NO. 12-7720

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD WAYNE STROUTH,
Petitioner,

v.

ROLAND W. COLSON, Warden,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I. Does this Court's decision in *Cullen v. Pinholster*, 563 U.S. __, 131 S. Ct. 1388 (2011), permit an exception whereby federal courts may consider newly developed evidence when the failure to develop that evidence in state court is a consequence of constrained process that is inadequate to develop the factual record?

II. Does this Court's decision in *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309 (2012), apply to substantial ineffective-assistance-of-counsel claims that were not raised in state court because constrained state court process prohibited development of the evidence that gives rise to the claim?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the denial of Strouth's petition for a writ of habeas corpus is reported at *Strouth v. Colson*, 680 F.3d 596 (6th Cir. 2012). (A. 49.) The order of the Court of Appeals denying Strouth's petition for rehearing is unreported. (A. 1.)

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on May 23, 2012. (A. 49.) On July 12, 2012, the Court of Appeals denied Strouth's petition for rehearing. (Pet. App. B.) Justice Kagan granted an extension of time until December 9, 2012, within which to file a petition for a writ of certiorari. *Strouth v. Colson*, No. 12A279 (Sept. 21, 2012) (Kagan, J.). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. (Pet. 1.)

STATEMENT OF THE CASE

Donald Wayne Strouth ("Strouth") murdered an elderly shopkeeper during the course of a robbery in 1978. *See State v. Strouth* ("*Strouth I*"), 620 S.W.2d 467, 469 (Tenn. 1981). He was appointed counsel prior to trial. *See Strouth v. State* ("*Strouth II*"), 755 S.W.2d 819, 823 (Tenn. Crim. App. 1986). Strouth proved to be an uncooperative client; although he was born to Caucasian parents and raised in Maryland, he told counsel, among other things, that he was an Apache Indian chief

from a tribe in Arizona and that he had no family left alive. *See id.* at 824. Counsel investigated these claims to no avail. *See id.*

Despite Strouth's tales, counsel "believed that Strouth was merely uncooperative, not insane." *Id.* at 825. Nevertheless, counsel arranged for a competency and sanity evaluation. *Id.* at 824, 825. The evaluation found Strouth to be both competent and not insane, *id.*, and was returned with the devastating tag: "We found no indication of mental illness in this man." (A. 105, 106.) Perhaps unsurprisingly, counsel mounted no mental health defense at the guilt or penalty phases of trial.

Strouth was convicted of murder in the first degree and robbery by the use of a deadly weapon. *See Strouth I*, 620 S.W.2d at 469. Finding that the murder was heinous, atrocious or cruel, that it was committed during the course of another felony, and that these aggravating circumstances outweighed any mitigating factors beyond a reasonable doubt, the jury sentenced Strouth to death. *Id.* On direct appeal, Strouth's conviction for armed robbery was vacated, but the conviction and sentence for murder were upheld. *Id.* at 470, 473.

In 1982, Strouth filed a petition for post-conviction relief with the state courts. *See Strouth II*, 755 S.W.2d at 821. Among the claims that he pressed was the allegation that the court-ordered mental evaluation was inadequate, which failing, Strouth asserted, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to

the United States Constitution. In connection with this claim, Strouth filed a motion for appointment and funding of experts and investigators. *See id.* One of these experts was Dr. Kathleen Broughan, who submitted an unnotarized affidavit in which she stated her opinion that the mental health examination had been insufficient. *See id.* The post-conviction trial court denied the motion for funding and, following an evidentiary hearing, denied Strouth's petition. *See id.*

Strouth appealed, contending that he was entitled to funding under the auspices of *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See id.* at 822. The Tennessee Court of Criminal Appeals declined to determine whether *Ake* applied in the post-conviction setting, but recognized that Strouth's claim might sound under ineffective assistance of counsel. *See id.* The court could discern no prejudice:

> In this record, we have only a written statement from Dr. Broughan that Strouth's pre-trial mental evaluation was "insufficient," apparently because it addressed the questions of his competency to stand trial and his sanity at the time of the offense, but not the possibility of mitigating circumstances relevant to his sentence. There is no showing in the record, however, of what an evaluation deemed "sufficient" by Dr. Broughan would have turned up that might have affected the outcome of the sentencing hearing. In the absence of any demonstration of prejudice, we decline to hold that the failure to fund Dr. Broughan's testimony was an abuse of discretion that merits reversal on appeal.

Id.; *see id.* at *832 ("And, as previously noted, there is no proof in the record, nor even an assertion by counsel, that Strouth's mental evaluation failed to turn up further

evidence that would have affected the jury's verdict in any way."). The court affirmed the denial of post-conviction relief. *See id.* at 821, 833.

In 1988, Strouth filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. (*See* A. 51.) While that petition was pending, Strouth filed a second petition for post-conviction relief in the state courts, alleging that the felony murder aggravating circumstance duplicated the elements of the underlying offense in violation of the state constitution. *See Strouth v. State* ("*Strouth III*"), 999 S.W.2d 759, 762-63 (Tenn. 1999). The district court dismissed Strouth's habeas petition without prejudice to allow him to exhaust his claims in state court. (*See* A. 51.) Strouth prevailed on his state-law claim, but the Tennessee Supreme Court concluded that the invalid felony murder circumstance was harmless beyond a reasonable doubt. *Strouth III,* 999 S.W.2d at 767.

Strouth filed a new federal habeas petition in 2000. (*See* A. 51.) He sought discovery and an evidentiary hearing, lodging in support two affidavits of mental health professionals diagnosing Strouth with a variety of ailments. (*See* R. 80, at 12-13.) In a decision pre-dating in *Cullen v. Pinholster,* 131 S. Ct. 1388 (2011), the district court denied an evidentiary hearing on the ground that Strouth had failed to exercise due diligence in developing the expert proof in state court:

> In any event, there is not any showing of clear and convincing evidence to satisfy the second part of Section 2254(e)(2). For the reasons stated with regard to discovery, the Court concludes that Petitioner's counsel

> did not exercise due diligence in pursuing this expert proof for an evidentiary hearing in the state courts.

(R. 80, at 19.)

The case proceeded to summary judgment in favor of the Warden. (*See* A. 164.) Notwithstanding its denial of an evidentiary hearing, the district court considered Strouth's affidavits in the context of an ineffective-assistance-of-counsel at sentencing claim. (*See* A. 110.) The court found the affidavits to lack probative value:

> In closing, Petitioner submits affidavits of medical experts (Docket Entry No. 80, Memorandum at pp. 16-19) and recites their opinions in his amended petition (Docket Entry No. 90, Amended Petition at pp. 30-36 and 95-97). These medical evaluations were conducted in 2004 and 2005 more than twenty five years after the critical events. As a matter of law, those evaluations are not as probative as medical evaluations at the time of the events. Expert testimony "well after trial" "lack the same relevance" as evaluations of the petitioner's mental condition prior to trial. *Harries v. Bell*, 417 F.3d 631, 636 (6th Cir. 2005). Moreover, the mental evaluation prior to his trial reads: "[w]e found no indication of mental illness in this man." (Docket Entry No. 90, Amended Petition at p. 141).

(A. 110.)

Strouth appealed. While the case was pending argument in the Court of Appeals, this Court handed down its decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Strouth filed a motion to remand the matter to the district court, asserting that the court had "determined that Petitioner's counsel in his initial review collateral proceeding had failed to seek funding for expert assistance like that which gave rise to

Petitioner's new claims in federal court," which failing, he claimed, was "a *prima* facie indication of performance that falls below an objective standard of reasonableness for post-conviction counsel." *Strouth v. Colson*, No. 08-6116 (6th Cir. Apr. 3, 2012) (mot. remand at 6). The Court of Appeals denied the motion. *Id.* (order of Apr. 5, 2012).

Following argument, the Court of Appeals affirmed the denial of the petition for a writ of habeas corpus. (A. 50, 65.) Regarding Strouth's claim of ineffective-assistance-of-counsel during penalty phase proceedings, the court wrote, in part:

> In his federal habeas petition, Strouth seeks to "supplement[ ]" the record with "expert evaluations of his longstanding mental illness." Br. at 99–100. But in reviewing the state court's resolution of Strouth's claim, federal courts must "limit[ ]" themselves to "the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). The new mental-health evidence has no bearing on whether AEDPA permits us to grant him habeas relief on this claim. And because that is the only ground on which Strouth seeks relief with respect to this claim, the claim necessarily fails. Even if that were not the case, the district court's reasoning on this score independently suffices to reject this claim: recent mental evaluations offer little insight into Strouth's state of mind twenty-five-plus years ago, as the state courts reasonably concluded in finding no prejudice.

(A. 56.)

Strouth now petitions for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Strouth asks that the Court overrule *Cullen v. Pinholster* in favor of a scheme in which federal courts may consider evidence newly acquired in federal habeas proceedings where the petitioner was "prohibited from developing evidence in state court by some state action." (Pet. 16, 22.) Additionally, Strouth requests that the equitable exception to the rules of procedural default set forth in *Martinez v. Ryan* be enlarged to encompass "petitioners whose post-conviction counsel are rendered ineffective by state action." (Pet. 26.) Neither question is properly before the Court.

I. Strouth's *Pinholster* Claim Is Not Before the Court.

For the "state action" that prohibited his development of an ineffective-assistance-of-counsel claim respecting mental health experts, Strouth maintains that to prove prejudice from counsel's failure, "Strouth's state post-conviction counsel required, but was denied, funding for the same kind of experts." (Pet. 26.) Strouth can make that claim only by overlooking the decision of the Tennessee Court of Criminal Appeals adjudicating his funding claim. That court found no abuse of discretion in the trial court's denial of the motion not because funds were unavailable to Strouth as a legal matter, but because he had failed to show good cause for the money. *See Strouth II*, 755 S.W.2d at 822. In particular, Strouth submitted an unnotarized affidavit from a mental health professional challenging the sufficiency of the evaluation that Strouth had received prior to trial, but it contained no indication,

"nor even an assertion by counsel," what a sufficient evaluation would have turned up that might have affected the outcome of the sentencing hearing. *Id.* at 822, 832. Thus, it was not "some state action"—beyond the bare denial of his motion—that prohibited Strouth from developing evidence in state court (Pet. 16), but rather his own failure to substantiate his motion.

Similarly, Strouth overlooks the decision of the district court denying his motion for an evidentiary hearing. The district court found that, under 28 U.S.C. § 2254(e)(2), Strouth "did not exercise due diligence in pursuing this expert proof for an evidentiary hearing in the state courts." (R. 80, at 19.) Even under the dissenting viewpoint in *Pinholster*—which Strouth urges the Court to adopt (Pet. 24)—the AEDPA bars an evidentiary hearing in these circumstances. *Pinholster*, 131 S. Ct. at 1415 (Sotomayor, J., dissenting) ("AEDPA thus bars an evidentiary hearing for a nondiligent petitioner unless the petitioner can satisfy both §§ 2254(e)(2)(A) and (B), which few petitioners can. Section 2254(e)(2) in this way incentivizes state prisoners to develop the factual basis of their claims in state court."). Accordingly, Strouth's *Pinholster* claim is not properly before the Court.

Finally, despite granting no evidentiary hearing, the district court considered Strouth's affidavits in the context of his ineffective-assistance-of-counsel claim at sentencing, but found them to be entitled to little weight because they were the ruminations of paid experts extending back more than two decades. (*See* A. 110.) As

the Court of Appeals remarked, "the district court's reasoning on this score independently suffices to reject this claim . . ." (A. 56.) That independent basis counsels against the grant of a writ of certiorari as to this question.

II. Stroth's *Martinez* Claim Is Not Before the Court.

Stroth next contends that "*Martinez*'s equitable exception to the rules of procedural default must contemplate petitioners whose post-conviction counsel are rendered ineffective by state action." (Pet. 26.) Stroth failed to preserve this claim below. It was not until *Martinez* was announced that Stroth decided that his post-conviction attorney (also one of his federal habeas attorneys) was ineffective. *Stroth v. Colson*, No. 08-6116 (6th Cir. Apr. 3, 2012) (mot. remand at 6). The claim, moreover, has shifted; post-conviction counsel (not having withdrawn from the habeas proceedings) is no longer said to be deficient for failing to seek funding for expert assistance, *see id.*, but rather, it is the denial of funding that "rendered" counsel ineffective (*see* Pet. 26).

Thus, in order to grant Stroth relief on this claim, the Court would have to: (1) consider an argument that was first raised during a petition for rehearing (*see, e.g.*, A. 14); (2) extend the holding of *Martinez* to states like Tennessee that allow (but do not encourage) ineffective assistance of trial counsel claims to be raised on direct appeal, *see State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001); and (3) further extend *Martinez* to "state action" including, in Stroth's view, denials of motions for expert services

that are justified under state law. All of this would be done, moreover, in service of an ineffective assistance of trial counsel claim that is not substantial. *See Martinez*, 132 S. Ct. 1309. Strouth's counsel obtained a pre-trial evaluation, and was advised "We found no indication of mental illness in this man." (*See* A. 106, 110.) Counsel was obliged to do no more. No writ should issue as to this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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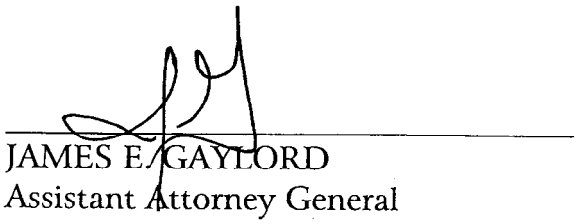
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, postage prepaid, to: Mark E. Olive, Law Office of Mark E. Olive, P.A., 320 W. Jefferson Street, Tallahassee, FL 32301; and Henry A. Martin, Federal Public Defender, Jerome C. Del Pino, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37027, on the 13th day of March, 2013.



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