

20-5527

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK BENTON

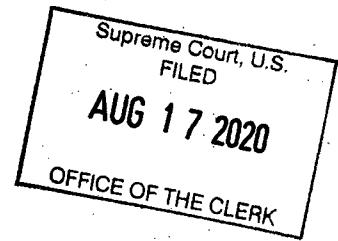
— PETITIONER

(Your Name)

vs.

BRIAN COLEMAN, ET AL

— RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

Third Circuit Court of Appeals #19-3271

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARK BENTON #GM-9193

(Your Name)

SCI-MAHANOY, 301 Morea Road

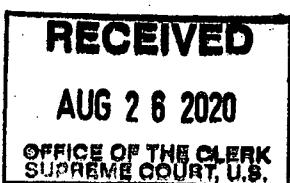
(Address)

FRACKVILLE, PA 17932

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

- 1). When this Court issued *Holland v. Florida*, 130 S.ct. 2549 (2010), decision, was is this Honorable Court intent to apply *Holland* to "Capital cases only" for purposes of Attorney Abandonment issues and equitable tolling of the (AEDPA's) one-1-year period to file a petition for Habeas Corpus relief pursuant to 28 U.S.C. Section 2254? If not, did the District Court and U.S. Court of Appeals error in ruling and abuse it's discretion ion denying Petitioner's Rule 60(b)(6) motion by holding "It is not clear" that the Supreme Court in *Holland* intended to overrule the Third Circuit holdings that in "Non-Capital case", Attorney error, miscalculation, or other mistakes have not been found to rise to the "extraordinary circumstances" required for equitable tolling.
- 2). This Honorable Court should resolve the Conflict in Circuit U.S. Court of Appeals and U.S. District Court decision(s) relating to attorney abandonment and equitable tolling of the (AEDPA's) one-1-year period to file a 28 U..S.C. Section 2254 Habeas Petition?

LIST OF PARTIES

[*] All parties appear in the caption of the case on the cover page.

[] 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:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[*] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix A-B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 4/6/2020

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2244, 2254

In general, Section 2244 provides that, A 1-year period of limitation 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 period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time seeking such review. 28 U.S.C. Section 2244 (d)(1)(A).

In general, section 2254 provides that, the Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This petition seeks [clarity] from this Honorable Court to Instruct whether this Court intended for it's *Holland v. Florida*, 130 S.ct. 2549 (2010) decision to apply to "Capital Cases only" for purposes of Attorney Abandonment issues and equitable tolling of the (AEDPA's) one-1-year period for filing a petition for Habeas Corpus Relief pursuant to 28 U.S.C. Section 2254.

This Honorable Court should resolve the conflict in circuit U.S. Court of Appeals and U.S. District Court decision(s) relating to attorney abandonment and equitable tolling of the (AEDPA's) one-1-year period to file a 28 U.S.C. Section 2254 Habeas petition. Some lower courts say *Holland v. Florida*, only applies to Capitol cases.

The genesis of this case occurred when petitioner was charged with murder, robbery and related offenses. Specifically, on February 2, 2006, Petitioner was found guilty by a jury of first degree murder, attempted murder, Robbery of motor vehicle, firearms not to be carried without a license, resisting arrest and fleeing and eluding a police officer. On February 3, 2006, the trial court imposed a sentence of life imprisonment, plus 7 1/2 to 15 years for the attempted murder and Robbery of a motor vehicle.

Petitioner exhausted his direct appeal(s) to the superior and Pennsylvania Supreme Court(s) which were denied on January 26, 2007, and July 24, 2007.

Petitioner sought Post Conviction Relief in which, the Pennsylvania Court(s) all denied the Petitioner relief which concluded on December 5, 2011, when the Pennsylvania Supreme Court denied relief.

Petitioner filed a habeas corpus petition dated February 6, 2012, in the U.S. District Court for the Middle District of Pennsylvania, No. 12-cv-0299, which was transferred to the Easter District for disposition and docketed at No. 12-cv-1015.

Petitioner raised 16 separate grounds for relief, including claims of ineffectiveness of trial and/or direct appeal counsel... including a claim of prosecutorial misconduct for injecting "race" into the case where "race" was not part of the case.

On July 25, 2012, U.S. Magistrate Judge issued a Report and recommendation (R&R) finding that Petitioner's habeas petition was time-barred. Petitioner filed objections to the (R&R) and argued that pursuant to *Holland v. Florida*, equitable tolling should apply because Petitioner's habeas petition was late by 29 days due to never being advised by his attorney that his appeal denied by the state court. The Magistrate Judge, as did the District Court, found that the petition was not subject to equitable tolling because "It was not clear" if the Supreme Court (This Court) intended for *Holland v. Florida* to apply to Non-capital cases.

The District Court overruled Petitioner's objections and adopted the (R&R) and denied the Habeas Petition; the U.S. Court of Appeals for the third circuit denied a Certificate of Appealability (COA) on March 14, 2014.

On or about June 26, 2019 with the assistance of a fellow prisoner, Petitioner filed a motion pursuant to Federal Rules of Civil Procedure 60(b)(6), to reopen the old Judgment of the District Court entered December 1, 2013, denying the Habeas petition as time-barred, as being in conflict with this Court's *Holland* decision and other circuit court(s) cases, as well as *Maples v. Thomas*, 132 S.ct. 912 (2012).

The District Denied the 60(b)(6) motion and the Third Circuit U.S. Court of Appeals denied application for Certificate of Appealability (COA) on April 6, 2020.

Due to Covid-19 and the PA. Department of Corrections being on quarantine/phase/lockdown, Petitioner filed a timely motion for extension of time to file this petition.

This Petition follows.

REASONS FOR GRANTING THE PETITION

The question(s) squarely presented is whether this Court intended for *Holland v. Florida*, 130 S.ct. 2549 (2010), to apply to "Capital Cases" only? If so, that's the end of the matter in the case sub judice. If not, it is respectfully requested that this Court grant the petition as "jurist of reason could disagree with the United States Court of Appeals for the third circuit-and-the United States District Court for the Eastern District of Pennsylvania resolution of Petitioner's motion to reopen the District Court's previous judgment under Federal Rule of Civil Procedure 60(b)(6), or jurist of reason could conclude the issues presented deserve encouragement to proceed further." *Miller El v. Cockrell*, 537 U.S. 322, 326-27 (2003), as it is clear from the record that the lower court(s) decision(s) were erroneous and an abuse of discretion.

This Court made clear in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that a Rule 60(b) motion is a "true" 60(b) motion if it challenges only a procedural ruling of the habeas court (such as failure to exhaust, procedural default or statute of limitations bar) that precluded a merits determination of the habeas application. *Id.* at 532 N.4.; and this Honorable Court also made clear in *Burk v. Davis*, 137 S.ct 759 (2017), when it re-iterated that a Court of Appeals exceeds the scope of the COA analysis when it side steps the two step process of the COA statute.

As such, in the case sub judice, Petitioner filed a "true" 60(b) motion as he challenged the procedural ruling of the habeas court statute of limitations bar that precluded a merits determination of the habeas application.

Petitioner challenged the District Court's previous determination that the habeas application was time-barred by a mere "29 days" on the basis of: (A) the previous judgment was in error because the court's judgment "Conflicts" with

Holland v. Florida, and Maples v. Thomas, and other circuit court decision(s) that held that "an attorney who fails to inform his client of a court decision constitutes attorney abandonment." (B) the previous judgment was in error because "an attorney who fails to inform a client of a court decision is an extraordinary circumstance warranting equitable tolling of the (AEDPA) time limitations period." (C) The previous judgment was in error because the Court "failed to construe Petitioner's "pro se" litigation liberally."

As such, in the first habeas proceedings, Petitioner argued "equitable tolling" of the (AEDPA's) one-1-year limitation period to file an habeas application should be tolled by "29 days" pursuant to Holland and Maples because Petitioner's attorney's failure to inform him of the state Supreme Court denial of appeal "constituted extraordinary circumstances" warranting equitable tolling. The District Court overruled Petitioner's objections to the United States Magistrates Report and Recommendation (R&R), and dismissed the petition as untimely... finding that "Petitioner made no showing that his attorney failed to inform him of the state court denied review of his appeal." See Appendix - A.

In the second proceeding in the District Court, ("Rule 60(b)") proceeding, the District Court again denied relief when it held Petitioner's has not shown "extraordinary circumstances" entitling him to relief under Federal Rule of Civil Procedure 60(b)(6).

This was an abuse of discretion as this Court and U.S. Court of Appeals (Circuit Courts) have held relief is available under Rule 60(b)(6) only in "Extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. *Cox v. Horn*, 757 F.3d 113 (3d cir. 2014), *Wilson v. Fenton*, 684 F.2d 249, 251 (3d cir. 1982).

This case is really no different than *Gibbs v. LeGrand*, 767 F.3d 879 (9th cir. 2014) ("An attorney's failure to inform a petitioner that state Supreme Court denied his appeal constituted abandonment"); *Holland v. Florida*, 130 S.ct. 2549 (2010) ("Attorneys are required to perform reasonably competent legal work, to communicate with their clients, to implement clients reasonable requests, and to keep their clients informed of key developments in their cases.") *Id.* at 652-53.

As such, in *Maples v. Thomas*, 132 S.ct. 912, 923-24 (2012), this decision "clarified" *Holland*'s distinction between "garden variety" attorney negligence and egregious attorney misconduct, drawing on Justice Alito's *Holland* Concurrence and casting the distinction in terms of agency principles. *Maples* explained, "An attorney's failure to communicate about a key development in a clients case can, therefore, amount to attorney abandonment and thereby constitute an extraordinary circumstances. *Id.*

As such, if the lower court's construed Petitioner's "pro-se"o litigations liberally, (Fed.R.Civ.P. 8(F)), ando *Maples* distinction in terms of agency principles, the District Court should have found that Petitioner's attorney's failure to inform him of the state court's denial of appeal amounted to attorney abandonment constituting "extraordinary circumstances" warranting equitable tolling of the (AEDPA's) one-1-year limitation period and permitting review on the merits of the Habeas petition. Thus, a merits review of "prosecutorial-Misconduct" for injecting "race" into the trial that was not an issue. As such, the prosecutor relying on race to gain a conviction and impose a criminal sanction "poisons of public confidence" in the judicial process. *Davis v. Ayala*, 576 U.S. __ __, *Burk v. Davis*, 137 S.ct. 759 (2017).

The second question presented, it is respectfully submitted that this Court should resolve the conflict in U.S. Court of Appeals and U.S. District Court(s) decision(s) relating to attorney abandonment and equitable tolling of the (AEDPA's) one-1-year limitations period to file a Habeas Corpus petition pursuant to 28 U.S.C. Section 2254, as the conflict in the Lower Court's on this matter is causing "Petitioner" to serve the rest of his life in prison without being afforded the protection of the great writ entirely as the dismissal of the first habeas petition is a serious matter. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

For example, in *Locava v. Kyler*, 398 F.3d 271 (3d cir. 2005), the Third Circuit U.S. Court of Appeals held, "An attorney" who fails to inform his client of a appeals court decision is not an "extraordinary circumstance" warranting equitable tolling of the (AEDPA's) limitation period, whereas, in ^o *Gibbs v. Legrand*, 767 F.3d 879 (9th cir. 2014), the Ninth Circuit U.S. Court of Appeals held, "An attorney" who fails to inform his client of an appeals court decision is an "extraordinary circumstance" warranting equitable tolling of the (AEDPA's) filing period. See also, *McClain v. Legrand*, 2019 U.S. Dist. Lexis 215062 (Dist. Nev. 12/13/19) (Appealing attorney abandonment on Post Conviction - Attorney;s failure to inform client of court decision), and compare with *Benton v. Coleman*, (No. 12-cv-01015 (E.D. PA Dist. Ct. 11/1/13)) ("Petitioner's case") ("Refusing to apply attorney abandonment where attorney's failure to inform Petitioner of court decision.").

* See also: Complete Record of Lower Courts.

*FN1 Infra

F.N.1 Petitioner requests that all litigations be construed liberally.

CONCLUSION

As such, for all reasons submitted to this Honorable Court herein, it is respectfully requested that this Court allow this case to proceed further and allow additional briefing.

WHEREFORE, Petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Mark Benton

Mark Benton, GM-9193

Dated: August, 25, 2020