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No. 20-7406

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IN THE  
SUPREME COURT OF THE UNITED STATES

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LIONEL ROBINSON – PETITIONER

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and  
ATTORNEY GENERAL, STATE OF FLORIDA – RESPONDENTS

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On Petition for Writ of Certiorari to  
The United States Court of Appeals for the 11<sup>th</sup> Circuit

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FILED

JAN 15 2021

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

Submitted by:

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D/C #G15804  
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## QUESTION PRESENTED

1. Does gross negligence on the part of postconviction counsel in the filing of timely postconviction motions constitute reasons warranting application of equitable tolling for filing a Petition for Writ of Federal Habeas Corpus?

While the Petitioner and this Court have recognized that defendants do not have a constitutional right to postconviction counsel, they also recognize that the time for filing Federal petitions can be equitably tolled when the petitioner has been pursuing his filings diligently and any delay is attributable to circumstances beyond a defendant's control.

Here, Robinson argues that he is entitled to equitable tolling for the delay caused by postconviction counsel hired to file the Petitioner's postconviction motions.

The Eleventh U.S. Circuit Court of Appeals answer to the above question in the negative represents a decision that is in conflict with decisions from this Honorable Court and from other U.S. Circuit Court of Appeals.

## LIST OF PARTIES

\_\_\_\_\_ All parties appear in the caption of the case on the cover page.

- X** All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Bernstein, David	Postconviction Counsel
Bondi, Pamela Jo	Attorney General (Former), State of Florida
Bouie, Jimmy	Victim
Cervone, William	State Attorney, 8 <sup>th</sup> Judicial Circuit Court (Florida)
Duffy, Thomas	Asst. Attorney General, State of Florida
Fay, Hon. Peter T.	U.S. Court of Appeals Judge, 11 <sup>th</sup> Circuit
Glant, Hon. David	Trial Judge, 8 <sup>th</sup> Judicial Circuit Court (Florida)
Grant, Hon. Britt C.	U.S. Court of Appeals Judge, 11 <sup>th</sup> Circuit
Inch, Mark S.	Secretary, Florida Department of Corrections
Jones, Julie L.	Secretary (Former), Florida Department of Corrections
Jordan, Hon. Adaberto	U.S. Court of Appeals Judge, 11 <sup>th</sup> Circuit
Kelsey, Hon. Susan L.	Rule 3.850 Postconviction Motion Appeal
Khan, Jr, Hon. Charles	U.S. Magistrate Judge
Luck, Hon.	U.S. Court of Appeals Judge, 11 <sup>th</sup> Circuit
Makar, Hon. Scott D.	Rule 3.850 Postconviction Motion Appeal
Marsteller, Hon.	Judge, Direct Appeal, Rule 9.141(d) Postconv. Petition
Moody, Ashley B.	Attorney General, State of Florida
Moseley, Hon. Mark	Postconviction Judge, 8 <sup>th</sup> Judicial Circuit Court (Florida)
Osterhaus, Hon. Timothy	Rule 9.141(d) Postconviction Petition
Padovano, Hon. Philip J.	Judge, Rule 9.141(d) Postconviction Petition
Robinson, Lionel	Petitioner/Defendant/Appellant
Rowe, Hon. Lori S.	Judge, Direct Appeal
Silver, Marci	Trial Defense Counsel
Singer, Jeanne	Chief Asst. State Attorney, 8 <sup>th</sup> Judicial Circuit Court (Fla)

## LIST OF PARTIES (Cont.)

Stover, Kathleen	Appellate Counsel Direct Appeal, Public Defender
Urrea, Adam	Asst. State Attorney, 8 <sup>th</sup> Judicial Circuit Court (Florida)
Van Nortwick, Hon.	Judge, Direct Appeal
Walker, Hon. Mark	U.S. District Court Judge
Wetherell, Hon. T. Kent	Rule 3.850 Postconviction Motion Appeal
Whistler, Darla	Asst. State Attorney, 8 <sup>th</sup> Judicial Circuit Court (Florida)

## RELATED CASES

- *Robinson v. State of Florida*, No. 01-2010-CF-004836-C, 8<sup>th</sup> Judicial Circuit Court, in and for Alachua County, Florida. Judgment entered May 14, 2012.
- *Robinson v. State of Florida*, No. 1D12-3291, First District Court of Appeal, Tallahassee, Florida. Opinion entered October 17, 2013.
- *Robinson v. State of Florida*, No. 1D14-5403, First District Court of Appeal, Tallahassee, Florida. Judgment entered December 10, 2014.
- *Robinson v. State of Florida*, No. 01-2010-CF-004836-C, 8<sup>th</sup> Judicial Circuit Court, in and for Alachua County, Florida. Judgment entered June 20, 2016.
- *Robinson v. State of Florida*, No. 1D16-3304, First District Court of Appeal, Tallahassee, Florida. Judgment entered February 22, 2017. Rehearing Denied March 31, 2017. Mandate issued on April 18, 2017 making the judgment final.
- *Robinson v. Secretary, Florida Department of Corrections, et al.*, No. 1:17-cv-198-MW/CJK, U.S. District Court for the Northern District of Florida. Judgment entered on January 2, 2019.
- *Robinson v. Secretary, Florida Department of Corrections, et al.*, No. 19-10428-H, U.S. Court of Appeals for the Eleventh Circuit. COA granted April 20, 2019.
- *Robinson v. Secretary, Florida Department of Corrections, et al.*, No. 19-10428-H, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered April 6, 2020. Rehearing denied August 19, 2020.

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## OPINIONS BELOW

**X** For cases from **Federal** courts:

The opinion of the United States Court of Appeals appears at **Appendix A** and **Appendix D** to the petition and is:

[ **X** ] reported at *Robinson v. State Atty. for Fla.*, 808 Fed Appx. 894 (11<sup>th</sup> Cir. 2020); and *Robinson v. State Atty. for Fla.*, 2020 U.S. App. LEXIS 26363 (11<sup>th</sup> Cir. 2020) (Rehearing).

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

The opinion of the United States District Court appears at **Appendix B** and **Appendix C** to the petition and is:

[ **X** ] reported at *Robinson v. Jones, Secr. Fla. Dept. of Corr. 's*, 2019 U.S. Dist. LEXIS 312 (N.D. (Fla.) 2019); and *Robinson v. Jones, Secr. Fla. Dept. of Corr. 's*, 2018 U.S. Dist. LEXIS 218178 (N.D. (Fla.) 2018) (Magis. R&R).

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

## JURISDICTION

This Honorable Court has jurisdiction under Title 28 U.S.C. §1254(1) to rule on this petition and to review the final judgment rendered on August 19, 2020 via the Eleventh U.S. Circuit Court Order Denying Petition for Rehearing. U.S. Supreme Court Rule 13 holds that a petition for a writ of certiorari to review a judgment issued by a United States Court of Appeals in a criminal case is timely when filed with the Clerk within 90 days after entry of the judgment. A March 19, 2020 U.S. Supreme Court Order extended the filing deadline of a petition for a writ of certiorari to 150 days (in this case, on or before January 19, 2021).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **Constitutional Issue Involved**

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

“No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.”

### **Statutory Provisions Involved**

Title 28 U.S.C. §2254(d) reads, in pertinent part, as follows:

“An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim... (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.”

Title 28 U.S.C. §2244(d) reads, in pertinent part, as follows:

- (1) “A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of ---
  - (A) The date of which the judgment became final by the conclusion of the direct review or the expiration of time for seeking such review; or
  - (B) The date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such action;
- (2) “The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection.”

## STATEMENT OF THE CASE

The following represents the relevant facts needed for this Court to understand the Petitioner's argument that he is entitled to equitable tolling during the period in which postconviction counsel's negligent delay in filing Robinson's State postconviction motions led to the lower Federal courts' determination that the Petitioner's federal habeas corpus petition was untimely filed. The parties do not contest the dates below, only the issue as to whether postconviction counsel's egregious performance constitutes a reason deserving of equitable tolling making Robinson's federal habeas corpus petition timely filed. The Eleventh U.S. Circuit Court has decided this question in the negative, and has denied the Petitioner equitable tolling contrary to decisions from this Honorable Court and other U.S. Circuit Court of Appeals.

On May 3, 2012, the Petitioner, Lionel Robinson ("Petitioner" or "Robinson") was found guilty after a jury trial of one count of Robbery with a Firearm (Count 1) and Tampering with Evidence (Count 4). On May 14, 2012, the trial court sentenced Robinson to a total of thirty (30) years imprisonment in the Florida Department of Corrections. A timely notice of appeal was filed with the First District Court of Appeal ("1<sup>st</sup> DCA"). On October 17, 2013, the 1<sup>st</sup> DCA per curiam affirmed the lower court's judgment on direct appeal (*Robinson v. State of Florida*, Case No. 1D12-3291). On January 16, 2014, ninety days after the 1<sup>st</sup> DCA opinion date, Robinson's time for filing a timely Federal petition for writ of habeas corpus began to run.

On September 23, 2014, the Petitioner entered into an oral contract to have his postconviction motions filed by retained counsel, Attorney David Jay Bernstein. The contract was based on the understanding that Attorney Bernstein immediately file a Motion for Postconviction Relief in order to begin tolling of Robinson's remaining Federal Habeas Corpus

Petition due date. Robinson had written Mr. Bernstein a letter that the contract was based on the understanding that a Fla.R.Crim.P. Rule 3.850 Motion for Postconviction Relief be filed by postconviction counsel to preserve 90 days of the 365-day filing time limitation (i.e. on or before October 18, 2014). The written contract (Retainer Agreement) was signed by Counsel on September 30, 2014, and was countersigned by Robinson on October 13, 2014 (see **Appendix 1**). Included in the Agreement is the language, “The rights set forth in this Agreement are subject to the professional responsibility requirements which regulate Attorneys” (**Appx. 1, Page 2**). Mr. Bernstein did not meet the filing deadline. Robinson’s family made phone calls to the law offices of postconviction counsel. Additionally, on both October 24, 2014 and November 18, 2014, the Petitioner wrote Counsel Bernstein a letter requesting an explanation for the delay.

On November 24, 2014, Counsel Bernstein filed his Fla.R.App.P. Rule 9.141(d) Petition Alleging Ineffective Assistance of Appellate Counsel (see **Appx. A, 11<sup>th</sup> Cir. Opinion, Page 2**). This date reflects a date **37 days after** the agreed-upon date of October 18, 2014 for filing of a postconviction motion for Robinson. The Petitioner wrote Counsel Bernstein several letters inquiring why a Rule 9.141(d) Petition was filed versus the agreed-upon Rule 3.850 Motion. It was obvious that Counsel’s Rule 9.141(d) Petition was just a “shell” motion because on December 10, 2014, the 1<sup>st</sup> DCA promptly denied the Petition (see *Robinson v. State of Florida*, No. 1D14-5403, First District Court of Appeal, Tallahassee, Florida. Judgment entered December 10, 2014). Postconviction Counsel never informed Robinson that the Rule 9.141(d) Petition was denied, constituting further ineffective assistance of counsel. On February 11, 2015, postconviction Counsel Bernstein filed Robinson’s Fla.R.Crim.P. Rule 3.850 Motion for Postconviction Relief with the trial court – **116 days after** the agreed-upon date of October 18, 2014.

Therefore, due solely to postconviction Counsel Bernstein's gross negligence, Robinson's 365-day time limitation expired. On January 16, 2014, ninety days after the 1<sup>st</sup> DCA opinion date, Robinson's time for filing a timely Federal petition for writ of habeas corpus began to run. The time for filing his Petition was tolled **312 days** later when Counsel Bernstein filed his November 24, 2014 Rule 9.141(d) Petition. On December 11, 2014, one day after the 1<sup>st</sup> DCA denied Counsel's Rule 9.141(d) Petition, Robinson's time for filing a timely Federal petition for writ of habeas corpus began to run again. The time was tolled **63 days later** on February 11, 2015 when Counsel Bernstein filed his February 11, 2015 Rule 3.850 Motion. This resulted in **375 days expiring** against the 365-day time limitation to file Robinson's Federal Petition, in explicit violation of Counsel's Bernstein's oral and written contracts with the Petitioner to preserve 90 days time left for Robinson to file the Petition.

On April 18, 2017, the mandate issued on the 1<sup>st</sup> DCA per curiam affirmance of the postconviction court's denial (see *Robinson v. State*, 230 So.3d 437 (Fla. 1<sup>st</sup> DCA 2017) (Table)). Realizing that his Federal time to file his habeas corpus petition would start running whenever Counsel's November 24, 2014 Rule 9.141(d) Petition was denied, Robinson immediately contacted postconviction counsel Bernstein. On both April 5, 2017 and April 21, 2017, Robinson wrote letters to inquire about the status of the Rule 9.141(d) Petition (see **Appx. A, 11<sup>th</sup> Cir. Opinion, Page 4**). On April 28, 2017, postconviction Counsel responded and informed the Petitioner of all of his filing dates and deadlines (**Appx. A, Page 4**). On May 15, 2017, Robinson contacted the 1<sup>st</sup> DCA to inquire about the status of his Rule 9.141(d) Petition (**Appx. A, Page 4**). On May 18, 2017, the 1<sup>st</sup> DCA replied stating the Rule 9.141(d) Petition had been denied back on December 10, 2014.

On July 31, 2017, **74 days after** the notification from the 1<sup>st</sup> DCA regarding the denial of his Rule 9.141(d) Petition, Robinson filed his instant Federal habeas corpus petition.

On November 6, 2018, United States Magistrate Judge Hon. Charles J. Kahn, Jr. filed his Report and Recommendation arguing that even if Robinson's claims of postconviction Counsel Bernstein's performance was grossly negligent were true, they are not enough to make his Federal Petition timely under 28 U.S.C. §2244(d) (see **Appx. C, Magis. R&R, Page 19**). The Magistrate's Report and Recommendation somehow concluded Robinson's Federal Petition was "untimely by over five years" (**Appx. C, Page 9**). On January 2, 2019, Chief United States Magistrate Judge Hon. Mark E. Walker accepted and adopted Hon. Kahn, Jr.'s Report and Recommendation and dismissed the Petition as untimely filed, denied an evidentiary hearing, and denied the issuance of a Certificate of Appealability (see **Appx. B, Final Order**; and see **Appx. C, Pages 19 and 22**).

Robinson requested a Certificate of Appealability ("COA") arguing that the District Court was in error for not granting the Petitioner equitable tolling during the period that postconviction counsel breached his contract to file a Rule 3.850 motion on or before October 18, 2014 to preserve 90 days of the 365-day filing time limitation. Robinson filed his instant Federal Petition **74 days after** the notification from the 1<sup>st</sup> DCA on the denial of his Rule 9.141(d) Petition, and pursued his postconviction inquires in a diligent manner. Robinson argued that his filing 74 days after learning his last State postconviction motion had been denied was prior to the 90 days that ethical and effective postconviction counsel would have filed his State postconviction motion in accordance with a written contract to do so.

In May 2019, the 11<sup>th</sup> U.S. Circuit Court of Appeals granted Robinson a Certificate of Appeal on two issues. First, whether the District Court erred in its determination that Robinson

was not entitled to equitable tolling of the statute of limitations period. Second, whether the District Court abused its discretion when it denied Robinson an evidentiary hearing.

On April 6, 2020, Hon. Grant, Hon. Luck, and Hon. Fay of the 11<sup>th</sup> U.S. Circuit Court of Appeals issued their 11-page written opinion affirming the U.S. District Court decision to dismiss Robinson's Federal Habeas Corpus Petition as time-barred (See **Appendix A**).

On August 19, 2020, the 11<sup>th</sup> U.S. Circuit Court of Appeals issued their Order Denying Robinson's Petition for Rehearing, and his Petition for Rehearing en Banc (see Appendix D).

A March 19, 2020 U.S. Supreme Court Order extended the filing deadline of a petition for a writ of certiorari to 150 days (in this case, **on or before January 19, 2021**).

The timely Reasons for Granting the Petition follow.

### **REASONS FOR GRANTING THE PETITION**

Does gross negligence on the part of postconviction counsel in the filing of timely postconviction motions constitute reasons warranting application of equitable tolling for filing a Petition for Writ of Federal Habeas Corpus?

**A. The 11<sup>th</sup> U.S. Circuit Court of Appeals has decided this important federal question in a way that conflicts with relevant decisions of this Court.**

In their April 6, 2020 Order (see **Appx. A**), the 11<sup>th</sup> U.S. Circuit Court affirmed the U.S. District Court decision to dismiss Robinson's Federal Habeas Corpus Petition as time-barred. The 11<sup>th</sup> U.S. Circuit Court decided that postconviction counsel's gross negligence in this case does not qualify as an "extraordinary circumstance" for purposes of equitable tolling (citing to *Cadet v. Fla. Dep't of Corr.* 853 F.3d 1216 (11<sup>th</sup> Cir. 2017)) (see **Appx. A, Order, Pages 7-10**). In *Cadet, id.*, the 11<sup>th</sup> Circuit Court held that even gross negligence on the part of a prisoner's

postconviction counsel does not warrant equitable tolling “because the attorney is the prisoner’s agent, and under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent. As a result, when the petitioner’s postconviction attorney misses a filing deadline the petitioner is bound by that oversight.” In *Cadet, id.*, the 11<sup>th</sup> Circuit Court held that “abandonment,” when coupled with reasonable diligence by the petitioner, can justify equitable tolling” but attorney gross negligence, by itself, cannot. In their April 6, 2020 Order (see **Appx. A, Pages 8-9**), the 11<sup>th</sup> Circuit Court held that nothing in the record in this case suggests that postconviction Counsel Bernstein abandoned Robinson because the attorney kept communicating with Robinson during the filing of his two postconviction motions and beyond. The 11<sup>th</sup> Circuit narrowly defined “abandonment” as the severing of all communication and failure to update his client (see **Appx. A, Pages 9-10**). While the 11<sup>th</sup> Circuit declared postconviction counsel’s performance arguably negligent and not flawless, the review court held that the errors cited by Robinson did not meet the extraordinary circumstances of bad faith or dishonesty needed to warrant equitable tolling.

This Honorable Court has run into the issue Robinson cites in this Petition on two separate occasions involving the 11<sup>th</sup> U.S. Circuit Court of Appeals and has reversed and remanded both cases back to the lower Federal courts for correction.

In *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), you held that the Eleventh Circuit Court’s holding that an attorney’s professional conduct could not warrant equitable tolling absent proof of bad faith, dishonesty, divided loyalty or mental impairment was too rigid in its application. *Id.* at 2549. You remanded Holland’s case back to the 11<sup>th</sup> Circuit Court to determine whether counsel’s failure amounted to egregious behavior warranting equitable tolling. This Court held that the 11<sup>th</sup> Circuit Court’s narrow interpretation



of what constitutes egregious attorney conduct warranting equitable tolling resulted in archaic rigidity whereby courts of equity should avoid mechanical rules and emphasize the need for flexibility. In *Holland, id.* 177 L.Ed.2d at 133, you clearly held that “A petitioner is entitled to equitable tolling 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 (citing to *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). As in *Holland, id.*, Robinson pursued his rights diligently by writing numerous letters to postconviction counsel seeking crucial information about his motions and the need to preserve his one-year federal time limitation to file his Federal habeas corpus petition. Once Robinson learned that postconviction counsel had breached his contract with Robinson and had even allowed the 365-day time limitation to expire, the Petitioner filed his pro se habeas corpus Petition 74 days later and within the 90 days to file that postconviction counsel was contractually bound to preserve, but failed. But for postconviction counsel’s record errors and breach of contract, Robinson was prevented from timely filing his Federal habeas corpus petition despite his personal diligence exercised in those efforts. The record facts in Robinson’s case in which postconviction counsel Bernstein’s conduct constituted far more than the garden variety of neglect in that: (1) counsel failed to file the State postconviction motions he agreed to in the oral contract and under the written contract; (2) he failed to notice Robinson that Counsel’s Rule 9.141(d) Petition was denied just weeks after its filing; and (3) he allowed Robinson’s 365-day Federal time limitation to expire in violation of the entire purpose of why Robinson and his family hired Mr. Bernstein.

In *Maples v. Thomas*, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012), you held that the Eleventh Circuit Court’s definition of the term “abandonment” by counsel was too narrow. This Honorable Court held that attorney conduct may provide cause to excuse a default

in timely filing of a federal habeas petition when the egregious conduct results in the attorney ceasing to be a petitioner's agent. In *Maples*, you reaffirmed your decisions in *Holland, ibid.* that: (1) the one-year deadline for filing a federal habeas petition can be tolled for equitable reasons; and (2) an attorney's unprofessional conduct can count as an extraordinary circumstance justifying equitable tolling. *Maples, id.*, 181 L.Ed.2d at 822. As in *Holland*, the *Maples* Court held that when a lawyer has detached himself from any trust relationship with his client, he has effectively and constructively "abandoned" the petitioner – just as postconviction Bernstein did with Robinson in this case. *Maples, id.*, 181 L.Ed.2d at 822.

In Robinson's instant case, this Court can see that the 11<sup>th</sup> U.S. Circuit Court of Appeals is again being inflexible in the need to correct the injustice in Robinson's case that was inarguably caused by postconviction counsel's proven breach of conduct, unprofessional conduct, lack of communication, and constructive "abandonment" of the Petitioner. If this case is not heard on certiorari review, you will have allowed the 11<sup>th</sup> U.S. Circuit Court of Appeals to decide this important federal question in a way that conflicts with the listed relevant decisions of this Court. Additionally, a man serving a 30-year prison sentence and others like Robinson under the 11<sup>th</sup> U.S. Circuit Court's jurisdiction will end up not having the Federal courts rule on the merits of their habeas corpus petitions when their delay in filing the motions is attributable to postconviction counsel's egregious and grossly negligent performance.

**B. The 11<sup>th</sup> U.S. Circuit Court of Appeals has entered a decision in conflict with other United States Court of Appeals on the same important matter whereby other courts have held that gross negligence on the part of postconviction counsel can warrant the application of equitable tolling time for filing a Petition for Writ of Federal Habeas Corpus.**

In this instant case, the 11<sup>th</sup> U.S. Circuit Court of Appeals has entered a decision that the “extraordinary circumstance” of egregious and postconviction counsel misconduct does not warrant tolling the AEDPA limitations period. Also see *Cadet v. Fla. Dep’t of Corr.* 853 F.3d 1216 (11<sup>th</sup> Cir. 2017) (“A petitioner is bound by his attorney’s mistaken inaction even where the attorney’s mistakes are egregious enough to be characterized as gross negligence.... Negligence, even gross negligence, alone is not enough to meet the extraordinary circumstance requirement for equitable tolling in a habeas case”).


This decision is in direct conflict with other U.S. Circuit Court of Appeals on the same important matter. See *Nara v. Frank*, 264 F.3d 310, 320 (3<sup>rd</sup> Cir. 2001) (Serious attorney misconduct may warrant equitable tolling); see *Spitsyn v. Moore*, 345 F.3d 796, 798 (9<sup>th</sup> Cir. 2003) (tolling State prisoner’s federal habeas statute of limitations due to the “extraordinary circumstance” of egregious misconduct on the part or petitioner’s attorney). See *Baldyague v. United States*, 338 F.3d 145, 152 (2<sup>nd</sup> Cir. 2003) (“It is not inconsistent to say that attorney error *normally* will not constitute the extraordinary circumstances required to toll the AEDPA limitations period while acknowledging that, at some point, an attorney’s behavior may be so outrageous or so incompetent as to render it extraordinary”). See *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4<sup>th</sup> Cir. 2003) (equitable tolling may be appropriate where attorney conduct reaches the level of “utter abandonment”); and see *United States v. Martin*, 408 F.3d 1089, 1093 (8<sup>th</sup> Cir. 2005) (“serious attorney misconduct, as opposed to mere negligence, may warrant equitable tolling in habeas cases”).

In almost identical circumstances as Robinson’s instant case, in *Gibbs v. LeGrand*, 767 F.3d 879 (9<sup>th</sup> Cir. 2014), the 9<sup>th</sup> U.S. Circuit Court of Appeals granted equitable tolling to a petitioner when postconviction counsel failed to inform the petitioner that his State

postconviction proceeding had ended, even though counsel had pledged to do so. The Petitioner had written to his counsel for updates, but the petitioner did not learn that the time to file his Federal habeas petition had begun until the time to file had expired. The 9<sup>th</sup> Circuit held that this circumstance represented constructive abandonment comprising the extraordinary circumstance of serious attorney misconduct warranting tolling of the petitioner's AEDPA time limitation.

### CONCLUSION

As this Honorable Court has done in the past, and due to the serious and direct conflict with other U.S. Circuit Courts decisions on this same important matter, this Court should grant the instant writ of certiorari. Under penalty of perjury, I certify that all of the facts and statements contained in this document are true and correct and that on the 15<sup>th</sup> day of January, 2021, I handed this document and exhibits to a prison official for mailing out to this Court and the appropriate Respondents for mailing out U.S. mail.

/s/   
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