

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALBERT HOLLAND, :

4 Petitioner : No. 09-5327

5 v. :

6 FLORIDA :

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8 Washington, D.C.

9 Monday, March 1, 2010

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:02 a.m.

14 APPEARANCES:

15 TODD G. SCHER, ESQ., Miami Beach, Florida; on behalf of
16 Petitioner.

17 SCOTT D. MAKAR, ESQ., Solicitor General, Tallahassee,
18 Florida; on behalf of Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear
argument next in Case 09-5327, Holland v. Florida.

Mr. Scher.

ORAL ARGUMENT OF TODD G. SCHER

ON BEHALF OF THE PETITIONER

MR. SCHER: Mr. Chief Justice, and may it
please the Court:

It is undisputed that Petitioner was not
provided notice that the State supreme court had denied
his postconviction appeal and had issued its mandate,
with the result being that his AEDPA statute of
limitations expired. The very day he learned this,
Petitioner immediately prepared a pro se habeas petition
and filed it within 24 hours. Before this, Petitioner
had taken --

JUSTICE SOTOMAYOR: How do -- what in the
record shows us that the failure to tell him that by the
lawyer was anything other than negligence? What in the
record suggests that the lawyer, just as many lawyers
do, forgot to call the client, forgot to send him
something? What shows that this is more than
negligence?

MR. SCHER: Well, first of all, we have what

1 the Eleventh Circuit characterized Mr. Collins's conduct
2 as, which was gross negligence. And what we have here
3 is a confluence --

4 JUSTICE SOTOMAYOR: Well, I'm trying to find
5 the basis for that finding.

6 MR. SCHER: We have a repeated pattern. For
7 example, first of all we have to go back in terms of what
8 happened in State court. First we have Mr. Collins's
9 assurances to Mr. Holland that he would in fact file his
10 Federal -- or was aware of this --

11 JUSTICE SOTOMAYOR: But -- but --

12 MR. SCHER: I'm sorry.

13 JUSTICE SOTOMAYOR: That's what his intent
14 was.

15 MR. SCHER: Correct.

16 JUSTICE SOTOMAYOR: People say I'm going to
17 do something, and they fail to do it often because
18 something else comes up, because something has happened.
19 That doesn't show intentionality in -- the failure to
20 act doesn't necessarily prove that it was intentional.

21 MR. SCHER: Well -- well, in terms of that
22 what we have here, for example, is Mr. Collins was given
23 two opportunities -- or the record shows that there were
24 two opportunities for Mr. Collins to provide answers to
25 these very questions. The most significant of those

1 responses was -- was in the Federal district court where
2 the Federal district judge in fact issued a show cause
3 order to Mr. Collins asking him to respond specifically
4 to Mr. Holland's allegations. And in that response Mr.
5 Collins completely ignored all of Mr. Holland's
6 allegations. He never denied that -- being instructed
7 to file the petition. He never denied that he had in
8 fact informed Mr. Holland that he wouldn't -- that he
9 would file the petition. He never denied any of the
10 allegations with regard to the fact that Mr. Holland
11 wanted that Federal habeas petition filed on time. He
12 just went on to address --

13 JUSTICE SCALIA: Well, that -- but that's
14 the case in every case where -- where the lawyer is
15 negligent and doesn't do something that -- that should
16 have been done.

17 MR. SCHER: Well --

18 JUSTICE SCALIA: He has assured the client,
19 I will take care of your case, and he doesn't do it.

20 MR. SCHER: Well, here we have --

21 JUSTICE SCALIA: That's all that happened
22 here.

23 MR. SCHER: This -- this goes beyond the
24 case of mere, garden-variety negligence that some of the
25 courts have -- have addressed, because here we have a

1 combination of not only a failure -- we have the failure
2 to notify Mr. Holland that the State supreme court has in
3 fact denied its opinion, despite repeated instructions
4 from Holland to Mr. Collins that he file his petition.
5 Mr. Holland wrote --

6 JUSTICE ALITO: The facts here -- the facts
7 here are quite extreme, but I am troubled by where you
8 think the line should be drawn. If it is just mere
9 negligence, would that be enough for equitable tolling?

10 MR. SCHER: No, courts -- and this Court in
11 Lawrence has held, for example, that mere negligence is
12 not sufficient. What we have here certainly is
13 suggestive --

14 JUSTICE ALITO: Well -- the difference
15 between mere negligence and gross negligence -- one of the
16 things I remember most clearly from torts in law school
17 is that that's pretty -- that's an ephemeral
18 distinction. But that's the one you one you think we
19 should draw, between mere -- if it's gross negligence,
20 then there's equitable tolling; if it's mere negligence,
21 it's not?

22 MR. SCHER: Well, we know certainly that the
23 floor from -- from cases from this Court and from other
24 courts is this mere or garden-variety negligence. But
25 when you get to other factors --

1 JUSTICE KENNEDY: Why should -- why should
2 that be? Two cases. Two criminal defendants. One
3 spends a lot of time trying to find the most competent
4 lawyer he can, and he does. He finds a highly skilled
5 lawyer, who makes one little mistake and it's
6 negligence.

7 The other doesn't care. He gets a lawyer
8 that's really incompetent, and the lawyer is grossly
9 negligent.

10 Now, you would be penalizing the client who
11 exercised the most diligence under your rule. I don't
12 understand the -- the justice of that. It seems to me
13 that the first client should be better off, not worse.

14 Now, maybe this is for your friend on the
15 other side to answer as well, but I'm not sure, even
16 following Justice Alito's initial line of questioning,
17 we can distinguish between gross and mere
18 negligence, that -- that it's even fair that we do so.

19 MR. SCHER: Well, this Court --

20 JUSTICE KENNEDY: I didn't mean to interrupt
21 his line of questioning, but it seems to be consistent
22 with it.

23 MR. SCHER: This and other courts have --
24 have been able to draw that line, and, of course you have
25 to look at the specifics of each particular case,

1 because not only --

2 JUSTICE KENNEDY: But what's the -- what's
3 the point? What's the justice in doing that?

4 MR. SCHER: Well, the way --

5 JUSTICE KENNEDY: Other than just limit
6 the number of cases in which we are going to set aside
7 convictions?

8 MR. SCHER: Well, in some circumstances,
9 courts have just said, unfortunately you lose, your
10 attorney didn't commit -- it was just a mere mistake.
11 But what we have here, of course, is not -- we don't
12 have a mere mistake; we have a confluence of these
13 particular factors. And I think one of the more salient
14 points that distinguishes Mr. Holland's case, for
15 example, from Lawrence and from the situation in
16 Coleman, is that Mr. Holland tried to rid himself of Mr.
17 Collins on numerous occasions while this case was in
18 State court. In Lawrence and in Coleman, the
19 petitioners were not allowed to be free of their
20 lawyers; they accepted those lawyers' representation --
21 they accepted their representation and the acts and
22 omissions that occurred in Lawrence and in Coleman were
23 attributed to -- to the petitioners in those cases.

24 Here, however, by contrast, Mr. Holland did
25 everything he could -- he could, to be -- reasonably, to

1 be free of --

2 JUSTICE SOTOMAYOR: Are you -- are you
3 suggesting that there should be a different standard for
4 those habeas petitioners who are -- whose counsel is
5 appointed for them by the State or by the Federal
6 government, as opposed to just a lawyer they hire?
7 That's what I'm hearing you say.

8 MR. SCHER: No, and I didn't mean to suggest
9 that --

10 JUSTICE SOTOMAYOR: All right. So if the
11 standard is going to be the same -- I -- I go back to
12 Justice Alito's question, which is, the Eleventh Circuit
13 is saying negligence/gross negligence, the line is too
14 fine to draw. But there is a difference in a line
15 between negligence, however one defines it, and an
16 intentional, bad faith, dishonest, conflicted
17 malfeasance.

18 MR. SCHER: Correct.

19 JUSTICE SOTOMAYOR: All right. Why isn't
20 that a more workable line, given that you can't have
21 equitable tolling without exceptional circumstances?

22 MR. SCHER: Correct enough, but I think
23 each -- well, certainly those were some of the
24 individual factors that the Eleventh Circuit discussed
25 when saying gross negligence isn't enough. I think in

1 Mr. Holland's case --

2 JUSTICE SOTOMAYOR: You haven't argued why
3 not, is what I'm saying to you. If exceptional
4 circumstances has to mean something that really makes
5 something exceptional, why is negligence of any variant
6 exceptional?

7 MR. SCHER: Because when you look at, for
8 example, in this particular case, when we are talking
9 about an exceptional circumstance, you're talking
10 about a lot of times -- and courts have done this --
11 is the confluence of what the attorney did or didn't do
12 versus what the petitioner did.

13 So we have, of course -- along the lines of
14 the extraordinary circumstances here, we have
15 Petitioner's diligence. And in some respects they
16 dovetail. And I think what the Eleventh Circuit did was
17 say we don't care what the Petitioner did; we don't
18 really care what the lawyer did; anything the lawyer did
19 unless the lawyer was mentally ill or had divided
20 loyalties, then that's -- those are the only factors that
21 were going to be considered in terms of equitable
22 tolling.

23 But that is -- that is antithetical to
24 the very nature of equity. Here --

25 JUSTICE SCALIA: We've never held that

1 equitable tolling for anything is available under this
2 statute of limitations here.

3 MR. SCHER: That's correct. This Court,
4 however --

5 JUSTICE SCALIA: And why should it be? It
6 seems to me, this is not like the ordinary statute of
7 limitations, where it says, you know, the statute is five
8 years, and courts make all sorts of necessary exceptions
9 to the five years. But here you have a statute that --
10 that provides exceptions, for example, "the limitation
11 period shall run from the latest of the date on which
12 the impediment to filing an application created by State
13 action in violation ... is removed." In other words, we're
14 going to toll it for that particular event.

15 "The date on which the constitutional right
16 asserted was initially recognized by the Supreme
17 Court" -- we're going to toll it for that.

18 "The date on which the factual predicate of
19 the claim or claims presented could have been discovered
20 through exercise of due diligence."

21 Many of -- many of the equitable tolling
22 holdings involved precisely that. We'll toll it since
23 you couldn't have found out about the violation within
24 the statutory period.

25 But all of these things are handled already

1 in 2244(d). Why should we -- why should we assume the
2 right to create some additional exceptions from the --
3 from the 1-year period?

4 MR. SCHER: Well, with all due respect, I
5 don't concur with the premise that those four particular
6 subsections of 2244(d) are exceptions or -- or are
7 tolling provisions. Indeed, this Court in Jimenez said
8 that those four, (a), (b), (c) and (d), are --

9 JUSTICE GINSBURG: How many circuits have
10 said that there is equitable tolling?

11 MR. SCHER: Eleven circuits -- all of the
12 circuits, and the only circuit that hasn't held that is
13 the D.C. Circuit where it remains an open question. So
14 all of the circuits that have addressed --

15 JUSTICE GINSBURG: Then it's a question of
16 what are exceptional circumstances and whether it has to
17 be something deliberate, which is what the -- as I
18 understand it, the Michigan Court of Appeals said --
19 yes, if it was bad faith -- if it was a lie, a
20 deception --

21 MR. SCHER: Correct. And, in fact --

22 JUSTICE GINSBURG: So they're drawing the
23 line between intentional and -- and without intending
24 but just being careless.

25 MR. SCHER: Correct. And, certainly here, I

1 think we have what they deemed to be gross negligence,
2 which I think certainly has an element of, let's say, for
3 example, to use the term "recklessness." I mean, we've
4 got six or seven circuits which have addressed this
5 particular issue in terms of this line between mere
6 negligence and -- and something more than that, and those
7 circuits have all -- in the 13 or 14 years since AEDPA
8 has been around, all been able to effectively deal with
9 these particular cases on their particular facts.

10 JUSTICE SCALIA: We have a case this
11 afternoon involving an opinion of ours named McNally,
12 which held that there's no such thing as a fraud action
13 for a right to honest services. How many of the courts
14 of appeals had held that there did exist such a right
15 when we held that there didn't in McNally?

16 MR. SCHER: I'm not familiar.

17 JUSTICE SCALIA: Every single court of
18 appeals that had faced it had held that there was such a
19 right. So the mere fact that you have 11 court of
20 appeals that have found that they have extraordinary
21 power -- judges like to find that they have power -- and
22 that doesn't necessarily make it right.

23 MR. SCHER: Well -- and I --

24 JUSTICE STEVENS: Of course, that also
25 assumes that McNally was correctly decided --

1 (Laughter.)

2 JUSTICE STEVENS: -- and I don't think it was.

3 May I ask you another question --

4 MR. SCHER: Yes.

5 JUSTICE STEVENS: -- prompted by Justice
6 Kennedy's question? Have any of the circuits taken a
7 look at the probable merit of the underlying claim in
8 evaluating the issue?

9 MR. SCHER: In this particular case or in
10 another case?

11 JUSTICE STEVENS: No, not in this particular
12 case. But Justice Kennedy says it's equally unjust to
13 the client whether it's negligence or gross negligence,
14 and I'm just asking whether in any of the reviews of this
15 issue, that you are familiar with, have they sometimes
16 looked at the probable merit of the claim, and if there
17 was merit, why, you were more disturbed about attorney
18 negligence, whereas if it's a frivolous claim, they
19 wouldn't be. But do you know if any of them take a look
20 at that at all?

21 MR. SCHER: There are certainly some cases
22 that address the tolling and then, of course, address the
23 merits of the petition. I don't know that there are any
24 that link the two. But, certainly, if you have, for
25 example -- the Respondent has argued that the floodgates

1 are just going open, but certainly one of the -- one of
2 the ways that a Federal district court can deal with
3 this and has dealt with this in the past 13 years is to
4 look at the petition. And if the petition raises
5 something that's so palpably meritless, you don't even
6 need to get to anything about whether it's -- just
7 dismiss the petition because, of course, the vast
8 majority of cases that AEDPA addresses in this particular
9 chapter are noncapital cases and are pro se cases.

10 JUSTICE KENNEDY: I looked in the brief to
11 see if there was reference to the merits, underlying
12 merits of the case. Can you just tell me very quickly
13 what the key arguments are, if we ever reach the merits?

14 MR. SCHER: In the Petitioner's case?

15 JUSTICE KENNEDY: Yes.

16 MR. SCHER: He had -- well, there were a
17 number of issues that he raised on direct appeal. There
18 was issues regarding counsel. For example, I know in
19 the postconviction motion, one of the key issues was he
20 had a what's termed in Florida "a Nixon issue," which is
21 where counsel conceded some of the elements of the
22 crime.

23 JUSTICE KENNEDY: Well, I shouldn't probably
24 take your time with that. I will look at the State
25 record.

1 MR. SCHER: But -- but --

2 JUSTICE GINSBURG: Mr. Scher, one point that
3 you didn't mention, but you did I thought stress it in
4 your brief, was that counsel here said: Oh, the
5 deadline had run even before I was engaged, even before
6 I was appointed to represent this man, so there was
7 nothing that I could do for him, because the time had
8 already expired.

9 MR. SCHER: That's correct,
10 Justice Ginsburg. What happened is that that particular
11 explanation came up after the fact. I think what's
12 significant about that, number one, is that his
13 explanations have been a moving target to a large
14 extent. But what's even more important is that none of
15 that information was ever imparted to Mr. Holland while
16 the case was pending.

17 While Mr. Collins was providing assurances
18 and reassurances to Mr. Holland -- about, don't
19 worry, your State postconviction motion will be filed
20 on time, your Federal rights will be honored, everything
21 will be done, your appeal will be taken, once we are
22 done in the Florida Supreme Court we will go off to the
23 Federal district court -- at no time did Mr. Collins ever
24 say: We've got a big problem here; the statute may have
25 run, and so we need to start thinking in advance of ways

1 to deal with this.

2 For example, if Mr. Collins truly
3 believed that the statute had already run, the day the
4 Florida Supreme Court issued that decision, he should
5 have been in Federal court filing something right away.

6 JUSTICE ALITO: Could you just tell me in a
7 sentence or two what test you think we should apply for
8 equitable tolling? What is necessary in order for there
9 to be equitable tolling?

10 MR. SCHER: Your Honor, I think the -- the
11 test is the test that this Court has applied, which is
12 in Pace and in Lawrence, which is extraordinary
13 circumstances coupled with diligence. I think under
14 those particular -- coupled with diligence, the
15 Petitioner's diligence.

16 JUSTICE ALITO: What does "extraordinary
17 circumstances" mean?

18 MR. SCHER: It's -- it's a case-by-case type of
19 issue. It's because it's an equitable remedy. It's not
20 something that's susceptible to rigid rules, which of
21 course is the problem with the Eleventh Circuit's
22 categorical exclusion of a particular large chunk of
23 misconduct on the part of the attorney. But certainly
24 here, where we have extraordinary circumstances, we have
25 lack of notice to the Petitioner that his State court

1 opinion had been issued, that they had affirmed, that
2 the mandate had come out; and a failure to communicate,
3 wholesale failure to communicate, bordering on, in fact,
4 abandonment --

5 JUSTICE SCALIA: All of that has nothing to
6 do with -- with what caused -- what caused the inability
7 to -- to bring the habeas action.

8 MR. SCHER: Well --

9 JUSTICE SCALIA: All of that is -- is
10 preliminary to that. This may have been a very
11 irresponsible lawyer, but that has nothing to do with
12 the event that -- the simple event, failure to file in
13 that what, 30-day period, which --

14 MR. SCHER: Fourteen days.

15 JUSTICE SCALIA: Fourteen days. It seems to
16 me "extraordinary" means unusual. So you say any unusual
17 event is a possible?

18 MR. SCHER: Well, I think the one --

19 JUSTICE SCALIA: Any unusual event is a
20 possible for a court to say, oh, yes, it says a year,
21 but this is unusual so we will give you a year and a
22 half.

23 MR. SCHER: Well, I think what we have here
24 is what makes this case I think unusual, and it's the
25 first type of case that this Court has seen, is under

1 these circumstances you have this confluence of events.
2 And I think what makes this case -- what sets this case
3 apart from the other ones that this Court has seen and
4 that certainly other courts have seen is, for example,
5 it's extraordinary -- or it was diligent for Mr. Holland
6 to have asked the Florida Supreme Court on two occasions
7 to rid himself of Collins, and he asked to proceed pro se.

8 JUSTICE KENNEDY: The client -- this client
9 was sort of the pesky client, but apparently knew a lot
10 more about AEDPA than most people generally do. I mean,
11 AEDPA's not exactly an ordinary term.

12 JUSTICE SCALIA: And had a lot of time to
13 devote to it.

14 JUSTICE KENNEDY: And -- and suppose you have a
15 client who is just bewildered. He doesn't know AEDPA;
16 he doesn't know Federal court. Why should he be in any
17 worse position than this client?

18 MR. SCHER: Well --

19 JUSTICE KENNEDY: It seems to me it would be
20 the other way around. This fellow knew enough that, if
21 he had really just done a little bit more, he would have
22 -- well, he tried to file a petition, but he might have
23 done a little bit more.

24 MR. SCHER: Well, I think --

25 JUSTICE KENNEDY: But the uninformed client,

1 the ignorant client, could never have approached this.
2 I don't know why he shouldn't be more protected than
3 your client, which goes back to Justice Alito's question.
4 I'm not sure how we draw this line.

5 MR. SCHER: I think the problem we have here
6 with Mr. Holland is that the more diligent he was, the
7 more the Respondent and the lower courts have said he
8 should have done. And so he did X, Y, and Z; they say
9 you should have done A, B, and C.

10 But what I think is -- is significant here
11 is he was stuck with this lawyer. He tried to get rid of
12 the lawyer. The State filed motions saying you can't --
13 not only can you not fire him, you can't file a pro se
14 motion because you are represented by the lawyer. So all
15 Mr. Holland hears from the courts is that: You can't speak
16 to us and we can't speak to you. So he's stuck.

17 And then, of course, he's writing to the
18 Florida Supreme Court clerk begging for information, and
19 in fact in footnote 11 of the brief --

20 JUSTICE GINSBURG: But he never asked -- he
21 wrote to the clerk, but he never asked to be informed
22 when the judgment came down.

23 MR. SCHER: Well, what we have, Your Honor,
24 is if you look on page 11, in footnote 11, Mr. Holland
25 wrote a letter to the Florida Supreme Court clerk,

1 toward the end of which he says: "I'm not trying to get
2 on your nerves. I would just like to know exactly what
3 is happening with my case on appeal to the Supreme Court
4 of Florida."

5 So we certainly have in the clerk's office
6 -- and, again, that was on page 11, footnote 11. It's
7 also at the Joint Appendix at 146 to 147.

8 What we have here is Petitioner putting the
9 Florida Supreme Court on explicit notice that he is
10 having a problem with his lawyer, and further -- earlier
11 in that particular letter, he apologizes to the clerk,
12 saying: I'm sorry to pester you with these -- with these
13 requests, but if I had a lawyer who was responding to my
14 letters and who was listening to me and who would send
15 me the documentations, I wouldn't have to be bothering
16 you, but this is the situation that I'm in.

17 And then, of course, he tries to not only have
18 Mr. Collins substituted, but he asks to go pro se.
19 That's an extraordinary circumstance. And what makes it
20 even further, more extraordinary is the State coming in
21 and saying, no, you can't not only do that, but you are
22 not even allowed to file the paperwork asking to do
23 that. And, in fact, when Mr. Holland did file his pro se
24 petition in Federal district court, the State moved to
25 strike it because he was represented by -- by counsel.

1 And so --

2 CHIEF JUSTICE ROBERTS: Is this case
3 different if the filing error -- I understand there was
4 a lot going on, but if the lawyer just miscalculated the
5 days and was off by one day, this case comes out the
6 other way in your view, right?

7 MR. SCHER: I think not only under my -- I
8 think, certainly, courts have -- have discussed this, that
9 that's -- that's just an unfortunate mere mistake. But I
10 think certainly we don't have that under the facts of
11 this case. There has never been any suggestion that
12 there was any miscalculation. We just have
13 complete abandonment by -- by the --

14 JUSTICE SOTOMAYOR: I don't -- you say --
15 you say "complete abandonment." But this lawyer filed a
16 whole lot of things on behalf of this client. He missed
17 a very critical thing, the Federal habeas filing. But
18 it's not abandonment of a client in the sense of not
19 doing anything for the client.

20 So it goes back to my beginning question,
21 which is, where is the line drawn between the types of
22 negligence and what the circuit suggested, which is some
23 sort of intentional malfeasance?

24 MR. SCHER: And I didn't mean to suggest --
25 when I -- when I used the word "abandonment," I'm -- I'm

1 referring to, of course, in terms of abandonment with
2 regard to preserving -- enforcing the assurances that
3 Collins had made with respect to filing the petition.

4 And, of course, he also had told -- that --
5 Mr. Holland that he would inform him of the Florida
6 Supreme Court's decision, because that, of course, is
7 the triggering date.

8 We have Mr. Holland, who had already been --
9 you know, asked his lawyer, you know, please file
10 certain issues in my case and please keep me informed.
11 When those two promises and assurances were not kept by
12 the lawyer, Mr. Holland at that point has reason to be
13 concerned that the additional promise, which is, I will
14 file on time, was not going to be honored.

15 And so Mr. Holland embarked on a series of
16 diligent steps in order to get some information, but he
17 didn't know where to turn. And, then, of course, for
18 example, he writes to the clerk's office of the supreme
19 court. Sometimes they send him information; sometimes
20 they tell him to send a check.

21 He doesn't know. He is not getting any
22 consistency, and he's certainly not getting any response
23 from his attorney.

24 Then he files these motions in the State
25 supreme court, which are opposed by the State as

1 nullities because he is represented by counsel. He then
2 writes to the Florida Supreme Court saying, can you give
3 me the information about your Web site -- maybe I can have
4 some friends look up this case. Because, of course, he
5 knows at this point that there is a problem, and he
6 knows that the triggering date for the filing in the
7 Federal petition is the denial by the Florida Supreme
8 Court and the issuance of the mandate.

9 JUSTICE GINSBURG: Then you are -- you
10 seem, from what you just said, to be relying on a
11 distinction between paid counsel, who is just as
12 careless, and court-appointed counsel, because in the
13 one case the client had picked that attorney, and in the
14 other case, the client was given this attorney by the
15 State. So I think you're suggesting that the State has
16 some responsibility when it provides the counsel.

17 But before you said, no, your answer would
18 be the same if you were not making a distinction between
19 court-appointed and paid counsel.

20 MR. SCHER: I think the -- the distinction
21 that I was making -- I'm not saying that there's a
22 difference in terms of paid or appointed counsel, but
23 here where you have appointed counsel, I think one of
24 the extraordinary factors is the State coming in and --
25 and moving to strike these pro se pleadings, telling

1 Mr. -- sending a signal to Mr. Holland that you are
2 stuck with Collins, you can't speak to the supreme
3 court, and the supreme court can't speak to you.
4 Everything has to be funneled through your lawyer.

5 And, of course, the ironic thing is that, had
6 Mr. Holland been permitted to proceed pro se, he would
7 have gotten copied with the decision by the supreme
8 court of Florida. He would have gotten copied with the
9 mandate. And then he would have known when the mandate
10 issued.

11 And as we know, when he found out -- I mean,
12 the other extraordinary factor here is that when he
13 found out that this happened, he prepared that petition
14 that day and mailed it the next day. This is not
15 somebody who sat on his rights. He didn't start
16 complaining and writing letters and bemoaning his
17 situation. He took action, which also distinguishes
18 this case from a number of others.

19 CHIEF JUSTICE ROBERTS: I guess I understand
20 what the cases have said. I -- I have trouble
21 understanding why that should make a difference, why
22 that should be so pertinent, why he should be in better
23 shape than somebody who says: Look, I don't know
24 anything about this. I need a good lawyer. This is what
25 I get. I'm trusting you. Tell me what I should do, and I

1 leave it in your hands.

2 And that person is in somehow worse shape?

3 MR. SCHER: Well, because in Lawrence and in --
4 in Coleman this Court had -- had said that that made a
5 difference. In Lawrence, this Court had said Lawrence
6 was out of luck because it's not like he asked for
7 another lawyer or asked to proceed pro se. And so
8 Holland -- and so Lawrence was stuck.

9 I would respectfully reserve the remainder
10 of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Makar.

13 ORAL ARGUMENT OF SCOTT D. MAKAR
14 ON BEHALF OF THE RESPONDENT

15 MR. MAKAR: Mr. Chief Justice, and may it
16 please the Court:

17 This case, we believe, is decided by one
18 principle --

19 JUSTICE STEVENS: May I just ask just an
20 information question before you -- are the postconviction
21 lawyers in these cases that are appointed, are they
22 compensated by the State?

23 MR. MAKAR: Yes, they are.

24 JUSTICE STEVENS: They are.

25 JUSTICE KENNEDY: And also, just in the

1 course of your argument, how -- how often do these
2 deadlines missed (a) in capital cases and (b) in AEDPA
3 cases? Do you have any statistics on that, or can you
4 tell us from your experience?

5 MR. MAKAR: I can tell you anecdotally the
6 attorneys that handle these cases in Florida, that the
7 equitable tolling issue comes up with some regularity.
8 I'm aware of three cases just in Jacksonville where I
9 live where the district judge there has had evidentiary
10 hearings and has looked at these equitable tolling issues.

11 In Florida, we have 394 individuals on death
12 row, and those cases are at various stages in the
13 litigation. So there is a certain amount of that that
14 goes on.

15 As to the noncapital cases, we know that
16 the system is flooded with habeas petitions. Obviously,
17 most of those are unrepresented. But there still is, in
18 those cases -- a study I saw recently, a 2007 study from
19 Vanderbilt University, that about 20 percent of those
20 cases are dismissed on statute of limitations grounds.
21 I'm inferring from that that there is some equitable
22 tolling action going on there, but the specific amount
23 we're not sure of. But certainly in both the capital
24 and noncapital area, this is an issue.

25 And if I could get to the standard here,

1 obviously, we're asking this Court to use the analysis
2 it has done in other cases to find that there is no
3 equitable tolling whatsoever. We --

4 JUSTICE BREYER: You mean to imply that
5 earthquake, fire, flood, mad postman burns mail truck,
6 et cetera?

7 MR. MAKAR: Precisely, Your Honor. I
8 mean --

9 JUSTICE BREYER: So, even if it's a terrible
10 earthquake, all these people are just out of luck?

11 MR. MAKAR: Well -- well, there are some,
12 certainly, safety valves if there's a natural disaster,
13 some --

14 JUSTICE BREYER: Well, why? Natural
15 disaster, yes, you said no equitable tolling, they're
16 out of luck?

17 MR. MAKAR: Well -- well, for example, the
18 Rules of Federal Procedure were recently amended to
19 allow for late filing when the courthouse is inaccessible.

20 JUSTICE BREYER: The statute?

21 MR. MAKAR: Precisely, Your Honor. And we
22 think --

23 JUSTICE BREYER: And, so, are you -- you
24 read the statute to say in some cases, you could do it.
25 If you're going to read it in some cases you can do it,

1 then I guess we're at a discussion of is this one of
2 those cases?

3 MR. MAKAR: Well, two responses. Number
4 one, we do not believe that equitable tolling was
5 intended by Congress under this complex statute of
6 limitations for all the reasons set out in our brief.

7 JUSTICE BREYER: So that's earthquake,
8 fire, flood, et cetera?

9 MR. MAKAR: Exactly. And it relates to the
10 same result, it seems -- to the same result as this Court
11 came to in Beggerly and Brockamp, where the -- if
12 Congress intended that to be the case, that's the case.

13 JUSTICE ALITO: What if the lawyer lies to
14 the client and the client says my time is running out,
15 have you filed my -- my Federal habeas petition, and the
16 lawyer says, yes, I filed it and here it is, and it has
17 a -- a forged date stamp on it? No equitable tolling
18 there?

19 MR. MAKAR: Well, under our position that
20 Congress intended to draw a very clear line, no. If
21 the -- if the Court assumes or decides there is some
22 sort of equitable tolling, then that's a different case,
23 and -- and in those situations where there's something
24 beyond the incompetence of the lawyer. And that's our rule.
25 If the Court decides there is equitable tolling or

1 assumes it exists, it has to be that the rule that the
2 incompetence of the postconviction counsel cannot be a
3 basis for relief.

4 That's what this Court has essentially said
5 in Lawrence and also in Coleman, and also what Congress
6 inferentially said in -- in 2254(i).

7 So, under those circumstances, here our rule
8 works because you don't get into those gradations of
9 negligence, you know, is it gross negligence? Well,
10 how gross? And the bottom line here in this particular case,
11 of course -- and the Court has asked these questions
12 here -- is what really happened in this case? All you
13 had was a Lawrence error, which was --

14 JUSTICE BREYER: Well, why should it matter?
15 It's certainly unusual. Isn't that what we are after, one,
16 is he diligent? Answer, yes, he has been diligent.

17 Two, is it extraordinary? I would think it
18 was fairly extraordinary that a person writes these letters
19 to counsel and so forth, then the -- the thing isn't
20 filed. Is that extraordinary or not?

21 Whether it was his fault, whether he himself
22 was kidnapped. I mean, maybe it wasn't the counsel's
23 fault. You can imagine a lot of circumstances. But the
24 question, I would think, is, is it extraordinary and is
25 it fair?

1 MR. MAKAR: Well, the answer -- is it
2 extraordinary? The answer is no. This is common --

3 JUSTICE BREYER: You mean counsel in Florida
4 often when -- miss deadlines and so forth when their
5 counsel -- when their client specifically says to them,
6 even a few weeks before and by mail several times,
7 please file such-and-such, is not extraordinary in
8 Florida?

9 MR. MAKAR: It's not just Florida; it's
10 nationwide there's -- there's problem with this complex
11 statute of limitations --

12 JUSTICE BREYER: We have a problem with
13 the bar, don't we, if -- if -- if the -- if --

14 (Laughter.)

15 MR. MAKAR: Well, there -- there has been no
16 bar discipline, to my knowledge, for missing a
17 deadline. And that -- and this Court has held that is not
18 an extraordinary circumstance, in Lawrence. The only --

19 JUSTICE KENNEDY: I -- I -- I didn't hear.
20 You say there has been discipline or there --

21 MR. MAKAR: To my knowledge, there has not
22 been for missing a deadline.

23 JUSTICE KENNEDY: If we or -- this would
24 probably be the Congress -- assuming some rule maker had
25 probably be the Congress, assuming some rulemaker had

1 authority to do this, would it make sense to say
2 that the State is going to be subject to equitable
3 tolling on a rather broad standard -- we're going to
4 give equitable tolling often -- unless the State has
5 attorney discipline procedures, so that this happens
6 only once and then the attorney can no longer practice
7 in the Federal courts?

8 MR. MAKAR: I suppose as a matter of --

9 JUSTICE KENNEDY: Obviously, what we're
10 looking for is some sort of a rule to keep the deadline,
11 and if we're going to accommodate your friend on the
12 other side, to have -- to have some rule about
13 exceptional -- exceptional cases.

14 MR. MAKAR: Well, perhaps something along
15 those lines legislatively might be -- be considered, but
16 -- but in the end, what we have here is garden-variety
17 attorney negligence miscalculating and missing a
18 deadline. The --

19 JUSTICE ALITO: Isn't there at least one
20 additional thing here? Holland filed a request -- a pro
21 se request to be relieved of Collins's representation,
22 and that was rejected by the -- that was rejected by the
23 court because he was pro se. And therefore he couldn't
24 ask -- he couldn't file something himself?

25 MR. MAKAR: Well, let me clarify that,

1 because there's a misconception going on here. In the
2 Florida Supreme Court postconviction process, Collins
3 -- I'm sorry, Holland twice filed motions to remove
4 Collins. Importantly, Holland never asked to go pro se.
5 That is incorrect. If you look at Joint Appendix 134
6 and 149 -- those are the two pro se filings that Holland
7 made here. In both of those, he said: I'm having a
8 conflict with my lawyer. My lawyer won't do what I want
9 him to do; I want a new lawyer.

10 And that's all he said: I want a new lawyer.

11 He never --

12 JUSTICE ALITO: Was that denied on the
13 ground that he was pro se?

14 MR. MAKAR: The first motion was stricken.
15 It was then denied because he was represented by counsel
16 at that point. Keep in mind, this is in the State
17 postconviction process. This is not where the Federal
18 AEDPA deadline and so forth is being kicked about. In
19 fact, there is really no discussion whatsoever about
20 what the actual deadline to file this petition was at
21 all in the record.

22 The only time Holland asked to go pro se in
23 any court filing is after he filed the pro se petition
24 in Federal court -- the untimely one. He then shortly
25 thereafter filed an emergency motion to relieve Collins,

1 and --

2 JUSTICE ALITO: What I don't understand is,
3 how can a -- how can a client request to have -- to be
4 relieved of representation, if the client can't file
5 that motion pro se? I understand the other things, but
6 I don't understand why -- how -- how you can deny the
7 request to get rid of this lawyer? Unless he has to
8 have the lawyer file the motion for him?

9 (Laughter.)

10 MR. MAKAR: No, I think that certainly the
11 filing of the motion, I think perhaps it was -- it shouldn't
12 have been stricken the first time, but the court then on the
13 merits denied it the second time. And keep in mind -- I
14 forget who alluded to it -- this has been somewhat of an
15 unusual case from the outset, in that if you look at the
16 three Florida Supreme Court opinions that have been
17 issued in this case, it shows that at the first trial
18 Holland absented himself from the -- absented himself
19 from the trial and he had to watch on circuit --
20 closed-circuit TV because he was being very difficult.

21 And then in the second trial, we had two
22 Faretta hearings amounting to hundreds of pages in which
23 the Florida Supreme Court then said, well, he wants to
24 represent himself, but he can't conduct himself properly
25 and so forth. And also there's the issue of his -- his

1 -- there's a mental issue there as well, that he has
2 raised on appeal as well.

3 So the court -- the Florida courts are sort
4 of put in this difficult posture of saying, we want you
5 to have counsel, we need you to have counsel because we
6 want you to have effective representation, but then
7 throughout the process here it's been a difficult,
8 difficult number of decades, essentially, in this
9 situation. So I think it's an unfair characterization
10 to say that the Florida courts and also the Office of
11 Attorney General who -- who routinely moves to
12 strike these -- it's not because we're trying to deny
13 anyone's day in court. It's because you have a lawyer
14 and they have to speak to the lawyer, and the hybrid
15 representation is impermissible. So --

16 JUSTICE SOTOMAYOR: Can we go back to
17 just --

18 JUSTICE GINSBURG: The State -- the State
19 has no responsibility even though it made this
20 appointment? So you agree there's no difference,
21 whether it was paid counsel, somebody that the -- that
22 the defendant picked to represent him, and someone that
23 he just had to take because it's what the State gave him?

24 MR. MAKAR: Exactly. And -- and that's the
25 way the Court's decision in Coleman has allocated the

1 burdens and the risks. I mean, what the Court said was
2 okay, if it's a direct appeal where the State is charged
3 with that responsibility, that's one thing; but when
4 it's postconviction, it's shifted. The whole paradigm
5 and whole structure is flipped the other way, and you,
6 the Petitioner, bear the burden, and not the State.
7 This is important under AEDPA, because AEDPA --

8 JUSTICE GINSBURG: Under -- on direct appeal,
9 if counsel conducted himself this way, the State
10 would -- he'd have to get relief because the State
11 would have the burden, but not -- not on collateral?
12 Is that what you're saying?

13 MR. MAKAR: Sure. On direct appeal, if the
14 lawyer is deemed to be ineffective, then that would be a
15 constitutional error, and that would be subject to some
16 sort of relief, but it flips in the postconviction
17 stage, as this Court has held in Coleman.

18 CHIEF JUSTICE ROBERTS: Counsel, I'm
19 concerned about some of the situations Justice Breyer
20 mentions, you know, if there is an earthquake, a plane
21 crash, but the law seems to be focusing on other things
22 when it's talking about extraordinary circumstances.
23 Like here, we're talking about how diligent he was in
24 pursuing his lawyer. There seems to be a disconnect
25 there.

1 I don't know why -- I mean, assuming we're
2 going to have, for argument, equitable tolling, what
3 should we be looking at? The unusual nature of the
4 situation that comes up, or whether you've got a pesky
5 client?

6 MR. MAKAR: Well, I think two responses
7 there: Obviously, we believe that attorney incompetence
8 or so forth cannot be a basis for equitable tolling.
9 These other situations about natural disasters and
10 hypotheticals where some, you know, very unusual, bizarre
11 situation comes in that's external to the
12 attorney-client relationship, perhaps those -- those
13 could be considered.

14 But we believe that the Congress, through its
15 purpose in enacting this statute of limitations, a
16 complex one that has exceptions, that -- that is
17 designed to alleviate the burdens and delays -- its intent
18 was not to allow equitable tolling, because we --

19 CHIEF JUSTICE ROBERTS: Well, but it
20 legislated against the background of cases like Irwin
21 that stated the general proposition is, unless Congress
22 says otherwise, there is equitable tolling.

23 MR. MAKAR: But that can be rebutted. That
24 can be rebutted, and we believe has been rebutted by the
25 record here, which shows that these are precisely the

1 kind of delays that Congress intended to avoid by having
2 a strict 1-year statute of limitations, that there's
3 burdens put on -- not just the States but the courts --

4 JUSTICE SOTOMAYOR: I -- what I worry about
5 is that you're confusing the -- or perceive --
6 confusing the fact that lawyer negligence may not be the
7 type of situation that Congress was looking at. With
8 the hypotheticals that Justice Breyer listed, which are
9 a different kind of situation, and you are trying to
10 pigeonhole both and say Congress didn't intend for both
11 to be covered. And yet you suggested a little later
12 that they may have intended what Justice Breyer was
13 thinking about. I -- I don't see anything in the
14 structure of the statute that would preclude what
15 Justice Breyer listed.

16 MR. MAKAR: Well --

17 JUSTICE SOTOMAYOR: So what can we read to
18 suggest that -- forget about the lawyer malfeasance;
19 let's talk just about equitable tolling

20 MR. MAKAR: Sure. Well --

21 JUSTICE SOTOMAYOR: -- in its traditional
22 sense. Most of the cases in equitable tolling, by the way,
23 have to do with court errors.

24 MR. MAKAR: Sure. What we're suggesting is
25 that under the structure of the Brockamp decision, what

1 the Court looked at there to determine when there is no
2 equitable tolling intended by Congress, that here
3 likewise there is no equitable tolling, and as the Court
4 held in Brockamp, the fact that there may be unfairness
5 in individual cases was the price Congress was willing
6 to pay, the tradeoff it was willing to allow, to have a
7 habeas system that was functioning.

8 Now, assuming that position is rejected by
9 the Court or the Court assumes equitable tolling, the
10 next question is what should be allowed. And we believe
11 it has to be exceptionally narrow. And certainly in
12 this case -- and this case is all about attorney
13 negligence or attorney gross negligence -- those --
14 those sort of circumstances are not enough. And --

15 JUSTICE BREYER: Why could you not say
16 here -- I mean, the key sentence, I take it, is the
17 Eleventh Circuit and it says: "No allegation of lawyer
18 negligence or failure to meet the standard of care" --
19 none -- without "proof, bad faith, dishonesty, mental
20 impairment" on the part of the lawyer, could ever
21 qualify.

22 Now, that's -- so we just say, no, no, that
23 isn't so. Sometimes it could, when combined with other
24 circumstances. And then go back and let them -- I don't
25 know what this particular individual Petitioner's prior

1 conduct has been. I understand the problems that you
2 have. But do you -- I guess you're going to say no to
3 this, but -- but it's a little hard to see why you couldn't
4 have a narrow standard but just not rule out the
5 possibility that under certain circumstances, just
6 negligence or even less -- maybe the lawyer wasn't even
7 at fault; maybe he got kidnapped. You know, I mean, there
8 are odd things that happen in life. And just say go look for
9 this; see if it's truly extraordinary, if it's fair, if
10 he was diligent. What about that?

11 MR. MAKAR: Well, we agree with the Eleventh
12 Circuit standard to the extent it says, you know, that this
13 sort of attorney negligence, gross negligence, incompetence,
14 is not enough. Where we differ from the Eleventh Circuit
15 is we're concerned, based upon our pragmatic day-in,
16 day-out handling of these cases, that when you say
17 dishonesty, well -- or a conflict -- that those concepts
18 can be conflated into things that they are not,
19 particularly when these communications between lawyer
20 and client are outside the State's view. We are not
21 privy to what goes on between lawyer and client. The
22 lawyer says, I will do this, says it verbally or maybe
23 even in writing. We don't know about that. We're not
24 privy to all that.

25 And it creates this potential, when we allow

1 the standard, as the Eleventh Circuit held -- we allow the
2 standard to gravitate away from its core purpose and
3 allows it to be used to sort of game the system in a way
4 to gain an advantage. That's why we are concerned about
5 any degree of attorney misconduct or behavior because it
6 could easily --

7 JUSTICE SOTOMAYOR: Do you have any idea,
8 before the Eleventh Circuit announced its standard, how
9 many habeas petitions were tolled by district courts in
10 that -- in your -- in Florida, on the basis of equitable
11 tolling, that -- that they permitted petitions to go
12 forward after the statute of limitations?

13 MR. MAKAR: Unfortunately, I'm not aware of
14 any data on that. There are not that many.

15 JUSTICE BREYER: So would there be -- I
16 mean, what I'm actually worried about is not a lawyer
17 being kidnapped. I'm actually worried what can
18 happen in a person's life. He gets deathly ill. His wife
19 gets sick. Something happens to the children. Some very
20 unusual thing comes along at the last minute, and all the
21 plans go awry. And to have a little bit of flexibility
22 in this statute to take care of those very unusual human
23 circumstances seems a reasonable reading of it. But you
24 say it's not because --

25 MR. MAKAR: Well, we say it's not because

1 Congress intended not to have equitable tolling, and
2 then to the extent it did, it could have drafted
3 something along the lines of what's in 2263, which is
4 the next chapter -- it's the companion chapter that says
5 instead of having 365 days with no equitable tolling,
6 you can have 180 days and 30 days for good cause if
7 there's a deadline missed --

8 CHIEF JUSTICE ROBERTS: You're not -- you're
9 not worried about Justice Breyer's case of the really
10 extraordinary circumstance where everybody would say,
11 well, that's -- you know, we understand. You're
12 worried that if you create an exception, that all sorts
13 of other stuff will come in. And so why isn't the answer
14 to that concern that you've got an unusual case here
15 where you do have the client saying, do this, do this,
16 do this, and the lawyer doesn't?

17 MR. MAKAR: Well, under these facts --

18 CHIEF JUSTICE ROBERTS: It's very hard to
19 argue against -- against equity, against equitable
20 tolling. But at the same time, I think you do need a
21 constraining principle that it doesn't do away with the
22 statute of limitations. So why isn't what we have here
23 good enough?

24 MR. MAKAR: Meaning the Eleventh Circuit's
25 standard?

1 CHIEF JUSTICE ROBERTS: Meaning the fact
2 that you have got a client who is constantly telling the
3 lawyer, do this, you know, get it done; doesn't get the
4 judgment. And, you know, it's not just your run-of-the-mill
5 case where the lawyer happens to miss a deadline.

6 MR. MAKAR: Well, that goes to the issue
7 that -- of not -- of diligence, of course, which is not
8 the issue we're looking at. We're looking at the
9 extraordinary circumstances, not the diligence.
10 Extraordinary circumstance has to be something that --
11 attributable to the lawyer or something along those lines.

12 We're not -- we'll concede diligence for the
13 moment and say here it's what the lawyer did, as
14 Lawrence held. He missed the deadline. In fact,
15 this case -- you know, Lawrence, obviously -- it was 364
16 days before they even filed the State postconviction motion,
17 and the lawyer in that case wasn't appointed for 300 days,
18 and the State postconvictions process was sort of in
19 disarray. And all those things that the Court in
20 Lawrence said are not supportable for equitable tolling
21 apply equally here.

22 The only difference in this case is this
23 allegation about the -- the lawyer didn't communicate
24 with his client. Well, if that becomes the governing rule,
25 all is lost, because attorney communication with client

1 is perhaps even more amorphous a concept. It could be
2 based on verbal representations and so forth. So we are
3 very concerned that it not slip into that sphere where
4 it can be easily manipulated for the advantage of
5 getting some sort of delay.

6 And as I say, the analysis here of
7 purpose of AEDPA, structure of AEDPA, and the
8 burdens -- as I say, the burdens are important to the
9 State and to the court system. I was looking at that
10 recent study, the 2007 study, that seemed to suggest
11 that AEDPA is -- basically, when these cases are being
12 filed in Federal district court, it has taken a year and
13 a half to 2, 3 years for them to be resolved, and in
14 this case keep in mind it took 18 months in the district
15 court, 18 months in the Eleventh Circuit, and then
16 further.

17 But that's allowing the invocation of this
18 doctrine, not just in this case. We're worried about the
19 noncapital context as well, that that will somehow put
20 an end to the importance of what Congress enacted.

21 There is a pre-AEDPA mentality out there,
22 I'm afraid. And it's natural. It's understandable.
23 We're all human. There's a pre-AEDPA mentality that
24 there must be a remedy. There must be some equity done.
25 And I think that sort of undergirds why perhaps most of

1 the circuits have either assumed -- I think 11 have
2 either assumed or adopted some sort of equitable
3 tolling.

4 I think they are waiting for this Court,
5 which has left the question open to provide guidance on
6 that issue, and we suggest that either there be no
7 equitable tolling or that, if there is to be equitable
8 tolling, on the circumstances of this case it has to be
9 extreme attorney misconduct or incompetence, and that
10 just simply is not established on this record.

11 CHIEF JUSTICE ROBERTS: What -- why isn't it
12 extreme attorney incompetence to miss a deadline? I
13 mean, you either miss it or you don't. It's not going
14 to get -- why doesn't that qualify as extreme attorney
15 misconduct?

16 MR. MAKAR: Well, I guess the short answer,
17 of course, is the courts have said no, that's not
18 enough, we need something that's truly extreme,
19 something far from just missing a deadline. We probably
20 all know lawyers who have missed deadlines. We all know
21 lawyers who haven't communicated with their clients.
22 Those things are ordinary, run-of-the-mill, happen-every-day
23 sort of events. It has to be something beyond that.
24 It has to be something that is truly extreme for
25 the exception to kick in.

1 CHIEF JUSTICE ROBERTS: I mean, give me
2 an example.

3 MR. MAKAR: Well --

4 CHIEF JUSTICE ROBERTS: That's worse than
5 missing the deadline.

6 MR. MAKAR: I mean, the example I've tossed
7 about in our conversations is -- is to say, well, what if
8 the postconviction lawyer is bribed by the victim's family
9 to not file something on time? I mean, oh gosh, that
10 strikes us all as just -- that's --

11 CHIEF JUSTICE ROBERTS: Well, we don't --
12 that's not negligence.

13 MR. MAKAR: No. No. But the question I
14 thought you were asking is, you know, how extreme can
15 we think about a situation, and -- and --

16 CHIEF JUSTICE ROBERTS: So you're -- it
17 has to be criminal behavior?

18 MR. MAKAR: It has to be something beyond
19 just attorney incompetence. What the -- that's a
20 concept that we can get our arms around, and we
21 certainly get into this line-drawing of, well, is a
22 failure to communicate three or four times enough? Or a
23 failure to have a letter go to the client in response to
24 his request -- is that enough?

25 JUSTICE STEVENS: May I ask another

1 question? It doesn't go to the merits, but I'm really
2 curious. The lawyers selected for postconviction work,
3 which I understand now are compensated by the State, are
4 they selected from the same panels as the lawyers that
5 represent defendants generally and who are appointed by
6 the State in criminal matters?

7 MR. MAKAR: Well, there's a collateral counsel
8 registry list.

9 JUSTICE STEVENS: Is it --

10 MR. MAKAR: There's actually what they call
11 CCRC. There's actually State lawyers around the State who
12 provide this, and then there's a registry list as well.
13 And they have to meet certain standards. Chapter 27 of
14 our Florida Statutes set out the standards that these
15 counsel have to meet.

16 JUSTICE STEVENS: But the collateral counsel
17 registry is a different group of lawyers than are
18 generally appointed in criminal cases?

19 MR. MAKAR: Yes.

20 JUSTICE STEVENS: I see.

21 MR. MAKAR: Well, Your Honors, if there's
22 no further questions, we ask that the court affirm the
23 Eleventh Circuit below, either on the basis that there's
24 no equitable tolling or that on this record there's
25 no basis for it under the attorney incompetence

1 standard.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Scher, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF TODD G. SCHER

6 ON BEHALF OF PETITIONER

7 MR. SCHER: I just have a couple of brief
8 points. First, to clarify, the Respondent argued that
9 Mr. Holland never asked to proceed pro se in the State
10 court, and that's just incorrect, and it's flatly
11 contradicted by their brief on page 43, where they
12 write: "Holland moved to replace Collins with another
13 attorney (whom Holland presumably thought would raise
14 any issues Holland desired) or to proceed pro se if
15 substitute counsel could not be appointed."

16 And I think, again, going back to one of
17 the things that Justice Breyer was discussing with
18 Respondent's counsel, was I think that that -- the
19 problem with the Eleventh Circuit's analysis is this
20 categorical exclusion. Equitable tolling and
21 extraordinary circumstances have to be considered as
22 a -- consider all the circumstances, and so to
23 categorically exclude this one particular area,
24 we submit, is what the problem is here.

25 And we also do have, contrary to what

1 the Respondent contended --

2 JUSTICE GINSBURG: But you would say --
3 it is -- you could categorically excuse ordinary
4 negligence as opposed to gross negligence?

5 MR. SCHER: That's where courts, including
6 this Court, have drawn the line. That seems to be the
7 floor, but, you know, obviously, when you get into the
8 particular circumstances of a case, that's where a
9 categorical rule excluding a particular type of area
10 beyond just garden-variety neglect -- really, that's
11 the problem here, is that was antithetical to the
12 notion of equity.

13 And I just wanted to point out briefly that
14 this record does avail itself of numerous instances where
15 Mr. Holland had alleged that the attorney lied to him. JA
16 -- in the Joint Appendix on 170, Mr. Holland writes that
17 Mr. Collins lied to him. On the Joint Appendix on 194,
18 that Mr. Collins deceived him and misled him --

19 JUSTICE ALITO: What were the lies?

20 MR. SCHER: -- about when the petition was
21 going to be --

22 JUSTICE ALITO: What was -- give me an example
23 of a lie that he told him?

24 MR. SCHER: These were in the context of Mr.
25 Collins telling Mr. Holland that he would protect his

1 Federal habeas rights. Those --

2 JUSTICE ALITO: Doesn't that go without
3 saying, that every attorney -- and every attorney presumably
4 undertakes not to miss the statute of limitations? Is
5 there a difference between the attorney who simply says
6 nothing and the attorney who says, yes, I'm not going to
7 miss the statute of limitations?

8 MR. SCHER: I think it makes it more --

9 JUSTICE ALITO: That's a lie?

10 MR. SCHER: I think it makes it makes
11 it more extraordinary. And what makes that situation
12 even yet more extraordinary is where the client has
13 tried to rid himself of this lawyer on a number of
14 occasions or to go pro se, precisely because he has been
15 experiencing these -- these -- lack of trust and other
16 problems in terms of these deceptions from his lawyer,
17 so he was really hamstrung by the time that --

18 CHIEF JUSTICE ROBERTS: If I'm worried --

19 MR. SCHER: -- it was too late.

20 CHIEF JUSTICE ROBERTS: If I'm worried about
21 the open-ended nature of what you're asking for, how --
22 how would you state the test you would like in the most
23 restrictive terms?

24 MR. SCHER: I think in terms -- I think the
25 test would be appropriate, what Justice Breyer

1 articulated, which is --

2 CHIEF JUSTICE ROBERTS: Hurricane or
3 kidnapping?

4 MR. SCHER: No, no.

5 CHIEF JUSTICE ROBERTS: Oh, the different
6 one.

7 (Laughter.)

8 MR. SCHER: No, the other test, the other
9 test. We need a hurricane exception in Florida.

10 But in terms of the Eleventh Circuit was
11 incorrect in excluding this particular type of attorney
12 misconduct and negligence because that's antithetical
13 to equity, and so I think --

14 CHIEF JUSTICE ROBERTS: What type -- the
15 problem comes up when you say "this type of attorney
16 negligence."

17 What is your test? What type of --

18 MR. SCHER: I certainly think, given the
19 unique facts here, we have, again, the confluence of
20 circumstances. We have the --

21 CHIEF JUSTICE ROBERTS: No, I know your test
22 will mean your client wins.

23 MR. SCHER: Correct.

24 CHIEF JUSTICE ROBERTS: But, I mean, can you
25 articulate it more -- because I'm very concerned that if

1 you start saying, well, you can forgive an inequitable case,
2 every time a case comes up, you're going to -- there's
3 going to be sympathy for the client. The lawyer goofed.

4 Of course, you don't want to penalize the
5 client, but Congress obviously had something more in
6 mind.

7 MR. SCHER: Well, but certainly -- but the other
8 part of the test for equitable tolling is diligence, and
9 I think, when -- when one looks at the -- at the body of
10 case law that has developed since 1997 on the issue of
11 equitable tolling and AEDPA, the vast majority of these
12 cases are disposed on the fact that the Petitioner is
13 indiligent.

14 Here, of course, the Respondent, if I heard
15 correctly, is now conceding that the Petitioner was
16 diligent. And so there are certainly other ways to avoid
17 even having to get to the question of exceptional
18 circumstances; for example, just looking to the
19 diligence prong.

20 But here, where you have a failure to
21 notify, you have the failure to heed the instructions from
22 a client, you have the client saying you've lied to
23 me, the client telling the State and the Federal courts
24 this lawyer is not my agent anymore, I don't want him, I
25 don't trust him, he has misled me, he has deceived me --

1 all of those factors certainly go to a consideration of
2 whether equitable tolling should be warranted, and the
3 problem here is that the Eleventh Circuit said no,
4 categorically no.

5 Thank you very much.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:54 a.m., the case in the
9 above-entitled matter was submitted.)

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