

18-7354      ORIGINAL  
IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM 2018

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FILED  
DEC 22 2018

OFFICE OF THE CLERK  
SUPREME COURT U.S.

DERRICK L. JOHNSON  
Petitioner,

-Vs.-

SIXTH CIRCUIT COURT OF APPEALS,  
Respondents.

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

DERRICK L. JOHNSON  
#254-768  
P.O. BOX 209  
ORIENT, OHIO 43146

## QUESTION(S) PRESENTED

1. **Sixth Circuit Court of Appeals failed to exercise it's supervisory power to establish a rule that preclude a United States District Magistrate Judge from waiving a litigant's right to file objections when litigant was not properly served a copy of the Magistrate's Report and Recommendation, pursuant to Title 28 U.S.C. §636(b)(1)(C) of the Federal Magistrate Act.**
2. **Sixth circuit Court of Appeals violated Title 28 U.S.C. §636 (b)(1)(C) when it affirmed the adoption of the District Court's decision to adopt the Magistrate Judge reason for failing to provide Petitioner notice of Magistrate Judge Report and Recommendation as required by Title 28 U.S.C. §636(b)(1)(C).**
3. **Was the Sixth Circuit Court of Appeals decision in violation of Title 28 U.S.C. §636(b)(1)(B) when the Petitioner was prejudiced by the District Judge failure to act pursuant to Title 28 U.S.C. §636(b)(1)(B) governing the management of litigation pursuant to the Federal Magistrate Act that precludes waiver rule caused by lack of notice and service in violation of Title 28 U.S.C. §636(b)(1)(C).**
4. **Magistrate's violated of Civ. R. 72(b)(1)**

## LIST OF PARTIES

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

**Sixth Court of Appeals & Stephanie L. Watson** Attorney General Criminal Justice Section At 150 East Gay Street, 16<sup>th</sup> Floor Columbus Ohio 43215-6001

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## Table of Authorities

### Cases:

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Nara v Frank, 488 F.3d 187.....

United States v. Raddatz, 447 U.S.667, 100 S.ct. 2406

*Franks v. Charles Bradley, Warden* 2018 U.S. District Lexis 192209

## **Decisions Below**

The decision of the United States Court of Appeals for the Sixth Circuit is reported as of this writer's knowledge. It is cited in the table of Appendix as **A-B-C on page 11, 12,13**

## **Jurisdiction**

The Judgment of the United States court of appeal for the Sixth Circuit was entered on **May 23, 2018**. An order denying a petition for re hearing was entered on **September 28, 2018** and a copy of that order is attached as **Appendix A-B** to this petition. Jurisdiction is conferred on the Supreme Court under 28 U.S.C. §1254(1).

## **Constitutional and Statutory Provisions involved**

This case involves Fifth Amendment Due Process and Equal Protection along with the Fourteenth Amendment of the United States Constitution.

**5<sup>th</sup>** Amendment states; No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment a grand jury\* \* \* nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property, without due process of law.

**14<sup>th</sup>** Amendment states; No state shall make 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.

### **The Amendment is enforced by Title 28 636 (b)(1)(C)**

The magistrate Judge shall file his proposed findings and recommendation Under sub paragraph (B) with the court and a copy shall forthwith be mailed to all Parties, within 14 days after being served with a copy, any party may serve and file Written objection to such proposed findings & Recommendations as provided by Rules of court. A Judge of the court shall make a de novo determination of those Portions of the report or specified proposed findings or recommendation to which Objections is made. A judge of the court may accept reject or modify in whole or in Part the findings or recommendation made by the magistrate judge. The Judge may

Also receive further evidence or recommit the matter to the magistrate Judge with Instructions.

## STATEMENT OF THE CASE

This Court has Jurisdiction to resolve the constitutional violation that was created by the Sixth Circuit Court of Appeals decision to condition its ruling based off the United States District Court for the Southern District of Ohio Western Division at Dayton, who adopted the Magistrate Judge Report and Recommendation which violated Petitioner's constitutional rights so severely that a certiorari to the United States Supreme Court is warranted to prevent a miscarriage of justice in the current case.

Petitioner, Derrick L. Johnson, filed a Federal Writ of Habeas Corpus under Title 28 U.S.C §2254 in March, 2015 (EFC No.1) challenging the constitutionality of his 1992 convictions and sentences for two counts of aggravated murder (Ohio Revised Code §2903.01(B)); one count of attempted aggravated murder Ohio Revised Code §§2903.01 and 2923.02; and one count of aggravated robbery Ohio Revised Code §2911.01; which included firearm specifications on each count, that were merged into a single firearm specification. Petitioner, Johnson's overall aggregated sentence is an indefinite term of 55-years to life.

Petitioner, Johnson asserts that the Magistrate Judge issued a report and recommendation on September 8, 2017 (EFC No.35) to dismiss Petitioner's Title 28 U.S.C §2254 Federal Writ of Habeas Corpus as extremely untimely, pursuant to Title 28 U.S.C. §2244(d)(1) of AEDPA's statute of limitations. Petitioner set forth his argument in his opposition to respondent's motion to dismiss as to why equitable tolling provisions and manifest injustice exceptions applied to his petition (EFC No. 34).

Petitioner, Johnson's habeas corpus case was before the Sixth Circuit Court of Appeals on application for Certificate of Appealability regarding the District Court's December 18, 2017 Decision and Entry (EFC No.53) adopting United States Magistrate Judge's Report and Recommendation on Motion to Vacate (EFC No.41), Report and Recommendation on Motion to Amend or Relief from Judgment(EFC No.44),and Report and Recommendation on Recomittal (EFC No.46); Overruling Petitioner's Objections (EFC Nos. 42 and 51); Overruling Petitioner's Motion to Vacate and Reinstate case due to lack of service of the Magistrate Judge's Report and Recommendation[s] (EFC No.40); Overruling Petitioner's Motion to Amend or in the Alternative, for Relief from Judgment under Fed. R. Civ. P.59 and 60.

Petitioner, Derrick L. Johnson ask the United States Supreme Court to not only grant his writ of certiorari to prevent the Sixth Circuit Court of Appeals from setting precedence upon citizens of the United States who are denied proper service via U.S. Mail of a copy of a

Magistrate Judge Report and Recommendation. §636(b)(1)(B) and(C) of the Federal Magistrate Act does not provide for a waiver it fixes a time limit of fourteen days for the filing of objections in the District Court. The legislative history of §636 did not indicate that Congress intended waiver of appellate rights based on a litigants failure to file objections.

In this case Petitioner could not have filed timely objections, the District Court entered Judgment on October 2, 2017. In the procedural history of this case Petitioner, Johnson argued therein, contrary to the Magistrate's findings in his Motion to Compel Service (EFC No.38) that Magistrate Judge Merz and the District Clerk failed to properly serve the September 8, 2017 Report and Recommendation (EFC No.35) that was not numerically designated in the service listings of the Notice of Electronic filings ("NEF") as stated on Page 2 of the Magistrate Judge October 13, 2017 Report and Recommendation (EFC No.41).

In addition Sixth Circuit Court of Appeals prejudiced Petitioner and denied him due process law of the Fifth and Fourteenth Amendment of the United States Constitution and Equal Protection of the Law based on Sixth Circuit Court of Appeals failure to exercise it's supervisory power to act pursuant to Title 28 U.S.C. §636(b)(1)(B) governing the Management of Litigation pursuant to the Federal Magistrate Act that precludes waiver of the right to appeal when a litigant was not put on notice of consequences for failure to raise timely objections.

Congress, in enacting §636(b)(1)(C), did not require Sixth Circuit Court of Appeals to adopt a rule conditioning a litigants appeal from a District Court's Judgment, adopting a report and recommendation to apply waiver of appellate rights that extinguished an error in the procedure of §636(b)(1)(C) of the Federal Magistrate Act. Petitioner's case is different in critical respects from cases in which a litigant fails/waives, or timely object to a Magistrate Judge Report and Recommendation, forfeiting his/her right to appeal the decision of a District Court. Sixth Circuit Court of Appeals failed to exercise its supervisory power to concede error and or cure the deficiency in Magistrate Judge Merz failure to follow the procedures in §636(b)(1)(C) of the Federal Magistrate Act.

The crux of the argument in the application for COA was centralized on the various number of pleadings presented to the District Court based on said Court's failure to provide notice and service via U.S. Mail of a copy of the September 8, 2017 Magistrate Judge Report and Recommendation (EFC No.35) in violation of Due Process of the Fifth and Fourteenth Amendment of the United States Constitution and Equal Protection of the law through noncompliance with Fed. R. Civ.P.72 (b) (1) and Title 28 U.S.C. §636(b)(1)(C) of the Federal Magistrate Act.

Sixth Circuit Court of Appeals misapplied COA standard pursuant to §2253 Sixth Circuit Court of Appeals exercised its supervisory power to decide the merits of the appeal based on a ruling that was conditioned upon the District Court's adoption of the Magistrate's Report and Recommendation, then justified it's denial of COA on the actual merits in the May 23, 2018 Decision order Entry. Sixth Circuit Court of Appeals exercised it's supervisory power to depart from the COA procedure and placed a stringent burden on Petitioner, Johnson who was only required to show Jurist of reason would agree, and or a reasonable probability.

§636(b)(1)(C) of the Federal Magistrate Act precludes waiver rule when a Petitioner is not put on notice of the consequences for his/her failure to raise timely objections, and receive proper service via U.S. Mail of a Magistrate Judge Report and Recommendation as required by Title 28 U.S.C. §636(b)(1)(B)(C) provides: "[T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

#### ***BASIS FOR FEDERAL JURISDICTION***

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The District court had jurisdiction under the general federal question jurisdiction conferred by **Titled 28 636 (B)(1)(C)**. In this case, Petitioner was denied due process in the Federal Court and was not allowed to survive the injury caused by the Federal Magistrate Judges failure to serve Petitioner Notice of filing of the Magistrates

#### ***[Report & Recommendation]***

#### ***ARGUMENT IN SUPPORT OF GRANTING CERTIORARI***

##### *A. Conflicts with Decisions of Other Courts*

*This case creates serious conflict with **Jerry Franks v. Charles Bradley, Warden Pickaway Correctional Institution**, 2018 U.S. District Lexis 192209 (EFC Nos.14-16) district court of appeals as well as with the Sixth Circuit Court of appeals; **Here is Why!***

*In Jerry Franks v. Charles Bradley, Warden Pickaway Correctional Institution, 2018 U.S. District Lexis 192209 (EFC Nos.14-16) Petitioner, Franks never received a copy of the magistrates Report and Recommendation, as in the present case herein. However, in that case, the Northern District of Ohio Eastern Division adopted the Magistrate Report and Recommendation and a 60(B)(1) was filed as in this case, the Respondent Attorney General Mike Dewines office as in this case, contacted the institution and gained a copy of the institution mail log, that provided a copy of the date but not the actual document, However, the Attorney general office created a reasonable conclusion for the excusable neglect, and concluded due to the late delivery of service to the petitioner in **Jerry Franks v. Warden, Pickaway Correctional Institution** that the court's could not determine if the petitioner could have responded in a timely manner and or received Magistrate Judge Knepp's Report and Recommendation after the 14 day limitation had expired.*

*Procedural History of the conflicting case; Franks v Warden 518-cv-35 2018 U.S. District LEXIS 192209 Which only states  
in part;*

*On October 19<sup>th</sup> 2018, Magistrate Judge James Knepp II submitted Report and Recommendation EFC 11. The court dismissed adopted Report and Recommendation Nov 9<sup>th</sup> 2018. EFC No.12-13*

*November 26<sup>th</sup> 2018, Petitioner filed 60(B) Stating that he was not properly served in violation of 636 (b)(1)(C) (EFC No.14) While taking no position to oppose that motion confirmed Franks was not served (EFC No.15).*

*November 29<sup>th</sup> 2018, the court granted 60(B)(1) motion and vacated final order and reinstated the matter to allow franks to file objections and to appeal. (EFC No.16)*

*Unlike, this present case, where Petitioner, Derrick L. Johnson presented the same facts that he had not been served via U.S. Mail and asserted that the last time he received legal mail was September 7, 2017. (EFC No.51, PageID#999), and pointed out that was the day before the September 8, 2017 Report and Recommendation was issued.*

*The United States District Magistrate Judge Michael Merz noted, numerous documents sent by regular mail to the same address at Pickaway Correctional Institution both before and after September 8, 2017, were delivered to Petitioner.*

*October 12, 2017, in the exercise of diligence to correct the excusable neglect on behalf of the Magistrate Judge, Petitioner filed a Motion to Vacate and Reinstate case due to lack of service of the Magistrate Judge Report and Recommendation[s] (EFC No.40). As in the Franks*

case see above: In the present case, United States District Court Magistrate Judge Michael Merz issued a Report and Recommendation on Motion to Vacate, noting that no mail had been returned to the Court, and that "[p]rior and subsequent docket entries of Court generated documents show the same method of service (See ECF Nos. 6,9,10,12,16,18,24,36,37,&39).

**November 2, 2017**, Petitioner filed objections to the October 13, 2017, Report and Recommendation, pointing out that the September 8, 2017, "R&R" (ECF No.35) was omitted from the list of Court generated documents cited by the Magistrate Judge Merz. (ECF No.42).

### *B. Importance of the Question Presented*

*This case presents a fundamental question of the interpretation of this court's decision in Thomas v Arn 106 SC. 466 (1985). The question presented is of great public importance because it affects the fundamental Process of Magistrates forwarding Petitioners with notice of the filing of Report & Recommendations. These basic fundamentals effect Due Process of all Citizens and creates unfairness and legal Injury to Petitioners who were never served a notice and not ever being allowed to survive the prejudice suffered thereafter.*

**Petitioner made a preliminary showing that his claim(s) was debatable** thus, Sixth Circuit Court of Appeals violated §2253 order of operations by deciding the merits of his appeal that was conditioned on the adoption of Magistrate Judge Report and Recommendation.

Petitioner's request for Certificate of Appealability raised issues concerning the **December 18, 2017** Decision and Entry (ECF No.53) adopting United States Magistrate Judge's Report and Recommendation on Motion to Vacate (ECF No.41), Report and Recommendation on Motion to Amend or Relief from Judgment(ECF No.44),and Report and Recommendation on Recomittal (ECF No.46); Overruling Petitioner's Objections (ECF Nos. 42 and 51); Overruling Petitioner's Motion to Vacate and Reinstate case due to lack of service of the Magistrate Judge's Report and Recommendation[s] (ECF No.40);Overruling Petitioner's Motion to Amend or in the Alternative, for Relief from Judgment under Fed. R. Civ. P.59 and 60.

The District court seriously misinterpreted Federal Rules of civil Practice Civ. R. 72 (b) (1), which states the Magistrate **'must'** enter a recommendation disposition and the Clerk **Must** promptly, mail a copy to each party. The District Court's failure to distinguish between the prejudiced Petitioner suffered by the violation of the Magistrate's failure to serve Petitioner notice of the R&R report as statutory required by Civ. R.72 (b) (1) cause serious prejudiced and injury to the procedural formality of which Petitioner Must follow. Civ. R. 72 (b) (1) states'

**"Findings and recommendation.** A magistrate Judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear pretrial matter dispositive of a claim or defense or prison petition challenging the condition of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate Judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The Clerk must promptly mail a copy to each party."

## Harm caused by Sixth Circuit Adoption of the District Court's decision

The Sixth Circuits Decision to adopt and affirm the District Court's May 23, 2018 decision violates Petitioners' constitutional Right to Due Process by the Fifth Amendment of the United States Constitution and therefore, the United States Supreme Court has jurisdiction to not allow this type of ambiguity to exist when petitioner's suffer this type of prejudice and harm in theses type's of decision.

## Conclusion

The United States Supreme Court should correct the misinterpretation and make it clear that when Magistrates fail to Serve Notice of Report and Recommendation upon Petitioner's in violation of Federal Rules of Civil Practice Civ. R. 72(b)(1) the harm and prejudiced suffered is so great that the petitioner never gains procedural Normality thereafter. The severity of this case ended in a sentence being imposed of an aggregate term of incarceration of Fifty-five years to life and the rules of procedure should be weighed closely and effective for all parties. **Herein, Petitioner does not stand a chance** based on Procedural default of the Magistrate's violation of Civ. R. 72(b)(1). Clearly, this United States Supreme Court can not say this is harmless error or no harm no foul when petitioner has been stopped dead in the tracks of his procedural ability to respond in a timely manner in which was his legal Right where rules incorporated in the Federal Magistrate Act provides clear notice to litigants and opportunity to seek extensions of time for filing objections. See 28 U.S.C.A. §636(b)(1)(C). All Citizens have the right to this rule of Civil R. 72 (b)(1) and Petitioner Derrick Johnson, now ask this United Supreme Court to address this Prejudice suffered in this case, based on the Magistrate along with the District Judge, and now the Sixth Circuits failure to exercise it's supervisory power to address the harm caused by Magistrate Judge's Report and Recommendation upon Citizens in the United States.