

No. 09-5327

In The
Supreme Court of the United States

— ♦ —
ALBERT HOLLAND,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

— ♦ —
ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

— ♦ —
BRIEF OF LEGAL ETHICS PROFESSORS AND
PRACTITIONERS AND THE STEIN CENTER FOR
LAW AND ETHICS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

— ♦ —
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INTEREST OF *AMICI CURIAE*¹

Amici Curiae have an interest in assisting this Court in recognizing the professional ethical obligations of defense counsel to obey client instructions, communicate material information to the client, withdraw from a representation only upon notice to the client and approval by the court, and be truthful to the client, and the extraordinary circumstances that arise if counsel fails to fulfill those duties to the client and counsel's obligations to the court.

The brief of *Amici Curiae* will not address every point argued by the parties. Instead, *Amici Curiae* focus on the professional responsibility issues described above.

¹ Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amici Curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. The *Amici Curiae* and their counsel are grateful to Tanya Abrams and Jason Wittlin-Cohen, Yale Law School students, for their assistance in preparing this brief.

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The views expressed herein reflect the personal opinions of *Amici Curiae* and should not be attributed to the organizations or firms with which they are associated.

STATEMENT OF THE CASE

Uncontradicted facts establish that Petitioner, convicted of capital murder and having unsuccessfully exhausted his direct appeals, repeatedly instructed his lawyer, who was handling his state habeas petition, to preserve his right to file a federal habeas petition. Those facts also establish that Petitioner's lawyer a) solicited Petitioner's trust by repeatedly reassuring him that counsel knew the federal statute of limitations and would comply with it, (Pet. Brief at 50), b) betrayed that trust by failing to notify him of the state court decision in his case, which triggered the running of the federal statute of limitations, c) took no steps to preserve Petitioner's right to file the habeas petition, d) failed to respond to Petitioner's repeated written requests for information about the status of state proceedings, and e) lied to Petitioner about the opportunities lost as a result of counsel's systematic misconduct, (Pet. Brief at 25). The Eleventh Circuit, classifying that combination of facts as no more than "gross negligence," refused to find grounds for equitable tolling of the statute of limitations to permit Petitioner to pursue his federal habeas claim, cutting off the last avenue of relief available to Petitioner to challenge his capital conviction.

SUMMARY OF ARGUMENT

Leaving to Petitioner and others the responsibility of presenting this Court with all the reasons why this Court should fashion a remedy that would avoid the shocking result that Petitioner should suffer the consequences of such extreme lawyer misconduct, *Amici Curiae* instead file this brief to address key issues that, by virtue of *Amici Curiae's* special background, expertise and teaching in the area of lawyer ethics and professional responsibility, might assist the Court in evaluating the lawyer's behavior in this matter.

First, *Amici Curiae* will explain a) why the misconduct of Petitioner's former counsel constitutes substantially more than "gross negligence" and, under the law governing lawyers, represents intolerable, thoroughly unacceptable behavior and b) how the Eleventh Circuit's characterization of the conduct of Petitioner's former counsel as no worse than gross negligence trivializes the extraordinary circumstances that arise when a lawyer's misconduct breaches the fundamental fiduciary duties of obedience, communication and loyalty that are owed to the client.

Second, *Amici Curiae* describe several professional responsibility concepts that govern the conduct of lawyers that this Court could use to articulate standards to guide the lower courts in distinguishing those matters in which equitable tolling should be available from those in which the Court might find it acceptable to visit the

consequences of the lawyer's misconduct upon the client.² These concepts are:

- a) when a lawyer's misconduct is so serious that the lawyer could be subject to fee forfeiture, even in

² Looking at this fact situation from a professional responsibility point of view presents a very different line of analysis from that suggested by equitable tolling jurisprudence. A lawyer who fails to notify his or her client of a key decision in the client's case and fails to take steps to file a timely pleading within the applicable statute of limitations would have breached the standard of care owed to the client. Under a professional responsibility analysis, whether the lawyer did so totally negligently by simply forgetting or by being distracted or by miscalculating the deadline or, intentionally and wantonly, by acting in total disregard of client instructions would be irrelevant. Similarly, whether the client directed the lawyer to notify the client of important matters and to take all steps necessary to protect the client or the client retained the lawyer to represent the client and gave the lawyer no further instructions, would likewise be irrelevant. Indeed, from a professional responsibility point of view, *Amici Curiae* must wonder how the client's right to file a habeas petition late on the basis of equitable tolling should turn on the diligence of the client or the characterization of the lawyer's conduct as something beyond negligence when, in the professional responsibility world, it is lawyers, not clients, who must be diligent. It is lawyers, not clients, who must keep clients informed. It is lawyers, not clients, who must file pleadings on a timely basis. And, of course, visiting the sins of the lawyer upon the client is especially inequitable where normal professional responsibility remedies, such as a malpractice claim and/or a disciplinary proceeding against the lawyer, can provide no meaningful relief from the lawyer's failures. This is particularly so here where the effect on the client – loss of the right to file a federal habeas petition – has irreparable consequences.

the absence of the client suffering actual damages,

- b) when punitive damages might be available in a claim by the client against the lawyer because of the outrageous character of the lawyer's conduct, and
- c) when another lawyer, with knowledge of the transgressing lawyer's serious misconduct, would be obliged under the applicable rule of professional conduct to report the lawyer's conduct to disciplinary authorities because the conduct raises a substantial question about the transgressing lawyer's honesty, trustworthiness or fitness to practice law.

ARGUMENT

I. The Conduct of Petitioner’s Lawyer Presents Exceptional Deviations from the Lawyer’s Fiduciary Obligations

Amici Curiae cannot fathom how the Eleventh Circuit could characterize what occurred here as a “pure professional negligence case,” as if a lawyer in Mr. Collins’s position were a mere messenger hired to deliver a package whenever he felt like it, with no fiduciary duties owing to the customer-client. Lawyers certainly have a duty to be competent. And, it is true, courts often view failure by a lawyer to fulfill that duty by a negligence standard – a garden variety failure to meet the standard of care – that would not give rise to an entitlement of the client to escape the damaging consequences of the lawyer’s conduct. Yet that is not what happened here. There was no mere lapse in the standard of care. Rather, this Court is presented with several fundamental breaches of the most sacred duties lawyers owe their clients, duties that long pre-date any lawyer codes, duties that courts have enshrined in the foundations of agency law (the roots of much of the law governing lawyers), duties that have been only strengthened over time as the courts have applied them to the lawyer-client relationship. The Court is also confronted with a lawyer who perpetrated a fraud on the lawyer’s client and at the same time abandoned the client’s cause without notice or court permission.

A. Duty of Obedience

It is not necessary for a client to tell the client's lawyer to undertake tasks essential to the successful conclusion of a representation in order for the lawyer to bear responsibility for fulfilling those tasks. Indeed, it would stand the lawyer-client relationship on its head if the only tasks a lawyer were required to undertake to fulfill the lawyer's fiduciary duties to the client were those the client demanded. It is the lawyer, by virtue of superior knowledge, skill and experience, who brings the ability to identify and to complete the tasks that must be undertaken to fulfill the objectives of the client's representation.

That having been said, there is something particularly pernicious about a lawyer who disobeys the express direction of the client. Agency law, from its earliest incarnation, obligated an agent to obey the express direction of the agent's principal and condemned the failure to fulfill that obligation. *See* Restatement (Third) of Agency §§ 1.01, 1.01 cmt. f(1), 8.01 and 8.07 (2006). *See also* Restatement (First) of Agency §§ 385(1), 385(1) cmt. a. and 385(2) (1933) (stating that an agent, including an attorney, "is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform").

As this court observed in *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000):

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. . . . This is so because a

defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

(Further citation omitted.)

That condemnation, and the resulting extraordinary consequences to the disobeying agent, have become hallmarks of the law governing lawyers, enshrined in the lawyer codes as well as in the case law. *See, e.g., Faretta v. California*, 422 U.S. 806, 834, 834 n.46, 836 (1975) (holding that certain fundamental decisions derive from an individual's right of self-representation, which "has been recognized from our beginnings by federal law and by most of the States"); *see also* Model Rules of Prof'l Conduct R. 1.2 (2009) (noting that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"); Restatement (Third) of the Law Governing Lawyers § 22(1) (2000) (the decision to appeal in a criminal proceeding is a decision "reserved to the client"); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 5.2(a) (Approved Draft 1971) (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel"); ABA Standards for Criminal Justice, Prosecution Function and Defense Function § 4-5.2 (3d ed. 1983) (noting specifically

that the decision whether to appeal is one “ultimately for the accused”). In short, the failure to follow a client’s lawful instructions creates the most substantial breach of the lawyer’s fiduciary duty, and a breach of this duty is what clearly occurred in this matter.

It is not surprising then that courts hold lawyers responsible for any loss resulting from the failure to obey a client’s orders and that lawyers who disobey can be sanctioned for such misconduct. *See, e.g., Wood v. Hollingsworth*, 603 S.E.2d 388 (N.C. Ct. App. 2004) (client stated claim for legal malpractice where allegations included failure to follow instructions to file suit, failure to notify client that lawsuit had not been filed, failure to advise client of running of the applicable statute of limitations, and failure to protect client’s interests by timely filing suit); *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417 (N.J. 1980) (lawyer expressly and explicitly instructed by his client to follow certain course of action is under the duty of doing so and may be held liable for damages resulting from his failure to do so); *Martin v. State Bar of California*, 575 P.2d 757 (Cal. 1978) (lawyer suspended for two years where, inter alia, she did not implement instructions of her clients or advise them that she was unable to do so).

A lawyer’s disobedience is particularly shocking and deliberate when, as here, the client, an incarcerated prisoner, has clearly repeated his instructions in the matter. Petitioner sent a letter to his lawyer on March 3, 2005 requesting that his lawyer promptly file his federal habeas petition. After failing to garner a response, he sent another letter three months later, inquiring as to the status

of his appeal. The lawyer's utter failure to respond in any manner to these two separate communications over a three-month period cannot be characterized as mere negligence.³ Instead, the failure manifested the lawyer's willful disregard of the lawyer's promises and the client's express direction.

B. Duty to Communicate

Similarly, it is not the client's obligation to seek communication from the lawyer. It would completely reverse the nature of the agent-principal relationship if the agent were only required to communicate when the principal sought information. Again, from the very origins of the common law of agency, the duty to communicate with the principal has been at the center of the fiduciary duties agents owe principals. *See Baker v. Humphrey*, 101 U.S. 494, 500 (1880) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."); *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 611 (N.D. Iowa 2003) (recognizing the importance of the duty to communicate and inform one's client); *Hart v. Comercia Bank*, 957 F. Supp. 958, 981-82 (E.D. Mich. 1987) (noting that the "[Michigan Rules of Professional Conduct] impose[] *rigorous duties* on a

³ It only adds insult to injury that the Petitioner, because of his lawyer's abandonment of him, sent a final letter on January 9, 2006, again demanding an update on the status of his appeal, not realizing that the statute of limitations had run a mere two weeks earlier.

lawyer regarding the breadth of advice and communication with which he or she should provide a client”) (emphasis added); *United States v. Bowers*, 517 F. Supp. 666, 671 (W.D. Pa. 1981) (recognizing that when a lawyer fails to communicate with his client he “violates the *fundamental* duty of undivided loyalty”) (emphasis added).

And, as with the duty of obedience, the duty to communicate has become a hallmark of the lawyer codes, as well as a centerpiece of the case law addressing the lawyer’s fiduciary duties vis-à-vis the lawyer’s client. *See, e.g.*, Model Rules of Prof’l Conduct R. 1.4(a) (“A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information . . .”). Not surprisingly, the failure of a lawyer to fulfill this duty is not treated as a minor transgression, but rather as a frontal assault on the lawyer-client relationship.

For two reasons it is hard to imagine a more deplorable disregard of the lawyer’s duty to communicate than that which occurred here. First, the client did not rely passively on the lawyer to fulfill the obligation; he repeatedly asked the lawyer to monitor this case and notify him when the state court rendered its decision. While the lawyer’s duty to the client was not enhanced as a result of the client’s request – the duty being absolute as to such

a critical event – the failure to act in the face of repeated client entreaties manifests the lawyer’s disregard of the client’s interests that equity must rectify when legal remedies are inadequate.

Second, the client’s need to hear from the lawyer could not be more critical. The client is on death row. The client may be about to exhaust any opportunity for collateral relief in state court. The client has only 14 days to file a federal habeas petition from the date state relief is denied. And, finally, this is the condemned’s last chance to gain any relief from a sentence of death. Again, to characterize Mr. Collins’s failure as simple negligence – or even gross negligence – understates the magnitude of the lawyer’s misconduct and the potentially tragic consequences of the lawyer’s lapse.

C. Misrepresentation by Omission

Lawyers are prohibited from making knowing misrepresentations to third parties. No matter how benign the result is viewed, Rules 3.3, 4.1, and 8.4(c) of the Model Rules of Professional Conduct, rules universally adopted in the United States, make this prohibition clear. As officers of the court with special responsibilities, lawyers are absolutely prohibited from lying and the damage caused by the lie is immaterial to the absolute rule. But when a lawyer lies to a client, the prevarications come at the expense of the very person to whom the lawyer owes fiduciary duties, including the affirmative duty to communicate in order to keep the client “reasonably informed about the status of the matter.” Model Rules of Prof’l Conduct R. 1.4(a)(3).

In the view of this affirmative duty, Mr. Collins's multiple failures to respond to any of Mr. Holland's requests for information constitute fraud by omission. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) (“[O]ne who fails to disclose material information . . . commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information ‘that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.’”). The Restatement (Second) of Torts has long recognized that, where a fiduciary relationship exists, “[o]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or to refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose.” Restatement (Second) of Torts § 551. The Restatement’s reference to “business transactions,” *a fortiori* contemplates client-lawyer relationships. *Id.*; Restatement (Third) of the Law Governing Lawyers § 56 cmt. f; *see also* Ronald E. Mallen & Jeffrey M. Smith, 1 *Legal Malpractice* § 8:10 (2009) (“When committed by an attorney, the tort of fraud or deceit is determined essentially by the same rules that apply to any defendant.”).

Mr. Holland’s counsel failed to communicate to his client that his appeal had been denied by the Florida Supreme Court and that the mandate had issued, triggering the time in which a timely habeas petition needed to be filed. That failure constituted a representation that those critical events had not

yet occurred. Mr. Holland relied (and in fact had no choice but to rely)⁴ to his detriment on these representations and accordingly missed the statutory deadline. Mr. Holland's case is, therefore, far from a "pure professional negligence case," the terms by which the Eleventh Circuit characterized it. Mr. Collins's grossly negligent conduct amounted to fraud and constitutes "extraordinary circumstances" warranting equitable tolling relief.

⁴ The conduct of Mr. Holland's lawyer, whether characterized as a failure to communicate, a failure to obey, or as fraud, is all the more injurious since the Florida court prevented Mr. Holland from dismissing the lawyer and proceeding *pro se*. In doing so, the Florida court affirmatively hindered Mr. Holland's access to court. While prisoners do not have the right to counsel for habeas petitions, they retain an autonomy interest in pursuing access to the courts. This Court has suggested that, or at least reserved the question whether, such conduct might constitute "special circumstances" warranting equitable tolling. In *Lawrence v. Florida*, 549 U.S. 327 (2007) (holding lawyer miscalculation of deadline not sufficient to warrant equitable tolling in the post-conviction context), this Court concluded the mere fact of state court assistance in post-conviction proceedings does not make the state accountable for delay. In reaching this conclusion, the Court noted that the prisoner-petitioner "has *not* alleged that the State *prevented him* from hiring his own attorney or *from representing himself*." *Id.* at 337 (emphasis added). In *Holland*, as distinguished from *Lawrence*, the Florida court did in fact prevent Mr. Holland from representing himself. The Florida court forced Mr. Holland to rely to his detriment on his appointed counsel. State action thus compounded the lawyer's gross negligence, misrepresentation by omission, and fraudulent conduct. Such frustration of Mr. Holland's efforts to file a timely federal habeas petition rises to the level of "extraordinary circumstances" and justifies equitable tolling.

D. Abandonment of the Client

It is clear that Petitioner's counsel took on the representation of Petitioner through federal habeas. *See Fla. Stat. § 27.711(2) (2005)*. Mr. Collins explicitly promised Mr. Holland that he would "enforce [Mr. Holland's] substantive and procedural constitutional rights to the fullest extent of the law" and asked for Mr. Holland's "complete confidence and support as we litigate your case to the state and federal trial and appellate courts." Joint Appendix at 62. Under these circumstances, Mr. Collins, in his role as an officer of the court as well as in his role as Petitioner's lawyer had absolute obligations: before taking any steps to withdraw and leaving his client in the lurch – even if he had the most compelling reasons to withdraw (as opposed to the instant situation where he had none) – Mr. Collins was required both to notify the client and to seek the permission of the court to withdraw.

Rule 4-1.16 of the Florida Rules of Professional Conduct provides in no uncertain terms:

(c) Compliance With Order of Tribunal.

. . . When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client's Interest.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a

client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

Fla. Rules of Prof'l Conduct R. 4-1.16.

The reasons for these rules are manifest. First, the general requirement is that a lawyer "should not accept a representation in a matter unless it can be performed competently, without conflict of interest and to completion." Model Rules of Prof'l Conduct R. 1.16 cmt. [1]. Clients are entitled to rely on that principle – as Petitioner clearly did here – particularly since his counsel's commitment was stated so explicitly and in writing. Second, any right to withdraw under the rule can always be trumped by the court's authority to order the lawyer to continue the representation. Ann. Model Rules of Prof'l Conduct R. 1.16 annot. subsec. (c) at 247 (2007); *see, e.g., In re Disciplinary Action Against Fuller*, 621 N.W.2d 460 (Minn. 2001) (court permission required to withdraw in case of alleged client fraud). Third, no matter how justified the withdrawal might be, it must be accomplished in a way that protects the client's interests. Among the most important steps the lawyer must take, the lawyer must "provide reasonable notice to the client that withdrawal is imminent," Ann. Model Rules of

Prof'l Conduct R. 1.16 annot. subsec. (d) at 250, so that the client can protect his or her interests, including opposing or seeking conditions on the lawyer's withdrawal.

In the case of Petitioner's counsel all these safeguards were honored in their breach. Petitioner received no notice that his lawyer was abandoning him, Petitioner's counsel ignored the requirement that he seek permission of the court, and Petitioner had no opportunity to protect himself in a timely way. To compound these indignities, Respondent now asserts that Petitioner, who was the victim of this aggressive rule-breaking, is somehow responsible for the blatant misconduct of his fleeing lawyer, fleeing that took place out of Petitioner's view.

The courts describe the misconduct that this case presents in terms of "client abandonment." *See, e.g., People v. Smith*, 93 P.3d 1136 (Colo. O.P.D.J. 2004) (relying on ABA Standards for Imposing Lawyer Sanctions for a rule that lawyer neglect rising to the level of abandonment warrants sanction). Courts have recognized that such misconduct seriously calls into question the lawyer's fitness to practice law. Misconduct that affects imprisoned clients who have a great deal at stake is deemed particularly egregious. *See In re Riggs*, 240 F.3d 668, 671 (7th Cir. 2001) ("Abandonment of one's (imprisoned) client in a criminal case is one of the most serious offenses a lawyer can commit.").

Florida courts follow the general trend of sanctioning, and at times disbaring, lawyers who abandon their clients. *See, e.g., Florida Bar v.*

Setien, 530 So. 2d 298 (Fla. 1988) (lawyer disbarred for ethical violations including repeatedly ignoring clients and ultimately abandoning law practice without notifying them); *see also People v. Whiting*, 539 P.2d 128 (Colo. 1975) (lawyer disbarred for closing his office and leaving community without advising his clients, acts constituting mass abandonment of the interests of his entire clientele, unprofessional conduct and gross negligence); *Walker v. State Bar*, 783 P.2d 184 (Cal. 1989) (disbarment warranted for lawyer who abandoned his practice, disregarded the interests of clients, and failed to communicate with them).

Even where a lawyer has not entirely abandoned his law practice, failure to timely file documents on a client's behalf and failure to keep the client informed about the status of the case constitute instances of abandonment that call for discipline. *See, e.g., Florida Bar v. Williams*, 753 So. 2d 1258 (Fla. 2000) (failing to file documents on client's behalf and failing to maintain adequate contact with client, among other ethical violations, warranted one-year suspension); *Florida Bar v. Roberts*, 770 So. 2d 1207 (Fla. 2000) (lawyer's failure to keep client reasonably informed of the status of her representation and to explain matter to client to extent reasonably necessary to permit client to make informed decision warranted 91-day suspension); *Florida Bar v. Fredericks*, 731 So. 2d 1249 (Fla. 1999) (lawyer suspended for six months for misrepresentations to client regarding status of lawsuit, failure to act with reasonable diligence to file the lawsuit, and failure to communicate with the client); *Florida Bar v. Jordan*, 705 So. 2d 1387 (Fla. 1998) (lawyer who allowed client's case to be

dismissed for lack of prosecution, failed to respond to client's attempts to communicate with him, and failed to inform client of dismissal of case violated state rules of professional conduct requiring competence, diligence, and communication with client and suspended for one year); *Florida Bar v. Knowles*, 534 So. 2d 1157 (Fla. 1988) (lawyer suspended for at least 3 years where, in addition to other misconduct, lawyer neglected legal matters, failed to return client phone calls, and failed to properly advise client of status of proceeding); *Florida Bar v. Patterson*, 530 So. 2d 285 (Fla. 1988) (lawyer suspended for one year, where, besides other disciplinary matters, lawyer failed to communicate with clients); *Florida Bar v. Neale*, 432 So. 2d 50 (Fla. 1983) (lawyer suspended for sixty days plus three years probation where lawyer failed to keep client advised at all times).

Given the foregoing, one can see that the exceptional conduct of abandonment that occurred here goes far beyond gross negligence, representing such a lapse in the fulfilling of fiduciary duties as to warrant severe discipline of the lawyer involved, a circumstance demonstrating yet again how the facts here cry out for equitable tolling.

II. The Law Governing Lawyers Provides Standards for Identifying Exceptional Circumstances

In light of this demonstration of the seriousness of the misconduct of Petitioner's lawyers, how can the Court find standards in the law governing lawyers to determine when equitable tolling would be an appropriate remedy? *Amici*

Curiae suggest that there are three different bodies of professional responsibility law that draw instructive distinctions, all of which support concluding that equitable tolling should be recognized in the present matter.

A. Forfeiture of Fees

The law governing forfeiture of a lawyer's fees for ethical misconduct is particularly instructive. Section 37 of the Restatement (Third) of the Law Governing Lawyers provides that a lawyer who commits a "clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." See Restatement (Third) of the Law Governing Lawyers § 37. Comment d observes that "[f]orfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy," *id.* at § 37 cmt. d, and refers to section 469 of the Restatement (Second) of Agency, which clearly provides that disobedience or disloyalty are a basis for forfeiture:

An agent is entitled to *no compensation* for conduct which is deemed disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

Restatement (Second) of Agency § 469 (1958) (emphasis added). The Restatement (Second) of Agency is so strict in matters of disloyalty and disobedience that it provides that an agent is entitled to no compensation, even if disobedience results in no substantial harm to the principal's interests and even where the agent believes he was justified in his actions. *Id.* at § 469 cmt. a.

Section 37 of the Restatement (Third) of the Law Governing Lawyers similarly recognizes fee forfeiture in every case of a clear and serious violation of a client's interest. It considers the gravity, timing, willfulness, and actual or threatened harm to the client to determine the extent of the forfeiture. Of course, the conduct here – willful and repeated disregard of an express direction to preserve appellant's federal habeas rights – meets all of these tests. On the questions of gravity of the offense and actual harm to the client there could be no more serious transgressions.

A lawyer's failure to keep his client apprised of the status of his matter – whether or not he has been expressly asked to do so – also should justify fee forfeiture. Both the Restatement (Third) of the Law Governing Lawyers § 20 (“a lawyer must keep a client reasonably informed about the matter” and must “promptly comply with reasonable requests for information”), and the Restatement (Second) of Agency § 381 (“an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the *principal would desire to have . . .*”) (emphasis added)), underscore the importance of this duty.

Several jurisdictions have adopted the Restatement's view that failure to keep a client informed and failure to respond to requests for information justify professional discipline. For example, in *State ex rel. Oklahoma Bar Assoc. v. O'Brien*, 611 P.2d 650 (Okla. 1980) a lawyer's failures to inform a client that he had lost his trial and appeal, or to leave a forwarding address, which resulted in additional costs for the client, justified the lawyer's indefinite suspension from the practice of law. Similarly, in *Vollgraff v. Block*, 458 N.Y.S.2d 437 (N.Y. Sup. Ct. 1982), the court held that the failure to inform a client of his firm's dissolution violated his duty of communication to his client. Finally, *Crean v. Chozick*, 714 S.W.2d 61 (Tex. Ct. App. 1986), held that the failure of a lawyer to disclose his own malpractice tolls the statute of limitations to bring a malpractice claim.

This matter is in many ways similar to *O'Brien*. In both cases, the lawyer failed to inform his client of the status of his appeal, resulting in significant consequences for the client. However, the lawyer's conduct here was more egregious because: a) he failed to respond to an express request for information and b) the consequence of his failure to communicate may result in the loss of the defendant's final opportunity to challenge his death penalty conviction, rather than a mere financial loss.

Crean evidences the extreme importance of the duty of communication in its holding that a lawyer's failure to inform his client of his *own malpractice* tolls the statute of limitations on the claim. Thus, the duty to communicate is so essential to the nature of the lawyer-client relationship and

the loyalty owed to the client that the lawyer is expected to communicate his own errors, even when it may result in criminal, civil, or reputational costs to the lawyer. Section 20 of the Restatement (Third) of the Law Governing Lawyers adopts the same view, stating that a lawyer must disclose any “substantial malpractice claim.” Restatement (Third) of the Law Governing Lawyers § 20. The example referenced in comment c of section 20 of the Restatement (Third) of the Law Governing Lawyers is particularly relevant here:

For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.

Restatement (Third) of the Law Governing Lawyers § 20 cmt. c.

In this matter, the lawyer’s failure to perform his duty to consult with his client rose above the level of mere negligence and even gross negligence. His conduct evidenced disobedience of his client’s express demands, disloyalty to his client, and indeed, a willful disregard for the client’s interests. The record indicates the lawyer’s complete lack of due diligence in this matter. He had many opportunities to respond to the client’s direct requests and ample time to file the federal habeas petition. The lawyer’s failure to do either represented a willful disregard of the client’s interests serious enough to justify fee forfeiture, if any had been paid. The gravity of this wrong similarly constitutes an extraordinary

circumstance that justifies equitable tolling of the statute of limitations.

B. Availability of Punitive Damage Claim

Another way to measure the seriousness of the lawyer's misconduct is to ask whether the law governing lawyers would permit a claim for punitive damages under these circumstances. Claims for punitive damages by clients vis-à-vis their lawyers are awarded rarely and only in the most exceptional cases. Several courts have held that a lawyer's failure to communicate with his client regarding the status of his case or to file within the statute of limitations may justify the allowance of punitive damages, resting their decisions upon a determination that the conduct rose above the level of gross negligence to willful misconduct *or* a callous indifference to the client's interests. This position is consistent with section 908 of the Restatement (Second) of Torts, which states that, while conduct must be outrageous to justify punitive damages, it need not be willful. It is sufficient that the actions "are done with reckless indifference to the rights of others." *Id.* at § 908 cmt. b.

For example, in *Patrick v. Ronald Williams, Prof'l Ass'n*, 402 S.E.2d 452, 460 (N.C. Ct. App. 1991), the court held that plaintiffs were entitled to submit to the jury a claim for punitive damages in a malpractice case where the lawyers, among various other misconduct, "failed to disclose the entry of judgment for more than six months" The court reasoned that while not every legal malpractice claim supports a claim for punitive damages:

Where, as here, plaintiffs offer evidence that defendants engaged in a repeated course of conduct which constituted a callous or intentional indifference to the plaintiffs' rights, the plaintiffs have made out a claim for punitive damages.

Id. at 460.

In *Metcalfe v. Waters*, 970 S.W.2d 448, 452 (Tenn. 1998), the Supreme Court of Tennessee held that a lawyer's failure to "keep [his clients] informed about the status of their lawsuit" as well as failure to "take any actions in an effort to preserve the [plaintiffs] right of appeal," among other failures, constituted a gross deviation from the applicable standard of care, rather than mere negligence, and thus supported a finding of punitive damages. And the Supreme Court of Kentucky concluded in *Bierman v. Klapheke*, 967 S.W.2d 16, 20 (Ky. 1998), that a lawyer's "acts of lying to conceal his neglect caused significant delays in the ultimate collection" by the client of the malpractice award, which warranted "a claim for punitive damages"

The Supreme Court of Delaware, in *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990), recognized that ordinary negligence will not suffice to support a claim of punitive damages, but that "intentional or willful conduct with reckless disregard for the interests of a client" may do so. Similarly, *Swinehart v. Turbin*, No. 82 C 2311, 1985 WL 1284, at *3 (N.D. Ill. May 2, 1985), held that under Illinois law, punitive damages are appropriate when torts are committed with "such gross

negligence as to indicate a wanton disregard of the rights of others.”

Mr. Collins’s failure to respond to any of the Petitioner’s requests for information as to the status of his appeal, or to promptly file his federal habeas petition, violated his duties of communication and loyalty to his client, and evidenced a willful disregard of Petitioner’s interests as well as constituting disobedience of Petitioner’s express, and quite reasonable, demands.

As the courts in *Patrick* and *Metcalfe* held, the failure to keep one’s clients informed or to preserve a client’s rights of appeal, when analyzed holistically in the context of the entire representation, may support a finding that the lawyer acted with willful or reckless disregard of his client’s interests – and not merely negligently. Mr. Collins’s repeated failure to respond to his client’s requests for information over a three-month period and his failure to file a habeas petition despite having ample time to do so are sufficient bases to conclude that he either acted willfully to harm the Petitioner or in reckless disregard of the interests of Petitioner, in such a way that punitive damages would be an available remedy in a legal malpractice case against Mr. Collins. And if the punitive damage standard is applied to determine whether equitable tolling should be available here, the answer should also be affirmative.

C. Required Reporting of Lawyer Misconduct

An additional body of law that provides a means to measure the exceptional nature of the transgressions of counsel for Mr. Holland asks the question whether a lawyer in Florida, knowing of the uncontradicted facts of this representation, would be required to report Mr. Collins to the Florida Bar disciplinary authorities. Such a non-discretionary duty has been imposed on lawyers because “self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct,” Fla. Rules of Professional Conduct R. 4-8.3 cmt. at ¶ 1. The applicable rule “limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.” *Id.* at R. 4-8.3 cmt. at ¶ 3.

In Florida, the Rule itself provides in applicable part:

(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Id. at R. 4-8.3.

Can there be any doubt that the conduct of Petitioner's counsel would trigger a reporting obligation under this rule? Mr. Collins was dishonest in that he promised his client certain undertakings and fulfilled none of them. Similar dishonesty is found in his fraud by silence in lulling his client into a false state of security that no decision had come down and, therefore, no statute of limitations was running. Finally, he was dishonest when his misconduct was revealed and he falsely informed his client (his client!) that the statute had long since run, even before his state habeas petition was filed.

Similarly, Mr. Collins demonstrated how untrustworthy he was not only in his catalogue of misrepresentations, but also by failing to act in a timely manner to obey his client's instructions, failing to communicate with his client the information the client needed to protect himself if his lawyer were to abandon him, and failing to file a habeas petition within the time that remained under the applicable statute. Needless to say, each and all of the foregoing raised a substantial question of the fitness of Mr. Collins to practice law.

The case of *In re Reihlmann*, 891 So.2d 1239 (La. 2005), reflects how the standard should be applied. In *Reihlmann*, a lawyer waited five years to disclose to anyone information he had learned from a prosecutor-friend that the latter had suppressed exculpatory blood evidence, long after the offending lawyer had passed away. The non-reporting lawyer was publicly reprimanded for failing to report, as would, in view of the *Amici Curiae*, any lawyer with knowledge of these uncontradicted facts who failed

to report Mr. Collins's conduct here. Exceptional circumstances exist when a lawyer's conduct demonstrates dishonesty, untrustworthiness or lack of fitness to practice law, a standard that could be easily applied to the conduct of Petitioner's counsel to more than justify providing Petitioner the relief he now seeks by way of equitable tolling.

CONCLUSION

This matter presents this Court with a litany of reprehensible conduct by a lawyer that is only compounded by the dramatic consequences that might befall the unfortunate client who suffered these exceptional indignities. Fortunately, such conduct is as rare as it is deplorable. As a result, in the view of *Amici Curiae*, looking at this from a professional responsibility perspective, the Court should conclude that the lawyer's failure to respond to and implement the client's request to file a federal habeas corpus petition presents extraordinary circumstances that warrant equitable tolling of the statute of limitations to give Petitioner one full opportunity for federal collateral review.

Respectfully submitted,

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