No. 20-1197

IN THE
Supreme Court of the United States

EUGENE MILTON CLEMONS II,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

BRIEF FOR CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION ADDRESSED BY *AMICUS*

Whether the court of appeals erroneously disregarded material errors made by the State in conducting an equitable tolling analysis under the Antiterrorism and Effective Death Penalty Act of 1996.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Conservatives Concerned About the Death Penalty ("CCATDP") respectfully submits this brief in support of petitioner, Eugene Milton Clemons II. CCATDP is a nationwide network of political and social conservatives who believe that the death penalty is a prime example of governmental overreach that does not serve its supposed purpose and is at odds with core conservative values, including:

- **Efficient and Limited Government.** The death penalty is cumbersome, bureaucratic, politicized, and wasteful, costing millions of dollars more than its alternatives even before any appeals begin.
- **Effective Government.** The death penalty is not an effective deterrent against violent crime and its implementation ultimately harms the families of victims.
- **Fairness.** The government applies the death penalty arbitrarily and unfairly based on geography, race, and socioeconomic class.
- **Justice.** To date, 185 people have been publicly exonerated after being sentenced to death. At least 20 additional people had strong claims of innocence, unheard before their executions. More are surely unknown. The death penalty system ensnares innocent persons and often fails to provide

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[1] The parties consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

them a fair avenue to establish their innocence. This unjustly punishes innocent people and undermines public confidence in the judicial system.

- **The Founders' Vision.** The death penalty is inconsistent with the Founders' belief that any punishment that goes beyond what is absolutely necessary is tyrannical.
- **The Sanctity of Life.** The death penalty contradicts the value of life, which is a fundamental, constitutionally protected right that is of utmost importance to CCATDP's supporters.

The Eleventh Circuit's decision to shut the courthouse doors on Mr. Clemons's constitutional challenges to his death sentence contravenes these values and threatens to set a dangerous precedent. This Court has long emphasized the importance of the Great Writ and the necessity of applying it in a flexible manner to guard against wrongful restraints on individuals' liberties. The decision below, however, creates a rigid rule that permits the government to avoid responsibility for its own errors while shifting the blame to Mr. Clemons and his counsel, thereby furthering the erosion of the public's trust in our court system and its fairness toward all citizens. CCATDP respectfully urges the Court to grant the petition and remind the Eleventh Circuit that a State cannot execute an individual for the negligence of others, particularly where those others are officials of the very judicial system that is charged with protecting citizens from governmental errors.[2]

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[2] CCATDP addresses in this submission only the first question presented in the petition.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision in this case is inconsistent with the equitable principles that inhere in habeas corpus proceedings. *See, e.g.*, *Holland* v. *Florida*, 560 U.S. 631 (2010). If not reversed by this Court, the Eleventh Circuit's decision will erode public confidence in the judicial system and set dangerous precedent for at least the following three reasons.

First, the decision below rests on the untenable premise that an attorney acts negligently by relying on court officials to provide accurate information regarding court procedures. That premise ignores that Alabama courts *invite* counsel to ask court clerks about fees, and the total fee amount can only be determined by such inquiry due to varying additional local fees. It also ignores that courts frequently permit counsel to rely on information from court clerks in non-capital contexts. The decision below, therefore, threatens to turn a ubiquitous (and salutary) practice of consulting with court officials into a game of chance, where attorneys must second-guess information received from the courts lest their clients pay the price for court officials' mistakes.

Second, in its equitable tolling analysis, the Eleventh Circuit failed to consider four critical errors committed by the court clerk, focusing instead solely on the purported negligence of Mr. Clemons's counsel. Such a narrow focus contradicts the fundamental nature of equity inherent in habeas cases—including consideration of *all* of the relevant circumstances to fashion an appropriate remedy for the specific case at hand. It also results in a rigid *per se* rule, contradicting the flexible approach required under *Holland*. The decision below, therefore, permits the State to

hide behind Mr. Clemons's counsel to escape responsibility for the mistakes of its agent, while depriving Mr. Clemons of his opportunity to have his constitutional claims heard on the merits.

Third, the decision below threatens to erode the public's trust in the judicial system by encouraging attorneys to distrust information provided by court officials. Even worse, by excluding the court clerk's errors from the analysis, the Eleventh Circuit has essentially blamed Mr. Clemons's counsel for *all* of the errors, including those committed by the clerk, furthering the perception that the judicial system is unfair. This deterioration of the public's confidence in the judicial system in turn undermines the central role of the courts as protectors of the citizenry against overreaching power of the government, ironically doing so in the context of the most overwhelming exercise of the government's power—the taking of life.

The Court should grant Mr. Clemons's petition for a writ of certiorari and reverse the judgment below so that his constitutional claims can be adjudicated.

ARGUMENT

This Court has unequivocally instructed the lower courts to approach equitable tolling under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") with "flexibility" and "awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Holland* v. *Florida*, 560 U.S. 631, 650 (2010). In this case, the Eleventh Circuit departed from that approach, instead creating and applying a rigid *per se* standard that *Holland* makes clear is not suitable to equitable tolling. *Id.* at 649–51. Applica-

tion of settled equity principles that have been historically applied to habeas cases such as this one requires reversal of the decision below.

In particular, CCATDP submits this brief to expose and address the dangerously false premise upon which the decision below is based: that reliance on court officials to provide accurate information is negligent conduct. This premise contradicts a multitude of court decisions in varying contexts that recognize the reasonableness of attorneys' reliance on court clerks and is at odds with the general practice in the legal profession of encouraging such reliance. *Amicus* also explains how this incorrect premise threatens to undermine the already fragile public confidence in our judicial system.

For the reasons below (in addition to the reasons advanced by petitioner), the Court should grant certiorari and reverse the Eleventh Circuit's decision.

I. COUNSEL'S RELIANCE ON INFORMATION PROVIDED BY A COURT OFFICIAL CANNOT PRECLUDE REVIEW.

The Eleventh Circuit's rigid rule—that a death-row inmate loses his right to federal-court review of his constitutional claims because his counsel committed "simple negligence," Pet. App. 3a—not only contradicts this Court's clear instructions in *Holland*, but also rests on an incorrect premise: that "this is a case in which an attorney made a mistake." Pet. App. 17a. This Court should grant Mr. Clemons's petition to ensure that his constitutional claims are not ignored because of the court of appeals' error.

The foundational premise of the decision below is faulty because it cannot be negligent conduct for coun-

sel to seek fee information from a court official *as invited to do by the court itself*. *See* Pet. 18–19. This is especially so when filing fees "differ from county to county," Pet. App. 15a, and the only sure means to obtain the exact amount—particularly in 1999, well before courts began making such information available on the Internet—is to ask the court clerk. The court of appeals' contrary conclusion would transform routine filings into a high-stakes guessing game, with the litigant's case (or life) turning on counsel's ability to predict the responses of government officials. Such a result is more likely to enlarge and entrench the unjust "'sporting contest' theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago . . . ." *Batson* v. *Kentucky*, 476 U.S. 79, 131 (1986) (Burger, C.J., dissenting), *holding modified by Powers* v. *Ohio*, 499 U.S. 400 (1991); *see also United States* v. *Carlisi*, 32 F. Supp. 479, 483 (E.D.N.Y. 1940) ("[T]he purpose of a law suit is to do justice rather than make it a game of chance").

The court of appeals glossed over this point by stating that it was not the clerk's duty to "inform counsel how to . . . compl[y] with Alabama's rules of procedure," citing "Alabama's case law" that purportedly "made that point crystal clear." Pet. App. 21a (citing *Smith* v. *Cowart*, 68 So. 3d 802, 812 (Ala. 2011), and *Ex parte Strickland*, 172 So. 3d 857, 859–60 (Ala. Civ. App. 2014)). The fee amounts are not mandated by rules of procedure, however, but by a combination of statute and local court rules, *ibid.*, and the Alabama courts' express invitation to counsel to consult with their clerks about filing fees necessarily imposes a duty on those clerks to provide accurate information. Furthermore, counsel in the cited cases failed to act after receiving *correct* information from the clerk, which led each court to explain that clerks had no duty

to litigate the cases for counsel. *See Smith*, 68 So. 3d at 812 (noting that "[t]he clerk's record indicates that all parties received notice of the [date of the] trial" for which counsel failed to appear (first alteration in original; internal quotation marks omitted)); *Strickland*, 172 So. 3d at 859 (quoting the clerk's notice that cited a specific local rule and instructed counsel that his petition was "deficient in that there are no attachments in accordance with [that rule]"). Here, even if the clerk had no formal duty to explain the fees to counsel, the clerk should have so stated or remained silent. Once the clerk chose to affirmatively provide this information, he was bound to do so accurately.

Attorneys every day consult with court clerks on basic administrative filing questions and reasonably trust that those government officials are providing them with accurate information, just as Mr. Clemons's counsel did here. Indeed, if following the directions of a court clerk constitutes negligence, then most members of the bar would be guilty. The administration of law cannot meaningfully function if attorneys must second-guess the information received from court officials—particularly in cases where, as here, there is no reason to suspect the received information is erroneous. *See* Pet. App. 15a (noting that the lack of a fee "made sense" to Mr. Clemons's counsel "because Clemons had already been granted IFP status in the underlying case"). Second-guessing, however, is precisely what the court of appeals expected Mr. Clemons's counsel to do. *See* Pet. App. 20a (holding that "it was clearly negligent for Clemons's attorneys to *fail to investigate* the statutory filing fee and *rely simply on the representations* of . . . the clerk's office" (emphasis added)).

In addition to ignoring the reality that attorneys properly seek guidance from court clerks about basic administrative information, the court of appeals also failed to meaningfully explain how Mr. Clemons's counsel could have investigated the required fee in this case without consulting with the clerk's office, given its acknowledgement that Alabama local courts were authorized to "assess local fees above the statutory filing fee." Pet. App. 21a. The court of appeals' statement that Mr. Clemons's counsel should have known to pay at least the $140 fee required by the Alabama Code, *ibid.*, is inadequate in that regard. Not only does this statement continue to rest on the expectation that counsel should have assumed the court clerk could not be trusted, but it also fails as a matter of logic: if Mr. Clemons's counsel had paid $140, but the actual fee had been higher due to the imposition of additional local fees, the result would have been precisely the same—the petition would have been defective for failing to pay the correct filing fee. Mr. Clemons's counsel had no choice in this case but to rely on the fee information provided by the court clerk, as countless attorneys do every day.

More fundamentally, the court of appeals' conclusion in this capital case that it was "simple negligence" for Mr. Clemons's counsel to rely on information supplied by a court clerk, Pet. App. 3a, conflicts with a substantial number of decisions holding in more mundane contexts that attorneys act reasonably when they rely on information provided by court clerks. For example, in the context of civil appellate deadlines, the Eleventh Circuit has previously excused counsel's failure to file a notice of appeal within the prescribed 30-day period where the delay was caused by "[a] clerk in the district court [who] pro-

vided plaintiffs' counsel with contradictory information concerning the date upon which the order [being appealed] was entered." *Meek* v. *Metro. Dade Cty.*, 908 F.2d 1540, 1543–44 (11th Cir. 1990). The court of appeals explained that "counsel's justifiable reliance on the district court clerk's erroneous information provides 'good cause' under the unique circumstances of this case." *Id.* at 1544. The Eleventh Circuit's willingness to permit reliance on information received from a court clerk is not even limited to attorneys. *See United States* v. *Brown*, 526 F.3d 691, 710 (11th Cir. 2008) (holding that a district court could rely on docket sheets downloaded from a state court clerk's website as evidence of defendant's prior convictions), *cert. granted, judgment vacated on other grounds*, 556 U.S. 1150 (2009).

Other examples are found in the context of bankruptcy, where courts have also excused delays caused by counsel's reliance on erroneous information supplied by court officials. For example, the Sixth Circuit has held that a bankruptcy court should have exercised its equitable powers to allow an untimely complaint to proceed where counsel was provided an incorrect filing deadline by the court clerk. *In re Isaacman*, 26 F.3d 629, 633–34 (6th Cir. 1994). Critically, the Sixth Circuit explained that counsel "acted reasonably," even though "in hindsight counsel admitted that 'we messed up,'" because "parties are entitled to rely on information issued by bankruptcy courts" and "[t]he clerk of the bankruptcy court and those who are under his or her direction are officials of the bankruptcy court itself." *Id.* at 632–34. Similarly, the Tenth Circuit has held that "when the court's act affirmatively misleads the creditor as to a deadline, . . . [a] creditor should be entitled to rely on the court's orders." *In re Themy*, 6 F.3d 688, 690 (10th Cir. 1993).

Indeed, courts permit counsel to rely on representations made by court clerks in many different contexts where, as here, the jurisdiction of the court is not implicated. *See, e.g.*, *Metcalf* v. *Williams*, 104 U.S. 93, 95 (1881) (holding that a judgment in a debt case entered by mistake based in part on a court clerk's error should have been equitably set aside); *Quintana-Gonzalez* v. *Ashcroft*, 110 F. App'x 793, 794 (9th Cir. 2004) (nonprecedential) (holding that the Board of Immigration Appeals abused its discretion by denying appellant's motion to reopen proceedings after appellant's counsel failed to appear to a hearing based on a court clerk's erroneous representation that the hearing was rescheduled); *Weiss* v. *St. Paul Fire & Marine Ins. Co.*, 283 F.3d 790, 795 (6th Cir. 2002) (affirming a decision to set aside a default judgment for failure to answer because "counsel was [not] willful in failing to respond timely" where he "repeatedly checked with the office of the district court clerk . . . and mistakenly relied upon the information obtained from the clerk"); *Tubbs* v. *Campbell*, 731 F.2d 1214, 1215–16 (5th Cir. 1984) (holding that affirmative and persistent misleading by court clerk concerning entry of judgement justified Rule 60(b)(6) relief); *Research Equity Fund, Inc.* v. *Ins. Co. of N. Am.*, 597 F.2d 1266, 1267 (9th Cir. 1979) (per curiam) ("If a party is informed by the clerk that judgment has not been entered, he is justified in relying on that information"); *West* v. *United States*, 222 F.2d 774, 779 (D.C. Cir. 1954) (appellant "could reasonably assume that information furnished him by an official of the District Court was correct").

Federal courts are not the only ones that permit counsel to rely on representations of court clerks. Alabama courts likewise hold in varying contexts that it is reasonable for counsel to rely on information provided by court clerks, even when such reliance results

in a late filing. For example, in a wrongful death action, the Alabama Supreme Court held that it was "reasonable" for plaintiff's counsel to rely on information provided by a court clerk that turned out to be incorrect due to a computer error and caused plaintiff's appeal to be filed forty-seven days late. *Sparks* v. *Ala. Power Co.*, 679 So. 2d 678, 680–82 (Ala. 1996). The Alabama Supreme Court explained that the State's procedural rules "evidence this Court's belief that every litigant must receive fair and just treatment from the court system of this State" and permitted the late appeal to go forward because "a litigant should not be penalized by relying in good faith on the information" that was "affirmatively supplied her by the Jefferson circuit clerk's office." *Id*. at 681.

Alabama courts have historically allowed counsel to rely on information provided by court clerks and granted equitable relief where such information was wrong. *See Hanover Fire Ins. Co.* v. *Street*, 154 So. 816, 820 (Ala. 1934) (setting aside judgment where defendant's counsel did not appear for trial because he was misinformed by a court clerk about the trial date and explaining that "[t]he law is a reasonable master," which "[i]n its administration, . . . neither requires nor expects litigants to distrust its sworn ministers"); *Williams* v. *Tyler*, 71 So. 51, 54 (Ala. Ct. App. 1916) ("A party . . . should not . . . be charged with fault for having relied in good faith on information . . ., although such information is incorrect, if it is imparted by the clerk, since he is the officer known to be the maker and custodian of the records which contain that information, and since, therefore, it is naturally to be supposed that he would give only correct information").

The soundness of the above body of law is evidenced by the ubiquity in the legal profession of attorneys relying on information supplied by court officials, a practice that is necessitated at least in part by the irregularities of local rules. As noted above, Alabama courts expressly invite counsel to consult with court clerks to obtain fee information. Pet. 18–19. Some Alabama federal courts likewise instruct counsel to direct any fee-related questions to the clerk's office. *See, e.g.*, Fees, U.S. District Court for the Middle District of Alabama, https://www.almd.uscourts.gov/about-court/fees ("If you have any questions, please feel free to contact the Office of the Clerk"). Even legal treatises and bar association publications often recommend this practice. *See, e.g.*, Lissa Griffin, *Federal Criminal Appeals* § 6.2(6) (8th release 1999) ("Counsel should contact the clerk before proceeding to the clerk's office to determine the amount of the [appeal] fee and the acceptable methods of payment"); Marcy Hogan Greer, *Supersedeas Bonds*, Superseding & Staying Judgments § 1.IV.A (Am. Bar Assoc. 2007) ("The best practice is to contact the district clerk's office to confirm in advance to precise amount of the supersedeas bond the court will approve in a given case"). Yet in one fell swoop, the decision below, if permitted to stand, would turn this common practice into negligent conduct.

Given courts' general willingness to conclude that a counsel's reliance on administrative information provided by a court clerk is reasonable in cases where mere money is at stake, it simply makes no sense to conclude that the same conduct is negligent where a person's life hangs in the balance—particularly in a case where the court clerk, as the "officer known to be the maker and custodian of the [court's] records," *Wil-*

liams, 71 So. at 54, stamped counsel's copy of the petition as "RECEIVED & FILED," Pet. App. 223a. And it is beyond reason in such circumstances to cut short the analysis without even *considering* the multitude of errors made by the State. This Court should step in to prevent such an inequitable outcome.

II. TRADITIONAL PRINCIPLES OF EQUITY DEMAND THAT THE STATE BE HELD ACCOUNTABLE FOR ITS OWN ERRORS.

While the traditional principles of equity call for flexibility and balancing, the Eleventh Circuit adopted and applied a rigid rule that ignores the totality of the circumstances and the multitude of errors committed by the State simply because petitioner was represented by counsel. In the process, the court of appeals created the very type of "mechanical rule[]" that this Court in *Holland* warned courts to "avoid[]." 560 U.S. at 650.

Even were the Eleventh Circuit correct in its assessment that Mr. Clemons's former counsel was negligent in trusting a court official, that conduct is more than counterweighed here by the multiple errors committed by the State: (1) affirmatively misleading Mr. Clemons's counsel about the need to pay a filing fee; (2) erroneously accepting and prominently stamping counsel's copy of the petition with "RECEIVED & FILED" when it was neither; (3) failing to docket the petition and instead *losing it behind a filing cabinet for months*; and (4) failing to notify counsel about the filing deficiency as required by internal procedures. Respondents do not dispute that the court clerk committed these errors, but the court of appeals erroneously failed to consider them at all, instead cutting short the equitable tolling analysis based on what it considered to be "the critical fact that [Mr.] Clemons

was represented by counsel." Pet. App. 17a. In doing so, the court of appeals incorrectly focused only on the actions of Mr. Clemons's counsel "as his client's agent," Pet. App. 19a, but failed to consider the actions of the court clerk as the State's agent.

Even a cursory analysis of the clerk's errors, however, would have made it plain that any one of them was sufficient to prevent Mr. Clemons's counsel from even learning of the deficient filing. Combined, this "perfect storm" of errors guaranteed that his counsel could have no opportunity to cure the fee deficiency—even though he filed the Rule 32 petition *twenty-nine days before* the expiration of the AEDPA's one-year limitations period, and thus should have had plenty of time to pay the correct fee. *See* Pet. 2. Mr. Clemons's counsel even prepared and mailed an *in forma pauperis* motion (which would have cured the deficient filing) one day *before* the expiration of the AEDPA's limitations period. Pet. App. 15a–16a. If counsel had an opportunity to learn about the deficient filing, he could have mailed that motion earlier or hand-delivered it that same day, but the clerk's errors ensured he had no chance to do so. At all times throughout the relevant period, Mr. Clemons's counsel acted reasonably, receiving proof of what he believed was a timely filing in the form of the court's "RECEIVED & FILED" stamp, but an "extraordinary circumstance" beyond his control—the clerk's errors—"stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)) (internal quotation marks omitted); *see Smith* v. *McClammy*, 740 F.2d 925, 927 (11th Cir. 1984) (stating, in a Title VII case, that "equitable tolling is based upon the actions of someone other than the claimant that are misleading").

The State should not be able to hide behind Mr. Clemons's counsel to escape responsibility for its overwhelming role in causing the filing delay, and the court of appeals should not have turned a blind eye to the State's culpability simply because it was Mr. Clemons's counsel who received misleading information from the court clerk and not Mr. Clemons himself. Instead, the State should have its own negligence weighed against any supposed mistake made by Mr. Clemons's counsel. Equity and justice demand at least that much before the State is permitted to take Mr. Clemons's life.

Just as "the AEDPA statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner," *Holland*, 560 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment), so should it be tolled if the missed deadline results from the misconduct of a court clerk that is not constructively attributable to either the attorney or petitioner. Although this Court has held that reliance on misinformation provided by a court cannot overcome jurisdictional time limits, *see Bowles* v. *Russell*, 551 U.S. 205, 214 (2007), "the AEDPA statute of limitations defense . . . is not jurisdictional," *Holland*, 560 U.S. at 645 (quoting *Day* v. *McDonough*, 547 U.S. 198, 205 (2006)) (omission in original; internal quotation marks omitted)).

Instead of shutting the courthouse doors on petitioner's constitutional claims based on a rigid technicality, the Eleventh Circuit should have applied well-established equity principles to at least consider all of the facts and fashion relief appropriate to this case based on the individual circumstances—which is precisely the purpose of equitable tolling. *See Holland*,

560 U.S. at 650 ("[W]e have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity'" (quoting *Hazel–Atlas Glass Co.* v. *Hartford–Empire Co.*, 322 U.S. 238, 248 (1944))); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility"); *Equitable Life Assur. Soc'y of U.S.* v. *Brown*, 213 U.S. 25, 42 (1909) ("A court of equity is bound to . . . take[] all the facts into consideration, and the relative advantages and disadvantages of granting a relief"); *see also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 918 (1987) (explaining that, historically, "[b]ills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law" and "became the procedural vehicle for the exceptional case"). Indeed, unlike "rigid" common law, "equity was more flexible, discretionary, and individualized." Subrin, 135 U. Pa. L. Rev. at 920.

Application of equitable principles to this case should have been the natural approach for the court of appeals to take because "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home." *Holland*, 560 U.S. at 647. This Court has repeatedly explained that "habeas corpus is, at its core, an equitable remedy." *Schlup* v. *Delo*, 513 U.S. 298, 319 (1995). The Great Writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963); *see also Witt* v. *Wainwright*, 470 U.S. 1039,

1042–43 (1985) (Marshall, J., dissenting) (explaining that "general equitable principles govern[] issuance of the writ" because "'[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned'" (quoting *Price* v. *Johnston*, 334 U.S. 266, 291 (1948))). In other words, "habeas corpus was, above all, an adaptable remedy." *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008); *see also Holland*, 560 U.S. at 650 ("[F]lexibility [is] inherent in equitable procedure" (internal quotation marks omitted)).

The decision below ignores these principles and instead applies "an overly rigid *per se* approach," *Holland*, 560 U.S. at 653, even though this is precisely the type of "exceptional case," Subrin, 135 U. Pa. L. Rev. at 918, for which equitable tolling exists. A court clerk provided erroneous information about required fees and then committed three additional errors that prevented counsel from even learning of the deficient status of the filing, much less being able to remedy the deficiency. The State of Alabama now seeks to take advantage of these errors, and execute Mr. Clemons without affording him an opportunity to have his constitutional claims heard in federal court, even though it was an agent of the State—the court clerk—who committed the errors that caused the late filing.

"When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief." *Metcalf*, 104 U.S. at 95. The fact that Mr. Clemons was represented by counsel does nothing to offset the inequity of allowing the State to benefit from its own errors. The application of equitable tolling here is warranted to ensure that the State is held to at least a minimal standard of competency in judicial proceedings and required to answer Mr. Clemons's constitutional claims on the

merits rather than on the basis of a procedural irregularity created by the State itself.

III. THE ELEVENTH CIRCUIT'S RIGID RULE UNDERMINES THE PUBLIC'S TRUST IN THE JUDICIAL SYSTEM.

The decision below implicates a critical public policy concern—protection of the public's confidence in the judicial system and its officials. By holding that Mr. Clemons's counsel acted negligently when he relied on representations of a court official, the Eleventh Circuit's decision signals to attorneys—and the public at large—that they cannot trust the government, including its court system, to provide accurate information. In addition, by concluding its analysis without even considering the clerk's errors or their effect on the filing delay, the Eleventh Circuit suggests that litigants are responsible for not only their mistakes, but also those of court officials. Both aspects of the decision below threaten to undermine the public's trust in the judicial system.

The core role of the courts is to act as a bulwark against governmental overreach and the inevitable errors that come with it. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983) (describing the courts' "traditional undemocratic role of protecting individuals and minorities against impositions of the majority"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1460 (1988) ("The distinctive judicial role is the protection of traditional or individual rights against governmental overreaching" (citation omitted)). For courts to properly exercise this power, the public's trust in the judicial system is paramount. *See Rita* v. *United States*, 551 U.S. 338, 356 (2007) (explaining

the importance of "provid[ing] the public with assurance that creates" and supports "the public's trust in the judicial institution"); *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26–27 (1994) (recognizing the importance of trust in the judicial system and "honor[ing]" "the demands of 'orderly procedure'" in its operation (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950))). Any rule or policy that risks eroding that trust should therefore be avoided.

This principle is especially important in the context of death penalty cases, where the State wields its power most irrevocably. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he fundamental rights to life, liberty, and the pursuit of happiness . . . are secured by [the] maxims of constitutional law"). In addition, death penalty cases constitute an extreme financial burden on taxpayers. *See Furman* v. *Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring) ("When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life"); *see also* Death Penalty Information Center (DPIC), Facts About the Death Penalty, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (updated Mar. 24, 2021) (noting that capital cases cost taxpayers three to four times, and millions of dollars, more annually than non-capital cases). Given the gravity of capital punishment and its prohibitive cost, it is critical for the public to trust that the process is carried out fairly and without error, and it is up to the courts to engender such confidence.

The rigid rule applied by the Eleventh Circuit can only foster distrust of the courts. By holding that Mr. Clemons's counsel was negligent to rely on information provided by a court official, Pet. App. 20a, the

decision below necessarily confirms to the public that court officials cannot be trusted. The court of appeals' attempt to cabin its holding only to cases where a petitioner is represented by counsel does nothing to temper the growth of this seed of distrust because the outcome would have been precisely the same if Mr. Clemons were not represented—the court clerk would have provided the same incorrect information, causing the same filing delay. Thus, the decision below undermines the public's trust in the judicial system.

Worse still, by failing to even consider the negligence of the court clerk, the decision below shifts the blame for the State's errors to Mr. Clemons's counsel and permits the State, which seeks to carry out a sentence of death, to escape responsibility for its own errors. The court of appeals stated that it was "critical . . . that Clemons was represented by counsel when he failed to properly file his Rule 32 petition" and asserted that was "the end of the analysis." Pet. App. 17a–18a. The remainder of the decision focuses solely on the purported negligence of Mr. Clemons's counsel, ignoring the cumulative errors committed by the clerk. *See* Section II, *supra*. By holding that only Mr. Clemons's counsel was at fault, the decision stamps a judicial seal of approval on the perception that litigation is a rigged game where litigants are not treated fairly by court officials. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) ("What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, . . . incapable of delivering real-world justice").

A century ago, Justice Holmes explained that citizens "must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. Co.* v.

United States, 254 U.S. 141, 143 (1920). But the government must deal fairly with citizens as well. *See United States* v. *Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) ("We have also recognized, however, that '[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government'" (quoting *Heckler* v. *Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n.13 (1984)) (alteration in original)); *Howbert* v. *Penrose*, 38 F.2d 577, 581 (10th Cir. 1930) ("[T]he government ought to turn square corners when dealing with its citizens"). That precept of civil law is equally applicable to post-conviction proceedings where a man's life is at stake. *See United States* v. *Lujan*, No. CR 05-0924 RB, 2011 WL 13210274, at *12 (D.N.M. June 16, 2011) ("[I]t is not too much to ask the government to turn square corners when seeking the ultimate penalty"). The law should not encourage a rule that erodes the public's trust in the judicial system, as the decision below does, lest it weaken the ability of the Judiciary to act as the primary check on the ever-expanding power of the government.

Mr. Clemons seeks to have the federal courts adjudicate his constitutional claims before the State of Alabama carries out a sentence of death. The court of appeals' conclusion that he forfeited that right as a result of errors committed by an Alabama court official is inconsistent with fundamental principles of equity and justice, and calls into question the integrity of the judicial system. The decision below should be reversed so that Mr. Clemons's claims can be resolved on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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