No. _____

IN THE

Supreme Court of the United States

RAYMOND DOUGLAS MYERS,

Petitioner,

v.

DAVID R. OSBORNE, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Through legislation, Tennessee Law makes it literally impossible for indigent non-capital petitioners to receive the effective assistance of post-conviction counsel and/or to obtain post-conviction relief no matter how entitled she/he might be thereto by placing financial limitations and zero entitlement to investigative and/or expert services. A factual intensive confession by a third party establishing Petitioner's clear-actual innocence, is blocked from consideration because this Court has not issued a decision permitting free standing claims of actual innocence in a non-capital case. A *McQuiggin* analysis is also avoided. This Court's precedent, requiring a petitioner to have been actively misled by counsel for extension of equitable principles to apply, and overwhelming record support of such occurrence, was ignored by the Sixth Circuit as was Petitioner's plea for equitable relief. As with the district court, so was whole record consideration.

I. WHERE THERE ARE INHERENT STATE LAW LIMITS PLACED UPON POST-CONVICTION COUNSEL AND HENCE INDIGENT PETITIONERS ABILITY TO PRESENT HIS/HER SUBSTANTIAL POST-CONVICTION CLAIMS, DOES THIS WARRANT AN EXTENSION OF EQUITABLE PRINCIPLES AND/OR HENCE ESTABLISH CAUSE TO EXCUSE PROCEDURAL DEFAULT?

II. WHERE THERE IS AN UNCHALLENGED, INDISPUTABLE AND CREDIBLE CONFESSION OF GUILT BY A PARTY TO AN OFFENSE OF WHICH THE PETITIONER STANDS CONVICTED, SHOULD THE SIXTH CIRCUIT HAVE RECOGNIZED AND/OR SHOULD THE SUPREME COURT FINALLY RECOGNIZE A FREE STANDING CLAIM OF ACTUAL INNOCENCE OR AT MINIMUM EXCUSED PROCEDURAL DEFAULT?

III. WHERE A PETITIONER HAS BEEN ACTIVELY MISLED BY HIS STATE COURT POST-CONVICTION ATTORNEY, THAT SHE WILL BE PURSUING HIS POST-CONVICTION CLAIMS THROUGH POST-CONVICTION HEARING AND ON APPEAL THEREFROM, YET, DOES NOT, DOES THIS CONSTITUTE ABANDONMENT UNDER PRECEDENT OF THIS COURT?

TABLE OF CONTENTS

Appendix A- *Raymond Douglas Myers, Petitioner v. David Osborne, Warden*, No. 17-5284 (6th Cir. June 15, 2018) **(Denial of Petition to Rehear and to Rehear Enbanc).**

Appendix B- *Raymond Douglas Myers, Petitioner v. David Osborne, Warden*, No. 17-5284 (6th Cir. April 12, 2018) **(Denial of COA).**

Appendix C- *Raymond Douglas Myers, Petitioner v. David Osborne, Warden*, No. 2:11-cv-00045, 2017 WL 607093 (M.D. Tennessee February 15, 2017) **(District Court decision denying Federal Habeas Corpus Relief).**

Appendix D- *Raymond Douglas Myers, Petitioner v. David Osborne, Warden*, No. 2:11-cv-00045, 2016 WL 1230740 (M.D. Tennessee March 29, 2016) **(Magistrate's recommendation).**

Appendix E- *Raymond Douglas Myers v. State of Tennessee*, No. M2009-02076-CCA-R3-PC, 2010 WL 3323748 (Tenn.Crim.App. August 23, 2010), Application for Permission to Appeal Denied by Supreme Court January 13, 2011. **(TCCA decision denying Post-Conviction Appeal).**

Appendix F- *State of Tennessee, v. Raymond Douglas Myer's,* No. M2003-01099-CCA-R3-CD, 2004 WL 911280 (Tenn.Crim.App. April 29, 2004), Application for Permission to Appeal Denied by the Supreme Court November 8, 2004. **(TCCA decision denying Direct Appeal).**

Appendix G- Copy of the Affidavit of TBI Informant Lawrence Ralph relative a confession that was made by a Toby Young as to Mr. Young's presence during the offense, motive behind the same and parties involved in conjunction with the location of evidence relative thereto.

Appendix H- Copy of the pro se Motion for Permission to Proceed Pro Se on Appeal, inclusive of a motion to strike brief of counsel and to allow a new briefing schedule filed by Mr. Myers in the Sixth Circuit before the Court issued its opinion in the case.

Appendix I- Copy of the Petitioner's pro se Motion to rehear and rehear enbanc filed in the Sixth Circuit.

Appendix J- Case In Point, Justice On the Cheap, The Thomas Edward Clardy Story, by Andrew Cohen. A public radio show from WNYC, Public Radio International, The New York Times, and WGBH-Boston Public Radio May 22, 2017

TABLE OF AUTHORITIES

CASES **Pages**

FEDERAL STATUTES

CONSTITUTIONAL AMENDMENTS

TENNESSEE RULES

Misc. References

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Raymond Douglas Myers, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). The Sixth Circuit entered its judgment on April 12, 2018, and denied a timely petition to rehear and rehear enbanc on June 15, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Federal Habeas Petition was filed under 28 U.S.C. § 2254.

INTRODUCTION AND SUMMARY

Initially Mr. Myers asks that the Court please consider that the parties who committed the horrible murders of two young girls and an adult woman are still free and in like manner preying on society in many ways, and with new offenses, while, despite the confession of one relative the guilt of all the others, the innocent Mr. Myers continues to sit in prison.

Despite the discovery of new evidence establishing this fact having been received during the pendency of federal habeas proceedings, from a credible TBI Informant who had alerted the TBI to the same, **[Affidavit of Mr. Lawrence Ralph, Appx G, dated May 1, 2013]**,[1] neither the district court nor the Sixth Circuit considered and/or otherwise permitted it to excuse procedural default under *McQuiggin v. Perkins*, 569 U.S. 383 (2013) nor as a free standing claim of actual innocence.

Neither did the district court consider this evidence or even the facts relative the petitioner having been actively misled by post-conviction counsel as grounds for equitable principles to apply and hence cause to excuse procedural default of his other substantial constitutional suppression and/or ineffective assistance of counsel claims. *Maples v. Thomas*, 132 S.Ct. 912 (Jan. 2012) and *Holland v. Florida*, 560 U.S. 631 (2010).

When the likely result of a post-conviction attorney's ineffectiveness, to the detriment of the petitioner and other poor petitioners, is the limited fee structure for appointed counsel under Tennessee law neither the district court nor the Sixth Circuit allowed this to be considered as essentially an external impediment/interference with the right to counsel. *United States v. Chronic*, 466 U.S. 648, 659 (1984); *Strickland v. Washington*, 466 U.S. 664, 691 (1984); *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); and *Trevino v. Thaler*, 132 S.Ct. 1744 (2012).

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[1] **This affidavit is included herewith and also found in the record as DE-51.**

In this Court and below, where there exists substantial record evidence and reliance by a petitioner establishing that he was actively misled by his state court post-conviction attorney and along with an actual credible showing of actual innocence, the Sixth Circuit has failed to extend this court's precedent to a situation of which it should have so done.

STATEMENT OF THE CASE

Petitioner, Raymond Myers, having always unrelentingly maintained his innocence, continues to suffer convictions for three counts of first-degree murder (with three life sentences), aggravated arson (24 years), and conspiracy to commit murder. The offenses were labeled by the prosecution as being the result of the Petitioner's family being about to be exposed, by the Petitioner's girlfriend who was the adult victim[2] in the case, for bankruptcy and food stamp fraud and an issue of some apparent related burglary information.

The only evidence the prosecution would use to claim the petitioner was present was a neighbor stating that she heard a loud truck and that her dog did not bark, hence revealing that whoever committed the offenses was someone familiar with the family, and to the dog. Because Petitioner had a loud truck and the dog was familiar with him, it had to have been him.

Petitioner's alleged co-defendant Johnny Lee Lewis's trial took place first. Upon its completion, the jury announced verdicts of not guilty of the premeditated murder of Dianne Watts, guilty of two lesser offenses of facilitation of second degree murder (Chelsea Smith-Jessica Watts), not guilty of both felony murders, and guilty of aggravated arson. There was no conspiracy allowed against Lewis by the court.[3]

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[2] **There were three victims in this case, all of whom were female. There was one adult and the other two were little girls.**

[3] **Lewis along with the Petitioner's mother, brother and sister in law were charged with the petitioner. At Lewis's trial, however, he was the only one who during his own trial was admittedly present at the victims' home as he was there from late the night before to within about twenty minutes of the fire. He also had a loud truck of which would not alert the neighbors dog. *Johnny Lee Lewis, Petitioner, v. David Mills, Warden,***

Mr. Myers' case is one wherein over 400 witnesses were interviewed, however, his single elderly attorney, suffering from early stages of dementia, only called three. The case is further one where, despite obvious evidence of Mr. Myer's innocence, trial counsel did not investigate and/or the prosecution did not disclose evidence of third party guilt.

Mr. Myers' direct appeal having concluded, he then filed for post-conviction relief in state court raising claims relative ineffective assistance of trial and appellate counsel, prosecution suppression and claims of new evidence of actual innocence.

Mr. Myers was successful in dismissing the first state court post-conviction attorney that was appointed to him, where that attorney had refused to investigate and amend Mr. Myer's post-conviction pleadings.

Petitioner, Myers along with his supporters, however, were assured by the second appointed attorney that, despite no amendment being necessary, she would pursue all of the claims he raised during the state court post-conviction evidentiary hearing and during appeal therefrom. Despite these assurances, she did not, resulting in the procedural default of his most significant claims.

Mr. Myers subsequently timely filed for federal habeas corpus relief whereby he argued either state interference-due to the continued suppression of proof-and/or his having been actively misled by his state court post-conviction attorney that she would be pursuing his substantial claims. He additionally argued state law as essentially limiting the work that counsel could perform due to its fee caps and the like.

No. 2:11-0049, 2012 WL 424996 (M.D. Tenn.Feb. 9, 2012). The jury in Mr. Myers's case was never made aware of this.

Mr. Myers subsequently retained counsel in the district court who assured Myers that his issues were covered and would be addressed as presented with the additional arguments that she might make.

While Mr. Myers case was pending in the district court, he was provided with an affidavit from a TBI informant, Mr. Lawrence Ralph, who had become imprisoned at the prison wherein he was located. Mr. Ralph was not only somewhat a prior associate with some of the parties who had actually committed the offenses in this case, but had unknowingly handled a weapon used in the case.

Mr. Lawrence's affidavit details a conversation/confession that he had with a Toby Young while Mr. Young was incarcerated in the county jail. These facts Mr. Ralph swore also that he had called and repeated to TBI Agent Dan Ogle about two days before the trial of Johnny Lee Lewis.

Mr. Ralph's affidavit reflects a totally separate plot and logical reason and account of what occurred and of which clearly only those involved would know, including having put Mr. Johnny Lewis at the scene as reflected in Mr. Lewis's own admissions. **Appx G [D.E. 51].**

Mr. Ralph's affidavit reflects Young as having tearfully told him that Michael Martin, Johnny Lewis, Ricky or Jimmy Estes, Steve Alley, Mike Brady, Toby's Aunt Patsy (or his mom Doreen) along with Toby himself were all at Shirley Humphries Package Store, which is about ten miles from the scene.

Per Toby, victim Diane Watts kept calling Johnny Lewis and threatening to call the police and inform them of Michael "Mike" Martin's extensive drug dealings therefore Johnny Lewis left and went to her residence to try and talk her down. Apparently this did not work, and Michael Martin was extremely mad and very much concerned. As a result, Mike drove his

Nova, while others went down in a white van[4] to the victims' residence where they killed the victims and set the house on fire.

Mr. Young informed Mr. Ralph that he himself had stayed in the van, however, he saw the young girl, Jessica Watts, run out of the house only to be grabbed by Michael Martin, hit in the head with the torque wrench,[5] by Martin, and then dragged back into the Watts' residence, by Mr. Martin. Toby stated that the sight has haunted him forever.

Mr. Young stated that the white van they were in belonged to his grandmother-Dixie Estes- and that she had reported it stolen as well as collected insurance on it (there should be a police report on it). Mr. Young goes on to say that the van, however, is at the bottom of the pond in Pea Ridge next to the house where Mr. Young's grandfather, Mr. Alvie Estes, was living.

The affidavit also provides information relative having also seen a tearful Johnny Lewis at one of the jails whom tearfully spoke of something about "some kids being killed."

The affidavit contains information that spoke of personal conversations and concerns of Michael Martin whereby he had Mr. Ralph make several trips to Pea Ridge to see if the white van was disposed of, as well as the disposing of his own Nova. It further addressed the dealing with a knife with blood on it of which concerned Martin and which Ralph was sent to find-and did find himself-at the place where the van was said to have been pushed into the lake.

In Mr. Myers habeas pleadings, because many of his substantial ineffective of counsel, prosecution suppression, and claims of new evidence were not pursued by post-conviction counsel, as she had promised, he argued cause in the form of actual innocence, having been actively misled by post-conviction counsel, and state law limitations of which prevent and/or

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[4] Witnesses had claimed to have seen a white van riding through the neighborhood around the time of the killings.

[5] At least one or more of the victims were allegedly hit and killed with a torque wrench that was found at the scene and introduced at trial.

otherwise interfere with indigent non-capital defendants receipt of effective post-conviction counsel.

The magistrate judge recommended, and the district court denied relief as to several claims, however, granted a certificate of appealability relative whether the conduct of post-conviction counsel equated to abandonment under this Court's precedent. **Appx C and D.**

As in the district court, on appeal to the Sixth Circuit, Mr. Myers sought assurance from counsel that his issues would be presented showing that counsel actively misled him that she would present his claims and an emphasize on the affidavit of Lawrence Ralph of which the district court ignored. That assurance given he paid habeas counsel to pursue the appeal.

In the Sixth Circuit, it was not until Mr. Myers had actually received a copy of the Respondent's reply brief that he learned said brief had been filed months earlier and that habeas counsel had not even responded thereto nor critical points in the record covered.

On March 26, 2018, Mr. Myers then filed a motion to proceed pro se on appeal, to strike the brief of counsel and to allow a new briefing schedule arguing extensively as to having been actively misled by post-conviction and federal habeas counsel (and hence abandoned), actual innocence (fundamental miscarriage of justice) as warranting the same. **Appx H.**

On April 12, 2018, the Sixth denied relief, however, made absolutely no mention of the motion to proceed pro se and to strike brief and order a new briefing schedule. **Appx B.**

Petitioner then filed a pro se motion to rehear and rehear enbanc. **Appx I**

Though habeas counsel filed no motion to rehear herself, however, the Sixth Circuit denied the rehearing setting forth that the issues in the petition were fully considered upon the original record and decision of the case. **Appx A.**

The district court nor the Sixth Circuit mentioned anything about the recently obtained affidavit of Lawrence Ralph.

REASONS FOR GRANTING THE PETITION

I. WHERE THIS COURT PERMITS INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL AS CAUSE FOR FAILURE TO RAISE SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS, AND STATE INTERFERENCE AS CAUSE TO EXCUSE DEFAULTED CLAIMS, TENNESSEE'S LEGISLATION, APPLICABLE ONLY TO POOR NON-CAPITAL PETITIONERS, IS ALSO RESULTING IN POST-CONVICTION COUNSEL'S INEFFECTIVENESS AND/OR REASON FOR FAILURE TO PROPERLY PRESENT AND/OR OBTAIN THE ENTITLED RELIEF AS TO ANY SUBSTANTIAL CONSTITUTIONAL CLAIM WITH NO REMEDY TO POOR PRISONERS.

No matter how substantial the merits of a Petitioner's constitutional claims, only for indigent non-capital defendants does Tennessee law limit the amount of money paid to attorneys to the point that it makes it impossible for them to perform effectively in state court post-conviction proceedings. **Tennessee Supreme Court Rule 13, Sections 2-3**

The law further prevents funding for expert or investigative services despite the cries of Tennessee attorneys and indigent non-capital petitioners for assistance relative thereto. **Tennessee Supreme Court Rule 13, Section 5(a)(1) and (2).**

This Honorable Court has said that cause for a procedural default is excused when the impediment is external to the defense. *Maples v. Thomas*, 565 U.S. 266, 281 (U.S. 2012) (Cause for a procedural default exists where "something external to the petitioner, something that cannot fairly be attributed to him [,] ... 'impeded [his] efforts to comply with the State's procedural rule.'") (*quoting Coleman v. Thompson*, 501 U.S. 722, 753 (1991)) (*quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

This Court has also said that when the state interferes with a petitioner's right to counsel then prejudice is presumed. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the

assistance of counsel altogether is legally presumed to result in prejudice. *So are various kinds of state interference* with counsel's assistance. *See United States v. Cronic*, 466 U.S., at 659, and n. 25).

This Court has further held that the ineffective assistance of post-conviction counsel, for failure to have raised a substantial claim of ineffective assistance of trial counsel, can constitute cause to excuse the procedural default of an ineffective assistance of counsel claim. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); and *Trevino v. Thaler*, 132 S.Ct. 1744 (2012).

Martinez and Trevino of course do not apply to ineffective assistance of post-conviction counsel on appeal.

Maples v. Thomas, 132 S.Ct. 912 (Jan. 2012) and *Holland v. Florida*, 560 U.S. 631 (2010), however, extend equitable principles to circumstances where a Petitioner has been effectively abandoned by counsel.

Mr. Myers ask then should not principles of equity and/or other provisions of law come into play and otherwise warrant consideration of procedurally defaulted meritorious constitutional claims when it is shown that the failure of post-conviction counsel to pursue the claims during a state court post-conviction evidentiary proceeding in lower court and/or on appeal therefrom is due to limitations posed by the state law itself?

As argued by Mr. Myers, no matter the merits, Tennessee law for compensation of Tennessee Post-Conviction Attorneys limits their compensation essentially to the point of making it impossible for them to provide effective representation.

In fact, an April 2017 Indigent Representation Task Force (Liberty & Justice for All, Providing Right to Counsel Services in Tennessee), a creation of the Tennessee Supreme Court,

found just that. *See* Indigent Representation Task Force, pp. 34-37 (April 2017) available at www.tncourts.gov.

The issues in Tennessee were even noted recently in the case of an innocent Tennessee Prisoner, Thomas Clardy during an audio broadcast called Case In Point, Justice On the Cheap, The Thomas Edward Clardy Story, wherein Andrew Cohen wrote pertinently:

As a recent task-force report of the Tennessee Supreme Court concluded, there is virtually no economic incentive for court-appointed post-conviction attorneys to dig deep to uncover new evidence or misconduct by police or prosecutors or trial attorneys. (If you have the money to pay for your own attorney you can spend all you want on investigators and expert witnesses). The system, the judicial task force and defense lawyers agree, is virtually designed to shield injustice from judicial review.

When a private attorney is appointed in a non-capital criminal case, that attorney cannot be paid more than $40 per hour for case preparation nor more than $50 per hour for courtroom work. Those rates haven't changed in 20 years. No matter how long a case takes to prepare or try, the maximum amount an attorney can be paid in these instances is $1,000 for a misdemeanor and $1,500 for low-level felony offenses. First-degree murder cases that are not capital cases cap out at $5,000 unless a lawyer convinces the judge that "extraordinary circumstances exist." There are no limits on capital cases.

But the cost calculations are different for post-conviction review. Every post-conviction review by an attorney in Tennessee caps out a $1,000 absent "extraordinary" circumstances that a judge may find in her or his discretion. Then the cap goes to a mere $2,000. Moreover, the state places restrictions on the manner in which defense attorneys may use investigators, either at trial or in post-conviction review. There is no funding for any expert or investigator at the post-conviction phase. If a post-conviction attorney wants to hire an investigator it has to come out of the money the state gives to the lawyer.

The Takeway, a public radio show from WNYC, Public Radio International, The New York Times, and WGBH-Boston Public Radio May 22, 2017. A full copy of the written article is included here as **Appx J**

Tennessee Courts further recognize the dilemma and their helplessness in its regard. *Joseph Cordell Brewer, III v. State of Tennessee*, No. W2016-02106-CCA-R3-PC, 2018 WL 446686, *4 (Tenn.Crim.App. January 16, 2018) (We realize that a "Catch-22" dilemma exists because of Tenn. S. Ct. R. 13, § 5. Before an indigent petitioner such as in this case can get

relief, he or she must obtain the services of an expert witness. However, funds for the expert witness to provide the necessary services to the indigent petitioner are prohibited by Tenn. S. Ct. R. 13, § 5. *A non-indigent petitioner can, however, meet the requirements mandated by case law in order to obtain post-conviction relief.* However, we do not have the ability to overrule supreme court case law or supreme court rules...).

Mr. Myers respectfully submits that, as here, when there is simply limited work that an attorney can perform due to limited resources imposed by state law on only indigent petitioners, and it affects such petitioner and/or her or his post-conviction counsel's ability to present substantial ineffective assistance of counsel, prosecution suppression and new evidence claims, again as here, this clearly should warrant application of equitable principles and at minimum warrant review by this Honorable Court.

II. WHERE AS HERE THERE EXIST NEW CREDIBLE EVIDENCE ESTABLISHING A PETITIONER'S ACTUAL INNOCENCE, THE SIXTH CIRCUIT HAS NOT ONLY REFUSED TO CONSIDER THIS COURT'S PRECEDENT IN *MCQUIGGIN V. PERKINS*, 133 S.CT. 1924 (2013), AS PERMITTING CAUSE FOR CONSIDERATION OF THEORETICALLY PROCEDURALLY DEFAULTED CLAIMS, BUT HAS FURTHER PERMITTED AND/OR OTHERWISE SANCTIONED A FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER SHIELD OF A MISAPPLICATION OF SUPREME COURT DECISIONS IN A CONTEXT WHERE THEY SHOULD NOT APPLY.

The Supreme Court has already made the determination that a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar to relief. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931 (2013) ("This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable

discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.")(citing *Herrera, v. Collins*, 506 U.S. 390 (1993)).

See also *David Bryant v. Justin Thomas*, 725 Fed.Appx. 72 (2nd Cir. June 4, 2018) (as a result, "[t]he petitioner raising such a claim does not seek to have his conviction vacated on grounds of innocence; rather, he seeks to create sufficient doubt about his guilt notwithstanding an otherwise applicable procedural bar.")(citing *Rivas v. Fischer*, 687 F.3d 514, 541 (2d Cir. 2012) and *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

Mr. Myers has done more than many prisoners pleading for equitable discretion, however, the point was completely avoided by both district court and the Sixth Circuit.

Mr. Myers submitted an affidavit of TBI Informant Lawrence Ralph. **APPX G**. With it, now every piece of evidence and to the puzzle has now been accounted for being the torque wrench, the loud truck (being that of Johnny Lee Lewis and why the dog would not bark), the white van, the motive and all in between.

Mr. Lawrence's affidavit details a conversation/confession that he had with a Toby Young while Mr. Young was incarcerated in the county jail. These facts Mr. Ralph swore that he had also called and told TBI Agent Dan Ogle about two days before the trial of Johnny Lee Lewis.

Mr. Ralph's affidavit reflects a totally separate plot and logical reason and account of what occurred that clearly only those involved would know, including having put Mr. Johnny Lewis at the scene as reflected in Mr. Lewis's own admissions. **Appx G [D.E. 51].**

Mr. Ralph's affidavit reflects Young as having tearfully told him that Michael Martin, Johnny Lewis, Ricky or Jimmy Estes, Steve Alley, Mike Brady, Toby's Aunt Patsy (or his mom

Doreen) along with Toby himself were all at Shirley Humphries Package Store, which is about ten miles from the scene.

Per Toby, victim Diane Watts kept calling Johnny Lewis and threatening to call the police and inform them of Michael "Mike" Martin's extensive drug dealings therefore Johnny Lewis left and went to her residence to try and talk her down. Apparently, this did not work and Michael Martin was extremely mad and very much concerned. As a result, Mike drove his Nova, while others went down in a white van to the victims' residence where they killed the victims and set the house on fire.

Mr. Young informed Mr. Ralph that he himself had stayed in the van, however, he saw the young girl, Jessica Watts, run out of the house only to be grabbed by Michael Martin, hit in the head with the torque wrench, by Martin, and then dragged back into the Watts' residence, by Mr. Martin. Toby stated that the sight has haunted him forever.

Mr. Young stated that the white van they were in belonged to his grandmother-Dixie Estes- and that she had reported it stolen as well as collected insurance on it (there should be a police report on it). Mr. Young goes on to say that the van, however, is at the bottom of the pond in Pea Ridge next to the house where Mr. Young's grandfather, Mr. Alvie Estes, was living.

The affidavit also provides information relative having also seen a tearful Johnny Lewis at one of the jails whom tearfully spoke of something about "some kids being killed."

The affidavit contains information that spoke of personal conversations and concerns of Michael Martin whereby he had Mr. Ralph make several trips to Pea Ridge to see if the white van was disposed of, as well as the disposing of his own Nova. It further addressed the dealing with a knife with blood on it of which concerned Martin and which Ralph was sent to find and did find himself-at the place where the van was said to have been pushed into the lake.

Mr. Myers is actually innocent[6] as the affidavit shows. As he pleaded with the District Court and Sixth Circuit, he now does so here by asking that the Court simply please just read the affidavit.

At the very least, under *McQuiggin v. Perkins* he respectfully submits that he should have been given an evidentiary hearing or some consideration of the same by the Sixth Circuit and District Court relative the same being a sufficient showing of actual innocence to permit the procedural default of the claims that his post-conviction attorney did not pursue at the post-conviction hearing and/or on appeal therefrom.

Mr. Myers lastly pleads that, if all else fails, the Court now consider this the proper non-capital case wherein exist a sufficient showing of a free standing claim of actual innocence wherein warrants and does not limit consideration by this Court, the Sixth Circuit and/or District Court. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *House v. Bell*, 126 S.Ct. 2064 (2006); *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005).

Mr. Myers respectfully submits that by refusing to consider this request "... *the court would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned*". *San Martin v. McNeil*, 633 F.3d 1257-1268 (C.A.11 2011).

Respectfully, for these reasons, the Petition for Writ of Certiorari should be granted.

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[6] **As he also reminds, the perpetrators of this offense are still free to live their lives and terrorize the citizens of their county inclusive of plotting their next murderous acts.**

III. WHERE AS HERE, THE SIXTH CIRCUIT HAS FAILED TO FIND ABANDONMENT AND TO EXTEND THE PRINCIPLES OF *MAPLES V. THOMAS*, 132 S.CT. 912 (Jan. 2012) AND *HOLLAND V. FLORIDA*, 560 U.S. 631 (2010) TO THIS CASE IN WHICH HE WAS ACTIVELY MISLED BY HIS POST-CONVICTION ATTORNEY DURING POST-CONVICTION PROCEEDINGS IN THE TRIAL COURT AND ON APPEAL, REVIEW BY THIS COURT IS WARRANTED.

In *Maples v. Thomas*, 132 S.Ct. 912, 924 (Jan. 2012) this court determined that for purposes of determining whether a habeas petitioner has procedurally defaulted a claim, under agency principles, a client cannot be charged with the acts of omissions of an attorney who has abandoned him, and neither can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys or record, in fact, are not representing him.

Some courts seem to struggle with what constitutes abandonment, however, Mr. Myers continues to position that abandonment applies in this context wherein he and those of his supporters, who had met with his post-conviction counsel, were actively misled by counsel that she would be pursuing all of his claims during the state court post-conviction evidentiary hearing and on appeal therefrom only to not have done so.

Other courts seem to recognize that *Maples* and other governing decisions provide relief only where a petitioner essentially does not have counsel, operating as his agent in any real sense of the word and does not require that he act when he has been actively misled by counsel to believe that counsel is doing that which she has promised. *See Martinez v. Superintendent of Eastern Correctional Facility*, 806 F.3d 27 (2nd Cir. 2015) (To be sure, Martinez ultimately was able to make several pro se filings, but we have previously noted that "[t]he fact that [a petitioner] was eventually able to draft a petition ... does not mean that a duly diligent person would have done so sooner." *Nickels v. Conway*, 480 Fed.Appx. 54, 58 (2nd Cir. 2012)). The

Martinez court found that counsel effectively abandoned the attorney-client relationship *where the attorney assured the Petitioner that he was "working very hard" on his behalf.*

In *Nickels v. Conway*, 480 Fed. Appx. 54, 57 (2nd Cir. 2012), the court determined that "Nickels was not required to take extraordinary precautions "well prior" to the filing deadline, *when PSL consistently reassured him* both that the petition would be timely, and moreover, that it did not have to be." *See* also *Randle v. U.S.*, 954 F.Supp.2d 339, 347 (E.D. Penn. 2013)(Actively misled by attorneys); *Nara v. Frank*, 264 F.3d 310 (3rd Cir. 2001) (actively misled), overruled on other grounds by *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002); *Spence v. Falk*, Civil No. 15-cv-02450-GPG, 2016 WL 632229 (D. Colorado 2016)(recognizing *Fleming* as requiring a showing of having been actively misled).

With counsel's clear assurances Mr. Myers no doubt could not have been expected to act.

Respectfully here, Supreme Court review is warranted where the Sixth Circuit and District Courts have ignored, otherwise failed to consider, or decided against this aspect of the claim.

CONCLUSION

For the foregoing reasons, Mr. Myer's respectfully requests that the petition for writ of certiorari is granted and that the appropriate relief is granted relative the important issues raised herein whether in the form of summary remand, GVR and/or a merits determination.

Respectfully Submitted,

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