

CAPITAL CASE

No. 21-6031

**In the
Supreme Court of the United States**

WILLIAM GREG THOMAS,
Petitioner,

v.

ATTORNEY GENERAL OF FLORIDA,
Respondent.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit*

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

I. Whether the district court violated due process when it ruled on the merits of a habeas petition that was filed by original federal habeas counsel who was removed due to a conflict and replaced with substitute, conflict-free merits habeas counsel who was given an opportunity to prepare a new habeas petition but who chose to adopt the original habeas petition.

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**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

OPINION BELOW

The Eleventh Circuit's opinion granting equitable tolling but denying habeas relief on the merits is a published opinion available at *Thomas v. Att'y Gen. of Fla.*, 992 F.3d 1162 (11th Cir. 2021).

JURISDICTION

On March 31, 2021, the Eleventh Circuit issued the opinion. Thomas filed a motion for rehearing. On May 17, 2021, the Eleventh Circuit denied the rehearing. On October 14, 2021, Thomas filed a petition for a writ of certiorari in this Court. The

petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).¹ This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

The Fourteenth Amendment, section one, to the U.S. Constitution provides:

No State shall make or enforce any law which shall 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 law.

U.S. Const. amend. XIV, § 1.

¹ This Court extended the deadline to timely file a petition for writ of certiorari from 90 days to 150 days due to COVID-19. *See* Order of March 19, 2020. The expanded time frame remained in place until July 19, 2021.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition seeks review of a decision from the Eleventh Circuit granting equitable tolling but denying § 2254 habeas relief on the merits. *Thomas v. Att’y Gen. of Fla.*, 992 F.3d 1162 (11th Cir. 2021).

Facts of the murders and procedural history in state court

In 1991, Thomas murdered his wife, Rachel Thomas, to avoid paying her settlement money in their pending divorce. *Thomas v. State*, 693 So.2d 951 (Fla. 1997), *cert. denied*, *Thomas v. Florida*, 522 U.S. 985 (1997) (No. 97-6051). He was convicted of first-degree murder, kidnapping, and burglary and was sentenced to death. *Id.* at 951. His co-perpetrator, Douglas Schraud, testified against him at trial and the State presented numerous witnesses to whom he had made incriminating statements. *Id.* at 951 & n.3. Thomas was represented at trial by defense counsel Richard Nichols. The trial court found five aggravating factors including heinous, atrocious, or cruel (HAC); the murder was committed in a cold, calculated, and premeditated manner (CCP); and prior violent felony. *Id.* at 951 n.1. The prior violent felony aggravator was based on a conviction for the murder of his adoptive mother, Elsie Thomas. *Thomas v. State*, 838 So.2d 535, 539 (Fla. 2003) (noting Thomas murdered his wife on September 12, 1991, and murdered his mother on May 4, 1993). Thomas had murdered his mother to prevent her from talking about the murder of his estranged wife to the authorities. The trial court found no mitigating circumstances. *Id.* at 537. Thomas raised nine issues in the direct appeal to the Florida Supreme Court. *Thomas*, 693 So.2d at 951 n.2. The Florida Supreme Court affirmed the convictions and death sentence. *Id.* at 953.

On October 5, 1998, Thomas filed an initial 3.851 motion for postconviction relief in the state trial court. *Thomas*, 838 So.2d at 538. Thomas, represented at that point

by registry counsel Dale Westling, filed amended state postconviction motions in 2000. *Id.* at 538. The state trial court conducted an evidentiary hearing in 2001 and then denied relief. *Id.*

In the postconviction appeal to the Florida Supreme Court, Thomas raised eight issues. *Thomas*, 838 So.2d at 538 n.3. The Florida Supreme Court affirmed the state postconviction court's denial of state postconviction relief. *Id.* at 542. The Florida Supreme Court issued the mandate in the postconviction appeal on March 3, 2003.²

Initial federal habeas proceedings

On March 24, 2003, original habeas counsel, Mary Catherine Bonner, filed an “emergency” motion for appointment as federal habeas counsel of record in the district court because the habeas petition was due shortly. *Thomas v. McDonough*, 452 F.Supp.2d 1203, 1210 (M.D. Fla. 2006) (Doc. #1). The district court held a hearing on the emergency motion and on April 2, 2003, the district court entered a written order appointing her as federal habeas counsel. (Doc. #4). The date for timely filing of a federal habeas petition was June 18, 2003. *Thomas v. McNeil*, 2009 WL 9081403, *1 (M.D. Fla. Feb. 10, 2009). On June 4, 2003, a few days before the federal habeas petition was due, the district court ordered original habeas counsel Bonner to file a status report. On June 10, 2003, eight days before the petition was due, Bonner filed a status report but not the actual habeas petition. (Doc. #108 at 2-3). On July 18, 2003, approximately a month after the deadline for timely filing the federal petition

² There has been successive postconviction proceedings in state court. The first successive state postconviction litigation were claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The Florida Supreme Court denied relief concluding that *Hurst* did not apply retroactively to Thomas. *Thomas v. State*, 234 So.3d 559 (Fla. 2018) (SC17-809); *Thomas v. Jones*, 2018 WL 3198373 (Fla. June 29, 2018) (SC17-2268).

The second successive state postconviction litigation raised a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In 2018, the Florida Supreme Court affirmed the summary denial of the *Brady/Giglio* claim. *Thomas v. State*, 260 So.3d 226 (Fla. 2018) (SC18-48).

had passed, original habeas counsel Bonner filed another status report. (Doc. #109 at 2). On February 19, 2004, the district court again ordered habeas counsel to file a status report. (Doc. #7). On March 15, 2004, Bonner filed yet another status report requesting leave to file the habeas petition. (Doc. #8). On March 18, 2004, the district court entered an order informing habeas counsel that leave to file the petition was not required. (Doc. #9). The next day, on March 19, 2004, the Secretary objected to the belated petition being filed. (Doc. #11). On March 22, 2004, habeas counsel Bonner finally filed the long-awaited petition. (Doc. #12). Two days later, on March 24, 2004, she also filed a memorandum of law in support of the petition. (Doc. #13).

On April 23, 2004, the Secretary filed a motion to dismiss the habeas petition as untimely. (Doc. #15). On January 18, 2006, the district court held an oral argument on timeliness and equitable tolling. (Doc. #27). After the oral argument, on February 27, 2006, the district court *sua sponte* appointed John Mills as co-counsel and ordered additional briefing. (Doc. #31). On September 26, 2006, the district court denied equitable tolling and dismissed the petition with prejudice. (Doc. #43); *Thomas v. McDonough*, 452 F.Supp.2d 1203, 1210 (M.D. Fla. 2006). Co-counsel Mills filed a motion for reconsideration, which the district court, following more briefing, granted. (Docs. #44; #62). On February 21, 2008, the district court held an evidentiary hearing on the issue of equitable tolling. (Doc. #84). The district court removed original habeas counsel Bonner as counsel of record at the evidentiary hearing. On February 10, 2009, the district court denied the motion to dismiss as untimely. (Doc. #107).

On June 25, 2010, the district court inquired whether Respondent wished to continue the litigation over equitable tolling or proceed to the merits. (Doc. #121). On July 14, 2010, the district court appointed merits habeas counsel, Ann Finnell and Patrick McGuinness. (Docs. #122; #126). Without withdrawing their objection to the finding of equitable tolling, Respondent agreed to merits briefing. (Doc. #124). On

February 23, 2011, substitute merits habeas counsel moved to adopt the original habeas petition which the district court granted. (Docs. #130, #132). On July 13, 2011, Respondent answered the petition on the merits. (Doc. #135). Merits habeas counsel filed a reply. (Doc. #138). On September 3, 2013, the district court denied the petition on the merits. (Docs. #141, #142). Thomas appealed to the Eleventh Circuit and the Secretary cross-appealed the finding of equitable tolling. (Docs. #145, #149). On June 19, 2015, the district court granted the motion for substitute merits habeas counsel, Ann Finnell and Patrick McGuinness, to withdraw and appointed Martin J. McClain as second substitute merits habeas counsel. (Docs. #169, #171). The district court's order detailed the procedural history regarding counsel in the case. (Doc. #169).

Eleventh Circuit appeal

The Eleventh Circuit remanded the case to the district court to make additional findings regarding equitable tolling. *Thomas v. Att'y Gen. of Fla.*, 795 F.3d 1286, 1287 (11th Cir. 2015). During the remand, on August 22, 2016, the parties deposed original habeas counsel Bonner. *Thomas v. Att'y Gen. of Fla.*, 2018 WL 733631, *10 (M.D. Fla. Feb. 6, 2018) (citing Doc. # 198-1). The parties entered a stipulation that original habeas counsel Bonner intentionally missed the deadline. *Id.* at *11-*12 (quoting the entire stipulation); (Doc. # 220). The parties stipulated that: "Bonner deliberately delayed filing the petition in order to use Petitioner's case as a test case to challenge AEDPA's statute of limitations." *Id.* at *12 (emphasis omitted).

Following the remand, the Eleventh Circuit affirmed the granting of equitable tolling. *Thomas v. Att'y Gen. of Fla.*, 992 F.3d 1162 (11th Cir. 2021). Thomas raised five claims of ineffectiveness of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), in the appeal. The Eleventh Circuit concluded that two of the *Strickland*

claims were procedurally barred and denied three of the *Strickland* claims on the merits.³

Current petition in this Court

On October 14, 2021, Thomas, represented by Martin McClain, filed a petition for a writ of certiorari in this Court raising two issues regarding due process when original habeas counsel was found to have acted in bad faith by intentionally missing the federal habeas deadline and petitioner was granted equitable tolling on that basis but substitute habeas counsel adopted the original habeas petition.

³ Thomas, represented by Marty McClain, filed a successive habeas petition in the federal district court that has been pending since 2017. *Thomas v. Sec'y, Fla. Dep't of Corr.*, 3:17-cv-662-TJC-JBT (M.D. Fla.). The successive habeas petition raised a claim based on *Giglio v. United States*, 405 U.S. 150 (1972), and a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016). The Secretary filed a response asserting the petition was an unauthorized successive petition as well as addressing the merits in 2017 and, then, once the stay was lifted, filed a motion to dismiss the unauthorized successive habeas for lack of jurisdiction in 2021. (Docs. #9; #24).

REASONS FOR DENYING THE PETITION

ISSUE I

WHETHER THE DISTRICT COURT VIOLATED DUE PROCESS WHEN IT RULED ON THE MERITS OF HABEAS PETITION THAT WAS FILED BY ORIGINAL FEDERAL HABEAS COUNSEL WHO WAS REMOVED DUE TO A CONFLICT AND REPLACED WITH SUBSTITUTE, CONFLICT-FREE MERITS HABEAS COUNSEL WHO WAS GIVEN AN OPPORTUNITY TO PREPARE A NEW HABEAS PETITION BUT WHO CHOSE TO ADOPT THE ORIGINAL HABEAS PETITION.

Petitioner Thomas asserts that the district court violated due process when it ruled on the merits of the original habeas petition filed by original habeas counsel who had a conflict of interest. The district court removed original habeas counsel and appointed new substitute habeas counsel to litigate the merits of the petition and allowed new substitute habeas counsel an opportunity to file a new habeas petition. New substitute habeas counsel, despite being given the opportunity to file an entirely new habeas petition, adopted the original habeas petition. Any due process objection to the district court's ruling on the original habeas petition was affirmatively waived by substitute counsel's adoption of the original habeas petition. Furthermore, this due process claim is being raised for the first time in this Court. The due process issue was not raised in, or ruled on by, the Eleventh Circuit. Moreover, there is no conflict with this Court's due process jurisprudence. This Court has never hinted, much less held, that it is a violation of due process for substitute counsel to adopt the original pleading. Nor is there any conflict with this Court's decision in *Christeson v. Roper*, 574 U.S. 373 (2015). The district court removed original habeas counsel due to a conflict created when she intentionally missed the deadline. There is also no conflict between the district court's ruling granting the motion to adopt the petition and any decision of any federal circuit court. This Court should deny the petition.

The Eleventh Circuit's opinion

The Eleventh Circuit determined that original habeas counsel's abandonment of her duty of loyalty to her client by intentionally missing the federal habeas deadline was an extraordinary circumstance and that Petitioner was diligent warranting equitable tolling. *Thomas*, 992 F.3d at 1171-84. The Eleventh Circuit found that two claims of ineffectiveness of trial counsel were procedurally barred. *Id.* at 1184-87. The Eleventh Circuit found that three claims of ineffectiveness were properly exhausted. *Id.* at 1187-88. On the merits, the Eleventh Circuit addressed three claims of ineffectiveness concluding that the state courts' adjudication was not contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). *Thomas*, 992 F.3d at 1188-93.

The Eleventh Circuit did not address a claim of a due process violation for the district court ruling on the adopted petition because no such argument was made in that court. *Thomas* did not seek a certificate of appealability (COA) on any such due process claim. There is no ruling from the Eleventh Circuit on this due process claim.

Waiver

Any due process claim for ruling on the adopted petition was affirmatively waived when substitute conflict-free merits habeas counsel chose to adopt the original habeas petition prepared by original habeas counsel. (Doc. #130); *Halbert v. Michigan*, 545 U.S. 605, 637 (2005) (noting that legal rights, even constitutional ones, are presumptively waivable citing *United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995)). A habeas petitioner may not be appointed a new federal habeas counsel to replace his original conflicted habeas counsel and be given the opportunity to prepare a new habeas petition but choose to adopt the original habeas petition and then

complain that the district court ruled on the adopted petition. The due process claim is waived.⁴ This Court should not grant review of an affirmatively waived claim.

Issue was not raised below

This Court does not grant review of questions raised for the first time in this Court. This Court refuses to entertain issues that were not properly presented to the state supreme court. *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (dismissing the writ as improvidently granted where the issue was not raised with “fair precision and in due time”). This Court is “a court of final review and not first view.” *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). This Court’s traditional rule precludes a grant of certiorari when the question raised in the petition was either not presented to the lower court or was not ruled upon by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (discussing the

⁴ What suffices for waiver depends on the nature of the right at issue. *New York v. Hill*, 528 U.S. 110, 114 (2000). For certain fundamental trial rights, the defendant must personally make an informed waiver but for other trial rights, waiver by counsel is sufficient and the defendant is deemed bound by the acts of his attorney. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008). Federal habeas review is not a fundamental right or even a trial right. Federal habeas review is a postconviction proceeding. Indeed, federal habeas review is not even constitutional, it is solely statutory. *Jennings v. Stephens*, 574 U.S. 271, 285 (2015) (explaining that historically the writ of habeas corpus was understood far more narrowly than it is today as a means of insuring a person was not held without trial but in recent decades it is used “to justify broad federal review of state criminal proceedings”); *Edwards v. Vannoy*, 141 S.Ct. 1547, 1562-63 (2021) (Thomas, J., concurring); *id.* at 1566-70 (Gorsuch, J., concurring) (explaining that The Great Writ which was designed to prevent detention without a trial is constitutional but that federal habeas review under § 2254, which is post-trial review, is statutory). Thomas himself was not required to have personally agreed to the adoption of the original habeas petition to be bound by the adoption of the original petition by his substitute habeas counsel. While the natural assumption is that substitute merits habeas counsel, Patrick McGuinness, discussed adopting the original habeas petition with Thomas before the adoption (substitute habeas counsel may well have explained to Thomas that the adoption of the original habeas petition was part of the litigation strategy to further the equitable tolling argument). But, even if substitute merits habeas counsel did not discuss the adoption with Thomas, Thomas is still bound by that adoption. Deciding to adopt the original petition in postconviction review is a decision that counsel may make alone under *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (explaining that while there are basic trial rights that the attorney cannot waive without the client’s consent, the attorney must have full authority to manage the conduct of the trial because the adversary process could not function effectively if every tactical decision required the client’s approval). Thomas waived the opportunity to file a new habeas petition when his attorney adopted the original habeas petition.

concept of “not pressed or passed upon below”); *Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (dismissing the writ of certiorari as improvidently granted where the issue was not raised as a federal constitutional issue); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing the writ of certiorari as improvidently granted where the issue was not raised, preserved, or passed upon in the state courts below); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875).

This due process claim is being raised for the first time in this Court. Thomas did not argue in the Eleventh Circuit that the district court violated due process by ruling on the merits of the adopted petition. Nor did Thomas object in the district court at the time of the merits briefing on the adopted petition or at any time before the final ruling on the merits by the district court. There is no ruling from the district court or decision from the Eleventh Circuit on this due process claim. This Court should not grant review of an issue that is being raised for the first time in this Court.

No conflict with this Court’s jurisprudence

There is no conflict between this Court’s jurisprudence and the district court’s action of ruling on the merits of the adopted habeas petition. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court has never hinted, much less held, that substitute federal habeas counsel may not adopt the original habeas petition filed by original habeas counsel.

There is also no conflict between this Court’s interpretation of 18 U.S.C. § 3599(e) and the district court’s removing original habeas counsel and appointing substitute habeas counsel. In *Christeson v. Roper*, 574 U.S. 373 (2015), this Court held the district court abused its discretion by denying the motion for substitution of counsel. Federal habeas petitioner Christeson filed a motion for substitution of counsel under § 3599(e), arguing that his attorneys had a conflict of interest in presenting an

equitable tolling claim on his behalf due to the attorneys' own failure to file a timely habeas petition. This Court explained that the attorneys' failure to timely file the petition created a conflict of interest because advancing a claim for equitable tolling would require the attorneys to denigrate their own performance. This Court observed that a significant conflict of interest arises when an attorney's interest in avoiding damage to their own reputation is at odds with the client's strongest argument for equitable tolling which was that his attorneys had abandoned him. This Court concluded the denial of the motion for substitution of § 3599 counsel contravened this Court's decision in *Martel v. Clair*, 565 U.S. 648 (2012). *Christeson*, 574 U.S. at 374. This Court applied the *Clair* factors. *Id.* at 379-80. This Court stated that given the statutory right to counsel, "a district court would be compelled to appoint new counsel if the first lawyer developed a conflict." *Id.* at 379. This Court determined that *Christeson* was entitled to the opportunity to establish equitable tolling and was also "entitled to the assistance of substitute counsel in doing so." *Id.* at 381.

But *Christeson* was fully complied with by the district court in this case because the district court removed original habeas counsel based on the conflict she created when she intentionally missed the deadline and appointed substitute habeas counsel. Indeed, the district court appointed two different types of substitute habeas counsel. The district court appointed one substitute habeas counsel, who had appellate experience, to litigate the equitable tolling issue and later appointed a different substitute habeas counsel, who had Florida criminal law experience, to litigate the merits of the petition. John Mills was appointed as substitute equitable tolling counsel; Patrick McGuinness was appointed as substitute merits counsel. The district court not only appointed new conflict-free substitute merits habeas counsel to represent Thomas but also permitted new substitute merits counsel to file a new habeas petition. But substitute merits counsel chose to adopt the original habeas

petition instead. (Doc. #130). Bonner had been removed as counsel in this case many years before new substitute merits counsel made the decision to adopt the original petition. The district court in this case complied with *Christeson* twice over.

There is no conflict between this Court's views and the district court's ruling on the merits of the adopted petition.

No conflict with any other federal circuit courts

There is no conflict with that of any federal appellate court. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The petition does not cite any federal circuit court case holding that substitute counsel may not adopt the pleadings filed by original counsel, even if original counsel had a conflict. There is no conflict among the lower federal appellate courts on the issue.

There is no basis for granting certiorari review of this issue. Because there is no conflict with this Court's jurisprudence or conflict among the federal circuit courts, review should be denied.

Accordingly, this Court should deny the petition.⁵

⁵ The only conflict between this Court's jurisprudence and the Eleventh Circuit's decision in this case is in the area of equitable tolling. Original habeas counsel in this case intentionally missed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deadline to litigate the law of equitable tolling. This Court has held that equitable tolling is not available if the deadline was intentionally missed because "would make little sense if equitable tolling were available when a litigant was responsible for its own delay." *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 256-57 (2016). This Court has long held that equitable remedies, including equitable tolling, are not available to those who act in bad faith, such as original habeas counsel Bonner in this case did. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240 (1933). The Eleventh Circuit mistakenly thinks that the Secretary had to establish the exact reason original habeas counsel intentionally missed the deadline. *Thomas*, 992 F.3d at 1183 & n.2. But all that matters to equitable tolling is that the deadline was intentionally missed — the exact reason for doing so does not matter. The only critical fact under the doctrine of equitable tolling is that she purposefully missed the deadline which was stipulated to. *Thomas*, 992 F.3d at 1183; *Thomas v. Att'y Gen. of Fla.*, 2018 WL 733631, *11-*12 (M.D. Fla. Feb. 6, 2018) (quoting the entire stipulation). Therefore, equitable tolling is not available as a matter of law regardless of the exact details of her litigation strategy. Furthermore, granting equitable tolling when habeas counsel intentionally misses the deadline undermines the AEDPA statute of limitations in all counseled habeas cases, which includes most capital cases. Equitable tolling should not be available as a matter of law when federal habeas counsel intentionally misses the AEDPA deadline, as counsel in this case did. The Eleventh Circuit's decision is contrary to *Menominee Indian Tribe* and *Keystone Driller Co.* and has the potential to negate the AEDPA statute of limitations in counseled habeas cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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