

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PERCY HUTTON,
PETITIONER,

v.

TIM SHOOP, Warden,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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**** CAPITAL CASE ****

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit violated the Court's mandate by failing to follow the Court's explicit instructions to properly analyze Mr. Hutton's claim for federal habeas relief under the "miscarriage of justice" exception to procedural default?
2. Whether the Sixth Circuit denied Mr. Hutton due process of law when it decided his case based on a dispositive issue it raised *sua sponte* without providing Mr. Hutton the opportunity to brief, or otherwise address, the issue?

PARTIES TO THE PROCEEDINGS

The Petitioner is Mr. Percy Hutton, an inmate imprisoned at the Chillicothe Correctional Institution.

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

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PETITION FOR WRIT OF CERTIORARI

Percy Hutton respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision, *Hutton v. Mitchell*, 839 F.3d 486 (6th Cir. 2016), is reproduced at Pet. App. 1a. The Court's review of that decision, *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017), is reproduced at Pet. App. 37. The Sixth Circuit's decision on remand from the Court, *Hutton v. Jenkins*, 704 F. App'x 584 (6th Cir. 2017), is reproduced at Pet. App. 42. The unpublished *en banc* denial is reproduced at Pet. App. 44.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on November 22, 2017. Mr. Hutton's petitions for rehearing and rehearing *en banc* were denied on January 4, 2018. The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Percy Hutton was convicted of aggravated murder by an Ohio trial court and sentenced to death in February 1986. Although he maintains his innocence, and the factual predicates purportedly supporting his guilt are illogical Mr. Hutton was denied relief in state and federal court. At issue here is that Mr. Hutton's jury was never instructed on the aggravating circumstances it could consider in handing down a death sentence. While the jury was instructed on the definition of "mitigating factors," there was no similar instruction defining "aggravating circumstances." The jury was given unfettered discretion to impose a death sentence by considering *anything* the jury deemed "aggravating." This is the second appeal from the Sixth Circuit's judgments stemming from Mr. Hutton's jury-instruction claim.

In the proceeding leading to the first appeal, the Sixth Circuit *sua sponte* invoked the "miscarriage of justice" exception to procedural default which applies to individuals who can show they are "actually innocent" of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Mr. Hutton neither argued to apply this exception to procedural default nor did the Sixth Circuit provide him the opportunity to brief the issue. But the court concluded that it could "reach the merits" of Mr. Hutton's procedurally defaulted claim to "avoid a fundamental miscarriage of justice." *Hutton v. Mitchell*, 839 F.3d 486, 498 (6th Cir. 2016) (*Hutton I*).

The court provided two reasons for reaching the merits of Mr. Hutton's claim. First, Mr. Hutton was not eligible for the death sentence because "the jury had not made the necessary finding of the existence of aggravating circumstances." *Id.* Second, since the trial court failed to give the jury "guidance as to what to consider

as aggravating circumstances” when weighing aggravating and mitigating factors, its death recommendation was not “based on a review of any valid aggravating circumstances.” *Id.* at 500. The Sixth Circuit ultimately held that Mr. Hutton’s constitutional rights had been violated by the erroneous jury instructions. The Warden petitioned the Court for certiorari.

The Court granted certiorari and held that the Sixth Circuit misapplied the miscarriage of justice exception to lift a procedural default. *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017). The Court identified two fundamental flaws in the Sixth Circuit’s analysis. *Id.* First, the Sixth Circuit erred in excusing the alleged procedural default because “the jury had not [found] the existence of aggravating circumstances” even though the jury had at the guilt phase of Mr. Hutton’s trial.¹ *Id.* Second, the Sixth Circuit erred in its application of the miscarriage of justice exception to procedural default by considering “whether, given the (alleged) *improper* instructions, the jury might have been relying on invalid aggravating circumstances when it recommended a death sentence.” *Id.*

To correct the Sixth Circuit’s flawed approach, the Court set forth the proper legal analysis to address Mr. Hutton’s claim: “Assuming such an error can provide a basis for excusing procedural default, the Sixth Circuit should have considered the following: Whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating

¹ Compounding the instructional error was the fact that the instructions referred to “aggravating circumstances” while the indictment and all other references were to “specifications.”

circumstances outweighed the mitigating circumstances.” *Id.* at 1772. When the Court reversed and remanded Mr. Hutton’s case, it directed the Sixth Circuit to re-apply the miscarriage of justice exception in the manner outlined by the Court. But on remand the Sixth Circuit flouted the Court’s explicit directive by *sua sponte* rejecting the miscarriage of justice exception altogether without participation of the parties. *Hutton v. Jenkins*, 704 F. App’x 584 (6th Cir. 2017) (*Hutton II*).

REASONS FOR GRANTING THE PETITION

The Court should grant review for two reasons. *First*, the Sixth Circuit violated the Court’s mandate by failing to follow the Court’s explicit instructions to properly analyze Mr. Hutton’s claim for federal habeas relief under the “miscarriage of justice” exception to procedural default. *Second*, the Sixth Circuit denied Mr. Hutton due process of law when it decided his case based on a dispositive issue it raised *sua sponte* without providing Mr. Hutton the opportunity to brief, or otherwise address, the issue.

I. The Sixth Circuit Disregarded the Court’s Express Instructions to Properly Apply the “Miscarriage of Justice” Exception to Mr. Hutton’s Case.

The Sixth Circuit ignored the Court’s explicit direction regarding the proper framework for evaluating a procedurally defaulted claim for federal habeas relief under the miscarriage of justice exception. The Sixth Circuit was directed by the Court to re-apply the miscarriage of justice exception to Mr. Hutton’s claims. *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017). The Court provided specific guidance for how that analysis was to be conducted.

However, on remand, the Sixth Circuit inexplicably reversed its earlier decision. *Hutton v. Jenkins*, 704 F. App’x 584, 584 (6th Cir. 2017). With no analysis or additional briefing from the parties, the Sixth Circuit summarily determined that the miscarriage of justice exception no longer applied, denying Mr. Hutton any review or relief on his jury-instruction claim. *Id.* at 585. The Sixth Circuit violated the Court’s mandate and set a dangerous precedent that undermines the Court’s supervisory authority.

It is imperative for the Court to take Mr. Hutton's case both to affirm its supervisory authority over the lower courts and to champion the purpose of its original grant of certiorari in Mr. Hutton's case, namely to guide the lower courts regarding the proper application of the miscarriage of justice exception to procedural default under its ruling in *Sawyer*.

A. The Court's Mandate Must Be Followed.

Since its earliest days, the Court has repeatedly held that an inferior court has no authority to depart from an appellate court's mandate. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 305 (1948). Despite this, history is replete with resistance by lower courts to the Court's mandate. These cases demonstrate instances wherein the lower courts appeared to resist the Court's mandate which forced the Court to respond.

- In an ERISA case from the **Ninth Circuit**, the Court considered for the second time the Ninth Circuit's determination that respondent stockholders' complaint stated a claim against petitioner fiduciaries for breach of the duty of prudence. The Court noted that it had GVR'd the case and that, on remand the court of appeals "failed to properly evaluate" the complaint in the way it had been instructed. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (*per curiam*).
- In another capital case, this time from the **Ninth Circuit**, the Court noted that it had "vacated and remanded [the] judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention." The Court found the Ninth Circuit's outright disobedience necessitated the Court's intervention. *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (*per curiam*).
- In a capital case from the **Sixth Circuit**, the Court observed that "time and again," it "has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.'" The Court concluded, "[A]s a final

matter, this Court again advises the Court of Appeals that the provision of AEDPA applies with full force even when reviewing a conviction and sentence imposing the death penalty.” *White v. Wheeler*, 136 S. Ct. 456, 462 (2015) (*per curiam*).

These cases and many others stand for the well-known proposition that the mandate of the Supreme Court must be obeyed to the furthest extent possible. *Ex parte Morris & Johnson*, 76 U.S. 605, 607 (1869). Where the direction in a mandate of the Court to a circuit court is precise and unambiguous, it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. *West v. Brashear*, 39 U.S. 51, 53 (1840). The Sixth Circuit should have scrupulously followed the Court’s decision in *Hutton I* as the law of the land unless the Court decides it should not be.

On prior review, the Court precisely and unambiguously instructed the Sixth Circuit to apply the proper legal analysis to Mr. Hutton’s jury-instruction claim. The Court held “[a]ssuming such an error can provide a basis for excusing default, the Sixth Circuit should have considered the following: Whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances.” *Hutton*, 137 S. Ct. at 1772. The final direct order was: “The petition for certiorari and motion for leave to proceed *in forma pauperis* are granted, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.” *Id.*

The Court’s prior decision was a directive for the Sixth Circuit to correct its analysis. The Sixth Circuit on remand, however, never addressed the Court’s explicit

instructions to re-apply the miscarriage of justice exception in the manner outlined by the Court. Rather than properly apply the miscarriage of justice exception, as this Court directed, the Sixth Circuit did just the opposite. Instead of following the Court's pronouncement, the Sixth Circuit *sua sponte* rejected the miscarriage of justice exception without participation of the parties. That decision directly contravenes the Court's mandate in *Hutton I*.

Even if the Court's mandate was not so precise, the law of the case doctrine still precluded the Sixth Circuit from adopting a new legal theory on remand to circumvent the Court's mandate in order to avoid applying the miscarriage of justice exception to Mr. Hutton's procedurally defaulted claim. In *Winn-Dixie, Inc v. Dolgencorp*, the Eleventh Circuit instructed the district court to adopt and follow definitions from its decision in *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So.2d 719 (Fla. 3d DCA 2002). However, on remand, the district court refused to do so. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 845 (11th Cir. 2018). In reversing the district court's post-remand ruling, the Eleventh Circuit noted that that the district court was led astray by the defense counsel who urged the court to disregard the Eleventh Circuit's clear directive by blatantly mischaracterizing its previous decision. *Id.* In a similar example, the Court reversed the Fifth Circuit, which on remand, denied relief on the merits of the petitioner's *Batson* claim by incorporating verbatim (without attribution) analyses and discussions from the dissenting opinion from *Miller-El v. Cockrell*, 537 U.S. 322

(2003), and from the State's brief on remand. *Miller-El v. Dretke*, 545 U.S. 231, 281 (2005).

In a similarly subversive fashion, one if not both judges in the *Hutton I* majority inexplicably changed their votes both on the application of the miscarriage of justice exception and the application of that exception to Mr. Hutton's case based on no additional briefing or argument of the parties. The opinion below not only undermines this Court's supervisory authority but it deprives Mr. Hutton due process. This Court must intervene to reaffirm its supervisory authority, given the Sixth Circuit's disregard for this Court's decision.

B. No Reasons Existed for the Sixth Circuit's Departure from the Law of the Case Doctrine.

The law of the case doctrine did not afford the Sixth Circuit the discretion to disregard the Court's mandate and, *sua sponte*, determine that the miscarriage of justice exception did not apply to Mr. Hutton's claim. Sometimes, it may be appropriate for a court to revisit an issue otherwise deemed outside the scope of an appellate mandate. *Spine Solutions, Inc. v. Medtronic Sofamor Danek, Inc.*, 928 F. Supp. 2d 956, 962 (W.D. Tenn. 2011). However, "these circumstances must be exceptional, otherwise, the underlying rationales for the law-of-the-case doctrine, such as finality, judicial economy, and consistency," would be rendered obsolete. *Id.* No such circumstances apply to Mr. Hutton's case.

Under the law-of-the-case doctrine, a lower court may depart from a decision of an appellate court only in the following, limited circumstances: "(1) the presentation of new evidence or (2) an intervening change in the controlling law

dictates a different result, or (3) the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.” *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985). *See Grigsby v. Barnhart*, 294 F.3d 1215, 1219 (10th Cir. 2002) (subsequent, contrary decision of law by a controlling authority and presentation of new evidence); *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53 (1982) (blatant error of prior decision).

The Sixth Circuit's refusal to follow the Court's mandate, though not explained, cannot be justified these exceptions. First, the Sixth Circuit's decision could not have been based on the new evidence exception because the parties presented no new evidence on the jury-instruction issue. The parties were barred from doing just that when the Sixth Circuit summarily held in *Hutton II*, without the benefit of either party's briefing that the miscarriage of justice exception no longer applied. The second exception, involving an intervening change in the controlling law, also could not have applied, because the law has not changed. This Court clarified the proper way to apply the miscarriage of justice exception to procedural default under *Sawyer*. Last, the court could not have invoked the third exception because the Court's decision in *Hutton I* was not clearly erroneous and, when implemented, would not work a manifest injustice.

II. The Sixth Circuit Denied Mr. Hutton Due Process When It Decided His Case on a Dispositive Issue Raised *Sua Sponte* Without Ordering Supplemental Briefing.

The Sixth Circuit denied Mr. Hutton his due process right to be heard twice—first, by *sua sponte* applying the “miscarriage of justice” exception to excuse the

alleged procedural default of Mr. Hutton’s jury-instruction claim in *Hutton I* without providing him an opportunity to brief the exception; second, by summarily holding in *Hutton II* that the exception no longer applied, also without the benefit of either party’s briefing. The Court should grant review not only to cure the Sixth Circuit’s egregious due process violation in *Hutton II*, but also to address the due process circuit disagreement of national import at play in Mr. Hutton’s case.

The Sixth Circuit’s flawed decision results from a fundamental disagreement between the federal circuits on how to satisfy due process while making *sua sponte* decisions. Mr. Hutton’s case presents the Court with a unique opportunity to resolve this disagreement with a simple procedural rule that would prevent future invasions of due process while preserving the discretion of lower courts to raise issues *sua sponte*.

Courts are “limited to addressing the claims and arguments advanced by the parties . . . [and they] do not usually raise claims or arguments on their own.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). The Court has long recognized the benefits of our party-driven adversarial system in “ascertaining truth and minimizing the risk of error.” *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). The Court “presupposes [that] accurate and just results are more likely to be obtained through the equal contest of opposed interests.” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981). However, the Court has never precluded lower courts from deviating from the adversarial model to raise issues *sua sponte*. This increases the risk of not only error, but *constitutional* error as the party-presentation model is

critical to ensuring that parties receive a meaningful opportunity to be heard—“the fundamental requirement of due process.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Arguably some of the Court’s most significant cases have been decided on dispositive issues raised *sua sponte*. Cases like *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Mapp v. Ohio*, 267 U.S. 643 (1961), fundamentally altered the landscape of our legal system in ways the Court may never have had occasion to address without unilaterally raising substantial constitutional issues in the proceedings. The Court has been reluctant to cabin the discretion of lower courts to similarly raise issues on their own initiative. But the Court’s ambivalence to how the lower courts exercise their *sua sponte* decision-making power has led to a critical disagreement between the federal circuits over the propriety of certain *sua sponte* decisions—decisions that seem wholly inconsistent with the principles of due process.

A. The Court Should Grant Review to Resolve the Disagreement Among the Circuits Regarding the Due Process Implications of *Sua Sponte* Decisions Made Without Supplemental Briefing.

The Court has never held that *sua sponte* decisions violate the Due Process Clause. But the lower courts have recognized that raising and deciding issues *sua sponte*, at the very least, has serious due process implications. With no guidance from the Court on making *sua sponte* decisions that do not run afoul of the Fifth and Fourteenth Amendments, the circuits have split into two camps regarding satisfying due process in cases that turn on issues raised by the court—one that requires supplemental briefing *before* a decision is made; and one that requires only

opportunities to move for rehearing *after* a decision is made. This second camp is not only inconsistent with the Court's cases, but it has grave consequences for capital defendants like Mr. Hutton whose life then unfairly depends on the ability to persuade a court that has already demonstrated a reluctance to be instructed on the law or facts that its decision is wrong. "Members of the Supreme Court have advised us to remember that "death is different" -- that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and that "[i]n death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948).

i. Supplemental Briefing Before Decision

The Court generally holds that parties should receive an opportunity to be heard *before* an adjudication impacts their rights. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) ("[W]e hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result."); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("[T]he Court's decisions suggest that, absent the necessity of quick action by the State or the impracticality of providing any pre-deprivation process, a post-deprivation hearing here would be constitutionally inadequate.").

Several lower courts have similarly found that due process requires an opportunity to be heard *before* a decision has been made on issues raised *sua sponte*.

These cases demonstrate how courts in the Third, Federal, Ninth, and Eleventh Circuits have offered pre-decision process, such as supplemental briefing, as a way to justify deciding on issues raised solely by the court.

- The **Third Circuit** justified its decision to raise *sua sponte* the applicability of the 28 U.S.C. § 2401(a) statute of limitations to Title VII actions by noting that, while “ordinarily an appellate court will not consider an issue that was not raised below . . . so that the parties may have the opportunity to offer all the evidence they believe relevant[,]” raising the legal question was not improper because the court “ordered two rounds of supplemental briefing and discussed [the] issue extensively at oral argument, thus giving the parties ample opportunity to present their positions.” *Kannikal v. Atty. Gen. U.S.*, 776 F.3d 146, 149 (3d Cir. 2015).
- The **Federal Circuit** found that the Court of Appeals for Veteran’s Claims’ decision to reach whether a veteran’s claim for a service connection was well-grounded—an issue neither raised nor briefed by the parties—to be “inconsistent with general principles of fairness” because it “came as a complete surprise to [the veteran], who never had a chance to address the issue directly.” *Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed.Cir.2000).
- The **Ninth Circuit**, in *sua sponte* raising whether the government had reasonable suspicion to support a warrantless search, explained that “[it] may consider an issue that has not been adequately raised on appeal if such a failure [to raise the issue] will not prejudice the opposing party” and because it “called for and received supplemental briefs by both parties . . . the government’s failure to address the issue [did] not prejudice [the defendant].” *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013).
- In his concurring opinion, an **Eleventh Circuit** judge noted the following in his analysis of the propriety of the court’s decision to raise the applicability of § 2254 to a defendant’s habeas petition *sua sponte*: “Where a circuit panel decides to raise an issue *sua sponte*, the preferred method of doing so is by requesting supplemental briefing from the parties and permitting oral argument, as was done here.” *Thomas v. Crosby*, 371 F.3d 782, 802 (11th Cir. 2004) (Tjoflat, J., specially concurring).

These decisions comport seamlessly with the Court’s traditional approach to satisfying due process when raising issues *sua sponte*. See, e.g., *Trest v. Cain*, 522 U.S. 87, 92 (1997) (“We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way ‘round is the shortest way home.”); *Mapp v. Ohio*, 367 U.S. 643, 677 (Harlan, J., dissenting) (“[O]rderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue.”); *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that the D.C. Circuit properly decided an issue raised *sua sponte* because it first ordered supplemental briefing which “[gave] the parties ample opportunity to address the issues.”).

The pre-decision process approach taken by these circuits also aligns with the Court’s due process precedents in capital cases. The Court recognizes that ensuring capital defendants receive due process is imperative. See *Burger v. Kemp*, 483 U.S. 776, 785 (1987) (“Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.”). Because of the potentially fatal consequences of denying a capital defendant due process the Court generally avoids *sua sponte* raising issues in criminal cases, unless doing so would provide *more* constitutional protection to a defendant. See *Greenlaw v. United States*, 554 U.S. 237, 243–44, 1 (2008) (“To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to *protect* a pro se litigant’s rights.”) (emphasis added).

Although both the Court and other lower courts have recognized the prudence in ordering supplemental briefing on issues raised *sua sponte*, other courts continue to raise issues on their own initiative without the benefit of supplemental briefing because they either opine that post-decision process is sufficient (*see infra* section ii); or, worse, they recognize that ordering supplemental briefing is the most sensible approach but, absent an express mandate to do so, forego it. *See Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 837 (10th Cir. 2014) (“[W]e disposed of an appeal on an unraised antecedent issue in *Hanson v. Wyatt*, 552 F.3d 1148 (10th Cir.2008), although it would have been better if we had requested supplemental briefing.”).

ii. Briefing After Decision

The Court has never held that pre-decision briefing opportunities described above are invariably required to satisfy due process. However, the Court has indicated that post-decision process is most appropriate in limited circumstances; for example, “where a State must act quickly, or where it would be impractical to provide predeprivation process.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). The Court recognizes that due process, while flexible, is not divorced from circumstance—it “calls for such procedural protections *as the particular situation demands*.” *Id.* Absent contrary guidance from the Court, several circuits have taken advantage of the perceived flexibility of due process to all but remove parties, like Mr. Hutton, entirely from the litigation process under the guise of satisfying due process with post-decision means.

- The **Fourth Circuit** held that the North Carolina Supreme Court did not deny petitioners due process in deciding their case on a dispositive issue raised *sua sponte* with no supplemental briefing because, in their motion for rehearing, the “plaintiffs did, eventually, brief the issue . . . thus satisf[y]ing the bare minimum requirements of procedural due process.” *Lawson v. Dixon*, 25 F.3d 1040 (4th Cir.1994). *See also Harris v. Marsh*, 123 F.R.D. 204, 218 (E.D.N.C. 1988) (“[T]o the extent [*sua sponte*] imposition of the original reprimand and fine violated any due process right of counsel, by providing for reconsideration and seriously entertaining counsel's arguments, due process requirements of notice and an opportunity to be heard have now been satisfied.”).
- The **Seventh Circuit** held that a district court’s *sua sponte* dismissal of a suit for improper service did not “rise to the level of a violation of due process” because the petitioner “had ample opportunity after the entry of the judgment to make his case to the district court” by moving for reconsideration. *Blaney v. West*, 209 F.3d 1027 (7th Cir. 2000).

Unfortunately, it is difficult to determine how often federal courts justify their *sua sponte* decisions with minimal post-decision process because “most courts that raise issues *sua sponte* neither declare that they are doing so nor attempt to justify making a decision without input from the parties.” Adam Milani & Michael Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 314 (2002). In *Hutton I*, for example, the Sixth Circuit acknowledged that the parties never raised the “fundamental miscarriage of justice” exception, but it did not rationalize its *sua sponte* decision with any sort of process. Similarly, in *Hutton II*, the Sixth Circuit summarily reversed on the *sua sponte* issue, again with no briefing or indication on how the parties’ due process rights were being met. The Sixth Circuit’s total disregard for Mr. Hutton’s due process rights should not be protected by extension under the umbrella of paying lip service to due process with post-decision motions.

Lower courts continue to struggle with balancing their discretion to raise issues *sua sponte* with their obligation to determine, case-by-case, the process due under the Fifth and Fourteenth Amendments. This confusion has led courts to reach markedly different conclusions about the due process implications of *sua sponte* decision-making. The Court should grant review of Mr. Hutton's case to resolve this circuit disagreement; a resolution imperative to preserving due process rights in the capital arena.

Mr. Hutton's case serves as a prime illustration of why the Court's due process precedent demands, at least in the capital context, resolution of the circuit disagreement for courts in the first procedural camp—i.e., those ordering supplemental briefing on issues raised *sua sponte*.

First, the Court has provided lower courts with a balancing test to determine the process due in any situation. When properly balanced, the factors invariably support providing pre-decision opportunities to be heard in capital cases that turn on issues raised *sua sponte*. In *Matthews v. Eldridge*, the Court held these factors should be balanced to determine what level of process is constitutionally due:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

In Mr. Hutton’s case, the first factor to be considered—the private interest at stake—was, and is, his life. This Court has always consistently acknowledged that death is “qualitative[ly]” different. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The severity of the consequences of inadvertently denying him due process under these circumstances suggests that the process he received—i.e., only the mere possibility of being heard in a post-decision motion—was deficient. The Sixth Circuit should not be permitted to use measures that even remotely resemble cutting due process corners when Mr. Hutton’s life is literally on the line. The Sixth Circuit’s failure to provide even a cursory rationalization for its failure to order supplemental briefing before deciding suggests that it was unjustifiably cavalier with its obligation to guarantee Mr. Hutton due process.

The “risk of erroneous deprivation” factor also suggests the Sixth Circuit provided deficient process to Mr. Hutton. The Court has explained, on more than one occasion, that *sua sponte* decisions inherently raise the risk of error. Mr. Hutton’s case is no exception. The case in which Mr. Hutton seeks review—*Hutton II*—was his second before the Sixth Circuit; the first having been found by this Court to be decided in error—error that might have been avoided had the Sixth Circuit permitted Mr. Hutton to participate in framing the analysis on the “fundamental miscarriage of justice” exception the first time around.

Finally, because the Sixth Circuit had no justifiable interest in denying Mr. Hutton the opportunity to brief the dispositive issues it raised, there is no

question Mr. Hutton received deficient process. Our adversarial system is predicated on parties having the chance to advance arguments and present evidence *before* a decision deprives them of their rights—to not do so is the exception, not the rule. It was neither necessary nor practical to deny Mr. Hutton the opportunity to brief the “fundamental miscarriage of justice” exception, especially considering it was the Sixth Circuit’s second bite at the apple.

In resolving the circuit disagreement, the Court should also consider that the opportunity to move for rehearing is not the “meaningful opportunity to be heard” contemplated by the promise of due process. There is a substantive difference between a merit brief and a motion for rehearing that makes post-decision motions wholly inadequate to satisfy due process. In post-decision motions, the movant is limited to addressing the specific points of law or fact that the court “overlooked or misapprehended.” F.R. App. P. 40(A)(2). The chance to narrowly challenge specific errors is simply not akin to the zealous development of all relevant facts and arguments we expect in our legal system. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (“The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.”). Courts raising issues *sua sponte* generally alter the entire shape of a case so the parties must adjust their strategy with different arguments to advance, facts to highlight, and evidence to present. Post-decision motions are simply not an adequate vehicle for parties to meet this challenge.

Mr. Hutton may have been given the opportunity to submit post-decision motions but, because of the limitations imposed on post-decision motions, he was

denied a meaningful opportunity to be heard. In *Hutton I*, the Sixth Circuit *sua sponte* decided the “fundamental miscarriage of justice” exception excused Mr. Hutton’s procedural default. In *Hutton II*, the court summarily reversed holding contrariwise without explanation. Mr. Hutton’s original merit brief never addressed the “fundamental miscarriage of justice” exception because it is applied when the petitioner cannot show “cause and prejudice,” and Mr. Hutton’s entire defense was predicated on demonstrating “cause” via ineffective-assistance of counsel. Had Mr. Hutton known the Sixth Circuit would base its decision on an entirely different legal theory, he would have made entirely different arguments in his merit brief; and, after the Court explained the applicable standard Mr. Hutton had to meet to avail himself of the exception, he would have highlighted entirely different facts. Because his motion for rehearing was limited by rule to pointing out only specific legal errors committed by the Sixth Circuit —namely, its failure to allow Mr. Hutton to be heard—Mr. Hutton has not been heard on this exception and was therefore denied due process of law.

B. This Court should grant review to announce a rule requiring lower courts to order supplemental briefing before deciding based on issues raised *sua sponte*.

The Court should announce a “supplemental briefing” rule for cases that turn on issues raised *sua sponte* to effectively resolve this circuit disagreement and silence the cries from legal scholars for reform. *See, e.g.,* Adam Milani & Michael Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253 (2002).

The rule would be the most efficient way to resolve this disagreement because it would disturb none of the Court’s precedents; the rule would neither cabin the discretion of lower courts to raise issues unilaterally nor take the determination of what process is constitutionally due out of the hands of lower courts. The rule would only require lower courts to provide the process due *prior* to a final decision when it exercises its power to raise an issue *sua sponte*.

A supplemental briefing rule would also resolve any confusion about the effect of *sua sponte* decisions on stare decisis. The Court has indicated that decisions reached on issues never briefed by the parties may deserve precedential value less than those reached with party input. *See Hohn v. United States*, 524 U.S. 236, 251(1998) (“[W]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and judgment) (“Sound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute, and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.”) (internal citations omitted). The rule would prevent the Court and lower courts from trying to resolve whether an issue was developed enough absent briefing to merit precedential value.

And finally, the Court should announce a supplemental briefing rule for these *sua sponte* situations because it is simply more efficient. The Court acknowledges that the adversary system is the best means to avoid error because it forces the courts

to hear from both parties and reach well-informed decisions. Without such a rule, courts may make haphazard decisions more likely to be challenged on appeal.

Here, absent a rule requiring it to order supplemental briefing, the Sixth Circuit became Mr. Hutton's advocate, opponent, and jurist for the second time. In so doing, the Sixth Circuit eliminated both Mr. Hutton and his counsel from the decision-making process. The Court should ensure that Mr. Hutton remains an active participant in his litigation, especially when he is the one who will be executed if denied relief. The Sixth Circuit's refusal to permit Mr. Hutton to participate in its latest decision continues the courts' treatment of this specific issue. No court, state or federal, has reviewed the merits of Mr. Hutton's claim - a claim that he is clearly entitled to relief.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Hutton respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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