No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BYRON COON,

Petitioner,

v.

MARK NOOTH, Superintendent,
Snake River Correctional Institution,

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

Oliver W. Loewy
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTION PRESENTED

Mr. Coon claimed through counsel in state postconviction proceedings challenging his murder conviction that trial counsel had been ineffective in failing to adequately investigate the victim's cause of death. State postconviction counsel neither alleged nor otherwise proffered any expert opinion that differed from that of the State's expert ("probable traumatic asphyxiation"). In federal habeas proceedings Mr. Coon proffered an expert opinion materially different from that of the State's expert—that the cause of death was at least as likely an asthma attack as traumatic asphyxiation—which would have supported a defense to the charge of intentional murder. Despite this critical difference between the claims, the District Court rejected Mr. Coon's argument that the state postconviction claim did not exhaust his federal habeas claim, and the Ninth Circuit Court of Appeals denied a Certificate of Appealability.

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 in a murder case that an ineffective assistance of counsel claim was exhausted even though the state postconviction claim did not, but the federal claim did assert an expert cause-of-death opinion materially different from that of the State's expert.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. State Court Proceedings 2

B. Federal Habeas Proceedings 3

REASONS FOR GRANTING THE WRIT 5

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. 5

CONCLUSION 10

APPENDIX

PAGE

A. Ninth Circuit's Order Denying Certificate of Appealability 1

B. Motion for Certificate of Appealability 2

C. District Court's Opinion and Order 21

D. District Court's Judgment 30

TABLE OF AUTHORITIES

PAGE

U.S. Const. Amend. VI ..... iv, 1

Cases

Coon v. Nooth,
344 P.3d 1149, (Or. Ct. App.) 3

Coon v. Nooth,
2019 WL 1118545 (D. Or. March 11, 2019) 1

Coon v. Nooth,
2019 WL 4945409 (9th Cir. July 22, 2019) 1

Cullen v. Pinholster,
563 U.S. 170 (2011) 6

Dickens v. Ryan,
740 F.3d 1302 (2014) 9

Gonzalez v. Wong,
667 F.3d 965 (9th Cir. 2011) 9

Gray v. Zook,
806 F.3d 783 (4th Cir. 2015) 7

Kernan v. Hinojosa,
136 S.Ct. 1603 (2016) 6

Martinez v. Ryan,
566 U.S. 1 (2012) 6

Miller-El v. Cockrell,
537 U.S. 322 (2003) i

Moore v. Mitchell,
708 F.3d 760 (6th Cir. 2013) 8

Penry v. Lynaugh,
492 U.S. 302 (1989) 7

Rhines v. Young,
899 F.3d 482 (2018) 7

Vasquez v. Hillery,
474 U.S. 254 (1986) ..... i, 6

Statutes

18 U.S.C. § 3006 (2012) 1
18 U.S.C. § 3006A (2012) 1
28 U.S.C. § 1254 (2012) 1
28 U.S.C. § 2253 (2012) 1, 2
28 U.S.C. § 2254 3

Other

Rule 29 1
Rule 39 1

OPINIONS BELOW

The United States District Court for the District of Oregon denied Mr. Coon's petition for writ of habeas corpus in an unpublished opinion and order. App. at 21 (*Coon v. Nooth,* 2019 WL 1118545 (D. Or. March 11, 2019) ("D. Ct. Order"). That Court also denied a certificate of appealability. D. Ct. Order at *11. On appeal, the United States Court of Appeals for the Ninth Circuit also denied a certificate of appealability. App. at 1 (*Coon v. Nooth,* 2019 WL 4945409 (9th Cir. July 22, 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 July 22, 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 or 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 August 7, 2001, a Deschutes County, Oregon, grand jury returned an amended indictment, the three top counts of which charged Mr. Coon with aggravated murder of a single victim. The state medical examiner opined that that the cause of death was "probable traumatic asphyxiation." D. Ct. Dkt. 20-2 at 35 (death certificate). On October 4, 2001, a day-long judicial settlement conference was conducted during which the settlement judge and defense counsel urged Mr. Coon to accept the State's plea offer because they believed his case was hopeless. Mr. Coon maintained his innocence and, that evening, entered an *Alford* plea.

In 2002, Mr. Coon commenced state post-conviction proceedings. Mr. Coon asserted that he was entitled to relief because trial counsel had been ineffective by, among other things, failing to adequately investigate the victim's cause of death:

> D. Trial counsel failed to investigate other possible causes of the victim's death to show that Petitioner was not responsible for the victim's death. The autopsy report listed probable traumatic asphyxiation as cause of death but was highly ambiguous and inconclusive. The victim had severe asthma, smoked three packs of cigarettes per day, and had stopped breathing on at least one occasion prior to her death. Her breathing difficulties were aggravated by alcohol and methamphetamine, which she had

consumed shortly before her death.

D. Ct. Dkt. 20-1 at 330 (Fourth Amended Petition for Post-Conviction Relief). However, postconviction counsel never asserted or proffered an expert cause-of-death opinion which differed from that of the state's medical examiner in the autopsy report. D. Ct. Dkt. 203 at 1 (autopsy report finding "probable traumatic asphyxiation" as cause of death). The state Circuit Court denied post-conviction relief. D. Ct. Dkt. 21-2 at 482. The Oregon Court of Appeals denied relief, and the Oregon Supreme Court denied review. *Coon v. Nooth*, 344 P.3d 1149, (Or. Ct. App.), *review denied*, 358 P.3d 1001 (2015).

B. Federal Habeas Proceedings

Mr. Coon's habeas proceedings commenced on November 12, 2015, when he filed his pro se Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (D. Ct. Dkt. 2). He later filed, through counsel, his First Amended Petition for Writ of Habeas Corpus. D. Ct. Dkt. 47. As he had in state post-conviction proceedings, Mr. Coon claimed that trial counsel's investigation into the victim's cause of death was inadequate. However, in addition to the state postconviction claim's general assertion that trial counsel had inadequately investigated the victim's cause of death, the federal habeas claim included the specific and concrete allegation that an adequate investigation would have revealed an independent forensic pathologist's expert opinion that the victim's cause of death was at least as

likely an asthma attack as traumatic asphyxiation – an opinion which would have squarely supported a defense that the prosecution had failed to prove beyond a reasonable doubt that the victim had been intentionally murdered. In particular, in his Claim I.A., Mr. Coon asserted:

> **A. Trial Counsel Failed To Investigate Asthma As A Cause Of Death**
>
> 33. Trial counsel was on notice that the deceased suffered sufficiently severe asthma that she used an inhaler available only through her physician's prescription. Trial counsel failed to consult with an independent forensic pathologist to determine whether the Medical Examiner's post-mortem examination was consistent with the deceased dying from an asthma attack, especially given her chronic drug and alcohol abuse, and the comparative likelihoods of an asthma attack and smothering having been the cause of death. **Upon information and belief, had trial counsel sought an independent forensic pathologist's expert opinion on these questions, they would have learned that the post-mortem examination report was entirely consistent with the deceased having died from an asthma attack and that her cause of death was at least as likely an asthma attack as smothering (the state's theory).**

Corrected Petition at 10 (boldface added).

The District Court ruled that because Mr. Coon had "alleged during PCR proceedings that counsel failed to conduct adequate investigation into alternative causes of death, including the victim's asthma condition[,]" he had "fairly presented" the habeas claim at issue here. D. Ct. Order at 16 n. 4.

In seeking a Certificate of Appealability from the Ninth Circuit Court of Appeals, Mr. Coon argued that reasonable jurists would find it debatable whether

the District Court had correctly assessed Claim I.A. as having been fairly presented in state proceedings rather than as a new claim. Noting that the District Court had compared the legal *theory* of the postconviction claim to that of Claim I.A. to determine that the claims were the same, Mr. Coon argued that the critical *factual* difference between the two claims rendered Claim I.A. new: to support Claim I.A. Mr. Coon alleged a fact neither alleged nor supported by evidence in postconviction proceedings, viz., that an independent forensic pathologist would have opined that the deceased's cause of death was at least as likely an asthma attack as asphyxiation. App. at 11-12 (Motion for Certificate of Appealability).

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 a claim has 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 a 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 Certificate of Appealability on whether Mr. Coon's ineffective assistance of counsel for failure to adequately investigate the victim's cause of death was exhausted. While state postconviction counsel alleged that trial counsel had inadequately investigated the cause of the victim's death, they neither alleged nor supported by evidence in postconviction proceedings what an adequate investigation would have revealed. The relevant federal habeas corpus claim, however, did assert what an adequate investigation would have revealed, that a qualified forensic pathologist would have opined that

the deceased's cause of death was at least as likely an asthma attack as asphyxiation. App. at 11-12 (Motion for Certificate of Appealability). This opinion would have supported a defense to the charge of intentional murder. *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 claims 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 October 21, 2019.

Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner