

CASE NO. 09-5327

IN THE UNITED STATES SUPREME COURT

October 2009 Term

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

(Restated)

(Capital Case)

Whether this Court should grant review of the Eleventh Circuit Court of Appeal's denial of equitable tolling based on ordinary attorney negligence based on the particular facts of this case?

Whether equitable tolling is available to toll the statute of limitation under the AEDPA where the statutory language is in clear conflict with the principle of equitable tolling?

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CITATION TO OPINION BELOW

The decision of which Petitioner seeks discretionary review is reported as Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008).

JURISDICTION

_____This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), except as argued herein. However, although this Court has jurisdiction pursuant to § 1254(1), Respondent submits that no question contained in the petition is worthy of this Court's consideration.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth Amendment to the United States Constitution.

The federal habeas statute of limitations, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), 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 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;

© 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(I) specifically states:

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.

STATEMENT OF THE CASE AND FACTS

On August, 16, 1990, Petitioner was indicted for: 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, all stemming from incidents that occurred on July 29, 1990.

After jury trial, the jury found Holland guilty as charged on all counts. On August 12, 1991, the jury recommended a sentence of death, by a vote of 11 to 1. Holland was sentenced to death on August 19, 1991, for the first-degree murder of Officer Winters; however, his convictions and sentences were reversed on appeal to the Florida Supreme Court. See Holland v. State, 636 So.2d 1289 (Fla. 1994). 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. Id. The State filed a Petition for Writ of Certiorari in the United States Supreme Court, challenging the reversal. However, on October 11, 1994, the United States Supreme Court denied the petition. Florida v. Holland, 513 U.S. 943 (1994).

Holland was re-tried before a jury beginning September 24, 1996 and was found guilty as charged on: Count I, the first-degree murder of Officer Scott Winters with a firearm; Count II, armed robbery of Officer Scott Winters; and Count IV, attempted first-degree murder of Thelma Smith Johnson with a deadly weapon. On Count III, the jury found Holland guilty of the lesser-included offense of Attempt to Commit Sexual Battery upon a person twelve years of age or older. On November 15, 1996, the jury recommended a sentence of death, by a vote of 8 to 4. 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, a consecutive 15 year sentence for the attempted sexual battery on Thelma Smith Johnson, and a consecutive 30 year sentence for the attempted murder of Thelma Smith Johnson.

Holland appealed his convictions and sentences to the Florida Supreme, raising twenty-two issues.¹ Affirming the convictions and sentences on direct appeal, the

¹ The issues raised on appeal were: whether the trial court erred in denying Holland his right of self-representation; whether the trial court erred in its instructions as to the intent requirement on felony-murder and attempted sexual battery; whether the trial court erred in denying appellant's motion to exclude the testimony of experts who had reviewed the report of Dr. Strauss; whether the trial court erred in failing to recuse State Attorney Michael Satz and/or the State Attorney's Office; whether the trial court erred in prohibiting the re-deposition of certain witnesses; whether the trial court erred in overruling appellant's objection to the admissibility of an inaudible videotape; whether the trial court erred in failing to suppress Mr. Holland's

Florida Supreme Court found 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 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.

The jury convicted Holland of first-degree murder, armed robbery, attempted sexual battery, and attempted first-degree murder. The jury recommended by an eight-to-four vote that Holland be sentenced to death. The trial court found the following aggravating circumstances:

statements; whether the trial court erred in admitting the hearsay testimony of Dr. Tate; whether the trial court erred in denying the motion for judgement of acquittal as to premeditation; whether the trial court erred in allowing a state witness to testify as to speculation; whether the trial court erred in using the wrong legal standard in rejecting mitigation; the trial court made several factual errors in its evaluation of the testimony of defense mental health experts; whether the trial court relied on a factual error in rejecting a statutory mental mitigating circumstance; whether the trial court erred in failing to consider non-statutory mitigating circumstances supported by the evidence; whether the trial court erred in allowing the State to bring out the facts of a prior offense of which Holland had been acquitted and which was not relevant; whether the trial court improperly used the attempted sexual battery to support two aggravating circumstances; whether it was error to instruct the jury and to find the aggravating circumstance that the capital felony was committed during a robbery; whether the trial court erred in allowing the use of victim impact evidence; whether the trial court erroneously applied a presumption of death; whether the felony murder aggravating circumstance (Florida Statutes 921.141(5)(d)) is unconstitutional on its face and as applied in this case; whether the death penalty is disproportionate; whether electrocution violates the Florida and United States Constitutions.

(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. The court did not find that any statutory mitigating circumstances were established, but did find the existence of two nonstatutory mitigating circumstances: (1) history of drug and alcohol abuse (little weight) and (2) history of mental illness (little weight). The trial court concluded that the aggravators outweighed the mitigators and sentenced Holland to death.

Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000).

Thereafter, on May 4, 2001, Holland filed a Petition for Writ of Certiorari in the United States Supreme Court raising two issues.² On October 1, 2001, the United States Supreme Court denied the petition. Holland v. Florida, 534 U.S. 834 (2001).

² 1. Whether the analysis employed by the Florida Supreme Court on denying Mr. Holland's right to self-representation, guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, is contrary to that employed by this Honorable Court in Godinez v. Moran, 509 U.S. 389 (1993) as well as opinions of federal courts of appeal and other state courts of last resort. 2. Whether Florida's felony murder aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

On September 19, 2002, Holland filed a post-conviction motion to vacate his convictions and sentences in the state trial court, raising eight claims.³ The trial court held an evidentiary hearing on claims III and VIII, after which it found them to be without merit. The court also summarily denied the remaining claims, finding them to be either legally insufficient, refuted by the record, or procedurally barred. Holland appealed the denial of his post-conviction motion to the Florida Supreme Court, raising three (3) issues.⁴ Holland also filed a state Petition for Writ of Habeas

³ The eight claims alleged that: defense counsel was ineffective for failing to object to the testimony of the deputy who found the firearm the day after the incident that the firearm had been intentionally hidden; Defense counsel was ineffective for failing to object when the State misstated the evidence, argued matters not in evidence, shifted the burden of proof, vouched for the credibility of State witnesses, expressed personal belief in Holland's guilt, ridiculed Holland and his defense, engaged in inflammatory argument, accused the defense of denigrating witnesses, and commented on Holland's post-arrest silence; Defense counsel was ineffective because he conceded Holland's guilt to attempted first-degree murder without his consent; The cumulative effect of defense counsel's failure to object to the various alleged procedural errors listed in claim II rendered Holland's trial fundamentally unfair; Holland's death sentence is unconstitutional because a judge determined the aggravating circumstances instead of a jury in violation of the Sixth, Eighth, and Fourteenth Amendments, Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000); and Holland's penalty phase counsel was ineffective because he failed to properly investigate mitigation evidence concerning Holland's birth, childhood, and early adult life.

⁴ The issues on appeal argued: the trial court's denial of Claim III is not supported by competent, substantial evidence as counsel conceded Holland's guilt without his authorization resulting in ineffective assistance of counsel; the trial court erred in denying Claim VIII as defense counsel's failure to properly investigate evidence in mitigation denied Holland the effective assistance of counsel guaranteed

Corpus raising four claims of ineffective assistance of appellate counsel.⁵

The Florida Supreme Court affirmed the denial of the post-conviction motion and denied the habeas petition. Holland v. State, 916 So. 2d 750 (Fla. 2005). The Florida Supreme Court issued the mandate on December 1, 2005.

On February 8, 2006, Holland filed a Petition for Writ of Certiorari in the United States Supreme Court.⁶ On April 17, 2006, the United States Supreme Court denied the petition. Before the Petition for Writ of Certiorari was filed in the United States Supreme Court, Holland filed a *Pro Se* Petition for Writ of Habeas Corpus in

by the Sixth Amendment during penalty phase; the trial court erred in summarily denying Claims I, II, IV, V, VI, & VII as they were facially sufficient and not conclusively refuted by the record.

⁵ The habeas issues were: whether appellate counsel was ineffective for not challenging the trial court's decision to preclude Holland from referencing internal police documents, which allegedly described incidences when the victim, Officer Winters, used excessive force; whether appellate counsel was deficient for failing to argue that Holland's allegations during the Nelson inquiry were entirely unrefuted and therefore, the trial court's order was not supported by competent, substantial evidence; whether appellate counsel was ineffective for failing to challenge the trial court's denial of a cause challenge to a juror based on racial prejudice and for denial of adequate peremptory challenges; and whether appellate counsel was deficient for failing to raise or discuss an allegedly fundamental sentencing error.

⁶ The question was whether, in requiring Holland to show that the outcome "was" changed by his counsel's unilateral concession of guilt of the jointly tried charge of attempted premeditated first-degree murder in light of Holland's trial testimony, the state court decided an important question of federal constitutional law in a way that conflicts with the "reasonable probability" test established by this Court in Strickland v. Washington, 466 U.S. 668 (1984).

the District Court on January 19, 2006.

From November 8, 2001 through May 6, 2006 when he was permitted to withdraw, Bradley M. Collins, Esq. represented Holland. Collins was appointed, for postconviction purposes after the Office of Capital Collateral Regional Counsel—South (“CCRC-South”) withdrew from the case because of caseload conflict. During the representation, Holland periodically complained about counsel, as he has about all counsel who have represented him. (DE41: Exh. 1 - Response to Bar Complaint). The District Court eventually appointed current counsel to represent Holland in June 2006. Holland then filed a consolidated pleading arguing that he was entitled to equitable tolling for filing his habeas corpus petition. (DE 35, 38). The State filed a sur-reply arguing that Petitioner was not entitled to equitable tolling. (DE 41). On April 27, 2007, the District Court entered an order dismissing Holland’s § 2254 petition as untimely and holding that equitable tolling was not appropriate given the facts of this case. (DE46). The court then denied Holland’s motion to amend judgement. (DE52). Holland filed a timely notice of appeal and the District Court granted a COA on the issue of whether Holland was entitled to equitable tolling. (DE60).

Holland appealed that denial to the Eleventh Circuit which affirmed it on August 18, 2008. Holland v. Florida, 539 F.3d 1334 (11th Cir. 2008). In its opinion

denying relief, the court assumed that equitable tolling was available in theory to toll the AEDPA time limit but found that it was not applicable on the facts of this case. The court determined that the attorney's missing the filing deadline was not egregious conduct but rather negligent since it did not include affirmative misrepresentations, dishonesty, or bad faith but rather was pure-professional-negligence.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED TO REVIEW THE ELEVENTH CIRCUIT COURT OF APPEAL'S AFFIRMANCE THAT EQUITABLE TOLLING IS NOT AVAILABLE BASED UPON ATTORNEY NEGLIGENCE NOT AMOUNTING TO EGREGIOUS MISCONDUCT SINCE; IT DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER CIRCUITS: THE LOWER COURT PROPERLY APPLIED THE EXISTING LAW TO THE PARTICULAR FACTS OF THIS CASE; AND SECTION 2254(I) PROHIBITS RELIEF UNDER THE AEDPA ON THE BASIS OF POST-CONVICTION COUNSEL'S CONDUCT.

The Petitioner, Albert Holland, asserts that this Court should review the Eleventh Circuit's decision denying him equitable tolling to file his federal habeas petition. He argues, as he did to the federal district court and to the Eleventh Circuit, that he is entitled to tolling of the statute of limitations under Section 2244 (d)(1)(B) of the AEDPA statute due to the ineffectiveness of his post conviction counsel. He claims that the Eleventh Circuit's decision to deny him relief on the grounds that his

counsel was “grossly negligent” in missing the deadline to file his habeas petition in federal court is in conflict with the decisions in other circuits and creates an impossibly high standard to achieve equitable tolling. Contrary to Petitioner’s position, there is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding particular issue and this decision was a proper application of the law. Holland has not established any reason for this Court to grant review of this fact-specific case.

The rule of this Court explaining the considerations governing review on writ of certiorari, rule 10(a), provides:

a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

In accordance with Rule 10, certiorari review may be granted only for compelling reasons, such as when a decision conflicts with another opinion on an important legal principle or addresses an unsettled question of federal law. The denial of equitable tolling did not conflict with the relevant decisions of this Court or other circuit courts on an important legal principle and did not decide an unsettled question of federal law.

It is undisputed that Holland filed his habeas corpus petition, pursuant to 28 U.S.C. § 2254, 38 days after the one year statute of limitations expired. Holland's judgement and sentence became final on October 1, 2001, when the United States Supreme Court denied his Petition for Writ of Certiorari. Consequently, Holland's one-year time limitation began running on October 1, 2001. Holland waited to file his state motion for post-conviction relief until September 19, 2002, 353 days later. Eleven (11) months and nineteen (19) days of Holland's one-year time limit expired, i.e., were not tolled, prior to the filing of his state motion for post-conviction relief. Holland's post-conviction motion was denied on May 16, 2003, after an evidentiary hearing. Holland appealed to the Florida Supreme Court and it affirmed the denial of relief on November 10, 2005. Mandate issued on December 1, 2005. As such, the time from September 19, 2002--when Holland filed his state post-conviction motion--through December 1, 2005--when mandate issued from the Florida Supreme Court's opinion affirming the denial of the post-conviction motion--was tolled. Consequently, Holland had eleven (11) days after issuance of the mandate, i.e., until December 12, 2005, to timely file his federal habeas petition. However, he did not sign his petition until January 19, 2006, thirty-eight (38) days late.

Neither party disputes the facts; the dispute is over the interpretation of those facts as to whether they constitute "extraordinary circumstances" to warrant equitable

tolling. Collins met with Holland on death row and had his investigator do so as well. He wrote at least eight letters to Holland⁷, none of which Holland answered. (DE 38 & 41, ap.). Collins provided Holland with a detailed written strategy of the case, fully pursued post-conviction collateral relief for him, and filed a writ of certiorari in this Court. He also, albeit late, drafted a federal habeas petition. Holland refused to cooperate with Collins and repeatedly sought to get him off the case, just as he did with his previous attorney and his current attorney. (DE 38 & 41). Holland was very familiar with contacting the court system as evidenced by his repeated filings of pro se motions and letters to various courts. (DE 41 & 38, Ap. C, I, & J). As noted by the district court, Holland did not write the Florida Supreme Court for the status of his case until after the deadline to file his federal habeas had already expired even though the decision had been pending for many months. Over the course of his post conviction litigation Holland wrote just three letters to Collins and failed to ever respond to any of Collin's communications. While Collins did fail to notify Holland that the mandate issued and miscalculated the federal habeas deadline, that was merely ordinary attorney negligence or error as both the lower federal courts found. They do not give rise to equitable tolling.

⁷ The letters included one sent after May 30, 2002, and on December 23, 2002, January 22, 2003, January 14, June 15, and July 19, 2004, and on January 18 and 31, 2006.

Nor does Holland dispute that his habeas petition was untimely filed under the AEDPA. Rather, he asserted below that he was entitled to equitable tolling on the basis of post-conviction counsel's conduct. This Court has not decided whether equitable tolling applies to the federal habeas statute. See, Lawrence v. Florida, 549 U.S. 327, 336 (2007) (assuming, without deciding that equitable tolling applies to the AEDPA because the parties did so); Pace v. DiGuglielmo, 544 U.S. 408, 418, n. 8 (2005) (noting the availability of equitable tolling is an open question that has never been addressed by the Supreme Court). However, the district court and the Eleventh Circuit assumed in this case that equitable tolling was an available possible remedy in extraordinary circumstances. The Eleventh Circuit upheld the district court's findings and stated that attorney negligence was not a basis for equitable tolling.

We will assume that Collins's alleged conduct is negligent, even grossly negligent. But in our view, no allegation of lawyer negligence or of failure to meet a lawyer's standard of care-in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part-can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough. This case is a pure-professional-negligence case.

Holland, 539 F.3d at 1339. The facts underlying those courts' conclusions were undisputed by Holland and it was that factual pattern which necessitated the rejection of his claim for equitable tolling. This Court has consistently held that it does not

review questions that do not affect the outcome of the matter before it. See Coleman v. Thompson, 501 U.S. 722, 730 (1991); Princeton University v. Schmid, 455 U.S. 100, 102 (1982). Moreover, this Court does not grant certiorari to entertain issues that would not be important to anyone besides the parties to this litigation. See Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1140 (1985); Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955). Certiorari should be denied.

Even though this Court has not specifically held that equitable tolling is available when a defendant files his habeas petition after the AEDPA deadline has run, many of the circuit courts have done so but only in limited circumstances. “Equitable tolling” is “an extraordinary remedy which is typically applied sparingly.” Steed v. Head, 219 F.3d 1298, 1300 (11TH Cir. 2000). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). “Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999); Drew v. Department of Corrections, 297 F.3d 1278, 1287 (11th Cir. 2002). An attorney’s negligence is not grounds for equitable tolling. Sandvik; Steed; Howell v. Crosby, 415 F.3d 1250, 1251-52 (11th

Cir. 2005). See Lawrence v. Florida, 421 F.3d 1221 (11th Cir. 2005) (rejecting defendant’s claim that the state appointed an incompetent registry counsel, thus, equitable tolling should apply). “Equitable tolling is limited to rare and exceptional circumstances, such as when the State’s conduct prevents the petitioner from timely filing” his federal habeas petition. Id. 421 F.3d at 1226. Usually, there must be some affirmative misconduct by the opposing party, such as deliberate concealment. See Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (recognizing equitable tolling allowed in situations where petitioner has been induced or tricked into missing filing deadline by opposing party’s misconduct) Arce v. Garcia, 400 F.3d 1340, 1349 (11th Cir. 2005) (same); Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir.2000) (noting state’s misconduct necessary to establish propriety for use of equitable tolling). Moreover, as noted in Arthur v. Allen, 452 F.3d 1234, 1252 (11th Cir. 2006): “A petitioner is not entitled to equitable tolling based on a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. Pace, 544 U.S. 408, 125 S.Ct. 1807, 1815, 161 L.Ed.2d 669 (2005); Justice v. United States, 6 F.3d 1474, 1478-79 (11th Cir. 1993).”

This Court, however, has consistently recognized that equitable tolling is unavailable based upon attorney negligence. See also Lawrence, 127 S. Ct. at 1085; Coleman v. Thompson, 510 U.S. 722, 752-753 (1991). The circuit courts have also

held that attorney negligence in calculating the date a pleading is due, the swiftness of the mail service, or misunderstanding of the law do not entitle the petitioner to equitable tolling. Helton v. Sec'y for Dep't of Corr., 259 F.3d 1310, 1313 (11th Cir. 2001) (agreeing that miscalculation of deadline for filing petition does not establish basis for equitable tolling); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (opining that “attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling ... Any miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling.”); Sandvick, 177 F.3d at 1271-72 (same); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (finding counsel's confusion about AEDPA's limitations period did not warrant equitable tolling); Harris v. Hutchinson, 209 F.3d 325, 330-31 (4th Cir. 2000) (same); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (holding defense counsel's error in determining limitations period for filing federal habeas petition did not require equitable tolling of statute). Here, Mr. Collins decided to pursue certiorari review and offered a reason for additional tolling of the time to file the federal habeas petition. (DE38-Exh. Y). There is no basis for obtaining jurisdiction in this Court where the alleged conflict is the lower court's proper application of one legal standard and refusal to extend another to the facts of Holland's particular case. This Court has

consistently held that it does not review questions that do not affect the outcome of the matter before it. See Coleman v. Thompson, 501 U.S. 722, 730 (1991); Princeton University v. Schmid, 455 U.S. 100, 102 (1982). As such, certiorari should be denied.

Petitioner argues that the Eleventh Circuit in this opinion retreated from its previous decision in Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) which found, based upon the unique facts of that case, that serious attorney misconduct could warrant equitable tolling and advocated a fact-specific, case-by-case approach in analyzing the alleged misconduct. The Eleventh Circuit was focused on the possibility that Downs's post conviction counsel overtly lied to him about whether he filed a state petition which would have tolled the AEDPA deadline, an issue of egregious misconduct not present in this case. The Downs court, however, specifically stated that attorney negligence alone was insufficient. That opinion suggested that courts should conduct a fact-specific, case-by-case approach in analyzing allegations of attorney misconduct. Contrary to Holland's assertion, the district court and the Eleventh Circuit did conduct such a fact specific analysis and approach in this case when it found no overt attorney misconduct but rather professional negligence. No "new test" was promulgated, rather the Eleventh Circuit applied the existing law to the individual facts of this case. There is no conflict within

the Circuit and certiorari should be denied.

Petitioner also points to Baldayaque v. United States, 338 F.3d 145 (2nd Cir. 2003) arguing that the fact that the attorney ignored his client's directive to file a §2255 petition might warrant equitable tolling. The attorney there did not follow his client's directive at all, did no legal research, and *never* communicated or even met his client. Even the Baldayaque court stated that ordinary mistakes about when a deadline is or how it is calculated do not trigger equitable tolling. Here, counsel did communicate with Holland at times, filed numerous motions but ultimately miscalculated and missed the filing deadline. Those facts supported the Eleventh Circuit's decision. There is no conflict between the Circuits.

The other cases cited by Holland chiefly involve lies or misrepresentations by the attorney to the defendant thereby allowing the courts to find equitable tolling was appropriate. In Fleming v. Evans, 481 F.3d 1249 (10th Cir. 2007) the attorney conduct in question involved deception and misrepresentations regarding whether counsel was preparing and filing motions. It was those misrepresentations which might allow the district court to grant equitable tolling after an evidentiary hearing. Deception was also present in United States v. Martin, 408 F.3d 1089 (9th Cir. 2005) where the attorney misrepresented the deadline and then repeatedly lied about his progress and having filed the petition. The attorney also failed ever to communicate with the

defendant or his family, actively refusing to attend scheduled meetings or to take telephone calls. The attorney in United States v. Wynn, 292 F.3d 226, 230 (5th Cir.2002) also lied about filing the petition which the defendant relied on those misrepresentations in not seeking to file the petition himself. In Spitsyn v. Moore, 345 F.3d 796, 798 (9th Cir.2003) the court held that “ordinary attorney negligence” will not justify equitable tolling, but found that Spitsyn’s attorney’s misconduct was sufficiently egregious to warrant equitable tolling under the facts of that case. The attorney failed to do any work on the case for a year before the deadline, failed ever to communicate with the defendant, and failed to give the defendant his file before the AEDPA deadline despite a timely request thereby thwarting defendant’s ability to file the petition. While respondent does not agree that any of the foregoing demands a finding of equitable tolling, or that equitable tolling even exists to excuse the failure to timely file, the facts presented here do not rise to the level of misconduct present in those cases and is of a more ordinary nature which would not entitle Holland to equitable tolling.

Petitioner's underlying argument appears to be that he was entitled to the tolling of the statute of limitations under Section 2244(d)(1)(B) of the AEDPA due to the alleged ineffectiveness of his post-conviction counsel. However, it is clear that Holland cannot make those arguments since there is no conflict or any basis to obtain

jurisdiction in this Court, this Court having rejected this same argument as meritless in Lawrence v. Florida, 127 S. Ct. 1079, 1085-86 (2007). Therefore, certiorari should be denied.

The lower courts' determination that equitable tolling is not available when based on attorney negligence and finding that Holland was not entitled to equitable tolling under the facts of this case represents the proper application of this Court's precedent. Once again, Petitioner's allegations amount to nothing more than complaints about the lower courts' proper application of the equitable tolling inquiry to the particular facts of this case. Certiorari should be denied. See Chevron U.S.A., Inc., 471 U.S. at 1140; Rice, 349 U.S. at 74.

Although this Court has not decided whether § 2244(d) allows for equitable tolling, granting equitable tolling of the AEDPA statute of limitations is inconsistent with the text of the statute. This Court has held that equitable tolling is not available in any case when the granting of equitable tolling would be inconsistent with the terms of the relevant statute. See Young v. United States, 535 U.S. 43, 49 (2002); United States v. Beggerly, 524 U.S. 38, 48 (1998). In Beggerly, this Court held that equitable tolling was inconsistent with the terms of a statute of limitation when the statute of limitations already provided that it would not start to run until the litigant knew or should have known of the claim, as that provision allowed for statutory

tolling in situations to which equitable tolling would usually apply. Beggerly, 524 U.S. at 48. Section 2244(d) provides for exceptions to the general statute of limitations based on certain enumerated circumstances, including 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. 28 U.S.C. § 2244(d)(1)(C) & (D). It also does not start to run until an illegal impediment to filing created by the State is removed or until after the time during which a defendant is actually seeking to exhaust his claims is not counted toward the statute of limitations. 28 U.S.C. § 2244(d)(1)(B) & (2). Thus, granting equitable tolling of the AEDPA statute of limitations is inconsistent with the text of the statute and should not be allowed under Beggerly.

Furthermore, this Court's precedent regarding the inapplicability of relief to remedy post-conviction counsel's conduct is inconsistent with the claim for equitable tolling and the habeas corpus statute. This Court has long recognized that defendants are not entitled to post-conviction counsel, and they, therefore, bear the risk of any procedural default resulting from post-conviction counsel's conduct. Coleman, 501 U.S. at 752-53; see also Lawrence, 127 S. Ct. at 1085. In enacting the AEDPA, Congress codified this holding. 28 U.S.C. § 2254(i). Clearly, as Petitioner's

complaints relate to his post-conviction counsel's alleged ineffectiveness, Petitioner's claim would be "at an end." Coleman, 501 U.S. at 752. Thus, granting equitable tolling based on his allegation of ineffective assistance of post-conviction counsel would be inconsistent with the plain language of the habeas corpus statute and this Court's precedent. After reviewing the undisputed facts and history of the case, the district court and the Eleventh Circuit properly refused to apply equitable tolling in this case. Petitioner's allegations amount to nothing more than a dispute about the application of a properly stated and well-settled rule of law to the facts of this matter. Accordingly, any decision that this Court might issue would be of importance to no one other than the parties to this litigation, a reason for which this Court declines review. See Chevron U.S.A., Inc., 471 U.S. at 1140; Rice, 349 U.S. at 74. This Court should, therefore, deny certiorari. Accordingly, the petition should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny the petition for writ of certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Todd Scher, Esq., 5600 Collins Ave., Suite 15-B, Miami Beach, FL 33140 on October 13, 2009.

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