No. 22-5676 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BERNARD ELLERBE,

PETITIONER,

vs.

WARDEN ROBERT MAY, et al,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE THIRD CIRCUIT COURT OF APPEALS

BERNARD ELLERBE
James T. Vaughn Corr. Ctr.
1181 Paddock Road
Smyrna, DE 19977

QUESTION PRESENTED

Did the Third Circuit & Delaware District Courts err by denying a Certificate of Appealability seeking to challenge procedural default findings where debatable *Hinton/Strickland* claim was presented?

LIST OF PARTIES & RELATED CASES

The Respondent(s) in this case are as follows, and were represented by Carolyn Hake, DAG, Bar No. 3839, Del. DOJ, 820 N. French Street, Wilmington, DE 19801:

- Robert May, Warden of James T. Vaughn Corr. Ctr.
- Kathleen Jennings, Attorney General for the State of Delaware

- *State v. Ellerbe*, No. 1406020386, Superior Court of Delaware. Judgment entered August 2, 2016.
- *Ellerbe v. State*, No. 453, Supreme Court of Delaware. Judgment entered May 8, 2017.
- *Ellerbe v. May*, No. 17-1231-CFC, U.S. District Court for the District of Delaware. Judgment entered September 25, 2020; Motion for Summary Judgment entered January 17, 2020; Motion for Reconsideration entered January 13, 2022.
- *Ellerbe v. James T. Vaughn Corr. Ctr.*, No. 20-3018, U.S. Court of Appeals for the Third Circuit. Judgment entered March 15, 2022.

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OPINION BELOW

The Third Circuit of Appeals affirmed Petitioner's conviction in its Case no. 20-3018. The opinion is unpublished, and is reprinted in the appendix to this petition at page 1a, *infra*. The order of the Third Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at 24a, *infra*.

JURISDICTION

The original opinion of the Third Circuit Court of Appeals was entered March 15, 2022. A timely motion to that court for rehearing was overruled on May 6, 2022. In July 2022, the Petitioner was granted until October 3, 2022, to file instant petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in the case:

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 defence.

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 [28 USCS § 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).

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In 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. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

STATEMENT OF THE CASE

Nearly forty years ago, this Court held in *Strickland v. Washington*, that effective assistance of counsel is guaranteed by the sixth amendment of the federal constitution, and that such ineffectiveness "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 US 668 (1984).

In *Hinton v. Alabama*, this Court held that the accused's trial counsel performance was deficient for not knowing the applicable law to client's case, *inter alia*, then remanded to the lower court to determine the prejudicial effect of counsel's performance. 188 L Ed 1 (2014).

It is important to note that on day two of Petitioner's trial, the State's expert witness-Ms. Tara Rossy-testified about her examination results of the drug evidence. On cross examination, Ms. Rossy confirmed 1) that she only tested 27 of the total 262 bags of alleged drugs; 2) the approximate total weight of said evidence was 3.8 grams; and 3) that she **only** "hypergeometric" tested about three-tenths of 1 gram. *See* Appx. 43a. Then, on January 30, 2015, the Petitioner was convicted by a Delaware Superior Court jury of drug dealing (over 2 grams of heroin), aggravated possession of heroin (over 3 grams of heroin), *inter alia*. Ellerbe was sentenced to eighteen years of imprisonment at Level V, followed by decreasing levels of supervision. *See* Appx. 3a. Thereafter, Ellerbe filed-yet later withdrew-his direct appeal, as well as unsuccessful attempted to move the Superior Court to reduce his sentence. *Ibid.*

In December 2015, the Petitioner, via counsel, filed a postconviction for relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"). *See* Appx. 3a. Presenting one claim on his Rule 61 motion, postconviction relief counsel averred that trial counsel was ineffective during the cross-examination of the State's expert witness. Said motion was denied in August 2016. Ellerbe then appealed that ruling to the Delaware Supreme Court, and also presented for the first time, that the trial counsel was ineffective for failing to challenge his conviction based on the "hypergeometric" sampling. In May 2017, the highest state court decided that the first claim was meritless and the second failed to established plain error according to Rule 8[1]. *See* Appx. 11a.

Subsequently, Ellerbe filed a federal habeas corpus petition for two claims of ineffectiveness[2], whereto admitting the first was meritless yet advanced his second claim. In January 2020, the district court denied Petitioner's motion for summary judgment. Appx. 16-18a. In September 2020, the district court denied claim two as procedurally barred. Appx. 11-13a. The court also denied an evidentiary hearing and the issuance of a COA. Appx. 14-15a. In October 2020, Ellerbe filed a NOA from that ruling (D.I. 36) and a motion for reconsideration. D.I. 37. In January 2022, his motion for reconsideration was denied, again without an issuance of a COA. *See* Appx. 19-23a.

In March 2022, the Third Circuit Court of Appeals denied Ellerbe's request for a COA from the District Court's decisions. *See* Appx. 1a. Then, on March 23, 2022, the

[1] See Del. Supreme Court Rule 8. ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").
[2] See Appx. 20-22a.

Petitioner sought reconsideration on that decision. Ellerbe was denied on May 6, 2022. *See* Appx. 24a.

Lastly, on July 29, 2022, Justice Alito of this Court granted an extension of time to file Petitioner's instant petition until October 3, 2022. *See* Appx. 51-52a.

REASONS FOR GRANTNG THE WRIT

I. THE THIRD CIRCUIT'S FAILURE TO GRANT PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY WARRANTS THIS COURT'S ATTENTION.

By denying Ellerbe's COA request, the United States Court of Appeals for the 3rd Circuit overlooked ***key*** pleadings which satisfied the 'threshold inquiry' on whether to issue a COA when a 28 USC §2254 petition has been dismissed on procedural grounds. Moreover, the Circuit Court's reliance on the district court's faulty findings of Petitioner's procedurally defaulted claim was erroneous. *Ellerbe v. James T. Vaughn Corr. Ctr.*, 2022 U.S. App. LEXIS 9626. *See* Appx. 1a.

It is well-settled that since the effective date of AEDPA[3], "the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 USC 2253(c)[.]" *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Also, in the *Slack* case this Court opined:

> "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, *a COA should issue* (and an appeal of the district court's order may be taken) *if the prisoner shows*, at least, that jurists of reason would find it *debatable whether the petition states a valid claim of the denial of a constitutional right*, and that jurists of reason would find it *debatable whether the district court was correct in its procedural ruling*."(*emphasis added*).

[3] Antiterrorism and Effective Death Penalty Act of 1996.

Furthermore, it is common practice for the Highest Court of the Land to rectify the Circuit, or the District Court's failure to grant a COA by applying its inherent power to issue a "GVR" order. *See* generally, *Slack.*

In the instant case, the Petitioner was entitled to a COA from either the district, or the Third Circuit because he demonstrated both components of §2253(c). Since the inception of Ellerbe's Trial Counsel Ineffectiveness claim in Delaware's highest state court to the 3rd Circuit Court of Appeals, and momentously now, the Petitioner has purported that his right(s) to effective assistance of counsel and fair trial were abridged. Likewise, the second component of the inquiry is substantiated by the District Court's use of an improper legal standard to assess whether or not the *Martinez* exception[4] applied to his procedurally defaulted claim. *See* Appx. 12-13a. Notwithstanding the district court's composition of a three-pronged *Martinez* exception test, once juxtaposed to the common standard applied in the 3rd Circuit, it transmute into an inadequate two prong test. *See Id.* (compare *Cruz-West v. Superintendent Fayette SCI*, 2021 U.S. App. LEXIS 14343 (headnotes); *Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750 (3rd Cir. 2018)(headnotes); *Preston v. Superintendent Graterford SCI*, 902 F.3d 365 (3rd Cir. 2018)(headnotes); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 237-38 (3rd Cir. 2017); *Cox v. Horn*, 757 F.3d 113 (3rd Cir. 2014)(headnotes)).

[4] *Martinez v. Ryan*, 566 U.S. 1 (2012).

This Court, in a series of interrelated cases, has issued a "GVR" order regarding the eligibility of issuing COA's. In the *Slack* holding, the Supreme Court determined that the accused evinced the debatability of the district court's procedural ruling, yet the question if accused was entitled to COA was to be answered on remand. *Slack*, supra. As abovementioned, Ellerbe has satisfied both of §2253(c) components, albeit, his petition was still denied.

According to *Tennard v. Dretke*, this Court held that the Fifth Circuit applied an "improper legal standard" to petitioner's claim, so consequently, the petitioner was entitled to a COA. 542 U.S. 274 (2004). Here, the Delaware District used a questionable legal standard for determining if the *Martinez* exception applied. *Ellerbe v. May*, *supra*, at 19-22. Moreover, the Third Circuit rubberstamped those improper findings. *Ellerbe v. James T. Vaughn Corr. Ctr.*, *supra*.

Then, in *Miller-El v. Cockrell*, where the Highest Court held: "[t]he [] Circuit should have issued a COA to review the District Court's denial of habeas relief to petitioner." 537 US 322, 154 L Ed 2d 931, 123 S Ct 1029. In making its ruling, this Court explained:

> "[t]his inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district

court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id., at 484, 146 L Ed 2d 542, 120 S Ct 1595. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, ibid."

Again, in Ellerbe's case, his §2254 proceedings established a valid claim of trial counsel ineffectiveness, and given the facts presented, the district court's procedural ruling was wrong, but nonetheless, 'debatable'.

II. DELAWARE'S DISTRICT COURT'S FAILURE TO EXCUSE ELLERBE'S PROCEDURAL DEFAULTED CLAIM, CONDUCT EVIDENTIARY HEARING, AND/OR GRANT CERTIFICATE OF APPEALABILITY TO THE THIRD CIRCUIT WARRANT'S THIS COURT'S ATTENTION.

The District Court of the First State, erroneously found the *Martinez* exception inapplicable to excuse Ellerbe's procedural default without a hearing, then, also in error, stymied Petitioner's efforts at recourse by denying a COA to the Court of Appeals. *See* Appx. 11-15a.

Recently, in *Workman v. Superintendent Albion SCI,* after granting a COA, the 3rd Circuit Court of Appeals vacated and remanded the district court's judgment with instructions to grant habeas corpus relief. 915 F.3d 928 (3rd Cir. 2019). In brevity, the Court determined that due to trial's and postconviction counsel's ineffectiveness, petitioner's procedural default should have been excused. *Id.* at 944. Ellerbe's case is very analogous to *Workman's*.

First, at the close of the State's case, before and after jury deliberations, Ellerbe's trial counsel was ineffective for failing to file an acquittal motion for insufficiency of evidence regarding his drug offenses. The then-extant applicable law stated, in pertinent part: "The State need only prove that the defendant knew that the substance was possessed; and, that the substance was that which is alleged, and that the substance weighed a certain amount or was in a certain quantity."[5] *See* Appx. 50a. This deficient performance resulted in prejudiced because Ellerbe was convicted of 16 Del. C.

[5] 16 Del. C. §4751D (2014).

§4752(2)&(4), whereas the presented evidence-as a matter of law-should have ***only*** procured a 16 Del. C. §4763 conviction. Each count of §4752 held a 2-25 year penalty, while §4763 held a 0-6 month penalty. In *Hinton v. Alabama*[6], where this Court determined that petitioner's trial counsel was ineffective opined: "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." 188 L. Ed. 2d 1, 9 (2014)(*internal cites omitted*).

Secondly, on his first postconviction proceeding, Ellerbe's counsel failed to raise the above claim of trial counsel ineffectiveness. *See* Appx. 33-42a. As the Third Circuit recently explained: "If [accused] shows that his underlying ineffective-assistance-of-trial-counsel claim has some merit and that his state post-conviction counsel's performance fell below an objective standard of reasonableness, he has shown sufficient prejudice from counsel's ineffective assistance that his procedural default must be excused under *Martinez*." *Workman*, 915 F.3d at 941 (*internal cites omitted*). Consequently, the district court's trichotomous ruling of 1) erroneous procedural default findings, 2) failing to have hearing, and 3) failure to issue a COA, should be remedied.

Furthermore, it is not uncommon for the 3rd Circuit to vacate and remand district court decisions whereto analogous to Ellerbe's procedural default issue. In *Grimes v. Superintendent Graterford SCI*, the Third Circuit vacated the district court's dismissal of petitioner's procedurally defaulted claim, and remanded with instructions to conduct an

[6] Issue raised yet ignored on Petitioner's motion for reconsideration. D.I. 37.

evidentiary hearing in order to properly consider the procedural default ruling. 619 Fed. Appx. 146 (3rd Cir. 2015). Similar to Ellerbe's case, the district court failed to conduct an evidentiary hearing[7]. Also, in January 2022, when denying his motion for reconsideration, the district court duplicitously held, in part, that Delaware state courts has **approved** this "hypergeometric testing" in question. In arguendo, the district court cited to a nonprecedential case decided after Ellerbe's case. *See* Appx. 21-22a (citing *State v. Mitchell*, 2017 Del. Super. LEXIS 440). Moreover, it's notable that five subsequent years of Petitioner's offenses, it became **lawful** to apply the "hypergeometric" testing method. *See* Appx. 48-49a.

Finally, pursuant to *Farmer v. Wilson*, the Circuit Court vacated the district court's denial of petitioner's writ of habeas corpus and remanded to the district court to hold a hearing to determine the substantive basis of his ineffectiveness claim. 248 Fed. Appx. 291 (3rd Cir. 2007). Despite the absence of the 'procedural default issue' from the COA, the Circuit took it into consideration *sua sponte*. *Id.* at 294. Significantly, the Court explained that an attorney who failed to preserve a claim in state court could establish "cause under the exception to procedural default." *Id.* at 294 (*citing Edwards v. Carpenter*, 529 U.S. 446, 451 (2000)). In light of the initial petition, coupled by the subsequent pleadings[8] submitted to the district court in Ellerbe's case, Ellerbe should very least, the Petitioner should have been granted a hearing before making this procedural default determination.

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[7] *See* Appx. 14a.

[8] *See* Appx. 16-18a; also, 53-65a.

CONCLUSION

For the reasons herein, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals

Respectfully submitted,

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Dated: September 15, 2022