NO. 20-7406

---

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

---

**LIONEL ROBINSON** – Petitioner

vs.

**MARK INCH, SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL,** – Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT, 11TH CIRCUIT

# PETITION FOR REHEARING

LIONEL ROBINSON, DC# G15804
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

Petitioner, *pro se*

## QUESTIONS PRESENTED ON REHEARING

The question concerns what attorney conduct may be considered in determining the existence of extraordinary circumstances to warrant equitable tolling. In Holland v. Florida, *infra*, this Court expressly rejected importing agency principles into the equitable tolling context. But circuit courts have interpreted this Court's later decision, Maples v. Thomas, *infra*, to do just that, event though agency principles were applied in the context of cause to avoid a state procedural bar. If agency principles apply to equitable tolling claims, then only attorney misconduct that amounts to abandonment may be considered. In this context, the question presented on rehearing, which involves a substantial ground not addressed in the petition for writ of certiorari, is:

1. Does Maples v. Thomas alter Holland v. Florida's holding on attorney error and rejection of agency principles into the equitable tolling context?

TABLE OF CONTENTS



## INDEX TO SUPPLEMENTAL APPENDICES

TABLE OF AUTHORITIES CITED

## Cases



## Statutes

## STATEMENT OF CASE AND FACTS

The Eleventh Circuit granted a certificate of appealability to decide whether the district court erred in its determination that Petitioner was not entitled to equitable tolling of the statute of limitations period. Petitioner's initial brief in the Eleventh Circuit argued that there were extraordinary circumstances in this case: Attorney David Jay Bernstein failed to timely notify Petitioner that his 9.141 petition had been denied; and Bernstein, contrary to his contractual and oral agreement, failed to file Petitioner's Rule 3.850 motion so as to protect and preserve Petitioner's ability to timely seek federal habeas corpus review. The totality of the circumstances, however characterized by Respondents (abandonment/gross negligence), entitled him to equitable tolling.

The Eleventh Circuit agreed that Bernstein's representation was not flawless and that taking Petitioner's allegations as true, Bernstein arguably was negligent on several occasions. **Appendix A** at 9. Ultimately, the Court reiterated its previous holding, and indeed held in this case, that "negligence, even gross or egregious negligence, does not, by itself, rise to the level of abandonment or qualify as an extraordinary circumstance for purpose of equitable tolling. **Appendix A** at 9, 8, citing Cadet v. Fla. Dep't of Corr., 853 F.3d 1216 (11th Cir. 2017) . Since Petitioner had failed to prove his alleged extraordinary circumstances, it was "unnecessary" for the court to consider whether he was "adequately diligent." **Appendix A** at 10.

The petition for writ of certiorari in this Court presented the following question: "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?" By court order, the Attorney General of Florida filed a Brief in Opposition. It restated the question as "whether the Eleventh Circuit erred in concluding that the attorney did not abandon Petitioner." The argument in opposition is that Petitioner waived the question that he presented by failing to raise it below; this case presents only a narrow fact-bound question; no split of authority is implicated; and the decision below is correct. Brief in Opposition at ii. The Brief in Opposition was both factually inaccurate and misleading. Apart from that, it was not forthright regarding this Court's jurisdictional considerations under Supreme Court Rule 10[1]. The Court denied the petition for writ of certiorari on June 14, 2021.

On June 16, 2021, the clerk of this court returned Petitioner's reply brief unfiled and advised him to file the instant request for rehearing. **Appendix 2.**

---

[1]: Respondents argued the case implicates no important, broadly applicable question of law, it is simply an exercise in error correction. Brief in Opposition at 8. Actually, the issue involves a need for this Court to clarify whether agency principles have been imported into the equitable tolling analysis where a habeas petitioner stands to forever lose an opportunity to have a first habeas petition considered by a federal court (*infra* at I & II). Respondents argued there is no conflict because the Eleventh Circuit faithfully applied Holland and Maples. Brief in Opposition at 8. Actually, the Eleventh Circuit has so misinterpreted the holdings in Maples that its decision is in conflict with Holland (*infra* at I.A.). Respondents argue there are no "compelling reasons" for granting review because the decision below implicates no split of authority. Brief in Opposition at 15. Actually, there is disagreement among the circuits on the question presented (*infra* at I.B.).

## REASONS FOR GRANTING REHEARING AND CERTIORARI

Title 28 U.S.C. § 2244(d) is subject to equitable tolling because the AEDPA statute of limitations defense is not jurisdictional and congress did not seek to end every possible delay at all costs. Holland v. Florida, 130 S. Ct. 2549, 2560, 2562 (2010). Equitable tolling is appropriate if extraordinary circumstances prevented timely filing. Id. Courts must exercise its equitable powers on a case-by-case basis. Id. at 2563. Courts of equity have sought to relieve hardships which arise from hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity. Id. Noting that the flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices, id, this Court explained why agency principles govern the "extraordinary circumstance" analysis in cases involving attorney error that led to a procedural bar in state court but not attorney error that led to a non-jurisdictional federal time bar,

> . . . in the context of procedural default, we have previously stated, without qualification, that a petitioner must "bear the risk of attorney error." *Coleman v. Thompson*, 501 U.S. 722, 752-753 [ ] (1991). But Coleman was a case about federalism, in that it asked whether federal courts may excuse a petitioner's failure to comply with a state court's procedural rules, notwithstanding the state court's determination that its own rules had been violated. Equitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with federal timing rules, an inquiry that does not implicate a state court's interpretation of state law. Holland does not argue that his attorney's misconduct provides a substantive ground for relief, cf. 2254(i), nor is this a case that asks whether AEDPA's statute of limitations should be recognized at all. Rather, this case asks how equity should be applied once the statute is recognized. And given equity's resistance to rigid rules, we cannot read *Coleman* as requiring a per se approach in this context.

Holland, 130 S. Ct. 2563. With these principles in mind, the Court held: "serious attorney misconduct" qualifies as an extraordinary circumstance warranting equitable tolling, but "a garden variety claim of excusable neglect" or miscalculation of a deadline does not. See Id. Only the this Court has the prerogative of overruling or modifying those holdings Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

Two years later, in a case that is often cited to decide equitable tolling claims, this Court reiterated the rule in Coleman, that under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent. Maples v. Thomas, 132 S. Ct. 912, 922 (2012) (citing Coleman, 501 U.S. at 753-754). However, this Court was not analyzing "extraordinary circumstances" for the purpose of equitable tolling as it did in Holland. Rather, the Court inquired "whether Maples has shown that his attorneys of record abandoned him, thereby supplying the 'extraordinary circumstances beyond his control,' necessary to lift the **state procedural bar** to his federal petition." Id. 132 S. Ct. 924 (bold print added).

On behalf of Petitioner, and all of those who are similarly situated, this Court should grant rehearing and certiorari to provide clarification of the effects of Maples, a case involving attorney misconduct in the context of cause to overcome a state-imposed procedural bar, on the holding in Holland, a case involving attorney misconduct in the context of equitable tolling to overcome a non-jurisdictional

federal time bar[2]. The Court should do this not because "extraordinary circumstance" in the context of attorney misconduct can be precisely defined, but because the Eleventh Circuit has fashioned an improper rule, a rule that forbids euitable tolling on the basis of attorney error that falls short of abandonment. The Eleventh Circuit insists on restricting the exercise of its equitable powers to labels, and that is contrary to the core holding in Holland, 130 S. Ct. at 2561-63 (rejecting as "too rigid" the rule that even attorney error conduct that is "grossly negligent" cannot justify equitable tolling of AEDPA's limitations period absent proof of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.").

## I. From this Court's decision in Maples v. Thomas, the Eleventh Circuit has extracted a bright line rule that prevents case-specific inquiry into attorney misconduct that does not rise to the level of abandonment.

The Eleventh Circuit relied on Maples to fashion "the appropriate standard for gauging when attorney error amounts to extraordinary circumstance." See Cadet, 853 F.3d at 1221, 1223-25. Over a well reasoned dissenting opinion, it held that "attorney negligence, even gross or egregious negligence, does not by itself qualify as 'extraordinary circumstance' for purpose of equitable tolling; either abandonment of the attorney-client relationship . . . or some other professional misconduct or some other extraordinary circumstance is required." Id. at 1277. The Eleventh Circuit relied on its decision in Cadet to determine that Petitioner did not

---

[2]: Cf. Cadet, 853 F.3d at 1226 ("the Holland opinion cannot be read by itself. It must be read in light of the Court's explanation of Holland eighteen months later in its Maples decision.").

demonstrate extraordinary circumstances because although his attorney's conduct was negligent, it did not rise to the level of abandonment. **Appendix A** at 9-10.

### A. The Eleventh Circuit's decision is erroneous as it misconstrues the decision in Maples v. Thomas as it applies to Holland v. Florida.

In Cadet, the Eleventh Circuit wrote: "What the Maples decision says is that Justice Alito got it right in Holland, that 'attorney error, however egregious' is not enough for equitable tolling." Id. at 1227. Citing a footnote in Maples, it concluded that this Court "held that there was 'no reason . . . why the distinction between attorney negligence and attorney abandonment should not hold in both' the equitable tolling and procedural default context." Id. at 1225. The Eleventh Circuit is wrong on both accounts. In Holland this Court did not hold that attorney error is never enough for equitable tolling. In Maples, this Court also did not "hold" in a footnote that it was modifying or overruling the holdings in Holland. See Bosse v. Oklahoma, 137 S. Ct. 1, 2, (2016) (per curiam) (instructing against construing one of this Court's opinions as "implicitly overrul[ing]" a previous opinion).

The opinion in Holland expressly rejected importing agency principles into the equitable tolling context, recognizing instead that attorney error can constitute extraordinary circumstances for purposes of equitably tolling the AEDPA deadline[3]. Holland, 560 U.S. at 650-52. Holland was not overruled just two years later in Maples, where the Court relied on agency principles to excuse a procedural default and merely cited Holland as "instructive" on that issue. Maples, at 281-82.

---

[3]: See Mathis v. U.S., 136 S. Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same[.]").

### B. There is a "burgeoning circuit split" over whether attorney error must amount to effective abandonment for it to constitute extraordinary circumstances warranting equitable tolling.

There is a "burgeoning circuit split" over whether attorney wrongdoing must amount to effective abandonment for it to constitute extraordinary circumstances warranting equitable tolling, and the Fifth and Sixth Circuits declined to express a view on the issue. Jones v. Davis, 922 F.3d 271, 279 (5th Cir. 2019) ; Nassiri v. Mackie, 967 F.3d 544, 546 (6th Cir. 2020). Whether Maples alters Holland is a subject of debate among the circuits. The Second Circuit, like the Eleventh Circuit, has ruled that it does, holding that Maples means attorney wrongdoing must rise to effective abandonment—an act that severs the agency relationship—to constitute extraordinary circumstances in the equitable tolling setting. Rivas v. Fischer, 687 F.3d 514, 538 n.33 (2d Cir. 2012). On the other hand, the Ninth Circuit has said it is unclear whether this Court intended to hold in Maples that attorney misconduct short of abandonment can no longer serve as a basis for equitable tolling. Luna v. Kernan, 784 F.3d 640, 648-49 (9th Cir. 2015). But, because Maples did not explicitly overrule Holland, it ruled that Holland's holding —egregious attorney misconduct of all stripes may serve as a basis for equitable tolling—remains good law. Id. at 649. The dissenting opinion in Cadet is aligned with the Ninth Circuit's holdings. See Cadet. 853 F.3d 1237-40 (WILSON, Circuit Judge, dissenting); Benzant v. Jones, 2017 U.S. Dist. LEXIS 174652 (Fla. S.D. 10/23/2017) (same); U.S. v. Halcrombe, 700 Fed. App'x 810, 815 (10th Cir. 2017) (recognizing that an attorney's misconduct or "egregious behavior" may also "create an extraordinary circumstance that warrants equitable tolling.")(quoting Holland, 560 U.S. at 651.) Granting both rehearing and

certiorari provides an opportunity for this Court to clarify whether agency principles really do govern the analysis when attorney misconduct is alleged in equitable tolling cases and will provide guidance to federal courts in *equitably* resolving the question of extraordinary circumstances.

### C. Even if agency principles have been imported into the equitable tolling analysis, Martinez v. Ryan implicates additional considerations.

Even if Coleman's agency principles do inform the analysis, only two months after deciding Maples, this Court held, as an **equitable matter**, that an attorney's ignorance or inadvertence in an initial collateral review proceeding does qualify as cause to excuse a procedural default so long as the petitioner demonstrates that postconviction counsel was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 (1984). See Martinez v. Ryan, 132 S. Ct 1309, 1315, 1318 (2012). Martinez created this exception to protect prisoners with a potentially legitimate ineffective-assistance-of-counsel claim. Id. at 1315. Surely Maples, which was argued the same day Martinez, was not intended to import into the equitable tolling analysis a more exacting standard to restrict a federal court's equitable power to excuse an untimely petition based upon the case specific facts because it could unnecessarily and completely deprive the petitioner of habeas review.

## II. The Eleventh Circuit precedent is irreconcilable with this Court's precedent on what attorney conduct amounts to "extraordinary circumstances" in equitable tolling cases, which led to an incorrect result.

This Court has instructed that in determining whether to grant extra time to file a federal habeas petition, federal courts must avoid the imposition of a

mechanical rule and consider on a case-by-case basis any attorney misconduct that exceeds garden-variety negligence. Holland, 130 S. Ct. at 2564. But from this Court's decision in Maples, the Eleventh Circuit extracted a mechanical rule that denies case-specific inquiry when attorney error cause the time bar. Cadet, 853 F.3d at 1277. It consistently imposes a rule that attorney negligence, even gross negligence, alone can never justify granting extra time to file a federal habeas petition. **Appendix A** at 9, 8. It holds that the attorney misconduct in this case constituted only negligence, thereby denying Petitioner the extra time he needs to have his constitutional claims considered by a federal court.

The attorney misconduct in this case exceeded garden-variety negligence and compels a case-specific inquiry into whether Petitioner is entitled to equitable tolling. The Magistrate judge found that Petitioner alleged the following to support his equitable tolling claim: he tasked his sister with finding and paying for an attorney who could promise to file a Rule 3.850 motion in time to preserve Petitioner's one-year federal habeas filing deadline; Attorney David Jay Bernstein orally agreed to file a Rule 3.850 motion before Petitioner's federal filing deadline expired; after having retained Bernstein, Petitioner wrote Bernstein on October 24, 2014, and November 18, 2014, asking why Bernstein had not contacted him or his family; Bernstein did not respond to Petitioner's letters and instead filed a state habeas petition on November 24, 2014; Petitioner wrote Bernstein on December 5, 2014, inquiring about the status of the state habeas petition; on December 16, 2014, Petitioner wrote Bernstein and told him his lack of communication was

unprofessional; on January 19, 2015, Petitioner wrote Bernstein threatening to file a Florida State Bar Association complaint against him; on February 11, 2015, Bernstein improperly filed Petitioner's original Rule 3.850 motion because he failed to have Petitioner sign and verify the motion; on March 27, 2015, Petitioner wrote Bernstein inquiring on the status of the 9.141 petition, but Bernstein did not respond to the letter; without explaining to Petitioner that his original motion has been procedurally dismissed, on July 31, 2015, Bernstein mailed Petitioner an amended Rule 3.850 motion and instructed Petitioner to sign the oath and return it to his office; Petitioner returned the signed oath on August 4, 2015; Petitioner's federal deadline expired between dismissal of his original Rule 3.850 motion and the filing of the corrected motion; Bernstein wrote Petitioner on June 28, 2016, to inform him that his Rule 3.850 motion was denied and Bernstein's representation was concluded; on April 5, 2017, and April 21, 2017, Petitioner wrote Bernstein to inquire about the status of the state habeas petition; and Bernstein responded to Petitioner's letters on April 28, 2017, informing Petitioner of all relevant dates. **Appendix C** at 7, 12-13, 17. Petitioner attached affidavits and other documents to support his allegations. **Appendix C** at 13-14. See also **Appendix 3** at 31-48.

## III. The question is important because it affects a large number of prisoners whose first federal habeas petition is dismissed due to a non-jurisdictional time bar.

The dissent pointed out in Cadet, almost five years ago that "[a]pproximately one hundred opinions and report and recommendations have cited this panel's initial opinion, many for the proposition that only abandonment merits equitably

tolling the limitations period for a federal habeas petition." Cadet, 853 F.3d 1238. Moreover, this Court has said: "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the Petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 324, (1996).

## CONCLUSION

This *pro se* Petitioner has neither the knowledge, time, nor resources to fully and effectively address the recondite issues presented herein. Due to the significance of the question presented, this Court should exercise its discretionary powers to appoint counsel to the extent that it may be helpful in properly framing the issue for review. In addition to this, Petitioner prays this Court grant rehearing.

Respectfully submitted,

Date: July 2nd, 2021

Lionel Robinson, DC# G15804
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

# Appendix 3

Excerpts from petition for writ of habeas corpus

**Equitable Tolling Time**
**Background And Procedural History**

On May 3, 2012 following a jury trial in the 8th Judicial Circuit Court in and for Alachua County, Florida, Case No: 01-2010-CF-004836-C Petitioner Lionel Robinson was found guilty of one count of robbery with a firearm or deadly weapon and one count of tampering with evidence.

On June 18, 2012, he was sentenced to 30 years in prison on the robbery with a firearm count, and 5 years on the tampering with evidence count to run concurrent to count one robbery with a firearm.

Petitioner's Court-Appointed Counsel filed a notice of appeal on July 6, 2012. The Florida First District Court of Appeal ("First DCA") assigned Case No: 1D12-3291.

The issues raised were: 1.) The circumstantial evidence was legally insufficient prove that evidence. 2.) Trial Court committed reversible error denying Appellant's objections to State's preemptory challenge of African-American juror. 3.) Trial Court committed reversible error denying Appellant's motion for mistrial. 4.) The prosecutor's closing argument was fundamental error for comments on Appellant's silence and shifted the burden of proof.

On October 17th 2013, the First DCA affirmed the judgment and conviction per curiam without a written opinion See **Lionel Robinson v. State**, 123 So.3d 565 (Fla. 1st DCA 2013).

The mandate having been issued on November 4th 2013, since there was no written opinion the First District Court of Appeal is the highest appellate court having jurisdiction in Florida.

Petitioner wrote a letter to the office of Attorney David Jay Bernstein stating the following: That Petitioner had written other law firms inquiring their assistance in filing a motion for postconviction relief rule 3.850.

Petitioner explained to attorney David Jay Bernstein that he needed Mr. Bernstein's law office to file a motion for post-conviction relief under rule 3.850 within a suitable time that would preserve the remaining 90 days of his federal time. Petitioner explained to the attorney David Jay Bernstein that Petitioner's federal time was ticking down and the only way Petitioner would retain Mr. Bernstein to represent Petitioner only if Mr. Bernstein could meet Petitioner's aforementioned demands to timely file a motion for post-conviction relief under rule 3.850 that would preserve the remaining 90 days of Petitioner's one year deadline to file a Federal Habeas Corpus petition.

Petitioner provided attorney David Jay Bernstein with the necessary information to contact Petitioner's family.

Petitioner's sister was aware of how important it was to preserve the one year Federal Habeas Corpus deadline, because of Petitioner emphasizing it through his letters to her, and that it was urgent of her to contact and pay for a lawyer, only by attorney contacting Petitioner at his facility to see can an attorney meet Petitioner's requirement.

Petitioner's sister contacted several attorneys and emphasized to these lawyers how important Petitioner's requirement was, which attorney David Jay Bernstein agreed. Petitioner's sister told attorney Mr. Bernstein to set up a legal call with Petitioner at his facility because Petitioner wanted to converse with Mr. Bernstein about his requirements, and this was the only way Mr. Berstein would get hired is by Petitioner.

Through a legal call at Petitioner's facility Mr. David Jay Bernstein made an oral agreement with Petitioner to follow Petitioner's requirement, which is the only reason petitioner hired attorney, to timely file a 3.850 within a timely manner that would preserve the one year Federal Habeas Corpus deadline.

Petitioner signed attorney David Jay Bernstein contract on 10-13-14 due to this oral agreement through the legal call. See Ex. **"A"**: 9-23-14 Letter/Contract from Mr. David Bernstein.

After this legal call petitioner forwarded all transcripts and documents to Mr. Bernstein, and Petitioner wrote family to inform them to pay Mr. Bernstein because he forwarded signed contract to attorney.

Petitioner asserts that he had his family retained David Jay Bernstein with the understanding that he could and would file 3.850 motion and represent Petitioner in the postconviction proceedings for the Rule 3.850 motion, and that the attorney David Jay Bernstein would do so within a timely manner that would preserve the remainder of the one year deadline Federal Habeas Corpus deadline.

This was an oral agreement that was contemplated and agreed upon by attorney David Jay Bernstein, Petitioner and Petitioner's sister.
See Ex. **"B"**. Affidavit of Petitioner and Petitioner's sister.

On October 24, 2014, Petitioner wrote a letter to David Jay Bernstein asking why he had not contacted him or his family and stated that his family was "calling" David Jay Bernstein's office.

Petitioner asked how long would it take him to file a 3.850 motion. Petitioner reiterated to David Jay Bernstein that he and his family paid him and retained him based upon his promise and assurance that he could and would file a 3.850 and represent Petitioner in a Rule 3.850 proceeding that would preserve the remaining three months of Petitioner's one year time limit to file his Federal Habeas Corpus which was set to expire January 15, 2015.

Petitioner further stated Petitioner didn't know how much time he had left on his Federal Habeas Corpus time, and asked David Jay Bernstein to please "Speed up the Process" on filing the Rule 3.850 motion, so he did not "lose" his Federal time.

Petitioner mentioned that the mandate in his case on his direct appeal was November 4, 2013.

On November 18, 2014 Petitioner wrote David Jay Bernstein expressing the importance that he contact Petitioner and respond back to Petitioner's letter.

On November 21, 2014 Petitioner wrote his family with the intent that his family call Mr. Bernstein and express their intent to address a complaint to the Florida Bar because of Mr. Bernstein's lack of communication, and Mr. Bernstein was utterly shirking his responsibility to file the 3.850 motion what he was paid for.

On November 12, 2014 attorney David Jay Bernstein out of nowhere filed a Federal time tolling 9.141, Petition for Writ of Habeas Corpus in the First District Court of appeal. See: EX. "C"

The issues raised were: **Appellate Counsel was Ineffective for failing to argue that the Trial Court committed fundamental error by failing to give the proper jury** instructions concerning lesser included offenses.

The 9.141 was docketed in the Court on November 24, 2014.

The filing of the 9.141 was not contemplated in the agreement between David Jay Bernstein, Petitioner, and Petitioner's sister. See Ex. "A", and totally contrary to the agreement, written and oral.

On December 4, 14 Petitioner received a copy of the 9.141. See: EX. "C"

On December 5, 2014 Petitioner wrote attorney David Jay Bernstein a letter inquiring into the status of his petition for Writ of Habeas Corpus 9.141, and why

didn't he file the 3.850 instead of the 9.141 because the 9.141 was not in the contract signed.

Petitioner begged attorney David Jay Bernstein to respond to his letters to inform him of what's going on, or either call the facility at Wakulla Correctional Institution to set up a legal call, which was the only way Petitioner was allowed to speak to Mr. Bernstein. Further, Petitioner again began inquiring about his Federal Time, however attorney David Jay Bernstein did not respond.

On December 16, 2014 Petitioner wrote a letter stating that David Jay Bernstein was being unprofessional and not communicating with him.

On January 19, 2015 Petitioner wrote another letter again to David Jay Bernstein and again expressed his intent to file a Bar complaint again him alleging: Failure to communicate any decisions and/or status of the 9.141, bad faith, utterly shirking all of his professional responsibilities to file Petitioner's 3.850 motion within their agreement, and that Mr. Bernstein took his family's money and abandoned him.

On February 11, 2015, David Jay Bernstein filed Petitioner's 3.850 motion:

**Ineffective Assistance of Counsel**
**Alleging Six Ground(s)**

**Ground One**: Trial Counsel was ineffective for failing to object to erroneous jury instructions concerning lesser included offense(s).

**Ground Two**: Trial Counsel was ineffective for failing to investigate and call exculpatory witness Daijanae Wright.

**Ground Three:** Trial Counsel was ineffective for failing to investigate and call exculpatory witness Malcolm Carter.

**Ground Four**: Trial Counsel was ineffective for failing to object to prosecutor's impermissible comments on Defendant's silence during trial.

**Ground Five**: Trial Counsel was ineffective for misadvising Defendant about potential ramifications of his testifying and, thereby, dissuading him from testifying to his detriment; and

**Ground Six**: Trial Counsel was ineffective for failing to call Malcolm Carter as a defense witness during... trial.

However, the aforementioned motion for post-conviction relief under rule 3.850 was not sent to Petitioner until March 20, 2015. See: EX. **"D"**

Attorney David Jay Bernstein never informed Petitioner of the status of the 9.141 filed in the 1st DCA, on November 12, 2014. When Petitioner received 3.850, on 3-27-15 Petitioner wrote Mr. Bernstein inquiring of the status of 9.141 because he was unsure and under the impression that 9.141 might have got denied due to 3.850 being filed. Mr. Bernstein still didn't respond to Petitioner's letters.

Petitioner then got an amended motion and letter from attorney sometime after 7-31-15. The amended motion had Ground 6 added for sworn affidavit of Malcolm Carter. Attorney still didn't respond to Petitioner's letters. Attorney just stated in letter for Petitioner to return certificate of service/un-notarized oath ASAP. Counsel also stated if Petitioner had questions contact by email or by phone. See July 31, 2015 letter, See: Ex. **"E"**. which was from someone that works in his firm. (Note: Petitioner does not have authority to utilize E-mail at this facility, and Mr. Bernstein was aware that Petitioner can only make a legal call to Mr. Bernstein only if it is prearranged by Mr. Bernstein.)

Petitioner immediately wrote letter informing attorney that he is incarcerated he has no e-mail and the only way he could speak to attorney of he set up legal call at prison facility, or attorney respond back to his letter.

Petitioner also received letter from family member that they can never get a hold of Mr. Bernstein because he's never in his office, however that they will keep calling to check, and leaving messages for Mr. Bernstein to contact Petitioner as soon as possible.

The next time Petitioner received a letter from attorney was after 6-28-16 when Petitioner's 3.850 got denied. See: EX. **"F"**

On 6-20-16, Mr. Bernstein ended his representation and abandoned Petitioner by filing no notice of appeal, nor informed Petitioner of status of 9.141, which left Petitioner to prepare his appeal pro se to the appellate courts. See: 6-28-16 Letter. See: Ex. **"F"**.

Petitioner sought and requested all papers from Mr. Bernstein to be able to appeal Court decision, which attorney did so within a letter. In letter attorney mentioned that they have also enclosed all copies of all motions, answers and Court orders that petitioner may need to appeal court's decision. See: July 18, 2016 Letter. See: Ex. **"G"**.

Means attorney never informed Petitioner in any type of fashion of motions, answers Court order and felt it was very important for Petitioner to know in appealing matter.

On March 29, 2017, April 5, 2017, April 21, 2017, when Petitioner was at his last step in District Court when his motion for rehearing, rehearing enbanc and written opinion was pending in March. Petitioner realized he had to calculate federal time, and that there were no were in documents of status of 9.141. Petitioner was under impression that 9.141 could still be active because attorney or courts never informed him of it ever being denied. So Petitioner wrote attorney repeatedly and begging attorney for this information. Also, Petitioner mentioned in his April 21, 2017, letter to attorney, how he recently observed by going through motions, answers and Court orders that attorney forwarded to Petitioner after he

ended his representation, that there were other matters in Petitioner's case, that Mr. Bernstein didn't inform him of during his representation. Petitioner also asked attorney to please not ignore his letters like he did when Mr. Bernstein was representing him in his case. See: Ex. "**L**" 4-5-17 Letter, 4-21-17 Letter. Petitioner also made a Notice of inquiry to Court See 5-15-17. See: Ex. **"H".**

Around 4-21-17 Petitioner became aware that Attorney David Jay Bernstein subsequently filed an amended motion 3.850 in July 23, 2015.

The motion was dismissed without prejudice as partially insufficient for failing to include the required oath and entered to refilling of amended motion containing a proper oath within sixty (60) days. Petitioner observed that Mr. Bernstein missed the 60 day limitation to refile, which resulted in Petitioner's 2 year limitation expiring for 3.850, which means Petitioner one year limitation for Federal time ran out, if it was any effect.

Attorney later on put in a motion of enlargement on 2-3-16, when he became aware and explaining to Court how his excusable neglect due to personal matters caused this to happen. See: EX. **"K"** Motion of Enlargement.

Note: Attorney never informed Petitioner of these matters in his case during the time of his representation. On 7-31-15 attorney send letter to Petitioner just to sign certificate of service/un-notarized oath and stated nothing else. See: EX. **"E"**: 7-31-15 letter. Petitioner became aware when he went through the motion, Court orders, and answers that attorney never sent him or informed of during representation. See: EX. **"G"**: 7-18-17 letter, See: EX. **"L"**: 4-21-27 letter.

The state circuit court summarily denied all six grounds, June 20, 2016, David Jay Bernstein again abandoned Petitioner and filed no notice of appeal, nor informed Petitioner of the status of the 9.141.

On May 16, 2017 Petitioner finally received a letter from Mr. Bernstein informing him of the status of the 9.141, which attorney responded to Petitioner's

April 21, 2017 letter. See: EX. **"J".** On May 18, 2017, prior to Petitioner filing a pro se initial brief the First DCA notified Petitioner that the 9.141 had been denied December 10, 2014, See: EX. **"I ".** **Lionel Robinson**, 152 So.3d 571 (Fla. 1st DCA 2014). Petitioner states that he received the notification of the denial of his 9.141, more than 2 years after it was denied. On February 22, 2017, the First DCA affirmed the circuit court's decision denying the Rule 3.850 motion without a written opinion, March 31, 2017 the First DCA denied Petitioner's rehearing enbanc. The mandate issued April 18th 2017. Since there was no written opinion, the First District Court of Appeal is the highest appellate court having jurisdiction of Florida.

Further, Petitioner states that the State Court and Mr. Bernstein delayed more than 2 years in providing Petitioner Notice of its denial of his 9.141 petition for Writ of Habeas Corpus. Petitioner states that he could not reasonably be expected to have filed his federal habeas petition, while under impression that his 9.141 petition was still active.

Petitioner commenced the instant federal habeas action on 7-31, 2017 after having properly exhausted all available State remedies/requirements.

Pursuant to the requirements set forth in 28 U.S.C. 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which became effective on April 24, 1996, a one-year period of limitation applies to the filing of a habeas petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

(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. Section 2244(d)(1).

Under federal law, the judgment becomes final for purposes of 2244(d)(1)(A) upon expiration of the 90-day period in which a defendant may seek direct review of his conviction in the United States Supreme Court. The 90-day period runs from the date of entry of the judgment sought to be reviewed. *See* **Chavers v. Sec'y, Fla. Dep't of Corr.**, 468 F.3d 1273, 1275 (11th Cir. 2006). Federal Rule of Civil Procedure 6(a) provides that "[I]n computing any period of time prescribed or allowed by . . . any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included." Fed. R. Civ. P. 6(a); *see also* **Washington v. United States**, 243 F.3d 1299, 1301 (11th Cir. 2001) (Rule 6 applies to calculation of one-year statute of limitations under AEDPA). Here, the 90-day period for seeking certiorari review was triggered by the First DCA's affirmance of Petitioner's conviction, on October 17, 2013, and it expired 90 days later, on January 15, 2014. Therefore, the statute of limitations began to run on January 16, 2014, the day after the 90-day period for Petitioner to file a petition for review in the United States Supreme Court expired. Petitioner had one year from that date, or until January 15, 2015, to file his 2254 petition. *See* **Downs v. McNeil**, 520 F.3d 1311, 1318 (11th Cir. 2008) (limitations period should be calculated according to "anniversary method," under which limitations period expires on anniversary of date it began to run) (citing **Ferreira v. Dep't of Corr.**, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)). Petitioner did not file

his federal petition on or before January 15, 2015; therefore, it is untimely unless tolling principles apply and render it timely.

Petitioner asserts he is entitled to equitable tolling of the federal limitations period. He states he retained Attorney David Jay Bernstein to represent him on the Rule 3.850 proceeding. Petitioner states David Jay Bernstein "failed to respond to any of Petitioner's letters, inquiries and concerns, and Petitioner's family phone calls during his entire representation concerning the Petitioner's 1 year federal deadline". Attorney David Jay Bernstein failed to keep Petitioner abreast upon any developing decisions in his case. Petitioner asserts that only after he expressed his intent to file to the Florida Bar a complaint against David Jay Bernstein in November of 2014, and in January of 2015, did David Jay Bernstein initially file a 9.141 petition for writ of Habeas Corpus and thereafter on February 11, 2015 the Rule 3.850 motion. Petitioner argues that Attorney David Jay Bernstein's failure to communicate, abandonment, and failure to notify the Petitioner of the filing and status and denial of the 9.141 petition for writ of Habeas Corpus and failed to file the Rule 3.850 motion sooner than February 11, 2015 which was contemplated and understood in the agreement between attorney David Jay Bernstein, Petitioner, and Petitioner's sister, entitles him to equitable tolling.

"Because the time period specified in **28 U.S.C. 2244** is a statute of limitations, not a jurisdictional bar, the Supreme Court has held 2244(d) does not bar the application of equitable tolling in an appropriate case." **Cole v. Warden, Ga. State Prison**, 768 F.3d 1150, 1157 (11th Cir. 2014) (citing **Holland v. Florida**, 560 U.S. 631, 645, 130 S. Ct. 2549, 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 circumstance stood in his way and prevented timely filing." **Holland**, 560 U.S. at 649. As an extraordinary remedy, equitable tolling is "limited to rare and exceptional

circumstances and typically applied sparingly." **Cadet v. Fla. Dep't of Corr.**, 742 F.3d 473, 477 (11th Cir. 2014).

Equitable tolling is assessed on a case-by-case basis, considering the specific circumstances of the case. **Hutchinson v. Florida**, 677 F.3d 1097, 1098 (11th Cir. 2012); *see* **Holland**, 560 U.S. at 649-50 (clarifying that the exercise of a court's equity powers must be made on a case-by-case basis). A petitioner has the burden of establishing his entitlement to equitable tolling; his supporting allegations must be specific and not conclusory. **Hutchinson**, 677 F.3d at 1099. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." **Holland**, 560 U.S. at 653; *see also* **Smith v. Comm'r, Ala. Dep't of Corr.**, 703 F.3d 1266, 1271 (11th Cir. 2012) (per curiam) (acknowledging petitioners are not required "to exhaust every imaginable option, but rather to make reasonable efforts"). Determining whether a factual circumstance is extraordinary to satisfy equitable tolling depends not on how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA's limitations period. **Cole**, 768 F.3d at 1158 (quotation marks and citation omitted).

"[Equitable] [t]olling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for 'serious instances of attorney misconduct.'" **Christeson v. Roper**, __ U.S. __, __, 135 S. Ct. 891, 894, 190 L. Ed. 2d 763 (2015) (quoting **Holland**, 560 U.S. at 651-52).

In **Thomas v. Attorney Gen., Fla.**, 795 F.3d 1286 (11th Cir. 2015), the Eleventh Circuit articulated the types of attorney misconduct that may serve as an extraordinary circumstance to support a claim to equitable tolling:

[W]e have explained that attorney negligence, and even gross negligence or recklessness, is not an extraordinary circumstance; "abandonment of the attorney-

client relationship . . . is required." **Cadet**, 742 F.3d at 481. At the same time, the factors we had identified in **Holland** I-"bad faith, dishonesty, divided loyalty, [and] mental impairment," 539 F.3d at 1339-may still serve as extraordinary circumstances that support a claim to equitable tolling. On remand, therefore, the district court must decide whether [petitioner's attorney's] conduct amounted to an abandonment of [the petitioner], as that concept has developed in **Holland II**, **Maples**, and **Cadet**, or whether her conduct nonetheless amounted to serious instances of attorney misconduct warranting equitable tolling. **Thomas**, 795 F.3d 1286, 2015 WL 4597532, at *5 (citing **Cadet v. Fla. Dep't of Corr.**, 742 F.3d 473 (11th Cir. 2014); **Holland v. Florida (Holland I)**, 539 F.3d 1334 (11th Cir. 2008), *rev'd on other grounds*, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (**Holland II**); **Maples v. Thomas**, _ U.S. __, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012)).

Petitioner states that his attorney's conduct amounted to abandonment of the attorney client relationship, and the State Court and attorney's actions in failing to notify Petitioner of the denial of his 9.141 until 3 years later warrants equitable tolling. Further, Attorney David Jay Bernstein's "failings were so egregious as to constructively sever the agency relationship between [David Jay Bernstein] and [himself], thus excusing [him] from bearing the risk of his attorney's mistake." See; **Damren v. Florida**, 776 F.3d 816, 822 (11th Cir. 2015); *see also* **Cadet**, 742 F.3d at 481 (holding that under "well-settled principles of agency law, . . . a petitioner bears the risk of attorney error unless his attorney has essentially abandoned him and thereby severed the principal-agent relationship" (citing **Maples**, 132 S. Ct. at 922-23)).

**Equitable Tolling Time**

A habeas petitioner like Petitioner is entitled to equitable tolling on 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. Holland v. Florida, 560 US 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

When a prisoner asks for equitable tolling because of a lawyer's failures, the question is usually whether the attorney effectively abandoned the client, placing the circumstances beyond the client's control such that the lawyer's errors are not attributable to the client. Id.

When answering that question a Court considers, among other things, whether the lawyer withdrew from the representation, renounced his role as counsel, his role as counsel, "utterly shirked his responsibilities, or walk[ed] away from the attorney-client relationship." Cadet v. Florida Dept. of Corr., 42 F.3d 473, 484 (11th Cir. 2014). A lawyer's willful disregard of the client's instructions to file something in court is surely relevant. Id. a lawyer's bad faith, dishonesty, divided loyalty, or mental impairment may also serve as extraordinary circumstances. Thomas, 795 F.3d at 1292.

An "extraordinary circumstance" that stands in the way of Petitioner's completion of a State application for relief may toll the federal habeas clock. See Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2002); see also Hollinger v. Sec. Dept. of Corr., 334 F. App'x 302, 307 (11th Cir. 2009) (noting that a "State Court's 8-month delay in providing [Petitioner] notice of its denial of his rule 3.850 motion eroded nearly two-thirds of [his] one-year limitations period and left [him] only 12 days on his AEDPA clock"). This is so bemuse "[t]he law is clear that [the Petitioner cannot] file a federal motion until his pending state application [is] denied." See Knight, 292 F.3d at 711; see also 28 USC 2254(b)(-(c).

A district Court has discretion to conduct an evidentiary hearing. See Lugo v. Sect. Florida Dept. of Corr., 750 F.3d 1198, 1206 (11th Cir. 2014). The burden is on the Petitioner to show the need for an evidentiary hearing. Chavez v. Sect. Florida Dept. of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). The allegations must be factual, specific, and not conclusory. Id. In deciding whether to hold an evidentiary hearing on equitable tolling, a federal court must consider whether such a haring could enable an applicant equitable tolling. See id. Courts have held evidentiary hearings if there are circumstances consistent with a Petitioner's petition under which he would be entitled to a finding of equitable tolling. See Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir. 2003). For example, the Eleventh Circuit has remanded a habeas petition for an evidentiary hearing to find out exactly why a lawyer delayed in filing a petition. See Thomas, 795 F.3d at 1296.

The Attorney David Jay Bernstein undertook to represent Petitioner on his Rule 3.850 motion but instead abandoned his obligation of the contract between him and the Petitioner by the filing of the 9.141 petition for writ of habeas corpus and didn't file his 3.850 motion until nearly a day before his federal one year deadline had elapsed. The Petitioner's argument is his Attorney's failure to communicate, by ignoring Petitioner's contact and oral agreements, by ignoring Petitioner's letters of inquiries or concerns about obligations, during Mr. Bernstein's entire representation, which Mr. Bernstein's bad faith and utterly shirked all his professional responsibilities shows attorney abandonment of the client relationship and Petitioner.

Coupled with Petitioner's liberally construed pleading, one can reasonably infer that Attorney David Jay Bernstein abandoned the representation for a period of time, and "utterly shirked" his professional responsibilities to file a Rule 3.850 motion within the one-year federal deadline as understood and contemplated in the agreement between the Attorney, petitioner and Petitioner's family.

Petitioner points out that his attorney David Jay Bernstein was only obligated to file Petitioner's 3.850. However, on November 12, 2014, he instead of filed the 9.141 petition for writ of habeas corpus on November 12, 2014, and effectively abandoned and violated the contract and oral agreement between him and the Petitioner. The Petitioner states that his federal time would have tolled; leaving him with 64 days to preserve his federal time if the Attorney David Jay Bernstein would have filed the 3.850 on 11-12-14, instead of the 9.141 petition for writ of Habeas Corpus. Furthermore, Petitioner asserts he would have been aware and prepared to timely file his federal habeas corpus if his attorney would have stuck to his obligations.

Petitioner states it is important to develop fully the critical findings of fact - the when, the "what, the how, and most importantly, the why" of the scope of Mr. Bernstein's representation from its inception and the reasons he did not file the Rule 3.850 motion as obligated until February 11, 2015. Petitioner humbly requests the Magistrate judge to recommend an evidentiary hearing.

A district Court has discretion to conduct an evidentiary hearing. See Lugo v. Sect. Fla. Dpt. Of Corr., 750 F.3d 1198, 1206 (11th Cir. 2014). The burden is on the Petitioner to show the need for an evidentiary hearing. Chavez v. Sect. Fla. Dept. of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). The allegations must be factual, specific, and not conclusory. Id. in deciding whether to hold an evidentiary hearing on equitable tolling, a federal Court must consider whether such a hearing could enable an applicant equitable tolling. See Id. Courts have held evidentiary hearings of there are circumstances consistent with a Petitioner's petition under which he would be entitled to a finding of equitable tolling. See Laws v. Lamarque, 351 F.3d 919, 924 (9th Cir. 2003). For example, the Eleventh Circuit has remanded a habeas petition for an evidentiary hearing to find out exactly why a lawyer delayed in filing a petition. See Thomas, 795 F.3d at 1296.

The Attorney David Jay Bernstein undertook to represent Petitioner on his Rule 3.850 motion but instead filed a 9.141 petition for writ of habeas corpus and didn't file his 3.850 motion until nearly a day before his federal one year deadline had elapsed. The Petitioner's argument is his Attorney's failure to communicate, bad faith and utterly shirked his professional responsibilities also Mr. Bernstein's failure to inform Petitioner about the status of the 9.141 (petition for writ of habeas corpus) which was filed November 12, 2014, and the other developing decisions in his case show abandonment to include Petitioner made many pleas by letters to Mr. Bernstein for the status of 9.141 petition., which Mr. Bernstein failed to communicate and ignored all Petitioner's letters during entire representation. Petitioner asserts that his attorney detached his self from any trust relationship with Petitioner and abandoned him.

Coupled with Petitioner's liberally construed pleading, one can reasonably infer that Attorney David Jay Bernstein abandoned without notice the representation of the 9.141 for a period of time, and "utterly shirked" his professional responsibilities to file a Rule 3.850 motion within the one year federal deadline as understood and contemplated in the agreement between the Attorney, Petitioner, and Petitioner's family.

Further, the State's and Attorney Mr. Bernstein's failure and delay in timely providing Petitioner notice of the denial 9.141 of the petition for writ of habeas corpus until nearly 3 years after it had been denied on December 10, 2014 show extraordinary circumstances warrant equitable tolling time.

Petitioner states it is important t develop fully the critical findings of fact – the when, the "what, the how, the reason Mr. Bernstein file the 9.141 which wasn't in the contract, and most importantly, the why" of the scope of representation from its inception, and the reasons did not file the Rule 3.850 motion until February 11, 2015. Petitioner asserts that he proffered enough facts and evidence that shows

extraordinary circumstances that warrants equitable tolling time. Therefore, Petitioner believes that a evidentiary hearing is necessary because there are basis that exist to believe that further inquiry would help Petitioner prove entitlement to equitable tolling. Petitioner humbly requests the Magistrate judge recommend an evidentiary hearing.

AO 241
(Rev. 10/07)

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: To vacate And set Aside Petitioner's Conviction And Sentence /or order An Evidentiary Hearing To Allow Petitioner An opportunity To develop the Facts of the claim.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 7-31-17 (month, date, year).

Executed (signed) on 7-31-17 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.