No. 20-7406

IN THE

Supreme Court of the United States

LIONEL ROBINSON,

Petitioner,

v.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act imposes on state prisoners a one-year statute of limitations for filing a federal habeas petition. Whether equitable tolling applies to the one-year period is a "fact-intensive inquiry," *Holland v. Florida*, 560 U.S. 631, 654 (2010) (quotations omitted), requiring the prisoner to show "that some extraordinary circumstance stood in his way and prevented timely filing," *id.* at 649 (quotations omitted). Abandonment, which occurs when an attorney "sever[s] [his] agency relationship" with a prisoner, can constitute an extraordinary circumstance. *Maples v. Thomas*, 565 U.S. 266, 283 (2012).

Petitioner argued below that he is entitled to equitable tolling because his state postconviction attorney "in effect" abandoned him. Pet. App. 7. But after examining the record as a whole, including evidence that the attorney "pursue[d] [state postconviction relief] to the fullest extent possible" and communicated with Petitioner throughout the proceedings, the Eleventh Circuit determined that the attorney did not sever the agency relationship. *Id.* at 11.

The question presented is: whether the Eleventh Circuit erred in concluding that the attorney did not abandon Petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT

1. A Florida jury found Petitioner Lionel Robinson guilty of robbery with a firearm and tampering with evidence. Pet. App. 4.[1] His convictions were affirmed on direct appeal and became final on January 15, 2014. *Id.* at 20. His one-year statute of limitations for filing a federal habeas petition began to run the next day. *Id.* at 21.

Nine months later, in October 2014, Petitioner hired an attorney to file a state postconviction motion under Florida Rule of Criminal Procedure 3.850. Pet. App. 4; *id.* at 30 ("[The attorney]'s obligation under the retainer agreement was 'to research, prepare, and file a 3.850 Motion.'" (quoting retainer agreement)). The retainer agreement limited the attorney's representation to state postconviction proceedings; the attorney did not agree to assist Petitioner with a federal habeas petition. *Id.* at 4, 30.

Before filing the Rule 3.850 motion, the attorney filed a different, less time-intensive state postconviction motion, one asserting ineffective assistance of appellate counsel under Florida Rule of Appellate Procedure 9.141. *Id.* at 18. The motion, which the attorney filed just a few weeks after Petitioner retained him, tolled Petitioner's one-year period for filing a federal habeas petition until December 2014, when the state court denied the motion on the merits. *Id.* at 18, 22; *see also* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed

[1] Petitioner's Appendix is not Bates stamped, so the cited page numbers are the Appendix's PDF page numbers.

application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation."). The tolling extended Petitioner's one-year deadline from January 16, 2015 to February 17, 2015. Pet. App. 22.

The attorney did not inform Petitioner about the denial of the Rule 9.141 motion, but he continued fulfilling his duties to Petitioner, and his actions put Petitioner on notice that the motion had been denied. *Id.* at 34. Less than two months after the denial, on February 12, 2015, the attorney filed the Rule 3.850 motion and sent Petitioner a copy. *Id.* at 5. Upon receiving it, Petitioner assumed that the Rule 9.141 motion had been denied. *Id.* at 34 (quoting a letter from Petitioner to the attorney stating, "I always assumed [the Rule 9.141 motion] got denied because you filed my 3850.").

In July 2015, the attorney filed an amended Rule 3.850 motion adding another ground for relief. *Id.* at 5. But soon after, the state postconviction court dismissed both "the original and amended motions for lack of proper verification" because the attorney did not attach to them an oath from Petitioner verifying their accuracy. *Id.*

Within a week of the dismissal, the attorney mailed Petitioner an oath to sign and return. *Id.* Petitioner did so, but around that time, the attorney's father died, and he took leave before the oath arrived at his office. *Id.* at 31. Sometime after he returned, he discovered the oath and contacted counsel for the State to obtain both an extension of time to file the

verified Rule 3.850 motion and a waiver of any limitations defense. *Id.* at 32. The State agreed, and the attorney filed the verified motion in early 2016. *Id.* at 5, 32. The state postconviction court deemed the motion timely filed. *Id.* at 5.

The motion did not toll Petitioner's one-year period for filing a federal habeas petition, however, because the period had already expired, back on February 17, 2015. *Id.* at 22–23. Petitioner neither retained federal-habeas counsel nor filed a pro se petition before February 17, *see id.* at 25, and although the state postconviction attorney had filed the original Rule 3.850 motion before February 17, the motion did not toll the one-year period because it was not "properly filed," *id.* at 22–23; *see also* 28 U.S.C. § 2244(d)(2).

In June 2016, the state postconviction court denied Petitioner's verified Rule 3.850 motion on the merits. Pet. App. 5. The attorney immediately notified Petitioner about the denial; explained that there was no "good-faith basis to appeal"; informed him that he could appeal pro se; advised him that, per their representation agreement, the representation was complete; and provided him his entire case file. *Id.* at 6. "[T]hroughout [the] representation," the attorney had "frequently communicated with [P]etitioner," keeping him apprised of case developments. *Id.* at 33.

Petitioner appealed the denial of his Rule 3.850 motion pro se, and the appellate court affirmed in April 2017. *Id.* at 6. At that point—ten months after the attorney's representation had ended—Petitioner contacted the attorney for "assistance in determining

his federal filing deadline." *Id.* at 32. The attorney informed him that the deadline had passed, but he nevertheless waited three more months, until July 2017, to file his petition. *Id.* at 32–33, 35.

2. After Petitioner filed his federal habeas petition, the State moved for dismissal, arguing that the petition is time-barred. *Id.* at 6–7. Petitioner conceded that the petition is untimely but asserted that he is entitled to equitable tolling because his state postconviction attorney "in effect abandoned him." *Id.* According to Petitioner, the attorney abandoned him by (1) failing to notify him that the Rule 9.141 motion had been denied, (2) filing a Rule 3.850 motion without the required verification, and (3) failing to immediately discover the oath that he sent the attorney. *Id.* at 7, 33.

The district court applied this Court's decision in *Holland* and granted the State's motion. *Id.* at 25–28. Under *Holland*, equitable tolling is warranted only if a prisoner shows (1) "that some extraordinary circumstance stood in his way and prevented timely filing" and (2) "that he has been pursuing his rights diligently." 560 U.S. at 649 (quotations omitted). The district court concluded that Petitioner established neither. Pet. App. 28. First, he failed to show the extraordinary circumstance that he alleged—abandonment. His three complaints about the state postconviction attorney, when "viewed in the context of [the attorney's] conduct as a whole," suggest "simple negligence" at most, not abandonment. *See id.* at 33–34. Second, Petitioner did not diligently pursue his rights because the record establishes that after he

learned that his one-year period had expired, he failed to file his petition for nearly three months. *Id.* at 35. That delay, the court stated, is particularly indefensible "since all of [P]etitioner's grounds for federal habeas relief are reiterations of the grounds presented in his counseled direct appeal and [state] postconviction proceedings." *Id.*

3. Petitioner appealed to the Eleventh Circuit, which affirmed in an unpublished, non-precedential decision. *See Robinson v. State Att'y for Fla.*, 808 F. App'x 894, 895 (11th Cir. 2020). Like the district court, the Eleventh Circuit performed a fact-intensive inquiry and held that Petitioner is not entitled to equitable tolling. Pet. App. 9–12. The court's decision turned on the issue of abandonment. *Id.* at 11–12.

"Nothing in the record," the court concluded, "suggests that [the state postconviction attorney] effectively severed the principal-agent relationship by abandoning" Petitioner. *Id.* at 11. "Rather, the record indicates that [the attorney] did exactly what he was hired to do—file a Rule 3.850 motion in state court and pursue that remedy to the fullest extent possible." *Id.* "After learning that [Petitioner]'s original and amended Rule 3.850 motions had been dismissed for lack of verification, [the attorney] requested that [Petitioner] sign an oath so that the motion could be properly filed." *Id.* The attorney "then properly filed [the] motion, which the state court denied on the merits." *Id.* "In doing so, [the attorney] not only fulfilled the terms of his engagement, but ensured that [Petitioner] was kept abreast of the status of his case as it progressed." *Id.*

"That is not to say," the court went on, "that [the attorney]'s representation was flawless; indeed, . . . [he] arguably was negligent on several occasions." *Id.* But negligence "does not, by itself, rise to the level of abandonment." *Id.*

The court therefore held that Petitioner "failed to prove his alleged extraordinary circumstance." *Id.* at 12. And because that failure forecloses equitable tolling, the court declined to reach the issue whether Petitioner pursued his rights diligently. *Id.*

Petitioner now seeks review of the Eleventh Circuit's decision.

REASONS FOR DENYING THE PETITION

I. PETITIONER WAIVED THE QUESTION THAT HE ASKS THIS COURT TO REVIEW BY FAILING TO RAISE IT BELOW.

Petitioner asks the Court to address whether "gross negligence on the part of postconviction counsel" is an extraordinary circumstance. Pet. i. But he waived that issue by failing to raise it below.

His appeal to the Eleventh Circuit was predicated not on gross negligence but on his view that his attorney had abandoned him—a distinct issue. Pet. App. 12 (stating that Petitioner's only "alleged extraordinary circumstance" was abandonment); *Maples*, 565 U.S. at 281–83 (setting forth a specific test for abandonment). Abandonment is "[a] markedly different situation" than "[n]egligence on the part of"

an attorney; it is not "a claim of attorney error" but a claim that the attorney "severed the principal-agent relationship." *Maples*, 565 U.S. at 280–82.

Because Petitioner alleged only abandonment below, the Eleventh Circuit considered only that issue, resolving the appeal by deciding whether his attorney severed the principal-agent relationship. Pet. App. 11–12. Petitioner cannot at this late stage pivot, argue gross negligence, and inject into this case a new issue. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (declining to address an argument not raised in the district court or the court of appeals); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (refusing to consider arguments raised for the first time in this Court because allowing parties "to alter . . . questions or to devise additional questions at the last minute would thwart" the integrity of the certiorari procedure).

Indeed, Petitioner's attempt to litigate whether gross negligence is an extraordinary circumstance—and have this Court serve as a court of "first review"—raises several prudential problems. *See Holland*, 560 U.S. at 654 ("[T]his is a court of final review and not first view." (quotations omitted)). First, because Petitioner failed to argue gross negligence below, neither the district court nor the Eleventh Circuit had an opportunity to address the issue, and this Court therefore "lack[s] guidance from" a lower court. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989). Second, the issue "has not been adequately briefed and argued" by the parties. *Id.* at 38. And third, the issue is not squarely presented because

neither the district court nor the Eleventh Circuit found Petitioner's attorney grossly negligent.

II. AT MOST, THIS CASE PRESENTS ONLY A NARROW, FACT-BOUND QUESTION—WHETHER PETITIONER ESTABLISHED ABANDONMENT.

Because the decision below turned exclusively on the issue of abandonment, the question presented in this case—assuming Petitioner has not waived it by failing to raise it in his Petition—is whether the Eleventh Circuit erred in concluding that he failed to establish abandonment. That is not an exceptionally important question; it is a narrow, fact-bound one.

If this Court were to grant review, it would merely apply its decisions in *Holland* and *Maples* to the circumstances here, assessing whether Petitioner's attorney "essentially abandoned" him, failing to "operat[e] as his agent in any meaningful sense of that word." *Maples*, 565 U.S. at 282 (quotations omitted). That is not a question that warrants this Court's review. It implicates no important, broadly applicable question of law—it is simply an exercise in error correction. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

III. NO SPLIT OF AUTHORITY IS IMPLICATED.

Petitioner contends that the decision below conflicts with (1) *Holland* and *Maples* and (2) various

circuit court decisions. Pet. 8–11. Neither claim has merit.

1. The decision does not conflict with *Holland* and *Maples*. Petitioner does not allege that the decision is "in conflict with" those cases "on the same important matter," nor does he allege that the decision resolved "an important federal question in a way that conflicts with" the cases. *See* Sup. Ct. R. 10(a). Instead, he asserts that, although the Eleventh Circuit properly stated the standard for equitable tolling, it applied the standard too rigidly. Pet. 8–10. But "misapplication of a properly stated rule of law" does not create a conflict warranting this Court's review, and even if it did, this case would present no such conflict because the Eleventh Circuit faithfully applied *Holland* and *Maples*. *See* Sup. Ct. R. 10.

In *Holland*, this Court held that the Eleventh Circuit's old test for determining when attorney conduct amounts to an extraordinary circumstance was "too rigid" because it required "bad faith, dishonesty, divided loyalty, mental impairment, or so forth." *Holland*, 560 U.S. at 649 (quotations omitted). "Unprofessional attorney conduct," the Court explained, "may, in certain circumstances, prove egregious and can be extraordinary even though [it] may not" involve bad faith, dishonesty, divided loyalty, or mental impairment. *Id.* at 651. For example, abandonment can constitute an extraordinary circumstance, the Court noted. *See id.*

In *Maples*, the Court expanded on *Holland*, setting forth a test for abandonment. *See Maples*, 565 U.S. at

280–83. An attorney abandons a prisoner when he "sever[s] the principal-agent relationship, . . . no longer act[ing], or fail[ing] to act, as the [prisoner's] representative." *Id.* at 281. If, for instance, an attorney "fail[s] to communicate with [a prisoner] or to respond to [his] many inquiries and requests over a period of several years," the attorney has abandoned him because the attorney "is not operating as his agent in any meaningful sense of that word." *Id.* at 282 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)).

Here, the Eleventh Circuit hewed to *Holland* and *Maples*. First, consistent with *Holland*, the court did not apply its old, overly rigid rule for attorney conduct. Rather than require Petitioner to show bad faith, dishonesty, divided loyalty, or mental impairment, it recognized that abandonment and "other professional misconduct" can be an extraordinary circumstance. Pet. App. 10 (quotations omitted).

Second, the court properly stated and applied *Maples*'s test for abandonment. Echoing *Maples*, it stated that a prisoner is "not bound by the actions or inaction[] of an attorney occurring after the attorney has" abandoned the prisoner by "sever[ing] the principal-agent relationship." *Id.* (quotations omitted). "Abandonment," the court then explained, "is illustrated by not keeping [the prisoner] updated on essential developments, not responding to [hi]s questions or concerns, and [ceasing] communication with" him. *Id.* Finally, the court applied that standard, concluding that Petitioner's attorney did not abandon him because the attorney "not only

fulfilled the terms of his engagement, but ensured that [Petitioner] was kept abreast of the status of the case as it progressed." *Id.* at 11. Indeed, even when the attorney failed to expressly update Petitioner about a case development (the denial of the Rule 9.141 motion), his actions put Petitioner on notice of the development. *See id.* at 34.

2. Nor does the Eleventh Circuit's decision conflict with any circuit court decisions. Petitioner contends that the court's determination that equitable tolling does not apply under the circumstances here is "in direct conflict" with *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003), *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003), *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc), *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005), and *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014). Pet. 11. But all of those decisions, save *Gibbs*, were decided before *Maples*, so they cannot possibly establish a conflict over how to apply *Maples*'s test for abandonment. And at any rate, the decisions involved much different circumstances than this case.

None held that equitable tolling applies when an attorney makes a few mistakes but nevertheless "fulfill[s] the terms of his engagement" and "ensure[s] that [the prisoner] [i]s kept abreast of the status of his case as it progresse[s]." *See* Pet. App. 11. In each case, the attorney either completely failed to fulfill the

terms of his engagement, lied to the prisoner, or failed to communicate with the prisoner for years:

- In both *Spitsyn* and *Baldayaque*, the attorney "completely failed to prepare and file" the pleading that the prisoner retained him to file—unlike here, where Petitioner's attorney successfully filed not only the Rule 3.850 motion but also another motion (the Rule 9.141 motion) that benefitted Petitioner by tolling his one-year limitations period. *See Spitsyn*, 345 F.3d at 801 ("Though he was hired nearly a full year in advance of the deadline, [counsel] completely failed to prepare and file a petition."); *Baldayaque*, 338 F.3d at 152 ("In spite of being specifically directed . . . to file a '2255,' [counsel] failed to file such a petition at all.").

- In *Martin*, the attorney "consistently lied" to the prisoner and made misrepresentations to him about his case—unlike here, where Petitioner has not even alleged that his attorney lied to him. *See Martin*, 408 F.3d at 1095.

- In *Gibbs*, the attorney "failed to communicate with [the prisoner] over a period of years," *Gibbs*, 767 F.3d at 887 (quotations omitted)—unlike Petitioner's attorney, who "frequently communicated" with him, Pet. App. 33.

- Finally, *Nara* and *Rouse* cannot establish a conflict because they did not hold that the prisoner was entitled to equitable tolling. *See Nara*, 264 F.3d at 320 (stating that equitable tolling "may" be warranted because the attorney made a series of

misrepresentations to the prisoner); *Rouse*, 339 F.3d at 257 (holding that the prisoner was "not entitled to equitable tolling" where he alleged that a medical condition and his attorney's negligence prevented him from timely filing a federal habeas petition).

IV. THE DECISION BELOW IS CORRECT.

As a final reason for denying review, the Eleventh Circuit correctly held that Petitioner is not entitled to equitable tolling. That is so for three independent reasons.

1. Under *Maples*, Petitioner's attorney did not abandon him. The attorney never "severed [his] agency relationship" with Petitioner. *See Maples*, 565 U.S. at 283. At no point during the state postconviction proceedings did the attorney "no longer act[]" or "fail[] to act" as Petitioner's representative. *See id.* at 281. Far from it. The attorney "frequently communicated" with Petitioner and acted on his behalf throughout the proceedings. Pet. App. 33. He filed not only a Rule 3.850 motion but also a Rule 9.141 motion; then, he amended the Rule 3.850 motion to add another basis for relief; and when the state postconviction court dismissed the motion for lack of proper verification, he took all the steps necessary to

correct the deficiency, ensuring that Petitioner obtained a ruling on the merits.[2]

2. Even if the attorney had abandoned him, Petitioner could not establish that the abandonment "prevented timely filing" of his federal habeas petition. *See Holland*, 560 U.S. at 649; *id.* at 658 (Alito, J., concurring) (noting that an attorney's conduct must be "a but-for cause of the late filing"). The attorney had no duty to assist Petitioner with a federal habeas petition, nor did he have a duty to ensure that Petitioner had time to file a federal habeas petition after his state postconviction proceedings concluded. *See* Pet. App. 4, 30. Therefore, Petitioner cannot blame the attorney for his untimely petition. The onus for filing a petition within the one-year period was always on Petitioner alone.

3. Lastly, even if Petitioner could establish that the attorney abandoned him and that the abandonment prevented him from timely filing his petition, he would not be entitled to equitable tolling because he did not "pursu[e] his rights diligently." *See Holland*, 560 U.S. at 649 (quotations omitted). First, after his convictions became final, he waited nine months to hire an attorney to file a state postconviction motion.

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[2] Nor was the attorney grossly negligent. He did not agree to file Petitioner's Rule 3.850 motion before the one-year limitations period expired, but even assuming that he did (*see* Pet. 3–4), "simple" mistakes—like forgetting to attach a verification to a pleading—that "lead[] a lawyer to miss a filing deadline" are at most "garden variety . . . attorney negligence." *See Holland*, 560 U.S. at 651–52 (quotations omitted); *Maples*, 565 U.S. at 281 ("[W]hen a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight.").

Pet. App. 4, 20. Lack of diligence caused that delay: rather than seek out an attorney himself, Petitioner offloaded the responsibility to his sister, "task[ing] [her] with finding and paying for an attorney." *Id.* at 28. Second, after Petitioner learned that his one-year period had expired, he waited nearly three months to file his petition, even though it merely recycles his state postconviction claims. *See id.* at 28, 32–33.

* * *

In short, there are no "compelling reasons" for granting review. *See* Sup. Ct. R. 10. This is a mine-run equitable-tolling case, requiring the application of settled precedent to the facts; the decision below implicates no split of authority; and the Eleventh Circuit properly denied Petitioner relief.

In fact, this Court has repeatedly denied petitions for certiorari where the prisoner has claimed that review is necessary to ensure adherence to *Holland* and *Maples*, and Petitioner identifies no change in circumstance that makes review now appropriate. *See* Pet. for Cert., *Crick v. Key*, No. 19-979 (U.S. June 25, 2019), *cert. denied*, 140 S. Ct. 2513 (2020); Pet. for Cert., *Traverso v. Ryan*, No. 17-428 (U.S. Sep. 21, 2017), *cert. denied*, 138 S. Ct. 506 (2017); Pet. for Cert., *Whiteside v. United States*, No. 14-1145 (U.S. Mar. 19, 2015), *cert. denied*, 576 U.S. 1055 (2015); Pet. for Cert., *Rues v. Denney*, No. 11-638 (U.S. Nov. 18, 2011), *cert. denied*, 565 U.S. 1179 (2012).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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