No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

KATHRYN B. PARISH
Carlyle Parish LLC
3407 Jefferson #128
St. Louis, Missouri 63118
314-277-7670
kay@carlyleparishlaw.com

*DAVID M. BARRON
*(*Counsel of Record*)
Assistant Public Advocate
Capital Post Conviction Unit
KY Department of Public Advocacy
5 Mill Creek Park, Section 101
Frankfort, Kentucky 40601
502-782-3601 (direct)
502-564-3948 (office)
502-695-6768 (fax)
david.barron@ky.gov
davembarr@yahoo.com

Counsel for Leif Halvorsen

CAPITAL CASE

QUESTIONS PRESENTED

Yet again, the United States Court of Appeals for the Sixth Circuit has disregarded the Court's clear directive and case law as to the meaning of clearly established law for purposes of 28 U.S.C. §2254(d). *See*, *e.g.*, *White v. Woodall*, 572 U.S. 415 (2014); *Parker v. Matthews*, 567 U.S. 37 (2012). This time, it did the opposite of what it did in those cases. Rather than construe §2254(d)'s clearly established law requirement too broadly, it construed it so narrowly that it too conflicts with the Court's precedent. Specifically, the Sixth Circuit here decided that the term "clearly established law" mandates a Supreme Court case that addresses the specific impropriety that occurred, even though the Court has held that a rule of generality, including the specific rule at issue here, constitutes clearly established law applicable to a myriad of factual circumstances. *Woodall*; *Marshall v. Rodgers*, 569 U.S. 58 (2013); *Panetti v. Quarterman*, 551 U.S. 931 (2007); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

Even though there was no evidence that Halvorsen might pose a future danger, the prosecutor dedicated a significant portion of his penalty phase closing argument to urging the jury to send a message to the community by imposing a death sentence and to impose a death sentence because it could not take the risk that any other sentence could end up with Halvorsen later killing an inmate or prison guard, such as a bailiff the prosecution specifically named, while also invoking the names of notorious killers Charles Manson, James Earl Ray, and Richard Speck as individuals who could kill again since they were not under a death sentence in contrast to Gary Gilmore who had been executed only a few years earlier.

Despite recognizing *Darden v. Wainwright*, 477 U.S. 168 (1986), as applicable law governing improper prosecution closing argument, the Sixth Circuit rejected Halvorsen's due process claim because the Court had not expressly held that either general deterrence arguments that were not directly tied to the defendant or invoking the names of notorious killers in general, or specifically ones who could or could not kill in the future based on the sentence imposed, is improper. Thus, the Sixth Circuit held there was no applicable clearly established law, thereby requiring the claim to fail under §2254(d).

Halvorsen and his codefendant were both indicted as principals for murders that occurred during an argument while the defendants and victims were doing drugs. Defense counsel wrongly believed that, under Kentucky law, Halvorsen could be convicted only as a principal, and presented only the defense that the prosecution had not proven Halvorsen was a principal but only that he had been an accomplice, and thus the jury must acquit.

Because prior counsel did not argue in state post-conviction that trial counsel performed ineffectively by basing his entire defense around a wrong understanding of the law, the claim was procedurally defaulted with no basis to excuse the default at the time Halvorsen filed his original habeas petition. Within only a few days of the Court's decision in *Martinez*, which has been held to apply to cases originating in Kentucky, Halvorsen sought to amend the petition with a new claim, pursuant to Fed.R.Civ.P. Rule 15. Rule 15 requires that leave to amend be granted where the interests of justice require, a standard that carries an intent of assuring that all legal claims arising out of a set of well-plead facts be heard. The district court assumed the claim related back to another claim that had been raised in the original petition, but denied the amendment, ruling the amount of time between when the habeas petition was filed and when Halvorsen sought to amend was too long and thus automatically prejudiced the Warden. The district court so ruled even though Halvorsen sought to amend only four days after *Martinez* was decided and thereby provided a means by which the district court could reach the merits of the underlying claim when none existed before *Martinez* and even though the amount of time that had elapsed by then would ultimately turn out to be only a little more than the additional two years it would take the district court to rule on the habeas petition. The Sixth Circuit affirmed, holding that the district court did not abuse its discretion by denying leave to amend.

The Sixth Circuit's decision gives rise to the following questions presented:

I. Does the Sixth Circuit's ruling that a lack of Supreme Court case law dealing with a specific type of improper prosecution closing argument means no "clearly established" law exists for purposes of 28 U.S.C. §2254(d) conflict with the Court's express ruling in *White v. Woodall,* 572 U.S. 415 (2014), that *Darden v. Wanwright*, 477 U.S. 168 (1986), constitutes a clearly established general rule applicable to improper prosecution closing argument due process claims and/or with the Court's decisions in *Woodall*, *Marshall v. Rodgers*, 569 U.S. 58 (2013); *Panetti v. Quarterman*, 551 U.S. 931 (2007); *Yarborough v. Alvarado*, 541 U.S. 652 (2004), and *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000), that "clearly established" law does not require a case with an identical fact pattern but instead includes legal principles and standards flowing from precedent and general standards designed to apply to a myriad of factual situations?

   Alternatively, does *Darden* constitute clearly established law applicable to determining whether due process is violated when a prosecutor urges the jury to send a message to the community with its verdict and/or invokes the names of notorious killers who can and cannot kill again based on whether they have been sentenced to death, and are such comments improper, as the Eighth Circuit has held under §2254(d), or are they proper and there no applicable clearly established law, as the Sixth Circuit has held?

II. Under Fed.R.Civ.P. 15, does *Martinez v. Ryan*, 566 U.S. 1 (2012), provide a basis to promptly amend a pre-*Martinez* habeas petition still pending in district court when *Martinez* overturned all prior precedent by creating a new basis to excuse a procedural default and thus a means by which a federal court could reach the merits of a defaulted claim when no means existed previously, or is *Martinez* limited to those who file their habeas petition after *Martinez* was decided and the small group of habeas petitioners who argued for the *Martinez*-exception to default before *Martinez* was decided?

III. Under Fed.R.Civ.P. 15, should leave to amend a pending habeas petition with a non-futile claim found to relate back to an original claim be granted when leave to amend has been sought within days of an intervening decision from the Court that overrules governing precedent and creates a new basis to excuse what was a fatal procedural default when the petition was filed?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES CASES

UNITED STATES COURTS OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

STATE CASES

STATUTES

RULES

No. 18-

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leif Halvorsen requests that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Halvorsen v. White*, 746 Fed.Appx. 489, rendered on August 20, 2018, with rehearing denied on October 12, 2018.

OPINIONS BELOW

The Sixth Circuit panel's decision in *Halvorsen v. White* is unpublished, but appears at 746 Fed.Appx. 489 (6th Cir. 2018), and is reprinted in the appendix as pages App. 1-14. The Sixth Circuit's order denying a timely filed petition for rehearing appears at App. 15. The district court's decision denying Halvorsen's

habeas petition claims appears at *Halverson v. Simpson*, 2014 WL 5149373 (E.D.Ky) (the district court misspelled Halvorsen's name throughout its rulings), and is reprinted at App. 16-76. The district court ruling denying Halvorsen's motion to amend his habeas petition appears at *Halvorsen v. Parker*, 2012 WL 5866220 (E.D. Ky.), and is reprinted at App. 85-88. The Kentucky Supreme Court's direct appeal opinion is reported at *Halvorsen v. Commonwealth*, 730 S.W.2d 921 (Ky. 1986), *cert. denied*, 484 U.S. 970 (1987), and reprinted in the appendix at App. 77-84.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its opinion affirming the denial of habeas relief on August 20, 2018. *Halvorsen v. White*, 746 Fed.Appx. 489 (6th Cir. 2018). Halvorsen's timely filed petition for rehearing en banc was denied on October 12, 2018. App. 15. The Court extended the time to file a petition for a writ of certiorari to, and including, March 11, 2019. This Petition has been filed within that timeframe. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "… nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

28 U.S.C. § 2254 (d)(1) provides:

> 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 the State court proceedings unless the adjudication of the claim 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

Leif Halvorsen, and his codefendant, Mitchell Willoughby were already high on drugs when they went to the house of Joe Norman, to use more drugs with Norman and others. While they were all high, Norman became belligerent, pulled out a bayonet, and threatened to kill Willoughby. Willoughby then pulled out a gun and shot Norman and the two people with Norman, Joey Durrum and Jacqueline Greene. Halvorsen also shot Durrum and Greene. While the victims were shot with bullets from different types of guns, it was not clear whether Halvorsen or Willoughby had actually killed the victims.

Halvorsen (and Willoughby) were both indicted as principals in the murders. Trial counsel wrongly believed that this meant Halvorsen could be convicted only as a principal, not as an accomplice. App. 130-133 (direct verdict argument and jury instruction argument). Based on that incorrect understanding of the law, trial counsel prepared, and presented, only a defense that it was unclear whether Halvorsen or Willoughby had killed the victims. He presented no defense (whether extreme emotional disturbance or otherwise) to accomplice/complicity liability, even though it was clear that Halvorsen shot two of the victims. Over trial counsel's objection, the trial court instructed the jury that it could convict Halvorsen of

intentional murder (making Halvorsen eligible for the death penalty) if it believed Halvorsen acted as an accomplice and even if it could not determine whether Halvorsen had acted as an accomplice or a principal. There being no dispute that Halvorsen was present when the murders occurred and with counsel having presented no defense to accomplice liability, the jury convicted Halvorsen under this instruction of intentional murder of Durrum and Greene.[1]

At the penalty phase, the prosecution presented no evidence that Halvorsen would be a future danger. Nor was there any evidence that he shared specific traits or characteristics with other notorious killers, as opposed to simply being a person whose crimes occurred, at least in large part, due to his severe drug addiction. Nonetheless, during closing argument, the prosecutor argued in detail that an inmate sentenced to less than death could attempt to escape and harm or kill inmates/prison staff, giving, as an example, bailiff George Coons.[2] The prosecutor also referenced notorious killers Richard Speck, James Earl Ray, Charles Manson, and Gary Gilmore (executed six years before trial) during his closing argument, suggesting implicitly a comparison to Halvorsen and that, if not sentenced to death, Halvorsen, being like those other killers, would likely commit another violent crime.

Specifically, the prosecutor stated:

> I wonder if the anti-death penalty people have ever really considered … the welfare of hundreds and thousands of people who are subjected to the risk of convicted murderers. Is the inmate population safe? What prevents a convicted murderer with a life sentence from getting a shiv

[1] Halvorsen was only convicted as an accomplice in the death of Joe Norman, and was not given a death sentence on this count. The evidence showed that he did not shoot Norman.

[2] There is strong reason to believe that Coons was the bailiff who accompanied the jury during the entirety of Halvorsen's trial, but the record does not clearly establish this.

and holding it to the kid's neck, the young burglar's neck, and demanding escape? What prevents that? Well, that's easy to say–the answer, segregation from the prison population. Well that's fine, but what about the prison officials, people like George Coons, people who have to handle the murderer with the multiple life sentence? That's a reality. That's in the world. Every second every son who is in this capacity of watching, of being in control, has to have a razor sharp sense of awareness in a penitentiary, because their laxness can be the opportunity, the chance, for the convicted murderers of effect [sic] his escape. That's reality. And his bargaining power, the throat of an innocent person whose job it is just to maintain the person. Well, our response to that person in the penitentiary, don't kill him now, Frank, because if you do we're going to give you a life sentence. Is that a deterrent to a person who's been convicted of murder, with a life sentence, multiple murders? Well I suggest to you that the death penalty is needed, much needed deterrent for the inmate population of our penal institution. Is it conceivable to you that a convicted murderer can escape from an institution and thus subject untold numbers of innocent citizens in a community to further tragedy? Well, I hope you understand that it is. In the last few years, we saw Martin Luther King…gunned down; the person…convicted, sentenced and placed in the extremely tight security…he escaped….

***

[W]hat about the death penalty as a deterrent? Does it actually stand as a threat to the criminal who is out there right now, thinking about an armed robbery of a liquor store, or the burglary of somebody's home? Do they kill the eyewitness? Do they think about that and thus escape capture because nobody can identify them….The death penalty conviction will not stop future murderers in this community…But it most certainly is a valuable and effective deterrent to individuals-to certain individuals who really believe the death penalty will be enforced by the Commonwealth Attorney's offices and juries, the citizens of the community. If they really believe that, then it can be a deterrent. If the belief is that you'll never get the death penalty, then the value of the life, of the potential innocent victim eyewitness, goes way down. The question of deterrence is easily resolved. As to the future threat of the convicted murderer to society, Gary Gilmore will never kill another college student, ever. Can the Illinois authorities guarantee that for Richard Speck? Can California authorities guarantee that about Charles Manson? Kentucky citizens…have a right to be protected from any person who kills innocent people for no reason. They have a right to be guaranteed that a convicted murderer under our law will never kill

> again. That's not murder. That's protection of society [writing "protection of society" on a board]."
>
> ***
>
> Understand that by your verdict you are going to set a standard as to when the death penalty should be recommended to a judge.
>
> ***
>
> Do we want to say to this community that with a verdict of a life sentence that it's less serious because they were on drugs? I don't think so. Do we want to establish a standard with a verdict that taking the lives of three human beings is less serious because a person consumes drugs and alcohol?
>
> ***
>
> Well do you want to establish a standard in this community that you can murder three people in cold blood and have no legitimate fear of the death penalty? Do we want that standard in Lexington? A life sentence in this case tells these defendants and potential defendants that you're safe if you limit your victims to three.
>
> ***
>
> It becomes not so much perhaps of do we have the right as citizens on this jury to recommend the penalty of death, but…do we as jurors and representatives of our law and our community, in view of this crime and the nature of the acts of these defendants, and in view of your responsibilities to society, do you have the right not to recommend the death penalty under the facts of this case? Do you have the right to run the risk of not recommending the death penalty?

Transcript, R.187-12, page ID#5228-5232, 5245, 5253-5254, 5257, closing argument reprinted at App. 91-129.

After the closing argument, the jury recommended the trial judge sentence Halvorsen to death for the murders of Durrum and Greene. The trial judge ultimately did so.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

The Martinez-related *ineffective assistance of counsel claim:*

While Halvorsen's habeas petition remained pending in district court without any ruling on the merits of the individual habeas claims and with no fact-development having been granted, the Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), deciding an issue other than the one on which certiorari had been granted,[3] and ruling for the first time that ineffective assistance of initial review collateral proceeding counsel in failing to raise a trial counsel ineffectiveness claim could constitute cause to excuse a default. That had the effect of overruling binding precedent holding otherwise in the Sixth Circuit and every other circuit. Four days after *Martinez*, Halvorsen sought to amend his habeas petition. Namely, Halvorsen sought to assert that trial counsel performed ineffectively, asserting a defense only that the state could not prove Halvorsen was a principal actor, and that his counsel did so because of his erroneous belief that the law did not allow Halvorsen to be convicted as an accomplice when he had been indicted only as a principal. The claim further asserted that the procedural default from not raising the issue in state post-conviction proceedings could be overcome because the failure to raise it had been a result of initial review collateral proceeding counsels' ineffectiveness, and that the

[3] Certiorari had been granted in *Martinez* to decide whether to recognize a federal constitutional right to effective assistance of initial-review-collateral-proceeding counsel. If the Court decided that issue and recognized the right, it would have meant a habeas petitioner would first have to exhaust the initial-review-collateral proceeding counsel ineffectiveness in state court and then could present the claim in a habeas petition. Instead of recognizing the right, the Court decided the separate issue not presented within Martinez's petition for a writ of certiorari of whether to create a new means of excusing a procedural default and thereby sidestepped the broader issue on which certiorari had been granted.

new claim related back to the petition in that it relied on the same common core of operative facts as a claim raised in the initial habeas petition. Specifically, the original petition had raised a claim that asserted it was a due process violation to instruct and convict on accomplice liability when that theory of liability was not contained within the indictment.

The district court assumed correctly that Halvorsen's amended claim related-back for purposes of Fed.R.Civ.P.15(c), *Halvorsen*, 2012 WL 5866220 at *3, App. 87, and relation-back was not an issue before the Sixth Circuit. Yet, the district court denied leave to amend because it believed Halvorsen should have raised the claim in his habeas petition, despite the binding adverse law which would have precluded relief prior to *Martinez. Id.* at *4-5, App. 97-88. It further ruled that the mere passage of time between when the habeas petition was filed and when Halvorsen sought to amend caused some unnamed prejudice to the Warden. *Id.* Even after so ruling, the district court took nearly as much time to decide Halvorsen's habeas petition claims as had elapsed between the filing of the habeas petition and when Halvorsen sought to amend the petition.

Halvorsen appealed to the Sixth Circuit, citing post-*Martinez* cases where an amendment had been permitted under the same circumstances and arguing that the district court erroneously denied the amendment and that the precedent set by the district court's ruling would inundate the federal courts with seemingly frivolous claims that had to be raised anyway on the off-chance that the law would change in the future. This is the exact opposite of what *Martinez*, which has been held to apply

to cases originating in Kentucky, *Woolbright v. Crews*, 791 F.3d 628, 635-36 (6th Cir. 2015), intended when it sought to ensure a convicted individual had at least one opportunity to have a court adjudicate a claim on its merits. *Martinez*, 566 U.S. at 15-16 ("The holding here ought not to put a significant strain on state resources."); *Davila v. Davis*, 137 S.Ct. 2058, 2069-70 (2017) (not expanding *Martinez* to direct appeal ineffectiveness claims because, in part, doing so would impose a significant burden on the federal courts since it would open the floodgates to a habeas petitioner being able to have a means to present every defaulted claim). Ignoring the case law Halvorsen cited and the implications of upholding the district court's decision, the Sixth Circuit quoted the district court's reasoning for denying leave to amend and held those reasons were not an abuse of discretion. *Halvorsen*, 746 Fed.Appx. at 496, App. 5. Halvorsen pointed this out in an unsuccessful petition for rehearing en banc.

II. Improper prosecution closing argument

Halvorsen argued on direct appeal that due process was violated when the prosecutor invoked the names of notorious killers and urged the jury to send a message to the community by imposing a death sentence. The Kentucky Supreme Court rejected the claim, and Halvorsen ultimately unsuccessfully presented the claim in his federal habeas petition. On appeal to the Sixth Circuit, he argued that *Darden* constituted the applicable clearly established law, that there need not be Supreme Court law directly addressing the specific types of improper comments that took place, that the comments were improper, and those types of improper comments (along with other improprieties during closing argument) "so infected the trial with

unfairness as to make the resulting conviction a denial of due process," *Darden*, 477 U.S. at 181. The Sixth Circuit rejected the claim, holding that the Supreme Court has never directly held that these type of comments are improper and thus there is no applicable clearly established law. *Halvorsen*, 746 Fed.Appx. at 498-99, App. 5-8. Halvorsen unsuccessfully sought rehearing en banc, pointing out the inconsistency between the Sixth Circuit's ruling and that of the Eighth Circuit on materially indistinguishable facts in a case to which §2254(d) applied, and pointing out that the panel's narrow interpretation of clearly established law conflicted with numerous Supreme Court cases.

Reasons for granting the Writ

I. The Sixth Circuit has again disregarded the Court's rulings and directives on what constitutes clearly established law for purposes of 28 U.S.C. §2254(d). Disregarding a series of decisions from the Court that held repeatedly that there need not be a case square on all fours and that instead a general legal standard constitutes the clearly established law for a myriad of circumstances, which the Court recognized *Darden* is with regard to improper prosecution argument, the Sixth Circuit held that a claim that a prosecutor's send a message to the community argument that invoked the names of notorious killers who could and could not kill again solely based on whether or not they were executed cannot prevail since the Court has never expressly held that type of argument is improper.

Parker v. Matthews, 567 U.S. 37 (2012), *White v. Woodall*, 572 U.S. 415 (2014), and *White v. Wheeler*, 136 S.Ct. 456 (2015), are just a snapshot of the Court's numerous and repeated opinions reversing the Sixth Circuit for the failure to properly apply the Court's rulings regarding §2254(d), namely the clearly established law provision. Halvorsen's case is the next in the long line of cases to arrive before the Court that necessitate once again reminding the Sixth Circuit of the proper

application and interpretation of §2254(d) and that therefore necessitate reversal for the failure to follow the basic tenets of what constitutes clearly established law.

A. The Sixth Circuit's decision conflicts with the Court's numerous decisions on what constitutes clearly established law.

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). This safeguard would be nearly eviscerated if federal courts had to await a nearly identical Supreme Court case, or a case on such a narrow issue as the impropriety of a prosecutor invoking during closing argument the names of notorious killers to make general deterrence arguments that have no direct connection to the particular defendant on trial. Fortunately, prosecutors recognize that these types of arguments before a jury are so far out of bounds of propriety that they rarely occur, and thus do not appear in recent case-law. That however, does not give prosecutors free reign to make these types of comments if they choose without habeas recourse for the defendant.

Perhaps recognizing that it would be patently unfair for "clearly established" law to exist only where the Court has directly addressed specific circumstances that rarely occur and that defining it as such would provide incentives for prosecutors to push the envelope towards constitutional violations out of both zeal to obtain a conviction and knowledge there would be no federal habeas remedy available to the defendant, the Court has routinely, repeatedly, and emphatically ruled that a federal

court need not wait for a nearly identical case. Clearly established Supreme Court law is much broader than that.

The absence of a fact specific statement of a rule is not determinative of whether clearly established Supreme Court law exists. *Panetti*, 551 U.S. at 953 (2007). The Court has since reiterated that §2254(d)(1) does not require an "identical factual pattern before a legal rule must be applied," *Woodall*, 572 U.S. at 427, *quoting Panetti*, 551 U.S. at 953, and has repeatedly held the same prior to *Woodall. See*, *e.g.*, *Rodgers*, 569 U.S. at 62; *Panetti*, 551 U.S. at 953; *Yarborough v. Alvarado,* 541 U.S. 652, 664-666 (2004). Rather than require a case with an identical fact pattern or a case "square on all fours," "clearly established" law includes "the legal principles and standards flowing from precedent," *Panetti*, 551 U.S. at 953, and "a general standard from this Court's cases can supply such [clearly established] law." *Rodgers*, 569 U.S. at 62, *quoting Alvarado*, 541 U.S. at 666.

Legal principles, by definition, apply to diverse factual situations. Those situations can differ in innumerable ways so long as they are analogous on the point to which the legal principle applies. "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not

dictated by precedent." *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring).

In *Williams (Terry) v. Taylor*, 529 U.S. 362, 391 (2000), the Court adopted this approach as to what constitutes "clearly established" law, and then used it to recognize that the ineffective assistance of counsel standard is one such broad, general standard that applies to the myriad of factual circumstances that can arise in any individual case. Th Court has since applied this approach regularly and has repeatedly reaffirmed its applicability as to what constitutes "clearly established" law, including, as noted above, in recent Terms. It is therefore clear that the "clearly established" law requirement of 28 U.S.C. §2254(d) does not require there to be a Supreme Court case with nearly identical facts, but instead permits reliance on this Court's general principles and rules that are designed to apply to a myriad of factual circumstances.

The *Darden* standard (1986 decision that applied and quoted a 1974 case on improper prosecution closing argument) for determining whether a prosecutor's improper comments violate due process is one such general principle; The Court has said so. *Matthews*, 567 U.S. at 45, 48-49 (stating *Darden* is a "general standard" and applicable to improper prosecution closing argument claims). While the Court's law in this regard is clear, the Sixth Circuit simply got this significant issue about the meaning of "clearly established" law wrong, resulting in a decision that conflicts with multiple cases from this Court.

The Sixth Circuit correctly recognized that 28 U.S.C. §2254(d) applies to Halvorsen's improper closing argument claim and that relief had to therefore be denied unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1). It was in applying this limitation on relief that the Sixth Circuit veered off path. The court noted that Halvorsen "cites no Supreme Court precedent suggesting that these comments clearly violate *Darden* – likely because none exists." *Halvorsen*, 746 Fed.Appx. at 498, App. 6; *id.* at 499, App. 7. Accordingly, the court held there was no applicable clearly established law and thus Halvorsen's claim had to fail.

In so ruling, the Sixth Circuit failed to recognize that the "clearly established" law requirement does not require a Supreme Court case addressing nearly identical facts but instead includes general legal principles, such as the due process standard regarding state evidentiary rulings that are so egregious that they deny the defendant fundamental fairness. Simply, the Sixth Circuit's ruling as to what is required for there to be "clearly established" law is incompatible with, and irreconcilable with *Woodall*, *Rodgers*, *Panetti*, *Alvorado*, and *Williams (Terry)*. This Court should therefore reverse the Sixth Circuit's ruling with regard to the improper prosecution argument claim and remand for further proceedings consistent with the Court's opinion, to wit, to apply the general due process standard that is applicable to Halvorsen's type of claim to determine whether, under the facts of Halvorsen's case, habeas relief should be granted.

B. Alternatively, the Court should grant plenary review because of the split among the circuit court of appeals as to whether clearly established law exists and as to whether the types of comments at issue are improper.

While this Court could reverse and remand solely because the Sixth Circuit misunderstood the limitations on what constitutes "clearly established" law, alternatively the Court should grant plenary review to resolve the apparent split between the Sixth Circuit and the Eighth Circuit as to whether clearly established law exists and as to whether the types of comments at issue were improper. The split is so significant that whether Halvorsen prevailed or not and thus whether he will face execution turns not on the constitutionality of his trial or the impropriety of the prosecutor's comments, but instead on the fact that his case fell within the jurisdiction of the Sixth Circuit instead of the Eighth Circuit. In other words, habeas relief would have been granted in the Eighth Circuit, but not in the Sixth Circuit. The law does not permit such arbitrariness. Allowing this arbitrariness to stand seriously calls into question the integrity of the judicial system, particularly when a person's life is at stake. The Court should not allow that to stand and should instead intervene to protect the institution of the Court.

To do so, it is should be clear that "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Alvarado*, 541 U.S. at 666. The general principle invoked here – that a prosecutor's improper comments rise to a constitutional violation when the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Darden*, 477 U.S. at 181 – applies to all alleged improper

prosecutor comments during closing argument. *Matthews*, 567 U.S. at 45, 48-49. The Eighth Circuit has so recognized in *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), and held that applies to the types of comments at issue here, as does the Eighth Amendment law governing an individualized sentencing.

In *Weaver*, the Eighth Circuit recognized that §2254(d) applied to Weaver's claim and that the *Darden* standard was applicable to determining whether a constitutional violation took place if the comments were improper. *Id.* at 838-40 (finding §2254(d) applicable); *id.* at 839-40 (rejecting the Warden's argument that no clearly established law existed because the Supreme Court had not addressed a prosecutor's improper penalty phase closing argument and holding that *Darden* was the applicable clearly established law). The court then held that the prosecutor's send a message to the community comments/argument were improper "because it prevents an individual determination of the appropriateness of capital punishment," because it is "unfairly inflammatory" as it invokes "a jury's general fear of crime to encourage the application of the death penalty," and because "[u]sing the conscience of the community as a guiding principle for punishment puts too significant of a burden on a single defendant." *Id.* at 841. It then ruled that "there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents." *Id.* at 842. In Halvorsen's case, the Sixth Circuit reached the exact opposite result regarding the same type of arguments. As a result, there is a split among the circuit courts of appeals, with the difference being literally the difference between life and death. The Eighth Circuit,

though, is correct on this issue and the Court should so rule, noting and applying the existing clearly established law of *Darden*.

The Court has never held that general deterrence arguments that have no direct relation to the facts of the crime or the individual defendant are permissible. Neither *Wainwright v. Goode*, 464 U.S. 78, 86 (1983), nor *California v. Ramos*, 463 U.S. 992, 1005-06 (1983) – the two cases the Sixth Circuit referenced – hold that type of argument is permissible. Rather, they dealt with arguments that were directly related to the defendant on trial; indeed, in *Goode*, the defendant testified at trial and said he would kill again if he had the opportunity. Future dangerousness and deterrence of the specific defendant were undoubtedly at issue and arguments regarding that were clearly proper in those contexts. That, though, is very different than when a prosecutor makes general deterrence and send a message to the community arguments that have no direct relation to the defendant and the crime, but that would apply equally to every single death penalty case that arises. In that situation, the comments are improper under the governing law and fall within the scope of *Darden*.

The sentencing determination in a capital case "requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). Anything, including improper prosecution comments, that "[i]mpairs the jury's ability 'to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of…those compassionate or mitigating

factors stemming from the diverse frailties of humankind." *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985). "[I]nstilling the jury with fears of [a defendant's] future dangerousness, either upon potential release or while in custody, where the prosecutor implied that the jury should premise those fears on actions and events wholly *unrelated* to [the defendant] himself, is inconsistent with a prosecutor's role and threatens to warp the jury's function at the penalty stage of the proceedings." *Stallings v. Bagley*, 561 F.Supp.2d 821, 849 (N.D. Ohio 2008) (capital habeas case). It is so damaging that, by itself, it amounts to a due process violation and undermines reliability in the decision-making process and the penalty that is then imposed.

The Court, though, need not determine that in isolation, for the prosecutor's reference to Manson, Speck, Ray, and Gilmore clearly implied, without any supporting evidence regarding Halvorsen or the crime itself, that Halvorsen is as dangerous as these notorious killers and that the jury therefore cannot take the risk of imposing a sentence less than death because it would mean Halvorsen might kill other inmates or prison guards, such as bailiff George Coons. Whether in the context of general deterrence or otherwise, it is always improper to compare a defendant to well-known mass murderers. *See*, *e.g.*, *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); *United States v. Phillips*, 476 F.2d 538, 538-39 (D.C. Cir. 1935). Yet, that is exactly what the trial prosecutor did in the first post-*Furman* death penalty trial in Kentucky's second largest county. The comments were clearly improper, thereby meaning Halvorsen's claim should ultimately turn on whether relief can be granted in light of §2254(d).

In that regard, the Kentucky Supreme Court disposed of this claim by saying "on the whole, the argument was fair comment on the evidence" and "[c]onsidering the overwhelming nature of the evidence against Halvorsen and Willoughby, including their own admissions, [] we do not think the prosecutor's arguments exceeded the bounds of propriety, nor do we think that it could have added much fuel to the fire anyway." *Halvorsen*, 730 S.W.2d at 925, App. 56.[4] That cannot be reconciled with the nature of the prosecutor's improper comments and how those comments were intended to, and undoubtedly did, inflame the passions and prejudices of the jurors. It was an unreasonable application of the Court's precedent for the Kentucky Supreme Court to rule as it did. This leads back to the question of whether the governing precedent was clearly established, as that is dispositive of whether Halvorsen's constitutional claim prevails.

Again, Halvorsen would have prevailed in the Eighth Circuit but lost because he was before the Sixth Circuit. A split among the circuit court of appeals therefore exists, and due to the gravity of the implications, it should be resolved by the Court. Plenary review may not be necessary to do so. The Court's precedent is clear that there need not be a Supreme Court case directly dealing with the specific facts at issue in order for clearly established law to exist. The Court can therefore reiterate and summarily reverse the Sixth Circuit for once again disregarding the Court's precedent as to what constitutes clearly established law. Halvorsen urges the Court

[4] This comment seems to suggest that the Kentucky Supreme Court considered only the impact of the comments on a guilt determination, not how the comments may have effected the jury's sentencing decision.

to take this route. If the Court does not do so, it should grant plenary review to resolve the split among the circuits, the impropriety of the types of arguments the prosecutor made in Halvorsen's case,[5] and to address the grave injustice that has occurred.

II. The Sixth Circuit's ruling renders *Martinez* inapplicable to almost anyone pending in habeas proceedings when *Martinez* was decided, punishes habeas petitioners for their counsel doing exactly what the Court has repeatedly said effective appellate/habeas counsel should do, and will open the floodgates the Court was concerned about in *Martinez* and *Davila* to the extent seemingly never seen before by requiring habeas counsel to ignore binding precedent and to instead impose significant costs on the federal courts by having to raise every conceivable claim the law has already rejected in the off-chance the Court sometime in the future overrules the precedent.

The Court has never addressed when an amendment, under Fed.R.Civ.P.15, that is the result of a sudden change of law reversing years of precedent should be permitted, such as how the timing of when the amendment is sought in relation to the new law, the amount of time the underlying case had already been pending, and the lack of prejudice to the opposing party plays into the analysis.[6] The Sixth Circuit's decision provides the Court with both the perfect opportunity to do so since the

[5] The prosecutor also improperly commented on Halvorsen's exercise of his constitutional rights as something to hold against him by stating the rights Halvorsen exercised and received and the same rights not being given to the victims before they were murdered: "For three weeks, you observed first-hand the criminal justice system in this Commonwealth.…You've observed safeguards, every safeguard afforded to these defendants by the constitution. You've seen their rights protected, protection of a person charged with a crime, their right to be represented by an attorney.…You've seen their right to cross-examine and confront witnesses who testified against them. That's the constitution. And you-you've seen their right exercised to be able to pick a jury of their peers.…They had a right to have a judge preside over this trial and insure that it's conducted fairly.…And you're presumed innocent. You're not innocent but you're presumed innocent on July 5th when you start this trial, and you're presumed innocent until it's proven against you. A right that is very rare in this world. What rights did the victims enjoy? Did they have attorneys? Did the victims have an impartial jury to decide their fate on Loudon Avenue? Did they have a judge to ensure that they had a fair trial? No, I'll tell you something. There sits the judge and jury and the executioner of three."

[6] Indeed, the Court has addressed Fed.R.Civ.P. 15 only a couple times in the past fifty years, thereby possibly contributing to the difficulties the lower courts have had in figuring out how to apply in light of the sudden and unexpected change in law that *Martinez* created.

relation-back doctrine is not at issue here and the consequences of the Sixth Circuit's ruling, if allowed to stand, would wreak havoc on the federal judiciary in a manner that will, over time, be hard to undo or otherwise rectify.

If allowed to stand, the lower court's decision would create this dire trifecta: 1) It would punish the habeas petitioner for counsel following decades of directive from the Court that effective counsel complying with their ethical obligations should not raise claims that governing law precludes from prevailing; 2) It would mean *Martinez* applies only to those whose federal habeas petitions were filed after *Martinez* was decided and the very small number of habeas cases that were both pending when *Martinez* was decided and had raised the *Martinez*-related matter and *Martinez*-reason to excuse a default in a habeas petition filed *before Martinez* was decided. This would eliminate for most inmates the important right *Martinez* sought to vindicate; and, 3) It would require habeas counsel in all habeas cases to raise every remotely conceivable claim even if existing law clearly refutes the claim, because the failure to do so would prohibit the habeas petitioner from getting the benefit of that law if the law ever changes. This would place federal district courts in a crisis situation trying to manage the resulting workload. These dire consequences require that the Court summarily reverse the district court. Alternatively, the Court should grant plenary review to address the parameters of when an amendment to a habeas petition should be permitted when the amendment is the result of intervening Supreme Court law, an issue the Court has never addressed but now should in light of the otherwise resulting consequences of the Sixth Circuit's ruling.

The Court has ruled that, under Fed.R.Civ. P. 15, leave to amend should be "freely given" unless there is, "an apparent or declared reason" for the delay. The Court specified such reasons, including: "undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Sixth Circuit adopted the district court's reasoning for denying leave to amend and expressly held the district court did not abuse its discretion. *Halvorsen*, 746 Fed.Appx. at 496, App. 5. The Sixth Circuit also stated that Halvorsen "bore the responsibility" for the time that passed prior to the amended claim being filed. *Id.*[7] That is irreconcilable with the Court's long-standing law that Halvorsen's habeas counsel followed.

The Court has held for decades that "[e]ffective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." *Davila*, 137 S.Ct. at 2067 (internal citations omitted). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986), *quoting Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). That is exactly what Halvorsen's habeas counsel did by not raising a claim that, under the governing law when the habeas was filed, could not prevail and was therefore frivolous.

[7] The Sixth Circuit commented, and therefore seemingly considered, the amount of time that elapsed between conviction and when Halvorsen sought to amend, most of which is irrelevant to whether a habeas claim, or an effort to amend a habeas petition, was timely filed, particularly when the habeas petition had been pending for only a couple years with little district court activity.

When Halvorsen's habeas petition was filed in 2009, it was well-settled before all courts that initial-review-collateral-proceeding counsel ineffectiveness could not serve as cause to excuse a default, which meant there was then no possible means by which a federal court could reach the merits of Halvorsen's defaulted ineffectiveness claim if raised within the habeas petition. *See*, *e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Landrum v. Mitchell*, 625 F.3d 905, 919 (6th Cir. 2010); *Byrd v. Collins*, 209 F.3d 486, 516 (6th Cir. 2000); *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 75 (1st Cir. 2009); *Murden v. Artuz*, 497 F.3d 178, 194 (2d Cir. 2007); *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993); *Smith v. Angelone*, 111 F.3d 1126, 1133 (4th Cir. 1997); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999); *Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir. 2002); *Wooten v. Norris*, 578 F.3d 767, 778 (8th Cir. 2009); *Smith v. Baldwin*, 510 F.3d 1127, 1146- 47 (9th Cir. 2007); *Anderson v. Sirmons*, 476 F.3d 1131, 1141 n.9 (10th Cir. 2007); *see also*, *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (reiterating only a couple months before *Martinez* that "[n]eligence on the part of post-conviction counsel does not provide cause for overcoming a procedural default"). Following this law and the Court's long-standing recognition that effective counsel winnows issues and both the legal and ethical obligations to not raise frivolous issues, Halvorsen's habeas counsel chose to comply with the governing law and to not raise Halvorsen's claim that trial counsel was ineffective for basing his entire defense strategy at trial around a false and inadequately researched understanding of Kentucky law regarding accomplice liability. Yet, the lower courts then turned around and faulted Halvorsen because his

counsel complied with the law and did not raise the then unwinnable claim. To the district court and the Sixth Circuit, Halvorsen's counsel should have either anticipated the ruling in *Martinez* (a ruling that Martinez's own lawyers, who sought certiorari on a completely different issue, did not anticipate) approximately two-and-a-half years earlier or should have raised the claim despite the overwhelming and universally adverse law.

The rulings of the district court and Sixth Circuit are inconsistent with how the Court treats these situations and with the nature of *Martinez* itself. As the Court has recognized, "even the most informed counsel" regularly "fail to anticipate a [] court's willingness to reconsider a prior holding." *Murray*, 477 U.S. at 536. That could not be more accurate than in the context of *Martinez*, in which the Court decided an issue different than the one on which certiorari had been granted. 566 U.S. at 4, 27 (Scalia, J., dissenting). Then, in deciding the issue, the Court issued "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied." *Id.* at 23. This repudiation was a "radical alteration of [the Court's] habeas jurisprudence," that was, before *Martinez* "quite clearly foreclosed by [the Court's] precedent." *Id.* at 23-24; *see also*, *Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012)(The decision in *Martinez* was remarkable);*Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014) (noting that " Martinez's change to the federal rules of procedural default . . . was *'remarkable.'* . . . Martinez sharply *altered Coleman's well-settled application of the procedural default bar and altered the law of every circuit*") (emphasis added). It is the quintessential type of sudden overruling of precedent that

would be what the Court has spoken about repeatedly in *Davila* and other cases. Counsel could not have been expected to anticipate such a radical change in the law and counsel's client's thus should not bear the blame for counsel's failure to do so. Many other courts have agreed. *Stevenson v. Wallace*, 2013 WL 7098642 (E.D. Mo.); *Husband v. Ryan*, 2016 WL 5799039 (D. Ariz.) (allowing petitioner to amend, in light of *Martinez*, to add a new claim that was not previously raised within the habeas petition); *Sigmon v. Byars*, No. 8:13-cv-01399 (D. S.C. July 23, 2014, R.123 at 1-6) (granting motion to amend to add entirely new claims in light of *Martinez*); *see also*, *Balentine v. Thaler*, 569 U.S. 1014 (2013) (GVR in light of *Martinez*).

Having respected the Court's precedent and the obligation to not raise frivolous claims (such as claims for which a clear procedural default could not be overcome) and recognizing the remarkable sudden change of law in *Martinez* and the importance of then moving expeditiously, Halvorsen sought to amend his habeas petition only *four calendar days* after *Martinez* was decided. The district court properly assumed the claim related-back for purposes of amending (thereby eliminating relation-back from being an issue the Court needs to now deal with), and the amended claim did not significantly alter the course of habeas proceedings or even what the Warden would have had to respond to. The district court was not close to deciding the habeas claims (it did not do so until approximately two years after ruling on the motion to amend), the amended claim resolved around the same underlying facts as a claim in the original petition, and the Warden's response to that claim

subsumed the legal arguments regarding the merits of amended claim.[8] Thus, there simply could be no prejudice from granting the amendment. Additionally, there was all the reason to have permitted the amendment in light of both the significance of the right *Martinez* sought to vindicate and Fed.R.Civ.P. 15's intentionally lenient standard, which requires that "leave *shall be* freely given when justice so requires." Fed.R.Civ.P. 15(a)(2) (emphasis added); *Foman*, 371 U.S. at 182.

In *Martinez*, the Court emphasized that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system," and thus "a prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. 566 U.S. at 12. The Court therefore sought "[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel" by creating ineffective assistance of initial-review-collateral-proceeding counsel as a basis to excuse a procedural default of a trial counsel ineffectiveness, because, without that, it would be likely that no court could ever review a meritorious ineffectiveness claim that had not been presented in state court. *Id.* at 7-14. The clear importance of, and purpose of, *Martinez* was to ensure that a convicted person has at

[8] In response to the claim to which the amended claim related back, the Warden asserted that trial counsel's understanding of the applicable law was incorrect and that the applicable law in that regard was clear at the time of trial. That, of course, would then lead to the conclusion that trial counsel performed deficiently by failing to know the applicable law and, as a result, devising a trial defense that was not a defense to all theories of culpability for which the jury could find Halvorsen guilty of intentional murder. And, the trial transcript itself made clear what trial counsel understood the applicable law to be. Thus, the only remaining issue for the Warden to make would have been regarding *Strickland* prejudice and the unusual argument the Warden made to the Sixth Circuit that trial counsel likely knew the law but told the trial court the law meant something completely different in an effort to achieve a particular outcome for the client. That argument, which borders on the ridiculous, could have easily been made to the district court and could have easily been addressed. The upshot is that there was no conceivable prejudice to the Warden if the amendment had been allowed and very little work the Warden would have likely had to perform to address the merits of the claim.

least one opportunity to have a court review an ineffective assistance of trial counsel claim and to ensure the federal courts could provide that opportunity when the habeas petitioner was denied that opportunity in state court because initial-review-collateral-proceeding counsel failed to present the claim. The Sixth Circuit and district court rulings in Halvorsen's case flaunt this purpose and flies in the face of *Martinez*.

No one disputes that Halvorsen's amended claim is an ineffective assistance of trial counsel claim that has never been addressed by any court. Nor did the district court or the Sixth Circuit rule that the claim was meritless or that Halvorsen could not satisfy *Martinez*. Indeed, the district court expressly noted that Halvorsen might be able to satisfy *Martinez*. *Halvorsen*, 2012 WL 5866220, *3, App. 86. The courts found that Halvorsen shall not receive the one opportunity *Martinez* created simply because he had the unfortunate luck that his habeas petition was due approximately two-and-a-half years before *Martinez* was decided and Halvorsen's counsel then could not see the future and thus did not anticipate *Martinez* would years later suddenly change the law. Nothing in *Martinez* suggests that "protect[ing] prisoners with a potentially legitimate claim of ineffective assistance of trial counsel" that was never before reviewed because state post-conviction counsel failed to raise it is less important for those who were pending in federal district court when *Martinez* was decided than for those who come afterwards. Yet, that is the effect of the lower court's ruling in Halvorsen's case.

It means that everyone whose habeas petition was pending in district court when *Martinez* was decided that had not argued for the *Martinez*-exception before *Martinez* could not amend their habeas petition to do so and could therefore never receive the protection the Court thought was so important that it overruled long-standing precedent to create.

Perhaps equally problematic, rather than provide the protections *Martinez* created and sought to guarantee, the lower court rulings appear to carve out a rule for habeas proceedings that leave to amend may be denied solely because of the amount of time that elapsed between when the petition was filed and when amendment was sought, which completely eviscerates the protections of *Martinez* and ultimately eliminates the possibility of an amendment if new Supreme Court law overturns long-standing precedent in the future, as it did in *Martinez*.

The upshot is that all of this creates a perhaps unintended, but now existing, dire consequence that should frankly frighten the Court. With the district court and Sixth Circuit rulings on the book, what is the habeas petitioner (by and through his counsel) supposed to do when deciding what claims to present in a habeas petition? Does counsel follow the Court's edict of winnowing out claims and being effective by presenting only claims that could potentially prevail under then-existing law? Before the lower court rulings in Halvorsen, effective counsel would do so. Now, though, in light of the Halvorsen rulings, if they still do so, they risk later being in the situation in which Halvorsen now finds himself. An unexpected change in law that overturns long-standing precedent and turns a non-meritorious claim into a potentially

meritorious one would not be available even if the petition was still pending in district court. No reasonable counsel would still winnow out any claims after the Halvorsen rulings, even if well-established existing law from the Supreme Court of the United States or even from all circuits universally precluded their success. Instead, they would raise every conceivable legal issue that they could think of, most of which binding precedent had already rejected.

This would turn already lengthy habeas petitions and habeas proceedings into enormous endeavors with petitions easily hitting 1,000 pages or more and with no end in sight, and would wreak havoc on the justice system. Already scarce judicial resources would be strained beyond its limits. And non-habeas cases would be significantly delayed too, as federal judges would have to find the time to juggle the additional work caused by having to address habeas petitions that contains a massive number of claims that would not otherwise be presented. This concern is not only real, it is one that will come to fruition and that was on the Court's mind when it decided *Martinez* and then *Davila*.

The majority in *Martinez* pointed out the narrowness of the scope of *Martinez*'s applicability – ineffective assistance of initial review collateral proceeding counsel for the failure to raise trial counsel ineffectiveness. It was no surprise then, that in *Davila*, the Court chose to not expand *Martinez* to direct appeal counsel ineffectiveness claims because that would result in seemingly any defaulted ineffectiveness claims suddenly being cognizable in federal courts and would therefore result in a massive influx of habeas claims that would "flood the federal

courts with defaulted claims." *Davila*, 137 S.Ct. at 2069-70. The Court was "loath to further burden scarce federal judicial resources in this way," and, partially for that reason, chose to not expand *Martinez*'s temporal reach. *Id.* Allowing the district court and Sixth Circuit's ruling in Halvorsen's case to stand would also flood the federal courts with additional claims, and would do so on a magnitude far greater than that which concerned the Court in *Davila*. It would be inconsistent with *Davila* to allow the lower court ruling to stand and would unleash havoc on the federal courts, which do not have the resources to handle all the additional claims that would end up being presented across the board in habeas cases.

This alone should be reason for the Court to grant certiorari and reverse the Sixth Circuit. But, it is not the only reason. As explained above, the lower court ruling disregards the purpose for which the Court created the *Martinez*-exception and eliminates the application of *Martinez* to a large category of inmates who may have meritorious ineffective assistance of trial counsel claims that have not been reviewed by any court and never will be if the Sixth Circuit's ruling is allowed to stand. Halvorsen's case presents a perfect vehicle for the Court to address this since Halvorsen moved extremely expeditiously once *Martinez* was decided, relation-back is not at issue, *Martinez* has been held to apply to cases originating in Kentucky and that was not an issue before the Sixth Circuit, the district court recognized that Halvorsen may be able to satisfy the requirements of *Martinez* if leave to amend is granted, and the reasons the district court denied leave to amend are clear. The Court should therefore take this opportunity to ensure the protections created by, and

intended to be protected by, *Martinez* are actually protected and to stop the dire consequences of the lower court rulings before it is too late. The Court should therefore summarily reverse the Sixth Circuit with regard to denial of leave to amend, or, alternatively, grant plenary review, through which the Court can provide much needed clarity as to the application of Fed.R.Civ.P.15's interests of justice component as applied to habeas petitions and the parameters of when leave to amend should be granted when the amendment is sought in light of the Court changing/overruling long-standing precedent. The Court has not addressed either of these matters before, but they will otherwise continue to arise with regularity in the wake of *Martinez* and the district court and Sixth Circuit rulings in Halvorsen's case and thus increases the need for the Court to weigh in either or both of them.

CONCLUSION

For the above reasons, Petitioner Halvorsen respectfully requests the Court grant certiorari and summarily reverse. Alternatively, Halvorsen requests the Court grant plenary review.

Respectfully submitted,

David M. Barron
(*Counsel of Record*)
Assistant Public Advocate
Capital Post Conviction Unit
5 Mill Creek Par, Section 101
Frankfort, Kentucky 40601
(502) 564-3948 (office)
(502) 782-3601 (office – direct line)
david.barron@ky.gov
davembarron@yahoo.com

Kathryn B. Parish
Carlyle Parish LLC
3407 Jefferson #128
St. Louis, Missouri 63118
314-277-7670
kay@carlyleparishlaw.com

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