

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

IN THE SUPREME COURT OF THE UNITED STATES

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**INEZ LAMBERT,**

**Petitioner,**

**v.**

**ROB PAERSSON,**

**Respondent.**

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether a Certificate of Appealability should have been granted to review petitioner's equitable tolling defense where a reasonable jurist could have rejected the District Court's determination that (a) former counsel's earlier correct advice negated his later incorrect advice identifying to petitioner the date on when the AEDPA limitation period started to run, (b) former counsel's earlier correct advice that some calculation beyond simple addition was needed to determine when the AEDPA limitation period would expire negated his later advice that she had a full year from the date the state supreme court rejected her postconviction appeal to file her federal habeas petition, and (c) petitioner was not diligent in filing her habeas petition even though she filed it two months in advance of the one year deadline former counsel had advised existed.

2. Whether, where to economize the use of their own and the judiciary's litigation resources the parties restrict their briefing to the threshold issue of whether equitable tolling is warranted, federal habeas courts should assume for Certificate of Appealability purposes that the petitioner has made a substantial showing of the denial of a constitutional right.

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## **OPINIONS BELOW**

The United States District Court for the District of Oregon denied Ms. Lambert's petition for writ of habeas corpus in an unpublished opinion and order. Appendix at 22 (*Lambert v. Paersson*, 2019 WL 3842386 (D. Or. August 13, 2019)). That Court also denied a Certificate of Appealability. *Id.* at 32 & 33 (Judgment). Ms. Lambert filed with the United States Court of Appeals for the Ninth Circuit a motion for a certificate of appealability, but the Court denied it. Appendix at 2 (motion) and 1 (*Lambert v. Paersson*, \_\_ WL \_\_, No. 19-35946 (9th Cir. May 15, 2020) (Order)).

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed the order sought to be reviewed on May 15, 2020. Appendix at 1.

## **STATUTORY PROVISIONS**

28 U.S.C. § 2253(c)(1) (2012) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

28 U.S.C. § 2253(c)(2) (2012) provides:

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

### **STATEMENT OF THE CASE**

#### **A. State Court Proceedings**

On August 24, 2011, Ms. Lambert entered guilty pleas to four felony counts of a twenty-one count Multnomah County, Oregon, indictment. The Circuit Court imposed a twenty-five year sentence and entered judgment on December 2, 2011. Ms. Lambert did not directly appeal the judgment, but she did commence postconviction proceedings by filing a petition on November 8, 2012. The Circuit Court denied postconviction relief. D. Ct. Dkt. 11-1 at 58 (Resp. Ex. 126) (PCR General Judgment). The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied Ms. Lambert's Petition for Review without opinion. *Lambert v. Steward*, 368 P.3d 85 (Or. Ct. App.) (table), 376 P.3d 281 (Or. 2016) (table). The appellate judgment was entered June 3, 2016. D.Ct. Dkt. 11-4 at 111 (Resp. Ex. 132) (Appellate Judgment).

#### **B. Federal Habeas Proceedings**

On February 28, 2017, Ms. Lambert filed her habeas petition in the court below. D. Ct. Dkt. 1 (habeas petition). Respondent-Appellee responded to Ms. Lambert's petition by seeking its dismissal as untimely and, immediately thereafter, noting:

Because that issue is dispositive, respondent will not address the merits of the petition. Should the Court find that the petition was timely filed, respondent would request time to respond on the merits.

D. Ct. Dkt. 9 at 1 (Response To Habeas Petition). Elsewhere below, Respondent-Appellee asserted that only “certain issues” were procedurally defaulted, but he specifically identified neither those issues nor the particular bases for their alleged procedural defaults. D. Ct. Dkt. 10 at 2 (Answer). Relying on Respondent-Appellee’s efficient approach to the litigation, Ms. Lambert did not address the merits of any of her claims – by, for example, seeking discovery or to supplement the record with additional facts supporting her claims, or arguing why she was entitled to relief on the state court record alone. *See* 28 U.S.C. § 2254(d). Nor, relying on Respondent-Appellee’s efficient approach to the litigation, did Ms. Lambert object to or seek to capitalize on Respondent-Appellee’s failure to specifically identify which claims were allegedly procedurally defaulted or why. In an eleven-page Opinion and Order, the District Court analyzed and denied Ms. Lambert’s request for equitable tolling and, without addressing the parties’ evident intent to seek a ruling on equitable tolling before addressing the merits of Ms. Lambert’s claims, denied a certificate of appealability solely because “Petitioner has not made a substantial showing of the denial of a constitutional right.” Appendix at 32 (Opinion and Order). The District Court entered its Judgment the

same day, again noting that it was denying a certificate of appealability solely because there had been no substantial showing of the denial of a constitutional right. *Id.* at 33 (Judgment). The District Court denied Ms. Lambert's Motion to Alter or Amend the Judgment. D. Ct. Dkts. 46 (motion) & 48 (order).

## **REASONS FOR GRANTING THE WRIT**

### **I.**

**The District Court Denied Equitable Tolling On The Basis Of Three Determinations, Each Of Which A Reasonable Jurist Could Have Rejected: (1) That Former Counsel's Initial and Correct Advice Negated His Years-Later Incorrect Advice Identifying The Date When The AEDPA Limitation Period Started To Run, (2) That Former Counsel's Initial and Correct Advice That Some Calculation Beyond Simple Addition Was Needed To Determine When The AEDPA Limitation Period Would Expire Negated His Later Advice That The Limitation Period Would Expire A Full Year From The Date The State Supreme Court Rejected Her Postconviction Appeal, And (3) That Petitioner Was Not Diligent In Filing Her Habeas Petition Even Though She Filed It Two Months In Advance Of The One Year Deadline Former Counsel Had Advised Existed.**

#### **A. The Law of Equitable Tolling**

A habeas 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 v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The second prong of the *Holland* test does not require a showing that some circumstance made it impossible to file a timely petition. *Fue v. Biter*, 842

F.3d 650, 657 (9th Cir. 2016). Rather, “*Holland* stressed “flexibility” and a disdain for “mechanical rules.” *Fue* (quoting *Holland*, 560 U.S. at 650). As *Holland* provided:

In emphasizing the need for “flexibility,” for avoiding “mechanical rules,” we have followed a tradition in which courts of equity have sought to “relieve hardships which, from time to time, arise from a hard and fast adherence” to more absolute legal rules, which, if strictly applied, threaten the “evils of archaic rigidity[.]” The “flexibility” inherent in “equitable procedure” enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.” . . . [Courts of equity] exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

*Id.* at 650 (citations omitted). Further, *Holland* makes clear that attorney negligence may justify equitable tolling. *Id.* at 634-35 (rejecting Eleventh Circuit holding that an attorney’s negligence or gross negligence can “warrant equitable tolling only if the petitioner offers proof of bad faith, dishonesty, divided loyalty, mental impairment and so forth”) (citations omitted). Further, unlike procedural default, equitable tolling does not implicate federalism concerns because “equitable tolling . . . asks whether *federal* courts may excuse a petitioner’s failure to comply with federal timing rules, an inquiry that does not implicate a state court’s interpretation of state law.” *Id.* (italics in original).

While “‘a garden variety claim of excusable neglect,’ *Irwin* [v. *Dept. of Veterans Affairs*, 498 U.S. 89,] 96 [(1990)], such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline, *Lawrence* [v. *Florida*, 549 U.S. 327,] 336 [(2007)], does not warrant equitable tolling[,]” the failure to advise that calculation rules beyond mere addition exist is not a simple miscalculation.

## **B. The Facts In The Instant Case**

While her post-conviction case was pending in the state appellate courts, Ms. Lambert’s then-counsel advised her that if the Oregon Supreme Court denied relief, she would have a year from that date to file her federal habeas petition. Appendix at 29. Rather than having merely miscalculated the number of days Ms. Lambert would have left in the one-year AEDPA limitations period, her counsel altogether failed to advise that any calculation beyond mere addition was necessary. *Id.* Instead, he advised her—and her brother and her mother—that should the Oregon Supreme Court deny her petition for review, she would have a year from that date in which to file her habeas petition. *Id.* at 28-29.

Earlier, after Ms. Lambert was convicted through her guilty pleas and sentenced to 25 years’s imprisonment, her family retained counsel for her. A month before that lawyer, Andy Simrin, filed a state court postconviction petition for Ms. Lambert, he advised her that, should she lose in the Oregon state courts, she would have less than a year after the Oregon Supreme Court denied relief to

file her federal habeas petition. Appendix at 26. Nearly four years later, on January 11, 2016, the Oregon Court of Appeals affirmed without opinion the denial of postconviction relief, and, on April 21, 2016, the Oregon Supreme Court denied Ms. Lambert's petition for review. *Lambert v. Steward*, 368 P.3d 85 (Or. Ct. App. 2016) (table), 376 P.3d 281 (Or. 2016) (table).

Shortly after the Court of Appeals affirmed the denial of relief, Mr. Simrin had conversations with Ms. Lambert, her brother Georvohn Lambert, and their mother Elaine Lambert. D. Ct. Dkt. 28-1 (Inez Lambert affidavit), 28-2 (Georvohn Lambert affidavit), and 28-3 (Elaine Lambert affidavit). In their sworn affidavits, each testifies that Mr. Simrin told them that if the Oregon Supreme Court rejected Ms. Lambert's appeal, she would have a year from that date to file her habeas petition.

After the Oregon Supreme Court denied Ms. Lambert's Petition for Review, Mr. Simrin did not verbally advise Ms. Lambert that she had less than a year in which to file a federal habeas petition or explain to her the AEDPA tolling calculations leading to that conclusion. Appendix at 29. *See* D. Ct. Dkt. 28-4 at 3 (Andy Simrin affidavit). Rather, he advised her only once that she would have less than a year after the Oregon Supreme Court denied her Petition for Review in

which to file her federal habeas petition. Appendix at 26. *See* D. Ct. Dkt. 28-4 at 2 & at 14 (Simrin 10/19/2012 letter to Ms. Lambert).<sup>1</sup>

Nor, when the Oregon Supreme Court denied her petition for review, did Mr. Simrin provide written advice that Ms. Lambert had less than a year in which to file her federal habeas petition. Instead, in his April 22, 2016, letter to Ms. Lambert, Mr. Simrin stated only that “there are strict time limits for getting a habeas corpus case filed.” *See* D. Ct. Dkt. 28-4 at 3 (Simrin Affidavit) and at 18 (Simrin 4/22/2016 letter to Ms. Lambert).

### **C. A Reasonable Jurist Could Have Rejected The Three Determinations On Which The District Court Based Its Denial Of Equitable Tolling.**

Despite these facts, the District Court denied equitable tolling and a Certificate of Appealability. Reasonable jurists could debate in at least the

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<sup>1</sup> In two earlier letters, Mr. Simrin had cautioned Ms. Lambert that filing her state post-conviction petition more than a year after the trial court judgment would preclude her from seeking federal habeas relief. Appendix at 26-27. *See* D. Ct. Dkt. 28-4 at 6 (Simrin 12/12/2011 letter to Ms. Lambert) and at 10 (Simrin 12/23/2011 letter to Ms. Lambert). However, in neither letter did he explain that even if she did file her state petition before a year passed from the criminal judgment, she would nevertheless have less than a year in which to file her federal habeas petition. *Id.* Nor did his letters advise that any calculation needed to be made to determine how much time she would have to file a federal habeas petition once state post-conviction proceedings were complete. *Id.*

following three respects whether Ms. Lambert's petition should have been resolved in a different manner.

First, the District Court rejected Ms. Lambert's argument that Mr. Simrin's erroneous advice constituted an extraordinary circumstance sufficient to warrant equitable tolling, reasoning that Mr. Simrin's advising Petitioner in 2012 that the AEDPA one-year limitation period was running negated his later advice that the one-year limitation period started running only when the Oregon Supreme Court denied her postconviction petition for review. Appendix at 29-30. Mr. Simrin provided his earlier advice four years before it had any pragmatic consequence, as he commenced state postconviction proceedings shortly after rendering that advice. When he provided his later advice, though, it had critical pragmatic impact because it counseled Petitioner that she had a full year to file her federal habeas petition from the date on which the Oregon Supreme Court had very recently denied postconviction review. A reasonable jurist could have found that Simrin's later advice was grossly erroneous not only because he provided the wrong trigger date but also because he failed to indicate that any calculation was necessary other than adding 365 days to the trigger date.

Second, the District Court reasoned that Simrin's earlier advice implied that some further calculation was necessary and that his later advice did not indicate that no calculation was necessary. However, a reasonable jurist could have found

that the absence of any indication in Simrin’s later advice that the one-year limitation period had already been nearly fully consumed (or consumed at all) clearly implied that there was no calculation adding 365 days to the trigger date to determine the due date for the habeas petition. That clear implication contradicts Simrin’s advice rendered four years earlier. Further, the District Court’s reasoning that Simrin’s later advice did not indicate that no calculation was necessary squarely contradicts Simrin’s sworn statement that in 2016 he did not advise Petitioner “that a calculation needed to be made to determine the date by which she needed to file her federal habeas petition” and that at that time he did not “warn her that the strict time limits for filing a habeas petition left her with very little time in which to file her petition.” D. Ct. Dkt. 28-4 at 3 (Affidavit of Andy Simrin). Thus, a reasonable jurist could have determined that Simrin’s later advice did indicate that no calculation was necessary.

Advising Ms. Lambert that she had a full year from the date the Oregon Supreme Court rejected her appeal was not an arithmetical error. Rather, the advice so grossly misstated the law that it constitutes an extraordinary instance of professional misconduct meriting equitable tolling. “Attorney mistakes that warrant the label ‘garden variety’—like miscalculating a filing deadline—are the sorts of mistakes that, regrettably, lawyers make all the time. They are mistakes made routinely enough that they’re regarded as one of the risks petitioners

typically assume when relying on counsel to litigate a case, rather than as an extraordinary circumstance warranting equitable intervention.” *Luna v. Kernan*, 784 F.3d 640, 647 (9th Cir. 2015). Lawyers may miscalculate due dates all the time, but those errors are based on an understanding that some particular kind of calculation is needed. Here, Mr. Simrin did not advise that any calculation was needed beyond extending by a year the date on which the Oregon Supreme Court rejected Ms. Lambert’s appeal. Lawyers do not “all the time” fail to apply (or alert their clients to) the AEDPA tolling provisions to determine the AEDPA deadline for filing a habeas petition. Even were it not fundamentally unfair to expect petitioners to remember advice provided four years earlier at a time when the subject of the advice had no pragmatic consequence, it is unfair, unjust, and inequitable to require that petitioners choose between contradictory earlier and later advice, particularly when the later advice was incorrect. *See Holland v. Florida*, 560 U.S. 631, 650 (2010) (equitable intervention allows courts to correct injustice).

Third, the District Court found that Ms. Lambert did not exercise reasonable diligence sufficient to warrant equitable tolling. Appendix at 30-31. The District Court reasoned that Petitioner was not reasonably diligent because even though she filed her petition by the year’s deadline Simrin had advised existed, she did not first attempt to file her habeas petition until six months after he had advised her to

contact a federal public defender “as soon as possible, because there are strict time limits for getting a habeas corpus filed.” *Id.* at 31 (internal quotation marks and citation omitted). The District Court also faulted Ms. Lambert because when the court clerk rejected her habeas petition, she waited “a further four months before re-submitting it.” Opinion and Order at 10. But, even though Ms. Lambert did wait, she filed her habeas petition approximately two months in advance of the deadline Simrin had advised existed and which she in good faith believed was the true deadline. Because Petitioner acted diligently to file her habeas petition by the deadline she reasonably and in good faith believed was accurate, she acted diligently to timely file her petition. See *Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017) (“a petitioner is entitled to use the full one-year statute-of-limitations period for the filing of his state and federal habeas petitions” and it is “inherently reasonable for a petitioner to rely on [the] statute of limitations and to plan on filing at any point within that period”). Finding a petitioner is not diligent where she files by what she reasonably and in good faith believes is the AEDPA deadline is no more than a finding that petitioner’s reasonable and good faith belief is wrong. Put differently, if the District Court’s ruling is correct, no petitioner who files a petition by the deadline which she reasonably, in good faith, but wrongly believes to be the AEDPA deadline can be diligent. By thus precluding equitable tolling anytime a petition is filed late due to counsel having failed to advise that

calculations need to be made to determine the due date, the Court's ruling cannot be squared with the test for when equitable tolling is required. *Holland v. Florida*, 560 U.S. at 649 (habeas petitioner is entitled to equitable tolling where he shows that he has been pursuing his right diligently and that some extraordinary circumstance stood in his way of timely filing his petition).

## II.

### **It Is An Important Federal Question Whether, When The Parties Seek To Economize The Use Of Their And The Judiciary's Resources By Restricting Their Briefing To The Threshold Issue Of Whether Equitable Tolling Is Warranted, Federal Habeas Courts Should Assume That The Petitioner Has Made A Substantial Showing Of The Denial Of A Constitutional Right.**

In the District Court, Respondent responded to Ms. Lambert's petition by seeking its dismissal as untimely and, immediately thereafter, noting:

Because that issue is dispositive, respondent will not address the merits of the petition. Should the Court find that the petition was timely filed, respondent would request time to respond on the merits.

D. Ct. Dkt. 9 at 1 (Response To Habeas Petition). Respondent also asserted that only "certain issues" were procedurally defaulted, but he specifically identified neither those issues nor the particular bases for the alleged procedural defaults. D. Ct. Dkt. 10 at 2 (Answer). Relying on Respondent's efficient approach to the litigation, Ms. Lambert did not address the merits of any of her claims – by, for example, seeking discovery or to supplement the record with additional facts

supporting her claims, or arguing why she was entitled to relief on the state court record alone. *See* 28 U.S.C. § 2254(d). Nor, and again in reliance on Respondent’s efficient approach to the litigation, did Ms. Lambert object to or otherwise seek to capitalize on Respondent’s failure to specifically identify which claims were allegedly procedurally defaulted or why. In this context, the District Court devoted its eleven-page Opinion and Order to an analysis and rejection of Ms. Lambert’s request for equitable tolling. It denied a COA without any discussion of the merits of any claim solely because Ms. Lambert did not make a substantial showing of the denial of a constitutional right. In this context, requiring petitioners to make that substantial showing will require them—and, thus, states and habeas courts—to expend significant resources even though in many cases equitable tolling properly will not be granted. Those significant resources will include discovery disputes, the hiring of experts, motions for and at least sometimes the conducting of evidentiary hearings, as well as complex and time-consuming legal and factual analysis.

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## **CONCLUSION**

For these reasons, this Court should grant certiorari and remand to the Ninth Circuit with instructions to issue a Certificate of Appealability on whether the District Court should have granted equitable tolling and allowed Ms. Lambert's habeas case to proceed.

Respectfully submitted on August 13, 2020.

*/s/ Oliver W. Loewy* \_\_\_\_\_

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