No. 11-958

In the Supreme Court of the United States

JOHN KERESTES, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL.,
Petitioners,

v.

ANGEL PABON,
Respondent.

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. As the respondent acknowledges, the Third Circuit's new rule effectively requires the provision of "translation or legal services" to post-conviction petitioners who do not speak English.

Pabon does not shy away from the implications of the opinion below. He recognizes that, if a state (or federal) government wishes to hold prisoners to the one year provided by AEDPA for filing habeas corpus petitions, it will generally have to supply translation or legal services to those with limited knowledge of English. Otherwise, the prisoner will have a ready-made claim of equitable tolling to excuse any late filing.[1]

Pabon contends that this result is not only welcome; it is required by *Holland v. Florida*, 130 S. Ct. 2549 (2010). There is no circuit split, he says, because the cases rejecting language-based tolling were all decided before *Holland*. Indeed, Pabon goes further: he

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[1]Brief in Opp. at 18: "As [the Ninth and Second] Circuit Courts did in *Mendoza* and *Diaz*, the Third Circuit held that the inability to read or understand English, combined with denial of access to translation or legal assistance, can constitute extraordinary circumstances that trigger equitable tolling."

Opinion below at App. 34: "We find it persuasive that the Second and Ninth Circuit Courts of Appeals have both determined that equitable tolling might be warranted when a non-English speaking petitioner could not comply with AEDPA's statute of limitations because the prison did not provide access to AEDPA-related materials, translation, or legal assistance in his or her language."

suggests that this Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), strengthens his position by implying a right to post-conviction counsel, which in turn implies a right to post-conviction translation.

Pabon's argument, while faithful to the approach taken by the court below, is in conflict with this Court's precedents. Like the Third Circuit, App. 33, Pabon maintains that *Holland* calls for equitable tolling here because it holds that, in equity, courts must use a case-by-case analysis rather than bright lines. Brief in Opp. at 19. Therefore, in the view of Pabon and the circuit court, anything can be an "extraordinary circumstance" for equitable tolling purposes if it can be said to have interfered with the ability to meet a filing deadline.

But *Holland* did not outlaw the development of general principles for the analysis of equitable tolling claims. The *Holland* Court simply rejected a particular rule that it thought too rigid: a per se prohibition of tolling for attorney misconduct, absent "bad faith, dishonesty, divided loyalty, mental impairment, or so forth." 130 S. Ct. at 2563. At the same time, *Holland* acknowledged – and declined to abandon – a less narrow rule against tolling based on mistake or ignorance. *Id*. at 2564.[2] Even after *Holland*, therefore,

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[2] *See, e.g., Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (no tolling for lawyer's mistake in calculating limitations period; "[i]f credited, this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline"); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("principles of equitable tolling described above do not (continued...)

there are still some things that generally do not constitute an extraordinary circumstance justifying equitable tolling.

Thus *Holland* cannot cover over the circuit split present here. At least three circuits – the Second, Third, and Ninth – hold that limited knowledge of English generally *can* be the basis for equitable tolling of the federal habeas deadline. Cert. Pet. at 11. At least three other circuits – the Seventh, Tenth, and Eleventh – hold that limited knowledge of English generally *can't* be the basis for equitable tolling of the federal habeas deadline. Cert. Pet. at 11-13.[3]

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[2](...continued)
extend to what is at best a garden variety claim of excusable neglect"); *Johnson v. United States*, 544 U.S. 295, 311 (2005); ("Johnson has offered no explanation for this delay, beyond observing that he was acting *pro se* and lacked the sophistication to understand the procedures. But we have never accepted *pro se* representation alone or procedural ignorance as an excuse").

[3]Pabon appears to argue that the cases rejecting tolling are not what they seem. He asserts, for example, that the Seventh Circuit case, *Montenegro v. United States*, 248 F.3d 585 (7th Cir. 2001), involved an evidentiary hearing about the defendant's skill in English. Brief in Opp. at 14. The events Pabon refers to, however, concerned an earlier, unpublished decision in the same case, *Montenegro v. United States*, 191 F.3d 456 (7th Cir. 1999). That earlier decision had nothing to do with equitable tolling, but instead addressed only the issue of the proper calculation of the habeas filing deadline under 28 U.S.C. § 2255(f)(4) (one-year limitations period runs from date of discovery of new facts). Only after Montenegro lost on that calculation theory did he litigate an equitable tolling claim, resulting in the published decision, at 248 F.3d 585, which is at issue here. That published decision held clearly that a "language barrier," like
(continued...)

It is left to this Court, then, to resolve the central question posed by this conflict among the courts of appeal: If ignorance of the law is not enough, why is ignorance of the language?

In his reliance on the recent *Martinez v. Ryan* decision, Pabon offers a solution to this problem. *Martinez*, he suggests, implies that there is a right to counsel on post-conviction review; by extension, there should also be a right to translation services on post-

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[3](...continued)
"limited education" and "lack of knowledge of the United States legal system," does "not constitute the kind of extraordinary circumstances that justify equitable tolling." *Id.* at 594. *See also Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) ("equitable tolling [is] not justified by [a] language barrier [or] lack of legal knowledge," citing *Montenegro*).

Similarly, Pabon suggests that the Tenth Circuit case, *Yang v. Archuleta*, 525 F.3d 925 (10th Cir. 2008), "cited the same standard set forth" by the Second and Ninth Circuits. Brief in Opp. at 15. That is true – but *Yang* cited that standard not to adopt it, but to point out that "[w]e have taken a seemingly contrary position," and have consistently rejected language barriers as a basis for equitable tolling. 525 F.3d at 929. *See* Cert. Pet. at 12-13.

As to the Eleventh Circuit, Pabon asserts that the decision rejecting tolling, *United States v. Montano*, 398 F.3d 1276 (11th Cir. 2005), was "without explanation." Brief in Opp. at 15. What matters here is not the length of the opinion, however, but the nature of the holding: "difficulties with the English language" were not "such 'extraordinary circumstances' as to justify equitable tolling." 398 F.3d at 1280 n.5. *See also DeLeon v. State Dept. of Corr.*, No. 11-11598, 2012 WL 987538, at *2 (11th Cir. March 26, 2012) (unpublished) ("An inability to understand English does not constitute extraordinary circumstances justifying equitable tolling," citing *Montano*).

conviction review. Brief in Opp. at 22-23. In other words, Pabon would say that ignorance of the law, like language deficiency, *is* enough. If the state does not provide a lawyer to cure the lack of legal knowledge, or a translator to cure the lack of language knowledge, then the fault is not the petitioner's, and an "extraordinary circumstance" exists.[4]

The Third Circuit rule that Pabon defends puts the state in an impossible position. To have a reasonable shot at limiting the habeas filing deadline to the one year actually authorized by Congress, it must supply

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[4]The court below could not cite *Martinez v. Ryan*, because it had not yet been decided. But the circuit's reasoning is consistent with Pabon's argument here. In fact the court of appeals went well beyond the precedents it relied on from the Second and Ninth Circuits, by insisting that only professional translation services provided by the state would be enough avoid an equitable tolling claim.

The other courts did not go quite so far. *See Diaz v. Kelly*, 515 F.3d 149, 154 (2nd Cir. 2008) ("[t]his is not to say, however, that language deficiency must be remedied by the State in any sense comparable to the obligation, grounded in the Sixth Amendment, to provide an interpreter at trial"); *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006) (extraordinary circumstance if prisoner unable "to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source").

The Third Circuit rejected the possibility that help from another prisoner could suffice, because "it would yield the perverse result of leaving prisoners at the mercy of fellow inmates.... For example, an inmate who at first might be willing to provide translation or legal help could change his or her mind.... Moreover, an inmate ... might not have enough language skills (or might not be willing) to help." App. 38.

professional translators to all non-native English speakers. But the effort to do so will be exorbitant, and ultimately unlikely to succeed, like raising a Tower of Babel in the nation's prison systems. The problem is in the premise. If ignorance of English really "may be enough for equitable tolling, there will be a basis for arguing that tolling is appropriate in almost every ... case involving a missed deadline." *Holland v. Florida*, 130 S. Ct. at 2567 (Alito, J., concurring). This Court's review is appropriate.

II. Respondent ignores the confusion and circuit conflict concerning the proper standard for granting a certificate of appealability.

Pabon essentially sidesteps the second issue presented by the certiorari petition: whether a court of appeals considering a certificate of appealability may disregard AEDPA's deference requirement and instead apply a *de novo* standard of review. Pabon has two opposite things to say about this issue. First he insists that the Third Circuit's rejection of deference at the COA stage was entirely "correct and unremarkable." Brief in Opp. at 24. He then turns about face and insists that the court of appeals did not discount the deference rule at all, but instead applied it in granting him a COA.

The difficulty with Pabon's first point is that, like the court below, he simply omits the language from this Court's precedent that contradicts his position. The crucial case is *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Third Circuit relied on language in *Miller-El* that takes a more expansive, arguably non-

deferential view of the COA standard.[5] Two other circuits have relied on different language in *Miller-El* that clearly includes AEDPA deference in the COA process.[6] *See* Cert. Pet. at 16-18.

The opinion below looks unremarkable to Pabon only because he dismisses these conflicting circuit decisions out of hand and pretends that the (for him) problematic language in *Miller-El* does not exist. Perhaps his is the correct understanding of *Miller-El* – although it seems more likely that Justice Scalia accurately characterized the general rule in his concurring opinion, 537 U.S. at 348-50, and that the opinion of the Court focused primarily on correcting the erroneous admixture of two different statutory provisions by the court of appeals in that case.[7] In any event, only this Court can now untangle the question.

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[5] *See, e.g.,* 537 U.S. at 342: "[T]o the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter."

[6] *See, e.g.,* 537 U.S. at 341: "At this stage, however, we only ask whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's *Batson* claim was debatable among jurists of reason."

[7] "This was too demanding a standard.... It was incorrect for the Court of Appeals ... to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence."

In a final defense of the court below, however, Pabon also has a second point, antithetical to his first. He contends that the Third Circuit *did* employ deferential review in the COA process. Brief in Opp. at 30-31. The basis for this claim, apparently, is the fact that, in the course of addressing the *Bruton* confrontation clause claim on which Pabon sought a COA, the court below discussed a prior *Bruton* decision, *Vasquez v. Wilson*, 550 F.3d 270 (3rd Cir. 2008), which happened to arise from state court and was subject to AEDPA deference. App. 23-24, 28-29.

The context of that discussion, though, provides no support for the notion that the opinion below embraces deference as part of its COA analysis. The court began that analysis with a section labeled "Standard of Review," in which it emphatically rejected the Commonwealth's argument "that we should use the AEDPA standard ... in our COA determination." App. 18. The court then moved on to the substance of Pabon's *Bruton* claim, reviewing the development of *Bruton* case law from *Cruz v. New York*, 481 U.S. 186 (1987), through *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), to its own decision in *Vasquez*. App. 20-24. After applying that case law to the facts of Pabon's *Bruton* claim, App. 25-29, the court completed its COA analysis with this declaration: "[u]nder the *Miller-El* standard, Pabon's alleged *Bruton* violation need only be debatable.... [W]e conclude that reasonable jurists could debate whether Pabon has a meritorious claim." App. 29-30. There was no nod to deference in that conclusion.

It is clear that the Third Circuit meant what it said from the beginning: that it was incorrect "to import the

standard from § 2254(d)(2)" into the COA process. "This attempt to raise our standard of review at the COA stage is precisely what the Supreme Court rejected in *Miller-El*." App. 18-19 n.9. Perhaps that is so; perhaps not. The question deserves this Court's review.

Conclusion

For these reasons, petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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