IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2017 TERM

LARRY GENE BURKS PETITIONER

V.

WENDY KELLEY, Director
Arkansas Department of Correction RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549 (2010), this Court held that federal courts must exercise flexibility and avoid mechanical rules when deciding issues of equitable tolling in habeas corpus cases Most equitable tolling cases arise in the context of collateral challenges to a conviction. This case arises from the denial of a direct appeal, which Burks was illegally denied when the presiding judge permitted Burks's attorney to abandon him in violation of an explicit Arkansas rule prohibiting such abandonment. The question presented here may be stated thus:

Under what circumstances should a federal court exercise equitable tolling when the reason for the delayed filing of a habeas petition is the denial of a direct appeal arising from the denial of appellate counsel in blatant disregard of Arkansas law?

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TABLE OF AUTHORITIES

Other authorities

CITATION TO OPINION BELOW

This case is cited below as *Burks v. Kelley,* 881 F.3d 663 (8^{th} Cir. 2018). A copy appears in the Appendix.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The opinion of the Court of Appeals was issued on February 5, 2018. Burks filed a pro se timely petition for rehearing, which was denied on March 23, 2018. This petition, being filed within 90 days thereof, is timely. The opinion of the Court of Appeals is in the Appendix at A. The order denying rehearing appears in the Appendix at B..

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall ..... have the Assistance of Counsel for his defence.

Fourteenth Amendment

.....nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with

respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Rule 16, Arkansas Rules of Appellate Procedure— Criminal

(a) Trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in counsel is permitted to withdraw in the interest of justice or for other sufficient cau the interest of justice or for other sufficient cause. After the notice of appeal of a judgment of conviction has been filed, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.
(b) If court appointed se in a direct appeal of a conviction or in an appeal in a postconviction proceeding under Ark. R. Crim. P. 37.5, new counsel shall be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal.
(c) If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause from an appeal in a postconviction proceeding other than a postconviction proceeding under Ark. R. Crim P. 37.5, new counsel may be appointed in the discretion of the court exercising jurisdiction over the matter of counsel's withdrawal.
(d) If pursuant to Ark. Code Ann. 16-13-506(b), the state has paid the court reporter for the transcript that is filed as part of the record with the appellate court and the defendant thereafter moves to substitute retained counsel for appointed counsel, the court may, as a condition of granting the motion, require the defendant to reimburse the state for the cost of the transcript.

STATEMENT OF THE CASE

In 2003, one Steven Evans was convicted of murder in the second degree in an Arkansas trial court. His trial lawyer was allowed to be relieved but no new attorney was appointed. Evans filed a motion for belated appeal, which the Arkansas Supreme Court originally denied. But upon reconsideration, that court reversed itself and held that Evans was entitled to an appeal and entitled to counsel on appeal. In *Evans v. State*, 356 Ark. 366, 151 S.W.3d 314 (2004), the Supreme Court wrote:

> It is not clear why the circuit court did not appoint an attorney when it relieved counsel. In failing to appoint counsel after the motion for new trial was denied, the court violated Arkansas Appellate Procedure - Criminal Rule 16(b) (2000). See *Wrenn v. State*, 355 Ark. 558, 141 S.W.3d 362 (Ark. 2004) (per curiam).
>
> Rule 16(b) provides in pertinent part:
>
>> If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause in a direct appeal of a conviction ... new counsel *shall* be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal. (emphasis added).
>
> Here, appointed counsel was allowed to withdraw while the court had jurisdiction of the case, leaving a convicted defendant to fend for himself within the time allowed for a notice of appeal to be filed. It must be stressed that when the trial court relieves counsel within the thirty-day period allowed to file a notice of appeal, the court has the obligation to appoint other counsel promptly so that the convicted defendant will be represented by an

> attorney if he elects to proceed with a direct appeal of the judgment of conviction. If counsel is not appointed, the defendant's right to proceed with a first appeal as a matter of right is impermissibly curtailed in that the defendant has no attorney to whom he may communicate his desire to appeal so that a timely notice can be filed. The direct appeal of a conviction is a matter of right, and a criminal defendant is entitled to representation by counsel on his or her first appeal of right if he desires to appeal. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). This right applies to indigent defendants on direct appeal of a judgment of conviction. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Four years later, Larry Burks was tried for rape and convicted. He wished to appeal. All of the actors in the judicial system—the substitute judge, the prosecutor, the defense attorney— either ignored Rule 16 and the *Evans* rule or did not press their misgivings. Unlike Larry Burks, all of these people were lawyers. Yet Burks has borne the brunt of these violations.

After Burks was convicted of rape and sentenced to 30 years, his trial attorney filed a motion to be relieved, asserting Burks to be indigent, that he desired to appeal and that the public defender should be appointed. A hearing was conducted several weeks later— about a week before the deadline to file the notice of appeal It is appropriate to parse this hearing in light of Rule 16 and *Evans*. The hearing is in the Appendix at J. In pertinent part:

> MR. LEVERETT (Trial attorney): Your Honor, this is set for motion to be relieved, and just so the Court knows, we tried this case to a jury. It's one count of rape.
>
> Mr. Burks, prior to that, had been in custody for over a year and has been indigent for quite a period of time. He does wish to appeal, does not have any resources whatsoever. While he's been in jail, he's lost his home, his vehicle and has nothing for which to pay for an appeal. I was gonna ask the Court to relieve me, declare him indigent so that the Public Defender's Office can perfect this appeal.
>
> THE COURT: Has he visited with the Public Defender yet?
>
> MR. LEVERETT: Not to this point.
>
> THE COURT: To your knowledge?
>
> MR. LEVERETT: No.
>
> THE COURT: Okay. I'm gonna need to—I believe this is what Judge Langston would do, so this is what I'm gonna try and do. He can visit with the Public Defender here, and if he can sign an affidavit and they can okay that, then we'll call you back up.

There was at the time established case law that indigency of the defendant is not a valid basis for relief of trial counsel. For example, in *James v. State*, 329 Ark. 58, 59-60, 945 S.W.2d 941 (1997), the Arkansas Supreme Court wrote:

> Appellant also requests that the court appoint another attorney to represent appellant due to the fact that Mr. James lacks the financial resources to continue this appeal. Once the notice of appeal has been filed, Rule 16 of the Rules of Appellate Procedure—Criminal requires that trial counsel continue to represent a convicted defendant throughout appeal unless the supreme court relieves counsel and appoints new counsel. See also Ark.

> Sup.Ct. R. 4–3(j)(1). Counsel may not abandon an appeal merely because the client lacks the money for the appeal. *Jackson v. State*, 325 Ark. 27, 923 S.W.2d 280 (1996). **Regardless of the defendant's financial circumstances, when an attorney knows of his desire to appeal, the attorney is obligated to do the following before he may be relieved: (1) file a notice of appeal; (2) file a partial record, consisting of at least the judgement and notice of appeal in the appellate court, along with a motion to be relieved containing a statement of the reasons for the request to withdraw; (3) mail a copy of the motion to be relieved to the defendant. Id. at 29, 923 S.W.2d at 281**.
> (*Emphasis supplied by Burks*)

This principle was reiterated in other cases, including a different *Evans v. State*, 370 Ark. 427, 260 S.W.3d 265 (2007). Nonetheless, the special judge plowed ahead in violation of the law and no one stopped her, even though the prosecuting attorney and defense counsel registered a meek sort of quasi- semi- protest. The entire hearing is in the Appendix at J.:

> THE COURT. All right. Mr. Burks, I have now an affidavit of indigency that appears to bear your signature. Is everything on that true and correct, sir?
> BURKS: It is.
> THE COURT: And that's your signature, sir?
> BURKS: That's my signature.
> THE COURT: I see the Public. Is this the Public Defender's Office standing by Mr. Leverett?
> MISS JACKSON: Yes, Your Honor?
> THE COURT: Okay. Have you gone over this with Mr. Burks?
> MISS JACKSON: I have.

THE COURT: And you agree that it's appropriate?

MISS JACKSON: I still don't. I believe that that's correct. I'm not sure this is the way that we generally handle it? **[*Note by Burks: As the case law supra makes clear, it is not the way it is supposed to be handled*]**

THE COURT: Okay.

MISS JACKSON: I don't know how it works when he's indigent and then wants to appeal. I'm not sure if we automatically pick it up and appeal it, or the logistics of that, to be honest.

THE COURT: Okay.

MISS JACKSON: I know we generally—They're just declared indigent for an appeal transcript. I understand that Mr. Leverett is not doing his appeal. He hasn't been paid to do his appeal, so I'm not sure exactly how that works.

THE COURT: Okay. So—all right. Sounds right.

MR. JONES (Deputy Prosecuting Attorney): Your Honor. I'm thinking that this kind of takes place at the next level. **[*Note by Burks: This is correct.*]**

THE COURT: Yeah I think so too.

MR. JONES : I think we declare him indigent here and then switching counsel takes place higher up.

THE COURT: I think I just was kind of on autopilot there for a second. Mr. Burks, I'm going to sign your affidavit of indigency declaring your (sic) indigent. I'm gonna relieve Mr. Leverett. **[*Note by Burks: After first agreeing, the special judge then decides that was an "auto pilot" response and overrules the prosecutor's advice.*]**

THE DEFENDANT: Okay.

THE COURT: And then you've been notified of your right to appeal your jury verdict, which took place on March 4 of 2008.

THE DEFENDANT: I have.

THE COURT: And then so you're declared indigent and you can proceed with your own appeal and

> ask for assistance, I suppose, if you need to. ***[Note by Burks: It is impossible to conceive of a clearer violation of Evans.]***
>
> THE DEFENDANT: Thank you.
>
> THE COURT: Okay. And the Public Defender's not appointed.
>
> MISS JACKSON: Okay.
>
> THE COURT: Thank you.
>
> MR. LEVERETT. Thank you, Your Honor. May I be excused?

This entire proceeding was in violation of established Arkansas law, as Judge Langston's successor Judge Herbert Wright found (Appendix H) and which respondent even conceded below. Trial counsel should never have been relieved in the first place. But even if this relief was legal, the court's failure to appoint new counsel was itself a violation.

Burks sought a belated appeal in the Arkansas Supreme Court, which denied him relief without a written opinion. (Appendix I) He then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. The magistrate originally denied relief on statute of limitations grounds. (Appendix C). The District Court rejected that recommendation (Appendix D). The magistrate then recommended equitable tolling (Appendix E) and the District Court rejected the State's statute of limitations defense, found equitable tolling and ordered Burks to either be released, retried or given a direct appeal. (Appendix F) That court also rejected the State's motion to alter or amend. (Appendix G) The State appealed. The Eighth Circuit reversed the District Court (Appendix A) and denied rehearing (Appendix B)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

EQUITABLE TOLLING SHOULD DEFEAT A FEDERAL HABEAS STATUTE OF LIMITATIONS DEFENSE WHEN THE REASON FOR THE DELAYED FILING OF A HABEAS PETITION IS THE DENIAL OF A DIRECT APPEAL ARISING FROM THE DENIAL OF APPELLATE COUNSEL IN BLATANT DISREGARD OF ARKANSAS LAW.

This case presents an opportunity for this Court to guide the lower federal courts that *sui generis* circumstances and flagrant denial of constitutional entitlements should affect the flexibility counseled by *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549 (2010).

Burks was denied a direct appeal because the judicial system illegally denied him one, as the District Court found. In ruling against Burks, the Eighth Circuit held that he was not "reasonably diligent" because he waited several years before inquiring about the status of his direct appeal. This finding is a too crabbed an application of *Holland.* A proper application of establishes that the doctrine of equitable tolling does apply to federal habeas corpus proceedings and that the application of the doctrine must be done on a case by case basis. *Holland* explicitly counsels against the application of inflexible rules.

> We have said that courts of equity "must be governed by rules and precedents no less than the courts of law." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (internal quotation marks omitted). But we have also made clear that often the

> "exercise of a court's equity powers ... must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices." Ibid. (permitting postdeadline filing of bill of review). Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.
>
> At 649-650

The particular circumstances of this case fit the flexibility invoked by *Holland* like a glove. Here the problem resulted not from attorney miscalculation or the failure of a lawyer or client to do something in which there was no right to appointed counsel. Rather the problem stems from the flagrant failure of the Arkansas judicial system to provide him with the appellate counsel and the direct appeal to which he was obviously and explicitly entitled. He was denied an explanation by the Arkansas

Supreme Court. The District Court ordered that he either be released, retried or given the direct appeal which he was inexcusably and illegally denied in 2008. This case can be resolved by the federal courts ordering (or sustaining an order) to Arkansas to consider Burks's appeal.

Although there is not necessarily a freestanding federal constitutional right to appeal, there is a *de facto* right in that once the right to appeal has been extended to anyone, due process and equal protection under the Fourteenth Amendment mandates the provision of counsel under the Sixth Amendment to indigent defendants for appeal. This was confirmed again in *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582 (2005). It was this complete deprivation of an established right that was the ultimate source of Burks's habeas petition being filed outside the one year habeas deadline. The deprivation of counsel when one has an absolute right to counsel under the Sixth Amendment is a structural error. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963) established that principle for trial deprivation. See also *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 n. 25 (1984):

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Although there is not an explicit holding that deprivation of appellate counsel is structural error, one can discern the functional equivalent of one from *Douglas*, *Halbert, Cronic* and similar cases.

An established ground for the application of the doctrine of equitable tolling is that of judicial error. See collected cases in Hertz and Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 6TH ED. §5.2(b)(iii) n. 77. Many of those cases arise from a court erroneously giving a prisoner wrong advice as to a date or deadline. This judicial error is much more serious than arithmetical mistakes; rather, it was the court stripping Burks of a core constitutional right.

Arkansas, of course, can invoke numerous cases that place an obligation on a defendant to file this or that and thus deny equitable tolling. Arkansas did so below in this case, but those cases cited are inapposite and distinguishable. In the district court, for instance, *Muhammad v. United States*, 735 F.3d 812 (8th Cir. 2013), involves the purported failure of counsel to file a § 2255 petition which had been promised. The salient distinction is that Muhammad had counsel for his direct appeal. *Anjulo-Lopez v. United States*, 541 F.3d 814 (8th Cir. 2008), also involves a species of attorney error, not complete deprivation of a right to counsel in state proceedings and is also pre- *Holland*. Additionally, it arose from a guilty plea. *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000), is pre- *Holland* and also involves someone who had counsel throughout. *Runyan v. Burt*, 521 F.3d 942 (8th Cir. 2008), is also is *pre- Holland* and also involves someone who had a state court direct appeal. *Shoemate v. Norris*, 390 F.3d 595 (8th Cir. 2004), also pre-*Holland*, involves a case where there was a finding that the petitioner never communicated to his attorney the desire to appeal.

In the Eighth Circuit, the respondent took a somewhat different tack, asserting that "there is no causal connection between the special judge's failure to appoint Burks counsel to pursue an appeal or even the lack of an appeal itself and Burks's failure to timely file his federal habeas petition." This somewhat cynical argument completely ignores the exhaustion doctrine, which of course tells state prisoners not to come to the federal court until they have been through the state system.

Arkansas argued that Burks has to prove that the extraordinary circumstance "prevented" compliance with the limitation period or "caused" the breach. But *Holland* uses the more modest and flexible term "stood in the way." (At 649) The deprivation of state counsel, and Burks' understanding that he would have a lawyer and that an appeal would be filed, certainly "stood in the way," even if it did not physically prevent Burks from filing. Arkansas even argues that Burks should have filed a "protective" habeas writ a mere year after his trial, when he rationally believed he was in the state court process.

A wholly erroneous deprivation of right to counsel is the root of the problem in this case and is the type of unanticipated *sui generis* circumstance for which *Holland* demands flexibility. The rarity of the situation which this case presents demonstrates that this is not the "garden variety" error for which equitable tolling is not available. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453 (1990).

Holland does require reasonable diligence, not maximum feasible diligence. Burks submits that under the more or less unique circumstances of this case, his 2008 attempt to obtain a transcript and his 2013 litigation in the state courts, counts as reasonable diligence.

This Court should grant certiorari and upon review reverse the decision of the Court of Appeals and find that equitable tolling is applicable to this case.

CONCLUSION

Wherefore, Burks prays that certiorari be granted, and that either summary reversal requiring consideration by the Court of Appeals or plenary relief vacating the death sentence be granted.

LARRY GENE BURKS

/s/ Jeff Rosenzweig

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing to Leslie Rutledge, Attorney General, and Vada Berger, Assistant Attorney General, 323 Center St. Little Rock AR 72201 this 18th day of June, 2018.

/s/ Jeff Rosenzweig

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JEFFREY M. ROSENZWEIG

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CERTIFICATE OF COMPLIANCE

This petition has 3665 words not including those parts not included by the Federal Rules of Appellate Procedure. It is prepared on a Word Perfect 8 program in 14 point type with a Times New Roman font.

/s/ Jeff Rosenzweig
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JEFFREY M. ROSENZWEIG