

No. 17-7463

In the Supreme Court of the United States

GERALD HAND,

Petitioner,

v.

TIM SHOOP, WARDEN

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Sixth Circuit properly deny Hand's motion to expand his certificate of appealability to include his pretrial-publicity claim?

LIST OF PARTIES

The Petitioner is Gerald Hand, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

The respondent is Tim Shoop, the Warden of the Chillicothe Correction Institution, who is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

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INTRODUCTION

Two of Gerald Hand's first three wives were murdered. Pet. App. A195-200. It was not until after Hand murdered his fourth wife, Jill Hand, along with his friend, Walter "Lonnie" Welch, that Hand's role in the two earlier murders came to light. Before Welch was killed, he had told friends and family members that Hand had hired him to murder Hand's first two wives. Pet. App. A196. Hand was convicted for the murder of Welch and Jill Hand, and received a death sentence. Pet. App. A202. Hand now argues that he received ineffective assistance because his trial counsel did not seek a change of venue on the basis of pretrial publicity. *See* Pet. 26-27. The Court should deny his petition for at least three reasons.

First, Hand's petition focuses primarily on the wrong question. The district court denied Hand a certificate of appealability on the claim that Hand seeks to raise in his first question presented. Pet. App. A23-A25. The Sixth Circuit in similar fashion denied Hand's request to expand the appealable issues to include his pretrial-publicity claim. Pet. App. A21. Thus, the only question that is properly before the Court is the second one—about whether the lower courts correctly determined that Hand's claim did not "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The law on that point is well-settled, however, and does not warrant further review.

Second, even if Hand had received a certificate of appealability, the outcome of this case would not have changed; Hand still would not be entitled to a writ of habeas corpus because his claim was procedurally defaulted. The state courts held that Hand's pretrial-publicity claim was barred by res judicata because he did not

raise it on direct appeal. Pet. App. A225-27. As the Sixth Circuit noted with respect to a different defaulted claim, “an Ohio court’s application of the doctrine of res judicata is an independent and adequate state ground sufficient to bar habeas relief.” Pet. App. A11 (citing *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012)).

Third, these procedural barriers aside, this case presents a poor vehicle to consider Hand’s underlying claim. Hand alleges that he received ineffective assistance because his trial counsel failed to move for a change of venue on the basis of pretrial publicity. See Pet. 26-27. Well-settled law applies to ineffective-assistance claims and to pretrial-publicity claims. That law shows that Hand’s claim lacks merit. Among other things, he conceded that he was unable to demonstrate prejudice from the pretrial publicity. See Pet. App. A67 (“Hand admits that he is *not* claiming that his jury was biased or lacked impartiality.”).

COUNTERSTATEMENT

A. Gerald Hand Killed His Wife And A Friend Who He Had Hired To Murder Two Of His Previous Wives

Gerald Hand was married four times. *State v. Hand*, 840 N.E.2d 151, 161-64 (Ohio 2006). Three of his marriages ended when his then-wife was murdered. *Id.* at 162-65. The murders of Hand’s first two wives, Donna Hand and Lori Hand, remained unsolved for years. *Id.* at 161. It was only after Hand murdered his fourth wife, Jill Hand, along with his friend, Walter “Lonnie” Welch, that Hand’s role in the earlier murders came to light. *Id.* at 161-62.

While married to Jill, Hand had accumulated significant debts—some of which were in his wife’s name. *Id.* at 164-65. He had attempted to conceal his

financial situation from her, and Jill was upset when she found out about it. *Id.* at 164. She insisted that Hand sell a radiator shop that he owned to pay off his debt. *Id.* After the sale, Hand and Jill’s relationship continued to deteriorate. *Id.*

On January 15, 2002, Hand called 911 to report that Jill had been shot by an intruder. *Id.* at 165. Hand reported that he had shot the intruder and that he did not know the intruder’s identity. *Id.* Police identified the intruder as Welch. Although Hand initially maintained that he did not know Welch, he later changed his statement and told the police that he had known Welch for over 20 years, but that the two were not close. *Id.* When the police then confronted Hand with a photo of Welch as the best man in Hand’s wedding to Lori, Hand stated that Welch had served in that role only because he was unable to find anyone else to do so. *Id.*

The police arrested Hand for the murders of Jill and Welch. While in jail, Hand admitted to a cellmate that he had shot both of them. *Id.* at 162. Forensic evidence, including DNA and glass fragments, also connected Hand to the murders. *Id.* at 165-68. Additionally, before Welch was killed, he told “various friends and family members that Hand hired him to kill Jill and that Hand had previously hired him to kill Donna and Lori.” *Id.* at 161.

B. After A Jury Convicted Hand, Ohio Courts Upheld His Conviction And Sentence On Appeal And In Postconviction Proceedings

Hand was charged with two counts of aggravated murder (for the murders of Jill and Welch) and three counts of conspiracy to commit murder—all of which contained a firearm specification. *Id.* at 170. He was also charged with one count of

escape, related to his role in an attempted jailbreak following his arrest. *Id.* A jury found Hand guilty on all counts and he was sentenced to death. *Id.*

On direct appeal to the Ohio Supreme Court, Hand raised thirteen assignments of error. Pet. App. A5-A6. Although he argued that he had received ineffective assistance of counsel, Hand did not raise an ineffective-assistance claim related to any pretrial publicity. *See id.* The court rejected all of Hand's arguments and affirmed his convictions and sentence. Pet. App. A6 and A222.

While his appeal was pending, Hand also filed a petition for postconviction relief. That petition argued that his trial counsel was ineffective for failing to seek a change of venue and for inadequately questioning potential jurors about the pretrial publicity. *See* Pet. App. A224-27. The postconviction court dismissed his petition; an Ohio appellate court affirmed. Pet. App. A229. The appellate court held that Hand's claims were barred by res judicata. Pet. App. A225-27. It noted that, in Ohio, claims based on the trial record must be raised on direct appeal and will be barred by res judicata if they are not. *Id.* It further explained that "the presentation of competent, relevant, and material evidence outside the record may preclude the application of res judicata." Pet. App. A226.

The appellate court determined that Hand had failed to meet that burden. It found that Hand's claims could have been raised on direct appeal and that his attachment of media reports was insufficient to overcome the res judicata bar. Although the reports were "admittedly outside the original trial record," the

appellate court held that they merely supplemented Hand's argument, "which was capable of review on direct appeal on the then extant record." Pet. App. A226-27.

C. The District Court And The Sixth Circuit Denied Habeas Relief

Hand filed a petition for a writ of habeas corpus, asserting fifteen grounds for relief, several of which included many sub-claims. Pet. App. A29. As relevant here, Hand argued that his trial counsel was ineffective for failing to seek a change of venue on the basis of pretrial publicity. Pet. App. A67-A68. He also argued that his trial counsel was ineffective for failing to question certain jurors more extensively during voir dire about their exposure to pretrial publicity. Pet. App. A65-A67.

The district court denied Hand's petition. Pet. App. A104. It held that Hand's change-of-venue claim was procedurally defaulted because it should have been raised on direct appeal. Pet. App. A68. It similarly held that Hand's voir dire claim was defaulted and that he had not established cause and prejudice to excuse that default. Pet. App. 65A-67A. The district court granted Hand a certificate of appealability on his claim that his trial counsel was ineffective for failing to more thoroughly question jurors during voir dire. Pet. App. A24. It declined to issue one for his remaining ineffective-assistance claims—including his claim that his trial counsel was ineffective for failing to move for a change of venue. *Id.*

Hand sought an expanded certificate of appealability from the Sixth Circuit, which granted his motion in part. Pet. App. A21. But it denied Hand's request that it issue a certificate of appealability for his change-of-venue claim. *Id.* The Sixth Circuit affirmed the district court's decision denying Hand's habeas petition. Pet. App. A19. It concluded that Hand's voir dire claim was procedurally defaulted and

that he had not demonstrated the cause and prejudice necessary to excuse that default. Pet. App. A12-A13.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT APPLIED WELL-SETTLED LAW WHEN IT DENIED HAND’S MOTION TO EXPAND HIS CERTIFICATE OF APPEALABILITY

Hand’s first (and principal) question presented focuses on the merits of the state courts’ holding that he procedurally defaulted his ineffective-assistance claim asserting that his counsel should have moved for a change of venue on the basis of pretrial publicity. Pet. 1. But that question is not properly before this Court because the lower courts denied a certificate of appealability over it. Instead, the only question before this Court is whether the Sixth Circuit correctly denied Hand’s motion to expand his certificate of appealability to reach this issue. It did, and, regardless, that fact-bound question does not warrant review.

A. There Is No Uncertainty Or Circuit Disagreement About The Standard That Applies To Certificates Of Appealability

The Court should not reach the first question presented in Hand’s petition because “[a] COA ruling is not the occasion for a ruling on the merit[s] of petitioner’s claim[s].” *Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003). Instead, review should be limited to determining whether the Sixth Circuit correctly applied 28 U.S.C. § 2253(c)(2) when denying Hand’s motion to expand his Certificate of Appealability. Thus the maximum relief available to Hand should be reversal of the denial of a certificate of appealability and a remand for consideration of the merits of his claims. See *Miller-El*, 537 U.S. at 337 (describing certificate of appealability inquiry as a threshold examination).

Even the limited relief available to Hand is unwarranted in this instance, however, because the Court’s review is not required either to clarify the standards for determining when a certificate of appealability should be granted or to correct the Sixth Circuit’s application of those standards. To establish that he is entitled to a certificate of appealability, Hand must demonstrate “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard is satisfied by “demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327.

Furthermore, when a district court does not reach the merits of a claim, and instead denies a habeas petition on procedural grounds, the reviewing court of appeals must determine whether “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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Under that standard, “[w]here a plain procedural bar is present and the district court [was] correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

B. The Sixth Circuit Properly Denied Hand’s Request To Expand His Certificate Of Appealability

Hand does not challenge the Sixth Circuit’s certificate-of-appealability standard, nor does he allege that the circuits are in disagreement about how to apply it. Instead, he simply contends the Sixth Circuit misapplied the standard. Pet. 23-25. Aside from presenting a fact-bound question unworthy of this Court’s review, Hand is also wrong. Applied here, *Slack* confirms that the Sixth Circuit properly denied Hand’s motion to expand the certificate of appealability.

Ohio defendants must include any record-based claims of ineffective assistance of trial counsel in their direct appeal—with the threat that such claims will later be barred by res judicata if they are not raised. *State v. Cole*, 443 N.E.2d 169, syllabus (Ohio 1982) (“Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant’s petition for postconviction relief.”). The Ohio Supreme Court has justified channeling these claims to direct appeal on the basis that it avoids certain shortcomings of the postconviction process. *See State v. Milanovich*, 325 N.E.2d 540, 543 (Ohio 1975) (In postconviction proceedings “[c]ases long considered to be fully adjudicated are reopened, although memories may be dim and proof difficult. The courts justifiably fear frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose.”). The Sixth Circuit has repeatedly held that “an Ohio court’s application of the doctrine of res judicata is an independent and

adequate state ground sufficient to bar habeas relief.” Pet. App. A11 (citing *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012)).

To lift the res judicata bar, petitioners seeking postconviction relief must provide competent credible evidence in support of their claims. *Cole*, 443 N.E.2d at 171; *see also State v. Calhoun*, 714 N.E.2d 905, 910 (Ohio 1999). Without a credible evidence requirement, the res judicata bar would be largely meaningless because “otherwise it would be too easy to defeat the res judicata doctrine by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner’s claim beyond mere hypothesis[.]” Pet. App. A226 (citations omitted); *see also Cole*, 443 N.E.2d at 172. Thus “[i]n a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness.” *State v. Jackson*, 413 N.E.2d 819, syllabus (Ohio 1980).

Claims involving pretrial publicity can and should be raised on direct appeal. It is well-established that “a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.” *State v. Bayless*, 357 N.E.2d 1035, 1051 (Ohio 1976); *see also State v. Adams*, 817 N.E.2d 29, 42 (Ohio 2004) (collecting cases). The adequacy and scope of voir dire can be determined *from the voir dire transcript*, which is part of the record on appeal. In light of that fact, Ohio courts regularly review pretrial publicity claims on direct appeal. *See State v. Adams*, 45 N.E.3d 127, 155-56 (Ohio

2015); *State v. Bryan*, 804 N.E.2d 433, 460-61 (Ohio 2004). This case is no different. The record on appeal contained the voir dire transcripts and was supplemented to include the jury questionnaires. Pet. App. A227.

Although Hand now argues that it is possible to evaluate the merits of his ineffective-assistance claim only by reviewing “the nature and extent” of the pretrial media coverage, Pet. 15, his petition for postconviction relief *itself* belies that claim. The *voir dire transcript* provided the factual basis for the claims that Hand raised in that petition. Postconviction Pet., Doc.133-10, PageID#6501-06. To the extent that he referenced any materials outside the record on appeal, Hand did so only in a conclusory fashion that was largely unconnected to the substance of his claim. *Id.*

In light of the above, there can be little doubt that “a plain procedural bar [was] present,” and that “a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Slack*, 529 U.S. at 484. The Sixth Circuit therefore properly apply settled precedent when it denied Hand’s motion to expand his certificate of appealability.

C. The Court Should Not Address The Merits Of Hand’s Defaulted Claim

Pointing to the Court’s decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), Hand suggests that a certificate of appealability is not required and that the Court may proceed directly to the merits of his ineffective-assistance claim. *See* Pet. 22. But even if the Court *may* address the merits of his claim, that does not mean that it *should* do so. The circumstances and posture of his case are significantly different

from those in *Buck* and they make this case an unsuitable one in which to exercise the power to directly review the underlying merits of a claim.

In *Buck*, unlike here, the merits of the underlying claim were squarely at issue. Among other things, the Fifth Circuit had already addressed the merits of the legal question when it determined whether to grant Buck a certificate of appealability. *Buck*, 137 S. Ct. at 773. The parties in that case had also “essentially briefed and argued the underlying merits at length.” *See id.* at 774. In this case, by comparison, no court has addressed the merits of Hand’s claim and this Court should not be the first to do so.

II. APART FROM THE ABSENCE OF A CERTIFICATE OF APPEALABILITY, THIS CASE PROVIDES A POOR VEHICLE TO ADDRESS HAND’S QUESTIONS PRESENTED BECAUSE HIS UNDERLYING CLAIMS ARE THEMSELVES FACT-BOUND AND THEY LACK MERIT

Even if the Court were interested in addressing the standard that applies to certificates of appealability, this case would present a poor vehicle in which to do so. Granting a certificate of appealability would not change the fact that the state courts properly invoked *res judicata* when they denied Hand’s petition for postconviction relief. And, procedural barriers aside, Hand’s underlying ineffective-assistance claim itself has no chance of success.

A. Hand’s Ineffective-Assistance Claim Was Defaulted

As discussed above, the courts below correctly determined that a reasonable jurist could not dispute that Hand’s petition fails to state a valid claim and, for that reason, declined to issue a certificate of appealability for Hand’s ineffective-assistance claim related to pretrial publicity. For those same reasons, even if he

had been granted a certificate of appealability, the outcome below would have been the same. “[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious.” *Buck*, 137 S. Ct. at 774.

Hand also argues in his petition that the Court should review a separate-but-similar challenge to the adequacy of the voir dire questions about pretrial publicity. *See* Pet. 23. It is debatable whether this issue is even properly before the Court because it is not raised as a question presented. *See* S. Ct. R. Prac. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”). But that ultimately does not matter because, as with Hand’s pretrial-publicity claim, his voir dire claim is also procedurally defaulted.

The voir dire transcript and jury questionnaires were both part of the trial record and his claim could (and should) have been raised on direct appeal. Because it was not, the Ohio courts determined that the claim was barred by res judicata. They held that Hand’s “attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant’s argument which was capable of review on direct appeal on the then extant record.” Pet. App. A226. The Sixth Circuit therefore held that Hand’s claim was procedurally defaulted and declined to review the claim because “Hand did not argue cause and prejudice to excuse his default.” Pet. App. A11-A12. He again omits any cause and prejudice argument, *see* Pet. 23, and this Court—like the Sixth Circuit—should therefore decline to review his claim.

B. Hand's Ineffective-Assistance Claim Lacks Substantive Merit

Although the procedural default provides sufficient reason to deny Hand's petition, a final reason still remains: His underlying ineffective-assistance claim is without merit. Thus, even if the Court ignored both the lack of a certificate of appealability and the procedural default, the Court still could not grant Hand relief.

Hand's underlying claim alleges that his trial counsel provided ineffective assistance by failing to seek a change of venue. *See* Pet. 26. By now, however, there is no question about the legal standard that applies to such claims; it is well-established that ineffective-assistance claims have two parts. First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a defendant must demonstrate prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* The party bringing an ineffective-assistance claim must also "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

A defendant seeking to assert an ineffective-assistance claim on the basis of pretrial publicity bears a particularly heavy burden. With respect to *Strickland's* first prong, Ohio courts have held that the decision about whether to seek a change of venue is "a matter of trial strategy and is thus not subject to second-guessing by a reviewing court as ineffective assistance." *Adams*, 45 N.E.3d at 155 (citing *Bryan*,

804 N.E.2d 433). As for *Strickland*'s second prong, a showing of prejudice with respect to a pretrial-publicity claim requires a defendant to demonstrate that "a fair trial was impossible." *White v. Mitchell*, 431 F.3d 517, 532 (6th Cir. 2005) (citation omitted). To do so, the defendant must show that "one or more jurors were actually biased." *State v. Gross*, 776 N.E.2d 1061, 1113 (Ohio 2002).

Even if Hand could overcome the presumption that the decision not to seek a change of venue was a tactical one, he would still need to demonstrate that he was prejudiced as a result. He cannot. Hand abandoned any prejudice argument in the district court. *See* Pet. App. at A67 ("Hand admits that he is *not* claiming that his jury was biased or lacked impartiality."). And the available evidence confirms that he was correct to do so. That evidence shows that the jurors in his case *were not* biased. To the extent that there were any questions about whether certain jurors might have been influenced by pretrial publicity, those jurors "made clear during voir dire that they could set aside any opinions that they might have held and decide the case on evidence presented in court." Pet. App. A13. Thus, far from demonstrating that Hand was prejudiced by pretrial publicity, the voir dire transcripts in this case refute his claim.

Having failed to demonstrate that one or more members of his jury were *actually* biased, Hand suggests that the amount of publicity surrounding his trial was *automatically* prejudicial. *See* Pet. 26 n.6. While "[i]n certain rare cases, pretrial publicity is so damaging that courts must conclusively presume prejudice even without a showing of actual bias," such a presumption of prejudice exists "only

in the extreme case,” *State v. Martin*, ___ N.E.3d ___, 2017-Ohio-7556, 2017 Ohio LEXIS 1689 *10 (Ohio 2017) (citations omitted); see *State v. Lynch*, 787 N.E.2d 1185, 1197 (Ohio 2003). The presumption “has been held not to reach even the most highly publicized cases that are covered step-by-step and scoop-by-scoop in evening newscasts and front page stories.” *Martin*, 2017-Ohio-7556 at *12 (quoting 6 LaFave, Israel, King, & Kerr, *Criminal Procedure*, Section 23.2(a), at 307-308 (4th ed. 2015)).

Here, however, Hand supports his pretrial publicity claim with little more than local press reports. See Pet. 14. Even if such evidence could now be considered, it still would hardly be sufficient to establish the degree of prejudice necessary to support a per se pretrial publicity claim. Cf. *Skilling v. United States*, 561 U.S. 358, 377-85 (2010) (rejecting presumption of prejudice for Enron executive, despite substantial publicity about the firm’s collapse). That Hand’s underlying claim would ultimately fail confirms that this case provides a poor vehicle to consider Hand’s Questions Presented.

CONCLUSION

For the above reasons, the petition should be denied.

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