

**MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

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**Law Court Docket No. Ken-23-419**

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**Aubrey Armstrong**  
*Petitioner/Appellant*

v.

**State of Maine**  
*Respondent/Appellee*

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On appeal from a denied Petition for Post-Conviction Review in the Kennebec  
County Unified Criminal Court

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***BRIEF FOR APPELLANT***

Michelle R. King  
Maine Bar No. 6418  
Thistle Weaver & Morris  
P.O. Box 7030  
Portland, Maine 04112  
(207) 772-0303

May 15, 2024

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## **PROCEDURAL HISTORY**

On June 29, 2023, petitioner Aubrey Armstrong's Petition for Post-Conviction Review, and a Motion for Appointment of Counsel was docketed in the lower court. [R. 1]. The lower court (Mallonee, J.) summarily denied the petition as untimely on September 29, 2023. [R. 7]. Mr. Armstrong filed a timely Notice of Appeal on October 20, 2023. [R. 1]. On April 2, 2024, this Court granted a Certificate of Probable Cause allowing full appellate review.

## **STATEMENT OF FACTS**

On April 3, 2023, Mr. Armstrong mailed a Petition for Post-Conviction Review (PCR) claiming judicial bias and violation of his Fifth, Sixth, and Fourteenth Amendment Rights. [R. 16, 21]. The Petition was docketed on April 10, 2023. [R. 3, 14-21]. On April 3, 2023, Mr. Armstrong also mailed a Motion for Appointment of Counsel. [R. 3]. The Motion was docketed on April 10, 2023. [R. 3]. Mr. Armstrong noted in his Petition that "Petitioner is a layment [sp] at law and reserves these grounds and facts to the lawyer appointed to assist prosecuting this Petition for Post Conviction Review." [R. 17]. Despite submitting the required paperwork for appointment of counsel, no counsel was appointed to assist Mr. Armstrong in amending his Petition. [R. 3, 11, 13]. On April 8, 2023, Mr. Armstrong wrote to the lower court and requested to Amend his PCR – he received no reply. On May 8, 2023, the post-conviction court summarily dismissed Mr.

Armstrong's petition pursuant to M.R.U. Crim. P. 70(b), finding that none of his claims raised "cognizable grounds upon which post-conviction relief may be granted." [R. 13]. Mr. Armstrong, who is incarcerated, did not receive this Order until May 25, 2023. [R. 35].

On June 1, 2023, Mr. Armstrong mailed a Motion for Reconsideration of the Order dismissing his PCR, again requesting legal counsel to assist him in developing his PCR claims. [R. 31-34]. The Motion was docketed on June 28, 2023. [R. 5]. On June 13, 2023, Mr. Armstrong mailed a "Motion Under Unified Criminal Docket for Order Extending the Time Within Which to File Notice of Appeal of This Court's May 8, 2023 Order Dismissing the Petition for Post Conviction Review," noting that the time for filing his Notice of Appeal should be tolled until a decision on his Motion for Reconsideration. [R. 35-36]. The Motion was docketed on June 28, 2023. [R. 3]. In an Order dated July 13, 2023, the lower court denied Mr. Armstrong's Motion to Reconsider. [R. 3, 9]. The lower court also denied Mr. Armstrong's motion to extend time for filing his notice of appeal holding that "an allowance of additional time to file an appeal to the Maine Supreme Judicial Court is a matter upon which only that court, and not this one, may rule." [R. 3, 8-9].

On June 2, 2023, Mr. Armstrong began filling out PCR forms for his second PCR – however, he was unable to get them notarized until June 15, 2023, because

no caseworker was available to notarize the document.<sup>1</sup> [R. 29]. Mr. Armstrong wrote to the lower court on a number of occasions between June 1, 2023, and June 21, 2023, inquiring about his motion to reconsider and extension of time to file an appeal of his denied PCR. In addition, Mr. Armstrong wrote to this Court requesting an extension of time in which to file an appeal of his denied PCR, but he received correspondence from the Deputy Clerk on June 27, 2023 that the Court could not take any action on his request.<sup>2</sup> [R. 30-34]. On June 15, 2023, Mr. Armstrong's second PCR claiming ineffective assistance of trial counsel and prosecutorial misconduct was filed. [R. 29]. The PCR was docketed in the lower court on June 29, 2023. [R. 1]. That PCR was summarily dismissed as untimely on September 29, 2023. [R. 7].

### **ISSUES FOR REVIEW**

- I. Whether the post-conviction court erred when it summarily dismissed Mr. Armstrong's petition as untimely pursuant to M.R.U. Crim. P. 70(b) where the doctrine of equitable tolling should have been applied to his case?

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<sup>1</sup> Petitioner has a letter from a Maine State Prison employee, and his own notarized Affidavit in support of this claim, however opposing counsel objected to inclusion of those documents in the Appendix. They are available upon request.

<sup>2</sup> Petitioner has a letter from Deputy Clerk Joel Biron dated June 27, 2023, to support this assertion, however opposing counsel objected to inclusion of this document in the Appendix. It is available upon request.

## ARGUMENT

### **I. THE POST-CONVICTION COURT ERRED WHEN IT SUMMARILY DISMISSED MR. ARMSTRONG’S PETITION AS UNTIMELY PURSUANT TO M.R.U. CRIM. P. 70(B) BECAUSE THE DOCTRINE OF EQUITABLE TOLLING SHOULD BE APPLIED TO HIS CASE.**

Because the post-conviction court erred when it summarily dismissed Mr. Armstrong’s Petition for Post-Conviction Review, this Court should reverse that decision and remand the case to the lower court. This Court reviews a post-conviction court’s legal conclusions de novo. *Roque v. State*, 2019 ME 99, ¶ 4, 210 A.3d 824, 825 (*citing Fortune v. State*, 2017 ME 61, ¶ 12, 158 A.3d 512).

In cases of post-conviction review, a petitioner is required to demonstrate five statutory prerequisites to permit an adjudication on the merits by the assigned court. One factor, and the only one relevant in this case, is a “Timely filing of the petition under 15 M.R.S. § 2128-B.” Me. R. U. Crim. P. Rule 66(4). As this Court has noted, “In 1997, the [Maine] Legislature adopted a filing deadline for petitions for post-conviction review ‘modeled after the federal habeas corpus statute, 28 United States Code, section 2244.’” *Finch v. State*, 1999 ME 108, ¶ 7, 736 A.2d 1043, 1044 (citation omitted). *See also* 15 M.R.S. § 2128-B(1) (A) (petitioner must file his claim within a one-year period from “The date of final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal”). Because the Maine statute was modeled after the federal



statute, federal case law interpreting timely filing of a habeas corpus petition should be adopted by this Court as applicable to petitions for post-conviction review.

Pursuant to federal law, under certain circumstances, the one-year period for filing a habeas corpus petition may be tolled thereby allowing the reviewing court to address the petitioner's substantive claims despite a filing outside of the statutory limits. This doctrine, known as "equitable tolling," as set forth by the United States Supreme Court in *Holland v. Florida*, 560 U.S. 631 (2010), has been routinely applied to petitioners seeking habeas corpus relief. *See, e.g., Holmes v. Spencer*, 685 F.3d 51, 61-62 (1<sup>st</sup> Cir. 2012) (petitioner seeking relief from statute of limitations in a habeas corpus petition). "Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances,' but should be applied only in 'rare and exceptional circumstances.'" *Clemente v. Lee*, 72 F.4th 466, 478 (2d Cir. 2023) (*quoting Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000)) (citations omitted).

Under *Holland*, a litigant is entitled to equitable tolling of a statute of limitations if the litigant establishes two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (internal quotation marks omitted). "The diligence prong covers those affairs within the petitioner's control, while the

extraordinary circumstance prong covers matters outside his control.” *Blue v. Medeiros*, 913 F.3d 1, 8 (1<sup>st</sup> Cir. 2019). To prevail, a petitioner must “provide details of the specific actions taken toward filing the petition” and explain how his efforts to timely file were thwarted by circumstances beyond his control. *Arthur v. Allen*, 452 F.3d 1234, 1253 (11<sup>th</sup> Cir.), *opinion modified on reh'g*, 459 F.3d 1310 (11<sup>th</sup> Cir. 2006). “As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules...” *Fisher v. Johnson*, 174 F.3d 710, 713 (5<sup>th</sup> Cir. 1999). As such, “The equitable tolling doctrine is applied on a ‘case-by-case basis, avoiding mechanical rules and favoring flexibility.’” *Ramos-Cruz v. Carrau-Martínez*, 627 F. Supp. 3d 114, 131 (D.P.R. 2022) (*quoting Holmes*, 685 F.3d at 62).

Although this Court has never addressed the issue of whether the equitable tolling doctrine applies in petitions for post-conviction review where the petitioner has technically filed a petition outside of the one-year limitations period, in at least two instances, the issue has been addressed in superior courts. *See Burr v. State*, No. CR-06-174, 2007 WL 2173744 (Me. Super. Ct. Mar. 28, 2007) (noting that the one-year limitations for post-conviction review was modeled after federal legislation and applying the doctrine of equitable tolling); *King v. State*, No. 99-69 (Me. Super. Ct. Apr. 14, 2000) (same). Here, an examination of the facts and circumstances of Mr. Armstrong’s case demonstrate that he pursued his rights

diligently, and that some extraordinary circumstances stood in his way that prevented timely filing. *Holland*, 560 U.S. at 649.

**Due diligence.**

“It is a well-established principle that, in order for appellant to claim an entitlement to equitable tolling, he must show that he ‘exercised reasonable diligence in ... bringing [the] claims.’” *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005) (quoting *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 618–619 (3d Cir. 1998)). (citations omitted).

“[T]he diligence required for equitable tolling purposes is ‘reasonable diligence,’ not ‘maximum feasible diligence.’” *Connors v. Hutchings*, 2023 WL 3641715, No. 21-15693, at \*2 (9<sup>th</sup> Cir. May 25, 2023) (quoting *Holland*, 560 U.S. at 653). “A petitioner’s complete lack of access to legal paperwork may warrant equitable tolling in limited circumstances; however, . . . the petitioner must also demonstrate that he exercised reasonable diligence in pursuing his rights.” See *Hudson v. United States*, 2023 WL 3231521, No. 2:14-cr-00045-JDL-1, 2:22-cv-00352-JDL, at \*3 (D. Me. May 3, 2023).

In *Ramos-Cruz*, the United States District Court for the District of Puerto Rico held that the petitioner had demonstrated reasonable diligence in filing his habeas corpus petition that was filed 15 days after the one-year statute of limitations and thus the principle of equitable tolling applied to his case. 627 F.

Supp. at 130. In that case, the petitioner filed his habeas corpus while in state custody, without the assistance of counsel while proceeding *in forma pauperis*, later amended his petition with the assistance of counsel, and opposed the respondents' motion to dismiss. *Id.* at 131. In addition, the petitioner had pursued a motion for new trial in the state courts for over three decades. *Id.* Ultimately, the court found that the petitioner had "appeared before every stratum of the Puerto Rico judiciary to litigate non-frivolous issues for three decades, demonstrating due diligence...." *Id.* at 132.

Similarly, Mr. Armstrong has been diligently pursuing a just result in his case for many years. After his conviction in May 2018, he filed a successful appeal based on double jeopardy grounds and this Court vacated and remanded his case back to the trial court on July 23, 2019. *See State v. Armstrong*, 2019 ME 117, 212 A.3d 856. After resentencing, the petitioner filed another successful appeal in which this Court again vacated Mr. Armstrong's sentence and remanded the case back to the trial court on July 14, 2020. *State v. Armstrong*, 2020 ME 97, 237 A.3d 185. On June 7, 2022, this Court affirmed the trial court's decision on Mr. Armstrong's third appeal. Thereafter, Mr. Armstrong began his efforts to get his trial file from his appellate counsel, the trial court, and the Law Court: He wrote letters to his appellate counsel on August 1, 2022, September 20, 2022, and October 18, 2022, Matthew Pollack on August 2, 2022, and Michele Lambert on

August 4, 2022. Finally, on March 28, 2023, he was able to file (mailed from the prison) his first PCR. In doing so, Mr. Armstrong clearly requested that counsel be appointed to assist him in filing an amended complaint and filed all necessary documents in doing so. [R. 11, 17]. Nevertheless, counsel was not appointed. [R. 3]. On April 8, 2023, Mr. Armstrong requested to amend his PCR, but on May 8, 2023, the lower court summarily denied the petition without allowing an amendment. [R. 13]. Mr. Armstrong did not receive notice of this denial until May 25, 2023. [R. 32]. On June 13, 2023, Mr. Armstrong filed a Motion for Reconsideration and a Motion to Extend Time for Filing his Notice of Appeal. [R. 32, 36].<sup>3</sup> Both motions were denied on July 13, 2023. [R. 8-9]. While awaiting the decision on the Motion for Reconsideration, Mr. Armstrong filed another PCR on June 15, 2023. However, Mr. Armstrong initiated the filing of this paperwork on June 2, 2023 – the paperwork was completed but he was unable to get it notarized until June 15, 2023, because there were no caseworkers available to notarize the petition. Thus, had it not been for the lack of caseworkers at his institution, Mr. Armstrong would have timely filed his Petition.<sup>4</sup> As it was, Mr. Armstrong’s

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<sup>3</sup> On June 13, 2023, Mr. Armstrong also wrote a letter to this Court requesting an extension to file a Notice of Appeal. He received a letter from this Court dated June 27, 2023, stating that no action could be taken while he had pending motions in the lower court. *See* fn. 2.

<sup>4</sup> Pursuant to the prisoner mailbox rule, an unrepresented prisoner is deemed to have filed a timely document if it was delivered to the Department of Corrections at least three days before it is due in court. *See Martin v. Department of Corrections*, 2018 ME 103, ¶21, 190 A.3d 237.

Petition was filed a mere eight days after the June 7, 2023 statute of limitations date. [R. 29].

By filing multiple successful appeals in this Court, consistently seeking his case file to initiate a PCR, filing the PCR and seeking legal assistance to amend his petition, filing a Motion for Reconsideration and Motion to Extend Time for Filing a Notice of Appeal, and filing another PCR, Mr. Armstrong has exercised “reasonable diligence” under the *Holland* standard. *See also Ramos-Cruz*, 627 F. Supp. at 130.

In addition, there are extraordinary circumstances that have prevented Mr. Armstrong from filing a PCR within the time limitation.

#### **Extraordinary Circumstances.**

“Extraordinary circumstances” exist when some “external force ... cause[s] the untimeliness.” *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9<sup>th</sup> Cir. 2009) (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9<sup>th</sup> Cir. 2008)). To prevail, a petitioner must establish that he “diligently pursued [his] rights, but some extraordinary circumstance, or obstacle, prevented timely filing.” *Blue*, 913 F.3d at 8 (citing *Holland*, 560 U.S. at 649). “Extraordinary circumstances” pertain to the conditions that caused the untimely petition, not the underlying facts resulting in the conviction. *Barreto-Barreto v. United States*, 551 F.3d 95, 101 (1<sup>st</sup> Cir. 2008). In applying the equitable tolling doctrine, an important factor is the reason for the

late filing.” *Trapp v. Spencer*, 479 F.3d 53, 60 (1<sup>st</sup> Cir. 2007) (*Abrogation Recognized by Holmes*, 685 F.3d 51) (noting that the “*Trapp* factors” were overtaken by the United States Supreme Court decision in *Holland*).

Circumstances beyond a petitioner's control may include situations in which “the claimant was materially misled into missing the deadline,” *Trenkler v. United States*, 268 F.3d 16, 25 (1<sup>st</sup> Cir. 2001) (*quoting Fradella v. Petricca*, 183 F.3d 17, 21 (1<sup>st</sup> Cir. 1999)), and where the inmate does not have access to legal materials. *See Mendoza v. Carey*, 449 F.3d 1065, 1071 (9<sup>th</sup> Cir. 2006).

Here, Mr. Armstrong faced extraordinary circumstances on two fronts when attempting to litigate his PCR. First, after his PCR was denied on May 8, 2023, Mr. Armstrong did not receive the Order until May 25, 2023. He immediately filed a Motion for Reconsideration and Motion to Extend Time for Filing a Notice of Appeal on June 1, 2023. Nevertheless, the lower court’s erroneous decision on Mr. Armstrong’s Motion to Extend Time for Filing a Notice of Appeal that determined that “an allowance of additional time to file an appeal to the Maine Supreme Judicial Court is a matter upon which only that court, and not this one, may rule” misled Mr. Armstrong into believing he could not proceed with his appeal absent an extension from the Law Court. [R. 8-9]. This ruling was clearly erroneous in that Maine Rules of Appellate Procedure provide that:

Upon a showing of good cause, the trial court may, before or after the time has expired, with or without motion and notice, extend the time

for filing the notice of appeal otherwise allowed for a period not to exceed 21 days from the expiration of the original time for filing an appeal prescribed by Rule 2B(b) or 2B(c).

Me. R. App. P. 2B. Thus, in denying Mr. Armstrong's Motion to Extend Time for Filing a Notice of Appeal, the lower court erroneously concluded that it was without authority to extend the time for filing the notice of appeal. This erroneous order was relied upon by Mr. Armstrong to his detriment. In addition, when Mr. Armstrong wrote a letter to this Court on June 13, 2023, seeking an extension of the time to file his Notice of Appeal, he was advised that no action could be taken while motions were pending in the lower court. Therefore, despite his best efforts, Mr. Armstrong could not perfect an appeal of his denied PCR.

Furthermore, when attempting to file a second Petition prior to the one-year statute of limitations, Mr. Armstrong properly filled out the petition approximately one week prior to the deadline but was unable to have the petition notarized until June 15, 2023, when a caseworker was available to notarize it. Thus, due to external forces – a lack of caseworkers to notarize the Petition – Mr. Armstrong was denied the means to effectuate a timely petition. *See Reaves v. Vidal*, 2017 WL 975944, No. 16-cv-10169-IT, at \*3 (U.S. Dist. Ct. Mass. Mar. 13, 2017) (“Equitable tolling may be appropriate where a prisoner has experienced a lack of access to necessary legal resources.”).



Because Mr. Armstrong has demonstrated both prongs of the *Holland* test for equitable tolling, this Court should reverse the lower court's decision and allow Mr. Armstrong to proceed with his Petition for Post-Conviction Review with the assistance of counsel.

### CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision to summarily deny Mr. Armstrong's Petition for Post-Conviction Review and remand the case to allow Mr. Armstrong to amend his Petition for Post-Conviction Review with appointed counsel.

Date: May 15, 2024

/s/ Michelle R. King  
Michelle R. King, Bar No. ~ 6418  
*Attorney for Petitioner Aubrey Armstrong*

Thistle Weaver & Morris  
P.O. Box 7030  
Portland, Maine 04112-7030  
(207) 772-0303  
*mking@twmmaine.com*

## CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Aubrey Armstrong, hereby certify that on this date I made service of two copies of the foregoing brief and one copy of the Appendix, by email and First-class mail, to the following counsel:

Katie Sibley, AAG  
Office of the Attorney General  
6 State House Station,  
Augusta, ME 04333-0006  
207-626-8800  
Katie.Sibley@maine.gov

Dated: May 15, 2024

/s/ Michelle R. King  
Michelle R. King, Bar No. ~ 6418  
*Attorney for Petitioner Aubrey Armstrong*

Thistle Weaver & Morris  
P.O. Box 7030  
Portland, Maine 04112-7030  
(207) 772-0303  
*mking@twmmaine.com*