

No. 21-6562

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

DEC 02 2021

OFFICE OF THE CLERK

FRANCIS PLAZA — PETITIONER  
(Your Name)

vs.

BARRY SMITH, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THIRD CIRCUIT COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

FRANCIS PLAZA, DOC #JV-6875, pro se

(Your Name)

PA SCI Houtzdale

209 Institution Drive

(Address)

Houtzdale, PA 16698-1000

(City, State, Zip Code)

814-378-1000

(Phone Number)

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SUPREME COURT, U.S.

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## 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:

N/A

## RELATED CASES

Plaza v. Smith, et al., No. 21-2104, Third Circuit Court of Appeals, en banc rehearing denied, October 21, 2021 (Appendix A).

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Plaza v. Smith, et al., No. 120-cv-01480, U.S. District Court, M.D.Pa., 28 U.S.C. §2254 petition denied May 25, 2021, published at 2021 U.S. Dist. LEXIS 98301 (Appendix C).

Com. v. Plaza, 1794 MDA 2019, Pa. Superior Court, M.D., affirmed June 16, 2020 unpublished.

Com. v. PLaza, No. 320-mc-277, U.S. District Court, M.D.Pa., stay denied May 18, 2020 U.S. Dist LEXIS 86590.

Com. v. Plaza, 318 MDA 2014, Pa. Superior Court, M.D., appeal from PCRA-1, affirmed February 19, 2015, unpublished LEXIS 295.

Com. v. Plaza, 388 MAL 2012, Pa. Supreme Court, M.D., appeal from judgment, denied November 9, 2012 at Pa. LEXIS 2631.

Com. v. Plaza, 137 MDA 2011, Pa. Superior Court, M.D. appeal from judgment, affirmed September 30, 2011, unpublished, 2011 Pa. Super. LEXIS 4755.

Com. v. Plaza, No. CP-67-CR-0005283-2009, York County, PA

**QUESTION(S) PRESENTED**

WAS IT AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT TO RULE THAT EQUITABLE TOLLING SHOULD NOT APPLY TO THE PETITIONER'S CASE WHERE THE STATE COURT ACTIVELY MISLEAD PETITIONER, THUS, PLACING THE BURDEN ON THE PRISONER TO CONTROL HIS CASE'S PROGRESS?

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SHOULD THIS COURT REMAND THE PETITIONER'S CASE TO THE THIRD CIRCUIT TO CONDUCT AN EVIDENTIARY HEARING PURSUANT TO PLILER V. FORD TO DETERMINE WHETHER THE PETITIONER WAS ACTIVELY MISLED BY THE STATE COURTS AND EQUITABLE TOLLING SHOULD APPLY?

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 A&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 C to the petition and is

reported at 2021 U.S. Dist. LEXIS 98301 ; 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 September 15, 2021.

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: October 21, 2021, and a copy of the order denying rehearing appears at Appendix A.

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. §2244. Finality of determination):

\* \* \* \*

(d)(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 a judgment of a State court. The limitation period shall run from the latest of--

\* \* \* \*

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State Action;

\* \* \* \*

28 U.S.C. §2254 (State custody; remedies in Federal courts):

\* \* \* \*

(d) 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 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.

\* \* \* \*

United States Constitution, First Amendment [1791]:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment [1868]:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \*

## STATEMENT OF THE CASE

July 25, 2009, Petitioner was charged with criminal homicide; August 18, 2010, following a three day jury trial, petitioner was convicted of first degree murder; September 30, 2010, sentenced to life without parole; a post-sentence motion for reconsideration was filed but denied on December 20, 2010.

Petitioner through counsel filed an appeal of judgment to the Pennsylvania Superior Court at 137 MDA 2011, which was subsequently affirmed in an unpublished opinion.

An Allowance of Appeal was filed with the Pennsylvania Supreme Court at 388 MAL 2012, ultimately denied. Petitioner did not file certiorari to this Court.

On or about October 9, 2013, Petitioner filed a pro se petition for post-conviction relief ("PCRA-1"). Counsel was appointed to assist and amend if meritorious issues were found. An evidentiary hearing was scheduled for February 11, 2014.

February 11, 2014, the same day of the evidentiary hearing, counsel filed an amended petition. The amended petition raised the pro se petition's issues verbatim. Nevertheless, PCRA-1 was dismissed. Petitioner, through counsel, filed a timely notice of appeal at 318 MDA 2014.

February 19, 2015, the Superior Court affirmed. Counsel did not inform of the affirmance, however, Petitioner and counsel had previously agreed if affirmed, counsel was to petition for Allowance of Appeal with the Pennsylvania Supreme Court.

Following repeated attempts by the Petitioner and his family without success, Petitioner filed a subsequent pro se PCRA ("PCRA-2") raising the issue of PCRA-1 counsel's abandonment.

February 5, 2016, PCRA-2 was dismissed without prejudice.

Petitioner filed another PCRA after no communication from counsel ("PCRA-3"), which was again dismissed without prejudice, however, the court ordered it to be "refile[d]" (if necessary) following the Pennsylvania Supreme Court's decision concerning the Allowance of Appeal. Counsel had informed the PCRA court that an Allowance of Appeal from the Superior Court February 19, 2015 decision was being prepared.

February 19, 2016, Petitioner filed a motion captioned "Petition for Appointment of New [PCRA] Counsel Due to Ineffectiveness and Conflict of Interest," which was denied on October 5, 2016.

January 29, 2017, after no communication from either the PCRA court or PCRA counsel, Petitioner filed a "Notice of Intent to file Mandamus." York County did not respond.

March 15, 2017, Petitioner filed the "Writ of Mandamus" to cure the extraordinary delay occurring in the York County Court of Common Pleas Court.

April 11, 2017, York County Court of Common Pleas denied the "Writ of Mandamus." The dismissal stated that counsel, the day before, had filed a "Motion for Leave to file a Petition for

Allowance of Appeal Nunc Pro Tunc," thus, rendering the "writ" moot. Petitioner wrote counsel asking for a copy of the nunc pro tunc Allowance of Appeal; counsel did not respond.

May 22, 2017, the Pennsylvania Supreme Court denied the petition; counsel forwarded a copy of the denial to the Petitioner, which was the only communication from counsel since the evidentiary hearing on February 11, 2014.

June 8, 2017, Petitioner per previous orders (*i.e.*, PCRA-2, -3) from Judge Kennedy, York County Court of Common Pleas, filed PCRA-4.

October 22, 2017, Petitioner filed a motion with York County captioned "Motion for Action Due to Administrative Breakdown and Counsel's Failure to Comply."

December 18, 2017, York County denied PCRA-4 relief on timeliness grounds, contrary to the court's previous orders.

December 21, 2017, Petitioner filed a second "Notice of Intent" to file a "writ of mandamus" with the Supreme Court of Pennsylvania averring his rule-based-right to effective assistance of counsel was violated and the breakdown of the process.

May 9, 2018, Petitioner filed an application to file "Original Process" and a "Petition for Writ of Mandamus and/or Extraordinary Relief" with the Pennsylvania Supreme Court; the court, did not accept the "writ" and related material pursuant to Commonwealth v. Jette, 23 A.2d 1032 (Pa. 2011)(Jette rule on hybrid representation).

May 21, 2018, Petitioner filed a "Motion for Immediate Hearing Due to Abandonment of Counsel That Has Lasted Three Years."

Without a response to the May 21, 2018 motion, Petitioner filed a motion to the York County Court Administrator formatted as an official complaint. There was no response.

November 4, 2018, Petitioner, left with no other options, filed a "Motion for Immediate GRAZIER [FN] Hearing Due to Ineffective Assistance of Counsel, A Pattern of Dereliction, and the Court's failure to Take Action on Multiple Filings," to proceed pro se.

January 3, 2019, a video GRAZIER hearing took place in which York County permitted pro se status.

January 10, 2019, Petitioner filed a motion for appointment of counsel due to the court's failure to consider counsel's abandonment of the Petitioner at the GRAZIER hearing.

January 25, 2019, the January 10th motion was denied.

Petitioner filed an appeal docketed at 244 MDA 2019, in which the Superior Court issued an order to "show cause," why the court should review an unappealable order denying appointment of counsel.

March 7, 2019, Petitioner responded as well as asked the court to remand.

May 20, 2019, the court "quashed" the appeal and denied the remand request as moot.

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[FN] Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998)

May 27, 2019, Petitioner filed a motion in York County to reinstate his appellate rights nunc pro tunc.

June 27, 2019, Petitioner asked the York County court to order "Either Granting or Denying" the May 27th motion.

July 29, 2019, the York County court (FN) notified Petitioner that the May 27th motion was construed as a petition for post conviction relief ("PCRA-5"), ultimately issuing a Pa.R.Crim.P. Rule 907 notice of intent to dismiss to which the Petitioner promptly responded.

August 21, 2019, York County issued a second 907 notice; again, the Petitioner promptly responded.

October 4, 2019, York County denied PCRA-5.

October 21, 2019, Petitioner filed a timely notice of appeal docketed at 1794 MDA 2019.

May 13, 2020, while the appeal 1794 MDA 2019 was pending, Petitioner filed a habeas to the U.S. Middle District Court at 3:20-mc-277, requesting relief through a stay of proceedings. The District Court denied for lack of subject matter jurisdiction.

June 16, 2020, the Pennsylvania Superior Court affirmed in an unpublished opinion; Petitioner did not file for Allowance of Appeal with the PA Supreme Court.

August 19, 2020, Petitioner filed a 28 U.S.C. §2254 petition in the U.S. Middle District Court of Pennsylvania at 1:20-cv-1480.

January 4, 2021, U.S.M.J. John E. Jones III, issued a memorandum that state Petitioner had not responded to the

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(FN) The original case judge, Judge Kennedy, was substituted by Judge M.M. Cook.

Court's order directing parties to "address the timeliness" of the 28 U.S.C. §2254 petition.

January 27, 2021, Petitioner objected by filing a Rule 60 motion that he had not received the Respondent's "Motion to Dismiss" addressing their timeliness argument.

Judge Jones held the Rule 60 motion in "abeyance" allowing the Petitioner to respond to the Respondent's "motion to dismiss."

April 29, 2021, Petitioner filed his objections.

May 25, 2021, Judge Jones issued a memorandum dismissing Petitioner's 28 U.S.C. §2254 petition as untimely (Appendix C).

June , 2021, Petitioner filed a timely appeal for issuance of a certificate of appealability with the Third Circuit Court of Appeals at 21-2104.

September 15, 2021, the Third Circuit denied the appeal and request for a certificate of appealability (Appendix B).

A timely Petition for rehearing en banc was filed at No. 21-2104, however, denied on October 21, 2021 (Appendix A).

This timely Writ of Certiorari follows.

## REASONS FOR GRANTING THE PETITION

WAS IT AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT TO RULE THAT EQUITABLE TOLLING SHOULD NOT APPLY TO THE PETITIONER'S CASE WHERE THE STATE COURT ACTIVELY MISLEAD PETITIONER, THUS, PLACING THE BURDEN ON THE PRISONER TO CONTROL HIS CASE'S PROGRESS?

The Third Circuit erroneously affirmed the U.S. District Court's unreasonable application of "equitable tolling" established in HOLLAND v. FLORIDA, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), where the Court held that the limitations period of 28 U.S.C. §2244 may be subject to equitable tolling. Id. The HOLLAND Court held that in order to be entitled to equitable tolling, the petitioner must show that "'(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" Id. (quoting PACE v. DIGUGLIELMO, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)).

The PACE Court held the petitioner was not entitled to "equitable tolling" because he had not pursued his claims diligently by waiting for years after his claims became available to file his state habeas. PACE, 544 U.S. at 418-19. Conversely, in HOLLAND, where the petitioner repeatedly wrote his attorney seeking information and direction, and repeatedly wrote the state courts, their clerks and the Florida Bar in an effort to have his attorney removed from his case, the Court held that equitable tolling may apply. HOLLAND, supra.

HOLLAND's and PACE's first prong is "diligence." If the Court reviews the procedural history of the Petitioner's case, it cannot agree with the Third Circuit and District Court that the diligence was below the obligational threshold, to the contrary, Petitioner's diligence was extraordinary. HOLLAND requires "reasonable diligence," not "maximum feasible diligence." 130 S.Ct. at 2565. The HOLLAND/PACE second prong, is the requirement that an "extraordinary circumstance" stood in the way of timely filing.

Sub judice is not a case where the underlying factor is counsel's abandonment of the Petitioner, which would be "garden variety" where this is common practice in Pennsylvania, consequently, counsel was merely the catalyst. Pennsylvania jurisprudence requires one thing of post-conviction counsel: an entry of appearance. The only communication from counsel was an introduction letter following appointment. Counsel would not respond to any communication from either the Petitioner or the Petitioner's family. Counsel's divided loyalty if not disinterest severing himself from the Petitioner's case can be inferred, and if that was the circumstances, counsel had the ethical duty to inform either the court or the Petitioner. The Petitioner was forced to write the York County, Pennsylvania court seeking information. Consequently, the court was being mislead by counsel's lack of candor to the court, in turn, the county court

based on counsel's attestations actively mislead the Petitioner. The court continued to inform the Petitioner that counsel was drafting the necessary document(s) for the court; this occurred for approximately two years. In an effort to alert the court of counsel's unprofessional ethics and abandonment, Petitioner filed multiple subsequent PCRA petitions [FN-1]; filed multiple writs of mandamus with both the trial court and appellate courts; filed multiple complaints to the State courts that counsel was not responding or proceeding as the court was informing the Petitioner; filed multiple complaints about the breakdown in the court's process itself. There was no significant time gaps between the foregoing, in other words, Petitioner was not sitting on his rights, but diligently pursuing his rights. All motions, petitions, and mandamus fell on deaf ears. [York County Docket].

Petitioner's county docket attached hereto as exhibit "A" shows multiple case correspondence listings, however, pursuant to COMMONWEALTH v. JETTE, 23 A.2d 1032 (Pa. 2011), the York County Court as well as the State's appellate courts without consideration merely forwarded them to counsel, erroneously claiming that everything, whether it be a complaint or question, were construed as hybrid representation. Herein, the Petitioner, like JETTE, was not attempting/asking to proceed through hybrid representation, to the contrary. This Court must agree, What good

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[FN-1] Subsequent PCRAs were dismissed without prejudice.

would it do sending anything received from a defendant to counsel who does not reply to simple correspondence?: NOTHING but effectively silence a defendant to a voiceless pawn.

Understandably, this Court condemns post-conviction proceedings and any alleged constitutional claims therefrom, bias on finality, however, when a State offers them--both statutorily [FN-2] and rule based [FN-3]--they should abide by the due process promised by the state's rules and statutes, otherwise, it is merely a promise of false hope and a process of futility. In desperation the defendant is forced, probably stated coerced, to take matters into his own hands and proceed pro se which amounts in most instances to nothing but a waste of judicial resources.

Justice Alito, concurring in part and concurring in the judgment, opined in HOLLAND that where counsel effectively abandoned the petitioner-client, and the petitioner made reasonable efforts to terminate counsel due to inadequate representation and to proceed pro se, but these efforts "were successfully opposed by the State on the perverse ground that petitioner failed to act through appointed counsel ... common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." HOLLAND, 130 S.Ct. at 2568. Precisely what Pennsylvania is doing, effectively shutting a defendant from any access to the courts. The First

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[FN-2] 42 Pa.C.S.A. §9541 et seq.

[FN-3] Pennsylvania Rules of Criminal Procedure Rule 901 et seq.

Amendment states "... to petition the Government for a redress of grievances," which is applicable to the State by the Fourteenth Amendment's "due process of law." U.S.C.A. Amend. 14, Sec. 1. It does not state that once counsel is appointed/retained the defendant loses his rights under the First Amendment to petition the court. This Court has repeatedly held counsel ordinary or gross negligence [error] "... would be constructively attributable to the client." HOLLAND, 130 S.Ct. at 2567 (Alito, J.). Pennsylvania's erroneous "hybrid representation" doctrine effectively shutters the courts' doors to a defendant's discovery of counsel error or negligence, albeit he can still proceed pro se. Jette, supra; see also MAPLES v. THOMAS, 132 S.Ct. 912, n.7, 181 L.Ed.2d 807 (2012).

Sub judice, neither the Third Circuit Court of Appeals nor the District Court considered the Petitioner's incarceration. It is well known that incarcerated prisoners find it difficult to monitor their case's progress. All circumstances were beyond the Petitioner's control. Herein, besides the erroneous directions of the county court was desperation, where the Petitioner continued to file motions, petitions, in desperation in the hope someone would listen. Petitioner, like other inmates, have no way to verify the status/progress of his/her case except through written correspondence, e.g., lack of internet or other court websites. The prison's law library stores only appellate opinions and federal court opinions, albeit 3-4 months following conclusion of review before being updated.

SHOULD THIS COURT REMAND THE PETITIONER'S CASE TO THE THIRD CIRCUIT TO CONDUCT AN EVIDENTIARY HEARING PURSUANT TO PLILER V. FORD TO DETERMINE WHETHER THE PETITIONER WAS ACTIVELY MISLED BY THE STATE COURTS AND EQUITABLE TOLLING SHOULD APPLY?

This Court found it necessary in PLILER v. FORD, 542 U.S. 225, 234 (2004), to remand to the Ninth Circuit Court of Appeals to determine whether the "respondent had been affirmatively misled" by the court. Justice O'Connor, concurring, stated "if the petitioner is affirmatively misled ... by the court ..., equitable tolling might well be appropriate." Id. at 235. Justice Stevens also endorsed the majority's approach. Id.

Sub judice, the Petitioner upon filing his 28 U.S.C. §2254 petition conceded that it was facially untimely appending a specific procedural history detailing the York County Pennsylvania Common Pleas Court affirmatively misleading the Petitioner with filings in and from that court on the record. As discussed in Issue One, ante, as well as in the "Statement of the Case," ante, section of this Writ of Certiorari, to hold the Petitioner accountable would be a rigid and unfair application of equity denying review and leaving uncorrected constitutional issues that arose in the State's courts.

The U.S. District Court abused its discretion, subsequently, the Third Circuit Court of Appeals when it affirmed the District Court's decision not to hold an evidentiary hearing to determine whether equitable tolling would be appropriate in the Petitioner's case like the petitioner in PLILER. This failure is manifest injustice itself.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Francis Paza

Date: 12/1/21