Case No. 18-5631

SUPREME COURT OF THE UNITED STATES

STEVEN M. JACOB,

Petitioner,

vs.

SCOTT R. FRAKES,
Director, Nebraska Department of
Correctional Services,

Respondent.

PETITION FOR REHEARING

COMES NOW the Petitioner, pro se, pursuant to Rule 44 and Petitions the Court for a rehearing after the Court has denied the Petitioner in forma pauperis status and dismissed the Petition as "frivolous or malicious" under Rule 39.8 as well as finding the Petitioner "has repeatedly abused this Court's process" citing to Martin v. District of Columbia Court of Appeals, 506 U.S. 1 (1992).

I first address the "abuse of process" finding. In Martin, supra, the Petitioner had filed 45 petitions in 10 years, 9 of them in the last year. This Petitioner. however, had filed only 8 petitions in the last 25 years. Three of those were related to the state criminal conviction the Petitioner is still fighting 29 years later. Because of the reversal and retrial it

is only now reaching the Court in a federal habeas corpus action.

The other petitions were filed as a result of the Petitioner's job assignment as an inmate legal aide at the Nebraska State Penitentiary. That job assignment was to assist other inmates by filing claims that affected the inmate population as a whole, or in large part. For example, two of the prior petitions were filed with Daniel T. Meis as a co-petitioner. Mr. Meis and I are in similar factual circumstances (along with a couple of hundred other inmates at that time). Now Mr. Meis had been denied in forma pauperis status by the Courts; I assume because of the money his wife regularly sent him. I can only hope the Court hasn't erroneously applied that status to me in this case.

So if the Court's decision was based solely upon the numbers of petitions filed, I argue that I am no way near the "abuse" that Mr. Martin subjected the Court to. This Petition is the last step for the habeas corpus process for the Petitioner's erroneous state court conviction. It is undoubtedly the most important one.

This petition is not "frivolous" under this Court's definitions. The Court defined "frivolous" as meaning "clearly baseless ... fanciful, fantastic, and delusional" in Denton v. Hernandez, 504 U.S. 25 (1992). In Neitzke v. Williams, 490 U.S. 319 (1989) the Court said that "frivolous" meant lacking "an arguable basis either in law or in fact."

This Petition presents the Court with, not only, a rational arguable basis for finding the state Supreme Court decision was contrary to at least two holdings of the U.S. Supreme Court. It also makes the rational legal argument that the U.S. District Court procedure followed in this habeas corpus case was also contrary to the holdings of the U.S. Supreme Court in a manner

that this Court should examine and address because other U.S. Appeals Courts have recognized the conflict between this Court's procedural holdings while other U.S. Appeals Courts have also described and exploited the conflicts.

The Petition presents the following logical syllogisms:

1) The Due Process clause guarantees a voir dire process that is adequate to reveal the actual prejudice of potential jurors; Morgan v. Illinois, 504 U.S. 719, 729 (1992), especially under the limiting factual circumstances of the venire's exposure to pervasive prejudicial publicity; Irvin v. Dowd, 366 U.S. 717 (1961).

2) The voir dire process in the Petitioner's case was not adequate to reveal the actual prejudice of the "newspaper juror" (who brought the 3 week old newspaper into the jury room to show the other jurors).

3) Therefore, the logical conclusion is that the Petitioner's right to an adequate voir dire was violated.

The logical syllogism to conclude the Nebraska Supreme Court failed to follow the holdings of the U.S. Supreme Court is:

1) The Nebraska Supreme Court accepted the potential jurors' claims of impartiality as sufficient to find the voir dire was constitutionally adequate; State v. Jacob, 253 Neb 950, 961-963 (1998).

2) But in Murphy v. Florida, 421 U.S. 794, 800 (1975) and Patton v. Yount, 467 U.S. 1025, 1031 (1984) the U.S. Supreme Court held that under the circumstances of pervasive prejudicial publicity, jurors' assurances that they can be impartial CANNOT be dispositive.

3) Therefore, the logical conclusion is that the Nebraska Supreme Court's decision was contrary to these holdings of the U.S. Supreme Court.

The logical syllogism to conclude that the U.S. District Court should have

provided a de novo review of the Petitioner's jury claims is:

1) In Panetti v.Quarterman, 551 U.S. 930 (2007) the Court held that where state court decisions were contrary to the holdings of the U.S. Supreme Court, the federal courts would perform de novo review of those claim(s) without AEDPA deference.

2) As shown above, the Nebraska Supreme Court decision was contrary to the holdings of the U.S. Supreme Court.

3) Therefore, the logical conclusion is that the U.S. District Court should have provided de novo review of the Petitioner's jury claims.

But that is NOT what the U.S. District Court did in this case. Instead, the U.S. District Court applied the holdings in Harrington v. Richter, 562 U.S. 86 (2011) and its' progeny, Johnson v. Williams, ___ U.S. ___, 133 S.Ct. 1088 (2013) by finding the Nebraska Supreme Court's ruling "reasonable", applying a presumption of correctness, and finding the Petitioner had failed to rebut that presumption of correctness. The U.S. District Court did not offer any substitute reasonable ruling to apply any "presumption of correctness" to. On the District Court's procedure, the logical syllogism is:

1) The holding in Harrington, supra, and Johnson, supra, were only applied where the state court's ruling failed to address the merits of a claim.

2) The Nebraska Supreme Court addressed the merits of the jury claim by finding the jurors' assurances of impartiality to be sufficient.

3) Therefore, the logical conclusion is that the procedural holdings from Harrington, supra, and Johnson, supra should NOT have been applied to the Petitioner's jury claim.

The rational argument for this Court to grant the Writ is to resolve the conflict in Appeals Courts' interpretations of the holdings of the U.S. Supreme

Court regarding the procedures to follow in habeas corpus cases.

1) Judge Jordan of the Third Circuit Court of Appeals explains that Harrington's process of "gap filling" a state court's failure to address the merits of a claim, should not permit error correction in the guise of "gap filling"; Dennis v. Sec., Penn. Dept. of Corr., 834 F.3d 263, 349 (3rd Cir. 2016).

2) In conflict with that explanation are Murdoch v. Castro, 609 F.3d 983, 991 (9th Cir. 2010) and the dissent in Barnes v. Joyner, 751 F.3d 229, 253-55 (4th Cir. 2014). These cases suggest that AEDPA deference allows U.S. District Courts to silently "correct" state courts' rulings that are contrary to the holdings of the U.S. Supreme Court; which is what the U.S. District Court did in the Petitioner's case.

3) Therefore, the Court should grant the Writ to address the conflict in the application of Harrington and Johnson, supra, versus the Panetti holding of requiring de novo review of the claim.

Perhaps that should have been the way the first question was presented to the Court, without the Petitioner's factual circumstances inserted:

> Can U.S. District Courts apply Harrington and Johnson's "gap filling" and "presumption of correctness" to state court rulings that are contrary to the holdings of the U.S. Suprmee Court without first performing the de novo review required by Panetti?

Allowing a District Court to reasonably fill in a gap left in a state court ruling is not the same as allowing the District Court to silently whitewash over a ruling in conflict with the holdings of the U.S. Supreme Court. The later procedure cannot prevent arbitrary decisionmaking; the findamental requirement of Due Process; Dent v. West Virginia, 129 U.S. 114, 123 (1889). Does Due Process and 28 U.S.C. §2254(d)(1) place any boundary on AEDPA deference?

These are logical and rational presentations of the issues in the Petition presented to the Court. They do NOT meet the Court's definition of "frivolous." I miss Justice Scalia's logical reasoning.

The Court has defined "malicious" as an ill will, evil motive, or an intention to injure, in Rosenblatt v. Baer, 383 U.S. 75 (1966). I am completely stumped as to how the Court could find any of those in my Petition. My only intent is to obtain the relief I believe the U.S. Constitution guarantees to me. The Court should not dismiss my Petition as malicious.

WHEREFORE, the Petitioner prays the Court will reverse its ruling on the Petitioner's in forma pauperis status and then grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned Petitioner, Steven M. Jacob, hereby certifies that the attached Petition for Rehearing, pursuant to Rule 44.1, is presented in good faith and not for delay.

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