No. 14-1145

In the Supreme Court of the United States

DEANGELO MARQUIS WHITESIDE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the existence of unfavorable precedent on the merits is an "extraordinary circumstance" preventing timely filing of a motion for collateral relief under 28 U.S.C. 2255 and justifying equitable tolling of the one-year statute of limitations in 28 U.S.C. 2255(f).

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-26a) is reported at 775 F.3d 180. The vacated opinion of the three-judge panel of the court of appeals (Pet. App. 27a-87a) is reported at 748 F.3d 541. The order of the district court (Pet. App. 88a-97a) is not published in the *Federal Supplement* but is available at 2013 WL 2317693.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2014. The petition for a writ of certiorari was filed on March 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina,

petitioner was convicted of possession with intent to distribute at least 50 grams of cocaine base (crack), in violation of 21 U.S.C. 841(a)(1). The district court sentenced him to 210 months of imprisonment, to be followed by ten years of supervised release. He did not appeal his conviction or sentence. See Pet. App. 3a-4a; Judgment 1-3.

Nearly two years later, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. See Pet. App. 4a. The district court denied the motion as untimely and declined to issue a certificate of appealability (COA). See *id.* at 88a-97a. On appeal, a panel granted a COA, vacated petitioner's sentence, and remanded the case for resentencing. See *id.* at 27a-87a. The government sought rehearing; the court of appeals agreed to rehear the case en banc and vacated the panel opinion. Sitting en banc, the court of appeals affirmed the denial of the Section 2255 motion on timeliness grounds. See *id.* at 1a-26a.

1. Beginning in 2007, multiple crack cocaine dealers identified petitioner as a wholesale distributor who sold substantial quantities of crack in Asheville, North Carolina. See Pet. App. 3a; Presentence Investigation Report (PSR) 3. Following an investigation, a federal grand jury in the Western District of North Carolina indicted petitioner and charged him with one count of violating 21 U.S.C. 841(a)(1) by possessing at least 50 grams of crack cocaine with intent to distribute. See Pet. App. 3a. The government filed an information under 21 U.S.C. 851 to notify petitioner that he was subject to "increased punishment by reason of one or more prior convictions." *Ibid.*; see Pet. App. 3a. Peti-

tioner pleaded guilty to the sole charge in the indictment. See Judgment 1.

The Presentence Investigation Report held petitioner accountable for 1951.9 grams of powder cocaine and 468.3 grams of crack cocaine. Pet. App. 3a. The Report also recommended that the district court sentence petitioner as a career offender under Sentencing Guidelines § 4B1.1, which provides that a defendant who was at least eighteen years old when he committed a felony "controlled substance offense" is "a career offender if * * * [he] has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Ibid.*; see Pet. App. 3a-4a; see also Sentencing Guidelines § 4B1.2, comment. (n.1) (explaining that a felony conviction is one "punishable by death or imprisonment for a term exceeding one year"). That recommendation was based on two earlier convictions of petitioner in the North Carolina courts: a 2002 conviction for possession of marijuana with intent to manufacture, sell, or deliver, and a 1999 conviction for possession of cocaine with intent to manufacture, sell, or deliver. See Pet. App. 3a-4a; see also PSR 7-17 (listing petitioner's extensive criminal record). In light of that recommended career-offender designation, the Report recommended an advisory guidelines range of 262 to 327 months of imprisonment. See Pet. App. 4a.

The government filed a motion for a downward departure from that advisory range, citing petitioner's substantial assistance. The district court accepted the Report's findings, granted the government's motion, and sentenced petitioner to 210 months of imprisonment. Petitioner did not pursue a direct appeal, and

his conviction became final on August 3, 2010. See Pet. App. 4a.

2. On May 18, 2012, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that the sentence should be set aside in light of *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. Aug. 17, 2011) (en banc). See Pet. App. 4a. In *Simmons*, the Fourth Circuit overruled existing circuit precedent to hold that, under this Court's reasoning in *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), classification of a North Carolina drug crime as a felony drug offense supporting a sentence enhancement should turn on whether the defendant himself could have been sentenced to more than a year in prison rather than on whether more than a year of imprisonment was a possible punishment for a defendant properly charged and sentenced as a recidivist offender. See *Simmons*, 649 F.3d at 243-250. Petitioner contended that, after *Simmons*, the drug offenses on which his career-offender enhancement rested no longer qualified as predicate felony convictions for purposes of Section 4B1.1 and that he was therefore entitled to resentencing based on a lower guidelines range than the one the district court had considered. See Pet. App. 4a.[1]

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[1] Petitioner's existing drug convictions also triggered a 20-year statutory mandatory minimum sentence, see PSR 7, 22, but the district court imposed a statutorily authorized sentence below the mandatory minimum on the basis of petitioner's substantial assistance, see 18 U.S.C. 3553(e). Petitioner therefore did "not address" the mandatory-minimum issue on appeal. Pet. C.A. Br. 4 n.1 (stating that "the district court's sentence was based on the career-offender Guidelines range and not on * * * [a] statutory mandatory-minimum sentence").

The district court denied petitioner's Section 2255 motion as untimely, explaining that the motion was filed outside the one-year limitations period set forth in 28 U.S.C. 2255(f). See Pet. App. 91a-96a. Section 2255(f) provides that "[a] 1-year period of limitation shall apply to a motion under this section" and that the period "shall run from the latest of" several possible dates, including "the date on which the judgment of conviction becomes final," 28 U.S.C. 2255(f)(1), "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3), or "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. 2255(f)(4). See Pet. App. 91a-92a.

In the district court's view, the limitations period in petitioner's case began running when his judgment of conviction became final in August 2010, and his Section 2255 motion was therefore filed approximately nine months too late. See Pet. App. 92a. The court rejected petitioner's argument that his motion was timely under Section 2255(f)(4) because the decision in *Simmons* was a new "fact" that could not previously have been diligently discovered. See *id.* at 92a-93a. That decision was a "change in the law" rather than a change in the available facts, the court explained, and a new legal decision can trigger a new one-year period only under Section 2255(f)(3), when this Court itself

newly recognizes a right. *Ibid.*[2] The district court declined to issue a COA. See *id.* at 96a.

3. a. A panel of the court of appeals granted a COA, vacated the district court's judgment, and remanded for resentencing. See Pet. App. 27a-55a.

The panel majority ruled that petitioner was entitled to equitable tolling of the Section 2255(f)(1) statute of limitations under the test set forth in this Court's decision in *Holland* v. *Florida*, 560 U.S. 631 (2010). See *id.* at 649 (stating with respect to a petition under 28 U.S.C. 2254 that equitable tolling is available when a defendant demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing") (citation and internal quotation marks omitted); Pet. App. 34a-35a. The majority found that petitioner had pursued his rights diligently by filing his Section 2255 motion within one year of the decision in *Simmons* and that extraordinary circumstances had prevented him from filing sooner because pre-*Simmons* circuit precedent would have foreclosed his argument. See Pet. App. 34a-39a. The majority also concluded that a non-constitutional error in calculation of advisory sentencing guidelines constituted "a fundamental defect which inherently results in a complete miscarriage of justice" and therefore could properly serve as a basis for collateral attack on petitioner's sentence. *Id.* at 40a (quoting *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979)); see *id.* at 41a-55a; see also *id.* at 32a-34a (stating that

[2] In the alternative, the district court held that petitioner's Section 2255 motion was "subject to dismissal because he waived his right to bring this challenge in his plea agreement." Pet. App. 95a.

petitioner did not waive his right to collaterally attack his sentence).

Judge Wilkinson dissented. See Pet. App. 58a-87a. He explained that petitioner could readily have asserted his claim of error within one year of the final judgment in his case, because many defendants raised the claim considered in *Simmons* before that case was decided and because *Simmons* was itself built on the foundation of other existing decisions. See *id.* at 78a-80a. He rejected the use of equitable tolling to circumvent the limitations of Section 2255(f)(3), which allows new law to reset the one-year period only when that new law comes from this Court. See *id.* at 81a. And he concluded that a COA should not have issued because petitioner had failed to make a substantial showing of a miscarriage of justice based on an error in calculating his advisory guidelines range. See *id.* at 61a-71a; see also *id.* at 67a (stating that given petitioner's "extensive criminal history," it was "highly questionable" whether petitioner would have received a substantially lower sentence absent the advisory career-offender enhancement); *id.* at 58a.

b. The government petitioned for rehearing en banc. The court of appeals granted the petition, vacated the panel's decision, and affirmed the district court's denial of petitioner's Section 2255 motion. See Pet. App. 1a-16a.

The 12-judge en banc majority concluded that petitioner's Section 2255 motion was untimely. See Pet. App. 3a. The court rejected petitioner's argument that the operative provision in his case was Section 2255(f)(4), observing that "*Simmons* represented a change of law, not fact." *Id.* at 7a. Relying on this Court's decision in *Holland*, the court also rejected

the argument that the statute of limitations should be equitably tolled. See *id.* at 10a-16a. No extraordinary circumstance stood in the way of a timely filing within one year after petitioner's conviction became final, the court explained, because although "*Simmons* plainly made a collateral attack on [petitioner's] sentence more plausible, nothing prevented [petitioner] from filing his petition within the one-year statute of limitations." *Id.* at 10a-11a; see *id.* at 11a (noting that futility "cannot serve as cause for a procedural default" under *Bousley* v. *United States*, 523 U.S. 614 (1998), and stating that "[i]t would be anomalous to contend" that the same circumstance "does nonetheless serve as cause for failure to timely file a § 2255 petition") (internal quotation marks omitted). Indeed, the court noted, "many defendants who filed suits prior to *Simmons* assert[ed] the exact same substantive claim that [petitioner] now raises, including, of course, Simmons himself," and *Simmons* was "strongly foreshadowed" by earlier decisions. *Id.* at 12a-13a. The court concluded that relaxing the "extraordinary circumstance" standard set forth in *Holland* to permit equitable tolling where "the only impediment to timely filing was the discouragement felt by petitioner when calculating his odds of success" would have destructive systemic results, "invit[ing] additional collateral attacks long after convictions were final and whenever a change in law of arguable import might appear." *Id.* at 12a-13a, 16a.

Three judges dissented. See Pet. App. 17a-26a. Two judges who were on the original panel—Judge Gregory, joined by Judge Davis—opined that the en banc court had applied an overly "rigid" equitable-tolling rule. *Id.* at 18a. Judge Wynn separately

opined that the court should have "set aside th[e] formalistic time bar in the name of equity." *Id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 14-28) that his Section 2255 motion is timely because he is entitled to equitable tolling of the one-year statute of limitations period. The court of appeals correctly rejected that contention, and its decision does not conflict with *Holland* v. *Florida*, 560 U.S. 631 (2010), or any other decision of this Court or another court of appeals. This case would also be a poor vehicle for considering whether petitioner is entitled to equitable tolling because, even if his motion had been timely filed, his claim would not be cognizable under Section 2255.

1. Equitable tolling of a statute of limitations is an extraordinary remedy that is applied "only sparingly." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). In *Holland*, which involved the statute of limitations applicable to federal habeas petitions filed by state prisoners under 28 U.S.C. 2254, this Court held that such tolling is appropriate only if a tardy filer can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." 560 U.S. at 649 (citation and internal quotation marks omitted); see *id.* at 648.[3]

The en banc court of appeals correctly held in this case that petitioner cannot satisfy the "extraordinary circumstance" prong of that test. Petitioner has al-

[3] Relying on *Holland*, the courts of appeals have ruled that the statute of limitations applicable to Section 2255 movants may be equitably tolled. See, *e.g.*, *Clarke* v. *United States*, 703 F.3d 1098, 1101 (7th Cir. 2013); *United States* v. *McDade*, 699 F.3d 499, 504 (D.C. Cir. 2012).

leged no facts showing that he was prevented at any time within the year after his conviction became final from filing a Section 2255 motion arguing that his North Carolina convictions did not make him a "career offender" under the Sentencing Guidelines. See Pet. App. 11a. It is true that petitioner's claim of error relies on the Fourth Circuit's decision in *United States* v. *Simmons*, 649 F.3d 237 (2011) (en banc), which was not issued until after the one-year statute of limitations had expired and which overruled precedent that had rejected his claim. But "many defendants * * * filed suits prior to *Simmons* asserting the exact same substantive claim" that petitioner belatedly raised. Pet. App. 12a-13a. Those defendants relied on this Court's decision in *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), and the Sixth Circuit's decision in *United States* v. *Pruitt*, 545 F.3d 416 (2008), both of which "strongly foreshadowed *Simmons*," Pet. App. 13a, and both of which were issued before petitioner's conviction became final.

Contrary to petitioner's argument (*e.g.*, Pet. 24-28), the advent of *Simmons* does not constitute an "extraordinary circumstance" under the *Holland* test. Although *Simmons* overturned circuit precedent, "[t]he standard announced in *Holland* * * * focuses not on whether unfavorable precedent would have rendered a timely claim futile, but on whether a factor beyond the defendant's control prevented him from filing within the limitations period at all." Pet. App. 10a; see *Holland*, 560 U.S. at 649; Pet. App. 13a-14a.

As the court of appeals explained, a comparison to the law of procedural default is instructive, because that law and the equitable-tolling doctrine "address the same basic question of when failures to raise

claims are to be deemed excusable." Pet. App. 11a; see *Doe* v. *Menefee*, 391 F.3d 147, 161 (2d Cir. 2004) (Sotomayor, J.) (stating that "the interests that must be balanced in creating an exception to the statute of limitations are identical to those implicated in the procedural default context"), cert. denied, 546 U.S. 961 (2005). In *Bousley* v. *United States*, 523 U.S. 614 (1998), a Section 2255 case, this Court held that "futility cannot constitute cause" for procedural default "if it means simply that a claim was unacceptable to that particular court at that particular time." *Id.* at 623 (citation and internal quotation marks omitted); see Pet. App. 11a. The same analysis applies in determining whether petitioner has demonstrated extraordinary circumstances warranting equitable tolling.[4] Existing law may have discouraged petitioner, but the building blocks of his argument were available to him within one year of his conviction, and he was not "prevented" from asserting that argument in a Section 2255 motion. *Holland*, 560 U.S. at 649.

Finally, the structure of the "highly refined statute of limitations" provision at issue here reinforces that

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[4] Petitioner resists any comparison to procedural default rules, asserting that they are "about federalism" because they ask "whether federal courts may excuse a petitioner's failure to comply with a state court's procedural rules." Pet. 21 (emphases omitted) (quoting *Holland*, 560 U.S. at 650) (internal quotation marks omitted). Petitioner is mistaken. While *Holland* distinguished a particular procedural-default precedent that involved a state prisoner, the decision in *Bousley* (on which the court of appeals relied here, see Pet. App. 11a) addresses a federal defendant's failure to comply with federal rules of procedure. Compare *Holland*, 560 U.S. at 635, with *Bousley*, 523 U.S. at 616; see also *United States* v. *Frady*, 456 U.S. 152, 157 (1982) (applying procedural default principles to movant under Section 2255).

conclusion. Pet. App. 15a; cf. *id.* at 14a. Section 2255(f)(3) resets the statute-of-limitations clock on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2255(f)(3); see *Dodd* v. *United States*, 545 U.S. 353, 357 (2005). Congress thus addressed the circumstances in which a change in law justifies giving a defendant a new one-year limitations period, and it did not provide for court of appeals decisions—rather than decisions of this Court—to have that effect.

Petitioner repeatedly contends (*e.g.*, Pet. 27-28) that he should be excused from filing a timely first Section 2255 motion, in which his claim would seemingly have been futile, because a loss would have exposed him to the stringent limits on a second or successive Section 2255 motion. But those limits help demonstrate that Congress wanted Section 2255 movants to marshal *all* of their claims, and seek judicial resolution of those claims, within one year of the event triggering the Section 2255(f) statute of limitations. See 28 U.S.C. 2255(h). Of course, the very nature of a statute of limitations is that some claimants will ultimately be barred from pursuing claims on which they perhaps could have prevailed on the merits. While that bar may be lifted in extraordinary circumstances, the court of appeals rightly concluded that those circumstances do not exist in this case.

2. a. Petitioner argues (Pet. 14-17) that the decision below conflicts with decisions from the Sixth, Ninth, and Tenth Circuits. He characterizes those decisions as holding that equitable tolling applies "when a petitioner has failed to file a timely petition

because of his reliance on precedent that is later overturned." Pet. 14. That characterization is inapt, and no such conflict exists.

Each of the cited decisions involves a Section 2254 habeas petitioner's reliance on existing precedent dictating the *deadline* for filing the petition. See *Sherwood* v. *Prelesnik*, 579 F.3d 581, 583, 588-589 (6th Cir. 2009); *Harris* v. *Carter*, 515 F.3d 1051, 1052-1055 (9th Cir.), cert. denied, 555 U.S. 967 (2008); *Hall* v. *Scott*, 292 F.3d 1264, 1267-1268 (10th Cir. 2002); see also *Nedds* v. *Calderon*, 678 F.3d 777, 780-782 (9th Cir. 2012); *York* v. *Galetka*, 314 F.3d 522, 524, 527-528 (10th Cir. 2003). In each case, a state prisoner calculated his filing deadline for a petition based on circuit-specific rules for statutory tolling of the one-year limitations period. An intervening decision by this Court then narrowed the statutory tolling provisions and rendered the petition untimely. Thus, in each case, the question confronted by the court of appeals was whether "[a] habeas petitioner who decides *when* to file his federal habeas petition by relying on [circuit] precedent that is later overturned by the Supreme Court is entitled to equitable tolling." *Nedds*, 678 F.3d at 781 (emphasis added).

Each court of appeals answered that question by stating that equitable tolling was or could be appropriate when the petitioner complied with a known filing deadline that was altered mid-stream by this Court. See, *e.g.*, *Hall*, 292 F.3d at 1268.[5] In many of the cases, that alteration happened after the petition

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[5] Petitioner's statement (Pet. 17) that the court in *Hall* "applied equitable tolling" is inaccurate. *Hall* remanded the case to the district court to decide whether equitable tolling was warranted. See 292 F.3d at 1267-1268.

had already been filed, moving the deadline into the past and thereby ensuring that a petition that seemed timely at its inception became untimely during its pendency. See *Nedds*, 678 F.3d at 781; *Hall*, 292 F.3d at 1267-1268; see also *York*, 314 F.3d at 526-528. In others, the alteration happened before the petition had been filed, thus making any petition instantly untimely or depriving the prisoner of the time necessary to prepare and submit his plea for collateral relief. See, *e.g.*, *Harris*, 515 F.3d at 1056 ("The Supreme Court's overruling of the [circuit precedent on the limitations period] made it impossible for [appellant] to file a timely petition.").

Whether equitable tolling is warranted in light of those kinds of deadline-related changes in the law says nothing about the propriety of such tolling when the relevant change in precedent is one that solely affects the likelihood that a claim will succeed on the merits. In light of what the Sixth, Ninth, and Tenth Circuits actually held, petitioner's assertion (*e.g.*, Pet. 15) that those circuits "would have" equitably tolled the Section 2255 limitations period in his case is not defensible. A court could readily decide both that equitable tolling is proper when a deadline moves back in time as a result of a newly announced legal rule and that equitable tolling is improper when a prisoner refrains from seeking collateral relief before a fixed deadline because he thinks that his request is likely to be denied. The decisions to which petitioner points thus do not speak to the circumstances presented here, and no tension exists between the courts of appeals on the question presented.

b. i. Petitioner also contends (Pet. 20-24) that the decision of the en banc court is inconsistent with this

Court's statements in *Holland* that equitable-tolling decisions "must be made on a case-by-case basis" and "with awareness of the fact that specific circumstances * * * could warrant special treatment in an appropriate case." 560 U.S. at 649-650 (citation omitted). But the decision below—which cited and discussed *Holland* in detail, see Pet. App. 10a-12a—is fully consistent with those statements.

The en banc court engaged in a thorough and case-specific discussion of whether extraordinary circumstances prevented petitioner from timely filing his Section 2255 motion. The court explained that the facts of *Holland* "are far afield from the case at bar." Pet. App. 12a. The court closely examined the particular "allegation" made by petitioner about why he failed to file in a "timely fashion"—that he "probably would have been unsuccessful in light of extant case law." *Ibid.* And the court delved into the specific law relevant to the strength of that allegation, examining whether a timely filed claim would have had any chance of success and whether other defendants managed to make such a claim during the period in which petitioner claimed he was prevented from asserting it. See *id.* at 12a-13a.

The court of appeals also stated more generally that extraordinary circumstances do not exist where "the *only* impediment to timely filing was the discouragement felt by petitioner when calculating his odds of success." Pet. App. 13a (emphasis added). But *Holland* similarly provided guidance about circumstances that are as a category not extraordinary. That decision made clear that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not war-

rant equitable tolling." 560 U.S. at 651-652 (citations and internal quotation marks omitted); see *id.* at 655 (Alito, J., concurring in part and concurring in the judgment) (stating that "our prior cases make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling"); see also *Maples* v. *Thomas*, 132 S. Ct. 912, 923 (2012) (noting that in *Holland* "the Court recognized that an attorney's negligence, for example, miscalculating a filing deadline, does not provide a basis for tolling a statutory time limit"). *Holland* therefore cannot be read to foreclose the courts of appeals from engaging in any categorizing at all. See 560 U.S. at 650-651.[6]

The decision below is no more in conflict with decisions of other courts of appeals applying *Holland* than it is in conflict with *Holland* itself. The decisions cited by petitioner (Pet. 22-24) merely echo *Holland*'s requirement of case-specific analysis, and do so with respect to a wide variety of fact patterns that are unrelated to the facts of this case. See *Munchinski* v. *Wilson*, 694 F.3d 308, 329-330 (3d Cir. 2012) (holding equitable tolling appropriate where a court's errone-

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[6] Petitioner also contends in passing (Pet. 21-22) that the court below departed from the principles set forth in *Holland* by allowing concerns about finality to enter into the equitable-tolling analysis. Such concerns are perfectly appropriate under *Holland*, however. They explain why equitable tolling is permissible only in extraordinary cases and help guide courts in deciding which circumstances are extraordinary and which are not. Contrary to petitioner's contention, *Holland*'s statement that an equitable-tolling determination may differ from the determination whether to "excuse a petitioner's failure to comply with a *state court's* procedural rules," 560 U.S. at 650, has no bearing on whether finality interests play any proper role here. See pp. 10-11, *supra*.

ous dismissal "operate[d] to prevent [the prisoner] from pursuing his rights"); *Jones* v. *United States*, 689 F.3d 621, 627-628 (6th Cir. 2012) (holding equitable tolling appropriate where prison transfers separated defendant from his legal materials and he had difficulty recovering them due to illiteracy and medical issues); *Doe* v. *Busby*, 661 F.3d 1001, 1012-1013 (9th Cir. 2011) (holding that extreme attorney misconduct constituted extraordinary circumstance); see also *Palacios* v. *Stephens*, 723 F.3d 600, 606, 608 (5th Cir. 2013) (ruling that seven-month delay in hiring attorney did not amount to reasonable diligence). None of those decisions suggests that a different court of appeals would have reached a different result than the one reached by the en banc court below.

ii. In addition, petitioner argues (Pet. 24-27) that the en banc decision conflicts with the discussion in *Holland* of the requirement that a movant seeking equitable tolling demonstrate not only extraordinary circumstances preventing filing but also "that he has been pursuing his rights diligently." 560 U.S. at 649. According to petitioner, the court of appeals improperly required "maximum feasible diligence" rather than "reasonable diligence," *id.* at 653 (internal quotation marks omitted), in contrast to other courts of appeals that are faithfully applying the correct diligence standard. Petitioner is incorrect. The decision below did not mention the diligence prong at all, let alone turn on application of that prong.

The en banc decision rests entirely on the "extraordinary circumstance" portion of the *Holland* test —that is, "whether a factor beyond [petitioner's] control prevented him from filing within the limitations period." Pet. App. 10a; see *id.* at 11a (explaining that

"nothing prevented [petitioner] from filing his petition within the one-year statute of limitations"); *id.* at 12a (stating that *Holland* "made clear that federal courts were to invoke the [equitable-tolling] doctrine only in cases of truly 'extraordinary circumstances'") (citation omitted); *id.* at 12a-13a (concluding that no "impediment to timely filing" existed here). To illustrate that petitioner was not prevented from making a timely filing, the court pointed to the fact that "many defendants * * * filed suits prior to *Simmons* asserting the exact same substantive claim that [petitioner] now raises." *Id.* at 12a-13a.

While the activities of other defendants might also have been relevant to an assessment of petitioner's diligence in pursuing his rights, the en banc court had no need to reach that issue once it found that extraordinary circumstances did not exist. See *Holland*, 560 U.S. at 649. The court's decision thus does not reference, much less alter, the "diligence" inquiry.[7] Nor does anything in that decision conflict with the decisions of other courts of appeals that have applied *Holland*'s reasonable-diligence prong in a variety of factual circumstances (none of which bear any resemblance to the ones presented here).[8]

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[7] Petitioner suggests (Pet. 25 & n.4) that the court was wrong to look to other defendants' pre-*Simmons* suits because they were direct appeals rather than collateral challenges. That criticism is unwarranted. See p. 12, *supra*. But even if it had merit, it would have no bearing on whether the decision below conflicts with *Holland*'s statements about reasonable diligence, since that issue played no role in the en banc court's decision.

[8] See Pet. 26-27 (citing, *e.g.*, *Holmes* v. *Spencer*, 685 F.3d 51, 63-66 (1st Cir. 2012) (analyzing diligence in filing a state-court motion and treating "extraordinary circumstance" inquiry separately); *Harper* v. *Ercole*, 648 F.3d 132, 137-139 (2d Cir. 2011) (concluding

3. Finally, this case is an unsuitable vehicle to decide petitioner's eligibility for equitable tolling. Resolution of that issue would have no effect on the judgment in this case, because—as the government argued below—a claim that the sentencing court misapplied the advisory career-offender guidelines is not cognizable under 28 U.S.C. 2255. The Fourth Circuit, joining every other court of appeals to have considered the issue, recently so held. See *United States* v. *Foote*, No. 13-7841, 2015 WL 1883538 (Apr. 27, 2015), slip op. 22-32, petition for cert. pending, No. 14-9792 (filed May 12, 2015); see also *Spencer* v. *United States*, 773 F.3d 1132, 1138-1144 (11th Cir. 2014) (en banc), petition for cert. pending, No. 14-8449 (filed Feb. 12, 2015); *Hawkins* v. *United States*, 706 F.3d 820 (7th Cir. 2013), opinion supplemented by 724 F.3d 915 (7th Cir. 2013), cert. denied, 134 S. Ct. 1280 (2014); cf., *e.g.*, *Sun Bear* v. *United States*, 644 F.3d 700, 704-706 (8th Cir. 2011) (en banc) (reaching the same conclusion when the career-offender guideline was mandatory rather than advisory).

To obtain relief on a claim that a sentence "was imposed in violation of the * * * laws of the United States," 28 U.S.C. 2255(a), the non-constitutional error asserted by the movant must be "a fundamental defect which inherently results in a complete miscarriage of justice." *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979); see *Hill* v. *United States*, 368 U.S. 424, 428 (1962). Misapplication of the advisory career-

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that hospitalized petitioner was prevented from filing by extraordinary circumstances and acted with reasonable diligence while hospitalized by submitting letter to the court); *Palacios*, 723 F.3d at 608 (holding that state prisoner was not reasonably diligent in light of his "lengthy, unexcused delay in hiring an attorney")).

offender guidelines does not satisfy that demanding standard. Although the applicable Guidelines range provides direction and advice for the sentencing court, the court is bound not by the Sentencing Commission's advice, but by the statutory obligation to impose a sentence that falls within defined bounds and is sufficient but not greater than necessary to achieve the purposes of sentencing. See 18 U.S.C. 3553(a); see also *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989) (Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress."). An error in applying the advisory Guidelines—whether in the career-offender context or in the context of any of the myriad other Guidelines enhancements—therefore is not a fundamental defect that results in a complete miscarriage of justice warranting collateral relief. The finality of sentences would be substantially undermined if every defendant asserting any advisory Guidelines error could claim that his sentence is fundamentally defective and warrants reopening.[9]

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[9] This Court's decision in *United States* v. *Addonizio*, 442 U.S. 178 (1979), is instructive. In that case, the Court held that a claim of sentencing error based on the Parole Commission's post-sentencing adoption of its release Guidelines, which affected the sentencing court's expectation of the time the defendant would actually serve in custody, did not present a fundamental error cognizable under Section 2255. The Court explained that the actual sentence imposed was "within the statutory limits" and that the error "did not affect the lawfulness of the judgment itself" but only how the judgment would be performed. *Id.* at 186-187. Although *Addonizio* predates the adoption of the Guidelines, its reliance on the fact that the actual sentence was "within the statutory limits" supports the conclusion that an error in applying the

That conclusion has particular force now that the Guidelines are advisory. See *United States* v. *Booker*, 543 U.S. 220, 245 (2005). If petitioner were sentenced today without the career-offender enhancement, he would have a reduced Guidelines range. But after *Booker*, that range is non-binding. While the sentencing court must give "respectful consideration to the Guidelines," *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007), "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [Section] 3553(a), subject to appellate review for 'reasonableness,'" *Pepper* v. *United States*, 562 U.S. 476, 490 (2011) (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). A sentencing court "may not presume that the Guidelines range is reasonable," *Gall*, 552 U.S. at 50, and "[it] may in appropriate cases" vary from the advisory range "based on a disagreement with the [Sentencing] Commission's views," *Pepper*, 562 U.S. at 501. Although an error in the court's calculation of the Guidelines range may affect the sentencing court's exercise of its discretion, it does not alter the "statutory limits" within which the discretion exists or the court's basic obligation under Section 3553(a).

Here, the sentencing court possessed the statutory authority and the legal discretion to impose the sentence it did. And, notably, the court did not sentence within the Guidelines range, relying on petitioner's substantial assistance to the government as well as his youth at the time of commission of the earlier offenses to sentence him below the recommended career-offender range. See 7/9/10 Sent. Tr. 16-17 (stating

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advisory Guidelines does not result in a complete miscarriage of justice cognizable under Section 2255.

that court was applying the Section 3553(a) factors); see also note 1, *supra*. Accordingly, even if petitioner had filed a timely Section 2255 motion, he would be ineligible for collateral relief—and if the case were to return to the Fourth Circuit, the court of appeals would undoubtedly rely on the absence of any miscarriage of justice to affirm the dismissal of his motion. See *Foote*, slip op. 22-32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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