22-6234

No. 22-_____

# SUPREME COURT OF THE UNITED STATES

REX **GAINEY**,

Petitioner,

vs.

STATE OF **FLORIDA**,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Eleventh Circuit
Case No.: 22-10650-A

## PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

## QUESTION

**Should district courts adopt an approach that allows for the holistic consideration of all the circumstances accompanying a petitioner's late filing when deciding whether to dismiss that petition (28 U.S.C. § 2254, habeas corpus) as barred by AEDPA's statute of limitations, especially when caused by the conditions of the COVID-19 pandemic and/or should the courts continue to apply the totality-of-the-circumstances approach even after the effects of the COVID-19 pandemic are mitigated especially for an illiterate prisoner lacking access to the prison law library?**

## LIST OF PARTIES

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

## RELATED CASES

State Direct Appeal: G*ainey v. State of Florida*, 244 So.3d 208 (Fla. 1st DCA 2018).

State Collateral Proceeding: *Gainey v. State of Florida*, 309 So.3d 211 (Fla. 1st DCA 2021).

Federal Collateral Proceeding: *Gainey v. Secretary, Florida Department of Corrections,* Case a No.: 3:10-cv-00736-LC-MJF (N.D. Fla. February 14, 2022)

Federal Collateral Proceeding Appeal: *Gainey v. Secretary, Florida Department of Corrections,* Case # 22-10650-A (11th Cir. May 20, 2022)

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IN THE
SUPREME COURT OF THE UNITED STATES

**Petition for Writ of Certiorari**

Petitioner, Rex Gainey, an inmate currently incarcerated at Graceville Correctional Facility in Graceville, Florida acting *pro se* respectfully petitions this Court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals, Atlanta, Georgia, being Petitioner's court of last resort which conflict with the decisions of other Circuit Courts of Appeals and the United States Supreme Court.

**Opinions Below**

The Magistrate's Report and Recommendation appears at Appendix: A, filed on January 27, 2022.

The order of the United States District Court appears at Appendix: B to the petition and is unpublished. The order was issued on February 14, 2022.

The order denying motion for leave to proceed in *forma pauperis* on appeal, of the United States District Court appears at Appendix: C to the petition and is unpublished. The order was issued on March 14, 2022.

The opinion of the United States Court of Appeals appears at Appendix: D to the petition and is unpublished at this time. The opinion was issued on May 20, 2022.

The order Denying Motion for Reconsideration of the United States Court of Appeals appears at Appendix: E to the petition and is unpublished at this time. The order was issued on July 27, 2022.

## Jurisdiction

The date on which the United States Court of Appeals decided Petitioner's case was May 20, 2022. (Appendix: D).

The date on which the United States Court of Appeals denied petitioner's motion for reconsideration was July 27, 2022. (Appendix: E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions Involved

This Court has repeatedly affirmed that one of the fundamental rights within the Due Process Clause of the Fourteenth Amendment in the right of access to the courts. Essential to the concept of due process of law is the right of an individual to have an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.

This Court stated in *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), holding "the right of access to the courts, upon which [*Johnson v. Avery*, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Furthermore, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." (Emphasis added).

Under AEDPA's one-year limitations period, district courts may be obligated to deny review of habeas petitions because incarcerated people were not able to file them quickly enough, even if petitioners' requests for relief are meritorious. However, in 2010, this Court recognized in *Holland v. Florida*, 560 U.S. 631, 635 (2010) that equitable tolling may apply in the habeas context, allowing courts to excuse petitioners' delay. This Court cautioned against an overbroad interpretation of AEDPA that would "close courthouse doors that a strong equitable claim would ordinarily keep open," and held that AEDPA's statute of limitations was subject to equitable tolling. The Court explained that a habeas petitioner is entitled to equitable tolling only if he shows "that he has been pursuing his rights diligently" and "that some extraordinary

circumstance stood in his way and prevented timely filing."

Petitioner was denied Due Process Clause under the Fourteenth Amendment, denying him the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights due to the COVID-19 pandemic, meeting the demands of *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Holland v. Florida*, 560 U.S. 631 (2010).

## Statement of the Case and Facts

Procedural Posture

This case involves an illiterate state inmate who missed his filing date (by fourteen (14) days) of his petition for writ of habeas corpus (28 U.S.C. § 2254), due to restrictions placed on the prison law library caused by the COVID-19 pandemic.

Petitioner has demonstrated both the restrictions on access to the prison law library (access to the courts) and his need for assistance from an inmate law clerk when combined, equals a situation beyond his control which resulted in his untimely filing of his 2254 petition.

Argument Posture

Petitioner distinctly identified the deficiencies of access to the prison law library during the Corona-Virus (COVID-19) pandemic causing his late filing. Petitioner provided the district court with proof of the following hardships he faced during his filing attempt:

A. *Prison Law Library Schedule of Availability – From March 2020 to November 2021*

**March 2020 to July 1, 2020**
Only inmates having verified deadlines were allowed to attend, and the days of operations were six days per week, being closed on Saturdays. There are five dormitories, housing inmates and each dormitory was limited to one hour per day. The dormitories are kept segregated while attending the Law Library.
**July 1, 2020 to July 10, 2020**
Law Library completely closed.
**July 13, 2020 to July 16, 2020**
Law Library operations resumed with inmates who had verified deadlines only.
**July 17, 2020 to August 5, 2020**
No inmates were allowed entry into Law Library except for one inmate certified law clerk. All assistance was accomplished was correspondence by inmate written requests, answered by the inmate certified law clerk.
**August 6, 2020 to August 19, 2020**
The Law Library was totally closed because the Library Supervisor had contracted the virus.
**August 20, 2020 to October 23, 2020**
Law Library resumed operation; providing only assistance by written request, and

answered by inmate certified law clerks.

**October 26, 2020 to March 3, 2021**

Law Library resumed operation with allowing inmates who had verified deadlines only, with one hour per session while remaining segregated.

**March 3, 2021 to August 2, 2021**

Law Library resumed normal operation (still segregated by dorm), however, only five days per week, one hour per session (Monday – Friday).

**August 3, 2021 to November 3, 2021**

Law Library ceased segregation by dormitories and allowed more than one hour per day.

**November 4 to Present**

Law Library revised its hours of operations to 7:30 to 9:30 a.m. and 10:30 a.m. to 2:30 p.m. Monday through Friday and Sunday 10:00 a.m. to 2:00 p.m.

B. *Petitioner Did Not Have Priority Access (Deadline) Until March 30, 2021*

Petitioner did not have priority access (deadline) to the law library until March 30, 2021. Florida Administrative Code, Chapter 33-501-301(3)(f)1. defines court imposed deadlines have priority access to the law library as: "Priority access shall be granted if the maximum time is 20 or fewer days." Petitioner's 20 day deadline begun on March 30, 2021 and ended on April 19, 2021. However, since an inmate law clerk was required to assist Petitioner with his 2254 form (due to his illiteracy) and the law library schedule only permitted routine call-outs to have a one hour sessions five days per week. Thus, this restriction allowed Petitioner two visits per week because the assigned inmate law clerk had to assist many other ADA (Americans Disability Act)/illiterate inmates who also had deadlines. At such time the prisoner population of Graceville Correctional Facility was at approximately 1,900 inmates, while approximately half of them being either illiterate or ADA qualifying for assistance. During this time period there were only three (3) certified inmate law clerks assigned at Graceville Correctional Facility.

C. *Petitioner Qualified for Legal Assistance (Illiterate) From a Certified Inmate Law Clerk*

The Florida Department of Corrections administers upon entry to prison all inmates are administered the "Test of Adult Basic Education." Petitioner's results of academic competence

scored out at an average of a 5.4 grade level. Petitioner provided the testing results to the district court as an exhibit. Florida Administrative Code, Chapter 33-501.301(2)(c) determines that an inmate is illiterate if he or she scores below a ninth grade level. Since Petitioner is considered illiterate by FDOC standards, the Law Library was required to provide research assistance from an certified inmate law clerk. Florida Administrative Code, Chapter 33-501.301(7)(c). However, Petitioner explained that this assistance does come with many stipulations, especially during the pandemic. Such as inmate law clerks are restricted from taking any ADA/illiterate inmates legal documents out of the law library and back to his dormitory, allowing the clerk to work on them. Florida Administrative Code, Chapter 33-501.301(7)(p).

Petitioner also met the criteria established by the Eleventh Circuit Court of Appeals when they held that "[t]he key is whether the *pro se* party needs help presenting the essential merits of his position to the court." *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993). The State submitted that Petitioner's 2254 petition arguments "are simply regurgitation of arguments presented in his counseled initial brief on direct appeal and in his counseled amended Rule 3.850 motion." This statement by the State in and of itself demonstrates Petitioner was in need of adequate access to the prison law library to produce an adequate petition.

This Court stated in *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), holding "the right of access to the courts, upon which [*Johnson v. Avery*, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Furthermore, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the

preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." (Emphasis added).

The central question in evaluating whether a prison law library adequately provides meaningful access to the courts is whether the facility will enable the prisoners to fairly present their complaints to a district court. It is not enough simply to say the books are there, when the plaintiffs/petitioners do not have that assistance necessary to use the books properly. All of the circumstances must be evaluated in determining the adequacy of a library, and a district court will error in holding that a prison without any assistance in its use suffices to provide access to the courts for all the prisoners detained. Although either an adequate law library or assistance from person trained in the law may satisfy the fundamental constitutional right to access to the courts, the fundamental concern is still whether the inmates have meaningful access to the courts. (Emphasis added). Library books, even if adequate in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate. (Emphasis added). Encompassed by the right of access are, federal habeas corpus or state or federal civil rights actions and inmates are entitled to either access to legal materials or access to counsel for assistance in filing habeas corpus and civil rights actions. *Cruz v. Hauck*,[1] 627 F.2d 710 (5th Cir. October 8, 1980) and *Hooks v. Wainwright*, 536 F.Supp. 1330 (M.D. Fla. 1982).

Petitioner has fully met his burden of establishing equitable tolling of the limitations period of 28 U.S.C. § 2244(d)(1) as the Eleventh Circuit Court of Appeals explained in *Johnson v. Dep't of Corr.*, 513 F.3d 1328 (11th Cir. 2008) demonstrating "that some extraordinary circumstance stood in his way and prevented timely filing."

1 *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*)(Adopting all decisions of the former Fifth Circuit announced prior to October 1, 1981, as binding precedent in the Eleventh Circuit).

## Reasons for Granting the Writ

When all other opportunities for relief have been exhausted, people convicted of crimes have one year to file a petition for habeas corpus in federal court before their chance to do so expires. But the COVID-19 crisis has fundamentally disrupted both the functioning of the criminal punishment system and people's daily lives inside and outside of prisons. COVID-19 has created delays, disruptions, and circumstances during which some incarcerated people have missed what may be their only opportunity to seek habeas review. Fortunately, those people may yet be heard in federal court – if their limitations period is equitably tolled.

Equitable tolling procedure allows accommodation of the courts to afford habeas petitioners when their petitions are filed after the statutory deadline but the interests of equity and fairness demand review of petitioners' claims on the merits. This petition explores how courts have made equitable tolling available for habeas petitioners during the COVID-19 pandemic. It addresses how courts evaluate whether "extraordinary circumstances" are present such that a petitioner is entitled to equitable tolling. It examines how district courts must adopt an approach that allows for the holistic consideration of all the circumstances accompanying a petitioner's late filing when deciding whether to dismiss that petition as barred by AEDPA's statute of limitations. It then summarizes the two competing approaches employed most frequently among district courts – one flexible, one strict – and argues that district courts, guided by extensive Supreme Court and circuit court precedent, must embrace flexibility. It concludes by explaining how district courts can adopt a flexible approach. Petitioner relies on an article written by Meghan L. Downey, Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the COVID-19 Pandemic and Beyond, Berkeley Journal of Criminal Law, Volume 27:1; 2022.

**Question**:

**Should district courts adopt an approach that allows for the holistic consideration of all the circumstances accompanying a petitioner's late filing when deciding whether to dismiss that petition (28 U.S.C. § 2254, habeas corpus) as barred by AEDPA's statute of limitations, especially when caused by the conditions of the COVID-19 pandemic and/or should the courts continue to apply the totality-of-the-circumstances approach even after the effects of the COVID-19 pandemic are mitigated especially for an illiterate prisoner lacking access to the prison law library?**

District courts can and must reject the restrictive circumstance-by-circumstance approach when evaluating extraordinary circumstances for equitable tolling. Only through adopting the totality approach can district courts adequately embrace the flexibility that *Holland v. Florida*, 560 U.S. 631 (2010) requires and that numerous courts of appeals have emulated and affirmed. Furthermore, through the totality approach, courts can recognize the unique hardships faced by habeas litigants and account for the ways in which the pandemic has fundamentally altered the lived experiences of petitioners and their attorneys.

This Court has, in no uncertain terms, emphasized the need for flexibility when courts' assess whether habeas petitioners are entitled to equitable tolling.[2] As this Court explained in *Holland*, when courts are required to meet new and unprecedented circumstances, flexibility and adaptability must predominate over adherence to strict and archaic legal rules – the rigid application of which is particularly inappropriate when special circumstances demand that courts promote innovation and compassion.[3] This Court's critique of the Eleventh Circuit's "overly rigid per se approach" in *Holland* counsels lower courts to reject the circumstance-by-

2 *Holland*, 560 U.S. at 650-51 ("In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.") (internal citations quotations omitted).

3 *Id.* ("Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."); *see Dillon v. Conway*, 642 F.3d 358, 362 (2nd Cir. 2011)(explaining that in *Holland*, the Supreme Court "reject[ed] the notion that rigid and nonvariable rules must guide courts of equity").

circumstance approach in favor of a more holistic analysis.[4] Furthermore, as COVID-era cases demonstrate, the circumstance-by-circumstance approach necessarily limits the scope of the court's extraordinary circumstance analysis and over-relies on rules and precedent from distinguishable pre-pandemic cases. Such rigidity is contradictory to *Holland's* instruction to evaluate the availability of equitable tolling on a case-by-case basis, taking guidance from previous decisions but recognizing when new circumstances warrant deviation from old rules.[5] The totality approach, therefore, is the only meaningful framework with which to effectuate *Holland's* flexibility mandate.

The totality approach has also proliferated among courts of appeals, emerging as the dominant interpretation of what *Holland* requires of lower courts. Courts of appeals reject rigid adherence to legal rules and favor an approach that takes into account, in the aggregate, all of the circumstances affecting a petitioner's ability to timely file.[6] Courts of appeals have repeatedly emphasized that "the proper application of [Supreme Court] precedent" favors a "flexible" approach, in which courts decide the extraordinary circumstances issue "based on all the circumstances of the case before it"[7] and by "consider[ing] the record as a whole."[8] The Seventh Circuit has explicitly rejected an approach that prohibits the cumulative assessment of the factors

4 *Holland*, 560 U.S. at 653-54 ("[B]ecause the Court of Appeals erroneously relied on an overly rigid per se approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief.").
5 *Id.; Dillon*, 642 F.3d at 362.
6 *See,* Meghan L. Downey, Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the COVID-19 Pandemic and Beyond, Part II, Berkeley Journal of Criminal Law, Volume 27:1; 2022.
7 *Smith v. Davis*, 953 F.3d 582, 593, 600 (9th Cir. 2020); see *Ross v. Varano*, 712 F.3d 784, 803 (3rd Cir. 2013)("The totality of these circumstances makes it clear that Ross satisfied the second prong of the showing required to justify equitable tolling."); *Jones v. United States*, 689 F.3d 621, 627 (6th Cir. 2012)("Although any one of the above factors may not constitute 'extraordinary circumstances' alone, the combination of all these factors justifies applying equitable tolling.").
8 *Ross*, 712 F.3d at 803; *see Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014)(explaining that *Holland* dictates that "courts are expected to employ 'flexible standards on a case-by-case basis'")(internal citations omitted).

that a petitioner contends with when seeking to file a timely habeas petition.[9] Moreover, the Third Circuit has interpreted *Holland* as holding that "courts should favor flexibility over adherence to mechanical rules" when deciding whether to grant equitable tolling.[10] Other courts of appeals have similarly repudiated strict adherence to "rigid and nonvariable rules," which the circumstance-by-circumstance approach fosters,[11] repeatedly holding instead that "a court is not bound by 'mechanical rules.'"[12] District courts must adopt the totality approach, not only in accordance with *Holland*, but also in accordance with courts of appeals' affirmation and explanation of the flexible, holistic assessment *Holland* requires.

One possible objection to adopting a more flexible – and perhaps more generous – approach to the extraordinary circumstances inquiry is that "[f]ederal courts have typically extended equitable relief only sparingly,"[13] and accordingly, an approach that renders courts more likely to award equitable tolling is inconsistent with this rule of equity. The totality-of-the-circumstances approach, however, does not necessarily entitle every late habeas petitioner to equitable tolling.[14] Even when courts adopt the totality approach to the extraordinary

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9 *Socha,* 763 F.3d at 685 (The state tries to pick off each of the circumstances *Socha* identifies explaining why in isolation it is not enough to justify equitable tolling. Incarceration alone, for example, does not qualify as an extraordinary circumstance.... It does not matter that one could look at each of the circumstances encountered by *Socha* in isolation and decide that none by itself required equitable tolling. The mistake made by the district court and the state was to conceive of the equitable tolling inquiry as the search for a single trump card, rather than an evaluation of the entire hand that the petitioner was dealt.").

10 *Ross*, 712 F.3d at 799, *see Dillon*, 642 F.3d at 362.

11 *Dillon*, 642 F.3d at 362-63.

12 *Smith*, 953 F.3d at 600, *Palacios v. Stephens*, 723 F.3d 600, 608 (5th Cir. 2013)(noting the court's "disinclination to create bright-line rules constraining [its] equitable tolling analysis"). *Cf. Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012)("[A]lthough equitable relief is flexible and all the facts and circumstances must be considered, we should 'draw upon decisions made in other similar cases for guidance.' We take that statement to mean that this is not an area free of rules of law, governed entirely by the chancellor's foot, but we are instead bound by precedent to the extent that there is precedent.")(*quoting Holland v. Florida*, 560 U.S. 631, 650 (2010)).

13 *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96 (1990).

14 *Taylor v. United States*, No. 4:20CV1489, 2021 WL 1164813, at *3 (E.D. Mo. Mar. 26, 2021)("The COVID-19 pandemic does not automatically warrant equitable tolling for any movant who seeks it on that basis."); *see Holland*, 560 U.S. at 649. The totality approach itself does not necessitate a finding that extraordinary circumstances exist, *see infra* note 19, and petitioners still must satisfy this standard as well as the diligence requirement before a court can permit equitable tolling.

circumstances inquiry, petitioners must still demonstrate sufficient diligence before convincing a court that they are entitled to equitable tolling abound.[15] Examples of courts invoking this basis to deny equitable tolling abound.[16] Thus, equitable tolling can still be granted "sparingly" even when courts employ a holistic, totality approach to one prong of the *Holland* inquiry.[17]

Furthermore, the nexus requirement also ensures that equitable tolling will be awarded sparingly, even when courts adopt the totality approach to the extraordinary circumstances inquiry. The nexus requirement operates to preclude courts from equitably tolling statutes of limitations where extraordinary circumstances are not sufficiently related to a petitioner's delay.[18] Courts can enforce the nexus requirement while embracing flexibility, and in fact, courts have made clear that considering "the entire hand" a petitioner is dealt does not mean that a court will necessarily make equitable tolling available.[19] Not only is the totality approach consistent with

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15 *Holland*, 560 U.S. at 648-50.

16 *See, e.g., Ford v. Gonzales,* 683 F.3d 1230, 1239 (9th Cir. 2012)(declining to award equitable tolling where petitioner did not demonstrate that "extraordinary circumstances beyond a prisoner's control make it *impossible* to file a petition on time")(emphasis in original); *Hutchinson*, 677 F.3d at 1103 ("We need not decide whether *Hutchinson* has established that extraordinary circumstances stood in the way of his meeting the § 2244(d) filing deadline, because he has not carried his burden of showing that he pursued his rights diligently."); P*atterson v. Lafler*, 455 F.App'x 606, 611 (6th Cir. 2012)(concluding that petitioner did not prove that he acted with reasonable diligence and not reaching the question of whether extraordinary circumstances precluded timely filing); *Manning v. Epps*, 688 F.3d 177 (5th Cir. 2012)(reversing grant of equitable tolling by district court where petitioner did not exercise due diligence).

17 *See Ross v. Varano*, 712 F.3d 784, 799 (3rd Cir. 2013)("We have held that equitable tolling is appropriate where principles of equity would make the rigid application of a limitation period unfair, but that a court should be sparing in its use of the doctrine.").

18 As the Second Circuit has explained, "[a]lthough we are mindful that equitable procedure demands flexibility ... that flexibility cannot stretch beyond the requirement that an extraordinary circumstance prevent timely filing." *Jenkins v. Greene*, 630 F.3d 298, 305 (2nd Cir. 2010) and *Mayberry v. Johnson*, 903 F.3d 525, 531 (7th Cir. 2014).

19 See *Mighty v. United States*, No. 15-CR-06109, 2021 WL 3036926, at *2 (W.D.N.Y. July 19, 2021)(denying equitable tolling on diligence grounds while noting that "the Court may be inclined to find that the circumstances of Petitioner's injury and the lockdown (and other restrictions) necessitated by the COVID-19 outbreak at FCI Elkton are 'extraordinary' and sufficient to equitably toll the limitation period"); *Brown v. Adams,* No. 3:20-CV-788, 2021 WL 3598544, at *4 (W.D. Ken. Aug. 13, 2021)(ultimately finding that petitioner had not exercised sufficient diligence but noting "the Court understands that the lockdowns which were implemented as the pandemic took hold during 2020 made it difficult, if not impossible, for prisoners to utilize library facilities to prepare court filings"); *Johnson v.* Greene, No. 21 C 3622, 2021 WL 4942037, at *2 (N.D. Ill. Oct. 22, 2021)(noting that, even if the pandemic allowed petitioner to demonstrate extraordinary circumstances, he "must also show that he had been pursing his rights diligently"); *see also Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016)(employing a totality approach but denying equitable tolling where a petitioner "failed to meet his burden of demonstrating that his

*Holland's* emphasis on flexibility, but it is also consistent with the nexus requirement as appellate courts have explained it. When considering the totality of the circumstances, courts are still able to assess whether the conditions surrounding an untimely petition "actually impaired [a petitioner's] ability to pursue his claims."[20] Thus, the benefit of the totality approach is not that it removes the nexus requirement altogether,[21] but rather, that it provides courts with an opportunity to avoid an overly particular application of the nexus requirement.

The COVID-19 pandemic illuminates the inappropriateness of a strictly enforced nexus requirement. Even if petitioners cannot identify a specific instance where pandemic interfered with their ability to file a timely motion, the idea that the pandemic has not created impediments that stand in the way of timely filing is absurd and disingenuous.[22] Clearly the pandemic has disrupted life inside and outside of prisons – creating both mild inconveniences and devastating losses that have severely impacted communities and individuals. Through the totality approach, courts can account for the pervasiveness of pandemic-related disruptions while still ensuring that those circumstances actually "stand in the way" of timely filing.[23] Employing the totality approach therefore allows courts to alleviate the exacting particularity with which petitioners must demonstrate how extraordinary circumstances caused their delay. Instead, the totality

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physical and mental health issues, even when combined with the other circumstances he classifies as extraordinary" *actually impaired* his ability to timely file).

20 *See Holland*, 560 U.S. at 653 (emphasis added)(internal quotations marks omitted).

21 *See, e.g., Carpenter,* 840 F.3d at 872 (applying the totality-of-the-circumstances approach but still concluding that an insufficient nexus existed between the extraordinary circumstances presented and the petitioner's delay).

22 *Holland*, 560 U.S. at 649; *Dunn v. Baca*, No. 3:19-cv-00702, 2020 WL 2525772, at *1 (D. Nev. May 18, 2020).

23 *Holland*, 560 U.S. at 652. Despite adopting a flexible approach, district courts employing the totality approach may still hold that a petitioner has not satisfied their burden to demonstrate that extraordinary circumstances are present. *See, e.g., Barnes v. Alabama*, No. 4:20-cv-01514, 2021 WL 3439411, at *3 (N.D. Ala. June 25, 2021) (declining to extend equitable tolling while considering holistically petitioner's circumstances, including that his family had been unable to timely contact the clerk of court and courthouse closures due to COVID-19); *United States v. Clay*, No. 2:20-236, 2021 WL 2018996, at *2-3 (S.D. Tex. May 18, 2021)(denying equitable tolling where petitioner did not test positive for COVID-19, did not file a habeas petition within the first six months of her limitations period, and filed other motions during her limitations period).

approach encourages courts to consider the uniquely challenging circumstances that incarcerated people have been subjected to, without rigidly adhering to distinguishable, pre-pandemic rules. This flexible assessment is necessary given the equitable considerations that *Holland* emphasizes.[24]

The totality approach also permits courts to recognize how the conditions created by the pandemic culminate into a set of circumstances that meet and surpass the extraordinary circumstances standard. This approach is better suited than the circumstance-by-circumstance approach for courts seeking to "relieve hardships" that "arise from a hard and fast adherence" to legal rules.[25] Consider the rule, as applied in some district courts, that *prison lockdowns are not extraordinary*, for example. Under the circumstance-by-circumstance approach, petitioners cannot successfully argue that facility lockdowns in any form justify equitable tolling.[26] But a flexible approach allows courts to "meet new situations" - including the unprecedented global pandemic and the prolonged lockdowns that incarcerated people have experienced since the pandemic began - "that demand equitable intervention."[27] Under a totality approach, courts *can* hold that lockdowns contribute to the circumstances justifying equitable tolling, whereas a circumstance-by-circumstance approach would preclude the court from considering lockdowns altogether.[28] Courts adopting the totality approach can differentiate between the facts of the pre-

24 *Holland*, 560 U.S. at 648-50.

25 *Id.* at 650.

26 *See Chapman-Sexton v. United States,* No. 2:20-CV-3661, 2021 WL 292027, *3 (S.D. Ohio Jan. 28, 2021) *supra* Meghan L. Downey, Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the COVID-19 Pandemic and Beyond, Section III.B, Berkeley Journal of Criminal Law, Volume 27:1; 2022 (explaining how district courts employing the circumstance-by-circumstance approach have dismissed arguments that prison lockdowns contribute to the extraordinary circumstances justifying equitable tolling).

27 *Holland*, 560 U.S. at 650.

28 *Compare Rivera v. Harry*, No. 20-3990, 2022 WL 93612, at *5 (E.D. Pa. Jan. 10, 2022)(considering petitioner's quarantine and inability to access the law library), *with Strickland v. Crow*, No. Civ-21-0064-HE, 2021 WL 3032668, at *2 (W.D. Okla. July 19, 2021)("[A] prison lockdown does not qualify as an extraordinary circumstance justifying equitable tolling absent a showing that some additional circumstance prevented the timely filing of the petition."), *and Strickland v. Crow*, No. Civ-21-64-HE, 2021 WL 3566406, at *4 (W.D. Okla. June 8, 2021)

pandemic cases giving rise to strict legal rules and pandemic-era circumstances that warrant an equitable departure from those rules, as *Holland* dictates.

As the conditions relating to COVID-19 wane, it remains necessary for courts to adopt a totality-of-the-circumstances style approach to account for the myriad circumstances that presently or potentially will affect petitioners' ability to timely file. Although the COVID-19 pandemic has been an unprecedented global crisis, courts should not assume that it will be the *only* disaster of its kind. Environmental cries, for example, similarly threaten to impact incarcerated populations in disproportionate ways, creating not only adverse health effects but also barriers to incarcerated people's ability to pursue postconviction relief.[29]

Prison and jails across the United States are "sites of environmental devastation and climate violence."[30] Many incarcerated people – who are disproportionately poor people and people of color – are and will be exposed to hazardous materials, as nearly 600 prison facilities in the United States are located within three miles of federally recognized contaminated sites.[31] Environmental degradation has extensive and disruptive effects on prison populations. People who are "detained in toxic jails and prisons risk diseases, cancers, and death as a consequence

("Temporary deprivation of access to the law does not automatically warrant equitable tolling.").

29 *See Candice Bernd et al., America's Toxic Prisons: The Environment Injustices of Mass Incarceration,* Earth Island J. & Truthout (June 1, 2017), http://www.earthisland.org/journal/americas-toxic-prisons/ (contextualizing U.S. incarceration as an environmental problem and explaining that many prisons "are built on some of the least desirable and most contaminated lands in the country, such as old mining sites, Superfund cleanup sites, and landfills"); Dustin S. McDaniel, et al., *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette,* Abolitionist L. Ctr. & Hum, Rts, Coal. (Sept 1, 2014), http://abolitionislawcenter.org/no-escape-bw-1-4mb/ (reporting that 81% of people incarcerated at SCI Fayette in Pennsylvania – which is "situated in the midst of a massive toxic waste dump – experienced adverse health symptoms such as throat, sinus, and respiratory conditions); *see generally* Derecka Purnell, Becoming Abolitionists 237-47 (2022)("Fighting for abolitionist futures means that we have to undermine climate change and environmental degradation, and resist policing and militarism as solutions to these problems .... Organizing for abolition alongside climate justice is imperative because policing and carceral responses will continue to manage internally displaced people, especially Black people, indigenous people, and people of color who are constantly displaced from colonialism, capitalism, and climate change.").

30 Purnell, *supra* note 29, at 247; *see generally id.* at 247-51.

31 Bernd, et al., *supra* note 29.

and often guaranteed outcome of their confinement."[32] Incarcerated people at such contaminated sites often become sick or are transferred to other facilities, further away from their families, to decrease the likelihood of illness.[33] Similar to COVID-19, the ubiquity of this exposure does not mean that these circumstances are any less extraordinary. Courts must be equipped to recognize the impact of these circumstances on incarcerated people, and adopting the totality-of-the-circumstances approach is the only way to consider these circumstances meaningfully when assessing equitable tolling.

Petitioner expressed in his Rely to the State's Motion to Dismiss his 2254 petition this Court's action which extended the filing time for a petition for writ of certiorari from 90 days to 150 days due to the pandemic. Petitioner expressed:

> "Even the United States Supreme Court has shown grace by increasing the 90-day deadline to file a petition for a writ of certiorari to 150-days. This was first ordered by the Court on Thursday, March 19, 2020, by (Order List: 589 U.S.) and then again it revised it on Monday, July 19, 2021, by (Order List: 594 U.S.) to read: '[...] [T]he deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order. [...]'."

Petitioner even included a copy of the Order as an exhibit with his reply. This Court allowed an additional 60 days, due to the pandemic in which to file their petition for writ of certiorari, which stayed in affect until September 1, 2021. Petitioner only missed his filing of his 2254 by 14-days.

Climate catastrophes also have the potential to disrupt people's ability to advocate for themselves while imprisoned.[34] In 2005, when Hurricane Katrina struck the southeastern United States, nearly eight thousand people detained at the Orleans Parish Prison were not evacuated

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32 Purnell, *supra* note 29, at 247.

33 *See* Bernd et al., *supra* 29 (reporting that 2,600 predominantly African American and Filipino people were transferred from two California state prisons where they were at high risk of contracting valley fever).

34 *See What About the Folks Inside?*, Fight Toxic Prisons (Dec. 12, 2021), https://fighttoxicprisons.wordpress.com/2021/12/12what-about-the-folks-inside/ ("Disasters are ALWAYS the greatest danger to prisoners."); Purnell, *supra* note 29, at 247.

before the storm.[35] When they were eventually allowed out of the flooding prison facility, they were transferred to over thirty different detention facilities across Louisiana.[36] Meanwhile, courts throughout the state faced "major logistical problems," as courthouses were closed, flooded, or inaccessible.[37] More recently, incarcerated populations were "some of the last people to be considered" when devastating tornadoes struck Mayfield, Kentucky,[38] and when Hurricane Ida stuck southern Louisiana.[39] Localized disasters such as hurricanes and tornadoes may leave incarcerated people in flooded facilities without heat, air conditioning, power, or even food.[40] Whether these disasters are geographically limited or global in scale, the federal judiciary must be prepared to address how similar cries will affect incarcerated communities. Courts must adopt an approach to equitable tolling that permits them to take these kinds of circumstances and burdens into account, long after the effects of the COVID-19 pandemic have dissipated.

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35 *See generally* Brandon L. Garrett & Tania Tetlow, Criminal *Justice Collapse: The Constitution After Hurricane Katrina,* 56 Duke L.J. 127, at 136 (2006)(explaining how the conditions in the wake of Hurricane Katrina constituted extraordinary circumstances).

36 *Id. at* 135-39.

37 *Id.* at 145-48.

38 *See What About the Folks Inside?, supra* note 34.

39 *Hurricane Ida – Support for Incarcerated People Impacted By the Storm*, Fight Toxic Prisons (Aug. 27, 2021), https://fighttoxicprisons.wordpress.com/2020/08/27/tropical-storm-ida/ ("It is unclear what happened to people in prisons and jails that were hit by Hurricane Ida. We now do know is that countless people were left behind in carceral facilities that did not evacuate.").

40 *Hurricane Laura Aftermath: Demand Safety for ICE Detainees, Fight Toxic Prisons* (Aug. 31, 2020), https://fighttoxicpriosns.wordpress.com/2020/08/31/hurricane-laura-aftermath-demand-saftety-for-ice-detainees/ ("In the aftermath of the Category 4 Hurricane Laura, we know that incarcerated people in parts of Louisiana and Southeast Texas have been experiencing power outages, water shortages, and other impacts of the hurricane combined with institutional abuse and neglect.").

## DECLARATION

I hereby declare under penalty of perjury that I understand English language or have had it read to me in a language that I understand and therefore, state that the facts set forth are true and correct.

Respectfully submitted,
/s/ _____
Rex Gainey, DC# P59469

## Conclusion

This Court has explained that "courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules."[41] Among the hardships arising from noncompliance with AEDPA's strict statute of limitations are continued incarceration and the preclusion of further judicial review of petitioners' convictions and sentences. Accordingly, district courts must embrace flexibility by adopting a holistic approach to evaluate the potentially extraordinary circumstances that may warrant equitable tolling – and they must reject a narrow approach that ignores the cumulative impact of various challenges to a petitioner's ability to timely file.

District court adopting a totality-of-the-circumstances approach to the extraordinary circumstances inquiry can conduct equitable tolling analysis consistent with the approach adopted by this Court and numerous courts of appeals. Using this approach, courts can also afford due weight to the experiences of incarcerated litigants, for example, by recognizing the toll that the pandemic has taken on incarcerated people. Courts must adopt an analytical framework that provides habeas petitioners the flexibility that is clearly warranted during extraordinary times.

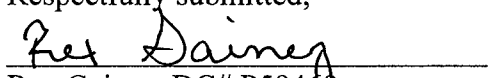
By the time incarcerated people seek to file federal habeas petitions, they have already been subjected to the violent, overwhelming power of the carceral state. Adopting a flexible approach to equitable tolling cannot and will not remedy the harms inflicted on people who are policed, surveilled, incarcerated, and disempowered in the criminal punishment system. Addressing these harms will ultimately take much more than adopting a holistic, flexible approach to an obscure legal doctrine. But while advocates and organizers work to address the

41 *Holland v. Florida*, 560 U.S. 631, 650 (2010)(internal quotations omitted).

root causes of violence and incarceration, building a world where incarceration is obsolete,[42] incarcerated litigants will continue working toward their release. The approach to equitable tolling proposed in this petition is just one way that this court can ensure that incarcerated litigants are heard, after circumstances they cannot control preclude them from meeting an arbitrary and harsh statutory deadline.

This petition for a writ of certiorari should be granted.

Respectfully submitted,



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42 See generally, Angela Y. Davis, Are Prisons Obsolete? (2003).