IN THE SUPREME COURT OF THE UNITED STATES
DEATH PENALTY CASE
EXECUTION SCHEDULED: 12:01 A.M., CDT, OCTOBER 29, 2014

MARK A. CHRISTESON,	:	
Petitioner,	:	Nos. 14-6873
	:	14A445
v.	:	
	:	
DONALD ROPER, WARDEN,	:	
Respondent	:	

PETITIONER'S REPLY TO COMBINED OPPOSITION TO STAY APPLICATION AND PETITION FOR A WRIT OF CERTIORARI

Respondent's Opposition[1] rehearses the procedural history in the Western District of Missouri and Eighth Circuit since the May 23, 2014 Notice By Friends Of The Court Of Petitioner's Need For Substitution By Conflict-Free Counsel (App. 1a), reflecting the lower courts' woeful handling of the repeated (ultimately, four) requests under 18 U.S.C. §3599 for substitution by conflict-free counsel to replace the conflicted, appointed attorneys who have, in various turns, abandoned, deceived, ignored, and opposed Mr. Christeson. Opp. at 3. Mr. Christeson was only able to escape that morass yesterday, having finally obtained a judgment from the Eighth Circuit to bring to this Court.

The Opposition acknowledges the controlling authority on Mr. Christeson's matter before this Court but fails to address the conflict of interest itself and the consequences that should follow from application of *Martel v. Clair*. The proper effect of *Martel* is side-stepped in service of the aim to sustain the Eighth Circuit's endorsement of appointed counsel's abandonment of Mr. Christeson, a man with profound impairments, at the single most critical juncture in their appointment.

[1] Suggestions in Opposition to Petition for Writ of Certiorari and to Application for Stay of Execution, filed October 27, 2014.

ARGUMENT

Respondent and Petitioner agree that *Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012), controls the substitution motion *sub judice*. Opp. at 5-6. Respondent correctly points to *Martel*'s "interests of justice" standard and addresses certain of the criteria, which has also been addressed elsewhere. Opp. at 5. But the Opposition merely grazes the heart of this dispute, *viz.*, Butts and Horwitz's conflict against Mr. Christeson due to the complete breakdown of their fiduciary duties to him at the most critical juncture.

A. The Courts Below Avoided Appointed Counsel's Conflict of Interest

Mr. Christeson's case is about whether the conflict of interest that his appointed counsel have against him requires substitution by conflict-free counsel. *See* Oct. 27, 2014, Pet., at i (Questions Presented, Question 1). The existence of this actual conflict is plain; indeed, District Judge Whipple's October 22, 2014 order *sub judice* (App. 375a), completely side-steps any engagement with the point. Pet. at 3. As litigated in the proceedings in the lower courts and argued here (Pet. at 25-27), the tenets of, *inter alia*, agency law, the law of professional conduct, and law governing lawyers all point emphatically in one direction. When counsel miss a crucial deadline, a "significant conflict of interest" arises between the client and his attorneys because the "strongest argument" for overcoming the default becomes the fact that counsel had abandoned him. *Maples v. Thomas*, 132 S.Ct. 912, 925 n.8 (2012), cited in Pet. at 25. Despite the pivotal function of this conflict, the district court's denial of Mr. Christeson's substitution (and the court of appeal's summary affirmance of that denial) flatly avoid addressing it. *See*

Brief of Former Federal and State Judges as *Amici Curiae* in Support of Petitioner, at 5, *Christeson v. Roper*, Case No. 14-6873.

B. Counsel's Abandonment When The Filing Deadline Passed Is Decisive

As the procedural history covered in the Opposition reflects, there has been extensive briefing on these issues. Opp. at 3-4. The Opposition repeatedly discusses "ineffective assistance" as an aspect of Mr. Christeson's argument. Opp. at 8. This is perplexing because that idea has played no part in the abandonment and misconduct points lying at the heart of this litigation. Respondent's repeated invocation of the term, in quotations, is simply misleading, given that Petitioner has not discussed ineffectiveness in relation to equitable tolling or, for that matter, the conflict of interest analysis. *Id.* at 8-9.

Petitioner does not argue that federal habeas counsel were ineffective under their 18 U.S.C. §3599 appointment. Opp. at 6. Ineffective §2254 counsel is a straw man and a figment of only Respondent's imagination. Since the inception of these proceedings on May 23, 2014, the position for Mr. Christeson has been that appointed counsel abandoned him when his federal habeas petition was due and that the abandonment had an unmistakable "causal connection" with the failure to file timely. *See , e.g.*, *Gillman v. Sec'y, Florida Dept. of Corr.*, 576 Fed.Appx. 940, 943 (11th Cir. 2014), quoting in *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011). Respondent either misreads or ignores this Court's recent jurisprudence (*e.g., Maples; Holland*), clearly providing that abandonment and egregious misconduct may readily supply grounds for overcoming procedural default. At this late date in Mr. Christeson's litigation, it is beyond perplexing

that Respondent would suggest Petitioner is arguing that Butts and Horwitz were simply ineffective.

As submitted to this Court yesterday, there is room for only one reading of Butts and Horwitz's conduct in the timeframe relevant for this Court's equitable tolling analysis under *Holland*, 560 U.S. at 649—*i.e.*, the period leading up to the filing deadline for the federal habeas petition.

By now, it is undisputed by all involved—save, perhaps Butts and Horwitz (App. 13a)—that the petition for Mr. Christeson was due by April 5, 2005. Yet after District Judge Whipple appointed Butts and Horwitz on July 2, 2004, contingent, *inter alia*, upon their submission of a budget that they filed on July 28, 2004, the docket reflects no activity by the parties until Butts and Horwitz filed the petition on August 5, 2005, 117 days out of time. App. 451a. As the record *sub judice* has developed throughout the lower court proceedings this year, it has emerged that Butts and Horwitz did not first meet Mr. Christeson until May 27, 2005, six weeks *after* the April 5, 2005 deadline. Pet. at 12; App. 93a. Further, appointed counsel have not identified *any* correspondence to Mr. Christeson prior to August 15, 2005 – ten days after the filing of their untimely petition – despite appearing to have identified every letter they have sent him during their appointment. App. 94a.

C. Counsel Manifested Their Conflict Through Vigorous Self-Defense At Petitioner's Grave Expense

In the present proceedings, Butts and Horwitz have launched a vigorous defense of their actions since the filing of the late petition on August 5, 2005. App. 86a *et seq*. Yet the record reflecting the time relevant for *Holland* supports only one reading:

appointed counsel had abandoned Mr. Christeson leading up to, and on the date of, his filing deadline.

Respondent argues that under Eighth Circuit authorities, equitable tolling was available to Petitioner when his appointed counsel procedurally defaulted his case in 2005, even before this Court's ruling in *Holland*. Opp. at 6-7, citing *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000). Petitioner agrees that equitable tolling of §2244(d)(1) was recognized in the Eighth Circuit at the time Butts and Horwitz defaulted Mr. Christeson's habeas petition and then litigated its untimeliness pursuant to the district court's briefing schedule through to the order dismissing the action on January 31, 2007. Two vital points must be made in reply.

1. Counsel's Self-Serving Advocacy Further Demonstrates Their Conflict

First, Butts and Horwitz had *every opportunity to raise equitable tolling* during that long span of briefing (and extensions) following their untimely filed petition. At the point that they resumed their representation of Mr. Christeson and then filed his petition, they had already become irredeemably conflicted by virtue of the violation of fundamental canons of professional responsibility inherent in their abandonment and resulting lapsed statute of limitations. *Holland*, 560 U.S. at 652-53. Respondent now seeks to perpetuate Mr. Christeson's burden from that conflict by insisting that his conflicted counsel's choice to litigate in their self-interest rather than his legal interest in 2005 and 2006 now forecloses conflict-free counsel from ever raising the issue upon belated replacement of the conflicted appointed attorneys, Butts and Horwitz.

In *Kreutzer*, 231 F.3d at 463, the attorneys responsible for missing filing deadlines raised equitable tolling as grounds for overcoming the procedural default of

their making. Opp. at 10. Other courts too have recognized that an attorney *may* raise the existence of grounds for equitable tolling. But the conflicted lawyer may go no further than implicating their own conduct and its legal significance because, *inter alia*, the attorney becomes a witness as to the relevant facts and he would labor under an actual conflict. *See Sallie v. Humphrey*, 789 F.Supp.2d 1351, 1364 (M.D. Ga. 2011) (district court ordered replacement of counsel after attorneys responsible for running out the statute of limitations raised the existence of equitable tolling grounds, requiring new counsel to develop and litigate equitable tolling). The fact that a conflicted attorney *may* introduce grounds for equitable tolling of a statute of limitations that he missed does not mean that a petitioner burdened by appointed counsel who missed his deadline must rely on that faulty attorney to transcend the conflict of interest created by his having defaulted the petitioner's habeas case.

Respondent argues that "simple attorney confusion about the due date of the petition is insufficient to warrant equitable tolling." Opp. at 7. Indeed, that is what Respondent can see when reviewing Butts and Horwitz's pleadings in the district court from 2005 through the end of 2006 and then again in the middle of this year. The conflicted attorneys have steadfastly maintained their *post hoc* analysis of timeliness of their very untimely petition. App. 45a.

Again, the pleadings and self-serving advocacy of these conflicted attorneys does not speak to the fact of the matter concerning what Butts and Horwitz knew or did not know and did or did not do when the deadline was widely missed. The whole point is that the appointed lawyers labored under this conflict situated at the center of the equitable tolling question that determines whether Mr. Christeson may return to court for his first

federal habeas review. Butts and Horwitz are the main witnesses to the equitable tolling question. Yet they have had the role of Mr. Christeson's advocate instead, where they have laid a self-serving and dubious line of argument to the grave detriment of their client.

Undersigned counsel have sought any information from appointed counsel to shed light or clarify the factual record in the period leading up to the April 10, 2005 habeas deadline. App. 12a. Yet Butts and Horwitz (and, for that matter, the State) have supplied no information, let alone evidence, to begin to fill this hole. A dispassionate reading of the foregoing record reflects simply a void in Mr. Christeson's representation. The only conclusion available from this record is that he was utterly abandoned when it mattered. Butts and Horwitz ultimately recovered in the sense that they would be able to keep up appearances as Mr. Christeson's counsel, but their unquestioned abandonment at the critical time remains.

It is this keeping up of appearances that Butts and Horwitz, the State, and the lower courts have all focused upon in their treatment of the abandonment question. *Holland* is not ambiguous on this point; the abandonment and/or misconduct assessment concerns the filing deadline (April 10, 2005), and the period leading up to it. What lawyers end up doing long after the blown filing deadline typically has little or no bearing upon the analysis relevant to equitable tolling of the one-year statute. Yet Respondent (Opp. at 11), and District Judge Whipple have relied on Butts and Horwitz's self-serving pleading about their post-2005 communication with Mr. Christeson and the periodic adding of Mr. Christeson's name to the list in multi-party litigation concerning Missouri's death row. App. 376a. Respondent's heavy reliance on Petitioner's conflicted

appointed counsel's pleadings lodged, in counsel's self-defense, in the district court only highlights Butts and Horwitz's already unmistakable conflict. Opp. at 10-11. Respondent has underscored for this Court that Butts and Horwitz's account of their conduct in Mr. Christeson's name since having to litigate the untimeliness of their petition and, thereafter, to add him to Missouri's several multi-party lethal injection litigations since 2007 settles the matter before this Court: "Vigorous litigation is not abandonment." Opp. at 11.

To this end, Respondent posits that Butts and Horwitz's late "filing occurred as a reasoned decision by original counsel." Opp. at 14. This assessment of the filing comes from the attorneys who breached their fiduciary duty to Mr. Christeson at the most critical juncture in their appointment. It should come as no surprise, but with considerable disappointment, that attorneys capable of abandonment are also capable of self-serving representations to the court that appointed them in their attempt to salvage their professional image. It is one thing to miscalculate a deadline; it is another to abandon a capital case very soon after taking it. The record from circa April 2005 reflects the latter, and only the latter, circumstance.

2. Counsel Have Acknowledged Mr. Christeson's Impairments But Left Them Unattended

Second, the record reflects Mr. Christeson did not learn until his first meeting with undersigned counsel on May 4, 2014 that his federal petition was untimely filed and subsequently dismissed (with the appeal denied) over seven years ago. App. 8a. Respondent, however, still attributes to Mr. Christeson an "awareness of the original habeas litigation" that, as a matter of fact, he simply did not possess. Opp. at 12. As addressed throughout the proceedings below, Mr. Christeson's cognitive impairments are

readily observable from routine client interviewing yet he has never obtained any—let alone a thorough—neuropsychiatric evaluation and reporting to begin to make sense of how compromised, as a medical matter, he is.

Mr. Christeson himself is not to be faulted because his attorneys—both his current appointed counsel and his state collateral review counsel—never managed to have him evaluated *even though they expressly recognized its necessity*. State post-conviction counsel pleaded trial counsel ineffectiveness due to a failure to develop and present evidence of neuropsychiatric impairments, yet that counsel never had him tested. App. 102a. Butts and Horwitz included funding for a neuropsychiatric expert in their July 28, 2004 budget (App. 451a), which the district court approved, yet they never retained an expert and Mr. Christeson was never examined in the many years leading up to the Missouri Supreme Court entering his execution warrant on September 19, 2014.

D. Mr. Christeson Has Struggled Through The Courts Below To Arrive Here

Finally, Respondent asserts that Mr. Christeson's substitution motion is somehow untimely. Opp. at 11-12. The record below, commencing on May 23, 2014, long before the Missouri Supreme Court entered on September 19, 2014 the present execution warrant, belies such a portrayal of the effort to obtain conflict-free counsel in order to litigate equitable tolling. Throughout this litigation—initiated days after attorneys other than Mr. Christeson's conflicted, appointed counsel, Butts and Horwitz, learned from Petitioner that he simply was not aware his federal habeas case had been defaulted—both Respondent and Butts and Horwitz have successfully sought filing extensions on their briefing, unduly drawing out the proceedings in the lower court.

CONCLUSION

For the further reasons set forth in this reply, this Court should grant Mr. Christeson a stay of execution and a writ of certiorari.

Respectfully submitted,
/s/Jennifer A. Merrigan
*JENNFIER A. MERRIGAN, Mo 56733
JOHN R. MILLS
JOSEPH J. PERKOVICH
St. Louis University School of Law
St. Louis, MO 63101
816-695-2214
jenmerrigan@gmail.com
john@jrmillslaw.com
mail@jos.perkovich.name
*Counsel of Record

Counsel For Petitioner, Mark A. Christeson
October 28, 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 D. Hawke
Office of the Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102
Mike.Spillane@ago.mo.gov

/s/Jennifer A. Merrigan
Jennifer A. Merrigan

Counsel for Petitioner