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 Circuit Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE
QUESTION PRESENTED

Whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond "gross negligence" must be established before an extraordinary circumstance can be found that would warrant equitable tolling?

PARTIES TO THE PROCEEDING

All the parties to the proceeding are listed on the cover of the brief.

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The Eleventh Circuit's opinion, 539 F.3d 1334 (11th Cir. 2008), is reproduced at J.A. 102-112. The district court's order dismissing Holland's habeas corpus petition is reproduced at J.A. 81-94.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Eleventh Circuit entered its judgment August 18, 2008, J.A. 102-112, and denied Holland's timely petition for rehearing and rehearing *en banc* January 13, 2009. Pet. App. B. Justice Thomas granted a 30-day extension; Holland filed his petition for certiorari May 13, 2009; this Court granted it October 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(d) provides:

> (1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state 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;
>
> . . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Fearing that his federal habeas corpus petition would be filed after the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations expired, Albert Holland repeatedly pled with his appointed attorney, Bradley Collins, not to miss the deadline, and sought the assistance of the Florida Courts, the Florida Bar, and other individuals in his quest not to be denied federal review of his claims. On January 18, 2005, through the writ room at Union Correctional Institution (UCI),[1] Holland discovered that all of his efforts had been in vain.

[1] At UCI, death row prisoners have access to a writ room, or library of sorts. However, inmates are not allowed free or consistent access to the writ room; they must ask for and receive permission to visit for a specified period of time. Death row inmates have no computer or online access. J.A. 104.

There, Holland learned for the first time that the Florida Supreme Court had, over two months earlier, affirmed the denial of his state motion for post-conviction relief and denied his petition for a writ of habeas corpus. He discovered that the mandate had issued on December 1, 2005, over six weeks earlier, triggering the re-commencement of his AEDPA statute of limitations. J.A. 105. He realized that the time to file his federal habeas petition had expired and, "despite [] repeated instructions to do so," Collins had "fail[ed] to file a federal habeas petition timely." J.A. 110. Collins had never told Holland about either the Florida Supreme Court's ruling or its mandate.

Distraught, Holland immediately wrote a *pro se* federal habeas corpus petition in longhand and mailed it to the United States District Court for the Southern District of Florida the following day, January 19, 2006. J.A. 181-191. The district court ultimately dismissed the petition on statute of limitations grounds. J.A. 81-94. As the following chronology demonstrates, Holland repeatedly, but futilely, sought to keep his federal habeas corpus rights alive at all stages of his state and federal court litigation.

A. The State Court Proceedings.

The Florida Supreme Court decided Holland's direct appeal October 5, 2000, *see Holland v. State,*

773 So.2d 1065 (Fla. 2000),[2] and this Court denied certiorari October 1, 2001. *See Holland v. Florida*, 534 U.S. 834 (2001). Holland then had 365 days to file a federal habeas petition, unless the time was tolled by a properly-filed state postconviction petition. *See* 28 U.S.C. §§2244(d)(1)(A); (d)(2).

Attorney Collins was appointed to represent Holland in postconviction proceedings on November 7, 2001.[3] Collins filed a state postconviction motion pursuant to Fla. R. Crim. P. 3.851 on September 17, 2002, 317 days after he had been appointed and 351 days into the one-year statute of limitations. This filing tolled the statute, *see* 28 U.S.C. §2244(d)(2), and left 14 days to file the federal petition once relief was denied. After the Florida Supreme Court's mandate

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[2] Holland had been indicted in August, 1990, in Broward County, Florida, on four criminal counts, including one count of first-degree premeditated murder. He was convicted and sentenced to death. On direct appeal, the Florida Supreme Court reversed and remanded for a new trial. *Holland v. State*, 636 So.2d 1289 (Fla. 1994). On retrial, he was again found guilty and, at a penalty phase, the jury recommended a death sentence by an 8-4 vote. The state trial court sentenced him to death.

[3] Collins was appointed pursuant to Fla. Stat. §27.711 (2005), from a list of attorneys called the "Registry." Pursuant to §27.711(2), an appointed attorney must "immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, *including federal habeas corpus proceedings*, in accordance with this section or until released by order of the trial court." (emphasis added).

issued on December 1, 2005,[4] Holland – who did not know that the mandate had issued or that the Florida Supreme Court had earlier decided his cases – had until December 15, 2005, to file his federal habeas petition within the statutory deadline.

1. Holland's Vigilance in State Post-conviction Circuit Court.

Holland had repeatedly stressed to Collins his overarching concern that his claims be preserved for federal habeas proceedings and, specifically, that his federal habeas petition be timely filed. Collins reassured him. For example, in June, 2002, Collins responded to a letter from Holland:

> I would like to *reassure* you that we are aware of state time-limitations and federal exhaustion requirements. . . . Our trust and confidence in one another is essential.

J.A. 55. Collins wrote another letter to Holland on December 23, 2002, stating that once the issues in

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[4] There are factual errors in the Eleventh Circuit's opinion regarding some of the relevant dates. Holland's state post-conviction motion was filed on September 17, 2002 (not September 19, 2002). J.A. 103. Because of this error, the Eleventh Circuit wrongly determined that Holland's state postconviction motion was filed 353 days after this Court denied certiorari. J.A. 107. Rather, it was filed 351 days after the denial of certiorari. That left Holland only 14 days to timely file a federal habeas corpus petition once the Florida Supreme Court issued the mandate, or until December 15, 2005.

state court were exhausted, all his legal issues "will then be ripe for presentation in a petition for writ of habeas corpus in federal court." J.A. 61. Collins assured Holland of his intent to "assert each and every one of [his] viable legal claims in order to enforce [his] substantive and procedural constitutional rights to the fullest extent of the law" and asked for Holland's "complete confidence and support as we litigate your case to the state *and federal trial and appellate courts.*" J.A. 62 (emphasis added).[5]

Despite Collins' assurances, Holland remained vigilant. For example, shortly after Collins filed Holland's state postconviction motion Holland filed a *pro se* motion to supplement the record with thirteen additional grounds for relief. The State moved to strike the motion as a "nullity," arguing that Holland "has no Sixth Amendment right to represent himself, and, at the same time, to have the assistance of counsel." J.A. 9 (citing cases). This argument was reinforced by the State at a later hearing, and the circuit court agreed and struck Holland's pleading. J.A. 14.[6] Following this hearing, Collins wrote to Holland that his office had researched Holland's *pro*

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[5] Collins would later tell Holland, falsely, that the statute of limitations for filing his federal habeas corpus petition had expired before Collins was even appointed to represent Holland. J.A. 79.

[6] At this hearing, Collins acknowledged that Holland's *pro se* motion raised "some points . . . that may be properly raised" and he adopted Holland's *pro se* issues. J.A. 13.

se claims and that "many of the issues you have raised . . . remain viable in a petition for writ of habeas corpus in the Florida Supreme Court[,]" a pleading which would be filed simultaneously with the appellate brief in the event of an appeal to the Florida Supreme Court from the denial of postconviction relief. J.A. 57-61.[7]

Holland continued to be vigilant, writing again to Collins in early January, 2003, to ask about the status of his case. Collins responded that the circuit court was considering whether to grant an evidentiary hearing. J.A. 63-64. Collins closed with "I trust we can move forward with your confidence and a sense of unity in approaching this very delicate matter." J.A. 64.

An evidentiary hearing was scheduled for April 10, 2003. Holland had prepared another *pro se* filing (a letter) containing issues he wanted included in his postconviction motion. J.A. 16. At the beginning of the hearing, Collins brought this pleading to the court's attention and stated that although Collins thought he had presented appropriate grounds for

[7] In Florida, claims of error on direct appeal, including claims of ineffective assistance of appellate counsel, may be raised only in a state habeas corpus petition filed directly in the Florida Supreme Court. *See, e.g. Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). This petition is filed along with the Initial Brief on the appeal from denial of a postconviction motion. *See* Fla. R. App. P. 9.142(a)(5) (2008); *Mann v. Moore*, 794 So.2d 595, 598 (Fla. 2001).

relief, Holland "has some of his own things he wants to raise." J.A. 17. However, the judge indicated that "the issue, unfortunately, with Mr. Holland is that Mr. Holland is represented by counsel. . . . And the period of time in which to file a petition has already expired. The State has responded. . . . The pleadings at this juncture are closed." *Id.*

On May 16, 2003, the state circuit court denied relief, and a timely appeal was taken to the Florida Supreme Court in June, 2003.

2. Holland's Vigilance on Postconviction Appeal.

a. Please let me "know exactly what is happening with my case on appeal to the Supreme Court of Florida."

On June 9, 2003, Holland's appeal was docketed in the Florida Supreme Court. District Court Docket Entry 38 at 31 (hereinafter DE). On July 18, 2003, Holland mailed a grievance to the Florida Bar explaining that he had a number of legal issues that his "attorney does not want to raise" and asking "What can I do to get all my legal issues before the Florida Supreme Court so that I can *exhaust state remedies*, so that my legal claims will not be procedurally barred when I get to the Federal Courts?" J.A. 207-208 (emphasis added).[8]

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[8] The Florida Bar did not initiate an investigation and did not request that Collins respond. J.A. 65-66.

On August 7, 2003, Holland, mistakenly believing that a state habeas corpus petition had been filed,[9] filed a *pro se* motion in the Florida Supreme Court purporting to amend and supplement it with additional issues. J.A. 113-121. As it had done and would do with all of Holland's *pro se* filings, the State moved to strike this *pro se* motion as unauthorized because Holland was represented by counsel. J.A. 19-21. While the motion to strike was pending, Holland wrote to the Florida Supreme Court Clerk requesting information about the status of his appeal, when the appeal was filed, when the record was to be filed, and the due date for the brief and state habeas petition.[10] J.A. 122. On September 11, 2003, the Clerk wrote Holland and answered only his specific questions. J.A. 22. On October 30, 2003, the Florida Supreme Court granted the State's motion to strike Holland's *pro se* motion as "unauthorized," but without prejudice for him to re-file pursuant to Fla. R. App. P. 9.142(a)(5). J.A. 24. *See supra* note 7.

On November 17, 2003, Holland again contacted the Clerk for a "status inquiry" and requested copies of his *pro se* motions which had been stricken. DE38 at 32. On November 20, 2003, Holland again

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[9] *See supra* note 7.

[10] Holland turned to the Florida Supreme Court for an update because "I have not heard from my post-conviction appellate attorney since he filed my Notice of Appeal. I wrote him a letter a couple of months ago, but he has not responded to my letter yet." J.A. 122.

contacted the Clerk to request a copy of the State's motion to strike and to inquire as to when his brief was due. J.A. 123-124. On December 3, 2003, the Clerk responded, providing a copy of the requested document and informing Holland when his brief was due. J.A. 25.

On January 9, 2004, Collins filed the Initial Brief and a Petition for Writ of Habeas Corpus, DE38 at 32, 37, and mailed them to Holland. Pursuant to the Court's earlier ruling, J.A. 24, Holland re-filed his *pro se* motion to amend and supplement the state habeas petition. J.A. 125-133. He was met **again** with a motion to strike by the State arguing that the pleading was a "nullity" because Holland had counsel. J.A. 27-29. The Florida Supreme Court **again** struck Holland's pleading on February 4, 2004. J.A. 30.

Having been repeatedly rebuffed in his efforts to have his issues presented so that they would be exhausted for federal review, Holland filed a *pro se* motion in the Florida Supreme Court on February 23, 2004, requesting that the Court remove Collins and appoint substitute counsel because Holland lacked confidence in Collins' ability to represent him. J.A. 134-145. **Again**, the State moved to strike the *pro se* motion, arguing that Holland was not authorized to file it while represented by counsel. J.A. 31-34.

Because Collins did not send Holland the State's motion to strike, the State's Answer Brief, or the State's Response to the State Habeas Corpus Petition, Holland requested copies of them from the Florida Supreme Court on April 26, 2004, so that he could

"know exactly what is happening with my case on appeal. . . ." J.A. 146-148.[11] The Clerk responded on May 5, 2004, informing Holland, who was indigent, that he would have to pay for copies by "submitt[ing] a check or money order in the amount of $77.00 made

[11] Specifically, Holland wrote:

> Mr. Hall, I have not yet received a copy of the Appellee's (State of Florida's) answer brief in response to the brief my post-conviction, appellate attorney Mr. Bradley M. Collins filed in behalf of me on January 12, 2004. I also have not received a copy of Mr. Bradley M. Collins Reply brief to the Appellate "Answer Brief."
>
> Mr. Hall would you please be kind enough to send me copies of the appellee's forgoing "Answer brief," Mr. Bradley M. Collins "Reply brief," and a copy of the appellee's or Mr. Bradley M. Collins's response to my pro se "Motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free Substitute Counsel," and if possible the Supreme Court of Florida's Ruling on my "Motion to Remove Conflict Counsel and to appoint Competent, Conflict-Free, Substitute counsel?"
>
> Mr. Hall, because I know and understand how busy you must be, I decided to wait until I believed that all of the foregoing legal documents have been filed before writing you this letter, instead of writing separate letters asking for each copy individually. I decided to include everything in one letter.
>
> Mr. Hall, if I had a competent, Conflict-Free, post-conviction appellate attorney representing me I would not have to write you this letter. I'm not trying to get on your nerves. I just would like to know *exactly what is* happening with my case on appeal to the Supreme Court of Florida.

J.A. 146-147 (emphasis in original).

payable to 'Clerk, Florida Supreme Court.'" J.A. 36.[12] On the same day as the Clerk's response, the Florida Supreme Court **again** granted the State's motion to strike Holland's *pro se* motion to remove Collins. J.A. 35.

On June 17, 2004, Holland filed another *pro se* motion in the Florida Supreme Court seeking to get free of Collins by requesting a hearing pursuant to the Florida procedure for seeking either substitute counsel or invoking the right to proceed *pro se*. J.A. 149-163.[13] After ordering and receiving responses to this motion from Collins and the State,[14] the

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[12] The Clerk also advised Holland that in lieu of sending money he could contact his attorney for copies or visit the Court's webpage. J.A. 36.

[13] Holland asked for a hearing pursuant to *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), which requires a court to inquire of a defendant and appointed counsel when allegations of attorney incompetency are made and, if warranted, permitting a court to appoint substitute counsel or to allow the defendant to proceed *pro se*. *Nelson*, 274 So.2d at 259. The Florida Supreme Court approved this procedure in *Hardwick v. State*, 521 So.2d 1071, 1074-75 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

Had Holland been allowed to proceed *pro se*, he would have necessarily received notice when the Florida Supreme Court ruled in his case.

[14] In its Response, the State argued that because the Court had struck Holland's previous *pro se* pleadings, it "should do so **again**" because Holland was represented by counsel. J.A. 45 (emphasis added). Collins' response "expresse[d] no preference whatsoever concerning [his] continued representation of Mr. Holland. . . ." J.A. 41. Collins also wrote that he "communicated" with Holland "before, during and after" the postconviction

(Continued on following page)

Florida Supreme Court **again** denied Holland's motion on October 22, 2004. J.A. 46.

b. "Please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)."

Oral argument on the appeal of the denial of postconviction relief and on the state habeas petition was conducted in the Florida Supreme Court on February 10, 2005. On March 3, 2005, Holland wrote Collins:

> I write this letter to ask that you please write me back, as soon as possible, to let me know what the status of my case is on appeal to the Supreme Court of Florida.
>
> If the Florida Supreme Court denies my 3.850-3.851 and State Habeas Corpus appeals, ***please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires).***
>
> Thank you very much.

---

motion was filed, "before, during and after" the evidentiary hearing, and "prior to filing appellate briefs and habeas corpus pleadings on the claims which, in [his] professional judgment, may be advanced in good faith." J.A. 38. In a *pro se* reply to Collins' filing, Holland wrote that Collins did not send him copies of the State's Answer Brief or its Response to the State Habeas Corpus Petition. J.A. 168.

J.A. 210 (emphasis added). *Collins did not respond*. Holland wrote again on June 15, 2005:

> On March 3, 2005, I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.
>
> ***Also, have you begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know, as soon as possible.***
>
> Thank you.

J.A. 212 (emphasis added). *This letter, too, went unanswered by Collins.*

With no response from Collins, Holland contacted the Florida Supreme Court Clerk in October, 2005, to inquire about how one could access its online docket. J.A. 104.[15] The Clerk supplied Holland with a print-out of its webpage with directions on how one could locate briefs and petitions online. DE38 at 52-54. Holland requested this information "so that he could secure the assistance of outside supporters to keep him updated about the appeal." J.A. 104.

On November 10, 2005, the Florida Supreme Court issued its decision affirming the denial of

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[15] As mentioned above, the Clerk's May 5, 2004, letter to Holland requesting $77.00 for documents referred him to the Court's webpage. J.A. 36. However, as also noted above, death row inmates at UCI do not have online access.

postconviction relief and denying Holland's petition for habeas corpus. *Holland v. State*, 916 So.2d 750 (Fla. 2005). Collins filed no motion for rehearing, and the Florida Supreme Court issued its mandate on December 1, 2005. "Unaware of the state supreme court's decision," J.A. 105, Holland contacted the Clerk's office again by letter of December 21, 2005, to ask when the mandate from his direct appeal had issued. DE35 at 19. The Clerk responded "Re: ALBERT HOLLAND V. STATE OF FLORIDA, CASE NO. SC03-1033" (the case number of the *post-conviction* appeal), without mentioning that relief had been denied in SC03-1033, and advised Holland that the mandate from the direct appeal could be obtained at the Florida State Archives. J.A. 70.[16] Remaining in the dark about the denial of the postconviction appeal, Holland again wrote to Collins on January 9, 2006, requesting, once more, information about his case and re-emphasizing his desire for federal habeas review:

> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet?
>
> Please send me the date when the "mandate" was issued in my case. If you could, please also send me a copy of said "mandate," so that I can determine when the

[16] Holland followed through and contacted the Archives, which provided him with a copy of the direct appeal mandate. J.A. 71-75.

> deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," ***if my appeals before the Supreme Court of Florida are denied.***
>
> ***Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.***
>
> Mr. Collins, would you please also inform me as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address?
>
> Thank you very much.

J.A. 214 (emphasis added).[17]

B. The Federal Court Proceedings.

1. Holland's Discovery of the State Court's Decision and Mandate; His Immediate *Pro Se* Habeas Filing.

This was the status of this case when Holland, on January 18, 2006, learned for the first time in the prison writ room that the Florida Supreme Court had

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[17] On this same date – January 9, 2009 – Holland requested to visit the writ room, but his request was inexplicably "refused." DE38 at 62; DE52 at 4-5.

denied relief on November 10, 2005, and had issued its mandate on December 1, 2005.

That instant, Holland hand-wrote a *pro se* habeas petition, which he mailed to the federal court the next day, January 19, 2006. J.A. 181-191.[18] At the top of his *pro se* pleading, Holland wrote "Re: To Preserve Federal Review of State Convictions and Sentences," and, in the opening paragraph, stated that his court-appointed counsel "failed to undertake timely action" in seeking habeas relief. J.A. 181. Holland summarily listed the claims that had been raised on direct appeal, in his postconviction appeal, and in his state habeas petition. J.A. 181-190. He also listed the claims contained in the *pro se* filings he had submitted but which the state courts had stricken. J.A. 190-191. He requested the appointment of counsel and "a reasonable amount of time to amend his action." J.A. 191.

2. Collins' Betrayal.

Holland was allowed to make an emergency telephone call to Collins on January 19, 2006. J.A. 76. Coincidentally, that same day Holland received a letter from Collins asking Holland to fill out, sign, and return an indigency affidavit to accompany a

[18] The Eleventh Circuit recognizes the "mailbox rule" for filing a prisoner's habeas petition. *Adams v. United States*, 173 F.3d 1339 (11th Cir. 1999). The court below and the State agree that Holland's *pro se* habeas petition was filed on January 19, 2006. J.A. 107; BIO 8-9.

petition for certiorari to this Court from the denial by the Florida Supreme Court. J.A. 216. Holland wrote to Collins on January 20, 2006, indicated that he had filled out the indigency form, and said:

> Since recently, the Supreme Court of Florida has denied my 3.851 and state writ of habeas corpus petition, I am left to understand that you are planning to seek certiorari on these matters.
>
> It's my understanding that the AEDPA time limitations is not *tolled* during *discretionary* appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.
>
> Therefore, I advise you *not* to file certiorari if doing so affects or jeopardizes my one year *grace* period as prescribed by the AEDPA.

Id. (emphasis in original).[19]

On January 26, 2006, Holland attempted to place a telephone call to Collins, but Collins' office refused to accept the call. J.A. 218. The next day, Holland again wrote to Collins about "the present status of my case on appeal. What have you filed? Please send me a copy of what you have filed on my behalf. I've

[19] On February 8, 2006, Collins filed a certiorari petition, which was denied on April 17, 2006. *Holland v. Florida*, 547 U.S. 1078 (2006).

written you two letters but you have not responded to them. Please respond." J.A. 218.

On January 31, 2006, Collins wrote to Holland explaining, for the first time (and falsely), that Holland's four years of vigilance had been a fool's errand all along because the AEDPA statute of limitations had expired *before* Collins was even *appointed* to the case:

> I am in receipt of your letter dated January 20, 2006 concerning operation of AEDPA time limitations. One hurdle in our up-coming efforts at obtaining federal habeas corpus relief will be that *the one-year statutory time frame for filing such a petition began to run after the case was affirmed on October 5, 2000.* . . . However it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a year after the case became final. . . . [The AEDPA statute of limitations period] had run before my appointment and therefore before your Rule 3.850 motion was filed.*

J.A. 78-79 (emphasis added).

On February 9, 2006, Holland responded to Collins' letter and said that Collins was "incorrect" that the one-year period began to run on October 5, 2000. J.A. 222. Holland pointed out that certiorari was denied on October 1, 2001, and "that is when my case became final." *Id.* Holland's letter continued:

Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.

You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005, decision denying my post-conviction appeals. You never kept me informed about the status of my case, although you told me that you would immediately inform me of the court's decision as soon as you heard anything.

Mr. Collins, I filed a motion on January 19, 2006, to preserve my rights, because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?

Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting any more time (valuable time).

Again, please file my 2254 Petition at once.

Your letter is the first time that you have ever mentioned anything to me about my time had run out, before you were appointed to represent me, and that my one-year started to run on October 5, 2000.

> Please find out the status of my motion that I filed on January 19, 2006 and let me know.

J.A. 222-223 (emphasis added).[20]

3. Holland's Request for Counsel and the State's Motion to Dismiss.

On March 8, 2006, Holland mailed a *pro se* "Emergency Motion to Dismiss Conflict-Counsel and for Appointment of Conflict-Free Counsel" to the district court requesting that Collins be dismissed and new counsel appointed, or that he be allowed to proceed *pro se*. J.A. 192-196. Holland alleged that Collins had not communicated with him from July, 2005, until January 19, 2006, that the prison "limits the hours that petitioner may have access to the law

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[20] On March 1, 2006, Holland mailed another complaint to the Florida Bar. DE41-1 at 8. In his grievance, Holland wrote that Collins "failed to inform me that the Florida Supreme Court denied my 3.850-3.851 and state habeas corpus appeals on November 10, 2005" and that Collins "failed to file my 28 U.S.C. §2254 habeas corpus petition in federal court before the deadline ran out (expired)." *Id*. This time the Florida Bar requested a response from Collins, which he submitted by letter dated March 21, 2006. DE41-1 at 2-3. In that response, Collins' attorney wrote that "[a]ll orders and motions have been forwarded to Mr. Holland"; that a petition for writ of certiorari was pending in this Court; and that "Mr. Collins has written Mr. Holland regarding some time limitation I believe may apply to him regarding federal attacks, and he is still researching filings in federal court," and that a "detailed explanation was written and sent to Mr. Holland." DE41-1 at 3.

library and the law materials contained there are very limited," that Collins failed to inform him of the Florida Supreme Court's denial, and that Holland had "instructed [Collins] to file his 2254 Habeas Petition, before the deadline to file it ran out (expired), but he refused to file the petition." J.A. 193-196. Holland also wrote that Collins had committed "egregious errors" and "deceived and misled petitioner as to when he would file his 2254 petition and has also misrepresented the law and facts, through-out said representation of petitioner's case." J.A. 194-195.

On March 22, 2006, Collins mailed Holland a proposed federal habeas petition requesting that Holland either sign and return the petition so that Collins could file it and continue his representation, or that Holland request that Collins move to withdraw. DE20 at 18.[21]

On March 27, 2006, the State responded to Holland's *pro se* motion for appointment of counsel and moved to dismiss Holland's *pro se* habeas petition. DE8. With respect to the petition, the State **once more** argued that Holland's *pro se* habeas petition was a "nullity" and should be dismissed because "Holland may not maintain a *pro se* Petition for Writ of Habeas Corpus while he has a Petition for Writ of Certiorari pending in the United States Supreme

[21] This letter to Holland was written one day after Collins' attorney responded to Holland's complaint to the Florida Bar. *See supra* note 20.

Court." DE8 at 2. Moreover, the State contended that Holland "does not have the right to proceed pro se while he is simultaneously being represented by a lawyer" and thus Holland's *pro se* habeas petition should be dismissed because he filed it while being represented by Collins. DE8 at 4. With respect to the counsel issue, the State argued that Collins had been appointed pursuant to Florida's registry scheme which required him to continue in his representation until Holland's sentence was reversed, reduced, or carried out, or until a state court permitted him to withdraw. DE8 at 4-5.[22]

The district court entered two Orders to Show Cause on March 29, 2006. DE9, 10. One directed the State to respond to Holland's *pro se* habeas corpus petition with "particular attention" to the timeliness of the petition, DE9; the other ordered Collins to respond to Holland's *pro se* motion to dismiss Collins. DE10. The district court was "particularly concerned over the source of the alleged conflict between counsel and Petitioner" and directed Collins to "address whether his appointment by the State of Florida extends to his representation of Petitioner in the instant federal habeas case." DE10.

On April 28, 2006, the State filed its Answer in response to the Show Cause Order. DE14. The State argued that Holland's *pro se* habeas petition was filed

[22] The State did not serve this pleading on Holland himself. Only Collins was served. DE8 at 6.

38 days beyond the statutory deadline set forth in 28 U.S.C. §2244(d)(1). DE14 at 12-13. According to the State, Holland's one year began running October 1, 2001, and was tolled on September 19, 2002, 11 months and 19 days later. DE14 at 13.[23] The time was tolled until the December 1, 2005, mandate from the Florida Supreme Court, at which time the clock began to run again. *Id*. In the State's view, Holland had 11 days after the issuance of the mandate, or until December 12, 2005, in which to file his federal habeas petition. DE14 at 14. Because he did not file his *pro se* petition until January 19, 2006, it was time-barred. *Id*.

Collins filed a response to the Order to Show Cause but did not respond to Holland's allegations. DE16. He did not mention whether the AEDPA's statute of limitations had expired on his watch. He did not deny that Holland had asked him repeatedly to file his federal habeas petition in a timely manner, that he had promised to do so, and that he had deceived and misled Holland. He did not explain why he failed to tell Holland about the Florida Supreme Court's denial or the issuance of its mandate.[24]

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[23] As noted earlier, Holland's state postconviction motion was actually filed on September 17, 2002, not September 19.

[24] The show cause order specifically had directed Collins to "respond with a written memorandum addressing Petitioner's emergency motion." DE10.

Instead, Collins described the procedural history of Holland's case and his own efforts leading up to the filing of Holland's postconviction motion on September 17, 2002. DE16 at 4-6. Collins wrote that he had "completed" a federal habeas corpus petition, had mailed Holland a copy, and had asked Holland whether he wanted Collins to file the petition or seek in state court to withdraw from the case.[25] DE16 at 6. Collins wrote that he had filed a motion in state court to withdraw as Holland's counsel because Holland "failed to elect" either of the alternatives. *Id*. Collins ultimately obtained an order from state court permitting him to withdraw from Holland's representation and Collins so informed the federal district court on May 5, 2006. DE17.

On May 25, 2006, the district court denied as moot Holland's *pro se* motion to discharge Collins because the state court had appointed the Office of the Capital Collateral Regional Counsel-South (CCRC-South) to undertake Holland's representation. DE18. CCRC-South, however, moved the district court to appoint other counsel because its office had a burdensome case load. DE19.[26]

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[25] Collins' response failed to note he did not mail Holland a proposed petition until March 22, 2006, well after Holland filed his *pro se* petition and well after the statutory deadline had expired.

[26] This was the second time CCRC-South had been appointed to Holland's case. CCRC-South is a state-funded agency providing legal representation to indigent death-row inmates for

(Continued on following page)

With the status of counsel still up in the air, Holland filed a *pro se* "rebuttal" to Collins' response to the court. J.A. 197-204. Holland correctly noted that Collins had not explained in his response to the court's show cause order why he had: (1) failed to inform Holland of the Florida Supreme Court's denial of relief in November, 2005; (2) failed to timely file his federal habeas petition despite Holland's repeated instructions to do so; (3) always led Holland to believe Collins would file a federal habeas petition in a timely manner; (4) deceived and misled Holland as to when Collins would file a federal habeas petition; and (5) drafted a federal habeas petition "two months and three days after petitioner filed a 'pro se' writ of habeas corpus petition on January 19, 2006," a draft which was "basically identical" to what Holland had filed *pro se* except that Collins' draft was typed. J.A. 198.

On June 13, 2006, the federal court relieved CCRC-South from its representation of Holland and appointed Todd Scher. DE22.

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state and federal postconviction litigation, Fla. Stat. §§27.701-708, and was originally appointed by the Florida Supreme Court to represent Holland on October 1, 2001. DE38 at 9. CCRC-South had to withdraw then due to its excessive case load; Collins was on the list of "registry" attorneys, *see supra* note 3, and was appointed to represent Holland after CCRC-South withdrew. DE16 at 3.

4. Holland Asserts Entitlement to Equitable Tolling.

On November 21, 2006, Holland's new counsel responded to the State's statute of limitations defense, DE35, and submitted an appendix of documents in support of an evidentiary hearing and of Holland's entitlement to equitable tolling. J.A. 53-81; 205-223; DE38.[27] Holland argued that he could establish "extraordinary circumstances that [were] both beyond his control and unavoidable even with diligence." DE35 at 8. Holland pled that he "sought assurances from Mr. Collins that his deadlines, both state and federal, would be honored." DE35 at 11. He detailed the chronology of events, including his instructions to Collins to file his federal habeas petition before the statutory deadline and Collins' assurances that he was "aware of" the relevant time

[27] The Appendix submitted in the district court, DE38, included the Florida Supreme Court's docket sheets from Holland's cases on direct appeal, from the denial of the appeal from denial of postconviction relief, and from the denial of the petition for habeas corpus. DE38 at 4-9; 31-35; 37-39. It also contained other documents and letters, some of which are reproduced in the Joint Appendix. The docket sheets documented filings in the Florida Supreme Court with brief explanatory notes entered by the Clerk; not all of the actual filings in the Florida Supreme Court, and documented on the docket sheets, were filed with the Appendix in the district court. However, the district court, the Eleventh Circuit, and the parties relied upon these docket sheets and the explanatory notes they contained. The parties agreed to include in the Joint Appendix many of the actual documents filed in the Florida Supreme Court reflected in the docket sheets.

limitations and exhaustion requirements. DE35 at 11, 16-17, 20-21. Holland also pled that Collins asked him to have "confidence" in Collins' work and his word. DE35 at 13. Holland explained the various *pro se* filings in the state courts seeking to have his issues heard and to have Collins removed, and that his efforts had been rebuffed by the Florida courts' granting the State's motions to strike his *pro se* pleadings as "nullities" that were "unauthorized." DE35 at 13-16. Holland also set out his repeated letters to the Florida Supreme Court Clerk requesting status updates and information about how to obtain copies of briefs and other pleadings that Collins had failed to provide him. DE35 at 18. He pled that in order to obtain pleadings and briefs from the Florida Supreme Court, he would have had to send money. DE35 at 15. Holland also documented that Collins never, either by letter or phone call, informed him of the Florida Supreme Court's denial of relief in November, 2005, or of the issuance of its December 1 mandate. DE35 at 18-19; J.A. 105. *See also* BIO 13 ("Collins did fail to notify Holland that the mandate had issued").

On January 29, 2007, the State responded to Holland's pleading, again maintaining that his *pro se* habeas corpus petition was a "nullity when filed" because Holland filed it *pro se* while represented by Collins. DE41 at 2 & n.3. The State did not dispute that equitable tolling was available but contended that Holland had the burden of establishing (1) that he had been pursuing his rights diligently, and

(2) that some extraordinary circumstance stood in his way. DE41 at 5.

The State argued that Holland lacked diligence because the Florida Supreme Court Clerk never "misled" Holland by promising to notify him when his case was decided and that Holland "could have" easily requested that the Court provide him with a copy of its opinion and mandate. DE41 at 8, 9.[28] The State also contended that Holland failed to "report what efforts, if any" he had made to secure assistance from persons outside the prison after he obtained information about the Florida Supreme Court's online docketing system. DE41 at 9. Finally, the State argued that attorney negligence did not entitle Holland to equitable tolling and that Collins "did not ignore Holland's requests and even prepared a federal habeas petition." DE41 at 9-10, 12.

5. The District Court Dismissed Holland's Habeas Corpus Petition as Untimely.

On April 27, 2007, the federal district court, without holding an evidentiary hearing, dismissed Holland's *pro se* habeas corpus petition as untimely. J.A. 81-94. The court concluded that Holland lacked diligence because the Florida Supreme Court Clerk never promised to inform him of the outcome of his case and Holland did not request that the Clerk send

[28] The State did not explain where Holland would get the funds to pay for a copy of an opinion.

him a copy of its decision or mandate. J.A. 87. The court also found diligence lacking because Holland failed to discuss what efforts he made to "find" outside supporters once he received information about the Florida Supreme Court's online docket. J.A. 88. The court wrote that Collins met with Holland on death row, communicated with him "on several occasions," provided a "detailed, written explanation of the strategy for the case," pursued collateral relief in the state courts, and filed a petition for writ of certiorari following the denial by the Florida Supreme Court. J.A. 90-91. The court wrote that Collins prepared a "proposed" federal habeas petition for Holland's review and signature, but Holland "never responded" to Collins. J.A. 91.

The court accepted the State's argument that Holland had no right to file *pro se* pleadings in the state courts (or, by implication, to be "served" with the Florida Supreme Court's decision) while simultaneously being represented by Collins. *Id.* Later, ruling on Holland's motion to alter or amend the judgment of dismissal, the district court found that "[w]hether waiting approximately seven weeks to inform Petitioner, when counsel believed, although erroneously, that the filing deadline had already passed, rises to an extraordinary circumstance is debatable." J.A. 99-100.

6. The Eleventh Circuit's Flawed, Bright-Line Test for Equitable Tolling.

The Eleventh Circuit described equitable tolling as an "extraordinary remedy" to be "applied sparingly." J.A. 107. It agreed that Holland's federal habeas petition would be considered timely if he showed (1) that he had pursued his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. J.A. 107-108 (quoting *Lawrence v. Florida*, 549 U.S. 327 (2007)). It wrote that "attorney negligence is not a basis for equitable tolling," J.A. 108, but noted that, in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), the Circuit had recently addressed whether attorney misconduct "going beyond 'mere negligence' may constitute an extraordinary circumstance warranting equitable tolling." J.A. 109. The *Holland* court explained that, in *Downs*, a district court order dismissing a habeas petition as untimely had been vacated because counsel's misconduct in missing the AEDPA deadline included "affirmative misrepresentations by counsel" about the filing of a state court postconviction motion that would have tolled the statute of limitations. In contrast to *Downs*, the *Holland* court wrote that here there was "no allegation of knowing or reckless misrepresentation or of lawyer dishonesty." J.A. 110.[29]

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[29] In point of fact, Holland specifically pled that Collins had "deceived and misled" him as to when he would file his habeas petition. J.A. 194-195.

The court described the allegations here as merely "Collins's failure to communicate with Petitioner on the status of his case and [ ] Collins's failure to file a federal habeas petition timely, despite repeated instructions to do so." J.A. 110. Assuming that Collins was "grossly negligent" in his representation of Holland, the Eleventh Circuit categorically excluded his "gross negligence" from its newly-announced bright-line rule for equitable tolling:

> We will assume that Collins's alleged conduct is negligent, even grossly negligent. *But in our view,* ***no*** *allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling.*

J.A. 110 (emphasis added).

The court concluded that Holland presented no evidence that "he ever asked – before the limitations period for filing his federal habeas petition had run – that the Florida Supreme Court provide him directly with notice of the decision on his postconviction appeal," and that Holland's inquiry of the Florida Supreme Court on December 21, 2005, was 9 days after the deadline had passed. J.A. 111. The court found that the Department of Corrections' denial of Holland's access to the prison writ room on January 9, 2006, was also well beyond the limitations period

and, thus, Holland "cannot reasonably argue that the incidents to which he draws our attention – both occurring after the limitations period had run – prevented him from filing a federal habeas petition timely." *Id.*[30]

SUMMARY OF ARGUMENT

By every precept of equity, petitioner is entitled to equitable tolling. The relevant statute, 28 U.S.C. §2244(d)(1), is a classic statute of limitations, which Congress would expect to be read in light of the conventional presumption that such limitations are subject to tolling in extraordinary circumstances. This Court has declared the presumption to be "hornbook law" and has recognized it in a wide range of contexts; the Court has several times assumed that §2244(d)(1) is susceptible to equitable tolling; every circuit court of appeals that has decided the question (eleven, in all) has agreed.

Pace v. DiGuglielmo, 544 U.S. 408 (2005), identified the traditional equitable tolling inquiries and applied them to §2244(d)(1): "Generally, a litigant seeking equitable tolling bears the burden of

[30] The Eleventh Circuit misconstrued Holland's arguments on these matters. Holland did not argue that his December 21, 2005, letter to the Florida Supreme Court or the denial of access to the writ room on January 9, 2006, constituted "extraordinary circumstances." Rather, these facts showed Holland's diligence.

establishing . . . (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Such a standard provides adequate guidance to the lower courts while allowing the adaptability for case-specific considerations that is the time-honored signature of equity. The lower courts have widely adopted it and applied it with discretion. They have reserved tolling for the rare, exceptional cases in which some unpredictable situation beyond a prisoner's control has resulted in delayed filing despite his or her diligence.

This is such a case. Throughout his state postconviction proceedings, petitioner repeatedly informed his court-appointed attorney, the State, and the Florida courts of his desperate desire to preserve his claims for federal habeas review. He implored his attorney to meet filing deadlines and made ceaseless inquiries about the status of his case. His attorney assured him the deadlines would be met. When the attorney failed to keep him advised of the status of his case, petitioner repeatedly tendered *pro se* filings and made inquiries of the court clerk. He sought to have his attorney removed by motions to the court and complaints to the Florida Bar. His six *pro se* pleadings were stricken as "nullities" at the State's insistence, on the ground that he was represented by counsel and could not address the courts personally. His motions to discharge counsel were rebuffed, with the result that, when the Florida Supreme Court denied him postconviction relief, notice was sent to his lawyer rather than petitioner himself. The lawyer

failed to advise him either of the Florida Supreme Court's decision or of its issuance of mandate which recommenced the federal clock running.

Petitioner had begged his attorney: "Please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)." The attorney had assured petitioner he would do so and had asked for petitioner's "trust" and "confidence." But the attorney let petitioner's federal deadline pass without filing a federal petition or even informing petitioner that the state postconviction proceedings had been decided and that the federal clock was ticking. When petitioner first learned these things – on his own, through the prison's writ room – he hand-wrote a federal habeas petition and filed it himself within 24 hours. One month too late.

Petitioner could not reasonably have done more than he did to assure the timely filing of his federal petition. The State of Florida could not possibly have done more than it did to prevent him from safe-guarding his own rights or to turn his status as a "represented" litigant into a state of helpless dependence on his court-appointed lawyer. That lawyer solicited Holland's trust and betrayed it. The Florida courts and Bar watched this happen and did nothing, despite Holland's pleas to them for aid.

Such circumstances are extraordinary. In a civilized administration of justice, they must be. Equity must recognize that.

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ARGUMENT

A. Equitable Tolling Is Available Under the AEDPA.

The doctrine of equitable tolling permits a court to toll a statute of limitations when extraordinary circumstances make rigid application of the statute unfair. When Congress provides for court filing deadlines its intent may be either to provide for the orderly processing of claims or to place a limit on a federal court's jurisdiction to entertain a claim. *Bowles v. Russell*, 551 U.S. 205, 211 (2007). Legislation containing a limitation period (governing the way claims are processed) customarily allows for equitable tolling;[31] a jurisdictional requirement customarily does not. *Id.*[32]

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[31] It is "hornbook law that limitations periods are 'customarily subject to equitable tolling.'" *Young v. United States*, 535 U.S. 43, 49 (2002), quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). *See also Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986); *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Amer. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-58 (1974); *Honda v. Clark*, 386 U.S. 484, 501 (1967).

[32] The Court emphasized in *Bowles* that the jurisdictional requirement in that case was established by statute rather than by rule or by judicial decision. Of course, Congress typically exercises its constitutional authority regarding the federal courts' jurisdiction by means of statutes. Yet a time limit is not jurisdictional *because* it is in a statute. Hosts of nonjurisdictional "statutes of limitations" are statutory.

28 U.S.C. §2244(d)(1) announces its character with unmistakable clarity: a "*period of limitation* shall apply to an application for a writ of habeas corpus." (emphasis added). This Court has recognized that §2244(d)(1) creates a "statute of limitations" rather than a jurisdictional requirement, *Day v. McDonough*, 547 U.S. 198, 205 (2006),[33] and has assumed without deciding that equitable tolling applies to §2254(d)(1). *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005).[34]

Eleven circuits have held that the limitation period in §2244(d)(1), or the similar period in 28 U.S.C. §2255(f), allows for equitable tolling.[35] This

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[33] *Accord Day*, 547 U.S. at 213 (Scalia, J., dissenting, joined by Thomas & Breyer, JJ.) (explaining that "the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional"); *see also Calderon v. Ashmus*, 523 U.S. 740, 747-748 (1998) (describing the time limits in §2244(d)(1) and in 28 U.S.C. §2263 as "statute[s] of limitations" giving rise to a "defense").

[34] Members of the Court have expressed the view that the §2244(d)(1) period of limitation can be equitably tolled. *See Duncan v. Walker*, 533 U.S. 167, 184 (2001) (Stevens, J., concurring in part and concurring in the judgment, joined by Souter, J.); *id*. at 192 (Breyer, J., dissenting, joined by Ginsburg, J.); *Pliler v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring).

[35] *See Calderon v. U.S. Dist. C*ourt, 128 F.3d 1283, 1289 (9th Cir. 1997), *overruled on other grd's*, 163 F.3d 530 (9th Cir. 1998) (*en banc*) ("Every relevant signal – from the Act's plain language, to its legislative history, to its structure – points in the same direction: [the] one-year timing provision is a statute of

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chorus of agreement is unsurprising given the history and purpose of habeas corpus. Congress "must be presumed to draft limitations periods" in view of the "background principle" that equitable tolling is "customarily" available, *Young*, 535 U.S. at 49, especially when federal courts are required to apply "the principles and rules of equity jurisprudence." *Id.* at 50. Habeas corpus is governed by equitable principles. *Gomez v. United States District Court*, 503 U.S. 653, 653-654 (1992); *cf.* 28 U.S.C. §2243 (a court entertaining a habeas petition "shall . . . dispose of the matter as law and *justice* require") (emphasis added).[36] Consistent with equity principles, Congress

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limitations subject to equitable tolling, not a jurisdictional bar."); *see also Neverson v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Miller v. New Jersey Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 329-340 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999); H.R. Conf. Rep. No. 104-518, at 111 (1996), 1996 U.S. Code & Admin. News 924 (stating that the AEDPA "sets a one year statute of limitation on an application for a habeas writ"); *Calderon*, *supra*, at 1288 (collecting statements by the floor leaders explaining that the bill would establish a "statute of limitations"). The question is open in the D.C. Circuit. *United States v. Pollard*, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005).

[36] *See also Lonchar v. Thomas*, 517 U.S. 314, 323 (1995); *Withrow v. Williams*, 507 U.S. 680, 716-17 (1993) (Scalia, J.,

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chose to create a limitation period, not anticipating all the scenarios in which tolling may serve equity, but instead relying on courts to exercise case-by-case judgment. *Schlup v. Delo*, 513 U.S. 298, 319 n.35 (1995) ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence"); *Moore v. Sims*, 442 U.S. 415, 433 (1979) ("extraordinary circumstances" can be identified only on a case-by-case basis). Congress plainly intended for equitable tolling to be available under the AEDPA.[37]

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concurring in part and dissenting in part, joined by Thomas, J.) (confirming the writ's equitable heritage).

[37] This Court resists interpretations of habeas statutes "that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2005). *See also Danforth v. Minnesota*, 552 U.S. 264, ___, 128 S.Ct 1029, 1040 (2008) ("This Court has interpreted . . . the statute's command to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. §2243 . . . as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations."); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power. . . .").

B. Equitable Tolling Is Based Upon General Principles Which Allow Fact-Dependent and Case-Specific Inquiries; This Court, and Circuit Courts Nationwide, Apply Such General Principles; the Lower Court Did Not.

1. The History of Equitable Tolling Generally and in Habeas – Flexibility.

Habeas corpus is "'governed by equitable principles.'" *Munaf v. Geren*, 128 S.Ct. 2207, 2220 (2008) (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963); *see also Schlup,* 513 U.S. at 319 ("Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy."). Courts in equity cases "tailor relief, and related procedure, to the exigencies of particular cases and individual circumstances," *Miller v. French*, 530 U.S. 327 (2000) (Breyer, J., joined by Stevens, J., dissenting), and are not "controlled by rigid rules rigidly adhered to." *Di Giovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 70 (1935). Equitable principles make adjustments for exceptional, unpredictable, circumstances that may come from any source and out of the blue, circumstances in which the application of rigid rules could result in an injustice. *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942). The whole history of equity jurisprudence makes plain that bright-line rules disserve this vital function: "[e]quity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also Hecht Co. v. Bowles*, 321

U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the equity of the case.").

This paradigm of flexibility resonates with the tradition of equitable tolling.[38] And it is workable, as evidenced by its adoption across virtually the entire roster of federal proceedings and claims.[39]

AEDPA's time limitation is no exception to this body of federal equitable tolling jurisprudence. The circuit courts have uniformly recognized that equitable tolling is available under the AEDPA but is appropriate only in rare conjunctions of highly singular circumstances. Far from prescribing any pat formula, the circuit courts have maintained flexibility by examining on a case-by-case basis whether extraordinary circumstances beyond a petitioner's control caused him or her to miss the statutory filing deadline, despite the petitioner's diligence. The following cases are illustrative of this case-specific,

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[38] "Justice sets out rigid rules and can be qualified by equity. Equity is not rigid: it is, as Aristotle said, malleable like lead and can be adjusted to special circumstances." D.D. Raphael, *Concepts of Justic*e, 237 (Oxford University Press 2001).

[39] Appendix A hereto is a compendium of federal cases documenting the application of equitable tolling to forty-five (45) different federal statutes or claims, from the Age Discrimination in Employment Act to Wrongful Death Actions.

flexible approach to the rarely-employed remedy of equitable tolling under the AEDPA:

> 1st Circuit: *Barreto-Barreto v. United States*, 551 F.3d 95, 100-101 (1st Cir. 2008) (to warrant equitable tolling petitioners must demonstrate extraordinary circumstances beyond their control; tolling is not applicable if petitioners "simply 'failed to exercise due diligence in preserving [their] legal rights.' ")
>
> 2d Circuit: *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004) (equitable tolling is available in "rare and exceptional circumstances"; a petitioner must establish that extraordinary circumstances prevented him from filing on time, and that he acted with reasonable diligence throughout the period he seeks to toll.)
>
> 3d Circuit: *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (equitable tolling is available only when the principle of equity would make the rigid application of a limitation period unfair; equitable tolling excuses untimely filing when the petitioner has in some extraordinary way been prevented from asserting his or her rights and the petitioner has shown that he or she exercised reasonable diligence.)
>
> 4th Circuit: *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*) (equitable tolling is appropriate only when a petitioner shows (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented timely filing; "Principles of

equitable tolling do not extend to garden variety claims of excusable neglect.")

5th Circuit: *Hardy v. Quarterman*, 577 F.3d 596, 598-600 (5th Cir. 2009) (long delay in receiving notice of state court action may warrant equitable tolling but a petitioner must proceed with diligence and alacrity both before and after receiving notification of the denial of his state court petition.)

6th Circuit: *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (equitable tolling is allowed when "a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control"; factors are (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement; these factors "are not necessarily comprehensive or always relevant; ultimately every court must consider an equitable tolling claim on a case-by-case basis.")

7th Circuit: *Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006) (equitable tolling excuses an untimely filing when, despite exercising reasonable diligence, a petitioner could not have learned the information he needed in order to file on time.)

8th Circuit: *Streu v. Dormire*, 557 F.3d 960, 967 (8th Cir. 2009) (litigant seeking

equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.)

9th Circuit: *Ramirez v. Yates*, 571 F.3d 993, 997-998 (9th Cir. 2009) (for equitable tolling petitioner must establish that he has been pursuing his rights diligently and that some extraordinary circumstances stood in his way; a prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter.)

10th Circuit: *Laurison v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) (AEDPA one-year statute of limitations is not jurisdictional and can be equitably tolled, but equitable tolling is limited to "rare and exceptional circumstances.")

11th Circuit: *Downs v. McNeil*, 520 F.3d 1311, 1318-1319, 1322 (11th Cir. 2008) (equitable tolling is limited to extreme cases where failure to invoke principles of equity would lead to unacceptably unjust outcomes; it is warranted in extraordinary circumstances that are both beyond petitioner's control and unavoidable even with diligence, a fact-specific, case-by-case inquiry.)

D.C. Circuit: *United States v. Saro*, 252 F.3d 449, 454-455 (D.C. Cir. 2001) (if equitable tolling applies to 2255 motions, tolling is

warranted only when extraordinary circumstances beyond a prisoner's control prevented him from filing by the deadline.)

2. The Court Below Created a Rigid Categorical Rule That Is Antithetical to the Equitable Tradition.

Contrary to the equitable tradition of "eschew[ing] mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. at 396, the court below introduced a rigid, bright-line rule into the equitable-tolling determination. Such an abrogation of equity conflicts with this Court's precedents and is anomalous when compared to other circuit court decisions, including other decisions of the Eleventh Circuit.[40]

Specifically, the court below, after "assum[ing] that Collins's alleged conduct is negligent, even grossly negligent," announced "[b]ut in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care – in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." J.A. 110. It justified this hidebound rule by explaining that "We recall the maxim that '[e]very exception not watched, tends to take the place of the rule.' . . . We are attempting to keep the exception for

[40] *See*, *e.g.*, *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008).

extraordinary circumstances from being the rule." *Id*. n.10.[41]

In Holland's case, a perfect storm of circumstances resulted in the AEDPA statute of limitations not being met. These extraordinary circumstances, considered with Holland's diligence throughout, ought to result in equitable tolling. *See* section C, *infra*. Postconviction counsel's actions contributed in important and extraordinary ways to this perfect storm, but the application of the Eleventh Circuit's ironclad rule – "*no* allegation of lawyer negligence or of failure to meet a lawyer's standard of care" can support a finding of equitable tolling," *not even gross negligence* – ensured that the specific facts and circumstances of Holland's case would not receive meaningful, equitable consideration. There was thus no attempt in the lower court "to do equity and to mould each decree to the equity of the case." *Hecht Co. v. Bowles*, 321 U.S. at 329.

3. This Court's Decisions in *Pace* and *Lawrence* Establish a Workable General Rule.

Although equitable principles are not reducible to rigid rules, they are subject to formulations that identify the controlling general considerations

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[41] The Court cited Peloubet, *Legal Maxims*, 294 (1884) (1985 ed.), for this maxim. *Cf*. *id*. at 24 ("A good judge decides according to justice and right, and prefers equity to strict law.").

sufficiently to guide the lower courts.[42] This Court identified a workable standard for equitable tolling in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and again in *Lawrence v. Florida*, 549 U.S. 327 (2006); and the circuits are adept at applying that standard.

In *Pace*, the Court recognized that "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The Court applied this standard and determined that Pace had not been diligent.[43]

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[42] *See Missouri v. Jenkins,* 515 U.S. 70, 127 (1995) (Thomas, J., concurring) ("courts of equity must be governed by rules and precedents no less than courts of law"); *Lonchar v. Thomas*, 517 U.S. 314 (1995); *see also* Blackstone (I *Blk. Comm.* 62) ("Law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law, which would make every judge a legislator, and introduces most infinite confusion, as there would be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind.").

[43] The Court noted the following:

> [P]etitioner waited years, without any valid justification, to assert these claims in his November 27, 1996, PCRA petition. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal. And not only did petitioner sit on his rights for years *before* he filed his PCRA petition, but he also sat on them for five more months *after* his PCRA

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Thereafter, in *Lawrence* this Court again assumed, because the parties did (549 U.S. at 335 n.3), that equitable tolling was available with respect to §2244(d). Going on to suggest that equitable tolling could provide a remedy for harsh results of the statute's application to unique and inappropriate situations,[44] the Court reiterated the *Pace* standard:

> proceedings became final before deciding to seek relief in federal court. *See id. [App],* at 372, 373. Under long-established principles, petitioner's lack of diligence precludes equity's operation. *See Irwin v. Department of Veterans Affairs, supra*, at 96, 111 S.Ct. 453; *McQuiddy v. Ware*, 20 Wall. 14, 19, 22 L.Ed. 311 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights").

Pace, 544 U.S. at 419.

[44] The Court in *Lawrence* was called upon to decide whether statutory tolling applied under 28 U.S.C. §2244(d) for the period of time when a petition for certiorari was pending in this Court from the denial of an application for state postconviction review. This Court held that this time was not tolled because the "state application" is not still "pending" after the state courts have entered a final judgment on the matter. *Lawrence*, 549 U.S. at 337. Lawrence argued that this could result in injustices

> . . . when the state court grants relief to a prisoner and the state petitions for certiorari. In that hypothetical, Lawrence maintains that the prisoner would arguably lack standing to file a federal habeas application immediately after the state court's judgment (because the state court granted him relief) but would later be time barred from filing a federal habeas application if we granted certiorari and the State prevailed. Again, this particular procedural posture is extremely rare.

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to warrant equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence*, 549 U.S. at 336 (quoting *Pace*, 544 U.S. at 418). The Court concluded that Lawrence had not shown extraordinary circumstances.[45]

C. On the Record Presented, Holland Is Entitled to Equitable Tolling.

Holland does not present a "garden variety claim of excusable neglect," *Irwin*, 498 U.S. at 96, and his case is not about "attorney miscalculation," *Lawrence*, 549 U.S. at 336, or "mere negligence" by counsel. J.A. 108. His case "must be determined by its own particular circumstances," *McQuiddy v. Ware*, 87 U.S. 14, 19 (1873), and there is nothing garden variety,

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Id. at 335. This Court responded: "Even so, equitable tolling may be available, in light of the arguably extraordinary circumstances and the prisoner's diligence." *Id.*

[45] Lawrence argued that his counsel's mistake in miscalculating the limitations period entitled him to equitable tolling. But this "would essentially equitably toll limitations periods for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." 549 U.S. at 336-37. Lawrence also suggested equitable tolling ought to apply "because the state courts appointed and supervised his counsel." The Court rejected this argument because "a State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay." *Id*. at 337.

average, or "mere" about the circumstances here. This is a rare case in which a habeas petitioner tried the best anyone could under his circumstances to preserve his right to federal court consideration of a state court judgment, but extraordinary events overtook him. These extraordinary circumstances, and Holland's diligence, included:

> • At the outset of Collins' representation, Collins repeatedly reassured Holland that Collins was aware of and would comply with the federal statute of limitations, and he sought Holland's "*complete confidence* and support." At the end of his representation, Collins told Holland (falsely) that the statute of limitations had expired before Collins had even begun his representation.[46]
>
> • Holland filed, and the State successfully opposed as "nullities" – and got stricken – **two** *pro se* motions in the state postconviction trial court to add claims for relief, **two** *pro se* motions in the Florida Supreme Court to supplement the claims Collins had raised, and **two** *pro se* motions

[46] Collins was aware of Holland's concern about federal habeas corpus: "I would like to *reassure* you that we are aware of state time-limitations and federal exhaustion requirements." J.A. 55 (emphasis added). Collins wrote to Holland on December 23, 2002, stating that once the issues in state court were exhausted, all Holland's legal issues "will then be ripe for presentation in a petition for writ of habeas corpus in federal court." J.A. 61.

in the Florida Supreme Court to remove Collins as counsel (one of which, if granted, would have allowed Holland to proceed *pro se*).

- Holland asked the Clerk of the Florida Supreme Court to provide him with one of the State's motions to strike, the State's Answer Brief, and the State's Response to the State Habeas Corpus Petition, because Collins had not provided them to him and Holland wanted to "know exactly what is happening with my case on appeal to the Supreme Court of Florida." The Clerk advised Holland that he would have to pay for copies by "submit[ting] a check or money order in the amount of $77.00 made payable to 'Clerk, Florida Supreme Court,'" or that Holland could contact his attorney or visit the Court's webpage.

- Holland twice asked for assistance from the Florida Bar, concerned that Collins was not preserving his federal habeas corpus rights with respect to certain claims, but the Bar dismissed both complaints.[47]

- Shortly after oral argument in the Florida Supreme Court in the appeal from denial of postconviction relief, Holland wrote to Collins instructing that "[i]f the Florida

[47] *See* J.A. 207-208 ("What can I do to get all my legal issues before the Florida Supreme Court so that I can *exhaust state remedies*, so that my legal claims will not be procedurally barred when I get to the Federal Courts?") (emphasis added).

Supreme Court denies my 3.850-3.851 and State Habeas Corpus appeals, please file my 28 U.S.C. 2254 writ of habeas corpus petition, before my deadline to file it runs out (expires)." This letter went unanswered, and Holland wrote Collins again in June 2005, asking "have you begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know, as soon as possible." No answer.

- On November 10, 2005, the Florida Supreme Court issued its decision affirming the denial of postconviction relief and denying Holland's petition for habeas corpus, Collins filed no motion for rehearing, and the Florida Supreme Court issued its mandate on December 1, 2005. Collins did not advise Holland of either the decision or the issuance of the mandate, and neither did the State or the Florida Supreme Court.

- In the dark about these developments, Holland asked the Florida Supreme Court Clerk to advise him of when the mandate had issued on direct appeal and was told to contact the Florida Archives for that information. He did so.

- Still ignorant of the Florida Supreme Court's actions, Holland wrote to Collins on January 9, 2006, requesting information about his case and re-emphasizing his desire to obtain federal habeas review. He asked: "Have my appeals been decided yet?" and he asked when the mandate had issued on

direct appeal "so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition . . . if my appeals before the Supreme Court of Florida are denied."

- On January 18, 2006, Holland first learned, on his own, that the Florida Supreme Court had affirmed the denial of relief on November 10, 2005, and issued its mandate on December 1, 2005. Holland immediately hand-wrote a *pro se* petition for writ of habeas corpus and mailed it to the federal district court, writing that Collins had "failed to undertake timely action."

The totality of these circumstances is extreme, and this Court should order that equitable tolling is warranted on this record.

1. Holland's Ability to File His Federal Petition Within the One-Year Statute of Limitations Was Hamstrung by an Extraordinary Combination of Crippling Circumstances.

Among the circumstances that the lower courts have considered "extraordinary" so as to warrant equitable tolling under the AEDPA are: that a petitioner had no notice that the state court had decided his case;[48] that state postconviction counsel was

[48] *See Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000) (receiving notice of denial of state habeas corpus petition four

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grossly negligent;[49] and that the State or state court contributed to the lateness of the petitioner's

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months late may toll statute of limitations for diligent petitioner); *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008) (petitioner did not receive notice of completion of exhaustion and had made reasonable inquiries with the state court); *Jones v. Nagle*, 349 F.3d 1305 (11th Cir. 2003) (petitioner did not receive notice from state court that his properly-filed state petition had been denied); *Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002) (equitable tolling warranted where delayed notice that state court had reached final decision was beyond petitioner's control and petitioner exercised diligence); *Ramirez v. Yates*, 571 F.3d 993 (9th Cir. 2009) (prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter); *cf. Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, (1874) (relief available "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part.").

[49] *See Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003) (attorney error normally will not support equitable tolling, but attorney malfeasance may if it is "so outrageous or so incompetent" or "sufficiently egregious" as to render it extraordinary); *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005) (attorney consistently lied about the filing deadline and the status of the case; failed to file any documents; failed to return original paperwork; and refused to communicate despite petitioner's repeated efforts); *Stillman v. LaMarque*, 319 F.3d 1199 (9th Cir. 2003) (there are instances when an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate); *cf. United States v. Saro*, 252 F.3d 449 (D.C. Cir. 2001) (even if the attorney's defalcation is the kind of extraordinary circumstance that warrants tolling, petitioner waited too long to file his motion after he knew that the attorney had not).

filings.[50] If one of these factors standing alone can be "extraordinary," their confluence in one case is beyond extraordinary.

They are all here. First, it is undisputed that Holland did not learn until January 18, 2006, that the Florida Supreme Court had decided his case on November 10, 2005, and issued its mandate on December 1, 2005. It is undisputed that he immediately prepared and filed a *pro se* petition for writ of habeas corpus in the district court. He did not sit on his rights. *See Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 429 (1965) (allowing equitable tolling where "plaintiff has not slept on his rights but, rather, has been prevented from asserting them").

Second, it is a given that Collins was "grossly negligent"; the Eleventh Circuit assumed he was, and with good reason.[51] But the court below then

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[50] Equity looks to the actions of both parties. If a petitioner is "'prevented in some extraordinary way from asserting his rights,'" *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999), particularly if "the state or [a] court . . . prevented him from asserting his rights," *Flores v. Quarterman*, 467 F.3d 484, 487 (5th Cir. 2006), then equitable tolling may be appropriate. Any "extraordinary circumstances beyond the prisoner's own conduct," *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003), may justify equitable tolling.

[51] Holland could do little more than "cajole [or] plead with his counsel to file the petition timely," *Downs v. McNeil*, 520 F.3d 1311, 1324 n.10 (11th Cir. 2008) (quoting *Thomas v. McDonough*, 452 F.Supp.2d 1203, 1206-07 (M.D. Fla. 2006)), and Holland did so. Collins' abandonment of Holland was absolute. Less than a month after oral argument was conducted in the Florida

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announced its bright-line rule that gross attorney negligence could never be relevant to equitable tolling. Under that rule, the *only* equitable considerations *vis-a-vis* attorney conduct are whether the lawyer acted in bad faith (or through divided loyalties), or lied, or was mentally ill; no other equitable considerations can be countenanced. This is inconsistent with this Court's language in *Pace* and *Lawrence*, the decisions of other circuit courts,[52] and

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Supreme Court, Holland wrote to Collins and asked: "please write me back, as soon as possible, to let me know what the status of my case is on appeal to the Supreme Court of Florida." J.A. 210. Holland further asked Collins to "please file my 28 U.S.C. 2254 writ of habeas corpus petition before my deadline to file it runs out (expires)" if the Florida Supreme Court denied the postconviction appeal and state habeas corpus. *Id.* Collins did not respond. On June 15, 2005, Holland wrote to Collins again asking if he had "begun preparing my 28 U.S.C. §2254 Writ of Habeas Corpus Petition? Please let me know as soon as possible." J.A. 212. Collins did not respond. The Florida Supreme Court decided Holland's appeal and later issued its mandate, but Collins did not tell Holland that. Holland wrote Collins again on January 6, 2006, pleading that, "if my appeals before the Supreme Court of Florida are denied," Collins would "preserve my privilege to federal review of all of my state convictions and sentences." J.A. 214. Collins knew Holland was desperate to learn the status of his case but kept him in the dark until too late.

[52] *See, e.g.*, *Baldayaque*, 338 F.3d at 152 ("It is not inconsistent to say that attorney error will *normally* not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that at some point, an attorney's behavior may be so outrageous or so incompetent as to render it extraordinary.") (emphasis in original); *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) ("Though ordinary attorney negligence will not justify equitable

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the letter and spirit of equity principles. And even under the Eleventh Circuit's new rule, Holland ought to have been granted equitable tolling: Nowhere in this record has Collins denied Holland's repeated assertions that Collins deceived and misled Holland as to when Holland would file the federal habeas petition.[53]

Third, the State cannot claim clean hands. Every time Holland tried to speak in state court the State

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tolling, we have acknowledged that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitations."); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005) (stating that "serious misconduct, as opposed to mere negligence, may warrant equitable tolling"); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *abrogated in part by Carey v. Saffold*, 536 U.S. 214 (2002) (ordering evidentiary hearing on whether misconduct of petitioner's counsel qualifies as exceptional circumstance, noting that the lawyer "effectively abandoned" petitioner, failed to inform petitioner when the state supreme court denied review, "led [petitioner] to believe she was going to file the federal habeas petition on his behalf," and "told him that there were no time constraints for filing a petition. These are serious allegations, if true.").

[53] Collins told Holland at the beginning of his representation that he would protect Holland's ability to file a federal habeas petition. Collins told Holland at the conclusion of his representation that, at the time of his earlier assurances (when he asked for Holland's "complete confidence," "trust," and "support"), the AEDPA statute of limitations had already expired. Neither of these two things Collins told Holland was the truth.

successfully muzzled him;[54] it then tried to do the same in the district court.[55] Labeling all Holland's words a nullity, and being rewarded with six state orders striking everything Holland had to say, is an extraordinary circumstance.[56]

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[54] The State successfully opposed Hollands's *pro se* attempts to speak (1) in the state postconviction court (*i.e.*, his motion to include all federal claims in his Rule 3.850 motion, and his renewed motion at the outset of the state evidentiary hearing) and (2) in the Florida Supreme Court (*i.e.*, his request to include claims in his state habeas petition, his request to replace counsel, his renewed motion to amend his state habeas petition, and his motion to discharge counsel). Having successfully urged the state courts not to listen to Holland, the State should be equitably estopped from arguing here that Holland should have said more to the state courts. *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (having succeeded in having the state court "accept that party's earlier position," *id*. at 750, a party may not now "'rely[ ] on a contradictory argument to prevail in another phase,'" *id.* at 749, of the litigation; the party should be estopped "from playing fast and loose with the courts" and "from deliberately changing positions according to the exigencies of the moment." *Id*. at 750).

[55] When Holland learned that the Florida Supreme Court had denied relief and had issued its mandate, he immediately hand-wrote a *pro se* habeas petition and, within 24 hours, mailed it to the federal district court. *The State moved to dismiss Holland's pro se* habeas petition: "Because Holland does not have a right to hybrid representation, his *pro se* Petition for Writ of Habeas Corpus, filed while he was being represented by Mr. Collins is a nullity." DE8 at 4. The State also argued that because Collins had already filed a petition for writ of certiorari in this Court, *that too warranted dismissal* of Holland's *pro se* habeas petition. DE8 at 2. *But see Roper v. Weaver*, 550 U.S. 598 (2007).

[56] Had the State not opposed Holland's request for a *Nelson* hearing, see *supra* note 13, and had the Court granted one,

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2. Holland's Diligence Was Far More Than Reasonably Can Be Expected of Someone in His Situation.

Although this Court has not defined "diligence,"[57] numerous lower courts have developed flexible standards not tied to rigid rules. "[M]aximum feasible diligence" is not required, only "'due,' or reasonable diligence." *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). *See also Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) ("The standard is not 'extreme diligence' or 'exceptional diligence,' it is *reasonable* diligence."); *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (it is not necessary that it be literally impossible for a petitioner to file on time). Due diligence does not require a habeas petitioner "to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Baldayaque*, 338 F.3d at 153. The "due diligence" requirement is construed in light of a habeas petitioner's confinement in prison and any special restrictions that

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Holland could have discharged his attorney and then represented himself. In *Lawrence*, by contrast, the petitioner had "not alleged that the State prevented him from hiring his own attorney or from representing himself." *Lawrence*, 549 U.S. at 337.

[57] In *Pace*, the Court's discussion of diligence was limited to its conclusion that Pace lacked diligence because he failed to "advance[ ] his claims within a reasonable time of their availability" and sat "on his rights" before deciding to seek relief in federal court." *Pace*, 544 U.S. at 419.

incarceration might impose on such a person. *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000). But even were the standard stricter than this, Holland's efforts would satisfy it.

The Florida Supreme Court, the State, Collins, and the Florida Bar were all repeatedly alerted: Holland desperately wanted to preserve his federal rights. They all repeatedly responded: he could not file anything, his words were a nullity, and he could only speak through his attorney. When Holland informed the Florida Supreme Court that Collins would not even provide briefs to him, the Court denied Holland's motion to dismiss Collins, and the Clerk told Holland he could send in a money order from death row or go to the Court's webpage. These are not reasonable ways of giving notice to an indigent death row prisoner.[58] Had Holland been allowed to proceed *pro se*, as he requested, he would have been personally notified of the Florida Supreme Court's mandate and – as his later actions showed – filed the next day.

After all of this, the State and the court below heaped blame on Holland. The Eleventh Circuit wrote that Holland presented "no evidence that he ever

[58] Nevertheless, Holland did ask for more information about the Court's online docket so he could attempt to get others to access the Court's webpage on his behalf. This is additional evidence of his due diligence; the fact that he was unsuccessful does not mean he was not diligent.

asked – before the limitations period for filing his federal petition had run – that the Florida Supreme Court provide him directly with notice of the decision on his postconviction appeal." J.A. 111. The Florida Supreme Court was quite aware that Holland was "not trying to get on your nerves. I just would like to know *exactly what is* happening with my case on appeal to the Supreme Court of Florida." J.A. 147 (emphasis in original). But even if the Florida Supreme Court were not aware that Holland was anxious to be kept advised of the status of his case, it is hardly likely that yet another letter from Holland would have resulted in his being notified when the appeal was decided. More importantly, why would Holland reasonably have thought another letter efficacious? The Court had silenced him with four orders and had demanded a money order for pleadings Collins should have provided him. A rule that, in order to show diligence, a petitioner represented by counsel must write an indeterminate number of letters to a state supreme court asking to be notified when the court decides his case would be a clerk's worst nightmare. And if it is required under the AEDPA, then it is required in all equitable tolling situations in federal court. That is inconceivable. *See* note 39, *supra*.[59]

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[59] *See Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008) ("no point in obligating a [ ] litigant to pester a state court with frequent inquiries as to whether a pending motion has been decided"); *see also Drew v. Dep't. of Corrections,* 297 F.3d 1278,

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Holland may not have been perfect, he may not have "undertake[n] repeated exercises in futility" or "exhaust[ed] every imaginable option." *Baldayaque*, 338 F.3d at 153. But he was diligent. And he faced impediments that were extraordinary under any analysis tethered to equitable principles. The lower court's new rigid rule blindly precluded equitable consideration of the special facts and circumstances presented here which, when fully considered, warrant equitable tolling.

1299 (11th Cir. 2002) (Barkett, J., dissenting) ("Under the majority's approach, the failure of all of these prisoners to make inquiries about the progress of their cases subjects them to a risk of being found indiligent and thus ineligible for equitable tolling should any statute of limitations problem subsequently arise. Were all of these prisoners to do what the majority says [petitioner] should have done – send letters, make phone calls, and have relatives go to the court personally to make inquiries – the court clerks would be considerably busier than they already are. And of course, since equitable tolling may apply to a wide variety of lawsuits, the effect of the majority's reasoning is not confined to petitions filed by prisoners.").

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Cases Illustrating Equitable Tolling Under Federal Statutes and for Federal Claims

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Age Discrimination in Employment Act. *See Prince v. Stewart*, 580 F.3d 571, 574-575 (7th Cir. 2009); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 384 (3d Cir. 2007); *Coons v. Mineta*, 410 F.3d 1036, 1040 (8th Cir. 2005); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221 (10th Cir. 1999); *Cada v. Baxter Heathcare Corp.*, 920 F.3d 446, 451 (7th Cir. 1990); *E.E.O.C. v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir. 1996); *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Bassett v. Sterling Drug, Inc.*, 578 F.Supp. 1244, 1247-48 (S.D.Ohio 1984) (recognizing exception to ADEA limitations period if plaintiff adjudged mentally incompetent or institutionalized during filing period); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998) (en banc) (limitations period was equitably tolled as to those employees who were affirmatively misinformed by Equal Employment Opportunity Commission (EEOC) regarding statute of limitations); *Browning v. AT&T Paradyne*, 120 F.3d 222, 225-27 (11th Cir. 1997) (same); *Schlueter v. Anheuser-Busch, Inc.*, 132 F.3d 455, 459 (8th Cir. 1998) (misleading conduct of the EEOC in this case was sufficient to justify plaintiff's neglect; fact that she was represented by counsel did not preclude equitable tolling); *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997) (EEOC letter incorrectly informing employee that old, pre-Civil Rights Act

statute of limitations applied to his claim equitably tolled limitations period for the 18 days that complaint was untimely); *Albano v. Schering-Plough Corp.*, 912 F.2d 384 (9th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (equitable tolling granted where EEOC failed to follow its own rules, the plaintiff had at least 14 conversations with the EEOC attempting to amend, and on at least three occasions the agency's employee assured plaintiff that his new claim was encompassed within the claim being investigated); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976) (equitable tolling where agency neglected to inform plaintiff of filing deadlines despite numerous phone conversations, at least once a month, to check on the progress of the investigation), *aff'd by an equally divided Court*, 434 U.S. 99 (1977) (per curiam).

Alien Tort Statute. *See Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (concluding that equitable tolling applied to time limits under ATS found in 28 U.S.C. § 1350).

Americans with Disabilities Act. *See Santa Maria v. Pacific Bell*, 202 F.3d 1170 (9th Cir. 2000) (concluding that equitable tolling applies to time limits for filing an action under ADA found in 42 U.S.C. § 12117(a)); *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1033 (8th Cir. 2005) (same); *Soignier v. American Bd. of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996) (plaintiff not entitled to equitable tolling of limitation period).

Appeals to the Department of Transportation for review of an airport charge under 49 U.S.C. § 47129(a)(1)(B). *See Alaska Airlines, Inc., et al. v. United States Dept. of Transportation*, 575 F.3d 750, 759 (D.C. Cir. 2009).

Appeals to the Court of Appeals for Veterans Claims. *See Barrett v. Nicholson*, 466 F.3d 1028, 1040 (Fed. Cir. 2007) (holding 120-day period for obtaining review of a final decision of the Board of Veterans' Appeals under 38 U.S.C. § 7266(a) is subject to equitable tolling); *Bailey v. Principi*, 351 F.3d 1381, 1383-84 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-97 (Fed. Cir. 2002).

Antitrust Cases under the Clayton Act. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997) (citing *Conmar Corp. v. Mitsui & Co.*, 851 F.2d 499, 502 (9th Cir. 1988) (recognizing that four-year filing period for antitrust actions under the Clayton Act, 15 U.S.C. § 15(b), is subject to equitable tolling for fraudulent concealment); *GO Computer, Inc. v. Microsoft Corp*., 508 F.3d 170, 177 (4th Cir. 2007) (same); *Morton's Market, Inc. v. Gustafson's Dairy, Inc*., 198 F.3d 823, 832 (11th Cir. 1999) (same).

Bankruptcy. *See In re International Administrative Services, Inc*., 408 F.3d 689, 699 (11th Cir. 2005) (concluding that time period for commencing avoidance actions found in 11 U.S.C. § 546(a)(1) is subject to equitable tolling, and concluding that period was tolled by the deliberate and intentional attempts of the debtor and its associates to hide their activities

from the trustee); *In re United Insurance Management, Inc*., 14 F.3d 1380, 1385 (9th Cir. 1994) (noting that "[e]very court that has considered the issue has held that equitable tolling applies to § 546(a)(1)."); *In re Maughan*, 340 F.3d 337, 344 (6th Cir. 2004) (holding that deadlines found in Bankruptcy Rules 4004(a) and 4007(c) for filing complaints objecting to discharge under 11 U.S.C. §§ 523 and 727 are subject to equitable tolling, and concluding that plaintiff's diligence and defendant's delayed production of critical documents justified tolling of filing period); *In re Kontrick*, 295 F.3d 724, 733 (7th Cir. 2002) (concluding time periods in Rules 4004(a) and 4007(c) may be equitably tolled); *In re Benedict*, 90 F.3d 50 (2d Cir. 1996) (the time period imposed by Rule 4007(c) of Federal Bankruptcy Rules is subject to equitable tolling).

Bivens Action. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996) (mistaken belief by counsel that exhaustion of administrative remedies was required prior to filing federal law suit against United States employees did not justify equitable tolling).

Civil Action for Deprivation of Rights. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (observing that § 1983 "generally borrows its statute of limitations from state laws . . . and incorporates equitable-tolling principles of either state or federal law in cases where a defendant's wrongful conduct, or extraordinary circumstances outside a plaintiff's control, prevented a plaintiff from timely asserting a

claim."); *Smith v. City of Chicago*, 951 F.2d 834, 841 (7th Cir. 1992) (federal courts, when borrowing state statutes of limitations, should apply the state doctrine of equitable tolling but the federal doctrine of equitable estoppel); *Cange v. Stotler & Co.*, 826 F.2d 581, 585-86 (7th Cir. 1987) (same); *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983) (holding federal courts should apply the state's equitable estoppel doctrine when borrowing a state's statute of limitations); *Donald v. Cook County Sheriff's Dept.*, 95 F.3d 548, 562 (7th Cir. 1996) (on remand, district court "should determine whether the balance of equities favors tolling the statute of limitations to allow Donald to bring this suit against the individual defendants, once they are identified.").

Civil Service Reform Act. *See Montoya v. Chao*, 296 F.3d 952 (10th Cir. 2002) (concluding 30-day filing period in CSRA, 5 U.S.C. § 7703(b)(2), is subject to equitable tolling in appropriate case); *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993); *Williams-Sciafe v. Dep't of Defense Dependent Schools*, 925 F.2d 346 (9th Cir. 1991); *Nunnally v. MacCausland*, 996 F.2d 1, 4-5 (1st Cir. 1993) (mental illness is an appropriate basis for tolling 30-day filing period set forth in CSRA).

Commodity Exchange Act. *See Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999) (concluding that two-year period for applying for reparations and posting requisite bond under CEA, 7 U.S.C. § 18(a)(1), is subject to equitable tolling).

Comprehensive Environmental Response, Compensation and Liability Act. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997) (but denying equitable tolling where delay in initiating lawsuit was due to excusable neglect).

Contract Disputes Act. *See Arctic Slope Native Assoc., Ltd. v. Sebelius*, 583 F.3d 785, 791 (Fed. Cir. 2009) (holding six-year period for filing administrative claims under CDA, 41 U.S.C. § 605(a), is subject to equitable tolling).

Copyright Act. *See Maurizio v. Goldsmith*, 230 F.3d 518, 520 (2d Cir. 2000) (concluding that equitable tolling applied to Copyright Act's three-year statute of limitations); *Pentagen Technologies Intern. Ltd. v. U.S.*, 175 F.3d 1003 (Fed. Cir. 1999) (plaintiff not entitled to equitable tolling of three-year limitation period of Copyright Act where plaintiff failed to allege in complaint concealment of infringement by defendant or that plaintiff was unaware of infringement during limitation period).

Employment Retirement Income Security Act. *See Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 875 (7th Cir. 1997) (equitable tolling of ERISA time limits available in suits for breach of fiduciary duty and for ERISA benefits); *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 322-23 (2d Cir. 2004) (concluding six-year statute of limitations applicable to suits challenging denial of benefits is subject to equitable tolling); *Gayle v. United Parcel Service, Inc.*, 401 F.3d 222 (4th Cir.

2005); *I.V. Services of America, Inc. v. Inn Development & Management, Inc.*, 182 F.3d 51 (1st Cir. 1999); *but see Radford v. General Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) ("Section 413 of ERISA is a statute of repose, establishing an outside limit of six years in which to file suit, and tolling [during administrative exhaustion] does not apply.").

Equal Access to Justice Act. *See Townsend v. Comm'r of Soc. Sec.*, 415 F.3d 578 (6th Cir. 2005) (concluding that 30-day period for seeking reimbursement under EAJA, 28 U.S.C. § 2412(d)(1)(B), may be equitably tolled).

Equal Pay Act. *See O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2006) (concluding equitable tolling is available to toll applicable EPA limitations period under 29 U.S.C. § 255(a), and concluding that defendants' filing for bankruptcy equitably tolled limitations period).

Fair Labor Standards Act. *See Chao v. Virginia Dep't of Transportation*, 291 F.3d 276 (4th Cir. 2002) (concluding that equitable tolling applies to 29 U.S.C. § 255, the three-year time period within which Secretary of Labor may sue to obtain an injunction to restrain an employer from continuing to withhold unpaid overtime compensation due an employee).

Federal Arbitration Act. *See Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (recognizing that equitable tolling

applies to three-month period under FAA, 9 U.S.C. § 12, to file motion to vacate arbitration award).

Federal Election Campaign Act. *See Federal Election Com'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (recognizing that equitable tolling can apply to default statute of limitations at issue here, 28 U.S.C. § 2462).

Federal Tort Claims Act. *See Santos v. United States*, 559 F.3d 189 (3d Cir. 2009) (concluding equitable tolling applies to FTCA's two-year limitations period, 28 U.S.C. § 2401(b), and concluding that equitable tolling was warranted in medical malpractice action under FTCA due to plaintiff's exemplary diligence and the fact that she could not have determined despite that diligence that the defendants – who appeared to be private entity – were, in fact, federal employees); *Hertz v. United States*, 560 F.3d 616, 619 (6th Cir. 2009) (recognizing that equitable tolling applies to § 2401(b); *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 963 (8th Cir. 2006) (same); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (same); *Muth v. United States*, 1 F.3d 246, 250-51 (4th Cir. 1993) (same). *But see Marley v. United States*, 548 F.3d 1286, 1289 (9th Cir. 2008) (holding FTCA's statute of limitation is jurisdictional and therefore equitable tolling does not apply).

Financial Institution Reform, Recovery, and Enforcement Act. *See Carlyle Towers Condominium Ass'n, Inc. v. F.D.I.C.*, 170 F.3d 301 (2nd Cir. 1999) (notice provisions of 12 U.S.C. § 1821(d)(3)(C)(ii) do not

impose a jurisdictional bar and are subject to equitable tolling).

Food Security Act. *See Von Eye v. United States*, 92 F.3d 681 (8th Cir. 1996) (time limitation in regulations concerning wetlands conversion activities could be equitably tolled).

Forfeiture. *See United States v. All Funds Distributed to, or O/B/O Weiss*, 345 F.3d 49, 51 (2d Cir. 2003) (concluding that one-year period under 18 U.S.C. § 984(c) for government to file forfeiture action against proceeds of pension plan can be equitably tolled, and allowing tolling of time during which distribution of pension plan funds to plan beneficiaries was prevented by certain ERISA provisions); *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001) (concluding equitable tolling can extend five-year period allowed under 19 U.S.C. § 1621 for government to institute forfeiture actions).

General Civil Actions Against United States. *See Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) (holding that 28 U.S.C. § 2401(a), which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues," is subject to equitable tolling, and granting equitable tolling where defendant seeking return of forfeited property timely filed action but did so in the wrong venue because of uncertainty in the law).

International Child Abduction Remedies Act. *See Furness v. Reeves*, 362 F.3d 702, 723-24 (11th Cir.

2004) (concluding that equitable tolling applied to one-year period for filing suit under ICARA, and was warranted where abducting parent concealed child's location and parent seeking return undertook "extensive efforts" to locate child); *Duarte v. Bardales*, 526 F.3d 563, 568 & n.7 (9th Cir. 2008) (same).

Jones Act. *See Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1120 (9th Cir. 2006) (concluding three-year period for filing civil action for damages for personal injury or death arising out of a maritime tort, 46 U.S.C.A. § 30106, is subject to equitable tolling).

Labor Management Relations Act. *See Chapple v. National Starch & Chemical Company and Oil*, 178 F.3d 501 (7th Cir. 1999) (finding plaintiffs not entitled to equitable tolling where they failed to show they could not have filed suit within limitation period).

Mandatory Victims Restitution Act. *See United States v. Dando*, 287 F.3d 1007, 1011 n.5 (10th Cir. 2002) (holding 90-day time period for district court to enter restitution order found in MVRA, 18 U.S.C. § 3664(d)(5), is subject to equitable tolling if the delay in entering the restitution order is attributable to the defendant); *United States v. Stevens*, 211 F.3d 1, 4-5 (2d Cir. 2000) (same).

National Flood Insurance Act. *See Gibson v. American Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002) (concluding one-year time period for claims under NFIA, 42 U.S.C. § 4072, may be equitably tolled).

Quiet Title Act. *See Fadem v. United States*, 113 F.3d 167 (9th Cir. 1997) (distinguishing *Brockamp* and finding that the statute of limitations in the Quiet Title Act, 28 U.S.C. § 2409a(g), is subject to equitable tolling.)

Racketeer Influenced and Corrupt Organizations Act. *See Rotella v. Wood,* 528 U.S. 549, 560-61 (2000) (recognizing that limitations period for civil RICO actions may be equitably tolled where defendants engaged in fraudulent concealment); *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 194-95 (1997).

Railroad Unemployment Insurance Act. *See Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967 (11th Cir. 1997) (petitioner failed to show entitlement to equitable tolling of the limitations period for filing an appeal of Railroad Retirement Board ruling.)

Railway Labor Act. *See Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transportation, Inc.*, 522 F.3d 1190 (11th Cir. 2008) (limitations period for enforcement actions under RLA, 45 U.S.C. § 153(r), may be equitably tolled).

Real Estate Settlement and Procedures Act. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166-67 (7th Cir. 1997) (recognizing application of equitable tolling to one-year limit for filing claims under RESPA, 12 U.S.C. § 2614).

Rehabilitation Act. *See Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (limitations statute codified equitable

tolling doctrine where filing within time period was not possible due to circumstances beyond the plaintiff's control).

Restitution. *See United States v. Terlingo*, 327 F.3d 216, 221 (3d Cir. 2003) (concluding that 18 U.S.C. § 3664(d)(5)'s requirement that restitution be ordered within 90 days of criminal sentencing was subject to equitable tolling when the delay is caused in significant part by the defendant); *United States v. Dando*, 287 F.3d 1007, 1011 (10th Cir. 2002); *United States v. Stevens*, 211 F.3d 1, 4-5 (2d Cir. 2000).

Security Exchange Act. *See Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009) (holding five-year period for SEC to file civil action asserting violations of federal securities law, 28 U.S.C. § 2462, is subject to equitable tolling for fraudulent concealment); *Whittaker v. Whittaker Corp*., 639 F.2d 516, 527 n.9 (9th Cir. 1981) (holding that an insider's failure to disclose covered transactions in the reports required by § 16(a) of the Security Exchange Act of 1934, 15 U.S.C. § 78p, equitably tolls the two-year limitations period for suits under § 16(b) of the SEA to recover profits connected with such a non-disclosed transaction); *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203 (2d Cir. 2004) (same).

Social Security Act. *See Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (concluding 60-day deadline under 42 U.S.C. § 405(g) for filing an action in district court seeking review of decision from Appeals Council of Social Security Administration is subject to equitable tolling). *But see Acierno v. Barnhart*, 475 F.3d

77 (2d Cir. 2007) (refusing to equitably toll the time limitation set forth at 42 U.S.C. § 405(c)(1)(B) and (c)(4) for correcting records of self-employment income kept by the Commissioner of Social Security).

Suits in Admiralty Act. *See Rashidi v. American President Lines*, 96 F.3d 124, 127 (5th Cir. 1996) (two-year period for filing SAA suits under 46 U.S.C. § 745 may be equitably tolled).

Tariff Act. *See US JVC Corp. v. U.S.*, 184 F.3d 1362, 1365 (Fed. Cir. 1999) (importer not entitled to equitable tolling where own lack of diligence caused the untimely filing.)

Title VII of the Civil Rights Act of 1964. *See Zipes v. Trans World Airlines, Inc*., 455 U.S. 385 (1982); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Prince v. Stewart*, 580 F.3d 571, 574-75 (7th Cir. 2009); *Abraham v. Woods Hole Oceanographic Institute*, 553 F.3d 114, 119 (1st Cir. 2009); *Brown v. Parkchester South Condominiums*, 287 F.3d 58, 60 (2d Cir. 2002); *Hoffman v. Rubin*, 193 F.3d 959 (8th Cir. 1999); *Fouche v. Jekyll Island State Park Authority*, 713 F.2d 1518, 1525 (11th Cir. 1983) ("[A]ll Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements."); *Weick v. O'Keefe*, 26 F.3d 467, 470-71 (4th Cir. 1994) (granting equitable tolling in light of deliberate misconduct by Navy personnel); *Brown v. Crowe*, 963 F.2d 895, 899-900 (6th Cir. 1992) (applying doctrine of equitable tolling where filing

would have been within the 300-day limit but for agency oversight and defendant was not prejudiced); *Laquaglia v. Rio Hotel & Casino, Inc*., 186 F.3d 1172, 1176 n.6 (9th Cir. 1999) (on remand, district court might decide whether plaintiff was entitled to equitable tolling); *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40, 42 (4th Cir. 1993) (although limitations period is triggered when the Postal Service delivers notice to plaintiff that right-to-sue letter is available for pickup, and not when the letter is actually picked up, equitable tolling is available to remedy any resulting injustices); *Zillyette v. Capital One Financial Corp*., 179 F.3d 1337, 1342 (11th Cir. 1999) ("hardships to plaintiffs can be accommodated by the equitable tolling rules, which are generally applicable in Title VII actions against both private and government employers."); *Moody v. Bayliner Marine Corp.*, 664 F.Supp. 232, 235 (E.D.N.C. 1987) (mental incapacity may toll Title VII limitations period "in rare circumstances"); *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999) (plaintiff entitled to equitable tolling despite fact that she was represented by counsel where mental disabilities allegedly caused by defendant left plaintiff unable to communicate directly with the lawyer who represented her in the EEOC); *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998) (misleading information provided by EEOC was basis for equitable tolling of filing requirement); *but see Thomas v. Eastman Kodak Co*., 183 F.3d 38, 53 (1st Cir. 1999) ("First Circuit law permits equitable tolling only where the employer has actively misled the employee.").

Torture Victims Protection Act. *See Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (concluding ten-year time period to bring suit under TVPA, 28 U.S.C. § 1350, is subject to equitable tolling, and affirming district court's conclusion that the pervasive violence that consumed El Salvador until that country first held national elections following the signing of its peace accord justified equitable tolling); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (noting that Senate Report on TVPA states that the ten-year statute is subject to equitable tolling).

Truth in Lending Act. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166-67 (7th Cir. 1997) (holding time period for filing action under TILA, 15 U.S.C. § 1640(e), is subject to equitable tolling). *Accord Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998); *Ramadam v. Chase Manhattan Corp.*, 156 F.3d 499 (3d Cir. 1998); *Jones v. TransOhio Savings Assn.*, 747 F.2d 1037, 1041 (6th Cir. 1984). *But see Hardin v. City Title & Escrow Corp.*, 797 F.2d 1037, 1039-40 & n.4 (D.C. Cir. 1986); *King v. State of California*, 784 F.2d 910 (9th Cir. 1986).

Veteran's Employment Opportunities Act of 1998. *See Kirkendall v. Dept. of the Army*, 479 F.3d 830, 835-44 (Fed. Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 375 (2007) (equitable tolling applies to the sixty-day filing window at the Department of Labor under the VEOA, 5 U.S.C. § 3330a).

Wrongful Death Action. *See Booth v. Carnival Corp*., 522 F.3d 1148 (11th Cir. 2008) (concluding one-year contractual limitation period for filing wrongful death action could be equitably tolled, and finding period equitably tolled where action was timely filed in state court, and state court had jurisdiction over action, but was not proper venue under contract).