NO. 18-6656

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY KYLE PRINCE, IN PRO PER,

PETITIONER

VS.

SHANE JACKSON, WARDEN

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

Kyle Prince 11-2-18

Timothy Kyle Prince #359035
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048*

*This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTION(S) PRESENTED

I. WHETHER PETITIONER WAS DENIED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS, WHERE BOTH GREGORY AND BRENDA RUSHLOW'S IN-COURT IDENTIFICATION OF THE DEFENDANT SHOULD HAVE BEEN SUPPRESSED, AS THEY WERE BASED ON UNNECESSARILY SUGGESTIVE PHOTOGRAPHIC LINE-UPS AND THE IDENTIFICATIONS WERE INHERENTLY UNRELIABLE?

II. WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR HEARING AND TO DUE PROCESS WERE VIOLATED WHERE THE SIXTH CIRCUIT ABUSED ITS DISCRETION AND MISCONSTRUED A MOTION TO AMEND AND ADD ADDITIONAL ARGUMENTS TO HIS REQUEST FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY AND TREATED NINE OF HIS TEN CLAIMS AS ABANDONED CLAIMS AND REFUSED TO ENTERTAIN HIS RULE 60(b) MOTION ADDRESSING THE COURT'S RULING THAT HE HAD ABANDONMENT HIS CLAIMS?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The opinion of the United States district court appears as APPENDIX to the petition and is unpublished.

[X] For cases from state courts:

Letter from Clerk US Court of Appeals appears at **APPENDIX – A** to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at **APPENDIX - B** to the petition and is unpublished

The opinion of the United States District Court appears as **APPENDIX - C** to the petition and is unpublished.

The opinion of the Michigan Supreme Court appears at **Appendix - D** to the petition and is unpublished.

The opinion of the Michigan Court of Appeals appears as **Appendix - E** to the petition and is unpublished.

The opinion of the Macomb County Circuit Court appears as **Appendix - F** to the petition and is unpublished.

JURISDICTION

[ ] For cases from Federal courts:

The date on which the US Court of Appeals decided my case was July 24, 2018.

[ ] NO petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Or

[X] For cases from State courts:

The date on which the US Court of Appeals decided my case was July 24, 2018.

[X] NO petition for rehearing was filed in my case.

[X] A Motion for Relief from Judgment or Order under Rule 60(b) was denied on September 11, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VI: 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."

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATUTORY PROVISIONS

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

On January 22, 2010, following a Jury Trial before the Honorable Mary A, Chrzanowski, Macomb County Circuit Court Judge, Petitioner was convicted First Degree Murder [MCL 750.316(A)], Felony Murder [MCL 750.316(B)]; Armed Robbery [MCL 750.529]; Kidnapping [MCL 750.349]; Arson of Personal Property, $1,000 or more [MCL 750.74(1)(c)(i) and Habitual Offender, Second Offense [MCL 769.10].

On February 23, 2010, Petitioner was sentenced to Life Without Parole for the First Degree Murder and Felony Murder Conviction; 25 to 60 years for Armed Robbery, Kidnapping 25 to 60 years, and 3yrs 4mos to 7yrs 6mos.for Arson-Personal Property, $1,000 or More. Petitioner Appealed as of right to the Michigan Court of Appeals raising the following:

I. DEFENDANT-APPELLANT IS ENTITLED TO DISMISSAL OF ONE OF THE CHARGES AND SENTENCES AGAINST HIM WHERE THE CONSTITUTIONAL PROVISION AGAINST DOUBLE JEOPARDY WAS VIOLATED

II. DEFENDANT-APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE FOR THE CONVICTION OF KIDNAPPING?

III. DEFENDANT-APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO THE TRACKING DOG INSTRUCTION, CJI2D 4.14, AND WAS HIS TRIAL COUNSEL INEFFECTIVE FOR FALING TO REQUEST THE INSTRUCTION?

Petitioner filed a pro per Supplement Brief in the Michigan Court of Appeals raising the following additional claims:

I. THE DEFENDANTS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW WAS VIOLATED, WHERE BOTH GREGORY AND BRENDA RUSHLOW'S IN-COURT IDENTIFICATION OF THE DEFENDANT SHOULD HAVE BEEN SUPPRESSED, AS THEY WERE BASED ON UNNECESSARILY SUGGESTIVE PHOTOGRAPHIC LINE-UPS AND BOTH IDENTIFICATIONS WERE INHERENTLY UNRELIABLE.

II. THE DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW, DUE TO VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT.

a. USE OF FALSE AND PREJURIED TESTIMONY OF SANDRA BERRY.

b. SUPPRESSION OF TWO VIDEO RECORDING OF THE ALLEGED CRIME SCENE.

c. IMPRPOER CLOSING ARGUMENTS, VOUCHING FOR CREDIBILITY OF WITNESSES.

d. IMPROPER COMMENTING ON DEFENDAN'T SLIENCE AND REFUSAL TO TESTIFY

III. DEFENDANT WAS DENIED HIS RIGHT TO FAIR TRIAL WHERE THE TRIAL COURT IMPROPERLY ADMITTED SEVERAL ITEMS OF PHYSICAL EVIDENCE WITHOUT AN ADEQUATE FOUNDATION AND ALLOWED DAMAGING HEARSAY TESTIMONY.

IV. DEFENDANT WAS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHT TO BE PRESENT DURING ALL CRITICAL STAGES IN THE PROCEEDINGS, WHERE HE WAS NOT PRESENT DURING A CRITICAL SUPPRESSION HEARING.

V. DEFENDANT WAS DEPRIVED OF HIS FEDERAL CONSTITIONAL RIGHT TO FAIR TRIAL WHERE THE COURT ADMITTED AUDIO RECORDED STATEMENTS INJECTED INADMISSIBLE HEARSAY STATEMENTS BY MEMBERS OF HIS FAMILY.

The Michigan Court of Appeals Affirmed his Conviction but remanded for entry of a Judgment of Sentence reflecting a single conviction and sentence for first degree murder, supported by two different theories. [See *People v. Timothy Kyle Prince*, Case No. 296922 (Unpublished Per Curiam); 2011 Mich. App. LEXIS 1621].

Petitioner appealed to the Michigan Supreme Court, the Court affirmed his conviction and sentence in an unpublished Judgment Order. [*People v. Timothy Kyle Prince*, 491 Mich. 886; 809 NW2d 591 (2012)].

Petitioner then filed a Petition for Writ of Habeas Corpus in the United States District Court, Eastern District of Michigan. He subsequently moved to have his Petition Held in abeyance, to allow him to return to the State Court's to exhaust unexhausted Claims. The Court granted his Motion. [See *Timothy Prince v. Cindi Curtin,* 2013 US Dist. LEXIS 114440].

Petitioner returned to the State Court and filed a Motion For Relief From Judgment pursuant to MCR 6.500 et. seq. raising the following claims of error.

I. DEFENDANT WAS DEPRIVED OF THE RIGHT TO PRESENT A DEFENSE WHERE THE TRIAL COURT EXCLUDED EXCULPATORY EVIDENCE.

II. SUBSTANTIAL PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT OF A FAIR TRIAL WHERE THE PROSECUTION (1) WITHHELD EXCULPATOR EVIDENCE FROM DISCOVERY; (2) THE PROSECUTION USED FALSE TESTIMONY FROM WITNESSES; (3) THE PROSECUTION REPEATEDLY SPOKE OF EVIDENCE NOT INTRODUCED INTO THE RECORD IN CLOSING ARGUMENTS; (4) THE PROSECUTOR ALTERED EVIDENCE THAT WAS PRESENTED DURING THAT PRELIMINARY HEARING AND TRIAL; (5) THE PROSECUTOR MADE AN IMPROPER GOLDEN RULE ARGUMENT.

III. INVESTIGATING OFFICER COMMITTED MULTIPLE ACTS OF MISCONDUCT WITH REGARDS TO EVIDENCE HANDLING, SEARCH AND INVESTIGATORY PRACTICES; VIOLATING THE DEFENDANTS CONSTITUTIONAL RIGHTS.

IV. TRIAL COUNSEL DENIED THE DEFENDANTOF EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL BY WITHHOLDING EVIDENCE, FAILING TO CALL WITNESSES AND PRESENTING FALSE FACTS IN CLOSING ARGUMENT ABOUT WITNESS TESTIMONY.

V. APPELLANT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY NEGLECTING TO RAISE MERITORIOUS ISSUES ON APPEAL OF RIGHT; SUBJECTING THE DEFENDANT TO A STRICTER LEVEL OF REVIEW.

On September 1, 2015, Macomb County Circuit Court denied his Motion. Macomb County Circuit Court. **APPENDIX-F** Petitioner Appealed to the Michigan Court of Appeals who in an Unpublished Per Curiam Judgment Order affirmed the Trial Court's denial for lack of merit in the grounds presented. [See *People v. Prince*, Case. No. 331823, 2016 Mich. App. LEXIS 2281]. **APPENDIX-E).** The Michigan Supreme Court denied Leave to Appeals, claiming inter alia, Petitioner failed to establish entitlement to relief under MCR 6.508(D). [See *People v. Prince*, 500 Mich. 923; 888 NW2d 81 (2016)] **APPENDIX-D.**

On or about February 15, 2017, Petitioner filed a Motion to reopen his Habeas Corpus Petition with an amended habeas petition containing ten grounds for relief. Judge Avern Cohn in an Unpublished Judgment Order and Opinion denied the Petition and refused to issue Certificate of Appealability. [See *Timothy Kyle Prince v. Shane Jackson*, 2017 US Dist. LEXIS 139242]. **APPENDIX - C.**

Petitioner filed Notice of Appeal and requested Certificate of Appealability from the Sixth Circuit Court of Appeals. He followed this pleading up with a Motion to Amend Additional Ground Ten. The Sixth Circuit misconstrued this pleading and treated as a Motion to amend the entire Notice of Appeals. The Court declined to issue Certificate of Appealability and treated all but one of his claims as abandoned. [See *Timothy Kyle Prince v. Shane Jackson*, Case. No. 17-2212 (6th Cir. July 24, 2018)]. **APPENDIX B**

Following its denial, Petitioner filed a Rule 60(b) Motion for Relief From Judgment, questioning the Sixth Circuits holding that Nine of his Ten Claims were considered abandoned and asking the Court to correct its mistake in treating his motion to amend as a motion to drop his other claims. The Clerk of the Sixth Circuit refused to process his motion and in a letter dated September 11, 2018, informed Petitioner that his case was closed and no other actions would be taken. **APPENDIX-A.**

Petitioner now bring this Petition for issuance of Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

GROUND I

WHETHER PETITIONER WAS DENIED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS, WHERE BOTH GREGORY AND BRENDA RUSHLOW'S IN-COURT IDENTIFICATION OF THE DEFENDANT SHOULD HAVE BEEN SUPPRESSED, AS THEY WERE BASED ON UNNECESSARILY SUGGESTIVE PHOTOGRAPHIC LINE-UPS AND THE IDENTIFICATIONS WERE INHERENTLY UNRELIABLE.

STANDARD OF REVIEW:

Pretrial identification procedures that are "unnecessarily suggestive and conducive to irreparable mistaken identification" violate the Due Process Clause of the US Const., Am XIV. *Stovall v. Denno*, 388 US 293,302; 87 SCt 1967; 18 LEd2d 1199 (1967). In making that determination, courts consider the "totality of circumstances" of the identification procedure. *People v. Colon*, 233 Mich. App. 295,304; 591 NW2d 692 (1998).

ARGUMENT

The Sixth Circuit Court of Appeals applied the legal standard set forth by this Court in *Perry v. New Hampshire*, 565 US 228, 238-139; 132 SCt 716; 181 LEd2d 694 (2012), in determining whether the identification procedures used were suggestive and unnecessary. This Court has said that due process concerns arise only when law enforcement officer's used an identification procedure that is both suggestive and unnecessary. To be impermissibly suggestive, the procedure must give rise to a very substantial likelihood of irreparable misidentification. See *Sexton v. Beaudreaux,* 138 SCt 2555, 2559; 201 LEd2d 986 (2018)

> "Due process requires courts to assess, on a case-by-case basis whether improper police conduct created a 'substantial likelihood of misidentification'" *Ibid.* (quoting *Biggers, supra,* at 201, 93 SCt 375; 34 LEd2d 401). "[R]eliability [of the eyewitness identification] is the 'linchpin' of that evaluation." *Perry, supra,* at 239; 132 SCt 716; 181 LEd2d 694 (quoting *Manson,* 432 US at 114; 97 SCt 2243; 53 LEd2d 140; alterations in original). The factors affecting reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witnesses' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."
> *Sexton v. Beaudreaux,* 138 SCt 2555, 2559; 201 LEd2d 986 (2018)

Where a pretrial identification procedure is unconstitutionally suggestive, the next step is to determine whether there is an independent basis for the identification which, in effect, would demonstrate that the error is harmless. In *People v. Gray,* 457 Mich. 107; 577 NW2d 92 (1988), despite finding an impermissibly suggestive identification procedure, the Supreme Court went on to deny relief because there was an independent basis for the complainant's identification.

In the instant case there is a total lack of any form of independent basis for the Rushlow's identification and the tactics employed by the Police undermines their identification of Petitioner. The Police conducted two separate photographic show-ups, the first on March 9, 2009 and the second on March 10, 2009. After the first lineup was conducted Gregory and Brenda Rushlow had allegedly narrowed it down to the two suspects in ***position #4 (Petitioner)*** and the suspect in ***position #5 (a bald man)***, with Mrs. Rushlow leaning more towards the man in ***position #5.***

The level of certainty the Rushlow's exhibited at the photographic line-ups was apparent based on the fact neither Rushlow could pick Petitioner with certainly during the first line-up as the person they had seen in the driveway the night Ms. Cezik disappeared. The photograph of the Petitioner incorporated into the first line-up depicted his appearance in a 2007 Michigan ID snap-shot, in which the Petitioner had worn sunglasses perched on top of his head.

As for the second photo array, the investigating "officers electronically removed the sun glasses from the photograph for the second line-up." [Trial Transcript Vol. VII; 1-21-10; pgs. 89, 94]. During the second line-up the Rushlow's picked Petitioner's photograph with certainty within five seconds. It must be noted that during this Second photographic line-up Petitioner's photo was moved by the Officer's to ***position #5***, which in the previous line-up contained the other person whom Mrs. Rushlow was leaning towards during the first line-up.

There was no reason for the Officer's not to have placed the man who was originally ***positions at #5*** in the second array with Petitioner. The fact Petitioner's photo was the only one placed in the second lineup was not only highly suggestive but also prejudicial. In *People v. Gray*, 457 Mich. 107; 577 NW2d 92 (1998), the police showed a kidnapping and criminal sexual assault victim a single photograph of the defendant, and told her that they had arrested the defendant for the assault. Show-ups singling out one person are particularly suspect. *Id.* at 111. Our Supreme Court concluded that the procedure violated due process:

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v. Kurylczvk,* 443 Mich. 289,302; 505 NW2d 528 (1993); *Simmons v. United States,* 390 US 377,384; 88 SCt 967; 19 LEd2d 1247 (1968). In *People v. Anderson*, 389 Mich. 155,178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person. *Id.*"
> *People v. Gray, supra.* 457 Mich. at 111; see also Sexton v. *Beaudreaux*, 138 SCt 2555, 2559;

Mrs. Rushlow denied recalling anyone having suggested before either line-up that a suspect or the victim's murderer was among the photographs. But Gregory Rushlow believed that the officer who presented the second line-up uttered, "Something to the effect of one of the six photos was the person we saw in the driveway that night." With Petitioner's photo being the only one familiar face to them, they picked him based on the Officer's influence.

The Rushlow's initially denied having communicated with each other their thoughts regarding either photo array, but later admitted that after the first line-up they expressed to each other thoughts regarding the suspect's specific position in the photos." Gregory Rushlow also denied that a suggestion about a suspect's presence in the line-up had anything to do with or any influence in his selection of the Petitioner's photograph. Ms. Rushlow testified that she was leaning towards #5 the unknown bald male in the first line-up and she picked #5 in the second which happened to be Petitioner.

The Supreme Court applied the eight-part test set forth in the plurality opinion in *People v. Kachar*, 400 Mich. 78,95-96; 252 NW2d 807 (1977)

> 1. Prior relationship with or knowledge of the defendant.
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
> 3. Length of time between the offense and the disputed identification....
> 4. Accuracy or discrepancies in the pre-lineup or show-up description and defendant's actual description.
> 5. Any previous proper identification or failure to identify the defendant.
> 6. Any identification prior to lineup or show-up of another person as defendant.
> 7. Still another consideration ... essential to a determination of judging the reliability of the witness's perceptions is the nature of the alleged offense and the physical and psychological state of the victim....
> 8. Any idiosyncratic or special features of defendant.
> People v. Gray, supra. at 116; see also *People v. Davis*, 241 Mich. App. 697; 617 NW2d 381 (2000).

WRONG DECISIONS

If the Court would have paid any amount of attention to the trial transcripts, their Judgment would have been different. The Appellate Court's stated that the photograph of the Petitioner incorporated into the first line-up depicts his appearance in a 2007 Michigan ID snapshot, in which the Petitioner had worn sunglasses, perched atop his head. "Officers electronically removed the sunglasses from the photograph in the first line-up." Detective Susan Dumas (1-21-2010, TT, pg. 144-145).

Detective Dumas stated that the first photographic line-up was, "in fact shown to the Rushlow's with the big black sunglasses on top of the Petitioner's head", because the Sherriff's Dept. didn't have the resources to remove the sunglasses from the Petitioner's head.

RUSHLOW'S TRANSCRIPTS

Brenda Rushlow was present with Greg when the statements were made, "you picked up the right man, and the suspect is in the line-up." (1-13-2010, TT, pg. 233). Greg Rushlow (prelim. -TT, pg. 55), "I believe we discussed where on the sheet the ones that we were looking at were the ones we thought were the right ones." Gregory Rushlow (prelim. -TT, pg. 47), "Did those photographs in anyway prejudice you or make you feel more comfortable with his face, and that's the reason you identified Mr. Prince?"

"IN THE SECOND OF THE PICTURES, YES."

(TT, pg. 48)

"Well Judge, he's already asked and answered that he was."

WRONG DECISIONS BY THE COURT

The Michigan Court of Appeals apparently didn't take the time to read the transcripts in this case prior to making a very important decision which would render in taking away the Petitioner's life. If the Court would have read page 233 of the trial transcripts, they would have known that Brenda Rushlow was present when the officer said "the suspect is in this line-up".

The Court made a wrong decision by saying that the Rushlow's denied communicating to each other about the line-up. Look at prelim. -TT, pg. 55, "I believed we discussed." The Court made the wrong decision about Gregory when they said that the second line-up didn't influence Greg in anyway.

"Were you prejudiced in anyway by the second line-up?"

"Yes." (Prelim-TT, pg. 47).

When the Rushlow's reviewed the second line-up Petitioner's photograph was moved to the fifth place, which originally was the spot were another individual was in during the first line up and who Ms. Rushlow initially identified as the person she had seen. The second lineup contained only the photograph of Defendant, thus suggesting to them that sine he the only person who photographs has shown up twice.

WHEREFORE, for the reasons set forth above, Petitioner prays this Honorable Court will reverse the ruling of the Court's below and remand is case back to the State for a New Trial.

GROUND II

WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A FAIR HEARING AND TO DUE PROCESS WERE VIOLATED WHERE THE SIXTH CIRCUIT ABUSED ITS DISCRETION AND MISCONSTRUED A MOTION TO AMEND AND ADD ADDITIONAL ARGUMENTS TO HIS REQUEST FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY AND TREATED NINE OF HIS TEN CLAIMS AS ABANDONED CLAIMS AND REFUSED TO ENTERTAIN HIS RULE 60(B) MOTION ADDRESSING THE COURT'S RULING THAT HE HAD ABANDONMENT HIS CLAIMS?

STANDARD OF REVIEW

The denials of Rule 60(b) Motions are review for an abuse of discretion. *Agostini v. Felton,* 520 US 203; 256; 117 SCt 1997, 2027; 138 LEd2d 391 (1997)

ARGUMENT

On April 9, 2013 Petitioner filed a Petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. He subsequently moved to have the Petition held in abeyance in order to return to State Court and Exhaust Additional Issues/Claims. The District Court granted his Motion. See *Prince v. Curtin,* 2013 U.S. Dist. LEXIS 114440 (Case No. 13-cv-11594).

On or about February 15, 2015, Petitioner returned to Federal Court and Moved to reopen his Original habeas Petition and filed an Amendment Petition for writ of habeas corpus raising several additional claims, all of which consisting of the following:

I. Double Jeopardy

II. Insufficient Evidence

III. Jury Instruction/Ineffective Assistance of Counsel

IV. In-Court Identification

V. Right to Counsel

VI. Prosecutorial Misconduct

VII. Right to a Defense

VIII. Prosecutorial Misconduct

IX. Ineffective Assistance/ Mishandled Investigation

X. Appellate Ineffective Assistance.

[See ***Timothy Kyle Prince v. Shane Jackson***, 2017 U.S. Dist. LEXIS 139242]

On or about August 30, 2017, United States District Court Judge Avern Cohn denied the Habeas Petition, and denied issuance of Certificate of Appealability. See *Timothy Kyle Prince v. Shane Jackson,* 2017 U.S. Dist. LEXIS 139242, (Case No. 12-11594). The District Court did not certify any issues/claims for Appeal when it denied his Habeas Petition. Petitioner moved this Court for Issue Certification and Issuance of Certificate of Appealability. See *Timothy Kyle Prince v. Shane Jackson,* 2017 U.S. Dist. LEXIS 139242.

Petitioner filed a Claim of Appeal and Request for Issuance of Certificate of Appealability, in which he presented the same Ten Issues/Claims that were set forth in his Original Habeas Corpus and Amended Habeas Corpus Petitions. On or about May 29, 2018, Petitioner filed an Amendment entitled ***"Motion to Amend Additional Ground Ten"***, in which he presented additions facts and information for the Court to consider while it reviewed whether to grant certificate of appealability.

On July 24, 2018, a panel of this Honorable Court denied the Appeal and Request for Issuance of Certificate of Appealability. In its Order the Court only address one single issue and ignored the remaining nine issues. The Court stated on pertinent part:

> "In his construed application for a certificate of appealability, Prince argues that "[t]he court made [f]our wrong decisions" when it concluded that the two pre-trial photographic line-ups presented to the Rushlow's were not unduly suggestive. Because Prince addresses only one-issue - the Rushlow's identification – he has abandoned all other grounds for relief. See *Jackson v. United States, 45 FAppx. 382,385 (6th Cir. 2002) (per curiam).*
> *Timothy Prince v. Shane Jackson,* 20018 U.S. App. LEXIS 139242

Somehow the Court misconstrued his ***Motion to Amend Additional Ground Ten*** as an Amended request for Issue Certification and issuance of Certificate of Appealability. The Court disregarded the remaining issues as set forth in the Notice of Appeal and request for Issue Certification and Certificate of Appealability.

> "'This Court has jurisdiction only over the areas of a judgment specified in the notice of appeal as being appealed', but the notice should be given liberal construction. *JGR Inc. v. Thomasville Furniture Indus., Inc.,* 550 F3d 529,532 (6th Cir. 2008) (citing *Smith v. Berry*, 502 US 244,248; 112 SCt 678; 116 LEd2d 678 (1992)). A Notice of appeal that names only a post-judgment decision may extend to the judgment itself if it can be reasonably inferred from the notice of appeal that the intent of appellant was to appeal from the final judgment and it also appears that the appellee has not been misled. *United State v. Grenier*, 513 F3d 632,635 (6th Cir. 2008) (quoting *Harris v. United States*, 170 F3d 607,608 (6th Cir. 1999). The intent may be inferred from the briefs and other filings."
> Kline v. Mortgage Elec. Registration System, 704 Fed. Appx. 451,456 (6th Cir. 2017)

The Court mistakenly took out of context the **"Motion to Amend Additional Ground Ten To Reopen Petition Of Habeas Corpus"** and treated it as an Amended Notice of Appeal and request for Issue Certification and Certificate of Appealability. As a result of the Court's mistake it treated as abandoned those issues/claims which were raised in the District Court and adjudicated by the Court. Although the Sixth Circuit has held that issues which were raised in the District Court, yet not raised on appeal are considered abandoned and not reviewable on Appeal. See *Robinson v. Jones,* 142 F3d 905,906 (6th Cir. 1998); *Post v. Bradshaw*, 621 F3d 406,413 (6th Cir. 2010).

That is not the case in the instant matter and Petitioner is confused as to how the Court reached the conclusion that the request for issue certification and certificate of appealability was somehow a motion to abandoned the claims he raised because he file a Motion to Amend one of the claims set forth in the pleadings.

In response to the Court's decision Petitioner filed a Motion for Relief From Judgment or Order pursuant to Federal Rules of Civil Procedure 60(b)(1) and (6), seeking relief from the July 24, 2018 Order and Opinion denying his Request for Issue Certification and Certificate of Appealability. There is a deeply embedded judicial and legislative policy in favor of keeping final judgments final. See *Ackerman v. United States*, 340 US 193,198; 71 SCt 209; 95 LEd2d 207 (1950); *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F2d 290,292 (6th Cir. 1992).

> "Rule 60(b) offers an exception to these general principles. *Gen. Corp. Inc. v. Olin Corp.*, 477 F3d 368,372 (6th Cir. 2007). It provides six discrete paths for undoing a final judgment. Only two have any potential relevance here: 60(b)(1) – mistake, inadvertence, surprise or excusable neglect and (b)(6) any other reason that justifies relief."
> Cummings v. Greater Cleveland Reg'l. Transit Authority, 865 F3d 844,846 (6th Cir. 2017)

In considering the merits of a rule 60(b) motion a Court is required to "intensively balance numerous factors. See *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund*, 241 F3d 519,529 (6th Cir. 2001). *Tanner v. Yukins*, 776 F3d 434,443 (6th Cir. 2015). When a Rule 60(b) motion attacks, not the substance of the federal court's resolution of claim on the merits, but some defect in the integrity of the federal habeas proceedings a Rule 60(b) Motion is appropriate. *Gonzalez v. Crosby,* 545 US 524; 125 SCt 2561, 2649; 162 LEd2d 480 (2005) (quoting *Calderon v. Thompson*, 523 US 538; 118 SCt 1489; 140 LEd2d 728 (1998)).

Petitioner was challenging the integrity of the Court of Appeals Panel Decision to disregard the Issues/Claims he presented in his request for Issue Certification and request for Certificate of Appealability.

RULE 60(b)(1)

Rule 60(b)(1) allows the Court to relieve a party from a final judgment based on mistake, inadvertence, surprise, or excusable neglect. It is well settled that the ruling on a motion to set aside judgment under Rule 60(b)(1) is a matter addressed to the sound discretion of the Court. *FHC Equities, LLC v. MBL Life Assur. Corp.*, 188 F3d 678,683 (6th Cir. 1999).

Petitioner's 60(b)(1) motion is premised on the Court's mistake or inadvertence caused by the failure to adjudicate the following Claims/Issues in his request for Issue Certification and Certificate of Appealability:

I. DEFENDANT - APPELLANT IS ENTITLED TO DISMISSAL OF ONE OF THE CHARGES AND SENTENCES AGAINST HIM WHERE THE CONSTITUTIONAL PROVISION AGAINST DOUBLE JEOPARDY WAS VIOLATED.

II. DEFENDANT- APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE FOR THE CONVICTION.

III. DEFENDANT – APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY AS TO THE TRACKING DOG INSTRUCTION, CJI 2D 4.14, AND HIS TRIAL COUNSEL WAS INEFECTIVE FOR FAILING TO REQUEST THE INSTRUCTION.

IV. THE DEFENDANTS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW WAS VIOLATED, WHERE BOTH GREGORY AND BRENDA RUSHLOWS IN-COURT IDENTIFICATIONS OF DEFENDANT SHOULD HAVE BEEN SUPPRESSED, AS THEY WERE BASED ON UNNECESSARILY SUGGESTIVE PHOTOGRAPHIC LINE-UPS AND BOTH IDENTIFICATION WERE INHERENTLY UNRELIABLE.

V. THE DEFENDANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE COUNSEL WHERE BOTH PHOTOGRAPHIC SHOW-UPS WERE IMPERMISSIBLY-CONDUCTED WITHOUT DEFENDANT'S COUNSEL PRESENT.

VI. THE DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO HAVE DUE PROCESS OF LAW, DUE TO VARIOUS INSTANCES OF PROSECUTORIAL MISCONDUCT.

VII. DEFENDANT WAS DEPRIVED OF THE RIGHT TO PRESENT A DEFENSE WHERE THE TRIAL COURT EXCLUDED EXCULPATORY EVIDENCE.

VIII. SUBSTANTIAL PROSECUTORIAL MISCONDUCT DEPRIVED DEFENDANT OF A FAIR TRIAL, WHERE THE PROSECUTION (A) WITHHELD EXCULPATORY EVIDENCE FROM DISCOVERY; (B) THE PROSECUTION USED FALSE TESTIMONY FROM WITNESSES; (C) THE PROSECUTION REPEATEDLY COMMITTED ERRORS WHICH AMOUNT TO MISCONDUCT, THE CONVICTION IN THIS CASE WAS THE PRODUCT OF THESE ERRORS AND SHOULD BE REVERSED.

IX. TRIAL COUNSEL DENIED THE DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL AND FAIR TRIAL BY WITHOLDING EVIDENCE AND PRESENTED FALSE FACTS IN CLSOING ARGUMENTS ABOUT WITNESSES.

MISTAKE OR INADVERTENCE

It appears that the Court's actions regarding these Issues/Claims is the result of a mistake and inadvertence cause by the Court's confusion regarding Petitioner's Pleadings and the Issues/Claims he was presenting. *Tyler v. Anderson,* 749 F3d 5499, 505 (6th Cir. 2014). Rule 60(b) can be used to alert the Court to unadjudicated claims which were presented to the District Court in his Original and Amended Habeas Corpus Petitions and request for Certificate of Appealability. See *Tyler v. Anderson*, supra. at 509.

Petitioner Pleading were based on his limited understanding of the Appellate rules and were intended to present his desire to pursue and Appeal and present his claims in a manner consistent with 28 USC §2253(c). It was the Court's mistake in this instance which led to the decision not to review all of his claims on the merits. The Court misconstrued the Notice of Appeal and Request for Issue Certification and Certificate of Appealability.

Further Petitioner's claims excusable neglect under Rule 60(b)(1), based on his lack of knowledge of the intricacies of the Federal Appellate System which contributed the confusion and a technical error or a slight mistake by Petitioner should not have deprived him of an opportunity to present the true merits of his claims. See *In re Salem Mortgage*, 791 F2d 456,450-460 (6th Cir. 1986)

Petitioner is not educated nor a seasoned litigator and is receiving help through the Michigan Department of Corrections Legal Writer Program, and could not foresee the Court misconstruing his request for Issuance of Certificate of Appealability. Petitioner is not attacking the substance of the Court's ruling he is attacking a defect in the integrity of the appellate proceedings where the Court misconstrued his amendment and refused to rule on the merits of the remaining issues. *Tyler v. Anderson, supra.*

Petitioner had no idea when he submitted his "Motion to Amend Additional Ground to Reopen Petition of Habeas Corpus", that it would be construed as his Request for Certificate of Appealability and an abandonment of the other claims he raised. Petitioner's Motion was meant only to present additional information which centered on the improper identification procedures utilized by the State, which he wanted before the Court when it was deciding his Habeas Corpus Claims. Petitioner is facing the rest of his Life in Prison for a crime he did not commit and he is seeking vindication of his wrongful conviction and gross miscarriage of justice.

Under the miscarriage of justice exception, a prisoner's whose claims may be barred by various federal or state procedural rules "may have his federal constitutional claims considered on the merits if he makes a proper showing of actual innocence". *McQuiggins v. Perkins*, 569 US 383; 133 SCt 1924, 1931; 185 LEd2d 1019 (2013)(quoting *Herrera v. Collins*, 506 US 390, 404-405; 113 SCt 853; 122 LEd2d 203) (1993)).

RULE 60(B)(6)

Lastly Petitioner claims entitlement to relief pursuant to Rule 60(b)(6), which is available only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule and only as a means to achieve substantial justice. *Olle v. Henry & Wright Corp.,* 910 F2d 357,365 (6th Cir. 1990) (internal quotation marks and citations omitted); see also *Gonzalez v. Crosby. supra.* The Rule contemplates situations where "something more ... is present" than those situations contemplated by the other clauses in the rule. *Id.* (internal quotation marks and citations omitted) "The something more" ... must include unusual and extreme situations where principles of equity mandate relief. *Id.* (emphasis in the original).

> "Federal Rules of Civil Procedure 60(b)(6) is a catchall provision providing relief from a final judgment for any reason not otherwise captured in Rule 60(b). *West v. Carpenter,* 790 F3d 693,696-697 (6th Cir. 2015) (citing *McGuire*, 738 F3d at 750). Rule 60(b)(6) applies in exceptional and extraordinary circumstances where principles of equity mandate relief." *Id,* but such circumstances "rarely occur" in habeas context. *Sheppard v. Robinson*, 807 F3d 815,820 (6th Cir. 2015) (quoting *Gonzales v. Crosby*, 454 US 524,535; 125 SCt 2641; 162 LEd2d 480 (2008))."
> *Miller v. Mays*, 879 F3d 691,698 (6th Cir, 2018)

CONCLUSION

Petitioner is claiming exceptional circumstances exist where the Court misconstrued his Motion to Amend Additional Ground Ten to add additional arguments to his Request for Certificate of Appealability and an Amendment, as an abandonment of the other claims set forth in his Claim of Appeal and Request for Certificate of Appealability.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, Petitioner prays this Honorable Court will GRANT the following relief:

a) Enter an Order reversing its July 24, 2018 Judgment Order and Opinion denying Petitioner's Claim of Appeal and Request for Certificate of Appealability regarding the unadjudicated Issues/Claims.

b) Enter an Order setting forth a New Briefing Schedule for Petitioner's Appellant's Brief and Responses and allow him to Brief and Argues all of the claims set forth in his Original Habeas Corpus and Amended Habeas Corpus Petitions.

c) Enter an Order remanding his case back to the District Court for further review and a threshold inquiry into the underlying merit of the Petitioner's claims. See *Miller-El v Cockrell*, 537 US 322,336-37, 123 SCt 1029, 154 LEd2d 931 (2003).

Respectfully submitted,

Timothy Kyle Prince #359035
Petitioner-Appellant, *in pro per*

Date: 11-2-18

VERIFICATION

I declare under penalty of perjury that the above statements are true to the best of my information, knowledge and belief. 28 USC §1746; 18 USC §1621.

Respectfully submitted,

Timothy Kyle Prince #359035
Petitioner-Appellant, *in pro per*

Date: 11-2-18

NOTICE: This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.