

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

PROVIDED TO CHARLOTTE
CORRECTIONAL INSTITUTION
ON 5/8/25 FOR MAILING
BY Amc-OK

ADAM MURRAY COSTELLO,
PETITIONER

V.

CASE NUMBER: 2:25-CV-00074-JLB-NPM
L.T. CASE NO: 16-CF-000371

STATE OF FLORIDA,
RESPONDENT

**REPLY TO RESPONDENT'S LIMITED RESPONSE AND INCORPORATED
MOTION TO DISMISS AS TIME-BARRED**

COMES NOW, Petitioner, ADAM MURRAY COSTELLO, pro se and pursuant to RULES GOVERNING SECTION 2254 AND 2255 CASES Rule 5(e) respectfully submits this reply and requests that this Honorable Court deny the Respondent's submission. In support thereof the petitioner would state:

ARGUMENTS FOR REVIEW OF THE PETITION

A. Equitable Tolling

In Part A of the Respondent's limited response, Respondent misapplies *Holland*. In Holland v. Florida, 130 S. Ct. 2549, 2564-65 (2010), the Supreme Court held that ineffective performance by a state post-conviction attorney could be the basis of a finding of extraordinary circumstances sufficient to equitably toll AEDPA's one year statute of limitations under §2244(d). See also, *Holland*, 130 S. Ct. at 2560 ("Because the Eleventh Circuit Court of Appeals' application of the

equitable tolling doctrine to instances of professional misconduct conflicts with the approach taken by other Circuits, we granted the petition for certiorari.”). The Eleventh Circuit’s rigid approach regarding the application of the doctrine of equitable tolling was struck down by the Supreme Court as far too narrow because it did not go far enough to protect a prisoner’s access to his final appeal in the criminal justice system, the writ of habeas corpus. It is precisely because of rulings such as *Diaz*, cited by Respondent, that the Supreme Court granted certiorari. Therefore, Respondent is citing inapplicable and outdated law to sustain her argument.

Petitioner asserts that his diligence was far more than can reasonably be expected of someone in his circumstances. The due diligence requirement in *Holland* should be construed in light of a habeas petitioner’s confinement in prison and any special restrictions that incarceration might impose on such a person. The fact that petitioner was not successful in meeting his AEDPA deadline does not mean that he was not diligent. The pursuit of his rights in state court proceedings is completely separate from the pursuit of filing a writ of habeas corpus. Had post-conviction counsel raised the substantive claims delineated in the instant petition, there would be no need for the filing of a writ of habeas corpus, as these claims are more than reasonably likely to have obtained relief.

An extraordinary circumstance that stood in petitioner’s way that prevented him from timely filing a §2254 was his attorney, Shannon McFee. The plea

agreement itself that petitioner entered on the misadvice of McFee precluded him from the opportunity to file a timely §2254. Due to the terms of the plea agreement, McFee's representation was to continue through 30 days past the judgment entered of the April 8, 2019 plea agreement of James Daniel Sinclair. (*See Respondent's Exhibit 3 - #'s: 8, 10 (J-M), 11, 12, and 13; Petitioner's Reply Exhibit C*).

In January of 2019, McFee arrived at Walton C.I. where petitioner was housed, to represent him during testimony. (*See Petitioner's Reply Exhibits A & B*). Subsequent to this testimony, petitioner was transferred back to county jail to complete the terms of the plea agreement in April 2019, where McFee met with him to, once again, misadvise him regarding his scoresheet. Once McFee's representation of petitioner was complete, the limitations period under §2244(d) had already expired.

Shortly after petitioner's arrival at Walton C.I., he met four inmates with the same charge yet without having been assessed points for victim injury. Petitioner's family contacted McFee regarding this issue. However, McFee continued to assert that the scoresheet was completely accurate. It is reasonable to defer to the advice of a well-known attorney who was still actively representing petitioner to the amount of \$156,000.

In sworn testimony McFee stated at petitioner's post-conviction evidentiary hearing that points for causation were accurately assessed, even though he stated that

he understood that such an assessment could only occur after the Court made a finding of causation. (*See* **Petition Exhibits K-2 & K-3**). These contradictory statements under oath constitute perjury by contradictory statements in an official proceeding. Furthermore, the presiding Judge, the Honorable Margaret Steinbeck, stated later in the same evidentiary hearing that petitioner was never charged with causation of death (*See* **Petition Exhibit K-6**), nor was there any evidence before the court which would have allowed her to make the requisite finding. (*See* **Petition Exhibit K-7**) Three Judges (Honorable Silberman, Sleet, and Rothstein-Youakim) from the Second District Court of Appeals also concurred with this fact in a published opinion. (*See* **Petition Exhibit J-1**)

This testimony demonstrates the intentional deception of McFee, and validates the egregious misconduct during McFee's representation of petitioner. See *Downs v. McNeil*, 520 F. 3d 1311, 1321-22 (11th Cir. 2008) (Noting that serious attorney misconduct may constitute an extraordinary circumstance for purposes of equitable tolling). Petitioner did not become aware of the extreme constitutional violations that occurred until after this hearing when he learned that his charge did not include culpability of causation of death. McFee continued to assert, under oath, that the assessment of death points was appropriate where there was no evidence in the record to substantiate such a claim. His misconduct is particularly egregious where he knowingly failed to place exculpatory evidence from state expert witnesses on the

record to advocate for his client. (*See* **Petition – Ground Four**) He did so while purporting – at the evidentiary hearing - that his client did, in fact, cause a death, especially where the information failed to allege causation of death, as required by law. (*See* **Petition – Ground One – E**) Interestingly, he did so while 4 judges maintained that there existed no evidence regarding the causation of a death.

Here, equitable tolling is warranted and without the application of this equitable principle requested by Petitioner the resulting outcome would be unacceptably unjust. A perfect storm of circumstances prevented the AEDPA statute of limitations from being met, all outside of the control of the petitioner. The aforementioned facts constitute extraordinary circumstances that meet the required threshold for this Honorable Court to invoke its inherent equitable powers to review the merits of the petition.

B. Actual Innocence

Respondent argues that petitioner has not come forward with new, reliable evidence of his actual innocence. Respondent also argues that petitioner does not show factual innocence, but mere legal insufficiency. The opinion of the Honorable Judge Silberman which was concurred by two other judges, the testimony of McFee and Judge Steinbeck at the evidentiary hearing after conviction and sentence, constitutes new evidence, because the State was under the impression, (as shown in the hearing transcript) and petitioner was intentionally misled by McFee, that

petitioner was convicted and sentenced for the causation of a death. It was not until this testimony at the evidentiary hearing that petitioner - and then the State - actually knew that petitioner was not charged with causing a death nor was there any evidence to make the finding of causation of death. Considering this post-conviction testimony is from 5 judges, it should be considered new and reliable in the context of the claims presented.

Even accepting the false narrative of the State, petitioner **has** come forward with new evidence that was not presented on his behalf because of the misconduct of his attorney. It is scientifically **factual** and therefore also reliable. The evidence is exculpatory and demonstrates that he is actually innocent. The deliberate misconduct of McFee not placing exculpatory evidence on the record on behalf of petitioner should not be held against him, and this evidence should be considered “new” because of intentional deception.

In viewing the actual innocence claim in the light of the fact that petitioner was never actually charged with a crime, the language in the body of the fourth-amended information replaced two standard essential elements (#2 and #4) with language that exists in no felony in the State of Florida. Petitioner was convicted of language that was ruled unconstitutional by the Supreme Court of Florida, which was the purpose of our legislature amending the statute in 2015, prior to the alleged offense in the instant case. No new evidence is required when there was no crime

charged in the information, only non-criminal conduct. Therefore, contrary to the arguments of Respondent, newly discovered evidence is not required where a “miscarriage of justice” would result because of fundamental error, which is not limited to actual innocence. This exception allows for review of claims that have been procedurally defaulted in state court, even without demonstrating “cause and prejudice”. This applies where the constitutional violation was particularly egregious, as here. The precedent of the error demonstrated in the petition, Ground One – A, has already been set by this Honorable Court, the Middle District of Florida, in *Pringle*. Petitioner Costello was charged and convicted of language that “misstates the law” and “constitutes fundamental error”, as noted by Florida Courts. Additionally, the Middle District held that the error here is a “due process claim, a claim of constitutional dimension”. Therefore, this Honorable Court has the inherent equitable power to review the merits of the claims.

C. *Martinez v. Ryan*, 566 U.S. 1 (2012)

Respondent mischaracterizes the petition by attempting to persuade this court that because petitioner raised his substantive claims under *Martinez*, and because *Martinez* “has no application to the operation or tolling of the §2244(d) statute of limitations”, petitioner is not entitled to equitable tolling. Petitioner did not request equitable tolling under the authority of *Martinez*. Rather, petitioner requested in the preliminary statement of the petition that this Honorable Court invoke its discretion

to apply any equitable principle deemed appropriate, including equitable tolling, as federal habeas corpus is governed by equitable principles.

Martinez is not about equitable tolling as Respondent correctly states. It is solely about procedural default of raising substantive claims of ineffectiveness of trial counsel in state court caused by the ineffectiveness of post-conviction counsel. *Martinez* is an equitable rule guided by equitable principles where the same set of circumstances presented here arises. *Holland* provides a framework for when a habeas petition can be filed late, while *Martinez* explores how these equitable principles apply in specific contexts, where here, petitioner seeks to raise substantive claims of ineffective trial counsel. It is *Holland* that provides the framework for equitable tolling and *Martinez* that provides the framework for cause of the procedural default. These two equitable rules work in tandem. Where Respondent does not make the connection of these two, the basis of her argument fails.

D. Errors of Constitutional Dimension


Petitioner avers that the claims presented in his petition delineate errors of such serious constitutional dimension that all of the proceedings were infected to the extent that his conviction was wrongly entered in violation of the 5th, 6th, 8th, 14th, and 16th Amendments of the Constitution of the United States. Petitioner contends that a failure to review the claims presented would result in a miscarriage of justice. Due to the gravity of these errors, timeliness and procedural default really do not apply in

these circumstances, and review as “law and justice” require under §2243 is relevant, and the fundamental error exception applies. Petitioner would restate that this Court’s precedent in *Pringle* should allow review of his claims as it was already deemed an error of constitutional dimension and petitioner’s claim is the same issue, but of greater magnitude. After five opportunities, one original and four amended informations filed by the State, petitioner was never charged with a crime, and further, is convicted and sentenced for causation of a death for which he was never charged nor did he commit.

CONCLUSION

WHEREFORE, in light of the foregoing, Petitioner prays this Honorable Court deny Respondent’s submission, order the Respondent to address the merits of the claims presented in the petition, or grant any other relief this Court deems equitable, just and proper.

Respectfully Submitted,


Adam Murray Costello – B16188
Charlotte Correctional Institution
33123 Oil Well Road
Punta Gorda, FL. 33955

OATH AND CERTIFICATION

I certify and declare, under penalty of perjury, that the foregoing is true and correct and that this petition was delivered to prison officials for mailing on the 8 day of May, 2025.

Adam Costello
Adam Murray Costello DC#: B16188
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CERTIFICATE OF SERVICE

I certify that on 5-8-25 I mailed a true and correct copy of the foregoing Reply to Respondent's Response and Incorporated Motion to Dismiss to:

United States District Court
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