No. 18-9059

IN THE

SUPREME COURT OF THE UNITED STATES

GEARY GILMORE
Petitioner,

v.

SHIRLEE HARRY
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

GEARY GILMORE
Inmate No. 138763
E.C. Brooks Correctional Facility
2500 S. Sheridan Drive
Muskegon Heights, Michigan 49444

QUESTIONS PRESENTED

I. Whether The United States Court Of Appeals For The Sixth Circuit Violated The Procedure Prescribed By 28 *U.S.C.* § 2253(c)(2) And Imposed An Improper Burden On Gilmore At The Certificate Of Appealability Stage Contrary To This Court's Precedents When It First Decided The Merits Of His Appeal, Then Justified Its Denial Of Certificate Of Appealability Based On Its Adjudication Of The Actual Merits?

II. Whether The United States District Court And The United States Court Of Appeals For The Sixth Circuit Violated *Article VI, Clause 2* Of The *United States Constitution* When They Decided Gilmore's *Fifth Amendment* Claim Based Solely On State Law Grounds And Completely Ignored The Firmly Established Precedents Of This Court?

III. Whether The State Court Decision Rejecting Gilmore's Ineffective Assistance Of Appellate Counsel Claim Was Based On An Unreasonable Determination Of The Facts Under 28 U.S.C. § 2254(d)(2), When The Successor Trial Judge, Without Reading The Record Or Giving Notice To The State Or Defense Counsel, Sua Sponte Acquired The Prosecutor's Brief In Opposition To A Prior Motion And Adopted Verbatim The Arguments Therein As The Court's Decision?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Geary Gilmore, respectfully prays that a Writ of Certiorari issue to review the Judgment below.

OPINIONS BELOW

The June 28, 2017 decision of the United States Court of Appeals for the Sixth Circuit which denied Certificate of Appealability is unpublished and reproduced at Appendix A; (App. 1a–14a)..

The September 28, 2017 Order of the United States Court of Appeals for the Sixth Circuit denying Rehearing is unpublished and reproduced at Appendix B; (App. 15a).

The October 18, 2017 Order of the United States Court of Appeals for the Sixth Circuit denying Rehearing *En banc*, is unpublished and reproduced at Appendix C; (App. 16a).

The March 30, 2016 Order of the United States District Court for the Eastern District of Michigan denying Petition for a Writ of Habeas Corpus is unpublished and reproduced at Appendix D; (App. 17a–45a).

The November 1, 2016 Order of the United States District Court for the Eastern District of Michigan denying Motion to Make Additional Findings under Federal Rule of Civil Procedure 52(b) and to Alter and Amend the Judgment under Federal Rule of Civil Procedure 59(e) is unpublished and reported at Appendix E; (App. 46a–55a).

The June 3, 2011 Opinion and Order Denying Successive Motion for Relief From Judgment by Wayne County Circuit Court Judge Annette J. Berry is reported at Appendix F; (App. 56a–99a).

The February 28, 2018 extention of time in which to file a Petition for a Writ of Certiorari to and including March 17, 2018 by Justice Kagan at Appendix G; (App. 100a–101a).

JURISDICTION

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

The United States Court of Appeals for the Sixth Circuit issued its Order denying Gilmore's Petition for Rehearing En Banc on October 18, 2017.

Petitioner Geary Gilmore's Application to Extend the Time to File a Petitioner for a Writ of Certiorari was presented to Justice Elena Kagan, who on February 28, 2018, extended the time to and including March 17, 2018.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a state criminal defendant's Constitutional rights under the United States Constitution and the Fifth, Sixth and Fourteenth Amendments.

Article VI, Clause 2 of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The *Fifth Amendment* to the *United States Constitution* provides in relevant part:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

The *Sixth Amendment* to the *United States Constitution* provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The *Fourteenth Amendment* to the *United States Constitution* provides in relevant part::

> "[N]or 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."

28 *U.S.C.* § 2254(d)(2) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> * * *
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

STATEMENT OF THE CASE

Petitioner Geary Gilmore, and one Byron Smith and one Jerome Holloway were convicted of two (2) counts of First Degree Felony Murder, *MCL* 750.316, *MSA* 28.548 and two (2) counts of Kidnapping, *MCL* 750.349, *MSA* 28.581, by a Wayne County Circuit Court, Detroit, Michigan. On August 8, 1974, the Honorable James N. Canham sentenced Petitioner to two (2) natural life terms and two (2) parolable life terms, respectively.

For simplicity, Gilmore adopts the following statement of facts and proceedings on pages 1 to 7 of the District Court's Opinion. Additional relevant facts are cited *infra*.

> "This action arises out of the abduction and murder of two young boys, Gerald Kraft and Keith Arnold, in early December of 1973. Petitioner was tried jointly with co-defendants Byron Smith and Jerome Holloway. The Michigan Court of Appeals summarized the trial evidence in its consolidated opinion affirming the thee (sic) defendants' convictions. This recitation of the evidence is presumed to be correct. 28 U.S.C. § 2254(e)(1); *Wagner v Smith,* 581 F.3d 410, 413 (6th Cir. 2009).
>
> > In simplified terms, the facts of this matter arose in the following order. On December 1, 1973, Keith Arnold and Gerald Craft, aged six years and eight years respectively, disappeared in late afternoon while playing near their homes on Inverness in the City of Detroit.
> >
> > At 9:00 p.m. that evening, Roy Hillyer, a friend of the Arnold family, received a telephone call demanding $53,000 ransom for the return of the children. Police were notified immediately and telephone surveillance was established.
> >
> > Two subsequent calls were received on December 1 and December 2, 1973, one taken by Marjorie Arnold, the mother, and one by Linda Ellis, Keith Arnold's sister. Both calls demanded ransom in the same general amount. Linda Ellis later testified that the calls she received all seemed made by the same person.
> >
> > As ordered, Roy Hillyer went to a specified public telephone booth on December 2, 1973, where he received a call instructing him to deliver a bag with the ransom to an address on Griggs Street. The delivery was made with a dummy ransom bag. Meanwhile, police had established a surveillance at the telephone booth. After some moments, officers observed Defendant Smith come to the booth, lift the receiver and look around. Testimony also placed Defendant Holloway in the immediate area of the dummy drop at the same time.
> > On December 4, 1973, the Wayne County Sheriff's office reported finding the boys' bodies in two fields located in Romulus, Michigan. The boys had each been shot twice in the head from the same weapon. Neighbors reported hearing the shots the previous evening about 7:00 p.m.

> At trial, various prosecution witnesses placed all three defendants and the two kidnapped boys in the 14th Street apartment of Fannie Johnson, the sister-in-law of Defendant Gilmore, on the evening of December 1, 1973. At least one of the Defendants was there at all times during this period. On the morning after the bodies were discovered, police found Defendant Gilmore at an apartment on Schafer Road and placed him under arrest. Defendant Smith was arrested on December 4, 1973 in the company of an acquaintance, Lucinda Pruwitt. Defendant Holloway voluntarily surrendered himself to police on December 5, 1973.

People v Gilmore, 73 Mich App 463, 466-467, 252 N.W.2d (1977).

The statement of facts appearing in the amended petition contains additional detail regarding Petitioner's trial. See Dkt. 6, at Pg ID 37-44, 89-91. In addition to the facts recited by the Michigan Court of Appeals, the prosecutor's case against Petitioner rested in large part on five witnesses who testified that they saw him with his two co-defendants and the two victims at his apartment over the weekend of December 1, 1973. Fannie Johnson, (who was Petitioner's sister-in-law and lived at the apartment), Jacqueline Wesley, Denise James, Carol Payne, and Lucinda Pruwitt all testified that they were at Petitioner's apartment during the weekend. They all saw the three defendants with the boys at the apartment during various times during the weekend. Pruwitt testified that at some point on Sunday December 2nd, the three defendants left the apartment with the two boys in her car. She heard Petitioner tell the boys that they were going home. The three defendants arrived back at the apartment about an hour and one-half later without the two boys.

A subsequent search of Petitioner's apartment by the police revealed two .32 caliber cartridges that matched the casing found next to one of the boy's bodies. Police also found a button from an article of clothing from one of the victims. Finally, latent fingerprints from both victims were found in the apartment.

Petitioner presented defense witnesses Ester Johnson, Clarence Fields, (sic) Harry Gilmore, and Deborah Lowery, who all testified that they visited Petitioner's apartment during various stretches of the weekend. These witnesses contradicted the prosecution witnesses' testimony about the two co-defendants presence at the apartment as well as the testimony that the boys stayed overnight. Another witness testified that Petitioner was at his body shop for car repairs on the evening of December 1, 1973,

Petitioner's sister testified that Gary Braceful and another man arrived at the apartment on Saturday evening with the two boys, but they were gone by 10:00 pm. A few of the prosecutor's witnesses also testified that they saw Braceful at Petitioner's apartment during the weekend.

Petitioner testified that Braceful and another man came to his apartment with two kids on Saturday evening. Braceful asked Petitioner for a gun, Petitioner refused, and Braceful left with the boys around 8:30 pm. Petitioner also testified that his two co-defendants visited his apartment during the weekend.

The prosecutor presented evidence in its rebuttal case that Braceful was murdered a few days (sic) after the boys were shot, and he was killed with the same gun that was used to kill the boys.

Following his conviction, Petitioner obtained appellate counsel who filed an appeal by right. Petitioner's appellate brief raised five claims: 1) the trial court erred in refusing to sever Petitioner's trial from Smith and Holloway's trial, 2) the trial court erred in admitting evidence that Gary Braceful was killed with the same gun used to kill the boys, 3) the prosecutor committed misconduct during closing argument, 4) the trial court erred in admitting voice-print evidence from the ransom demand calls, and 5) the search warrant for Petitioner's residence was invalid because it was based on previous illegal activity. *Gilmore, supra.* The Michigan Court of Appeals rejected these claims and affirmed Petitioner's convictions. Petitioner appealed the decision, but the Michigan Supreme Court denied leave to appeal. *People v Gilmore,* 402 Mich. 803 (1977 (table). Petitioner then unsuccessfully pursued federal habeas relief. See *Gilmore v Koehler,* 709 F.2d 1502, 1983 U.S. App. LEXIS 13430 (6th Cir. 1983).

On April 8, 2004, Petitioner filed a motion for relief from judgment in the trial court asserting among a host of other claims that he was denied the effective assistance of appellate counsel. See Dkt. 54, Exhibit A. Specifically, Petitioner claimed that his appellate counsel was ineffective for failing to raise the following claims: 1) the trial court failed to swear the jurors, 2) the trial court made prejudicial comments, 3) the trial court failed to properly instruct the jury on his alibi defense, 4) the trial court failed to allow Petitioner to examine a document used to refresh the recollection of a witness, 5) the trial court erroneously admitted a non-testifying co-defendant's statement, 6) the prosecutor offered perjured testimony at trial, 7) the trial court allowed admission of evidence that Petitioner was poor and unemployed, 8) the trial court allowed admission of Petitioner's silence after his arrest, and 9) Petitioner's Fourth Amendment rights were violated. Id., Exhibit A, p. 6.

On October 18, 2004, the trial court denied Petitioner's motion for relief from judgment. See Dkt. 47-3. In pertinent part, the trial court found:

> With regard to the claim of ineffective assistance of appellate counsel the defendant must show that a reasonable appellate attorney could not have concluded that the issues were not worthy of mention on appeal. *People v Reed,* 449 Mich. 375, 535 N.W.2d 496 [(19950]. The defendant has not demonstrated that his appellate counsel's performance fell below an objective standard of reasonableness as required.

Id, p. 25.

Petitioner appealed this decision, but the Michigan Court of Appeals denied leave for "failure to meet the burden of establishing entitlement to relief under Michigan Court Rule 6.508(D)." *People v Gilmore,* No. 265879, 2006 Mich. App. LEXIS 3930 (Mich. Ct. App. May 4, 2006). The Michigan Supreme Court denied relief under the same court rule. *People v Gilmore,* 477 Mich. 912, 722 N.W.2d 861 (2006) (table).

On June 1, 2007, Dennis M Elliot, serving a term of mandatory life imprisonment for his own first-degree murder conviction, signed an affidavit. The affidavit alleges that in early December of 1973 he was in a car with Gary Braceful, Larry Lester, a woman known to him as "Star," and the two kidnapped victims. He states that they went to an apartment where they met Petitioner and his sister to buy drugs. The boys were brought into the apartment as well. Elliot saw Braceful produce a handgun. He went outside and fired two shots. Braceful then came back inside and threw away two shell casings from the gun. Elliot and Braceful purchased drugs and left. Lester then dropped the two boys off at another house with Braceful and Star. Rossi Maclin, a prisoner advocate, signed an

affidavit on July 11, 2007, explaining how she (sic) [he] connected Elliot with Petitioner while she (sic) [he] was helping Elliot with his own habeas petition.

On January 31, 2008, Petitioner then filed a second motion for relief from judgment in the state trial court relying on this newly discovered evidence. While that motion was pending, Petitioner sought and received permission from the Sixth Circuit to file a second federal habeas petition. On January 9, 209, Gilmore filed the instant case and a motion to hold the case in abeyance while he completed exhaustion of his claims in the state courts. On August 18, 2009, this Court granted Petitioner's motion to stay.

The trial court denied Petitioner's second motion for relief from judgment on June 3, 2011. Dkt. 47-11. The opinion cited Michigan Court Rule 6.502(G), which generally prohibits a defendant from filing a successive post-conviction motion. The lengthy opinion adopted almost verbatim a large part of the prosecutor's answer to Petitioner's 2004 motion for relief from judgment, discussing and rejecting on the merits seven of the nine claims that Petitioner asserts his appellate counsel should have raised on direct appeal.

Petitioner appealed this decision, but the Michigan Court of Appeals dismissed the appeal "for lack of jurisdiction" citing Rule 6.502(G). *People v Gilmore,* No. 306437, 2011 Mich. App. LEXIS 2628 (Mich. Ct. App. Oct. 28, 2011). Petitioner again appealed, but the Michigan Supreme Court denied an application "because the defendant's motion for relief from judgment is prohibited by Michigan Court Rule 6.502(G)." *People v Gilmore,* 492 Mich. 853, 817 N.W.2d 100 (2012) (table).

On December 12, 2012, the case was reopened. Respondent filed a motion for summary judgment, asserting that the petition was filed after expiration of the one-year statute of limitations. the Court granted the motion, but the Sixth Circuit reversed and remanded for further proceedings. *Gilmore v Berghuis,* No. 13-2008, 2015 U.S. App. LEXIS 4501 (6th Cir.. Jan. 30, 2015). The case is now ready for decision."

Order Denying Petition for Writ of Habeas Corpus, pgs. 1–7; (App. D; [17a-23a]).

On November 1, 2016, the District Court denied Gilmore's Motion to Make Additional Findings (App. E; [46a-55a]).

The United States Court of Appeals for the Sixth Circuit denied Gilmore's Motion for Certificate of Appealability, on June 28, 2017, (App. A; [1a-14a]). Rehearing was denied on September 28, 2017, (App. B; [15a]), and Rehearing En Banc on October 18, 2017, (App. C; [16a]).

On February 28, 2018, Justice Kagan extended the time in which to file a Petition for a Writ of Certiorari to and including March 17, 2018. (App. G; [100a-101a]).

Gilmore now timely files his Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Geary Gilmore seeks a Writ of Certiorari for this Court to review, or remand for a *de novo* review of his claim that he was denied his *Sixth* and *Fourteenth Amendment* right to the effective assistance of counsel on his appeal as of right when appellate counsel failed to raise significant and obvious claims on appeal that were clearly stronger than the claims he raised and there was a reasonable probability that had counsel raised the omitted claims, the outcome of the appeal would have been different.

Gilmore argued in his habeas petition under 28 *U.S.C.* § 2254, and the Sixth Circuit in his Motion for Certificate of Appealability (COA) that the State court decision denying his successive motion for relief from judgment was not entitled to deference under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") because the *process* used by the State court to adjudicate his claims was objectively unreasonable, violated his due process right to an impartial judge and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under 28 *U.S.C.* § 2254(d)(2), where the successor trial judge, without reading the record or requesting a response from the State, *sua sponte* acquired a Prosecutor's brief in opposition to a prior motion and adopted verbatim the facts and law cited therein as the court's decision.

In denying a Certificate of Appealability (COA) on Gilmore's remaining claims, the United States Court of Appeals for the Sixth Circuit went beyond the COA's "threshold requirement" set forth by this Court in *Slack v Mc Daniel,* 529 U.S. 473, 483 (2000) and *Miller El v Cockrell,* 537 U.S. 322 (2003), by *first* deciding the merits of the claims presented, *then* justifying the denial of a COA based on the Court's adjudication of the actual merits, which *Slack* and *Mc Daniel* forbid.

The Sixth Circuit reached the merits of Gilmore's claim that his jury was not sworn, jeopardy had not attached and he was never placed in jeopardy of conviction under the *Fifth Amendment* to the *United States Constitution,* according to *Crist v Bretz,* 437 U.S. 528 (1978); *Serfass v United States,* 420 U.S. 377 (1975), in violation of *Article VI, Clause 2* of the *United States Constitution,* by resolving the claim solely on the basis of the plain error review analysis conducted by the Michigan Supreme Court and completely disregarded the firmly established precedents of this Court.

Consequently, the United States Court of Appeals for the Sixth Circuit erred in denying a Certificate of Appealability (COA) on Gilmore's claim that he was denied his constitutional right to effective assistance of appellate counsel on his appeal as of right because jurist of reason would find the District Court's resolution of the claim debatable or wrong and/or at the very least, the claim is adequate to deserve encouragement to proceed further. *Slack v McDaniel,* 529 U.S. 473 483 (2000).

REASONS FOR GRANTING THE WRIT

This Petition should be granted for four compelling reasons. First, the Order of the United States Court of Appeals for the Sixth Circuit that denied Gilmore a Certificate of Appealability (COA) by first deciding the merits of his appeal then justifying its denial of COA based on its adjudication of the actual merits so far departed from this Court's mandate in *Slack v Mc Daniel,* 529 U.S. 473 (2000) and *Miller El v Cockrell,* 537 U.S. 322 (2003), that exercise of this Court's supervisory power is required.

Second, the United States District Court and Court of Appeals for the Sixth Circuit have decided an important Federal question regarding the Constitutional rule that jeopardy attaches in a jury trial when a jury is sworn in a way that conflicts with this Court's decisions in *Serfass v United States,* 420 U.S. 564 (1977) and *Crist v Bretz,* 437 U.S. 28 (1978).

Third, the United States District Court and Court of Appeals for the Sixth Circuit have sanctioned a Michigan trial judge's actions that departed so far from the accepted and usual course of judicial proceedings that the exercise of this Court's supervisory power is required.

Fourth, granting this petition will provide this Court with a vehicle to settle a significant conflict among the State and Federal Courts as to the appropriate remedy for when a Judge violates Due Process and the appearance of impartial justice by *sua sponte* adopting, verbatim, the findings of fact and conclusions of law of one of the parties as the court's decision, without reading the record or making any independent findings.

I. The Order Of The United States Court Of Appeals For The Sixth Circuit That Denied Gilmore A Certificate Of Appealability (COA) By First Deciding The Merits Of His Appeal Then Justifying Its Denial Of COA Based On Its Adjudication Of The Actual Merits So Far Departed From This Court's Mandate In *Slack v Mc Daniel*, 529 U.S. 473 (2000) And *Miller El v Cockrell*, 537 U.S. 322 (2003), That Exercise Of This Court's Supervisory Power Is Required.

The Sixth Circuit's resolution of Gilmore's Motion for Certificate of Appealability (COA) directly conflicts with this Court's decisions in *Slack v Mc Daniel*, 529 U.S. 473 (2000) and *Miller El v Cockrell*, 537 U.S. 322 (3003), by first deciding the merits of Gilmore's claim, and then justifying the denial of a COA based on its adjudication of the actual merits, which *Slack* and *Miller-El* forbid.

In *Slack*, this Court held that the COA statute [28 U.S.C. § 2253(c)] "requires a threshold inquiry into whether the circuit courts may entertain an appeal." *Id.*, 529 U.S. at 482.

In *Miller El, supra*, this Court illustrated the *"threshold inquiry"* requirement as follows:

> "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurist of reason. This threshold inquiry does not require full consideration of the factual or legal based adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor.
>
> * * *
>
> We do not require petitioner to prove, before the issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claim debatable or wrong."'

Miller-El v Cockrell, 537 U.S. at 336-38. (Quotation marks and citation omitted).

Gilmore presented the claim to the State courts that his appellate counsel was ineffective for failing to raise on appeal that he was denied his right to trial by jury, due process of law, and was never put in jeopardy of conviction because the jurors selected to try his case were not a legal jury impaneled and sworn according to law, rendering his trial *void ab initio* and their verdict fundamentally invalid. Gilmore cited State and Federal authorities in support of his claim that the jury trial oath is a jurisdictional requisite to conferring Constitutional jurisdiction on a jury and put him in jeopardy of conviction, and that the failure to swear the jurors is a jurisdictional defect and structural error requiring a new trial. *Mich Const 1963,* Art 1, §§ 14, 20; *U.S. Const,* Ams. V, XIV.

The Michigan Courts did not address this claim. The District Court's *de novo* review denied the claim based on the state court "plain error test" and did not address the Federal Constitutional claim that jeopardy did not attach and Gilmore was never put at risk of conviction.

The Court of Appeals for the Sixth Circuit resolved the claim as follows:

> *"I. The trial court failed to properly swear in the jury.*
>
> Gilmore argues that appellate counsel was ineffective for not arguing that the jury was not sworn in prior to trial. He asserts that, at the time of his trial and direct appeal, a finding that the jury was improperly sworn would have resulted in an automatic mistrial. *See People v Allan,* 829 N.W.2d 319, 326-27 (Mich. Ct. App. 2013). The district court denied this claim because "[w]hether or not the claim would have found support under Michigan law at the time of his direct appeal, [Gilmore] cannot demonstrate that he has suffered prejudice under the *Strickland* standard . . . because his claim is without merit in light of the current state of the law." Jurist of reason could not debate the district court's conclusion. In *Lockhart,* 506 U.S. at 370-72, defense counsel failed to make an objection during sentencing that was supported by case law that was subsequently overruled. *Id.* at 366. The Court held that, although defense counsel's performance was deficient, *Strickland*'s "prejudice" requirement was not satisfied because, in light of current law, the result of the proceedings was not unreliable or fundamentally unfair. *Id.* at 370-72.
>
> In *People v Cain,* 869 N.W.2d 829, 840 (Mich. 2015), the Michigan Supreme Court held that the failure to swear in the jury would not result in plain error unless, under the facts of the case, "leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected." The parties agree that the transcripts do not indicate whether the jury was sworn-in prior to trial. However, the trial record establishes that the jury in this case received the same types of instructions that the court in *Cain* held fulfilled the primary purposes of the oath. After closing arguments, the trial court instructed the jurors that they had "the responsibility and duty of assisting the court in the administration of justice," that they "must put aside all feeling of fear, favor, bias or prejudice," that they were to look steadfastly and alone to the law and the evidence in the case, and return a verdict that is warranted by the law and the evidence." The trial court also instructed the

> jury regarding the presumption of innocence and reasonable doubt. Further, during opening statements, counsel emphasized to the jury the importance of listening to the evidence with impartiality. Accordingly, even assuming that the jury in this case was not properly sworn in, Gilmore has not established that the result of his trial was unreliable or fundamentally unfair. This sub-claim does not warrant a COA."

Order Denying Certificate of Appealability, pgs. 6-7. (Appendix A; [App. 6a-7a]).

Here, the Sixth Circuit is in direct conflict with the "threshold inquiry" requirement described in *Slack* and *Miller-El* by *first* conducting a "plain error test" of the merits of the claim pursuant to *People v Cain,* 869 N.W.2d 829, 840 (Mich. 2015), *and then* denying COA based on its adjudication of the merits of the claim.

In *Cain,* the Michigan Supreme Court rejected the bright-line rule that a *failure to properly swear a jury* constituted an error that required reversal, and instead applied the "plain-error test" adopted in *Olano v United States,* 507 U.S. 725, 735-37 (1993), and *People v Carines,* 460 Mich. 750, 763 (1999), which has four prongs. According to *Cain,* the application of the fourth prong requires appellate courts to engage in a "case-specific and fact-intensive" analysis to assess whether "the error in failing to swear the jury undermined the proceedings with respect to the broader pursuits and values that the oath seeks to advance." *Cain,* at 122. Specifically, the courts must examine the facts and circumstances of a case and determine whether the purposes of administering an oath to the jury, *i.e.,* to impart to the members of the jury their duties as jurors, were alternatively fulfilled in other instructions by the trial court prescribing the particulars of the jurors' duties. *Id.*

In this case, the Sixth Circuit conducted a "case specific and fact-intensive" analysis of the merits of his claim according to *Cain,* and denied a COA based on their adjudication of its merits, instead of conducting a "threshold inquiry" to determine whether a reasonable jurist could debate whether (or, for that matter, agree that) Gilmore's claim should have been resolved in a different manner or that it was adequate to deserve encouragement to proceed further. Notably, in *Cain,* two reasonable Michigan Supreme Court jurist dissented on this issue and would have reversed, holding that "reversal is warranted under the fourth *Carines prong." Cain,* 498 Mich at 160 (Viviano, J., joined by McCormack, J., dissenting). Consequently, two reasonable jurist have found that this claim should have been decided differently. "When a state appellate court is divided on the merits of the constitutional question,

issuance of a certificate of appealability should ordinarily be routine." *Jordan v Fisher,* 135 S. Ct. 2647, 2651 (2015) (Justice Sotomayor, with whom Justice Ginsburg and Justice Kagan join, dissenting from the denial of certiorari) (quoting *Jones v Basinger,* 635 F.3d 1030, 1040 (7th Cir. 2011). *Accord, Robinson v Stegall,* 157 F.Supp.2d 802, 820 n. 7 (E.D. Mich. 2001).

The "case specific and fact-intensive" analysis conducted by the District Court and Court of Appeals is *directly* contrary to the "threshold inquiry" requirements this Court set forth in *Slack v Mc Daniel,* 529 U.S. 473, 483 (2000) and *Miller El v Cockrell,* 537 U.S. 322, 336-338 (2003).

II. The United States District Court And Court Of Appeals For The Sixth Circuit Have Decided An Important Federal Question Regarding The Constitutional Rule That Jeopardy Attaches In A Jury Trial When A Jury Is Sworn In A Way That Conflicts With This Court's Decisions In *Serfass v United States,* 420 U.S. 564 (1977) And *Crist v Bretz,* 437 U.S. 28 (1978).

The Supremacy Clause, *U.S. Const.* Art VI, Cl 2, provides that the laws and treaties of the United States "shall be the Supreme law of the land, binding alike upon states, courts, and the people, anything in the Constitution or laws of any state to the contrary notwithstanding." *Mutual Pharmaceutical Co., Inc., v Bartlett,* 570 U.S. 472, 617 (2013). Accordingly, it has long been settled that state laws that conflict with federal laws are "without effect." *Maryland v Louisiana,* 451 U.S. 725, 746 (1981).

The *14th Amendment*'s Due Process Clause extends the protections of the Double Jeopardy Clause of the *5th Amendment* to state prosecutions. *Benton v Maryland,* 395 U.S. 784, 794 (1969). This protection includes the fundamental requirement that jeopardy attaches when the jury is empaneled and sworn. *Crist v Bretz,* 437 U.S. 28, 37-38 (1978). The United States District Court and Court of Appeals for the Sixth Circuit violated the Supremacy Clause when it ignored this Court's clearly established precedents regarding the attachment of jeopardy and resolved Gilmore's claim that his appellate counsel was ineffective for failing to raise on appeal that the jurors selected to try his case were not a legal jury impaneled and sworn according to law, and he was never put in jeopardy of conviction based solely on the State of Michigan's plain error test. (*See Issue I*).

The plain error test is not applicable to a violation of the rule that jeopardy attaches when the jury is sworn. This rule is significantly different from other rules relating to the constitutional rights of criminal defendants that prescribe procedural rules to govern the conduct and basic fairness of the trial. The practical result of this rule is to prevent a trial from taking place at all, even though it might have been conducted with a scrupulous regard for all the constitutional procedural rights of the defendant. *See Robinson v Neil,* 409 U.S. 505, 508-09 (1973).

This Court has uniformly held that in the case of a Jury trial, jeopardy attached when a Jury is "empaneled and sworn." *Downum v United States,* 372 U.S. 734 (1963); *Illinois v Somerville,* 410 U.S. 458 (1973); *United States v Martin Linen Supply Co.,* 430 U.S. 564 (1977); *Serfass* v *United States,* 420 U.S. 377 (1975). In *Crist v Bretz,* 437 U.S. 528 (1978), this Court held that the Federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is constitutionally binding on the states through the *Fourteenth Amendment.*

There can be no conviction without jeopardy. *Kepner v United States,* 195 U.S. 100 (1904). The risk of determination of guilt comes into play only when a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." "Without risk of determination of guilt, jeopardy does not attach." *Serfass, supra,* 420 U.S. at 391. Accordingly, the risk associated with trial does not occur, and jeopardy does not attach, until the Jury has been impaneled and sworn and is thus competent to render a verdict of guilt or innocence. Until that moment, a defendant is subject to no jeopardy, for the twelve individuals in the box have no power to convict him. *U.S. v Green,* 556 F.2d 71 (DC Cir. 1977).

Only if jeopardy attached could Gilmore be put to trial before a competent tribunal and his guilt or innocence be legally determined. However, his trial proceeded to conclusion without a properly impaneled and sworn jury. Since a jury had not been empaneled and sworn, jeopardy had not attached and Gilmore was never placed at risk of conviction. *Crist, supra; Serfass, supra.* He was not exposed to the "risk of a determination of guilt" and the verdict rendered against him was null and void. Because jeopardy did not attach the resulting conviction is invalid.

III. The United States District Court And Court of Appeals for the Sixth Circuit Have Sanctioned The Actions Of A Michigan Trial Judge That Departed So Far From The Accepted And Usual Course Of Judicial Proceedings That The Exercise Of This Court's Supervisory Power Is Required.

Gilmore argued in the District Court and in his application for COA in the Sixth Circuit that the State court decision denying his successive motion for relief from judgment was not entitled to deference under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") because the *process* used by the State court to adjudicate his claims was objectively unreasonable, violated his due process right to an impartial judge and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under 28 *U.S.C.* § 2254(d)(2), where the successor trial judge, without reading the record or requesting a response from the State, *sua sponte* acquired a Prosecutor's brief in opposition to a prior motion and adopted verbatim the facts and law cited therein as the court's decision.

State Court Proceedings

Gilmore's first Motion for Relief From Judgment was heard and denied by Judge Prentis Edwards on October 18, 2004. Reconsideration was denied on July 29, 2005. A Motion for an Evidentiary Hearing pursuant to *Franks v Delaware,* 438 U.S. 154 (1978) and *People v Ginther,* 390 Mich 436 (1973), in support of the Motion was not decided.

On January 31, 2008, Gilmore filed a Successive Motion for Relief From Judgment Based on Newly Discovered Evidence and Successive Motion for Evidentiary Hearing. A Motion to Disqualify Judge Edwards from hearing these Successive Motions was filed on April 1, 2008.

On August 15, 2008, Gilmore filed an Amended Successive Motion for Relief From Judgment Based on Newly Discovered Evidence and Successive Motion for Evidentiary Hearing. These Motions were denied on September 23, 2008.

On January 29, 2010, the Michigan Supreme Court **REMANDED** the case to the trial court "for a decision on defendant's motion to disqualify Judge Prentis Edwards, for reconsideration of defendant's successive motion for relief from judgment,"

On May 27, 2010, Judge Edwards granted Gilmore's Motion to Disqualify vacated his Order denying Gilmore's Motion for Reconsideration of the Motion for Relief From Judgment.

On September 17, 2010, Gilmore, through counsel, Craig A. Daly, filed three Motions: (1) Amended Motion for Reconsideration of Motion for Relief From Judgment, (referred to as "Second Motion for Relief From Judgment"), (2) Second Amended Motion for Evidentiary Hearing in Support of Motion for Relief From Judgment, and (3) Second Amended Motion for Evidentiary Hearing Based on Newly Discovered Evidence, before Successor Judge Annette Berry.

The Prosecutor did not respond to these Motions.

On January 6, 2011, instead of directing the Prosecutor to respond to the motions, and providing Gilmore an opportunity to reply, Judge Berry *sua sponte* obtained the Prosecutor's Answer to Gilmore's 2004 Motion for Relief From Judgment from the court file, and adopted *verbatim* the "arguments" contained therein as the court's decision denying the motions filed on September 17, 2010.

In adjudicating Gilmore's claims Judge Berry stated:

> "Generally, a motion which merely presents the same matters that were considered by the Court will not be granted. However, in this case because the order denying defendant's motion to reconsider denial of the 2004 motion for relief from judgment was vacated, the court will readdress and reconsider the issues raised by defendant in the initial motion for relief from judgment."
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> * * *
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> "This court agrees with the Plaintiff's position in the Plaintiff's Brief in Response to Defendant's Motion for Relief from (sic) Judgment in that defendant has not met his burden and is thus not entitled to the relief requested. This court (sic) adopts argument from the Plaintiff's brief as provided below."

Opinion and Order, June 3, 2011, pp. 2-4. (Footnote omitted and emphasis added).

After quoting virtually *verbatim* thirty-eight (38) pages of "argument from the Prosecutor's Brief in Opposition," Judge Berry concluded:

> "As discussed previously in this opinion, and for the reasons outlined above, *Franks v Delaware* is not applicable to the Defendant's case and has no application that would serve as a basis for relief to support an Evidentiary hearing or relief from judgment. As such defendants (sic) Second Amended Motion for Evidentiary hearing in support of Motion for relief from judgment is denied.

Defendant has not shown "good cause" under **MCR 6.508(D)(3)** as to why the issues presented in the motion were not previously raised on appeal. Further, he has not proven actual prejudice.

Therefore, for all the reasons stated, Defendant's Second Amended Successive motion for evidentiary hearing in Support of the Motion for Relief from Judgment; Second Amended Successive Motion for Evidentiary hearing based on Newly Discovered Evidence; and Amended Motion for Reconsideration of the Motion for Relief from Judgment are hereby **DENIED**."

Opinion/Order Denying Successive Motion for Relief From Judgment, p. 43. (Appendix F; [App. 98a]).

On April 21, 2011, Mr. Daly wrote Judge Berry and informed the court that neither he, nor Gilmore, had been notified of the court's Order, or given an opportunity to respond. Mr. Daly further asked the court to reissue the Order to protect Gilmore's rights for reconsideration and appeal. Without giving defense counsel an opportunity to respond, Judge Berry reissued the Order on June 3, 2011.

The Federal Court Proceedings

The District Court resolved this claim as follows:

"The Court has now had an opportunity to review Petitioner's claims in light of the trial record. Though the trial court's statement of facts does seem to be a copy of a statement of facts submitted by the prosecutor, see Dkt. 42-2, after review of the trial record, the Court concludes that it accurately summarized the trial proceedings, and it does not constitute an unreasonable determination of the facts contrary to § 2254(d)(2)."

Order Denying Motion to Make Additional Findings, pgs. 3–4; (Appendix E; [App. 48a–49a).

In denying Certificate of Appealability on this claim, the Sixth Circuit stated:

"In arguing that he is entitled to de novo review, Gilmore attempts to overcome the presumption that his IAAC claims were denied on the merits. He asserts that, when the trial court readdressed the IAAC claim presented in his amended motion for relief from judgment, the court merely adopted the state's brief in opposition to his initial motion for relief from judgment, showing that the court did not independently review the claims. "[A]bsent some indication or [Michigan] procedural principle to the contrary,' [this court] must presume that an unexplained summary order is an adjudication 'on the merits' for AEDPA purposes." *Werth v Bell*, 692 F.3d 486, 493 (6th Cir. 2012) (quoting *Richter*, 562 U.S. at 99). Moreover, the district court found that, although the trial court's statements of facts did seem to be a copy of the statement of facts submitted by the prosecutor, the trial court had in fact accurately summarized the trial proceedings. Gilmore does not dispute this finding by the district court. Jurist of reason, therefore, could not debate the district court's conclusion that the trial court's orders denying Gilmore initial and successive motions for relief from judgment were entitled to AEDPA

> deference–meaning that habeas relief will not be granted unless the adjudication of the claim resulted in an unreasonable application of federal law or an unreasonable determination of the facts based upon the evidence presented to the state court. *See* 28 U.S.C. § 2254(d0(1), (2); *Williams v Taylor,* 529 U.S. 362, 413 (2000)."

Order Denying Certificate of Appealability, pgs. 4–5; (Appendix A; [App. 4a–5a]).

Both the District Court and Sixth Circuit did not dispute Gilmore's claim that the process used by the trial judge to reach its decision was based on an objectively unreasonable determination of the facts. Instead, the Court reasoned that since the trial court "accurately summarized the trial proceedings," then its decision was entitled to AEDPA deference. In doing so, the Courts have sanctioned the Michigan trial Judge's departure from the accepted and usual course of judicial proceedings. Their conclusion that the trial court *"accurately summarized the trial proceedings,"* addresses a completely different question than whether the *process* used by the trial court to reach its decision was based on an unreasonable determination of the facts. "*Unreasonable*" is different from "*incorrect*" or "*erroneous.*" *Williams v Taylor,* 529 U.S. 362, 412 (2000).

Analysis Under 28 U.S.C § 2254(d)(2)

28 *U.S.C.* § 2254(d)(2) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
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> * * *
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Plain meaning serves as the touchstone in this analysis. *Carter v United States,* 530 U.S. 255, 271 (2000). Legislative intent and other extrinsic evidence of statutory purpose provide a secondary path to proper construction, supplementing a possibly ambiguous provision, but can never contravene the plain meaning of the text. *National Bank v Germain,* 503 U.S. 249, 253-54 (1992). Words and phrases should receive the same construction throughout the statute and should be interpreted, to the extent possible, to give full effect to all provisions. *TRW Inc. v Andrews,* 534 U.S. 19, 31 (2001) ("It is

'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

According to *Blacks Law Dictionary,* 9th Ed. (2009), "adjudication" is defined as "The legal process of resolving a dispute; the process of judicially deciding a case." *Id.,* p. 47. In addition, the word "determination" in § 2254(d)(2) has two meanings in common parlance – the *process* by which a decision is reached, and the *substance* of the decision that is reached. *See, e.g., Webster's Ninth New Collegiate Dictionary,* p. 346 (1983) (determination defined as both "act of deciding definitely" and "decision settling and ending a controversy"). Section 2254(d) appears to use the word in both senses. Both in the context of the *AEDPA* and in other types of criminal proceedings, a determination of "reasonableness" depends not only on the substance of the underlying ruling or finding, but also on the adequacy of the process that produced it. *See, e.g., Gall v United States,* 552 U.S. 38, (2007) (review of sentence for reasonableness includes determination that sentencing decision was "procedurally sound"); *Taylor v Maddox,* 366 F.3d 992, 999 (9th Cir. 2004) (habeas petitioner may challenge a conviction under Section 2254(d)(2) on the grounds that "the process employed by the state court is defective").

The Process Used To Adjudicate Gilmore's Claims Violated Due Process And Resulted In A Decision That Was Based On An Unreasonable Determination Of The Facts Under 28 U.S.C. § 2254(d)(2).

Here, it was a denial of Gilmore's due process right to an impartial judge and an objectively unreasonable determination of the facts in light of the evidence presented for the trial judge to abdicate its role as independent fact-finder and determine that the prosecutor's 2004 arguments were a sufficient basis for its 2011 decision. Gilmore's 2011 motions contained facts and arguments that were not cited in the 2004 motion and were not addressed in the 2011 decision.

Gilmore was entitled to due process in his post-conviction proceeding. *U.S. Const* Am XIV; *Skinner v Switzer,* 131 S. Ct. 1289, 1302 (2011). (Thomas, J., dissenting) ("[A]lthough a State is not required to provide procedures for post-conviction review, it seems clear that when state collateral review procedures are provided for, they too are part of the 'process of law under which [a prisoner] is held in custody by the State.'"). The right to a hearing before an impartial judge "is a basic requirement

of due process." *In re Murchison,* 349 US 133, 136 (1955). "Any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias." *Commonwealth Coatings Corp. v Continental Casualty Co.,* 393 US 145 (1968). The adjudication of Gilmore's claims by a judge who was not impartial violated the "basic requirement of due process." In *Marshall v Jerrico, Inc.,* 100 S. Ct. 1610, 1613 (1980), this Court stated:

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the ***appearance*** and the reality ***of fairness,*** "generating the feeling, so important to a popular government, that ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." (Citations omitted) (Emphasis added).

In *Offutt v United States,* 75 S. Ct. 11, 14 (1954), this Court penned the frequently recited statement, "Justice must satisfy the appearance of justice."

Recently, in *Williams v Pennsylvania,* 136 S. Ct. 1899, 1909 (2016), this Court stated:

> "An insistence on ***the appearance of neutrality*** is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both ***the appearance and reality of impartial justice*** are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.' (Emphasis added).

Of notable relevance to the instant case, this Court held:

> "The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."
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> * * *
>
> "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists ***when the same person serves as both accuser and adjudicator in a case.***"

Id., 136 S. Ct. at 1905. (Citation and quotation marks omitted) (Emphasis added).

Similarly, in Gilmore's case, the trial judge practically "served as both accuser and adjudicator." By *sua sponte* obtaining arguments on the states behalf, the trial judge put herself in the untenable position of ferreting out arguments upon which the State did not rely. These were inherently antagonistic and biased arguments presented by a learned Prosecutor who, in his zeal, advocacy and enthusiasm, prosecuted the case against Gilmore as vigorously as he could. The judge was acting as an advocate for the State rather than as an impartial judge. The judge's actions gave the appearance, not of a judicious reasoned decision, but rather an abdication of its judicial obligation to dispense justice fairly and evenly, which denied Gilmore his due process right to an impartial judge. *U.S. Const,* Am XIV.

Not only was the process used by the trial judge to adjudicate Gilmore's claims objectively unreasonable, it was an abdication of its constitutional obligation to determine the facts and decide the issues in controversy and merely adopt the Prosecutor's arguments as its decision. Not only did the judge pierce the veil of judicial impartiality to reveal a level of favoritism that "make a fair judgment impossible," *Liteky v United States,* 510 US 540, 555 (1994), any decision resulting from such a flagrant disregard of judicial responsibility is a decision based on an unreasonable determination of the facts. 28 *U.S.C.* § 2254(d)(2). Such a decision is not entitled to deference under the AEDPA.

IV. Granting This Petition Will Provide This Court With A Vehicle To Settle A Significant Conflict Among The State And Federal Courts As To The Appropriate Remedy For When A Judge Violates Due Process And The Appearance Of Impartial Justice By *Sua Sponte* Adopting, Verbatim, The Findings Of Fact And Conclusions Of Law Of One Of The Parties As The Court's Decision, Without Reading The Record Or Making Any Independent Findings.

The District Court and Sixth Circuit's resolution of this claim conflicts with several United States Courts of Appeals that have long condemned the practice of "verbatim adoption of findings of fact prepared by prevailing parties" as an abdication of responsibility by the assigned fact-finder and a disservice to reviewing courts. *United States v El Paso Natural Gas Co.,* 376 U.S. 651, 657 n.4 (1964):

Chicopee Mfg. Corp. v Kendall Co., 288 F.2d 719, 724-25 (4th Cir.) *cert. denied,* 368 U.S. 825 (1961) (while citing authority for the submission to the court of proposed findings of fact and conclusions of law by the attorneys for the opposing parties in the case and the adoption of such of the proposed findings as the judge may find to be proper, the Court further stated that "there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side," and that "That practice involves the failure of the trial judge to perform his judicial function," justifying a reversal and a remand for further proceedings.); *Maljack Productions, Inc. v Good Times Home Video Corp.*, 81 F.3d 881, 890 (9th Cir. 1996) (remanding the case for findings and reassigning the case to a new judge, noting the 'regrettable practice' of adopting the findings drafted by the prevailing party wholesale) (*quoting Sealy, Inc. v Easy Living, Inc.*, 743 F.2d 1378, 1385 n.3 (9th Cir. 1984)); *Cuthbertson v Biggers Bros., Inc.*, 702 F.2d 454, 465-66 (4th Cir. 1983) ("The district court in the case at hand did not merely adopt such of the proposed findings and conclusions as it found to be proper; it adopted 24 pages of them verbatim, with only a few inconsequential changes. We express again our strong disapproval of this practice. Even if the vacation of the district court's order is not required by the practice, it is permitted because of it, and we are of opinion it is an additional reason to remand the judgment"); *FMC Corp. v Varco International*, 677 F.2d 500, 501 n.2 (5th Cir. 1982) (noting that "[w]e have consistently expressed our disapproval of the practice of unconditionally adopting findings submitted by one of the parties to a litigation"). Accord, *Keystone Plastics, Inc. v C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir.. 1975); *Bradley v Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967); *Louis Dreyfus & Cle. v Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir. 1962).

More recently, this Court has written that "[a]lthough we have stated that a court's "'verbatim adoption of findings of fact prepared by prevailing parties"' should be treated as findings of the court, we have also criticized that practice. *Anderson,* [*v City of Bessemer,* 470 U.S. 564 (1985], 470 U.S., at 572 . . . . And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence that the judge may not have read them." *Upton, supra,* 130 S. Ct. at 2223.

Several State courts have also condemned the practice: *Schmidkunz v Schmidkunz,* 529 N.W.2d 857, 858 (N.D. 1995) (fail[s] to foster the appearance of fairness and impartiality"); *Safety Natural Cas. Co. v Cinergy Corp.,* 829 N.E.2d 896, 993 n. 6 (Ind. App. 2005) ("weaken[s] our confidence . . . that the findings are the result of considered judgment by the trial court"); *Schallinger v Schallinger,* 699 N.W.2d 15, 23 (Minn. Ct. App. 2005) ("raises the question of whether the court independently evaluated the evidence"); *Makino, U.S.A., Inc., v Metlife Capital Credit* Corp., 518 N.E.2d 519, 526 (Mass. App. Ct. 1988) (raises "a gnawing doubt . . . about how much the judge injected his own intelligence into the process"); *Krupp v Krupp,* 236 A.2d a653, 655 (Vt. 1967) (may cause court to be "charged with overlooking the proper performance of its judicial function"); *Williams v State,* 627 So. 2d 985, 993 (Ala. Crim. App. 1991) ("wholesale adoption of a draft prepared by the state gives rise to a legal issue of whether the findings and conclusions are in fact those of the court."); *South Side Lumber Co. v Stone Const. Co.,* 152 S.E. 2d 721, 724 (W. Va. 1967) (Trial court "should not surrender or delegate [its] important function by a mechanical adoption of findings proposed by counsel"); *Pollock v Ramirez,* 870 P.2d 149, 154 (N.M. Ct. App. 1994) (should be "avoid[ed]"); *Harrigan v Gilchrist,* 99 N.W. 909, 993 (Wis. 1904) ("quite liable to lead to bad results"); *E.L.S. v F.M.S.,* 829 S.W.2d 19, 21 (Mo. Ct. App. 1992) ("Even the most conscientious advocate cannot reasonably be expected to prepare a document which would reflect precisely the trial court's view of the evidence.") (quotations and citations omitted); *Kaechele v Kaechele,* 594 N.E.2d 641, 647 (Ohio Ct. App. 1991) ("breeds error and reversal");

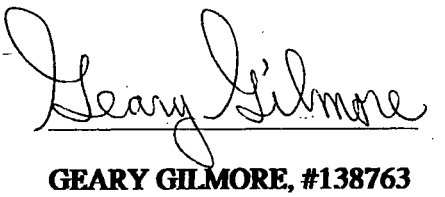
More to the point, on habeas review, "the question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable – a substantially higher threshold.'" *Knowles v Mirzayance,* 556 U.S. 111, 123 (2009) (quoting *Schriro v Landrigan,* 550 U.S. 465, 473 (2007)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington,* 562 U.S. at 101. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 556 U.S. 123.

To consider the the trial court's decision in this case to be "reasonably determined," would be to stretch the latitude for making reasonable determinations beyond the boundaries contemplated in *Harrington,* 562 U.S. at 101, and *Knowles,* 556 U.S. at 123. Nothing could be more unreasonable in reaching a decision than for a judge to completely abdicate his or her judicial role, adopt the role of prosecutor and – without the prosecutor's consent – present arguments on the prosecution's behalf – then adopt those arguments verbatim as the judge's decision.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

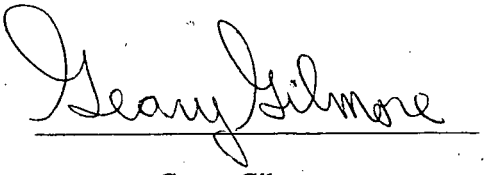


GEARY GILMORE, #138763
Petitioner In Pro Se
E.C. Brooks Correctional Facility
2500 S Sheridan Drive
Muskegon Heights, MI 49444

Dated: March 8, 2018

VERIFICATION

I, Geary Gilmore, declare under penalty of perjury that he has read the foregoing Petition for Writ of Certiorari, and knows the contents thereof to be true of his own personal knowledge except for those matters therein stated upon information and belief and as to those matters, he believes them to be true.



Dated: March 8, 2018

Geary Gilmore