ORIGINAL

NO: 18-5090

In The Supreme Court of the United States

Quonshay Mason,

Petitioner-Appellant,

v.

DeWayne Burton,

Respodent-Appellee.

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

PETITIONER'S REPLY TO THE STATE'S RESPONSE IN OPPOSITION

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I OVERVIEW OF THE STATES' RESPONSE

Petitioner sought Certiorari in this instance to have the Court resolve whether "clearly established Supreme Court precedent forbids more than actual bias", "to expound upon whether a court must review "Multiple" allegations of judicial misconduct individually or collectively", and to "determine whether the lower federal court's application of AEDPA to Petitioner's judicial misconduct claim conflicts with this Court's precedent, ---- where the state courts neither adjudicated the claims on the merits, nor disposed of them in summary fashion.

The State of Michigan has, however, failed to address the questions head on. Instead, it has paraded a pleathora of meritless arguments before the Court, attempts to belie the wide spread split amongst the circuits on the point of law articulated in the chief question presented in the Petition, and creates fictitious hurdles to argue against this Court's review. In short, the position, taken by the State --- like the court's below --- rests on a fundamental misunderstanding of this Court's precedent. And whether or not the federal court's erroneously applied AEDPA to Petitioner's habeas claims, is obviously irrelevant to the State.

Absent intervention by this Court both state and federal courts will continue to ask the wrong question when faced with analogous situations. In turn, other incarcerated men --- like Petitioner --- may be improperly denied habeas relief, or at the very least they may be denied a fair opportunity to secure such relief by having a federal court apply this Court's precedent accordingly to their case.

II. DISCUSSION

a. When Measured Against This Court's Judicial Bias Jurisprudence And The Rules That Directs A Federal Court's Panel Opinion, It Is Obvious That the State's Understanding Of This Court's Precedent Is Misplaced, And That It Is Wrong About The legal Standard Applied By The Sixth Circuit In This Case.

The State correctly observes that the Sixth Circuit panel acknowledged that "it is possible ... to infer impermissible bias from judicial remarks during the course of a trial." Mason, 720 F.Appx. at 245; Brief In Opposition, Id, at p. 18. But citation in passing to a legal standard, ---- alone and without more ---- does not necessarily mean that court when determining whether habeas relief should be granted on the judicial misconduct issue looked for more than just bias in this case. In fact, as explained in the Petition for Certiorari, Id, at p. 3|| 4, 12, and 13, a fair reading of the Court's Opinion definatively shows otherwise.

Another reason, for this Court to discount the State's argument here is the Sixth Circuit's holding in Railey v. Webb, 540 F.3d 393 (6th Cir. 2008). There, while acknowledging that a judge may be disqualified from a case for the mere appearance of bias, the Sixth Circuit went on to consider whether the failure of a judge to disqualify him or herself for the appearance of bias constitutes a constitutional violation. After engaging in a so-called comprehensive review of Supreme Court and Circuit precedent. Id, at 401-13, that panel concluded it was "arguable," not "clearly established", that a judge's failure to recuse himself when faced with the possibility of bias constitutes a due process violation. Id, at 413-14.

Under Sixth Circuit precedent, once a prior panel determines that a rule has been clearly established all future panels of that Court are bound by the holding. See, e.g. Gordan v Lafler, 710 F.Appx 659, 660-61 (6th Cir 2017) ("Where that panel relied on Railey to undercut Gordan's argument that the

appearance of bias standard is clearly established under Supreme Court precedent" and, in doing so, noted "We are bound by prior Sixth Circuit determinations that a rule has been clearly established under Supreme Court precedent") "(citing Toliver v. Sheets, 594 F.3d 900, 916, n6 (6th Cir 2017)(quoting Smith v. Stegall, 385 F.3d 993, 998 (6th Cir 2004). In light of Railey's holding being binding on all future panels it is absolutely no reason to believe that the panel that adjudicated Petitioner's habeas claims departed from Toliver and Smith and looked for more than just bias when reaching it's conclusion. See Railey, 540 F.3d at 713-14; See also, Sixth Circuit Rule 15(c).

Further, considering, the State has not offered a valid reason to lead this Court to conclude that the Sixth Circuit looked for more than actual bias when adjudicating Petitioner's judicial misconduct claim, ---- it cannot be ignored that the legal standard applied by that panel conflicts with this Court's precedent. As this Court has consistently overturned judgments because of the risk or appearance of bias, whether or not the adjudication was actually biased. See Petition for Certiorari, Id at p 15-17.

Apparently, knowing it could not escape the cases cited by Petitioner to support his position the State in it's Brief concedes that "this Court when confronted with judicial misconduct claims has, indeed, identified certain situations where due process was violated based on something less than actual bias." See Brief in Opposition, Id at p, 19-23. But it insists that the standard applied in those cases extends only to similar situations with the exact factual structure of those cases. Id.

When formulating it's Response the State clearly overlooked that in every scenario i.e, when faced with cases with different factual contexts, --- the only question this Court has ever asked was whether "the possibility of bias on the part of a judge or decision maker is too high too be constitutionally

tolerable"? See e.g. Withrow v. Larkin, 421 U.S. 35, 47 (1975); Caperton v. A.T. Massey Coal Co. 536 U.S. 869, 838 (2009)(quoting same); Williams v. Pennsylvania, 136 S.Ct. 1899, 1903 (2016); Rippo v. Baker, 137 S.Ct. 905, 917 (2017)(quoting sone).

In light of the unequivocal position taken by this Court in the above mentioned cases, ---- this Court should find the States' arguments here to be meritless. As this Court's consistency in applying the appearance of bias standard reflects that it has determined that the," principal is Fundamental enough that when a new factual permutation arises, the necessity to apply the prior rule is beyond doubt." See Yarborough v. Alvaredo, 541 U.S. 652, 666 (2004). And, even if AEDPA applied to this context it would not have any bearing on the question at hand. See White v. Woodall, 572 U.S. 415, 427 (2013)("Stating § 2254 (d)(1) does not require a identical factual pattern before a legal rule must be applied.") (quoting Panetti v. Quarterman, 551 U.S. 930, 953 (2007).

Accordingly, the State has offered no substantial rebuttal as to why the principal applied in Withrow, Caperton, Willians, and Rippo, should not apply in Petitioner's case. See Knowles v. Mryance, 556 U.S. 111, 122 (2009)("Court's must apply the rules squarely established by the Court's holding to the facts of each case.").

With respect to States' assertion that Petitioner relied on this Court's dicta about bias, rather that it's holding, in violation of AEDPA, See Brief in Opposition, Id at p 21-32, ---- this argument is, likewise meritless. As it is understood in the legal community that " when an Opinion issues from the Court, it is not only the result but also the portions of the Opinion necessary to reach that result by which the "Court" --- and everyone else "are bound." Seminole Tribe of Fla, v. Florida, 517 U.S. 44, 67 (1996). Hence, the standard

used to adjudicate ineffective assistance claims is part of the holding of Strickland v. Washington, 466 U.S. 668 (1984); See also Williams v. Taylor, 529 U.S. 362, 412 (2000).

Additionally, the State in it's Brief In Opposition seams to suggest Petitioner's case differs from those he cited because he points to no "existing objective factors that creates a serous risk of actual bias (not just the appearance of bias) on the part of the judge." See Brief in Opposition, Id. However, "remarks during the course of trial ---- will support a bias claim", if they unconstitutionally suggest "a high degree of favoritism or antagonism." Liteky v. United States, 510 U.S. 540, 555 (1994).

And if the State means to suggest that Petitioner has not sufficiently identified the requisite objective evidence to support his allegations of judicial bias, ---- the State is wholly wrong. Objective evidence, campaign donations, financial incentives, and personal involvement on behalf of a judge --- under this Court's precedent --- suggest actual bias or the appearance of bias, in light of a "realistic appraisal of psychological tendicies and human weakness." Capetton, 556 U.S at 883 (quoting Withrow, 421 U.S. at 97).

In the present case that objective evidence comes from Judge Townsend's own mouth and conduct. See Petition for Certiorari, Id at p. 6-11. And, as explained in other pleadings associated with this matter, ---- Petitioner's case is not the first instance ---- where Judge Townsend's conduct has created a high risk of the appearance of bias. See Gordan v. Lafler, (Case No. 17-1404), Interestingly, enough the State in it's 32 page Response has never mentioned this fact.

Next, the State tries to exclude the holdings of Williams, supra, and the on-point decision in Rippo, supra, from this Court's consideration of the questions presented in the Petition by noting those decisions post-date

Petitioner's case. There are two problems with the State's argument here, however; first, the decision reached by the Court in Rippo and Williams were directed by clearly established principals that were reiterated in Caperton, i.e, a case that relied on precedent discussing the relevant standard that predated it's holding. And, this Court had made explicitly clear that, "a decision does not announce a new rule when it is merely an application of principals governing prior Supreme Court precedent." Teague v. Lane, 489 U.S. 288, 307 (1989).

Second, as noted in the Petition for Certiorari Id, at p. 15-16, Rippo's "Summary Reversal" reflects the feelings of a majority of this Court that the lower court's result was so clearly erroneous, in light of controling Supreme Court precedent to the contrary that full briefing and arguments would have been a waste of time. See, Weary v. Cain, 136 S.Ct. 1002, 1007 (2016)("Noting that this Court has not sheid sway form summarily deciding fact intense cases, where, as here, the lower courts have egregiously misapplied settled law.").

Indeed, Teague's holding and the settled principals that directed the decisions reached by this Court in Williams and Rippo proves fatal to the State's argument here. In other words, contrary to the States assertions, Williams and Rippo's holding are fully applicable to the instant matter.489 U.S. at 307. Moreover, if it would have been a waste of time to brief whether the lower court to decide Rippo's case erred by looking for "actual bias", 137 S.Ct at 907, it is apparent that the posdecision taken by the State and the Sixth Circuit is wrong.

b. Rather Than Refuting That There's A Wide Spread Conflict Between The Circuit Regarding This Area Of Law; The State's Response Magnifies The Conflict.

As established by the cases brought to this Court's attention in the Petition for Certiorari, there is a conflict among the Circuit regarding

whether it is clearly established under this Court's precedent that due process is violated when a judge's conduct creates an unconstitutional high appearance of bias. See for Petition for Certiororl, Id, at p. 15-17. The State however, attempts to downplay this fact by distinguishing those cases Petitioner relied on to support his request for Certiorari.

Take first, Hurles v. Ryan, which held, even under pre-Caperton precedent, a habeas petitioner "need not prove actual bias to establish a due process violation, just on unacceptable risk of bias." 752 F.3d 769, 789 (9th Cir, 2014); cert. denied, 137 S.Ct 710 (2014). According to the State Hurles does not create a conflict with other cases such as the Sixth Circuit's holding In Railey, 540 F.3d at 413-14, because it did not "hold that a due process violation occurred." See Brief In Opposition, Id, at 23-24. However, Hurles did hold that less than actual bias suffices, ---- that is why that court" remanded ... for an evidentiary hearing." See Brief In Opposition. Id.

Beyond that, the State claims there is no split because Hurles "did not specifically apply an appearance of bias standard", but rather that court instead "recognized there was a risk of actual bias because the judge affirmatively advocated against the Defendant." Id. The distinction the State makes here is irrelevant and ignores the relationship between the appearance of bias and an unacceptable risk of bias, ---- as the two go hand and hand. For example, the reason it looks questionable for Judges to decide cases in which they have a financial stake is the risk that the stake will actually bias their opinion. That rationale applies here too. Meaning, the reason that Judge Townsend's remarks and concuct created a unconstitutionally high appearance of bias in this case is, because his actions illuminated his bias against Petitioner and it is conceivable that the jury thought as much.

Also, the State attempts to distinguish the other cases cited by Petitioner

fares no better. It argues, specifically, that Alston v. Smith, 840 F.3d 363 (7th Cir. 2016), and Jones v. Luebbers, 359 F.3d 1005 (8th Cir. 2004), do not create a circuit split because each court "held that no constitutional violation occurred based on the specific facts of those cases." See Brief In Oppositoin, Id, at 24.

Apparently, that the State does not comprehend what a circuit split is. As both, Alston and Jones stated and applied a different legal rule than the one the Sixth Circuit applied in this case and others. To be exact, the panels in Alston and Jones explained that "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." Alston, 840 F.3d at 368 (Citing Caperton and Withrow). See Jones, 359 F.3d at 1012 ("clearly established federal law ... recognizes not only actual bias, but also the appearance of bias, as grounds for disqualification."). Plainly put, what the State fails to recognize is that the disagreement between those court's and the Sixth Circuit's opinion does not disappear, simply, because the defendants in Alston and Jones could not prevail under the Seventh and Eighth Circuit's more defendant friendly approach.

It is also note noteworthy to mention that the State doesn't bother to reference other cases cited by Petitioner, such as United States v. Gordan, 272 F.3d 659 (6th Cir. 2001), -- instead it insists that direct review cases "cannot establish a conflict" with Petitiner's habeas based appeal and that those cases are "factually distinguishable." See Brief In Oppostion, Id at 25. Such cases are relevant, however, because their holdings provides clarity regarding whether a judge's actions' "creates an appearance of partiality," in violation of the due process clause of the U.S. Constitution. Gordan, 272 F.3d at 677.

As for the supposed factual distinctions, they must not be of importance, considering the State never explains what they are. See Brief In Opposition, Id. More importantly, regardless of the specific facts of the cases cited by Petitioner, ---- what matters is the legal standard they applied. And, as illustrated the reviewing Courts in those cases unlike the Sixth Circuit's search for actual bias in Petitioner's case, ---- interpreted this Court's precedent accordingly and asked the appropriate question under the circumstances.

In additions, the States argument in this regard is further undermined by the cases it cites that supposedly demonstrates that court's on direct-review have been reluctant to reverse based on accusations of a trial court' impartiality. See Brief In Opposition, Id at 22-23. As those cases said nothing about a requirement that mandates a defendant prove active bias in this context. And It's argument that "others" circuit' have held that," clearly established law requires no more than the absence of actual bias," See Brief In Support, Id at p 22-23 ---" Magnifies"--- rather than refutes, that there's a conflict amongst the Circuits regarding this point of law.

Considering that other circuits, including the Sixth Circuit have set precedent that demands that a petitioners' judicial misconduct allegedly must prove actual bias notwithstanding the holdings of Caperton, Williams, and this Court's summary reversal in Rippo, --- it is absolutely necessary for this Court to resolve the confflict and bring the lower courts into uniformity once and for all.

c. Whether Petitioner Will Prevail Under De Novo Review Is Irrelevant At This Stage Of The Litigation.

In it's Brief In Opposition the State dedicates a substantial number of pages to explaing why it believes Petitioner's judicial bias claim will fail under de novo review. But what the State misunderstands is the Certiorari

stage is not the appropriate forum to argue the merits of the underlying constitutional issues. What matters at this stage is, whether a Petitioner has presented sufficient evidence to establish that this Court's intervention is warranted to resolve a Circuit Split pursuant to Rule 10; this Petitioner has done. And, the State is normally tasked with the endeavor of rebutting such a contention by a petitioner; this the State has failed to do.

Likewise, the State has also failed to present any credible argument illustrating that the Sixth Circuit's legal approach and conclusion that followed it, --- in the present case can be reconciled with this Court's precedent. Indeed, as explained above, the Sixth Circuit got it wrong in this case and, in doingso, it egregiously misapplied clearly established law. That said, once this Court corrects the Sixth Circuit's misunderstanding; it will be that court's job to analyze Petitioner's claim in the first instance. See Alabama v. Shelton, 535 U.S. 654, 673 (2009).

And for the record, Petitioner maintains that it is, most certainly, a possibility that once the Sixth Circuit applies the appropriate "standard of review" and the "law accordingly," --- Petitioner could be afforded habeas relief. As panels of that court on occasion, --- in a non-AEDPA habeas case and on direct-review --- has granted relief were the collective impact of a judges actions and remarks were found to have infringed upon the guarantees of due process. See Lyell v. Renico, 470 F.3d 1777 (6th Cir. 2007); See also United States v. Hickman, 592 F.2d 92, 96 (6th Cir. 1979)"(concluding that the judge's "constant interruptions," which frustrated the defense at every turn," denied the defendant a fair trial,").

d. Contrary To the States Contentions The Sixth Circuits Opinion Does Not Suggest That Petitioner's Judicial Bias Claims Were Assessed Collectively, As This Court's Precedent Demands.

Let the State tell it, after grouping Petitioner's allegations of judicial

misconduct into five categories the Sixth Circuit took notice that Petitioner was arguing the challenged conduct "taken together" constituted bias on behalf of the trial judge, Mason, 720 Fed. Appx. at 245, and after assessing the claims collectively that court ultimately concluded that the judicial activity in this case" did not deny Petitioner a fair trial." Id at 248-49. This is not an accurate representation of the Sixth Circuit's Opinion, however.

In fact, the State correctly notes that the Sixth Circuit grouped Petitioner's claims into five categories and acknowledge that he was urging that court to review them collectively. Id, But there is not a single paragraph or for that matter, any language contained in the Sixth Circuit's opinion that definitively indicates that the Court analyzed the claims "collectively" before reaching it's conclusion. See Mason, 720 F.Appx. at 245-249.

Hence, the State's argument here is unfounded and at best amounts to conjecture. To be clear, what the State asks this Court to do here is, conclude that just because the Sixth Circuit acknowledged Petitoner's request to review the claims collectively in passing ---- the panel automatically accommodated Petitioner's request. To reach this conclusion, however, this Court would have to read into the Sixth Circuit's opinion a holding and application of law that does not otherwise exist. See, Mason, supra. Id, see also Williams, supra, 133 S.Ct at 1907 ("Noting the appropriate approach when determining whether a judge is biased is to access the cumulative impact of the judge's improper actions collectively, rather than in isolation").

e. In Light Of The Lower Court's Egregious Misapplication of This Court's Settled Precedent, The Erroneous Application Of AEDPA To Petitioner's Judicial Bias Claim, And The Wide Spread Split Among The Circuits On The Relevant Point Of Law, The State Is Clearly Wrong About The Instant Case Being a Poor Vehicle For This Court To Address The Questions Presented

In taking it's final stand against this Court granting Certiorari in this case; the State asserts that the instant case is a poor vehicle to address the

questions presented because, (1) whether the District Court and Sixth Circuit applied the wrong standard of review is of no consequence, because in it's opinion Petitioner would lose under de novo review, and (2) the judicial bias claims were defaulted in State Court, therefore, this Court could not reverse the lower court's judgment and grant Certiorori without first addressing the procedural question. See Brief In Opposition, Id, at p. 30.

Concerning the States first argument here; this Court's holding in Davis v. Ayala, 135 S.Ct 2187 (2016) easily does away with it. In Davis, for example, this Court took occasion to reiterate that federal court's," when reviewing a habeas Petition must first address the threshold question of the proper standard of review, specifically whether AEDPA's deference or demo review applies." Id at 2198.

Such a holding by this Court places a mandate on federal courts to undertake the preliminary inquiry of the proper standard of review before adjudicating a habeas claim. And given that the application of AEDPA can be dispositive of a petitioner's habeas claim. Kernan v. Hinajaso, 136 S.Ct 1603, 1604-05 (2016), Where as, de novo review encompasses a less restrictive and Petitioner friendly analysis of a habeas claim. 136 S.Ct Id at 1604, the State cannot realistically portray the lower federal court's application of AEDPA to Petitioner's judicial bias claims to be harmless. Id.

Moreover, by acknowledging that neither the state post-conviction or appeal court adjudicated the merits of Petitioner's judicial bias claims, See Brief In Opposition, Id -- the State has necessarily conceded that the lower federal court erred in applying AEDPA's deference to Petitioner's claims. As far as the State's beliefs that Petitioner could not prevail under de novo review; this speculative contention has been throughly refuted above.

The problem with the State's second argument here is, --- it admits that it

did not previously raise the procedural default defense below, See Brief In Opposition, Id, at p 31. Accordingly, per this Court's precedent the State's failure to advance such an argument in it's initial Response Brief in the district federal court amounts to a waiver of the procedural default defense. See Wood v. Milyard, 132 S.Ct 1826, 1832 (2012) ("An affirmative defense once forfeited is excluded from the case"). And neither this Court or the court's below posses the liberty of disregarding that choice. Day v. McDonough, 126 S.Ct 1175, 1683 (2007).

Subsequently, there are no procedural issues for this Court to reslove and, therefore, no procedural hurdles preventing this Court from entertaining Petitioner's request for Certiorari. See, e.g, Rippo, 137 S.Ct at 907 n1 ("Because the court below did not invoke any state-law grounds "independent of the merits of Rippo's Federal Constitutional challenge", we have jurisdiction to review it's resolution of federal law.")(Citing Foster v. Chatman, 136 S.Ct 1737, 1746 (2016).

CONCLUSION

If there was ever a situation that warrants this Court's intervention such a case exists here. Therefore, for the reasons explained above and those articulated in the Petition, this Honorable Court should grant full briefing on the merits, or alternatively find that the decision below should be summarily vacated and remand this case to the Sixth Circuit with instructions directing that court to apply the law accordingly and review the relevant claims under the proper Standard of Review.

Respectfully Submitted,

Date: November 26, 2018.

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