No. 19-6081

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE GILLMAN – PETITIONER

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and
ATTORNEY GENERAL, STATE OF FLORIDA – RESPONDENTS

On Petition for Writ of Certiorari to
The United States Court Of Appeals for the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

Robert Wayne Gillman, Pro Se
D/C #U16057
Marion Correctional Institution
P.O. Box 158
Lowell, FL 32663-0158

QUESTION(S) PRESENTED

1. Is this instant case before the Court to answer the question left open in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991):

   "Does a prisoner have a right to effective counsel in initial-review collateral proceedings?"

   and

2. Whether the Petitioner's §2254 Federal Habeas Corpus Petition was timely based on the totality of the evidence proving that he exercised due diligence and that extraordinary circumstances stood in his way of filing a timely habeas corpus petition?

LIST OF PARTIES

____ All parties appear in the caption of the case on the cover page.

X All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Ballard, Erwin Edward	Victim (Deceased)
Covington, Hon. Virginia Hernandez	U.S. District Court Judge
DeMaggio, Bryan	Ex-Counsel for Appellant
Gillman, Robert W.	Petitioner/Appellant
Harper, Robert A.	Ex-Counsel for Appellant
Hodges, William T.	U.S. District Court Judge
Jenkins, Patricia	Ex-Counsel for Appellant
Johnson, Huntley	Ex-Counsel for Appellant
Inch, Mark S.	Secretary, Fla. Dept. of Corrections
King, Brad	State Attorney, 5th Judicial Circuit (Fla)
Lammens, Hon. Philup	U.S. Magistrate Judge
Moody, Ashley	Florida Attorney General
Sheppard, William T.	Ex-Counsel for Appellant
Swigart, William T.	Trial Judge (Deceased)
Thomas, D.G.	Ex-Counsel for Appellant
Tomms, Kenneth	Victim (Deceased)
Ufferman, Michael	Ex-Counsel for Appellant
Vipperman, Lloyd	Ex-Counsel for Appellant
Walls, Rebecca Roark	Asst. Attorney General (Florida)

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[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

X is unpublished.

JURISDICTION

This Honorable Court has jurisdiction under Title 28 U.S.C. §1254(1) to rule on this petition and to review the final judgment rendered on June 25, 2019 via the Eleventh U.S. Circuit Court Order Denying Petition for Panel Rehearing, and their corresponding April 24, 2019 Order Denying Motion for Certificate of Appealability and Motion to Proceed In Forma Pauperis. This U.S. Code provides in pertinent part, "Cases in the courts of appeal may be reviewed by the Supreme Court... (1) [B]y writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree." U.S. Supreme Court Rule 13 holds that a petition for a writ of certiorari to review a judgment issued by a United States Court of Appeals in a criminal case is timely when it is filed with the Clerk within 90 days after entry of the judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Issues Involved

The Fifth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "No person shall be held to answer a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of the law...."

The Sixth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved

Title 28 U.S.C. §2254(d) reads, in pertinent part, as follows:

> "An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim... (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

Title 28 U.S.C. §2244(d) reads, in pertinent part, as follows:

(1) "A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest of ---

(A) The date of which the judgment became final by the conclusion of the direct review or the expiration of time for seeking such review; or
(B) The date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such action; or
(C) The date in which the constitutional right asserted was officially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) The date on which the factual predicate of the claim or claims presented could not have been discovered through the exercise of due diligence."

(2) "The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection."

Title 28 U.S.C. §1257(a) reads, in pertinent part, as follows:

"Final judgments or decrees rendered by the highest court in a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a State treaty or statute of the United States is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States ---

Federal Rules of Civil Procedure (Fed.R.Civ.P.) Rule 60(b) reads, in pertinent part, as follows: Rule 60 Relief from a judgment or order.

(b) Grounds for relief from a final judgment, order or proceeding. On motion and just terms, the Court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons...:

(3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party....

(6) Any other reason that justifies relief.

STATEMENT OF THE CASE

On January 14, 1997, Mr. Gillman was indicted for 1st-degree murder, 2nd-degree murder, armed burglary, and armed extortion for an incident that occurred on December 21, 1996.

On October 11, 2002, following a jury trial in the Fifth Judicial Circuit Court, in and for Marion County, Florida, Mr. Gillman was convicted on all counts.

On April 11, 2003, upon motion by the State, the trial judge granted a judgment of acquittal on the Armed extortion count. The court sentenced Appellant to Life in prison on the first-degree murder count, plus twenty years on the remainder of the counts.

On April 20, 2004, the Fifth District Court of Appeal ("DCA") affirmed the judgment. The following issues were raised on direct appeal: (1) The evidence was insufficient to sustain the conviction for burglary; (2) The evidence was insufficient to sustain the conviction for second-degree murder; (3) Error to give the jury the "remaining in" part of the jury instruction on burglary; (4) The verdicts were legally inconsistent; (5) The testimony of Ralph ("Duke) Troisi should have been excluded from evidence; and (6) Trial court erred when denying a competency hearing for the Appellant. Mr. Gillman filed a Motion for Rehearing, and a Motion for Rehearing En Banc.

On June 28, 2004, the Fifth DCA denied the rehearing motions and issued its mandate in this case. The conviction became final for triggering the one-year time limitation for filing a timely petition for writ of Federal habeas corpus ninety (90) days later on September 7, 2004.

On July 1, 2005, Mr. Gillman filed a pro se Motion to Correct Illegal Sentence pursuant to Fla.R.Crim.P. Rule 3.800(a).[1]

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[1] Gillman was charged with 297 days against the one-year AEDPA statute of limitations. This left him with 68 days to file a timely Federal habeas corpus petition.

On July 13, 2005, the lower court denied the 3.800(a) motion.

On December 13, 2005, on appeal, the Fifth DCA affirmed the lower court ruling on the 3.800(a) motion without opinion.

On January 18, 2006 the 5th DCA opinion became final upon denial of Gillman's motion for rehearing.

On February 2, 2006, Gillman filed a petition seeking review of the 3.800(a) motion denial and affirmance on appeal with the Florida Supreme Court.

On February 3, 2006, the Florida Supreme Court dismissed the petition for lack of jurisdiction.

On February 6, 2006, the Florida Supreme Court issued its mandate.

On June 20, 2006, Mr. Gillman, through counsel, filed a Motion for Postconviction Relief pursuant to Fla.R.Crim.P. Rule 3.850. Counsel presented eight (8) claims for relief involving ineffective assistance of counsel ("IAC"), trial court error and cumulative effect of error as follows: (1) IAC for failure to investigate and raise the issue of Gillman's incompetency to stand trial. (2) IAC for trial counsel's conflict of interest (Attorney Mr. Jenkins was a former Public Defender and a partner of Gillman's trial counsel that represented State key witness Ralph E. Troisi in matters arising out of the incident in which the Defendant was tried and convicted). Additionally, in the year 2000, Mr. Jenkins testified on behalf of Mr. Troisi at a bond hearing in an unrelated case. (3) IAC for failing to inquire and investigate the conflict of interest raised in Claim Two. (4) Ralph Troisi should have been excluded as a witness because he was mentally incompetent. At the evidentiary hearing on this claim, Gillman produced evidence that Troisi was a heavy drug user and was 100% disabled sue to Post-Traumatic Stress Disorder ("PTSD"). (5) IAC for failure to object to the admission of hearsay regarding Gillman's alleged unlawful

entry into the Tomms's residence which formed the basis for conviction on all counts. (6) Ground 6 was withdrawn from consideration. (7) IAC for failure to object to the jury instruction identifying Mr. Ballard as Gillman's accomplice. This error essentially directed a verdict for the State against Gillman. (8) IAC for failure to object to the supplemental jury instructions which dealt with the right of Mr. Troisi to qualify as a guest in the Tomms's residence if Troisi knocked and identified himself before entering. The instruction shifted the burden of proof from the State over to Mr. Gillman.

On March 9, 2009, the 3.850 motion was denied (see **Appendix T**).

On June 29, 2010, the 5th DCA affirmed the lower court's denial order (see **Appx. S**).

On July 21, 2010, the mandate issued making the 3.850 denial final in the State courts.

On August 10, 2010, Mr. Gillman, through counsel, filed a 28 U.S.C. §2254 Federal Petition for Writ of Habeas Corpus.

On March 6, 2013, the U.S. District Court Judge held an evidentiary hearing to take testimony regarding the "timeliness" of the Petition, to wit, whether Mr. Gillman would have timely filed his Federal Petition but for hired Counsel's deficient performance. Following the evidentiary hearing, briefs were filed by the parties.

On July 5, 2013, the U.S. District Court dismissed the Petition for Writ of Habeas Corpus as being filed untimely (see **Appendix Q**).

On August 14, 2014, the Eleventh U.S. Circuit Court of Appeals affirmed the U.S. District Court's order (see **Appendix P**).

On August 28, 2014, Mr. Gillman filed a pro se Motion for Reconsideration and a Motion to Discharge Counsel.

On September 16, 2014, the Eleventh U.S. Circuit Court of Appeals recognized Gillman's Motion to Discharge Counsel as received, and additionally directed the Clerk's Office to recall the mandate.

On October 7, 2014, the Eleventh U.S. Circuit Court of Appeals denied the Motion for Reconsideration but cited information regarding issuance and stay of mandate (see **Appx. O**).

On January 12, 2015, through Counsel, Mr. Gillman filed a Petition for Writ of Certiorari with this Honorable Court.

On March 2, 2015, this Court denied the Petition for Writ of Certiorari (see **Appx. M**).

Motion to Produce Documents Filings

On October 27, 2014, prior to filing his Petition for Writ of Certiorari with this Honorable Court. Gillman filed a pro se Motion to Produce Documents pursuant to Fla.R.Crim.P. Rule 3.220 (Discovery Rule) with the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On November 3, 2014, the Motion to Produce Documents was denied.

On November 12, 2014, Gillman filed a motion for rehearing on the denial order.

On January 5, 2015, the motion for rehearing was denied.

On February 3, 2015, Gillman filed a pro se Petition for Writ of Mandamus with the 5th DCA seeking an order to compel the lower court to produce the requested documents pursuant to Fla.R.App.P. Rule 9.030(b)(3) and Rule 9.100 and Article V, Section §4(b) of the Florida Constitution.

On April 2, 2015, the 5th DCA transferred the Petition for Writ of Mandamus to the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On July 1, 2015 the Petitioner filed a Motion for Disposition seeking a ruling on the mandamus pursuant to Article I, Section §13 of the Florida Constitution, and Article I, Section §p of the U.S. Constitution (motion amended July 15, 2015).

On or about July 16, 2015 the postconviction judge (trial judge deceased) ordered the Clerk of Court to respond to the motion within thirty (30) days.

On July 24, 2015, Gillman filed a Motion to Produce Out-of-State Documents requesting the Clerk of Court to produce the requested documents pursuant to Fla.R.Crim.P. Rule 3.220 (Discovery Rule).

On August 26, 2015, Gillman filed a Motion for Default Judgment due to the Clerk of Court, Fifth Judicial Circuit Court, in and for Marion County, Florida failure to meet the court-ordered thirty-day deadline imposed on or about July 16, 2015.

On November 23, 2015, the Fifth Judicial Circuit Court, in and for Marion County, Florida denied Gillman's Petition for Writ of Mandamus that was filed back on February 3, 2015.

On November 23, 2015, Gillman filed a Motion to Compel in the Florida Supreme Court requesting an order to compel the lower courts to produce the documents he was seeking in this case. This motion was filed pursuant to Article I, Section §13 of the Florida Constitution, and Article I, Section §4(b) of the U.S. Constitution (motion amended January 27, 2016).

On December 4, 2015, the Florida Supreme Court assigned New Case Number #SC15-2222 to the Petitioner's Motion to Compel.

On December 7, 2015, Gilman filed a Motion for Rehearing on the November 23, 2015 Denial Order of his Gillman's Petition for Writ of Mandamus with the Fifth Judicial Circuit Court, in and for Marion County, Florida.

On December 18, 2015, the Florida Supreme Court ordered the Motion to Compel to be treated as a Petition for Writ of Mandamus and transferred the case back to the 5th DCA pursuant to the holding in *Havard v. Singletary*, 733 So.2d 1020 (Fla. 1999). The 5th DCA then issued orders for the lower court to respond.

On January 26, 2016, the Fifth Judicial Circuit Court, in and for Marion County, Florida issued a denial order on the Petitioner's December 18, 2015 Petition for Writ of Mandamus, and contemporaneously denied the Petitioner's August 26, 2015 Motion for Default Judgment.

On January 27, 2015, the Fifth Judicial Circuit Court, in and for Marion County, Florida issued a denial order on the Petitioner's July 15, 2015 Amended Motion for Disposition and contemporaneously denied the Petitioner's On July 24, 2015 Motion to Produce Out-of-State Documents.

On March 18, 2016, the 5th DCA issued its own order denying the Petitioner's December 18, 2015 Petition for Writ of Mandamus

On April 4, 2016, Gillman filed a Motion for Rehearing, Clarification, and Certified Opinion with the 5th DCA.

On April 21, 2016, the 5th DCA issued its order denying the Motion for Rehearing, Clarification, and Certified Opinion.

Other Related Federal Court Filings

On October 2, 2015, Gillman filed a pro se Application for Leave to File a Second or Successive Federal Habeas Corpus Petition pursuant to 28 U.S.C. §2244(b) with the Eleventh U.S. Circuit Court of Appeals (amended on October 16, 2015).

On November 19, 2015, the Eleventh U.S. Circuit Court of Appeals denied the Application (see **Appendix N**).

On July 28, 2016, the Petitioner filed a Second Federal Habeas Corpus Petition under 28 U.S.C. §2254 with the U.S. District Court, Middle District, Ocala Division (Case No. 5:16-cv-00479-WTH-PRL.

On December 16, 2016, and on December 19, 2016, the U.S. District Court dismissed the Petitioner's Federal Habeas Corpus Petition as successive.

On January 6, 2017 the Petitioner filed a Notice of Appeal in the U.S. District Court which construed the appeal notice as an inferred Motion for Certificate of Appealability ("COA") and Leave to Proceed In Forma Pauperis ("IFP").

On February 21, 2017, the U.S. District Court denied the Motion for COA and denied the Leave to Proceed IFP.

On March 7, 2017, the Petitioner filed a Motion for Rehearing with the U.S. District Court asking the Court to construe/continue the §2254 Petition as a Fed.R.Civ.P. Rule 60(b)(6) motion.

On March 22, 2017, the U.S. District Court denied the Petitioner's Motion for Rehearing.

The Petitioner then filed a Motion for COA and Leave to Proceed IFP with the Eleventh U.S. Circuit Court of Appeals.

In a subsequent order, the Eleventh U.S. Circuit Court of Appeals accepted jurisdiction to hear the issue regarding the timeliness of Gillman's Petition and granted the Petitioner IFP status. The Court determined that issuing a COA was not necessary (citing *Hubbard v. Campbell*) and holding, in part, "Gillman has shown that he has a non-frivolous issue."

In early October 2017, the Petitioner filed an initial Brief that was Amended on October 18, 2017. On November 13, 2017, a final Initial Brief was filed in accordance with an order from Hon. U.S. Circuit Court Judge Charles Wilson.

On March 27, 2018, the Eleventh U.S. Circuit Court issued an Order Vacating the December 16, 2016 and December 19, 2016 Orders by the U.S. District Court that had dismissed the Petitioner's habeas corpus petition as successive, and Remanding Case Number 5:16-cv-479-WTH-PRL back to the District Court for further proceedings (see **Appendix G**). The Order held, in part, "Because we cannot discern from the record whether the District Court considered Gillman's tolling argument under Fed.R.Civ.P. Rule 60(b)(6), or, if so, on what grounds it may have rejected his argument, we cannot meaningfully review its decision and therefore remand."

On May 14, 2018, the U.S. District Court, on remand, issued an Order (doc. 26) in instant Case Number 5:16-cv-479-WTH-PRL and re-assigned Case Number 5:10-cv-380-OC-PRL stating, in part:

"Petitioner is seeking relief from judgment with respect to the court's initial ruling, (therefore) the motion is more properly docketed as Case Number 5:10-cv-380-OC-PRL" and "While the Court will review the Petitioner's argument under Fed.R.Civ.P. Rule 60(b)(6) in a separate order, there has been no ruling on the merits of the motion or any finding or any filing as to whether the motion is subject to procedural default or bar" (see **Appendix F**).

Pursuant to the above order, the Petitioner then filed motions for leave to file briefs and to introduce new evidence for the court's consideration.

On August 29, 2018, the U.S. District Court issued an order granting the Petitioner leave to file briefs and to introduce new evidence.

On November 14, 2018, the District Court entered an order stating as follows: "Upon due consideration, the Petition was properly dismissed as untimely for the reasons stated in the Court's July 5, 2013 order, which the Court of Appeals affirmed. Petitioner's motion for relief pursuant to Fed.R.Civ.P. Rule 60(b)(6) is **DENIED**" (see **Appendix E**).

On November 29, 2018, the Petitioner filed a Motion for Reconsideration with the U.S. District Court.

On December 6, 2018, the U.S. District Court denied the Motion for Reconsideration (see **Appendix D**).

On December 14, 2018, the Petitioner filed a Notice of Appeal that the U.S. District Court modified four days later. The Petitioner also filed a Motion to Proceed IFP for Appeal purposes.

On February 5, 2019, the U.S. district Court issued an order denying the Petitioner's Motion for Appeal, Motion for COA and Motion to Proceed IFP (see **Appendix C**).

On March 13, 2019, the Petitioner filed a Motion for COA and Motion to Proceed IFP directly with the Eleventh U.S. Circuit Court of Appeal.

On April 24, 2019, the Eleventh U.S. Circuit Court issued its order denying the Petitioner's Motion for COA and Motion to Proceed IFP (see **Appendix B**).

The Petitioner filed a timely Motion for Reconsideration.

On June 25, 2019, the Eleventh U.S. Circuit Court issued its order denying the Petitioner's Motion for Reconsideration (see **Appendix A**).

STATEMENT OF THE FACTS PERTINENT TO RULE 60(b)

Petitioner, a State inmate proceeding pro se, filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. By order dated June 19, 2013, after an evidentiary hearing, the U.S. District Court denied the Petition as untimely (Doc. 33). An Amended Order and Judgment were entered (Doc 37, 38). Pending before this Honorable Court is a Petition for Writ of Certiorari, pursuant to Fed.R.Civ.P. Rule 60(b)(6), 28 U.S.C. §2254, and 28 U.S.C. §1257. The motion is based on Petitioner's argument that the District Court and Court of Appeals should have considered his attorney's egregious misconduct (abandonment) when they determined the issue of the Petitioner's equitable tolling for timely filing of the Petition. The Petitioner has filed Memorandums in Case Number 5:16-cv-479-WTH-PRL (Doc. 54) and in Case Number 5:10-cv-380-OC-PRL. The Petitioner has additionally filed a number of notices and exhibits in support of his request for relief on this issue (Docs. 56-58, 62, 64-66, 69 and 70).

The Petitioner avers that the U.S. District Court erred in denying the Petitioner's filing under Fed.R.Civ.P. Rule 60(b)(6) for the reasons stated in the Petition, and that the 11th U.S. Circuit Court of Appeals erred in denying the Petitioner's request for a Certificate of Appealability ("COA") and Leave to Proceed in Forma Pauperis ("IFP").

In its April 24, 2019 Order Denying "COA" and "IFP," the 11th U.S. Circuit Court of Appeals was in error. See *Buck v. Davis*, 197 L.Ed.2d 1 (2017) where this Court held that the COA determination sets forth a two-step process. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the District Court's resolution of his constitutional claims or ... could conclude the issues presented are adequate to deserve encouragement to proceed further" (citing to *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The *Buck* Court also wrote, "when a Court of Appeals sidesteps [the COA] process by first

deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction" *Id.* at 336-337.

However, in Justice Robin S. Rosenbaum's denial of Petitioner's COA, she states, "To show a District Court abused its discretion in denying a Rule 60(b) motion, the Petitioner must demonstrate a justification so compelling that the District Court was required to vacate its order" (see *Cano v. Baker*, 435 F.3d 1337 (11th Cir. 2006)).

The Petitioner believes he is seeking an issuance of a COA as held in *Slack v. McDaniel*, 529 U.S. 473, 478 (2000) that requires a showing that a reasonable jurist would find debatable issues. In *Buck*, both Justice Thomas and Justice Alito dissented with the Court's granting certiorari thereby showing that the issue presented was debatable.

The Petitioner further relies upon both *Holland v. Florida*, 560 U.S. 631, 649 (2010) and *Maples v. Thomas*, 132 S.Ct. 912 (2012) which were cited in his previous Petitions.

In the District Court's November 14, 2018 denial of the instant Fed.R.Civ.P. Rule 60(b)(6) motion (doc. 74), the Court on Page 6 writes, "Petitioner contends in the instant motion, 3 years later, that he is entitled to relief from judgment because Mr. Sheppard and Mr. DeMaggio were the reason he did not comply with the statute of limitations" (Doc. 51). Petitioner states that on April 12, 2006, he transmitted his 3.850 motion 5 days before the filing deadline, but due to Mr. Sheppard's and Mr. DeMaggio's deliberate acts, the motion was filed untimely.

The District Court does not consider that the appeal of the June 19, 2013 dismissal was not denied by the Eleventh Circuit Court until August 14, 2014, and certiorari by this Court was not denied until March 2, 2015 regarding the timeliness issue. In its August 14, 2014 order affirming, the Eleventh U.S. Circuit Court twice mentions "Gillman signed the verification form

for his rule 3.850 motion a few days before the statute of limitations expired, but for some unexplained reason Sheppard and DeMaggio did not file the motion until several months later.

The District Court, obviously aware of the misdeeds of Sheppard and DeMaggio, erred when not following precedent in *Christeson v. Roper*, 135 S.Ct. 891 (2015) that held, "Petitioner's motion to substitute habeas counsel was improperly denied where his appointed attorneys had missed the filing deadline for filing his first habeas petition. Petitioner's best argument for equitable tolling the limitations period was the attorney's own failure to satisfy the AEDPA's statute of limitations, and thus, there was a significant conflict of interest that entitled the petitioner to new counsel under 18 U.S.C. §3599(e)." Headnote [4] stated "A significant conflict of interest arises when an attorney's interest in avoiding damage to his own reputation is at odds with his client's strongest argument. Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct" (see *Holland v. Florida*, 560 U.S. 631, 652 (2010)).

As explained in *Christeson*, to advance Gillman's claim would have required Sheppard and DeMaggio to denigrate their own performance. In *Christeson*, "counsel cannot reasonably be expected to make such an argument, which threatens their potential reputation and livelihood" (see Restatement (Third) of Law Governing Lawyers 125 (1998)). In a similar context, in *Maples v. Thomas*, 132 S.Ct. 912, 925 (2012) a "significant conflict of interest arises when an attorney's interest in avoiding damage to [his] own reputation is at odds with his client's 'strongest argument' – i.e., that his attorney's abandoned him."

"Because counsel herein would be essential witnesses to factual questions indispensible to a *Holland* inquiry, there may be ethical and legal conflicts that would arise that would prohibit

counsel from litigating these issues in any way" (see *Holloway v. Arkansas*, 435 U.S. 475, 485-86; 98 S.Ct. 1173; 55 L.Ed. 426 (1978)).

Conflict-free counsel must be appointed to present the equitable tolling question in a Federal District Court. See *Stewart v. Florida Dept. of Corr.*, 635 Fed.Appx. 711 (11th Cir. 2015) "where the district court dismissed capital inmate's habeas petition as time-barred, remand was necessary to appoint conflict-free counsel pursuant to 18 U.S.C. §3599 because he had sufficiently shown that, after counsel did not timely file the 28 U.S.C. §2254 petition, counsel at the time developed an actual conflict of interest as to the equitable tolling issues" (see also *Tabler v. Stevens*, 591 Fed.Appx. 281 (5th Cir. 2015)). All vacated and remanded.

In light of the holdings in *Christeson* and *Tabler*, the District Court erred in not vacating the dismissal of the instant case and ruling on the merits of the motion.

The Petitioner cited *Buck v. Davis*, 197 L.Ed.2d 1 (2017) in his Motion for Reconsideration filed with the District Court following their December 16, 2016 dismissal of Gillman's construed Rule 60(b) Motion. *Buck* held that "when damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value."

Petitioner Gillman presented several examples of extraordinary circumstances that should warrant the equitable tolling of his §2254 habeas petition, yet the District Court improperly denied them. The facts are as follows:

The December 21, 1996 incident that arose when Mr. Gillman and Erwin E. Ballard entered the Ocala residence of Kenneth Tomms, in which Ralph "the Duke" Troisi alleges to have been in the living room and Jodeanne Moore in another room. Gunfire ensued, resulting in Tomms's and Ballard's deaths, and Gillman being wounded. Whether entry was consensual or

not was a critical issue at trial, and it was undisputed that Gillman shot no one, and that Troisi shot Ballard. Gillman was charged with felony murders with the predicate felony being armed burglary, and he was released on bond. Troisi fled the State and was later captured and charged with Evidence Tampering and Possession of a Firearm by a Convicted Felon.

Private Attorney Huntley Johnson represented Gillman, and Assistant Public Defender ("APD") Patricia Jenkins represented Troisi. At the January 14, 1997 Grand Jury Hearing leading to Mr. Gillman's Indictment, Assistant State Attorney ("ASA") James Phillups stated while interviewing State witness Gary Tabor "that it would be nearly impossible to get a conviction, quite frankly, without his cooperation" (emphasis added) (in reference to Ralph "The Duke" Troisi testifying against Gillman) (see **Appendix 1**). This fact demonstrates that as early as January 14, 1997, ASA James Phillups knew he could not prosecute Gillman without Troisi.

On March 21, 1997, APD Jenkins received a document demonstrating Ralph Troisi's mental disabilities (incompetency to testify) and provided it to the court (In Re: *State v. Troisi*, Case No. 96-400-CF-AZ) (see **Appendix 2**, also including documents demonstrating the State possessed these documents and more).

During the July 7, 1997 hearing ASA James Phillups' testimony proves he was not only aware of Troisi's incompetency, but engaged in a colloquy with APD Jenkins to deliberately deprive Gillman of this information in violation of discovery rules (see **Appendix 3**) (see *Brady v. Maryland*, 373 U.S. 83 (1963)).

In March 2001, APD Patricia Jenkins joined the law firm of Johnson, Vipperman and Jenkins. Contrary to the trial court's ruling, Ms. Jenkins actively participated in Mr. Gillman's case. APD Jenkins signed multiple documents and was to represent Gillman at trial (**see Appendix 4**). In October 2002, merely days before the trial, the State put Ms. Jenkins on their

trial witness list in rebuttal against Gillman. The State also produced documents reflecting evidence of the *Brady* violations in the transcripts (see **Appendix 5**). When APD Jenkins argued successfully for the sealing of Troisi's files (see **Appendix 3**, In Re: *State v. Troisi*, Case No. 96-400-CF-AZ), she became a "member of the prosecution team." See *United States v. Barcelo*, 628 Fed. Appx. 36 (2nd Cir. 2015) holding disclosure violations under *Brady v. Maryland* apply to suppression hearings (citing to *Kyles v. Whitley*, 514 U.S. 419 (1995) ("A prosecutor is deemed to have constructive knowledge of anybody who is part of the prosecution team... The relevant inquiry for determining whether a person is a member of the prosecution team is what the person did, not who the person is").

Ms. Jenkins successfully argued to seal the records (see **Appendix 3**) preventing "Gillman's people" from getting them. The Petitioner avers that this fact made Ms. Jenkins a member of the prosecution team.

Gillman's trial counsel Huntley Johnson, Ms. Jenkins's partner, having developed certain "empathy" for Ralph Troisi (the State's only eyewitness) elicited a lot of inadmissible hearsay relied upon the State for use in closing argument. The hearsay evidence was absolutely necessary for the State to prove the illegal entry element required to gain a conviction for Burglary, the predicate felony offense that served the basis for Gillman's two felony murder charges. Therefore, in essence, the burglary charge represents Florida's entire case against Gillman. Jodeanne Moore and Ralph Troisi were the only two people inside the trailer at the time of entry other than the two victims, Kenneth Tomms who was killed by Erwin E. Ballard, and Ballard, who was killed by Ralph Troisi's gunfire.

Ralph Troisi testified, "[Y]eah, here's the front door. There's the cushion. I'm standing. I get up from here, and I'm walking toward here. I got up maybe take [sic] the screen door,

whoosh, open and boom, they're in the house." However, Troisi also admitted that he could not distinguish between fantasy and reality.

Jodeanne Moore testified during her "live trial testimony" that she could not see the door at the time Gillman and Ballard entered, and did not know whether the entry was invited or not. See *Cushion v. State*, 637 So.2d 2 (Fla. 3rd DCA 1994) holding, in relevant part, "the live trial testimony concerning this court unequivocally contradicted earlier testimony and thus renders the earlier testimony insufficient for consideration by the jury."

Gillman's trial counsel Huntley Johnson elicited inadmissible hearsay from Jodeanne Moore's mother, Ms. Norma McCain concerning entry that was refuted by Ms. Moore's "live trial testimony." Johnson elicited further inadmissible hearsay from Sylvia Thodore and Barbara Gerome (Kenneth Tomms's aunts in Massachusetts) that testified they spoke with Ms. Moore by telephone and Moore told them that she rushed in, "heard the door smash in or break in, or whatever term Moore used." The aunts testified that they "just took it in my mind that the conclusion this was a home invasion. That's what it sounded like to me."

The Petitioner argues that because Counsel Johnson elicited this inadmissible hearsay evidence that would have otherwise been unavailable to the State, Johnson also became a "member of the prosecution team" under *Barcelo, supra*, since the prosecution team relied heavily on the elicited hearsay evidence in closing argument when arguing for conviction. During his closing argument, trial Counsel Johnson played the harmful videotaped depositions of both Sylvia Thodore and Barbara Gerome, and these tapes were the last thing the jury saw prior to their deliberations. The holding in *Buck v. Davis*, 197 L.Ed.2d 1 (2017) states, "When damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value."

Gillman suffered great prejudice by Counsel's agency breach, and the conflict of interest that resulted from APD Jenkins's dual representation. See *Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994) is exactly on point with Gillman's instant case. In *Burden*, the Court held that Burden's Sixth Amendment rights to effective counsel was violated by counsel's dual representation negotiating agreement where co-defendant would testify against Burden.

In Gillman's instant case, the trial court ruled Troisi competent based on the psychiatric report from "2001" written by Elizabeth McMahon, Ph.D. (see **Appendix 5**). However, the only report in the record is Gillman's competency report written by Dr. McMahon (see **Appendix 6**).

The trial court failed to inquire of Gillman concerning the conflict of interest despite ASA Phillups telling the Court the situation had to violate this Court's well-settled law and holdings in *Cuyler v. Sullivan*, 446 U.S. 261 (1981), *Holloway v. Arkansas*, 435 U.S. 475 (1977), and *Glasser v. United States*, 315 U.S. 60 (1942). The presence of agency breach (conflict of interest) is obviously prejudicial. Accordingly, the conflict of interest is an extraordinary circumstance requiring relief under Fed.R.Civ.P. Rule 60(b)(6) (see *Gonzalez, supra*).

Gillman suffered great prejudice as a result of the agency breach (conflict of interest) that led to Defense Counsel's failure to investigate and failure to disclose further information revealing Ralph Troisi's incompetency to testify. Mr. Troisi has a long and serious history of drug abuse, addiction and mental illness. Ms. Patricia Jenkins obtained much knowledge of that history while representing Mr. Troisi. Ms. Jenkins thwarted Defense Counsel Johnson's limited efforts to obtain the doctor report(s) containing the history of Troisi's drug abuse and mental health treatment.

Defense Counsel Johnson made no further efforts to acquire any of Troisi's records after the Massachusetts deposition of Troisi (his second deposition) and Ms. Jenkins joining of his law

firm. Ms. Jenkins negotiated for the State to nolle prosequi Troisi's charges in exchange for his testimony against Gillman. However, the July 7, 1997 grant use immunity, the July 8, 1997 nolle prosequi and the July 10, 1997 nolle prosequi are in conflict with each other and demonstrate deliberate fraud upon the court (see **Appendix 7**).

ASA Phillups entered into Gillman's court records and prepared the two documents of July 7, 1997 and July 8, 1997 reflecting that Mr. Troisi is to receive the benefits above in exchange for his testimony against Gillman. However, the July 10, 1997 nolle prosequi document demonstrated the fact ASA Phillups was convinced of Troisi's mental incompetency. Additionally, in collusion with Counsel Jenkins, ASA Phillups purposefully concealed the July 10, 1997 nolle prosequi document and other documents from Gillman in violation of *Brady v. Maryland, supra* (see **Appendix 3**).

The issue of Troisi's competency was vital to Gillman's case. However, Gillman has shown that the State was fully aware that Troisi was unfit to testify and regardless of that fact, the State was going to conceal Troisi's incompetency and use him as a witness anyway. The State knew "without him," they had no case against Gillman (see **Appendix 1**). During cross-examination by Defense Counsel Lloyd Vipperman, Troisi testified as follows:

Q. You don't have the slightest idea what really happened, do you, sir?
A. I know that didn't happen.
Q. You don't have the slightest idea what did happen, do you?
A. Yeah, I do. I know what happened.
Q. Well, did it happen in your mind, or did it happen in reality?
A. That is the question.
Q. That, you don't know, do you?
A. No, not for sure.

(See **Appendix 4**).

Additionally, at a prior deposition, Troisi testified:

A. I flash back to things - I flash back to things that didn't even happen.
Q. In Viet Nam?
A. In Viet Nam? I'm talking about this incident here. You know how many times I flash back to things that I thought were true and then, you know, after a while it wasn't true?
Q. In this thing here, meaning this shooting incident that we're testifying about today.
A. Right.

(See **Appendix 4**).

Thereafter, *Brady v. Maryland*, 373 U.S. 83 (1963) held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." Additionally, "When the reliability of a given witness may well be determinative of guilt or innocence, 'non-disclosure of evidence affecting credibility falls within this general rule'" (see *Giglio v. United States*, 405 U.S. 150 at 154, 92 S.Ct. 763 at 766 (1972) (citing *Napue v. Illinois*, 360 U.S. 264 at 269, 79 S.Ct. 1173 at 1177 (1959)). "But we do not automatically require a new trial whenever a combing of the prosecution's files after the trial has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict" *Id.* " A finding of the materiality of the evidence is required under Brady" *Id.*

In the instant case in point, Troisi testified that a green and black flannel shirt, and a black leather jacket found in a dumpster were placed there by the victim Kenneth Tomms before the incident leading to Gillman's charges. However, in her December 21, 1997 affidavit, Tomms' girlfriend testified that the perpetrator was wearing the green flannel shirt on the day of the incident. During Gillman's October 7 – 11, 2002 trial, Detective Chaz Maier admitted that the Ocala Police Department and the State had determined that the clothes found in the dumpster

(i.e. green and black flannel shirt, and a black leather jacket) belonged to Ralph Troisi, and that Kenneth Tomms's blood was on the black jacket (see **Appendix 4**).

In *Guzman v. Secretary, Fla. Dept. of Corrections*, 663 F.3d 1336 (11th Cir. 2011), the Eleventh U.S. Circuit Court of Appeals stated that, "we begin by noting that clearly established federal law relevant to Guzman's claims was firmly established by United States Supreme Court holdings long before Guzman's trial and postconviction proceedings. As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), the Supreme Court made clear that the deliberate deception of a court and jurors by the presentation of false evidence is incompatible with the rudimentary demands of justice." In *Napue v. Illinois*, 360 U.S. 264 at 269, 79 S.Ct. 1173 at 1177 (1959), the Supreme Court explained, "First, it is established that a conviction obtained by the use of false evidence, known to be such by representatives of the State , must fall under the Fourteenth Amendment, and [t]he same result is obtained when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

In Gillman's instant case, the State knew Troisi's testimony was fraudulent. In trial transcripts, ASA James Phillups discusses sending Detective Maier and others to Arizona to get Troisi but tells them not to discuss the case. However, in Detective Maier's "investigative follow-up," he elaborates how he and Troisi engaged in discussions of the case. Additionally, ASA Phillups in transcripts states, "I had his deposition and his prior statement between myself and Ms. Jenkins delivered to (Troisi) at the jail so he could look those over on Wednesday, Myself and Mr. Maier went down to the jail on Thursday morning to ask (Troisi) have you read anything or do you have any questions." This issue is no longer just an issue of Troisi's memory having returned, it is one big example of both ASA James Phillups and Ocala Police Department Detective Chaz Maier providing Troisi "their theory of guilt."

A brief recap:

Appendix 1 by Phillups, "it would be nearly impossible to get a conviction."

Appendix 2 by Phillups, "Troisi's mental status is totally incapacitated."

Appendix 3 by Phillups, "I didn't put it on Gillman's Case Number."

Appendix 4 by Troisi, "Q. That you don't know, do you?" "A. No, not for sure." and "I flash back to things. I flash back to things that didn't happen."

Appendix 5 by Phillups, "potential *Brady* evidence," "there's *Richardson* information floating around," and "At some point, Mr. Gillman is going to have to make a waiver of that conflict." Gillman did not waive any conflicts, ever, nor was it properly explained about Ms. Jenkins conflict of interest under long settled law (e.g. *Cuyler, Wood, Holloway,* and *Hamilton v. Ford*).

Appendix 6 by the court, transcripts showing the judge erroneously used Petitioner Gillman's September 5, 2001 psychological report prepared by Dr. Elizabeth McMahon to declare Ralph Troisi competent to testify.

Appendix 7 Petitioner Gillman's September 5, 2001 psychological report prepared by Dr. Elizabeth McMahon.

Appendix 9 Gillman now offers "Motion to Produce Documents from Out-of-State Records." This document further demonstrates Florida's refusal to reveal Troisi's true mental state.

In the trial transcripts, Josh Simmons testified that the day before he went to the Grand Jury, Gary Tabor told him how to testify. Tabor reminded Simmons of a couple of people "going dead," and informed Simmons he should be worried about it. Gary Tabor is the witness being examined by ASA Phillups in **Appendix 1**.

Gillman, in an attempt to bring the pre-described facts to bear, hired Attorney Robert Augustus Harper for direct appeal. However, to Mr. Gillman's prejudice, Attorney Harper operated under a conflict of interest because Harper refused to investigate or file any fraud or *Brady* issues caused by the Johnson, Vipperman and Jenkins law firm's continued collusion. See **Appendix 4** Motion for Disposition containing a letter from Attorney Harper informing Gillman that Attorney Patricia Jenkins that represented Ralph Troisi had nothing to do with the identification of grounds to be raised on appeal on behalf of Gillman. Additionally, Harper stated that Jenkins had nothing to do with the preparation of Judicial Acts to be Reviewed filed on behalf of Gillman – even though Attorney Jenkins signed it on behalf of the firm of Johnson, Vipperman and Jenkins. Exhibits to **Appendix 4** Motion for Disposition also contain billing statements to Gillman from Harper for time Harper spent with Lloyd Vipperman involving direct appeal "conference/strategy" calls. The interference by the Johnson, Vipperman and Jenkins law firm is clearly reflected in the documents/exhibits that bear Harper's own signature (See **Appendix 4**, Motion for Disposition and Exhibits). Harper cannot claim that his decision not to investigate and pursue the issues of Troisi's and Gillman's competency to testify, the issue of the State's *Brady* violations, and the issue was based on trial strategy because such failure was patently unreasonable and outside the normal competence demanded by the legal profession. See *Roesch v. State*, 627 So.2d 57, 58 n.3 (Fla. 2nd DCA 1993) (noting that the courts will not defer to patently unreasonable decisions by defense counsel that are labeled as trial tactic). (See also *Ridenour v. State*, 768 So.2d 480, 482 (Fla. 2nd DCA 2000)).

To establish ineffective assistance when the issue involves a strategic decision made by trial counsel, the movant must show that the strategy was patently "unreasonable" (see *Florida v. Nixon*, 543 U.S. 175, 189 (2004)). Even if tactical or strategic, an attorney's acts or omissions

will constitute ineffective assistance if they are so patently unreasonable that no competent attorney would have chosen them (see *Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla. 1997)).

Troisi's and Gillman's competency should have been determined by the court prior to trial in light of the motions filed by Defense Counsel. Neither Gillman's nor Troisi's competency was ever legally resolved as a result of agency breach (conflict of interest) as already argued and demonstrated earlier in this Petition. See the deposition of trial counsel partner Lloyd Vipperman's reading of Patricia Jenkins's conflict and counsel Huntley Johnson's empathy for Ralph Troisi (i.e. Johnson cried at Troisi's Massachusetts deposition – an obvious conflict). Agency breach is defined as a lawyer placing his own interests, his firm's interest, or the interests of a third party over those of the client's. Johnson's interests lied with Jenkins and Troisi over those of Petitioner Gillman.

Federal courts refuse to credit State court rulings that a defendant waived or defaulted a claim that he was incompetent to stand trial. See *Lawrence v. Secretary*, 700 F.3d 464, 481 (11th Cir. 2012) cert. denied 133 S.Ct. 1807 (2013) ("We have both pre-AEDPA and post-AEDPA precedent holding that substantive competency claims cannot generally be procedurally defaulted. The State's disagreement with this is of no moment, because we are bound by our prior panels"). See *Walker v. Gibson*, 228 F.3d 1217, 1229 (10th Cir. 2000) cert. denied 533 U.S. 933 (2001) ("A substantive due process mental competency claim may not be procedurally barred"). See *Clayton v. Gibson*, 199 F.3d 1162, 1171 n.3 (10th Cir. 1999) cert. denied 531 U.S. 838 (2000)) ("A substantive competency claim is not subject to waiver"). See *Foster v. Ward*, 182 F.3d 1177, 1190 (10th Cir. 1999) cert. denied 529 U.S. 1027 (2000); and see *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999) ("A substantive competency claim is not subject to procedural bar"). See *Rogers v. Gibson*, 173 F.3d 1278, 1289 (10th Cir. 1999) cert. denied 528

U.S. 1120 (2000)) (same as *Barnett v. Hargett, supra*). See *Johnston v. Singletary*, 162 F.3d 630 637 (11th Cir. 1988) cert. denied 528 U.S. 833 (1999)) (reaffirming this Court's claim regarding competency [to stand trial] generally cannot be procedurally defaulted unless petitioner tried to manipulate the appeal or postconviction process or to abuse the writ by invoking competency issue in a piecemeal fashion[,] drop[ping] the issue or later pick[ing] it up as it suits his purposes) (See Lieberman & Hertz, *Federal Habeas Corpus Practice and Procedure*, 7th Edition, Section §26.2, Footnote 25). In Florida, see *Brockman v. State*, 852 So.2d 330 (Fla. 2nd DCA 2003). In *Brockman*, the court held that (as in Gillman) competency reports done in 2001 do not speak to the record in 2002 (over 1 year old).

In the Florida Supreme Court, see *Hill v. State*, 473 So.2d 1253 (1985), (the "hearing on defendant's competency to stand trial could not be held retroactively....the principles of law which compel us to vacate Hill's conviction and direct a hearing to determine his competency to stand trial have been clearly set forth by the United States Supreme Court in its decisions in *Bishop v. United States*, 350 U.S. 91, 76 S.Ct 440, 100 L.Ed.2d 835 (1956); *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 824 (1960); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct 836, 15 L.Ed. 815 (1966); and *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.103 (1975))".

Due to the agency breach, the trial court failed to properly determine either Gillman or Troisi's competency. Counsel took advantage of Gillman's mental deficiencies for their own purposes. In the deposition of trial counsel Lloyd Vipperman (**Appendix 10, Page 153**), Counsel testifies to the firm's interest in Gillman's monies over the conflict. Agency breach is defined as a lawyer placing his own interests, his firm's interests, or those of a third party, over the client's. Vipperman's deposition (**Appendix 10, Page 109, L 17**) demonstrates his firm's

(Huntley Johnson's) conflict: "Q. He was reluctant to attack the star witness? A. Well, he was reluctant --- yes, I would have to say he felt great empathy for Troisi and was reluctant to take that on." Vipperman's deposition covers all issues concerning trial attorneys in this motion. At **Appendix 10, Pages 142-146**, Vipperman opines to Mr. Sheppard that he believes withheld documents being discussed are *Brady v. Maryland* material. Also see **Appendix 10, Pages 187-188** whereby the Timothy Alessi case is discussed. Trial counsels Johnson and Jenkins represented Alessi at trial, and through some limited partnership, Sheppard's law firm did Alessi's appeals. This demonstrates Gillman's initial-review collateral appeals attorneys, Sheppard and DeMaggio were also conflicted through Johnson, Vipperman and Jenkins.

In support, Gillman offers the following: Gillman pushed for *Brady* violations to be filed on his 3.850 motion and earlier on his direct appeal. Contrary to Vipperman's deposition, and James Phillups testimony (**Appendix 5**), on November 16, 2009, Attorney Sheppard sends Gillman a letter saying the issue "isn't so much a *Brady*," which conflicts with his own interoffice memorandum and also with filings enclosed, and demonstrates Johnson's and Sheppard's law offices had all Gillman's medical files concerning his head injuries and mental incompetency. Additionally, an April 13, 2000 letter (**Appendix 11**) angrily protecting himself "Huntley Johnson and Patricia Jenkins maybe your only civil targets." See *Wearry v. Cain*, 136 S.Ct. 1002, 1011 (2016) held that the failure to disclose information favorable to the defense, including the potential for a sentence reduction, gave the State's witness reason to curry favor with the prosecution. This Court also held, "the possibility of a reduced sentence on an existing conviction" was *Brady/Giglio* and described well-settled precedent. The inter-office memorandums from Sheppard's office call the failures to disclose Troisi's information to defense *Brady* violations, yet they tell Gillman differently in his letter.

The U.S. District Court erred in denying Gillman's Fed.R.Civ.P. Rule 60(b)(6) motion according to this Court's rulings in *Holland v. Florida*, 560 U.S. 631 (2010), *Maples v. Thomas*, 132 S.Ct. 912 (2012), and *Martinez v. Ryan*, 132 S.Ct. 1309 (2012)). In *Holland*, Justice Alito opined, "common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not acting as his agent in any meaningful sense of the word. '[W]hen an acts in a manner completely adverse to the principal's interest, the principal is not charged with [the] agent's misdeeds'." *Holland* also held "an attorney's unprofessional conduct may sometimes be an 'extraordinary circumstance' justifying equitable tolling." As cited in *Maples*, a markedly different situation arises, however, when an attorney abandons his client without notice, and thereby occasions the default.

In Gillman's instant case, in their August 14, 2014 order affirming the District Court's July 5, 2013 dismissal, the Eleventh U.S. Circuit Court twice noted on Pages 4-5, and Page 8, Note 8, "Gillman signed the verification form on his Rule 3.850 motion a few days before the statute of limitations expired, but for some unexplained reason, Sheppard and DeMaggio did not file the motion until several months later."

Gillman avers that the agency breach caused the late filing, and the "causal connection" has been demonstrated by Johnson, Vipperman and Jenkins continued interference, and after signing the 3.850 documents, from at least April 12, 2016 until June 20, 2006, Sheppard, Thomas, and DeMaggio effectively **abandoned** Gillman for all practical purposes. See *Maples*, citing *Holland*), "Holland's claim he was abandoned by his attorney would suffice to establish extraordinary circumstances beyond his control."

Gillman avers that he has always diligently pursued his defense, as evidenced by the record before this Court, and that but for the egregious attorney misconduct before this Court, his

motion would have been timely filed. Gillman avers that he signed the 3.850 motion timely, and the only reason it was not filed was Attorney(s) Sheppard and DeMaggio's failures/egregious attorney misconduct. Gillman also asks this court to recognize that the *Brady* issues fall under the holdings in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012)). Attorney Sheppard's "error during an appeal on direct review may provide cause to excuse a procedural default." Gillman's representation was all conflicted until the Eleventh U.S. Circuit Court of Appeals approved his pro se Motion to Discharge Counsel back in September 2014, representing another example of Sheppard and DeMaggio's divided loyalty and lying to Gillman (see **Appendix 12**).

In the Eleventh U.S. Circuit Court of Appeals case of *Cadet v. Florida Dept. of Corr.*, 853 F.3d 1216 (11th Cir. 2017), in a dissenting opinion Justice Hon. Wilson argues that the majority interprets *Maples* as implicitly overruling *Holland.* However, the Supreme Court has stated "it is this Court's prerogative alone to overrule one of its precedents" (see *Bosse v. Oklahoma*, 196 L.Ed.2d 1 at 2 (2016) quoting *United States v. Hatter*, 532 U.S. 557 (2001)). Reluctant to declare outright that *Maples* implicitly overrules *Holland*, the majority states that *Maples* "construed and clarified" *Holland.* In *Maples*, Justice Hon. Alito held that because discussion of an attorney's abandonment was sparse in case law, *Maples* found the *Holland* concurrence to be "instructive." In *Holland*, Justice Hon. Alito homed in on the essential difference between a claim of attorney error, however egregious, and a claim the attorney abandoned his client. Additionally, *Maples* found under agency principles a client cannot be charged with the acts or omissions of an attorney who has abandoned him. In *Cadet, id.* Justice Wilson held, "The majority's interpretation (that) Maples implicitly overrules Holland is baseless."

As with *Cadet*, Gillman's Attorney Daniel Akes was disbarred. Gillman's attorneys from his October 11, 2002 trial up through the September 16, 2014 Discharge of Counsel by the Appeals court operated under conflict of interest as demonstrated throughout this Petition. A review of the U.S. District Court's July 5, 2013 order (**Appendix Q**) dismissing Gillman's Petition as untimely demonstrates Attorney Akes abandonment. Additionally, the Eleventh U.S. Circuit Court's August 14, 2014 Order (**Appendix P**) confirms in Footnote 8 Attorney's Sheppard and DeMaggio's abandonment, yet both the District and Appeals Court dismiss the Petition as untimely by citing Gillman's failure to demonstrate a "causal connection." Gillman avers that he at all times diligently pursued his rights. Trial Attorneys Johnson, Vipperman, and Jenkins' continuous interference was the causal connection leading to abandonment, and conflict of interest (agency breach) throughout all of Gillman's representation.

The Eleventh Circuit Court is obviously divided on this debatable issue, yet denied Gillman's COA and IFP. U.S. Supreme Court Rule 10 reads in pertinent parts: "(a) has so far departed from the accepted and usual course of judicial proceedings, --- as to call for an exercise of this Court's supervisory power... (c) A State Court or a United States Court of Appeals has decided an important question of Federal law that has not been, but should be settled by this Court." A full read of Justice Wilson's dissent opinion in *Cadet, id.* lays out why this Court needs to settle this very important Federal issue.

In sum, the attorneys involved in Gillman's cases/filings were all top-rated. Their grievous/egregious errors and misconduct cannot be simply explained away. In fact, Huntley Johnson has successfully argued before this Court (see *Florida v. Wells*, 495 U.S. 1, 110 S.Ct 1632, 109 L.Ed.2d 1 (1990)). It appears that all errors, including the late 3.850 filings, were purposeful, resulting from the agency breach.

REASONS FOR GRANTING THE WRIT

For all of the foregoing reasons stated in this filing, the Petition should be granted.

CONCLUSION

Under penalty of perjury, I certify that all of the facts and statements contained in this document are true and correct

September 18, 2019
Date

/s/ Robert Wayne Gillman
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