23-5223

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FIDEL RIOS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

FIDEL RIOS, JR.
Reg. No. 14564-085
Federal Correctional Institution
P.O. Box 800
Herlong, CA 96113

QUESTION PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. RIOS WAS NOT ENTITLED TO EQUITABLE TOLLING

LIST OF PARTIES

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

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Iowa appears at Appendix A to the petition and is unpublished.

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix B to the petition and is unpublished.

JURISDICTION

The District Court had jurisdiction over the initial criminal proceeding pursuant to Title 18, United States Code, section 3231. It had jurisdiction to consider Mr. Rios's motion to vacate, set aside or correct sentence pursuant to Title 28, United States Code, section 2255. (Case No. 4:21-cv-00382-SMR).

The District Court's Order denying Mr. Rios's 2255 motion was entered on January 19, 2023. See Appendix A. Mr. Rios filed a timely notice of appeal on January 30, 2023. There are no additional issues or cases between the parties and thus, the District Court's Order is final.

The United States Court of Appeals for the Eighth Circuit had jurisdiction over Mr. Rio's Application for a Certificate of Appealability under Title 28, United States Code, section 1291. (Case No. 23-1268).

The United States Court of Appeals' Order denying Mr. Rios's COA was entered on April 7, 2023. See Appendix B.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, section 2255 establishes a "1-year limitation within which a federal prisoner may file a motion to vacate, set aside, or correct sentence under that section. That period runs from the 'latest' of a number of events, which are enumerated in subparagraph (1) through (4) of [paragraph] 6 of that section." Dodd v. United States, 545 U.S. 353, 354, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005).

This case involves subparagraph (1), which provides that the limitation period begins to run on "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255(f)(1).

This Court, however, has previously ruled that the limitation period is not jurisdictional, see e.g. Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), and thus, it does not require dismissal of a motion to vacate, set aside, or correct sentence simply because the clock has run. Rather, the limitation period may be tolled if a petitioner can establish two elements: "(1) that he has been pursuing his right diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 560 U.S. at 649.

STATEMENT OF THE CASE

a. Procedural History

On September 26, 2018, a federal grand jury sitting in the Southern District of Iowa returned a single count indictment against Mr. Rios, Francisca Yadira Rios, and Joaquin Coronado, alleging conspiracy to distribute 50 grams or more of methamphetamine. Case No. 4:18-cr-00203-SMR.

By way of a plea agreement, Mr. Rios pleaded guilty to the indictment before a magistrate judge on August 28, 2019.

Mr. Rios appeared in the District Court for sentencing on January 7, 2020. The District Court sentenced Mr. Rios to a total of 360 months; of which 300 months were to run concurrently to Mr. Rios's prior federal case in the Southern District of Iowa and 60 months to run consecutively to the prior federal case.

Mr. Rios belatedly filed a notice of appeal on August 13, 2021. ECF No. 187. This Court denied Mr. Rios appeal without comment. ECF No. 200.

On November 30, 2021, Mr. Rios filed a motion to vacate, set aside or correct sentence. ECF No. 1. Case No. 4:21-cv-00382-SMR. The Government filed an Opposition, ECF No. 4, and Mr. Rios filed a Traverse. ECF No. 8. On January 19, 2023, the District Court denied Mr. Rios's motion. ECF No. 10.

b. FACTS OF THE CASE

On January 7, 2020, Mr. Rios was sentenced in the United

States District Court for the Southern District of Iowa. He received a total sentence of 360 months, of which 300 months were to be served concurrently with his prior federal case in the Southern District of Iowa and 60 months to be served consecutively with the earlier case. Case No. 4:18-cr-00203-SMR.

After he received his sentence, Mr. Rios asked his defense attorney to file a notice of appeal and a direct appeal brief on his behalf. Defense counsel informed Mr. Rios that he would file both the notice of appeal and appellate brief on Mr. Rios's behalf. He further stated that the appellate process took about 18 months to complete.

Approximately one month after Mr. Rios was sentenced in the Southern District of Iowa, he was transferred to the state of Washington to deal with a pending supervised release revocation hearing. He arrived in March of 2020 when the COVID-19 pandemic was in full bloom. As a result, the jail at which Mr. Rios was housed instituted numerous restrictions on the inmate population, to include limiting the number of phone calls that an inmate could place. Despite these restrictions, Mr. Rios nevertheless was able to telephone his attorney's office. However, he never had an opportunity to speak directly with his attorney. Instead, he left messages with his attorney's secretary. Mr. Rios also had other family members contact the attorney's office. Like himself, each of these family members got stuck leaving messages with the

attorney's secretary. But there was one critical difference. On at least two occasions, after Mr. Rios's sister left him a message, defense counsel responded by email. In those emails he claimed that everything was okay, that he was doing well, and that he was diligently working on Mr. Rios's appeal. Mr. Rios's sister relayed that information to him.

In January 2021, Mr. Rios was placed into the custody of the Bureau of Prisons (BOP) and began an extended trek around the Western region before he arrived at his final destination, FCI Herlong, on May 12, 2021. Because of the pandemic, Mr. Rios was immediately placed into quarantine for 30 days, with no contact with the outside world (not even the prison's general population).

Once out of quarantine, Mr. Rios spoke with the prison's legal clerk. The legal clerk advised Mr. Rios that he should obtain his docket sheet from the District Court to ascertain the status of his appeal. Following the legal clerks advice, Mr. Rios sent a letter to the District Court, inquiring about the status of his direct appeal and seeking a copy of his docket sheet. The District Court responded by letter and informed Mr. Rios that he would have to pay a copying fee in order to obtain the docket sheet. Mr. Rios promptly paid the fee from his inmate account.

On August 2, 2021, the District Court received Mr. Rios's payment and sent him a copy of his docket sheet.

Notably, the letters that Mr. Rios had sent to the District Court and the letters that the District Court sent to Mr. Rios were not entered on his docket sheet. Mr. Rios received the letter and docket sheet on August 6, 2021. It was on that date that Mr. Rios learned that his defense attorney had misrepresented to him that he had filed the notice of appeal. Since the library was closed over the weekend and there was no weekend mail service at the prison, the earliest that Mr. Rios could send his notice of appeal was August 8, 2021, which is when he mailed it. It arrived at the District Court on August 13, 2021. ECF No. 187.

In his notice of appeal, Mr. Rios stated that the reason for the tardiness of his notice of appeal was his defense attorney's misrepresentation to him that he had filed a notice of appeal. This Court instructed the District Court to develop a record with regards to Mr. Rios' misrepresentation claim. After receiving briefs from the parties, the District Court denied Mr. Rios's misrepresentation claim, that is, defense counsel failed to file a timely notice of appeal. Mr. Rios appealed the District Court's decision to this Court. However, a panel of this Court denied the appeal without comment on September 27, 2021. ECF No. 200.

On November 30, 2021, Mr. Rios filed within the District Court a motion to vacate, set aside or correct sentence. Case No. 4:21-cv-00382-SMR, ECF No. 1. On January 19, 2022, the District Court found that Mr. Rios failed to demonstrate that he

was entitled to equitable tolling and dismissed his motion as untimely. ECF No. 10. On January 30, 2023, Mr. Rios filed a timely notice of appeal. ECF No. 11.

On February 21, 2023, Mr. Rios filed an Application for a Certificate of Appealability (COA) to the United States Court of Appeals for the Eighth Circuit. Case No. 23-1268. The Eighth Circuit denied the Application for a COA on April 7, 2023.

REASONS FOR GRANTING THE PETITION

a. Title 28, United States Code, section 2255 establishes a "1-year period of limitation within which a federal prisoner may file a motion to vacate, set aside, or correct sentence under that section. That period runs from the 'latest' of a number of events, which are enumerated in subparagraph (1) through (4) of [paragraph] 6 of that section." Dodd v. United States, 545 U.S. 353, 354, 123 S.Ct. 2478, 162 L.Ed.2d 343 (2005)(citing 28 U.S.C. 2255(f)(1)-(4)).

This case involves subparagraph (1), which provides that the limitation period begins to run on "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255(f)(1).

This Court, however, has previously ruled that the limitation period is not jurisdictional and thus, it does not require dismissal of a motion to vacate, set aside, or correct sentence simply because the clock has run. Rather, the limitation period may be tolled.

b. A Defendant Seeking to Establish Equitable Tolling Must Demonstrate Two Elements.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010); Walker v. Norris, 436 F.3d 1026, 1032 (8th Cir. 2006). This Court has expressly characterized these two

components as distinct "elements," and not merely factors of indeterminate or commensurable weight. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005).

Moreover, a petitioner must demonstrate both elements in order to obtain equitable tolling. See e.g. Lawrence v. Florida, 549 U.S. 327, 336-337, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007)(rejecting equitable tolling claim without addressing diligence element because petitioner failed to demonstrate "extraordinary circumstances"). Mr. Rios established both elements in this motion. However, the District Court failed to address his claim.

c. The Misrepresentation Claim Underlying Mr. Rios's Equitable Tolling Argument Was Not Addressed By the District Court Before the District Court Denied Mr. Rios's Motion.

The District Court noted that "courts around the country have found that the circumstances of the COVID-19 pandemic 'could -- in certain circumstances -- conceivably warrant equitable tolling.'" ECF No. 10, at 2 (quoting United States v. Haro, 2020 WL 565320, at *4 (D. Neb. Sept. 23, 2020)). Nonetheless, the District Court found that "[t]here is no evidence in the record that [Mr.] Rios 'was pursuing his rights diligently and that the COVID-19 pandemic specifically prevented him from filing his motion.'" Id., at 3 (quoting Howard v. United States, 2021 WL 409841, at *3 (E.D. Mo. Feb. 5, 2021)). But Mr. Rios raised claims that were much broader than the COVID-19 claim that the District Court relied on to deny Mr. Rios's motion.

In his motion Mr. Rios asserted that his defense attorney misrepresented to him that he had filed an appellate brief on his behalf. Mr. Rios contended that defense counsel's misrepresentation was grounds for an ineffective assistance of counsel claim as well as grounds for equitable tolling.

Specifically, Mr. Rios asserted that after he was sentenced in the District Court he asked his attorney to file a notice of appeal and appellate brief. ECF No. 1, at 22-27. Defense counsel assured Mr. Rios that he would file an appellate brief on his behalf. Id., at 23. Shortly thereafter, Mr. Rios was transferred from Iowa to the state of Washington for a supervised release revocation hearing. While in Washington, his new jail enacted COVID-19 restrictions, which seriously curtailed his ability to communicate with his attorney. Id., at 23-24. Nevertheless, Mr. Rios called his attorney's office on several occasions. He was unable to speak with his attorney directly, but he did leave phone messages with his attorney's secretary. Id., at 24. His family also attempted to contact his defense attorney. However, they too were unable to speak with the attorney directly. Id. Yet, one of Mr. Rios's sisters did receive a couple of confirming emails from defense counsel shortly after she telephoned his office. In his email, defense counsel claimed that everything was fine and that he had worked on Mr. Rios's appeal. Id., at 24. Upon completion of his revocation hearing, Mr. Rios was placed into the Bureau of Prison's (BOP)

custody and transferred to several facilities before he was finally assigned to the Federal Correctional Institution in Herlong, California, where he was instructed by the prison's law clerk to contact the District Court to ascertain the status of his appeal. Based on this advice, Mr. Rios sent a letter to the District Court inquiring about the status of his appeal and seeking a copy of his docket sheet. The District Court responded that Mr. Rios had to pay a copying fee in order to obtain the document. Mr. Rios promptly paid the fee. On August 2, 2021, the District Court mailed Mr. Rios a copy of his docket sheet, which he received on August 6, 2021. On August 8, 2021, Mr. Rios mailed the District Court a notice of appeal. In that notice, Mr. Rios wrote that he "stated to my Sentencing Counsel to please file an Appeal right after I was [s]entenced to 35 years, and he stated to me that he would in did [sic] due [sic] so." Case No. 4:18-cr-00203-SMR, ECF No. 187, at 1. He further wrote that "To my [s]urpri[s]e when I ordered the Criminal Docket Sheet Statement to the above stated Case Name and Number, I notice that there is Not [an] appeal filed. [F]or this reason I am now filing my ow[n] Appeal." Id.

Notably, the District Court did not address this claim in its Order. Rather, in a footnote, it stated:

> The Court notes that despite Rios['s] claim that pandemic restrictions prevented him from filing his [ ] 2255 petition in a timely manner, Rios had belatedly filed a notice of appeal in his criminal case on August 13, 2021, twenty

> months after the deadline for such an appeal had expired. Crim. Case, ECF No. 187. Nowhere in his untimely appeal in his criminal case does Rios mention any pandemic-related obstacles in his notice. See id. Rather, he states he believed his counsel had filed an appeal but later learned that no appeal had been filed. The appeal was denied by the Eighth Circuit without comment. Crim. Case, ECF No. 200. Rios does not bring any grounds for ineffective assistance of counsel related to a failure to file an appeal in his original Motion, see [ECF No. 1], his reply in support of the Motion's timeliness, [ECF No. 5], nor his amended Motion, [ECF No. 8].

ECF No. 10, at 1 f.n. 1.

The District Court's finding is contrary to the record. In his original motion Mr. Rios stated that "[d]efense counsel['s] deception and failure to file the notice of appeal after Rios had asked him to do so amounted to ineffective assistance of counsel under Supreme Court law as well as the law in every other circuit." ECF No. 1, at 26. Mr. Rios also cited court precedent on the issue. And while it is true that Mr. Rios placed his ineffective assistance of counsel claim under the "equitable tolling" heading, that does not excuse the District Court's failure to address the issue, for two reasons.

First, Mr. Rios was proceeding pro-se and thus, the District Court should have liberally construed his motion. "[A] petition filed by a pro-se petitioner should be 'interpreted liberally and ... should be construed to encompass any allegations stating federal relief." Harris v. Wallace, 984 F.3d 641, 647 (8th Cir. 2021)(quoting Jones v. Jerrison, 20 F.3d 849, 853 (8th Cir. 1994)). See also Haines

v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

In Harris, the Eighth Circuit held that the petitioner had sufficiently pleaded his claim because "[w]hile all the supporting facts [were] not written on the habeas form, they [were] stated in the attachment Harris included with his petition. Between the habeas form and the attachment, which comprised a single filing, Harris alleged sufficient facts to apprise the district court and the State of a distinct basis for his claim." Harris, 984 F.3d at 647. See also Jones, 20 F.3d at 853 ("A district court is obligated to analyze all alleged facts to determine whether they state a federal claim.").

Applying Harris to the facts of this case, Mr. Rios filed both a pre-printed motion to vacate sentence form and a memorandum of law in support thereof. In the memorandum, he supplied facts that sufficiently apprised the District Court of his Sixth Amendment claim. Indeed, Mr. Rios specifically stated that his defense attorney's deception and failure to file a notice of appeal "amounted to ineffective assistance of counsel" and cited to legal authority to support his claim. ECF No. 1, at 26. This was more than sufficient under case law precedent. "No statute or rule requires that petition identify a legal theory or include citations to legal authority." Jones, 20 F.3d at 853 (citing Johnson v. Puckett, 929 F.2d 1067, 1070 (5th Cir. 1991)).

Second, this Court as well as numerous courts of appeal have held that an attorney's misrepresentation or misconduct can provide grounds for equitable tolling. See e.g. United States v. Martin, 408 F.3d 1089, 1095 (8th Cir. 2005)(equitable tolling applied when counsel grossly mislead petitioner). See also United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002)(equitable tolling warranted based on attorney deceiving the petitioner into believing that a timely 2255 motion had been filed) and Seitzinger v. Reading Hosp. and Med. Ctr., 165 F.3d 236, 237-238 (3d Cir. 1999)(finding equitable tolling to be appropriate when a diligent client persistently questioned the lawyer as to whether he had filed the complaint in time, and the lawyer affirmatively mis-represented to client that he had done so).

In the seminal case of Holland v. Florida, this Court was called upon to decide whether equitable tolling could be granted to a petitioner based on the misconduct of his court-appointed attorney.

The Defendant, Holland, had been convicted of first-degree murder and sentenced to death in the state of Florida. The Defendant, through court-appointed counsel, filed a direct appeal to the state supreme court, but his conviction and sentence were affirmed. The Defendant then sought collateral relief via the state's post-conviction process. But to no avail. Approximately five weeks after the 1-year statute of limitation

period set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) had expired, the Defendant filed a pro-se habeas corpus petition in federal court.

In his petition, the Defendant asked the federal district court to grant him equitable tolling. As the record indicated in the case, the Defendant had been appointed an attorney by the state court. During the pendency of the state court proceedings, the Defendant had repeatedly sent letters to his attorney asking him to keep him abreast of the state court decisions. He also asked counsel to file a timely federal habeas corpus petition. When the attorney did not research court rules to ascertain the proper filing date, the Defendant did the research himself and made his attorney aware of the required filing date. The attorney, however, failed to notify the Defendant when the state courts had denied his direct appeal and post-conviction petition. He also failed, over many years, to even respond to the Defendant's numerous letters. Based on defense counsel's failure to communicate with him, the Defendant sought to have him removed from his case by making a request to both the state court and the Florida bar. Neither entity granted him the requested relief.

After sending a letter to the court, the Defendant learned that his state conviction had become final and that his attorney had not filed a federal habeas petition in the United States district court within the required time period. That same day, Holland

filed out a pre-printed, pro-se habeas petition and sent it to the federal district court.

Despite the above facts, the federal district court held that the Defendant had not demonstrated the due diligence necessary to warrant equitable tolling. The Defendant filed an appeal to the United States Court of Appeals for the Eleventh Circuit. That court, without addressing the diligence claim, affirmed the lower court's decision, but held that the Defendant failed to demonstrate extra-ordinary circumstances. Specifically, the Eleventh Circuit held that the Defendant had to demonstrate that his attorney's unprofessional conduct was the result of bad faith, dishonesty, divided loyalty, or mental impairment.

On certiorari, this Court noted, first, that the limitation period was not jurisdictional, Day v. McDonough, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006), and was subject to a rebuttable presumption in favor of equitable tolling. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1993). Next, this Court addressed the test employed by the Eleventh Circuit; finding that its per se standard was too rigid. The Court counseled that "[a]lthough equitable tolling is not warranted for a garden variety claim of excusable neglect ... this case presents far more serious instances of attorney misconduct than that." Holland, 560 U.S. at 651-652. In the end, this Court concluded that the district court erroneously held that the Defend-

ant had not demonstrated diligence. It remanded the case to the Eleventh Circuit to re-address the extraordinary circumstances claim under a less rigid standard.

In a similar vein, the Defendant in Martin had been convicted by a jury of conspiracy to distribute methamphetamine. The Defendant, through counsel, filed a direct appeal, in which he alleged, among other things, that trial counsel had provided ineffective assistance of counsel. The Eighth Circuit affirmed his conviction and sentence. Thereafter, the Defendant asked his appellate counsel to file a motion to vacate, set aside, or correct sentence pursuant to section 2255 of Title 28, United States Code. The attorney promised his client that he would file the motion on his behalf. Over the next year, the Defendant contacted the attorney to ascertain the status of the motion. At first, the attorney incorrectly advised him that there was no time limitation for the filing of a section 2255 motion. Later, after the one-year time period had lapsed, the attorney told the Defendant that he had filed the motion, which was a lie. The Defendant's wife had also made numerous attempts to contact the attorney and visited his office on two occasions, but the attorney refused to meet with her.

More than a year and a half after his conviction became final, the Defendant filed a section 2255 motion in the District Court. The District Court denied the motion as untimely, however.

The Defendant appealed the District Court's decision.

On appeal, the Eighth Circuit was asked to decide three questions. The first question was whether the doctrine of equitable tolling applied to federal Defendants filing motions under section 2255. Citing the then recent decision by the Ninth Circuit, the Eighth Circuit held that the "statute of limitations contained in [ ] 2255 is subject to equitable tolling." Martin, 408 F.3d at 1092 (citing United States v. Battles, 362 F.3d 1195 (9th Cir. 2004)). Next, the appeals court determined that "[a] de novo standard of review is appropriate in this case" because the District Court "treated the issue as one of law" and the facts were undisputed. Martin, 408 F.3d at 1093. The final question for the Eighth Circuit was whether the District Court had erred in determining that the Defendant in the case could not benefit from equitable tolling.

In responding to this question, the Eighth Circuit noted that for a claim of equitable tolling, an "[i]neffective assistance of counsel [claim], where it is due to an attorney's negligence or mistake, has not generally been considered an extraordinary circumstance in this regard." Id., at 1092. What is needed to make a valid claim for equitable tolling is gross or egregious misconduct by the attorney, this Court held in Martin. For instance, the attorney in Martin not only misinformed the Defendant about the 1-year limitation period, but he also lied to the Defendant by claiming that he

had filed the motion when he had not do so and refused to return the Defendant's paperwork, which was need in order for him to file his own pro-se motion. As the Eighth Circuit stated:

> This is not a case where a petitioner has himself to blame for an untimely filing, nor are we dealing with attorney negligence, simple error, or even abandonment. [Counsel] misrepresented the law, misrepresented the status of [Defendant's] case, and retained possession of documents that were crucial to [Defendant's] case. [Defendant] reasonably relied on [counsel's] misrepresentation, and demonstrated due diligence in pursuing his [ ] 2255 claim. Thus, he is entitled to equitable tolling.

Id., at 1095.

d. Mr. Rios Did Show That "Extraordinary" Reasons Prevented Him From Filing a Timely Motion.

Generally, Defendants who seek equitable tolling put forth one reason that they claim is extraordinary. In Martin, the Defendant cited gross misconduct by his attorney as the sole reason for his tardiness. This was not the case with Mr. Rios. He established a myriad of reasons, which when combined, demonstrate extraordinary circumstances beyond his control.

First, the basic facts in this case are very similar to those in the Martin case. Mr. Rios asked his attorney to file a notice of appeal and direct appeal on his behalf. The attorney promised that he would do so. Repeatedly, Mr. Rios and other members of his family called the attorney's office and left messages with the attorney's secretary. On at least two occasions, defense counsel responded by email to one of Mr. Rios's sisters inquiry. In those

emails defense counsel claimed that he was working on Mr. Rios's motion. Like the Defendant in Martin, it was not until Mr. Rios's paid for and received his docket sheet that he learned that his attorney had lied to him and had not filed any motion on his behalf.

As noted herein, the District Court did not take this claim into consideration when assessing whether Mr. Rios was entitled to equitable tolling. Rather, the District Court mistakenly held that Mr. "Rios does not bring any grounds for ineffective assistance of counsel related to a failure to file an appeal in his original Motion." ECF No. 10, at 4. As shown herein, that statement is contrary to the record. "Defense counsel['s] deception and failure to file the notice of appeal after Rios had asked him to do so amounted to ineffective assistance of counsel under Supreme Court law as well as the law in every other circuit." ECF No. 1, at 26.

As noted herein, the District Court previously ruled that Mr. Rios had not demonstrated that his attorney had provided ineffective assistance of counsel when defense counsel failed to file a notice of appeal. Thus, a stand alone claim of ineffective assistance of counsel, even one based on defense counsel's gross misconduct may not have carried the day in the District Court; though the Eighth Circuit has ruled that such conduct may entitle a Defendant to equitable tolling. Martin, 408 F.3d at 1093.

Even still, the District Court was obligated to consider the

claim in conjunction with the other reasons that Mr. Rios raised in his 2255 motion, as he was proceeding pro-se. "[A] petition filed by a pro-se petitioner should be construed to encompass any allegations stating federal relief." Harris, 984 F.3d at 647.

Second, in conjunction with the claim of attorney misconduct, Mr. Rios asserted that his five months of travel between prisons before he reached his final destination at FCI Herlong also played a part, in not only his inability to communicate effectively with his attorney, but also denied him critical access to his legal work. ECF No. 1, at 24. In Martin, the Eighth Circuit held that the withholding of the Defendant's legal paperwork was a critical factor in its decision. Martin, 408 F.3d at 1095. In this case, Mr. Rios was no less denied access to his crucial legal work; albeit due to the BOP's travel protocol rather than counsel's misconduct.

Third, the situation with the denial of his property, including his legal work, was compounded by the fact that due to the pandemic, he was denied access to the law library. ECF No. 5, at 3. This may have seemed like a minor point. But how could the District Court have expected Mr. Rios to write it a letter or motion when he could not even get the court's address?

Fourth, and just as critical, Mr. Rios was denied access to the commissary and the ability to purchase paper, pencils, stamps, and envelopes; all the necessary implements needed to effectively communicate with the District Court.

Notably, the District Court did not dispute Mr. Rios's assertions. Instead, it held that "[t]he bases for Rios's claims [limited access to the law library, suspended commissary services, and denial of the ability to purchase stamps and writing paper] were known to him, thus any limitation on usage of the law library is especially unpersuasive." ECF No. 10, at 3.

The District Court used the incorrect standard here. The question is not whether Mr. Rios knew about an impediment but rather, was the impediment beyond his ability to control it. See Holland, 560 U.S. at 649. The fact that Mr. Rios knew he was confined to his cell due to quarantine measures and could not go to the law library to get the court's address or purchase stamps and writing material from the commissary in no way altered the fact that these impediments were beyond his control.

e. Mr. Rios Also Demonstrated His Diligence.

This Court has held that a Defendant need only show "reasonable diligence," not "maximum feasible diligence." Holland, 560 U.S. at 653.

In denying Mr. Rios's motion, the District Court -- without elaboration -- simply stated that "[t]here is no evidence in the record that Rios 'was pursuing his rights diligently ..." ECF No. 10, at 3 (quoting Howard, 2021 WL 409841, at *3). Again, the District Court's finding is contrary to the record.

It is undisputed that when the law library at FCI Herlong

reopened to a limited inmate population, Mr. Rios spoke with the law clerk and asked him to find his case on the LEXIS database. ECF No. 1, at 25. When the law clerk could not find his case on the database and advised him to contact the District Court by letter, Mr. Rios immediately wrote the District Court. Id. at 25-26. The District Court responded to Mr. Rios's request for a case update and a copy of his docket sheet by informing Mr. Rios that he had to pay a copying fee in order to obtain the information. And despite the fact that Mr. Rios did not have a job, he nevertheless paid the required fee. The records indicate that the District Court processed his request on August 2, 2021 and sent Mr. Rios a letter and a copy of his docket sheet (neither of which is recorded on the docket sheet). Mr. Rios received the District Court's letter on August 6, 2021 and filed his notice of appeal on Monday, August 8, 2021 -- the earliest date in which the prison's mail room opened. The District Court received it on August 13, 2021.

The District Court faults Mr. Rios for failing to raise pandemic-related claims in his notice of appeal. ECF No. 10, at 1 f.n. 1. But what the District Court failed to recognize is that when Mr. Rios filed his notice of appeal he had just learned that defense counsel had lied to him about having filed a notice of appeal and appellate brief. Within a day or two (both the law library and mailroom were closed over the weekend), Mr. Rios filed his notice of appeal. In that document he alleged that defense counsel had provided in-

effective assistance of counsel. The filing of that document was akin to him filing a pro-se 2255 motion as he was not required to cite any legal authority or legal theory. See Jones, 20 F.3d at 853. Thus, with regards to diligence, Mr. Rios immediately filed a claim as soon as he became aware of defense counsel's egregious conduct. See Holland, 560 U.S. at 653 (noting that the petitioner had filed his pro-se petition the day that he learned the 1-year limitation period had expired).

However, defense counsel's misconduct in the case at bar is even more egregious than in both Holland and Martin. In both Holland and Martin, defense counsels had filed direct appeals and thus, the Defendant in each case had been given a shot at appellate review. It was not until each Defendant attempted habeas review under sections 2254 (Holland) and 2255 (Martin) that the attorney's misconduct stymied them; a point in the proceeding in which neither Defendant was entitled to counsel under the Sixth Amendment. See Pa. v. Finley, 481 U.S. 551, 555-56, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(petitioners do not have a right to counsel in habeas proceedings); see also Cox v. Burger, 398 F.3d 1025, 1030 (8th Cir. 2005) (same).

In contrast, defense counsel's misconduct in the instant case had a cascading effect, which ultimately denied Mr. Rios both direct review (in which he was entitled to counsel under the Sixth Amendment) and review under section 2255. Because of the cascading

effect, it was an error by the District Court to fail to consider this cascading effect when determining Mr. Rios's diligence, as well as failing to combine it with Mr. Rios's other claims of diligence. As noted in his original motion, Mr. Rios asked defense counsel to file a notice of appeal and a direct appeal. ECF No. 1, at 23. "Defense counsel also told Rios that the appellate process normally took between eighteen months and two years to complete." Id. Mr. Rios relied on these representations by counsel -- that he would filed a direct appeal and that it would take roughly two years to complete. Mr. Rios had no reason to doubt the validity of those statements. But Mr. Rios did not just sit back and await the outcome of the proceeding. According to Mr. Rios, even with the pandemic restrictions at the county jail in Washington, he made "phone calls to his attorney's office concerning the progress of his appeal." Id., at 23-24. As well as having family members call his attorney's office. Id., at 24. The end result of this attempted communication was that "[m]ore than once, shortly after a family member called defense counsel's office, the attorney would send an email to one of Rios' sisters indicating that he was okay and was busy working on Rios' case." Id. And even when Mr. Rios endured the five month trek from prison-to-prison before reaching his final destination at FCI Herlong (and an immediate 30-day quarantine upon arrival), Mr. Rios "would try to contact his attorney to learn the status of his case." Id. Upon his arrival at FCI Herlong, Mr. Rios did not abandon

his case. Because he could not go to the law library, he asked a law clerk to find his case on the LEXIS database. Id., at 25-26; ECF No. 5, at 3. When that proved impossible, he wrote letters to the District Court (which were not recorded on his docket sheet) and paid the required court fees to obtain his docket sheet. Upon learning of his attorney's misconduct, Mr. Rios immediately filed a notice of appeal, which also contained a Sixth Amendment claim of ineffective assistance of counsel. Case No. 4:18-cr-00203-SMR, ECF No. 187. These facts demonstrate that Mr. Rios was more than "reasonable diligen[t]" in pursuing his appeal. Holland, 560 U.S. at 653.

CONCLUSION

Mr. Rios respectfully requests that this Honorable Court reverse the District Court's decision and remand his case with instruction that the District Court address the meritorious claims raised within the motion to vacate, set aside, or correct sentence.

Respectfully submitted,

Fidel Rios, Jr.