No. 22-6296 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARTIN A. LEWIS - PETITIONER

VS.

GARY MINIARD - WARDEN RESPONDENT

On Petition For Writ Of Certiorari

The Court judgment Petitioner seek to review

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
100 East Fifth Street, Rm., 540
Potter Stewart U.S. Courthouse
Cincinnatti, OH. 45202 - 3988

Date: December 6, 2022

Martin A. Lewis #138477
Martin A. Lewis #138477
Petitioner In Pro Se
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI. 48623
Veterans Unit 800-004

QUESTION(S) PRESENTED

Whether Petitioner Lewis' habeas petition should be re-opened where (1) Petitioner was denied Due Process of Law contrary to **United States v. Castro,** 540 U.S. 375 (2003), because Petitioner was not placed on notice of the consequences of deleting unexhausted claims, and (2) the United States District Court Judge erred in deciding exhaustion on one of Petitioner's ineffective assistance of counsel claims contrary to **Strickland v. Washington,** 466 U.S. 668 (1984).

Does the time limitation of Federal Rule Civil Procedure 60(c)(1), preclude relief from judgment under Rule 60(b)(6), where a Castro claim is involved in the responsive pleadings on exhaustion grounds?

Can a conditional statement be considered a waiver of Due Process of Notice, where **Rose v. Lundy,** 455 U.S. 509 (1982), and **United States v. Castro,** 540 U.S. 375 (2003), require Due Process of Notice?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF AUTHORITIES

Federal Cases Pages

TABLE OF AUTHORITIES CONTINUE

Cases — Pages

Constitutions

STATUTES

TABLE OF AUTHORITIES CONTINUE

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at NA; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the NA court appears at Appendix NA to the petition and is

[ ] reported at NA; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

TABLE OF CONTENTS

INDEX OF APPENDICES

INDEX OF APPENDICES (CONT.)

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 7, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NA, and a copy of the order denying rehearing appears at Appendix NA.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. A NA.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was NA. A copy of that decision appears at Appendix NA.

[ ] A timely petition for rehearing was thereafter denied on the following date: NA, and a copy of the order denying rehearing appears at Appendix NA.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. A NA.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitutions provides in pertinent part as follows:

In all criminal prosecutions, the accused shall ...have the assistance of counsel for his defense.

U.S. Const. Am. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

...nor shall any State deprive any person of life, liberty or property, without due process of law.

U.S. Const. Am. XIV.

28 U.S.C. §2241(c)(2)(3)

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(2) He is in custody for an act done or omitted in pursuant to an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

28 U.S.C. §2254(b)(1)(A)

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

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

Federal Rules of Civil Procedure Rule 60(b)(4)(6)

STATEMENT OF THE CASE

Petitioner Martin A. Lewis was convicted after a bench trial in the 9th Circuit Court for Kalamazoo County, Kalamazoo, Michigan of a single count of first-degree murder, MCL 750.316, and sentenced to a mandatory life sentence without the possibility of parole by the Honorable William G. Schma on October 9, 2000.

The conviction was based on evidence that Petitioner beat the victim to death with a baseball bat. The Michigan Court of Appeals affirmed Petitioner's conviction, see **People v. Lewis, No. 2380887**, 2002 WL 31957700, at *1 (Mich. Ct. App. Dec. 27, 2002)(per curiam), and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. See **People v. Lewis**, 671 NW2d 880 (Mich. 2003)(table).

Petitioner commenced this case in 2004. The State initially moved for summary judgment and dismissal of the habeas petition based on Petitioner's failure to exhaust two claim of ineffective assistance of trial counsel ("IATC").

The two claims in question stemmed from trial counsel's (1) failure to obtain an expert on eyewitness identification and (2) counsel forfeited Petitioner's right to impeach two trial witnesses with their prior convictions by not complying with the trial court's motion schedule.

In response to the State's motion, Petitioner maintained that he had exhausted his state remedies. Thereafter, entered a [conditional statement] that, if the Court agreed with the State's argument, he would delete the unexhausted claims and proceed with his exhausted claims. (ECF No. 30, PageID. 1968).

Former United States District Judge Lawrence P. Zatkoff was assigned to the case at that time, and he agreed with the State that Petitioner had not exhausted state remedies for his impeachment and expert-witness claims. (ECF No. 33, PageID.1989-1992).

Based on Petitioner's conditional statement, Judge Zatkoff denied the State's motion for summary judgment and dismissal. (ECF No. 33, PageID.1992).

Per the record, though Patitioner made an offer in a conditional statement that he himself would delete the unexhausted claims. District Court Judge Zatkoff recharecterize his conditional statement into an amendment and deleted the claims he deemed were unexhausted without a prior due process of notice warning that Petitioner's habeas petition would be subject to the 28 U.S.C. 2244 bar and his claims would be forever lost.

Among the exhausted issues that remained in the case was a claim that the trial court had interfered with Petitioner's right to present a defense by preventing defense counsel from impeaching two witnesses with their prior convictions.

On September 27, 2007, Judge Zatkoff denied Petitioner's habeas petition. (ECF No. 41). On the impeachment issue, he opined that, even if the trial court's ruling on impeachment of witnesses violated Petitioner's right to defend himself, the error was harmless, given Petitioner's admissions to close friends and relatives that he killed a man.

Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit, the Court declined to issue a certificate of appealability. See **Lewis v. Vasbinder**, No. 07-2265 (6th Cir. June 6, 2008).

Petitioner's subsequent procedural history indicates multiples trips to the state and federal courts from 2009 to present:

* In re Lewis, No. 09-1670 (6th Cir. Nov. 24. 2009)
* In re Lewis, No. 11-1658 (6th Cir. Sep. 12, 2011)
* In re Lewis, No. 12-2246 (6th Cir. May 16, 2013)

In 2014, Petitioner filed a motion for relief from judgment in the state trial court and raised the two ineffective assistance of counsel claims that Judge Zatkoff had determined were unexhausted.

The trial court opined that Petitioner had raised the impeachment/ineffectiveness claims in his direct appeal motion for remand and the Michigan Court of Appeals had decided the issues again on appeal. The trial court concluded that it was precluded under MCR 6.508(D)(2) from granting relief on that issue. See **People v. Lewis, No. 2000-0171-FC** (Kalamazoo Cty, Cir. Ct. Mar. 30. 2015).

Petitioner appealed the trial court's decision but the Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal. See **People v. Lewis,** No. 328472 (Mich. Ct. App. Sept. 29, 2015); **People v. Lewis,** 882 NW2d 144 (Mich. 2016). The procedural record supports Petitioner's federal filings In re Lewis, No. 17-1253 (6th Cir. Jul. 19. 2017).

In 2018, Petitioner moved to amend his habeas petition and to re-open his case under Federal Rule of Civil Procedure 60(b). (ECF Nos. 57 & 58). He argued that his trial attorney was ineffective for failing to obtain an expert witness and impeach two prosecutions witnesses with their criminal histories. Petitioner based his claims for re-opening his habeas petition on Judge Zatkoff's error in determining exhaustion by the record of the trial court's examination of his original direct appeal that these issue had been previously raised and were barred under MCR 6.508(D)(2).

The United States District Court Judge Sean Cox was assigned to this case due to the retirement of Judge Zatkoff and on January 14, 2019, denied Petitioner's motion to amend his habeas petition and to re-open the case.

Petitioner requested rehearing and the Court denied the request, in part, because there was not a reasonable probability that the outcome of the trial would have been different if defense counsel had impeached the witnesses with their prior convictions. The Court noted that there was substantial evidence implicating Petitioner in the murder, apart from the witnesses' testimony. (ECF No. 63, Page.2293). Petitioner then requested a rehearing **en banc**, which the Court denied on January 14, 2020.

On June 2, 2020, the Sixth Circuit Court of Appeals denied a certificate of appealability on the basis that no reasonable jurist could conclude that the District Court abused its discretion in denying Petitioner's motion. See **Lewis v. Winn, No.** 20-1094 (6th Cir. June 2, 2020).

On August 27, 2020, Petitioner filed another motion to re-open his case on the grounds that Judge Zatkoff failed to adjudicate the merits of his impeachment/IATC claims. (ECF no. 73). On March 24, 2021, the Court denied Petitioner's motion to re-open the case. (ECF No. 75).

A timely notice of appeal was filed and the Court of Appeals for the Sixth Circuit entered an order on October 7, 2022, affirming the district court's denial to re-open Petitioner's habeas proceedings under Federal Rule Civil Procedure 60(b), and denying certificate of appealability (COA) and to proceed in forma pauperis on appeal.

REASONS FOR GRANTING OF WRIT

Petitioner was denied Due Process of Law (Notice) by the United States District Court Judge's recharacterization of his conditional statement regarding two unexhausted IATC claims and transformed his conditional statement into a deletion of alleged unexhausted claims and amended the petition into an exhausted petition. Petitioner contends that the District Court erred as a matter of law, where one IATC claim had been exhausted.

The District Court further erred contrary to the holding in **Castro v. United States**, 540 U.S. 375 (2003), since the Court failed to provide a 28 U.S.C. §2244(b) warning of the consequences of the deletion of any unexhausted claims. Petitioner was not provided the opportunity to amend his petition or argue against any articulated findings of the District Court Judge during the recharacterization.

Moreover, the District Court erred under **Strickland v. Washington**, 466 U.S. 668 (1984), where it failed to assess the cumulative effect of trial counsel's deficient performance to determine the prejudicial effect.

Petitioner's claim of recharacterization under **Castro** is novel since it deal specificelly with an erroneous ruling on exhaustion during the summary judgment affirmative defense of exhaustion Federal Rule Civil Procedure Rule 8(c), and denial of an opportunity to amend under Federal Rules Civil Procedure Rule 15(a)(2). See also Section 2254 Cases Rule 5(e).

In this matter, Federal Rule Civil Procedure Rule 60(c) time limitation does not preclude re-opening Petitioner's habeas petition once a **Castro** violation has been demonstrated. See **United States v. Blackstock**, 513 F3d 128 (4th Cir. 2008).

GROUND ONE

WHETHER PETITIONER LEWIS' HABEAS PETITION SHOULD BE RE-OPENED WHERE (1) PETITIONER WAS DENIED DUE PROCESS OF LAW CONTRARY TO UNITED STATES V. CASTRO, 540 U.S. 375 (2003), BECAUSE PETITIONER WAS NOT PLACED ON NOTICE OF THE CONSEQUENCES OF DELETING UNEXHAUSTED CLAIMS, AND (2) THE UNITED STATES DISTRICT COURT JUDGE ERRED IN DECIDING EXHAUSTION ON ONE OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CONTRARY TO STRICKLAND V. WASHINGTON 466 U.S. 668 (1984).

I. Background

Following a bench trial in the 2000, Petitioner was found guilty of first-degree murder, Mich. Com. Laws §750.316, and sentence to mandatory life imprisonment without possibility of parole. The Michigan Court of Appeals affirmed Petitioner's conviction. See **People v. Lewis, No. 2380887, 2002 WL 31957700**, at *1 (Mich. Ct. App. Dec. 27, 2002), and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. See **People v. Lewis**, 671 NW2d 880 (Mich. 2003)(table).

Petitioner commenced this case in 2004 by filing a motion to proceed in forma pauperis (ECF No. 1), and a petition for writ of habeas corpus. (ECF No. 3). The State initially moved for summary judgment and dismissal of the petition since Petitioner had not exhausted state remedies on at least one of his two claims about trial counsel. See Mot. for Summary Judgment J. and Dismissal of Pet. (ECF No. 11). These two claims in question alleged that trial counsel was ineffective for (1) failing to procure an expert witness on eyewitness identification and (2) forfeiting Petitioner's right to impeach two trial witnesses with their prior conviction. See Id. at Page.195-96.

Former U.S. District Judge Lawrence P. Zatkoff agreed with the State that

Petitioner had not exhausted state remedies for those claims. However because Petitioner made a [conditional statement] that he himself would delete those claims, Judge Zatkoff denied the State's motion for summary judgment and dismissal. See Op. and Order Denying Respondent's Mot. for Summary J. and Dismissal (ECF No. 33).

Per the record in this Court, Judge Zatkoff did not warn Petitioner of the consequence of deleting any unexhausted claims and the 28 U.S.C. §2244 bar contrary to **United States v. Castro**, 540 U.S. 375 (2003), since he based his decision on **Rose v. Lundy**, 455 U.S. 509 (1982), which was a pre-AEDPA case. **Rose** had been abrogated in part by this Court's rulings in **Rhines v. Weber**, 544 U.S. 269 (2005), which was applicable to post-AEDPA cases, such as Lewis' by the time of the District Court's decisions in 2005 and 2007.

Here, Petitioner exhaustion requirement should have been excused because his IATC claims were procedurally barred if presented to the state court, since an IATC claim was raised on initial direct appeal and MCR 6.508(D)(2), would have been applied.

In this case at bar, Petitioner in 2018, moved to re-open his case and to amend his habeas petition under Federal Rule Civil Procedure Rule 60 (b)(4)&(6), citing that Judge Zatkoff had erred when he determined that Petitioner did not exhaust state remedies for these claims. See (ECF Nos. 57 thru 73).

II. EXHAUSTION REQUIREMENT OF 28 U.S.C. §2254

Habeas relief generally is not available unless the petitioner has "exhausted the remedies available" in the state courts, which means utilizing all procedures available under the state law to raise the claim and properly pursuing a claim through the entire appellate process of the state. See 28

U.S.C. § 2254(c).

Moreover, in order to present a federal claim to the state courts in a manner sufficient to satisfy exhaustion concerns, a petitioner must inform the state court of both the factual and legal underpinnings of the claim. See **Picard v. Conner,** 404 U.S. 270, 276-78 (1971).

Exhaustion can also occur when a state court sua sponte examined federal constitutional claims. See **Jones v. Dretke,** 375 F3d 352, 355 (5th Cir. 2004)(exhaustion requirement satisfied because state courts sua sponte examined federal constitutional claims).

The Second Circuit, in **Twitty v. Smith,** 614 F2d 325, 332 (2d Cir. 1979) held, "the mention of 'effective assistance of counsel' instantly calls to mind the Sixth Amendment's guaranty of the accused's right 'to have the Assistance of Counsel for his defence'". See also **Brady v. Ponte,** 706 F.Supp. 52, 54 (D. Mass. 1988)(stating that explicit reference to "ineffective assistance of counsel" suffices to exhaust a Sixth Amendment claim)(dictum).

Petitioner contends that any failure to cite directly to federal precedent in his journey through the state appellate process, that such omissions are not fatal. See **Scarpa v. Dubois,** 38 F3d 1, 8 (1st Cir. 1994).

III. DUE PROOF OF EXHAUSTION OF IATC CLAIMS

On direct appeal, the Michigan Court of Appeals in reviewing the abuse of discretion claim on the preclusion of witnesses' prior convictions for impeachment purpose under MRE 609. The court opined that it could not accept that the trial counsel did not understand the order...and, further that counsel was responsible for familiarizing himself with the court file and there is no suggestion that he was not aware of the order. **People v. Lewis,** WL 31957700 at *4, ¶V.

In this Court of Appeals' opinion placed the onus on the trial counsel and

ruled that the trial court did not err in its decision. A cursory review of the Michigan Court of Appeals' opinion supports that the appellate review side stepped the ineffective assistance claims, though placing trial court error on the defense counsel by failure to familiarize himself with the court file, failure to adhere to Local Rule 6.001(E)(2) of the Ninth Judicial Circuit, failure to file a timely motion which resulted in a wavier of claims and defense. **Lewis, WL 31957700 at *4-5, ¶V.**

The Court of Appeals further opined regarding the eyewitness identification expert, "defendant never notified of this alleged situation, never made a request for additional funds, and never asserted that he was unable to retain another expert for the authorized amount...and that the defendant never represented that the amount authorized was insufficient, we conclude that plain error has not been shown. Thus, the record shows that the court side step the IATC claim and review the claim under plain error as the trial court abuse of discretion, though pointing to trial counsel's deficient performance.

Even the perjury/prosecutorial misconduct claim support counsel's deficient performance, where the Court of Appeals makes specific reference to defense counsel's [ample] opportunity to impeach the witnesses' credibility at trial with their prior statements. **Id. at *5, ¶VI-VII.**

The Court of Appeals further, opined that, "the record indicates that defense counsel had access to all of the police reports and other documents, and had ample opportunity to use them in cross-examining the witnesses". **Id. at *5-6.**

As part of the appeal in Petitioner's case, Petitioner filed a Motion to remand, and in that motion Lewis argued that trial counsel's failure to file a pre-trial motion to impeach constituted ineffective assistance of counsel.

The Court of Appeals denied Lewis' motion to remand for failure to persuade the Court of the necessity of remand at the time. The remand issue was raised in the Michigan Supreme Court, thus exhaustion occurred on the IATC/impeachment grounds.

The Petitioner argued in the U.S. District Court during his responsive pleadings that contrary to the Respondent's pleading for summary judgment for failure to exhaust on at least one of his ineffective assistance of counsel claims. See (ECF No. 11).

On November 30, 2004, Lewis filed his response to the Motion to Dismiss for Summary Judgment. (ECF No. 30).

Petitioner cited, "Further more **'if'** this Court decides in favor of Respondent, for any reason that Petitioner did not forsee (not being an attorney) that, Petitioner would delete the claims at issue and move forward with the Writ." (ECF No. 30).

On September 30, 2005, Judge Zatkoff entered an order denying Respondent's motion to dismiss, and Summary Judgment. (ECF 33)

On September 27, 2007, Judge Zatkoff entered an Order/Judgment denying Habeas Corpus Petition and Declining to Grant a Certificate of Appealability. (ECF Nos. 41 & 42).

The Respondent in their Motion to Dismiss and Summary Judgment specifically stated "that the petition contains at least one unexhausted claim and is subject to dismissal under **Rose v. Lundy,** 455 U.S. 509, 522 (1982), and moved for summary judgment. See **Resp. Mot. for Summary J. at pp. 1-2.**

Petitioner is not contesting unexhaustion on the eyewitness expert/IATC claims, since it was only presented to the State's Supreme Court. The error of the State occurred where the Respondent failed to refer to the Motion and Brief for Remand which addressed the waiving of Lewis' right to impeach two

witnesses with prior convictions, and failure to comply with the motion schedule. This was present to the Michigan Court of Appeals in the appellate brief and remand motion as IATC claims. A cursory review of the Respondent's plead Rule 5 material supports this error. **Resp. Mot. for Summary J. at *1.**

Judge Zatkoff's concurrence with the Respondent was an error of law. See **Elmore v. Foltz,** 768 F2d 773, 775 (6th Cir. 1985)(Court concluding that Elmore having raised his claim in a properly filed motion to remand constitutes a fair presentation to the Michigan Court of Appeals).

Petitioner contends that this is a novel claim based on Due Process of Notice and Castro, since this Court has not dealt exclusively with the recharacterization issues in the context of the post-AEDPA, and **Rhine v. Weber,** 544 U.S. 269 (2005). The advisement of the consequences of deletion was still required, even though Petitioner entered a [conditional statement] for deletion, and recharacterized as a deletion motion by Judge Zatkoff. See **Castro,** 540 U.S. at 383.

Petitioner ask this Court to take note of the 2005 Order denying Motion to Dismiss and Summary Judgment by Judge Zatkoff, in conjunction with this Court's March 30, 2005 ruling in **Rhine v. Weber,** 544 U.S. 269 (2005).

A case on point regarding the controversy is **Duncan v. Walker,** 533 U.S. 167, 182-183, 192 (2001), recognizing that nearly every circuit has adopted stay-and-abeyance procedures. See also **Pliler v. Ford,** 542 U.S. 225, 236-240 (2004)(Ginsburg, J., and Breyer, J. dissenting).

Moreover, Rose v. Lundy, was a pre-AEDPA decision of this Court, which affected by the holding in Castro and Rhine both post-AEDPA rulings of this Court. The Sixth Circuit by the time of Petitioner's case had established a stay-and-abeyance procedures. See **Palmer v. Carlton,** 276 F3d 777, 781 (CA6 2002). Notably in Pliler, this Court did not see that Castro was applicable

to the question of whether a district court is required to explain to a pro se litigant his options before a voluntary dismissal, holding that its reasoning sheds no light on the question we confront. **Pliler**, 542 U.S. at 234. Petitioner contends that **Castro** is applicable to the question of due process of notice, in context of the Great Writ and the forfeiture of it, by an unknowing or unintelligent waiver, and loss of a meritorious constitutional claim which holds a person in prison. The very essence of the Great Writ, which has been affected by the AEDPA's statutory provisions in 28 U.S.C. §2244 and §2254.

Petitioner moves this Court to review the [conditional statement] under its precedent of waiver. See **Ohio Bell Tel. Co. v. Public Utilities Comm'n**, 301 U.S. 292, 307 (1937)(This Court has said in the civil area, "we do not presume acquiescence in the loss of fundamental right"). See **U.S. Const. Art. I, §9 "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."**

This Court should review this claim as a Due Process of Notice violation under the AEDPA context and addressing whether **Castro** requires re-opening a habeas petition.

IV. THE UNITED STATES DISTRICT COURT ERRED IN DECIDING EXHAUSTION ON ONE OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CONTRARY TO STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Among its several important safeguards, the Sixth Amendment to the United States Constitution provides that : "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence."

In a system of justice premised on the assumption that the clash of skilled advocates representing the opposing views of the parties is the surest path to the truth, it only makes sense to involve an attorney for the defense as a counterweight to the public prosecutor.

No state court has adjudicated the merits of Lewis' ineffective claim, prior to Judge Zatkoff's conversion of this IATC claim as unexhasuted. Therefore, the deferential standard of review set forth in section 2254(d) of the AEDPA does not apply, as there is no state court conclusion by which review could be circumscribed. **Wiggins v. Smith,** 539 U.S. 510 (2003).

In analyzing, Lewis' ineffective assistance of counsel claim, this Court considers "the totality of the evidence - 'both that adduced at trial, and the evidence adduced in the habeas proceeding.'" **Wiggins,** 539 U.S. at 536 (quoting **Williams v. Taylor,** 529 U.S. 362, 397-98 (2000))(emphasis omitted).

The familiar two-prong test set forth in **Strickland v. Washington,** 466 U.S. 668 (1984), governs this analysis.

The first prong requires Lewis to prove that his trial counsel's representation was deficient in that it "fell below an objective standard of reasonebleness." **Strickland,** 466 U.S. at 688.

The second prong requires that Lewis demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," Id. at 694.

Here the September 30, 2005, Opinion/Order Denying Respondent's Motion for Summary Judgment and Dismissal, and directing Respondent to file an Answer to the Habeas Petition cited that "two of Petitioner's claims that counsel was ineffective for failing to take adequate steps to impeach witnesses, and counsel was ineffective for failing to obtain an expert witness on

identification. Respondent argues that neither of these claims have been exhausted in the state court. Op. at *4-5.

The Petitioner contends and the record by the State in their responsive pleadings support that they never raised how the exhaustion did not occur in their briefs. See (ECF Nos.11 & 38). District Court Judge Zatkoff on his own raised how exhaustion did not occur and cited that, "The Michigan Court of Appeals requires issues to be identified in the statement of questions presented, and issues so not identified need not be considered by the Court. **Joerger v. Gordon Fod Serv.,** 568 NW 2d 365, 368 (Mich. Ct. App. 1997). Petitioner did not include the impeachment ineffective assistance claim in his statement of questions presented. Thus, it was not properly before the Michigan Court of Appeals." Op. Id. at *7. The Court made no reference to the Motion/Brief to Remand. The Remand Motion citing explicitedly at ¶4 - The primary issue Mr. Lewis seeks to have reviewed on appeal is whether he is entitled to a new trial because he was denied his constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); People v. Pickens, 446 Mich 298 (1994). A claim of ineffective assistance which depends in part on fact not on the record must first be brought before the trial court. People v. Mitchell, 454 Mich 145, 162-164 (1997); People v. Ginther, 390 Mich 436 (1973).

Moreover, Remand at ¶6, Lewis cited, "In addition, Defendant seeks remand to create a factual record concerning the trial court's obstruction of counsel's effort to impeach witnesses by prior conviction, as well as a factual concerning the proposed expert witness' reason for declining to review his case."

These two reasons conjunctively, supported that the fault and reasons would have been based on the ineffective assistance of trial counsel, which were

not made on the record. The specific purpose of a remand under Ginther. The brief in support of remand, made an offer of proof in support of the IATC claim as required by MCR 7.211(C), with the criminal histories as Appendices D and E. See Def. Remand Br. at *34.

Notably, the Michigan Court of Appeals did not cite the absence of the IATC/Impeachment claims in their two orders. Thus, constituting a waiver of the procedural misstep. The Respondent also waived this argument, since it did not raise how Petitioner had not complied with exhaustion.

Judge Zatkoff erred by making a finding that was not raised by the State. Further, the reliance on **Martens v. Shannon,** 836 F2d 715, 717 (1st Cir. 1988), was misplaced and in conflict with **Twitty in the Second Circuit, Scarpa,** 38 F3d at 8, **supra,** which was also a First Circuit case.

Strickland, required that, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." **466 U.S. at 690.**

Moreover, under the Strickland inquiry, there is an additional fundamental legal principle regarding the ineffective assistance of counsel claims, after a reviewing court analyzes each claim of deficient performance to determine whether prejudice was establish, if no single claim amounts to prejudice, the court must assess the cumulative prejudicial impact of all deficient performance claims. Strickland, 466 U.S. at 690; **Williams v. Taylor,** 529 U.S. 362, 395-96, 398-99 (2000)(considering cumulatively multiple errors of counsel in finding prejudice in light of the "entire...record viewed as a whole").

In this case, sub judice, the District Court's original review of the State's trial record and the exhaustion was contrary to Strickland, where the Impeachment/IATC/impeachment claims had been exhausted and erroneously

deleted by Judge Zatkoff. This Court should grant a review of the Strickland IATC claims properly exhausted.

GROUND TWO

DOES THE TIME LIMITATION OF FEDERAL RULE 60(c)(1), PRECLUDE RELIEF FROM JUDGMENT UNDER RULE 60(b)(6), WHERE A CASTRO CLAIM IS INVOLVED IN THE RESPONSIVE PLEADING ON EXHAUSTION GROUNDS?

I. CASE FACTS

In 2004, Petitioner filed his first habeas petition 28 U.S.C. §2254, in which he raised several claims including that trial counsel had rendered ineffective assistance. The district court determined that Petitioner had failed to exhaust his state remedies with respect to his ineffective assistance of trial counsel claims, denied Lewis' remaining claims on the merits, and declined to issue a COA. **Lewis v. Vasbinder, No., 04-CV-71140-DT, 2007 WL 2812306, at *4-12 (E.D. Mich. Sept. 27, 2007).** The Court of Appeals for the Sixth Circuit also declined to issue a COA. **Lewis v. Vasbinder, No. 07-2265 (6th Cir. June 6, 2008)(order).**

In 2009, Lewis filed for relief from judgment under Rule 60(b). The district court construed the motion as successive §2254 petition because it attacked the merits of Lewis' conviction. The district court therefore transferred the motion to the Sixth Circuit for consideration, which was subsequently denied. **In re Lewis, No. 09-1670** (6th Cir. Nov. 24, 2009)(order). Lewis filed 3 more motions for authorization in 2011, 2013, and 2017, which were denied.

Petitioner between these filings, filed a 2014 relief from judgment pursuant to MCR 6.500, in which he raised the IATC claims that the federal court had deemed unexhausted under Rose v. Lundy in the habeas proceedings. Petitioner also raised that his appellate counsel was ineffective as cause and prejudice under MCR 6.508(D). The trial court denied relief and the Michigan Court of Appeals denied leave to appeal. **People v. Lewis,** No. 328472, (Mich. Ct. App. Sept. 29, 2015). The Michigan Supreme Court denied leave to appeal this decision. 882 NW2d 144 (Mich. 2016).

In April 2018, Petitioner moved the district court to reopen his habeas petition pursuant to Rule 60(b)(4) and (b)(6). Further, moved to amend his habeas petition under Rule 15(a)(2) in order to raise the ineffective assistance of trial counsel claims that he advanced in his state relief from judgment motion, as well as a claim challenging the district court's prior determination that those claims were unexhausted. The district court denied the Rule 60(b) motion as untimely, denied the Rule 15(a)(2) motion as futile, and declined to issue a COA. The district court also denied Lewis' subsequent motion for reconsideration.

The Court of Appeals for the Sixth Circuit again denied COA and motion for pauper status. **Lewis v. Winn,** No. 20-1094 (6th Cir. June 2, 2020)(order). On August 27, 2020, Petitioner filed a second Motion to reopen Judge Zatkoff's judgment. (ECF Doc. 73).

District Court Judge Sean F. Cox, reviewed Petitioner's claims that his willingness to delete the claim on habeas review was a [conditional statement] and that Judge Zatkoff erred in mischaracterizing Petitioner's conditional statement as a motion to withdraw the unexhausted claims. Additionally, that Petitioner asserts that Judge Zatkoff should have given him his an opportunity to be heard before recharacterizing his conditional statement as a motion to withdraw or to delete his unexhausted claims himself.

Lewis raised this claim under both Rule 60(b)(4) and (b)(6). Judge Cox, opined that the Rule 60(b) motion was not filed within a reasonable time. **Lewis v. Vasbinder,** 2021 U.S. Dist. LEXIS 55188 at *6-7.

Judge Cox on the Rule 60(b)(4) claim citing **United States Student Funds. Inc. v. Espinosa,** 559 U.S. 260, 271 (2010), that:

"A void judgment under Rule 60(b)(4) "is one so affected by a fundamental infirmity may be raised even after the judgment becomes final." Espinosa, 559 U.S. at 270. "The list of such infirmities is exceedingly short[.]" Id. "A judgment is not void,' for example, 'simply because it is or may have been erroneous.'" Id. (end Citations omitted). "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." Id. at 271.

Petitioner had asserted a due process of notice violation. The district court disagreed pointing to the responsive pleadings regarding the unexhausted claims and his conditional statement. 2021 U.S. Dist. LEXIS 55188 at *8-9".

Judge Cox did opine that "Even if Zatkoff erred on the exhaustion issue, a judgment is not void merely because it may have been erroneous. Espinosa at 270. Id. at *9.

Judge Cox, ruled in similar fashion on the Rule 60(b)(6) claim, that the claim was untimely and the IATC claim lacked merit. Denying motion for Leave to Re-Open the Judgment and declining to issue a COA. Id. at 11-12.

Petitioner moved for an extension of time to file a petition for panel rehearing/reconsideration on April 20, 2021, then on May 12, 2021, filed his petition for panel rehearing. (ECF No. 79). The Panel rehearing was denied and COA, on Decmeber 7, 2021. (ECF No. 80). Lewis timely filed a notice of appeal on December 15, 2021. **Lewis v. Miniard,** No. 21-1833 (6th Cir. Dec. 15, 2021).

On January 31, 2021, Lewis filed Application for Certificate of Appealability. On October 7, 2022, the United States Court of Appeals for the Sixth Circuit denied COA and leave to proceed in forma pauperis on appeal. **Lewis v. Minierd, No. 21-1833 (6th Cir. Oct. 7, 2022).** Petitioner now moves for a Writ of Certiorari to this Honorable Court.

II. A Castro claim involved in responsive pleading on exhaustion grounds does not preclude a review of the claim under FRCP Rule 60(c)(1).

Petitioner relies not only on **United States v. Castro**, 540 U.S. 375 (2003), but also the Fourth Circuit's application of Castro in **United States v. Blackstock**, 513 F3d 128 (4th Cir. 2008).

In Blackstock, he raised a challenge to the district court's dismissal of his motion under 28 U.S.C. §2255 as successive. Blackstock had pled guilty to federal weapons charges in 1993. In 2001, he filed a motion seeking to require the government to produce all documents associated with his case. The relief request was simply the production of the requested documents, since his conviction had been invalidated under the 2000 decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000). The district court recharacterized the discovery motion into a petition under 28 U.S.C. §2255, and because Apprendi had not been retroactively applied, the court denied the petition on the merits.

In 2005, Blackstock filed a motion under Rule 60(b), sought to set aside the district court's 2001 ruling. Blackstock argued that the district court had improperly converted his 2001 discovery motion into a §2255 petition. Blackstock attached a new §2255 petition to his Rule 60 motion, which the district court denied, looking to the pre-Castro decision in **United States v. Emanuel**, 288 F3d 644 (4th Cir. 2002), concluding that no notice of the conversion of the discovery motion into a §2255 petition was required.

The district court then dismissed the §2255 petition filed with the Rule 60 motion, because he had not received permission from the court to pursue a second or successive §2255 petition. See 28 U.S.C. §2244(b).

In this case, Petitioner Lewis contends that his conditional statement regarding the deletion of any unexhausted issue was not a consent for the district court to act on his behalf, but rather, as a counter-offer. See **Agema v. City of Allegan,** 826 F3d 326, 333 (CA6, 2016)(holding, "A counter-offer generally constitutes a rejection of the original offer").

Moreover, if an amend was to occur at all, Petitioner was entitled to amend his pleading. See **Littlejohn v. Artuz,** 271 F3d 360 (CA 2, 2001).

Here, the State and district court relied heavily on Rose v. Lundy, regarding the unexhaustion of Lewis' IATC claims. The district court's in reliance the State, that there were two unexhausted claims, but there was only one unexhausted IATC claim, the expert witness/IATC claim.

The Court reliance on pre-AEDPA Rose, which had been abrogated by Rhine v. Weber, 540 U.S. 269 (2005), further its error of law on exhaustion.

The body of this argument is that in applying **Castro**, the procedural missteps by a district court should fall within the defined parameters of the U.S. Constitutions right to Due Process of Notice. See U.S. Const. Ams. V, XIV.

The unadvised and unconsulted consequences of any deletion, mislead the Petitioner in an unnecessary deletion of an exhaustion Sixth Amendment, Strickland claim.

The time limit of Rule 60(c)(1), should not count against Lewis since the error was predicated on the district court's error of law regarding 28 U.S.C. §2254(b)(1)(A). Further, parties cannot consent or otherwise agree to violate federal law, 28 U.S.C. §2254 is a federal law.

In Blackstock, the Fourth Circuit Court of Appeal, overlooked the time limit of FRCP Rule 60(c)(1), holding:

"The government argues that Blackstock's was filed his petition more than four years after his discovery motion was recharacterized by the district court and more than two years after the Supreme Court decided Castro, was not filed within a reasonable time. While we are inclined to agree with the government about Blackstock's entitlement to relief under Rule 60(b), we believe that under Castro, any deficiencies in Blackstock's Rule 60 motion do not foreclose his right to relief on his §2255 petition". Blackstock, 513 F3d at 134.

Petitioner contends that under the Equal Protection Clause and Due Process Clause, any unwarned consequence in §2254 or §2255 habeas petition case should be warned if the pleading of an untrained **pro se** litigant is required to choose the effects of a motion/pleading which would have dire consequences on future habeas petitions under §2244. Petitioner warned the Court that he was untrained in the law, and to his detriment, the district erred in exclusion/deletion of an exhausted constitutional claim. The district court erred by not applying the post-AEDPA laws in existence in 2005, when Lewis' petition was ruled on regarding the deletion.

Petitioner Lewis moved this Honorable Court to answer the question of whether Castro can be used to overcome the time limitation of Federal Rule Civil Procedure Rule 60(c)(1), regarding conversion of a responsive pleading in habees corpus proceeding resulting in an improper dismissal of an exhausted constitutional claim.

GROUND THREE

CAN A CONDITIONAL STATEMENT BE CONSIDERED A WAIVER OF DUE PROCESS, WHERE ROSE V. LUNDY, 455 U.S. 509 (1982), AND UNITED STATES V. CASTRO, 540 U.S. 375 (2003), REQUIRE DUE PROCESS OF NOTICE?

I. Whether a Petitioner has made an intelligent waiver of his or her constitutional rights depends on the individual facts of each case, including the background, experience, and conduct of the accused.

In **Johnson v. Zerbst**, this Court stated that whether a defendant has made an "intelligent waiver" of his or her constitutional rights depends on the individual facts of each case, "including the background, experience, and conduct of the accused." 304 U.S. 458, 464 (1938).

The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In this case sub judice, Petitioner Lewis entered the federal court on application for writ of habeas corpus under 28 U.S.C. §2254, and Respondent moved for summary judgment and dismissal contending Lewis had not exhausted two of his ineffective assistance of counsel claims.

Petitioner maintained that he did exhaust state remedies for these claims.

In the September 30, 2005, Opinion and Order Denying Respondent's motion for Summary Judgment and Dismissal and Directing Respondent to File an answer to the habeas petition, District Court Judge Lawrence P. Zatkoff, found that Petitioner did not raise the disputed claims as independent claims in both state appellate court. However, because Petitioner has agreed to delete the claims if the Court finds them unexhausted, Respondent's motion will be denied. See (ECF No. 33).

Through the course of this opinion, there is no Due Process of Notice warning of the consequence of deleting the two IATC claims, and Petitioner's conditional statement does not amount to a knowing waiver of review of the Great Writ in accordance with the AEDPA.

Therefore, "The question of a waiver of federal guaranteed constitutional right is, of course a federal question controlled by federal law". See **Brookhart v. Janis,** 384 U.S. 1, 4 (1966).

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." **Mathews v. Eldridge,** 424 U.S. 319, 348-49 (1976).

It is axiomatic that a waiver as defined in **Johnson v. Zerbst,** 304 U.S. 458, 464 (1938), is "an intentional relinquishment or abandonment of a known right or privilege". The Court added, "Courts indulge very reasonable presumption against waiver" of fundamental constitutional rights and * * * we "do not presume acquiescence in the loss of fundamental rights."

Moreover, waiver consist of two seperate parts: 1) a specific knowledge of the constitutional right; and 2) an intentional decision to abandon the protection of constitutional rights. Both of these elements must be present and if either is missing there can be no waiver and finding of consent.

Petitioner's Castro claim supports that he was not aware of the consequence of a deletion, and unaware that the impeachment/IATC had in fact be exhausted. The

record supports that Petitioner Lewis plead his ignorance of the law, and sought advisement by the district court. The conditional statement was not permission for the court to act on his behalf but rather to rule on how the claim was unexhausted and provide the necessary consequence and procedure for deletion or enter an amendment order as suggested by the State.

Thus, if the district court agreed with the Respondent, the Respondent requested that an order be enter directing Lewis to withdraw the unexhausted claims, or at least one unexhausted claim. Petitioner could not have waived this recharacterization claim, because he had no knowledge of the consequence of withdrawal in his future habeas proceeding under the time limitation set by the AEDPA and 28 U.S.C. §2244. See **In re Neilor,** 487 F3d 1018, 1023 fn. 23 (6th Cir. 2007)(court may only construe post-conviction motion as §2255 petition if petitioner understands consequences and given opportunity to withdraw). See also **In re Shelton,** 295 F3d 620, 622 (6th Cir. 2002).

The Sixth Circuit Court of Appeals declined to a COA, though this recharacterization claim was raised in the district court. The Sixth Circuit also relied on a waiver by this conditional statement, that falls short of the waiver requirments. See **Lewis v. Miniard, No. 21-1833 (6th Cir. Oct. 7, 2002).**

In conclusion, a Due Process of Notice violation occurred and Petitioner Lewis' conditional statement cannot be construed as a waiver to a review of his exhausted impeachment/IATC claims. Writ of Certiorari should be granted on these issues, or an evidentiary hearing should be conducted pursuant 28 U.S.C. §2254(e)(2)(A)(i); **Townsend v. Sain,** 372 U.S. 293 (1963).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Martin a. Lewis

Date: Dec. 6 2022

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____ — PETITIONER
(Your Name)

VS.

_____ — RESPONDENT(S)

PROOF OF SERVICE

I, _____, do swear or declare that on this date, _____, 20___, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 20___

_____
(Signature)