No. 23-5585

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT DAVID GREECH

VS.

STATE OF OHIO-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SCOTT DAVID CREECH

P.O. BOX 5500

CHILLICOTHE, OHIO 45601

Questions Presented:

I. CAN A LEGITIMATE 60(B)(6) MOTION BE CONSIDERED A 60(B)(3) CLAIM, IF THAT CLAIM DOES NOT ASSERT RELIEF FROM JUDGMENT IN THE EVENT OF "FRAUD . . . MISREPRESENTATION, OR MISCONDUCT BY AN OPPOSING PARTY? AS SUCH, CAN IT BE BARRED BY THE ONE (1) YEAR STATUTE OF LIMITATIONS?

II. DOES THE CASE OF STONE V. POWELL, 428 U.S. 465, 494, 96 S. CT. 3037, 49 L. ED. 2D 1067 (1976), OVERRIDE THE CASE OF FRANKS V. DELAWARE, 438 U.S. 154, 98 S. CT. 2674, 57 L. ED. 2D 667 (1978) IN A HABEAS CORPUS PETITION? AND WAS PETITIONER PROVIDED A FULL AND FAIR LITIGATION OF HIS FOURTH AMENDMENT CLAIM IN STATE COURT?

☑ All parties appear in the caption of the cover page.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☑ 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 Creech v. Shoop, 2023 U.S. App. Lexis 5417 (6th Cir., Mar. 7, 2023).

The Opinion of the United States District Court appears at Appendix B to the petition and is reported at Creech v. Warden, 2022 U.S. Dist. Lexis 175668, 2022 WL 4480124 (S.D. Ohio, Sept. 27, 2022.

The Rehearing in Bank appears at Appendix C to the petition and is reported at Creech v. Shoop, 2023 U.S. App. Lexis 13288 (6th Cir., May 30, 2023).

JURISDICTION

☑ For cases from **Federal Courts:** The date the United States decided my case was March 7, 2023.

☑ A timely petition for rehearing was denied by the Sixth Circuit Court of Appeals on May 30, 2023.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.) **Fourth Amendment:** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2.) **Sixth Amendment:** 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.

3.) **Fourteenth Amendment: [Citizens of the United States.]** 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 to any person within its jurisdiction the equal protection of the laws.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

[X] This case is from the Sixth Circuit Court of Appeals.

The opinion of the sixth circuit court of appeals to review the merits appears at appendix B to the petition.

The opinion for rehearing en banc from the sixth circuit court of appeals appears at appendix A to the petition.

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STATEMENT OF THE CASE

Petitioner was indicted on March 31, 2008, by a Scioto County grand jury under Case No. 08-CR-291 charging him with a number of drug and explosive possession and manufacturing offenses. That indictment was superseded a month later in Case No. 08-CR-461. The trial jury found Petitioner guilty on ten of eleven counts, but the verdict forms carried Case No. 08-CR-291.

Three years later in 2011 Petitioner retained counsel and raised the claim that the case number discrepancies voided the convictions. In 2013 the Fourth District Court of Appeals rejected that claim on the merits and also found Petitioner's application for post-conviction relief was untimely. In 2015 Petitioner filed the Petition in this case. The Court entered judgment dismissing the Petition in 2020. On February 3, 2021, the Sixth Circuit denied a certificate of appealability (ECF No. 83). 364 days later on February 2, 2022, Petitioner filed a Motion for Relief from Judgment under 60(b)(6) for "fraud upon the court."

On September 27, 2022, the United States District Court denied the petition and on March 7, 2023, the Sixth Circuit Court of Appeals declined to issue a certificate of appealability. A timely rehearing was Filed and on May 30, 2023 a rehearing *in banc* was denied.

REASONS FOR GRANTING THE PETITION

I. **Can a legitimate 60(b)(6) motion be considered a 60(b)(3) claim, if that claim does not assert relief from judgment in the event of "fraud . . . misrepresentation, or misconduct by an opposing party? As such, can it be barred by the one (1) year statute of limitations?**

It is clear and unambiguous that a 60(b)(3) motion requires a habeas corpus petitioner to show, misconduct by the opposing party, not misconduct by the prosecutor and/or judge in state criminal proceedings. See, Crehore v. United States, 253 F. App'x 547, 549-50 (6th Cir. 2007). Petitioner argued in his 60(b)(6) motion that his attorney's committed "fraud upon the court" by filing a motion for a suppression hearing, and then abandoning that motion for no apparent reason. The claim also asserts that his Post-Conviction Counsel committed "fraud upon the court" by filing frivolous arguments that she knew she would lose. This type of argument could not be couched in a 60(b)(3) argument. Yet that is exactly what both the district court and the sixth circuit court of appeals did. This way, they were able to dismiss the claim under the one year limitations period for bringing said claims.

This was clear in Buck v. Davis, 137 S.Ct. 759, 197 L. Ed. 2d 1 (2017); Buck contended that his attorney's introduction of evidence violated his Sixth Amendment right to the effective assistance of counsel. Buck failed to raise this claim in his first state post-conviction proceeding. While that proceeding was pending, The United States Supreme Court received a petition for certiorari in Saldano v. Texas, 530 U. S. 1212, 120 S. Ct. 2214, 147 L. Ed. 2d 246, a case in which Dr. Quijano, who had testified in Buck's case, had also testified in Saldano, that the petitioner's Hispanic heritage weighed in favor of a finding of future dangerousness. Texas confessed error on that ground, and this Court vacated the judgment. Soon afterward, the Texas Attorney General issued a public statement identifying six similar cases in which Dr. Quijano had testified. Buck's

was one of them. In the other five cases, the Attorney General confessed error and consented to resentencing. But when Buck filed a second state habeas petition alleging that his attorney had been ineffective in introducing Dr. Quijano's testimony, the State did not confess error, and the court dismissed the petition as an abuse of the writ on the ground that Buck had failed to raise the claim in his first petition.

Buck's claim was procedurally defaulted and he ultimately relied upon Martinez v. Ryan, 566 U. S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272, and Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044, for the proposition that the controlling law in Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640. had been modified. However, Martinez and Trevino had been decided before Buck filed his habeas corpus. Buck later filed a 60(b)(6) which was denied by the district court and subsequently denied by the Fifth Circuit Court of Appeals. The Fifth Circuit reasoned that the case did not fit under the exceptional and extraordinary circumstance analysis. The United States Supreme Court disagreed and concluded that The Fifth Circuit exceeded the limited scope of the COA analysis. The COA statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. 28 U. S. C. §2253. At the first stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U. S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931.

In correlation to Buck's case—the same procedure was analyzed on a cursory reading of Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); and Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). The lower court's

seem to have forgotten to analyze cases under Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "where a court can deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." Id at 686. It has long been recognized that the right to counsel is the right to the effective assistance of counsel." United States v. Cronic, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Moreover, The Fourteenth Amendment guarantees a criminal defendant the assistance of counsel in his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 388, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1984) (citing Douglas v. California, 372 U.S. 353, 356-57, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)). This necessarily entails the right to effective assistance of appellate counsel Evitts v. Lucey, 469 U.S. 387, 397, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) In general, effective assistance of appellate counsel is evaluated according to the same standards as effective assistance of trial counsel. Frederick v. Warden, Lewisburg Correctional Facility, 308 F.3d 192, 197 (2d Cir. 2002). The guarantee of counsel cannot be satisfied by mere formal appointment. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. Strickland, supra, at 685.

Petitioner had post-conviction counsel, just as the Buck case did, and yet the lower court's did not address the true merits of the claim, but instead only applied the procedural default to said claims. The sixth circuit averred that there was no reason why Petitioner could not have raised the claims earlier. They then further averred that the argument about the ineffectiveness of post-conviction counsel should have been known to petitioner, and because he failed to timely assert the fourth amendment along with ineffective assistance, those clams should have been asserted when he filed his amended 2254 habeas corpus petition. However, as the sixth circuit reasoned

themselves, "a district court's discretion to grant or deny relief under Rule 60(b)(6) is especially broad." Moreover, Buck's case was not an extraordinary case that required it to become void ab initio. However, it was a constitutional question of importance that relied upon race as a factor in deciding the death penalty and whether ineffective assistance contributed to the decision to give Buck the death sentence. Therefore, this case fits squarely under a 60(b)(6) analysis, that should fit in correlation with Buck v. Davis? Therefore, the judgment and way the court analyzed Buck v. Davis is in direct contrast to Petitioner's case—which should have been analyzed under the same standard.

WHEREFORE, based on the foregoing argument and authorities, it is respectfully requested that certiorari be granted.

II. Does the case of Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), override the case of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) in a habeas corpus petition? And was Petitioner provided a full and fair litigation of his fourth amendment claim in State Court?

Suppression is an appropriate remedy if a magistrate judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154 (1978). In the case of Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) the United States District Court for the District of New Jersey, granted the accused's petition for a writ of habeas corpus, holding (1) that it was precluded from considering the merits of the accused's Fourth Amendment claim under the rule of Stone v Powell, since it had not been alleged that the accused had been denied an opportunity to fully and fairly litigate that claim; but (2) that trial counsel's conduct in regard to that claim had deprived the accused of the effective assistance

of counsel to which he was entitled under the Sixth Amendment (579 F Supp 796). The United States Court of Appeals for the Third Circuit vacated the District Court's decision and remanded for further proceedings, holding (1) that Stone v Powell did not preclude consideration of the accused's Sixth Amendment claim; and (2) that counsel's performance had been incompetent enough to support such a claim; but (3) that the District Court should reconsider, in the light of intervening decisions, whether the accused had been prejudiced by this incompetence (752 F2d 918). Kimmelman v. Morrison, 477 U.S. 365, 379.

Moreover, over the years since Stone, this court has repeatedly declined to extend the rule beyond its original bounds. In Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), for example, this court denied a request to apply Stone to bar habeas consideration of a Fourteenth Amendment due process claim of insufficient evidence to support a state conviction. This court stressed that the issue was "central to the basic question of guilt or innocence," Jackson, 443 U.S. at 323, unlike a claim that a state court had received evidence in violation of the Fourth Amendment exclusionary rule, and this court found that to review such a claim on habeas imposed no great burdens on the federal courts. Id., at 321-322.

The sixth circuit also ruled that the claim was procedurally barred because the district court denied the motion to amend on the fourth amendment subject. However, the fourth amendment issue had been argued in both the state courts and the federal court. Thus, it was an error for the district court not to allow an amendment on the same subject but under different case law. In the context of Fed. R. Civ. P. 15(c)(2), so long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order. See Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). These claims were also raised through the State Courts' in State v. Creech, No. 19CA3877, 2020 Ohio 582, 2020 WL 837505

(Ohio Ct. App. Feb. 12, 2020). However, the claims presented did not address a *Franks hearing*, but the fourth amendment was argued in several different ways which is inclusive of the fact that both the fourth amendment and the ineffective assistance of counsel were both addressed before ruled on by the district court.

It is unequivocal that trial counsel should have at the very least filed for a *Franks hearing*, to determine whether suppression was necessary. To hold otherwise allows ineffective assistance of counsel linger in a procedural maze. Thus, regarding counsel's failure to request a *Franks* hearing, such a hearing is appropriate when the defendant seeks to suppress evidence gathered from a search conducted pursuant to a warrant because the warrant was granted on the basis of an allegedly false statement. Franks, 438 U.S. at 155-56. The only outcome from a Franks hearing favorable to the defendant is the voiding of the search warrant and the suppression of the fruits of the search. See United States v. Graham, 275 F.3d 490, 505 (6th Cir. 2001) Therefore, Stone v. Powell cannot and should never override a void judgment.

The only conclusion is that Petitioner was never afforded a full and fair litigation of his fourth amendment claim because the State court's defaulted that claim—which is directly the fault of both trial and appellate counsel. If counsel had at the very least showed up for the suppression hearing before the trial began, we wouldn't be here now. This case would have been over with, which would have left constitutional safeguards where they belong—with the people.

ARGUMENT

The State of Ohio and/or all the higher courts the Petitioner has attempted to appeal his unlawful conviction to has repeatedly ruled that the defendant's ineffective assistance of all his counsels is the defendant's own fault because he was incompetent to timely defend himself against

these counsel's ineffectiveness and/or the courts' rulings in error because of these attorney's failures to effectively defend him.[1]

The rulings by the courts have completely undermined the Petitioner's right and need for the assistance of an effective counsel at the critical stages of proceeding in the case at hand, not to mention the other right— (fourth and fourteenth amendment) rights that were violated also in the case at hand.

The record clearly shows these rights were violated and also that Petitioner's counsel was all aware of said violation.

CONCLUSION

The previous rulings by the courts' that the defendant is somehow at fault for all his counsel's failures because he was not competent to act as his own effective counsel against his ineffective counsel's and/or the rulings in error from the courts—is in error and a grave miscarriage of justice. The lower courts' rulings completely undermine the defendant's constitutional rights.

The Petitioner respectfully request this honorable court to do a thorough review of all filing by Petitioner's counsel, and filings the Petitioner attempted to make on his own and the courts' rulings in his case at hand.

Petitioner further request this honorable court to take jurisdiction of this case and take the appropriate actions necessary to stop this travesty of justice by reversing the lower courts erroneous decisions in error and remand this case for a *Franks* hearing or new trial.

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[1] Defendant suffers from Traumatic Brain Injuries which all attorneys were made aware of as well as the courts.

Respectfully Submitted,

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