

No. 15-8753

IN THE SUPREME COURT OF THE UNITED STATES

DOYLE LEE HAMM,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

This supplemental brief calls the Court's attention to three intervening developments, not readily available at the time of Petitioner's last filing on June 14, 2016, that may affect the Court's consideration of this case.

I. The American Bar Association Has Filed an Amicus Brief in A Separate Case That Adds Further Reason to Grant Certiorari on Question 1.

The question of whether AEDPA deference should apply to the results of deeply flawed state fact-finding procedures is the subject of a circuit split and scholarly commentary in favor of Mr. Hamm's position. Since his filings, Mr. Hamm has learned that an additional certiorari petition and an amicus brief by the American Bar Association ("ABA") are also asking this Court to resolve this question. That case, *Gray v. Zook*, No. 15-9473 in this Court, involves different factual circumstances but the identical question presented.

In *Gray*, the petitioner did not receive a hearing in state court in Virginia on his state habeas corpus petition, but instead had factual findings made by an appellate court from a cold record. Mr. Hamm was denied a neutral fact-finder of any kind in state habeas corpus, as the state court simply signed the "PROPOSED MEMORANDUM OPINION" submitted by the Alabama Attorney General without meaningfully reviewing it.

Mr. Gray's and the ABA's legal positions are identical to Mr. Hamm's. As the ABA writes, relying expressly on the very same provision of AEDPA and the same opinions of this Court, where a state court's decision in state post-conviction rests on

an unreasonable process for the determination of the facts, “the federal courts should not defer to the [state court] factual conclusions.... Instead, when a petitioner has raised a substantial claim of constitutional error, that claim should be given the full and fair consideration it deserves.” *Brief of The American Bar Association as Amicus Curiae in Support of Petitioner* at 7, *Gray v. Zook*, No. 15-9473 (June 23, 2016). The ABA’s argument applies equally to Mr. Hamm.

Given the circuit split, the continued use of dubious fact-finding processes in state courts, and the recurring nature of this question, this Court should now resolve whether factual findings derived from unreasonable procedures should nonetheless be entitled to deference. Mr. Hamm’s case, because of the flagrantly inadequate nature of the state court process, presents an ideal vehicle on which to provide the answer. In the ABA’s words, Mr. Hamm’s case “call[s] for this Court’s intervention.” *ABA Amicus Brief* at 23.

II. A Journalistic Investigation Revealed That Other States Would Benefit From This Court’s Answer to Question 1.

When Mr. Hamm originally filed his petition with this Court, he asserted that the problem of “ghost-written opinions,” uniquely abusive in his case, also affected other Alabama death penalty cases. *See Petition for Writ of Certiorari* at 17 (“wholesale judicial adoption of proposed orders and opinions is ‘virtually the norm in Alabama capital post-conviction cases.’”) However, through the work of an investigative journalist at the *Marshall Project*, petitioner has learned that the practice of adopting prosecution-written opinions in capital cases also exists elsewhere, although generally in a less

egregious form. The *Marshall Project* investigation reveals that, to a lesser extent, the practice of ghost-written opinions in capital cases occurs in states such as Georgia, Louisiana, Kentucky, South Carolina, Ohio, and Texas. Some of those states address the issue themselves and sanction the judge under the state's judicial code of conduct, but not uniformly. See Andrew Cohen, *Letting Prosecutors Write the Law: It's More Common Than You Think*, THE MARSHALL PROJECT, July 18, 2016, available at <http://www.themarshallproject.org/2016/07/18/letting-prosecutors-write-the-law>. In Alabama, as noted in Mr. Hamm's previous filings, as well as the *amicus* brief in this case, essentially no action has been taken by the state courts to address this problem.

Although Mr. Hamm's case presents the most extreme example within an outlier state, a decision in his case would benefit and provide necessary guidance to other state courts regarding the acceptability of this practice. This Court has already taken one such step by noting three factors that make ghostwritten opinions untrustworthy in the pre-AEDPA case of *Jefferson v. Upton*, 560 U.S. 284, 294 (2010). Clarifying that these factors are meaningful in cases governed by AEDPA as well would do much to ensure that the more problematic ghostwritten opinions would be addressed by the state courts in the first instance.

III. Another Case Before This Court Presents the Identical Question Presented (Question 2 in Mr. Hamm’s Case) Concerning the Applicability of *Martinez v. Ryan* Where Post-conviction Counsel Fails to Develop the Facts Supporting a Claim

After filing his reply brief, Mr. Hamm learned that another condemned man in Tennessee, Mr. Farris Genner Morris, has raised in this Court an identical question regarding the reach of this Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). See *Petition for Writ of Certiorari* at 36-39, *Morris v. Westbrooks*, No. 15-9002 (Apr. 15, 2016) (Question #2a). Mr. Morris’s case is similarly set for conference on September 26, 2016. Mr. Morris’s petition demonstrates well, in its discussion of the reasoning of Justices Breyer and Sotomayor’s statement in *Gallow v. Cooper*, 133 S.Ct. 2730, 2731 (2013), the direct conflict in his case (and thus Mr. Hamm’s) with *Newbury v. Stephens*, 756 F.3d 850 (5th Cir. 2014) and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)—and also the fact that this Court’s decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011) has effectively left the question open. As indicated by the multiple petitions presenting identical questions, this issue is important, recurring, and will not resolve itself absent this Court’s review.

CONCLUSION

The writ should be granted.

Respectfully submitted,



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