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## 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

Marni von Wilpert

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## 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**

*Marni von Wilpert\**

*When should a prisoner be held accountable for his attorney's negligence or misconduct? Since the mid-1990's, courts throughout the nation were deciding this question, after a growing tide of attorneys failed to meet the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations when filing federal habeas corpus petitions on behalf of their incarcerated clients. In *Holland v. Florida*, the Supreme Court decided once and for all when a prisoner would be given another chance to file his habeas corpus petition through the doctrine of equitable tolling when the only reason his petition was late was the fault of his attorney. This Comment explores the issues raised by the *Holland* decision. In doing so, this Comment analyzes the principles of agency law and professional responsibility—the foundations of the attorney-client relationship—and raises questions as to whether these principles are properly applied to incarcerated clients in the post-conviction context. This Comment ultimately concludes that while *Holland* was properly decided, the Court misapplied agency law to support its decision and did not go far enough in extending the protection of equitable tolling to all prisoners who have been turned away from the courts because they detrimentally relied on their defaulting attorneys.*

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\* J.D. Candidate, 2011, Fordham University School of Law; B.A., 2005, University of California at Berkeley. I wish to thank my wonderful mentor Professor Bruce Green for his tremendous support and encouragement. I would not be the student I am today, and the future attorney I hope to be, without his guidance. I am also grateful for my wonderful family and the best friends in the world who have displayed endless patience in listening to and fostering my ideas.

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## INTRODUCTION

In February of 1996, Raymond Powell and James Wright engaged in an argument with Aaron Jones and Marquise McVea that escalated and ended

in gunfire.<sup>1</sup> After the shooting stopped, McVea was dead and Jones was injured. Raymond Powell was convicted of murder and attempted murder and sentenced to ninety-five years in prison.<sup>2</sup> Jones, the attempted murder victim, testified at Powell's trial that he was an innocent victim and that he did not possess or draw a weapon at any time during the altercation.<sup>3</sup> One year later, Jones testified as a defense witness in an unrelated handgun prosecution. In that case, Jones changed his story and testified that he did in fact have a gun on his person the day McVea was killed, but that he did not draw his weapon.<sup>4</sup> Two months later at James Wright's trial, Jones ultimately testified that he and McVea were both drug dealers, that the verbal altercation with Powell and Wright was over drug turf, that everybody including himself had drawn their guns, and that he had previously lied under oath.<sup>5</sup>

In light of Jones's new testimony, Powell requested an attorney so that he could pursue post-conviction relief on the grounds that newly discovered evidence entitled him to a new trial.<sup>6</sup> The trial court appointed a public defender.<sup>7</sup> In 2000, Powell's attorney filed a motion for post-conviction relief in the trial court. The court then ordered discovery relating to Jones's perjured testimony.<sup>8</sup> Powell's attorney then requested an indefinite stay on the proceedings and told Powell that his case was "on hold until I can get to it which will be awhile since I have at least 23 unreviewed cases ahead of you."<sup>9</sup> Powell wrote to his attorney several times about his case. Each time, his attorney responded that he still had other cases to finish before he could review Powell's case.<sup>10</sup> Two years later, Powell's attorney still had not made any progress on his case and his petition was dismissed by the court.<sup>11</sup>

Powell then filed a pro se writ of habeas corpus in federal court in 2002.<sup>12</sup> However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that state and federal prisoners have only one year from the date their convictions become final to file habeas petitions in federal court.<sup>13</sup> Powell's convictions became final in 1999, and in the two

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1. Powell v. State, 714 N.E.2d 624, 626 (Ind. 1999).

2. *Id.* at 625.

3. *Id.* at 626.

4. *Id.*

5. *Id.*

6. *Id.*

7. Powell v. Davis, 415 F.3d 722, 725 (7th Cir. 2005).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The procedural mechanism for filing a federal habeas petition challenging a state court's judgment is 28 U.S.C. § 2254 (2006). The analogous provision for federal prisoners is found in *id.* § 2255.

13. *Id.* § 2244(d)(1). The corresponding limitations period for prisoners in federal custody is *id.* § 2255.

years that his attorney was neglecting his case, the statute of limitations for federal court had run.<sup>14</sup>

Since the Indiana Supreme Court had affirmed his conviction,<sup>15</sup> a federal habeas corpus petition was Powell's last option for post-conviction relief. The district court appointed a new attorney, who argued that Powell's circumstances warranted the equitable tolling<sup>16</sup> of AEDPA's statute of limitations because the only reason his petition was late was his previous attorney's negligence in permitting his case to languish.<sup>17</sup> The U.S. Court of Appeals for the Seventh Circuit denied Powell's plea, reasoning that attorney error is attributable to the client and thus is not a circumstance that will excuse an untimely petition.<sup>18</sup> The court held that counsel's failure to do any work on the case was either negligence or legal error, but in neither case would it warrant equitable tolling.<sup>19</sup>

Because of his attorney's negligence, Powell was out of time. His conviction stands, and Raymond Powell will spend the rest of his life in prison.

Powell's case illustrates the recent legal controversy among the federal appellate courts that the Supreme Court finally decided in *Holland v. Florida*.<sup>20</sup> This Comment discusses one of the central questions the Court addressed in *Holland*: when a prisoner's failure to file a timely habeas corpus petition is solely the fault of the prisoner's criminal defense attorney, should the courts deny the petition as untimely, or alternatively, use their equitable powers to give the prisoner another chance and allow his petition to be heard on the merits?<sup>21</sup> In a divided opinion, the Court held that if an attorney's conduct in failing to file a timely petition rises to the level of professional misconduct, equitable tolling may be warranted.<sup>22</sup>

An analysis of the *Holland* decision requires a basic understanding of the issues raised in the case. Part I of this Comment discusses the enactment of AEDPA's one-year statute of limitations period, and the subsequent trend of defense attorney default in failing to meet the statutory filing deadline. This part also reviews the doctrine of equitable tolling as it applies in the AEDPA litigation context, as well as the doctrine's "extraordinary circumstances" and due diligence requirements. Because the Court relies on agency law in the *Holland* decision, Part I includes a discussion of agency law as the foundation of the attorney-client relationship, and the implications of the *Holland* decision for prisoners who detrimentally rely

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14. *Powell*, 415 F.3d at 726.

15. *Powell v. State*, 714 N.E.2d 624, 630 (Ind. 1999).

16. Equitable tolling is an equitable remedy the court can use to allow the prisoner another chance to file a habeas petition, even though the statutory limitations period has passed, if in the particular situation, applying the statute rigidly would be fundamentally unfair to the prisoner. *See infra* Part I.B.

17. *Powell*, 415 F.3d at 726.

18. *Id.* at 727.

19. *Id.*

20. 130 S. Ct. 2549 (2010).

21. *Id.* at 2554.

22. *Id.*

on their attorneys to further their habeas corpus claims. Part II details the factual backdrop of the *Holland* decision, discusses the arguments each party raised in their respective briefs, and explores the majority, concurring, and dissenting opinions. Part III analyzes the *Holland* decision and evaluates the rationales set forth by the various opinions. Finally, Part IV concludes by proposing an alternative rule to the negligence/misconduct standard recognized in *Holland*. This Comment instead recommends a balanced approach to equitable tolling that permits prisoners' habeas petitions to be heard on the merits, while deterring attorney default through the direct enforcement of the rules of professional conduct.

#### I. AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS AND THE ALARMING TREND OF ATTORNEYS WHO FAIL TO MEET ITS DEADLINE

Part I.A briefly discusses the history and purpose of the writ of habeas corpus and AEDPA's establishment of a one-year statute of limitations period on federal habeas corpus review. This part also explains the practical need for competent attorney involvement in filing meritorious federal habeas corpus petitions. This part also illustrates, however, the disconcerting trend of attorney default in meeting the limitations deadline since AEDPA's enactment. Part I.B describes the Supreme Court's pre-*Holland* jurisprudence in cases of attorney default in meeting AEDPA's one-year deadline, including the extraordinary circumstances and due diligence requirements. Part I.B also discusses the circuit split that led to the *Holland* decision as well as the Court's reliance on agency law to draw a distinction between simple attorney negligence and egregious misconduct when determining whether to give a prisoner a second chance by allowing his untimely habeas corpus petition to be heard on the merits.

##### A. *Attorney Default in Meeting the One-Year Limitations Period for Federal Habeas Corpus Review*

Lawyers are professionals who are trusted with the societal responsibility of promoting and implementing the administration of justice.<sup>23</sup> However, in the past fourteen years since a statute of limitations was placed on federal habeas corpus review, criminal defense attorneys throughout the nation have failed to file their clients' federal habeas corpus petitions on time. An understanding of the underlying purpose of the writ of habeas corpus and the lawyer's role in habeas proceedings is integral to a full analysis of the *Holland* decision. This part discusses AEDPA's one-year statute of limitations on federal habeas corpus petitions, and the consequences for incarcerated clients when their attorneys fail to meet AEDPA's deadline.

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23. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Introduction (2000).

### 1. The Lawyer's Role in Habeas Corpus Proceedings: The Need for Competent Attorneys

In the last thirty years, the number of prisoners in the United States has increased dramatically. In 1972, roughly 330,000 people were incarcerated, and by 2006 there were about 2.3 million people in jails and prisons.<sup>24</sup> Yet despite the Sixth Amendment right to the effective assistance of counsel,<sup>25</sup> criminal defense systems for indigent defendants routinely operate at substandard levels and provide defendants with gravely inadequate representation.<sup>26</sup> Due to an increase in the number of criminal defendants and a decrease in the adequacy of indigent representation, many defendants face an increased risk of wrongful conviction.<sup>27</sup> As a result, many people have likely been wrongly imprisoned due to ineffective legal assistance.<sup>28</sup> For example, a report on indigent defense systems produced by the American Bar Association (ABA) estimated that the national annual number of wrongful convictions in serious felony cases may be as high as 10,000.<sup>29</sup>

The increased risk of wrongful convictions makes access to federal habeas corpus review essential, as it is often a prisoner's last chance to appeal an unjust incarceration. Accordingly, the fundamental purpose of the writ of habeas corpus is to protect the fundamental right to liberty.<sup>30</sup>

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24. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 340 (2006); see also Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 336-337 (2009) (noting that "[t]he number of incarcerated Americans increased by a factor of seven between 1970 and 2007, resulting in 1 of every 131 Americans being incarcerated in prison or jail by mid-year 2007"); see also BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS vi (1995), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=103> (predicting that habitual offender statutes and "three strikes" laws are likely to increase the proportion of prisoners with life sentences and thus increase the total prison population as fewer prisoners are exiting prison systems).

25. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that "the right to counsel is the right to the effective assistance of counsel") (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

26. See AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7 (2004) [hereinafter *GIDEON'S BROKEN PROMISE*]; see also Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1619 (2002).

27. See *GIDEON'S BROKEN PROMISE*, *supra* note 26, at 38; see generally Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

28. See Stevenson, *supra* note 24, at 344-45 ("[E]xamples abound of capital defendants represented by sleeping attorneys, drunk attorneys, attorneys largely unfamiliar with death penalty law and procedure, and attorneys who otherwise could not provide the assurance of reliability or fairness that criminal proceedings require.") (internal citations omitted); see also Curtis & Resnik, *supra* note 26, at 1619 (explaining that many defense attorneys cannot spend adequate time on each client by describing one lawyer who was assigned 1600 misdemeanor cases in a single year).

29. See *GIDEON'S BROKEN PROMISE*, *supra* note 26, at 3.

30. *Fay v. Noia*, 372 U.S. 391, 400-02 (1963) (stating that the writ of habeas corpus is "inextricably intertwined with the growth of fundamental rights of personal liberty").

Thus the writ of habeas corpus is used to prevent unlawful detention by ensuring that a person is not in custody in violation of the Constitution, laws, or treaties of the United States.<sup>31</sup> The writ of habeas corpus is not a direct appellate review of a criminal proceeding;<sup>32</sup> rather it is a prisoner-initiated civil action, which provides collateral review of the legality of criminal judgments.<sup>33</sup> In a habeas proceeding, both state and federal prisoners may petition a federal court to determine whether the imprisonment violates their constitutional rights.<sup>34</sup>

Prisoners may, if they desire, proceed in habeas litigation pro se. However, commentators have found that, in general, pro se petitioners cannot successfully navigate the complex habeas corpus procedures. For example, the National Legal Aid and Defender Association once remarked that “[v]irtually all habeas corpus petitioners are prisoners. Many are illiterate, ignorant, and confused. Some are retarded, mentally ill, insane, or physically incapacitated. To them, the legal system is an unintelligible morass. Indeed, concepts of by-pass, forfeiture, waiver, and exhaustion, as well as underlying substantive claims, are complicated ideas.”<sup>35</sup> Another commentator noted that proceeding pro se in habeas litigation is impractical because post-conviction procedures are generally marked by strict fact-specific pleading standards, intricate exhaustion requirements, “and other technical pitfalls that cannot practicably be navigated without highly skilled counsel.”<sup>36</sup>

Furthermore, AEDPA’s procedural requirements are so complicated that they are sometimes misunderstood even by attorneys, let alone pro se prisoners. For example, the U.S. Court of Appeals for the Ninth Circuit once commented on the complexity of the statute when it stated that, “Even with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, an informed calculation of [the prisoner’s] tolling period evaded both his appointed counsel and the expertise of a federal magistrate judge.”<sup>37</sup> Due to its complexity and resulting confusion, the Supreme Court itself has reviewed AEDPA’s

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31. 28 U.S.C. § 2241(c)(3) (2006).

32. *Riddle v. Dyche*, 262 U.S. 333, 336 (1923) (stating that the “writ of habeas corpus is not a proceeding in the original criminal prosecution but an independent civil suit”) (emphasis omitted).

33. See RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 16 (2001).

34. See 28 U.S.C. §§ 2241(c), 2254(a).

35. *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary*, 97th Cong. 198 (1982) [hereinafter *Hearings on S. 2216*] (statement of Phylis Skloot Bamberger on behalf of the National Legal Aid and Defender Association); see also Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 481–84 (1990–1991) (noting that many habeas petitioner “inmates are illiterate, uneducated, mentally impaired, or any combination of the three”).

36. See Stevenson, *supra* note 24, at 354.

37. *Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002).



limitations period twelve times since its enactment fourteen years ago.<sup>38</sup> Because of its complicated requirements, prisoners are virtually compelled to entrust their case to an attorney in order to navigate the federal habeas corpus system.

The assistance of competent criminal defense attorneys is not only advantageous to providing prisoners with a fair process, but also integral to the public's positive perception of the judicial system itself.<sup>39</sup> For example, the Open Society Institute recently published a public opinion study, which found that a majority of Americans believe the provision of adequate legal help for those who need it is fundamental to the fair administration of justice.<sup>40</sup> Moreover, the criminal justice system reduces litigation costs and runs more efficiently when qualified attorneys represent the litigants in habeas proceedings.<sup>41</sup> For these reasons, and the important purpose of protecting the fundamental right to liberty, it is a practical necessity that prisoners have the assistance of a competent attorney when filing habeas corpus petitions.

## 2. On Your Mark, Get Set, Go!: AEDPA's One-Year Statute of Limitations

AEDPA was passed in 1996 due to pressure to reform habeas corpus law after the perpetrator of the 1995 bombing of the Oklahoma federal building was convicted and sentenced to death.<sup>42</sup> Specifically, congressional representatives sought to end the lengthy appeals in capital cases by enacting legislation to reduce delay in the completion of death sentences.<sup>43</sup>

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38. See Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 553 (2009).

39. See Stevenson, *supra* note 24, at 342.

40. BELDEN RUSSONELLO & STEWART, OPEN SOC'Y INST. & NAT'L LEGAL AID AND DEFENDER ASS'N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 8 (2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf>.

41. See *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 89 (1995) [hereinafter *Hearings on S. 623*] (statement of Nicholas deB. Katzenbach, former Att'y Gen. of the United States) ("[A]ssignment of competent counsel in post-conviction proceedings actually speeds capital cases along and reduces their cost."); see also James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 350 (2000) (explaining that "[l]awyers do perform a screening or gate-keeping function for the courts, society, and clients [and] . . . [c]ourts, therefore, have some assurance that complaints and defenses have some merit"). Furthermore, Congress included an "opt-in" provision in AEDPA allowing states to take advantage of more restrictive habeas corpus procedures if they agree to provide post-conviction counsel for prisoners. For a description of AEDPA's "opt-in" provision, see generally Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467 (2000).

42. Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 10 (2004).

43. See *Hearings on S. 623*, *supra* note 41, at 2 (statement of statement of Sen. Orrin G. Hatch) (arguing that prisoners' "abuse of habeas corpus litigation, particularly in those cases involving lawfully imposed death sentences, has . . . drained State criminal justice resources, and taken a dreadful toll on victims' families"); BUREAU OF JUSTICE STATISTICS, *supra* note

At the time, the popular perception about capital prisoners encompassed the belief that they filed spurious and repeated habeas corpus petitions as a tactic for delaying their punishment.<sup>44</sup> Indeed, the title of the Senate Judiciary Committee hearings leading up to AEDPA's enactment reflected the congressional sentiment at the time: "Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process."<sup>45</sup> Therefore, AEDPA was enacted to ensure the finality of state court judgments by creating procedural barriers to federal review of those judgments.<sup>46</sup> In order to reduce the repeated filings and the delay between them, Congress included an unprecedented one-year statute of limitations provision for federal habeas corpus review.<sup>47</sup>

The focus of this Comment is on the subsequent failure of criminal defense attorneys to comply with AEDPA's statutory limitations period.

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24, at 21 (stating that concerns about the lengthy process of death penalty cases dominate policy discussions about habeas corpus reform).

44. See Bellamy, *supra* note 42, at 10; Curtis & Resnik, *supra* note 26, at 1625 (explaining that Congress has codified procedural obstacles to prisoner litigation on the prevailing view that prisoners complain too much).

45. See *Hearings on S. 623*, *supra* note 41, at I.

46. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (reasoning that AEDPA's purpose is to "limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings"); see also *Panel Discussion, Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 560, 565 (1996) [hereinafter *Panel Discussion*] (Professor Larry Yackle stated that, "The drafters of this bill obviously want this provision to restrict a prisoner's ability to get an evidentiary hearing in federal court"); Traum, *supra* note 38, at 547 (explaining that the function of AEDPA's statute of limitations is to "guard[] the door to federal habeas review").

47. The one-year limitations period is codified in 28 U.S.C. § 2244(d)(1) (2006), which states:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Likewise, the statute of limitations provision for federal prisoners is found in 28 U.S.C. § 2255 (2006). It is important to note that before AEDPA, neither Congress nor the judiciary had ever imposed a time limit on federal habeas corpus petitions. See Bellamy, *supra* note 42, at 12. Instead, the Supreme Court had consistently maintained that the right to habeas corpus review could not be conditioned on the passage of time. See *Day v. McDonough*, 547 U.S. 198, 215 (2006) (noting that the Court had repeatedly asserted that "the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration") (Scalia, J., dissenting); *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (declining to adopt a judicial rule which would "condition the grant of relief upon the passage of time between a conviction and the filing of a petition for federal habeas corpus").

The prevalence of this attorney default is evidenced by the fact that virtually every federal appellate court has addressed this topic in lengthy opinions, many of them on multiple occasions.<sup>48</sup> Moreover, this problem became an issue of national concern to the point that the Supreme Court granted certiorari in *Holland v. Florida* to determine whether equitable tolling of AEDPA's statute of limitations is warranted in cases of attorney default.<sup>49</sup>

There are a variety of explanations for this trend of defense attorney default, ranging from the inability of appointed counsel to manage abysmally large caseloads,<sup>50</sup> to the active misconduct of attorneys who take their clients' retainers and run.<sup>51</sup> In *Holland*, the aggrieved prisoner asked the Court to apply equitable tolling in his case, which would give him an opportunity to have his habeas petition heard on the merits, after his attorney refused to answer his letters and phone calls over a period of two years, during which time AEDPA's limitations period elapsed.<sup>52</sup> Attorney error in calculating the one-year period also accounts for a large portion of the number of late habeas filings.<sup>53</sup> This Comment does recognize and commend the incredibly hardworking public defenders and criminal defense attorneys who have unimaginably large case loads and work tirelessly to serve their clients. But regardless of the reason for their attorneys' failures, prisoners around the country have been asking the federal courts for equitable tolling to give them a chance to have their habeas petitions heard on the merits after their attorneys fail. Accordingly, the Supreme Court developed a two-prong rule for applying equitable tolling in AEDPA litigation generally. A brief explanation of this rule is necessary to understand its application to cases of attorney default, as the Court did in *Holland*. The next part of this Comment describes the Supreme Court's equitable tolling jurisprudence in AEDPA litigation and the particular

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48. See, e.g., *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007); *Trapp v. Spencer*, 479 F.3d 53 (1st Cir. 2007); *Sellers v. Burt*, 168 Fed. App'x 132 (8th Cir. 2006); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003); *Modrowski v. Mote*, 322 F.3d 965 (7th Cir. 2003); *David v. Hall*, 318 F.3d 343 (1st Cir. 2003); *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133 (2d Cir. 2001); *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000); *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616 (3d Cir. 1998).

49. *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008), cert. granted 130 S. Ct. 398 (U.S. Oct. 13, 2009) (No. 09-5327).

50. See *Panel Discussion*, supra note 46, at 563 (stating that due to the complicated pleading requirements of a habeas petition a one-year period will be "nearly impossible to comply with").

51. See, e.g., *Spitsyn*, 345 F.3d at 797–800 (deciding whether equitable tolling applied when an attorney took the prisoner's fee payment and had not done any work on the case for over a year).

52. *Holland v. Florida*, 130 S. Ct. 2549, 2554–60 (2010).

53. See, e.g., *Lawrence v. Florida* 549 U.S. 327, 336–37 (2007) (deciding whether an attorney's mistaken belief about the triggering of AEDPA's limitations period should excuse the prisoner's late petition); see also *Lott v. Mueller*, 304 F.3d 918, 922–23 (9th Cir. 2002); *Smaldone*, 273 F.3d at 138–39. As discussed in Part II *infra*, one of *Holland*'s attorney's many errors included miscalculating *Holland*'s AEDPA time period. See *Holland*, 130 S. Ct. at 2558. Indeed, due to the statute's complexity and resulting confusion, the Supreme Court itself has reviewed AEDPA's limitations period twelve times since its enactment over thirteen years ago. See *Traum*, supra note 38, at 553.

evidentiary requirements that a prisoner must meet in order to obtain equitable relief from his attorney's failure to file his habeas petition in a timely fashion.

*B. Development of a Doctrine: The Use of Agency Law in Applying Equitable Tolling to Cases of Attorney Default*

Equitable tolling is a remedy that may be awarded at the discretion of the court and allows a petitioner to assert a claim after the statutory limitations period has expired.<sup>54</sup> This doctrine permits a court to toll a statutory limitations period in situations where the strict enforcement of the statute would operate unfairly or result in gross injustice.<sup>55</sup> Thus courts have used their discretion to equitably toll AEDPA's statute of limitations when a habeas petitioner "has been unfairly prevented from asserting his rights in a timely fashion."<sup>56</sup> In adjudicating whether a prisoner was unfairly prevented from filing a timely habeas petition, it is the litigant's reason for the late filing that is scrutinized by the court.<sup>57</sup>

As was the story in *Holland*, in the past fourteen years since AEDPA's enactment there has been a growing trend of equitable tolling requests from prisoners who wish to have their untimely federal habeas corpus petitions heard on the merits. In many cases, their reason for requesting equitable tolling is the negligent representation of their post-conviction attorneys.<sup>58</sup> As the Supreme Court held in *Coleman v. Thompson*,<sup>59</sup> there is no Sixth Amendment right to post-conviction counsel, thus there is no ineffective assistance of counsel remedy in this context.<sup>60</sup> Therefore, a prisoner's only avenue to obtaining relief from his attorney's negligent representation is an appeal to the courts for equitable tolling.

The Supreme Court first addressed this specific issue—namely the equitable tolling of AEDPA's limitations period on grounds of attorney default—in its 2007 decision in *Lawrence v. Florida*.<sup>61</sup> Without actually

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54. *Nara v. Frank*, 264 F.3d 310, 319 (3d Cir. 2001); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (noting that courts "can allow an untimely petition to proceed under the doctrine of equitable tolling").

55. *See, e.g., Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("[E]quity must be reserved for those rare instances where . . . it would be unconscionable to enforce the limitation period against the party and gross injustice would result."); *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (noting that equitable tolling is only applied when the rigid application of the limitations period would be unfair).

56. *Nara*, 264 F.3d at 320.

57. *Trapp v. Spencer*, 479 F.3d 53, 60 (1st Cir. 2007) ("In applying the equitable tolling doctrine, an important factor is the reason for the late filing.").

58. *See, e.g., Powell v. Davis*, 415 F.3d 722, 726 (7th Cir. 2005) (noting petitioner's argument that the state public defender's negligence warranted equitable tolling); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) (noting that petitioner sought equitable tolling because of his attorney's mistaken belief about the AEDPA statute).

59. 501 U.S. 722 (1991).

60. *Id.* at 752 ("There is no constitutional right to an attorney in state post-conviction proceedings.").

61. 549 U.S. 327, 336 (2007) (noting the petitioner's argument that "his counsel's mistake in miscalculating [AEDPA's] limitations period entitles him to equitable tolling").

deciding whether AEDPA was subject to equitable tolling, the Court articulated the following rule in *Lawrence*: “To be entitled to equitable tolling, [the petitioner] must show ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”<sup>62</sup> Although the Court stated that it was not yet deciding whether equitable tolling was applicable to AEDPA’s statute of limitations,<sup>63</sup> this rule had been followed by the district courts and circuit courts of appeals since the late 1990s,<sup>64</sup> almost a decade before *Lawrence* was decided. This rule was reaffirmed by the Court three years later in *Holland*, when it formally decided that AEDPA’s limitations period was subject to equitable tolling.<sup>65</sup>

### 1. Extraordinary Circumstances: The Attorney’s Behavior

In habeas corpus litigation, a prisoner is eligible for the remedy of equitable tolling only if he can prove that “extraordinary circumstances” prevented him from filing his habeas corpus petition on time.<sup>66</sup> Although

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62. *Id.* at 336 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

63. Before the Court decided to apply equitable tolling in certain cases of attorney default, it had to determine whether equitable tolling was applicable to AEDPA’s limitations period at all. The circuit courts of appeals had been applying equitable tolling to AEDPA’s limitations period since the late 1990s, and this issue was argued and finally decided in *Holland*. See *infra* Part II for a description of *Holland*’s treatment of this issue. The issue of whether AEDPA should be subject to equitable tolling at all is beyond the scope of this Comment, and indeed has been the sole subject of many pre-*Holland* academic discussions and articles. The focus of this Comment, rather, is directed toward the attorney-client relationship in the post-conviction habeas corpus context, and the ever-increasing prevalence of standard legal representation that requires the extraordinary remedy of equitable tolling in order to maintain the procedural fairness that the justice system demands. For further discussions of equitable tolling’s general applicability to AEDPA’s statute of limitations, see generally Bellamy, *supra* note 42; Stevenson, *supra* note 24; Traum, *supra* note 38.

64. See, e.g., *Downs v. McNeil*, 520 F.3d 1311, 1319 (11th Cir. 2008) (“This Court has used equitable tolling to extend the federal limitations period for prisoners seeking federal review of their state convictions . . . .”); *Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007) (“[S]ufficiently egregious misconduct on the part of a habeas petitioner’s counsel may justify equitable tolling of the AEDPA limitations period.”); *Trapp v. Spencer*, 479 F.3d 53, 59 (1st Cir. 2007) (“In this circuit, we have allowed for equitable tolling of [AEDPA’s] limitations period . . . .”); *United States v. Martin*, 408 F.3d 1089, 1092 (8th Cir. 2005) (“The statute of limitations contained in § 2255 [AEDPA] is subject to equitable tolling.” (quoting *United States v. Battles*, 362 F.3d 1195, 1197 (9th Cir. 2004))); *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (“[T]he one-year statute of limitations for filing a habeas petition may be equitably tolled . . . .”); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (stating that the court has discretion to apply principles of equity in AEDPA); *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000) (“As a general matter, principles of equitable tolling may . . . apply to excuse a plaintiff’s failure to comply with the strict requirements of [AEDPA’s] statute of limitations.”); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (proclaiming that the Second Circuit agrees that AEDPA is subject to equitable tolling); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (explaining that under AEDPA, “[a] court can allow an untimely petition to proceed under the doctrine of equitable tolling”).

65. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (holding that AEDPA’s statute of limitations, 28 U.S.C. § 2244(d) (2006), is subject to equitable tolling).

66. *Id.* at 2563; *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

there is no single definition of “extraordinary circumstances,” courts have generally required that they be situations that are beyond the prisoner’s ability to control.<sup>67</sup> For example, courts have allowed equitable tolling in AEDPA litigation when a court itself misled a prisoner about the habeas petition process,<sup>68</sup> when a government official misled a prisoner,<sup>69</sup> when a prisoner was denied access to his legal files,<sup>70</sup> and when deficiencies in a prison library prevented a diligent pro se prisoner from learning about the limitations period.<sup>71</sup> In these situations, prisoners were misled or obstructed by a state official, and thus the reasons for these prisoners’ untimely filings were beyond their control.<sup>72</sup>

As was the case in *Holland*, many prisoners cite their attorney’s negligent or intentional bad faith conduct as extraordinary circumstances that prevented them from complying with AEDPA’s statutory limitations period. Requesting equitable tolling on these grounds, however, led the Court in *Holland* to make a stark departure from its historical jurisprudence regarding claims of substandard legal representation. Outside of the post-conviction habeas corpus context, and indeed largely outside of the criminal justice context as a whole,<sup>73</sup> the Court has disposed of similar claims of

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67. See, e.g., *Barreto-Barreto v. United States*, 551 F.3d 95, 101 (1st Cir. 2008) (“[P]etitioners carry the burden of demonstrating that extraordinary circumstances beyond their control ‘prevented timely filing.’” (quoting *Trenkler v. United States*, 268 F.3d 16, 25 (1st Cir. 2001))); *Downs*, 520 F.3d at 1319 (citing *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)) (explaining that the court’s precedents require not only extraordinary circumstances, but circumstances that are beyond the petitioner’s control); *Spitsyn*, 345 F.3d at 799 (holding that “the one-year statute of limitations for filing a habeas petition may be equitably tolled if ‘extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time’” (quoting *Brambles v. Duncan*, 330 F.3d 1197, 1202 (9th Cir. 2003))); *Harris*, 209 F.3d at 330 (explaining that equitable tolling is only appropriate when “‘extraordinary circumstances beyond plaintiffs’ control made it impossible to file the claims on time’” (quoting *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996))).

68. See, e.g., *Prieto v. Quarterman*, 456 F.3d 511, 514–15 (5th Cir. 2006) (applying equitable tolling because petitioner detrimentally relied on a misleading filing extension granted by the district court when filing his habeas petition).

69. *Knight v. Schofield*, 292 F.3d 709, 710, 712 (11th Cir. 2002) (holding that equitable tolling was warranted when a government official, the Clerk of the State Supreme Court, had misled a petitioner about the habeas filing procedure).

70. *Lott v. Mueller*, 304 F.3d 918, 924–25 (9th Cir. 2002).

71. See *Roy v. Lampert*, 465 F.3d 964, 975 (9th Cir. 2006) (holding that equitable tolling would be warranted by the extraordinary circumstances a prisoner faced while attempting to access the prison library to do legal research in order to determine his AEDPA deadline).

72. *Spottsville v. Terry*, 476 F.3d 1241, 1246 (11th Cir. 2007) (holding that when a court misled the prisoner about the filing deadline, the prisoner’s subsequent late filing was “not his fault”).

73. At the criminal trial level, for example, criminal defendants are not bound to the consequences of their attorney’s substandard legal representation but instead may obtain a new trial if their attorney does not perform with “reasonably effective assistance.” See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, the Court later clarified in *Coleman v. Thompson* that its ruling was not based on the premise that when the attorney’s errors are egregious the attorney ceases to be an agent of the defendant, rather, it is the Sixth Amendment itself that requires responsibility for the attorney’s default to be imputed to the state. 501 U.S. 722, 754 (1991). Nonetheless, the *Strickland* precedent still stands and is

negligent representation resulting in procedural default by invoking agency law in holding that clients are bound by their attorney's acts or omissions.<sup>74</sup> Since the purpose of habeas corpus is to ensure fairness to prisoners in the criminal justice system,<sup>75</sup> it follows that before *Holland*, the courts of appeals and the Supreme Court itself were struggling to determine whether it was fair to preclude a habeas petition because of attorney error in the post-conviction process. Accordingly, the courts of appeals developed varying doctrines to deal with the claims of attorney default in meeting AEDPA's limitations period. The Supreme Court finally decided which approach to adopt in *Holland*.

Long before *Holland* was decided, the Supreme Court and every circuit court of appeals to have decided an equitable tolling case based on a claim of attorney default held that simple attorney negligence was not an extraordinary circumstance, and thus did not warrant equitable tolling.<sup>76</sup>

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representative of the Court's hesitation to hold criminal defendants responsible for the consequences of their attorney's failures in many stages of the criminal justice system.

74. See, e.g., *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (precluding equitable tolling for a petitioner when his attorney failed to file a timely habeas corpus petition on his behalf); *Coleman*, 501 U.S. at 752–53 (holding that litigants must “bear the risk of attorney error that results in a procedural default”); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 91, 96 (1990) (precluding equitable tolling of an employment discrimination law’s limitations period when a petitioner’s attorney failed to file a timely complaint because the attorney was not in the country when the limitations period elapsed); *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988) (striking down a litigant’s argument that the attorney’s sins should not be constructively attributed to the client because “[t]he argument that the client should not be held responsible for his lawyer’s misconduct strikes at the heart of the attorney-client relationship”); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634–36 (1962) (holding that a litigant’s case was dismissed for failure to prosecute when his attorney failed to appear in a pretrial conference because in “our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent”). See also *Cohen*, *supra* note 41, at 349 (noting that “[t]he law of agency has governed American lawyers since before the Revolution”).

75. See 1 HERTZ & LIEBMAN, *supra* note 33, at 16.

76. *Lawrence*, 549 U.S. at 336–37; *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008) (holding that mere attorney negligence does not justify equitable tolling); *Trapp v. Spencer*, 479 F.3d 53, 60 (1st Cir. 2007) (“[M]istake by counsel in reading [AEDPA] or computing the time limit is, at most, a routine error and does not . . . [warrant] equitable tolling.”) (internal quotation marks omitted); *Fleming v. Evans*, 481 F.3d 1249, 1255 (10th Cir. 2007) (“Habeas counsel’s negligence is not generally a basis for equitable tolling . . .”); *Sellers v. Burt*, 168 F. App’x 132, 133 (8th Cir. 2006) (ineffective assistance of counsel generally does not warrant equitable tolling in habeas proceedings); *Modrowski v. Mote*, 322 F.3d 965, 967–68 (7th Cir. 2003) (holding that attorney negligence is not grounds for equitable tolling); *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) (holding that ordinary attorney negligence will not justify equitable tolling); *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (noting that principles of equitable tolling do not extend to excusable neglect); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) (holding that an attorney’s erroneous interpretation of AEDPA’s statute of limitations cannot excuse the prisoner’s failure to file on time); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) (noting that attorney error does not create the extraordinary circumstances equitable tolling requires); *Harris v. Hutchinson*, 209 F.3d 325, 331 (4th Cir. 2000) (“[A] mistake by a party’s counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party’s control where equity should step in . . .”); *Miller v. N.J. State Dep’t of Corr.*, 145 F.3d 616, 619 (3d Cir. 1998) (holding that excusable neglect is not sufficient justification for equitable tolling).

Courts have defined attorney negligence to mean an attorney's mistake in calculating the limitations period,<sup>77</sup> an attorney's erroneous interpretation of the statute,<sup>78</sup> or other misunderstandings regarding AEDPA's procedural requirements that result in untimely habeas filings.<sup>79</sup> In these cases, the courts of appeals and the Supreme Court itself have historically invoked agency law, reasoning that attorney negligence is not an "extraordinary circumstance" that prevents a petitioner from filing on time because prisoners, as principals in the agency relationship, must supervise—and bear responsibility for—their attorneys' acts or omissions.<sup>80</sup>

Although courts have established that simple attorney negligence does not warrant equitable tolling, the courts of appeals before *Holland* had a much harder time deciding what to do when an attorney missed a prisoner's AEDPA deadline because of egregious misconduct. Before *Holland*, the Supreme Court had never addressed equitable tolling of AEDPA's limitations period in the context of an attorney's affirmative misconduct,<sup>81</sup> and the circuit courts of appeals took divergent approaches when adjudicating these cases. A majority of the circuit courts allowed equitable tolling in circumstances of attorney misconduct,<sup>82</sup> reasoning that

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77. See *Lawrence*, 549 U.S. at 336–37 (holding that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling"); *David*, 318 F.3d at 346 (holding that "a mistake by counsel in reading the statute or computing the time limit" does not warrant equitable tolling).

78. See *Fierro*, 294 F.3d at 683 (holding that an attorney's erroneous interpretation of AEDPA's statute of limitations provision cannot, on its own, excuse the prisoner's failure to file on time).

79. See, e.g., *Rouse v. Lee*, 339 F.3d 238, 245–46, 249–50 (4th Cir. 2003) (holding that an attorney's mistaken belief that the mailbox rule in Federal Rule of Civil Procedure 6(e) applies to AEDPA's limitations period will not excuse an untimely habeas petition).

80. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (holding that attorney error is not grounds to excuse an untimely petition because "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation"); *Modrowski*, 322 F.3d at 968 ("[A]ttorney negligence is not extraordinary and clients, even if incarcerated, must 'vigilantly oversee,' and ultimately bear responsibility for, their attorneys' actions or failures." (quoting *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001))); *Harris*, 209 F.3d at 331 ("[A] mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in.").

81. See *Lawrence*, 549 U.S. at 336 (addressing the question of whether an attorney's error in miscalculating AEDPA's limitations period entitles the petitioner to equitable tolling).

82. See, e.g., *Downs v. McNeil*, 520 F.3d 1311, 1321–22 (11th Cir. 2008) (noting that "serious attorney misconduct may constitute an extraordinary circumstance for purposes of equitable tolling"); *Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007) (holding that "sufficiently egregious misconduct on the part of a habeas petitioner's counsel may justify equitable tolling of the AEDPA limitations period"); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005) ("[S]erious attorney misconduct, as opposed to mere negligence, 'may warrant equitable tolling.'" (quoting *Beery v. Ault*, 312 F.3d 948, 952 (8th Cir. 2002))); *Baldayaque v. United States*, 338 F.3d 145, 152–53 (2d Cir. 2003) (holding that sufficiently egregious misconduct may justify the use of equitable tolling); *Ford v. Hubbard*, 330 F.3d 1086, 1106 (9th Cir. 2003) (finding that "there are instances in which an attorney's failure to take necessary steps to protect his client's interests is so egregious and atypical that the court may deem equitable tolling appropriate"); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (holding that an attorney's deception is the sort of extraordinary circumstance that



misconduct is not attributable to the client because such attorney behavior constitutes the “extraordinary circumstances” required for equitable tolling. Again, while there is no single definition of attorney misconduct, courts have found misconduct occurs where the prisoner requests or demands that the attorney file a habeas petition, but for a variety of reasons the attorney never does. For example, courts have found misconduct when an attorney affirmatively misleads the prisoner about the law,<sup>83</sup> effectively abandons the case,<sup>84</sup> or blatantly deceives or lies to his client about the status of his case.<sup>85</sup> When granting equitable tolling in these circumstances, some courts have once again invoked agency law, reasoning that if an attorney acts in a manner completely adverse to the client, the attorney no longer functions as the client’s agent, rendering it improper to bind these incarcerated clients to the consequences of their attorney’s actions.<sup>86</sup> As discussed in Part II *supra*, some of the Justices adopted this agency law reasoning in *Holland*.

The Seventh Circuit, on the other hand, consistently held that attorney default, whether due to negligence or misconduct, was always attributed to

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could warrant the use of equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (holding that an attorney’s effective abandonment of the case may warrant equitable tolling).

83. *Martin*, 408 F.3d at 1094 (finding misconduct where an attorney told the prisoner that “there was no such thing as a one-year filing deadline”).

84. *Spitsyn v. Moore*, 345 F.3d 796, 798, 801 (9th Cir. 2003) (finding misconduct when an attorney accepted a retainer payment then failed to do any work or respond to prisoner’s letters or phone calls for over a year, by which time the deadline had lapsed); *Nara*, 264 F.3d at 320 (holding that equitable tolling would be justified if the petitioner’s attorney effectively abandoned the case).

85. *Martin*, 408 F.3d at 1094 (finding misconduct where the attorney lied to prisoner by telling him that he had filed the prisoner’s petition, which was not true); *Wynn*, 292 F.3d at 230 (“Wynn’s allegation that he was deceived by his attorney into believing that a timely [habeas corpus] motion had been filed on his behalf presents a ‘rare and extraordinary circumstance’ beyond petitioner’s control that could warrant equitable tolling of the statute of limitations.”). Notably, some of the courts of appeals found that an attorney’s behavior constitutes misconduct when an attorney violates the professional duties of care that she owes to the client. *See, e.g., Baldayaque*, 338 F.3d at 152 (finding misconduct when the attorney violates the duty of loyalty that she, as an agent, owes to the client); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”). The American Bar Association (ABA) Model Rules of Professional Conduct state that a lawyer engages in professional misconduct when she violates or attempts to violate the Rules of Professional Conduct by breaching the duties attorneys owe to clients. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2003). The Court relied on these Model Rules when deciding to make an exception to agency principles in *Strickland*, and also adopted the Model Rules reasoning in *Holland*, citing an amicus brief written by a group of extremely astute legal ethics professors. *See Holland v. Florida*, 130 S. Ct. 2549, 2564–65 (citing Brief for Legal Ethics Professors et al. as Amici Curiae Supporting Petitioners, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5237)); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (referencing the “[p]revailing norms of practice as reflected in American Bar Association standards”).

86. *See Downs*, 520 F.3d at 1321 (holding that “when an attorney’s conduct is so egregious it amounts to a *de facto* termination of representation, it would be improper to hold the client to the actions of his agent”); *Baldayaque*, 338 F.3d at 154 (“[W]hen an ‘agent acts in a manner completely adverse to the principal’s interest,’ the ‘principal is not charged with [the] agent’s misdeeds.’”) (Jacobs, J., concurring) (quoting *Nat’l Union Fire Ins. Co. v. Bonnanzio*, 91 F.3d 296, 303 (2d Cir. 1996))).

the client and therefore never warranted the use of equitable tolling.<sup>87</sup> Even though attorneys displayed the same unethical conduct as those in other circuit's jurisdictions, the results for the prisoner were radically different in the Seventh Circuit, as prisoners were never granted equitable tolling no matter how severe the attorney's misconduct. The Supreme Court granted certiorari in 2009 to finally decide when a habeas petitioner would be bound by his attorney's failures.<sup>88</sup>

Although the Court spent a significant portion of its analysis in *Holland* determining whether the attorney's behavior constituted "extraordinary circumstances," the Court also evaluated the second prong of the equitable tolling analysis—whether the prisoner acted with "due diligence" in pursuing his rights. The next section of this Comment addresses the prisoner's duty to diligently pursue his rights, no matter how poorly the attorney is handling his case.

## 2. Due Diligence: The Prisoner's Behavior

When Albert Holland's attorney stopped answering his letters and phone calls, Holland began to worry.<sup>89</sup> In an effort to try and force his attorney to work on his habeas petition, or at least return his letters and phone calls, Holland contacted the courts, their clerks, and the Florida State Bar reporting his attorney's misconduct and asking for information about his case.<sup>90</sup> When Holland learned that his attorney had missed AEDPA's deadline, Holland immediately wrote his own pro se habeas motion, and filed it the next day.<sup>91</sup> However, by this time it was too late, and the District Court dismissed Holland's petition as untimely.<sup>92</sup> The District Court refused to grant Holland equitable tolling on the grounds that he had not been diligent enough in pursuing his rights.<sup>93</sup>

The second prong of the equitable tolling rule, which the Court expressed in *Lawrence* and later affirmed in *Holland*, requires a prisoner to show that he has been pursuing his rights diligently during the time that his attorney

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87. See, e.g., *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("[A]ttorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client' and thus is not a circumstance beyond a petitioner's control that might excuse an untimely petition.") (quoting *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003)); *United States v. 7108 W. Grand Ave.*, 15 F.3d 632, 634 (7th Cir. 1994) (precluding equitable tolling because the errors and misconduct of the lawyer redound upon and bind the principal (i.e., the client)).

88. *Holland v. Florida*, 539 F.3d 1334 (11th Cir. 2008), cert. granted 130 S. Ct. 398 (U.S. Oct. 13, 2009) (No. 09-5327). See also *Holland*, 130 S. Ct. at 2560 ("Because the [Eleventh Circuit] Court of Appeals' application of the equitable tolling doctrine to instances of professional misconduct conflicts with the approach taken by other Circuits, we granted the petition [for certiorari].").

89. *Holland*, 130 S. Ct. at 2555.

90. *Id.* at 2555–57.

91. *Id.* at 2557.

92. *Id.* at 2559.

93. *Id.*

was neglecting his case.<sup>94</sup> Before *Holland*, the circuit courts of appeals treated this due diligence requirement differently, and these divergent approaches generated an important question: should the context of imprisonment be taken into account when evaluating a habeas petitioner's due diligence?

The Fifth and Seventh Circuits, for example, chose not to acknowledge a prisoner's conditions of confinement when evaluating the diligence requirement. In denying a prisoner's argument that his confinement limited his ability to pursue his rights diligently, the Fifth Circuit stated that, "Congress knew AEDPA would affect incarcerated individuals with limited access to outside information."<sup>95</sup> Similarly, the Seventh Circuit has held that a prisoner can overcome even an attorney's willful misconduct by diligently pursuing his rights in filing "protective" or duplicative pro se petitions if he fears his attorney will fail to file a timely petition on his behalf.<sup>96</sup> The facts of *Holland*, however, make clear that the Seventh Circuit's protective petition approach is not necessarily feasible, as every pro se petition *Holland* filed was dismissed by the District Court on the premise that prisoners who are represented by an attorney are not permitted to file pro se petitions.<sup>97</sup>

The Ninth Circuit, on the other hand, did consider the realities of prison life when evaluating a prisoner's diligence in pursuing his constitutional habeas corpus claims. For example, this circuit once remarked that "confinement makes compliance with procedural deadlines difficult because of restrictions on the prisoner's ability to monitor the lawsuit's progress."<sup>98</sup> Likewise, commentators and scholars have noted that because much of the attorney's factual investigations, legal research, and document drafting is done outside of the courtroom, it is difficult for prisoners to monitor their attorneys' progress on their cases.<sup>99</sup>

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94. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). *See also* Bellamy, *supra* note 42, at 29 ("[C]ourts frequently hold that despite the existence of extraordinary circumstances, prisoners' delays do not warrant equitable tolling because they have not exercised reasonable diligence in pursuing their claims.").

95. *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (finding the prisoner did not act with the requisite diligence even though the court "recognize[d] that Fisher's incarceration prevented him from knowing sooner of AEDPA's limitation period").

96. *See Powell v. Davis*, 415 F.3d 722, 728 (7th Cir. 2005); *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (holding that "petitioners bear ultimate responsibility for their [habeas corpus] filings, even if that means preparing duplicative petitions").

97. *Holland*, 130 S. Ct. at 2556.

98. *See Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998) (en banc).

99. *See, e.g., Green, supra* note 27, at 1171 (stating that "[i]t is hard for clients themselves . . . to know most of what happens from the time the lawyer is assigned to represent an indigent defendant until the time the defendant pleads guilty"); *Curtis & Resnik, supra* note 26, at 1620 (noting that in the context of the criminal justice system, "[i]ndividual clients, in turn, have little or no ability to monitor their own lawyers").

II. *HOLLAND V. FLORIDA*: A CASE ANALYSISA. *Statement of the Case*

Albert Holland's story began in 1997, when he was convicted of murder and sentenced to death.<sup>100</sup> Although Albert Holland was represented by an attorney, he filed a pro se habeas corpus petition in the Federal District Court for the Southern District of Florida in January of 2006, approximately one month after his AEDPA limitations deadline had passed.<sup>101</sup> As Holland had exhausted his state court remedies, a federal habeas corpus petition was his last chance for judicial review of his conviction before his execution was to be carried out. Holland asked the District Court to toll the limitations period on equitable grounds, claiming that his attorney's egregious misconduct prevented him from filing his petition on time.<sup>102</sup> Eventually, Holland appealed his plea for equitable tolling to the Supreme Court. For the first time in its jurisprudence, the Supreme Court handed down a ruling on the equitable tolling of AEDPA's statute of limitations.

In the year 2000, the Florida Supreme Court affirmed Holland's conviction,<sup>103</sup> and on October 1, 2001 the U.S. Supreme Court denied Holland's petition for certiorari to review the State Court's judgment.<sup>104</sup> On that date—the date that direct appellate review of Holland's conviction became final—AEDPA's one-year limitations period began to run.<sup>105</sup> Approximately one month later, the state of Florida appointed attorney Bradley Collins to represent Holland in all state and federal post-conviction matters.<sup>106</sup> A full ten months after taking on Holland's case, Collins filed a motion for post-conviction relief in a state trial court in September of 2002, 316 days after his appointment as Holland's attorney, and only 12 days before the one-year limitations period expired.<sup>107</sup> That filing automatically stopped the running of the clock, as it triggered a statutory tolling provision for AEDPA's limitations period.<sup>108</sup> Although the limitations period was not running during Holland's state post-conviction appeals process, Holland was left with only twelve days at that point.<sup>109</sup>

Holland's petition was pending in the various state courts over the next three years.<sup>110</sup> During that time, Holland wrote Collins many letters requesting that Collins "make certain that all of his claims would be

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100. *Holland*, 130 S. Ct. at 2555.

101. *Id.* at 2554.

102. *Id.* at 2555.

103. *Id.* (citing *Holland v. State*, 773 So. 2d 1065 (Fla. 2000)).

104. *Id.*, cert. denied, 534 U.S. 834 (2001).

105. *Id.* at 2555.

106. *Id.*

107. *Id.*

108. *Id.* See also 28 U.S.C. § 2244(d)(2) (2006) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

109. *Holland*, 130 S. Ct. at 2555.

110. *Id.*

preserved for any subsequent federal habeas corpus review.”<sup>111</sup> Collins wrote back to Holland, stating that “I would like to reassure you that we are aware of state-time limitations and federal exhaustion requirements” and instructed Holland that if his state post-conviction motion be denied, “your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court.”<sup>112</sup>

The state trial court denied Holland relief in 2003, and Collins appealed to the Florida Supreme Court.<sup>113</sup> That is when Collins’s communication with his client began to break down. Over the next three years, from April 2003 to January 2006, Collins communicated with Holland only three times, each time by a letter sent to Holland’s prison.<sup>114</sup> Holland became increasingly unhappy with his attorney’s lack of communication, and wrote the Florida Supreme Court on two separate occasions, asking it to remove Collins from his case.<sup>115</sup> In the second letter, filed in 2004, Holland informed the court that “Collins had not kept [him] updated on the status of [his] capital case” and that Holland “had not seen or spoken to Collins since April 2003.”<sup>116</sup> Holland also wrote that “Collins has abandoned [me]” and that “Collins has never made any reasonable effort to establish any relationship of trust or confidence with [me].”<sup>117</sup> Holland concluded by asking the court to dismiss or remove Collins from his capital case.<sup>118</sup> As the opposing party, the State filed a response to Holland’s request, arguing that Holland could not file any pro se paperwork with the court while he was represented by counsel—including any requests seeking new counsel for his case.<sup>119</sup> The Florida Supreme Court agreed with the State and denied Holland’s request for a new attorney.<sup>120</sup>

After being turned down by the court, Holland then wrote letters to the Clerk of the Florida Supreme Court asking for assistance in obtaining information about his case.<sup>121</sup> Holland wrote, “I’m not trying to get on your nerves. I just would like to know *exactly* what is happening with my case on appeal to the Supreme Court of Florida.”<sup>122</sup> He added, “[I]f I had a competent . . . post-conviction, appellate attorney representing me, I would not have to write you this letter.”<sup>123</sup> During that time, Holland also filed a complaint against Collins with the Florida Bar Association, but his complaint was denied.<sup>124</sup> Holland then wrote again to the Florida Supreme Court Clerk requesting copies of the State’s response to his State Habeas

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (internal quotation marks omitted).

117. *Id.*

118. *Id.* at 2556.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

Corpus Petition.<sup>125</sup> The Clerk responded to Holland's letter by informing Holland that he would have to pay for the copies of his records by "submitt[ing] a check or money order in the amount of \$77.00"<sup>126</sup> or that "in lieu of sending money he could contact his attorney for copies or visit the Court's webpage."<sup>127</sup> Holland was indigent, so he was not able to send money for the copies, and, as a death row inmate, he had no access to computers or the Internet, and thus could not visit the court's webpage to obtain information about his case.<sup>128</sup> Out of the choices the Clerk presented to him, the only route of communication Holland had available was through his attorney.

Meanwhile, without informing Holland, Collins argued Holland's appeal before the Florida Supreme Court in February of 2005.<sup>129</sup> Holland, who had been in the dark about his case for over a year at this point, continued to write his attorney a series of letters "emphasizing the importance of filing a timely petition for habeas corpus in federal court once the Florida Supreme Court issued its ruling."<sup>130</sup> On March 3, 2005, Holland wrote:

Dear Mr. Collins, P.A.: How are you? Fine I hope. I write this letter to ask that you please write me back, as soon as possible to let me know what the status of my case is on appeal to the Supreme Court of Florida. If the Florida Supreme Court denies my [post-conviction] and State Habeas Corpus appeals, please file my 28 U.S.C. 2254 writ of Habeas Corpus petition, before my deadline to file it runs out (expires). Thank you very much. Please have a nice day.<sup>131</sup>

Collins did not answer this letter.<sup>132</sup> Holland wrote again on June 15, 2005:

Dear Mr. Collins: How are you? Fine I hope. On March 3, 2005 I wrote you a letter, asking that you let me know the status of my case on appeal to the Supreme Court of Florida. Also, *have you begun preparing my 28 U.S.C. § 2254 writ of Habeas Corpus petition? Please let me know, as soon as possible. Thank you.*<sup>133</sup>

Again, Collins did not reply.<sup>134</sup>

Five months later, in November 2005, the Florida Supreme Court affirmed the lower court decision denying Holland's motion for post-conviction relief.<sup>135</sup> On December 1, 2005, the court's decision became final when it issued its mandate.<sup>136</sup> Once again the AEDPA clock began

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125. Brief for Petitioner at 9–10, *Holland v. Florida*, 130 S. Ct. 2459 (2010) (No. 09-5327).

126. *Id.* at 11.

127. *Id.* at 12 n.12.

128. *Id.* at 2 n.1.

129. *Holland*, 130 S. Ct. at 2556.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (citing *Holland v. State*, 916 So. 2d 750 (Fla. 2005) (per curiam)).

136. *Id.* (citing *Holland v. Florida*, 539 F.3d 1334, 1337 (11th Cir. 2008)).

ticking, with only twelve days left on the one-year time limit.<sup>137</sup> Collins never informed his client about the court's decision, and twelve days later Holland's AEDPA time limit expired,<sup>138</sup> and with it so did his last plea for judicial review of his conviction and death sentence: his federal writ of habeas corpus.

Holland, however, was still unaware of the Florida Supreme Court's ruling and continued to write his attorney letters asking for information about his case. In January of 2006, Holland wrote:

Dear Mr. Bradley M. Collins: How are you? Fine I hope. I write this letter to ask that you please let me know the status of my appeals before the Supreme Court of Florida. Have my appeals been decided yet? Please send me the [necessary information] . . . so that I can determine when the deadline will be to file my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition, in accordance with all United States Supreme Court and Eleventh Circuit case law and applicable 'Antiterrorism and Effective Death Penalty Act,' if my appeals before the Supreme Court of Florida are denied. Please be advised that I want to preserve my privilege to federal review of all of my state convictions and sentences.

Mr. Collins, would you please also inform me as to which United States District Court my 28 U.S.C. Rule 2254 Federal Habeas Corpus Petition will have to be timely filed in and that court's address? Thank you very much.<sup>139</sup>

Again, Collins did not answer.<sup>140</sup> Nine days later, Holland, while working in the prison library, learned for the first time that the Florida Supreme Court had made a decision on his case five weeks ago.<sup>141</sup> Immediately, he wrote his own pro se federal habeas corpus petition and mailed it to the Federal District Court for the Southern District of Florida the next day.<sup>142</sup> Holland then tried to call Collins from his prison, but he called collect and Collins's office refused to accept the call.<sup>143</sup>

Five days later, Collins wrote Holland a letter and told him that as Collins understood the AEDPA statute, Holland's one-year limitations period had in fact expired in 2000, *before* Collins had even begun to represent Holland.<sup>144</sup> Collins wrote:

Dear Mr. Holland: I am in receipt of your letter . . . concerning operation of AEDPA time limitations. One hurdle in our upcoming efforts to obtain federal habeas corpus relief will be that the one-year statutory time frame for filing such a petition began to run after [your] case was affirmed [by the Florida Supreme Court] on October 5, 2000 . . . . However, it was not until November 7, 2001, that I received the Order appointing me to the case. As you can see, *I was appointed about a*

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137. *Id.*

138. *Id.*

139. *Id.* at 2557 (alteration in original).

140. *Id.*

141. *Id.* (citing *Holland v. Florida*, 539 F.3d 1334, 1337 (11th Cir. 2008)).

142. *Id.*

143. *Id.*

144. *Id.* at 2557–58.

*year after your case became final . . . [T]he AEPDA time period [thus] had run before my appointment and therefore before your [post-conviction] motion was filed.*<sup>145</sup>

Collins's interpretation of the law was wrong.<sup>146</sup> Holland's time clock had not begun to run until after the Supreme Court denied certiorari on October 1, 2001.<sup>147</sup> Therefore, when Collins was appointed in November of 2001, the AEDPA clock still had 328 days remaining.<sup>148</sup> Holland immediately wrote back to his attorney informing Collins of his error:

Dear Mr. Collins: I received your letter . . . . You are incorrect in stating that the one-year statutory time frame for filing my 2254 petition began to run after my case was affirmed on October 5, 2000, by the Florida Supreme Court. . . . Also, Mr. Collins you never told me that my time ran out (expired). I told you to timely file my 28 U.S.C. 2254 Habeas Corpus Petition before the deadline, so that I would not be time-barred. You never informed me of oral arguments or of the Supreme Court of Florida's November 10, 2005 decision denying my post-conviction appeals. . . . Mr. Collins, please file my 2254 Habeas Petition immediately. Please do not wait any longer, even though it will be untimely filed at least it will be filed without wasting anymore [sic] time. (valuable time).<sup>149</sup>

Once again, Collins did not answer this letter, nor did he file a federal habeas petition as his client requested.<sup>150</sup>

In March of 2006, Holland filed another complaint with the Florida Bar Association.<sup>151</sup> This time, the Bar demanded a response from Collins, which he provided through his own attorney.<sup>152</sup> By that point, Holland had already filed another pro se petition in the District Court requesting for a second time that Collins be dismissed from his case.<sup>153</sup> Once again, the State filed a response to Holland's request and argued that "Holland could not file a pro se motion seeking to have Collins removed while he was represented by counsel, *i.e.*, represented by Collins."<sup>154</sup>

Fortunately for Holland, this time the court considered Holland's motion and allowed Collins to withdraw from the case.<sup>155</sup> The court appointed a new lawyer for Holland and heard arguments as to whether the circumstances of Holland's case justified the equitable tolling of AEDPA's limitations period for the five weeks that Collins failed to inform his client about the Florida Supreme Court's decision that triggered the clock

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145. *Id.* at 2558.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (internal quotation marks omitted).

150. *Id.* at 2559.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*



again.<sup>156</sup> If the court agreed to equitably toll the limitations period for those five weeks, Holland's federal habeas corpus petition would be considered timely.<sup>157</sup>

After considering the case, the Federal District Court held that Holland's circumstances did not warrant equitable tolling and therefore his petition was time-barred.<sup>158</sup> The court suggested that Holland "was a difficult client" and that "Collins' professional conduct in the case was at worst merely negligent."<sup>159</sup> The court stated that "even if Collins' behavior could be characterized as an extraordinary circumstance," Holland had nonetheless failed to demonstrate the requisite "due diligence" aspect of the equitable tolling inquiry because he, among other things, did not seek aid from outside supporters.<sup>160</sup>

On appeal, the Eleventh Circuit agreed with the District Court in holding that Holland's petition was untimely.<sup>161</sup> However, it did not address the question of Holland's diligence, but instead held that the facts of Holland's case did not warrant equitable tolling because Holland had not met the second part of the inquiry—namely that some extraordinary circumstance stood in his way and prevented timely filing.<sup>162</sup> Specifically, the Court of Appeals stated that Collins's behavior involved "no more than [p]ure professional negligence" and that "such behavior [on the part of a petitioner's attorney] can never constitute an extraordinary circumstance."<sup>163</sup>

The Supreme Court granted certiorari<sup>164</sup> and heard arguments in March of 2010.<sup>165</sup> The next section of this Comment examines the arguments of the various briefs submitted to the Court.

## *B. Arguments from the Briefs*

### 1. Albert Holland

In his brief, Holland argued that he had shown sufficient facts to prove he had been pursuing his rights diligently, and that an "extraordinary circumstance" stood in his way and prevented him from a timely filing—namely his attorney, Bradley Collins.<sup>166</sup>

Holland first addressed the threshold issue of whether AEDPA's statute of limitations was actually subject to equitable tolling. Holland cited

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (internal quotation marks omitted).

160. *Id.* (internal quotation marks omitted).

161. *Id.*

162. *Id.*

163. *Id.* (internal quotation marks omitted) (citing *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008)).

164. *Holland v. Florida*, 130 S. Ct. 398 (2009).

165. *Holland*, 130 S. Ct. at 2549.

166. Brief for Petitioner, *supra* note 125, at 27.

Supreme Court precedent, noting that “[i]t is hornbook law that limitations periods are customarily subject to equitable tolling.”<sup>167</sup> He argued that the writ of habeas corpus itself has historically been “governed by equitable principles”<sup>168</sup> and that eleven of the federal appellate courts have held that AEDPA is subject to equitable tolling.<sup>169</sup> Most importantly, Holland pointed to a rich history of case law stating that equitable remedies are warranted when the rigid application of a rule would “lead to unacceptably unjust outcomes.”<sup>170</sup> Holland next turned his attention to the Eleventh Circuit’s decision and argued that application of its rigid, bright-line rule regarding an attorney’s conduct would lead to an unjust outcome in his case.

In its decision, the Eleventh Circuit ruled that even if Collins’s conduct was grossly negligent,

[N]o allegation of lawyer negligence . . . in the absence of an allegation and proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part—can rise to the level of egregious attorney misconduct that would entitle Petitioner to equitable tolling. Pure professional negligence is not enough.<sup>171</sup>

Holland argued that if the Eleventh Circuit’s rule prevailed, many cases such as his, in which “a perfect storm of circumstances resulted in the AEDPA statute of limitations not being met,” would never “receive meaningful, equitable consideration” by the courts.<sup>172</sup> With the goal of equitable treatment in mind, Holland then presented his arguments for equitable tolling in his particular case. He noted that not only had he written numerous letters to his attorney, but when his attorney did not respond he asked for assistance from the Clerk of the Florida Supreme Court and the Florida Bar Association on multiple occasions.<sup>173</sup> Despite Collins’s recurring failure to communicate with his client, Holland continued to write him letters, and even outlined—and correctly interpreted—the relevant sections of the United States Code pertaining to Federal Habeas Corpus time limitations.<sup>174</sup> Furthermore, every time Holland tried to speak on his own behalf to alert the state court of his attorney’s behavior, the “State successfully muzzled him” by arguing that Holland could not proceed *pro se* while he was represented by an attorney.<sup>175</sup> Holland’s inability to speak on his own behalf to preserve his federal rights, and his attorney’s absence and thus inability to speak for

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167. *Id.* at 36 n.31 (quoting *Young v. United States*, 535 U.S. 43, 49 (2002)) (internal quotation marks omitted).

168. *Id.* at 38 (citing *Gomez v. United States District Court*, 503 U.S. 653, 653–54 (1992)).

169. *Id.* at 37.

170. *Id.* at 44 (quoting *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008)).

171. *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008).

172. Brief for Petitioner, *supra* note 125, at 46.

173. *Id.* at 51–52.

174. *Id.* at 52–53.

175. *Id.* at 57–58.

him, constituted “extraordinary circumstance[s]” that prevented him from filing a timely petition.<sup>176</sup>

Holland also argued that his “diligence was far more than reasonably can be expected of someone in his situation.”<sup>177</sup> He noted that the “due diligence” requirement should be “construed in light of a habeas petitioner’s confinement in prison and any special restrictions that incarceration might impose on such a person.”<sup>178</sup> Holland had repeatedly alerted the Florida Supreme Court, the State, and the Bar Association that he wanted to preserve his federal rights and that he feared his attorney had abandoned him.<sup>179</sup> Despite his efforts, Holland continued, he was not able to assert his rights because the State and the court told Holland he could not speak on his own behalf;<sup>180</sup> the Clerk twice referred him to the court’s webpage, despite the fact that death row prisoners are not allowed to use computers;<sup>181</sup> and the Florida Bar Association ignored his first complaint.<sup>182</sup> When his attorney finally did contact him, his attorney was wrong about the law and gave him incorrect advice.<sup>183</sup> Holland nonetheless wrote again to his attorney, providing him with the correct interpretation of the law, despite the fact that Holland’s access to the prison law library and writ room was substantially constrained by prison regulations.<sup>184</sup> Holland concluded by stating that at no point in his case did he sit on his rights. To the contrary, he filed a pro se petition the very next day after he first learned of the Florida Supreme Court’s decision.<sup>185</sup> The fact that he was not successful in meeting his AEDPA deadline, he asserted, did not mean he was not diligent.<sup>186</sup> For all his diligence in the face of such extraordinary circumstances, Holland concluded that he had met the threshold required for equitable tolling.<sup>187</sup>

## 2. Florida

The State of Florida argued that AEDPA was not subject to equitable tolling, and that even if it were, Holland’s case did not warrant such treatment. It went even further by contending that the Eleventh Circuit’s ruling was too broad because attorney misconduct, whatever the attorney’s level of culpability, should never be a reason to grant a prisoner equitable

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176. *Id.* at 58.

177. *Id.* at 59.

178. *Id.* at 59–60.

179. *Id.* at 60.

180. *Id.* at 57–58.

181. *Id.* at 12 n.12, 14.

182. *Id.* at 8 n.8 (noting that “[t]he Florida Bar did not initiate an investigation and did not request that Collins respond [to the complaint against him]”).

183. *Id.* at 19.

184. *Id.* at 21–22 (noting that “the prison limits the hours that [Holland] may have access to the law library and the law materials contained there are very limited”) (internal quotation marks omitted).

185. *Id.* at 55; *see also* Holland v. Florida, 130 S. Ct. 2549, 2557 (2010).

186. Brief for Petitioner, *supra* note 125, at 60 n.58.

187. *Id.* at 27.

tolling.<sup>188</sup> In support for its argument, the State cited the Supreme Court's decision in *Coleman v. Thompson*.<sup>189</sup> In *Coleman*, the Court held that an attorney's failure to file a timely notice of appeal in a collateral proceeding was not a reason to excuse a procedural default specifically because "no constitutional right to post-conviction counsel exists."<sup>190</sup> Under agency principles, the State continued, an attorney is his client's agent and therefore clients are required to bear the risk of an attorney missing a deadline.<sup>191</sup> Further, the State averred, the Court in *Coleman* specifically rejected the "assertion that a post-conviction attorney's error can be 'so bad that the lawyer ceases to be an agent of the petitioner.'"<sup>192</sup>

The State further contended that mistakes or negligence by a litigant's attorney are "grounded in circumstances" within the litigant's control, and thus do not qualify as "extraordinary circumstances" that are beyond the petitioner's control for equitable tolling purposes.<sup>193</sup> Moreover, the State framed Holland's challenges with his attorney as nothing more than his attorney's "misunderstanding of the law [regarding] when the one-year

188. Brief for Respondent at 22–23, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327) (arguing that "equitable tolling does not apply for attorney misconduct amounting to ineffective assistance of counsel"). In terms of the State's argument that AEDPA should not be subject to equitable tolling, the State asserted that equitable tolling is inconsistent with the text and structure of AEDPA because Congress already laid out specific instances of tolling within the statute itself. *Id.* at 26–27. For the Court to extend the time beyond these instances, the State continued, would be inconsistent with the text of the statute. *Id.* (noting that "[e]ven where equitable considerations strongly support[] a nonliteral reading of the statutory provisions regarding the time during which a claim could be asserted[,] this Court has refrained from altering the statutory structure that Congress enacted"). The State further asserted that application of equitable tolling would be at odds with the Congressional purpose of AEDPA: namely "the reduction of delays and abuses in federal habeas proceedings via the establishment of a detailed statute of limitations." *Id.* at 23. Permitting equitable tolling, the State urged, would invite "side litigation . . . over attorney misconduct [that] would significantly lengthen the habeas process via additional hearings, appeals, and certiorari petitions to this Court." *Id.* at 30. The State also maintained that allowing delay in the habeas process would "damage[] the states' implementation of their criminal justice systems and creat[e] uncertainty as to the finality of criminal judgments." *Id.* at 31. Therefore, the State concluded, AEDPA should not be subject to equitable tolling. *Id.* at 23.

189. 501 U.S. 722 (1991).

190. Brief for Respondent, *supra* note 188, at 33 (citing *Coleman*, 501 U.S. at 756–57).

191. *Id.* at 34. As discussed in Part I.B.1 *supra*, the only time the risk for attorney error will be imputed to the State is when the Constitution requires the State to provide a criminal defendant with counsel. In that situation, the State—and not the client—would be held responsible in the event that the attorney, which the State appointed, did not provide effective assistance of counsel to the criminal defendant client. *See generally* *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Constitution, however, does not provide *post-conviction* prisoners with the right to counsel, therefore, prisoners such as Holland must bear the risk of attorney error on their own, as per "well-settled principles of agency law." Brief for Respondent, *supra* note 188, at 34 (quoting *Coleman*, 501 U.S. at 754).

192. *Id.* (quoting *Coleman*, 501 U.S. at 754). Holland rejoined in his reply brief that *Coleman*'s analysis had nothing to do with the equitable tolling of AEDPA's limitations period and that AEDPA did not even exist when *Coleman* was decided. *See* Petitioner's Reply Brief on the Merits at 9–10, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327). Holland argued that his case was not about a constitutional right to counsel, rather, it was about whether he was entitled to equitable tolling under the circumstances of his late habeas corpus filing. *Id.* at 10.

193. Brief for Respondent, *supra* note 188, at 39.

limitations period under AEDPA began to run.”<sup>194</sup> The State then cited *Lawrence v. Florida*,<sup>195</sup> in which the Court held that “[a]ttorney miscalculation [of AEDPA’s limitations period] is simply not sufficient to warrant equitable tolling.”<sup>196</sup> “Viewed fairly,” the State concluded, “the relationship between Holland and Collins was one in which Holland consistently second-guessed and interfered with the professional judgment of his counsel”<sup>197</sup> and thus “Holland’s claim for equitable tolling reduces to a misunderstanding about the tolling period for the federal habeas petition.”<sup>198</sup> Accordingly, none of Holland’s claims rise to the level of “extraordinary attorney behavior” that could justify equitable tolling under the *Lawrence* precedent.<sup>199</sup>

Although the State insisted that the Eleventh Circuit’s decision should be affirmed, it also argued that its standard for allowing equitable tolling only in cases of an attorney’s egregious misconduct “is unworkable in practice.”<sup>200</sup> The Eleventh Circuit’s rule, the State warned, creates incentives for prisoners to falsely allege that their attorneys acted with dishonesty as a delay tactic to prolong their limitations periods.<sup>201</sup> Indeed, capital litigants and their attorneys may even have “some incentive to agree that counsel . . . [was] less than honest if the effect is to extend the time for judgment and avoid finality.”<sup>202</sup> The State further cautioned that the Eleventh Circuit’s standards of “divided loyalty and mental impairment” are similarly subjective and create the same incentive for prisoners to characterize circumstances within their control as “extraordinary” for the purposes of obtaining equitable tolling.<sup>203</sup>

The State then turned its attention to the due diligence prong of the equitable tolling analysis and supported the District Court’s findings that Holland had not acted with the requisite level of diligence under the

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194. *Id.* at 43.

195. 549 U.S. 327 (2007).

196. *Id.* at 336–37.

197. Brief for Respondent, *supra* note 188, at 45.

198. *Id.* at 43. In Petitioner’s Reply Brief, Holland argued that there is a difference between an attorney’s simple negligence in failing to file a petition and a situation in which an attorney ignores his client’s requests or instructions. See Petitioner’s Reply Brief, *supra* note 192, at 11–14. Holland cited *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in which the Court held that a lawyer who disregards specific instructions from a client to file a notice of appeal “acts in a manner that is professionally unreasonable. . . . [F]iling a notice of appeal is purely a ministerial task, and the failure to file reflects inattention to the defendant’s wishes.” *Id.* at 477 (citations omitted). Holland thus argued that his circumstances were distinguishable from mere attorney negligence because Holland had repeatedly instructed his attorney to file his federal habeas petition on time. See Petitioner’s Reply Brief, *supra* note 192, at 13.

199. Brief for Respondent, *supra* note 188, at 44 (adding that “[t]his ‘garden variety’ negligence by an attorney does not provide grounds for equitable tolling”) (citing *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008)).

200. *Id.* at 46–50.

201. *Id.* at 46–47.

202. *Id.* at 47.

203. *Id.* at 49.

circumstances.<sup>204</sup> As the District Court held, when “Holland felt his attorney was not competent, it became incumbent upon Holland to act given the circumstances he found himself in” and that “a reasonable person in his position would have done more to protect his interests in filing a federal habeas petition.”<sup>205</sup>

### C. *The Holland Decision*

In a seven-to-two decision, the Supreme Court decided that AEDPA’s statute of limitations was subject to equitable tolling.<sup>206</sup> The Court also overturned the Eleventh Circuit’s ruling that Holland’s case did not warrant equitable intervention, as well as its bright-line rule for equitable tolling in cases of attorney default.<sup>207</sup> While the Court stated that the facts of Holland’s situation “suggest that this case may well present ‘extraordinary’ circumstances,” the Court did not make a determination as to whether Holland was entitled to equitable tolling.<sup>208</sup> Instead, it remanded his case to the Eleventh Circuit for further proceedings to determine whether equitable tolling was warranted under the Court’s new guidelines.<sup>209</sup>

The Court began its analysis by holding that AEDPA is subject to equitable tolling, reiterating its precedent that a non-jurisdictional federal statute of limitations is subject to a rebuttable presumption in favor of equitable tolling.<sup>210</sup> This presumption, the Court stated, was further reinforced by the fact that habeas corpus has always been an equitable remedy governed by equitable principles.<sup>211</sup> The Court concluded that although AEDPA was enacted with the purpose of eliminating delays in the process of federal habeas review, the statute can still achieve its purpose without undermining the basic equitable principles of habeas corpus, under which a petition’s timeliness had historically been determined by equitable standards.<sup>212</sup> Accordingly, the Court concluded that AEDPA’s limitations period is subject to equitable tolling.<sup>213</sup>

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204. *Id.* at 45–46.

205. *Id.* at 46 (internal quotation marks omitted). The State, however, did not provide any explanation as to what actions, in its opinion, Holland could have taken that would have fulfilled the diligence requirement.

206. *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010). Justice Breyer delivered the opinion of the court, in which Chief Justice Roberts, and Justices Stevens, Kennedy, Ginsburg, and Sotomayor joined. Justice Alito concurred in the judgment and filed a concurring opinion. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined as to all but Part I. *Id.*

207. *Id.*

208. *Id.* at 2565.

209. *Id.*

210. *Id.* at 2560 (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)).

211. *Id.* (“[E]quitable principles’ have traditionally ‘governed’ the substantive law of habeas corpus”) (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)).

212. *Id.* at 2562.

213. *Id.* As this Comment is focused on attorney default rather than the general question of whether AEDPA’s limitations period should be subject to equitable tolling, this Comment briefly discusses the Court’s reasoning behind its decision in this regard. For further discussion of this issue, see *id.* at 2560–63. See also Brief for the Petitioner, *supra* note 125, at 36–45; Brief for the Respondent, *supra* note 188, at 22–31. See generally Bellamy, *supra*

Turning to the issue of attorney default, the Court reversed the Eleventh Circuit's ruling and remanded Holland's case to determine whether the factual allegations in the record actually warrant equitable tolling.<sup>214</sup> The Court set the stage for the equitable tolling inquiry by invoking the canons of professional responsibility as a benchmark for evaluating whether the attorney's behavior rose to the level of extraordinary circumstances that prevented Holland from filing his habeas petition on time.<sup>215</sup> The Court found that Collins's failures to perform adequate legal research or communicate with his client about crucial facts such as the Florida Supreme Court's decision—which triggered AEDPA's limitations period again—were actions that violated basic standards of professional responsibility.<sup>216</sup> In this case, the Court concluded, Collins's professional lapses extinguished his client's ability to assert his last appeal for judicial review before his conviction and death sentence was to be carried out.<sup>217</sup> The Court thus found that Collins had violated fundamental principles of professional conduct, and that Holland was seriously prejudiced by his attorney's failures in this regard. Having found that Holland was injured by his attorney's conduct, the Court then had to make a decision: It could either strictly apply agency law, which binds clients to the acts or omissions of their attorneys, or carve out an exception to the agency doctrine by invoking equitable principles and granting Holland the remedy of equitable tolling.<sup>218</sup>

In the beginning of its agency analysis, the Court recognized its previous holdings in the context of procedural default in which petitioners "must 'bear the risk of attorney error.'"<sup>219</sup> While the Court has historically disposed of claims of attorney error resulting in procedural default by applying agency law, the Court continued, equity has also played an integral role in the Court's jurisprudence, and it emphasized the need for flexibility to avoid injustices that may occur when a law is strictly applied.<sup>220</sup> In light of both of these precedents—agency and equity—equity carried the day in Holland's case, and the Court held that professional

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note 42, at 54 (contending that equitable tolling should be applied to AEDPA's limitations period in order to avoid unjust outcomes); Traum, *supra* note 38, at 599 (arguing that equitable tolling is necessary to ensure prisoners are not unfairly deprived of access to habeas relief).

214. *Holland*, 130 S. Ct. at 2564–65.

215. *Id.* at 2562 ("In this case, the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care.").

216. *Id.* at 2565. Specifically, the Court commented that Collins's behavior violated ethical rules that require attorneys to perform "reasonably competent legal work, to communicate with their clients, [and] to keep their clients informed of key developments in their cases." *Id.* at 2564.

217. *Id.* at 2565 (noting that his attorney's failures extinguished "his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence").

218. *Id.* at 2563 (noting that "this case asks how equity should be applied").

219. *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991)). This notion is consistent with the fundamental principles of agency law.

220. *Id.* ("[W]e have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules . . . .") (quoting *Hazel-Atlas Glass Co., v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

misconduct that amounts to egregious attorney behavior can constitute an extraordinary circumstance warranting the use of equitable tolling.<sup>221</sup>

However, the Court limited its ruling by reaffirming its longstanding rule that an attorney's simple negligence is not an extraordinary circumstance, thus it does not warrant equitable tolling.<sup>222</sup> In distinguishing negligence from misconduct, the Court described attorneys who miscalculate the statute of limitations deadline as examples of "garden variety claim[s] of excusable neglect."<sup>223</sup> It labeled Holland's attorney's conduct, on the other hand, as a case of "far more serious instances of attorney misconduct."<sup>224</sup> However, the Court did not specifically define misconduct, rather, it simply held that behavior that falls into the category of attorney misconduct is "not limited to those [circumstances] that satisfy the test the Court of Appeals used in this case."<sup>225</sup>

Finally, the Court turned to the issue of due diligence, and held that Holland had acted with the requisite level of diligence to satisfy this prong of the equitable tolling analysis.<sup>226</sup> The standard required for equitable tolling, the Court continued, was "reasonable diligence" and not "maximum feasible diligence."<sup>227</sup> In making its determination, the Court emphasized that Holland immediately took action when he found out his attorney had failed to file his habeas petition on time by filing his pro se petition the next day.<sup>228</sup>

Upon remand, the Eleventh Circuit handed Holland's case back to the District Court for fact finding and further proceedings consistent with the

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221. *Id.* In supporting its holding, the Court finally decided the circuit split by citing the line of circuit court cases that held attorney misconduct could warrant equitable tolling. *See id.* at 2563–64 (noting that "[s]everal lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove 'egregious' and can be 'extraordinary'"). The Court also distinguished its prior ruling in *Coleman* simply by stating that "*Coleman* was a 'case about federalism'" because its inquiry turned on whether federal courts may excuse a litigant's failure to comply with a state court's procedural rules. *Id.* at 2563. The equitable tolling question in this case, the Court continued, asked only whether federal courts may excuse a litigant's failure to comply with *federal* procedural rules—an inquiry that does not implicate federalism concerns. *Id.*

222. *Id.* at 2564. By excluding negligence from circumstances that may warrant equitable tolling, the Court avoided any contradiction with its ruling in *Lawrence*, in which it held that attorney negligence did not warrant equitable tolling in *Lawrence's* case, but did not evaluate any issues of attorney misconduct. *See Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007).

223. *Holland*, 130 S. Ct. at 2564.

224. *Id.*

225. *Id.* Here, the Court referred to the Eleventh Circuit's test to determine where to draw the line between attorney negligence or misconduct, which stated that "attorney negligence that is 'grossly negligent' can never warrant equitable tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part.'" *Id.* at 2562–63 (quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008) (per curiam)).

226. *Id.* at 2565.

227. *Id.*

228. *Id.* (noting that "the *very day* Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court").



Supreme Court's judgment.<sup>229</sup> As of the publication of this Comment, Holland's case is still pending in the District Court.

#### D. *The Concurrence*

Justice Alito wrote a concurring opinion in which he agreed with the majority that the facts of Holland's case suggest that his attorney's conduct was so far beyond ordinary negligence that equitable tolling would likely be awarded in this case upon remand.<sup>230</sup> Justice Alito wrote separately, however, because he thought the majority opinion did not provide sufficient guidance for the lower courts.<sup>231</sup> While he acknowledged the impracticality of attempting to anticipate and define every situation in which an attorney's behavior could be construed as negligence or misconduct, he set forth "several broad principles" about the negligence/misconduct distinction to guide the lower courts in their future cases.<sup>232</sup> First, Justice Alito explained that it would be impractical for courts to attempt to distinguish "ordinary" attorney negligence from gross negligence,<sup>233</sup> therefore, any form of attorney negligence should never constitute equitable tolling and instead must always be attributed to the client under agency principles.<sup>234</sup> Since the attorney is acting on behalf of the client in furtherance of the litigation, he explained, the attorney's negligence is constructively attributed to the client.<sup>235</sup> Therefore, he concluded, the attorney's negligence is not a circumstance beyond the prisoner's control that would prevent him from filing his habeas petition on time.<sup>236</sup>

Justice Alito argued that attorney misconduct, on the other hand, would be grounds for equitable tolling of AEDPA's limitations period because an agent's misconduct is not constructively attributable to the client.<sup>237</sup> In this aspect of his opinion, he cited the Second Circuit's agency analysis in stating that when an attorney's actions are completely adverse to the client's interests, the attorney is not truly acting as the client's agent and therefore his actions are not constructively attributed to the client.<sup>238</sup> This rule

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229. See *Holland v. Florida*, No. 07-13366, 2010 U.S. App. LEXIS 16058, at \*1 (11th Cir. Aug. 3, 2010) (ordering the District Court to hold an evidentiary hearing if necessary).

230. *Holland*, 130 S. Ct. at 2566 (Alito, J., concurring) (noting that Holland "alleged certain facts that go well beyond any form of attorney negligence").

231. *Id.* ("Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard.").

232. *Id.*

233. *Id.* at 2567 (arguing that the question of equitable tolling should not "turn on the highly artificial distinction between gross and ordinary negligence").

234. *Id.* at 2566 (noting that the Court's prior cases of procedural default make the law "abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling").

235. *Id.* at 2566–67 (explaining that "[a]ttorney ignorance or inadvertence is not 'cause' [for excusing a procedural default] because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner 'must bear the risk of attorney error'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991))).

236. *Id.* at 2567.

237. *Id.* at 2568.

238. *Id.* ("[W]hen an 'agent acts in a manner completely adverse to the principal's interests,' the 'principal is not charged with [the] agent's misdeeds.'" (alteration in original))

separating attorney negligence from misconduct, Alito reasoned, was in full conformity with agency law. Further, he remarked, “[c]ommon 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.”<sup>239</sup> If Holland’s allegations of his attorney’s conduct prove to be true, Justice Alito concluded, they would establish the extraordinary circumstances beyond his control that warrant equitable tolling.<sup>240</sup>

#### *E. The Dissent*

Justices Scalia and Thomas did not agree with either aspect of the majority’s ruling. The dissent stated its opinion that AEDPA’s limitations period should not be subject to equitable tolling, and Holland would not be eligible for such a remedy even if it were.<sup>241</sup> In the plain language of the statute, the dissent emphasized, Congress had enumerated specific events that toll the limitations period, leaving no room for the Court to add exceptions, such as equitable tolling, as it sees fit.<sup>242</sup>

The dissent then turned to the facts of Holland’s case and firmly adhered to the principles of agency law in its determination that Holland’s circumstances did not warrant equitable tolling.<sup>243</sup> The dissent explained that Congress could have included errors made by state-appointed habeas counsel as a statutory basis for tolling the limitations period, but it did not.<sup>244</sup> Therefore, the dissent concluded, “when a state habeas petitioner’s appeal is filed too late because of attorney error, the petitioner is out of luck.”<sup>245</sup>

For support, the dissent pointed to the Court’s recent decisions in *Coleman* and *Lawrence*. *Coleman*, the dissent stated, was not a case about federalism as the majority proclaimed.<sup>246</sup> Instead, *Coleman* merely reinforced the principle that because there is no Sixth Amendment right to the effective assistance of counsel in habeas proceedings, “the rule holding [the petitioner] responsible for his attorney’s acts applies with full force” in this case.<sup>247</sup> The dissent also reasoned that *Lawrence* was squarely on point with the facts of Holland’s case.<sup>248</sup> Collins, the dissent proceeded, most

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(quoting *Baldyague v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring))).

239. *Id.* (emphasizing that petitioners should not be held accountable for an attorney’s misconduct especially when “the litigant’s reasonable efforts to terminate the attorney’s representation have been thwarted by forces wholly beyond the petitioner’s control”).

240. *Id.*

241. *Id.* at 2569 (Scalia, J., dissenting).

242. *Id.* at 2570. For further discussion of the dissent’s interpretation of AEDPA’s limitations period, which Justice Thomas did not join, see *id.* at 2569–71.

243. *Id.* at 2571 (“Because the attorney is the litigant’s agent, the attorney’s acts (or failures to act) within the scope of the representation are treated as those of his client . . .”).

244. *Id.*

245. *Id.*

246. *Id.* at 2571 n.4.

247. *Id.* at 2571 (citing *Coleman v. Thompson*, 501 U.S. 722, 752–54 (1991)).

248. *Id.* at 2572.

likely made the exact mistake that the attorney in *Lawrence* made by assuming incorrectly that a pending petition for certiorari in the Supreme Court seeking review of the state court's denial of post-conviction relief would toll AEDPA's timing provisions under § 2244(d)(2).<sup>249</sup> Although this mistake would account for Collins's conduct, the dissent persisted, it would be insufficient to warrant equitable tolling under *Lawrence*.<sup>250</sup>

Justice Scalia then addressed the due diligence standard of the equitable tolling analysis. In the dissent's opinion, nothing Collins did actually prevented Holland from filing his habeas petition on time.<sup>251</sup> Collins's repeated failures to respond to Holland's requests for information, Justice Scalia continued, should have alerted Holland that "Collins had fallen asleep at the switch."<sup>252</sup> Accordingly, the dissent admonished, Holland could have filed a "'protective' federal habeas application" and asked the federal court to stay its proceedings until the state courts finished their review.<sup>253</sup> He could have also checked the prison writ room for his court records on a more regular basis.<sup>254</sup> In short, the dissent argued that Holland could have taken many other actions to file his habeas petition on time and therefore was not convinced that Holland had acted with the requisite diligence required for equitable tolling.<sup>255</sup>

Finally, the dissent expressed concern over the precedential and policy ramifications of the majority's opinion. First, the dissent stated that the majority's holding created a disincentive for states to provide post-conviction counsel at all, as "[i]t would be utterly perverse . . . to penalize the State for *providing* habeas petitioners with representation, when the

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249. *Id.* The defaulting attorney in *Lawrence* had made this exact mistake in calculating AEDPA's limitations period. See *Lawrence v. Florida*, 549 U.S. 327, 330–36 (2007). In *Lawrence*, the Court first noted that the text of AEDPA's limitations period provided for statutory tolling only while state courts reviewed a habeas petition. *Id.* at 332. The Supreme Court, however, "is not a part of a State's post-conviction procedures" and therefore section 2244(d)(2) of AEDPA's limitations period is not tolled during the pendency of a petition for certiorari. *Id.* (internal quotation marks omitted). While Collins did not seem to be aware of the rule in *Lawrence*, Holland apparently was, and brought this issue to Collins's attention in one of the many letters he wrote to his attorney. See *Holland*, 130 S. Ct. at 2557 ("Dear Mr. Bradley M. Collins: . . . . It's my understanding that the AEDPA time limitations is not tolled during discretionary appellate reviews, such as certiorari applications resulting from denial of state post conviction proceedings.").

250. *Holland*, 130 S. Ct. at 2572 (Scalia, J., dissenting).

251. *Id.* at 2573. This aspect of the dissent's analysis is on par with the Seventh Circuit, which before *Holland* had consistently held that diligent prisoners could always file their own pro se petitions in federal court if they were worried that their attorneys were going to miss the deadline. See, e.g., *Powell v. Davis*, 415 F.3d 722, 728 (7th Cir. 2005) (holding that an attorney's misconduct in abandoning the prisoner's case for over a year did not actually prevent the prisoner from filing a timely petition); *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (explaining that attorney misconduct does not prevent a prisoner from filing his own pro se habeas petition because "petitioners bear ultimate responsibility for their filings, even if that means preparing duplicative petitions").

252. *Holland*, 130 S. Ct. at 2573 (Scalia, J., dissenting).

253. *Id.* at 2576.

254. *Id.*

255. *Id.* at 2575.

State could avoid equitable tolling by providing none at all.”<sup>256</sup> Second, the dissent lamented, the majority failed to adequately explain the errors in the Eleventh Circuit’s test and at the same time offered the lower courts little guidance as to what test they should actually use.<sup>257</sup>

### III. QUESTIONS RAISED BY THE *HOLLAND* DECISION

In *Holland*, the Supreme Court finally determined that AEDPA’s statute of limitations is subject to equitable tolling, and that in some circumstances, an attorney’s failure to file a habeas corpus petition on behalf of a prisoner may warrant the use of equitable tolling to allow the prisoner’s petition to be heard on the merits. Because the Supreme Court’s decision in *Holland* is relatively recent, its long-term impact is hard to determine at this point. However, many commentators would likely applaud the first part of the Court’s decision that AEDPA’s limitations period is subject to equitable tolling.<sup>258</sup> The focus of this Comment, however, is directed toward the second part of the Court’s ruling: that an attorney’s negligence will never constitute such “extraordinary circumstances” to justify the use of equitable tolling, but that some situations involving attorney misconduct may.<sup>259</sup> While the Court’s decision to strike down the Eleventh Circuit’s overly narrow equitable tolling standard is commendable, this Comment argues that the Court incorrectly applied agency law to the context of post-conviction habeas corpus representation and therefore did not go far enough to protect a prisoner’s access to his final appeal in the criminal justice system: the writ of habeas corpus.

#### A. *The New Rule for Equitable Tolling After Holland: How the Negligence/Misconduct Standard is Unworkable in Practice*

As discussed above, the Court affirmed the equitable tolling rule it had previously referred to in *Lawrence*, which states that a prisoner may be granted equitable tolling if he can show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”<sup>260</sup> This section of the Comment takes a

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256. *Id.* at 2571 n.5.

257. *Id.* at 2574. Justice Scalia then proceeded to attack the majority’s reliance on attorney ethics rules in his usual rhetorical fashion: “The only thing the Court offers that approaches substantive instruction is its implicit approval of ‘fundamental canons of professional responsibility,’ articulated by an ad hoc group of legal-ethicist *amici* consisting mainly of professors of that least analytically rigorous and hence most subjective of law-school subjects, legal ethics.” *Id.* at 2575.

258. *See, e.g.*, Bellamy, *supra* note 42, at 54 (supporting the use of equitable tolling in AEDPA litigation in order to avoid a miscarriage of justice); Stevenson, *supra* note 24, at 360 (arguing that the denial of habeas corpus review on procedural grounds, such as the failure to file before the limitations period, is unfair); Traum, *supra* note 38, at 599 (“[E]quitable tolling is essential to ensuring that the Court, in applying Section 2244(d) [AEDPA’s limitations period], does not unfairly deprive prisoners of access to the writ.”).

259. *Holland*, 130 S. Ct. at 2564.

260. *Id.* at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also supra* Part I.B.

closer look at the Court's rule, specifically the range of attorney behaviors that constitute "extraordinary circumstances" and the actions the prisoner must take to meet the "due diligence" threshold.

### 1. Extraordinary Circumstances: Why are Attorneys Ordinarily Negligent?

As the Court noted in *Holland*, and the circuit courts of appeals found in similar cases of attorney default in AEDPA litigation, the extraordinary circumstances aspect of the equitable tolling rule requires courts to scrutinize the attorney's conduct in failing to file a timely habeas petition on behalf of his client.<sup>261</sup> Specifically, the Court held that simple attorney negligence does not constitute "extraordinary circumstances,"<sup>262</sup> but that in some situations, professional misconduct that amounts to egregious attorney behavior does.<sup>263</sup> *Holland* is not the first time that the Supreme Court has held that attorney negligence does not warrant equitable relief for the injured client, and has alluded several times to the notion that attorney negligence seems to be an ordinary occurrence within the legal profession.<sup>264</sup>

The Court's ruling that attorney negligence is not an "extraordinary circumstance" is unsettling for many reasons. Why does the Supreme Court seem to be complacent with the notion that attorney negligence is an ordinary occurrence within the legal profession? The legal profession is self regulated and has established attorney disciplinary mechanisms available to deter unprofessional conduct,<sup>265</sup> but the Court did not once refer to these mechanisms or offer the lower courts any guidance as to how to craft rules that will improve the baseline standard of attorney behavior. Substandard criminal defense representation, at any stage of the litigation, undermines the adversarial process<sup>266</sup> and engenders a negative public perception of the criminal justice system.<sup>267</sup> Aside from the societal costs,

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261. *Holland*, 130 S. Ct. at 2562.

262. *Id.* at 2564 (noting that an attorney's "'garden variety claim of excusable neglect' . . . does not warrant equitable tolling" (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990))).

263. *Id.* at 2563 (noting that "professional misconduct that . . . amount[s] to egregious behavior [may] create an extraordinary circumstance that warrants equitable tolling").

264. *See, e.g.*, *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (declining to allow equitable tolling for attorney mistake because it would then "essentially equitably toll limitations periods for every person whose attorney missed a deadline"); *Irwin*, 498 U.S. at 96 (describing an attorney's failure to submit a timely employment discrimination claim as a "garden variety claim" of an attorney's excusable neglect); *see also Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (noting that "attorney negligence is not extraordinary").

265. Every jurisdiction maintains a disciplinary system that regulates lawyers according to codified ethical rules, and a license to practice law is conditioned upon compliance with the jurisdiction's standards of professional conduct. *See Curtis & Resnik, supra* note 26, at 1615–16.

266. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that ineffective criminal defense representation undermines the "proper functioning of the adversarial process").

267. *See Curtis & Resnik, supra* note 26, at 1628 (lamenting that "[p]oor provision of criminal defense services is a grievous injury not only for clients but for the legal profession and the public"); *see also Stevenson, supra* note 24, at 342 ("If the administration of

an ABA report commented that to the wrongfully convicted, “the cost of inadequate defense representation is reflected in countless wasted years spent in prison, the deprivation of cherished rights . . . and quite possibly the loss of life.”<sup>268</sup> When an attorney miscalculates his client’s AEDPA deadline or engages in similar negligent conduct, the prisoner’s right to habeas corpus is extinguished, a situation which may engender the very consequences that the ABA predicts. Thus, the Court has a strong policy incentive to deter attorney negligence in this context, and it is unfortunate for the wrongfully convicted prisoner—not to mention the ideals of fairness and justice—that the Court chose not to do so in its opinion in *Holland*.

Furthermore, the Court’s distinction between negligence and misconduct seems to be unworkable in practice because it may lead to disparate results for prisoners who have pending cases in the circuit courts of appeals. While the Court stated definitively that ordinary attorney negligence does not warrant equitable tolling, it did not actually articulate a definable standard as to what types of attorney behavior *would* rise to the level of extraordinary circumstances. For example, the Court overruled the Eleventh Circuit’s test, which required a prisoner to offer “proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth” in order to be granted equitable tolling after his attorney missed the AEDPA deadline.<sup>269</sup> However, the Court did not offer a test of its own, but instead merely stated, “we hold that such [extraordinary] circumstances are not limited to those that satisfy the test the Court of Appeals used in this case.”<sup>270</sup> In his dissent, Justice Scalia emphasized this point when he stated that “the Court offers almost no clue about what test [the Eleventh Circuit] should have applied”<sup>271</sup> and Justice Alito stated that “Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard.”<sup>272</sup>

Commendably, the Court did at least suggest that lower courts use the canons of professional responsibility as a benchmark for determining whether the attorney’s behavior amounted to misconduct.<sup>273</sup> Indeed, the

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criminal justice is perceived to be unfair, corrupt, biased, and error-plagued, it is not seen as a corrective or necessary component of public safety.”)

268. *GIDEON’S BROKEN PROMISE*, *supra* note 26, at 4. The Third Circuit’s jurisprudence in AEDPA litigation reflected similar sentiments prior to *Holland* by affording considerable weight to the fact that there may be a death sentence on the line when deciding whether to bind a habeas petitioner by his attorney’s error. *See Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (recognizing that in capital cases, “the consequences of error are terminal, and we therefore pay particular attention to whether principles of ‘equity would make the rigid application of a limitation period unfair’”) (quoting *Miller v. N.J. State Dep’t of Corr.*, 145 F.3d 616, 618 (1998)).

269. *Holland v. Florida*, 539 F.3d 1334, 1339 (2008) (per curiam).

270. *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010).

271. *Id.* at 2574 (Scalia, J., dissenting).

272. *Id.* at 2566 (Alito, J., concurring).

273. *Id.* at 2564–65 (majority opinion). Justice Scalia also acknowledged this point in his dissent, stating that “[t]he only thing the Court offers that approaches substantive instruction is its implicit approval of ‘fundamental canons of professional responsibility.’” *Id.* at 2574 (Scalia, J., dissenting).

Court remarked that in *Holland*'s case, "the 'extraordinary circumstances' at issue involve an attorney's failure to satisfy professional standards of care."<sup>274</sup> The Court then cited an attorney's duties to, among other things, "communicate with their clients" and "perform reasonably competent legal work."<sup>275</sup> Although such standards of professional conduct are important, requiring the lower courts to use these standards to bisect the line between negligence and misconduct—which determines whether a prisoner's habeas claim will be heard on the merits or not—may still very likely lead to disparate conclusions by the lower courts.

For example, before *Holland* the Third and Seventh Circuits reached opposite conclusions in two cases that presented a similar set of facts: *Modrowski v. Mote*<sup>276</sup> and *Nara v. Frank*.<sup>277</sup> The attorneys in each case failed to meet AEDPA's limitations deadline, failed to effectively communicate with their clients, and performed almost no legal work on their clients' respective habeas petitions during the year in which the limitations period lapsed.<sup>278</sup> Although both attorneys displayed similar behavior in effectively abandoning their clients, the Third Circuit found that this behavior amounted to attorney misconduct,<sup>279</sup> while the Seventh Circuit held that it was merely attorney negligence.<sup>280</sup> *Nara*, the prisoner in the Third Circuit, was awarded equitable tolling and had his habeas petition heard on the merits,<sup>281</sup> while the unlucky prisoner in the Seventh Circuit, *Modrowski*, was not.<sup>282</sup> These results have real consequences. When all was said and done, *Nara*'s habeas corpus petition was ultimately granted. After the Third Circuit heard his claims on the merits, it found that he had in fact been wrongfully convicted.<sup>283</sup> What might have come of *Modrowski*'s habeas claims, no one will ever know, since his attorney filed the petition one day late.

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274. *Id.* at 2562 (majority opinion).

275. *Id.* at 2564. See also MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003) (requiring a lawyer to "act with reasonable diligence and promptness in representing a client"); *Id.* R. 1.4(a)(3) (requiring a lawyer to "keep the client reasonably informed about the status of the matter").

276. 322 F.3d 965 (7th Cir. 2003).

277. 264 F.3d 310 (3d Cir. 2001).

278. See *Modrowski*, 322 F.3d at 966. In *Modrowski*, the Seventh Circuit noted that in addition to the attorney filing the habeas petition one day late, "[t]he petition was unsigned, missing the filing fee and exhibits, and had blank paragraphs where many of *Modrowski*'s constitutional claims should have been." *Id.* at 966. In *Nara*, the Third Circuit noted that the prisoner's allegations that his attorney had "effectively abandoned" him halfway through the litigation when she failed to move his case forward, if found to be true in a factual hearing upon remand, would be enough for equitable tolling. *Nara*, 264 F.3d at 320.

279. *Nara*, 264 F.3d at 320.

280. *Modrowski*, 322 F.3d at 966 (affirming the district court's dismissal of *Modrowski*'s petition as untimely because attorney negligence does not warrant equitable tolling).

281. Upon remand, the Magistrate Judge found that equitable tolling should apply under *Nara*'s circumstances. *Nara v. Frank*, Civil Action No. 99-5, 2004 U.S. Dist. LEXIS 6508, at \*1 (W.D. Pa. Mar. 10, 2004), *aff'd*, 488 F.3d 187 (3d Cir. 2007).

282. *Modrowski*, 322 F.3d at 968.

283. *Nara v. Frank*, 488 F.3d 187, 189 (3d Cir. 2007) (affirming the district court's order directing the Commonwealth to release *Nara* if it did not retry him within 120 days).

In similar fashion, when courts seek to apply the rules of professional responsibility, conduct that meets the threshold of “reasonably competent legal work” in one circuit may not pass muster in another.<sup>284</sup> Accordingly, the Court’s rule requiring lower courts to distinguish between negligence and misconduct may lead to very inequitable results.

This approach to equitable tolling also creates an ironic result in that prisoners will actually fare better the worse their attorney’s conduct becomes. It is only if his attorney crosses the line to misconduct that the prisoner has a chance to receive equitable tolling in the case of attorney default.<sup>285</sup> Equitable tolling is never granted for “ordinary” attorney negligence,<sup>286</sup> therefore, if the attorney commits misconduct when filing the petition past AEDPA’s deadline, he is actually putting his client in a better position for equitable tolling than if he were merely negligent in missing the deadline.<sup>287</sup> Accordingly, this result may create the perverse incentive for attorneys who are confused about AEDPA’s complex procedural requirements to abandon their clients’ cases, rather than attempt to better understand the law and risk the chance of filing the petitions late. While it is difficult to believe that attorneys would deliberately commit misconduct in an effort to better serve their clients, the perverse incentive that this rule conceivably engenders certainly does not serve to improve the professional standards of conduct in the legal profession.

## 2. Due Diligence: The Due Diligence Standard in the Context of Prison

The Court also addressed the actions Albert Holland took in an effort to contact his attorney, obtain information about his case, and ultimately file his own pro se habeas petition when he realized his attorney had missed the deadline. While the Court did establish that the standard for due diligence is “reasonable diligence” and not “maximum feasible diligence,”<sup>288</sup> it left open the question that the courts of appeals had debated,<sup>289</sup> namely, whether the specific circumstances of the prisoner’s confinement should be factored into the due diligence analysis.<sup>290</sup> While the Court noted Holland’s repeated attempts to contact his attorney, the courts, and the Florida State Bar Association, it made no reference to the fact that Holland was doing all of this from inside the walls of prison,<sup>291</sup> even though

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284. That said, one could question how an attorney’s failure to file a petition on time and thereby extinguishing a client’s rights to federal habeas corpus review could ever be “reasonably competent” legal representation in any sense of the term.

285. See *supra* note 221 and accompanying text.

286. See *supra* note 222 and accompanying text.

287. See *supra* Part I.A.2.

288. *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010) (internal citations omitted).

289. See *supra* Part I.B.2.

290. *Holland*, 130 S. Ct. at 2565. While the Court addressed the issue of Holland’s due diligence, it did not state whether it was considering the circumstances of his imprisonment into its analysis.

291. *Id.* Justice Alito did not address the due diligence part of the equitable tolling test in his concurring opinion. *Id.* at 2565–68 (Alito, J., concurring). Justice Scalia did not think that Holland had shown the requisite standard at all. *Id.* at 2576 (Scalia, J., dissenting)



Holland urged the Court to take his imprisonment into account in his brief on the merits.<sup>292</sup>

Nonetheless, in overturning the District Court's determination that Holland did not act with the requisite diligence, the Court reviewed the actions Holland took in attempting to obtain information about his case when his attorney stopped communicating with him.<sup>293</sup> Holland's actions, however, were met with insurmountable barriers. For example, the Clerk told Holland, an indigent prisoner, that he would have to pay seventy-seven dollars to obtain copies of his court records.<sup>294</sup> As the ABA has found, most habeas corpus petitioners are indigent and cannot afford to pay court fees,<sup>295</sup> an issue which greatly impacts a prisoner's ability to show due diligence in obtaining information about his case. If a prisoner cannot obtain information about a state court's denial of his appeal, he will not be able to determine when his AEDPA clock begins running.<sup>296</sup> Besides the difficulties in obtaining information about the prisoner's specific case, often times prisoners have a hard time finding information about the law and AEDPA's statute of limitations in the first place. For example, prison libraries are often deficient and prisoners' access to these libraries can be severely restricted.<sup>297</sup> One court has even justified the use of equitable tolling on this basis, noting that even a diligent prisoner's inability to learn about AEDPA due to prison law library deficiencies constituted extraordinary circumstances that prevented him from filing on time.<sup>298</sup>

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(stating that Holland could have pursued other reasonable measures, such as seeking permission to proceed pro se and formally discharging his attorney, instead of requesting that his attorney be replaced, in order to free himself from his attorney's inadequate representation). Justice Alito, however, noted in his concurring opinion that even Holland's efforts to proceed pro se "were successfully opposed by the State on the perverse ground that the petitioner failed to act through appointed counsel." *Id.* at 2568 (Alito, J., concurring).

292. See Brief for Petitioner, *supra* note 125, at 59–60 (arguing that the due diligence requirement should be "construed in light of a habeas petitioner's confinement in prison and any special restrictions that incarceration might impose on such a person").

293. *Holland*, 130 S. Ct. at 2565 (noting that "Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts [and] their clerks . . .").

294. See *supra* text accompanying note 126.

295. See Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 902 (1996) (stating that habeas petitioners such as "[c]apital inmates almost uniformly are indigent") (internal citations omitted); Stevenson, *supra* note 24, at 349 (describing that most habeas prisoners have "virtually no resources" with which to litigate in habeas proceedings).

296. See *Holland*, 130 S. Ct. at 2564 (noting that Holland's attorney had "failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case").

297. See Mello & Duffy, *supra* note 35, at 484 (noting that "many condemned inmates are prohibited from gaining physical access to the prison law library, which itself is often inadequate"). Even the Fifth Circuit once explained that prisoners cannot use law libraries adequately without the aid of trained law librarians or paralegals. See *Cruz v. Hauck*, 627 F.2d 710, 720–21 (5th Cir. 1980) (stating that when determining if a prisoner has meaningful access to law libraries, "[i]t is not enough simply to say the books are there").

298. See *Roy v. Lampert*, 465 F.3d 964, 970, 975 (9th Cir. 2006) (holding that equitable tolling would be warranted when deficiencies in a prison library prevented a diligent pro se

Scholars and jurists have also argued that a habeas petitioner's limited ability to communicate with the outside world is a barrier to his ability to diligently request information from, or monitor the conduct of, his defaulting attorney.<sup>299</sup> For example, the petitioners in both *Holland* and *Lawrence* had no regular access to phones and were not permitted to use the Internet.<sup>300</sup> Contacting a defaulting attorney while in prison is difficult, and thus courts should take the context of imprisonment into account when determining whether the prisoner was diligent.

*B. Rationale: Why Agency Law Principles are Unworkable in the Post-Conviction Context*

Both the majority opinion and the concurrence relied upon agency law principles to reach the conclusion that *Holland* should given equitable tolling upon remand if the lower court finds that his allegations of his attorney's conduct are true.<sup>301</sup> However, a deeper analysis reveals that agency law's foundational principles are unworkable in the post-conviction context. This section of the Comment discusses the Court's and Justice Alito's application of agency law in *Holland*, and evaluates the effectiveness of the agency doctrine in achieving just outcomes for prisoners whose attorneys fail to meet AEDPA's statute of limitations deadline.

As the Restatement of Agency makes clear, one of the founding principles of agency law is that the principal has the ability to control the agent.<sup>302</sup> Accordingly, the attribution of the lawyer's conduct to the client is appropriate because clients are the only parties that can direct and oversee

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prisoner from learning about the limitations period). *Holland* also argued this point in his brief. See Brief for Petitioner, *supra* note 125, at 21–22.

299. See, e.g., MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 17–18 (3d ed. 2002). See also *Wilkinson v. Austin*, 545 U.S. 209, 209 (2005) (describing the increasing use of “Supermax” prisons as a form of incarceration that is extremely isolated and stating, “Opportunities for visitation are rare and are always conducted through glass walls. Inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact”).

300. See Brief for Petitioner at 11 n.25, *Lawrence v. Florida*, 549 U.S. 327 (2007) (No. 05-8820) (describing death row prisoner's lack of access to a computer). Cf. Brief for Petitioner, *supra* note 125, at 2 n.1 (describing a habeas petitioner's difficulties in contacting his attorney about the status of his case because death row inmates do not have access to computers).

301. See *Holland*, 130 S. Ct. at 2564–65 (referencing the Restatement of Agency); *Id.* at 2566–68 (Alito, J., concurring).

302. As the RESTATEMENT OF AGENCY explains, “[t]he agent shall act on the principal's behalf and subject to the principal's control.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000) (explaining that the attribution of an attorney's conduct to the client is appropriate because clients—as the parties involved in the case being litigated—are the only actors that can control the lawyer's actions in the matter at hand); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 62 (2005). Before *Holland*, the Seventh Circuit applied this premise of agency law in its jurisprudence. For example, the Seventh Circuit once stated that, “‘petitioners, whether in prison or not, must vigilantly oversee the actions of their attorneys.’” *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (quoting *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001)).

their attorneys' actions.<sup>303</sup> Justice Alito echoed this reasoning in his concurrence, when he stated that ordinary attorney negligence is not a circumstance beyond the litigant's control, therefore, it does not warrant equitable tolling.<sup>304</sup> Yet in habeas corpus litigation, the Court and Justice Alito fail to consider that the clients in these agency relationships are incarcerated.<sup>305</sup> Therefore, scholars have raised serious questions as to whether these clients can actually exercise supervisory control over their attorneys. The first concern is that prisons have traditionally been built in remote places with highly restrictive visitor and mail policies.<sup>306</sup> Consequently, the simple fact that a habeas petitioner has limited ability to communicate with the outside world is a barrier to his ability to supervise his attorney.<sup>307</sup> Second, because the majority of prisoners filing habeas corpus petitions receive appointed counsel, they are much less likely than a paying client to influence which tasks and priorities the lawyer will perform.<sup>308</sup>

A second, and perhaps more significant flaw in the agency analysis in the post-conviction context, is Justice Alito's discussion of a prisoner's ability to respond to an attorney's negligence versus an attorney's misconduct. In his concurrence, Justice Alito explained that a lawyer's negligence is within the prisoner's control,<sup>309</sup> while a lawyer's misconduct is not.<sup>310</sup> And any circumstances that are within a prisoner's control—such as an attorney's gross negligence—cannot by definition be extraordinary circumstances that prevented a prisoner from filing his habeas petition.<sup>311</sup> While Justice Alito's distinction regarding a client's ability to control his attorney's

303. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000).

304. *Holland*, 130 S. Ct. at 2567 (Alito, J., concurring) (explaining “the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus *is not a circumstance beyond the litigant's control*”) (emphasis added).

305. *See Hearings on S. 2216, supra* note 35, at 198 (statement of Phylis Skloot Bamberger on behalf of the National Legal Aid and Defender Association) (explaining that “virtually all habeas petitioners are prisoners”).

306. *See MUSHLIN, supra* note 299, at 17–18.

307. *See supra* notes 299–300 and accompanying text.

308. *See Strickland v. Washington*, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) (“It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.”); *see also Green, supra* note 27, at 1176.

309. *Holland*, 130 S. Ct. at 2567 (Alito, J., concurring).

310. *Id.* at 2568 (explaining that Holland's allegations of his attorney's misconduct would “suffice to establish extraordinary circumstances *beyond his control*”) (emphasis added).

311. *See id.* at 2567 (stating that an attorney's gross negligence does not establish an extraordinary circumstance); *see also Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (holding that attorney miscalculation of AEDPA's deadline does not warrant equitable tolling). Even before *Holland*, many of the circuit courts adopted similar reasoning. *See, e.g., Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) (noting that attorney error does not create the extraordinary circumstances equitable tolling requires); *Harris v. Hutchinson*, 209 F.3d 325, 331 (4th Cir. 2000) (“[A] mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in . . .”).

actions may very well be a good standard for civil litigation between private litigants, his rationale is not practical in the post-conviction, AEDPA litigation context.

It is difficult to understand how an incarcerated client, who most likely has little if any access to phones, computers, or Internet, and has absolutely no ability to show up at his attorney's office for an in-person visit, could possibly have any more control over his attorney's negligent behavior than he would over his attorney's misconduct. Putting Justice Alito's examples of attorney negligence to the test illustrates this point. For example, Justice Alito identified examples of attorney negligence as instances in which an attorney miscalculates the filing deadline, fails to do the appropriate research to determine the deadline, mails the petition to the wrong address, or simply forgets about the deadline altogether.<sup>312</sup> How can a prisoner possibly be required to ensure that his attorney does not make these simple mistakes? As the particular facts of Holland's case prove, even when a prisoner is able to successfully research AEDPA's law, determine his correct filing deadline under the law, and present his attorney with this information, the prisoner nonetheless cannot ultimately control his attorney's failure to correctly comprehend AEDPA's limitations requirement.<sup>313</sup>

Moreover, Justice Alito stated that he would not allow equitable tolling if the prisoner's attorney was negligent in mailing a client's habeas petition to the wrong address.<sup>314</sup> How could a client, who is confined inside a penitentiary, be expected to make sure his attorney does not mistakenly write an incorrect address on the envelope when submitting his federal habeas corpus petition? If a client is expected to ensure the attorney is performing adequate legal research, double-check the attorney's mathematical calculations of AEDPA's complex tolling requirements, and review the address labels on mailing envelopes, one might inquire as to the point of having an attorney in the first place. For these reasons, incarcerated clients cannot reasonably be expected to supervise their attorneys in the manner that the agency relationship assumes.<sup>315</sup>

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312. *Holland*, 130 S. Ct. at 2567 (Alito, J., concurring). In reference to these specific examples of attorney default, Justice Alito specifically emphasized that "the mere fact that a missed deadline involves 'gross negligence' on the part of counsel does not by itself establish an extraordinary circumstance." *Id.*

313. *Id.* at 2564 (majority opinion) (noting that "Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules"). See also *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) ("Even if a prisoner diligently checks an attorney's references and disciplinary records, *he still cannot prevent the attorney from bungling his case*. Nonetheless, we hold the prisoner responsible for his attorney's bungling.") (emphasis added).

314. *Holland*, 130 S. Ct. at 2567 (Alito, J., concurring).

315. See *Curtis & Resnik*, *supra* note 26, at 1620 (demonstrating that clients have little or no ability to monitor criminal defense attorneys); *Green*, *supra* note 27, at 1170 (explaining that many criminal defense attorneys do not keep clients reasonably informed or comply with clients' requests for information).

To be sure, many of the above mentioned examples of attorney negligence do not only affect prisoners, but also clients in civil cases who are not incarcerated.<sup>316</sup> Although non-incarcerated clients in civil cases certainly have a greater ability to call, visit, and otherwise supervise their attorneys than prisoners do, such clients are not necessarily standing over their attorney's shoulders to ensure that the attorney does not mail a petition to the wrong address.<sup>317</sup> However, there are crucial differences in the application of agency principles in these two contexts. First, the stakes are much higher in criminal cases than in civil cases—especially when an imminent execution is on the line—and second, civil clients have remedies available to them in the case of an attorney's negligence that convicted prisoners do not.<sup>318</sup> The agency relationship assumes that clients may recover monetary damages from injuries they sustain because of their attorneys' actions by way of legal malpractice lawsuits.<sup>319</sup> But a prisoner serving a life sentence or sitting on death row is not going to be compensated for his injury—an unjust incarceration or possibly an execution—by a monetary damages award. Moreover, due to the complicated causation requirements involved in criminal legal malpractice lawsuits, commentators and practitioners have found that it is virtually impossible for a prisoner to obtain his desired relief, such as a fair trial or exoneration, through such actions.<sup>320</sup> Furthermore, most habeas petitioners—as convicted prisoners—cannot even invoke the remedies of

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316. See, e.g., *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 91 (1990) (discussing an attorney's failure to timely file a client's civil discrimination complaint against the Veteran's Administration before the statute of limitations had run).

317. *Holland*, 130 S. Ct. at 2567 (Alito, J., concurring).

318. In civil legal malpractice actions, for example, a former client may sue the defendant attorney in tort or contract and must prove that the attorney either violated a duty of care or breached another fiduciary duty. See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006); see also GILLERS, *supra* note 302, at 63. In criminal malpractice suits, however, the great majority of courts nationwide require the former client to prove his actual innocence or obtain exoneration before he can sue his defense attorney for malpractice. See RONALD E. MALLIN & JEFFREY M. SMITH, 3 LEGAL MALPRACTICE § 27:13 (2010). Due to the procedural hurdles that guard the door to criminal malpractice actions, scholars and commentators have demonstrated that this remedy is largely unavailable to clients who may have been harmed by negligent representation. *Id.* at § 27:2 (noting that statistics compiled by the American Bar Association's National Legal Malpractice Data Center show that claims against "criminal law practitioners account only for a small percentage of all [malpractice] claims"); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 40; Green, *supra* note 27, at 1195 ("It [is] almost impossible for aggrieved criminal defendants to prevail in a malpractice action, assuming they could find a lawyer to take their cases, because of doctrinal barriers."). Moreover, in some jurisdictions public defenders are given absolute immunity from malpractice liability under state law. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (2000); see also GILLERS, *supra* note 302, at 649.

319. See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006).

320. See Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1265–70 (2003). The requirement to prove actual innocence or obtain post-conviction relief is needed for the defendant to prove the causation element of a malpractice tort claim, that "but for his counsel's negligence, he would have been acquitted of the offense." *Id.* at 1279.

the Sixth Amendment right to the effective assistance of counsel.<sup>321</sup> Because none of the remedies and procedures available to clients in a typical agency relationship apply to convicted prisoners, strict agency principles are not fairly applied in this context. From a prisoner's perspective, the Court's line-drawing between attorney negligence and misconduct will only result in gross inequities.

#### IV. PROPOSED SOLUTIONS TO CONTINUING PROBLEMS

This Comment proposes to abrogate the Court's negligence/misconduct rule, and instead offers a rule as follows: in the absence of any evidence that a defendant was responsible for the attorney's default, courts should allow equitable tolling for the prisoner while directly sanctioning the attorney. This solution will uphold the fairness objectives of the writ of habeas corpus and is more effective in preventing attorney default than precluding prisoner's habeas petitions as untimely.

##### A. Putting the "Equity" Back into Equitable Tolling

The United States Supreme Court has held that in a criminal trial, the right to the effective assistance of counsel is one of the fundamental values of our democratic society.<sup>322</sup> However, in an address to the American Bar Association, Justice Kennedy once lamented, "When someone has been judged guilty . . . the legal profession seems to lose all interest . . . . When the door is locked against the prisoner, we do not think about what is behind it."<sup>323</sup>

The need for a wrongfully convicted prisoners to have access to post-conviction relief is magnified by the dramatic increase in the number of prisoners across the country.<sup>324</sup> This increasing prison population is in turn overburdening indigent defense systems, resulting in a greater likelihood of reversible error during criminal trials.<sup>325</sup> Therefore, there is additional need for safeguarding the writ of habeas corpus to ensure that convictions are fair.<sup>326</sup> Habeas petitioners are often unable to navigate the habeas process on their own, thus as a practical matter they are dependent on attorneys.<sup>327</sup> The post-conviction litigation system also functions more efficiently when attorneys participate.<sup>328</sup> Thus, the State and the courts should be encouraging the use of attorneys in habeas litigation.

However, courts should only encourage petitioners to entrust their cases—and in many situations their life and liberty—to an attorney if the

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321. See *supra* note 60 and accompanying text.

322. *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984).

323. Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_08-09-03.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_08-09-03.html).

324. See *supra* notes 26–28 and accompanying text.

325. See *supra* notes 26–28 and accompanying text.

326. See *supra* notes 23–30 and accompanying text.

327. See *supra* Part I.A.1.

328. See *supra* note 41 and accompanying text.

court can ensure the attorney-client relationship will treat the prisoner fairly. As discussed above, the fundamental principles that maintain fairness in the agency relationship are generally inapplicable to habeas petitioners.<sup>329</sup> Nor does the prisoner in the post-conviction context have an ineffective assistance of counsel remedy.<sup>330</sup> As a result, there are no statutory or doctrinal protections for prisoners who suffer from an attorney's default in this post-conviction context. In order to uphold the writ of habeas corpus's purpose of maintaining fairness to prisoners in the criminal justice system, the courts should allow equitable tolling for attorney default in the absence of any evidence that a defendant was responsible for the attorney's failure to file a timely habeas petition.

Under this proposed rule, the Court's requirement that the prisoner prove he acted with due diligence<sup>331</sup> is still relevant. However, it is extremely difficult for an incarcerated prisoner in a remote penitentiary to show due diligence by attempting to supervise or control his attorney *before* the attorney misses the deadline.<sup>332</sup> In order to produce a more just outcome, courts should evaluate whether the prisoner acted with diligence *after* the attorney default, from the point at which the prisoner actually becomes aware of the attorney's failure. Since equitable tolling is an equitable remedy, the court has discretion to change the way in which it is applied.<sup>333</sup> For example, the court could inquire into whether the prisoner was diligent in petitioning for equitable tolling after the prisoner has discovered or should have discovered the attorney default (i.e., did the prisoner wait five years after his attorney defaulted to request equitable tolling?). By applying the due diligence requirement in this way, the criminal justice system will actually give prisoners a standard they can meet. In fact, at least two of the circuit courts of appeals have already implemented the due diligence requirement in this manner—after the point at which the litigant became aware of the lawyer's procedural default.<sup>334</sup>

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329. See *supra* Part III.B.

330. *Coleman v. Thompson*, 501 U.S. 722, 756–57 (1991).

331. See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007).

332. See *supra* Part III.A.2.

333. See *supra* notes 54–56 and accompanying text.

334. See *Dang v. Sisto*, No. 08-16970, 2010 U.S. App. LEXIS 16377, at \*2 (9th Cir. Aug. 5, 2010) (mem.) (declining to apply equitable tolling to AEPDA's limitations period in a case of attorney default because the prisoner "did not carry his burden of showing that he was diligent *during the period after* he had his case file in hand") (emphasis added); see also *Pafe v. Holder*, No. 09-3466, 2010 U.S. App. LEXIS 17013, at \*6 (8th Cir. Aug. 11, 2010). In *Pafe*, the court referred to Holland's example that "the *very day* that Holland discovered that his AEDPA clock had expired due to [his attorney's] failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court." *Id.* (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010)). In contrast, the *Pafe* court continued, "Pafe . . . waited nearly three years before hiring new attorneys to replace each of her ineffective ones and did not file her motion to reopen until over five years after it was due. Accordingly, Pafe has not shown even 'reasonable diligence,' and her petition for review is denied." *Id.* See also *Roy v. Lampert*, 465 F.3d 964, 971 (9th Cir. 2006) (holding that "the person seeking equitable tolling [must demonstrate] reasonable diligence in attempting to file . . . after the extraordinary circumstances began" (emphasis added) (internal citations omitted)).

Under this proposed rule there continues to be a consequence for the prisoner who sits on his rights, thus this type of due diligence requirement will still compel the prompt filings of habeas corpus petitions. Applying the due diligence requirement in this way will serve the goal of judicial efficiency, yet not at the expense of fairness and justice.

*B. Utilizing Ethical Disciplinary Systems To Deter Attorney Default*

“Ordinary negligence”<sup>335</sup> should not be an acceptable standard of conduct for the legal profession. Every jurisdiction requires attorneys to comply with ethical rules, and has a disciplinary system to reprimand attorneys who violate those rules.<sup>336</sup> Courts and state bar associations have the power to regulate lawyers using these disciplinary systems. In order to treat prisoners fairly, while enhancing the integrity of the criminal justice system by deterring attorney default, courts should utilize these disciplinary systems in habeas litigation.

When an attorney fails to file a timely petition on behalf of a prisoner, the Court itself stated that an attorney is violating professional ethical rules.<sup>337</sup> Courts can therefore employ their disciplinary powers to reprimand attorneys who violate their professional duties of care. The threat of disciplinary proceedings is much more likely to influence attorney behavior than the indirect punishment an attorney would theoretically receive in precluding his client’s claims. As Justice William J. Brennan once remarked, “directly sanctioning the attorney is not only fairer but *more* effective in deterring violations” than sanctioning clients.<sup>338</sup> In the post-conviction context, criminal defense attorneys are typically public defenders who are not regulated by their clients through malpractice litigation or the demand in the market for legal services.<sup>339</sup> Thus, it is left to the courts and state bar associations to regulate criminal defense attorneys. This method of discipline would obviate the need to punish attorneys indirectly through their clients. Therefore, the court would be free to apply equitable tolling for prisoners who failed to file timely habeas petitions due solely to their attorney’s default.

Finally, directly disciplining attorneys, rather than precluding their clients’ habeas corpus petitions, also serves AEDPA’s interest in making habeas litigation more efficient.<sup>340</sup> Some commentators argue that foreclosing the use of equitable tolling for attorney default does not further the goal of efficiency. Instead, they contend that the effect of AEDPA has

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335. *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring) (describing an attorney’s “ordinary” as opposed to “gross” negligence).

336. *See* Curtis & Resnik, *supra* note 26, at 1615.

337. *See Holland*, 130 S. Ct. at 2564–65; *see also supra* note 85 and accompanying text.

338. *Taylor v. Illinois*, 484 U.S. 400, 433 (1988) (Brennan, J., dissenting).

339. *See supra* note 318 and accompanying text.

340. *See Hearings on S. 623, supra* note 41, at 2 (statement of Sen. Orrin G. Hatch) (arguing that reform of the habeas adjudication process must stop prisoners from filing spurious habeas corpus petitions in federal court); *see also supra* notes 43–47 and accompanying text.



not been to reduce the amount of habeas filings, but has merely changed the nature of these filings.<sup>341</sup> One commentator noted that “[AEDPA’s] [p]rocedural requirements have resulted in years of litigation and time-consuming adjudication of technical issues often unrelated to constitutional protections.”<sup>342</sup> Thus, by punishing clients rather than directly disciplining the attorneys themselves, AEDPA’s statute of limitations has not had its intended effect of making habeas litigation more efficient.

#### CONCLUSION

In the context of habeas litigation, a prisoner should not have to pay with his life or liberty for an attorney’s mistake. The Court’s holding in *Holland* was a step in the right direction for protecting the fairness of the habeas corpus process, but did not go far enough in ensuring that attorneys do not become barriers to a prisoner’s right to due process. Agency law is a valuable tool for maintaining fairness in the relationship between principals, agents, and third parties in civil litigation. However, the interests of justice are not served by strictly applying agency principles in the post-conviction context. Therefore, when an attorney becomes a barrier to the prisoner’s pursuit of justice, the court must apply equitable tolling to AEDPA’s statute of limitations.

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341. See Stevenson, *supra* note 24, at 360–61; see also *Habeas Reform: The Streamlined Procedures Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 45–46 (2005) (statement of Professor Eric M. Freedman, Hofstra Law School) (arguing that both speed and accuracy of habeas proceedings are impaired by litigation over procedural issues that do not address the merits of the claim).

342. See Stevenson, *supra* note 24, at 360–61. The fact that virtually every circuit court of appeals and the Supreme Court have heard multiple cases regarding AEDPA and attorney default, which have nothing to do with the merits of the prisoners’ habeas claims, is evidence of this point. See *supra* note 82 and accompanying text.