No. 19-3227

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RONNIE L. FAMOUS,

Petitioner-Appellant,

v.

LARRY FUCHS, Warden,

Respondent-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Wisconsin
Case No. 10-C-707, Hon. William C. Griesbach

REPLY BRIEF FOR APPELLANT RONNIE L. FAMOUS

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I. Famous is entitled to an evidentiary hearing on timeliness.

Famous's petition was timely if AEDPA's statute of limitations did not run for more than one year between February 25, 2002 and August 17, 2010. *See* 28 U.S.C. § 2244(d)(1); *Socha v. Boughton*, 763 F.3d 674, 683-84 (7th Cir. 2014). Famous has alleged facts that entitle him to an evidentiary hearing on whether statutory and equitable tolling are appropriate.

This Court reviews de novo the district court's dismissal of Famous's petition as untimely. The State correctly notes that district court denials of tolling are typically reviewed under an abuse-of-discretion standard. *See* Resp. Br. 32. But where "the district court did not gather the evidence needed" to decide whether tolling is appropriate, de novo review applies. *See Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016). The rule articulated in *Schmid* applies here because the district court gathered no evidence and relied only on (erroneous) interpretations of law to reject Famous's request for statutory and equitable tolling. *See* D. Ct. Op. 6-9.

A. Famous is entitled to an evidentiary hearing on statutory tolling.

AEDPA's statute of limitations is tolled when an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States … prevented [the petitioner] from filing." 28 U.S.C. § 2244(d)(1)(B). Denial of access to an adequate prison library is a state-created impediment that justifies equitable tolling. *See Estremera v. United States*, 724 F.3d 773, 776 (7th Cir. 2013); *Moore v. Battaglia*, 476 F.3d 504, 508 (7th Cir. 2007). Famous maintains that, in the years leading up to

filing his federal habeas petition, the prison law library did not contain relevant portions of AEDPA, including its statute of limitations. App. 108A-109A. The State asserts that Famous is not entitled to an evidentiary hearing on this contention for two reasons, neither of which is correct.

First, the State suggests that inadequate law library access is a state-created impediment only where the inmate was physically denied access to the library. *See* Resp. Br. 37-38 (citing *Estremera*, 724 F.3d at 776). That makes no sense. For example, library access would be inadequate, and thus toll the limitations period, where an inmate had physical access to a law library that contained only a few books, or only books written in ancient Greek, or only books on topics generally irrelevant to prisoners' litigation. In any event, the State misreads *Estremera*, which nowhere suggests that the denial of physical access is necessary for a state-created impediment to exist. *See Estremera*, 724 F.3d at 776-77. Indeed, *Estremera*'s reasoning suggests the opposite by emphasizing the importance of accurate and thorough legal research and explaining that an inmate who files a "petition based on a bad legal theory may doom his chance to prevail on a good one." *Id.* at 776.

Moreover, *Estremera* described this Court's decision in *Moore v. Battaglia* as addressing "whether lack of library access" ever allows statutory tolling. 724 F.3d at 777. *Moore* did not deal with a petitioner's allegation that he was physically denied access to the prison law library. Rather, this Court remanded for an evidentiary hearing on a petitioner's allegation that the law library—to which he had physical access—contained books that were "real old" and "irrelevant to his needs" and may have lacked "the relevant statute of limitations." 476 F.3d at 508. *Moore* looked to decisions from the Fifth and Ninth

Circuits that also remanded for further factfinding on petitioners' allegations that prison libraries did not contain legal materials required to file their habeas petitions. *See id.* at 507 (citing *Egerton v. Cockrell*, 334 F.3d 433, 438 (5th Cir. 2003), and *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc)). This case is no different: Famous maintains that the law library lacked a copy of AEDPA's statute of limitations and, as a result, he is entitled to statutory tolling. *See* App. 108A-109A.

Second, the State recites the boilerplate rule that a petitioner's lack of familiarity with the law does not justify tolling. *See* Resp. Br. 38. That misses the point of *Estremera* and *Moore*. Where inadequate prison library access prevents a prisoner from curing his ignorance of the law, that state-created impediment justifies statutory tolling. *See Estremera*, 724 F.3d at 776; *Moore*, 476 F.3d at 508.

B. Famous is entitled to an evidentiary hearing on equitable tolling.

In addition to statutory tolling, a petitioner is entitled to equitable tolling of AEDPA's statute of limitations if extraordinary circumstances prevented him from timely filing and he diligently pursued his rights. *See Socha*, 763 F.3d at 683-84. Famous has alleged both.

1. Famous has alleged extraordinary circumstances that prevented timely filing.

When evaluating equitable-tolling claims, courts consider "the entire hand that the petitioner was dealt." *Socha*, 763 F.3d at 686. Here, Famous's allegations of attorney misconduct, lack of access to legal materials, and mental incompetence combine to create an "entire hand" that prevented him from timely filing his petition.

First, "serious instances of attorney misconduct," including failure to turn over a former client's file, justify equitable tolling. *Holland v. Florida*, 560 U.S. 631, 652 (2010); *see also Socha*, 763 F.3d at 686. Famous maintains that his appellate attorney, Mark Rosen, wrongfully withheld his file from the time his direct appeal ended until June 2005. *See* Opening Br. 20-21. The State does not contest that Rosen's misconduct, if shown, would entitle Famous to equitably toll the statute of limitations until June 28, 2005. *See* Resp. Br. 39.

The State observes that Famous "did not file a 'protective' petition" before he received his file, but does not contend that a prisoner must file a such a petition to preserve his entitlement to equitable tolling. *See* Resp. Br. 39 (citing *Johnson v. McCaughtry*, 265 F.3d 559, 565 (7th Cir. 2001)). This Court has never required prisoners to file so-called protective petitions—that is, petitions that are timely but drafted without the benefit of improperly withheld legal materials. Indeed, filing a petition without one's legal materials would be risky. "[T]he law allows just one petition as of right," and if a prisoner advanced bad or underdeveloped claims, that could "block[] relief on a good claim later." *See Estremera*, 724 F.3d at 776.

Second, the intentional confiscation of a petitioner's legal papers is "extraordinary as a matter of law." *Weddington v. Zatecky*, 721 F.3d 456, 464 (7th Cir. 2013) (quotation marks omitted). Prison officials seized Famous's legal file from Shaheed Madyun, Famous's jailhouse lawyer, and withheld it from Famous for nearly two years, until April 30, 2007. App. 112A-113A. Famous filed numerous formal complaints seeking the return of his file throughout that time. *Id.* 87A-96A.

The State argues that the prison officials' confiscation does not entitle Famous to equitable tolling because they took the file from Madyun, rather than from Famous himself, and a prisoner's decision to enlist a jailhouse lawyer does not warrant equitable tolling. *See* Resp. Br. 39-40. But Famous's argument doesn't turn on the actions of his jailhouse lawyer. Rather, like the petitioner in *Weddington*, the actions of *prison officials*, who seized Famous's legal materials and refused to return them after Famous repeatedly requested them, entitle him to a hearing on the propriety of equitable tolling. *See Weddington*, 721 F.3d at 460, 464-65. The State also looks to warnings in the Wisconsin Administrative Code and prison handbook that prison officials are not "responsible for legal materials … given to other inmates." Resp. Br. 40. That may be so, but prison officials are indisputably responsible when they seize legal materials and then affirmatively withhold them from a prisoner. *See Weddington*, 721 F.3d at 460, 464-65.

The State's citations to *United States v. Cicero*, 214 F.3d 199 (D.C. Cir. 2000), and *Paige v. United States*, 171 F.3d 559 (8th Cir. 1999), provide it no help. *See* Resp. Br. 40. In *Cicero*, the petitioner was not entitled to equitable tolling where "he never asked the prison officials to return the legal documents" that they had confiscated from his jailhouse lawyer. 214 F.3d at 204. As discussed above, Famous filed several complaints with prison officials seeking the return of his documents. *Paige* is even further afield. There, the petitioner sought equitable tolling after a motion drafted by a jailhouse lawyer incarcerated at a different facility was "sent [in the mail] to the wrong penal institution and only later delivered" to the petitioner. *Paige*, 171 F.3d at 560. Neither *Cicero* nor *Paige* involved prison officials seizing a prisoner's legal materials and refusing to return them, despite repeated demands for their return.

Third, mental illness that prevents a prisoner from understanding and acting on his legal rights justifies equitable tolling. *Mayberry v. Dittmann*, 904 F.3d 525, 530 (7th Cir. 2018) (quoting *Obriecht v. Foster*, 727 F.3d 744, 750-51 (7th Cir. 2013)). A petitioner is entitled to an evidentiary hearing on equitable tolling where he has alleged "facts [about his mental competence], which if proven, would entitle him to relief." *Id.* at 532.

The State cherry-picks from Famous's medical records to argue that he has not alleged facts sufficiently calling his mental competence into question. *See* Resp. Br. 43-44. Some of the State's omissions are striking. For example, the State notes that a medical report "declare[d]" that Famous's "functioning is not noticeably impaired." *Id.* 44. The full quote from the doctor's report tells a different story: "Mr. Famous' functioning is not noticeably impaired or odd/bizarre *in other aspect[s] of his life*, which is another *core feature of a delusional disorder*." App. 98A (emphasis added). Thus, the doctor was detailing how Famous's noticeably impaired functioning in some (but not all) aspects of his life supported a delusional disorder diagnosis. That same report declared Famous "seriously mentally ill" and stated that his "diagnosis does not suggest a good prognosis." *See id.* 97A-98A.

The medical records speak for themselves. During the relevant time period, Famous suffered from mental illness that had "per[sist]ed for nearly twenty years" and "seemingly bec[a]me worse over time," App. 101A, with symptoms that rendered Famous "psychotic" and left him with a "delusional system [that] interfer[ed] with his functioning." *Id.* 103A. The State suggests that Famous must have been competent in the years leading up to filing his federal habeas petition because he sporadically filed legal documents in Wisconsin state court. *See* Resp. Br. 44. But Famous's medical

records document that he suffered from (at a minimum) intermittent bouts of severe mental illness for many years. These records raise a serious question of whether and when Famous was mentally competent, entitling him to an evidentiary hearing on the propriety of equitable tolling. *See, e.g.*, *Perry v. Brown*, 950 F.3d 410, 412, 414 (7th Cir. 2020).

Grasping at a different straw, the State discounts Famous's medical records because they do "not begin until a report dated July 21, 2009, more than one year *after* the time period" for which Famous seeks tolling. Resp. Br. 43. But the records indicate that "Famous ha[d] been quite clearly delusional and paranoid for some time" and "refusing medical help" during the relevant time period. App. 99A. The State cites no authority for the extraordinary proposition that mental illness must be contemporaneously documented to equitably toll the statute of limitations. That Famous only received mental health treatment after the period for which he seeks tolling does not render those records irrelevant.

Fourth, an inadequate prison library "shed[s] light on the question" of equitable tolling because it is an "extraordinary circumstance[] far beyond the litigant's control that prevent[s] timely filing." *Socha*, 763 F.3d at 684. As our opening brief explains (at 23), Famous maintains that the prison library lacked a copy of AEDPA's statute of limitations, and that adds to the "entire hand" of extraordinary circumstances he was dealt from February 2002 to August 2010.

2. Famous pursued his rights with reasonable diligence.

"The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotation marks and citations omitted). The State points out that Famous did not take exactly the same measures as did the petitioner in *Holland*, *see* Resp. Br. 41-42, but Famous nonetheless demonstrated reasonable diligence in pursuit of his rights. Our opening brief shows (at 24-25) that Famous persistently requested his file from Rosen and then, after it was seized by prison officials shortly after he received it, filed multiple complaints seeking its return. *See* App. 80A-84A, 87A-96A. And Famous has presented evidence that the prison library lacked relevant legal materials and that he suffered from mental illness, both of which "shed light" on his delay in filing his petition. *See Socha*, 763 F.3d at 684; *Obriecht*, 727 F.3d at 750-51.

* * *

Taken together, Famous plausibly alleges two extraordinary circumstances—lack of adequate library access and mental incompetence—that span the entire period from February 25, 2002 to August 17, 2010. He also maintains that Rosen wrongfully withheld his file for over three years from February 2002 to June 2005 and that prison officials seized and wrongfully refused to return his legal file from July 2005 to April 2007. Because he was diligent in his pursuit of his rights, Famous is entitled to an evidentiary hearing to determine if any combination of these grounds for equitable tolling prevented the AEDPA statute of limitations from running for more than one year, thus rendering his petition timely.

II. Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-appellate-counsel claim.

A. The Wisconsin Court of Appeals unreasonably applied clearly established law.

To reasonably determine whether Rosen provided constitutionally adequate representation on direct appeal, the Wisconsin circuit court considering Famous's post-conviction claims needed to decide whether Rosen declined to raise a claim on appeal that was "obvious" and "clearly stronger" than the claims he actually presented. *See Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013). The State does not contest that if Demark retaliated against Famous by refusing to call available alibi witnesses, that would have been a clear-cut example of ineffective assistance of trial counsel. *See* App. 28A-29A. Nor does the State contest that Rosen's assistance would have been constitutionally ineffective if he knew about the alleged retaliation but failed to raise the ineffective-assistance-of-trial-counsel claim on direct appeal. *See* Opening Br. 27.

Instead, the State argues that there is "adequate" support in the record for the Wisconsin Court of Appeals' affirmation of the circuit court's rejection of Famous's inadequate-assistance-of-appellate-counsel claim based on a critical, yet "implicit" finding: that Famous did not tell Rosen about Demark's alleged retaliation. *See* Resp. Br. 51-52; App. 37A.

But the circuit court did not make that finding, implicit or otherwise. Rather, the circuit court expressly refused to make any finding as to whether Rosen knew about Demark's alleged retaliation, stating that the "record of sworn testimony does not establish" whether "Famous advised [] Rosen that there was some retaliation involved," App. 75A, and that Rosen decided "[f]or some reason" not to bring the trial-level

ineffective-assistance claim. *Id.* 74A. With those gaping holes in the record, the circuit court could not reasonably determine whether Rosen's failure to bring the ineffective-assistance-of-trial-counsel claim was constitutionally ineffective.

In short, the Wisconsin Court of Appeals' affirmance rested on a foundation of quicksand: the circuit court's purported "implicit finding" contradicted by the express terms of that court's decision. As such, its decision is so inadequately supported by the record as to be unreasonable under Section 2254(d)(1). *See* Opening Br. 28-29; *Badelle v. Correll*, 452 F.3d 648, 655 (7th Cir. 2006); *Taylor v. Grounds*, 721 F.3d 809, 823-24 (7th Cir. 2013) (state appellate court decision is unreasonable where it reads a non-existent factual finding into a bare trial-court record).

B. Famous is entitled to an evidentiary hearing.

A Section 2254 petitioner is entitled to an evidentiary hearing in federal court when the state-court record lacks sufficient factual information to adjudicate his claim and the prisoner was diligent in his efforts to develop the record. *Williams v. Taylor*, 529 U.S. 420, 435 (2000); 28 U.S.C. § 2254(e)(2). The State's contention that Famous satisfies neither of these requirements is doubly mistaken.

First, on the state-court record, it is impossible to determine whether the unraised ineffective-assistance-of-trial-counsel claim was "obvious" and "clearly stronger" than the claims Rosen raised on appeal—that is, it is impossible to determine whether Rosen knew about the retaliation claim. *See Shaw*, 721 F.3d at 915; Opening Br. 30. The State's only contrary argument is that Famous's retaliation claim is plainly meritless because

Demark called at trial the two witnesses that he mentioned in his opening statement. As discussed below (at 13-14), the State is factually mistaken.

Second, as to diligence, a prisoner has been diligent where he "wanted to introduce more" facts into the state-court record, but "the state barred the door." *Lee v. Kink*, 922 F.3d 772, 775 (7th Cir. 2019). Where a prisoner "repeatedly implore[s]" the state courts to "assist him" and "made appropriate efforts to locate and present [relevant] evidence to the state courts," "[i]t is not reasonable to characterize [his] efforts as less than diligent." *Davis v. Lambert*, 388 F.3d 1052, 1061 (7th Cir. 2004).

The State faults Famous for the sparse state-court record, describing Famous as "cho[osing] expressly to focus on Attorney Rosen" at the *Machner* hearing and "insist[ing]" that the hearing have a narrow scope. *See* Resp. Br. 52-53. That's simply not true. Famous presented "detailed and not conclusory" allegations of ineffective assistance of trial counsel in his state postconviction petition, including signed declarations by the alibi witnesses, and also maintained "that he brought this claim to postconviction counsel's attention, but counsel did not raise it." App. 28A-29A; *see id.* 76A-79A. At a pre-*Machner* hearing status conference, the circuit court limited the testimony "to that of postconviction counsel." *Id.* 34A. Famous "filed a motion seeking to have the court subpoena three additional witnesses"—two alibi witnesses and trial counsel Demark—"for the upcoming hearing," *id.* 34A, 37A, and appealed when the circuit court denied that motion, *id.* 35A, 38A.

Famous filed his motion to subpoena additional witnesses in the face of sustained discouragement. The pre-hearing status conference transcript shows that both the circuit court and the State suggested that Famous could effectively make his arguments

without Demark's testimony. *See* Supp. App. 402-403. Later, the circuit court "narrowed" the scope of the *Machner* hearing to focus "solely as to ineffective assistance of appellate counsel" and asked Famous if he wanted to call any witnesses in addition to "obviously … your appellate counsel, Mr. Rosen." *Id.* 406. Taking his cues from the circuit court and the State, Famous responded that, with the scope of the hearing "[n]arrowed in that fashion … [,] probably not." *Id.* The Wisconsin Court of Appeals recognized that the "circuit court"—not Famous—"limited the testimony to the issue of … ineffective assistance of postconviction counsel." App. 37A. Famous nevertheless later filed a motion to subpoena Demark and two additional witnesses. *See id.* 34A.

The circuit court—with the State's encouragement—dissuaded Famous from calling any witnesses beside Rosen, and the State represented to the court that Famous did not need to call Demark to succeed on his ineffective-assistance-of-appellate-counsel claim. Famous withstood that pressure and filed a motion to subpoena Demark's and two alibi witnesses' testimony for the *Machner* hearing. The State cannot now turn around and blame Famous for the absence of their testimony, after *the State itself* stated that Famous did not need to do so, the circuit court narrowed the scope of the hearing accordingly, and Famous alone sought to subpoena the additional testimony. Famous diligently "did all that he could" to develop the state-court record, but was overridden by the circuit court. *Davis*, 388 F.3d at 1061.

III. Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-trial-counsel claim.

If Famous prevails on his ineffective-assistance-of-appellate counsel claim, the procedural default of his underlying ineffective-assistance-of-trial-counsel claim will be

excused. *See* Opening Brief 32. Famous will then be entitled to an evidentiary hearing on that claim because the state-court record does not contain sufficient factual information to adjudicate it, and, as discussed above (at 11-12), Famous was diligent in his efforts to develop the record. *See Williams*, 529 U.S. at 435; Opening Br. 32-37.

The State argues that, even on this sparse state-court record, it is clear that Famous's ineffective-assistance-of-trial-counsel claim lacks merit. On the State's telling, Demark told the jury in his opening statement that he would call only two witnesses: Elizabeth Green and David Famous. *See* Resp. Br. 53. The State characterizes Demark's opening statement as not identifying Carolyn Famous, Rosie Marie Kelly, or Lynette Famous as "witnesses who were likely to testify at trial." *Id.* It thus concludes that "a key factual predicate for Famous' claims"—that Demark planned to call those three alibi witnesses before Famous moved to remove him—"simply does not exist." *Id.*

The State badly mischaracterizes the trial transcript. In his opening statement, Demark previewed Carolyn Famous's and Lynette Famous's testimony for the jury. He described them as being "in the residence" while the alleged assault happened and stated that he "believe[d] their testimony will be" that they spent time in both the upstairs and downstairs apartments. Supp. App. 132. Demark went on to tell the jury that their testimony would show that "there are people all around right in the immediate vicinity [of the alleged crime] upstairs and there's also people downstairs," thereby suggesting that their testimony would undermine the State's case. *Id.* 133. In other words, in his opening statement, Demark led the jury to believe that Carolyn and Lynette Famous each would testify on Famous's behalf about what they observed inside the apartment during the alleged assault.

Moreover, because no state court reached the trial-ineffective-assistance claim, the state-court record contains no information about Demark's reasons—retaliatory or otherwise—for declining to call Carolyn and Lynette Famous after previewing their testimony to the jury. According to Famous, Demark told him that the alibi witnesses were not called because they refused to testify, App. 28A, but Lynette Famous submitted a sworn affidavit to the contrary, *id.* at 78A-79A. And, as our opening brief discusses (at 34-35), even a strategic (rather than retaliatory) decision by trial counsel not to call "useful, corroborating witnesses" can "constitute[] deficient performance." *Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012).

CONCLUSION

The district court's judgment should be reversed and the case remanded for an evidentiary hearing on the merits of Famous's statutory and equitable-tolling claims, ineffective-assistance-of-appellate-counsel claim, and ineffective-assistance-of-trial-counsel claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 3,740 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2019, set in Garamond font in 14-point type.

/s/ Hannah Mullen
Hannah Mullen

CERTIFICATE OF SERVICE

I certify that on, July 2, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Hannah Mullen
Hannah Mullen