

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

MICHAEL DUANE ZACK, III,

Petitioner,

vs.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether a change in the law during the pendency of a federal habeas proceeding, which the federal court chooses not to address, can constitute an extraordinary circumstance justifying the reopening of the case under Fed. R. Civ. Pro. 60(b)(6)?

2. Whether a State's dilatory appointment of counsel for postconviction proceedings in a capital case can constitute an extraordinary circumstance warranting the reopening of a final judgment under Fed. R. Civ. Pro. 60(b)(6)?

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Petitioner, MICHAEL DUANE ZACK, III, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Zack v. Secretary*, Case No. 14-14998 (11th Cir. 2018), and is Attachment A to this petition. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The district court's order denying relief is Attachment C to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on January 12, 2018. Rehearing was denied on March 29, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

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

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Fed. R. Civ. Pro. 60(b)(6) provides in relevant part:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief.

STATEMENT OF THE CASE

On January 25, 1996, Michael Zack was indicted by an Escambia County grand jury on one count of first-degree murder, one count of sexual battery, and one count of robbery (R. 1-3). After Zack pled not guilty and his case proceeded to trial, a jury found him guilty as charged and recommended a sentence of death by a vote of eleven to one (R. 792). The trial court followed the jury's recommendation, found six aggravating circumstances, and imposed a sentence of death on November 24, 1997 (R. 859-75).

The Florida Supreme Court affirmed Zack's convictions and sentence on direct appeal, finding harmless error regarding the application of two of the six aggravating circumstances. *Zack v. State*, 753 So. 2d 9 (Fla. 2000). This Court denied certiorari on October 2, 2000. *Zack v. Florida*, 531 U.S. 858 (2000).

On July 11, 2001 – nine months and ten days (283 days total) after certiorari had been denied in this case – Glenn Arnold was appointed from the Florida registry list of private capital postconviction attorneys to represent Zack during his collateral proceedings (PC-R. 122). The delayed appointment¹ left Arnold with 82 days in which to file a motion for postconviction relief on behalf of Zack. The one-year deadline, October 2, 2001, came and went without action or comment by Arnold.

¹Pursuant to Fla. R. Crim. P. 3.851(b)(3) (1996), collateral counsel was to be appointed to Zack's case within 30 days after his judgment and sentence became final.

Over two and one-half months later, on December 26, 2001, Arnold filed a motion in the Florida Supreme Court to extend the time for filing Zack's Rule 3.850 motion. The court granted Arnold's motion, giving him until May 13, 2002, in which to file a motion for postconviction relief (PC-R. 131). Arnold filed Zack's 3.850 motion on May 10, 2002 (PC-R. 132-42).

On June 20, 2002, this Court rendered its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). On August 22, 2002, Arnold sought permission to amend Zack's state postconviction motion in light of *Atkins* (PC-R. 191-94). The state court granted the motion, and on October 21, 2002, Arnold filed an amended Rule 3.850 motion to include a claim based on *Atkins* (PC-R. 219-56).

On July 14, 2003, the state court denied relief (PC-R. 577). Zack appealed and simultaneously filed a petition for a writ of state habeas corpus. On July 7, 2005, the Florida Supreme Court affirmed the denial of postconviction relief and denied the habeas corpus petition. *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). Rehearing was denied on September 16, 2005, and the mandate issued on October 3, 2005.

Eight days after the Florida Supreme Court had denied rehearing and before the mandate had issued, Zack filed a petition for a writ of habeas corpus in the Northern District of Florida, on September 28, 2005 (Doc. 1). Zack also filed a motion to hold proceedings in abeyance while the Florida Supreme Court considered two pending claims that Zack had included in his petition before that court (Doc. 3). The district court granted the motion to hold in abeyance on November 14, 2005 (Doc. 9).

Following the conclusion of the state court proceedings on the pending claims, on February 29, 2008, Zack sought leave from the federal district court to amend his petition (Doc. 17). The district court granted Zack's motion, and on March 20, 2008, Zack filed an amended petition for a writ of habeas corpus (Doc. 20).

The State proceeded to file a motion to dismiss Zack's petition as untimely under the one-year statute of limitations contained in 28 U.S.C. §2244(d)(1)(A) (Doc. 23 at 12-13). The State argued that because Zack's conviction became final on October 2, 2000, and Zack did not file his 3.850 motion until May 10, 2002, Zack's petition for a writ of habeas corpus was untimely (Doc. 23 at 12-13).

Relying on the statutory language of § 2244(d)(1) as well as the Eleventh Circuit's decision in *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003), Zack argued in response that § 2244(d)(1) provided for 1) a single one-year statute of limitations to be applied to the habeas petition as a whole; 2) four alternative starting dates on which the single one-year clock begins to run; and 3) the clock actually only begins to run on the last of the four potential dates provided in the statute (Doc. 24 at 6-9).²

²In *Walker*, 341 F.3d at 1242, the Eleventh Circuit considered "whether individual claims within a single habeas petition may be reviewed separately for timeliness . . .". After examining the statute of limitations contained in § 2244(d)(1), the court concluded that "[t]he statute of limitations in § 2244(d)(1) applies to the application as a whole; individual claims within an application cannot be reviewed separately for timeliness." *Id.* at 1245. In arriving at its conclusion, the court "recognize[d] that § 2244(d)(1) as written allows for the resurrection of what seem to be time-barred claims tagging along (continued...)"

Zack submitted that the latest limitation period, under § 2244(d)(1)(C), was triggered on June 20, 2002, when this Court rendered its decision in *Atkins*; thus his petition was timely (Doc. 24 at 7).

On November 17, 2008, the federal district court issued an Order Dismissing Petition in Part, finding that Zack's *Atkins* claim was timely while his other claims were not (Doc. 33 at 7). After further briefing, the district court denied Zack's *Atkins* claim on March 26, 2009 (Doc. 36). Judgment was entered on March 27, 2009 (Doc. 37).

Zack filed a motion to alter or amend (Doc. 38), which was denied on April 20, 2009 (Doc. 39). On May 19, 2009, Zack filed a Notice of Appeal (Doc. 40). On May 20, 2009, Zack submitted an application for a COA, which was granted in part by the district court (Doc. 44).³ Zack filed a motion to expand the COA in the Eleventh Circuit, which was denied on August 27, 2009.

²(...continued)
on the coattails of a timely claim." *Id.* at 1247. However, as the court noted:

Nevertheless, Congress wrote the statute, and we cannot see how it can be read any other way without departing from the plain meaning of the words of the statute. The Supreme Court has advised that "[w]hatever merits ... policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them." *Artuz*, 531 U.S. at 10, 121 S.Ct. at 365.

Id.

³The district court granted a COA on the issue of whether Zack's claims were properly dismissed as untimely (Doc. 44).

Subsequent to briefing and oral argument, a three-judge panel from the Eleventh Circuit issued an opinion reversing the district court. The panel unanimously stated that *Walker* did indeed control in this case. *Zack v. Tucker*, 666 F.3d 1265, 1268 (11th Cir. 2012).⁴ However, following the panel's opinion, the State filed a petition for rehearing en banc, and the Eleventh Circuit on April 30, 2012, entered an order granting the petition, vacating the panel's opinion, and agreeing to rehear the case en banc. Thereafter, on January 9, 2013, the Eleventh Circuit issued an opinion affirming the district court's order. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013) (en banc).⁵ Zack filed a petition for a writ of certiorari, which was denied by this Court on October 7, 2013 (Doc. 55).

⁴The panel explained:

Walker binds us in the present case. Section 2244(d)(1) has in no way been amended since *Walker* was decided. No Supreme Court holding or en banc holding from this Court has superseded the *Walker* decision on the manner to analyze timeliness in a habeas petition.² In this Circuit, the timely *Atkins* claim in Petitioner's petition makes timely all the other claims in the petition: reviving claims that were determined to be individually untimely by the District Court. The *Walker* court explicitly recognized that its decision would allow the "resurrection of what seem to be time-barred claims tagging along on the coattails of a timely claim." *Walker*, 341 F.3d at 1247. That "resurrection" has happened in the present petition.

Zack, 666 F.3d at 1268-69 (footnote omitted).

⁵The Eleventh Court "overrule[d] *Walker* to the extent that it holds that § 2244(d)(1) provides a single statute of limitations that applies to the application as a whole and that individual claims within an application cannot be reviewed separately for timeliness." *Zack*, 704 F.3d at 926.

On August 25, 2014, Zack filed a motion under Fed. R. Civ. Pro. 60(b)(6) to reopen his case (Doc. 56). The district court denied Rule 60(b) relief, and Zack's subsequent motion for reconsideration was likewise denied (Docs. 58-60). Zack appealed and the Eleventh Circuit granted a COA as to two issues: (1) whether the district court abused its discretion in denying Zack's Rule 60(b)(6) motion in light of *Holland v. Florida*, 560 U.S. 631 (2010), "without determining whether Zack's mental impairment and the timing of the appointment of collateral counsel, collectively, amount to extraordinary circumstances"; and (2) whether the district court abused its discretion in refusing to grant Zack an evidentiary hearing under *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009), "to further investigation and factual development and proceedings to determine whether a causal connection exists between Zack's mental impairment and the timing of the appointment of collateral counsel, collectively, on the one hand, and the untimely filing of his petition for habeas relief under 28 U.S.C. § 2254, on the other."

On January 12, 2018, subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion affirming the denial of Zack's Rule 60(b) motion. *Zack v. Secretary*, Case No. 14-14998 (11th Cir. 2018). Zack thereafter moved for rehearing en banc and panel rehearing, which the Eleventh Circuit denied on March 29, 2018.

THE COURTS' RULINGS

In denying Zack's Rule 60(b) motion, the federal district court stated:

The law evolves constantly. An allegation that the law has evolved is not an "extraordinary circumstance" that warrants relief under Rule 60(b)(6). See, e.g., *Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005) (assuming that, in light of intervening authority, the district court erred in holding a habeas petition untimely, but nonetheless affirming the denial of relief under Rule 60(b)(6)). The principle is fully applicable here.

As it turns out, the holding that Mr. Zack's non~~Atkins~~ claims were untimely was correct when entered and is still correct under the law as it has evolved. But even if, in hindsight, it could be said the ruling was incorrect, Mr. Zack still would not be entitled to relief under Rule 60.

(Doc. 58 at 2-3).

In its order affirming the denial of relief, the Eleventh Circuit stated:

As the catchall provision of Rule 60(b), Rule 60(b)(6) authorizes relief from judgment for "any other reason that justifies relief." But, in *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005), the Supreme Court clarified that "a movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." The Supreme Court noted that such extraordinary circumstances "will rarely occur in the habeas context." *Id.* And even then, we have explained, "whether to grant the requested relief is . . . a matter for the district court's sound discretion." *Lugo*, 750 F.3d at 1210 (citing *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000)).

Because Zack presented his claim for equitable relief to the district court under Rule 60(b)(6), he must first show a qualifying "extraordinary circumstance" under *Gonzalez* justifies reopening his final judgment. If Zack can pass through this gate, we must then consider whether Zack has made the necessary showing to warrant equitable tolling. Under *Holland v. Florida*, 560 U.S. 631 (2010), and its progeny, equitable tolling may be warranted in the event of an extraordinary

circumstance. Although the distinct categories of extraordinary circumstances that support reopening of a final judgment under Rule 60(b)(6) and those that support equitable tolling may overlap, an extraordinary circumstance must independently warrant each particular relief sought.

Zack argues that he presented two extraordinary circumstances justifying Rule 60(b)(6) relief. First, Zack contends that the Supreme Court's ruling in *Holland v. Florida* and the timing of the Eleventh Circuit's en banc decision overturning *Walker v. Crosby* constitute changes in law that amount to an extraordinary circumstance justifying reopening Zack's case under Rule 60(b)(6). In support of this position, Zack asserts that he "could not have anticipated the en banc decision to overrule existing law, nor could he have expected the expansion and clarification of equitable tolling to AEDPA cases under *Holland*." Pet'r-Appellant Initial Br. 21. Zack further argues that "[b]ecause *Holland* was not a necessary avenue for relief until after this Court had overruled *Walker* and because Zack sought to alert the courts to his *Holland* claim for equitable tolling at the earliest practicable moment," the "district court should have recognized that this case fell within the 'limited set of circumstances' envisioned by the Supreme Court in *Gonzalez*, 545 U.S. at 529." *Id.* at 22.

Second, Zack contends that the "systemic failures of the State to appoint counsel in a reasonable timeframe . . . merit[] relief under Rule 60(b)(6)."

While the second circumstance is troubling, we cannot conclude that either rises to the level of the "extraordinary circumstances" necessary to allow reopening of a final judgment under Rule 60(b)(6). Consequently, the district court did not abuse its discretion in denying Zack's Rule 60(b)(6) motion.

A. Changes in the Law

First, as *Gonzalez* makes clear, changes in the law do not, on their own, constitute extraordinary circumstances justifying relief under Rule 60(b)(6). See *Gonzalez*, 545 U.S. at 536. In the underlying decision in *Gonzalez*, the district court dismissed Gonzalez's federal habeas petition as untimely under then-existing Eleventh Circuit precedent. *Id.* at 527. After the district court's decision, the Supreme Court announced a new AEDPA statute-of-limitations tolling rule in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), which, had it been in effect earlier, would have permitted

Gonzalez to pursue his petition. Based on the change in law that Artuz created, *Gonzalez* filed a Rule 60(b)(6) motion arguing that his case should be reopened and that his petition should be deemed timely. The district court denied the Rule 60(b)(6) motion and the Eleventh Circuit affirmed. *Gonzalez*, 545 U.S. at 527-28.

As relevant here, the Supreme Court in *Gonzalez* held that the district court properly denied the Rule 60(b)(6) motion because the change in the law did not constitute "extraordinary circumstances" justifying the reopening of the case. *Id.* at 536-37. The Supreme Court opined that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.* at 536. Still further, the Supreme Court reasoned that if *Gonzalez* were correct, changes in the law would be a two-way street, justifying not only reopening decisions that disfavored petitioners when the law became more advantageous, but also justifying reopening decisions that otherwise favored petitioners should the law become harsher: If "Artuz justified reopening long-ago dismissals based on a lower court's unduly parsimonious interpretation of [the statute of limitations], then *Pace v. DiGuglielmo* . . . would justify reopening long-ago grants of habeas relief based on a lower court's unduly generous interpretation of the same tolling provision." *Id.* at 536-37.

Since *Gonzalez*, we have repeatedly found that particular changes in the interpretation of federal habeas law fall short of the requisite extraordinary circumstance justifying Rule 60(b)(6) relief. In *Howell v. Sec'y, Fla. Dep't Corr.*, 730 F.3d 1257, 1261 (11th Cir. 2013), for example, we upheld the district court's denial of a Rule 60(b)(6) motion premised on the change of law in *Holland*, concluding that the change of law resulting from *Holland* "is not an extraordinary circumstance under Rule 60(b)."

Likewise, in *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014), we held that "the change in the decisional law affected by the *Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] rule is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)."

Notwithstanding our holdings in *Howell* and *Arthur* however, we have also concluded that certain, limited changes in intervening law can occasionally constitute the necessary extraordinary circumstance. In particular, we have found extraordinary circumstances may exist when we can identify the case under review

and a prior case as "legal twins." See *Ritter v. Smith*, 811 F.2d 1398, 1402-03 (11th Cir. 1987). So, for example, if a supervening decision is issued in a case arising out of the same transaction as the petitioner's case, or if two cases are related insofar as they concern the constitutionality of the same statute, a petitioner's case may satisfy this "legal twin" status. See *id.*

But that is not the case here. We cannot say that Zack's case presents a "legal twin" of any other case involving a change in the law. Rather, the changes in the law Zack points to are much closer to those involved in *Gonzalez*, *Howell*, and *Arthur*.

As noted above, we have specifically held that the change in law brought about by *Holland* cannot constitute an extraordinary circumstance for purposes of reopening a case under Rule 60(b). And if the change in law created by *Holland* cannot constitute an extraordinary circumstance, neither does the change in law created by our en banc decision overturning *Walker*.

Walker allowed petitioners to revive claims that had already expired—but only if a timely, valid claim later arose. Here, Zack could not have relied on *Walker* when he blew past the statute of limitations on his eight untimely claims because he had no way of knowing that the Supreme Court would later issue *Atkins*, on which his only timely claim was ultimately based. As a result, the equitable considerations driving *Holland* do not exist with respect to Zack's *Walker* claim, and there is even less of a basis to find an extraordinary circumstance in this case than existed in *Howell*, where we found no extraordinary circumstances based on the change in law created by *Holland*. As a result, Zack cannot rely on the changes in the law that he identifies to establish the extraordinary circumstances necessary to allow the reopening of a final judgment on a Rule 60(b)(6) motion.

B. "System Failures"

Zack's additional argument, concerning the State's delay in appointing him counsel, likewise fails to constitute an extraordinary circumstance for the purposes of Rule 60(b)(6) relief.

We have explained that "a true 60(b) motion within the meaning of *Gonzalez* [*v. Crosby*, 545 U.S. 524 (2005),] . . . attack[s] 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." *Lugo*

v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1210 n.11 (11th Cir. 2014) (citation and internal quotation marks omitted). The state's late appointment of collateral counsel is very troubling.^[1] And under the correct circumstances, it might establish the extraordinary circumstances necessary for equitable tolling.^[2] But it cannot establish the extraordinary circumstances necessary to reopen a final judgment under Rule 60(b)(6) in this case.

Zack was aware when he filed his § 2254 petition in this case that the state did not appoint counsel until nine months into his year to file his federal petition. Nothing about the integrity of the federal proceedings prevented him from raising the issue at that time. And nothing new about the state's late appointment of counsel has been revealed or has otherwise disclosed a defect in the federal proceedings since the district court issued its order denying and dismissing Zack's petition. For these reasons, Zack cannot establish extraordinary circumstances supporting the reopening of the final judgment under Rule 60(b)(6).

Because Zack has failed to establish the two required sets of extraordinary circumstances that justify reopening a final judgment and equitable tolling, we conclude that the district court did not abuse its discretion in denying Zack's Rule 60(b) motion.

^[1] Here, Florida appears not to have complied with its own rules. See Fla. R. Crim. P. 3.851(b)(3) (1996) (requiring appointment of counsel within 30 days after the judgment and sentence become final). And while we recognize that we lack the power to control Florida's compliance with its own rules, that fact doesn't make Florida's noncompliance any less troubling—particularly since Florida adopted the 30-day requirement after its Supreme Court Committee on Postconviction Relief in Capital Cases “recognized that, *to make the process work properly*, each death row prisoner should have counsel available to represent him or her in postconviction relief proceedings.” See *id.* at Ct. Comm. 1993 Adoption (emphasis added). Indeed, so important did Florida deem timely appointment that Florida's current version of Rule 3.851, Fla. R. Crim. P., appoints counsel contemporaneously with the Florida Supreme Court's issuance of its mandate on direct appeal and, to our concurring colleague's point, requires all conflicts of interest and other appointment issues to be resolved within 45 days thereafter—a far cry

from the nine months that passed in Zack's case. Fla. R. Crim. P. 3.851(b).

And turning to proceedings we do have jurisdiction over, as a practical matter, the late appointment of state counsel—particularly when it does not occur until three-quarters of the way through the statutory period—can have an effect on a petitioner's ability to meet AEDPA's limitations period because a petitioner need not seek § 2254 relief if he obtains state postconviction relief, and he cannot obtain § 2254 relief without first exhausting his state remedies, in any case. We simply don't know whether Zack has a meritorious federal claim because we cannot consider his claims since counsel missed the filing deadline. The problem is not, as our colleague incorrectly suggests we "assume," "that every state prisoner sentenced to death should file a federal petition," Conc. at 22, but rather, that a state's extremely late appointment of counsel, resulting in counsel's missing of the filing deadline, should not be the sole reason why a state prisoner who may have a meritorious claim is precluded from seeking federal relief.

Finally, we are disappointed that our colleague would use the Smith family's ongoing tragedy to excuse what have become routine failures in Florida by state-appointed counsel to comply with a simple filing deadline, see *Lugo*, 750 F.3d at 1215-26 (Martin, J., concurring) (identifying more than 30 capital defendants whose counsel missed the deadline for filing § 2254 claims). See Conc. at 21-22. The Smith family has had to endure the unimaginable and is surely entitled to justice. Upon this we all agree. But justice necessarily includes affording defendants their constitutionally guaranteed rights to pursue habeas relief.

[2] In particular, where a state collateral proceeding is effectively the first opportunity where an ineffective-assistance-of-counsel claim can be raised and the state's failure to timely appoint counsel to raise such a claim amounts to a petitioner's effective absence of counsel, perhaps the existence of extraordinary circumstances may be satisfied. See *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). We need not and do not opine on this issue because we do not reach it since Zack has not established extraordinary circumstances warranting

the reopening of a final judgment under Rule 60(b)(6).

IV.

We also conclude that the district court did not abuse its discretion in denying Zack an evidentiary hearing to prove his equitable-tolling allegations under *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009). An evidentiary hearing would have served no useful purpose because Zack alleged no facts that could have warranted relief if proven true. See *Chavez v. Sec'y Fla. Dep't Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011) ("[I]f a habeas petition does not allege enough specific facts, that, if they were true, would warrant relief, the petitioner is not entitled to an evidentiary hearing."); see also *id.* at 1061 ("The allegations must be factual and specific, not conclusory."). Accordingly, the district court did not abuse its discretion by declining to grant Zack an evidentiary hearing.

Zack, Case No. 14-14998 at 10-18 (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF ZACK'S RULE 60(b) ISSUE IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

This Court has found that equitable tolling should be applied under AEDPA to those cases involving an extraordinary circumstance that could not have been circumvented by a defendant's due diligence. *Holland v. Florida*, 560 U.S. 631 (2010). In the instant case, Zack sought to notify the district court of the need to apply equitable tolling by filing a motion pursuant to Fed. R. Civ. P. 60(b)(6), which "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005).

In support of his motion, Zack raised several factors which he believed operated as extraordinary circumstances warranting

the reopening of his case and the application of equitable tolling. The primary factor concerned the unique procedural history of Zack's case, which included this Court's decision in *Holland v. Florida* as well as the Eleventh Circuit's determination that *Walker v. Crosby* was no longer good law.

In its opinion, the Eleventh Circuit found that changes in the interpretation of federal law, in this case in *Holland*, could not constitute an extraordinary circumstance for purposes of reopening a case under Rule 60(b). *Zack*, Case No. 14-14998 at 14-15. The Eleventh Circuit relied upon this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), as well as the Eleventh Circuit's decisions in *Howell v. Sec'y, Fla. Dep't Corr.*, 730 F.3d 1257 (11th Cir. 2013) and *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014). *Zack*, Case No. 14-14998 at 12-14.

Zack submits that the Eleventh Circuit in its opinion failed to recognize significant factual distinctions between the aforementioned cases and his case. In *Gonzalez*, *Howell* and *Arthur*, the relevant changes in the law occurred after the affirmance of the dismissal of their cases. In *Gonzalez*, 545 U.S. at 527, after the dismissal of petitioner's case by the district court as time barred, the Eleventh Circuit denied a COA on April 6, 2000, and petitioner did not file for rehearing or review of that decision. The change in the law at issue, in *Artuz v. Bennett*, 531 U.S. 4 (2000), did not occur until November 7, 2000. Given these circumstances, this Court stated:

Petitioner's only ground for reopening the judgment denying his first federal habeas petition is that our decision in *Artuz* showed the error of the District

Court's statute-of-limitations ruling. We assume for present purposes that the District Court's ruling was incorrect.^[8] As we noted above, however, relief under Rule 60(b)(6)—the only subsection petitioner invokes—requires a showing of “extraordinary circumstances.” Petitioner contends that Artuz's change in the interpretation of the AEDPA statute of limitations meets this description. We do not agree. The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U. S. C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation. Although our constructions of federal statutes customarily apply to all cases then pending on direct review, see, e. g., *Harper v. Virginia Dept. of Taxation*, 509 U. S. 86, 97 (1993), **not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.**^[9] If Artuz justified reopening long-ago dismissals based on a lower court's unduly parsimonious interpretation of § 2244(d)(2), then *Pace v. DiGuglielmo*, 544 U. S. 408 (2005), would justify reopening long-ago grants of habeas relief based on a lower court's unduly generous interpretation of the same tolling provision.

Gonzalez, 545 U.S. at 536-37 (footnotes omitted) (emphasis added).

In *Howell*, the Eleventh Circuit affirmed the district court's dismissal of the petition in 2005. See *Howell v. Crosby*, 415 F.3d 1259 (11th Cir. 2005). The change in the law at issue, in *Holland*, did not occur until 2010, and a Rule 60(b) motion premised on that change was not filed until the eve of petitioner's execution in 2013. See *Howell*, 730 F.3d at 1258. And in *Arthur*, where the change in the law was derived from this Court's 2012 decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Eleventh Circuit affirmed the district court's judgment in 2006. See *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006).

Unlike in the aforementioned cases, the change in the law at issue here, in *Holland*, occurred during the pendency of Zack's federal proceedings. Thus, Zack sought to expand the COA to address *Holland*, and he raised the issue during his en banc proceedings. Indeed, in his December 5, 2011 motion before the Eleventh Circuit to expand the COA, Zack stated:

This Court recently conducted oral argument in the above-entitled matter. In preparing for the oral argument, Mr. Zack's counsel recognized that in the years since the denial of a COA as to the equitable tolling argument, the law of this Circuit has been overturned in *Holland v. Florida*, 130 S. Ct. 2549 (2010). **Under the decision in *Holland* equitable tolling is available to Mr. Zack.** Indeed, Mr. Zack's argument that he should receive equitable tolling was premised upon the failure of the state courts to provide him with court-appointed collateral counsel as required by §27.710, Fla. Stat., for approximately nine months after his conviction and sentence of death were final and Florida law required the state to provide collateral counsel to be formally appointed and in place. This nine month delay was not due to any conduct by Mr. Zack, but was in fact entirely external to him and created an obstacle to the preparation of a properly filed motion for postconviction in state court. Had the State of Florida complied with the controlling statute and provided Mr. Zack with the counsel as statutorily required, the delay in filing the properly filed motion for postconviction relief would not have occurred and the one year clock for filing the federal habeas petition would not have expired.

This Court has recognized that expanding COA issues can be appropriate after briefing, and even oral argument, but it is inappropriate for a party to broaden a COA issue in briefing without regard to the limited nature of a COA grant:

we do not mean to rule out the possibility that in an extraordinary case a merits panel may decide, after considering the merits of an issue on which the COA was granted, to expand the certificate to include another issue. That is what happened in *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003), where the panel, after oral argument, expanded the COA to include an additional issue, requested

supplemental briefing on that issue, and then decided it. *Id.* at 1307. It is one thing for an appellate court in an unusual case to be persuaded during its consideration of the merits of a granted issue to expand the COA to include a related issue and to request supplemental briefing on that previously excluded issue. It is another thing for an appellant to simply ignore the COA order and brief any issue he pleases. We recognize the former practice and condemn the latter.

Hodges v. Attorney General, State of Florida, 506 F.3d 1337, 1341-42 (11th Cir. 2007).² **In light of the intervening decision in *Holland v. Florida*, the equitable tolling argument is at a minimum debatable among jurists of reason, and it would seem that the COA should be expanded to include Mr. Zack's equitable tolling argument as presented in the district court.**

* * * *

Mr. Zack submits that reasonable jurists could, and have, disagreed with the district court's resolution of the equitable tolling issue, as is evidenced by the fact that *Holland v. Florida* reaches the opposite conclusion.

(Emphasis added) (footnote omitted).

On December 9, 2011, the State served a response in opposition to Zack's motion to expand the COA. In its January 9, 2012 opinion reversing the district court, the Eleventh Circuit stated that "Petitioner/Appellant's Motion for Expansion of Certificate of Appealability, filed 5 December 2011, is DENIED." *Zack*, 666 F.3d at 1269, fn 3.

Subsequently, during the en banc proceedings, Zack explained in his initial brief that the district court had relied upon the pre-*Holland* law of the circuit to conclude that Zack was not entitled to equitable tolling. Zack again asserted that in light of the decision in *Holland*, equitable tolling was warranted for the nine month period that the State of Florida withheld the appointment of collateral counsel after his conviction and

sentence of death became final. Zack stated that if the Eleventh Circuit determined that any part of his petition was untimely, it should grant him the benefit of equitable tolling under *Holland*. Yet, despite the intervening decision in *Holland* and the fact that Zack brought it to the attention of the court, the Eleventh Circuit did not consider whether equitable tolling was warranted. Rather, as the Eleventh Circuit acknowledged in its most recent opinion, “We chose not to substantively address Zack’s equitable-tolling arguments in our en banc decision and instead focused on determining the effect of *Pace* on *Walker*.” *Zack*, Case No. 14-14998 at 8-9.

In its opinion, the Eleventh Circuit also determined that Zack could not have relied on its decision in *Walker v. Crosby* “when he blew past the statute of limitations on his eight untimely claims because he had no way of knowing that the Supreme Court would later issue *Atkins*, on which his only timely claim was ultimately based.” *Zack*, Case No. 14-14998 at 15. Thus, the Eleventh Circuit determined that the equitable considerations driving *Holland* did not exist with respect to Zack’s *Walker* claim. *Id.*

Zack submits that the Eleventh Circuit in its determination misconstrued the significance of his reliance on *Walker*. Zack’s argument was not, as the court seemingly presumed, that he relied on *Walker* as a basis to “bl[o]w past” the statute of limitations. Rather, it was the fact that, as evidenced during the initial Eleventh Circuit proceedings, *Walker* was considered to be good law and therefore Zack’s petition was timely. And during the en

banc proceedings, the issue concerned whether *Walker* should be overruled, which is what ultimately occurred. *Walker's* viability was at issue, and equitable tolling was not addressed by the court. Given these circumstances, including the fact that *Holland* was not a necessary avenue for relief until after the Eleventh Circuit had overruled *Walker* and because Zack sought to alert the courts to his *Holland* claim for equitable tolling, Zack submits that the Eleventh Circuit should have recognized that this case fell within the "limited set of circumstances" envisioned by this Court in *Gonzalez*, 545 U.S. at 529.

Zack submitted as another extraordinary circumstance the fact that the State, in contravention of its own rule, failed to appoint counsel in a timely and meaningful fashion. In its opinion, the Eleventh Circuit found the State's delay in doing so to be "very troubling". *Zack*, Case No. 14-14998 at 16. The court noted that the late appointment of state counsel, particularly when it did not occur until three quarters of the way through the statutory period, could have an effect on a petitioner's ability to meet AEDPA's limitations period. *Id.* at 16, fn 1. While the Eleventh Circuit found that "under the correct circumstances", the State's late appointment of counsel "might establish the extraordinary circumstance necessary for equitable tolling", *id.* at 16-17, it determined that Zack could not establish the extraordinary circumstances necessary to reopen a final judgment under Rule 60(b)(6). *Id.* at 17. According to the court, Zack was aware when he filed his § 2254 petition that the State did not appoint counsel until nine months into his year to file his

federal petition; and nothing about the integrity of the federal proceedings prevented him from raising the issue at that time. *Id.*

Zack submits that the Eleventh Circuit erred in its determination, as Zack did in fact raise the issue during his § 2254 proceedings. Following the filing of Zack's petition and amended petition (Docs. 1, 20), the State filed a motion to dismiss (Doc. 23). Zack responded to the motion to dismiss in which he raised three defenses, that the petition was timely pursuant to *Walker*; that he was prevented from filing his petition due to a state impediment⁶; and/or that equitable tolling was warranted (Doc. 24). With regard to the state impediment, Zack specifically raised the State's delay in appointing counsel:

In Mr. Zack's case, the State of Florida promised to provide him with "quality representation" in state postconviction proceedings, including "fil[ing] appropriate motions in a timely manner." Fla. Stat. § 27.711 (12). See also Spalding v. Dugger, 526 So.2d 71, 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation").

Florida Rule 3.851(b)(3) as it existed in 2000 indicated that counsel would be in place within thirty days after Mr. Zack's conviction and sentence became final.⁴ Yet, despite this requirement, the State failed in its obligation to appoint counsel in a timely fashion. It was not until July 11, 2001, over nine months later, that Mr. Zack was appointed counsel. And the counsel who was appointed, Glenn Arnold, was seemingly unaware that his appointment was belated:

⁶While acknowledging that then existing Eleventh Circuit precedent foreclosed relief as to this argument, Zack stated that he was raising the issue "in order to preserve the argument in the event that the United States Supreme Court addresses the issue." (Doc. 24 at 9).

MR. ARNOLD: Well, you're right Judge. Let me explain what took place on there. I tried to put a little bit of that in my motion but as you know, Judge Tarbuck and I have been friends for a lot of years. Said, Glen, I need somebody to handle it. Fine. I got the order in. **I did not know at the time that the time was about to run on it, that the year was about to run.** And in fact, Tanya Roberts (phonetic) called me from - - **Tanya Carol (phonetic) called me from the Supreme Court and said, Glen, you know, your time ran like the second, or whatever that month was, and I said, Oh, Christ, no.** Then since we couldn't do like what we did in the old days and come to you or Judge Tarbuck for an order to extend the time, I have to now go back to the Supreme Court on a 3.851. I had to go through the procedure, file the motion to the Supreme Court, then they gave me leave to file but they gave me 120 days.

(PC-R. 203-04) (emphasis added).

Through no fault of his own, Mr. Zack was deprived of his right to postconviction counsel for over nine months. According to the language in §2244(d)(1)(B), the limitation period would begin to run on "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."

Here, the State impediment was removed on July 11, 2001, when Arnold was court appointed to represent Mr. Zack as registry counsel (PC-R. 122). Mr. Zack's Rule 3.850 motion was filed 303 days later, on May 10, 2002. Mr. Zack's clock was thereafter continuously tolled until October 3, 2005, when the Florida Supreme Court issued its mandate following its affirmance of the state lower court's denial of Mr. Zack's amended 3.850 motion. Zack v. State, 911 So. 2d 1190 (Fla. 2005). Since Mr. Zack filed his federal habeas petition on September 28, 2005, prior to the issuance of the mandate, Mr. Zack asserts that his clock was tolled with 62 days remaining on it. Thus, under this provision, Mr. Zack submits that his petition is timely filed.

(Doc. 24 at 9-11) (footnote omitted) (emphasis in original).⁷

Zack submits that this Court should grant certiorari to consider whether the Eleventh Circuit's affirmance of the denial of his Rule 60(b) motion was based on a flawed legal and factual analysis.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

⁷In its order dismissing Zack's petition in part, the district court stated:

First, Mr. Zack asserts that state action - the delay in appointing an attorney for purposes of collateral review - impeded the filing of a federal habeas petition, thus extending the limitations period under § 2244(d)(1)(B). But "a state's delay in appointing [post-conviction] counsel is not a 'violation of the Constitution or laws of the United States,' as required by § 2244(d)(1)(B)." *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1331 (11th Cir. 2008).

(Doc. 33 at 10-11).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Charmaine M. Millsaps, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 22nd day of June, 2018.

/s/. Linda McDermott
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