CAPITAL CASE

No. 22-6268

In the

Supreme Court of the United States

DAVID MILLER, JR., *Petitioner*,

v.

RICKY D. DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

CHARMAINE M. MILLSAPS
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
capapp@myfloridalegal.com

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Eleventh Circuit denying a certificate of appealability regarding a claim of equitable tolling of the federal habeas statute of limitations in which the district court properly limited scope of the evidentiary hearing on the equitable tolling claim.

II. Whether this Court should grant review of a decision of the Eleventh Circuit denying a certificate of appealability regarding the district court limiting the evidentiary hearing on equitable tolling to only one prong and to the testimony of only the crucial witnesses.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES OF COURT

OPINION BELOW

The Eleventh Circuit's decision denying a certificate of appealability is unreported but available at *Miller v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 1692946 (11th Cir. May 10, 2022) (No. 22-10657).

JURISDICTION

On February 25, 2022, Miller, represented by the Capital Habeas Unit of the Federal Public Defender Office of the Middle District of Florida (CHU-M), filed a notice of appeal of the federal district court's dismissal of the habeas petition as untimely in the Eleventh Circuit. *Miller v. Sec'y, Fla. Dep't of Corr.*, No. 22-10657. On May 10, 2022, the Eleventh Circuit denied a COA. *Miller v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 1692946 (11th Cir. May 10, 2022). On May 31, 2022, CHU-M filed a motion for reconsideration of the single judge's order in the Eleventh Circuit. The Secretary responded to the motion for reconsideration. CHU-M filed a reply. On August 9, 2022, the Eleventh Circuit denied the motion for reconsideration. On December 7, 2022, Miller filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). This Court has jurisdiction. 28 U.S.C. § 1254(1); *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

There are also two federal statutes involved — the federal habeas statute of limitations and the federal habeas appeal statute. The federal habeas statute of limitations, 28 U.S.C. § 2244(d)(1), provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run 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.
>
> (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.

The appeals in habeas corpus proceedings statute, 28 U.S.C. § 2253(c), provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional

right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks review of a decision of the Eleventh Circuit denying a certificate of appealability (COA), regarding a district court dismissing his habeas petition as untimely after concluding that equitable tolling did not apply. The district court conducted a limited evidentiary hearing on the issue of equitable tolling and concluded that equitable tolling was not warranted based on its explicit credibility findings.

Facts of the case

On March 5, 1997, Miller attacked two homeless people who were sleeping in the doorway of a Jacksonville church with a six-foot pipe, as part of an attempted robbery. *Miller v. State*, 770 So.2d 1144, 1146-47 (Fla. 2000). One of them, Albert Floyd, died from the three blows to his head. *Id.* at 1147. Miller confessed to a Louisiana police officer.

Procedural history of state court litigation

A jury convicted Miller of first-degree murder and aggravated battery and then recommended a death sentence by a vote of seven to five. *Miller v. State*, 926 So.2d 1243, 1247 (Fla. 2006). A defense mental health expert, Dr. Harry Krop, testified at the penalty phase in 1998, that Miller was not insane at the time of the murder and was competent to stand trial. *Miller v. State*, 926 So.2d 1243, 1251 (Fla. 2006); *Miller v. State*, 770 So. 2d 1144, 1147 (Fla. 2000) (noting Dr. Harry Krop, a clinical psychologist, testified for the defense at the penalty phase). Dr. Krop testified that

Miller had a "mixed" personality disorder but no major mental illness, such as psychosis or schizophrenia. *Miller*, 926 So.2d at 1250. The Florida Supreme Court affirmed the convictions and death sentence in the direct appeal. *Miller*, 770 So.2d at 1147-50.

On September 27, 2001, Miller filed a motion for postconviction relief in the state trial court. *Miller*, 926 So.2d at 1248. On March 11, 2002, Miller filed an amended postconviction motion raising 16 claims. *Id.* at 1248, n.1 (listing the issues). The state postconviciton court held an evidentiary hearing on claims 2, 3, 4, 8, and 13. The trial court denied the state postconviction motion.

In the initial postconviction appeal to the Florida Supreme Court, Miller, represented by registry counsel Robert A. Norgard, raised seven issues. *Miller*, 926 So.2d at 1248 (listing the issues on appeal). Attorney Norgard also filed a state habeas petition raisng a claim of ineffective assistance of appellate counsel. *Miller*, 926 So.2d at 1261. The Florida Supreme Court affirmed the trial court's denial of postconviction relief and denied the state habeas petition. *Id.*

Procedural history of current habeas litigation

More than a decade after the postconviction appeal was concluded, on January 30, 2019, Miller, represented by CHU-M, filed a 28 U.S.C. § 2254 habeas petition and a memorandum of law in support of the petition in the federal district court. *Miller v. Sec'y, Fla. Dep't of Corr.*, 3:17-cv-00932-BJD-JBT (M.D. Fla.) (Docs. #15,24). On April 9, 2019, the Secretary filed a motion to dismiss the habeas petition as untimely. (Doc. #26). The district court denied the motion to dismiss requiring the Secretary to file a full answer to the petition and to file the entire state court record. (Doc. #28). The Secretary then filed an answer including an argument that the entire petition was untimely. (Doc. #29).

The CHU-M agreed that the petition was untimely but argued that equitable tolling applied based on Miller's mental health issues which "impacted his ability to communicate with counsel." *Miller v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 5395961, at *2 (M.D. Fla. Nov. 18, 2021). CHU-M also asserted "some sort of abandonment or attorney misconduct" on the part of state postconviction counsel as a possible basis for equitable tolling, pointing out Attorney Norgard's failure "to do any work on Petitioner's case after the Florida Supreme Court affirmed the denial of post-conviction relief." *Id.* at *2.

On October 21, 2021, the federal district court held a limited evidentiary hearing on the issue of equitable tolling. Miller's state postconviction counsel, Robert A. Norgard, testified. Attorney Norgard testified that Miller himself made the decision to forgo federal habeas review. Petitioner Miller did not testify.

On November 18, 2021, following the evidentiary hearing, the district court dismissed the petition as untimely, rejecting any equitable tolling of the statute of limitations. *Miller v. Sec'y, Fla. Dep't of Corr.*, 2021 WL 5395961 (M.D. Fla. Nov. 18, 2021); (Doc. #72 at 62, 66). The district court recounted multiple conversations between Petitioner Miller and his state postconviction counsel, Robert Norgard, in which Miller told Norgard that he did not want any further review of his case, including federal habeas review. (Doc. #72 at 22-23). Miller wanted to be a "death volunteer" and just wanted to "get it over with." (Doc. #72 at 25). The district court noted Norgard's testimony on cross-examination that Miller himself made the decision to forgo federal habeas review. (Doc. #72 at 24). The district court noted that CHU-M attempted to impeach Norgard with visitation and calling logs and billing records, but they "failed to rebut" Norgard's testimony "with any direct evidence."(Doc. #72 at 26-27). The district court specifically stated that it "credits the testimony of Mr. Norgard." (Doc. #72 at 27,40). The district court observed that Petitioner Miller did not

testify at the evidentiary hearing to rebut Norgard's testimony that Miller himself decided to forgo habeas review. (Doc. #72 at 27,39). Based on its determination that Petitioner Miller had instructed counsel not to file a petition, the district court concluded that "there was no abandonment by counsel" or bad faith and Norgard "did not negligently miss the deadline." (Doc. #72 at 27-28,30,40-41). The district court found "there was no attorney misconduct" and concluded that equitable tolling did not apply under the facts of the case. (Doc. #72 at 30). The district court dismissed the habeas petition as untimely. The district court also denied a COA.

On March 16, 2022, Petitioner Miller, represented by CHU-M, sought a COA in the Eleventh Circuit before a single circuit judge, which was denied. *Miller v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 1692946 (11th Cir. May 10, 2022) (No. 22-10657). On May 31, 2022, CHU-M filed a motion for reconsideration of the denial of the COA before a panel. The Secretary filed a response to the motion for reconsideration pointing out the standard of review of the equitable tolling claim would be clearly erroneous because the district court rejected equitable tolling based on an explicit credibility finding, which, under Eleventh Circuit precedent, is basically "untouchable on appeal." The Secretary also argued equitable tolling did not apply at all under this Court's opinion in *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250 (2016). CHU-M filed a reply. On August 9, 2022, the panel denied a COA.

On December 7, 2022, Petitioner Miller, represented by CHU-M, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE ELEVENTH CIRCUIT DENYING A CERTIFICATE OF APPEALABILITY REGARDING A CLAIM OF EQUITABLE TOLLING OF THE FEDERAL HABEAS STATUTE OF LIMITATIONS IN WHICH THE DISTRICT COURT PROPERLY LIMITED SCOPE OF THE EVIDENTIARY HEARING ON THE EQUITABLE TOLLING CLAIM.

Petitioner Miller seeks review of the Eleventh Circuit's decision denying a certificate of appealability (COA) on the issue of equitable tolling of the federal habeas statute of limitations. Pet. at 19. Miller complains that the district court limited the testimony at the federal evidentiary hearing on equitable tolling to the attorney who represented Miller during the time the deadline to timely the federal habeas petition was missed and did not permit the other three attorneys who represented Miller many years later to testify. But equitable tolling does not apply to this case under this Court's decision in *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2016). This is a case where the petitioner instructed his attorney not to file a habeas petition. The district court made a factual finding that Petitioner Miller instructed Attorney Norgard not to file any further pleadings challenging his case, following the federal evidentiary hearing at which the attorney testified to that fact, and the district court credited that testimony. The Eleventh Circuit could have denied a COA on that credibility finding alone. Alternatively, the district court properly limited the evidentiary hearing to the second prong of the test for equitable tolling, which is the extraordinary circumstances prong. The district court also properly limited the evidentiary hearing to the testimony of the attorney who represented Miller at the time the federal habeas petition was actually due. Opposing counsel insists that the district court erred in addressing equitable tolling in such a "piecemeal" fashion. Pet. at 23. But under this Court's decision in *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250 (2016), a district court is not required to address both

prongs of the test for equitable tolling, which means a district court may conduct a limited evidentiary hearing. A district court may not only limit the evidentiary hearing to one prong but may also limit the testimony to the testimony of the critical attorney. There is no conflict between this Court's decision in *Menominee Indian Tribe* and the Eleventh Circuit's decision denying a COA. There is also no conflict regarding limited evidentiary hearings on equitable tolling. Nor is there any conflict among the circuit courts. Review of this issue should be denied.

The Eleventh Circuit's decision in this case

The Eleventh Circuit denied a COA. *Miller v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 1692946 (11th Cir. May 10, 2022) (No. 22-10657). The Eleventh Circuit denied a COA concluding jurist of reason would not debate the conclusion that Miller was not entitled to equitable tolling of the habeas statute of limitations. *Id.* at *1. The Eleventh Circuit noted that the district court had dismissed the habeas petition as untimely and concluded that petitioner was not entitled to equitable tolling. *Id.* at *1. The Eleventh Circuit concluded that Miller had "failed to carry his burden to show that jurists of reason could find it debatable whether he is entitled to equitable tolling for the entire period between the expiration of the limitation period on August 3, 2006, and January 30, 2019, when Miller filed his petition." *Id.* The Eleventh Circuit observed that, while Miller offered arguments regarding why he was entitled to equitable tolling around the time the petition was due in 2006, he did not offer any reason why he was entitled to equitable tolling for the period after the withdrawal of his original attorney in 2013 until the petition was actually filed in 2019. The Eleventh Circuit panel observed that Petitioner Miller was represented by multiple attorneys after Norgard withdrew in 2013, including the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida (CHU-N), which was appointed on August 24, 2017. The

Court noted that they could deny a COA on any ground supported by the record. *Id.* (citing *Szuchon v. Lehman*, 273 F.3d 299, 318 n.8 (3d Cir. 2001)). The Court reasoned that, even if they assumed that it was debatable whether Miller was entitled to equitable tolling from 2006 until the withdrawal of his attorney in 2013, he had still not shown that it was debatable for the remainder of the time until 2019, when the petition was actually filed.

Personal autonomy and federal habeas review

An inmate's decision not to seek federal habeas review is a decision over which he has personal control. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) (stating, in a capital case, that some decisions are "reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and *forgo an appeal*" citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)) (emphasis added); *Alexander-Mendoza v. Att'y Gen.*, 55 F.4th 197, 209 (3d Cir. 2022) (observing that "the decision to waive appeal is traditionally reserved for the party – not counsel" citing *McCoy* and *Barnes*). The decision to forgo federal habeas review is personal, just like the decision to forgo other types of appellate review is personal. An attorney may not override a criminal defendant's personal decision not to seek further review, including federal habeas review of a capital case. Thus, habeas counsel may not file a 28 U.S.C. § 2254 petition against his client's wishes.

According to the unrebutted testimony at the limited federal evidentiary hearing on the issue of equitable tolling, Petitioner Miller told his attorney not to file any further appeals of his judgment and sentence after the initial state postconviction proceedings, which would include a federal habeas petition. Petitioner Miller's attorney at the time, Robert Norgard, testified at the federal evidentiary hearing that Miller told him that he wanted to be a volunteer and did not want any further appeals

or review of his capital case. The federal district court credited the unrebutted testimony of Attorney Norgard as the basis for denying equitable tolling.

Credibility findings

The first question presented in the petition ignores the district court's credibility finding that Miller personally chose to forgo federal habeas review. The district court credited Attorney Norgard's testimony that "Petitioner decided to forego his federal remedies" and told that to his attorney first at the state court evidentiary hearing and then again later during a telephone conversation that he did not want further appeals and that his attorney "abided by his client's directive to not file a federal habeas petition." *Miller*, 2021 WL 5395961, at *10.

Such credibility findings are reviewed for clear error. Fed. R. Civ. P. 52(a)(6) (providing that findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility"); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985) (explaining under Rule 52(a), a reviewing court is not entitled to reverse the fact finding of the district court if the district court's view of the evidence was "plausible" in light of the entire record). Where there are two permissible views of the evidence, the factfinder's choice between them "cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. In more colorful terms, for a district court's credibility findings to be clearly erroneous, they must strike the appellate court not merely as wrong but as wrong with "the force of a five-week-old, unrefrigerated dead fish." *United States v. Miller*, 35 F.4th 807, 817 (D.C. Cir. 2022) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). If the district court credits the testimony of a witness, who has told a consistent, coherent, and plausible story, that finding "can virtually never be clear error." *Anderson*, 470 U.S. at 575.

Attorney Norgard's testimony that Miller did not want any further challenges to his conviction or death sentence at the federal evidentiary hearing was consistent, coherent, and plausible. Indeed, opposing counsel does not even attempt to establish the implausibility of the district court's credibility finding that Miller told Attorney Norgard not to file any further challenges to his judgment and sentence, including a § 2254 habeas petition.

Furthermore, the testimony that Miller himself intentionally waived federal habeas review was unrebutted. Miller was present at the federal evidentiary hearing but did not testify. He did not dispute Norgard's testimony that he had instructed his attorney not to file any further challenges to his case, despite having the burden of proof on the issue of equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (stating that a habeas petitioner seeking equitable tolling bears the burden of establishing two elements); *cf. Dunn v. Reeves*, 141 S.Ct. 2405, 2409 (2021) (affirming the district court's denial of a claim of ineffectiveness noting that, although the defendant was raising a claim regarding the conduct of his attorney at trial, and that all of his lawyers were "alive and available," the defendant did not call any of the three attorneys to testify at the state postconviction evidentiary hearing, despite having the burden of proof). It was Miller's burden to undermine his attorney's testimony that he had instructed his attorney not to file any further challenges in his case, including to not file a § 2254 petition. But Miller remained silent.

Opposing counsel asserts that only his mental health experts could have rebutted Norgard's testimony but that is not accurate. Pet. at 30. None of those experts were present at either of the conversations between Petitioner Miller and Attorney Norgard during which Miller told his attorney not to pursue any further review of his case. While the mental health experts certainly could testify as to their retrospective opinion of Miller's mental state at the time those conversations, the

experts could not testify as to whether the conversations actually occurred. Only Miller himself could rebut that aspect of Norgard's testimony but he did not. And only Miller could testify as to his exact mental health symptoms at the time of the critical conversations regarding waiving any further review of his case and to exactly what he did not understand about the consequences of his decision not to pursue any further review. The district court properly found, based on Norgard's testimony, that Miller made those statements. And the district court correctly observed that the attorney's testimony that Miller seemed to be competent to waive further review at the time of the conversations was not rebutted by Miller's silence.

The petition simply ignores the consequences of the district court's credibility findings. The scope of the evidentiary hearing, including whether all four attorneys should have be permitted to testify regarding the extraordinary circumstances prong, was rendered moot in light of these credibility findings based on his first attorney's testimony. The district court did not need to hear any more testimony after Attorney Norgard's testimony to determine that equitable tolling was not warranted in a case where the petitioner himself had decided to forgo habeas review.

While the Eleventh Circuit focused on the lack of allegations regarding the reasons other three attorneys, including a Capital Habeas Unit, did not promptly file a habeas petition, opposing counsel admits that a circuit court may deny a COA based on any grounds supported by the record. Pet. at 24 (citing *Szuchon v. Lehman*, 273 F.3d 299, 318 n.8 (3d Cir. 2001)); *see also Tribue v. United States*, 929 F.3d 1326, 1328, n.7 (11th Cir. 2019) (noting a court may affirm on any alternative ground supported by the record citing *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017)). That is this Court's view as well. *Dahda v. United States*, 138 S.Ct. 1491, 1498 (2018) (observing a court may affirm a lower court's ruling on "any ground permitted by the law and the record" because there is "little to be gained" by remanding for further

litigation). That appellate adage applies equally to the denial of a COA. The Eleventh Circuit could have denied a COA based solely on the district court's credibility finding.

No conflict with this Court's equitable tolling jurisprudence

There is no conflict between this Court's equitable tolling jurisprudence and the Eleventh Circuit's decision denying a COA. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

The federal habeas statute of limitations, 28 U.S.C. § 2244(d)(1), is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *see also Maples v. Thomas*, 565 U.S. 266, 281-86 (2012) (finding attorney abandonment of the client is a basis for equitable tolling). To establish equitable tolling, the petitioner bears the burden of showing: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Holland*, 560 U.S. at 649. A habeas petitioner seeking equitable tolling must establish both prongs of diligence and extraordinary circumstance. And the extraordinary circumstance prong of equitable tolling is met "only" where the circumstances that caused the delay are "both extraordinary *and* beyond [his] control." *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 (2016) (emphasis in original).

In *Menominee Indian Tribe*, this Court held that the Tribe was not entitled to equitable tolling of the limitations period because equitable tolling is not available "when a litigant was responsible for its own delay." *Menominee Indian Tribe*, 577 U.S. at 257. The Tribe had decided not to file suit thinking that another pending suit would solve the matter but then when the pending suit did not solve the matter, the Tribe filed an untimely complaint and argued for equitable tolling. This Court relied on its prior habeas case of *Holland v. Florida*, 560 U.S. 631 (2010), as the basis for its

discussion of equitable tolling and then discussed the meaning of the phrase "*stood in his way*" which is required for equitable tolling. *Menominee Indian Tribe*, 577 U.S. at 257 (citing *Holland*, 560 U.S. at 649) (emphasis in original). This Court has explained that the two prongs of equitable tolling are "distinct elements" and that if a court finds a litigant fails one prong, the court may decline to address the other prong. *Menominee Indian Tribe*, 577 U.S. at 256.

Miller was responsible for his "own delay" because he personally choose not to file a federal habeas petition and therefore, under *Menominee Indian Tribe*, equitable tolling does not apply, as a matter of law. Any claim of equitable tolling was affirmatively waived by Miller when he decided to forgo any further review, including federal habeas review. Miller told his state postconviction counsel Norgard at the state postconviction evidentiary hearing that he did not want any other further review of his capital case. Missing the deadline was done at Miller's specific directions and was completely within his control, not "beyond" it, as required by *Menominee Indian Tribe*. If a habeas petitioner intentionally misses the AEDPA deadline, he simply may not invoke equitable tolling. The entire concept of equitable tolling does not apply in such a situation. This Court has already answered the main underlying issue in this case in *Menominee Indian Tribe*. Equitable tolling does not apply to any habeas petitioner who willfully caused the delay himself.

A habeas petitioner may not decide to forego federal habeas review and then, over a decade later, change his mind and have that change of mind serve as a basis for equitable tolling of the AEDPA one-year statute of limitations. Miller changed his mind and filed a § 2254 petition over 12 years after the AEPDA statute of limitations had expired. Miller's change of mind is not a basis for equitable tolling. Any statute of limitations that could be evaded based simply on a change of mind would be no statute of limitations at all.

Opposing counsel is raising issues regarding the scope of the evidentiary hearing on equitable tolling when equitable tolling does not apply at all. This Court should not grant review of equitable tolling issues when equitable tolling does not apply, as a matter of law.

Regarding the district court holding an limited evidentiary hearing, the district court was entitled to limit the evidentiary hearing to the extraordinary circumstances prong and then further limit the evidentiary hearing to the conduct of the most crucial attorney, under this Court's decision in *Menominee Indian Tribe*. The district court, in its own words, focused on a "very precise period of time," when the petition was actually due in 2006 as being crucial for a determination of equitable tolling. *Miller*, 2021 WL 5395961, at *6 (focusing on the time between the date when the clock to timely file a federal habeas petition restarted after the state postconviction proceedings were completed and the date the § 2254 petition was due a few months later). Attorney Norgard was representing Miller at the time the § 2254 petition was actually due in 2006. Attorney Norgard was Miller's attorney at the time Miller decided, against his attorney's advice, not to seek further review of his case, including not filing a § 2254 petition. Filing a federal habeas petition would have been the next step after the completion of the initial state postconviction appeal and the initial state habeas petition which Norgard handled in the Florida Supreme Court. *Miller v. State*, 926 So.2d 1243, 1246 (Fla. 2006) (Nos. SC04-892, SC05-472) (listing Robert A. Norgard as attorney of record). Norgard was attorney of record at that time and remained attorney of record for many years afterward until he withdrew in 2013. Norgard had a statutory obligation as state postconviction counsel to be available to represent Miller as federal habeas counsel in the federal habeas litigation. § 27.711(2). Fla. Stat. (2022) (stating that the appointment as registry counsel continues "throughout all postconviction capital collateral proceedings, including federal habeas corpus

proceedings"). Norgard testified at the evidentiary hearing that registry counsel was obliged to handle all subsequent litigation, including the subsequent federal habeas litigation, under the registry contract. *Miller*, 2021 WL 5395961, at *7. Norgard's conduct was therefore, in the district court's words, the "primary issue."

This Court has explained, if a court finds a litigant fails one prong of the two prongs of equitable tolling, the court may decline to address the other prong. *Menominee Indian Tribe*, 577 U.S. at 256. So, not only may a district court limit an evidentiary hearing on equitable tolling to the one prong it believes is likely to be determinative of the issue of equitable tolling, but the district court may also limit the evidentiary hearing to the testimony of the one attorney whose conduct was most at issue during the critical time period that the § 2254 petition was due in federal district court. Opposing counsel insists that the district court was required to hear from all four attorneys but this Court requires no such thing. The logic of *Menominee Indian Tribe* is to the contrary. While a habeas petitioner seeking equitable tolling must establish both prongs of diligence and extraordinary circumstance, that does not mean that a district court must conduct an evidentiary hearing on both prongs or make factual findings on all subissues presented by the claim of equitable tolling. Opposing counsel would mandate that a district court waste its time by exploring both prongs and by making extraneous, unnecessary factual findings regarding the conduct of all four attorneys. But a district court is not required to waste its time conducting a full evidentiary hearing on both prongs or listening to the testimony of additional witnesses when the issue can be determined based on the testimony of one witness. While Miller would have to establish abandonment or bad faith by all four attorneys, during the entire time period from 2006 until the year the habeas petition was actually filed in 2019, the district court can deny equitable tolling by determining that there was no abandonment or bad faith by any single one of the four attorneys, which is

exactly what the district court did. The district court was entitled to limit the evidentiary hearing to the attorney that was the attorney of record when the federal habeas petition was due in 2006 and to the testimony of the attorney who would have been federal habeas counsel, if Miller had not decided to forgo federal habeas review. The district court did not need to hear any more testimony after Attorney Norgard's testimony that Miller decided to forgo federal habeas review to determine that equitable tolling was not warranted. Opposing counsel complains about the district court addressing equitable tolling in a "piecemeal fashion" but a district court is entitled to do just that, under the logic of this Court's decision in *Menominee Indian Tribe*.

There is no conflict between this Court's equitable tolling jurisprudence and the Eleventh Circuit's decision denying COA in this case.

No conflict with the other circuit courts

There is also no conflict between the decision of the Eleventh Circuit denying a COA and that of any federal circuit court. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict among the federal circuit courts regarding whether equitable tolling applies when a petitioner directs his attorney not to file a § 2254 petition. Even

before this Court's decision in *Menominee Indian Tribe*, the federal circuit courts did not permit claims of equitable tolling when the delay was of the petitioner's own making. *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (stating that "delays of the petitioner's own making do not qualify" as extraordinary circumstances for purposes of equitable tolling). The delay in filing the habeas petition was of Miller's own making, and therefore, as a matter of law, he does not qualify for equitable tolling. Petitioner Miller cites no case from any federal circuit court holding that equitable tolling applies when a petitioner make the personal decision for forgo federal habeas review or granting COA on such an issue. Nor does Miller cite any circuit court case holding that a habeas petitioner who changes his mind many years later about seeking federal habeas review is entitled to equitable tolling or granting COA on such an issue.

Nor is there any conflict among the federal appellate courts regarding the issue of whether a district court may conduct a limited evidentiary hearing on the issue of equitable tolling. Opposing counsel does not cite any case from any circuit court holding that a district court may not limit an evidentiary hearing to one prong of equitable tolling or to the testimony of only the crucial witnesses. Petitioner Miller cites no case from any circuit court holding that limited evidentiary hearings on equitable tolling are improper, which is quite understandable in light of this Court's decision to the contrary in *Menominee Indian Tribe*. There is no conflict among the federal appellate courts.

There is no conflict between the Eleventh Circuit's decision denying a COA on the issue of equitable tolling in this type of situation and that of any other federal circuit court of appeals. Because there is no conflict with this Court or among the federal appellate courts, review of this issue should be denied.

ISSUE II

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE ELEVENTH CIRCUIT DENYING A CERTIFICATE OF APPEALABILITY REGARDING THE DISTRICT COURT LIMITING THE EVIDENTIARY HEARING ON EQUITABLE TOLLING TO ONLY ONE PRONG AND TO THE TESTIMONY OF ONLY THE CRUCIAL WITNESSES.

Petitioner Miller seeks review of the Eleventh Circuit's decision denying a certificate of appealability (COA) on the issue of the district court conducting a limited evidentiary hearing on equitable tolling rather than a full evidentiary hearing. Pet. at 29. Petitioner Miller sought an evidentiary hearing at which he would present mental health experts to establish equitable tolling. But, under this Court's precedent, a district court may limit its ruling denying equitable tolling to addressing only one of the two prongs of equitable tolling and to certain witnesses. A district court is not required to conduct an evidentiary hearing exploring both prongs of equitable tolling or required to listen to extraneous testimony. The district court limiting the evidentiary hearing comports with this Court's decision in *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 256-57 (2016). Opposing counsel insists that Miller's mental health problems can serve as a basis to excuse his lack of diligence and as a basis for extraordinary circumstances and then argues that therefore, the evidentiary hearing needed to explore both prongs. But, when a habeas petitioner is represented by counsel, the petitioner's mental health problems, including severe mental illnesses, can only be used as to excuse his lack of diligence, not to establish extraordinary circumstances. It is the attorney's conduct that is at issue in a counseled case to establish extraordinary circumstances. Furthermore, Attorney Norgard, an experienced criminal attorney, testified, at the federal evidentiary hearing, that Miller was mentally competent during their discussions regarding his client's desire to waive any further review. This Court considers defense counsel's meaningful interactions

with the defendant to be evidence of the defendant's mental competency. *Drope v. Missouri*, 420 U.S. 162, 177 n.13 (1975). Indeed, a large part of the test for competency is whether the defendant is able to understand and effectively communicate with his attorney. The district court properly refused to explore Miller's mental health at the limited evidentiary hearing beyond his own attorney's testimony that Miller was competent to waive. There is no conflict between this Court's equitable tolling jurisprudence allowing limited evidentiary hearings on equitable tolling and the Eleventh Circuit's denial of a COA. Nor is there any conflict between the Eleventh Circuit's denial of a COA and that of any decision of any other federal circuit court. Therefore, this Court should deny review of this issue.

No conflict with this Court's equitable tolling jurisprudence

There is no conflict between this Court's equitable tolling jurisprudence and the Eleventh Circuit's decision denying a COA. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). The federal habeas statute of limitations, 28 U.S.C. § 2244(d)(1), is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). To establish equitable tolling, the petitioner bears the burden of showing: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Holland*, 560 U.S. at 649.

Contrary to opposing counsel's assertion, mental health problems cannot constitute the basis for extraordinary circumstances in a counseled case. Pet at 30. While mental problems can be the basis for both lack of diligence and extraordinary circumstances in a pro se case, it cannot be the basis for extraordinary circumstance in a case where the habeas petitioner is represented by counsel. In a counseled case, the extraordinary circumstance prong of equitable tolling focuses on the attorney, not

on the habeas petitioner. Indeed, this Court's cases regarding equitable tolling in federal habeas cases, such as *Holland* and *Maples*, focused on counsel's conduct when determining the extraordinary circumstance prong. CHU-M's view totally ignores habeas counsel's presence in the equitable tolling equation. The petitioner's mental problems are not at issue in a determination of the extraordinary circumstances in a counseled case. Miller may rely on his own mental health to excuse his lack of diligence, which was not the prong at issue at the evidentiary hearing, but he may not rely on his mental health to establish extraordinary circumstance, which was the prong at issue at the evidentiary hearing. There is no allegation that Attorney Norgard suffered from any mental health problems. The mental health testimony was basically irrelevant to the prong at issue at the evidentiary hearing. So, the district court properly excluded the mental health testimony on Miller's mental condition because the diligence prong was not at issue at the limited evidentiary hearing on the extraordinary circumstance prong.

Opposing counsel attacks Norgard's testimony, at the evidentiary hearing that Miller was competent to waive any further review of his case, as being a "self-serving" opinion. Pet. at 30. But this Court does not view an experienced criminal attorney's opinion of his own client's competency in that manner. Indeed, because part of the test for competency is the defendant's ability to aid counsel in representing him, this Court considers defense counsel's view of his client's mental condition to be of particular value. *Drope v. Missouri*, 420 U.S. 162, 177 n.13 (1975) (noting the opinion of defense counsel is a "unquestionably a factor" to be considered in determining whether to conduct a competency hearing); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (stating that part of the test for competency is the defendant's "ability to consult with his lawyer" with a "reasonable" degree of understanding); *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986) (explaining that because incompetency involves an

inability to assist in the preparation of a defense, a failure by trial counsel to indicate the presence of such difficulties "provides substantial evidence of the defendant's competence"). Defense counsel's testimony that his conversations with the defendant were meaningful is substantial evidence that Miller was competent to waive further review. Attorney Norgard interacted the most with Miller during the critical time period when Miller was telling his attorney that he wanted to be a volunteer. Experienced defense counsel usually have prior experience interacting with defendants who suffer from mental health problems and even severe mental illnesses. *Miller*, 2021 WL 5395961, at *7 (recounting Norgard's experience as an assistant public defender and in private practice handling capital cases). It is par for the course for defense counsel to deal with defendants with mental health problems. And Norgard testified that he was aware of Miller's history of mental health problems, which had affected Miller "throughout most of his life." *Id.* at *7. Attorney Norgard, however, believed that Miller was competent to waive federal habeas, despite knowing his mental health history, based on the "low threshold" for competency. *Id.* This Court does not view defense counsels' views of the severity of their clients' mental health problems in the same dismissive manner as opposing counsel does. The district court relying on Norgard's view that Miller was competent to waive further review of his case does not conflict with this Court's view in *Drope*.

There is no conflict between this Court's equitable tolling jurisprudence and the Eleventh Circuit's decision denying a COA.

No conflict with the other federal circuit courts

There is also no conflict between the decision of the Eleventh Circuit denying a COA and that of the decision of any federal circuit court. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United

States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict among the federal circuit courts regarding whether equitable tolling applies at all when a petitioner directs his attorney not to challenge his judgement and sentence any further, including not to file a § 2254 petition. Opposing counsel also fails to point to any federal circuit court that has held that t petitioner's mental problems may be a basis for extraordinary circumstance in a counseled case or that has granted a COA on that issue. The petition cites to *pro se* cases as support for the view that a habeas petitioner's mental problems can be the basis for both prongs. Instead, opposing counsel relies only on pro se habeas cases. Pet. at 30-31 (citing *Riva v. Ficco*, 615 F.3d 35, 38 (1st Cir. 2010); *Bolarinwa v. Williams*, 593 F.3d 226, 231-32 (2d Cir. 2010), and *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009)). But pro se cases cannot be support for such a statement. Opposing counsel cites to no case holding that the petitioner's mental problems can be the basis for both prongs in a counseled case and certainly not to a case that explains why the petitioner's mental problems would be at issue when determining whether any extraordinary circumstances exist when counsel, who has no mental problems, is handling the case. Nor does opposing counsel account for this Court's focus on the attorney's conduct in the equitable tolling cases of *Holland* and *Maples*. CHU-M's view totally ignores habeas counsel's presence in the equitable tolling equation.

There is no conflict between the Eleventh Circuit's decision denying a COA on

the issue of equitable tolling in a counseled case and that of any decision of any other federal circuit court of appeals. Because there is no conflict with this Court or among the federal appellate courts, review of this issue should be denied.

Accordingly, this Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

Carolyn M. Snurkowski
Associate Deputy Attorney General
Fla. Bar No. #158541
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3566
primary email: capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com