No. A_____

IN THE

Supreme Court of the United States

RICHARD STANTON WHITMAN,

Applicant,

v.

DAVID W. GRAY, WARDEN,

Respondent.

APPLICATION DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CODY L. REAVES*
BENJAMIN M. MUNDEL
MANUEL VALLE
CODY M. AKINS
SIDLEY AUSTIN LLP
Washington, D.C. 20005
(202) 736-8000
cody.reaves@sidley.com

Counsel for Applicant Richard Whitman

*Counsel of Record

August 23, 2024

APPLICATION FOR EXTENSION OF TIME

To the Honorable Brett M. Kavanaugh, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

1. Pursuant to 28 U.S.C. § 2101(c), and Supreme Court Rules 12, 13.3, 13.5, 22, 30, and 33.2, Applicant Richard Whitman respectfully requests a 60-day extension of time, up to and including November 8, 2024, to file a petition for a writ of certiorari. The United States Court of Appeals for the Sixth Circuit issued its opinion and entered judgment in Whitman's case on June 10, 2024. The opinion is available at 103 F.4th 1235, and a copy is attached as Exhibit A. Whitman's petition is currently due on September 9, 2024. This application has been filed on August 23, 2024, more than ten days before the time for filing the petition is set to expire. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Sixth Circuit.

2. In the decision below, the Sixth Circuit panel deepened an entrenched circuit split concerning whether a state waives a procedural-default defense when, in its answer to a state habeas petition in district court, it raises the defense to some claims in the petition but not to others and instead argues those claims on the merits. The court below recognized that the state, despite raising procedural default on nine of the ten claims raised in Whitman's habeas petition, "never argued that Whitman's due process claim" targeting the state court's denial of the castle doctrine instruction "was procedurally defaulted." Ex. A at 5. Indeed, the state instead argued the claim on the merits, contending that the state court's failure to

give the instruction constituted "an error of state law" not cognizable on federal habeas review and that, in any event, the state court's harmlessness analysis was not unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 3. The district court likewise rejected Whitman's due-process claim on the merits and issued a certificate of appealability. *Id.*

The panel noted that it did "not condone" the state's approach and even highlighted that counsel "conceded at oral argument that the state made 'a mistake[]' by not raising in district court Whitman's procedural default of the due process claim." *Id.* at 5. Nonetheless, the panel held that, despite raising the procedural-default defense for *every single one* of Whitman's other claims, the state's decision to argue the merits and not raise procedural default on Whitman's due process claim merely "forfeited the argument." *Id.* Having found the argument forfeited rather than waived, the Court held that it had "discretion whether to consider" the defense and ultimately decided to "enforc[e] Whitman's procedural default" and affirm the judgment below denying his habeas petition. *Id.* at 5–7 (citing *Wood v. Milyard*, 566 U.S. 463, 471 (2012) ("[T]he bar to court of appeals' consideration of a forfeited habeas defense is not absolute.")).

The Sixth Circuit's decision puts it on the wrong side of a lopsided circuit split. A majority of circuit courts have held that raising a procedural-default defense on some claims but not others and choosing instead to argue those claims on the merits waives the defense as to those claims. *See, e.g.*, *Jones v. Norman*, 633 F.3d 661, 666 (8th Cir. 2011) ("The State's response did raise procedural default de-

fenses to a number of Jones' claims, but not to his *Faretta* claim. Rather, it specifically argued the *Faretta* claim on the merits. The district court correctly concluded the State waived its procedural default defense."); *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003) (same); *Henderson v. Thieret*, 859 F.2d 492, 497–98 (7th Cir. 1998) (same and explaining that "it is one thing to omit the defense altogether in the district court and quite another to raise it as to one claim and yet fail to pursue it as to other claims"); *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 287 n.11 (3d Cir. 2018); *Plymail v. Mirandy*, 9 F.4th 308, 316–17 & n.4 (4th Cir. 2021); *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994); *McCormick v. Parker*, 821 F.3d 1240, 1245–46 (10th Cir. 2016). Just one other circuit court has taken the position the Sixth Circuit panel took here. *See Washington v. James*, 996 F.2d 1442, 1447–48 (2d Cir. 1993) (holding that the state did not waive the procedural default defense even though the state "failed to raise the defense" because "it incorrectly deemed that it had no merit").

This split is critically important because, as this Court explained in *Wood*, "a federal court has the authority to resurrect only forfeited defenses"—not waived ones. 566 U.S. at 471 n.5. Procedural default, this Court has made clear, is a "defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest v. Cain*, 522 U.S. 87, 89 (1997). And as this Court held in *Wood*, when a State "express[es] its clear and accurate understanding" of a defense and "deliberately steer[s] the District Court away from the question and toward the merits of [the] petition," it waives the defense. 566 U.S. at 474.

That is—as many of the lower court's sister circuits have held—precisely what the state did here. *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

At bottom, in the vast majority of other circuits, the court would have concluded that the State waived the procedural-default defense as to Whitman's federal due process claim. And as the Sixth Circuit panel recognized, because no state court ever adjudicated Whitman's claim on the merits, holding that the state waived the defense would result in the court "apply[ing] de novo review" to his due process claim. Ex. at 7. Accordingly, Whitman respectfully submits that this case warrants the Court's attention.

3. Whitman has good cause to seek an extension of time. Counsel must examine the case materials and arguments in the case, along with relevant case law from each circuit, and must continue to address several competing deadlines extending from August through November—including in matters before this Court—that have made and will continue to make it difficult to meet the current deadline for filing a petition for writ of certiorari. Those trial dates and deadlines include:

- August 26, 2024: case management conference in *George, et al. v. Gopher Resource, LLC, et al.*, No. 24-CA-000371 (Fla. Cir. Ct.);
- August 28, 2024: reply brief due in *U.S. Anesthesia Partners v. CMS*, No. 24-10384 (5th Cir.);

- August 30, 2024: joint proposed agenda for conference due in *State of Oklahoma, et al. v. Tyson Foods Inc. et al.*, No. 05-CV-00329-GKF-SH (N.D. Okla.);

- September 3, 2024: petition for certiorari due in *Fields v. Colorado*, No. 24A84 (US);

- September 9, 2024: response received following request from the Court in *John Doe v. The Trustees of Indiana University* (No. 24-88);

- September 11, 2024: response received following request from the Court in *Rivers v. Lumpkin*, No. 23-1345 (US);

- September 13, 2024: status conference in *State of Oklahoma, et al. v. Tyson Foods Inc. et al.*, No. 05-CV-00329-GKF-SH (N.D. Okla.);

- September 20, 2024: response in support of motion to summary judgment due in *ManhattanLife Insurance & Annuity Co. v. HHS*, No. 6:24-cv-178-JCB (E.D. Tex.);

- October 17, 2024: hearing on motion to dismiss and motion to suppress in *United States v. Long*, No. 22-cr-00139-JAC-RJK (E.D. Va.).

- December 2–6, 2024: trial in *United States v. Long*, No. 22-cr-00139-JAC-RJK (E.D. Va.)

Whitman respectfully submits that his counsel's need for additional time to prepare his petition for a writ of certiorari given the press of existing matters constitutes good cause for an extension of time.

CONCLUSION

For the foregoing reasons, Richard Whitman respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 60 days, up to and including November 8, 2024.

Dated: August 23, 2024

Respectfully submitted,

/s/ Cody L. Reaves
CODY L. REAVES*
BENJAMIN M. MUNDEL
MANUEL VALLE
CODY M. AKINS
SIDLEY AUSTIN LLP
Washington, D.C. 20005
(202) 736-8000
cody.reaves@sidley.com

Counsel for Applicant Richard Whitman

*Counsel of Record