**No. _____**

IN THE

# Supreme Court of the United States

ANTHONY FLOYD WAINWRIGHT,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

## PETITION FOR A WRIT OF CERTIORARI

***CAPITAL CASE***

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**CAPITAL CASE**

## QUESTIONS PRESENTED

Petitioner's 28 U.S.C. § 2254 petition was dismissed due to his attorney's "beyond troubling" failure to timely file. Although Petitioner moved—pro se—for the appointment of alternative federal counsel in 2007, this request was not honored until 2018. Upon the appointment of new counsel, Petitioner filed a Rule 60(b) motion to reopen his habeas judgment so that he could present evidence that his former attorney's misconduct justified equitable tolling.

The Eleventh Circuit affirmed the district court's denial of Rule 60(b) relief. These decisions rested solely on a finding that habeas counsel's failure to timely file was merely negligent, and thus Petitioner's underlying equitable tolling claim lacked merit. Likewise, that finding relied solely on self-serving statements prior counsel made to Petitioner and the federal courts during litigation regarding the petition's timeliness.

The questions presented are:

1. In determining whether a hearing related to equitable tolling is warranted, do the unsworn representations of an attorney—while that attorney is operating under a conflict of interest—conclusively rebut a petitioner's allegation that those same representations were dishonest?

2. Is an evidentiary hearing related to equitable tolling appropriate when a habeas petitioner has made a showing that the petition's untimeliness is attributable to his attorney's false representations, lack of communication, and failure to follow the petitioner's explicit directives?

## PARTIES TO THE PROCEEDINGS

Petitioner Anthony Floyd Wainwright, a death-sentenced Florida prisoner, was the appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent, the Secretary of the Florida Department of Corrections, was the appellee in that court.

## DIRECTLY RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Criminal Trial:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 1994 CF 150
Judgment Entered: June 12, 1995

Direct Appeal:
Florida Supreme Court (No. 86022)
*Anthony Floyd Wainwright v. State of Florida*, 704 So. 2d 511 (Fla. 1997)
Judgment Entered: November 13, 1997 (affirming)
Rehearing Denied: January 16, 1998

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 97-8324)
*Anthony Floyd Wainwright v. State of Florida*, 118 S. Ct. 1814 (1998)
Judgment Entered: May 18, 1998

Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: April 12, 2002 (denying motion for postconviction relief)

Florida Supreme Court (Nos. SC02-1342; SC02-2021)
*Anthony Floyd Wainwright v. State of Florida*, 896 So. 2d 695 (Fla. 2004)
Judgment Entered: November 24, 2004 (affirming denial of postconviction relief and denying state habeas corpus relief)
Rehearing Denied: March 1, 2005

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 05-5025)
*Anthony Floyd Wainwright v. State of Florida*, 126 S. Ct. 188 (2005)
Judgment Entered: October 3, 2005

Federal Habeas Proceedings:
District Court for the Middle District of Florida
*Wainwright v. Sec'y, Fla. Dep't of Corrs.*, Case No. 3:05-cv-276-TJC
Judgment Entered: March 10, 2006 (dismissing habeas petition as untimely)
Reconsideration Denied: May 12, 2006

Eleventh Circuit Court of Appeals (No. 06-13453)
*Wainwright v. Sec'y, Fla. Dep't of Corrs.*, 537 F.3d 1282 (11th Cir. 2007)

Judgment Entered: November 13, 2007 (affirming habeas dismissal)
Rehearing Denied: December 26, 2007

First Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: September 20, 2007 (summarily denying)

Florida Supreme Court (No. SC07-2005)
*Anthony Floyd Wainwright v. State of Florida*, 2 So. 3d 948 (Fla. 2008)
Judgment Entered: November 26, 2008 (affirming)
Rehearing Denied: February 6, 2009

Second Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: June 15, 2009 (dismissing)

Florida Supreme Court (No. SC09-1411)
*Anthony Floyd Wainwright v. State of Florida*, 43 So. 3d 45 (Fla. 2010)
Judgment Entered: May 6, 2010 (affirming)
Rehearing Denied: August 3, 2010

Third (Amended) Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: June 15, 2012 (denying)

Florida Supreme Court (No. SC11-1669)
*Anthony Floyd Wainwright v. State of Florida*, 77 So. 3d 648 (Fla. 2011)
Judgment Entered: December 2, 2011 (affirming)

Fourth Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: June 15, 2012 (denying)

Florida Supreme Court (No. SC11-1669)
*Anthony Floyd Wainwright v. State of Florida*, 77 So. 3d 648 (Fla. 2011)
Judgment Entered: December 2, 2011 (affirming)

Fifth Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2

Judgment Entered: February 6, 2014 (denying)
Judgment Amended: April 24, 2014

Sixth Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgments Entered: June 2, 2015 and September 22, 2015 (denying)

Florida Supreme Court (No. SC15-2280)
*Anthony Floyd Wainwright v. State of Florida*, 2017 WL 394509 (Fla. Jan. 30, 2017)
Judgment Entered: January 30, 2017

Seventh Successive Postconviction Proceedings:
Circuit Court of Hamilton County, Florida
*State of Florida v. Anthony Floyd Wainwright*, Case No. 94-150-CF-2
Judgment Entered: July 15, 2022 (denying)
Rehearing Denied: August 4, 2022

Florida Supreme Court (No. SC22-1187)
*Anthony Floyd Wainwright v. State of Florida*, 2022 WL 4282149
Judgment Entered: September 16, 2022 (striking)
Rehearing Denied: January 12, 2023

Related Proceedings Under FRCP 60(b):
District Court for the Northern District of Florida
*Wainwright v. Sec'y, Fla. Dep't of Corrs.*, Case No. 3:05-cv-276-J-TJC
Judgment Entered: January 27, 2020 (denying relief from judgment in part and dismissing in part as unauthorized successive petition)
Reconsideration Denied: August 24, 2020

Eleventh Circuit Court of Appeals
*Wainwright v. Sec'y, Fla. Dep't of Corrs.* (No. 20-13639)
Judgment Entered: July 18, 2023 (affirming)
Rehearing Denied: October 13, 2023

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**Cases**

## DECISION BELOW

The Eleventh Circuit's opinion is reported at 2023 WL 4582786. It is also reprinted in the Appendix (App.) at 4a-22a.

## JURISDICTION

On July 18, 2023, the Eleventh Circuit affirmed the Middle District of Florida's denial of Mr. Wainwright's FRCP 60(b) motion for relief from the judgment related to his 28 U.S.C. § 2254 proceedings. App. 4a-22a.[1] Rehearing was denied on October 13, 2023. App. 1a-3a. On December 27, 2023, Justice Thomas granted an extension of time to file a petition for certiorari to and including February 10, 2024. App. 68a-69a. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

Federal Rule of Civil Procedure 60(b) provides, in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for…any other reason that justifies relief.

[1] The equitable tolling issue underlying this petition was unambiguously accepted by the lower courts as properly raised via Rule 60(b) and decided on the merits. Although a discrete section of Mr. Wainwright's district court filing was dismissed as an unauthorized successive habeas petition, that section is wholly unrelated to the issues before this Court and will not be referenced herein.

Rule 12 of the Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts provides, in relevant part:

> The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

## STATEMENT OF THE CASE

### A. State-Court Proceedings Trigger and Toll the § 2244(d) Clock

In 1995, Mr. Wainwright was convicted of murder and related charges after he and co-defendant Richard Hamilton were tried jointly before separate juries in a Florida court. R. 3651-53.[2] Mr. Wainwright was sentenced to death. R. 3738-39, 3790. The Florida Supreme Court affirmed on direct appeal, *Wainwright v. State*, 704 So. 2d 511 (Fla. 1997). Upon this Court's subsequent denial of certiorari review, *Wainwright v. Florida*, 523 U.S. 1127 (1998), the one-year statute of limitations to file a federal habeas petition commenced. *See* 28 U.S.C. § 2244(d)(1).

Mr. Wainwright properly filed a state-court postconviction motion, which tolled the federal habeas statute of limitations. *See Wainwright v. Sec'y, Fla. Dep't of Corrs.*, 537 F.3d 1282, 1283 (11th Cir. 2007) (noting that six days remained on Mr. Wainwright's federal clock). The Florida Supreme Court affirmed the trial court's

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[2] Citations to appendix materials submitted with this petition are designated as "App. __". References to non-appendix material from the record below are as follows: References to the record of Mr. Wainwright's direct appeal (which includes the trial transcript) are designated as "R. __". References to the record of Mr. Wainwright's respective postconviction proceedings are designated as "PCR1. __"; "PCR2. __"; etc. References to documents contained in Mr. Wainwright's federal district court docket are designated as "NDFL-ECF __". References to documents contained in Mr. Wainwright's Eleventh Circuit docket related to his Rule 60(b) motion are designated as "CA11-ECF __".

denial of postconviction relief. *Wainwright v. State*, 896 So. 2d 695 (Fla. 2004), *reh'g denied* (Mar. 1, 2005), *cert. denied*, 546 U.S. 878 (2005). When the state mandate issued on March 17, 2005, the 28 U.S.C. § 2244(d)(1) statute of limitations again began to run. This set Mr. Wainwright's federal habeas deadline as March 23, 2005. *See Wainwright*, 537 F.3d at 1284.

**B. Hobson Assumes Representation in State and Federal Court**

In October 2003, while his postconviction appeal was pending in the Florida Supreme Court, Mr. Wainwright retained attorney Joseph Hobson for the express purpose of representing him in federal court. Mr. Hobson's fee, approximately $25,000, was paid by Mr. Wainwright's fiancée and a Christian nonprofit organization. Hobson took Mr. Wainwright's case despite having no known federal habeas experience, and less than two years of any kind of capital experience. Hobson had worked at Florida's Capital Collateral Regional Counsel-Middle Region ("CCRC-M") from August 1999 through May 2001, during which he noticed only one appearance in federal court—in a case which was inactive pending exhaustion of state remedies. *See Grossman v. Moore*, No. 8:98-cv-01929-EAK (M.D. Fla.).

Despite having been paid nearly $25,000 through a charity collection for the indigent Mr. Wainwright, *see* NDFL-ECF at App. 275-76 (Declaration of Annarita Magri), Hobson filed an untimely federal habeas corpus petition on March 29, 2005—six days after the statute of limitations under AEDPA had run out, and over

seventeen months after Mr. Wainwright had retained Hobson.[3] The district court dismissed Mr. Wainwright's petition as untimely on March 10, 2006. *Wainwright v. McDonough*, No. 3:05-cv-276-J-25, 2006 WL 8449862 (M.D. Fla. Mar. 10, 2006).

In the months and years before his March 2005 federal habeas deadline, Mr. Wainwright consistently had been concerned about his federal habeas proceedings. In April 2002, Mr. Wainwright wrote to his state postconviction attorney, instructing him to federalize and exhaust Mr. Wainwright's claims in state court. *See* NDFL-ECF 52 at App. 35. Similarly, after retaining Hobson, Mr. Wainwright wrote to him multiple times about the preparation of his federal petition. *Id*. at App. 37-40, 41, 42-43, 44, 46-47, 48-50. From the first letter that Mr. Wainwright sent to Hobson in 2003, he told Hobson that he wanted Hobson's representation specifically for his federal appeals. *Id.* at App. 37. He also wrote Hobson repeatedly toward the end of 2004 about the preparation of his federal habeas petition and specific issues surrounding AEDPA's application in his case. *See, e.g.*, *id.* at App. 46 (Letter from

[3] The exact circumstances under which Hobson was chosen to be Mr. Wainwright's federal lawyer are unclear, including what exactly Hobson represented to Mr. Wainwright about his experience, abilities, and compensation needs, as there was no written arrangement. This kind of retained arrangement, however, was part of a pattern for Hobson. Within a year of missing Mr. Wainwright's habeas deadline, Hobson sold his services to yet another death-sentenced individual for a $25,000 upfront fee without a written contract. *See LaMarca v. Secretary*, No. 8:06-cv-01158, ECF No. 63 (M.D. Fla., Oct. 4, 2007) (*ex parte* hearing, with transcript reproduced as Supplemental Appendix (Supp.App.) at 2-63). In *LaMarca*, the district court ordered LaMarca to show cause as to the untimeliness of his federal habeas petition, *see id.* ECF No. 19, and Hobson conceded that the petition was untimely, *see id.* ECF No. 22. However, the district court later reversed itself *sua sponte* and—despite pointing out that Hobson conceded untimeliness—found that an exhibit attached to the State's memorandum showed the petition was in fact timely. *See id.* ECF No. 29.

October 14, 2004); *id.* at App. 48 (Letter from November 12, 2004). In his November 12, 2004, letter to Hobson, Mr. Wainwright even apologized, writing, "I hope my numerous letters to you recently aren't bothering you." *Id.* at App. 48.

Hobson twice responded to Mr. Wainwright's letters, assuring him that the next step was preparing his federal petition, and discussing payment for his representation. *Id.* at App. 51-52, 53-56. In one such response, Hobson stated in a letter on December 17, 2004—over one year after his engagement and despite the fact that a ruling from the Florida Supreme Court was imminent—that "I am eagerly *looking forward* to the preparation of your Federal Habeas Corpus petition." *Id.* at App. 53 (emphasis added).

### C. Hobson Blows the Federal Deadline and Develops a Conflict of Interest

On March 11, 2005, Hobson wrote Mr. Wainwright saying that Hobson had received the denial of the Motion for Rehearing from the Florida Supreme Court. *Id.* at App. 57. Seemingly unaware that the state's mandate—and thus the remaining six days for submitting Mr. Wainwright's federal habeas petition—were imminent, Hobson wrote:

> I *will then begin* immediately a Petition for a Writ of Certiorari the United States Supreme Court as well as on the Federal Habeas Corpus Petition. I will be up to visit you soon. There are many issue which we need to discuss which will be presented in your prepare [sic] for federal release.

*Id.* (emphasis added).

The petition Hobson filed on March 29, 2005—six days after the statute of limitations had expired—was riddled with factual, typographical, and legal errors.[4] Hobson had refused to give Mr. Wainwright a copy of his federal habeas petition before it was filed and, even after it was filed, failed to give him a copy for over two months. *See id.* at App. 61 (Mr. Wainwright's May 31, 2005, letter: "All I wanted was a copy of my federal habeas corpus . . . I should have received a copy of it before it was even filed."). Apart from citations to Mr. Wainwright's own case, the entire petition cited only four other cases. *See* NDFL-ECF 1 at 63-64, 66. Most claims within the petition did not even refer to the state court's underlying judgment. Eventually, on May 23, 2005, Hobson filed an amended petition, entitled "Corrected Petition," which attempted to fix the numerous spelling and grammar errors in the initial petition. NDFL-ECF 6.

The State moved for summary judgment, arguing that Mr. Wainwright's petition was untimely under AEDPA. Hobson wrote to Mr. Wainwright and

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[4] *See, e.g.*, NDFL-ECF 1 at 14 (identifying Mr. Wainwright's first attorney as "Vincent" Africano, rather than Victor Africano); *id.* at 26 (claim four: "The failure of petioner's counsel to move for a mistrial as well aas preserve for appeal the issue of a secret microhone being discovered in petitioner's jail cell in the course of the trial"); *id.* at 28 (identifying State Attorney Bob Dekle, who prosecuted Mr. Wainwright, as a jailer); *id.* at 35 (sentence reading, in part: "Petitioner had requested trial counsel to make arrangements to see a physiatrist same was not done."); *id.* at 39 (claiming "Petitioner was a 19 year old male at the time of the killings" even though Mr. Wainwright was 23 years old at the time of the murder, and there were not multiple "killings"); *id.* at 50 ("str4ike"); *id.* at 50 ("Petitioner's layer argued . . ."); *id.* at 66 (claim 11: "Petitonr's rights under the Sixth Eight and Fourteenth amendmentsfifth and Foruteenth amendmenets to the Untied Ststes Constituion were violated by the trial court in allowing petition to be tried jointly with is co defendant before separate juries.").

misrepresented to him that the State's assertions were legally incorrect, because "[t]he year period from the denial of cert by the Florida Supreme Court is tolled by the filing for public records requests." NDFL-ECF 52 at App. 60.

On June 9, 2005, the district court ordered Hobson to respond within thirty days to the State's Motion for Summary Judgment. NDFL-ECF 11. On July 11—more than thirty days later—Hobson filed a response suggesting that the public records requests, which Mr. Wainwright had submitted before filing his state postconviction motion, had tolled the federal deadline. NDFL-ECF 12 at 3. In the alternative, Hobson argued that the State's timeliness arguments were premature and seemed to suggest that equitable tolling could be warranted, stating: "[T]his Honorable Court can be more properly briefed and apprised as to facts upon which to make its ruling as regards the timeliness of the petition and as regards the inequitable factors that may have—if the court finds such to be the case—prevented a timely filing." NDFL-ECF 12 at 5. With his response, Hobson also filed a copy of his CM/ECF registration, including his username and password. NDFL-ECF 12 at 7. Without leave of the court, Hobson later filed a "Second Amended Motion to Strike and to Toll the Time to Substantively Answer Respondent's Motion for Summary Judgement," NDFL-ECF 14, which was substantively the same as the prior filing.

After the district court denied the State's first Motion for Summary Judgment in light of Hobson's "Corrected Petition," NDFL-ECF 15, the State renewed its Motion for Summary Judgment the following day, again arguing untimeliness, NDFL-ECF 16. Hobson filed another motion to strike the State's motion, which was substantively

the same as his prior responses. NDFL-ECF 17; 18; 19. On October 26, the court denied as untimely Hobson's motions to strike the State's Renewed Motion for Summary Judgment and "granted [Petitioner] another opportunity to substantively respond to the Renewed Motion for Summary Judgment." NDFL-ECF 22.

On November 29, 2005, Hobson responded to the State's renewed motion for summary judgment. NDFL-ECF 24. In this response, Hobson argued for the first time that equitable tolling applied to Mr. Wainwright's untimely filing. Specifically, Hobson wrote that he had changed law firms in January 2005 and that, although he changed his address with the Florida Bar, the Florida Supreme Court mailed its March 2, 2005,[5] order denying Mr. Wainwright's Motion for Rehearing regarding the denial of his initial state postconviction appeal to Hobson's prior address. *See id.* at 4.

Critically, Hobson did not mention *when* he received the Florida Supreme Court's denial or the mandate (which was the operative date), claiming only he was "not properly notified of nor provided with the operative rulings from the Florida Supreme Court that triggered the deadline." NDFL-ECF 24 at 7. However, on March 11—twelve days before Mr. Wainwright's federal habeas deadline—Hobson had mailed Mr. Wainwright a copy of the denial, which suggested a mandate was imminent. *See* NDFL-ECF 29 at 7-8.

[5] Although Hobson wrote in this filing that the Florida Supreme Court's rehearing denial issued on March 2, 2005, it actually issued on March 1, 2005.

Hobson also argued that statutory tolling applied because of public records requests filed in state postconviction. NDFL-ECF 24 at 8. Hobson argued that this constituted extraordinary circumstances warranting equitable tolling, writing: "To procedurally dismiss a crucial pleading in a case with literally mortal consequences because a pleading is, arguably, a scant eight days late is harsh and unnecessary." NDFL-ECF 24 at 5.

On March 10, 2006, the district court granted the State's Motion for Summary Judgment, finding Mr. Wainwright's petition was untimely filed and dismissing it with prejudice. NDFL-ECF 29. On March 20, Hobson moved for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), restating the same grounds for tolling that he had previously raised. NDFL-ECF 31. Much of the motion was identical to his prior responses, including the erroneous prior calculation of the federal deadline as March 21, 2005, rather than the court's ruling that it was March 23, 2005. *See* NDFL-ECF 31 at 7. The court denied the Rule 59(e) motion on May 12, 2006. NDFL-ECF 34.

The Eleventh Circuit granted a Certificate of Appealability ("COA") to consider four issues, including equitable tolling and timeliness. NDFL-ECF 38. On appeal, Hobson argued, inter alia, that Mr. Wainwright was entitled to equitable tolling for the six-day tardiness in March 2005. Hobson also argued for the first time that there was a circuit split over whether a petition for certiorari review in the United States Supreme Court following the denial of initial state postconviction tolled the time to file a habeas petition, and this split caused "confusion" that entitled Mr. Wainwright

to equitable tolling. Additionally, Hobson reiterated his prior arguments that equitable tolling should apply because he did not receive the denial of the rehearing motion due to his change in address and because this Court's denial of Mr. Wainwright's petition for certiorari review was not recorded by the Florida Supreme Court until May 26, 1998.

In affirming the district court, the Eleventh Circuit held that Mr. Wainwright was not entitled to equitable tolling because he had failed to preserve the arguments he raised for the first time on appeal, and because his arguments for tolling were "without merit." *See Wainwright v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1282, 1285–86 (11th Cir. 2007).

Although Hobson remained Mr. Wainwright's federal counsel until 2018, he never sought certiorari review of the Eleventh Circuit's decision, nor filed any federal post-judgment motions in light of the certiorari grant in *Holland v. Florida*, 539 F.3d 1334, 1336 (11th Cir. 2008), *cert. granted*, 558 U.S. 945. And, despite having advanced numerous—often legally unsupported—theories before the district court and Eleventh Circuit as to why equitable tolling was warranted, Hobson never argued that his own conduct might serve as a basis for equitable tolling.

In March 2009, Mr. Wainwright filed a pro se application to file a successive federal habeas petition pursuant to § 2244(b)(2) in the Eleventh Circuit. The application raised newly discovered evidence of innocence, and other claims relating primarily to the ineffective assistance of his trial counsel. The Eleventh Circuit denied the application on May 7, 2009.

Mr. Wainwright repeatedly attempted to remove Hobson as his counsel, including by filing complaints with the Florida Bar as early as January 2008. NDFL-ECF 52 at App. 73-88, 109-16, 117-18, 120, 137-41. But for many years, Mr. Wainwright was unsuccessful. Hobson successfully sought appointment as Mr. Wainwright's state registry counsel in September 2008. *Id.* at App. 98. The trial court denied multiple requests by Mr. Wainwright to replace Hobson. *See id.* at App. 101-02, 106-08.[6] Although Hobson eventually withdrew as state-court counsel in October 2013, *id.* at App. 13, he remained federal counsel until 2018.

### D. Mr. Wainwright's Rule 60(b) Proceedings

On June 22, 2018, the district court appointed the Capital Habeas Unit of the Federal Public Defender for the Northern District of Florida ("CHU-N") to replace Hobson as federal counsel. NDFL-ECF 47. Now represented by conflict-free counsel, Mr. Wainwright moved via Federal Rule of Civil Procedure 60(b) to reopen the

[6] Hobson did apparently assist Mr. Wainwright in *filing* one successive state postconviction motion based on newly discovered evidence of a signed statement from Mr. Wainwright's co-defendant claiming that Mr. Wainwright did not participate in the sexual assault of the victim in their case. *See Wainwright v. State*, 2 So. 3d 948 (Fla. 2008). It is doubtful, however, that Hobson did anything more than sign his name and file the motion. Mr. Wainwright wrote a complaint to the Florida Bar in January 2008, and attached a sworn statement from another inmate, indicating that Mr. Hobson took a motion prepared by that inmate, deleted the words "pro se" from the title, and filed it. NDFL-ECF 52 at App. 86-87. While Hobson remained on Mr. Wainwright's case in name, Mr. Wainwright himself attempted to raise and exhaust many claims in successive filings in state court. *See, e.g.*, *Wainwright v. State*, 43 So. 3d 45 (Fla. 2010) (table); *Wainwright v. State*, 77 So. 3d 648 (Fla. 2011); *Wainwright v. State*, FSC No. SC15-2280 (Fla. Jan. 30, 2017). Mr. Wainwright's pro se filings were stricken by the trial court because he was represented by Hobson. Even after his conduct in Mr. Wainwright's case, Hobson continued to advertise that he had "significant experience in . . . death penalty cases." NDFL-ECF 52 at App. 71.

judgment dismissing his habeas petition as untimely. NDFL-ECF 52. He argued that the extraordinary circumstance of Hobson's conflict of interest constituted a defect in the earlier habeas proceedings, and he should be allowed to present evidence in support of equitable tolling. *Id.* at 69-73.

In support, Mr. Wainwright pleaded numerous factual allegations of Hobson's misconduct leading to the untimely habeas filing. These allegations were non-conclusory, often corroborated by other sources, and—if true—would warrant equitable tolling. Specifically, Mr. Wainwright's allegations included that:

- Prior to Mr. Wainwright's federal habeas deadline on March 23, 2005, Hobson repeatedly lied about the status of his preparation of Mr. Wainwright's petition, which led Mr. Wainwright to believe Hobson was actively conducting work related to the federal petition when in reality he was not doing so;

- Hobson had a pattern of inflating his capital habeas expertise in order to obtain large private retainer fees from individuals on death row, and this exaggeration of credentials led Mr. Wainwright—with financial assistance from a Christian nonprofit organization—to hire Hobson as his federal attorney;

- Hobson had a pattern of entering into capital habeas representation despite knowing that he lacked the relevant competence—including that he did not know how federal habeas deadlines worked—and failing to take steps to obtain the relevant competence;

- Hobson had a pattern of fiduciary irregularities, including accepting large payments in exchange for representing death-sentenced prisoners, inadequately accounting for the money's use, then withdrawing from the case without having fulfilled his representational obligations;

- After Hobson received money from the Christian nonprofit financing his services on Mr. Wainwright's behalf, he became increasingly uncommunicative and did not respond to numerous attempts made by Mr. Wainwright and his loved ones to facilitate the preparation of his federal petition;

- Hobson blatantly ignored Mr. Wainwright's express directive to research the Antiterrorism and Effective Death Penalty Act and its application to federal litigation of Mr. Wainwright's case; and

- Hobson's pattern of dishonest behavior included the perpetration of a fraud on the court when he falsely claimed that despite his "diligent effort, he was not properly notified of nor provided with the operative rulings from the Florida Supreme Court that triggered [Mr. Wainwright's] deadline".

*See* NDFL-ECF 52 (including appendix). Mr. Wainwright reiterated that a) Hobson had a conflict of self-interest against advancing his own misconduct when pursuing equitable tolling in 2005 and 2006, and b) Hobson's statements—which occurred during his ongoing conflict of interest and indeed reflected that very conflict—could not properly be used to refute Mr. Wainwright's allegations. For these reasons, Mr. Wainwright asserted that an evidentiary hearing was necessary before the court could resolve the genuine dispute of material fact of the degree of Hobson's misconduct.

Despite finding the equitable tolling claim properly raised via Rule 60(b), App. at 53a-55a, the district court denied relief on a singular ground: that the underlying equitable tolling claim lacked merit because Hobson's conduct amounted to nothing more than "gross negligence". App. at 60a. The court attributed Hobson's untimely filing to a sincere misunderstanding of the federal statute of limitations and ruled that an evidentiary hearing was unnecessary because Mr. Wainwright's allegations of dishonesty and misconduct were refuted by the record. App. at 57a-62a.

The district court enumerated the record-based evidence upon which it had based its findings, namely:

- A response Hobson filed opposing Respondent's motion for summary judgment due to untimeliness, in which Hobson argued the petition was timely because

(1) the statute of limitations was tolled by the filing of public records requests; and (2) the one-year statute of limitations did not begin until the certiorari denial following direct appeal was docketed in the Florida Supreme Court (App. at 57a-58a);

- A letter Hobson sent to Mr. Wainwright in the wake of Respondents' motion for summary judgment, in which Hobson represented that the petition was timely for the same reasons he argued in his response to summary judgment (App. at 58a);

- A letter Hobson wrote to Mr. Wainwright indicating that he was "eagerly looking forward" to preparing the federal habeas petition (App. at 62a);

- A personal agenda entry dated one week before the federal petition was due, in which Hobson wrote "look at deadlines" and conduct "2 hours of Box review" related to Mr. Wainwright's case—although the district court noted that it was "unclear to what extent [Hobson] completed this agenda item" (App. at 62a);

- The fact that Mr. Hobson did file an untimely 73-page habeas petition (App. at 61a).

The district court reasoned that—because the inaccurate legal representations Hobson made in his letter to Mr. Wainwright were synonymous with those he made to the court—even if those representations were unreasonable, Hobson must have "genuinely" believed in their truth. App. at 57a-60a. It reasoned that because Hobson made a cursory to-do notation in a personal agenda one week before the petition's due date, his efforts on Mr. Wainwright's behalf must have been sincere. App. at 62a. It reasoned that because a petition was ultimately filed, Hobson's promises to work on Mr. Wainwright's petition couldn't have been dishonest. App. at 61a. It assumed Hobson's conduct to be grossly negligent, but reiterated controlling circuit precedent that gross negligence is insufficient on its own to warrant equitable tolling. App. at 56a, 60a (citing *Thomas v. Att'y Gen. of Fla.*, 795 F.3d 1286, 1291 (11th Cir. 2015); and *Cadet v. Fla. Dep't of Corrs.*, 853 F.3d 1216, 1228 (11th Cir. 2017)).

The district court declined to issue a certificate of appealability and denied Mr. Wainwright's Rule 59(e) motion to alter or amend the judgment. App. at 23a-35a, 39a-40a. The Eleventh Circuit granted a certificate of appealability and ordered briefing as to, inter alia, whether Mr. Wainwright should be entitled to equitable tolling.

**E. The Eleventh Circuit's Decision**

Mr. Wainwright argued that the district court erred in summarily denying the Rule 60(b)(6) motion because he had plausibly alleged attorney misconduct that transcended negligence, creating grounds for equitable tolling.

The Eleventh Circuit affirmed the district court's denial. *See Wainwright v. Sec'y, Fla. Dep't of Corrs.*, 2023 WL 4582786, (11th Cir. July 18, 2023). The court accepted the propriety of Rule 60(b) as a vehicle for the equitable tolling claim and did not dispute Mr. Wainwright's diligence at any stage of the litigations. App. at 5a-9a. However, the court concluded that none of the facts underlying the district court's finding of negligence were clearly erroneous. App. at 12a. Specifically, the Eleventh Circuit found that 1) the district court had not clearly erred by concluding that Hobson missed the March 2005 deadline because he misunderstood how AEDPA's statute of limitations functioned; 2) Hobson had not lied to Mr. Wainwright regarding his work preparing the petition; 3) there was no "causal link" between Hobson's apparent deceit regarding his federal habeas experience and the subsequent untimely filing of the habeas corpus petition. *Id.* Finally, the court held that the district court had not abused its discretion when denying an evidentiary hearing because, in the

Eleventh Circuit's view, the record refuted "most" of Mr. Wainwright's factual allegations about Hobson. *Id.*

Following the Eleventh Circuit's affirmance, Mr. Wainwright moved for en banc or panel rehearing. CA11-ECF 70. Mr. Wainwright argued that the court misapplied clear error review given the undeveloped record in his case. To conclude that Hobson had not been lying, the district court had relied on Hobson's own communications to Mr. Wainwright and Hobson's arguments before the courts—statements made in 2005 reflecting the very conflict of interest that should have precluded Hobson from litigating the equitable tolling issue; statements which thus should not have been credited as fact. Mr. Wainwright argued that the clear error standard was designed to apply in situations where the lower court facilitated factual development, such as at an evidentiary hearing. Because the district court never held an evidentiary hearing on the equitable-tolling issue, the district court never had the chance to evaluate Hobson as a fact witness. Such an opportunity is critical to a court's ability to make credibility determinations.

The Eleventh Circuit summarily denied the motion for rehearing. Mr. Wainwright now seeks certiorari, asserting that the district court abused its discretion by denying the Rule 60(b) motion without an evidentiary hearing. Without this Court's intervention, Mr. Wainwright will be deprived of his "one fair opportunity to seek federal habeas relief" from his convictions and death sentence. *See Banister v. Davis*, 140 S. Ct. 1698, 1702 (2020).

## REASONS FOR GRANTING THE WRIT

### I. The Court Should Grant Certiorari to Review the Eleventh Circuit's Ruling That the Denial of an Evidentiary Hearing Was Not an Abuse of Discretion

Mr. Wainwright presented the lower courts with myriad specific factual allegations demonstrating that the untimeliness of his federal habeas petition was attributable to his attorney's pattern of misconduct and dishonesty. This proffer not only includes Mr. Wainwright's personal communications with Hobson, but also statements from members of a Catholic charity that paid approximately $20,000 to attorney Hobson, documents from the Florida Bar Association that disciplined Hobson for unethical behavior, and judicial findings regarding Hobson's untrustworthiness in another capital case.

No court below disputes that because Hobson blew the federal deadline, he had a conflict of interest related to equitable tolling. This means that from the moment the petition's timeliness was placed at issue in 2005 until Hobson withdrew as Mr. Wainwright's federal attorney in 2018, every representation Hobson made about timeliness or his own conduct in preparing the petition was tainted by a conflict of interest. This includes every verbal or written communication Hobson had with Mr. Wainwright and every argument Hobson presented to the courts. **In other words, the entire portion of the record upon which the lower courts relied to deny Mr. Wainwright's request for an evidentiary hearing is the product of Hobson's actual conflict of interest**.

In making impermissible credibility findings based on Hobson's nontestimonial, conflicted representation, the lower courts not only failed to remedy the harm of Hobson's conflict of interest, but also weaponized that conflict against Mr. Wainwright. This Court need not decide whether Mr. Wainwright is ultimately entitled to equitable tolling, but should intervene and determine whether the byproducts of an attorney's conflict of interest may be used to deny his client any meaningful opportunity to be heard. In Mr. Wainwright's case, that denial equates to a wholesale denial of federal constitutional review. *See Banister*, 140 S. Ct. at 1702.

### A. The record is not sufficient to support the factual findings underlying the lower courts' rulings

A federal court commits "clear error" when the record before it lacks substantial evidence to support its factual determinations. *San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011). The lower courts improperly applied basic standards of review in light of the factual allegations in Mr. Wainwright's pleadings and the information (or lack thereof) contained in the existing record. Although "clear error" review is highly deferential when it occurs in the context of a developed record, that deference is based on the assumption that there is a developed factual record to defer to, such as when a district court conducts factfinding *after* formal evidentiary development. *See, e.g.*, *Thomas v. Att'y Gen. of Fla.*, 992 F.3d 1162, 1167, 1176, 1179 (11th Cir. 2021) (applying clear error review and affirming grant of equitable tolling after remanding for additional factfinding, which included a deposition of counsel regarding her conduct). In Mr. Wainwright's case, none of the lower courts' factual

findings are owed deference, because the district court never held an evidentiary hearing.

As a basis for its nonintervention, the Eleventh Circuit cited this Court's decision in *Cooper v. Harris*, 581 U.S. 285, 293, 298 (2017). But in a case like Mr. Wainwright's, where no such factual development has taken place and a scant relevant record exists, "clear error" is not such a high bar. Prior to an evidentiary hearing, the reviewing court is obligated to construe a movant's pleading in the light most favorable to him, draw all reasonable inferences in his favor, and accept his factual allegations as true unless conclusively refuted by the record. *See Downs v. McNeil*, 520 F.3d 1311, 1313 n.3 (11th Cir. 2008).

And, although a petitioner seeking equitable tolling ultimately bears the evidentiary burden to show tolling is warranted, *see, e.g.*, *Lugo v. Sec'y, Fla. Dep't of Corrs.*, 750 F.3d 1198, 1209 (11th Cir. 2014), the burden at the initial pleading stage is much lower: a petitioner must simply "proffer enough facts that, if true, would justify an evidentiary hearing on the issue." *Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012). Although the allegations must be more than speculative, they need not be detailed. *See Twombly*, 550 U.S. at 555.

An evidentiary hearing is necessary when "the material facts are in dispute[,]" *San Martin*, 633 F.3d at 1271 (quoting *Pugh v. Smith*, 465 F.3d 1295, 1298 (11th Cir. 2006)), as opposed to when claims "are merely conclusory allegations unsupported by specifics[,]" *id.*, or the alleged facts would still not meet the legal standard. *See, e.g.*, *Lugo*, 750 F.3d at 1208-09 (denying evidentiary hearing on equitable tolling because

petitioner's allegations regarding counsel's misconduct showed no causal connection to the untimely filing). Material facts in an equitable tolling inquiry relate to one of two issues: (1) whether an extraordinary circumstance existed that is not attributable to the petitioner and that prevented timely filing of a habeas petition (such as serious attorney misconduct); and (2) whether the petitioner was diligent in the pursuit of his rights. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Where a petitioner alleges that his attorney committed serious misconduct that stood in the way of timely filing, and those allegations are more than conclusory, findings of fact that preclude an evidentiary hearing in the Eleventh Circuit typically pertain to the petitioner's diligence, as opposed to findings related to counsel's conduct. *See, e.g.*, *Hutchinson*, 677 F.3d at 1102-03 (11th Cir. 2012) (denying evidentiary hearing regarding counsel's conduct because facts alleged by petitioner would still fail on diligence prong); *San Martin*, 633 F.3d at 1271-72 (same); *cf. Downs*, 520 F.3d at 1313, 1323-24. This is because facially plausible allegations of counsel's misconduct can rarely be refuted without hearing from counsel about why they did what they did.

Here, as in *Downs*, Mr. Wainwright has alleged facts which, if proven, would warrant equitable tolling based on Hobson's serious attorney misconduct. Specifically, Mr. Wainwright's pleadings in the district court alleged that: (1) Mr. Wainwright was concerned that his current counsel in state court was not properly preserving his federal rights and hired Hobson for the purpose of ensuring preservation and vindication of those rights; (2) Hobson misrepresented his federal habeas qualifications and experience to procure a $25,000 retainer agreement for Mr.

Wainwright's representation; (3) despite falsely holding himself out as an expert, Hobson admitted on the record in another case that he did not know how the federal habeas deadlines work; (4) once Hobson was paid the retainer fee for Mr. Wainwright's case, he became increasingly uncommunicative and was absent during critical periods of time leading up to the AEDPA deadline; (5) Hobson did not account for his time or how the money was spent; (6) Mr. Wainwright explicitly instructed Hobson to research the AEDPA and its application to his case, but Hobson did not; (7) Hobson told Mr. Wainwright he was working on the federal petition when he was not; (8) as a result of Hobson's deceit about his federal experience and qualifications, Mr. Wainwright detrimentally relied on his false assurances; (9) Hobson has a pattern of similar misconduct so troubling that it prompted another judge to express concern about "having counsel come in the case, take the money, and leave" and in yet another case resulted in a reprimand and referral to an Ethics School and Professionalism Workshop pursuant to a confidential agreement with the Florida Bar Association; (10) although Hobson did some state-court work for Mr. Wainwright, he did no federal work prior to the federal deadline's expiration; (11) as a direct result of Hobson's malfeasance, Mr. Wainwright's federal habeas deadline was blown; (12) Hobson lied to Mr. Wainwright about the timeliness of his federal habeas petition; and (13) Hobson hid from Mr. Wainwright that he had a conflict of interest related to arguing equitable tolling.[7]

[7] Attorney misconduct, as a whole, can qualify as extraordinary even if it was only negligent or grossly negligent at times. *See Holland*, 560 U.S. at 652; *see also Downs*, 520 F.3d at 1323 ("In considering whether the conduct of counsel was extraordinary,

It was clear error to find these allegations refuted by the record extant. The district court found (1) that Hobson's failure to timely file Mr. Wainwright's habeas petition was simply negligence due to a "sincere but persistent" misunderstanding of the AEDPA deadline, NDFL-ECF 60 at 20; and (2) that Hobson never lied to Mr. Wainwright about the preparation of his federal petition. But there is no evidence in the record that supports this, much less when construed in the light most favorable to Mr. Wainwright. Hobson never said that he filed late because he misunderstood the deadline. Hobson never said he didn't lie to Mr. Wainwright. Hobson never provided information about what, if any, federal work he did and when. In fact, Hobson never provided any relevant facts at all.

The district court's factual findings relied almost exclusively on (1) Hobson's prospective assurances that he would work on the federal petition; (2) Hobson's arguments to the federal courts about why they should find the petition timely; and (3) Hobson's post hoc representations to Mr. Wainwright that the petition was timely. But none of these representations can be credited or viewed as fact. The prospective assurances are not borne out by the record, and there is nothing to suggest Hobson did what he said he would.[8] Hobson's timeliness arguments and representations to

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we will not dissect the continuing course of conduct in which counsel engaged, but rather view counsel's behavior as a whole.").

[8] Similarly unilluminating was Hobson's personal agenda one week before the petition's due date, in which "Anthony Floyd Wainwright look at deadlines and 2 hours of Box review"—was sandwiched in the middle of a 26-item task list, between such exhaustive tasks as "Taxes"; "[Unrelated client] depos"; "Continue marketing efforts"; "letter to bar"; and work on multiple other cases. NDFL-ECF 52 at App. 58. There is no conclusive factual support in the record that the deadlines referenced here

Mr. Wainwright are similarly inadequate, because they are not testimony or a lay factual account. Instead, these representations were those of a lawyer whose conflict of interest prevented him from revealing his own misconduct, and who was therefore constrained to attempt to persuade a court and pacify his client with arguments unsupported by law.

Further, Hobson's representations are inconsistent with his actions and with a finding that he negligently but in good faith misunderstood the petition's timeliness. For instance, Hobson proffered two arguments for timeliness in the district court: (1) public records requests filed at the commencement of state postconviction review tolled the AEDPA deadline;[9] and (2) the AEDPA clock was not triggered until the denial of a petition for certiorari off of direct appeal was filed with the Florida Supreme Court clerk's office. NDFL-ECF 24 at 8-10.[10] But Hobson simultaneously conceded that his arguments were not reflective of the law. *Id.* at 8-9 ("invit[ing]" the district court to reinterpret "the actual tolling of the statute" without providing any legal basis); *id*. at 9-10 ("submit[ting]" that the court could choose to interpret the trigger date differently).

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included the AEDPA deadline, nor is there *any* evidence that Hobson conducted this research, let alone on March 16, 2005.

[9] At one point, Hobson stated these requests were filed in December 1998, NDFL-ECF 24 at 8, and at another he stated they were filed in October 1998. *Id*. at 9.

[10] It was only on appeal to the Eleventh Circuit that Hobson argued that postconviction certiorari review continued tolling the AEDPA statute of limitations. *Wainwright*, 537 F.3d at 1285-86. But, had Hobson mistakenly but sincerely believed this, he presumably would have raised it in the district court.

The habeas petition's eventual filing also cannot justify the lower courts' findings that Hobson was actively working on Mr. Wainwright's federal petition prior to the deadline, as he had represented to Mr. Wainwright. Indeed, the state of the petition Hobson filed belies such a finding. Had Hobson mistakenly but genuinely believed the arguments he advanced, he would have thought he had several months left on the AEDPA clock. This belief is incongruous with Hobson's filing of an egregiously unprofessional habeas petition which, despite its length, was little more than a sloppily repackaged 'copy and paste job' from the work of prior attorneys. Further, the petition was riddled with so many typographical errors that it appears it may have been dictated; contained significant substantive errors; cited only a single federal case; and failed in many claims to address the underlying state-court judgment. The petition was so unprofessional that, nearly two months after Hobson filed, he entered a "corrected" petition which was substantively identical and merely corrected certain of the egregious errors in the original. NDFL-ECF 6. Had Hobson been conducting work in good faith and simply mistakenly believed the timeliness arguments he later advanced, there would have been no reason to file a petition in such shambles.

Further, Hobson's personal agenda cannot be given credence in light of the proffer Mr. Wainwright has made. Months before the federal deadline expired, Mr. Wainwright explicitly instructed Hobson to conduct research on the AEDPA and its application to Mr. Wainwright's litigation. Yet, despite Hobson's letters assuring Mr. Wainwright that he was diligently preparing the federal litigation, Hobson's agenda

shows that one week before the deadline, he had not yet taken the first step of that preparation. *Compare* NDFL-ECF 52 at App. 58 *with* NDFL-ECF 60 at 22. Similarly, the Attorney General raised the petition's untimeliness and cited significant law in its motion for summary judgment, which was filed weeks before Hobson wrote to Mr. Wainwright insisting the petition was timely. *See* NDFL-ECF 3 at 7-9. Thus, at the time he was assuring Mr. Wainwright, Hobson would have known that the petition was untimely.

In endorsing the district court's findings, the Eleventh Circuit relied heavily on the purported similarities between Mr. Wainwright's case and *Cadet*. *See* App. at 11a (comparing Mr. Wainwright's case to *Cadet*, where equitable tolling was denied even though counsel "misunderstood how the limitations period functioned, relayed that misunderstanding to his client, and stuck to his position when the client suggested that the limitations period should be calculated differently"); *see also id.* at 13a (stating that, like *Cadet*, Mr. Wainwright showed "no 'causal link' between [Hobson's] 'apparent deceit' and the subsequent untimely filing").

But, rather than supporting the lower courts' findings in this case, *Cadet* actually highlights their impropriety. In *Cadet*, the attorney whose conduct was the subject of the equitable tolling inquiry blew the AEDPA statute of limitations. When the district court ordered him to show cause why the petition should not be dismissed as untimely, he made an argument for timeliness. After the State filed a reply explaining the petition was untimely, counsel performed research and felt "horrendous" after realizing his "mistake[.]" *Cadet*, 853 F.3d at 1220. Counsel

promptly conceded his miscalculation and argued that his actions warranted equitable tolling for *Cadet*.

Rather than rely on counsel's legal representations to the court—which, although self-deprecating, were made amidst a conflict of interest and not in the capacity of a fact witness—the district court appointed new counsel to represent *Cadet* and held an evidentiary hearing regarding whether equitable tolling should apply. *Id*. In other words, the factfinding process the federal courts relied upon for their determinations in *Cadet* is the same process the lower courts have denied Mr. Wainwright.

This process is not prophylactic—it is critical to ensuring the equity at the heart of tolling inquiries. Decisions across federal circuits illustrate this through the sheer variety of factual scenarios that can give rise to equitable tolling. Often, the determination of whether tolling is warranted comes down to holistic review of multiple small, idiosyncratic details. For instance, courts across the circuits have examined conduct analogous to that Mr. Wainwright has alleged (such as an attorney's affirmative misleading representations that a timely petition has been or will soon be filed) and recognized that it can amount to egregious attorney misconduct. *See, e.g.*, *Dillon v. Conway*, 42 F.3d 358 (2d Cir. 2011) (attorney waited until what he thought was the last day to file despite petitioner's instructions not to do so, and blew the deadline due to a miscalculation); *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011) (charging $20,000 for representation, then failing to file despite numerous assurances); *Luna v. Kernan*, 784 F.3d 640 (9th Cir. 2015) (attorney

repeatedly assured petitioner that he would soon file a habeas petition, but inexplicably filed untimely); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007) (attorney repeatedly assured petitioner he was preparing the petition); *Downs v. McNeil*, 520 F.3d at 1321 (granting evidentiary hearing based on petitioner's allegation that lawyer deceived him, and collecting cases which found equitable tolling justified "where the attorney has made misrepresentations to the client, disregarded the client's instructions, refused to return documents, or abandoned the client's case").

The fact-intensive, case-by-case equitable tolling analyses this Court has endorsed can only occur when a diligent petitioner—who has proffered unrebutted factual allegations that, if true, could justify equitable tolling—is permitted to conduct evidentiary development. This Court should grant review.

### B. Even without disturbing the lower courts' factual findings, this case provides an opportunity to clarify this Court's precedent and create uniformity among the federal courts

Although the record below cannot sustain the lower courts' findings related to equitable tolling, certiorari review is warranted even without disturbing the conclusion that Hobson's conduct amounted to nothing more than gross negligence.

In *Holland v. Florida*, this Court criticized the Eleventh Circuit's holding that grossly negligent attorney conduct was insufficient to warrant equitable tolling absent other elements of attorney misconduct such as "bad faith, dishonesty, divided loyalty, mental impairment, or so forth[.]" 560 U.S. 631, 649 (2010). Although the *Holland* Court characterized the Eleventh Circuit's approach as "overly rigid[,]" *id.*

at 654, it also recognized that the need for flexibility in equitable tolling determinations means lower courts must be allowed the first opportunities to undertake those equitable, fact-intensive inquiries. *Id.* at 650, 654 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 540 (2005)).

In seeming contradiction of this Court's guidance in *Holland*, the Eleventh Circuit has continued to take the categorical position that an attorney's gross negligence cannot independently constitute an extraordinary circumstance warranting equitable tolling. *See, e.g.*, *Cadet*, 853 F.3d at 1227 ("attorney error, however egregious, is not enough for equitable tolling") (cleaned up); *Thomas*, 795 F.3d at 1291 ("even gross negligence or recklessness[] is not an extraordinary circumstance"). This Court should grant certiorari review to settle the question left open in *Holland* but precluded by the Eleventh Circuit: whether gross negligence itself can suffice as an extraordinary circumstance warranting equitable tolling.

Such review will also help to resolve uncertainty and potential conflict and among the federal circuit courts. While the Eleventh Circuit is adamant that an attorney's gross negligence does not justify equitable tolling, other federal circuits have not foreclosed that possibility. The Second Circuit recognizes that egregious attorney negligence can be an extraordinary circumstance for tolling purposes if it amounts to "effective abandonment[.]" *Rivas v. Fischer*, 687 F.3d 514, 538 (2d Cir. 2012). The Sixth Circuit recognized a dispute on this issue between the Second and Ninth Circuits, *Nassiri v. Mackie*, 967 F.3d 544 (6th Cir. 2020) (interpreting the Ninth Circuit as having concluded that egregious attorney misconduct including

negligence could serve as a basis for equitable tolling) (citing *Luna*, 784 F.3d at 649), but declined to take a position because it was remanding for further factual development on the equitable tolling issue.

In light of the Eleventh Circuit's tension with this Court's precedent and simmering discrepancies with other circuits, this Court should grant review.

### C. This case is a pristine vehicle to resolve issues of national significance

Despite its lengthy procedural history, this case presents a procedurally unencumbered opportunity to decide the questions presented. The lower courts' sole ground for denying Rule 60(b) relief related to equitable tolling rested squarely on the underlying merits. No adequate or independent ground exists to preclude this Court from reaching the merits of Mr. Wainwright's equitable tolling claim.

In an equitable tolling context, precedent in this Court and the Eleventh Circuit is clear that where the record lacks information about why counsel took or did not take an action that is relevant to a determination of extraordinary circumstances, a remand for further factual development is necessary. *See Holland*, 560 U.S. at 652-53 (remanding where some record facts regarding counsel's conduct "alone, might suggest simple negligence" but others suggest more serious misconduct and "no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances"); *Holland v. Florida*, 613 F.3d 1053 (11th Cir. 2010) (remanding to district court for further factfinding such as an evidentiary hearing). *Thomas*, 795 F.3d at 1295 (remanding because the record extant did not clarify whether counsel's "conflicting and inconsistent letters to

[petitioner] about the deadline…reflect a deliberate attempt to mislead [Petitioner] regarding the status of his petition, or simply reflect a combination of [counsel's] own ignorance about the filing deadline") (quotations omitted); *Downs*, 520 F.3d at 1325 (remanding to determine the truth of petitioner's allegations that his counsel committed misconduct "far beyond miscalculating the date on which his federal petition was due[,]" including lying to petitioner "on a matter of legal importance and evinc[ing] utter disregard" for petitioner's directives regarding his petition).

Mr. Wainwright's procedural situation is indistinguishable from these cases: He has made specific allegations that his counsel engaged in misconduct of a different type than garden-variety negligence which—if taken as true in the face of an unresolved record—would constitute extraordinary circumstances to justify equitable tolling.

And although Mr. Wainwright's death sentence underscores the need for further review, this Court's intervention would not equate to simple error correction. Nor would its impact be limited to the capital or criminal context. After all, Mr. Wainwright's case is not at a proper juncture to determine whether equitable tolling is warranted; he simply seeks this Court's review of how factfinding must be conducted in the face of an unrebutted proffer. Put simply, the questions in this case boil down to something very basic: what procedural rights can a petitioner or plaintiff expect upon making a facially valid showing at the pleading stage? This Court's guidance would have far-reaching implications for litigants in various fields of law.

Because the procedural issue at bar is so simple, and because precedent so heavily favors the position Mr. Wainwright has taken, it is intellectually surprising that the lower courts have not granted a hearing and obviated the need for this Court's intervention. But because the lower courts erred so severely with regard to their factfinding process, Mr. Wainwright's case provides this Court with a rare opportunity to explore the questions presented absent the muddied waters of case-specific, fact-intensive inquiries that are best left to the lower courts.

This Court should accept the opportunities this case presents to weigh in on rudimentary but broadly impactful procedural issues, and to provide guidance and promote faithful application of this Court's precedent.

## CONCLUSION

The Court should grant the petition for a writ of certiorari and review the Eleventh Circuit's decision.

Respectfully submitted,

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