STATE OF MAINE
KENNEBEC, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: KEN-23-419

AUBREY ARMSTRONG,
Appellant

v.

STATE OF MAINE,
Appellee

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. Whether the post-conviction court erred by summarily dismissing Armstrong's petition for post-conviction review.

II. Whether Armstrong waived the issue of equitable tolling by not raising it below.

III. Whether the post-conviction court erred by failing to, sua sponte, apply equitable tolling to Armstrong's petition for post-conviction review; and whether Armstrong has met his burden demonstrating that he had been diligently pursuing his rights and that some extraordinary circumstance prevented a timely filing.

SUMMARY OF ARGUMENT

1. The post-conviction court did not err by summarily dismissing Aubrey Armstrong's (Armstrong) petition for post-conviction review. The deadline for filing was June 7, 2023, he did not sign the petition until June 15, 2023, and did not file it until June 29, 2023. Since the face of the petition unambiguously discloses its failure to adhere to the filing limitations period, summary dismissal is required under Maine law.

2. This Court should not consider Armstrong's argument as to the application of equitable tolling to the petition for post-conviction review. The issue of equitable tolling was not raised to the post-conviction court. Therefore, the proper foundation for this Court to consider equitable tolling, for the first time on appeal, has not been laid.

3. In the alternative, if this Court considers the issue of equitable tolling, the post-conviction court did not commit obvious error by failing to, sua sponte, apply equitable tolling to Armstrong's petition. Neither the petition itself, nor any exhibits, requested the post-conviction court to consider equitable tolling. Additionally, Armstrong has failed to produce evidence that he pursued his rights diligently and that extraordinary circumstances prevented him from filing on time. *Holland v. Florida,* 560 U.S. 631, 649 (2010). For these reasons, he cannot show that his case is one of the "rare and

exceptional cases" that warrant a tolling of the limitations period of. *Holmes v. Spencer,* 685 F.3d 51, 62 (1st Cir. 2012).

PROCEDURAL HISTORY

On June 15, 2023, Armstrong signed a petition for post-conviction review seeking to challenge his felony murder conviction in *State of Maine v. Armstrong,* KENCDCR-2016-00172. (Appendix, page 22-29, hereinafter cited as "A. ___."; *State v. Armstrong,* 2019 ME 117, ¶ 3, 212 A.3d 856). On June 29, 2023, the Kennebec County Unified Criminal Docket received and filed the petition. (A. 1, 22; *Armstrong v. State of Maine,* KENCDCR-2023-1110).

On September 29, 2023, the post-conviction court summarily dismissed the petition, pursuant to M.R.U. Crim. P. 70(b), for failing to meet the one-year filing deadline under 15 M.R.S. § 2128-B (2023) (*Mallonee, J.*). (A. 4-7). On October 20, 2023, Armstrong filed a notice of appeal and memorandum in support of a certificate of probable cause. (A. 1). On April 2, 2024, this Court granted a certificate of probable cause on the issue of "whether the post-conviction court erred by concluding that Armstrong's petition was untimely filed and summarily dismissing it pursuant to M.R.U. Crim. P. 70(b)."

STATEMENT OF FACTS

On June 7, 2022, this Court issued a Memorandum of Decision denying Armstrong's third appeal from his conviction and sentencing in *State of Maine v. Armstrong,* KENCDCR-2016-00172, for felony murder in the brutal beating death of Joseph Marceau on November 23, 2015. *State v. Armstrong,* Mem-22-53; (A. 10).[1] Ten months later, on April 3, 2023, Armstrong signed a petition for post-conviction review. (A. 21). This petition was received and docketed by the Kennebec County Unified Criminal Docket on April 10, 2023. (A. 14; *Armstrong v. State of Maine,* KENCDCR-2023-00659).

On May 8, 2023, the post-conviction court concluded that the face of "the petition [failed to] raise any cognizable grounds upon which post-conviction relief may be granted," because "all of [Armstrong's] claims could have been raised in his most recent direct appeal to the Law Court or in his

[1] In the first appeal, the State conceded that Armstrong could not be convicted and sentenced for both felony murder and robbery because robbery is a lesser-included offense felony murder, and the Court remanded for "further post-trial proceedings where the court may take appropriate action to eliminate the double jeopardy effect arising from the two charges by merging the two counts into a single defined count, which has the same effect as dismissing one count, and then imposing sentence on the merged count." *State v. Armstrong,* 2019 ME 117, ¶ 26, 212 A.3d 856 (citation omitted). In the second appeal, this Court faulted the trial court for dismissing, rather than merging, the duplicative count and for failing to convene a de novo sentencing proceeding; the case was remanded to correct the record and for another hearing on sentencing. *State v. Armstrong,* 2020 ME 97, 237 A.3d 185. In the third appeal, Armstrong sought to appeal his sentence and asserted that the trial justice should have recused himself in the third sentencing proceeding. The Law Court affirmed the sentence in a memorandum of decision. *State v. Armstrong,* MEM-22-53.

previous appeals." (A. 12-13).[2] On this basis, the post-conviction court summarily dismissed the petition pursuant to M.R.U. Crim. P. 70(b). (A. 10-13). On May 16, 2023, a copy of this order was sent to Armstrong. (A. 3). Armstrong acknowledged that he received the order on May 25, 2023. (A. 35).

On June 15, 2023, Armstrong signed a second petition for post-conviction review. (A. 22-29). On June 28, 2023, he filed motions to reconsider the post-conviction court's order dismissing his first petition, and for an extension of time to file a notice of appeal. (A. 35). On June 29, 2023, the post-conviction court received and docketed the second petition for post-conviction review. (A. 1; *Armstrong v. State of Maine,* KENCDCR-2023-01110).

On July 13, 2023, the post-conviction court issued a written order denying Armstrong's motions to reconsider and to extend the time to file a notice of appeal. (A. 8-9). On September 29, 2023, the court issued a written order dismissing the second petition in KENCDCR-2023-01110 pursuant to M.R.U. Crim. P. 70(b). (A. 10-13). The court found that "it [was] apparent from the face of the document that the petition was not filed within the post-conviction statute's one year filing deadline[,]" and was "therefore untimely under 15 M.R.S. § 2128-B[.]" (A. 17).

[2] Indeed, the subject matter of the third appeal, which challenged the trial judge's decision not to recuse himself in the resentencing proceeding, is identical to one of the claims in the first petition for post-conviction review. (A. 16).

ARGUMENT

I. The post-conviction court properly dismissed the petition subject to this appeal as untimely.

The Law Court "review[s] a post-conviction court's legal conclusions de novo and its factual findings for clear error." *Gordon v. State,* 2024 ME 7, ¶ 14, 308 A.3d 228. This Court does not set aside a post-conviction court's findings and conclusions unless clearly erroneous and unsupported by any competent evidence in the record. *Philbrook v. State,* 2017 ME 162, ¶ 9, 167 A.3d 1266.

The plain language of the post-conviction statute defines the limitations period and should control this case. "A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief … under section 2124, subsection 1 or 1-A." 15 M.R.S. § 2128-B(1) (2023). This "limitation period runs from the … date of final disposition of the direct appeal from the underlying criminal judgment[.]" *Id.* at (1)(A). This filing deadline was adopted by the Legislature in 1997 and was "modeled after the federal habeas corpus statute, 28 United States Code, section 2244." *Finch v. State,* 1999 ME 108, ¶ 7, 736 A.2d 1043 (citation omitted). Accordingly, Rule 70(b)(2) of the Maine Rules of Unified Criminal Procedure provides that: "[t]he court shall enter an order for the summary dismissal of the petition in whole or in part, stating the reasons for dismissal, if from the face of the petition and any

exhibits attached to it, the petition affirmatively discloses … [f]ailure to adhere to the filing deadline under 15 M.R.S. § 2128-B[.]"

In the context of a habeas corpus petition from a state court judgment, the United States Supreme Court has recognized that a filing period limited to one year "quite plainly serves the well-recognized interest in the finality of state court judgment." *Duncan v. Walker,* 533 U.S. 167, 179 (2001). The Court noted that this deadline "reduces the potential for delay on the road to finality by restricting the time that a prospective [post-conviction] petitioner has in which to seek [post-conviction] review." *Id.*

Here, Armstrong's petition sought relief under 15 M.R.S. § 2124(1)(A) (2023). (A. 23). His third and last direct appeal received its final disposition on June 7, 2022, which extended his limitations period to June 7, 2023. (A. 5, 6-7); 15 M.R.S. § 2128-B(1)(A) (2023). The petition subject to this appeal was signed on June 15, 2023, and filed on June 29, 2023 – twenty-two days after the one-year limitations period expired. (A. 1).

Failing to adhere to the filing deadline established in 15 M.R.S. § 2128-B(1) (2023) constitutes a waiver of ground(s) for post-conviction relief. 15 M.R.S. 2128(5) (2023). The burden is on the petitioner to "demonstrate that any ground of relief has not been waived." 15 M.R.S. § 2128 (2023). The face of the petition subject to this appeal discloses no "assertion of a right under the

Constitution of the United States" that excepts his untimely filing from constituting a waiver of ground(s) for relief. 15 M.R.S. § 2128-A (2023); (A. 22-29). Therefore, the post-conviction court's findings that the petition "affirmatively disclose[d] a failure to adhere to the limitations period[,]" and that it disclosed no exception for that failure were not clearly erroneous. *Diep v. State,* 2000 ME 53, ¶ 6, 748 A.2d 974. Because these findings are supported by competent evidence in the record, the post-conviction court did nor err by concluding that summary dismissal was required under M.R.U. Crim. P. 70(b)(2).

II. This Court should not consider the issue of equitable tolling for the first time on appeal.

Armstrong's failure to raise equitable tolling below precludes consideration of the issue on appeal. Maine's well-established principle is that a "foundation must be laid in the trial court for appellate review[.]" *State v. Wheeler,* 252 A.2d 455, 458 (Me. 1969). The foundation for an issue is laid, and thus "preserved for appellate review if there is a sufficient basis in the record to alert the trial court and the opposing party to the existence of the issue." *State v. Ouellette,* 2024 ME 29, ¶ 12, 314 A.3d 253 (quoting *State v. Reeves,* 2022 ME 10, ¶ 35, 268 A.3d 281). Therefore, "[issues] not properly raised so as to have been considered and ruled upon by the trial judge will not

be considered and passed upon for the first time on appeal." *Wheeler,* 252 A.2d at 458 (Me. 1969).

The record is clear that the issue of equitable tolling was not properly raised to the post-conviction court. (A. 1-36). Thus, the post-conviction court neither considered nor ruled upon this issue. (A. 1-36). Therefore, because the requisite foundation was not laid before the post-conviction court, this Court should decline to consider and rule on the issue of equitable tolling "for the first time on appeal." *Wheeler,* 252 A.2d at 458 (Me. 1969).

III. The post-conviction court committed no error in not considering equitable tolling as to the second petition.

If this Court chooses to consider the issue of equitable tolling, the proper standard of review is for obvious error. *State v. Brown,* 2017 ME 59, ¶ 8, n. 4, 158 A.3d 501 ("issues raised for the first time on appeal [are reviewed] for obvious error."); *see also State v. Green,* 2024 ME 44, ¶ 19, 315 A.3d 755 (unpreserved issues reviewed for obvious error); *Ouellette,* 2024 ME at ¶ 12, 314 A.3d 253 (same); *Reeves,* 2022 ME at ¶ 35, 268 A.3d 281) (same).

The United States Supreme Court has recognized that equitable tolling applies to the limitations period for federal habeas corpus petitions filed by state prisoners. *Holland v. Florida,* 560 U.S. 631 (2010). Because Maine's post-conviction review limitations period is modeled after the federal habeas

corpus limitations period applicable to state prisoners, *see Finch,* 1999 ME at ¶ 7, 736 A.2d 1043, it may be appropriate for Maine to recognize a similar equitable tolling exception in State of Maine post-conviction matters under extraordinary circumstances. However, this is not the appropriate case to establish such a principle in Maine because Armstrong has failed to show he was diligent and that any "extraordinary" circumstances exist to warrant tolling of the filing deadline. *Holland,* 560 U.S. at 652 (2010).

Pursuant to *Holland,* "a petitioner is entitled to equitable tolling *only* if he [or she] shows (1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstance stood in his [or her] way and prevented timely filing." *Id.* at 649 (2010). "The diligence prong covers those affairs within the petitioner's control, while the extraordinary-circumstances prong covers matters outside his [or her] control." *Blue v. Medeiros,* 913 F.3d 1, 9 (1st Cir. 2019). "The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief." *Donovan v. Maine,* 276 F.3d 87, 93 (1st Cir. 2002); *see also Delaney v. Matesanz,* 264 F.3d 7, 14 (1st Cir. 2001).

Importantly, the application of equitable tolling "is limited to rare and exceptional cases; [it] is the exception rather than the rule and resort to its prophylaxis is deemed justified only in extraordinary circumstances." *Holmes*

v. Spencer, 685 F.3d 51, 62 (1st Cir. 2012) (citation omitted); *see also Ramos-Martinez v. United States,* 638 F.3d 315, 322 (1st Cir. 2011); *Neverson v. Farquharson,* 366 F.3d 32, 42 (1st Cir. 2004), *Donovan,* 276 F.3d at 93 (1st Cir. 2002), *Delaney,* 264 F.3d 14 (1st Cir. 2001).

Here, nothing on the face of the petition requested the post-conviction court to consider or apply equitable tolling to the untimely filed petition. (A. 22-29). No exhibits were attached requesting the same. (A. 22-29). In fact, the record, as argued below, is devoid of any facts upon which the post-conviction court could have properly considered, let alone even applied, equitable tolling to Armstrong's second petition. (A. 1-36). Thus, the post-conviction court did not commit obvious error by failing to, sua sponte, apply equitable tolling to the filing deadline for the petition subject to this appeal.

In support of applying equitable tolling to the petition that is the subject of this appeal, Armstrong argues that he acted diligently because 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 (sic) on August 4, 2022." (Blue Brief 8-9, hereinafter cited as "Bl. Br. ___"). None of these letters are in the record, and there is no indication as to how the correspondence contributed to the ten-month delay in filing his first petition. *See In re Child of Brooke B.,* 2020 ME 20, ¶ 3 n.2, 224 A.3d 1236; M.R. App. P.

5(a) ("[t]he record on appeal shall consist of the trial court clerk's record and exhibits filed in the trial court … and a copy of the docket entries."). Moreover, there is no evidence of what information was obtained during that period that formed the "factual predicate" for his claims. 15 M.R.S. § 2128-B(1)(C) (2023).

What the record reflects is that Armstrong's limitation period to file for post-conviction review began on June 7, 2022, and he did not complete a petition for post-conviction review until April 3, 2023 – 300 days later. (A. 3-4, 10, 21). The record contains no evidence upon which this Court can conclude that he acted with reasonable diligence during this 300-day delay. *See Neverson,* 366 F.3d 32, 42 (1st Cir. 2004) (equitable tolling "is not available to rescue a litigant from his own lack of due diligence.); *Howland v. Quarterman,* 507 F.3d 840, 846 (5th Cir. 2007), abrogated on other grounds, (petitioner not entitled to equitable tolling because, among other reasons, he failed to explain "why he did not even attempt to file his state application until over ten months after his conviction became final.").

Even if the asserted justification for a 300-day delay is credited without record support, Armstrong's first petition belies the assertion that documentation from his attorney or the courts was necessary to file the petition. All the grounds he asserted occurred either during the trial or at sentencing and thus he already had knowledge of the grounds raised in the

first petition. (A. 14-21); *see Donovan,* 276 F.3d at 93 (1st Cir. 2002) (delay in obtaining a transcript not an extraordinary circumstance because petitioner was present at the hearing, "knew what had transpired [and] citation to [a] transcript [is] unnecessary in order to allege grounds for federal habeas relief."). Despite prior knowledge of the specific grounds, Armstrong delayed filing a petition for a significant portion of the limitations period. (A. 3, 21). A delay of this nature cannot be characterized as diligence. *See David v. Hall,* 318 F.3d 343, 347 (1st Cir. 2003) ("one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack.").

It was the delay in filing the first petition that created a time crunch to file a second petition by June 7, 2023, following his receipt of the court's summary dismissal of his first petition on May 25, 2023. He claims he "initiated the filing of this paperwork on June 2, 2023" but could not file until a notary was available on June 15, 2023, to notarize his signature. (Bl. Br. 9). There is no evidence that he in fact "initiated the paperwork on June 2, 2023," but even if he had, the delay in the receipt of mail and the alleged lack of notaries on demand at the prison are not extraordinary circumstances warranting tolling of the one-year period of limitation. Issues inherent in a custodial setting, such as lack of access to a notary, or mail delays are not extraordinary circumstances justifying the application of equitable tolling. *See*

Holmes, 685 F.3d at 63 (1st Cir. 2012) ("[T]he usual problems inherent in being incarcerated do not justify equitable tolling."). Specifically, the Fourth Circuit has reasoned:

> [W]e do not believe that the ordinary time that it takes to deliver the mail can be regarded as a circumstance external to a party's own conduct within the contemplation of the equitable tolling doctrine.
>
> And to accept it as such, effectively would be nothing short of to extend judicially the legislatively-prescribed one-year statute of limitations. Every person knows, or should know, that it can take at least several days to receive mail even from within the same postal jurisdiction, and he can, and may reasonably be required to, adjust his conduct accordingly. Ordinary delivery time is not a "rarity," nor is the charge of knowledge of such to the habeas petitioner "unconscionable."

Spencer v. Sutton, 239 F.3d 626, 629 (4th Cir. 2001) (alterations and quotation marks omitted).

Any delay is attributable to Armstrong's inaction, not diligence. There was ample opportunity to research grounds for post-conviction review in the five years since his 2018 trial, and over the course of three appeals to this Court. *State v. Armstrong,* 2019 ME at ¶ 8; *Holmes,* 685 F.3d at 62-63 (1st Cir. 2012). This is especially true because the grounds alleged in the first petition were ones that were, or could have been, litigated during his multiple appeals, and of which he had prior knowledge. (A. 14-21); *David,* 318 F.3d at 347 (1st Cir. 2003). The timing of the first petition, filed ten months into the limitations

period, delayed the filing of the second petition. This delay rests squarely on Armstrong.

Having failed to demonstrate that he acted diligently in pursuing his post-conviction petitions, he claims that extraordinary circumstances prevented him from filing his second petition within the one-year limitations period. (Bl. Br. 11). First, he asserts that the delay of sixteen (16) days in receiving the order dated May 9, 2023 (May order), amounted to extraordinary circumstances. (Id. at 12). He then alleges that he relied "to his detriment" on the order dated July 13, 2023, indicating that the court did not have authority to extend the time to file the notice of appeal of the May order. (Id. at 11). The court's denial of his request to extend the period for filing the notice of appeal on the first petition had nothing to do with the late filing of the second petition, because the court's denial was issued on July 13, 2023 (July order), well after the filing deadline of June 7, 2023, and the filing of the second petition on June 29, 2023. (A. 3, 9). Contrary to his assertion, Armstrong could not have relied to his detriment on the July order because his one-year deadline had already expired over a month before.

Even *after* receiving the July order, Armstrong still took no steps to appeal the dismissal of his first petition or the July order. (A. 3). The post-conviction court's July order was docketed on July 14, 2023. (A. 3, 8-9). The

time in which to file a notice of appeal of the July order extended to August 4, 2023. M.R. App. P. 2B(b)(1). As part of that order, the post-conviction court "[had] no obligation to act as counsel or paralegal to" Armstrong by advising him that filing a notice of appeal regarding the July order would implicate the May order. *Pliler v. Ford,* 542 U.S. 225, 231 (2004). The record demonstrates that, instead of filing a notice of appeal, Armstrong did nothing until he received the post-conviction court's order on the second petition three (3) months later. (A. 1, 3). The failure to appeal the first petition was not the result of extraordinary circumstances; rather, it was the result of Armstrong's own inaction. *See Delaney,* 264 F.3d at 15 (1st Cir. 2001) ("[w]hile judges are generally lenient with pro se litigants, the Constitution does not require courts to undertake heroic measures to save pro se litigants from the readily foreseeable consequences of their own inaction.").

Finally, neither Armstrong's pro se status, the post-conviction court's declination to appoint counsel, nor his incarcerated status establish diligence or constitute extraordinary circumstances. (Bl. Br. 8-12).

Ignorance of the law due to pro se status has repeatedly been rejected as an extraordinary circumstance excusing late filing.[3] Similarly, the post-

[3] *See Delaney,* 264 F.3d at 15 (1st Cir 2001) ("courts have been loath to excuse late filings simply because a pro se prisoner misreads the law."); *Donovan,* 276 F.3d at 94 (1st Cir. 2002) ("[w]hile pro se pleadings are to be liberally construed … the policy of liberal construction cannot plausibly

conviction court declining to appoint counsel, when counsel is not required to be appointed, is also not an extraordinary circumstance. The face of the first petition only raised grounds that had been waived, and contained no explanation to suggest that the failure to previously raise these grounds was excusable. (A. 14-21); *see* M.R.U. Crim. P. 70(b)(2); 15 M.R.S. §§ 2128(1), 2128-A (2023). Thus, because the post-conviction court's "decision to summarily dismiss [was] absolutely clear," appointment of counsel was not required. *McEachern v. State,* 676 A.2d 488, 489, n. 3 (Me. 1996).

Notably, Armstrong's primary argument supporting diligence and extraordinary circumstances, specifically a letter from a prison staff member, is devoid from the record. (Bl. Br. 9, 12). Though he places blame on the State for its proper objection to its inclusions in the Appendix pursuant to M.R. App. P. 8(g), (Bl. Br. 3, n. 2), ultimately, "it was [Armstrong's] obligation – not the court's [or the State's] – to provide a sufficient record" for appellate review.

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justify a party's failure to file a habeas petition on time."); *Lattimore v. Dubois,* 311 F.3d 46, 55 (1st Cir. 2002) ("Ignorance of the law alone, even for incarcerated *pro se* prisoners, does not excuse an untimely filing."); *Merritt v. Blaine,* 326 F.3d 157, 169-170 (3rd Cir. 2003) (petitioner's uncertainty of state post-conviction procedure regarding filing deadline does not warrant equitable tolling); *United States v. Sosa,* 364 F.3d 507, 512 (4th Cir. 2004) (citing *Delany's* rejection of pro se status warranting tolling); *United States v. Riggs,* 314 F.3d 796, 799 (5th Cir. 2002) ("a petitioner's *own* ignorance or mistake does not warrant equitable tolling[.]"); *Davis v. Humphreys,* 747 F.3d 497, 500 (7th Cir. 2014) ("it is established that prisoners' shortcomings of knowledge about [the post-conviction statutes] or the law of criminal procedure in general do not support tolling."); *Cross-Bey v. Gammon,* 322 F.3d 1012, 1015 (8th Cir. 2003) ("even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted." (quotation marks omitted)); *March v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) ("it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." (quotation marks omitted)).

State v. Keene, 2020 ME 102, ¶ 4 n.1, 237 A.3d 845. Had Armstrong wanted this Court to consider "the substance of the [letter,]" he should have submitted it to the post-conviction court with a motion to reconsider the September 29, 2023, order dismissing the petition subject to this appeal. *Brooke B.,* 2020 ME at ¶ 3 n.2, 224 A.3d 1236. Because he did not do so, the letter is not part of the record. M.R. App. P. 5(a).

Even taking Armstrong's timeline as true, he delayed simply completing a second petition until five (5) days before the limitations period expired. (Bl. Br. 9, 12). Such a delay can neither be characterized as demonstrating reasonable diligence, nor an extraordinary circumstance because, "[w]ere it not for [Armstrong's] own delay, the time needed for [a notary and] ordinary mail delivery almost certainly would not have affected the timeliness of his [post-conviction] petition." *Spencer,* 239 F.3d 626, 629 (4th Cir. 2001). Therefore, Armstrong has established neither that he was diligent, nor that the untimely filing of the petition subject to this appeal was caused by circumstances so extraordinary as to warrant the rare application of equitable tolling.

CONCLUSION

For the foregoing reasons, the summary dismissal of Armstrong's petition for post-conviction review should be affirmed.

Respectfully submitted

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Dated: July 10, 2024

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CERTIFICATE OF SERVICE

I, Katie Sibley, Assistant Attorney General, certify that I have mailed two copies of the foregoing "BRIEF OF APPELLEE" to Armstrong's attorney of record, Michelle King, Esq.

/s/ KATIE SIBLEY

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