No._____

IN THE SUPREME COURT OF THE UNITED STATES

CAPITAL CASE
EXECUTION SCHEDULED October 29, 2014 at 12:01 a.m. CDT

MARK A. CHRISTESON
Petitioner,

v.

DONALD ROPER,
Superintendent, Potosi Correctional Center
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE ETHICS BUREAU AT YALE, LEGAL ETHICS PROFESSORS AND CAPITAL HABEAS CORPUS PRACTITIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Lawrence J. Fox
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu
Counsel of Record

Counsel for Amici Curiae

Dated: October 27, 2014

Interest of Amici Curiae[1]

The Ethics Bureau at Yale, a clinic composed of fifteen law school students supervised by an experienced practicing lawyer and lecturer, drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools. Additional amici curiae are lawyers and scholars whose interests include the conduct of the judiciary and the codes that regulate judicial conduct.

MISSOURI CAPITAL HABEAS ATTORNEYS AND PROFESSORS

Pat Berrigan is an Assistant Public Defender, Capital Division, Western District, Missouri Public Defender. He has been a defense attorney and death penalty advocate since graduating from the University of Missouri at Kansas City Law School in 1984.

Elizabeth Unger Carlyle practices criminal defense law in Kansas City, Missouri and has been a member of the Missouri bar since 1991. Former president of the Missouri Association of Criminal Defense attorneys she specializes in sentencing and death penalty post-conviction defense.

Brian Gaddy is a partner at Gaddy and Weis LLC in Kansas City, Missouri, specializing in criminal defense, including capital habeas corpus, since graduating from the University of Missouri at Kansas City Law School. He is past-president of the Missouri Association of Criminal Defense Lawyers and has served as an Adjunct Professor of Law at the University of Missouri-Kansas City School of Law for seven years.

David J. Gottlieb is the Emeritus Professor at the University of Kansas School of Law. He taught International Human Rights, Professional Responsibility, Criminal Procedure, and Refugee and Asylum Law. He has written extensively on guideline sentencing and the death penalty.

Michael Kaye is a Professor of Law at Washburn University and Director of the Center for Excellence in Advocacy. He teaches criminal procedure and is an experienced public defender.

[1] Pursuant to Rule 37.2 of the Rules of this Court, Petitioners and Respondents have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than Amici and their counsel has made a monetary contribution to the preparation and submission of this brief. Mr. Fox previously submitted an expert witness affidavit in the underlying case on behalf of Petitioner.

Paul Litton is the R. B. Price Professor of Law Professor of Law at the University of Missouri School of Law at Columbia. He teaches criminal law, death penalty law, jurisprudence, and bioethics. Before joining the University of Missouri faculty in 2006, he was law clerk to Chief Justice Deborah T. Poritz of the New Jersey Supreme Court, serving a second term as the Court's death penalty law clerk.

Joseph Luby has served as an attorney with the Death Penalty Litigation Clinic Kansas City, Missouri since 2001. He served as a judicial law clerk for Judge John R. Gibson of the Eighth Circuit Court of Appeals, and then for Judge Howard F. Sachs of the United States District Court for the Western District of Missouri. In 2009 he was awarded the Missouri Association of Criminal Defense Lawyers, Atticus Finch Award for the pursuit of justice and the defense of unpopular causes.

Susan McGraugh is an Associate Professor of criminal law and Supervisor of Criminal Clinics at Saint Louis University Law School. Prior to joining Saint Louis University Law School in 2002, she was a Missouri state public defender for eight years. She has represented clients in death penalty proceedings.

Sean O'Brien is an Associate Professor Criminal Law at the University of Missouri at Kansas City Law School, where he received his J.D. He served as the chief public defender in Kansas City, Mo., from 1985 through 1989, when he was appointed executive director of the Missouri Capital Punishment Resource Center, now the Death Penalty Litigation Clinic, where he represents clients in capital trial, appeal and post-conviction cases.

Kay Parish is an attorney at Sindel, Sindel, and Noble in St. Louis, Missouri. She has represented prisoners in capital habeas appeals since graduating from Washington University Law School in St. Louis in 2009.

Cheryl Pilate is a partner at Morgan Pilate in Kansas City, Missouri, where her practice includes civil rights and death penalty advocacy. From 1990-1992, she was the Law Clerk for the Honorable John R. Gibson, formerly of the United States Court of Appeals for the Eighth Circuit

Charlie Rogers is a shareholder at Wyrsch Hobbs Mirakian, in Kansas City, Missouri where he specializes in death penalty defense and federal capital habeas corpus. He was a Missouri state public defender for seventeen years and is a University of Missouri at Kansas City Law School alum.

Lindsay Runnels is an attorney at Morgan Pilate in Kansas City, Missouri. She has represented prisoners on death row in habeas corpus proceedings since graduating from University of Missouri Kansas City Law School in 2009. She is the 2014 recipient of the Missouri Bar YLS Pro Bono Award.

Cyndy Short is an attorney with McCallister Law Firm, in Kansas City, Missouri, where she represents capital defendants in trial and post-conviction proceedings. A graduate of Saint Louis University Law School, she worked for the Missouri State Public Defender for fifteen years, running the Capital Division for nearly ten of them.

Richard Sindel is a partner at Sindel, Sindel, and Noble in St. Louis, Missouri and a recipient of numerous awards for zealous representation of his clients. He has defended capital clients at trial and in post-conviction and is a graduate *summa cum laude* from the University of Missouri at Kansas City Law School.

Jessica Sutton is a capital habeas attorney and former staff attorney at the Death Penalty Litigation Clinic in Kansas City, Missouri, which she joined in 2010. She specializes in mitigation investigation and development.

Jeremy Weis is a partner at Gaddy and Weis LLC in Kansas City significant experience in federal habeas corpus and state post-conviction matters. He has been a member of the Missouri bar since graduating from the University of Kansas in 1999.

Rebecca Woodman is the Executive Director of the Death Penalty Litigation Clinic in Kansas City, Missouri. She was a capital appellate defender in Kansas for fifteen years and has been an adjunct and visiting professor at Washburn Law School.

Rodney J. Uphoff is the Elwood L. Thomas Missouri Endowed Professor of Law at the University of Missouri School of Law. He teaches trial practice, professional responsibility, criminal procedure, and criminal litigation skills. Before becoming a law professor, he was a public defender.

LEGAL ETHICS PROFESSORS AND PRACTITIONERS

Richard Abel is Michael J. Connell Professor of Law Emeritus at U.C.L.A. He is the author of many books, including *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (2008).

Aviva Abramovsky teaches Professional Responsibility and is the Associate Dean for International Initiatives and an Associate Professor of Law at Syracuse University College of Law.

Dr. Gregory B. Adams has been a law professor at the University of South Carolina School of Law for more than 30 years. He specializes in lawyers' and judges' ethics, subjects on which he is a recognized expert. He is also the founding Director of the Program on Judicial Ethics, Selection, Accountability & Independence.

James Ellis Arden is a member of the Association of Professional Responsibility Lawyers with expertise in attorney ethics, duties, and client relations.

Robert H. Aronson was a Commissioner on Uniform State Laws for 15 years and has been a member of the Washington Legislative Ethics Board. From 1987-1994, he was a member of the National Conference of Bar Examiners Multistate Professional Responsibility Exam Drafting Committee. In 1991, he was Chair of the Association of American Law Schools Professional Responsibility Section. He is a co-author of a casebook, *Problems, Cases and Materials on Professional Responsibility* (West 1985; 2nd ed. 1995; 3rd ed., 2004) and a book, *Professional Responsibility in a Nutshell* (West, 1980; 2nd ed., 1991).

Susan J. Becker is a Professor who teaches Legal Profession, Civil Procedure and other courses from a practice-oriented perspective at Cleveland-Marshall College of Law. She is a co-author of *The Law of Professional Conduct in Ohio* (Lexis-Nexis 2009- 2010).

Sherman L. Cohn is a Professor of Law at Georgetown University Law Center. He has served for the U.S. Department of Justice from 1958 to 1965. From 1957 to 1958, he was a Law Clerk to the Honorable Charles Fahy, U.S. Court of Appeals for the D.C. Circuit. Professor Cohn was also the President of American Inns of Court from 1985 to 1994.

Joshua P. Davis is the Associate Dean for Academic Affairs, Professor, and the Director of the Center for Law and Ethics at the University of San Francisco School Of Law. Professor Davis teaches and writes, inter alia, in the areas of complex litigation and legal ethics.

A. James Elliott, is the Associate Dean and teaches Legal Profession at Emory University School of Law. He was in private practice with Alston & Bird LLP in Atlanta for 28 years prior to returning to the academy.

Lawrence J. Fox is a partner at Drinker Biddle & Reath LLP. He is also currently the Visiting Lecturer of Law and the Crawford Lecturer at Yale Law School, teaching Ethics and Professional Responsibility, while also serving as the Supervising Lawyer at the newly established Ethics Bureau there. Mr. Fox was formerly a lecturer on law at both Harvard Law School (2007-2010) and The University of Pennsylvania Law School (2000-2008), and has authored many articles and books on Professional Responsibility. He is the former Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility and has served as an advisor to the Restatement (Third) of the Law Governing Lawyers.

Monroe H. Freedman is a Professor of Law at Hofstra University and the author of *Understanding Lawyers' Ethics* (3d Ed. 2004) (with Abbe Smith).

Leonard Gross is a Professor of Law Emeritus at Southern Illinois University School of Law and has served as Reporter to the Illinois Judicial Conference committee on Judicial Ethics and its committee on Sanctions in Civil Cases.

Joseph Gordon Hylton is a Professor of Law at Marquette University where he teaches Professional Responsibility.

Sung Hui Kim is an Acting Professor of Law at U.C.L.A. School of Law. She writes and teaches in the areas of Professional Responsibility, Business Associations, and Securities Regulation.

Maury Landsman is an Emeritus Clinical Professor at the University of Minnesota Law School and was a Clinical Professor from 1986-2008. Professor Landsman taught Ethics and Professional Responsibility from 1998-2008.

Lisa G. Lerman is a Professor of Law and at The Catholic University of America. She teaches Professional Responsibility She is a co-author (with Philip G. Schrag) of *Ethical Problems in the Practice of Law* (2d Ed., Aspen 2008), co-author of *Learning from Practice* (2d Ed. West 2007),

and an author of numerous articles in the field of legal ethics, including *Lying to Clients*, University of Pennsylvania Law Review, 1990.

Judith L. Maute is William J. Alley Professor of Law at the University of Oklahoma College of Law in Norman, Oklahoma, where for over 25 years she has studied lawyers' fiduciary duties to communicate and comply with clients' lawful instructions. *See*, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. Davis L. Rev. 1049-1115 (1984).

James E. Moliterno is the Vincent Bradford Professor of Law at Washington & Lee University. He has taught lawyer ethics for over 30 years at six U.S. law schools and in seven other countries, and is author of several books on lawyer ethics issues, including *Cases and Materials on the Law Governing Lawyers* (2008).

Cruz Reynoso is a Retired Associate Justice of the California State Supreme Court, Professor Emeritus at the University of California at Davis, and Past Vice Chair of the United States Commission on Civil Rights.

Patricia E. Roberts is a Clinical Assistant Professor of Law and Director of Clinical Programs at William & Mary Law School. She has taught Professional Responsibility and ethical lawyering as part of her skills teaching, following eight years in private practice.

Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas School of Law in Minnesota. He has taught Professional Responsibility for over 17 years, co-authored a treatise on lawyer ethics with Chief Justice Mark Cady of the Iowa Supreme Court, and served as reporter for the drafting committee on the Iowa Rules of Professional Conduct.

Keith Swisher is an Assistant Professor of Law at Arizona Summit Law School. He teaches Professional Responsibility and focuses his scholarship on legal and judicial ethics.

W. Bradley Wendel is a Professor of Law at Cornell Law School. He is the author of *Professional Responsibility: Examples and Explanations* (Aspen 2007) and joins as an editor on the Fifth Edition of the casebook, Geoffrey C. Hazard, et al., *The Law and Ethics of Lawyering* (Foundation Press 2010).

Ellen Yaroshefsky is the Clinical Professor of Law and Director of the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo School of Law. She teaches a range of courses, sponsors programs and events that provoke critical thought on issues of legal ethics.

Summary of Agreement

It is the view of amici that the conduct of Messrs. Butts and Horwitz fell far beneath the bare minimum standard of care, let alone the standard applicable in a capital case; that they not only committed malpractice and breached multiple fiduciary duties, but also abandoned their client long before they did anything meaningful pursuant to their appointment ; that they

continued to violate their duties of loyalty and confidentiality; that, a fortiori, what they provided was ineffective assistance of counsel; and that they were required to withdraw from this representation years ago to avoid perpetuating an unwaivable conflict of interest. In adjudicating this case, this court has the perfect vehicle to establish the need for capital counsel to conform to critical fiduciary duties codified as court mandated rules in order to fulfill the constitutional standard of effective assistance of counsel.

The Lawyers' Incompetence is Manifest

The first ethical obligation of every lawyer is to be competent. In order to do that the lawyer has to conduct the necessary research in order to determine what the lawyer's obligations are. If undertaken correctly, one does not miss a one-year statute of limitations by 117 days. To be negligent is one thing; something far more reprehensible occurs when one not only misses a deadline by such a wide margin, but uses as an excuse for such a terrible result an argument that compromises the client's entitlement to relief. As one reviews the virtually incoherent defense of Mr. Christeson's counsels' conduct in the Court below, the conclusion that correctly characterizes their behavior is abject neglect.

It would be hard to imagine a more clear-cut case of abandonment. See *Holland v. Florida*, 130 S.Ct. 2549 (2010), the seminal case on equitable tolling, and *Maples v. Thomas*, 132 S.Ct. 912 (2012), the seminal case on abandonment. In the latter, the lawyers who were supposed to be handling the case had left the sinking ship. Here, from what amicus can conclude, the lawyers never got on the ship in the first place.

Messrs. Butts and Horwitz needed to file the petition by April 10, 2005. (Doc. 62 at 5). They appear to admit that they did not meet with Mr. Christeson until May 27, 2005, over a month after his petition was due and nearly eleven months after the court appointed them. (Doc. 73 at 8). If they had gotten aboard the ship when appointed, they would have been on top of the

deadlines that are so critical in habeas litigation — especially the crucial first deadline—and never more critical than when a person's life is on the line. If this was not abandonment, amici are not sure what would be.

The Lawyers' Conflict Required Withdrawal

In any case, it was vital for Messrs. Butts and Horwitz to protect Mr. Christeson's interests after the district court correctly identified that they had missed his filing deadline. It is apparent that, instead, they sought to keep from view any of the evidence of their abandonment through their belated and hapless actions, filing an out-of-time petition in August 2005.[2]

As soon as they realized they had missed the deadline, however, they had an ethical obligation to confess error to the client, and immediately withdraw. Their abandonment created an on-going palpable conflict, a conflict that is manifest in their perpetuation of the abandonment by attempting to hide their misconduct and choosing to defend themselves at the expense of their client. And they did this despite the fact that their prompt withdrawal would have permitted replacement counsel to investigate and present to the district court compelling bases for equitable tolling.

Their obligation to confess error stemmed from their fiduciary duty of communication (Mo. R. of Prof'l Conduct 1.4), and upon their utter failure, after having initially abandoned him, to recognize the profound conflict of interest between the lawyers and their client that then arose, a conflict that is graphically demonstrated by reading the lawyers' filings.

If a lawyer's conduct gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that fact to the client. Restatement (Third) of Law Governing Law § 20 (2000). A lawyer who fails to file for a client before the limitations period has run must inform

[2] At the relevant time Eighth Circuit law clearly recognized that the one-year federal habeas limitations period was subject to equitable tolling. *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000), a view confirmed by *Holland v. Florida*, 560 U.S. 631 (2010) which established the basic parameters for it.

the client of the error, must inform the client of the possibility of a malpractice suit and further inform the client of the resulting conflict of interest that may require the lawyer to withdraw. *Id.*

Their obligation as lawyers for Mr. Christeson was to admit that they had abandoned him at the time of his greatest need. But rather than explain the situation to their client, amici understand they refused to cooperate with new unconflicted counsel, withholding Mr. Christeson's file and communications. They also chose to defend themselves, cobbling together arguments that are difficult to understand and that provide no excuse, but ample evidence that the original abandonment was being compounded by an additional transgression. Mr. Butts and Mr. Horwitz actually argued to the court that they were *diligent* in filing Mr. Christeson's petition—117 days late—in direct contravention of their client's best interest, effectively seeking to preclude Mr. Christeson's equitable tolling claim by characterizing their unfortunate conduct in filing his petition as a conscious tactical decision.

The inescapable conclusion here is that the interests of the lawyers and the interests of the client, a client sitting on death row, were directly adverse. Under those circumstances, Mo. R. of Prof'l Conduct 1.16(a) demanded their immediate withdrawal. Instead, they have persisted in representing their client, even though in their representation of the client they were pursuing ends that were diametrically opposed to everything the client should be seeking, all the time also continuing to violate their ethical obligation of communication with their client.

For example, they represented to the court that they have contacted a psychologist and that Mr. Christeson had agreed to an evaluation, but the lawyers did not speak with Mr. Christeson about this matter until two days *after* they made this statement to the court.

By their own admission, Mr. Butts and Mr. Horwitz did not meet with Mr. Christeson until ten months after their appointment as his counsel, and long after his statute of limitations

had run. Nevertheless, they persisted in attempting to persuade the court that their representation has been diligent and competent. To the contrary, this manner of abandonment could be grounds for disbarment, *See People v. Elliott*, 39 P. 3d 551 (Colo. 2000) (lawyer disbarred for abandoning two clients in violation of Rules of Professional Conduct 1.3 and 1.4 by agreeing to provide specific professional services, failing to provide the services and failing to protect his clients or to communicate with them regarding the matters he was handling), as could their misrepresentation of the chronology to the court.

In sum, it is troubling beyond explanation that these lawyers, in effect, argued in support of their client's execution.

The Lawyers Breached Their Obligation of Confidentiality

One measure of the conflict was these lawyers' use of client confidential information. Indeed their response to court order of May 27, 2014 (Document 73) goes into excruciating detail regarding their otherwise privileged communications with their client and the contents of the case file. See id, at 8-12, 15, 16. In doing so, they violated Mo. R. Prof'l Conduct 1.6 using the confidential information of their client without consent, not in aid of their client's cause, but in support of their own vindication. An assault on loyalty and confidentiality does not get more unethical or devastating than this.

It is true that under certain circumstances lawyers may use confidential information to defend themselves. But the "self- defense" exception is "limited ... because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." *Id.* The "self-defense" exception allows a lawyer to reveal confidential information only to respond to formal allegations in a proceeding where disclosing such information is "reasonably necessary" to

"defend against charges that [would] imminently threaten the lawyer … with serious consequences," such as a disciplinary hearing or a malpractice suit. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c).

This was not one of those situations. They have revealed privileged attorney-client communications in support of their self-serving argument that they have acted as competent, diligent lawyers throughout Mr. Christeson's representation. In doing so they violated the trust Mr. Christeson reposed in them by disclosing the confidential information without notice to the client, let alone seeking the client's informed consent, the ethical requirement because the self-defense exception did not apply.

Conclusion

The lawyers here did not just violate some hortatory guidelines for effective assistance of counsel. They did not just violate court-established rules of professional conduct, the violation of which could and should result in disbarment. They did not just violate these rules in connection with a capital case, as a result of which their client sits on death row, with an execution scheduled. No, they did all of that, dealing with a client of significantly diminished capacity, the victim of an accumulation of disadvantages, denied his right to federal review, not simply because his lawyers lapsed, but because his lawyers turned into his adversaries. It is on

this basis that amici respectfully pray that this Court grant review and remand this matter for further proceedings in which Petitioner will be represented by competent counsel to present his habeas claims.

Respectfully submitted,

LAWRENCE J. FOX
George W. and Sadella D. Crawford
Visiting Lecturer in Law
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-9358
lawrence.fox@yale.edu
Counsel of Record

Counsel for Amici Curiae

Dated: October 27, 2014

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 28th day of October, 2014:

Stephen Hawke
Office of the Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102
Stephen.Hawke@ago.mo.gov

_____
Lawrence J. Fox