No. 13-8530

In The
Supreme Court of the United States

PAUL AUGUSTUS HOWELL,

Petitioner,

v.

MICHAEL D. CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

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*** CAPITAL CASE ***

Questions Presented

1. Whether, when a lawyer commits egregious lawyer-agent conduct that violates the fundamental fiduciary duty of loyalty, a habeas petitioner is entitled to equitable tolling even if that conduct may not constitute abandonment?

2. Whether the client diligence requirement should be relaxed or waived for the client of diminished capacity?

3. Whether diminished capacity should be measured by factors beyond the client's intelligence quotient (IQ)?

4. Whether the standard for what constitutes egregious conduct to establish equitable tolling should be relaxed in light and to the extent of the client's diminished capacity?

5. Whether a conflict of interest caused by defense counsel's representation of a client whose family purportedly threatened counsel, such that counsel is unable to develop mitigation evidence, violates the Sixth Amendment right to counsel?

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Interest of Amicus Curiae[1]

The Ethics Bureau at Yale, a clinic composed of fifteen law school students supervised by an experienced practicing lawyer and lecturer, drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

The Ethics Bureau respectfully submits this brief as amicus curiae for two reasons. First, it has an abiding interest in ensuring that the Sixth Amendment and the Model Rules of Professional Conduct preserve the right of every criminal defendant to conflict-free representation. Second, it believes that when courts ignore conflicts of interest affecting the representation of criminal defendants, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the legal system.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, both Petitioner and Respondent have consented to the filing of this brief. The letters granting consent were filed with the underlying petition. This brief was not written in whole or in part by counsel for any party, and no person or entity other than Amicus and its counsel has made a monetary contribution to the preparation and submission of this brief.

I. Summary of Argument

The Ethics Bureau at Yale presents this brief to emphasize the importance of the issues that could be addressed if the Court were to grant Mr. Howell's 60(b)(6) motion to reopen the judgment. Affording Mr. Howell the opportunity to present his claim for equitable tolling would enable this Court to resolve legal questions left unanswered by *Holland v. Florida*, questions that cry out for the Court's guidance. A hearing would also permit the necessary fact-gathering to resolve lingering legal issues in the case. Finally, the merit of Mr. Howell's underlying claims regarding ineffective representation at trial compels reopening the judgment. Habeas exists precisely for the purpose of their just resolution.

II. Habeas Counsel's Egregious Misconduct Coupled with Mr. Howell's Diminished Capacity Compels Equitable Tolling Under *Holland*

In *Holland*, this Court held that a habeas petitioner may secure equitable tolling of the one-year AEDPA statute of limitations when he "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (citation omitted). This Section begins with the second prong, showing how the egregious misconduct of Mr. Howell's habeas counsel constitutes an extraordinary circumstance as envisioned by *Holland*. Second, Amicus will show that Mr. Howell's mental incapacity excused any further diligence that

would be required under the first prong of the *Holland* test; Amicus will argue in the alternative that the Court should remand for further factual development to provide Mr. Howell the opportunity to prove his mental incapacity. Finally, Amicus explains that even if this Court were to conclude that habeas counsel's conduct did not rise to the level of egregiousness usually required to satisfy the extraordinary circumstance prong, the standard should be relaxed in cases of mental incapacity such as Mr. Howell's, thus permitting equitable tolling in this case.

A. Habeas Counsel's Egregious Misconduct Satisfies the Extraordinary Circumstance Prong of the *Holland* Test

i. An egregious breach of the duty of loyalty constitutes an extraordinary circumstance under Holland

In *Holland*, this Court recognized that egregious misconduct on the part of counsel may create an extraordinary circumstance warranting equitable tolling. 130 S. Ct. at 2563. Since this Court's holding in *Maples v. Thomas*, 132 S. Ct. 912 (2012), courts including the Eleventh Circuit have narrowed the equitable tolling analysis to focus entirely on a lawyer's "abandonment" of the client. *See*, *e.g.*, *Smith v. Comm'r, Alabama Dep't of Corr.*, 703 F.3d 1266, 1273 (11th Cir. 2012) *cert. denied*, 134 S. Ct. 513 (2013) (limiting the extraordinary circumstance test to the specific "circumstances that

the Supreme Court found constituted attorney abandonment in *Maples*."). The Eleventh Circuit's strict "abandonment only" construction ignores the fact that equitable tolling is an equitable remedy based on agency principles, requiring a flexible, equitable determination rather than rigid formalism. *See Holland*, 130 S. Ct. at 2553 ("Courts must often exercise [their] equity powers . . . on a case-by-case basis, demonstrating flexibility and avoiding mechanical rules." (citations and internal quotation marks omitted)).

The agency framework that underlies the *Maples* abandonment standard similarly originated in courts of equity; it is not a formalist doctrine. The proper equitable tolling analysis derives from principles of agency and fiduciary law, and should therefore be rooted in case-specific considerations of equity. *See* Tamar T. Frankel, *Fiduciary Law* 256 (2011) ("Doctrinally, equity is the source of the remedies for violations of fiduciary obligations, because fiduciary obligations originated in the English equity courts."). "[T]he attorney is the [client's] agent," *Maples v. Thomas*, 132 S. Ct. 912, 914 (2012), so the appropriate inquiry is whether the lawyer has violated the fiduciary duty of loyalty to the principal. *See* Restatement (Third) of Agency § 8.01 (2006); *see also Keech v. Sandford*, [1726] EWHC Ch J76 (English case in court of equity holding that an agent has a fiduciary duty of loyalty).

Several circuit courts have adopted this understanding of equitable tolling, concluding that abandonment is merely one among several possible forms of egregious misconduct that violate

fundamental principles of the lawyer-client agency relationship. *See*, *e.g.*, *Nickels v. Conway*, 480 F. App'x 54, 56 (2d Cir. 2012) (a case decided after both *Holland* and *Maples* that does not require proof of abandonment for a finding of egregious lawyer misconduct); *Manning v. Epps*, 688 F.3d 177, 184 n.2 (5th Cir. 2012) (identifying abandonment as one possible type of extraordinary circumstance); *Towery v. Ryan*, 673 F.3d 933, 936 (9th Cir. 2012) (per curiam) (presenting the *Holland* "egregious misconduct" standard and the *Maples* "abandonment" standard as alternatives).

This Court's language in *Holland* is also consistent with an approach to equitable tolling based on a comprehensive conception of egregious misconduct tied to agency principles. 130 S. Ct. at 2564 ("[F]undamental canons of professional responsibility . . . require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, *and* never to abandon a client.") (emphasis added).

Thus, the Court should grant Mr. Howell's petition in order to clarify that the appropriate equitable tolling analysis involves an examination of potential breaches of fiduciary duty, rather than the

rigid "abandonment" inquiry.[2] From a professional responsibility perspective, there is no reason to single out for equitable tolling only those cases in which defense counsel's egregious misconduct constitutes abandonment. *Any* egregious misconduct by which defense counsel breaches the duty of loyalty requires a case-specific equity inquiry to alleviate the injury caused to the client.

ii. The professional misconduct of Mr. Howell's post-conviction counsel constitutes an extraordinary circumstance that should qualify Mr. Howell for equitable tolling

The professional misconduct of Mr. Howell's post-conviction counsel, Danielle Jorden, constitutes an extraordinary circumstance that should qualify Mr. Howell for equitable tolling. Ms. Jorden's conduct "seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the constitutionality of his imprisonment and of his death sentence." *Id.* at 2564–65.

An enumeration of Ms. Jorden's violations of the fundamental agency requirements that are embodied in the ethics rules speaks volumes. These

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[2] Furthermore, even if this Court were to accept the Eleventh Circuit's approach that *Maples* restricts the *Holland* test, *Maples* abandonment should likewise be defined as a breach of the duty of loyalty upon which agency relationships are founded.

professional obligations apply equally to appointed and retained counsel. Fla. St. Bar R. 4-6.2 cmt. (2013); Restatement (Third) of the Law Governing Lawyers § 14 (2000) [hereinafter RLGL].

First, Ms. Jorden utterly failed her basic duty to act with reasonable competence, diligence, and promptness in carrying her client's case through to its conclusion. *See* Fla. St. Bar. R. 4-1.1, 4-1.3; RLGL § 16(2) (2000). Ms. Jorden's errors go well beyond mere miscalculation of the AEDPA deadline. Ms. Jorden acknowledges that Mr. Howell did not waive his habeas claim. *See* Jorden Aff. 1. But like the lawyer in *Holland*, Ms. Jorden "apparently did not do the research necessary to find out the proper filing date," 130 S. Ct. at 2564. Such conduct is especially shocking given that this was Ms. Jorden's first capital case. Jorden Aff. 1. Despite her inexperience, Ms. Jorden made no effort to identify or understand the federal consequences of requesting an extension of time before filing Mr. Howell's state post-conviction motion.

Second, Ms. Jorden violated her duty to communicate with her client. *See* Fla. St. Bar R. 4-1.4 & cmt. ("[T]he lawyer [must] promptly consult with . . . the client."); RLGL § 20 (2000). Specifically, Ms. Jorden failed to "keep [her] client reasonably informed about the status of [the case]" and to "explain [the] matter to the extent reasonably necessary to permit [Mr. Howell] to make informed decisions regarding the representation," as required by Florida Rule of Professional Conduct 1.4. Her failure to communicate further implicates her disloyalty to Mr. Howell; when a lawyer agrees to a

fiduciary representation and betrays the client by failing to find out what the client wants to be done on his behalf, that lawyer breaches the duty to act loyally for the client's benefit. Restatement (Third) of Agency §§ 8.01 & 8.06(1) (2006).

Though she was assigned to his case in December 1998, it was not until July 1999, seven months later, that Ms. Jorden first communicated with Mr. Howell. In the view of Amicus, this period is more than long enough for this Court to find egregious misconduct. Indeed, Ms. Jorden did worse than abandon her client. Despite being appointed petitioner's lawyer, she never undertook the representation in the first place; by the time Ms. Jorden finally initiated contact with her client, the federal habeas deadline had already passed. In violating these basic rules of professional conduct, Ms. Jorden cost her death row client the chance to have his case reviewed by a federal court.

Lawyers who violate the rules of professional conduct are subject to severe professional sanctions. *See*, *e.g.*, *People v. Elliott*, 39 P. 3d 551 (Colo. 2000) (disbarring a lawyer for failing to provide agreed-upon services and failing to communicate with his clients regarding their matters, thereby violating Rules of Professional Conduct 1.3 and 1.4). When the rights of the client have been trampled, however, sanctions alone are not enough.

Ms. Jorden's egregious violations of her professional obligations must not go unremedied. "When a lawyer's negligence forecloses consideration of the entirety of the death row inmate's federal

claims, the result is the imposition of the death penalty without federal review." *Hutchinson v. Florida*, 677 F.3d 1097, 1110 (11th Cir. 2012) (Barkett, J., concurring), *cert. denied*, 133 S. Ct. 435 (2012). Forcing Mr. Howell to pay for the misconduct of his appointed counsel would be manifestly unjust and constitute a denial of his right to counsel.

B. Mr. Howell's Mental Incapacity Satisfies the Diligence Prong of the *Holland* Test

If there must be a diligence requirement,[3] Mr. Howell's mental incapacity satisfies the diligence prong of the equitable tolling test under *Holland*. Alternatively, Amicus believes that the Court should remand for further factual development on the matter to determine the degree to which Mr. Howell's mental incapacity caused his failure to file a timely § 2254 petition.

[3] Amicus raises a question that is not necessary for granting relief in this case, but is certainly apt for many other compelling cases. Once a client has a lawyer and has established the objective of securing habeas relief, why must the client show continued diligence? While the client may well suffer consequences from a failure to cooperate with the representation, it is the loyal agent alone who must take full responsibility for meeting all legal requirements such as statutory deadlines, without regard to any further undertaking by the client.

i. Mental incapacity satisfies the diligence prong of the Holland *test under Eleventh Circuit precedent*

Under Eleventh Circuit precedent, equitable tolling is available where the petitioner can show "a causal connection between his mental incapacity and his ability to file a timely § 2254 petition." *Hunter v. Ferrell*, 587 F.3d 1304, 1309–10 (11th Cir. 2009).[4]

In *Hunter*, the Eleventh Circuit considered a pro se petitioner whose mental incapacity may have prevented him from making a timely filing. The Court held that in such circumstances no independent showing of diligence would be required for equitable tolling; the incapacity itself not only precluded diligence, but also constituted an extraordinary circumstance that impeded a timely filing. *See id.*

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[4] Other circuits have also held that mental incapacity is sufficient to equitably toll the AEDPA deadline. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010) ("The question of whether mental illness can equitably toll the AEDPA statute of limitations has not been definitively answered by this Court. We now hold that, under the appropriate circumstances, it can.") (citation omitted)); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental incompetence in fact caused him to fail to meet the AEDPA filing deadline . . . the deadline should be equitably tolled."); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (alleged mental incompetence can toll the limitations period if it "affected the petitioner's ability to file a timely habeas petition"), *overruled in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002).

When, as in the present case, the mentally incapacitated petitioner has representation, the analysis should be similar: the court should require no diligence of the petitioner, and as a result the burden of a timely filing must fall entirely on the lawyer.[5]

Notably, despite denying Mr. Howell's 60(b) motion, the district court concluded that his incapacity could satisfy the diligence prong of the equitable tolling test (though it did not ultimately reach the incapacity question for its holding). *Howell v. Crews*, 2013 WL 672583, at *6 n.8 (N.D. Fla. Feb. 23, 2013) ("Such incapacity, assuming it existed, would be relevant to Howell's diligence in protecting his federal rights.").

Numerous courts and scholars have addressed the extreme challenge that a diligence requirement poses for *any* incarcerated petitioner, let alone a petitioner of diminished mental capacity. This Court itself has observed that in the area of post-conviction habeas review, "the complexity of our jurisprudence . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994). Even assuming an intellectually capable and competent client, the barriers imposed

[5] The Florida Rules of Professional conduct envision a similar shift in responsibility by enabling a lawyer to take "protective action" on behalf of a client when the lawyer "reasonably believes that the client cannot act in the client's own interest." Fla. St. Bar R. 4-1.14.

by prison walls are virtually insurmountable: "Besides the difficulties in obtaining information about the prisoner's specific case, often times [sic] prisoners have a hard time finding information about the law and AEDPA's statute of limitations in the first place," Marni von Wilpert, Comment, *Holland v. Florida*, *A Prisoner's Last Chance*, *Attorney Error*, *and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 Fordham L. Rev. 1429, 1468–69 (2010), to say nothing of prisoners' ability to understand information that befuddles even experienced lawyers and judges.

In the view of Amicus, fulfilling the diligence prong should require nothing more than the petitioner urging his lawyer to pursue his habeas rights and we caution that even this level of diligence, which Mr. Howell did demonstrate, should not be required in all cases. This is because death row inmates have a very limited ability to communicate with their lawyers. Inmates have restricted access to telephones, the internet, and writing supplies. Furthermore, "most death row inmates lack the skills and intellect to supervise, direct or police the activities of their lawyers." *Hutchinson v. Florida*, 677 F.3d 1097, 1106 (11th Cir. 2012) (Barkett, J., concurring).

ii. Mr. Howell's mental incapacity prevented him from diligently pursuing his habeas claim and so should satisfy the diligence prong of Holland

Extremely low IQ demonstrates incapacity; however, it is not the only metric a defendant of diminished capacity can offer that would prove that fact. Properly assessing the scope of the diligence requirement demands a full hearing that considers whether the defendant could reasonably have been expected to pursue his own rights in light of his particular mental deficits.

Under such an approach, Mr. Howell would be excused from the requirement. Mr. Howell was mentally incapacitated during 1998–1999, the period in question; as a result, he should not have been burdened with the responsibility to diligently pursue his own legal rights during this time. Although the State, in its reply brief to the Eleventh Circuit, asserted that Howell's IQ score of 84 was not low enough to excuse him from fulfilling the diligence requirement, Answer Brief of Appellee at 51, *Howell v. Crews*, 730 F.3d 1257 (11th Cir. 2013) (No. 13-10766), the record shows that during 1998–1999, Mr. Howell's IQ actually *decreased* from 109 to 84, indicating that he was under severe mental distress. Holmes Aff. 2. Moreover, he was suffering from extreme migraine headaches and sleep deprivation. *Id*.

Finally, Ms. Jorden testified by affidavit that Mr. Howell had not waived his habeas claim. *See*

Jorden Aff. 1. Given this knowledge, the burden to fulfill her client's request rested entirely upon her. No more can be asked of a defendant where his lawyer is aware of the goals of representation. *See* Fla. St. Bar R. 4-1.2(a) (2013) (explaining that client determines the goals of representation and the lawyer determines the means); *id.* R. 4-1.4 (The lawyer has a duty to "keep the client reasonably informed about the status of the matter."). These expectations must be further relaxed for defendants with diminished capacity. *See id.* R. 4-1.14.

iii. If the Court does not find sufficient evidence that Mr. Howell's mental incapacity satisfied the diligence requirement, it should remand the case for further factual development on the issue

Two psychologists have written affidavits concluding that Mr. Howell did not have the mental capacity to diligently pursue a timely filing of his § 2254 petition. Holmes Aff. 2; Ouaou Aff. 2. However, both doctors noted that the factual record on the matter was deficient.

Equitable tolling is, by definition, an equitable remedy. As an inmate sitting on death row, Mr. Howell deserves a review of his habeas petition on the merits, but he has not had a fair opportunity to demonstrate his mental incapacity during 1998-1999. At a minimum, this Court ought to remand the case for such factual development.

C. Mr. Howell's Mental Incapacity Also Satisfies The Extraordinary Circumstance Prong Of The *Holland* Test

Even if the Court were of the view that Ms. Jorden's misconduct was not sufficiently egregious to constitute an "extraordinary circumstance" on its own, Mr. Howell should nevertheless be entitled to equitable tolling of the filing deadline. Mr. Howell's diminished capacity for diligence requires relaxing the extraordinary circumstance standard. The *Holland* test is defined by the agency relationship, *see supra* Section II.A., and the duty of loyalty requires that when a client has diminished capacity, his lawyer has responsibilities beyond the typical representation relationship. *Cf.* Fla. St. Bar R. 4-1.14 (2013). Accordingly, lawyer misconduct that normally might be insufficient to justify equitable tolling may constitute a violation of the duty of loyalty to a client with diminished capacity, thereby compelling equitable tolling of a missed deadline.

Mr. Howell's entitlement to relief rests on principles of agency law that this Court has held underlie the lawyer-client relationship. *See*, *e.g.*, *Maples v. Thomas*, 132 S. Ct. 912, 914 (2012) ("[T]he attorney is the prisoner's agent . . . ."). The test for equitable tolling endorsed in *Holland* [6] is both

[6] "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

informed by these agency principles and structured to protect them. As applied to the present case, the test can effectively protect these principles only if a petitioner's demonstration of diminished capacity to act diligently results in a reconstituted "extraordinary circumstance" standard.

Under traditional agency doctrine, the client as principal is responsible for the actions of his lawyer as agent; this is because the law understands the principal to empower and instruct, that is, to control his agent. *See* Restatement (Third) of Agency § 1.01 (2006). Thus, any undesired acts of the agent are generally imputed to the principal, under the assumption that the principal can exercise reasonable control over his agent to prevent the agent from engaging in such conduct. *See*, *e.g.*, Restatement (Second) of Agency § 216 cmt. a (1958).

Applying this theory, a principal is not responsible for any undesired acts of his agent that are beyond the principal's control; such acts violate the duty of loyalty per se. This is particularly relevant with regard to the relationship between lawyer and client during habeas proceedings—in this context, the inherent complexity of the law and the practical limitations of life in prison severely hamper the principal's ability to exercise direct control over his agent. As Justice Alito explained in his concurrence in *Holland*: "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring).

This Court clearly intended the test in *Holland* to enforce the agency principle by granting equitable tolling only to those petitioners who face an extraordinary circumstance: a lawyer whose egregious misconduct could not have been avoided through the client's exercise of control. This is what marks a true violation of the duty of loyalty for the purposes of the *Holland* test. The analysis isolates such extraordinary circumstances by means of the diligence requirement—if the petitioner is exercising a reasonable level of diligence in directing the representation and still faces lawyer misconduct that prevents timely filing, then such conduct was truly beyond the petitioner's control. In other words, the two prongs of the test are not independent; rather, they operate in concert to ensure that courts grant equitable tolling in a manner wholly consistent with traditional agency doctrine.

This interplay was endorsed in *Holland*, where the Court held that "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id.* at 2565 (quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)) (internal citations omitted). "Reasonable diligence" is of course a flexible test under which courts must require different levels of diligence for different petitioners. Indeed, courts in equity act "with awareness of the fact that specific circumstances, often hard to predict, could warrant special treatment in an appropriate case." *Id.* at 2553.

If a court is willing to find that "reasonable diligence" for an incapacitated petitioner is not the

same as for a petitioner of full capacity, it must also conclude that the incapacitated petitioner need demonstrate a lower threshold of egregious lawyer misconduct to satisfy the "extraordinary circumstance" prong. If an incapacitated petitioner is less capable of diligence, then his ability to control his lawyer is necessarily diminished. *Cf.* Fla. St. Bar R. 4-1.14 (2013). Under traditional agency principles, such a petitioner need not show misconduct rising to the same level of egregiousness that is typically required to prove an extraordinary circumstance and thereby secure equitable tolling.[7]

Even if the Court were to find that Ms. Jorden's misconduct did not rise to the level of egregiousness usually required for tolling, Mr. Howell should not be held responsible for her errors. Mr. Howell has a demonstrated mental incapacity that allows him to satisfy the diligence requirement.

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[7] This rule is logically consistent with—and indeed the necessary extension of—precedent applied by several courts of appeals in cases considering the equitable tolling claims of pro se petitioners with diminished capacity. *See*, *e.g.*, *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009); *Ata v. Scutt*, 662 F.3d 736 (6th Cir. 2011); *Riva v. Ficco*, 615 F.3d 35 (1st Cir. 2010); *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003); *Nara v. Frank*, 264 F.3d 310 (3rd Cir. 2001). In each of these cases the court held that mental incapacity may in itself permit a court to toll the AEDPA filing deadline without any additional requirement. None of the courts explicitly cabined the holding to pro se petitioners, but rather established a two-part test that a petitioner must fulfill in order to secure tolling: he must demonstrate actual mental incapacity, and he must demonstrate that his incapacity prevented him from filing a timely petition. This test reflects the agency principles discussed in the context of the *Holland* diligence prong in Section II.B., *supra*.

Because Mr. Howell was incapable of controlling his lawyer to any effective degree, it must follow that his lawyer's misconduct, however egregious, satisfies the "extraordinary circumstance" requirement.

In sum, traditional agency principles, as protected by the *Holland* test, demand that Mr. Howell be granted equitable tolling of the missed AEDPA filing deadline. The Court should reverse the judgment in this case for further fact finding so as to clarify this crucial point of law. The lives of other incapacitated habeas petitioners may depend on it.

III. Lawyer Conflicts of Interest Infect This Case and Violate Mr. Howell's Fundamental Constitutional Right to Effective Representation

Forcing Mr. Howell to suffer the repercussions of Ms. Jorden's egregious behavior would be particularly unconscionable because Mr. Howell's underlying habeas claim asserts lawyer misconduct that constitutes a clear violation of his Sixth Amendment rights: Mr. Howell's initial trial lawyer labored under a profound conflict of interest. Because of the gross misconduct of his subsequent habeas lawyer, Mr. Howell is being forced to bear the consequences of his trial lawyer's disloyal conduct. Such a result is antithetical to the fundamental guarantees of our Constitution.

A. At Every Stage of Criminal Proceedings, Defendants Have a Constitutional Right to Conflict-Free Counsel

A conflict of interest exists if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities" to another client or a third party or by the lawyer's personal interests. Fla. St. Bar R. 4-1.7(b) (2013). Attorney Frank Sheffield represented Mr. Howell in the state proceedings that resulted in Mr. Howell's death sentence, but Mr. Sheffield labored under a material limitation that was so extreme as to approach the level of caricature.

Rules against conflicts of interest are designed "to preclude the . . . practitioner from putting himself in a position where he may be required to . . . attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent." *Fla. Bar v. Moore*, 194 So. 2d 264, 269 (Fla. 1966); *accord Smiley v. Dir., Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir. 1993). The rules of professional conduct in every jurisdiction, including Florida, prohibit a lawyer from undertaking representation that involves a conflict of interest when that conflict is non-waivable or when the conflict is waivable but consent has not been obtained. *See generally* National Reporter on Legal Ethics and Professional Responsibility, Vols. I–IV (2001); Fla. St. Bar R. 4-1.7 (2013).

Conflicts of interest are worse than other failures in representation because they pervade and infect *every aspect* of the lawyer-client relationship. The first duty a lawyer owes to his or her client is the duty of loyalty. The fundamental nature of this duty has been recognized for centuries: as Justice Story observed in 1824, the client has a right to presume his attorney "has no engagements, which interfere, in any degree, with his *exclusive devotion* to the cause confided to him." *Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (emphasis added).

Conflicts of interest strike at the heart of this exclusive devotion. A lawyer's divided loyalties undermine client trust and autonomy, and a conflicted attorney is blunted in his ability to diligently represent, vigorously advocate for, and effectively communicate with his or her client. Recognizing this, the Sixth Amendment does not simply guarantee the right to counsel, but the right to conflict-free counsel. *See Glasser v. United States*, 315 U.S. 60, 70 (1942).

Mr. Howell was denied this right in his underlying trial. However, this claim has never been appropriately addressed despite present counsel's Herculean efforts to right previous wrongs.

B. By All Parties' Admission, Mr. Howell's Trial Lawyer Labored Under a Debilitating Conflict of Interest

Though initially appointed to represent Mr. Howell in both federal and state court, Mr. Sheffield

insisted on withdrawing from the federal case. He claimed that his wife (who was also his legal secretary) had received a death threat from someone whom he believed was either a member of Mr. Howell's family or connected to them in some way. Mr. Sheffield found this threat sufficiently credible to seek extraordinary relief. Yet despite the client's own request that Mr. Sheffield be removed from the case, despite the prosecutor's insistence that he withdraw because of the obvious conflict of interest, and despite the court's knowledge of the conflict, Mr. Sheffield refused to withdraw from the state prosecution.

There can be no doubt that Mr. Sheffield's representation of Mr. Howell—specifically, his ability to zealously seek out and compellingly present the mitigation evidence necessary to prevent Mr. Howell from receiving the death sentence—was materially limited by the fact that Mr. Sheffield believed that Mr. Howell's family members posed a threat to his wife's safety and his own. In fact, Mr. Sheffield went so far as to state, "Quite honestly, Judge, I've been practicing criminal law for 21 years and I've had threats before, but this one here really, really makes me nervous . . . . This is not the first time I have gotten threats, but this is the first time that I have treated it seriously, and the first time that I am genuinely concerned about this . . . ." Trial Tr. Fourth Day 5-8, Jan. 21, 1993.

This conflict of interest prevented Mr. Sheffield from fulfilling a host of core fiduciary duties that every lawyer owes to his client, including the duties of competence, Fla. St. Bar R. 4-1.1 (2013),

and diligence, *id.* R. 4-1.3. Mr. Sheffield could be neither competent nor diligent in gathering the necessary information while fearing that Mr. Howell's family members, whom he was required to contact, posed a threat to his life.

Moreover, by representing Mr. Howell in direct contravention of Mr. Howell's own wishes, Mr. Sheffield violated his obligation to respect his client's autonomy with respect to critical decisions concerning the representation. This obligation is enshrined in Rule 1.2, which requires the lawyer to abide by the client's decisions regarding such critical matters as the objectives of the representation and the means by which they are to be pursued. Fla. St. Bar R. 4-1.2(a).

The conflict of interest in this case was so obvious that the state prosecution itself repeatedly moved for Mr. Sheffield's removal, fearing the collateral consequences of allowing Mr. Sheffield to proceed. Appellant's Br. 8, *Howell v. Crews* (11th Cir. 2013) (13-10766). The state's actions in notifying the trial court of the egregious nature of the conflict were not only appropriate, but also required. Nonetheless, the trial court failed to act. *See Holloway v. Arkansas*, 435 U.S. 475, 484 (1978).

The fact that the trial court was on notice eliminates any obligation for Mr. Howell to painstakingly detail the adverse effects stemming from the actual conflict in this case. Courts within and outside the Eleventh Circuit have observed that when the defendant *does not* raise a conflict of interest objection before or during trial, on appeal

the defendant "must demonstrate that an actual conflict of interest adversely affected [his] lawyer's performance." *Dixon v. State*, 758 So. 2d 1278, 1280 (Fla. Dist. Ct. App. 2000) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)); *see also Cadejuste v. State*, 993 So. 2d 122, 125–26 (Fla. Dist. Ct. App. 2008) (ordering reversal and remand "[s]ince the trial court failed to make a sufficient inquiry concerning the identified conflict of interest of [defendant's] counsel"). An essential corollary is that no such proof should be necessary where the trial court was put on notice of the conflict of interest and let it persist. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 488 (1978) ("[W]henever a trial court improperly requires joint representation over timely objection reversal is automatic.").

Although Mr. Howell should not bear the burden of proving adverse effect, Mr. Sheffield's conflict clearly did have a materially adverse effect on the quality of his representation. Indeed, Mr. Sheffield himself expressly recognized that his loyalty to Mr. Howell was undermined by his own self-preservation instinct. In seeking to be removed from the federal case, he explained that "[T]his [threat] here really, really makes me nervous. And it is impinging upon my ability to represent Mr. Howell." Trial Tr. Fourth Day 5, Jan. 21, 1993.

The record suggests that Mr. Sheffield's family had been threatened by Mr. Howell's relations, but there is also evidence that hints at an even darker scenario: the possibility that Mr. Sheffield simply fabricated the death threat. Counsel for the Appellant cites substantial evidence

indicating that this is exactly what happened. Appellant's Br. 11, *Howell v. Crews* (11th Cir. 2013) (13-10766). If true, then Mr. Sheffield lied to the court and committed an unethical assault on his own client's interests. *See* Fla. St. Bar R. 4-3.3, 4-8.4(c), 4-4.1(a) (2013).

By falsely accusing his client's family of delivering death threats, Mr. Sheffield ensured that they would feel unwelcome at and unhelpful with respect to any aspect of the trial. Indeed, these accusations made it impossible for Mr. Sheffield to collect information from the family, and no family members were present at the penalty phase of the trial. *See* Appellant's Br. 63, *Howell v. Crews* (11th Cir. 2013) (13-10766). A lawyer who is capable of telling such a lie to the court in any case, let alone a capital case, proves he is willing to smother his client's interests to further his own. Such egregious misconduct would not only require a new trial for the client, but it would also warrant the lawyer's disbarment.

IV. Conclusion

Mr. Howell is the victim of multiple layers of egregious lawyer misconduct, made all the more compelling in light of his mental incapacity and relative inability to control the principal-agent relationship. Wronged by each of the lawyers appointed to advocate on his behalf, Mr. Howell must now be granted the opportunity to present his claim for equitable tolling. Only by providing Mr. Howell with a hearing on his equitable tolling claim can this Court ensure the development of a factual

record sufficient to adjudicate this case. To decline to reopen the judgment would be to condemn a man to death for his lawyers' misconduct, making a mockery of criminal defendants' Sixth Amendment right to effective assistance of counsel.

Respectfully submitted,

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