Capital Case

Case No. 17-8686

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Warden's Brief in Opposition (BIO), p.6, he argues fundamentally that the district court correctly found Hutton's Rule 60(b) motion to be an improper attempt to file a second-or-successive petition under 28 U.S.C. § 2244(b) because unlike *Martinez* and *Trevino*, "Hutton had preserved his claims based on counsel's mitigation efforts, and those claims failed *on their merits*." (Emphasis in original.) *See also*, BIO, p.7 ("*Martinez* and *Trevino* addressed a procedural default question that this case does not implicate.") Because the Warden's entire BIO is anchored in this misleading assertion it is necessary to correct the record. No court, either state or federal, has *ever* reviewed Hutton's IAC during the penalty phase of trial claim that was factually based on the readily available but never-investigated records from the Beech Brook childhood residential facility and the information about the horrendous experiences of Hutton's childhood contained therein.

I. The IAC penalty phase claim previously addressed on the merits was completely insubstantial and without reference to the qualitatively unique and horrendous experiences of Hutton's childhood as revealed in the Beech Brook childhood residential facility's records.

The Warden's BIO is misleading because an IAC penalty phase claim based upon the Beech Brook records has never been litigated in the entire history of Hutton's litigation and is therefore unexhausted and defaulted. According to Ohio's post-conviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for post-conviction relief is not entitled to a hearing unless the trial court shall determine *whether there are substantive grounds for relief* (R.C. §

2953.21(C)), *State v. Cole*, 443 N.E.2d 169 (1982). (Emphasis added.); R.C. § 2953.21(A)(1). Therefore, before a hearing is granted, "the petitioner bears the initial burden to submit evidentiary documents [de hors the record] containing *sufficient operative facts* to demonstrate the lack of competent counsel *and* that the *defense was prejudiced* by counsel's ineffectiveness." (Emphasis added.) *State v. Jackson* 413 N.E.2d 819, 823 (1980) (at syllabus).

As the district court acknowledged, during state post-conviction the state court addressed the IAC penalty phase claim presented by Doughten, and ruled that Hutton's supporting affidavits were not "quality" evidentiary documents, but were "specious and totally inadequate to substantiate a substantive ground for relief." *See*, *Hutton v. Mitchell*, No. 1:05-cv-2391, 2013 WL 2476333, Memorandum and Order, at *21 (N.D. Ohio June 7, 2013), rev'd in part, 839 F.3d 486 (6th Cir. 2016), *cert. granted, judgment rev'd sub nom. Jenkins v. Hutton*, 137 S. Ct. 1769 (2017), and *aff'd sub nom. Hutton v. Jenkins*, 704 F.App'x 584 (6th Cir. 2017) (hereinafter, "Memorandum and Order.")

So insubstantial was the evidence de hors the record that the state court ruled the claim to be res judicata, meaning that it could have been brought on direct appeal. *Id.* The district court went on to note that the Ohio court of appeals agreed with that assessment and the Ohio Supreme Court simply declined jurisdiction. *Id.*

During federal habeas, Doughten, now as habeas counsel presented the same insubstantial IAC penalty phase claim. The district court went on to acknowledge that "[t]he Court has thoroughly examined the additional evidence Hutton submitted

with his pc petition in support of his IAC claims…" and ruled that "the Court finds that it would not have materially changed the case that could have been presented on direct appeal. The Ohio court, therefore properly applied res judicata to the IAC claims Hutton raised in his pc petition that could have been raised on direct appeal but were not, and they are procedurally defaulted." Memorandum and Order, 2013 WL 2476333, at *25.

The district court went on to address the merits of that insubstantial IAC penalty phase claim saying because the state court of appeals gave alternative res judicata and merits ruling, it would also address the merits. *Id.* It was in this sense that Hutton received a "merits" review of his insubstantial IAC penalty phase claim. n denying the claim the district court takes direct aim at Doughten both as pc counsel and as habeas counsel in comments that again reflect the failure to investigate anything of substance in support of the IAC penalty phase claim:

> "However, Hutton has set forth *no evidence* that suggests that these witnesses, records or an expert would have helped him in mitigation. *Indeed, the likelihood that additional mitigating evidence exists is minimal given that Hutton has had access to these witnesses and records throughout his appeals, but has failed to unearth anything significant enough to submit to a court, including this one*."

Memorandum and Order, 2013 WL 2476333, at *38. (Emphasis added.) Of course, there was significant and substantial mitigating evidence that *did* exist but which Doughten had simply "failed to unearth."

It is similarly telling that for purposes of his appeal, the COA that was granted specific to an IAC at the penalty phase claim was based solely upon a failure to object and had no relationship to trial counsel's failure to investigate given the insubstantial

basis for the claim litigated by Doughten first in state post-conviction and then in federal habeas. *See Hutton v. Mitchell*, 839 F.3d 486, 505 (6th Cir. 2016), *cert. granted, judgment rev'd sub nom. Jenkins v. Hutton*, 137 S.Ct. 1769 (2017), *reh'g denied,* 138 S.Ct. 43 (2017).

II. Significant new facts specific to the horrendous childhood experiences as reflected in the Beech Brook records give rise to a new claim to which *Martinez* and *Trevino* are relevant.

Section 2254(d), by its plain language, applies only to "claims" that were "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). A "claim" is the application of governing law to a particular set of facts. Indeed, *Black's Law Dictionary* 264 (8th ed. 2004) defines "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court."[1] The admission of significant new evidence on federal habeas, therefore, may give rise to a new "claim" that no state court has previously "adjudicated on the merits." And the idea that new facts can give rise to a new claim in a way that controls the application of § 2254(d) finds considerable support in this Court's jurisprudence. *See Gonzalez v. Crosby,* 545 U.S. 524, 530-31 (2005); *Price v. Vincent,* 538 U.S. 634, 638 (2003); *Vasquez v. Hillery,* 474 U.S. 254, 258-60 (1986). In other words, new evidence on federal habeas that

[1] It is well-settled that where Congress uses a legal term, that term should be defined in its legal sense. *See, e.g., Bradley v. United States,* 410 U.S. 605, 609 (1973) ("Rather than using terms in their everyday sense, 'the law uses familiar legal expressions in their familiar legal sense.'") (quoting *Henry v. United States,* 251 U.S. 393, 395 (1920)); *see also Boumediene v. Bush,* 128 S.Ct. 2229, 2242-43 (2008) (relying on *Black's Law Dictionary* to define "habeas corpus").

significantly alters the claim presented in state court, gives rise to a new "claim" upon which the state court did not rule.

This foundational reasoning that new substantive evidence can substantially alter the nature of a claim has been recognized in many federal Circuits. A federal court that permissibly takes significant new evidence has before it a "claim" different from the one "adjudicated on the merits" by the state court. *See Monroe v. Angelone,* 323 F.3d 286, 297-99 (4th Cir. 2003) (admission of new *Brady* material on federal habeas takes claim out of § 2254(d) because "no state court considered" the totality of exculpatory evidence seen by federal court); *Joseph v. Coyle,* 469 F.3d 441, 469 (6th Cir. 2006) ("Joseph's current *Brady* claim is not the same as the one he brought before the state courts: he now relies on a different mix of suppressed evidence that includes some items discovered only during federal habeas proceedings. Thus, Joseph argues, his *Brady* claim was *not* 'adjudicated on the merits in State court proceedings,' and AEDPA's strict standard of review does not apply. We agree."), *cert. denied*, 127 S.Ct. 1827 (2007); *Killian v. Poole,* 282 F.3d 1204, 1207-08 (9th Cir. 2002) (similar); *Cargle v. Mullin,* 317 F.3d 1196, 1212 (10th Cir. 2003) (where *Strickland* claim is based in part on evidence wrongly disregarded by the state court, "the prejudice flowing from *all* of counsel's deficient performance … has never been made in the state courts, so we have no state decision to defer to under § 2254(d)").

So it is significant that nowhere does the Warden ever suggest let alone deny that the information within the Beech Brook records was substantial and qualitatively unique from anything Doughten had ever presented in litigating the

IAC penalty phase claim previously. In other words, the new evidence within the Beech Brook records presented by newly appointed and un-conflicted habeas counsel significantly altered the previously litigated IAC penalty phase claim. The only thing the two claims had in common was their name.

The position underlying the Warden's arguments is precisely the argument the Court expressly rejected in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), when the Court rejected the broad notion of an old claim being based upon any substantial new evidence discovered during federal habeas review and incorporated into the merits ruling of a state court's adjudication under § 2254(d)(1). *Pinholster*, 131 S.Ct. at 1400 (holding that "[t]oday, we . . . hold that evidence introduced in federal court has no bearing on § 2254(d)(1) review").

In *Pinholster*, the Court left open the possibility that, in certain circumstances, significant new evidence will justify regarding a federal claim as sufficiently new so as to be unadjudicated for purposes of § 2254(d) and therefore unaffected by *Pinholster*. 131 S.Ct. at 1401. Specifically, in footnote 10, the Court wrote: "Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, Justice Sotomayor's hypothetical involving *new evidence* of withheld exculpatory witness statements may well present a *new claim*." 131 S.Ct. at 1401 n. 10. (Emphasis added.)

In Hutton's case, the new Beech Brook evidence renders the claim new and also factually unexhausted. *Vasquez v. Hillery,* 474 U.S. 254, 260 (1986). State law bars the filing of a successive petition, *see, e.g.*, *Pinholster*, 131 S.Ct. at 1400 n.6, and

Hutton must overcome the default by demonstrating cause and prejudice. *Cf. (Michael) Williams v. Taylor*, 529 U.S. 420, 432–33 (2000). *Martinez* and *Trevino* are relevant and applicable to this litigation.

III. Doughten abandoned his client by both failing to investigate the readily available Beech Brook records in state post-conviction, by continuing to litigate Hutton's habeas for a year even after the Court decided *Martinez* and *Trevino*, by continuing to not investigate the readily available records after *Martinez* and *Trevino* were decided, and by failing to bring the apparent conflict of interest to the attention of the district court until after the district court had decided the habeas petition. These are "extraordinary circumstances."

The Warden insists that the "extraordinary circumstances," alleged to underlie Hutton's Rule 60(b)(6) motion are nothing but a "[t]he single fact of" the change in law brought about by *Martinez* and *Trevino*." BIO, p.14 (citations omitted.) The Warden acknowledges that a change of law could support "extraordinary circumstances" but "not 'by itself,'" or only if "combined with other factors." *Id.* The Warden is wrong to ignore the substantial evidence of Doughten's conflict of interest that form the basis of the Rule 60(b) motion.

Nowhere does the Warden deny that Doughten abandoned his client by: 1) failing to investigate the readily available Beech Brook records during his appointment as state post-conviction counsel; 2) by continuing to represent Hutton in his federal habeas litigation even after the Court decided both *Martinez* and *Trevino*; 3) failing to investigate the still readily-available Beech Brook records throughout the entire course of the habeas litigation; and 4) clearly recognizing that he *did* have a conflict in interest yet failing to advise the district court for over a year that he was litigating under that conflict of interest and only then *after* the district court had

ruled upon Hutton's habeas petition. This was particularly serious given that under 18 U.S.C. § 3006A(c), "the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings." By failing to so advise the court Hutton was denied the opportunity for un-conflicted counsel to have investigated and litigated the IAC penalty phase claim during the course of the initial habeas litigation.

The Warden notes only in passing that when Doughten finally did bring his conflict of interest to the district court's attention, *after* the district court had decided the petition, it was in a Rule 59(e) pleading, which was rejected by the district court because Doughten "could have raised these arguments before the district court's ruling," Warden's BIO, pp. 1-2, which occurred approximately one year after the Court's decisions in *Martinez* and *Trevino*. The Warden never acknowledges that this recounting of the procedural history reflects the abandonment of Hutton by Doughten and forms the precise basis of the "extraordinary circumstances" that support the Rule 60(b) request. *See Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004) (noting "an attack on the integrity of a previous habeas proceeding using subsection (6) of Rule 60(b) is viable only in 'extraordinary circumstances,' and that such circumstances will be particularly rare," and holding "therefore, to be successful under Rule 60(b)(6), [the movant] must show more than ineffectiveness under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *To obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer*

abandoned the case and prevented the client from being heard, either through counsel or pro se.") (Emphasis added.)[2]

Relevant by analogy, in *Maples v. Thomas*, 132 S.Ct. 912 (2012), the Court held that a post-conviction petitioner would not be bound by the acts of his attorney, where the evidence showed that the petitioner was abandoned by his counsel. It was an equitable consideration. The Court adopted the reasoning of Justice Alito's concurrence in *Holland v. Florida*, 130 S.Ct. 2549 (2010), where he noted that "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Maples*, 132 S.Ct. at 923 (quoting *Holland*, 130 S.Ct. at 2568 (Alito J., concurring)). The Court's decision in *Maples* about fundamental fairness and in particular Justice Alito's construct of attorney misconduct has relevance here.

By refusing to acknowledge the conditions of abandonment that underlie the "extraordinary circumstances," (particularly that Doughten and his co-counsel both recognized Doughten had a conflict of interest after *Martinez* and *Trevino* yet continued to litigate the habeas case for over a year until completion before advising the district court and seeking removal and without ever indicating that Hutton himself was informed), the Warden's argument that Hutton's extraordinary circumstances are nothing but "[t]he single fact of" the change in law brought about by *Martinez* and *Trevino*," is shown to be wrong. BIO, p.14 (citations omitted.)

[2] *Harris* and its reasoning was cited approvingly in *Gonzalez v. Crosby*, 545 U.S. 524, 531-532 (2005).

IV. An Evidentiary Hearing is necessary to assess the reasons why habeas counsel continued litigating under a known conflict of interest without advising the district court until after it had finished adjudicating the habeas petition.

The Warden notes that the Sixth Circuit Court of Appeals denied Hutton's request to remand the case knowing that Hutton's habeas counsel "had the opportunity to present *Martinez* and *Trevino* claims in the district court, but did not do so." BIO, p. 4 (citation omitted.) Moreover, the court was well aware that both the state post-conviction / habeas counsel and his co-counsel could both have brought the conflict of interest to the court's attention during the pendency of the habeas litigation but did not do so, rather waiting until the district court had adjudicated the petition before coming forward to put the district court on notice that they had been litigating while aware of the conflict. The Sixth Circuit recognized that both habeas counsel "failed to explain" why neither had "timely asserted any valid claims under *Martinez* and *Trevino*." *Id.* It is telling that neither habeas counsel acknowledged ever informing Hutton about the conflict under which his habeas litigation was being conducted.

The Warden's BIO does not make clear that it was Hutton's original habeas counsel that immediately *after* the district court denied his petition, approximately a year after *Martinez* was decided, filed a Rule 59(e) pleading requesting their own removal. *See Hutton v. Mitchell*, No. 1:05-cv-2391, 2013 WL 4060136 at *2 (N.D. Ohio Aug. 9, 2013) (not reported in F.Supp. 2d (2013)) (ruling "Hutton is not entitled to the relief he seeks under Rule 59(e) because the law he cites was not 'intervening,'" and noting, the Supreme Court "decided *Martinez* and *Trevino* before this Court issued

its decision denying Hutton's Petition on June 7, 2013: *Martinez* was decided on March 20, 2012; *Trevino,* on May 28, 2013. Thus, Hutton could have raised these issues before this Court's ruling, but he did not. The arguments, therefore, are barred.")

Upon denial of the Rule 59(e) original habeas counsel then filed their motion to withdraw as habeas counsel in the Sixth Circuit Court of Appeals. Counsel indicated they were "unwittingly" conflicted, *Hutton v. Mitchell,*[3] No. 13-3968, Motion to Withdraw As Counsel And Request For Appointment of New Counsel, RE 13 at p. 1 (6th Cir. Oct. 06, 2013), and the Warden ignores that the request to withdraw was filed by both counsel and noted that lead counsel Doughten "could not and cannot raise that the cause for failing to raise a claim was his own failure on state postconviction," while co-counsel Gibbons "was also not in position to raise the [conflict of interest] issue on his co-counsel." *Id.* at p. 6. The Sixth Circuit Court of Appeals "in the exercise of our discretion," permitted the withdrawal and appointed new counsel for the appeal. *Hutton v. Mitchell,* No. 13-3968, Order, RE 15-1 at p. 1 (6th Cir. Oct. 18, 2013). Particularly as to the failure of both original habeas counsel to bring the conflict of interest timely to the attention of the district court, a remand is necessary to assess the factual basis of those extraordinary circumstances and to what extent their client was informed or not informed about the conflict under which

[3] This pleading was filed with the erroneously-captioned title, "*United States of America v. Percy June Hutton.*"

they were knowingly litigating. The appellate court was in no position to have made such a determination.

Given the undeniable existence of the conflict of interest, which the Warden does not deny, a remand is warranted so the lower court can properly assess the factual basis for the "extraordinary circumstances" that underlie Hutton's Motion to Remand. *See, i.e., Blue Diamond Coal Co. v. Trs. of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (holding Rule 60(b)(6) applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule."); *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002) (same); *Jalapeno Property Management, LLC v. Dukas*, 265 F.3d 506, 509-10 (6th Cir. 2002) (same); *Jinks v. Allied Signal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001) (same). An evidentiary hearing is necessary so the record can reflect why Hutton's counsel continued to litigate his habeas, knowing full well about the conflict of interest under which they were individually and collectively litigating, with no evidence of having ever made the conflict known to their client, and without bringing the conflict to the district court's attention until after the case was fully decided (and counsel could arguably be paid in full).

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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