

No. 18-8604

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In The  
Supreme Court of the  
United States

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IVAN VAZQUEZ-GONZALEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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REPLY TO RESPONSE IN OPPOSITION

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## **QUESTION PRESENTED**

- I. May a district court's modification of sentence under Rule 35, Fed. R. Crim. P., be treated as resetting the one-year clock under 28 U.S.C. §2255(f)(1) so that a timely claim of the denial of the right to counsel which was associated with the Rule 35 and subsequent appellate decisions may be addressed on the merits?**

## **PARTIES TO THE PROCEEDINGS**

Petitioner, Ivan Vazquez-Gonzalez was the Defendant- Movant in the United States District Court for the Southern District of Illinois, East. St. Louis Division in USDC Case 3:14-cv-1267, and Appellant in the United States Court of Appeals for the Seventh Circuit in USCA Case No. 18-1762

Respondent, United States of America was the named Plaintiff - Respondent in the United States District Court for the Southern District of Illinois, East. St. Louis Division in USDC Case 3:14-cv-1267, and Appellant in the United States Court of Appeals for the Seventh Circuit in USCA Case No. 18-1762. No other relevant parties are represented in the instant action.

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## **REPLY IN SUPPORT OF PETITION**

Vazquez's issue turns on whether or not an amended judgment brought about via a Rule 35, Fed. R. Crim. P. Motion filed by the government resets the one-year clock under 28 U.S.C. §2255(f)(1)? He submits in the alternative, that equitable tolling should be have been applied by the district court.

As the Government would have it, not only should Vazquez forfeit his collateral attack rights for assisting the government and being rewarded via a Rule 35, Fed. R. Crim. P. Motion, but he should also be time barred to prevent a merits determination of his ineffective assistance of counsel claims associated with that process.

### **[1]. Excusable Neglect for Out of Time Motion to Vacate**

The government submits that Vazquez's

Motion to Vacate is time barred. Vazquez submits that at a minim, he is entitled to equitable tolling due to circumstances beyond

his control and because his attorney failed him as detailed in his complaint to the Kentucky Bar. (See, USDC Docket sheet attachments).

A petitioner “is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland*, 560 U.S. at 649, 130 S.Ct. 2549 (internal quotation marks omitted). It is clearly Vazquez’s burden to establish both of these points. See \*684 *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir.2008). Indeed, the realm of equitable tolling is a “highly fact-dependent area” in

which courts are expected to employ “flexible standards on a case-by-case basis.” *Socha I*, 621 F.3d at 672 (citing *Holland*, 560 U.S. at 650–52, 130 S.Ct. 2549). That said, tolling is rare; it is “reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing.” *Nolan v. United States*, 358 F.3d 480, 484 (7th Cir.2004) (internal quotation marks and alterations omitted).

The Seventh Circuit recently noted in *Socha v. Boughton*, 763 F.3d 674, 683-84 (7<sup>th</sup> Cir. 2014) “[w]e are not free, however, to regard equitable tolling as something that

exists in name only; this would render the Supreme Court's explicit approval of equitable tolling in *Holland* a nullity." See also *McQuiggin v. Perkins*, — U.S. —, 133 S.Ct. 1924, 1931 (2013). "We have properly enforced the high bar that the Court has erected in this area, but by the same token we have not set that bar so high as to make equitable tolling impossible. To the contrary, we recognize that its availability depends on the facts. For example, in *Davis v. Humphreys*, we held that mental incompetence could support equitable tolling of the section 2244(d) limitations period, and we

remanded to the district court for a more nuanced evaluation of the petitioner's mental capabilities. 747 F.3d 497, 498–99 (7th Cir.2014). In *Weddington v. Zatecky*, we stated that the intentional confiscation of a prisoner's habeas corpus petition and related legal papers by prison officials is extraordinary as a matter of law. 721 F.3d 456, 464–65 (7th Cir.2013) (quoting *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir.2000)). We remanded in *Weddington* for further factual findings. Cf. *Carter v. Hodge*, 726 F.3d 917, 919 (7th Cir.2013) (ordering equitable tolling of time under Fed. R. App. P. 4 for taking a criminal

appeal where court erroneously told prisoner that final judgment had not yet been entered against him)."

Vazquez avers that because "extraordinary circumstance stood in his way and prevented timely filing" as addressed in his complaint to the Kentucky Bar, he should be permitted equitable tolling for the AEDPA time limitation for his Motion to Vacate.

**B. Conclusion**

Last, in the Seventh Circuit "ineffective assistance of counsel is a single ground for relief no matter how many failings, a lawyer may have displayed" (*Peoples v. United States*,

403 F.3d 844, 848 (7<sup>th</sup> Cir. 2005)), should Vazquez prevail on his claims or allegations, the Court of Appeals would be faced with determining an appropriate remedy which by necessity should include an evidentiary hearing at the district court.

The Sixth Amendment provides that defendants in criminal trials have a right to counsel. As the Amendment “envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results[,] ... the right to counsel is the right to the effective assistance of counsel.”

*Strickland v. Washington*, 466 U.S. 668, 685-

86 (1984)(internal citation and quotation marks omitted). Based on the foregoing Reply as well as the claims advanced in his Motion to Vacate, Vazquez submits the Court should Grant his Petition or alternatively GVR the matter.

Dated: June 11, 2019

Respectfully submitted,

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