

SanMartin vs. McNeil, 633 F3d. 1257, 1267-1268 CA. 2011 A court may consider an untimely § 2254 if by refusing to consider the petition for untimeliness would thereby endorse a 'fundamental miscarriage of justice', because it would require an innocent individual remain imprisoned.

In the 2010 United States Supreme Court case *Holland vs. Florida*, which involves a missed one year deadline prescribed by the U.S.C. 28 § 2244(d) for filing a Federal habeas petition. Holland presented two issues: First time limit can be tolled for equitable reasons, and second whether an attorney's unprofessional conduct can ever count as "extraordinary circumstance" justifying equitable tolling 560 U.S. at 130S.Ct. 2549, 177, L.Ed. 2d. 130, 145(internal quotation marks omitted) the answer was yes to both questions.

Section § 2244(d) (1) (D) provides a fresh year in which to file, starting on the date which the factual predicate of the claim or claims presented could have been discovered through exercise of due diligence. 2244 (b) (2) (B) lifts the bar on second or successive petitions.

Petitioner has not failed in his due diligence, petitioner has done all that is physically possible to gain discovery in a timely manner¹, once discovery was obtained petitioner timely filed a state post-conviction petition. This was required of petitioner in order to fulfill his requirements of exhausting all state remedies.

The 14th Amendment provides that "[N]o state shall... deprive a person of life, liberty, or property without due process of law." Federal court cases have recognized that protected liberty interests may arise "from the Constitution it's-self by reason of guarantees implicit in the word liberty,..." or it may arise from an exception or interest created by state laws or policies.

Under that provision, a person who has been, "convicted of, or sentenced for, a crime may institute a proceeding for post- conviction relief if the person claims ... that there exists evidence of material facts, not previously heard by the court, that require vacation of the conviction or sentence in the "interest of justice". Petitioner has met this requirement and was wrongfully denied relief by the County District Court and the Minnesota Supreme Court.

The Courts have long held that "[I]n exceptional circumstances, especially in criminal cases, appellate courts may of their own motion, notice errors to which no exceptions has been taken, if the errors are obvious, or if they affect the fairness, integrity, or public reputation of the judicial proceedings." *United States vs., Atkinson*, 135, S.Ct. 2400, 297, U.S. 157, 160, 56, S.Ct. 391, 80 L.Ed. 555(1936).

¹ See petitioner's first post-conviction exhibits one and three page 48, and 49