No. 18-8434

IN THE
SUPREME COURT OF THE UNITED STATES

LEIF HALVORSEN,

Petitioner

v.

DEEDRA HART, WARDEN

Respondent

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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Reply

The Brief in Opposition (hereinafter "BIO") essentially does as follows: 1) further demonstrates why the Court should defer consideration of the Petition until the Sixth Circuit issues its post-argument decision in the jointly tried co-defendant's case; 2) presents a brief on the merits of the arguments made before the United States Court of Appeals for the Sixth Circuit, ignoring the specific questions presented, the conflict between the lower court decision and the Court's precedent, and the split among the circuit courts of appeals; 3) addresses claims and issues not encompassed

within the questions presented or even within the Petition itself;[1] 4) brings up facts from outside the case; and, 5) asserts inaccurate information. Each will be addressed below. Suffice it to say, the BIO does not undermine the significant reasons presented for deferring consideration of the Petition or for granting certiorari. If anything, it makes it clearer that the Court should defer consideration of the Petition and that certiorari should ultimately be granted.

First, the Warden concedes that *Darden v. Wainwright*, 477 U.S. 168 (1986), is the applicable clearly established law regarding improper prosecution closing argument. But, she then repeats (and adopts) the lower court's conclusion that there is no applicable clearly established law because the Court has not directly addressed the impropriety of future dangerousness arguments unrelated specifically to the defendant, send the message to the community arguments, and invocation of the names of notorious murderers.[2] As was explained within Halvorsen's recently filed motion to defer consideration of the Petition, at least one of the judges on the panel

[1] The Warden devotes more than two pages of her BIO to argument regarding the prosecutor's comments on Halvorsen having exercised his constitutional rights. However, Halvorsen did not raise an issue within the Petition regarding these comments, but merely mentioned the comments within a footnote without making any argument regarding the comments. Thus, matters regarding those comments are not before the Court.

[2] The Warden's assertion that the mention of notorious murderers who did not receive a death sentence harmed the prosecution's case is ridiculous. The clear context, and apparent purpose, of that portion of the prosecutor's argument was to persuade the jurors to compare Halvorsen to those feared and notorious killers, and to impose a death sentence out of the fear that, like those horrendous killers, if not given the death penalty, Halvorsen could kill again. The argument prefaced the list of notorious killers with the statement "as to the future threat of the convicted murderer to society…." That indicates the jurors should consider those who did not get death and those who did in the context of considering the possibility that giving less than death could mean Halvorsen may kill again, just as it could mean for notorious killers Richard Speck and Charles Manson. Fear that Halvorsen could be as dangerous as Speck or Manson and thus could kill again is the theme the prosecutor tried to create, with no supporting evidence, to inflame the passions and prejudices of the jurors. It is thus preposterous to suggest the argument actually harmed the prosecution.

deciding the jointly tried codefendant's habeas appeal seems to disagree entirely, thereby providing reason to defer consideration.

Alternatively, the Warden's position underscores why certiorari should be granted. As explained within the Petition, the Sixth Circuit's resolution of the improper prosecution closing argument claim conflicts with the Court's repeated precedent on what constitutes clearly established law and also conflicts with precedent of another circuit court of appeals. The Warden completely ignores that law and argument, not even attempting to assert that no actual conflict/split exists or that the conflict/split is inconsequential and thus unworthy of certiorari. That is likely because no such argument could legitimately be made. The split among the circuits is clear and the gravity of the issues provides additional reason for the Court to address the conflict/split. The Warden did not dispute that.

Second, with regard to all three questions presented, the Warden asserts that the evidence of guilt is so overwhelming that the result, even as to penalty, would not have been different, no matter what. The law disagrees. Post-*Furman* death penalty jurisprudence has never been that a crime is so horrendous that no error could be prejudicial. *See*, *e.g.*, *Hodge v. Kentucky*, 133. S.Ct. 506 (2012) (Sotomayor, J., dissenting from the denial of certiorari). Yet, even if the law was different, it would not matter here. Contrary to the Warden's assertion otherwise, the Sixth Circuit did not even state within the portion of the opinion dealing with the improper comments that the evidence against Halvorsen was so overwhelming that it neutralized any harm from the prosecutor's closing argument. Simply, the Sixth Circuit never said

that; instead, it focused on whether clearly established law exists and whether the comments were improper. *Halvorsen v. White*, 746 Fed.Appx. 489, 497-502 (6th Cir. 2018), Cert. App. at 5-9. The Court does not therefore need to address at this point whether the comments were so egregious that they require granting the writ of habeas corpus. Instead, that would be an appropriate matter to be addressed in the first instance on remand once the Court addresses the questions presented that have actually been presented to the Court. The only matters before the Court, with regard to the first question presented, are whether, contrary to the Sixth Circuit's opinion, clearly established law exists and then whether the comments were improper.

Third, the fact that the codefendant's attorney mentioned serial killers during closing argument indicates nothing about overall fairness of the trial. That closing argument came after the prosecutor's closing argument. The prosecutor's invocation of notorious killers who could or could not kill again based solely on whether the death penalty had been imposed left Willoughby's counsel with no reasonable choice other than to address notorious killers within his closing argument.[3]

Fourth, the Warden cites cases allowing consideration of future dangerousness, but those cases dealt with whether the actual defendant would be a future danger, not whether a prosecutor may make a general future dangerousness and send a message to the community argument that is not tied directly to the defendant. As noted in the Petition, the law does not permit a general future

[3] Halvorsen's attorney did not also do so within his closing argument.

dangerousness argument that is unrelated to the defendant's personal future dangerousness.[4] The Warden fails to address that, and does not directly dispute it.

Fifth, with regard to questions presented II and III, the Warden fails to recognize the significance of the issue at stake, how the Court has described and treated the holding, and implications, of *Martinez v. Ryan*, 566 U.S. 1 (2012), and the dire consequences the Sixth Circuit's decision will have on the judicial system if the decision is allowed to stand. Namely, it would result in district courts being flooded with massive habeas petitions containing every conceivable claim unsupported by law, but that could theoretically become viable if the law ever changes.[5] Rather than recognize that would overload the federal courts and bring the criminal justice system towards an even slower grind than already exists, the Warden tosses the Court red-herrings seemingly in the hope to deflect the Court's attention away from the need to intervene and that Halvorsen had sought to amend his Petition only *four calendar days after Martinez was decided*.

Sixth, the Warden emphasizes that the habeas petition contained numerous claims not previously presented in state court, and thereby argues that Halvorsen could have, and should have, raised the claim at issue earlier. But, those claims all asserted ineffective assistance of direct appeal counsel to excuse the procedural default. When Halvorsen filed his habeas petition, the right to effective assistance of

[4] The Warden also notes that *Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008), held that general deterrence arguments are proper. *Beuke* held the opposite. It held that it is improper under *Darden* to ask jurors to send a message to other potential murderers by imposing a death sentence.

[5] In the Petition, Halvorsen lists multiple cases where leave to amend to add a new claim in light of *Martinez* had been granted. The Warden does not address any of those cases.

direct appeal counsel had long-been established, and the law was already settled that an ineffective assistance of direct appeal counsel claim, and ineffective assistance of direct appeal counsel used to excuse a default, could be raised for the first time in federal habeas proceedings in a case that originated in a Kentucky state court. *See*, *e.g.*, *Boykin v. Webb*, 541 F.3d 638, 647 (6th Cir. 2008) (ineffective assistance of direct appeal counsel may provide cause for overcoming a procedural default because Kentucky courts did not permit ineffective assistance of direct appeal counsel claims). Following *Boykin*, the Sixth Circuit agreed that the claims Halvorsen presented within his habeas petition that were not presented in state court were properly before the federal court in the first instance because (a) direct appeal counsel ineffectiveness was the basis to excuse the default, and (b) state law did not (until after the habeas petition had been filed) permit ineffective assistance of direct appeal counsel matters. *Halvorsen*, 746 Fed.Appx. at 494, Cert. App. at 3.

In contrast, the amendment that is the subject of questions presented II or III involved trial counsel and initial-review-collateral-proceeding counsel ineffectiveness and thus the default could not then be excused by direct appeal counsel ineffectiveness. Unlike with the claims raised within the habeas petition, there was no already existing legal grounds on which the default could be excused. Instead, the law of the circuit and beyond was well-established that the only theoretical basis to excuse the default – ineffective assistance of initial-review-collateral-proceeding counsel – did not exist within the law, and had been resoundingly rejected by governing precedent the court would have to apply. Thus, there was a sound basis for

raising the "new" claims presented within the habeas petition, but not the one at issue here. The law at the time Halvorsen filed his original habeas petition permitted the "new" claims raised in the initial habeas petition to be raised, but resoundingly prohibited the claim at issue here, which would have made the claim frivolous if raised at that time.

Counsel thus did exactly what the courts and the law expect of them -- not raise a claim that was frivolous under the binding law. And, when that law changed, they did exactly what is expected of counsel: they sought to amend the habeas petition to raise the issue and did so extremely expeditiously – within four calendar days.

The "new" claims raised within the habeas petition, in comparison to the claim not raised within it, thereby actually further demonstrates the propriety of Halvorsen seeking to amend when he did. At a minimum, it does not provide a basis for rejecting the amendment. A conclusion to the contrary would, as discussed *supra*, wreak havoc on the judiciary because it would create precedent (by leaving in place the Sixth Circuit's decision) requiring habeas counsel to raise every conceivable issue in complete disregard of binding adverse precedent on an issue. That would overwhelm the federal courts. The Court should not allow law requiring that to stand, without at least weighing in on it.

Seventh, the Warden argues that "Halvorsen's entire argument was based on the false premise that defense counsel (Hon. Michael Moloney) did not know/understand the law and thought Halvorsen was only on trial as a principal – formulating Halvorsen's 'only' defense based on that fact and ignoring accomplice

liability," and then says, "[t]hat is not true." BIO at 21-22. Counsel for the Warden, though, knows it *is true*. Trial counsel signed an affidavit, which was provided to counsel for the Warden during the habeas appellate proceedings,[6] stating that, at the time of trial, he thought Halvorsen was only on trial for murder and formulated his defense on that fact without understanding the law also allowed a conviction as an accomplice.[7] Halvorsen sought to expand the record on appeal with the affidavit. The Sixth Circuit denied that motion, so Halvorsen did not use the affidavit as part of his Petition. But, it is now relevant to whether to grant the Petition because it refutes the Warden's argument, and demonstrates that the facts regarding the amendment claim are correctly stated within the Petition. The affidavit is attached for that purpose.

Finally, the Warden asserts that Halvorsen's amended claim and his original claim do not relate back because one is an ineffective assistance of counsel claim and the other is not. Courts have not construed relation back so narrowly. But, the Court need not even delve into relation back. The district court assumed Halvorsen's claim related back, and the Sixth Circuit did not rule otherwise. Thus, relation back is not at issue and is something that, if necessary, would be addressed in more detail on

[6] Counsel for the Warden is the same attorney who represented the Warden before the Sixth Circuit.
[7] The Warden cites mainly to the closing argument in an attempt to demonstrate counsel accurately understood the law and chose to proceed with his ill-fated, unreasonable trial strategy anyway. However, the closing argument was after the instructions conference at which trial counsel learned that the defense he had spent the entire trial presenting was no defense at all under the instructions the court would give. Because the closing argument occurred after this conference, it sheds no light on what trial counsel believed the law to be when he was preparing for trial and when he presented his trial defense to the jury. Regardless, the Warden is aware of, and had for nearly a year before he filed his BIO, a copy of trial counsel's affidavit that completely refutes the Warden's position and establishes trial counsel did not correctly know the law on this fundamental matter even as late as when he presented the trial defense to the jury.

remand. It is nothing more than a red-herring here that should not distract the Court from the significant issues before it, the split among the circuits, and the compelling reasons for granting certiorari.

Conclusion

For the reasons stated above and within the Petition, the Court should disregard the Warden's arguments, grant certiorari, and summarily reverse. Alternatively, Halvorsen requests the Court grant plenary review.

Respectfully submitted,

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