

IN THE SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON,)	
)	
Appellant / Petitioner,)	
)	
v.)	Nos. 16A769, 16-7730
)	Capital Case
)	Execution Scheduled
DONALD P. ROPER, WARDEN)	January 31, 2017, 6 p.m.
POTOSI CORRECTIONAL CENTER)	(Central Standard Time)
)	
Appellee/Respondent.)	

**RESPONSE IN OPPOSITION TO MOTION
FOR STAY OF EXECUTION AND BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

Petitioner Mark Christeson, a triple murderer scheduled to be executed on January 31, 2017, at 6:00 p.m. Central time, moves for a stay of execution and petitions this Court for writ of certiorari. Christeson contends that a decade-old final judgment dismissing his federal habeas petition as untimely should be reopened, and that he is entitled to equitable tolling of the one-year deadline for filing habeas petitions. But the record in this case conclusively demonstrates that Christeson’s federal habeas petition was untimely for the simple reason that his attorneys miscalculated the filing deadline. As this Court has repeatedly held, “[a]ttorney miscalculation is simply not sufficient to

warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.” *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2010). “[A] garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” *Holland v. Florida*, 560 U.S. at 631, 651–52 (2010). “[A]n attorney’s negligence, for example, miscalculating a filing deadline, does not provide a basis for tolling a statutory time limit.” *Maples v. Thomas*, 132 S.Ct. 912, 922–23 (2012). Christeson does not demonstrate any likelihood of prevailing on the merits of his claim that he is entitled to equitable tolling, and he identifies no issue worthy of this Court’s discretionary review. Both his motion for stay of execution and his petition for writ of certiorari should be promptly denied.

I. This Court should analyze the stay application under the standard set forth in *Hill v. McDonough*.

In *Hill v. McDonough*, 547 U.S. 573 (2006), this Court held that a pending lawsuit does not entitle a condemned inmate to a stay of execution as a matter of course, and that the State and crime victims have an important interest in the timely execution of a death sentence. *Id.* at 583–84. This Court held that an inmate seeking a stay of

execution must meet *all* the elements of a stay, including showing a significant possibility of success on the merits. *Id.* at 584. This Court cited *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), for the proposition that a “preliminary injunction [is] not granted unless the movant, by a clear showing, carries the burden of persuasion.” *Hill*, 547 U.S. at 584.

This Court has held that “a stay of execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course.” *Hill*, 547 U.S. at 583–84; *Nelson v. Campbell*, 541 U.S. 649 (2004). This is so because “both the State and crime victims have an important interest in the timely enforcement of a sentence.” *Hill*, 547 U.S. at 584. This Court also explained that an inmate *must carry his burden on each of the four elements*, and that there is “a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Nelson*, 541 U.S. at 650.

II. The facts of the case do not support a stay.

On February 1, 1998, Christeson and an accomplice committed a triple murder in which they killed a young mother, her nine-year-old

son, and her twelve-year-old daughter. App. 27a. During a home invasion, the pair bound the children, and Christeson raped the mother at gunpoint on her daughter's bed. *Id.* at 27–28a. The accomplice then bound the mother's hands with rope. *Id.* They struck both mother and son in the head with a blunt object. *Id.*

After he was recognized by one of the children, Christeson told his accomplice, “we got to get rid of them.” *Id.* They loaded the mother, her children, and property looted from her home into a Ford Bronco. *Id.* They drove to a pond at the edge of a wooded area and forced the mother and children to the edge of the pond. *Id.* Christeson kicked the mother to the ground, stood on her midsection, and slit her throat. *Id.* As she lay on the bank bleeding, the mother told her children that she loved them. *Id.* Christeson then cut the son's throat twice and held him under water until he drowned. *Id.* The accomplice held the daughter's feet while Christeson pressed down on her throat until she suffocated. *Id.* While the mother was still alive, Christeson and his accomplice threw her into the pond on top of her dead children. *Id.* at 29a.

Semen recovered from the mother's body and from the daughter's bedsheets contained Christeson's DNA, and forensic testing showed

that a shotgun later pawned by Christeson had been discharged at the crime scene. *Id.*; see also *State v. Christeson*, 50 S.W.3d 251, 257-59 (Mo. banc 2001). A jury convicted Christeson of three counts of capital murder in 1999, and returned verdicts of death on all three counts. App. 29a. The Missouri Supreme Court affirmed the convictions and sentences on direct review in 2001, and the United States Supreme Court denied his petition for writ of certiorari on direct appeal on October 15, 2001. *Id.* at 30a.

Thirty-one days later, on November 15, 2001, Christeson filed a motion for post-conviction review in Missouri state court. *Id.* This petition was denied, and the Missouri Supreme Court affirmed the denial of post-conviction relief in a final ruling on May 11, 2004. *Id.* at 31a. Christeson had another 90 days, until August 8, 2004, in which to petition the United States Supreme Court to review the Missouri Supreme Court's denial of his request for post-conviction relief. *Id.* Christeson did not file such a petition. *Id.*

On July 2, 2004, the United States District Court for the Western District of Missouri appointed two attorneys, Phil Horwitz and Eric Butts (“original counsel”), to represent Christeson in federal habeas

corpus litigation. *Id.* at 30a. On May 27, 2005, original counsel met with Christeson in prison. *Id.* at 41a. Original counsel met with Christeson again on August 4, 2005. *Id.* On August 5, 2005, ten weeks after their first meeting with Christeson, original counsel filed a federal habeas petition on his behalf. *Id.* The petition was 51 pages long and alleged 16 grounds for relief, and it was accompanied by a 14-page request for evidentiary hearing. *Id.* In addition, original counsel subsequently filed an 82-page traverse in support of the petition, a seven-page brief explaining why they viewed the filing as timely, a five-page motion to alter or amend judgment, and a nine-page motion for a certificate of appealability, all in support of his federal habeas petition *Id.*

As noted above, original counsel filed Christeson's federal habeas petition on August 5, 2005—362 days after the expiration of the time for him to seek discretionary review of the denial of state post-conviction relief. In calculating the time to file the federal petition under the one-year statute of limitations, original counsel thus treated two time periods as tolled: (1) the 31-day period between the conclusion of direct review and the filing of Christeson's application for state post-conviction relief; and (2) the 90-day period in which Christeson could have sought,

but did not seek, review from the United States Supreme Court of the denial of state post-conviction relief. *Id.* at 31a; *see also* Doc. 45 in *Christeson v. Roper*, No. 04-CV-08004-DW (W.D. Mo.).

When original counsel calculated the filing deadline, colorable arguments existed for their conclusions that both the 31-day period and the 90-day period were tolled. First, as to the 31-day period, Missouri law authorizes the filing of state post-conviction review application within 90 days of the expiration of direct review. *See* Mo. Sup. Ct. R. 29.15(b). On original counsel's view, this rule meant that state post-conviction review proceedings had been "pending" during the 31-day period prior to the filing of Christeson's state application, and were thus tolled under *Carey v. Saffold*, 536 U.S. 214 (2002). App. 31a. As it turned out, this conclusion was erroneous as a matter of law. *See Christeson v. Roper*, 135 S. Ct. 891, 892 (2015).

Second, as to the 90-day period during which Christeson could have sought review from the U.S. Supreme Court of the denial of his application for state post-conviction review, "both parties agreed that the law was unsettled [in 2005] on whether these 90 days should be tolled". App. 31a; *see also Abela v. Martin*, 348 F.3d 164, 168-70 (6th

Cir. 2003) (en banc) (holding that the time for filing a petition for writ of certiorari to review the state courts' denial of post-conviction relief is tolled, and describing a then-existing Circuit split on this question). In 2007, however, the Supreme Court resolved the Circuit split on this issue against Christeson, overruling the Sixth Circuit and holding that such periods are not tolled. *Lawrence v. Florida*, 549 U.S. 327, 329 (2007).

Thus, original counsel miscalculated the due date of the petition and filed the original petition 117 days too late. App. 32a. These 117 days included the 31 days between the completion of direct review and the filing of a state post-conviction relief motion, and most of the 90-day period after the denial of rehearing in the post-conviction appeal when the time for filing a certiorari petition had not yet expired. *Id.* Notably, when original counsel met with Christeson on May 27, 2005, the time for filing his federal petition had already run—but this meeting occurred well before original counsel *thought* the petition was due, based on their misunderstanding of the law. By the time they met with Christeson in May 2005, moreover, original counsel had already spent

numerous hours over many months researching and studying his case. *See App. 15a; see also infra.*

On January 31, 2007, the district court dismissed Christeson's federal habeas petition as untimely under the one-year statute of limitations, holding that the 31-day period between the completion of direct review and the filing of a post-conviction relief motion was not tolled. *Id.* The district court found it unnecessary to address whether the separate 90-day period was tolled. *Id.* Original counsel filed a timely Rule 59(e) motion and a request for a certificate of appealability, challenging the district court's ruling on timeliness. *Id.* The district court denied the motion on March 16, 2007. *Id.* Original counsel then filed a motion for a certificate of appealability in this Court, again challenging the district court's ruling on timeliness, but this motion was denied on June 29, 2007. *Id.* at 33a. The case lay dormant for the next seven years, during which Christeson took no action to pursue his federal habeas claims. *Id.*

On April 7, 2014, the Missouri Supreme Court ordered Christeson to show cause why the court should not set an execution date. *Id.* Original counsel then contacted attorneys Jennifer Merrigan and

Joseph Perkovich (“current counsel”) and asked them to review the case and offer an opinion on equitable tolling. *Id.* On May 23, 2014, current counsel filed a motion for substitution of counsel in the district court, alleging that original counsel had a conflict of interest, asking for the appointment of new counsel in place of original counsel, asking for a stay of execution, and asking that current counsel be given 90 days to file a motion to reopen the case. *Id.*

On October 22, 2014, the district court denied the motion to substitute counsel. *Id.* at 34a. The Eighth Circuit summarily affirmed on October 24, 2014. *Id.* This Court then granted a writ of certiorari and stayed Christeson’s execution. *Id.*

This Court summarily reversed the denial of substitution of counsel, holding that Christeson was entitled to conflict-free counsel to litigate his equitable tolling claim. *Christeson v. Roper*, 135 S. Ct. 891 (2015). This Court remanded the case for further proceedings, but noted that Christeson still faced “a host of procedural obstacles” to obtaining relief. *Id.* at 895. Among other things, this Court noted that, to prevail on a Rule 60(b)(6) motion, Christeson would have to establish both that the motion was timely “and, more significant here, that extraordinary

circumstances justify reopening a final judgment.” *Id.* at 895-96. The Court held that Christeson would also have to show an entitlement to equitable tolling. *Id.*

On remand, the district court terminated original counsel and appointed current counsel to represent Christeson. App. 35a. On March 31, 2015, current counsel asked for \$161,000 to represent Christeson in the Rule 60(b)(6) litigation. *Id.* at 46a. The district court found the request excessive, and approved \$10,000. *Id.* Current counsel then filed a lengthy Rule 60(b)(6) motion supported by numerous affidavits, seeking relief from the final judgment dismissing his federal habeas petition as untimely, on grounds of equitable tolling. *Id.* The Rule 60(b)(6) motion also objected to the district court’s partial denial of current counsel’s request for funding, arguing that inadequate funding constituted a constructive denial of counsel. *Id.*

On March 8, 2016, the district court denied Christeson’s motion to reopen the final judgment under Rule 60(b)(6), in the order currently under review. *Id.* at 27a–48a. Regarding current counsel’s complaints about inadequate funding, the district found that current counsel had not filed a supplemental motion with additional information supporting

a higher payment and had not filed an interlocutory appeal from the partial denial of funding. *Id.* at 46a. Instead, current counsel had impermissibly waited four months and then argued in the Rule 60(b)(6) motion itself that the level of funding caused a constructive denial of counsel. *Id.*

The district court rejected Christeson's argument that the partial funding award constituted constructive denial of counsel for three reasons. First, the district court noted, no amount of money could change the fact that original counsel had filed the federal habeas petition too late based on a miscalculation of the due date of the petition, and those circumstances do not justify equitable tolling. *Id.* Second, there was clearly no prejudice from the partial denial of funding, since current counsel filed a 77-page motion and a 49-page reply that articulated and applied the applicable law to the facts. *Id.* at 46a–47a. Third, the district court found it inexcusable that current counsel waited four months to present their claim of constructive denial of counsel claim in the motion itself. *Id.* at 47a.

On the merits of the Rule 60(b)(6) motion, the district court found that the late filing of the habeas petition was caused by original

counsel's miscalculation of the time when the petition was due. *Id.* at 31a–41a. The district court held that original counsel had mistakenly concluded that the 31-day period before the filing of the post-conviction motion and the 90-day period after the post-conviction appeal were tolled, and that counsel made these miscalculations “based on colorable arguments, and on then-existing case law.” *Id.* at 40a. The district court found that original counsel's explanation for their calculation of the filing deadline was directly supported by the record. *Id.* at 42a. The district court also held that, even if the calculation had not been supported by colorable arguments, the miscalculation still would not be an extraordinary circumstance that would justify equitable tolling. *Id.* at 40a. The district court rejected the argument that original counsel should have provided incomplete or false information to the court in order to support a theory other than miscalculation as an explanation for the late filing. *Id.* at 42a.

The district court also found that there was no abandonment in this case that would break original counsel's agency relationship with Christeson, and therefore Christeson was bound by counsel's miscalculation. *Id.* at 41a–42a. The court found that original counsel

met with Christeson ten weeks before they believed the petition was due, and met with him again on the day before they filed. *Id.* at 41a. The district court found that original counsel filed numerous pleadings in the habeas case, including a 16-claim petition, a request for an evidentiary hearing, an 82-page traverse, a brief on timeliness, a motion to alter or amend judgment, and a motion for a certificate of appealability. *Id.*

The district court held that the seven-year delay in replacing original counsel did not affect its conclusion that the late filing was due to an attorney miscalculation, which provides no support for equitable tolling. *Id.* at 43a. And the district court found that, under the facts of this case, an equitable tolling argument would have failed no matter who made it. *Id.*

In an alternative holding, the district court found that Christeson's equitable tolling argument also failed based on lack of diligence. *Id.* at 44a–46a. The district court held that the seven-year delay between the denial of the petition as untimely, and the motion to substitute original counsel to challenge that ruling, was unreasonable. *Id.* Based on substantial evidence in the record, the district court found

that Christeson was not prevented from exercising diligence by any putative mental incapacity. *Id.* at 44a. During this period, the district court noted, Christeson was able to carry out normal everyday functions, and he was able to respond to prison conduct violation allegations, identify a witness, request an attorney for a grievance, and provide his own version of events. *Id.* The district court also noted that, about five years after the end of the habeas litigation, Christeson began filing bar complaints against his original counsel. *Id.* at 44a–45a. But in the six-year period from 2008 through 2013, Christeson did not file any motion with the district court or send any correspondence to the district court. *Id.* at 44a. The district court found this delay both showed lack of diligence required for equitable tolling, and showed unreasonable delay under Rule 60(c)(1). *Id.* at 46a.

On January 18, 2017, the Eighth Circuit remanded this case to the district court for a prompt and limited evidentiary hearing on whether Christeson’s original counsel, Mr. Horwitz and Mr. Butts, abandoned Christeson. *Christeson v. Roper*, 2017 WL 190727 at *2 (8th Cir. 2017); App. 18a, 19a. The order of remand specifically referenced

findings on original counsel's pre-filing activity and the credibility of their explanation for the late filing of the petition. *Id.*

The district court held an evidentiary hearing on January 20, 2017. App. 102a-281a. Mr. Horwitz and Mr. Butts gave testimony on the actions they took in the case, including actions before they filed the habeas petition. *Id.* at 19-22, 95-100, 120a-123a, 196a-201a. Both testified that early in the case they calculated the due date of the petition based on their reading of the case law. *Id.* at 123a-126a, 200a-204a. Both testified to conducting extensive study of a record of thousands of pages as soon as they received it, and to starting work from other materials even before the record arrived. *Id.* at 120a-133a, 198a-207a. Despite reviewing thousands of pages of documents and doing extensive research, neither attorney charged the court for anything and never had any intention of doing so. *Id.* at 160a, 196a-198a. Both attorneys had extensive experience in capital habeas litigation and had successfully challenged death sentences in more than one earlier habeas case. *Id.* at 113a-114a, 195a-196a.

Specifically, Mr. Horwitz testified that, when he was appointed to represent Christeson, he received voluminous case materials, which he

thoroughly reviewed and discussed with Christeson's previous counsel. App. 120a–121a. Before visiting Christeson in May 2005, Mr. Horwitz testified that he took substantial time to “go through those boxes” of voluminous case materials, including “numerous, numerous documents.” App. 128a. During the May 2005 visit with Christeson, original counsel discussed the case extensively with Christeson, and they “went through the pleadings. We went through many, many different issues” with Christeson. *Id.*

Promptly upon being appointed, Mr. Horwitz calculated the deadline for filing the federal habeas petition, along with Mr. Butts. App. 122a. (“As soon as we were appointed to the case, we would calculate the time in which we needed to file, and that was done in this case.”). In making the calculation of the due date, Mr. Horwitz “review[ed] case law” to determine that both the 31-day period between the conclusion of direct review and the filing of the state post-conviction motion, and the 90-day period after the final denial of the state post-conviction motion, were tolled. *Id.* at 124a-125a. Original counsel met with Christeson on May 27, 2005, which was “two-and-a-half months, three months before the petition was due as far as our calculation was

concerned.” *Id.* at 127a. This calculation “was incorrect, but at the time we believed it was a correct calculation; and so, therefore, we had time.” *Id.* As Mr. Horwitz stated, the allegation of abandonment is “based on the fact that our calculation was wrong. But at the time, we did not know it was wrong. We believed we were correct.” App. 128a–129a. “And so based on our calculation, we actually visited with [Christeson] . . . two to three months prior to the petition actually being due, which we felt was sufficient time to speak with him, to review issues, and to finalize the petition.” App. 129a.

Similarly, Mr. Butts testified that he had experience with multiple capital habeas cases in the past, and two of his cases had resulted in the death sentences being vacated on post-conviction review. App. 195a–196a. He testified that original counsel received 16 boxes of case materials in September or October 2004, and that he spent “several weeks and months going through the case in general,” which involved “read[ing] the transcripts and then. . . looking at everything else.” App. 199a. This comprehensive review of case material was “finished prior to seeing Mr. Christeson in May [2005].” App. 200a.

In terms of calculating the deadline for filing the habeas petition, Mr. Butts testified that they made the calculation “[w]hen we first started,” soon after the appointment. *Id.* He testified that “we believed the petition was due August 8th [2005]. . . . our belief was that it was filed timely. We filed on that date because we believed that was a timely date.” App. 201a. Mr. Butts “examine[d] case law in reaching that decision,” and “looked at cases for timeliness.” *Id.* Original counsel’s calculation of the deadline was based both on this review of case law and the fact that they were “generally familiar with time periods” because they both “had been and were involved in other capital cases at that time.” *Id.* Mr. Butts engaged in ongoing review of recent court decisions related to capital cases, and “my belief was it was filed correctly based upon cases I had looked at.” *Id.* This belief was based on his review of several relevant cases. App. 202a–203a.

The district court issued findings of fact and conclusions of law at the conclusion of the hearing. App. 13a-15a. Based on their demeanor, the district court found attorneys Horwitz and Butts, original counsel, to be credible. *Id.* 13a. The district court found that the testimony of counsel was consistent with the record. *Id.* The district court also found

Christeson's current counsel had a full and fair opportunity to test the credibility of original counsel. *Id.*

Specifically, the district court found that Butts and Horwitz credibly testified that they did not abandon Christeson. *Id.* The Court found credible that Mr. Butts and Mr. Horwitz began reviewing documents and completing other work in the case within two to three months after their July 2004 appointment. *Id.* The court found that counsel were working on the case months before the habeas petition was due. *Id.* The court found that counsels' pre-deadline activities are detailed in Document 73, which is Respondent's Exhibit 5 at the hearing. App. 13a-14a.

The district court found original counsel adequately and continuously represented Christeson during all relevant periods. App. 14a. The court found credible the testimony of counsel that they calculated the due date of the petition based on specific cases shortly after being appointed. *Id.* The court found original counsel's explanation of specifically how they calculated the due date to be credible, and found that the calculation was a reasonable interpretation of then-existing

case law. *Id.* The court noted counsel's experience in other death penalty cases in making its finding. *Id.*

The court found credible Mr. Horwitz's testimony that he did not believe he had a conflict of interest after the case was dismissed as untimely because Christeson was not entitled to relief under existing case law. *Id.* The court found that as a matter of law the miscalculation of the due date was not abandonment, and did not entitle Christeson to equitable tolling. *Id.*

The district court found that original counsel performed diligent work on the petition before the date the petition was actually due. *Id.* at 3. The court also found original counsel performed significant work on behalf of Christeson both before and after the date they mistakenly thought the petition was due. *Id.*

The United States Court of Appeals for the Eighth Circuit affirmed. *Christeson v. Roper*, No. 16-2730162730, 2017 WL (Jan. 27 2014) (2017). App. 1a-9a. The Court of Appeals reviewed the district court's factual findings for clear error and considered whether extraordinary circumstances justified equitable tolling or justified reopening the final judgment *de novo*. App. 4a. The Court of Appeals

deferred to the district court's determination that original counsel were credible in their testimony, and it found no clear error in the district court's finding that original counsel had actively worked on the case for Christeson but simply miscalculated the due date of the petition. *Id.* at 4a–7a. The Court of Appeals held that counsel's miscalculation of the due date of the petition was not abandonment. *Id.* at 5a. The Court of Appeals found that because no extraordinary circumstances justified equitable tolling or justified reopening the case it was not necessary to address whether Christeson was diligent. *Id.* at 8a.

III. Christeson is not entitled to a stay of execution because he does not demonstrate any reasonable likelihood of success on the merits.

Appellate courts review the district court's decision to deny relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure for abuse of discretion. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1152 (8th Cir. 2013). In order to obtain relief from a final judgment under Rule 60(b)(6), Christeson was required to “demonstrate both the motion's timeliness and. . . that ‘extraordinary circumstances’ justify the reopening of a final judgment.” *Christeson*, 135 S.Ct. at 895-96 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535

(2005)); *see also Gonzalez*, 545 U.S. at 536-37 (holding that a new precedent interpreting the statute of limitations did not justify reopening a judgment incorrectly dismissing a habeas petition as untimely). In addition to “extraordinary circumstances,” a motion to reopen a final judgment under Rule 60(b)(6), the motion must be filed within a “reasonable time.” Fed. R. Civ. P. 60(c)(1).

Regarding equitable tolling, there is a circuit split on whether a habeas petitioner’s entitlement to equitable tolling is reviewed *de novo* or for abuse of discretion. *Jihad v. Hvass*, 267 F.3d 803, 806 n.3 (8th Cir. 2001). But “it is clear” that appellate courts “review for clear error any relevant findings of fact made by the district court.” *Id.* “Review under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed.” *United States v. Williams*, 299 F.3d 673, 676 (8th Cir. 2001) (internal quotation marks and citations omitted). Under the clearly erroneous standard, “[c]redibility determinations are considered to be the special province of the finder of fact . . . [W]hen [the] judge’s finding concerns credibility of witnesses, ‘clear error’ is even more deferential than usual.” *Chen v. Mukasey*, 510 F.3d 797, 801 (8th Cir. 2007). In this

case, the Eighth Circuit applied the less deferential *de novo* standard of review in affirming the district court's findings. App. 4a.

To establish entitlement to equitable tolling of AEDPA's statute of limitations, the habeas petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). Equitable tolling thus requires an "extraordinary circumstance" beyond attorney miscalculation or attorney negligence. *Id.* ("Attorney miscalculation is simply not sufficient to warrant equitable tolling"); *Holland v. Florida*, 560 U.S. 631, 651-52 (2010). An extraordinary circumstance may exist where there has been a total abandonment by counsel, and therefore his acts or omissions are not constructively attributable to the litigant through agency theory. *Id.* at 659-60 (Alito, J., concurring). And even if there is an extraordinary circumstance justifying equitable tolling, the litigant must use reasonable diligence to detect his or her attorney's error and bring the matter to the court's attention. *Id.* at 653.

Thus, for Christeson to prevail in the district court, he bore the burden of demonstrating (1) that an extraordinary circumstance

justified equitable tolling of the statute of limitations for his original petition, (2) that he pursued his equitable-tolling claim diligently, (3) that an extraordinary circumstance justified granting his Rule 60(b)(6) motion to reopen the final judgment, and (4) that he filed the Rule 60(b)(6) motion within a reasonable time. To prevail on appeal, Christeson needed to show the district court erred or abused its discretion in concluding that he did not make each and every one of the required showings. He did not meet his burden on any of these issues, but it is not necessary to go beyond review of equitable tolling here.

On the critical question of Christeson's entitlement to stay of execution, the dispositive question before this Court is whether Christeson has demonstrated a significant possibility of success on the claim that he is entitled to equitable tolling of the statute of limitations based on his attorneys' miscalculation of the filing deadline. He has not.

The district court found that original counsel performed diligent work on the petition before the date the petition was actually due. App. 15a. The court also found original counsel performed significant work on behalf of Christeson, both before and after the date they mistakenly thought the petition was due. *Id.* The court found credible the testimony

of counsel that they calculated the due date of the petition based on specific cases shortly after being appointed. *Id.* The court found original counsel's explanation of how they calculated the due date to be credible, and found that the calculation was a reasonable interpretation of then-existing case law. *Id.* The court noted original counsel's experience in other death penalty cases in making its findings. *Id.*

The district court's factual findings are strongly supported by the record, and corroborated by contemporaneous records and case filings. *See* App. 370a–490a. (Respondent's Hearing Exhibits 1–6). And the courts' credibility determinations that underlie its findings of fact and conclusions of law are entitled to great deference. *Chen*, 510 F.3d at 801. There is no clear error in finding that original counsel diligently represented Christeson, and that counsel simply made a mistake in calculating the due date of the petition based on their interpretation of then existing case law. *Id.* Therefore, Christeson has no significant possibility of success on the merits.

IV. Christeson fails to establish that there is any likelihood that this Court would grant his petition for writ of certiorari, and he fails to identify any issue worthy of this Court’s discretionary review.

The record in this case conclusively demonstrates that Christeson’s federal habeas petition was untimely because his attorneys simply miscalculated the filing deadline. This issue presents no question worthy of this Court’s discretionary review. As the Eighth Circuit held, “[w]hether original counsel’s miscalculation was reasonable based on then-existing law (as the district court thought) or was the result of negligence (ordinary or gross), it is well settled that attorney negligence in calculating a deadline is not sufficient to warrant equitable tolling of a statutory time limit.” *Id.* 4a-5a.

This Court has repeatedly stated that “[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.” *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2010). “[A] garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” *Holland v. Florida*, 560 U.S. at 631, 651–52 (2010). “[W]hen a petitioner’s post-conviction attorney misses a filing deadline, the

petitioner is bound by the oversight. . . . [A]n attorney’s negligence, for example, miscalculating a filing deadline, does not provide a basis for tolling a statutory time limit.” *Maples v. Thomas*, 132 S.Ct. 912, 922–23 (2012). *See also, e.g., Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999).

The facts of this case bear no resemblance to those cases in which this Court has found abandonment by counsel, rather than mere attorney error. For example, in *Holland*, habeas counsel engaged in a “near-total failure to communicate with petitioner or to respond to petitioner’s many inquiries and requests over a period of several years.” *Holland*, 560 U.S. at 659 (Alito, J., concurring). In *Maples*, the petitioner’s habeas counsel had “left the law firm” and their “new employment disabled them from continuing to represent Maples,” but “[t]hey did not inform Maples of their departure and consequent inability to serve as his counsel,” and they did not seek the “trial court’s leave to withdraw.” *Maples*, 132 S.Ct. 912, 916–17 (2012). Instead, *Maples*’ case remained pending while critical deadlines passed, with no attorney representing *Maples* at all. *Id.* Here, by contrast, original

counsel met with Christeson multiple times and actively and diligently pursued habeas relief through the time his federal petition was finally denied as untimely. This was not “abandonment,” but attorney error. The district correctly found there was no abandonment here. (App. 13a–15a).

Further, the evidence from the evidentiary hearing and the district court’s findings both demonstrate that original counsel were not laboring under any conflict of interest at the time they made their initial calculation of the filing deadline and filed the untimely habeas petition. There is simply no evidence of any bad faith or misfeasance by original counsel during 2004 and 2005. Rather, as the district court found, their activity reflected diligent and professional efforts on behalf of Christeson. No conflict of interest emerged until, at the earliest, *after* the district court had denied Christeson’s habeas petition as untimely and the Eighth Circuit had denied a certificate of appealability on that issue in 2007. Up through that point, original counsel’s interests were completely aligned with Christeson’s interests—both had every incentive to argue that the federal habeas petition had been timely filed. Only *after* Christeson had lost on the

issue of timeliness, both in the district court and on appeal, did he obtain the opportunity and incentive to seek equitable tolling by collaterally attacking original counsel's performance. This incentive to collaterally attack original counsel's performance, which did not arise until 2007, is what created a conflict of interest with original counsel. At that point, Christeson had an incentive to argue that his original counsel had engaged in extraordinary misfeasance, while original counsel had the incentive to defend their performance.

In short, only *after* “[t]he District Court dismissed [Christeson’s habeas] petition as untimely, and the Court of Appeals denied Christeson’s application for a certificate of appealability,” did it become true that “Christeson’s only hope for securing review of the merits of his habeas claims was to file a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen final judgment” and assert equitable tolling. *Christeson*, 135 S. Ct. 892. Once this became true, a conflict of interest arose, because “Horwitz and Butts could not be expected to file such a motion,” *id.*, which would attack their own conduct. Prior to that point, however, original counsel had no conflict of interest—they and Christeson had every incentive to argue that their petition had been

timely filed. Christeson's filings in this Court attempt to project this conflict of interest into the past, to impugn original counsel's conduct and motives when they filed the original habeas petition, but this is mere anachronism. During 2004 and 2005, Horwitz and Butts were guilty of a deadline miscalculation, nothing more. And that simple miscalculation does not warrant equitable tolling.

In short, this Court's precedents squarely foreclose Christeson's claim that his original counsel's simple miscalculation of the deadline for filing his federal habeas petition constitutes an extraordinary circumstance warranting equitable tilling. This claim does not warrant further discretionary review by this Court.

Christeson contends that the Eighth Circuit's decision in this case deepens a Circuit split on whether instances of severe attorney misconduct short of abandonment might constitute "extraordinary circumstances" warranting equitable tolling. *See* Cert. 25-28; Stay App. 12-13. This argument has no merit. Regardless of whether such a split of authority exists, it is not implicated in this case. There is assuredly no Circuit split on the question whether miscalculation of a filing deadline by an attorney constitutes an "extraordinary circumstance,"

because this Court has repeatedly instructed that it does not. *Lawrence*, 549 U.S. at 336–37; *Holland*, 560 U.S. at 651–52; *Maples*, 132 S.Ct. at 922–23. None of the cases cited by Christeson as supposedly conflicting the Eighth Circuit’s judgment here involves an attorney error in miscalculating a deadline, so there is no reason to suppose that any Circuit has held that attorney miscalculation constitutes an “extraordinary circumstance” that warrants either equitable tolling or reopening a final judgment under Rule 60(b). See *Luna v. Kenan*, 784 F.3d 640, 646 (9th Cir. 2015) (holding that “egregious professional misconduct,” such as “voluntarily dismissing the [timely filed] petition for no good reason,” warranted equitable tolling, but reaffirming that “run-of-the-mill mistakes by one’s lawyer that cause a filing deadline to be missed do not rise to the level of extraordinary circumstances”); *Ross v. Varango*, 712 F.3d 784, 802-03 (3rd Cir. 2013) (holding that grave attorney misconduct, including misleading the client and undermining the client’s ability to proceed, warranted equitable tolling); *Whiteside v. United States*, 775 F.3d 180, 184-85 (5th Cir. 2014) (rejecting the claim that a favorable change in substantive law justifies late filing of a habeas petition); *Robertson v. Simpson*, 624 F.3d 781 (6th Cir. 2012)

(remanding to the district court for a determination whether the attorney's misadvice to his client due to the attorney's cocaine use warranted equitable tolling); *Schmid v. McCauley*, 825 F.3d 348 (7th Cir. 2016) (remanding for a determination whether the combination of mental illness and abandonment by prior counsel warranted equitable tolling).

Finally, Christeson contends that this Court should summarily reverse and remand the case because the district court and the Eighth Circuit supposedly "abjectly failed to conduct the further proceedings consistent with this Court's remand." Cert. 23. On this point, Christeson contends principally that (1) the district court's denial of his application for \$161,000 to conduct Rule 60(b) proceedings was fundamentally unfair, and (2) the district court's conduct of the evidentiary hearing on January 20, 2017 was also unfair. Neither of these contentions has any merit.

First, Christeson argues that the denial of the request for \$161,000 prevented him from developing the evidence needed to argue for equitable tolling. *See* Cert. 3-4; Stay App. 2-3. But all of the evidence that Christeson claims he needed pertained to Christeson's mental

capacity, and was therefore relevant only to the question of Christeson's capacity for diligence. In other words, such evidence was only relevant to attack the district court's *alternative* holding that Christeson had failed to exercise diligence even if there had been an extraordinary circumstance that warranted tolling. *See id.* This evidence has no bearing on whether attorney miscalculation by original counsel warranted tolling. As the district court in this case stated, "no amount of money would change the fact that original counsel simply miscalculated AEDPA's one-year deadline." App. 46a. Moreover, as the district court found, App. 47a, and as Christeson effectively concedes, *see* Stay App. 3, the level of funding did not prevent Christeson's counsel from presenting an extremely vigorous case for equitable tolling in the district court, including the submission of voluminous briefing and three expert reports relating to Christeson's mental capacity. App. 47a; Stay App. 3. The notion that this extremely vigorous effort constituted "constructive denial of counsel," *id.*, has no merit.

Christeson also contends that the U.S. District Judge exhibited bias and denied him due process in the conduct of the evidentiary hearing at which original counsel testified on January 20, 2017. *See*

Stay App. 5-8; Cert. 10-16. This contention has no merit. Christeson argues that the district court denied his counsel an effective opportunity to cross-examine original counsel, but the transcript decisively refutes this allegation. It reflects an extremely lengthy and vigorous cross-examination of original counsel. *See* App. 102a–281a. Christeson contends that the district court erred by preventing him from admitting a copy of the Eighth Circuit’s decision in *Snow v. Ault*, 238 F.3d 1033 (8th Cir. 2001), in an attempt to impeach original counsel’s testimony. But as the Eighth Circuit pointed out in this case, “Christeson did not propound any question about *Snow* to which an objection was sustained, so he has not preserved any claim of error about limitation of cross-examination.” App. 5a. “In any event, the import of *Snow* is to show that original counsel negligently miscalculated the filing deadline,” but “negligent miscalculation of the deadline is insufficient” to warrant equitable tolling, so there was clearly no prejudice in this ruling. *Id.* Similarly, Christeson contends that he was denied effective cross-examination because he did not receive discovery of original counsel’s billing records, but original counsel testified that they “kept no time records of work performed before the filing deadline” and had no

other relevant records. *Id.* at 6a. Accordingly, as the Eighth Circuit held, “[t]he *absence* of records was the most effective impeachment material available, yet the district court nonetheless credited the testimony of original counsel that they worked on Christeson’s case before the actual filing deadline.” *Id.*

Conclusion

Christeson does not show a significant possibility of success on the claim that the district court abused its discretion when it denied his motion to reopen the final judgment dismissing his federal habeas petition as untimely. Further, Christeson fails to forecast a likelihood that this Court would grant his petition for writ of certiorari, and he fails to identify any question worthy of review by this Court. Respondent respectfully requests that this Court deny both Christeson’s application for stay of execution and his petition for writ of certiorari.

Respectfully submitted,

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