

NO. 21-5138

In The

SUPREME COURT OF THE UNITED STATES

In re Willie S. Smith

**CERTIFICATE OF COUNSEL OF UNREPRESENTED PETITIONER FOR
REHEARING OF PETITION OF HABEAS CORPUS**

Willie S Smith
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Petitioner *pro se*

Mr. Dave Yost: Attorney General of Ohio
State Office Tower,
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I, Willie S. Smith, do swear or declare that this Certification of counsel (or of a party unrepresented by counsel) is presented in "good faith" and not for delay, and also that all issues raised are restricted to grounds specified to in Supreme Court Rule 44.2.

I declare under penalty of perjury that the forgoing is true and correct pursuant to
28 U.S.C §1746.

Executed on October 15, 2021

Willie S. Smith

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Pro se litigant

NO. 21-5138

In The

SUPREME COURT OF THE UNITED STATES

In re Willie S. Smith

**PETITION FOR REHEARING
PURSUANT TO Sup. Ct. R. 44.2**

PROOF OF SERVICE

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I Willie S. Smith, do swear or declare that on October 15, 2021 as required by Supreme Court rule 29. I have served the enclosed, Petition of Rehearing of Writ of Habeas Corpus pursuant to Supreme court rule 44.2, Motion for leave to file in Forma Pauperis, Certificate of Compliance, Certificate of unrepresented counsel, on each party to the above proceeding or opposing party's counsel, and every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each party, with first- class postage prepaid, or by delivery to a third -party commercial carrier for certified delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mr. Dave Yost: Attorney General of Ohio
State office Tower,
30 East broad Street, 16th floor
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I do declare under penalty of perjury that the forgoing is true and correct pursuant to § 28 U.S.C. §1746.
Executed on October 15, 2021.



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NO. 21-5138

In The
SUPREME COURT OF THE UNITED STATES

In re Willie S. Smith

**CERTIFICATE OF COMPLIANCE FOR PETITION FOR
REHEARING OF HABEAS CORPUS PETITION**

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As required by Supreme Court rule 33.1(h), I Willie S. Smith certify that the Petition for Rehearing of Habeas Corpus contains 2814 words, excluding the parts of the petition exempted by Supreme Court rule 33.1(d).

I do declare under penalty of perjury that the forgoing is true and correct pursuant to 28 U.S.C §1746.

Executed on October 15, 2021



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PETITION FOR REHEARING
PURSUANT TO Sup. Ct. R. 44.2

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QUESTIONS PRESENTED

1. The first question presented in this Request for Rehearing is whether intervening circumstances of a substantial or controlling effect, or other substantial grounds not previously presented, warrant relief from this Court.
2. The second question is whether the denial of habeas relief by this Court is inconsistent with this Court's decision in *In re Davis*, 557 U.S. 952, 130 S.Ct. 1, 174 l. Ed. 2d 614.

PARTIES TO THE PROCEEDINGS BELOW

The proceeding giving rise to this request for Rehearing pursuant to Supr. Ct. P. Rule 44.2, was an Original Action of Habeas Corpus filed pursuant to Supr. Ct. P. Rule 20, the parties involved were Willie S. Smith, Petitioner and Kenneth Black, Warden – Respondent. See: *In re Smith*, 2021 U.S. LEXIS 4657 (Decided October 4, 2021)

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION:	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1-2
INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT	2
SUPR. CT. P. RULE 44.2 STATES IN PART:	2
STATEMENT OF THE CASE:	3
GROUND ONE: THE DENIAL OF HABEAS RELIEF BY THIS COURT IS CONTRARY TO THE INTENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT	3
SUPPORTING ARGUMENT:	3
The Antiterrorism and Effective Death Penalty Act of 1996:	4

GROUND TWO: THE DENIAL OF HABEAS RELIEF BY THIS COURT IS INCONSISTENT WITH THIS COURT'S DECISION IN <i>IN RE DAVIS</i> , 557 U.S. 952, 130 S. CT. 1, 174 L. ED. 2D 614	5
SUPPORTING ARGUMENT:	5
APPLICATION TO THIS CASE:	6-7
CONCLUSION:	9

TABLE OF AUTHORTIES

	Page
Federal Statutes Cited:	
28 USC§ 2241	Passim
28 USC§ 2244	Passim
28 USC§ 2254	Passim
 Federal Case Authorities:	
<i><u>Felker v. Turpin</u></i> , 518 U.S. 651	7
<i>In re Davis</i> , 557 U.S. 952	3, 6
<i>In re Smith</i> , 2019 U.S. App. LEXIS 31062	Passim
<i>Marbury v. Madison</i> , (citation omitted)	4
<i>McQuiggin v. Perkins</i> , 569 U.S. 383	3
<i>Norton v. Shelby County</i> 118 U.S. 425, (1886).	8
<i>United States v. Ohio power Co.</i> , 353 U.S. 98, (1955)	8

JOINT APPENDIX

Appendix A: The opinion of the United States Supreme Court is Published at In re Willie S. Smith, 2021 U.S. LEXIS 4657 on October 4, 2021.

Appendix B: President's statement upon signing the Antiterrorism and Effective Death Penalty Act of 1996 Matthew Bender Federal Habeas Corpus Practice and Procedure.

Appendix C: Supr. Ct. P. Rule 44.2

Appendix D: Supreme Court's Rule 20.4(a)

PETITION FOR REHEARING OF WRIT OF HABEAS CORPUS

Petitioner Willie S. Smith, invokes this Court's broad and discretionary power pursuant to 28 U.S.C.S. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution, to remand this case to the District Court with instructions to grant a writ of Habeas Corpus relief.

OPINION BELOW

The opinion of the United States Supreme Court is Published at *In re Willie S. Smith*, 2021 U.S. LEXIS 4657 on October 4, 2021 and attached at Appendix A.

STATEMENT OF JURISDICTION

The order of the Supreme Court of the United State denying Habeas relief without a merit determination was entered on October 4, 2021. This Court's jurisdiction is invoked pursuant to 28 U.S.C.S. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution.

RELEVANT CONSTITUTIONAL AND STATUORY PROVISIONS

THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION STATES IN RELEVANT PART: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION STATES IN RELEVANT PART: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION STATES IN RELEVANT PART: "Nor cruel and unusual punishment inflicted."

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION STATES IN RELEVANT PART: "Nor shall any State deprive any person of life, liberty, or property, without due process of law..."

- **28 USCS § 2241**
- 28 USCS § 2244**
- 28 USCS § 2254**

INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL OR CONTROLLING EFFECT.

Mr. Willie S. Smith has highlighted, clearly established Federal law determined by this Court has been violated in this case, that is the issue of this rehearing. Mr. Smith has the only case in the country of where a criminal defendant was acquitted and that jury verdict was simply ignored. The Miscarriage of Justice Exception should have protected Mr. Smith's due process rights in the face of the AEDPA's strict application.

The clear and convincing proof of Mr. Smith Innocence deserves this court's full attention. The contrast in how *In re Davis, 557 U.S. 952, (U.S. 2009)* was allowed his day in court, and how Mr. Smith is being denied his day, is fundamentally wrong. Mr. Smith declares acquittals survive any procedural confines, and transferring this injustice with instructions **could never** be a fool's errand.

To condemn Mr. Smith, when the State waived any response to this acquittal issue in the Supreme Court of Ohio on September 26, 2018 in Case No. 18-1340, is unconstitutional.

Supr. Ct. P. Rule 44.2 states in part:

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but *its grounds shall be limited to intervening circumstances of a substantial or controlling effect* or to other substantial grounds not previously presented.

See Rule 44.2. APPENDIX C (emphasis added)

Statement of Case:

In *In re Smith*, 2019 U.S. App. LEXIS 31062, The Sixth Circuit set forth the following case facts regarding Mr. Smith's procedure in that Court:¹

GROUND ONE: THE DENIAL OF HABEAS RELIEF BY THIS COURT IS CONTRARY TO THE INTENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

SUPPORTING ARGUMENT

Willie S. Smith, herein Petitioner submits that while there are intervening circumstances to bring to this Court attention, there are also substantial constitutional considerations that were not addressed in the habeas petition at issue here.

¹ Smith now moves this court for an order authorizing his second or successive habeas petition. To obtain such authorization, Smith must make a *prima facie* showing that his proposed habeas petition satisfies the requirements of 28 U.S.C. § 2244(b): (1) his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) the facts underlying his claim "could not have been discovered previously through the exercise of due diligence" and, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2); see id. § 2244(b)(3)(C). Smith concedes that his proposed habeas petition does not rely on any new rule of constitutional law or newly discovered evidence. Smith instead argues that "the only question is whether [he] can obtain relief under the manifest injustice exception for compliance with 28 U.S.C. § 2244(b)." D. 6 at 43 (Pet'r's Mem. Supp.).

Leave to File Second or Successive Pet.). But this judicially created exception to the restrictions on second or successive habeas petitions did not survive the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). See: *McQuiggin v. Perkins*, 569 U.S. 383, 396, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) ("Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ('clear and convincing evidence') and to satisfy a diligence requirement that did not exist prior to AEDPA's passage."). [*4]

Because Smith's proposed habeas petition does not satisfy the requirements of 28 U.S.C. § 2244(b), we DENY his motion for an order authorizing a second or successive habeas petition.

Specifically, Petitioner respectfully ask this Court to **consider two factors** that **were not addressed** in his habeas petition. Considerations that go to the very heart of the meaning of manifest injustice. The **first** consideration is in regards to the intent of the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA). The **second**, and perhaps most important, the inconsistent decisions from this Court regarding what is sufficient evidence to warrant intervention from this Court in the form of habeas corpus relief, and asks this Court to compare the denial of review in *In re Smith*, 2021 U.S. LEXIS 4657 with this Court's decision in *In re Davis*, 557 U.S. 952, 130 S. Ct. 1, 174 L. Ed. 2d 614, Decided August 17, 2009.

The Antiterrorism and Effective Death Penalty Act of 1996

Mr. Smith highlights here that the purpose of the AEDPA was **never to preclude** those that are innocent or could prove innocence relief. See: (Appendix B) President William Jefferson Clinton

When signing into law on April 24, 1996, the AEDPA, then President William Jefferson Clinton made a statement explaining the reasons for the AEDPA and the intended results of signing the AEDPA into law.

Some have expressed the concern that two provisions of this important bill could be interpreted in a manner that would undercut meaningful Federal habeas corpus review. I have signed this bill because *I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.*"

See: Appendix B. President's statement upon signing the Antiterrorism and Effective Death Penalty Act of 1996 Matthew Bender Federal Habeas Corpus Practice and Procedure. (emphasis added).

In addition, the President cited the great 1803 case of *Marbury v. Madison*, stating: "Chief Justice John Marshall explained for the Supreme Court that "(i)t is emphatically the province and duty of the judicial department to say what the law is." Id.

Most importantly, the President stated: “Section 104(3) would be subject to serious constitutional challenge *if it were read to preclude the Federal courts from making and independent determination* about ‘what the law is’ in cases within their jurisdiction.” *Id.* (emphasis added).

The implication to this case are obvious. Petitioner brought this Court’s attention to two undisputed facts. **One**, that he was acquitted by a jury of every element of every crime for which he was charged. **Two**, that the trial court, the trial counsel, and every court thereafter has completely disregarded that acquittal.

To that point, the only reason the Federal Appellate Court below refused to address the issue was because of the misapplication of the successive petition rule in **28 U.S.C. §2244(b)**.

Thus, this Request for Rehearing, is a petition of **last resort** and, in the absence of intervention from this Court, will allow an “**innocent man**” to remain imprisoned for life, in complete disregard of the jury’s decision, and in contradiction of the intent of the AEDPA, as outlined by President William Jefferson Clinton.

GROUND TWO: THE DENIAL OF HABEAS RELIEF BY THIS COURT IS INCONSISTENT WITH THIS COURT’S DECISION *IN RE DAVIS*, 557 U.S. 952, 130 S. CT. 1, 174 L. ED. 2D 614.

SUPPORTING ARGUMENT:

In re Davis, 557 U.S. 952, was presented to this Court as an original action in habeas corpus. In the *Davis* case, this Court’s ruling states: “The petition for a writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.” **557 U.S. at 952.**

Significantly, Justice Scalia, joined by Justice Thomas, filed dissenting opinions. Justice Scalia, in his dissenting opinion, stated in significant part:²

Ironically, the Majority, in its refutation of Justice Scalia's dissent, stated: The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See: *Felker v. Turpin*, 518 U.S. 651, 663, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis that *Davis* is bringing an "actual innocence claim" *Id.* 557 U.S. at 953.

APPLICATION TO THIS CASE:

First, Petitioner, Mr. Smith, in this case, like the Majority in *Davis*, also cited this Court's decision in *Felker v. Turpin*, 518 U.S. 651, 663, for the question of whether the AEDPA applies to original petitions in this Court. The Majority also found it "relevant to the AEDPA analysis that; "*Davis*, is bringing an actual innocence claim." *Id.*

As discussed further below, Mr. Smith also brought an "actual innocence" claim. However, the **significant difference between** Mr. Smith and Mr. Davis is that **Mr. Smith's actual innocence is already established**, and documented in the **sentencing Journal Entry** that was attached to his original habeas petition. Mr. Davis, on the other hand, had to establish his innocence. Specifically, on the date of this Court decision in *In re Davis*, *supra*, a determination of whether Mr. Davis' new evidence was sufficient to establish innocence has yet to be determined.

² "Today this Court takes the extraordinary step -- one not taken in nearly 50 years -- of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus. The Court proceeds down this path even though every judicial and executive body that has examined petitioner's stale claim of innocence has been unpersuaded, and (to make matters worse) even though it would be impossible for the District Court to grant any relief. Far from demonstrating, as this Court's Rule 20.4(a) requires, "exceptional circumstances" that "warrant the exercise of the Court's discretionary powers," petitioner's claim is a sure loser. *Id.* 557 U.S. at 954 (underline added). See: Appendix D

More significant still, Justice Scalia justified his position, stating:
 "Eighteen years ago, after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen ***." *Id.* (underline added)

As it turns out, Justice Scalia and Justice Thomas were correct in regards to their concerns regarding returning the case to the District Court. However, of particular interest to Mr. Smith, the Majority explained: “JUSTICE SCALIA would pretermit all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this.

The admonishment continued with the following important scenario, an analysis of sorts, made by this Honorable Court. Specifically stating: But imagine a petitioner in *Davis*'s situation who possesses new evidence conclusively and definitively proving, ***beyond any scintilla of doubt***, that he is an innocent man.” The Court **correctly refused** to endorse such reasoning.

To that analysis Mr. Smith offers the following retort. Imagine a scenario of a petitioner standing before this very Court pleading for this Court’s help and intervention after being acquitted of every element of every charge for which he stood trial, and that fact has been established ***beyond any scintilla of doubt***, and this Court simply says “No”!

That response **was not** appropriate when Justice Scalia used it, and attempted to condemn a man to a fundamentally unjust incarceration, and it is equally wrong in Mr. Smith’s case, and would have a **substantial or controlling effect** on the condition of United States Jurisprudence.

To be sure, that is what took place when this Court denied review of Mr. Smith’s habeas petition in *In re Smith*, 2021 U.S. LEXIS 4657. Moreover, pertinent to the very foundation of the need for rehearing and intervention from this Court is the undisputed fact that Mr. Smith already established a manifest injustice by a documented jury’s declaration that was placed before this Court **in the original** habeas petition, (attached thereto as **Appendix B**). Thus, the decision in Mr. Smith’s case, is inconsistent with this Court’s decision in *In re Davis*, supra. The constitutional safeguards upon which this country was founded, and upon which the Majority in Mr. Davis’ case relied, was consistent with this Court’s jurisprudence, and not equally applied to Mr. Smith. One only need review the admonishments of the Majority in the *Davis* case to validated the need for intervention here. Otherwise, the Majority has joined Justice Scalia’s dissent by proxy, a result no one expected or envisioned.

“The interest in finality of litigation **must yield** where the **interest of justice** would make unfair the strict application of our rules. This policy **finds expression** in the manner in which we have **exercised our power over our own judgments**, both in civil and **criminal** cases.” See **United States v. Ohio power Co., 353 U.S. 98,99** or **HN1.** (1955)

Mr. Smith wants to clarify why he stated: Justice Scalia and Thomas were ultimately right ***In re Davis***, in the context that it was a **fool’s errand**, because few-in any- recantation cases involve consistent, multiple recantations from state witnesses who were innocent bystanders to the crime. Moreover, recantations from innocent bystanders are even more rare in states such as Georgia where the **penalty for perjury** in a capital case is a **mandatory life sentence**.

In essence this Court’s order granting relief and transferring ***Davis***’ case to the lower court for further review was a **fool’s errand**, succinctly put, because no innocent bystander was about to trade places with ***Davis*** because of his innocence. **Lucky for this Court** and Mr. Smith, **Mr. Smith’s innocence is unchallenged in state court, and firmly established in the sentencing journal entry**, all that’s left is, that the jury’s verdict needs to be recognized by this Court to avoid a fundamental miscarriage of justice.

“Any unconstitutional act is null and void of law. It confers no rights, it imposes no duties, it affords no protections, it creates no office.” See **Norton v. Shelby County 118 U.S. 425, at HN2.** (1886).

CONCLUSION:

The controlling effect of allowing this acquittal and manifest injustice to continue to be disregarded and remain in place, is not consistent with the intent of the AEDPA, and simply sends the wrong message to the various State courts, that now the proverbial gloves can come off and anything goes.

There can be no better example, then a jury entering not guilty findings to every element of every charged offense, and the trial court, trial counsel, appellate counsel, numerous retained counsel, and every reviewing Court thereafter, disregarding that acquittal, as this Court did in *In re Smith, 2021 U.S. LEXIS 4657*, without a merits determination.

The interest of justice requires intervention, and simple decorum warrants review from this Honorable Court.

I do declare under penalty of perjury that the forgoing is true and correct pursuant to 28 U.S.C §1746.

Executed on October 15, 2021



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