

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THEODORE WASHINGTON,
Petitioner-Appellant,

v.

CHARLES L. RYAN,
Respondent-Appellee.

No. 05-99009

D.C. No.
CV-95-02460-JAT

THEODORE WASHINGTON,
Petitioner-Appellant,

v.

CHARLES L. RYAN,
Respondent-Appellee.

No. 07-15536

D.C. No.
CV-95-02460-JAT

OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, Senior District Judge, Presiding

Argued and Submitted En Banc March 22, 2016
San Francisco, California

Filed August 15, 2016

Before: Sidney R. Thomas, Chief Judge and William A. Fletcher, Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan, Carlos T. Bea, Milan D. Smith, Jr., Sandra S. Ikuta, Morgan Christen and Paul J. Watford, Circuit Judges.

Opinion by Judge Christen;
Dissent by Judge Bybee;
Dissent by Judge Watford

SUMMARY*

**Habeas Corpus / Fed. R. App. P. 4(a) /
Fed. R. Civ P. 60(b)**

In appeal No. 07-15536, the en banc court reversed the district court's order denying Arizona death row inmate Theodore Washington's motion under Fed. Civ. P. 60(b) to vacate and reenter its judgment denying his 28 U.S.C. § 2254 habeas corpus petition so that his appeal could be timely, and remanded for the district court to vacate and reenter its judgment *nunc pro tunc* as of June 9, 2005, in a case in which Washington filed a notice of appeal one day beyond the 30-day window set forth in Fed. R. App. P. 4(a)(1) and did not request an extension until well after the grace period expired.

The en banc court rejected the State of Arizona's argument that the district court lacked authority to vacate its judgment and that this court is without jurisdiction to hear the appeal. Having considered the interests of finality, the danger of prejudice to the State, that Washington missed the filing deadline by just one day, and the absence of any indication of bad faith by his lawyers, the en banc court concluded that relief was required under Rule 60(b)(1) or, alternatively, Rule 60(b)(6).

The en banc court wrote that after the district court reenters its judgment, Washington's appeal from the denial of his § 2254 petition may proceed in appeal No. 05-99009.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge Bybee, joined by Judges Callahan, Bea, Ikuta, and Watford, dissented. He wrote that the majority ignores the holding in *Bowles v. Russell*, 551 U.S. 205 (2007), that the FRAP timely filing requirements are mandatory and jurisdictional, by shoehorning an essentially equitable exception to the jurisdictional requirements of Fed. R. App. P. 4(a) into Rule 60(b).

Judge Watford also dissented because *Bowles* held that the filing deadline for civil appeals is jurisdictional and thus not subject to equitable exceptions. He offered thoughts as to why the *Bowles* holding is worth revisiting, should the Supreme Court decide to take up the issue.

COUNSEL

Gilbert H. Levy (argued), Law Offices of Gilbert H. Levy, Seattle, Washington, for Petitioner-Appellant.

Laura Chiasson (argued), Assistant Attorney General; Terry Goddard, Attorney General; Office of the Arizona Attorney General, Tucson, Arizona; for Respondent-Appellee.

Nathaniel C. Love (argued), Sidley Austin LLP, Chicago, Illinois; Mark E. Haddad, Sidley Austin LLP, Los Angeles, California; David M. Porter, Co-Chair, NACDL Amicus Committee; for Amicus Curiae National Association of Criminal Defense Lawyers.

considered the interests of finality, the danger of prejudice to the State, that Washington missed the filing deadline by just one day, and the absence of any indication of bad faith by his lawyers, we conclude that relief was required under Rule 60(b)(1) or, alternatively, 60(b)(6). We reverse the district court's order and remand for the district court to vacate and reenter its judgment *nunc pro tunc* as of June 9, 2005. Once judgment is reentered, Washington's appeal from the denial of his petition for writ of habeas corpus will be timely and may be considered on its merits.

BACKGROUND

Washington is one of three co-defendants who were convicted in 1987 of first degree murder and other offenses after two of them entered a home and robbed and shot its occupants. *State v. Robinson*, 796 P.2d 853, 856–58 (Ariz. 1990). All three defendants were sentenced to death. One of them, James Mathers, prevailed on direct appeal when the Arizona Supreme Court ruled that there was insufficient evidence to support his conviction. *See State v. Mathers*, 796 P.2d 866, 873 (Ariz. 1990) (In Banc). The second co-defendant, Fred Robinson, argued in his federal habeas petition that the state trial court's application of a "cruel, heinous, and depraved" sentencing enhancement was arbitrary and capricious, and that counsel was ineffective at the penalty phase of the defendants' joint trial. *See Robinson v. Schriro*, 595 F.3d 1086, 1110–12 (9th Cir. 2010). Robinson was granted relief on habeas review, *see id.* at 1113, and on remand the state trial court resentenced him to sixty-seven years to life, *see Judgment and Sentence*, Case No. S1400CR87-14064 (Yuma Cty., Ariz., Oct. 25, 2011).

