No. 17-7463

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

GERALD HAND,
Petitioner,

v.

TIM SHOOP, WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION
Respondent.

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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PETITIONER'S REPLY

The Warden's arguments lack merit and this Court should reject them. Hand's case presents substantial issues warranting this Court's review, and his petition for certiorari should be granted.

I. This Court can reach the merits of Hand's procedural default arguments notwithstanding the denial of a certificate of appealability in the lower federal courts.

The Warden argues that "Hand's petition focuses primarily on the wrong question," because "the only question that is properly before the Court" is "whether the lower courts correctly determined that Hand's claim did not deserve encouragement to proceed further" so as to warrant a certificate of appealability. (Brief in Opposition ("BIO") at 1; *see also id.* at 6-7.) As a result, the Warden's brief in opposition does little to address the first question presented by Hand's petition for certiorari. As Hand explained in his petition, however, this Court's decision in *Buck v. Davis*, 137 S.Ct. 759, 774-75 (2017), makes clear that a denial of a certificate of appealability in the lower federal courts poses no bar to this Court's merits review of the underlying question. (Petition for Certiorari ("Pet.") at 22.) The Warden's argument should therefore be rejected.

The Warden nevertheless attempts to reframe Hand's *Buck* argument by stating "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." (BIO at 10.) This is incorrect. Hand is not asking this Court to proceed directly to the merits of the underlying ineffective assistance claim, but to the merits of his *procedural default* arguments. (Pet. at 22 ("This Court can proceed directly to the merits of the procedural default issue, notwithstanding the Sixth Circuit's denial of a certificate of appealability on this particular claim . . . Accordingly, it is not necessary to

determine if Hand is entitled to a certificate of appealability before considering the merits of Hand's procedural default arguments" (formatting removed).) As a result, the Warden's attempt to distinguish *Buck* on the ground that "no court has addressed the merits of Hand's claim" is unavailing. (*See* BIO at 11.) Hand argued in the lower federal courts that his claim was not defaulted because the state courts had misapplied their own procedural rules, and as a result this Court would not be the first to address this issue if certiorari were granted.

II. The state courts clearly misapplied their own procedural rules in determining that Hand's claim was defaulted, and as a result the procedural default doctrine should not bar review in federal court.

The Warden argues that certiorari is not warranted because Hand's claim is defaulted, but makes little effort to counter Hand's showing that the state courts clearly misapplied their own procedural rules in the finding of default. (*See* BIO at 9-10.) The propriety of the federal courts enforcing a default under such circumstances presents an issue that is likely to recur in many different jurisdictions, and as a result this case warrants review by this Court. (*See* Pet. at 17.) Federal habeas corpus review should not be foreclosed in cases where a default has resulted from a state court's misapplication of its own rules. (*Id.* at 17, 21-22.)

As Hand has explained in his petition, the state courts misapplied Ohio's *res judicata* doctrine in dismissing Hand's claim that his trial lawyers were ineffective in failing to request a change of venue based on extensive pretrial publicity. (Pet. at 17-20.) Hand could not have raised his claim on direct appeal because it necessarily depended on evidence outside of the trial record. *See State v. Hunter*, 960 N.E.2d 955, 966, ¶46 (Ohio 2011). Specifically, none of the media reports supporting the claim were a part of the record on direct review. (Pet. at 12, 14-15, 18-20.) Because the claim could not have been fairly determined without resorting to evidence outside of the record, the application of *res judicata* was clearly improper. *See State v. Cole*, 443

N.E.2d 169, 171 (Ohio 1982). "Generally, the introduction in an R.C. 2953.21 petition of evidence *dehors* the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata*." *Id*. *Res judicata* does not apply "where the allegations of ineffectiveness are based on facts not appearing in the record." *State v. Cooperrider*, 448 N.E.2d 452, 454 (Ohio 1983).

The Warden nevertheless alleges that Hand's claim in his post-conviction petition in state court did not actually rely on materials outside the trial record, and to the extent that it did it was "only in a conclusory fashion that was largely unconnected to the substance of his claim." (BIO at 10.) The Warden's argument is not supported by the procedural history of this case.

Hand's post-conviction petition specifically alleged that trial counsel had been ineffective in failing to move for a change of venue, and that he "was prejudiced when his case was tried in a county where prospective jurors were overly exposed to the media's detailed, sensationalized coverage of his case. Furthermore, trial counsel was aware of the extensive press coverage of this case." (ROW Apx., ECF 133-10, PageID 6505.) He supported this allegation with 89 pages of local media reports that were not part of the record on direct review. (*Id*. at 6526-6615.)

In his appeal from the denial of post-conviction relief, Hand again alleged that "[b]ecause of the pre-trial publicity, it was impossible for Appellant to receive the fair trial he was guaranteed by the United States Constitution. Trial counsel's performance was ineffective when they were aware of the publicity and neglected to make a motion for a change of venue." (ROW Apx., ECF 134-2, PageID 7173.) Hand further argued that the post-conviction court improperly dismissed the claim as barred by *res judicata* because it was supported by the media reports that were not part of the trial record. (*Id.* at 7169.) He repeated these same arguments in his request for discretionary review in the Ohio Supreme Court. (ROW Apx., ECF 134-3, PageID 7474,

7476, 7477, 7487, 7490.) Accordingly, Hand fairly presented his claim to the state courts and satisfied the requirements for avoiding dismissal under state law.[1]

The Warden argues that dismissal in state court was appropriate because the media reports were not necessary for a fair adjudication of Hand's claim. (BIO at 9-10.) The Warden alleges that the claim could have been adequately litigated solely by reference to the *voir dire* transcripts and juror questionnaires. (*Id.*) The Warden is mistaken. *See State v. Beasley*, ___ N.E.3d ___, 2018 WL 915251, at *13, ¶115-16 (Ohio Jan. 16, 2018) (rejecting the defendant's argument that pretrial publicity necessitated a presumption of prejudice because he "presented no evidence of the amount or quality of pretrial media or social-media coverage of the case."). Furthermore, the Ohio Supreme Court takes media reports into consideration when the denial of a change of venue is raised as an independent claim on direct review. *See State v. Lundgren*, 653 N.E.2d 304, 312-13 (Ohio 1995); *State v. Clemons*, 696 N.E.2d 1009, 1015 (Ohio 1998); *State v. Mammone*, 13 N.E.3d 1051, 1068-69, ¶62 (Ohio 2014). The Sixth Circuit has similarly found that under *Irvin v. Dowd*, 366 U.S. 717 (1961), courts must consider "the media coverage itself" in determining if a presumption of prejudice is warranted. *Nevers v. Killinger*, 169 F.3d 352, 366 (6th Cir. 1999), *abrogated on other grounds in Harris v. Stovall*, 212 F.3d 940, 942–43 (6th Cir.2000). Accordingly, Hand's claim could not be fairly considered on direct review.[2]

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[1] Moreover, Hand alleged in his traverse that a presumption of prejudice was warranted based on the extensive pretrial publicity, and he relied on the collected media reports in making this claim. (Traverse, ECF 32, PageID 543-44.) The Warden's surreply made no argument that this claim had not been fairly presented to the state courts. (Surreply, ECF 35, PageID 691-701.)

[2] The Warden conflates the issues before this Court by also directing his argument at separate allegations of ineffective assistance of counsel that Hand raised in state court: that his trial lawyers were ineffective in failing to question two specific jurors regarding their exposure to pretrial publicity, and also in failing to exercise peremptory challenges against them. (*See* BIO at 10 (citing ROW Apx., ECF133-10, PageID 6501-06, and arguing that "[*t*]*he voir dire transcript* provided the factual basis for the claims that Hand raised in that petition").) Hand did rely heavily on the *voir dire* transcript and juror questionnaires in raising those claims, but he is

III. Hand did not abandon his claim that a presumption of prejudice was warranted based on extensive pretrial publicity.

The Warden quotes a passage from the District Court's order denying habeas corpus relief that states "Hand admits that he is *not* claiming that his jury was biased or lacked impartiality," and claims that this shows Hand abandoned any allegation of prejudice. (BIO at 14, citing Pet. App. at A67.) The Warden's argument lacks merit for two reasons. First, the District Court made this statement in conjunction with Hand's claim that his trial lawyers were ineffective in failing to adequately question two specific jurors. (*See* Pet. App. at A67.) As Hand has already explained, *see* n.2, *supra*, that is a separate allegation of ineffective assistance of counsel that Hand is not pursuing in this proceeding, and it is not before the Court.

Second, a review of the record shows that Hand's habeas lawyers were actually objecting to the Magistrate Judge's mischaracterization of the nature *of that particular claim*. (*See* Objections, ECF 117, PageID 2758.)[3] The statements clearly were not intended as an abandonment of Hand's separate allegation that his trial lawyers were ineffective in failing to request a motion for a change of venue. In fact, Hand objected to the dismissal of his venue

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not raising them here. The *only* allegation of ineffective assistance of counsel that Hand is relying on at this stage is his claim that his trial lawyers should have filed a motion for a change of venue based on overwhelming pretrial publicity. (Pet. at 18-20.) To the extent that the Warden's arguments are directed at counsel's failure to question and challenge specific jurors, they are inapposite.

[3] Hand's objections stated "As the Magistrate Judge observed, the responses given by the two challenged jurors 'clearly indicate that [they were] exposed to pre-trial publicity' and that their positions were 'problematic.' R&R, p. 78. Nevertheless, the Magistrate concluded that the jurors were not so biased that they were required to be excused for cause. *Id*. at 79-80. In so doing, the Magistrate mistakes Hand's Sixth Amendment ineffective assistance of counsel claim for a Sixth Amendment biased jury claim. Hand does not claim, as the Magistrate implies, that his jury was not fair and impartial or comprised of a fair cross-section of his peers, but instead faults his attorneys for not adequately questioning Jurors Ray and Finamore to determine whether they should be the subject of peremptory challenges." (Objections, ECF 117, PageID 2758.)

change claim on the very next page. (*Id.* at 2759.) The Warden's argument should accordingly be rejected.

IV. Hand's underlying claim that the trial judge failed to conduct an adequate *voir dire* on the issue of pretrial publicity is clearly encompassed by the first question presented.

Hand has also asked the Court to consider whether the state courts misapplied the *res judicata* doctrine to his claim that the trial judge failed to conduct an adequate *voir dire* on the issue of pretrial publicity. (Pet. at 23.) The Warden argues that "[i]t is debatable whether this issue is even properly before the Court because it is not raised as a question presented." (BIO at 12.) But this claim clearly falls within Hand's first question presented: "Whether the procedural default doctrine bars federal habeas corpus review in cases where the state courts clearly misapplied their own procedural rules in determining that a claim was defaulted." (Pet. at 1.) The Warden's argument accordingly lacks merit.

V. This Court should alternatively grant certiorari to determine if the Sixth Circuit erroneously denied Hand a certificate of appealability on his claim that his trial lawyers were ineffective in failing to file a motion for a change of venue.

Hand has alternatively requested that the Court grant certiorari to determine if he is entitled to a certificate of appealability on his claim that his trial lawyers were ineffective in failing to file a motion for a change of venue. (Pet. at 1, 17, 23-27.) The Warden argues that certiorari is not warranted "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." (BIO at 7.) This Court's rules expressly provide that certiorari may be warranted where a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower

court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a). Furthermore, this Court recently intervened to require further consideration of a highly questionable denial of a certificate of appealability in another capital case. *See Tharpe v. Sellers*, 138 S.Ct. 545, 546-47 (2018).

The Warden also argues that certiorari is not warranted with respect to Hand's second question presented because Hand's underlying claim of ineffective assistance of counsel lacks merit. (BIO at 14-15.) The Warden relies on *Skilling v. United States*, 561 U.S. 358 (2010), to argue that Hand cannot establish a presumption of prejudice based on pretrial publicity, and that his attorneys were therefore not ineffective in failing to move for a change of venue. (*Id.* at 15.) This Court found that a presumption of prejudice was not warranted in *Skilling*, but one of the primary factors that the decision relied on was "the size and characteristics of the community in which the crime occurred." *Skilling*, 561 U.S. at 382. Skilling was tried in Houston, "the fourth most populous city in the Nation" where "more than 4.5 million individuals eligible for jury duty resided in the Houston area." *Id*. "Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Id*.

Delaware County, Ohio, is not comparable to Houston. The 2010 Census found that the county had a population of only 174,214.[4] That is not much larger than the community of 150,000 people at issue in *Rideau v. Louisiana*, 373 U.S. 723 (1963), where a presumption of prejudice was found. Given the small size of the community in which Hand was tried, it is far more likely he would be successful in demonstrating that a presumption of prejudice was

[4] UNITED STATES CENSUS BUREAU QUICKFACTS, DELAWARE COUNTY, OHIO, https://www.census.gov/quickfacts/fact/table/delawarecountyohio/PST045216 (last checked Mar. 28, 2018).

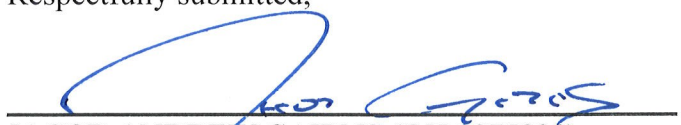
warranted, and that his attorneys were ineffective in failing to seek a venue change. Accordingly, the Warden's reliance on *Skilling* is misplaced.

Finally, as Hand has already explained at length in his petition for certiorari, the Sixth Circuit's denial of a certificate of appealability on this particular claim is incompatible with this Court's established precedent. (Pet. at 23-27.) It is clear that reasonable jurists could conclude that Hand's claim is not procedurally barred, and that it is meritorious. (*Id.*) Accordingly, certiorari is warranted under S.Ct.R. 10(a). The arguments of the Warden to the contrary lack merit and this Court should reject them.

CONCLUSION

The Warden's arguments lack merit, and this Court should grant certiorari.

Respectfully submitted,



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March 29, 2018