Petition Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY BERNARD SMITH, JR., *Petitioner-Appellant*, v. RON DAVIS, *Respondent-Appellee.*	No. 17-15874 D.C. No. 2:15-cv-01785-JAM-AC OPINION

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted En Banc September 24, 2019
San Francisco, California

Filed March 20, 2020

Before: Sidney R. Thomas, Chief Judge, and Ronald M. Gould, Marsha S. Berzon, Johnnie B. Rawlinson, Carlos T. Bea, Sandra S. Ikuta, Mary H. Murguia, Paul J. Watford, Andrew D. Hurwitz, Mark J. Bennett and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Bea;
Dissent by Judge Berzon

SUMMARY*

Habeas Corpus

The en banc court affirmed the district court's denial of California state prisoner Anthony Smith's habeas corpus petition as untimely, in a case in which Smith argued that he was entitled to extend the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1) by equitable tolling for the 66 days between the date his conviction became final in the state appellate court and the date when his attorney informed him of that unsuccessful appeal and provided him with the state appellate record.

The en banc court affirmed because Smith failed to exercise reasonable diligence during the 10 months available after he received his record from his attorney and before the time allowed by the statute of limitations expired.

In view of the historic practice of courts of equity and modern Supreme Court precedent governing equitable tolling, the en banc court made two related holdings.

First, for a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court. In so holding, the en banc court rejected the "stop-clock" approach under

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

which whenever a petitioner is impeded from filing his petition by extraordinary circumstances while the time period of a statute of limitations is running out, he may add the time during which he was so impeded to extend the limitations period, regardless whether he was reasonably diligent in filing his petition after the impediment was removed.

Second, it is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy. In evaluating whether an extraordinary circumstance stood in a petitioner's way and prevented timely filing, a court is not bound by mechanical rules and must decide the issue based on all the circumstances of the case before it.

Applying this framework to Smith's petition, the en banc court accepted Smith's allegations as true and assumed that his attorney's failure to contact him for five months after his state appeal was denied was sufficiently egregious so that it could qualify as an "extraordinary circumstance" that created an impediment to filing under the second required element for equitable tolling. The en banc court nevertheless concluded that Smith did not exercise the necessary diligence to satisfy the first element because when given the opportunity to explain how he had used his time diligently after receiving his file from his attorney, Smith made no allegation or claim in his opposition to the motion to dismiss or his supporting declaration that he had acted diligently but had not been able to file earlier.

Dissenting, Judge Berzon, joined by Chief Judge Thomas and Judges Murguia, Watford, and Hurwitz, wrote that the central problem with the majority's approach

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concerns its substitution of its own determination of the time needed to file for Congress's clear prescription that petitioners are to be given 365 days to draft and file a federal habeas petition.

COUNSEL

David M. Porter (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Federal Defenders of the Eastern District of California, Sacramento, California; for Petitioner-Appellant.

Justain P. Riley (argued), Deputy Attorney General; Tami Krenzin, Supervising Deputy Attorney General; Michael P. Farrell, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, Sacramento, California; for Respondent-Appellee.

OPINION

BEA, Circuit Judge:

Anthony Smith is imprisoned in the custody of the California Department of Corrections and Rehabilitation having been convicted of burglary, robbery, and forcible oral copulation. He appeals the district court's denial of his petition for the writ of habeas corpus. The denial was ordered solely because Smith's petition was not timely filed. Smith acknowledges he filed his petition more than two months after the expiration of the applicable statute of limitations, *see* 28 U.S.C. § 2244(d)(1), but argues he was entitled to extend the limitations period by equitable tolling for the 66 days between the date his conviction became final in the state appellate court and the date when his attorney informed him of that unsuccessful appeal and provided him the state appellate court record. The district court found Smith was not diligent in his use of the 10 months remaining in the limitations period after he received the case file from his attorney and that the delay in receiving his record had not been the cause of his untimely filing. The district court refused to apply equitable tolling to toll the statute of limitations.

Smith asks us to reverse the district court and to extend the period of the statute of limitations by those 66 days. He asks us to adopt a flat rule: a "stop-clock" approach to equitable tolling so that whenever a petitioner is impeded from filing his petition by extraordinary circumstances while the time period of a statute of limitations is running out, he may simply add the time during which he was so impeded to extend the period of the statute of limitations, regardless whether he was reasonably diligent in filing his petition after the impediment was removed. What Smith requests is an application of equitable tolling that is contrary to Supreme

Court precedent and also contrary to traditional principles of equity, in which "each case as it arises must be determined by its own particular circumstances." *McQuiddy v. Ware*, 87 U.S. (20 Wall.) 14, 19 (1874). The rule he asks us to apply is something much more akin to the uniform, forward-looking actions of a legislature. But, of course, we are not a legislature; we are a court. Because, as a court, we must follow the precedents that require we employ principles of traditional equity and evaluate whether Smith was reasonably diligent in filing his habeas petition before we equitably toll the statute of limitations, we decline to adopt his suggested approach. Therefore, we affirm the district court's order denying Smith's habeas petition because Smith failed to exercise reasonable diligence during the 10 months available after he received his record from his attorney and before the time allowed by the statute of limitations expired.

I. Background

Smith was convicted in California state court in 1998 of one count of residential burglary, two counts of robbery, and one count of forcible oral copulation. He was sentenced to 25-years-to-life. Smith was granted federal habeas relief in 2010 for the forcible oral copulation conviction, but after a retrial he was again convicted of forcible oral copulation and then again sentenced to 25-years-to-life in 2012. Smith appealed his conviction through the California courts, which denied his appeals. His state appeals culminated when the California Supreme Court issued a summary denial of his petition for review on March 12, 2014. Smith did not seek review in the United States Supreme Court, and his conviction became final on June 10, 2014, when the time for filing a petition for a writ of certiorari expired.

Smith was represented in his California state appeals by a court-appointed attorney. After the California Supreme

Court denied Smith's petition for review in March 2014, Smith alleges the next correspondence he had with his attorney was a letter received on August 15, 2014, which informed Smith that his California state appeal had been denied and that the attorney's representation of Smith was complete. Smith's attorney also returned the appellate record to Smith in the same mailing. Smith acknowledges that his attorney's letter was not the first time he learned that his appeal had been denied, and that his family had informed him of the denial three months earlier, around May 10, 2014. After Smith learned that the California Supreme Court had denied his appeal, Smith sent his attorney a letter the next day, requesting an update from the attorney and the immediate return of his appellate record so that Smith could prepare a federal habeas petition. When Smith did not receive a timely response to his letter, he filed a complaint with the California State Bar in June 2014. It appears that this complaint prompted Smith's attorney to contact Smith and return his appellate record in August 2014.

Appearing pro se, Smith filed his habeas petition in the district court for the Eastern District of California on August 14, 2015, asserting nearly identical claims to those he had made to the California Supreme Court. California moved to dismiss Smith's petition as untimely filed. According to the State, the one-year statute of limitations allowing for state prisoners to file federal habeas petitions had expired on June 10, 2015, one year after Smith's conviction became final. Smith filed an opposition arguing that he was entitled to equitable tolling from June 10 to August 15, 2014 and claimed the statute of limitations did not expire until August 15, 2015, the day after his petition was filed. Smith argued he was entitled to equitable tolling for that 66-day period because he had been abandoned by his attorney, did not have

access to his appellate record, and had been diligent in his attempts to contact his attorney to remedy the situation.

The magistrate judge assigned to Smith's case in the district court issued findings and recommended that California's motion to dismiss be granted. The magistrate judge noted that even though Smith did not receive his appellate record until two months after the time period prescribed by the statute of limitations had begun to run, he still had ten months thereafter in which to file his habeas petition on time. According to the magistrate judge, the "petitioner has offered no explanation as to why he was unable to file his federal petition during this ten month period"; instead it appeared "it was petitioner's own lack of diligence during the ten months after he received the appellate record, and not [the attorney's] delay in forwarding the records, that was the cause of petitioner's untimeliness." While the magistrate judge was "convinced that petitioner acted diligently to obtain his appellate record" from his attorney, she concluded that "there is no evidence that the delayed receipt of the file made timely filing impossible." The district judge adopted the findings and recommendations of the magistrate judge and denied the petition. Smith appealed.

A three-judge panel affirmed the district court, but we granted rehearing en banc to resolve a conflict within our cases about the nature of the diligence required for a petitioner to be eligible for equitable tolling. *See Smith v. Davis*, 740 Fed. App'x 131 (9th Cir. 2018), *reh'g en banc granted*, 931 F.3d 829 (9th Cir. 2019).

II. Standard of Review

We review *de novo* the dismissal of a federal habeas petition as untimely, including "whether the statute of

limitations should be equitably tolled." *Fue v. Biter*, 842 F.3d 650, 653 (9th Cir. 2016) (en banc) (quoting *Corjasso v. Ayres*, 278 F.3d 874, 877 (9th Cir. 2002)). When, as here, the district court has not made factual findings "we accept the facts as alleged by the petitioner" for the purpose of determining whether, if proven, the allegations are sufficient to merit equitable tolling. *Id.* (alteration and internal quotation marks omitted).

III. Discussion

A. *AEDPA and Equitable Tolling*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") subjects federal habeas corpus petitions filed by state prisoners to a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). As relevant here, the time provided by the statute of limitations begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).[1] The statute does provide that

[1] In other circumstances the limitations period could be restarted on:

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

while "a properly filed application for State post-conviction or other collateral review . . . is pending," the time period of the statute of limitations does not run. *Id.* § 2244(d)(2).[2]

In addition to this statutory tolling provision, the one-year statute of limitations is also subject to the doctrine of equitable tolling. *Holland v. Florida*, 560 U.S. 631, 634 (2010). A petitioner seeking equitable tolling bears the burden of establishing two elements: "'(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 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

The parties disagree about how these elements of equitable tolling should be applied. Smith argues that the only diligence required of one seeking equitable tolling is diligence in remedying the impediment to filing caused by the extraordinary circumstance. He reads *Holland*'s first element, "that he has been pursuing his rights diligently," to require no more than he pursue his rights diligently up to a point: the point at which the impediment to filing caused by the extraordinary circumstances has been abated. As applied to his case, Smith argues that because he was diligent in attempting to contact his attorney to obtain his appellate record after he learned about the denial of his appeal, it is irrelevant whether he used his time diligently after he

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(B)–(D).

[2] Smith did not file a habeas petition or otherwise seek collateral review in the state court.

received that record, and he is entitled to 66 days of equitable tolling so that he may have a full 365 days, free of any impediment to filing caused by an extraordinary circumstance, in which to file his habeas petition. California, arguing on behalf of the warden, takes an opposite position. The State argues that because Smith seeks the extraordinary remedy of equitable tolling of the statute of limitations, he must prove he was diligent throughout the time from when the state conviction became final to the filing of the habeas petition in federal court. Specifically, here, Smith would need to show that he was diligent in using the time available to him after he received his file from his attorney until he filed his habeas petition. The parties also disagree about what it means for an extraordinary circumstance to prevent timely filing. Smith argues the relevant question is whether the extraordinary circumstance prevented timely filing only while the circumstance existed. Applied to his case, he argues that his attorney's failure to return his appellate record was an extraordinary circumstance and that he could not prepare his habeas petition without this record, thereby satisfying the element. California, again, takes the broader view and argues the question whether an extraordinary circumstance prevented timely filing requires a fact-specific analysis to determine whether the extraordinary circumstance prevented a petitioner acting with reasonable diligence from filing within the one-year period.

Our cases applying the elements of equitable tolling, and specifically as it applies to habeas petitions brought under AEDPA, have not been particularly clear and point in opposite directions. In 2001, a three-judge panel declined to apply the stop-clock approach sought by Smith to tolling the AEDPA statute of limitations, but when an en banc court decided the case on rehearing, that issue was not addressed. *See Allen v. Lewis*, 255 F.3d 798, 801 (9th Cir. 2001), *rev'd*

en banc, 295 F.3d 1046 (9th Cir. 2002) (finding habeas petition timely filed even absent tolling). Then, later in 2001, in an immigration case heard by an en banc court, we took the approach advocated by Smith and held that equitable tolling in that case applied in a stop-clock manner so that "the days during a tolled period simply are not counted against the limitations period," without evaluating whether the petitioner had used his available time diligently. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc). We chose this method over an alternative which would have required us to take a case-specific approach and evaluate whether a petitioner exercising ordinary diligence "reasonably could have been expected to bring a claim within the remainder of the limitations period" after the extraordinary circumstances ended. *Id.* at 1194. We found the stop-clock method easier to administer, more in line with Supreme Court precedent on equitable tolling, and consistent with the policy objectives of statutes of limitations. *Id.* at 1195.

In later cases, however, and especially after the Supreme Court decisions in *Pace* and *Holland*, habeas petitioners who sought to have AEDPA's statute of limitations equitably tolled have been required to demonstrate not only extraordinary circumstances that prevented timely filing while those circumstances existed but also that the petitioners, (1) had been diligent in using the time given to them before and after the extraordinary circumstances were dispelled, and (2) that the extraordinary circumstances were the cause of an untimely filing. *See, e.g.*, *Fue*, 842 F.3d at 656–57; *Gibbs v. Legrand*, 767 F.3d 879, 884–85 (9th Cir. 2014); *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003); *Lott v. Mueller*, 304 F.3d 918, 924–25 (9th Cir. 2002). Our principal effort to combine these holdings failed to provide the desired clarity. In *Gibbs* we declared the applicability of

the stop-clock approach to equitable tolling of the AEDPA statute of limitations. 767 F.3d at 892. However, we simultaneously acknowledged that "[c]ourts take a flexible, fact-specific approach to equitable tolling" and required an evaluation of a petitioner's diligence before, during, and after the extraordinary circumstance existed before granting relief to address the "causation question." *See id.* at 885, 892.

It is because our cases issued in the last two decades on the proper application of equitable tolling point in opposite directions that we granted rehearing en banc. To determine which line of cases controls Smith's eligibility for equitable tolling (and therefore which party is correct), we need look no further than the decisions issued by the Supreme Court in *Pace* and *Holland*. But because it also directs our decision, we first consider how and why courts have historically provided equitable relief.

B. *Traditional Equity Jurisprudence*

Equity exists to address specific circumstances and not to create blanket, prospective rules or applications. *See McQuiddy*, 87 U.S. (20 Wall.) at 19 ("There is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances."). As put in Justice Joseph Story's *Commentaries on Equity Jurisprudence*, because "[i]t is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them," equity exists in "every rational system of jurisprudence" to address the cases in "which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all." 1 Joseph Story, *Commentaries on Equity Jurisprudence* 6–7 (13th ed. 1886); *see also The Federalist No. 83* (Alexander Hamilton) ("[T]he great and primary use of a court of equity is to give

relief in extraordinary cases, which are exceptions to general rules.").

Because equity requires a court to deal with the case before it, complete with its unique circumstances and characteristics, courts must take a flexible approach in applying equitable principles. The Supreme Court has been clear in this requirement, stating "exercise of a court's equity powers . . . . must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). And when applying equitable tolling to the AEDPA statute of limitations in *Holland*, the Supreme Court stated "[t]he '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.'" 560 U.S. at 650 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

But despite the flexibility that equity requires, "courts of equity must be governed by rules and precedents no less than the courts of law." *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (citation omitted). As it applies to equitable tolling, the Supreme Court has been clear that one such rule that limits a court's equitable powers is that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland*, 560 U.S. at 649). The first element, requiring diligence on the part of the litigant, flows from the traditional notion that "[c]ourts of [e]quity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion." 1 Joseph

Story, *supra*, at 226. Put differently, "equity aids the vigilant, not those who slumber on their rights." 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in The United States of America* 393 (1881); *see also Pace*, 544 U.S. at 419 ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights." (quoting *McQuiddy*, 87 U.S. (20 Wall.) at 19)). The second element comes from the fact-specific inquiry equity demands and the flexible remedies that it provides. For if an extraordinary circumstance is not the cause of a litigant's untimely filing, then there is nothing for equity to address.

C. *Congressional Intent and Supreme Court Precedent*

The stop-clock method of equitable tolling Smith seeks runs counter to the traditional notion that "[c]ourts take a flexible, fact-specific approach to equitable tolling." *Gibbs*, 767 F.3d at 885. But he makes two arguments in favor of the stop-clock approach. First, he claims that applying the stop-clock approach is consistent with the expressed intent of Congress. And second, he claims that the Supreme Court has already decided that the stop-clock approach applies. We disagree with both points and address them in turn.

1. Congressional Intent

In asking us to grant him an additional 66 days to file his habeas petition, the core of Smith's argument is that because Congress established a one-year statute of limitations in AEDPA, 28 U.S.C. § 2244(d)(1), Congress intended for him to have 365 days, free of any impediment to filing caused by an extraordinary circumstance, to draft and file his petition after his conviction was final. Our dissenting colleagues also advance this as their principal disagreement with the result we reach today. Smith urges that the stop-clock remedy he

seeks is merely a fulfillment of obvious congressional intent. But statutes of limitations are not that simple, and such congressional intent is not so obvious.

As the Supreme Court stated in a case relied on heavily by the dissent, "[s]tatutes of limitations are primarily designed to assure fairness to defendants." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). The Supreme Court has also more recently described statutes of limitations in general as serving the "basic policies of . . . repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). And more specifically, the Supreme Court has found "[t]he AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Day v. McDonough*, 547 U.S. 198, 205–06 (2006) (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). At their core, "[s]tatutes of limitations require plaintiffs to pursue diligent prosecution of known claims," *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (internal quotation marks omitted), and "protect defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

Requiring a petitioner who files after the deadline imposed by a statute of limitations has expired to show he has been diligently pursuing his rights up until the time he did file his petition does not ignore congressional intent—it furthers it. The dissent's contention that the purpose of AEDPA's statute of limitations is solely (or primarily) to protect the time available for the petitioner to file is not one

of the purposes for the statute of limitations the Supreme Court recognized in *Day*, *see* 547 U.S. at 205–06, and ignores the fact that "AEDPA seeks to eliminate delays in the federal habeas review process," *Holland*, 560 U.S. at 648. As the Supreme Court has held, AEDPA's goal of elimination of delays does not preclude the operation of equitable tolling, but it does refute the notion that the purpose of the limitations period is to protect petitioners alone. In fact, though we can speculate that Congress considered the needs of habeas petitioners as a part of its calculation before enacting a one-year statute of limitations, all we may say for certain is that Congress intended for states to have an affirmative defense against habeas petitions filed more than one year after a conviction became final. *See Day*, 547 U.S. at 205.

The dissent would ignore Supreme Court cases describing statutes of limitations as primarily protecting defendants—and in the habeas context as ensuring judicial efficiency and achieving finality for state judgments within a reasonable time—and elevate an ancillary aim of the statute of limitations to be its only one. On the other hand, requiring reasonable diligence through to the moment of filing protects the rights of all parties without unnecessarily sacrificing one to the other. Petitioners are able to file habeas petitions after the limitations period has expired and still have their claims evaluated on the merits—provided they were reasonably diligent in using their available time and showed that an extraordinary circumstance prevented them from filing within the one-year limitations period. At the same time, states receive a measure of finality and are not required to defend against petitions filed after the deadline by petitioners who have failed to pursue reasonably diligent prosecution of their claims.

Though we think our rule best serves the animating purposes of statutes of limitations, we also dispute the notion that equitable tolling, practiced consistent with governing precedent, could undermine the intent of a statute. This is because as the Supreme Court has recognized, Congress legislates against the backdrop of the equitable powers of courts and knows of the rebuttable presumption in favor of equitable tolling for statutes of limitations. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). In statutes like AEDPA, where Congress has not acted to preclude equitable tolling, it intended for equitable tolling to apply and to be employed consistent with standard equitable concepts and governing precedent. That is what we do today.

Insofar as Smith believes Congress's inclusion of conditions which reset the start of the one-year limitations period, or the statutory tolling provision in AEDPA, which both work to the petitioner's benefit, *see* 28 U.S.C. § 2244(d)(1)(B)–(D), (d)(2), evinces an intent by Congress to alter the traditional way equitable tolling applies in AEDPA and to make its application more favorable to him, he is mistaken. Equitable tolling operates apart from any statutory provision. The authority by which courts equitably toll statutes of limitations comes not from any statute but instead from our exercise of "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under th[e] Constitution, [and] the Laws of the United States." U.S. Const. Art. III, § 2. When courts apply equitable tolling to a statute of limitations, they are exercising that independent judicial power, consistent with governing law and precedent. This is distinct from any efforts to interpret a statute or to effect congressional intent behind statutory language.

2. Supreme Court Precedent

Smith's second argument, also favored by the dissent, that the stop-clock approach to equitable tolling is required by Supreme Court precedent, fares no better. We find the proper application of precedent to favor the flexible, circumstance-specific approach we adopt today.

In *Pace*, the Supreme Court addressed equitable tolling for the first time as it related to the AEDPA statute of limitations. *See* 544 U.S. at 418 n.8. At issue was whether the statute of limitations was tolled while the petitioner's untimely, and ultimately procedurally barred, petition for post-conviction relief was pending in state court. *Id.* at 410. Though the case dealt primarily with whether AEDPA's statutory tolling provision, 28 U.S.C. § 2244(d)(2), applied in these circumstances, after it was determined the petitioner was ineligible for statutory tolling, his claim for equitable tolling was also addressed. *See id.* at 418. In addressing the merits of the equitable tolling claim, the Court stated that to be eligible for equitable tolling the petitioner was required to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* The Court held that even if it assumed the pendency of the untimely state court petition "satisfied the extraordinary circumstance test," equitable tolling was nevertheless unavailable because the petitioner had not shown "the requisite diligence." *Id.* To determine whether the petitioner "has been pursuing his rights diligently," the Supreme Court evaluated the petitioner's diligence both before and after the

existence of the "extraordinary circumstance" and found it wanting.[3] *See id.* at 418–19.

Pace arose in unique circumstances because the state court conviction became final nearly four years before AEDPA's statute of limitations was enacted. However, after the time period of AEDPA's statute of limitations had begun to run in 1996, the petitioner waited nearly seven months before filing his state court post-conviction relief application (the pendency of which was assumed to be an "extraordinary circumstance"), and once that was denied, waited an additional five months to file for habeas relief in federal court. *Id.* at 419. In rejecting Pace's arguments that he was entitled to equitable tolling, the Supreme Court emphasized Pace's lack of diligence in all time frames, right up to Pace filing his federal habeas petition. *Id.* ("Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal. And not only did petitioner sit on his rights for years *before* he filed his [state post-conviction relief] petition, but he also sat on them for five more months *after*

[3] The Supreme Court's phrasing of the first element required for equitable tolling is telling. The Court required Pace to demonstrate that he "*has been pursuing* his rights diligently"—not that he "pursued," "had pursued," or "has pursued" his rights diligently. This specific phrasing indicates a need for a petitioner to show his diligence continued up through the point of filing his habeas petition in federal court. *See The Chicago Manual of Style* ¶¶ 5.132, 5.135 (17th ed. 2017). Compare this to the second element, which is phrased in the simple past tense—"some extraordinary circumstance *stood* in his way"—and it is clear the Supreme Court's wording is intentional. Coupled with the Court's application of the rule for equitable tolling, which evaluated the petitioner's diligence before and after the extraordinary circumstance, and through the date he filed his federal habeas petition, there is no doubt that diligence is required through the period up to the actual filing of the petition to merit equitable tolling. *See Pace*, 544 U.S. at 419.

his [state] proceedings became final before deciding to seek relief in federal court.") (emphasis in original) (footnote omitted).

In addition to laying the foundation for future AEDPA equitable tolling decisions, a key aspect of *Pace* is that the Supreme Court actually had an opportunity to adopt the stop-clock rule Smith now seeks but refused to do so. Had the Supreme Court applied the stop-clock approach, the outcome in *Pace* would have been reversed, and the federal petition would have been timely filed, as it was indeed filed on the 363rd "untolled" day of the limitations period, under the stop-clock approach.[4] But the Supreme Court did not apply the stop-clock approach and evaluate only Pace's diligence in remedying his extraordinary circumstance. The Court evaluated Pace's diligence in all time periods, including those when he was free from impediments to preparing and filing his habeas petition that had been caused by any extraordinary circumstance. The Court found his "lack of diligence precludes equity's operation." *Id.* Bound

[4] Pace pleaded guilty to second degree murder in Pennsylvania state court in February 1986, and in September 1992, the Pennsylvania Supreme Court denied his appeal. AEDPA was passed on April 24, 1996, and the newly imposed statute of limitations began to run on April 25, 1996. Pace filed a petition for post-conviction relief in the Pennsylvania courts on November 27, 1996, which was pending for 974 days, and was finally denied by the Pennsylvania Supreme Court on July 29, 1999. Pace then filed a habeas petition in federal district court on December 24, 1999, which was 1337 days after the statute of limitations began to run. Subtracting the 974 days the state petition for post-conviction relief was pending from the time it took Pace to file a federal habeas petition after AEDPA was enacted left potentially 363 "untolled" days had the Supreme Court chosen to adopt the stop-clock approach and excuse Pace's lack of diligence. *See* 544 U.S. at 410–11. As noted, the Court did not adopt the stop-clock approach; it noted Pace's lack of diligence in filing and affirmed the denial of habeas as untimely.

as we are by the decisions of the Supreme Court, we follow this same approach today.

The dissent argues that we misunderstand *Pace* and that despite the Supreme Court's explicit evaluation of Pace's lack of diligence in preparing and filing his federal habeas petition both before and after his state petition was denied, such evaluation of his diligence was unnecessary to the decision, if it was even considered at all. The dissent believes that the Supreme Court put little or no weight on Pace's lack of diligence while the limitations period was expiring, including the seven months before he filed his state petition for post-conviction relief and the five months following the rejection of the state petition. *See* Dissent at 54 ("Essentially, the Court held that laches already barred Pace's claim when AEDPA was enacted, so he was entitled to no additional consideration after he was accorded an additional year."). This is a strange way to read a passage in a Supreme Court opinion that highlighted this exact lack of diligence. *See Pace*, 544 U.S. at 419 ("[Pace] also sat on [his rights] for five more months *after* his [state] proceedings became final before deciding to seek relief in federal court.") (emphasis in original). Further, the dissent's supposition that laches would have barred Pace's habeas petition (in the pre-AEDPA regime) simply because it was filed four years after his conviction was final finds no support in caselaw. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) ("[T]here is no statute of limitations governing federal habeas, and *the only laches recognized is that which affects the State's ability to defend against the claims raised on habeas*.") (emphasis added); *see also Day*, 547 U.S. at 215 (Scalia, J., dissenting) ("We repeatedly asserted [before AEDPA] that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration."). Simply put, the dissent's reading of *Pace* is too narrow, and

we do not adopt such a limited view of the only Supreme Court case in which the Supreme Court conclusively determined a habeas petitioner's eligibility for equitable tolling.

It is clear to us that the Court did factor Pace's lack of diligence after the statute of limitations was enacted, including his failure to pursue his rights diligently after the extraordinary circumstance abated, into its decision to deny him equitable tolling—a holding as to which no justice dissented. What relative importance this held when combined with Pace's years-long pre-AEDPA delay, and his additional seven month delay after the statute was enacted, we cannot say with certainty, but we know it was important enough for the Court to mention and consider in its opinion. But whatever relative weight Pace's various periods of non-diligence carried, we know for sure that the Supreme Court did not limit its diligence analysis, as the dissent would have us do, to the question in *Socop-Gonzalez*, whether Pace had been diligent in bringing about the end of his extraordinary circumstance. *See* 272 F.3d at 1196. If it had, its decision would have reversed, rather than affirmed, the judgment which denied the writ.

The Supreme Court next considered equitable tolling for habeas petitions in *Holland*, where it took an additional step that weighs against the application of the stop-clock approach here. In *Holland*, the Court added an explicit causation requirement to the rule for equitable tolling previously stated in *Pace*. *See Holland*, 560 U.S. at 649 ("[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*." (emphasis added) (quoting *Pace*, 544 U.S. at 418)). As we have previously

described it, whether an impediment caused by extraordinary circumstances prevented timely filing is a "causation question" that requires courts to evaluate a petitioner's diligence in all time periods—before, during, and after the existence of an "extraordinary circumstance"—to determine whether the extraordinary circumstance actually did prevent timely filing. *See Gibbs*, 767 F.3d at 892. Though the causation requirement announced in *Holland* modified the extraordinary circumstance prong of the test, it nevertheless speaks to the diligence required by a petitioner seeking equitable tolling. This is because the Supreme Court held that equitable tolling is not available whenever there is an extraordinary circumstance that impaired the litigant for some portion of the limitations period. It may apply only when an extraordinary circumstance prevented a petitioner from filing before the deadline expired. The only way for a court to evaluate whether an extraordinary circumstance caused the untimely filing is to examine and assess the facts of the case to determine whether a petitioner acting with reasonable diligence could have filed his claim, despite the extraordinary circumstance, before the limitations period expired. This stands in direct contrast to the position we adopted in *Socop-Gonzalez*. *See* 272 F.3d at 1194.[5]

The strongest argument Smith can make against the weight of this precedent is based on the earlier case of *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965), which we cited in *Socop-Gonzalez* when

[5] We also note that, in *Holland*, as it had before in *Pace*, the Supreme Court evaluated the petitioner's diligence after the extraordinary circumstance was dispelled and did not apply a rigid stop-clock rule, though admittedly, this did not impact the outcome of the case. *See* 560 U.S. at 653.

adopting a stop-clock approach to equitable tolling, *see* 272 F.3d at 1195–96.

In *Burnett* a plaintiff timely filed a Federal Employers' Liability Act ("FELA") personal injury claim against his employer in state court, seeking compensation under the federal law. The federal claim was subject to a three-year statute of limitations. Ultimately, the state court dismissed the claim for improper venue under state law, and the plaintiff refiled in federal court eight days later but after the statute of limitations had expired. *Burnett*, 380 U.S. at 424–25.

Addressing the situation, the Supreme Court equitably tolled the statute of limitations and allowed the plaintiff's suit to proceed in federal court. *Id.* at 434–35. The Supreme Court commented on the plaintiff's diligence in bringing the claim in state court and treated that diligence as a prerequisite for equitable tolling. *See id.* at 429 ("Petitioner here did not sleep on his rights . . . ."). The Court also noted the plaintiff's diligence in refiling his claim in federal court eight days after his state court suit was dismissed, but this diligence notwithstanding, the Court was clear that it was tolling the limitations period for the entire period the state court claim had been pending and not merely for a "reasonable time." *Id.* at 435–36. This holding allowed the plaintiff to use whatever time remained of the limitations period when he filed in state court to refile in federal court, regardless of his diligence in refiling the claim. The concurrence by Justices Douglas and Black was explicit that the decision in *Burnett* to extend the limitations period automatically, rather than evaluate the plaintiff's diligence in refiling in federal court, ran counter to "long-established" and "familiar" equitable principles. *See id.* at 437 (Douglas, J., concurring). We acknowledge that *Burnett*, absent

subsequent development by the Supreme Court, would seem to direct a stop-clock approach that allows a plaintiff who qualifies for equitable tolling through diligence to extend the limitations period automatically by the full period of time that the extraordinary circumstance existed, but *Pace* and *Holland* were such developments.

Whatever the Court's reason in *Burnett* for veering from "long-established" and "familiar" applications of equity, modern Supreme Court cases citing *Burnett* have emphasized the diligence of the petitioner in *Burnett*, not the stop-clock application of equitable tolling. *See, e.g.*, *Irwin*, 498 U.S. at 96 & n.3 (characterizing *Burnett* as a case "where the claimant has actively pursued his judicial remedies"); *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 238 (1976) (quoting *Burnett*'s statement that "[p]etitioner here did not sleep on his rights"); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974) (describing *Burnett* as involving a "suit in a state court within the three-year time limitation" and being refiled in federal court "[i]mmediately after the dismissal" in state court for improper venue). And none of these cases permitted equitable tolling where a litigant had not been persistent in pursuing his rights diligently. But most tellingly, when the Supreme Court explicitly established the two required elements of equitable tolling in *Pace* and *Holland*—diligence and causation—the Court did not apply the stop-clock approach, and citations to *Burnett* were nowhere to be found. *See Holland*, 560 U.S. at 634; *Pace*, 544 U.S. at 418. And since *Pace* was decided, the only citation to *Burnett* by a Supreme Court majority[6] was in

[6] *Burnett* was recently cited in a solo dissent in *Rotiske v. Klemm*, but the citation served to distinguish equitable tolling from the "fraud-

Lozano v. Montoya Alvarez, where the Court cited *Burnett*, not for its stop-clock rule, but for the notion that statutes of limitations are "designed to protect defendants," an argument counter to the one Smith and the dissent advance here. 572 U.S. 1, 14 (2014) (quoting *Burnett*, 380 U.S. at 428).

All of this is to say that any attempt by Smith to claim *Burnett* dictates the outcome of this case and excuses his lack of diligence after he received his files from his attorney is unavailing. Smith's argument ignores the fact that, even in *Burnett*, the plaintiff exercised diligence consistent with the rule we announce today, and more importantly, it ignores recent Supreme Court cases that have rejected the stop-clock approach and instead meticulously examined petitioner diligence when determining whether equitable tolling was warranted.

Smith's citation to the recent case of *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), likewise does not support the outcome he seeks. For there, the Supreme Court was asked to decide the scope of the statutory tolling provision contained in 28 U.S.C. § 1367, the federal supplemental jurisdiction statute, and accordingly, was not asked to decide how to apply equitable tolling or determine whether the plaintiff had exercised any measure of diligence. *See Artis*, 138 S. Ct. at 600–01 (describing the case as "resolv[ing] the division of opinion among State Supreme Courts on the proper construction of § 1367(d)").

Artis addressed a narrow question, whether section 1367(d)—not the doctrine of equitable tolling—

based discovery rule" and does not provide support to Smith's arguments here. *See* 140 S. Ct. 355, 363–64 (2019) (Ginsburg, J., dissenting).

functioned to suspend state periods of limitations for the entire time state claims were pending in federal court, plus thirty days, or whether the law provided merely a thirty-day grace period for a litigant to refile in state court after a federal court declined supplemental jurisdiction over the state-law claim. *Id.* The answer to this question has nothing to do with the issue we address today. The Supreme Court's decision that the proper way to read section 1367(d) is to suspend the running of the statute of limitations, and not merely to grant litigants a 30-day grace period, was based on a plain text reading of section 1367(d), not principles of equity. *See id.* at 603–04. However, in rendering its decision, the Court noted that it commonly uses the "terms 'toll' and 'suspend' interchangeably," *id.* at 601–02, and that prior decisions of the Court had described equitable tolling as "paus[ing] the running of" a statute of limitations, *id.* at 602 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014)). It is based on these statements that Smith and the dissent argue *Artis* supports the position that Smith is entitled to equitable tolling even if he did not use the time available to him diligently after he received his appellate record from his attorney.

Smith asks us to read the statement in *Artis* that equitable tolling may serve to pause the period of a statute of limitations as excusing him from the requirements for equitable tolling explicitly described in *Pace* and *Holland*. *Artis* does not support such an argument. *Artis* had almost nothing to say about equitable tolling, and what it did say did not alter the rule that "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 (internal quotation marks omitted). The cases *Artis* cited for the idea that equitable tolling

pauses, or suspends, a statute of limitations do not suggest otherwise and do not support an application of equitable tolling in a circumstance where a litigant has not diligently pursued his rights before, during, and after the existence of an extraordinary circumstance.[7]

[7] *Artis* characterized *CTS Corp.* as "describing equitable tolling as 'a doctrine that pauses the running of, or 'tolls' a statute of limitations.'" *Artis*, 138 S. Ct. 602 (quoting *CTS Corp.*, 573 U.S. at 9). This is true, but *CTS Corp.* is explicit that equitable tolling applies only "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." 573 U.S. at 9 (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)). *Artis* also quotes *United States v. Ibarra*, which predates *Pace* and *Holland*, but states, "[p]rinciples of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." 502 U.S. 1, 4, n.2 (1991) (per curiam). *Ibarra* addressed when the government's 30-day window to appeal district court orders in criminal cases began and did not involve an application of equitable tolling. It thus provides little guidance on how to determine eligibility for equitable tolling, but the opinion cited a Seventh Circuit opinion by Judge Posner, *Cada v. Baxter Healthcare Corporation*, 920 F.2d 446 (7th Cir. 1990), as standing for the "principles of equitable tolling." *Ibarra*, 502 U.S. at 4, n.2. *Cada* is explicit that equitable tolling is available only when the plaintiff exercises "all due diligence," including the diligence required to "bring suit within a reasonable time after" an extraordinary circumstance ends and that the period of limitations is not tolled automatically. 920 F.2d at 451, 453; *id.* at 452 ("We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. It is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations." (citation omitted)); *see also Socop-Gonzalez*, 272 F.3d at 1194 (citing *Cada* as rejecting a stop-clock approach that ignored a lack of diligence after the removal of the extraordinary circumstance that impeded filing).

Artis did not involve a determination of whether a litigant was eligible for tolling (equitable or otherwise) and addressed no more than the mechanical calculation of the new litigant-specific limitations deadline, *after* a court makes the determination that the litigant qualifies for tolling. *See Artis*, 138 S. Ct. at 598–99. The case sheds no light on the underlying question of which litigants are eligible for such extended limitations deadlines. In cases involving equitable tolling, *Pace* and *Holland* still govern that inquiry. At most, the effect of *Artis*'s observation that equitable tolling may serve to "pause[] the running of . . . a statute of limitations," *id.* at 602, was to confirm that the maximum additional time, beyond the period of limitations, available to a litigant otherwise eligible for equitable tolling, is equal to the amount of time that the extraordinary circumstance that impeded timely filing existed. As far as we know, this was not in dispute.

D. *The Proper Rule of Equitable Tolling of Statutes of Limitations*

In view of the historic practice of courts of equity and modern Supreme Court precedent governing equitable tolling, we make two related holdings. First, for a litigant to demonstrate "he has been pursuing his rights diligently," *Holland*, 560 U.S. at 649, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court. This rule is in accord with the traditional concept that equity requires diligence and is also consistent with recent Supreme Court practice. Though we today reject the stop-clock approach we took in *Socop-Gonzalez* for evaluating when a petitioner must be

diligent,[8] this does not alter what it means for a petitioner to exercise diligence. On that issue the rule remains that "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653 (citations omitted). In determining whether reasonable diligence was exercised courts shall "consider the petitioner's overall level of care and caution in light of his or her particular circumstances," *Doe v. Busby*, 661 F.3d 1001, 1013 (9th Cir. 2011), and be "guided by 'decisions made in other similar cases . . . with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.'" *Fue*, 842 F.3d at 654 (quoting *Holland*, 560 U.S. at 650). What we make clear is that it is not enough for a petitioner seeking an exercise of equitable tolling to attempt diligently to remedy his extraordinary circumstances; when

[8] As mentioned previously, *Socop-Gonzalez* rested its decision to apply equitable tolling in a manner that ignored a litigant's diligence after remedying an extraordinary circumstance on three factors: (1) congressional intent; (2) Supreme Court precedent; and (3) ease of administration. 272 F.3d at 1195. Today we explicitly reject the first two rationales and hold that diligence only up to the point of the removal of the impediment caused by the extraordinary circumstances is not enough to merit equitable tolling. In 2001, we did not have the benefit of the Supreme Court's decisions in *Pace* and *Holland*, which undermine the continued validity of the first two reasons we gave for adopting the stop-clock approach. This leaves just the third rationale: ease of administration. Standing alone, whether the stop-clock approach is easier to administer than the rule we announce today is debatable but ultimately of no consequence. *Pace* and *Holland* illustrate that in application of the extraordinary remedy of equitable tolling, individual, and perhaps painstaking, analysis of the specific case overcomes considerations of convenience. If ease of administration is indeed a better policy, it is one for Congress, not the courts, to adopt. But we have no doubt that district courts will be able to apply equitable tolling consistent with the traditional concepts of equity, Supreme Court precedent, and the rule we announce today.

free from the extraordinary circumstance, he must also be diligent in actively pursuing his rights.[9]

[9] Contrary to the belief of the dissent we make no holding "that 364 days is *always* too long a period within which to prepare a federal habeas petition." Dissent at 65. Nor do we announce a rule that any time long stretches of time pass without a petitioner acting on a habeas petition is it necessarily a situation where a petitioner failed to exercise reasonable diligence. *See Huizar v. Carey*, 273 F.3d 1220, 1224 (9th Cir. 2001) (finding a petitioner's wait of 21 months before seeking an update on his petition from a state court was an exercise of reasonable diligence).

The dissent's characterization of our court's application of equitable tolling as based on such arbitrary considerations as "the length of each chancellor's foot," Dissent at 41, not only disserves our judiciary, it ignores our safeguard against such arbitrariness: our standard of review in habeas cases is *de novo*. *See* ante at 8–9. Such characterization is particularly inept here where the magistrate judge carefully weighed the evidence and fully explained her decision.

We also find the dissent's criticism that today's decision provides no guidance for future district courts or three-judge panels to decide cases involving requests for equitable tolling misplaced. As an initial matter, our precedents, *Socop-Gonzalez* notwithstanding, already require courts to go through the general diligence analysis we outline today. *See Gibbs*, 767 F.3d at 892. And as discussed previously, one of the benefits of equitable doctrines is that they allow courts to fashion remedies tailored to the circumstances of the case, within the bounds of governing precedent. Further, the evaluation of diligence is hardly new territory for trial courts. For example, in evaluating motions for new criminal trials or relief from civil judgments, courts must regularly evaluate whether newly discovered evidence could have been discovered earlier with reasonable diligence. *See* Fed. R. Civ. P. 60(b)(2); *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005). And finally, both our approach and the one favored by the dissent, require courts to evaluate whether a petitioner, who is imprisoned and usually filing pro se, exercised the required diligence. The difference between our rule and the dissent's, as it relates to a court's evaluation of a petitioner's diligence,

Second, and relatedly, it is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy. This rule aligns with the flexible and fact-specific nature of equity and is directed by Supreme Court precedent. To be clear, this rule does not impose a rigid "impossibility" standard on litigants, and especially not on "pro se prisoner litigants—who have already faced an unusual obstacle beyond their control during the AEDPA limitation period." *Fue*, 842 F.3d at 657 (quoting *Sossa v. Diaz*, 729 F.3d 1225, 1236 (9th Cir. 2013)). In evaluating whether an "extraordinary circumstance stood in [a petitioner's] way and prevented timely filing," a court is not bound by "mechanical rules" and must decide the issue based on all the circumstances of the case before it. *Holland*, 560 U.S. at 649–50 (internal quotation marks omitted).

E. *Equitable Tolling Applied to Smith's Petition*

Accepting Smith's allegations as true, and assuming that his attorney's failure to contact him for five months after his state appeal was denied[10] was sufficiently egregious so that it could qualify as an "extraordinary circumstance" that created an impediment to filing under the second required element for equitable tolling, we nevertheless conclude Smith has not exercised the necessary diligence to satisfy the

is that one requires an evaluation of a petitioner's diligence across the whole time involved, and the other conducts the same inquiry but for just part of the time.

[10] This includes three months after the California Supreme Court denied Smith's appeal but before the decision was finalized, and an additional 66 days after the decision was final and the time period of the statute of limitations began to run.

first element and may not have the statute of limitations tolled to excuse his late filing.

Smith's appeal was denied by the California Supreme Court on March 12, 2014 and became final on June 10, 2014. According to Smith, he learned from his family that his appeal had been denied on May 10, 2014, and he received his appellate record from his attorney on August 15, 2014. Smith's habeas petition was filed in the district court on August 14, 2014, 364 days after Smith received his appellate record and 65 days after the limitations period expired. Smith's habeas petition was a 48-page document consisting of 20 pages of facts and background and 28 pages of legal analysis and argument. The petition consisted almost exclusively of items written previously by Smith's court-appointed attorney and submitted in briefs to the California appellate courts. The facts and background were copied with only minor alterations from Smith's brief to the California Court of Appeal.[11] And the legal argument section was taken nearly verbatim from the legal arguments previously submitted by Smith to the California Supreme Court, though Smith omitted from his federal habeas petition a challenge to jury instructions he had raised to the state supreme court.

In the district court, after California moved to dismiss Smith's petition as untimely, Smith filed an opposition brief and supporting declaration. In his opposition papers Smith argued that he was diligent in attempting to maintain contact with his attorney and in seeking the return of his case file after he learned his California Supreme Court appeal had

[11] Smith's brief to the California Supreme Court is part of the record before us, but his brief to the California Court of Appeal is not. However, we may take judicial notice of this document and do so. *See Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011).

been denied. Citing *Gibbs*, Smith acknowledged that our cases have evaluated "[d]iligence *after* an extraordinary circumstance is lifted"[12] in making determinations about equitable tolling. But Smith alleged no facts, argued no circumstances, and made no claim that he had been diligent in preparing his habeas petition after he had received his file from his attorney. The only diligence with which Smith claimed to have acted was in contacting his attorney to remedy the extraordinary circumstance that he lacked his case file. As we have now held, this was not enough.

The problem with Smith's request for equitable tolling is not simply that he took 364 days after receiving his case file to file his habeas petition. We have no trouble imaging a circumstance where a petitioner is impeded by extraordinary circumstances from working on a habeas petition for two months, but after those circumstances are dispelled, uses the next 364 days diligently, files his petition, and has the entire two months during which the extraordinary circumstances existed equitably tolled. What reasonable diligence would look like in those circumstances varies based on the specifics of the case, but in every instance reasonable diligence seemingly requires the petitioner to work on his petition with some regularity—as permitted by his circumstances—until he files it in the district court. The problem with Smith's

[12] Smith also noted that in *Gibbs* we stated a lack of diligence after an extraordinary circumstance ended was "not alone determinative" in deciding eligibility for equitable tolling. *See* 767 F.3d at 892. But despite this statement in *Gibbs*, Smith was on notice by other statements in *Gibbs* that we would consider his diligence after the extraordinary circumstance ended as part of our overall assessment to determine whether he was entitled to equitable tolling. *See id.* When responding to the State's motion to dismiss, Smith had the necessary notice and incentives to claim he had diligently pursued his rights after he received his case file from his attorney, but he did not do so.

request for equitable tolling is that when given the opportunity to explain how he had used his time diligently after receiving his file from his attorney and thus merited equitable tolling, Smith made no allegation or claim in his opposition to the motion to dismiss or his supporting declaration that he had acted diligently but had not been able to file earlier.

Nor is the only trouble with Smith's request for equitable tolling the fact that his habeas petition consisted almost exclusively of materials that had been prepared and filed in state courts years earlier. We agree with the Seventh Circuit that when a petitioner acts diligently to prepare a habeas petition, it matters not if he recycles arguments previously made by counsel to state courts. *See Socha v. Boughton*, 763 F.3d 674, 688 (7th Cir. 2014). But again, the petitioner must act with diligence in preparing his petition to warrant equitable tolling; Smith has not alleged that he was diligent in this manner.

In the absence of any claim by Smith that he was diligent in preparing his habeas petition after he received his case file, we fail to see how Smith exercised reasonable diligence and why, if he had, Smith would have been unable to file a habeas petition in the district court before the time period of the statute of limitations expired on June 10, 2015. The district court correctly held Smith had not met the criteria for equitable tolling and denied Smith's habeas petition as untimely.

AFFIRMED.

BERZON, Circuit Judge, joined by THOMAS, Chief Judge, and MURGUIA, WATFORD, and HURWITZ, Circuit Judges, dissenting:

Anthony Smith's state court convictions became final on June 10, 2014.[1] For the sixty-six days that followed, Smith's former attorney failed to deliver Smith's appellate record to him despite repeated requests. Smith filed his federal petition for habeas corpus 364 days after his record arrived.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") contains a statute of limitations of 365 days for the filing of a federal petition for habeas corpus challenging a state conviction. 28 U.S.C. § 2244(d). Congress could, of course, have opted for more time or less. But it determined that 365 days is the number of days reasonably required for habeas petitioners to prepare their petitions. In doing so, Congress required habeas petitioners to exercise a certain level of diligence: the diligence required to file within 365 days.

Holland v. Florida held that Congress intended that the doctrine of equitable tolling apply to this 365-day limitations period. 560 U.S. 631, 645 (2010). To obtain equitable tolling, a habeas petitioner must show "'(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 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The majority today holds that under this standard, if an extraordinary circumstance existed for a part (or all) of the 365 days Congress prescribed as the period available for preparing a federal habeas petition, the

[1] Smith was convicted of one count of residential burglary, two counts of robbery, and one count of forcible oral copulation.

petitioner may have *less* than 365 days to complete the petition, based on a free-floating judicial determination of whether, notwithstanding the impediment, the petitioner was sufficiently diligent during the less-than-365 day period available to him.[2]

The central problem with the majority's approach concerns its substitution of its own determination of the time needed to file for Congress's clear prescription that petitioners are to be given 365 days to draft and file a federal habeas petition. In the majority's view, if equitable tolling is invoked, no deference is owed to Congress's determination of the amount of time reasonably required to prepare a petition.[3] For the majority, "the judicial Power" furnishes authority to impose, on an ad hoc basis, individual judges' own views as to the time it should take to prepare and file a habeas petition. Maj. Op. at 18 (citing U.S. Const. Art. III, § 2).

In the absence of a statute of limitations, of course, judges have no choice but to draw discretionary lines as to when a particular claim should be time-barred.[4] But where a

[2] The majority assumes that Smith's attorney's wrongful withholding of his records constituted an extraordinary circumstance, and so we do as well. Majority Opinion ("Maj. Op.") at 33.

[3] The majority views the congressionally established limitations period as a one-way ratchet where equitable tolling is at issue, such that judges can provide *less* total time than the statutory limitations period once the time covered by the extraordinary circumstance is subtracted but not more. *See* Maj. Op. at 30. On this view, the congressional determination of the time needed to file merits deference when equitable relief is to be denied but not when it is to be granted. We are not told why that should be the case.

[4] That is how the laches doctrine operates. *See, e.g.*, *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975).

legislature has determined the time it should reasonably take to file an initial pleading, there is no need for such ad hoc, inevitably inconsistent, decision-making, and so no excuse for it. Here, Congress has spoken—the period of time a petitioner may devote to preparing a federal habeas petition is one year, or 365 days. As one of our colleagues put it some time ago with regard to the issue before us, "[a] year is a year is a year." *Lott v. Mueller*, 304 F.3d 918, 927 (9th Cir. 2002) (McKeown, J., concurring). The majority's insistence to the contrary notwithstanding, we are bound to respect Congress's policy judgment to the degree that we can even when applying an equitable doctrine.

This fundamental precept was at the core of this Court's carefully considered en banc opinion in *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176 (9th Cir. 2001). There, we rejected an interpretation of equitable tolling's diligence requirement which would have empowered judges to deny equitable relief whenever *they* believed that a claimant reasonably could have filed faster—that is, the version of equitable tolling the majority now enthusiastically adopts. *Id.* at 1194–95. *Socop-Gonzalez* held instead that where a petitioner is prevented from timely filing because an extraordinary circumstance stood in his way for part of the limitations period and is otherwise eligible for equitable tolling, he is afforded the time he lost during the extraordinary circumstance. *Id.* at 1195–96. That is, the extraordinary circumstance "*stops the clock* until the occurrence of a later event that permits the statute to resume running."[5] *Id.*

[5] As I discuss later, the Supreme Court has recently explained that this understanding of what "tolling" means comports with both the ordinary legal meaning of the word of the word "tolling" and its use in the equitable tolling context. *Artis v. District of Columbia*, 138 S. Ct. 594, 601–02 (2018).

at 1195. The stop-clock approach to equitable tolling, as we said in *Socop-Gonzalez*, is more respectful of congressional intent, more compatible with the common understanding of "tolling" and with Supreme Court precedent, and more sensitive to the realities of judicial administration than one which depends on the judge's "subjective view of how much time a plaintiff reasonably needed to file suit." *Id.* at 1195–96.

After *Socop-Gonzalez*, some opinions of this court muddled *Socop-Gonzalez*'s clarity by focusing on whether a petitioner could have filed faster than he did *after* an extraordinary circumstance had abated in deciding whether a statute of limitations was equitably tolled. *See Gibbs v. Legrand*, 767 F.3d 879, 890–91 (9th Cir. 2014). *Gibbs* noted the tension between examining a petitioner's post-extraordinary-circumstance diligence in the abstract and *Socop-Gonzalez*'s teaching that "courts should not take it upon themselves to decide how much time a claimant needs to file a federal case." *Id.* at 891–92. Attempting to reconcile these two strains, *Gibbs* explained that equitable tolling's diligence requirement ensures that the allegedly extraordinary circumstance actually prevented timely filing—that is, helps establish causation—but does not invite judges to substitute a judicial determination of the time it should take to file for a legislative one. *Id.* at 892.

Starting anew and purporting to return to "principles of traditional equity," the majority opinion overrules *Socop-Gonzalez* and holds that equitable tolling may be denied whenever a judge concludes—on an entirely ad hoc basis—that a claimant reasonably could have filed his lawsuit faster than he did once the extraordinary circumstance was removed. Maj. Op. at 6. The majority's analysis—and its excuse for overruling *Socop-Gonzalez*—rests in large part

on its limited understanding of equity's history, portraying that history as establishing little more than the proposition that equity is flexible and fact-specific. That proposition is accurate, as far as it goes. But the majority's version of "traditional equity" is incomplete, disregarding a strong and competing development in American equity jurisprudence: the effort to restrain the discretion courts of equity once wielded and to roundly reject a view in which equity depends on "the length of each chancellor's foot." *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (citing 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886)). With regard to equitable tolling in particular, that restraint has been effectuated in large part through respect for legislative determinations of the total period of time a plaintiff or petitioner should have to prepare initial pleadings. By brushing aside any need to incorporate that legislative determination into its equitable tolling analysis, and by substituting a pure chancellor's-foot approach to determining whether the plaintiff or petitioner worked quickly enough, the majority flaunts the understanding of equity jurisprudence that has developed in this country since its founding.

Incorporating its one-sided understanding of the place of judicial discretion in American equity jurisprudence, the majority opinion goes on to misapply or disregard the three considerations on which *Socop-Gonzalez* rested its stop-clock approach—congressional intent, Supreme Court precedent, and administrability. As to Supreme Court precedent in particular, the majority insists that that precedent has fundamentally changed since *Socop-Gonzalez*. It decidedly has not.

At the end of its opinion, the majority applies its new non-standard to the facts of this case. In doing so, the

majority makes clear that its talk of "the fact-specific inquiry equity demands" serves largely to obfuscate an approach that plucks from the air—or measures by the chancellor's foot—the conclusion that, despite a congressionally-enacted 365-day limitations period, 364 days is too long a period within which to prepare a habeas petition. With *Socop-Gonzalez* abandoned, such arbitrary judgments, disregarding *both* the legislative judgment about the total time period that should be available to file a lawsuit *and* the facts of the particular case, will come to predominate applications of equitable tolling.

I. American Equity Jurisprudence and Judicial Restraint

The majority begins its analysis with a discussion of "Traditional Equity Jurisprudence," purporting to undertake a historical analysis. Maj. Op. at 13–15. I therefore begin as well with some history concerning equity jurisprudence, but with an emphasis absent from the majority's approach—the care taken in this country to ensure that judicial exercise of its equitable authority comfortably coexists with closely related legislative enactments. This discussion will prove helpful, I hope, in explaining why the majority's paean to principles of traditional equity offers no reason to abandon *Socop-Gonzalez*'s well-considered en banc holding.

Equitable tolling dates from an era in English history when the separation of legislative and judicial power was incomplete. Until the Glorious Revolution of 1688, the Crown "had pretensions to independent legislative authority," and the authority of English judges derived from their status as agents of the Crown. John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 36–37 (2001). Such judges would not have had any sense that their application of principles of equity might "usurp[] the responsibilities of a different branch" of government. *Id.*

at 42–43, 53; *see also McQuiggin v. Perkins*, 569 U.S. 383, 409–10 (2013) (Scalia, J., dissenting).

In the American system, by contrast, fears of judicial usurpation of legislative authority have driven equity jurisprudence from the first. During the debates over the Constitution's ratification, prominent anti-federalists objected to Article III's extension of the judicial power to cases in equity on precisely such grounds. "It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Letters from the Federal Farmer No. III (Oct. 10, 1787), *in* 2 The Complete Anti-Federalist 234, 244 (H. Storing ed. 1981). In particular, the anti-federalists worried that the grant of powers in equity would enable judges to avoid "being confined to the words or letter" of the Constitution or of legislative enactments. Brutus No. XI (Jan. 31, 1788), *in id.* at 417, 419.

Those who favored ratification of the Constitution shared these concerns to some extent. They responded to critiques of federal equity jurisdiction by emphasizing that Article III judges would be "bound down by strict rules and precedents, which serve to define and point out their duty in every case that comes before them." The Federalist No. 78 (Alexander Hamilton). "Although the purpose of a court of equity was 'to give relief in extraordinary cases, which are exceptions to general rules,' 'the principles by which that relief is governed are now reduced to a regular system.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (quoting The Federalist No. 83 (Alexander Hamilton)).

After the ratification of the Constitution—with Article III's grant of jurisdiction over "all Cases, in Law and Equity," U.S. Const. Art. III, § 2—concerns remained that judges would exercise their powers in equity to undermine legislative and executive authority. Alarmed at (what he saw as) a tendency to treat equity "as a source of nearly unbounded judicial discretion," Justice Joseph Story—quoted by the majority several times, but without acknowledgement of his disquiet about the exercise of unbridled judicial power in the guise of equity jurisprudence—devoted himself to developing equity jurisprudence into a "science." Gary L. McDowell, Equity and the Constitution 74–76 (1982). Justice Story's purpose in doing so was to assure that the discretion equity confers would be used "not to act arbitrarily, according to men's wills and private affections" but would rather "be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other." J. Story, 1 *Commentaries on Equity Jurisprudence* § 13 (14th ed. 1918).

Attention to congressional intent proved critical to the effort in this country to restrain the exercise of powers in equity and thereby to guard against judicial usurpation of the coordinate branches of government. So, although Article III endows the judiciary with equity jurisdiction, American courts have (until now) never viewed equitable relief as *purely* a matter of judicial discretion, created anew for each case and each circumstance. Rather, federal courts have avoided the separation-of-powers problems that might otherwise be posed by the broad and idiosyncratic powers English courts of equity once wielded by recognizing that legislatures understand that they act against the backdrop of existing law, including equitable principles. Concomitantly, judges exercising their equitable authority endeavor to

incorporate legislative enactments to the degree consistent with equitable doctrines. Given that dual dynamic, whether equitable relief is appropriate in a particular instance necessarily incorporates considerations of legislative intent.

In the famous case of *Riggs v. Palmer*, for example, a statute governing wills was interpreted to incorporate the equitable doctrine of unclean hands on the ground that the legislature intended for the doctrine to apply, because the legislature could not have meant to allow murderers to inherit the estates of those they murdered. 115 N.Y. 506, 510–12 (1889). Similarly, the Supreme Court has repeatedly declared that whether to apply equitable tolling is "fundamentally a question of statutory intent." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). It was on this basis that *Holland* held that Congress intended AEDPA's statute of limitations to be equitably tolled in appropriate circumstances. 560 U.S. at 645–46; *see also McQuiggin*, 569 U.S. at 398 n.3; *id.* at 409–10 (Scalia, J., dissenting).

If a statute of limitations has been adopted, legislative intent determines not only *whether* equitable tolling is available, but also, if it is available, how it is to be applied. Statutes of limitation reflect policy judgments as to the length of time within which plaintiffs or petitioners should reasonably be expected to file. To take one early English example, a statute codified a common law limitations period based on "a reasonable time" that it would take a party, "wheresoever he dwelt in England," to reach the court of justice "wheresoever" it sat. Edward Coke, The Second Part of the Institutes of the Laws of England 567 (1642).

Equity jurisprudence has long been sensitive to such legislative determinations of the time it should take a claimant to file. As early as 1767, English courts recognized:

> Expedit reipublicae ut sin finis litum [it is in the public interest that lawsuits come to an end] is a maxim that has prevailed in this court in all times without the help of an act of Parliament. *But as the court has no legislative authority, it could not properly define the time of bar by a positive rule to an hour, a minute, or a year*. It was governed by circumstances. But as often as Parliament had limited the time of actions or remedies to a certain period of legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity.

J. Story, 3 *Commentaries on Equity Jurisprudence* § 1972 n.2 (14th ed. 1918) (quoting *Smith v. Clay*, Ambl. R. 645 (1767)) (emphasis added). To put the same point another way: In the absence of a statute of limitations, courts engage in a free-wheeling, independent assessment of how much time a claimant reasonably should take to pursue his claim, and how much delay should bar relief.[6] But once the legislature has made a policy determination as to the precise amount of time a claimant reasonably should have to file under ordinary circumstances, that policy determination sets a baseline for equity's operation. So, where a limitations period has been fixed by statute, courts of equity have acted "positively in obedience to such statute," 2 J. Story,

[6] "Equity, when there is no statute of limitations applicable to suits, fashions its own time limitations through laches." *Int'l Tel. & Tel. Corp.*, 518 F.2d at 926. But even in that circumstance, courts usually shy away from making their own policy judgments as to the time it should take to file: "Although analogous statutes do not necessarily control, equity will look to the statute of limitations relating to actions at law of like character and usually act or refuse to act in comity with such statutes." *Id.* (citation omitted).

Commentaries on Equity Jurisprudence § 705 (14th ed. 1918).

Against this long tradition of restraining equitable discretion out of respect for the separation of powers, the majority relies on "[t]he judicial Power" alone for the proposition that its application of equitable principles need not attend to congressional intent. Maj. Op. at 18 (citing U.S. Const. Art. III, § 2). Once equitable tolling is invoked, the majority insists, judges are free to determine for themselves, in the name of equity, how long a filing should take to prepare, entirely disregarding the period of time chosen by Congress in the course of determining how long the functional limitations period should be. *Id.*

The fundamental problem with the majority's bald invocation of "[t]he judicial Power" is that it proves the anti-federalists' original point. Maj. Op. at 18 (citing U.S. Const. Art. III, § 2). Equitable tolling's place in the American system has been justified on the assumption that Congress acts against a stable backdrop of equity jurisprudence and common law. That assumption makes sense only if the background doctrines Congress assumes to apply are effectuated so that they coexist with rather than flaunt legislative determinations. In the equitable tolling context, that coexistence requires respect for the filing periods Congress has deemed reasonable. By instead invoking the judicial power as a source of raw authority to declare, on a blank slate, how much time a "diligent" habeas petitioner needs to file a federal habeas petition, the majority interprets Article III to be the very judicial supremacy provision its opponents feared.

II. AEDPA and Congressional Intent

Consistently with the applicable principles of equity, *Socop-Gonzalez* invoked congressional intent as one of three considerations counseling in favor of the "stop-clock" rule. Pausing the limitations period, rather than replacing it with one invented by judges, avoids the separation-of-powers problem posed when a court "usurps congressional authority . . . [by] rewrit[ing] the statute of limitations" and "substituting its own subjective view of how much time a plaintiff reasonably needed to file suit." 272 F.3d at 1196. By reversing that well-considered holding, the majority institutes a new regime in this Circuit—a regime which sanctions the very judicial usurpation of congressional authority we warned against in *Socop-Gonzalez*.

Congress made a considered judgment in AEDPA that 365 days is the period of time a prisoner should have to prepare and file a habeas petition. As Congress intended AEDPA's limitations period to be subject to equitable tolling, *Holland*, 560 U.S. at 645, it necessarily set the length of the limitations period with the understanding that, when extraordinary circumstances arise, a longer period is permitted for filing. How much longer? As we explained in *Socop-Gonzalez*, under the stop-clock approach to equitable tolling, when an extraordinary circumstance prevents a claimant from timely filing, the claimant receives the full time Congress determined he may take to file—365 days—but not more. The statute of limitations resumes running for any time remaining in it after the extraordinary circumstance that precluded filing has ended.[7] At the same time, the

[7] I note that the stop-clock rule provides the rationale absent from the majority's approach, *see* n.3, *supra*, for ending the limitations period on a day certain even when there is equitable tolling. Here, the

diligence requirement ensures that the claimed extraordinary circumstance actually denied the claimant the full time Congress intended he have to file, such that equity offers only relief, not a windfall. *See Doe v. Busby*, 661 F.3d, 1001, 1012–13 (9th Cir. 2011); *Roy v. Lampert*, 465 F.3d 964, 973 (9th Cir. 2006); *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003); *Valverde v. Stinson*, 224 F.3d 129, 134 (9th Cir. 2000); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). Under the majority's approach, in contrast, the congressional determination that 365 days is to be allowed is ignored, and one judge—or three, or eleven—may decide for themselves how much time a plaintiff or petitioner should have to put together an initial pleading.

The majority avoids grappling with the focus on congressional intent underlying *Socop-Gonzalez* in part by insisting that statutes of limitation are generally seen as protecting the rights of defendants, not plaintiffs. Maj. Op. at 16–17. The congressional determination *whether* to impose a statutory limitations period surely does turn largely on the perceived strength of defendants' interests in repose. But the question of *how long* a statute of limitations should

extraordinary circumstance existed on the day the limitations period began running, so Smith would have 365 days, not more, from the end of the extraordinary circumstance within which to file. And if, for example, Smith's extraordinary circumstance—say, a debilitating illness—had not arisen until midway through the limitations period, he still would have had, under the stop-clock approach, the number of days left in the limitations period after his recovery, not more, within which to file his petition.

be necessarily includes the consideration of how much time a plaintiff should have to file.[8]

In sum, the majority follows *Holland*, as it must, as to whether equitable tolling is available. But it does so begrudgingly, resisting *Holland*'s recognition that equitable tolling is available under AEDPA because it is fully consistent with, not at odds with, congressional intent. Instead of using the congressional determination of the applicable limitations period—a total of 365 days—the majority proclaims that once equitable tolling is invoked, "[t]he judicial Power" takes over, empowering judges to second-guess Congress's judgment of the time claimants should be given to file. Maj. Op. at 18 (citing U.S. Const. Art. III, § 2). I would reinstate *Socop-Gonzalez*'s preference for respecting rather than ignoring Congress's determination of the number of days available to prepare and file a lawsuit by stopping the clock for the period of the extraordinary circumstance.

III. Supreme Court Precedent

Aside from its expansive invocation of judicial power, the majority's argument for abandoning *Socop-Gonzalez* rests on the assertion that the Supreme Court's decisions in

[8] The majority extensively quotes cases recognizing that the legislative decision to impose a statute of limitations reflects a policy judgment that defendants should be protected against claims of a certain age. Maj. Op. at 16. That recognition is correct. But the majority does not grapple with a basic point: if Congress were really exclusively concerned with protecting defendants, every limitations period would be extremely short. That is not the case. Congress determined, for example, that habeas petitioners should have 365 days to prepare and file their petitions, not ten or thirty or ninety or one hundred eighty days, all periods that would be more defendant protective. *That* determination is the legislative judgment that the majority refuses to respect.

Pace and *Holland* overturned (sub silentio) the Supreme Court cases *Socop-Gonzalez* relied upon as a basis for adopting the stop-clock rule for equitable tolling. The majority does not explicitly say that these cases overrule *Socop-Gonzalez*, only that they "undermine" its "continued validity." Maj. Op. at 31 n.8. And the majority is not clear as to whether the rule it extracts from these cases controls only in "future *AEDPA* equitable tolling decisions," or whether it sweeps more broadly. Maj. Op. at 21 (emphasis added). Either way, *Pace* and *Holland* are perfectly compatible with *Socop-Gonzalez*, and with a key Supreme Court case post-dating *Pace* and *Holland*—*Artis v. District of Columbia*, 138 S. Ct. 594 (2018)—which the majority seeks to sweep aside.

In establishing the stop-clock standard, *Socop-Gonzalez* relied principally on *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965), and *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). In *Burnett*, the plaintiff timely filed a Federal Employers' Liability Act claim in state court; the claim was dismissed for improper venue. The plaintiff refiled in federal court eight days later, but the three-year statute of limitations had by then expired. 380 U.S. at 424–25. The Supreme Court held that the limitations period "was tolled during the pendency of the state action," and that the plaintiff could have taken the full time remaining under the tolled statute when the state court dismissal became final—the limitations period minus the time the state court suit was pending—to refile. *Id.* at 434–35.

American Pipe rested on a similar understanding of tolling. 414 U.S. at 541, 561. The Court there held that the institution of a class action suspends the running of the limitations period for individual class members' claims until

the suit is stripped of its class-action character. *Id.* at 561. Subtracting the tolled period from the time since the original statute of limitations had been running, the Court concluded that individual class members had eleven days remaining within which to file at the time that the tolled period ended: "The class suit brought by Utah was filed with 11 days yet to run in the [limitations] period . . . , and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene." *Id.* Because the plaintiffs filed within eight days of the class action order, their individual claims were not time-barred—that is, they could have taken the full eleven days they had to file, regardless of any judge's subjective views as to whether they really needed all eleven days. *See id.*

The majority recognizes that *Burnett* "would seem to direct [the] stop-clock approach" of *Socop-Gonzalez*. Maj. Op. at 25–26. (*American Pipe* is barely discussed. Maj. Op. at 26.) But, the majority asserts, "subsequent developments"—namely, *Pace* and *Holland*—have silently abrogated *Burnett*. *Id.*

Equitable tolling's diligence requirement was not elaborated upon in the Court's opinion in *Burnett*; given the speed with which the plaintiff refiled, diligence was not a live issue. The fact that diligence was not at issue in *Burnett* is no reason to assume that the diligence requirement is in any tension with the stop-clock principle. In fact, *Socop-Gonzalez* recognized and applied the Ninth Circuit's longstanding diligence requirement. "The question is whether, despite due diligence, Socop was prevented during this period [the period for which equitable tolling is sought] by circumstances beyond his control and going beyond 'excusable neglect,' from discovering that his order of

deportation had become effective—the vital information he needed in order to determine that a motion to reopen was required in order to preserve his status." 272 F.3d at 1194; *see also id.* at 1185 ("[a]ll one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim" (quoting *In re Gardenshire*, 220 B.R. 376, 382 (B.A.P. 9th Cir. 1998))); *Miles*, 187 F.3d at 1107; *Valverde*, 224 F.3d at 134. The question, then, is whether and how *Pace* and *Holland* disturbed this settled understanding of the dual roles of diligence and the stop-clock calculation—especially when, as I shall show, a recent Supreme Court case reiterated the stop-clock understanding of equitable tolling.

Pace arose in a distinctive context. Pace's state conviction became final four years before AEDPA's one-year statute of limitations was enacted, at a time when courts applied a laches analysis to the timeliness of federal habeas petitions because there was no limitations statute. 544 U.S. at 410–11; *see also Gratzer v. Mahoney*, 397 F.3d 686, 690 (9th Cir. 2005) ("In pre-AEDPA practice, the equitable doctrine of laches as applicable to habeas petitions was codified in Rule 9(a) of the Rules Governing Section 2254 Cases."). Indeed, before AEDPA, some states had no, or had only recently passed, deadlines for filing state post-conviction petitions. *Grant v. Swarthout*, 862 F.3d 914, 922 (9th Cir. 2017). Thus, petitioners sometimes waited years before filing state post-conviction petitions, leaving federal habeas courts to determine "whether petitioners had sat on their claims for years before seeking relief and then asserted that they were further entitled to equitable tolling." *Id.* With AEDPA's passage, all prisoners to whom AEDPA applied and who had not yet filed petitions were given 365 days within which to file one. Pace missed that deadline and

sought statutory and, as a backup, equitable tolling. 544 U.S. at 410, 417–18.

The Court rejected Pace's principal, statutory tolling argument. *Id.* at 417. In a brief discussion denying equitable tolling, the Court stressed that Pace "waited *years*, without any valid justification" to file his petition in Pennsylvania. *Id.* at 419 (emphasis added). Had he "advanced his claims within a reasonable time of their availability," the Court stated, Pace would not have "fac[ed] any time problem, state or federal." *Id.* It also noted (but seemingly placed no weight upon) the fact that, after the rejection of his state court petition became final, Pace waited five more months to file in federal court. *Id.* The Court gave no indication that, if Pace had filed five months earlier, it would have been any more inclined to grant equitable relief, given the years-long prior delay. Indeed, the passage of AEDPA gifted Pace a year he would not otherwise have had within which to file. Essentially, the Court held that laches already barred Pace's claim when AEDPA was enacted, so he was entitled to no additional consideration after he was accorded an additional year. *Id.* at 419 (citing *McQuiddy v. Ware*, 20 Wall. 14, 19 (1874) ("Equity always refuses to interfere where there has been *gross laches* in the prosecution of rights) (emphasis added)). In light of the transition worked by AEDPA—from a regime in which courts assessed filing delays in the absence of any statute of limitations to one in which they defer to a congressional determination of the time it should take to file—*Pace*'s distinct factual context is unlikely to recur. *See Grant*, 862 F.3d at 922 ("*Pace* was a case in which the Court denied equitable tolling based on the petitioner's failure to pursue state postcollateral relief for four years after his direct appeal was concluded. . . . *Pace* was the product of a problem common before the passage of AEDPA.")

The Court also emphasized that Pace's pre-AEDPA multiple-year delay lacked "any valid justification," because the facts underlying the claims in his habeas petition were available by 1991, long before his eventual filing. *Id.* at 418–19. Pace was not denied equitable tolling on the basis of his delay alone; it was the availability, even before the limitations period began, of the facts he needed to file, *together with* the five years that lapsed before AEDPA's passage, that precluded a finding that the asserted extraordinary circumstance during the additional year the new limitations period provided actually prevented timely filing. *Id.*

Given this history, *Pace* is best understood as an application of pre-AEDPA principles in the context of a prisoner whose conviction became final well before AEDPA. Otherwise, Pace's lack of diligence before AEDPA's statute of limitations began to run would have had no bearing on whether he was entitled to equitable tolling under the statute thereafter. *Pace* thus offers no support for the rule that the majority ultimately endorses: that a post-extraordinary-circumstance delay *alone* can be seized upon to deny relief for an otherwise diligent petitioner. Although *Pace* reaffirmed that equitable tolling requires diligence, it does not suggest that the diligence requirement displaces, rather than operates in conjunction with, the stop-clock approach to determining the amount of time available to the plaintiff or petitioner.[9]

[9] The majority asserts that if the stop-clock approach had been applied to the facts of *Pace*, the outcome would have been different. Maj. Op. at 21 n.4. Not so. Again, under the stop-clock approach, diligence *is* a separate inquiry and can independently bar the application of equitable tolling, obviating the need to apply the stop-clock calculation—which is

The majority next relies on *Holland*, which it asserts "took an additional step that weighs against" retaining *Socop-Gonzalez* by adding "an explicit causation requirement to the rule for equitable tolling." Maj. Op. at 23. But this Court had already recognized a causation requirement for equitable tolling before *Socop-Gonzalez*, and it has focused its diligence analysis on precisely that requirement. *See Miles*, 187 F.3d at 1107; *Valverde*, 224 F.3d at 134. Moreover, to the extent the *Holland* Court modified *Pace* at all, it modified only the extraordinary-circumstance element of equitable tolling—not the diligence element—by adding four words ("and prevented timely filing") to the requirement that "some extraordinary circumstance stood in [the petitioner's] way." 560 U.S. at 649 ("[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.") (quoting *Pace*, 544 U.S. at 418).[10] The case does nothing to heighten the diligence requirement, nor does it invite judicial second-guessing of congressional determinations of the time ordinarily needed to file.

what happened in *Pace*. *See* pp. 52–53 (discussing the diligence prong as applied in *Socop-Gonzalez*).

[10] The majority makes much of the *Pace* and *Holland* Courts' phrasing of the diligence requirement as requiring that the petitioner demonstrate "that he '*has been pursuing* his rights diligently'—not that he 'pursued,' 'had pursued,' or 'has pursued' his rights diligently." Maj. Op. at 20 n.3. But as the majority itself recognizes in a separate footnote, the Supreme Court elsewhere has more recently phrased the diligence requirement to require only that the petitioner "has pursued his rights diligently." Maj. Op. at 29 n.7 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014)).

The majority also suggests that *Holland* further undermined *Socop-Gonzalez* by remarking on a petitioner's diligence after the extraordinary circumstance had dissipated. But as the majority acknowledges, this remark had no effect on the outcome of the case. Maj. Op. at 24 n.5. So, like *Pace*, *Holland* does not stand for the proposition that a delay in filing after an extraordinary circumstance has abated, standing alone, can justify denying a petitioner equitable relief. Rather, *Pace* and *Holland* made explicit what the Ninth Circuit had already recognized about equitable tolling's diligence requirement, *see Miles*, 187 F.3d at 1107; *Valverde*, 224 F.3d at 134; *Spitsyn*, 345 F.3d at 802; *Roy*, 465 F.3d at 973; *Doe*, 661 F.3d at 1012–13, and did not discuss—much less disapprove—the well-established stop-clock principle. Much more would be needed to conclude—as does the majority—that *Pace* and *Holland* silently abrogated *Burnett* and *American Pipe*.

Were there any doubt that the stop-clock approach to equitable tolling survived *Pace* and *Holland*, the Supreme Court eliminated it in *Artis v. District of Columbia*, 138 S. Ct. 594 (2018). *Artis* discussed at length the meaning of "tolling" in the limitations period context generally and in the equitable tolling context in particular, explaining that the stop-clock approach applies in both contexts. *Id.* at 601–02.

The equitable tolling discussion in *Artis* was an integral part of a larger discussion of the legal meaning of "tolling" in the context of statutory time prescriptions generally. The Court in *Artis* adopted a stop-clock interpretation of the word "tolled" within the meaning of 28 U.S.C. § 1367(d) on the understanding that "'tolled' in the context of a time prescription . . . means that the limitations is suspended (stops running) . . . then starts running again when the tolling period ends, picking up where it left off." *Id.* at 601. *Artis*

confirmed that understanding by quoting Black's Law Dictionary 1488 (6th ed. 1990) for the proposition that "'toll,' when paired with the grammatical object 'statute of limitations,' means "to suspend or stop temporarily," 138 S. Ct. at 601, and also by quoting *American Pipe* for the proposition that "a 'tolling' prescription . . . 'suspend[s] the applicable statute of limitations," *id.* at 602 (quoting 414 U.S. at 554). The Court then turned to its understanding of equitable tolling as further indication of the stop clock meaning of "tolling":

> We have similarly comprehended what tolling means in decisions on equitable tolling. See, e.g., CTS Corp. v. Waldburger, 573 U.S. —, —, 134 S.Ct. 2175, 2183, 189 L.Ed.2d 62 (2014) (describing equitable tolling as "a doctrine that pauses the running of, or 'tolls' a statute of limitations" (some internal quotation marks omitted)); United States v. Ibarra, 502 U.S. 1, 4, n. 2, 112 S.Ct. 4, 116 L.Ed.2d 1 (1991) (per curiam) ("Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.").

Id. at 602.

The majority emphasizes that *Artis* and some of the cases upon which it relied did not directly involve equitable tolling; instead, the issue in *Artis* was what a statute meant by "toll." Maj. Op. at 27–29. But it would have been

puzzling for the Court to describe the stop-clock rule of equitable tolling exactly as it was framed in *Socop-Gonzalez* if *Pace* and *Holland* had genuinely wrought the revolution in the jurisprudence of equitable tolling imagined by the majority.

Moreover, where a precedent "confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001)). And, in any event, "[w]e do not treat considered dicta from the Supreme Court lightly." *McCalla v. MacCabees Life Ins. Co.*, 369 F.3d 1128, 1132 (9th Cir. 2004) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc)). Here, the Supreme Court invoked its stop-clock understanding of equitable tolling as an integral part of its reasoning for adopting its stop-clock interpretation of the statute at issue. *Artis* thus made clear that *Pace* and *Holland* did not silently overrule *Burnett* and *American Pipe* and thereby undermine *Socop-Gonzalez*.

IV. Administrability and Uniformity

The majority does not engage at all with the third consideration underlying *Socop-Gonzalez*: that the approach the majority today adopts is "needlessly difficult to administer," and promotes "inconsistency" and "uncertainty." 272 F.3d at 1195; *see also* Maj. Op. at 31 n.8. But, if more were needed, that consideration remains a powerful reason to retain *Socop-Gonzalez*'s stop-clock approach to equitable tolling.

Given its "chancellor's foot" approach to deciding the total filing period available to a petitioner when the other equitable tolling requisites are met, the Court's opinion today provides no guidance to district courts or three-judge panels for determining, retrospectively, the filing period required in the various circumstances in which equitable tolling can be invoked. This case is one in which the extraordinary circumstance impeded filing during the first part of the statutory limitations period. But that is not always the case. Extraordinary circumstances are often extraordinary precisely because they arise at an unexpected time and involve widely varying circumstances. By committing this Circuit to the business of deciding how long one should take to prepare and file a federal claim, the majority requires judges to decide whether claimants should receive more, less, or the same amount of time to file depending on what the extraordinary circumstance is and whether it arises sooner or later during the running of the limitations period.

To illustrate: Suppose that a six-month coma befalls one petitioner exactly at the moment that an applicable one-year limitations period would ordinarily begin to run. And suppose that a second petitioner succumbs to an indistinguishable six-month coma with exactly six months remaining on the applicable limitations clock. Both petitioners file exactly 366 days after the applicable limitations period would ordinarily have begun—that is, both petitioners took six conscious months plus an additional conscious day to prepare their respective filings. Must the second petitioner exhibit more, less, or the same level diligence as the first to prove worthy of equitable tolling?

Under the stop-clock rule, of course, equitable tolling would provide the full period Congress determined should

be available, 365 days, so each petitioner would receive six months of tolling and both filings would be timely. But without such a rule, courts are left free to decide, on a case-specific basis, whether six months and a day was too long a period within which to file for the first petitioner but not the second (perhaps on the ground that, once the first petitioner awoke, he had an uninterrupted preparation period, while the second petitioner could not have foreseen the barrier to filing), or vice versa (perhaps because the second petitioner could have been working diligently all along and, if she did, could have finished before disaster struck). Suppose, further, that a third unfortunate petitioner survives a 365-day coma which began on the day that his limitations period started. Could six conscious months (plus a day) be deemed too long a period within which to prepare and file a claim in his case, even though Congress provided a 365-day limitations period?

Consider, too, the dilemmas the majority's approach creates for petitioners. The majority effectively requires petitioners to be prepared, in advance of filing, to demonstrate precisely how they used their time, even if they do not yet know that an extraordinary circumstance that gets in their way may arise. This new requirement is particularly troubling given the majority's assertion—unnecessary to decide this case—that diligence *before* the extraordinary circumstance arises must also be demonstrated. *See, e.g.*, Maj. Op. at 30. Under the majority's approach, a petitioner who fears that an extraordinary circumstance might arise would be well-advised to prepare a journal, demonstrating just how diligently they have used each month, day, or hour available, to prevent a judge from seizing upon delay that seems to her excessive as an excuse to deny relief.

Then there is the problem of what the journal must show to reflect diligence: If the petitioner attends classes provided by the prison for three hours when he could be working on his petition, is he insufficiently diligent? If a non-prisoner plaintiff takes a week-long vacation with his family when he could be working on his complaint, is he insufficiently diligent? Should the petitioner's reading level or minor illnesses affect the determination of how long he should have taken to file once the extraordinary circumstance abated?

Any answers to these questions will be unpredictable and come after the fact. As a result, a petitioner will have the incentive "to rush to court without fully considering his or her claim—a policy that serves none of the parties involved." *Socop-Gonzalez*, 272 F.3d at 1196. *Socop-Gonzalez* was correct to regard the ease of administration of the stop-clock rule as an additional reason for affirming it. I would do so again today.

V. Equitable Tolling as Applied

The strength of *Socop-Gonzalez*'s administrability consideration is well demonstrated by the majority's application of its approach to the facts of this case.

It is undisputed that Smith's lawyer wrongfully withheld Smith's appellate record, despite Smith's diligent efforts in seeking it, for 66 days. Smith filed his federal habeas petition 65 days after the statute of limitations would ordinarily have expired. He requests equitable tolling for the 66 days for which his record was wrongfully withheld. Applying the stop-cock rule (and assuming, again, that the withholding of the record was an extraordinary circumstance), Smith filed his petition with a day to spare.

It is unclear on the present record how Smith used the 364 days it took him to prepare and file his petition. Although his legal arguments on federal habeas are largely the same as those asserted in his state court appellate briefs, he deleted one claim. Why, and whether his decision to do so depended on his review of the case files, the record does not disclose. Also, Smith's federal habeas petition contained 20 pages of factual background copied, with a number of alterations, from a brief he submitted on direct appeal. The record does not tell us whether the fact section he revised was included in the records he received.

This factual ambiguity illustrates why this Court has long tethered equitable tolling's diligence inquiry to its causation requirement. Suppose, for example, that, after receiving the records wrongfully withheld, Smith never opened the box containing them. If that were so, it could not be said that the 66-day delay in receiving those records prevented his timely filing, as he evidently did not need those records to prepare his petition. To put it another way: for a petitioner who would make no use of his record, the unavailability of that record is not an extraordinary circumstance that prevents timely filing.

But suppose, instead, that Smith did review the wrongfully withheld records to determine whether his petition might be strengthened by them. That effort could take considerable time. As the Seventh Circuit has recognized in a similar context,

> [S]ometimes it takes a longer time to review the possibilities, discard the least promising, and write a concise pleading than it would to write a kitchen-sink petition. Perhaps a review of his entire record indicated to [petitioner] that he was best served by

> repeating claims made by a member of the bar, instead of trying to craft legal arguments from scratch. He could not have known until he had the chance to review his file.

Socha v. Boughton, 763 F.3d 674, 688 (7th Cir. 2014). Exactly how much time should be allowed for that reviewing process and for the preparation of a habeas petition based on it? Congress has been clear: a petitioner is permitted to take up to 365 days to prepare and file a federal habeas petition. Again, "[a] year is a year is a year." *Lott*, 304 F.3d at 927 (McKeown, J., concurring).

The difference between these two scenarios explains why, even if Smith's federal habeas petition had been a verbatim copy of what he submitted for state habeas review, the 364-day delay between his receipt of the records and his filing, *standing alone*, cannot support the denial of relief. In the first scenario, Smith's lack of diligence once he received his record would have illustrated that the absence of his records did not affect his ability to meet the statutory deadline, so his lack of diligence would preclude equitable tolling. But in the second scenario, in which Smith did need and use his case files, his overall diligence should be measured against the 365-day period provided by Congress. Under these circumstances, the causal link would be unbroken: had Smith's attorney not prevented him from beginning his reviewing process sooner, he would have had the full statutory period in which to prepare a timely filing.

The majority does not and cannot say which of these two scenarios more accurately reflects Smith's drafting process. Previously, when we have been unsure about the relationship between the asserted extraordinary circumstance and the impact of the plaintiff's diligence, or lack thereof, on his

ability to use the time ordinarily available under the limitations deadline, we have remanded for the fact-finding necessary to resolve that uncertainty. *Spitsyn*, 345 F.3d at 802. This the majority refuses to do. On the one hand, the majority instructs courts to be "fact-specific"; on the other, the majority's reasoning provides no guidance as to which sorts of facts—say, variations in petitioners' reading levels, in the scheduling demands of their wardens, or in the quality of their prison libraries—might have made a difference for Smith. *Compare* Maj. Op. at 11–15 *with* Maj. Op. at 33–36. So, the majority's ruling is really that 364 days is *always* too long a period within which to prepare a federal habeas petition, whatever the petitioner was doing for those days—even though Congress provided a 365-day limitations period. From whence that judicially decreed benchmark came we are not told.[11]

The majority rejects this characterization of its holding, insisting that it has "no trouble imagining" cases in which taking 364 days to prepare and file a habeas petition after an extraordinary circumstance abates does not disqualify a petitioner from receiving equitable tolling. Maj. Op. 35. But it makes no effort to distinguish its imaginings from the case at hand, saying only that petitioners must work on their petitions "with some regularity." Maj. Op. at 35. We are left to wonder what sort of regularity must be demonstrated—

[11] This indifference to the factual record—or in this case, to the silence of the record as to the pertinent considerations—creates, I note, a split with the Sixth and Seventh Circuits, which have both recognized that "the mere passage of time—even a lot of time—. . . does not necessarily mean [a claimant] was not diligent." *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011); *see also Pervaiz v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005) ("[T]he test for equitable tolling . . . is not the length of the delay.").

that is, what the journal Smith is retroactively expected to have prepared must show. *See* p.62, *supra*.

Conclusion

Under the new regime, plaintiffs and petitioners who file their habeas petitions free from any extraordinary impediments will enjoy the full 365 days that Congress provided within which to complete and file their initial pleadings. But if an extraordinary circumstance—say, grave illness, *see, e.g.*, *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005), serious attorney misconduct, *Holland*, 560 U.S. at 652, or misinformation from a court or government office, *Socop-Gonzalez*, 272 F.3d at 1184–85—precludes a potential litigant from drafting or filing his lawsuit during part or all of the limitation period, the ground shifts. Now, the litigant has only the number of days for drafting and filing deemed adequate after the fact by the judge or judges who happen to be assigned to his case. We decided otherwise in *Socop-Gonzalez*, and *Artis* reaffirmed the stop-clock approach to equitable tolling there adopted. Neither the majority's extravagant view of judicial discretion in equity nor its misreading of Supreme Court precedent can justify abandoning that approach.

I therefore respectfully dissent. I would remand for the district court to apply the correct, stop-clock standard, after deciding (rather than assuming, as both the majority and I have done) whether Smith did in fact face an extraordinary circumstance and met the diligence standard as it relates to that circumstance.

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY BERNARD SMITH, Jr., Petitioner-Appellant, v. RON DAVIS, Respondent-Appellee.	No. 17-15874 D.C. No. 2:15-cv-01785-JAM-AC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted October 9, 2018
San Francisco, California

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

Anthony Smith appeals the district court's order dismissing his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291, 2253. We review the district court's order de novo. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Smith filed his habeas petition on August 14, 2015, approximately twelve months after he received his appellate record from his attorney and fourteen months after his state conviction became final. The magistrate judge issued findings and a recommendation that Smith's petition be dismissed. The district court dismissed Smith's petition as untimely.

Smith argues that he was entitled to equitable tolling for the two months during which his appellate attorney improperly retained his records. A habeas petitioner seeking equitable tolling must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). "Courts may . . . consider a petitioner's diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment" to "ensure that the extraordinary circumstance faced by petitioners . . . cause[d] [] the tardiness of their federal habeas petitions." *Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014) (citations and quotations omitted). We are willing to assume that the failure of Smith's counsel to provide his records was an extraordinary circumstance. But when Smith received his records, he had ten months left in which to file his federal petition. Smith did not explain why the two-month deprivation of his records caused his untimely filing. A review of his petition reveals

that it is essentially a verbatim copy of his previous state filings. Under these circumstances, the district court was correct to conclude that Smith had not established (1) that the deprivation of his appellate record caused his untimely filing or (2) that he diligently used the ten months of the limitations period that remained after receiving his records.

AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY SMITH,

Petitioner,

v.

RON DAVIS,

Respondent.

No. 2:15-cv-1785 JAM AC P

ORDER

Petitioner, a state prisoner proceeding pro se and in forma pauperis, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 8, 2016, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. ECF No. 24. Neither party has filed objections to the findings and recommendations.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 8, 2016, are adopted in full;

2. Respondent's motion to dismiss (ECF No. 14) is granted and petitioner's application

for writ of habeas corpus is denied as untimely.

3. The court declines to issue the certificate of appealability referenced in 28 U.S.C. § 2253.

DATED: October 27, 2016

/s/ John A. Mendez

UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

ANTHONY SMITH,

CASE NO: **2:15−CV−01785−JAM−AC**

V.

RON DAVIS,

XX −− Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 10/27/16

Marianne Matherly
Clerk of Court

ENTERED: **October 27, 2016**

by: /s/ H. Kaminski
Deputy Clerk

NOT FOR PUBLICATION

FILED

JUL 15 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY BERNARD SMITH, Jr., Petitioner-Appellant, v. RON DAVIS, Respondent-Appellee.	No. 17-15874 D.C. No. 2:15-cv-01785-JAM-AC Eastern District of California, Sacramento **ORDER**

THOMAS, Chief Judge:

En banc oral argument will take place during the week of September 23, 2019, in San Francisco, California. The date and time will be determined by separate order. For further information or special requests regarding scheduling, please contact Deputy Clerk Paul Keller at paul_keller@ca9.uscourts.gov or (206) 224-2236.

Within seven days from the date of this order, the parties shall forward to the Clerk of Court eighteen additional paper copies of the original briefs and ten additional paper copies of the excerpts of record. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. A sample certificate is available at

http://www.ca9.uscourts.gov/datastore/uploads/cmecf/Certificate-for-Brief-in-Paper-Format.pdf. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF.

No. 17-15874

Before the Honorable Dorothy W. Nelson, William A. Fletcher, and Jay S. Bybee, CJJ; Memorandum Disposition filed October 17, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY SMITH,

v. *Petitioner-Appellant*,

RON DAVIS, Warden

Respondent-Appellee.

On Appeal from a Judgment of the
United States District Court for the Eastern District of California

District Court No. 2:15-cv-01785 JAM AC

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY SMITH,

Petitioner-Appellant,

v.

RON DAVIS, Warden,

Respondent-Appellee.

D.C. No. 2:15-cv-01785 JAM AC

Eastern District of California, Sacramento

Petition for Panel Rehearing and Rehearing *En Banc*

I. INTRODUCTION

This case squarely presents an issue that has bedeviled this Court, and the district courts of this circuit, for almost two decades. Courts have taken two very different approaches in determining whether a statute of limitations is equitably tolled. Some courts follow the "stop-clock" rule, where the statute of limitations clock stops running when extraordinary circumstances stand in the way of a litigant's timely filing, but the clock resumes running once the extraordinary circumstances are overcome or resolved. Under this rule, a litigant needs to show diligence *only* during the period she seeks to have tolled; there is no need to show diligence *after* the extraordinary circumstances have ended. In 2001, this Court sitting en banc adopted this bright line rule in *Socop-Gonzalez v. INS*, 272 F.3d

1176. Some panels, however, have followed a diligence-through-filing approach, which, as the name implies, requires a litigant to show diligence through the time of filing, even after the extraordinary circumstances have ended. Some panels have claimed courts are obligated to apply *both* tests.

Courts applying the stop-clock rule have explained in detail the benefits of the rule: it better serves the statute of limitation policies of certainty and uniformity; it respects congressional authority because it does not permit judges to substitute their subjective views of how much time a plaintiff reasonably needs to file suit; it encourages the exhaustion of state remedies without eliminating federal habeas relief; and, the contrary approach is needlessly difficult to administer and has been explicitly rejected by the Supreme Court.

No such explication is found in the cases applying the diligence-through-filing approach, and plainly, the two tests are at odds, as this Court has repeatedly recognized. As discussed more fully below, one court observed that "our circuit may need to decide whether it makes sense to follow the stop-clock approach and at the same time impose a diligence-through-filing requirement," and another panel, after an extensive discussion of the divergent tests, left the specific question "for another day," but noted it was inclined to follow the stop-clock rule. One judge put it forthrightly and, we believe, correctly in stating, "the two lines of cases are irreconcilable."

The Federal Rules of Appellate Procedure describe two types of cases that merit en banc review: ones that are necessary to secure or maintain uniformity of the court's decisions, and ones involving a question of exceptional importance. Fed.R.App.P. 35(a). This case meets both those descriptions. As numerous courts have recognized, the stop-clock test and diligence-through-filing approach are, at best, "in tension," and at worst, "irreconcilable." Only this court sitting en banc can resolve this conflict, secure uniformity of decision, and provide much-needed guidance to the district courts. So too, a significant portion of this Court's docket is devoted to habeas corpus appeals, and many of those appeals involve equitable tolling.[1] Thus, the case presents a recurring issue of exceptional importance.

The fact that so many panels have wrestled with this specific issue suggests it is a pressing problem that will not go away. For two reasons, Mr. Smith's case is an excellent vehicle for resolving the question. First, the facts, which are not in dispute, paint the issue in unusually stark relief: Mr. Smith's repeated efforts to obtain the appellate record from his appointed appellate attorney were unsuccessful, and it was not until after he filed a state bar complaint that he received it. The magistrate judge ruled that Mr. Smith "acted diligently," and if he

[1] Of the 6,624 appeals commenced in this Circuit during the 12-month period ending June 30, 2018, more than 15% involved "Habeas Corpus - General." Statistical Tables for the Federal Judiciary, Table B-7, available at: http://www.uscourts.gov/report-names/statistical-tables-federal-judiciary (last visited Dec. 19, 2018). A LEXIS Advance search for "'equitable tolling' and AEDPA and date>1/1/2018" limited to the Ninth Circuit revealed 407 hits.

were entitled to equitable tolling for the 66-day period he was separated from his record, his petition would have been timely. She concluded, however, "it appeared" Mr. Smith's "own lack of diligence during the ten months after he received the appellate record, and not the [attorney's] delay in forwarding the records, . . . was the cause of petitioner's untimeliness." Second, the law is well established in this Circuit that it is unrealistic to expect a habeas petitioner to prepare and file a meaningful petition on his own within the limitation period without access to his legal file, so the extraordinary circumstances test is plainly met.

Below, we trace the adoption of the stop-clock rule and the benefits its application secures. We next explain how this court adopted the rule to apply equitable tolling in the context of habeas corpus cases arising under the Antiterrorism and Effective Death Penalty Act (AEDPA). We note, however, that when the court adopted the stop-clock rule, it still permitted courts to examine a litigant's diligence in the post-impediment period - something the stop-clock rule expressly prohibits. This has caused widespread confusion, which merits this court's en banc attention. Finally, we detail why Mr. Smith's is an ideal case to address this important issue.

II. ARGUMENT

A. The stop-clock rule promotes statute of limitation policies, respects congressional authority, and encourages the exhaustion of state remedies without eliminating federal habeas relief.

Congress creates statutes of limitations to promote certainty and uniformity so that litigants can know how long they have to file a claim and plan their affairs accordingly. There is a rebuttable presumption, though, that limitation periods are subject to equitable tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). There might be uncertainty in any given case whether or not the court will apply equitable tolling, but under the stop-clock rule, the parties will be able to calculate with some confidence the date on which the period would run if tolling is applied, and act accordingly. When courts employ the diligence-through-filing approach, however, they encroach on the legislative decision to set a limitation period by effectively substituting their own subjective view of how much time a litigant reasonably needs to file suit. The benefits of the stop-clock rule were examined in the 2001 en banc decision of *Socop-Gonzalez v. INS*, 272 F.3d 1176, which adopted the rule.

In that case, the petitioner, an alien, had 90 days in which to file a motion to reopen his deportation proceedings. Because of incorrect advice from an Immigration and Naturalization Services officer, however, he withdrew his appeal from the deportation order. For a period of 63 days, he had no reason to believe

his deportation had become effective. This Court held the petitioner was entitled to equitable tolling, and the 63 days should not have counted toward the ninety-day period during which the petitioner could have filed a motion to reopen. *Id*. at 1194.

The government argued that in determining whether a litigant was entitled to equitable tolling, a court had to "further inquire whether he reasonably could have been expected to file his motion to reopen within the twenty-seven days remaining in the limitations period." *Id*. at 1194. The government stood on solid ground because the same argument had been accepted just a year earlier by a panel of this Court in *Santa Maria v. Pac. Bell*, 202 F.3d 1170 (2000), which in turn relied on the Seventh Circuit's decision in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (1990)). But the en banc court rejected the *Santa Maria/Cada* approach for three reasons: it was "needlessly difficult to administer, runs counter to Supreme Court precedent, and undermines the policy objectives of the statutes of limitations." *Socop-Gonzalez*, 272 F.3d at 1194.

Because *Socop-Gonzalez* sets forth the controlling rule, its reasoning deserves quotation at length:

> The *Santa Maria* rule ***does away with the major advantages of statutes of limitations: the relative certainty and uniformity with which a statutory period may be calculated and applied***. *See Burnett* [*v. N.Y. Cent. R.R. Co.*], 380 U.S. [424] at 436 (1965) (stating that the policies served by statutes of limitations are "uniformity and certainty"). While under the conventional tolling rule there may be

uncertainty in any given case whether equitable tolling will apply at all, the parties are able to calculate with some certainty the date on which the period would run if tolling is applied, and act accordingly. Moreover, litigants across the board are given the same amount of time in which to file a claim. The *Santa Maria* rule, in contrast, promotes inconsistency of application and uncertainty of calculation, thus undermining two of the purposes served by statutes of limitations.

The approach taken in *Santa Maria* was also ***explicitly rejected by the Supreme Court*** in *Burnett*. In *Burnett*, the Court decided to apply equitable tolling to a limitations period within which to bring suit under the Federal Employers' Liability Act (FELA). The plaintiff originally filed suit in the wrong venue, and brought suit in the proper venue only after the limitations period had run. After deciding that equitable circumstances warranted the application of tolling, the Court had to determine for how long the filing period should be tolled. The Court explicitly rejected the suggestion that the filing period be tolled "for a 'reasonable time' after the state court orders the plaintiff's action dismissed because such a rule would create uncertainty as to exactly when the limitation period again begins to run." Instead, in the name of greater uniformity and certainty, the Court adopted the rule that "under familiar principles which have been applied to statutes of limitations . . . the limitation provision is tolled until the state court order dismissing the state action becomes final .." This precedent appears to foreclose the approach to tolling taken in *Santa Maria* and *Cada*.

Finally, the approach to tolling taken in *Santa Maria* and *Cada* trumps what is arguably Congress' intended policy objectives in setting forth a statutory limitations period -- to permit plaintiffs to take a specified amount of time (even if they don't "need it," *Cada*, 920 F.2d at 452) to further investigate their claim and consider their options before deciding whether to file suit. A court may decide whether or not to use its equitable powers to toll a limitations period, but ***a court arguably usurps congressional authority when it tolls and then rewrites the statute of limitations by substituting its own subjective view of how much time a plaintiff reasonably needed to file suit***. Moreover, the *Santa Maria*/*Cada* approach provides the plaintiff with an incentive to rush to court without fully considering

his or her claim -- a policy that serves none of the parties involved.

> Accordingly, we reject the approach to tolling adopted in *Santa Maria*, and we need not inquire whether Socop reasonably could have filed his motion to reopen within the twenty-seven days remaining in the limitations period . . ..

272 F.3d at 1195-96 (some citations omitted, emphasis added).[2]

Shortly after *Socop-Gonzalez* was decided, an equitable tolling case came to this Court in the context of the AEDPA, in which the petitioner alleged he was denied access to his files during prison transfers that lasted eighty-two days. *Lott v. Mueller*, 304 F.3d 918 (9th Cir. 2002). The majority agreed his alleged circumstances appeared to meet the equitable tolling test, but remanded the case to allow the state to rebut the petitioner's allegations. *Id*. at 924-26. In her concurring opinion, Judge McKeown, agreed with the majority's conclusion, but stressed she would have arrived there "by the more direct and practical approach recently adopted by our court en banc in *Socop-Gonzalez*." *Id*. at 926. She criticized the majority for "appear[ing] to address the very question S*ocop* has precluded, namely whether the petitioner 'could reasonably have been expected to file his motion . . . in the [time] remaining in the limitations period.'" *Id*. at 926 (quoting *Socop-Gonzalez*, 272 F.3d at 1195). The majority's approach to tolling, she explained, is "opaque at best," and frustrates a petitioner's efforts to utilize the

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[2] *Contra Mangum v. Action Collection Serv., Inc*., 575 F.3d 935, 945 (9th Cir. 2009) (O'Scannlain, J., concurring) (criticizing *Socop-Gonzalez* as "a significant unwarranted departure from ancient principles of equity").

full limitations period Congress bestowed.

Urging the adoption of *Socop-Gonzalez*'s practical and bright-line rule, Judge McKeown concluded:

> I can find nothing in the context of a civil habeas suit that would diminish the tolling concerns addressed in *Socop*. The alternative is neither practical nor prudent. Instead of a definite and relatively easy-to-apply limitations period, the courts would be left drawing lines within lines that create new limitations within the one originally imposed by Congress. *A year is a year is a year*. A year in the context of a statute of limitations should have the same certainty as a year that represents the number of days required for one revolution of the earth around the sun.

Id. at 927 (citation omitted, emphasis added).

This Court recently affirmed that the stop-clock rule of *Socop-Gonzalez* "remains the law in our circuit and applies" with full force in AEDPA cases. *Gibbs v. LeGrand*, 767 F.3d 879, 892 (9th Cir. 2014). Writing for the Court, Judge Berzon explained that *Socop-Gonzalez* rejected the diligence-through-filing approach to equitable tolling, where courts consider whether a claimant should have been expected to file his lawsuit within the amount of time left in the statute of limitations after an extraordinary circumstance barring filing was lifted. Instead, *Gibbs* teaches, "the event that tolls the statute simply stops the clock until the occurrence of a later event that permits the statute to resume running." *Id*. at 892 (quotation omitted). The stop-clock rule promotes the AEDPA's aim of encouraging the exhaustion of state remedies without eliminating federal habeas

relief. *Gibbs* noted the rule's effects, concisely and unconditionally: "[the] rule *prohibits* courts from constraining litigants to a judicially imposed filing window, and *warns against* imposing additional diligence requirements on recipients of equitable tolling." *Id*. at 892 (emphasis added).

In the very next paragraph, however, *Gibbs* does a complete about-face and claims courts *may* do what *Socop-Gonzalez* specifically "prohibited," *i.e.,* consider a petitioner's diligence *after* an extraordinary circumstance has been lifted. They may do so, the court claimed, "as one factor in a broader diligence assessment." *Ibid.* But applying both rules is contrary to logic and bad policy. Examining whether a petitioner is diligent after the extraordinary circumstances have ceased completely subsumes the stop-clock rule and vitiates its benefits. It injects considerable confusion and disparity where Congress intended certainty and uniformity, and it permits judicial encroachment on Congress's legislative prerogative.[3]

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[3] A recent decision of the Supreme Court reaffirms that "tolling" a limitation period means "stopping the clock." *Artis v. District of Columbia*, 138 S. Ct. 594 (2018). While that case involved statutory tolling, the Court declared, "We have similarly comprehended what tolling means in decisions on *equitable tolling*." *Id.* at 602 (emphasis added). It quoted with approval an earlier decision describing equitable tolling in conformity with the stop-clock rule: "Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *Id*. at 602 (quoting *United States v. Ibarra*, 502 U.S. 1, 4 (1991)). Finally, and most importantly for purposes of this case, *Artis* commended the stop-

B. The "irreconcilable" approaches have caused widespread confusion that can be resolved only by addressing the issue en banc.

It is not surprising that subsequent panels have struggled to apply these divergent tests. In *Luna v. Kernan*, 784 F.3d 640 (9th Cir. 2015) (per Watford, J.), the court acknowledged *Gibbs* adopted the stop-clock rule.[4] But *Luna* also observed that in *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), this Court "require[d] a petitioner to show diligence through the time of filing, even after the extraordinary circumstances have ended." *Ibid.* In *Spitsyn*, the case was remanded to determine whether the petitioner, whose lawyer delayed returning his files, exercised diligence during the 174 days that elapsed between the time he received his files back (the point at which the extraordinary circumstances ceased) and the

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clock rule as "suited to the primary purposes of limitations statutes: promoting certainty by preventing surprises to defendants and barring a plaintiff who has slept on his rights." *Id*. at 594.

[4] The *Luna* court suggested there is a circuit split because the Second Circuit follows a "pure stop-clock approach," which the diligence-through-filing rule "appears to thwart." *Id*. at 651 (citing *Harper v.* Ercole, 648 F.3d 132, 136-37 (2d Cir. 2011)).

Notably, *Luna* also observed another rationale supporting application of the stop-clock rule in the AEDPA context - a rationale that had not been recognized by earlier cases. The stop-clock approach to equitable tolling works similarly to the way statutory tolling does under 28 U.S.C. § 2244(d)(2): any period when there are extraordinary circumstances and diligence (for equitable tolling) or a properly filed petition for state post-conviction relief pending (for statutory tolling) is simply not counted toward the statute of limitations. *Id*. (citing *Wood v. Milyard*, 566 U.S. 463, 468 & n.3 (2012)).

date he filed his *pro se* petition. The *Luna* court felt compelled, "under current circuit law," to apply "*both* the diligence-through-filing requirement imposed by *Spitsyn* and the stop-clock approach adopted in *Gibbs*." *Id*. at 652 (emphasis added). *Luna* presciently forecasted, however, "our circuit may need to decide whether it makes sense to follow the stop-clock approach and at the same time impose a diligence-through-filing requirement. If the objective of the stop-clock approach is to give petitioners one full year of unobstructed time to prepare a federal habeas petition**, a separate diligence-through-filing requirement appears to thwart that objective**." *Ibid*. (citing *Lott*, 304 F.3d at 926-27 (McKeown, J.,concurring) (emphasis added)).

Just last year, another panel recognized the "considerable confusion" in the circuit's case law regarding "whether a petitioner may need to prove that he was diligent *after* an extraordinary circumstance has ended." *Grant v. Swarthout*, 862 F.3d 914, 925 (9th Cir. 2017) (emphasis in original). Writing for the court, Judge Reinhardt noted, "Although some language exists in our cases suggesting that, contrary to the stop-clock approach, diligence may be required for the remainder of the filing period, it bears emphasizing that we have *never* denied relief to a petitioner because he did not exercise diligence after the relevant extraordinary

circumstance had ended." *Id*. at 924 n.9. (emphasis in original).[5] In cases like Mr. Smith's, the court "would be inclined to hold that diligence is not required after the termination of an extraordinary circumstance" because the stop-clock approach "give[s] effect to Congress's intent to provide prisoners with a full 365 days to file their state and federal petitions." *Id*. at 925.

In a recent memorandum disposition, Judge Murguia penned a dissenting opinion tracing the two lines of cases, and plainly concluded they are "irreconcilable."

> As the majority notes . . . *Luna v. Kernan* advises this Court to apply both the diligence-through-filing requirement imposed by *Spitsyn* and the stop-clock approach adopted in *Gibbs*. However, I take issue with *Luna*'s attempt to reconcile the diligence-through-filing requirement and the stop-clock approach. Under the stop-clock rule, diligence during the post-impediment period does not need to be shown. If, as *Luna* asserts, another line of cases holds that diligence must be shown, then the two lines of cases are *irreconcilable*. In attempting to apply both approaches, which directly contradict each other, the diligence-through-filing rule necessarily subsumes the stop-clock rule. Because the stop-clock rule is a definitive test and is consistent with the policy objectives of the statute of limitations, I would apply this rule [in this case]."

Bobadilla v. Gipson, 679 Fed. Appx. 600, 2017 U.S. App. LEXIS 4102, **6 (9th Cir. March 8, 2017) (Murguia, J., dissenting) (emphasis added).

These recent cases demonstrate that the confusion sown by the diligence-

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[5] *Spitsyn*, the court observed, addressed the diligence prong in dicta only; the court did not indicate that the petitioner's lack of diligence post extraordinary circumstances (if such a finding were made on remand) would necessarily preclude a finding of equitable tolling. *Ibid*.

through-filing approach is substantial and on going. And that confusion is not limited to habeas corpus cases. Last year this court noted the confusion of the Bankruptcy Appellate Panel in applying the stop-clock rule in bankruptcy proceedings. *Milby v. Templeton*, 875 F.3d 1229 (9th Cir. 2017).[6] Unless and until this court grants en banc review to resolve this issue, given the ubiquity of statutes of limitations and equitable tolling, this confusion is likely to spread to other areas of the law.

C. This case is the perfect vehicle for addressing the recognized and widespread confusion created by the divergent tests.

Mr. Smith was wrongfully deprived of his appellate file for 66 days by his appellate lawyer, whose conduct violated the California Rules of Professional Conduct. See Cal. Rules Prof'l Conduct, Rules 3-500 (communication) and 3-700(D) (termination of employment). There can be no doubt Mr. Smith diligently sought his file, through telephone calls, letters, and finally filing a State Bar complaint, and the district court so concluded. ER 11. It is equally clear that, in this Circuit, "it is 'unrealistic to expect [a habeas petitioner] to prepare and file a meaningful petition on his own within the limitations period' without access to his legal file." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1207 (9th Cir. 2015)

[6] *Milby* claimed that *Gibbs* "resolved" "the tension" between the stop-clock rule and diligence-through-filing approach, but in fact, as Judge Murguia correctly concluded in *Bobadilla*, the two rules are not only in tension, they are "irreconcilable." 2017 U.S. App. LEXIS at **6.

(quoting *Spitsyn*, 345 F.3d at 801 (alternation in *Espinoza-Matthews*)). Mr. Smith filed his pro se federal habeas petition almost exactly 66 days after the statute of limitation ran absent equitable tolling.

Thus, the issue was raised and preserved in the lower courts, and it is starkly and clearly presented on the facts, which are undisputed. This case is an ideal vehicle for addressing this recurring and vexing problem that has caused widespread confusion in applying equitable tolling principles in habeas corpus proceedings, which confusion will likely spread to other areas of the law unless this court grants en banc review.

III. CONCLUSION

For the foregoing reasons, Mr. Smith respectfully requests this Court grant rehearing and rehearing en banc, reverse the district court's judgment, and remand the case with instructions to consider the petition on its merits.

DATED: December 27, 2018

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

s/ David M. Porter
David M. Porter
Assistant Federal Defender

No. 17-15874

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY SMITH, Petitioner-Appellant, v. RON DAVIS, Warden, Respondent-Appellee.	D.C. No. 2:15-cv-01785 JAM AC Eastern District of California, Sacramento

BRIEF FORMAT CERTIFICATION
PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(4)-(6), I certify that the attached petition does not exceed 15 pages.

Dated: December 27, 2018

Respectfully submitted

HEATHER E. WILLIAMS
Federal Defender

s/ David M. Porter
David M. Porter
Assistant Federal Defender

Attorneys for Petitioner-Appellant
ANTHONY SMITH

No. 17-15874

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY SMITH, Petitioner-Appellant, v. RON DAVIS, Warden, Respondent-Appellee.	D.C. No. 2:15-cv-01785 JAM AC Eastern District of California, Sacramento

I hereby certify that on December 27, 2018, I electronically filed the Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 27, 2018

s/ Alex Moyle
Alex Moyle

FILED

OCT 17 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY BERNARD SMITH, Jr., Petitioner-Appellant, v. RON DAVIS, Respondent-Appellee.	No. 17-15874 D.C. No. 2:15-cv-01785-JAM-AC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted October 9, 2018
San Francisco, California

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

Anthony Smith appeals the district court's order dismissing his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291, 2253. We review the district court's order de novo. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Smith filed his habeas petition on August 14, 2015, approximately twelve months after he received his appellate record from his attorney and fourteen months after his state conviction became final. The magistrate judge issued findings and a recommendation that Smith's petition be dismissed. The district court dismissed Smith's petition as untimely.

Smith argues that he was entitled to equitable tolling for the two months during which his appellate attorney improperly retained his records. A habeas petitioner seeking equitable tolling must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). "Courts may . . . consider a petitioner's diligence, after an extraordinary circumstance has been lifted, as one factor in a broader diligence assessment" to "ensure that the extraordinary circumstance faced by petitioners . . . cause[d] [] the tardiness of their federal habeas petitions." *Gibbs v. Legrand*, 767 F.3d 879, 892 (9th Cir. 2014) (citations and quotations omitted). We are willing to assume that the failure of Smith's counsel to provide his records was an extraordinary circumstance. But when Smith received his records, he had ten months left in which to file his federal petition. Smith did not explain why the two-month deprivation of his records caused his untimely filing. A review of his petition reveals

that it is essentially a verbatim copy of his previous state filings. Under these circumstances, the district court was correct to conclude that Smith had not established (1) that the deprivation of his appellate record caused his untimely filing or (2) that he diligently used the ten months of the limitations period that remained after receiving his records.

AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY SMITH,

Petitioner,

v.

RON DAVIS,

Respondent.

No. 2:15-cv-1785 JAM AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition challenges his 2012 conviction, following a jury retrial, for oral copulation and related enhancements. ECF No. 1. Petitioner seeks relief from his conviction on grounds of instructional error, prosecutorial misconduct, and ineffective assistance of counsel.

Respondent moves for dismissal on the ground that the instant petition was filed beyond the AEDPA one-year statutory limitation period. ECF No. 14. Petitioner opposed the motion, ECF No. 19, and respondent filed a reply, ECF No. 22. For the reasons discussed below, the undersigned recommends that the petition be dismissed as untimely.

I. Factual and Procedural Background

The relevant chronology of this case is as follows:

In 1998, petitioner was convicted of one count of residential burglary, two counts of

residential robbery, and one count of forcible oral copulation and related enhancements. Lodged Doc. 2 at 1. Petitioner was sentenced to an indeterminate term of 25-years-to-life in state prison on the oral copulation charge, and a 20-year consecutive determinate term on the other counts. Id. at 2.

In 2010, petitioner was granted federal habeas relief with respect to the oral copulation conviction, which was vacated on the ground that the trial court coerced the jury's verdict on that charge. Lodged Doc. 2 at 2; Dkt. No. 94 in Smith v. Kane, Case No. 2:03-cv-1871-LKK-KJM (E. D. Cal. Nov. 3, 2010).

Petitioner was retried by a jury on the oral copulation charge and related enhancements. In 2012, petitioner was again convicted and sentenced to an indeterminate term of 25 years to life. Lodged Doc. 2 at 2.

Petitioner appealed, and on December 16, 2013, the California Court of Appeal, Third Appellate District, directed the trial court to amend the abstract of judgment to award custody credits, but otherwise affirmed the judgment. Lodged Doc. 2 at 13.

On January 29, 2014, petitioner, through counsel, filed a petition for review in the California Supreme Court. Lodged Doc. 3. The California Supreme Court denied the petition on March 12, 2014 without comment or citation. Lodged Doc. 4.

Petitioner filed no post-conviction collateral challenges in state court.

The instant federal petition was constructively filed on August 14, 2015.[1] ECF No. 1.

II. Statute of Limitations

Section 2244(d) (1) of Title 28 of the United States Code contains a one-year statute of limitations for filing a habeas petition in federal court. This statute of limitations applies to habeas petitions filed after April 24, 1996, when the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect. Cassett v. Stewart, 406 F.3d 614, 625 (9th Cir. 2005). Absent circumstances not present here, the limitations period runs from the date that the state court

[1] As a pro se inmate, petitioner is entitled to the use of the prison mailbox rule in determining the constructive filing date of his federal habeas petition. Houston v. Lack, 487 U.S. 166, 276 (1988).

judgment becomes final by the conclusion of direct review or the expiration of time to seek direct review. § 2244(d)(1)(A); Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010). The time during which a "properly filed" application for state post-conviction relief is pending does not count toward this one-year period. § 2244(d)(2); Porter, 620 F.3d at 958.

In the instant case, the California Supreme Court denied the petition for review on March 12, 2014. Lodged Doc. 4. Petitioner's conviction became final ninety days later, on June 10, 2014, when the time for seeking certiorari with the United States Supreme Court expired. See Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999). The AEDPA statute of limitations period began to run the following day, on June 11, 2014. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (the AEDPA limitations period begins to run on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Absent tolling, petitioner's last day to file his federal petition was June 10, 2015.

Because petitioner filed no applications for state habeas relief, the limitations period elapsed without any tolling on June 10, 2015. The instant petition was constructively filed on August 14, 2015, just over two months after the one-year limitations period expired. Accordingly, this action is time-barred unless petitioner can demonstrate that he is entitled to equitable tolling. Petitioner concedes the instant petition's facial untimeliness, but argues that he is entitled to equitable tolling. ECF No. 19.

III. Equitable Tolling

A habeas petitioner is entitled to equitable tolling of AEDPA's one-year statute of limitations only if the petitioner 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 v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)); Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009). The diligence required is "reasonable diligence," not "maximum feasible diligence." See Holland, 560 U.S. at 653; see also Bills v. Clark, 628 F.3d 1092, 1096 (9th Cir. 2010).

"The threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (citation

and internal quotation marks and punctuation omitted). "To apply the doctrine in 'extraordinary circumstances' necessarily suggests the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in his way' suggests that an external force must cause the untimeliness, rather than, as we have said, merely 'oversight, miscalculation or negligence on the petitioner's part, all of which would preclude the application of equitable tolling." Waldron–Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir. 2008). Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544 U.S. at 418.

A. Petitioner's Allegations

Petitioner contends that he is entitled to equitable tolling because he was abandoned by his appellate attorney, Scott Concklin, who refused to correspond with petitioner, failed to timely inform petitioner that his petition for review had been denied by the California Supreme Court, and delayed in forwarding petitioner's appellate record. ECF No. 19 at 4-8. Specifically, petitioner asserts that the following events support equitable tolling:

On March 12, 2014, petitioner's petition for review was denied by the California Supreme Court.

On May 10, 2014, petitioner "was advised by [his] family that the online docket in [his] case reflected that [his] appeal was denied on March [12],[2] 2014." ECF No. 19 at 23.

On May 11, 2014, petitioner sent the following letter to Concklin:

> Dear Mr. Concklin,
>
> I was recently appraised by my family that on March 12, 2014 the California Supreme Court denied the Petition for Review that you filed on my behalf thus ending your representation of me.[3]

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[2] Although petitioner alternatively asserts that his petition for review was denied by the California Supreme Court on March 12, 2014 and March 13, 2014, this inconsistency appears to be a typographical error. Regardless, the petition for review was denied on March 12, 2014. See Lodged Doc. 4 (Order of denial).

[3] It appears that Concklin had previously advised petitioner regarding the scope of Concklin's representation of petitioner. In a letter dated November 17, 2012, attached as an exhibit to petitioner's opposition, Concklin wrote:

> If the [California] Supreme Court grants the petition for review, the

> It has been 60 days since the Supreme Court's order became effective and yet I have not received my appellate record from you OR any letter advising me of the court's ruling in my case. As you should be well aware, the time which you're withholding my appellate record is using up my statutory time that I have to file for relief in the federal courts. Will you please send my appellate record forthwith?
>
> Thank you for your time and understanding with this matter.

ECF No. 19 Exh. G at 36. Petitioner's letter went unanswered. Id. at 23.

On June 9, 2014, petitioner initiated a complaint to the State Bar of California regarding Concklin's conduct. ECF No. 19 at 23. In his complaint, petitioner described the difficulties he had communicating with Concklin about his direct appeal in 2012 and 2013. See ECF No. 19 Exh. H at 38-39. Petitioner explained that Concklin refused to respond to letters or accept collect phone calls, and failed to properly federalize his appellate brief, despite petitioner's requests for him to do so. Petitioner further explained that his petition for review had been denied and that he had written a letter to Concklin asking why Concklin had not advised petitioner of "these developments or sent [petitioner's] appellate record so [petitioner] could proceed on [his] own." Id. at 39. Petitioner asserted that he still had not received a response from Concklin, or his appellate record, and requested the Bar's assistance with the matter, lamenting that Concklin's actions had "consumed 90 days of the time [petitioner had] to file [his] federal habeas court." Id.

On July 7, 2014, petitioner received a response from the Bar, indicating that his complaint was under evaluation. Id. at 23.

On or about August 15, 2014, petitioner received his appellate record from Concklin,

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> court of appeal decision will be vacated, and the Supreme Court will decide the case anew. If the Supreme Court denies review, the decision of the court of appeal will become final.
>
> **REMITTITUR.** Once the decision of the court of appeal becomes final, a remittitur will be issued formally, concluding your appeal. My appointment as your attorney will conclude. If your appeal is decided unfavorably, you still could have the opportunity to petition the federal court for a writ of habeas corpus. Federal relief may be available if your appeal raised federal constitutional issues, which were incorrectly decided by the state court. There is currently a one year statute of limitation, from the conclusion of a state appeal, within which to file a federal petition.

ECF No. 19 Exh. C at 20.

along with a letter and a printout of the electronic docket in his appeal. Id. at 23. The letter from Concklin, dated August 14, 2014, reads as follows:

> Dear Mr. Smith:
>
> I am enclosing a copy of the online docket in your appeal. It shows that date of all activity from the inception of the case to the filing of the remittitur. As I previously informed you, the remittitur signifies that the California Supreme Court denied review and the appeal is concluded. The issuance of the remittitur concludes my appointment as your attorney in the appeal. I have returned all of the trial transcripts (Clerk and Reporter's Transcripts) to you, which you should have received.
>
> The federal issues that were raised in your appeal were preserved by filing a Petition in the California Supreme Court[.] The Review Petition itself contains a summary of those issues that can be used for reference in your federal writ petition, if you chose to file one.

ECF No. 19 Exh. F at 30.

Petitioner asserts that the August 14, 2014 letter was the first time Concklin informed him that his appeal had been denied by the California Supreme Court and that Concklin no longer represented petitioner as counsel. Id. at 23. Petitioner contends that he is entitled to equitable tolling from the commencement of the limitations period on June 11, 2014[4] through August 15, 2014, when he received the above letter and appellate record from Concklin.[5]

Notably, if petitioner is entitled to equitable tolling for this period, the deadline for filing the federal petition would be extended 66 days to August 15, 2015, rendering the instant petition, filed August 14, 2015, timely. As explained more fully below, however, petitioner has not demonstrated that the asserted extraordinary circumstances were the cause of his untimeliness.

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[4] Although petitioner contends he is entitled to equitable tolling beginning on March 13, 2014, see ECF No. 19 at 7-8, the federal statute of limitations period did not begin to run until June 11, 2014. Accordingly, the court considers whether petitioner is entitled to equitable tolling beginning on June 11, 2014 rather than March 13, 2014.

[5] To the extent respondent asserts that petitioner meant to allege that he received the appellate record from Concklin on August 14, 2014 (the date of the letter) rather than August 15, 2014, the court disagrees. Considering that the letter is dated August 14, 2014, it is seems unlikely that petitioner received the letter on the same date.

B. Discussion

Under extraordinary circumstances, counsel's malfeasance may support equitable tolling. Holland, 560 U.S. at 652-53 (equitable tolling may be appropriate where post-conviction counsel effectively abandoned client); Spitsyn v. Moore, 345 F.3d 796, 801 (9th Cir. 2003) (statute of limitations equitably tolled where attorney was retained to prepare and file a habeas petition for incarcerated inmate, failed to do so, and then disregarded requests to return files pertaining to the case until well after the petition was due); Gibbs v. Legrand, 767 F.3d 879, 886 (9th Cir. 2014) ("[f]ailure to inform a client that his case has been decided, particularly where that decision implicates the client's ability to bring further proceedings *and* the attorney has committed himself to informing his client of such a development, constitutes attorney abandonment."); Foley v. Biter, 793 F.3d 998, 1003 (9th Cir. 2015) (equitable tolling warranted where counsel failed to communicate with client, failed to notify client that his habeas petition had been denied, and failed to withdraw as counsel so client could be served directly, where client believed counsel was representing him and expected a long delay before receiving a decision from the district court).

Relying on Gibbs v. Legrand, 767 F.3d 879, petitioner asserts that Concklin's failure to communicate with him, failure to inform him that his petition for review had been denied by the California Supreme Court, and delay in forwarding the appellate record amounts to client abandonment warranting equitable tolling. ECF No. 19 at 4, 6-7.

In Gibbs, the petitioner's attorney filed a state post-conviction petition in the Nevada Supreme Court and promised to forward petitioner any notice received from the court regarding his case. 767 F.3d at 882-83. When the Nevada Supreme Court denied the petition, counsel did not notify petitioner of the denial, despite petitioner's repeated inquiries regarding the status of his case. Id. at 883. As a result, petitioner did not learn that his petition had been denied until petitioner wrote to the Nevada Supreme Court and received, in response, a copy of the docket sheet reflecting the order of denial. Id. By that time, the one-year deadline for filing a federal habeas corpus petition had expired. Id. at 882. The Ninth Circuit held that counsel's failure to communicate and failure to inform the petitioner of the state court's decision, despite counsel's

promise to do so, amounted to abandonment, such that the petitioner was not responsible for the fact that he did not learn of the state court's denial of his petition until after the federal filing deadline had passed. Id. at 887-88.

The court first notes the markedly different obstacles faced by the petitioner in Gibbs and petitioner in the instant case. In Gibbs, the petitioner repeatedly attempted to contact counsel to learn the status of his case, but as a result of counsel's actions remained unaware that the state court had reached a decision in his case and that the federal limitations clock had started ticking. In contrast, petitioner here learned on his own, *before* the federal limitations period commenced, that the state court had reached a decision in his case, and attempted to contact counsel in order to retrieve the appellate record so he could proceed on his own. Whereas the petitioner in Gibbs remained wholly ignorant of the limitations period, petitioner here was motivated by his own knowledge that the limitations clock was ticking.

The instant case also differs from Gibbs in that there is no indication that Concklin promised to personally inform petitioner when the state court issued a decision in his direct appeal. See Gibbs, 767 F.3d at 887 ("Moreover, [counsel] went out of his way to *guarantee* Gibbs that he would update him about the case . . .") (emphasis in original). Rather, it appears Concklin advised petitioner that if the California Supreme Court denied his petition for review, petitioner would receive notice directly from the Court of Appeal, in the form of a remittitur, which would signal to petitioner that his appeal had concluded. See ECF No. 19 Exh. C at 20. However, because it is unclear from the record before the court whether petitioner actually received notice from the state court, the court will assume for the purposes of this motion that petitioner did not receive the remittitur.[6]

Even assuming that petitioner did not receive the remittitur and that Concklin's actions constitute client abandonment, the larger problem is that petitioner has not demonstrated that

[6] While respondent asserts that the proof of service attached to the remittitur shows that petitioner was directly served with a copy of the remittitur on March 19, 2014, ECF No. 22 at 3, the remittitur and proof of service were not included in the documents respondent lodged with the court, see ECF No. 15 (Notice of Lodging). Petitioner makes no mention of whether he received the remittitur.

these circumstances were the cause of his untimely filing.

First, while petitioner asserts that Concklin did not timely notify him that the California Supreme Court denied his appeal on March 12, 2014, petitioner concedes that he learned of the denial on May 10, 2014 from another source. See Ramirez v. Yates, 571 F.3d at 997–98 (9th Cir. 2009) ("a prisoner's *lack of knowledge* that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter") (emphasis added). As discussed above, it was petitioner's awareness of the state court's denial, and his understanding that the statute of limitations was running, that prompted petitioner's May 11, 2014 letter to Concklin and subsequent complaint to the State Bar. Thus, Concklin's delay in notifying petitioner of the state court's decision could not have been the cause of petitioner's untimeliness, as petitioner had actual notice of the denial an entire month before the statute of limitations began to run.

Second, Concklin's failure to communicate with petitioner did not mislead petitioner into believing that Concklin was still representing petitioner or working to prepare a federal petition on his behalf. Concklin had previously advised petitioner that Concklin's representation of petitioner would terminate upon the conclusion of direct review, and it is apparent from petitioner's statements in his May 11, 2014 letter that petitioner understood this point: "[O]n March 12, 2014 the California Supreme Court denied the Petition for Review that you filed on my behalf *thus ending your representation of me*." See ECF No. 19 Exh. G at 36 (emphasis added). Thus, there is no argument that petitioner delayed because he believed Concklin intended to prepare his federal petition. See Gibbs, 767 F.3d at 888-89 (observing that until petitioner definitively terminated the attorney-client relationship, petitioner may reasonably have believed counsel was going to assist him in federal court); Foley, 793 F.3d at 1003. Petitioner clearly understood that he was proceeding "on [his] own" and was focused on obtaining the appellate record. See ECF No. 19 Exh. G at 36, 39.

Petitioner also appears to assert that he is entitled to equitable tolling because Concklin did not provide him with a copy of the state court's order denying his petition for review. See ECF No. 19 at 6. See Gibbs, 767 F.3d at 889 (concluding that petitioner "could not realistically

file a federal petition" until he received a copy of the state court's order affirming the denial of his petition," where petitioner requested a copy of the order from the state court and it was unclear from the record when petitioner received the document). Here, petitioner's allegation that Concklin "has never" provided petitioner with a copy of the state court's order suggests that petitioner prepared and filed the instant federal petition without obtaining a copy of the order of denial. Thus, it does not appear that Concklin's failure to provide petitioner with a copy of the state court order caused petitioner to file his federal petition two months late.

Petitioner's main argument appears to be that he is entitled to equitable tolling because of Concklin's delay in forwarding the appellate record. Petitioner is correct that in some instances, a petitioner's lack of access to his or her legal files may warrant equitable tolling. See Waldron–Ramsey, 556 F.3d at 1013 ("[d]eprivation of legal materials is the type of external impediment for which we have granted equitable tolling"); Ramirez, 571 F.3d at 998 (holding that "a complete lack of access to a legal file may constitute an extraordinary circumstance" and remanding for determination of whether petitioner's lack of access to his legal file made timely filing impossible). However, the dispositive question is whether the denial of access to the files was the cause of the delay. United States v. Battles, 362 F.3d 1195, 1197–98 (9th Cir. 2004).

Petitioner repeatedly asserts in his opposition that the "extraordinary circumstances" brought about by Concklin's actions were lifted on August 15, 2014, when petitioner received the appellate record. At that time, ten months remained in the federal limitations period, and petitioner has offered no explanation as to why he was unable to file his federal petition during this ten month period. While the court's own review of the record indicates that petitioner may have used the appellate record to prepare a lengthy statement of facts,[7] the arguments in the federal petition were taken verbatim from the petition for review filed on direct appeal by counsel in state court.[8] Given that petitioner received the appellate record early in the limitations period,

[7] Because petitioner's opening appellate brief is not part of the record, it is unclear if the statement of facts was taken from the brief prepared by counsel.

[8] It appears that petitioner re-typed the argument section from the petition for review word for word, with a few minor edits, i.e., "petitioner" instead of "appellant" and "appellate court" instead of "Court of Appeal." See ECF No. 1 at 27-54; Lodged Doc. 3 at 4-25.

and did not make any new arguments in his federal petition, there is no indication that petitioner would have filed his federal petition within the one-year limitations period had he received the appellate record from Concklin at an earlier date. See Randle v. Crawford, 604 F.3d 1047, 1058 (9th Cir. 2009) (no equitable tolling based on counsel's retention of files where there was no indication that petitioner would have filed his federal habeas petition within the one-year limitations period had he received the files sooner); c.f. Spitsyn, 345 F.3d at 801 (equitable tolling may be warranted where counsel retained petitioner's case file through the duration of the federal limitations period). Thus, it appears that it was petitioner's own lack of diligence during the ten months after he received the appellate record, and not Concklin's delay in forwarding the records, that was the cause of petitioner's untimeliness.

Petitioner "bears the burden of showing his own diligence *and* that the hardship caused by lack of access to his materials was an extraordinary circumstance that caused him to file his petition . . . late." Waldron–Ramsey, 556 F.3d at 1013 (emphasis added). While the court is convinced that petitioner acted diligently to obtain his appellate record from Concklin, there is no evidence that the delayed receipt of the files made timely filing impossible. Because petitioner has not established that Concklin's actions caused petitioner's untimely filing, petitioner is not entitled to equitable tolling. Accordingly, the undersigned recommends that respondent's motion to dismiss the petition as untimely be granted.

IV. Certificate of Appealabilty

Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons set forth in these findings and recommendations, a substantial showing of the denial of a constitutional right has not been made in this case. Therefore, no certificate of appealability should issue.

V. Conclusion

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Respondent's motion to dismiss (ECF No. 14) be granted and petitioner's application

for a writ of habeas corpus be denied as untimely.

2. This court decline to issue the certificate of appealability referenced in 28 U.S.C. § 2253.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." **Due to exigencies in the court's calendar, no extensions of time will be granted.** The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 9, 2016.

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

FILED
AUG 24 2015
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

ORIGINAL

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Eastern District of California	
Name: Anthony Smith	Prisoner No.: P-19045	Case No.
Place of Confinement: San Quentin State Prison		
Name of Petitioner (include name under which convicted): Anthony Smith	Name of Respondent (authorized person having custody of petitioner): v. Ron Davis	
The Attorney General of the State of: California	2:15-CV-1785 AC (HC)	

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Sacramento Superior Court; 720 Ninth Street; Sacramento, CA, 94974.
2. Date of judgment of conviction: _____
3. Length of sentence: 20 years plus 25 years-to-life.
4. Nature of offense involved (all counts): Burglary; robbery; oral copulation.
5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

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9. If you did appeal, answer the following:

(a) Name of court California Court of Appeal, Third Appellate District.

(b) Result Conviction affirmed.

(c) Date of result and citation, if known December 16, 2013

(d) Grounds raised PLEASE SEE ATTACHED PETITION.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court California Supreme Court.

(2) Result Petition For Review denied.

(3) Date of result and citation, if known March 12, 2014.

(4) Grounds raised PLEASE SEE ATTACHED PETITION.

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

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(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

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For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: PLEASE SEE ATTACHED PETITION.

Supporting FACTS (state *briefly* without citing cases or law) PLEASE SEE ATTACHED PETITION.

B. Ground two: PLEASE SEE ATTACHED PETITION.

Supporting FACTS (state *briefly* without citing cases or law): PLEASE SEE ATTACHED PETITION.

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C. Ground three: PLEASE SEE ATTACHED PETITION.

Supporting FACTS (state *briefly* without citing cases or law): PLEASE SEE ATTACHED PETITION.

D. Ground four: PLEASE SEE ATTACHED PETITION.

Supporting FACTS (state *briefly* without citing cases or law): PLEASE SEE ATTACHED PETITION.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing Joseph S. Farina; 604 10th St.; Sacramento, CA 95814.

(b) At arraignment and plea Had no arraignment or plea.

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(c) At trial Joseph S. Farina; 604 10th St.; Sacramento, CA, 95814.

(d) At sentencing Same as above.

(e) On appeal Scott Concklin; 2205 Hilltop Dr., No. PMB-1116; Redding, CA 96002.

(f) In any post-conviction proceeding N/A.

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed

8-14-15
(date)

Signature of Petitioner

Anthony Smith
CDCR #: P-19045
San Quentin State Prison
1 MAin Street (3-W-92)
San Quentin, CA 94974

Petitioner In Pro Se

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Anthony Smith, Petitioner, v. Ron Davis, Warden Respondent.	**Case No.** **PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES**

INTRODUCTION

Petitioner is a prisoner of the State of California, unlawfully confined at San Quentin State Prison, and in the custody of respondent warden pursuant to a invalid judgment and conviction suffered in the Superior Court of California, County of Sacramento, case number 97F07219. Petitioner's conviction, judgment and sentence are all in violation of the Constitution or laws or treaties of the United States.

This Court has jurisdiction and power to issue a writ of habeas corpus in this case under 28 U.S.C. § 2241.

STATEMENT OF THE CASE

On October 24, 1997, an information was filed in Sacramento

County Superior Court which charged Petitioner with the following five counts:

Count 1: Burglary in violation of Penal Code § 459,[1/] with personal use of a firearm in the commission of the offense. (P.C. §12022.5(a).)

Counts 2 and 3: Robbery in violation of P.C. § 211, with personal use of firearm in the commission of the offense. (P.C. § 12022.5(a).)

Count 4: Forcible oral copulation in violation of P.C. 288a(c), committed against Deanna S. It was further alleged that Petitioner personally used a firearm in the commission of the offense, within the meaning of P.C. § 12022.3(a). It was further alleged that the offense was committed during the commission of a burglary, within the meaning of P.C. § 667.61(e)(2) and that he personally used a deadly or dangerous weapon or firearm in the commission of the present offense, within the meaning of P.C. § 667.61(e)(4).

Count 5: Burglary in violation of P.C. § 459, committed against Zella Hunsinger. (Aug. CT 2-7.)

Following a jury trial, Petitioner was convicted on all counts and the allegations were sustained.

On November 13, 1998, Petitioner was sentenced to state prison for a term of 25 years to life (Count 4), with an additional consecutive determinate term of 20 years on the other

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[1/] All statutory references are to the California Penal Code unless otherwise expressed.

counts. A $10,000 restitution fine was imposed pursuant to P.C. § 1202.4(b) and a a restitution fine of the same amount was imposed pursuant to P.C. § 1202.45. Petitioner was awarded a total of 492 days credit for time served. (Aug. CT 29-30.)

On June 23, 2000, the Court of Appeal filed a decision affirming the judgment. (1 CT 17-56.) The remittitur issued October 6, 2000. (1 CT 15.)

On March 19, 2007, then U.S. Magistrate Judge Kimberly Mueller recommended that a writ of habeas corpus be granted on Petitioner's claim of jury coercion. (1 CT 150-189.) On August 2, 2007, the recommendation was adopted by the late U.S. District Judge Lawrence Karlton. (1 CT 191-193.) On September 8, 2009, the Ninth Circuit Court of Appeals affirmed. (**Smith v. Curry**, 580 F.3d 1071 (9th Cir. 2009).) On November 1, 2010, the United States Supreme Court denied certiorari. (**Wong v. Smith**, ___ U.S. ___, 131 S.Ct. 10 (2010) (sub. nom.) (Alito, J. dissenting).)

On November 17, 2010, Petitioner was ordered returned to Sacramento Superior Court. (1 CT 213.)

Petitioner was retried on Count 4 and the special allegations pertaining thereto. Following trial by jury Petitioner was convicted on Count 4 and the special allegations were sustained. (2 CT 413.) On July 13, 2012, Petitioner was resentenced to the 20 years and 25 years to life. (4 RT 1051, 1057-1058.) The court calculated credit for time served at 5,227 total days.

On July 16, 2012, Petitioner filed a timely notice of appeal. (2 CT 479.) On December 16, 2013, the Court of Appeal filed

a decision that corrected custody credits and otherwise affirmed the judgment. (See, Exhibit "A".) A petition for rehearing was not filed.

On March 12, 2014 the California Supreme Court denied review in Petitioner's case.

STATEMENT OF FACTS

A. PROSECUTION

1. The home invasion.

On September 6, 1997, Deanna S. was chatting with a former co-worker (Robert McKenzie) in a supermarket parking lot when she mentioned that her husband won $4000 gambling at Harrah's the night before. (1 RT 165-167, 191-195, 254-255.)

Deanna and her husband were at home Sunday, September 7, 1997. She was just stepping out of the shower when she heard the doorbell ring several times. She peaked down the hallway and could see that her husband had answered the door and was speaking with a man who appeared to be selling newspapers. Her husband told the man no, closed the screen door and went back to the living room. (1 RT 146-147, 197-198.)

Deanna was drying her hair when she heard a commotion going on in the living room a short while later. She heard voices and she heard her husband yell "what are you doing here." (1 RT 147, 199-204.) She peaked around the corner and saw two intruders in the house, one of whom was wearing a plaid shirt. (1 RT 148.) Deanna went to the phone that was by her bed and called 911 to report that two men were in the house hitting her husband.[2/] While she was on the phone, she heard the sound

of footsteps walking on the tiled hallway floor toward her room. She ditched the cordless phone under the bed and hid on the floor between the bed and the wall. (1 RT 149, 206-209.)

Deanna could hear an intruder rummaging around the bedroom but she could not see him from her hiding place. She heard him check the closet, the entertainment center and dresser drawers. (1 RT 140, 211-213, 216-217.) She heard the intruder open the drawer on her husband's side of the bed and then he walked around to Deanna's side of the bed, apparently to check her night stand as well. (1 RT 218.) When he got around to her side of the bed, he was startled to see Deanna on the floor and exclaimed, "there you are." (1 RT 150, 218-219.)

The man noticed that the phone was off the stand and accused her of calling the police. She told him that she did not have time to call the police. (1 RT 220.) He pulled the mattress partially off of the bed looking for the phone. (1 RT 158, 222.) He then demanded money. Deanna took a $100 bill that she had in either a wallet or cigarette pouch and she gave it to him. (1 RT 155-156.) Deanna tried not to make eye contact with him and she kept her eyes closed for most of the time. (1 RT 248.) The intruder took the money and then accused her of concealing money in her bra. Deanna denied the intruder's accusations and raised her top exposing her breasts to the intruder. The intruder told Deanna to 'suck his dick', and when she refused, he slapped

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2/ It was stipulated that the 911 call was placed at 2:18 p.m. (3 RT 645.)

her around and may have kicked her, and pointed a large, black gun at her. He put his penis in her mouth and ejaculated. She spat the ejaculate onto the carpeted floor and wiped her mouth with the purple T-shirt that she had been wearing. (1 RT 156-159.)

They heard the sound of siren chirps outside and the intruder said "you bitch, you did call the cops." (1 RT 158, 224-225.) At some point, he removed his white T-shirt and it appeared that he was trying to wipe off fingerprints from things that he had touched. (1 RT 152.) Deanna saw no tattoos on his chest. (1 RT 248.)

Deanna heard footsteps coming down the hallway and she could hear her husband's voice. It sounded to her that the accomplice was pushing her husband down the hall. (1 RT 160.) The door opened as the gunman was pulling up his shorts. Deanna's husband saw this and accused him of rape. The gunman said, "don't be yelling rape, I didn't rape her." (1 RT 161-162.) He then exchanged some words with his accomplice who was out of view in the hallway. Deanna heard one say to the other, "Angel, the cops are coming, we have to get out of here." (1 RT 239.) The gunman ran from the room saying something like: "I'll be back to hurt or kill ... Dirty bitch." (1 RT 167, 257.) She then heard both intruders run out the front door. (1 RT 62.)

Deanna's husband, Eugene S., testified that he was watching football in the living room when the doorbell rang. He went to the door. A man holding a newspaper was selling subscriptions. Eugene declined and returned to the couch, which was only a

few feet from the door. The next thing he knew, there was a gun pressed up against his head. The gun was a metalic, semi-automatic handgun, possibly a .22 or .25 caliber. The gunman asked him repeatedly "where is it at." (2 RT 316-321, 350-362, 388-389.) "I'm going to shoot your ass if you don't come up with the money." (2 RT 322.) A second intruder entered the house and stood alongside the gunman. (2 RT 323.) Eugene did not tell them he had $4,000 in the house because he was afraid they would kill him once they got the money. (2 RT 323-324.)

The two intruders spoke amongst themselves and the gunman said that he would search the house. He asked Eugene where his wife was, and Eugene told him she was either in the shower or was away visiting her father. He also told them that she might have $100. (2 RT 325, 368.) The gunman proceeded down the hall while the second intruder stayed with Eugene and continued to demand money. Eugene gave him whatever money he had in his wallet, a $5 bill and three ones. (2 RT 326-327.) Eugene watched the intruder go into the kitchen to get a kitchen knife. He returned with the knife, waving it around. He grabbed Eugene by the hair and demanded more money. (2 RT 328329, 369.) The intruder then tore open a wrapped package that was in the living room. (2 RT 328-329.) He then appeared to get nervous and went to the front door, that was left ajar, to listen for noises outside. (2 RT 328-329, 370-371.) When he heard the chirp of a police police siren outside, he grabbed Eugene and hustled him down the hallway toward the master bedroom. The bedroom door was closed and Eugene heard his wife scream from inside.

The intruder was yelling to his partner as he opened the door, "We got to go, we got to go." When the door opened, Eugene saw that the bedroom had been ransacked. The man inside was standing with his pants down and his wife was squatting on the floor naked in front of him. As the man was pulling up his pants, Eugene went into a rage and yelled, "You raped her." The one with the knife said, "we don't rape ... don't be talking about that rape shit to me." (2 RT 331-335.) The one in the room took off his T-shirt and appeared to be trying to wipe away fingerprints with the shirt. The two then ran out the door. (2 RT 336-337, 373-374.) Eugene ran after them. When he emerged from the house, he saw a police officer in the driveway. (2 RT 337, 371.)

Eugene described the gunman as an African-American male in his early twenties, wearing a white T-shirt, sagging shorts that were dark in color, and tennis shoes. He had a medium complexion. He looked to be six-one and 160 pounds. (2 RT 338.) The one with the knife was described as an African-American male in his early twenties, looked to be six-one 160 pounds. Eugene thought that he was the shorter of the two. (2 RT 339.) He testified that the gunman wore no hat. He denied telling an officer that the gunman wore a hat. (2 RT 338.)

2. Police response.

Patrol officer August Johnson was dispatched to a call regarding a woman being slapped around at 7939 Center Parkway at 2:21 P.M. and arrived at 2:24 as the first officer on scene. (1 RT 288-290.) He deactivated his siren as he approached the

house and parked short of the residence. He exited the patrol car and took up a position in front of the garage and waited for backup. (1 RT 290-291.) As a two-man patrol car was arriving, the front door security screen flung open and two men came running out. They made eye contact with the officer and continued running. One of them threw a knife to the ground. They ran northbound on Center Parkway. (1 RT 292-293, 420.)

Both suspects appeared to be of similar height, about six-feet tall, and of similar build. (1 RT 293-294.) Johnson described them as follows: "One subject didn't have a shirt on, he was shirtless. And they had I think jean shorts on and some tennis shoes and they were wearing a dark-colored baseball hat. ["] The other subject had like a blue and green plaid styled button-up shirt with dark pants." (1 RT 293.)[3/]

Johnson gave chase. Neither suspect appeared to be carrying a weapon. They split up about two houses down and Johnson followed the one who was wearing no shirt. He did not know where the one in the plaid shirt went. (1 RT 294-295, 2 RT 421-423.) The shirtless man turned eastbound on Bamford Drive and outran Johnson. He escaped by jumping over fences. Johnson radioed other officers to set up a perimeter and then returned to the crime scene. (1 RT 295-296.) He then returned to the crime scene where he found the knife that the suspect threw in a flower

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3/ Johnson's report only described one of the suspects that he saw, the one he did not chase, who was described as follows: "early twenties, male, Black, six one, 165, hair color black, short, build, slim and muscular. Complexion, medium. Upper body clothing color green and blue plaid shirt. lower body clothing color black jeans." (2 RT 422.)

bed. (1 RT 297.)

Eric Poerio, a K-9 patrol officer, responded to a home invasion robbery call at 2:23 P.M. He heard a radio broadcast that officers were in pursuit of a suspect last seen at 33 Panos Court. He arrived at that location and searched the house and yard, but did not locate a suspect. He and his dog went over the back fence and began searching on Center Parkway. The dog alerted and led him northbound. The dog went over a fence and found a suspect on the ground. The suspect was arrested and identified as James Hinex. He was wearing long, blue jeans shorts and no shirt, with white socks and white tennis shoes. He had a light goatee and mustache and an inch of hair on his head. No hat or shirt was found in the area. Officer Fritzsche took custody of Hinex. (1 RT 260-273.)

Fritzsche found in Hinex's front pocket $8 in crumpled bills: a five dollar bill and three ones crumpled into a ball. In his rear pocket, she found $40 to $50 in folded bills. No other money was found on him. (1 RT 274-281.)

In the meantime, Officer Hinkson searched the yard at 33 Panos Court and found a dark colored baseball cap in the shrubbery of the front yard. (1 RT 282-287.)

Officer Johnson transported Eugene and Deanna to view Hinex at an in-field show-up. Johnson testified that he stopped the car within 50-75 feet of where the suspect was located. (2 RT 301-302, 416-418, 425.) Deanna testified that the car pulled up within 18 feet of the suspect. (1 RT 172.) Eugene testified that the officers marched the suspect up to within six or seven

feet of the front window. (2 RT 341-342.)

Johnson testified that without prompting, Deanna identified Hinex as the man who was in the bedroom with her: "Yup, that's him, that was the guy in the room with me." Eugene identified him as one of the men who was in the house: "Yup, that's one of them." (2 RT 301-302, 416-418, 425, 428.)

Eugene testified that he immediately identified Hinex as "the same guy that had the gun. ... Yeah, I mean it was that quick. And I never -- pretty hard to forget that when you see a guy with a gun in his hand." And he testified at the prior trial that he was able to view Hinex from only a few feet away and he was positive that Hinex was the one with the gun. (2 RT 340-342, 378-379.)

Deanna testified that she identified Hinex, saying "I'm certain that that's the man who sexually assaulted me." (1 RT 173.) She said "that man is definitely the one who pointed the gun at me and made orally copulate him." (1 RT 230.)

Johnson took a statement from Eugene, which was largely consistent with his trial testimony, with a few additional details. Eugene told Johnson that the gun held to his head was a black .22 or .25 millimeter semi-automatic handgun. (2 RT 410.) The gunman also slapped him three times and pulled a telephone cord from the wall. (2 RT 396, 426.) After the gunman went down the hall, the other man went to the kitchen for a time. (2 RT 412.) When he returned, he put the knife to Eugene's throat to demand money. (2 RT 427.) After the one with the knife led him to the end of the hall, he yelled for his partner "Angel

... get the fuck out." (2RT 413.) Eugene described the "guy with the gun" as male Black, early twenties, white T-shirt, dark, long saggy shorts, dark baseball hat, six one, 160, medium complexion, white tennis shoes." (2 RT 396.)

On September 8, 1997, Detective Willover and Detective Ware (deceased) met with the victims in their home to show them photo lineups. (2 RT 450-452.) Willover met with Deanna in one room and Ware met with Eugene in another. (2 RT 453, 479.) Willover showed Deanna a photo array with Petitioner in the number 4 position. She examined the array for 40 seconds and pointed to Petitioner's photograph and said "Maybe number 4" was the one in her bedroom, commenting "it's the eyes." (2 RT 455.) Willover then showed her a photo array with Hinex in the number 7 position. She identified a decoy photo as the one who looked the closest to the one in her bedroom, commenting "I don't remember him having a mustache or being that dark." She continued to assert that the suspect she identified the day before (Hinex) was the man. (2 RT 457, 487.)

Deanna described the gunman as sweaty, wearing dark navy blue shorts that were quite long, with no hat. She said that she only got a glimpse of the other one, who was wearing a plaid shirt and a dark colored billed hat, similar to a baseball hat. (2 RT 480-481.) She said she was trying to block it all out of her mind. (2 RT 458.)

After viewing the lineups, Willover asked her about the incident. She told him the assailant ejaculated in her mouth and that she spat the ejaculate onto her bedroom carpet, and

she pointed out the location on the carpet where she spat. She also told him that she was holding a purple t-shirt at the time. (2 RT 459.)

Willover interviewed Hinex that same day. Hinex told him that someone named Anthony was involved. Hinex's girlfriend told him that Anthony's last name was Smith. (2 RT 482-484.) On September 12, 1997, Willover was notified that Petitioner was in custody. He interviewed Petitioner that day. (2 RT 461-463.)

3. Forensics.

On September 7, 1997, CSI Officer Anthony Schiele found three latent prints on the sliding glass door at the residence located at 33 Panos Court. (2 RT 326-327.) He also photographed a hat that was found there. (2 RT 526.)

At the victims' home, he obtained two latent prints from a phone in the master bedroom and two latent prints from the side of a night stand. (2 RT 530-531.) Schiele returned the next day with a woods lamp to search for possible biological deposits. Deanna directed him to where she was standing in the master bedroom when the incident occurred. Schiele took three swabs from the floor that fluoresced under the woods lamp, two from the carpet and one from the edge of a throw rug. (People's Exhibit 14-A, 14-B & 14-C.) Deanna gave him three items: (1) a checkbook cover; (2) a rolodex; and (3) a purple t-shirt (People's Exhibit 10.) (2 RT 531-538.)

The parties stipulated that latent fingerprint impressions were developed from various items of evidence (a knife, brown

wrapping paper, a cardboard box, a $5 bill, three $1 bills, a checkbook cover and rolodex binder.) (2 RT 539-540.) An impression found on the wrapping paper matched the left ring finger impression of James Minex. Of the other impressions, some did not have sufficient ridge detail to make a comparison, and of those that did, they could not be matched to either Minex or Petitioner. (2 RT 540-541.)

On September 11, 1997, officer Chapman was tasked with searching for a gun in yards along Grandstaff Drive. Using a metal detector, she located a .38 caliber revolver in weeds at 7838 Grandstaff Drive. (2 RT 304-313.)

After Petitioner was interviewed on September 12, 1997, Detective Willover witnessed the collection of blood and saliva samples from him. He deposited those samples in the locked mailbox at the jail with his initials and agency number on the package. (People's Exhibit 22.) (2 RT 471.) Blood and saliva samples were collected in the same manner from Minex on October 30, 1997. (People's Exhibit 23.) (2 RT 473-474.)

Blood samples were obtained from Eugene (People's Exhibit 20-A) and Deanna (People's Exhibit 20-C) on November 20, 1997. (2 RT 514-516.) Saliva samples were also obtained from both (People's Exhibits 20-B and 20-D.) (2 RT 516.) On November 23, 2010, Detective Willover collected additional saliva samples from Deanna (People's Exhibit 68) and Eugene. (People's Exhibit 69.) (2 RT 474-475.)

a. Serology.

Criminalist Jeffrey Herbert tested a blood sample from Minex

(People's Exhibit 23) and determined his blood type as Type O. Herbert could not determine whether Hinex was a secretor. (2 RT 517-524.)

Ann Murphy testified as an expert in serology. (2 RT 545-546.) On October 8, 1997, she received three carpet swabs (People's Exhibit 14). (2 RT 547-549.) On October 10, 1997, she received a purple t-shirt (People's Exhibit 10). (2 RT 550-551.)

Two of three carpet swabs (002-9-A and 002-10-A) tested presumptive positive for the presence of semen using an acid phosphate test. The third (002-8-A) was negative. (2 RT 553-555.) She also tested the carpet swabs for the presence of amylase. A high level of amylase is indicative of saliva. (2 RT 555-557.) One carpet swab (002-9-A) had a high level of amylase. The other two (002-8-A and 002-10-A), had amylase in low levels. (2 RT 575.)

On the t-shirt, Murphy located three stains and took three cuttings. The three shirt cuttings tested presumptive for semen and high levels of amylase. (2 RT 564.) She made two additional stain cuttings from the shirt (People's Exhibit 35) for DNA testing. (2 RT 581.)

Murphy also tested saliva reference samples which were attributed to four individuals: Deanna and Eugene S. (People's Exhibit 20), Hinex (People's Exhibit 23), and Petitioner (People's Exhibit 22). (2 RT 566-570.)

All saliva reference samples were tested for ABO antigens using an absorption inhibition test. Antigens were detected

in all four samples, which indicates that the four donors were secretors. (2 RT 572-577.) Eugene S. had a type A antigen indicative of Type A blood. Petitioner had a type B antigen indicative of Type B blood. Deanna S. and Hinex both had type H antigens, indicative of Type O blood. (2 RT 576-577.)

For all evidence samples tested (except for the one carpet swab that tested negative for semen), Murphy found both type B antigens and type H antigens. Assuming that Deanna contributed saliva with type H antigens that the semen came from a single donor, she deduced that the semen donor had type B blood and antigens. (2 RT 578-579.) Petitioner was the only one of the four who was type B. (2 RT 580.)

Type B secretors are found in 15 percent of the African-American population, 8 percent of the Caucasian population, and 7 percent of the Hispanic population. (2 RT 580.)

On cross-examination, she agreed that evidence samples could also be explained as a mixture of Hinex and Petitioner. (2 RT 586-587.)

B. DQ-Alpha Polymarker DNA.

In 1997, Jill Spriggs was asked to conduct DNA testing on two cuttings and the control cutting from the back of the purple t-shirt (People's Exhibit 10) and to compare the results with four reference samples belonging to Petitioner, Hinex, Eugene and Deanna S. (3 RT 620.) In 1997, the DNA typing technique used at the time was DQ-Alpha Polymarker, which was a polymerase chain reaction (PCR) method that produced results at six locations. (3 RT 601, 621.)

Spriggs testified that she helped Ann Murphy select the two t-shirt cuttings (People's Exhibit 35) that would be used for DNA testing. The cutting labeled 6B-1 was from the back inside of the left sleeve. The cutting labeled 6C-1 was from the front inside of the T-shirt. A control cutting labeled 6 control A was taken from the back inside of the left sleeve. (3 RT 617.)

Spriggs performed a differential extraction on the t-shirt cuttings and was able to separate the sperm fraction from the nonsperm fraction on both. (3 RT 621.) She did not test any of the carpet swabs. (3 RT 624.)

Spriggs developed a 6-loci profile from the sperm fractions of both cuttings. The profile developed from 6B-1 was the same as the one developed from 6C-1 at every location. (3 RT 623-624.) Comparing the sperm fraction profile to reference profiles, both Hinex and Eugene S. were excluded as donors. Deanna S. was also excluded because she was female and incapable of producing sperm. (3 RT 628.)

Petitioner was not excluded. His reference profile matched the sperm fractions developed from both 6B-1 and 6C-1 at all six locations (3 RT 628-629.) Spriggs used FBI frequency statistics to determine the rarity of the marker at each location and multiplied those together to determine random match probability as follows: 1 in 1,450 in the African-American population, 1 in 17,500 in the Hispanic population, and 1 in 19,500 in the Caucasian population. (3 RT 631-632.)

C. STR DNA.

In 2010, Joy Viray was asked to conduct DNA testing on items of evidence and to compare the results with four reference samples belonging to Petitioner, Hinex, Eugene and Deanna S. (3 RT 678-679.)

As reference samples, Viray obtained oral swabs from Deanna S. (People's Exhibit 68) and Eugene S. (People's Exhibit 69.) She also obtained blood stain reference samples from Deanna S. (People's Exhibit 20-E) and Eugene S. (People's Exhibit 20-F). (3 RT 679-680.) She also obtained blood reference cards for Petitioner (People's Exhibit 22) and Hinex (People's Exhibit 23). (3 RT 681-683.)

As for evidence samples, Viray obtained two carpet swabs (People's Exhibit 14-B and 14-C) and two t-shirt cuttings, 6B-1 and 6C-1 (People's Exhibit 35-A & 35-B). (3 RT 678, 683-684.)

Viray subjected the reference and evidence samples to STR DNA analysis, which is a modern technique, more advanced than DQ-Alpha polymarker, and is the generally accepted DNA technique in current use. The STR Identifier produces an electropherogram with a 15 loci profile. (3 RT 660-661, 655.) Testing showed that Petitioner's reference profile matched the sperm fraction profiles obtained from both carpet swabs and both t-shirt cuttings. (3 RT 657.) Eugene S and Hinex were excluded. Deanna S. was also excluded because she is incapable of producing sperm. (3 RT 676.) She provided a random match probability statistic for the evidence profile only for the African-American population, which was stated as 1 in 640 quintillion. (3 RT 696.)

On cross-examination, Viray admitted that electropherograms from evidence samples contained anomalies that required her to make judgment calls in determining a DNA profile. Specifically, for both evidence samples, there was an extra allele at VWA. She opined that it was more likely a pull-up rather than evidence of a tri-allelic donor. If the donor was actually tri-allelic, that would have excluded Petitioner. (3 RT 714-720.)

4. Petitioner's statement.

In his statement to Detective Willover, Petitioner stated that he knew Hinex from high school. (2 CT 485.) On Sunday, before the incident, he was at Hinex's home. Also present were Chris (Hinex's cousin) and a friend named Brian. Brian drove them to the home of someone named Rob, who was also related to Hinex, where they planned to "kick it." (2 CT 488-490.) Chris and Rob started talking about how an old man won $4000 gambling and they discussed plans for committing a home invasion. (2 CT 490, 494-495.) Rob showed them where the house was located. Brian drove Hinex, Chris and Petitioner to that location and dropped them off around the corner from the victims' home. (2 CT 491.)

Chris stayed back while Petitioner and Hinex went to the door to pretend like they were selling papers. Petitioner and Hinex then entered. (2 CT 492.) Petitioner had a gun that he obtained from a drug user. (2 CT 493, 506.) Both of them demanded money from the man who lived there. After arguing with him for awhile, Petitioner went to close the curtains and Hinex closed

the door. (2 CT 494.) They then went off to search the house. Petitioner said that he went to the back of the house to look in other rooms two or three times. He did not find the lady when he first went looking. When he came back, he gave Hinex the gun and Hinex went to the back of the house and went into the room where the lady was found. Petitioner got the gun back from Hinex after Hinex found a knife. Petitioner had the gun when he went into the lady's room. He kept it pointed at the ground and did not point it at her when he asked her for money. She gave him $100. (2 CT 495-501.) He denied engaging in oral copulation or any other sexual assault. He did not expose his penis, he did not masturbate, and he did not ejaculate. (2 CT 501-503.) Hinex brought the man to the back of the house. He and his wife were standing there when they heard sirens outside. Hinex and Petitioner ran. (2 CT 499.) Petitioner threw the gun, the $100 bill and a checkbook he took as he was running away. (2 CT 499, 506.) While running, he saw Chris drive off through the neighborhood. (2 Ct 505.)

B. DEFENSE.

Aziza Greer testified that she dated Petitioner in high school and they had a child together. They broke up shortly before New Year's Day of 1997. Petitioner had a birthday in August of 1996, and for his birthday, Greer gave him money to get a tattoo at the Back Door Studio. Petitioner had their daughter's name tattooed on his chest above his left nipple. She saw the tattoo before they broke up. She identified a photograph of the tattoo on his chest. (3 RT 750-762.)

When Detective Ware showed Eugene a photo lineup with Hinex and several decoys, Eugene identified Hinex as the gunman. When Eugene viewed the other photo lineup, he identified a decoy as the one with the gun. (3 RT 763-764.)

Eugene told Detective Ware that when he heard his wife scream from the bedroom, the man with the knife led him down the hallway to the bedroom. when he looked in the bedroom, he saw the other man pulling up his pants. He was no longer wearing the t-shirt he had been wearing. Eugene did not see him with a gun. (3 RT 766-767.

MEMORANDUM OF POINTS AND AUTHORITIES

LAW AND ARGUMENT

I.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO REQUEST INSTRUCTION ON THIRD-PARTY CULPABILITY AND FOR FAILURE TO OBJECT TO PROSECUTOR'S ARGUMENT REGARDING THIRD-PARTY CULPABILITY

On direct appeal Petitioner raised a claim of ineffective assistance of counsel based on the Sixth Amendment of the United States Constitution (**Strickland v. Washington**, 466 U.S. 668, 688 (1984)), and on the right of counsel guaranteed by article I, section 15 of the California Constitution. (**People v. Pope**, 23 Cal.3d 412 (1979).) His claim asserted that counsel was ineffective (1) for failure to request instruction on the People's burden of proof in a case involving a claim of third party culpability and (2) for failure to object and request admonition when the prosecutor made an argument that reduced the People's burden of proof by implying in closing argument

that the alleged third-party perpetrator (Hinex) enjoyed the same presumption of innocence as a defendant on trial, and that the jury should act as if he were on trial. The need for an instruction on third-party culpability became ever more imperative when the prosecutor urged the jury in summation to imagine that Hinex was the one on trial and how difficult it would be to convict him on this evidence. That argument implied that Hinex enjoyed the same presumption of innocence as a defendant at trial. Defense counsel was ineffective for failing to object and request admonition in response to the prosecutor's misstatement of the applicable standard of proof.

1. Failure to request instruction on third party culpability.

Petitioner's primary defense to the oral copulation charge went to the issue of identity. In his statement, he admitted that he participated in the burglary with Hinex, but denied that he engaged in oral copulation. Defense counsel argued that Hinex was the perpetrator of the sexual assault, but failed to request an instruction to inform jurors that a successful third party culpability defense need not prove the guilt of the third party, but need only raise a reasonable doubt that the other party could be the perpetrator, which would in turn raise a reasonable doubt as to Petitioner's guilt. This was obviously a crucial issue to the defense. Defense counsel's failure to request instruction on that point fell below an objective standard of reasonableness.

Such an instruction was necessary because this concept may be counterintuitive to jurors who believe that everyone is

presumed innocent until proven guilty. Jurors may feel that they cannot return a verdict based on a theory that someone else is guilty of the crime unless they are convinced that the other person is actually guilty. They may believe that a successful third-party culpability defense requires the defense to expose and convict the actual perpetrator at trial, a' la Perry Mason.

The federal due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and the jury must be so instructed. (**In re Winship**, 397 U.S. 358, 364 (1970); **Cage v. Louisiana**, 508 U.S. 275, 278 (1993).) A defendant is entitled to an acquittal if the jury believes that exculpatory evidence "possibly could be" true. (**People v. Hinton**, 37 Cal.4th 839, 916 (2006) (emphasis added).) A successful third party culpability defense need not "'establish the guilt of a third person with that degree of certainty requisite to sustain a conviction of the latter.'" (People v. Hall, 41 Cal.3d 826, 831 (1986).) If third party culpability evidence raises a reasonable doubt as to the defendant's guilt, the defendant should be acquitted. (**People v. Abilez**, 41 Cal.4th 472, 517 (2007).)

Here, the appellate court found that "defense counsel appears to have performed ineffectively in declining such an instruction at the retrial." (Exhibit "A" at 6.) But the appellate court found no prejudice. (Id. at 10.)

Counsel was asked for an explanation as to why he was not requesting an instruction on third party culpability and his

answer "illuminate[s] the basis for the attorney's challenged acts or omissions." (**People v. Wilson**, 3 Cal.4th 926, 936 (1992).) Defense counsel explained that he "decided not to rely on third party culpability, in part because of my client's statement to Detective Willover. Mr. McCurin and Mr. McKenzie were not there and put himself and Mr. Hinex in the house." (3 RT 769.) This explanation shows that defense counsel declined the instruction due to faulty reasoning rather than sound trial tactics. Counsel did not express the view, as a matter of tactics, that a third-party culpability instruction would have a negative effect on the defense, or that the defense would be better off without it. Instead, counsel believed that the instruction was simply inapplicable. Counsel believed that a third-party culpability defense was not supported by the evidence because there was no evidence placing McCurin or McKenzie inside the residence and Petitioner's own statement indicated that only he and Hinex were inside the residence. Counsel's explanation overlooked the fact that Hinex was a third-party perpetrator. The theme of the defense was that the scientific evidence was unreliable and that the jury should credit eye witness testimony that identified Hinex as the gunman who perpetrated the sexual assault. Because the prosecutor was not relying on aiding and abetting or any other theory of joint or vicarious culpability on this charge, and because the jury was not instructed on aiding and abetting, the jury was faced with an either-or proposition. Either Petitioner was the perpetrator or Hinex was the perpetrator of the sexual assault.

2. Failure to object to prosecutor's argument on third-party culpability.

Petitioner also received ineffective assistance of counsel by counsel's failure to object to the prosecutor's improper argument which took advantage of the lack of a third-party culpability instruction in a way that compounded the problem. The prosecutor asked jurors to imagine that Hinex was the one on trial for this offense and how absurd it would be to convict him on the state of this evidence. (3 RT 798.) If Hinex had been the one on trial, as jurors were asked to imagine, he would have been protected by the presumption of innocence and the prosecution would have had the burden of proving him guilty beyond a reasonable doubt. The prosecutor's argument invited jurors to apply the same reasoning to Hinex in this case. Because it would be absurd to convict Hinex based on this evidence, it would be equally absurd to acquit Petitioner based on a theory that Hinex was the guilty party. That was the clear implication of the prosecution's argument.

The appellate court could not find ineffective performance on direct appeal: "We can conceive of a tactical reason why defense counsel did not object to this specific argument; therefore, on appeal, we find no ineffective assistance on this point [Citation.] Defense counsel reasonably may have thought that since the prosecutor's argument emphasized the witness identification evidence (which tended to show Hinex as the sexual assailant) rather than the forensic evidence (which squarely tagged [Petitioner]) defense counsel would simply let this point

go without objection." (Exhibit "A" at 7.)

Petitioner's burden is to overcome the presumption that the challenged action might be considered "sound trial strategy." (Strickland, supra, 466 U.S. at 668, 689; **Michel v. Louisiana**, 350 U.S. 91, 101 (1955).) Under that standard, a generalized fear that "an objection would do more harm than good because it would focus the jurors' attention on the prosecutor's statement even if the court instructed them otherwise" is not an objectively reasonable tactical choice. (**Washington v. Hofbauer**, 228 F.3d 689, 705-706 (6th Cir. 2000).) "[A]ccepting as a proper trial strategy a lawyer's doubts over the effectiveness of objections and curative instructions would preclude ineffectiveness claims in every case such as this, no matter how outrageous the prosecutorial misconduct might be." (Ibid.) Such an excuse can serve as a reasonable tactical decision only in cases where it is "unclear that the challenged conduct itself was improper in the first place," but will not serve to excuse a lack of objection where the prosecutor's conduct "was clearly improper and prejudicial." (Id. at 706, fn. 11.)

"'[I]t is improper for the prosecutor to missatate the law generally, and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.'" (**People v. Weaver**, 53 Cal.4th 1056, 1079 (2012), citing **People v. Marshall**, 13 Cal.4th 799, 831 (1996).)

The prosecutor's argument, which implied that a third-party culpability theory should be judged in the same way that the

jury would judge the guilt of the third party, as if he were the one on trial, misstated the People's burden of proof. It was the People's burden to show that the third-party culpability evidence did not raise a reasonable doubt as to Petitioner's guilt. The prosecutor's argument was an attempt to avoid that burden by arguing that jurors should employ a higher standard in judging the third-party culpability testimony. The jury should imagine that Hinex was the one on trial.

A criminal defendant has a Sixth Amendment right to present to the jury exculpatory testimony. (**Washington v. Texas**, 388 U.S. 14 (1967).) In **Cool v. United States**, 409 U.S. 100 (1972), the Supreme Court found a constitutional violation in a case where the court instructed the jury that exculpatory accomplice testimony could be considered only if you are "convinced it is true beyond a reasonable doubt." (Id. at 102.) Such an instruction "impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." (Id. at 104.) The prosecutor's argument here accomplished the same constitutional violation.

A juror's natural tendency would be to accept the words of a prosecutor as true. (**Berger v. United States**, 295 U.S. 78, 88 (1935).) It is defense counsel's responsibility to protect the defendant from misstatments of the law by the prosecutor. Here, defense counsel did not object to the prosecutor's erroneous argument, nor did counsel request an admonition or instruction to ensure that the jury was not misled by the

prosecutor's improper argument.

3. Ineffective assistance was prejudicial.

"[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (Strickland, supra, 466 U.S. at 693-694.) "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (Id. at 694.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Ibid.) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (**Kyles v. Whitley**, 514 U.S. 419, 434 (1995).)

This case presented ample evidence from which the jury could conclude, based on eyewitness testimony, that there was a reasonable doubt as to whether Hinex was the perpetrator and that Petitioner was not.

Both Eugene and Deanna differentiated the intruders by the clothing they were wearing. They both consistently described the gunman as wearing shorts.[4/] The other one wore a plaid shirt and black pants.[5/] And they both described the gunman as shirtless when he left the house.[5/] It was beyond dispute,

therefore, that the one who ran from the house wearing shorts and no shirt was not the perpetrator.

Officer Johnson saw the two men run out of the house. One was shirtless and was wearing jean shorts and a dark-colored baseball hat. The other one was wearing a plaid shirt and black jean pants. (1 RT 293; 2 RT 422.) Given that Eugene and Deanna claimed that the gunman fled shirtless and in shorts, the shirtless man in shorts and a hat that the officer saw run from the house must have been the perpetrator. The one in a plaid shirt and black pants was not the perpetrator. When the two

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4/ Deanna told police the gunman was wearing "dark navy blue shorts that were quite long." (2 RT 481, emphasis added.) She testified that she was "sure" that he was wearing "a white t-shirt and shorts, tennis shoes." (1 RT 152, emphasis added.) She testified that he pulled his shorts down" prior to the sexual assault. (1 RT 157, emphasis added.) After the sexual assault, he was seen "pulling up his shorts." (1 RT 161, emphasis added.) Eugene described the gunman: "male Black, early twenties, white t-shirt, dark, long saggy shorts, dark baseball hat, six one, 160, medium complexion, white tennis shoes." (2 RT 396, emphasis added.) Eugene confirmed that description in his trial testimony. (2 RT 338.)

5/ Deanna told police she only got a glimpse of the other one, who was wearing a plaid shirt and a dark colored billed hat, similar to a baseball hat. (2 RT 480-481.) When she testified, she could only recall that the other man wore a plaid shirt. (1 RT 164.) Eugene described the other one in his testimony as wearing a blue and green plaid shirt and black pants. (2 RT 339.)

6/ Deanna testified that her assailant removed his white t-shirt to wipe fingerprints. (1 RT 152.) Eugene likewise testified that the assailant removed his t-shirt to wipe fingerprints. (2 RT 336-337, 373-374.)

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split up, Johnson followed the shirtless man (the perpetrator) who was wearing shorts and a hat. (1 RT 293-294.)

Residents at 33 Panos Court stated that a suspect ran through their house. (1 RT 262-263.) A hat was found at that location. (1 RT 284.) That means that the shirtless man in shorts with a hat that Johnson was chasing must have been the one who ran through the Panos Court residence. The K-9 officer followed a scent to where Hinex was hiding. Hinex was wearing blue jean shorts and was shirtless. (1 RT 282-287.) That identifies Hinex as the shirtless perpetrator in shorts that Johnson had been chasing.

Deanna and Eugene were transported to view Hinex at an in-field show-up and both of them testified that they were positive that Hinex was the gunman, and Deanna was certain that Hinex was the one who sexually assaulted her. (1 RT 173, 230; 2 RT 340-342, 378-379.)

When Detective Ware showed Eugene a photo lineup with Hinex and several decoys, Eugene identified Hinex as the gunman. When Eugene viewed the other photo lineup, he identified a decoy as the one with the gun. (3 RT 763-764.) He did not identify Petitioner in the photo lineups.

When Detective Willover showed Deanna a photo lineup she said "maybe" in reference to Petitioner's photograph, commenting "it's the eyes." (2 RT 455.) When she viewed a photo array with Hinex in the number 7 position, she identified a decoy photo as someone who looked the closest. But she continued to insist that the suspect she identified the day before (Hinex) was the

man. (2 RT 457, 487.)

All of this evidence points to Hinex as the perpetrator. The prosecutor's explanation of the eyewitness testimony was weak and untenable. The prosecutor theorized that Hinex was the one who ran from the house wearing the plaid shirt and black pants and a hat. The prosecutor theorized that Hinex ditched the hat at 33 Panos Court and that he must have ditched his plaid shirt somewhere along the way, never to be found. (3 RT 826, 883.) To explain away the fact that Hinex was wearing blue jean shorts when he was found, the prosecutor argued that nobody specifically said that the black pants he was seen wearing were long pants. (3 RT 885.) And the prosecutor argued that Deanna and Eugene were mistaken when they identified Hinex at the in-field show-up because they were "not fully functioning" and were too stressed to make an accurate identification. (3 RT 826, 885.)

The prosecutor's theory overlooks the fact that Officer Johnson did not see the man in the plaid shirt and black pants wearing a hat. Instead, he testified that the other man -- the shirtless man in shorts -- was the one wearing the hat. (1 RT 293.) If Hinex was the one who dropped the hat at 33 Panos Court, as the People theorized, then Hinex must have been the shirtless man in shorts that Johnson saw running from the scene of the crime wearing a hat.

As for the prosecutor's claim that nobody ever specifically said that the black pants worn by the other suspect were long pants, that argument is a nonstarter. Eugene, Deanna, and Officer

Johnson differentiated the two suspects by saying that one was wearing shorts while the other was wearing black pants. All of them cited this as a distinguishing factor. Deanna stated that the shorts were blue. (2 RT 481, 493.) Johnson specifically described the plaid-shirted suspect as wearing black jeans, not blue jeans. He described the other one, the one with no shirt and a hat, as wearing black jeans. He was shirtless wearing blue jean shorts. (2 RT 499.) That identifies him as the one who committed the sexual assault.

The prosecutor argued that Hinex could not have been the gunman because the .38 caliber revolver found in the yard at 7838 Grandstaff Drive was not found along the route that Hinex took fleeing from the scene of the crime to his hiding place. (3 RT 819.) But Eugene S. claimed that he knew the difference between a semi-automatic handgun and a revolver and he insisted that the gun that was pointed at him was a semi-automatic. (2 RT 389.) Even the prosecutor was forced to concede that the .38 caliber revolver may not have been the gun used in the crime. (3 RT 801-802.)

The prosecutor noted that Hinex had $8 stuffed in his pants pocket (3 RT 798, 818, 876-877), which is the same amount that Eugene claimed he gave to the man who wore a plaid shirt and black pants. Hinex was not wearing a plaid shirt and black pants when they found him. He was shirtless wearing blue jean shorts. The $8 that Hinex had in the pocket of his shorts could not have been the same $8 that Eugene gave to the man in the plaid shirt and black pants.

Eugene told Detective Ware that both suspects were present, yelling at him, when he handed the wallet to the second suspect, who removed the $8. (3 RT 765.) The one who took the $8 could have handed it to the other one.

The prosecutor urged the jury to reject the fact that Eugene and Deanna positively identified Hinex as the perpetrator at the in-field show up by arguing that they were "not fully functioning" and too stressed to make an accurate identification. (3 RT 826, 885.) The People's argument that Eugene and Deanna were too traumatized to make an accurate identification also calls into question their narrative of what happened inside the house, including the entire sequence of events and the role that each intruder played. In Petitioner's statement, he claimed that he handed the gun off to Hinex during the burglary and at one point, Hinex went into the bedroom with the lady. (2 CT 498.) That very well could have been true. Petitioner could have been the one who took the $100 from Deanna. Hinex could have entered her room sometime later (or sometime before) to commit the sexual assault. In her confusion, Deanna could have thought that both were the same person. After all, she testified that she kept her eyes closed much of the time. (1 RT 248.)

In sum, all of the eyewitness testimony -- including the testimony of the victims and of the police officers who participated in the chase that led to the apprehension of Hinex -- points to Hinex as the perpetrator. There was certainly enough evidence to raise a reasonable doubt that Hinex was the perpetrator and that Petitioner was not.

The conundrum facing the jury was that the eyewitness accounts pointed almost exclusively to Minex as the perpetrator of the sexual assault but the scientific evidence (serology, DQ-Alpha polymarker DNA typing, and STR DNA typing) pointed to Petitioner and excluded Minex as the semen donor. When faced with an insoluble conundrum, a properly instructed jury is required to give the defendant the benefit of the doubt and acquit.

The scientific evidence was not infallible. All of it was dependent upon the believability of a single witness. Detective Willover testified (in 2012) that he collected reference samples from Petitioner and Minex 14 years prior. He testified that he witnessed the collection of blood and saliva samples from Petitioner and he deposited those samples in the locked mailbox at the jail with his initials and agency number on the package. (People's Exhibit 22.) (2 RT 471.) Blood and saliva samples were collected in the same manner from Minex on October 30, 1997. (People's Exhibit 23.) (2 RT 473-474.) Those reference samples were used in all three forms of scientific testing. The integrity of the scientific testing depended upon the integrity of those reference samples. If there was any doubt as to Willover's testimony about collecting those samples 14 years prior, or the integrity of those samples, it would cast doubt over all of the results obtained through scientific testing.

On November 23, 2010, Detective Willover collected recent saliva samples from Deanna (People's Exhibit 68) and Eugene

(People's Exhibit 69.) (2 RT 474-475.) There was no attempt to obtain more recent reference samples from Petitioner or Hinex.

Defense counsel argued that the reference samples could have been inadvertently switched in the lab, which is an explanation that would reconcile the scientific results obtained with the eyewitness testimony. (3 RT 862.) The prosecutor argued that there was no evidence of a mix-up (3 RT 877-878), but the fact that the scientific evidence turned out to be the reverse of what eyewitnesses claimed is evidence that gives rise to that possibility.

Defense counsel argued that it is unknown where the reference samples were kept between 1998 and 2005 (3 RT 845.) The prosecutor countered by pointing to People's Exhibit 76 (Aug. CT 63-64), an order releasing exhibits to the prosecutor, to argue that the reference samples were kept in the courthouse as trial exhibits. (3 RT 880.) That explanation casts further doubt on the integrity of the reference samples. The court's exhibit room is open to the public and is not necessarily a secure location for storing critical scientific evidence.

Based on the strength of eyewitness testimony that identified Hinex as the perpetrator and possible doubt as to the reliability of scientific evidence, there is a reasonable chance that a jury, properly instructed on third-party culpability, would have found reasonable doubt as to Petitioner's guilt. Without an instruction on third party culpability, the jury may have been persuaded by the prosecutor's improper argument which urged jurors to imagine Hinex was the one on trial. If the jury

accepted the implication of the prosecutor's argument, the jury could have dismissed Petitioner's third-party culpability defense on the grounds that there was insufficient evidence to find Minex guilty. Defense counsel's failure to request the instruction on third-party culpability and his failure to correct the prosecutor's erroneous argument, so as to ensure that the jury understood the correct burden of proof on the issue of thirdparty culpability rendered the resulting verdicts unworthy of confidence.

II.

CALCRIM NO. 302 DILUTED THE PEOPLE'S BURDEN OF PROOF ON THE ISSUE OF THIRD PARTY CULPABILITY

CALCRIM No. 302[7/] denied Petitioner federal due process, guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, in that the instruction reduced the government's burden of proof (Cool, supra, 409 U.S. at 104 [instruction that substantially reduces the government's burden of proof is a violation of due process]), and it denied Petitioner a meaningful opportunity to present a complete defense (**Crane v. Kentucky**, 476 U.S. 683, 690-691 (1986)), by specifically inhibiting his right to rely on a third-party culpability defense. (**Chambers**

7/ If you determine there is a conflict in the evidence, **you must decide what evidence, if any, to believe.** Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence **convinces you**, not just the number of witnesses who testify about a certain point. (4 CT 1006.)

v. Mississippi, 410 U.S. 284, 294 (1973).)

In reviewing a challenged instruction, the inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (Boyde v. California, 494 U.S. 370, 380 (1990).) A defendant "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." (Ibid.) But a "slight possibility" is enough. (Weeks v. Angelone, 528 U.S. 225, 236 (2000).)

When CALCRIM No. 302 is applied to the conflict in evidence that arises from third-party culpability evidence, there is a reasonable likelihood that the jury would interpret the instruction to mean that unless jurors believes and are convinced by third party culpability evidence, the jury may treat the issue as an unresolved conflict in the evidence that they can ignore. CALCRIM No. 302 is erroneous and misleading when applied to third-party culpability evidence because it treats both sides of the conflict as being on equal footing and requires jurors to determine which side "convinces you."

"[T]he jurors were not, as the court erroneously instructed, required to decide whom to believe or what actually occurred. They had to determine only whether the Government proved what it alleged had happened beyond a reasonable doubt." (United States v. Rawlings, 73 F.3d 1145, 1148-49 (D.C. Cir. 1996) emphasis added.)

The CALCRIM No. 302 formulation may be correct when applied to prosecution evidence, where the People bear the burden of

proving guilt beyond a reasonable doubt. But the formulation is not correct when applied to defense evidence on the other side of the conflict, such as third-party culpability evidence.

Nothing in CALCRIM No. 302 tells jurors that the reference to convincing evidence -- where it says "[w]hat is important is whether the testimony or any other evidence convince you" -- applies only to prosecution evidence. Nothing in the instruction tells jurors that a conflict in the evidence can be resolved in the defendant's favor with less than convincing evidence, or with evidence that they do actually believe. Instead, the instruction speaks of conflicting evidence and the differing sides in a neutral and impartial manner.

Moreover, the part of the instruction that says, "you must decide what evidence, if any, to believe," suggests that if the jury cannot decide whether to believe one side or the other on the issue of third-party culpability, the result is a wash, leaving the conflict in the evidence unresolved. When such is the case, jurors who believe that everyone is presumed innocent until proven guilty would consider the defendant's attempt to assign guilt to a third party as unproved, and would ignore it.

The prosecution's summation played upon this error. The prosecutor urged jurors to imagine that Hinex was the one on trial, and to think how absurd it would be if a prosecutor sought to convict him on this evidence. (3 RT 798.) That argument implied that if the evidence was insufficient to convict Hinex, the jury cannot accept a theory of defense that points to Hinex

as the perpetrator. Given the state of the evidence (see ante, at 28-36), and the cumulative effect of all of the errors set forth herein, the cumulative error was prejudicial. (Rawlings, supra, 73 F.3d at 1148-49, fn. 4 [error in instructing jury that it is required to decide whom to believe is prejudicial when combined with other errors that compounded the instructional error].)

III.

THE COURT ERRED IN MODIFYING THE EYEWITNESS IDENTIFICATION INSTRUCTION (CALCRIM NO. 315) BY MAKING IT APPLICABLE TO THE IDENTIFICATION OF A "SUSPECT" RATHER THAN THE IDENTIFICATION OF THE "DEFENDANT"

CALCRIM No. 315[8/] as given at trial, denied Petitioner federal due process, as defined by the Fifth and Fourteenth Amendments to the United States Constitution, in that the instruction reduced the government's burden of proof (Cool, supra, 409 U.S. at 104), and it denied him a meaningful opportunity to present a complete defense (Crane, supra, 476 U.S. at 690-691), by specifically inhibiting his right to rely on a third-party culpability defense. (Chambers, supra, 410 U.S. at 294.)

CALCRIM No. 315 reflects the fact that a "defendant may be entitled to a special instruction specifically directing the jury's attention to other evidence in the record -- e.g.,

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[8/] CALCRIM No. 315 included the following language: "You have heard eyewitness testimony identifying a suspect. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. (2 CT 422-423, emphasis added.)

facts developed on cross-examination of the eyewitnesses -- that supports his defense of mistaken identification and could give rise to a reasonable doubt of his guilt." (**People v. McDonald**, 37 Cal.3d 351, 377, fn. 24 (1984).) "We hold that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (**People v. Wright**, 45 Cal.3d 1126, 1141 (1988).) "Defendant is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (**People v. Johnson**, 3 Cal.4th 1183, 1230 (1992); **People v. Fudge**, 7 Cal.4th 1075, 1110 (1994).)

CALCRIM No. 315 was not intended to protect the prosecution from the defendant's reliance on a third-party culpability defense. It was not designed to protect the presumption of innocence of a potential third-party perpetrator. The potential third-party perpetrator is not protected by a presumption of innocence, and guilt need not be established beyond a reasonable doubt. CALCRIM No. 315 should not be used to single out eyewitness testimony that identifies a third-party perpetrator, to suggest that the jury should not accept such testimony without special scrutiny and critical analysis.

The introduction to the modified eyewitness instruction -- "You have heard eyewitness testimony identifying a suspect"

-- would be understood by the jury as directed at the eyewitness identification of Hinex, because he was the only "suspect" who was positively identified by "eyewitness testimony." There was no eyewitness testimony that positively identified Petitioner. Because Hinex was the only suspect identified by eyewitness testimony and because the reliability of the eyewitness identification of Hinex was a key issue at trial, it is likely that the jury understood this instruction as focusing on the identification of Hinex.

By changing "defendant" to "suspect" in the introduction, the court effectively denied Petitioner that benefit of the instruction and gave it to the prosecution. The modification changing the person identified from "defendant" to "suspect," which the jury would understand to mean Hinex, switched the focus of the instruction to require special scrutiny of the testimony identifying Hinex, and away from the identification of Petitioner.

Immediately after stating that the instruction applied to the identification of a "suspect," the instruction goes on to say that jurors "must decide whether an eyewitness gave truthful and accurate testimony." This suggested that eyewitness testimony identifying a third party perpetrator, such as Hinex, is judged with the same scrutiny and by the same standard as eyewitness testimony identifying a defendant, as if Hinex (the suspect) enjoyed the same presumption of innocence as a defendant.

Although "defendant" was changed to "suspect" in the introduction, the court failed to change "defendant" to "suspect"

in the body of the instruction. CALCRIM No. 200 told jurors: "Some of these instructions may not apply, depending on your findings about the facts of the case." (2 CT 415.) The specific reference to "defendant" in some eyewitness factors, but not all, could have led jurors to believe that some factors only apply when a defendant has been identified, and that others apply when a "suspect" other than the defendant has been identified.

One factor asked: "Did the witness give a description and how does that description compare to the defendant?" (2 CT 422, emphasis added.) The eyewitness identification of Hinex found strong support from the fact that Hinex matched the description of the perpetrator given by the eyewitness who identified him. (See, ante at 28-33.) This evidence confirmed the accuracy of the eyewitness identification of Hinex. But the jury may have ignored these facts in assessing the eyewitness identification of Hinex because the eyewitness instruction made the match-in-description factor applicable only to the "defendant."

Another factor that supported the identification of Hinex was the fact that both eyewitnesses identified him within an hour of the crime. But the jury may have ignored this fact in assessing the eyewitness identification of Hinex because the eyewitness instruction made the timing factor applicable only to the "defendant."

Another factor that supported the identification of Hinex was that Eugene S. identified Hinex as the perpetrator in a photo lineup. (3 RT 763-764.) But the jury may have ignored

this fact in assessing the eyewitness identification of Hinex because the eyewitness instruction made the photographic lineup factor applicable only to the "defendant."

On the other hand, several of the factors that did not refer to the "defendant" involved things that the prosecution relied on to disparage the accuracy of eyewitness testimony identifying Hinex. One factor that did not mention the "defendant" asked: "Was the witness under stress when he or she made the observation?" The prosecutor argued that the identification of Hinex was unreliable because both eyewitnesses were too stressed to make an accurate identification. (3 RT 825.) Because this factor was not limited to the "defendant," the jury could use it to discount eyewitness testimony that identified Hinex as the perpetrator.

Another factor that did not mention the "defendant" asked: "Was the witness asked to pick the perpetrator out of a group?" The prosecutor argued that the identification of Hinex was unreliable because Hinex was identified at a one-person show up. (3 RT 823.) Because this factor was not limited to the "defendant," the jury could use it to discount eyewitness testimony that identified Hinex as the perpetrator.

In sum, by changing "defendant" to "suspect" in the introduction, but not in the body of the instruction, the court gave the impression that the "suspect" was someone other than the defendant, and that eyewitness testimony identifying a "suspect" (i.e., Hinex) should be subjected to special scrutiny and critical analysis, as if he enjoyed a presumption of

innocence and proof beyond a reasonable doubt. The jury could ignore factors that would have supported the reliability of the identification of Hinex because those factors were made specifically applicable to the identification of the "defendant," while other factors that the prosecutor relied on to disparage the accuracy of eyewitness testimony identifying Hinex were not. For those reasons, the modification to the instruction was erroneous and harmful to Petitioner.

IV.

PROSECUTORIAL MISCONDUCT FOR VIOLATION OF IN LIMINE STIPULATION REGARDING HINEX AND INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT

1. Prosecutorial misconduct.

Petitioner avers the prosecutor committed misconduct when he violated and exploited an in limine ruling thus denying Petitioner federal due process as defined by the Fifth and Fourteenth Amendments to United States Constitution, as well as his confrontation rights under the Sixth and Fourteenth Amendments, including the constitutional right "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness" (**Davis v. Alaska**, 415 U.S. 308, 318 (1974)) and the right to show "a prototypical form of bias on the part of the witness...." (**Delaware v. VanArsdall**, 475 U.S. 673, 680.)

It was stipulated in limine that there would be no reference to the fact that Hinex was convicted for his role in the home invasion. (1 RT 25.) In response to defense counsel's argument that the prosecution DNA expert made judgment calls that favored

the prosecution,[9] the prosecutor argued in rebuttal that if the analyst had been biased in favor of the prosecution, she would have implicated Hinex instead of Petitioner, because that would have made for a cleaner prosecution, given that Hinex was the one who was identified by witnesses.[10] It was prejudicial misconduct, in violation of the in limine stipulation, for the prosecutor to bolster the credibility to the People's expert witness in particular, and the prosecution team in general, with an argument known to be false or misleading.

The gist of the prosecutor's argument was that Viray had no reason to have a prosecutorial bias against Petitioner. If she wanted to favor the prosecution, she would have slanted her findings to implicate Hinex, because a prosecution of Hinex would have been consistent with eyewitness accounts, and hence, "cleaner." The jury was led to believe that DNA testing conducted for retrial was not done to prosecute Petitioner, but was done in a neutral manner to determine whether he or Hinex was the perpetrator, and that the prosecution would have preferred to see Hinex identified, because the case against him was stronger.

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[9] Counsel argued in closing that the DNA analyst had to make Petitioner's profile, and without those judgment calls, Petitioner would have been excluded. Counsel argued that the analysis "erred on the side of the prosecution." (3 RT 866.)

[10] Joy Viray? Uh, what does she care whether she excludes Mr. Hinex or Mr. Smith? [¶] I mean, if you believe that she just wants -- she's out there to get somebody. If she knew the evidence and the witness identified Mr. Hinex, wouldn't it be simply I'll just say it's Mr. Hinex, let's keep this thing clean. (3 RT 879, emphasis added.)

The premise of this argument was false. As the parties recognized at the in limine hearing, Hinex was already convicted for his role in the home invasion. (1 RT 25.) He could not be tried again for any additional offense arising out of the same home invasion. (Kellett v. Superior Court, 63 Cal.2d 822 (1966); In re Johnny V., 85 Cal.App.3d 120, 138-142 (1978); People v. Tatem, 62 Cal.App.3d 655 (1976).)[11/]

Due process bars a prosecutor's knowing presentation of false or misleading argument. (Miller v. Pate, 386 U.S. 1, 6-7 (1967); Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).) The constitutional prohibition against misleading the jury applies to the issue of witness credibility. (Napue v. Illinois, 360 U.S. 264, 269 (1959); Giglio v. United States, 405 U.S. 150, 153-154 (1972).)

2. Ineffective assistance of counsel.

Defense counsel was ineffective for failure to object to the prosecutor's misconduct and request an admonition. (Strickland, supra, 466 U.S. 688.) "A question of professional competence is inevitably aroused by a defense attorney's deliberate failure to object to potentially inadmissible ... evidence and by the implicit surrender of ability to exploit the inadmissibility on appeal." (People v. Stratton, 205 Cal.App.3d 87, 93 (1988) citing In re Woods, 256 Cal.App.2d 743, 753-754 (1967).) The same is true for failure to object

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11/ Also, by 2010, the 10-year statute of limitations had expired as to Hinex. (P.C. § 801.1(b).)

to the prosecutor's improper argument. (**People v. Osbund**, 13 Cal.4th 622, 696 (1996); **People v. Anzalone**, 141 Cal.App.4th 380, 395 (2006).)

Because there was no conceivable tactical advantage to be gained by withholding objection to the prosecutor's improper argument, counsel's failure to object cannot be attributable to "sound trial strategy." The theory of defense was that eyewitness testimony identifying Hinex as the perpetrator was strong enough to raise a reasonable doubt as to the integrity of the scientific evidence that pointed in the opposite direction. Counsel argued the scientific results that showed the opposite of what eyewitnesses claimed could have been due to a mix-up of the 1998 suspect reference samples, and he faulted the prosecution team for failing to obtain updated reference samples. He also argued that the DNA analyst made judgment calls to obtain a DNA match implicating Petitioner. The prosecutor's misleading argument effectively undercut the theory of defense. The jury was led to believe that Viray in particular, and the prosecution team in general, would have preferred it if scientific evidence implicated Hinex because it would have been easier to prosecute him. There was no solid tactical reason to allow the prosecutor to mislead the jury in this regard without objection.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests the Court order Respondent to show cause why the instant petition should not be granted; order an evidentiary hearing to further

develop any facts the Court deems necessary for its adjudication of the habeas corpus petition; appoint counsel to represent Petitioner in the instant proceedings; grant the instant writ of habeas corpus.

Date: August 14, 2015

Respectfully Submitted,

Anthony Smith
Petitioner In Pro Se

EXHIBIT A

Filed 12/16/13 P. v. Smith CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY BERNARD SMITH, Defendant and Appellant.	C071696 (Super. Ct. No. 97F07219)

A jury convicted defendant Anthony Bernard Smith in 1998 of one count of residential burglary, two counts of residential robbery, and one count of forcible oral copulation, and also found that defendant personally used a handgun during these offenses and that the oral copulation was committed during a burglary. (Pen. Code, §§ 459, 211, 288a, subd. (c), 12022.5, subd. (a), 12022.3, subd. (a), & former 667.61, subd. (e)(4), (2).) These offenses arose out of a home invasion involving two intruders.[1]

[1] A second, unrelated count of residential burglary was resolved before trial by defendant's guilty plea.

Defendant received a 25-year-to-life sentence on the oral copulation and a 20-year consecutive determinate term on the other counts. In 2000, this court affirmed the judgment. (*People v. Smith* (June 23, 2000, C031225) [nonpub. opn.].)

Federal habeas corpus proceedings culminated successfully for defendant in 2010; his oral copulation conviction was overturned on the basis that the trial court coerced the jury's verdict on that charge.

The present appeal involves a jury retrial of defendant's oral copulation charge and its enhancements noted above, for which defendant met the same fate (and sentence) as the initial trial.

On appeal, defendant claims instructional error regarding third party culpability and weapon use, as well as counsel ineffectiveness and prosecutorial misconduct. We shall affirm the judgment.

FACTUAL BACKGROUND

The Home Invasion

On a Sunday afternoon in September 1997, Eugene S. was watching football on television when he saw a man at his door, claiming to be selling newspaper subscriptions. Eugene declined and returned to the couch, only to discover the man right next to him, holding a gun against Eugene's head and demanding money (the previous night, Eugene had won $4,000 gambling at Lake Tahoe). A second man entered Eugene's home, and remained with Eugene in the living room while the gunman went to search the rest of the house. Eugene gave the second man the money from his wallet—a $5 bill and three $1 bills. The second man also grabbed a knife from the kitchen, which he used to threaten Eugene and rip open a wrapped package his wife had prepared to mail.

Deanna S., Eugene's wife, was in the back bedroom when she became aware of the commotion in the living room. Deanna called 911 and hid by the bed. The gunman

found her, robbed her of a $100 bill, and forced her at gunpoint to orally copulate him to ejaculation. Deanna spit the ejaculate onto the carpet and wiped her mouth with the T-shirt she had been wearing. Deanna tried to avert eye contact with the gunman and kept her eyes closed most of the time.

Upon hearing a police siren chirp outside, the second man forced Eugene to the back bedroom; there, the gunman was seen shirtless, having taken off his T-shirt to wipe away fingerprints. The second man told the gunman they had to flee, which the two men did out the front door.

Witness Identification Evidence

Officer August Johnson, the first officer to arrive on the scene, saw two African-American men of similar height and build run out of the house. One was shirtless, and apparently wearing jean shorts and tennis shoes. The other man was wearing a plaid shirt and dark pants. Johnson gave chase, the two men split up, and Johnson followed the shirtless one, who outran Johnson.

Meanwhile, another responding officer, Eric Poerio, and his K-9 partner Ajax, engaged a suspect, James Hinex, whose height, build, and race matched the description of the two suspects. Hinex was shirtless, wearing blue jean shorts and white tennis shoes. He had a light goatee and mustache, and was carrying $8 crumpled up in his front pants pocket, consisting of a $5 bill and three $1 bills.

In an in-field showup, Deanna identified Hinex as the sexual assailant, and Eugene identified Hinex as one of the men who was in the house.

In a photo lineup containing defendant's picture, Deanna identified defendant as "[m]aybe" the sexual assailant, commenting "it's the eyes." Deanna failed to identify Hinex from a lineup containing his photo, but identified a "filler" (decoy) picture as the

sexual assailant, commenting that she did not remember the assailant as having a mustache.

In a photo lineup containing defendant's picture, Eugene identified a filler photo as the gunman. In a lineup with Hinex's photo, Eugene identified Hinex as the gunman.

At trial, Deanna and Eugene testified that her sexual assailant wore a white T-shirt, shorts, and tennis shoes, and that the other intruder wore a plaid shirt (and Eugene added, black pants).

Forensic Evidence

Defendant's fingerprints did not match any of the latent impressions collected, but a fingerprint of Hinex's matched an impression collected from the knife-ripped wrapping paper on the package at the victims' house.

Three carpet swabs from Deanna's bedroom as well as the shirt she had worn (at the time of the sexual assault) were subjected to serological and DNA testing.

The serologist deduced that the semen donor had type B blood and antigens; defendant was the only one of the four involved (he, Hinex, Deanna, Eugene) who was type B. Type B secretors are found in 15 percent of the African-American population.

DNA testing in 1997 of sperm on Deanna's shirt, using the PCR (polymerase chain reaction) method, disclosed a match to defendant's DNA profile, and excluded Hinex and Eugene (Deanna was also excluded as she was incapable of producing sperm). A random match probability was 1 in 1,450 in the African-American population.

DNA testing in 2010 of sperm on the two T-shirt cuttings and two of the carpet swabs, using the current short tandem repeat (STR) method, disclosed a match to defendant's DNA profile, and excluded Hinex and Eugene (and, again, Deanna was excluded). A random match probability was 1 in 640 quintillion.

Defendant's Statement to the Police

In a statement to the police, defendant admitted that he and Hinex were the home invaders. He stated that he initially had the gun, then gave it to Hinex who went into the woman's bedroom; defendant later got the gun back when Hinex found a knife. Defendant then went into the woman's bedroom with the gun, and she gave him $100. Defendant denied being the sexual assailant, and denied ejaculating.

DISCUSSION

I. The Issues Involving Third Party Culpability

The only offense retried was forcible oral copulation. The defense pegged Hinex as the perpetrator.

Under the defense of third party culpability, the evidence need not show beyond a reasonable doubt that Hinex was the sexual assailant, but need only raise a reasonable doubt that defendant was. (*People v. Earp* (1999) 20 Cal.4th 826, 887 (*Earp*); see also *People v. Hall* (1986) 41 Cal.3d 826, 829.)

Defendant contends that four alleged errors—his counsel's ineffectiveness in failing to request a third party culpability instruction and in failing to object to the prosecutor's argument on this theory, and two instructions that were given—individually and cumulatively shredded his third party culpability defense. According to defendant, these four alleged errors improperly characterized the third party culpability defense as requiring that Hinex be shown beyond a reasonable doubt to have been the sexual assailant; as noted, under this defense, the evidence need only have raised a reasonable doubt that defendant was the perpetrator. We discuss these four alleged errors and find no reversible error.

A. Ineffective Assistance

To establish ineffective assistance of counsel, defendant must show (1) his counsel failed to act as a reasonably competent attorney and (2) defendant was prejudiced—i.e.,

there is a reasonable probability defendant would have fared better had counsel not failed. (*In re Avena* (1996) 12 Cal.4th 694, 721.)

Defendant claims his counsel was ineffective in declining an instruction on third party culpability; as counsel told the trial court, he was declining "in part because of [defendant's] statement to" the police. Presumably, a third party culpability instruction would have stated along the lines: " 'Evidence has been offered that a third party is the perpetrator of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In order to be entitled to a verdict of acquittal, it is only required that such evidence raise a reasonable doubt in your minds of the defendant's guilt.' " (See *Earp*, *supra*, 20 Cal.4th at p. 887.)

Defendant's statement to the police effectively admitted he committed the home invasion offenses, *except for* the oral copulation, which left only Hinex as the sexual assailant. Thus, defendant's statement to the police was in line with his third party culpability defense (to the oral copulation charge, the only charge on retrial) and defense counsel appears to have performed ineffectively in declining such an instruction at the retrial. The question becomes whether defendant was prejudiced by this ineffective assistance, a question we will address in our analysis of defendant's four alleged errors below.

Defendant also claims his counsel rendered ineffective assistance by failing to object to the prosecutor's closing argument that asked the jurors to imagine this case with exactly the same evidence, but with one distinction: Instead of defendant, Hinex was on trial for the oral copulation. In this argument, the prosecutor stated that Hinex's counsel probably would have thought the district attorney crazy to bring such a charge, given that Hinex was the man who stayed with Eugene S. and took the $8 from him, while defendant was the one with Deanna S. and took the $100 from her.

We can conceive of a tactical reason why defense counsel did not object to this specific argument; therefore, on appeal, we find no ineffective assistance on this point. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582 [this rule is necessary so that appellate courts do not second-guess every unstated trial tactic of a defense counsel].) Defense counsel reasonably may have thought that since the prosecutor's argument emphasized the witness identification evidence (which tended to show Hinex as the sexual assailant) rather than the forensic evidence (which squarely tagged defendant), defense counsel would simply let this point go without objection. To the extent the prosecutor's argument put Hinex on trial (subject to proof beyond a reasonable doubt instead of the third party culpability defense standard of proof that merely requires a reasonable doubt that defendant was the perpetrator), it will figure in our analysis of defendant's four alleged errors in this regard.

B. The Two Challenged Instructions

Defendant's remaining two alleged errors regarding the third party culpability defense concern two instructions.

First, the trial court instructed the jury with the standard instruction for evaluating conflicting evidence, CALCRIM No. 302, as pertinent: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. . . . What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Defendant argues that, under this instruction, jurors would resolve evidentiary conflicts by asking whether defendant did the oral copulation or whether Hinex did; and jurors, improperly, would credit evidence of Hinex's (third party) culpability *only if* they found such evidence believable and convincing, rather than, properly, if such evidence merely raised a reasonable doubt that defendant did the oral copulation.

Second, the trial court gave CALCRIM No. 315, which lists the commonsense factors in evaluating eyewitness identification testimony (e.g., the circumstances of the observation, the certainty of the identification), but the court modified that instruction's preface as follows: "You have heard eyewitness testimony identifying a suspect [substituting "suspect" for "the defendant"]. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony."

Defendant argues that under this substituted wording, the trial court gave the benefit accorded defendant—the standard of proof beyond a reasonable doubt, based on identification factors raising a reasonable doubt concerning identification—instead to Hinex; and that this instruction suggested that jurors should credit Deanna's and Eugene's eyewitness identification of Hinex as the sexual assailant *only if* the jurors found such identification of Hinex to be "truthful and accurate."

C. Analysis

As noted, defendant claims the two alleged errors involving ineffective assistance and the two alleged errors involving instructions, individually and cumulatively, effectively told the jury that his third party culpability defense required evidence showing beyond a reasonable doubt that Hinex was the sexual assailant, rather than evidence simply raising a reasonable doubt of defendant's guilt. We find defendant was not prejudiced by these alleged errors.

As for the claimed ineffective assistance, we found only defense counsel's declination of the third party culpability instruction to be ineffective. Counsel's failure to object to the prosecutor's argument (about Hinex being tried) arguably highlighted the defense-favorable witness identification evidence (which tended to show Hinex as the sexual assailant). And to the extent the prosecutor's challenged argument put Hinex on trial subject to proof beyond a reasonable doubt, that argument also emphasized that defendant, who actually was on trial, was subject to such a standard of proof as well. In

determining whether a counsel's particular ineffectiveness has been prejudicial, we ask whether there is a reasonable probability defendant would have fared better had counsel not been ineffective. (*In re Avena*, *supra*, 12 Cal.4th at p. 721.)

As for the two challenged instructions, the eyewitness identification instruction with the substituted word "suspect" arguably highlighted, too, the defense-favorable witness identification evidence. The instruction on resolving evidentiary conflict was a simple matter of common sense, stated simply. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 940.) And when, as here, we review an instruction alleged to be ambiguous, we ask whether there is a "reasonable likelihood" the jury applied the instruction in an unconstitutional manner; if not, instructional error is reviewed under the similar reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), which asks whether there is a reasonable probability defendant would have fared better absent the error. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1244; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156-1157.)

In determining the prejudicial effect of defendant's alleged errors, we find helpful a decision from our state Supreme Court, *Earp*, *supra*, 20 Cal.4th 826. In *Earp*, the high court found harmless a trial court's refusal to give a third party culpability instruction (the high court assumed, for the sake of argument, this instruction applied), reasoning: "The jury was instructed under [the reasonable doubt instruction] that the prosecution had to prove defendant's guilt beyond a reasonable doubt, and the jury knew from defense counsel's argument the defense theory that [the third party], not defendant, had committed the crimes. Under these circumstances, it is not reasonably probable that had the jury been given defendant's proposed [third party culpability] instruction, it would have come to any different conclusion in this case." (*Earp,* at p. 887 [using the "reasonably probable" standard of harmless error of *Watson, supra,* 46 Cal.2d at p. 836].)

Similar reasoning applies here. The jury was properly instructed that the People had to prove defendant guilty beyond a reasonable doubt. It could not have escaped the jury's attention that the defense here was that Hinex was the sexual assailant rather than defendant. Under these circumstances, it is not reasonably probable that defendant would have fared better absent trial counsel's ineffectiveness. And since there is not a reasonable likelihood the jurors applied the challenged instructions unconstitutionally to dilute this standard of proof applicable to defendant, the similar "reasonably probable" standard of harmless error applies to the allegedly ambiguous instructions, with a similar result of no prejudice.

II. Prosecutorial Misconduct and Ineffective Assistance

To preclude conviction bias against defendant, the parties stipulated before trial that they would not mention that Hinex had been convicted for his role in the home invasion.

Defendant contends the prosecutor committed misconduct and his counsel rendered ineffective assistance when the prosecutor breached this stipulation during closing argument and defense counsel failed to object. We disagree.

During closing argument, defense counsel argued that the STR-DNA expert erred on the side of the prosecution because that expert "was a little less than forthcoming about [DNA] contamination issues"; this, in turn, the defense argued, allowed the expert to implicate defendant, using outlandish probability numbers.

In response to this argument, the prosecutor argued in closing that had the STR-DNA expert been biased for the prosecution, she simply would have implicated Hinex in line with the witness identification evidence. Defense counsel did not object to these remarks.

We see no prosecutorial misconduct and no ineffective assistance of counsel for the simple reason that the prosecutor, in this argument, did not mention that Hinex had been convicted for his role in the home invasion.

III. Weapon-use Instructions

On retrial, defendant was charged with a single offense: forcible oral copulation. As enhancements to this offense, it was alleged that defendant personally used a deadly weapon during this offense, that defendant personally used a firearm during this offense, and that defendant committed this offense during a burglary.

Defendant notes the weapon-use "instructions . . . did not specify that the weapon must be use[d] in the commission of oral copulation. Instead, the instructions directed the jury to find whether a weapon was used in the commission of the 'crime charged.' " From this, defendant argues: "Because in the everyday meaning of words, burglary is a 'crime' which was included in the 'charges,' the jury could interpret the instructions to mean that any weapon use during the course of the burglary would be sufficient to support a weapon-use finding." For this reason, defendant adds, the weapon-use instructions were ambiguous and the trial court erred in failing to define, on its own initiative (sua sponte), the meaning of these quoted legal terms (and other similar terms) that were used in the instructions. We disagree.

"A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law." (*People v. Bland* (2002) 28 Cal.4th 313, 334.) This case falls within the "no sua sponte duty."

The trial court instructed the jury, as pertinent, in the following order (we have deleted additional instruction language interspersed between these points):

- "The defendant is charged with oral copulation by force or fear in violation of Penal Code section 288a[, subdivision] (c)(2)." (The court then set forth the elements of this crime.) (See CALCRIM No. 1015.)
- "If you find the defendant guilty of the crime charged, you must then decide whether the People have proved the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of that crime." (See CALCRIM No. 3145.)
- "If you find the defendant guilty of the crime charged, you must then decide whether the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime." (See CALCRIM No. 3146.)
- "If you find the defendant guilty of the crime charged, you must then decide whether the People have proved the additional allegation that the defendant committed the crime during the commission of a burglary." (See CALCRIM No. 3180.)

Furthermore, the jury's verdict form was structured along these same lines.

Under these instructions, and as was clear during retrial, the "crime charged" and the "crime" was forcible oral copulation, not burglary, and the weapon use had to be during the "crime charged"—i.e., during the forcible oral copulation, not the burglary. The weapon-use instructions were not ambiguous on this point, and the trial court had no sua sponte duty to clarify what was already clear in everyday parlance.

IV. Custody Credits

The trial court awarded defendant 6,227 days of custody credits (consisting of 5,414 days for actual time served and 812 days of conduct credit), but the abstract of judgment fails to note these credits. We will direct the trial court to make this correction. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect the custody credits specified in part IV. of this opinion and to send a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.

DECLARATION OF SERVICE BY MAIL
(C.C.P. §§ 1013(a) and 2015.5)

I, Anthony Smith, declare: I am a resident of San Quentin State Prison in San Quentin, CA; I am over the age of eighteen (18) years; I am a party to the attached action; my address is San Quentin State Prison, San Quentin, CA, 94974; I served the attached document entitled:

PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES; and,

NOTICE OF RELATED CASES

on the persons/parties below by placing a true copy of said document into a sealed envelope with the appropriate postage affixed thereto and surrendering said envelope(s) to the staff of San Quentin State Prison entrusted with the logging and mailing of inmate legal mail, addressed as follows:

Department of Justice
Office of the Attorney General
1300 I Street, Ste. 125
P.O. Box 944255
Sacramento, CA 94244-2550

There is First Class mail delivery service by the U.S. Postal Service between the place of mailing and the address(es) indicated above.

I declare under the penalty of perjury laws of the United States of America that the foregoing is true and correct and I executed this service this 14th day of August, 2015 at San Quentin, California.

Anthony B. Smith, Jr.
Declarant