

No. 23-147

In the Supreme Court of the United States

LEANDER MANN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in declining to equitably toll petitioner's one-year limitations period for filing a motion for postconviction relief under 28 U.S.C. 2255.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2023 WL 3479402. The order of the district court (Pet. App. 10a-12a) is unreported. The report and recommendation of the magistrate judge (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2023 (Pet. App. 9a). The petition for a writ of certiorari was filed on August 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing cocaine with intent to

distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 24a. The district court sentenced him to 167 months of imprisonment, to be followed by three years of supervised release. *Id.* at 26a, 28a. The court of appeals affirmed. *Id.* at 1a-8a.

1. While petitioner was on parole after serving a prison sentence for multiple home invasions and weapons-related offenses, officers conducted a compliance check at his house as authorized by the consent-to-search provision of his parole order. Pet. App. 14a; Gov't C.A. Br. 4. The search revealed drugs, firearms, and ammunition, as well as a cell phone (found in petitioner's possession) that contained text messages relating to the sale of firearms and photographs of drugs, firearms, and large amounts of cash. Pet. App. 2a; Gov't C.A. Br. 4.

A federal grand jury in the Eastern District of Michigan returned an indictment charging petitioner with unlawfully possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); possessing marijuana and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(e) (2012). Indictment 1-4.

2. After consulting with his attorney, petitioner decided to accept a plea agreement under which he would plead guilty only to the count of possessing cocaine with intent to distribute. D. Ct. Doc. 76, at 1-13 (Oct. 2, 2018). Under the plea agreement, the parties agreed that petitioner would be sentenced to a prison term of 180 months, "[i]rrespective of the guideline range." *Id.* at 4. And in exchange for petitioner's guilty plea to the cocaine count, the government agreed to dismiss the remaining counts, which would have subjected petitioner

to a statutory-minimum sentence of 240 months. *Id.* at 4-5; see Gov't C.A. Br. 6; Pet. App. 15a.

Before sentencing, petitioner's counsel moved to withdraw on the ground that he had previously advised petitioner that petitioner was a career offender under the Sentencing Guidelines, see Sentencing Guidelines § 4B1.1 (2016), and thus faced a guidelines range of 151 to 188 months, whereas the initial presentence report calculated a Guidelines range of 92 to 115 months. Pet. App. 15a. The district court granted counsel's motion to withdraw. *Ibid.* Represented by new counsel, petitioner then moved to withdraw his guilty plea. *Ibid.* After an evidentiary hearing, the court denied petitioner's motion, finding that petitioner benefitted from the plea agreement because the government agreed to dismiss counts that would have mandated an even longer sentence upon conviction, and declining to credit petitioner's claim that his previous attorney's advice about his advisory guidelines range was the impetus for his guilty plea. *Id.* at 15a-16a; Gov't C.A. Br. 6-7.

The Probation Office issued a revised presentence report before sentencing, which calculated a Guidelines range of 168 to 210 months. Presentence Investigation Report ¶ 65 (revised Aug. 13, 2019). The district court adopted that calculation and sentenced petitioner to 167 months of imprisonment, which reflected the parties' agreed 180-month sentence and a 13-month credit for time served. Pet. App. 15a-16a & n.3. Petitioner did not file a timely notice of appeal, and the judgment thus became final on November 20, 2019, 14 days after it was entered. See *id.* at 17a.

3. In January or early February 2020, a severe illness—possibly COVID-19—began to circulate in petitioner's prison. Pet. App. 2a. Officials restricted

prisoners' movement in an effort to contain the outbreak, reducing petitioner's access to the prison law library. *Ibid.* Petitioner became ill in late February; he was bedridden for a week and experienced severe symptoms for one month (through the end of March). *Ibid.*

To combat rising infections, officials implemented a full lockdown in petitioner's prison from March through June or early July 2020. Pet. App. 2a. The lockdown resulted in petitioner's loss of law-library access. *Ibid.* And while the Eastern District of Michigan continued to accept filings during that time, petitioner has also asserted that he believed, incorrectly, that the courts closed for approximately 90 days. *Ibid.* Then, on July 15, 2020, petitioner filed a "compassionate release" motion, see 18 U.S.C. 3582(c)(1)(A)(i), and two weeks later, the court appointed counsel to assist petitioner with that motion. Pet. App. 2a.

Beginning in September 2020, petitioner was transferred to two different facilities, causing him lost access to his legal materials for a total of 24 days. Pet. App. 2a-3a. During those transfers, on September 16, petitioner submitted a petition for compassionate release to the warden. *Id.* at 3a. On October 27, 2020, petitioner filed an updated motion for compassionate release with the assistance of counsel, which the district court denied on December 11, 2020. *Ibid.*; D. Ct. Doc. 127.

4. In January 2021, petitioner filed a six-page, handwritten motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 3a; D. Ct. Doc. 134 (Jan. 13, 2021). The government moved to dismiss petitioner's motion on the ground that it was filed outside the one-year limitations period applicable under 28 U.S.C. 2255(f)(1). Pet. App. 3a. Petitioner acknowledged that he had filed his motion approximately 14 months after the judgment in his

case became final but argued that the limitations period should be equitably tolled based on, *inter alia*, his belief that the pandemic had caused the district court to shut down for 90 days, prison lockdowns, and his monthlong illness. *Id.* at 3a, 17a-18a; see Gov't C.A. Br. 10-11.

A magistrate judge recommended that the government's motion to dismiss be denied. Pet. App. 13a-23a. The magistrate judge noted that petitioner had not explained the actions he took to diligently pursue his rights, but observed that, notwithstanding the asserted COVID-19 impediments, he "still managed to file his § 2255 motion only two months late," and took the view that "while [petitioner] should have explicitly detailed how he diligently pursued his rights during the time period in question, the timing * * * at least arguably suggests [petitioner] acted reasonably diligently." *Id.* at 20a-21a. The magistrate judge also took the view that the effects of the COVID-19 pandemic, including petitioner's illness "in roughly the middle of his one-year timeframe to file his § 2255 motion," were "'extraordinary circumstances'" that prevented petitioner from filing a timely Section 2255. *Id.* at 21a (citation omitted).

The district court, however, declined to follow the magistrate judge's report and recommendation, and granted the government's motion to dismiss. Pet. App. 10a-12a. The court cited the magistrate judge's observation that petitioner "did not explicitly detail how he pursued his rights during the period in question." *Id.* at 11a. It also noted that, contrary to petitioner's belief about a 90-day shutdown, the court had never stopped accepting filings and had accepted two compassionate-release motions filed by petitioner within his one-year window for filing a Section 2255 motion. *Ibid.* The court

found that petitioner “chose to expend his time-relevant efforts on seeking compassionate release from th[e] [c]ourt, and ignored his timely opportunity to file” a Section 2255 motion. *Ibid.* It accordingly declined to equitably toll the period applicable to petitioner’s filing of a Section 2255 motion. *Id.* at 11a-12a.

5. After granting a certificate of appealability, the court of appeals unanimously affirmed in an unpublished decision. Pet. App. 1a-8a.

The court of appeals explained that, although the one-year deadline for filing a Section 2255 motion “can be tolled, tolling is the exception not the rule,” and requires that the prisoner “show that (1) an extraordinary circumstance kept him from filing on time, and (2) he diligently pursued his rights.” Pet. App. 3a-4a (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Applying that standard to the facts here, the court found that petitioner was not entitled to equitable tolling because he had shown “neither * * * extraordinary circumstances that kept him from filing nor that he diligently pursued his rights.” *Id.* at 4a.

The court of appeals first focused on the requirement that a movant show that the assertedly extraordinary circumstances on which he relies “actually caused him to miss the deadline.” Pet. App. 4a; see *id.* at 5a (“The extraordinary circumstances must have ‘prevented timely filing.’”) (quoting *Holland*, 560 U.S. at 649). It found that petitioner could not make that necessary showing. *Id.* at 5a-6a. The court observed that, even crediting petitioner’s allegations of a one-month illness and 24 days of preparation time lost to prison transfers, those allegations “only account for two months,” and petitioner “d[id] not explain why ten months was insufficient to permit him to meet the filing deadline.” *Id.* at

5a. The court further observed that “[f]actoring in the mid-January to February library restrictions and the March to June lockdown” would not “alter the analysis,” because “[s]ubtracting those periods still left [petitioner] with five to six months entirely unimpeded,” and petitioner had likewise failed to explain why that period “was insufficient.” *Ibid.* The court additionally observed that, except for his illness, none of the claimed impediments on which petitioner relied in arguing for tolling had “actually stopped [petitioner] from litigating.” *Id.* at 5a-6a.

The court of appeals also found that petitioner had not satisfied the requirement to show that he diligently pursued his rights under Section 2255. Pet. App. 6a-8a. The court observed that, “aside from filing grievances to challenge his lack of access to legal materials from September 8 to October 2, 2020, [petitioner] d[id] not articulate or show that he pursued his habeas petition at all.” *Id.* at 6a-7a. And the court explained that petitioner’s efforts to obtain compassionate release during the same period did not suffice to establish the necessary diligence, because “the inquiry asks whether the prisoner diligently pursued these rights in particular, not whether [he] was diligent in general.” *Id.* at 7a.

Finally, the court of appeals found that petitioner was not entitled to an evidentiary hearing on his motion because, “even if true,” his allegations did not present “a meritorious equitable tolling claim.” Pet. App. 8a.

ARGUMENT

Petitioner renews his contention (Pet. 22-28) that he was entitled to equitable tolling of the one-year limitations period applicable to his Section 2255 motion. The court of appeals correctly rejected that contention, and its fact-bound, non-precedential decision does not conflict

with the decision of another court of appeals. This Court previously denied a petition for a writ of certiorari presenting a similar question, see *Smith v. Davis*, 141 S. Ct. 878 (2020) (No. 20-5366), and should follow the same course here.

1. Congress has adopted a strict one-year statute of limitations for motions for postconviction relief under Section 2255. See 28 U.S.C. 2255(f). In *Holland v. Florida*, 560 U.S. 631 (2010), this Court held that courts may equitably toll such statutory deadlines on postconviction relief only if a tardy filer can show both “that he has been pursuing his rights diligently, and * * * that some extraordinary circumstance stood in his way and prevented timely filing.” *Id.* at 649 (citation and internal quotation marks omitted).¹ The court of appeals correctly determined that petitioner failed to make either—let alone both—of those showings. Pet. App. 4a-8a.

First, petitioner did not establish that the asserted extraordinary circumstances—the illness he suffered from late February through March 2020 and the 24 days lost during two prison transfers beginning in September 2020—“prevented timely filing” of his Section 2255 motion by November 20, 2020. *Holland*, 560 U.S. at 649. As the court of appeals observed, “[e]ven crediting th[o]se allegations, they only account for two months,” and petitioner did not explain “why ten months was insufficient to permit him to meet the filing deadline.” Pet. App. 5a. Nor would “[f]actoring in the mid-January

¹ Although *Holland* involved the statute of limitations applicable to federal habeas petitions filed by state prisoners under 28 U.S.C. 2254, courts of appeals have applied it to cases involving motions filed by federal prisoners under Section 2255. See, e.g., Pet. App. 4a; *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013); *United States v. McDade*, 699 F.3d 499, 504 (D.C. Cir. 2012).

and February library restrictions and the March to June lockdown * * * alter the analysis”; they still left petitioner “with five to six months entirely unimpeded,” and he did not explain why “that period was insufficient” to prepare his six-page motion. *Ibid.*; see D. Ct. Doc. 134.

Second, petitioner “fail[ed] to show that he diligently pursued his rights.” Pet. App. 6a; see *Holland*, 560 U.S. at 653 (explaining that equitable tolling requires “reasonable diligence”). In particular, while petitioner identified several periods of the year in which his access to legal research materials was limited, see D. Ct. Doc. 154 (Aug. 13, 2021), he offered no evidence that he worked on the preparation of his Section 2255 motion at any point during the remainder of the year while he had undisputed access to legal research materials. See Pet. App. 6a-7a.

Furthermore, petitioner’s filing of multiple submissions regarding compassionate release during the limitations period indicates that he was not prevented from pursuing relief in the courts, but prioritized the possibility of compassionate release, which has no fixed due date, over challenging his conviction through a Section 2255 motion, which does. Compare 18 U.S.C. 3582(c)(1)(A)(i), with 28 U.S.C. 2255(f)(1). Petitioner was free to prioritize in that way, but having done so, he is not entitled to an equitable override of the statutory deadline that Congress established for Section 2255 motions. As the court of appeals observed, “Section 2255(f)’s deadline would matter little if a petitioner could pursue other forms [of] relief until each was exhausted before turning to his habeas claim.” Pet. App. 7a.

2. Petitioner’s contrary arguments (Pet. 22-28) lack merit.

a. Petitioner contends (Pet. 22) that “[t]raditional principles of equitable tolling” required the court of appeals to apply a “stop-clock approach” under which “the limitations clock” does not run “during periods where a claimant is prevented from pursuing his rights.” On that understanding, courts would automatically toll statutory deadlines whenever extraordinary circumstances prevent a plaintiff from “work[ing] on his filing” at any point during the limitations period, and the only question would be whether the plaintiff’s eventual submission is timely under the new, judicially extended deadline. Pet. 17.

This Court’s decision in *Holland*, however, makes clear that it is not enough for a prisoner to show that “extraordinary circumstances stood in his way” for part of the limitations period; before a court will toll a statutory deadline, the prisoner must make the additional showing that those extraordinary circumstances actually “prevented timely filing.” 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)). And “[t]he only way for a court to evaluate whether an extraordinary circumstance caused the untimely filing is to examine and assess the facts of the case to determine whether a petitioner acting with reasonable diligence could have filed his claim, despite the extraordinary circumstance, before the limitations period expired.” *Smith v. Davis*, 953 F.3d 582, 595 (9th Cir.) (en banc), cert. denied, 141 S. Ct. 878 (2020). *Holland* thus forecloses petitioner’s automatic stop-the-clock approach, which would leave no room for a court to ask whether a claimant could have met the statutory

deadline notwithstanding the presence of extraordinary circumstances.

This Court also implicitly rejected the stop-the-clock approach that petitioner proposes in *Pace v. DiGuglielmo*, *supra*, from which *Holland*'s tolling standard was derived. See *Holland*, 560 U.S. at 649. In *Pace*, the Court considered equitable tolling in connection with a state prisoner's late-filed habeas petition under 28 U.S.C. 2254. See 544 U.S. at 410, 418-419. The prisoner contended that the statute of limitations should be tolled for the period during which his state-court application for post-conviction relief was pending, because circuit precedent and state law had "required him to exhaust his state remedies" before seeking federal habeas review, even as "his federal time limit slipped away." *Id.* at 418. This Court assumed, for purposes of deciding the case, that the prisoner could satisfy the "extraordinary circumstance test" during the period when his state-court application was pending. *Ibid.* But the Court found that even "accept[ing] [the prisoner's] theory" on that point, the prisoner had failed to establish "the requisite diligence" to justify equitable tolling because he had "s[a]t on his rights" for "months *after* his [state] proceedings became final before deciding to seek relief in federal court." *Id.* at 418-419. "Under long-established principles," the Court held, that "lack of diligence precludes equity's operation." *Id.* at 419.

As the Ninth Circuit has observed, if a stop-the-clock rule had governed the analysis, "the outcome in *Pace* would have been reversed, and the federal petition would have been timely filed, as it was indeed filed on the 363rd 'untolled' day of the limitations period, under the stop-clock approach." *Smith*, 953 F.3d at 594 & n.4; see *Pace*, 544 U.S. at 410-411. But rather than treat the

periods in which assertedly extraordinary circumstances were present as automatically tolled, as petitioner urges here (Pet. 17-18, 22-28), this Court held that the prisoner's lack of diligence meant that he "was not entitled to * * * equitable tolling for *any* of that period." *Pace*, 544 U.S. at 419 (emphasis added).

b. None of the decisions on which petitioner relies (Pet. 22-25) supports his contrary approach. As a threshold matter, many of those decisions did not directly involve the application of equitable tolling. See *Artis v. District of Columbia*, 583 U.S. 71, 74-75 (2018) (addressing the scope of the statutory tolling provision in 28 U.S.C. 1367); *CTS Corp. v. Waldburger*, 573 U.S. 1, 3 (2014) (addressing whether discovery rule in a federal tort statute, 42 U.S.C. 9658, pre-empts state statutes of repose); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014) (holding that "equitable tolling is not available" under the treaty at issue); *United States v. Ibarra*, 502 U.S. 1, 2-4 (1991) (per curiam) (addressing when the 30-day period for filing a government appeal began to run).

To the extent that those decisions refer to the tolling of a limitations period as "suspend[ing]" or "stopping" the relevant clock, Pet. 23 (citations omitted), they are simply describing how equitable tolling operates once a court has determined that the requirements for tolling are met, not establishing a test for when tolling is warranted in the first place (the question relevant here). And as to that latter issue, the decisions reinforce the court of appeals' understanding that a claimant must demonstrate that extraordinary circumstances actually prevented timely filing notwithstanding the exercise of reasonable diligence. See, e.g., *Lozano*, 572 U.S. at 10 ("[E]quitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his

rights diligently but some extraordinary circumstance prevents him from bringing a timely action.”) (citing *Pace*, 544 U.S. at 418); *CTS Corp.*, 573 U.S. at 10 (similar).

Petitioner’s reliance (Pet. 24-25) on this Court’s decision in *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965), is likewise misplaced. In *Burnett*, a plaintiff refiled a personal injury claim in federal court after a state court dismissed his originally filed claim for improper venue. *Id.* at 424-425. Although the state-court action was timely filed, the three-year limitations period had expired while the state suit remained pending, and the federal suit would therefore have been untimely unless the Court tolled the limitations period. *Id.* at 425. Finding that the plaintiff had acted diligently in timely filing his claim in state court and re-filing in federal court “only eight days after the [state] court dismissed his action,” this Court tolled the statute of limitations and allowed the action to proceed. *Id.* at 429, 434-436.

Petitioner emphasizes (Pet. 24) that the Court “operationalize[d]” its decision that equitable tolling was appropriate by suspending the limitations period for the full time that the case was pending in state court. See *Burnett*, 380 U.S. at 433-435. But the Court did so only after finding that the plaintiff “did not sleep on his rights but” rather was prevented from asserting them when the defendant railroad, contrary to railroads’ typical practices, declined to waive venue—but waited until after the federal statute of limitations had run to do so. *Id.* at 429; see *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990) (citing *Burnett* as a case “where the claimant * * * actively pursued his judicial remedies”). *Burnett* is thus fully consistent with the

court of appeals' recognition that in order to obtain any tolling at all, a claimant must first show that "he diligently pursued his rights" and that "extraordinary circumstances * * * actually caused him to miss the deadline." Pet. App. 4a (citing, *inter alia*, *Holland*, 560 U.S. at 649).

c. Petitioner's contention that "[o]nly the stop-clock approach" is consistent with Congress's intent in establishing a one-year limitations period for filing a Section 2255 motion, Pet. 25 (emphasis omitted), lacks merit. Through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress sought "to eliminate delays in the federal habeas review process, * * * without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles." *Holland*, 560 U.S. at 648 (citation omitted). Requiring an AEDPA petitioner to establish, as a prerequisite to equitable tolling, that an extraordinary circumstance actually prevented him from timely filing his application gives effect to statutory purpose while respecting this Court's precedents and "the flexible and fact-specific nature of equity." *Smith*, 953 F.3d at 600; see, *e.g.*, *Irwin*, 498 U.S. at 96 (explaining that the extraordinary remedy of equitable tolling is applied "only sparingly"). Automatically suspending the limitations clock upon any showing of an extraordinary circumstance, even though the exercise of reasonable diligence would have permitted a timely filing, does not.

3. Petitioner errs in contending (Pet. 15-20) that the decision below conflicts with decisions of the Second and Eleventh Circuits.

a. In *Hizbullahankhamon v. Walker*, 255 F.3d 65 (2001), cert. denied, 536 U.S. 925 (2002), the Second Circuit rejected the stop-the-clock approach to tolling that petitioner urges here. There, the habeas petitioner “was in solitary confinement,” without “access to his legal files and the law library,” when the statute of limitations began to run, and was not released until “22 days into the one-year limitations period.” *Id.* at 76. The petitioner “urge[d] th[e] [c]ourt equitably to toll the limitations period during this 22-day period,” but the court declined to do so. *Ibid.* In an opinion by then-Judge Sotomayor, the court explained that even assuming that the petitioner’s solitary confinement “constituted an ‘extraordinary circumstance’ warranting equitable tolling,” the petitioner could not “show that this extraordinary circumstance *prevented* him from filing a timely habeas petition” because “[i]t cannot plausibly be said that, but for those 22 days at the very beginning of the one-year limitations period during which petitioner was allegedly denied access to legal materials, he would have been able to file his petition within the one-year limitations period.” *Ibid.*

In support, the Second Circuit pointed to decisions of the Fifth and Tenth Circuits declining to grant equitable tolling in cases where, even accounting for the assertedly extraordinary circumstances, the claimants still had several months in which to prepare and file their federal habeas petitions before the statutory deadline. *Hizbullahankhamon*, 255 F.3d at 76 (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000), cert. denied, 532 U.S. 963 (2001); and *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000)). The Second Circuit’s reasoning, and the reasoning of the Fifth and Tenth

Circuit decisions on which it relied, accords with the reasoning in the decision below. See Pet. App. 5a.

Petitioner is incorrect in his assertion (Pet. 16) that the Second Circuit took a different approach a decade later in *Harper v. Ercole*, 648 F.3d 132 (2011).² There, the state habeas petitioner was hospitalized beginning 78 days before the limitations period was set to expire and remained hospitalized past the one-year deadline. See *id.* at 134, 138. It was thus clear that the “extraordinary circumstances * * * caused him to miss the original filing deadline,” since “no filing time remained when the extraordinary circumstances ended.” *Id.* at 137-138.

In holding that equitable tolling was appropriate on those particular facts, *Harper* emphasized—citing *Hizbullahankhamon* and other decisions—that no such tolling would be warranted in cases “where the identified extraordinary circumstances arose and concluded early within the limitations period,” at a point when “a diligent petitioner would likely” be able “to file within the time remaining to him.” 648 F.3d at 137 (citing *Hizbullahankhamon*, *supra*; *Allen v. Lewis*, 255 F.3d 798, 801 (9th Cir. 2001) (per curiam); and *Fisher v. Johnson*, 174 F.3d 710, 715-716 (5th Cir. 1999), cert. denied, 531 U.S. 1164 (2001)). As the Sixth Circuit found, this case falls into that latter category, see Pet. App. 4a-6a, such that the denial of equitable tolling is consistent with the distinction drawn by the Second Circuit in *Harper*.

² Even if petitioner were correct, any intra-circuit conflict between *Harper* and the earlier decision in *Hizbullahankhamon* would provide no basis for this Court’s review. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

b. For similar reasons, the decision below does not conflict with the Eleventh Circuit’s decision in *Knight v. Schofield*, 292 F.3d 709 (2002) (per curiam), which in any event predated this Court’s decision in *Holland*. As in *Harper*, the extraordinary circumstances in *Knight* remained in effect until after the limitations period had expired, preventing the state habeas petitioner from complying with the statutory deadline, notwithstanding his “demonstrated diligence” in attending to his case. *Id.* at 711; see *id.* at 710-711. The court therefore had no occasion to address the scenario presented here, in which the assertedly extraordinary circumstance ended well before the limitations period had expired. See *id.* at 711 (noting that “[e]ach case turns on its own facts”).

When the Eleventh Circuit did later address that scenario in *San Martin v. McNeil*, 633 F.3d 1257, cert. denied, 565 U.S. 843 (2011), which was decided after *Holland*, it rejected the automatic stop-the-clock approach that petitioner urges in favor of an approach consistent with the one applied by the Sixth Circuit below. See *id.* at 1270 (affirming the denial of equitable tolling where habeas petitioner did not explain “why he did not have ample time, even after the two-week delay [caused by allegedly extraordinary circumstances], in which he could have presented a timely federal petition”); Pet. App. 5a (“Since [petitioner] does not explain why ten months was insufficient to permit him to meet the filing deadline, he fails to meet his burden.”).

c. Petitioner’s suggestion (Pet. 21) that the decision below applied an “impossibility rule” that conflicts with the approach that the Ninth Circuit applied in the course of finding tolling unwarranted in *Smith v. Davis*, *supra*, is likewise mistaken. In context, the court of appeals’ references in this case to extraordinary

circumstances that “made compliance impossible” simply refer to a petitioner who was unable to file even though he “took reasonable steps to develop and file his habeas petition during the limitations period.” Pet. App. 5a-6a. The principal authority on which the court relied for that statement was *Holland* itself.

The Sixth Circuit’s evident understanding of *Holland* and other precedent fully accords with the approach applied by the Ninth Circuit, under which “it is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy.” *Smith*, 953 F.3d at 600. And even if some difference existed between the Sixth Circuit’s formulation of the standard and the standard applied in *Smith*, this case would be a poor vehicle in which to address that difference because petitioner—who had “five to six months entirely unimpeded” in which to prepare his Section 2255 motion, Pet. App. 5a—would not be entitled to tolling under *Smith*’s articulation of the standard, either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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