No. _____

# In the Supreme Court of the United States

JO GENTRY, *et al.*,

*Petitioners*,

v.

MARGARET RUDIN,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Margaret Rudin was convicted of murdering her husband. She did not file her first state habeas petition until over a year after her current post-conviction counsel, Christopher Oram, was appointed. Oram, acknowledging that the petition was late, argued that the court should accept it. The lower court did. But the Nevada Supreme Court reversed, ruling that Rudin's untimely petition was not excused. 350 days later, she filed her first federal habeas petition.

A divided panel of the Ninth Circuit held that Rudin's federal petition was timely. It equitably tolled her federal deadline for over three years on the basis that Rudin was "misled" when the lower state court allowed her late filing. Included in that time was 254 days between the Nevada Supreme Court's reversal of the lower court and its denial of Rudin's motion for rehearing. The questions presented are:

1. Whether a later-overturned lower court decision accepting an untimely state habeas petition can equitably toll the federal habeas deadline when the prisoner was on notice that her state petition was filed late and she failed to file a protective federal petition per *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

2. Whether the Ninth Circuit's decision warrants summary reversal because, although it purported to toll Rudin's federal deadline because she was misled by the lower court, the Ninth Circuit without explanation granted an extra 254 days of additional equitable tolling for the period *after* the Nevada Supreme Court reversed the misleading decision.

## PARTIES TO THE PROCEEDING

Petitioner Adam Paul Laxalt, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Petitioner Jo Gentry, warden of the Florence McClure Women's Correctional Center in Nevada, replaces Carolyn Myles, who was originally named as the warden. Respondent Margaret Rudin is an inmate at Florence McClure Women's Correctional Center.

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The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214 (codified at 28 U.S.C. § 2241, *et seq*.), gives prisoners one year to file their federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). That deadline can be statutorily tolled while a state petition is pending, but only if the state petition was "properly filed." *Id.* at § 2244(d)(2). Years before Rudin filed her late petition in Nevada state court, this Court made clear that a state petition ultimately rejected as untimely by a state court will not be considered "properly filed" under AEDPA. *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005).

This created a potential quandary for petitioners like Rudin, whose late-filed petition was excused or accepted by a lower state court. If the state's highest court later disagreed with the lower court and ultimately rejected the untimely petition, the federal habeas deadline would not be tolled. Often, as in Rudin's case, that later high court decision wouldn't be rendered until after the one-year AEDPA deadline was already past. Thus, in *Pace*, this Court acknowledged that "a 'petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never "properly filed,"' and thus that his federal habeas petition is time barred." *Id.* at 416 (citation omitted).

Fortunately, this Court explained what a petitioner should do in that circumstance: a habeas petitioner "might avoid this predicament * * * by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Id.*

That way, a petitioner like Rudin could protect herself against the foreseeable possibility that the state's highest court might disagree with the lower court and reject her late-filed state petition.

Five years later, right around the time the Nevada Supreme Court did, in fact, reverse the lower court's acceptance of Rudin's untimely petition, this Court quoted *Pace* in reinforcing the narrow availability of equitable tolling of AEDPA's federal habeas deadline. The Court emphasized that a federal habeas petitioner can receive equitable tolling of the one-year AEDPA limitations period "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (*quoting Pace*, 544 U.S. at 418).

Notwithstanding that these and other cases from this Court have established that "the threshold necessary to trigger equitable tolling under AEDPA" is supposed to be "very high, lest the exceptions swallow the rule," App. 37 (O'Scannlain, J., dissenting) (citing cases), the recent trend—at least in the Ninth Circuit—has been to ensure that equitable tolling is "sufficiently expansive to provide petitioner with access to the federal courts." App. 74 (Adelman, J., dissenting). This case takes that trend to the extreme, where in order to make equitable tolling work the panel majority stretched this Court's guidance beyond recognition. Not surprisingly then, this case presents several important and worsening circuit conflicts meriting plenary review.

First, at odds with decisions from the Fifth Circuit, the Ninth Circuit ruled that a later-overturned lower

court acceptance of an improperly filed state habeas petition is an "extraordinary circumstance" under *Holland*. And at odds with the Eleventh Circuit, the Ninth Circuit ruled that a state can contribute to the "extraordinary circumstance" by not objecting earlier and more vigorously to an improperly filed petition. The Ninth Circuit also ignored *Pace* by holding that Rudin was "reasonably diligent" even though she never filed a protective federal petition when she knew her state petition was filed late.

Finally, even beyond ignoring *Pace*, the panel majority never tried to explain why it tacked on an extra 254 days of equitable tolling for the period *after* the Nevada Supreme Court overruled the lower court. Even if the Ninth Circuit was correct that Rudin should receive equitable tolling because she was "misled" by the lower state court accepting her untimely petition—which it isn't—surely she was no longer "misled" once the Nevada Supreme Court reversed the lower court. The Ninth Circuit never addressed how this extra 254 days of tolling—from the Nevada Supreme Court's ruling to its denial of rehearing—is supported by either extraordinary circumstances or reasonable diligence. Left in place, the published decision in this case will work mischief every time a state faces a late-filed federal habeas petition in the Ninth Circuit. This last error merits summary reversal.

## OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1–41) reversing the district court's order is reported at *Rudin v. Myles*, 781 F.3d 1043 (9th Cir. 2014). That opinion replaced an earlier opinion (App. 42–81) reported at

*Rudin v. Myles*, 766 F.3d 1161 (9th Cir. 2014), *withdrawn and superseded*, 781 F.3d 1043, which affirmed the district court's order. The district court's order (App. 82–94) dismissing Rudin's federal habeas petition as untimely is unreported but available at 2012 WL 221080. The opinion of the Nevada Supreme Court (App. 97–103) is unpublished but available at 2010 WL 3341944.

## JURISDICTION

The Ninth Circuit's opinion was issued on March 10, 2015, and a petition for rehearing was denied on April 16, 2015. App. 116. On July 14, 2015, Justice Kennedy extended the time to file a petition for a writ of certiorari until and including September 13, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214 (codified at 28 U.S.C. § 2241, *et seq*.), provides in relevant part (28 U.S.C. § 2244(d)):

> (1) 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.

(2) 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.

## STATEMENT OF THE CASE

### A. Rudin's Murder Conviction and Relevant Statutory Habeas Deadlines

In 2001, a Clark County, Nevada jury convicted Margaret Rudin of murdering her husband Ron, and she was sentenced to life in prison with eligibility for parole. App. 7. The Nevada Supreme Court affirmed her conviction on April 1, 2004. *Id.* June 30, 2004 was the deadline for seeking a writ of certiorari from this Court, which she did not do. App. 8.

Under Nevada law, Rudin had one year from when the Nevada Supreme Court issued its remittitur on April 27, 2004 to seek post-conviction relief. App. 10,

97–98. So her deadline for filing a state habeas petition was April 27, 2005. App. 10. Under AEDPA, Rudin had to file her federal habeas petition within a year of the deadline for filing a writ of certiorari challenging her conviction on direct appeal. App. 10; 28 U.S.C. § 2244(d)(1)(A); *Jimenez v. Quarterman*, 555 U.S. 113, 119–20 (2009). Her federal habeas petition was therefore due June 30, 2005. App. 10. That federal deadline would be statutorily tolled if, before its expiration, Rudin submitted a "properly filed" state habeas petition. 28 U.S.C. § 2244(d)(2).

### B. Rudin's Untimely State Habeas Petition

After the Nevada Supreme Court affirmed her conviction, Rudin asked that post-conviction counsel be appointed. App. 11. Attorney Dayvid Figler was appointed on November 10, 2004. App. 11–12. Rudin had not filed a state or a federal habeas petition at that point. App. 13.[1] So as of Figler's appointment, 133 days had passed on Rudin's one-year AEDPA clock and she had 232 days left within which to file a federal petition. App. 27, 36 n.1.

Figler was Rudin's attorney from November 10, 2004 until August 17, 2006. App. 11–17 & 12 n.6. Other than "attend[ing] the court's status hearings, [Figler] appears to have done nothing else" to represent Rudin, and even "stopped communicating" with her at some point. App. 16. The Ninth Circuit concluded that Figler

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[1] At the November 10, 2004 hearing where the state court appointed Figler as post-conviction counsel, Rudin attempted to file a series of papers pro se with the court. App. 12. Pursuant to the court's rules, the court declined to accept those papers and instead turned them over to Figler. *Id.*

abandoned Rudin, thereby entitling her to equitable tolling during the time of his putative representation, App. 27, and Petitioners do not contest that conclusion.

Rudin asked the state court to appoint replacement counsel. App. 15. On August 17, 2006, the court appointed Christopher Oram to replace Figler. App. 17. Oram remains Rudin's counsel to this day. *Id.*

Rudin waited until August 21, 2007—over a year after Oram's appointment—to file her first state habeas petition. *Id.* The next day, at a status conference with the court and the State's counsel, Oram acknowledged that Rudin's state petition was filed late but asked the court to excuse the late filing. App. 17–18.[2] Based on the length of Rudin's trial, the size of her case file, and the fact that she was abandoned by Figler, the court stated that it would excuse the late filing. App. 18–19, 100.

The State's counsel objected to the court accepting Rudin's untimely petition. The court agreed to postpone its formal ruling until the State had an opportunity to brief the issue, but noted that "'I really think * * * not only this court, but the next court, is going to find that there were extraordinary circumstances in this case, which would allow the court to extend the one year deadline.'" *Id.* at 19. The State never briefed the timeliness question to the lower court and, on December 19, 2008, the court granted Rudin's request for post-conviction relief and ordered a new trial. App. 19–20.

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[2] Rudin also acknowledged that the petition was late in an errata to the petition filed the same day. App. 99 n.3.

The State appealed, raising the timeliness issue. App. 21. On May 10, 2010, the Nevada Supreme Court reversed the lower court's acceptance of Rudin's untimely petition on the basis that Rudin had not demonstrated good cause to excuse a petition filed "more than three years after the remittitur." App. 21, 97. Rudin sought en banc reconsideration, which the Nevada Supreme Court denied on January 20, 2011. App. 21.

### C. Rudin's Federal Habeas Petition

During all of this time—five and a half years since her one-year AEDPA clock started—Rudin never filed a federal habeas petition. Even after the Nevada Supreme Court on May 10, 2010 ruled that Rudin's untimely state petition was procedurally barred by Nevada's statute of limitations and therefore not "properly filed," Rudin waited 350 more days, until April 25, 2011, to file her first federal habeas petition. App. 21.

The State moved to dismiss Rudin's federal petition as untimely. App. 82. In reviewing the State's motion, the federal district court repeatedly emphasized that it was giving Rudin "every benefit of the doubt"—including assumptions that were "debatable at best." App. 85–87. The court assumed "the time Figler represented petitioner does not count toward the [AEDPA] period of limitation." App. 85 & n.1. It also used the dates most generous to Rudin when determining Figler's and Oram's appointments. App. 85–86. The court even assumed (counterfactually) that the federal deadline would be statutorily tolled while the untimely state petition and appeal were pending. App. 86.

The court concluded that "[a]ll those assumptions make no difference." *Id.* Rudin used 133 days of her one-year AEDPA clock before Figler was appointed. App. 86–87. Even if the entirety of Figler's appointment was tolled, she only had 232 AEDPA days remaining after Oram was appointed. App. 87. But Rudin waited over a year after Oram was appointed to file her state habeas petition. *Id.* "Even with every possible benefit of the doubt that the court could give petitioner, the federal period of limitation expired more than four months before petitioner filed her state petition. * * * There was no time left to toll." *Id.* The district court further concluded that Rudin would not be eligible for equitable tolling in any event because she did not pursue her rights diligently, and also because she failed to file a protective petition under *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), while her state petition was pending. App. 91–92.

**D. The Ninth Circuit's First Opinion**

Rudin appealed to the Ninth Circuit. On September 10, 2014, the court affirmed the district court's dismissal of Rudin's federal habeas petition as untimely. App. 42–81. In an opinion authored by Judge Murguia and joined by Judge O'Scannlain, the court concluded that Rudin was entitled to equitable tolling of her AEDPA deadline from when Figler was appointed on November 10, 2004 to when Oram filed her first state petition on August 22, 2007. App. 66–68. But they held that Rudin was not entitled to statutory tolling after that point because her state petition was not properly filed. App. 63. Nor was she entitled to equitable tolling after August 22, 2007, because at that point she was on notice that her first state habeas

petition had been filed late and she failed to act diligently to protect her federal rights by filing a protective federal petition. App. 69–70. In ruling that Rudin's federal petition was untimely, the panel majority repeatedly emphasized that "[w]e, like the district court, give Rudin every benefit of the doubt." App. 51 n.6, 52 n.7, 71 n.19.

District Judge Adelman, sitting by designation, dissented, stating that "the doctrine of equitable tolling is sufficiently expansive to provide petitioner with access to the federal courts." App. 74.

### E. The Ninth Circuit's Second Opinion

Rudin petitioned for rehearing. On March 10, 2015 the panel withdrew its September 10, 2014 opinion and replaced it with an opinion authored by Judge Murguia and joined by Judge Adelman, with a dissenting opinion by Judge O'Scannlain. App. 1–41. Like the first opinion, the new opinion concluded Rudin was not entitled to statutory tolling because her state petition was not properly filed. App. 22–24. Also like the first, the new opinion granted equitable tolling for the period from Figler's appointment to when Rudin's first state petition was filed on August 22, 2007. App. 27–30. But departing from the first opinion, the new opinion found that Rudin was additionally entitled to equitable tolling from August 22, 2007 until the Nevada Supreme Court denied her motion seeking rehearing on January 20, 2011. It concluded that her federal petition was therefore timely because the only non-tolled time was the first 133 days between when her conviction became final and Figler was appointed, and the final 96 days between when the Nevada Supreme Court denied her

rehearing motion and when she filed her federal petition on April 25, 2011. App. 31–34.

In support of these extra years of equitable tolling, the panel majority declared that the combination of the lower state court accepting Rudin's late-filed state petition, "coupled with the state's failure to brief the timeliness question or move to dismiss Rudin's petition, 'affirmatively misled' Rudin into believing that" her state petition was properly filed and that the "federal limitations period would be statutorily tolled." App. 31. According to the court, "the inaccuracy of a state post-conviction court's extension of time may constitute an 'extraordinary circumstance' making it 'impossible' to file a petition on time." App. 32 (citation omitted).

In contrast to her first opinion, Judge Murguia now also concluded that "reasonable diligence" did not require Rudin to protect herself against possible "error in the post-conviction court's timeliness ruling." App. 32; c*ompare* App. 69–70 (holding in the first opinion that "reasonable diligence" required Rudin to "have been aware of the possibility that nothing had been 'properly filed'" in state court, and therefore her "eligibility for AEDPA statutory tolling was in jeopardy"; "she could have filed a protective federal habeas application [under *Pace*] while her state-court post-conviction appeal was pending, [but] she did not"). Rudin, the majority said, was therefore entitled to "benefit" from the lower state court's "misleading" acceptance of her state petition "until the Nevada Supreme Court reversed the grant of habeas relief on January 20, 2011." App. 33. The court never explained why it used January 20, 2011—the date the Nevada Supreme Court summarily denied rehearing—instead

of May 10, 2010, the date the Nevada Supreme Court actually "reversed the [lower court's] grant of habeas relief." App. 97–102.

Judge O'Scannlain, dissenting, first agreed with the majority that Rudin was entitled to equitable tolling from November 10, 2004 to August 22, 2007, based on the "extraordinary circumstance of being abandoned by her lawyer." App. 36. But he disagreed with the court's grant of additional equitable tolling after Rudin was on notice that her state court petition had been filed late. *Id.* He stressed that the standard for "extraordinary circumstances" is supposed to be "very high, lest the exceptions swallow the rule"; namely, circumstances "beyond a prisoner's control [that] make it *impossible* to file a petition on time." App. 37 (internal quotation marks omitted).

Judge O'Scannlain's dissent, however, focused mostly on the other part of *Holland*'s two-part test: reasonable diligence. Even assuming a lower state court's erroneous acceptance of a late-filed petition could qualify as an "extraordinary circumstance," Judge O'Scannlain insisted that Rudin could not demonstrate reasonable diligence. App. 41. He explained:

> The August 22, 2007 conference did not excuse Rudin from acting, but rather armed her with knowledge that should have spurred her to protect her rights. Rudin did not file anything in federal court until April 25, 2011, over three years and eight months later. "Such a delay does not demonstrate the diligence required for application of equitable tolling."

*Id.* (citation omitted). Judge O'Scannlain emphasized that "the Supreme Court has spelled out precisely what steps Rudin *should* have taken as soon as she and Oram were aware that there were potential timeliness issues with the state petition"—namely, file a protective petition under *Pace*. App. 41. By failing to do so—indeed, failing to do "*anything* with respect to her *federal* petition for post-conviction relief for well over three years"—Rudin failed to exercise reasonable diligence. App. 39.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's split decision in this case presents several important questions worthy of this Court's review. In *Pace* and again in *Holland*, this Court made clear that a federal habeas petitioner can receive equitable tolling of the one-year AEDPA limitations period "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." 560 U.S. at 649 (*quoting Pace*, 544 U.S. at 418). Continuing a trend started in other Ninth Circuit decisions,[3] the panel majority's decision in this case severely weakens both of those requirements in the common situation where it is unclear whether a state habeas petition is timely. It did so in conflict with other federal courts of appeal and in

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[3] *See*, *e.g.*, *Sossa v. Diaz*, 729 F.3d 1225, 1233–35 (9th Cir. 2013) (expanding equitable tolling where petitioner was purportedly "misled" by a federal magistrate judge granting a requested extension of time beyond AEDPA's one-year statutory limit); *Gibbs v. LeGrand*, 767 F.3d 879, 891–93 (9th Cir. 2014) (granting second period of equitable tolling "*after* an extraordinary circumstance is lifted" and unsupported by reasonable diligence).

conflict with *Pace*'s instruction to petitioners. And in granting hundreds of days of equitable tolling *after* the Nevada Supreme Court ruled that Rudin's state application was untimely, the Ninth Circuit manifestly disregarded this Court's cautions on the limits of equitable tolling. This Court's review is warranted.

## I. The Petition Should Be Granted To Address Whether and When a State Court's Erroneous Acceptance of a Late-Filed Habeas Petition Warrants Equitable Tolling of AEDPA's Habeas Deadline.

A. The panel majority below held that when the state court incorrectly accepted Rudin's untimely state habeas petition, that "affirmatively misled" Rudin and constituted an "extraordinary circumstance" triggering equitable tolling, even though Rudin at that point was "on notice of the fact that nothing had been 'properly filed' in either state or federal court on her behalf." App. 31. That ruling conflicts with this Court's own statement that an "'extraordinary circumstance'" must have "*prevented* timely filing" of a federal petition. *Holland*, 560 U.S. at 632 (quoting *Pace*, 544 U.S. at 418) (emphasis added). As Judge O'Scannlain explained in his dissent, the lower state court's allowance of a petition that everyone (including Oram) acknowledged was late did nothing to *prevent* her from filing a protective federal petition under *Pace*; quite the opposite, the court's discussion "armed her with knowledge that should have spurred her to protect her rights." App. 41 (O'Scannlain, J., dissenting).

The Ninth Circuit's "extraordinary circumstances" ruling conflicts with more than *Holland*; it also directly conflicts with decisions from the Fifth Circuit. The

Fifth Circuit has repeatedly rejected the argument that a lower state court's initial acceptance and even review on the merits of an improperly filed habeas petition constitutes "an extraordinary circumstance" warranting equitable tolling. *See Larry v. Dretke*, 361 F.3d 890, 896–98 (5th Cir. 2004); *Jones v. Stephens*, 541 F. App'x 499, 503–04 (5th Cir. 2013). The petitioner in *Jones*, like Rudin, argued "that the state courts' failure to timely inform him that his habeas application was improperly filed misled him into missing his federal deadline for filing a federal habeas petition and thus is an extraordinary circumstance." 541 F. App'x at 503. Because, just as in Rudin's case, "the claimed extraordinary circumstance ar[ose] from [petitioner's] failure to comply with the state procedural rules," the Fifth Circuit flatly rejected that argument. *Id.* at 504 ("This is not an extraordinary circumstance warranting equitable tolling."); *see also Larry*, 361 F.3d at 897 (rejecting claim that petitioner's federal deadline should be equitably tolled because he "was misled by state trial court into believing that his first state habeas application was properly filed").

The Ninth Circuit also ruled that the State contributed to the "extraordinary circumstance" by not contesting the untimeliness of Rudin's petition earlier. App. 31. That too creates a conflict. The same claim was made in the Eleventh Circuit by a habeas petitioner arguing that the state's "response to [petitioner's] appeal of the denial of his * * * petition made no mention of the untimeliness of the appeal." *Hill v. Jones*, 242 F. App'x 633, 634 (11th Cir. 2007) (per curiam). Acknowledging that "the state might have earlier brought Hill's mistake to his attention," the Eleventh Circuit nonetheless concluded that this "does

not shift the burden of diligence to the state." *Id.* at 637. Accordingly, the petitioner was "entitled to no equitable tolling merely because the state failed to flag his error earlier." *Id.*

B. The Ninth Circuit's holding that Rudin exercised "reasonable diligence" also cannot be squared with this Court's decision in *Pace* or decisions by courts of appeal in other cases. The entire Ninth Circuit panel agreed that when Rudin filed her state post-conviction petition in August 2007, she knew that her state petition was filed after the statutory deadline and that no federal petition had been filed within AEDPA's one-year statutory period. *See* App. 31 ("* * * Rudin was put on notice of the fact that nothing had been 'properly filed' in either state or federal court on her behalf."); App. 39 (O'Scannlain, J., dissenting) (same). As Judge O'Scannlain observed, neither Rudin nor the Ninth Circuit needed to guess what she needed to do to meet the "reasonable diligence" requirement under these circumstances: this Court "has spelled out precisely what steps Rudin *should* have taken as soon as she and Oram were aware there were potential timeliness issues with the state petition." App. 40 (O'Scannlain, J, dissenting). Specifically, *Pace* instructed petitioners like Rudin to "file a protective petition in federal court." *Id.* (quoting *Pace*, 544 U.S. at 416) (internal quotation and alteration marks omitted).

The panel majority's summary conclusion that Rudin demonstrated reasonable diligence, App. 33, when she filed nothing in federal court for almost *four years* after she knew her state petition was filed late and could ultimately be deemed improperly filed is not faithful to this Court's guidance in *Pace*. Nor is it

consistent with other circuit cases concluding that "a state prisoner's failure to file a protective federal petition 'does not demonstrate the diligence required for application of equitable tolling.'" *Szabo v. Ryan*, 571 F. App'x 585 (9th Cir. 2014) (unpublished) (quoting *White v. Martel*, 601 F.3d 882, 884–85 (9th Cir. 2010) (per curiam)); *cf. Palacios v. Stephens*, 723 F.3d 600, 608 (5th Cir. 2013) (holding that "failure to file a protective federal habeas petition weighs against, but is not dispositive of, the reasonable diligence inquiry").

Whether viewed generally under the "extraordinary circumstances" and "reasonable diligence" requirements of *Holland*, or more specifically under circuit court cases applying those requirements in circumstances akin to Rudin's case, or most precisely under *Pace*'s on-point instruction on how a petitioner like Rudin can demonstrate reasonable diligence under these exact circumstances, the Ninth Circuit's published decision in this case sets bad precedent, creates multiple conflicts, and warrants correction by this Court.[4]

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[4] The Ninth Circuit committed still another error in granting equitable tolling during the year between Oram's appointment and his filing of her first state petition. It assumed that Oram remained unaware for the entire first year of his representation that Rudin had not previously filed a petition. *See* App. 28–29. It therefore extended the period of equitable tolling based on Figler's abandonment for more than a year after Oram replaced Figler. *Id.* The district court refused to equitably toll that period, and its analysis is persuasive. Even granting the Ninth Circuit's bare assumption about Oram's year-long ignorance, counsel's failure to ascertain proper deadlines in a case is not an "extraordinary circumstance." As this Court explained in *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007), *Holland*, 560 U.S. at 651–52, and *Maples*

## II. The Petition Should Be Granted Because the Ninth Circuit, Without Explanation, Awarded Hundreds of Days of Extra Equitable Tolling Even After the Nevada Supreme Court Eliminated the Basis for that Tolling.

Equitable tolling is supposed to be an "extraordinary" remedy applied sparingly. This case is an excellent vehicle to reinforce that basic understanding, especially given the panel majority's multiple conflicts with other circuits and departures from the principles laid down in this Court's cases. But if the Court does nothing else, it should summarily reverse the decision below because the Ninth Circuit added 254 days of equitable tolling for the period after the Nevada Supreme Court reversed the lower state court's supposedly "misleading" decision.

Even if Rudin was entitled to equitable tolling for some amount of time because she was "misled" by the state lower court (which she should not be), that time ended once the Nevada Supreme Court held that her state petition was, in fact, untimely. That date was

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*v. Thomas*, 132 S. Ct. 912, 923 (2012), negligence by counsel, such as missing a filing deadline, "does not warrant equitable tolling." *See also Coleman v. Thompson*, 501 U.S. 722, 753 (1991) ("Attorney ignorance or inadvertence is not 'cause'" to excuse a procedural default relating to a filing deadline); *Cadet v. Florida Dept. of Corr.*, 742 F.3d 473, 481 (11th Cir. 2014) ("attorney negligence, however gross or egregious, does not qualify as an 'extraordinary circumstance' for purposes of equitable tolling; abandonment of the attorney-client relationship * * * is required").

This error, though not requiring independent consideration by the Court, is noted here to emphasize just how fundamentally flawed is the published decision below.

May 10, 2010. App. 97. On that day, the Nevada courts were no longer "misleading" Rudin into thinking her state petition was timely. Yet the Ninth Circuit held that Rudin was entitled to an additional 254 days of equitable tolling after that—until the date the Nevada Supreme Court denied her motion for rehearing—*plus* another 96 days after that to file her first federal petition on April 25, 2011.

That cannot be right. The Ninth Circuit's supposed extraordinary circumstance justifying equitable tolling from 2007 until she filed her federal petition in 2011 was Rudin's reliance on the state trial court's mistake. Once the Nevada Supreme Court spoke to the issue on May 10, 2010, any continued reliance on the trial court's (mistaken) view was not reasonable.[5]

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[5] In finding that Rudin's petition was timely, the Ninth Circuit's second decision expressly applied a "stops-the-clock" approach whereby a habeas petitioner's one-year AEDPA clock stops whenever a petitioner is eligible for equitable tolling, and resumes again from that point once the period of equitable tolling ends. *See* App. 34–35. In contrast, the court in its first decision merely "assume[d] that equitable tolling preserves the remaining AEDPA limitations period" because it was giving "Rudin every benefit of the doubt." App. 71 n.19. The Ninth Circuit has been inconsistent in whether and how it has applied the stops-the-clock approach to equitable tolling. *See Luna v. Kernan*, 784, F.3d 640, 651–52 (9th Cir. 2015) (discussing cases and concluding the Ninth Circuit has applied a stops-the-clock rule or a diligence-through-filing rule in different cases). It doesn't matter in this case, however. Because Rudin used up 133 days of her AEDPA clock before Figler was appointed, App. 27, and waited 350 more days to file her federal petition after the Nevada Supreme Court reversed the supposedly "misleading" lower court decision, her petition was untimely whether a court applies a stops-the-clock or diligence-through-filing rule.

The indefensibility of this extra tolling is confirmed by the fact that the only way the Ninth Circuit reached its conclusion was by simply ignoring the Nevada Supreme Court's 2010 ruling. There is no mention of that ruling in the Ninth Circuit's decision. Instead, the panel majority's opinion repeatedly projects the substance of the May 10, 2010 decision into the Nevada Supreme Court's later 2011 order summarily denying rehearing. *See*, *e.g.*, App. 33 (holding that Rudin "continued to benefit from" the lower state court's erroneous acceptance of her petition until the "Nevada Supreme Court reversed the grant of habeas relief on January 20, 2011"); App. 33 ("Rudin waited only three months after the Nevada Supreme Court denied her relief—from January 20 to April 25, 2011"); App. 34 ("no state court found Rudin's petition untimely until the Nevada Supreme Court entered judgment in January 2011").

The Nevada Supreme Court "reversed the grant of habeas relief on" May 10, 2010, *not* January 20, 2011. App. 33, 97. After "the Nevada Supreme Court denied her relief" on May 10, 2010, Rudin sat on her rights for 350 days—not "three months"—before filing her first federal petition on April 25, 2011. *Id.* Those 254 days of extra equitable tolling, plus the additional 96 days before Rudin filed her federal petition, are not supported by any extraordinary circumstance.

Nor has Rudin demonstrated she was "reasonably diligent" in waiting almost a year to file her federal petition after the Nevada Supreme Court ruled. In other circuits, prisoners who sit on their rights for periods ranging from two weeks to nine months have been deemed *not* reasonably diligent. *See*, *e.g.*, *Palacios*,

723 F.3d at 608 (holding that "two weeks was enough time 'to allow [petitioner] to take action to preserve his federal rights'"); *Koumjian v. Thaler*, 484 F. App'x. 966, 969 (5th Cir. 2012) (holding petitioner not diligent when, "even if we were to subtract the time" of the alleged extraordinary circumstances, petitioner's delay "would still exceed four and a half months"); *Earl v. Fabian*, 556 F.3d 717, 724–25 (8th Cir. 2009) (holding no reasonable diligence when petitioner waited eight months to preserve rights); *Coppage v. McKune*, 534 F.3d 1279, 1281–82 (10th Cir. 2008) (same for 50 days); *Donovan v. Maine*, 276 F.3d 87, 93–94 (1st Cir. 2002) (same for seven weeks). The Ninth Circuit's new record—allowing a petitioner to wait almost a full year after she was authoritatively notified that her state petition was not "properly filed"—would not be considered "reasonable diligence" in any other court of appeal. Indeed, this part of the Ninth Circuit's decision is so manifestly contrary to this Court's teachings on equitable tolling it warrants summary reversal.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and set the case for plenary review. In the alternative, the Court should grant the petition and summarily reverse on the second question presented because the Ninth Circuit's unexplained grant of hundreds of days of extra equitable tolling is not supported by the panel majority's own rationale, much less this Court's equitable tolling precedents.

Respectfully submitted,

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September 2015

# APPENDIX

# APPENDIX

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## APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-15362**
**D.C. No. 2:11-cv-00643-RLH-GWF**

**[Filed March 10, 2015]**

| | |
|---|---|
| MARGARET RUDIN, *Petitioner-Appellant*, | ) |
| v. | ) |
| CAROLYN MYLES; ATTORNEY GENERAL OF THE STATE OF NEVADA, *Respondents-Appellees*. | ) |

ORDER AND OPINION

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, Senior District Judge, Presiding

Argued and Submitted
February 11, 2014—San Francisco, California

Filed September 10, 2014
Opinion Withdrawn and New Opinion Filed
March 10, 2015

Before: Diarmuid F. O'Scannlain and Mary H. Murguia, Circuit Judges, and Lynn S. Adelman, District Judge.[*]

Order;
Opinion by Judge Murguia;
Concurrence by Judge Adelman;
Dissent by Judge O'Scannlain

**SUMMARY**[**]

Habeas Corpus

The panel withdrew an opinion filed on September 10, 2014, and filed a new opinion reversing the district court's order dismissing as untimely Nevada state prisoner Margaret Rudin's 28 U.S.C. § 2254 habeas corpus petition challenging her conviction of murder with the deadly use of a weapon and unauthorized surreptitious intrusion of privacy by listening device.

The panel held that because the Nevada State Supreme Court concluded that Rudin's state post-conviction petition was untimely under state law, Rudin is not entitled to statutory tolling under 18 U.S.C. §2244(d)(2) for the duration of her state post-conviction proceedings.

The panel held that extraordinary circumstances prevented Rudin from filing her application for federal habeas relief, and that she is therefore entitled to

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[*] The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

equitable tolling of the AEDPA statute of limitations, between November 10, 2004, and August 22, 2007 – during which period the first attorney appointed to represent Rudin in collateral review proceedings abandoned her, and during which period she was diligent in pursuing her rights.

The panel held that the state post-conviction court's finding – at an August 22, 2007, status conference, immediately upon discovering counsel's failure to file a post-conviction petition in state court – of "extraordinary circumstances" that would "extend the one year deadline," coupled with the state's failure to brief the timeliness question or move to dismiss Rudin's petition, "affirmatively misled" Rudin into believing that the state court had excused her late filing and that her federal limitations period would be statutorily tolled. The panel explained that until the state court's finding was challenged or reversed – that is, as long as Rudin's petition was deemed "properly filed" by the state post-conviction court – Rudin remained entitled to statutory tolling of the federal clock.

The panel held that Rudin satisfied her burden to show that she is entitled to equitable tolling of the AEDPA limitations period until January 20, 2011, when the extraordinary circumstances making it impossible for her to file her federal petition on time were removed, giving her until September 9, 2011, to file her petition for federal habeas relief in the district court. Because Rudin filed her petition on April 25, 2011, the panel concluded that her petition was timely filed.

The panel remanded for further proceedings and denied the state's motion to expand the record on appeal.

Concurring, District Judge Adelman wrote that a contrary result would require the essentially pointless early filing of federal petitions by prisoners who reasonably believe that their claims are properly pending, unexhausted, in state courts.

Dissenting, Judge O'Scannlain wrote that Rudin is not entitled to equitable tolling beyond the August 22, 2007, conference because she failed to act with reasonable diligence to protect her rights for the duration of the relevant time period.

## COUNSEL

Christopher Oram, Las Vegas, Nevada, for Petitioner-Appellant.

Jamie J. Resch (argued), Senior Deputy Attorney General, and Catherine Cortez Masto, Attorney General, Office of the Attorney General, Las Vegas, Nevada, for Respondents-Appellees.

Rene L. Valladares, Federal Public Defender, Megan Hoffman, Chief, Non-Capital Habeas Unit, Heather Fraley , Assistant Federal Public Defender, Las Vegas, Nevada, for Amicus Curiae Federal Public Defender for the District of Nevada.

## ORDER

The opinion filed on September 10, 2014, and appearing at 766 F.3d 1161, is withdrawn. The superseding opinion will be filed concurrently with this

order. The parties may file additional petitions for rehearing or rehearing en banc.

## OPINION

MURGUIA, Circuit Judge:

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year period of limitation within which an individual seeking relief must file an application for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). Once that one-year period begins to run, it may be tolled only in certain circumstances. *See id.* § 2244(d)(2) (providingfor statutorytolling); *Holland v. Florida*, 560 U.S. 631, 634 (2010) (providing for equitable tolling). The question this case presents is whether Petitioner Margaret Rudin is entitled to statutory or equitable tolling of the AEDPA limitations period, excusing her six-year delay in filing her application. We conclude that she is entitled to equitable tolling sufficient to excuse her delay. We therefore reverse the district court's order dismissing Rudin's application as untimely.

## I. FACTS

The facts giving rise to this appeal are essential to our tolling analysis. We therefore describe those facts in more detail than we otherwise might.

### *A. Rudin's Criminal Trial and Direct Appeal Proceedings*

In April 1997, Rudin was charged with murder with the use of a deadly weapon and unauthorized surreptitious intrusion of privacy by listening device, both in violation of Nevada state law. *See* Nev. Rev.

Stat. §§ 200.010; 193.165; 200.650. Those charges arose out of the death of Rudin's husband Ron, whose charred remains had been discovered in Lake Mojave a few years earlier. *See Rudin v. State*, 86 P.3d 572, 577 (Nev. 2004). After pleading not guilty to both charges, Rudin retained the services of a private attorney, Michael Amador, to represent her at trial. Her trial began in the Eighth Judicial District Court of the State of Nevada (the "trial court" or the "court") on March 2, 2001.

Two-and-a-half weeks before trial commenced, it became clear to the court that Amador alone could not adequately defend Rudin. After a series of pretrial delays, the court appointed attorney Thomas Pitaro to assist Amador with Rudin's defense. Pitaro quickly realized that Amador had not yet reviewed "thousands of pages of discovery," and Pitaro soon became "concerned about the preparation that had been done for the trial." Amador had not, for example, interviewed critical witnesses. As a result, the defense team would learn, for the first time at trial, the content of various witnesses' testimony. In at least one instance, when a witness was called to the stand, Pitaro "went to get from Mr. Amador the [witness's] file and found nothing inside." As Pitaro would later describe, "the preparation that [one] would hope normally would be done before trial starts was being done during the trial."

But even with Pitaro's help, Rudin's trial was replete with alleged errors and professional misconduct on the part of the defense team. Amador, for example, began with an opening statement that had "no cohesive theme." Over the course of trial, Amador was accused

of creating a prejudicial conflict of interest by allegedly negotiating agreements for the literary and media rights to his representation. *Rudin*, 86 P.3d at 587–88. His general lack of preparation prompted Rudin twice to move for a mistrial, but both of her motions were denied. *Id.* at 579–80, 585–86. Pitaro, who was appointed after Amador's opening statement, described the representation as " 'a farce, and that disturbs me as an attorney. . . . This has become a sham, a farce and a mockery.' "[1] *Id*. at 590 (Rose, J., dissenting).

A jury convicted Rudin on both charges. For her conviction for murder with the use of a deadly weapon, the trial court imposed a sentence of life imprisonment with a possibility of parole after twenty years. For her conviction for unauthorized surreptitious intrusion of privacy by a listening device, the court imposed a one-year sentence, to run concurrently with Rudin's life sentence. Rudin's judgment of conviction was entered on September 17, 2001.

On April 1, 2004, the Nevada Supreme Court affirmed both of Rudin's convictions on direct appeal. *See Rudin v. State*, 86 P.3d 572 (Nev. 2004). The court concluded that Amador's alleged conflict of interest and ineffectiveness, while sufficient to cause "concern," "must be examined in a separate post-conviction proceeding at which time Rudin's post-conviction attorney will examine the entire record, interview all relevant witnesses and present the matter to the district court for a full and complete airing and

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[1] By the time Rudin's trial ended, the court had actually appointed a third attorney, John Momot, to assist with the defense. *Rudin*, 86 P.3d at 580.

decision." *Id.* at 588.[2] The Nevada Supreme Court's remittitur issued on April 27, 2004, and Rudin did not seek a writ of certiorari from the U.S. Supreme Court. The deadline for her to do so was June 30, 2004.[3]

*B. Rudin's Petitions for Collateral Relief*

Around the time that appellate review of Rudin's judgment of conviction concluded, two statutes of limitation began to run, both relating to her ability to seek collateral review of the errors that she alleged had affected her underlying criminal trial. The first limitations period is defined by state law and requires, except under certain circumstances, that a state-court petition for post-conviction relief be filed within one year of the Nevada Supreme Court issuing its remittitur:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment,

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[2] Two of the six justices dissented. They concluded that

> there is sufficient evidence in the record, without the necessity of post-trial proceedings, to establish that the defense was totally unprepared to try this case and that Amador had a substantial conflict of interest with his client. This was prejudicial to Rudin, and the result reached was unreliable.

*Rudin*, 86 P.3d at 595 (Rose, J., dissenting).

[3] Rudin had ninety days from the date of the Nevada Supreme Court's decision, which was issued on April 1, 2004, to petition for a writ of certiorari. Sup. Ct. R. 13(3).

> within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Nev. Rev. Stat. § 34.726(1). The second limitations period is defined by AEDPA, and it also establishes a one-year deadline for a state prisoner seeking a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The AEDPA limitations period runs from the latest of four specified dates:

> (1) 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.

*Id.* The AEDPA limitations period may be tolled if a petitioner "properly file[s]" a petition for post-conviction relief in state court; where that occurs, the limitations period will be tolled for the time during which the state-court petition is pending. *Id.* § 2244(d)(2).

Thus, from the date on which the Nevada Supreme Court issued its remittitur, which was April 27, 2004, Rudin had one year, or until April 27, 2005, to file a petition for post-conviction relief in state court. And from the date on which the deadline passed for seeking a writ of certiorari from the U.S. Supreme Court, which was June 30, 2004, she had one year, or until June 30, 2005, to file an application for a writ of habeas corpus in federal court. If Rudin were "properly" to file her state post-conviction petition, the time for filing an application for federal habeas relief would be statutorily tolled.

With that statutory background in mind, we turn to the series of events that occurred during each of those respective one-year periods in this case.

*1. Attorney Dayvid Figler's Representation*

On April 30, 2004, three days after the Nevada Supreme Court issued its remittitur on direct appeal of Rudin's judgment of conviction, Rudin's appellate counsel, Craig Creel, moved to withdraw as counsel and asked the trial court to appoint post-conviction counsel. The trial court granted Creel's motion on June 8, 2004. Rudin, proceeding pro per, filed a similar motion on July 14, 2004, also seeking appointment of post-conviction counsel.[4] At a hearing on November 10, 2004, after 197 days had passed since the state supreme court issued its remittitur, the court granted Rudin's motion and appointed attorney Dayvid Figler

[4] We assume that the state court was required, under Nevada Rule of Appellate Procedure 46(d)(3)(C), to wait to set a hearing date until after Rudin had filed her pro per motion for appointment of post-conviction counsel. Under that rule, in a post-conviction appeal, an attorney's motion to withdraw as counsel "shall be accompanied by . . . a motion by defendant to proceed in proper person or with substitute counsel."

to represent her.[5] Two weeks later, on November 24, 2004, the court issued an order to that effect.[6]

At the November 2004 hearing at which the state court appointed Figler to represent Rudin, Rudin attempted pro per to file with the court a series of papers. In the district court and on appeal, Rudin contends that those papers would have constituted a "properly filed" post-conviction petition had the court accepted them. *See* 28 U.S.C. § 2244(d)(2). Pursuant to the applicable local rules, however, the court declined to accept them and instead "turned [them] over to Mr. Figler."[7] But Figler never filed them with the court. One month later, in December 2004, Judge Bonaventure, who had presided over Rudin's trial and

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[5] The record is not clear as to the reason, if any, that the post-conviction court delayed four months in hearing Rudin's pro per motion for appointment of post-conviction counsel. *Cf.* Nev. Rev. Stat. §§ 34.740 (requiring "expeditious judicial examination" of petitions for post-conviction relief); 34.726 (limiting the period for filing a petition to one year). In the district court, Rudin argued in passing that the state court's four-month delay was "unnecessarily long" and was a part of the "extraordinary circumstances" that gave rise to her filing delay. She does not renew that argument on appeal.

[6] We take November 10, 2004, not November 24, 2004, as the date on which Figler's representation commenced.

[7] Rule 3.70 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada provides that papers "delivered to the clerk of the court by a defendant who has counsel of record will not be filed [but will be] forwarded to that attorney for such consideration as counsel deems appropriate."

post-conviction proceedings up until that point, recused himself sua sponte, and Rudin's case was reassigned.[8]

When Rudin's case was reassigned to another judge on December 29, 2004, 246 days had passed since the Nevada Supreme Court issued its remittitur. Rudin therefore had 119 days left to file a petition for post-conviction relief in state court. With respect to AEDPA, 182 days had passed since that limitations period had begun to run, leaving Rudin with 183 days to file an application for federal habeas relief. Again, the deadlines for filing those petitions were April 27, 2005, and June 30, 2005, respectively. And although Rudin had once tried to file a petition for relief in state court herself, the post-conviction court rejected that effort because the local rules prohibited Rudin from doing so when she had "counsel of record."

* * * * *

The record suggests that, after Rudin's case was reassigned (and perhaps as a result of that reassignment), substantial confusion arose between the parties and the court about whether Rudin had already filed a petition for post-conviction relief. On January 5, 2005, for example, the state court held a status hearing on Rudin's "opening brief." The court's use of the term

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[8] Judge Bonaventure recused himself as a result of personal biases that he had against Rudin's previous appellate counsel, Craig Creel. *See* Matt Pordum, *Bonaventure Won't Hear Rudin Appeal*, Las Vegas Sun, Dec. 28, 2004, http://www.lasvegassun.com/news/2004/dec/28/bonaventure-wont-hear-rudin-appeal/ (" 'My blood boils every time I hear the name Craig Creel. . . . Whether I look at him or think of him, my blood boils. I'm getting a headache thinking of him right now.'" (quoting Bonaventure, J.)).

"opening brief" suggested that the parties and the court believed that Rudin's initial petition for post-conviction relief had been filed but that Rudin had yet to file a brief in support of that petition. *See* Nev. Rev. Stat. § 34.735 (establishing the form of a petition). At the same status hearing, the court granted Figler a continuance, extending his time to file the "brief" and setting a second status hearing for July 13, 2005. At the July 13th status hearing, Figler again requested "an additional 90 days to file his brief," which the court granted the following week. By that date, both of Petitioner's one-year limitations periods for filing her requests for collateral relief had run. But nobody—neither Figler, nor the State, nor the court—recognized that to have occurred. On January 18, 2006, the post-conviction court again granted Figler an additional "45 days in which to file his opening brief due to the voluminous record in this case." The State would later confirm that, at that time, the State and the court were "under the mistaken impression" that a petition had already been filed.

Meanwhile, Rudin became concerned—and we believe rightfully so—that Figler was not adequately representing her in her collateral review proceedings. According to Rudin, at some point in 2005, she requested that Figler provide her with copies of her file. Figler did not immediately respond. Figler visited Rudin only a handful of times that year, but he did not interview the witnesses she identified, and he never informed her that he had requested a series of continuances on the basis of the "complexity" of her case. Figler last visited Rudin in May 2006, which was the first time in almost a year that he had done so.

In November 2005, Rudin began to gather information in support of her soon-to-be-filed motion to substitute counsel. First, she submitted an Inmate Request Form to the prison staff asking for a summary of the attorney visits she had received that past year. In a response dated a few weeks later, the staff informed her that she had received four visits in 2005, occurring on January 4, February 7, February 25, and June 17. In January 2006, after multiple failed attempts to contact Figler, Rudin submitted a second Inmate Request Form notifying prison staff that she had "not been able to call [her] attorney since [December 15, 2005]" and requesting that the staff fix the problem, which she was concerned was "at this facility." Three weeks later, the prison staff responded, informing Rudin that Figler had a collect call block on his office phone and that Rudin would need to send a letter to Figler requesting that the block be removed. At the same time, Rudin's friend, who was not in prison, "repeatedly . . . requested [that Figler] visit [Rudin]; have the telephone block removed; not postpone [Rudin's] post conviction brief filing; and send her a copy of the opening brief," all to no avail.

Figler never filed anything with the state post-conviction court. On April 5, 2006, 511 days after Figler was appointed, Rudin moved to substitute counsel. In her motion, she described Figler's inadequacies and expressed her "grea[t] concer[n] that she [was] not receiving adequate representation regarding her post conviction." At a hearing on July 17, 2006, the court granted her motion and, at the same time, appointed attorney Christopher Oram, who continues to represent Rudin on appeal, to represent

her.[9] The court filed an order to that effect on August 17, 2006.

To summarize the facts leading up to this point: By August 17, 2006, the day that Figler was relieved from his duties to represent Rudin, almost two years had passed since the day he was appointed to represent her. Early on in the course of Figler's representation, Rudin's case was reassigned to a new judge, who granted at least three of Figler's requests for additional time to file an "opening brief." At no point did the court ever mention the one-year limitations period under Nevada state law, and at no point did the State raise timeliness concerns. And while Figler regularly attended the court's status hearings, he appears to have done nothing else in support of his client's request for post-conviction relief. Indeed, after June 2005, Figler stopped communicating with his client altogether, by declining to visit her in prison and by placing a collect call block on his office telephone. When Figler's representation ended, 842 days had passed since the day Rudin's one-year state limitations period began to run, and 778 days had passed since the day her one-year AEDPA limitations period began to run. Of those days, 645 and 581, respectively, had run under Figler's watch. And during that time, Figler had filed nothing in either state or federal court.

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[9] Attached to Petitioner's motion to substitute counsel was what she called a "brief opening supplement," presumably to her petition for post-conviction relief. When the post-conviction court ruled on her motion, however, it appears to have construed the filing solely as a motion to substitute counsel, not as a petition for post-conviction relief.

*2. Attorney Christopher Oram's Representation*

Oram's representation began on August 17, 2006,[10] and has continued through the course of this appeal. Oram finally filed a post-conviction petition in state court on August 21, 2007. Prior submissions or references to Rudin's "opening brief" notwithstanding, Oram's August 21, 2007, submission appears to have been the first and only petition for post-conviction relief filed in the state court. It was filed three years and 116 days after the state-law statute of limitations began to run—or 846 days too late.

A colloquy between Oram, the post-conviction court, and the State at a status conference on August 22, 2007, demonstrates that, even at that late date, the parties were still confused as to whether a petition for post-conviction relief had actually been filed. Oram initially raised the issue by suggesting that he re-label his most recent filing as a petition for "a writ of habeas corpus" as opposed to a "supplement." The post-conviction court agreed and proceeded to find "extraordinary circumstances" to excuse the delay in filing:[11]

> MR. ORAM: [M]y fear is, as I look at the statute, that – um – the one year deadline to file, I

---

[10] We consider Figler's representation to have extended until the date on which the court entered its order substituting counsel, which was August 17, 2006.

[11] We assume that the post-conviction court's reference to "extraordinary circumstances" is equivalent to, or was intended to mean, "good cause," which is the standard to excuse a filing delay under Nevada Revised Statute section 34.726.

looked at it and it said that – uh – the court can excuse it, and can delay the process, which I assume was going on while Mr. Figler was going through this. But perhaps I should relabel the petition for writ of habeas corpus. I may need to amend it today, just to say where she's located, because that's what the statute requires.

THE COURT: Okay. I may say you should probably do that. Just do that as like a one page sheet, like an errata to your deal.

MR. ORAM: Yes.

THE COURT: And the court will find, as a matter of finding today, that [your] filing of the writ for post-conviction relief is timely, based upon – um – the fact that – uh – Mr. Figler had the case for so many years. I believe it was years.

MR. ORAM: It was two years. Yes, it was two years.

THE COURT: It was two years, and filed nothing, even though we kept having status checks. So – um – we're going to find that it was timely filed.

. . . .

Um – and it was an extensive trial. Didn't it take several weeks?

MR. ORAM: Ten weeks.

. . . .

> THE COURT: Ten week trial. So that would be the extraordinary circumstance that we would find would allow the petition for post-conviction relief be filed. That, plus the fact that the first attorney didn't do anything.

At that point, and for the very first time in two years, the State became aware that no petition had been filed and decided to speak up:

> [THE STATE]: I think, Judge, that sets a bad precedent, in light of the fact that we can get multiple attorneys, and every attorney that gets this says, well, he had it too long, he had it too long. We'd like to at least address that, before you make that finding.

The post-conviction court obliged, declining to make a finding until the State had the opportunity to address the issue in further briefing. It noted, however, that "I really think that the court is going to find, not only this court, but the next court, is going to find that there were extraordinary circumstances in this case, which would allow the court to extend the one year deadline." The State never did brief the timeliness question, nor did it ever move to dismiss Rudin's petition.

On December 19, 2008, the post-conviction court held a hearing to consider the merits of Rudin's petition for relief. At that hearing, the court questioned whether "the defense . . . start[ed] out so far behind the starting line of this trial that no matter how much time the [c]ourt gave them during the trial . . . it ultimately [was] an unfair trial." The post-conviction court went on to state,

> And there's two standards for *Strickland*:[12] One is was counsel effective, and then the second standard is even if counsel wasn't effective was the evidence so overwhelming . . . against the defendant [that] it wouldn't make any difference who defended her and how prepared they were and how many experts they called because the decision would always be guilty of murder.
>
> In this case I can't say that that is true. I didn't try the case, but in reviewing the writ filed by Mr. Oram and reviewing the response by the State, and I had commented on the 22nd of October that the case was full of a cast of characters together with witnesses, and the case had a lot of intrigue and spins and loops, and there was a lot of ulterior motives on people who testified.
>
> . . . .
>
> The experts couldn't agree on much of anything in this case as I read the dry record. The proof of guilt was not a slam dunk by any stretch of the imagination for the State, so I can't say – I cannot say in this case that no matter who had defended her that the verdict would have been the same.

After hearing testimony from defense attorneys Pitaro and Momot, the court granted Rudin's request for post-conviction relief and ordered her a new trial. The post-conviction court described Rudin's prior trial as a "mockery of our promise to people who are in the

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[12] *Strickland v. Washington*, 466 U.S. 668 (1984).

criminal justice system that they will have an adequate defense."

The State appealed, arguing for the first time on appeal that Rudin's petition was untimely. In its brief, the State confirmed what we think is suggested by the record: that "the prosecution and the judge were under the mistaken impression that an initial petition had been timely filed."

The Nevada Supreme Court reversed the post-conviction court's judgment. It concluded that neither of that court's stated reasons for excusing Rudin's delay "affords a factual or legal basis to find that Rudin's claims were not reasonably available to be raised in a timely manner." Rudin sought en banc reconsideration, which the Nevada Supreme Court denied on January 20, 2011. It was only after the Nevada Supreme Court denied en banc reconsideration of Rudin's state post-conviction appeal that Oram filed an application for habeas relief in federal court.

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On April 25, 2011, Rudin, still represented by Oram, applied for habeas relief in federal court. By that time, almost seven years had passed since the deadline for seeking a writ of certiorari from the U.S. Supreme Court, *see* 28 U.S.C. § 2244(d)(1)(A), making her application almost six years too late under AEDPA. In her application, Rudin contended that the Nevada Supreme Court erred in finding her state-court petition for post-conviction relief time-barred because either (1) the petition was timely, or (2) the State had waived any argument to the contrary when it failed to make a timeliness argument before taking its appeal. For those

reasons, according to Rudin, the federal district court should have considered her state-court petition to be "properly filed" and given her the benefit of statutory tolling of the AEDPA limitations period. *See* 28 U.S.C. § 2244(d)(2). In the alternative, Rudin argued that equitable tolling pursuant to *Holland v. Florida*, 560 U.S. 631 (2010), also applied to her case. The district court granted the State's motion to dismiss, dismissed Rudin's petition with prejudice, and denied the certificate of appealability. On October 24, 2012, we granted Rudin's request for a certificate of appealability on the question "whether the district court properly determined that the petition was barred by the statute of limitations." We turn now to that question.

## II. DISCUSSION

We review de novo the question whether a petitioner's application for federal habeas relief was timely filed. *Noble v. Adams*, 676 F.3d 1180, 1181 (9th Cir. 2012). We also review de novo the question whether AEDPA's statute of limitations should be tolled. *See Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Unless the facts are undisputed, we review the district court's findings of fact underlying a claim for equitable tolling for clear error. *Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012). The petitioner bears the burden to establish that she is entitled to tolling of the AEDPA limitations period. *Id*.

### *A. Statutory Tolling*

We begin with Rudin's argument that she is entitled to statutory tolling of the AEDPA limitations period. On this point, Rudin appears to argue that the Nevada

Supreme Court erred when it found her state post-conviction petition untimely, and that had it not so erred, her petition would be considered "properly filed" under 28 U.S.C. § 2244(d)(2), entitling her to statutory tolling of the AEDPA limitations period.[13]

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[13] In *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), the Court noted that a habeas petitioner may have a constitutional right to the assistance of effective counsel in collateral proceedings, where state collateral review is the first place a prisoner can present an ineffective assistance claim. *See id.*; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) ("*Coleman v. Thompson* left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."). *But see Buenrostro v. United States*, 697 F.3d 1137, 1139–40 (9th Cir. 2012) ("*Martinez* did not decide a new rule of constitutional law."). Rudin does not explicitly articulate a claim for ineffective assistance of her state post-conviction relief counsel, but we notice that this claim nonetheless pervades her claim for equitable tolling. Assuming *arguendo* that Rudin had stated such a claim, and that this Court were to recognize the constitutional right left open by *Coleman* and acknowledged by *Martinez*, Rudin may have qualified for statutory tolling under 28 U.S.C. § 2244(d)(1)(D).

To state a claim for ineffective assistance of counsel, a habeas petitioner must show both (1) deficient performance, and (2) stemming from that deficient performance. *Strickland*, 466 U.S. at 687. Here, although Rudin learned of Figler's deficient performance by August 22, 2007 at the latest, she was not prejudiced by his deficient performance until January 20, 2011, when the Nevada Supreme Court declined to toll the time of Figler's abandonment and barred Rudin's state petition as untimely. Accordingly, "the factual predicate" of her claim for ineffective assistance of post-conviction relief counsel could not have been discovered until January 20, 2011, 28 U.S.C. § 2244(d)(1)(D), and the statutory limitations period for that claim would not have begun to run until that date. *See Hasan v. Galaza*, 254 F.3d 1150, 1154–55 (9th Cir. 2001).

While we may not have made the same decision as the Nevada Supreme Court, we are not at liberty to second guess that court's decision when it was acting on direct appeal of the state post-conviction court's judgment. The state supreme court concluded that Rudin's petition was untimely under state law, and "[w]hen a post-conviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (internal quotation marks omitted) (second alteration in original); *accord Zepeda v. Walker*, 581 F.3d 1013, 1018 (9th Cir. 2009). In light of *Pace*, and because the Nevada Supreme Court is the final arbiter of Nevada state law, that is the end of the matter here. Rudin is not entitled to statutory tolling under § 2244(d)(2) for the duration of her state post-conviction proceedings.[14]

*B. Equitable Tolling*

We turn, therefore, to Rudin's argument that she is entitled to equitable tolling under *Holland v. Florida*. A petitioner is entitled to equitable tolling if she can establish that (1) she was pursuing her rights diligently, but (2) some extraordinary circumstance stood in her way. *Pace*, 544 U.S. at 418; *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling

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[14] We likewise reject Rudin's argument that she can claim the benefit of equitable tolling in state court, thereby entitling her to statutory tolling in federal court. Equitable tolling under *Holland v. Florida* is a federal doctrine entirely separate from state law. *See* 560 U.S. at 650 ("Equitable tolling [is] an inquiry that does not implicate a state court's interpretation of state law."); *see also Coleman*, 501 U.S. at 732 (applying the independent and adequate state ground doctrine to the habeas context).

is available 'only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of [the prisoner's] untimeliness.'" (second alteration in original) (quoting *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010)). Rudin bears a heavy burden to show that she is entitled to equitable tolling, "lest the exceptions swallow the rule," *Bills*, 628 F.3d at 1097 (internal quotation marks omitted); however, the grounds for granting equitable tolling are also highly fact-dependent, *Sossa*, 729 F.3d at 1229. At bottom, the purpose of equitable tolling is to "soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court." *United States v. Buckles*, 647 F.3d 883, 891 (9th Cir. 2011) (internal quotation marks omitted); *see also Holland*, 560 U.S. at 650 ("[W]e have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944))).

In *Holland*, the Supreme Court held that AEDPA's limitations period may be tolled for equitable reasons. 560 U.S. at 649. In that case, the petitioner's attorney had failed to file a timely application despite the petitioner's repeated requests to do so, failed to inform the petitioner about crucial facts related to his case, and failed to communicate altogether with his client over a period of several years. *Id.* at 2564. The Supreme Court found those circumstances to constitute more than a "garden variety claim of excusable neglect," and instead concluded that the attorney's

egregious misconduct amounted to, in essence, abandonment. *Id.*; *id.* at 2568 (Alito, J., concurring); *see also Maples v. Thomas*, 132 S. Ct. 912, 923–24 (2012) (adopting Justice Alito's reasoning in *Holland* addressing attorney abandonment).[15] Because of that abandonment, the petitioner's delay could be deemed to result from misconduct that could not constructively be attributed to him, and therefore the AEDPA limitations period could potentially be tolled for the relevant period of time. *Holland*, 560 U.S. at 652–53.

To be entitled to equitable tolling of the AEDPA limitations period, Rudin thus bears the burden to prove that she has been pursuing her rights diligently but that extraordinary circumstances made it impossible for her to file her application on time. *See Pace*, 544 U.S. at 418. Under *Holland*, attorney abandonment may give rise to such extraordinary circumstances. 560 U.S. at 652–53. "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id.* at 2565 (citations and second and third internal quotation marks omitted). We readily conclude that extraordinary circumstances in part gave rise to

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[15] Mere negligence on the part of a prisoner's post-conviction counsel does not warrant equitable tolling. *Holland*, 560 U.S. at 651–52. "That is so . . . because the attorney is the prisoner's agent, and under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Maples*, 132 S. Ct. at 922 (quoting *Coleman*, 501U.S. at 753–54). But when an attorney abandons his client, the principal-agent relationship is severed, and the attorney's "acts or omissions therefore 'cannot fairly be attributed to [the client].'" *Id.* at 923 (alteration in original) (quoting *Coleman*, 501 U.S. at 753).

Rudin's delay in filing her application for federal habeas relief.

*1. July 1, 2004, Through November 10, 2004*

Between July 1, 2004, the day the AEDPA limitation period began to run, and November 10, 2004, the day that Figler was appointed to represent Rudin, Rudin was not represented by counsel. During that time, Rudin cannot establish that "extraordinary circumstances" existed to equitably toll the AEDPA limitation period. *See Roy v. Lampert*, 465 F.3d 964, 970 (9th Cir. 2006) ("[P]ro se status, on its own, is not enough to warrant equitable tolling."). Thus, during that time, 133 non-tolled days passed on Rudin's AEDPA clock.

*2. November 10, 2004, Through August 22, 2007*

On November 10, 2004, Figler was appointed to represent Rudin in her collateral review proceedings.[16] After Figler was appointed, however, he abandoned her. Over the course of his period of representation, Figler visited Rudin in prison only a handful of times, and by mid-2005, those visits had stopped. He had a collect call block placed on his office phone, making him all but impossible to reach. And while we acknowledge that Figler physically attended the post-conviction court's status hearings, the record makes clear that he did so with seemingly no intention to actually represent his client. All the while, Figler failed to

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[16] It is significant that Figler's representation commenced before June 30, 2005—the last day of Rudin's AEDPA limitation period. That is so because extraordinary circumstances cannot toll a statute of limitations that has already run.

inform Rudin of the reasons for his delay, providing her no clue of "any need to protect [herself] pro se." *See Maples*, 132 S. Ct. at 917. On the record before us, it does not appear that *anyone* was aware of Rudin's need to protect herself until at least August 22, 2007. We therefore conclude that extraordinary circumstances prevented Rudin from filing her application for federal habeas relief between November 10, 2004, and August 22, 2007.

Rudin was also diligent in pursuing her rights during that time, beginning with her attempt to file pro per a petition for post-conviction relief on November 10, 2004. Over the course of Figler's representation, Rudin made repeated attempts to contact him, provided him with witness information relevant to her case, and requested that he provide her with copies of her files so that she could take additional steps on her own behalf. When Figler repeatedly failed to respond, Rudin prepared and filed her own motion to substitute counsel, which had a "brief opening supplement" attached to it. Until she filed that motion, Rudin had done everything short of filing her own "opening brief," which, as the state court had already made clear, the local rules prohibited her from doing. We conclude that Rudin was "reasonably diligent" during the period of Figler's representation, which is all that is required for equitable tolling purposes. *See Holland*, 560 U.S. at 653–54.

Rudin is therefore entitled to equitable tolling of the AEDPA statute of limitations during the time in which Figler was representing her and up until the point at which Oram became aware that Figler had never filed

anything on Rudin's behalf.[17] That period of time ran from November 10, 2004, to August 22, 2007.

The State argues that Rudin cannot avail herself of the benefit of equitable tolling during that time because Figler represented Rudin only in state court, not in federal court. On that point, the State contends that Figler's inadequacies in state court had no bearing on Rudin's ability to file a timely federal application for relief. It argues that, pursuant to *Pace*, Rudin should have filed a "protective" application in federal court and asked the court to stay and abey its habeas proceedings while she exhausted her state-court remedies. 544 U.S. at 416 ("A prisoner seeking state post-conviction relief [may file] a 'protective' petition in federal court and as[k] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted."). Under the specific circumstances of this case, we are not persuaded by the State's argument. *See Holland*, 560 U.S. at 632 ("[S]pecific circumstances . . . could warrant special treatment in an appropriate case.").

For all Rudin knew—and, indeed, until August 22, 2007, for all the *State* knew—Rudin's state-court petition had already been filed, making her eligible for statutory tolling under § 2244(d)(2). During the period that Figler had represented her, almost every reference to the pending filing was to an "opening" or

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[17] Regrettably, this Court has become familiar with Figler's repeated abandonment of his habeas clients. *See, e.g.*, *Gibbs v. LeGrand*, 767 F.3d 879, 888 n.7 (9th Cir. 2014) ("Figler's abandonment of both Gibbs and Rudin is deeply troubling, to say the least.").

"supplemental brief," suggesting that the court had already received her initial petition. Even the State concedes that it believed that to be the case. During the period in which Rudin "lacked a clue" of any need to protect herself, we decline to impute to her knowledge that neither the State nor the court possessed. *See Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002) (declining to impute to a petitioner knowledge that, "[e]ven with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, . . . evaded both [petitioner's] appointed counsel and the expertise of a federal magistrate judge").[18]

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[18] The State filed a motion in this court to expand the record on appeal to include various state-court documents that it had not, for whatever reason, made a part of the record in the district court. As a general rule, documents not filed with the district court cannot be made part of the record on appeal. *See* Fed. R. App. P. 10(a) ("[T]he original papers and exhibits filed in the district court; the transcript of proceedings, if any; and a certified copy of the docket entries prepared by the district clerk . . . constitute the record on appeal."); *Kirschner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). There are of course narrow exceptions to that general rule, which we may, in our discretion and in "unusual circumstances," invoke. *Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) (listing exceptions).

The State offers no compelling reason for its failure to make these documents part of the record in the district court. Ironically, the reasons it offers for doing so are the same reasons to which it objected when the state post-conviction court found that Rudin had established good cause for her filing delay: that "this is not a typical case," that "Rudin's trial was one of the longest in Nevada history," and that, overall, the proceedings below were complex.

We do not need the documents that the State seeks to make part of the record on appeal in order to decide this case. Thus, we

*3. August 23, 2007, Through January 20, 2011*

On August 22, 2007, at the status conference in the state post-conviction court, the parties first became aware of the fact that Figler had never filed a post-conviction petition in state court. From that point forward, Rudin was put on notice of the fact that nothing had been "properly filed" in either state or federal court on her behalf. However, immediately upon discovering Figler's failure to file, the post-conviction court found "extraordinary circumstances" that would "extend the one year deadline."

This finding, coupled with the state's failure to brief the timeliness question or move to dismiss Rudin's petition, "affirmatively misled" Rudin into believing that the state court had excused her late filing and that her federal limitations period would be statutorily tolled. *See Sossa*, 729 F.3d at 1232 (citing *Pliler v. Ford*, 542 U.S. 225, 234 (2004)). In *Sossa*, we held that where a petitioner was affirmatively misled to believe that her limitations period was being tolled under the statute, this inaccuracy could entitle her to equitable tolling. *See id.* at 1232–35. Similarly here, the state court's finding of "extraordinary circumstances" led Rudin to believe that her limitations period would be statutorily tolled. By excusing Rudin's delay in state court, the state post-conviction court conveyed that Rudin's state petition was "properly filed" and, by extension, that her time to file a federal petition would

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decline to depart from our general rule. The State's motion to expand the record on appeal is **DENIED.**

be extended under the statute. *See id.* as 1233.[19] Until the state court's finding was challenged or reversed—that is, as long as Rudin's petition was deemed "properly filed" by the state post-conviction court—Rudin remained entitled to statutory tolling of the federal clock. *See* 28 U.S.C. § 2244(d)(2).

Under *Sossa*, therefore, the inaccuracy of a state post-conviction court's extension of time may constitute an "extraordinary circumstance" making it "impossible" to file a petition on time, *see Gibbs*, 767 F.3d at 888 n.8 (citation omitted) (internal quotation marks omitted). Reasonable diligence did not require Rudin to foresee the error in the post-conviction court's timeliness ruling—especially where, as here, the state acquiesced

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[19] Contrary to the dissent, that *Sossa* considered the inaccuracy of a federal magistrate judge's instructions, rather than a state court judge's instructions, is immaterial. *Sossa* does not limit its reasoning to actions by federal forums. *See id.* at 1235 (reasoning that the state bears responsibility for objecting to extensions of time, lest it "lie in wait . . . and only thereafter oppose a petition as untimely"); *see also Pliler* 542 U.S. at 235(O'Connor, J., concurring) (providing the fifth vote for the majority and stating that "if the petitioner is affirmatively misled, either by the court *or by the State*, equitable tolling might well be appropriate" (emphasis added)). *Sossa*'s reasoning is explicitly intended to protect habeas petitioners who are "affirmatively misled," by courts or prosecutors, into believing their petitions have been timely filed.

Similarly, that *Sossa* dealt with the inaccurate extension of a federal limitations period, rather than a state limitations period, is also immaterial. Because the federal limitations period is automatically extended by a "properly filed" state limitations period, 28 U.S.C. § 2244(d)(2), a federal habeas petitioner may be entitled to equitable tolling where, as here, a state court erroneously extends the state limitations period and, by extension, the federal statutory limitations period.

in the extension of time. *See Gibbs*, 767 F.3d at 890–91 (To expect a petitioner to file a federal petition while her state proceedings are still pending "improperly raises the standard from 'reasonable' to 'maximum feasible' diligence." (quoting *Holland*, 560 U.S. at 653)).

The post-conviction court's timeliness finding was integrated into a final adjudication on December 31, 2008, when the state post-conviction relief court issued an order granting Rudin's state habeas petition. Rudin therefore continued to benefit from the post-conviction court's finding of "extraordinary circumstances" until the Nevada Supreme Court reversed the grant of habeas relief on January 20, 2011.

Following the post-conviction court's initial finding of extraordinary circumstances, Rudin diligently pursued her then-"properly filed" state petition, and pursued her rights in federal court promptly after her state post-conviction proceedings were no longer pending. *See* 28 U.S.C. § 2244(d)(2). Unlike the petitioner in *Pace*, 544 U.S. at 410–11, who waited over seven years after the first state court decision found his petition untimely, Rudin waited only three months after the Nevada Supreme Court denied her relief—from January 20 to April 25, 2011—before filing her federal petition. Rudin's failure to file a protective petition in federal court before her state petition was deemed untimely, in reliance first on the state post-conviction court's timeliness finding and later on that court's grant of relief, did not undermine Rudin's diligent pursuit of her rights. *See Sossa*, 729 F.3d at 1229, 1237 (holding petitioner entitled to equitable tolling where he reasonably relied on a magistrate judge's orders extending his habeas filing deadline).

To the contrary, once the state post-conviction relief court excused Rudin's delay and deemed her petition "properly filed," Rudin remained entitled to statutory tolling in federal court. *See Pace*, 544 U.S. at 417. What's more, once the state post-conviction relief court granted Rudin's petition for habeas relief, Rudin could not have filed a protective federal habeas petition that would have been ripe for review. Because Rudin prevailed in the state post-conviction court, she had no adverse ruling to challenge in a federal petition. Until the Nevada Supreme Court ruled, Rudin could not have known whether she would even need the intervention of the federal courts. Further federal proceedings would have been unnecessary unless and until the Nevada Supreme Court reversed the grant of relief. Unlike *Pace*, where the state courts repeatedly and consistently found petitioner's filings untimely, *Pace*, 544 U.S. at 410–11, no state court found Rudin's petition untimely until the Nevada Supreme Court entered judgment in January 2011. To require Rudin to have anticipated the Nevada Supreme Court's reversal by filing a protective petition in federal court would undermine the state post-conviction relief court's authority and would hold Rudin to a standard higher than reasonable diligence. *See Holland*, 560 U.S. at 653; *see also Gibbs*, 767 F.3d at 890–91.

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In sum, we conclude that Rudin has satisfied her burden to show that she is entitled to equitable tolling of the AEDPA limitations period until January 20, 2011, when the extraordinary circumstances making it impossible for her to file her federal petition on time were removed. *See Sossa*, 729 F.3d at 1229. After that

date, AEDPA's one-year limitations period resumed, giving Rudin until September 9, 2011 to file her petition for federal habeas relief in the district court. Because Rudin filed her petition on April 25, 2011, within the tolled limitations period, we conclude that her petition was timely filed.

## III. CONCLUSION

We **REVERSE** the district court's dismissal of Rudin's petition and **REMAND** for further proceedings consistent with this opinion. For the reasons explained earlier, we **DENY** the State's motion to expand the record on appeal.

ADELMAN, District Judge, concurring:

I join the court's opinion in full. I add only that a contrary result would require "the essentially pointless early filing of federal petitions," *Brooks v. Williams*, No. 2:10-cv-00045, 2011 WL 1457739, at *4 (D. Nev. Apr. 14, 2011), by prisoners who reasonably believe that their claims are properly pending, unexhausted, in state courts. *See Gibbs v. Legrand*,767 F.3d 879, 890–91 (9th Cir. 2014); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (indicating that a prisoner's "reasonable confusion about whether a state filing would be timely" will ordinarily constitute good cause for a protective federal petition).

Requiring a protective filing would be particularly pointless in this case. By August 2007, the federal habeas statute of limitations had long since run. Unlike in *Pace*, where the prisoner could have filed a

protective petition during the state post-conviction proceedings but before the federal statute ran, in the present case any protective petition Rudin might have filed after August 2007 would not have protected anything. *See, e.g.*, *Urrizaga v. Attorney General for Idaho*, No. CV-07-434, 2008 WL 1701735, at *3 (D. Idaho Apr. 9, 2008) (dismissing as untimely protective petition filed after the statute of limitations had already expired).

O'SCANNLAIN, Circuit Judge, dissenting:

I joined Judge Murguia's original opinion for the Court, *Rudin v. Myles*, 766 F.3d 1161 (9th Cir. 2014), and regret that she has changed her view. She was right then, and I believe her original view is still correct. We are all agreed that Rudin is entitled to equitable tolling for the period between November 10, 2004 and August 22, 2007. *See* Majority at 26–29. During that time period, Rudin faced the extraordinary circumstance of being abandoned by her lawyer, Dayvid Figler, and diligently pursued her rights. *See Holland v. Florida*, 560 U.S. 631, 652–54 (2010). However, I cannot join the Court's new conclusion that Rudin is entitled to equitable tolling after August 22, 2007. In my view, the statute of limitations expired on April 11, 2008, over three years before she filed the instant petition.[1] Therefore, I respectfully dissent.

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[1] As the majority points out, Rudin is not entitled to equitable tolling between July 1, 2004—the date the AEDPA limitations period began to run—and November 10, 2004—the date Figler was

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Under AEDPA, "equitable tolling is available 'only when extraordinary circumstances beyond a prisoner's control make it *impossible* to file a petition on time and the extraordinary circumstances were the *cause* of [the prisoner's] untimeliness.'" *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) (emphasis in original) (quoting *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010)). And even if a prisoner can show such extraordinary circumstances, she must also demonstrate that she pursued her rights with "reasonable diligence." *Holland*, 560 U.S. at 653. Indeed, "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Bills*, 628 F.3d at 1097. With these principles in mind, I turn to the relevant facts of this case.

II

The majority asserts that the events of a state court status conference, which took place on August 22, 2007, "affirmatively misled" Rudin with respect to the deadlines for her federal habeas petition, Majority at 30, and therefore holds that Rudin's failure to file a timely federal petition may be excused. That conclusion, however, cannot be squared with the record or our precedents.

Even if the status conference were an "extraordinary circumstance" for AEDPA purposes, Rudin failed to act with reasonable diligence to protect

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appointed. *See* Majority at 26. Thus, as of August 23, 2007, Rudin had 232 days to file her federal petition. When she failed to file by April 11, 2008, the statute of limitations expired.

her rights.[2] On August 22, 2007, Rudin, her attorney, the prosecution, and the state post-conviction court first became aware that Figler had never filed a post-conviction petition in state court. The court informed the parties, however, that due to the "extraordinary circumstances" of Figler's failure to file, it would "extend the one year deadline" to file a *state* habeas petition.[3] Based on these events, the majority

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[2] The majority conflates the concepts of statutory tolling and equitable tolling. Here, there is no dispute that Rudin is not entitled to statutory tolling. Thus, the majority's attempt to recast a losing statutory tolling argument in terms of equitable tolling is unpersuasive.

[3] The majority says that such a ruling, "coupled with the state's *failure* to brief the timeliness question or move to dismiss Rudin's petition, 'affirmatively misled' Rudin." Majority at 30 (emphasis added). It is unclear, however, what authority supports the position that the state's *failure* to do something can amount to *affirmative* misleading. The majority cites *Sossa* but *Sossa* actually suggests that a state, as an opposing party, has no authority to extend the statutory deadline established by Congress and therefore the state's actions (or, in this case, inactions) should not influence the petitioner. *See Sossa*, 729F.3d at 1235 n.9 (citing *Johnson v. Quarterman*, 483 F.3d 278 (5th Cir. 2007)). In any event, the state's failure to object to the timeliness question applied to the *state* petition and thus would not affect Rudin's assessment of her *federal* petition.

For that same reason, the majority is incorrect in relying on *Sossa* to assert that the events of the August 22, 2007 conference were an extraordinary circumstance under AEDPA. In *Sossa*, we held that when a prisoner is "affirmatively misled" by a federal magistrate judge regarding AEDPA's deadlines, the petitioner maybe entitled to equitable tolling. 729 F.3d at 1232 (citing *Pliler v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring)). We determined that when a *federal* magistrate judge granted multiple

makes the extraordinary leap that Rudin was excused from doing *anything* with respect to her *federal* petition for post-conviction relief for well over three years. *See* Majority at 30–31.

In fact, however, Rudin was under a duty to pursue her rights diligently. *See Holland*, 560 U.S. at 653. As the majority recognizes, as of the August 22, 2007 conference, Rudin and her new attorney, Christopher Oram, were "put on notice of the fact that nothing had been 'properly filed' in either state or federal court on her behalf." Majority at 30. With such knowledge, Rudin was not excused from taking action. Rather, she needed to act—with "reasonable diligence"—to preserve

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extensions for the prisoner to file his *federal* habeas petition, such extensions effectively instructed the prisoner that if he followed the court's schedule, his *federal* filing would be deemed timely. *Id.* at 1235.

In contrast, the majority here focuses on a *state* court's instruction regarding a *state* habeas petition. Unlike *Sossa*, neither the parties nor the court discussed the federal petition. Thus, rather than "affirmatively misle[ading]" Rudin in any way as to the AEDPA statute of limitations, if anything the status conference made Rudin aware that her state petition had not been properly filed and notified her that she should file a protective federal petition. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005).

Moreover, the majority does not explain what *inaccuracy* actually affirmatively misled Rudin. *Sossa* holds that "'[i]n order to show that he was affirmatively misled, [a habeas petitioner] need[s] to point to some inaccuracy in the district court's instructions' to him, not merely to his 'misunderstanding of accurate information.'" *Sossa*, 729 F.3d at 1233 (quoting *Ford*, 590 F.3d at 788). Whereas *Sossa* identified such an inaccuracy, *see id.*, Rudin—and the majority—cannot. *Sossa*, in short, does not govern here.

her right to challenge her conviction. *See Holland*, 560 U.S. at 653. Indeed, the Supreme Court has spelled out precisely what steps Rudin *should* have taken as soon as she and Oram were aware that there were potential timeliness issues with the state petition.

In *Pace v. DiGuglielmo*, the Court instructed that if a state prisoner is faced with uncertainty about whether her state post-conviction petition is timely, she should "fil[e] a 'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." 544 U.S. at 416; *see also Lakey v. Hickman*, 633 F.3d 782, 787 (9th Cir. 2011) ("*Pace* also explicitly advised state prisoners . . . to file a protective federal petition to avoid a possible timeliness bar."). Rudin not only failed to file such a protective petition, she failed to file anything in federal court over the next three years.

The majority's bare assertion that Rudin diligently pursued her rights does not make it so. That "Rudin waited only three months after the Nevada Supreme Court denied her relief—from January 20[, 2011] to April 25, 2011—before filing her federal petition" is completely beside the point. Majority at 32. Indeed, even if the August 22, 2007 conference were an "extraordinary circumstance" that would qualify for equitable tolling purposes, Rudin must still show she acted with reasonable diligence between August 22, 2007 and April 25, 2011. *See Pace*, 544 U.S. at 418. The majority fails to demonstrate—nor could it, in light of the record—how Rudin acted with reasonable diligence for the duration of the relevant time period.

The August 22, 2007 conference did not excuse Rudin from acting, but rather armed her with knowledge that should have spurred her to protect her rights. Rudin did not file anything in federal court until April 25, 2011, over three years and eight months later. "Such a delay does not demonstrate the diligence required for application of equitable tolling." *White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010). Thus, even if the status conference were an extraordinary circumstance, as the majority asserts, Rudin is not entitled to equitable tolling beyond that date.

## III

For the foregoing reasons, I would affirm the judgment of the district court.

## APPENDIX B

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-15362**
**D.C. No. 2:11-cv-00643-RLH-GWF**

**[Filed September 10, 2014]**

| | |
|---|---|
| MARGARET RUDIN, *Petitioner-Appellant*, | ) |
| v. | ) |
| CAROLYN MYLES; ATTORNEY GENERAL OF THE STATE OF NEVADA, *Respondents-Appellees*. | ) |

OPINION

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, Senior District Judge, Presiding

Argued and Submitted
February 11, 2014—San Francisco, California

Filed September 10, 2014

Before: Diarmuid F. O'Scannlain and Mary H. Murguia, Circuit Judges, and Lynn S. Adelman, District Judge.[*]

Opinion by Judge Murguia;
Dissent by Judge Adelman;

## SUMMARY[**]

### Habeas Corpus

The panel affirmed the district court's order dismissing as untimely Nevada state prisoner Margaret Rudin's 28 U.S.C. § 2254 habeas corpus petition challenging her conviction of murder with the deadly use of a weapon and unauthorized surreptitious intrusion of privacy by listening device.

The panel held that because the Nevada State Supreme Court concluded that Rudin's state post-conviction petition was untimely under state law, Rudin is not entitled to statutory tolling under 18 U.S.C. § 2244(d)(2) for the duration of her state post-conviction proceedings.

The panel held that extraordinary circumstances prevented Rudin from filing her application for federal habeas relief, and that she is therefore entitled to equitable tolling of the AEDPA statute of limitations, between November 10, 2004, and August 22, 2007—during which period the first attorney appointed

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[*] The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to represent Rudin in collateral review proceedings abandoned her, and during which period she was diligent in pursuing her rights.

The panel held that Rudin is not entitled to equitable tolling after the point, August 22, 2007, at which the parties and her subsequent appointed counsel first became aware that prior counsel had never filed a post-conviction petition in state court, through April 25, 2011, when counsel applied for habeas relief in federal court, during which period Rudin failed to act diligently to protect her rights.

Dissenting, District Judge Adelman concluded that, on the egregious facts of this case, the doctrine of equitable tolling is sufficiently expansive to provide Rudin with access to the federal courts.

## COUNSEL

Christopher Oram, Las Vegas, Nevada, for Petitioner-Appellant.

Jamie J. Resch (argued), Senior Deputy Attorney General, and Catherine Cortez Masto, Attorney General, Office of the Attorney General, Las Vegas, Nevada, for Respondents-Appellees.

## OPINION

MURGUIA, Circuit Judge:

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year period of limitation within which an individual seeking relief must file an application for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). Once that one-year period begins to run, it may be tolled only in certain

circumstances. *See id.* § 2244(d)(2) (providing for statutory tolling); *Holland v. Florida*, 130 S. Ct. 2549, 2554 (2010) (providing for equitable tolling). The question this case presents is whether Petitioner Margaret Rudin is entitled to statutory or equitable tolling of the AEDPA limitations period, excusing her six-year delay in filing her application. We conclude, albeit not without pause, that she is not entitled to statutory or equitable tolling sufficient to excuse her delay. We therefore affirm the district court's order dismissing Rudin's application as untimely.

## I. FACTS

The facts giving rise to this appeal are essential to our tolling analysis. We therefore describe those facts in more detail than we otherwise might.

### *A. Rudin's Criminal Trial and Direct Appeal Proceedings*

In April 1997, Petitioner Margaret Rudin was charged with murder with the use of a deadly weapon and unauthorized surreptitious intrusion of privacy by listening device, both in violation of Nevada state law. *See* Nev. Rev. Stat. §§ 200.010; 193.165; 200.650. Those charges arose out of the death of Rudin's husband Ron, whose charred remains had been discovered in Lake Mojave a few years earlier. *See Rudin v. State*, 86 P.3d 572, 577 (Nev. 2004). After pleading not guilty to both charges, Rudin retained the services of a private attorney, Michael Amador, to represent her at trial. Her trial began in the Eighth Judicial District Court of the State of Nevada (the "trial court" or the "court") on March 2, 2001.

Two-and-a-half weeks before trial commenced, it became clear to the court that Amador alone could not adequately defend Rudin. After a series of pretrial delays, the court appointed attorney Thomas Pitaro to assist Amador with Rudin's defense. Pitaro quickly realized that Amador had not yet reviewed "thousands of pages of discovery," and Pitaro soon became "concerned about the preparation that had been done for the trial." Amador had not, for example, interviewed critical witnesses. As a result, the defense team would learn, for the first time at trial, the content of various witnesses' testimony. In at least one instance, when a witness was called to the stand, Pitaro "went to get from Mr. Amador the [witness's] file and found nothing inside." As Pitaro would later describe, "the preparation that [one] would hope normally would be done before trial starts was being done during the trial."

But even with Pitaro's help, Rudin's trial was replete with alleged errors and professional misconduct on the part of the defense team. Amador, for example, began with an opening statement that had "no cohesive theme." Over the course of trial, Amador was accused of creating a prejudicial conflict of interest by allegedly negotiating agreements for the literary and media rights to his representation. *Rudin*, 86 P.3d at 587–88. His general lack of preparation prompted Rudin twice to move for a mistrial, but both of her motions were denied. *Id.* at 579–80, 585–86. Pitaro, who was appointed after Amador's opening statement, described the representation as " 'a farce, and that disturbs me as

an attorney. . . . This has become a sham, a farce and a mockery.'"[1] *Id.* at 590 (Rose, J., dissenting).

A jury convicted Rudin on both charges. For her conviction for murder with the use of a deadly weapon, the trial court imposed a sentence of life imprisonment with a possibility of parole after twenty years. For her conviction for unauthorized surreptitious intrusion of privacy by a listening device, the court imposed a one-year sentence, to run concurrently with Rudin's life sentence. Rudin's judgment of conviction was entered on September 17, 2001.

On April 1, 2004, the Nevada Supreme Court affirmed both of Rudin's convictions on direct appeal. *See Rudin v. State*, 86 P.3d 572 (Nev. 2004). The court concluded that Amador's alleged conflict of interest and ineffectiveness, while sufficient to cause "concern," "must be examined in a separate post-conviction proceeding at which time Rudin's post-conviction attorney will examine the entire record, interview all relevant witnesses and present the matter to the district court for a full and complete airing and decision." *Id.* at 588.[2] The Nevada Supreme Court's

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[1] By the time Rudin's trial ended, the court had actually appointed a third attorney, John Momot, to assist with the defense. *Rudin*, 86 P.3d at 580.

[2] Two of the six justices dissented. They concluded that

> there is sufficient evidence in the record, without the necessity of post-trial proceedings, to establish that the defense was totally unprepared to try this case and that

remittitur issued on April 27, 2004, and Rudin did not seek a writ of certiorari from the U.S. Supreme Court. The deadline for her to do so was June 30, 2004.[3]

*B. Rudin's Petitions for Collateral Relief*

Around the time that appellate review of Rudin's judgment of conviction concluded, two statutes of limitation began to run, both relating to her ability to seek collateral review of the errors that she alleged had affected her underlying criminal trial. The first limitations period is defined by state law and requires, except under certain circumstances, that a state-court petition for post-conviction relief be filed within one year of the Nevada Supreme Court issuing its remittitur:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

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> Amador had a substantial conflict of interest with his client. This was prejudicial to Rudin, and the result reached was unreliable.

*Rudin*, 86 P.3d at 595 (Rose, J., dissenting).

[3] Rudin had ninety days from the date of the Nevada Supreme Court's decision, which was issued on April 1, 2004, to petition for a writ of certiorari. Sup. Ct. R. 13(3).

> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Nev. Rev. Stat. § 34.726(1). The second limitations period is defined by AEDPA, and it also establishes a one-year deadline for a state prisoner seeking a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The AEDPA limitations period runs from the latest of four specified dates:

> (1) 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.

*Id.* The AEDPA limitations period may be tolled if a petitioner "properly file[s]" a petition for post-conviction relief in state court; where that occurs, the limitations period will be tolled for the time during which the state-court petition is pending. *Id.* § 2244(d)(2).

Thus, from the date on which the Nevada Supreme Court issued its remittitur, which was April 27, 2004, Rudin had one year, or until April 27, 2005, to file a petition for post-conviction relief in state court. And from the date on which the deadline passed for seeking a writ of certiorari from the U.S. Supreme Court, which was June 30, 2004, she had one year, or until June 30, 2005, to file an application for a writ of habeas corpus in federal court. If Rudin were "properly" to file her state post-conviction petition, the time for filing an application for federal habeas relief would be statutorily tolled.

With that statutory background in mind, we turn to the series of events that occurred during each of those respective one-year periods in this case.

*1. Attorney Dayvid Figler's Representation*

On April 30, 2004, three days after the Nevada Supreme Court issued its remittitur on direct appeal of Rudin's judgment of conviction, Rudin's appellate counsel, Craig Creel, moved to withdraw as counsel and asked the trial court to appoint post-conviction counsel. The trial court granted Creel's motion on June

8, 2004. Rudin, proceeding pro per, filed a similar motion on July 14, 2004, also seeking appointment of post-conviction counsel.[4] At a hearing on November 10, 2004, after 197 days had passed since the state supreme court issued its remittitur, the court granted Rudin's motion and appointed attorney Dayvid Figler to represent her.[5] Two weeks later, on November 24, 2004, the court issued an order to that effect.[6]

At the November 2004 hearing at which the state court appointed Figler to represent Rudin, Rudin attempted pro per to file with the court a series of papers. In the district court and on appeal, Rudin contends that those papers would have constituted a

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[4] We assume that the state court was required, under Nevada Rule of Appellate Procedure 46(d)(3)(C), to wait to set a hearing date until after Rudin had filed her pro per motion for appointment of post-conviction counsel. Under that rule, in a post-conviction appeal, an attorney's motion to withdraw as counsel "shall be accompanied by . . . a motion by defendant to proceed in proper person or with substitute counsel."

[5] The record is not clear as to the reason, if any, that the post-conviction court delayed four months in hearing Rudin's pro per motion for appointment of post-conviction counsel. *Cf.* Nev. Rev. Stat. §§ 34.740 (requiring "expeditious judicial examination" of petitions for post-conviction relief); 34.726 (limiting the period for filing a petition to one year). In the district court, Rudin argued in passing that the state court's four-month delay was "unnecessarily long" and was a part of the "extraordinary circumstances" that gave rise to her filing delay. She does not renew that argument on appeal.

[6] We, like the district court, give Rudin every benefit of the doubt. We therefore take November 10, 2004, not November 24, 2004, as the date on which Figler's representation commenced.

"properly filed" post-conviction petition had the court accepted them. *See* 28 U.S.C. § 2244(d)(2).[7] Pursuant to the applicable local rules, however, the court declined to accept them and instead "turned [them] over to Mr. Figler."[8] But Figler never filed them with the court. One month later, in December 2004, Judge Bonaventure, who had presided over Rudin's trial and post-conviction proceedings up until that point, recused himself sua sponte, and Rudin's case was reassigned.[9]

When Rudin's case was reassigned to another judge on December 29, 2004, 246 days had passed since the Nevada Supreme Court issued its remittitur. Rudin therefore had 119 days left to file a petition for post-conviction relief in state court. With respect to AEDPA, 182 days had passed since that limitations period had begun to run, leaving Rudin with 183 days to file an application for federal habeas relief. Again, the deadlines for filing those petitions were April 27, 2005,

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[7] We give Rudin every benefit of the doubt and assume her contention is accurate.

[8] Rule 3.70 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada provides that papers "delivered to the clerk of the court by a defendant who has counsel of record will not be filed [but will be] forwarded to that attorney for such consideration as counsel deems appropriate."

[9] Judge Bonaventure recused himself as a result of personal biases that he had against Rudin's previous appellate counsel, Craig Creel. *See* Matt Pordum, *Bonaventure Won't Hear Rudin Appeal*, Las Vegas Sun, Dec. 28, 2004, http://www.lasvegassun.com/news/2004/dec/28/bonaventure-wont-hear-rudin-appeal/ (" 'My blood boils every time I hear the name Craig Creel. . . . Whether I look at him or think of him, my blood boils. I'm getting a headache thinking of him right now.' " (quoting Bonaventure, J.)).

and June 30, 2005, respectively. And although Rudin had once tried to file a petition for relief herself, the post-conviction court rejected that effort because the local rules prohibited Rudin from doing so when she had "counsel of record."

* * * * *

The record suggests that, after Rudin's case was reassigned (and perhaps as a result of that reassignment), substantial confusion arose between the parties and the court about whether Rudin had already filed a petition for post-conviction relief. On January 5, 2005, for example, the state court held a status hearing on Rudin's "opening brief." The court's use of the term "opening brief" suggested that the parties and the court believed that Rudin's initial petition for post-conviction relief had been filed but that Rudin had yet to file a brief in support of that petition. *See* Nev. Rev. Stat. § 34.735 (establishing the form of a petition). At the same status hearing, the court granted Figler a continuance, extending his time to file the "brief" and setting a second status hearing for July 13, 2005. At the July 13 status hearing, Figler again requested "an additional 90 days to file his brief," which the court granted the following week. By that date, both of Petitioner's one-year limitations periods for filing her requests for collateral relief had run. But nobody–neither Figler, nor the State, nor the court–recognized that to have occurred. On January 18, 2006, the post-conviction court again granted Figler an additional "45 days in which to file his opening brief due to the voluminous record in this case." The State would later confirm that, at that time, the State and the court were

"under the mistaken impression" that a petition had already been filed.

Meanwhile, Rudin became concerned–and we believe rightfully so–that Figler was not adequately representing her in her collateral review proceedings. According to Rudin, at some point in 2005, she requested that Figler provide her with copies of her file. Figler did not immediately respond. Figler visited Rudin only a handful of times that year, but he did not interview the witnesses she identified, and he never informed her that he had requested a series of continuances on the basis of the "complexity" of her case. Figler last visited Rudin in May 2006, which was the first time in almost a year that he had done so.

In November 2005, Rudin began to gather information in support of her soon-to-be-filed motion to substitute counsel. First, she submitted an Inmate Request Form to the prison staff asking for a summary of the attorney visits she had received that past year. In a response dated a few weeks later, the staff informed her that she had received four visits, occurring on January 4, February 7, February 25, and June 17. In January 2006, after multiple failed attempts to contact Figler, Rudin submitted a second Inmate Request Form notifying prison staff that she had "not been able to call [her] attorney since [December 15, 2005]" and requesting that the staff fix the problem, which she was concerned was "at this facility." Three weeks later, the prison staff responded, informing Rudin that Figler had a collect call block on his office phone and that Rudin would need to send a letter to Figler requesting that the block be removed. At the same time, Rudin's friend, who was not in

prison, "repeatedly . . . requested [that Figler] visit [Rudin]; have the telephone block removed; not postpone [Rudin's] post conviction brief filing; and send her a copy of the opening brief," all to no avail.

Figler never filed anything with the state post-conviction court. On April 5, 2006, 511 days after Figler was appointed, Rudin moved to substitute counsel. In her motion, she described Figler's inadequacies and expressed her "grea[t] concer[n] that she [was] not receiving adequate representation regarding her post conviction." At a hearing on July 17, 2006, the court granted her motion and, at the same time, appointed attorney Christopher Oram, who continues to represent Rudin on appeal, to represent her.[10] The court filed an order to that effect on August 17, 2006.

To summarize the facts leading up to this point: By August 17, 2006, the day that Figler was relieved from his duties to represent Rudin, almost two years had passed since the day he was appointed to represent her. Early on in the course of Figler's representation, Rudin's case was reassigned to a new judge, who granted at least three of Figler's requests for additional time to file an "opening brief." At no point did the court ever mention the one-year limitations period under Nevada state law, and at no point did the State raise timeliness concerns. And while Figler regularly

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[10] Attached to Petitioner's motion to substitute counsel was what she called a "brief opening supplement," presumably to her petition for post-conviction relief. When the post-conviction court ruled on her motion, however, it appears to have construed the filing solely as a motion to substitute counsel, not as a petition for post-conviction relief.

attended the court's status hearings, he appears to have done nothing else in support of his client's request for post-conviction relief. Indeed, after June 2005, Figler stopped communicating with his client altogether, by declining to visit her in prison and by placing a collect call block on his office telephone. When Figler's representation ended, 842 days had passed since the day Rudin's one-year state limitations period began to run, and 778 days had passed since the day her one-year AEDPA limitations period began to run. Of those days, 645 and 581, respectively, had run under Figler's watch. And during that time, Figler had filed nothing in either state or federal court.

*2. Attorney Christopher Oram's Representation*

Oram's representation began on August 17, 2006,[11] and has continued through the course of this appeal. Oram finally filed a post-conviction petition in state court on August 21, 2007. Prior submissions or references to Rudin's "opening brief" notwithstanding, Oram's August 21, 2007, submission appears to have been the first and only petition for post-conviction relief filed in the state court. It was filed three years and 116 days after the state-law statute of limitations began to run–or 846 days too late.

A colloquy between Oram, the post-conviction court, and the State at a status conference on August 22, 2007, demonstrates that, even at that late date, the

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[11] Oram technically was appointed at the hearing that took place on July 17, 2006. Again, however, we seek to give Rudin every benefit of the doubt. We therefore consider Figler's representation to have extended until the date on which the court entered its order substituting counsel, which was August 17, 2006.

parties were still confused as to whether a petition for post-conviction relief had actually been filed. Oram initially raised the issue by suggesting that he re-label his most recent filing as a petition for "a writ of habeas corpus" as opposed to a "supplement." The post-conviction court agreed and proceeded to find "extraordinary circumstances" to excuse the delay in filing:[12]

> MR. ORAM: [M]y fear is, as I look at the statute, that – um – the one year deadline to file, I looked at it and it said that – uh – the court can excuse it, and can delay the process, which I assume was going on while Mr. Figler was going through this. But perhaps I should relabel the petition for writ of habeas corpus. I may need to amend it today, just to say where she's located, because that's what the statute requires.
>
> THE COURT: Okay. I may say you should probably do that. Just do that as like a one page sheet, like an errata to your deal.
>
> MR. ORAM: Yes.
>
> THE COURT: And the court will find, as a matter of finding today, that [your] filing of the writ for post-conviction relief is timely, based upon – um – the fact that – uh – Mr. Figler had the case for so many years. I believe it was years.

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[12] We assume that the post-conviction court's reference to "extraordinary circumstances" is equivalent to, or was intended to mean, "good cause," which is the standard to excuse a filing delay under Nevada Revised Statute section 34.726.

> MR. ORAM: It was two years. Yes, it was two years.
>
> THE COURT: It was two years, and filed nothing, even though we kept having status checks. So – um – we're going to find that it was timely filed.
>
> . . . .
>
> Um – and it was an extensive trial. Didn't it take several weeks?
>
> MR. ORAM: Ten weeks.
>
> . . . .
>
> THE COURT: Ten week trial. So that would be the extraordinary circumstance that we would find would allow the petition for post-conviction relief be filed. That, plus the fact that the first attorney didn't do anything.

At that point, and for the very first time in two years, the State became aware that no petition had been filed and decided to speak up:

> [THE STATE]: I think, Judge, that sets a bad precedent, in light of the fact that we can get multiple attorneys, and every attorney that gets this says, well, he had it too long, he had it too long. We'd like to at least address that, before you make that finding.

The post-conviction court obliged, declining to make a finding until the State had the opportunity to address the issue in further briefing. It noted, however, that "I really think that the court is going to find, not only this

court, but the next court, is going to find that there were extraordinary circumstances in this case, which would allow the court to extend the one year deadline." The State never did brief the timeliness question, nor did it ever move to dismiss Rudin's petition.

On December 19, 2008, the post-conviction court held a hearing to consider the merits of Rudin's petition for relief. At that hearing, the court questioned whether "the defense . . . start[ed] out so far behind the starting line of this trial that no matter how much time the [c]ourt gave them during the trial . . . it ultimately [was] an unfair trial." The post-conviction court went on to state,

> And there's two standards for *Strickland*:[13] One is was counsel effective, and then the second standard is even if counsel wasn't effective was the evidence so overwhelming . . . against the defendant [that] it wouldn't make any difference who defended her and how prepared they were and how many experts they called because the decision would always be guilty of murder.
>
> In this case I can't say that that is true. I didn't try the case, but in reviewing the writ filed by Mr. Oram and reviewing the response by the State, and I had commented on the 22nd of October that the case was full of a cast of characters together with witnesses, and the case had a lot of intrigue and spins and loops, and there was a lot of ulterior motives on people who testified.

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[13] *Strickland v. Washington*, 466 U.S. 668 (1984).

. . . .

> The experts couldn't agree on much of anything in this case as I read the dry record. The proof of guilt was not a slam dunk by any stretch of the imagination for the State, so I can't say – I cannot say in this case that no matter who had defended her that the verdict would have been the same.

After hearing testimony from defense attorneys Pitaro and Momot, the court granted Rudin's request for post-conviction relief and ordered her a new trial. The post-conviction court described Rudin's prior trial as a "mockery of our promise to people who are in the criminal justice system that they will have an adequate defense."

The State appealed, arguing for the first time on appeal that Rudin's petition was untimely. In its brief, the State confirmed what we think is suggested by the record: that "in the proceedings below," "the prosecution and the judge were under the mistaken impression that an initial petition had been timely filed."

The Nevada Supreme Court reversed the post-conviction court's judgment. It concluded that neither of that court's stated reasons for excusing Rudin's delay "affords a factual or legal basis to find that Rudin's claims were not reasonably available to be raised in a timely manner." Rudin sought en banc reconsideration, which the Nevada Supreme Court denied on January 20, 2011. It was only after the Nevada Supreme Court denied en banc reconsideration of Rudin's state post-

conviction appeal that Oram filed an application for habeas relief in federal court.

* * * * *

On April 25, 2011, Rudin, still represented by Oram, applied for habeas relief in federal court. By that time, almost seven years had passed since the deadline for seeking a writ of certiorari from the U.S. Supreme Court, *see* 28 U.S.C. § 2244(d)(1)(A), making her application almost six years too late under AEDPA. In her application, Rudin contended that the Nevada Supreme Court erred in finding her state-court petition for post-conviction relief time-barred because either (1) the petition was timely, or (2) the State had waived any argument to the contrary when it failed to make a timeliness argument before taking its appeal. For those reasons, according to Rudin, the federal district court should have considered her state-court petition to be "properly filed" and given her the benefit of statutory tolling of the AEDPA limitations period. *See* 28 U.S.C. § 2244(d)(2). In the alternative, Rudin argued that equitable tolling pursuant to *Holland v. Florida*, 130 S. Ct. 2549 (2010), also applied to her case. The district court granted the State's motion to dismiss, dismissed Rudin's petition with prejudice, and denied the certificate of appealability. On October 24, 2012, we granted Rudin's request for a certificate of appealability on the question "whether the district court properly determined that the petition was barred by the statute of limitations." We turn now to that question.

## II. DISCUSSION

We review de novo the question whether a petitioner's application for federal habeas relief was timely filed. *Noble v. Adams*, 676 F.3d 1180, 1181 (9th Cir. 2012). We also review de novo the question whether AEDPA's statute of limitations should be tolled. *See Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Unless the facts are undisputed, we review the district court's findings of fact underlying a claim for equitable tolling for clear error. *Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012). The petitioner bears the burden to establish that she is entitled to tolling of the AEDPA limitations period. *Id.*

### *A. Statutory Tolling*

We begin with Rudin's argument that she is entitled to statutory tolling of the AEDPA limitations period. On this point, Rudin appears to argue that the Nevada Supreme Court erred when it found her state post-conviction petition untimely, and that had it not so erred, her petition would be considered "properly filed" under 28 U.S.C. § 2244(d)(2), entitling her to statutory tolling of the AEDPA limitations period.

While we may not have made the same decision as the Nevada Supreme Court, we are not at liberty to second guess that court's decision when it was acting on direct appeal of the state post-conviction court's judgment. The state supreme court concluded that Rudin's petition was untimely under state law, and "[w]hen a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (internal quotation marks omitted) (second

alteration in original); *accord Zepeda v. Walker*, 581 F.3d 1013, 1018 (9th Cir. 2009). In light of *Pace*, and because the Nevada Supreme Court is the final arbiter of Nevada state law, that is the end of the matter here. Rudin is not entitled to statutory tolling under § 2244(d)(2) for the duration of her state post-conviction proceedings.[14]

*B. Equitable Tolling*

We turn, therefore, to Rudin's argument that she is entitled to equitable tolling under *Holland v. Florida*. A petitioner is entitled to equitable tolling if she can establish that (1) she was pursuing her rights diligently, but (2) some extraordinary circumstance stood in her way. *Pace*, 544 U.S. at 418; *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013) ("[E]quitable tolling is available 'only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of [the prisoner's] untimeliness.' " (quoting *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (second alteration in original))). Rudin bears a heavy burden to show that she is entitled to equitable tolling, "lest the exceptions swallow the rule," *Bills*, 628 F.3d at 1097 (internal quotation marks omitted);

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[14] We likewise reject Rudin's argument that she can claim the benefit of equitable tolling in state court, thereby entitling her to statutory tolling in federal court. Equitable tolling under *Holland v. Florida* is a federal doctrine entirely separate from state law. *See* 130 S. Ct. at 2563 ("Equitable tolling [is] an inquiry that does not implicate a state court's interpretation of state law."); *see also Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (applying the independent and adequate state ground doctrine to the habeas context).

however, the grounds for granting equitable tolling are also highly fact-dependent, *Sossa*, 729 F.3d at 1229. At bottom, the purpose of equitable tolling is to "soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court." *United States v. Buckles*, 647 F.3d 883, 891 (9th Cir. 2011) (internal quotation marks omitted); *see also Holland*, 130 S. Ct. at 2563 ("[W]e have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.' " (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944))).

In *Holland*, the Supreme Court held that AEDPA's limitations period may be tolled for equitable reasons. 130 S. Ct. at 2562. In that case, the petitioner's attorney had failed to file a timely application despite the petitioner's repeated requests to do so, failed to inform the petitioner about crucial facts related to his case, and failed to communicate altogether with his client over a period of several years. *Id.* at 2564. The Supreme Court found those circumstances to constitute more than a "garden variety claim of excusable neglect," and instead concluded that the attorney's egregious misconduct amounted to, in essence, abandonment. *Id.*; *id.* at 2568 (Alito, J., concurring); *see also Maples v. Thomas*, 132 S. Ct. 912, 923–24 (2012) (adopting Justice Alito's reasoning in *Holland* addressing attorney abandonment).[15] Because of that

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[15] Mere negligence on the part of a prisoner's post-conviction counsel does not warrant equitable tolling. *Holland*, 130 S. Ct. at 2564. "That is so . . . because the attorney is the prisoner's agent,

abandonment, the petitioner's delay could be deemed to result from misconduct that could not constructively be attributed to him, and therefore the AEDPA limitations period could potentially be tolled for the relevant period of time. *Holland*, 130 S. Ct. at 2564–65.

To be entitled to equitable tolling of the AEDPA limitations period, Rudin thus bears the burden to prove that she has been pursuing her rights diligently but that extraordinary circumstances made it impossible for her to file her application on time. *See Pace*, 544 U.S. at 418. Under *Holland*, attorney abandonment may give rise to such extraordinary circumstances. 130 S. Ct. at 2564. "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.' " *Id.* at 2565 (citations and second and third internal quotation marks omitted). We readily conclude that extraordinary circumstances in part gave rise to Rudin's delay in filing her application for federal habeas relief.

*1. July 1, 2004, Through November 10, 2004*

Between July 1, 2004, the day the AEDPA limitation period began to run, and November 10, 2004, the day that Figler was appointed to represent Rudin, Rudin was not represented by counsel. During that

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and under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Maples*, 132 S. Ct. at 922 (quoting *Coleman*, 501 U.S. at 753–54). But when an attorney abandons his client, the principal-agent relationship is severed, and the attorney's "acts or omissions therefore 'cannot fairly be attributed to [the client].' " *Id.* at 923 (quoting *Coleman*, 501 U.S. at 753) (alteration in original).

time, Rudin cannot establish that "extraordinary circumstances" existed to equitably toll the AEDPA limitation period. *See Roy v. Lampert*, 465 F.3d 964, 970 (9th Cir. 2006) ("[P]ro se status, on its own, is not enough to warrant equitable tolling."). Thus, during that time, 133 non-tolled days passed on Rudin's AEDPA clock.

*2. November 10, 2004, Through August 22, 2007*

On November 10, 2004, Figler was appointed to represent Rudin in her collateral review proceedings.[16] After Figler was appointed, however, he abandoned her. Over the course of his period of representation, Figler visited Rudin in prison only a handful of times, and by mid-2005, those visits had stopped. He had a collect call block placed on his office phone, making him all but impossible to reach. And while we acknowledge that Figler physically attended the post-conviction court's status hearings, the record makes clear that he did so with seemingly no intention to actually represent his client. All the while, Figler failed to inform Rudin of the reasons for his delay, providing her no clue of "any need to protect [herself] pro se." *See Maples*, 132 S. Ct. at 917. On the record before us, it does not appear that *anyone* was aware of Rudin's need to protect herself until at least August 22, 2007. We therefore conclude that extraordinary circumstances prevented Rudin from filing her application for federal habeas relief between November 10, 2004, and August 22, 2007.

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[16] It is significant that Figler's representation commenced before June 30, 2005. That is so because extraordinary circumstances cannot toll a statute of limitations that has already run.

Rudin was also diligent in pursuing her rights during that time, beginning with her attempt to file pro per a petition for post-conviction relief on November 10, 2004. Over the course of Figler's representation, Rudin made repeated attempts to contact him, provided him with witness information relevant to her case, and requested that he provide her with copies of her files so that she could take additional steps on her own behalf. When Figler repeatedly failed to respond, Rudin prepared and filed her own motion to substitute counsel, which had a "brief opening supplement" attached to it. Until she filed that motion, Rudin had done everything short of filing her own "opening brief," which, as the state court had already made clear, the local rules prohibited her from doing. We conclude that Rudin was "reasonably diligent" during the period of Figler's representation, which is all that is required for equitable tolling purposes. *See Holland*, 130 S. Ct. at 2565.

Rudin is therefore entitled to equitable tolling of the AEDPA statute of limitations during the time in which Figler was representing her and up until the point at which Oram became aware that Figler had never filed anything on Rudin's behalf. That period of time ran from November 10, 2004, to August 22, 2007.

The State argues that Rudin cannot avail herself of the benefit of equitable tolling during that time because Figler represented Rudin only in state court, not in federal court. On that point, the State contends that Figler's inadequacies in state court had no bearing on Rudin's ability to file a timely federal application for relief. It argues that, pursuant to *Pace*, Rudin should have filed a "protective" application in federal court

and asked the court to stay and abey its habeas proceedings while she exhausted her state-court remedies. 544 U.S. at 416 ("A prisoner seeking state postconviction relief [may file] a 'protective' petition in federal court and as[k] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted."). Under the specific circumstances of this case, we are not persuaded by the State's argument. *See Holland*, 130 S. Ct. at 2563 ("[S]pecific circumstances . . . could warrant special treatment in an appropriate case.").

For all Rudin knew–and, indeed, until August 22, 2007, for all the *State* knew–Rudin's state-court petition had already been filed, making her eligible for statutory tolling under § 2244(d)(2). During the period that Figler had represented her, almost every reference to the pending filing was to an "opening" or "supplemental brief," suggesting that the court had already received her initial petition. Even the State concedes that it believed that to be the case. During the period in which Rudin "lacked a clue" of any need to protect herself, we decline to impute to her knowledge that neither the State nor the court possessed. *See Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002) (declining to impute to a petitioner knowledge that, "[e]ven with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, . . . evaded both [petitioner's] appointed counsel and the expertise of a federal magistrate judge").[17]

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[17] The State filed a motion in this court to expand the record on appeal to include various state-court documents that it had not, for whatever reason, made a part of the record in the district court. As a general rule, documents not filed with the district court cannot

*3. August 23, 2007, Through April 25, 2011*

On August 22, 2007, at the status conference in the state post-conviction court, the parties first became aware of the fact that Figler had never filed a post-conviction petition in state court. From that point forward, Rudin should have been aware of the possibility that nothing had been "properly filed" in either state or federal court on her behalf. And at that time, having been put on notice that her state-court petition may not have been timely filed, 28 U.S.C. § 2244(d)(2), Rudin had every reason to act diligently to protect her rights. Yet she failed to do so.

Rudin offers no persuasive reason for her failure to act diligently during that time, however. Although she

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be made part of the record on appeal. *See* Fed. R. App. P. 10(a) ("[T]he original papers and exhibits filed in the district court; the transcript of proceedings, if any; and a certified copy of the docket entries prepared by the district clerk" . . . "constitute the record on appeal."); *Kirschner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). There are of course narrow exceptions to that general rule, which we may, in our discretion and in "unusual circumstances," invoke. *Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) (listing exceptions).

The State offers no compelling reason for its failure to make these documents part of the record in the district court. Ironically, the reasons it offers for doing so are the same reasons to which it objected when the state post-conviction court found that Rudin had established good cause for her filing delay: that "this is not a typical case," that "Rudin's trial was one of the longest in Nevada history," and that, overall, the proceedings below were complex.

We do not need the documents that the State seeks to make part of the record on appeal in order to decide this case. Thus, we decline to depart from our general rule. The State's motion to expand the record on appeal is **DENIED.**

could have filed a protective federal habeas application while her state-court post-conviction appeal was pending, she did not. *See Pace*, 544 U.S. at 416. After the State filed its notice of appeal in the Nevada Supreme Court, it should have been eminently clear to Rudin (and Oram, her counsel) that Rudin's eligibility for AEDPA statutory tolling was in jeopardy. Absent any compelling reason for her failure to act during this time, Rudin cannot satisfy her burden to establish that she is entitled to equitable tolling after August 22, 2007.[18]

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[18] The dissent takes issue with our conclusion in this respect, pointing out that by the time Rudin learned that Figler had never filed a post-conviction petition on her behalf, the AEDPA limitations had already run. Therefore, the dissent argues, Rudin had nothing left to protect, and any protective application for habeas relief would have been pointless.

But our caselaw still requires that Rudin show some degree of diligence during that time. We cannot conclude that, simply because the AEDPA statute of limitations had run, Rudin needn't have filed anything in federal court. Although a district court might have "dismissed [Rudin's application] because it was untimely," Rudin would have had every right to appeal such a decision and seek relief on equitable tolling grounds. In any event, our cases do not permit us to resolve this appeal by speculating as to what might have happened had Rudin been diligent; rather, those cases required Rudin to show that she was diligent by filing something in federal court. *See White v. Martel*, 601 F.3d 882, 884–85 (9th Cir. 2010) (per curiam) (rejecting the argument that filing a protective application after the AEDPA statute of limitations had run would have been "pointless or even detrimental" and concluding that failure to file demonstrated a lack of diligence). Unfortunately, Rudin did not. We are therefore compelled to conclude that she is not entitled to equitable tolling of the AEDPA statute of limitations after August 22, 2007.

* * * * *

In sum, we conclude that Rudin has satisfied her burden to show that she is entitled to equitable tolling of the AEDPA limitations period until August 22, 2007, when the extraordinary circumstances making it impossible for her to file on time were removed. *See Sossa*, 729 F.3d at 1229. After that date, AEDPA's one-year limitations period resumed, giving Rudin until April 10, 2008, at the latest to file her application for federal habeas relief in the district court.[19] She waited until April 25, 2011, to do so. We must therefore also conclude that Rudin's application was, by our calculations, over three years–or 1109 days–too late.

## III. CONCLUSION

We are troubled by the outcome of this case for many reasons. Margaret Rudin's direct appeal and collateral review proceedings have been pending in either state or federal court for a combined total of 13 years. She has potentially meritorious claims that she has suffered prejudice at the hands of her own attorneys' egregious misconduct. Yet she has never had an opportunity to present those claims in court.

Rudin's defense counsel, Amador, indisputably engaged in egregious professional misconduct during the course of her underlying criminal trial. On direct appeal of her judgment of conviction, the Nevada Supreme Court acknowledged that Rudin's trial was plagued not only with inadequacies on the part of

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[19] Again, giving Rudin every benefit of the doubt, we assume that equitable tolling preserves the remaining AEDPA limitations period.

defense counsel, but also with prosecutorial misconduct and legal error on the part of the State and the court.[20] Although two members of the Nevada Supreme Court found the record sufficiently clear as to the "inherent prejudice created by [trial counsel]" to require immediate reversal of Rudin's judgment of conviction, a majority of the court declined to address the effect of those errors, finding them more appropriate for resolution on collateral review.

But then, in her collateral review proceedings, Rudin was abandoned. Rudin's first attorney filed nothing in any court on her behalf, and he also failed entirely to investigate her post-conviction claims. By the time Rudin requested and obtained substitute counsel, her state and federal limitations periods had already run, but nobody, not even the court, knew that to be true. And although the state post-conviction court, seeing the case as a "mockery of [its] promise to people who are in the criminal justice system that they will have an adequate defense," initially granted Rudin relief, the Nevada Supreme Court reversed that court's judgment, finding Rudin's petition untimely and reinstating her criminal convictions. Now, for reasons that completely escape us and that remain unexplained by the record, Rudin's current counsel failed to file a protective habeas application in federal court to

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[20] On direct appeal, the Nevada Supreme Court noted that, at trial, the State had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Nevada Supreme Court also noted that the trial court had applied the wrong legal standard when it ruled on Rudin's requests for a mistrial. The state supreme court concluded, however, that those errors were harmless.

preserve Rudin's right to any opportunity for review that may have remained.

At this point, Rudin is still in prison, having served 13 years of her life sentence for murder. We know from the state post-conviction court that the State's "proof of guilt [at that trial] was not a slam dunk by any stretch of the imagination." We also know from the post-conviction court that, had Rudin been represented by competent counsel, the jury's verdict may have been different. Thus, what we do not know is whether Rudin is lawfully imprisoned. And, regrettably, that is something we may never know.

The prejudice that Rudin potentially suffered at trial has only been compounded by the inadequacies of her attorneys on collateral review, who have now precluded her from having any chance at presenting her claims in federal court. Thus, if ever there were a case in which equitable tolling should apply to soften the harsh impact of technical rules, perhaps this is that case. However, we are bound by AEDPA and the standards established under our caselaw and that of the U.S. Supreme Court, which circumscribe our power to grant relief to cases in which extraordinary circumstances–in other words, abandonment–made it impossible for the petitioner to file on time.

Applying those equitable tolling standards here, we are unable to conclude that, during the time in which Rudin was represented by her current counsel, Oram, extraordinary circumstances made it impossible for her to file a protective application for habeas relief in federal court. While we can find no explanation for Oram's conduct, we likewise cannot conclude that he abandoned her in a way that, under *Holland*, would

constitute extraordinary circumstances sufficient to equitably toll the AEDPA limitations period. For that reason, this case–this patent denial of the safeguards of our criminal justice system–calls for a remedy that we, as a circuit court, simply cannot provide.

Because that is so, we must **AFFIRM** the district court's dismissal with prejudice of Rudin's application. For the reasons explained earlier, we **DENY** the State's motion to expand the record on appeal.

ADELMAN, District Judge, dissenting:

No one can seriously dispute that Margaret Rudin received ineffective assistance of counsel during her state court homicide trial, reportedly the longest such trial in Nevada history. Although two justices of the Nevada Supreme Court were prepared to grant relief based on the record on direct appeal, a majority directed her to follow the usual procedure of developing her ineffective assistance claim by bringing a post-conviction motion. Rudin attempted to do so but, based on a constellation of circumstances none of which are fairly attributable to her lack of diligence, she was prevented both from properly filing a post-conviction motion and from timely filing a federal habeas corpus petition.

The majority finds unfairness but concludes that our hands are tied. I disagree with the latter proposition and conclude that, on the egregious facts of this case, the doctrine of equitable tolling is sufficiently expansive to provide petitioner with access to the federal courts. Thus, I respectfully dissent.

## I.

Regarding the facts, I emphasize only a few key points. Rudin attempted to comply with the state supreme court's directive to present her ineffective assistance claim via a post-conviction motion both by requesting the appointment of post-conviction counsel and by attempting to file papers which, according to her, raised the claim. In November 2004, in response to Rudin's request, the trial court appointed Dayvid Figler as post-conviction counsel but declined to accept Rudin's pro se submission and instead gave it to Figler. Figler did not file Rudin's papers and, for almost two years, did nothing except seek continuances. Justifiably fed up, Rudin ultimately asked for and was provided new counsel. By that time, however, both the state post-conviction motion deadline and the federal habeas statute of limitations had run.

In August 2007, Rudin's new lawyer Christopher Oram filed a brief in support of state post-conviction relief and realized that no post-conviction motion had previously been filed. He apprised the post-conviction court of this, and the court found that because of the case's extraordinary circumstances, including the length and complexity of the trial and Figler's misconduct, the delay in filing was justified. The state's counsel complained that the court's ruling set "a bad precedent" and asked permission to file a brief on the timeliness issue. The post-conviction court granted the request, but the state then failed to file such a brief and instead chose to contest the merits of Rudin's claim. In December 2008, the post-conviction court granted Rudin relief on her ineffective assistance claim.

The state appealed to the state supreme court and, notwithstanding having forgone the timeliness issue in the post-conviction court, argued that Rudin's post-conviction motion was untimely. Remarkably, in view of the state's previous failure to contest the issue, the state supreme court ruled that the post-conviction court had failed to make a sufficient finding of cause for its timeliness ruling. The court also refused to remand the case to enable Rudin to make a record on the issue. On January 20, 2011, the state supreme court concluded its consideration of the case when it denied en banc review over a dissent which memorably noted, "If this is justice then I must be dreaming." On April 25, 2011, Rudin filed her federal habeas petition.

**II.**

A petitioner is entitled to equitable tolling if she shows that she has been pursuing her rights diligently and some extraordinary circumstance stood in her way. *Pace v. DiGuglialmo*, 544 U.S. 408, 418 (2005). The diligence required for equitable tolling purposes is "reasonable diligence," not "maximum feasible diligence." *Ford v. Gonzalez*, 683 F.3d 1230, 1237 (9th Cir. 2012). While the threshold necessary to trigger equitable tolling is high, lest the exceptions swallow the rule, *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009), the grounds for granting equitable tolling are highly fact-dependent, *Nedds v. Calderon*, 678 F.3d 777, 780 (9th Cir. 2012).

When considering whether to apply equitable tolling, the Supreme Court has emphasized the need for flexibility and for avoiding mechanical rules. *Holland v. Florida*, 560 U.S. 631, 650 (2010). A court reviewing a habeas petition should adhere to 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, and which, if strictly applied, threaten the evils of archaic rigidity. *Id.*; *see also Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008) ("We have stated that the purpose of the equitable tolling doctrine 'is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court.'") (quoting *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004)).

Rudin presents a compelling case for equitable tolling. She consistently sought to press her ineffective assistance claim in the state courts, as she was required to do before turning to the federal courts, yet due to impediments created by others she was prevented from obtaining review on the merits. She attempted to file a pro se submission challenging the effectiveness of her trial counsel, but the post-conviction court turned it over to Figler. Had the court accepted Rudin's filing, statutory tolling would likely have applied throughout the state post-conviction process.

As the majority recognizes, Figler then abandoned Rudin. *See, e.g.*, *Holland*, 560 U.S. at 651 (holding that unprofessional attorney conduct, if sufficiently egregious, may constitute an extraordinary circumstance justifying equitable tolling); *Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) ("We similarly conclude that the misconduct of Spitsyn's attorney was sufficiently egregious to justify equitable tolling of the one-year limitations period under AEDPA."). And when Rudin realized that Figler was doing nothing, she again

demonstrated due diligence by asking the post-conviction court to replace him.

The state suggests that, notwithstanding Figler's misconduct, Rudin could have filed a protective petition in federal court. But Rudin had no reason to know that a post-conviction motion had not been docketed during the one year limitation period set by state law such that she could not avail herself of statutory tolling. Reasonable diligence did not require her to file a protective federal petition based on the possibility that the state post-conviction court would without informing her refuse to file her pro se submission and that her court-appointed lawyer would never file a post-conviction motion in state court. As we stated in *Harris*, the fact that a prisoner "*could* have filed a timely federal habeas petition at a certain point in time is not dispositive." 515 F.3d at 1055.

I part ways with the majority when it concludes that in August 2007, after Rudin's new lawyer advised the post-conviction court that no state post-conviction motion had been filed, Rudin failed to exercise reasonable diligence by not filing a protective federal habeas petition. The facts do not justify this conclusion. First, by August 2007 the federal habeas statute of limitations had long since run. It would have been pointless for Rudin to file a "protective" habeas petition pursuant to *Pace* because, unlike in *Pace*, there was nothing to protect. In *Pace*, the prisoner could have filed a protective habeas petition before the federal habeas statute of limitations had run and thus had a timely habeas petition on file. In the present case, any protective petition that Rudin might have filed in 2007 would have been untimely and would not have

protected anything. In all likelihood, it would have been dismissed because it was untimely. *See, e.g.*, *Urrizaga v. Attorney General for Idaho*, No. CV-07-434, 2008 WL 1701735, at *3 (D. Idaho Apr. 9, 2008) (dismissing as untimely a petition that the prisoner apparently intended to function as protective because by the time he filed it the statute of limitations had already expired).

The second reason that Rudin had no reason to file a protective habeas petition based on the proceedings in the post-conviction court is that the state provided her with good cause to believe that it had given up on the timeliness issue. As discussed, at the August 2007 hearing, the post-conviction court found that, because of the extraordinary circumstances of the case, the post-conviction submission by Rudin's new lawyer was timely. The state asked for and received permission from the court to contest the timeliness issue but then chose not to do so. The state essentially sandbagged Rudin, lulling her into believing that it was not contesting the post-conviction court's conclusion that she had properly filed a post-conviction motion which tolled the federal clock. *See Maghee v. Ault*, 410 F.3d 473, 476 (8th Cir. 2005) ("Equitable tolling is appropriate . . . where a defendant's conduct lulls the prisoner into inaction."). The state's failure to raise the timeliness issue in the post-conviction court certainly provided Rudin with a reasonable basis to believe that she had no need to file a protective petition in federal court; she was entitled to rely in good faith on the state's position. *Cf. Harris*, 515 F.3d at 1055 (finding equitable tolling where the petitioner relied in good faith on then-binding circuit precedent).

The majority attempts to buttress its contention that Rudin should have filed a protective petition by citing the state's challenge to the timeliness of her post-conviction motion in the state supreme court after the post-conviction court had granted her relief in December 2008. Surely by this time, the majority concludes, Rudin should have known that her eligibility for statutory tolling was in jeopardy. But reasonable diligence did not require Rudin to file a protective federal petition while the state appealed her victory. First, as stated, the federal statute of limitations had long since run, making a protective petition pointless. Second, a litigant in Rudin's position could have reasonably concluded that the state had waived or forfeited its right to contest the timeliness issue by not having done so in the post-conviction court. Finally, at that point in the proceedings, Rudin had *prevailed*. She had no reason to file a protective petition because she had no claim to raise. She had won and, as a result, there was no adverse decision for the federal courts to review. To conclude that she is not entitled to equitable tolling because she failed to file a protective petition after she had won her case in state court seems extremely unfair.

And after she lost in the state supreme court in 2011, she promptly filed in federal court.[1]

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[1] The majority cites *White v. Martel*, 601 F.3d 882, 884–85 (9th Cir. 2010) (per curiam), for the proposition that a prisoner must file a protective petition to show reasonable diligence even though the AEDPA limitations period has already run. In *White*, however, the prisoner's state court petition was held untimely on January 6, 2006, but the prisoner had until January 12, 2006 to timely file a federal habeas petition. *See id.* at 884; *White v. Subia*, No. 2:06-cv-

## III.

Commentators have noted that modern habeas corpus law requires prisoners to run a procedural gauntlet before they can even get their cases in front of an article III judge for review of the merits. *See* John H. Blume, et al., *In Defense of Non-Capital Habeas: A Response to Hoffmann and King*, 96 Cornell L. Rev. 435, 442–43 (2011). Nevertheless, both the Supreme Court and the Ninth Circuit have recognized that equitable doctrines remain available to soften the harsh impact of technical rules that prevent a good faith litigant from having her day in court. If ever there was a case in which the deadlines need to be relaxed to avoid a miscarriage of justice, this is it.

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02840, 2008 WL 2302534, at *2 (E.D. Cal. May 30, 2008). *White* turned on the fact that the prisoner waited until December 14, 2006, nearly a year after his state court motion was rejected, to file in federal court.

The facts of the present case are not comparable. Here, on August 22, 2007 (about two years after the federal statute of limitations had run), the parties first discovered that no state post-conviction motion had been filed. On that same date, the post-conviction court accepted Rudin's supporting brief as a proper motion, a determination the state failed to challenge until after it lost on the merits. As discussed in the text, reasonable diligence did not require Rudin to file a protective petition while the state, having forfeited a timeliness challenge, appealed her victory.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

**Case No. 2:11-CV-00643-RLH-(GWF)**

**[Filed January 25, 2012]**

MARGARET RUDIN, )
)
Petitioner, )
)
vs. )
)
CAROLYN MYLES, et al., )
)
Respondents. )

**ORDER**

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1), respondents' motion to dismiss (#6), petitioner's opposition (#11), and respondents' reply (#12). The court finds that the petition is untimely, and the court grants respondents' motion (#6).

Congress has limited the time in which a person can petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254:

> 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). A judgment, if appealed, becomes final when the Supreme Court of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R. 13(1). Any time spent pursuing a properly-filed application for state post-conviction review or other collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-conviction judgment becomes final upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not "properly filed" and does not toll the period of limitation. Pace v. DiGuglielmo, 544 U.S. 408,

417 (2005). Section 2244(d) is subject to equitable tolling. Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Id. at 2562 (quoting Pace, 544 U.S. at 418).

After a jury trial in the Eighth Judicial District Court of the State of Nevada, petitioner was convicted of first-degree murder with the use of a deadly weapon and unauthorized surreptitious intrusion of privacy by a listening device. The court entered its judgment of conviction on September 17, 2001. Respondents' Ex. A (#8). Petitioner appealed, and the Nevada Supreme Court affirmed on April 1, 2004. Respondents' Ex. B (#8). Petitioner did not petition the Supreme Court of the United States for a writ of certiorari, and the time to file such a petition expired on June 30, 2004.

Petitioner then sought post-conviction relief in the state courts. On July 14, 2004, she filed a proper-person motion for appointment of post-conviction counsel, who would file a habeas corpus petition. Respondents' Ex. C (#8). On November 10, 2004, the state district court granted that motion and appointed Dayvid Figler to represent her. Respondents' Ex. E (#8). A written order to that effect was entered on November 24, 2004. Respondents' Ex. D (#8). Petitioner had wanted to file other proper-person documents, and the court turned them over to Figler. Respondents' Ex. E (#8). After a couple of years in which counsel filed no petition, petitioner filed two motions to have counsel replaced. Respondents' Ex. F, H (#8). The state district court agreed, and at a hearing on July 19, 2006, the

court appointed Christopher Oram to represent petitioner. Petitioner's Ex. C, p. 3 (#1). A written order to that effect was entered on August 17, 2006. Respondents' Ex. I (#8). Petitioner filed a state habeas corpus petition, titled erroneously as a supplemental petition, on August 21, 2007. Petitioner's Ex. A (#1). The state district court reached the merits of the petition, and it granted relief to petitioner. Petitioner's Ex. C (#1). The state appealed. The Nevada Supreme Court determined that the petition was untimely pursuant to Nev. Rev. Stat. § 34.726. Petitioner's Ex. G (#1). The Nevada Supreme Court then denied panel rehearing and en banc reconsideration, the latter occurring on June 25, 2010. Petitioner's Ex. H, L (#1). Remittitur issued on May 2, 2011. Respondents' Ex. J (#8).

Petitioner commenced this action on April 25, 2011, before the Nevada Supreme Court issued its remittitur.

For the moment, the court will give petitioner every benefit of the doubt. The court will assume that petitioner was unable to file anything while Figler was representing her.[1] The court will assume that Figler's representation of petitioner began when the state court

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[1] The Supreme Court of the United States recently issued a decision in Maples v. Thomas, 2012 WL 125438 (2012). It held that post-conviction counsels' abandonment of Maples in state court was good cause to excuse procedural default in federal court. Id., at *14. The Court based its decision in part upon its discussion of attorney abandonment in Holland v. Florida. Id., at *10-11. To the extent that Maples has any applicability to untimely federal petitions, Maples has no effect upon the court's decision, because the court already is assuming that the time Figler represented petitioner does not count toward the period of limitation.

appointed him at the hearing on November 10, 2004, and not on November 24, 2004, when it entered its written order. The court will assume that Oram's representation of her began on August 17, 2006, when the written order of appointment was entered, and not on July 19, 2006, when the state district court appointed Oram at a hearing.[2] The court will assume that equitable tolling operates like quasi-statutory tolling, in which the period of limitation is stopped while petitioner was unable to file anything and then resumes after the removal of the impediment. The court will assume that the time spent while the state habeas corpus petition and appeal were pending was eligible for tolling pursuant to 28 U.S.C. § 2244(d)(2).

All those assumptions make no difference. The judgment of conviction became final on June 30, 2004, and the period of limitation commenced the next day. 28 U.S.C. § 2244(d)(1)(A). No post-conviction petition or other motion for collateral review was filed in state court on or after that date until August 21, 2007, and thus statutory tolling pursuant to § 2244(d)(2) was unavailable. Figler's representation of petitioner

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[2] The court is deliberately inconsistent in its application of dates. If the court determines that Figler started representing petitioner when the state district court orally appointed him, on November 10, 2004, then the court also should determine that Figler's representation ended, and Oram's representation began, on July 19, 2006, when the court orally appointed Oram. If the court determines that Oram's representation of petitioner began when the court entered a written order, on August 17, 2006, then the court also should determine that Figler started representing petitioner on November 24, 2004, again, when the court entered a written order. However, the court is giving petitioner every benefit of the doubt.

commenced no earlier than November 10, 2004, one hundred thirty-three (133) days later.[3] Figler's representation of petitioner ended on August 17, 2006. Assuming that Figler's representation tolled the period of limitation, petitioner had two hundred thirty-two (232) days remaining, or through April 6, 2007, to file a post-conviction petition in state court. When petitioner filed her state post-conviction petition on August 21, 2007, five hundred two (502) non-tolled days had passed. Even with every possible benefit of the doubt that the court could give petitioner, the federal period of limitation expired more than four months before petitioner filed her state petition.

In reality, the assumptions that the court has made are debatable at best. First, petitioner's arguments about the timeliness of the state post-conviction petition are irrelevant. If the state petition was timely, then it would be properly filed and qualified to toll the federal period of limitation pursuant to 28 U.S.C. § 2244(d)(2). Nonetheless, the federal period of limitation had expired more than four months before petitioner filed her state petition. There was no time left to toll. Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

Second, petitioner cannot argue in this court about the correctness of the Nevada Supreme Court's ruling on the timeliness of the state petition. The Nevada Supreme Court held that the state petition was untimely, and that is the end of the matter for the question whether it was properly filed and eligible for

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[3] In her opposition (#11), petitioner does not address this span of time.

statutory tolling of the federal period of limitation. Pace, 544 U.S. at 414. Petitioner's argument that the Nevada Supreme Court failed to consider equitable tolling pursuant to Holland v. Florida is unpersuasive. An error in the state post-conviction proceedings is not addressable in federal habeas corpus. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989). Additionally, Holland was solely a case of statutory interpretation. The Court noted that it had held previously that § 2244(d) was not jurisdictional. 130 S. Ct. at 2560. The Court then noted that other prior decisions had established a rebuttable presumption that a non-jurisdictional federal statute of limitations is subject to equitable tolling, and that the presumption was strengthened in the case of § 2244(d) because equitable principles govern federal habeas corpus law. Id. at 2560-61. The Court distinguished two other cases in which it had determined that certain federal statutes of limitations were not subject to equitable tolling. Id. at 2561-62. Finally, the court determined that equitable tolling did not undermine Congress' purpose in enacting the Antiterrorism and Effective Death Penalty Act, which created the statute of limitations and other restrictions upon federal habeas corpus petitions. Id. at 2562. Nowhere in Holland did the Court state that the Constitution of the United States required equitable tolling for § 2244(d). Without a constitutional basis, there is no reason why Holland is applicable to a state statute of limitation like Nev. Rev. Stat. § 34.726.[4]

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[4] Petitioner's argument based upon Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010), is equally inapposite. While the petitioner in Bills was a state prisoner, the timeliness of the state habeas corpus

Third, equitable tolling does not stop the limitation clock in the same way that the statutory tolling of § 2244(d)(2) does. "[T]he 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.' The prisoner must show that the 'extraordinary circumstances' were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted).

> [T]he prisoner must show that the "extraordinary circumstances" were the but-for and proximate cause of his untimeliness. . . . It will normally be much more difficult for a prisoner to demonstrate causation where he encounters the "extraordinary circumstances" in the beginning or middle of the limitations period than where he encounters them at the end of limitations period. This is the case because, if the prisoner is diligently pursuing his habeas petition, the one-year limitations period will ordinarily give him ample opportunity to overcome such early obstacles.

Allen v. Lewis, 255 F.3d 798, 800 (9th Cir. 2001) (per curiam) (citations omitted). The Court of Appeals for

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petition and its tolling of the federal statute of limitations were not at issue. The state petition was timely, and it tolled the federal statute of limitations pursuant to 28 U.S.C. § 2244(d)(2). See Bills, 628 F.3d at 1094. The issue in Bills was whether the federal statute of limitations should be equitably tolled because of the petitioner's argued incompetence. Id. at 1093. The court of appeals never ruled that federal law required equitable tolling of a state statute of limitations.

the Ninth Circuit has not applied a stop-the-clock rule for equitable tolling of § 2244(d). Instead, it looks upon equitable tolling as an equitable concept. As noted in Allen, petitioner must demonstrate causation as part of the requirement that she is pursuing her remedies diligently. See, e.g., Waldron-Ramsey v. Pacholke, 556 F.3d 1008 (9th Cir.), cert. denied, 130 S. Ct. 244 (2009); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005), amended by 447 F.3d 1165 (9th Cir. 2006); Spitsyn, 345 F.3d at 799. In Lott v. Mueller, 304 F.3d 918 (9th Cir. 2002), the court determined that equitable tolling might have been warranted, but it applied the same causation rule which it had adopted in Allen, and the court remanded for further argument on whether equitable tolling was warranted. 304 F.3d at 922-26.[5] Diligence requires a petitioner to file a petition as promptly as reasonably possible upon learning that the period of limitation had expired and upon the removal of the circumstances that prevented filing. A petitioner who delays filing a petition in federal court while pursuing motions and petitions in state court, assuming that the federal court will equitably toll the period of limitations, has demonstrated neither a circumstance that prevents timely filing nor diligence in pursuing his remedies. Waldron-Ramsey is instructive. The petitioner in that case argued that the period of limitation should have been equitably tolled because he did not have access to all of his legal records. The court of appeals held:

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[5] Judge McKeown's argument for a stop-the-clock rule did not have majority support. 304 F.3d at 926-27 (McKeown, J, concurring in the judgment).

> Moreover, even if Waldron-Ramsey may have faced some difficulty developing his claims without constant possession of all of his records, he has not adequately explained why he filed 340 days after his AEDPA deadline. If diligent, he could have prepared a basic form habeas petition and filed it to satisfy the AEDPA deadline, or at least could have filed it less than 340 days late assuming that some lateness could have been excused.

556 F.3d at 1014 (emphasis added).

Even if the court were to determine that petitioner was unable to file a federal petition while Figler represented her, that inability ended when Figler's representation ended. Petitioner did not file a federal petition promptly after that time. Instead, petitioner waited more than a year to file a state petition. Petitioner has not explained why it took so long to file the state petition, and petitioner has not explained why she did not file a federal petition at the same time, if not earlier. In short, petitioner has not shown that she was pursuing her rights diligently.

Fourth, equitable tolling is not warranted while petitioner was pursuing her untimely state habeas corpus petition. No law stopped petitioner from filing a federal habeas corpus petition simultaneously with a state habeas corpus petition, although the exhaustion requirement of 28 U.S.C. § 2254(b) might have prevented this court from granting relief. The Supreme Court of the United States has noted that when the timeliness of a state petition might be an issue, a person can file a federal habeas corpus petition while the state petition is pending, and then the person can

move to stay the federal petition until the conclusion of the state post-conviction proceedings. Pace, 544 U.S. at 416-17. Petitioner has not demonstrated any extraordinary circumstance that stood in the way of her filing a federal habeas corpus petition while the state petition was pending. See Holland, 130 S. Ct. at 2562.

Fifth, it is debatable whether equitable tolling in this court is warranted while Figler was representing petitioner in state court. Petitioner has demonstrated that she might not have been able to file a proper-person petition in state court because, pursuant to Eighth Judicial District Court Rule 3.70, a represented petitioner cannot file proper-person documents.[6] However, petitioner has not demonstrated that she was unable to file a proper-person petition in this court. Nobody represented petitioner in this court at the time, and thus no rule kept her from filing a proper-person federal petition. Petitioner knew that Figler was not filing a petition in state court, and she was frustrated by the delay. See Respondents' Ex. H, p. 2 (#8). It is possible that petitioner lacked the documents from her trial that she would have needed to develop her grounds for relief, because Figler possessed those documents, and thus she was hindered from completing a federal petition. However, that is only the court's speculation. It is petitioner's responsibility to demonstrate that Figler's representation of petitioner in state court made it impossible for her to file a

[6] This court's Local Rule IA 10-6(a) is similar. On the other hand, such a common rule makes it difficult to describe an inability to file a proper-person document while being represented as an extraordinary circumstance.

petition in federal court. See Holland, 130 S. Ct. at 2562. She has made no such demonstration.

The court's rejection of the preceding five assumptions can be debated among jurists of reason. What is not debatable, however, is the court's determination that this action is untimely even when the court gives petitioner every benefit of the doubt. For that reason, the court will not issue a certificate of appealability.

Petitioner has submitted a motion to hold issue 1(A) in abeyance until a similar issue is decided by the United States Supreme Court (#13), and respondents have filed an opposition. Petitioner wants this court to wait until the Supreme Court of the United States has decided Wood v. Milyard, No. 10-9995. The questions that the Court is considering in Wood are:

> 1) Does an appellate court have the authority to raise sua sponte a 28 U.S.C. § 2244(d) statute of limitations defense? 2) Does the state's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the state may have had?

The questions that the Supreme Court is considering are only questions of interpretation of § 2244(d), the Federal Rules of Civil Procedure, and the Rules Governing Section 2254 Cases in the United States District Courts. Nothing in the questions or the petitioner's brief indicates that there is a constitutional issue that might be applicable to state statutes of limitations. See Wood v. Milyard, 2011 WL 6094907

(opening brief). The decision in the court of appeals was based solely upon interpretation of § 2244(d). See Wood v. Milyard, 403 Fed. Appx. 335 (10th Cir. 2010). Just like Holland v. Florida, any decision in Wood will be inapplicable to petitioner's case. There is no reason why the court should hold this action or any issue in abeyance until the Supreme Court issues its decision.

IT IS THEREFORE ORDERED that petitioner's motion to hold issue 1(A) in abeyance until a similar issue is decided by the United States Supreme Court (#13) is **DENIED**.

IT IS FURTHER ORDERED that respondents' motion to dismiss (#6) is **GRANTED**. This action is **DISMISSED** with prejudice as untimely. The clerk of the court shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

DATED: January 24, 2012.

/s/ Roger L. Hunt
ROGER L. HUNT
United States District Judge

## APPENDIX D

AO450 (Rev. 5/85) Judgment in a Civil Case

**UNITED STATES DISTRICT COURT**
**_____ DISTRICT OF Nevada**

**Case Number: 2:11-cv-00643-RLH -GWF**

**[Filed January 25, 2012]**

| | |
|---|---|
| Margaret Rudin | ) |
| Petitioner, | ) |
| | ) |
| V. | ) |
| | ) |
| Warden Carolyn Myles, | ) |
| Attorney General of the State of Nevada | ) |
| Respondents. | ) |
| | ) |

**JUDGMENT IN A CIVIL CASE**

□ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a d decision has been rendered.

□ **Notice of Acceptance with Offer of Judgment.** A notice of acceptance with offer of judgment has been filed in this case.

IT IS ORDERED AND ADJUDGED

This action is DISMISSED with prejudice as untimely. Judgment is hereby entered in favor of respondents, Warden Carolyn Myles and Attorney General of the State of Nevada, and against petitioner, Margaret Rudin.

January 24, 2012
Date

/s/ Lance S. Wilson
Clerk

/s/ Molly Morrison
(By) Deputy Clerk

## APPENDIX E

**An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**No. 53143**

**[Filed May 10, 2010]**

THE STATE OF NEVADA, Appellant, vs. MARGARET RUDIN, Respondent.

ORDER OF REVERSAL

This is an appeal from an order of the district court granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Respondent Margaret Rudin, with the aid of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court on August 21, 2007, more than three years after the remittitur from her direct appeal was issued on April 27, 2004.[1] Thus,

[1] Rudin v. State, 120 Nev. 121, 86 P.3d 572 (2004).

Rudin's petition was untimely filed.[2] See NRS 34.726(1). Rudin's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. Id. "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations and internal quotations omitted)). Prejudice can be shown by demonstrating that the errors worked to a petitioner's actual and substantial disadvantage.

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[2] Rudin also filed a proper person document entitled "motion for substitution of court appointed attorney Dayvid Figler and opening brief supplement" on April 5, 2006. This motion raised some claims which challenged the judgment of conviction. Even assuming that this motion could be construed as Rudin's first petition for a writ of habeas corpus, this document was filed almost two years after the remittitur from her direct appeal was issued, and therefore was also untimely filed. See NRS 34. 726(1).

Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993). "Appellate courts will not disturb a trial court's discretion in determining the existence of good cause except for clear cases of abuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citing State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981)).

Rudin did not attempt to provide good cause for the delay in her pleadings before the district court.[3] However, this issue was discussed briefly at a status hearing during the post-conviction proceedings. At the hearing, post-conviction counsel acknowledged that the petition was untimely filed and the State briefly argued that the district court should not find good cause to excuse the delay. The district court then stated that it was "going to find that there were extraordinary circumstances which would allow the court to extend the one-year deadline," based on Rudin's lengthy trial and her first post-conviction counsel's failure to file a timely petition. At the status hearing the district court withheld making a final ruling on the procedural bar, but the district court's final order granting the petition did not address the issue of good cause to excuse the delay in filing the petition. The district court's final order discussed Rudin's claims on the merits and determined that her trial counsel was ineffective for failing to properly investigate and interview witnesses, and was therefore not prepared for trial.

The State argues on appeal that the district court erred in granting the petition because it was

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[3] Notably, Rudin acknowledged in an errata to the petition, filed on August 22, 2007, that the petition was untimely, but did not include any arguments of good cause to excuse the delay.

procedurally barred and without good cause for the delay.

While the district court did not discuss the procedural bar in its order granting the petition, it appears from the record that the district court concluded that Rudin had demonstrated cause for the delay because her trial was lengthy, her case file was large and her first post-conviction counsel had failed to file a timely petition.[4]

Assuming the district court determined that Rudin had demonstrated cause to excuse the delay, we conclude that the district court erred as a matter of law. See id. A lengthy trial and a large case file are not impediments external to the defense which demonstrate cause to excuse the delay because neither affords a factual or legal basis to find that Rudin's claims were not reasonably available to be raised in a timely manner. See Hathaway, 119 Nev. at 252, 71 P.3d at 506.

In addition, Rudin was not entitled to post-conviction counsel and therefore, she was not entitled to the effective assistance of post-conviction counsel. NRS 34.750; McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). As Rudin was not entitled to the effective assistance of post-conviction counsel, she cannot demonstrate cause for the delay based on the failure of her first post-conviction counsel to file a

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[4] If the district court did not conclude that Rudin had demonstrated good cause for the delay, then the district court erred in considering the merits of claims raised in an untimely post-conviction petition for a writ of habeas corpus. NRS 34.726(1); Riker, 121 Nev. at 231, 112 P.3d at 1074.

timely petition because that also does not provide a legal or factual excuse to find that Rudin's claims were not reasonably available to be raised in a timely manner. McKague, 112 Nev. at 164-65, 912 P.2d at 258; Hathaway, 119 Nev. at 252, 71 P.3d at 506.

Rudin argues that the petition should be considered timely filed because her post-conviction counsel complied with the district court's schedule and because the State did not file a motion to dismiss the petition due to the procedural time bar. The district court cannot extend the time for filing a post-conviction petition for a writ of habeas corpus without good cause, regardless of whether the State filed a motion to dismiss. Riker, 121 Nev. at 231, 112 P.3d at 1074; Haberstroh, 119 Nev. at 181, 69 P.3d at 681. Even assuming the district court's schedule could provide good cause, Rudin did not comply with the schedule because she did not file a petition by the July 6, 2005, deadline set by the district court and sought numerous continuances after the deadline had passed. To the extent Rudin argues it would be a fundamental miscarriage of justice to enforce the procedural time bar because the State did not file a motion to dismiss, this claim is patently without merit. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Schlup v. Delo, 513 U.S. 298, 327 (1995).

Based on all of the documents before this court, we conclude that the district court erred as a matter of law in considering Rudin's petition on the merits and erred as a matter of law in granting the petition because the

petition was procedurally barred and without good cause to excuse the delay.[5] Accordingly, we

ORDER the judgment of the district court REVERSED.[6]

/s/ Parraguirre, C.J.
Parraguirre

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

cc: Eighth Judicial District Court Dept. 15,
District Judge
Attorney General/Carson City
Clark County District Attorney
Christopher R. Oram
Eighth District Court Clerk

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[5] As the district court did not consider any other good cause claims beyond the legally insufficient claims discussed above and Rudin acknowledged before the district court the petition was untimely filed and did not raise any claims of good cause, further proceedings before the district court are not necessary.

[6] The State also argues that the district court erred in granting Rudin's claim that her trial counsel was ineffective for failing to be prepared for trial because Rudin did not demonstrate that she was prejudiced. As we conclude that the district court erred in considering Rudin's claims on the merits because her petition was procedurally barred, we need not consider this claim.

## APPENDIX F

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

**CASE NO. C142448**
**DEPT NO. XV**

**[Dated August 22, 2007]**

| | |
|---|---|
| THE STATE OF NEVADA, PLAINTIFF, | ) |
| VS. | ) |
| MARGARET RUDIN, DEFENDANT. | ) |

REPORTER'S TRANSCRIPT OF STATUS CHECK

BEFORE THE HONORABLE SALLY LOEHRER, DISTRICT COURT JUDGE

WEDNESDAY, AUGUST 22, 2007

8:35 O'CLOCK A.M.

| | |
|---|---|
| FOR THE PLAINTIFF: | LYNN ROBINSON, BILL KEPHART, DEPUTY DISTRICT ATTORNEYS |
| FOR THE DEFENDANT: | CHRISTOPHER ORAM, ESQ. |

* * * *

REPORTED BY: KIT MACDONALD, C.S.R.
CERTIFICATE NO. 65

[p.2]

LAS VEGAS, CLARK COUNTY, NEVADA,
WEDNESDAY, AUGUST 22, 2007

8:35 O'CLOCK A.M.

* * * * *

THE COURT: PAGE 4, RUDIN. MR. ORAM?

MR. ORAM: YES, YOUR HONOR. UM--

THE COURT: ALL RIGHT, LET ME SEE WHO'S HERE FOR THE STATE. WE'LL SEE IF MR. KEPHART IS HERE.

MR. STEGE: MR. OWENS IS SUPPOSE TO BE APPEARING.

THE COURT: ALL RIGHT. THIS IS A STATUS CHECK ON DEFENDANT'S OPENING BRIEF. AND BACK ON JULY 11TH YOU ADVISED US WHAT -- WHAT PROGRESS YOU MADE, AND --

MR. ORAM: YES, MA'AM.

THE COURT: I CAN'T EVEN REMEMBER HOW MANY BOXES OF DOCUMENTS AND FILES YOU NEEDED TO LOOK THROUGH.

WHAT'S YOUR PRESENT -- WHAT'S YOUR PRESENT ESTIMATE FOR DOING AN OPENING BRIEF?

MR. ORAM: IT'S FINISHED. IT WAS FILED LAST NIGHT.

MS. ROBINSON: OH. OH.

THE COURT: ALL RIGHT, SO NOW --

MR. ORAM: I HAVE A COURTESY COPY FOR THE STATE. I BELIEVE ONE WAS BEING PROVIDED -- IT WAS LATE LAST NIGHT, YOUR HONOR, WHEN IT CAME IN, AND SO WE PROVIDED A COURTESY COPY.

I ALSO WONDERED, IF I CAN INFORM THE COURT, THAT WHAT WE DID IS, WE -- UM -- SCANNED IN ALL OF THE TRIAL TRANSCRIPT ONTO A DISK. I QUOTED IN MY STATEMENT OF FACTS,

[p.3]

WHICH IS QUITE LENGTHY, ABOUT 41 PAGES, FROM ABOUT 37 VOLUMES. THEY'RE ALL CONTAINED ON THIS DISK, AND THEY'RE BATE STAMPED. THEY WERE BATE STAMPED UP IN THE SUPREME COURT. SO WHEN I REFER, LET'S SAY TO 618, WHAT YOU DO IS GO IN HERE, LOOK AT THE VOLUME, GO TO PAGE 618, SO YOU CAN CHECK MY CITES, AND I WONDERED IF I COULD GIVE A COPY TO THE COURT?

THE COURT: OH, WE'D LOVE THAT, THANK YOU.

MR. ORAM: PERMISSION TO APPROACH?

THE COURT: CERTAINLY.

MR. ORAM: IF -- IF THE COURT OR YOUR CLERK HAS ANY DIFFICULTY WITH IT --

THE COURT: WE'LL CALL YOUR OFFICE.

MR. ORAM: JUST CALL MY OFFICE. AND IT'S VERY SELF-EXPLANATORY, BUT WE CAN HELP OUT. UM --

THE COURT: OKAY.

MR. ORAM: YOUR HONOR, THERE WAS ALSO ANOTHER MATTER. I WONDERED -- I'VE BEEN DOING THIS ALL ALONE, AND I WONDERED NOW, ONCE THE COURT SEES THE BRIEF -- UM -- THERE'S SEVERAL ISSUES. I DON'T WANT TO BE PRESUMPTUOUS, BUT IF THERE IS AN EVIDENTIARY HEARING, I WOULD NEED AN INVESTIGATOR, AND I WONDERED IF I COULD HAVE THE APPOINTMENT OF AN INVESTIGATOR.

THE COURT: WELL, WHAT I WOULD LIKE TO DO IS, I'D LIKE TO GET THE STATE'S RESPONSE FIRST.

MR. ORAM: YES, YOUR HONOR. YES.

THE COURT: AND THEN -- UM -- BASED ON THE STATE'S

[p.4]

RESPONSE -- YOUR BRIEF AND THE STATE'S RESPONSE, IF IT APPEARS THAT ADDITIONAL INVESTIGATION NEEDS TO BE DONE, AT THAT POINT I WOULD BE MORE THAN HAPPY TO -- UM -- POINT AN INVESTIGATOR FOR YOU.

IS ANYBODY GOING TO SPEAK FOR MR. OWENS ON HOW LONG IT WILL TAKE THEM TO REPLY?

MS. ROBINSON: WELL, HOW LONG DID --

THE COURT: IT'S THE RUDIN CASE.

MS. ROBINSON: HOW LONG DID THE OPENING BRIEFS TAKE?

MR. ORAM: IT TOOK ME --

THE COURT: ABOUT THREE -- WELL, LET'S SEE. FIRST, JUDGE BONAVENTURE APPOINTED DAVID FIGLER, AND THAT TOOK THREE YEARS, BEFORE HE GOT FIRED.

MS. ROBINSON: OKAY, WE DON'T NEED THREE YEARS.

THE COURT: AND THEN MR. ORAM GOT APPOINTED. MR. ORAM, WHEN DID YOU GET APPOINTED?

MR. ORAM: I REMEMBER EXACTLY, I GOT THE FILE AUGUST 22ND, I BELIEVE A YEAR -- ALMOST ONE YEAR TO THE DAY.

THE COURT: SO --

MS. ROBINSON: WE PROBABLY DON'T NEED A YEAR.

THE COURT: SIX MONTHS?

MS. ROBINSON: I WAS THINKING 60 DAYS, FRANKLY. DO YOU THINK THAT'S ENOUGH?

THE COURT: WELL --

MS. ROBINSON: NINETY DAYS?

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MR. ORAM: IT'S -- YOU KNOW A LOT --

THE COURT: YOU'LL REMEMBER THE CASE. YOU'LL REMEMBER THE CASE.

MR. KEPHART: NO, I -- I REMEMBER.

THE COURT: JUDGE BONAVENTURE TRIED THE CASE.

MS. ROBINSON: I REMEMBER THE CASE, AS WELL, YOUR HONOR.

THE COURT: MARGARET RUDIN IS THE REAL ESTATE PERSON'S WIFE.

MS. ROBINSON: YEAH, WE REMEMBER THE CASE.

THE COURT: IT WAS A VERY MESSY TRIAL, AS I RECALL IT, EVEN THOUGH I DIDN'T DO IT.

MR. KEPHART: IF I MAY, JUDGE. UM -- CHRIS OWENS IS HANDLING THIS?

MR. ORAM: YES.

MR. KEPHART: THE PROBLEM WITH 60 DAYS IS, WE'RE COMING UP ON THAT MONGREL ISSUE, AND YOU'RE ON THAT CASE, AS WELL, SO --

MS. ROBINSON: SO WE'LL GET SIX -- SIX MONTHS?

THE COURT: HOW ABOUT SIX MONTHS?

MR. ORAM: YOUR HONOR, MAYBE WE CAN SET IT FOR 90 DAYS, JUST FOR A STATUS CHECK --

THE COURT: ALL RIGHT.

MR. ORAM: -- TO SEE HOW THE STATE'S DOING.

THE COURT: ALL RIGHT. THAT WILL BE GOOD. SO LET'S

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SET IT FOR STATUS CHECK FOR THE STATE'S RESPONSE IN 90 DAYS, WHICH WILL BE, SEPTEMBER, OCTOBER --

THE CLERK: NOVEMBER --

THE COURT: -- END OF NOVEMBER.

THE CLERK: NOVEMBER 21ST AT 8:30.

THE COURT: ALL RIGHT. SO IT WILL BE ON FOR STATUS CHECK ON NOVEMBER 21ST, SO THAT THE STATE CAN COME IN AND TELL US WHERE THEY ARE IN GETTING THEIR RESPONSE IN, AND THEN WE'LL -- UM -- BASED ON WHEREVER THEY THINK THEY ARE -- DID YOU GIVE ONE OF THOSE CD DISKS TO THE STATE, OR ARE YOU GOING TO GIVE IT TO THEM?

MR. ORAM: I'M GOING TO GIVE THEM ONE NOW.

THE COURT: MR. KEPHART, DO YOU WANT TO TAKE THAT FROM MR. --

MR. KEPHART: I WILL, JUDGE.

THE COURT: -- FOR MR. -- BE SURE THAT THE CD THING GETS -- STAYS WITH IT.

AND THEN WOULD YOU -- UM -- OUR COPY IS COMING TO US?

MR. ORAM: IT WAS FILED -- I CHECKED THIS MORNING. THEY SAID IT WAS FILED, AND ONE WAS COURTESY COPIED, BUT I'LL GO BACK TO MY OFFICE --

THE COURT: OKAY, DON'T WORRY ABOUT IT.

DO YOU KNOW IF WE GOT IT? IT WOULD HAVE BEEN A BIG THING LIKE THIS. WE PROBABLY HAVE IT NOW, BUT --

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MR. ORAM: I'LL MAKE SURE IT COMES TO YOUR COURT.

I DO HAVE ONE OTHER QUESTION.

THE COURT: OKAY.

MR. ORAM: FROM REVIEWING THIS FILE -- UH -- I FILED THIS AS A SUPPLEMENT, YOUR HONOR.

THE COURT: RIGHT.

MR. ORAM: PERHAPS I SHOULD, FOR THE RECORD, CALL IT A WRIT OF HABEAS CORPUS, AND MAYBE I SHOULD AMEND IT TO BE CALLED A WRIT OF HABEAS CORPUS. USUALLY IN THE PAST I CALL THEM SUPPLEMENTS.

THE COURT: WELL, I DON'T RECALL THE RECORD BEING HERE. I BELIEVE THAT JUDGE BONAVENTURE HANDLED THE CASE.

MR. ORAM: CORRECT.

THE COURT: THE DIRECT APPEAL WAS DENIED.

MR. ORAM: CORRECT.

THE COURT: WHICH -- THIS IS NOT PROBABLY -- SURPRISED ME.

(DISCUSSION BETWEEN THE COURT AND THE LAW CLERK.)

THE COURT: NOW WE'RE BACK ON THE RECORD.

SO -- UM -- I DON'T KNOW WHO FILED IN THE ORIGINAL DOCUMENTS. I DON'T THINK MR. FIGLER FILED ANYTHING.

MR. ORAM: I DON'T THINK --

THE COURT: I DON'T THINK HE FILED ANYTHING.

MR. ORAM: NOTHING.

THE COURT: SO WHAT DID YOU TITLE YOURS,

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SUPPLEMENTAL POINTS AND AUTHORITIES?

MR. ORAM: YES, YOUR HONOR, AND THEN I -- I -- I'M UNDER -- MY FEAR IS, AS I LOOK AT THE STATUTE, THAT -- UM -- THE ONE YEAR

DEADLINE TO FILE, I LOOKED AT IT AND IT SAID THAT -- UH -- THE COURT CAN EXCUSE IT, AND CAN DELAY THE PROCESS, WHICH I ASSUME WAS GOING ON WHILE MR. FIGLER WAS GOING THROUGH THIS. BUT PERHAPS I SHOULD RELABEL THE PETITION FOR WRIT OF HABEAS CORPUS. I MAY NEED TO AMEND IT TODAY, JUST TO SAY WHERE SHE'S LOCATED, BECAUSE THAT'S WHAT THE STATUTE REQUIRES.

THE COURT: OKAY. I MAY SAY YOU SHOULD PROBABLY DO THAT. JUST DO THAT AS LIKE A ONE PAGE SHEET, LIKE AN ERRATA TO YOUR DEAL.

MR. ORAM: YES.

THE COURT: AND THE COURT WILL FIND, AS A MATTER OF FINDING TODAY, THAT YOU'RE FILING OF THE WRIT FOR POST-CONVICTION RELIEF IS TIMELY, BASED UPON -- UM -- THE FACT THAT -- UH -- MR. FIGLER HAD THE CASE FOR SO MANY YEARS. I BELIEVE IT WAS YEARS.

MR. ORAM: IT WAS TWO YEARS. YES, IT WAS TWO YEARS.

THE COURT: IT WAS TWO YEARS, AND FILED NOTHING, EVEN THOUGH WE KEPT HAVING STATUS CHECKS. SO -- UM -- WE'RE GOING TO FIND THAT IT WAS TIMELY FILED. AND -- UH -- THE STATE HAS NOW RECEIVED THEIR COPY.

WE'LL HAVE A STATUS ON NOVEMBER 21ST TO SEE WHETHER

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THE STATE -- UH – FEELS THEY CAN GET IT'S RESPONSE IN.

UM -- AND IT WAS AN EXTENSIVE TRIAL. DIDN'T IT TAKE SEVERAL WEEKS?

MR. ORAM: TEN WEEKS.

THE COURT: TEN WEEKS.

MR. ORAM: TEN WEEKS.

THE COURT: TEN WEEK TRIAL. SO THAT WOULD BE THE EXTRAORDINARY CIRCUMSTANCE THAT WE WOULD FIND THAT WOULD ALLOW THE PETITION FOR POST-CONVICTION RELIEF BE FILED. THAT, PLUS THE FACT THAT THE FIRST ATTORNEY DIDN'T DO ANYTHING.

MR. ORAM: YES, YOUR HONOR.

THE COURT: DIDN'T GET ANYTHING FILED.

MR. KEPHART: WHAT ABOUT IF WE GO FROM THE TIME WHEN HE FIRST GOT THE FILE?

MR. ORAM: I DID IT UNDER ONE YEAR. ONE DAY UNDER ONE YEAR.

MR. KEPHART: ONE DAY UNDER A YEAR?

MR. ORAM: ONE DAY UNDER A YEAR. FROM THE TIME I RECEIVED THE 64 BOXES.

MR. KEPHART: I THINK, JUDGE, THAT SETS A BAD PRECEDENT, IN LIGHT OF THE FACT THAT WE CAN GET MULTIPLE ATTORNEYS, AND

EVERY ATTORNEY THAT GETS THIS SAYS, WELL, HE HAD IT TOO LONG, HE HAD IT TOO LONG. WE'D LIKE TO AT LEAST ADDRESS THAT, BEFORE YOU MAKE THAT FINDING.

THE COURT: ALL RIGHT, YOU CAN ADDRESS IT. I WON'T

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MAKE A FINDING, YOU CAN ADDRESS IT.

BUT I THINK -- I REALLY THINK THAT THE COURT IS GOING TO FIND, NOT ONLY THIS COURT, BUT THE NEXT COURT, IS GOING TO FIND THAT THERE WERE EXTRAORDINARY CIRCUMSTANCES IN THIS CASE, WHICH WOULD ALLOW THE COURT TO EXTEND THE ONE YEAR DEADLINE.

MR. ORAM: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: AND I WOULD PRESUME THE STATE IS NOT GOING TO JUST GIVE ME A ONE PAGE RESPONSE THAT SAYS IT'S TOO LATE. THAT'S WHAT I WOULD PRESUME.

MR. KEPHART: NO. NO.

THE COURT: THANK YOU.

MR. KEPHART: I DOUBT IT. I MEAN, LOOKING AT THIS.

THE COURT: OKAY.

MR. KEPHART: CHRIS -- CHRIS DOES A PRETTY GOOD JOB ON THESE, SO WE HAVE TO LOOK AT THEM.

THE COURT: ALL RIGHT, THANK YOU.

MR. ORAM: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. ORAM.

ATTEST: FULL, TRUE AND CERTIFIED TRANSCRIPT.

/s/ Kit MacDonald
KIT MACDONALD, C.S.R.
COURT REPORTER
C.S.R. 65

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-15362**
**D.C. No. 2:11-cv-00643-RLH-GWF**
**District of Nevada, Las Vegas**

**[Filed April 16, 2015]**

| | |
|---|---|
| MARGARET RUDIN, | ) |
| | ) |
| Petitioner - Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| CAROLYN MYLES; ATTORNEY GENERAL OF THE STATE OF NEVADA, | ) |
| | ) |
| Respondents - Appellees. | ) |

ORDER

Before: O'SCANNLAIN and MURGUIA, Circuit Judges and ADELMAN,[1] District Judge.

Judges Murguia and Adelman have voted to deny the Petition for Panel Rehearing. Judge Murguia has

[1] The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

voted to deny the Petition for Rehearing En Banc, and Judge Adelman so recommends. Judge O'Scannlain has voted to grant the Petition for Rehearing and Petition for Rehearing En Banc.

The Petition for En Banc Rehearing has been circulated to the full court, and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

Appellees' Petition for Panel Rehearing and Petition for Rehearing En Banc is DENIED (Doc. 50)