

No. \_\_\_\_

**In the Supreme Court of the United States**

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DAVID BOBBY, Warden,  
*Petitioner,*

v.

JOE D'AMBROSIO,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE—NO EXECUTION DATE SET**

**QUESTION PRESENTED**

Can a federal habeas court bar re-prosecution of an inmate based on an unexhausted claim of prosecutorial misconduct?

## **LIST OF PARTIES**

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Margaret Bagley. See Fed. R. Civ. P. 25(d).

The Respondent is Joe D'Ambrosio, a former inmate at the Ohio State Penitentiary.

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## **PETITION FOR WRIT OF CERTIORARI**

The Attorney General of Ohio, on behalf of David Bobby, Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## **OPINIONS BELOW**

The Sixth Circuit's opinion, *Bagley v. D'Ambrosio*, 656 F.3d 379 (6th Cir. 2011), is reproduced at Apx. 1a - 41a. The United States District Court for the Northern District of Ohio's opinions and orders are reproduced at Apx. 42a - 180a.

## **JURISDICTIONAL STATEMENT**

The Warden files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

§ 2254. State custody; remedies in Federal courts

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.



## INTRODUCTION

In February of 1989, Respondent Joe D'Ambrosio was convicted of kidnapping and murdering Anthony Klann and sentenced to death. Over twenty years later, a federal district court granted D'Ambrosio the greatest possible remedy in habeas corpus. Based on a new claim of prosecutorial misconduct -- which allegedly occurred after the district court granted a conditional writ and a re-trial was scheduled -- the district court expanded its relief to bar the state from again prosecuting D'Ambrosio. This new claim was not exhausted before the state courts, and therefore the state courts were not given the opportunity to address the newly alleged misconduct and rectify it. In essence, the district court determined that now D'Ambrosio cannot receive a fair trial. But that claim could have and should have been presented to the state courts.

The district court's order barring D'Ambrosio's re-prosecution and the Sixth Circuit decision affirming it present important questions concerning the statutory jurisdiction of a court in federal habeas corpus. The authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted. *Felker v. Turpin*, 518 U.S. 651, 662 (1996). The district court exceeded this statutory authority in a fundamental way. By granting relief based on a new claim of constitutional error, the district court ran afoul of the statutory requirement that D'Ambrosio exhaust his available state remedies before calling upon a federal court's intervention. The district court's order also contravened *Pitchess v. Davis*, 421

U.S. 482 (1975), in which the Court applied and enforced the exhaustion requirement in virtually identical circumstances. The exhaustion requirement is most appropriately applied here as well, in light of the district court's finding that the state trial court was capably addressing the prosecution's alleged misconduct following issuance of the conditional writ.

For these reasons, the Court should grant the Warden's petition and reverse the Sixth Circuit's decision.

### STATEMENT OF THE CASE

In 1988, D'Ambrosio and co-defendants Thomas Keenan and Edward Espinosa were indicted by a grand jury in Cuyahoga County, Ohio, for the kidnapping and aggravated murder of Anthony Klann. D'Ambrosio waived his right to trial by jury and his case was heard by a three-judge panel. Espinoza testified for the prosecution that he participated in the kidnapping and that he witnessed D'Ambrosio kill Klann. D'Ambrosio was convicted and sentenced to death on the aggravated murder counts. His convictions were affirmed on direct appeal. *State v. D'Ambrosio*, No. 57448, 1990 Ohio App. LEXIS 3781 (Ohio Ct. App. Aug. 20, 1990), *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 616 N.E.2d 909 (Ohio 1993). Following a remand to the court of appeals, the Supreme Court of Ohio affirmed D'Ambrosio's death sentence. *State v. D'Ambrosio*, 73 Ohio St. 3d 141, 652 N.E.2d 710 (Ohio 1993).

After unsuccessfully seeking state post-conviction relief, in March of 2001, D'Ambrosio filed with the United States District Court for the Northern District of Ohio a petition for a writ of habeas corpus under 28 U.S.C. Section 2254. D'Ambrosio claimed, among other things, that the prosecution prior to trial suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). On March 24, 2006, the district court issued an opinion and order in which it held that D'Ambrosio's claim of suppressed evidence warranted relief in federal habeas corpus. The district court ordered that "[t]he Respondent shall either: (1) set aside D'Ambrosio's conviction and sentence of death; or (2) conduct another trial," and that "[t]his shall be done within 180 days from the effective date of this Order." However, the district court stayed its order pending appeal by the parties. *D'Ambrosio v. Bagley*, No. 1:00-cv-2521, 2006 U.S. Dist. LEXIS 12794 (March 24, 2006).<sup>1</sup> On June 5, 2008, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. *D'Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008)

On September 11, 2008, the district court issued a conditional writ of habeas corpus consistent with its prior judgment. On October 23, 2008, D'Ambrosio was transferred from the custody of the Warden to the custody of the Cuyahoga County Sheriff. After a series of pre-trial conferences, the

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<sup>1</sup> The district court subsequently filed an amended judgment which clarified that its order extended to D'Ambrosio's convictions and sentences as to all counts of the indictment, including the sentence of death. *D'Ambrosio v. Bagley*, *supra*, at fn. 1.

trial court scheduled D'Ambrosio's re-trial to commence on March 2, 2009. However, after the prosecution disclosed to D'Ambrosio's counsel the existence of additional evidence, including blood and soil samples, the trial court granted the defense's motion to extend the trial date until May 4, 2009. In the meantime, on February 17, 2009, D'Ambrosio's attorneys filed a motion for bail. On February 24, 2009, the trial court granted the motion. D'Ambrosio was then released on bail. *D'Ambrosio v. Bagley*, *supra*, 656 F.3d at 381, 392-393, Apx. at 4a - 5a, 31a - 32a.

On March 4, 2009, the Warden and attorneys from the Cuyahoga County Prosecutor's Office filed with the district court a motion to extend the time provided by the conditional writ to conduct a re-trial. On March 6, 2009, the district court granted an enlargement of time solely for the purpose of having the parties submit briefs addressing the issues presented in the motion for an extension of time. In opposing the motion, D'Ambrosio asked the district court to grant an unconditional writ and bar his re-prosecution because of the state's failure to comply with the conditional writ. *D'Ambrosio v. Bagley*, *supra*, 656 F.3d at 381-382, Apx. at 5a.

On April 1, 2009, the district court conducted an evidentiary hearing on the joint motion, and, on April 27, 2009, the district court issued an opinion and order denying the motion and granting an unconditional writ. The district court also ordered the expungement of D'Ambrosio's convictions. The district court cited "the State's" failure to respond to discovery requests, delay in producing relevant, discoverable evidence until the eve of trial, and

attempts "to interfere with the orderly progress of trial through gamesmanship." The district court concluded that the latter actions "all counsel against a finding that the State engaged in a good faith effort to substantially comply with this Court's mandate." *Id.* at 382, Apx. at 5a.

However, the district court declined to bar D'Ambrosio's re-trial. The district court found, among other things, that "the state trial court protected D'Ambrosio ... by granting a continuance ....;" that "there is no evidence of an attempt by the current prosecutors to affirmatively hide evidence or distort witness testimony;" that "the state court is committed to conducting a constitutional trial;" and that "[t]he state court's decision to delay the proceedings both benefits D'Ambrosio and ensures that the State has and will continue to honor its discovery obligations." *Id.*, Apx. at 6a.

D'Ambrosio appealed the district court's order to the Sixth Circuit, insofar as the district court denied his request to bar his re-trial. On August 14, 2009, D'Ambrosio filed with the district court a motion for relief from judgment under Fed R. Civ. P. 60(b). D'Ambrosio claimed that the death of Espinosa on April 26, 2009 and the prosecution's failure to notify the defense of Espinoza's death until August 24, 2009, violated his right to due process and required the district court to bar his re-trial. While acknowledging that the trial court had prohibited the prosecution from introducing Espinoza's prior testimony, D'Ambrosio argued that Espinoza's death deprived the defense from "hav[ing] the opportunity to expose the truth as Espinoza

faced the withheld exculpatory evidence that eviscerates his entire story and the State's case." *Id.* at 382-383, Apx. at 7a.

On March 3, 2010, after remand from the Sixth Circuit, the district court granted D'Ambrosio's motion and entered an order barring his re-trial. Citing the state's "substantial inequitable conduct" after issuance of the conditional writ and its "startling indifference to D'Ambrosio's rights," and the state's failure to re-try D'Ambrosio within 180 days, the district court found that the state's act of withholding the fact that the "critical state's witness" is no longer available for trial "tipped the balance" in favor of barring D'Ambrosio's re-trial. *Id.* at 383, Apx. at 7a - 9a.

Upon the Warden's appeal, the Sixth Circuit affirmed in a 2 to 1 decision. The panel majority principally relied on *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006), in which the Sixth Circuit held that a federal court in habeas corpus in "extraordinary circumstances" may bar a successful petitioner's re-prosecution. The Warden argued for various reasons that the district court was without jurisdiction to bar D'Ambrosio's re-prosecution, and that the district court's order violated this Court's decision in *Pitchess v. Davis*, 421 U.S. 482 (1975). The panel majority essentially held that because the State did not comply with the conditional writ, the district court retained jurisdiction. The panel majority distinguished *Pitchess v. Davis*, *supra*, reasoning that in *Pitchess* the state complied with the conditional writ and the prisoner subsequently presented a new claim for relief "unconnected" to the

claim upon which relief was originally granted. *D'Ambrosio v. Bagley*, *supra*, 656 F.3d at 384, 389, Apx. at 12a, 22a. Judge Boggs dissented. He reasoned that the district court was without jurisdiction because as a matter of fact D'Ambrosio's conviction had been vacated and therefore the state complied with the conditional writ. Judge Boggs further determined that under *Pitchess*, the district court was without authority to consider D'Ambrosio's new claim that the prosecutor's recent misconduct would prevent a fair re-trial. *Id.* at 393, 395, Apx. at 32a, 36a - 37a.

## REASONS FOR GRANTING THE WRIT

**In barring the re-prosecution of D'Ambrosio based on an unexhausted claim, the district court exceeding its statutory authority in habeas corpus, and contravened this Court's decision in *Pitchess v. Davis*, 421 U.S. 482 (1975).**

For over a hundred years the Court has recognized that a state prisoner's exhaustion of available state remedies is an essential prerequisite to habeas corpus relief. *Ex parte Royall*, 117 U.S. 241 (1886); *Rose v. Lundy*, 455 U.S. 509 (1982); *Castille v. Peoples*, 489 U.S. 346 (1989). It is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Rose v. Lundy*, *supra*, 455 U.S. at 518, citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973). The exhaustion requirement is rooted in comity between courts, "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U.S. 200, 204 (1950).

Title 28 U.S.C. Section 2254(d)(1)(A) provides, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." Under 28



U.S.C. § 2254(b)(3), “[a] State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.” The statute codifies the Court's longstanding exhaustion doctrine.

The district court exceeded its jurisdiction under 28 U.S.C. Section 2254(d)(1)(A) by granting relief based on “inequitable conduct” by the prosecution subsequent to the issuance of a conditional writ of habeas corpus. A petition for habeas corpus relief “seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement,” and, “[i]f his petition results in a district court's granting of the writ, ‘the State may seek a new judgment (through a new trial or a new sentencing proceeding).” *Magwood v. Patterson*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2788, 2797 (2010) (emphasis omitted), quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005). The prosecutor's alleged misconduct after the granting of the conditional writ could not possibly have affected the constitutionality of the judgment which was the subject of D'Ambrosio's petition. Rather, the alleged misconduct could only result in habeas corpus relief in the event that the alleged misconduct affected the fairness of a re-trial and a subsequently adjudged conviction. Thus, D'Ambrosio's Rule 60(b) motion unquestionably presented a new claim of constitutional error subject to the exhaustion requirement.

The district court's order also contravened *Pitchess v. Davis*, 421 U.S. 482 (1975), in which the Court applied and enforced the exhaustion

requirement in a procedural context virtually identical to the context presented here. The prisoner claimed that the prosecution's failure to turn over an exculpatory laboratory report violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). The district court granted a conditional writ permitting the state to commence a re-trial. After it became apparent that the state had destroyed the physical evidence referenced in the report, the prisoner moved the trial court to dismiss the charges. After the trial judge denied the motion, the prisoner returned to federal court and filed a motion for relief from judgment under Fed. Rule of Civ. P. 60(b). The district court granted the motion, ordered the prisoner's release, and stayed any further state proceedings. The circuit court of appeals affirmed. 421 U.S. at 485.

Upon the Warden's appeal, this Court reversed the district court's order. The Court reasoned that "[h]abeas corpus jurisdiction of persons in custody pursuant to the judgment of a state court is conferred on federal courts by 28 U.S.C. § 2254," and that the statute "requires exhaustion of available state remedies as a precondition to consideration of a federal habeas corpus petition." The Court applied the exhaustion requirement to the prisoner's claim that destruction of the physical evidence deprived him of a fair trial. The Court found that the exhaustion requirement had not been met, because should the prisoner be convicted upon re-trial, full appellate review in state courts would be available to review his claim. 421 U.S. at 486-587.

As in *Pitchess*, here the district court granted a conditional writ of habeas corpus, based on a claimed violation of *Brady v. Maryland*, which permitted the state to conduct a re-trial of D'Ambrosio. And, as in *Pitchess*, D'Ambrosio sought via a Rule 60(b) motion to expand the relief to include barring his re-trial, based on alleged misconduct by the prosecutor which could only have affected the fairness of the re-trial. And, most importantly, like the district court in *Pitchess*, the district court, in granting relief under Rule 60(b) and barring D'Ambrosio's re-trial, did not require D'Ambrosio to exhaust before the state courts his claim that the prosecutor's failure to timely disclose the death of the state's "key witness" prevented him from receiving a fair re-trial.

Application of the exhaustion requirement is even more appropriate given the findings of the district court. Exhaustion presumes that the state courts will zealously safeguard the prisoner's rights, and the district court expressed no doubts about the trial court's ability to do so. Indeed, the district court found that "the state court is committed to conducting a constitutional trial;" and that "[t]he state court's decision to delay the proceedings both benefits D'Ambrosio and ensures that the State has and will continue to honor its discovery obligations." *D'Ambrosio v. Bagley*, *supra*, at 382, Apx. at 6a. Moreover, upon the death of the state's "key witness," the trial court prohibited the prosecution from introducing the witness's prior testimony. And, of course, there is no reason to believe that if D'Ambrosio was convicted -- notwithstanding the unavailability of the testimony of the prosecution's

"key witness" -- the state appellate courts would not fully and fairly consider D'Ambrosio's claims.

The panel majority sought to avoid *Pitchess* and bypass the exhaustion requirement on two bases. First, the panel thought it distinguishable that in *Pitchess* the state complied with the conditional writ by commencing re-trial within the required time. *D'Ambrosio v. Bagley, supra*, 656 F.3d at 384, Apx. at 21a - 22a. The panel majority acknowledged that the district court's decision not to bar re-prosecution when it initially granted an unconditional writ "further complicated" the case, but reasoned that the district court retained jurisdiction and therefore had the authority to consider and grant D'Ambrosio's Rule 60(b) motion. *Id.* at 388, Apx. at 20a - 21a. But even if the district court retained jurisdiction to consider the Rule 60(b) motion, it still lacked the authority under 28 U.S.C. Section 2254 to expand relief based on an unexhausted claim. Thus, notwithstanding the state's non-compliance with the conditional writ, the district court's order remains squarely within the ambit of *Pitchess*.

Second, according to the panel, the prisoner in *Pitchess* asserted a new claim in his Rule 60(b) motion whereas D'Ambrosio's allegations were based upon the *Brady* claim upon which the district court initially granted a conditional writ. *D'Ambrosio v. Bagley, supra*, at 389, Apx. 22a - 23a. But the facts remain that the district court did not bar re-prosecution until D'Ambrosio raised his "dead witness" claim, and the prosecution's alleged misconduct in failing to disclose the witness's death

could not possibly be deemed grounds for expanding habeas corpus relief based on the unconstitutionality of D'Ambrosio's conviction. As found by Judge Boggs in dissent, "In his Rule 60(b) motion, D'Ambrosio's argument was not that the state withheld exculpatory information in his 1988 trial, but that, without the ability to cross-examine the state's dead witness, he could not mount an adequate defense at retrial. This is not the old *Brady* claim. It is an entirely new substantial-delay claim." *Id.* at 395, Apx. at 36a.

It is seemingly beyond question that the district court barred D'Ambrosio's re-prosecution based on allegedly improper actions by the prosecutor which the state trial court was fully capable of addressing and rectifying. The Court's application of the exhaustion requirement in *Pitchess* ultimately underscored the state's paramount interest in the unfettered administration of criminal justice that the exhaustion requirement is designed to serve. "Neither Rule 60 (b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court." *Pitchess v. Davis, supra*, 421 U.S. at 490, citing *Stefanelli v. Minard*, 342 U.S. 117 (1951). The district court ran afoul of this fundamental principle.

The power exercised by the district court and the Sixth Circuit's sanctioning of it have potentially wide-ranging implications. Claims that the prosecution withheld exculpatory evidence are common in habeas corpus. All such claims would

allow for an argument that the passage of time precludes a fair re-trial. The panel majority's opinion, which essentially applied a "relation back" rule to D'Ambrosio's original *Brady* claim, will no doubt be read to support such an argument and confirm the authority of the district court to bar re-prosecution. It is also not uncommon that after a re-trial has been scheduled, following the issuance of a conditional writ, the trial court finds it necessary to delay the trial. The panel majority's opinion allows for the prisoner to return to the district court to argue that the delay is unjustified and amounts to a continuing violation of the prisoner's constitutional rights.

### CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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