No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

QUONSHAY MASON — PETITIONER
(Your Name)

vs.

DEWAYNE BURTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

QuonShay Mason
(Your Name)

MCF, 2400 S. Sherdian Dr
(Address)

Muskgeon Mi, 49442
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I. WHETHER THE SIXTH CIRCUIT, IN LIGHT OF THE CLEARLY ESTABLISHED HOLDINGS OF OFFUTT V. UNITED STATES, 348 U.S. 11, 13 (1954), AND UNGAR V. SARAFITE, 376 U.S. 575, 586 (1964), ASKED THE WRONG QUESTIONS WHEN IT REASONED THAT, IN ORDER FOR PETITIONER TO OBTAIN HABEAS RELIEF ON HIS JUDICIAL MISCONDUCT CLAIM, PETITIONER HAD TO PROVE THAT HIS TRIAL JUDGE WAS ACTUALLY BIASED?

II. WHETHER THIS COURT'S PRECEDENT CLEARLY ESTABLISHES THAT WHERE A PETITIONER PRESENTS MULTIPLE ALLEGATIONS OF JUDICIAL MISCONDUCT, A REVIEWING COURT MUST CONSIDER THEM COLLECTIVELY TO DETERMINE IF THE JUDGE'S ACTIONS CUMULATIVELY ESTABLISHES THAT HE WAS BIAS?

III. WHETHER THE SIXTH CIRCUIT'S APPLICATION OF A.E.D.P.A TO PETITIONER'S JUDICIAL BIAS CLAIM CONFLICTS WITH THE CLEARLY ESTABLISHED HOLDINGS OF CASES SUCH AS JOHNSON V. WILLIAMS, 133 S.CT. 1088, 1097, AND YIST V. NUNNEMAKER, 501 U.S. 797, 803 (1991), WHERE THE STATE COURT NEITHER ADJUDICATED THE CLAIM ON THE MERITS, NOR DISPOSED OF IT BY WAY OF SUMMARY OPINION?

TABLE OF CONTENTS

INDEX OF APPENDIXES

INDEX OF AUTHORITIES

CASES:

CONSTITUTIONS, STATUTES, COURT RULES

OPINIONS BELOW

The Sixth Circuit Court of Appeals' Opinion is unpublished, Appx. A. The Eastern District of Michigan Federal Court's Opinion is Unpublished, Appx. B. The Michigan Court of Appeals Direct Review Opinion is unpublished, Appx. C. The Michigan Supreme Court's Order denying Leave to Appeal on Direct Review can be found at 489 Mich 993 (2011), Appx. D. The Trial Court's Opinion denying Relief from Judgment, Appx. E. The Michigan Court of Appeals Court Order denying Leave to Appeal on Post-Conviction review is unpublished. Appx. F. The Michigan supreme Court's Order denying Leave to Appeal on Post-Conviction Review can be found at 495 Mich 851 (2013), Appx. G.

JURISDICTION

The Sixth Circuit Court of Appeals entered Its judgment on December 21, 2017. On March 20, 2018, Petitioner motioned the Court for an extension of time to file his Petition. (See Initial Motion for Extension of Time, Attachments, and Expedited Legal Mail Forms, indicating that Petitioner mailed a copy of the said Motion to the Court and Michigan Attorney General).

On April 19, 2018, concerned that he had not yet heard from the Court regarding the request, Petitioner, by way of a family member, contacted the Court regarding the matter. According to the said family member, the Clerk, after a thorough search for the pleadings, was unable to locate the relevant Motion; but the Clerk indicated that the additional information Petitioner forwarded to the Court on April 4, 2018 was found.

Adhering to the instructions of the Clerk, Petitioner has renewed his request for an extension of time to file the Petition. (See Renewed Motion for Extension of Time and Attachments). And, in doing so, Petitioner simultaneously submitted the Motion with his Petition. Thus, the Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1); Hohn v. United States, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides that "no state shall...deprive any person of...liberty without due process of law." U.S. Const. Amend XIV, §1.

28 U.S.C. §2254(d) provides:

That a federal Court may not grant a state prisoner's application for Writ of Habeas Corpus unless the State Court's adjudication of the prisoner's claim on the merits:

> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or
>
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. §2254(d).

INTRODUCTION

Unlike other cases that this Court has reviewed to see if the veil of impartiality has been pierced, the instant case involves a unique circumstance where the trial judge, Leonard Townsend, has been documented expressing his dislike for defense lawyers and criminal defendants and his preconceived beliefs that criminal trials are shams. As reported in Andy Court, Special Report: Poor mans justice, Am. Law. 1993 at 56, Judge Townsend stated: "All this stuff about jury trials and due process, what it really amounts to is crooks getting not guilty verdicts. I'm not talking about cases where it's arguable. I'm talking about cases where you have guilty persons walking out the door, because of misguided guilty verdicts. It happens quite a lot." Id.

It was this avowed temperament that Petitioner asked the Sixth Circuit to take into consideration when assessing whether Judge Townsend's conduct and favoritism shown to the Prosecutor in this case demonstrated a state of mind that he was biased under this Court's Jurisprudence.

Though the Sixth Circuit found Judge Townsend's statement regarding due process made over 20 years ago -- intemperate, the Court failed to recognize, however, that Judge Townsend's conduct in this case was a physical manifestation of his deep seated bias, for Defense lawyers and criminal defendants that he candidly expressed long ago. And that the motivations behind his actions were, indeed, calculated to guide the jury to reaching a guilty verdict in this case, so Petitioner, (who was already determined to be guilty by Judge Townsend), would not potentially obtain an acquittal.[1]

Yet, rather than considering "all" the circumstances supporting Petitioner's allegations of judicial bias cumulative to determine if judge

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1 As explained, infra id, at pg. 20, this is not the only case where a Petitioner has alleged that the conduct exhibited by Judge Townsend rose to the level of judicial bias.

Townsend's conduct collectively established an appearance of bias towards Petitioner, the Sixth Circuit, after erroneously applying AEDPA to the claim reviewed the allegations separately -- while holding Petitioner to a standard of proving that Judge Townsend was actually biased. After finding that Petitioner was unable to meet the standard under the rubrics of AEDPA, the Court denied Petitioner habeas relief.

Petitioner now seeks Certiorari in this Court. As the Sixth Circuit's approach departed from this Court's precedent and conflicts with other circuits' understanding of those precedents.

STATEMENT OF CASE

1. The charges against Petitioner arose from the shooting of Bennie Peterson and Danteau Dennis in Detroit, Michigan on September 28, 2007. Petitioner was jointly tried with co-defendant's Andre Jackson and Kainte Hickey before a single jury in Wayne County Circuit Court. The State Court's Opinion outlines the following summary of the testimony:

> Dennis was the primary prosecution witness at trial. Dennis testified that he was at the home of Bennie Peterson when Defendant Mason came to the house and invited them to participate in a planned robbery of a drug purchaser at the Cabana Hotel. Mason told them that the purchaser would be carrying a large sum of money. Peterson and Dennis agreed to go and they left with Mason in Peterson's van, with Mason driving. Co-defendant Jackson followed them in a Jeep. According to Dennis, Jackson positioned himself in the Jeep to prevent Dennis from seeing another occupant in the Jeep.
>
> Instead of driving to the Motel, Mason drove to Malcolm Street, where he instructed Dennis to purchase drugs from the drug house, informing him that the drugs would be used as bait in the planned robbery. As Dennis began walking toward the drug house, he noticed that Mason and Jackson had positioned their vehicles so that Peterson's van was trapped between the Jeep and another parked car. Hickey then approcahed Dennis, apparently having come from Jackson's Jeep. Dennis owed a $50.00 drug debt to Hickey, who shot Dennis. During the same time, Dennis saw Mason and Jackson exit their vehicles carrying guns, and one or both of them fired into the van. Peterson died from multiple gunshot wounds. Dennis was shot several times, but fled to the home nearby and survived.
>
> Detroit Police Officer Frank Senter found Dennis lying in the backyard of that home. Dennis told Senter that Hickey had shot him over a drug debt, but did not say anything about Peterson, Mason, or Jackson over

the next few days. Sergeant William Anderson interviewed Dennis at the Hospital. Dennis reiterated that he was shot by Hickey, and also stated that Mason and Jackson killed Peterson.

See, People v. Mason, No. 285254, 2011 WL 801034 at *1 (Mich Ct. App. March 8, 2011), pp 1-3, Appx. C.

2. As recognized by the habeas courts, neither the Petitioner, nor his co-defendants testified or presented any witnesses. Petitioner's defensive theory, however, was aimed at attacking Dennis' narrative of events on the relevant day. Defense counsel took pains to argue to the jury that even if one believed Dennis' version of facts, there was reasonable doubt, because Petitioner and Dennis were friends, and Petitioner had no motive for shooting Peterson. Defense counsel also argued that Petitioner had no opportunity to plan the murder with somebody else, that he did not conspire to murder his friend, and that Dennis was a thug, thief, robber, and stick-up man unworthy of belief.

3. Defense counsel's efforts to prove reasonable doubt, as explained below, however, was infringed upon by the Trial Court actions that constituted judicial misconduct establishing the likelihood of the appearance of bias that the Judge was unable to hold the balance between vindicating the interest of the Court and the Accused. Obviously being influenced by the trial judge's impermissible actions --- the jury after being instructed on second degree murder as a lesser degree offense of first degree murder found Petitioner, Jackson, and Hickey guilty of the charge of first degree murder, conspiracy to commit murder, assault with intent to murder, and felony firearm.[2]

4. The trial court sentenced Petitioner to two years for the felony firearm, followed by concurrent terms of life in prison for murder and the conspiracy conviction and two hundred and eighty-five (285) months to fifty years in prison for the assault conviction.

See Mason v. Burton, Case No. 2:14-cv-14-10566 (E.D. Mich. 2016), pp. 3, Appx. B; People v. Mason, No. 285254; 2011 WL 801034, at p. 7 (Mich. 2011). Appx. D. Id.

2 Hickey was convicted of an additional count of being a felon in possession of a firearm.

5. THE SPECIFIC ACTS BY JUDGE TOWNSEND THAT REFLECTS AN APPEARANCE OF BIAS.

a) Directing Findings of Fact

The critical prosecution witness in this trial was Dennis. During the course of trial, Dennis admitted that on the day of the shooting he was going with Peterson to "hit a lick", to rob someone. TT Vol I, 112, 114.

Towards the end of trial, when a police officer was testifying the prosecutor elicited that Dennis did not have a criminal record for Armed Robbery. TT. Vol IV, 33-34. When defense counsel objected the trial court overruled, stating:

"THE COURT: No Overruled. There was nothing about anybody out robbing anybody. And I think the use of the word was inflammatory. And I'm going to instruct the jury to disregard it."

TT. Vol IV, 34-35.

b) Interference With Cross-Examination

This was a multiple defendant case. However, the defense theory was only one person was involved in the shooting, not multiple people. Defense counsel was questioning the officer who had taken the initial statement of the key prosecution witness and trial counsel was trying to establish for the jury....that only one person was involved in the shooting.

Here, the judge prevented cross-examination of the officer who had taken the witness's statements, and then answered the question for the testifying officer.

DEFENSE COUNSEL: You had said he used the word "they"---

THE COURT: The witness says I don't know. Your asking him to make a conclusion based on what wasn't said.

DEFENSE COUNSEL: Now I'm asking a different question, Your Honor.

THE COURT: No, you're asking him the same question. You're asking him to come up with something that never occurred that nobody -- that was not asked.

DEFENSE COUNSEL: Had he used the word "they" instead of "he" that would have indicated to you that more than one person had done this, correct?

THE COURT: I'm going to sustain the objection as to the form of the question.

DEFENSE COUNSEL: Did he never use the they?

THE COURT: I think that's the same thing.

DEFENSE COUNSEL: Do we have an answer? Apparently that could mean he.

PROSECUTOR: In relation to what, Judge? The form of the question, Judge, I object.

DEFENSE COUNSEL: The question is a very simple question about a factual event.

THE COURT: He answered the question. You won't accept the answer. You keep asking the same question over and over again.

DEFENSE COUNSEL: Might be I have some sort of memory lapse, but I've never heard the answer.

THE COURT: I think so, Mr. Omeara. He's never said anything except the name of the person that shot him. That's all he said - He never went into any other scenario. That's - he doesn't know anything about that.

TT Vol. II 176.

The evidentiary point was whether the witness (Dennis) had first reported there was only one assailant (Hickey), not multiple assailants. The police report indicated that Dennis - - - who knew Petitioner --- said there was only one assailant (Hickey). Rather than let the officer tell the truth, (About Dennis's statement about the one assailant), the Trial Court aborted testimony from the witness and, in fact, testified for the officer (and for the prosecutor), that there were multiple assailants involved.

c. Acting as the Prosecutor

Beyond preventing the cross-examination of the above mentioned officer, Judge Townsend, rather than maintaining the role as detached umpire assumed the role of the prosecutor during Petitioner's trial, i.e., a prosecutor with a black robe. There were several occasions where Judge Townsend became another

prosecutor in the courtroom.

For example, when defense counsel was examining a police evidence technician and asked if the officer did "an investigation of areas surrounding where the bloody clothes were found" and the police officer replied "No. I did not," counsel asked about the policy and procedure for processing criminal cases. TT. Vol. III, 19. The prosecutor objected to the question, and then Judge Townsend stepped in and "terminated" defense counsel's cross-examination without opportunity for argument:

> DEFENSE COUNSEL: And it is really the City of Detroit Police Department's policy that when a police officer -- an evidence technician shows up on the scene of a homicide or a shooting to give you no information whatsoever and just let you like kind of wonder around?
>
> PROSECUTOR: Objection to the form of the question.
>
> THE COURT: Sustained, sustained.
>
> DEFENSE COUNSEL: Is it part of your training ---
>
> THE COURT: It's the same question that you just asked.
>
> DEFENSE COUNSEL: It's not the same question.
>
> THE COURT: Yes it is. You can ask him what he did, he's told you what he did. I don't think the policy is an issue in this case at all. You can ask this man what he did and what he saw. And I think he's already done that.

TT. Vol III, 20.

Contrary to Judge Townsend's determination --- a question presented to a witness to prompt a response regarding their professional title --- is wholly different than a question framed to get that same witness to explain the training required to operate effectively in their respective capacity. Moreover, viewed in context, defense counsel's question regarding policy and procedure for processing criminal cases was an issue in the case. As defense counsel was obviously trying to get the evidence technician to explain when and under what circumstances can a crime scene be contaminated and the evidence gathered tainted.

Again, rather than letting the witness respond to defense counsel's question, Judge Townsend aborted testimony from the witness and, in fact, testified for the evidence technician and for the prosecutor.

Also during trial, over objection, Judge Townsend let the prosecutor question a witness about perjury during direct examination:

PROSECUTOR: "Were you ever threatened with perjury yesterday?"

"...You were not going to be charged with perjury..."

"...at that time the word perjury was brought up..."TT. Vol. II, 6.

However, when defense counsel questioned the same witness about perjury, it was not the prosecutor, but Judge Townsend, that objects and rules such line of questioning improper:

> DEFENSE COUNSEL: All right. When I asked you about perjury you said the only to time --
>
> THE COURT: You can't ask him anything about that. Those are legal conclusions. You can't go into that.

TT. Vol. II, 69-70.

This became a recurring theme in this case and at one point when defense counsel sought to impeach a witness with a prior statement -- it was Judge Townsend -- and not the prosecutor who objected and then effectively foreclosed any confrontation with the prior statement:

> DEFENSE COUNSEL: It's not that you're guessing that they must have been shooting?
>
> WITNESS: No.
>
> DEFENSE COUNSEL: Second transcript, pg. 47.
>
> THE COURT: No. No. We've gone through that ad nauseam, about seeing or hearing. We've gone through all of that. This is questions you've asked and answered. The jury has heard it for two days now. No, we're not gonna go back through that again.

TT. Vol. II, 68.

d) <u>UNREASONABLE AND UNEQUAL DISPOSITION OF THE OBJECTIONS</u>

At trial there was a dispute as to who fired a gun and shot Peterson.

The prosecutor asked the evidence technician which bullet had struck the window. The defense objected as the answer would be speculation. At first, Judge Townsend appeared to agree, but then overruled the objection and went further, putting his stamp of approval on this "true, but trivial fact":

> WITNESS: There are two that went through the outer cover skin of the driver's door that lodged in the door. And there was one that the top edge of the door where the glass and the metal would meet. There was one that had struck the top edge of the interior panel. You could see that it had damaged the cloth and entered the car. That one would appear to have broken the glass.
>
> DEFENSE COUNSEL: Objection to speculation. He can testify as to what he saw, Your Honor.
>
> THE COURT: Very good.
>
> PROSECUTOR: Let me ask you this, the location of that bullet, was that consistent with the ---
>
> THE COURT: -- I think we're making a mountain out of a molehill. True, but trivial. But, I'll overrule the objection. You may continue.

TT. Vol. III, 11-12.

In addition to this example, when the entire record is analyzed, a disparity in the rulings made during the four day trial is revealed. There were 40 objections made in total, of which the prosecutor's objections were sustained 19 times, while the objections made by the 3 defendants were sustained 2 times.

Similarly, defense objections were overruled 16 times, while the prosecutor's objections were overruled 2 times.

6. Every court to review Petitioner's judicial bias claim failed to consider that true thrust of the argument, i.e., that the cumulative impact of Judge Townsend's behavior showed an appearance of impermissible bias. As explained above, Judge Townsend's involvement was more than clarifying testimony and administratively based actions to move the trial along. To be exact, Judge Townsend made findings of fact for the jury, acted as the prosecutor, and affirmatively interfered with Petitioner's constitutional right to present a defense, right to confront witnesses, and right to an impartial adjudicator, and

the presumption of innocence.

Despite the clear cumulative prejudice deriving from Townsend's actions the lower courts avoided granting relief by analyzing each incident of judicial bias in a vacuum, i.e., in isolated fashion. In taking such an approach the courts failed to take notice that Judge Townsend's actions caused a number of constitutional infractions. And, subsequently, his personal involvement throughout Petitioner's trial was uniquely calculated to induce a conviction in the case.

Most importantly, each court to review Petitioner's judicial bias claim failed to ask the question that this Court's precedent demands, i.e., specifically, whether that Judge Townsend's "conduct showed actual bias, or such a likelihood of bias, or, an appearance of bias that the Judge was unable to hold the balance between vindicating the interest of the Court and the interest of the accused?" Ungar v. Sarafite, 375 U.S. 575, 588 (1964); Rippo v. Baker, 137 S.Ct. 905 (2017).

a). DIRECT REVIEW: The Michigan Court of Appeals made reference to the State cases discussing judicial bias, but the court took occasion to note that the thrust of Petitioner's argument on direct review was an allegation that Petitioner was deprived of his right to present a defense due to an instruction by the trial judge that the Court found was improper. When addressing the claim the Court reviewed the matter for plain error and its Opinion omits any application of relevant precedent that expounded on this area of Constitutional law to this claim. See Appx. C., p. 5 and 11.

b. POST-CONVICTION PROCEEDING: the post-conviction court recognized that Petitioner sought to set aside his conviction on the grounds that multiple instances of Judge Townsend's conduct violated his due process right. See Appx. C. p. 3. This Court, as explained below, however, concluded erroneously --without any merits discussion of the relevant issue --- that the judicial bias

claim was raised and decided in a prior appeal and disposed of the matter on procedural grounds pursuant to MCR 6.508(D); Appx. E., p. 6.

c. DISTRICT COURT HABEAS PROCEEDINGS: The District Court cited Ungar, supra, for the proposition that this Court's precedent clearly established that judicial misconduct can come in the form of actual bias, or rise to the level of displaying an appearance of bias on a judge's behalf. See Appx. B, p. 16-20. But the District Court, for a number of reasons, failed to apply the law accordingly. First, the District Court erroneously concluded that Petitioner's judicial bias claim was adjudicated on the merits on direct and post-conviction review and applied AEDPA to a context that warranted de novo review. See Appx. B, Id.

Nevertheless, as previously stated, neither the Michigan court of Appeals on direct review or the trial court during post-conviction proceedings adjudicated Petitioner's judicial bias claim on the merits. Under such circumstances the District Court's application of AEDPA to Petitioner's judicial bias claim was a substantial error of law. See e.g., Johnson v. Williams, 133 S. Ct. 1088, 1097 (2012); Keman v. Hinajoso, 136 S.Ct. 1603, 1604 (2016).

Second, the above mentioned error by the District Court allowed it to defer to State Court Opinions that have not said a word regarding the specific allegations of judicial bias. In doing so, and without assessing the cumulative impact of Judge Townsend's misconduct --- the District Court found no judicial bias, because Judge Townsend's actions were administratively based to move the trial along. See Appx. B, p. 19-20. And, because Judge Townsend during "general instructions" took occasion to inform the jury that he did not have a side in this case. See Appx. B, p. 19-20. The District Court then went on to deny Petitioner habeas relief. Id.

The problem with the District Court's reliance on the said instruction to support the denial of habeas relief is, for one, it is a standard instruction

given in all criminal trials and , for two, this Court's judicial bias Jurisprudence does not direct courts to take into consideration jury instructions when asking whether a judge's conduct exhibits a likelihood of the appearance of bias, or actual bias. In other words, this Court's Jurisprudence clearly indicates that when undertaking the relevant inquiry the determinative process embodies a focus on the actual allegations before and during trial. See e.g., Ungar, supra, 376 U.S. at 575; Liteky v. United States, 510 U.S. 540 (1994); Williams v. Pennsylvania, 136 S.Ct 1899 (2016); Withrow v. Larkin, 421 U.S. 33 (1975).

As for the other reason relied on by the District Court to deny habeas relief -- the cumulative action of Judge Townsend's conduct provides inescapable proof that his involvement at trial was more than clarifying and administratively based actions to move the trial along. Notably, the granting of a Certificate of Appealability in this matter by the District Court lends support to Petitioner's arguments. As such actions by the District Court strongly suggest, however, that the Court questioned the correctness of the result reached. See Slack v. McDaniels, 529 U.S. 473, 484 (2003)(explaining that a certificate of Appealability may be issued where reasonable jurists would find the District Court's assessment of the Constitutional claim is debatable, or wrong).

d. SIXTH CIRCUIT PROCEEDINGS: Like the District Court, the Sixth Circuit also incorrectly applied AEDPA to Petitioner's judicial bias claim. Also, though the court observed that Petitioner was asserting that the "cumulative actions" of Judge Townsend, viewed collectively, were sufficient to establish that he was biased, the Sixth Circuit, nevertheless, reviewed each instance of judicial bias alleged independently. And, in doing so, the Court reasoned that in order for Petitioner to obtain relief he had to prove that Judge Townsend was actually

biased.[3]

Specifically, in the opening paragraph the Sixth Circuit, when discussing the relevant matter, stated: "A fair trial in a fair tribunal is a basic requirement of due process." And a trial's fairness is irreversibly undermined if it is held "before a judge with...actual bias against the defendant's interest in the outcome of the particular case." (citation omitted). See, Appx., p. 5. The Court, after holding Petitioner to the standard, determined that the State court rejection of the relevant claim was neither contrary to, or involved an unreasonable application of clearly established law. See, Appx. A, p. 12.

The Sixth Circuit got it wrong, however, as the State Courts never adjudicated Petitioner's judicial bias claim on the merits. AEDPA, therefore, was inapplicable in this context. Moreover, under this Court's precedent, to prevail on a judicial bias claim a habeas petitioner is not held to proving actual bias. Rather, a habeas petitioner must show that there was bias, or a likelihood, or appearance of bias on the behalf of the judge to establish a Due Process violation. Ungar, 376 U.S. at 588; Larkin, 421 U.S. at 47; Offutt, 348 U.S. at 13.

Also, the Sixth Circuit's denial of habeas relief on the judicial bias claim is questionable. As the legal conclusion reached by the court came by way of a misapprehension of law borne through the application of the wrong standard of review.

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3 In reviewing Petitioner's judicial bias claim, the Sixth Circuit incorrectly determined Petitioner only alleged one instance where Judge Townsend interrupted defense counsel's cross examinations. As can be clearly seen from the instances of judicial misconduct outlined above, however, Judge Townsend also interrupted defense counsel's cross examinations of police officers and the evidence technician. Id.

REASONS FOR GRANTING CERTIORARI

I. The Sixth Circuit's Actual Bias Standard Conflicts With This Court's Precedent.

This Court's precedent has long ago established that, "due process guarantees" an absence of bias "on the part of a judge." Williams v. Pennsylvania, 136 S.Ct. 1899, 1905 (2016)(quoting In re Murchison, 349 U.S. 133, 136 (1955)). The prohibition against such a judge is to ensure "for a fair trial in a fair tribunal..." 349 U.S. at 136.

In the context of determining whether a judge is impartial the Court has continuously stated, a "violation of due process may occur when a judge has no actual bias." Antea Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986), i.e., where "the possibility of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." Larkin, supra, 421 U.S. at 47; See also, Caperton v. AT. Massey Coal Co., 556 U.S. 868 (2012)("Where the Court made clear that it was clearly established that due process can be violated where there is an unconstitutional risk of bias"); accord Williams, supra, 136 S.Ct. 1t 1599, ("The court asks not whether a judge harbors an actual subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias").

Whatever doubts that existed within the mind of jurist about the appearance of bias standard should have been eliminated by the holdings of Caperton and Williams. And if these decisions weren't enough, this Court's summary reversal in Rippo v. Baker settles the point. In Rippo, the Nevada Supreme Court rejected a judicial bias claim because the defendant's allegations did not suffice to show actual bias. 137 S.Ct. 905, 906 (2017)(Per Curiam). This Court summarily reversed the decision because the Nevada Supreme Court did not

ask the question that this Court's precedent requires: Whether considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable? Id.

The approach taken by the Nevada Supreme Court is exactly the same as the approach taken by the Sixth Circuit in the present case. And by focusing on actual bias, rather than the unconstitutional high appearance of bias, it is abundantly clear that the Sixth Circuit here, like the Nevada Supreme Court in Rippo, applied the "wrong legal standard." Id. Williams, supra, 136 S.Ct. 1899, at 1888-89.[4]

4 It is entirely possible that the panel of the Sixth Circuit in this case failed to ask the relevant questions because, as an initial matter, the Court in other instances had already held that "the unconstitutional risk of the appearance of bias standard was not clearly established under this Court's precedence." See e.g., Railey v. Webb, 540 F.3d at 413-14; Gordon v. Lafler, 710 F.Appx. 654 (2017). The summary reversal in Rippo, however, proves that the panel in Railey and Gordon got it wrong. As summary reversal reflects the feelings of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and arguments would be a waste of time. See e.g., Weary v. Cain, 136 S.Ct. 1002 (2016)(and the case cited therein).

II. THE SIXTH CIRCUIT'S FAILURE TO ASK THE APPROPRIATE QUESTION IS IN DIRECT CONFLICT WITH OTHER CIRCUITS

Other Circuits have recognized that this Court's precedence clearly established a general appearance of bias standard long ago. In Hurles v. Ryan, a judge presided over the defendant's capitol murder trial and purposefully and forcefully responded to her lawyer's attempt to reverse her refusing to appoint co-counsel. 752 F.3d 768 (9th Cir. 2014), cert denied, 137 S.Ct. 716 (2014). In addressing the defendant's judicial bias claim under AEDPA, the Ninth Circuit cited the body of pre-Caperton precedent discussed above to demonstrate the habeas petitioner "need not prove actual bias to establish a due process violatio, just an intolerable risk of bias." Id. at 754. The Seventh Circuit, in Alston v. Smith, 890 F.3d 363 (7th Cir. 2016), has reached a similar conclusion in assessing Alston's judicial bias claim, the Court explained under clearly established law, "due process is violated not only where an adjudicator is biased, in fact, but also where a situation presents a particularly high probability of bias." Id. at 368 (citing Caperton and Withrow).

Indeed, other Circuits have recognized the appearance of bias as clearly established law, as well. See e.g. Jones v. Luethers, 359 F.3d 1003, 1008 (10th Cir. 2004); Alidan v. Dooley, 365 F.3d 635, 640 (8th Cir. 2004); United States v. Gordon, 272 F.3d 659, 677-79 (4th Cir. 2001); United States v. Brown, 352 F.3d 654, 665, n. 10 (2nd Cir. 2001).

In light of the almost unanimous view by the Circuits on this point and multitude of cases decided by this Court in this context, it is perplexing to comprehend how the Sixth Circuit has continued not to follow the guidance of this Court and ask the questions that this Court's precedent requires.

III. The Sixth Circuit's application of AEDPA to Petitioner's Judicial Bias claim also conflicts with this Court's precedent, as the claim was never adjudicated on the merits in state court.

This Court's precedent makes clear that because the deference owned to state courts' decision can be dispositive of a claim, "a federal court reviewing a habeas petition must first address the threshold question of the proper standard of review, specifically whether AEDPA's deference or de novo review applies." Davis v. Ayala, 135 S.Ct. 2187 (2016). The Sixth Circuit has also noted such. See English v. Berghius, 528 F. Appx. 734, 740 (6th Cir. 2013)("Before a reviewing court reaches the question of the reasonableness and conformity to relevant precedent of the state court adjudication, however, it must first confront a more primal question: whether the defendant's claim was actually adjudicated on the merits?").[5]

5 It should be noted that, "a party cannot waive the proper standard of review by failing to argue it." As it is understood "that the Court, not the parties must determine the Standard of Review, and, therefore it cannot be waived." Brown v. Smith, 551 F.3d 424, 429 (6th Cir. 2008); Ward v. Stephens, 777 F.3d 250, 257 n.3 (5th Cir. 2015)(citing Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009).

This Court's precedent also dictate that, "in order for AEDPA's standard of review to apply a petitioner's claim must have been adjudicated on the merits in state court proceedings." 28 U.S.C. §2254(d); Davis, 135 S.Ct. at 2195. If not, this Court has directed federal courts to review a petitioner's habeas claim de novo. Keman v. Hinajoso, 136 S.Ct. 1603, 1604 (2016). This Court has further held, "It is presumed that the state court adjudicates on the merits all claims presented to it, absent indici to the contrary." Harrington v. Richter, 562 U.S. 86, 99 (2011). That presumption may be overcome, where there is reason to think some other explanation for the state court's decision is more likely, Id. 99-100 (citing Yist v. Nunnemaker, 501 U.S. 797, 803 (1991)).

In the present case, the record indicates that Petitioner may be able to rebut the presumption that his judicial bias claim was adjudicated on the merits in state court. As stated, supra, Id. at 11, the Michigan Court of Appeals never addressed the judicial bias claim on the merits. Id. To be exact, the court construed Petitioner's claim as alleging a deprivation of the right to present a defense stemming from an improper instruction given by the trial court. Id. And when addressing the claim the Michigan Court of Appeals reviewed the matter for "plain error". Moreover, Its opinion omits any application of any precedent that expounded upon this particular area of constitutional law to the relevant claim. See Appx. C. Id.

The last reasoned opinion discussing the matter came form the Wayne County Circuit Court. In rejecting Petitioner's judicial bias claim the court wrote: Defendant's . . . argument, i.e., the judicial bias claim, has been raised in a prior appeal or Motion. The Court then invoked MCR 6.508(D) and disposed of the claim on procedural grounds. Thus, finding it to be without merit, because it had been allegedly raised and decided in a subsequent appeal. (Citations omitted). See Appx. E, p. 3-6. A fair review of the Michigan Court of Appeals

opinion, however, makes clear that this statement by the Wayne County Circuit Court and citations supporting it are both erroneous, see Appx. D, p. 5, 11, as Petitioner did not raise the judicial bias claim on direct appeal in the Michigan Court of Appeals. Id.

It is, thus, obvious that the Wayne County Circuit Court confused Petitioner's judicial bias claim with issues he raised in his Appeal of Right. Put simply, the Wayne County Circuit Court's treatment of Petitioner's judicial bias claim clearly leads to the conclusion that the Court "inadvertently overlooked" the claim and improperly disposed of it on procedural grounds. See Johnson v. Williams, 133 S.Ct. 1088, 1097 (2013).

Despite the strong reasons to believe that Petitioner could rebut the presumption that the state court adjudicated the merits of the judicial bias claim, the District Court and Sixth Circuit, contrary to this Court's directives, analyzed the full context of the judicial bias claim without making the preliminary determination of whether AEDPA's deferential standard, or de novo review applies. See Keman, supra, 136 S.Ct. at 1604, Davis, supra, 135 U.S. at 2195.

a. The adverse effect of the Sixth Circuit's holding Petitioner to the standard of proving actual bias and the Court's erroneous application of AEDPA to the judicial misconduct claim.

It cannot be denied that because of the actions of the Sixth Circuit Petitioner faced an almost impossible task of proving that the state post-conviction court, pursuant to 28 U.S.C. §2254(d), unreasonably determined that Petitioner failed to establish actual or subjective bias in Judge Townsend's heart. Cf. Caperton, supra, 556 U.S. at 883 ("Noting the difficulties of inquiring into actual bias and the impossibilities of Petitioner obtaining habeas relief increased 10 fold) by the Sixth Circuit's deviation from making the crucial preliminary determination of the proper standard of review. See

e.g., Olsen v. Little, 604 F.Appx. 387, 390 (6th Cir. 2015)("recognizing the importance of determining whether to apply §2254's deferential standard of review...because the requirements are difficult to meet")(quoting Johnson, supra, 133 S.Ct at 1091), see also Wood v. Donald, 135 S.Ct. 1372 (2015).

Thus, like the District Court before it, the Sixth Circuit could never have acted as it did without holding Petitioner to a standard of proving actual bias and erroneously applying AEDPA in this context. Given the scope of this Court's clearly established precedent, neither standard should have been applied in this case. Consequently, because the decision reached by the Sixth Circuit came by way of misapprehension of law that was borne through the application of the wrong standard of review --- the integrity of Petitioner's habeas proceedings have been compromised by judicial error.

IV. The case is a good vehicle to once and for all resolve this relevant question.

Whether clearly established law precludes an unconstitutional high appearance of the possibility of bias, as well as actual bias is an important, frequently recurring question worthy of this Court's time. In fact, the question has come before the Court from other Circuits at least twice during the 2016-2017 term. See Rippo, supra, 137 S.Ct. at 905-06 ("Granting Certiorari and summarily reversing the Nevada Supreme Court because when reviewing the defedant's judicial bias claim the court did not ask the question that this Court's precedent requires."); see also, Lacaze v. Louisiana, 138 S.Ct. 60 (2017)("Certiorari granted and the case remanded with instructions for the lower court to consider the Court's holding in Rippo"."

And in the Sixth Circuit alone a casual search of the LEXIS Website discloses there is a host of decisions addressing judicial bias claims brought by habeas Petitoners. One notable case is Gordon v. Lafler, 710 F.Appx. 654 (6th Cir. 2018). In Gordon the petitioner alleged that habeas relief was

warranted because the trial judge (1) "interrupted defense counsel questioning of witnesses"; (2) "Interjected at least three times when witnesses appeared to evade the question"; (3) "reprimanded defense counsel several times during the course of trial"; (4) "stated sarcastically, 'don't they teach you legal courtesy in law school these days"; and (5) made "various statements," that could certainly be considered inappropriate and lacking (in fact). 710 F.Appx. at 661-64.[6]

As it did in this case, the Sixth Circuit held Gordon to the impossible standard of proving that the trial judge was actually biased. 710 F.Appx. Id. After finding that Gordon could not meet this actual bias standard the Sixth Circuit denied habeas relief. Premised on the Sixth Circuit's application of the wrong legal standard, Gordon now awaits this Court's determination, as to whether Certiorari should be grated, in light of the following question:

> WHETHER THIS COURT'S DECISION UP TO AND INCLUDING CAPERTON V. AT. MASSEY COAL CO. 586 U.S. 868 (2009), CLEARLY ESTABLISHED THAT A JUDGE PRESIDING OVER A MURDER TRIAL MUST BE FREE FROM AN UNCONSTITUTIONAL HIGH APPEARANCE OF BIAS, NOT JUST ACTUAL BIAS?

See Gordon v. Lafler, ____S.Ct.____(2018)(pending).

Also, see e.g. Caley v. Bagley, 786 F.3d 741 (6th Cir. 2013); Bailey v. Smith, 492 F.Appx. 610 (6th Cir. 2012); Johnson v. Bagley, 544 F.3d 592 (6th Cir. 2008); Railey, supra, 540 F.3d at 413-14, Getsy v. Mitchell, 495 F.3d 395 (6th Cir. 2008)(en banc).

6 Judge Townsend was also Gordon's trial judge.

Though Caley, Bailey, Johnson, and Getsy may not have the same factual contexts or application of law as Petitioner's or Gordon's, their allegations of judicial bias, along with the decisions from the other Circuits discussed above, see, supra, pp. at 17, clearly illustrates that the Sixth Circuit is not alone in regularly confronting such claims. Making clear what this Court has already clearly established for the purpose of judicial bias issues, and reiterating the necessity of Federal Courts to determine whether AEDPA or de novo review applies to a claim would foster the resolution of future cases.

Additionally, this case also provides a convenient opportunity for this Court to explicitly clarify, that where a Defendant alleges multiple instances of judicial bias, the appropriate approach when determine whether a judge is bias, is to assess the cumulative impact of the judge's improper actions collectively, rather than in isolation. See e.g., Williams, supra, 133 S.Ct. at 1907. Rippo, supra, Id.

FINAL NOTE

It is clear from this Court's precedence that a criminal defendant may not be sentenced to life in prison after a trial presided over by a partial judge whose own words and actions show that he is partial, i.e. biased against criminal defendants.

Therefore, for the reasons articulated above, the Court should grant plenary review, to "once and for all resolve the question as to whether clearly established precedent forbids more than just actual bias. Plenary review, moreover, would allow the Court to expound on whether a court, in assessing multiple allegations of judicial bias, should review the allegations independently or collectively to determine if the judge's conduct established bias. And, finally, this case presents a convenient opportunity for the Court to remind Federal Judges of the importance of determining whether AEDPA, or de novo review applies before addressing a habeas petitioner's claim.

With respect to the Chief Questions in this case, the Court could also summary vacate the decision below, as it did in Rippo. Or remand the matter to the Sixth Circuit for further consideration in light of Rippo's holding, as the Court did in Lacaze, supra. Id.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Quon'Shay Mason #620368
Muskegon Corr. Fac.
2400 S. Sheridan Dr.
Muskegon, Mi. 49442

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