No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

DARREN HOGUE,

Petitioner,

v.

MARK NOOTH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit's memorandum decision contravene this Court's command that a proper review of a viable Sixth Amendment claim of ineffective assistance of counsel requires review of evidence outside a standard plea colloquy and waiver hearing?

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The petitioner, Darren Hogue, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 2, 2017.

Opinions Below

The United States District Court for the District of Oregon denied Mr. Hogue's petition for writ of habeas corpus, but issued a Certificate of Appealability. (Appendix D). The United States Court of Appeals for the Ninth Circuit published a memorandum opinion affirming the denial of relief. (Appendix C). Denying the petitioner's petition for rehearing and rehearing *en banc*, the Court issued an Amended Memorandum opinion, affirming, but modifying, its initial decision. (Appendices A & B).

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Fourteenth Amendment provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

The Sixth Amendment provides that criminal defendants "enjoy the right . . . to have the Assistance of Counsel" for their defense.

28 U.S.C. § 2254(a) provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

Section (d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to

> any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Statement of the Case

A. State criminal case

In 2008, Mr. Hogue was charged with sexual offenses. The alleged victim was his daughter who was then ten years old. Defense counsel, Robert Abel, was appointed to represent Mr. Hogue. Investigation and plea negotiations ensued. Ultimately, Abel persuaded Mr. Hogue to accept a plea agreement under which Mr. Hogue would plead guilty to two lesser included charges of second-degree rape, with an agreed-upon sentence.

In July of 2009, Mr. Hogue appeared before the court to plead guilty. At the plea hearing, the court canvassed Mr. Hogue's understanding of the agreement and related matters. Mr. Hogue then entered guilty pleas to two second-degree rape charges. (Appendix G). The court then reviewed a provision in the plea agreement in which Mr. Hogue waived his right to move to set aside his plea unless he filed such a challenge within sixty days of the entry of the conviction. (Appendix G, p. 4). The full waiver agreement appears in Appendix H. Defense counsel noted that he (counsel) would not sign the waiver because he could not ethically preclude a later challenge to his own ineffectiveness. (Appendix G, pp. 4-5). The court found that Mr. Hogue signed the waiver of direct appeal and collateral remedies freely and voluntarily. (Appendix G, p. 5).

The court announced it would adhere to the plea agreement. It then imposed consecutive seventy-five month sentences. (Appendix G, pp. 9-10). The judgment was entered on July 17, 2009.

B. State post-conviction proceedings

On December 10, 2009, Mr. Hogue filed a *pro se* petition for post-conviction relief. The court appointed PCR counsel. In his amended petition, Mr. Hogue challenged his convictions, primarily raising ineffective assistance of his trial counsel. In one claim, Mr. Hogue asserted that he was denied effective assistance "when trial counsel failed to bring forth proper and necessary advice concerning the petitioner's guilty plea." As a result, Mr. Hogue claimed that he lacked a clear understanding of the consequences of the guilty plea. He also asserted that his attorney failed to properly advise him on the consequence of waiving his appeals.

Among his claims, Mr. Hogue averred that his attorney, Mr. Abel, had not thoroughly investigated his case. Hogue added that his attorney's refusal to use certain available information "forced petitioner to feel the need to make a plea agreement" and that that made his plea agreement involuntary.

The Respondent (State of Oregon) moved for summary judgment "because petitioner waived post-conviction proceedings pursuant to his plea agreement." Respondent argued: "In this case, petitioner waived his right to post conviction relief, and his current post conviction petition should be dismissed pursuant to the plea agreement and the "'Waiver of Appeal and Collateral Remedies[.]'"

At the ensuing hearing, Respondent argued that Mr. Hogue had waived his post-conviction rights and urged the court "to dismiss the petition based on the petitioner's agreement and contract with the State." Mr. Hogue countered that "there are many facts in dispute in this case" pertaining to trial counsel's failure to adequately represent him. He argued that trial counsel could not validly counsel him to waive his right to challenge counsel's effectiveness.

Without receiving evidence beyond the record of the guilty plea hearing, the post-conviction court found that the waiver was a legally enforceable contract that Mr. Hogue had "executed . . . freely, voluntarily and knowingly," that there were no facts in dispute, and granted summary judgment on that basis. (Appendix F, p. 6; *see also* Appendix I). The court referenced the "detailed waiver of collateral remedies" which required Mr. Hogue to file any collateral challenge within sixty days. The court granted the state's motion, "[i]n view of this agreement[.]"

The Order Granting [the] Motion for Summary Judgment found that: "[P]etitioner failed to file his petition within the sixty day period provided in his detailed Waiver of Direct Appeal and Collateral Remedies." The court also found that:

> The discussion on the record at the plea hearing regarding the plea agreement and the contents of the waiver document, evidence that petitioner was of sound mind, and that he executed the waiver of post conviction remedies and collateral relief freely, voluntarily and knowingly.

(Appendix E, p. 3). The order concluded:

> NOW THEREFORE, IT IS HEREBY ORDERED, for the reasons stated in Defendant's Motion for Summary Judgment, and for the reasons provided

> above, that, Defendant's Motion for Summary Judgment is GRANTED, and petitioner's "Final Amended Petition for Post Conviction Relief," is dismissed with prejudice.

Mr. Hogue appealed the dismissal. The Oregon Court of Appeals affirmed without an opinion. The Oregon Supreme Court denied his petition for review. (Appendix F, p. 6).

C. Federal habeas corpus case

Mr. Hogue then filed his petition for a writ of federal habeas corpus. He continued to assert claims of ineffective assistance of counsel. He also sought an evidentiary hearing before the district court. (Appendix E, p. 5; Appendix F, pp. 18-21).

In support of his request for an evidentiary hearing, and in support of his ineffective assistance claims, Mr. Hogue submitted an affidavit which highlighted the problems he encountered in Mr. Abel's representation that led to his guilty plea. (Appendix J). Mr. Hogue attested that he pled guilty based on undue pressure from Abel and others. Mr. Hogue sought an opportunity to testify concerning the circumstances surrounding the plea and, in particular, to describe the pressure he felt leading up to the plea entry. He emphasized that the waiver was the product of duress. Given the truncated filing deadline, he stated that he did not have time to develop his post-conviction challenge. Lastly, he maintained that had Mr. Abel investigated his case properly, and not unduly pressured him into pleading guilty, he would have taken his case to trial. (*Id.*)

The magistrate judge recommended the denial of relief and refused to hold an evidentiary hearing. (Appendix F). Using a different legal analysis, the district court

denied the petition and dismissed the case. The district court likewise denied an evidentiary hearing. (Appendix D).

In a memorandum opinion, the Ninth Circuit affirmed (Appendix C), and further denied rehearing, issuing an amended decision. (Appendices A & B).

Reasons for granting the Petition for Certiorari

The Ninth Circuit disregarded this Court's command that a meaningful review of an ineffective assistance claim entails examination of actions or advice outside the trial court record.

In rejecting Mr. Hogue's habeas petition, the Ninth Circuit incorrectly found that the state post-conviction court adjudicated the merits of petitioner's *Strickland* and *Hill* claim, and the panel then "deferred" to that supposed ruling. (Appendix A, p. 2).[1] The panel wrote: "The PCR court's application of the due-process "voluntary and knowing" test necessarily reflected a judgment that petitioner's counsel had adequately investigated petitioner's case and advised him about his plea agreement; were that not so, petitioner's plea and post-conviction-remedies waiver could be neither voluntary nor intelligent." (Appendix A, pages 2-3).

This ruling conflicts with this Court's clear precedent. When faced with a viable ineffective assistance claim, a valid *Strickland* and *Hill* ruling cannot be based solely on the bare record of a plea and waiver colloquy. Rather, the reviewing court must actually review evidence necessary to make such a Sixth Amendment decision. Here, the post-

[1] *Strickland v. Washington*, 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52 (1985).

conviction court, at most, rendered a due process voluntariness decision, a decision that is jurisprudentially distinct from a *Strickland* inquiry.

A due process voluntariness decision that is based on a plea colloquy is emphatically not a Sixth Amendment decision under *Strickland*. The Washington Supreme Court explained this distinction:

> To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the familiar two-part *Strickland v. Washington*, test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant. ***Ordinary due process analysis does not apply***. *Hill*, 474 U.S. at 56–58.

State v. Sandoval, 249 P.3d 1015, 1018 (Wash. 2011) (emphasis added; citations omitted and others modified).

Lafler v. Cooper, 566 U.S. 156 (2012) makes this very distinction as well. The Court there faulted the Michigan Court of Appeals for making the same mistake as the circuit did in this case. This Court stated:

> [T]he Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland*, the state court simply found that respondent's rejection of the plea was knowing and voluntary. ***An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel.*** *See Hill*, 474 U.S., at 57–59 (applying *Strickland* to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process)

Lafler v. Cooper, 566 U.S. at 173 (internal citation omitted and *Hill* citation modified; emphasis added). In deciding the merits of Lafler's claim, this Court relied on trial counsel's and the habeas petitioner's testimony, at a post-trial hearing, establishing that

counsel advised him that a certain conviction was not possible, causing him to reject two plea offers. The Sixth Circuit's decision in *Cooper v. Lafler*, 376 Fed. Appx 563, 571 (6th Cir. 2010) recites the testimony offered at the evidentiary hearing before the Michigan trial court.[2]

This Court has consistently underscored the necessity, on a *Strickland* claim, to inquire beyond the trial-court record. *Trevino v. Thaler*, 569 U.S. 413, 424, 1918 (2013) ("'the inherent nature of most ineffective assistance' of trial counsel 'claims' means that the trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim.") (citation omitted); *Martinez v. Ryan*, 566 U.S. 1, 9, 1315 (2012). This Court has long recognized the reality that "the usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom." *United States. v. MacCollom*, 426 U.S. 317, 327–28 (1976) (quoting *United States v. Shoaf*, 341 F.2d 832, 835 (4th Cir. 1964)).

Illustrating this point, in *Premo v. Moore*, 562 U.S. 115 (2011), the Court ruled on an Oregon prisoner's Sixth Amendment challenge to his guilty plea. All courts reviewing

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[2] In its Amended Memorandum, issued in response to the rehearing petition, the Circuit stated that "Petitioner raises *Lafler v. Cooper* . . . for the first time in his petition for rehearing . . ., and then stated that such "reliance" was, therefore, waived. (Appendix B, p. 4). Significantly, Mr. Hogue did not rely on *Lafler* for any kind of new point or new legal argument. Rather, he has consistently made the same argument at every level of this federal litigation. While in his petition for rehearing, he quoted (for the first time) this supportive passage from *Lafler*, he did so only in support of the same consistent constitutional argument he has made at every phase of the habeas case. Therefore, the Circuit wrongly assumed that some type of new claim or argument had been raised by the mere quotation of this language.

Moore's claim, including this Court, reviewed evidence outside the plea colloquy. This Court deferred to the state court's Sixth Amendment ruling based, in large part, on the detailed recounting by trial counsel in his post-conviction affidavit. *Id.* at 119-20. After quoting from that affidavit, this Court wrote: "In light of these facts, the Oregon Court concluded Moore had not established ineffective assistance of counsel under *Strickland*." *Id.* No such examination took place in Hogue's case. (*See* Appendix I).

Federal courts of appeal recognize the need to review evidence outside the plea colloquy involving ineffective assistance of counsel claims. *Young v. Spinner*, 873 F.3d 282, 284 (5th Cir. 2017) (letters from petitioner and his counsel that were exchanged after the sentencing, in addition to the state-court plea colloquy); *Magana v. Hofbauer*, 263 F.3d 542, 545 (6th Cir. 2001) (the petitioner's and counsel's testimony); *St. Pierre v. Walls*, 297 F.3d 617, 638 (7th Cir. 2002) (deposition of one of petitioner's attorneys); *Hawkman v. Parratt*, 661 F.2d 1161, 1162-63 & 1167 (8th Cir. 1981) (petitioner's attorney's testifimony).

As these cases demonstrate, to render a *Strickland* decision in this case, the PCR court had to look at evidence apart from the plea petition and plea colloquy. Yet, the post-conviction court in Mr. Hogue's case did nothing of the kind. Instead, the post-conviction court dismissed Hogue's Sixth Amendment claims on procedural grounds and a finding of constitutional voluntariness that was drawn exclusively from the trial-level plea colloquy and the plea and waiver documents. (Appendix I). Plainly, the PCR court did not apply the requisite test under *Strickland v. Washington* or *Hill v. Lockhart*. Thus, in the only state

forum in which Mr. Hogue could have litigated his *Strickland* claims, he was denied an adjudication of the merits of his claim.[3]

The upshot of the Circuit's decision is that the reviewing court found adequate investigation and proper legal advice, and, based on that, constitutionally effective counsel, without ever undertaking the necessary factual inquiry into those very matters. If the Constitutional guarantee of effective counsel is to have meaning, however, the law cannot sanction such a hollow and meaningless ritual.

To be sure, not all ineffective assistance challenges necessitate an evidentiary hearing. For example, in *Hill v. Lockhart*, this Court held "that the two-part *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. at 58. But it was unnecessary to conduct a hearing regarding counsel's advice on petitioner's parole eligibility because "petitioner's allegations [were] insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.'" *Hill*, 474 U.S. at 59. In essence, *Hill* "did not allege in his habeas petition that, had counsel correctly advised him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 59. "Because [he] in failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court

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[3] In Oregon, an ineffective assistance claim can only be raised in a post-conviction proceeding, meaning that that is the only opportunity for the claim to be heard on the merits in state court. *See State v. Sweet*, 30 Or. App. 45, 48, 566 P.2d 199, 200 (1977); *State v. McKarge*, 78 Or. App. 667, 717 P.2d 656 (1986) (issue as to whether a defendant had ineffective assistance of counsel was one that could only be resolved in a post-conviction proceeding where an evidentiary hearing could be held).

did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim." *Id.*

Mr. Hogue, in contrast, made exactly that type of allegation, stating explicitly that he would have insisted on trial if his lawyer had properly advised him regarding his case and his options and the full effect of the waiver. (Appendix J). Because the post-conviction court dismissed the claim as untimely, and found the waiver of collateral challenges to be voluntary and knowing, it never applied the two-part *Strickland* test. *See* Appendix I

Contrary to the Circuit's conclusion, *Johnson v. Williams*, 568 U.S. 289, 305 (2013) does not support its decision. (*See* Appendix B). In *Johnson*, the question was whether a state court opinion that addresses some issues but does not expressly address the federal claim in question nevertheless constitutes an adjudication of the merits of that claim. *Id.* at 292. To answer that question, this Court outlined the circumstances that would provide an affirmative answer to that question. Here, however, the state court had a specific Sixth Amendment claim before it and dismissed that claim based on untimeliness and waiver grounds. It issued a companion due process ruling that the wavier of collateral challenges was valid. However, it never reached the Sixth Amendment ineffective assistance of counsel claim. Notably, *Johnson* involved a claim of trial court error. And the state court that adjudicated that claim had all the evidence before it that it required to rule on the merits of the claim. Here, in contrast, the state court *dismissed* the *Strickland* claim *without even entertaining evidence relevant to the claim*. Consequently, it cannot be said that the court reached the merits.

Lastly, the Circuit found that Petitioner offered no argument that the PCR court's adjudication of the merits of the claim satisfied the AEDPA standard for relief. That is true. Again, the reason is that there was no adjudication of the merits of the Sixth Amendment claim in state court. In federal court, Hogue has therefore sought the genuine judicial hearing that has never taken place. For an adjudication of the *Strickland* claim, there must be an actual hearing on the merits of his claim that he was denied effective assistance of counsel, a hearing that involves the review of relevant evidence.

This latter aspect of the panel's decision underscores another error in its analysis. A federal court, sitting in habeas, does not defer to a ruling that has never been made. *See Porter v. McCollum*, 558 U.S. 30, 37 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*).

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Respectfully submitted and DATED this 21 day of November 2018.

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