NO. 08-76

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2008

KAREN BRUNSON, SUPERINTENDENT
CLALLAM BAY CORRECTIONS CENTER

Petitioner,

vs.

Jerry L. Harris,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a petitioner is entitled to equitable tolling of 28 U.S.C. § 2244(d)'s one-year time limit for filing his habeas corpus petition, for relying upon then-controlling authority of *Dictado v. DuCharme*, 244 F.3d 724 (9th Cir. 2001) – which held that Washington successor post-conviction petitions statutorily toll the time for filing – when *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), overruled *Dictado* following that detrimental reliance?

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JURISDICTION

The Ninth Circuit U.S. Court of Appeals issued its opinion on February 8, 2008. Pet. App. 1a-13a. Its order denying the Petition for Rehearing *En Banc* was filed on March 14, 2008. Pet. App. 14a. This Court extended the time for filing the petition for writ of certiorari until July 14, 2008. The state's petition was timely filed under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. OVERVIEW OF STATE COURT TRIAL

Jerry Harris, along with codefendants Michael Sawyer and Brett Johnson, was charged with aggravated murder in the first degree, contrary to Wash. Rev. Code 10.95.020 and 9A.32.030, in October of 1995. They were charged in the alternative with felony murder in the first degree. Following a jury trial, Harris was found guilty of aggravated murder in the first degree; Sawyer was found guilty of first-degree felony murder; and special verdicts were entered finding each was armed with a deadly weapon. Harris was sentenced to life in prison without possibility of parole.

There was, however, no conclusive testimony or finding about which defendant was the one who premeditated, or pulled the trigger, or undertook the aggravating factors that elevated this from first degree murder (punishable by a term of years) to aggravated murder (punishable by life

without possibility of parole). Instead, the evidence placed both Mr. Harris and a codefendant at the scene of the murder, from which a gunshot was heard, by a witness who gave a description of two assailants – a description that changed over time. The evidence also showed that the car in which Mr. Harris and the two codefendants were arrested contained personal property of the deceased, thus providing circumstantial evidence of a robbery motive by at least one of those men.

The admissible evidence thus contained nothing directly proving that Mr. Harris premeditated or shot victim Renee Vivas, that he robbed Mr. Vivas (one aggravating factor elevating the murder to aggravated murder and life without parole) or that he planned witness or crime concealment (the other aggravating factor).

The critical direct evidence that Mr. Harris premeditated and committed the murder, and that he was responsible for the aggravating factors of robbery and crime or witness concealment, was out-of-court, self-serving statements by codefendant Sawyer, to law enforcement, during interrogation, admitted into evidence through the testimony of law enforcement witnesses. Mr. Harris' habeas petition therefore presented constitutional issues concerning the admission of those out-of-court, testimonial, declarations of non-testifying codefendant Sawyer which

minimized his own involvement and inculpated Mr. Harris, along with other claims.

II. DIRECT APPEAL

Mr. Harris' conviction was affirmed on direct appeal. *State v. Sawyer*, 1999 Wash. App. LEXIS 1487 (1999), *review denied*, 2000 Wash. LEXIS 152 (2000) (Pet. App. 31a).

III. STATE POST-CONVICTION PROCEEDINGS AND FACTS RELEVANT TO EQUITABLE TOLLING

Mr. Harris then filed a timely, first, personal restraint petition or PRP on February 20, 2001. It was denied by the Court of Appeals in CA No. 48450-8-I on August 25, 2003. Pet. App. 32a-58a. His Motion for Discretionary Review was denied in Wash. S. Ct. No. 74514-5 on December 8, 2003. Pet. App. 59a-62a. A Motion to Modify was denied on February 4, 2004. Pet. App. 63a. A key reason for the denial of relief on the claims concerning accomplice liability for aggravating factors was that any jury instruction error on these factors was harmless.

Immediately before the February 4, 2004, denial of relief, however, the state Supreme Court granted relief on a similar jury instruction claim and ruled that prejudice from such an error must be presumed when (as in this case) it affects aggravating factors. Since that decision (*State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004)) was so new, it had not been put in

any of the briefing in Mr. Harris' case. A new PRP was therefore filed (on March 4, 2004) to bring that new *Thomas* decision to the state Supreme Court's attention. Mr. Harris combined his *Thomas* argument with claims arising under *Crawford v. Washington*, 541 U.S. 36 (2004). That PRP was dismissed as "mixed" on July 27, 2004, for containing both timely and untimely claims (Pet. App. 64a-66a) – a dismissal that does not preclude refiling under Washington law. *In re the Personal Restraint of Hankerson*, 149 Wn.2d 695, 72 P.3d 703 (2003).

Mr. Harris therefore filed a third PRP presenting only the *Thomas* issue, to avoid dismissal as a "mixed" petition. It was filed on October 11, 2004; it was denied by a Commissioner on March 14, 2005 (Pet. App. 68a); and a Motion to Modify was denied on June 1, 2005 (Pet. App. 73a).

IV. THE HABEAS CORPUS PETITION

Mr. Harris filed his habeas petition in federal court on May 11, 2005, in advance of the final Washington Supreme Court denial. The district court dismissed the petition as time-barred. Pet. App. 16a. It acknowledged that the habeas petition would have been timely under prior, controlling, Ninth Circuit law – because in *Dictado v. Ducharme*, 244 F.3d 724, decided in 2001, the Ninth Circuit held that successor state-court PRP's in Washington toll the time for filing a federal habeas petition, even if the PRP's are later

determined to have been procedurally defective under Washington law.

Mr. Harris' petition was clearly timely under *Dictado*. As the state and the district court acknowledged, Mr. Harris filed each PRP shortly after the previous one was denied; each PRP was based on new and controlling law and not on authority that could have been raised earlier; and Mr. Harris immediately filed his federal habeas corpus petition after losing on his final state PRP – in fact, he filed a couple of weeks earlier, anticipating the final denial, when *Pace* was decided. Those dates show that Mr. Harris was not sleeping on his rights during any of the time preceding his federal filing.

This Court, however, overruled *Dictado* four years after it was decided in *Pace v. DiGuglielmo,* 544 U.S. 408, decided in 2005. In *Pace*, this Court ruled for the first time that successor state post-conviction petitions which are later determined to have been untimely filed do *not* toll the time for filing a federal habeas corpus petition under § 2244(d)(2).

In Mr. Harris' case, the district court ruled that statutory tolling was therefore unavailable. That much of its decision was correct under *Pace*.

It continued, however, that although the equitable tolling doctrine applied, Mr. Harris could not meet its prerequisites. It reasoned that reliance upon controlling authority did not make it impossible for Mr. Harris to file earlier, even though it recognized that Mr. Harris' counsel acted

"presumably in reliance on precedent at that time." The district court explained that reliance on controlling Ninth Circuit authority does not warrant equitable tolling:

> Petitioner Harris appeals from a denial of his claims as time-barred, a procedural ground. The court interprets Harris' pleadings as acknowledging that the claims are barred under *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), whereas they would have been timely under the prior Ninth Circuit authority. *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001).
>
> Petitioner Harris asks the court to hold that he is entitled to equitable tolling of the statute of limitations found in the AEDPA due to the change in controlling authority. While the court recognizes the harshness of the result, the situation before the court does not meet the high burden for equitable tolling established by the Ninth Circuit. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Petitioner Harris could have filed a timely petition but did not *presumably in reliance on precedent at the time*. This does not meet the "impossibility test" established in equitable tolling cases. …

Order Denying Certificate of Appealibility, pp. 2-3 (emphasis added).

As the emphasized material shows, there is no factual dispute here. The district court acknowledged – and the state has never disputed – that the "delay" in filing was due to reliance upon controlling Ninth Circuit precedent.

The Ninth Circuit reversed. Pet. App. 1a-13a. It ruled that the time for filing Mr. Harris' habeas corpus petition should be equitably tolled for the period of counsel's reliance upon then-controlling Ninth Circuit

authority, to Mr. Harris' detriment.

SUMMARY OF ARGUMENT

As the state candidly admits in its petition, there is no conflict in the circuits over whether the time for filing a habeas corpus petition under 28 U.S.C. § 2254 is subject to equitable tolling. All the circuits that have addressed the issue agree that the one-year time limit established in § 2244(d) is subject to equitable tolling. Section I.

In addition, there is no conflict in the circuits over whether facts similar to the ones presented here meet even the strictest prerequisites to equitable tolling. The Circuit Courts of Appeals have consistently held that reliance upon a controlling court order – or even a confusing court order, or advice from court personnel – satisfies the prerequisites to application of equitable tolling. The state has identified no dispute on this point, either. Section II.

Reliance to a petitioner's detriment on controlling circuit authority that is later overruled is a fairly rare circumstance. To the extent the state seeks review to establish general guidelines for equitable tolling, it has chosen a poor vehicle. Any decision about the scope of equitable tolling in this case would probably have limited applicability to the run of the mill tolling claims about which the state is seeking guidance. Section III.

Finally, the state never raised the issue of whether 28 U.S.C. §

2244(d)'s one-year time limit is even subject to equitable tolling in the district court or the Ninth Circuit. It took the opposite position there; it argued that the statute could be equitably tolled, but the prerequisites to tolling were not met in this case. The state should be judicially estopped from relying upon a contrary argument to gain review in this Court. Section IV.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER WHETHER THE TIME FOR FILING A HABEAS PETITION UNDER 28 U.S.C. § 2244 CAN BE EQUITABLY TOLLED – ALL CIRCUITS AGREE THAT IT CAN.

There is no conflict in the circuits over whether the time for filing a 28 U.S.C. § 2254 habeas corpus petition can be equitably tolled. All eleven circuits that have considered the question agree that the one year time limit established by 28 U.S.C. § 2244(d) establishes a statute of limitations that is subject to equitable tolling. In fact, the state itself has collected those cases. Pet. at 16-18 (collecting cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits which have held that this statute of limitations is subject to equitable tolling, along with a decision from the D.C. Circuit acknowledging these holdings but declining to reach the issue).

II. THERE IS NO CONFLICT IN THE CIRCUITS OVER WHETHER FACTS SIMILAR TO THESE JUSTIFY EQUITABLE TOLLING – ALL CIRCUITS AGREE THAT IT CAN.

There is not even any conflict in the circuits over whether facts similar to the ones presented here – reliance on the order of a court – should justify equitable tolling. The Ninth Circuit has consistently held that reliance upon a controlling court order in determining when a habeas petition should be filed *does* justify equitable tolling. *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 n.5 (9th Cir. 2005), *amended*, 2002 U.S. App. LEXIS 2169 (applying equitable tolling to habeas filing deadline); *Corjasso v. Ayers*, 278 F.3d 874, 877-78 (9th Cir. 2002) (applying equitable tolling to habeas filing deadline; citing other cases in which such tolling of the habeas deadline was granted); *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (*en banc*) (district court's order that "stay of the proceedings prevented [petitioner's] counsel from filing a habeas petition and, in itself, justifies equitable tolling" was not clearly erroneous but "clearly correct"), *cert. denied*, 526 U.S. 1060 (1999), *overruled on other grounds*, *Woodford v. Garceau*, 538 U.S. 202 (2003).

The other circuit courts have also granted equitable tolling to AEDPA habeas petitioners where, as here, the petitioner relied to his detriment upon representations, actions, or decisions, of the courts, concerning the time for

filing in federal court. *E.g.*, *Prieto v. Quarterman*, 456 F.3d 511, 514-16 (5th Cir. 2006) ("Although AEDPA applied to Prieto's application, the district court's order granting him additional time for the express purpose of filing his petition at a later date was crucially misleading. *Prieto* relied on the district court's order in good faith and to his detriment when he filed his petition. As Prieto submitted his petition within the time expressly allowed him by the district court, he is entitled to equitable tolling."); *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (remanding for district court to determine whether petitioner "reasonably viewed the Ohio Supreme Court's order as granting him extra time to properly file a petition for state postconviction relief" and whether he reasonably "assumed that any time spent pursuing this avenue would toll his federal statute of limitations").

The circuit courts have granted equitable tolling to AEDPA habeas petitioners even where the law about the time for filing upon which they relied was unsettled or unclear, rather than controlling and clear (as it was in this case). *E.g.*, *York v. Galetka*, 314 F.3d 522, 528 (10th Cir. 2003) ("at the time York filed his third petition, the law in this circuit was unsettled on the issue [of whether a habeas petition is 'other collateral review' that tolls AEDPA time limit], and the statute is ambiguous … We conclude that the district court should have applied equitable tolling to relieve York of the

one-year statute of limitations."); *Miller v. Collins*, 305 F.3d 491, 496 (6th Cir. 2002) ("In light of Miller's lack of notice [from state court that relief was denied], his diligence in pursuing his claims, and the State of Ohio's failure to argue that it will be prejudiced if this limited period of time is tolled, we hold that the section 2244 one-year statute of limitations was [equitably] tolled."); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) ("applicable law is so confounding and unsettled"; "When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2244 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations."), *cert. denied*, 534 U.S. 944 (2001).

The Third Circuit described the predicament faced by habeas petitioners trying to timely file, in compliance with controlling law, in a similar situation, in *Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001), *rev'd on other grounds, Beard v. Band*, 542 U.S. 406 (2004). It explained, "In *Fahy v. Horn*, we described the state of the [post-conviction filing deadline] law at the time … when Banks's petition was pending, as 'inhibitively opaque.' … We noted that in *Banks*, we had required Banks to return to state court because even we believed the relaxed waiver rule might well apply.

How can we expect Banks to have predicted the ultimate ruling of the Pennsylvania Supreme Court when we could not?" *Id.* *See also Baker v. Horn*, 383 F. Supp.2d 720, 745 (E.D. Pa. 2005) ("Baker sought to present his claims to the Pennsylvania courts at a time when Pennsylvania law regarding acceptance of otherwise untimely petitions was 'inhibitively opaque' … Therefore, Baker exercised even greater diligence … and meets the 'reasonable diligence' requirement of equitable tolling."). *Accord Griffin v. Rogers*, 399 F.3d 626 (6th Cir. 2005).

In fact, one district court granted equitable tolling in virtually identical circumstances to those presented here – the filing of a habeas petition that would have been timely under circuit precedent but, under a new Supreme Court case decided thereafter, became untimely. The district court ruled that under controlling Second Circuit law, a prior habeas corpus petition had tolled the time for filing a second habeas petition. But a new Supreme Court decision – *Duncan v. Walker*, 533 U.S. 167 (2001) – effectively overruled that circuit precedent. The district court ruled that the *Duncan* case constituted an "extraordinary circumstance[]" warranting equitable tolling. *De Jesus v. Miller*, 215 F. Supp.2d 410, 412-13 (S.D.N.Y. 2002).

The court came to essentially the same conclusion in *In re Wilson*, 442 F.3d 872 (5th Cir. 2006). In that case, the Fifth Circuit applied equitable

tolling to extend the § 2244(d) filing period because controlling authority in the Circuit (there, the "two-forum" rule) led petitioners and counsel to delay federal habeas filing until state post-conviction was completed. That is the same thing that happened to Mr. Harris: controlling authority in the Ninth Circuit – *Dictado* – led petitioner and counsel to delay federal habeas filing until state post-conviction was completed. And there as here, the petitioner exercised diligence in meeting what he thought was the controlling deadline, by filing quickly in federal court once his state post-conviction claims were finished.

At least one court has even granted equitable tolling to a habeas petitioner due to justifiable and detrimental reliance upon prison authorities, not just courts. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) ("Miles contends the doctrine of equitable tolling precludes a finding that his habeas petition was time-barred. We agree … as an incarcerated pro se litigant, Miles depended on prison authorities to draw on his trust account and to prepare a check for the filing fee … [and to mail it with the petition]. Once Miles made his request, any delay on the part of prison officials … was not within Miles' control.").

Similarly, the circuit courts have granted equitable tolling where petitioners reasonably relied to their detriment on actions of court personnel.

See Burger v. Scott, 317 F.3d 1133, 1143 (10th Cir. 2003) (granting equitable tolling where evidence showed state court had received state postconviction document but not stamped it filed for four months); *Knight v. Schofield*, 292 F.3d 709, 709-10 (11th Cir 2002) (granting equitable tolling where prisoner was assured by "Georgia Supreme Court Clerk … that he would be notified as soon as a decision was made," but was not"); *Corjasso v. Ayers*, 278 F.3d 874, 878-90 (granting equitable tolling because of delay caused by district court clerk's office mishandling of prisoner's pro se papers).

There is simply no conflict in the circuits over whether equitable tolling applies to facts like those in Mr. Harris' case, that is, where the petitioner relies to his detriment on a controlling court order or decision. The circuits that have considered the issue hold that it does support such tolling. There is not even any conflict in the circuits over whether equitable tolling applies to petitioner's reliance upon confusing law, or even seemingly controlling pronouncements by non-judicial personnel such as prison officials and court clerks. Again, the circuits that have considered the issue hold that it does.

Even this Court has recognized that habeas petitioners may be entitled to equitable tolling if they rely to their detriment upon a court decision. In *Pliler v. Ford*, 542 U.S. 225, 234 (2004), this Court remanded to the Ninth

Circuit for a determination of whether its "concern that respondent had been affirmatively misled" by a magistrate judge warranted equitable tolling of the statute of limitations. *Id*., 542 U.S. at 235 (O'Connor, J., concurring) ("if the petitioner is affirmatively misled … by the court or the State …, equitable tolling might well be appropriate"); *id.* (Stevens, J., concurring in judgment) (endorsing majority's approach of remanding to the Ninth Circuit to determine the propriety of equitable tolling).

The state's suggestion (Pet., at 26) that Mr. Harris could have easily filed his habeas petition while continuing his state post-conviction litigation by using the federal "stay and abey" procedure is incorrect. That option was not as clearly available to Mr. Harris as the state suggests. Actually, this Court's decision directing those in danger of filing their federal habeas petitions too late, because of continuing state post-conviction litigation, to file protective habeas petitions before the conclusion of the state court litigation, was *Pace v. DiGuglielmo* itself. But that was decided on April 27, 2005, well after Mr. Harris and counsel had already made the decision to follow existing Ninth Circuit precedent by filing only in state court.

Pace in turn cited to *Rhines v. Weber*, 544 U.S. 269 (2005), for the availability of the "stay and abey" procedure. *Pace*, 544 U.S. at 416. But this Court decided *Rhines* on March 30, 2005, also well after the decision to rely

on existing Ninth Circuit precedent by filing only in state court had been made in Mr. Harris' case.

This is critical, because *Rhines v. Weber* changed Supreme Court law on this point. Prior to that decision, this Court barred the "stay and abey" procedure that *Rhines v. Weber* adopted. As this Court explained of that history in *Rhines v. Weber* itself:

> Fourteen years before Congress enacted AEDPA, we held in *Rose v. Lundy*, 455 U.S. 509 … (1982), that federal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims. We reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims. *Id.*, at 518-519 …
>
> Accordingly, we imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement *by dismissing mixed petitions without prejudice* and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. *Id.*, at 522 ….

Rhines v. Weber, 544 U.S. 269, 273-74 (emphasis added).

The argument that Mr. Harris should have availed himself of the benefit of a "stay and abey" procedure that this Court had not yet endorsed for people in his situation – a procedure barred to him by then-existing Supreme Court precedent, *i.e.*, *Rose v. Lundy*, 455 U.S. 509 – must therefore fail. A habeas petitioner cannot be expected to be prescient enough to take advantage of a filing procedure that was blocked by controlling precedent at the time he filed

his state post-conviction petition (and filed it in reliance upon existing circuit court authority).

III. THIS CASE RESTS ON THE PECULIAR CIRCUMSTANCE OF RELIANCE ON CIRCUIT PRECEDENT, LATER OVERRULED; IT IS A POOR VEHICLE FOR CRAFTING BROAD RULES ABOUT WHEN EQUITABLE TOLLING CAN APPLY.

The state argues that the petition should be granted to offer the lower courts broad guidance about whether equitable tolling applies to the habeas corpus statute of limitations and, if so, in what circumstances. Pet., at 14-15.

But the Court would never get to that question in this case. The facts of this case fall way over on the justifiable end of the equitable tolling spectrum. As discussed above, all the circuit courts that have considered whether equitable tolling should apply to facts like these – reliance upon a controlling court decision or order – have ruled that the answer is yes. If the state is looking for guidance about how the courts should proceed in the close cases, which are bogged down in a fact-intensive record, *see* Pet. at 14-15, a decision in this case will not help.

IV. THE STATE NEVER RAISED THE ISSUE OF WHETHER 28 U.S.C. §2244(d) CAN BE EQUITABLY TOLLED IN THE LOWER COURTS.

Finally, the issue of whether § 2244(d)'s time limit can be equitably tolled is not well developed in this case, because the state never raised that

issue in the courts below. Instead, it argued that the statute could be equitably tolled, but only when circumstances beyond the petitioner's control made it "impossible" to file on time.

The state took this position in the Ninth Circuit. *E.g.*, Response, p. 15 ("The statute of limitations is subject to equitable tolling …"); Response, p. 16 ("habeas petition is untimely … unless Mr. Harris can demonstrate he is entitled to either statutory tolling or equitable tolling under the federal statute of limitations"); Response, p. 19 ("Thus, Mr. Harris' federal habeas petition must be dismissed unless he is entitled to further tolling under equitable tolling principles. But no valid grounds for equitable tolling are present in Mr. Harris' case."); Response, p. 20 ("statute of limitations *may be tolled* where extraordinary circumstances beyond a petitioner's control made it impossible … to file a petition on time") (emphasis added); Response, p. 24 ("He cannot show that the announcement of *Pace* constituted an external circumstance which made it impossible for him to file a timely habeas petition.") (emphasis added).[1]

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[1] In fact, the state even acknowledged in the court below that this Court's recent decision on equitable tolling of the AEDPA statute of limitations established two prerequisites to equitable tolling: diligence in pursuing rights and an extraordinary circumstance standing in the way of filing. Response, p. 26 (discussing *Lawrence v. Florida*, 549 U.S. 327 (2007). The state took the position that those two prerequisites to equitable tolling were not satisfied in this case. Its briefs do not contain the argument that the

The state took the same position in the district court. Motion to Dismiss p., 16 ("The statute of limitations is subject to equitable tolling …"); *id*., p. 16 ("his habeas petition is untimely … unless Mr. Harris can demonstrate he is entitled to either statutory tolling or equitable tolling …."); *id.*, p. 19 ("no grounds for equitable tolling are present in Mr. Harris' case").

The state never raised the argument that equitable tolling was completely unavailable in either court below. It acknowledged that the one-year time limit was subject to equitable tolling, as the quotes above show. The state consistently argued, instead, that Mr. Harris' case did not meet the prerequisites to equitable tolling established by this Court and by the Ninth Circuit.[2]

The state is switching positions. That change in position over the course of this litigation in order to gain a tactical advantage in this Court should be rejected on the ground of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("judicial estoppel" prevents party from

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AEDPA statute of limitations cannot be equitably tolled at all.

[2] In addition, instead of arguing that the statute of limitations could not be equitable tolled, the state argued (in part) to the courts below that even under *Dictado v. Ducharme*, "his habeas petition would still clearly [have] been time-parred by the one-year federal statute of limitations." Response Brief, p. 10. *See also* Response Brief pp. 11-14, pursuing this argument. The state had their dates wrong, though, a matter that they conceded in a document filed with the Ninth Circuit shortly before oral argument.

prevailing in one phase of a case on one argument and then relying on a contradictory argument to prevail in a later phase.).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of September, 2008.

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