CASE No. ____

In The Supreme Court of the United States

JAMES SAYLOR,

Petitioner,
v.

TAGGART BOYD,

Respondent.

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether summary judgment may be utilized to dispose of a federal habeas petition in light of AEDPA.

2. Whether a State's failure to address a gateway actual innocence claim constitutes deliberate waiver.

3. Whether a gateway actual innocence claim may be made if new evidence makes it "more likely than not *any* reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006).

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IV. PETITION FOR A WRIT OF CERTIORARI

James Saylor respectfully petitions for a writ of certiorari to review the Eighth Circuit Court of Appeals judgment denying a Certificate of Appealability ("COA").

V. OPINIONS BELOW

The district court's denial of Petitioner's § 2254 Petition and the Eighth Circuit's decision denying a Certificate of Appealability are included in the Appendix.

VI. JURISDICTION

The order of the court of appeals denying Petitioner a COA was entered June 2, 2020. The Eighth Circuit denied a timely petition for rehearing on August 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. § 2253(c)

(c)

(1) 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; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

VIII. STATEMENT OF THE CASE

James M. Saylor ("Saylor") was convicted in 1985 of second-degree murder following a stipulated "trial." Saylor sought state post-conviction relief arguing, among other things, that his trial and appellate attorneys were ineffective. The state post-conviction court denied relief. Thereafter, the Nebraska Supreme Court affirmed. *State v. Saylor*, 883 N.W.2d 334 (2016). Key among Saylor's state post-conviction arguments was the testimony of two experts, Drs. Baden and Spitz. Drs. Baden and Spitz called into question the State's theory of the case; namely, that Lena Saylor, Saylor's grandmother, was suffocated to death.

Saylor made a "gateway" actual innocence claim, consistent with *McQuiggin v. Perkins*, 569 U.S. 383 (2013) in the district court in order to present his otherwise untimely underlying claims of constitutional violations that occurred in the case. To successfully make out a gateway actual innocence claim, Saylor argued that he needed to: (1) "present new, reliable evidence" and (2) "show by a preponderance of the evidence 'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Stated another way, Saylor contended that it is "more likely than not *any* reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasis added).

The Respondent did not address Saylor's gateway actual innocence claim or any other aspect of Saylor's petition. Instead, Respondent filed a motion for summary judgment arguing that Saylor's petition was untimely.

Saylor opposed the State's summary judgment motion arguing that summary judgment is improper in habeas corpus proceedings, the State's failure to file an answer constituted an admission to Saylor's claims, the State deliberately waived any opposition to Saylor's invocation of the actual innocence exception by failing to respond to the argument, and that Saylor was otherwise entitled to relief.

The district court rejected each of Saylor's arguments.

The Eighth Circuit denied a COA.

IX. REASONS FOR GRANTING THE PETITION

A. Summary Judgment Is Not Proper In Habeas Corpus

In *Gussner v. Gonzalez*, 2013 WL 458250 *3-5 (N.D.Cal. Feb. 5, 2013), the Court explained:

In The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), PL 104-132, April 24, 1996, 110 Stat 1214, worked a significant

change in federal habeas corpus review of state court criminal convictions and severely limited the scope of review. Thus, the Supreme Court's earlier approval of summary judgment during habeas proceedings does not necessarily mean that summary judgment remains appropriate in a habeas proceeding governed by AEDPA. The Supreme Court has not addressed the question since 1977. The most recent case Petitioner cites on the question of the appropriateness of summary judgment in habeas corpus proceedings is from 1990. *See* Mot. at 3 (citing *Johnson v. Rogers,* 917 F.2d 1283, 1284-84 (10th Cir. 1990)). Thus, there does not appear to be any clear authority on the subject under the modern statute.

Lower courts have not been consistent in their treatment of the issue. Some courts have decided summary judgment motions on § 2254 petitions without comment on the appropriateness of doing so. *See, e.g., Rowland v. Chappell,* C 94-3037 WHA, 2012 WL 4715262 (N.D. Cal. Oct. 2, 2012). At least one court has concluded that to do so would be inappropriate. *See Buchanan v. Foster,* No. 3:06-cv-00340-LRH-RAM, 2007 WL 2459289 (D. Nev. Aug. 24, 2007). Still other courts have explicitly considered the apparent tension between the requirements for summary judgment and the procedures under § 2254, and have, with varying degrees of hesitation, gone ahead to decide the motion. *See, e.g., Smith v. Cockerell,* 311 F.3d 661 (5th Cir. 2002); *Gentry v. Sinclair,* 576 F. Supp. 2d 1130, 1139 (W.D. Wash. 2008). Given the absence

of guidance or consensus, the Court will undertake an analysis of the appropriateness of considering a motion for summary judgment in this case.

Rule 12 of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. § 2254 ("Habeas Rules") provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."

Summary judgment is governed by Federal Rule of Civil Procedure ("FRCP") 56, and thus may be applied to a § 2254 proceeding to the extent that FRCP 56 is not inconsistent with the federal statutes governing collateral review of state criminal convictions. FRCP 56 provides, in relevant part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

One aspect of the federal habeas statute that appears to be in square conflict with FRCP 56 is 28 U.S.C. § 2254(e)(1), which provides in relevant part that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." This requirement that a federal court defer to the state court's factual findings is in conflict with the

requirement under FRCP 56 that Courts draw all factual inferences in the nonmovant's favor. *See United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc). A court cannot simultaneously assess all facts in the record in the light most favorable to the nonmovant and accept as true the state court's factual findings based on that same record.

Some courts have solved this problem by "substituting" the 2254(e)(1) standard for the usual summary judgment standard, *Smith v. Cockrell,* 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke,* 542 U.S. 274 (2004) ("Therefore, § 2254(e)(1)-which mandates that findings of fact made by a state court are "presumed to be correct"-overrides the ordinary rule that, in a summary judgment proceeding, all disputed facts must be construed in the light most favorable to the nonmoving party."); *see also* Brian Means, *Federal Habeas Manual* § 8:36. This procedure, however, would not provide a solution in any case where the state court's findings of fact were not made explicit. This is especially so where there is more than one basis on which a state court's decision might have rested, as a reviewing federal court cannot easily determine what implied factual findings the state court might have made.

Moreover, the procedures of federal habeas review are inconsistent with the purpose of FRCP 56. FRCP 56 exists to prevent the need for trial.

See Advisory Committee Notes, Fed. R. Civ. P. 56, 1963 Amendment ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."); *Zweig v. Hearst Corp.,* 521 F.2d 1129, 1135-36 (9th Cir. 1975), *disapproved of on other grounds by Hollinger v. Titan Capital Corp.,* 914 F.2d 1564 (9th Cir. 1990) ("Summary judgment has, as one of its most important goals, the elimination of waste of the time and resources of both litigants and the courts in cases where a trial would be a useless formality."); *Mintz v. Mathers Fund, Inc.,* 463 F.2d 495, 498 (7th Cir. 1972) ("The primary purpose of a motion for summary judgment is to avoid a useless trial.") In a proceeding where there is no provision for trial, the summary judgment cannot serve this function. Indeed, the Habeas Rules contemplate an answer and reply (Rule 5), an evidentiary hearing in some cases (Rule 8), and the entry of an order with or without a certificate of appealability (Rule 11), but they do not contemplate either a trial or an additional set of briefing or hearing, which actually *adds* a step rather than serving FRCP 56's function of *reducing* the burden on the court.

Moreover, "[u]nder AEDPA evidentiary hearings in federal court should be rare." *Cullen v. Pinholster,* 131 S. Ct. 1388, 1411, (2011). Summary judgment proceedings in cases that will ultimately largely be resolved without evidentiary hearings anyway seem largely duplicative with the

routine consideration of § 2254 petitions, though, as explained above, with a troublingly different standard for reviewing the factual record. Rather, in § 2254 cases where a live hearing to resolve the factual record is not necessary, the proper way for the Court to conserve its resources in the absence of a factual dispute is usually to deny an evidentiary hearing and defer to the existing factual record as determined by the state court.

Finally, the rules for § 2254 proceedings provide a mechanism for courts to rule on petitions where the factual record clearly does not support relief: the Preliminary Review descried in Habeas Rule 4 ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."). Though there is no facial conflict between this rule and FRCP 56, the two appear intended to serve the same purpose of disposing of cases where the factual record cannot support relief before they reach the final stages of adjudication. The fact that Congress provided a specific procedure for habeas corpus militates against also allowing the use of the more general procedure. In sum, although not in explicit conflict with FRCP 56, the Habeas Rules are a poor fit with FRCP 56.

This case is particularly inappropriate for the kind of merging of standards that would be required to reconcile FRCP 56 with § 2254 because there is considerable uncertainty about the

contents of the state court record. There appears to have been additional evidence before the Court of Appeal that was not before the Superior Court, but only the Superior Court wrote an opinion. Mot. at 12; *see also* Pet. Exh. ZZA (declaration of Petitioner concerning whether he would have pleaded guilty, submitted for the first time to Court of Appeal). Additional evidence was also submitted to the California Supreme Court on appeal of the Court of Appeal's denial. *See* Attachment to Exhibits for Petition for Writ of Habeas Corpus (Declaration of Thomas Worthington submitted in California Supreme Court). Both of these declarations are central to Petitioner's motion, and thus the state court's treatment of these declarations is critical to this Court's resolution of Petitioner's claims. *See* Mot. at 6, 13 (discussing the additional declarations).

In regular § 2254 review, the Court can simply take a summary denial and consider whether, in light of the factual record, there is any reasonable explanation for the denial that would not constitute an unreasonable application of clearly established federal law. *See Harrington v. Richter,* 131 S.Ct. 770, 784-85. Although this analysis of course entails a consideration of the factual record, it does not require the type of detailed piece-by-piece analysis of the factual record required by a motion for summary judgment, because a court need only determine whether there exists a possible reasonable underpinning for the state court's conclusion.

Thus, a reviewing court faced with a summary denial can consider what a state court might reasonably have concluded. *See Richter,* 131 S.Ct. at 784. A court considering a motion for summary judgment, in contrast, must determine whether there is any genuine issue of material fact. As explained above, in order to give effect to the requirements of § 2254(e)(1), this Court would have to take all the facts as the state court determined them. In considering the underpinnings of a state court decision, this Court would normally look to the last reasoned state court opinion. *See Ylst v. Nunnemaker,* 501 U.S. 797, 805-06 (1991). In this case, however, the record before the Superior Court, which issued the last reasoned opinion, is not the same as the record before the Court of Appeal, a higher state court that also denied the Petition. There is thus a written opinion to which this Court would normally defer, but that opinion did not make factual findings based on certain key evidence on which Petitioner now wishes to rely. The Court of Appeal, which did consider that evidence, was silent as to factual findings. This is a good example of precisely the type of procedural morass that will result from importing the summary judgment procedure from regular civil cases to the already extremely complex set of procedures governing § 2254 petitions.

Finally, it is not clear how the review Petitioner seeks now is different from the review he will get when the Court considers his complete

petition. Though Petitioner has requested an evidentiary hearing, the Supreme Court has explicitly instructed that district courts considering petitions under § 2254(d) may not consider evidence first brought to light in such a hearing, but are rather limited to the record that was before the state court. *See Pinholster,* 131 S. Ct. at 1398. Thus, in assessing Petitioner's claim under § 2254(d), the Court will consider Petitioner's claims in light of the state court record - precisely what Petitioner is asking for now. To the extent that there is a difference, it appears to be in the treatment of the facts, a difference which highlights the inappropriateness of considering such a motion now.

As explained above, there is a poor fit between FRCP 56 and the rules and statutes governing federal court review of a state court conviction. The difficulties are compounded in this case due to the lack of clarity in the contents of the state court record. Accordingly, the Court finds that a motion for summary judgment is not appropriate in this case.

Consistent with reasoning of *Gussner*, the Court should grant certiorari to resolve this important issue.

B. THE LOWER COURTS ERRED IN NOT TREATING THE STATE'S FAILURE TO ADDRESS SAYLOR'S GATEWAY ACTUAL INNOCENCE CLAIM AS DELIBERATE WAIVER

The Court should grant certiorari on whether the district court erred in failing to consider whether the Respondent deliberately waived any argument concerning the actual innocence exception and the underlying merits by solely limiting its summary judgment motion to a statute of limitations defense. The district court did not address this argument at all. Instead, the district court *sua sponte* decided Saylor's actual innocence argument with *no input or argument from the Warden on this point*. This was improper as federal courts do not have carte blanche to depart from the basic party presentation system. *Wood v. Milyard*, 566 U.S. 463, 472-74 (2012). The Warden waived any argument about the actual innocence exception.

C. THE EIGHTH CIRCUIT MISINTERPRETED THE GATEWAY ACTUAL INNOCENCE EXCEPTION

The Court should grant certiorari on whether the lower court procedurally erred in misapplying the "no reasonable juror" standard in assessing whether Saylor could satisfy the actual innocence gateway exception. The district court entirely overlooked what this Court said in *House v. Bell*, 547 U.S. 518, 538 (2006) concerning the "no

reasonable juror standard":

A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt--*or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.*

Id. at 538. This Court has not yet considered this aspect of *House* when applying the "no reasonable juror" standard. Because the proper standard of review affected the district court's ultimate decision on whether Saylor could satisfy the actual innocence gateway exception, the Court should grant certiorari.

X. CONCLUSION

WHEREFORE, James Saylor respectfully asks this Court to grant this Petition for Writ of Certiorari, vacate the denial of a COA by the court of appeals and district court and remand this case to the Eighth Circuit for further proceedings.

Respectfully submitted,

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