20-5684

THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

DOCKET NO: 19A979

Frank Joseph Schwindler,
Appellant,

v.

Shay Hatcher, Warden, et al.,
Appellees.

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
RELATED TO
AN INTERLOCUTORY APPEAL FROM A HABEAS CORPUS DECISION
IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

FRANK JOSEPH SCHWINDLER
GDC# 323208
PHILLIPS STATE PRISON
2989 WEST ROCK QUARRY ROAD
BUFORD, GA 30519-4118

STATEMENT OF THE QUESTIONS

1. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit, finding that it lacked jurisdiction to review the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's § 2254 case is contrary to this Court's holding in Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983)?

2. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit, finding that the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's § 2254 case were not a precedent-setting error of exceptional importance in interpreting the requirements for "excusing a petitioner's failure to exhaust state remedies" when it has been shown that the State of Georgia's procedure for reviewing post-conviction challenges had been inadequate in Schwindler's case, as shown by that challenge having languished within the State Courts for over 15 years without resolution?

3. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit, finding that the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's § 2254 case were not subject to review, was a precedent-setting error of exceptional importance in interpreting the requirements for establishing venue in § 2254 cases in view of the conflict between "the policy of the United States courts within the State of Georgia" to transfer § 2254 actions to the district within which a conviction occurred, and the clear statement of required venue set by Congress within the statute, as well as considerations of equal protection, due process, and various provisions of law and equity?

CERTIFICATE OF INTERESTED PERSONS AND PARTIES

1. Batten, Hon. Timothy C. - U.S. District Judge; Northern District of Georgia.
2. Baverman, Hon. Alan J. - U.S. Magistrate Judge; Northern District of Georgia.
3. Branch, Hon. - U.S. Circuit Judge; 11th Circuit.
4. Beauvais, Steven - State Stand-by Appellate Counsel.
5. Hatcher, Shay - Warden; Respondent/Appellee
6. Karpf, Hon. Michael, - State Trial Judge; Chatham County Superior Court.
7. Martin, Hon. - U.S. Circuit Judge; 11th Circuit.
8. McConnell, Gregory - State Prosecutor; Chatham County District Attorney's Office.
9. Moore, Hon. William - U.S. District Judge; Southern District of Georgia.
10. Ray, Hon. Christopher - U.S. Magistrate Judge; Southern District of Georgia.
11. Rosenbaum, Hon. - U.S. Circuit Judge; 11th Circuit.
12. Schwindler, Frank - Petitioner/Appellant
13. Smith, Paula - Counsel for Respondent/Appellee; Georgia Department of Law.
14. Turner, Hon. Debra K. - State Habeas Corpus Judge; Gwinnett County Superior Court.

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III. FRANK JOSEPH SCHWINDLER V. CEDRIC TAYLOR, WARDEN

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Georgia Supreme Court; Docket No. S18H0017.

IV. FRANK JOSEPH SCHWINDLER V. AHMED HOLT, WARDEN

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U.S. Court of Appeals, 11th Circuit; Docket No. 19-11693-A
Decided; August 28, 2019.
Rehearing Decided: November 20, 2019.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit related to an interlocutory appeal from a habeas corpus decision in the United States District Court for the Southern District of Georgia pursuant to 28 USC § 2254.

The initial judgement of the Eleventh Circuit was entered on August 28, 2019. Motion for Reconsideration was considered and denied on November 20, 2019. Notice of Intention to Seek Certiorari in this Court was filed in both the Eleventh Circuit and Southern District Courts, and served on counsel on February 4, 2020. A sixty-day extension of time to file this petition was sought by petitioner on February 4, 2020, and granted by Justice Thomas.

Pursuant to 28 USC § 1746, I hereby certify that no notifications are required by Supreme Court Rule 29.4 (b) and (c) associated with this petition. Sworn to this 12th day of April, 2020

Frank Joseph Schwindler

FRANK JOSEPH SCHWINDLER
323208 / A-2-12-B
PHILLIPS STATE PRISON
2989 WEST ROCK QUARRY ROAD
BUFORD, GA 30519-4118

CONSTITUTIONAL PROVISIONS AND TABLE OF CITED AUTHORITIES

CERTIFICATE OF COMPLIANCE

WITH

SUPREME COURT RULE 33.2

Pursuant to 28 USC § 1746, I hereby certify that this petition complies with Supreme Court Rule 33.2 as to font, type size, and word limits. The number of pages within the petition does not exceed 40 as established by the rule. This 12th day of April, 2020.

Frank Joseph Schwindlea

FRANK JOSEPH SCHWINDLEA
323208/A-2-12-B
PHILLIPS STATE PRISON
2989 WEST ROCK QUARRY ROAD
BUFORD, GA 30519-4118

PRISON MAILBOX RULE CERTIFICATION

Pursuant to 28 USC § 1746, I hereby certify that I have this 12th day of April, 2020, placed the within Petition for Writ of Certiorari into the legal mail system provided by Phillips State Prison, properly addressed to the Clerk of the Court, with copy to counsel for Appellee. I hereby invoke the prison mailbox rule as to the timeliness of this petition. The Court should take note that Phillips State Prison is currently undergoing severe restrictions on movement within the prison, as well as in and out of the prison due to the COVID-19 pandemic. No legal supplies have been available since March 10th, and no access to legal research facilities or record materials have been possible since March 11th. All mail in and out of the prison has been subject to quarantine since March 12th. Sworn to under penalty of perjury, this 12th day of April, 2020.

Frank Joseph Schwindler

FRANK JOSEPH SCHWINDLER
323208/A-2-12-13
PHILLIPS STATE PRISON
2989 WEST ROCK QUARRY ROAD
BUFORD, GA 30519-4168

Remailed this 12th day of June, 2020.

Frank Joseph Schwindler

FRANK JOSEPH SCHWINDLER

Recertified and remailed along with sworn affidavit this

Frank Joseph Schwindler

FRANK JOSEPH SCHWINDLER

STATEMENT OF THE CASE

I. UNDERLYING CASE BACKGROUND

Schwindler retained counsel prior to being arrested on February 10, 1999. (Dwight Feemster and Jack Strother). His adult adopted son, Albert Charles (Chuck) Schwindler, who was on parole, participated in numerous defense team meetings, and assisted counsel with investigating potential witnesses. Counsel made arrangements to associate counsel (Michael Schiavone) to represent Chuck, but considered him to be a member of the general defense team. The State arrested Chuck several times between February of 1999, and June of 2000, with the sole intent of forcing him to "cooperate" in the prosecution of Schwindler. Among other things, the State demanded that Chuck reveal such defense strategies, defense witnesses, and intentions as he had been privy to as part of the supposed defense team. Once Chuck was faced with the threat of never being released from prison unless he "cooperated," he agreed to do whatever the State wanted.

Counsel moved to withdraw based upon what they perceived to be a conflict of interest due to Chuck's participation within the defense team. During a September 29, 1999, hearing on the topic, the trial court commented that the State's efforts to obtain Chuck's "cooperation" was just "good police work." Schwindler was given 30 days to obtain new counsel. When Schwindler was unable to obtain counsel in the allotted time, he requested appointment of stand-by counsel along with an order to compel the Sheriff to provide access to legal materials. Part-time Magistrate Judge Emory Bazemore was appointed to represent Schwindler, and the trial court instructed Schwindler that the court would not interfere in the jail's operation to require that he be provided access to legal research materials or assistance. Bazemore refused to serve in a stand-by capacity. The relationship between Schwindler and Bazemore was tendentious from the outset. Bazemore called Schwindler a "god-damned liar" in open court on the third day of trial while cross-examining a prosecution witness (who was subsequently proven to have embezzled thousands of dollars from Schwindler). The trial court declined to order a mistrial, and found that Schwindler acquiesced to all of this.

Schwindler was convicted on March 10, 2000, following a week-long jury trial in the Superior Court of Chatham County, Georgia, of three counts

of child molestation, two counts of aggravated child molestation, two counts of enticing a child for indecent purposes, and one count of violation of the Georgia private school reporting act - all related to a single 13-year-old victim. He received a directed verdict of not guilty on the one count of child pornography.

Between conviction on March 10, 2000, and sentencing on March 24, 2000, Schwindler demanded that the trial court remove the court-appointed counsel who had been imposed upon him following the court's dismissal of retained counsel, and its continuing failure to conduct a "Faretta hearing" (Faretta v. California, 422 U.S. 806), and requested a short continuance to prepare for sentencing. Schwindler's motion for continuance was denied, and the trial court finally dismissed appointed counsel, but still refused to conduct a proper "Faretta hearing." The State did not conduct a pre-sentencing investigation as required by Georgia law, and Schwindler was not permitted to introduce any mitigation evidence or arguments.

The State requested and received an enhanced sentence of three concurrent life terms for the three counts of child molestation based upon Schwindler's December 3, 1987, "Alford plea" in the Superior Court of Muscogee, Georgia. (Alford v. North Carolina, U.S.). Schwindler was charged with molesting a 13-year-old boy in Columbus, GA, on July 27, 1987. The date and time of offense were specific within the indictment. The court appointed counsel, but counsel never bothered obtain records from the Veterans Administration Medical Center (VAMC), Tuskegee, AL, which proved Schwindler could not have molested anyone in Georgia on July 27, 1987, because he was physically in the VAMC at Tuskegee at the time. Schwindler consisted to insist he was not guilty, but counsel paid little attention to him. On December 3, 1987, the trial court conducted a hearing on Schwindler's motion to suppress photographs which had been obtained by the Tallapoosa County, AL, Sheriff's Department following an unconstitutional search of Schwindler's lake house in Dadeville, AL, on November 2, 1985. Schwindler had entered a guilty plea to possession of child pornography in the Tallapoosa County District Court in 1986. Two parts of the plea were pertinent to the 1987 case: (1) Schwindler preserved his challenge to the constitutionality of the 1985 search under Alabama law, and (2) the State agreed to not enter the photographs

into the record of the case, but to destroy them upon the entrance of Schwindler's plea. Alabama either did not destroy the photographs, or someone within the Sheriff's Department illegally kept photocopies of the originals. Counsel was unprepared to challenge various false assertions made by witnesses during the hearing. Those witnesses falsely asserted that the photographs were part of the Alabama record, that the search had been ruled to be constitutional by the Alabama court, and that Schwindler's Alabama probation had been revoked by the Alabama court. When the trial court ruled the photos of Schwindler's nephews would be published in open court, Schwindler agreed to enter an "Alford plea" in exchange for a prison sentence concurrent with the supposedly revoked Alabama probation so as to prevent exposing his nephews (whose photographs they were) to further embarrassment.

In addition to the three life terms, Schwindler was sentenced to two concurrent thirty year terms, with twenty-five years to served consecutive to the lifes for the two aggravated child molestation counts (the lesser included offenses thus receiving the greater punishment of life); and two consecutive twenty year terms to be served on probation concurrent with the lifes; as well as imposing a one hundred dollar fine for the school reporting act violation, and one hundred thirty three dollars in court costs, to be paid consecutive to all other sentences.

Motion for new trial was filed pro se, and Schwindler unequivocally demanded to represent himself on appeal. The trial court appointed Steven Beauvais anyway. Beauvais advised the trial court that Schwindler wished to represent himself during the first of many evidentiary hearings between June of 2000 and September of 2001. The trial court reluctantly agreed, but continued to not conduct a "Faretta hearing," and required all pleadings to be submitted through Beauvais as "attorney/advisor" or "stand-by counsel." Schwindler was not allowed to speak on his own behalf or make any arguments during any of the repeated hearings until after his appeal was denied by the Georgia Court of Appeals, and the trial court conducted an evidentiary hearing to reconsider Schwindler's pro se Motion to supplement the record with documents alleged to be missing from the original appellate record in August of 2002. The appellate record was finally supplemented by the trial court - but not until Schwindler's direct appeals were completed.

The State rearrested Schwindler's son, Chuck, at the outset of the motion for new trial process in an effort to ensure his continued "cooperation." When the trial court opined that perhaps Chuck should be given immunity from prosecution in order to encourage him to be more forthcoming, the State vehemently protested that the trial court had no such authority. Chuck finally got exasperated at the State's continually increasing demands, and testified as to all of the various threats and actions taken by the State in the course of both cases. The State responded by ignoring its written promise to not revoke Chuck's parole, declaring that his truthful testimony did not constitute "cooperation." As soon as Chuck announced that he would tell the trial court the whole story, the State revoked his parole without a hearing.

In spite of Chuck's sentence having been found to be "excessive" by the Georgia Board of Pardons and Paroles in 1995, he remains incarcerated - having served more than 23 years in prison for a first offense series of four robberies over a nine day period in 1987, without a weapon, injury, or threat of injury to any of the victims. Chuck is an eagle scout, with an honorable discharge from the United States Army, who earned a college degree magna cum laude, owned his own house and business. The State of Georgia has opposed Chuck's release claiming that doing so is not in the best interests of society "due to the nature and circumstances" of his offense. The real offense is having been adopted by Schwindler, and Chuck's refusal to continue "cooperating" in the fashion demanded by Assistant District Attorney Gregory McConnell.

Schwindler's attempts to perfect the record as to the State's prosecutorial misconduct related to the entire course of its efforts to control precisely how and when Chuck would testify, and what his testimony would consist of, was thwarted by Beauvais' refusal to subpoena either of Schwindler's two retained attorneys, Dwight Feemster and Jack Strother, as well as by the trial court's refusal to permit Schwindler to speak on his own behalf during motion for new trial proceedings. Schwindler was not permitted to call a single of the many witnesses he believed were necessary to call in order to perfect the record on this issue. The trial court merged Schwindler's independent prosecutorial misconduct complaint with his motion for new trial, but then prevented Schwindler from pursuing the issue.

Following denial of motion for new trial, Schwindler filed his notice of appeal pro se. Beauvais was told that Schwindler intended to file his own appellate brief. Beauvais ignored Schwindler and filed his own brief that not only cited incorrect case law, it argued numerous points against Schwindler's interests. The Georgia Court of Appeals responded to Schwindler's objections to proceeding on Beauvais' brief by granting Schwindler leave to submit a short supplemental brief. Schwindler's direct appeal is the only direct appeal in Georgia history conducted both pro se and with counsel in spite of this sort of arrangement being specifically prohibited by Georgia law.

While Schwindler's direct appeal was making its way through the courts, it was discovered that several hundred pages of documents which belonged in the record on appeal had not been included in the initial direct appeal record. Schwindler's criminal appeal eventually ended up being considered in three separate appeals due to ongoing discoveries of materials which should have been included in the initial record.

The State of Georgia began attempting to limit Schwindler's ability to prosecute his appeals shortly after he was transferred to the Georgia Department of Corrections (GDC) in September of 2002. At one point, Assistant District Attorney Gregory McConnell called the warden at one of the prisons Schwindler was being held to demand that Schwindler not be permitted to pursue a lawsuit against one of the prosecution's witnesses who had embezzled thousands of dollars from Schwindler. Schwindler refused to drop the case (Chatham County Schwindler v. Colson-Arbogast. 2001-CV-0191), and the prosecution witness, Elizabeth Colson-Arbogast, was eventually compelled to declare bankruptcy in order to repay the damages.

The GDC repeatedly seized Schwindler's legal files, obstructed access to his legal materials, and began transferring him all over the State in what is called "diesel therapy." He was kept in solitary confinement for seven and a half years in an attempt to break his will to continue fight his conviction. Schwindler was transferred to 5 different prisons between September, 2002, and February, 2003 - an average of 29 days as Schwindler sought certiorari in this Court. The repeated transfers and denial of access to legal records and research materials led this Court to extend the deadline for filing Schwindler's initial

petition for writ of certiorari. At one point, the GDC even denied Schwindler use of paper and pens - telling him to use toilet tissue and a golf pencil. Schwindlers attempt to seek certiorari ended when the GDC seized all of his legal materials and ordered their destruction as "nuisance contraband" in March of 2003. Certiorari was denied. (Schwindler v. Georgia; 538 U.S. 2016 [2003]). The "diesel therapy" continued.

Schwindler filed a State civil rights action pursuant to 42 USC § 1983 concerning the obstruction on March 25, 2003. The trial court entered a restraining order prohibiting destruction of the legal files, but it took no other action. No sooner had a negotiated agreement been made to allow Schwindler access to his legal materials that the State resumed Schwindlers "diesel therapy." Schwindler, his State civil rights action, and his State habeas corpus action were repeatedly transferred every few months beginning in February of 2005. The cases were ultimately merged and appeared in 4 different courts before 6 different judges in the following 10 months. The State ignored every court's order or oral direction to stop transferring Schwindler, and to permit access to his legal materials. When Hancock County Superior Court Judge James L. Cline, Jr. caused 5 boxes of legal files the State had introduced as the trial court record during a December, 2006, hearing to be copied and sent via FedEx to Schwindler, the State actually intercepted the shipment and didn't even advise the court or Schwindler of their action. "Diesel therapy" and other harassment continued even after Judge Cline excoriated the State for its obstruction during a November 7, 2007, hearing on the State habeas. (See Schwindler v. Commissioner, GDC, 605 Fed. Appx. 971 [11th Cir., 2015]).

After over 9 years of near continual obstruction, harassment, and "diesel therapy" by the State of Georgia, Schwindler filed a 42 USC§ 1983 lawsuit in the U.S. District Court for the Northern District of Georgia (ND GA) in 2011. In response to the States continual lack of cooperation, that court appointed the law-firm of Sutherland, Asbill, and Brennan (Ann Fort) to represent Schwindler in case number 1:11-CV-1276-TCB. The district court entered a summary judgement against Schwindler after finding he could not prove an ongoing constitutional violation.

Schwindler appealed pro se to the U.S. Court of Appeals for the 11th Circuit (11th Circuit), and that court appointed Merritt McAlister of King & Spalding after issuing a certificate of appealability. The 11th Circuit agreed with Schwindler that the loss of the legal files and continual delays in his challenge to conviction stated an ongoing constitutional violation. Judge Cline's November 7, 2007, comments were prominently featured in the 11th Circuit's decision remanding the case with directions. (605 Fed. Appx. 971 [11th Cir. 2015]).

McAlister sought and received appointment in the district court (ND GA) to continue representing Schwindler. McAlister eventually got several thousand pages of Schwindler's missing documents provided to him in electronic form, along with increased access to the legal materials in the State's possession, which belonged to Schwindler, but his State habeas corpus proceeding continued to languish due to the slowness of the State's provision of materials the State had seized and "lost" between 2003 and 2016.

Because Schwindler's State habeas was going nowhere as the State took its time providing the "lost" materials, Schwindler filed his 28 USC§ 2254 petition in the ND GA in May of 2016. (Schwindler v. Holt, 1:16-CV-1845-TCB). The § 2254 was filed in the ND GA because: (1) Schwindler is incarcerated in the ND GA; (2) Schwindler's § 1983 was in the ND GA; (3) Schwindler's 1st State habeas was 1st filed in the ND GA; (4) Schwindler's State habeas was still in the ND GA; (5) Federal Rules require § 2254 petitioners to file in the district court where they are incarcerated; (6) Georgia law requires habeas petitions to be heard in the county of incarceration; (7) Judicial economy requires companion cases to be assigned to the same judge; (8) All attorneys involved in both cases resided in the ND GA; (9) the facts of the § 1983 are relevant to the § 2254 case for due process reasons; and (10) There are no potential witnesses other than stand-by counsel Steven Beauvais who reside in any other district in Georgia.

II. CURRENT CASE BACKGROUND

Without providing Schwindler any opportunity to be heard on the matter, the ND GA transferred Schwindler's § 2254 to the U.S. District Court

for the Southern District of Georgia (SD GA) in June of 2016. Schwindler objected to the SD GA in 2016, citing each of the 10 points above. The SD GA agreed with Schwindler's arguments and sent his §2254 back to the ND GA in 2017. These were the 1st transfers of Schwindler's case in the federal courts.

The ND GA scheduled the §1983 for trial in May of 2017. As soon as the §1983 was scheduled for trial, the State moved the Gwinnett County Superior Court to set the State habeas for a "final hearing" - assuring Schwindler and both courts that ALL "lost" documents had either already been produced, or would be produced at the hearing, and that initial potential trial defense witnesses Cody Cahoon, Erick Williams, Tom Fisk, and Joshua Brantley would be present. Schwindler was given forms for the State to obtain the VAMC Tuskegee records that establish he could not have committed the 1987 offense used to enhance his sentence, and the Social Security disability records that support his contention he physically could not have committed the 1997 offense for which he was convicted. These forms were provided by the State through the federal §1983 lawsuit attorney, Merritt McAlister. The Gwinnett County Court scheduled the "final hearing" for late April of 2017, in an attempt to preclude the ND GA from having any say about the ongoing constitutional violation.

Schwindler objected to the State Court conducting a "final hearing" before the obstruction matter of the federal §1983 was resolved, and before the State actually produced the VAMC and Social Security records. His objections were overruled as the Gwinnett Court ruled that obstruction of a habeas corpus action is not cognizable in a habeas corpus action in Georgia, therefore it didn't matter whether the legal files were "lost" or "destroyed" by the State. The Gwinnett County Court also stated that anything the federal court ruled in the §1983 would be irrelevant. Schwindler's request for subpoenas was denied, as was his request for the Gwinnett Court to bring back appellate stand-by counsel for cross examination concerning the thousands of pages of documents received after his previous appearance.

Instead of the State producing ANY of the potential trial defense witnesses, or ANY of the promised missing documentary evidence, as originally announced, the State called the initial prosecutory, Gregory

McConnell, prosecution witness Cathy Cahoon (who had initiated the criminal prosecution), and Paulette Hosti - Tom Fisks' ex-wife. (Cathy Cahoon was another of the prosecution witnesses who was involved in a successful lawsuit brought by Schwindler. In October of 2004, Schwindler obtained a judgement in the U.S. District Court for the District of South Carolina for $470,400.00, at 2.2% APR from February 10, 1999, in admiralty against the sailing ship Fridhem and the Spirit of Savannah Foundation. Cathy Cahoon was the Treasurer of the foundation. The Superior Court of Effingham County, Georgia, refused to permit the judgement to be executed. Assistant District Attorney Gregory McConnell assisted Cahoon at various points of her defense.)

Schwindlers' objection to the States witnesses as being contrary to habeas corpus rules was overruled. After the State was allowed to essentially "re-prosecute" the States initial case, Schwindler was told to examine these witnesses, or examine no witnesses, because his habeas corpus was ending that day no matter what. Schwindler's request to keep the record open for inclusion of additional documents from the federal § 1983 was denied.

After having been pending for over 13 years, in 6 different superior courts, before 8 different judges, and held in abeyance for the State to stop obstructing by seizing, holding, and "losing" necessary legal materials; and subjecting Schwindler to seven and a half years in solitary confinement, and "diesel therapy" by transferring him 22 times (until the State was finally directly ordered to stop transferring Schwindler in 2013... 16 transfers in the preceeding 9 years), Hon. Debra K. Turner of the Gwinnett County Superior Court decided enough time had been "wasted" (her word) considering Schwindlers' case. All the findings of every previous court - including those of the 11th Circuit - were "irrelevant." Judge Cline's November 7, 2007, comments were ignored.

Schwindler filed his Application for Certificate of Probable Cause in the Georgia Supreme Court (GA SC) on July 20, 2017. Between the State habeas corpus hearing and his appeal in that case, Ms. McAlister advised Schwindler to dismiss his § 1983 case, because as long as the State produced the promised VAMC and Social Security records there was little or no relief the Court could provide - especially since the State habeas corpus record

was closed. Schwindler's federal § 1983 was dismissed on May 18, 2017. As should have been predictable, the State never provided either set of documents.

The ND GA Magistrate, "sua sponte," recommended transferring the § 2254 back to the SD GA following the State's 2nd or 3rd motion to dismiss. (It is rather obvious that an order entered following submission of any motion is not truly "sua sponte," but the ND GA prefered that fiction.) Schwindler objected on several grounds - the most pertinent of which was implicit in the 11th Circuit's 13-A-15073-C decision ... there comes a point at which repeated delays and transfers of a habeas corpus case requires remedial action due to the due process violations implicated by the delays and transfers. In plain English, there's a time where a court must say "enough is enough."

The ND GA's October 23, 2017, order transferring the § 2254 back to the SD GA purports to consider Schwindler's objections, but none of his substantive objections are even hinted at, nor is there any indication that the court paid any attention to the 11th Circuit's comments cited above as inordinate and unjustified delays in State habeas corpus proceedings. Interestingly enough, the October 23, 2017, order was not ever served on Schwindler until after he got a notice from the SD GA Clerk and wrote for a copy of the order. (Technically speaking, Schwindler has still never been served with a copy of this order.) Objections filed in the SD GA as to denial of his right to appeal the transfer were ignored until after the SD GA Magistrate entered a Report and Recommendation that has also still not been served on Schwindler in spite of repeated written requests since May 4, 2018. (An objective observer might begin to notice a pattern of due process violation at this point.) The first clue Schwindler had about either action was the receipt of the SD GA's May 4, 2018, order.

Schwindler filed a Rule 60 motion challenging the legitimacy of the transfer, the due process violation of not serving him a copy of the Report and Recommendation, and the refusal to engage with his assertion that the repeated transfers and delays have worked a due process violation that requires relief.

The SD GA took no action on Schwindler's Rule 60 Motion for almost a year - allowing the habeas to continue to languish, and when the court finally denied Schwindler's motion, it did so without addressing any of the points raised by Schwindler. A Notice of Appeal was filed and a request to proceed in forma pauperis was submitted. The 11th Circuit docketed the case and directed Schwindler to submit his formal application by letter on June 24, 2019. Schwindler received the June 24 letter on June 28, 2019.

On July 1, 2019, the 11th Circuit notified Schwindler of a jurisdictional question, and provided Schwindler with 14 days to respond. Again, as has happened repeatedly throughout Schwindler's 20 years of challenges to conviction, the GDC did not deliver the jurisdictional question to Schwindler until there was no way to meet the court's deadline.

Between the time the SD GA filed its order denying Schwindler's Rule 60 Motion, and the 11th Circuit's docketing Schwindler's appeal, the GA SC finally concluded Schwindler's State challenges to his March 10, 2000, conviction - over 19 years later - after having taken more than four times the time that court normally requires to consider a habeas corpus appeal. No habeas corpus case in American history has had a more tortured course to conclusion within the courts of any other State - and given the fact that Schwindler's challenge has yet to actually begin the process within the federal courts, no habeas corpus challenge at any level has a history like this one.

Schwindler sought, and received a ten-day extension for answering the 11th Circuit's jurisdictional question. Schwindler argued that the appellate court had jurisdiction because the §2254 should have proceeded to a hearing in the ND GA after Schwindler showed that court that the "inordinate and unjustified delays in the state corrective process" justified excusing "his failure to exhaust state remedies," and that the point at which some court had to say "enough is enough" had long since passed. (It is a misstatement of facts to assert that Schwindler "failed to exhaust state remedies." The more accurate statement is that Georgia has actively obstructed him from doing so. In fact, as noted in Schwindler's request for a 60-day extension to file

this petition for certiorari: (1) Schwindler had only been permitted to use the law library 4 times between November 20, 2019, and February 4, 2020; (2) Schwindler only received indigent legal supplies twice during that same period; (3) the average time processing outgoing legal mail since before November 20, 2019, has been 10 days; (4) the average time for delivering incoming legal mail during the same time period has been 10 days; (5) the GDC has not provided Schwindler with access to any of his legal files or materials since the Gwinnett County Court conducted its final hearing in April of 2017, in spite of its agreement to provide such access on at least a weekly basis as part of its attempts to resolve the ND GA's §1983; and (6) the GDC has eliminated all ability for Schwindler to use any of his electronically stored legal files and materials even if the GDC were to permit him to have access to them.)

In addition to arguing that the three year delay caused by the federal courts' repeated transfers, and failure to set the matter down for a hearing while the State courts continued allowing the State of Georgia to obstruct the case by dithering in its provision of the materials promised as part of the ND GA's §1983, Schwindler argued that the SD GA's May 4, 2018, stay order had put him "effectively out of court" pending conclusion of related proceedings (Schwindler's 2017 GA SC habeas corpus appeal) which the SD GA had no reason to believe was anywhere near a resolution. (The GA SC had already surpassed its "normal" time for deciding habeas corpus appeals by more than 100%, and was, in fact, still more than a year away from deciding to not decide. In the end, the GA SC took more than four times its normal time to decide to not review the Gwinnett County Court's decision.) Schwindler pointed out that less than 20 days of the 8,142 days since he was convicted on March 10, 2000, had not been tolled under the AEDPA, and argued that that one fact alone should scandalize anyone even passingly concerned about due process and access to the courts.

On August 28, 2019, the 11th Circuit found that Schwindler's appeal of the May 4, 2018, and April 1, 2019, SD GA stay orders was timely as to both orders, but concluded it did not has jurisdiction because it found that neither order was final or fell into a specific class of interlocutory

orders that are made appealable by statute or jurisprudential exception. Schwindler's motion for reconsideration was denied on November 20, 2019. The statutory deadline for seeking review in this Court was February 18, 2020. Schwindler submitted an emergency motion for extension of time to file this petition for writ of certiorari on February 4, 2020. Justice Thomas granted the requested 60-day extension, and this petition follows.

Schwindler remains incarcerated at Phillips State Prison; 2989 West Rock Quarry Road; Buford, GA 30519-4118.

IMPORTANT NOTE

Schwindler has continued to have no access to either legal research facilities, or his electronic legal records since March 13, 2020, due to Phillips State Prison being on semi-quarantine/limited movement caused by the Covid-19 pandemic. The first virus patient at the prison was identified on March 12, 2020. The immediate impact of this lockdown is that Schwindler is unable to provide full legal citations and authorities at certain parts of this petition. In the event that the prison resumes movement, Schwindler will attempt to provide missing citations and authorities via supplementary filing. This denial of access to legal research and materials has continued up until this 12th day of June, 2020.

Frank Joseph Schwindler

FRANK JOSEPH SCHWINDLER
323208/A-2-12-B
PHILLIPS STATE PRISON
2989 W. ROCK QUARRY RD.
BUFORD, GA 30519-4118

ARGUMENT & CITATION OF AUTHORITIES

1. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit finding that it lacked jurisdiction to review the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's § 2254 case is contrary to this Court's holding in Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983)?

DECISION BELOW:

"... we lack jurisdiction to review order because we conclude that they are not final or immediately appealable. See 28 USC §§ 1291, 1292; CSX Transp. Inc. v. City of Garden City, 235 F. 3d 1325, 1327 (11th Cir. 2000)..."

"The district court's stay order also does not qualify for immediate review under the 'effectively out of court' doctrine because the stay was not immederate and did not involve an indefinite period of delay." See Miccosukee Tribe of Indians of Florida v. S. Fla. Water Mgmt. Dist., 559 F.3d 1191, 1194 (11th Cir. 2009); King V. Cessna Aircraft Co., 505 F. 3d 1160, 1165-66 (11th Cir. 2007).

PERTINENT FACTS AND ARGUMENT

Schwindler's State habeas was filed on March 25, 2004. His § 2254 was filed May 16, 2016 - 12 years and 2 months later. On the day the § 2254 was filed, not one thing had changed in his efforts to challenge conviction from the day he had filed his State 42 USC§ 1983 action concerning Georgia's ongoing obstruction of Schwindler's access to court on March 25, 2003 - 13 years and 2 months earlier. Nothing had changed from the day (November 7, 2007) Hon. James L. Cline, Jr., of the Hancock County Superior Court had stated:

> "I don't know how I can move forward... and I don't know how any judge in the State of Georgia or in the United States Federal System can move forward with anything on Mr. Schwindler's case until the materials that moves Mr. Schwindler's case forward starts moving with Mr. Schwindler."

(Transcript of Hancock County Superior Court case 05-HC-47; 11/7/07; page 14, line 21, to page 15, line 3; Exhibit #1 to Schwindler's 42 USC § 1983 complaint in ND GA case 1:11-CV-1276-TCB; quoted by the 11th Circuit in 605 Fed. Appx. 971 [2015].) Nothing - not a thing had changed, Schwindler

still didn't have all his legal materials - his State habeas was still not moving forward.

In spite of these facts, and in spite of the 11th Circuit's order in 605 Fed. Appx. 971 stating that the State's ongoing obstruction of Schwindler's attempts to challenge his conviction posed an ongoing Constitutional violation, and in spite of having Schwindler's companion §1983 case before it, and in spite of Congress having provided that venue in §2254 cases lies in the district of incarceration, the ND GA perpetuated the languishing of Schwindler's habeas by transferring his §2254 to the SD GA. And it did so without permitting Schwindler to be heard in opposition. Once the SD GA considered Schwindler's objections to the transfer, it returned the §2254 to the ND GA, and the ND GA sent it back to the SD GA, without even serving a copy of its October 23, 2017, order on Schwindler.

The SD GA did nothing for more than 6 months. The GA SC had already done nothing concerning Schwindler's appeal to that court for almost a year (more than double its normal time for deciding such cases). There was, in fact, no change in anything even remotely associated with Schwindler's case that precipitated the SD GA's decision to indefinitely stay the §2254, pending any action by the GA SC. Schwindler had again objected to the §2254 having been transferred back to the SD GA, but could not appeal that action without leave of court since he had never received the ND GA October 23, 2018, order. (You can't appeal an order you don't receive.) He had also argued that it was past time for a federal court to excuse his inability (not failure) to exhaust State remedies due to the "inordinate and unjustified delays in the State corrective process." (Dixon v. Florida, 388 F. 2d 424 [5th Cir. 1968]). As with everything else the courts have done with Schwindler's case over the years, the SD GA entered its indefinite stay of Schwindler's §2254 without permitting him to be heard in opposition.

There had been no change in the facts. Nothing had changed in the State courts since long before the §2254 had been transferred back to the SD GA. Schwindler had no access whatsoever

to any of his legal materials - no access whatsoever to legal research materials or indigent legal supplies - Schwindler still had not (and still has not) received any of the VAMC Tuskegee records which definitively prove he was not guilty of the 1987 Muscogee County case used to give him 3 life terms. It was (and is) as if the 11th Circuit never ruled in Schwindler's favor in 605 Fed. Appx. 971. (As an aside, the initial ND GA §1983 contained two issues. In addition to the obstruction issue, Schwindler, who is a Seneca Indian, complained about the GDC's obstruction of his RLUIPA rights. The GDC entered into an agreement on September 28, 2012, to permit Schwindler to exercise those rights, and guaranteed he'd be permitted to continue doing so as long as he was in a GDC facility. He was guaranteed regular times to smoke his pipe along with other Indians. As soon as the ND GA sent his §2254 to the SD GA, the GDC immediately seized a package of previously approved items, including all Kinnick-Kinnick and ceremonial materials - even feathers - which were reclassified as weapons. Ever since the SD GA entered its April 1, 2019, stay of Schwindler's §2254, the GDC has reverted to its total obstruction of Schwindler's RLUIPA rights. Weekly American Indian Sacred Circle meetings continue to appear on the chaplaincy schedule, but Schwindler and the other Indians at his prison have not been permitted to gather even once. Again - it is as if 1:11-CV-1276-TCB and 605 Fed. Appx. 971, never happened.) In short, the SD GA had no reason to enter a stay on May 4, 2018, and even less of a reason to reenter a stay on April 1, 2019.

On the day the SD GA entered its April 1, 2019, stay, the SD GA had already done nothing concerning Schwindler's case for more than four times its normal time for deciding similar cases. There was, thus no factual reason to conclude that progress had been made towards concluding Schwindler's case in the State courts. In light of the facts set forth above, and in view of Judge Cline's findings on November 7, 2007, any supposed progress was really "make believe" since nothing had changed in the real world. The fact that the SD GA knew on April 1, 2019, above all others was that Schwindler's challenge to his convictions had already taken more than 19 years. Any notion

that progress had been made - or was being made - was pure speculation. Courts are supposed to deal with facts and law - not speculation.

Schwindler was, in fact, "effectively out of court" once the SD GA entered its 1st stay on May 4, 2018. It is a mistake to look backwards from the vantage point of August 28, 2019, to conclude that "progress had been made" - and was observable - on May 4, 2018. The rule is that court decisions are reviewed based upon what the court knew at the time. Once the May 4, 2018, order was entered, Schwindler was permanently put out of court as to the question of the transfer back to the SD GA from the ND GA, as well as to the argument that the federal courts had ignored the "inordinate and unjustified delays in the State corrective process" by not allowing Schwindler's §2254 to proceed after over 19 years worth of bouncing around the Georgia courts. The SD GA knew the transfer issue was at the heart of the problem with Schwindler's challenges to conviction. In what way could a federal court conclude that transferring Schwindler's §2254 between federal courts between May of 2016, and October of 2017 (an average of a transfer every 5 2/3 months) after 13 years of similar transfers within the State of Georgia was "progress"?

The 11th Circuit's decision is directly contrary to this Court's decision in Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. The question is when is a stay one where a litigant is "effectively out of court"? Schwindler submits that this Court's decision in Moses H. Cone Mem'l Hosp. was a common sense one which looked to the totality of circumstances of the case. Two of the questions a court must consider before entering a stay involve balancing the harm to the adverse party with the harm to the other party if no stay is entered, and whether the public policy - or interests of the public - supports the entry of the stay.

Georgia would argue that the federal court stay was necessary to protect its right to decide Schwindler's claims within its court system - "free of interference" from the federal courts. Georgia would insist that losing a chance to consider Schwindler's claims would work a harm to Georgia's sovereignty. Of course, Schwindler, and a common sense review of the facts, given the totality

of circumstances, argue that 19 years without federal "interference" is proof positive of a Constitutionally unacceptable process - at least in Schwindler's case - in Georgia. Over 19 years of "inordinate and unjustified" delays is a fact that simply will not go away.

It is not even possible to enunciate a list of harms to Schwindler that the 19 years of delays have caused - and continue to cause. In a very real way, the SD GA's stays were the straw that broke the camel's back. As noted above, Schwindler is in a worse position for prosecuting his challenges to conviction than he has been at any time since he was arrested on February 10, 1999. He has no access to any of his legal materials - not the few paper copies still in GDC possession - not the electronic ones - which are also in the GDC's possession. The minute the ND GA got rid of Schwindler's cases on October 23, 2017, the GDC had no more fear of "federal interference" from a court familiar with the history of Schwindler's case due to the years of direct involvement with Schwindler and his case. Georgia suddenly had no reason to provide the VAMC Tuskegee records - or to continue honoring its September 28, 2012, agreement. Virtually all witnesses who could have helped Schwindler have died or gone missing. The evidence and witnesses necessary to overcome the presumptions of correctness and deference to State courts no longer exist. By perpetuating the languishing of Schwindler's case for an additional 2 years, the SD GA not only effectively put him out of court for those two years, it set in motion the actions which have left Schwindler unable to prosecute his §2254 - period. No objective trier of fact could fail to conclude that Schwindler has suffered the greater - and irreparable harm.

What about the public interest? Can anyone say that it is in the public interest to allow Georgia - or any State - to obstruct a party's efforts to vindicate Constitutional rights for more than 19 years? Is there not a stage at where the federal courts must say "enough is enough?" Is it not in the public interest for federal courts to step in when such egregious due process and equal protection violations are made manifest?

The 11th Circuit's decision avoided dealing this this Court's Moses H. Cone Mem'l Hosp. decision because there is no way to reconcile what the

11th Circuit wanted to do for policy reasons. The 11th Circuit wanted to substitute facts not known to the SD GA on May 4, 2018, or April 1, 2019, in place of those known to the district courts on those dates so as to avoid the unavoidable conclusion that the Georgia process as applied in Schwindler's case was unacceptable as a matter of public interest and the Constitution. The lengths the 11th Circuit went to to avoid seeing the elephant in the room is illustrated by citing King v. Cessna Aircraft Co., as if that decision applying Moses H. Cone Mem'l Hosp. somehow undid this Court's "effectively of of Court" doctrine.

At its core, King says that a stay puts a party "effectively out of court" when it is indefinite (like Schwindler's), and has an end factor that is dependent upon an unknown and unknowable event - "pending conclusion of related proceedings in a different court." In King the court struck down a stay that had been entered pending conclusion of a related proceeding in an Italian court. The King trial court had no idea when the Italian court would conclude its related proceeding - or even if it would do so. The decision to strike down the stay did so solely because the predicate for lifting the stay (the conclusion of the Italian proceeding) was unknown - and unknowable to the King trial court. The relevant facts are identical to Schwindler's. Quite contrary to the 11th Circuit's decision, the SD GA May 4, 2018, and April 1, 2019, stays were both indefinite on the dates they were entered, because the SD GA did not know - and could not have known if or when the GA SC would enter its decision in Schwindler's case. Nothing in the 19 plus years of the Georgia courts' handling of Schwindler's case even implied that a decision would ever be coming. For the 11th Circuit to state:

> "Although we recognize that there has been considerable delay in Schwindler's federal and state proceedings, the district court's stay order was premised on the fact that progress had been made..."

is an unbelievable intrusion of magical thinking or policy preferences in place of the facts as they actually are in the record. The SD GA had no more reason to believe "progress" had been made on May 4, 2018 (and that's the relevant date since that's when the stay was entered) than the King court. In fact, the King

court had more reason to rely on the Italian court reaching a timely conclusion than the SD GA had on May 4, 2018, because the Georgia courts had already delayed Schwindler's challenges for longer than any other in American history, and the GA SC had already exceeded its normal time for deciding. More to the point, the SD GA's May 4, 2018, stay actually perpetuated what was already a 2 year federal stay of Schwindler's §2254 since May of 2016, which built upon the 17 years worth of State court stays. On May 4, 2018, the stay was not only indefinite on its face, and dependent upon an unknowable predicate for its end date, it was immoderate by virtue of perpetuating the already 2 years long federal delay on top of the decade plus stay Judge Cline had essentially imposed by declaring that no court anywhere could proceed until Georgia began cooperating on November 7, 2017. (The Court should stop to consider this point. Would the 11th Circuit have upheld Judge Cline if he had entered a formal stay on November 7, 2007, that was predicated upon Georgia's "cooperation"? Of course it wouldn't have. It found that Georgia's continued lack of "cooperation" stated an ongoing constitutional violation in 605 Fed. Appx. 971. Judge Cline hoped his comments would obtain timely cooperation from Georgia. He had no inkling that he would be dead, and Schwindler's State habeas would "time out" after 5 more years, and would not even begin to obtain even minor cooperation from Georgia until after the 605 Fed. Appx 971 decision.)

A stay is determined to be indefinite based upon its face. If a stay has an unknown or unknowable predicate for lifting, it is by definition indefinite. An indefinite stay, by definition, is one which puts the adverse party "effectively out of court", and is thus, by definition, contrary to Moses H. Cone Mem'l Hosp. The 11th Circuit had it right in King - making lifting a stay dependent upon conclusion of matters in another court is, by definition, an impermissible indefinite stay because that adverse party has been effectively put out of court. The 11th Circuit's finding that the May 4, 2018, and April 1, 2019, stays were not indefinite or immoderate is simply contrary to facts as to the face of the SD GA's May 4, 2018, and April 1, 2019, stays - as well as to the facts before the SD GA on those dates - and the decision is not saved by the after-the-fact decision of the GA SC to not decide anything in Schwindler's

case because Schwindler was still out of court as to the transfer issue (the ND GA's 2017 transfer to the SD GA), the proper venue for § 2254 actions in Georgia issue, and the exhaustion of State remedies issue - each of which are now incapable of ever being reviewed by any court

The SD GA entered orders on the transfer issue on April 30, 2019, and May 15, 2019 (copies are in the Appendix attached hereto), because it was recognized that the venue and transfer issues pose important procedural and pubic policy questions. The general rule followed by this Court has always been that whenever a procedural or public policy question is capable of recurring, but escaping review, equity requires exercise of the reviewing courts jurisdiction, Schwindler has addressed the specific transfer and venue issues below at Question * 3.

2. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit, finding that the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's §2254 case were not a precedent-setting error of exceptional importance in interpreting the requirements for "excusing a petitioner's failure to exhaust state remedies" when it has been shown that the State of Georgia's procedure for reviewing post-conviction challenges had been inadequate in Schwindler's case, as shown by that challenge having languished within the State Courts for over 15 years without resolution? . . .

DECISION BELOW:

"The district court's stay order also does not qualify for immediate review under the 'effectively out of court' doctrine..."

PERTINENT FACTS AND ARGUMENT:

Schwindler was convicted on March 10, 2000. Georgia directly and deliberately obstructed Schwindler's access to courts - seizing all of Schwindler's legal materials, including the record of his case, documentary evidence (including certified copies of the VAMC Tuskegee records), and witness affidavits on March 17, 2003. Every court's attempts to move Schwindler's challenges to conviction were ignored by Georgia. Judge James L. Cline, Jr.'s comments on this issue were prominently featured in the 11th Circuit's finding in 605 Fed. Appx. 971, that the loss and destruction of Schwindler's legal materials stated an ongoing Constitutional violation in 2015. When the 11th Circuit's decision still didn't result in an end to the obstruction, Schwindler filed his §2254 petition in the ND GA, and argued that he should be excused from the requirement to exhaust state remedies because that process had been, and continued to be obstructed by the State of Georgia, and this situation had persisted for over 15 years. The ND GA, which had been reversed by the 11th Circuit's 605 Fed. Appx. 971, decision responded by transferring the §2254 to the SD GA without permitting Schwindler to be heard in opposition. The SD GA agreed with Schwindler that his §2254 should be in the ND GA, and transferred the case back to the ND GA. Instead of making a decision on Schwindler's exhaustion arguments, the ND GA did nothing - continuing to hope that Georgia would stop obstructing Schwindler's §2254. As soon as the ND GA set the §1983 down for trial, Georgia demanded,

and received a complete reversal of position by the State courts as to the obstruction issue. Prior to the ND GA's scheduling of Schwindler's §1983 for trial, every Georgia court, including the Gwinnett County Superior Court, had agreed with Judge Cline that the obstruction issue had to be resolved before the State habeas could be addressed. After the scheduling of the §1983, the Gwinnett County court suddenly decided - after 4 years of waiting for the State to stop obstructing, not only was the State's obstruction irrelevant, the State habeas had to be heard and decided before the ND GA could hold its scheduled trial. The ND GA transferred Schwindler's §2254 without ever deciding the exhaustion issue, and Schwindler's efforts to get the SD GA to make any sort of decision on this issue were ignored.

Schwindler submits to the Court that the 11th Circuit's failure to address the exhaustion issue sanctioned the district courts' refusal to make any decision on the issue, and that this is a departure from the usual course of judicial proceedings in such a fashion as to call for an exercise of this Courts supervisory power. (Supreme Court Rule 10[a]).

It is, or should be in-arguable that a 15-years-long State habeas corpus proceeding is constitutionally unacceptable regardless of the reasons for the delay. In this case, the delays were caused by the State seizing, holding and "losing" Schwindler's legal materials. (See 605 Fed. Appx. 971). It does not matter if Georgia's initial intention was obstruction, delay, or business as usual. All that matters is that the obstruction occurred and had the result that it has. As Judge Cline stated on November 7, 2007, no court could reasonably proceed with Schwindler's habeas corpus case until the legal materials were available to Schwindler, especially the VAMC Tuskegee records.

As noted previously, not much has changed over the past 17 years. In March of 2003, the problem was that Georgia had taken all of the paper copies of Schwindler's legal materials and wanted to destroy them. In November of 2007, the problem was that Georgia refused to cooperate with the State habeas corpus court. [See transcript of Hancock County Superior Court case 05-HC-47 at Exhibit #1 to complaint in ND GA case 1:11-CV-1276-TCB / 11th Circuit 13-A-15073-C [605 Fed. Appx. 971]). Today,

the problem is that Georgia has possession of all of Schwindler's electronic legal materials, and has found various reasons for not allowing Schwindler to have any access to those materials for the past 3 years. Georgia has, of course, still not provided Schwindler with the "lost" VAMC Tuskegee records. In short, nothing has changed in Schwindler's case - except that the federal courts have sanctioned the State court's finding that it is okay for Georgia to subvert any habeas corpus from proceeding by seizing and "losing" legal materials so as to delay proceedings until there's no possibility of properly prosecuting the case.

In addition to the legal materials related delays, Georgia subjected Schwindler to 7½ years of solitary confinement and over 10 years of "dietal therapy" transfers between prisons in an effort to wear him down and dissuade him from seeking recourse from the courts. Again, it does not matter what Georgia's intent was. The facts are what they are. Schwindler was transferred by Georgia 24 times between September of 2002, and February of 2014 - an average of once every six months (until the ND GA finally put a stop to the transfers). Schwindler's State habeas corpus case was transferred at Georgia's request - over Schwindler's objections that Georgia was venue shopping (contrary to Freer v. Johnson(__GA__, cites unknown), between six different courts. As Judge Cline noted on November 7, 2007, every time Schwindler encountered a cooperative warden or Superior Court judge, Georgia had Schwindler, and/or his case transferred.

All of the indisputable facts in Schwindler's case point to a habeas corpus procedure in Georgia which, as applied to Schwindler, is unconstitutionally inadequate to the point where the district court should have been required to excuse exhaustion of state remedies once the facts were made known to the ND GA in May of 2016. This is doubly true since the 11th Circuit had pointed the ND GA to Dixon v. Florida, 388 F.2d 424 (5th Cir. 1968), on this precise point. (605 Fed. Appx. 971) There is simply no way to defend Georgia's habeas corpus procedure in Schwindler's case, because no habeas corpus case in American history has ever languished as long, and cases delayed years less time for potentially more valid reasons have been found to require excusal of failure to exhaust State remedies. If Schwindler's case doesn't mandate excusal of the requirement to exhaust state

remedies, then no case in American history could possibly qualify. The refusal of the two district courts of Georgia to even address this series of facts or issues is an egregious example of refusal to see the forest for the trees. While Lady Justice is supposed to be blind, she's not supposed to intentionally ignore or dismiss that which is obvious to even the most casual of observers.

This question of whether or not the 11th Circuit's August 28, 2019, decision to not address this critical issue of inordinate and unjustifiable delays to Schwindler's post conviction challenges caused by deliberate and direct obstruction by the State of Georgia is a departure from the accepted and usual course of judicial proceedings has ramifications far beyond those in Schwindler's case. From Schwindler's perspective, the federal courts' sanctioning of the procedure followed in his specific case has resulted in a foreclosure of his ability to ever obtain a fair and objective review of his conviction. From the point of view of all other §2254 petitioners, Schwindler's case establishes the precedent that no-matter how egregious a State's behavior in obstructing a criminal case from receiving an objective review, the federal courts will not intervene or excuse the requirement of a §2254 petitioner to exhaust state remedies. Schwindler submits that this is an important public policy matter that the Court should address and resolve. Due process of law, equity, and the interest of justice all call out for this Court to consider this question.

One thing is certain, and that is that the 11th Circuit is wrong on the facts and law on this issue, because Schwindler is definitely - and permanently out of court on the issue of being prevented by Georgia from properly exhausting his State remedies. If - by an act of God - Schwindler were to suddenly obtain the VAMC Tuskegee records that definitively prove he was not guilty of the crime used to give him 3 life sentences (and he had these until Georgia took them from him), no federal court could even consider them because only facts in the record before the State courts can be considered by a §2254 court. If this isn't being out of court - nothing is. This case provides a road map for how to subvert challenges to conviction by selected petitioners.

3. Whether or not the August 28, 2019, opinion of the U.S. Court of Appeals for the 11th Circuit, finding that the May 4, 2018, and April 1, 2019, orders of the U.S. District Court for the Southern District of Georgia indefinitely staying Schwindler's §2254 case were not subject to immediate review, was a precedent-setting error of exceptional importance in interpreting the requirements for establishing venue in §2254 cases in view of the conflict between "the policy of the United States courts within the State of Georgia" to transfer §2254 actions to the district within which a conviction occurred, and the clear statement of required venue set by Congress within the statute, as well as considerations of equal protection, due process, and various provisions of law and equity?

DECISION BELOW:

"The district court's stay order also does not qualify for immediate review under the 'effectively out of court' doctrine..."

PERTINENT FACTS AND ARGUMENT:

Schwindler is an inmate in the Georgia prison system. He is subject to Georgia law. Georgia law requires inmates to bring a habeas corpus action in the Superior Court of the county in which he is incarcerated at the time he initiates his habeas corpus action. Georgia law does not permit a Georgia inmate to bring a habeas corpus action in the Superior Court of the county in which he was convicted unless the Georgia inmate is incarcerated there at the time his habeas corpus action is filed. 28 USC § 2254 contains the exact same requirements. All state inmates must file their §2254 petitions within the district in which they are incarcerated. The ONLY difference between the Georgia and federal venue rules is that there are no exceptions to the Georgia rules, while the 11th Circuit has allowed for the possibility of local exceptions. (Eagle v. Linahan, 279 F.3d 926, 933 n.9 [11th Cir. 2001]). Allowing something is not mandating it.

The State of Georgia took advantage of the Georgia venue rules to cause Schwindler's State habeas corpus action to be transferred to the local Superior Court of the County he was transferred to by the GDC whenever it liked the new venue, but to object to the case being transferred along with Schwindler whenever Georgia didn't like the new venue. Preer v. Johnson was cited repeatedly by the State and transferring courts. Schwindler's objections that the State was engaging in "venue shopping" in a manner disapproved of by Preer were repeatedly ignored by the State habeas courts, but Judge Cline did

address the transfer issue in his November 7, 2007, comments. (Exhibit #1 to §1983 complaint in ND GA 1:11-CV-1276-TCB). Judge Cline declined to transfer the habeas, so the State simply let Georgia's 5 year time-out period elapse. Once Schwindler renewed the State habeas, Georgia reverted to its venue shopping transfers until the ND GA ordered the State to not transfer Schwindler or his habeas again.

Both Georgia law and federal rules require all cases between similar parties or on related subjects to be assigned to the same judge. This rule has to do with judicial economy and the interests of justice. The end of one of a set of related cases does not alter the reason for assignment for another of the set of cases to the same judge. While there is no doubt that any judge can become familiar with the most complicated set of facts, that capability does not diminish the reason for assigning cases in the interests of judicial economy. In Schwindler's case, no one really knows how many tens of thousands of pages of documents are involved in any of his cases. (The ND GA district courts' October 23, 2017, order transferring Schwindler's §2254 case back to the SD GA is illustrative of the nebulus nature of the Schwindler records when it states Schwindler was "provided with several thousand pages of public documents" at the top of page 3. "Several thousand pages" is not a precise or discrete number, and these were not just "public documents," they were materials which Georgia took from Schwindler that, to quote the 11th Circuit in 605 Fed. Appx. 971, "went missing." Of course, the "several thousand pages" were those Georgia found convient to replace, not the inconvenient VAMC Tuskegee records.)

The ND GA judge was presumably familiar with the facts of the §1983, and the 11th Circuit's 605 Fed. Appx. 971, decision reversing his 2013 summary judgement order. The further one gets away from the facts of any case, the less likely it becomes that anyone can familiarize themselves with those facts. This simple human fact applies to lawyers and the best of federal judges. It's why Georgia has had the same lawyer represent the 12 different respondents in both Schwindler's State and Federal habeas cases. The best federal judge always has to be refamiliarized with cases before them after passages of time. It is not a supportable position to assert, as the SD GA has, that any judge can remember that which has never been learned. The whole reason for judicial economy

assignments is to recognize that prior exposure to a set of facts is invaluable to a judge. A judge familiar with Schwindler's case would never need a 13 page statement of the case as was necessary for this Court.

The Georgia habeas corpus procedure, as set forth by statute, envisions an expeditious resolution of habeas corpus cases by mandating that they be heard where the inmate is in custody. While it allows inmates to be transferred, it does not mandate that habeas corpus cases be transferred whenever an inmate is transferred by the State. Preer v. Johnson specifically permits habeas corpus cases to be transferred unless it is shown that the State is "venue shopping" in search of a less-favorable-to-the-inmate venue. Georgia demanded that Schwindler's habeas be transferred 3 times in 2005 alone, and then opposed Schwindler's requests for the case to be transferred after each of 11 transfers of Schwindler in the next 8 years. As noted above, only the death of Judge Cline, and the implication of the 5-year dismissal rule allowed Schwindler to move the habeas from Hancock County. As soon as the case was set for a hearing in Macon County, Georgia had Schwindler transferred to Gwinnett County, and demanded that the habeas be transferred to Gwinnett County, where it languished for 4 more years as Georgia took its time producing the "thousands of pages" referenced above.

It should be intuitively obvious to the most casual of observers that the Georgia habeas corpus procedure did not operate as designed in Schwindler's case. The fact is that the Georgia procedure in Schwindler's case was anything but expeditious.

The federal habeas corpus procedure under 28 USC § 2254 is supposed to be more expeditious than Georgia's. Like Georgia, § 2254 cases are supposed to be heard in the district where they're filed / the inmate is incarcerated. While bringing an inmate to court is easy enough in theory, it is not easy in practice due to security considerations and costs... both for the State and federal courts. Federal § 2254 hearings are rare - especially those with inmates present. The majority of § 2254 cases are disposed of based upon the records. This fact is yet another reason for the wisdom of assigning cases with related facts and records to the same judge.

If Schwindler were a federal inmate from South Carolina (where he was actually taken into custody from his ship's operating base on February 10, 1999) incarcerated in the ND GA, there would be no question of the case being transferred to South Carolina; 28 USC § 2255 is explicit and allows of no exceptions. Equal protection under the 14th Amendment should cause Schwindler's § 2254 to be treated in precisely the same fashion as a federal inmate's § 2255. Schwindler's § 2254 should be in the ND GA because the facts and law remains the same: (1) Schwindler is in the ND GA; (2) Schwindler's § 1983 was in the ND GA; (3) Schwindler's State habeas was initially filed pursuant to State law in the ND GA; (4) Schwindler's State habeas was heard/denied in the ND GA; (5) 28 USC § 2254 requires State inmates to file in the district where they're incarcerated - which in this case is the ND GA; (6) Georgia law requires inmates to seek habeas corpus relief in whatever jurisdiction they're incarcerated; (7) judicial economy dictates that Schwindler's § 2254 be before the same judge as the § 1983 - which is the ND GA; (8) all attorneys directly involved in both the § 1983 and § 2254 reside in the ND GA; (9) the facts of the § 2254 and § 1983 are closely related and overlapping; (10) the only potential § 2254 witness located anywhere in Georgia outside of the ND GA is stand-by appellate counsel Steven Beauvais.

It is not possible to argue that it is cheaper, more expeditious, more convenient, or more reasonable (or anything else) for Schwindler, respondent's counsel, and all potential witnesses and evidence to be brought to Savannah for any potential evidentiary hearing than it would be to cause Steven Beauvais to travel to Atlanta or testify via video/telephone.

Due process and equal protection require venue to be in the ND GA. Virtually every provision of Georgia law and 28 USC § 2254 mandates that venue be in the ND GA. The only argument for the SD GA having venue is a policy of the Georgia federal courts that cannot possibly outweigh any of the other facts or considerations in this case. While it is remotely possible that there are § 2254 cases which might benefit from the notion that "the district of conviction would appear to be the most convenient for witnesses should an evidentiary hearing be necessary..." (Stahl v. Crosby, No. 5:06-CV-45-SPM, 2006 WL 931864 *1 [ND FLA, April 10, 2006])[15], this factually not true in Schwindler's

case by any stretch of the imagination. Such facts matter. Policies made for convenience can never outweigh facts, law, or the Constitution.

Considering some of the factors cited in support of the policy of the Georgia federal courts as ratified by the 11th Circuit yields the conclusion that there really isn't a reasoned process behind the policy. As noted above, almost no §2254 result in evidentiary hearings due to the AEDPA and its emphasis on deferring to State court findings in almost all cases, as well as the requirement for federal courts to not considering evidence or facts not found in the State court records except in exceptional cases. Policy rules can never be based upon exceptional cases rather than the general cases. One of the reasons set forth for the Georgia federal court policy is to balance out the case load between the three districts. The problem with this reasoning is that it's not based on facts. The facts are that Georgia has 3 federal districts, and each district has approximately the same number of State prisons and State inmates as equal the proportional populations of the districts. While the ND GA has the Atlanta metropolitan area, and its population/crime demographic, the MD GA has a larger number of next level population/crime centers, while the SD GA is similarly situated. In other words, none of the districts would face a disproportionate number of §2254 cases if they merely followed the statute and practice set forth under Georgia law. There is, in fact, no rational or reasonable cause for the Georgia federal courts' policy except for having "always done it this way" (from the days when Georgia had only one large city and most prisons not anywhere near that city).

Beyond the above, it is incomprehensible that any district court could conclude that a §2254 petitioner whose State habeas corpus proceeding has languished for over 15½ years due to the 6 transfers of that case, and 24 cases of that petitioner, would not be further prejudiced and compromised by the federal case being sent back and forth between district courts for no reason beyond the supposed convenience on non-existent witnesses and achieving a balance of caseloads that are already balanced... especially given the 11th Circuit's highlighting of Dixon v. Florida in 605 Fed. Appx. 971.

The SD GA was right to send the § 2254 back to the ND GA in 2017. The ND GA was wrong to send it back to the SD GA in October of 2017, and to not permit Schwindler to appeal that transfer. The SD GA was wrong to not send the case back to the ND GA in 2018 for the same reasons it had done so in 2017. It was also wrong to not allow Schwindler to directly appeal the October, 2017, transfer. The policy of the federal courts of Georgia concerning § 2254 cases' venue is wrong. Policies cannot outweigh facts, law, Congressional intent and/or the Constitution.

Schwindler submits to the Court that the 11th Circuit's failure to address the transfer/venue issue (which the SD GA recognized was central to his appeal) (See Appendices C and D) sanctioned the district courts' adherence to a policy which is contrary to statute, Georgia law and practice, and both clauses of the 14th Amendment, and is a departure from the usual course of judicial proceedings in such a fashion as to call for the exercise of this Court's supervisory power pursuant to Supreme Court Rule 10(a).

The 11th Circuit's finding that it lacked jurisdiction to review the SD GA's May 4, 2018, and April 1, 2019, orders because they ostensibly had not put him effectively "out of court," is an unreasonable decision on both the facts and the law, because Schwindler could not be more out of court on this very important question. The SD GA realized that Schwindler had a legitimate reason for appealing the May 4, 2018, and April 1, 2019, orders as to the venue/transfer issue, but the 11th Circuit ignored the facts of the case and the law so as to avoid addressing the challenge to the policy. The 11th Circuit should have found jurisdiction and struck down the policy as applied to Schwindler's case.

CONCLUSION

The 11th Circuit had jurisdiction to consider Schwindler's appeal of the SD GA's May 4, 2018, and April 1, 2019, orders as to the indefinite stays which put Schwindler effectively out of court pursuant to Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., and as to the exhaustion of state remedies and the venue transfer issues for which he is actually out of court due to the 11th Circuit's failure to exercise its jurisdiction.

The district courts erred in not excusing Schwindler from the requirement to exhaust state remedies because the Georgia habeas corpus procedure in Schwindler's case did not meet the minimal due process requirements of the U.S. Constitution because of the inordinate and unjustifiable delays which have caused Schwindler's habeas corpus challenges to languish for longer than any other in American history.

The policy of the U.S. Courts within the State of Georgia to transfer §2254 cases to the districts within which a conviction occurred is not mandatory and does not outweigh considerations of facts, due process, equal protection, and various provisions of law, as well as Congress' intent as stated in 28 USC §2254. Schwindler's §2254 belongs in the ND GA, and the district courts have abused their discretion by transferring Schwindler's §2254 back and forth between them - exacerbating the due process violations caused by the interminable delays caused by Georgia's direct and deliberate obstruction of the State corrective procedure in Schwindler's case.

The Court should issue Writ of Certiorari to the 11th Circuit and appoint counsel to represent Schwindler. This 12th day of April, 2020

Frank Joseph Schwindler

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