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

MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI PENDING THE SIXTH CIRCUIT'S DECISION ON THE SAME ISSUE IN THE JOINTLY TRIED CODEFENDANT'S CASE

CAPITAL CASE

One of the questions Leif Halvorsen's Petition presents for review involves the same issues that the Court granted certiorari in *Roper v. Weaver*, 550 U.S. 598 (2007) to resolve - whether *Darden v. Wainwright*, 477 U.S. 168 (1986), constitutes clearly established law in general for improper prosecution penalty phase closing argument and for the particular type of closing arguments that are the same type of arguments made in Halvorsen's case, and, if so, whether the comments violated due process under *Darden*. The Court did not decide that issue in *Weaver,* dismissing the Petition

as improvidently granted because a separate matter necessitated leaving the grant of relief in place regardless of how the Court would have decided the issue on which certiorari had been granted. While that makes Halvorsen's Petition generally a good vehicle to reach the issue the Court had previously found in *Weaver* to be worthy of certiorari, a development days after Halvorsen filed his Petition means the same reason for ruling in Weaver's favor without reaching the underlying issue may soon exist in nearly the same way for Halvorsen. Accordingly, Halvorsen requests the Court defer consideration of his Petition for a Writ of Certiorari (rather than conference and decide the Petition in its ordinary course) until the United States Court of Appeals decides jointly tried codefendant Mitchell Willoughby's habeas appeal. Counsel for the Warden opposes the Petition being deferred, but has authorized undersigned counsel to represent to the Court that he does not intend to file a response to this motion.

Halvorsen requests the Court defer the Petition because an unexpected development during codefendant Willoughby's oral argument could lead to a decision in Willoughby's appeal that could then promptly result in the Sixth Circuit revisiting its ruling in Halvorsen's case or that would have significant bearing on whether the Court should grant certiorari or summarily reverse for further consideration. Specifically, questions the Sixth Circuit asked, and statements the panel made, during Willoughby's oral argument suggest a high likelihood that the Sixth Circuit will rule that the prosecutor's penalty phase closing argument at Halvorsen and Willoughby's joint trial was improper and requires granting habeas relief under

clearly established Supreme Court law. Such a ruling would agree with the argument Halvorsen now presents to the Court and had previously made to the Sixth Circuit regarding the same issue. In other words, as of March 19, 2019, it appears a panel of the Sixth Circuit will reject a separate panel of the same court's unpublished ruling in Halvorsen's case that is now pending on a petition for a writ of certiorari.

This would create the untenable and unacceptable situation in which Halvorsen will be executed while Willoughby will receive a new penalty phase solely due to a random circuit panel assignment and to the speed at which the two panels moved in their respective cases.[1] A disparity in this regard is unacceptable and would itself merit the Court's intervention. *Cf.*, *Weaver*, 550 U.S. at 601-02 ("We find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants [including Weaver and his codefendant] from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition.").[2] If the Court acts on Halvorsen's

[1] Willoughby's case actually arrived at the Sixth Circuit first, but moved at a slower pace solely because of the relative speed, and lack of speed, at which the respective panels ruled on expanding the certificate of appealability. Oddly, neither the panel assigned to Willoughby's case nor to Halvorsen's case transferred the appeal to the other panel, despite the fact that the cases had been tried together and presented some identical issues. The Sixth Circuit has done this in the past in similar circumstances in an attempt to avoid potential inconsistent rulings.

There is no feasible basis to argue the prosecutor's closing argument comments apply differently to Halvorsen than to Willoughby, as the jury convicted both of them of the same charges for the offenses for which a death sentence was imposed, was unable to decide whether Halvorsen or Willoughby acted as the principal or inflicted the fatal wounds, and was aware that both defendants shot two victims.

[2] Like in Halvorsen's case, *Weaver* involved a prosecutor's improper send a message to the community argument, which, applying 28 U.S.C. §2254(d), the Eighth Circuit had found improper under the Court's clearly established precedent. In his petition for a writ of certiorari, Halvorsen relied on *Weaver* to demonstrate the impropriety of the prosecutor's closing argument, that courts have held that clearly established law exists with regard to send a message to the community arguments, and that the Sixth Circuit's decision in *Halvorsen* creates a split among the circuits. The only difference was that *Weaver* prevailed below and Halvorsen did not, thereby meaning the Warden sought

petition before the Sixth Circuit decides *Willoughby* and denies certiorari, Halvorsen could be without a remedy for being "treated in a needlessly disparate manner" as his codefendant, despite the Court's ruling in *Weaver*.

At the same time, a Sixth Circuit decision in Willoughby's favor could render Halvorsen's petition moot or unnecessary, *but only if the petition remains pending before the Court at that time*. This is because the Sixth Circuit stayed its mandate in Halvorsen's case pending disposition of his certiorari petition. Because the mandate has not yet been issued, the Sixth Circuit maintains jurisdiction until final disposition of the certiorari petition and can act further on Halvorsen's case if it decides Willoughby's case during that time. For example, it could *sua sponte*, or upon motion by Halvorsen or the Warden, rescind its ruling in Halvorsen's case and then further revisit the case in light of the Willoughby ruling. The likelihood the Sixth Circuit would do so is increased by the fact that its decision in Halvorsen's case was unpublished and thus does not bind a panel for future cases. All of this, though, does not mean the Court should deny certiorari or should otherwise dismiss the petition, particularly since the allotted time for seeking certiorari would then expire. Doing so would then potentially leave Halvorsen without a remedy because it would mean the mandate would likely issue, and thus would likely limit the Sixth Circuit's authority to act further. The appropriate course would therefore be to instead defer consideration of the Petition until the Sixth Circuit decides Willoughby's appeal or to

---

certiorari in *Weaver*. Now, the cases are similar for an additional and separate reason. Acting on the petition for a writ of certiorari before Willoughby's appeal is decided could likewise result in two codefendants obtaining different results on the exact same issue for an arbitrary reason that has nothing to do with the merits of a claim or any governing law.

otherwise not decide whether to grant certiorari in Halvorsen's case until the Sixth Circuit decides *Willoughby*, because there is reason to believe the Sixth Circuit could decide differently the same issue from the joint trial.

In light of the Sixth Circuit's ruling in Halvorsen, Willoughby's attorney did not even address the improper closing argument claim during the March 19, 2019 oral argument. Yet, as soon as counsel for the Warden, who is the same attorney that argued for the Warden in Halvorsen's case, took the podium, Judge Griffin indicated that he was more concerned about the issue left unaddressed by prior counsel, stating as follows:

"The prosecutor at the penalty phase, to me, appeared to go way over the top, arguing matters that had nothing to do with the crime or necessarily the defendant in asking the jury to impose the death sentence, and the prosecutor argued that, if he is not sentenced to death that he could assault other inmates with a knife in the prison, that perhaps he could escape and be a danger to the community and commit other murders, and that the innocent citizens in our community are going to be at risk. . . . You can't make inflammatory arguments that go to the passions of the juror members to try to get your ultimate result. And, here, did not the prosecutor go too far with some of these comments, and if not, why is that not reversible?" Argument audio at 28:30 – 30:11.[3]

[3] The citation here is to the time-stamp on the Sixth Circuit's audio recording of the oral argument in *Willoughby v. Simpson*, 14-6505. For the Court's benefit, Halvorsen has attached a CD-ROM copy of the audio of the oral argument, which the Court can listen to on a computer.

In asserting that Willoughby suffered no prejudice, counsel for the Warden pointed out that Halvosen's panel had already addressed and unanimously rejected, "these very same issues that you are bringing up today," pointing out that Halvorsen had been jointly tried with Willoughby and the prosecutor had given a single penalty phase closing argument that referred to Willoughby and Halvorsen collectively in a way that applied the comments that concerned Judge Rogers to both of them. *Id.* at 33:30-34:40.

It is clear that Halvorsen's and Willoughby's habeas appeals are inescapably intertwined. It is also clear that Judge Rogers believes the closing argument was improper and reversible under clearly established Supreme Court law, even going so far as to state the portions of the prosecutor's closing argument at issue were "way over the top" of what is permissible. This exact issue, based on the exact same set of facts, including whether there is any applicable clearly established law and whether the Sixth Circuit construed what constitutes clearly established law so narrowly that it conflicts with a long line of Supreme Court precedent, is before the Court in Halvorsen's Petition for Writ of Certiorari. It appears Judge Rogers would answer these questions in Willoughby's favor, and that the panel will reverse the district court decision rendered by the same district judge that denied Halvorsen's habeas claims. If that happens, it would be untenable for Halvorsen's death sentence to stand and for him to be executed.

Allowing that to happen would substantially damage the public's confidence in the application of the death penalty and the integrity of the judicial system and the

highest court in the land, with no quantifiable benefit. There would be no harm from awaiting the Sixth Circuit's ruling in Willoughby's case. Oral argument has already taken place. The Sixth Circuit decided Halvorsen's appeal approximately two-and-a-half months after argument. Willoughby's appeal will likely be decided within a similar timeframe, particularly since he has only three claims pending before the Sixth Circuit. Deferring consideration of Halvorsen's certiorari petition should therefore not result in an inordinate amount of time before the Petition is acted upon or is found moot because the Sixth Circuit intervenes first. Deferring consideration of the Petition could also lead to the reasonably prudent course of consolidating the certiorari petitions for Halvorsen and Willoughby if the non-prevailing party in Willoughby seeks certiorari. And, there is no possibility that an execution date could be set for Halvorsen in the near future even if the Court "holds" his petition. That is because a state-court issued injunction barring all executions in Kentucky remains in effect. Thus, there is simply no cognizable harm to deferring consideration of the Petition until the Sixth Circuit's decides Willoughby's appeal and much benefit to doing so. It will eliminate the possibility of Halvorsen "being treated in a needlessly disparate manner."

For these reasons, Halvorsen requests the Court defer consideration of his petition for a writ of certiorari until the Sixth Circuit decides codefendant Willoughby's recently argued habeas appeal, or otherwise reserve ruling on whether to grant certiorari until the Sixth Circuit decides Willoughby's appeal.

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

March 29, 2019