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In The
Supreme Court of the United States
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SHAUN HODGE

Petitioner,

v.

KEVIN GENOVESE, Warden

Respondent.
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MOTION TO DIRECT CLERK TO FILE PETITION OUT OF TIME
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March 5, 2020

MOTION TO DIRECT CLERK TO FILE PETITION OUT OF TIME

Comes the Petitioner, by and through pro bono counsel, and herein respectfully moves the Supreme Court to direct the Clerk to file the Petition for Writ of Certiorari out of time. In further support, the following is submitted:

1. Petitioner Shaun A. Hodge is represented by pro bono counsel with the Tennessee Innocence Project. The Petition was due on January 22, 2020. Prior to that date, Petitioner made request for an extension of time for 60 days up to and including March 22, 2020. On February 18, 2020, counsel received correspondence from the Clerk that the request for a 60-day extension was denied. Following the denial of the 60-day extension request, pro bono counsel submitted a request for a 30-day extension and also submitted the Petition and Motion to Proceed In Forma Pauperis to the Clerk on February 21, 2020 - within 30 days of the initial filing date for the Petition. The Clerk did not file the Petition and returned it.

3. Counsel has been a member of the bar of this Court since 2006 and has filed other petitions in pro bono innocence project cases and other matters before the Court. In that time, counsel had never experienced a denial of an initial request for extension of time to file a Petition for Writ of Certiorari. The request for extension was made in good faith by counsel, and counsel respectfully requests that this Court excuse any deficiencies of pro bono appellate counsel and allow the Petition to be filed. The Court has the discretion to direct the Petition to be filed, and the Petition is not jurisdictionally out of time. *See* Rule 13; 28 § U.S.C. 1254(1); 28 U.S.C. § 2101(c) (petition for writ of certiorari must be filed within 90 days but Supreme Court may extend time up to an additional 60 days).

3. Mr. Hodge is serving a life sentence in a Tennessee prison and was wrongfully convicted. There is no forensic evidence in this case – no DNA or other evidence to test

forensically to allow the case to be reopened. Review by this Court is almost certainly Mr. Hodge's last resort, with his case having completed direct and collateral review in the courts.

4. This case involves an appeal from the denial of a certificate of appealability by the United States Court of Appeals for the Sixth Circuit via an order entered on October 24, 2019. The United States District Court for the Eastern District of Tennessee denied habeas corpus relief and denied a certificate of appealability on the issues of ineffective assistance of trial counsel and the state's failure to disclose material exculpatory evidence. This Court would have jurisdiction under 28 U.S.C. § 1254(1). Counsel's initial application for extension was made on January 20, 2020, within the 10 days before the petition was due, and was only done so reluctantly once it was clear that counsel was not going to be able to have the petition completed in a fashion to best present the issues to the Court. The order from the United States Court of Appeals for the Sixth Circuit was entered on October 24, 2019, with the petition being due in this Court by January 22, 2020. Counsel regularly works with law students on innocence project cases, and the work to be done on the petition encompassed the end of semester and winter break timeframe, limiting the ability of counsel to have assistance with the petition. Despite counsel's work on the case as well as counsel's own research and drafting efforts, counsel was not able to get the petition completed within the initial 90 days following the Sixth Circuit's order.

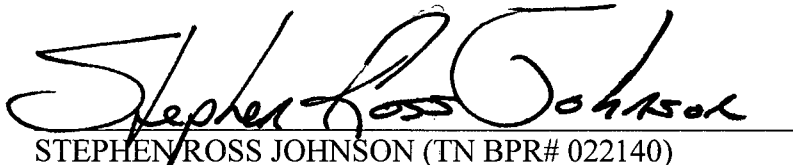
5. Undersigned counsel is a partner at a small law firm in Knoxville, Tennessee, and has an active trial and appellate practice focused exclusively on criminal defense. In addition to counsel's private practice, for several years counsel was the director and an adjunct professor with the University of Tennessee College of Law's Innocence and Wrongful Convictions Clinic. Last year, the Clinic was transitioned to the Tennessee Innocence Project, a new state-wide non-profit organization, of which counsel is the President and Co-Founder. The Tennessee Innocence Project

has limited volunteer and staff resources, with undersigned counsel working pro bono on the cases in addition to his private practice. Undersigned counsel is the only experienced practitioner with the Tennessee Innocence Project in matters of this nature. At this time, in addition to the other matters in counsel's trial and appellate criminal defense practice, undersigned counsel is providing pro bono assistance in four Tennessee Innocence Project cases, two of which are at the initial hearing stage, and all four cases concern homicide and/or rape convictions with lengthy sentences, have complex factual and procedural histories, and have deadlines encompassed within the timeframe for the filing of the petition in this case.

6. Petitioner Shaun Hodge was convicted of first-degree murder based solely on conflicting eyewitness testimony. *State v. Hodge*, No. E2002-01794-CCA-R3-CD, 2003 WL 22888892, at *1-8 (Tenn. Crim. App. Dec. 8, 2003), *perm. app denied* (Tenn. May 10, 2004). No forensic evidence connected Mr. Hodge to the murder, with the state presenting evidence from four eyewitnesses that Mr. Hodge was the shooter and the defense presenting six eyewitnesses who testified that Mr. Hodge was either not the shooter or did not match the shooter's description. *Id.* After trial and direct appeal, new evidence was presented in state collateral review proceedings that substantially undermined the testimony of three of the four state eyewitnesses. In reviewing the facts and the newly discovered evidence, the state courts and the lower federal courts erroneously viewed the evidence in a piecemeal fashion and misapplied the materiality standard promulgated in *Brady v. Maryland*, 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Smith v. Cain*, 565 U.S. 73 (2012). Upon proper analysis of this case, reasonable jurists could disagree as to whether the failure to provide exculpatory evidence and ineffective assistance of counsel undermined confidence in the outcome of the case. *See* 28 U.S.C. § 2254.

7. Counsel for Mr. Hodge respectfully requests that this Court excuse any deficiencies of pro bono appellate counsel in submitting his case to the Court, and that the Court direct the Clerk to file the Petition out of time.

Respectfully submitted,

A handwritten signature in black ink, reading "Stephen Ross Johnson". The signature is written in a cursive, flowing style. The first name "Stephen" is written with a large, sweeping 'S'. The last name "Johnson" is written with a large, looping 'J' and 'h'. The signature is positioned above a horizontal line.

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March 5, 2020

No. 19-5453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 24, 2019
DEBORAH S. HUNT, Clerk

SHAUN A. HODGE,

Petitioner-Appellant,

V.

SHAWN PHILLIPS, Warden,

Respondent-Appellee.

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O R D E R

Shaun A. Hodge, a Tennessee prisoner represented by counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Hodge has applied for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5), and to have counsel, currently retained, appointed to represent him on appeal.

In 2001, a jury convicted Hodge of premeditated first-degree murder, in violation of Tennessee Code Annotated § 39-13-202, for the shooting and killing of Benny Boling. The trial court sentenced Hodge to life imprisonment with the possibility of parole. The Tennessee Court of Criminal Appeals affirmed. *State v. Hodge*, No. E2002-01794-CCA-R3-CD, 2003 WL 22888892 (Tenn. Crim. App. Dec. 8, 2003), *perm. app. denied* (Tenn. May 10, 2004). Hodge sought state post-conviction relief, but after an evidentiary hearing, the postconviction petition was denied. The Tennessee Court of Criminal Appeals affirmed. *Hodge v. State*, No. E2009-02508-CCA-R3-PC (Tenn. Crim. App. Aug. 26, 2011), *perm. app. denied* (Tenn. Feb. 15, 2012). Hodge next filed a petition for a writ of coram nobis, which was also denied.

In 2016, Hodge filed the present habeas petition. He argued that trial counsel performed ineffectively by failing to (a) obtain the mental health records of witness Lorraine Young, (b)

interview witness Tim Bolden with an audio recording device or another witness present, or testify as to Bolden's exculpatory statements, and (c) provide meaningful representation due to a conflict of interest. He also argued that the prosecution violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding Young's medical records. After a response from the State, the district court denied the petition, finding that the Tennessee courts' denial of his claims was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d). The district court declined to grant a COA.

In his COA application, Hodge argues that the district court erred in its rulings on each individual claim, and, moreover, failed to take into account the cumulative effect of the claimed errors when the verdict was based entirely on what he deems to be unreliable eyewitness testimony.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court's assessment of the petitioner's constitutional claims, however, must be viewed in light of any deference required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, a habeas petition brought by a person in state custody cannot be granted unless the state court's adjudication of his federal claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Thus, when a petitioner seeks a COA following the district court's dismissal of his § 2254 petition, we "look to the District Court's application of

AEDPA to [the] petitioner's claims and ask whether that resolution was debatable among jurists of reason." *Miller-El*, 537 U.S. at 336.

Ineffective Assistance of Trial Counsel. The Sixth Amendment guarantees criminal defendants the right to be represented by counsel during trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). That right is deprived when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Such errors must "fall below an objective standard of reasonableness" measured by "prevailing professional norms." *Id.* at 687–88. In other words, counsel's performance must be considered "outside the range of professionally competent assistance." *Id.* at 690. Importantly, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* And we apply a "strong presumption" that counsel's performance was reasonable under the circumstances. *Id.* at 689.

Additionally, to prevail on a Sixth Amendment claim for ineffective assistance of counsel, a petitioner must show that his counsel's constitutionally deficient performance prejudiced his defense. *Id.* at 687. Prejudice occurs when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A petitioner therefore must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

As discussed above, habeas petitioners challenging a state criminal conviction face an even higher burden. AEDPA precludes relief unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Thus, a § 2254 petitioner claiming ineffective assistance of counsel must surmount a "doubly deferential" standard of review. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The issue is whether the state court's determination that trial counsel performed reasonably was itself unreasonable. *Id.*; see also

Harrington v. Richter, 562 U.S. 86, 105 (2011) (“The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”).

Hodge first argues that trial counsel performed ineffectively by failing to obtain the mental health records of Young—a witness who testified that she saw Hodge shoot the victim—which Hodge asserts would have demonstrated her mental health issues and history of auditory and visual hallucinations and thus called into question the reliability of her testimony. Hodge faults trial counsel for not investigating Young’s mental history more thoroughly after Hodge had informed trial counsel that Young had issues with alcohol and drugs and the prosecution did not provide trial counsel with any information concerning Young’s mental issues in response to a discovery request. Hodge argues that trial counsel’s failure to obtain and present this evidence, in a case based on conflicting eyewitness testimony concerning who shot the victim, was deficient and prejudiced him.

The state court rejected this claim, holding that any failure by Hodge’s trial counsel to pursue Young’s mental health records did not render trial counsel’s performance constitutionally deficient. *Hodge v. State*, No. E2009-02508-CCA-R3-PC, 2011 WL 3793503, at *4–5 (Tenn. Crim. App. Aug. 26, 2011). The state court found “no reason in the record for trial counsel to have suspected that Ms. Young suffered from mental health problems.” *Id.* Thus, the state court concluded, “we do not believe that trial counsel fell below an objective standard of reasonableness in failing to investigate this issue further.” *Id.* at *5.

The district court reviewed this claim with the deference required by AEDPA. It noted that the state court correctly identified *Strickland* as the governing standard for ineffective-assistance-of-counsel claims. And it concluded that the state court did not unreasonably apply that standard. Although reasonable jurists might debate whether Hodge’s trial counsel performed effectively, they could not argue that the state court’s decision is an “unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *See* 28 U.S.C. § 2254(d)(1).

Hodge next argues that trial counsel performed ineffectively by not recording or bringing a third-party witness to an interview with Bolden, during which Bolden purportedly contradicted his later trial testimony that he saw Hodge shoot the victim. Bolden refused to speak with trial counsel about the shooting after this initial interview, and trial counsel was thus put in the position of being the only witness to this alleged impeachment evidence. Hodge argues that trial counsel should have withdrawn when he realized that he might become a witness in the trial, and that trial counsel's belief that he would be subject to wide-open cross-examination if he testified about the interview was a mistaken understanding of the law.

The state court rejected this claim as well. *Hodge*, 2011 WL 3793503, at *5. It found that trial counsel had deliberately sought to "entice" Bolden into speaking with him "by offering to come alone and not to tape the interview." *Id.* Indeed, the record shows that Bolden's counsel agreed to the interview on those conditions. The state court noted that this strategy "could have potentially been very helpful to trial counsel in developing the petitioner's case and trial strategy," even though impeaching Bolden during any future testimony with statements made during the interview would have been difficult. *Id.* Thus, the state court concluded that "although his strategy ultimately failed, trial counsel's decision to attend Mr. Bolden's interview without a witness or recording device does not appear to . . . have been deficient at the time it was made." *Id.*

In his § 2254 petition, Hodge argued that the state court "wrongly characterized trial counsel's decision as strategic." The district court rejected that claim, concluding that Hodge had not rebutted the "presumption of correctness" afforded to the state court's factual findings under AEDPA. *See* 28 U.S.C. § 2254(e)(1). Additionally, the district court held that trial counsel's decision not to testify so as to avoid exposure to cross-examination was not constitutionally deficient under *Strickland*. Reasonable jurists could not debate either conclusion.

Finally, Hodge claims that trial counsel performed ineffectively by failing to withdraw after Hodge had filed various complaints against trial counsel and had moved to have trial counsel dismissed from the case, and that the trial court failed to inquire into his dissatisfaction with counsel. *See United States v. Iles*, 906 F.2d 1122, 1130-32 (6th Cir. 1990). In order to make a

substantial showing of a Sixth Amendment violation, Hodge must demonstrate that trial counsel had an actual conflict of interest that adversely affected his performance at trial. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *United States v. Barrow*, 287 F.3d 733, 738 (8th Cir. 2002).

The state court denied this claim too. *Hodge*, 2011 WL 3793503, at *5. It recited state law holding that “trial counsel is not required to withdraw merely because a client has filed a complaint against him.” *Id.* And it noted that a contrary rule would “essentially permit a defendant to automatically discharge his appointed counsel simply by raising written complaints.” *Id.* Instead, the state court held that a claim for ineffective assistance of counsel required Hodge to show “actual conduct that would require counsel to withdraw and the resulting prejudice.” *Id.* And it found that Hodge had failed to make that showing. *Id.*

The district court deferred to the state court’s decision, “find[ing] that [Hodge] ha[d] not met his burden of demonstrating that he is entitled to relief on this claim as he has not provided any evidence to diminish the deference owed to the state court’s factual findings under [AEDPA].”

The district court identified various points in the record demonstrating that trial counsel and Hodge did not have irreconcilable differences or a complete breakdown in communication, and noted that filing a complaint to the Tennessee Board of Professional Responsibility does not establish that trial counsel had a conflict of interest that prevented him from performing his duties. Reasonable jurists could not debate the district court’s denial of this claim. Additionally, because Hodge did not make a substantial showing of an actual conflict of interest, reasonable jurists could not debate the district court’s conclusion that Hodge was not prejudiced by the trial court’s claimed failure to hold a hearing or consider his complaints against counsel. *See Tolliver v. Dallman*, No. 94-3491, 1995 WL 364176, at *4 (6th Cir. June 16, 1995) (holding that a trial court’s failure to consider a defendant’s motion for new counsel was “harmless error” because trial counsel’s performance was constitutionally adequate).

Brady Claim. Hodge asserts that the prosecution withheld exculpatory evidence by failing to turn over Young’s mental health records, in violation of *Brady*. Under *Brady*, a prosecutor may not suppress material evidence favorable to a defendant. 373 U.S. at 87. A *Brady* violation has

three elements: “[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] the evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” *Stickler v. Greene*, 527 U.S. 263, 281–82 (1999). Hodge asserts that the prosecution should have been aware of Young’s mental health history because the police had been called to Young’s house on January 7, 1998, during which her speech was rambling and she stated that she was out of “meds,” and the prosecution should have been accountable for mental health records maintained at State-operated and State-funded facilities.

The state court rejected Hodge’s *Brady* claim on two grounds. *Hodge*, 2011 WL 3793503, at *6–7. First, it concluded that “the prosecution did *not* actually suppress” Young’s mental health records. *Id.* at *6 (emphasis added). The state court found that “the prosecution had nothing in its files to indicate that Ms. Young suffered from mental health issues, and nothing indicates that the prosecution was aware that [she] had ever sought mental health treatment or that mental health records might exist at any particular state facility.” *Id.* Thus, the state court held that “the prosecution had no affirmative duty to seek out such records and is not responsible for the consequences of any failure to locate them.” *Id.*

Second, the state court held that Young’s mental health records were not “material.” *Id.* at *7. It found that “[m]any of the medical records at issue postdate trial or concern medical problems that would not have affected Ms. Young’s credibility as a witness.” *Id.* Additionally, the state court noted that “the testimony of three other eyewitnesses to the crime would still remain.” *Id.* Consequently, the state court concluded that Young’s medical records “simply d[id] not undermine [its] confidence in the jury’s verdict.” *Id.*

The district court applied AEDPA and deferred to the state court’s denial of Hodge’s *Brady* claim on both the suppression and materiality grounds. After discussing the relevant standards for relief, it concluded that Hodge “ha[d] not shown that [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’ or ‘an unreasonable determination of the facts in light of the

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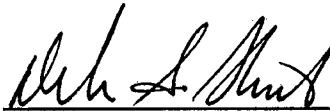
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evidence presented in the State court proceeding.” See 28 U.S.C. § 2254(d). Reasonable jurists could not debate that determination.

Cumulative Effect of Errors. Lastly, Hodge argues that the cumulative effect of the claimed errors resulted in Hodge receiving an unfair trial. However, Hodge did not raise this issue in the district court and, in any event, “[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief.” *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002).

Accordingly, the application for a COA is **DENIED**. Hodge’s motions to proceed in forma pauperis and to have counsel Stephon Ross Johnson appointed on appeal are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**