No. 14-6873

IN THE

Supreme Court of the United States

MARK CHRISTESON,

Petitioner,

v.

DON ROPER,

Respondent.

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

BRIEF OF FORMER FEDERAL AND STATE JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

TEJINDER SINGH
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BRIEF OF *AMICI CURIAE*[1]

Amici curiae former federal and state judges respectfully submit this brief in support of petitioner Mark Christeson, and urge that the writ for certiorari and a stay of execution be granted.[2]

INTEREST OF THE *AMICI*

Amici are seventeen former federal and state judges.[3] They include trial and appellate judges from across the nation and the political and ideological spectrum. Notwithstanding their diversity, *amici* share a deep familiarity with the judicial system and a strong interest in maintaining its fairness and public legitimacy. These values are never more salient than in capital cases, where judges have the particularly heavy responsibility to ensure that the process is beyond reproach. *Amici* filed a brief in support of petitioner's motion for a stay of execution pending appeal in the court of appeals. *See* Pet. App. 412a-28a.

---

[1] Pursuant to Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici's* intent to file this brief, which is filed more than ten days before its due date, and all parties consented to the filing of this brief.

[2] This brief relates to the petition for a writ of certiorari seeking review of the Eighth Circuit's order dated October 24, 2014, in court of appeals case number 14-3389.

[3] A complete list of the *amici* appears as an addendum to this brief.

The lower courts' rulings in this case undermine *amici's* interest in a fair criminal justice system. By denying petitioner's request for substitution of counsel under 18 U.S.C. § 3599(e) without an evidentiary hearing—indeed, without even addressing the conflict of interest at the heart of this case—the courts below endorsed the apparent abandonment and misconduct of petitioner's appointed counsel. If the status quo holds, petitioner will be executed without any meaningful federal review of his death sentence, even though he has made a substantial showing that conflict-free counsel would be able to obtain equitable tolling and thus consideration of the merits of his § 2254 petition.

This case also raises a separate concern relating to the administration of the death penalty. As states, including especially Missouri, have moved to execute inmates on death row after lengthy periods of delay, both the bar and the bench have been taxed by the demands of the process. This strain is likely why petitioner's appointed counsel—who clearly were not up to the task before them—were appointed in the first place, and why their errors were not caught before now. Cases, including this one, are falling through the cracks of the system. When the stakes are this high, such failures unacceptably threaten the legitimacy of the judicial process. The concern is only heightened when, as here, courts respond with indifference, or appear partial to the prosecution.

SUMMARY OF ARGUMENT

This Court should grant certiorari and a stay of execution so that petitioner may have an opportunity to have conflict-free counsel present his case for

equitable tolling of the Antiterrorism and Effective Death Penalty Act's statute of limitations.

The lower courts' decisions denying petitioner's motion are at odds with this Court's precedents, which hold that conflicts of interest constitute particularly strong grounds for substitution, and further require courts to at least *address* a petitioner's argument for substitution before ruling on his motion. Here, the conflict between petitioner and his appointed attorneys—who would have to argue their own egregious malpractice in order to obtain tolling for their client—warrants substitution (or at least an evidentiary hearing), and undermines all of the district court's stated rationales for denying petitioner's motion. By denying petitioner's motion without discussing the conflict, the lower courts abused their discretion.

Certiorari also should be granted because this case presents questions of national importance relating to the administration of the death penalty. The decisions below implicate the proper weight to give to conflicts of interest in substitution motions; the proper role of counsel in capital cases; and the proper role of the courts supervising those cases. Here, the lower courts set the terrible precedent that federal courts can reject a capital inmate's request for relief without considering the core of his argument, or even ensuring that his attorneys are capable of representing his interests. The rush to execute petitioner privileges finality above fairness, and this Court's review is necessary to restore balance to the administration of the death penalty.

ARGUMENT

I. The Decision Below Conflicts With This Court's Decisions.

1. The history of this case shows that the postconviction system has failed petitioner—an inmate of limited mental capacity who was raised in horrific circumstances and imprisoned since he was a teenager. *See* Pet. App. 346a-47a, 353a; *see also id.* 229a-31a (declaration of fellow inmate describing petitioner's lack of capacity). In his state postconviction proceedings, a judge whose term in office had already expired was assigned to petitioner's case. *See id*. 347a. That judge resolved the matter by signing, without editing, a 170-page order drafted by the prosecution. *Id*.

In these federal postconviction proceedings, petitioner's appointed lawyers failed to meet the deadline to file his § 2254 petition. Indeed, they did not even meet with their client until the deadline had already lapsed, and they ultimately missed the deadline by almost four months. *See* Pet. App. 384a. They then refused to argue for tolling of the statute of limitations when they had the opportunity, out of reticence to admit that their failure. *Id*. For years, they allowed petitioner to believe that his federal case was ongoing when it had, in fact, been dismissed as time-barred. *Id*. 385a-86a, 229a-31a. They did not withdraw from the representation, nor seek alternate representation for their client. As stated by legal ethics expert Lawrence Fox, who prepared a report in this case, appointed counsel's conduct can only be characterized as "abject neglect." *Id*. 131a.

It was only when appointed counsel finally sought outside assistance—seven years after missing the deadline—that their errors came to light and petitioner had the opportunity to challenge them. *See* Pet. App. 384a. The pro bono attorneys presently assisting petitioner raised appointed counsel's error in a thirty-four page pleading to the district court that was both thorough and respectful. *See id*. 2a-35a. Although the pro bono attorneys did not themselves demand to be substituted in as petitioner's attorneys, they offered to take the appointment if necessary. This notice was filed in May of this year, four months before the state of Missouri issued a death warrant in this case.

The lower courts' reaction to this sequence of events has been alarming. The district court repeatedly denied the pro bono attorneys' requests to appoint conflict-free counsel. But the district court *never addressed* the conflict of interest between petitioner and his appointed attorneys.

Instead, the court initially denied the request because it did not wish to appoint attorneys from Philadelphia and New York to represent an inmate in Missouri—even though there was no evidence that any qualified attorney in Missouri was available to take up the representation. *See* Pet. App. 169a. The pro bono attorneys requested reconsideration, and even offered to pay their own travel costs, but the court was unmoved. *See id.* 390a-91a. The matter went to the Eighth Circuit, which dismissed the appeal for lack of jurisdiction, reasoning that the pro bono attorneys lacked standing because at the time they had filed their initial notice, they were not formally representing petitioner. *See id*. 240a.

On remand, the pro bono attorneys promptly cured the standing issue by executing a retainer agreement with petitioner and refiling their motion. The district court again denied it, reasoning that the Eighth Circuit's mandate had not yet issued, and so it lacked jurisdiction over the motion. *See id*. 300a. The district court further signaled its hostility to the pro bono attorneys by directing that they were not permitted to file anything else in that court. *Id*. The pro bono attorneys thus sought and obtained an order from the Eighth Circuit directing the district court to allow them to file a renewed substitution motion now that the standing defect had been cured. *See id*. 339a.

The district court then denied the new substitution motion—again without mentioning the conflict that formed its basis. This time, the district court concluded that a denial would not be in "the interests of justice" for three reasons: (1) that the motion was untimely because it was filed seven years after the denial of petitioner's federal habeas petition and on the eve of his execution; (2) that petitioner's appointed attorneys had not abandoned him because they continue to represent him in various other proceedings; and (3) that permitting substitution would set a precedent permitting outside counsel to toll executions by second-guessing the performance of an inmate's attorneys. *See id*. 375a-76a.

The next day, the Eighth Circuit summarily affirmed without opinion and denied petitioner's motion for a stay of execution. *Id*. 448a.

2. Even cursory scrutiny reveals that the lower courts' decisions are deeply flawed. Most obviously, the strong showing of a conflict in this case—which the lower courts ignored—undermines all three of the

district court's rationales. The district court's reasoning is also flawed on its own terms.

Beginning with the conflict itself: in order to argue for equitable tolling, petitioner will have to present "extraordinary circumstances" that prevented him from filing in a timely fashion despite his diligent efforts. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). While mere attorney neglect, standing alone, may not satisfy that standard, this Court has held that "at least sometimes, professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id*. at 651. This Court gave examples in *Holland*, explaining that "fundamental canons of professional responsibility . . . require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client." *Id*. at 652-53. In this case, petitioner's appointed attorneys sought to be appointed to represent him, and then apparently abandoned him out of the gate, getting involved in has case only after it was already too late. Their work was not "reasonably competent," they did not "communicate with their client[]," and they did not "keep their client[] informed of key developments." *See id.* What is more, as explained in the petition and stay application, petitioner's mental capacity to police his lawyers' conduct is virtually nonexistent. More than many, he was counting on his attorneys to exercise care in representing him—and was participating as diligently as he was able.

Petitioner's showing that his appointed attorneys failed to meet even basic standards of professional responsibility gives rise to a clear conflict because attorneys cannot be expected to argue their own negligence in an effort to obtain tolling for their client. *See Maples v. Thomas*, 132 S. Ct. 912, 925 n.8 (2012) (acknowledging that a "significant conflict of interest arose" between an inmate and a law firm when the inmate's "strongest argument" was that attorneys from that firm had abandoned him). The courts of appeals have recognized as much. *See, e.g.*, *Tabler v. Stephens*, No. 12-70013, 2014 WL 4954294, at *15 (5th Cir. Oct. 3, 2014); ("A significant conflict of interest arises if an attorney must argue that his own representation at an earlier stage of the litigation was ineffective."); *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013) (adopting as precedential *Gray v. Pearson*, 526 F. App'x 331, 334 (4th Cir. 2013), which held that "a clear conflict of interest exists in requiring . . . counsel to identify and investigate potential errors that they themselves may have made," such that a failure to appoint substitute counsel was "unsupportable by basic legal ethics principles" in case involving procedural default).

This Court has explained that under 18 U.S.C. § 3599(e), which governs the substitution of counsel in capital cases, substitution is warranted when it would serve the "interests of justice." *Martel v. Clair*, 132 S. Ct. 1276, 1284 (2012). This broad standard entitles the district court to consider an array of factors to determine whether substitution is appropriate. *Id*. at 1287. But conflicts of interest give rise to an especially strong case for substitution. As this Court explained, even independent of § 3599's

substitution provision, "a court would have to ensure that the defendant's statutory right to counsel was satisfied throughout the litigation; for example, the court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Id*. at 1286. Moreover, even the state in *Martel*—which advanced an unduly narrow and restrictive standard for substitution—acknowledged that conflicts of interest and abandonment would justify relief under § 3599. *See id.* at 1284. When, as here, an actual conflict of interest exists, courts should readily grant substitution motions.

3. Against these authorities, the decision below cannot stand.

Critically, neither the district court nor the Eighth Circuit ever found that a conflict of interest does not exist; nor did they find that the conflict has not prejudiced petitioner. Instead, the district court addressed peripheral points without ever explaining how they overcome petitioner's claim, and the Eighth Circuit issued no opinion at all. This Court has already held that "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer," and that a credible allegation that appointed counsel has engaged in misconduct "require[s] the court to make further inquiry before ruling on his motion for a new attorney." *Martel*, 132 S. Ct. at 1288. *See also Brown v. United States*, 720 F.3d 1316, 1336 (11th Cir. 2013) ("The trial court is obliged to explore the extent of the conflict and any breakdown in communication between the lawyer and the client."). By failing to consider or address petitioner's most compelling

argument for substitution, the district court abused its discretion.

Furthermore, neither court held that petitioner's motion for equitable tolling would be "futile" even if filed by substitute counsel. *Cf. Martel*, 132 S. Ct. at 1289. The state made this argument below, but neither court discussed it. That is unsurprising, because for the reasons set forth above and in the petition, petitioner's request for equitable relief would not be futile if his attorneys behaved as he alleges. And in any event, consideration of the ultimate merits of that motion would be premature at this point, because conflict-free counsel have not yet had a full opportunity to access the relevant case information and prepare a comprehensive presentation. *See* Pet. App. 345a (noting that "[c]onflicted counsel have withheld access to their file and any other relevant information bearing upon the circumstances *sub judice* and specifically their conduct and abandonment at critical junctures following their 2004 appointment"). Thus, there is no way that a court credibly can hold today that petitioner's motion for tolling would be futile.

As noted, instead of addressing the heart of the matter, the district court advanced three reasons to support its denial of petitioner' substitution motion: (1) timeliness; (2) appointed counsel's representation in other proceedings; and (3) concern that a ruling in petitioner's favor would set a broad precedent permitting outsiders to meddle in capital cases. *See* Pet. App. 375a-76a. None of these three concerns justifies denial of substitution in the face of a strong showing of a conflict.

With regard to the issue of timeliness, substantial evidence shows that the reason for the delay in filing has everything to do with appointed counsel's failure to disclose their error and to withdraw from the case. Indeed, there is even evidence that counsel have been concealing their errors from their client—or that, at a minimum, he has not comprehended their failure and its implications for his challenge to his sentence. Because the delay in this case is the product of the conflict of interest, it was error for the district court to rely on the former without even considering the latter.

Even putting the conflict aside, the district court's reliance on timeliness rings hollow. To be sure, it is *now* late in the day. But the original notice requesting conflict-free counsel was filed in May, four months before Missouri issued the death warrant—and as soon as possible after the pro bono attorneys discovered the violations in this case. Since then, the principal source of delay has been the lower courts, which have done everything in their power not to rule on the merits of petitioner's argument. And the state itself has not been in a hurry, until recently, to execute petitioner. His appeal from the initial dismissal of his claim was adjudicated in 2007, yet no death warrant issued until 2014. For the state now to assert a strong interest in finality is disingenuous.

The district court's second rationale is equally flawed because whether or not counsel abandoned petitioner in other proceedings is irrelevant if they have an intractable conflict of interest in *this case*. Conflicts of interest and abandonment constitute separate grounds for substitution of counsel—and the

court below erred by addressing one and not the other. Even putting that conflation aside, the appointed attorneys *did* abandon petitioner in this case. Indeed, they did not even meet with petitioner until the deadline had lapsed—and they failed to file anything on his behalf for 117 days past the deadline. See Pet. App. 132a (report of ethics expert Lawrence Fox stating that "if this was not abandonment, I am not sure what would be"). Through egregious neglect, the appointed attorneys thus scuttled petitioner's § 2254 petition—likely his best prospect for obtaining relief. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (explaining that "[d]ismissal of a first federal habeas petition is a particularly serious matter"). In some ways, "abandonment" is too charitable a word for this conduct, because it suggests that at some point prior to the abandonment, the attorneys did something positive for the client. Here, the court-appointed attorneys commenced the representation by placing their client in the unenviable position of having to ask for equitable tolling.

Finally, granting substitution in this case would not set an "untenable precedent" because nobody is arguing for tolling on the basis of mere "second-guessing." *Contra* Pet. App. 376a. And nobody is suggesting that district court decisions regarding substitution do not warrant deference. Instead, an inmate must, at least, be able to set forth a *prima facie* case for substitution before a court should order a hearing. That was done here, yet ignored by the district court. It follows from this Court's command in *Martel* that the court failed adequately to consider petitioner's argument for relief, and thus failed to

fulfill its obligation as the court with jurisdiction over his petition.

Indeed, the district court's hostility to intervention from "outside attorneys" in this case is truly puzzling. It appears from the record that petitioner lacks the mental capacity necessary to evaluate the performance of his lawyers or instruct them as to the law. Moreover, for large portions of his sentence, petitioner has been in protective custody because he has repeatedly suffered violence and threats from other prisoners; thus, his ability to access other inmates who might aid him in his legal case has likewise been limited. So he cannot help himself. Nor can petitioner's appointed attorneys, who have a clear conflict of interest. And the courts below have all showed sympathy with the prosecution, and not petitioner. In light of those facts, it is unclear how the district court believes that grave errors—like the ones in this case—should properly be exposed and addressed. The attention of outside attorneys seems like the only viable avenue to relief, and so the lower courts' hostility to them—*e.g.*, the district court's refusal to consider appointing attorneys from New York or Philadelphia, the Eighth Circuit's decision that the outside attorneys lack standing to make arguments on petitioner's behalf, and the district court's subsequent decision barring the pro bono attorneys (who by then had been retained and were working for free) from filing any documents in the case—all suggests a desire to cover up appointed counsel's errors and move this case to execution before those errors may be addressed. But that is not how any case—let alone a capital case—should be allowed to proceed.

II. This Case Presents Questions Of National Importance.

This case presents multiple questions of national importance that this Court should address. First, it presents an important question regarding the salience of conflicts of interest in substitution motions. The lower courts' rulings effectively establish that in the Eighth Circuit, even a substitution motion raising a clear and acute conflict of interest may be denied in the interest of timeliness—even when the conflict itself gave rise to the delay. But § 3599, as interpreted by this Court, is not so harsh. This Court should grant certiorari to establish that a strong showing of a conflict of interest supersedes an attenuated interest in finality.

Second, this case furnishes a useful vehicle to articulate counsel's obligations in capital cases. In *amici*'s view as former judges, petitioner's appointed attorneys were plainly negligent, and his pro bono attorneys are acting in the best traditions of the profession. The appointed attorneys failed to meet relevant deadlines, made meritless arguments asserting their compliance, and ultimately have failed to represent their clients' interests in the courts below. The pro bono attorneys did everything in their power to bring the errors to the court's attention in a respectful, thoughtful pleading that seeks modest, but important, relief. Yet somehow, the courts below decided to reward the former and excoriate the latter. If this result is permitted to stand, it sends exactly the wrong message to the capital defense bar—a group whose work is critical to the fair administration of the death penalty.

Finally, this case presents an ideal vehicle to address the obligations of the federal courts in capital cases. The lower courts have, at every turn, refused to consider the meat of petitioner's argument for substitution: an argument that has been well-pled and substantiated. It would be tragic to permit the district court's most recent order to become the final word as to whether petitioner lives or dies, because it would suggest that federal courts are permitted, or perhaps even encouraged, to participate in a state's rush to execute an inmate before he has a chance to present his case for review. This Court can cure that misimpression by granting petitioner's application for a stay of execution and by adjudicating the merits of his claim. Petitioner's challenge to his sentence may or may not ultimately succeed. But our system would be broken indeed if it did not even provide him with an opportunity, assisted by conflict-free counsel, to present his case to a federal court. At a minimum, before our system allows petitioner to be executed, it should at least hear from attorneys who have his best interests at heart, and address his strongest arguments for relief.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

TEJINDER SINGH
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

October 27, 2014

ADDENDUM: FULL LIST OF *AMICI CURIAE*

Charles F. Baird

Judge, 299th Criminal District Court, Travis County, Texas (2007-2011); Judge, Associate Judge, Texas Court of Criminal Appeals (1991-1999).

William G. Bassler

Judge, United States District Court for the District of New Jersey (1991-2006).

Edward N. Cahn

Partner, Blank Rome LLP; Judge, United States District Court for the Eastern District of Pennsylvania (1974-1998; Chief Judge, 1993-1998).

U. W. Clemon

Shareholder, White Arnold & Dowd, P.C.; Judge, United States District Court for the Northern District of Alabama (1980-2006; Chief Judge 1999-2006).

Oliver E. Diaz, Jr.

Oliver Diaz, Attorney at Law; Justice, Mississippi Supreme Court (2000-2008); Judge, Mississippi Court of Appeals (1994-2000); Member, Mississippi House of Representatives (1988-1994).

Nancy Gertner

Judge, United States District Court for the District of Massachusetts (1994-2011).

Karla Gray

Chief Justice, Montana Supreme Court (2000-2008); Associate Justice (1991-2000).

Nathaniel Jones

Judge, United States Court of Appeals for the Sixth Circuit (1979-2002).

Gerald Kogan

Chief Justice, Supreme Court of Florida (1996-1998); Associate Justice (1987-1996); Judge, Eleventh Judicial Circuit of Florida (1980-1987); Assistant State Attorney, Dade County (1960-1967).

Thomas Lambros

Judge, United States District Court for the Northern District of Ohio (1967-1995); Chief Judge (1990-1995); Judge, Jefferson County (Ohio) Court of Common Pleas (1960-1967); United States Army Judge Advocate General's Corps (1954-1956).

Nan Nolan

Magistrate Judge, United States District Court for the Northern District of Illinois (1998-2012).

Stephen M. Orlofsky

Partner, Blank Rome LLP; Judge, United States District Court, District of New Jersey (1996-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980).

Marsha K. Ternus

Chief Justice, Iowa Supreme Court (2006-2010); Associate Justice (1993-2006).

Sol Wachtler

Chair, Law and Psychiatry Institute of North Shore Long Island Jewish Hospital; Adjunct Professor, Touro Law Center; Judge, New York Court of Appeals (1972-1992; Chief Judge, 1985-1992); Judge, New York State Supreme Court (1968-1972).

Penny White

Associate Justice, Tennessee Supreme Court (1994-1996); Judge, Tennessee Court of Criminal Appeals (1992-1994); Judge, Circuit Court, First Judicial District, Tennessee (1990-1992).

Michael A. Wolff

Dean, St. Louis University Law School; Chief Justice, Supreme Court of Missouri (2005-2007); Judge, Supreme Court of Missouri (1998-2011).

Alfred M. Wolin

Judge, United States District Court for the District of New Jersey (1988-2004).