CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD WAYNE STROUTH,

Petitioner

vs.

ROLAND W. COLSON, Warden

Respondent

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

PETITION FOR WRIT OF CERTIORARI

Mark E. Olive
Law Office of Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Henry A. Martin
Federal Public Defender
Jerome C. Del Pino*
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

*Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

Donald Strouth was 19 years old in 1978 when he was the seventh person sentenced to death under Tennessee's 1-year old death penalty statute. His attorney, who had never defended a homicide case, did not investigate his client's record of juvenile psychiatric hospitalization or on-going mental illness. He limited his inquiry to Strouth's competence to stand trial and sanity at the time of the offense and neglected any development of mitigating mental-health evidence.

In state post-conviction proceedings, Strouth's *pro bono* counsel raised claims that the court-ordered mental evaluation was inadequate to discover, and that defense counsel had failed to investigate, Strouth's mitigating mental illness. In a diligent effort to pursue these claims, post-conviction counsel requested funding for a mental health expert, even though Tennessee post-conviction law did not provide for such funding. The court denied his request and, ultimately, relief.

In federal habeas proceedings, Strouth gained access to funding for mental health experts who diagnosed him as being brain damaged and suffering from a schizophreniform delusional disorder. Federal habeas counsel included this evidence in his ineffective assistance of counsel claim. The district denied a hearing and, ultimately, relief reasoning that: (1) this was a new claim that was procedurally defaulted; (2) Strouth had failed to develop the evidence in state court; or (3) the evidence was too temporally removed from the offense to be of any weight. The Sixth Circuit Court of Appeals affirmed the district court's decision.

The questions presented in Mr. Strouth's petition for certiorari are:

1. 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?

2. 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?

TABLE OF CONTENTS

B. Strouth v. Colson, No. 08-6116 (Petitioner's Petition for Rehearing and Appendices)

C. Strouth v. Colson, 680 F.3d 596 (6th Cir 2012)

D. Strouth v. Bell, No. 00-00836 (M.D. Tenn.)(District Court Order Denying Relief)

TABLE OF AUTHORITIES

Statutes **Page(s)**

CITATIONS TO OPINIONS BELOW

The opinion of the Unites States Court of Appeals for the Sixth Circuit is reported at Strouth v. Colson, 680 F.3d 596 (6th Cir. 2012); A49.[1] The order of the Sixth Circuit denying rehearing is unreported. Strouth v. Colson, No. 08-6116 (6th Cir. July 12, 2012); A1. The opinion of the United States Court for the Middle District of Tennessee is unreported. Strouth v. Bell, No. 3:00-836 (M.D.Tenn. Feb. 4, 2008); A66.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1254. The Unites States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on May 23, 2012. The Sixth Circuit denied rehearing on July 12, 2012. On September 21, 2012, Justice Kagan granted an extension of time, to and including, December 9, 2012, within which to file a petition for writ of certiorari. Strouth v. Colson, No. 12A279 (September 21, 2012)(Kagan, J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

[1] Citations to pages in the attached appendix are indicated as "A___." Citations to the appendix filed with the Court of Appeals for the Sixth Circuit are indicated as "6th Cir Apx. p. __."

process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

U.S. Const. Amend XIV, §1: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Throughout all Donald Strouth's capital legal proceedings, no court has ever heard evidence of his mental illness and brain damage. Mr. Strouth's trial attorneys failed to investigate it. The state post-conviction court refused to grant counsel funds to diagnose it. Federal habeas courts, relying on the decisions of this Court and the AEDPA statute, have refused to consider it on the ground that his trial attorney or post-conviction attorney should have raised it.

A. Strouth's Defense Counsel Chased Fantasy With the Intent Of Proving a Legal Impossibility Instead of Investigating His Client's Life And Discovering His Mental Illness And Brain Damage

Strouth's childhood was marked by privation and abuse, including being locked in the bathroom and beaten by his father and forced by his mother to eat his own vomit. When, at the age of 13, his home life compelled him to run away, he was placed in a state facility for three months. During this time, he was assessed by psychiatrists, psychologists, and social workers, all of whom agreed that his home life was sewing the seeds of severe mental disturbance: he was a "decidedly emotionally disturbed youngster"; he had threatening perceptions of the world that overwhelmed him "to the extent that there are indications of impaired reality

contact with concomitant distortions of ongoing perceptions"; he devoted "a disproportionate amount of his ego strength to controlling ongoing anger in an effort to avoid receiving additional punishment and/or rejection [from his mother]"; he was "signaling for help and unless it is forthcoming fairly soon and in adequate amount and quality, he might very well start showing some signs of more serious emotional disorder." 6th Cir. Apx pp. 1828, 1825. All of the clinicians agreed that Strouth should not be returned to his home without intense family therapy and strict state supervision. 6th Cir. Apx, pp. 1821, 1825. Nevertheless, the juvenile court did just that.

Five years later, 19 year-old Strouth was facing capital murder charges in Tennessee. His court-appointed attorney, Larry Dillow, who had never tried a homicide case and was at a loss to navigate the state's new capital prosecution statute[2], was a one-person defense team. 6th Cir. Apx. pp. 1693-1694, 1378, 1384.[3] Dillow ignored his client's personal history. The State gave notice that it would use Strouth's prior felony conviction for engaging in homosexual sex as an aggravating factor, but Dillow did not contact the attorney who represented Strouth on that case

---

[2] Four days before trial began, Dillow told the court, "I've had to prepare under these new rules also and I've been trying to get all that straight in my mind. . . . I've been faced with the *Lockett* decision which just came down, faced with getting these motions in proper order, faced with trying to determine how this statute actually reads, and also getting myself familiar with picking a jury in a case of this magnitude, and also with getting ready for - - under the new rules of criminal procedure, and it's been rather hard, rather difficult." CA 6 Apx. pp. 1378, 1384.

[3] A second attorney joined Dillow four days before trial. 6th Cir. Apx. pp. 1708-09. A third attorney came on board the day before the trial began; that attorney was made responsible for the penalty phase of the trial. 6th Cir. Apx. p. 1738. Dillow did not have funds to employ any investigators or experts. 6th Cir. Apx. p 1357. See n. 4, *infra*.

and knew how to contact Strouth's family. *Cf.* Lawrence v. Texas, 539 U.S. 558 (2003)(declaring law criminalizing homosexual relations unconstitutional); Rompilla v. Beard, 545 U.S. 374 (2005)(counsel ineffective for failing to investigate file of offense that prosecution gave notice it would use in aggravation). When Strouth's sister called Dillow before the trial, he refused to speak with her and told her not to come to the trial. 6th Cir. Apx. pp. 1687-88, 1726. Yet, had he spoken with the family, Dillow could have obtained Strouth's juvenile psychiatric records, which would have tipped him to Strouth's impaired mental health and given context to the 19 year-old's fantastical stories that he was an Indian chief, a mercenary in the far east, and part of the mafia.

Instead, Dillow put Strouth "in control of the case" (6th Cir. Apx. p. 1720), and bought into his delusions, squandering the twelve weeks he had to prepare for trial. He traveled to Yuma, Arizona, the purported site of the tribe of which Strouth claimed to be the chief; read Juan Castenda's fantasy tome on hallucinogenic drugs, The Adventures of Don Juan; and attempted to contact Mel Torme, after hearing him say on "The Tonight Show" that he had known Nino Cochese. 6th Cir. Apx. pp. 1712-14, 1723, 1742. All of these efforts were aimed at a legal impossibility – immunizing Strouth from prosecution by validating his status as a Native American. 6th Cir. Apx. p. 1715. Dillow conceded in post-conviction that the

time was "wasted as far as [] preparation of [Strouth's] defense." 6th Cir. Apx. pp. 1711-12. Indeed, Dillow had no mitigation case prepared by the time of trial.[4]

Barely four weeks before trial, Dillow began to realize his errors. He filed a motion for a mental evaluation "to determine whether or not the Defendant was and is suffering from systematic delusion, a delusional psychosis, a fixed delusional system, . . . and whether or not the Defendant suffers from a psychosis disorder such as paranoia or some other variety of schizophrenia." 6th Cir. Apx. p. 1363. The court-ordered examination, conducted without the insight of Strouth's psychiatric records or his social history, assessed only whether he was competent to stand trial or insane at the time of the offense. It did not encompass or consider mitigating mental health issues. 6th Cir. Apx. pp. 1367, 1723. Thus, the mental illness that professionals foresaw in Strouth's adolescence, and that his attorney suspected, never came to the jury's attention. Strouth was convicted and sentenced to death.

[4] In a bitter twist of irony, the state introduced Strouth's juvenile record of marijuana possession and being a runaway in the penalty phase as aggravating character evidence. 6th Cir. Apx. p. 1398. The judge deemed this evidence proof of depravity of mind, which was one element of the heinous-atrocious-cruel aggravating factor that the jury found against Strouth. 6th Cir. Apx. p. 1370. A year after Strouth's conviction the Tennessee Supreme Court ruled that such "bad character" evidence that was not relevant to any statutory aggravating circumstance was inadmissible. Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979).

B. Stroud's Post-Conviction Counsel Was Not Able To Retain A Mental Health Expert To Develop His Ineffective Assistance Of Counsel Claim Because Tennessee's Post-Conviction Process Did Not Provide Petitioners With Investigative Resources And The State Court Declined To Exercise Its Statutory Power To Grant Such Funds

In his initial opportunity collateral review in state court, Stroud was represented by unfunded *pro bono*, volunteer counsel.[5] He raised a penalty-phase ineffective assistance claim based on Dillow's failure to: investigate and challenge the State's case in aggravation; discover evidence of Petitioner's troubled childhood home life, including the juvenile psychiatric records; and argue Stroud's youth as a mitigating factor to the jury. 6th Cir. Apx. p. 1582. Counsel also raised a claim that the court-ordered psychological evaluation Stroud received at trial was unconstitutionally inadequate to identify mitigating mental illness. Id., p. 1574. At that time, under Tennessee law, there was no statutory provision for post-conviction petitioners to obtain funding for investigation or expert services.[6] Nevertheless, post-conviction counsel moved the trial judge – the same one who had presided at Stroud's trial – to grant funding to retain a psychologist pursuant to his statutory post-conviction power "to issue such interlocutory orders [] as may be required."

---

[5] Tennessee only provided for the appointment of counsel to capital post-conviction petitioners in the discretion of the trial judge. Crumley v. Tollett, 474 S.W.2d 148 (Tenn. Crim. App. 1971). Mr. Stroud's counsel was never formally appointed by the court and, therefore, was not compensated.

[6] The statute that made expert services available to criminal defendants at trial was not enacted until 1984, two years after Petitioner filed his post-conviction petition and more than a year after the conclusion of his state court evidentiary hearing, and was not ruled applicable to post-conviction petitioners until 1995. *See* Tenn. Code Ann. § 40-14-207(b) (1984); Owens v. State, 908 S.W.2d 923, 926-927 (Tenn. 1995). *See also* "Report of the Tennessee Committee of the Sixth Circuit Death Penalty Task Force", (1987)(commissioned by the Sixth Circuit Court of Appeals to address the "crisis" in Tennessee's capital post-conviction indigent representation), A30, 35-38.

Tenn. Code. Ann. § 40-3809 (1975) (renumbered as Tenn. Code Ann. § 40-30-109 (1982)). A24-25. The judge denied the motion. 6th Cir. Apx. p. 1670.

Without funding for a mental health expert, Strouth's post-conviction counsel was left to argue generally that there were mitigating aspects of Strouth's mental health that Dillow had failed to investigate and present in the penalty phase based on only the juvenile psychiatric records that trial counsel had missed, Dillow's own motion requesting an evaluation, and the post-conviction testimony of the third attorney.[7] 6th Cir. Apx. p. 1641-43. He was not able to allege counsel's failure to discover and develop Strouth's specific mental disabilities because he had not been able to hire a consultant to diagnose them. Nonetheless, the import of his argument was clear to the State, which acknowledged in its post-hearing brief that, "Petitioner alleges that his attorneys were ineffective in pursuing and presenting a now alleged claim of 'mental problems.'" 6th Cir. Apx. p. 1676.

---

[7] The third attorney, Patrick O'Roarke, who joined the team the day before trial and was put in charge of the penalty phase, testified in post-conviction proceedings that had the lawyers been in touch with Strouth's family earlier, "[i]t would have been very helpful in terms of making the decision to use her and also to counsel the Defendant as to the importance of her testimony." 6th Cir. Apx. p. 1739. In response to questions from the State's attorney about what should have been done differently in Strouth's defense, O'Roarke testified

> [Strouth had] an underlying mental or emotional problem. . . . [Q]uite frankly, I was concerned because there had been no motion to hire a defense psychologist or psychiatrist . . . someone who would examine the Defendant and advise counsel as to [] how to present his case, how to question the persons who found that he was competent to stand trial. . . . There were many, many things that we [] should have done. I think that one of the areas that I feel uncomfortable with [is the] pre-trial stage, the issue of dealing with his emotional stage. . . . I was very concerned about whether [Strouth] understood what was happening here. . . . [I]t appeared to me that he had created a fantasy life. . . . I certainly didn't believe that he was [] able to deal in the real world.

Id., pp. 1740-43.

The trial court denied relief, adopting and incorporating in their entirety the State's arguments in opposition to Strouth's claim of penalty phase ineffective assistance. 6th Cir. Apx. p. 1671. *Cf.* Jefferson v. Upton, __ U.S. __, 130 S.Ct. 2217 (2010). Specifically, the court wrote that "had defense counsel performed each of the tasks . . . to the standards of present counsel, the result of the trial would not have been different." Id. *Compare* Strickland v. Washington, 466 U.S. 668, 694 (1984)(defining prejudice as a reasonable probability of a different outcome). The Tennessee Court of Criminal Appeals affirmed. Strouth v. State, 755 S.W.2d 819 (Tenn. Crim. App. 1987).[8] The state appellate court erroneously concluded that the Maryland juvenile offense records that the prosecution introduced at trial and disclosed to the defense had included Strouth's psychological assessments and, therefore, found that Dillow was not ineffective for failing to discover them. Strouth, 755 S.W.2d at 827-28. In fact, the juvenile mental health records were introduced for the first time in the post-conviction hearing. Strouth v. Bell, No. 00-00836, R.E. 118-4, p. 35 (M.D. Tenn.). The court also ignored Dillow's failure to contact Strouth's family and rejection of their efforts to communicate, and instead adopted the State's argument that "Strouth refused to let counsel call his mother to testify." Id. Compare Rompilla, *supra,* at 380 (counsel was ineffective for failing to

[8] The appellate court also determined that Strouth had waived his claim for an inadequate psychological assessment at trial by not raising it on direct appeal and that he had not demonstrated that ineffective appellate counsel was cause for that waiver because he had not shown prejudice in the form of what a proper assessment would have revealed. Of course, to do so would have required a full psychological evaluation, for which Strouth had been denied funding.

investigate even where client "actively obstructive by sending counsel off on false leads").

Strouth's initial-opportunity collateral-review state court process consisted of: (1) a *pro bono* attorney; (2) who had no investigative or expert funds; (3) arguing to a hostile judge who had presided over Strouth's trial; (4) who misapplied the *Strickland* analysis and adopted wholesale the state's arguments to deny relief; (5) which was affirmed by an appellate court opinion that misread the record and made unreasonable determinations of fact in light of the evidence presented. This is the record to which the AEDPA and *Cullen v. Pinholster* require federal courts to defer.

C. In His Federal Habeas Proceedings Strouth Is Finally Able To Retain Mental Health Experts – Only To Have The Courts Ignore The Evidence

1. A Comprehensive Psychological Assessment Confirms That Strouth Is Brain Damaged And Mentally Ill

After exhausting state court procedures, Strouth filed a federal petition for writ of habeas corpus.[9] His petition included a penalty-phase ineffective assistance of counsel claim that mirrored the claim he had presented to the state courts. Strouth v. Bell, No. 00-00836, R.E. 68, pp. 80–86 (M.D. Tenn.); 6th Cir. Apx. pp. 92-97. The claim did not specify any particular mental infirmities. Represented by

[9] Strouth initially filed his federal petition in 1988. When the Tennessee Supreme Court decided that the state's felony murder aggravating factor was unconstitutional, State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), Strouth returned to state court to exhaust that issue. The Tennessee courts upheld his death sentence by weighing the remaining heinous-atrocious-cruel aggravating factor against the mitigation evidence that Strouth's counsel presented, which was none. Strouth v. State, 999 S.W.2d 759 (Tenn. 1999).

The federal court dismissed the initial habeas action. He was forced to file anew in 2000 subject to the constraints of AEDPA.

the Office of the Federal Public Defender, Strouth had access for the first time to funding for investigators to look into his life history and psychological experts to assess his mental health. Based on neuropsychological tests, interviews with Strouth, his juvenile mental health records, and his social history, two experts determined that he suffers from disabling brain damage and a schizophreniform delusional disorder. Strouth, 00-00836, R.E. 71, 73; 6th Cir. Apx. pp. 951, 964.

2. The District Court Rejects Strouth's Evidence And Denies His IAC Claim By Misapplying The AEDPA

Strouth moved for an evidentiary hearing to present his previously unobtainable evidence of mental illness and brain damage. Strouth, 00-00836, R.E. 68. In response, the State argued that the penalty phase ineffective assistance claim as originally pleaded "did not raise any claim of ineffective assistance of counsel for failing to present mitigating evidence related to petitioner's mental state at the time of the offense," and, therefore, the evidence did not entitle Strouth to an evidentiary hearing. Strouth, 00-00836, R.E. 77, pp. 4-5. The district court denied the hearing on the ground that this Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985), was not retroactive and "any deficiency in counsel's performance must be based upon the law at the time of the final judgment in Peittioner's case." Strouth, 00-00836, R.E. 80, p. 18. Habeas counsel had not based any part of his ineffectiveness claim on the *Ake* decision.[10] Strouth filed a motion for

[10] Habeas counsel had relied on *Ake* for his challenge to the constitutional adequacy of Strouth's pre-trial psychological assessment. However, that was separate and apart from his Sixth Amendment claim, which was the claim for which the District Court denied the hearing.

reconsideration wherein he recounted again his futile efforts to obtain funding to develop the evidence in state court. Strouth, 00-00836, R.E. 82, pp. 4-7. This was also denied. Strouth, 00-00836, R.E. 93.

Strouth then filed an amended petition that explicitly included the experts' conclusions as a component of his penalty-phase ineffective assistance of counsel claim that addressed Dillow's failure to investigate Strouth's life history. Strouth, 00-00836, R.E. 90, pp. 92-97. The State argued in its answer that "to the extent petitioner's claims differ and/or exceed those presented in the state courts, the claims are barred by procedural default." Strouth, 00-00836, R.E. 100.

The District Court denied relief on the ground that the post-conviction court's opinion did not satisfy §2254(d). In its order, the Court noted Strouth's expert evidence, but rejected it on the ground that their findings were "[a]s a matter of law . . . 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." A110. The District Court ignored the evidence in the post-conviction record of the limited purpose and informational basis of the court-ordered pre-trial assessment that found Strouth not insane and competent to stand trial and relied on that report on the issue of mitigating mental health issues. Id. The Court also failed to note that the state court made an unreasonable determination of fact in light of the evidence presented when it stated that "Petitioner's proffered expert proof did not identify any condition that would warrant post-conviction relief," without acknowledging that the proffered expert

proof was not based on an examination of Strouth because the state court had denied him funding. A110-11.[11]

3. The Sixth Circuit Court Of Appeals Affirms – And Compounds – The District Court's Erroneous Analysis Of Strouth's Ineffectiveness Claim

In Strouth's appeal, the Sixth Circuit also refused to consider Strouth's expert evidence of his mental disabilities in its analysis of his penalty-phase ineffective assistance claim. Quoting from this Court's decision in Cullen v. Pinholster, 563 U.S. __, 131 S.Ct. 1388 (2011), the circuit court wrote:

> 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." The new mental health evidence has no bearing on whether AEDPA permits us to grant him habeas relief on this claim.

---

[11] The district court thoroughly confused the state court record in its AEDPA analysis of Strouth's IAC claim in his original petition. This included:

- misapplying the *Strickland v. Washington* analysis by rejecting Strouth's claim because "counsel's lack of investigation of [the aggravating] evidence would not have altered the result at sentencing" (A105);

- stating that Strouth's expert evidence was considered by the Tennessee courts in his second post-conviction proceeding, even though that evidence was not available until his federal habeas proceeding (A101);

- crediting the state courts with considering Strouth's youth in mitigation, but ignoring that the courts: (1) considered it merely as an objective fact without any development by Strouth's defense of the relevant corollary considerations *(Cf.* Roper v. Simmons, 543 U.S. 551 (2005)); and (2) relied on improperly admitted aggravating evidence of Strouth's juvenile offenses to diminish its mitigating weight (A102);

- rejecting post-conviction testimony from the attorney who joined Strouth's defense the day before trial that he was concerned about Strouth's mental health and the inadequacy of the preparation for sentencing (see n. 6, *supra*) because that attorney had not moved for a continuance, when the record showed that the attorney could not have sought more time because the trial judge had refused to appoint him and regarded him as "an interloper" (A106);

- denying that it was ineffective for Dillow not to contact Strouth's mother based on Strouth's instruction that she should not be called to testify, which confuses two separate issues and ignores defense counsel's duty to investigate his client's history.

P. A56; Strouth v. Colson, 680 F.3d 596, 603 (6th Cir. 2012), *quoting* Pinholster, 131 S.Ct. at 1398 (brackets in quotation). Thus, the federal appellate court penalized Strouth for never having presented in state court evidence that ineffective trial counsel and the state post-conviction process prevented him from developing.

The panel also added to the District Court's obfuscation of Strouth's ineffective assistance claim. It adopted the lower court's rejection of his mental illness evidence on the ground that it was too far removed from the time of trial, but added a twist: misinterpreting the state court record by concluding that the state courts had also found no prejudice based on the temporal distance of mental health evidence that, in reality, they never saw. "[T]he district court's reasoning on this score also 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." Id. *Cf.* Porter v. McCollum, 558 U.S. 30 (2009)(granting IAC relief based on psychological evidence developed 23 years after trial); Rompilla, *supra* (granting IAC relief based on psychological evidence developed 17 years after trial). The Court of Appeals also relied on the state court's rejection of Strouth's Fourteenth Amendment inadequate psychological assessment due process claim to affirm the denial of his Sixth Amendment claim by ruling that the post-conviction court's conclusion that

ineffective appellate counsel did not constitute cause for Strouth's default of his due process claim was not an unreasonable application of *Ake v. Oklahoma*. Id.[12]

****

Strouth's trial counsel did nothing to defend him against a death sentence. Even though he suspected his client was mentally ill – specifically "suffering from systematic delusion, a delusional psychosis, a fixed delusional system . . . or . . . from a psychosis disorder such as paranoia or some other variety of schizophrenia" – he failed to do any investigation into Strouth's life history, which would have turned up records that confirmed his suspicion and information that would inform a diagnosis. Strouth's post-conviction counsel also believed that he was mentally ill, and he sought money for experts in order to prove it, even though state law did not permit such finding. The Tennessee courts denied his request and then denied his

[12] The appellate panel also twisted its analysis to deny the other aspects of Strouth's penalty-phase ineffectiveness claim. Like the state courts, it ignored that Dillow had access to Strouth's family and made his failure to communicate with them a consequence of Strouth's non-cooperation. P. A108; 680 F.3d at 604. Yet the juvenile mental health records made clear that Strouth's mental disabilities stemmed in part from the home life from which he had run away.

The Court of Appeals also adopted the state court reasoning by denying that there was any ineffectiveness in Dillow's failure to challenge the State's evidence of Strouth's criminal history because the jury had not found the prior-felony aggravator. Id. This glossed over Tennessee's weighing sentencing scheme that enabled jurors to compare *all* of the State's evidence to the mitigating evidence. The prejudice from this was plain where the trial judge, himself, considered the state's bad-character evidence as proof of the depravity of mind component of the heinous-atrocious-cruel aggravating circumstance the the jury found against Strouth. 6th Cir. Apx. p. 1370.

Finally, the Sixth Circuit relied on the Tennessee Supreme Court's rejection of Strouth's youth as a mitigating factor to deny any ineffectiveness. P. A109; 680 F.3d at 604. The state court dismissed the significance of Strouth's youth because he "had been living independent of his parents . . . and committing crimes as a juvenile." Strouth v. State, 999 S.W.2d 759, 767. (In fact, the horrible conditions of his home life had compelled him to run away.) By adopting this reasoning, the federal appellate court adopted the state court's consideration of improperly admitted evidence (Strouth's juvenile crimes) and implicit acknowledgment that Dillow failed to investigate his client's social history or argue the fact of Strouth's incomplete psychological development as an aspect of his youth.

ineffectiveness claim because he had not produced any evidence that Strouth was mentally ill. Strouth's federal habeas counsel developed evidence that he is mentally ill and brain damaged, but the federal courts refused to consider that evidence because it was not presented in state court.

REASONS FOR GRANTING THE WRIT

Over the last 35 years, this Court's decisions have given increasing primacy to state court proceedings in federal habeas litigation. See Harrington v. Richter, __ U.S. __ , 131 S.Ct. 770 (2011); (Terry) Williams v. Taylor, 529 U.S. 362 (2000); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977). Most recently, the Court determined that "Congress' intent to channel prisoners' claims first to the state courts" requires that federal review of state court decisions must be limited to the record that was before the state court. Pinholster, 563 U.S. __, 131 S.Ct. at 1399.

This primacy leaves petitioners like Strouth at the mercy of a state court initial-opportunity collateral-review process that did not provide him with an attorney, funding for any investigation or development of claims, or court-ordered discovery. Strouth's case is a relic, left from the days when Tennessee was still developing its capital sentencing scheme and had only a rudimentary post-conviction review process. Yet he is now bound by the results of that archaic process even as he navigates contemporary deferential federal habeas proceedings.

If this Court and Congress would make state courts the primary forum for resolution of federal claims, those courts must provide process for petitioners that entitles the courts' decisions to the deference that AEDPA prescribes. Where the state courts fail to provide such process, federal courts owe their decisions no deference.

I. THIS COURT MUST CLARIFY ITS DECISION IN *CULLEN v. PINHOLSTER* TO ADDRESS FEDERAL HABEAS PETITIONERS WHO ARE CAUGHT IN A PROCEDURAL NO-MAN'S LAND WHERE FEDERAL COURTS ARE PROHIBITED FROM CONSIDERING NEWLY OBTAINED EVIDENCE THAT STATE ACTION PROHIBITED THE PETITIONER FROM DEVELOPING IN STATE COURT

This Court's decision in *Cullen v. Pinholster* created a procedural pitfall for petitioners like Strouth who are prohibited from developing evidence in state court by some state action, and then are able to obtain that evidence in federal habeas proceedings only to have it excluded from consideration. This Court should grant certiorari in this case to articulate the procedure that will permit efficient consideration of such evidence and assure such petitioners adequate process.

A. *Pinholster*'s Catch 22: Habeas Petitioners Who Obtain Evidence In Federal Court That Was Denied In State Court By State Action Cannot Use That Evidence In Support Of Federal Claims

In its decision in *Pinholster*, this Court determined that federal habeas review of a state court's decision under 28 U.S.C. §2254(d)(1) is limited to the record that was before the state court. This decision created a "brand new set of procedural complexities" for certain federal petitioners. Pinholster, 131 S.Ct. at

1415 (Sotomayor, J., dissenting). Specifically, how do federal courts treat newly developed evidence that was not available in state court because of state action?

Justice Sotomayor's dissent illustrated the potential of the majority's opinion "to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court." Id. at 1417. By hypothesizing a *Brady* claim – whose inherent context is evidence controlled by the state and prohibited to the petitioner – she demonstrated how a petitioner who diligently developed the claim in state court and lost because the evidence did not satisfy the materiality element could then obtain additional evidence that did rise to the level of materiality after the close of state court proceedings.[13] Were federal courts permitted to consider such after-acquired evidence that was unavailable due to state action, such a petitioner may well prevail in federal habeas proceedings. Under the majority's decision, however, the petitioner "with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy §2254(d)(1) without the new evidence" – a steep climb. Id. at 1418. In contrast, if a petitioner presented a brand new, defaulted claim, upon a showing of cause and prejudice for the default, that claim would be susceptible to *de novo* review with an evidentiary hearing. Id.

In response to the predicament that Justice Sotomayor illustrated, the majority added a footnote stating that her hypothetical "involving new evidence of

[13] This hypothetical is perfectly plausible under current Tennessee law, which prohibits post-conviction petitioners from obtaining district attorney files under the rules of discovery. See Tenn. Code. Ann. §40-30-109(b); Tenn. R. Crim. Pro. 16(a)(2).

withheld exculpatory witness statements may well present a new claim." Id. at 1401 n. 10. This offers a glimmer of hope specifically for habeas petitioners with *Brady* claims who acquire exculpatory witness statements after the close of their state court proceedings. But the effect of *Pinholster* in the vast majority of federal courts has been to leave adrift petitioners like Strouth who have similarly newly-acquired evidence that was previously unavailable because of state action. Under the terms of the majority's footnote, such evidence does not constitute a new claim, and so must be left by the wayside in a federal court's AEDPA deference to a state court decision that is effectively based on an incomplete record.

B. The Subservience To State Courts That *Pinholster* Imposes On Federal Courts Stands In Conflict With Those Decisions Of This Court That Upheld The Federal Habeas Power To Redress Deficiencies In The Development Of A State Court Record

Pinholster's catch-22 is a symptom of the on-going diminution of the federal habeas power. Fifty years ago this Court recognized that there were instances wherein state court collateral review processes were inadequate to develop the factual record necessary to decide a petitioner's habeas claims. In Townsend v. Sain, 372 U.S. 293 (1963), the Court observed that, "because detention . . . obtained [in violation of fundamental liberties safeguarded by the Constitution] is intolerable, the opportunity for redress, *which presupposes the opportunity to be heard, to argue and present evidence*, must never be totally foreclosed." Townsend, 372 U.S. at 312 (emphasis added). In order to assure federal petitioners' claims were decided on a complete record, the Court set forth six contexts wherein federal

courts were required to hold an evidentiary hearing. Id., at 313-318. Among them were that "the fact-finding procedure employed [in state court] was not adequate for reaching reasonably correct results"; that "newly discovered evidence is alleged in a habeas application, [] *which could not reasonably have been presented to the state trier of facts*"; and that "for any reason *not attributable to the inexcusable neglect of petitioner*, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing." (emphasis added)

Other rulings from this Court have found state court process to be inadequate. However, those rulings were confined to the nature of the claim at issue. See Ford v. Wainwright, 477 U.S. 399 (1986)(unilateral executive process to determine competency to be executed did not afford due process required by Fourteenth Amendment); Panetti v. Quarterman, 551 U.S. 930 (2007)(state court did not provide adequate process to litigate *Ford* competency claim). They have not addressed broadly the responsibility of state courts to provide due process in their role as enforcers of constitutional safeguards. *Cf.* Felder v. Casey, 487 U.S. 131, 138 (1988)("States may establish the rules of procedure governing litigation in their own courts. . . . [H]owever, where the state courts entertain a federally created cause of action, the federal right cannot be defeated by the norms of local practice.")(internal quotations omitted).

In the wake of Congress' passage of the AEDPA and certain of this Court's decisions, these federal powers and obligatory processes have been constrained, as state courts have been made the primary forum for the resolution of federal claims.

Yet, as this constriction of the federal habeas process and power has occurred, there have not been any corollary mandate for state courts, in their role as sovereign arbiters of federal questions, to assure adequate process to post-conviction petitioners. See Maples v. Thomas, __ U.S. __, 132 S.Ct. 912 (2012)(state did not provide post-conviction counsel); Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010)(state did not provide evidentiary hearing or discovery); Wessinger v. Cain, No. 04-637, 2012 WL 1752683 (M.D.LA. May 16, 2012)(state did not provide funding to investigate and develop claims).

If state courts are to be given the power to decide the constitutionality of a petitioner's conviction and sentence to the degree that federal courts are expected to yield to those decisions unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents" or "the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," Harrington v. Richter, 131 S.Ct. 770, 786 (2011), then those courts must provide a process that comports with federal due process for litigating federal claims. Where they do not, federal courts exercising their habeas powers should not be bound by the state court record.

C. Lower Courts' Varied Treatment Of Petitioners Caught In The *Pinholster* Catch-22 Creates Unequal Burdens And Disparate Federal Processes For Habeas Petitioners

Federal courts have responded in various ways to habeas petitioners with newly-obtained, previously-unobtainable evidence who are snared by *Pinholster*.

A very few courts have developed what is equitably and logically the most appropriate procedure for such petitioners. Justice Alito succinctly articulated this approach in his concurrence in the judgment in *Pinholster:*

> I agree with the conclusion reached in Part I of the dissent, namely, that when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d) must take into account the evidence admitted at the hearing. . . . A hearing should not be held in federal court unless the new evidence that the petitioner seeks to introduce was not *and could not have been* offered in the state court proceeding. . . . The whole thrust of AEDPA is essentially to reserve federal habeas relief for those cases in which the state courts acted unreasonably. Permitting a petitioner to obtain relief on the basis of evidence that could have been but was not offered in state court would not upset this scheme.

131 S.Ct. at 1411 (Alito, J., concurring in part)(emphasis added). Under this reasoning, where new evidence that the state court process prohibited is developed in federal habeas proceedings, the state courts, having had their opportunity to redress the claim of constitutional violation, failed to do so with process that could qualify its decision as an adjudication on the merits, and, therefore, the evidence should be susceptible to federal review. See Winston v. Kelly, 592 F.3d 535, 555 (4th Cir. 2010)("when a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures. If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of §2254(d)."), *aff'd in light of* Pinholster, *sub nom* Winston v. Pearson, 683 F.3d 489 (2012); Miles v. Martel, 696 F.3d 889 (9th Cir. 2012)(opinion withdrawn pursuant to joint agreement for petitioner's immediate release, 2012 WL 5896794 (9th Cir., Nov. 21, 2012))(state court's

summary dismissal without a hearing of petitioner's application for post-conviction relief that stated *prima facie* claim of ineffective assistance was unreasonable application of federal law); Ballinger v. Prelesnik, 844 F.Supp.2d 857 (E.D.Mich. 2012)(state court that "denied [petitioner's] claim on the merits despite the fact that the record was insufficient to reasonably decide the claim one way or the other . . . effectively passed the questions to [the federal] Court [by concluding] that Petitioner's claim was meritless without providing Petitioner with any opportunity to develop a record or support his claim.").

This approach best serves the theory of the habeas process. It does not undermine state courts' opportunity to be the first to remedy their own constitutional violations. See Rose v. Lundy, 455 U.S. 509 (1982); Woodford v. Viscotti, 537 U.S. 19 (2002)(*per curiam*). Petitioners are still required to exhaust their claims and make a diligent effort to develop the record. *See* (Michael) Williams v. Taylor, 529 U.S. 420 (2000). And the procedure accords with Congress' intent to defer to state court decisions that are "adjudications on the merits," because it will only apply where a state has constrained a petitioner's development of the record. But where state action prohibits a petitioner's efforts to develop the record – by *Brady* suppression, or denial of funding, or denial of discovery, or undue restriction of time – and the petitioner then acquires evidence in federal court that does not "fundamentally alter the legal claim already considered," Vasquez v. Hillery, 474 U.S. 254, 260 (1986), federal courts may consider the newly acquired evidence in support of the claim.

Other courts that have recognized that a petitioner's newly-proffered evidence was not available in state court because of state action have attempted to adhere to *Pinholster*'s acknowledgment that "Congress' intent [was] to channel prisoners' claims first to state court." These courts have stayed the federal proceedings under the theory of Rhines v. Webber, 544 U.S. 269 (2005), in order to permit the petitioners to return to state court and present their new evidence and any unexhausted claim to which it may give rise. See Gonzalez v. Wong, 667 F.3d 965 (9th Cir. 2011), *cert denied* __ U.S. __ , 133 S.Ct. 155 (2012); Wagle v. Sherry, No. 2:06-CV-57, 2012 WL 4120837 (W.D.Mich., Sept. 18, 2012); Nicolas v. Smith, No.1:06-cv-02637, Doc. # 126 (D.MD., Sept. 24, 2012); Johnson v. Bobby, No. 1:08-cv-55, 2012 WL 628507 (S.D.Ohio, Feb. 27, 2012); Cook v. Anderson, No. 1:96-cv-424, 2011 WL 6780869 (S.D.Ohio, Dec. 22, 2011).

But this procedure undermines the habeas process. State courts are permitted to give truncated process to post-conviction petitioners and foist thorough discovery processes onto the federal courts and federal dollar, only to then get a second bite at the apple by considering claims based on evidence whose development they had inhibited. Likewise, petitioners who diligently sought full process in state court and were denied are compelled to chase their tails into federal court, back into the state courts, and then back to federal court to overcome §2254(d) deference to a state court decision based on a record that is actually the product of federal process. See Thomas v. Chappell, 678 F.3d 1086 (9th Cir. 2012)(pre-AEDPA petitioner who was granted *de minimus* funds in state court to

develop IAC-innocence claim obtained adequate funding in federal court but was remanded to state court to exhaust new evidence before ultimately obtaining federal relief).

The predominant process applied by federal courts has been to exclude newly-acquired, previously-unavailable evidence and review the state court's decision based on the state court record. See, *eg.*, Brown v. Wenerowicz, 663 F.3d 619 (3rd Cir. 2011); Hammonds v. Allen, 849 F.Supp.2d 1262 (M.D.Ala. 2012); Caudill v. Conover, --- F.Supp.2d ----, 2012 WL 1673262,(E.D.Ky., May 14, 2012); Carter v. Bigelow, No. 2:02-cv-326, 2012 WL 3964819 (D.Utah, Sep 11, 2012); Lynch v. Hudson, No. 2:07-cv-948, 2011 WL 4537890 (S.D.Ohio Sep 28, 2011); Row v. Beauclair, No. 1:98-cv-000240, 2011 WL 3837303 (D.Idaho, Aug 29, 2011).[14] These courts will consider the evidence only after petitioners satisfy the 2254(d)(1) barrier to relief. This is the procedure that the Sixth Circuit followed, which left Strouth in the untenable position that Justice Sotomayor predicted.

Of the three lines of response that federal courts have developed to the *Pinholster* decision, only that which follows the reasoning of Justices Sotomayor and Alito enforces the intent of AEDPA and preserves the proper scope and application of the federal habeas power. This Court should grant the writ to resolve the disparity in procedures and burdens imposed on habeas petitioners and instruct the proper procedure for addressing evidence like Strouth's.

[14] Several courts have pre-empted the *Pinholster* dilemma by prohibiting discovery unless and until the state court decision on the claim for which discovery is sought is found to be unreasonable or contrary under §2254(d)(1) review.

II. THE EQUITABLE EXCEPTION TO THE RULES OF PROCEDURAL DEFAULT RECOGNIZED IN *MARTINEZ v. RYAN* MUST BE CONSTRUED TO ENCOMPASS POST-CONVICTION COUNSEL RENDERED INEFFECTIVE BY STATE COURT PROCESSES THAT CONSTRAIN THE DEVELOPMENT AND RAISING OF CLAIMS

A. *Martinez v. Ryan* Recognizes That Resources Are Essential For The Development Of Substantial Claims Of Ineffective Assistance Of Counsel

In its decision in *Martinez v. Ryan*, this Court recognized an equitable exception to the rules of procedural default that permits a federal habeas petitioner to demonstrate ineffective assistance of initial-opportunity collateral-review counsel as cause for failure to raise a substantial claim of ineffective assistance of trial counsel. Martinez v. Ryan, __ U.S. __, 132 S.Ct. 1309 (2012). That decision was predicated upon the tenet that "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." Martinez, 132 S.Ct. at 1317. Likewise, the majority observed that just as effective counsel is necessary to litigate claims of error on direct appeal from a conviction, "[w]ithout the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective assistance of trial counsel claim. Claims of ineffective assistance at trial often require *investigative work* . . . ." Id. (emphasis added).

The Court's statement that there is an investigative component to developing substantial claims of ineffective assistance of trial counsel is a tacit acknowledgment that litigating such claims requires not merely an effective attorney, but an adequately resourced one. Central to every capital case is a social history of the client and expert analysis of any mental disabilities that history

presents. See Gregg v. Georgia, 428 U.S. 153, 190 (1976)("accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision"); Lockett v. Ohio, 438 U.S. 586, 604 (1978)("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death"); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"). This may require investigators, mitigation experts, psychiatrists, and psychologists. These are the kind of professionals that Dillow failed to retain for Strouth's defense. In order to prove the prejudice from that failure, Strouth's state court post-conviction counsel required, but was denied, funding for the same kinds of experts.

Where a state's mere provision of counsel is insufficient to litigate effectively a substantial claim for ineffective assistance of trial counsel, *Martinez*'s equitable exception to the rules of procedural default must contemplate petitioners whose post-conviction counsel are rendered ineffective by state action.

B. This Court Should Grant Certiorari In This Case To Reverse The Decision Of The Sixth Circuit And Instruct That *Martinez* Applies To Petitioners Who Are Caught In The *Pinholster* Catch-22 Because The Post-Conviction Attorney Was Hamstrung By State Court Process

The construction of the equitable exception of *Martinez v. Ryan* anticipates federal habeas petitioners who are caught in a *Pinholster* catch-22. In *Martinez* the Court set forth the process whereby petitioners could overcome the procedural default of an ineffective assistance of counsel claim: such petitioners must show that the claim was substantial and that they either had no attorney in their initial-opportunity collateral-review proceeding or that their attorney's failure to raise the claim satisfied the deficient performance and prejudice prongs of *Strickland v. Washington*. Where a petitioner can show that the attorney's failure to raise a substantial ineffective assistance claim was the result of state action that prohibited the development of evidence – *eg*. denial of funding, no discovery process, short time to investigate claims in preparation for hearings – that petitioner should be deemed to have satisfied the *Strickland* ineffectiveness showing for purposes of *Martinez*'s equitable exception.

One district court has already recognized that, in some instances, *Martinez* can solve the problem that *Pinholster* creates. In Wessinger v. Cain, No. 04-637 (M.D.LA.), the petitioner presented substantial newly-obtained mitigation evidence, which *Pinholster* prohibited from being considered in support of his penalty-phase ineffective assistance of counsel claim. The District Court ruled that the petitioner's extensive mitigation evidence created a new claim that was

procedurally defaulted, but could be considered upon a showing of *Martinez* cause. Wessinger v. Cain, 2012 WL 1752683 (May 16, 2012). Specifically, the District Court found that "[initial review counsel] agrees that his performance was deficient, but only because he repeatedly was denied funds and time to properly investigate these claims. The court finds there are questions of law and fact as to whether this theory applies in this case." Id. at *2 (citations omitted). See also Dickens v. Ryan, 688 F.3d 1054 (9th Cir. 2012)(petitioner who presented substantial mitigation evidence in support of his penalty phase ineffective assistance claim in federal habeas that counsel in initial-opportunity collateral-review overlooked was entitled to show cause and prejudice under *Martinez* exception).

These cases present a proper application of *Martinez* to redress the predicament of federal habeas petitioners caught in *Pinholster*'s catch-22. This Court should grant the writ to instruct that the equitable exception recognized in *Martinez* contemplates this application.

CONCLUSION

This Court should grant a writ of certiorari to the Court of Appeals for the Sixth Circuit in Strouth's case. The Court should reverse the appellate court's exclusion of Strouth's expert mental health evidence under *Cullen v. Pinholster* where Strouth was not able to develop that evidence in state court because he was denied the necessary funds. This Court should also rule that Strouth may proceed to present his evidence under the equitable exception recognized in *Martinez v. Ryan* where Strouth's initial-opportunity collateral-review counsel was rendered ineffective by constrained state court process, which prohibited him from developing and raising a substantial claim of ineffective assistance of trial counsel.

Respectfully submitted,

Jerome C. Del Pino*
Assistant Federal Public Defender
Henry A. Martin
Federal Public Defender
810 Broadway Suite 200
Nashville, TN 37203

Mark E. Olive
Law Office of Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, FL 32301

*counsel of record

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was served this 10th day of December, 2012, upon counsel for Respondent, Mr. James E. Gaylord, 425 Fifth Avenue North, Nashville, Tennessee 37243.

_____