OCTOBER TERM 2024

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN RITCHIE,
Petitioner,

v.

RON NEAL, Superintendent Indiana State Prison,
Respondent.

REPLY IN SUPPORT OF PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

--- CAPITAL CASE ---

EXECUTION SCHEDULED FOR 12:00 A.M. ON TUESDAY, MAY 20, 2025

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First, as an initial matter, the State misunderstands what is currently before the Court. Although the State argues throughout its brief that the district court denied Mr. Ritchie's Rule 60(b) motion, *see e.g.* BIO at i, 9, 12, that is not the case. The district court only ruled on Mr. Ritchie's motion to stay his execution. *See* DCt. No. 76. The importance is this: at this stage of proceedings, Mr. Ritchie only needed to show that he is substantially likely to succeed on the merits in seeking to reopen the judgment. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). That the lower courts denied Mr. Ritchie's stay motion because his Rule 60(b) motion would be categorically untimely under the substantially-likelihood test makes the decisions below all the more unreasonable and worthy of this Court's review.

Second, the State's attempt to create a jurisdictional issue is unavailing. Mr. Ritchie's Rule 60(b) motion does not constitute an unauthorized second or successive habeas petition because Mr. Ritchie is seeking to attack a "defect in the integrity of the federal habeas proceeding," rather than "the substance of the federal court's resolution of a claim on the merits." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Prior counsel had an "obvious" conflict of interest—they could not raise substantial but procedurally defaulted claims of trial counsel ineffectiveness because that would require them to "denigrate" their own performance during state postconviction. *Christeson v. Roper*, 574 U.S. 373, 379 (2015). The conflict "precluded a merits determination" of procedurally defaulted claims of ineffective assistance of trial counsel. *Gonzalez*, 545 U.S. at 532. *See also Clark v. Davis*, 850 F.3d 770, 779–80 (5th Cir. 2017) ("To the extent that [petitioner's] Rule 60(b)(6) motion attacks not the

substance of the federal court's resolution of the claim on the merits, but asserts that [counsel] had a conflict of interest that resulted in a defect in the integrity of the proceedings, the motion is not an impermissible successive petition."). Thus, the defect is twice removed from the "merits" of any claim—it is based on prior counsel's conflict of interest which prevented them from pursuing an excuse for procedural default.

This is unquestionably so with respect to Proffered Claim 2 regarding lead exposure, which was raised in Mr. Ritchie's habeas petition, DCt. No. 11, at 45, meaning it is inherently not a "new" ground for relief. As Mr. Ritchie has explained, the claim was raised in the habeas petition but abandoned by prior counsel in response to the State's assertion of procedural default. DCt. No. 64, at 19-20, 51. As a result, the district court did not rule on the merits of the claim and only addressed Mr. Ritchie's exhausted, non-defaulted claims. DCt. No. 32, at 12. None of the claims the district court addressed on the merits dealt with trial counsel's failure to investigate and discover Mr. Ritchie's childhood exposure to toxic levels of lead or the lifelong impairments that ensued.

The State concedes that the lead claim was raised in Mr. Ritchie's habeas petition and that it was procedurally defaulted, but does not dispute that it never received a merits ruling:

> Ritchie then came to federal court and filed a petition for a writ of habeas corpus in July 2008 that raised approximately eleven claims of ineffective assistance of trial counsel. D. Ct. Dkt. 11. That petition contained claims that were procedurally defaulted because they had not been presented to the state courts, including that trial counsel were

> ineffective for failing to investigate the possibility that Ritchie had been exposed to lead as a child. D. Ct. Dkt. 11, 16, 17.

BIO, at 6. This proffered claim cannot be successive because it was raised in the initial habeas petition but never reviewed on the merits. *See Gonzalez*, 545 U.S. at 532.

Third, the State opposes certiorari by arguing that "the lower courts' analysis was specific to the facts of this case." BIO, at 13. The State thus insists that "[t]he district court did not create, and the Seventh Circuit did not sanction, any 'categorical rules' about . . . timeliness." BIO, at 13. The lower courts' analysis belies this assertion. The only "facts" that the district court looked to were general in the extreme—namely, that prior counsel's conflict arose in or before 2017 and Mr. Ritchie became immediately responsible for raising the conflict *pro se*, A25–26; and, alternatively, that new counsel were "experienced" and therefore should have filed a Rule 60(b) motion within weeks of their appointment in 2024 and concurrently with the state court successive post-conviction proceedings, A27–28.

As to the district court's first reason, it plainly creates a categorical rule that Rule 60(b) motions based on conflicted counsel will become unreasonable the longer that the conflict continues. That is not an analysis "specific to the facts of this case," as the State would have it. As Judge Jackson-Akiwumi observed, under "the district court's logic, Rule 60(b) would never be available to petitioners with conflicted counsel, so long as the conflict lasts long enough." A5. The district court's analysis, adopted by the Seventh Circuit, was categorical—and categorically at odds with *Christeson*, 574 U.S. at 375, 380, where this Court permitted appointment of conflict-

free counsel to file a Rule 60(b)(6) motion seven years after the statute of limitations had passed.

As to the district court's second reason, it creates a clear rule that newly appointed conflict-free counsel must file any Rule 60(b) motion within weeks of taking over a case—at least where there are concurrent state court proceedings. But that will inevitably be before they complete review of the record, conduct meaningful investigation, or obtain competent mental health evaluations of their client. Practically speaking, even "experienced" counsel will rarely, if ever, be able to do so. The district court erred in giving concurrent state court proceedings such talismanic power, particularly here, where the state court filings in 2024 were preliminary and had not yet developed the claims that would form the basis of a successive petition. Cert. Pet., at 15-16. As the Seventh Circuit itself recognized, the district court thus found Mr. Ritchie's motion "untimely under any possible starting point." A3–A4. In its framing and its inevitable application, this creates a categorical rule that this Court should grant certiorari to review.

Fourth, the State incorrectly argues that Mr. Ritchie cannot "establish[] that his underlying claims have merit" because he cannot prove prior counsel were ineffective on postconviction or that the underlying claims of ineffective assistance of trial counsel are substantial. *See* BIO, at 23.

Mr. Ritchie's prior counsel failed to investigate and present trial counsel's ineffectiveness for failing to investigate and present evidence of Mr. Ritchie's Fetal Alcohol Spectrum Disorder (FASD) in postconviction proceedings. The State recites

various actions prior counsel took, *see* BIO at 23, but whether counsel performed deficiently is determined by whether their investigation was reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Rompilla v. Beard*, 545 U.S. 374, 381, 383, 392 (2005).

The State argues that prior counsel "would never have been able to prove prejudice because the sentencing jury knew all about Ritchie's mother's drinking." BIO, at 24. But trial expert Dr. Gelbort diagnosed Mr. Ritchie only with Cognitive Disorder Not Otherwise Specified, and he explained, "[t[he problem with cognitive disorder NOS is that you know there's something wrong in a certain area but you don't really know the nature, extent, depth, and breadth of it." TR. 2499. The State successfully undermined both the prenatal alcohol exposure as the cause of Mr. Ritchie's impairments and also the prenatal alcohol exposure's effects; for example, the State argued that "[n]o evidence of fetal alcohol syndrome or fetal alcohol effect has been introduced," TR. 2804; that Mr. Ritchie's Cognitive Disorder NOS diagnosis means "[w]e think something may be wrong," TR. 2818; and "there may be some sort of mental deficit" but that it is "very subtle," TR. 2819; that "what we are left with" is a "[d]iagnosis of attention deficit disorder [ADHD]," *id*.; that Mr. Ritchie lacks the physical abnormalities associated with FASD, TR. 2804; that "[i]f at birth he had been affected by alcohol that badly, he would not have had that mid-average IQ," TR. 2806; and that Mr. Ritchie's relative strength in "visual scanning," as demonstrated by his IQ test, aided him in committing the crime, TR. 2817.

Because of counsel's failure, the jury did not hear that "it is clear that Mr. Ritchie suffered brain damage from his prenatal exposure to alcohol resulting in physical, cognitive, and neurobehavioral deficits," DCt. No. 64-1, at 159, which were particularly "debilitating" when combined with other risk factors, *id.* at 422; *see also id.* at 163; that unlike Cognitive Disorder NOS, which "only diagnoses brain dysfunction," an FASD diagnosis means "there is organic brain damage caused by prenatal alcohol exposure," *id.* at 338; that "[i]n teratogenic ADHD (i.e., caused by a prenatal substance exposure), typical ADHD treatments tend to be less effective . . . and the adult outcomes are a lot worse," DCt. No. 64-1, at 420; that although most people with FASD do not have associated physical abnormalities, Mr. Ritchie had moderate-severe facial features of FAS, *id.* at 413; that his IQ score and functioning were consistent with FASD, *id.* at 352; and that IQ "splits" reflected not a strength but an impairment in intellectual functioning underlying Mr. Ritchie's FASD diagnosis, *id.* at 181, 229, 415–16. Certainly if, as the State suggests, this evidence would not have made a difference to a jury, then the Indiana Supreme Court would not have split on an evenly divided 2-2 vote in denying him permission to litigate this claim in a successive postconviction petition. DCt. No. 64-1, at 255, 260–64. Proffered Claim 1 is a "good claim" that Mr. Ritchie would be able to raise upon reopening of the judgment. *Buck v. Davis*, 580 U.S. 100, 126 (2017).

Prior counsel were also ineffective in failing to present trial counsel's ineffectiveness in failing to present Mr. Ritchie's childhood lead exposure during postconviction. Having failed to raise this claim of trial counsel's ineffectiveness in

state court, prior counsel presented it in the habeas petition but then abandoned it after Respondent asserted procedural default. *See* DCt. No. 64, at 51. Counsel made no attempt to excuse the default because they could not do so without arguing their own ineffectiveness under *Martinez* and *Trevino*. Proffered Claim 2 is a "good claim" that Mr. Ritchie would be able to raise upon reopening of the judgment. *Buck*, 580 U.S. at 126.

CONCLUSION

For all of the reasons set forth above and in Mr. Ritchie's other submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Ritchie's execution. It should then either set the case for full briefing, or vacate and remand for further proceedings in the district court.

Respectfully submitted,

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