No. _____

In the Supreme Court of the United States

October Term 2023

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1 Equitable Tolling under AEDPA Prefatory Statement: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was passed by the 107th Congress "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." In doing so, Congress made modifications to the law of habeas corpus. The most notable modifications enacted by AEDPA were made to the law of habeas corpus. AEDPA's habeas reform provisions, codified in 28 U.S.C. §§ 2254 and 2255, included a statute of limitations for habeas corpus claims and restrictions on a habeas petitioner's ability to file a second habeas petition.

The question here addresses specifically the statute of limitations under 28 U.S.C. § 2255(f) and the courts' evaluation of circumstances to determine if "extraordinary circumstances" exist warranting equitable tolling. Equitable tolling is available to overcome the one-year limitation period where the court finds that the petitioner has acted diligently but, because of extraordinary circumstances, he or she was unable to satisfy the one-year limitation period for filing.

QUESTION 1: Equitable Tolling: Whether the *Holland* Court's direction to review with flexibility the circumstances warranting equitable tolling is consistently applied where the Circuits are split into two disparate approaches: some using a flexible totality of the circumstances approach and others a rigid

circumstance-by-circumstance approach, where each circumstance is viewed in isolation.

QUESTION 2: Structural Error: Whether a Petitioner is entitled to habeas review for raising an issue of Constitutional magnitude when the issue raised is one of structural error based on the petitioner being deprived of his 6th Amendment guarantee of meaningful adversarial confrontation and denial of assistance of counsel.

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OPINIONS BELOW

The Circuit's opinion on direct appeal is published at 899 F.3d 925 (11th Cir. 2018). (Copy attached at Appendix #1, p.2.)

The Circuit Judge's opinion denying a certificate of appealability by the court is not reported. A copy is attached. (App.#1, p.32).

The Circuit judge's denial of Petitioner's Motion to Reconsider is not reported. A copy is attached. (App. #1, p.34.)

The district court's dismissal of Petitioner's § 2255 Motion and Amended Motion is not reported. A copy is attached. (App. #1, p. 36.).

The district court's denial of Petitioner's Indicative Motion requesting for more time to file his Amended Motion (i.e., amended § 2255 Motion) is not reported. A copy is attached (App. #1, p. 94.)

JURISDICTION

The court of appeals judgment was entered on September 8, 2023 in appellate court case 23-11007. A Motion to Reconsider was denied on October 23, 2023. Jurisdiction of this Court rests in 28 U.S.C, § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

QUESTION 1. Equitable Tolling

1. In 1948, Congress largely replaced the petition for habeas corpus, *see* 28 U.S.C. 2241, with the motion to vacate, *see* 28 U.S.C. § 2255, as the means for federal prisoners collaterally to attack the legality of their convictions or sentences. *See* Pub. L. No. 8-773, 62 Stat. 869, 967-68.

A motion to vacate under § 2255 allows inmates to contest their sentences or convictions "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 (a).

Habeas relief, as stated in the Suspension Clause (Art I, § 9, Cl. 2), was retained only in § 2255's "safety valve" in subparagraph (e).

2. The Antiterrorism and Effective Death Penalty Act (AEDPA) was passed

in 1996. *See* Pub. L. No. 104-132, 110 Stat. 1214. AEDPA bars second or successive § 2255 motions unless a "panel of the appropriate court of appeals" certifies that they contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C. § 2255(h).

Also, for the first time Congress put a statutory deadline of one year on § 2255 motions. 28 U.S.C. § 2255(f):

> "**(f)** A 1-year period of limitation shall apply to a motion under this section.
>
> The limitation period shall run from the latest of—
>
> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

In effect, the prisoner filing for post-conviction relief had one year after his or her conviction became final to file. If the one-year limitations period was missed, then in most instances, the petitioner had lost the opportunity for relief.

3. Equitable tolling of the one-year period may be appropriate when the petitioner can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631 (2010), *quoting, Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005).

QUESTION 2. Structural Error

4. The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

I. INTRODUCTION REGARDING EQUITABLE TOLLING

Habeas corpus is the Great Writ, embodied in the Constitution's Suspension Clause. It is the last vestige to ensure that no one's conviction is attributable to a deprivation of a Constitutional guarantee. Regrettably, the Great Writ has been chipped away over the past decades. Petitioner submits that the Great Writ has lost some chips not because anyone wants to deny a prisoner his or her right to the Constitutional guarantees but instead because each habeas corpus

filings require careful examination, and there are so many petitions in a system of limited judicial resources.

A. The guarantees of habeas relief under Suspension Clause have been fragmented over time. Originally, 28 U.S.C. § 2255 provided an alternative mechanism for federal prisoners to obtain collateral review. A § 2255 filing had identical scope and availability to common law habeas corpus. There could be little doubt that this alternative was constitutional because its imposition was of little significance. *See Suspended Justice: The Case Against 28 U.S.C. § 2255's Statute of Limitations*, 129 Harv.L.Rev. 1090, Part II (Feb. 2016).

However, once Congress passed AEDPA, the situation changed. With a one-year statute of limitations, § 2255 was no longer coextensive with habeas corpus as it existed at common law. At common law, applications for the writ were never time-barred nor limited in number. The new statute of limitations shrank the circle of those with access to collateral review from all those with colorable claims to all those with colorable claims who were able to make a filing within one year.

Habeas corpus proceedings are notoriously complex. Chief Judge Diane Wood has written that "habeas corpus has tied courts and legal scholars into knots for many years." *The Enduring Challenges for Habeas Corpus*, 95 Notre Dame L.Rev. 1809, 1809 (2020). A consequence of AEDPA's limitation period is that many petitioners are prisoners in a system in which they have little or no control over their access to the resources or means for putting together a viable § 2255 motion. These petitioners are not entitled to court-appointed counsel, and substantially all

proceed *pro se*. Few, if any, have sophistication with the procedural rules or the law that applies in § 2255 filings to understand or to put together a viable filing compatible with the rules that apply, regardless of the issues that may exist.

In 1948, Congress largely replaced the petition for habeas corpus, *see* 28 U.S.C. 2241, with the motion to vacate, *see* 28 U.S.C. § 2255, as the means for federal prisoners collaterally to attack the legality of their convictions or sentences. *See* Pub. L. No. 8-773, 62 Stat. 869, 967-68.

A motion to vacate under § 2255 allows inmates to contest their sentences or convictions "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 (a).

Habeas relief, as stated in the Suspension Clause (Art I, § 9, Cl. 2) was retained only in § 2255's "safety valve" at subparagraph (e).

B. Petitioners have strict bars which operate to preclude his or her § 2255 filing from judicial review.

The Antiterrorism and Effective Death Penalty Act (AEDPA) was passed in 1996. *See* Pub. L. No. 104-132, 110 Stat. 1214. AEDPA bars second or successive § 2255 motions unless a "panel of the appropriate court of appeals" certifies that they contain:

> (3) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that nor reasonable factfinder would have found the movant guilty of the offense; or

(4) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

28 U.S.C. § 2255(h).

Consequently, the petitioner must satisfy AEDPA's strict filing requirements in his first timely filing for review or his opportunity is lost and may never be recovered.

Also, AEDPA imposes for the first time on the § 2255 petition, a statutory deadline of one year which starts, roughly, when the petitioner has lost or waived his alternative means of redress. Specifically, 28 U.S.C. § 2255(f) provides as follows::

"**(f)** A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(5) the date on which the judgment of conviction becomes final;

(6) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(7) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(8) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

In effect, the prisoner filing for post-conviction relief has one year after his or her conviction becomes final to file. If the one-year limitations period is missed, then in most instances, the petitioner has lost the opportunity for relief.

C. Equitable tolling of the one-year limitation period may be appropriate.

When the petitioner can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing" then equitable tolling of that one-year limitation may be appropriate *Holland v. Florida*, 560 U.S. 631 (2010), *quoting, Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005).

Equitable tolling, as the name implies, is a flexible undertaking depending on each factual situation. The need for flexibility was noted by the *Holland* Court. 560 U.S. at 649-50. In practice, however, some Circuits apply a flexible totality of the circumstances approach and others apply a rigid circumstance-by-circumstance approach in which each circumstance is evaluated in isolation as whether it is "extraordinary" for equitable tolling purposes.

Petitioner submits that a flexible approach, as directed by *Holland,* means that evaluating the totality of the circumstances is apt. The circumstance-by-circumstance relies on a fiction that circumstances attributable to the delay are not interdependent or have isolated effects on the petitioner's ability to produce a timely filing.

D. Equitable Tolling Proceedings.

Following is an itemization with a brief description of the proceedings in this case, followed by a statement regarding the issues underlying Petitioner's § 2255 filings, including his Application for a Certificate of Appealability. (App.#1, p. **). The § 2255 filing comprised an initial § 2255 Motion, which was a completed form,

and an Amended Motion with developed issues. His § 2255 Motion and Amended Motion were given case number 20-CV-21212-BB in the district court.

E.. History of Petitioner's Post-Conviction Relief Efforts in 20-cv-21212-BB.

1. Petitioner filed a timely notice of appeal following his sentencing in case number 1:15-cr-20820-BB. His appeal was affirmed on September 5, 2018 in appellate case number 16-16048-C. He filed a petition for a writ of certiorari of issues raised on appeal, which was denied on March 19, 2019.

2. On March 19, 2020, proceeding *pro* se, Petitioner filed his Motion to Vacate his Sentence under 28 U.S.C. § 2255 (§ 2255 Motion). (Appx. #1. p. **) The motion was filed in a timely manner in accordance with the prisoner mailbox rule. *Houston v. Lack*, 487 U.S. 266 (1988).

3. The court did not proceed on the § 2255 Motion. Instead, it administratively closed the matter, and ordered Petitioner to provide notification when the appellate court ruled on a pending and related forfeiture matter. (Appx. #1, p**)

4. On September 22, 2020, the Petitioner's Notice of Change of Address was docketed. (App. #1, p. **)

5. On January 14, 2021, Petitioner filed a Status Report and Notice of Intent to Seek Certiorari on the forfeiture matter, which was docketed on January 14, 2021. (App. #1, p. **)

6. On October 4, 2021, the court ordered Petitioner to file a legally sufficient

and properly verified § 2255 motion no later than November 4, 2021. (App. #1, p. **)

7. Petitioner received that order some time later; it was not recorded in the FCI Miami's mail log.

8. Upon receipt of the court's order, Petitioner filed a Motion to Correct the Calculation of Time ("Time Calculation Motion") on October 12, 2021 (App. #1, p. **). The Motion submitted that Petitioner was entitled to more time than the 30 days ordered. It evidenced Petitioner's misunderstanding of the forfeiture matter tolling the proceeding under 28 U.S.C. § 2255(f). (App. #1, p. **)

9. The court denied the Time Calculation Motion on October 14, 2021. (App. #1, p. **).

10. Petitioner appealed the court's denial of his Time Calculation Motion. (App. #1, p. **). The appeal was interlocutory. It was dismissed for lack of jurisdiction by the appellate court. (App. #1, p. **)

11. On November 3, 2021, Petitioner's Motion for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1 ("Indicative Moton for Extension") was docketed. he asked for more time to prepare his Amended Motion and assistance in getting his trial transcript. ("Indicative Moton for Extension"). (App. #1, p. **). His circumstances warranting the extension follow: (i) he needed his trial transcripts; (ii) he was an Egyptian native and there was a language barrier affecting his ability to prepare the Amended Motion; (iii) COVID-19 concerns and protocols in the prison caused increased lockdowns and included quarantines, both of which precluded or

severely limited his access to the law library for research and the Education Department (which provided among other things, a word processing means), (iv) the FCI was renovating the law library and Education Department causing more difficulties in accessing those resources (v) COVID-19 caused dramatic modifications of the prison's protocols and visitation precluding access to legal counsel or Arabic interpreters or translators inside or outside of the prison who might assist Petitioner in the preparation of the Amended Motion.

12. The court denied Petitioner's Indicative Motion for Extension on November 8, 2021. (App. #1, p. **). The court stated that Petitioner had not posed extraordinary circumstances warranting a rescheduled filing date. The court analyzed each circumstance as if it alone should satisfy equitable tolling; it did not consider the interdependency of the totality of the circumstances. For each circumstance, the court denied equitable tolling by evaluating each circumstance, making a finding whether that circumstance created an "extraordinary circumstance," and then citing an Eleventh Circuit precedent that previously found that that circumstance did not warrant equitable tolling.

The court declined to assist Petitioner in getting his transcripts, and it did not consider Petitioner's need for his transcripts in the context of equitable tolling.

The government was not required and did not respond to Petitioner's Indicative Motion for Extension. There was no prejudice to the government.

13. Petitioner filed his Amended Motion supplementing his § 2255 Moiton on June 10, 2022. (App. #1, p. **).

14. On March 10, 2023, the court dismissed Petitioner's § 2255 Motion and Amended Motion; denied him a certificate of appealability, and dismissed entitlement to appeal *in forma pauperis* was dismissed. (Although the docket entry date is March 10, 2023, the reported entry date is March 15, 2023.) (App. #1, p. **).

The court stated that Petitioner's § 2255 Motion and accompanying Amended Motion were procedurally barred. It denied equitable tolling, relying on Petitioner's filing of the Calculation of Time Motion, which he appealed, and his filing of the Indicative Motion for Extension as showing he had time to file his Amended Motion "but he opted not to." (App-#1, p. **).

15. Petitioner filed a notice with the appellate court and was given case number 23-11007 on April 4, 2023. The notice was for a Circuit judge's review of the denial of a certificate of appealability. (App. #2, p. **)

16. In the appellate court on May 8, 2023, Petitioner filed an application for a certificate of appealability. (App. #2, p. **). The application argued two issues of Constitutional magnitude and the issue of procedural bar. The argument for the procedural bar stressed, among other things, the court's failure to consider the totality of the circumstances surrounding Petitioner's inability to produce the final § 2255 Supplement. It also argued two issues of Constitutional magnitude: (1) Petitioner was denied counsel when the court would not substitute counsel before trial or mid-trial, even though both Petitioner and his counsel advised the court in each instance that the attorney-client relationship was counter-productive, and (2) Trial counsel was ineffective for failing to challenge the government's strategic

handling of the indictment process, by allowing the first indictment to wane to dismissal and then reindicting for more serious charges 30 days later.[1] (App. #2, DE 5)

17. The application for a certificate of appealability was denied on September 8, 2023, (App. #2, DE 13). The ruling was short, stating the following:

> "Khaled Elbeblawy appeals the denial of his 28 U.S.C. § 2255 motion to vacate as time-barred. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"). To merit a COA, Elbeblawy must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because Elbeblawy has failed to make the requisite showing as to the second prong of the *Slack's* test, his motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED AS MOOT."

18. Petitioner through counsel filed a Motion to Reconsider on October 5, 2023. (App. #2, p. **). The Motion was denied on October 23, 2023. (App. #2, p. **)

II. STRUCTURAL ERROR. Statement of the Case for Structural Error.

Petitioner raised in his Amended Motion the issue of structural error resulting from the court compelling him to represent himself midtrial and his attorney failing to apprise the court that he could not represent himself because he was unfamiliar with the discovery. He also proceeded to represent himself without investigating the government's evidence and without witnesses. The court dismissed Petitioner's § 2255 Motion and Amended Motion based on its finding that it was procedurally barred. When it did so, it stated that Petitioner's claims were without merit.

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[1] The issue of prosecutorial misconduct is not raised here for review.

Petitioner then filed a notice of appeal and an application with the Court of Appeals for a certificate of appealability. (Appx. #2, p. **) The Circuit denied the certificate. (App. #2, p. **). He then filed a Motion to Reconsider (App. #2, p.. **), which was denied on September 8, 2023. (App. #2, p. **)

Facts: Petitioner is a naturalized citizen and a native of Egypt. At the time of his prosecution, he had never before been a part of the criminal justice system. His understanding of the English language is colloquial, not legal.

Although unfamiliar with the system and humbled by its significance, Petitioner, three times, raised to the court the problems he had with his counsel. He wrote a letter dated December 28, 2015 advising the court that he had problems with his counsel and that he was concerned about his status for trial. (App. #3, p. **, Pet. Ltr of 12/18/2015)) The court reviewed the letter on January 4, 2016 and held a hearing. The court denied Petitioner's request even though both counsel and Petitioner admitted that the attorney-client relationship was broken and that they were unable to communicate. (App. #3, p. ** (Tr. 1/4/2016, pp. 1-12))

Midtrial, Petitioner asked for new counsel a second and third time. He complained that his attorney had not listened to him at their conferences, had not shared discovery with him; had not explained the defense strategy, had not subpoenaed witnesses, had not prepared him to testify, and had treated him belligerently. (App. #3, p. ** (Tr. 1/12/2016, pp. 2-19); p. ** (Tr. 1/19/2016, pp. 1-25)). Counsel affirmed that he and Petitioner could not work together.

The court again denied Petitioner's request for new counsel. However, at the third hearing, the court went beyond denying new counsel; it told Petitioner that it would not appoint new counsel but he had the right to represent himself. The court compelled Petitioner either to continue with his existing counsel or proceed *pro* se. Petitioner did not ask to proceed *pro se* but facing that Hobson's Choice, he did so. (App. #3, p. ** (Tr. 1/19/2016, pp.19-26))

The court ordered his former counsel to stay in the courtroom. His former counsel was to stay in the courtroom so that the jury could see him and to be stand-by counsel on matters of law. *(Id.* (Tr. 1/19/2016, p. 25))

The court did not consider at the time that Petitioner had not received or reviewed discovery.

At trial, it became clear that Petitioner was so unfamiliar with the evidence against him that he could not represent himself. As a solution, the court ordered Petitioner to review his attorney's files after the close of the trial on the fourth day. There were over 100 government exhibits at trial. (App. #1, p. ** (Gov Exhibit List)) The court allowed 40 minutes to view his former attorney's volumes of discovery in multiple bank boxes, as he sat off to the side while the court held other hearings.

The government's trial evidence was complex. It included, for example, patients' files which allegedly showed falsification of records tied to Medicare fraud. Petitioner had insufficient time to become familiar with the tangible evidence. Petitioner's ability to use that 40 minutes for volumes of discovery was inadequate.

Moreover, the government's case did not include specific examination of the patient files. Instead, it relied on a cooperating witness who was testifying to reduce his exposure to incarceration for engaging in Medicare fraud. That cooperating witness testified that the Petitioner was a participant in one home health care service, a partner in another and that he had purchased a third without including that witness in the service, and that trial exhibits were patient files. (*See generally*, Trial Tr. 1/16/2016, pp. 11-235 (Escalona testimony))

Petitioner was unable to put on witnesses to refute the government's evidence since he became *pro se* mid-trial and since his attorney had not subpoenaed any witnesses.

Petitioner was unprepared to testify by his attorney even though he told his attorney he wanted to testify. He testified in his own behalf but it was difficult to follow, and difficult to put into context of the government's evidence.

Petitioner was convicted on both counts relating to allegations of Medicare fraud: Conspiracy to Commit Healthcare Fraud, and Wire Fraud (respectively, violations of 18 U.S.C. § 1349 and § 371). He was sentenced concurrently to 240 months on the Conspiracy to Commit Healthcare Fraud and 60 months on Wire Fraud. Restitution was also imposed.

Petitioner appealed his conviction; however, the issue of no counsel or ineffective assistance of counsel was not raised. His appeal was affirmed. He filed a petition for writ of certiorari; however, the writ was denied

REASONS FOR GRANTING THE WRIT

I. QUESTION 1. Equitable tolling in the post-conviction relief context is shapeless where *Holland's* direction to review with flexibility the circumstances warranting equitable tolling is inconsistently applied because the Circuits are split into two disparate approaches: some using a flexible totality of the circumstances approach and others a rigid circumstance-by-circumstance approach in which each circumstance is viewed in isolation.

It requires a review of the totality of the circumstances review. Petitioners filing for post-conviction relief under 28 U.S.C. § 2255 typically are indigent prisoners proceeding *pro se*. Yet all petitioners seeking to file for post-conviction relief under 28 U.S.C. § 2255 must satisfy the rules and the law by filing within a one-year limitation period. Once it expires, petitioners are typically barred from seeking further judicial review. The one-year begins when the petitioner's conviction is final, roughly measured from when the lower courts finish with the case (with periods of inaction within the court system counting toward one year). *See* 28 U.S.C. § 2255(f) (specifying circumstances triggering a one-year limitation period).

The Court recognized that equitable tolling may be appropriate where the § 2255 petitioner has diligently pursued post-conviction relief and extraordinary circumstances beyond his or her control have precluded a timely filing. *Holland v.*

Florida, 560 U.S. 631, 635 (2020) (considering 28 U.S.C. § 2244(d)(1), the state counterpart provision to § 2255)

A. The *Holland* Court approved equitable tolling of AEDPA's one-year deadline. *Id.* The *Holland* Court approved equitable tolling of AEDPA's deadline for a petitioner who could show that, despite due diligence, extraordinary circumstances beyond his or her control prevented timely filing. *Id. See Maples v. Thomas*, 565 U.S. 266, 271 (2012) (attorney abandonment constituted "extraordinary circumstances" warranting equitable tolling).

The "extraordinary circumstances" and "diligence" requirements are distinct elements. *Menominee Indian Tribe of Wisconsin v. United States,* 577 U.S. 250, 256-57 (2016) *citing Holland*, 560 U.S. at 652. The Court has clarified that the extraordinary circumstances element is "met only where the circumstances that caused a litigant's delay are both extraordinary and beyond [the litigant's] control and that extraordinary circumstances must have "stood in the way" of a timely habeas petition. *Menominee Indian Tribe,* 577 U.S. at 251 (denying equitable tolling where the petitioner failed to establish the extraordinary circumstances that stood in the way of timely filing).[2]

Holland clarified that equitable tolling could be apt in the § 2255 context, and courts across the country have relied on *Holland* for widely disparate evaluation of

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[2] In *Menominee, supra*, the Court ruled that equitable tolling did not apply to render timely Indian tribe's claim for breach of contract by the government since the tribe's mistaken belief that limitations period was tolled during putative class action, its mistaken belief that presentment to contracting officer was unneeded, and risks and expense of litigation were not extraordinary circumstances

what constitutes "extraordinary circumstances." The disparity stems primarily from differences in a court's evaluative approach. One approach looks at the totality of the circumstances, and the other focuses on each circumstance and makes a determination on whether, in isolation, that circumstance warrants equitable tolling consideration.

B. Courts have made equitable tolling decisions based on two disparate review approaches: the totality of the circumstances review and circumstance-by-circumstance approach.

Examples of court cases[3] recognizing "extraordinary circumstances" under the totality of the circumstances approach follow:

(1) In *Contreras v. Davis,* No. 1:19-cv-01523, 2021 WL 5414285, at *5 (E.D. Cal. Nov. 19, 2021), the court determined equitable tolling was apt. Petitioner's counsel could not put together the § 2255 filing timely because of the limits placed on access to the petitioner and access to outside assistance due to COVID-19 and its recurrent variants raised exceptional circumstances notwithstanding available COVID-19 vaccines and safety guidelines and protocols.

(2) In *Dunn v. Baca,* No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020), the court granted equitable tolling prospectively, finding

[3] Review of petitioners' filings for equitable tolling rarely progress to appeal. If the district court denies equitable tolling then the petitioner must have a certificate of appealability. That certificate may be granted by the district court or by a single judge in the Circuit court. Fed. R.App. Pro 22. Habeas Corpus and Section 2255 Proceedings. 28 U.S.C. § 2253 (petitioner may appeal to the court of appeals for the district court's order denying the application

that COVID-19 caused unprecedented disruptions in the criminal justice system, and

(3) In *Rivera v. Harry,* No. 20-3990-KSM, 2022 WL 93612, at *5 (E.D.Pa. Jan. 10, 2022), the court found that equitable tolling was apt where the COVID-19 pandemic prevented the petitioner from timely filing, and the petitioner filed almost immediately upon being given the means to do so.

In contrast, examples of courts using a circumstance-by-circumstance approach and using that approach and not recognizing "extraordinary circumstances" warranting equitable tolling follow:

(1) In *Cannon v. United States,* No. 3:20-cv-00097, 2021 WL 537195, at *4 (D.N.D. Feb. 12, 2021), the court held that the petitioner's claims of attorney negligence and COVID-19 protocols causing prison lockdowns were not "extraordinary circumstances" warranting equitable tolling.

(2) In *Martinez v. Hooks*, No. 5:19-cv-00117-MR, 2021 WL 510956, at *7 (W.D.N.C. Nov, 2, 2021), the court found that petitioner's access to his trial or plea transcripts did not constitute an extraordinary circumstance warranting equitable tolling but even if it did, petitioner's five-month lag between obtaining the transcript and filing for relief and the 16-month delay in filing his petition undermined his claim of diligence. In making its ruling, the court cited *Lloyd v. Van Natta*, 296 F.3d 630, 634 (7th Cir. 2002), and

(3). In Petitioner's case, App. #1, p.36), the court ruled that he was not entitled to equitable tolling because the 11th Circuit had determined that prison

lockdowns were not an "extraordinary circumstance" and that the language barrier was not an "extraordinary circumstance," and that COVID-19 was not an "extraordinary circumstance." Each determination was based on the 11th Circuit precedent, and no consideration was given to the interdependence of circumstances and how the Petitioner was affected. Additionally, in Petitioner's case, no consideration was given to his inability to get a copy of his trial transcript, which is essential for preparing the Amended Motion.

C. The totality of the circumstances is necessary for an equitable evaluation of whether a petitioner's late filing warrants equitable tolling. Following are some examples of circumstances which the courts must consider in the context of how petitioners are affected in their filing efforts during the COVID-19 global health crisis.

(1) What effect does a prisons' reaction to a global health crisis have on the prisoner's ability to put together a viable § 2255 motion?

(2) Since the global health crisis affects everyone, everywhere, is it "extraordinary"?

(3) When institutions, including schools and courts, shut down and reconfigure to conduct only the most essential business in intense efforts to thwart the global health crisis, are those circumstances "extraordinary"?

(4) If the effects on our institutions is everywhere, is it still "extraordinary"?

(5) If those effects cause a petitioner to be unable to file a timely § 2255 motion, is the petitioner entitled to equitable tolling despite his or her diligent efforts?

(6) When our prisons, in trying to thwart a global health crisis while trying to maintain safety and security, put their prisoners' rights to the law library and word processing means on unprecedented delays, enforce continued lockdowns, and deny access to petitioners' only means for developing his § 2255 motion, is that "extraordinary"? Is it extraordinary where every prisoner experiences the same deprivation?

(7) When a prisoner, proceeding *pro se*, is unable to produce his § 2255 motion because of the prison's and the country's reaction to a global health crisis, is the petitioner entitled to equitable tolling?

In answering those questions, all could probably agree that the prison's reaction to a global health crisis is largely controlled by the prison. All could agree that the prison administration is outside the petitioner's control. All could agree that the prisoner depends on access to research and word processing means to produce a § 2255 motion. And, all could agree that the petitioners proceeding *pro se* are more endangered than their attorney-represented colleagues in successfully wending their way through AEDPA and criminal law, especially during a global health crisis where outside institutions are shut down or inaccessible to the prisoner.

One more consideration: How is a petitioner with a language barrier affected by a global health crisis in getting legal counsel or Arabic translations?

Petitioner experienced all of the above circumstances and each and every one of them affected his ability to produce an Amended Motion within 30 days. Nevertheless, he was denied equitable tolling.

D. Petitioner's circumstances warranted a finding of "extraordinary circumstances" and a grant of equitable tolling but for the court's reliance on a circumstance-by-circumstance approach. In this case, Petitioner not only proceeded *pro se*, but he did so while in prison during a global health crisis. He filed his Amended Motion seven months after the court imposed its due date, requiring the Amended Motion to be filed within 30 days. He filed as soon as he could upon receiving his trial transcripts, reviewing them, having some, even if severely limited, access to the prison's law library and word processing means, and after studying to the best of his ability the legal terms and cases relevant to his Motion. He diligently prepared his Amended Motion, overcoming the obstacles as soon as he had the essentials necessary to do so.

The COVID-19 health crisis caused the prison resources of a law library and word processing means to be entirely and then substantially unavailable. Access to the law library and word processing means were entirely unavailable for the 30-day period imposed by the court to produce the Amended Motion.

Petitioner prepared his Amended Motion without legal assistance. Indeed, even if legal counsel had been allowed into the jail, it is unlikely that counsel would be willing to go to jail during the pandemic.

Petitioner, in an act of desperation, sought financial assistance from a friend so that he could get his trial transcripts. He knew of no other way. As a prisoner during the pandemic, he could not access the court reporter's office or provide payment, and when asked, the court declined to assist him.

Petitioner did legal research without an Arabic interpreter. He worked at producing the Amended Motion, and he did so within seven months of the court's due date, as soon as he could upon having the essentials necessary to produce the Amended Motion. He did so through hard, diligent work.

He submits that he was denied equitable tolling not because the totality of his circumstances did not warrant it but because his circumstances were reviewed by a court where equitable tolling analysis is done using a circumstance-by-circumstance approach, and reliance on 11th Circuit precedent for finding each circumstance insufficient to warrant an "extraordinary" finding.

II. QUESTION 2. Structural Error. A § 2255 petitioner is entitled to habeas review for raising an issue of Constitutional magnitude when the issue raised is one of structural error based on the petitioner being deprived of his 6th Amendment guarantee of meaningful adversarial confrontation and assistance of counsel.

A. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. *United States v Cronic,* 466 U.S. 648, 654 (1984). The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate. *Id.,* at 666. A trial is unfair if the accused is denied counsel at a critical stage of his trial. *Id.*

In this case, Petitioner was appointed counsel; however, that counsel failed to act in a critical stage of the prosecution. Counsel committed structural error that constructively denied him the right to counsel and rendered the trial inherently unreliable. Specifically, counsel failed to advise the court that Petitioner could not represent himself mid-trial because Petitioner was unfamiliar with the evidence against him.

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. *Weaver v. Massachusetts,* 582 U.S. 286, 295 (2017). Structural error occurs, for example, when counsel is completely denied, actually or constructively, at a critical stage of the proceeding, *Id.* It includes errors affecting the framework within which the trial proceedings. *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991).

Although not expressly identified as structural error, the Court has found that reversal is appropriate when the attorney fails to file for appeal, against the defendant's wishes. *Garza v. Idaho,* 568 U.S. ___ (2019); 139 S.Ct. 738, 746 (2019),

citing Roe v Flores-Ortega, 528 U.S. 470, 477 (2000). The "serious denial of the entire judicial proceeding itself . . . demands a presumption of prejudice." *Flores-Ortega,* 528 U.S. 470, 477 (2000). Counsel's failure to file for appeal was not justified as a strategic decision; the failure to file reflected inattention to the defendant's wishes. *Garza v. Idaho*, 568 U.S. ___ (2019); 139 S.Ct. at 746 (2019) (citations omitted).

B. In this case, the court and the attorney compounded the structural error by denying Petitioner meaningful adversarial confrontation at trial.

The court imposed a "Hobson's Choice" on Petitioner: he would continue with an attorney where both Petitioner and the attorney acknowledged that they could not work together. Petitioner asked the court for replacement counsel three times. Each time, the court held a hearing, and each time, Petitioner and counsel advised the court that they could not work together. Nevertheless, the court refused to appoint new counsel. To do so at the first hearing required a trial delay. To do so midtrial required a "mistrial" ruling and dismissal of the seated jury. However, not to do so inevitably led to structural error.

At the third hearing, the court compelled Petitioner to proceed *pro* se midtrial, Petitioner's attorney also had a duty to advise the court that Petitioner could not take over his defense. (App. #3, p.48 (Tr. 1/19/2016, pp. 15-18)) The attorney knew Petitioner was woefully unprepared to face the government's evidence; indeed, Petitioner had not even seen the government's evidence. Instead of speaking up on behalf of the accused, the attorney remained silent. As a result,

trial continued with Petitioner representing himself even though he was unfamiliar with the evidence that he must confront, unprepared to testify, unable to investigate his case or to subpoena witnesses.

The Sixth Amendment protects the adversarial process and requires the accused to have counsel acting in his role of advocate in order to confront the government's evidence. Those protections were not present in Petitioner's circumstances. A true adversarial process did not exist here.

Shortly after going back into trial, Petitioner's unfamiliarity with the government's evidence was clearly a problem. The court asked the Marshal to allow Petitioner to review his former attorney's file boxes. The petitioner was allowed 40 minutes to sit in the courtroom while the court was ongoing addressing others' matters, and to go through his attorney's boxes of discovery.

Even though Petitioner had previously asked his counsel more than once to investigate and to subpoena witnesses, no witnesses were under subpoena, and it appeared that no investigation had been conducted.[4] Petitioner knew of no investigation of the allegedly fraudulent patient files even though he had asked for it. In any event, Petitioner could not benefit from or have the opportunity to conduct his own investigation at the time he was compelled to proceed *pro se.* It was also too late to subpoena witnesses to come to court to testify for him in his defense.

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[4] However, in the January 4, 2016 hearing, the attorney said he had spoken with one witness, a nurse, and he did not believe that witness would testify as Petitioner expected. (App. #3, p.29 (Tr. 1/12/2016, pp 2-3))

When asked, counsel explained to the court that his defense was that the government's witnesses engaged in conduct worse than that alleged against Petitioner (App.#1, Tr. 1/4/2016, p. 8)). One of Petitioner's complaints about his counsel was that he did not answer basic questions, like what was his defense strategy. (App. #3, p. 27 (Ltr. of 12.28.15))

Consequently, at trial the government's evidence did not face meaningful adversarial confrontation, as guaranteed by the Sixth Amendment.

C. Structural error was not raised on appeal; however, typically, the appeal is not the best tribunal for consideration of matters not wholly covered in the case record. Petitioner raised structural error in his Amended Motion. (App.#, p. 73). However, the district court held that the Amended Motion was procedurally barred, it also stated that Petitioner's *pro se* claims lacked merit. (App. #1, p. 36)

Petitioner then sought further judicial review. With *pro bono* counsel, he applied to the Circuit for a certificate of appealability. The Circuit denied review on the application and denied Petitioner's motion to reconsider. (App.#1, p. 34).

D. Structural error is a failure in the adjudication to provide the fundamental Constitutional guarantees. It is unwelcome for anyone involved in the judicial system, not just the accused. For all, it is essential that trust in the system's integrity is maintained. The Sixth Amendment's guarantee of an adversarial process is a well-established guarantee.

E. The Court has ruled that a §2255 Motion, which raises a colorable Constitutional claim should be granted review. In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Court held that a certificate of appealability should issue when the prisoner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Petitioner raised a claim of Constitutional magnitude; that is, structural error resulting from a trial without adversarial confrontation. The trial proceeded without adversarial confrontation because he was compelled to go forward midtrial without the assistance of counsel; without familiarity with the government's evidence; without an opportunity to investigate the government's case; without an opportunity to subpoena witnesses, without preparation to testify, and he is an Egyptian native with only a colloquial understanding of the English language.

The district court dismissed Petitioner's claim and denied him a certificate of appealability.

The appellate court, when asked to review, denied Petitioner's Application for a Certificate of Appealability and his Motion to Reconsider.

Petitioner's position on the procedural bar is addressed in Question 1. His challenge to the dismissal of his Constitutional claim, that is, structural error, is raised here in Question 2.

As a claim of Constitutional magnitude, Petitioner's claim should have been recognized and acted on.

III. This Case Provides an Important Opportunity for Resolving a Major Split in the Evaluation of Equitable Tolling for Habeas Filings under 28 U.S.C. §§ 2255 and 2245 (the State Counterpart), and For Clarifying the Sixth Amendment's Guarantee.

First, the split among the courts on what warrants equitable tolling is reflective of the split among the Circuits on how to address equitable tolling in the context of post-conviction relief. Second, Mr. Elbeblawy's wrongfully deprived freedom is at issue because he has been improperly denied his day in court, at the trial level and at the post-conviction review level. The legal interpretation of equitable tolling does not involve disputed issues of fact; it involves an examination of how or by what. system those facts should be interpreted. Third, there are no issues of fact here, only questions of how to apply the law of equitable tolling in Question 1. In Question 2, there are no issues of fact, only questions of whether the denial of the adversarial process is structural error. Fourth, Mr. Elbeblawy's case does not pose a danger of mootness; his sentence runs past 2024. Fifth, neither party has waived any argument requiring the Supreme Court to decide the issues presented here on any non-substantive ground. Stated differently, nothing about the issues presented here limit the scope of the Court's review.

CONCLUSION

This petition for a writ of certiorari should be granted on each question presented.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. _____

KHALED ELBEBLAWY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contained 7,520 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sara E. Kopecki
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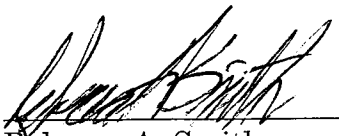
Member of the Bar



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AFFIDAVIT OF SRVICE

No._____

KHALED ELBEBLAWY,

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v.

UNITED STATES OF AMERICA,

Respondent.

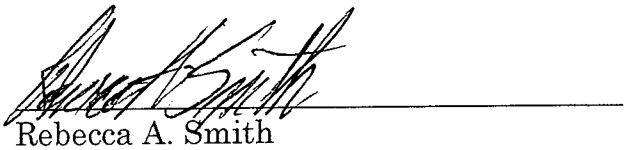
I certify that on February 8, 2024, I served the Respondent, United States of America, with the Petition for a Writ of Certiorari with Appendices in the above-captioned matter by sending three copies using the United States Postal Service and first-class express mail, postage prepaid, to the following:

Hon. Elizabeth Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001.

All parties required have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Sara E. Kopecki
BHT Legal, PLLC



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