

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

KUNTA K. GRAY,

Petitioner,

v.

DUSHAN ZATECKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *pro se* habeas petitioner is entitled to equitable tolling or, at a minimum, further factual development before the district court, where the petitioner's submissions demonstrate that there are circumstances under which tolling is warranted.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

Kunta K. Gray petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

This Court's guidance is needed to resolve a conflict between the decision below and decisions from other courts of appeals on a recurring issue of critical importance: the circumstances under which assertions of inadequate access to legal documents, inadequate access to the law library, frequent prison lockdowns, and placement in administrative segregation warrant a grant of equitable tolling or, at a minimum, further factual development to demonstrate the petitioner's entitlement to equitable tolling. The Court's intervention is also needed to correct the Seventh Circuit's doctrinal departures from this Court's decisions when it failed to afford Gray, a *pro se* petitioner, an opportunity to have his meritorious claims for habeas relief heard.

This case presents an appropriate vehicle for the Court to provide much-needed guidance on the circumstances when habeas petitioners—and in particular, *pro se* petitioners—are entitled to further factual development of their claims for equitable tolling. The Seventh Circuit's refusal to grant Gray equitable tolling, or the opportunity to develop his claim for equitable tolling, poses a serious threat to petitioners in that Circuit who may be ill-equipped or unable to present the best evidence necessary for equitable tolling without the assistance of counsel.

Furthermore, this Court's intervention is needed to ensure that Gray, who is essentially serving a life-sentence in state prison, and future petitioners like him,

have the opportunity to present the merits of their habeas petitions when equitable tolling may be warranted. Here, Gray has a compelling case of ineffective assistance of trial counsel, as well as other constitutional claims, that will never be addressed by the federal courts absent this Court's intervention. Given the emphasis this Court has placed on hearing meritorious habeas petitions, a grant of the writ of certiorari is warranted.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, *Gray v. Zatecky*, No. 15-2482 (7th Cir. Aug. 2, 2017), is published at 865 F.3d 909 (7th Cir. 2017), and reproduced at App. 1a–9a. The order of that court denying a petition for panel rehearing and rehearing en banc, *Gray v. Zatecky*, No. 15-2482 (7th Cir. Sept. 19, 2017) is reproduced at App. 10a. The opinion of the United States District Court for the Southern District of Indiana and entry of judgment, *Gray v. Zatecky*, No. 1:13-cv-00812 (S.D. Ind. June 16, 2015), is unreported and is reproduced at App. 11a–16a. The Indiana Supreme Court's order denying transfer, *Gray v. State of Indiana* (Aug. 8, 2012), is reproduced at App. 17a. The Court of Appeals of Indiana's post-conviction opinion is unpublished and reproduced at App. 18a–30a. The Marion County Superior Court's post-conviction opinion is unpublished and is reproduced at App. 31a–41a. The Indiana Supreme Court's order denying transfer of Gray's direct appeals is reproduced at App. 42a. The Court of Appeals of Indiana's direct-review decision is unpublished and is reproduced at App. 43a–56a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of Gray’s habeas petition on August 2, 2017. App. 1a–9a. That court denied his petition for rehearing and rehearing en banc on September 19, 2017. App. 10a. This Court, per Justice Kagan, entered an order on December 4, 2017, extending the time to file this petition until February 1, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides a one-year statute of limitations that begins to run on the “date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Under AEDPA, the limitations period is tolled while a state court considers “a properly filed application for State post-conviction or other collateral review.” *Id.* § 2244(d)(2).

The Fifth Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, provides, in pertinent part, that “[n]o person” shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

The Sixth Amendment to the Constitution, as applicable to the states through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. Const. amend. VI

The Sixth Amendment to the United States Constitution also mandates that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury.” U.S. Const. amend. VI.

STATEMENT OF THE CASE

This case raises serious concerns regarding the Seventh Circuit’s application of the equitable tolling doctrine as well as its failure to permit *pro se* petitioners like Gray the opportunity to develop the record regarding their entitlement to such tolling. Acting *pro se* before the district court, Gray made allegations sufficient to demonstrate that equitable tolling was warranted under the standard articulated by this Court in *Holland v. Florida*, 560 U.S. 631 (2010), or at a minimum, that he was entitled to develop his request for equitable tolling on remand. In other circuits he may have received equitable tolling, but would have almost certainly received the opportunity to develop his request for equitable tolling through further factual development or an evidentiary hearing. The Seventh Circuit denied Gray that opportunity.

Instead, the court of appeals affirmed dismissal of Gray’s habeas petition. In so doing, the court of appeals failed to reach Gray’s argument that remand for further factual development was warranted and required by law. The court of appeals compounded this error by refusing to grant reconsideration (or take the case en banc) to correct its failure to address Gray’s meritorious argument.

The Seventh Circuit’s decision is all the more concerning because Gray presents powerful constitutional claims. In what Circuit Judge Wood described as

“the worst cross-examination I have ever seen,” Gray’s trial counsel elicited otherwise inadmissible testimony concerning another crime that Gray allegedly committed that bore a close resemblance to the crime for which he was standing trial. *See* Oral Argument, beginning at 28:30, *Gray v. Zatecky*, No. 15-2482 (“Oral Argument”), *available at* http://media.ca7.uscourts.gov/sound/2017/rt.15-2482.15-2482_01_10_2017.mp3. This deficient performance prejudiced Gray, as the prosecution exploited trial counsel’s error and portrayed Gray as a violent, habitual offender.

To date, Gray, who filed his habeas petition *pro se*, has never been afforded an opportunity to present the merits of his claims to a federal court. By this petition Gray seeks to be given the opportunity to develop his entitlement to equitable tolling and explore before a federal district court the merits of his habeas claim. To deny the very possibility of habeas relief here—where the merits are compelling and Gray has not been afforded further factual development with the assistance of counsel to demonstrate his entitlement to equitable tolling—denigrates the power and purpose of the writ of habeas corpus not only in his case, but also in future cases where *pro se* petitioners make a valid, but imperfect, showing of entitlement to equitable tolling. *See Murray v. Carrier*, 477 U.S. 478, 500 (1986) (Stevens, J., concurring) (“[T]he central mission of the Great Writ should be the substance of ‘justice,’ not the form of procedures.”); *Brown v. Allen*, 344 U.S. 443, 554 (1953) (Black, J., dissenting) (“[I]t is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent

forfeiture of life or liberty in flagrant defiance of the Constitution” (citations omitted)).

A. State Court Proceedings

Kunta Kinte Gray, a certified spot welder, lived in Indianapolis, Indiana. On March 5, 2002, a jury convicted Gray of various charges, including felony murder, robbery, and unlawful possession of a firearm by a serious violent felon, in connection with the robbery and murder of Gregory Jones.¹ App. 20a. Although Gray requested that his serious-violent-felon charge be tried separately from the other charges, the trial court denied that request. *Id.* After unsuccessfully appealing his conviction, Gray sought post-conviction relief. *Id.* Among other things, Gray argued that he was denied effective assistance of appellate counsel because trial counsel failed to appeal the denial of Gray’s request to try the serious-violent-felon charge separately from the other charges. App. 19a. The post-conviction court denied Gray’s request for relief, but the Indiana Court of Appeals reversed, overturned his convictions, and ordered a new trial. *Id.*

Gray’s second trial began on August 7, 2006, and lasted four days. Tr. 1–4.² The proceedings began with voir dire. Groups of prospective jurors from the venire

¹ Facts concerning Gray’s first trial were described by the Indiana Court of Appeals in considering Gray’s first request for state post-conviction relief. App. 19a.

² The transcript of Gray’s second trial is cited as “Tr.” followed by the relevant page number(s). The complete trial transcript was lodged with the Seventh Circuit Court of Appeals on July 8, 2016. “S.A.” stands for the Supplemental Appendix that Gray filed with his opening brief to the Seventh Circuit. These materials were not included in the appendix to this petition because they are not essential to understanding the Petition, Sup. Ct. R. 14.1(h)(vi), but will be supplied upon request.

were called into the jury box for voir dire. S.A. 103–106. The Court, the prosecution, and Gray’s trial counsel all had the opportunity to question the prospective jurors. *See id.* When this process was complete, the parties made their lists of peremptory strikes, and the trial judge excused those jurors. S.A. 117–119. Additional members of the venire were then called into the box and the process repeated until a complete jury was empanelled. *See id.*

1. The *Batson* challenge

Although the record is unclear as to how many prospective black jurors were in the venire, the first group of prospective jurors included Mr. Simmons and Ms. Hunt, both of whom are black. S.A. 118–21, 128. The prosecution struck both from the panel. S.A. 118–21. During a sidebar immediately after the first round of strikes, Gray’s trial counsel raised an objection under *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986). *Id.* The court delayed resolution of the *Batson* challenge until after the jury was empanelled. *Id.*

The next group of prospective jurors included Mr. Beckham, who is also black. S.A. 120, 128. The prosecution struck him from the panel. S.A. 128. The prosecution also struck Mr. Gilbert, who is also black. S.A. 122, 127–28.

After the jury was empanelled, defense counsel renewed his *Batson* challenge and made a motion for a mistrial, arguing that the prosecution had improperly struck four black jurors from the jury panel: Mr. Simmons, Mr. Gilbert, Ms. Hunt,

and Mr. Beckham.³ S.A. 128.

The trial court asked the prosecution to provide its reasons for striking the four black jurors. S.A. 129–31. The prosecutor explained that she struck Mr. Simmons because he was a convicted felon. S.A. 129. Mr. Simmons, however, had testified that he harbored no ill-will towards the State. S.A. 110–11. The prosecutor justified striking Mr. Gilbert in part because he did not answer “yes” or “no” on his juror questionnaire as to whether he could be an impartial witness. S.A. 130. Mr. Gilbert stated during voir dire that he could fairly listen to and consider the evidence. S.A. 123–24.

As for Ms. Hunt, the prosecutor said that she “loved” what Ms. Hunt had to say in response to questioning. S.A. 129. Ms. Hunt had represented that she could be a fair and impartial juror. *Id.* Even so, the prosecutor struck her “because of her employment with [Indiana’s Family Social Services].” *Id.* As the prosecutor explained, “our office has charged and has investigated a lot of people who work for the FSSA and we’re very worried that she would hold that against The State of Indiana.” *Id.* The prosecutor, however, did not ask Ms. Hunt if she was aware of the investigation, or would hold such an investigation against the prosecution. S.A. 111–12.

With respect to Mr. Beckham, the prosecutor explained that “Mr. Beckham would not directly answer why he could not be a fair and impartial juror.” S.A.

³ The record reflects that the defense struck one black juror from the panel, S.A. 129, and two black jurors were eventually empaneled on the jury, S.A. 133–34.

130–31. But the prosecution did not apply this same reasoning to at least one other juror, Mr. Walker, who is white, and “checked that he could not be a fair and impartial juror in a criminal trial.” S.A. 132–33.

Ultimately, the trial court denied the *Batson* motion and trial counsel’s request for a mistrial. S.A. 132–34.

2. Erin Bower

The initial group of prospective jurors also included Erin Bower, who would eventually serve on Gray’s jury. Before voir dire, Ms. Bower completed a questionnaire about her life experiences, including whether she or anyone close to her had ever been the victim of a crime. S.A. 192–93. Ms. Bower answered that question: “No.” *Id.*

But both Ms. Bower and her mother were the victims of a crime. S.A. 189–91. When Ms. Bower was a child, her family was shopping at a Kmart. *Id.* While there, she picked up a tube of toothpaste. *Id.* Unbeknownst to Ms. Bower, the tube contained a pipe bomb that exploded, causing her to lose both her hand and an eye. *Id.* The bomb also injured her mother. S.A. 190–91.

During voir dire, Ms. Bower alluded to this incident as an “accident,” but did not elaborate, S.A. 115, or speak up when other prospective jurors discussed their experiences as victims of crime, S.A. 113–14, 125–26. Because Ms. Bower indicated that she had never been the victim of a crime (or that her mother had been the victim of a crime) in either the questionnaire or during voir dire, Gray’s counsel did not question her further about the “accident” or strike her from the jury. S.A. 186–87. Consequently, Ms. Bower remained on the jury that eventually convicted Gray.

3. Gray's conviction and appeal

The prosecution's case against Gray centered on the testimony of two witnesses: purported eyewitness Tracy Avant and jailhouse informant Andrew White. The prosecution's theory was that Gray approached the eventual victim, Gregory Jones, about purchasing several pounds of marijuana early in the day on November 16, 2000. Tr. 71, 76–77. Avant was to testify that Gray was one of two men who came to the home later in the day and robbed and murdered Jones. Tr. 72–75. White was to testify that after Gray's arrest, White and Gray were briefly confined in a holding cell together. Tr. 77–78. According to White, Gray confessed to the crime. *Id.*

The opening statement by Gray's counsel, Stephen Gray,⁴ described a different set of facts: although Gray had sought to purchase drugs from Jones, Avant had wrongly identified Gray as one of the assailants. Tr. 78–85. With respect to White, trial counsel argued that he was testifying against Gray to receive a less severe sentence, and that his testimony was inconsistent and unreliable. Tr. 88.

On direct examination, Avant testified that Gray was one of two assailants who fled from the home where the robbery and murder occurred. Tr. 134–135. He also purported to identify Gray in a photographic lineup. *Id.*

The cross-examination of Avant focused on inconsistencies in his testimony

⁴ To avoid confusion, Stephen Gray is referred to as “Attorney Gray” or “trial counsel” in this Petition.

and his purported identification of Gray. Avant had testified that he arrived at Jones's home, where the robbery and murder occurred, before the assailants. Tr. 153. But on the day of the crime he told Detective Aikman, one of the officers investigating the crime, that he arrived at Jones's home after the assailants and after the crime took place. Tr. 141–144, 321–323. Avant did not give Detective Aiken any description of the alleged assailants, Tr. 175–177; 323–324, and was not asked to identify Gray until two weeks after the crime occurred, Tr. 175–177. And even then, he required two trips to the police station to review the photographic array before he said he was able to identify Gray with complete certainty. Tr. 175–177, 273–274.

Trial counsel cross-examined Avant about other inconsistencies in his testimony. For example, Avant claimed to be a close friend of Jones, the victim. Tr. 113. But when Avant called the 911-emergency number to report the crime, he did not know Jones's name. Tr. 132–133; 145–146. Avant also testified that one of assailants beat him badly with a gun, Tr. 123–125; 162–164, but there was no evidence of the assault and Avant did not require or seek medical attention, Tr. 183–184; 323–324. Also, when asked to identify this assailant in a photographic lineup, Avant identified the wrong person, even though he said at the time he was 100% sure he was right. Tr. 176–178; 650–655. And Avant testified that he had not smoked marijuana the day of the crime, Tr. 148, but the victim's sister testified that she saw Avant smoking marijuana on multiple occasions that day, Tr. 673–675.

To rehabilitate Avant's testimony during closing, the prosecutor accused

Detective Aikman—the officer who took Avant’s statement—of “poor police work,” and asked the jury “not to give any weight to what Detective Aikman said that happened with—Tracy Avant.” S.A. 84; *see also* S.A. 85 (“Detective Aikman did a poor job of interviewing.”). Even then, the prosecutor conceded that “certain things [Avant previously] said might have been different” from what he testified to. S.A. 87.

As for White, a jailhouse informant offered by the prosecution, he testified that while he and Gray were detained in the same holding cell, Gray allegedly confessed to committing the crime. Tr. 517.

On cross-examination, trial counsel employed several tactics to impeach White. White was incarcerated when the alleged conversation with Gray occurred, and trial counsel questioned White about a letter he wrote to the sentencing judge in his case requesting consideration for testifying against Gray. S.A. 35–38.

Trial counsel also wanted to show that White and Gray were not in the holding cell at the same time, and thus the confession White described could have never occurred. S.A. 181. He initially hoped to introduce a court chronological case summary (or docket sheet) that he argued would support this theory, but the trial court refused to admit it. S.A. 181, 184; *see also* Tr. 446–49. Even so, Attorney Gray questioned White about inconsistencies in his testimony regarding when the alleged conversation with Gray occurred, suggesting that the timing of the conversation was implausible. S.A. 20–24. White also admitted that he “didn’t really like Mr. Gray” because White and the victim had been friends. S.A. 39.

Attorney Gray then moved to a different line of questioning, one that was not part of his original strategy for cross-examining White. S.A. 180–81. Without discussing this line of questioning at any time with his client, Attorney Gray asked White whether he had ever been “one of Mr. Gray’s victims”:

Q. And the reason that you didn’t like Mr. Gray and the reason that you had these strong passionate feelings of animosity towards Mr. Gray, or the reason that you wanted to attack Mr. Gray is that you told Detective Tudor that you had been one of Mr. Gray’s victims, and he tried to rob you once, that you were in a drug deal with Mr. Gray and he pointed a gun at you and tried to rob you; isn’t that a fact?

A. I don’t know, tried -- I mean you usin’ the wrong words.

Q. Okay. Well, did you tell him that you’d been one of Mr. Gray’s victims where you’d been the victim of a --

A. Yeah, yeah, yeah --

Q. -- robbery?

A. -- that’s true.

Q. So let’s see if I understand this. You and Mr. Gray weren’t friends?

A. Well.

Q. You know who he was right?

A. Yeah.

Q. Okay. Because of your past association with Mr. Gray -- it wasn’t that you were drinking buddies or had friends in common, you’d just

been one of his victims; is that right?

A. That's true.

Q. Okay. That's what you told the detective right?

(No audible response)

Q. And so now what you're telling the jury that having been one of Mr. Gray's victims -- and didn't you also tell him that you were a victim during a drug deal?

A. I think I did, yeah.

Q. And so having been one of Mr. Gray's victims, and having had him rob you, or attempt to rob you, and waive a gun around in your face, and steal your goods, or belongings, or marijuana, or money, or whatever it was that you told Detective Tudor that he stole, you hated Mr. Gray, didn't you?

A. Well hate is a strong word. Not for that, no. I chalked that up as a loss; he killed my friend. So, I don't care about . . .

S.A. 40–42. Although Attorney Gray would later describe this testimony as “critical” to Gray’s defense, S.A. 184, he did not mention it in his closing argument, S.A. 45–83.

The prosecution, however, exploited the testimony, reminding the jury that White “knew Kunta Gray because Kunta Gray had robbed him before.” S.A. 44. The prosecution also encouraged the jury to draw comparison between the alleged robbery and the robbery of Jones:

Now Andrew White does hate Kunta Gray interestingly enough because he [Gray] robbed [White] during a dope deal—sound familiar—that [is] Kunta Gray’s job, he robs people, (indiscernible), dope dealers

S.A. 88.

4. The jury verdict

The jury initially deadlocked on the question of Gray’s guilt. S.A. 89–90.

After receiving further instruction from the court, the foreperson sent a note to the court and the parties, notifying them that the hold-out juror “suddenly changed votes. It is apparently a concession and is unable to be backed up by the evidence.”

S.A. 91. The foreperson wrote: “I have trouble submitting the change in good conscience.” *Id.* Nonetheless, the jury returned with a guilty verdict on charges of felony murder, murder, robbery, attempted murder, and carrying a handgun without a license. S.A. 94–95; *see also* S.A. 135–40. The court sentenced Gray to 85 years in prison. S.A. 97–102.

5. Gray’s direct appeal

Now represented by the Marion County Public Defender’s office, Gray appealed his conviction to the Indiana Court of Appeals. App. 43a–56a. Among other issues, Gray argued that the trial court erred when it denied his *Batson* challenge. App. 52a–54a. The Indiana Court of Appeals rejected Gray’s *Batson* argument (and his other arguments as well), reasoning that the State provided race-neutral reasons for striking each individual juror. App. 54a.

Thereafter, Gray filed a petition to transfer, asking the Indiana Supreme Court to address all “issues raised before the court of appeals” S.A. 159, 161.

The Indiana Supreme Court denied transfer on October 4, 2007. App. 42a.

B. State Post-Conviction Proceedings

After exhausting his direct appeal, Gray was no longer represented by counsel. *Pro se*, Gray petitioned the Indiana Court of Appeals for his records so that he could file a petition for state post-conviction relief. S.A. 164–165. It took the Indiana Court of Appeals over a month to rule on that request, S.A. 166, and another two months to release the records to the public defender, who no longer represented Gray, S.A. 221. In all, it took nearly four months for Gray to receive his records. *Id.* Gray then worked diligently to prepare his petition for post-conviction relief and filed it on July 29, 2008, which was amended after the appointment of counsel. S.A. 167–76.

The post-conviction court held an evidentiary hearing on March 29, 2011. At that hearing, Attorney Gray and his co-counsel, Todd Ess, testified about their voir dire and trial strategies.

Attorney Gray was asked about his strategy for cross-examining White, the jailhouse informant. S.A. 180–82. He testified that he had three goals for his cross-examination of White, none of which involved eliciting the fact that Gray robbed White. *Id.* He wanted to show that (1) White received a reduced sentence in exchange for his testimony; (2) White’s testimony was inconsistent; and (3) White and Gray were not in the holding cell together, and thus Gray could not have confessed to White. *Id.* Attorney Gray testified that he “was tremendously troubled by” eliciting the testimony that Gray robbed White and admitted that the alleged robbery was “very similar” to the crime Gray was on trial for. S.A. 183–84. He

nonetheless maintained that it was critical to impeach White with the robbery testimony. S.A. 184–85.

Attorney Gray also testified about his decision to keep Ms. Bower on the jury panel. Attorney Gray testified that “we kept her on the panel because she indicated she had been the victim of an accident, not the victim of a crime.” S.A. 178. Had he known Ms. Bower was a crime victim, he “[a]bsolutely” would have struck her from the jury. S.A. 178–79. Attorney Todd Ess echoed this sentiment, testifying that he “absolutely” would have struck Ms. Bower from the panel had he known she was the victim of a crime. S.A. 186.

On October 24, 2011, the post-conviction court denied Gray’s petition for relief. App. 31a–41a. Gray appealed to the Indiana Court of Appeals, which affirmed. App. 18a–30a. As for the ineffective assistance claim, the court of appeals concluded that trial counsel “reluctantly chose” to elicit the prior-bad-acts evidence when his “preferred course of action” failed; his performance was therefore not deficient. App. 29a. Because the court of appeals determined that counsel’s performance was not deficient, it did not address whether Gray was prejudiced by counsel’s performance. *Id.* The court of appeals also rejected Gray’s claim of juror misconduct, concluding that because the claim was available to Gray on direct appeal, and had not been asserted then, it could not be raised in a petition for post-conviction relief. App. 28a.

Thereafter, the Indiana Supreme Court denied Gray’s petition to transfer on August 8, 2012. App. 17a.

C. Federal Habeas Proceedings

Gray was again without counsel in preparing his petition for habeas corpus relief. After the Indiana Supreme Court denied his petition to transfer, Gray requested a copy of his file from the State Public Defender's office and a copy of the post-conviction transcript so that he could fully research and prepare his habeas petition. S.A. 222–23. This caused further delay, and without these records, he could not effectively prepare his petition for writ of habeas corpus. *Id.* Gray's efforts to file his habeas petition were further hampered by his inadequate access to the prison law library, caused in part by frequent lockdowns at the prison. *Id.*

On April 29, 2013, Gray petitioned *pro se* for a writ of habeas corpus. App. 13a. The district court issued an order to show cause as to why his habeas petition should not be dismissed as untimely. After the parties submitted briefing, the district court dismissed the petition as untimely and entered judgment. App. 11a–16a.

The Seventh Circuit granted a certificate of appealability, finding that Gray “has made a substantial showing of the denial of his right to the effective assistance of trial counsel, his right to due process, and his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986).” The court of appeals also instructed the parties to “address the timeliness of Gray's petition and whether he is entitled to equitable tolling.” The court of appeals then appointed counsel.

In his briefing to the court of appeals, Gray argued (among other things) that the panel should not afford the district court's decision on equitable tolling deference because the district court did not give Gray the resources necessary to

gather relevant evidence (such as appointing counsel) nor did it appear to consider whether to hold an evidentiary hearing. *See* 7th Cir. Dkt. 17 (Opening Br.) at 43; *see also* 7th Cir. Dkt. 28 (Reply Br.) at 18. Gray argued that despite the district court’s failure to afford him the opportunity, with counsel, to gather relevant evidence, the record before the district court established his entitlement to equitable tolling. *See, e.g.*, 7th Cir. Dkt. 17 (Opening Br.) at 43–50.

But this was not Gray’s sole argument. He also argued that if the panel determined that the limited record was inadequate to establish his entitlement to equitable tolling, the proper result under Seventh Circuit case law was to remand to the district court for further factual development and, if necessary, an evidentiary hearing. 7th Cir. Dkt. 17 (Opening Br.) at 50. As Gray explained, he would gather and present evidence that he was placed in administrative segregation and moved from cell to cell while the limitations period was running, which significantly delayed the filing of his petition. *Id.* Gray’s reply brief also raised this argument. 7th Cir. Dkt. 28 (Reply Br.) at 22–24.

After briefing and argument, the panel affirmed dismissal. App. 1a–9a. Applying a deferential standard, it held that the district court could have reasonably determined that Gray did not show entitlement to equitable tolling. App. 7a–8a. In reaching this conclusion, the panel noted the “similarities” between Gray’s case and that of the petitioner in *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014), a case where this Court found the application of equitable tolling was warranted. App. 5a–7a. Like Socha, Gray “experienced long delays in obtaining

the files [he] needed to prepare [his] petition[],” and had inadequate access to the prison law library due to institutional lockdowns. App. 6a. But the panel also held that the district court could have found that Gray made a less “compelling . . . showing [than] Socha,” who also alleged placement in administrative segregation and experienced a longer delay in receiving his legal papers. App. 7a. The panel, however, did not address Gray’s argument that it should remand to the district court for further factual development on the equitable-tolling factors.

After the Seventh Circuit denied rehearing and rehearing en banc, App. 10a, this timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* for two reasons.

First, the Seventh Circuit’s decision conflicts with decisions of other courts of appeals concerning when a petitioner—and in particular, a *pro se* petitioner—has made a sufficient showing to warrant equitable tolling or further factual development to support the petitioner’s request for equitable tolling.

Second, the question presented addresses an exceptionally important issue for habeas petitioners generally and Gray in particular. The Seventh Circuit’s refusal to address (and implicit denial of) Gray’s request for remand for further factual development means that habeas petitioners like Gray who make a substantial, yet imperfect showing of entitlement to equitable tolling will be denied the opportunity to substantiate the substance of their allegations through further factual development or an evidentiary hearing. The decision also conflicts with this

Court's clear instruction that *pro se* habeas petitioners should have the opportunity to have valid habeas claims heard on the merits despite procedural obstacles.

I. The Seventh Circuit's Decision Conflicts With Decisions From Other Courts Of Appeals.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a one-year statute of limitations to file a habeas petition. 28 U.S.C. § 2244(d)(1). That limitations period, however, is not absolute. In *Holland v. Florida*, 560 U.S. 631, 645 (2010), this Court confirmed that the AEDPA limitations period is subject to equitable tolling in appropriate cases. As this Court explained, the statute of limitations is tolled where (1) extraordinary circumstances prevented a timely filing of the habeas petition, and (2) the petitioner has diligently pursued his legal remedies. *Id.* at 649. In reaching this conclusion, the *Holland* Court emphasized that a sufficiently developed factual record was essential to the equitable-tolling determination, and remanded for the lower courts "to determine whether the facts in this record entitle [the petitioner] to equitable tolling or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail." *Id.* at 654.

Here, the record as it exists leaves no doubt that "further proceedings," such as an evidentiary hearing, "might indicate that respondent should prevail." *Id.* In fact, Gray specifically requested that if the Seventh Circuit could not grant Gray equitable tolling on the record as it currently exists, then it should remand to the district court for further factual development. *See* 7th Cir. Dkt. 17 (Opening Br.) at 44; *see also* 7th Cir. Dkt. 28 (Reply Br.) at 24. Gray argued that with the assistance

of counsel, he could fully develop the record regarding the extraordinary circumstances he encountered and the diligence he used to file his habeas petition.

The Seventh Circuit, however, entirely ignored that argument, and refused to remand. Instead, the court analyzed Gray's request for equitable tolling in light of a case in which it previously granted equitable tolling, *Socha v. Boughton*, 763 F.3d 674, 686 (7th Cir. 2014). App. 5a–8a. In *Socha*, the Seventh Circuit found the petitioner was entitled to equitable tolling because he was held in administrative segregation, which limited his library access to 80 minutes every two weeks and the “library” consisted of “two computers with spotty internet access” that were “shared by 250 inmates.” *Socha*, 763 F.3d at 680. Analyzing Gray's case, the court of appeals noted the “similarities” between Gray's case and the facts in *Socha*, including that Gray's “access to the prison's law library was constrained ‘due to various institutional lockdowns ranging from (2) weeks up to (10) months, with (2) lockdowns in the past (3) months lasting a total of (3) weeks.’” App. 6a (citation omitted). “Most important” to the Seventh Circuit was that “Gray and Socha both experienced long delays in obtaining the files they needed to prepare their petitions.” Socha spent the “better part of a year begging trial counsel for his file, while Gray waited 113 days for the Indiana Court of Appeals to give him his case record.” *Id.* Although the Seventh Circuit acknowledged that the delay Gray experienced was a “substantial obstacle,” the court reasoned that “the district court reasonably could have found that [Gray] did not make as compelling a showing as Socha,” and thus affirmed dismissal of the petition. App. 7a–8a.

But as Gray emphasized throughout this appeal, the real difference between his case and Socha's case is that Socha benefited from a more developed record before the district court. Indeed, if given the opportunity, Gray would present evidence that, like Socha, he too was placed in administrative segregation while the limitations period was running. And he would further develop the factual record demonstrating that he was without his legal papers for much of the limitations period and had inadequate access to the law library due to frequent prison lockdowns. Because he was *pro se* when filing his habeas petition and responding to the district court's order to show cause, and because the district court never appointed counsel to assist him in gathering evidence, Gray had no legal assistance in presenting the reasons why equitable tolling was warranted.

Whether Gray's habeas claims are heard on the merits should not turn on whether he had representation to present evidence to the district court. Remand, therefore, was appropriate given the lack of representation and the "substantial" obstacles Gray faced in filing his habeas petition. App. 7a. The Seventh Circuit, however, did not address that argument, let alone remand for such further proceedings. Instead, the court affirmed dismissal of the petition, citing the substantial similarities between Gray's case and a case warranting equitable tolling, but noting Gray's *pro se* showing was not as "compelling." App. 7a–8a. The court then refused to reconsider its failure to address Gray's argument. App. 10a.

This approach directly conflicts with that articulated in decisions of other courts of appeals, particularly those of the Fifth and Ninth Circuits. Those other

courts have held that, at a minimum, a *pro se* petitioner who alleges facts that may ultimately entitle her to equitable tolling is deserving of an evidentiary hearing to develop the basis of his request for equitable tolling. *See, e.g., Lott v. Mueller*, 304 F.3d 918, 924–25 (9th Cir. 2002) (remanding for further fact-finding when prisoner was denied access to his legal files during two temporary transfers that lasted 82 days). In fact, in some instances these courts have outright granted equitable tolling. *See, e.g., Espinoza-Matthews v. California*, 432 F.3d 1021, 1027–28 (9th Cir. 2005) (granting equitable tolling where the prisoner was placed in administrative segregation and denied access to his legal papers despite diligent efforts to receive them). Here, the Seventh Circuit did neither.

Specifically, the Ninth Circuit has recognized that remand for further factual proceedings is warranted where it could not be determined that there were “no circumstances consistent with petitioner’s petition and declaration under which he would be entitled to a finding of . . . equitable tolling.” *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc). In contrast to the Seventh Circuit’s approach, in the Ninth Circuit a *pro se* petitioner’s filings should be construed “liberally,” and where “on the facts supported by the submissions presently before the court, . . . it cannot be conclusively determined that [the *pro se* petitioner] is not entitled to equitable tolling,” remand for further factual development is warranted. *Porter v. Ollison*, 620 F.3d 952, 960 (9th Cir. 2010); *see also Lott*, 304 F.3d at 924 (refusing to “impos[e] extraordinarily high evidentiary standards on *pro se* prisoner litigants—who have already faced an unusual obstacle beyond their control during

the AEDPA limitation period . . .”). Consistent with this rule favoring remand for *pro se* petitioners where there is a potential that equitable tolling is warranted, the Ninth Circuit has remanded for further proceedings where, as here, the petitioner was denied access to legal papers and experienced other significant obstacles. *See, Mendoza v. Carey*, 449 F.3d 1065, 1071 (9th Cir. 2006) (“[R]emand for factual development of the records is the appropriate course” where “there are circumstances consistent with petitioner’s petition and declaration under which he would be entitled to . . . equitable tolling” (citation omitted)).⁵

The Ninth Circuit’s analysis in *Whalem/Hunt* illustrates how the outcome in Gray’s case would have been different had his case arisen in the Ninth Circuit, not the Seventh. 233 F.3d at 1147. In *Whalem/Hunt*, the petitioner filed his petition after the one-year limitations period, and the state moved to dismiss. *Id.* In response, the petitioner submitted a declaration “that the law library of the prison in which he is incarcerated” did not have necessary legal materials until after the year expired. *Id.* The district court determined that the petition was untimely and that tolling was not warranted. *Id.* at 1148. The Ninth Circuit reversed, holding

⁵ Until the panel’s published decision, it appeared that the Seventh Circuit followed a similar rule. *See, e.g., Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016) (holding that district court erred in dismissing an untimely habeas petition by failing to appoint counsel and allow counsel to “formulat[e] an explanation for delay satisfactory to the district judge”); *Moore v. Battaglia*, 476 F.3d 504, 508 (7th Cir. 2007) (remanding to the district court for further factual development because “this case presents us with a limited factual record” from which it could not determine whether equitable tolling was warranted). But in the published decision here, the court of appeals departed from this precedent, thereby creating a split with other circuits and threatening to deny other habeas petitioners of relief in the future.

that “[w]e do not agree with the district court that there are no circumstances consistent with petitioner’s petition and declaration under which he would be entitled to” equitable tolling. *Id.* The Ninth Circuit further explained that “[o]n the present record, however, we cannot go farther.” *Id.* The district court had not conducted an evidentiary hearing or solicited a response from the state regarding the contents of the prison library. *Id.* Instead of affirming dismissal, like the Seventh Circuit did, the Ninth Circuit remanded for further factual development “to develop the facts and assess their legal significance.” *Id.*

The same result occurred in *Sossa v. Diaz*, 729 F.3d 1225, 1236–37 (9th Cir. 2013). There, the Ninth Circuit held that remand was required to develop the record as to whether prison lockdowns and limited library access prevented the petitioner from timely filing his habeas claim. *Id.* Thus, in both *Whalem/Hunt* and *Sossa*, the Ninth Circuit considered allegations nearly identical to those raised by Gray and determined that while they did not conclusively prove entitlement to equitable tolling, they warranted further factual development below. Had Gray’s case arisen in the Ninth Circuit, therefore, he would have likely received the opportunity to further develop his claim in the Ninth Circuit. Instead, in the Seventh Circuit, the district court’s dismissal was affirmed.

The decision below also conflicts with decisions from the Fifth Circuit. In the Fifth Circuit, remand for further factual proceedings is warranted where the factual allegations in support of equitable tolling “may” warrant such tolling even if it is not conclusive from the petitioner’s submissions. *See Phillips v. Donnelly*, 216 F.3d 508,

511 (5th Cir. 2000) (remanding to determine, after an evidentiary hearing, whether petitioner’s equitable tolling claim was supported by the evidence). The Fifth Circuit has thus held that remand was warranted where the petitioner alleged that his legal papers were confiscated and thus he was unable to timely file, but were “not sufficient to establish his ultimate entitlement to equitable tolling.” *Valverde v. Stinson*, 224 F.3d 129, 135 (5th Cir. 2000) (remanding with instruction to develop the factual record regarding equitable tolling further).

By its silence on the issue of remand for further factual development, the Seventh Circuit held that although Gray’s *pro se* submission was similar in several key respects to a case where the court of appeals previously granted equitable tolling, Gray was not entitled to the opportunity for further factual development to demonstrate conclusively his entitlement to tolling as well. The result would be different in other circuits which hold that any plausible showing of entitlement to equitable tolling warrants the opportunity for further factual development.

This Court’s review is therefore necessary to resolve this dispute among the courts of appeals.

II. The Seventh Circuit’s Decision Creates Virtually Insurmountable Hurdles For *Pro Se* Petitioners Going Forward.

By refusing to reach Gray’s request for further factual development—thereby implicitly denying that request—the Seventh Circuit sets a precedent that *pro se* petitioners that make a substantial but imperfect showing of entitlement to equitable tolling will not have the opportunity to have their petitions heard on the merits, even if their underlying habeas claims are meritorious.

As an initial matter, the Seventh Circuit’s decision ignores this Court’s instruction that *pro se* filings, like Gray’s submissions to the lower courts, must be construed liberally. *E.g., Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” (citation omitted)). That did not happen here. Gray was *pro se* when he filed his habeas petition, and when he responded to the district court’s request for briefing on the timeliness of his petition. On his own, Gray identified extraordinary circumstances—inadequate access to the law library, frequent prison shutdowns, and lack of access to his case records—which in other cases justified equitable tolling. He also described the diligence he used to file his petition in the face of those obstacles. But the court of appeals found that while his situation was indeed “similar[]” to cases where equitable tolling was warranted, his *pro se* submissions were not as developed as the other cases. *See App. 6a.*

Consistent with construing Gray’s submissions liberally (which the lower courts did not do), the lower courts could have taken other steps to ensure that Gray had the opportunity to present his best case for equitable tolling. The district court could have appointed counsel to assist Gray in gathering and presenting evidence of his entitlement to equitable tolling. *See* 18 U.S.C § 3006A. Likewise, the Seventh Circuit, which did appoint counsel to assist Gray with his appeal, could have remanded and allowed Gray, with the assistance of counsel, the opportunity to develop the record regarding his entitlement to equitable tolling. The lower courts,

however, did none of these things.

This result is all the more concerning because it ignores Gray’s meritorious claims for habeas relief. This Court has emphasized that the strength of the claims in a habeas petition *must* inform a court’s decision to equitably toll the statute of limitations. *E.g.*, *Lonchar v. Thomas*, 517 U.S. 314, 324–25 (1996) (“Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”). Indeed, a facially strong constitutional claim that calls into question the fundamental fairness of the very process by which a petitioner was convicted and sentenced “compels review regardless of possible procedural defaults.” *Murray*, 477 U.S. at 501 n.8 (Stevens, J., concurring); *see also Hensley v. Mun. Court*, 411 U.S. 345, 349–50 (1973) (“[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.” (citations omitted)).

The Seventh Circuit’s decision, however, virtually ensures that the merits of Gray’s petition are never heard by a federal court, even though his claims are in fact meritorious. In particular, Gray brings a claim for ineffective assistance of counsel based on his trial counsel’s disastrous cross-examination of a prosecution witness. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). At Gray’s trial,

during the cross-examination of a proffered jailhouse snitch, Gray’s trial counsel badgered the witness into testifying that the witness had previously been robbed by Gray during a drug deal gone bad—almost the exact crime that Gray was presently on trial for. This blunder allowed the prosecution to encourage the jury to view Gray as a violent, habitual offender. S.A. 88. As Circuit Judge Wood noted at oral argument, trial counsel’s cross-examination “may be the worst example” of cross-examination she has ever seen. *See Oral Argument*, beginning at 28:30.⁶ But because the lower courts held Gray’s petition to a strict pleading standard, and refused to provide him with the resources necessary to cure any deficiencies in his *pro se* submissions, Gray will not have the opportunity to have his meritorious ineffective-assistance-of-counsel and other claims considered on their merits (to say nothing of the opportunity to fully demonstrate his entitlement to equitable tolling).

Gray will not be the only *pro se* petitioner adversely affected by the Seventh Circuit’s decision. By denying Gray’s request for the opportunity for further factual development (and indeed, refusing to even reach that request), the Seventh Circuit sets a dangerous precedent that *pro se* petitioners should be treated the same as petitioners represented by counsel, and held to the same pleading standard regardless of the merits of their underlying claims for relief. As shown here, the Seventh Circuit’s decision departs significantly from this Court’s guidance and the

⁶ Trial counsel’s deficient cross-examination was not the only unconstitutional aspect of Gray’s trial. The prosecutor used its preemptory challenges to strike black jurors disproportionately and another juror gave materially false statements on her jury form. These constitutional deficiencies form the basis of Gray’s claims based on *Batson v. Kentucky*, 476 U.S. 79 (1986) and due process, respectively.

decisions of other circuits. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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