No. 17-___

IN THE

Supreme Court of the United States

JOSEPH LOMBARDO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can egregious attorney misconduct other than abandonment ever constitute an "extraordinary circumstance" under the equitable-tolling doctrine?

2. Joseph Lombardo's attorney did not research the deadline for filing Lombardo's petition for post-conviction relief under 28 U.S.C. § 2255. Instead, he delegated that important and complex task to an unsupervised non-lawyer, and relied uncritically on that non-lawyer's flawed analysis. As a result, the attorney untimely filed Lombardo's petition, denying Lombardo his first and likely last chance to raise an ineffective-assistance-of-trial-counsel claim. Did the Seventh Circuit err in holding that such misconduct can never constitute an "extraordinary circumstance" for equitable-tolling purposes?

PARTIES TO THE PROCEEDING

The parties to this proceeding below were petitioner Joseph Lombardo and respondent the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

"In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." U.S. Const., Am. 6. Joseph Lombardo is in jail for a conviction that was, he contends, obtained in violation of the right to counsel. The question in this petition is not whether he was indeed denied that right. Instead, the question is whether any court will ever even consider the issue.

Lombardo sought to raise his argument in a petition for post-conviction relief filed under 28 U.S.C. § 2255. But his post-conviction attorney filed late, because he never bothered to research when the petition was due, choosing instead to rely on the inaccurate advice of an unsupervised non-lawyer. The Seventh Circuit held that Lombardo was *not* entitled to equitable tolling, because miscalculations attributable to attorney error—no matter how egregious the professional misconduct at issue—are insufficient to justify equitable tolling. It thus followed a line of Seventh Circuit cases holding that post-conviction petitioners can obtain equitable tolling based on attorney misconduct *only* when the misconduct constitutes abandonment.

This petition presents two questions. *First*, can egregious professional misconduct other than abandonment *ever* constitute an "extraordinary circumstance" of the sort needed to toll the one-year limitations period in § 2255? *Second*, can post-conviction petitioners show "extraordinary circumstances" where an attorney fails to timely file a §2255 petition because neither he nor any other lawyer researched when the petition was due? Both

questions are the subject of circuit splits, and both are worthy of this Court's consideration.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois dismissed Lombardo's petition as untimely in an unpublished decision. Pet. App. 36a. The United States Court of Appeals for the Seventh Circuit affirmed in a published opinion, which is available in the Federal Reporter at 860 F.3d 547. Pet. App. 1a.

JURISDICTION

Joseph Lombardo initiated this case when he petitioned the United States District Court for the Northern District of Illinois for post-conviction relief under 28 U.S.C. § 2255. That court had jurisdiction under 28 U.S.C. §§ 1331 & 2255(a). Following the district court's dismissal of Lombardo's case on July 29, 2015, Lombardo timely noticed his appeal to the United States Court of Appeals for the Seventh Circuit on August 27, 2015. *See* Fed. R. App. P. 4(a)(1)(B), 4(a)(2).

The Seventh Circuit, which issued a certificate of appealability, had jurisdiction under 28 U.S.C. §§ 1291 & 2253(a). It published the decision below on June 20, 2017. Lombardo timely petitioned for rehearing and rehearing en banc, which the court denied on September 6, 2017. Pet. App. 39a.

On October 25, 2017, Lombardo applied to this Court for an extension of time in which to file his petition for a writ of certiorari. *See Lombardo v. United States*, No. 17A467 (U.S., 2017). Justice Kagan granted that request on October 27, 2017,

extending the deadline to file a certiorari petition to January 19, 2018. Lombardo timely filed his petition, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28 of the United States Code provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> …
>
> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> > (1) the date on which the judgment of conviction becomes final;
> >
> > (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

1. This case began with the federal government's investigation of the "Chicago Outfit"—a gang with roots tracing back to Al Capone. *United States v. Schiro*, 679 F.3d 521, 524 (7th Cir. 2012). That investigation culminated in the indictment of numerous individuals suspected of having ties to the Outfit, including Joseph Lombardo.

The government charged Lombardo with two counts. The first, Count 1, accused him of engaging in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d). The second, Count 9, alleged that Lombardo obstructed justice in violation of 18 U.S.C. § 1512(c), by evading service of arrest warrants. The government additionally alleged that, in furtherance of the conspiracy charged in Count 1, Lombardo murdered Daniel Seifert in 1974. It asked the court to impose an enhanced sentence based on the Seifert murder.

The government tried Lombardo alongside four of his alleged co-conspirators: Frank Calabrese, Sr., James Marcello, Paul Schiro, and Anthony Doyle. The trial lasted about three months, in the summer

of 2007, with the majority of the testimony and evidence focused on Lombardo's co-defendants. The evidence against some of these men was overwhelming. For example, witnesses tied to the Outfit—including Calabrese's own son and brother—testified that they carried out murders and other crimes with Lombardo's co-defendants. *See, e.g.*, Pet. App. 44a–45a, 48a–49a, 50a. (All citations to pages 41a through 65a of the Appendix refer to portions of the transcript in Lombardo's criminal trial. *See United States v. Lombardo, et al.*, No. 02-cr-01050 (N.D. Ill.).) The evidence against Lombardo was weaker: Much of it was circumstantial or second-hand, and nearly all of it related to decades-old events.

Lombardo's trial counsel, however, barely put on a defense. The defense took up only about three days of the months-long trial, and consisted of just six witnesses, with the only substantial testimony coming from Lombardo himself. The primary defense to the conspiracy charge was that Lombardo withdrew from the conspiracy in 1992, when he took out highly publicized newspaper ads disavowing any ties to the Chicago Outfit. As a result, Lombardo argued, the five-year statute of limitations applicable to Count 1 began to run in 1992, and expired years before his 2005 indictment. *See Smith v. United States*, 568 U.S. 106, 111 (2013) ("Withdrawal … starts the clock running on the time within which the defendant may be prosecuted, and provides a complete defense when the withdrawal occurs beyond the applicable statute-of-limitations period.")

A conspirator may withdraw from a conspiracy "by clearly communicating to his co-conspirators that

he has abandoned the venture." *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The advertisement that Lombardo took out in the Chicago Tribune and other newspapers could certainly qualify. But Lombardo's trial counsel made barely any effort to put on a plausible defense; counsel did nothing more than establish, in testimony covering just a few pages, that the ad existed. Pet. App. 57a–60a; 62a. Counsel did not, for example, introduce evidence regarding the circulation and popularity of the newspapers in which the ad appeared, or the publicity that it received—evidence that would have helped establish that Lombardo "clearly communicat[ed]" his disavowal of the Chicago Outfit. *DePriest*, 6 F.3d at 1206. Perhaps more critically, counsel did nothing at all to establish that Lombardo's ad constituted a genuine disavowal. For example, he failed to call *any* expert or lay witness who could have testified as to the manner in which Outfit members understood the ad. It is hard to believe that there were no such witnesses, since the former chief investigator of the Chicago Crime Commission had praised the ad at the time of its release, explaining: "As I read his ad, he is saying, I'm through with crime." Pet. App. 67a.

Trial counsel made similarly little effort to establish Lombardo's alibi for the Seifert murder. Indeed, the only evidence offered in support of his alibi was testimony from Lombardo himself, *see, e.g.*, Pet. App. 54a–56a—testimony that trial counsel later discredited by telling the jury, during closing arguments, that Lombardo had lied (in unspecified ways) during his testimony. Pet. App. 65a. As for Count 9, counsel elicited from Lombardo what

amounted to a confession: Counsel goaded him into admitting that he intentionally evaded arrest in order to avoid his trial. The only defense that trial counsel presented in detail rested on the legally invalid theory that, because Lombardo did not know he was violating federal law while evading arrest, he could not be found guilty of obstructing justice. Pet. App. 60a–61a.

In the end, the jury convicted Lombardo on both counts, and found that he murdered Seifert. The District Court sentenced him to life in prison. Lombardo appealed to the Seventh Circuit, lost, *Schiro*, 679 F.3d at 534–35, and eventually filed a petition for a writ of certiorari. This Court denied that petition, *Lombardo v. United States*, 133 S. Ct. 1633 (2013) (mem.), and then it denied Lombardo's petition for rehearing, *Lombardo v. United States*, 133 S. Ct. 2792 (2013) (mem.).

2. With his direct appeals exhausted, Lombardo turned his attention to seeking post-conviction relief under 28 U.S.C. § 2255, on the ground that he was denied his Sixth Amendment right to effective trial counsel. *Cf.* 28 U.S.C. §§ 1331 & 2255(a) (conferring jurisdiction to entertain such petitions). As is true of most defendants, the post-conviction stage was Lombardo's first chance to raise an ineffective-assistance-of-counsel claim: "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro v. United States*, 538 U.S. 500, 504–05 (2003). "Even meritorious claims" are thus likely to fail on direct

appeal. *Id.* at 506. This Court and the courts of appeals have thus recognized that criminal defendants are best off waiting for post-conviction proceedings before raising their ineffective-assistance claims. *Id.*

Consistent with the importance of capitalizing on his first (and in all likelihood last) chance to vindicate his Sixth Amendment right to counsel, Lombardo retained a lawyer named David J. Bernstein to file the § 2255 petition. Bernstein needed to file within one year of "the date on which [Lombardo's] judgment of conviction bec[a]me[] final." *Id.* at § 2255(f)(1). Since Lombardo's conviction became final when this Court denied his certiorari petition on March 25, 2013—*not* when the Court denied his petition for rehearing on June 3 of the same year, *Robinson v. United States*, 416 F.3d 645, 650 (7th Cir. 2005)—he had until March 25, 2014 to timely file.

Bernstein missed the deadline. He filed Lombardo's § 2255 petition on May 31, 2014—more than two months late. Bernstein untimely filed the petition because he never researched the applicable deadline. Rather, he relied uncritically on the advice of an unsupervised non-lawyer—in Bernstein's words, a "trusted paralegal," *see* Petr's Reply to the Gov's Mot. to Dismiss at 1, *Lombardo v. United States*, No. 15-cv-1038 (N.D. Ill., June 4, 2015), Doc. 15—who misinformed him that the one-year deadline ran from the Supreme Court's denial of Lombardo's rehearing petition.

It is at least conceivable that Bernstein's misconduct was even worse than blind reliance on a paralegal. All evidence of what really went on in

Bernstein's office comes from Bernstein's own say-so, contained in documents filed with the District Court. At the time Bernstein filed these documents, he was already under investigation by the Florida Bar: Ten days before he untimely filed Lombardo's § 2255 motion, the Bar filed a complaint against Bernstein, accusing him of failing to adequately supervise a paralegal who practiced law out of his office. *Fla. Bar v. Bernstein*, 2015 Fla. LEXIS 477, at *1, *2–3, *4–5 (Fla. Jan. 5, 2015). Bernstein later admitted to violating his ethical responsibilities, and received a public reprimand from the Florida Supreme Court. *Fla. Bar v. Bernstein*, 160 So.3d 899 (Fla. 2015). In light of the fact that he was still under investigation when fessing up to the wrongdoing in this case, Bernstein had good reason to put his failure to supervise the paralegal's research in the most favorable light possible.

Whatever the real reason for Bernstein's delay, the petition he filed was untimely. The government thus moved to dismiss Lombardo's petition. The District Court granted the motion, rejecting Lombardo's argument that the filing period should be equitably tolled based on Bernstein's ineffective assistance. The District Court acknowledged that equitable tolling is appropriate in extraordinary circumstances. Pet. App. 37a (citing *Holland v. Florida*, 560 U.S. 631, 651–52 (2010)). But it held that a lawyer's misunderstanding of a due date—which is all it understood Lombardo to have alleged—did not meet this standard. Pet. App. 37a.

3. Lombardo—who is 89 years old, wheelchair-bound, and significantly limited in his ability to communicate with the outside world and fellow

inmates—timely filed his own notice of appeal to the Seventh Circuit, rather than risking another mistake by Bernstein. That court, in an order entered by Judge Flaum, granted a certificate of appealability. The order explained that Lombardo made out a "substantial claim" of ineffective assistance of trial counsel. The Seventh Circuit directed the parties to address "whether Lombardo [was] entitled to equitable tolling because of ineffective assistance of counsel [by Bernstein] in his initial-review collateral proceeding." Pet. App. 4a. Because Bernstein would face a conflict of interest if made to argue his own ineffective assistance, the Court appointed new appellate counsel.

After briefing and oral argument, a divided panel affirmed the District Court's denial of equitable tolling. The Court of Appeals reasoned that "mistakes or miscalculations … by a party's attorney do not satisfy the extraordinary circumstances element for equitable tolling." Pet. App. 6a. The court placed particular stress on the rule that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." Pet. App. 9a (quoting *Holland*, 560 U.S. at 651–52). This, the Seventh Circuit held, was all that Lombardo alleged.

Lombardo's briefing expressly recognized that garden-variety miscalculations cannot constitute extraordinary circumstances. But he argued that the miscalculation in his case was far more egregious, since the attorney delegated the critical and complex task of calculating the deadline in a § 2255 case to an unsupervised paralegal. The Seventh Circuit

rejected this argument, reasoning that every miscalculation "will involve a similar type of shortcoming." Pet. App. 11a. And anyway, it reasoned, equitable tolling is available only when "external obstacles" stand in the way of timely filing, and "errors by an attorney acting on a party's behalf do not constitute external obstacles beyond the party's control." Pet. App. 7a. In other words, a litigant may be entitled to equitable tolling when he misses a deadline because his attorney abandons him, thereby ceasing to act as his agent. But a litigant is *not* entitled to equitable tolling when his attorney miscalculates a deadline and fails to timely file, regardless of the egregiousness of the misconduct that caused him to do so. Pet. App. 6a–13a. While the Seventh Circuit claimed in a footnote not to decide the question whether abandonment is strictly required for equitable tolling, Pet. App. 10a n.1, its reference to agency principle of lawyering, and its reliance on Seventh Circuit precedent requiring abandonment, *see, e.g.*, Pet. App. 7a–8a (quoting *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003)), belie that claim.

Judge Posner dissented. In "35 years as a judge," he explained, he could not "recall a case … in which a lawyer made such an error—and with such adverse consequences for his client." Pet. App. 32a (Posner, J., dissenting). This was not, he argued, a garden-variety case of excusable neglect. To the contrary, Bernstein "engaged in egregious professional misconduct by outsourcing a critical issue to a paralegal." Pet. App. 27a. In concluding otherwise, the panel contradicted this Court's decision *Holland*. In *Holland*, "as in this case," "'the extraordinary

circumstances at issue involve[d] an attorney's failure to satisfy professional standards of care.'" Pet. App. 29a (quoting *Holland*, 560 U.S. at 649). Judge Posner argued that the majority's decision failed to adequately deal with this. And in holding that a miscalculated deadline is never egregious enough to justify equitable tolling, the majority ignored *Holland*'s command that courts eschew "mechanical rules" in the equitable tolling context, and contravened its insistence on "flexibility'" in the exercise of equity powers. Pet. App. 31a (quoting *Holland*, 560 U.S. at 649–51). Lombardo lost his one and only chance to vindicate his rights based on "an inexcusable miscalculation either by Lombardo's lawyer or by the lawyer's 'trusted' paralegal—a miscalculation that Lombardo would not have noticed or been able to correct." Pet. App. 29a. This is precisely the sort of conduct that can "rise to the level of the 'egregious' and the 'extraordinary.'" Pet. App. 32a.

After the Seventh Circuit denied Lombardo's petition for rehearing and rehearing en banc, he filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case presents two questions for the Court's review. *First*, can egregious attorney misconduct other than abandonment ever constitute an "extraordinary circumstance" under the equitable-tolling doctrine? *Second*, when Bernstein failed to research the due date for Lombardo's §2255 petition, deciding instead to rely uncritically on the inaccurate advice of an unsupervised non-lawyer, did he engage in the sort of egregious misconduct that qualifies as an "extraordinary circumstance"? Both questions

implicate circuit splits, and both are of significant importance to post-conviction cases.

I. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE TWO CIRCUIT SPLITS.

The Seventh Circuit, at odds with every other circuit to have addressed the issue, permits equitable tolling of a § 2255 filing deadline based on attorney misconduct only in cases involving attorney abandonment. Applying that abandonment-only test to this case, the Seventh Circuit held that Bernstein's uncritical reliance on a non-lawyer's calculation of the §2255 petition's due date could not constitute an "extraordinary circumstance"—a result at odds with the Second Circuit's decision in *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). This Court should grant certiorari to restore uniformity to the law of equitable tolling.

A. The Seventh Circuit is the only federal appellate court in which attorney misconduct other than abandonment cannot constitute an "extraordinary circumstance."

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, more commonly known as AEDPA, subjects requests for post-conviction relief to a one-year limitations period. *See* 28 U.S.C. § 2244(d)(1) (one-year limitations period for petitions brought by prisoners in state custody); § 2255(f) (one-year period applicable to prisoners in federal custody). That limitations period has an equitable exception: The statute of limitation is tolled if the petitioner can show that (1) "he has been pursuing his rights

diligently," and (2) "some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

In determining whether circumstances are sufficiently "extraordinary," courts are to avoid bright-line rules. That is, the inquiry must be a flexible one, conducted on a case-by-case basis in light of specific facts at issue. *Id*. at 650. Precedent guides the inquiry, but courts must not apply it rigidly; "specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 650.

Consistent with *Holland*, lower courts have generally recognized that "egregious" professional misconduct by counsel "may justify equitable tolling of the AEDPA limitations period." *Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007). Thus, a petitioner whose "petition is untimely because of the extraordinary actions of [his] attorney," *Baldayaque*, 338 F.3d at 147—actions amounting to "serious instances of attorney misconduct" as opposed to mine-run errors, *Holland*, 560 U.S. at 652—may be entitled to tolling, *id*. Courts apply this rule in cases arising under 28 U.S.C. § 2254, which governs post-conviction petitions filed by state prisoners. *See, e.g.*, *Fleming*, 481 F.3d at 1256; *Ross v. Varano*, 712 F.3d 784, 800 (3d Cir. 2013); *Doe v. Busby*, 661 F.3d 1001, 1012 (9th Cir. 2011). They likewise apply it to cases arising under § 2255, which applies to prisoners (like Lombardo) convicted of a federal crime. *See, e.g.*, *Baldayaque*, 338 F.3d at 147; *Ramos-Martínez v. United States*, 638 F.3d 315, 323 (1st Cir. 2011); *United States v. Martin*, 408 F.3d 1089, 1092 (8th Cir.

2005); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002). "Even prior to *Holland*, lower courts had recognized that egregious conduct on the part of counsel in failing to file a timely appeal or petition for post-conviction relief can constitute an extraordinary circumstance." Brian R. Means, POSTCONVICTION REMEDIES § 25:39 n.72 (2017 Westlaw).

The Seventh Circuit is an outlier; the "most glaring exception to this otherwise universal" rule. *Id*. It "has adopted a bright-line approach to requests for equitable tolling premised on the misconduct of a petitioner's attorney and, applying agency principles, has held that an attorney's actions are always attributable to the client in the context of postconviction proceedings." *Id*. Thus, an attorney's poor performance is *never* considered an "extraordinary" circumstance unless it rises to the level of abandonment. *See, e.g.*, *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005); *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999). The Seventh Circuit's decision below—which relied on this principle, explaining that "errors by an attorney acting on a party's behalf do not constitute external obstacles beyond the party's control," Pet. App. 7a—is only the latest equitable-tolling case from that circuit adopting an abandonment-only approach.

While the Seventh Circuit is alone in adopting the abandonment-only approach, the Eleventh Circuit has come close. In *Cadet v. Florida Department of Corrections*, 853 F.3d 1216 (11th Cir. 2017), it held that "attorney negligence, even gross or egregious negligence, does not by itself qualify as an

'extraordinary circumstance.'" *Id*. at 1227. Rather, for an attorney's misconduct to qualify as an extraordinary circumstance, the litigant must show "either abandonment of the attorney-client relationship," or some other professional misconduct such as "bad faith, dishonesty, divided loyalty, and mental impairment." *Id*. at 1236; *cf. also Rivas v. Fischer*, 687 F.3d 514, 538 (2d Cir. 2012) (suggesting that, "[i]n order to rise to the level necessary to constitute an 'extraordinary circumstance,' for purposes of tolling § 2254's limitations period, attorney negligence must be so egregious as to amount to *an effective* abandonment of the attorney-client relationship.") (emphasis added). Since that decision, Cadet filed a petition for certiorari, asking this Court to decide "[w]hether grossly negligent conduct by counsel, which directly results in the late filing of a federal petition for a writ of habeas corpus, can qualify as an extraordinary circumstance sufficient to equitably toll the statute of limitations …" *Cadet v. Florida Dept. of Corrections*, Petition for a Writ of Certiorari at i, No. 17-6146 (U.S. July 5, 2017). This Court called for a response on October 27, 2017, and the case remains pending.

The fact that circuit courts are divided regarding the rigidity with which *Holland* applies is not subject to serious debate. *See* Atkins, et al., *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 Stan. L. Rev. 427, 439–43 (2016) (addressing confusion in the circuit courts). The Court should grant the writ of certiorari to resolve this confusion.

B. Bernstein's egregious misconduct would have qualified as an "extraordinary circumstance" in the Second Circuit.

The Seventh Circuit's holding in this case is of a piece with its abandonment-only approach. The Court reasoned that missed deadlines always result from inadequate research or attorney error. And, no matter how egregious the surrounding circumstances, the Court concluded, such errors do not qualify as "extraordinary circumstances." Pet. App. 8a–9a. In so holding, the Seventh Circuit contradicted the Second Circuit's application of the equitable-tolling doctrine in *Baldayaque v. United States*, 338 F.3d 145.

In *Baldayaque*, as in this case, the post-conviction petitioner retained counsel for the express purpose of filing a § 2255 petition. In *Baldayaque*, as in this case, post-conviction counsel performed no research on his client's case. *Id.* at 152. And in *Baldayaque*, as in this case, post-conviction counsel failed to ensure the timely filing of a § 2255 petition. *Id.* But the Second Circuit in *Baldayaque*, unlike the Seventh Circuit in this case, held that these circumstances were "extraordinary." *Id.*

The panel below offered two bases for distinguishing *Baldayaque*, neither of which is persuasive. First, the Seventh Circuit reasoned that the attorney in *Baldayaque* "not only misunderstood the statute of limitations and failed to perform the proper research on that topic, he never filed a motion under § 2255 at all." Here, in contrast, Bernstein did eventually file a petition on Lombardo's behalf." Pet. App. 12a. This is a factual distinction, but not one that matters. Whether the attorney files late or

altogether fails to file, he leaves his client in precisely the same situation for statute-of-limitations purposes.

The Seventh Circuit additionally noted that the attorney in *Baldayaque* "never spoke to or met with the petitioner, and did not follow up when his letter to the petitioner was returned as undeliverable." Pet. App. 12a. Bernstein, in contrast, apparently had some contact with Lombardo. But this is another distinction without a difference: While failing to communicate with one's client is egregious, it is not egregious in a manner that has anything to do with the timely or untimely nature of a filing. If anything, the lawyer's failure to communicate in *Baldayaque* should have put the client on notice of his attorney's failure to perform any work, thus making the petitioner less deserving of equitable tolling. *See Holland*, 560 U.S. at 655 (only those who diligently pursue their rights are entitled to equitable tolling).

In sum, Lombardo would have been entitled to equitable tolling—and would not have missed out on his first and last chance to vindicate his Sixth Amendment rights—had his case arisen in the Second Circuit.

Perhaps recognizing this, the Court attempted to support its unstated rejection of *Baldayaque* with reference to the rule that "[a]ttorney miscalculation" of a deadline, by itself, is "not sufficient to warrant equitable tolling." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). That rule makes sense, as many missed deadlines result from "garden variety" negligence, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990), rather than truly extraordinary circumstances. This Court has never held, however,

that an attorney's miscalculation can never amount to an "extraordinary" circumstance. Nor could it without overruling *Holland*, as such a holding would run afoul of *Holland*'s prohibition on "rigid" and "mechanical" rules. 560 U.S. at 649–50. And so the somewhat self-evident rule that miscalculated deadlines do not inherently constitute extraordinary circumstances, *see Lawrence*, 549 U.S. at 336, does nothing to justify the Seventh Circuit's bright-line rule under which miscalculated deadlines can *never* give rise to equitable tolling.

C. This is an ideal vehicle for resolving the questions presented.

Again, to establish his entitlement to equitable tolling, a litigant must show that an "extraordinary circumstance" prevented his timely filing, *and* that he "he has been pursuing his rights diligently." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016). In this case, neither the District Court nor the Seventh Circuit questioned Lombardo's diligence. Nor could they have. Lombardo has been diligently seeking relief since the date of his conviction. He has filed *pro se* petitions, and he even filed a *pro se* notice of appeal in this very case when the risk that Bernstein might again drop the ball seemed too high. Lombardo has done this despite being under special administrative measures that make it effectively impossible for him to communicate with the outside world, and that make it exceptionally difficult to communicate even with fellow inmates.

Because Lombardo's diligence is not at issue, the case squarely presents the question whether the circumstances here are "extraordinary." The Court

can decide that issue without any risk of its being sidetracked by the diligence question.

II. THE SEVENTH CIRCUIT'S OPINION BELOW CONTRADICTS *HOLLAND*.

1. As the foregoing suggests, the Seventh Circuit's abandonment-only approach is inconsistent with this Court's precedent.

For one thing, it ignores *Holland*'s instruction to conduct a flexible inquiry rather than a rigid one; to eschew bright-line rules in favor of case-by-case analysis. 560 U.S. at 650. "In emphasizing the need for flexibility, for avoiding mechanical rules," *Holland* "followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Id.* (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). The Seventh Circuit's abandonment-only approach is rigid, rather than flexible: Regardless of the surrounding circumstances, equitable tolling cannot be predicated on attorney misconduct unless it rises to the level of attorney abandonment.

Indeed, the Seventh Circuit's approach is *more* rigid than the equitable-tolling approach that *Holland* struck down for being *too* rigid. *Holland* reviewed an Eleventh Circuit decision holding that "attorney conduct that is 'grossly negligent'" could "never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." 560 U.S. at 649 (quoting *Holland*, 539 F.3d at 1339). The Court faulted the Eleventh

Circuit for "fail[ing] to recognize that, at least sometimes, professional misconduct" falling short of this standard "could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651.

The too-rigid test that *Holland* rejected was less rigid than the Seventh Circuit's abandonment-only test, because it permitted equitable tolling in some instances of attorney misconduct aside from abandonment. And so *Holland* stands for the proposition that "professional misconduct falling short of abandonment *could* support a claim of equitable tolling." *Luna v. Kernan*, 784 F.3d 640, 648 (9th Cir. 2015). The Ninth Circuit has so held expressly. *Id.* And that holding, just like *Holland*'s logic, cannot be squared with the Seventh Circuit's abandonment-only test. That test "must be reexamined in light of *Holland*." Means, POSTCONVICTION REMEDIES at § 25:39 n.72. This case presents the opportunity to do so.

2. Just as the abandonment-only rule is irreconcilable with *Holland*, so too is the Seventh Circuit's more specific holding that a miscalculated deadline can never constitute an "extraordinary circumstance," no matter how egregious the surrounding circumstances. *See* Pet. App. 10a–11a. This bright-line rule contradicts *Holland*'s emphasis on "the need for flexibility," and "for avoiding mechanical rules" in the equitable tolling context, Pet. App. 31a (Posner, J., dissenting) (quoting *Holland*, 560 U.S. at 650).

As already noted, this Court's decision in *Lawrence v. Florida*, 549 U.S. 327, is not to the

contrary. That case held that an attorney's miscalculation is not inherently enough to justify equitable tolling. *Id*. at 336. But it did not say that a miscalculated deadline could *never* give rise to equitable tolling. And in cases of egregious misconduct—such as this one, where counsel blindly relied on a non-lawyer's unsupervised analysis of the complex question of when Lombardo's § 2255 petition was due—a "flexib[le]" approach that "avoid[s] mechanical rules" would permit tolling. *See Holland*, 560 U.S. at 650. In short, the Seventh Circuit's strict reading of *Lawrence* brings it into conflict with *Holland*. The two cases can be easily reconciled simply by recognizing that *Lawrence* went no further than to hold that a missed deadline does not inherently constitute an extraordinary circumstance.

III. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING.

The circuit splits at issue in this case implicate important and recurring issues of federal law. Since this Court decided *Holland* in 2010, it has been cited over 10,000 times. And equitable-tolling issues often arise in the post-conviction context, as illustrated by the many post-conviction petitioners in 2017 who asked the Court to address questions relating to equitable tolling. *See, e.g.*, *Traverso v. Ryan*, Petition for a Writ of Certiorari, No. 17-428 (U.S. Sept. 21, 2017); *Cadet*, Petition for a Writ of Certiorari, No. 17-6146. Thus, every year there are hundreds if not thousands of cases in which the questions presented may be implicated. The many individuals who litigate the issue should not be subject to different standards depending on the court before which they happen to appear. But that is precisely what is

happening: Litigants in the Seventh Circuit cannot establish extraordinary circumstances by proving egregious attorney misconduct short of abandonment, while litigants in other circuits can. Given the importance of the issue, the Court should resolve this lack of uniformity.

Equitable tolling is of particular importance with respect to § 2255 petitioners like Lombardo. As this Court has recognized, and as explained above, it is generally either impossible or inadvisable to bring an ineffective-assistance-of-trial-counsel claim on direct appeal. *See Massaro*, 538 U.S. at 504–05. Thus, a § 2255 petition often presents the first and last opportunity for a federal prisoner to vindicate his Sixth Amendment right to counsel. A rigid abandonment-only approach to equitable tolling thus risks depriving § 2255 petitioners with ineffective *post-conviction lawyers* from vindicating their right to effective *trial counsel*.

Equity requires relief for litigants harmed by two levels of ineffective assistance. That is the lesson of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Those cases arose in the context of procedural default; the doctrine "under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez*, 566 U.S. at 9. In general, this means that state habeas petitioners who fail to raise an argument in state court may not later do so in federal court. But what if the state post-conviction proceedings are the first opportunity to raise an ineffective-assistance-of-*trial*-counsel claim and the petitioner loses that

opportunity because of *post-conviction* counsel's ineffectiveness? Is the petitioner forever barred from raising his Sixth Amendment ineffective-assistance-of-trial-counsel claim in federal court? Under *Martinez* and *Trevino*, the answer is "no": If [1] the petitioner was convicted in a state where (as in the federal system) such claims must be raised first in post-conviction proceedings, and if [2] the petitioner failed to raise his claim because his *post-conviction counsel* was ineffective, then [3] his procedural default will be forgiven if the underlying ineffective-assistance-of-*trial*-counsel claim has "some merit." *See Martinez*, 566 U.S. at 17; *Trevino*, 133 S. Ct. at 1921.

The *Martinez-Trevino* framework rests on the view that defendants should have one opportunity to argue that their convictions were obtained in violation of the Sixth Amendment right to counsel. That is, state defendants convicted with ineffective trial counsel should not be prohibited from challenging their convictions simply because their *post-conviction* counsel is similarly ineffective. The same logic extends to federal defendants. *See Ramirez v. United States*, 799 F.3d 845, 853–54 (7th Cir. 2015). But the logic is inconsistent with the abandonment-only rule, which holds that even egregious professional misconduct by *post-conviction* counsel is insufficient to support equitable tolling, thus potentially blocking those with valid ineffective-assistance-of-*trial*-counsel claims from raising such claims in court.

CONCLUSION

The Court should grant this petition for certiorari.

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