
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP WALTER JONES

Petitioner

v.

SECRETARY, FLORIDA DEPT OF CORRECTIONS

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

This case presents two questions pertaining to the “proper filing” requirement that were left open by *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) and that have split the circuit courts of appeals: (1) is diligence in discovering new evidence a condition to filing a postconviction motion or a condition to obtaining relief on that motion; and (2) must a trial court unambiguously state that a postconviction motion is untimely so that a prisoner can know that it was not “properly filed”?

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Petition for Writ of Certiorari

Petitioner Philip Walter Jones respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the Eleventh Circuit Court of Appeals appears at pages 1a–28a of the Appendix to the Petition and is reported at *Jones v. Fla. Dep’t Corrs.*, 906 F.3d 1339 (11th Cir. 2018). The opinion of the United States District Court for the Middle District of Florida is unpublished and is available at pages 29a–40a of the Appendix to the Petition.

Statement of Jurisdiction

The judgment of the Eleventh Circuit Court of Appeals was entered on October 29, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The relevant statutes are set forth in pages 47a–56a of the Appendix to the Petition.

Introduction and Statement of the Case

In June 2007, Philip Walter Jones was convicted on one count of aggravated battery and sentenced to serve twenty-years. Appx. at 2a. Mr. Jones unsuccessfully appealed, and his conviction became final on September 18, 2007. *Id.* In theory, the clock for the one-year statute of limitations to file a federal habeas petition began to run on that date. *See* 28 U.S.C. § 2244(d).

However, Mr. Jones filed several motions for postconviction relief that tolled the statute of limitations until April 4, 2012. *Id.* at 32a. Then, approximately two months later, Mr. Jones filed a Rule 3.800(a) motion that again tolled the limitations period until August 9, 2013. *Id.* From that point, Mr. Jones had 310 days remaining to file a habeas petition in federal court, giving him a deadline of June 16, 2014.

Forty-one days later, though, Mr. Jones filed a motion to vacate his conviction under Rule 3.850, alleging that he had obtained newly-discovered evidence of a pre-trial ten-year plea offer that his trial counsel failed to convey to him. *Id.* at 33a. Whether that motion was “properly filed” for purposes of tolling the deadline on his federal habeas petition is the issue in this case. The state court denied the motion on November 7, 2013, and began its opinion by acknowledging that the motion was “filed on September 19, 2013, pursuant to Florida Rule of Criminal Procedure 3.850.” *Id.* at 43a. The court then gave a brief overview of the procedural history of Mr. Jones’s case before proceeding to analyze Mr. Jones’s newly discovered evidence claim. *Id.* at 43a–45a. Then the court noted (1) that Mr. Jones had previously asked

his trial attorney for all communications from the State Attorney’s Office and (2) that Mr. Jones’s trial attorney had testified under oath that he had relayed all offers to Mr. Jones. *Id.* at 44a. Based on those facts, the state court held that Mr. Jones could have discovered the ten-year offer within the two-year limit imposed by Rule 3.850. *Id.* Therefore, the court held that Mr. Jones did not have newly discovered evidence under that rule. *Id.* In doing so, the court never stated expressly or implicitly that Mr. Jones’s motion was untimely. *See generally id.* at 43a–45a.

With 221 days remaining at that point to file his federal habeas petition, Mr. Jones appealed the trial court’s ruling to the state appellate court. *Id.* at 2a. The state appellate court affirmed the trial court’s dismissal 211 days later on June 6, 2014. *Id.* Mr. Jones then filed his federal habeas petition on June 25, 2014. *Id.* at 3a. The district court dismissed the petition, though, holding that because the state court had denied the newly-discovered evidence claim in Mr. Jones’s Rule 3.850 motion, the motion was “untimely.” *Id.* at 35a–36a. Because the motion was untimely, it was not “properly filed” under 28 U.S.C. § 2244(d) and did not toll the one-year statute of limitations for his federal habeas petition. *Id.* at 36a. Thus, the district court concluded that the limitations period had expired on June 16, 2014. Appx. at 32a.

The Eleventh Circuit affirmed the district court’s ruling on October 29, 2018, finding that the district court correctly determined that Mr. Jones’s petition was “untimely” and thus not “properly filed.” Appx. 21a. On that basis, the Court

likewise concluded that Mr. Jones's state postconviction motion failed to toll the one-year statute of limitations under § 2244(d)(2). *Id.* Mr. Jones respectfully asks this Court to reconsider that decision for the following reasons.

Reasons for Granting the Petition

This Court should grant the petition for two reasons. First, the Eleventh Circuit misapplied both the plain language of Rule 3.850 and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) when it found that Mr. Jones's motion was not properly filed. Second, that decision implicates circuit splits on two questions: (1) whether diligence in discovering new evidence is a condition to filing a postconviction motion or a condition to obtaining relief on that motion; and (2) whether a trial court must unambiguously state that a postconviction motion is untimely so that a prisoner will know that it was not "properly filed." These are important questions because they impact lower courts' obligation to apply the plain language of state postconviction review statutes and their obligation to give prisoners notice—if a motion is not properly filed—that the statute of limitations continues to run for any federal habeas petition.

I. The Eleventh Circuit's decision is inconsistent with the plain text of Florida's postconviction review statute and it misconstrues this Court's decision in *Pace v. DiGuglielmo*.

Florida's Rule 3.850(b)(1) says that a postconviction motion shall not be "filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it *alleges* that the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence" Fla. R. Crim. P.

3.850(b) (emphasis added). Mr. Jones's Rule 3.850 motion made those allegations here. Specifically, it alleged that he had newly discovered evidence and that he was diligent in having discovered that evidence. *See Jones v. Fla. Dep't Corrs.*, 906 F.3d 1339, 1345 (2018) ("[Jones] alleged in his motion that he had only recently learned of the plea offer and that he could not have learned of it earlier with the exercise of due diligence."). Therefore, Mr. Jones satisfied the plain language of one of the exceptions to Florida's time bar. *See Fla. R. Crim. P. 3.850(b)* ("No other motion shall be filed . . . unless it *alleges* that . . .") (emphasis added).

To bypass the plain language of the rule and find that Mr. Jones's postconviction motion was not "properly filed" for purpose of tolling the deadline on his federal habeas petition, the Eleventh Circuit cited *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) and found that the state court had deemed his motion "untimely" by denying his new evidence claim, even though the state court never said so. *Jones*, 906 F.3d at 1350. That decision is not consistent with *Pace*. There, this Court held that when a state court rejects a postconviction motion as untimely under state law, the motion is not properly filed within the meaning of Section 2244(d)(2). *See Pace*, 544 U.S. at 414. But in doing so, this Court distinguished a motion that "fit" within a statutory exception to a time limit (properly filed) from a motion that is untimely without satisfying any exception (not properly filed). *Id.* at 408. Because Mr. Jones's motion fit within a statutory exception to Florida's filing deadline (by "alleging" that he had diligently discovered new evidence), his motion was properly filed under *Pace*. The Eleventh Circuit's decision failed to recognize that distinction.

More specifically, unlike Mr. Jones, the petitioner in *Pace* fit within no exceptions to the statutory filing deadline. The Pennsylvania Post Conviction Relief Act (PCRA) set out a statutory time limit for postconviction petitions and provided for statutory exceptions to that time limit. *See* 42 Pa. Cons. Stat. §§ 9545(b)(1)(i)-(iii). Under those exceptions, a petitioner like Mr. Pace had to both allege and prove that “he fell within a statutory exception” for his motion to be properly filed. *See Pace*, 544 U.S. at 411 (citing 42 Pa. Cons. Stat. §§ 9545(b)(1)(i)-(iii)). Because Mr. Pace neither alleged nor proved that he met any statutory exception, the issue in his case was a limited one reserved by this Court in *Artuz v. Bennett*: “whether the *existence* of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed.” *Id.* at 413 (“[In *Artuz*] we reserved the question we face here”) (citing *Artuz v. Bennett*, 531 U.S. 4, 8 n.2 (2000)) (emphasis added). That question meant just what it said: whether the mere *existence* of exceptions to a statutory time limit would make a postconviction motion properly filed, not whether a petition could be properly filed when it fit within an exception to a time limit. The only motion at issue in *Pace* was an untimely motion that met no exception. *Id.*

The Court even expressly cabined its holding in *Pace* to petitions that did not fit within a statutory exception to a time limit. In particular, the Court held untimely “a petition filed after a time limit, *which does not fit within any exceptions to that limit*” *Pace*, 544 at 413 (emphasis added). A petition that fit within no statutory exception would be “no more ‘properly filed’ than a petition filed after a

time limit permitting no exception.” *Id.* To be sure, the *Pace* decision contained broad language about the effect of untimeliness. *See, e.g., id.* at 414 (“When a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).”) (quoting *Carey v. Saffold*, 536 U.S. 214, 226 (2002) (alterations in *Pace*)). But the Court’s statements about the effect of untimeliness are controlled by its express cabining language: “which does not fit within any exceptions to that limit” *Id.* at 413.

Mr. Jones accepts that, under *Pace*, satisfying a time limit is a condition to filing. But a postconviction motion is still properly filed if it fits within a statutory exception to a time limit. *See id.* Mr. Jones’s petition “fit” within a statutory exception here because his motion satisfied the plain terms of Rule 3.850. *Id.* To say that Mr. Jones’s motion was not properly filed because of *Pace* would be to apply *Pace* to a case that the *Pace* Court had no occasion to consider and that the *Pace* Court excluded by its own phrasing of the issue before it. The Eleventh Circuit thus elevated its misreading of *Pace* over the plain language of Florida’s statute—a statute that Mr. Jones, unlike the petitioner in *Pace*, satisfied.

II. The Eleventh Circuit’s decision implicates circuit splits on two important questions.

The Eleventh Circuit’s decision implicates circuit splits on two issues: first, whether diligence in presenting newly discovered evidence is a condition to filing a postconviction motion or a condition to obtaining relief on that motion, and second, whether a trial court must clearly and unambiguously state that a postconviction

motion is untimely to prevent statutory tolling under § 2244(d)(2). Guidance from this Court would bring clarity to these issues for lower courts and litigants, alike.

A. The courts of appeals disagree on whether diligence in presenting new evidence is a condition to filing or a condition to obtaining relief.

A circuit split now exists on whether diligence in presenting newly discovered evidence is a condition to proper filing or a condition to obtaining relief on the merits of the postconviction motion. In this case, the Eleventh Circuit said that it is the former, holding that Mr. Jones's Rule 3.850 motion was untimely and therefore not properly filed because the state court had held that Mr. Jones was not diligent in discovering new evidence. *See Jones*, 906 F.3d at 1350 ("We conclude that based on the language in the Trial Court Order, an untimeliness finding was subsumed within the state court's denial of relief because (according to that court) the petitioner *could* have discovered the new evidence several years before That necessarily means that the motion wasn't 'properly filed,' and thus it didn't toll AEDPA's one-year statute of limitations.") (emphasis in original). After the Eleventh Circuit's ruling, diligence is a necessary condition to proper filing in that circuit, even when the plain language of the state postconviction review statute only requires a petitioner to allege the diligent discovery of new evidence to bypass a time limit on filing. *See Fla. R. Crim. P. 3.850(b)*.

That holding is directly at odds with the Ninth Circuit's holding on the same issue. *See generally Ramirez v. Yates*, 571 F.3d 993 (2009). In *Ramirez*, the state had argued that a petitioner's coram nobis petition was not properly filed under AEDPA because of the petitioner's long delay in filing it. *Id.* at 999. The Ninth

Circuit disagreed. It explained that the lower court had denied the coram nobis petition because the petitioner “failed to allege the time and circumstances under which the new facts were discovered in order to demonstrate that he ha[d] proceeded with due diligence.” *Id.* (quotation omitted) (alteration added). That, according to the Ninth Circuit, made the petition “properly filed because California’s requirement to show ‘due diligence’ [wa]s *plainly* ‘a condition to obtaining relief’ and not ‘a condition to filing.’” *Id.* (citing *Artuz*, 531 U.S. at 10) (alteration added) (emphasis added). In other words, even though the state court had denied his claim on the merits, the *Ramirez* petitioner had “properly filed” his petition and was “entitled to statutory tolling” for that reason. *Id.* (“As the Supreme Court has explained, failing to meet all the elements of a court’s ‘rule of decision’ does not render a petitioner’s papers improperly filed; rather, it renders them without merit.”).

The Ninth Circuit’s holding was correct; the Eleventh Circuit’s was not. When a state postconviction review statute only requires a petitioner to allege the diligent discovery of new evidence to bypass a time limit, a separate requirement that the petitioner actually be diligent in discovering new evidence (to obtain relief on the postconviction motion) is distinct from the time limit on filing. Florida’s scheme, for example, explicitly distinguishes between the two requirements. The first, which appears in the introductory paragraph of Rule 3.850(b), is the timely filing requirement: “No other motion shall be filed . . . more than 2 years after the judgment and sentence become final *unless it alleges that. . .*” Fla. R. Crim. P.

3.850(b) (emphasis added). The second, which is one of the conditions that the petitioner must “allege,” is the diligence requirement that appears in subparagraph (b)(1): “the claim [must be] made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence” *Id.* at 3.850(b)(1). The time limit for filing after the sentence or judgment become final is the time limit for proper filing. *Id.* at 3.850(b). The diligence requirement, on the other hand, is a condition that the petitioner must satisfy to obtain relief on the postconviction motion. *See id.* at 3.850(b)(1). Simply put, whether a petitioner was diligent in discovering new evidence and presenting it to the court has nothing to do with the time limit on delivery. This Court should grant review to provide clear guidance on this issue.

B. The courts of appeals disagree on whether a state court must clearly and unambiguously say that a postconviction motion is untimely.

The state court in Mr. Jones’s case never said that his Rule 3.850 motion was untimely, giving him no notice that the deadline on his federal habeas petition continued to run. The Eleventh Circuit said that this did not matter, and as a result, the chasm between the courts of appeals has widened on whether a state court must clearly and unambiguously rule that a postconviction review motion is untimely to prevent statutory tolling under § 2244(d)(2). Guidance from this Court is necessary to resolve this growing division. *See, e.g., Robinson v. Lewis*, 795 F.3d 926, 932 (9th Cir. 2015) (discussing the tripartite balance in habeas corpus jurisprudence between federal courts’ interest in “discharg[ing] [their] duty to discern the state rule for timeliness of filing state habeas petitions,” state courts’

interest in protecting the finality of state decisions and promoting the exhaustion of state remedies, and habeas petitioners' interest in "know[ing] whether the federal statute of limitations is running while they prepare their state petitions"); *see also* Brian R. Means, *Postconviction Remedies* § 25:21 (Thomson Reuters 2018) ("The Supreme Court has not decided whether the limitations period is tolled where, although the state court did not *explicitly* deny the petition as untimely, as occurred in *Pace*, the record demonstrates that the petition was not filed within the time authorized by state law.") (emphasis in original).

On one hand, the Ninth and Eleventh Circuits have held that a state court's timeliness ruling on a postconviction motion need not be clear and unambiguous to prevent statutory tolling under § 2244(d)(2). *See Jones v. Sec'y, Fla. Dep't of Corr.*, 906 F.3d 1339 (11th Cir. 2018); *Thorson v. Palmer*, 479 F.3d 643 (9th Cir. 2007).

The Eleventh Circuit, for instance, interpreted the trial court's denial of Mr. Jones's Rule 3.850 motion as a ruling on timeliness even though the trial court never mentioned any form of the word untimely and even though Judge Newsom, at oral argument, described the trial court's order as a "hot mess." *Jones*, 906 F.3d 1339; Oral Argument at 15:41, *Jones v. Fla. Dep't Corrs.*, 906 F.3d 1339 (11th Cir. 2018) (No. 17-10693),

http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/17-10693.mp3. In fact, the trial court had analyzed the merits of Mr. Jones's claim of newly discovered evidence, finding that he was "not entitled to relief for this claim." *Id.* at 1345. Nevertheless, the Eleventh Circuit concluded on appeal that the trial

court's dismissal of the petition rested squarely on timeliness grounds and precluded Mr. Jones from claiming statutory tolling under §2244(d)(2). *Id.* at 1349. After conceding that the trial court's order was neither clear nor unambiguous, the court stated that "magic words are not required" to find a postconviction motion untimely. *Id.* at 1346. The Court even concluded by stating that "the state court doesn't even have to make a timeliness ruling *at all* before a federal court can find that it was untimely and not 'properly filed' for Section 2244(d)(2) purposes." *Id.* (citing *Evans v. Chavis*, 546 U.S. 189 (2006)) (emphasis in original).

Similarly, in *Thorson*, the Ninth Circuit reviewed the California Supreme Court's justification for its summary denial of an inmate's state habeas petition. 479 F.3d at 645. In its entirety, the order read: "Petition for writ of habeas corpus is DENIED," which was followed by a bare citation to *In re Robbins*, 959 P.2d 311, 317 (Cal. 1998). *Id.* Finding that the order constituted a rejection of the habeas petition as untimely, the Ninth Circuit focused on the fact that the court's decision "[cited] the very page of *Robbins* that sets forth 'the basic analytical framework' governing California's timeliness determinations in habeas corpus proceedings," despite the fact that the order *itself* made no mention of the statutory time bar. *Id.*; *see also Curiel v. Miller*, 830 F.3d 864, 870 (9th Cir. 2016) ("We have no cause to treat a state court's summary order with citations as anything but a 'reasoned' decision, provided that the state court's references reveal the basis for its decision."). In justifying its position that a timeliness ruling can be made without clear reference

to the statutory time bar, the Court explained that “the Supreme Court has never required state courts to be verbose for AEDPA purposes.” *Curiel*, 830 F.3d at 870.

By contrast, the Fifth and Seventh Circuits have interpreted the statutory tolling provision of § 2244(d)(2) to require that rulings finding postconviction motions untimely—and thus improperly filed—*must* be clear and unambiguous. *See Grillette v. Warden, Winn Corr. Ctr.*, 372 F.3d 765 (5th Cir. 2004); *Smith v. Battaglia*, 415 F.3d 649 (7th Cir. 2005).

In *Grillette*, for example, the Fifth Circuit observed that “when the denial of an application is based on untimeliness, Louisiana courts *routinely and unmistakably indicate so* in their opinions.” 372 F.3d 765, 775 (emphasis supplied). In that case, the trial court “succinctly disposed of the application ‘on the merits,’” and the Fifth Circuit found the absence of *any* mention of Louisiana’s statutory time bar to be dispositive on the question of timeliness. *Id.* at 771. Specifically, the Court held that “had the Louisiana Court of Appeal decided to reach the merits of the application notwithstanding a determination that the application was untimely, *it appears that the court would have indicated any such untimeliness in its opinion.*” *Id.* at 775. (emphasis supplied); *see also Dilworth v. Johnson*, 215 F.3d 497, 501 (5th Cir. 2000) (noting that because the petitioner’s application was “‘accorded some level of judicial review’ by the state courts, it is considered a ‘properly filed application’ under section 2244(d)(2)”) (*citing Villegas v. Johnson*, 184 F.3d 467, 470 n. 2 (5th Cir. 1999)).

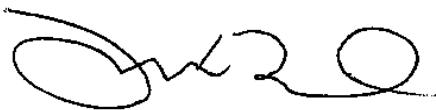
The Seventh Circuit has similarly taken the position that any ruling on the issue of timeliness must be “clear and express” to prevent statutory tolling under § 2244(d)(2). *Battaglia*, 415 F.3d at 650. In *Battaglia*, the trial court’s disposition rested on the merits of the petitioner’s motion for postconviction relief, while also briefly mentioning in the order’s closing sentence that the “defendant’s petition *may* be considered untimely.” *Id.* at 653 (emphasis in original). Finding that the lower court’s passing, secondary reference to timeliness fell short of a “clear and express” ruling on the time bar, the Seventh Circuit held that the court’s ambiguous order must be interpreted to rest on the merits of the petition alone and the motion was, therefore, properly filed for statutory tolling purposes. *Id.*; *see also Morales v. Boatwright*, 580 F.3d 653, 658 (7th Cir. 2009) (“For an improperly filed petition to be a separate and adequate ground for the state court disposition of the case, the court must have...clearly and expressly relied on the filing error to rule against the petitioner.”). Recognizing also that this Court’s decision in *Pace* has cast some doubt upon this area of law among the circuit courts, the Seventh Circuit even specifically stated that “*Pace* does not change the rule that requires the state court ruling [on timeliness] to be a clear one.” *Battaglia*, 415 F.3d at 653. In short, the courts of appeals disagree on whether, after *Pace*, a state court ruling on untimeliness must be clear. Mr. Jones asks this Court to grant his petition to end that disagreement.

Conclusion

In ruling on this case, the Eleventh Circuit only considered whether Mr. Jones’s habeas petition was properly filed. It did not address any underlying

challenges within that petition. As result, the questions presented before this Court are narrow, and this case provides the appropriate vehicle for this Court to offer clear guidance on the proper filing requirement. As the questions are ripe for review in the context of two well-defined circuit splits, there is no added advantage from further delay.

Respectfully submitted,



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