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

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CAPITAL CASE
QUESTION PRESENTED

Whether equitable tolling is available under the Antiterrorism and Effective Death Penalty Act (AEDPA), and, if so, whether the Eleventh Circuit properly denied Petitioner's contention that he is entitled to equitable tolling of the limitations period based on the alleged "gross negligence" of his counsel?

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The August 18, 2008 decision of the United States Court of Appeals for the Eleventh Circuit is reported as *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008). [JA 102][1] The district court's order dismissing Holland's petition for writ of habeas corpus as untimely filed is unreported. [JA 81-94] The district court's order denying Holland's motion to alter or amend judgment is unreported. [JA 95-101]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal habeas statute of limitations is found in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), which provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or

[1] References to the Joint Appendix are "JA" followed by page number(s); references to district court docket entries are "DE" followed by docket number(s); references to the Petitioner's Brief are "Br." followed by page number(s).

> the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (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.

In addition, 28 U.S.C. § 2254, entitled "State custody; remedies in federal court," includes subsection (i), which states:

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

INTRODUCTION

This case asks who bears the risk in federal post-conviction proceedings of attorney negligence that causes an untimely filing of a habeas petition on behalf of an incarcerated offender? Under the Antiterrorism and Effective Death Penalty Act (AEDPA), should the conduct of the post-conviction attorney be imputed to the client, thereby barring equitable relief, or may a court equitably toll the clear statutory deadline despite the intent of Congress to avoid delays and promote finality in post-conviction proceedings, particularly those involving the death penalty?

Here, Petitioner Albert Holland asks that this Court establish a new rule that excuses the late filing of a habeas petition arising from negligence on the part of his post-conviction attorney. Such a rule, giving courts the discretion to lengthen the federal habeas statute of limitations for attorney negligence, contravenes Congress's clear intent to establish filing deadlines and expedite federal habeas review. This new rule would open the door to potentially lengthy and costly rounds of collateral proceedings in which courts must determine the nature of the alleged attorney misconduct and whether that conduct meets some sufficiently high threshold to warrant equitable relief from the statutory deadline established in AEDPA.

This Court and others have recognized that attorneys make mistakes and miss deadlines, but that fact alone does not warrant equitable relief in the post-conviction context in light of AEDPA's purpose and structure. Indeed, the Court has held that the Constitution does not require states to provide post-

conviction counsel, nor does a convicted offender have a right to effective post-conviction counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Coleman v. Thompson*, 501 U.S. 722 (1991). For this reason, the Court has denied equitable relief for attorney negligence resulting in late filings, assuming that such relief is even available under AEDPA. *See Lawrence v. Florida*, 549 U.S. 327 (2007).

As discussed below, it is doubtful that Congress intended that equitable tolling exist under AEDPA in any case, in light of the specific grounds in section 2244(d)(1) for delaying the running of the statute of limitations and the specific ground for tolling in section 2244(d)(2). To allow Holland and others similarly situated to obtain relief based on the negligence of their attorneys would circumvent the statutory time period for filing petitions established in AEDPA. It would also undermine *Lawrence* and the principles of *Coleman*, as well as Congress's intent to structure the habeas process to provide true deadlines and eliminate unnecessary delays in federal proceedings. Assuming equitable tolling exists, this Court should reject Holland's proposed tolling rule. The prevailing rule should be that attorney conduct in the post-conviction process is imputed to the client and cannot warrant equitable relief absent extraordinary and unavoidable circumstances beyond the control of the litigant and his attorney. Alternatively, the Eleventh Circuit's standard, which limits equitable relief to very narrow categories of attorney misconduct, should prevail and bar relief in Holland's case.

STATEMENT OF THE CASE

Holland was indicted for the first-degree murder of a police officer, armed robbery, sexual battery, and attempted first-degree murder,[2] all four counts stemming from incidents that occurred on July 29, 1990. *Holland v. State*, 636 So. 2d 1289, 1290 (Fla. 1994). The jury found Holland guilty as charged on all counts, and recommended a sentence of death by a vote of 11 to 1. *Id.*

Holland was sentenced to death on August 19, 1991, for the first-degree murder of Officer Scott Winters; however, his convictions and sentences were reversed by the Florida Supreme Court. *Id.* at 1293. The Florida Supreme Court held that Holland's Fifth and Sixth Amendment rights were violated by the admission of testimony from a state psychiatrist who had interviewed Holland in jail without prior notice to defense counsel. *See id.* at 1292-93. This Court denied the State's petition for certiorari. *See Florida v. Holland*, 513 U.S. 943 (1994).

Holland was re-tried and was again found guilty as charged on the first-degree murder, armed robbery, and attempted first-degree murder counts. *Holland v. State*, 773 So. 2d 1065, 1068 (Fla. 2000). The jury also found Holland guilty of the lesser-included offense of attempt to commit sexual battery.

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[2] The four counts in the indictment were: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; Count III, sexual battery on Thelma Smith Johnson with a deadly weapon or physical force likely to cause serious personal injury; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon.

Id. The jury recommended a sentence of death by a vote of 8 to 4. *Id.* On February 7, 1997, the trial court sentenced Holland to death for the first-degree murder of Officer Winters and to a consecutive life sentence for the armed robbery of Officer Winters, as well as consecutive thirty and fifteen-year sentences for the crimes involving Thelma Smith Johnson.[3]

Holland appealed his convictions and sentences to the Florida Supreme Court. Following oral argument,[4] the court affirmed Holland's convictions and sentences, setting out the following facts:

> Holland attacked a woman he met on July 29, 1990. Holland ran off after a witness interrupted the attack. Police officers responding to a call about the attack found the woman semi-conscious with severe head

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[3] The trial court found the following aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; (2) the capital felony was committed while the defendant was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit the crime of robbery or an attempt to commit the crime of sexual battery or both; and (3)(a) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, merged with (3)(b) the victim of the capital felony was a law enforcement officer engaged in the performance of his legal duties. *Holland*, 773 So. 2d at 1068. The court did not find that any statutory mitigating circumstances were established, but did find the existence of two non-statutory mitigating circumstances: (1) history of drug and alcohol abuse, and (2) history of mental illness. *Id.* Both of these factors were given little weight.

[4] Archived videos of the Florida Supreme Court oral argument in this case as well as Holland's state post-conviction proceeding can be found at: http://wfsu.org/gavel2gavel/archives/index.html (Sept. 1, 1999 & Feb. 10, 2005) (last visited Jan. 21, 2010).

> wounds. Officer Winters and other officers began searching for the man believed to have been involved in the attack. A short time later, witnesses saw Officer Winters struggling with Holland. During the struggle, Holland grabbed Officer Winters' gun and shot him. Officer Winters died of gunshot wounds to the groin and lower stomach area.

Holland, 773 So. 2d at 1068 (Fla. 2000). Holland filed a petition for writ of certiorari to this Court, which denied the petition on October 1, 2001. *Holland v. Florida*, 534 U.S. 834 (2001). The one-year time period within which to file a federal habeas petition therefore began to run on this date.

From November 8, 2001, until he withdrew in May 2006, attorney Bradley M. Collins represented Holland, who began periodically writing letters to his attorney and filing unauthorized *pro se* supplements.[5] During the time his state post-conviction proceedings were pending in the Florida Supreme Court, Holland sent two letters to Collins in which he inquired about his appeal and his potential federal habeas petition; Collins did not respond. *See* [JA 104, 210, 212, 214, & 218]; *Holland v. Florida*, 539 F.3d 1334, 1337 (11th Cir. 2008). Holland also contacted the Florida Supreme Court about the use of its website to keep him updated about the status of his appeal. *See* [JA 122, 123, & 146]; *Holland*, 539 F.3d at 1337. Collins communicated to Holland during the state post-

[5] As noted by the Eleventh Circuit, Holland twice moved the state court to remove Collins and appoint new counsel in 2004, but both *pro se* motions were denied. *See* [JA 134; 149; 192]; *Holland v. Florida*, 539 F.3d 1334, 1337 n.3 (11th Cir. 2008).

conviction proceedings concerning the issues to be raised, the handling and status of the case, and Holland's potential federal habeas petition. [JA 13, 38, 55, 57, 61, 62, 64, 79]

Nearly the entire one-year period within which to file a federal habeas petition had expired before Holland initiated state court post-conviction proceedings. On September 19, 2002, Holland, through Collins, petitioned to vacate his convictions and sentences in the state trial court, raising eight claims based on ineffective assistance of counsel and the fundamental unfairness of his trial and sentence.[6] [JA 84, 103] Holland attempted during his state court proceedings to file *pro se* supplements to the issues presented by Collins, but Holland's filings were struck by the court because he was represented by counsel. [JA 24, 30, 104 n.3] The state trial court held an evidentiary hearing and found all claims to be without merit or procedurally barred. [JA 83]

Holland (again through counsel) appealed the denial of his post-conviction motion to the Florida Supreme Court and also filed a state petition for writ of habeas corpus based on ineffective assistance of appellate counsel. *Holland v. State*, 916 So. 2d 750, 753 (Fla. 2005). Following oral argument, the Florida Supreme Court affirmed the denial of the post-conviction motion and denied the habeas petition in a

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[6] In addition to various claims of ineffective assistance of trial counsel, Holland also claimed that his death sentence is unconstitutional because a judge determined the aggravating circumstances instead of a jury, in violation of the Sixth, Eighth, and Fourteenth Amendments and this Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

unanimous twenty-two page opinion dated November 10, 2005. *Id.* The Florida Supreme Court issued its mandate on December 1, 2005.

Holland wrote to Collins in January 2006 inquiring about the status of his state court proceedings, but did not learn about the denial of his post-conviction appeal until January 18, 2006. *See* [JA 220]; *Holland*, 539 F.3d at 1337. On January 31, 2006, Holland received a letter from Collins in which Collins mistakenly stated that the time period to file a federal habeas petition had passed nearly a year prior to his appointment in November 2001. [JA 78-79] Collins was under the mistaken belief that the time in which to file a federal habeas petition would begin to run on the day the Florida Supreme Court denied relief on Holland's direct appeal in October 2000, when in fact the time did not begin to run until a year later when certiorari was denied by this Court. *See id.*

On February 8, 2006, Holland (through counsel) filed a petition for writ of certiorari in this Court, which was denied on April 17, 2006. Before the petition was filed, however, Holland filed a *pro se* petition for writ of habeas corpus in the federal district court on January 19, 2006. [JA 181][7] Collins sent Holland a proposed federal habeas petition on March 22, 2006, which by implication indicates that Collins intended to argue that equitable tolling should

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[7] Holland points out a discrepancy with the filing date of his state post-conviction motion. [Br. 5 n.4] As the district court noted [JA 82 n.2], Holland claims a filing date of September 17, 2002, while the state claims September 19, 2002 (a date which the Eleventh Circuit cited). [JA 103] Whether 36 or 38 days late, Holland's federal habeas petition was untimely.

apply to allow the late filing in federal court. [DE 20] Holland did not respond to this proposed petition, and the state court permitted Collins to withdraw in May 2006. [DE 17] The district court appointed current counsel, Todd G. Scher, to represent Holland in June 2006. [DE 22]

The district court ordered the State to show cause why the petition for habeas corpus should not be granted, calling "particular attention to the timeliness of the petition in light of the limitations period." [DE 9] The State's response asserted that Holland's time had expired. [DE 14] In his reply, Holland asserted that his petition was timely and also that he was entitled to equitable tolling. [DE 35] The State's sur-reply followed. [DE 41]

On April 27, 2007, the district court entered a detailed order dismissing Holland's section 2254 petition as untimely, holding that equitable tolling was not appropriate under the facts alleged.[8] [DE 46] At the outset, the court held that the pendency of Holland's petition for certiorari in this Court from his state habeas proceedings did not toll the time for filing his federal habeas petition in light of *Lawrence v. Florida*, 549 U.S. 327 (2007). [JA 83-84] The court rejected the contention that Holland could await the outcome in *Lawrence*. [JA 84 (noting that the "parties had been awaiting" the *Lawrence* decision)]

Next, the court rejected five arguments Holland advanced for equitable tolling. First, it rejected the

[8] The district court based its order on proffered evidence and did not hold an evidentiary hearing to assess factual allegations, such as those in Holland's merits brief claiming that Collins "deceived," "misled," or "betrayed" him. [Br. 35, 57]

argument that the alleged failure of the Florida Supreme Court to oversee attorney Collins is an extraordinary circumstance justifying equitable tolling. [JA 86] This Court in *Lawrence* had rejected such an argument. [JA 86]

Second, the district court held that the alleged failure of the Florida Supreme Court to inform Holland that the mandate had issued in his state habeas appeal "misses the mark." [JA 87] The court noted that, in contrast to cases where a court clerk specifically assures litigants that they will be notified of a decision or mandate in a case, Holland "never argues that someone in the Clerk's Office promised to inform him of the outcome of his case." [JA 87] It found "no evidence" that Holland ever contacted the Florida Supreme Court to request a copy of its decision or mandate denying post-conviction relief. [JA 87] The court pointed out that Holland contacted the Florida Supreme Court clerk for other reasons [JA 87],[9] but he failed to ask that he be given notice of the mandate in his state post-conviction proceeding, such that no assurance from the clerk could have been given. [JA 87-88]

Third, the district court held that Holland's claim of denial of access to the writ room on one occasion, which is akin to denial of access to a prison law library, was supported by "no specific information" about how the alleged denial of access

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[9] The district court provided a detailed deconstruction and rejection of Holland's attempts to "conflate" his claimed contacts with the Florida Supreme Court clerk into a request for the decision in his state post-conviction proceeding, finding either no supporting evidence or that Holland's characterizations of such contacts are inaccurate. [JA 88 n.4]

delayed his filing of a federal petition or what other efforts Holland made. [JA 90] Holland's "bald assertion" was simply insufficient. [JA 90]

Fourth, the district court rejected Holland's claim that his counsel failed to communicate with him and that his counsel's failure to file a timely habeas petition was an extraordinary circumstance warranting equitable tolling. As to Holland's claim that Collins failed to keep him adequately informed about his case, the court concluded otherwise:

> The record shows that Collins met with [Holland] on death row and communicated with him in writing on several occasions, provided to [Holland] a detailed, written explanation of the strategy for the case, pursued state collateral relief for [Holland], and filed a petition for writ of certiorari from the United States Supreme Court. Collins had prepared a proposed federal habeas petition on [Holland's] behalf and sent it to [Holland] for his review, suggesting that Holland either sign the Petition for filing or indicate that he would prefer [Collins] comply with Holland's repeated requests that [Collins] move the trial court for leave to withdraw as counsel. … *[Holland] never responded to Collins' correspondence.*

[JA 90-91 (emphasis added) (footnotes and citations omitted)][10] The district court also concluded, based on

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[10] The court noted that the record had "at least eight letters" to Holland from Collins [JA 91 n.6] and that Holland had no right to "hybrid" representation, which is the ability to "proceed *pro se* while simultaneously being represented by an attorney." [JA 91-92 n.8]

the evidence, that Holland was not only non-responsive to his counsel but that "[r]ather than cooperate with Collins, [Holland] filed numerous *pro se* motions during the time Collins represented him." [JA 91] Moreover, the court credited Collins's statement that Holland "has complained of conflicts with every counsel he has had since the beginning of his case, including trial counsel in his first trial and again different counsel in his retrial." [JA 92]

As to Holland's claim that Collins acted negligently, the trial court noted that it is "well settled that attorney negligence in calculating deadlines and understanding the law on habeas relief is not a basis for equitable tolling." [JA 90] The court noted that the Florida Bar, which received a complaint from Holland regarding Collins, initiated no investigation because the issues that Holland raised "did not rise to the standard of a violation of the Rules Regulating The Florida Bar." [JA 92 n.9] Even if Holland believed his attorney was careless or negligent, the district court found that Holland did not make the necessary showing of his own diligence because the record showed:

> that he wrote a few letters to his attorney, but did not seek any help from the court system to find out the date mandate issued denying his state habeas petition, nor did he seek aid from "outside supporters" he claimed he wanted to enlist to help him. This does not establish due diligence.

[JA 92]

Finally, the district court rejected Holland's allusion to "his long history of mental illness as a

basis for equitable tolling." [JA 93] The court noted that Holland's claim was contradicted by his "numerous, cogent letters" to his attorney, the courts, the Department of Corrections, and The Florida Bar. [JA 93] "What this shows is that Petitioner was certainly capable of using due diligence to ascertain his filing deadline for the instant habeas petition, but did not." [JA 93]

In response to Holland's motion to alter or amend judgment, the district court issued an order addressing why Holland was not entitled to relief. First, Holland claimed that he could not have done more to determine when the mandate issued in his state post-conviction proceeding. The court again rejected his contention, stating that Holland reasonably could have done more under the circumstances:

> For example, Petitioner could have contacted the Florida Supreme Court directly to inquire about the pending appeal of his state post-conviction application. Specifically, he could have asked to be copied on the issuance of the mandate given his narrow window for seeking federal relief and his lack of confidence in his appointed lawyer. Petitioner undeniably knew that the state appeal had been pending for quite some time, and knew that the mandate would trigger the time to file his federal habeas petition. Petitioner knew how to contact the Florida Supreme Court, and did so on several occasions for other reasons.

[JA 98] The district court further stated:

> Petitioner also had experienced perceived conflicts with his appointed counsel, and had

> expressed concerns to him about the issuance of the mandate and the running of the limitations clock. When those concerns went unaddressed, a reasonable person in his position would have done more to protect his interest in filing a federal habeas petition. The evidence submitted by Petitioner shows that he was decidedly not "in the dark" about his circumstances. Indeed, Petitioner ultimately overcame whatever reliance he had placed on his appointed counsel and filed his own habeas petition *pro se*. Hence, even if counsel's failure to contact Petitioner was an "extraordinary circumstance," and not merely based on an erroneous reading of the rule (i.e., that the limitations period had already run so there was no urgency in filing a habeas petition with this Court or with notifying his client), Petitioner did not do enough to overcome the circumstances he found himself in.

[JA 99] Finally, the district court rejected Holland's contentions that the one-time denial to the writ room supported relief. The court noted that "even if they had granted him access on January 9th, the limitations period had already run on his federal petition." [JA 100] The court continued:

> While this one belated attempt to go to the writ room is some evidence of diligence, one attempt is not enough to establish tolling given that he did not undertake other reasonable steps. … One denied attempt to access the writs rooms and three letters to counsel between June of 2003 and January of 2006 simply are not enough. A reasonable person who knows that the date of decision would trigger the clock on his federal petition, and believed that he had such conflicts

> with his appointed counsel that he sought to have him removed, would have at least tried to do more than Petitioner did.

[JA 100] Thereafter, the district court granted a certificate of appealability on the question of "whether equitable tolling enlarged the one-year time period for [Petitioner] to file his 28 U.S.C. § 2254 petition." *Holland*, 539 F.3d at 1338.

The Eleventh Circuit Court of Appeals affirmed the district court. *Id.* at 1336. The court found it undisputed that Holland's federal habeas petition was filed beyond the one-year limitations period in 28 U.S.C. § 2244(d). *See id.* at 1338. The court reasoned that Holland's limitation period began running on October 1, 2001, the date on which this Court denied certiorari on Holland's direct appeal. *See id.* Eleven months and 19 days of the one-year federal limitations period then expired before Holland filed his state court motion for post-conviction relief, which tolled the remaining limitations period. *See id.* Once the Florida Supreme Court issued its mandate on December 1, 2005, Holland had 11 days remaining on his federal limitations period, but he did not file his petition in the district court until January 19, 2006 – 38 days late. *See id.*

The Eleventh Circuit, which has held that equitable tolling of AEDPA's statute of limitations may be available in truly extraordinary and rare situations, affirmed the district court's conclusion that tolling is unavailable on the facts of this case. *See Holland*, 539 F.3d at 1338 (citing *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001) ("Equitable tolling can be applied to prevent the application of [the] statutory deadline when

'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition.")). The court held that "a truly extreme case is required" under this Court's recent *Lawrence* decision. *Holland*, 539 F.3d at 1338.

As to attorney misconduct, the Eleventh Circuit affirmed the district court's conclusion that Holland failed to demonstrate extraordinary circumstances. The court concluded that Collins's failure to meet the filing deadline was negligent (perhaps grossly negligent) and a failure to meet "a lawyer's standard of care," but that such misconduct falls short of the type of egregious attorney misconduct necessary to claim equitable tolling. *Id.* at 1339; [JA 110]. Notably, Holland made no allegations of factual misrepresentations or lies by Collins. *See Holland*, 539 F.3d at 1339. The allegations only involved communications between Holland and Collins, disagreements over issues to be raised, an alleged failure to update Holland on the status of his case, and a mistake regarding the applicable law. Holland could therefore, at most, establish "mere" professional negligence, which is insufficient to toll the statute of limitations. *Id.* (citing *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008)). The court reasoned that "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 and so forth on the lawyer's part – can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling." *Id.* The court summarized its holding, stating: "Pure professional negligence is not enough. This case is a pure professional negligence case." *Id.*

In addition, the Eleventh Circuit rejected Holland's contention that the Florida Supreme Court's alleged failure to oversee Collins was a basis for relief. [JA 110-11 (citing *Lawrence*)] The court also rejected Holland's contentions that the Florida Supreme Court failed to notify him about the issuance of the mandate in his case and that the Department of Corrections alleged denial of access to the "writs room" supported relief. The court noted that Holland sent his letter to the Florida Supreme Court on December 15, 2005 (nine days *after* the deadline for his federal habeas petition), and that the alleged denial of access occurred on January 9, 2006 (28 days *after* the deadline for his federal habeas petition). Even assuming Holland's two allegations were true, the court held that both occurred *after* the filing deadline and could not have prevented him from filing a timely petition. [JA 110-111] The court also rejected the contention that the district court erred by not holding an evidentiary hearing, noting that circuit precedent leaves this decision to the "sound discretion of the district court." [JA 111]

Holland filed a petition for writ of certiorari in this Court, which was granted on October 13, 2009.

SUMMARY OF ARGUMENT

The Eleventh Circuit was correct in denying equitable tolling of the limitations period established in AEDPA based on the alleged "gross negligence" of Holland's counsel.

As an initial matter, equitable tolling conflicts with AEDPA, which provides specific instances in which delays are recognized or tolling of the one-year statute of limitations is permitted, *see* 28 U.S.C. §§ 2244(d)(1) & (d)(2), thereby overcoming a presumption favoring such tolling. Given AEDPA's purpose of establishing deadlines that promote the finality of criminal judgments, as well as the statute's structure, Congress could not have intended the application of equitable tolling. Moreover, no statutory ground exists under AEDPA to toll the one-year limitations period for the incompetence or ineffective conduct of petitioner's post-conviction counsel. Had Congress so intended, such an exemption could have been set forth in AEDPA; it was not. Instead, Congress stated that the incompetence or ineffectiveness of post-conviction counsel provides no basis for relief in the federal forum, *see* 28 U.S.C. § 2254(i), thereby implicitly buttressing the point that post-conviction counsel's conduct should not form the basis for the extra-statutory relief sought in this case. Read as a whole, AEDPA reflects Congress's intent that the Act's one-year limitations period should not be tolled for reasons beyond those set forth in the statute.

Even if this Court assumes or decides that equitable tolling exists under AEDPA, the Eleventh Circuit was correct in denying relief on the facts presented. Because only extraordinary and rare

circumstances, not attributable to the petitioner or his attorney, justify the application of equitable tolling, the standard for such relief must be exceptionally high. All errors of a litigant's post-conviction counsel are attributable to the litigant. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). No meaningful difference exists between an attorney who fails to understand the law and, as a consequence, files an untimely petition, and an attorney who fails to file the petition despite his client's directions. The record here establishes that the failure to timely file a habeas petition was due to Holland's attorney, who misapprehended the applicable law, a ground that does not warrant equitable relief under *Lawrence*.

To open the door to attorney "gross negligence" or "dishonesty" as grounds for equitable tolling is inconsistent with *Lawrence* and *Coleman* and unworkable in practice. Courts would have to conduct evidentiary hearings to determine whether an attorney was "dishonest" or committed a sufficiently egregious act of incompetence in filing an untimely habeas petition. Attempts to define what degree of dishonesty or incompetence that justifies relief will lead to more litigation and more delays, particularly in capital cases. Litigants such as Holland, who the district court found was uncooperative and non-responsive and who filed an unfounded bar complaint against his attorney, will have a vehicle for pursuing unjustified relief by characterizing their post-conviction counsel as dishonest or incompetent. Allowing equitable tolling under these circumstances undermines the intent of Congress as well as the states' interests in finality of judgments and the administration of their criminal justice systems. The purpose of AEDPA's statute of limitations is to provide finality for capital convictions; allowing extra-

statutory judicial tolling based on discretionary equitable principles puts this core purpose in jeopardy.

For these reasons, this Court should hold that equitable tolling is unavailable under AEDPA, or alternatively that equitable tolling based on attorney incompetence or ineffectiveness is unavailable. If the Court determines or assumes that equitable tolling exists under AEDPA, it should affirm the decision of the Eleventh Circuit that equitable tolling is unavailable based on the alleged "gross negligence" of the attorney at issue in this case. In doing so, the Court should refrain from adopting the entirety of the Eleventh Circuit's standard, which allows for equitable tolling based on allegations of attorney bad faith, dishonesty, divided loyalty, and the like. Such a standard is unmanageable in practice and creates incentives to characterize disagreements with post-conviction counsel's actions as "dishonest" or "deceitful" conduct warranting equitable relief, thereby thwarting AEDPA's limited tolling provisions and this Court's decision in *Lawrence*.

ARGUMENT

Holland filed his habeas petition, pursuant to 28 U.S.C. § 2254, 38 days after the one-year statute of limitations expired. In rejecting the out-of-time petition, the Eleventh Circuit held that attorney negligence, even gross negligence, is not a basis for equitable tolling. Instead, absent "allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," equitable tolling is not allowed. *Holland*, 539 F.3d at 1339. Holland asserts he is entitled to equitable tolling of the statute of limitations under section 2244(d)(1)(B) based on his counsel's negligence in missing this statutory deadline. Holland's claims should be rejected because (a) equitable tolling is inconsistent with AEDPA; and (b) even if equitable tolling is available, the attorney conduct at issue does not meet the extraordinarily high standard required for such relief.

I. Equitable Tolling Is Unavailable Under AEDPA.

The issue of whether AEDPA allows for equitable tolling has eluded this Court's resolution. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (assuming, without deciding, that equitable tolling applies); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (availability of equitable tolling is an open question). But it is fairly considered a part of the Question Presented, which assumes the existence of equitable tolling. As discussed below in subsection (A), equitable tolling does not apply based on the purpose and statutory structure of AEDPA, which overcomes the presumption that such tolling exists for non-jurisdictional statutes of limitations. Alternatively, as

discussed below in subsection (B), equitable tolling does not apply for attorney misconduct amounting to ineffective assistance of counsel.

A. Equitable tolling is inconsistent with AEDPA's purpose and structure.

Nearly 20 years ago in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990), an action involving a belated filing of an employment discrimination action against the government, this Court explained that while a presumption of equitable tolling exists in suits against the government, the presumption can be overcome by Congress. An underlying question in this case is whether this presumption in favor of equitable tolling is rebutted by the purpose and statutory structure of AEDPA. This purpose and structure must be considered in light of the principles in this Court's precedents holding that the presumption in favor of equitable tolling can be rebutted where such tolling would be inconsistent with the terms of the relevant statute. *See, e.g., Young v. United States*, 535 U.S. 43, 49 (2002); *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *United States v. Brockamp*, 519 U.S. 347 (1997).

A clear and consistently-cited purpose of AEDPA is the reduction of delays and abuses in federal habeas proceedings via the establishment of a detailed statute of limitations that accounts for those situations in which Congress deemed extensions of time permissible. Congress was concerned about the delay caused by habeas petitions, and sought to shorten the time between sentencing and execution. *See* H.R. Conf. Rep. No. 104-518, at 111 (1996) ("This

title incorporates reforms to curb the abuse of the statutory writ of habeas corpus and to address the acute problems of unnecessary delay and abuse in capital cases."); *see also* 142 Cong. Rec. S3376 (Apr. 16, 1996) (remarks of Senator Slade Gorton that delay has "caused the people of the United States to lose an important degree of faith in their criminal justice system."); Cong. Rec. S5805 (Apr. 27, 1995) (remarks of Sen. Bob Dole that new bill was meant to prevent violent criminals from "gaming the system" by purposefully causing unwarranted delay).[11]

This Court has stressed that the habeas statute of limitations was meant to end delays in capital cases. *See, e.g., Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (noting AEDPA was designed to address the problem of "seemingly endless proceedings that have characterized capital litigation" (citing H.R. Rep. No. 104-23, p. 8 (1995) (stating that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases")); *see also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (stating that "Congress enacted AEDPA to reduce

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[11] Early in the legislative debates, a letter from several state attorneys general was read into the record, noting that capital sentences are subject to endless legal obstacles, undermining the credibility of those sanctions. 141 Cong. Rec. S7480 (May 25, 1995). The National Association of Attorneys General also sent a letter, signed by 34 state attorneys general, supporting the bill, and the National Association of District Attorneys supported the bill as well. *See* 142 Cong. Rec. H3611 (Apr. 18, 1996) (statement of Rep. Hyde). The delays can be substantial. *See, e.g., Johnson v. Bresden*, No. 09-7839 (December 2, 2009) (denial of certiorari in a capital case spanning 29 years in which petitioner asserted that such a "lengthy and inhumane delay" violates the Eighth Amendment).

delays in the execution of state and federal criminal sentences, particularly in capital cases"); *Day v. McDonough*, 547 U.S. 198, 208 (2006). Ending delay is critical because the states have a "strong interest in preserving the finality" of their criminal judgments. *Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977).

Given this purpose, Congress structured federal habeas proceedings in a thoughtful way that provides for appropriate exceptions for delays in the filing of such petitions and for circumstances when tolling of such proceedings is permissible. For example, section 2244(d) provides that the statute of limitations will not begin to run until the facts upon which claims are based could have been discovered through due diligence, or until a new retroactive constitutional right that forms the basis for a claim is recognized. *See* 28 U.S.C. § 2244(d)(1)(C) & (D). In addition, the limitations period does not begin to run until a state-created illegal impediment to filing is removed. *See id.* § 2244(d)(1)(B). Section 2244(d) also provides that the time during which a defendant is actually seeking to exhaust his claims in state court is not counted toward the statute of limitations, as occurred in Holland's case, thereby providing a specific basis for statutory tolling. *See id.* § 2244(d)(2).

Given AEDPA's comprehensive legislative structure, these specific limitations on the situations involving delays and tolling that Congress deemed appropriate should be read as limiting the situations where relief was intended. *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) ("The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."). Had Congress intended a

greater scope of circumstances justifying delays or tolling, it certainly could have said so, but did not.[12] *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). In determining the scope and meaning of AEDPA's language, this Court should not infer or create exceptions that add to those that Congress has specified. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 n.30 (1994) ("We are not free to fashion remedies that Congress has specifically chosen not to extend."). Even where "equitable considerations strongly support[] a nonliteral reading of the statutory provisions regarding the time during which a claim could be asserted[,]" this Court has refrained from altering the statutory structure that Congress enacted. *See Nw. Airlines,* 451 U.S. at 97-98 ("favorable reaction to the equitable considerations" of a petitioner's claim "is not a sufficient reason for enlarging on the remedial provisions contained in these carefully considered statutes."). Similarly, while the Court has the authority to construe statutes, this authority "is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Id.* at 97. Based on these principles, the list of exceptions that Congress has specified in AEDPA should be read narrowly, and not expanded in a way that thwarts its intent that delays be avoided and tolling limited.

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[12] That Congress did not include a tolling provision for the ineffectiveness or incompetence of post-conviction counsel, and, instead, affirmatively said such conduct "shall not be a grounds for relief" in section 2254 proceedings, is a strong indicator that no such "relief" was intended. *See* section I(B) below.

AEDPA's statutory structure reflects that Congress intended that other causes of delay should be charged against the defendant. The "most natural reading" of AEDPA indicates that Congress intended to exclude open-ended judicial tolling from the statute by including specific provisions for delays and tolling. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001); *Brockamp*, 519 U.S. at 352. Given AEDPA's statutory limitations, the additional grant of equitable tolling would be inconsistent with the text and purpose of the statute. *See Young*, 535 U.S. at 49; *Beggerly*, 524 U.S. at 48; *Brockamp*, 519 U.S. at 347.

This conclusion is consistent with *Beggerly*, which held that equitable tolling was inconsistent with the terms of a statute of limitations when the statute already provided that it would not start to run until the litigant knew or should have known of the claim. *See Beggerly*, 524 U.S. at 48 (ruling that statute already "effectively allowed for equitable tolling" on this specified ground; when combined with a generous 12-year limitations period, extension of the period through equitable tolling would be unwarranted); *see also Honda v. Clark*, 386 U.S. 484, 501 (1967) (reasoning that whether a statute allows for equitable tolling should be determined by asking whether such tolling would be "consistent with the overall congressional purpose" for the statute).[13]

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[13] This rule also follows directly from the cannon of statutory construction "*expressio unius est exclusio alterius*." *TRW, Inc.*, 534 U.S. at 28; *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). This rule of construction is the default rule when Congress designates a specified conduction or event, such as the tolling provisions of section 2244(d). This means that the absence of equitable tolling in a statute that otherwise contains detailed (Continued …)

Allowing equitable tolling similarly undermines the plain text and purpose of AEDPA. Federal courts of appeals, however, have been invoking equitable principles in instances that fall more appropriately within the ambit of AEDPA's statutory tolling provisions. *See, e.g., Hollinger v. Sec'y, Dep't of Corrs.*, 2009 WL 1833746, at *4 (11th Cir. 2009) (finding extraordinary circumstances sufficient to trigger equitable tolling due to state trial court's admitted failure to notify petitioner of denial of his postconviction motion); *Spotsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (permitting equitable tolling due to petitioner's reliance on wrong instructions from court).

As an example, lower courts have considered the application of equitable tolling in claims of actual innocence. However, this Court has held that for a claim of actual innocence "[t]o be credible," it has to be supported with "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Because a claim of actual innocence must be based on new evidence, and the statute of limitations does not begin to run under section 2244(d)(1)(D) until the evidence in support of the claim was known or could have been known through an exercise of due diligence, it is inconsistent with the terms of the statute to grant equitable tolling based on a claim of actual innocence. Allowing

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tolling provisions indicates that the legislature did not intend any additional tolling. *See Brockamp*, 519 U.S. at 352 (reasoning that the statute's detailed list of exceptions "indicate[s] to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote.").

equitable tolling on grounds that overlap with the specific deadlines in section 2244(d)(1)(A) is inconsistent with decisions on the start and "re-start" dates that Congress has already set; petitioners either qualify for a delayed starting date under the statute or they do not.

Here, as in *Beggerly*, the general presumption is rebutted by evidence that Congress would not want equitable tolling to apply. *See Beggerly*, 524 U.S. at 49 (refusing to apply the general presumption in favor of equitable tolling to the Quiet Title Act in light of the "special importance" of repose in the area of real property rights). The great importance of finality of judgments in the area of state criminal convictions, and the intent of Congress to reduce delays via a detailed statute of limitations, rebuts the general presumption.

This conclusion is particularly appropriate because federal habeas litigation is so peculiarly governmental (rather than private party litigation), that the basis for the presumption is not apparent. *See also Brockamp*, 519 U.S. at 347 (explaining that for *Irwin*'s general presumption to apply, the underlying cause of action must be "sufficiently similar" to a traditional cause of action between private parties); *compare Young*, 535 U.S. at 49 (applying general presumption in favor of equitable tolling to a provision of the Bankruptcy Code, observing that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with text of relevant statute). Habeas litigation is dissimilar from a traditional cause of action between private parties; it is a unique cause of

action resulting in the overturning of a criminal conviction.[14]

Moreover, in interpreting statutes of limitations, this Court has consistently looked at the burden equitable tolling would have on government operations. In the case of section 2244(d), allowing equitable tolling would require states to have "side litigation" in far too many cases each year, further draining state resources. *See Brockamp*, 519 U.S. at 352-53. For example, allowing contests over attorney misconduct would significantly lengthen the habeas process via additional hearings, appeals, and certiorari petitions to this Court. Simply put, judicial exceptions to AEDPA's statute of limitations would inappropriately expose final state criminal judgments to prolonged jeopardy.[15]

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[14] The brief of amici Legal Historians essentially argues that since the writ of habeas corpus has historical underpinnings in the courts, it must be subject to equitable principles such as judicial tolling. This Court's decision in *Felker v. Turpin*, 518 U.S. 651 (1996), however, demonstrates that habeas jurisdiction in the lower federal courts is historically a creature of *statute*, and that Congress can establish requirements and limitations on relief as well as "gatekeeping" provisions. AEDPA's one-year limitations period, enacted in the interests of federalism, comity and finality, does just that. As discussed herein, these principles are violated when federal courts allow discretionary tolling in circumstances beyond those Congress has specified. *See id.* at 663-64 (reasoning that restrictions on the writ provided by Congress are not unconstitutional suspensions of the writ in violation of Article I, Section 9 of the Constitution, but can be enacted to prevent abuses of the writ).

[15] As this Court has noted, the primary focus of AEDPA is on capital cases, *see Woodford v. Garceau*, 538 U.S. 202, 206 (2003), though its limitations extend to non-capital petitioners, who may lack the incentives of capital petitioners to delay resolution of their cases.

Equitable tolling is fruitful as a delay strategy in part because the chances of success on the merits in federal habeas review are low. Habeas relief is an "extraordinary remedy" limited to correcting those "grievously wronged." *See Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993); *Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring) ("Delay is the name of the game in death penalty cases."). In fact, defendants can put the brakes on collateral review for substantial periods of time simply by making conclusory allegations and obtaining an evidentiary hearing as to entitlement to equitable tolling, and then appealing. Delays create unique harms in capital cases by damaging the states' implementation of their criminal justice systems and creating uncertainty as to the finality of criminal judgments, results that are clearly at odds with the purpose of AEDPA.

For all these reasons, equitable tolling is inconsistent with the purpose and structure of AEDPA's statute of limitations and its exceptions. Congress has specified the parameters it deems appropriate for delays or tolling in the context of federal habeas litigation, thereby rebutting the presumption that equitable tolling is available.

B. Equitable tolling based on ineffective or incompetent post-conviction counsel is unavailable.

Even if equitable tolling were consistent with the purpose and structure of AEDPA's statute of limitations, claims based on ineffective or incompetent attorney conduct should not be cognizable as grounds for such relief. When it enacted AEDPA, Congress

added section 2254(i), which states that the "ineffectiveness or incompetency of counsel during Federal or State collateral post-conviction shall not be a ground for relief in a proceeding arising under section 2254." Because habeas jurisdiction is limited to constitutional defects in the conviction and sentence, *see Engle v. Issac*, 456 U.S. 107, 119 (1982), and is not available for defects in collateral proceedings, *see Quince v. Crosby*, 360 F.3d 1259, 1262-63 (11th Cir. 2004), this statutory language evidences a clear legislative intent that allegations of ineffective assistance of post-conviction counsel during the state and federal collateral post-conviction processes are not cognizable in federal post-conviction proceedings to avoid procedural defaults.

By logical extension, section 2254(i) inferentially bars petitioners in federal habeas proceedings from using "ineffectiveness or incompetency" by their collateral post-conviction counsel to justify equitable tolling, which is a form of "relief" from the bar of AEDPA's statute of limitations. Logically, Congress would not have intended to deny relief based on ineffective or incompetent assistance of post-conviction counsel in advancing a petitioner's constitutional claims, and yet allow ineffective or incompetent assistance to be the basis for extending the deadline to raise those claims. While the Eleventh Circuit properly denied equitable tolling and should be affirmed on that basis, its implication that tolling could be permitted based on attorney conduct should be rejected in light of section 2254(i).

The ACLU's amicus brief contends that section 2254(i) is "entirely irrelevant" because it only denies federal courts a "ground" for awarding habeas "relief"

on the merits. ACLU Br. at 21-22. "Relief" as used in the statute, however, can be easily read to mean *any* relief, including equitable tolling and procedural default. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005); *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005) (concluding that § 2254(i) precluded granting a 60(b) motion based on habeas counsel failure to pursue discovery because the statute bars "relief," not simply particular kinds of relief, such as a granting writ of habeas corpus, and noting that section 2254 "is expansive in its prohibition."). Given AEDPA's structure and purpose, this statutory language strengthens the conclusion that any relief, not just ultimate relief on the merits of habeas claims, was intended, including equitable tolling based on ineffective or incompetent attorney conduct.

Section 2254(i) essentially codified the principle that attorney negligence does not excuse a procedural default. The point of this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), is that because no constitutional right to post-conviction counsel exists, even if post-conviction counsel is ineffective, the claims are barred from federal habeas review. *See also Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (stating that attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel, and citing *Coleman*, 501 U.S. at 756-57).

In *Coleman*, this Court held that the attorney's failure to file a notice of appeal in collateral proceedings, where no constitutional right to post-conviction counsel exists, did not constitute cause to excuse the procedural default. *See Coleman*, 501 U.S. at 756-57. Coleman's state habeas counsel filed a

notice of appeal in the Virginia Supreme Court three days late, and the Virginia Supreme Court dismissed the appeal as untimely. Coleman then filed a federal habeas petition, but the district court found several of the claims to be procedurally barred because the claims had been dismissed by the Virginia Supreme Court. Coleman asserted that his attorney's ineffectiveness in missing the deadline should excuse his procedural default.

This Court in *Coleman* noted that because no constitutional right to an attorney exists in state post-conviction proceedings, Coleman was required to bear the risk of his attorney missing the deadline. *See Coleman*, 501 U.S. at 753. The Court reasoned that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' " *Id.* (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990)). This Court specifically rejected Coleman's assertion that a post-conviction attorney's error can be "so bad that the lawyer ceases to be an agent of the petitioner." *Coleman*, 501 U.S. at 754 (citation omitted). This assertion "would be contrary to well-settled principles of agency law." *Id.* The Court held that "the gravity of the attorney's error" did not matter, concluding that in "the absence of a constitutional violation, the *petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation*." *Id.* (emphasis added). Similar to *Coleman*, Holland wants to use the ineffectiveness of his collateral counsel in missing a deadline as an excuse to allow the federal court to hear the merits of his federal habeas petition. Holland's situation is closely analogous to the type of

attorney error upon which this Court denied relief in *Coleman*.

Indeed, it would be an odd result that a petitioner has no constitutional right to effective or competent post-conviction counsel on the *merits* of his claims, yet the alleged ineffectiveness or incompetence of post-conviction counsel can justify the extraordinary step of overriding the statutory limitations period and allow claims that are time-barred under AEDPA. Likewise, because a failure to comply with a limitations period in state court bars relief, it would be odd that the same conduct in federal court would not bar relief. *See Coleman*, 501 U.S. at 722 (rejecting claim of ineffective assistance based on failing to file a timely notice of appeal). The principle that applied in *Coleman*, that a habeas petitioner bears the risk of "*all attorney errors made in the course of the representation*" applies with equal force in this case. *Id.* at 754 (emphasis added).[16]

In summary, AEDPA's language in section 2254(i) – buttressed by the purpose and structure of

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[16] *See also Williams v. Taylor*, 529 U.S. 420, 436 (2000) (citing *Coleman*, noting it has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); *Johnson v. McBride*, 381 F.3d 587, 590 (7th Cir. 2004) (citing § 2254(i) and *Coleman* to conclude that attorney conduct is not a basis for equitable tolling in capital case); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client") (citation omitted); *Davis v. Sec'y, Dep't of Corrs.*, 2009 WL 4349709 (M.D. Fla. 2009) (denying equitable tolling because petitioner did not show circumstances beyond his control in unreasonably allowing 294 days to lapse before filing his state proceedings).

AEDPA's statute of limitations – is consistent with the principles of *Coleman*, and supports the conclusion that equitable tolling based on ineffective or incompetent attorney conduct is inconsistent with the terms of AEDPA's statute of limitations.

II. Even if Equitable Tolling Exists (Or Is Assumed to Exist) Under AEDPA, It Does Not Extend to the Attorney Conduct Below.

Even if some form of equitable tolling exists (or is assumed to exist) under AEDPA, those circumstances should be exceedingly rare and should not extend to (a) circumstances within a litigant's control; or (b) disagreements between attorney and client or mistakes concerning the applicable law, both of which form the essential core of this case. The circumstances below do not meet the heavy burden that petitioners in nearly every circuit[17] must

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[17] *See, e.g.*, *United States v. Pollard*, 416 F.3d 48, 56 (D.C. Cir. 2005) (assuming equitable tolling exists, petitioner not entitled to it due to lack of "extraordinary circumstances" beyond his control; petitioner had to show unethical and outrageous behavior by opposing counsel); *Neverson v. Farquharson*, 366 F.3d 32, 42 (1st Cir. 2004) (non-capital case; equitable tolling should be used sparingly, in extraordinary circumstances, and "at a minimum, … is appropriate only when circumstances beyond the petitioner's control have prevented him from filing on time"); *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (capital case; equitable tolling "must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result") (affirming dismissal of petition where untimely filing resulted from counsel's gross negligence and unprofessional conduct in misinterpreting timing requirements); *Fierro v. Cockrell*, 294 F.3d 674, 681, 684 (5th Cir. 2002) (capital case; petitioner's (Continued …)

demonstrate to establish the type of "extraordinary circumstances" that prevent a petitioner from asserting his or her rights. Excusable neglect and mistakes by the prisoner's attorney are deemed, often

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mistaken assumption was not a sufficient exceptional circumstance to warrant equitable tolling; equitable tolling not justified either by a lack of notice of AEDPA's requirements or insufficient access to law library); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (non-capital case; petitioner not entitled to equitable tolling based on claim of insufficient access to relevant law; relief would be appropriate if petitioner could show (1) actual innocence; (2) adversary's conduct or uncontrollable circumstance prevented him from timely filing; or (3) prisoner actively pursued judicial remedies but filed a defective pleading); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (capital case; counsel's confusion about applicable statute of limitations did not warrant equitable tolling); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (non-capital case; petitioner could not show "extraordinary circumstances prevented him from filing his petition on time" or that he "acted with reasonable diligence" when the untimely filing was due to his attorney's miscalculation of time); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (non-capital case; equitable tolling exists under AEDPA, but AEDPA's already built-in tolling provisions make it "unclear what room remains for importing the judge-made doctrine of equitable tolling"; attorney's mistake is clearly insufficient); *see also Spitsyn v. Moore*, 345 F.3d 796, 799, 801 (9th Cir. 2003) (capital case; court applied "high" threshold requirement for equitable tolling, citing examples of situations where intervening actions of court or prison official interferes with a prisoner's otherwise timely filing; court determined that attorney misconduct at issue sufficiently egregious that equitable tolling applied). Only two federal circuits have rejected the extraordinary circumstances analysis in favor of an arguably less burdensome standards. *See Dunlap v. United States*, 250 F.3d 1001, 1009 (6th Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

explicitly, insufficient to overcome the high threshold in these cases.[18]

A. The Standard: Equitable tolling extends only to circumstances beyond a litigant's control.

Equitable tolling is unavailable to Holland because the failure to file a timely federal habeas petition was not due to some extraordinary circumstance beyond his and his attorney's control. A "litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently,[19] and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th

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[18] *Trapp v. Spencer*, 479 F.3d 53, 60 (1st. Cir. 2004) ("mistake by counsel … does not constitute extraordinary circumstances warranting equitable tolling."); *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004) (attorney incompetence, on its own, is not sufficient to trigger equitable tolling, as petitioner must also demonstrate own reasonable diligence); *Spitsyn*, 345 F.3d at 801 (equitable tolling requires more than mere negligence to apply); *Rouse*, 339 F.3d at 246, 248; *United States v. Martin*, 408 F.3d 1089, 1093-95 (8th Cir. 2005) (equitable tolling appropriate where attorney deceived petitioner); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (same).

[19] This case focuses on the second factor. The district court's finding that Holland did not meet the first factor of diligence [JA 90-92] was not addressed in the Eleventh Circuit's decision and is not within the Question Presented, which is limited solely to whether the "gross negligence" of Holland's counsel is an extraordinary circumstance warranting equitable tolling. Holland addresses his own diligence in his merits brief [Br. 59-62], and to the extent the Court considers the matter, Respondent relies on the findings of the district court below.

Cir. 1999); *Drew v. Dep't of Corrs.*, 297 F.3d 1278, 1287 (11th Cir. 2002).

As sufficient "cause" to excuse a procedural default, this Court has required a showing that some factor external to the litigant resulted in noncompliance with the procedural requirements of habeas law. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Mistakes or negligence by a litigant's attorney, his agent, are grounded in circumstances under a litigant's control and do not qualify. As stated in *Coleman*, error by post-conviction counsel is not "cause" and cannot form the basis for relief. In effect, conduct of a litigant's attorney amounts to action of the litigant's agent and thereby cannot meet the standards for equitable tolling. *See also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Coleman*, 501 U.S. at 752-57; *see also Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (capital defendants have no constitutional right to appointed counsel in post-conviction proceedings); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (same as to non-capital defendants).

This conclusion is consistent with the principle that equitable tolling is a rare remedy that is "not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). At the very least, it must be limited to rare and exceptional circumstances. *See Irwin*, 498 U.S. at 96 (recognizing equitable tolling allowed in situations where petitioner has been induced or tricked into missing filing deadline by opposing party's misconduct); *Lawrence*, 549 U.S. at 335-36; *Coleman*, 501 U.S. at 752-753. As discussed above, however, AEDPA already provides *statutory* grounds for extraordinary circumstances that delay or toll the start date of the

limitations period, making equitable tolling an impermissible or very limited basis for relief. In fact, this Court in *Irwin* discussed misconduct by the opposing party as an available ground for equitable tolling, a ground specifically listed in 28 U.S.C. § 2244(d)(1)(B). This demonstrates that Congress has already considered necessary reasons to delay or toll the AEDPA limitations period, making extra-statutory tolling inconsistent with the Act.

This Court should reject any standard of tolling based on circumstances within the petitioner or his agent's control. On this basis alone, the acts of Collins, as Holland's agent, and those of Holland himself, do not form the basis for equitable relief as the next section discusses.

B. The Eleventh Circuit correctly held that equitable tolling does not apply in this case.

Given this Court's precedents, the Eleventh Circuit correctly held that nothing occurring during Holland's attorney-client relationship with Collins rose to the extraordinary level that would justify equitable tolling. The court correctly held that Holland raised merely a professional negligence claim that forms no basis for relief.

The facts demonstrate that this case is little different from *Lawrence*. During the period in which state post-conviction proceedings were pursued (and AEDPA's statute of limitations was tolled), the sum and substance of Holland's communications with his attorney amounted to a disagreement with the direction and objectives of the litigation and an apparent misunderstanding of applicable law.

Holland tried to convince Collins to raise claims that Collins did not think should be raised in state court, complaining to whoever would listen and undertaking *pro se* filings in state court when Collins would not raise those claims. These facts, as described by the district court and relied upon by the Eleventh Circuit, provide no basis to justify tolling the limitations period.

In September 2002, Collins filed a state post-conviction motion, which was near the end of the one-year AEDPA limitations period, leaving little remaining time for the filing of a possible federal post-conviction. From that point in 2002 through the issuance of the Florida Supreme Court's decision and mandate in 2005, Collins communicated with Holland about the litigation regularly, as the district court clearly demonstrated in its order and as mentioned in Holland's brief. [JA 57-61, 63-64; Br. 5-10] Fairly read in context, the communications between Holland and Collins during this time period (i.e., while the state post-conviction proceedings were pending in the state trial and appellate courts) amounted to a disagreement over the issues to be raised in the state habeas proceedings. Holland attempted on several occasions to "supplement" the documents filed by Collins with additional issues, which was improper given that he was represented by counsel. [JA 9, 14, 17]

For example, on appeal to the Florida Supreme Court, Holland continued to disagree with Collins over the substantive issues to be presented in his case and attempted to raise additional issues in the Florida Supreme Court, despite Collins's continued representation. [JA 24, 207] Collins filed the state post-conviction documents in the Florida Supreme

Court on January 9, 2004, and Holland continued to improperly attempt to supplement the issues. [JA 30, 31, 35] He also complained to The Florida Bar, asserting that Collins failed to raise issues in his case, a complaint the Bar found "did not rise to the standard of a violation" bar rules. [JA 92 n.9]

Notably, on January 31, 2006, Collins sent a letter to Holland explaining why Holland's federal habeas petition was untimely. [JA 78-80] Collins believed that AEDPA's one-year limitation began to run on October 5, 2000, when the Florida Supreme Court affirmed Holland's death sentence on direct review. Because Collins was appointed in November 2001, more than a year after Holland's case became final, he implied that filing a federal habeas petition would be untimely absent equitable tolling. [JA 78-79] His explanation was erroneous.[20] *See, e.g., Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari

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[20] The record does not reflect the precise basis for Collins's misunderstanding, which could have been based on a number factors including uncertainty as to Florida's possible status as an opt-in state under Chapter 154 subject to the strictures of 28 U.S.C. §§ 2261-2266. *See Kelley v. Sec'y, Dep't of Corrs.*, 377 F.3d 1317, 1340 n.26 (11th Cir. 2004) ("To the best of our knowledge, the issue of chapter 154's applicability to Florida cases *remains unresolved*.") (emphasis added) (citation omitted); *see generally* 28 U.S.C. §§ 2261 & 2265 (opt-in to special habeas procedures in capital cases where state has certified mechanism for "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post conviction proceedings brought by indigent prisoners who have been sentenced to death."). Whatever the reason, his mistake does not support equitable tolling.

petition expires."). As the district court and the Eleventh Circuit both held, however, this misunderstanding of the law of when the one-year limitations period under AEDPA began to run does not justify relief under *Lawrence*. [JA 90, 110]

Holland moved to replace Collins with another attorney (whom Holland presumably thought would raise any issues Holland desired) or to proceed *pro se* if substitute counsel could not be appointed. As the district court noted, Holland had disagreements with his past lawyers, and the situation with Collins was no different. [JA 92] Holland essentially wanted to have the authority to raise claims beyond those presented by his attorney. [JA 46, 149][21]

Given this background, Holland's claim for equitable tolling reduces to a misunderstanding about the tolling period for the federal habeas petition and second-guessing of his attorney. As Holland acknowledges, Collins mistakenly believed that the tolling period under AEDPA ended before he was even appointed to represent Holland [Br. 19; JA 78-79] focuses on two letters he wrote to Collins inquiring about the status of his state appeal, both of which apparently went unanswered. [Br. 13-16] He then argues that Collins "betrayed" him by failing to file a federal habeas petition, mistakenly believing the time to file under AEDPA had already run out. [JA 78-79]

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[21] Notably, in responding to Holland's motion to replace him, Collins defended himself by stating that he did communicate with Holland during the state post-conviction proceedings and in filing briefs, raised the issues he felt could ethically be raised in good faith. [JA 38]

None of these contentions rise to the level of extraordinary attorney behavior that justifies equitable tolling. Collins was at most negligent, misconstruing the law and believing that any federal habeas petition would be late at the outset of his representation. This "garden variety" negligence by an attorney does not provide grounds for equitable tolling. *See Holland*, 539 F.3d at 1339.

Even if counsel's conduct constituted gross negligence, equitable tolling is not available. As the Eleventh Circuit held, even gross negligence is a professionalism issue that does not afford extraordinary equitable relief. *Holland*, 539 F.3d at 1339. No principled basis exists for distinguishing mere negligence from gross negligence within the context of equitable tolling. Neither category denotes conduct so far outside the range of ordinary circumstances as to be the kinds of grounds for which equitable tolling is available. *See id.* (noting that such circumstances were triggered by an attorney's knowing or reckless misrepresentations and dishonesty). As this Court has held, all degrees of negligence require "an absence of the care that was necessary under the circumstances." *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 495 (1875). Given the uncertain and malleable boundary between gross and ordinary negligence, any level of attorney negligence should remain insufficient as a basis for equitable tolling as it is outside the bright line of extraordinary circumstances.

The inadequacy of Holland's claims becomes even more pronounced when compared with the situation in *Lawrence*. In *Lawrence*, this Court rejected the claim that tolling should apply due to the uncertainty about whether the statute of limitations

was tolled during the pendency of a certiorari petition; moreover, any misunderstanding of a litigant's lawyer about AEDPA's requirements did not warrant equitable tolling. *See Lawrence*, 549 U.S. at 336-37. The reorganization of Florida's collateral system that caused confusion and delay also was deemed insufficient to constitute extraordinary circumstances justifying tolling of the statute of limitations. *Id.* at 330-31. This Court essentially rejected the same argument that Holland is making here, i.e., that he is entitled to equitable tolling because his attorney mistakenly missed the deadline or miscalculated the limitations period. *See id.* For similar reasons, Holland's claims should be rejected under the principles of *Lawrence*.

Moreover, Holland's communications (or alleged lack thereof) with Collins do not amount to the type of extraordinary circumstance that supports equitable tolling. Viewed fairly, the relationship between Holland and Collins was one in which Holland consistently second-guessed and interfered with the professional judgment of his counsel. While Holland was correct on the proper filing deadline, and his counsel mistaken, that does not amount to an extraordinary circumstance. Neither the district court nor the Eleventh Circuit were shown any evidence supporting Holland's claims in this Court that Collins intentionally betrayed his confidences by, for example, saying he filed a federal habeas petition when he did not.

To the contrary, as the district court specifically noted, it was Holland who lacked diligence by failing to take all reasonable steps once he believed that his attorney would not meet the deadline for filing a federal habeas petition. As the district court held,

when Holland's concerns about the deadline for the filing of a federal habeas petition "went unaddressed, a reasonable person in his position would have done more to protect his interest in filing a federal habeas petition." [JA 99] The court held that Holland's own evidence "shows that he was decidedly not 'in the dark' about his circumstances. Indeed, [Holland] ultimately overcame whatever reliance he had placed on his appointed counsel and filed his own habeas petition *pro se*." [JA 99] Given that Holland felt his attorney was not competent, it became incumbent upon Holland to act given "the circumstances he found himself in." [JA 99]

C. The Eleventh Circuit's standard creates manageability problems that justify a narrower standard for equitable tolling.

While the Eleventh Circuit's decision should be affirmed, its standard for allowing equitable tolling for the acts of a litigant's post-conviction counsel, such as bad faith, dishonesty, divided loyalty, and mental impairment, is unworkable in practice and allows conduct within the post-conviction attorney's control (and perhaps the litigant's in some cases) to form the basis for relief.

For example, the Eleventh Circuit's standard creates incentives, as reflected in Holland's brief and that of its legal ethics amici, to claim dishonesty or bad faith for disagreements over litigation strategy and misunderstandings of the law, both of which do not justify relief. The degree of dishonesty that must be shown and how it is to be proven are entirely uncertain, thereby creating incentives for litigants to allege "dishonesty" in situations where they are

merely second-guessing their lawyers' decisions. Determining whether an attorney engaged in an act of dishonesty or had some "bad faith" reason for not filing a timely federal habeas petition will often be based on private interactions between a defendant and his attorney that are unrecorded and must necessarily be based on potentially unreliable testimony. In some cases, capital litigants and their counsel may have some incentive to agree that counsel did not fully inform the clients and thereby were less than honest if the effect is to extend the time for judgment and avoid finality. *See, e.g.,* Victor L. Streib, *Would You Lie to Save Your Client's Life?*, Ethics and Effectiveness in Defending Against Death, 42 Brandeis L.J. 405 (2004). In short, no reliable standard or formula exists for determining what level of bad faith, dishonesty or other types of conduct by a post-conviction attorney would merit relief. An attorney who tells his client that he will file the petition and forgets or fails to do so is not lying; he is simply engaging in professional negligence similar to the mistake of law in this case. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect."); *Wallace v. Kato*, 549 U.S. 384, 396 (2007) (observing that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.").

The mischief of a standard that includes dishonesty or bad faith is reflected where courts have found egregious attorney misconduct based on little more than missing a deadline. An example is the case of Ernest Whitfield, whose petition for certiorari is before this Court. *Whitfield v. McNeil*, Case No. 09-5776. Whitfield filed a response to the State's motion

to dismiss his petition as time barred within days of the issuance of the Eleventh Circuit's decision in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), which allows for tolling in cases of egregious attorney conduct. Whitfield claimed he met the *Downs* definition of "egregious attorney misconduct" because he had been shown a draft of a federal habeas petition before the statute of limitations had expired, executed an affidavit of indigence to be filed with the petition at the time, and was told that a petition would be timely filed. *See Whitfield v. McNeil*, 2008 WL 4372850, at * 4 (M.D. Fla. 2008). He also asserted that he was subsequently told the petition had been timely filed even though it was not. *Id.* at *4 n.9. The motion was supported by an affidavit from one of Whitfield's attorneys stating that she had led the defendant to believe that the petition he was shown would be timely filed when the affidavit of indigence was executed. *See Whitfield v. Sec'y, Dep't of Corrs.*, Case No. 8:07cv-1823-T-30MAP, Docket Entry 20-2 (M.D. Fla. July 11, 2008).

When the district court requested additional information regarding who told Whitfield the petition had been filed and when the communication had occurred, Whitfield provided an affidavit identifying two attorneys who had provided him this information. *See Whitfield*, Case No. 8:07cv-1823-T-30MAP, Docket Entry 25. At the evidentiary hearing in the district court, Whitfield retracted these statements. *See Whitfield*, 2008 WL 4372850, at *4 n.9. The attorney who was implicated in the affidavit testified that the habeas petition she had shown Whitfield (at the time the affidavit of indigence was filed) had only been an incomplete draft. *Id.* at *4. Moreover, both attorneys denied ever telling Whitfield that a petition had been filed. *See id.* at *4-*5. After this delay, the district

court ultimately denied equitable tolling, and the Eleventh Circuit denied relief. Petitioner now seeks review in this Court.

In the cases of Mark Asay and William Thomas (in both cases this Court denied certiorari, case numbers 09-216 and 09-234, respectively), the district court found the defendants were entitled to equitable tolling because their attorney elected to file the petitions late and testified that she had health problems. *See Asay v. McNeil*, Case No. 3:05-cv-147-J-32, Dist. Ct. Consolidated Order, Docket Entry 112, at 16, 39 (M.D. Fla. Feb. 10, 2009). This attorney provided differing versions of the cause for her delay, varying from no explanation to health problems of her husband, herself, and her mental impairment, to, finally and most offensively, her deliberate ignorance of the due date as a concerted attempt to trigger equitable tolling. *Id.* at 15, 19, 20, 23, & 37. The district court found that the attorney engaged in a pattern of egregious conduct and may have chosen to miss the deadline on purpose, and that she deceived her client by informing him that a federal petition was already untimely when it was not. *Id.* at 37. Equitable tolling was applied by the district court under these circumstances. *Id.*

As to divided loyalty and mental impairment, these standards are just as subjective and create similar incentives to characterize circumstances within the attorney's control as extraordinary ones. For instance, is the untimely filing of a petition excused due to divided loyalty because the attorney had other equally important cases she was working on? Might she be subject to accusations of bad faith for not notifying the client and/or seeking to withdraw? Or divided loyalty because she gave her

attention to one client rather than another when both needed it? What does mental impairment mean and what degree is required for relief? While some situations may involve circumstances beyond the control of the litigant and his counsel, many will not. Because the Eleventh Circuit's standard invites these types of rationalizations for the extraordinary equitable relief sought, this Court should be wary of announcing a standard that includes these potentially open-ended concepts.

In summary, attempting to separate the forms of attorney conduct that are sufficiently egregious and beyond the control of both the attorney and client from those that are not presents manageability problems that, as the Eleventh Circuit feared, might allow the exceptions to swallow the rule. [JA 110 (citing maxim that "[e]very exception not watched tends to take the place of the rule.")] The unintended consequence of including attorney conduct such as dishonesty in the list of extraordinary conduct justifying relief is that litigants and their counsel have an incentive to frame their allegations to this standard, even where supporting evidence of truly dishonest (versus negligent, ineffective, or incompetent) conduct is lacking. The result is that evidentiary hearings are often ordered, further delaying the proceedings in cases nationwide, resulting in unnecessary delays that Congress intended to avoid. This result does not serve the goals of federalism and comity that underlie AEDPA, and justifies carefully limiting the scope of the circumstances that warrant equitable tolling, if it is to be allowed at all.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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