(ORDER LIST: 574 U.S.)

TUESDAY, JANUARY 20, 2015

CERTIORARI -- SUMMARY DISPOSITIONS

13-705 KEIRAN, ALAN, ET AL. V. HOME CAPITAL, INC., ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Jesinoski* v. *Countrywide Home Loans*, 574 U. S. ___ (2015).

13-884 TAKUSHI, ROCKY F. V. BAC HOME LOANS SERVICING

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Jesinoski* v. *Countrywide Home Loans*, 574 U. S. ___ (2015).

13-1526 PETERSON, GARY R., ET UX. V. BANK OF AMERICA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Jesinoski* v. *Countrywide Home Loans*, 574 U. S. ___ (2015).

ORDERS IN PENDING CASES

14M71 GOLDBLATT, LAWRENCE A. V. KANSAS CITY, MO, ET AL.

The motion for leave to proceed *in forma pauperis* with the declaration of indigency under seal is denied.

14M72 REYNA, OSCAR J. V. STEPHENS, DIR., TX DCJ

The motion for leave to proceed as a veteran is denied.

14-562 TANCO, VALERIA, ET AL. V. HASLAM, GOV. OF TN, ET AL.

The motion of Chris Sevier for leave to intervene is denied.

14-6589 HAIRSTON, ARTHUR L. V. SAMUELS, DIR., BOP, ET AL.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

14-6960 M. J. V. WA UNIV. PHYSICIANS, ET AL.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is granted. The order entered December 15, 2014, is vacated.

14-7525 MADRID, ARMINDA V. KMF FREMONT, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until February 10, 2015, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

13-817 KELLOGG BROWN & ROOT SERVICES V. HARRIS, CHERYL, ET AL.

13-956 TEVA PHARMACEUTICALS USA, ET AL. V. SUPERIOR COURT OF CA, ET AL.

13-1241 KBR, INC., ET AL V. METZGAR, ALAN, ET AL.

14-105 KBR, INC., ET AL. V. McMANAWAY, MARK, ET AL.

14-151 WILSON, KEISCHA, ET VIR V. LONG BEACH, CA, ET AL.

14-200 NACS V. BD. OF GOVERNORS

14-337 HOLMICH, WALTER V. UNITED STATES

14-341 CLS TRANSPORTATION LOS ANGELES V. ISKANIAN, ARSHAVIR

14-420 LEMBARIS, ANN M. V. UNIVERSITY OF ROCHESTER

14-439 KURTZ, JACK, ET AL. V. VERIZON NEW YORK, INC., ET AL.

14-530 TAYLOR, LAWRENCE J. V. MARTIN, WARDEN

14-536 JONES, DONALD A. V. HOUSTON INDEPENDENT, ET AL.

14-539 DAVIS, HENRY V. DUNCAN, WARDEN

14-540 PANASONIC CORP., ET AL. V. SAMSUNG ELECTRONICS CO.

14-545 NORTON SIMON MUSEUM, ET AL. V. VON SHER, MAREI

14-546 NEXTERA ENERGY POINT BEACH V. INT'L BRO. OF ELECTRICAL WORKERS

14-548 EUBANKS, WILLIAM M. V. HOBBS, DIR., AR DOC

14-550 FERRIER, RONALD E. V. KENTUCKY

14-559 FLEMING, MARK A. V. TEXAS

14-566 FL DOC V. RODRIGUEZ, MOISE

14-567 HOFFMAN, JESSIE V. CAIN, WARDEN

14-575 HOBART CORP., ET AL. V. WASTE MANAGEMENT OF OH, ET AL.

14-584 KUTTY, MOHAN V. DEPT. OF LABOR

14-609 MALASKA, ALEXANDER E. V. MARYLAND

14-628 SOUTHERN ELECTRONICS, ET AL. V. CAMSOFT DATA SYSTEMS, INC.

14-635 CARROLL, CHARLES A. V. HUNTER, ACTING WARDEN

14-636 SEARCY, ANDREW V. MERIT SYSTEMS PROTECTION BOARD

14-637 UNITED STATES, EX REL. BARKO V. KELLOGG BROWN & ROOT, ET AL.

14-642 BARNES, ANDREW H., ET AL. V. KINNEY, ROBERT

14-667 DEE, MICHAEL J. V. MAINE

14-673 ROGOWSKI, MICHAEL V. MISSISSIPPI

14-682 WHITAKER, FRANCIS G. V. MISSISSIPPI

14-698 WILLIE, JOSEPH R. V. COMMISSION FOR LAWYER DISCIPLINE

14-702 STRAW, ANDREW U. V. KLOECKER, JOHN F., ET AL.

14-707 WARREN, RANDY V. BANK OF AMERICA

14-5258 YEARY, BRIAN M. V. UNITED STATES

14-5273 CARTER, GREGORY V. CALIFORNIA

14-6287 PADILLA, MANUEL C. V. UNITED STATES

14-6320 SOLIZ, MARK A. V. TEXAS

14-6332 NGUYEN, NHUONG V. V. PHAM, MONIQUE, ET AL.

14-6343 COLE, JAIME P. V. TEXAS

14-6711 AMEUR, MAMMAR V. GATES, ROBERT M., ET AL.

14-7047 ROCCO, STEFANO V. SUPERIOR COURT OF CA

14-7061 LUCAS, JAMES V. REYNOLDS, WARDEN

14-7067 BAEZ, ORLANDO V. FALOR, STANLEY, ET AL.

14-7068 ALVARADO, WILMER A. V. BITER, WARDEN, ET AL.

14-7069 PRATER, WAYNE V. PHILADELPHIA FAMILY COURT

14-7070 MOORER, DAVID V. UNIVERSAL PROTECTION SERVICES

14-7075 VELASCO, WILLIAM Z. V. CALIFORNIA

14-7077 PRINGLE, CHARLES E. V. UNITED STATES

14-7080 JACKSON, ANDRE V. MILLER, WARDEN

14-7087 YAZDCHI, ALI V. TEXAS

14-7088 WALLER, RONALD B. V. POSEY, CATHERINE, ET AL.

14-7095 JAMERSON, MARCUS V. TEXAS

14-7099 DAWES, DOLORES V. PUBLISH AMERICA, ET AL.

14-7106 PERSAUD, VISHNU D. V. FLORIDA

14-7107 MYERS, DAVID J. V. BOP MAILROOM STAFF, ET AL.

14-7108 MUHAMMAD, AHAID A. V. VAUGHN, DAVID R., ET AL.

14-7116 WILSON, DARNELL V. HARRINGTON, WARDEN

14-7117 WEBSTER, BRENT E. V. ARAMARK CORRECTIONAL SERVICES

14-7120 CARR, RAYMOND E. V. STEPHENS, DIR., TX DCJ, ET AL.

14-7126 SALINAS, MARTIN V. STEPHENS, DIR., TX DCJ

14-7131 McCARTHY, JOSEPH V. McCARTHY, ANNIE

14-7132 BLUNT, RALPHAEL V. PENNSYLVANIA

14-7134 BERNIER, REJEANNE M. V. COURT OF APPEAL OF CA, ET AL.

14-7150 McARTY, RANDALL T. V. HOBBS, DIR., AR DOC

14-7189 PINTO, RICHARD V. WALSH, SUPT., SULLIVAN

14-7193 FRITH, ROGER V. ND WORKFORCE INSURANCE, ET AL.

14-7243 LUGO, DANIEL V. JONES, SEC., FL DOC

14-7252 MAYO, STANLEY V. VERMONT

14-7292 WILLIAMS, CARL L. V. PERRITT, SUPT., LUMBERTON

14-7305 HICKS, DAMONE L. V. GROUNDS, WARDEN

14-7307 FLETCHER, DENNIS V. MENDONSA, SUPT., SOUZA

14-7308 HILTON, MICHAEL V. McCALL, WARDEN

14-7314 WHITE, MARK V. USDC ED MI, ET AL.

14-7333 ZWEIFEL, JULIE V. ZWEIFEL, KYLE W.

14-7338 SLONE, WILLIAM D. V. MEKO, WARDEN

14-7364 JACKSON, KENJI V. CALIFORNIA

14-7381 VIVO, JOHN V. CONNECTICUT

14-7384 WESTON, MALCOLM V. DENNEY, WARDEN

14-7401 MEALING, ROOSEVELT V. GA DEPT. OF JUVENILE JUSTICE

14-7410 SECESSIONS, TIMOTHY D. V. OHIO

14-7443 CARR-STEPHENSON, NEDRA V. OFFICEMAX NORTH AMERICA, INC.

14-7466 ROBERTSON, MARCO M. V. SAMUELS, CHARLES E., ET AL.

14-7476 ROBERTSON, MARCO M. V. THOMAS, WARDEN

14-7487 BRUNSTING, LANCE P. V. COLORADO

14-7491 TATE, BOBBY L. V. WISCONSIN

14-7563 BARTOLI, EDWARD V. UNITED STATES

14-7565 SCOTT, LEROY V. UNITED STATES

14-7566 RODRIGUEZ-IZNAGA, CLARA V. UNITED STATES

14-7575 HAYNESWORTH, ROY V. UNITED STATES

14-7576 SAMUEL, SHAWN D. V. UNITED STATES

14-7590 CHASSE, PATRICK V. UNITED STATES

14-7618 SMITH, MONIQUE V. UNITED STATES

14-7622 ANDRULONIS, ALBERT A. V. UNITED STATES

14-7624 CAUSEY, WILLIAM A. V. UNITED STATES

The petitions for writs of certiorari are denied.

14-220 ROMAN CATHOLIC DIOCESE, ET AL. V. MAYEUX, ROBERT D., ET UX.

The motion of The Confraternity of Catholic Clergy for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

14-6573 CURRY, RICARDO O. V. UNITED STATES

The motion of respondent for leave to file a brief in opposition under seal with redacted copies for the public record is granted. The motion of petitioner for leave to file a reply under seal with redacted copies for the public record is granted. The petition for a writ of certiorari is denied.

14-7102 KEARNEY, RICHARD V. GRAHAM, SUPT., AUBURN

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

14-7110 RIGGINS, RICHARD P. V. USCA 5

14-7114 STEBBINS, DAVID A. V. USDC WD AR

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

14-7596 FLOOD, KEVIN P. V. UNITED STATES

14-7597 GAREY, EDDIE M. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

14-7601 ROMAN, MANUEL V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

MANDAMUS DENIED

14-630 IN RE THEODORE B. GOULD

14-7270 IN RE AKILAH SHABAZZ

14-7500 IN RE WILLIAM R. ABBOTT

The petitions for writs of mandamus are denied.

REHEARINGS DENIED

12-9909 NOBLE, TYRONE V. UNITED STATES

14-414 THOMPSON, GARY V. JPMORGAN CHASE BANK, ET AL.

14-5016 WILLIAMS, ROBERT L. V. UNITED STATES

14-5806 ROSARIO, EVARISTO V. RHODE ISLAND, ET AL.

14-5935 TAYLOR, EVELYN S. V. BERNICH, ERNEST A., ET UX.

14-5972 NESBY, RODGY L. V. TEXAS

14-5988 OLIVER, WILLIAM H. V. BANKFIRST, ET AL.

14-6494 BRIGHT, EDNA V. HUD, ET AL.

14-6522 KITCHEN, RAYMOND V. CREWS, SEC., FL DOC

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON *v.* DON ROPER, WARDEN

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

No. 14–6873. Decided January 20, 2015

PER CURIAM.

Petitioner Mark Christeson's first federal habeas petition was dismissed as untimely. Because his appointed attorneys—who had missed the filing deadline—could not be expected to argue that Christeson was entitled to the equitable tolling of the statute of limitations, Christeson requested substitute counsel who would not be laboring under a conflict of interest. The District Court denied the motion, and the Court of Appeals for the Eighth Circuit summarily affirmed. In so doing, these courts contravened our decision in *Martel* v. *Clair*, 565 U. S. ___ (2012). Christeson's petition for certiorari is therefore granted, the judgment of the Eighth Circuit is reversed, and the case is remanded for further proceedings.

I

In 1999, a jury convicted Christeson of three counts of capital murder. It returned verdicts of death on all three counts. The Missouri Supreme Court affirmed Christeson's conviction and sentence in 2001, see *State* v. *Christeson*, 50 S. W. 3d 251 (en banc), and affirmed the denial of his postconviction motion for relief in 2004, see *Christeson* v. *State*, 131 S. W. 3d 796 (en banc).

Under the strict 1-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2244(d)(1), Christeson's federal habeas petition was due on April 10, 2005. Nine months before this critical deadline, the District Court appointed attorneys Phil Horwitz and Eric Butts to represent

Christeson in his federal habeas proceedings. See 18 U. S. C. §3599(a)(2) (providing for appointment of counsel for state death row inmates).

Horwitz and Butts, as they have subsequently acknowledged, failed to meet with Christeson until more than six weeks *after* his petition was due. See App. to Pet. for Cert. 93a. There is no evidence that they communicated with their client at all during this time. They finally filed the petition on August 5, 2005—117 days too late. They have since claimed that their failure to meet with their client and timely file his habeas petition resulted from a simple miscalculation of the AEDPA limitations period (and in defending themselves, they may have disclosed privileged client communications). See *id.,* at 90a–92a, 135a. But a legal ethics expert, reviewing counsel's handling of Christeson's habeas petition, stated in a report submitted to the District Court: "[I]f this was not abandonment, I am not sure what would be." *Id.*, at 132a.

The District Court dismissed the petition as untimely, and the Court of Appeals denied Christeson's application for a certificate of appealability. Christeson, who appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys, may not have been aware of this dismissal. See *id.*, at 229a, 231a, 237a.

Nearly seven years later, Horwitz and Butts contacted attorneys Jennifer Merrigan and Joseph Perkovich to discuss how to proceed in Christeson's case. Merrigan and Perkovich immediately noticed a glaring problem. Christeson's only hope for securing review of the merits of his habeas claims was to file a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen final judgment on the ground that AEDPA's statute of limitations should have been equitably tolled. But Horwitz and Butts could not be expected to file such a motion on Christeson's behalf, as any argument for equitable tolling would be premised on their own malfeasance in failing to file timely the

habeas petition. While initially receptive to Merrigan and Perkovich's assistance, Horwitz and Butts soon refused to allow outside counsel access to their files. See App. to Pet. for Cert. 345a.

On May 23, 2014, Merrigan and Perkovich filed a motion for substitution of counsel. The District Court denied the motion, explaining only that it was "not in [Christeson's] best interest to be represented by attorneys located in New York and Pennsylvania," as Merrigan and Perkovich are. *Id.*, at 169a. The District Court did not address Merrigan and Perkovich's offer to forgo all fees and expenses associated with travel to Missouri, nor did it address the possibility of appointing other attorneys for Christeson.

Christeson appealed. The Eighth Circuit dismissed for lack of jurisdiction, apparently reasoning that Merrigan and Perkovich were not authorized to file an appeal on Christeson's behalf.[1] On September 19, 2014, while this appeal was still pending before the Eighth Circuit, the Missouri Supreme Court issued a warrant of execution setting October 29, 2014, as Christeson's execution date.

After further proceedings not relevant here, Merrigan and Perkovich again filed a motion for substitution of counsel on Christeson's behalf. The District Court again denied the motion. Explaining that substitution of "federally-appointed counsel is warranted only when it would serve the interests of justice," it offered four reasons for its decision. Order in No. 04–CV–08004 (WD Mo., Oct. 22, 2014), p. 1, App. to Pet. for Cert. 375a (quoting *Lambrix* v. *Secretary, Florida Dept. of Corrections*, 756 F. 3d 1246, 1259 (CA11 2014); internal quotation marks omitted). First, it deemed the motion to be untimely because it "was not filed until 2014, and shortly before [Christeson's]

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[1] Christeson has since submitted a signed retainer agreement with Merrigan and Perkovich that removes any doubt on that score.

execution date." App. to Pet. for Cert. 375a. Second, it observed that Horwitz and Butts had not "abandoned" Christeson, as they had recently appeared on his behalf in a class-action lawsuit challenging Missouri's lethal injection protocol. *Id.*, at 376a. Third, it noted that although Horwitz and Butts had represented Christeson before the Eighth Circuit, that court had not appointed substitute counsel. *Ibid.* Fourth and finally, the District Court expressed its belief that granting the motion would set "an untenable precedent" by allowing outside attorneys to seek "'abusive'" delays in capital cases. *Ibid.*

Christeson again appealed. This time, the Eighth Circuit summarily affirmed the District Court's order. We stayed Christeson's execution, see *post*, p. ____, and now reverse.

II

Title 18 U. S. C. §3599 "entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings." *Martel* v. *Clair*, 565 U. S., at ___ (slip op., at 1). "By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland* v. *Scott*, 512 U. S. 849, 859 (1994). Congress has not, however, conferred capital habeas petitioners with the right to counsel of their choice. Instead, the statute leaves it to the court to select a properly qualified attorney. See §§3599(a)–(d). But the statute contemplates that a court may "replace" appointed counsel with "similarly qualified counsel . . . upon motion" of the petitioner. §3599(e).

We addressed the standard that a court should apply in considering such a motion in *Clair*. We rejected the argument that substitution of an appointed lawyer is war-

ranted in only three situations: "when the lawyer lacks the qualifications necessary for appointment . . . ; when he has a disabling conflict of interest; or when he has completely abandoned the client." 565 U. S., at ___ (slip op., at 7) (internal quotation marks omitted). Instead, we adopted a broader standard, holding that a motion for substitution should be granted when it is in the "'interests of justice.'" *Id.*, at ___ (slip op., at 13). We further explained that the factors a court of appeals should consider in determining whether a district court abused its discretion in denying such a motion "include: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." *Ibid.*

The District Court here properly recognized that its consideration of Christeson's motion for substitution was governed by *Clair*'s "interests of justice" standard. But its denial of his motion did not adequately account for all of the factors we set forth in *Clair*.

The court's principal error was its failure to acknowledge Horwitz and Butts' conflict of interest. Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "serious instances of attorney misconduct." *Holland* v. *Florida*, 560 U. S. 631, 651–652 (2010). Advancing such a claim would have required Horwitz and Butts to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood. See Restatement (Third) of Law Governing Lawyers §125 (1998). Thus, as we observed in a similar context in *Maples* v. *Thomas*, 565 U. S. ___, ___, n. 8 (2012) (slip op., at 17, n. 8), a "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with

his client's "strongest argument—*i.e.*, that his attorneys had abandoned him."

Indeed, to their credit, Horwitz and Butts acknowledged the nature of their conflict. Shortly before the first motion for substitution was filed, they provided an update to the Missouri Supreme Court on the status of Christeson's collateral proceedings. In it, they stated:

> "Because counsel herein would be essential witnesses to factual questions indispensable to a *Holland* inquiry, there may be ethical and legal conflicts that would arise that would prohibit counsel from litigating issues that would support a *Holland* claim. Unwaivable ethical and legal conflicts prohibit undersigned counsel from litigating these issues in any way. *See Holloway* v. *Arkansas*, 435 U. S. 475, 485–486 (1978). Conflict free counsel must be appointed to present the equitable tolling question in federal district court." App. to Pet. for Cert. 48a–49a.

Yet, in their response to the District Court's order to address the substitution motion, Horwitz and Butts characterized the potential arguments in favor of equitable tolling as "ludicrous," and asserted that they had "a legal basis and rationale for the [erroneous] calculation of the filing date." *Id.,* at 86a, 90a. While not every case in which a counseled habeas petitioner has missed AEDPA's statute of limitations will necessarily involve a conflict of interest, Horwitz and Butts' contentions here were directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests.

Clair makes clear that a conflict of this sort is grounds for substitution. Even the narrower standard we rejected in that case would have allowed for substitution where an attorney has a "'disabling conflict of interest.'" 565 U. S., at ___ (slip op., at 7). And that standard, we concluded,

would "gu[t]" the specific substitution-of-counsel clause contained in §3559(e), which must contemplate the granting of such motions in circumstances beyond those where a petitioner effectively "has no counsel at all"—as is the case when counsel is conflicted. *Id.*, at ___ (slip op., at 10). Indeed, we went so far as to say that given a capital defendant's "statutory right to counsel," even "in the absence" of §3599(e) a district court would be compelled "to appoint new counsel if the first lawyer developed a conflict." *Ibid.*

Given the obvious conflict of interest here, the considerations relied upon by the District Court cannot justify its decision to deny petitioner new counsel. The second and third factors noted by the District Court—that appointed counsel continued to represent Christeson in litigation challenging the means of his execution, and that the Eighth Circuit had not previously substituted counsel—are not substantial. Whether Horwitz and Butts had currently "abandoned" Christeson is beside the point: Even if they were actively representing him in some matters, their conflict prevented them from representing him in this particular matter. Likewise, it is irrelevant that the Eighth Circuit had not previously *sua sponte* directed substitution of counsel in the course of denying Christeson's request for a certificate of appealabilty and adjudicating his challenge to Missouri's execution protocol, when the conflict was not evident.

The first and fourth factors cited by the District Court—the delay in seeking substitution and the potential for abuse—might be valid considerations in many cases. See *Clair*, 565 U. S., at ___ (slip op., at 12) ("Protecting against abusive delay *is* an interest of justice"). But under the circumstances here, these factors alone cannot warrant denial of substitution. Christeson's first substitution motion, while undoubtedly delayed, was not abusive. It was filed approximately a month after outside counsel

became aware of Christeson's plight and well before the State had set an execution date, and it requested only 90 days to investigate and file a Rule 60(b) motion.

Nor is it plain that any subsequent motion that substitute counsel might file on Christeson's behalf would be futile. See *id.*, at ___ – ___ (slip op., at 15–16) (affirming denial of substitution motion as untimely where any filing made by substitute counsel would have been futile). To be sure, Christeson faces a host of procedural obstacles to having a federal court consider his habeas petition. Although Christeson might properly raise a claim for relief pursuant to Rule 60(b), see *Gonzalez* v. *Crosby*, 545 U. S. 524, 535–536 (2005), to obtain such relief he must demonstrate both the motion's timeliness and, more significant here, that " 'extraordinary circumstances' justif[y] the reopening of a final judgment." *Id.*, at 535 (quoting *Ackermann* v. *United States*, 340 U. S. 193, 199 (1950)). That, in turn, will require Christeson to show that he was entitled to the equitable tolling of AEDPA's statute of limitations. He should have that opportunity, and is entitled to the assistance of substitute counsel in doing so.

* * *

The petition for certiorari and the motion to proceed *in forma pauperis* are granted. The judgment of the Eighth Circuit Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON *v.* DON ROPER, WARDEN

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

No. 14–6873. Decided January 20, 2015

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I would not reverse the decision of the Court of Appeals in this case without briefing and argument. As the Court acknowledges, petitioner cannot obtain review of the merits of his federal habeas claims without showing that the applicable statute of limitations should have been equitably tolled, *ante*, at 2, and the availability of equitable tolling in cases governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is a question of great importance.

AEDPA sought to ameliorate the lengthy delay that had often characterized federal habeas proceedings in the past.* See *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"). AEDPA thus imposed a strict 1-year time limit for filing a federal habeas petition. 28 U. S. C. §2244(d). If this 1-year period were equitably tolled whenever a habeas petitioner's attorney missed the deadline and thus rendered ineffective assistance, the 1-year period would be of little value, and the days of seemingly interminable federal habeas review would return. In

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*Members of this Court have lamented the delay that often occurs in capital cases. *Johnson* v. *Bredesen*, 558 U. S. 1067, 1067–1070 (2009) (Stevens, J., statement respecting denial of certiorari), *Elledge* v. *Florida*, 525 U. S. 944, 944–946 (1998) (BREYER, J., dissenting from denial of certiorari).

Holland, the Court held that the AEDPA statute of limitations may be equitably tolled—but only under quite extraordinary circumstances. *Holland* v. *Florida*, 560 U. S. 631, 651–652 (2010). Any expansion or further delineation of such circumstances should not be undertaken without the careful consideration that is possible only after the normal procedure of full briefing and argument.

The Court believes that briefing and argument are not necessary in this case, and my understanding of the Court's decision is that it expresses no view whatsoever on the question whether petitioner may ultimately be entitled to equitable tolling. I understand the Court to hold only that conflict-free substitute counsel should have been appointed for the purposes of investigating the facts related to the issue of equitable tolling and presenting whatever argument can be mounted in support of a request for that relief.

Based on the present record, it is not clear that this case involves anything other than an error, albeit a serious one, on the part of the attorneys who represented petitioner at the time when his federal habeas petition was due to be filed. According to those attorneys, they miscalculated the due date and as a result filed the petition after the time had run. They met with petitioner to discuss the habeas petition prior to the date on which they say they thought the petition was due but after the date on which it was actually due. These facts show nothing more than attorney error and thus fall short of establishing the kind of abandonment that is needed for equitable tolling under our precedent. See *id.*, at 651–652. I do not understand the Court's opinion to hold otherwise.

Because of the close relationship between the question that the Court decides (the propriety of the District Court's refusal to appoint substitute counsel) and the question of petitioner's entitlement to equitable tolling, I think that plenary review would have been more appro-

priate in this case. I write separately to emphasize that the Court's summary disposition does not address that issue.

SUPREME COURT OF THE UNITED STATES

MARVIN PLUMLEY, WARDEN *v.* TIMOTHY JARED AUSTIN

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

No. 14–271. Decided January 20, 2015

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting from the denial of certiorari.

Forty-six years ago, this Court created a presumption of judicial vindictiveness that applies when a judge imposes a more severe sentence upon a defendant after a new trial. *North Carolina* v. *Pearce*, 395 U. S. 711, 725–726 (1969). That presumption was—and remains—an anomaly in our law, which ordinarily "'presum[es] . . . honesty and integrity in those serving as adjudicators.'" *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 891 (2009) (ROBERTS, C. J., dissenting) (quoting *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975)). Perhaps recognizing the oddity of this presumption, the Court has repeatedly cautioned that it applies only where there is a reasonable likelihood that the increase in sentence was the product of *actual* vindictiveness on the part of the sentencing authority. *E.g., Alabama* v. *Smith*, 490 U. S. 794, 799 (1989).

Despite this instruction, confusion reigns. Some Courts of Appeals have taken a narrow view of the presumption, concluding that it applies only when a "triggering event" like a reversal by a higher tribunal "prods the sentencing court into a posture of self-vindication." *Kindred* v. *Spears*, 894 F. 2d 1477, 1480 (CA5 1990); accord, *e.g., Fenner* v. *United States Parole Comm'n*, 251 F. 3d 782, 788

(CA9 2001). Others have taken a more expansive view, applying it when the trial court imposes a higher sentence after granting a motion for corrected sentence. See, *e.g., United States* v. *Paul*, 783 F. 2d 84, 88 (CA7 1986). In this case, the United States Court of Appeals for the Fourth Circuit took the latter approach. 565 Fed. Appx. 175, 188 (2014) (*per curiam*). The Court should have granted this petition to resolve the confusion.

I

While serving a prison term for breaking and entering, respondent Timothy Jared Austin walked away from an inmate road crew. He was apprehended and pleaded guilty to attempted escape. The West Virginia trial court sentenced him to one to three years for the attempted escape.

At sentencing, the trial judge considered when Austin should begin serving that sentence. Austin was expected to be discharged on his breaking-and-entering conviction in December 2014, but was expected to become eligible for parole in March 2010. Recognizing that Austin's attempted escape had not been violent, but still amounted to a "breach [of] trust," App. to Pet. for Cert. 70, the trial court announced its sentence to begin on Austin's expected parole date:

> "Now, I've got several ways that I can sentence you. I can sentence you to a one to three, starting today [November 12, 2009], or I can sentence you to a one to three starting when you're discharged, but I'm going to split the baby in half. I'm going to sentence you to a one to three, and your one to three is going to begin in March of 2010, which means you're not going to get out on parole in March, but you will start your one year then.
>
> "Now, why am I doing it that way? . . . [I] think you should serve some time for [the attempted escape]; so,

> by making [the sentence] beginning in March of 2010, which is about 4 or 5 months from now and not giving you any back credit, that's probably going to cost you—well it will cost you your opportunity for parole because you won't be eligible then until March of 2011, and if the parole board wants to parole you on both of those, that's fine, and if not, well, you'll remember that next time you go for a little stroll." *Id.*, at 71–72.

Seven months later, Austin filed an expedited motion to correct his sentence, arguing that state law prohibited the trial court from imposing a sentence that was neither purely concurrent nor purely consecutive. While that motion was pending in the trial court, he petitioned the West Virginia Supreme Court of Appeals for a writ of mandamus to the trial court to respond to the motion. Four days after receiving a copy of that petition, the trial court entered an amended sentencing order as follows:

> "[T]he undersigned Judge received a copy of a Writ of Mandamus or in the alternative Original Petition for Writ of Habeas Corpus. The Court also received a proposed Amended Sentencing Order. After reviewing this matter, it is clear to this Court that an Amended [Sentencing] Order is needed to clarify the original Sentencing Order, entered on November 23, 2009. . . . It was the intent of this sentencing court that the sentence imposed on November 12, 2009 be served consecutively with the unrelated sentence the defendant was already serving on November 12, 2009. It was the intent of the sentencing court to give the defendant credit for time served from his arraignment to the date of sentencing and that the balance of his sentence be served consecutively to the sentence he was already serving in an unrelated matter." *Id.*, at 59.

This order resulted in a longer total sentence.

The defendant appealed to the West Virginia Supreme Court, arguing that the court should presume that the trial judge had acted vindictively when he filed the amended sentencing order. The State Supreme Court rejected the appeal, explaining that it was clear that the trial judge acted only to clarify his intention in the original sentencing order.

The defendant then applied for a writ of habeas corpus in federal court based on the same claim of judicial vindictiveness. The District Court denied the application, concluding that the West Virginia Supreme Court's decision was not based on an unreasonable determination of the facts. See 28 U. S. C. §2254(d). It agreed with the West Virginia Supreme Court that nothing had occurred to trigger the presumption of judicial vindictiveness. As it explained, the West Virginia trial judge had entered the amended sentencing order based on the defendant's motion for a corrected sentence, not based on any reversal by a higher tribunal.

The Fourth Circuit granted a certificate of appealability and reversed. 565 Fed. Appx. 175. It concluded that the West Virginia Supreme Court's decision was based on an unreasonable determination of the facts, §2254(d)(2), and declined to afford any deference to that decision. *Id.*, at 184–185. It then applied the presumption of vindictiveness. Although recognizing that the state trial judge had not been reversed by a higher tribunal, the Fourth Circuit concluded that the presumption applied because, "when [the defendant] was resentenced, he was exercising rights guaranteed under the statutes and Constitution of West Virginia." *Id.*, at 188.

II

This Court should have granted certiorari to review the Fourth Circuit's decision for a number of reasons. To

begin with, that decision is in tension with our precedents. Although "the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'does not apply in every case where a convicted defendant receives a higher sentence on retrial.'" *Smith*, 490 U. S., at 799 (brackets omitted). Instead, we have applied it only where there is a reasonable likelihood of actual vindictiveness on the part of the sentencing authority. *Ibid.* Thus, we have refused to apply the presumption to a higher sentence entered after a retrial ordered by the original sentencing judge. *Texas* v. *McCullough*, 475 U. S. 134, 138–139 (1986). "[U]nlike the judge who has been reversed," we explained, the trial judge had "no motivation to engage in self-vindication." *Ibid.*

The Fourth Circuit's rule is incompatible with this reasoning. The Fourth Circuit concluded that the presumption applied because, when Austin was resentenced, "he was exercising rights guaranteed under the statutes and Constitution of West Virginia." 565 Fed. Appx., at 188. Under that reasoning, the defendant who exercised his rights to file and obtain a motion for a new trial should also have been entitled to the presumption of vindictiveness. Contra, *McCullough*, 475 U. S., at 138–139. But this Court has already rejected the "view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion." *Id.*, at 139. To presume otherwise is to show profound disrespect to our fellow jurists. And that disrespect is even more pronounced in cases like this one, when federal judges are reviewing state criminal proceedings.

The Fourth Circuit's decision merits review for an additional reason: It deepens existing disagreement between the Courts of Appeals over the scope of the presumption of vindictiveness. On the one hand, the Fifth and Ninth Circuits have taken the position that the presumption

does not apply "[a]bsent a triggering event" that "prods the sentencing court into a posture of self-vindication." *Kindred*, 894 F. 2d, at 1480; accord, *e.g., Fenner*, 251 F. 3d, at 788. For these courts, a reversal by a higher tribunal or order from a higher tribunal is such a triggering event, see *Bono* v. *Benov*, 197 F. 3d 409, 417 (CA9 1999); *Kindred*, *supra*, at 1479–1480, whereas the mere filing of an application or motion challenging a sentence is not, see *Fenner*, *supra*, at 788–789. The Eighth Circuit agrees and has concluded that reversal by a higher tribunal is the only such triggering event. *Savina* v. *Getty*, 982 F. 2d 526 (1992) (unpublished table decision). The Seventh Circuit, on the other hand, has stated that it would apply the presumption even if the trial court imposed a higher sentence after itself granting a defendant's motion for a corrected sentence. *United States* v. *Brick*, 905 F. 2d 1092, 1096 (1990) (citing *United States* v. *Paul*, 783 F. 2d 84, 88 (CA7 1986)).

Our precedents have created this confusion, first by endorsing a presumption that is at odds with the respect we ordinarily accord our Nation's judges, and then by chipping away at that presumption in a piecemeal fashion. We should not abdicate our responsibility to clean up a mess of our making. *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. ___, ___–___ (2011) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 17–18). It is time to revisit and clarify when, if ever, a presumption of judicial vindictiveness is appropriate.

True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. *Minor* v. *Bostwick Labs., Inc.*, 669 F. 3d 428, 433, n. 6 (CA4 2012). But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin's claim of judicial vindictiveness. It analyzed the claim in a 39-page opinion writ-

ten over a dissent. By any standard—and certainly by the Fourth Circuit's own—this decision should have been published. The Fourth Circuit's Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it "establishe[d] . . . a rule of law within th[at] Circuit," "involve[d] a legal issue of continuing public interest," and "create[d] a conflict with a decision in another circuit." Rules 36(a)(i), (ii), (v) (2015). It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.

* * *

The Fourth Circuit's decision warrants review. It orders the District Court to grant the extraordinary writ of habeas corpus on a questionable basis. It announces a rule that is at odds with the decisions of this Court and Courts of Appeals. And, it does so in an unpublished opinion that preserves its ability to change course in the future. For these reasons, we should have granted the petition for a writ of certiorari.