No. _____

IN THE

Supreme Court of the United States

ANTHONY FLOYD WAINWRIGHT,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITIONER'S APPENDIX

CAPITAL CASE

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In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-13639

ANTHONY F WAINWRIGHT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:05-cv-00276-TJC

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before JORDAN, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 13, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13639-P
Case Style: Anthony F Wainwright v. Secretary, FL DOC, et al
District Court Docket No: 3:05-cv-00276-TJC

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-13639

ANTHONY F WAINWRIGHT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:05-cv-00276-TJC

Before JORDAN, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Anthony Wainwright, who is under sentence of death in Florida for the 1994 rape, kidnapping, and robbery of Carmen Gayheart, *see Wainwright v. State*, 704 So. 2d 511, 512 (Fla. 1997) (opinion on direct appeal), appeals from the district court's denial of his Rule 60(b) motion in his habeas corpus case. Following oral argument and a review of the record, we affirm.[1]

I

In 2007, we affirmed the district court's dismissal of Mr. Wainwright's habeas corpus petition as time-barred by six days. In so doing we held that Mr. Wainwright was not entitled to equitable tolling of the limitations period. *See Wainwright v. Sec'y, Dep't of Corr.*, 537 F.3d 1282, 1285–86 (11th Cir. 2007) (*Wainwright I*).

On June 5, 2018, the Capital Habeas Unit of the Federal Defender's Office for the Northern District of Florida filed a motion to be appointed as habeas counsel for Mr. Wainwright. The district court granted the motion on June 22, 2018. Almost a year later, on June 21, 2019, the CHU filed a Rule 60(b) motion on Mr. Wainwright's behalf. The motion asserted a number of grounds, which we summarize.

[1] We assume the parties' familiarity with the vast record in this case, and set out only what is necessary to explain our decision.

First, Mr. Wainwright argued that the matter of equitable tolling should be revisited. His former habeas counsel, Joseph Hobson, had a conflict of interest in arguing equitable tolling because he was the attorney who had missed the filing deadline. Moreover, Mr. Hobson had misrepresented his experience and qualifications, had lied to him (about working on the petition and about the limitations period), and had perpetrated a fraud on the court (concerning the equitable tolling argument he had made). Mr. Wainwright asserted that he had acted diligently to protect his rights.

Second, Mr. Wainwright argued that there were independent grounds for granting him relief from his conviction and death sentence through Rule 60(b). He claimed for the first time that he was actually innocent of Ms. Gayheart's murder and asserted 12 new substantive grounds for relief.

The district court denied the Rule 60(b) motion.

With respect to Mr. Wainwright's first argument, the district court concluded that Mr. Hobson had a conflict of interest with respect to equitable tolling because he was the attorney who had missed the filing deadline. But the district court found that the late filing was due to his misunderstanding of how the limitations period set out in 28 U.S.C. § 2244(b) worked. The district court ruled that Mr. Hobson's negligent miscalculation of the filing deadline—though troubling—was not extraordinary and did not give rise to equitable tolling. The district court also found that Mr. Hobson had not lied to Mr. Wainwright when he assured him that he would work on filing a habeas corpus petition. Given its rationale, the

district court did not address whether Mr. Wainwright had pursued his rights diligently.

Turning to Mr. Wainwright's actual innocence claim, the district court concluded that it constituted an unauthorized second or successive habeas petition because the newly presented assertion of actual innocence was not a contention that the previous ruling (the dismissal of the original habeas corpus petition as untimely) was erroneous. As a result, the district court explained, it lacked jurisdiction to consider the claim of actual innocence and the new substantive claims Mr. Wainwright presented for relief from the conviction and sentence.

Mr. Wainwright filed a motion to alter and amend, which the district court denied. Assuming that Rule 59(e) could be used to challenge the denial of a Rule 60(b) motion in a habeas case, the district court explained that it had not acted prematurely in denying the equitable tolling claim. The record showed that Mr. Hobson's behavior did not constitute egregious attorney misconduct, and Mr. Wainwright did not show the existence of an equitable tolling claim with some merit. Moreover, some of the new arguments Mr. Wainwright presented were not proper bases for Rule 59(e) relief and failed in any event. Finally, the newly raised actual innocence claim did not indicate any defect in the integrity of the original habeas proceeding.

II

Rule 60(b), in subsections (1) through (5), provides a number of specific reasons that allow a court to relieve a party from a

judgment (e.g., mistake, excusable neglect, fraud, satisfaction). Rule 60(b)(6), a catch-all provision, allows a court to reopen a judgment for "any other reason that justifies relief." To obtain relief under Rule 60(b)(6), a movant must demonstrate "extraordinary circumstances." *Buck v. Davis*, 580 U.S. 100, 123 (2017). Even when the movant has demonstrated extraordinary circumstances, whether to grant relief is a matter for the court's discretion. *See Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006).

We review the denial of a Rule 60(b)(6) motion for abuse of discretion. *See Buck*, 580 U.S. at 122–23; *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014). The same deferential standard applies to the denial of an evidentiary hearing on equitable tolling. *See Cano*, 435 F.3d at 1342–43 (reviewing denial of evidentiary hearing under Rule 60(b)(6) for abuse of discretion); *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1206–07 (11th Cir. 2014) (reviewing denial of evidentiary hearing on equitable tolling for abuse of discretion).

A different standard applies to the district court's underlying findings of fact, including those relating to equitable tolling. We review those findings for clear error. *See Wilson v. Thompson*, 638 F.2d 801, 803–04 (5th Cir. Unit B March 2, 1981); *Dodd v. United States*, 365 F.3d 1273, 1277 (11th Cir. 2004).

III

Mr. Wainwright asserted in his Rule 60(b)(6) motion that he was entitled to equitable tolling of the habeas limitations period. He acknowledged that an attorney's negligence in calculating a filing deadline does not warrant equitable tolling. *See* D.E. 52 at 69.

See also Holland v. Florida, 560 U.S. 631, 651–52 (2010) ("We have previously held that 'a garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline does not warrant equitable tolling.") (internal citations omitted). He argued, however, that this was not a typical case of negligence because his former habeas counsel, Mr. Hobson, (1) operated under a conflict of interest in arguing for tolling because he was the attorney who had missed the filing deadline; (2) engaged in bad faith by (a) lying to him about working on the habeas petition and making it seem as if the petition would be filed on time, and (b) misrepresenting to him that the petition was timely; and (3) perpetrated a fraud on the court by basing his equitable tolling argument on the false claim that he was not provided notice of the rulings of the Florida Supreme Court. *See* D.E. 52 at 69–78.

A

The district court concluded, based on *Christenson v. Roper*, 574 U.S. 373, 377–78 (2015), that Mr. Hobson was indeed acting under a conflict of interest when he requested equitable tolling because he was the attorney who missed the filing deadline and was placed in the position of arguing his own ineffectiveness. *See* D.E. 60 at 13–15. It then turned to whether the arguments that Mr. Hobson failed to raise for equitable tolling (the ones set forth in the Rule 60(b) motion and summarized in the preceding paragraph) had some merit.

Noting that Mr. Wainwright based his equitable tolling claim on Mr. Hobson's alleged dishonesty, the district court rejected that

contention. The district court found that Mr. Hobson missed the filing deadline "because he misunderstood the federal statute of limitations." D.E. 60 at 17. And it based that finding on the following evidence in the record.

First, Mr. Hobson's misunderstanding was reflected in both his court filings and in his letters to Mr. Wainwright, and "[u]nfortunately such misconceptions are not extraordinary. Mr. Hobson is not the only attorney to have thought that [the] limitations period did not start running until the Florida Supreme Court docketed a denial of certiorari review." *Id.* at 17–18 (citations omitted).

Second, the fact that Mr. Hobson communicated his mistaken belief about the operation of the limitations period did not amount to a lie because "nearly anytime a lawyer miscalculates or misinterprets AEDPA's limitations period, he has an opinion about the deadline that, by definition has no basis in law or fact." *Id.* at 19. The district court explained that if it accepted Mr. Wainwright's "recasting of the facts, many instances of attorney negligence like this one would morph into cases of attorney dishonesty. That cannot be so, because it is well established that a 'garden variety claim of excusable neglect,' such as a 'simple miscalculation that leads a lawyer to miss a filing deadline,' does not warrant equitable tolling." *Id.* (quoting *Holland*, 560 U.S. at 651–52, with some internal quotation marks omitted).

Third, Mr. Wainwright's case was like *Cadet v. Fla. Dep't of Corrections*, 853 F.3d 1216, 1219, 1237 (11th Cir. 2017), which held that gross negligence or misunderstanding of the law on the part

of an attorney is not enough, by itself, to warrant equitable tolling. *See* D.E. 60 at 19–20. In that case, equitable tolling was denied even though habeas counsel misunderstood how the limitations period functioned, relayed that misunderstanding to his client, and stuck to his position when the client suggested that the limitations period should be calculated differently. *See Cadet*, 853 F.3d at 1234–36.

Fourth, the district court found that Mr. Hobson did not lie to Mr. Wainwright when he assured the latter that he was working on filing a habeas petition. Mr. Hobson filed a 73-page habeas petition raising 11 grounds for relief, stating factual and legal bases for each claim. Though Mr. Hobson filed the petition late, he did so because of his misunderstanding of the limitations period, and his letters to Mr. Wainwright about working on the petition were not false: "Mr. Hobson's intentions were sincere," and he did not "lie[ ] to [Mr. Wainwright] about investigating and filing the habeas petition." D.E. 60 at 22. And although the petition contained typographical and factual errors, and only included four case citations, those shortcomings demonstrated negligence rather than "willfully misle[ading] Mr. Wainwright about working on the petition." *Id.* at 23. Similarly, the fact that Mr. Hobson pivoted to other arguments on equitable tolling on appeal in *Wainwright I* also did not "indicate that [he] was willfully deceitful." *Id.* at 21 n.13.

Assuming that Mr. Hobson had been grossly negligent, the district court found no basis for equitable tolling based on the new arguments that Mr. Wainwright presented. *See id.* at 20. The

district court concluded that there was no basis for an evidentiary hearing or for Rule 60(b)(6) relief. *See id.* at 17 n.11, 24.[2]

B

Mr. Wainwright argues that he plausibly alleged misconduct on the part of Mr. Hobson, and that he was entitled to Rule 60(b)(6) relief on equitable tolling grounds. Alternatively, he argues that the district court should have held an evidentiary hearing. *See* Br. for Appellant at 8–22.

Applying clear error review, we cannot say that any of the district court's factual findings concerning Mr. Wainwright's claim of attorney dishonesty and misconduct are clearly erroneous. *See generally Cooper v. Harris*, 581 U.S. 285, 293 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). That means that Mr. Hobson missed the habeas filing deadline because he misunderstood how AEDPA's statute of limitations functioned; that Mr. Hobson's communications with Mr. Wainwright about preparing the habeas petition reflected and conveyed that misunderstanding; and that Mr. Hobson did not lie to Mr. Wainwright when he said he was working on the habeas petition.

[2] Because the district court addressed the equitable tolling claim on the merits after finding that Mr. Hobson operated under a conflict of interest, it reasoned that it did not have to address Mr. Wainwright's contention that Mr. Hobson perpetrated a fraud on the court by making spurious equitable tolling arguments. *See* D.E. 60 at 13–14 n.9.

As for Mr. Wainwright's reliance on Mr. Hobson's "apparent deceit" about his experience and qualifications in federal habeas corpus litigation—which allegedly led to him being hired and paid $25,000 by a charitable organization—the problem is that there is no "causal link" between that "apparent deceit" and the subsequent untimely filing of the habeas corpus petition. *See Cadet*, 853 F.3d at 1236. And without that link, any "apparent deceit" on Mr. Hobson's part does not provide a basis for Rule 60(b)(6) relief based on equitable tolling.

We also see no abuse of discretion on the part of the district court in denying Mr. Wainwright an evidentiary hearing. The abuse of discretion standard gives a district court a "range of choice" as long as its decision is not a "clear error of judgment." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). This deferential review means that we will sometimes affirm the district court even though we might have ruled differently had it been our call. *See In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994). Here the "record refute[d]" most of Mr. Wainwright's "factual allegations" about Mr. Hobson, and in such a situation "a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

IV

Mr. Wainwright also argues that the district court erred in holding that his petition was an unauthorized second or successive petition because actual innocence is a cognizable basis for finding extraordinary circumstances for Rule 60(b)(6) relief. We affirm the

district court's decision because Mr. Wainwright has failed to show that he is actually innocent.

A

A petitioner sentenced to death may "raise[ ] a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995). Such a showing of actual innocence allows a petitioner to overcome AEDPA's statute of limitations, even without successfully asserting equitable tolling. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). The so-called *Schlup* gateway standard used to invoke this exception is high—a petitioner asserting actual innocence must "persuade[ ] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 386 (citing *Schlup*, 513 U.S. at 329).

Whether a convincing showing of actual innocence can also reopen a final judgment pursuant to Rule 60(b)(6) is an open question for us. The Third Circuit has held that "a proper demonstration of actual innocence by [the petitioner] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Satterfield v. Dist. Att'y Philadelphia*, 872 F.3d 152, 163 (3d Cir. 2017). *Accord Howell v. Superintendent Albion SCI*, 978 F.3d 54, 58 (3d Cir. 2020) (same). On the other hand, the Eighth Circuit has ruled that a Rule 60(b) motion raising a new claim of actual innocence is an unauthorized second or successive petition. *See Rouse v. United States*, 14 F.4th 795, 800–

03 (8th Cir. 2021). *Cf. Brooks v. Yates*, 818 F.3d 532, 534 (9th Cir. 2016) (holding that the district court did not abuse its discretion in holding that the petitioner failed to demonstrate entitlement to Rule 60(b) relief via a showing of actual innocence, but alternatively holding that even if "the *Schlup* gateway is available to support a Rule 60(b) motion, [the petitioner] has fallen well short of raising sufficient doubt about his guilt to undermine confidence in the result of the trial") (internal brackets, citation, and quotation marks omitted).

In one of our prior habeas decisions presenting a Rule 60(b) motion premised on actual innocence, we looked at the petitioner's evidence of actual innocence and found it to be insufficient. We did this without first taking a position on whether actual innocence can be used to reopen a final habeas judgment pursuant to Rule 60(b)(6) because the "actual innocence question" is the "decisive factor." *Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314 (11th Cir. 2012). Here we follow the approach of *Kuenzel*. We need not reach the question of whether actual innocence can reopen a final judgment under Rule 60(b) because Mr. Wainwright has not sufficiently shown that he is actually innocent.

B

Mr. Wainwright offers a new report from a DNA expert criticizing the work and testimony that the state's DNA experts presented at his trial. He argues that this report, considered with all the other evidence in the record, establishes his actual innocence

of sexual battery, premediated and felony murder, and innocence of the death penalty. We do not agree.

Again, to meet the applicable standard, the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Kuenzel*, 690 F.3d at 1314–1315 (citing *Schlup*, 513 U.S. at 867). Or, to remove the double negative, he must demonstrate "that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). The standard does not require a district court to form an "independent judgment as to whether reasonable doubt exists," but rather "requires the district court to make a probabilistic determination about what reasonable jurors would do." *Schlup*, 513 U.S. at 868.

The petitioner must present new, credible evidence of innocence: "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Kuenzel*, 690 F.3d at 1315 (citing *Schlup*, 513 U.S. at 865). Cases in which constitutional error has caused the conviction of an innocent person are "extremely rare[,]" and therefore claims of actual innocence are "rarely successful." *Schlup*, 513 U.S. at 865–66. *See House*, 547 U.S. at 538 ("the *Schlup* standard is demanding and permits review only

in the extraordinary case") (internal citation and quotation marks omitted).[3]

As new evidence, Mr. Wainwright offers a report from a DNA analyst, Candy Zuleger, which criticizes the findings of the two state DNA experts who testified at trial. Those two experts were James Pollock, a Florida Department of Law Enforcement serologist, and Michael DeGuglielmo, a DNA analyst from a private company. Both experts testified that DNA evidence found on the backseat of Ms. Gayheart's car was consistent with Mr. Wainwright's semen.

According to Ms. Zuleger, Mr. Pollock obtained DNA evidence from unreliable testing methods, and therefore the evidence does not show that Mr. Wainwright raped Ms. Gayheart. Specifically, Ms. Zuleger's report states that "it is unclear how [Mr. Pollock] . . . extracted sperm cells" because his report does not explain

[3] The circuits are split as whether the new evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial or whether it encompasses evidence that was available but not presented at trial. The Seventh, Ninth, and Tenth Circuits have interpreted "new" to mean evidence that was not presented at trial. *See Gomez v. Jaimet*, 350 F.3d 673, 679–80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962–63 (9th Cir. 2003); *Fontenot v. Crow*, 4 F.4th 982, 1032 (10th Cir. 2021). The Third and Eighth Circuits have held that "new" means evidence not available at trial through the exercise of due diligence. *See Kidd v. Norman*, 651 F.3d 947, 952 (8th Cir. 2011); *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004). Because we conclude that Mr. Wainwright has not sufficiently established his actual innocence with the evidence he has presented, we need not address this issue today.

how he did it. *See* D.E. 52–4 at 30. Ms. Zuleger contends that her "review cannot determine that [Mr.] Pollock used a verifiable method for the extraction of sperm cells" and therefore she "cannot conclude that the cells [Mr.] Pollock analyzed were sperm cells." *Id*. She concludes that Mr. Pollock's testing does not show to a degree of reasonable scientific certainty that the DNA that came from Mr. Wainwright is from semen. In other words, she asserts that Mr. Wainwright's DNA could have come from his skin or elsewhere. *See id*.

Mr. DeGuglielmo testified that he was able to extract from the sample an epithelial cell—one of the four main types of body tissue—that came from Ms. Gayheart. But according to Ms. Zuleger his report does not explain how he knows the epithelial cell was from Ms. Gayheart. *See* D.E. 52–4 at 30–31. It does not, for example, say that this extracted cell matched a known sample from Ms. Gayheart (perhaps one provided by the medical examiner's office). *Id*. She also states that Mr. DeGuglielmo's testing, which showed that Mr. Wainwright's sperm was mixed in the same sample with Ms. Gayheart's epithelial cells, does not show that Mr. Wainwright raped Ms. Gayheart because "[t]he epithelial cells could have come from the skin on any part of her body." *Id*. at 31.

Ms. Zuleger hypothesizes that the sample could have been a result of Mr. Wainwright's "ejaculation on a place where Ms. Gayheart's epithelial cells were[.]" *Id*. She also criticizes other aspects of both experts' work—they shared their results with each

other, and Mr. DeGuglielmo failed to list the database that he used. *See id*. at 31–33.

Mr. Wainwright's new impeachment evidence—even considered on its own—does not meet the rigorous *Schlup* innocence standard. Ms. Zuleger's report does not include results from new DNA testing showing that Mr. Wainwright is innocent of the rape or the murder. Indeed, Ms. Zuleger's affidavit does not even establish that the state's experts mistakenly identified Mr. Wainwright's DNA as semen. It merely points to some ways that the experts may have deviated from proper protocol or procedure in conducting the DNA testing and highlights some conclusions that she contends could not have been reliably drawn from the results. This impeachment evidence falls short of establishing Mr. Wainwright's innocence. *See House*, 547 U.S. at 540–553 (petitioner satisfied gateway standard from *Schlup* by presenting new DNA testing showing that sperm did not come from petitioner but from victim's husband, along with new witnesses testifying that the husband confessed to the murder); *McQuiggin*, 569 U.S. at 389–90 (petitioner presented sufficient new evidence of actual innocence based on new affidavits from three witnesses, two of whom heard another person confess to the murder, and two of whom saw that other person's blood-stained clothing).

Moreover, Mr. Wainwright's new evidence is insufficient when considered together with the other evidence presented at trial. *See House*, 547 U.S. at 538 ("In assessing the adequacy of a petitioner's showing, the habeas court must consider all the

evidence, old and new, incriminating and exculpatory.") (internal citation and quotation marks omitted). At trial, the state presented evidence that Mr. Wainwright confessed to Sheriff James Harrell Reid that he had kidnapped, robbed, and raped Ms. Gayheart (although he claimed his co-defendant, Richard Hamilton killed her). *See Wainwright v. State*, 2 So. 3d 948, 950 (Fla. 2008). Additionally, two jailhouse informants, Robert Murphy and Gary Gunter, testified that Mr. Wainwright told them that he shot Ms. Gayheart. Mr. Murphy testified that Mr. Wainwright admitted to strangling Ms. Gayheart and shooting her in the head. *See* R. 2708, 3414. Mr. Gunter testified that Mr. Wainwright said both he and his co-defendant raped a woman they abducted, and "they" took a gun and shot her. *See* R. 2742.

Reasonable jurors, considering the new evidence along with the evidence available at trial, would still find Mr. Wainwright guilty beyond a reasonable doubt. He therefore has not met the *Schlup* innocence standard and cannot set aside the previous judgment under Rule 60(b).

V

We affirm the district court's denial of Mr. Wainwright's Rule 60(b) motion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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July 18, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13639-P
Case Style: Anthony F Wainwright v. Secretary, FL DOC, et al
District Court Docket No: 3:05-cv-00276-TJC

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers
General Information: 404-335-6100 Attorney Admissions: 404-335-6122

Case Administration: 404-335-6135 Capital Cases: 404-335-6200
CM/ECF Help Desk: 404-335-6125 Cases Set for Oral Argument: 404-335-6141

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTHONY WAINWRIGHT,

Petitioner,

vs. Case No.: 3:05-cv-276-J-TJC
Capital Case

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner Anthony Wainwright, an inmate in the custody of the Florida Department of Corrections (FDOC), is under a death sentence for the 1994 murder, rape, kidnapping, and robbery of Carmen Gayheart. Wainwright v. State, 704 So. 2d 511, 512 (Fla. 1997). In 2006, the Honorable Henry Lee Adams dismissed Petitioner's 28 U.S.C. § 2254 habeas petition as time-barred. (Doc. 29). In 2007, the Eleventh Circuit Court of Appeals affirmed the dismissal. Wainwright v. Sec'y, Dep't of Corr., 537 F.3d 1282 (11th Cir. 2007). Twelve years later, in June 2019, Petitioner filed a Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b)(6). (Doc. 52, Rule 60(b)(6) Motion). Petitioner argued he was entitled to equitable tolling based on his habeas attorney's failure to file the petition within AEDPA's[1] limitations period. He

[1] The Antiterrorism and Effective Death Penalty Act.

also argued that a new actual innocence claim entitled him to add 12 new grounds for relief. The Court denied the motion as to the equitable tolling argument, and dismissed it for lack of jurisdiction as to the actual innocence argument. (Doc. 60, Order Denying Rule 60(b)(6) Motion); see also Gonzalez v. Crosby, 545 U.S. 524 (2005).[2]

The case is now before the Court on Petitioner's Motion to Alter or Amend Judgment (Doc. 61) and accompanying exhibits (Doc. 61-1, "Supp. App."). Respondent has filed a brief in opposition. (Doc. 64). Petitioner has filed a reply. (Doc. 69). For the reasons below, the motion is due to be denied.

I. Standard for Relief Under Rule 59(e)

Under Federal Rule of Civil Procedure 59, a party may file "[a] motion to alter or amend a judgment … no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(e). "The decision to alter or amend a judgment is committed to the sound discretion of the district court." Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006) (citation omitted). "'The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact.'" Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197

[2] Based on these rulings, the Court did not resolve Respondent's argument that the Rule 60(b)(6) Motion was not filed within a reasonable time. See Fed. R. Civ. P. 60(c)(1). If the Eleventh Circuit Court of Appeals determines that resolution of this issue would be helpful, the Court is prepared to do so.

F.3d 1116, 1119 (11th Cir. 1999)).[3] The purpose of Rule 59 is not to ask the Court to reexamine an unfavorable ruling in the absence of a manifest error. Jacobs v. Tempur-Pedic Int'l., Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). As such, Rule 59(e) cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005). For the sake of finality and conserving judicial resources, "reconsideration of a previous order is an extraordinary remedy to be employed sparingly." United States v. Bailey, 288 F. Supp. 2d 1261, 1267 (M.D. Fla. 2003).

Petitioner contends that Rule 59(e) may be used to alter or amend an order denying Rule 60(b)(6) relief. (Doc. 61 at 1).

> There is reason to think that Rule 59(e) cannot be used to second-guess the denial of a Rule 60(b) motion. Rule 59(e) by its own terms permits a party to "alter or amend a judgment," not an order. Fed. R. Civ. P. 59(e) (emphasis added). And the denial of a Rule 60(b) motion is an order, not a judgment.

Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1267 n.3 (11th Cir. 2015). "There is, however, no need for [this Court] to resolve that question today." Id. Even assuming Petitioner may use Rule 59(e) to challenge the denial of his Rule 60(b)(6) motion, he is not entitled to relief.

[3] An intervening change in controlling law may also justify reconsideration. Church of Our Savior v. City of Jacksonville Beach, 108 F. Supp. 3d 1259, 1265 (M.D. Fla. 2015).

II. Discussion

Petitioner moves the Court to alter or amend the "judgment" "for two principal reasons." (Doc. 61 at 1). First, Petitioner insists that his underlying equitable tolling claim had "some merit," and that "this Court prematurely engaged in a plenary equitable tolling review to conclude that Joseph Hobson's conduct was no more than grossly negligent, without permitting Mr. Wainwright to expand on his equitable tolling arguments." (Id.). Petitioner's second principal argument is that "this Court failed to recognize that, under existing law, actual innocence – or any sufficiently serious injustice – is a cognizable basis for finding extraordinary circumstances for Rule 60(b)(6) relief from a non-merits dismissal of a habeas petition." (Id. at 2). Finally, Petitioner asks the Court to consider granting a certificate of appealability (COA). (Id.).

A. Equitable Tolling

In the Order denying Rule 60(b)(6) relief, the Court found that federal habeas counsel, Joseph Hobson, had a conflict of interest in arguing equitable tolling because he himself missed the deadline, and that this conflict could properly be raised in a Rule 60(b)(6) motion. (Doc. 60 at 13-15). However, the Court explained that "'having conflicted counsel is not enough to obtain relief under Rule 60(b).'" (Id. at 15) (quoting In re Johnson, 935 F.3d 284, 290 (5th Cir. 2019)). Rather, to demonstrate "extraordinary circumstances" for purposes

of Rule 60(b)(6), Petitioner also had to show that his equitable tolling claim "had 'some merit,' because the existence of 'a good claim or defense … is a precondition of Rule 60(b)(6) relief.'" (Id.) (quoting In re Johnson, 935 F.3d at 290). The Court found that Petitioner's equitable tolling claim had "no merit," (id. at 23-24), a conclusion the Court based on the facts alleged in the Rule 60(b)(6) motion and the materials it referenced (id. at 16-23).

Petitioner argues that "[t]he Court correctly found that Mr. Hobson was conflicted from arguing equitable tolling based on his own conduct," but contends "the Court prematurely denied Rule 60(b) relief on the ground that Mr. Wainwright's equitable tolling argument did not even have 'some merit.'" (Doc. 61 at 3) (citations omitted). According to Petitioner, "the Court did not consider the full range of evidence of Mr. Hobson's misconduct" and "misapplied the some-merit standard to prematurely deny relief." (Id.).[4]

Before reaching any other issue, the Court addresses Petitioner's argument about the standard for determining whether his equitable tolling claim had enough merit to warrant relief from judgment. The Supreme Court has said that "showing 'a good claim or defense' is a precondition of Rule 60(b)(6) relief." Buck v. Davis, 137 S. Ct. 759, 780 (2017) (quoting 11 Wright & Miller,

[4] Petitioner did not brief, or even mention, this "some-merit standard" in the Rule 60(b)(6) Motion, but only raised this issue in the Rule 59(e) motion. Because neither party briefed the standard in the Rule 60(b)(6) Motion or the response, the Court provides more discussion here.

Federal Practice and Procedure § 2857). Thus, to be entitled to Rule 60(b)(6) relief, Petitioner must establish – to some extent – that his equitable tolling claim is meritorious. However, neither the Supreme Court nor the Eleventh Circuit has elaborated on the standard for deciding whether an underlying claim is meritorious enough to justify vacating a judgment under Rule 60(b)(6). Some circuits have suggested that the underlying claim must have at least "some merit." In re Johnson, 935 F.3d at 290; Thomas v. Holder, 750 F.3d 899, 902 (D.C. Cir. 2014). The D.C. Circuit Court of Appeals elaborated:

> In Lepkowski, 804 F.2d at 1314[5], the court explained that a Rule 60(b) motion will not be granted unless the movant "can demonstrate a meritorious claim or defense" to the motion upon which the district court dismissed the complaint. It has long been established that as a precondition to relief under Rule 60(b), the movant must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture.... Although the proffered claim or defense need not be "ironclad," a Rule 60(b) movant "must at least establish that it possesses a potentially meritorious claim or defense which, if proven, will bring success in its wake." Superline Transp., 953 F.2d at 21.[6] Consequently, ... appellants must still proffer, as movants under Rule 60(b), a potentially meritorious claim or defense in order to provide the district court with a basis for concluding that granting reconsideration will not be a useless gesture. See Lepkowski, 804 F.2d at 1314; Boyd, 905 F.2d at 769.[7]

Murray v. Dist. of Columbia, 52 F.3d 353, 355 (D.C. Cir. 1995) (some citations

5 Lepkowski v. U.S. Dep't of Treasury, 804 F.2d 1310 (D.C. Cir. 1986).

6 Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 59 v. Superline Transp. Co., 953 F.2d 17 (1st Cir. 1992).

7 Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990).

omitted). Specifically, showing a "meritorious [claim] requires a proffer of evidence which would permit a finding for the [movant]." Superline Transp., 953 F.2d at 21 (first alteration added) (quoting Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988)). In other words, a Rule 60(b)(6) movant "must show facts which, if established, might reasonably be said to be a basis for [relief]." Id. (alteration added) (quoting Beshear v. Weinzapfel, 474 F.2d 127, 132 (7th Cir. 1974)). Therefore, if the proffer of evidence or the facts alleged are insufficient to establish a meritorious claim or defense, Rule 60(b)(6) relief is not warranted.

Applying these principles, Petitioner has not shown that the Court prematurely denied his equitable tolling claim. The Court based its decision on the insufficiency of the facts alleged and Petitioner's own attachments to the Rule 60(b)(6) Motion. (See Doc. 60 at 16-23). The Court also considered the original habeas petition (Doc. 1) and Petitioner's response to the State's motion for summary judgment (Doc. 24), both of which Petitioner referenced in the Rule 60(b)(6) Motion as well. Petitioner claimed that he missed the AEDPA deadline because Mr. Hobson "lied to" him about two things: (1) working on the habeas petition and (2) the statute of limitations. (Doc. 52 at 73-76).[8] The facts alleged

[8] Petitioner also argued that Mr. Hobson had a conflict of interest in arguing equitable tolling (Doc. 52 at 69-73) and that Mr. Hobson perpetrated a fraud on the court by raising a dubious tolling argument (id. at 76-78). But the Court explained that these were not bases for equitable tolling because they arose only after Petitioner had filed the habeas petition. (Doc. 60 at 9 n.7).

in support of the claim, stripped of labels and conclusions, were these: Mr. Hobson's interpretation of the statute of limitations was wrong, the habeas petition contained some sloppy errors, the habeas petition contained four case citations, and Mr. Hobson did not mail Petitioner a copy of the petition until two months after filing the original. The Court explained that these facts (accepted as true) failed to establish attorney dishonesty, and the attachments only further refuted the claim. It was plain from the attached exhibits that Mr. Hobson missed the AEDPA deadline because he misunderstood the statute of limitations, which, as a matter of law, does not justify equitable tolling. Holland v. Florida, 560 U.S. 631, 651-52 (2010); Lawrence v. Florida, 549 U.S. 327, 336-37 (2007); Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221-37 (11th Cir. 2017).

Because it plainly appeared from the Rule 60(b)(6) Motion and attached exhibits that Mr. Hobson's performance did not constitute egregious attorney misconduct, Petitioner did not show the existence of "'a good claim or defense.'" In re Johnson, 935 F.3d at 290 (quoting Buck, 137 S. Ct. at 780). Stated differently, the Court was not persuaded that allowing Petitioner to proceed further would "not be a useless gesture." Murray, 52 F.3d at 355.[9] As such, the Court properly determined that his equitable tolling claim lacked enough merit

[9] Petitioner also argues that the Court erred by holding his equitable tolling claim to the pleading standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Schriro v. Landrigan, 550 U.S. 465 (2007). Petitioner cited no binding authority for this proposition. The alternative would be to accept legal conclusions, couched as factual allegations, as true.

to warrant Rule 60(b)(6) relief. See Norman v. United States, 467 F.3d 773, 775 (D.C. Cir. 2006) (affirming denial of Rule 60(b)(1) motion where underlying equitable tolling claim was legally insufficient).

The Court turns to Petitioner's claim that it "did not consider the full range of evidence of Mr. Hobson's misconduct." (Doc. 61 at 3). First, Petitioner suggests that the Court did not consider all the types of attorney misconduct that could warrant equitable tolling, such as bad faith, divided loyalty, mental impairment, or the like. (Id. at 4-5) (citing Cadet, 853 F.3d at 1236; Thomas v. Att'y Gen. of Fla., 795 F.3d 1286, 1294 (11th Cir. 2015)). But that is because Petitioner did not allege any of these forms of misconduct in support of equitable tolling.[10] Rather, Petitioner homed in on attorney dishonesty as the type of misconduct that prevented him from timely filing. (Doc. 52 at 73-76). Petitioner claimed that "Mr. Hobson lied to Mr. Wainwright [about working on the petition and the statute of limitations], Mr. Wainwright relied on those lies, and thus Mr. Hobson's misconduct rises to the level of extraordinary circumstances." (Id. at 73) (capitalization altered). Petitioner cited case law involving willful attorney deceit. (Id.) (citing United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002), and United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2003)). This was the theory that the Court considered and rejected. Petitioner cannot fault the Court for not considering other theories he did not fairly raise. Mays v. United

[10] See Footnote 8, supra.

States Postal Service, 122 F.3d 43, 46 (11th Cir. 1997) ("[A] motion to reconsider should not be used … to set forth new theories of law").

Second, Petitioner insists that he did clear the "some merit" threshold for his equitable tolling claim (Doc. 61 at 6-9), and that the prior decision "overlooked certain parts of the record and failed to draw appropriate inferences," (id. at 7). Petitioner does not point to a fact that he raised in the Rule 60(b)(6) Motion pertaining to attorney dishonesty and which the Court ignored. Instead, he simply believes the Court "failed to draw appropriate inferences." (Id.). However, a party may not use Rule 59(e) merely to ask the Court to reexamine an unfavorable ruling. Jacobs, 626 F.3d at 1344.

Petitioner raises a number of other arguments, including that: (1) Mr. Hobson procured Petitioner as a client essentially through false advertising (Doc. 61 at 9-12)[11]; (2) Mr. Hobson knew he lacked the competence and

[11] A group called the Association of Christians Against Torture (ACAT) hired Mr. Hobson to argue Petitioner's collateral appeal before the Florida Supreme Court and to file a federal habeas petition. (See id. at 9-10). Puzzlingly, Petitioner states that the Court "overlooked or misapprehended this fact" because it "incorrectly describ[ed] Mr. Hobson as 'appointed.'" (Doc. 61 at 10) (citing Doc. 60 at 5). But on page 2 of his own Rule 60(b)(6) Motion, Petitioner described Mr. Hobson as "his appointed attorney," noting that a charity (ACAT) had chosen Mr. Hobson on Petitioner's behalf. (Doc. 52 at 2). In the Order denying Petitioner's Rule 60(b)(6) Motion, the Court said: "Joseph Hobson, who later served as Petitioner's federal habeas counsel, was appointed to argue the appeal [before the Florida Supreme Court]." (Doc. 60 at 5). The Court used the word "appointed" in the same sense that Petitioner used the same word, yet Petitioner now argues that the Court "overlooked or misapprehended" the facts.

The Court is aware that a charity selected Mr. Hobson to represent Petitioner. But that fact makes no difference. The same rules apply regardless

knowledge to represent Petitioner (Doc. 61 at 12-15), based on a statement Mr. Hobson made during a hearing in 2007 with respect to a different case, Anthony LaMarca v. Sec'y, Fla. Dep't of Corr., No. 8:06-cv-1158-T-17MSS (M.D. Fla.); and (3) "there are indicia pointing to other likely improprieties incident to Mr. Hobson's representation" (Doc. 61 at 15), such as Mr. Hobson not providing a fee contract to Petitioner or Anthony LaMarca (id. at 15-16). Petitioner did not raise these arguments in his Rule 60(b)(6) Motion, nor did he refer at all to the LaMarca case. Instead, as noted before, Petitioner argued that he missed the AEDPA deadline because Mr. Hobson lied to him about (1) working on the habeas petition, and (2) the statute of limitations. (Doc. 52 at 73-76).[12] Rule 59(e) may not be used "to set forth new theories of law," Mays, 122 F.3d at 46, or "to raise arguments which could, and should, have been made before the judgment was issued," O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir.

of whether a prisoner's lawyer was appointed by a court, selected by a third-party charity, or retained by the prisoner himself. Cf. Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982) ("[W]e judge the competence of appointed and retained counsel by the same standard.") (citation omitted). There are not different sets of equitable tolling rules depending on the source of a lawyer's compensation.

[12] Petitioner mentioned, in connection with showing that Mr. Hobson had a conflict of interest in arguing equitable tolling, that Mr. Hobson had advertised his "significant experience in … death penalty cases." (Doc. 52 at 70) (citing Rule 60(b)(6) App. 71). Petitioner referenced that fact to explain why Mr. Hobson had a professional interest against evaluating his own performance for serious misconduct. (See Doc. 52 at 69-73). But Petitioner did not argue that the advertisement itself was serious attorney misconduct that somehow caused Petitioner to miss the AEDPA deadline. (See id. at 73-76).

1992). Nor can a party use a Rule 59(e) Motion to "present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. 408 F.3d at 763. Thus, these claims do not warrant relief.

The new arguments are unconvincing in any event. With respect to the false advertising theory, Petitioner asserts that Mr. Hobson procured Petitioner as a client by overstating his experience in federal habeas litigation. (Doc. 61 at 9-12). But Petitioner admits he does not actually know that such was the case: "The exact circumstances under which [Mr. Hobson] was chosen to be Mr. Wainwright's federal lawyer … are unclear, including what exactly he represented about his experience, abilities, and compensation needs." (Id. at 10). The only fact Petitioner identifies to suggest that Mr. Hobson obtained this case under false pretenses is a paid advertisement Mr. Hobson took out afterward, in 2007, where Mr. Hobson touted his "significant experience" in death penalty cases. (Id. at 10) (citing Rule 60(b)(6) App. at 71). And, Petitioner acknowledges that Mr. Hobson did in fact work in the Office of Capital Collateral Regional Counsel between 1999 and 2001. (Id. at 10 n.2).

With respect to his claim that Mr. Hobson knew he lacked the competence to accept representation in this case, Petitioner seizes on the following statement by Mr. Hobson in the LaMarca proceedings: "I don't know how the federal habeas deadlines work, but [LaMarca] had a very small amount of time to author a 3.850 …." (Supp. App. 29). This isolated statement cannot bear the

weight Petitioner puts on it: it does not prove Mr. Hobson accepted Petitioner's case knowing he was not competent to do so. If anything, it reinforces the conclusion that Mr. Hobson did not understand the statute of limitations, which as a matter of law does not justify equitable tolling. Holland, 560 U.S. at 651-52; Lawrence, 549 U.S. at 336-37; Cadet, 853 F.3d at 1221, 1235-37.

With respect to his claim that there were "other likely improprieties," such as Mr. Hobson failing to provide Petitioner a fee contract (id. at 15-16), he does not explain how this caused Petitioner to miss the AEDPA deadline. Thus, this claim is unconvincing as well.

Accordingly, the Court rejects Petitioner's argument that the Court should alter its decision on equitable tolling and reopen the proceedings. Petitioner's own filings showed that Mr. Hobson botched the deadline because he misunderstood the statute of limitations. Simply put, this was not one of those "rarely occur[ring]"and "extraordinary" cases in which Rule 60(b)(6) relief was appropriate. Buck, 137 S. Ct. at 772 (quoting Gonzalez, 545 U.S. at 535).

B. Actual Innocence

Petitioner also seeks reconsideration of the Court's decision to dismiss Part VI of the Rule 60(b)(6) Motion. In Part VI, Petitioner claimed that he had "new evidence of his innocence," (Doc. 52 at 88), which he argued should allow him to reopen the habeas proceedings and add 12 new claims for relief (id. at

82, 98-181).[13] The Court explained that "'[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction … circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.'" (Doc. 60 at 24) (quoting Gonzalez, 545 U.S. at 531). Petitioner argues that the "Court failed to recognize that, under existing law, actual innocence – or any sufficiently serious injustice – is a cognizable basis for finding extraordinary circumstances for Rule 60(b)(6) relief from a non-merits dismissal of a habeas petition." (Doc. 61 at 2; see also id. at 18-22). Petitioner claims that the Court "deemed innocence irrelevant to the extraordinary circumstance inquiry" and is "contrary to the Supreme Court's subsequent guidance in Buck v. Davis." (Id. at 18).

Petitioner misconstrues the Court's Order. The Court did not say that actual innocence was "irrelevant" to the extraordinary circumstances inquiry under Rule 60(b)(6). That part of the Court's decision did not even turn on whether Petitioner had shown extraordinary circumstances. Rather, the Court's decision was based on the fact that Part VI did not present a true Rule 60(b)(6) claim at all, which is a threshold jurisdictional issue distinct from

[13] The "new" evidence of innocence was the opinion of Candy Zuleger, a DNA analyst who scrutinized lab reports and trial testimony that implicated Petitioner in the rape of Carmen Gayheart. (Rule 60(b)(6) App. 261-68). However, the lab reports and trial testimony have existed since 1994-95. Ms. Zuleger did not rely on any newly discovered DNA evidence or perform new DNA testing.

whether extraordinary circumstances warrant relief. See Franqui v. Florida, 638 F.3d 1368, 1370 (11th Cir. 2011) ("At the outset, we must decide whether Petitioner's motion for relief from the District Court's judgment was a true Rule 60(b) motion or was instead … a second or successive habeas petition that should have been dismissed for lack of jurisdiction….").

According to Gonzalez, there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) where the motion attacks a "defect in the integrity of the federal habeas proceeding," 545 U.S. at 532, and (2) where the motion "merely asserts that a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar," id. at 532 n.4. See also Gilkers v. Vannoy, 904 F.3d 336, 344 (5th Cir. 2018). A never-before-raised claim of actual innocence is neither of these things. Actual innocence is not a "defect in the integrity of the federal habeas proceeding," nor is a newly-minted innocence claim an argument "that a previous ruling which precluded a merits determination was in error," (Doc. 60 at 25) (emphasis in original). See also Haag v. Florida, 792 F. App'x 664 (11th Cir. 2019) (Rule 60(b) motion that asserted actual innocence based on newly discovered evidence was effectively a successive petition because it "advance[d] a 'claim' within the meaning of 28 U.S.C. § 2244."). Moreover, the Supreme Court instructs that "[a] [Rule 60(b)] motion that seeks to add a new

ground for relief … is effectively indistinguishable from" a successive petition. Gonzalez, 545 U.S. at 532 (footnote and emphasis omitted). That is precisely how Petitioner aimed to use the Rule 60(b)(6) Motion. He sought to add 12 new claims for relief, which falls squarely within the scope of what Gonzalez forbade.

Buck v. Davis did not alter these principles. The Supreme Court's decision in Buck was about whether the petitioner had demonstrated "extraordinary circumstances" under Rule 60(b)(6). The Court held that he had, given the pernicious specter of racial discrimination and Texas's confession of error in nearly identical cases. 137 S. Ct. at 777-80. Buck did not concern the threshold jurisdictional issue here: whether the Rule 60(b)(6) motion presented a true Rule 60(b) claim in the first place.[14]

Congress created a channel for a prisoner to file a second or successive petition if he has newly discovered evidence that proves his innocence: 28 U.S.C. § 2244(b)(2)(B). Petitioner failed in 2009 to obtain the Eleventh Circuit's permission to file a successive petition based on his co-defendant's affidavit that Petitioner did not rape Carmen Gayheart. (See Doc. 52 at 62). He now presents

[14] Unlike Petitioner, Buck did not seek to add any new grounds for habeas relief. Buck merely sought reconsideration of an ineffective assistance of counsel claim that he had raised in the original federal habeas petition, but which the district court dismissed as procedurally defaulted under then-existing law, and which became viable following Martinez v. Ryan, 132 S. Ct. 1309 (2012), and Trevino v. Thaler, 133 S. Ct. 1911 (2013). Buck, 137 S. Ct. at 767.

"new" evidence that he also thinks undermines his participation in the rape.[15] Petitioner's effort to use Rule 60(b)(6) to add 12 new claims for relief is an effort to circumvent the Eleventh Circuit's 2009 ruling and § 2244(b)'s requirements. Under Gonzalez, the Court cannot permit such a use of Rule 60(b)(6).

C. Certificate of Appealability

A COA is "required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding." Gonzalez v. Sec'y, Dep't of Corr., 366 F.3d 1253, 1263 (11th Cir. 2004) (en banc). Likewise, a COA is also required to appeal the denial of a Rule 59(e) motion. Perez v. Sec'y, Fla. Dep't of Corr., 711 F.3d 1263, 1264 (11th Cir. 2013). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

> When the district court denies a habeas petition on procedural grounds …, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added). The Court's holding that Petitioner "failed to demonstrate that he was entitled to have his

[15] As the Florida Supreme Court explained, however, even if Petitioner did not personally rape Gayheart, he would still be guilty of sexual battery as a principal because he aided and abetted the rape. Wainwright v. State, 2 So. 3d 948, 951 n.2 (Fla. 2008).

judgment reopened under Rule 60(b)(6) is a procedural ruling." Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1169 (11th Cir. 2017).

> The Supreme Court has recently admonished that "a litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'"

Id. (quoting Buck, 137 S. Ct. at 777-78).

In light of the foregoing standards, the Court finds that a COA is not warranted. Given Holland, 560 U.S. 631, Cadet, 853 F.3d 1216, and Gonzalez, 545 U.S. 524, reasonable jurists would not debate the denial of the Rule 60(b)(6) Motion or Rule 59(e) Motion. Nor has the Court identified an underlying substantial constitutional violation. As such, Petitioner's Motion to Alter or Amend Judgment and for Reconsideration of the Denial of a Certificate of Appealability (Doc. 61) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida this 24th day of August, 2020.

TIMOTHY J. CORRIGAN
United States District Judge

lc 19

Copies:
Counsel of record
Anthony Wainwright

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTHONY WAINWRIGHT,

Petitioner,

vs. Case No.: 3:05-cv-276-J-TJC
Capital Case

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner Anthony Wainwright is a death-row inmate in the custody of the Florida Department of Corrections (FDOC). Petitioner and his co-defendant, Richard Hamilton, are under a death sentence for the 1994 murder, rape, kidnapping, and robbery of Carmen Gayheart, a mother of two children whom the defendants terrorized before shooting her twice in the head. Wainwright v. State, 704 So. 2d 511, 512 (Fla. 1997) ("Wainwright I").

On March 10, 2006, the Honorable Henry Lee Adams dismissed Petitioner's 28 U.S.C. § 2254 habeas corpus petition because it was untimely under the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations. (Doc. 29). The Court determined that the petition was filed six days after AEDPA's limitations period had expired, and that Petitioner

was not entitled to equitable tolling. (Id. at 8-10). On November 13, 2007, the Eleventh Circuit Court of Appeals affirmed the dismissal. Wainwright v. Sec'y, Dept. of Corr., 537 F.3d 1282 (11th Cir. 2007) ("Wainwright III").

This case has returned to the Court on a 187-page "Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b)(6)" (Doc. 52, Rule 60(b)(6) Motion), along with 277 pages of exhibits (Docs. 52-1, 52-2, 52-3, 52-4) ("App. __"). Petitioner's current attorneys, from the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida ("CHU North"), filed the motion on June 21, 2019 – more than 13 years after the Court dismissed the habeas petition and nearly 12 years after the Eleventh Circuit affirmed the dismissal. Respondent, the Secretary of FDOC, has filed a response in opposition. (Doc. 54, Response). Petitioner has filed a reply brief (Doc. 58, Reply), and Respondent has filed a sur-reply (Doc. 59, Sur-Reply). Thus, the motion is ripe for a decision.

I. Background

As set forth in the Florida Supreme Court's opinion affirming Petitioner's conviction and sentence on direct appeal:

> Anthony Wainwright and Richard Hamilton escaped from prison in North Carolina, stole a Cadillac and guns, and drove to Florida. In Lake City, the two decided to steal another car and on April 27, 1994, accosted Carmen Gayheart, a young mother of two, at gunpoint as she loaded groceries into her Ford Bronco in a Winn–Dixie parking lot. They stole the Bronco and headed north on I–75.

> They raped, strangled, and executed Gayheart by shooting her twice in the back of the head, and were arrested the next day in Mississippi following a shootout with police.
>
> Upon arrest, Wainwright revealed to officers that he had AIDS and in subsequent statements admitted to raping Mrs. Gayheart despite his illness after kidnapping and robbing her. He claimed, however, that it was Hamilton who strangled and shot her. Wainwright was charged with first-degree murder, robbery, kidnapping, and sexual battery, all with a firearm, and at trial fellow prisoners testified that he admitted he was the shooter. He was convicted as charged, and during the penalty phase his mother testified inter alia that until he was fourteen years old he was a bed wetter. The jury unanimously recommended death and the judge imposed death based on six aggravating circumstances, no statutory mitigating circumstances, and several nonstatutory mitigating circumstances.

Wainwright I, 704 So. 2d at 512-13 (footnotes omitted).

In addition to his own confessions, there was forensic evidence that Petitioner raped Gayheart. Josephine Roman, a Florida Department of Law Enforcement (FDLE) lab analyst, testified at trial that she examined a portion of the backseat cover from the victim's Ford Bronco (Exhibit 75-B), and discovered the presence of semen and spermatozoa as well as blood types A and O. (Doc. 52 at 35-36) (citing R. at 3022-24).[1] Roman then sent the seat cover to another FDLE lab for DNA testing. FDLE serologist James Pollock testified that he analyzed six DNA loci from a portion of the backseat cover, all of which were "consistent with semen having come from Anthony Wainwright on Exhibit

[1] The victim had blood type A, while both Petitioner and Hamilton had blood type O. (App. at 267).

75-B." (Id. at 36) (quoting R. at 3155). Finally, Michael DeGuglielmo, a DNA analyst with a private company, testified that he examined two other samples of fabric from the seat cover. In the first sample, he identified DNA from Richard Hamilton but not Petitioner. (Id.) (citing R. at 3217). In the second sample, DeGuglielmo testified there was "a mixture of DNA's in the sperm fraction of the sample that are consistent with DNA from Ricky Hamilton and Anthony Wainwright." (Id. at 37) (citing R. at 3221).

On direct appeal, Petitioner raised nine grounds for reversing his conviction and death sentence. Wainwright I, 704 So. 2d at 513 n.4.[2] The Florida Supreme Court rejected each one. Id. at 513-16. The court added "that competent substantial evidence supports the conviction for first-degree murder and sentence of death and that the death sentence is proportionate." Id. at 516. Thus, the Florida Supreme Court affirmed the conviction and capital sentence. Petitioner sought certiorari review from the United States Supreme Court, which the Supreme Court denied on May 18, 1998. Wainwright v. Florida, 523 U.S. 1127 (1998).

[2] Petitioner argued that the trial court erred by: (1) allowing Petitioner's pre-trial statements to be introduced; (2) allowing three DNA loci to be introduced; (3) allowing the case to be tried jointly with separate juries; (4) admitting evidence of other crimes; (5) removing a juror on the tenth day of trial; (6) admitting testimony that Gayheart routinely picked her kids up from preschool; (7) overlooking the State's failure to establish the corpus delicti of sexual assault; (8) admitting Petitioner's statement to police that he had AIDS; and (9) imposing the mandatory minimum portions of the noncapital sentences, and retaining jurisdiction over the life sentences.

Petitioner then filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 in which he raised 14 claims. Wainwright v. State, 896 So. 2d 695, 697 n.1 (Fla. 2004) ("Wainwright II").[3] The trial court denied relief on all grounds, after which Petitioner filed an appeal and an original petition for writ of habeas corpus with the Florida Supreme Court. See id. Joseph Hobson, who later served as Petitioner's federal habeas counsel, was appointed to argue the appeal. The Florida Supreme Court affirmed the denial of collateral relief and denied the petition for a writ of habeas corpus. Id. at 704. The Florida Supreme Court denied Petitioner's motion for rehearing on March 1, 2005, and issued the mandate on March 17, 2005. After the mandate issued, Petitioner had six days remaining, or until March 23, 2005, to timely file a

[3] Petitioner's Rule 3.850 Motion argued: (1) trial counsel was ineffective regarding the admission of additional DNA evidence; (2) trial counsel was ineffective regarding Petitioner's statements and admissions; (3) trial counsel was ineffective regarding evidence of Petitioner's out-of-state crimes; (4) trial counsel was ineffective regarding a microphone discovered in Petitioner's jail cell; (5) trial counsel was ineffective for failing to object to the penalty phase instructions on the aggravators; (6) trial counsel was ineffective for failing to object to the prosecutor's argument at the guilt and penalty phases; (7) trial counsel was ineffective for failing to maintain a proper attorney-client relationship, failing to ensure that Petitioner received adequate mental health evaluations and failing to investigate and present additional mitigating evidence; (8) trial counsel was ineffective for allowing the victim's family to testify at sentencing; (9) trial counsel was ineffective for failing to object to an alleged Caldwell v. Mississippi, 472 U.S. 320 (1985), error; (10) initial counsel, Victor Africano, was ineffective in his pretrial representation of Petitioner; (11) trial counsel was ineffective for failing to be prepared for trial; (12) trial counsel was ineffective for introducing statements of the codefendant; (13) trial counsel was ineffective for committing an alleged discovery violation; and (14) trial counsel's illness during trial rendered him ineffective.

federal petition for writ of habeas corpus. (See Doc. 29 at 7-8).

Petitioner filed his § 2254 habeas petition in this Court on March 29, 2005 (he later submitted a corrected petition on May 23, 2005 (Doc. 6)). Respondent moved for summary judgment, arguing that the petition was untimely because AEDPA's statute of limitations lapsed a few days before it was filed. (Doc. 16; Doc. 16-1). In response, Petitioner argued that the petition was timely because (1) AEDPA's limitations period only began to run on May 26, 1998, when the Florida Supreme Court docketed the United States Supreme Court's denial of certiorari review, (2) AEDPA's statute of limitations was tolled during the pendency of public records requests under Fla. R. Crim. P. 3.852 and Florida Statutes Chapter 119, and (3) Petitioner was entitled to equitable tolling because the Florida Supreme Court mailed a copy of the order denying the motion for rehearing to the wrong address. (Doc. 24). If Petitioner's first argument alone had been correct, he would have had eight additional days to file the petition, and the petition would have been filed with two days to spare.[4] However, this Court rejected the arguments for tolling and determined that the petition was untimely by six days. (Doc. 29 at 7-10). The Court also noted "that attorney negligence does not warrant equitable tolling." (Id. at 8-9) (quoting Diaz v. Sec'y, Dept. of Corr., 362 F.3d 698, 700-01 (11th Cir. 2004)). As such, the

[4] The record is unclear exactly how many days would have been tolled had Petitioner's second and third tolling arguments been correct.

Court dismissed the habeas petition with prejudice. (Id. at 11). The Eleventh Circuit Court of Appeals affirmed the dismissal on November 13, 2007. Wainwright III, 537 F.3d 1282.

While Petitioner's federal appeal was pending, he returned to state court and filed a successive motion for post-conviction relief under Rule 3.851. Petitioner claimed to have newly discovered evidence of his innocence. Petitioner "alleged that in a written statement his codefendant Richard Hamilton asserted that 'Wainwright was not involved in any manner of [sic] the sexual assault committed upon the victim in this case.'" Wainwright v. State, 2 So. 3d 948, 949–50 (Fla. 2008) ("Wainwright IV").[5] The trial court denied relief and the Florida Supreme Court affirmed. Id. at 950. The Florida Supreme Court ruled that "given the totality of the evidence, Hamilton's statement would not raise reasonable doubt about the convictions or undermine any of the six aggravators found in this case." Id. at 952. The court explained that ample other evidence, including forensic evidence, Petitioner's own confessions, and his convictions for kidnapping and armed robbery, supported the first-degree murder conviction and death sentence. Id. at 950-52 & n.2.[6]

[5] Based on Hamilton's statement, Petitioner also filed a pro se application in the Eleventh Circuit Court of Appeals to file a successive habeas petition. The Eleventh Circuit denied the application on May 7, 2009. (Doc. 52 at 62).

[6] The Florida Supreme Court added that even if Petitioner did not rape Gayheart himself, Petitioner still would have been convicted of sexual battery as a principal because he admitted to driving Gayheart's vehicle while Hamilton raped her in the backseat, making Petitioner liable for aiding and abetting. Id.

Over the next few years, Petitioner filed five more successive state-court motions for post-conviction relief, but the trial court denied or dismissed each one. Each time, the Florida Supreme Court affirmed or Petitioner did not appeal. Wainwright v. State, No. SC15-2280, 2017 WL 394509 (Fla. Jan. 30, 2017) (affirming denial of sixth successive Rule 3.851 motion; recounting that Petitioner was also denied relief on each of his previous post-conviction motions); Wainwright v. State, 43 So. 3d 45 (Fla. 2010) (affirming denial of second successive Rule 3.851 motion based on newly discovered records and neuropsychological evidence).

On June 5, 2018 – 12 years after the Court dismissed the habeas petition – CHU North filed a motion to be appointed as counsel in this case. (Doc. 42). The Court granted the motion on June 22, 2018. (Doc. 47). Almost exactly one year later, on June 21, 2019, CHU North filed the instant Rule 60(b)(6) Motion.

II. The Rule 60(b)(6) Motion

The Rule 60(b)(6) Motion raises two general issues. First, in Part V, Petitioner contends that the Court should reconsider equitable tolling under Rule 60(b)(6). (Doc. 52 at 68-82). Petitioner raises four arguments for doing so: (1) federal habeas counsel, Joseph Hobson, had a conflict of interest because "[m]issing [AEDPA's] deadline necessarily implicated [counsel's] own conduct,

at 951 n.2 (citing § 777.011, Fla. Stat (1993); State v. Williams, 637 So. 2d 45, 46 (Fla. 2d DCA 1994)).

and any argument that equitable tolling was warranted required him to … explain why the deadline was missed," but Mr. Hobson avoided discussion of his own performance; (2) Petitioner would have been entitled to equitable tolling because Mr. Hobson lied to Petitioner about working on the habeas petition and about the statute of limitations; (3) Mr. Hobson perpetrated fraud on the Court by arguing Petitioner was entitled to equitable tolling based on the Florida Supreme Court mailing a copy of the order denying rehearing to the wrong address; and (4) Petitioner acted diligently to protect his rights.[7]

Next, in Part VI, Petitioner argues "there are independent grounds for granting Mr. Wainwright relief from his conviction and death sentence that are cognizable in this Rule 60(b)(6) motion by virtue of the actual innocence

[7] Arguments (1) and (3) raise claims for Rule 60(b) relief but not equitable tolling. An allegation of conflicted counsel or fraud on the habeas court alleges a defect in the collateral proceedings, which may properly be raised in a Rule 60(b) motion. Gonzalez v. Crosby, 545 U.S. 524, 532 n.5 (2005) (fraud on the court may properly be raised in a Rule 60(b) motion); Clark v. Davis, 850 F.3d 770, 779-80 (5th Cir. 2017) (habeas counsel's conflict of interest was a defect in the collateral proceedings). But arguments (1) and (3) are not claims for equitable tolling because the conflict of interest and alleged fraud on the court arose only after Petitioner missed the AEDPA deadline. See Downs v. McNeil, 520 F.3d 1311, 1325 (11th Cir. 2008) ("We note generally that equitable tolling would not be available for any period of time following [the date] when Downs' federal limitations period expired.") (citing Moore v. Crosby, 321 F.3d 1377, 1381 (11th Cir. 2003)). Missing the AEDPA deadline caused the conflict of interest and led to the fraud-on-the-court contention, not vice versa.

Arguments (2) and (4) go to the issue of equitable tolling itself, because they allege that an extraordinary circumstance prevented Petitioner from timely filing and that Petitioner exercised due diligence. Holland v. Florida, 560 U.S. 631, 649 (2010) ("Holland II").

gateway." (Doc. 52 at 82) (capitalization altered); (id. at 82-181). Petitioner claims, for the first time in these proceedings, that he is actually innocent of the offense. He contends there is new evidence of his innocence in the form of the opinion of Candy Zuleger, a DNA analyst who challenges the testing conducted by DNA analysts Pollock and DeGuglielmo, and who disputes the State's presentation of DNA evidence at trial. (App. at 261-68). Petitioner asserts that the newly discovered evidence is an "extraordinary circumstance" that opens the door for him to raise 12 new grounds for habeas relief.[8]

[8] Petitioner seeks to add the following 12 grounds: (1) the trial court violated Petitioner's right to be sentenced by an impartial and adequate decision-maker; (2) Petitioner was sentenced to death under a sentencing scheme that violated his Sixth and Eighth Amendment rights; (3) the trial court sentenced Petitioner to death based on unreliable and inflammatory information that was unknown to Petitioner or his counsel, and which the trial court did not weigh impartially; (4) trial counsel violated Petitioner's rights under McCoy v. Louisiana, 138 S. Ct. 1500 (2018), by conceding guilt; (5) Petitioner's death sentence is precluded by Roper v. Simmons, 543 U.S. 551 (2005), because, although he was 23 years old when he committed the murder, he had the maturity of a juvenile; (6) Petitioner was not competent to stand trial because of post-traumatic stress disorder and major depressive disorder; (7) the State's inconsistent positions violated Petitioner's right to due process; (8) trial counsel gave ineffective assistance in the penalty phase, and state collateral counsel was ineffective for not investigating the matter; (9) trial counsel violated Petitioner's rights by disparaging his character to the judge; (10) trial counsel failed to advise Petitioner of his right to testify; (11) Petitioner's trial rights were violated because he was tried and sentenced to death by a jury that included one person who was "functionally illiterate" and three people who were crime victims; and (12) Petitioner's conviction is unreliable because of the presentation of allegedly misleading DNA evidence.

III. Applicable Law

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for such reasons as mistake, excusable neglect, newly discovered evidence, or fraud on the court. Fed. R. Civ. P. 60(b). Rule 60(b) also includes a catch-all provision, which allows a court to relieve a party from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Petitioner relies on the catch-all provision to vacate the 2006 order dismissing his habeas petition.

"Whether to grant relief under Rule 60(b) is 'a matter for the district court's sound discretion.'" Lambrix v. Sec'y, Fla. Dept. of Corr., 851 F.3d 1158, 1170 (11th Cir. 2017) (quoting Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1317 (11th Cir. 2000)). "Rule 60(b) vests wide discretion in courts, but [the Supreme Court has] held that relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" Buck v. Davis, 137 S. Ct. 759, 777 (2017) (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005)); see also Booker v. Singletary, 90 F.3d 440, 442 (11th Cir. 1996) (explaining that relief from "judgment under Rule 60(b)(6) is an extraordinary remedy."). "Such circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S. at 535.

In habeas cases, a district court must ensure that a Rule 60(b) motion is not, in substance, an unauthorized successive petition. "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." Gonzalez, 545 U.S. at 531 (citing 28 U.S.C. § 2244(b)(2)). "A motion that seeks to add a new ground for relief" or which "attacks the federal court's previous resolution of a claim on the merits … is effectively indistinguishable from" a successive petition. Id. at 532 (footnote and emphasis omitted). "That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. (footnote omitted). "Fraud on the federal habeas court is one example of such a defect." Id. at 532 n.5. Likewise, a Rule 60(b) motion is permissible when it "merely asserts that a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. at 532 n.4.

If the district court determines that a Rule 60(b) motion challenges a defect in the collateral proceedings, the court has jurisdiction to rule on the motion. See id. at 533. But if the district court determines that the Rule 60(b)

motion is effectively an unauthorized successive petition, the district court must dismiss the motion as successive. Franqui v. Florida, 638 F.3d 1368, 1374-75 (11th Cir. 2011). Before a district court may rule on a successive petition, a petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Without pre-authorization, "the District Court lack[s] subject-matter jurisdiction even to consider Petitioner's claim[s]." Franqui, 638 F.3d at 1375 (citing Williams v. Chatman, 510 F.3d 1290, 1295 (11th Cir. 2007)).

IV. Analysis

A. Petitioner is not entitled to equitable tolling or Rule 60(b)(6) relief.

Before discussing equitable tolling itself, the Court accepts Petitioner's argument that Mr. Hobson developed a conflict of interest after he missed the AEDPA deadline. (Doc. 52 at 69-73). Despite filing the habeas petition late, Mr. Hobson was also responsible for arguing equitable tolling, which would have required him to assess his own conduct. Although Mr. Hobson raised other arguments for tolling the limitations period, he raised no theory of equitable tolling based on his own performance.[9] The Supreme Court has recognized that

[9] Because the conflict of interest leads the Court to examine the merits of equitable tolling, and because the Court ultimately finds no merit in Petitioner's claim for equitable tolling, the Court need not resolve Petitioner's other claim

a habeas attorney who misses AEDPA's deadline has a conflict of interest regarding equitable tolling. Christeson v. Roper, 135 S. Ct. 891, 894 (2015). As the Court explained:

> Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct." Holland v. Florida, 560 U.S. 631, 651–652, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). Advancing such a claim would have required [habeas counsel] to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. See Restatement (Third) of Law Governing Lawyers § 125 (1998). Thus, as we observed in a similar context in Maples v. Thomas, 565 U.S. 266, 285-286, n.8, 132 S. Ct. 912, 925, n.8, 181 L. Ed. 2d 807 (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 attorneys had abandoned him."

Christeson, 135 S. Ct. at 894.

"Capital habeas petitioners have a statutory right to conflict-free counsel," Clark, 850 F.3d at 779 & n.41 (collecting cases), something Petitioner was denied with respect to equitable tolling in the previous habeas proceeding. Moreover, "a Rule 60(b) motion premised on federal habeas counsel's conflict of interest … attacks not the substance of the federal court's resolution of the claim o[n] the merits, but asserts that [habeas counsel] had a conflict of interest that resulted in a defect in the integrity of the proceedings." Id. at 779–80. "There can be no question" that a petitioner has grounds to file a Rule 60(b)

for Rule 60(b)(6) relief: whether Mr. Hobson committed fraud on the court by making a spurious argument for equitable tolling.

motion when "his initial federal habeas counsel … had a conflict of interest that precluded him from asserting his own ineffectiveness…." Pruett v. Stephens, 608 F. App'x 182, 186 (5th Cir. 2015). Yet, "having conflicted counsel is not enough to obtain relief under Rule 60(b)." In re Johnson, 935 F.3d 284, 290 (5th Cir. 2019) (citing Raby v. Davis, 907 F.3d 880, 884 (5th Cir. 2018)). A petitioner must satisfy another "significant element" to show that extraordinary circumstances exist for Rule 60(b)(6) purposes: the conflict must have caused the petitioner to forfeit a claim that had "some merit," because the existence of "a good claim or defense … is a precondition of Rule 60(b)(6) relief." Id. (citing Buck, 137 S. Ct. at 780). Accordingly, to decide if Rule 60(b)(6) relief is appropriate, the Court must examine whether there is some merit to the equitable tolling claims that Mr. Hobson failed to raise.

Equitable tolling "is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" Cadet v. Fla. Dept. of Corr., 853 F.3d 1216, 1221 (11th Cir. 2017) (quoting Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009)). "To warrant that extraordinary remedy, a petitioner must demonstrate '(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 Holland II, 560 U.S. at 649). "The burden of proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner." San Martin v. McNeil, 633 F.3d 1257, 1268 (11th

Cir. 2011). Garden-variety attorney negligence, "and even gross negligence or recklessness, is not an extraordinary circumstance" that will justify relief. Thomas v. Att'y Gen. of Fla., 795 F.3d 1286, 1291 (11th Cir. 2015); see also Holland II, 560 U.S. at 651-52 (a "garden variety" claim of neglect, such as a miscalculation that causes a lawyer to miss a filing deadline, does not warrant equitable tolling). Something more is required, such as attorney abandonment, Maples, 132 S. Ct. at 922-24, or bad faith, dishonesty, divided loyalty, or mental impairment, Thomas, 795 F.3d at 1294 (citing Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008) ("Holland I")).

Petitioner does not allege that Mr. Hobson abandoned him, or that he missed the AEDPA deadline because of bad faith, divided loyalty, or mental impairment. Rather, Petitioner claims that attorney dishonesty was the extraordinary circumstance that prevented him from timely filing. (Doc. 52 at 73) ("Where an attorney lies to his client, equitable tolling can be warranted." (citing United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2003); United States v. Wynn, 292 F.3d 226, 230 (5th Cir. 2002))). According to Petitioner, Mr. Hobson (1) lied to Petitioner about preparing the habeas petition, and (2) lied to Petitioner about AEDPA's statute of limitations. (Id. at 73-76).[10] The facts

[10] A "lie" is "[a] false statement or other indication that is made with knowledge of its falsity; an untruthful communication intended to deceive." Black's Law Dictionary (11th ed. 2019) (emphasis added); accord Riggs, 314 F.3d at 799 ("An attorney's intentional deceit could warrant equitable tolling….) (emphasis added) (citation omitted); Downs, 520 F.3d at 1323 (remanding for a

alleged in support of these accusations are that the petition contained typographical errors and few case citations, that Mr. Hobson did not mail Petitioner a copy until two months after it was filed, and that Mr. Hobson's misinterpretation of the AEDPA deadline had no basis in law or fact. However, the record and alleged facts do not support the accusations of attorney dishonesty. To borrow Respondent's words, "[w]hat Petitioner claims are 'lies' by his counsel instead are manifestations of counsel's misapprehensions of AEDPA tolling law which are unfortunately an all too common occurrence." (Doc. 59 at 4) (citations omitted).

The record shows that Mr. Hobson missed the AEDPA deadline because he misunderstood the federal statute of limitations.[11] That point is reflected by the fact that Mr. Hobson consistently expressed the same misconceptions about § 2244(d) in his court filings and in his private letters alike. In responding to

hearing on equitable tolling where "counsel's alleged behavior ran the gamut from acts of mere negligence … to acts of outright willful deceit.") (emphasis added). Thus, attorney dishonesty has an element of willfulness.

The accusation that Mr. Hobson "lied" is a conclusion, not a fact. See Broughton v. School Bd. of Escambia Cnty., Fla., 540 F. App'x 907, 911 (11th Cir. 2013) (characterizing statements in affidavits that a teacher "lied and mistreated" the plaintiff's son as "conclusions."). Thus, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

[11] The Court has determined that the record is sufficiently developed and no evidentiary hearing regarding equitable tolling is required. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

the State's motion for summary judgment, Mr. Hobson argued that the habeas petition was timely because, among other reasons, (1) the limitations period was tolled by the filing of public records requests (Doc. 24 at ¶¶ 31-37), and (2) the limitations period only began to run on May 26, 1998, when the Florida Supreme Court docketed the United States Supreme Court's denial of certiorari review (id. at ¶¶ 38-47). Mr. Hobson expressed the same beliefs in a letter to Petitioner, dated May 25, 2005:

> I think their motion [the State's motion for summary judgment] is flawed in two respects. One, the grounds they are trying to assert as to timeliness are properly asserted in an *affirmative defense* not a motion for summary judgment. Two, the writ **is timely**. The year period from the denial of cert by the Florida Supreme Court [sic] is tolled by the filing for public records requests and, regardless, the actual date the year period began to run was March 26, 1998 [sic], which was when the actual denial of writ was filed in the Florida Supreme Court.

(App. at 60) (italics and bold in original).[12] Unfortunately, such misconceptions are not extraordinary. Mr. Hobson is not the only attorney to have thought that AEDPA's limitations period did not start running until the Florida Supreme Court docketed a denial of certiorari review, San Martin, 633 F.3d at 1268, or that filing a discovery motion tolled the statute of limitations, see Brown v.

[12] Mr. Hobson probably meant "[t]he year period from the denial of cert by the United States Supreme Court," not the Florida Supreme Court. He also likely meant to say May 26, 1998, instead of March 26, 1998. May 26, 1998, was the date on which the Florida Supreme Court docketed the denial of certiorari review, which is the date on which Mr. Hobson argued that the limitations period began to run. (Doc. 24 at ¶ 38).

Sec'y, Dept. of Corr., 530 F.3d 1335, 1337-38 (11th Cir. 2008) (petitioner argued that the filing of a motion for DNA testing under Fla. R. Crim. P. 3.853 tolled the limitations period). However, Mr. Hobson's court filings and contemporaneous private letters show that he genuinely – but mistakenly – held these beliefs.

Petitioner tries to reframe Mr. Hobson's misinterpretation of the law as a lie because the misinterpretation had no basis in law or fact, and because Mr. Hobson communicated his false beliefs to Petitioner. (Doc. 52 at 75-76). But nearly anytime a lawyer miscalculates or misinterprets AEDPA's limitations period, he has an opinion about the deadline that, by definition, has no basis in law or fact. And any attorney who communicates with his client is bound to communicate some opinion about the deadline. If the Court were to accept Petitioner's recasting of the facts, many instances of attorney negligence like this one would morph into cases of attorney dishonesty. That cannot be so, because it is well established that "a garden variety claim of excusable neglect," such as "a simple 'miscalculation' that leads a lawyer to miss a filing deadline," does not warrant equitable tolling. Holland II, 560 U.S. at 651–52 (citations and quotation marks omitted); see also Lawrence v. Florida, 549 U.S. 327, 336-37 (2007); Cadet, 853 F.3d at 1221-37. Indeed, these facts resemble what happened in Cadet. In that case, habeas counsel

> mistakenly and repeatedly assured Cadet that they had one year

> from the resolution of his state post-conviction motion to file a federal petition. Goodman based those assurances on his own misreading of § 2244(d)(1). Reading the statutory provision is all that Goodman did to determine how to calculate the running of the limitations period. He did not research the matter.

Id. at 1219. Like Mr. Hobson, Cadet's attorney's interpretation of AEDPA had no basis in the law, and similar to Mr. Hobson, Cadet's attorney gave his client mistaken assurances based on that interpretation. However, like Mr. Hobson, Cadet's attorney's misunderstanding of the law was sincere, even if it was unreasonable. Id. at 1235-36, 1237. The Eleventh Circuit held that such negligence did not amount to an extraordinary circumstance that prevented Cadet from timely filing. Id. at 1235-36.

The Court "assume[s] … that attorney [Hobson's] sincere but persistent misreading of § 2244(d) … amounted to gross negligence." Id. at 1225-26. However, "an attorney's mistake in calculating the statute of limitations period, even when caused by the failure to do rudimentary legal research, does not justify equitable tolling." Id. at 1221 (citing Lawrence, 549 U.S. at 336-37). "[A]n attorney's miscalculation of the filing deadline, inadvertent failure to file a § 2254 petition on time, or failure 'to do the requisite research to determine the applicable deadline' are all types of errors that are 'constructively attributable to the client.'" Id. at 1235 (citing Holland II, 560 U.S. at 657 (Alito, J., concurring)).

[T]he Supreme Court has held[ ] that the fact that an attorney

> missed a filing deadline because he failed to do even rudimentary research, is a type of "miscalculation [that] is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."

Id. at 1232 (quoting Lawrence, 549 U.S. at 336-37; citing Holland II, 560 U.S. at 651-52).[13] Based on the record and the alleged facts, that is the kind of attorney error that occurred here.

The record also refutes the accusation that Mr. Hobson "lied" when he assured Petitioner that he would work on filing a habeas petition. (Doc. 52 at 73-75; see also App. at 51-52, 53-54, 57). Mr. Hobson did in fact file a 73-page habeas petition on March 29, 2005. (Doc. 1). The petition raised eleven grounds for relief based on ineffective assistance of counsel and trial court error, stated the factual bases for each claim, and cited relevant constitutional provisions.[14]

[13] That Mr. Hobson pivoted to other arguments for equitable tolling on appeal, Wainwright III, 537 F.3d at 1285-86, also does not indicate that Mr. Hobson was willfully deceitful. (See Doc. 59 at 17)

[14] In the federal habeas petition, Mr. Hobson claimed: (1) trial counsel gave ineffective assistance by failing to preserve a claim that the State improperly disclosed DNA evidence too late; (2) trial counsel failed to preserve a claim that Petitioner's confessions to Sheriff Reid were improperly admitted; (3) trial counsel gave ineffective assistance because he allowed collateral crimes to become a feature of the trial; (4) trial counsel gave ineffective assistance because he failed to move for a mistrial based on a microphone being placed in Petitioner's jail cell; (5) counsel gave ineffective assistance at sentencing by failing to effectively present mitigation evidence; (6) Petitioner's Sixth, Eighth, and Fourteenth Amendment rights were violated by the lack of reliable adversarial testing and "a breakdown of the adversarial system"; (7) trial counsel, Victor Africano, was ineffective in his pretrial representation because he allowed Petitioner to cooperate with law enforcement without securing a plea deal; (8) the trial court erred by removing a juror mid-trial, after it was discovered that the juror had criminal charges pending; (9) trial counsel gave

Though Mr. Hobson missed the deadline by six days because he misunderstood the law, the petition would have been on time according to Mr. Hobson's misinterpretation of § 2244(d)(1)'s start date, implying that he subjectively intended to file the petition on time. Additionally, the letters themselves show that Mr. Hobson was "eagerly looking forward to the preparation of [the] Federal Habeas Corpus petition," (App. at 53), since he would "be able to draft and conceptualize this pleading from the inception, unlike the previous Rule 3.850 and the Brief which I just got done arguing," (id. at 51). The record contains Mr. Hobson's personal agenda for Wednesday, March 16, 2005, five days after he sent a letter assuring Petitioner that he would attend to filing a federal habeas petition. (App. at 57-59). Item 12 on the agenda states: "Anthony Floyd Wainwright look at deadlines and 2 hours of Box review." (Id. at 58). It is unclear to what extent Mr. Hobson completed this agenda item, but together with the rest of the record, it reinforces the conclusion that Mr. Hobson's intentions were sincere, not that he lied to Petitioner about investigating and filing the habeas petition.

ineffective assistance by failing to preserve issues pertaining to jury instructions, prosecutorial misconduct, and improper aggravating factors; (10) the trial court erred by admitting testimony that the victim routinely picked up her children from daycare, which was unduly prejudicial; and (11) the trial court violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights by allowing him to be tried jointly with his co-defendant before separate juries. (Doc. 1).

Ultimately, Petitioner's accusation that Mr. Hobson "lied" about working on the petition relies on the fact that the petition contained typographical and factual errors and only four case citations, and that Mr. Hobson did not mail Petitioner a copy until two months after it was filed. (Doc. 52 at 75).[15] These shortcomings suggest that Mr. Hobson was careless or neglectful. However, they do not demonstrate that Mr. Hobson willfully misled his client about working on the petition. Cf. Downs, 520 F.3d at 1322-23 (equitable tolling may have been warranted where "counsel's alleged behavior ran the gamut from acts of mere negligence … to acts of outright willful deceit," including "counsel's overt deception in representing they had filed a tolling petition in state court when they had not in fact done so.") (emphasis added). Although Mr. Hobson was regrettably negligent, the record and the alleged facts offer no support for the accusation that Mr. Hobson intentionally deceived Petitioner.

It is beyond troubling that Petitioner's habeas counsel could not perform the most basic step of filing his federal habeas petition on time, especially in a capital case.[16] However, because the record and the alleged facts do not show

[15] The Court disagrees that the factual errors identified in the petition (Doc. 52 at 54 n.16) were extraordinary. While the errors indicate sloppiness, they would not have affected the merits of Petitioner's claims for relief. Additionally, the paucity of case law citations is consistent with the standard § 2254 form, AO Form 241, which instructs petitioners (or their attorneys) not to "argue or cite law. Just state the specific facts that support your claim." E.g., AO Form 241 at p. 6, ¶ 12(a).

[16] This Court has written a number of opinions on equitable tolling in federal capital habeas cases, including recently in Thomas v. Fla. Att'y General,

that an "extraordinary circumstance" prevented Petitioner from timely filing, there is no merit to Petitioner's claims for equitable tolling.[17] Consequently, there is also no basis for Rule 60(b)(6) relief. See In re Johnson, 935 F.3d at 290 (for a conflict of interest to warrant Rule 60(b)(6) relief, the petitioner must also show that the defaulted claim had "some merit.").

B. The Court lacks jurisdiction over Part VI of the motion.

Part VI of the Rule 60(b)(6) Motion is effectively an unauthorized second or successive petition, which the Court lacks jurisdiction to entertain. Franqui, 638 F.3d at 1374-75. As stated earlier, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." Gonzalez, 545 U.S. at 531 (citing 28 U.S.C. § 2244(b)(2)). That is exactly what Part VI attempts to accomplish. Petitioner argues "there are independent grounds for granting Mr. Wainwright

No. 3:03-cv-237-J-32PDB, 2018 WL 733631 (M.D. Fla. Feb. 6, 2018). The Thomas case, in which this Court found equitable tolling, is currently on appeal in the Eleventh Circuit. Thomas v. Fla. Att'y General, No. 13–14635 (11th Cir.). In Thomas, the parties stipulated that Petitioner's federal habeas attorney deliberately missed the filing deadline to set up a constitutional challenge to AEDPA's statute of limitations. Thomas, 2018 WL 733631, at *11, 16. The situation here is far different.

[17] Because of this ruling, the Court need not determine whether Petitioner pursued his federal habeas rights diligently.

relief from his conviction and death sentence that are cognizable in this Rule 60(b)(6) motion by virtue of the actual innocence gateway." (Doc. 52 at 82) (capitalization altered; emphasis added). By his own admission, Petitioner seeks to raise new grounds attacking the conviction and sentence itself, not merely some defect in the previous federal habeas proceedings. Gonzalez forbids such a use of Rule 60(b).

Nor does Petitioner "merely assert[ ] that a previous ruling which precluded a merits determination was in error." Gonzalez, 545 U.S. at 532 n.4. Petitioner does not argue in Part VI that the Court misapplied the statute of limitations, miscalculated the deadline, or reached the wrong result because of a defect in the collateral proceedings. Instead, Petitioner raises a fresh claim of actual innocence, both to overcome the statute of limitations and to reopen the proceedings. However, an actual innocence gateway claim "seeks an equitable exception to § 2244(d)(1)…." McQuiggin v. Perkins, 569 U.S. 383, 392 (2013) (emphasis in original) (citing Rivas v. Fischer, 687 F.3d 514, 547 n.42 (2d Cir. 2012) (distinguishing actual innocence from equitable tolling)). By its nature, a newly-raised actual innocence claim is not an argument "that a previous ruling which precluded a merits determination was in error." Gonzalez, 545 U.S. at

532 n.4 (emphasis added). Accordingly, Petitioner's new actual innocence argument is not permissible under Rule 60(b)(6) and Gonzalez.[18]

Finally, while the actual innocence exception can overcome AEDPA's statute of limitations, it cannot be used to circumvent AEDPA's restrictions on second or successive petitions, even if the first petition was dismissed as time-barred. In re Bolin, 811 F.3d 403, 411 (11th Cir. 2016). Therefore, the Court has no jurisdiction to rule on Part VI of the motion, which is effectively an unauthorized successive petition.[19]

Accordingly, it is hereby **ORDERED:**

[18] Petitioner cites Satterfield v. Dist. Att'y, Philadelphia, 872 F.3d 152 (3d Cir. 2017), for the proposition that a petitioner can raise actual innocence to revive an untimely habeas petition under Rule 60(b)(6). Satterfield is not binding, but it is also distinguishable in at least two ways. First, the petitioner in Satterfield alleged actual innocence in his original habeas petition, 872 F.3d at 157, but at the time, actual innocence was not yet an exception to the statute of limitations, id. at 160. Had McQuiggin been in place, it could have altered the disposition of Satterfield's original petition. Id. at 159. Here by contrast, Petitioner did not raise actual innocence in the original petition; he only alleged actual innocence for the first time in the Rule 60(b)(6) Motion. Second, the petitioner in Satterfield merely sought to reopen the merits of his original habeas petition, whereas Petitioner seeks to use Rule 60(b)(6) to add 12 new grounds for relief. Thus, Petitioner's Rule 60(b)(6) Motion falls squarely within the scope of what Gonzalez forbade: "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction … [which] circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." Gonzalez, 545 U.S. at 531.

[19] Because of the Court's rulings, there is no need to address Respondent's alternative argument that the Rule 60(b)(6) Motion was not filed within a reasonable time.

1. Part VI of Petitioner's Rule 60(b)(6) Motion (Doc. 52) is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction. Petitioner may apply to the Eleventh Circuit Court of Appeals for permission to file a successive habeas petition on these grounds. 28 U.S.C. § 2244(b).
2. The Rule 60(b)(6) Motion is otherwise **DENIED.**
3. If Petitioner appeals this Order, the Court denies a certificate of appealability.

DONE AND ORDERED at Jacksonville, Florida this 27th day of January, 2020.

TIMOTHY J. CORRIGAN
United States District Judge

lc 19

Copies:
Counsel of record

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 27, 2023

Ms. Katherine Ann Blair
Federal Public Defender
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301

Re: Anthony F. Wainwright
v. Ricky D. Dixon, Secretary, Florida Department of Corrections, et al.
Application No. 23A586

Dear Ms. Blair:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 27, 2023, extended the time to and including February 10, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Rashonda Garner
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Ms. Katherine Ann Blair
Federal Public Defender
227 N. Bronough St., Ste. 4200
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Clerk
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