No. 22-125

IN THE

Supreme Court of the United States

SCOTT FENSTERMAKER,

Petitioner,

v.

STEPHEN FENSTERMAKER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

REPLY BRIEF

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PETITIONER'S REPLY

Respondent Czymmek, arguing that the Connecticut courts based their decisions on "independent and adequate" state grounds, asserts that there is no basis for Supreme Court jurisdiction in this matter. For the reasons stated below, Respondent Czymmek's arguments are misplaced, her support distinguishable, and her conclusions flawed.

ASSERTED STATE LAW GROUNDS

Respondent Czymmek's Claims of Procedural Default

Respondent Czymmek, relying on *Harris v. Reed*, 489 U.S 255 (1989) and *Coleman v. Thompson*, 501 U.S. 722 (1991), claims that "the courts below ultimately dismissed the action based on well-established Connecticut law." Respondent Czymmek's Brief ("Czymmek's Brief"), Pages 8 and 9. Both *Harris* and *Coleman* are distinguishable and do not control.

As an initial matter, both *Harris* and *Coleman* are Federal *habeas* matters seeking review of State criminal convictions. As a result, we can reasonably conclude that neither case addressed issues of a judgment rendered without either notice or the opportunity to be heard, as does the present matter.

Both *Harris* and *Coleman* address the issue of whether Federal courts have jurisdiction to review state court decisions when those decisions rest on *both* Federal and state grounds. *See Harris*, 489 U.S. at 260

(This Court will not review "a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision") and *Coleman*, 501 U.S. at 729 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *see also Beard v. Kindler*, 558 U.S. 53, 55 (2009) (Federal jurisdiction does not lie "if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment," citation omitted (emphasis added)).

The issue presented by the Petition for a Writ of Certiorari (the "Petition") is not whether this Court has jurisdiction based upon competing state law and Federal law grounds. The Connecticut courts clearly based their decisions on state law, while essentially ignoring Petitioner's Federal law claims. This, however, does not end proper Federal jurisdictional analysis, as *Harris*, *Coleman* and *Beard* all require that the state law upon which the state courts' decisions were based be both "adequate" and "independent." *See Harris*, 489 U.S. at 260; *Coleman*, 501 U.S. at 729; and *Beard*, 558 U.S. at 55.

Whether the Connecticut Courts' State Law Analysis was Adequate and Independent

"The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard*, *supra.*, 558 U.S. at 60, citation omitted. This Court frames the adequacy inquiry by "asking whether the state rule in question was 'firmly established and regularly followed.'"

Id, citation omitted. Therefore, the issue before this Court is whether the state procedural basis of the lower courts' decisions is "firmly established and regularly followed." This, in turn, raises the question of upon what state procedural law did the Connecticut courts rely?

There are two procedural rules that the Superior Court applied in arriving at its decision. The first procedural rule is that "our courts of probate possess only such powers as are expressly or by necessary implication conferred upon them by statute" and, in turn "save in the cases excepted by statute, a final probate decree can be set aside or reversed only upon appeal" and finally that so-called "direct attacks" on Connecticut probate court decrees are not permitted, absent statutory authority therefore. *Delehanty v. Pitkin*, 76 Conn. 412, 416, 420, and 422-24 (1904). In other words, under Connecticut law, a Connecticut probate court decree can only be attacked as provided for by statute. Petitioner does not dispute that this procedural rule is "firmly established and regularly followed," a conclusion that is amply supported by the cases cited by Czymmek's Brief. *See* Czymmek's Brief, page 9, *citing In re Buckingham*, 197 Conn. App. 373 (2020) and *In re Probate Appeal of Cadle Co.*, 129 Conn. App. 814 (2011).

However, the second procedural rule relied upon by the Connecticut courts is the interaction of C.G.S. §§45a-273 ("Section 273") and 45a-128(a) ("Section 128(a)"). *Delehanty* was decided in 1904. Sections 128(a) and 273 were both enacted in 1949. Obviously, *Delehanty*, from which *Buckingham* and *Cadle* flow, did not address the procedural interaction of Section 128(a) or Section 273. Hence, *Delehanty* cannot answer the question of

whether Section 128(a) authorizes Petitioner's attack on Czymmek's Section 273 Decree.

In re Buckingham did not apply either Section 273 or 128(a), as the *Buckingham* decree was not rendered *ex parte*.[1] *See* 197 Conn. App. at 375. Similarly, in *In re Probate Appeal of Cadle Co.*, the challenged decree was not issued *ex parte*. *See Cadle*, *generally* (all parties properly before the court). As a result, the Connecticut courts' decisions applying Sections 128(a) and 273 are neither firmly established nor regularly followed, as this matter was apparently a case of first impression applying *Delehanty* to Sections 128(a) and 273. As procedural applications of Sections 128(a) and 273 have not been firmly established and regularly followed, *Harris* and *Coleman* do not necessarily deprive this Court of jurisdiction. *See Beard*, *supra.*, 558 U.S. at 60.

Procedural Application of Sections 128(a) and 273 to the Instant Matter

Section 128(a) requires a written application filed by "any interested person" and that the application seek reconsideration and either revocation or modification of the prior decree. *See* Section 128(a). In this matter, the only state court written decision was the Superior Court's decision. The Superior Court found that Petitioner's application would "undo," "directly attack" and "wipe out of existence" the prior decree. *See* State Appendix, Pages A584, A586, A591 and A593 ("direct attack"), *see*

1. *Buckingham* references Section 128(a), but only to describe its inapplicability to the matter at hand. *See* 197 Conn. App. at 380, n.4.

also State Appendix, Pages A587, 588, and A589 ("undo" the prior decree). Based on these findings, it is difficult to understand how the Connecticut courts' rulings held that the same application did not seek reconsideration and revocation of the prior decree, as required by Section 128(a).

Czymmek's Brief cites to Petitioner's cover letter (the "Cover Letter") sent to the Connecticut probate court ("Probate Court") with his application to probate Decedent's last lawfully-executed last will and testament as evidence of Petitioner's intent in filing that application. *See* Czymmek's Brief, Page 6; *see also* State Appendix, Pages A544 and A545. However, Czymmek's Brief's citation is taken out of context and disregards the portion of the Cover Letter that makes Petitioner's intent clear.

As an initial matter, the Cover Letter's reference to initiating a probate proceeding was attributable to the fact that no will had ever been offered for probate in the Decedent's estate. Hence, while a probate court proceeding had been initiated (18-0399), no probate proceeding had been. The Cover Letter next references a motion that Petitioner had filed in docket number 18-0399, thereby noticing his appearance and the Probate Court's lack of ruling on that motion.

The Cover Letter then addresses Respondent Czymmek's "unlawful transfer of approximately $1.5 million in assets held by [the Decedent] at the time of his passing" and posits that the alleged unlawful transfer was effectuated "to avoid disclosing those pilfered assets during a probate proceeding." The Cover Letter then asked that "[the Probate Court] grant [Petitioner's] application

for Letters Testamentary and permit [Petitioner] to investigate [Respondent] Czymmek's scheme and to effectuate [Decedent's] testamentary intentions as stated in his last lawfully executed Last Will and Testament."

The Cover Letter clearly stated Petitioner's intent to have Czymmek's 273 Decree reconsidered and revoked, as called for by Section 128(a). After all, the 273 Decree accepted (1) Decedent's November 28, 2016 will, and (2) Czymmek's claim that Decedent's estate was valued at $158.03. The Cover Letter makes clear that Petitioner asserted that the November 28, 2016 will was not lawfully executed and that Decedent's estate had $1.5 million in potential claims.

Notwithstanding the Cover Letter's clear intent, Czymmek's Brief asks that this Court blindly follow state procedural rulings and ignore the Federal constitutional deprivation resulting therefrom. To do so would ignore the teachings of *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455 (1958) (the Supreme Court's "jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support,'" *quoting Ward v. Love County*, 253 U.S. 17, 22 (1920). "It thus becomes [this Court's] duty to ascertain, '. . . in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground *independently and adequately* supports the judgment.'", *id.*, *quoting Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931) (emphasis added); *see also Staub v. City of Baxley*, 355 U.S. 313, 318-320 (1958) ("Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state

court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.", *quoting First National Bank v. Anderson*, 269 U.S. 341, 346 (1926)); *see also Ward*, *supra.*, 253 U.S. at 22 (This Court may "inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support." Citations omitted. "Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." Citation omitted).

Here, the Connecticut courts hid behind inapplicable and pretextual state procedural trappings to avoid subject matter jurisdiction in a state probate matter laden with evidence of undue influence, lack of testamentary capacity, and fraud. *See* Petition, Pages 7 through 12. Based upon these facts, it is not only likely that Petitioner was deprived of his ability to challenge his disinheritance, but that Petitioner's nephews were deprived of a remainder valued at $1 million by Respondent Czymmek's, her bankers', and her lawyers' misconduct. While the stakes here are admittedly not as grave as those faced in *N.A.A.C.P. v. Alabama*, the procedural precedent presented here by the Connecticut state courts' avoidance of Federal constitutional issues by employing state procedural trickery and sleight-of-hand should be clear. Employing state procedural rules in this manner would enable state courts and legislatures to eviscerate the protections provided by the Fourteenth Amendment's Due Process Clause.

Nature and Character of the Superior Court's Decision

Not only did the Superior Court's decision deprive Petitioner of his right to due process of law under the Fourteenth Amendment, but it was intellectually, factually and procedurally dishonest in arriving at its state-law procedural conclusions. The Superior Court made factual findings that were clearly erroneous, and easily proven to be so, arrived at a state law legal conclusion that is clearly incorrect,[2] and procedural claims about the contents of Petitioner's filings that were simply false. *See* Petition, Pages 17 through 19.

While not directly related to Petitioner's constitutional claims, the Superior Court's errors call into question the independence and adequacy of its state law procedural rulings. In short, for reasons known best to it, the Superior Court denied Petitioner his right to due process of law by state law procedural avoidance based on flawed reasoning. While Petitioner's property rights implicated in this matter may be relatively trivial compared with much that comes before this Court, this Court surely recognizes the potential due process consequences of allowing state courts to use procedural tactics of this nature in far more serious matters. *See N.A.A.C.P. v. Alabama*, *supra*.

2. Superior Court's holding that Petitioner was not a "legal heir" or "heir-at-law" under Connecticut state law is clearly incorrect.

Czymmek's Brief's Misleading and Inaccurate Nature

Czymmek's Brief makes a number of inaccurate or misleading claims. Czymmek's Brief, on Page 2, notes that the Decedent "worked with two different lawyers in 2016 to disinherit [Petitioner] . . . ." Here, Czymmek's Brief fails to acknowledge that the first of these two lawyers, who prepared the first two wills in July and October of 2016 that purportedly disinherited Petitioner, was Respondent Czymmek's and her husband's personal estate planning attorney. *See* Petition, Page 7. Also, on Page 2 of Czymmek's Brief, she claims that the Decedent ensured that "his assets would be distributed in equal one-third shares to his other two children, Stephen and Martha, and to his daughter-in-law, Linda." This is simply not true. Decedent's assets were to be distributed through a so-called "pour-over will" into an *inter vivos* trust for the income benefit of Stephen, Martha and Linda, with a remainder over to his grandchildren.[3] *See id*, Page 11, footnote 6.

Similarly, on Page 3 of Czymmek's Brief, in footnote 2, Czymmek claims that "[t]wo of the Wills had to be re-executed to correct typographical and scrivener's errors." This claim is misleading. The November 23, 2016 will that needed to be corrected stated that Linda Fenstermaker, who was Decedent's daughter-in-law, was actually his daughter. *See* Petition, Pages 7 and 8. This fact is significant for two reasons. It is unclear whether this

3. As described in footnote 6 of the Petition, Petitioner's four nephews are likely additional victims of Respondent Czymmek's misconduct.

was a scrivener's or typographical error or if the Decedent had actually believed, as of November 23, 2016, that Linda was his daughter. Second, even if this assertion was a scrivener's or typographical error, the Decedent clearly executed this will without objection, calling into question (1) whether he even read it, or (2) whether he understood what he was signing. Both of these issues call into question Decedent's testamentary capacity in November of 2016.

On Page 4 of Czymmek's Brief, she claims that "[u] nder [Decedent's] last estate plan, his assets had been transferred into the *inter vivos* trust and his estate therefore had no assets." This claim is (1) not true, and (2) lacks evidentiary support. As an initial matter, Decedent made it clear that he wanted his assets to pass by bequest. *See* Petition, Page 9. Decedent never made any mention of his assets being placed into his *inter vivos* trust prior to his death. Indeed, his clear intention was that Petitioner be afforded the opportunity to challenge his disinheritance. *See* Petition, Pages 8 and 9 (discussing Decedent's invocation of the Delaware pre-mortem validation statutes and his Federal court affidavit). Similarly, while Respondent Czymmek has made numerous claims, both in the Connecticut courts and this Court, that Decedent's assets were placed into his *inter vivos* trust prior to his death, she has failed to provide any evidence of such a transfer, notwithstanding her ability to do so.

Czymmek's Brief next claims that "[Petitioner] did not enter an appearance in #18-0399 despite knowing of his father's death in July while that case was pending" and that "[Petitioner] filed nothing in connection with #18-0399." Czymmek's Brief, Page 5. These claims are both false. Petitioner filed a motion in 18-0399 in February

of 2019 and attempted to file Decedent's last lawfully-executed last will and testament in that matter, only to be thwarted by the clerk's office's opening up an entirely new matter involving Decedent's estate, 19-0444. *See* Cover Letter, State Appendix A544-545.

Czymmek's Brief next claims that "[Petitioner] filed a new action in probate court petitioning for the probating of the decedent's old, revoked 1997 will." As described above, this is misleading. Petitioner did not file a new action in the Probate Court. Petitioner simply attempted to file Decedent's last lawfully-executed last will and testament in Decedent's estate, 18-0399. The substance of the Cover Letter made his intentions clear. *See* Cover Letter.

Finally, Czymmek's Brief repeatedly asserted that, in order to file a Section 128(a) application, Petitioner would have had to have filed a "motion." *See* Czymmek's Brief, Pages 10 and 13. This is incorrect. Section 128(a) makes clear that an applicant need merely file an "application" to reconsider or revoke the prior decree. While this distinction may seem unimportant, Section 128(a) specifically requires a Court seeking to reconsider a prior decree doing so by "motion." *See* Section 128(a), second sentence. This distinction has never been addressed by the Connecticut courts and can be construed as allowing for a broader range of applications seeking to reconsider a prior decree than those provided for by motion.

CONCLUSION

Here, Respondent Czymmek's reliance on the state procedural grounds doctrine, as stated in *Harris* and *Coleman v. Thompson,* is misplaced. The state procedural grounds relied upon by the Connecticut courts violated Petitioner's due process rights by denying him "full right to assail" the Probate Court's decision in 18-0399. *See Farrell v. O'Brien*, 199 U.S. 89, 118 (1905). As a result, the state procedural grounds were neither adequate nor independent. *See Harris*, *supra.*, 489 U.S. at 260; *see also Coleman*, *supra.*, 501 U.S. at 729; and *Beard v. Kindler*, 558 U.S. 53, 55 (2009).

While Czymmek's Brief muddies the water with efforts to litigate the substantive merits of Petitioner's state court probate challenge, she cannot overcome the fact that the State courts' procedural maneuvering was neither adequate nor independent of Petitioner's Federal constitutional challenge. Where Petitioner's challenge to the no-notice Section 273 Decree would have "undone" it, was a "direct attack" on it, and would have "wiped it out of existence," the Connecticut courts either (1) had subject matter jurisdiction, or (2) the state court procedural rules run afoul of Fourteenth Amendment due process protections.

For this reason, this Court should grant Petitioner's Petition and proceed to hear this matter on the merits.

Dated: Ellsworth, Maine
October 19, 2022

Respectfully Submitted by,

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