No. 13-

IN THE

Supreme Court of the United States

PAUL AUGUSTUS HOWELL,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FLORIDA CAPITAL RESOURCE CENTER IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) has more than 12,500 members nationwide, including public and private defenders, active U.S. Military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in its House of Delegates. NACDL promotes study and research in the field of criminal law, disseminates and advances legal knowledge in the area of criminal justice, and encourages the integrity and expertise of defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the justice system, NACDL files approximately 35 *amicus* briefs a year on issues such as this that affect the vital interests of its members and their clients.

The Florida Association of Criminal Defense Lawyers (FACDL) is a state-wide organization representing 1,700 members, all of whom are criminal-defense practitioners. FACDL's founding purposes are: promoting study and research in criminal law; ensuring the fair administration of criminal justice in the Florida courts; fostering the independence and expertise of criminal-defense lawyers;

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1. Pursuant to Supreme Court Rules 37.2(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, that the parties have consented to the filing of this brief in letters on file with the Clerk's office, and that counsel of record for all parties received timely notice of *Amici Curiae's* intention to file this brief.

and furthering the education of the criminal-defense community. As an association of criminal-defense lawyers, FACDL is keenly interested in the outcome of this matter.

Florida Capital Resource Center (FCRC) is a non-profit organization whose mission is to protect the constitutional rights of Florida capital defendants by assisting counsel in providing effective representation. To that end, FCRC provides free consultation, research, training, advocacy, and other resources to capital defendants and their counsel. The issue presented in this case is a matter of great importance to FCRC because it implicates the right of a capital defendant to an initial consideration in the federal courts of constitutional claims presented on a petition for writ of habeas corpus.

SUMMARY OF ARGUMENT

In *Gonzalez v. Crosby,* 545 U.S. 524 (2005), this Court rejected the argument that a petitioner who seeks to reopen habeas corpus proceedings solely on the basis of a new interpretation of the statute-of-limitations provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244 (d)(2), establishes the "extraordinary circumstances" required for a Federal Rule of Civil Procedure 60(b)(6) motion. The Court explained that there was nothing extraordinary about the fact that it construed the AEDPA statute-of-limitations provision in *Artuz v. Bennett*, 531 U.S. 4 (2000), differently than had the Eleventh Circuit. *Gonzalez*, 545 U.S. at 536-37.

Five years later, this Court decided *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549 (2010), and declared that federal courts retain their traditional equitable

powers to treat as timely a habeas petition that is belatedly filed due to extraordinary circumstances. The Court did not interpret a limitations provision, as it had in *Artuz*. Instead, the Court incorporated general equitable principles into habeas law by recognizing that equitable tolling can be applied in the rare and extraordinary habeas case. *Holland*, 130 S. Ct. at 2560-64.

Mr. Howell filed a Rule 60(b)(6) motion seeking an opportunity to establish that, under the analysis in *Holland*, multiple factors entitled him to the reopening of his initial habeas proceeding that had been dismissed as untimely without a determination of the merits. But the Eleventh Circuit, wrongly concluding that *Holland* was merely another statute-of-limitations interpretation like *Artuz*, held that this Court's *Gonzalez* decision precluded consideration of the case. *Howell v. Sec'y, Fla. Dep't of Corrs.*, 730 F.3d 1257, 1260-61 (11th Cir. 2013). Not only did the court misread *Gonzalez*, but by rigidly refusing to consider the circumstances unique to Mr. Howell's case, the court announced a decision that conflicts with the case-by-case, equitable approach endorsed by the Sixth and Ninth Circuits in their proper adherence to the *Gonzalez* holding. *See Stokes v. Williams*, 475 F.3d 732, 735-36 (6th Cir. 2007); *Phelps v. Alameida*, 569 F.3d 1120, 1131-34 (9th Cir. 2009), *cert. denied*, 558 U.S. 1137 (2010).

Mr. Howell has never had the merits of his constitutional claims considered by the federal habeas courts. And because the district court denied Mr. Howell an evidentiary hearing on his Rule 60(b)(6) motion, and because the Eleventh Circuit does not recognize that *Holland* could warrant the reopening of a habeas proceeding no matter how extraordinary the circumstances, Mr. Howell has

been denied the chance to prove just how extraordinary the circumstances are that caused his initial petition to be belatedly filed. Amici urge the Court to grant the Petition for Writ of Certiorari to resolve the conflict among the circuits and reaffirm the equitable principles that obtain in habeas cases. Petitioner is entitled to a hearing at which he has the opportunity to establish that his is the rare case in which relief under Rule 60(b)(6) is appropriate.

ARGUMENT

THE EQUITABLE-TOLLING DECISION OF *HOLLAND V. FLORIDA* AUTHORIZES A RULE 60(B)(6) MOTION WHEREAS THE STATUTORY-CONSTRUCTION DECISION OF *ARTUZ V. BENNETT* DID NOT.

The Eleventh Circuit rejected Mr. Howell's argument that, with the advent of *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549 (2010), a habeas petitioner should be granted the opportunity to prove equitable factors—such as egregious attorney misconduct—that rise to the level of extraordinary circumstances and thus satisfy the stringent standard of Federal Rule of Civil Procedure 60(b)(6). *Howell v. Sec'y, Fla. Dep't of Corrs.*, 730 F.3d 1257, 1260-61 (11th Cir. 2013). By wrongly equating *Holland* with *Artuz v. Bennett*, 531 U.S. 4 (2000), as merely a habeas statutory-construction case, the court ruled that *Gonzalez v. Crosby*, 545 U.S. 524 (2005), proscribed consideration of Mr. Holland's claim. *Howell*, 730 F.3d at 1260-61.

The court thus announced as an immutable rule that "this kind of change in decisional law is not an

extraordinary circumstance under Rule 60(b)." *Id.* at 1261.[2] This *amici* brief will focus on the significant distinctions between *Artuz* and *Holland* that render *Holland* an appropriate authority for incorporating equitable factors in the "extraordinary-circumstances" analysis under the rule.

A. Rule 60(b) Applies to Federal Habeas Cases, But Decisions Such As *Artuz v. Bennett* That Interpret Provisions of the Federal Habeas Statute Will Not Generally Constitute "Extraordinary Circumstances" Under the Rule.

Gonzalez first addressed whether there is a place in the federal-habeas realm for a motion for relief from judgment under Rule 60(b). The Court concluded that "Rule 60(b) has an unquestionably valid role to play in habeas cases," *Gonzalez*, 545 U.S. at 534, and is properly invoked to attack "some defect in the integrity of the federal habeas proceedings." *Id.* at 524 (footnote omitted). Any argument against its application grounded on the "virtues of finality" is misplaced, because Rule 60(b)'s "whole purpose is to make an exception to finality." *Id.* at 529. But to prevail on a Rule 60(b)(6) motion, "extraordinary circumstances" must be shown. *Id.* at 535.

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2. This *per se* rule is in direct conflict with *Phelps v. Alameida*, 569 F.3d 1120, 1131-34 (9th Cir. 2009), *cert. denied*, 558 U.S. 1137 (2010), in which the Ninth Circuit, after analyzing this Court's decision in *Gonzalez*, anticipated this Court's adoption in *Holland* of a case-by-case, equitable approach to a habeas-timeliness question. *Holland*, 120 S. Ct. at 2560-65; *see also Stokes v. Williams*, 475 F.3d 732, 735-36 (6th Cir. 2007) (approving case-by-case approach to Rule 60(b)(6) motions seeking to reopen habeas cases based upon a change in law).

The "only ground" that Mr. Gonzalez asserted to establish extraordinary circumstances was that *Artuz* showed that the district court had erred in its interpretation of the pertinent AEDPA statute-of-limitations provision. *Gonzalez*, 545 U.S. at 536. In considering this claim, this Court assumed that the district court's ruling was erroneous, but nonetheless ruled that its interpretation of the statutory provision in *Artuz* did not constitute extraordinary circumstances. *Id.* The Court explained that there was nothing exceptional about the Court construing a statute differently than had a lower court, indeed depicting this occurrence as "hardly extraordinary." *Id.*[3]

B. Unlike *Artuz*, *Holland v. Florida* Authorizes a Rule 60(b)(6) Motion Because *Holland* Does Not Merely Construe a Statutory Provision, But Instead Incorporates Equitable Principles in Analyzing Whether Extraordinary Circumstances Justify Reopening Federal Habeas Proceedings.

It is necessary to examine *Holland* and *Artuz* under the *Gonzalez* paradigm to show why *Holland* authorizes a Rule 60(b)(6) motion, while this Court rightly concluded that *Artuz* did not. The key lies in the words "extraordinary circumstances," *see Ackerman v. United*

3. The Court did not completely rule out that changes in the law, even if involving merely an "interpretation of the federal statutes setting forth the requirements for habeas," could provide "extraordinary circumstances" justifying a Rule 60(b)(6) motion. *Gonzalez*, 545 U.S. at 536. The Court thus noted that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Id.* (footnote omitted).

States, 340 U.S. 193, 199 (1950), "[a] highly unusual set of facts that are not commonly associated with a particular thing or event." Black's Law Dictionary (9th ed. 2009).

Artuz, of course, did not involve an unusual set of facts; it did not involve a "set of facts" at all. And interpreting a statutory provision is a common event, traditionally performed by this Court. *See*, *e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 84-100 (2007); *United States v. Stevenson*, 215 U.S. 190, 196-99 (1909); *Moore v. Am. Transp. Co.*, 65 U.S. 1, 9-10 (1860). Indeed, the Court's decision was simply a matter of customary statutory interpretation of a limitations provision, a task that the Court has long performed. *See*, *e.g.*, *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7-14 (2008); *Toussie v. United States*, 397 U.S. 112, 115-24 (1970); *United States v. Zacks*, 375 U.S. 59, 59-70 (1963); *United States v. Scharton*, 285 U.S. 518, 520-22 (1932); *United States v. Irvine*, 98 U.S. 450, 451-52 (1879).

In construing the term "properly filed application," as set forth in 28 U.S.C. § 2244(d)(2), to encompass state post-conviction motions raising procedurally defaulted claims, the Court was solely deciphering the intent of Congress, and not considering policy or equitable justifications:

> Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. We hold as we do because respondent's view seems to us the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as

> part of the legislative compromise that enabled the law to be enacted.

Artuz, 531 U.S. at 10. Thus, the sole purpose of *Artuz*'s rule of law was to implement the will of Congress as expressed in the words chosen in promulgating section 2244(d)(2).

This "change in law" did not involve the "passage of a new act by Congress [that could be] a valid ground under Rule 60(b)(6) of the Civil Rules for relief of the defendant." *McGrath v. Potash*, 199 F.2d 166, 167 (D.C. Cir. 1952), *cited with approval in Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650 n.6 (1961). Nothing was "new"; no additional right was bestowed. Rather, *Artuz* was merely construing a narrow provision of the previously enacted habeas statute. It was "hardly extraordinary" that the Court arrived at an interpretation of the statutory provision that differed from that of the district court. *See Gonzalez,* 545 U.S. at 536.

Indeed, the Court noted in *Gonzalez* that, if *Artuz* justified reopening dismissals based on an unduly narrow interpretation of the statutory provision, then revisiting grants of habeas relief based on a lower court's unduly broad interpretation of the same tolling provision would similarly be justified. *Id.* at 536-37. Permitting every new construction of an AEDPA statute-of-limitations provision to constitute an extraordinary circumstance warranting relief from judgment would undo the very notion of "extraordinary" and inexorably invite never-ending litigation to reopen cases long ago closed, either by dismissal or grants of habeas corpus relief.

In contrast, *Holland* does not interpret any provision of the AEDPA statute. Instead, this Court for the first time held that the separate and long-established equitable-tolling doctrine applies to provide flexibility when enforcing the timeliness provision of the habeas statute. *Holland*, 130 S. Ct. at 2560-63. True, the Court considered the language of section 2244(d)(2), the very subsection interpreted in *Artuz*, in noting that that subsection provides for an explicit tolling exception. *Id.* at 2561-62.[4] But instead of construing any particular language of that tolling section, the Court focused instead on the habeas statute's silence on equitable tolling to determine whether, by providing for a method of tolling in section 2244(d)(2), equitable principles were somehow foreclosed. *Id.* The Court ultimately refused to interpret Congress's silence as precluding equitable consideration of the timeliness question.

There is no comparable risk that *Holland*, when recognized as justifying Rule 60(b) consideration in an extraordinary case, compels the reopening of previous habeas grants. There simply is no parity with *Gonzalez*, 545 U.S. at 536-37, because *Holland*'s rule is predicated upon case-specific, equitable principles, and not statutory construction. *Holland*, 130 S. Ct. at 2561-62.

But these are just the most obvious surface distinctions between *Artuz* and *Holland.* For the substance of *Holland*'s

4. The Court also considered the language in section 2244(d)(1) in concluding that the "1-year limitation reads like any ordinary, run-of-the-mill statute of limitations." *Holland*, 130 S. Ct. at 2561 (citation omitted). This conclusion only contributed to the holding that equitable tolling is not foreclosed by AEDPA's time limitation. *Id.*

rule of law—that federal courts retain equitable powers in determining whether to forgive, under extraordinary circumstances, the otherwise belated filing of a habeas corpus petition—makes clear why *Holland* permits invocation of Rule 60(b)(6). *Holland* is rooted in a court's equity powers, the exercise of which "must be made on a case-by-case basis." *Holland*, 130 S. Ct. 2549, 2563 (2010). This Court emphasized "the need for flexibility, for avoiding mechanical rules," instead adhering to a "tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." *Id.* at 2563 (citations and internal quotations omitted).

The rule that emanates from these tenets recognizes that a highly unusual set of facts, not commonly associated with either a defense counsel's duty as the agent of his client or the court's role in strictly enforcing a statutory time limitation, may warrant equitable intervention. Reduced to its essence, *Holland* stands for the principle that, in the habeas context, "specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 2563. *Holland*, thus, looks beyond the provisions of the habeas statute of limitations interpreted in *Artuz* to incorporate the role of equity, proclaiming that "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home." *Id.* at 2561. But the Court made clear that only cases in which the circumstances are indeed extraordinary warrant equitable intervention. *Id.* at 2564.

C. Mr. Howell Alleges Extraordinary Circumstances That Justify Reopening the Habeas Proceeding to Permit Initial Habeas Corpus Consideration of the Merits of His Constitutional Claims, Pursuant to Rule 60(b)(6).

The factual allegations in this case warrant a finding of extraordinary circumstances.[5] Mr. Howell was the victim of gross misconduct by the appointed counsel who did not, at any point during the one-year habeas period, communicate with the incarcerated petitioner. Counsel did not simply make a mistake and miss the habeas deadline; counsel failed to inform Mr. Howell that she had been appointed as his counsel. While under agency law, usually an "error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control," *Holland*, at 2567 (Alito, J., concurring), this is not the usual case.

Florida law provides for the appointment of counsel to represent indigent capital defendants in post-conviction state and federal proceedings. Fla. Stat. § 27.711 (1998 Supp). Putting aside the sworn evidence presented to the district court of Mr. Howell's mental infirmities and its implications here, Mr. Howell could rightly expect that he, like all other Florida capital defendants, would be provided counsel pursuant to Florida requisites, and that counsel would properly represent him in state and federal courts.

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5. Mr. Howell was denied an evidentiary hearing by the district court so his allegations, substantiated in significant part by affidavits, must be proved and tested in a hearing before that court.

One could argue that no Florida capital defendant can ever complain of counsel's misconduct no matter how extreme because counsel's errors are constructively attributable to the client. But this agency principle is stretched too far when the appointed counsel fails ever to contact her intellectually disabled client before the pertinent time limitation has expired. And *Holland* surely forbids this type of inflexible rule, mandating instead that extraordinary circumstances be gauged by a case-by-case, fact-specific assessment, the type of equitable determination that was never performed by the lower courts in Mr. Howell's case.[6] Indeed, *Holland* insists that

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6. An additional factor that the District Court must consider in performing the "equitable, often fact intensive" extraordinary-circumstances assessment, *Holland*, 120 S. Ct. at 2565 (citation omitted), is the trial court's failure even to appoint counsel until one-half of the one-year habeas period had elapsed. A special committee appointed by Florida Supreme Court Chief Justice Shaw in 1991 concluded that "counsel should be designated to represent each defendant whose death sentence has been affirmed not later than 30 days after the mandate has issued from the Supreme Court of Florida or certiorari is denied by the United States Supreme Court, whichever is later." *Arbelaez v. State*, 738 So. 2d 326, 327 n.2 (Fla. 1999) (Anstead, J., concurring) (citation omitted).

Ten years later, the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.851(b), effective October 1, 2001, requiring the appointment of post-conviction counsel at the same time that the Florida Supreme Court issues its mandate affirming the death sentence. If the appointed regional collateral counsel perceives a conflict, a notice must be filed within 30 days of the issuance of the mandate, and new counsel must be appointed within 15 days of the motion to withdraw. *Amendments to Florida Rules of Criminal Procedure 3.851*, 797 So. 2d 1213, 1221, 1226 (Fla. 2001). Mr. Howell's post-conviction counsel was appointed

"at least sometimes," professional misconduct can "create an extraordinary circumstance that warrants equitable tolling." *Holland*, 120 S. Ct. at 2563. An evidentiary hearing is required to ascertain whether this is one of those rare occasions.

The Eleventh Circuit's rigid interpretation of *Gonzalez*, at odds with that of the Sixth and Ninth Circuits, and in contravention of the language of *Gonzalez* itself, warrants this Court's certiorari review under Supreme Court Rules 10(a) and (c). Much is at stake, in addition to the confusion engendered by the conflicting precedent of the circuits and that created by the Eleventh Circuit's constricted reading of *Gonzalez*. The dismissal of a first federal habeas petition is a "particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). This is true where there is the risk of "injury to an important interest in human liberty," *id.*; it is all the more compelling where the constitutionality of a death sentence, and the conviction on which it is based, is in question.

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in December 1998, six months after this Court denied his Petition for Writ of Certiorari, and nine months after counsel would have been required to be appointed under the 2001 rule.

CONCLUSION

Mr. Howell's Petition for Writ of Certiorari should be granted to resolve the conflict created by the Eleventh Circuit decision, and to authorize federal courts to afford the habeas petitioner who has been deprived of an initial review of constitutional claims due to extraordinary circumstances the opportunity to so demonstrate on a Rule 60(b)(6) motion.

Respectfully submitted,

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