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**TOLLING OF THE AEDPA STATUTE OF LIMITATIONS:
BENNETT, WALKER AND THE EQUITABLE LAST RESORT**

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I. Introduction

¶1 The Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted in 1996 in the wake of terrorist attacks on the World Trade Center and the federal building in Oklahoma City and was intended primarily to deter future terrorist attacks and limit the lengthy appeals process available to death-row inmates. The AEDPA also effected a substantial restriction on the rights of both capital and non-capital defendants to appeal state convictions by introducing a one-year statute of limitations for the filing of a petition for habeas corpus in federal court.^[1] In fact, the statute of limitations was "Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions."^[2] Before the enactment of the AEDPA, a defendant challenging the legal authority of his detention on the basis of alleged violations of his constitutional rights had never been subject to any formal time limit for the filing of a federal habeas petition under 28 U.S.C. § 2254. Given the total absence of such a restriction at any time in the history of federal habeas, the introduction of the AEDPA statute of limitations effected a "dramatic change in the law" that further restricted the practical availability of federal habeas relief.^[3]

¶2 The short window of opportunity within which a prisoner may now file a habeas petition creates a significant procedural bar to a prisoner's ability to have constitutional claims reviewed by a federal court. In the nearly five years since the enactment of the AEDPA, the federal courts' interpretation and application of § 2244(d), which sets forth the statute of limitations for federal habeas review of state convictions, have revealed the procedural challenges an inmate now faces in bringing a federal habeas claim within the one-year period and confirmed that any argument for tolling of the statutory limitation will face an equally uphill battle.

¶3 However, the Supreme Court in *Artuz v. Bennett*^[4] recently declined to adopt a restrictive interpretation of § 2244(d) that would have raised the bar even higher by severely limiting exceptions to the one-year rule. The provision at issue, § 2244(d)(2) allows for tolling of the statutory period while a "properly filed application for State post-conviction or other collateral review" is pending. In *Bennett*, the Court held that regardless of whether claims raised in an application would be found without merit or subject to procedural bar in the state court, an application is "properly filed" and sufficient to toll the one-year period under § 2244(d)(2) as long as the application for review comports with all state filing requirements.^[5] On March 26, 2001, the Court heard the case of *Duncan v. Walker*,^[6] where it again had the opportunity to determine how far open the one-year door to the federal courts really is. The issue in *Walker* also concerns the interpretation of the § 2244(d)(2) tolling provision addressed in *Bennett*, but

focuses on whether petitions for federal post-conviction review fall within the phrase "State post-conviction or other collateral review" and therefore toll the statutory period. While *Bennett* suggests the Court is unwilling to add to the procedural requirements expressly delimited in § 2244, it is likely that the statutory ambiguity at issue in *Walker* will be resolved in a way that will limit the ability of an inmate to request federal habeas review. The Supreme Court's decisions in these two cases are particularly significant because they define what is effectively the only relief from the strict one-year limitation. As this discussion will show, the "last resort" of equitable tolling is a practical nullity for all but a handful of habeas petitioners.

¶4 The discussion in Part II introduces § 2244(d) as interpreted by the courts and then explores the courts' approach to the tolling provisions of § 2244(d). Part III then assesses the Supreme Court's decision in *Artuz v. Bennett* with respect to the tolling during state post-conviction proceedings. Part IV presents the debate in *Duncan v. Walker* and suggests its significance for the continued availability of federal habeas. Finally, Part V addresses the circuit courts' jurisprudence on equitable tolling under the AEDPA.

II. The AEDPA Statute of Limitations: What Does One Year Really Mean?

¶5 The AEDPA's one-year statute of limitations, codified in 28 U.S.C. § 2244(d), provides that the limitations period runs from the latest of several events, one of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."⁷¹ For convictions that became final prior to the passage of the AEDPA, those circuits that have considered the question have held that the one-year period begins to run on April 24, 1996, the date the law was enacted.⁸¹

¶6 However, § 2244(d) also contains a tolling provision intended to allow state prisoners to exhaust state remedies without having that time count against them before filing a habeas petition in federal court.⁹¹ The § 2244(d)(2) tolling provision applies "during the time [in] which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."¹⁰¹ While inclusion of a tolling provision appears to "soften" the impact of the one-year limitation, it in fact reflects a primary policy goal of Congress in enacting the AEDPA to "provide ... for the exhaustion of state remedies and require ... [federal court] deference to the determinations of state courts."¹¹¹ Consequently, the federal interest in expedited petitions for habeas review also embodied in the AEDPA yields in § 2244(d)(2) to federalism concerns for due deference to state proceedings.

¶7 The contours of § 2244(d)(2)'s "loophole" have been the subject of the greatest debate regarding the interpretation of the one-year limitation. An initial question, the meaning of "State post-conviction" review, has consistently been read by appellate courts that have considered the question to include all state-court proceedings from initial filing at the trial level "to final disposition by the highest state court."¹²¹ A more contentious issue, resolved by the Supreme Court's recent decision in *Artuz v. Bennett*, is what constitutes a "properly filed application" sufficient to toll the statute. This debate is addressed in Part

III below. The latest divide centers on the meaning of "State post-conviction or other collateral review," specifically, whether federal habeas petitions are "other collateral review" for tolling purposes. This final question is currently before the Court in *Duncan v. Walker*,^[13] an appeal from the Second Circuit, discussed in Part IV, which will be decided this spring.

III. *Artuz v. Bennett*: "Properly Filed" Applications for State Review

¶8 Since 1996, courts have added a substantive gloss to § 2244(d)(2), which provides for tolling while decision on a "properly filed application" is pending. For example, the Sixth Circuit has held that an application does not toll the one-year statute of limitations unless it "address[es] one or more grounds of the federal habeas petition in question."^[14] Furthermore, the Supreme Court in *O'Sullivan v. Boerckel* interpreted the exhaustion requirement of § 2254(c)^[15] to mean that in order to toll the AEDPA statute of limitations, a state post-conviction petition that is otherwise properly filed must raise a federal constitutional issue.^[16]

¶9 Throughout 1999 and 2000, a number of circuits had also added a procedural gloss to the statute, construing the "properly filed" language of § 2244(d)(2) to include a "merits" requirement; that is, they held that a claim is not "properly filed" under § 2244(d)(2) if it cannot be heard on the merits because of a state procedural bar.^[17] For example, in *Weekley v. Moore*, a divided panel of the Eleventh Circuit found that a petitioner's state post-conviction application did not toll under § 2244(d)(2) because it was "successive" and thus not "properly filed."^[18] The Third, Eleventh and Tenth Circuits also drew from principles of federal-state comity, which undergird procedural default principles in federal habeas law, to find that state post-conviction petitions time-barred at the state level would also not be deemed "properly filed" for the purposes of § 2244(d)(2).^[19] However, the Fifth and Third Circuits argued that an application would be deemed "properly filed" if it conformed to a state's "applicable procedural filing requirements"^[20] and expressed their reluctance "to engraft a merit requirement into § 2244(d)(2) without some indication of Congressional intent to do so."^[21]

¶10 In *Artuz v. Bennett*, the Supreme Court resolved the circuit split and clarified the question of what constitutes a "properly filed application" for state post-conviction review. In a unanimous decision, the Court upheld the Second Circuit's conclusion that the term "properly filed" means only that the application for post-conviction relief had been delivered and accepted for *filing* in compliance with the applicable laws and rules governing filings.^[22] Justice Scalia, writing for the Court, noted "the question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar."^[23] Although acknowledging the competing policy concerns at issue in the case, the Court focused instead on its reading of the statutory language and concluded that an alleged failure to comply with state procedures which would prevent a hearing on the merits does not prevent a petition from tolling the statute of limitations as a "properly filed application."^[24]

¶11 Had the Court reversed the Second Circuit, the decision would have imposed significant additional constraints on the availability of federal habeas review, since any failure to comply with a state procedural bar would eliminate tolling, forcing petitioners to bring simultaneous federal and state claims in an effort to avoid the time bar.^[25] Inmates that failed to cover both federal and state bases would have found the federal courthouse door closed by the time their state petition was denied. By affirming the Second Circuit, the Supreme Court upheld the availability of federal habeas review and rejected a reading of the statute that would not only have increased the burden on the federal courts to hear perhaps unexhausted claims, but would also have amounted to a significant restriction of federal habeas review for many inmates.

IV. *Duncan v. Walker*: Federal Habeas Petitions as "Other Collateral Review"?

¶12 On March 26, 2001, the Supreme Court heard oral arguments in *Duncan v. Walker*, the latest of several recent cases arising out of the AEDPA and one that hinges on the interpretation of the tolling provision of the statute of limitations in § 2244(d)(2).^[26] The sole question at issue on appeal was whether a prior federal habeas corpus petition tolls the statute of limitations as an "application for State post-conviction or *other collateral review*" under 28 U.S.C. 2244(d)(2). The Third, Fifth and Ninth Circuits have read the phrase conjunctively and determined that "State" modifies "other collateral review," thus excluding federal habeas review from the tolling provision.^[27] The Second and Tenth Circuits have interpreted the phrase disjunctively, holding that "State" modifies only "post-conviction" and therefore that "other collateral review" includes federal habeas review.^[28]

¶13 As in *Bennett*, the answer will depend entirely upon the Court's construction of the statute and its ability to divine Congressional intent. However, *Walker* is a tougher case in that it involves not the definition of a single term, but the interpretation of an internally ambiguous provision whose contested language appears inconsistently and imperfectly throughout the AEDPA. Also, as with *Bennett*, the outcome of the case will either further restrict the availability of federal habeas review or leave the door ajar for inmates with constitutional claims.

¶14 The procedural history of *Walker* is rather straightforward. On April 14, 1996, Walker's conviction for first-degree robbery became final.^[29] Walker then pursued a number of state post-conviction remedies, all of which proved unavailing.^[30] On April 10, 1996, Walker then filed a federal habeas petition challenging his conviction as unconstitutional due to ineffective assistance of counsel.^[31] In July 1996, this petition was dismissed without prejudice for failure to state a claim, and because the petition did not make clear whether Walker had exhausted state remedies.^[32] About eleven months later, Walker filed a second federal habeas petition, which was dismissed as time-barred under the AEDPA because it was filed twenty-six days after the end of the one-year statutory period.^[33]

¶15 On appeal to the Second Circuit, Walker argued that the initial federal habeas petition should be considered an "application for State post-conviction or other collateral

review" and therefore the statute should be tolled for the three-month period in which that petition was pending.^[34] The Second Circuit panel was unanimous in its interpretation that the phrase at issue should be construed disjunctively and that therefore "the word 'State' modifies only the word 'post-conviction,' [while] the phrase 'other collateral' is to be given its naturally broader meaning."^[35] Though acknowledging that its interpretation conflicted with the Third Circuit's holding in *Jones v. Morton*,^[36] the court concluded that "State post-conviction review" encompassed "all collateral review of a conviction provided by a state" and therefore "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions."^[37] The Tenth Circuit followed *Walker* in its recent ruling in *Petrick v. Martin*,^[38] decided January 3, 2001.^[39]

¶16 The Third, Fifth and Ninth Circuits have adopted the stronger contrary interpretation that the tolling provision of § 2244(d) applies only to state, and not federal, petitions for collateral relief.^[40] While the *Walker* court read "post-conviction review" to refer independently to "habeas corpus, *coram nobis* and similar writs" issued after a final conviction,^[41] the Third Circuit in *Jones v. Morton* confined "post-conviction review" to *state judicial* remedies and concluded that "collateral review" applied to *non-judicial state* remedies, such as petitions for clemency filed with the governor.^[42] Amici curiae to the Supreme Court filed by a number of states have also stressed that in many states "post-conviction review" refers to a specific proceeding so termed, while other avenues for state collateral review, or even *pre-conviction* challenges, do exist; therefore, Congress may have in fact intended "other collateral review" to refer to state proceedings only, that is, all other state collateral proceedings in addition to the proceedings expressly labeled "post-conviction review."^[43]

¶17 This argument draws additional support from the legislative history, which provides no indication that the bill as it developed was intended to permit tolling for federal petitions, and there is some evidence to the contrary.^[44] For example, Senator Hatch "appear[ed] to describe a state petition for clemency as a form of collateral review, but distinct from judicial post-conviction review."^[45] California Attorney General Dan Lungren, a major supporter of habeas reform, summarized the language of the statute of limitation as finally adopted as, "[o]ne year for general habeas and 180 days for capital habeas, with tolling periods; that is, periods where you don't count the time while they are going through State review or State collateral review."^[46] In addition, the term "other collateral" in § 2244(d)(2) and § 2263(b)(2), which refers solely to state petitions, appeared at the same stage of the bill's evolution, perhaps indicating its meaning is the same in both.^[47]

¶18 Moreover, as the Ninth Circuit noted in *Jiminez v. Rice*,^[48] language elsewhere in the AEDPA lends support to a narrower reading. First, "§ 2244(d)(2) makes no mention of federal relief. This omission is in stark contrast to other sections of the AEDPA in which Congress explicitly described both state and federal collateral relief," such as § 2261(e),^[49] applicable to capital cases, which precludes habeas claims for ineffectiveness of counsel during "State or Federal collateral post-conviction proceedings," and § 2264(a)(3), which permits certain new habeas claims to be heard if they were discovered after "State or Federal post-conviction review."^[50] The *Jiminez* court also noted that the

language in § 2244(d)(2) resembles the § 2263(b)(2) ^[51] provision on tolling for habeas petitions in capital cases, where "post-conviction review or other collateral relief" is used to refer solely to state relief. ^[52] To be sure, the Tenth Circuit recently considered this aspect of the *Jiminez* opinion in *Petrick*, ^[53] but concluded instead that differences in the wording of § 2244(d), with its ambiguous construction, and § 2263(b)(2), whose structure emphasizes that state petitions alone are referenced, in fact provide "some indication that Congress did not intend to limit 'other collateral review' in § 2244(d)(2) to state remedies." ^[54] However, the inarticulate drafting of the AEDPA is a rather weak counterpoint to the fact that both clauses of § 2244(d)(2) have meaning even if limited to state petitions, and that Congress failed to expressly extend the provision to federal petitions as it did elsewhere in the AEDPA.

¶19 A further argument in support of the narrower reading is that the Fifth, Sixth, Tenth and Eleventh Circuits have held that § 2244(d)(2) does not toll the statute of limitations for the period during which a writ of certiorari to the Supreme Court following a denial of a state habeas petition could have been sought, and in that context, have read § 2244(d)(2) tolling to apply solely to state petitions. ^[55] The Fifth Circuit had adopted this interpretation in *Ott v. Johnson*, ^[56] and in *Grooms v. Johnson*, ^[57] relied on the *Ott* interpretation as the basis for its holding that federal habeas petitions do not constitute "other collateral relief."

¶20 Arguments based on the underlying policies of the AEDPA also seem to favor a more restrictive view. As Duncan (the appellant) argues in *Walker*, "the statute of limitations enacted in AEDPA was written to balance twin goals of comity in tension, i.e., to balance the goal of reducing delays to the finality of state convictions, with the goal of ensuring full exhaustion of state court remedies." ^[58] Tolling for state petitions reinforces comity and respect for the state judiciary "because it allows and encourages full exhaustion of state court remedies, thereby affording state courts the first opportunity to consider prisoners' federal claims." ^[59] Tolling for federal petitions as well furthers Congress' goal of "spur[ring] defendants to file their federal habeas petitions more quickly," ^[60] but it may undermine Congress' second objective of encouraging exhaustion of state remedies, since petitioners could presumably "delay commencement of the state exhaustion process and instead ... file unexhausted petitions in federal court." ^[61] Admittedly, the AEDPA does contain other provisions which could prevent inmates' filing successive or frivolous petitions merely to toll the statute, such as the exhaustion provisions of § 2254(b) and (c) which require summary dismissal of any unexhausted claims brought prematurely to federal court. ^[62] The restrictions on successive petitions in § 2244(b) could also curb such abuse. ^[63]

¶21 However, it is possible that Congress intended § 2244(d)(2) to buttress the exhaustion provisions by limiting tolling to state petitions rather than creating a limited exception to exhaustion by permitting federal petitions to toll as well. Nonetheless, tolling *only* for state petitions does create the potential for a harsh application of the rule in some cases, since "a diligent prisoner who filed his federal petition the very day after his state conviction became final could still be permanently time barred from habeas relief if the district court delayed before dismissing the petition for failure to

exhaust.^[64] If the Court adopts a narrow view of § 2244(d)(2), the lower courts could find this situation subject to equitable tolling.

¶22 If the Court's approach in *Artuz v. Bennett*, where it found arguments based on the purpose of AEDPA "beside the point," is any indication, its assessment of the competing policy considerations outlined above is likely to be overshadowed by its reading of the legislative history and its view of similar provisions elsewhere in AEDPA.^[65] If this is true, the evidence from both weighs more heavily in support of the majority view that "other collateral review" in § 2244(d) refers to state, and not federal petitions. A reversal of the Second Circuit would strengthen the current requirement of state exhaustion, and in so doing would heighten the consequences of failure to do so by, as the Tenth Circuit feared, barring the federal courthouse door to petitioners who unwittingly fail to exhaust state remedies or who are unaware of such failure until the statutory period has run.

V. Arguing the Last Resort: Equitable Tolling under the AEDPA

¶23 If a petitioner has filed his application outside the statutory period and no tolling is available under § 2244(d)(2), the only remaining avenue available to prevent dismissal of the claim is for the court to find that the petitioner is entitled to tolling of the statute on equitable grounds. As the following discussion shows, arguments for equitable tolling will rarely prevail, and even where grounds for equitable tolling might otherwise exist, courts have refused to grant it where a petitioner has not been "reasonably diligent" in pursuing the claim. Given the narrow application within which courts have permitted tolling, the availability of equitable tolling will be irrelevant to most inmates and does nothing to lessen the impact of the AEDPA limitation.

A. § 2244(d)(2) is a Statute of Limitations, not a Jurisdictional Bar

¶24 Soon after the passage of the AEDPA, courts confronted the question of whether the AEDPA is a statute of limitations or a jurisdictional bar. Principles of equitable tolling do "not apply to overcome a jurisdictional bar, where 'strict satisfaction of a time limit may be required as a precondition to jurisdiction over a matter.'"^[66] However, appellate courts, relying on both the language of the AEDPA and its legislative history,^[67] have uniformly found 28 U.S.C. § 2244(d) to be a statute of limitations, subject to equitable tolling principles, rather than a mandatory jurisdictional bar.^[68]

¶25 To reach this conclusion, courts have expressly rejected policy-based arguments that equitable tolling is inconsistent with the text of the AEDPA and therefore should not be permitted even if § 2244(d) is viewed as a statute of limitations. As explained by the Fourth Circuit in *Harris v. Hutchinson*,^[69] the explicit exceptions to the one-year limit set forth in § 2244(d)(1)(B-D) and § 2244(d)(2) merely reflect Congress' decision to "make the writ available to address later arising circumstances" and to permit exhaustion of state post-conviction remedies, and do not indicate an intent to make the limitation period absolute.^[70] However, if the Court in *Walker* reaches this issue, it may reject the Fourth Circuit's approach and find that the AEDPA does not provide for tolling outside the express provisions if it concludes that these exceptions do in fact evidence Congressional

intent to prevent equitable tolling.^[71] On the other hand, an interpretation of § 2244(d) that permits equitable tolling may be required to avoid a constitutional violation of the "Suspension Clause . . . in the 'rare case' where strict application of the one year limitations period would create 'an unreasonable burden'" on its exercise.^[72] And in any event, the circuits have uniformly found that equitable tolling is, as a general matter, permissible under the AEDPA.

B. Narrowing the Scope of Equitable Tolling: "Extraordinary Circumstances" under the AEDPA

¶26 Appellate courts have by and large restricted the availability of equitable tolling to cases in which the petitioner is prevented from complying with the statutory time limit by "extraordinary circumstances beyond his control."^[73] As the Third Circuit has explained:

Equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way ... been prevented from asserting his or her rights." The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims."^[74]

Simply stated, "equitable tolling will not be available in most cases."^[75]

¶27 However, a mere showing of extraordinary circumstances is not sufficient - the inmate must also show "reasonable diligence" in pursuing federal relief.^[76] In the words of the Second Circuit, this requires demonstrating "a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of [the] filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances."^[77] Reasonable diligence is most often at issue in cases where the inmate is physically or mentally incapable of filing for temporary periods.^[78]

1. Actions of Third Parties

¶28 Courts have rarely found "extraordinary circumstances" under § 2244(d)(2). However, nearly all cases where equitable tolling has been or would be granted involve actions of third parties whose actions prevented timely filing of a petition.^[79] For example, the Second Circuit held in *Valverde v. Stinson*, that "the confiscation of a prisoner's legal papers by a corrections officer shortly before the filing deadline [if proven, would] justify equitable tolling and permit the filing of a petition after the statute of limitations ordinarily would have run."^[80] The Ninth Circuit granted equitable tolling under similar circumstances where the plaintiff submitted a petition *pro se* five days before the statute of limitations expired with instructions to mail his materials to the court with a check drawn from his prison trust account for the filing fee.^[81] The prison authorities failed to issue the check and file the petition in time, at which point the materials were returned to the plaintiff, who immediately resubmitted them.^[82] The court

compared the case to one of fraud on the petitioner, stating that "any delay on the part of prison officials in complying with [plaintiff's] instructions was not within [his] control," and therefore constituted "exceptional circumstances."¹⁸³ The Ninth Circuit also found exceptional circumstances in a capital case where the third party was petitioner's counsel. In that instance, the attorney withdrew after accepting employment in another state, and much of the work product relating to the preparation of the prisoner's petition was unusable by replacement counsel, making it impossible for the prisoner to file in time.¹⁸⁴ The Fifth Circuit has suggested that equitable tolling would be appropriate if the defendant "actively misled" the plaintiff about the cause of action.¹⁸⁵

¶29 Actions of a court that affirmatively prevent the filing of a timely petition present a somewhat clearer case for equitable tolling, although such cases are not common. The lone example of this is the *Kelly* case, where the Ninth Circuit upheld a grant of equitable tolling on two independent grounds: 1) where a court-ordered stay of habeas proceedings prohibited counsel from filing a petition, and 2) where timely federal habeas proceedings were pending at one time, but were mistakenly dismissed under a writ of mandamus.¹⁸⁶ Under these circumstances, "it was [the court's] mistake that deprived Kelly of the opportunity to have his first federal habeas petitions considered on the merits."¹⁸⁷

2. Ineffective Assistance of Counsel or Attorney Error

¶30 Despite the courts' acknowledgment that circumstances beyond a petitioners' control may be sufficient grounds for equitable tolling, courts have consistently rejected claims that attorney error, though admittedly impossible for a petitioner to prevent, constitutes "exceptional circumstances" sufficient to justify tolling. This is perhaps analogous to the courts' general refusal to provide relief to an inmate for errors not meeting the high *Strickland* standard of ineffective assistance of counsel, even where the inmate suffered prejudice as a result of the error.¹⁸⁸ Under the AEDPA, the Fourth and Seventh Circuits have followed this principle in holding that a lawyer's misinterpretation of the statute or miscalculation of a limitation period is not sufficient grounds for equitable tolling.¹⁸⁹ In *Sandvik v. United States*,¹⁹⁰ the Eleventh Circuit refused to toll the similar § 2255 limitations period where the prisoner's delay was admittedly the result of a lawyer's decision to mail the petition by ordinary mail rather than to use some form of expedited delivery.¹⁹¹

¶31 Moreover, even ineffective assistance of counsel claims may not support a grant of equitable tolling under the AEDPA. In *Molo v. Johnson*,¹⁹² the Fifth Circuit held that a clear violation of the right to counsel at the first appeal does not toll the AEDPA's statute of limitations.¹⁹³ However, in *United States v. Griffin*¹⁹⁴ the district court found that equitable tolling under the AEDPA was justified for ineffective assistance of counsel where a lawyer failed to carry out a client's instruction to file an appeal that would have tolled the time bar.¹⁹⁵ Even in a circuit which adopts the approach in *Griffin*, the difficulty of proving ineffective assistance of counsel in the first place still significantly reduces the possibility that equitable tolling would be granted on that ground.¹⁹⁶

¶32 Whether these decisions reflect the courts' belief that attorney error or lack of counsel are too common to be "extraordinary" or rather a fear that the time limitation could be rendered a nullity if every failure to file could be blamed on attorney error, it is clear that a petitioner hoping for equitable tolling of the statute on the basis of attorney conduct will face an uphill battle.

3. Ignorance of the Law

¶33 Ignorance of the law and, in nearly all cases, ignorance due to lack of access to text of the AEDPA as well, are unlikely to justify equitable tolling, even in the case of *pro se* prisoners.^[97] Courts have consistently found that proceeding *pro se*, lack of familiarity with the legal process, incarceration prior to the passage of the AEDPA, or the prison library not receiving copies of the AEDPA for even up to several months are typical circumstances in many cases, and therefore cannot be "extraordinary" as required for equitable tolling.^[98] Claims that illiteracy, or an inability to speak and write English constitute "extraordinary circumstances" have also been rejected.^[99]

¶34 Because the Supreme Court has held that the Sixth Amendment right to counsel extends only to the trial and first appeal, many inmates file habeas petitions *pro se*.^[100] A petitioner's *pro se* status may lead a court to grant more flexibility in applying procedural bars to the filing of petitions for state post-conviction review, which are critical if the petitions are to toll the AEDPA statute of limitations.^[101] However, as the cases discussed above demonstrates, the one-year statutory period presents a particularly high barrier to appeal when the inmate is proceeding without the benefit of counsel.

4. Physical or Mental Illness

¶35 Courts addressing physical and mental illness as cause for equitable tolling have acknowledged it as a potential "extraordinary circumstance," though few have found facts sufficient to meet the "high standard" necessary to toll in the case before them.^[102] Deafness, temporary blindness and even AIDS-related mental and physical illness and hospitalization have been found insufficient to warrant equitable tolling without a showing that the condition renders the inmate unable to pursue his legal rights.^[103] Long-term physical conditions, particularly at or near the statutory period, may provide a more persuasive case, though no circuit courts to date have confronted such facts.

¶36 "Outright mental incompetency" may be sufficient to support equitable tolling, particularly because of the constitutional due process concerns implicated in the conviction of the incompetent.^[104] In *Kelly*, the Ninth Circuit allowed equitable tolling pending a district court competency determination when there had been a threshold showing of mental incompetency, reasoning that mental incompetency is "a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control [which] renders the petitioner unable to assist his attorney in the preparation of a habeas petition." However, below-average mental ability is unlikely to qualify as an "extraordinary circumstance."^[105] And again, to prevail based on mental health grounds the petitioner must present specific evidence of mental illness and demonstrate how it

prevented compliance with the statutory period.^[106] A mere allegation of mental illness is generally insufficient.^[107]

5. Actual Innocence

¶37 There is considerable debate and no direct precedent on the question of whether the AEDPA, to survive constitutional challenge, must necessarily be read to include an actual innocence exception.^[108] A number of circuits have recognized that if it does not, then denial of habeas to a party claiming actual innocence raises serious Eighth Amendment and Due Process concerns and may render § 2244(d) an unconstitutional violation of the Suspension Clause, particularly where all other avenues for judicial review are foreclosed.^[109] The Second Circuit's solution in a case arising under § 2255 of the AEDPA (a parallel provision to § 2244) was to permit the petitioner to file for review under § 2241.^[110] In that case, petitioner had a legal claim of innocence because a subsequent and retroactive Supreme Court decision rendered the underlying conduct not illegal. Although the constitutional implications of actual innocence claims make it possible that equitable tolling would be granted in an appropriate case, it is far from clear what type of showing a petitioner must make to uphold it, particularly where the claim is one of factual, rather than legal, innocence. Because many prisoners maintain their innocence, a mere assertion of innocence will not likely be deemed "extraordinary" for the purposes of § 2244(d).^[111]

6. Delays of the Underlying State Determination

¶38 § 2244(d)(1)(D) provides for equitable tolling "when the facts on which a federal habeas claim is based would not have been discovered by a duly diligent petitioner."^[112] In *Ybanez v. Johnson*, the plaintiff argued for equitable tolling because the basis of the untimely federal habeas petition was a challenge to errors made in a decision on a state habeas petition not rendered until after the statutory period had expired.^[113] The Fifth Circuit rejected the argument, finding it "extraordinary" if "facts" were not evidence or events, but rather a state court ruling. While the facts of *Ybanez* do not present the best case for a finding of reasonable diligence, the case shows the unlikelihood that given the one-year limitation, a petitioner would be able to raise constitutional challenges to state post-collateral review proceedings (such as determinations of ineffective assistance of counsel) on federal habeas, even with § 2244(d)(2) tolling during the pendency of the state proceeding.

C. Equitable Irrelevance?

¶39 Given the effective limitation on equitable tolling to cases involving third party action, the "loophole" of equity is narrow indeed. Only the Ninth and Fifth Circuits have ever granted it, and the Fifth Circuit has rejected equitable tolling arguments in every other instance.^[114] Where multiple grounds for equitable tolling can be shown, the court may be more likely to grant it, as in *Kelly*. However, it is unlikely that courts will view multiple, independently insufficient grounds for equitable tolling as sufficient through aggregation.^[115]

VI. Conclusion

¶40 Recent decisions of the circuit courts and the Supreme Court indicate that the bounds of the AEDPA statute of limitations remain unclear. While the Court's decision in *Bennett* relieved the burden of adding state procedural bars to the restrictive one-year limitation, the Court will be hard-pressed to find grounds for a similarly generous interpretation of the language at issue in *Walker*. An affirmance of the Second Circuit, though improbable, would further relieve the severity of the short limitations period. However, if the Court reverses, the practical effect will be that where no state filings toll the statute, an untimely application will render the inmate completely barred from federal court. Despite the practical, physical, or even mental inability of many inmates to comply with the statute in a timely fashion, equitable tolling, the last resort, will almost certainly fail.

* J.D. 2001 Harvard Law School. I wish to thank Stephen B. Bright, Director of the Southern Center for Human Rights for his inspiration and advice which were the motivation for this Article.

^[1] [28 U.S.C. § 2244\(d\)\(1\)](#) (2001).

^[2] [Walker v. Artuz](#), 208 F.3d 357, 361 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121).

^[3] *Id.*

^[4] [Walker v. Artuz](#), 208 F.3d 357, 361 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121).

^[5] *Id.* at 364.

^[6] [121 S. Ct. 480](#) (2000).

^[7] [28 U.S.C. § 2244\(d\)\(1\)\(A\)](#) (2001). The other dates on which the one-year period may begin to run are: “(B) the date on which [any illegal or unconstitutional state-created barrier to filing] is removed . . . ; (C) the date on which [a new and retroactively applicable] constitutional right asserted was initially recognized by the Supreme Court; or (D) the date [when facts underlying the claims presented could have been discovered].” [28 U.S.C. § 2244\(d\)\(1\)](#). For the purposes of [§ 2244\(d\)\(1\)](#) (and a similar section in [§ 2255](#)), a judgment is not considered final, and hence, the statute of limitations does not begin to run, until after the time for filing a petition for a writ of certiorari to the United States court has passed. See [Rhine v. Boone](#), 182 F.3d 1153, 1155 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000). See also [Isham v. Randle](#), 226 F.3d 691 (6th Cir. 2000); [Nichols v. Bowersox](#), 172 F.3d 1068, 1072 (8th Cir. 1999); [Kapral v. United States](#), 166 F.3d 565, 570-71 (3d Cir. 1999) (finding in the context of [§ 2255](#)).

^[8] See [Ross v. Artuz](#), 150 F.3d 97, 102-03 (2d Cir. 1998); [Burns v. Morton](#), 134 F.3d 109, 111 (3d Cir. 1998); [Minter v. Beck](#), 230 F.3d 663, 665 (4th Cir. 2000); [Flanagan v. Johnson](#), 154 F.3d 196, 200-02 (5th Cir. 1998); [Austin v. Mitchell](#), 200 F.3d 391, 393 (6th Cir. 1999); *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir. 1998); [Lindh v. Murphy](#), 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Beeler\)](#), 128 F.3d 1283, 1287 (9th Cir. 1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997).

^[9] See, e.g., [Bennett v. Artuz](#), 199 F.3d 116, 119 (2d Cir. 1999), *aff'd on other grounds*, 121 S. Ct. 361 (2000); [Mills v. Norris](#), 187 F.3d 881, 883-84 (8th Cir. 1999). Pre-AEDPA habeas jurisprudence had already established that petitioners must exhaust state remedies with respect to each claim raised for federal habeas review. See, e.g., [Rose v. Lundy](#), 455 U.S. 509, 520 (1982) (stating that [§ 2254\(b\)](#) “provides a simple and clear instruction to potential litigants, before you bring any claims to federal court, be sure that you first have taken each one to state court”).

^[10] Those Circuit Courts confronting the issue have held that the tolling provision also applies to the one-year “grace period” most applicable to pre-AEDPA convictions. See, e.g., *Gaskins v. Duval*, 183 F.3d 8, 10 (1st Cir. 1999); [Bennett v. Artuz](#), 199 F.3d 116, 119 (2d Cir. 1999); [Lovasz v. Vaughn](#), 134 F.3d 146, 149 (3d Cir. 1998); [Fields v. Johnson](#), 159 F.3d 914, 916 (5th Cir. 1998) (per curiam); [Gendron v. United States](#), 154 F.3d 672, 675 & n.3 (7th Cir. 1998) (per curiam), *cert. denied*, 119 S. Ct. 1758 (1999); [Hoggro v. Boone](#), 150 F.3d 1223, 1226 (10th Cir. 1998); [Guenther v. Holt](#), 173 F.3d 1328, 1331 (11th Cir. 1999).

^[11] [H.R. Rep. No. 104-518, at 111](#) (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. See [Bennett v. Artuz](#), 199 F.3d 116, 119 (2d Cir. 1999).

^[12] [Taylor v. Lee](#), 186 F.3d 557, 561 (4th Cir. 1999). See [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Beeler\)](#), 128 F.3d 1283, 1286-87 (9th Cir. 1997); [Hoggro v. Boone](#), 150 F.3d 1223, 1226 (10th Cir. 1998).

^[13] [Walker v. Artuz](#), 208 F.3d 357 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2000) (No. 00-121).

^[14] [Austin v. Mitchell](#), 200 F.3d 391, 395 (6th Cir. 1999) (finding that unless the petition addresses one of the federal grounds for review, it cannot be considered an application “with respect to the pertinent judgment or claim” under [§ 2244\(d\)\(2\)](#)).

^[15] “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, *the question presented.*” [28 U.S.C. § 2254\(c\)](#) (2001) (emphasis added).

^[16] [O'Sullivan](#), 526 U.S. 838, 845 (1999). The Court based its holding on the purpose of the exhaustion doctrine, which is “to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.” *Id.*

^[17] [Dictado v. Ducharme](#), 189 F.3d 889 (9th Cir. 1999) (finding defendant’s petition not “properly filed” because of state procedural bar, but staying its mandate pending the Supreme Court’s ruling in [Artuz v. Bennett](#)). The original *Dictado* opinion was withdrawn following the ruling in [Artuz v. Bennett](#). See also [Austin v. Mitchell](#), 200 F.3d at 395 n.2 (noting that a state petition might not be “properly filed” because it was filed in the wrong state court); [Freeman v. Page](#), 208 F.3d 572 (7th Cir. 2000) (holding that a state collateral attack was “properly filed” and sufficient to toll the AEDPA limitations period if the claim was not dismissed for procedural deficiencies and the state court considered the claims).

^[18] [204 F.3d 1083, 1086](#) (11th Cir. 2000).

^[19] See [Webster v. Moore](#), 199 F.3d 1256, 1258-59 (11th Cir. 2000); [Hoggro v. Boone](#), 150 F.3d 1223, 1226 n.4 (10th Cir. 1998); [Lovasz v. Vaughn](#), 134 F.3d 146, 148-49 (3d Cir. 1998). However, the [Lovasz](#) court rejected broader merit requirements, stating that “in considering whether a petition for post-conviction relief is properly filed [under § 2244(d)(2)], district courts should not inquire into its merits.” *Id.* at 149.

^[20] See [Smith v. Ward](#), 209 F.3d 383 (5th Cir. 2000) (finding that even state petitions later deemed untimely still satisfied state filing rules and therefore holding that tolling would be permitted under § 2244(d)(2)); [Lovasz v. Vaughn](#), 134 F.3d 146, 148 (3d Cir. 1998).

^[21] [Villegas v. Johnson](#), 184 F.3d 467, 470 (5th Cir. 1999).

^[22] [Artuz v. Bennett](#), 121 S. Ct. 361, 364 (2000).

^[23] *Id.*

^[24] *Id.* at 365.

^[25] This argument was raised by Bennett and acknowledged, though not relied on, by the Court. See *id.* at 365.

^[26] The first case, [Felker v. Turpin](#), 518 U.S. 651, 663-64 (1996), held that the AEDPA did not violate an inmate’s constitutional right under the Suspension Clause to file a habeas petition. On November 7, 2000, the Court decided [Artuz v. Bennett](#), 121 S. Ct. 361 (2000), discussed above.

^[27] See [Jones v. Morton](#), 195 F.3d 153, 158-59 (3d Cir. 1999); [Grooms v. Johnson](#), 208 F.3d 488, 489 (5th Cir. 1999) (finding that “the word ‘State’ in the phrase ‘State post-

conviction proceeding [sic] or other collateral review' modifies both the phrase 'post-conviction review' and the phrase 'other collateral review'"); [Jiminez v. Rice](#), 222 F.3d 1210 (9th Cir. 2000).

[28] See [Walker v. Artuz](#), 208 F.3d 357, 359-61 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121); [Petrick v. Martin](#), 236 F.3d 624, 626-28 (10th Cir. 2001).

[29] [Walker v. Artuz](#), 208 F.3d 357, 358 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121).

[30] *Id.*

[31] *Id.*

[32] *Id.* (citing [Walker v. Legal Aid Soc'y](#), 1996 U.S. Dist. LEXIS 22492 (E.D.N.Y. 1996)).

[33] Because Walker's conviction became final before April 24, 1996, the effective date of the AEDPA, he was entitled to a one-year grace period which ended on April 24, 1997. *Id.* at 359 (citations omitted).

[34] Tolling the statute for that period would render his second federal petition timely.

[35] [Walker v. Artuz](#), 208 F.3d 357, 359 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121).

[36] [195 F.3d 153, 159](#) (3d Cir. 1999).

[37] [Walker v. Artuz](#), 208 F.3d 357, 360 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121)(citing [Barrett v. Yearwood](#), 63 F. Supp. 2d 1245, 1250 (E.D. Cal. 1999)).

[38] [236 F.3d 624, 627](#) (10th Cir. 2001).

[39] *Id.* at 625-26. The court rejected dicta in [Rhine v. Boone](#), 182 F.3d 1153 (10th Cir. 1999), which adopted the opposite interpretation, and distinguishing the case as addressing only the tolling power of petitions for certiorari.

[40] See *supra* n. 28

[41] [Walker v. Artuz](#), 208 F.3d 357, 360 (2d Cir. 2000), *cert. granted sub nom. Duncan v. Walker*, 121 S. Ct. 480 (2001) (No 00-121).

[42] [Sperling v. White](#), [] 30 F. Supp. 2d 1246, 1251 (C.D. Cal. 1998).

[43] See Brief of Amici Curiae Massachusetts, et al., at 4-5, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121).

[44] See [Brief of Amici Curiae Criminal Justice Legal Foundation](#), at 11-17, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121) (providing a detailed discussion of the legislative history of the AEDPA).

[45] See [Jones v. Morton](#), 195 F.3d 153, 159 (3d Cir. 1999).

[46] [Brief of Amici Curiae Criminal Justice Legal Foundation](#), at 13-14, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121) (quoting statements of California Attorney General Dan Lungren before the Senate Judiciary Committee regarding federal habeas corpus reform).

[47] See *id.* at 14.

[48] [222 F.3d 1210](#) (9th Cir. 2000).

[49] “The ineffectiveness or incompetence of counsel during *State or Federal post-conviction proceedings* in a capital case shall not be a ground for relief in a [federal habeas proceeding]. This limitation shall not preclude the appointment of different counsel . . . at any phase of *State or Federal post-conviction proceedings* [on that basis].” [28 U.S.C. § 2261\(e\)](#) (2001) (emphasis added).

[50] [Jiminez](#), 222 F.3d at 1213.

[51] “[The statute of limitations for habeas petitions in capital cases shall be tolled] from the date on which the first petition for *post-conviction review or other collateral relief* is filed until the first State court disposition of such petition.” [28 U.S.C. § 2263\(b\)\(2\)](#) (2001).

[52] [Jiminez](#), 222 F.3d at 1213. See also [Brief of Amici Curiae Criminal Justice Legal Foundation](#), at 9, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121).

[53] [Petrick v. Martin](#), 236 F.3d 624, 626-28 (10th Cir. 2001).

[54] *Id.* at 627-28.

[55] See [Ott v. Johnson](#), 192 F.3d 510, 513 (5th Cir. 1999) (stating that a “petition for writ of certiorari to the Supreme Court is not an application for ‘State’ review that would toll the limitations period”), *cert. denied*, 529 U.S. 1099 (2000); [Isham v. Randle](#), 226 F.3d 691, 695 (6th Cir. 2000); [Snow v. Ault](#), 238 F.3d 1033 (8th Cir. 2001); [Jiminez](#), 222 F.3d at 1213-14; [Coates v. Byrd](#), 211 F.3d 1225, 1227 (11th Cir. 2000) (holding that the limitations period is tolled “only so long as the case is in the state courts”).

[56] [Ott v. Johnson](#), 192 F.3d 510 (5th Cir. 1999).

^[57] [Grooms v. Johnson](#), 208 F.3d 488, 489 (5th Cir. 1999).

^[58] U.S. Pet. Brief, at 32-33, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121). The brief for the United States cites House Report No. 104-23, at 9 (1995), which explains that the statute of limitations provisions are designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner."

^[59] *Id.* at 33. See also [Jiminez](#), 222 F.3d at 1214.

^[60] [Walker v. Artuz](#), 208 F.3d 357, 360-61 (2d Cir. 2000), *cert. granted sub nom.* [Duncan v. Walker](#), 121 S. Ct. 480 (2001) (No 00-121).

^[61] Brief of Amici Curiae Massachusetts, et al., at 4, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121). See also U.S. Pet. Brief, at 34, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121); [Brief of Amici Curiae Criminal Justice Legal Foundation](#), at 5, 17, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121) (arguing also that "the generous interpretation of tolling for state court filings in [Artuz v. Bennett](#), coupled with denying tolling for unexhausted federal petitions, will encourage the proper procedure and reduce shuttling between state and federal courts. . . . The natural complement to Bennett's encouragement to file these claims in state court is a discouragement to file them in federal court.").

^[62] [Petrick v. Martin](#), 236 F.3d 624, 628 (10th Cir. 2001).

^[63] [Walker v. Artuz](#), 208 F.3d 357, 360 (2d Cir. 2000), *cert. granted sub nom.* [Duncan v. Walker](#), 121 S. Ct. 480 (2001) (No 00-121).

^[64] [Petrick](#), 236 F.3d at 628-29.

^[65] [121 S. Ct. at 365](#) (2000) (stating that "[the text] may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted").

^[66] [Harris v. Hutchinson](#), 209 F.3d 325, 328 (4th Cir. 2000) (citing [Shah v. Hutto](#), 722 F.2d 1167, 1167 (4th Cir. 1983)).

^[67] *Id.* at 328-29 (noting that the AEDPA limitation provisions, unlike certain Title VII provisions, do "not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"). See also [Miller v. N.J. State Dep't of Corr.](#), 145 F.3d 616, 617-18 (3d Cir. 1998) (providing an analysis of the legislative history of the AEDPA); [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Beeler\)](#), 128 F.3d 1283, 1288-89 (9th Cir. 1997), *rev'd on other grounds*, 163 F.3d 530 (9th Cir. 1998).

^[68] See [Smith v. McGinnis](#), 208 F.3d 13, 17 (2d Cir. 2000); [Miller v. N.J. State Dep't of Corr.](#), 145 F.3d at 617-18; [Brown v. Angelone](#), 150 F.3d 370, 371-72 (4th Cir. 1998); [Davis v. Johnson](#), 158 F.3d 806, 810 (5th Cir. 1998); [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Beeler\)](#), 128 F.3d 1283, 1288-89 (9th Cir. 1997), *rev'd on other grounds*, 163 F.3d 530 (9th Cir. 1998)(discussing the language, legislative history and statutory purpose of the AEDPA in support of its holding); [Miller v. Marr](#), 141 F.3d 976, 978 (10th Cir. 1998). The Third, Fifth, Eighth and Ninth Circuits, as well as other district courts have similarly concluded that the largely identical [§ 2555](#) of the AEDPA is a statute of limitations subject to equitable tolling. See [Davis](#), 158 F.3d at 811; [Miller v. N.J. State Dep't of Corr.](#), 145 F.3d at 619 n.1; [Moore v. United States](#), 173 F.3d 1131, 1134 (8th Cir. 1999); [United States v. Griffin](#), 58 F. Supp. 2d 863 (N.D.II. 1999).

^[69] [209 F.3d 325](#) (2000).

^[70] *Id.* at 329; [Miller v. N.J. State Dep't of Corr.](#), 145 F.3d at 618; [Davis](#), 158 F.3d at 811; [Calderon \(Beeler\)](#), 128 F.3d at 1288-89. Cf. [Taliani v. Chrans](#), 189 F.3d 597, 598 (7th Cir. 1999) (concluding that “the judge-made doctrine of equitable tolling is available, in principle at least” although “it is unclear what room remains for importing the judge-made doctrine,” given the express tolling provisions of the statute).

^[71] Brief of Amici Curiae Massachusetts, et al., at 5, [Duncan v. Walker](#), 121 S. Ct. 480 (2000) (No. 00-121) (arguing that “[b]ecause the statute provides explicitly for tolling during State review proceedings, and where it also includes equitable considerations in defining the events that trigger the commencement of the statute of limitations, it is plain that Congress did not intend to permit additional factors, not among those specified in the statute, to toll the limitations period”). There is a “rebuttable presumption” that equitable tolling applies to most statutes of limitation. See [Irwin v. Dept. of Veterans Affairs](#), 498 U.S. 89, 95-96 (1990). However, the presumption is overcome where adhering to it would be “inconsistent with the text of the relevant statute.” [United States v. Beggerly](#), 524 U.S. 38, 48 (1998).

^[72] [Warren v. Garvin](#), 219 F.3d 111, 113 (2d Cir. 2000) (citations omitted).

^[73] [Harris v. Hutchinson](#), 209 F.3d 325, 330 (4th Cir. 2000; See also [Valverde v. Stinson](#), 224 F.3d 129, 133 (2d Cir. 2000); [Calderon \(Beeler\)](#), 128 F.3d at 1288.

^[74] [Miller v. N.J. State Dep't of Corr.](#), 145 F.3d at 618-19 (internal citations omitted).

^[75] [Calderon \(Beeler\)](#), 128 F.3d at 1288.

^[76] See, e.g., [Fisher v. Johnson](#), 174 F.3d 710, 713, 715-16 (5th Cir. 1998) (rejecting a request for equitable tolling because “in order for equitable tolling to apply, the applicant must diligently pursue [federal relief] . . . equity is not intended for those who sleep on their rights”).

[77] [Valverde v. Stinson](#) 224 F.3d 129,134 & n.4 (2d Cir. 2000). See also [Smith v. McGinnis](#), 208 F.3d 13, 17 (2d Cir. 2000); [Miller v. N. J. State Dep't of Corr.](#), 145 F.3d at 618-19; [Miller v. Marr](#), 141 F.3d 976, 978 (10th Cir. 1998); [Sandvik v. United States](#), 177 F.3d 1269, 1271 (11th Cir. 1999). These four cases all require habeas petitioners seeking equitable tolling to show some form of diligence.

[78] See, e.g., [Fisher v. Johnson](#), 174 F.3d 710, 714-15 (5th Cir. 1998) (refusing to grant equitable tolling because of lack of reasonable diligence even where extraordinary circumstances, namely petitioner's confinement to a psychiatric ward without glasses and hence legally blind, existed for seventeen days).

[79] To date, the only grounds for which equitable tolling has been granted that did not involve a third party has been for mental incompetency. See [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Kelly\)](#), 163 F.3d 530 (9th Cir. 1998) (*en banc*) (upholding a grant of equitable tolling in a capital case, partially on grounds of alleged mental incompetency). See also [Hood v. Sears, Roebuck & Co.](#), 168 F.3d 231, 232-33 (5th Cir. 1999) (recognizing the possibility, while not finding so in the instant case). Note, however, that in [Kelly](#), the primary ground for upholding equitable tolling was the fact that the district court had stayed all proceedings pending a competency hearing, thereby preventing the habeas petition filing. [Calderon \(Kelly\)](#), 163 F.3d at 541. Viewing the district court order itself as a third party action, this ground for equitable tolling fits within the general rule.

[80] [Valverde v. Stinson](#), 224 F.3d 129, 133 (2d Cir. 2000). The court vacated and remanded for a factual finding on the alleged confiscation of the petition.

[81] [Miles v. Prunty](#), 187 F.3d 1104, 1107 (9th Cir. 1999).

[82] *Id.*

[83] *Id.* (citing [Lopez v. INS](#), 184 F.3d 1097 (9th Cir. 1999), holding that where a petition is filed late due to fraud perpetrated on the petitioner, the statute of limitations is equitably tolled until the date the fraud is discovered).

[84] [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Beeler\)](#), 128 F.3d 1283, 1289 (9th Cir. 1997).

[85] [Coleman v. Johnson](#), 184 F.3d 398, 402 (5th Cir. 1999) (quoting [Rashidi v. Am. President Lines](#), 96 F.3d 124, 128 (5th Cir. 1996)).

[86] [Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal. \(Kelly\)](#), 163 F.3d 530, 541-42 (9th Cir. 1998) (*en banc*). The court also found mental incompetency a third independent ground for equitable tolling. *Id.*

[87] *Id.* at 542.

^[88] [Strickland v. Washington](#), 466 U.S. 668 (1984). *See, e.g.*, [Burger v. Kemp](#), 483 U.S. 776 (1987); [United States v. Cronin](#), 466 U.S. 648 (1984); [Chandler v. United States](#), 218 F.3d 1305 (11th Cir. 2000) (en banc); [McFarland v. Texas](#), 928 S.W.2d 482 (Tex. Cir. Ct. App. 1996). *Cf.* [Williams v. Taylor](#), 529 U.S. 362 (2000).

^[89] *See* [Harris v. Hutchinson](#), 209 F.3d 325, 330-31 (4th Cir. 2000); [Taliani v. Chrans](#), 189 F.3d 597, 598 (7th Cir. 1999). For a similar holding in another context, see [Gilbert v. Secretary of Health and Human Services](#), 51 F.3d 254 (Fed. Cir. 1995) (finding attorney misinterpretation of a statute insufficient grounds for equitable tolling).

^[90] [177 F.3d 1269](#) (11th Cir. 1999) (per curiam).

^[91] *Id.* at 1272.

^[92] [207 F.3d 773](#), 774-75 (5th Cir. 2000).

^[93] *Id.* at 775. However, on the facts of the case, the petitioner had made no showing that alleged ineffective assistance of counsel at the appeal stage prevented him from filing a timely federal habeas petition under the AEDPA. *Id.* Molo's conviction was confirmed in 1970 because his attorney failed to file a timely appellate brief. He filed a state habeas petition in 1975 and another, which was dismissed as successive in 1997. He then filed a federal habeas petition in 1998 which was found time-barred.

^[94] 58 F. Supp. 2d 863 (N.D.II. 1999) (finding grounds for an evidentiary hearing on ineffective assistance of counsel, though under [§ 2255](#)).

^[95] *Id.* at 869-70 (citing [Castellanos v. United States](#) 26 F.3d 717, 718-19 (7th Cir. 1994), for the proposition that failure to follow a client's instruction to appeal constitutes ineffective assistance of counsel).

^[96] *See supra* n. 90

^[97] *See, e.g.*, [Felder v. Johnson](#), 204 F.3d 168, 171-173 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 622 (2000) (finding insufficient grounds for equitable tolling where the prison denied Felder access to the AEDPA for seventeen months after its enactment); [Fisher v. Johnson](#), 174 F.3d 710, 714-15 (5th Cir. 1999) (refusing to toll limitation where access to legal materials that would have given notice of the limitations period was delayed); [Miller v. Marr](#), 141 F.3d 976, 978 (10th Cir. 1998); [United States v. Griffin](#), 58 F. Supp. 2d 863, 869 (N.D. Ill. 1999). However, as the dissent in [Felder](#) notes, "no court ... has held that actual ignorance of [the] AEDPA, resulting from the denial of access to the ... statute, can *never* be a basis for equitable tolling," though the majority's holding in that case suggests the Fifth Circuit at least, would be particularly unlikely to so find. 204 F.3d at 175-76 (emphasis added).

^[98] *See* [Barrow v. New Orleans S.S. Ass'n](#), 932 F.2d 473, 478 (5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of a plaintiff's

unfamiliarity with the legal process or his lack of legal representation); *Felder*, 204 F.3d at 171 (finding limited library resources insufficient grounds and declining to follow dicta in *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999), that a “delay in receiving information might call for equitable tolling – such as if the prison did not obtain copies of the AEDPA for months and months”); *Miller v. Marr*, 141 F.3d at 978 (finding limited library access insufficient to establish “extraordinary circumstances”); *Atkins v. Harris*, 1999 WL 13719, at *2 (N.D.Cal. Jan. 7, 1999) (holding that “lockdowns, restricted library access and transfers do not constitute extraordinary circumstances sufficient to equitably toll the AEDPA statute of limitations”).

^[99] *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (holding pro se status, illiteracy, deafness and lack of legal training are not external factors excusing abuse of the writ); *Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1996); *Furr v. Robinson*, 2000 U.S. Dist. LEXIS 1290 (E.D. Va. January 13, 2000).

^[100] *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that the state’s constitutional obligation to provide counsel to indigent defendants does not extend to discretionary state appeals or applications for Supreme Court review). There is, however, a statutory right to counsel for any “post-conviction proceeding” under the § 2254 and § 2255 federal habeas statutes in capital cases, as provided by the Anti-Drug Abuse Act of 1988. 21 U.S.C. 848(q)(4)(B) (2000). For a discussion of this provision and procedures for its invocation, see *McFarland v. Scott*, 512 U.S. 849 (1994). In addition, many states provide counsel to death row inmates in state habeas proceedings, though they are not constitutionally required to do so. *Murray v. Giarratano*, 492 U.S. 1, 10, 12 & n.7 (1989).

^[101] For example, in *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000), the Eleventh Circuit vacated a lower court’s refusal to toll the ADEPA statute of limitations because the petition at issue had not been signed. The court stated that “pro se filings . . . are entitled to special consideration” and stated that given Mederos’ efforts to promptly remedy the defect and the fact that his subsequent (time-barred) petition was substantively identical to the first, albeit with the required signature, the second “should have been construed liberally as an amendment” to the first motion. *Id.*

^[102] See, e.g., *Rhodes v. Senkowski*, 82 F. Supp. 2d 160, 168 (S.D.N.Y. 1999). Some courts have found in other contexts that illness may be an “exceptional circumstance” that can toll a statute of limitations when it has prevented the party from pursuing legal rights. See, e.g., *Canales v. Sullivan*, 936 F.2d 755, 759 (2d Cir. 1991) (noting that mental illness which incapacitated the petitioner during the limitations period may warrant tolling of the Social Securities Act statute of limitations).

^[103] See, e.g., *Fisher v. Johnson*, 174 F.3d 710, 714-15 (5th Cir. 1999) (temporary blindness); *Rhodes*, 82 F. Supp. 2d at 160-68 (AIDS-related illness). Relevant to the court’s decision in *Rhodes* was the fact that the petitioner was not totally incapacitated during his hospitalization and the fact that the federal habeas petition was filed eight years after his state conviction became final (though only two years after the enactment of the AEDPA).

[104] [Hood v. Sears, Roebuck & Co.](#), 168 F.3d 231, 232-33 (5th Cir. 1999); [Miller v. Marr](#), 141 F.3d 976, 978 (10th Cir. 1998). *See also* [Drope v. Missouri](#), 420 U.S. 162, 163 (1975) (recognizing competency to stand trial as rudimentary); [Riggins v. Nevada](#), 504 U.S. 127, 139-40 (1992) (opinion concurring in judgment).

[105] *See, e.g.*, [Furr v. Robinson](#), 2000 U.S. Dist. LEXIS 1290 (E.D. Va. January 13, 2000) (denying equitable tolling where petitioner “demonstrated only that his mental abilities are below average [and did not show] that his fifth grade educational abilities render him incompetent from a legal standpoint”).

[106] *See, e.g.*, [Derritt v. Galaza](#), 229 F.3d 1157 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1128 (2001).

[107] *Id.* (holding that the defendant’s mere allegation that he suffered from a mental illness, without any indication of what mental disorder he suffered from, whether he suffered from it during the limitations period, or how the disorder would have rendered him incompetent to file a timely petition, was insufficient basis for equitable tolling).

[108] *See, e.g.*, [Lucidore v. N.Y. State Div. of Parole](#), 209 F.3d 107, 112-13 (2d Cir. 2000).

[109] *See* [Triestman v. United States](#), 124 F.3d 361, 378-79 (2d Cir. 1997); [Lucidore](#), 209 F.3d at 112-113; *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997) (noting that “were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue”); [Miller v. Marr](#), 141 F.3d 976, 978 (10th Cir. 1998).

[110] [Triestman](#), 124 F.3d at 380.

[111] *See* [Felder v. Johnson](#), 204 F.3d 168, 191 (5th Cir. 2000).

[112] *See* [Ybanez v. Johnson](#), 204 F.3d 645, 646 (5th Cir. 2000).

[113] *Id.*

[114] *See* [Felder](#), 204 F.3d at 191. *See also* [Barrow v. New Orleans S.S. Ass’n](#), 932 F.2d 473, 478 (5th Cir. 1991) (rejecting equitable tolling in another context).

[115] *See* [Barrow](#), 932 F.2d at 478 (refusing equitable tolling where plaintiff asserted both unfamiliarity with the legal process and lack of legal representation); [Atkins v. Harris](#), 1999 WL 13719, at *2 (N.D.Cal. Jan. 7, 1999) (denying equitable tolling under the AEDPA where the inmate was subject to a number of restraints, including lockdowns, restricted library access and transfers).