09-5327

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW THE PETITIONER, ALBERT HOLLAND, by and through his undersigned counsel, and herein moves for leave to proceed *in forma pauperis*. In support thereof, Petitioner would state:

1. Petitioner is an indigent death-sentenced inmate in the State of Florida.
2. On this date, Petitioner is filing a Petition for A Writ of Certiorari to the Eleventh Circuit Court of Appeals.
3. Petitioner, who is without funds, seeks leave to proceed in this matter *in forma pauperis*.
4. The undersigned counsel was appointed by the United States District Court for the

Southern District of Florida, and by the Eleventh Circuit Court of Appeals, pursuant to the Criminal Justice Act.

WHEREFORE, Petitioner moves to proceed *in forma pauperis*.

Respectfully submitted,

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
FAX: (305) 861-9253
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

TODD G. SCHER
Counsel for Petitioner

09-532

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Tel: (305) 861-9252
Fax: (305) 861-9253

CJA COUNSEL FOR PETITIONER

QUESTIONS PRESENTED--CAPITAL CASE

In determining that Petitioner was not entitled to equitable tolling to excuse the late filing of his habeas petition, the Eleventh Circuit determined that the reason for the late filing was the "gross negligence" on part of Petitioner's state-appointed collateral attorney's failure to file the petition in a timely fashion despite repeated instructions from the Petitioner to do so. However, under the new test announced by the Eleventh Circuit in Petitioner's case, *no* allegation of attorney negligence or failure to meet a lawyer's standard of care, in the absence of bad faith, dishonesty, divided loyalty, or mental impairment, could *ever* qualify as an exceptional circumstance warranting equitable tolling.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petitioner, Albert Holland, respectfully petitions this Court for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINION BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit in this cause is reported as *Holland v. Florida*, 539 F. 3d 1334 (11th Cir. 2008), and is attached hereto as Attachment A. A timely petition for rehearing and rehearing *en banc* was denied on January 13, 2009 (Attachment B). An extension of time to file the instant petition was granted by Justice Thomas up to and including April 13, 2008. This petition is timely filed.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244 (d) provides:

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

PROCEDURAL HISTORY

A. Trial/Direct Appeal Proceedings.

Petitioner was indicted on or about August 16, 1990, in Broward County, Florida, on four counts, including first-degree premeditated murder. He pled not guilty and, after a jury trial, was convicted and sentenced to death for the first-degree murder count, life imprisonment for sexual battery, forty (40) years for attempted first-degree murder, and seventeen (17) years imprisonment for armed robbery. On direct appeal, however, the Florida Supreme Court reversed and remanded for a new trial. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, Petitioner was again found guilty,[1] and, at a penalty phase, the jury recommended a sentence of death by a vote of eight (8) to four (4). He was thereafter sentenced to death on the first-degree murder count, life imprisonment on the armed robbery count, fifteen (15) years imprisonment on the attempted sexual batter count, and thirty (30) years on the attempted first-degree murder count. On direct appeal, the Florida Supreme Court affirmed the judgments of conviction and sentences, including the sentence of death. *Holland v. State*, 773 So. 2d 1065 (Fla. 2000). *Certiorari* review was denied on October 1, 2001. *Holland v. Florida*, 534 U.S. 834 (2001).

B. State Postconviction Proceedings.

On October 1, 2001, pursuant to state procedures, *see* Fla. R. Crim. P. 3.851

---

[1]However, at the retrial, Petitionerwas found guilty of the lesser offense attempted sexual battery, rather than sexual battery as alleged in Count 3 of the indictment.

(b), the Florida Supreme Court assigned the Office of the Capital Collateral Regional Counsel–South [CCRC-South] to represent Petitionerfor purposes of his collateral representation. However, CCRC-South moved to withdraw and, on November 2, 2001, the state circuit court appointed attorney Bradley Collins to represent Petitioner pursuant to the "registry" list of attorneys. Following the discovery process permitted under Fla. R. Crim. P. 3.852, *see generally* DE16 at 3-4, Petitioner, through Mr. Collins, filed his motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 on or about September 17, 2002. The motion was ultimately denied by the state circuit court and affirmed by the Florida Supreme Court on November 10, 2005. *Holland v. State*, 916 So. 2d 750 (Fla. 2005). No motion for rehearing was filed by Mr. Collins and, as a result, the mandate issued from the Florida Supreme Court on December 1, 2005.[2] Mr. Collins never informed Petitioner that his appeal had been denied by the Florida Supreme Court nor that the mandate had issued, thus triggering the time in which a timely petition for writ of habeas corpus needed to be filed.

Petitioner thereafter filed a *pro se* petition for writ of habeas corpus (DE1).[3] Petitioner thereafter moved the court to discharge attorney Collins and to appoint new counsel (DE6). After ordering both the Respondent and Collins to file

---

[2]Mr. Collins, on behalf of Petitioner, did file a petition for *certiorari* review in this Court on February 8, 2006, a petition which was denied on April 17, 2006. *Holland v. Florida*, 126 S.Ct. 1790 (2006).

[3]The circumstances leading up to the filing of Petitioner's *pro se* petition are fully discussed in the section of this Petition discussing the reasons that the writ should be granted in this case.

responses to Petitioner's motion, and after reviewing these responses, the court ultimately entered an order appointing the undersigned counsel to represent Petitioner (DE22). The Petitioner, through undersigned counsel, thereafter filed a consolidated pleading (with an extensive appendix) in which he alleged his entitlement to equitable tolling and to an evidentiary hearing (DE35, 38). The Respondent filed a sur-reply (accompanied by an appendix) in which it contended that Petitioner was not entitled to equitable tolling (DE41). On April 27, 2007, the district court entered an order dismissing Petitioner's §2254 petition as untimely, concluding that equitable tolling was not warranted (DE46). A motion to alter or amend judgment, and supplement thereto, was filed; following a response by the Respondent (DE49), the court denied the motion (DE52). A timely notice of appeal was filed (DE53), and the district court granted a COA on the issue of whether the Petitioner was entitled to equitable tolling (DE60).

On August 18, 2008, the Eleventh Circuit affirmed the district court's dismissal of Petitioner's habeas corpus proceeding. Declining to conclude that Petitioner was not diligent in his efforts, the Eleventh Circuit focused instead on whether the acts of Petitioner's state collateral counsel were sufficient to constitute an "extraordinary circumstance" sufficient to warrant equitable tolling. Recognizing that attorney misconduct going beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling (Attachment

A at 8) (citing *Downs v. McNeil*, 529 F. 3d 1311 (11th Cir. 2008),[4] and that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his representation of Petitioner and his failure to file a federal habeas petition "despite repeated instructions to do so," (Attachment A at 9), the Eleventh Circuit concluded 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 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 is pure-professional-negligence case. . . .

(Attachment A at 9-10).

---

[4] *Downs* had issued while Petitioner's case was pending before the Eleventh Circuit and shortly before Petitioner's appeal was disposed of by that Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING WHEN LATE FILING OF A HABEAS PETITIONER IS DUE TO THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL , AND WHETHER THE "GROSS NEGLIGENCE" OF STATE COLLATERAL COUNSEL CAN CONSTITUTE AN EXTRAORDINARY CIRCUMSTANCE SUCH THAT EQUITABLE TOLLING IS APPROPRIATE TO EXCUSE A LATE PETITION.

In affirming the dismissal of Petitioner's habeas corpus petition as untimely, the Eleventh Circuit set out a bright-line standard for determining under what circumstances the actions of a state collateral lawyer's actions, or inactions, can rise to the level of an "extraordinary circumstance" such that a habeas petitioner's late filing can be excused under the doctrine of equitable tolling. In Petitioner's case, the Eleventh Circuit found that Petitioner's state collateral counsel acted in a "grossly negligent" manner in his "failure to file a federal habeas petition timely, despite repeated instructions to do so" (Attachment A at 9). However, despite finding that counsel had acted in a "grossly negligent" manner, the Eleventh Circuit condoned his behavior by concluding 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 or so forth on the lawyer's part– can rise to the level of egregious misconduct that would entitle Petitioner to equitable tolling" (Attachment A at 9-10). The Eleventh Circuit's stubborn refusal to acknowledge that "gross negligence" is sufficient to warrant equitable tolling is in conflict with the holdings of other

circuits and is a near-impossible standard to meet. If the late filing is due to the "gross negligence" of state collateral counsel, as it was in the instant case, Petitioner submits that an exceptional circumstance has been established and that equitable tolling is warranted.

Despite the State of Florida's promise to Petitioner that he have counsel to competently and effectively represent him in both his state and federal postconviction litigation, a promise that would be purportedly enforced by judicial monitoring,[5] Petitioner's state collateral attorney, Mr. Collins, failed to timely file a §2254 petition on behalf of Petitioner.[6] Petitioner, *pro se*, filed a habeas corpus

---

[5]When Florida created the registry system, it took the important step of creating an affirmative obligation for the state courts to monitor registry counsel. Fla. Stat. §27.11(12) reads:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, *or the failure to file appropriate motions in a timely manner.*

(emphasis added). The Florida Supreme Court has also held that because state collateral counsel are appointed by operation of statute, such representation must be effective in order to give any meaning to the statutory provision. *See Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988).

[6]When Mr. Collins was appointed to represent Petitioner, he was contractually bound by the mandates of Fla. Stat. §27.711(2) (2005), which provides:

> After appointment by the trial court under s. 27.710, the attorney must

petition pursuant to 28 U.S.C. §2254, on January 19, 2006.[7] In the district court and the Eleventh Circuit, Respondent argued that Petitioner's petition was filed thirty-eight (38) days beyond the one-year statute of limitations set forth in 28 U.S.C. §2244 (d)(1) (DE14 at 10 *et. seq.*). In light of the late filing, Petitioner acknowledged the late filing but urged that he was entitled to equitable tolling for a number of reasons.

Equitable tolling of the AEDPA statute of limitations for filing a federal habeas corpus petition set forth in 28 U.S.C. §2244(d)(1) is appropriate where: (1) the petitioner has been prevented from asserting his rights in some extraordinary way, and (2) the petitioner has exercised reasonable diligence. *See, e.g. Merritt v. Blaine*, 326 F. 3d 157, 168 (3d Cir. 2003); *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999); *Marsh v. Soares*, 223 F. 3d 1217, 1220 (10th Cir. 2000). As the Eleventh Circuit has explained, equitable tolling is available to a habeas petitioner who "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik,* 177 F. 3d at 1271. *Accord Steed v. Head*, 219 F. 3d 1298, 1300 (11th Cir. 2000).

> immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, *including federal habeas corpus proceedings*, in accordance with this section or until released by order of the trial court.

(emphasis added).

[7]The State of Florida acknowledged in the district court litigation that January 16, 2006, the date that Petitioner signed the petition, was the "filing" date due to the "mailbox rule" applicable to a prisoner filing (DE14 at 12 n.4).

While equitable tolling is an "extraordinary remedy" to be applied "sparingly," *id.*, it is nonetheless a remedy that can be applied when a court finds that a petitioner has made a sufficient showing of both extraordinary circumstances and diligence. *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). Although equitable tolling is not appropriate in cases of "garden variety excusable neglect," *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990), it should be evaluated on a case-by-case basis and granted upon the establishment of a "unique, specific set of facts." *Browning v. AT&T Paradyne*, 120 Fl. 3d 222, 227 (11th Cir. 1997). *See also Arthur v. Allen*, 452 F. 3d 1234, 1253 (11th Cir. 2006) ("A determination as to whether rare and exceptional circumstances are presented requires the examination of the facts in each case") (citing *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002)). The "focus" of the inquiry is on the circumstances surrounding the late filing of the habeas petition, and not on the circumstances of the underlying conviction. *Arthur v. Allen, supra* at 1253.

Given the extraordinary circumstances in this case and the diligence established by the Petitioner,[8] this Court should grant certiorari review of the Eleventh Circuit's decision in this case for the following reasons.

A. Facts In Support of Equitable Tolling.

Despite a long and documented history of an "unstable mental condition," *Holland v. State*, 773 So. 2d 1065, 1069-70 (Fla. 2000), Petitioner's own actions more than establish both extraordinary circumstances accompanied by the

---

[8]The Eleventh Circuit never addressed the issue of Petitioner's diligence.

requisite showing of diligence such that equitable tolling is appropriate. It is difficult to imagine what else Petitioner could have done; if the circumstances presented below do not establish diligence, then the concept simply has no relevant meaning. Indeed, the Eleventh Circuit did not attribute the late filing of Petitioner's habeas petition to a lack of diligence; rather, the direct cause of the late filing was due to the fact that Mr. Collins acted in a "grossly negligent" manner in failing to timely file the petition "despite repeated instructions to do so" from Petitioner (Attachment A at 9).

Early on in Mr. Collins's representation of Petitioner in state court, Petitioner sought assurances from Mr. Collins that his deadlines, both state and federal, would be honored. For example, in early 2002, Petitioner sought reassurance from Mr. Collins that his state postconviction motion would be filed timely and that his federal habeas deadline be secured; in response, Mr. Collins informed Petitioner that he was "aware of state time-limitations and federal exhaustion requirements" (DE38, Appendix B). Unsatisfied with Mr. Collins's representation in the time period leading up to and including the filing of his Rule 3.851 motion, Petitioner sought to file, in the state circuit court, a motion to supplement the record with additional issues that Mr. Collins did not include as claims for relief; the state circuit court, however, struck Petitioner's pleading as a nullity in light of the fact that he was represented by counsel (DE38, Appendix

C).[9] In his December 23, 2002, correspondence to Petitioner, Mr. Collins noted that Petitioner's claims "will [] be ripe for presentation in a petition for writ of habeas corpus in federal court" should the Florida Supreme Court deny collateral relief and "should the United States Supreme Court deny any petition for writ of certiorari" (DE38, Appendix C at 3).[10] Mr. Collins further reassured Petitioner by letter dated January 22, 2003, that if the circuit court were to deny relief, he would ensure that the "proper appeals" would be undertaken and asked for Petitioner's "confidence" and "sense of unity" in "this very delicate matter" (DE38, Appendix F).

An evidentiary hearing on Petitioner's Rule 3.851 motion took place in April, 2003, and the state circuit court denied relief in May, 2003. Remaining unsatisfied with Mr. Collins's representation, Petitioner, on July 18, 2003, filed a

---

[9]Logs generated by the Florida Department of Corrections establish that from the time of his appointment until his representation ceased in 2006, Mr. Collins visited Appellant at Union Correctional Institution only two times prior to the filing of the Rule 3.851 motion: on January 29, 2002, for approximately three (3) hours, and again on September 13, 2002, for approximately 90 minutes (DE38, Appendix D). Mr. Collins's investigator, Don Carpenter, visited Appellant two times Union Correctional Institution, on October 4, 2002, and November 6, 2002, both of which were subsequent to the filing of the Rule 3.851 motion (DE38, Appendix E). Mr. Collins did also meet with Appellant one time while Appellant was in Broward County for his evidentiary hearing in April, 2003.

[10]Based on this language, it is clear that Mr. Collins was under the belief that Petitioner's time to file his federal habeas petition would continue to be tolled until this Court denied certiorari from the state courts' determination of his collateral claims for relief. Significantly, in 2002, Mr. Collins did not take the position that Petitioner's statute of limitations had already expired by the time he was appointed in November, 2001; Mr. Collins substantially changed his position when confronted with the fact that he had missed the deadline to file Petitioner's habeas petition.

grievance with The Florida Bar, noting that his Rule 3.851 motion had been denied on May 16, 2003, that Mr. Collins had failed to adequately represent him, and that he was concerned that his legal issues be presented to the state courts so they "will not be procedurally barred when I get to the Federal Courts" (DE38, Appendix G). The Florida Bar, on August 20, 2003, refused to initiate an investigation into Petitioner's complaints, however (DE38, Appendix H). In the meantime, while Petitioner's complaints were pending with The Florida Bar, he sought relief in the Florida Supreme Court on August 8 and 18, 2003 (DE38, Appendix I at 1).[11] The State of Florida moved to strike these pleadings because they were unauthorized as Petitioner was represented by counsel (DE38, Appendix I at 1), and, on October 30, 2003, the Florida Supreme Court granted the State of Florida's motion (DE38, Appendix I at 2).

Petitioner's concern at this time was the fact that Mr. Collins had not been in communication with him concerning the pending appeal; as evidenced in the Florida Supreme Court's docket, Petitioner himself inquired by letter to the Florida Supreme Court as to the status of when the appeal was filed and when the record on appeal was due to be filed (DE38, Appendix I at 1). Petitioner again

---

[11]According to the Florida Supreme Court docket, Petitioner's *pro se* pleadings were construed as motion to amend and supplement state habeas corpus petition (DE38, Appendix I). However, Mr. Collins had not yet filed a state habeas corpus petition for Petitioner; it was not filed until January 9, 2004 (DE38, Appendix J). Of course, given Petitioner's lack of legal knowledge and the fact that he was suffering what the Florida Supreme Court determined to be an "unstable mental condition," the fact that he was confused about what to file and when further establishes that Mr. Collins had a heightened duty to keep Petitioner informed of the status of his case.

contacted the Florida Supreme Court as reflected in the November 24, 2003, docket entry, and the Court advised Petitioner when his Initial Brief was due to be filed (DE38, Appendix I at 2). After another unsuccessful attempt to amend and supplement a state habeas petition (DE38, Appendix J at 1), Petitioner, on February 23, 2004, filed a *pro se* motion to remove Mr. Collins as his counsel and to appoint competent conflict-free counsel (DE38, Appendix I at 2; Appendix J at 1). The State of Florida opposed the motion, and, on May 5, 2004, the Florida Supreme Court granted the State's motion and struck Petitioner's *pro se* motion (DE38, Appendix I at 3).

In the meantime, Petitioner, still not able to get updated information from Mr. Collins about the status of his case, wrote to the Florida Supreme Court on April 23, 2004, requesting a copy of the State's Answer Brief, which had been filed on April 15, 2004 (DE38, Appendix I at 3). On April 29, 2004, the Florida Supreme Court advised Petitioner that he would have to pay for copies of the requested documents (Appendix I at 3). It was *after* the Florida Supreme Court was aware that Mr. Collins had not provided Petitioner with the State's Answer Brief that, on May 5, 2004, it granted the State's motion to strike Petitioner's *pro se* request for competent counsel to represent him. At no time did the Florida Supreme Court appear to even attempt to engage in any "monitoring" of Mr. Collins's performance pursuant to its statutory mandate. *See supra* n.6.

Petitioner again sought to remove Mr. Collins on June 17, 2004, this time requesting a hearing pursuant to *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA

1973) (DE38, Appendix I at 3; Appendix J at 2).[12] On July 7, 2004, the Florida Supreme Court ordered both Mr. Collins and the State to respond (DE38, Appendix I at 4; Appendix J at 2). Without ordering a hearing, the Florida Supreme Court, on October 22, 2004, denied Petitioner's motion, again without attempting to comply with its mandated oversight of Mr. Collins's representation of Petitioner (DE38, Appendix I at 4).

The briefing in Petitioner's appeal to the Florida Supreme Court was concluded by the filing of his Reply Brief on June 16, 2004 (DE38, Appendix I at 3). Oral argument was conducted on February 10, 2005 (DE38, Appendix I at 4). On March 3, 2005, Petitioner wrote to Mr. Collins the following, in pertinent part:

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

(DE38, Appendix K) (emphasis added). Having heard nothing from Mr. Collins despite his written request for a status, Petitioner, on June 15, 2006, again wrote to Mr. Collins:

> On March 3, 2005, I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida.

---

[12]In *Nelson*, the court set forth a procedure requiring a trial court to inquire of a defendant and appointed counsel when allegations of incompetency are made and, if established, to appoint substitute counsel or allow the defendant to proceed *pro se*. *Nelson*, 274 So. 2d at 259.

Also, have you begun preparing my 28 U.S.C. §2254 writ of habeas corpus petition? Please let me know, as soon as possible.

(DE38, Appendix L) (emphasis added).[13]

Not only was Petitioner vainly attempting to secure the status of his appeal from Mr. Collins, he was also informing Mr. Collins about the need to begin preparing his federal habeas corpus petition so that it would be filed within the deadline. However, as noted above, Petitioner received no response at all from Mr. Collins. Undeterred, Petitioner took additional steps while his case was still in state court in order to keep updated as to the status of his appeal. In October, 2005, Petitioner contacted the Florida Supreme Court about how to find his case on its website so that Petitioner could secure the assistance of outside supporters to keep him updated about the appeal;[14] in response, the Florida Supreme Court clerk mailed him printouts of the website with instructions as to which menu options should be used (DE38, Appendix N).

On November 10, 2005, the Florida Supreme Court issued its opinion

---

[13]Mr. Collins never responded to either of Petitioner's afore-discussed letters, a fact that is conclusively established by the Department of Corrections logs, which provide meticulous detail as to each and every piece of incoming mail sent to death row inmates. In preparation for an equitable tolling argument in the lower courts, Petitioner sought these logs from the Department of Corrections on February 5, 2006; Sergeant Overtrop of Union Correctional Institution responded to Petitioner's request by informing him that he pulled "all logs" from January 1, 2004, until February 6, 2006, and these logs revealed that Petitioner received only five (5) pieces of mail from Mr. Collins during this time period: January 14, 2004, June 16, 2004, July 19, 2004, January 19, 2006, and February 6, 2006 (DE38, Appendix M).

[14]There are no computers accessible to any death-row inmates at Union Correctional Institution.

affirming the denial of the Rule 3.851 appeal and denied the state habeas petition. Shockingly, Mr. Collins **never informed Petitioner, either by legal phone call or by letter, that his appeal had been denied.**[15] Because he was unaware that the appeal had been denied, he again contacted the Florida Supreme Court by letter dated December 21, 2005, in order to inquire about the status of his case and when the mandate from his direct appeal had issued (DE38, Appendix P).[16] In a written communication dated December 28, 2005, the Florida Supreme Court, referring to Case No. SC03-1033 (which was the case number for Petitioner's Rule 3.851 appeal), informed Petitioner that he would need to contact the Florida State Archives in order to obtain the mandate issued in his direct appeal case (DE38, Appendix O). Inexplicably, despite acknowledging that Petitioner's request was also for a status of Case No. SC03-1033, *never* informed him that, in fact, the mandate in the Rule 3.851 appeal had also been issued and that the appeal had been denied on November 10, 2005. And, because he still had no idea that his

---

[15]Petitioner received confirmation of this from Sgt. Overtrop pursuant to his request that Overtrop review the phone logs; according to Overtrop, Petitioner received no legal phone calls from Mr. Collins (or anyone else for that matter) in November, 2005 (DE38, Appendix O).

[16]Petitioner believed that the date of the mandate on direct appeal was significant in order for him to be able to ascertain when the federal habeas would be due since he had never heard anything from Mr. Collins about the status of the case. Clearly, this request indicates that Petitioner was making a diligent effort to ascertain how much time he had left on his statute of limitations if and when the Florida Supreme Court were to deny relief (DE38, Appendix Q). Of course, at the time he made his request to the Florida Supreme Court on December 21, 2005, he had no idea that the Court had denied his appeal already and, in fact, mandate had already issued on December 1, 2005.

appeal had been denied, Petitioner, on January 9, 2006, requested permission from the Department of Corrections to visit the "writ room" in order to see if he could ascertain the status of his case from the legal library (DE38, Appendix R); however, the Department of Corrections inexplicable "refused" his request (*Id.*). Because this request to visit the writ room was denied, Petitioner *again* wrote to Mr. Collins on January 9, stating as follows:

> I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. **Have my appeals been decided yet?**
>
> Please send me the date when the "mandate" was issued in my case.[17] If you could please send me a copy of said "mandate" so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable "Antiterrorism and Effective Death Penalty Act," **if my appeals before the Supreme Court of Florida are denied.**
>
> Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.
>
> Mr. Collins, would you also please inform me, as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will be have to be timely filed in and that court's address?
>
> Thank you very much.

(DE38, Exhibit Q) (emphasis added).

---

[17]Petitioner's inquiry of Mr. Collins puts into context his request of the Florida Supreme Court on December 21, 2005, for a copy of the direct appeal mandate. Petitioner did follow through with the Florida Supreme Court's direction that he contact the Florida State Archives in order to get a copy of the direct appeal mandate; on January 27, 2006, Petitioner received the requested documents from the Archives (DE38, Appendix S).

Having still not heard anything from Mr. Collins, having not been informed by the Florida Supreme Court's December 28, 2005, communication, that his appeal had been already denied and that mandate had been issued, and having been inexplicably denied the opportunity to go to the writ room on January 9, 2006, Petitioner again, on January 18, 2006, requested and was granted permission to go to the writ room to attempt to ascertain the status of his case (DE38, Appendix T). It was on this date–January 18, 2006–that Petitioner learned for the first time that his appeal had already been denied over two (2) months earlier. As a result, Petitioner, the following day–January 19, 2006–made an emergency request for a telephone call to Mr. Collins the first thing in the morning because, as Petitioner himself wrote, "It's important!!" (DE38, Appendix U). That request was approved (*id.*). Because he was now aware that his state appeals had been denied over two (2) months earlier, Petitioner, following his visit at the writ room on January 18, 2006, immediately prepared his *pro se* habeas corpus petition, which he mailed to the district court clerk for filing on January 19, 2006.

Coincidentally, Mr. Collins had written a letter to Petitioner which Petitioner received on January 19, 2006 (the same day that Petitioner mailed his *pro se* habeas petition to the district court), requesting that Petitioner fill out the *in forma pauperis* documentation necessary to file a *certiorari* petition in this Court (DE38, Appendix V). By the time Petitioner received this letter, he had already spoken with Mr. Collins in the morning of January 19. In his written response to Mr. Collins's letter on January 20, 2006, Petitioner noted that he was "left to

understand" that Mr. Collins was intent on filing a *certiorari* petition but that it was Petitioner's understanding that the AEDPA statute of limitation was "not tolled" during this period, and therefore advised Mr. Collins "not to file certiorari if doing so affects or jeopardizes my one-year grace period as prescribed by the AEDPA" (DE38, Appendix V).[18]

On January 27, 2006, Petitioner again communicated with Mr. Collins to request information on what Mr. Collins had filed on Petitioner's behalf and to send him copies (DE38, Appendix W), and, on January 30, 2006, again wrote to Mr. Collins with some legal research indicating that the time for seeking *certiorari* from the state court's denial of collateral relief would not toll the AEDPA statute of limitations (DE38, Appendix X). In response to Petitioner's letter of January 20, 2006, Mr. Collins acknowledged that there was a "hurdle" to overcome "concerning operation of AEDPA time limitations," but, expressing a gross and negligent understanding of basic federal habeas law, expressed his view that Petitioner's time for filing his federal habeas "began to run after the case was affirmed [by the Florida Supreme Court] on October 2, 2000" and that therefore "the period had run before my appointment and therefore before your Rule 3.850 motion was filed" (DE38, Appendix Y). Mr. Collins further expressed his understanding that a *certiorari* petition was Petitioner's "only technically timely remedy" and that filing a *certiorari* petition "will have no effect on the viability of

---

[18]In reality but unbeknownst to Petitioner, his concern was moot since the Florida Supreme Court had denied relief in November, 2005, and Mr. Collins never informed Petitioner of this denial.

the federal habeas corpus remedy" (*Id.*). In response to this letter, Petitioner, on February 9, 2006, wrote to Mr. Collins:

> I received your letter dated January 31, 2006. You are incorrect in stating that "the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court." As stated on page three of my Petition for a Writ of Certiorari, October 1, 2001, is when the United States Supreme Court denied my initial petition for writ of certiorari and that is when my case became final. That meant that time would be tolled once I filed my 3.850-3.851 motion in the trial court.
>
> Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred.
>
> You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005, decision denying my postconviction appeals. You never kept me informed about the status of my case, although you told me that you wold immediately inform me of the court's decision as soon as you heard anything.
>
> Mr. Collins, I filed a motion on January 19, 2006, to preserve my rights because I did not want to be time-barred. Have you heard anything about the aforesaid motion? Do you know what the status of aforesaid motion is?
>
> Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting any more time (valuable time).
>
> Again, please file my 2254 Petition at once.
>
> Your letter is the first time that you have ever mentioned anything to me about my time had [sic] run out, before you were even appointed to represent me, and that my one-year started to run on October 5, 2000.
>
> Please find out the status of my motion that I filed on January 19, 2006, and let me know.

(DE38, Exhibit Z).

B. "Gross Negligence" by Collateral Counsel is an "Extraordinary Circumstance" Warranting Equitable Tolling.

While it is generally true, and Petitioner does not contend otherwise, that garden variety attorney mistakes do not constitute "extraordinary circumstances" to warrant equitable tolling, the issue presented by Petitioner is whether the "gross negligence" found by the Eleventh Circuit does qualify as such a circumstance, and whether any allegation of lawyer negligence or misconduct, short of bad faith, dishonesty, divided loyalty, or mental impairment, can satisfy the definition of an "extraordinary circumstance" such that equitable tolling is warranted.[19] Under the new test set out by the Eleventh Circuit, *no* allegation of lawyer misconduct, even gross misconduct, can qualify for an exceptional circumstance. This truncated holding essentially eviscerates the doctrine of equitable tolling and conflicts with the holdings of numerous other circuits.

At the outset, it is important to note that, until Petitioner's case was pending in the Eleventh Circuit, that court had not yet addressed whether attorney conduct beyond "mere negligence" could constitute an extraordinary circumstance warranting equitable tolling. In *Downs v. McNeil*, 520 F. 3d 1311 (11th Cir. 2008), the Eleventh Circuit held for the first time that attorney misconduct going beyond "mere negligence" can constitute an extraordinary circumstance warranting

---

[19]To be sure, Petitioner does not agree that the "gross negligence" found by the Eleventh Circuit fails to satisfy some of the arbitrary criteria set out in the Eleventh Circuit's opinion. For example, in Petitioner's view, "gross negligence" of counsel certainly qualifies as bad faith and demonstrates, at the least, divided loyalties.

equitable tolling. Yet in Petitioner's case, the Eleventh Circuit effectively announced that *Downs* did not really mean what it said and limited its holding to such an extent as to render it meaningless for purposes of a reasoned equitable tolling analysis and to place Petitioner's case in direct conflict with other circuits.

To properly put Petitioner's contentions in this petition into their proper context, it is first important to discuss what the Eleventh Circuit held in *Downs*, and, just as importantly, what it did not hold in *Downs*. At issue in *Downs* was whether the Eleventh Circuit would join those circuits which have allowed equitable tolling due to "some forms of serious attorney misconduct," or whether this Court would agree with the lone circuit –the Seventh Circuit – to adopt a "bright-line approach" refusing to allow equitable tolling when the reason for the late filing is attributable to the misconduct or negligence, no matter how serious, of the defendant's collateral counsel. *Downs*, 520 F. 3d at 1319. After discussing the holdings of the various circuits, the *Downs* court declined to follow the bright-line approach of the Seventh Circuit in favor of an analysis that truly reflects the fact that equitable tolling is, after all, an *equitable remedy*. *Downs*, 520 F. 3d at 1321 ("bright-line rules do not govern the court's exercise of its equitable powers") (citing cases). Hence, the *Downs* court embraced the line of cases from other circuits which have provided a basis for equitable tolling in instances where, for example, the attorney has made misrepresentations to the client, disregarded the client's instructions, refused to return documents, or abandoned the client's case. *Id.* at 1321-22 (discussing cases). After discussing with approval the line of

cases from other circuits, the *Downs* court concluded by holding that "the fact-specific, case-by-case approach taken by the majority of our fellow circuits is better suited to an equitable inquiry than is the bright-line approach to egregious attorney misconduct adopted by the Seventh Circuit[]." *Id.* at 1322 (footnote omitted).

Nothing in *Downs* could be read to state that only allegations of "reckless factual misrepresentation or of lawyer dishonesty" (Attachment A at 9), could, to the exclusion of any other allegation, constitute an extraordinary circumstance warranting equitable tolling. In fact, in *Downs*, the Court stated it would "not dissect the continuing course of conduct in which counsel engaged, bur rather view counsel's behavior as a whole," and acknowledged that while overt dishonesty could constitute equitable tolling, other factors, such as disregarding client instructions or effective abandonment of the client, could also constitute an extraordinary circumstance warranting equitable tolling. *Downs*, 520 F. 3d at 1321-23.

Yet in Petitioner's case, the Eleventh Circuit indeed focused on the lack of allegations of the overt false representations made in *Downs,* to the exclusion of the Petitioner's other equally serious allegations, and faulted Petitioner for not having similar allegations to those in *Downs*:

> no allegations 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. We decline to extend *Downs* to the different facts of this case.[]

(Attachment A at 9-10)

As the *Downs* court noted, other circuits have extended equitable tolling to circumstances involving some forms of serious attorney misconduct or negligence, and not just to allegations of overt lying by counsel or actual dishonesty. For example, the *Downs* court cited to and discussed *Baldayaque v. United States*, 338 F. 3d 145 (2d Cir. 2003), noting that the Second Circuit, in considering the allegations there, which included the attorney ignoring the directive of the defendant to file a §2255 petition and failing to communicate with the client, determined that the attorney's actions, "taken together," might warrant equitable tolling. *Downs*, 520 F. 3d at 1321. There was nothing in *Baldayaque* that discussed actual lying or overt dishonesty, yet the *Downs* court cited it with approval, as it also cited other similar cases. *See Fleming v. Evans*, 481 F. 3d 1249 (10th Cir. 2007); *United States v. Martin*, 408 F. 3d 1089 (8th Cir. 2005); *United States v. Wynn*, 292 F. 3d 226 (5th Cir. 2002); *Spitsyn v. Moore*, 345 F. 3d 796 (9th Cir. 2003).[20]

By first embracing this line of cases in *Downs* and deciding their reasoning would govern the Circuit's jurisprudence, and then by openly distancing itself

---

[20]As the *Downs* court also noted, nothing in this Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), can be read to exclude equitable tolling due to circumstances extending beyond mere attorney negligence. *Downs*, 520 F. 3d at 1319. Here, as the Eleventh Circuit acknowledged, we are dealing with "gross negligence," not garden variety, or "mere" negligence (Attachment A at 9).

from these very cases, the Eleventh Circuit in Petitioner's case effectively returned the Circuit to pre-*Downs* status by enforcing the very "bright-line" rule it rejected in *Downs*. By holding that "no allegation of lawyer negligence or of failure to meet a lawyer's standard of care" – absent bad faith, dishonesty, divided loyalty, or mental impairment on part of the attorney – can rise to the level of "egregious attorney misconduct that would entitle Petitioner to equitable tolling," the panel not only effectively overruled *Downs* and limited it in such an unprecedented way as to render its holding meaningless in cases not involving overt bad faith or dishonesty, but also aligned, once again, the Eleventh Circuit with the Seventh Circuit in its bright-line approach.

The "gross negligence" that the Eleventh Circuit found in Petitioner's case is just as deserving of equitable tolling as the lies and misrepresentations found to warrant an evidentiary hearing in *Downs*. This is not a case of garden-variety or after-the-fact miscalculation, but a flagrant failure by attorney Collins to adhere to his client's request to timely file his habeas petition. Collins gave no advance warning to Petitioner that he would not or could not timely file the habeas petition on time as promised to Petitioner and as Petitioner had repeatedly implored him to do while his appeal was still pending in the Florida Supreme Court. *See Nara v. Frank*, 264 F. 3d 310, 320 (3d Cir. 2001) (noting that evidentiary hearing warranted where petitioner alleged, *inter alia*, that habeas petition filed late because state postconviction counsel told petitioner that there were no time constraints to timely filing and led petitioner to believe a timely petition would be

filed; these "serious allegations" would constitute extraordinary circumstances, if proven to be true). *See also Baldayaque,* 338 F. 3d at 152-53.

Due to Collins's "gross negligence," Petitioner never received any communication that his appeal to the Florida Supreme Court had been denied on November 10, 2005, despite repeated requests to Collins in the preceding months for a status of the case. This failure by Collins to keep Petitioner apprised of the denial of his appeal is not only a violation of the Florida Rules of Professional Conduct,[21] but also constitute grounds for equitable tolling, at least in other circuits. "[A] prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the manner." *Woodward v. Williams*, 263 F. 3d 1135, 1143 (10th Cir. 2001). *See also Phillips v. Donnelley*, 216 F. 3d 508, 511 (5th Cir.) (Remanding for district court to determine the date on which the petitioner first received notice of the denial of his state appeal), amended in part, 223 F. 3d 797 (5th Cir. 2000); *Knight v. Schofield*, 292 F. 3d 709, 711 (11th Cir. 2002) (prisoner entitled to equitable tolling because, despite diligence, he had not been timely informed of the denial of state collateral relief); *Thompson v. Smith*, 2006 U.S. App. LEXIS 5620 at *12 (11th Cir. 2006) (unpub.) ("When outside forces, such as

---

[21]*See* Rule Regulating the Florida Bar 4-1.4 (a)(1), (2) (3) & (4) (A lawyer "shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information").

the courts themselves, act independently of the petitioner to prevent him from timely filing a petition for habeas corpus, then, provided that the petitioner has exercised diligence, the district court may properly apply the doctrine of equitable tolling").

Because the Eleventh Circuit's conclusion that "gross negligence" does not qualify as an exceptional circumstance warranting equitable tolling has placed the Eleventh Circuit squarely in conflict with other circuits, and has essentially eviscerated a defendant's entitlement to equitable tolling under certain circumstances, Petitioner submits that certiorari review of the Eleventh Circuit's decision is warranted at this time.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
FAX: (305) 861-9253
CJA Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Lisa-Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, on this 13th day of May, 2009.

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
FAX: (305) 861-9253
CJA Counsel for Petitioner-Appellant