Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ANDREW WRIGHT,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

1. Does equitable tolling automatically apply under 28 U.S.C. § 2255(f)(4) where a defendant relies, to his detriment, on an oral order of a United States district court judge, directing outgoing retained counsel to file a notice of appeal, in Petitioner's presence, and then fails to do so?

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OPINION BELOW

There was one decision below, which is attached to this petition. *See United States v. Wright*, No. 17-2715-cr, 2019 U.S. App. LEXIS 37682 (2d Cir. Dec. 19, 2019).

JURISDICTION

The order of the Court of Appeals was decided on December 19, 2019, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(f)(4).

STATEMENT OF THE CASE

The United States District Court for the Western District of New York (Siragusa, J.) sentenced Petitioner to 240 months' imprisonment for two counts of Assault on a Law Enforcement officer, in violation of 18 U.S.C. § 111(a)(1), (b). Petitioner appealed.

The Second Circuit Court of Appeals dismissed Petitioner's appeal as untimely, and remanded to the District Court with instructions to convert Wright's notice of appeal into a petition for habeas corpus, and to assess whether that be timely under the equitable tolling provisions of 28 U.S.C. § 2255(f)(4).

STATEMENT OF FACTS

At the end of trial, Petitioner told Judge Charles J. Siragusa that he could no longer afford retained counsel on appeal. In response, the Judge informed him that the Second Circuit Court of Appeals would appoint new counsel on appeal. In the meantime, Judge Siragusa told defense counsel: "What I would ask you to do, Mr. Roberts [defense counsel], before you are relieved, file a Notice of Appeal." Counsel agreed. Judge Siracusa then addressed the defendant personally, and reassured him that "[h]e'll file the Notice of Appeal."

On May 6, 2014, defense counsel filed a Notice of Appeal from the judgment of conviction and sentence entered under docket number 10-cr6128, but failed to include the instant case, under docket number 10-cr-6166, within 14 days of the entry of judgment, as directed by the District Court. *See* Fed. R. App. Pro. 4(b)(1)(A)(I). Nor did he file a motion to extend the time to file the Notice of Appeal within 30 days thereafter, as required by Fed. R. App. Pro. 4(b)(4).

On August 25, 2017, Wright filed a *pro se* notice of appeal with the Second Circuit Court of Appeals. The Court declined to reach the merits of the appeal, and, instead, remanded the case to the District Court

with instructions to convert the untimely notice of appeal into a habeas petition, and to consider whether his petition was timely under § 2255(f)(4), either with or without application of equitable tolling.

SUMMARY OF ARGUMENT

Where, as here, Petitioner told the Court at sentence that he wanted to appeal, and the District Court ordered defense counsel to file a notice of appeal, Petitioner's *pro se* notice of appeal could not fairly, reasonably or equitably be deemed untimely.

A defendant has the right to rely on a Court's promise that a notice of appeal will be filed. That is a self-executing judicial order. A defendant need not ensure that a Court does its job or fulfills its promise. Nor must he establish due diligence, because no diligence is due when a court issues an oral order.

Petitioner was forced to file his own notice of appeal because the system failed him. For defendants who occupy his unenviable position, rules of equity regarding untimely notices of appeal should be used as a shield, not a sword.

Certiorari should thus be granted to find that equitable tolling occurs under 28 U.S.C. § 2255(f)(4) as soon as a United Stated district court issues an oral order at sentence directing defense counsel, in Petitioner's presence, to file a notice of appeal.

ARGUMENT

POINT I

WHERE A DEFENSE ATTORNEY PROMISES TO FILE A NOTICE OF APPEAL, AND A UNITED STATES DISTRICT COURT JUDGE REASSURES A DEFENDANT THAT DEFENSE COUNSEL WILL FILE IT ON HIS BEHALF, BUT NEVER DOES SO, A REMAND TO THE DISTRICT COURT TO RESOLVE QUESTIONS OF FACT RELATING TO EQUITABLE TOLLING IS UNJUSTIFIED, BECAUSE THE TOLLING OCCURRED THE MOMENT THE DISTRICT COURT GUARANTEED PETITIONER THE NOTICE WOULD BE FILED.

Following his conviction, Petitioner did not just ask defense counsel to file a notice of appeal. On the contrary, he told Judge Siragusa that he could no longer afford retained counsel on appeal, but still wanted to appeal. After telling Petitioner that the Second Circuit Court of Appeals court would appoint new counsel on appeal, Judge Siragusa asked defense counsel to file a notice of appeal, and he agreed. He then allayed Petitioner's concerns, by representing to him that defense counsel would, in fact, "file the Notice of Appeal." But he never did.

As a result, defense counsel rendered ineffective assistance of counsel. *See Garza v. Idaho*, 139 S. Ct. 738, 747, 203 L. Ed. 2d 77 (2019)("So long as a defendant can show that 'counsel's constitutionally

deficient performance deprive[d him] of an appeal that he otherwise would have taken,' courts are to 'presum[e] prejudice with no further showing from the defendant of the merits of his underlying claims.'" (*quoting Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Instead of remanding to the District Court for entry of a new judgment, from which Petitioner could take a timely direct appeal, the Second Circuit ruled that, had he filed a 28 U.S.C. § 2255 petition on August 25, 2017, the date of his notice of appeal would not have been timely. As such, it found that a remand, with no further analysis of Petitioner's actions during the three years between his sentencing and attempt to appeal, would circumvent and upend Congress's provisions limiting untimely post-conviction petitions pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). The Court thus remanded Petitioner's case to the District Court with instructions to convert his untimely notice of appeal into a habeas petition and for consideration of whether his petition was timely under § 2255(f)(4), either with or without

application of equitable tolling. *United States v. Wright*, No. 17-2715-cr, 2019 U.S. App. LEXIS 37682, at *2-4 (2d Cir. Dec. 19, 2019).

The Second Circuit is incorrect. No remand was necessary to elucidate the factual basis for a possible finding of equitable tolling. On the highly unusual facts of this case, where a district court reassured a concerned defendant at sentence, on the record, in his presence, that defense counsel would, in fact, file the notice of appeal, equitable tolling occurred automatically.

Clearly, the AEDPA imposes a one-year statute of limitations on motions to set aside sentences imposed "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a), (f). This one year runs from the last of a number of "triggering events," *Rivas v. Fischer*, 687 F.3d 514, 533 (2d Cir. 2012). Here, that means "(1) the date on which the judgment of conviction [became] final," and "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(1), (4). When no notice of appeal is filed in a defendant's case, as here, the Federal Rules of Appellate Procedure provide that the conviction becomes final fourteen days after judgment is entered. *See* FRAP 4(b)(1)(A)(I). Pursuant

to 28 U.S.C. § 2255(f)(1), the statute of limitations to file a habeas petition runs one year from that day. Here, all of those days passed without any filings.

In cases in which an attorney fails to file a requested notice of appeal, the Second Circuit Court of Appeals allows "the date on which the facts supporting [the defendant's claim of ineffective assistance] could have been discovered," *see* 28 U.S.C. § 2255(f)(4), may very well be later than the day the judgment became final. The deadlines created by 28 U.S.C. § 2255(f) are not jurisdictional. AEDPA's statute of limitations "does not set forth an inflexible rule requiring dismissal whenever its clock has run." *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). This is because, although "AEDPA seeks to eliminate delays in the federal habeas review process," it does not do so at the expense of "basic habeas corpus principles," or prior law that a "petition's timeliness [has] always [been] determined under equitable principles." *Holland*, 560 U.S. at 648. Hence, even after the AEDPA, a Petitioner is entitled to equitable tolling of the one-year statute of limitations, provided 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." *Id*. at 649 (internal quotation marks omitted). To warrant equitable tolling, " ... the circumstances of a case must be extraordinary." *Id*. at 652 (internal quotation marks omitted).

Here, they were. Defense counsel abandoned the Petitioner when he told the Court he would file the notice of appeal and then never did. *See Rivas v. Fischer*, 687 F.3d 514, 538 (2d Cir. 2012)(extraordinary circumstances may be found where "attorney negligence ... [is] so egregious as to amount to an effective abandonment of the attorney-client relationship."). *Cf. Holland*, 560 U.S. at 652 (finding extraordinary circumstances when attorney "failed to file [defendant's] federal petition on time despite [his] many letters that repeatedly emphasized the importance of his doing so" and "failed to communicate with his client over a period of years, despite various pleas from [defendant] that [the lawyer] respond to his letters"); *Maples v. Thomas*, 565 U.S. 266, 281, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012) (concluding, in context of state procedural default, that extraordinary circumstances existed as "[a] markedly different situation is presented ...when an attorney abandons his client without notice, and thereby occasions the default").

Petitioner can also show he pursued his rights diligently. Indeed, he did not simply request that defense counsel file a notice of appeal. Rather, he told the District Court, at sentence, that, while he did not have any remaining funds to retain appellate counsel, he still wanted to appeal.

After that, an extraordinary circumstance stood in his way and prevented timely filing, namely, the Court itself. When Petitioner said he intended to appeal, despite being indigent, the Court told him the Second Circuit Court of Appeals would appoint new counsel on appeal. In the meantime, Judge Siragusa told defense counsel: "What I would ask you to do, Mr. Roberts [defense counsel], before you are relieved, file a Notice of Appeal." He then addressed the defendant, reassuring him that "[h]e'll file the Notice of Appeal." This was an order of the Court. It was self-executing. The Petitioner had the right to rely, to his detriment, on a representation and promise by the Court.

Even when extraordinary circumstances exist, as here, Petitioner must demonstrate diligence to qualify for equitable tolling. This Court has ruled that the only diligence required for the application of equitable

tolling is "reasonable diligence," not "maximum feasible diligence." *Holland*, 560 U.S. at 653. Here, Petitioner exercised more than reasonable diligence regarding his appeal. He told the District Court he wanted to appeal; he asked for the appointment of counsel; he was told the Circuit Court would appoint appellate counsel; and, in his presence, the Court ordered outgoing retained counsel to file the notice of appeal. Then, in reliance on the promise of both counsel and the court, Petitioner waited, on the ground that an oral order of the Court is self-executing. Against this backdrop, to now require Petitioner to demonstrate diligence to qualify for equitable tolling, under these highly unusual facts, would require a him to first question the promise of a lawyer and then the representation by a Court.

This is a case of first impression. No federal case has ever been decided in which an attorney defies an order of a United States District Court to file a notice of appeal, and how that relates to the interplay of equitable tolling on the one hand, and a defendant's detrimental reliance on the other. Yet this Court has addressed unique cases such as this when it ruled:

> We have said that courts of equity must be governed by rules and precedents no less than the courts of law. But we have also made clear that often the exercise of a court's equity powers must be made on a case-by-case basis. 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, 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. Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts 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. *Holland*, 560 U.S. at 649-50 (citations and internal quotation and grammatical marks omitted).

This is a case that was hard to predict in advance, because it is rare for a defendant to ask a court at sentence to appoint appellate counsel, and even rarer for a district court judge to direct outgoing retained counsel to file a notice of appeal. Certiorari should be granted to find that nothing in the constellation of judicial actions is more binding than a United States district court judge telling a defendant an act will be undertaken. A defendant should be able to unconditionally rely on a court's promise,

without exercising due diligence to ensure that the Court has done what it said it would.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: January 10, 2020
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

ANDREW WRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on January 10, 2020, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney, Western District of New York, 138 Delaware Avenue, Buffalo, NY 14202, on the Office of the Solicitor General, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-2203and on Andrew Wright, 19501-055, Atwater United States Penitentiary, P.O. Box 019001, Atwater, CA 95301.

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