

No. _____

In The
Supreme Court of the United States

_____ Δ _____
JAVIER CHAVEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

_____ Δ _____
**On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Fifth Circuit**

_____ Δ _____
PETITION FOR WRIT OF CERTIORARI

_____ Δ _____
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QUESTION PRESENTED:

1. Should the Fifth Circuit have granted a Certificate of Appealability on equitable tolling when Petitioner's retained lawyer died and no one could find the file to get the Petition for Review filed on time?

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PETITION FOR A WRIT OF CERTIORARI

Attorney Larry Warner, on behalf of Petitioner, Javier Chavez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. (App. F-G)

CITATION OF OPINIONS BELOW

The Fifth Circuit's Decision Conflicts With The Decision Of the Ninth Circuit remanding for an evidentiary hearing when Petitioner's "jailhouse lawyer" died. *Holloway v. Roe*, 31 Fed.Appx. 376 (9th Cir. 2002)

The Decision Below Will Have Inequitable Consequences Throughout The Federal Judicial System.

The Fifth Circuit's Decision misconstrues 28 USC 2254 by failing to characterize the death of one's retained counsel as an "extraordinary circumstance" warranting equitable tolling.

January 12, 2009 Judgment in the District Court of Cameron County Texas 107th Judicial District imposing a life sentence. (App. A)

July 15, 2010 the opinion of the Court of Criminal Appeals of Texas denying the state Application for Post-conviction Writ of Habeas Corpus (App. B).

August 5, 2015 the application for writ of habeas corpus denied without written order or a hearing on the findings of the trial court (App. C)

The August 17, 2017 United States District Court Civil Action No. 1:16-283 Report and recommendation to deny motion for COA (App. D)

January 27, 2018 the order of the United States District Court denying a Certificate of Appealability (App. E).

November 18, 2018, the opinion of the United States Court of Appeals for the Fifth Circuit (App. F)

The December 27, 2018 letter of Notice that The United States Court of Appeals for the Fifth Circuit did not take action on the Petition for Rehearing. (App. G)

JURISDICTION

The judgment of the court of appeals for the Fifth Circuit denying the COA was entered on November 18, 2018, (App. F) and a timely petition for rehearing *en banc* was denied on December 27, 2018 (App. G). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) Courts of appeals; certiorari; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. (June 25, 1948, ch. 646, 62 Stat. 928 ; Pub. L. 100-352, §2(a), (b), June 27, 1988, 102 Stat. 662.).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. § 2254. HABEAS CORPUS: State custody; remedies in Federal court

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to

support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18 .

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

Pertinent provisions of 28 USC 2254, Petitions for Review, essentially applications for habeas corpus by persons in custody pursuant to state court judgments, are set forth at Appendix D to this petition

STATEMENT OF THE CASE

This case involves the meaning of what constitutes an “extraordinary circumstance” warranting equitable tolling for of nationwide group encompassing every Petition for Relief pursuant to 28 USC 2254 and every Motion to Vacate Sentence pursuant to 28 USC 2255 which is filed out of time. The court below denied a certificate of appealability, failing to deem the death of Petitioner’s retained attorney and subsequent lawyers’ inability to find the file in time to get the Petition for Review filed on time as an “extraordinary circumstance” justifying equitable tolling of the statute of limitations set out in AEDPA.

The Fifth Circuit’s ruling effectively deletes the provision for equitable tolling when there is an “extraordinary circumstance” set out in 28 USC 2254. The Fifth Circuit’s decision will affect every Petition for Review (28USC2254) and every Motion to Vacate Sentence (28USC2255) which is filed out of time. If the death of one’s counsel and the loss of the file do not constitute an “extra-ordinary circumstance” justifying equitable tolling, then then the exception to the application of the statute of limitations for those seeking habeas corpus in the federal forum simply does not exist.

The United States Courts of Appeals for the Ninth Circuit remanded to the District Court for an evidentiary hearing on the effect of the death of Petitioner’s “jailhouse lawyer” on the timeliness of his filing. Petitioner here had a retained lawyer. The Supreme Court of the United States should direct the United States Court of Appeals for the Fifth Circuit to remand to the District Court for an evidentiary hearing on the effect of the death of Petitioner’s retained lawyer.

This square conflict between the Ninth and the Fifth Courts of Appeals means that, until this Court

resolves the issue, courts reviewing equitable tolling cannot be sure what criteria to apply in deciding whether an “extraordinary circumstance” exists or not...if the death of one’s counsel does not constitute such an out-of-the-normal occurrence. Under the Fifth Circuit’s rule, there really is no equitable relief for those who seek habeas corpus out-of-time...even if their lawyers die. The Ninth Circuit reached a more equitable remedy...remand to the District Court for an evidentiary hearing on the effect of the death of Petitioner’s retained counsel on Petitioner’s ability to get a Petition for Relief (28 USC 2254) filed on time when Petitioner was in the state penitentiary and his hired attorney was dead.

It is critically important for courts and litigants to know whether the Fifth Circuit’s decision is right or wrong. The Ninth Circuit remanded for an evidentiary hearing when the litigant’s lawyer died. There was no evidentiary hearing in Chavez’ case. The Supreme Court should remand to the Fifth Circuit with instructions to send the matter to the District Court for an evidentiary hearing for an evidentiary hearing on the effect of the death of Petitioner’s retained counsel on Petitioner’s ability to get a Petition for Relief (28 USC 2254) filed on time when Petitioner was in the state penitentiary and his hired attorney was dead.

Confusion is created by the Fifth Circuit regarding what constitutes extraordinary circumstances warranting equitable tolling. The Ninth Circuit says if the litigant’s lawyer died, the Court will remand for an evidentiary hearing to decide if that is an extraordinary circumstance warranting equitable tolling. The Fifth Circuit has simply decided that the death of the litigant’s lawyer does not constitute an extraordinary circumstance warranting application of equitable tolling. The Supreme Court of the United States should grant certiorari and resolve the

controversy and answer the question. It should define the nebulous concept of “extraordinary circumstance” justifying equitable tolling of the statute of limitations set out in the Antiterrorism and Effective Death Penalty Act.

If the Fifth Circuit is wrong but its ruling remains unreviewed, the decision will inequitably apply the statute of limitations. If the Fifth Circuit is right and its approach ultimately prevails nationwide, the equitable principle of tolling will effectively be vitiated. If the party’s lawyer dies and the lawyer’s having died is not an extraordinary circumstance warranting equitable tolling, then there simply is no circumstance which is extraordinary.

This Court should grant review to clarify the governing standard and prevent the enormous waste of both judicial and private resources that is the inevitable real-world result of these conflicting rulings.

Moreover, the issue arises here in a case of substantial importance. Allowing the Fifth Circuit’s decision to stand unreviewed will eviscerate the concept of equitable tolling.

The courts, litigants, and public will be relegated to strict application of the law rather than the law as moderated by equity. This Court should decide whether the Fifth Circuit was correct in concluding that even the death of the litigant’s lawyer did not constitute an extraordinary circumstance warranting equitable tolling...even when subsequent lawyers could not find the client’s file.

Background:

Petitioner was indicted, tried, and convicted for a felony in state court.

He appealed. He lost. His lawyer died.

The subsequent lawyers could not find the client's file in the dead lawyer's office.

He filed an application for a post-conviction writ in state court. TEX.CODE CRIM P.art.11.07

The state writ was denied. Petitioner filed a Petition for Relief.

The United States District Court denied the Petition for Relief.

Petitioner sought a Certificate of Appealability from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the District Court and denied a Certificate of Appealability.

Petitioner timely files this Petition for Certiorari.

A. The Fifth Circuit's decision conflicts with the decision of another Court of Appeals...the Ninth Circuit.

The death of one's lawyer is an extraordinary circumstance warranting equitable tolling.

LAWYER NOT DETERMINING DEADLINE

This Court decided that the AEDPA statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631 (2010). In *Holland*, the state prisoner's attorney did not do "the research necessary to ascertain filing deadline" and did not timely file the petition.

Chavez' lawyer died.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine the effect of Chavez' lawyer's death on timely filing of the Petition for Relief.

INADEQUATE LAW LIBRARY

The court in *Roy v. Lampert*, 465 F.3d 964, 18 A.L.R. Fed. 2d 931 (9th Cir. 2006), cert. denied, 2007

WL 186231 (U.S. 2007), held that the habeas petitioner's allegation that the prison law library "consisted of only three outdated legal books, which contained no information about the [Antiterrorism and Effective Death Penalty Act] AEDPA" entitled him to an evidentiary hearing regarding his claim that the limitations period for filing a habeas petition should be equitably tolled.

Since lack of access to a law library entitled one to equitable tolling, the death of one's lawyer should entitle one to equitable tolling as well, since a lawyer, particularly a retained lawyer, provides a greater resource and access to the courts than simple books.

PRISON'S DELAY IN FURNISHING IN FORMA PAUPERIS CERTIFICATE

Similarly, as noted in *Grant v. Swarthout*, 862 F.3d 914,918(9th Cir.2017)the prison's delay in providing petitioner with a mere in forma pauperis certificate was an extraordinary circumstance justifying equitable tolling of habeas. Petitioner Chavez was not deprived of a form on time by forces out of his control; Chavez' retained lawyer died.

The Supreme Court should direct the Fifth Circuit to remand to the District Court for an evidentiary hearing on the effect of the death of Chavez' lawyer on the late-filing of his Petition for Relief (28 USC 2254).

SOLITARY CONFINEMENT AND LACK OF ACCESS TO COURT FILES

On remand for an evidentiary hearing from the Ninth Circuit, the District Court denied the warden's motion to dismiss when the "Petitioner filed a motion for reconsideration, stating that he could explain the delay between the denial of his state superior court filing and his filing in the state appellate court on account of his placement in administrative

segregation and his consequent lack of access to his court files." *Grecu v. Evans*, No. C-07-0780 EMC.Docket No. 64(N.D. California. April 2, 2013) 2013 WL 1346145*2

Further,

"The Ninth Circuit found that "the district court's dismissal of Mr. *Grecu*'s petition [could] not be squared with *Herbst v. Cook*," id. at 4, which held that "[a] habeas court must give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal," *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir.2001) (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir.1998))." *Grecu v. Evans*, No. C-07-0780 EMC.Docket No.64(N.D. California.April 2, 2013)2013 WL 1346145*3

The Supreme Court should direct the Fifth Circuit to remand to the District Court for an evidentiary hearing on the effect of the death of Chavez' lawyer on the late-filing of his Petition for Relief (28USC 2254), specifically to "give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal". *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir.2001) (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir.1998))

ACCESS TO PRISON LAW LIBRARY IMPEDED BY LOCKDOWNS

A District Court noted that "the Court concludes that the statute of limitations was extended by equitable tolling"(*1) because Petitioner's "access to the prison law library was impacted by a period of full or modified prison lockdowns". *Pre v. Almager*, No. 07-CV-890 W(WMC). (S.D.Cal.Nov. 29, 2007)2007 WL 4219449*2

Chavez has an even better claim for an evidentiary hearing than Pre did. Pre could not get to the library. Chavez could not have gotten help from his retained lawyer because his attorney had died.

The Supreme Court should direct the Fifth Circuit to remand to the District Court to “give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal”. *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir.2001) (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir.1998)).

EQUITABLE TOLLING IS EVEN APPLIED IN CIVIL CASES.

Equitable tolling is even applied in civil cases. *Struck v. PNC Bank N.A.*, 931 F.Supp.2d 842(S.D. Ohio [Eastern Div.]2013) The District Court tolled the three year statute of limitations, holding:

The “majority of putative class were never informed of FLSA lawsuit or employer's potential wage violations, their ignorance of three-year limitations period was reasonable.”

Struck at 845hn1

Even if Chavez knew of any deadline, his attorney's death precluded him from filing the Petition for Relief on time.

The Supreme Court should direct the Fifth Circuit to remand to the District Court to “give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal”. *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir.2001) (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir.1998))

ONCE PETITIONER'S LAWYER DIED, PETITIONER WAS PRO SE

The Second Circuit in *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001), as amended, (June 26, 2001) and as amended, (Aug. 17, 2001), the Second Circuit held that the petitioner's pro se status excused his failure to seek the appropriate form of procedural relief, and therefore he was entitled to equitable tolling of the one-year limitation period under 28 U.S.C.A. § 2244(d)(1).

Once Petitioner's lawyer died, Petitioner was pro se.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

LACK OF NOTICE

In *Gilbert v. Wolfe*, 2004 WL 945146 (E.D. Pa. 2004), report and recommendation adopted, 2004 WL 1126026 (E.D. Pa. 2004) the Court granted equitable tolling to the pro se petitioner because the state supreme court mistakenly sent the order denying the petition to the wrong address.

Chavez was in a worse position than the state prisoner in *Gilbert* because his lawyer died.

The result should be the same as in *Gilbert*, application of equitable tolling.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

ABANDONMENT OF CLIENT BY ATTORNEY

Attorney negligence may constitute an extraordinary circumstance warranting equitable tolling of the Anti-Terrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period when it is so egregious as to amount to an effective abandonment of the attorney-client relationship. 28

U.S.C.A. § 2244(d)(1)(A). *Samo v. Keyser*, 305 F. Supp. 3d 551 (S.D. N.Y. 2018).

Chavez' lawyer did not negligently effectively abandon Chavez. The lawyer just died. The result of the lawyer's death was the same for Chavez as if his lawyer had negligently abandoned Chavez.

The result in Chavez should be the same as in *Samo v. Keyser*, 305 F. Supp. 3d 551 (S.D. N.Y. 2018)...application of equitable tolling.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

ATTORNEY'S OUTRAGEOUS AND INCOMPETENT CONDUCT

Among the 'limited circumstances' that merit equitable tolling of the limitations period for habeas claims under the Antiterrorism and Effective Death Penalty Act (AEDPA) is an attorney's outrageous and incompetent conduct that rises to a truly extraordinary level. 28 U.S.C.A. § 2254(d)(1). *Chrysler v. Guiney*, 14 F. Supp. 3d 418 (S.D. N.Y. 2014).

Chavez' lawyer may as well as have been incompetent...the lawyer was dead. He could not do anything for Chavez and did not do anything for Chavez after the attorney died.

The prejudice to Chavez from the lawyer's death was the same as if his lawyer had been incompetent...no effective action by the lawyer.

The result in Chavez should be the same as in *Chrysler v. Guiney*, 14 F. Supp. 3d 418 (S.D. N.Y. 2014)...application of equitable tolling.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

ATTORNEY'S FAILURE TO COMMUNICATE AND FAILURE TO CONDUCT RESEARCH

The Seventh Circuit noted that under certain circumstances, attorney misconduct constitutes an extraordinary circumstance warranting equitable tolling of the limitations period for a state prisoner's filing of a federal habeas petition, such as when the attorney violates fundamental canons of professional responsibility by failing to communicate with the prisoner and failing to perform necessary research. 28 U.S.C.A. § 2244(d)(1)(A), (d)(2). *Obriecht v. Foster*, 727 F.3d 744 (7th Cir. 2013), cert. denied, 134 S. Ct. 802, 187 L. Ed. 2d 607 (2013).

Chavez' lawyer could neither communicate with Chavez nor perform research because Chavez' lawyer simply died.

The prejudice to Chavez from his lawyer's death was the same as if his lawyer had lived but failed to communicate with Chavez and failed to do necessary research.

The result for Chavez should be the same as in *Obriecht v. Foster*, 727 F.3d 744 (7th Cir. 2013), cert. denied, 134 S. Ct. 802, 187 L. Ed. 2d 607 (2013)...application of equitable tolling.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

EFFECTIVE ABANDONMENT OF CLIENT BY ATTORNEY

Professional misconduct by an attorney may constitute an extraordinary circumstance warranting equitable tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period if the misconduct is not a garden variety claim of excusable neglect, but rather is such that it is

egregious behavior equivalent to abandonment. 28 U.S.C.A. § 2244(d)(2). *Ramey v. Davis*, 314 F. Supp. 3d 785 (S.D. Tex. 2018).

Chavez' lawyer died. He had no lawyer. The result of his retained lawyer's death is the same as if the lawyer had effectively abandoned Chavez.

The result in Chavez should be the same as in *Ramey v. Davis*, 314 F. Supp. 3d 785 (S.D. Tex. 2018)...a determination that Chavez' lawyer's death is an extraordinary circumstance warranting equitable tolling.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

The Supreme Court should give the same relief as in *Holland* at 654, 130 S.Ct. at 2565:

"[W]e leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent [the State] should prevail." *Holland* at 654, 130 S.Ct. at 2565

REASON FOR GRANTING THE PETITION

EFFECT OF ATTORNEY'S "WALKING AWAY FROM THE RELATIONSHIP"

For attorney's misconduct to amount to an extraordinary circumstance that would justify equitable tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year statute of limitations, there must be an absolute renunciation or withdrawal, or a complete rejection or desertion of one's responsibilities, a walking away from a relationship. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. §

2244(d). *Sallie v. Chatman*, 34 F. Supp. 3d 1272 (M.D. Ga. 2014).

Chavez' lawyer did not walk away from the relationship...he just died.

The District Court in *Sallie v. Chatman*, 34 F. Supp. 3d 1272 (M.D. Ga. 2014) quoted the Supreme Court of the United States' decision in *Holland*. For there to be an

"extraordinary circumstance, there must be an 'absolute renunciation or withdrawal, or a complete rejection or desertion of one's responsibilities, a walking away from a relationship.' Id. at 484 (citing Black's Law Dictionary 2 (6th ed.1990))". *Sallie v. Chatman*, 34 F. Supp. 3d 1272, 1286 hn19(M.D. Ga. 2014)

The prejudice to Chavez from his lawyer's death was the same as if his lawyer had intentionally engaged in walking away from [the] relationship'...no lawyer.

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

CONCLUSION AND REQUEST FOR RELIEF

The Supreme Court should effect remand to the District Court for an evidentiary hearing to determine any nexus between Petitioner's lawyer's death and untimely filing.

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Respectfully submitted,
February 10, 2019

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