No._____

IN THE SUPREME COURT OF THE UNITED STATES

FORGE MILEHAM,

Petitioner,

v.

MR. PREMO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Mileham claimed in state postconviction proceedings that trial counsel had been ineffective in advising Mr. Mileham respecting whether to waive a jury trial, in failing to request a hearing on whether Mr. Mileham was competent to stand trial, and in failing to object to the imposition of consecutive sentences on several counts of conviction. The only supporting factual allegations were that trial counsel had failed to advise Mr. Mileham that he would be facing a life sentence, that trial counsel "was informed of my mental state and that I had recently attempted suicide," and that trial counsel had failed to object to the imposition of consecutive sentences on certain counts of conviction. D. Ct. Dkt. 19-2 at 178. In federal habeas proceedings, Mr. Mileham sought relief based on related claims but which included robust and disturbing allegations of fact never presented to the state courts–including particularized allegations of a long and troubling history of suicidality, alcoholism, and psychiatric hospitalizations.

The question presented is: Whether a Court of Appeals' denial of a certificate of appealability conflicts with this Court's rulings in *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986), and *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), where the district court determined that ineffective assistance of counsel claims were exhausted even though the federal claims included robust and disturbing

factual allegations as compared to the state court claims whose factual allegations were sparse and qualitatively neutral.

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OPINIONS BELOW

The United States District Court for the District of Oregon denied Mr. Mileham's petition for writ of habeas corpus in an unpublished opinion and order. App. at 3-11 (*Mileham v. Mr. Premo,* 2018 WL 6515142 (D. Or. December 11, 2018)). That Court also denied a certificate of appealability. App. at 11. On appeal, the United States Court of Appeals for the Ninth Circuit also denied a certificate of appealability as well as a motion to reconsider that denial. App. at 1 (*Mileham v. Premo*, No. 19-356013, 2019 WL 1531774 (9th Cir. April 2, 2019). The Ninth Circuit denied a motion to reconsider. App. at 2 (*Mileham v. Premo*, No. 19-356013 (9th Cir. April 26, 2019).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed its order sought to be reviewed on April 2, 2019. App. at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253(c)(1) (2012) provides:

> Unless a circuit justice of judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . .

28 U.S.C. § 2253(c)(2) (2012) provides:

A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. State Court Proceedings

On October 12, 2007, a Hood River County, Oregon, grand jury returned a thirteen count indictment charging Mr. Mileham with violent offenses against Cheri Belander and Lela Teresa Hulahan. After his bench trial, Mr. Mileham was sentenced to a total of 320 months (about 26 1/2 years) imprisonment.

Ms. Hulahan, in her trial testimony, recounted Mr. Mileham's suicidality and other mental imbalance. She testified that while assaulting her, Mr. Mileham instantaneously pivoted from assaulting her to trying to kill himself. D. Ct. Dkt. 19-1 at 106-07 (trial transcript). When an officer first approached Ms. Hulahan after the assault, she was holding an open cell phone and explained that she had just been calling 911 when her phone died. *Id.* She told the officer that a friend had beaten her up and that "[s]he was afraid that her friend was going to kill himself . . . [w]ith a knife. She explained . . . that he was holding the knife to his

wrist threatening to kill himself, and actually asked her to hold his hand while he did it." *Id.* at 94.

After his arrest later that night, Mr. Mileham was placed on suicide watch and remained in that custody level until shortly after being sentenced. Nevertheless, while in pretrial custody, Mr. Mileham attempted suicide by cutting a major blood vessel with a razor blade. At the same time, he scrawled "Not Guilty" on his cell wall with his own blood. Letters to his children explaining his suicide were found in his cell. Trial counsel neither investigated Mr. Mileham's mental health background nor moved for a hearing on whether Mr. Mileham was competent to stand trial.

Mr. Mileham appealed his conviction and sentence. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *State v. Mileham*, 250 P.3d 464 (Or. Ct. App. 2011) (table), *pet'n for review denied*, 256 P.3d 1097 (Or. 2011) (table).

Mr. Mileham filed a petition for postconviction relief. *Mileham v. Franke*, Umatilla County Circuit Court Case No. CV120714. Among other claims, Mr. Mileham asserted that

(a) Trial counsel was ineffective because he "failed to adequately advised Petitioner about the risk in *waiving a jury trial* (that he would be facing a life sentence). D.Ct. Dkt. 19-2 at 145 (amended postconviction petition) (italics added).

(b) Trial counsel was ineffective because he "failed to request a competency hearing although trial counsel was informed of Petitioner's mental stat (suicide attempt)." *Id.*

(c) Trial counsel was ineffective because he "failed to object to the trial court's imposition of consecutive sentences on Counts 2, 6, and 7." *Id.*

Relief was denied. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Mileham v. Taylor*, 367 P.3d 568 (Or. Ct. App. 2016) (table), *pet'n for review denied*, 370 P.3d 1252 (Or. 2016) (table).

B. Federal Habeas Proceedings

On April 29, 2016, the Court docketed Mr. Mileham's pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. D. Ct. Dkt. 2. In an amended petition, Mr. Mileham raised claims related to but distinct from the three claims noted above:

(a) Trial counsel was ineffective because he "failed to adequately advise Mr. Mileham regarding the advantages, disadvantages and risks in rejecting or accepting the State's plea offers." D. Ct. Dkt. 28 at 6. He further asserted that:

> In failing to advise Mr. Mileham on the likelihood of conviction after trial before a judge rather than a jury, on the likelihood of a higher sentence after trial as compared to the plea offer, and on the maximum sentence to which Mr. Mileham would be exposed if convicted after trial, trial counsel performed deficiently. Had trial counsel provided adequate advice in these regards, there is a reasonable probability that Mr. Mileham would have accepted the plea offer made before trial and/or the plea

offer made during trial. *Lafler v. Cooper*, 566 U.S. 156, 170-71 (2012).

D. Ct. Dkt. 28 at 7.

(b) Trial counsel was ineffective because he "failed to adequately investigate whether Mr. Mileham was competent to stand trial and failed to move for a competency hearing." *Id.* (capitalization and bolding deleted).

(c) Trial counsel was ineffective because he "failed to adequately investigate Mr. Mileham's background and mental health in preparation for the sentencing hearing [and] failed to present and argue in favor of a lesser sentence what information he did possess regarding Mr. Mileham's background and mental health." D. Ct. Dkt. 28 at 9.

In support of (b), Mr. Mileham noted that his two attempted suicides, one during one of the charged offenses and the other while in jail awaiting trial, triggered counsel's obligation to investigate Mr. Mileham's background for evidence suggestive of mental health difficulties and to present the results of that investigation to a defense mental health professional with expertise in competency determinations. D. Ct. Dkt. 35 at 10-11 (supporting brief) (citing to *Strickland v. Washington*, 449 U.S. 668, 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary")). In support of (b) and (c), above, Mr. Mileham contended that had trial counsel conducted an adequate investigation into Mr. Mileham's mental health background, he would have learned, among other things, that:

- Forge grew up in a neglectful and physically abusive home. Indeed, when he was approximatcly two years old, his biological mother tried to suffocate him with a pillow.

- Forge started drinking when he was about 7 years old. He remained an active alcoholic until he was arrested in the underlying state case.

- Forge started using marijuana when he was about 11 or 12 years old, and he abused other drugs as a teenager.

- Forge first attempted suicide at age 12 or 13.

- Shortly after his first suicide attempt, Forge was hospitalized at St. Anthony's Hospital in Oklahoma City, Oklahoma, for approximately six months because, among other things, he remained suicidal. During his hospitalization, Forge was prescribed Thorazine, a powerful medication used to treat such serious mental health difficulties as schizophrenia, psychosis, and bipolar disorder.

- Within a year or two of his Oklahoma City mental health hospitalization, Forge was admitted to the Oregon State Hospital after again attempting suicide.

- After having severely cut himself with the razor blade at NORCO (so severely that he was hospitalized and placed on prescription psychiatric medication), the jail's health care provider prescribed Mr. Mileham a variety of medications including but not limited to Elavil, Amitriptyline and Trazodone, and that Mr. Mileham was continued on these and/or other psychiatric medications throughout the remainder of his stay at NORCO, including throughout his trial and sentencing. After his suicide attempt in jail, Mr. Mileham was placed in special housing due to his mental health difficulties. He remained specially housed until the conclusion of his trial proceedings.

Dkt. 35 at 11-12.

After briefing, the District Court denied the three ineffective assistance of trial counsel claims highlighted above on the ground that while they had all been raised in state postconviction proceedings, each had been abandoned on appeal. App. at 7-8.

REASONS FOR GRANTING THE WRIT

The Lower Courts Employ Various Inconsistent Interpretations Of *Hillery* In Determining Whether A Claim Is New, As Compared To One Adjudicated In State Postconviction Proceedings.

How to determine whether a federal habeas claim is new, as compared to a related claim adjudicated in state postconviction proceedings, is an important federal question because whether a claim is new drives how a court treats it. It has profound effects on whether the claim may be reviewed on its merits at all and, assuming merits review is available, on what standard of review is employed and what evidence may be considered in deciding the claim. If the claim had been adjudicated in state court, then federal habeas courts must review with deference the state court decision and may not consider any evidence outside the state court record unless certain requirements are satisfied. *Kernan v. Hinojosa*, 136 S.Ct. 1603, 1604 (2016) (AEDPA mandates "deference, rather than *de novo*, review" of merits adjudicated claims unless either § 2254(d)(1) or (d)(2) is satisfied); *Cullen v. Pinholster*, 563 U.S. 170 (2011) (federal habeas court considering the merits of an state court adjudicated claim ordinarily may not consider evidence beyond the

state court record). However, if a claim has not been adjudicated in state court, the default may be excused by showing cause and prejudice. An ineffective assistance of trial counsel ("IATC") claim may be excused, in an initial review jurisdiction, by showing that postconviction counsel was ineffective in failing to raise the IATC claim. *Martinez v. Ryan*, 566 U.S. 1 (2012). Thus, generally, whether an IATC claim is new governs whether a habeas petitioner may be able to present new evidence and whether his claim will be reviewed de novo.

Over two decades ago, the Court held that a habeas claim is new if it "fundamentally alter[s]" the claim as presented to the state courts. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). With no subsequent guidance from this Court on how to determine when a claim is fundamentally altered, the lower courts have developed different approaches.

The Fourth Circuit holds that "a petitioner may not support a claim in state court with 'mere conjecture' and subsequently provide the necessary evidentiary support for the claim on federal habeas review." *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010)).

Similarly, the Eighth Circuit holds that "merely provid[ing] additional evidentiary support" did not "fundamentally alter" the claim presented in state court. *Rhines v. Young*, 899 F.3d 482, 495 (2018). This could simply be an unremarkable statement that where the "additional evidentiary support" is

immaterial, then it does not fundamentally alter the claim. But the *Rhines* opinion did not note that the additional proffered evidence was of a type quintessentially mitigating and that it had not been presented to the state courts. Specifically, habeas counsel presented evidence of childhood exposure to environmental toxins, of brain damage, and of military service and its resulting trauma. *Rhines v. Young*, Case 00-5020-KES (S.D. Western Div.) at Dkt. 282 (motion for leave to amend and exhibits). Each of these factors is classic mitigation, as each may reduce moral culpability. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("defendants who commit criminal acts that are attributable to . . . mental problems[] may be less culpable than defendants who have no such excuse") (internal quotation marks and citation omitted). Thus, in ruling that the claim had been adjudicated in state court, the Eighth Circuit is fairly read to have rejected *in principle* that a claim adjudicated in state court can be fundamentally altered and, therefore, rendered new and unexhausted by alleging or presenting supporting evidence for the first time in federal court.

The Sixth Circuit, too, has rejected *in principle* that new facts presented in federal habeas proceedings in support of a claim adjudicated in state court can render it new and unexhausted. In *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), the Court of Appeals ruled that petitioner's state court argument that counsel spent insufficient time preparing his expert who, as a result, gave

damaging testimony exhausted his federal court claim based on depositions from trial counsel, a mitigation specialist, and a psychologist. The Sixth Circuit ruled that because the claim had been adjudicated in state court, new supporting evidence could not render it new and unexhausted. *Id.* at 780 ("Thus we are faced with the novel question stemming from *Pinholster*: May a federal habeas court consider additional evidence not before the state courts[?] . . . We hold that it may not." *Id.*

In the case at bar, the Ninth Circuit denied a COA on whether several of Petitioner's habeas claims were exhausted. None of the salient facts alleged in his federal habeas proceedings in support of his claims rendered had been presented in state court. *See also Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011) (determining that habeas claim is not new even though "if the new evidence were considered, [the petitioner] could make a colorable or potentially meritorious *Brady* claim [on which, in its state court iteration, the petitioner lost]"). Of course, the Ninth Circuit has sometimes adhered to the Court's test set out in *Hillery*. *See Dickens v. Ryan*, 740 F.3d 1302 (2014). Nevertheless, as the instant case and *Wong* illustrate, it does not always do so, and the cases discussed above from other Circuit Courts of Appeal make clear that *Hillery* has been variously interpreted. Lower courts and litigants need further guidance on how to distinguish new claims from related claims adjudicated in state court.

CONCLUSION

For these reasons, this Court should grant certiorari to resolve how to distinguish new claims from related claim adjudicated in earlier state court proceedings, or, in light of *Hillery*, grant the writ, vacate the judgment, and remand for further proceedings.

Respectfully submitted on July 1, 2019.

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