

FILED

MAY 14 2009

Lima v. Kramer, 07-56533
GOULD, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I believe that it is incorrect to view Lima's two state habeas petitions as part of "one full round" of state review, in light of the intervening federal habeas corpus petition filing and the dismissal for exhaustion. Lima did not argue on appeal to us that his state petitions were part of one round, and I would not take that position *sua sponte*. If, as I believe, the gap between Lima's state filings is not tolled by statute, then timeliness turns on the issue of equitable tolling. As I see that issue, Lima showed insufficient diligence for equitable tolling. Accordingly, I respectfully dissent.