

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

JO GENTRY, *at al.*,
Petitioners
vs.

MARGARET RUDIN,
Respondent

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

Motion for Leave to Proceed *In Forma Pauperis*

Brief in Opposition

Submitted by:

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IN THE SUPREME COURT OF THE UNITED STATES

JO GENTRY, *et al.*,
Petitioners

vs.

MARGARET RUDIN,
Respondent


MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Margaret Rudin, who is indigent, asks leave to file the attached *Brief in Opposition to the Petition for a Writ of Certiorari* without prepayment of costs, and to proceed *in forma pauperis* under Rule 39.

No affidavit or declaration is attached because the United States District Court, District of Nevada, appointed counsel for Margaret Rudin as reflected in the attached order.

Dated: January 15, 2016

Respectfully submitted,



M. Greg Mullanax
Counsel for Respondent,
Margaret Rudin

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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 MARGARET RUDIN,

10 Petitioner,

11 vs.

12 CAROLYN MYLES, et al.,

13 Respondents.
14

Case No. 2:11-CV-00643-RLH-(GWF)

ORDER

15 Petitioner has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1).
16 The court has reviewed the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
17 United States District Courts. The court will serve the petition upon respondents for a response.

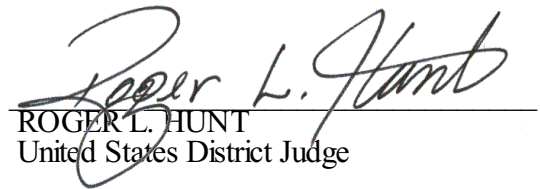
18 Petitioner also has submitted a motion for appointment of counsel and for payment of expenses
19 (#3). She asks that Christopher Oram, who represented her in post-conviction proceedings in the state
20 courts, be appointed to represent her in this action. Petitioner has satisfied the court that she is financially
21 unable to employ counsel. The court finds that pro hac vice appointment of Christopher Oram to the CJA
22 panel for the purposes of appointment to this case is in the interest of justice and judicial economy.

23 IT IS THEREFORE ORDERED that petitioner's motion for appointment of counsel and for
24 payment of expenses (#3) is **GRANTED**. Christopher Oram is admitted pro hac vice to
25 the CJA panel and is appointed to represent petitioner.

26 IT IS FURTHER ORDERED that the clerk shall electronically serve upon respondents a copy of
27 the petition (#1).
28

1 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date on
2 which the petition was served to answer or otherwise respond to the petition (#1). If respondents file and
3 serve an answer, then they shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the
4 United States District Courts, and then petitioner shall have forty-five (45) days from the date on which the
5 answer is served to file a reply.

6 DATED: July 18, 2011.

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8 
9 ROGER L. HUNT
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

Jo Gentry, *et al.*,

Petitioners,

v.

Margaret Rudin,

Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Submitted by:

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Questions Presented

1. Whether to qualify for equitable tolling under AEDPA, a prisoner is not required to file a protective federal petition per *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), when the lower court has found, under Holland, that when considering all of facts, the prisoner had been pursuing her rights diligently and that some extraordinary circumstances stood in her way and prevented timely filing.
2. Whether the Ninth Circuit's decision granting equitable tolling constitutes a violation of clearly established law when it found equitable tolling warranted on the specific extraordinary facts of this case.

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A. Statement of the Case

On March 10, 2015, a panel of the United States Court of Appeals for the Ninth Circuit issued an opinion, *Rudin v. Myles*, 781 F. 3d 1043, withdrawing its previously issued opinion reported at 766 F. 3d 1161, reversing the district court's dismissal of Margaret Rudin's federal habeas petition as untimely. The court of appeals determined that Rudin was entitled to equitable tolling based on her diligence and the extraordinary circumstances of her case leading up to the Nevada court ordering a new trial and the State's subsequent appeal. The appeals court reversed the district court's order and remanded the case for further proceedings.

On April 16, 2015, the panel voted 2-1 to deny the petition for rehearing. The petition for en banc rehearing was circulated to the full court, and no judge of the court requested a vote. On September 11, 2015, Petitioner Jo Gentry's Petition for Writ of Certiorari was docketed.

1. Procedural History

Margaret Rudin was indicted by a grand jury, was tried and convicted. Her direct appeal was denied by the Nevada Supreme Court, and her collateral appeal in Nevada state court resulted in an order for new trial, which was later reversed by the Nevada Supreme Court. Rudin then filed her federal habeas petition in federal district court and her petition was dismissed as untimely filed. Rudin appealed to the Ninth Circuit Court of Appeals, which eventually afforded her relief and the State seeks certiorari. Due to the intense factual nature of this case, the proceedings are set forth in more detail below.

a. State Court

Nevada State District Judge Joseph Bonaventure presided over Rudin's trial and a Nevada jury convicted Rudin in 2001. Rudin directly appealed and the Nevada Supreme Court affirmed her conviction on April 1, 2004 and issued remittitur on April 27, 2004. App. 7.¹ On that date, Rudin's deadline for filing a state habeas petition was April 27, 2005 and her deadline to file a federal habeas petition was June 30, 2005. App. 8.

Rudin asked the state court to appoint an attorney to represent her in her state post-conviction appeal. On November 10, 2004 during a hearing on the matter, Judge Bonaventure appointed attorney Dayvid Figler to represent Rudin. App. 11-12.

At the hearing, Rudin was confined in a cell and was not present in the courtroom. Rudin had prepared a state habeas petition and gave it to the bailiff to present to Judge Bonaventure for filing. Judge Bonaventure refused to accept the habeas petition, and gave the petition to Figler, ostensibly relying on Rule 3.70 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada which says papers "delivered to the clerk of the court by a defendant who has counsel of record will not be filed [but will be] forwarded to the attorney for such consideration as counsel deems appropriate." App. 12.

The parties convened again before Judge Bonaventure on December 28, 2004. Judge Bonaventure declared that not only was Rudin's trial attorney still barred from his courtroom, and his distaste for Rudin's direct appeal attorney was so strong, Judge Bonaventure disqualified himself from the case and ordered the case to be randomly reassigned to another court. App. 12-13.

¹ "App." refers to the appendix filed with Petitioners' Petition for Writ of Certiorari.

The case was reassigned on December 29, 2004. App. 13. On January 5, 2005, the court conducted a status hearing regarding the “opening brief” and granted Figler’s request for a continuance to file a brief. App. 13-14.

At a July 13, 2005 status hearing, Figler requested another continuance which the court granted. App. 14.

On April 5, 2006, Rudin moved to substitute counsel expressing her “grea[t] concern[n] that she [was] not receiving adequate representation regarding her post-conviction.” App. 15.

Judge Loehrer entertained Rudin’s motion to substitute counsel on July 17, 2006. After argument, Judge Loehrer granted Rudin’s motion and Christopher Oram was appointed to represent Rudin in place of Figler. App. 15.²

After months of continuances and issues related to Figler transferring Rudin’s file to her new counsel, Oram filed Rudin’s opening brief on August 21, 2007. App. 17.

At the hearing the next day, August 22, 2007, Oram advised the court and State’s counsel that he should re-label the filing as a petition for writ of habeas corpus as opposed to a supplement because apparently, they all learned for the first time, a writ had never been filed. Judge Loehrer declared the writ timely filed based on a finding of “extraordinary circumstance.” Only then—for the first time ever—did the State ever object to timeliness. In response, Judge Loehrer declined to make a finding until the State had the opportunity to address the issue in further briefing. App. 17-19.

² Astonishingly, Dayvid Figler was also attorney for George Gibbs, who was forced to seek equitable tolling from the Ninth Circuit which introduced the decision, “This case arises from a prisoner’s vigorous pursuit of post-conviction review in the face of egregious misconduct from his court-appointed lawyers.” *Gibbs v. Legrand*, 767 F.3d 879, 882 (9th Cir. 2014). Figler was Gibbs’ attorney. The Court mentioned Rudin’s case in footnote 7.

But the State never briefed the timeliness issue and at a hearing on December 19, 2008, after taking testimony from witnesses, Judge Loehrer ordered a new trial, commenting, “...The proof of guilt was not a slam dunk by any stretch of the imagination for the State, so I can’t say—I cannot say in this case that no matter who had defended her that the verdict would have been the same.” App. 19-21.

The State appealed to the Nevada Supreme Court arguing, for the first time ever, that Rudin’s petition was late. App. 21.

The Nevada Supreme Court reversed the lower court’s new trial order on May 10, 2010 holding that Rudin’s petition was time-barred. On January 20, 2011, the Nevada Supreme Court rejected Rudin’s request for *en banc* reconsideration. App. 21.

b. Federal District Court

On April 25, 2011, Oram filed a federal habeas petition on Rudin’s behalf asserting arguments for statutory and equitable tolling. The State responded with a motion to dismiss which the district court granted, with prejudice and further, denied the certificate of appealability. App. 21.

On October 24, 2012, the Ninth Circuit granted Rudin’s request for a certificate of appealability to decide whether the district court properly determined that the petition was barred by the statute of limitations under 28 USC § 2244(d)(2). App. 22.

c. Ninth Circuit Panel: *Rudin I*

The Ninth Circuit panel initially decided Rudin’s case issuing its opinion on September 10, 2014. The panel declared even though they may not have made the same decision as the Nevada Supreme Court, they were powerless to disturb that court’s decision since the Nevada Supreme Court was acting on direct appeal of the state post-conviction court’s judgment. App. 71. The

panel found no statutory tolling concluding that “when a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of Section 2244(d)(2).” Quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). App. 62.

But the panel did find Rudin was entitled to equitable tolling based on Rudin’s diligence in the face of the extraordinary circumstance of attorney abandonment, noting that in the nearly two years he represented Rudin, Figler never filed anything on her behalf. The panel further noted Rudin’s efforts at trying to contact Figler to no avail. The panel also noted that Rudin herself attempted to file her own pro per petition for post-conviction relief on November 10, 2004, well within the statutory period. App. 65-71.

However, the panel still rejected Rudin’s claim for equitable tolling after August 27, 2007 determining that she failed to protect her rights by filing a *Pace* petition in federal court after Oram found out and then informed the court and the State’s counsel that no writ had actually been filed and that he would have to re-label his supplemental petition filed on August 21. App. 71.

Since the panel decided Rudin was not entitled to equitable tolling after August 22, 2007, the panel concluded the AEDPA limitations period resumed on August 27 and since she did not file her federal petition until after April 10, 2008, the claim was time-barred.

The panel seemed disturbed at the holding. The panel said:

We are troubled by the outcome of this case for many reasons. Margaret Rudin’s direct appeal and collateral review proceedings have been pending in either state or federal court for a combined total of 13 years. She has potentially meritorious claims that she has suffered prejudice at the hands of her own attorneys’ egregious misconduct. Yet she has never had an opportunity to present those claims in court.

App. 71.

The panel further stated:

“...if ever there were a case in which equitable tolling should apply to soften the harsh impact of technical rules, perhaps this is that case.”

App. 73.

Judge Adelman issued a dissenting opinion, in particular noting that the *Pace* petition issue did not apply to Rudin because even if she filed a federal petition on August 22, 2007, she had no reasonable belief there were timeliness issues in her case since the court ordered a new trial and the State never brought up the timeliness issue. App. 78-80.

d. Ninth Circuit Panel: *Rudin II*

After losing on appeal, Rudin filed a petition for rehearing and on March 10, 2015, the Ninth Circuit panel withdrew *Rudin I* and issued *Rudin II* which superseded the prior opinion.

This time, the panel still held that Rudin was not entitled to statutory tolling under Section 2244(d)(2) for the duration of her state post-conviction proceedings based on her claim as presented.

The panel did not change its mind about finding equitable tolling applying for the November 10, 2004 through August 22, 2007 period.

But the panel reconsidered the equitable tolling for the August 23, 2007 through January 11, 2011 time period finding that immediately upon discovering Figler's failure to file a petition, Judge Loehrer found extraordinary circumstances that would extend the one-year deadline. This coupled with the fact the State failed to brief the timeliness question in its opposition,

“affirmatively misled” Rudin into believing the state court had excused her late filing and that her federal limitations period would be statutorily tolled. App. 31-32.

The panel went on to find that until the state court’s finding was challenged or reversed, Rudin remained entitled to AEDPA’s statutory tolling because Rudin diligently pursued her then “properly filed” state petition and then pursued her rights in federal court promptly after state proceedings concluded. App. 31-32. This time, the panel adopted from Judge Adelman’s dissent in *Rudin I* the contention since the lower court ordered a new trial, Rudin had no adverse ruling to challenge in a federal petition.

The State filed petitions for rehearing and *en banc* review which were denied. No Ninth Circuit judge requested a vote on the *en banc* petition. App. 116-117.

B. Reasons for Denying the Petition

The petition should be denied because there is no Ninth Circuit “trend” severely weakening the equitable tolling factors articulated in *Pace* and *Holland*. There is no “direct” circuit split between the Ninth Circuit and Fifth Circuit and the Ninth Circuit and the Eleventh Circuit nor is the Ninth Circuit ignoring this Court’s holdings in *Pace* and *Holland*. Equitable tolling cases are fact-intensive and the facts and circumstances in this case are so unusual as to be unlikely to occur again, thus making this case a poor vehicle for the Court to use to articulate a holding applicable to most or all future AEDPA equitable tolling cases.

- 1. The False Circuit Split: There is no real circuit split on the issue of equitable tolling especially when considering the factors to determine equitable tolling demand an intensive fact inquiry on a narrow and unique set of facts which makes it impossible to declare bright-line rules to cover every situation.**

There is no real circuit split and certainly the Ninth Circuit is not a rogue circuit when it comes to equitable tolling under AEDPA. Especially not since this Court cited the Ninth Circuit

case, *Calderon v. United States Dist. Ct. for Central Dist. of Cal.*, 128 F. 3d 1283 (9th Cir. 1997) as an example of an appropriate case for equitable tolling in *Holland v. Florida*, 560 U.S. 631, 645 (2010).

But that wasn't the only Ninth Circuit case *Holland* cited. This Court also cited *Spitsyn v. Moore*, 345 F. 3d 796 (9th Cir. 2003), *Holland* at 644, which adopted a less categorical approach which this Court adopted in lieu of the 11th Circuit's stricter approach.

As part of its "trend" argument, petitioners cite *Gibbs v. Legrand* as an example of the Ninth Circuit gone rogue. *Gibbs v. Legrand*, 767 F. 3d 879 (9th Cir. 2014) *cert. denied*, 2015 US LEXIS 2293 (March 30, 2015).³

Sadly, Gibbs had the same problems with Figler that Rudin had. The Ninth Circuit panel, different than Rudin's panel, found that Figler abandoned Gibbs, just as he abandoned Rudin. This is simply another example of the extraordinary events that transpired in close proximity and which further demonstrates that despite Petitioner's desire for hard and fast rules in an equity analysis, it simply is not appropriate. For who could have anticipated this?

a. Ninth Circuit v. Fifth Circuit

Petitioners claim a "direct" split between the Fifth and Ninth Circuits alleging that Ninth Circuit equitable tolling decision directly conflicts with Fifth Circuit jurisprudence.

Petitioners designate *Larry v. Dretke*, 361 F. 3d 890 (5th Cir. 2004) as an example. But *Larry v. Dretke*, decided before *Holland* or *Pace*, was a case in which the prisoner, Larry, filed his first state habeas petition in the wrong court and then filed a second state habeas petition which

³ *Gibbs* involved the unfortunate case of a prisoner who was also represented by Dayvid Figler, the same Dayvid Figler who represented Rudin in *this* case. The Ninth Circuit released *Gibbs* about a week after *Rudin I* was published.

was denied. Larry then filed his federal habeas petition after the one-year AEDPA limitations period and the district court declined to apply equitable tolling and further found that Larry's claim for statutory tolling was not available since his state petitions were not properly filed.

The appeals court determined that Larry's first state petition was not properly filed because he filed it in the wrong court—a court with no jurisdiction to consider the petition.

Rudin is not in direct conflict with *Larry* because they are factually not even similar. There were no allegations in *Larry* about attorney abandonment, court sanctioned continuances spreading over years with acquiescence and no objections from the State, with all of the involved attorneys and the court confused about the status of the case. Nor was Larry actually prevented from filing his own state petition in the correct court as Rudin was. Larry was never told by a court that a late filing was accepted because of extraordinary circumstances. What Larry did was his own doing—he simply filed his habeas petition with a court without jurisdiction to consider it.

Petitioners' next Fifth Circuit argument is the unpublished *Jones v. Stephens*, 541 F. App'x 499 (5th Cir. 2013). Like the case in *Larry*, here Jones improperly filed his state habeas application because he failed to follow the instructions on the State's habeas application form. And when Larry filed it, the court dismissed the petition because it did not comply with the rules of appellate procedure. After the court dismissed the petition, Jones filed an amended petition, but since the prior petition had already been dismissed, there was nothing to amend. Jones then filed a second habeas petition which was dismissed.

Jones filed a federal habeas petition which was also dismissed as untimely under AEDPA. There was no statutory tolling under Section 2244(d) (2) because Jones' original habeas petition was not properly filed and the court found no basis for equitable tolling. On appeal, the Fifth Circuit panel found no extraordinary circumstances to justify equitable tolling with the court

noting it was Jones himself who failed to comply with the state procedural rules. The court also determined Jones read the habeas instructions because his brief made that clear. The court also found Jones was not diligent in pursuing his habeas rights.

As is the case in *Larry*, the *Jones* case has no allegations of attorney misconduct or any other of the sordid and messy facts in *Rudin*.

But petitioners analyze *Larry* and *Jones* with *Rudin* by arguing that like Rudin, Larry and Jones argued that the state court's failure to warn them that their petitions were not properly filed misled them into missing their federal deadlines for seeking habeas relief. What petitioners leave out of this analysis are the *Rudin* facts spelled-out above—from an unhappy judge who disqualifies himself resulting in a new judge taking over in mid-stream. Then the regular continuances requested by an attorney who never filed anything on Rudin's behalf and then abandoned her forcing Rudin to seek new counsel. Then it took about four months for Oram to get Rudin's file from Figler. And that led to more continuances with the agreement and acquiescence of the State. Oram eventually file the petition with the judge telling the parties in open court she found extraordinary circumstances and would allow Rudin's late filing. The State never objected in its opposition despite the court specifically affording the State the opportunity.

The Ninth Circuit's holding in *Rudin* is not in direct conflict with these Fifth Circuit decisions.

Curiously, petitioners didn't share some published Fifth Circuit cases where equitable tolling was granted. For example, in *Prieto v. Quarterman*, 456 F. 3d 511 (5th Cir. 2006), the Fifth Circuit found equitable tolling when the federal district court granted Prieto's motion for an extension of time in which to file his habeas petition and set the due date *after* the AEDPA time had expired. Prieto filed his petition before the due date established by the court but it was after

the deadline under AEDPA. After the State responded with a motion to dismiss on the basis of an untimely filing, the district court dismissed the petition and Prieto appealed urging extraordinary circumstances justifying equitable tolling based on the court's order. The Fifth Circuit agreed holding that Prieto's motion for a continuance was made before his AEDPA time expired and the district judge's order gave a specified date for filing and Prieto relied on that order and complied with it.

Not only that, but the Fifth Circuit *Prieto* court, citing a prior Fifth Circuit decision⁴, reiterated Fifth Circuit guidelines for courts to follow in equitable tolling cases, such as, “[w]e must be cautious not to apply the statute of limitations too harshly.”⁵ And, “Dismissing a habeas petition is a ‘particularly serious matter.’”⁶ And, “This is why we look to the facts and circumstances of each case to determine whether the district court abused its discretion in declining to apply equitable tolling.”⁷

And there is more. In *Palacios v. Stephens*, 723 F. 3d 601, 608 (5th Cir. 2013), the Fifth Circuit *declined* to hold that the failure to file a protective petition alone prevents a prisoner from receiving equitable tolling. This was, the court explained, “In keeping with [their] disinclination to create bright-line rules constraining [their] equitable tolling analysis...” *Id.* Even though the court held *Palacios* did not merit equitable tolling, the court made clear these cases are decided on a case-by-case basis.

Then there's the case of *Alexander v. Cockrell*, 294 F. 3d 626 (5th Cir. 2002) in which the court found equitable tolling for the prisoner whom the district court determined was misled by a

⁴ *Fisher v. Johnson*, 174 F. 3d 710, 713 (5th Cir. 1999)

⁵ *Prieto* at 514.

⁶ *Id.*

⁷ *Id.*

prior Fifth Circuit holding governing his case. It was compounded by the actions of a previous district judge who raised, *sua sponte*, the statutory constitutionality claim rendering the prisoner's timely federal habeas petition a mixed petition necessitating its dismissal for failure to exhaust.

The Alexander court also said the decision to apply equitable tolling in a case is a judgment call given their "reluctance to apply equitable tolling even in extraordinary circumstances." *Id.* at 630. The court further stated "the decision to apply equitable tolling is an exercise of discretion." *Id.* The court too, noted, that reasonable jurists can debate whether equitable tolling should apply in a given situation.

b. Ninth Circuit v. Eleventh Circuit

Petitioners maintain the Ninth Circuit is in conflict with the Eleventh Circuit and offer the unpublished *Hill v. Jones*, 242 F. App'x 633 (11th Cir. 2007) as evidence of it. Prisoner Hill filed his state notice of appeal with the wrong court and by the time he found out about it, it was too late to correct the mistake. After filing a federal habeas action after his AEDPA time expired, the State objected to the filing as untimely and the district court dismissed Hill's petition as untimely.

Hill appealed to the 11th Circuit which declined to find extraordinary circumstances and therefore found no equitable tolling. The court explained that Hill's error was simply his negligence and the State had no duty to warn Hill that his state appeal was filed late.

Petitioners claim this circumstance is just like *Rudin* because Rudin argued that the State did not object to her deemed late state petition until the issue reached the Nevada Supreme Court. Petitioners are trying to compare the years of continuances granted by the judge in the presence of and with the acquiescence of the State's attorneys to *Hill*? Petitioner's comparison

leaves out important details such as the fact that it wasn't until August 22, 2007 before the judge and the State's attorney and Rudin's attorney realized no writ had actually been filed. In fact, the only person before that time that tried to file a writ was Margaret Rudin herself when she attempted to file her petition on November 10, 2004 but the filing was denied by Judge Bonaventure.

After that, confusion in the court reigned. Judge Bonaventure left in a huff requiring another judge unfamiliar with the sordid history of this case to step in. And then Rudin's attorney abandoned her, according to the Ninth Circuit panel and to anyone else who values professionalism in the law. And after months of trying to reach Figler who moved and changed his phone numbers and blocked prisoner's calls, Rudin was finally able to get her motion for new counsel granted only to find that Figler took four months to deliver the file to Oram.

So to exploit an unpublished Eleventh Circuit decision denying equitable tolling in a case involving mere negligence with Rudin's case is trying to create a conflict where none exists. And it was the Eleventh Circuit from which the case of *Holland v. Florida* came to this Court's attention. *Holland*, a notorious case of attorney misconduct that nearly rivals the misconduct found in Rudin's case, provided the vehicle for this Court to hold that equitable tolling applies to AEDPA's statute of limitations at 28 USC § 2244(d).

The Court noted in *Holland* that the "exercise of a court's equity powers...must be made on a case-by-case basis." *Id.* at 649-50 (citations omitted). "In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." *Id.* at 650. (internal quotes and citations omitted).

This Court also recognized that courts of equity “exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.” *Id.*

In light of these *Holland* admonitions, it’s a fool’s errand to make the case that the Ninth Circuit has gone rogue on equitable tolling creating splits within the circuits.

As a final example of the alleged split, petitioners cite another unpublished case, this time from the Ninth Circuit, *Szabo v. Ryan*, 571 F. App’x 585 (9th Cir. 2014) hoping to convince the unwary that *Szabo* is evidence of a circuit gone bad. Petitioners point out that some Ninth Circuit cases have held that “a state prisoner’s failure to file a protective federal petition does not demonstrate the diligence required for application of equitable tolling.” *Szabo* at 585. (citations omitted). This is interesting because nothing demonstrates a split more vividly than petitioners arguing on the one hand Margaret Rudin should not benefit from equitable tolling because she was not diligent and didn’t file a protective petition in federal court, but then takes the quote from *Palacios*, as discussed *infra*, where the Fifth Circuit said failure to file the Pace petition is not dispositive but merely a factor in weighing reasonable diligence.

This is hardly the makings of an irreconcilable split worthy of this Court’s attention. And, as the Fifth Circuit itself noted in *Jones*, reasonable jurists can debate whether equitable tolling should apply to a particular case.

- 2. The Petition should be denied because the Ninth Circuit’s equitable tolling analysis stems from a heavily fact-intensive case that is unlikely to ever be repeated and practically be of no importance except to the litigants themselves and petitioners’ questions are at best, simply a plea for correction of a misapplication of a properly stated rule of law.**

Supreme Court Rule 10 says that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated

rule of law. That is the case here. The Ninth Circuit panel deciding *Rudin* applied all of the appropriate standards applicable to AEDPA equitable tolling claims. As the panel documented in its opinion, it followed the guidance of *Holland* and *Pace* and other relevant authority and then exercised its judgment based on a narrow set of facts.

Moreover, as *Holland* instructs, the “flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct particular injustices.” (internal quotes omitted). *Holland* at 650.

So even though the very nature of equity implies that reasonable jurists can debate whether equitable tolling should apply in a messy case like this, regardless of a particular jurist’s conclusion, one must think the facts presented in this case are extraordinary, to say the least.

Petitioners concede the equitable tolling is appropriate up to at least the Nevada Supreme Court’s decision overruled the lower court’s new trial order. So the real dispute is the 254 days from that date until Rudin filed her petition in federal court. But after the Nevada Supreme Court issued its order, Rudin exercised her right under Nevada law to petition the Nevada Supreme Court for an en banc reconsideration. Which sometimes succeeds, as did reconsideration for Rudin in the Ninth Circuit. But unfortunately, the Nevada Supreme Court denied Rudin’s petition for en banc reconsideration and issued remittitur on January 20, 2011.

According to Nevada Rule of Appellate Procedure 41(a)(1), the Nevada Supreme Court’s remittitur shall issue 25 days after the entry of judgment unless a timely filing of a petition for rehearing or en banc reconsideration is filed in which case issuance of the remittitur is stayed until the disposition of the petition. Therefore, Rudin’s case was still open in the Nevada Supreme Court, and her AEDPA time was stayed until remittitur did issue on January 20, 2011.

So until that date, Rudin was exhausting her remedies in State court. And until that date, she was entitled to statutory tolling under § 2244(d)(2) and had no reason to file a protective petition in federal court because she had until September 9, 2011 (232 days) remaining on her AEDPA clock after the Nevada Supreme Court issued remittitur on January 20, 2011.

Finally, the Ninth Circuit panel noted in footnote 18 that the State filed a motion with the Ninth Circuit court to expand the record on appeal to include various state-court documents that were omitted from the district court's record. App. 30-31. In support of its motion to expand the record, the State claimed that "this is not the typical case" and that "Rudin's trial was one of the longest in Nevada history" and that the proceedings below were complex.

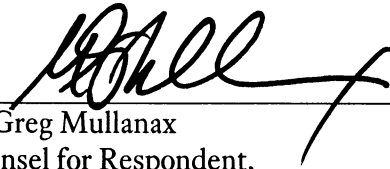
C. Conclusion

For these reasons, this Court should deny Petitioners' petition.

Dated: January 15, 2016

Respectfully submitted,

By:



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