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No. \_\_\_\_\_

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**IN THE SUPREME COURT  
OF THE UNITED STATES**

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**MARC NIELSEN,**

**Petitioner,**

**v.**

**JEFF PREMO, Superintendent,  
Oregon State Penitentiary,**

**Respondent.**

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether petitioner's request for equitable tolling of the statute of limitations period set out in 28 U.S.C. § 2244(d) based on evidence of his post-conviction attorneys' violation of the standards of professional conduct meets the statutory requirement for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2) so as to warrant remand to the United States Court of Appeals for the Ninth Circuit with instructions to issue a certificate of appealability.

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**The United States Court Of Appeals**  
**For The Ninth Circuit**

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The petitioner, Marc Nielsen, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 28, 2019.

## **OPINIONS BELOW**

The United States District Court for the District of Oregon denied Petitioner's petition for writ of habeas corpus on October 9, 2019, finding the petition untimely and refusing to equitably toll the statute of limitations. The court declined to issue a certificate of appealability. Appendix B. Petitioner filed a timely notice of appeal seeking a certificate of appealability. CR 1. On January 28, 2019, the United States Court of Appeals for the Ninth Circuit issued an order of two Circuit Judges denying a certificate of appealability. Appendix A.

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

28 U.S.C. § 2244(d) provides that: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .

(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

## **STATEMENT OF THE CASE**

### **A. Petitioner's Guilty Plea Was Not Knowing, Intelligent, And Voluntary.**

Petitioner was charged with numerous counts relating to a domestic violence incident involving his wife. Despite that his attorney was unprepared on the eve of trial, and conflicted as a result of a prior relationship to the alleged victim, the trial court refused to postpone trial to allow Petitioner to hire his counsel of choice. Moreover, the prosecutor raised concerns about the appearance of impropriety because the judge had been exposed to extra-judicial information about the victim's injuries. In response, rather than recusing himself, the judge refused Petitioner's request for bench trial, depriving Petitioner of his state constitutional right to waive jury trial. As a result, on the day of trial, counsel pressured Petitioner to plead guilty to four counts of the ten count indictment. Under the plea, Petitioner could not ask for fewer than twenty years in prison while the State's sentencing recommendation was not capped. The judge sentenced Petitioner to even more than the State requested: thirty-three years in prison.

In his federal habeas corpus proceeding, Petitioner challenged his guilty plea as not knowing, intelligent, and voluntary based on the following. Counsel failed to seek an impartial jurist to preside over the bench trial or to prepare a defense. Instead, counsel pressured Petitioner into accepting a plea based upon incomplete and incorrect advice. First, counsel failed to advise Petitioner that pleading to the



counts as alleged in the indictment would automatically allow the court to run each of the four sentences consecutively—something that might not be permitted after trial. Second, counsel advised Petitioner if he plead guilty he would still be able to appeal the pretrial ruling on counsel of choice, when, in fact, the guilty plea would extinguish that appellate right under Oregon law. But for counsel's lack of preparedness, conflict, and ineffective advice, Petitioner would not have pled guilty; he would have gone to trial.

**B. The District Court Denied Equitable Tolling And A Certificate Of Appealability.**

Petitioner's federal petition was filed thirty-four days beyond the short one-year AEDPA deadline. Accordingly, Petitioner sought equitable tolling based on the fact that his retained attorney used up 350 days of the one-year limitations period to file a bare-bones counseled post-conviction petition that statutorily tolled the limitations clock. During this period, counsel barely communicated with Petitioner, except to assure him that his attorneys were "working on the case," implying that the attorney and his associates could be relied upon to protect Petitioner's rights. Given the large retainer, and these assurances, it was entirely reasonable for Petitioner to rely on his attorney to protect his rights. Despite that counsel's use of the clock left Petitioner, a layman with no relevant experience, only fifteen days to figure out how to draft and file a federal habeas corpus petition on his own, counsel

neither calculated a due date for Petitioner, nor made clear to Petitioner that he would need to file his federal petition immediately after the post-conviction proceedings ended. Petitioner argued that the statute of limitations should be equitably tolled because his attorneys' conduct violated the relevant professional standards and he acted with reasonable diligence.

On October 9, 2018, the District Court for the District of Oregon denied Petitioner's petition for writ of habeas corpus, finding the petition untimely and refusing to equitably toll the statute of limitations. Appendix B. On October 10, 2018, Petitioner timely filed a Notice of Appeal. CR 1.

**C. The Ninth Circuit Denied A Certificate Of Appealability.**

On January 28, 2019, the United States Court of Appeals for the Ninth Circuit issued an order of two Circuit Judges denying a certificate of appealability because the appellant "has not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Appendix A.

**REASONS FOR GRANTING THE WRIT**

This Court should grant the writ of certiorari. At a minimum, this Court should order summary reversal because the Ninth Circuit was clearly wrong in finding that Petitioner did not meet the standard for a certificate of appealability.

## **A. The Certificate Of Appealability Standard**

To obtain a certificate of appealability, a habeas petitioner must make a “substantial showing of the denial of constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he “must ‘[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

“[A] COA does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue (and an appeal of the district court’s order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Reasonable jurists could debate the merits of Petitioner's Sixth Amendment claim that his guilty plea was not knowing, intelligent and voluntary because it was based on incomplete and incorrect advice of counsel. Further, reasonable jurists could debate whether equitable tolling should have excused the late filing of Petitioner's petition where, but for his attorneys' unprofessional conduct, Petitioner would have timely filed. The legal argument, set forth below, demonstrates that Petitioner has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are "debatable among jurists of reason." *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

**B. Reasonable Jurists Could Debate Or, For That Matter, Agree That Relief Is Appropriate On Petitioner's Sixth Amendment Claim.**

Petitioner's Sixth Amendment claim meets the standard for a certificate of appealability. Counsel provides ineffective assistance when he misadvises his client about the collateral consequences of his plea of guilty and prejudice is demonstrated if there is a reasonable probability that the client would have rejected the plea had he been correctly advised. *Lee v. United States*, 137 S. Ct. 1958, 1964-65 (2017); *Hill v. Lockhart*, 474 U.S. 52 (1985). Petitioner's counsel misadvised him that, should he plead guilty, he would be able to appeal the court's adverse pretrial ruling. This incorrect advice was based on counsel's failure in his basic obligation to

research the relevant law. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”). But for this bad advice, there is a reasonable probability that Petitioner would have taken his case to trial. This Sixth Amendment claim satisfies the standard for issuance of a certificate of appealability because reasonable jurists could debate its merits, and it deserves encouragement to proceed further.

**C. Equitable Tolling Based On Attorney Mistakes That Violate The Standards Of Professional Conduct Is Appropriate.**

In *Holland v. Florida*, 560 U.S. 631 (2010), this Court held that the 2244(d) limitation period is subject to equitable tolling. This Court explained that equitable tolling decisions are made on a “case-by-case” basis, and that while “courts of equity can and do draw upon decisions made in other similar cases for guidance,” they do so “with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.” *Id.* at 650 (internal citations omitted).

A petitioner seeking equitable tolling must demonstrate: “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* at 649 (citing *Pace v. DeGuglielmo*, 544

U.S. 408, 418 (2005)). Abandonment by counsel may be an “extraordinary circumstance beyond [a client’s] control” necessary to lift a procedural bar to a federal habeas corpus petition. *Maples v. Thomas*, 565 U.S. 266, 283 (2012). “[A]n attorney’s unprofessional misconduct,” even short of outright abandonment, may justify equitable tolling. *Holland*, 560 U.S. at 649. *Holland* explicitly rejected the Eleventh Circuit’s standard, which required something more than “negligence” or “gross negligence” such as “bad faith” or “dishonesty” or “divided loyalty,” and stated:

In this case, the ‘extraordinary circumstances’ at issue involve an attorney’s failure to satisfy professional standards of care.

*Id.* at 634, 644, 649. The ruling in *Holland* was guided by canons of professional responsibility. *Id.* at 652-53.

**D. Reasonable Jurists Could Debate Whether To Equitably Toll The Limitations Period.**

Tolling of the statute of limitations and excusing Petitioner’s delay in filing on equitable grounds in this case is fully supported by the record and Supreme Court authority. Delay, nonfeasance, and failures to communicate on the part of Petitioner’s retained post-conviction attorney used up nearly all of the limitations period. Record evidence shows that Oregon post-conviction attorneys have received training on the AEDPA statute of limitations and that it is the standard of care to safeguard a client’s rights to seek subsequent habeas corpus relief. Yet, Petitioner’s

post-conviction attorneys failed to communicate to Petitioner the habeas deadline or how little time remained on the statute of limitations. Counsel left Petitioner insufficient information and time to prepare his *pro se* petition, particularly in light of the limitations placed on him by his prison confinement. Counsel failed to satisfy professional standards of care, including his obligation to communicate with his client and to handle the legal matter with diligence, which, among other things, requires attorneys to leave their clients in good stead vis a vis limitations deadlines. *E.g.*, Or. R. Prof. Conduct 1.3; Or. R. Prof. Conduct 1.4. Putting a client in an untenable position in relation to a limitations deadline is sanctionable professional misconduct in Oregon. *E.g.*, *In re Scott M. Snyder*, 348 Or. 307 (2010) (attorney suspension upheld even though attorney did not miss limitations period, because his failure to communicate prevented client from taking other measures to pursue his claim and, together with the failure to return the file to the client, left the client in the difficult position of trying to find new counsel only a *few months* before the statute of limitations expired).<sup>1</sup>

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<sup>1</sup> See also *In re William S. LaBahn*, 355 Or. 357 (2003) (attorney suspension upheld for, among other things, failing to file proof of service within the statute of limitations); *In re Patrick A. Butler*, 324 Or. 69 (1996) (attorney suspension upheld for failing to avoid dismissal of client's case on limitations grounds, failing to keep client fully apprised of status of case, and misleading client that he was working on the case); *In re Kenneth A. Morrow*, 297 Or. 808 (1984) (attorney suspension upheld for neglect of a legal matter resulting in client's claim being untimely).

Petitioner reasonably relied on his attorneys to protect his rights, took action when they directed to, and acted with the haste and urgency called for by their communications. Petitioner contacted his prior attorney for case-related information and the Federal Public Defender office for forms needed to make his *pro se* filing soon after learning his post-conviction appeal had been denied. He filed his federal petition very soon thereafter, missing the deadline by just over a month. As such, he acted with the diligence reasonably expected of a person in his situation. Federal courts should hold post-conviction attorneys accountable for communicating clearly with their clients and protecting their clients' rights to subsequent review. Accordingly, reasonable jurists could agree, but, at least debate, whether equitable tolling is warranted.

**E. This Court Should Summarily Reverse The Ninth Circuit's Order.**

This Court has authority to “reverse any judgment” brought before it and “remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. Summary reversals are “usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering



summary reversal because the decision below was “contrary to” established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was “plainly wrong”). The Ninth Circuit’s order denying Petitioner’s request for a certificate of appealability is clearly wrong. Petitioner clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

Because the circumstances supporting Petitioner’s request for equitable tolling are fact-dependent, Petitioner also sought an evidentiary hearing at which to further develop the facts that support his claim. At a minimum, therefore, the Ninth Circuit should have decided whether an evidentiary hearing was necessary to the resolution of this case. *See Smith v. Wainwright*, 737 F.3d 1036, 1037 (11th Cir. 1984) (certificate of probable cause granted, in part, because “the district court refused to hold an evidentiary hearing to develop the true factual setting in which [the] claim must be judged.”).

## **CONCLUSION**

For the foregoing reasons, a writ of certiorari should be granted, and, at a minimum, the case should be summarily remanded to the Ninth Circuit with instructions that it grant a certificate of appealability.

DATED this 23rd day of April, 2019.



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Nell Brown, Assistant Federal Public Defender  
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