HABEAS CORPUS — FEDERAL STATUTE OF LIMITATIONS — ELEVENTH CIRCUIT HOLDS THAT POSTCONVICTION COUNSEL'S MISCONDUCT DOES NOT EXCUSE UNTIMELY PETITION. — *Smith v. Commissioner, Alabama Department of Corrections*, 703 F.3d 1266 (11th Cir. 2012) (per curiam), *reh'g en banc denied*, No. 11-13802 (11th Cir. Feb. 19, 2013).

When a prisoner challenging his death sentence misses a filing deadline, the mistake can be deadly. In *Holland v. Florida*,[1] the Supreme Court tried to limit this risk for inmates who miss the statute of limitations on federal habeas petitions due to attorney error. Using agency law principles, the Court held that this deadline can be equitably tolled if an inmate proves that his lawyer was no longer acting as his agent.[2] In *Smith v. Commissioner, Alabama Department of Corrections*,[3] the Eleventh Circuit recently held that an Alabama death row inmate's lawyers were acting as his agents when they missed a filing deadline, even though one lawyer was not licensed to practice in Alabama and the other was suffering from a severe drug addiction.[4] This troubling result shows how agency law can fail to protect inmates from grave misconduct by their lawyers. Instead, courts should equitably toll the deadline on federal habeas petitions based on whether a postconviction lawyer provided ineffective assistance.

Even though the ineffective assistance of counsel standard normally does not apply after a criminal conviction is final, the Supreme Court recently used it to excuse missed postconviction deadlines in a different context. In *Martinez v. Ryan*,[5] the Court held that ineffective assistance of postconviction counsel could excuse untimely claims in the initial round of state postconviction proceedings if these proceedings were the first time a prisoner could file the claims.[6] *Martinez* and *Holland* excused separate procedural restrictions on federal habeas petitions. *Martinez* altered the procedural-default rule, which bars federal courts from hearing habeas claims that a state court defaulted for procedural reasons.[7] *Holland* excused filings that missed the federal deadline. Whereas *Martinez* permitted relief based on ineffective assistance, *Holland* failed to specify a precise standard.[8] Each case was

---

[1] 130 S. Ct. 2549 (2010).

[2] *See id.* at 2562, 2464.

[3] 703 F.3d 1266 (2012) (per curiam), *reh'g en banc denied*, No. 11-13802 (11th Cir. Feb. 19, 2013).

[4] *Id.* at 1269, 1272–73.

[5] 132 S. Ct. 1309 (2012).

[6] *See id.* at 1315.

[7] *See id.* at 1314, 1320.

[8] *Id.* at 1320. *Holland* simply cited agency principles and overturned the Eleventh Circuit's rule that lawyer negligence could never warrant equitable tolling. 130 S. Ct. at 2563–65.

an important and distinct step in protecting inmates from inadequate postconviction lawyers.[9] *Martinez* was the first time the Court used the ineffective assistance standard for postconviction counsel. *Holland* was the first time the Court held that the filing deadline on federal habeas petitions is subject to equitable tolling. Allowing equitable tolling when a habeas petitioner misses the federal filing deadline because of an ineffective postconviction lawyer would link these developments.

Ronald Bert Smith was convicted of murder in 1995.[10] Though the jury voted against the death penalty, the trial judge rejected the recommendation and sentenced him to death.[11] Smith's conviction became final five years later on October 2, 2000, when the United States Supreme Court denied his petition for certiorari.[12] The federal habeas statute requires state prisoners to file habeas petitions within a year of a conviction becoming final, but this deadline can be statutorily tolled while a postconviction filing is pending in state court.[13] As such, Smith had until October 2, 2001, to preserve his right to federal review of any claim that killing him would be unconstitutional.

Because Alabama does not provide lawyers to indigent death row inmates,[14] the Montgomery-based Equal Justice Initiative recruited Tennessee attorney William Massey to represent Smith pro bono.[15] Massey was not licensed to practice in Alabama, so C. Wade Johnson, an Alabama attorney, signed on as local counsel.[16] Unknown to Smith, Johnson was suffering from a debilitating drug addiction.[17] Months after joining the case, Johnson was caught visiting a client in

---

[9] The Court extended each step further last Term. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court expanded *Martinez* beyond states that do not allow ineffective assistance claims prior to collateral proceedings, to any state where filing these claims earlier is unrealistic. *See id.* at 1914–15. And in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), the Court held that the federal deadline can be excused for inmates who prove "actual innocence." *Id.* at 1928.

[10] Smith v. Campbell, No. 5:05-cv-1547-LSC-JEO, slip op. at 2 (N.D. Ala. Jan. 15, 2009).

[11] *Smith*, 703 F.3d at 1268. Only three states let judges impose death against a contrary jury recommendation. *The Death Penalty in Alabama*, EQUAL JUST. INITIATIVE 7 (July 2011), http://www.eji.org/files/Override_Report.pdf. But whereas no judge in the other two states has used this override to impose death in over a decade, Alabama judges have done so at least 107 times since 1976, including against unanimous verdicts for life. *Id.* at 4, 7–8. Alabama is also the one state with this mechanism that elects judges in partisan elections, and overrides for death greatly increase in election years. *See id.* at 4–5, 7–8.

[12] *See Smith*, 703 F.3d at 1268.

[13] *See* 28 U.S.C. § 2244(d) (2006).

[14] "Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings." Maples v. Thomas, 132 S. Ct. 912, 918 (2012).

[15] *Smith*, 703 F.3d at 1268–69.

[16] *Id.* at 1269.

[17] Smith v. Campbell, No. 5:05-cv-1547-LSC-JEO, slip op. at 29 (N.D. Ala. Jan. 15, 2009). "Reportedly, he often came to his office in a state of intoxication and on occasion had to be retrieved from his home by his office staff in order to attend court hearings." *Smith*, 703 F.3d at 1276 (Barkett, J., dissenting).

prison with a bag full of crystal meth in his car.[18] Johnson was charged with nine counts of controlled-substance possession and barred from practicing law. The next year, he took his own life.[19]

As for Massey, the Tennessee lawyer was never licensed to practice in Alabama. He also did little work on the case. Massey and Johnson had filed a state petition written by students interning with the Equal Justice Initiative, but neglected to include a mandatory $154 filing fee.[20] When first notified about the missing fee, Massey "did nothing."[21] Only after an attorney for the state informed Johnson (who by then was barred from practicing law) that the state's *two*-year statute of limitations would expire in four days did Massey pay the fee.[22] Then, without further work on the case, Massey announced his withdrawal.[23] Because the $154 fee was paid within Alabama's limitations period, the state courts adjudicated Smith's petition on the merits, denying relief on July 15, 2005.[24] Smith immediately petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Alabama.[25] Three years later, the court dismissed the petition as untimely, holding that Smith's state petition did not toll the federal statute of limitations until his lawyers paid the $154 in February 2002, after the October 2, 2001, deadline had passed.[26]

Another four years later, the Eleventh Circuit affirmed. The court acknowledged that an inmate is entitled to equitable tolling if he can show "that some extraordinary circumstance stood in his way and prevented timely filing."[27] But the court reasoned that even if Smith proved that his Alabama lawyer totally abandoned him, he could not attribute the untimely filing to "extraordinary circumstances" without proving abandonment by his Tennessee lawyer as well.[28] The court explained that Massey's inability to practice in the state, his refusal to request permission to practice, and his persistent failure to pay the $154 were only "'garden variety' or 'excusable neglect'"[29] and did not establish that he was "not operating as [Smith's] agent[]."[30]

---

[18] *Smith*, 703 F.3d at 1276 (Barkett, J., dissenting).

[19] *See id.*

[20] *See id.* at 1268–69 (majority opinion).

[21] *Id.* at 1277 (Barkett, J., dissenting).

[22] *Id.*

[23] *Id.*

[24] Smith v. Campbell, No. 5:05-cv-1547-LSC-JEO, slip op. at 3 (N.D. Ala. Jan. 15, 2009).

[25] *Id.* at 4.

[26] *See id.* at 27.

[27] *Smith*, 703 F.3d at 1271 (quoting Holland v. Florida, 130 S. Ct. 2549, 2562 (2010)) (internal quotation mark omitted).

[28] *Id.* at 1272–73.

[29] *Id.* at 1274 (quoting *Holland*, 130 S. Ct. at 2564).

[30] *Id.* at 1273 (quoting Maples v. Thomas, 132 S. Ct. 912, 923 (2012)) (internal quotation mark omitted).

Judge Barkett dissented. She saw Johnson's drug abuse as "an egregious breach of [his] professional ethical obligations to Smith."[31] For her, this breach provided the "extraordinary circumstances" that warranted equitable tolling under *Holland*.[32] She also rejected the majority's attempt to separate the incompetence of Smith's two lawyers. Instead, she reasoned that, "when considered in conjunction with Johnson's inability to competently represent Smith," Massey's failures were "sufficient to constitute abandonment."[33] At a minimum, Judge Barkett urged, the question required an evidentiary hearing.[34]

Smith underscores the futility of applying agency principles to the relationship between indigent death row inmates and "agents" they neither choose nor control. This arrangement has long been justified by the idea that defendants cannot question their postconviction lawyer's effectiveness since the Sixth Amendment right to counsel does not apply at this stage. *Martinez* holds otherwise, allowing ineffective assistance of counsel to excuse missed deadlines from state postconviction proceedings. While *Martinez* only excuses defaults in the initial round of state postconviction proceedings, this distinction is arbitrary for inmates like Smith who fail to comply with federal deadlines during those same proceedings. Moreover, equitable tolling does not disturb the overall comity balance of the habeas scheme because it simply alters one statutorily imposed deadline. Also, habeas courts routinely decide whether capital defense lawyers were ineffective, so this standard provides a better basis to protect inmates from attorney misconduct than the agency law principles cited in *Holland*. In *Martinez*, the Supreme Court applied the ineffective assistance standard to the postconviction appeal stage. The Court should extend it to equitable tolling as well.

The assumptions underlying agency law rarely apply to death row inmates. Agency law presumes that a principal is responsible for an agent's actions because the principal hires and controls the agent.[35] Indigent death row inmates do not hire their lawyers.[36] Nor can they freely call, visit, or otherwise supervise their lawyers.[37] Even if inmates try to assert control over their representation or correct mistakes

---

[31] *Id.* at 1276 (Barkett, J., dissenting).

[32] *Id.*

[33] *Id.* at 1277.

[34] *Id.* at 1275.

[35] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

[36] As Alabama has told the Supreme Court, most of its death row inmates are represented by public interest groups or out-of-state volunteers. *See* Maples v. Thomas, 132 S. Ct. 912, 918 (2012).

[37] "Prisons are often located in far-flung places that are difficult for lawyers to reach and often the lawyers are not even located within the same state as their death row clients." Hutchinson v. Florida, 677 F.3d 1097, 1105 (11th Cir. 2012) (Barkett, J., concurring in the result only).

by their lawyers, many courts, including the Eleventh Circuit, do not accept pro se filings from inmates who are represented by counsel.[38] As the Eleventh Circuit has observed, "a savvy petitioner, who may see the clock running out on his habeas time, can only cajole [or] plead with his counsel to file the petition timely."[39] *Holland*'s analogy to agency law treats this cajoling and pleading as equivalent to the relationship between paying clients and their lawyers.

Martinez shows how ineffective assistance can be used to excuse missed deadlines even when no right to counsel applies. The fiction that inmates constructively bear responsibility for attorney mistakes had long been justified by asserting that there is "no inequity in requiring [inmates] to bear the risk of attorney error" because convicted inmates have no right to a lawyer.[40] *Martinez* undermined this idea, providing "as an equitable matter" that federal courts can hear certain claims that an ineffective postconviction lawyer defaulted during the initial round of state collateral proceedings, if those proceedings were the inmate's only chance to allege the underlying violation.[41] Even though the opinion emphasized concern about inmates being forced to bring these claims after they no longer have a Sixth Amendment right to counsel, the Court made clear that it was not creating any right to postconviction counsel, merely a right to not have a particular default applied due to lawyer error when equity warrants it.[42] The Court also stressed that inmates, "unlearned in the law, may not comply with the State's procedural rules."[43] This concern holds equal weight for federal procedural rules, especially when these rules require compliance with state rules, as in *Smith*. The *Martinez* exception is also limited to claims that show "some merit," and only excuses attorney incompetence that would rise to the level of a constitutional violation if it occurred at trial.[44] Similar limits on an expanded standard for equitable tolling would address the concern in *Holland* about inmates frivolously winning equitable tolling every time they miss a deadline.[45]

---

[38] *See, e.g.*, 11TH CIR. R. 25-1. Indeed, in *Holland v. Florida*, the inmate expressly told his state postconviction judge that his lawyer had "abandoned" him. 130 S. Ct. 2549, 2555 (2010). But prosecutors argued that he was not allowed to address the court while represented by counsel, and the state court agreed. *Id.* at 2556.

[39] Downs v. McNeil, 520 F.3d 1311, 1324 n.10 (11th Cir. 2008) (alteration in original) (quoting Thomas v. McDonough, 452 F. Supp. 2d 1203, 1207 (M.D. Fla. 2006)) (internal quotation mark omitted).

[40] Coleman v. Thompson, 501 U.S. 722, 752 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

[41] Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012).

[42] *Id.*

[43] *Id.* at 1317.

[44] *See id.* at 1318.

[45] *See* Holland v. Florida, 130 S. Ct. 2549, 2564 (2010).

The ineffective assistance standard suits the relationship between death row inmates and their lawyers better than *Holland*'s analogy to agency principles. While *Holland* suggested that "failure to satisfy professional standards of care" could excuse untimely filings, the Court did not specify when attorney misconduct rises to that level.[46] Instead, the majority referred to secondary materials on agency law, as well as to various equitable tolling cases.[47] Unlike this diverse array of cases, the caselaw governing ineffective assistance solely and fully addresses the standard for conduct by criminal defense lawyers representing indigent clients. Moreover, the Supreme Court routinely visits this standard in the context of capital representation, typically relying on the same "professional standards of care" that the Court mentioned but failed to specify in *Holland*.[48] For example, in 2003, the Supreme Court granted an ineffective assistance claim because a defense lawyer's performance "fell short of the standards for capital defense work articulated by the American Bar Association."[49] These same guidelines establish standards for postconviction counsel and specifically require lawyers to monitor how the one-year filing period for federal petitions interacts with state procedural rules.[50] *Holland* provides that "an attorney's failure to satisfy professional standards of care" can warrant equitable tolling.[51] Linking this rule to the ineffective assistance standard would give it bite.

Using ineffective assistance for equitable tolling is also appropriate because equitable tolling does not disturb the concern for comity that underlies the habeas scheme. Smith sought federal review of a claim that Alabama courts had adjudicated on the merits. Equitable tolling would simply let him into federal court at a later time. By comparison, *Martinez* lets federal courts hear challenges to state court convictions that no state court ever considered. The procedural-default rule that *Martinez* modified was "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."[52] To be

---

[46] *Id.* at 2562; *see id.* at 2563, 2565. Justice Scalia's dissenting opinion criticized "[t]he Court's refusal to articulate an intelligible rule." *Id.* at 2575 (Scalia, J., dissenting).

[47] *Id.* at 2563–64 (majority opinion) ("[G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Id.* at 2564.). Justice Alito specified that his view was guided by agency principles. *See id.* at 2568 (Alito, J., concurring in part and concurring in the judgment).

[48] *Id.* at 2562 (majority opinion).

[49] Wiggins v. Smith, 539 U.S. 510, 524 (2003).

[50] ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 127 (rev. ed. 2003).

[51] *Holland*, 130 S. Ct. at 2562.

[52] Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012). *Coleman v. Thompson*, 501 U.S. 722 (1991), which defined the rule that *Martinez* modified, begins: "This is a case about federalism. It con-

sure, *Martinez* created a limited exception to this rule, covering just one round of postconviction proceedings and leaving a stricter standard intact for other defaults. After all, expanding *Martinez* to all state court defaults could drastically upset the federalism balance of the habeas scheme and perhaps even force a universal right to postconviction counsel.[53] But the same is not true for equitable tolling, which simply extends the time petitioners have to challenge state court judgments already subject to federal review.[54]

The narrow scope of *Martinez* also produces odd inconsistencies. *Martinez* benefits only petitioners who default in the first round of state postconviction proceedings. Petitioners who default at other times must meet a stricter standard to get into federal court. *Smith* shows how this line can be arbitrary. Though Smith's lawyers paid his filing fee too late to statutorily toll the one-year federal deadline, they met Alabama's two-year deadline, but only after an attorney for the state told them it would expire in four days.[55] If the lawyers were slightly more inept, Smith might have missed that deadline too, procedurally defaulting all his claims. But in that case, *Martinez* could have excused the default based on ineffective assistance.[56] As the Court observed last Term when it extended a different equitable exception from the procedural-default rule to the federal statute of limitations, "[i]t would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the *States*."[57] This same "strange" interpretation occurred in *Smith*. Smith's habeas claims were defaulted for one reason: he lacked effec-

---

cerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.* at 726.

[53] *Martinez* even excuses defaults that occurred simply because an inmate had no counsel. 132 S. Ct. at 1320. Whereas equitable tolling just changes the deadline for when state defendants can enter federal court, *Martinez* incentivizes states to guarantee state postconviction counsel lest defendants use the exception to sidestep state courts and obtain first-bite federal review of their habeas claims. *See* Brief of *Amici Curiae* Utah and 24 Other States in Support of Respondent at 17–18, Trevino v. Thaler, 133 S. Ct. 1911 (2013) (No. 11-10189); *see also Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) (arguing that the result of *Martinez* is "precisely the same" as "a constitutional right to counsel").

[54] *See Holland*, 130 S. Ct. at 2563 (explaining why equitable tolling does not implicate federalism concerns).

[55] *Smith*, 703 F.3d at 1277 (Barkett, J., dissenting).

[56] Whether *Martinez* applies in Alabama had been an open question at first. Though *Martinez* applied only to states that expressly bar certain claims on direct appeal, the Supreme Court later extended the exception to any state where the "structure, design, and operation" of an appellate system makes filing all claims on direct appeal "highly unlikely." *Trevino*, 133 S. Ct. at 1921. *Trevino* was decided on May 28, 2013, and the first court to address its relevance to Alabama has held that it can apply in the state. *See* Brown v. Thomas, No. 2:11-CV-3578-RDP, 2013 WL 5934648, at *2 (N.D. Ala. Nov. 5, 2013).

[57] McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013).

tive postconviction counsel at the same critical moment that *Martinez* polices for state defaults. Bridging *Martinez* and *Holland* would help protect the "right to federal review of a death row inmate's federal habeas petition"[58] in states that fail to provide adequate postconviction counsel to their death row inmates.

Smith and other cases of death row inmates whose incompetent lawyers missed filing deadlines[59] show that the Supreme Court needs to back *Holland* up with a clear and realistic rule for when to leave courthouse doors open for inmates whose lawyers fail them. Agency law is not up to the task. The implication that a man scheduled to die should have checked from his prison cell whether his lawyers, who mailed him a court-stamped copy of his timely filed petition, also paid the required filing fee, underscores the need to set a standard that is sensitive to the unique challenges death row inmates face, rather than relying on the concepts used for paying clients. The last time the Supreme Court addressed the broad inadequacy of state capital postconviction counsel, a plurality concluded that nothing in the Constitution required a state to provide lawyers to inmates whose convictions are final.[60] Nonetheless, Justice Kennedy's concurring opinion invited states to experiment with "responsible solutions" for enforcing the Fourteenth Amendment "requirement of meaningful access" to habeas courts.[61] The woeful way in which states like Alabama ignore that call shows that this experiment has failed.[62] Justice Kennedy's majority opinion in *Martinez* outlines a new framework for ensuring meaningful state postconviction counsel. This approach is attuned to the comity and equity concerns the federal habeas scheme balances, and keeps the scope of both the Sixth and Fourteenth Amendments intact. The Supreme Court should extend it to equitable tolling.

---

[58] Hutchinson v. Florida, 677 F.3d 1097, 1110 (11th Cir. 2012). The court cited *Holland* as the basis for this right. *Id.*

[59] *E.g.*, Melson v. Comm'r, Ala. Dep't of Corr., 713 F.3d 1086 (11th Cir. 2013); *Hutchinson*, 677 F.3d 1097. The Eleventh Circuit has never allowed equitable tolling under *Holland*.

[60] *See* Murray v. Giarratano, 492 U.S. 1, 7–10 (1989) (plurality opinion). The plurality explained that the Eighth Amendment permits "a death sentence to be carried out while a prisoner is unrepresented," *id.* at 8, and that the Fourteenth Amendment "right to access" habeas courts is met by the provision of prison law libraries, *id.* at 4; *see id.* at 11.

[61] *Id.* at 14 (Kennedy, J., concurring in the judgment).

[62] Alabama is the only state that does not guarantee any postconviction counsel for its death row. Only two other death penalty states have no statutory right to postconviction counsel: Georgia, which funds some state capital habeas appeals anyway, and New Hampshire, whose one death sentence since 1976 is not final yet. Brief of Amicus Curiae NAACP Legal Defense Fund & Educational Fund, Inc. in Support of Petitioner at 15–16 n.10, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63). Alabama also executes more people per capita than any other state. *See The Death Penalty in Alabama*, *supra* note 11, at 4.