No. 06-954

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review whether the district court abused its discretion in denying Arthur an evidentiary hearing and discovery on his actual innocence claim?

2. Should this Court grant certiorari to review whether Arthur is entitled to statutory tolling under 28 U.S.C. § 2244(d)(1)(B) because of alleged inadequacies in the prison library and Alabama's failure to automatically appoint counsel before a post-conviction petition is filed?

3. Should this Court grant certiorari to review whether Arthur is entitled to equitable tolling despite his failure to argue the existence of extraordinary circumstances?

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The United States District Court for the Northern District of Alabama issued a memorandum opinion dismissing Arthur's petition as time-barred. (Pet. App. A1-A24) Arthur's motion to alter amend the judgment was denied by a separate memorandum opinion. (Pet. App. A25-A33) The United States Court of Appeals for the Eleventh Circuit affirmed. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006). (Pet. App. A34-A61) The decision was modified slightly on petition for rehearing. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006). (Pet. App. A62-A64)

STATEMENT OF JURISDICTION

This Court would have jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). However, Arthur has failed to articulate adequate grounds for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Petitioner's statement of the statutory provision involved in this case, on page 2 of his petition, is correct. Arthur does not assert any constitutional basis for review.

STATEMENT OF THE CASE

Petitioner Thomas Douglas Arthur was found guilt by a jury and sentenced to death for the murder of Troy Wicker. Though his first two convictions were overturned, he was convicted and again sentenced to death at a third trial. The Alabama Supreme Court reversed his first conviction because details of Arthur's prior second-degree murder conviction were erroneously admitted at trial. *Ex parte Arthur*, 472 So.2d 665, 668-70 (Ala.1985). The Alabama Court of Criminal Appeals reversed his second conviction because of the admission of a statement Arthur made to a police officer approximately two weeks after he had asserted his right to remain silent. *Arthur v. State*, 575 So.2d 1165, 1171-75 (Ala. Crim. App. 1990).[1] His habeas petition relates to this third trial.

A. Facts from the Trial.

Judy Wicker ("Judy) and Theresa Rowland, Judy's sister, began to plan the murder of Troy Wicker in the early part of 1981. R. 748.[2] Theron McKinney, Rowland's husband, was also involved in some of the discussions. R. 800-802. They had at least two reasons for wanting Troy Wicker dead. First, there was an insurance policy worth $90,000 that was payable to Judy upon Troy Wicker's death. R. 748. Second, Rowland had previously hired Troy Wicker to burn her house down for insurance proceeds and he was threatening to expose that fact. R. 799-800.

[1] The jury learned that Arthur told police that he did not know his accomplices or recognize their photographs. When confronted with contradictory evidence, Arthur ended the interview. *Arthur*, 575 So.2d at 1170-71.

[2] "R. __" refers to pages in the transcript of Arthur's 1991 capital murder trial.

Judy testified that she began a sexual relationship with Thomas Arthur after he committed to killing her husband and that she paid him $10,000 to carry out the murder. R. 753-54, 778-780.[3] Judy also paid Rowland $6000 and gave McKinney a Pontiac Trans Am and some jewelry. R. 780.

Patricia Green testified that Arthur approached her the day before the murder and asked her to get him some bullets. R. 560-562. Green sent a friend across the street to purchase .22 caliber mini magnum long rifle bullets, which Green later gave to Arthur. *Id.* Judy testified that Arthur shot Troy Wicker one time and ransacked the house. R. 768-70. An expert in firearm identification testified that the bullet removed from the victim's body was a .22 caliber long rifle consistent with a CCI brand bullet. R. 404-405. The four shell casings found near the body were CCI brand .22 long or long rifle casings. *Id.*

Judy and Arthur agreed that she would tell the police that a black person murdered her husband. R. 773-74. When Arthur murdered Troy Wicker on February 1, 1982, he darkened his face and wore a black wig in an apparent attempt to disguise himself as an African-American. R. 757-59. Joseph Wallace, an evidence technician with the Alabama Department of Forensic Sciences, removed a black wig from the car that Arthur used to make his getaway. R. 374. To deflect suspicion from Judy, Judy

[3] Arthur was on work release when he committed the murder. Pat Halliday, an employee with the Decatur Work Release Center, testified that Arthur was transferred to the Morgan County Jail after the discovery of the discrepancy between the number of hours he was away from the center and the number of hours he was actually paid for working. Upon routine inspection of his effects before the transfer, twenty one-hundred-dollar bills were discovered in an envelope in Arthur's overcoat pocket. R. 543.

and Arthur agreed that she should be injured. R. 771-76. Arthur struck Judy with a blow that knocked out several of her teeth and lacerated her lip, injuries that resulted in her staying in the hospital for several days. *Id.*

Judy testified that on the day of the murder Arthur was carrying a gun and a garbage bag. R. 760. Debra Phillips testified that Arthur was supposed to meet her for lunch on the day of the murder, but he was late and, instead of going to lunch, they rode to a bridge over the Tennessee River where Arthur stopped the car and threw a garbage bag, that was half-full and bulky and wrapped in a sheet, into the river. R. 627-34. As he disposed of the garbage bag, Arthur said he was "trying to get rid of some old memories." R. 632.

In accordance with their agreement, Judy testified falsely at her own trial where she was convicted of murder. *Wicker v. State,* 433 So. 2d 1190, 1195-96 (Ala. Crim. App. 1983). She gave her first truthful testimony regarding Troy Wicker's murder at Arthur's second trial. *Arthur v. State,* 575 So. 2d 1165, 1167 (Ala. Crim. App. 1990). She admitted in her testimony that the prosecutor told her that, if she testified truthfully, he would put in a "good word ... for her with the parole board." *Id.*

Arthur was his own lead counsel at his trial, but Harold Walden and Joseph Walden served as co-counsel.[4] William Del Grosso served as stand-by counsel. R1-22. Arthur conducted the majority of voir dire questioning, examination of witnesses, argument to the jury, and argument to the court. In fact, Arthur cross-examined each of the prosecution's 13 witnesses, often at length. *See, e.g.,* R. 375-85. Arthur presented four witnesses in his defense. Bruce Coan, a police detective, testified about his observations of the crime scene. R. 867. Two of

[4] The Waldens are father and son, respectively.

Arthur's four witnesses were called in an apparent attempt to offer an explanation of how, as a prisoner, he came to possess $2100. Bruce Carroll, a friend and fellow inmate, testified that he lost $6500 to Arthur in a poker game. R. 879-83. Gene Moon, who resided in the Cullman County Jail at the time of his testimony, said that another inmate gave him an envelope with $2000 in it and that Moon put it in Arthur's coat. R. 927-29. The fourth and final witness, Ronald Spears, an inmate at West Jefferson prison, stated that Patricia Green told him that the police were forcing her to lie about Arthur asking her to buy some bullets for him. R. 901-07.

The record also reveals that Arthur was searching for witnesses to provide him with an alibi. During cross-examination of Joel Reagan, Arthur asked: "...[D]o you remember Larry Whitman telling you that he saw me the morning that Mr. Wicker was murdered over in Muscle Shoals?" R. 473-74. There are no references in the trial record to either Alphonso High or Ray Melson, the two individuals (of which more later) who signed affidavits filed in the federal district court stating they talked to Arthur around the same time Troy Wicker was being murdered, having seen Arthur on the day of the murder.

At the penalty phase, Walden argued that the jury should recommend a sentence of life without parole because of several mitigating factors. First, Walden argued that Arthur had been a model prisoner and had spoken to high school groups as a part of correctional programs to deter young people from committing crimes. R. 1170. Walden also argued that Arthur's punishment was disproportionate in relation to the other persons that had involvement in Troy Wicker's murder. He told the jury that Judy, who was just as culpable as Arthur, was soon to be released from prison, and that Rowland and McKinney had never been prosecuted for their roles. R. 1171-72.

Arthur argued to the jury that he should be sentenced to death. Arthur said that Walden was morally opposed to the death penalty and urged the jury to disregard his counsel's arguments. R. 1178. Arthur told the jury that he didn't have a death wish; in fact, he said "I wouldn't dare ask you for it if I thought for a minute that I would be executed." R. 1181. Arthur argued that a death sentence would allow him to have more visitations from his children, R. 1183, and to have more privacy in his death row cell as opposed to living in general population, R. 1190, and would allow him to have more control over his appeals. R. 1186-1194. Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if the jury sentenced him to death, he would be in a better position to overturn his latest capital murder conviction. R. 1188-89.

B. Proceedings at Trial and Direct Appeal.

Upon consideration of the facts discussed above, the jury found Arthur guilty for the 1982 capital murder of Troy Wicker on December 5, 1991. C. 11, R. 1150. The murder was made capital because Arthur had previously been convicted of murder in the second degree in 1977. *Arthur v. State*, 711 So. 2d 1031, 1043 (Ala. Crim. App. 1996) (citing Ala. Code § 13A-5-40(a)(13)).

Following the sentencing hearing described above, the jury recommended, by an eleven-to-one vote, that Arthur be sentenced to death. C. 12, R. 1237. On January 24, 1992, the trial court entered a sentencing order in which it followed the jury's recommendation and sentenced Arthur to death. C. 14-26, R. 1291-1300.

On March 8, 1996, the Alabama Court of Criminal Appeals affirmed Arthur's conviction and death sentence. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996). On November 21, 1997, the Supreme Court of Alabama

affirmed the judgment of the Court of Criminal Appeals. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). Arthur did not file a petition for certiorari in this Court.

C. Postconviction Proceedings.

Arthur failed to meet his obligations under the state and federal statutes of limitation for postconviction challenges. Arthur had until April 7, 2000 — two years the after the Alabama Court of Criminal Appeals issued the certificate of judgment on direct appeal—to file his Rule 32 petition in state court. *See* Rule 32.2(c), Ala.R.Crim.P. His time to file a habeas corpus petition in federal court under 28 U.S.C. § 2254 expired on June 18, 1999. *See* 28 U.S.C. § 2244(a)(1). Both limitation periods passed without any filings by Arthur. As a result, the State filed a motion to set an execution date with the Alabama Supreme Court on September 8, 2000.

On January 25, 2001, Arthur, proceeding through counsel, filed a Rule 32 petition in the Jefferson County Circuit Court. Arthur's petition was filed more than nine months after the limitation period had expired, and more than nineteen months too late for any tolling of his habeas limitation period. The Rule 32 Petition was dismissed as untimely. C32. 60-187.[5] The Alabama Court of Criminal Appeals affirmed the denial and dismissal of Arthur's Rule 32 petition. *Arthur v. State*, 820 So. 2d 886, 889 (Ala. Crim. App. 2001). The Alabama Court of Criminal Appeals denied Arthur's application for rehearing and the Alabama Supreme Court denied certiorari review. *Id.* This Court denied Arthur's petition for writ of certiorari. *Arthur v. Alabama*, 535 U.S. 1053 (2002).

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[5] "C32. __" refers to pages of the clerk's record from Arthur's Rule 32 state post-conviction proceedings.

Pursuant to the State's motion, the Alabama Supreme Court set Arthur's execution date for April 27, 2001. On April 20, 2001, Arthur filed a petition for writ of habeas corpus, along with a motion to stay the execution, in the United States District Court for the Northern District of Alabama. The district court stayed the execution and stayed this habeas proceeding pending a resolution of Arthur's state post-conviction petition in the state appellate courts. R1-11.

Arthur attempted to overcome his failure to comply with the statute of limitation in federal court by asserting a "gateway claim" of actual innocence. His claim was based principally on the affidavits of Alphonso High and Ray Melson,[6] who claimed to have seen Arthur on the February 1, 1982, the morning of the murder. High and Melson gave affidavits to the State that contradicted their earlier affidavits, stating that they could not be certain of the day or month that they saw Arthur.

The federal district court rejected Arthur's actual innocence claim and dismissed Arthur's habeas petition as untimely. R1-55, R1-56. Arthur's motion for reconsideration was denied. R1-61, R1-62. Arthur's motion for a certificate of appealability was granted by the district court. R1-66. The Eleventh Circuit Court of Appeals affirmed the dismissal. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006). The decision was modified slightly on petition for rehearing, with the court elucidating its denial of a hearing and discovery. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).

Arthur's petition to this Court followed.

[6] Arthur also submitted an affidavit from Billy Peebles to the district court, but Peebles is not discussed in Arthur's Eleventh Circuit briefing or in his petition to this Court. *Arthur*, 452 F.3d at 1244 n.8.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DENY CERTIORARI REVIEW OF ARTHUR'S CLAIM THAT HE WAS ENTITLED TO AN EVIDENTIARY HEARING AND DISCOVERY ON HIS ACTUAL INNOCENCE CLAIM.

Arthur first argues that the Eleventh Circuit errred in failing to grant an evidentiary hearing and discovery on his actual innocence claim. Arthur contends that this Court should grant certiorari to determine whether he was entitled to an discover and an evidentiary hearing to establish his actual innocence claim. (Pet. 8-15) Certiorari should be denied for the following reasons.

A. <u>This Court Should Deny Certiorari Because There Is No Conflict Between This Case And This Court's Prior Decisions</u>.

Arthur's claim is not worthy of certiorari review because he fails to demonstrate an actual conflict between the circuit court decision and a decision of this Court. Arthur suggests that the lower court's decision is contrary to *Schlup v. Delo*, 513 U.S. 298 (1995) and instead erroneously applies the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). The circuit court's decision is consistent with *Schlup* and its progeny.

Arthur first suggests that, given the uncertain credibility of affiants High and Melson, the circuit court should have remanded for an evidentiary hearing. (Pet. 12) For support, he quotes from *Battle v. Delo*, 64 F.3d 347 (8th Cir. 1995), which states that "[i]f new evidence calls the credibility of certain witnesses into question, and their credibility figures reasonably in our assessment, remand for an evidentiary hearing *may* be appropriate." *Id.* at 352 (emphasis added). The court immediately added that "the mere fact that affidavits are presented

does not automatically require such a remand." *Id.* Indeed, the Battle court denied the petitioner's gateway innocence claim without remanding for a hearing on his affidavits and without granting him discovery or a hearing to attack the State's serology evidence. *Id.* at 353-55. The lower court's decision is consistent with the precedent cited by Arthur.

Arthur next argues that the circuit court improperly applied the "sufficiency of the evidence" standard from *Jackson* rather that *Schlup*'s "more likely than not" standard. (Pet. 12-13) Arthur relies on the lower court's holding that "the affidavits do not furnish good cause to believe that the facts, if 'fully developed' through the discovery sought, would be any different from those found at trial." *Arthur*, 459 F.3d at 1310. However, the opinion never discussed or applied the "sufficiency of the evidence" standard and never cited *Jackson*. It is apparent from the opinion that the court properly applied the *Schlup* standard in conjunction with the "good cause" standard for discovery in habeas corpus proceedings. *See Arthur*, 459 F.3d at 1310-11 (citing *Schlup* and *Bracy v. Gramley*, 520 U.S. 899 (1997)). Arthur's contention that the court applied the *Jackson* standard is completely baseless.

The demands on this Court's time mandate that it select for review only those truly important cases with wide ranging impact. This is not such a case. Certiorari is not a matter of right, but of sound judicial discretion granted only when special and important reasons exist. *See Fay v. Noia*, 372 U.S. 391, 436 (1963). "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court of the United States. The "conflicts" asserted by Arthur are based upon misrepresentations of the lower court's opinion, and a decision on his claim will only serve to

reaffirm the current state of the law. This Court should, therefore, deny certiorari.

B. <u>This Court Should Deny Certiorari Because This Claim Is Without Merit and Is Not Appropriate for Review By This Court</u>.

This claim is also without merit. In reviewing this claim the circuit court correctly held that Arthur was not entitled to discovery or a hearing. Arthur's petition merely repeats the arguments he proffered in the lower courts, and does nothing to undermine those decisions.

Arthur was not entitled to a hearing to determine the credibility of his two "alibi witnesses." Under *Schlup*, the evidence used to support a claim of actual innocence must be "new reliable evidence that was not presented at trial." 513 U.S. at 299, 327-328. Even taking the original affidavits of High and Melson at face value without accounting for their subsequent, express recantation, the fact that neither Arthur, nor High and Melson, came forward with this information during any of Arthur's three capital murder trials or until Arthur was within 48 hours of his execution renders their affidavits highly unreliable.[7] A hearing is not required to make that

[7] Assuming the information in the initial affidavits from High and Melson is correct, Arthur himself had knowledge for over 20 years that he did not murder Troy Wicker and that he knew two people who could testify regarding his location when the murder was taking place. At his third trial, Arthur served as lead counsel, participating in every phase of the trial, including cross-examining every one of the prosecution's 13 witnesses, often at length. It stands to reason that if Arthur had knowledge that he was in another location at the time the murder was taking place, and that two people were ready, willing, and able to testify to those facts, he would have presented that information at his trial. However, Arthur never mentioned High and Melson during any of his three trials,

determination, and the lower courts properly denied Arthur's request for one. *See Arthur v. Allen*, 452 F.3d 1234, 1246 (11th Cir. 2006) (stating that "exculpatory affidavits 'produced . . . at the 11th hour with no reasonable explanation for the nearly decade-long delay' are "suspect") (quoting *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring)).

The circuit court found that the affidavits "in no way undermine[] confidence in the result of his trial." *Id.* Significant evidence demonstrates Arthur's guilt. Judy Wicker testified in detail about Arthur's commission of the murder, and the affidavits tend to contradict her testimony. However, as discussed above, her testimony was supported by significant evidence, including testimony from multiple witnesses that Arthur had a relationship with Judy, had acquired ammunition the day before the murder, and that Judy's purse and a wig matching that used in the crime were found in his car. A showing of actual innocence requires it be "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. Even if High and Melson were unwavering in their recollection of the morning February 1, 1982, their testimony can not overcome this burden.

Arthur's request for discovery is also meritless. Arthur's discovery requests do not relate to the above-discussed affidavits, but instead seek physical evidence that he asserts may exonerate him. "[A] habeas petitioner is not entitled to discovery as a matter of course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Good cause is shown only when the federal habeas petitioner identifies "specific allegations before the court

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during any of his appeals, or during the time while the limitation periods for both his state and federal post-conviction petitions expired.

[which] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." *Id.* at 908-909. Arthur has never plead specific allegations demonstrating how any of the evidence would show that he is actually innocent of killing Troy Wicker. Thus he has not shown good cause for the discovery he seeks. Arthur also fails to point to any case where a petitioner was granted discovery under similar circumstances. For the foregoing reasons, this Court should deny certiorari.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO ARTHUR'S CLAIM THAT HE IS ENTITLED TO STATUTORY TOLLING.

Arthur requests that this Court consider whether the limitation period should have been statutorily tolled because he alleges that the library facilities at Holman Prison are inadequate and the State did not provide him legal assistance. (Pet. 15-21)

A. The Claim that Arthur Was Denied Access to a Law Library is Meritless and Irrelevant to His Failure to Comply with the Limitation.

In his petition before this Court, Arthur attempts to justify certiorari review by noting that other circuits have suggested that a "book paging" system is constitutionally inadequate. (Pet. 18-19 (citing cases)) This argument is inadequate to support review for several reasons.

As a preliminary matter, Arthur never presented this argument to the courts below. Before the district court, Arthur challenged only the adequacy of the death row reading room, and made no allegations regarding the adequacy of or his access to the main prison library. *Arthur v. Haley*, CV-01-N-0983-S, at *8 n.7 (N.D. Ala. Jun. 5, 2003) (slip op.) (Pet. App. A32). In any event, Arthur **fails to cite a single case** in this section of his

petition that addresses equitable or statutory tolling. Given Arthur's failure to assert compelling reasons for review under Rule 10, certiorari is inappropriate.

The claim is also without merit. Arthur has never demonstrated that the law library actually served as an impediment to his filing. In *Helton v. Secretary for the Department. of Corrections*, 259 F.3d 1310 (11th Cir.2001), the Eleventh Circuit denied tolling for an allegedly inadequate prison library because the petitioner had not exercised reasonable diligence. The petitioner never asserted that he "asked for the amendments to the federal habeas corpus statutes," *id.* at 1314, could not show he was "even aware the library did not have these materials at the time he filed his section 2254 petition," *id.* at 1313; and failed "to state any independent efforts he made to determine whether the relevant limitations period began to run," *id.* at 1314. This requirement is consistent with the approach taken by other circuits in addressing prison library tolling claims. *See, e.g., Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998) ("In the final analysis, however, Mr. Miller has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims."); *Roy v. Lampert*, 465 F.3d 964 (9th Cir. 2006) (distinguishing Helton and Roy because the petitioner had diligently pursued his claims and had attempted to attain a copy of AEDPA but had been prevented from doing so by the library).

Not only did Arthur fail to show that the library prevented his timely filing, but the circuit court found that he was "aware of the deadline to file his habeas petition[.]" *Arthur*, 452 F.3d at 1253. Despite this, he was not diligent in attempting to file a timely habeas petition. *Id.* The circuit court's decision is correct, and this Court should deny certiorari.

B. <u>The Claim that the State Failed to Provide Arthur with Legal Assistance or Counsel Fails to Assert a Reason for this Court to Grant Review</u>.

Arthur next asserts that he was prevented from filing his petition because he was not provided counsel to prepare a Rule 32 petition. (Pet. 19-21) Arthur fails to assert any reason why this court should grant review to this claim.

Arthur provides absolutely no argument that this claim is worthy of the Court's review. This Court has held that a prisoner has no right to an appointed counsel during post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today."); *Murray v. Giarratono*, 492 U.S. 1, 12 (1989) (plurality opinion) ("[]*Finley* applies to those inmates under sentence of death as well as to other inmates[.]"); *Smith v. Robbins*, 528 U.S. 259, 275 (2000) (holding death row inmate has no constitutional right to counsel in post-conviction proceedings). As such, it is undisputable that Arthur cannot show "State action in violation of the Constitution or laws of the United States," as is required for statutory tolling under AEDPA. 28 U.S.C. § 2244(d)(1).

In any event, if Arthur wanted legal representation to pursue either state or federal post-conviction relief, all he had to do was request counsel. The *Alabama Rules of Criminal Procedure* provide that a court, upon request from an indigent inmate, may appoint counsel.[8] Rule 32.7(c), A.R.Cr.P. Instead of requesting counsel, Arthur

[8] In order to obtain appointed counsel, the post-conviction petitioner need only fill in the form Rule 32 petition, located at the end of Rule 32 in the Alabama Rules of Criminal Procedure.

allowed the statute of limitation for filing a state post-conviction claim to expire while (allegedly) looking for counsel of his choice on the internet. Notably, Arthur has not cited a single case in the State of Alabama where an indigent death row inmate was not appointed counsel in a state post-conviction proceeding following a request. Furthermore, Arthur has not demonstrated how his failure to obtain state-funded counsel prevented him from pursuing post-conviction relief.

Similarly, no "illegal state action" prevented Arthur from filing a federal habeas petition. The United States Code provides that an indigent inmate seeking federal habeas relief "shall be entitled to the appointment of one or more attorneys ...." 21 U.S.C. § 848(q)(4)(B). In order to invoke this right to habeas counsel, an inmate need only file a motion with the federal court requesting counsel. *See McFarland v. Scott*, 512 U.S. 849 (1994). Arthur was not provided an attorney to represent him in pursuing federal habeas relief because he did not ask for one. Instead, Arthur allowed the statute of limitation to expire while he allegedly searched for a lawyer on his own. Inmates simply are not entitled to counsel of their choice. Furthermore, as this Court is well aware, *pro se* petitioners routinely file habeas petitions, so even if Arthur was unable to select counsel of his own choosing, it was still possible for him to file a federal habeas petition. There is no basis for statutory tolling in this case.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO ARTHUR'S CLAIM THAT HE IS ENTITLED TO EQUITABLE TOLLING.

Arthur also asserts that he was entitled to equitable tolling of the limitations period because he faces the death penalty. (Pet. 21-27). Though Arthur does identify a possible split among the circuits in the equitable tolling standards applicable to capital cases, review is

inappropriate here because Arthur cannot satisfy any equitable tolling standard.

A. The Majority Rule—Which Requires Extraordinary Circumstances for Equitable Tolling in Both Capital and Non-Capital cases—Was Correctly Applied Here and is Consistent With This Court's Precedent.

The Eleventh Circuit has held that the limitation period in 28 U.S.C. § 2244 may be equitably tolled "if the petitioner demonstrates (1) diligence in his efforts to timely file a habeas petition and (2) extraordinary and unavoidable circumstances." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000) (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)). Equitable tolling is "applied sparingly" and mere negligence or mistake by an attorney, for example, is insufficient to invoke its protections. *Id.* "The focus of the inquiry regarding 'extraordinary circumstances' is on the circumstances surrounding the late filing of the habeas petition and not on the circumstances of the underlying conviction, and whether the conduct of others prevented the petitioner from timely filing[.]" *Arthur*, 452 F.3d at 1253 (citations and quotation marks omitted). The Eleventh Circuit found that Arthur failed to demonstrate extraordinary circumstances or diligence. *Id.*

In his petition, Arthur abandons any argument that extraordinary circumstances were present, but instead argues that a lesser standard should apply in capital cases. (Pet. 22-25) Only the Third Circuit has held that in death penalty cases, "less than 'extraordinary' circumstances" may trigger equitable tolling of the AEDPA's statute of limitations. *Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir. 2001). The court essentially held that because "death is different," a petitioner facing the death penalty can be granted tolling by showing only that

he "diligently and reasonably asserted his claims" and "rigid application of the statute would be unfair." *Id.* at 245. The other circuits to address this question have expressly rejected the proposition that capital proceedings are not subject to the "extraordinary circumstances" requirement. *Steed*, 219 F.3d at 1300; *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir.2003) (en banc) (denying equitable tolling for a petition that was filed one day late); *Johnson v. McBride*, 381 F.3d 587 (7th Cir. 2004) (same).[9]

Arthur urges that a different standard is needed in capital cases because a petitioner may be executed even though—as he contends is the case here—the petition contains meritorious claims and those "claims have never been reviewed on the merits by a state or federal post-conviction court." (Pet. 24-25) However, the merits of the underlying claims should not influence an equitable tolling decision. The Fourth Circuit reasoned as follows:

> Allowing consideration of the merits of time-barred claims to creep into the equitable tolling analysis lets petitioners effectively circumvent the statute of limitations because the merits of their claims will always be considered. This would enable petitioners who were in no way prevented from complying with the statute of limitations to create delay and undermine finality—two of the reasons that precipitated enactment of the AEDPA statute of limitations. . . . [W]e reject [the petitioner's] invitation to apply equitable tolling based on a factor that had nothing to do with his failure to file on time.

[9] Though Arthur contends that *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003), acknowledges that an exception to the equitable tolling rules for capital cases may exist (Pet. 22), *Modrowski* was not a capital case so the issue remained unsettled. The circuit's subsequent decision in *Johnson* is an unmitigated rejection of any capital-case exception.

Rouse, 339 F.3d at 251; see *Johnson*, 381 F.3d at 591 ("It is unnecessary to add to the discussion of this subject in *Rouse*, 339 F.3d at 251-56.").

This Court has also demonstrated a general reluctance to create dual standards for post-conviction proceedings in capital and noncapital cases. In *Ohio Adult Parole Authority v. Woodard*, this Court emphasized that

> [t]he distinctions accorded a life interest . . . are primarily relevant to trial. **And this Court has generally rejected attempts to expand any distinctions further.** *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 8-9[] (1989) (opinion of Rehnquist, C.J.) (there is no constitutional right to counsel in collateral proceedings for death row inmates; cases recognizing special constraints on capital proceedings have dealt with the trial stage); *Satterwhite v. Texas*, 486 U.S. 249, 256[] (1988) (applying traditional standard of appellate review to a Sixth Amendment claim in a capital case); *Smith v. Murray*, 477 U.S. 527, 538[] (1986) (applying same standard of review on federal habeas in capital and noncapital cases); *Ford* [*v. Wainwright*, 477 U.S. 399, 425] (Powell, J., concurring) (noting that the **Court's decisions imposing heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context**).

523 U.S. 272, 281-82 (1998) (emphasis added).

This Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), is instructive. In *Coleman*, the petitioner filed his notice of appeal three days late in state post-conviction proceedings. This Court held that his habeas corpus claims were defaulted because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Id.* at 252-54. This Court noted that there is not a more lenient standard for capital cases. *Id.* at 252 (citing *Murray v. Giarratano*, 492 U.S. 1, 109 (1989). As the Seventh Circuit reasoned, "[t]o the extent *Fahy*[] suggests that attorneys' errors in handling collateral attacks against death sentences justify equitable tolling even though the identical conduct in other cases would not, it is hard to reconcile with *Coleman*, which the third circuit did not mention." *Johnson*, 381 F.3d at 590-91. The Third Circuit's decision in *Fahy* is an outlier, further review of Arthur's claim is therefore inappropriate.

B. Even if this Court Desires to Resolve the Conflict Between the Equitable Tolling Standards Set Forth in *Fahy* and the Other Cases Cited, Review of Arthur's Claim is Inappropriate Because He Cannot Meet Either Standard.

Arthur's petition is a poor vehicle for reconciling the any conflict among the circuit courts because he cannot meet the requirements of even the lower standard established in *Fahy*. There is therefore a significant probability that the circuit split would remain unresolved even if this Court reviews this claim.

The circumstances faced by the petitioner in *Fahy* were quite unusual—even if they did not rise to the level of "extraordinary circumstances." The court found that petitioner Fahy "believed he was required to pursue a fourth petition for collateral relief in state court" and

"reasonably believed that the state petition was properly filed." *Fahy*, 240 F.3d at 244. However, the Pennsylvania Supreme Court eventually determined that his fourth petition was inappropriate and thus improperly filed, precluding statutory tolling for his subsequent habeas corpus petition and causing it to be untimely. *Id.* In applying equitable tolling, the Third Circuit found that Fahy's mistake was reasonable because "[t]he law at the time of Fahy's petition was inhibitively opaque" such that even the Third Circuit "could not predict how the Pennsylvania court would rule[.]" *Id.* at 245. This confusion in the law was central to the court's reasoning. *Compare Phillips v. Vaughn*, 55 Fed. Appx. 100, 101 (3d Cir. 2003) (not precedential) ("[U]nlike in *Fahy*, the state law regarding timeliness that is at issue here was *well-settled and unquestioned.*") (emphasis added).

The circumstances faced by Arthur are entirely typical of those confronted and surmounted by the vast majority of capital murder petitioners throughout Alabama and the nation. Both the Rule 32 (Alabama state post-conviction rule) and AEDPA limitation periods are well-settled and unambiguous, a fact that Arthur does not dispute.[10] Also, unlike in *Fahy*, Arthur has not filed anything in any court that he could have believed (reasonably or otherwise) complied with or tolled either limitation period. Whether Arthur is compelled to show

[10] The *Fahy* court concluded its opinion by narrowly tailoring its applicability, stating that "[w]hen state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court." 240 F.3d at 245. Arthur ignores this carefully couched language.

extraordinary circumstances as required by the majority rule, or the "confounding and unsettled" but "less than 'extraordinary' " conditions required by the Third Circuit rule, *Fahy*, 240 F.3d at 245, Arthur has failed to meet is burden.

In any event, Arthur must also show that he diligently asserted his claims, a burden he also cannot meet. *See id.* at 245; *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) ("[E]quity is not intended for those who sleep on their rights."); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (The petitioner "has provided no specificity regarding ...the steps he took to diligently pursue his federal claims....").

There is no evidence to suggest that Arthur ever attempted, with any diligence, to pursue his remedies in federal court. In fact, he waited more than 22 months after the federal statute of limitations expired before seeking relief. Arthur attempts to show diligence by citing his attempt to obtain private counsel. (Pet. 25) Seeking to obtain a lawyer does not demonstrate diligence in pursuing federal habeas relief. Indeed, Arthur could have filed his federal habeas petition *pro se* or requested the federal district court to appoint him a lawyer. The first time Arthur even *attempted* to pursue federal habeas relief was after AEDPA's statute of limitation had long expired and his execution date was set. Though Arthur claims he was ignorant of the limitation periods, the circuit court explicitly held that

> Arthur was aware of time limits for filing his petition and the consequences for missing those times. In an internet posting seeking counsel, Arthur asked for "help . . . **now I'm running out of time for appeals.**" R2-40, Exh. E (also stating "the time for appeal on my case is critical to me.")

Arthur, 452 F.3d at 1251 (emphasis added). He blames his failure in part on the inadequacy of the prison library, but provides no evidence that he ever attempted, successfully or unsuccessfully, to use its resources. His contention that he did not know that Alabama would provide him appointed counsel for a Rule 32 petition is also belied by his own statements. In letters requesting assistance, he specifically dismissed the idea of accepting state-appointed counsel because " 'Alabama's court-appointed attorneys don't get paid enough to care.' " *Arthur*, 452 F.3d at 1250.[11] Though it is understandable that Arthur wanted to hold out for his ideal representation, his stubbornness in refusing to accept other assistance or to act pro se in the face of deadlines he knew were approaching cannot be called diligence.

The Fifth Circuit, in *Cantu-tzin v. Johnson*, 162 F. 3d 295, 300 (5th Cir. 1998), another capital case, stated that the petitioner's conduct in waiting until the statute of limitations expired and the execution date was set, and then seeking habeas relief "contradicts any possibility that equitable circumstances exist which might authorize a tolling of the AEDPA limitation period." Because equitable tolling is not warranted unless the federal habeas petitioner can demonstrate his diligence in attempting to file a timely federal habeas petition and because Arthur has not shown the required diligence,

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[11] Arthur's discriminating taste in attorneys dates back to his trial, where he chose to act as his own attorney rather than allow his three appointed attorneys to lead his defense. *Arthur*, 452 F.3d at 1241. For his appeals, he similarly declined to accept assistance from the Southern Center for Human Rights in Atlanta, Georgia, or to the Equal Justice Initiative of Alabama, in Montgomery, Alabama. *Id.* at 1250.

there is no possibility that Arthur will receive equitable tolling regardless of the standard applied. Therefore, there is no reason for this Court to grant certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Arthur's petition for certiorari.

Respectfully submitted,

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