exist when *Coleman* was decided.⁷ Holland's case is not about a constitutional (or even statutory) right to counsel during state or federal postconviction litigation and he is not asserting "a ground for relief" from the state court judgment "in a proceeding arising under section 2254."⁸

This case is about whether Holland is entitled to equitable tolling given the perfect storm of extraordinary circumstances surrounding the late filing of his federal habeas corpus petition and whether the Eleventh Circuit's "rule" excluding any type of

⁷ Under Respondent's analysis, if a court appointed attorney in a federal habeas case acted unprofessionally, no federal judge could remove and replace this court appointed attorney with another because that would provide a form of "relief" for the Petitioner.

⁸ By analogy, habeas petitioners also have no "right" to a stay and abeyance of their federal habeas corpus petitions when a mixed petition is filed. Yet this Court, acknowledging the "gravity" of the problem associated with the filing of a mixed petition given the AEDPA's statute of limitations, concluded that district courts are vested with the authority to issue a stay and abeyance of the federal habeas proceeding and that "AEDPA does not deprive district courts of that authority." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Mindful of the "potential" that the stay and abeyance procedure might have to undermine AEDPA's goals of encouraging finality and streamlining federal habeas corpus proceedings, the Court noted that a stay and abeyance would only be appropriate in "limited circumstances," that is, when good cause has been shown and the unexhausted claims are not plainly meritless. *Id.* at 277.

attorney misconduct from the equitable analysis is consistent with longstanding equitable principles. *See* Brief for Pet. at 54 n.49; 56 n.52. The State filed motions in state court which silenced Holland and made him accept Collins' representation, the Florida Supreme Court and the Florida Bar looked the other way despite Holland's pleas, and Collins solicited Holland's trust and betrayed it in the face of specific instructions from Holland that Collins timely file a federal petition. Collins, *who the State insisted that Holland rely upon*, not only failed to file a federal petition but also failed to advise Holland that state postconviction proceedings had ended and the federal clock had again started ticking. These circumstances are extraordinary.

D. There is A Difference When Counsel Ignores Requests/Instructions.

Respondent contends that Collins' conduct amounted to "garden variety" negligence for which equitable tolling is not available. Brief of Resp. at 44. However, the Eleventh Circuit did not characterize Collins' actions as merely negligent but assumed he was "grossly negligent" due to a combination of factors including his failure to communicate with Holland about the status of his appeal to the Florida Supreme Court and his "failure to file a federal habeas petition timely, *despite repeated instructions to do so.*" J.A. 110 (emphasis added).

But Respondent contends that there is no “meaningful difference” between an attorney who fails to understand the law and, as a consequence, files an untimely petition (ostensibly “mere negligence”), and an attorney “who fails to file the petition despite his client’s direction.” Brief for Resp. at 20. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court rejected this premise:

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit.”). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies on counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal cannot later complain that, by following his instructions, his counsel performed deficiently. . . . The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?

. . .

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent question: whether counsel in fact consulted with the defendant about an appeal. We employ the term “consult” to convey a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with respect to an appeal. . . . If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel’s failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

Id. at 477-478 (citations omitted). Holland repeatedly instructed Collins to file his habeas petition in a timely fashion. In conjunction with the other extraordinary circumstances Holland faced and his unquestionable

diligence, equitable tolling is warranted on this record.



CONCLUSION

For these reasons and those in the Brief of Petitioner, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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