No. 20-5556

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

GENARO EDGAR ESPINOSA DORANTES

Petitioner

Vs.

KEVIN MYERS, Acting Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS
No. 3:14-cv-01913

PETITION FOR WRIT OF CERTIORARI

PRO-SE PETITIONER:

Genaro Edgar Espinosa Dorantes
420728
T.C.I.X.
1499 R.W. Moore Memorial
Highway
P. O. Box 4050
Only, Tennessee 37140-4050

No Phone

QUESTIONS PRESENTED FOR REVIEW

Did the District Court Err Or Abuse Its Discretion in a § 2254 case When It Denied Equitable Tolling To A Mexican National, Unable To Speak Or Understand English, Without Benefit Of A Hearing To Establish Whether The Language Barrier Stood In His Way And Prevented Timely Filing And Whether, Under The Circumstances, He Had Been Pursuing His Rights Diligently?

PARTIES

Petitioner Genaro Edgar Espinosa Dorantes is a citizen of Mexico who was extradited from Mexico under the Extradition Treaty between the United States and Mexico and is now serving a state sentence in a Tennessee Department of Corrections institution. No corporation is involved in this cause.

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IN THE
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GENARO EDGAR ESPINOSA DORANTES

Petitioner

Vs.

KEVIN MYERS, Acting Warden

Respondent

Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

The Petition of Genaro Edgar Espinosa Dorantes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Sixth Circuit, entered in the above-styled proceedings on July 2, 2020.

OPINIONS BELOW

c). The opinion of the 6th Circuit Court of Appeals appears at Appendix 1 to the petition and is unpublished at *Dorantes v. Genovese*, No. 20-5013 (6th Cir., filed May 5, 2020).

a. Order denying rehearing appears at Appendix 1(a) to the petition and is unpublished at *Dorantes v. Genovese*, No. 20-5013 (6th Cir., filed Jun 17, 2020).

b. Order denying rehearing *en banc* appears at Appendix 1(b) to the petition and is unpublished at *Dorantes v. Genovese*, No. 20-5013 (6th Cir., filed Jul 02, 2020).

d). The opinion of the U.S. District Court for the Middle District of Tennessee appears at Appendix 2 to the petition and is unpublished at 2019 WL 6524888 (M.D.Tenn., filed December 3, 2019).

e). The opinion of the Tennessee Supreme Court appears at Appendix 3 to the petition and is published at 331 S.W.3d 370 (Tenn. 2011).

f). The opinion of the Tennessee Court of Criminal Appeals appears at Appendix 4 to the petition and is unpublished at No. M2007-01918-CCA-R3-CD, (Tenn.Crim.App. filed Nov. 30, 2009).

JURISDICTION

The date on which the 6th Circuit Court of Appeals decided my case was May 5, 2020. A copy of that decision appears at Appendix 1.

A timely motion for rehearing was thereafter denied on the 17th day of June, 2020, and a copy of the order appears at Appendix 1(a).

A timely motion for rehearing *en banc* was thereafter denied on the 2nd day of July, 2020, and a copy of the order denying rehearing appears at Appendix 1(b).

Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. § 1291

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rules 10 and 13.

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A.

Luis Osvaldo Cisneros (the "victim") was born in Mexico on July 16, 1998, the fourth child of Jose Luis Cisneros Servantes ("Cisneros") and his wife, Martha Patlan-Cano ("Patlan"). Shortly after the victim's birth, the parents separated, and Cisneros moved to Houston, Texas, leaving his family

in Mexico. In 2001, the victim and the three other children joined Cisneros in Houston. On June 18, 2002, one of the children, Martha Bernece Cisneros Patlan, observed Patlan and Genaro Edgar Espinosa Dorantes (the "defendant") abduct the victim from Cisneros' yard, place him in a black vehicle, and drive away. At the time, the victim, not yet four years of age, was described as "normal and healthy." He no longer wore diapers. Cisneros reported the abduction to the Houston police and, about two months later, traveled to Nashville in an unsuccessful effort to find the victim.

Patlan, who had given birth to a son fathered by the defendant on October 20, 2001, in Nashville, was "supposedly" staying at the apartment of the defendant's mother, but much of her time involved travel with the defendant. They had no established residence. In February of 2003, Patlan visited the apartment of her sister, Antonia Patlan ("Antonia"), 2 who had lived in Nashville for some nine years. Appearing concerned about the victim, Patlan asked Antonia for "money to buy a cream" to treat his injuries, explaining that while she was in the bathroom, "she heard her child crying out" when he "burned himself with some corn cobs that she was cooking." Antonia gave Patlan forty dollars to purchase medicine. One week later, Patlan returned to the apartment and asked Antonia for permission to store some toys, stating that she was about to take a trip to Florida. When Antonia asked to see the victim, Patlan led her to a white van parked outside and driven by the defendant. Antonia entered the van and saw the victim lying on

his side in an apparent effort to protect the area around his buttocks - "in a position like maybe not to hurt himself." She touched his head and asked, "what happened to you, my child?" The victim provided an unintelligible response. At that point, the defendant interrupted, saying "let's go, let's go woman, let's go, woman" to Patlan before driving away. In consequence, Antonia was unable to determine the nature or extent of the victim's injuries.

A few days later, on February 20, 2003, Patlan approached another one of her sisters, Maria Patlan-Cano ("Maria"), at the Nashville restaurant where she worked, claiming that the victim "was very sick" and in need of medication. Patlan was accompanied by the victim, her baby by the defendant, and her ten-year-old daughter by Cisneros, who by that time was somehow in Patlan's physical custody. After tearfully explaining that the victim had been burned while she had been cooking corn on the cob, Patlan expressed her fear to Maria that the victim might die. In response, Maria gave Patlan food and two hundred dollars, but insisted upon seeing the victim. When Maria went outside, however, the defendant, who was driving the white van, was reluctant to allow her to see the victim, claiming that he was blocking traffic. After the defendant moved the vehicle out of the street, Maria opened the door, observed the victim, and screamed, "why [is] the child like that?" Maria, who had described the victim as "chubbier" and "very happy" when she had last seen him in Mexico, noticed that he was very thin and that a foot was bandaged. He was positioned "[o]n his knees with his feet

behind him" but did not move. When Maria asked the defendant why he had not provided medicine to the victim or taken him to the doctor, the defendant replied that "since he wasn't his father[,] he didn't have any reason to want to make him get better." Maria then asked why the defendant had taken the victim away from his father if he did not intend to provide for his care. According to Maria, the defendant replied that "he didn't want to bring him[,] but that bitch [Patlan] wanted it to happen." At that point, Patlan directed Maria to get out of the van because the defendant was angry. When Maria complied, the defendant drove away "really fast."

Maria tried to get the license plate number in order to provide it to the police, but, because of the defendant's sudden departure, was unable to do so. Afterward, she asked her brother-in-law, Juan Sanchez ("Sanchez"), to contact the police and report her observations about the victim's health. Sanchez called 911; however, because of the language barrier, there was a delay in the processing of the information to the proper authorities within the department. Initially, in addition to an unidentified male child, Patlan was also thought to be a victim. After the report, patrol officers were notified, but the matter was not immediately assigned as a high priority.

Detective Sara Bruner of the Youth Services Division of the Metro Police Department had the responsibility for investigating child abuse and neglect cases and deaths of children twelve and under. She contacted Sanchez, who provided her with the victim's name and urged her "to find

him." As a result of their conversation, on February 21, 2003, Detective Bruner issued a notice for officers to be on the lookout for the van being driven by the defendant. Her investigation was to include not only the victim, but also the other two minors in the custody of Patlan and the defendant.

On February 23, 2003, three days after the initial report to the police, Jerry Moore of the Metropolitan Park Police was approached by a visibly shaken woman who had observed the body of a child on a grassy surface behind a mound of dirt in West Park in Nashville. The mound blocked the view of the body from the road and parking lot. Officer Moore found the body and secured the scene before Metro Police Detective Brad Corcoran of the Homicide Division arrived to conduct the investigation. No shoes were on the body, which was otherwise clothed. Because no grass stains were on the socks or pants and the body was not covered by the snow that had fallen during the night, Detective Corcoran deduced that the body had been placed at that location only a short time before its discovery. Later, Sanchez identified body as that of the victim. On the following day, arrest warrants were issued for the defendant and Patlan. Despite substantial media coverage, including the mention of the crime on the "America's Most Wanted" television show, which resulted in several tips, the police were unable to locate either the defendant or Patlan.

Dr. Amy McMaster, the Deputy Chief Medical Examiner for Davidson County, who had special training in the interpretation of injuries, performed

the autopsy the day after the body was found. She discovered that the victim was wearing a diaper at the time of his death and had bandages and a piece of cloth wrapped around his feet. The autopsy indicated that the victim had received "multiple, multiple" injuries to "virtually every surface of [his] body," and had also suffered serious burns to entire areas of his feet, which were wrapped in elastic bandages and covered by socks. The nature of the numerous injuries, including horrific burns of "full and partial thickness," 3 was illustrated by graphic photographs taken during the autopsy. After examining the contents of the diaper, which concealed the more severe burns, Dr. McMaster speculated that its primary purpose was to absorb blood that was probably caused by the scabbing and infection of the extreme burns to the entire area of the buttocks, rear upper thighs, and genitals.

According to Dr. McMaster, the burns were altogether inconsistent with injuries caused by a cooking accident and were consistent with "burn [im]mersion," the result of the victim, likely in a sitting position with knees raised, having been intentionally forced into a liquid over 150 degrees for at least one second. The pattern of some of the "satellite" or splash burns suggested that the victim kicked and resisted as his buttocks and feet entered the water. In Dr. McMaster's opinion, the burns, between days and weeks old, were so serious that the victim could not have been able to walk or sit without painful consequences. The infection caused by the burns and loss of skin had damaged the victim's internal organs, which were failing at the time

of his death. Dr. McMaster also found scars on the victim's face and multiple bruises and puncture wounds on other areas of his body. In her opinion, the puncture wounds were the result of "some type of pointed instrument." The injuries to the skin, dozens in number, were at different stages of healing at the time of the victim's death.

The examination also revealed that the victim had sustained blunt trauma injuries to the brain and skull. According to Dr. McMaster, the swelling to the brain indicated that the head injuries had been recently inflicted. She determined that the skull fracture, which involved internal and external bleeding, was the most serious of his injuries. In her opinion, the victim lived no more than two hours after being struck by the blow. Because the victim was immobile due to the extensive nature of the burns, she concluded that the blunt force had to have been inflicted by another individual rather than being accidental in nature. Dr. McMaster expressed the further view that the victim had suffered a blunt trauma to his hand, which was swollen and discolored. This injury was consistent with the victim attempting to protect himself and shield his body from attack. She also found an older contusion on the front portion of his brain, which was likely sustained six to seven weeks earlier.

Dr. McMaster found a therapeutic level of naproxen - possibly Aleve or Antiprox - in the victim's body. She believed that the "fluid accumulated in different body spaces" indicated that the victim would have ultimately died

from the infection due to the burns; she speculated, however, that "with immediate treatment, he likely could have survived" the burns. She also found that he was malnourished, weighing only thirty-four pounds at the time of his death, which was far less than the average weight for a child his age. "[H]is ribs were very easily seen beneath the skin," and only a small amount of brown and gray thick fluid was found in his stomach. Dr. McMaster classified the cause of death as battered child syndrome, a term "used to describe a child . . . subjected to repeated bouts of severe physical abuse."

Carla Aaron, the Regional Administrator for the Department of Children's Services in Davidson County, who had training and experience in child abuse cases and a familiarity with the procedures involved in reporting the suspected abuse or neglect of children to law enforcement, the Juvenile Court, or the District Attorney's Office, confirmed that her department had not received any notification of the victim's circumstances until after his death. After reviewing the autopsy photographs, she concluded that if any medical provider had been called on to treat the injuries the victim had sustained, they would have "absolutely" reported the incident to her department for investigation.

Approximately four months after the discovery of the body, a Davidson County Grand Jury returned a two-count indictment for felony murder during the perpetration of aggravated child abuse. Count One alleged that

the defendant and Patlan "did kill [the victim] during the perpetration of or attempt to perpetrate Aggravated Child Abuse, in violation of Tennessee Code Annotated § 39-13-202." Count Two alleged that the defendant and Patlan "did knowingly, other than by accidental means, treat [the victim], a child six (6) years of age or less in such a manner as to inflict injury, and the act of abuse resulted in serious bodily injury to the child, in violation of Tennessee Code Annotated § 39-15-402." *State v. Dorantes*, 331 S.W.3d 370, 376 (Tenn.2011); (Appendix 3, *infra*).

On April 5, 2006, Katrin Miller, Assistant District Attorney General for the 20th Judicial District, submitted applications for the extradition of the defendant and Patlan, based specifically upon the charges for felony murder committed in the perpetration of or the attempt to perpetrate aggravated child abuse and for aggravated child abuse. The affidavit in support of the request to extradite also included the following language:

> Both [the defendant and Patlan] are criminally responsible as a party to the offenses of felony murder and aggravated child abuse if the offenses were committed by the defendants' own conduct, by the conduct of another for which the defendants are criminally responsible, or by both.

The extradition agreement, executed by the appropriate authorities on May 30, 2006, made specific reference to the charges in the indictment.[1] The

[1] Article 17 of the Extradition Treaty between the United States and Mexico provides, in relevant part: "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition was granted." Pursuant to Article 2 of the United States and Mexico, the offenses for which the requesting party seeks to prosecute must be punishable in both the United States and Mexico by deprivation of liberty. 31 U.S.T. 5059, art. 2. Whether

terms authorized and directed the extradition of the defendant to face charges of "homicide in violation of criminal code 39-13-202 and . . . child abuse described by criminal code 39-15-402." *Id.* The Federal Bureau of Investigation assisted in the extradition process and, in July of 2006, the defendant and Patlan were returned to Nashville. *Id.*

Some five months later, on December 7, 2006, the District Attorney General's Office filed a superceding indictment against the defendant and Patlan that included two additional counts for felony murder by aggravated child neglect, an offense not specified in the extradition request or in the extradition agreement. Upon motion by the defense, however, and a concession by the office of the District Attorney General that the new charges were prohibited by the terms of the extradition agreement, the trial court entered an order of dismissal as to those two counts. [2] *Dorantes*, 331 S.W.3d at 376-77.

The defendant and Patlan were tried jointly on the charges set out in the original indictment. The State, through the witnesses previously identified in this opinion, prosecuted the offenses based entirely upon

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a defendant may be prosecuted for a certain crime under an extradition treaty is a matter for the extraditing country to determine. *Johnson v. Browne*, 205 U.S. 309, 316, 27 S.Ct. 539, 540, 51 L.Ed. 816 (1907).

[2] In *United States v. Rauscher*, 119 U.S. 407, 429-30, 7 S.Ct. 234, 30 L.Ed. 425 (1886), the United States Supreme Court held that the courts of the United States may not try a defendant who was extradited from another country for a crime not listed in the extradition agreement, This doctrine of specialty prohibits the prosecution for crimes which were not the basis for extradition. *Untied States v. Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991). Further, Article 17 of the extradition treaty between the United States and Mexico specifically provides that an individual extradited under the treaty "shall not be detained, tried, or punished ... for an offense other than that for which extradition has been granted" absent an exception, none of

circumstantial evidence, including expert testimony. There were no eyewitnesses to any of the allegations of abuse. Moreover, neither the defendant nor Patlan made incriminating statements to the police which were admitted as evidence. Further, the defense elected not to offer proof at the trial.

During closing argument, the State, precluded from prosecution based upon aggravated child neglect, argued that the death of the victim was the result of abuse and relied upon the surrounding circumstances to establish that the defendant and Patlan either caused or were mutually culpable for his death under the alternative theory of criminal responsibility. In response, the defense argued that the State had proved little more than the mere presence of the defendant some three days before the body was found and, further, had offered no evidence of the requisite shared intent to support the theory of criminal responsibility for the conduct of another. At the conclusion of the proof and the arguments of counsel, the trial court instructed the jury as to felony murder, aggravated child abuse, and criminal responsibility.

Following its deliberations, the jury found Patlan and the defendant guilty of both aggravated child abuse and first degree felony murder by aggravated child abuse. As to the defendant, whose appeal is separate from

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which apply to these circumstances. Extradition Treaty, U.S.-Mex., art. 17, ¶ 1, May 4, 1978, 31 U.S.T. 5059.

the Patlan case,[3] the trial court imposed a mandatory life sentence for first degree murder and a consecutive sentence of twenty-two years for the aggravated child abuse conviction.

B.

On direct appeal, the Tennessee Court of Criminal Appeals reversed the defendant's conviction for aggravated child abuse, finding the evidence to be insufficient and more specifically observing that the State had failed to offer any proof that the defendant had actually inflicted the injuries causing the death of the victim. The Court of Criminal Appeals, however, affirmed the first degree murder convictions, concluding that the crime of aggravated child abuse, although different from child neglect, included "aggravated child abuse through neglect":

The Tennessee Court of Criminal Appeals expressed the following standard of review:

> I. Sufficiency of the Evidence. Dorantes argues the record is insufficient to support both his convictions for first degree felony murder based on aggravated child abuse and his conviction for aggravated child abuse. He contends that the above convictions were based solely upon circumstantial evidence that does not exclude every reasonable hypothesis except that of his guilt. He claims "while any of the State's theories of guilt are possible, a conviction based on any such theory would be contrary to this Court's decision in *State v. Hix*, 696 S.W.2d 22, 25 (Tenn. Crim. App. 1994) [overruled on unrelated issue by *State v. Messamore*, 937 S.W.2d 916, 919 (Tenn.1996).]" He lastly argues the evidence is insufficient as a matter of law to establish beyond a reasonable doubt that he knowingly committed or attempted to treat the

[3] The appeal of Martha Patlan-Cano, State v. Patlan, M2008-02515-CCA-R3-CD, was heard by the Court of Criminal Appeals on June 22, 2010.

victim in such a manner as to inflict injury. The State argues the evidence is sufficient to support the convictions. Because the record is devoid of any proof showing Dorantes inflicted physical injury upon the victim, his conviction for aggravated child abuse must be reversed and vacated. However, we conclude that the evidence was sufficient for the jury to find Dorantes guilty of first degree felony murder by aggravated child abuse through neglect.

Our analysis of the above issue is guided by the well-established rule that the State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which maybe drawn from that evidence. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). When a defendant challenges the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 442 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, "Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Guilt may be found beyond a reasonable doubt in cases where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977); *Farmer v. State*, 343 S.W.2d 895, 897 (Tenn. 1961)). The trier of fact must evaluate the credibility of the witnesses, must determine the weight given to witnesses' testimony, and must reconcile all conflicts in the evidence. *State v. Odom*, 923 S.W.2d 18, 23 (Tenn. 1996). When reviewing issues regarding the sufficiency of the evidence, this court shall not "reweigh or reevaluate the evidence." *State v. Philpott*, 882 S.W.2d 394, 398 (Tenn. Crim. App. 1994) (citing *State v. Cabbage*, 571 S.W.2d 832, 836 (Tenn. 1978), superseded by statute on other grounds as stated in *State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993)). This Court has often stated that "[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997) (citation omitted). A guilty verdict also "removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id. (citing *State v. Tuggle*, 639 S.W.2d 913, 914 (Term. 1982)).

We also recognize that "[i]n the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence." *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) (citing *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973); *Marable v. State*, 313 S.W.2d 451, 456-58

(Tenn. 1958)). In such a case, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971). In addition, the evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt." *Pruitt v. State*, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Crawford*, 470 S.W.2d at 613. The trier of fact decides the weight to be given to circumstantial evidence, and " [t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable*, 313 S.W.2d at 457 (quoting 2 Wharton's Criminal Evidence 1605-06).

State v. Dorantes, No. M2007-01918-CCA-R3-CD, 2009 WL 4250431, *6–7 (Tenn.Crim.App., filed Nov. 30, 2009) (Appendix 4, *infra*).

Joseph M. Tipton filed a concurring and dissenting opinion concurring in the reversal of the aggravated child abuse conviction and dissenting in the opinion's affirming the felony murder conviction, stating that he "would reverse and vacate the felony murder conviction as well." In particular, Judge Tipton stated:

I concur with most of the decisions and reasoning in the majority opinion, including the reversal of the aggravated child abuse conviction for insufficient evidence. I respectfully dissent, however, from the opinion's affirming the felony murder conviction. I would reverse and vacated the felony murder conviction, as well.

My position stems from the legislative intent regarding the first degree murder statute and regarding child abuse and child neglect. *See* T.C.A. § 39-15-401(a)(Supp.1998) (Amended 2005, 2006). Before 1989, Tennessee Code Annotated section 39-4-401(a) (1982) (repealed by 1989 Tenn. Pub. Acts ch. 591 § 1) provided as follows:

> *Child abuse and neglect-Penalty-Procedure-Relation of section to other law* –(a) Any person who maliciously, purposely, or knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect its health and welfare is guilty of a misdemeanor....

In *State v. Cynthia Denise Smith*, No. 1153, Hamilton County (Tenn. Crim. App. Sept. 20, 1990), this court stated that the 1982 child abuse statute created "two separate ways (abuse and neglect) by which the offense could be committed and that two separate verdicts would be appropriate." Sip. op. at 6.

In 1989, the child abuse and neglect statute was re-enacted in the 1989 Code with a similar definition. At that time, the legislature also created the aggravated child abuse statute which provided in part:

> Aggravated child abuse.-(a) A person is guilty of the offense of aggravated child abuse who commits the offense of child abuse as defined in § 39-15-401 and:
>
> (1) The act of abuse results in serious bodily injury to the child....

T.C.A. § 39-15-401(a) (1991). I note that the Sentencing Commission Comments to this provision view both abuse and neglect offenses to be covered under -402(a).

Beginning in 1988, the first degree murder statute provided in part:

> *First-degree murder.*-... (2) It shall also be murder in the first degree to kill a child less than thirteen (13) years of age if the child's death results from one (1) or more incidents of a protracted pattern or a multiple incident of child abuse committed by the defendant against such child, or if such death results from the cumulative effects of such pattern or incidents.

T.C.A. § 39-2-202 (1988) Supp.) (repealed by 1989 Tenn. Pub. Acts, ch 591, § 1).

Noting *Smith*, this court reversed a conviction for child abuse murder under the 1988 first degree murder statute, when the proof showed only, if anything, neglect. *State v. Denise Maupin*, No. 272, Washington County (Tenn. Crim. App. Oct. 7, 1991), *aff'd* 859 S.W.3d 313, 315 (Tenn.1993) (agreeing with court of criminal appeals that evidence was insufficient). In so doing, this court concluded that "the legislature did not intend for criminal neglect to be covered by the child abuse murder statute." Slip op. at 10. "Mere proof of child neglect is not proof of child abuse so as to sustain a conviction for child abuse murder." *Id.*

In 1992, ouir supreme court ruled that the child murder statute discussed in *Maupin* was unconstitutional. *State v. Hale*, 840 S.W.2d 307, 313 (Tenn.1992). In response, the legislature amended the first degree murder statute in part as follows:

> *First degree murder.*-(a) First degree murder is:
>
> ...
>
> (4) A reckless killing of a child less than thirteen (13) years of age, if the child's death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child.

T.C.A. § 39-13-202(a)(4) (Supp.1993). Effective in 1995, however,, the legislature amended the first degree murder statue to provide in part as follows:

> *First degree murder.*-(a) First degree murder is:
>
> ...
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, or aircraft piracy....

T.C.A. § 39-13-202(a)(2) (Supp.1995) (Amended 1998, 2002, 2007). Relevant and applicable to this case, the legislature again amended the first degree murder statute in 1998 to provide as follows:

> *First degree murder.*-(a) First degree murder is:
>
> ...
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, *aggravated child neglect*, or aircraft piracy....

T.C.A. § 39-13-202(a)(2) (Supp. 1998) (emphasis added) (amended 2002, 2007). At the same time, the legislature amended the child abuse and neglect statutes to add the terms "neglected," "neglect," and "aggravated child neglect." For example, Tennessee Code Annotated section 39-15-402(a) (Supp.1998) (Amended 2005) provided in part:

> *Aggravated child abuse and neglect.*-(a) A person commits the offense of aggravated child abuse or *aggravated child neglect* who commits the offense of Child abuse or neglect as defined in § 39-15-401 and;
>
> (1) The act of abuse or *neglect* results in serious bodily injury to the child....

(Emphasis added).

Our supreme court has stated that Tennessee Code Annotated section 39-15-401(a) (1997) proscribed a single offense that may be committed through one of two courses of conduct: child abuse through injury and child abuse through neglect." *State v. Mateyko*, 53 S.W.3d 666, 668 n. 1 (Tenn.2001). For "ease of reference," the court referred to child abuse through neglect as "child neglect." The fact that the offense could be committed in separate ways has carried significance in the context of charging instruments. In *State v. John E. Parnell*, No. W1999-00562-CCA-R3-CD, Shelby County (Tenn.Crim.App. Feb. 6, 2001), count one alleged aggravated child abuse by treating the child in a manner so as to inflict injury and count two charged aggravated child abuse by neglecting the child so as to adversely affect his health and welfare. The trial court instructed the jury that if it found guilt under count one, it was not to consider count two. The jury convicted the defendant on count one, This Court concluded the evidence was insufficient under count one but that the evidence overwhelmingly established neglect as alleged in count two. Under these circumstances, this court reversed the conviction for aggravated child abuse in count one but remanded count two for a new trial.

Obviously, the majority in this case thinks significant the fact that the aggravated child abuse count specified that the defendant treated the victim in such a manner as to inflict serious bodily injury but did not allege anything regarding neglect. In reversing the abuse conviction for insufficient evidence, it is apparent that my colleagues concluded that the specific allegation distinguishes this count from the murder count which alleged "generally" that the Defendant killed the victim "during the perpetration of or attempt to perpetrate aggravated child abuse, in violation of Tennessee Code Annotated § 39-13-202."

No case has analyzed the significance of the 1998 addition of aggravated child neglect to the predicate felonies for first degree felony murder. However, I view it to be significant in the context of separating aggravated child abuse from aggravated child neglect when considering what constitutes a particular felony murder. In other words, under that provision, murder in the perpetration of aggravated child abuse is a separate from murder in the perpetration of aggravated child neglect, no different than murder during the perpetration of air piracy, for example. In this regard, even though the aggravated child abuse statute is viewed to cover both abuse and neglect, such is not the case under the 1998 first degree murder statute.

I assume that if the murder count in the present case had specified that a killing occurred in the perpetration of the Defendant's knowingly treating the victim in a manner as to cause serious bodily injury, my colleagues would then conclude that the evidence did not prove the crime

charged. The 1998 first degree murder statute, however, already distinguished aggravated child abuse from aggravated child neglect. I believe that under the statute, charging murder in the perpetration of aggravated child abuse did not charge murder in the perpetration of aggravated child neglect. The very fact that the State in this case chose to allege aggravated child neglect in a separate count reflects the same belief. Also, the State did not argue to the jury that the Defendant was guiltyof child abuse through neglecting the injured victim's need for treatment. Rather, the State assailed the Defendant regarding the injuries inflicted upon the victim, including the final blow the victim received near the time of his death. The State's one or two references to the Defendant's concealing the victim's injuries without obtaining treatment were not in the context of child neglect but in the context of concealing the injuries inflicted upon the victim, i.e., child abuse through injury.

Last, and material to this issue, I note that the aggravated child abuse instruction given to the jury by the trial court provided that an essential element was 'that the defendant did knowingly, other than by accidental means, treat a child in such a manner as to inflict injury.' It did not provide the jury with the alternative of aggravated child neglect or of aggravated abuse through child neglect. Under these circumstances, I do not believe we are in a position to replace a jury finding regarding one offense with a judicial finding of another offense that was not submitted to the jury. I would reverse both the felony murder and aggravated child abuse judgments and dismiss the charges." [4]

State of Tennessee v. Genaro Dorantes, Mo. M2007-01918-CCA-R3-CD, 2009 WL 4250431, *14-17 (Tenn.Crim.App., filed Nov. 30, 2009) (*dissent*) (Appendix 4, *infra*)..

[4] The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 2313, 132 L.ed.2d 444 (1995). The Supreme Court has held "that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*; citing, *Sullivan v. Louisiana*, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993). This right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted upon by our ancestors in the parent country, as the great bulwark of their civil and political liberties. *Gaudin*, 515 U.S. at 510-511. The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. *Alleyne v. United States*, 570 U.S. 99, 107, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013); *United States v. O'Brien*, 560 U.S. 218, ___, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010).

C.

The Tennessee Supreme Court "granted applications for permission to appeal by both the State and the defendant." *Dorantes*, 331 S.W.3d at 372. In a 62 page opinion, the Tennessee Supreme Court concluded that Dorantes could be convicted under a theory of criminal responsibility for the conduct of another, as set forth in Tennessee Code Annotated sections 39-11-401 and 402.

The Tennessee Supreme Court set out the following standard of review:

> "When considering a sufficiency of the evidence question on appeal, the State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn there from. The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.
>
> In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. Ultimately, however, the jury decides the weight to be given to circumstantial evidence, and the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. On appeal, the court may not substitute its inferences for those drawn by the trier of fact in circumstantial evidence cases. The standard of review "is the same whether the conviction is based upon direct or circumstantial evidence."
>
> Years ago, Special Justice Erby Lee Jenkins wrote expressively on behalf of this Court, admonishing the finder of fact in criminal cases to

exercise particular caution in the prosecution of cases based entirely upon circumstantial evidence:

In order to convict on circumstantial evidence alone, the facts and circumstances must be so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone. A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt. Mere suspicion and straws in the wind are not enough for circumstances take strange forms. Under our form of government and the administration of criminal justice, the defendant is clothed with a mantle of innocence and that presumption of innocence hovers over and protects him throughout the trial. Until this is overturned by strong proof of his guilt beyond a reasonable doubt, not an imaginary or captious doubt but an honest doubt engendered after a consideration of all the evidence so that the minds of the jurors cannot rest easy as to the certainty of guilt, he is entitled to an acquittal. The Crawford standard purportedly required the State to prove facts and circumstances so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt. This language has long been applied in Tennessee to criminal cases, particularly those cases in which the sufficiency of the circumstantial evidence is at issue. Recently, however, this Court pointed out the inconsistency between the terminology employed in Crawford and its progeny and the standard of proof applied by the United States Supreme Court when the evidence is solely circumstantial.

Significantly, the Supreme Court has specifically rejected the notion "that the prosecution [i]s under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." In Jackson, the Supreme Court cited with approval Holland v. United States, a case holding "that where the jury is properly instructed on the standards for reasonable doubt," an additional instruction that circumstantial evidence "must be such as to exclude every reasonable hypothesis other than that of guilt . . . is confusing and incorrect. In Holland, our highest Court made the following observation:

> Circumstantial evidence . . . is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in

> weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.
>
> The federal courts of appeal have followed the Supreme Court's directive, consistently holding that direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence. "Thus, though it is said that circumstantial evidence is to be scrutinized with the utmost care, and nonlawyers are suspicious of it, the courts reject the view that circumstantial evidence has less probative value than direct evidence.
>
> We specifically adopt the standard enunciated by the United States Supreme Court as applicable to prosecutions in this state. In practice, the distinction between the federal standard and the "reasonable hypothesis" language used in our state has rarely made a difference; therefore, there has been little reason to refine our standard of review by voicing disapproval of much of the terminology used in Crawford. [5] ***This case, however, may qualify as one of those rare instances where the application of the federal and state standards could result in a different outcome, particularly in view of the State's election to extradite the defendant based upon the two counts founded in aggravated child abuse rather than aggravated child neglect.***

State v. Dorantes, 331 S.W.3d 370, 379-81 (Tenn. 2011)(citations omitted) (emphasis added) (Appendix 3, *infra*).

D.

Petitioner did not file any further challenges to his convictions or sentences until he placed the habeas petition in the prison mail system on June 17, 2019.

Dorantes, in his § 2254 petition, asserted that he is a citizen of Mexico and did not speak or understand English throughout his trial and appeal; as a result, he did not understand what transpired during his appeal and was

[5] The trial court instructed the jury on circumstantial evidence using some of the language from Crawford: "the facts must exclude every other reasonable theory or hypothesis except that of guilt; and the facts must

not informed by his appointed counsel that he had additional appeals he could pursue. [6] Even today, he has a very limited understanding of the English language and requires assistance from an interpreter to communicate with the Legal Library Clerk that is assisting him in the preparation of this document. Mr. Dorantes is innocent of the charges that he was convicted for and has employed reasonable diligence in pursuing what remedies he thought he had available, i.e., he has been in contact with Maddy DeLone, Esq., Executive Director of the Innocence Project in New York and has been in contact with the Consular of Mexico at the Embassy of the United Mexican States in Little Rock, Arkansas. Mr. Dorantes, in the process of seeking assistance in filling out an application to the Innocence Project, became aware that he could have filed: a petition to the U.S. Supreme Court; a state post-conviction petition; and/or a Habeas Petition for Relief under § 2254.

Petitioner Dorantes submits that his appointed counsel's failure to apprise him of the additional remedies available to him violates the fundamental canons of professional responsibility to communicate with their clients, to keep their clients informed of key developments in their cases, and to never abandon a client. *Holland v. Florida*, 560 U.S. 631, 652-53, 130 S.Ct. 2549, 2564, 177 L.Ed.2d 130 (2010).

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establish such a certainty of guilt of the defendant as to convince beyond a reasonable doubt that the defendant is the one who committed the offense."

[6] Moreover, the appointed Spanish translator's vernacular was such that the Petitioner could not understand what was being said.

Petitioner Dorantes argues that his appointed counsel's failure, abandonment and the extraordinary circumstances of the language barrier together with the State's failure to provide an adequate translator stood in his way and prevented his timely filing warrants equitable tolling. (Appendix 5, *infra*).

Petitioner raised one (1) Claim in his § 2254 Petition that: The Evidence Is Insufficient to Sustain a Conviction for Aggravated Child Abuse and Felony Murder by Aggravated Child Abuse.

Your Petitioner now seeks review by the United States Supreme Court to resolve a division among the circuits and to clarify an important question of law: Whether a non-English speaker who required a translator in his interactions with the court system, lacked access to legal materials in Spanish or notice of AEDPA in Spanish and did not have access to translation assistance until well beyond the limitation period, whether those circumstances can constitute extraordinary circumstances that trigger equitable tolling sufficient to warrant an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

I. Did the District Court Err Or Abuse Its Discretion When It Denied Equitable Tolling To A Mexican National, Unable To Speak Or Understand English, Without Benefit Of A Hearing To Establish Whether The Language Barrier Stood In His Way And Prevented Timely Filing And Whether, Under The Circumstances, He Had Been Pursuing His Rights Diligently?

In *Holland v. Florida*, this Court held that § 2244(d) is subject to equitable tolling. 560 U.S. 631, 649, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130 (2010). 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 circumstances stood in his way and prevented timely filing. *Id.* The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence. *Id.*, 560 U.S. at 653, 130 S.Ct. at 2565. The *Holland* court held that § 2254(i) does not preclude equitable tolling of a statute of limitations based on attorney misconduct in habeas proceedings. *Martel v. Clair*, ___ U.S. ___, 132 S.Ct. 1276, 1287 fn3, 182 L.Ed.2d 135 (2012), Cf. *Holland v. Florida*, 560 U.S. at 651, 130 S.Ct. at 2563-2564.

Where the facts are undisputed or the district court rules as a matter of law that equitable tolling is unavailable, the Court applies a de novo standard of review to a district court's refusal to apply the doctrine of equitable tolling, in all other cases the Court applies an abuse of discretion standard. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Ata v.*

Scutt, 662 F3d 736, 741 (6th Cir. 2011).

Here, petitioner claims he is entitled to equitable tolling because he is a Mexican national who, when first incarcerated, spoke only Spanish and could not read or write English. Courts "have rejected a per se rule that a petitioners language limitations can justify equitable tolling, but have recognized that equitable tolling may be justified if language barriers actually prevent timely filing." *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006); *Diaz v. Kelly*, 515 F.3d 149, 151 (2d Cir.), *cert. denied*, 555 U.S. 870, 129 S.Ct. 168, 172 L.Ed.2d 121 (2008). "[A] non-English-speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal material in his own language or translation assistance from an inmate, library personnel, or other source." *Mendoza*, 449 F.3d at 1070; see also *Diaz*, 515 F.3d at 154 ("[T]he diligence requirement of equitable tolling imposes on the prisoner a substantial obligation to make all reasonable efforts to obtain assistance to mitigate his language deficiency.").

The sole contested issue on appeal is whether Dorantes sufficiently alleged diligence in his motion for equitable tolling.

AEDPA's one-year limitations period is not a jurisdictional bar and is subject to equitable tolling in certain instances. See *Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549, 2560, 177 L.Ed.2d 130 (2010). However, 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*, 130 S.Ct. at 2562. Equitable tolling should be applied "sparingly," *Solomon v. United States*, 467 F.3d 928, 933 (6th Cir. 2006), and decided on a case-by-case basis," *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005).

The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence. *Id.*, 560 U.S. at 653, 130 S.Ct. at 2565. The *Holland* court held that § 2254(i) does not preclude equitable tolling of a statute of limitations based on attorney misconduct in habeas proceedings. *Martel v. Clair*, ___ U.S. ___, 132 S.Ct. 1276, 1287 fn3, 182 L.Ed.2d 135 (2012), Cf. *Holland v. Florida*, 560 U.S. at 651, 130 S.Ct. at 2563-2564.

Further, although "the party asserting statute of limitations as an affirmative defense has the burden of demonstrating that the statute has run," the petitioner bears the ultimate burden of persuading the court that he or she is entitled to equitable tolling. *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002).

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year limitations period for habeas petitions brought by prisoners challenging state-court convictions. 28 U.S.C. § 2244(d). Under this provision, the limitations period runs from the latest of four enumerated

events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (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
>
> (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).

In his § 2254 petition, Mr. Dorantes alleged as follows:

> "The Petitioner is a citizen of Mexico and did not speak or understand English throughout his trial and appeal; as a result, Mr. Dorantes did not understand what transpired during his appeal and was not informed by his appointed counsel that he had additional appeals he could pursue.[7] Even today, Mr. Dorantes has a very limited understanding of the English language and requires assistance from an interpreter to communicate with the Legal Library Clerk that is assisting him in the preparation of this document. Mr. Dorantes is innocent of the charges that he was convicted for and has employed reasonable diligence in pursuing what remedies he thought he had available, i.e., he has been in contact with Maddy DeLone, Esq., Executive Director of the Innocence Project in New York and has been in contact with the Consular of Mexico at the Embassy of the United Mexican States in Little Rock, Arkansas. Mr. Dorantes, in the process of seeking assistance in

[7] Moreover, the appointed Spanish translator's vernacular was such that the Petitioner could not understand what was being said.

filling out an application to the Innocence Project, became aware that he could have filed: a petition to the U.S. Supreme Court; a state post-conviction petition; and/or a Habeas Petition for Relief under § 2254.

Petitioner Dorantes submits that his appointed counsel's failure to apprise him of the additional remedies available to him violates the fundamental canons of professional responsibility to communicate with their clients, to keep their clients informed of key developments in their cases, and to never abandon a client. *Holland v. Florida*, 560 U.S. 631, 652-53, 130 S.Ct. 2549, 2564, 177 L.Ed.2d 130 (2010).

Petitioner Dorantes argues that his appointed counsel's failure, abandonment and the extraordinary circumstances of the language barrier together with the State's failure to provide an adequate translator stood in his way and prevented his timely filing warrants equitable tolling."

(Petition, pgs. 18-19).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one year statute of limitations for 28 U.S.C. § 2254 petitions. See 28 U.S.C. § 2244(d). Although Dorantes has not identified a newly recognized constitutional right or any newly discovered facts, he has argued that the State created an impediment to his timely filing of a petition through his appointed counsel. The Petitioner is a citizen of Mexico and did not speak or understand English throughout his trial and appeal; as a result, Mr. Dorantes did not understand what transpired during his appeal and was not informed by his appointed counsel that he had additional appeals he could pursue. Additionally, the appointed Spanish translator's vernacular was such that the Petitioner could not understand what his translator was

saying.

A petitioner seeking equitable tolling must demonstrate (1) that some extraordinary circumstance stood in his way end prevented timely filing end (2) that he has been pursuing his rights diligently.

Dorantes contends that an inability to communicate in English is similar to a physical or mental impediment and that it qualifies as an extraordinary circumstance that can prevent a timely filing of a habeas petition. This Court has previously found that a lack of English proficiency, standing alone, is insufficient to entitle a petitioner to equitable tolling. See *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002). However, Dorantes urges this Court to follow the lead of other Circuits and find that the inability to read and understand English, coupled with the denial of access to adequate translation or legal assistance, can constitute an extraordinary circumstance in the equitable-tolling context. See *Pabon v. Mahoney*, 654 F.3d 385 (3d Cir. 2011); *Diaz v. Kelly*, 515 F.3d 149 (2d Cir. 2008); *Mendoza v. Carey*, 449 F.3d 1065 (9th Cir. 2006).

To paraphrase what was argued in his Petition, Mr. Dorantes has a very limited understanding of the English language and requires assistance from an interpreter to communicate with the Legal Library Clerk that is assisting him in the preparation of this document. Mr. Dorantes claims he is innocent of the charges that he was convicted for and has employed reasonable diligence in pursuing what remedies he thought he had available,

i.e., he has been in contact with Maddy DeLone, Esq., Executive Director of the Innocence Project in New York and has been in contact with the Consular of Mexico at the Embassy of the United Mexican States in Little Rock, Arkansas. Mr. Dorantes, in the process of seeking assistance in filling out an application to the Innocence Project, became aware that he could have filed: a petition to the U.S. Supreme Court; a state post-conviction petition; and/or a Habeas Petition for Relief under § 2254.

Petitioner Dorantes submits that his appointed counsel's failure to apprise him of the additional remedies available to him violates the fundamental canons of professional responsibility to communicate with their clients, to keep their clients informed of key developments in their cases, and to never abandon a client. *Holland v. Florida*, 560 U.S. 631, 652-53, 130 S.Ct. 2549, 2564, 177 L.Ed.2d 130 (2010).

Moreover, The Tennessee Department of Corrections does not have legal materials printed in Mr. Dorantes native language, nor has he had access to a translator until January of this year when an inmate, capable of speaking Mr. Dorantes language, arrived at the Turney Center Industrial Complex. Mr. Dorantes does not speak English proficiently enough to communicate with other inmates or staff. He merely gets by through single words along with hand signals in order to understand what other inmates and staff are trying to say.

Petitioner Dorantes argues that his appointed counsel's failure,

abandonment and the extraordinary circumstances of the language barrier, together with the State's failure to provide an adequate translator, stood in his way and prevented his timely filing of his petition and warrants equitable tolling.

At a minimum, Dorantes should have an opportunity to address the District Court in an evidentiary hearing so that the Court could ascertain Mr. Dorantes English proficiency first hand and question him regarding his diligence in pursuing his remedies.

CONCLUSION

This Court made clear that a non-jurisdictional federal statute of limitations, including the AEDPA timing provisions, is subject to a rebuttable presumption in favor of equitable tolling. *Holland v. Florida*, 560 U.S. 631, 646-49, 130 S.Ct. 2549, 2560-62, 177 L.Ed.2d 130 (2010). The Holland court made clear 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 circumstances stood in his way and prevented timely filing. In this case the "extraordinary circumstances" at issue involves the petitioner's inability to speak or read the English language, the lack of legal books printed in Spanish, and the absence of translators at the prisons where the Petitioner was housed.

This Court has not addressed whether a significant language barrier is an "extraordinary circumstance" that warrants equitable tolling and the

circuits are divided on the question. A ruling by this Court would settle an important question of law and would resolve differences among the Circuits.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Genaro Edgar Espinosa Dorantes

Genaro Edgar Espinosa Dorantes
420728
T.C.I.X.
1499 R.W. Moore Memorial Highway
P. O. Box 4050
Only, Tennessee 37140-4050