No 18-6326

In the Supreme Court of the United States

TERRY ALFRED COXE, PETITIONER

v.

Daniel White, Superintendent, Washington State Corrections Center.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

Terry Alfred Coxe, DOC # 328971
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Defendant pro se

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Pursuant to Rule 44 of this Court, the DEFENDANT/PETITIONER pro se Terry Coxe, hereby respectfully petitions for rehearing of this case before a full nine-Member Court. Coxe did not discuss this issue in his original petition "WHETHER THE AEDPA's TIME LIMITATION DISPROPORTIONATELY EFFECTS A PROTECTED CLASS OF INMATES...[and] CONSTITUES AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS?"

1. This case involves a time bar of Petitioner's underlying claim of intentional counsel abandonment--barred both in state and federal court under McQuiggin v. Perkins, 133 S.Ct. 1924, 1936, 185 L.Ed.2d 1019 (2013), solely because Petitioner discovered the issue too late to obtain relief pro se, despite the following clarification of that Court:

> "We vacate the Court of Appeals' judgment and remand the case. Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual

innocence has been reliably shown." Id.

The state and federal courts below fundamentally transgressed this limitation, singling Coxe out for disparate treatment under McQuiggin--this Court's denial would effectively deny Coxe the equal application of the law. Moreover, today's denial sub silentio overrules clearly established federal law, as previously recongized by this Honorable Court in Holloway v. Arkansas, 435 U.S. 475, 489 (1978):

> "Moreover, this Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, supra, at 23. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963)."

(Id.) Involved with paid counsel's refusal to raise Coxe's proposed defense, is the intentional denial of, inter alia, the defendant's right to cross-examination:

> **Davis v. Alaska**, 415 U.S. 308 (1974) ("The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev.1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."); **Holmes v. South Carolina,** 547 U.S. 319 (2006) ("the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case").

If the trial court denied this right the appellate ruling should follow precedent: "[it] would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." **Brookhart v. Janis**, 384 U. S. 1, 3 (1966); **Smith v. Illinois**, 390 U. S. 129, 131 (1968). Why would this rule change for counsel's transgresions in the pro se case of Coxe? Exempting only the super smart/fast [in 365

days] pro se litigant?

Attorney General Nominee, William Barr testified at his recent Senate conformation hearing to his professional belief in the Rule of Law--that no person should be held to a standard above the law--while this Court's denial of certiorari is akin to holding Coxe beneath the law. The common perception is that the Clinton's were held above the law by the DOJ, while Coxe demonstrates here that he was held beneath the law.

It seems to Coxe that there would be no right to counsel at all under the Sixth Amendment, if counsel could willingly abandon his client with impunity. Coxe demonstrates he is held to yet another different standard--he paid for his trial attorney and the structrual error was complete at the very moment of counsel's intentional abandonment. See, United States v. Gonzalez-Lopez, 548 U.S. 140, 150-52, n.2 (2006):

> ("[T]he right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete." (Footnote 2) ("[T]he Sixth Amendment is violated when the erroneous disqualification of counsel 'impair[s] the assistance that a defendant receives at trial [from the counsel that he choose]."'))

This Court just last term decided a claim similar to the Coxe issue in Weaver v. Massachusetts, 582 U.S. ___, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), and held that some types of structural error can be held harmless--determining the fundamental question is whether the proceedings were unfair as a result of the errror:

> "Not every public-trial violation will lead to a fundamentally unfair trial. And the failure to object to that violation does not always deprive the defendant of a reasonable probability of a different outcome. Thus, a defendant raising a public-trial violation via an ineffective-assistance claim must show either a reasonable probability of a different outcome in his or her case or, as assumed

> here, that the particular violation was so serious as to render the trial fundamentally unfair." (Id.)

This Court has never determined that a defendant raising a claim of intentional counsel abandonment for the first time in a post-conviction proceeding must prove Strickland's prejudice prong in addition to the abandonment/cause prong, and to do so now is an unwarranted departure from controlling precedent. Penson v. Ohio, 488 U.S. 75 (1988):

> "In cases such as this, it is inappropriate to apply either the lack of prejudice standard of Strickland v. Washington, 466 U. S. 668, or the harmless error analysis of Chapman v. California, 386 U. S. 18. Such application would render the protections afforded by Anders meaningless, since the appellant would suffer no prejudice or harm from the denial of counsel, and would thus have no basis for complaint, whether the court, on reviewing the bare appellate record, concluded either that the conviction should not be reversed or that there was a basis for reversal." (Id. 488 U.S. at 85-89)

This Court should resolve the time bar question today for the sake of Judicial Economy. Otherwise, Coxe serving life will be forced to file an original habeas under Title 28, U.S.C. § 2241--When he discovered the issue and the supporting evidence § 2254 was unavailable to him under A.E.D.P.A.. Cf. Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 2554, 115 L. Ed. 2d 640 (1991)(Procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.").

As this Court is fully aware, the Ninth Section of Article One places limits on Congress' powers: "The Privilege of the Writ of Habeas shall not be suspended, unless [the defendant is not as smart as a lawyer]." Coxe's case is part of a much bigger problem stemming from the interplay of several moving parts. Washington State judges are

directed by ethics to hold pro se prisoners to the standards of lawyers:

> Canon 3 of the Canons of Judicial Conduct.
>
> "3.1. The court must treat a pro se party the same way it treats a lawyer. Pro se litigants, although not expected to be as skilled and knowledgeable as lawyers, are nevertheless subject to all laws, rules and regulations that apply to a lawyer. Judges and their assistance are forbidden by law from giving any advice or help to unrepresented parties. Judges and their assistants must remain entirely neutral and impartial. Judges and their assistants also may not give unrepresented parties special treatment."

How can the pro se inmate of ordinary intelligance meet that standard within A.E.D.P.A.'s one year time limitation? It takes a lawyer what 3 years of law school to constitutionally represent a defendant, while the inmate only gets 365 days to file a claim? While prison officials limit access to a pro se law library [8hrs total weekly]--How can that be deemed constitutional as it effects only poor people?

Consider the withholding of exculpatory discovery material in this equation! The orchestrated denial of access to the discovery [court rule, prosecurtor and defense counsel in concert] amounts to a due process violation under the Fourteenth Amendment. Cf. Lott v. Mueller, 304 F.3d 918 (9th Cir 2002)(The denial of access to legal files may in some cases [arbitrarily excluding Coxe?] constitute "the type of external impediment for which we [grant] equitable tolling," Chaffer v. Prosper, 592 F.3d 1046 (9th Cir. 2010)).

Further, the state appellate and supreme courts both raised the procedural default doctrine sue sponte on behalf of the State, and denied Coxe's motion for discovery, as well as, an evidentiary hearing--the Court then granted It's own affirmative defense without seeking a response from the pro se litigant! Coxe is held beneath every law:

In re Pers. Restraint of Turay, 153 Wn.2d 44, 48 (Nov. 2004):

[1]¶7 The State contends that Turay's personal restraint petition should be dismissed as an abuse of the writ. Initially, we agree with the United States Supreme Court that the government has the burden of pleading abuse of the writ. McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Thus, we conclude under state law that **before we will consider dismissing a personal restraint petition** on the basis that it constitutes an abuse of the writ, the State **must** allege an abuse of the writ, note the petitioner's prior history of personal restraint petitions, and identify the claims that appear for the first time. (Empasis clearly demonstrates contempt for poor people).

[2]¶8 A prisoner's second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ. In re Pers. Restraint of Jeffries, 114 Wn.2d 485 , 487-88, 789 P.2d 731 (1990). We have held that "**if the [defendant] was represented by counsel throughout postconviction proceedings**, it is an abuse of the writ for him or her to raise . . . a new issue that was 'available but not relied upon in a prior petition.' " Jeffries, 114 Wn.2d at 492 (quoting Kuhlmann v. Wilson , 477 U.S. 436, 444 n.6, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986).(Emphasis mine).

The Ninth Circuit also holds Coxe to a different due process standard:

United States v. LaPage, 231 F.3d 488 (9th Cir. 2000) (The due process clause entitles defendants in criminal cases to fundamentally fair procedures. It is fundamentally unfair for a prosecutor to knowingly present perjury to the jury. Over forty years ago, the Supreme Court made it clear that "a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." [citation] "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." [citation] The Court explained that this principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness." [citation] Rather, "[a] lie is a lie, no matter what its subject." [citation] Because the use of known lies to get a conviction deprives a defendant of his constitutional right to due process of law, we must reverse LaPage's conviction unless Manes's false testimony was "harmless beyond a reasonable doubt." [citation] That is, we must reverse " 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.')

LAMBERT v. BLODGETT, 393 F.3d 943 (2004)("In an effort to permit Lambert to make a record in support of his claims, the Washington Court of Appeals ordered Lambert's prior attorney, Romero, to submit to a deposition by Lambert's current counsel. At the deposition, Romero was questioned at length regarding his relationship with Betancourt's attorney, Earl, and his representation of Lambert both prior to and in connection with his guilty plea.")

The Lambert case is a conflict case very similar to Coxe's. Why would the district court in Tacoma treat Coxe any different than the defendant Lambert's attorney is

treated by the district court in Seattle? Same state, same federal circuit, different standards? Coxe submits that this blatant mistreatment of pro se defendants is indicative of the Left's courage--belief that a foolish pro se litigant could not obtain relief in any federal court.

2. Petitioner has appended a draft Motion For New Trial that pro se inmate James Oliver is preparing to file in Pierce County that proves defense counsel, just like the Coxe case, worked in secret collusion with the prosecutor. (Exhibit A) Also appended are relevant portains of a DOJ report investigating the Seattle Police Department (SPD), finding a 20 year pattern/practice of violent misconduct toward minorities, deceptive reporting practices, and no accountability by the State Executive Branch. (Exhibit B)

Coxe argues that this pattern and practice was permitted by a conspiracy in this State between the prosecutors and defense counsel, and that, when the inmates bring it to the attention of the Judiciary, arguing without the discovery, they are arbitrarily denied by the Court, which (too willingly) becomes the gospel in federal court. But see, Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (district court may reach the merits of a habeas petitioner's claim even if procedural default is asserted).

Petitioner submits it is an unconstitutional standard to also hold a pro se litigant to this standard **within 365 days**, and will inevitably promote more cases like the Oliver case. (Exhibit A)(Jim has been in prison for 7 years, Terry for 9). A prime example of this type of collusion and abandonment is the case of, State v. A.N.J. where counsel,

enticed by a suspect public defender contract, failed to investigate his client's proposed defense to sex crimes with issues factually similar to those involved in Coxe's case:

> State v. A.N.J., 168 Wash.2d 91 (2010) ("[16, 17] ¶28 A.N.J. also argues the Grant County public defender contract in place at the time created an incentive for attorneys not to investigate their clients' cases or hire experts. We agree. Entering such contracts is now a violation of the Rules of Professional Conduct. RPC 1.8(m). The system effectively paid a bounty for every guilty plea delivered by assigned defense counsel to the county prosecutor. This was a dysfunctional system. We do not, at this time, go so far as the Arizona Supreme Court in holding that the system itself violates a defendant's constitutional rights to due process and right to counsel. Cf. State v. Smith, 140 Ariz. 355, 362, 681 P.2d 1374 (1984) (finding somewhat similar system of public defense constitutionally defective). However, we hold that if a public defender contract requires the defender to pay investigative, expert, and conflict counsel fees out of the defender's fee, the contract may be considered as evidence of ineffective assistance of counsel. We further hold that depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.")

In Washington State poor people's lives don't matter to the Executive or the Judiciary [in some cases perhaps where a turncoat public defender later, (1) goes into private practice; (2) becomes a prosecutor; or (3) becomes a trial or appellate judge]. Explore the brief of post-conviction practitioner, Jeffery Ellis where the attorney is arguing that the state court held pro se Oliver to the standards of an attorney. (Exhibit C) In denying a reference hearing the court has displayed contempt for federal constitional law. But to be sure, read what happened in Bryan Torpey's case, (Exhibit D) or Rodney Garrott's case, (Exhibit E) or Wendell Mulliken's case. (Exhibit E)

3. Petitioner also contends that a denial in his case violates the appearance of fairness doctrine. As if 4 Justices voted to docket the Coxe case and 5 Justices voted not to call the case to D.C.--that vote [appearing] split on party lines while Justice Roberts is in the middle of a twitter war with Donald Trump [appearing likely] the swing vote [appearing to side arbitrarily] with the democrats--[appearing motivated] because

Washington State is controlled by Democrats--if this Honorable Court elects to overturn the Ninth Circuit's rubber stamp of the district court's arbitrary denial, the President would get a political win and tweet up a firestorm of mockery that a high school dropout-litigant prevailed! That is unfair prejudice to worry about this Court's vote.

4. **WHEREFORE**, for these reasons--to preserve the Rule of Law--this Court should grant the Petition for rehearing.

DECLARATION OF TERRY ALFRED COXE

I, Terry Alfred Coxe, hereby declare under the pains and penalties of perjury under the laws of the United States of America, that the foregoing factual representation are true, correct and entirely accurate to the best of my knowledge, belief.

Respectfully Submitted,
January 23, 2019

Terry A. Coxe
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DECLARATION OF TERRY ALFRED COXE and CERTIFICATE OF SERVICE

I, Terry Alfred Coxe, hereby declare under the pains and penalties of perjury under the laws of the United States of America, that (1) this Petition is restricted under Rule 44 to "other substantial grounds not previously presented" (2) this Petition is presented in good faith belief in (his innocence and) the teachings of Jesus Christ in Luke 18:1-5 (The persistent widow obtaining justice from an unjust judge by her persistance); (3) this Petition does not exceed 3,000 words (hand counting 232 words on page 3, times 9 pages, equals only 2,088 words); and that, (4) I served a true and correct copy of the Petition For Rehearing with Exhibits upon the Respondent by causing same to be placed for delivery in the United States mail system with proper first class postage, properly addressed as follows:

PAUL D. WEISSER, WSBA #17918
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Executed this the 23rd day of January, 2018.

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Additional material from this filing is available in the Clerk's Office.