No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

DAVID VAHLKAMP,
*Petitioner*,

v.

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

**On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals**

# PETITION FOR WRIT OF CERTIORARI

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## A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner is entitled to equitable tolling in light of his postconviction attorney's gross negligence.

2. Whether the Eleventh Circuit Court of Appeals misapplied the "reasonable diligence" standard set forth in *Holland v. Florida*, 560 U.S. 631 (2010).

## B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

## C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

### 1. TABLE OF CONTENTS

## 2. TABLE OF CITED AUTHORITIES

**b. Statutes**



**c. Other Authority**

The Petitioner, DAVID VAHLKAMP, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on December 19, 2022. (A-3).[1]

## D. CITATION TO OPINION BELOW

*Vahlkamp v. Sec'y, Dep't of Corr.*, 2022 WL 17752230 (11th Cir. Dec. 19, 2022).

## E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the opinion of the Eleventh Circuit Court of Appeals.

## F. CONSTITUTIONAL PROVISION INVOLVED

Article I, section 9 of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

## G. STATEMENT OF THE CASE

The Petitioner is seeking review of the Eleventh Circuit Court of Appeals' affirmance of the district court's order dismissing his 28 U.S.C. § 2254 petition as untimely. In his § 2254 petition (A-18), the Petitioner raised two valid claims

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

concerning the denial of constitutional rights, including the denial of his Sixth Amendment right of effective assistance of counsel and the denial of his Fifth Amendment right against compelled self-incrimination (as guaranteed by *Miranda*[2]). Additionally, in his § 2254 petition, the Petitioner asserted that he is entitled to equitable tolling due to his postconviction attorney's gross negligence. After the Petitioner filed his § 2254 petition, the Respondent filed a motion to dismiss the petition. On October 19, 2021, the district court issued an order dismissing the Petitioner's § 2254 petition as untimely. (A-10).[3] Notably, prior to rejecting the Petitioner's equitable tolling claim, the district court did *not* conduct an evidentiary hearing. Thereafter, the Eleventh Circuit granted the Petitioner a certificate of appealability on the following issue:

> [W]hether the district court erred in its determination that Vahlkamp was not entitled to equitable tolling

After the parties briefed this issue, the Eleventh Circuit affirmed the dismissal of the Petitioner's § 2254 petition. (A-3).

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] In its order, the district court did not address the merits of the Petitioner's § 2254 claims.

## H. REASON FOR GRANTING THE WRIT

**The questions presented are important.**

The questions presented in this case is as follows:

> 1. Whether the Petitioner is entitled to equitable tolling in light of his postconviction attorney's gross negligence.
> 2. Whether the Eleventh Circuit Court of Appeals misapplied the "reasonable diligence" standard set forth in *Holland v. Florida*, 560 U.S. 631 (2010).

Undersigned counsel submits that guidance on these issues is needed from the Court, as the answers to these questions have the potential to impact numerous inmates seeking federal habeas relief.

In 2002, the Petitioner was charged with killing his wife. The incident occurred during the evening of May 30, 2002/morning of May 31, 2002. At trial, the State argued that the killing amounted to first-degree murder and the defense argued that the Petitioner acted in the "heat of passion" and therefore the killing was manslaughter. At the conclusion of the trial, the jury convicted the Petitioner of first-degree murder, and the Petitioner was sentenced to life imprisonment. On direct appeal, the Petitioner argued that his statements to law enforcement officials were obtained in violation of his *Miranda* rights, but the Florida Second District Court of Appeal rejected this claim and affirmed the conviction and sentence. *See Vahlkamp v. State*, 923 So. 2d 506 (Fla. 2d DCA 2005).

The Petitioner subsequently filed a state court motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In the motion, the Petitioner raised three claims, one of which is relevant to the instant petition: defense counsel

rendered ineffective assistance of counsel by failing to present a mental health expert during the trial in support of the Petitioner's "heat of passion" defense. An evidentiary hearing on this claim was held on June 20, 2016. On June 4, 2018, the state postconviction court denied the Petitioner's state postconviction motion. On appeal, the Florida Second District Court of Appeal affirmed the denial of the Petitioner's state postconviction motion. *See Vahlkamp v. State*, 294 So. 3d 284 (Fla. 2d DCA 2020).

Thereafter, the Petitioner filed a § 2254 petition raising the two claims set forth above (i.e., the *Miranda* claim and the ineffective assistance of counsel claim). When the Petitioner filed his § 2254 petition, he acknowledged that the petition was untimely – but he argued that he was entitled to equitable tolling due to his postconviction attorney's egregious negligence. Specifically, in April or early May of 2006, the Petitioner retained attorney Charles Murray to file a state postconviction motion on his behalf. Prior to retaining Mr. Murray, the Petitioner's trial/appellate counsel (Stephen M. Grogoza) had sent a letter to the Petitioner informing him that if he wanted to preserve his federal habeas corpus rights, he was required to file his state postconviction motion within one year of his conviction becoming final. When he retained Mr. Murray, the Petitioner informed Mr. Murray of Mr. Grogoza's letter and told him that the state postconviction motion must be filed within the applicable one-year period in order to preserve his federal habeas rights. The one-year deadline expired on May 30, 2006. Mr. Murray, however, did not file the state postconviction motion until 2008. As a result, the Petitioner's § 2254 time period expired before the state postconviction motion was filed. In light of Mr. Murray's actions in failing to

timely file the state postconviction motion (as specifically requested by the Petitioner), the Petitioner asserted that he is entitled to equitable tolling. *See Holland v. Florida*, 560 U.S. 631 (2010). Mr. Murray's gross negligence amounts to an extraordinary circumstance that allows for equitable tolling in the instant case.[4]

The Petitioner submits that the type of negligence exhibited by counsel in this case satisfies the standard set forth in *Holland*. In *Holland*, the Court confirmed that the AEDPA[5] statute of limitations is subject to equitable tolling based on an attorney's gross or extraordinary negligence – a conclusion that had been reached in the majority of all other circuits but a conclusion that had been rejected by the Eleventh Circuit Court of Appeals. Prior to *Holland*, the Eleventh Circuit consistently held that "attorney negligence is not a basis for equitable tolling." *Howell v. Crosby*, 415 F.3d 1250, 1252 (11th Cir. 2005). In *Holland*, the Court held that the Eleventh Circuit's standard was "too rigid":

> In this case, the "extraordinary circumstances" at issue involve an attorney's failure to satisfy professional standards of care. The [Eleventh Circuit] held that, where that is so, even attorney conduct that is "grossly negligent" can never warrant tolling absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." 539 F.3d, at 1339. But in our view, the [Eleventh Circuit's] standard is too rigid.

*Holland*, 560 U.S. at 649. In reaching this conclusion, the Court noted that the Eleventh Circuit stood alone in its "rigid" standard, and there was no law or precedent

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[4] All of the facts set forth in this petition were alleged in the Petitioner's § 2254 petition and confirmed by the Petitioner's affidavit. (A-46).

[5] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2253(c)(2).

that supported such a standard:

> In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove "egregious" and can be "extraordinary" even though the conduct in question may not satisfy the Eleventh Circuit's rule. *See, e.g., Nara v. Frank*, 264 F.3d 310, 320 (C.A.3 2001) (ordering hearing as to whether client who was "effectively abandoned" by lawyer merited tolling); *Calderon* [*v. U.S. Dist. Court for the Cent. Dist. of Cal.*], 128 F.3d [1283,] 1289 [(9th Cir. 1997)] (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); *Baldayaque* [*v. United States*], 338 F.3d [145,] 152-153 [(2d Cir. 2003)] (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, tolling could, under the circumstances, be warranted); *Spitsyn* [*v. Moore*], 345 F.3d [796,] 800-802 [(9th Cir. 2003)] (finding that "extraordinary circumstances" may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to his client's communications); *United States v. Martin*, 408 F.3d 1089, 1096 (C.A.8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct).

*Id.* at 651. Whatever name is given to the type of negligence that permits equitable tolling (i.e., "gross" or "extraordinary"), the Petitioner meets that standard in this case.

In its order dismissing the Petitioner's § 2254 petition, the district court concluded that the Petitioner did not act with "reasonable diligence." (A-14-15). The Petitioner respectfully disagrees.[6] After Mr. Murray missed the AEDPA deadline

[6] In *Holland*, the Court clarified that the standard is "reasonable diligence" – not "maximum feasible diligence." *See Holland*, 560 U.S. at 653 (internal quotation marks and citations omitted). The Petitioner acted with "reasonable diligence" in this case.

(despite being told by the Petitioner to file by the deadline), there was nothing else the Petitioner could do (i.e., the deadline had passed), other than at least ensuring that Mr. Murray did not *also* miss his state postconviction deadline – *and the record shows that Mr. Murray was also extraordinarily negligent in handling the Petitioner's state postconviction motion.* In fact, Mr. Murray was specifically found by the state court to be ineffective in his representation of the Petitioner in the state postconviction proceeding (and, in essence, Mr. Murray *abandoned* the Petitioner).[7] *See Maples v. Thomas*, 565 U.S. 266, 283, 288-289 (2012) (holding that the attorneys' abandonment constituted an "extraordinary circumstance[] beyond his control" that justified lifting the state procedural bar to his federal § 2254 petition).[8] First, when Mr. Murray finally filed a state postconviction motion in 2008, one of the claims in the motion (i.e., Ground 1 of the Petitioner's § 2254 petition) was stricken by the state postconviction court with leave to amend. However, Mr. Murray *failed* to timely amend the state postconviction motion. On August 21, 2014, the state postconviction court granted the Petitioner's state court habeas petition and allowed the Petitioner to file an amended

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[7] The district court found that it is a "close call" as to whether Mr. Murray abandoned the Petitioner. (A-13) ("Vahlkamp claims Murray abandoned him, and Respondent disagrees. It is a close call."). As explained in this petition, the Petitioner asserts that the findings by the state court judges regarding Mr. Murray's gross negligence confirm the Petitioner's contention that Mr. Murray abandoned him.

[8] *See also Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th Cir. 2012) (holding that relief should be granted "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense").

state postconviction motion. In the order, the court stated:

> After reviewing the motion, the case law and the testimony presented, the Court finds that the Defendant did, in fact, retain counsel to timely file a rule 3.850 motion and counsel through neglect, failed to file the motion as it relates to Ground I.

(A-49-50). Second, when the state postconviction court first denied the 2008 state postconviction motion filed by Mr. Murray, Mr. Murray failed to inform the Petitioner of the denial and failed to file a notice of appeal. On June 15, 2012, the Florida Second District Court of Appeal granted the Petitioner a belated appeal due to Mr. Murray's ineffectiveness in failing to advise the Petitioner of his appellate options. *See Vahlkamp v. State*, 93 So. 3d 1034 (Fla. 2d DCA 2012). Both of these conclusions by the state courts support the Petitioner's assertion that counsel's actions in this case amount to the type of extraordinary negligence/abandonment that justify equitable tolling under the *Holland* standard.

In *Holland*, the Court cited with approval the Second Circuit's opinion in *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). *See Holland*, 560 U.S. at 651. In *Baldayaque* – a case concerning the failure to timely file a 28 U.S.C. § 2255 petition – the Second Circuit found the existence of egregious attorney conduct based on three factors that were established in that case: (1) the attorney was specifically requested to file a § 2255 petition,[9] (2) the attorney failed to do "cursory" research to

[9] The Second Circuit stated:

> In spite of being specifically directed by his client's representatives to file a "2255," Weinstein failed to file such a petition at all. By refusing to do what was requested by his client on such a fundamental matter,

determine the deadline for filing the § 2255 petition,[10] and (3) the attorney failed to communicate with the defendant.[11] *See Baldayaque*, 338 F.3d at 152. Based on the existence of these three factors, the Second Circuit concluded that the attorney's "actions were far enough outside the range of behavior that reasonably could be

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> Weinstein violated a basic duty of an attorney to his client. *See In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 17 (2d Cir. 1986) ("As a matter of professional responsibility, an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the client's wishes on major litigation decisions.").

*Baldayaque*, 338 F.3d at 152.

[10] The Second Circuit stated:

> Weinstein did no legal research on Baldayaque's case. Weinstein failed to comply with Rule 1.1 of the Connecticut Rules of Professional Conduct, which requires a lawyer to "provide competent representation to a client, [which] requires the legal knowledge, skill, *thoroughness and preparation* reasonably necessary for the representation." (emphasis added). Had Weinstein made a cursory review of the law, he would have discovered that it was not "too late" to file a section 2255 petition when he met with Rivera and Marquez in 1997; in fact, he would have discovered that he had until May 1998 to file such a petition within the limitations period.

*Baldayaque*, 338 F.3d at 152.

[11] The Second Circuit stated:

> Weinstein never spoke to or met Baldayaque. When his letter to Baldayaque was returned, Weinstein made no effort to locate Baldayaque. Weinstein failed to "keep [his] client reasonably informed about the status of [the case]" and failed to "explain [the] matter to the extent reasonably necessary to permit [Baldayaque] to make informed decisions regarding the representation," as required by Connecticut Rule of Professional Conduct 1.4.

*Baldayaque*, 338 F.3d at 152.

expected by a client that they may be considered 'extraordinary.'" *Id.* The same three factors that amounted to egregious conduct in *Baldayaque* also apply in the Petitioner's case. First, the Petitioner specifically requested Mr. Murray to timely file his state postconviction motion in order to preserve his § 2254 rights. Second, Mr. Murray failed to do "cursory" research to determine the deadline for filing the Petitioner's state postconviction motion in order to toll the Petitioner's § 2254 rights. The plain language of 28 U.S.C. § 2244(d) clearly establishes that the AEDPA time limitation is tolled only with the filing of a state postconviction motion. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) ("Padilla's counsel could have *easily determined* that his plea would make him eligible for deportation *simply from reading the text of the statute* . . . .") (emphasis added). Mr. Murray failed to comply with Rule 4-1.1 of the Florida Rules of Professional Conduct, which requires a lawyer to "provide competent representation to a client, [including] the legal knowledge, skill, *thoroughness and preparation* reasonably necessary for the representation." (Emphasis added). Finally, Mr. Murray failed to communicate with the Petitioner. Specifically, despite being retained and being informed about the § 2254 deadline by the Petitioner, *Mr. Murray never spoke to the Petitioner prior to the AEDPA deadline.* Thus, as in *Baldayaque*, Mr. Murray failed to "keep his client reasonably informed about the status of [the case]" and failed to "explain [the] matter to the extent reasonably necessary to permit [the Petitioner] to make informed decisions regarding the representation," as required by Florida Rule of Professional Conduct 4-1.4. Accordingly, the Petitioner submits that the facts in his

case establish the "extraordinary circumstance"/egregious conduct prong of *Holland*. As in *Baldayaque*, Mr. Murray's actions were "far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary.'" *Baldayaque*, 338 F.3d at 152.

In its opinion affirming the dismissal of the Petitioner's § 2254 petition, the Eleventh Circuit concluded (even though no evidentiary hearing had been held) that the Petitioner failed to exercise "reasonable diligence":

> Vahlkamp's attempt to fault Murray for his delay misunderstands the nature of the diligence required for equitable tolling. Although Murray should have been more responsive, Vahlkamp bore the burden to prove that he, not his counsel, independently exercised reasonable diligence. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). And Vahlkamp failed to satisfy this burden. He knew when the federal limitations period would expire because Grogoza sent him a letter advising him of the deadline. But, after retaining Murray, Vahlkamp made no effort to communicate about the upcoming deadline or to preserve his rights through other counsel or pro se action. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1072 (11th Cir. 2011).

*Vahlkamp*, 2022 WL 17752230 at *3; (A-8). Contrary to the district court's statement, the Petitioner has specifically alleged that prior to AEDPA deadline, he, in fact, communicated with Mr. Murray and directed him to file the state postconviction motion before the expiration of the AEDPA deadline.[12] Despite this clear and specific communication, Mr. Murray missed the deadline. Once the deadline passed, the Petitioner had no option other than to (1) hope that he was successful on his state

[12] Undersigned counsel submits that whether the Petitioner's actions were "reasonable" must be judged based on how a reasonable person in the Petitioner's situation would have acted – i.e., a person who is a prisoner with no legal training – and not how a lawyer or a judge would have acted.

postconviction motion (which would have rendered a § 2254 petition moot) and, if not, then (2) immediately file a § 2254 petition following the conclusion of the state postconviction proceeding and argue equitable tolling. Undersigned counsel notes that the Petitioner filed his § 2254 petition just days after the state appellate court decision affirming the denial of his state postconviction motion and *before* that state proceeding became final (i.e., the § 2254 petition was filed on April 14, 2020, and the state appellate court mandate following the affirmance of the denial of the state postconviction motion was not issued until April 29, 2020). In light of the circumstances of this case (i.e., a case where the state court specifically concluded that the Petitioner's former counsel was negligent), the Petitioner's actions were "reasonable." Thus, the Petitioner requests the Court to grant review in this case to again clarify the "reasonable diligence" standard set forth in *Holland*.

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Court stated the following regarding the "great writ":

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas

corpus is plenary.

(Citation omitted). In this case, the Petitioner is simply attempting to have the district court consider the merits of his federal habeas claims[13] – and he should not be denied that opportunity solely due to the egregious actions of his former lawyer. Applying equitable tolling to the facts of this case is both consistent with (1) *Holland* and (2) the spirit of "the great writ of habeas corpus." At the very least, the Petitioner is entitled to an evidentiary hearing on his equitable tolling claim.[14]

Accordingly, the Petitioner requests the Court to grant his petition for a writ of certiorari to review the important questions presented in this case. As stated above, this case has a potential impact on all § 2254 petitions nationwide.

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[13] The Petitioner's § 2254 petition presents colorable claims relating to ineffective assistance of counsel (Sixth Amendment violation) and the failure to suppress his statements to law enforcement officials (Fifth Amendment violation). At a minimum, jurists of reason could debate the merits of the Petitioner's assertion that his constitutional rights were violated.

[14] As explained above, the district court rejected the Petitioner's equitable tolling claim without first conducting an evidentiary hearing. The Petitioner submits that he is entitled to an evidentiary hearing on his equitable tolling claim. *See Vineyard v. Dretke*, 125 Fed. Appx. 551 (5th Cir. 2005) (holding that remand was warranted for further findings of fact relevant to alleged misrepresentations by defendant's counsel and the reasonableness of defendant's reliance upon them with regard to equitable tolling of the habeas limitations period). By conducting a hearing, the district court can hear from the Petitioner and Mr. Murray – which will allow the district court to make a proper determination about the application of the equitable tolling doctrine to the facts of this case.

## I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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