No. 22-1780

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Marcus Conner, Petitioner-Appellant, v. Dennis Reagle, Respondent-Appellee.	)	Appeal from the U.S. District Court for the Southern District of Indiana (Indianapolis) No. 21-cv-02188-SEB-MPB The Hon. Sarah Evans Barker

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT

Christopher Keleher
The Keleher Appellate Law Group
1 East Erie, Suite 525
Chicago, Illinois 60611
(312) 448-8491
ckeleher@appellatelawgroup.com

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Appellate Court No: 22-1780

Short Caption: Conner v. Reagle

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Marcus Conner

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Attorney's Signature: s/ Christopher Keleher Date: June 22, 2022

Attorney's Printed Name: Christopher Keleher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 1 East Erie, Suite 525

Chicago, Illinois 60611

Phone Number: 312-448-8491 Fax Number:

E-Mail Address: ckeleher@appellatelawgroup.com

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JURISDICTIONAL STATEMENT

This is an appeal from the dismissal of Marcus Conner's petition for writ of habeas corpus under 28 U.S.C. § 2254. Conner is in the custody of Warden Dennis Reagle at the Pendleton, Indiana Correctional Facility.

On August 4, 2021, Conner filed a petition for writ of habeas corpus to challenge his Indiana state conviction for selling cocaine and maintaining a common nuisance. Doc. 2. The State of Indiana asserted the petition was untimely and moved to dismiss. Doc. 9. The district court found Conner was not entitled to equitable tolling and granted the State's motion to dismiss. Doc. 13 at 1, attached hereto at Appendix Page 1. It also issued a certificate of appealability on whether Conner was entitled to equitable tolling. Doc. 13 at 11. The district court entered final judgment dismissing the petition on April 19, 2022. Doc. 15, attached hereto at Appendix Page 13. Conner filed a timely notice of appeal on April 29, 2022. Doc. 16. On June 2, 2022, the Seventh Circuit issued a supplemental certificate of appealability which added a second issue regarding Conner's speedy trial rights. Appellate Doc. 5.

The district court has jurisdiction under 28 U.S.C. §§ 1331, 2241, and 2254. Appellate jurisdiction exists via 28 U.S.C. § 2253 and 28 U.S.C. § 1291 as this is an appeal from a final order of the district court.

INTRODUCTION

Conventional wisdom says that proceeding *pro se* in a criminal case is foolish. The steady hand of counsel is necessary to guide a defendant through the legal landscape's treacherous terrain. This case shatters those notions. Marcus Conner's efforts to enforce his constitutional rights were thwarted not once, but twice, by his advocates. Because Sixth Amendment rights should not be held hostage by inept lawyering, habeas relief is needed.

Conner was sentenced to decades in prison because he peddled cocaine to two informants at his home, which happened to be near a youth program center. This fortuity netted the "habitual offender" a 72-year sentence. Prior to his 2-day trial, Conner sat in jail for 1,034 days. The delay can be traced to the usual suspects of congested courts and overburdened government lawyers, little solace to the expendable Conner. During this "extraordinarily-and disconcertingly-long" delay (the Indiana Court of Appeals' words), Conner did not sit idle. While different defenders appeared on Conner's behalf, the speedy trial issue lay dormant. Invoking it was left to Conner, who peppered the trial court with dead-on-arrival *pro se* objections to the delay. The beleaguered bench and ambivalent bar took little notice of his concerns, kicking the can of trial as Conner's Sixth Amendment rights decayed. One thousand and thirty-four days after arrest, Conner was tried and convicted of selling cocaine and maintaining a nuisance. Conner's state post-conviction efforts asserting

speedy trial violations and ineffective assistance of counsel failed.

The trial court calamity was compounded during Conner's pursuit of federal relief. As Conner prepared a *pro se* petition for habeas corpus, his state-appointed post-conviction counsel filed a writ of certiorari to the United States Supreme Court. Conner's anxiety about the strict timeline for a habeas petition was eased by his lawyer, who instructed Conner not to seek habeas relief until after resolution of the certiorari petition. Counsel dispensed this advice based on no research of his own, but rather on a brief exchange with an outside lawyer. This mistaken advice caused Conner to file his habeas petition 113 days too late.

Conner now must continue a 72-year sentence because counsel twice shunned his accurate legal interpretations.

STATEMENT OF THE ISSUES

I. Whether Conner's trial lawyers were ineffective for ignoring his numerous objections to the lengthy pretrial detention and refusing to argue that the 1,034 days between Conner's arrest and 2-day trial violated his Sixth Amendment right to a speedy trial.

II. Whether Conner's state post-conviction counsel committed an "extraordinary error" necessitating equitable tolling of the habeas corpus deadline by misrepresenting that deadline and convincing an anxious Conner not to file his habeas petition until after the Supreme Court ruled—even though counsel lacked habeas experience, conducted no research, relied on an informal exchange with an outside attorney, was not representing Conner in the habeas proceedings, and admitted to preventing a timely filing.

STATEMENT OF THE CASE

A. Overview of The Proceedings

Marcus Conner was convicted of selling cocaine within 1,000 feet of a youth program center and maintaining a common nuisance. *Conner v. State*, 59 N.E.3d 1100 (Ind. Ct. App. 2016), attached hereto at Appendix Page 22. His sentence was 72 years. *Id*. On direct appeal, the Indiana Court of Appeals affirmed. *Id*. Through the Indiana State Public Defender, Conner moved for state post-conviction relief. Doc. 9-3, p. 2. Conner asserted his trial lawyers were ineffective because they did not file a Sixth Amendment speedy trial motion. *Conner v. State*, 146 N.E.3d 343 (Ind. Ct. App. 2020), attached hereto at Appendix Page 14. The court denied his petition and the Indiana Court of Appeals affirmed. *Id*.

After an unsuccessful certiorari petition to the United States Supreme Court, Conner filed a *pro se* habeas corpus petition in the Southern District of Indiana. *Conner v. Indiana*, 141 S. Ct. 2574 (2021); Doc. 2. The State moved to dismiss the petition as untimely and the district court agreed. Docs. 9, 13. However, the court issued a certificate of appealability on whether equitable tolling should apply. Doc. 13 at 11. This Court further supplemented the certificate of appealability:

> (1) whether trial counsel was ineffective for not arguing that the 1,034 days Conner spent in pretrial detention violated his Sixth

> Amendment right to a speedy trial; and (2) whether state postconviction counsel committed an extraordinary error that warrants equitable tolling of the federal-petition deadline, specifically by affirmatively misrepresenting to Conner the filing deadline for any federal petition—even though counsel conducted no independent research on the question, relied on an informal exchange with an outside attorney, and had not agreed to represent Conner in federal proceedings.

Appellate Doc. 5.

B. The Underlying Charges

Conner was arrested on September 19, 2012, after selling cocaine to two confidential informants in three transactions arranged by the Elkhart Police Department. 59 N.E.3d 1100, ¶ 3. These transactions occurred within 1,000 feet of a youth program center, enhancing the offense level and potential sentence pursuant to Indiana Code §§ 35-48-4-1(b)(3)(B)(iv), 35-41-1-29(a) (2014). Doc. 9-1 at 2. Indiana has since repealed this enhancement. On September 24, 2012, the prosecution filed an information charging Conner with three counts of selling cocaine and one count of maintaining a common nuisance. Doc. 9-1 at 2. Under Indiana's classification system in 2012 (the system was changed in 2014) the cocaine offense was a Class A felony, and the nuisance offense a Class D felony. *Id.*

C. The 1,034 Days of Pretrial Detention

The trial court conducted an initial hearing on September 26, 2012 and set a trial date of March 11, 2013. Doc. 9-1 at 3. On March 8, 2013, the court

continued the matter due to a crowded docket, and scheduled a pretrial conference on April 11, 2013. Doc. 9-1 at 5. A trial date was set for July 15, 2013, but this date was continued at defense counsel's request. Doc. 9-1 at 6. At a pretrial conference on July 25, 2013, the parties agreed to a trial on August 12, 2013. Doc. 9-1 at 7. Meanwhile, on July 22, 2013, a *pro se* Conner apprised the court that he opposed the continuances and expressed his wishes to proceed to trial immediately. Doc. 9-1 at 6.

Four days after agreeing to the August 12, 2013 date, the prosecution moved for a continuance. Doc. 9-1 at 7. The trial court vacated the August date and a pretrial conference occurred on September 5, 2013. Doc. 9-1 at 8. A new trial date was set for January 6, 2014. *Id*. On January 2, 2014, the court continued the trial due to a crowded docket for the second time. *Id*. The parties held a pretrial conference on February 6, 2014, and set a new date of March 24, 2014. Doc. 9-1 at 9. On March 17, 2014, the court granted the prosecution's second continuance request. *Id*. On April 17, 2014, the court rescheduled the trial for June 23, 2014. Doc. 9-1 at 10. On June 13, 2014, the prosecution moved for its third continuance. *Id*. A pretrial conference was set for July 31, 2014. *Id*. On July 7, 2014, a *pro se* Conner moved for release on his own recognizance pursuant to Indiana Criminal Procedure Rule 4 ("Rule 4"). Doc. 9-1 at 11. This rule places an affirmative duty on the prosecution to bring a defendant to trial within one year from the later of the filing of

charges or arrest. IND. CRIM. R. 4(C).

On July 31, 2014, the court for the third time reset the trial for January 26, 2015. Doc. 9-1 at 11. On September 9, 2014, the court received a letter from Conner contending the numerous continuances violated Rule 4. *Id*. On October 23, 2014, Conner filed a *pro se* motion for discharge under Rule 4. *Id*. On January 21, 2015, the prosecution moved for its fourth continuance. Doc. 9-1 at 12. On February 26, 2015, Conner's counsel moved for discharge under Rule 4. *Id*. The court denied the motion and the case was set for trial on April 6, 2015. *Id*. On April 6, 2015, Conner's public defender needed a continuance due to a conflict of interest with a confidential informant after the prosecution released the informants' identities on the morning of trial. Doc. 9-1 at 15. The court granted the motion and continued the trial to July 20, 2015. *Id*. On May 11, 2015, Conner wrote to the court objecting to his 32 months of pretrial incarceration. Doc. 9-1 at 16.

The trial commenced July 20, 2015 and concluded the next day. Doc. 9-1 at 17. A jury found Conner guilty of all charges. *Id*.

D. The Direct Appeal

Represented by new counsel on appeal, Conner argued he was entitled to discharge under Rule 4. Doc. 9-6; 59 N.E.3d 1100, ¶ 18. The Indiana Court of Appeals criticized the "extraordinarily-and disconcertingly-long" delay of 1,034 days, but found no violation of Rule 4. *Id.* at ¶ 31. Conner also argued

the 1,034-day delay violated his state and federal constitutional rights to a speedy trial, but the court found the argument waived because Conner's trial lawyers never raised it. *Id.* at ¶ 35.

E. The State Post-Conviction Hearing

Conner filed a *pro se* petition for post-conviction relief on January 23, 2017. Doc. 9-10 at 2. A public defender was assigned and an amended petition was filed on November 8, 2018. Doc. 9-9. Conner claimed the trial lawyers were ineffective because they did not argue the delay in bringing Conner to trial violated his constitutional speedy trial rights. *Id*. Conner also asserted appellate counsel was ineffective for not raising a sufficiency of the evidence argument. *Id*.

The post-conviction court held a bifurcated evidentiary hearing on March 29, 2019 and May 3, 2019. Doc. 9-10 at 1. Conner's trial attorneys and appellate lawyer testified. *Id*. Trial counsel stated he was familiar with Rule 4 and the constitutional right to a speedy trial but "didn't contemplate in this case that that might be something I would file." 146 N.E.3d 343, ¶ 5. Conner's other trial lawyer saw the speedy trial claim as weak because "evidence was not lost as a result of the delay." *Id*. at ¶ 6. On August 30, 2019, the court denied post-conviction relief. Doc. 9-10. The court found the ineffective assistance of trial counsel issue "was raised on direct appeal and decided adversely to him. Accordingly, as a matter of procedure, this argument is *res*

judicata and not available for review." Doc. 9-10 at 6-7. Still, the court found the lengthy delay tolerable because Conner did not demonstrate "that had counsel [raised the issue], the result would have been different, i.e., he would have been discharged or his convictions would have been vacated." Doc. 9-10 at 10.

F. The State Post-Conviction Appeal

Conner appealed the denial of his post-conviction petition, arguing the trial lawyers were ineffective for failing to raise a federal speedy trial challenge, which prompted the waiver finding on direct appeal. Doc. 9-11. The Indiana Court of Appeals disagreed. 146 N.E.3d 343, ¶ 1. The court cited the ineffective assistance of counsel standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and the four-factor test for speedy trial claims from *Barker v. Wingo*, 407 U.S. 514 (1972). 146 N.E.3d 343, ¶¶ 11-12. To resolve speedy trial claims under the Indiana Constitution, Indiana courts apply the federal speedy trial analysis from *Barker*. *See Logan v. State*, 16 N.E.3d 953, 961 (Ind. 2014). Rule 4 challenges are "separate and distinct" from constitutional speedy trial arguments. *See Austin v. State*, 997 N.E.2d 1027, 1037, n.7 (Ind. 2013).

After finding *res judicata* did not bar Conner's claim, the court applied the *Barker* factors. 146 N.E.3d 343, ¶ 14. First, Conner's delay of almost 3 years was not as long as other cases where speedy trial claims failed. *Id*. at ¶

16. The court pointed to *Barker*, 407 U.S. at 533 (5 years); *O'Quinn v. Spiller*, 806 F.3d 974, 977-79 (7th Cir. 2015) (3.5 years); *United States v. Oriedo*, 498 F.3d 593, 598 (7th Cir. 2007) (3 years); *Johnson v. State*, 83 N.E.3d 81, 87 (Ind. Ct. App. 2017) (4 years); and *Sickels v. State*, 960 N.E.2d 205, 221 (Ind. Ct. App. 2012) (9 years). 146 N.E.3d 343, ¶ 16. Following this string cite, the court concluded, "the delay was not so long that it violated Conner's constitutional right to a speedy trial." *Id*.

The court next addressed the reasons for the delay and found that while the delays due to court congestion weighed against the State, this factor was negligible "because the delays were justified." *Id*. at ¶ 19.

As for the third factor, invocation of the speedy trial right, the court acknowledged Conner submitted five *pro se* filings in the trial court and that Conner's counsel sought discharge under Rule 4. *Id*. at ¶ 20. But trial courts are "not required" to respond to *pro se* filings when the litigant has counsel. *Id*. (citing *Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000)). The Court of Appeals also warned that a litigant's *pro se* requests "could undermine trial counsel's litigation strategy." 146 N.E.3d 343, ¶ 20. The court then concluded Conner's assertions of his constitutional rights were inconsequential. *Id*.

For the final factor of prejudice, the court rejected Conner's position because he made no argument "beyond the fact of his incarceration." *Id*. at ¶ 21. The court also emphasized that no evidence was lost due to the delay. *Id*.

"Therefore, this factor weighs heavily in favor of the State." *Id.*

G. Conner Seeks Federal Relief

Conner's state public defender represented Conner in the capacity of a petition for writ of certiorari, but not for habeas relief. Doc. 12, pg. 3 at ¶¶ 2-3. This attorney inquired about a habeas petition with an outside lawyer who assisted on the certiorari petition, is a habeas corpus practitioner, and teaches a federal habeas course at the Indiana University Law School. *Id.* at ¶ 4. The outside lawyer believed that Conner should litigate a petition for writ of certiorari in the United States Supreme Court before pursuing habeas relief. *Id.* The outside lawyer explained "that the one-year habeas AEDPA limitations clock would remain tolled if a petition for certiorari were filed." *Id.* at ¶ 6. Emails between the two lawyers capture the exchange. Doc. 12-1. Conner's counsel asked, "Does the habeas clock remain tolled for 90 days after transfer is denied, regardless of whether a cert petition is ultimately filed?" *Id.* at 2. The outside lawyer replied, "The clock only remains stopped if a cert. petition is actually filed. It's not like after a direct-appeal decision when you get the 90 days regardless of whether a cert. petition is filed." *Id.* at 1.

Meanwhile, on October 16, 2020, Conner told his lawyer that he planned to file a habeas petition in federal court, with either private counsel or *pro se*. Doc. 12, pg. 4 at ¶ 7. Counsel told an antsy Conner to wait. *Id.* Counsel spelled out in an affidavit that he assured Conner "the one-year habeas clock would

remain tolled if [he] filed a collateral review certiorari petition" and there was "plenty of time" to file a habeas petition if the certiorari route was not pursued. *Id.*, attached hereto at Appendix Page 28. But counsel admitted he "failed to conduct any independent research" to confirm that the one-year habeas limitations period would remain tolled during the pendency of a certiorari petition. *Id.* at ¶ 8.

Ultimately, Conner's attorney filed a petition for writ of certiorari which the Supreme Court denied on April 26, 2021. *Conner v. Indiana*, 141 S. Ct. 2574 (2021). The next day, counsel advised Conner that he now had 200 days to file a habeas petition. Doc. 12, pg. 5 at ¶ 11. This advice was incorrect in light of *Lawrence v. Florida*, 549 U.S. 327 (2007). *Lawrence* instructs that the one-year statute of limitations to file a habeas petition is not tolled by a certiorari petition seeking review of the denial of state post-conviction relief. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007). Counsel first learned of *Lawrence* when he read the prosecution's motion to dismiss filed on October 12, 2021 in the district court. Doc. 12, pg. 5 at ¶ 13.

Counsel concluded his affidavit with a *mea culpa*:

> I prevented Mr. Conner from timely filing a habeas petition by assuring him the one-year habeas clock would remain tolled while his collateral review certiorari petition was pending. I have no doubt he would have filed a timely habeas petition had I told him not to wait. By relying on [outside counsel's] advice without conducting any independent legal research, I failed to perform

> reasonably competent legal work for Mr. Conner. This was an inexcusable and unprofessional error.

Doc. 12, pg. 5 at ¶ 15.

H. Conner's Habeas Corpus Petition

On August 4, 2021, Conner filed a *pro se* habeas corpus petition in the Southern District of Indiana, thinking he was three months early. Doc. 2. His habeas petition mirrored the state post-conviction contentions. *Id*. The prosecution moved to dismiss the petition as untimely. Doc. 9. Conner countered that equitable tolling was proper because he pursued his rights and his state court attorney instructed him to delay filing his habeas petition. Doc. 10. The district court found that while Conner "has been diligently pursuing his Sixth Amendment right to a speedy trial for close to a decade," equitable tolling was improper, and granted the prosecution's motion to dismiss. Doc. 13 at 1, 7. However, it issued a certificate of appealability on whether equitable tolling applied. Doc. 13 at 11. After Conner appealed *pro se*, the Seventh Circuit added the issue of whether trial counsel was ineffective for neglecting the speedy trial issue. Appellate Doc. 5.

SUMMARY OF ARGUMENT

"Justice delayed is justice denied" is not an abstraction. While sitting in jail for 1,034 days, Marcus Conner begged for a trial. The court and counsel did not share a similar sense of urgency and disregarded his pleas.

The 1,034-day delay between the arrest for selling cocaine to two informants and the trial was far too long. Worse, the delay persisted despite Conner's emphatic objections. The speedy trial claim was obvious given Conner's complaints. It was also significant given that its remedy meant escaping the clutches of a seven-decade prison sentence and walking out a free man. The trial lawyers' feeble *post hoc* explanations for neglecting the issue confirms their failure was inexcusable. The Indiana Court of Appeals was right to note the delay was "extraordinarily-and disconcertingly-long." 59 N.E.3d 1100, ¶ 31. It was wrong to do nothing about it.

Conner continued to be besieged by bad lawyering during post-conviction. Because the timeframe for a habeas corpus petition is tight, Conner sought to file his petition early. His post-conviction lawyer told him to wait. Despite the existential nature of the question, counsel did no research on when the habeas petition was due, instead relying blindly on the erroneous instruction of an outside lawyer. Conner complied, and counsel conceded his gross miscalculation gutted Conner's last, best chance to challenge an unconstitutional conviction. Equitable tolling is needed because extraordinary

circumstances prevented a timely filing and Conner, as the district court noted, "has been diligently pursuing his Sixth Amendment right to a speedy trial for close to a decade." Doc. 13 at 7.

Ineffectual, and by extension ineffective, assistance abounds here. If not rectified, it threatens to bleed "speedy trial" of all meaning and stymie a petitioner's access to federal courts. The criminal justice system is only as good as the attorneys filling its ranks. Attorneys are human, and mistakes are inevitable. However, the transgressions here are too egregious and the stakes too high to deny habeas relief. Ultimately, this case is extraordinary because a *pro se* criminal defendant toiling in the correctional confines can, on two separate occasions, know the law better than experienced professionals.

ARGUMENT

I. Standard of Review.

When considering the district court's decision on a habeas corpus petition, the Court examines factual findings for clear error and legal conclusions *de novo*. *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014).

II. The Principles Governing Conner's Habeas Corpus Petition.

Conner's petition is controlled by The Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254. AEDPA permits a federal court to grant a writ of habeas corpus for a state court decision in tension with Supreme Court precedent. *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003). The Court may set aside a state court decision if it unreasonably applies established federal law. *Id*. Such an application can occur where a state court refuses to extend a principle to a new factual context. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The Court may also set aside a state court decision if it rests on an unreasonable reading of the facts. 28 U.S.C. § 2254(d)(2).

AEDPA requires a criminal defendant to file a federal habeas petition one year after the conviction becomes final. 28 U.S.C. § 2244(d). This deadline is not jurisdictional. *Holland v. Florida*, 560 U.S. 631, 645 (2010). The AEDPA statute of limitations does not set forth an inflexible rule mandating dismissal. *Id*. *See also Ray v. Clements*, 700 F.3d 993, 1006 (7th Cir. 2012) (noting the AEDPA deadline "is a nonjurisdictional affirmative defense").

Thus, along with the statutory bases for tolling the deadline, *see* 28 U.S.C. § 2244(d)(1)(B)-(D), the deadline is also subject to waiver, *see Wood v. Milyard*, 566 U.S. 463, 473 (2012), and other equitable bases for extension.

III. The "Extraordinarily-and Disconcertingly-Long" Wait to Try Conner For Three Controlled Buys Violated Conner's Speedy Trial Rights Where Conner Repeatedly Objected to The Delay.

A. The vital interests fostered by this fundamental right.

A speedy trial is the first right enshrined in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. AMEND. VI. The Supreme Court describes a speedy trial "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (citing Magna Carta, c. 29 (1225), *reprinted in* Edward Coke, *The Second Part of the Institutes of the Laws of England* 45 (Brooke, 5th ed., 1797)). This bulwark against tyranny protects against "prolonged detention without trial" as well as unreasonable "delay in trial." 386 U.S. at 224. A defendant tethered to jail before trial is disadvantaged by delays. *United States v. MacDonald*, 456 U.S. 1, 8 (1982). Societal interests also favor speedy trials. *Barker v. Wingo*, 407 U.S. 514, 519 (1972). Long delays spawn overcrowded jails, manipulation of the justice system, the opportunity for defendants released on bail to commit more crimes, and increased costs. *Id*. at 519-20.

The remedy for a speedy trial violation reflects its gravity. The only redress for an infringement is dismissal of the indictment. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973). A severe remedy to be sure, but "not unique in the application of constitutional standards." *Id.* at 439. Moreover, a dismissal here would be less drastic because when this appeal ends, Conner will have served 12 years in prison for selling cocaine to two informants.

B. A strong speedy trial claim exists here given the 1,034-day delay, Conner's multiple objections, and the causes of the continuances.

The almost three years that elapsed between Conner's arrest and trial denied him the right to a speedy trial under the Sixth Amendment. The speedy trial clock starts with the defendant's arrest and does not stop until trial begins. *United States v. Marion*, 404 U.S. 307, 320 (1971). A speedy trial violation turns on four factors: (1) the length of delay; (2) the reason for delay; (3) the defendant's invocation of speedy trial rights; and (4) the prejudice to the defendant. *Barker*, 407 U.S. at 530. Ultimately, the burden is on the courts and prosecution "to assure that cases are brought to trial." *Id.* at 529.

The first factor, length of delay, triggers the *Barker* balancing test. *Id.* A delay between arrest and trial becomes "presumptively prejudicial" and therefore implicates the *Barker* analysis when it nears one year. *Doggett v. United States*, 505 U.S. 647, 651-52 n.1 (1992). A court then examines how much in excess of a year the delay was. *Id.* at 652. The acceptable amount of

delay hinges on the complexity of the case. *Barker*, 407 U.S. at 530-31. "The delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

That instruction is why the first factor favors Conner. It is axiomatic that the underlying case—three controlled drug buys—is simple. The limited evidence and few witnesses were all under the prosecution's control. And the trial for this pedestrian offense took just two days. Yet the criminal justice system needed 1,034 days to prepare. As the Indiana Court of Appeals noted in the direct appeal, this delay was "extraordinarily-and disconcertingly-long." 59 N.E.3d 1100, ¶ 31. Because taking almost three years to try this simple matter is too long and thus prejudicial as a matter of law, the first factor weighs heavily for Conner.

As for the second factor, the reason for delay, courts assign different weights to different reasons. *Barker*, 407 U.S. at 531. A neutral reason for delay such as negligence or overcrowded courts weighs against the prosecution. *Id.* Courts also construe a deliberate delay to hamper the defense against the prosecution. *Id.* Valid reasons for delay like locating a witness or answering pretrial defense motions are justifiable. *Id.* Continuances acquiesced to or sought by defense counsel do not count against the defendant where the attorney fails to inform the defendant of the requests. *Id*. at 529.

Of the nine continuances here, two were at the behest of Conner's

lawyers, four by the prosecution, and three by the court. *Barker* instructs that at a minimum, seven of the nine continuances weigh against the prosecution. *See* 407 U.S. at 531. Moreover, of the two continuances sought by the defense, one was due to a conflict of interest with a confidential informant revealed the morning of trial. The prosecution could have avoided this dilemma by disclosing those identities beforehand. Efficiency and foresight being in short supply, it is no surprise this was not done, especially since Conner would absorb any fallout. As he did. Thus, eight of the nine continuances were out of Conner's control and should be charged to the prosecution. If Conner cannot prevail under such figures, the second factor will be unattainable for all defendants.

The third factor concerns whether the defendant invoked the speedy trial right. *United States v. Saenz*, 623 F.3d 461, 465 (7th Cir. 2010). The assertion of a speedy trial right "is entitled to strong evidentiary weight." 407 U.S. at 531-32. While a defendant bears some responsibility to raise it, courts do not require a "*pro forma* objection." *Id.* at 531. More important is "the frequency and force" of less formal assertions of the right. *Id.* The inquiry is a fluid one: whether the prosecution and court were on notice of the defendant's invocation. *United States v. Loud Hawk,* 474 U.S. 302, 314 (1986). Underlying this factor is the principle that a defendant "has no duty to bring himself to trial." 407 U.S. at 527.

From the beginning, Conner was steadfast in his position against continuances, and given his predicament, understandably so. After learning of the second continuance, Conner wrote to the court requesting no more. He would speak out four additional times, as well as counsel's Rule 4 motion, for a total of six objections:

> 7/22/13 Letter to court objecting to counsel agreeing to continuances;
> 7/7/14 *Pro se* motion for discharge under Rule 4;
> 9/9/14 Letter to court objecting to delay, requesting release;
> 10/23/14 *Pro se* motion for discharge under Rule 4;
> 2/26/15 Counsel's motion for discharge under Rule 4; and
> 5/11/15 Letter to court objecting to 32-month jail stint.

These six assertions satisfy the "frequency and force" test of *Barker*. Indeed, to claim the prosecution and court were not on notice of Conner's invocation of his rights is to deny reality. The third factor thus strongly favors Conner.

The final factor is prejudice. A speedy trial seeks to prevent prejudice stemming from oppressive pretrial incarceration, the defendant's anxiety, and impairment of the defense. 407 U.S. at 532-33; *see also Marion*, 404 U.S. at 320. A defendant incarcerated during a lengthy delay "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." 407 U.S. at 533. However, prejudice transcends the impact on trial preparation:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.

Marion, 404 U.S. at 320; *see also Moore v. Arizona*, 414 U.S. 25, 26-27 (1973) (prejudice is not limited to the legal defense). For these reasons, an affirmative demonstration of prejudice is not mandated. 414 U.S. at 26. Excessive delay undermines the reliability of a trial "in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655.

Such is the case here. Conner was prejudiced because he endured oppressive pretrial incarceration and stress from the upheaval. That anxiety was manifested in the repeated demands to be tried or released. The fourth factor thus heavily favors Conner.

In sum, all four *Barker* elements decisively favor Conner. This simple case cannot justify a wait of 1,034 days, especially where Conner invoked his rights six times, his contribution to the delay was meager, and he endured significant pretrial imprisonment and its attendant ills. This conclusion clashes with the findings of the Indiana Court of Appeals, examined next.

IV. The Indiana Court of Appeals Disregarded Clearly Established Federal Law Because It Gave *Barker* and Its Progeny Short Shrift.

The Indiana Court of Appeals' decision was contrary to and involved an unreasonable application of clearly established federal law, along with resting

on an unreasonable reading of the facts. *See* 28 U.S.C. § 2254(d). Although reviewing a state court decision under § 2254 is deferential, it is not toothless. The Supreme Court has generated an expansive body of case law beyond *Barker* which the Indiana Court of Appeals had to follow. Even under a deferential lens, reasonable jurists can conclude the court abdicated this duty.

The court construed none of the four *Barker* factors decisively for Conner. First, the court cited five cases with longer delays in which speedy trial claims failed and summarily approved of Conner's delay. 146 N.E.3d 343, ¶ 16. Second, the court found the delays due to a crowded docket were justified and thus did not weigh against the prosecution. *Id.* at ¶ 19. Third, Conner's invocations of his rights were of no import because trial courts are "not required" to respond to *pro se* filings when the litigant has counsel. *Id.* at ¶ 20. Fourth, the prejudice factor supported the prosecution since no evidence was lost and Conner made no argument "beyond the fact of his incarceration." *Id.* at ¶ 21. These conclusory findings falter because they defy critical speedy trial concepts and contradict Supreme Court law in seven ways.

A. Tripling the time for a presumptively prejudicial delay.

The court glossed over the second half of the "double enquiry" mandated by *Barker*'s first element. *See Doggett*, 505 U.S. at 651. While the court observed the length of the delay was enough to trigger review of the other three *Barker* factors, it did not assign any weight to the fact the 1,034 days

almost tripled the time needed to find a "presumptively prejudicial" delay. Failing to heed this factor disavows *Doggett*, which holds that if the defendant shows the delay exceeds the minimum required to trigger the full inquiry, "the court must then consider . . . the extent to which the delay stretches beyond the bare minimum." *Doggett*, 505 U.S. at 652. Instead, the court simply cited five other cases with longer delays and finished. 146 N.E.3d 343, ¶ 16.

A smattering of cases with longer delays proves little as there are cases where shorter delays established a presumption of prejudice. *See, e.g.*, *Ashburn v. Korte*, 761 F.3d 741, 752 (7th Cir. 2014) (20 months); *United States v. White*, 443 F.3d 582, 589-90 (7th Cir. 2006) (9 months); *United States v. Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (8 months); *United States v. Jackson*, 542 F.2d 403, 405 (7th Cir. 1976) (one year); *United States v. De Tienne*, 468 F.2d 151, 155-56 (7th Cir. 1972) (19 months). The speedy trial analysis is applied on a case-by-case basis, and the court's compare-and-contrast approach on the first element rejects that principle. It is also detached from *Barker* and *Doggett* because it adopts a bright line rule: any case with a wait less than five years (the delay in *Barker*) will not satisfy the first factor. The analysis is more nuanced, and the length courts consider prejudicial depends on "the peculiar circumstances of the case." *Barker*, 407 U.S. at 530-31. An instruction disobeyed here.

Further, the court veered from its view in the direct appeal, where it deemed Conner's delay "extraordinarily-and disconcertingly-long." 59 N.E.3d 1100, ¶ 31. This finding cannot be reconciled with the court's opposite determination in the post-conviction appeal which afforded the delay length "little weight." *See* 146 N.E.3d 343, ¶ 22. Accordingly, the 1,034-day delay was presumptively prejudicial.

B. This case was exceedingly simple.

Also plaguing the court's analysis of the first factor is its avoidance of the mundane facts. Nowhere does the court mention the simplicity of this case. To reiterate, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. The court thus ignored this crucial aspect of the first factor.

C. Every delay but one was the prosecution's responsibility.

Conner should have prevailed on the second factor. He did not because the court circumvented federal law. The court inexplicably evaded the four continuances filed by the prosecution. It then compounded this error by finding the delays due to court congestion only had "slight weight." 146 N.E.3d 343, ¶ 19. In support, the court cited *Wilkins v. State*. *Id*. (citing *Wilkins v. State*, 901 N.E.2d 535 (Ind. Ct. App. 2009)). Yet *Wilkins* could not be more different. The delay there was 8 months. 901 N.E.2d at 536-37. And there was one continuance, which was due to court congestion. *Id*. More on point is the

Indiana Supreme Court's decision in *Logan v. State*, which vacated a child molesting conviction because the defendant waited 1,291 days. *Logan v. State*, 16 N.E.3d 953, 964-65 (Ind. 2014). The *Logan* Court found the second element favored the defendant because a congested court calendar "must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial." *Id*. at 963. *Logan* echoed *Barker*, which found congested court delays are weighed against the prosecution "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id*. (quoting *Barker*, 407 U.S. at 531).

Here, eight of the nine continuances were the prosecution's responsibility per *Barker* and *Doggett*. The court and prosecution protracted Conner's pretrial detention as a severe and persistent institutional breakdown drove the delay. It is thus inconceivable that the court did not find the second factor clearly favored Conner.

As for the delay caused by defense counsel's conflict of interest with a confidential informant, the court refused to blame the prosecution even though it could have disclosed those identities beforehand. 146 N.E.3d 343, ¶ 19. Only the prosecution knew whether there was a conflict. It could have reviewed the chronological case summaries to assess any lawyer-informant collaboration. *Barker* holds that a delay caused by the prosecution's negligence is not attributed to the defendant because the "ultimate responsibility for such

circumstances must rest with the government." *Barker*, 407 U.S. at 531. *See also Terry v. Duckworth*, 715 F.2d 1217, 1220 (7th Cir. 1983) (finding delay after mistaken arrest warrant "must be given some weight in defendant's favor" in *Barker* analysis.). In short, the court's truncated analysis of the reasons for the 1,034-day delay contravenes Supreme Court precedent and is thus unreasonable.

D. Conner distanced himself from counsel.

The court did not excuse Conner for his lawyers' actions. In doing so, the court disregarded *Barker*'s instruction that courts must "attach a different weight to a situation in which the defendant knowingly fails to object [to a delay in trial] from a situation in which his attorney acquiesces in long delay without adequately informing his client." 407 U.S. at 529. Thus, the court failed to consider that any delays by Conner's counsel should not count against Conner as he objected to all continuances. Doc. 9-1 at 6. And while the court acknowledged that Conner denounced the continuances, it never viewed his efforts as mitigating factors when calculating culpability for the delays. This is necessary where counsel was lax, as here. Conner's multiple communications to the court highlighted his stress about the case and desire to proceed immediately. Yet neither the prosecution, public defender, nor court acted on his concerns as the continuances piled up. Finally, the court was silent on the fact Conner did not rest on his rights. Conner was involved

from the outset, making his position on continuances clear after the second continuance. Doc. 9-1 at 6. The court buried this relevant fact.

E. Conner invoked his rights early and often.

The court's analysis of the third factor, invocation of rights, turns *Barker* on its head. The court eviscerated the importance of Conner's five speedy trial invocations because they were made *pro se*. This is flawed because every speedy trial protest Conner lodged was received and included in the record. Doc. 9-1. Court and counsel could not plead ignorance, nor did they. Supreme Court case law also refutes the court's reasoning. Courts do not require a "*pro forma* objection." 407 U.S. at 531. Rather, compelling is "the frequency and force" of less formal assertions of the right. *Id.* Ultimately, the prosecution and court must be on notice of the defendant's invocation. *Loud Hawk,* 474 U.S. at 314.

There can be no doubt they were here, requiring this factor to strongly favor Conner. The correct way to treat a *pro se* filing is demonstrated by *Watson v. State*, 155 N.E.3d 608 (Ind. 2020). The defendant in *Watson* had counsel when he wrote letters to the court, "but that does not mean his correspondence should be ignored when evaluating whether Watson asserted his personal right to a speedy trial." *Watson*, 155 N.E.3d at 619. While the trial court was not required to answer the correspondence, "what matters is whether the letters put the government on notice that Watson wanted to be

tried." *Id*. Given their "frequency and force," they did. *Id.* (quoting *Barker,* 407 U.S. at 529). *See also United States v. Tigano,* 880 F.3d 602, 618 (2d Cir. 2018) (recognizing that in the context of a speedy trial claim, the defendant's assertion of his own right—regardless of actions by counsel—is the operative consideration). *Watson* thus exemplifies adherence to clearly established federal law. Similarly, the Indiana Supreme Court in *Logan* found the defendant's seven requests for discharge weighed heavily in his favor. *Logan*, 16 N.E.3d at 963.

In addition, the Court of Appeals here dispensed with Conner's five invocations because a litigant's *pro se* requests "could undermine trial counsel's litigation strategy." 146 N.E.3d 343, ¶ 20. The record says otherwise. Counsel filed a Rule 4 motion for discharge, so Conner's contentions aligned with counsel's (albeit uninspired and paltry) efforts. Doc. 9-1 at 12. The record further undercuts the court's logic given the trial attorneys' post-conviction testimony. One lawyer "didn't contemplate in this case that [a speedy trial motion] might be something I would file." 146 N.E.3d 343, ¶ 5. The other trial lawyer saw the speedy trial claim as weak because "evidence was not lost as a result of the delay." *Id*. at ¶ 6. Thus, there was no grand strategy. Counsel simply missed the obvious despite repeated reminders. *Barker* commands that the assertion of a speedy trial right "is entitled to strong evidentiary weight." 407 U.S. at 531-32. Conner's six invocations deserved that endorsement.

F. Stewing in jail for 1,034 days epitomizes prejudice.

The court avoided the prejudice arising from the 1,034-day pretrial detention, without a word about the lengthy amount of jail time and concomitant stress afflicting Conner. Evading these facts, along with the conclusion that no prejudice resulted from the lengthy pretrial detention, ignores Supreme Court law. This includes *Marion*: "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." 404 U.S. at 320. As well as *Moore*: "prejudice to a defendant . . . is not confined to the possible prejudice to his defense in those proceedings." 414 U.S. at 26-27. The court here did not acknowledge this form of prejudice, much less weigh it as a factor. Failing to consider the prejudice from the extended delay between arrest and trial engendered the erroneous conclusion that the fourth factor "weighs heavily in favor of the State." 146 N.E.3d 343, ¶ 21.

G. Tangible prejudice is not required.

The court shifted the burden to Conner to affirmatively prove prejudice. *Doggett* provides that prejudice may not be "specifically demonstrable" and that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655. In direct contradiction, the court saddled Conner with that burden by penalizing him for providing no allegations of lost evidence. 146

N.E.3d 343, ¶ 21. Once again, *Watson* exposes the fallacy. Although the *Watson* petitioner claimed no prejudice to his defense, "it is well settled that such a showing is not required." 155 N.E.3d at 620 (citing *United States v. MacDonald,* 456 U.S. 1, 7-8 (1982); *Moore*, 414 U.S. at 26-27). In turn, the *MacDonald* Court noted that the primary concern of the speedy trial guarantee is minimizing lengthy pre-trial incarceration, not preventing prejudice. 456 U.S. at 8. And in *Moore*, the Court rejected the notion that an affirmative demonstration of prejudice was necessary to prove a speedy trial violation. 414 U.S. at 26-27. *MacDonald* and *Moore* are thus two more casualties of the court's aberrant approach to the speedy trial test.

For these reasons, the Court should grant habeas relief because the Indiana Court of Appeals' decision is incompatible with Supreme Court precedent and rests on an unduly narrow reading of the record.

V. Trial Counsel Was Ineffective for Not Arguing The 1,034-Day Delay Violated Conner's Speedy Trial Rights Where A *Pro Se* Conner Repeatedly Notified Counsel of The Clear Constitutional Violation.

The Sixth Amendment provides that in all criminal prosecutions, "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. The right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The ineffective assistance inquiry first examines whether the representation was

so deficient as to deprive the defendant of his Sixth Amendment right to counsel. *Id*. at 687. Second, whether the deficient performance deprived the defendant of a fair trial. *Id.* Dispositive is whether counsel's conduct was reasonable under the circumstances, and whether the outcome of the trial would have been different had counsel acted properly. *Id.* at 693-94.

Attorneys may be deficient when they neglect a specific issue, especially one that is stronger than those presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). In *Gray v. Greer*, the Court held that the failure to raise "significant and obvious issues" could be deficient performance. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Such a failure is prejudicial if the rejected issue could have resulted in a reversal of the conviction or a new trial. *Id.*

Although Conner's lawyers made speedy trial arguments under Rule 4, they did not file a speedy trial motion. It was left to Conner to press his constitutional rights, filing a series of *pro se* Sixth Amendment speedy trial objections, which the court summarily denied because he had counsel. It was obvious that a speedy trial issue existed, yet counsel did nothing. There is no evidence they disavowed the speedy trial issue for strategic gain. Indeed, the speedy trial claim was "significant and obvious" thanks to Conner's protests. As articulated in Section IV and incorporated here, *Barker*'s test is straightforward and decidedly favors Conner. What is more, the speedy trial violation was the strongest issue. Prevailing on it would mean a reversal of

the conviction and dismissal of the conviction, the pinnacle of success. There was no legitimate reason to neglect the issue, as reflected by the lawyers' meek explanations at the post-conviction hearing. *See* 146 N.E.3d 343, ¶¶ 5-6. Their inability to explain themselves confirms the deficiency of their defense.

Finally, there is no question the outcome of the case would have been different had counsel acted properly. In fact, the contrast is stunning. Conner would have exited jail years ago, instead of staring at additional decades of imprisonment. Under *Smith* and *Gray*, and given the strength of the speedy trial issue as set forth in Section IV, the failure to raise the speedy trial claim prejudiced Conner's defense and thus constitutes ineffective assistance as a matter of law. Habeas relief is needed.

VI. Conner's Diligent Pursuit of His Rights Along With Exceptional Circumstances Warrant Equitable Tolling.

The next reason for habeas corpus involves the second issue in the certificate of appealability, the propriety of equitable tolling. While distinct from the first issue, their catalyst—incompetent counsel—is the same.

A. The uniqueness of Conner's ordeal requires relief.

A state prisoner has one year after a conviction becomes final in state court to file a habeas petition. *Gladney v. Pollard*, 799 F.3d 889, 894 (7th Cir. 2015). A conviction becomes final when the deadline to file a petition for certiorari in the United States Supreme Court expires. *Gonzalez v. Thaler*,

565 U.S. 134, 154 (2012). The limitations period is tolled while the petitioner's state post-conviction relief petition is pending. *Day v. McDonough*, 547 U.S. 198, 201 (2006). A state post-conviction relief petition is pending until denied by the highest state court. *Lawrence v. Florida*, 549 U.S. 327, 332 (2007). Thus, the one-year statute of limitations to file a habeas corpus petition is not tolled during the pendency of a certiorari petition seeking review of the denial of state post-conviction relief. *Id.*

Equitable tolling is appropriate if the petitioner: (1) pursued his rights diligently, and (2) an extraordinary circumstance precluded a timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). While not granted lightly, equitable tolling is not "something that exists in name only." *Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014). As with any equitable doctrine, courts decide equitable tolling flexibly. 560 U.S. at 650. Courts eschew mechanical rules, and must be cognizant that specific circumstances, "often hard to predict in advance, could warrant special treatment in an appropriate case." *Id*. (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). Where the extraordinary circumstance involves "[p]oor representation by an attorney," courts deciding whether equity demands tolling should make a "nuanced appraisal" of the petitioner's situation. *Socha*, 763 F.3d at 685.

B. Six invocations and preserving an issue for a decade is diligence.

As for *Holland*'s first element, "reasonable diligence," not "maximum

feasible diligence," is the lodestar. *Holland*, 560 U.S. at 653. Inmates that reasonably rely on their attorneys can meet this standard. *United States v. Martin*, 408 F.3d 1089, 1093-94 (8th Cir. 2005). The assessment of what efforts are "reasonable" should adjust for "the effect of prison life on one's ability to communicate with counsel." *Ryan v. United States*, 657 F.3d 604, 607 (7th Cir. 2011). The diligence requirement is satisfied where inmates rely on attorneys whom they monitor and whom they reasonably believe are doing their jobs. *Martin*, 408 F.3d at 1095 (inmate diligent where he sought and received reasonable assurances that his attorney was preparing a timely § 2255 petition); *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011) (same); *Fleming v. Evans*, 481 F.3d 1249, 1257 (10th Cir. 2007) (same).

A petitioner may demonstrate diligence by writing letters seeking information, contacting attorneys or courts, or filing a *pro se* habeas petition shortly after learning the limitations period expired. *Taylor v. Michael*, 724 F.3d 806, 811 (7th Cir. 2013). In *Holland*, the petitioner begged his attorney, the courts, and their clerks for case information. 560 U.S. at 649-51. After discovering his lawyer's missteps, he recognized the need to move *pro se* and did so. *See id.*

Conner displayed reasonable diligence under *Holland*. He continuously asked counsel and the court to address his arguments. He preserved these arguments through multiple proceedings and courts. The district court thus

accurately described Conner as "diligently pursuing his Sixth Amendment right to a speedy trial for close to a decade." Doc. 13 at 7. Conner was also active in federal court, where he litigated *pro se* in the district court. He sought to rectify counsel's error by filing a *pro se* notice of appeal less than 30 days after the district court's dismissal, assuring himself the opportunity to appeal. Conner thus did everything in his power "to stay abreast of the status of his case." *See Martin*, 408 F.3d at 1095. Nor can he be faulted "for relying on his attorney." *Id*. Because Conner doggedly pursued his speedy trial rights from the outset and managed to preserve the argument for a decade and through multiple courts, he satisfies *Holland*'s first element.

C. Professional misconduct creates an extraordinary circumstance.

As for *Holland*'s second element, an "extraordinary circumstance" is something "beyond the applicant's control, that prevents timely filing; simple legal errors, such as ignorance of the federal deadline, do not suffice." *Perry v. Brown*, 950 F.3d 410, 412 (7th Cir. 2020). However, the Supreme Court has noted that "at least sometimes, professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Holland*, 560 U.S. at 653. The *Holland* Court cited with approval a series of such examples. *See*, *e.g., Baldayaque v. United States*, 338 F.3d 145, 152-53 (2d Cir. 2003) (finding that where an attorney failed to communicate with the client and do basic legal research, tolling could

be proper); *Spitsyn v. Moore,* 345 F.3d 796, 800-802 (9th Cir. 2003) ("extraordinary circumstances" may require tolling where lawyer denied client access to files and failed to prepare a petition); *Calderon v. United States District Court,* 128 F.3d 1283, 1289 (9th Cir. 1997) (allowing tolling where client was prejudiced by last minute change in representation). The extraordinary circumstance inquiry avoids bright line rules and instead considers "the entire hand that the petitioner was dealt." *Socha*, 763 F.3d at 686. Here, there is no question Conner was dealt from the bottom of the deck.

Whether circumstances are extraordinary to permit tolling is answered with reference to prior precedent. *Holland*, 560 U.S. at 650. The precedent here suggests that attorney miscalculation of a deadline alone is insufficient to prompt equitable tolling. *See Lawrence*, 549 U.S. at 336. However, "egregious" professional misconduct by post-conviction counsel may justify equitable tolling of the limitations period. *Fleming*, 481 F.3d at 1256. Thus, an inmate whose petition is untimely thanks to counsel, *Baldayaqu*e, 338 F.3d at 147, along with "serious attorney misconduct," *Holland*, 560 U.S. at 652, may be entitled to tolling.

The instant facts constitute an extraordinary circumstance as in *Holland*. Like *Holland*, Conner's counsel "violated fundamental canons of professional responsibility," including the duty "to perform reasonably competent legal work." *See* 560 U.S. at 652. Like *Holland*, Conner's counsel

"did not do the research necessary to find out the proper filing date." *See id*. Like *Holland*'s counsel who was alerted to the timeliness issue by his client, Conner also sounded the alarm. *See id*. Finally, like *Holland*, counsel jeopardized Conner's "single opportunity for federal habeas review of the lawfulness of his imprisonment." *See id*. at 653. These actions exceeded the range of behavior that a client could reasonably expect. Counsel himself admitted as much. *See* Doc. 12, pg. 5 at ¶ 15.

Scrutinizing counsel's conduct provides four additional reasons to find an extraordinary circumstance. First, post-conviction counsel was appointed to represent Conner in state collateral proceedings only. He was not Conner's lawyer for habeas purposes, nor was he qualified to be since he worked for the State Public Defender's Office. *See* Doc. 12, pg. 3 at ¶¶ 2-3. Conner's habeas litigation was thus outside counsel's ken, and his oath admitted as much. *See* Doc. 12, pg. 3 at ¶ 3. As the state and federal proceedings were on two separate planes, when Conner filed his habeas petition, how he filed it, and its contents had nothing to do with counsel and his state efforts. There was simply no reason for counsel to instruct Conner to hold off on the habeas petition.

Second, there was no justification for counsel to assure Conner that his habeas deadline was tolled during the pendency of the certiorari petition. Counsel was inexperienced in habeas law and its notoriously complicated

clock calculations. It is therefore troubling that he would advise Conner on the matter. And while it is common to seek a second opinion from another lawyer, it would be reckless to rely exclusively on that opinion for a consequential legal question with decades of prison time at stake. Most troubling is that counsel instructed Conner to delay the petition when counsel himself was not certain of the tolling rules, as reflected in his email exchange with outside counsel. Doc. 12-1. Nor was there any benefit served by the delay, only the risk of Conner losing the last chance at vindicating his rights and concomitantly, freedom.

Third, this misconduct is graver than the missteps of *Holland*. The attorney's negligence in *Holland* was at least committed in his area of expertise. In contrast here, counsel had no habeas experience and was not merely negligent, but intentionally intervened to foil a filing. This despite never researching the law, not representing Conner in the habeas proceedings, and having no intention of working on the habeas litigation. Doc. 12, pg. 4-5. While in *Holland*, there was no actual circumstance preventing the petitioner from filing his habeas petition, Conner was preparing his petition when post-conviction counsel stopped him. Counsel bolstered his erroneous instructions by explaining the deadline was tolled during certiorari to convince Conner to wait. No such impediment existed in *Holland*.

Fourth, counsel, to his credit, owned up to his errors:

> I prevented Mr. Conner from timely filing a habeas petition by assuring him the one-year habeas clock would remain tolled while his collateral review certiorari petition was pending. I have no doubt he would have filed a timely habeas petition had I told him not to wait. By relying on [outside counsel's] advice without conducting any independent legal research, I failed to perform reasonably competent legal work for Mr. Conner. This was an inexcusable and unprofessional error.

Doc. 12, pg. 5 at ¶ 15. This testimony speaks for itself.

For these reasons, the Court should find the egregious attorney misconduct is an extraordinary circumstance.

D. Post-conviction counsel's ineffective assistance is an extraordinary circumstance under the *Martinez-Trevino* framework.

Alternatively, and additionally, equitable relief is proper under the *Martinez-Trevino* doctrine, which permits a post-conviction petitioner to secure equitable relief if: (1) the post-conviction attorney performed ineffectively under *Strickland*, and (2) this performance precluded an ineffective assistance of trial counsel claim that had "some merit." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). A petitioner who can satisfy the *Martinez-Trevino* framework establishes "extraordinary circumstances." *Ramirez v. United States*, 799 F.3d 845, 854 (7th Cir. 2015). Moreover, the *Martinez-Trevino* doctrine can apply to claims for ineffective assistance of counsel originating in Indiana state courts. *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017). *Brown* provides that petitioners can

overcome a procedural default of ineffective assistance claims if they can demonstrate ineffective assistance of post-conviction counsel and assert a substantial claim of ineffective assistance of trial counsel. *Id*. at 506. Because the petitioner in *Brown* offered evidence of deficient performance by his post-conviction relief counsel and asserted a substantial claim of ineffective assistance of trial counsel, the Court reversed for an evidentiary hearing on both ineffective assistance claims. *Id*.

Besides *Brown*, *Ramirez* also compels reversal. The *Ramirez* petitioner contended his post-conviction counsel was ineffective for causing him to miss a filing deadline. *Ramirez*, 799 F.3d at 848. He invoked the *Martinez-Trevino* framework to determine whether his post-conviction counsel's ineffectiveness was an extraordinary circumstance that would permit him to reopen the district court's judgment under Rule 60(b) of the Federal Rules of Civil Procedure. *Id*. at 849. The Court agreed, and held the petitioner could establish an extraordinary circumstance where counsel abandoned him on the cusp of appeal. *Id*. at 851-52.

Additionally, an attorney's failure to timely appeal constitutes ineffectiveness. *United States v. McKenzie*, 99 F.3d 813, 816 (7th Cir. 1996); *see also United States v. Nagib*, 56 F.3d 798, 801 (7th Cir. 1995). Forgetting to file a notice of appeal is not a reasonable strategy and falls outside the range of competent assistance. *Kitchen v. United States*, 227 F.3d 1014, 1020 (7th

Cir. 2000). Moreover, a direct appeal rarely affords an opportunity to challenge ineffectiveness, and a petition for post-conviction relief therefore functions as the appeal of a conviction that violates the Sixth Amendment. *Ramirez*, 799 F.3d at 853.

1. Thwarting a timely filing is ineffective assistance.

As set forth above, a conviction succumbs to ineffectiveness if: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense by depriving the defendant of a fair trial. *Strickland*, 466 U.S. at 687. Ineffective assistance exists here because counsel steered his client away from what he should have done. Like *Ramirez*, Conner's post-conviction counsel performed deficiently by stymieing the timely filing of Conner's § 2254 petition. Unlike *Ramirez*, counsel did not abandon Conner, but affirmatively stopped him from filing his petition. Preventing a timely filing makes the abandonment in *Ramirez* look benign in comparison. Convincing Conner to wait—and thereby miss the deadline for a § 2254 petition—was fatal to Conner's only chance to vindicate his Sixth Amendment rights in federal court. Thus, if the failure to timely appeal satisfies *Strickland*'s first element, so should the failure to timely file a § 2254 petition asserting ineffective assistance.

2. Not researching the habeas deadline is ineffective assistance.

Effective lawyering requires learning the law. "Failure to perform basic

research . . . is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). The Supreme Court has found ineffective assistance where an attorney failed to investigate records based on an incorrect belief "that state law barred access to such records." *Williams v. Taylor*, 529 U.S. 362, 395 (2000). Ineffectiveness also existed where an attorney did not request discovery based on the mistaken legal interpretation that the prosecution was obligated to produce it. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Further insightful is the Third Circuit's holding that counsel performed deficiently by advising a client to accept a guilty plea based on a misreading of sentencing laws. *United States v. Bui*, 795 F.3d 363, 367 (3d Cir. 2015). The Eleventh Circuit also found an attorney performed deficiently by failing to preserve an issue for appeal because of a "mistake of law." *French v. Wilcox State Prison*, 790 F.3d 1259, 1269 (11th Cir. 2015). Underlying this case law is the notion that besides being ineffective, a lawyer who neither knows nor learns the law flouts a fundamental professional responsibility—the duty to provide competent representation. *See Wroblewska v. Holder*, 656 F.3d 473, 478 (7th Cir. 2011). Fulfilling that duty "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA MODEL R. OF PROF. CONDUCT 1.1.

These principles confirm ineffectiveness here. When counsel took on this

matter, he was presented with the questions of what to file, and when. Had he reviewed § 2254, and post-conviction law generally, it would have been apparent that calculating deadlines in the § 2254 context is tricky. *See Baldayaque*, 338 F.3d at 152. A glance at post-conviction law would have also revealed that timeliness is imperative as petitioners who miss the filing deadline squander their only chance for habeas relief. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007).

Counsel instructed Conner not to file his § 2254 petition based on a misunderstanding of the governing law. Worse, that misunderstanding was caused by a failure to acquaint himself with it. Counsel conducted no research on this existential question. Doc. 12, pg. 5 at ¶ 15. He instead relied unquestioningly on an outside lawyer's belief that § 2254's one-year limitations period began only after the Supreme Court denied the writ of certiorari. *Id*. Given the complexity of the deadline calculation and with Conner's freedom on the line, no reasonable lawyer would accept without verification an outside lawyer's advice regarding when a § 2254 petition is due. Counsel thus did not acquire the necessary knowledge and failed to exercise the requisite skills on a paramount issue. This was unreasonable, as counsel concedes. *Id*.

E. The underlying ineffective assistance claim has merit.

With post-conviction counsel's ineffectiveness established (*Martinez-*

Trevino's first element), the next question is whether Conner's "underlying ineffective assistance of counsel claim" has "some merit," and is thus "substantial." *See Martinez*, 566 U.S. at 17-18. *Martinez* equated "substantial" with the standard for a certificate of appealability to issue. *Id*. Conner will not belabor this point as he addressed the trial lawyers' flawed assistance above. He thus incorporates Section V of the Argument here. Since the underlying claim has merit, the second *Martinez-Trevino* element is established and the Court should find an extraordinary circumstance.

F. Summation.

Because Conner diligently pursued relief, and because his untimely filing resulted from an extraordinary circumstance, he deserves equitable tolling. Alternatively, the district court could conduct an evidentiary hearing into tolling itself. *See Boulb v. United States*, 818 F.3d 334, 339 (7th Cir. 2016). If the Court finds any of the above legal theories can justify equitable tolling, it should at least remand for an evidentiary hearing, or otherwise develop the record for the tolling question as it did in *Davis v. Humphreys*, 747 F.3d 497, 500 (7th Cir. 2014), and *Estremera v. United States*, 724 F.3d 773, 775 (7th Cir. 2013).

CONCLUSION

Conner was jailed for 1,034 days while the Indiana criminal justice system dawdled. He conveyed a clear desire to be tried as soon as possible yet

was ignored. The prejudice sustained cannot be reduced to quantifiable terms like a lost exhibit but is rather embodied by a life upended, a sudden exchange of home for prison. The Indiana Court of Appeals considered none of these realities, defying Supreme Court precedent.

Additionally, equitable tolling is needed to save Conner from counsel. Actively precluding a petitioner from a timely filing is unheard of, as reflected by the absence of similar cases. The reasonable diligence Conner displayed coupled with the extraordinary circumstance of an attorney stopping a timely filing necessitates equitable tolling.

For these reasons, Marcus Conner requests the Court grant the writ of habeas corpus and order him to be unconditionally discharged from custody. Alternatively, he requests a remand for further proceedings on his entitlement to equitable tolling.

Respectfully submitted,

s/ Christopher Keleher

Christopher Keleher
The Keleher Appellate Law Group
1 East Erie Street, Suite 525
Chicago, Illinois 60611
(312) 448-8491
ckeleher@appellatelawgroup.com