NO. 11-7376

IN THE

SUPREME COURT OF THE UNITED STATES

Tyrone Noling,

Petitioner,

v.

Margaret Bradshaw, Warden,
Respondent.

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

Introduction

Respondent's introduction cobbles together pieces of the Ohio Supreme Court's opinion in Noling's case, creating the impression that the state court considered and adjudicated the merits of Noling's claim that the prosecutor committed prejudicial misconduct when impeaching Gary St. Clair. By selectively quoting from pieces of that opinion, pages apart and relating to two separate and distinct constitutional claims, Respondent creates an inaccurate impression. Even more significant to this Court's consideration of Noling's petition than what the Ohio Supreme Court did say, is what the Ohio Supreme Court did not say. While specifically delineating each sub-claim of prosecutorial misconduct raised by Noling, nowhere in the Ohio Supreme Court's opinion does it even recognize that Noling alleged prosecutorial misconduct with respect to St. Clair's improper impeachment. *See, e.g., State v. Noling*, 781 N.E.2d 88, 108-11 (Ohio 2002).

The Ohio Supreme Court did not adjudicate on the merits Noling's claim that the prosecution's impeachment of St. Clair was prejudicial prosecutorial misconduct. Thus, the Anti-Terrorism and Effective Death Penalty Act's (AEDPA) constraint on relief found in 28 U.S.C. §2254(d) does not apply to this issue.

Reply to Counterstatement

Respondent's counterstatement devotes several paragraphs to the State's case at trial. Respondent's counterstatement suggests Noling is a cold-blooded killer whose case is somehow unworthy of review.

As evidenced by the Sixth Circuit's opinion, there are very real concerns about Noling's conviction, concerns that the Circuit felt powerless to address due to the constraints of the AEDPA:

> Nevertheless, we pause for a moment to highlight our concern about Noling's death sentence in light of questions raised regarding his prosecution. Noling was not indicted until five years after the Hartigs' murders when a new local prosecutor took office. The new prosecutor pursued the cold murder case with suspicious vigor according to Noling's accusers, who have since recanted their stories and now claim that they only identified Noling as the murderer in the first place because they were threatened by the prosecutor. In addition to the identifications being potentially coerced, there is absolutely no physical evidence linking Noling to the murders, and there are other viable suspects that the prosecutor chose not to investigate or did not know of at the time. Furthermore, that St. Clair switched course before trial, deciding not to testify against Noling, gives rise to even more suspicion. This worrisome scenario is not enough to create a constitutional claim cognizable under habeas and the Antiterrorism and Effective Death Penalty Act.

Noling v. Bradshaw, 651 F.3d 573, 575-76 (6th Cir. 2011). Noling's innocence claim is supported by far more evidence than that referenced by the Sixth Circuit Court of Appeals' opinion, including for example, evidence currently before the Ohio state courts—the 1990 statement by Nathan Chesley that his brother killed the Hartigs and rudimentary genetic testing that failed to exclude

Chesley's foster brother as the person who smoked the cigarette butts found at the Hartig scene. This evidence was suppressed by the prosecution, unavailable for Noling to use in defense of these charges.

Reasons for Granting the Writ

Noling agrees with Respondent that the Ohio Supreme Court was not required "to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). Had the Ohio Supreme Court issued a postcard denial, or simply stated "denied," this Court's precedent would dictate that Noling's argument fail. That is not, however, what transpired in the state court.

Respondent's argument that Noling's prosecutorial misconduct sub-claim, that the prosecution committed prejudicial misconduct in its impeachment of Gary St. Clair, was adjudicated on the merits only succeeds if this Court ignores the plain text of the Ohio Supreme Court's opinion. At page nine of Respondent's opposition, he quotes from the Ohio Supreme Court's merits adjudication of Noling's Second Proposition of Law, which alleged trial court error with respect to St. Clair's improper impeachment. The Ohio Supreme Court made clear that this section of its opinion was only addressed to Noling's Second Proposition of law. The court noted, "[*i*]*n his second proposition of law*, Noling argues that the trial court erred both in declaring St. Clair a hostile witness and in not

restricting the state's cross-examination and impeachment of its own witness." *Noling,*781 N.E.2d at 100. For the next nine paragraphs, the court does not mention "prosecutorial misconduct" or any clearly established Federal law related to prosecutorial misconduct. The Court then concludes consideration of this issue with, "[w]e therefore find no error warranting reversal in relation to *Noling's second proposition of law.*" *Id.* at 101.

When the Ohio Supreme Court addresses Noling's prosecutorial misconduct claim, nearly eight pages later, the court addresses with specificity all sub-claims raised by Noling, save Noling's claim related to St. Clair's improper impeachment. *Id.* at 108-11. The Ohio Supreme Court "provided a lengthy, reasoned explanation for its denial of [Noling's] appeal, but none of those reasons addressed" Noling's claim that the prosecutor committed prejudicial misconduct in his impeachment of St. Clair. *See Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011) *cert. granted Cavazos v. Williams*, No.11-465, 2012 WL 104740 (Jan. 13, 2012). Simply put, the Ohio Supreme Court failed to address the federal constitutional claim that [Noling] had raised." *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011) (Barkett, J., dissenting).

Respondent suggests that Noling's case is not worthy of this Court's consideration because "there may also be an argument that his claim is procedurally defaulted." (Opposition at 10.) This is contrary to the position that

Respondent took in federal court. *See, e.g., Noling v. Bradshaw*, No. 5:04 CV 1232, 2008 WL 320531 *31 (N.D. Ohio Jan. 31, 2008) (identifying Noling's sub-claim related to St. Clair as claim four, the Court notes, "[t]he Respondent asserts that sub-claims (1)-(4) and (16) are the only claims preserved for federal review."). Moreover, neither the federal district court nor the Sixth Circuit Court of Appeals found this claim to be procedurally barred. *See Noling v. Bradshaw*, 651 F.3d 573 (6th Cir. 2011); *Noling v. Bradshaw*, 2008 WL 320531 at *31 (identifying Noling's sub-claim related to St. Clair as claim four, the Court "finds sub-claims (5)-(15) to be procedurally defaulted.").

Even the Ohio Supreme Court's manner of addressing waiver of Noling's prosecutorial misconduct sub-claims supports Noling's position that his claim was not adjudicated on the merits by that court. Respondent suggests that the court held Noling's misconduct claim related to St. Clair was waived. (*See* Opposition at 10.) Yet that Court addressed the merits of Noling's sub-claims that it identified as waived through plain error review. *See Noling*, 781 N.E.2d at 108 (addressing Noling's argument that the prosecutor improperly used peremptory challenges against death-hesitant jurors, the court held "[b]y failing to identify an error, Noling has thus failed to satisfy the first prong of our plain-error inquiry."); *id.* at 109 (addressing Noling's arguments regarding the prosecutor's guilt-phase closing argument, the court held "[h]ere, the prosecutor

did not create plain error"); *id.* at 110 (addressing Noling's challenges to the prosecutor's penalty-phase closing argument, the court held, "[b]ut, as we note, Noling on occasion failed to object and on those points waived all but plain error."); *id.* at 111 ("Moreover, Noling did not object, and because no prejudicial error resulted from such comments, Noling has failed to satisfy at least the third prong of our plain-error inquiry."). The Ohio Supreme Court's opinion is silent to Noling's sub-claim that the prosecution committed prejudicial misconduct in its impeachment of St. Clair. Had the court adjudicated this claim on the merits, at least one of the seventeen paragraphs devoted to Noling's many claims of prosecutorial misconduct would have addressed Noling's claim related to St. Clair.

Whether Noling's claim was adjudicated on the merits is of significant import because there is little question that Noling would be entitled to relief under the *de novo* standard of review to which he is entitled. *Apanovitch v. Houk*, 466 F.3d 460 (6th Cir. 2006), resolves the issue. "The recitation by the prosecutor of the entire substance of a witness's disavowed, unsworn prior statements, which, if credited by the jury, would be sufficient to sustain a conviction, [the impeachment] abridged defendant's right to a fair trial in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 485 (citing *United States v. Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977)). St. Clair's disavowed

statement was sufficient on its face to sustain Noling's conviction. The prosecution's recitation of his statement was prosecutorial misconduct, which abridged Noling's right to a fair trial violating the Due Process Clause. *See id.* Rather than detracting from the witness's credibility, Noling's jurors likely treated the impeachment information as evidence supporting or disputing a fact at issue. *See United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *see also United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973). This is evidenced by the fact that the trial court relied on the impeachment evidence as if it were substantive evidence in its sentencing opinion. (T.C.O. at 2.)

Respondent points to a "curative" instruction to resolve any prejudice to Noling. In point of fact, this was not a curative instruction in the typical sense; it was not given at the time of St. Clair's impeachment, which occurred on January 12, 1996. (*See* Tr. 939 *et seq.*) Rather, the instruction was given some ten days later, on January 22, 1996. Moreover, the instruction was not specifically tied to the improprieties of St. Clair's cross-examination, but was part of the general charge given to the jury. (*See* Tr. 1519; "If statements in a transcript or written or typed statements differed from the testimony given by the same witness in the courtroom, you may consider them to test the credibility or believability of such witness, and for no other purpose.") And, even with the limiting instruction, federal courts recognize that prejudice to Noling was likely.

See Morlang, 531 F.2d at 190; *Shoupe*, 548 F.2d at 641 (internal cites omitted); *United States v. Miles*, 413 F.2d 34, 38 (3d Cir. 1969) (footnote omitted) ("we are unable to say that the court's cautionary instruction, to consider the statement as impeachment material only, adequately dispelled the prejudicial effect of the Government's line-by-line reading of the statement.").

Conclusion

On January 13, 2012, this Court granted certiorari in *Williams v. Cavazos,* No. 11-465. It appears that *Childers v. Flowers*, No. 11-42, is being held for this Court's consideration of *Williams*. Respondent states that Noling's case does not present the same issue as found in these two cases. However, Respondent fails to distinguish Noling's case from *Williams* or *Childers*. As evidenced by the preceding discussion, Noling's case squarely presents the issue of when a state court's reasoned opinion, silent as to a given claim, has "adjudicated on the merits" the habeas petitioner's claim. Noling respectfully requests that this Court grant certiorari and review this matter. Alternatively, Noling would request that this Court hold his petition pending this Court's review of *Williams*.

EXECUTED this 25th day of January, 2012

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