
No. _____

**IN THE SUPREME COURT
OF THE UNITED STATES**

RONALD GLICK,

Petitioner,

v.

**JEFF PREMO, Superintendent,
Oregon State Penitentiary,**

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's request for equitable tolling of the statute of limitations period set out in 28 U.S.C. § 2244(d) based on evidence of his post-conviction attorneys' violation of the standards of professional conduct meets the statutory requirement for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2) so as to warrant remand to the United States Court of Appeals for the Ninth Circuit with instructions to issue a certificate of appealability.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Trial Counsel Ineffectively Advised Mr. Glick Based On Counsel’s Failure To Understand The Law Relevant To His Case.	3
B. The District Court Denied Equitable Tolling And A Certificate Of Appealability.	4
C. The Ninth Circuit Denied A Certificate Of Appealability.	4
REASONS FOR GRANTING THE WRIT	5
A. The Certificate Of Appealability Standard	5
B. Reasonable Jurists Could Debate Or, For That Matter, Agree That Relief Is Appropriate On The Sixth Amendment Claim	7
C. Equitable Tolling Based On Attorney Mistakes That Violate The Standards Of Professional Conduct Is Appropriate.	8
D. Reasonable Jurists Could Debate Whether To Equitably Toll The Limitations Period.	9
E. This Court Should Summarily Reverse The Decision Of The Ninth Circuit.	12
CONCLUSION	13

APPENDICES

Appendix A:	Opinion and Order of the United States District Court for the District of Oregon (7/31/2018)
Appendix B:	Order of the United States Court of Appeals for the Ninth Circuit (11/16/2018)

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	5, 6
<i>Hinton v. Alabama</i> , 571 U.S. 263 (2014)	7-8
<i>Holland v. Florida</i> , 560 U.S. 631 (2010)	8, 9
<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996)	12
<i>Lee v. United States</i> , 137 S. Ct. 1958 (2017)	7
<i>Maples v. Thomas</i> , 565 U.S. 266 (2012)	9
<i>Maryland v. Dyson</i> , 527 U.S. 465 (1999)	12
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	5, 6
<i>Pace v. DeGuglielmo</i> , 544 U.S. 408 (2005)	8
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981)	12
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	5, 6
<i>Smith v. Wainwright</i> , 737 F.3d 1036 (11th Cir. 1984)	13
<i>United States v. Bass</i> , 536 U.S. 862 (2002)	12

Statutes

28 U.S.C. § 2106	12
28 U.S.C. § 2244	2
28 U.S.C. § 2253	2, 5, 6

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The petitioner, Ronald Glick, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 16, 2018.

OPINIONS BELOW

The United States District Court for the District of Oregon denied Mr. Glick's petition for writ of habeas corpus on July 31, 2018, finding the petition untimely and refusing to equitably toll the statute of limitations. The court declined to issue a certificate of appealability. (Appendix A). Mr. Glick filed a timely notice of appeal seeking a certificate of appealability. CR 1. On November 16, 2018, the United States Court of Appeals for the Ninth Circuit issued an order of two Circuit Judges denying a certificate of appealability. (Appendix B).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(d) provides that: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

28 U.S.C. § 2253(c) provides that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .

(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Trial Counsel Ineffectively Advised Mr. Glick Based On Counsel's Failure To Understand The Law Relevant To His Case.

In his federal habeas corpus proceeding below, Ronald Glick challenged his no-contest plea as not knowing, intelligent, and voluntary based on his counsel's ineffective advice. Specifically, based on his attorney's incorrect advice, Mr. Glick forewent a viable extreme-emotional-duress defense, pled no contest to the murder of his estranged wife, and was sentenced to life in prison. The attorney's advice was based on counsel's misapprehension of the relevant law. The attorney incorrectly believed that he would be permitted to seek leniency at sentencing after the plea. However, a no-contest plea to murder required a mandatory sentence of life in prison with a minimum of twenty-five years. The sentencing court lacked discretion to deviate from this statutory sentence, rendering futile any argument for leniency. Thus, contrary to his attorney's advice, there was no benefit or sentencing upside to pleading no contest and foregoing his right to trial by jury on a viable defense that could have resulted in no penalty at all. But for counsel's incorrect advice, there is a reasonable probability that the outcome of the case would have been different. Mr. Glick would have gone to trial and a jury would have heard his viable defense.

B. The District Court Denied Equitable Tolling And A Certificate Of Appealability.

It was undisputed in the District Court proceedings that a period of more than a year passed before Mr. Glick's retained post-conviction attorney filed his state-court post-conviction petition, the filing of which thereafter tolled the federal limitations period. Several more months passed between the conclusion of Mr. Glick's post-conviction appeal and his *pro se* filing of the federal habeas corpus petition. Mr. Glick argued that the statute of limitations should be equitably tolled because his attorneys' conduct violated the relevant professional standards.

On July 31, 2018, the District Court for the District of Oregon denied Mr. Glick's petition for writ of habeas corpus, finding the petition untimely and refusing to equitably toll the statute of limitations. (Appendix A). The court declined to issue a certificate of appealability, stating "Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2)." *Id.* at 7.

C. The Ninth Circuit Denied A Certificate Of Appealability.

On August 6, 2018, Mr. Glick timely filed a Notice of Appeal. CR 1. On November 16, 2018, the United States Court of Appeals for the Ninth Circuit issued an order of two Circuit Judges denying a certificate of appealability because the appellant "has not shown that 'jurists of reason would find it debatable whether the

petition 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.” (Appendix B).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari. At a minimum, this Court should order summary reversal because the Ninth Circuit was clearly wrong in finding that Mr. Glick did not meet the standard for a certificate of appealability.

A. The Certificate Of Appealability Standard

To obtain a certificate of appealability, a habeas petitioner must make a “substantial showing of the denial of constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he “must ‘[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

“[A] COA does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court has explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.

Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. In *Slack*, 529 U.S. at 478, this Court held:

when the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue (and an appeal of the district court’s order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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.

Reasonable jurists could debate whether Mr. Glick’s guilty plea was knowing, intelligent, and voluntary when it was premised on counsel’s incorrect advice that the plea carried with it a potential sentencing advantage. Further, reasonable jurists could debate whether equitable tolling should have excused the late filing of Mr. Glick’s petition where, but for his attorneys’ conduct that violated the rules of professional conduct, Mr. Glick would have timely filed. The legal argument, set forth below, demonstrates that Mr. Glick has satisfied the § 2253(c) standard because, at a minimum, both the constitutional question and the procedural one are “debatable among jurists of reason.” *Miller-El*, 537 U.S. at 336 (quoting *Barefoot*, 463 U.S. at 893 n.4).

B. Reasonable Jurists Could Debate Or, For That Matter, Agree That Relief Is Appropriate On Mr. Glick’s Sixth Amendment Claim.

Mr. Glick’s Sixth Amendment claim meets the standard for a certificate of appealability. Counsel provides ineffective assistance when he misadvises his client about the collateral consequences of his plea of guilty and prejudice is demonstrated if there is a reasonable probability that the client would have rejected the plea had he been correctly advised. *Lee v. United States*, 137 S. Ct. 1958, 1964-65 (2017). In *Lee*, “[t]he Government concede[d] that Lee’s plea-stage counsel provided inadequate representation when he [incorrectly] assured Lee that he would not be deported if he pleaded guilty.” *Id.* at 1964. As this Court explained, where the respective consequences of a conviction after trial and by plea “are, from the defendant’s perspective, similarly dire, even the smallest chance of success at trial may look attractive.” *Id.* at 1966. In *Lee*, there existed a reasonable probability that Lee would have rejected the plea had he known that it would lead to mandatory deportation, such that prejudice has been demonstrated. *Id.* at 1967-68.

Mr. Glick’s counsel misadvised him that, should he plead no contest to murder, he would be able to seek a lesser sentence, although he would, in fact, face a mandatory life sentence based upon his plea. This incorrect advice was based on counsel’s failure in his basic obligation to research the relevant law. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (“An attorney’s ignorance of a point of law that

is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”). But for this bad advice, there is a reasonable probability that Mr. Glick would have taken his case to trial and presented his viable extreme-emotional-duress defense. This Sixth Amendment claim satisfies the standard for issuance of a certificate of appealability because reasonable jurists could debate its merits, and it deserves encouragement to proceed further.

C. Equitable Tolling Based On Attorney Mistakes That Violate The Standards Of Professional Conduct Is Appropriate.

In *Holland v. Florida*, 560 U.S. 631 (2010), this Court held that the 2244(d) limitation period is subject to equitable tolling. This Court explained that equitable tolling decisions are made on a “case-by-case” basis, and that while “courts of equity can and do draw upon decisions made in other similar cases for guidance,” they do so “with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.” *Id.* at 650 (internal citations omitted).

A petitioner seeking equitable tolling must demonstrate: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* at 649 (citing *Pace v. DeGuglielmo*, 544 U.S. 408, 418 (2005)). Abandonment by counsel may be an “extraordinary

circumstance beyond [a client's] control" necessary to lift a procedural bar to a federal habeas corpus petition. *Maples v. Thomas*, 565 U.S. 266, 283 (2012). "[A]n attorney's unprofessional misconduct," even short of outright abandonment, may justify equitable tolling. *Holland*, 560 U.S. at 649. *Holland* explicitly rejected the Eleventh Circuit's standard, which required something more than "negligence" or "gross negligence" such as "bad faith" or "dishonesty" or "divided loyalty," and stated:

In this case, the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care.

Id. at 634, 644, 649. The ruling in *Holland* was guided by canons of professional responsibility. *Id.* at 652-53.

D. Reasonable Jurists Could Debate Whether To Equitably Toll The Limitations Period.

Tolling of the statute of limitations and excusing Mr. Glick's delay in filing on equitable grounds in this case is fully supported by the record and Supreme Court authority. This is not a case where an attorney committed "garden-variety" neglect or simply miscalculated the deadline. The post-conviction trial attorney's conduct here was more than "merely negligent"—it was a gross dereliction of his basic duty to understand and advise his client regarding the applicable law so as to protect his client's rights and to allow his client to make informed decisions. Post-conviction trial counsel's use of the entire federal limitations period due to ignorance of the

relevant law, together with the failures of counsel to communicate effectively, abandonment by appellate counsel, and the provision of misleading information by substitute counsel, form the basis for Mr. Glick's tolling request.

Record evidence shows that Oregon post-conviction attorneys have received training on the AEDPA statute of limitations and that it is the standard of care to safeguard a client's rights to seek subsequent habeas corpus relief. Yet, Mr. Glick's retained post-conviction attorney was ignorant of the AEDPA statute of limitations—as he said in an affidavit filed in the court below, “it was not on my radar.” Counsel utterly failed in his duty to apprise himself of the relevant law, and in his duty to protect his client's interests, while, at the same time, leading Mr. Glick to believe he could count on retained counsel to handle all relevant matters.

Counsel thereby failed to satisfy professional standards of care, including his obligation to communicate with his client and to handle the legal matter with diligence, which, among other things, requires attorneys to leave their clients in good stead vis a vis limitations deadlines. *E.g.*, Or. R. Prof. Conduct 1.3; Or. R. Prof. Conduct 1.4. Putting a client in an untenable position in relation to a limitations deadline is sanctionable professional misconduct in Oregon. *E.g.*, *In re Scott M. Snyder*, 348 Or. 307 (2010) (attorney suspension upheld even though attorney did not miss limitations period, because his failure to communicate prevented client

from taking other measures to pursue his claim and, together with the failure to return the file to the client, left the client in the difficult position of trying to find new counsel only a *few months* before the statute of limitations expired).¹

To make matters worse, the record reflects that post-conviction appellate counsel outright abandoned Mr. Glick. Then, adding to the cascade of errors, substitute appellate counsel botched the substitution, providing incorrect information, losing Mr. Glick's trust, and then providing additional misleading information. At a minimum, the combination of such unprofessional attorney conduct demonstrates an extraordinary circumstance.

Mr. Glick reasonably relied on his attorneys to protect his rights, took action when they directed to, and acted with the haste and urgency called for by their communications. As such, he acted with the diligence reasonably expected of a person in his situation.

Accordingly, reasonable jurists could debate whether equitable tolling is warranted as a result of the combination of delay and nonfeasance by retained post-

¹ See also *In re William S. LaBahn*, 355 Or. 357 (2003) (attorney suspension upheld for, among other things, failing to file proof of service within the statute of limitations); *In re Patrick A. Butler*, 324 Or. 69 (1996) (attorney suspension upheld for failing to avoid dismissal of client's case on limitations grounds, failing to keep client fully apprised of status of case, and misleading client that he was working on the case); *In re Kenneth A. Morrow*, 297 Or. 808 (1984) (attorney suspension upheld for neglect of a legal matter resulting in client's claim being untimely).

conviction counsel as a result of his ignorance of the applicable law; abandonment by post-conviction appellate counsel; and, finally, the inadvertent provision by substitute counsel of misleading information that lulled Mr. Glick into believing he had additional time to file. Federal courts should hold post-conviction attorneys accountable for communicating clearly with their clients and protecting their clients' rights to subsequent review.

E. This Court Should Summarily Reverse The Ninth Circuit's Order.

This Court has authority to “reverse any judgment” brought before it and “remand the cause and direct entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. Summary reversals are “usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was “contrary to” established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was “plainly wrong”). The Ninth Circuit’s order denying Mr. Glick’s request for a certificate of appealability is clearly wrong. Under *Miller-El* and *Slack*,


Mr. Glick clearly satisfied the standard for a certificate of appealability. This case warrants summary reversal.

Because the circumstances supporting Mr. Glick's request for equitable tolling are fact-dependent, Mr. Glick also sought an evidentiary hearing at which to further develop the facts that support his claim. At a minimum, therefore, the Ninth Circuit should have decided whether an evidentiary hearing was necessary to the resolution of this case. *See Smith v. Wainwright*, 737 F.3d 1036, 1037 (11th Cir. 1984) (certificate of probable cause granted, in part, because "the district court refused to hold an evidentiary hearing to develop the true factual setting in which [the] claim must be judged.").

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted, and, at a minimum, the case should be summarily remanded to the Ninth Circuit with instructions that it grant a certificate of appealability.

DATED this 12th day of February, 2019.



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