No. 09-5327

IN THE

Supreme Court of the United States

ALBERT HOLLAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether equitable tolling is available under the Antiterrorism and Effective Death Penalty Act (AEDPA), and, if so, whether the Eleventh Circuit properly denied Petitioner's contention that he is entitled to equitable tolling of the limitations period based on the alleged "gross negligence" of his counsel?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the petitioner proposes granting to the lower federal courts an open-ended, vaguely defined

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

power to make exceptions to the time limit established by Congress to expedite habeas corpus petitions, especially in capital cases. While most federal courts would probably use this power sparingly, it creates the potential for abuse in those courts that have shown the greatest determination to evade the limits of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and perpetuate the evils that statute was enacted to correct. We have seen, with other provisions of this statute, how often courts have erred so seriously as to warrant summary reversal by this Court and how many times egregious errors have gone uncorrected. Authorizing an end run around the AEDPA statute of limitations would be contrary to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Albert Holland has received two trials, and has been twice sentenced to death. See *Holland* v. *State*, 636 So. 2d 1289, 1290 (Fla. 1994) (*per curiam*); see also *Holland* v. *State*, 773 So. 2d 1065, 1068 (Fla. 2000) (*per curiam*). His first conviction was overturned based on *Powell* v. *Texas*, 492 U. S. 680 (1989), see *Holland*, 636 So. 2d, at 1291, but the fact that Holland shot and killed Officer Scott Winters has not been questioned. See *id.*, at 1294 (McDonnell, J., dissenting).

In July 1990, witnesses saw Holland attack a woman he had met in Pompano Beach, Florida. *Id.*, at 1290. Police officers responded to the call, and Officer Winters began a search for Holland. *Ibid.* A short time later, witnesses saw the two men struggling and saw Holland grab Officer Winters' gun. *Ibid.* Holland shot Officer Winters once in the abdomen and once in the

groin. Officer Winters later died from the wounds. *Ibid.*

In 1996, Holland was tried a second time and was convicted for first-degree murder, attempted first-degree murder, attempted sexual battery, and armed robbery. He was sentenced to death, and the Florida Supreme Court affirmed without dissent, addressing 22 claims. See 773 So. 2d, at 1069, n. 1.

This Court denied certiorari on October 1, 2001, *Holland* v. *Florida*, 534 U. S. 834, starting the one-year clock of the federal habeas statute of limitations, 28 U. S. C. § 2244(d)(1)(A). State postconviction counsel, Bradley Collins, was appointed a month later. Brief for Petitioner 4. He filed the postconviction motion two weeks short of the one-year limit. *Ibid.*[2] The federal clock was stopped during the pendency of this motion. See 28 U. S. C. § 2244(d)(2).

Holland's state postconviction motion raised eight claims. *Holland* v. *State*, 916 So. 2d 750, 755 (Fla. 2005). The trial court held an evidentiary hearing on two of them and found them without merit. The other six "were either legally insufficient, refuted by the record, or procedurally barred." *Ibid*. He appealed the denial of relief to the Florida Supreme Court, which found his claims to be without merit. *Ibid*. Holland also filed an original habeas petition in the Florida Supreme Court alleging four claims of ineffective assistance of appellate counsel. *Id*., at 760. "Applying the *Strickland* analysis to each of these claims leads to the conclusion that they are without merit." *Ibid*. The state high court issued its decision on November 10, 2005, but did not issue its mandate restarting the

2. There is an inconsequential dispute between the parties on the exact date: September 17 or 19. Compare Brief for Petitioner 5, n. 4, with Brief for Respondent 9, n. 7.

federal clock until December 1. Brief for Petitioner 14-15.

Holland therefore had until December 15, 35 days from the state court decision, to file a federal habeas petition stating the federal claims he had already litigated in the state courts. Collins did not file in time. A letter dated January 31, 2006, indicates that he erroneously believed the time had already run before he was appointed. J. A. 78-79. Holland filed a federal habeas petition *pro se* on January 19, 2006, over a month after the deadline. Brief for Petitioner 17. The Federal District Court dismissed the petition as untimely, and the Court of Appeals for the Eleventh Circuit affirmed. See *Holland* v. *Florida*, 539 F. 3d 1334, 1336 (2008). This Court granted certiorari on October 13, 2009.

SUMMARY OF ARGUMENT

The question of whether equitable tolling is available for the period of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 cannot be answered merely by categorizing habeas corpus as "equitable." Unlike the common law usage, habeas corpus today has aspects of an appeal, where time limits are applied strictly, as well as a proceeding in equity, where they are applied more flexibly. The question must be answered instead by looking at the language and purpose of the statute.

The detailed structure of § 2244(d) implies that Congress made the exceptions it deemed necessary and did not intend to authorize courts to make additional exceptions through equitable tolling. This conclusion is reinforced by the purpose of the statute. Unlike the other statutes of limitation in this Court's precedents, this statute was enacted for the specific purpose of

reining in courts that Congress believed had given insufficient weight to the State's interest in finality. Congress is unlikely to have intended to grant open-ended authority to evade its limits to the very courts it intended to restrain.

The four paragraphs of § 2244(d)(1) establish alternate starting dates for a straightforward statute of limitations. None is properly characterized as a statute of repose. The reading of the statute proposed by *amicus* ACLU is convoluted and unnecessary. The right reading is the simple reading.

Congress legislated against a case-law background in which the risk of default by habeas counsel was borne by the petitioner, not the state. This background included the very well known and then-recent case of *Coleman* v. *Thompson*. The language of the statute confirms that Congress expected and intended that this allocation continue. Attributing the default of the State's adversary to the State is a necessary evil for trial and the first appeal, but it is not necessary for collateral review.

ARGUMENT

I. Habeas corpus as a collateral attack is a unique procedure, not cleanly categorized as either equitable or appellate.

Young v. *United States*, 535 U. S. 43, 50 (2002), noted that the usual rule that Congress presumably intends equitable tolling to apply to limitations periods "is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.' " However, the Court has said just the opposite for "statutory provisions specifying the timing

of review," which are typically considered "jurisdictional in nature and must be construed with strict fidelity to their terms." *Stone* v. *INS*, 514 U. S. 386, 405 (1995) (citing *Missouri* v. *Jenkins*, 495 U. S. 33, 45 (1990)).

Not surprisingly, Petitioner and supporting *amici* seize on the *Young* language and couple it with statements by this Court over the years regarding the equitable nature of habeas corpus. See Brief for Petitioner 38; Brief for Eleven Legal Historians as *Amici Curiae* 13. *Amici* Legal Historians devote nearly all of their brief to the point.

If this were a case of the writ of habeas corpus being used for its original purpose, consistently with the common law usage, this would be a stronger argument. In this case, however, the writ is being used to collaterally attack the final judgment of a court of general jurisdiction, alleging mere error, not a lack of jurisdiction. That is a usage unknown to the common law. See Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966). In *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830), the Court refused to review constitutional challenges to the final judgment of a circuit court, holding that the court's ruling on matters within its jurisdiction was binding, even in the Supreme Court. See also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963). Not until after the Civil War was the concept of "jurisdiction" stretched in federal courts to provide a back-door appeal of certain constitutional issues. See Bator, *supra*, at 467-474; *Stone* v. *Powell*, 428 U. S. 465, 474-476, and nn. 7-8 (1976).

Amicus ACLU notes, "The period of limitation established by § 2244(d)(1) is not a time limit for 'taking an appeal,' but is, instead, a statute of limitations for initiating an independent original action in a federal district court." ACLU Brief 5, n. 2. That is true in form but not in substance, when the writ is used to attack the judgment of another court. Even in the very early cases, where the writ could be used to revise a *pretrial* custody determination of another court, this Court recognized that it was appellate in nature, despite the form, and therefore came within the Court's broad appellate jurisdiction, not its narrow original jurisdiction. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 100-101 (1807).

When habeas is used as a back-door appeal, the considerations involved are quite different from when it is used for its original, primary purpose of reviewing detention by the executive without judicial authorization. See *Boumediene* v. *Bush*, 553 U. S. __, 128 S. Ct. 2229, 2268-2269, 171 L. Ed. 2d 41, 87-88 (2008). The English authorities noted in the Legal Historians Brief, at pages 3-7, have limited relevance to a writ used for a very different purpose.

Why have the courts generally been so strict with time limits for review, in comparison to the limits for an original action? A plaintiff who has his complaint thrown out by the court of first instance has been denied his day in court. His complaint has not been reviewed on the merits by any court, and it never will be. A would-be appellant has already had his day in one court and is seeking another day in another court. The chance that a genuine miscarriage of justice is going

uncorrected diminishes exponentially with the number of courts that have reviewed the case.[3]

The diminishing returns of successive reviews was among the reasons underlying this Court's decision in *Ross* v. *Moffitt*, 417 U. S. 600, 615-618 (1974), that the Sixth Amendment right to counsel does not extend beyond the first appeal to discretionary review in the state high court or in this Court. Relying on *Ross*, this Court has further held that there is no constitutional right to counsel on state collateral review. *Pennsylvania* v. *Finley*, 481 U. S. 551, 555-557 (1987) (plurality opinion).

Habeas corpus does have some aspects of equity cases, but when it is used to collaterally attack convictions, it also has aspects of an appeal, and a secondary appeal at that. These two aspects point in opposite directions on the question of how strictly courts should apply limitations periods. Certainly one cannot jump directly from statements about habeas and equity to a conclusion that all principles of equity apply. If the petitioner had to come to the court with "clean hands,"

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3. One notorious study claimed a high rate of "serious error" in capital cases that went to federal habeas review from 1976 to 1995. The multiple serious errors of the study itself are well documented. See Minority Views on the Innocence Protection Act of 2002, S. Rep. No. 107-315, 107th Cong., 2d Sess., 69-74 (2002). Among other problems, the study counted as "serious error" cases where the trial was conducted under the law in effect at the time but the judgment was overturned years later after the rules had changed. See *id.*, at 70-71. Given the zigzag course of capital sentencing jurisprudence during that period, this effect is necessarily large. See K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 20-22 (1995), http://www.cjlf.org/publctns/OverdueProcess.pdf. A decision overturning a death sentence on federal habeas corpus is not necessarily a correction of an injustice. More often, it is the perpetration of an injustice.

habeas relief would be immediately denied to any clearly guilty criminal. Although such a limitation has been proposed, see Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970), it has never been adopted.

Just a few weeks before AEDPA became law, this Court explained the limitations of invoking equitable principles to do an end run around a codified rule, the predecessor of the statute at issue in this case. In *Lonchar* v. *Thomas*, 517 U. S. 314, 322 (1996), the Court explained that as habeas corpus evolved beyond a simple examination of the jurisdiction of the committing court, it also evolved into a system of more fixed rules.

> "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts' freedom to issue the writ . . . while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State's interest in the 'finality' of its own legal processes." *Id*., at 322-323.

If the balance of interests struck by the existing rule was incorrect, the solution lay not in creating an "ad hoc judicial exception" but rather "through congressional legislation or through the formal rulemaking process." *Id*., at 328. President Clinton signed AEDPA into law 23 days later.

The answer to the puzzle is not found in sweeping generalities about equity or appeals. It is found in the text and the purpose of the statute.

II. AEDPA must be interpreted in light of Congress's clear purpose of restraining courts it believed had wrongly balanced the competing interests.

The starting point for interpretation is always the text of the statute. In this case, the State has explained how the unusually detailed structure of 28 U. S. C. § 2244(d), with four alternate starting dates and one express tolling provision, is inconsistent with an interpretation that Congress intended to grant the courts an open-ended authority to craft additional exceptions. See Brief for Respondent 25-31. Little needs to be added to this straightforward and powerful argument, although in Part III, *infra*, we will address *amicus* ACLU's convoluted attempt to avoid the clear implication of the statutory text.

Along with the text, the purpose of the statute is also an important consideration. Here, we submit, the Court must consider the fact that AEDPA has a purpose different from the statutes in all the other equitable tolling precedents cited in the briefs. In the statements of supporters of the legislation on the floor of both houses, one message comes through loud and clear. Congress was fed up with the way many of the lower federal courts had been handling capital cases. The supporters filled the Congressional Record with horror stories of protracted proceedings and pointless delays in cases with no genuine issue of guilt of the accused. See 141 Cong. Rec. 14734 (statement of Sen. Feinstein) (1995); *id*., at 15062 (statement of Sen. Hatch); *id*., at 15019 (statement of Sen. Specter); *id*., at 15036-15037 (statement of Sen. Nickles).

Congress's diminished confidence in the federal district and circuit courts can also be seen in the substance of the legislation. Almost every change made is for the purpose of restraining the federal habeas

courts. The most controversial change, by far, was the so-called "deference" standard of § 2254(d). *De novo* review of a state court judgment by a federal district or circuit court would make sense only if one had confidence that in the event of a disagreement the federal court was far more likely to be correct. The new standard was enacted on the express premise that the state courts were "just as good." 141 Cong. Rec. 15062, col. 2 (1995) (statement of Sen. Hatch). The limit on successive petitions was tightened substantially beyond what this Court had required just a few years earlier, compare *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991), with 28 U. S. C. § 2244(b), implying that Congress believed the federal courts had been excessively lax in allowing successive petitions.

The new statute of limitations effectively displaced the prior rule on delayed petitions, Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules).[4] The prior rule is quoted and discussed in *Lonchar* v. *Thomas*, 517 U. S. 314, 326 (1996). It was stated in permissive terms, "may be dismissed." The rule did not give a specific time frame for delay, and it required an affirmative showing of prejudice to the state for a dismissal. Delay could be excused if "petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence . . . ."

In comparison to former Rule 9(a), § 2244(d) shows a tightening all around. The statute is a mandatory period of limitation, not a permissive rule. There is a

4. In the 2004 rule amendments, former "Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations . . . ." Advisory Committee's Notes on 2004 Amendment to Habeas Rule 9, 28 U. S. C., p. 1242 (2006 ed.).

fixed time frame of one year. The delay permitted for grounds not discoverable with reasonable diligence is limited to the factual basis of the claim, not a legal argument. See § 2244(d)(1)(D). Delays for new legal arguments are limited to the very narrow category of rights "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ." § 2244(d)(1)(C). The requirement for the state to show prejudice is gone, although the state can forfeit the protection of the statute through its own illegal action. See § 2244(d)(1)(B).

This level of detail negates any intent to authorize courts to make additional exceptions, even on the face of this subdivision alone. See Brief for Respondent 25-31. That implication is even more clear, however, when it is considered in light of Congress's disapproval of the way federal courts had been handling habeas corpus, especially in capital cases. Would Congress really delegate an open-ended, unstructured authority to bypass the limitation it imposed to the very courts that it had decided needed to be put on a shorter leash in so many other ways?

When Congress enacted AEDPA, it did so out of the conviction that the federal courts had, overall, struck the balance between finality and rights of the defendant in the wrong place. Finality had not, to that point, been given nearly the weight it deserved in that balance.

Just two years ago, this Court said in regard to *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89 (1990),

> *"Irwin* adopted a '*rebuttable* presumption' of equitable tolling. [*Id*., at 95] (emphasis added). That presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of in-

> stances where it enacted a Government-related statute of limitations. But the word 'rebuttable' means that the presumption is not conclusive. Specific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary." *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 137-138 (2008).

The specific statutory language spelling out the starting times and tolling in detail, when combined with the overall purpose of the statute to tighten up a system that Congress believed the courts had allowed to get too loose, demonstrates a contrary intent and rebuts the presumption. Congress has already provided for what it perceives to be the equities, see *United States* v. *Beggerly*, 524 U. S. 38, 48 (1998), and courts are not authorized to graft on additional exceptions.

III. Paragraphs (d)(1)(B)-(D) are detailed exceptions to the general rule of (d)(1)(A), not exceptions to an unwritten, assumed rule of equitable tolling.

The statute of limitation in this case is so unusually detailed, and the negative implication against additional unwritten exceptions so strong, that *amicus* ACLU tries a Hail Mary pass, contending that paragraphs (B) and (D) "are better understood as *statutes of repose*." See ACLU Brief 14 (emphasis in original). Tellingly, the ACLU does not cite a single case or even a single law review article that reads this 14-year-old, much litigated, much discussed statute in this way. That is because this statute is nothing of the sort. First, it is necessary to define the term.

> "Five definitions of statutes of repose have been offered:[23] (1) in the most general sense, statute of repose is synonymous with statute of limitations; (2)

'statute of repose' is a general term that encompasses various statutes, including statutes of limitation (in this view, it is an act that promotes the policy of finality in legal relationship, and it can include any number of statutory devices that accomplish this purpose); (3) it is merely one type of statute of limitations (a suggestion that it is the portion of the statute of limitations that places a cap or outer limit on a statute and that begins to run when the party discovers the existence of injury or cause of action; this third type also is called a 'bifurcated'[24] or 'two-tier'[25] statute); (4) a statute of repose is considered distinct from a statute of limitations because it begins to run at a time unrelated to the traditional cause of action, that is, from the date of the act of injury regardless when discovered; and (5) is synonymous with the 'useful safe life'[26] provisions of product liability statutes.

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[23] Hicks, The Constitutionality of Statutes of Repose: Federalism Reigns, 38 Vand. L. Rev 627 (1985); McGovern, The Variety, Policy, and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579, 582-586 (1981).

[24] McGovern, *supra* note 23, at 584 (citing *Gates Rubber Co.* v. *USM Corp.*, 508 F. 2d 603 (7th Cir.), reh'g denied (1975))."

1 C. Corman, Limitation of Actions § 1.3.2.1, pp. 30-31 (1991) (footnotes 25-26 omitted).

Amicus ACLU is evidently referring to the third definition, and particularly the parenthetical in that definition. The first, second, and fifth definitions clearly do not apply here. A statute of repose under the fourth definition would begin running on the date

judgment is entered, and nothing in § 2244(d) relates to that date.

Yet on closer examination, the third definition refers to something quite different from paragraphs (B) and (D). The *Gates Rubber* case referred to in the passage above gave as an example an Illinois statute on medical malpractice that began the period of limitation when "the person actually knows or should have known of the facts of hurt and damage to his body; provided that no such action may be commenced more than 10 years after such treatment or operation." *Gates Rubber Co.* v. *USM Corp.*, 508 F. 2d 603, 611-612 (7th Cir. 1975). This statute provides one limitation period based on discovery by the plaintiff and another based on the act of the defendant, and the cause of action may be barred by either limitation, whichever expires first.

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U. S. 350 (1991), involved a similar statute. The statute of limitation "adopted" by the Court in that case required a suit to be filed "within one year after the discovery of the facts constituting the violation *and* within three years after such violation." *Id.*, at 360, n. 6 (quoting 15 U. S. C. § 78i(e)) (emphasis added). The second part of the statute is a period of repose, see *id.*, at 360, and it may terminate a cause of action even before the plaintiff learns of its existence. The defendant gets the benefit of whichever alternate period expires first.

The four alternate time periods in § 2244(d)(1) work in the opposite manner. The petitioner gets the benefit of whichever alternative applies to his case and provides the longest period. The statute provides, "The limitation period shall run from the *latest* of— . . . ." 28 U. S. C. § 2244(d)(1) (emphasis added). Nothing in subdivision (d)(1) gives the state the benefit of finality without regard to any of the other alternatives, which

is what an alternative period of repose does. Statutes of repose are alternative ways to cut off a cause of action. The four alternatives of subdivision (d)(1) are alternative ways to keep alive a cause of action. As statutes of limitation go, this one is "unusually generous," cf. *United States* v. *Beggerly*, 524 U. S. 38, 48-49 (1998), in the sense that it gives the plaintiff rather than the defendant the benefit of the alternatives.

Amicus ACLU tries to pound the square pegs of subparagraphs (B) and (D) into the round hole of statutes of repose by claiming that the function of the latter "is not to toll a limitation period, but rather to place a cap on any tolling a limitation period would otherwise contemplate." ACLU Brief 14. Yet as *Gates Rubber* and *Lampf* indicate, the alternative statutes of repose were not for the purpose of capping *tolling* of the primary limitation period but rather for providing a complete alternative to the primary limitation period. *Lampf* held that equitable tolling was inconsistent with a period of repose, 501 U. S., at 363, not that capping tolling was the primary purpose of the period of repose. Cf. ACLU Brief 15 (citing *Lampf* for a proposition it does not support).

The ACLU's reading of § 2244(d) is extraordinarily convoluted. Congress's intent, in this reading, was to enact paragraph (A) as the main statute of limitations, assume it was implicitly subject to equitable tolling, and then cap that implied exception with express exceptions, *i.e.*, paragraphs (B) and (D), which are periods of repose not subject to equitable tolling. See ACLU Brief 15. The fundamentally different nature of these paragraphs from paragraph (A) is also merely implied. That would be a bizarre way to write a statute, and therefore it is a bizarre way to read this statute.

The right way to read this statute is the simple way. Congress wanted to enact paragraph (A) as the primary

statute of limitations, but it recognized that this rule would be too harsh in certain circumstances. It considered what circumstances should be exceptions and enacted them as alternative starting dates in paragraphs (B) through (D), and further provided for tolling in subdivision (d)(2) to avoid a conflict with the requirement to exhaust state remedies. Having expressly considered and decided what the exceptions to the main rule would be, Congress did not intend to authorize the courts to create additional exceptions.

IV. Congress legislated against a background of case law holding that factors internal to the defense do not excuse defaults during collateral review.

When civil cases on statutes of limitation discuss the diligence and defaults of plaintiffs, they typically do not distinguish between the diligence of the plaintiffs personally and that of their attorneys. See, *e.g.*, *Irwin* v. *Dept. of Veterans Affairs*, 498 U. S. 89, 96 (1990) (attorney's absence from office was "garden variety . . . excusable neglect," not basis for tolling). In civil litigation, the risk and burden of a default by an attorney is entirely on the party represented by that attorney, not the opposing party. The remedy would be a malpractice suit against the attorney.

Criminal cases are different for two reasons. First, effective assistance of counsel is a constitutional right. See *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). Second, the injustice of a wrongful conviction in a major felony case is not compensable by any amount of money. However, claims of ineffective assistance of counsel place unique burdens on the State, and they have great potential for causing rather than correcting miscarriages of justice.

For example, in *Wood* v. *Allen*, 558 U. S. __ (No. 08-9156, Jan. 20, 2010), the state trial judge appointed two experienced attorneys to represent the defendant, plus a third, inexperienced attorney to assist them. See *id.* (slip op., at 2). Having done exactly what the State should do in the circumstances, the State then lost all control. The subsequent decisions of what evidence to investigate and use and how much responsibility to delegate to the rookie, see *id.* (slip op., at 4-5) (Stevens, J., dissenting), were completely beyond the ability of the State to control. When these issues were litigated years later in collateral review, the evidence available consisted entirely of the testimony and correspondence of the State's adversaries. See *ibid*.

Not only can the State not control the events of which the defendant will later complain, it cannot even control the documentation which will enable it to establish what actually happened. This is all in the hands of its adversaries, draped in the cloak of the work product and attorney-client privileges. When those attorneys' effectiveness is challenged, as it always is in capital cases regardless of the actual quality of representation, they may come out swinging in their own defense, or they may fall on their swords and help make the case against themselves for the benefit of their former clients. Defending the actions of a person who does not want to be defended is problematic, to put it mildly. In the present case, the *amici* ethics professors refer to "[u]ncontradicted facts," Brief for Legal Ethics Professors *et al*. as *Amici Curiae* 8, but the reality of ineffective assistance litigation is that the State is severely disadvantaged in its ability to contest the facts.

For trial, the importance of the right of effective assistance requires that we accept this situation as a necessary evil. The further we get from trial, the less necessary and more evil it becomes. That is why this

Court drew the line on the constitutional right to counsel, and hence the right to relief for ineffectiveness, at the first appeal as of right. See *Coleman* v. *Thompson*, 501 U. S. 722, 755-756 (1991).

Coleman is the pre-AEDPA case most closely analogous to the present case. It involved the same type of default, missing a deadline. See *id*., at 727. Coleman claimed the same cause for the default, attorney error. See *id*., at 752. The *Coleman* opinion expressly joined the constitutional right to effective counsel with the allocation of risk of attorney error.

> "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' [*Murray* v. *Carrier*, 477 U. S. 478, 488 (1986).] . . . Attorney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that 'the lawyer ceases to be an agent of the petitioner.' . . . Rather, as *Carrier* explains, 'if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.' 477 U. S., at 488. In other words, *it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor*, *i.e.*, 'imputed to the State.' " *Id*., at 753-754.

Courts generally assume that Congress is aware of the case law background when it legislates. See, *e.g.*, *Ankenbrandt* v. *Richards*, 504 U. S. 689, 700-701 (1992). Sometimes that assumption is a bit of a fiction, but not for *Coleman*. The case was widely publicized and the topic of much debate. Coleman was executed

just three years before the main AEDPA debate in the Senate, and his picture was on the cover of the May 18, 1992 issue of Time Magazine with his fabricated claim of innocence.[5] Congress knew about *Coleman* when it enacted AEDPA.

With well known case law placing the risk of attorney error in collateral proceedings on the petitioner regardless of the magnitude of that error and tying that rule specifically to the right to counsel, what did Congress enact? Congress could, at this point, have either abrogated *Coleman* or passed legislation consistent with *Coleman* and assuming its rule would continue. Congress did the latter.

The rule that ineffective assistance in collateral proceedings is not a ground for relief was explicitly codified in 28 U. S. C. § 2254(i). Given *Coleman*'s express connection between the right to counsel and the allocation of risk of attorney error of default, this provision indicates Congress's agreement with that allocation.

More importantly, when we look at § 2244(d)(1)(D), we see that Congress agreed that factors external to the defense, not just external to the defendant individually, were deemed necessary to extend the time. Discovery of new facts is cause to restart the clock only if those facts could not previously "have been discovered through the exercise of due diligence." Clearly, this requires the diligence of the attorney, as the defendant

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5. The DNA technology available at the time provided substantial corroboration of Coleman's guilt. See *Coleman* v. *Thompson*, 798 F. Supp. 1209, 1217 (WD Va. 1992), aff'd 966 F. 2d 1441 (CA4 1992), stay denied 504 U. S. 188 (1992). Years later, improved technology eliminated any doubt. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., Washington Post, Jan. 13, 2006, p. A1.

himself will be incarcerated and have virtually no ability to investigate any facts not already known to him.

If paragraph (D) were subject to equitable tolling for a default of the attorney in failing to investigate the facts, then the requirement of diligence that Congress expressly wrote into the statute would be implicitly repealed. If not, then we must ask if Congress intended to allow equitable tolling for other defaults of the attorney but not for failure to investigate facts. That would be an extremely strange choice as a policy matter. Discovery of important new facts unknown to the state courts at the time of their decision is the most compelling reason to reopen the case, especially if the facts relate to guilt of the crime. Second-guessing the state courts' legal conclusions on the same facts is far less likely to produce a better result. See *supra*, at 12.

Unlike the pre-AEDPA procedural default case law, Congress did not provide that compelling evidence of actual innocence would be sufficient by itself to revive an otherwise time-barred habeas petition. Cf. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). This omission must be intentional, as Congress addressed the actual innocence issue in the successive petition subdivision of the same section. See § 2244(b)(2)(B). The statute of limitation is actually the more generous of these two provisions, as it requires new facts alone while the successive petition rule requires new facts *and* innocence.

Why did Congress leave out the *Carrier* safety valve? Perhaps it believed that actually innocent petitioners would be able to meet the cause test. See *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). Perhaps it had confidence in state court procedures and executive clemency to deal with those rare cases. See *Herrera* v. *Collins*, 506 U. S. 390, 415 (1993). Perhaps it was so appalled

by the capital defense bar's record of misuse of available procedures, as exemplified in the *Harris* debacle, that it simply could not risk opening a loophole it expected to be exploited with fabricated, eleventh-hour claims of innocence.

Whatever the reason, there is no doubt it was intentional. Questions have been raised as to whether the statute of limitations would be constitutional if applied to block a habeas petition despite a strong claim of actual innocence. That issue should be addressed in a case which actually presents it. See *Lucidore* v. *New York State Division of Parole*, 209 F. 3d 107, 113-114 (CA2 2000). The doctrine of constitutional doubt does not apply when the meaning of legislation is clear. See *Miller* v. *French*, 530 U. S. 327, 336 (2000). A possibility of an unconstitutional application in a rare case should not produce a distortion in the interpretation of a statute that would be far broader than the problem and that threatens to defeat the statute's purpose in a great many cases. Congress intended a "strict" statute of limitation, not one subject to open-ended exceptions created ad hoc by the very courts it intended to restrain. See Part II, *supra*, at 11-14.

An exception specifically for actual innocence claims would be best created by amendment of the statute. See *Dodd* v. *United States*, 545 U. S. 353, 359-360 (2005). Congress is aware of the issue and has held a hearing on an "actual innocence" bill. See House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Hearing to: Consider the Impact of Federal *Habeas Corpus* Limitations on Death Penalty Appeals (Dec. 28, 2009), http://judiciary.house.gov/hearings/hear_091208_1.html. While this Court would have an obligation to address the constitutional issue in a case that actually presented it, it has no obligation to reach out and decide it in a case which does not. Hol-

land's very long statement of the case does not deny that he murdered Officer Scott Winters in the performance of his duty. See Brief for Petitioner 2-33.

A guilty murderer has received a trial, an appeal, a state collateral review, an appeal from the state collateral review, and an original state habeas review in the state supreme court. Congress has required that a petition for *yet another* review in federal court be filed within one year of four different dates, which take into account the reasons for delay that Congress deemed sufficient. No petition was filed within that time, and the State is entitled under the law to have its judgment be genuinely final.

CONCLUSION

The decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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Respectfully submitted,

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