No. 21-6061

ORIGINAL

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. JOHNSON - PETITIONER

vs.

SUPERINTENDENT DONNIE AMES - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JOHN R. JOHNSON, Petitioner
Inmate No. MOCC - 3369927
ONE MOUNTAINSIDE WAY
MOUNT OLIVE, WV. 25185
Pro se, Without counsel.

QUESTION(S) PRESENTED

1) Does a Prosecutor's conduct to interject race comments into a State trial as an appeal to a racial prejudice based on the fact the trial having the involvement of a Bi-racial individual, still protect the Defendant's rights to an impartial trial with due process of law under the scope of the Sixth and Fourteenth Amendment Clauses of the United States Constitution.

2) Should this Court on the basis of a multiracial individual carve out a - per se rule- to prohibit Prosecutors from presenting racially bias and prejudicial questions to prospective jurors before a reviewing of the questions by the trial judge, as a protection to the Fifth, Sixth and Fourteenth Amendment Clauses of the United States Constitution.

3) Whether the re-sentencing procedure, In re *Johnson v. McKenzie*, (W.Va. 1976) 226 S.E. 2d 721, pursuant to §58-5-4; [§53-4A-7(c)], through a void of former sentence and receipt of a new final judgment on re-sentencing, precludes or permits to grant AEDPA effectiveness with specific intent to reset the 1-year statute of limitations, as a protection of the Fourteenth Amendment Clause of the United States Constitution.

LIST OF PARTIES

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APPENDIX B: Complete Copy of the **Southern District Court of W.Va.'s** *Memorandum Opinion and Order Summarily Denying and Dismissing Petitioner's § 2254 Petition.* Filed: September 29, 2020.

APPENDIX C: Complete Copy of the **Magistrate Judge's** *Propose Finding and Recommendation.* Filed: April 02, 2020.

APPENDIX D: Complete Copy of the 4th Circuit Court of Appeals' (*Mandate entered for* February 26, 2021 *Decision Denying Petitioner's Motion for a Certificate of Appealability).*[1] Filed: August 9, 2021.

APPENDIX E: Relevant Portions of the **4th Circuit Court of Appeals'** *Rehearing/ En Banc final decision and General Docket Statement*:

(1) Complete Copy of Order to Recall April 22, 2021, Mandate for the limited purpose of considering a timely Rehearing/ En Banc Petition. Filed: April 23, 2021.

(2) Complete Copy of Mandate entered April 22, 2021. Filed: April 22, 2021.

(3) Complete Copy of Order to extend time to file Petition for rehearing/ En banc to April 15, 2021. Filed: March 16, 2021.

APPENDIX F: Complete Copy of the **West Virginia Supreme Court of Appeals'** *Opinion Affirming Petitioner's Conviction on Habeas Appeals.* Filed: March 07, 2014.

APPENDIX G: Complete Copy of the **West Virginia Supreme Court of Appeals'** *Opinion Affirming Petitioner's Conviction on* ***Second*** *Habeas Appeals.* Filed: February 22, 2019.

APPENDIX H: Complete Copy of **Petitioner's** *§ 2254 petition*, Filed: June 21,2019; *with Memorandum of Law in Response and Support of Argument.* Filed: July 02, 2019.

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[1]The U.S. 4th Circuit Court of Appeals decision order to deny rehearing was never received. This Certiorari petition is being filed in compliance to the requested General Docket sheet [23], in **Appendix E.**

APPENDIX I: Relevant Portions in Support concerning the Petitioner's argument of Presented Questions:

(1) Complete Copy of **Re-Sentencing Order**. Filed: May 20, 2011.

(2) Partial [ECF 17, Opposition] to Respondent's Motion for summary judgment, **pgs. 3 -28.**

(3) Partial [Trial Transcripts] of March 10, 2004, **pgs. 1- 66.**

(4) Partial [ECF 22, Objection] to PF&R **Appendices 1 - 10.**

(5) Partial [Petitioner's Rehearing/ En Banc] petition **Exhibits 1 - 7.**

TABLE OF AUTHORITIES CITED

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN R. JOHNSON - PETITIONER

vs.

SUPERINTENDENT DONNIE AMES - RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Rodney Johnson (Mr. Johnson/Appellant) respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals of the Fourth Circuit.

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Fourth Circuit Court of Appeals denying 28 U.S.C. § 2254 petition is unpublished, with a per curiam memorandum decision which affirmed District courts denial of a COA, appears on file at *Johnson v. Ames*, No. 20 - 7614, and is reproduced at **Appendix (A)**.

STATEMENT OF BASIS FOR JURISDICTION

The U.S. Court of Appeals decided the case on February 26, 2021. A motion was granted to extend time to file a Rehearing / En Banc to April 15, 2021, with an order to recall of the April 22, 2021 mandate and reproduced at **Appx. (E:1-3)**. A timely petition for a rehearing was filed on April 15, 2021, followed with an Amended Motion for Rehearing on April 30, 2021 and reproduced at **Appx. E**. Without the notification of denial of Rehearing decision entered July 30, 2021, a new Mandate was received on August 09, 2021, and reproduced at **Appx. (D)**.

Prior, the [WVSCA] entered a judgement and decided to deny Petitioner's case on March 07, 2014 and is reproduced at **Appx. (F)**. A State petition for rehearing was denied on May 02, 2014,

due to Ineffectiveness of Appellate counsel by abandonment of representation during appellate procedures and the West Virginia Appellate Clerk errors hindering the Petitioner's ability to file a timely petition for rehearing, as well as a timely § 2254 petition. On May 19, 2017, Petitioner filed a *Pro se*, Second and Successive Writ of Habeas Corpus Petition in the Circuit Court of Cabell County W.Va. and argued (11) issues including the Appellate counsel's incompetence and W.Va. Clerk's error on failure to notify of final judgement. On August 24, 2017 the state circuit court only addressed two contentions and ruling to summarily judge remaining issues as being adjudicated. On February 22, 2019, an appeals was denied by the State higher court and reproduced at **Appx. (G)**. However, during the investigative discovery of these procedures, on August 17, 2018, Petitioner discovered a re-sentencing order, which may restarted the AEDPA 1-year statute of limitations and reproduced at **Appx. (I:1)**. On June 28, 2019 the § 2254 petition was filed seeking relief from his state conviction and sentence at **Appx. (H)**. The U.S. District Court Magistrate Cheryl A. Eifert issued a Propose Findings and Recommendation, which recommending a summary judgement denial of the § 2254 petition as untimely and to dismiss with prejudice at **Appx. (C)**. As a result, Petitioner timely filed an Objection to the PF&R, with the showing of cause and prejudice, that should award equitable tolling by the challenge of validity to statute 28 U.S.C. § 2244(d) [and, *West Virginia Code Section § 58-5-4* ,(§ 53-4A-7(c))]; where the state court's failure to notify of a final judgement order created extraordinary circumstances that caused the filing of his 28 § U.S.C. 2254 petition to be untimely; and demonstrated actual innocence to overcome the procedural bar, to avoid the risk of allowing a miscarriage of justice. This is also based upon the motion for supplemental record, files and supporting exhibits in the case, including but not limited to the § 2254 Petition; Opposition to Summary judgement and the traverse Informal brief; along with the incorporation by reference with the Objection to Propose Findings and Recommendation, which were filed and overruled by the W.Va. District Court at **Appx. (B)**. Therefore, the jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, which provide respectively:

FIFTH AMENDMENT

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

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT (Section 1)

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

This case also involves West Virginia Constitution, Article III § 10, and West Virginia Code, Chapter 53; article 4A, section 7(c), which provides in pertinent parts:(*W.Va. Const.* III § 10)

> No person shall be deprive of life, liberty or property, without due process of law, and the judgment of his peers.
>
> **[IV**(c)] The concept of equal protection of the laws is inherent in this section and the scope and application of this protection are coextensive or broader than that of the fourteenth amendment to the United States Constitution; and ...
>
> **[V**(e)(1)] It is a fundamental guarantee under the Due Process Clause of W.Va. Const., art. III § 10, that the factors of race, religion, gender and political ideology, when prohibited by our laws, shall not play any role in our system of criminal justice.

also, (*W.Va. Code* § 53-4A-7(c)):

> **[VII**(c)] When the court determines to deny or grant relief, as the case may be, the court shall enter an appropriate order with respect to the conviction or sentence in the former criminal proceedings and such supplementary matters as are deemed necessary and proper to the findings in the case, including but not limited to, remand, the vacating or setting aside of the plea, conviction and sentence, rearrangement, retrial, custody, bail, discharge, correction of sentence and re-sentencing, or other matters which may be necessary and proper. In any order entered in accordance with the provisions of this section, the court shall make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, shall clearly state the grounds upon which the matter was determined, and shall state whether a federal and/or state right was presented and decided. Any order entered in accordance with the provisions of this section shall constitute a final judgement, and, unless reversed, shall be conclusive.

STATEMENT OF THE CASE

The petitioner John Rodney Johnson, an African-American defendant stands convicted under One-count Indictment of First Degree murder and is presently serving a sentence of life without the possibility of parole following an unsubstantial jury trial. This case deemed a homicide, originated from a dispute which occurred at a local night club between Mr. Johnson and Thomas Lee Drake II., (victim)(also, African-American declared 'Bi-racial'). Mr. Johnson and the victim, with a multiple group of individuals engaged into a physical altercation, where as a few months following the initial dispute, a shooting occurred outside of the same night club in which the victim Thomas L. Drake lost his life. An extended summary of the basic facts of the case are set forth in the Memorandum decision in *Johnson v. Ballard*, 13-0292 (W.Va. 2014), **Appx. (F)**; and Petitioner's Opposition to Respondent's Motion for summary judgment, at **Appx. (I:2)**.

In the launch of Mr. Johnson's trial, the State's Prosecuting Attorney Joseph G. Martorella (Prosecutor), stepped outside the boundaries of his quasi-judicial role by making improper, prejudicial and impermissible racial comments during voir dire examination and trial. The state trial court judge exercised its broad discretion under Rule 24(a), of *West Virginia Rules of Criminal Procedure*, in which conducting the examination of prospective jurors allows the attorney(s) to supplement the examination by further inquiry, where questions 'can be permitted by the trial court as long as it deems proper, or state trial court shall itself submit to prospective jurors such additional questions requested by the parties or their attorneys as it deems proper.'[2] *Id.* See, W.V.C.P. Rule 24(a). The rule defines the safeguard in which a possible racial prejudice within prospective jurors can be effectively explored without undermining the trial judge's solitary control of the voir dire proceedings insuring the scope of the "essential demands of fairness." ***Aldridge***, *infra*.

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[2]The trial court judge adequately inquired as to any bias or prejudice concerns among the prospective jurors. (Tr. Vol. I, p.24-25) **Appendix [I:3]**.

However, the Prosecutor's voir dire inquiry without the presentment of substantial evidence, insinuated Mr. Johnson as a bad person whom had racist and prejudicial feelings toward "white boys." [Tr. Vol. I, p28] **Appx. (I:3)**. And, continued with inserting highly inflammatory racial assumptions in the presence of an all-white jury on opening statements. Where generally, claims of Prosecutorial misconduct from prejudicial and inflammatory remarks arise during closing arguments following supporting evidence, provocations or a presented cautionary instruction. Here, Prosecutor Joseph Martorella's comments were made at the onset of Mr. Johnson's trial. Making the Prosecutor's remarks the first statements that the jury heard from either of the attorneys presenting the first impression of the case. Immediately, into the Prosecutor's questioning of the prospective jurors they were advised of the following:

> Quoting: *PROSECUTOR*, Joseph G. Martorella; Voir Dire Proceedings, 10 March 2004.
>
> "Not to put too fine of a point on it, there is a - - there is a shade of racial situation here but its actually a case of - - from the State's point of view of meanness and hostility, but it may come up in the trial that they thought - that the defendant might have thought that the victim was a white boy. The fact of the matter, he was Bi-racial. The fact of the matter that this would have overtones of race but truly very little. I mean, it just - - but it may come up in the trial.
>
> Would that bother anybody here?"
>
> (Tr. Vol. I, p.28) **Appx. (I:3)**.

The Defense attorney Paul Billups, Esq., later raised an objection to this line of questioning and other improper comments. However, Defense counsel failed to make a direct objection to the prejudicial effect of the Prosecutor's comments injecting race, his objection was to the fact that the Prosecutor's line of voir dire questioning was, "...more of an opening statement rather than juror voir dire questioning." (Tr. Vol. I, p.31) **Appx. (I:3)**. Before a proper objection could be uttered by Defense counsel to the prejudice effect about race, the state trial court interrupted Counsel's objection and without providing a cautionary instruction or warning as to the nature of the statements

and Prosecutor's conduct, the state trial court proceeded to peremptory challenges, and thereafter, an all-white jury was impaneled to try the case. (Tr. Vol. I, p.31, 58) **Appx. (I:3)**. Following the seed that was sown during voir dire, the Prosecutor's opening statements, for a successive time interjected a misleading racial argument with improper racial provocations and other inflammatory comments to the impaneled all-white jury by stating:

> Quoting: PROSECUTOR, Joseph G. Martorella; State's Opening Statements (Comments referring to an incident that allegedly occurred October 5th 2002).
>
> "...And they are having a pretty good time and he [Mr. Drake] goes to the bar to either - - I guess to pickup a drink and at the bar the defendant, John R. Johnson is at the bar and he makes a comment that sounds like a racial overtone. "You white boy;" and for some reason or other he says, "You think you are smart, you have got a cute girl," and "You have got money." Its one of those bars' comments by a 'lout' at the bar who has nothing better to do..."
>
> (Tr. Vol. I, p.65-66) **Appx. (I:3)**.

During the trial the Prosecutor Joseph Martorella produced no evidence or a single witness to validate these statements. The intent of the prosecutor to inject race an underlying factor, before an all-white jury, is crystal clear. His argument was solely predicated on a false, unreliable premise and had no relevant cause to interject race, other than an egregious appeal to the passion and prejudice of the all-white jury. There was absolutely no proof proffered, other than that of the prosecutor's imagination that the defendant actually made the inflammatory remarks about the victim's race or socio-economic status. It was wholly created by the prosecutor as a ploy to circumvent the rules and inject race, where it was not a feature in the case. Moreover, the fact that the victim was bi-racial made the prosecutor's statements even more nefarious. And, the harmlessness was removed because these statements came before the giving of any judges instruction as how to receive these statements as evidence or not. (Tr. Vol. I, p.59) **Appx. (I:3)**. The Prosecutor's comments called for speculation to make out its case and asserted prejudicial

interpretations not based on the actual facts of the evidence to violate Petitioner's right to a fair trial. The State Prosecutor's path continued throughout petitioner's entire trial. During Prosecution's direct examination of George Newman, a key witness for the State, the Prosecutor repeatedly gave his own personal testimony in front of the jury of his witness' statements given to the police:

> *Prosecutor*: "What he intended to say was he didn't know he was there when he shot him."
>
> *The Court*: "No, don't make any statements; but I'm having a little trouble understanding also. I will let you go ahead with it."
>
> *Prosecutor*: "Your Honor, I have got to treat him a little bit more hostile than I did originally – as I originally planned because, because he is putting a different spin on that and-"
>
> *The Court*: "Don't make statements in front of the jury. Just ask-"
>
> *Prosecutor*: "May I – may I say to him, didn't he mean to tell you he didn't know you were out there when he shot Mr. Drake?"
>
> *Prosecutor*: "That's the meaning of it – Well, he is not confronting you about not identifying the shooter. He is saying to you, 'I am the shooter. I didn't know you were out there.'"
>
> *Defense Counsel*: "Objection, Your Honor."
>
> *The Court*: "Alright, I will sustain the objection"
>
> *Prosecutor*: "Well, didn't - - I mean, you - - I mean, in a sense you really can because he really did tell you that afterwards."
>
> (T.Tr.I, p.154-64)

These remarks were made over the state trial court's orders to the Prosecutor not to make prejudicial statements in front of the jury. The Prosecutor solidified his path of misconduct in closing arguments by continuing to make improper statements in front of the jury.[3]

> "Take, for instance Virginia Bias, how scared she was... it is a different set of circumstances when you are in a stand and you must give testimony against somebody that you know... or somebody who has lots of friends and somebody who is seen to be powerful..."
>
> (T.Tr. III, p.534)

[3]The State inferred Petitioner was so dangerous, he would retaliate against the State witness for testifying.

Prosecutor: (Closing Arguments - Emphases added);

> "We took it to mean, we believe Newman took it to mean... that the defendant knew what he was doing and didn't realize how close his friend was going to be to the victim he was intending *to eliminate, to shoot, to kill.*"
>
> "I think Mr. Elmore gave an explanation on what happened at the preliminary hearing. *As an experienced Prosecutor, as a person who has experience in the courts, as a person who comes into contact with witnesses everyday, I do not find it unusual. You might; But it's not its not an unusual occurrence because people are frightened and they are nervous when they come to court...*"
>
> How many - - *I wonder how many lawyers who have practiced in this court or any other court ever heard a statement* like I'm looking right at him..."
>
> And this was caused by *the actor, the perpetrator and the criminal*, the defendant..."
>
> And then he says what *every criminal* I guess says in that spot..."
>
> Ladies and Gentlemen of the jury, *if you find him not guilty, it will be the worst travesty you ever could be a part of.*"
>
> Just like it was with the bullets... *I am an Assistant Prosecuting Attorney in Cabell County, I propose and the Judges dispose.*"
>
> (T.Tr. III, p.532-64)

Clearly, in an extreme course to convict Petitioner the Prosecutor simply became an unconstitutional, unpartisan character in denying Petitioner a fair trial by an impartial jury. A prosecutor has no business in the criminal justice system using professional vouching, racial arguments or a witness cross-examination as a basis to testify before the jury. Another particularity critical effect here is that the Court has to question, if the actions of the Prosecutor Joseph Martorella was also an attempt on constructing a 'Structural error,' which he intentionally set out to undermine the trial court's control in guaranteeing the Constitutional right and protection of having a fair impartial, unbiased jury. As considered, 'You can sway a thousand men by appealing to their prejudices quicker than you can convince one man by logic.' - [Robert Heinlein]

The case was given to the jury on 12 March 2004, the all-white jury found Petitioner guilty of murder in the First Degree as charged in the indictment. The jury by way of a Bifurcated proceeding did not recommend mercy and on 15 March 2004, the court imposed the sentence of "*Life Without a Recommendation of Mercy*" upon the conviction. On, 07 August 2008, Petitioner first raised the current federal question presented here in his *Pro se* Petition for Writ of Habeas Corpus to the Cabell County Circuit Court of Huntington, WV., as to whether the scope of the Prosecutorial misconduct rendered the trial fundamentally unfair under the U.S. Constitution. The circuit court of Cabell County stayed silent concerning the federal question as presented in the habeas petition. Thereafter, on 30 September 2013, Steven Wolfe, Esq., newly appointed appellate counsel for Mr. Johnson, filed the Writ of Habeas petition with the Supreme Court of Appeals of West Virginia, raising Prosecutorial Misconduct, but not the legal federal issue of law. Instead, appellate counsel attached Petitioner's *Pro se* federal question as an Addendum to the original petition against the request of Petitioner.[4] *Id. Johnson v. Ballard*, 13-0292 (W.Va. 2014). The Supreme Court of Appeals of West Virginia in a memorandum decision ruled that "...the comments were isolated, and we [found] no evidence that they were prejudicial or inflammatory." **Appx. (F)**. The WVSCA never addressed the entirety of the Federal due process violation presented in the attached addendum. The State appeals court's decision overlooking the review of the *Pro se* addendum ignored that the Prosecutor abused his discretion when injecting race as an unwarranted appeals to racial prejudice into Petitioner's trial. This conclusory approach to the Constitutional issue shows the State failed to consider the manifest injustice caused by the lack of essential fairness of protecting Mr. Johnson's right, and the important rights of all individuals under the Fourteenth Amendment's due process and equal protection clauses.

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[4]Appellate Counsel Steven Wolfe, made note to the WVSCA, that the Addendum and federal issues were submitted without the advice of counsel. *Id. Johnson v. Ballard*, 13-0292 (W.Va. 2014)

Mr. Johnson asserts given the circumstances of this case, the fact that Mr. Johnson is a male of African-American descent accused [convicted] of a violent crime against a victim who is also of African-American descent, shows the Prosecutor's racial slurs and remarks had no relevancy to the case. The Prosecutor first giving his own personal opinions, ["meanness and hostility"], to the alleged statements and not able to present any evidence or witnesses to confirm the allegations of racial overtones existing in the trial cannot be overlooked by allowing the Prosecutor to deliberately allege the victim to be white [or Bi-racial] in voir dire. Despite the serious dangers of having an implicit bias effect[5] to the minds of the jurors, by this action irreparably misleading an all-white jury to believe that Mr. Johnson is a racist who had an ill will toward white people, or creating a connotation insinuating the victim was harmed because he was believed to be white, ['Bi-racial' or 'light-skin'], (Tr. Vol. I, p.66) **Appx. (I:3)**, the State has to possibly know that 'the interracial character of cases involving a Black defendant and a White victim renders race especially salient. Such crimes could be interpreted or treated as matters of intergroup conflict. The salience of race may incline jurors to think about race as a relevant and useful [discovery] for determining the blameworthiness of the defendant and the perniciousness of the crime.'[6] An all-white jury would be influenced immensely to return a guilty verdict with such an idea of prejudice, by taking this view of Mr. Johnson as a racist with a personal attack towards their own lifestyle, or racial ethnicity. The risk of the injection of racial or ethnic prejudice being ignored is too high, providing that the essential purpose of voir dire is the safeguards to discover such prejudice. Albeit, this role of conduct by the Prosecutor being able to intentionally create such prejudice was distasteful and fell well below the standard of protection guided by the U.S. Fourteenth Amendment's Constitution.

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[5]Jennifer K. Elek & Paula Hannaford-Agor. *Implicit Bias and the American Juror*. 51 Ct. Rev.: J. Am. Judges Ass'n. 522, _____(2015).

[6]Jennifer L. Eberhardt et al., *Looking Deathworthy: Preceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, _____ (2006).

REASON FOR GRANTING

I. This Court's earlier decisions appear to leave undisturbed the Sixth and Fourteenth Amendment issue presented in this case as the decisions relate to the essential fairness as to a racial bias inquiry of the prospective jurors and prosecutor misconduct during trial.

While the U.S. Fourth Circuit Court of Appeals has previously upheld convictions that Prosecutor misconduct for comments not rising to the level of a new trial when "isolated," ***United States v. Odom*, 736 F.2d 104 (4th Cir. 1984)**, this Court has still condemned even an isolated comment by the Prosecutor when its hostility has reached Constitutional violation of essential fairness. *Id.* This Court's recent Sixth and Fourteenth Amendment rulings cast an uncertain shadow upon the Constitutionality of judicial fairness within the realm of Due Process and Equal Protection, involving the right to a racial prejudice inquiry where, as in the instant case, it is the Prosecutor who presented to prospective jurors an intemperate question involving the Defendant's alleged racial feelings and beliefs toward a multiracial victim. As earlier decisions focus the determinations to interrogate perspective jurors on racial prejudice from the plea of a defendant, there is nothing whether the Prosecutor should be awarded the same structure under "essential demand of fairness" on racial prejudicial inquiry. *Infra.* ***Ham,*** 409 U.S. at 526. ***See, Aldridge v. United States*, 283 U.S. 308 (1931)**. To address the appropriateness of the application, "in essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accuse a fair hearing violates even the minimal standards of due process..... a juror must be as 'indifferent as he stands unsworne.'"*Infra*, ***Ham***, 409 U.S. at 531;(*quoting*, Justice Thurgood Marshall). The Prosecutor deliberately and directly ignored the risk of the presented racial inquiry violently having the petit jury adversely influenced by the direct inference of the Petitioner having negative feelings and beliefs towards the ethnicity of a multiracial victim (declared Bi-

racial).[7] As for the Prosecutor giving an appeal to a racial prejudice question the scope of essential fairness should have a higher priority and concern. The effect of leaving undisturbed the Prosecutor's misconduct of constitutional violation without regulations or determinations on 'essential demands of fairness' when presenting a racial bias inquiry removes the guaranteed rights of a defendant to an impartial jury. Where under the facts, the Prosecutor introduced the condemning race question overtop of the trial courts discretion, this action would leave Petitioner without the protection of the Constitution's Fourteenth Amendment. Where, as the Court should hold that a factual determination be created on views which concerning personal characteristics of a Bi-racial individual or multiracial parties in an offence, that would protect racial bias inquires from the Prosecutor creating prejudices without considering the required "essential demand of fairness" for the lower courts. *Id.* For these reasons this certiorari should be granted, and legally entitle Petitioner to a new trial.

A. The majority decision in *Ham v. South Carolina*, fails to adequately define and protect Defendant's Sixth and Fourteenth Amendment right under Constitutional dimensions as to a determination of circumstances when a racial bias inquiry is Constitutionally required or prohibited.

In ***Ristaino v. Ross*, 424 U.S. 589, 694 (1976)**, this Court held that only if "special circumstances" indicate that racial issues are "inextricably bound up with the conduct of the trial," then is the accused entitled, under the Federal Constitution that an inquiry be made regarding possible racial prejudice. In contrast, some cases may lack "special circumstances," in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court conceding to question prospective jurors specifically about racial prejudice during voir dire. *Id. 424 U.S. at 590*; ***See, Goins v. Angelone*, 226 F.3d 312, 324 (4th Cir. 2000)** (as both the accused and the victim were

[7]The victim Thomas L. Drake II., was the descendent of an African-American father and a Caucasian mother, which the mother took the witness stand and the only parent that appeared in the courtroom in front of the jury. Id. (Tr. Vol. I, p.66) **Appendix [I:3]**.

of the same race and failed to establish the existence of "special circumstances" indicating that racial issues were "inextricably bound up in the trial." On this basis, leaving neither party constitutionally entitled to ask prospective jurors the specific questions requested). Even in which cases the accuse's victim(s) are of different race, or even in all such cases which involves an alleged interracial violent crime alone, the necessity to a racial prejudice inquiry has no requirement. The Constitutional holding on a defendant's right to voir dire inquiry requirements on cases involving interracial crimes, ***Turner v. Murrey*, 476 U.S. 28 (1986)**, where in a capital case involving the request of an African-American accused of killing a Caucasian individual and to have prospective jurors informed of race of victim, questioned on racial prejudice as a constitutional entitlement, extended to the fact of the circumstances surrounding the case being a "capital offense." *Id.* Where the circumstances did not suggest a significant issue to racial prejudice, "[T]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice venire men against [a defendant]." *Id. 424 U.S. at 594.*

In ***Ham v. South Carolina*, 409 U.S. 524 (1973)**, which held the requiring of prospective jurors be inquired as to racial prejudice did not by its terms announce an universal rule requirement with respect to racial bias inquiry and formation of questions, but underlying the federal holding which provide for a broad discretion to the trial court to an inquiry as to racial prejudice. It leaves the trial court discretionary power to have the ability to assess the facts relevant to a racial bias inquiry before presenting the questions. However, it also leaves the trial court's broad discretionary power unprotected from an abuse of discretion by a created possibility to remove the essential demand of fairness under this power or from a propounding of inappropriate racial questions, as to conducting a voir dire examination when absent such particular "special circumstances," when the likelihood of racial prejudice is not "inextricably bound up with the conduct of the trial." *Id. 424 U.S. at 596-97.* As in the current case, an abuse of discretion allowed the Prosecutor to interject an

inadequate racial prejudice question over "the good judgement of the trial judge, whose immediate perception' determines what questions are appropriate for ferreting out relevant prejudices." ***United States v. Barber*, 80 F.3d 964 (2nd Cir. 1996)**. "[S]ince a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race." The principles upon which *Ham supra*, relies on and risk of violating constitutional protection, when overlooking the rules under an "essential demand of fairness," as to the appropriate formation of the question and requirement when there's no "reasonable possibility" that racial prejudice might influence the jury, *Id. 409 U.S. at 624*, fails to protect from an abuse of discretion by the Prosecutor intentionally interjecting questions directed in creating a bias or prejudice in potential jurors when such questions under constitutional law should be prohibited as prima facie herein.[8]

B. This Court's longstanding Fourteenth Amendment rulings demonstrate the scope of the Due Process and Equal Protection Clause strongly requiring Prosecutorial arguments in State courts be free of racially prejudicial comments and inappropriate appeals to passions rising to bias the jury in argument.

The United States Supreme Court has long made clear that statements that are capable of inflaming juror's racial or ethnic prejudices works to "degrade the administration of justice." ***Battle v. United States*, 209 U.S. 36, 39 (1908)** (The court properly interrupts counsel to ask him to make an argument that does not appeal to racial prejudice). Where such references based on race or ethnic prejudices in argument are legally irrelevant and trigger a jurors implicit bias, separates the equality of justice among different ethnic groups, where implicit bias can operate to distort a person's interpretations of the evidence in a case. In ***United States ex rel. Haynes v. McKendrick*, 481 F.2d 152 (2nd Cir. 1973)**, which indicates "the purpose and spirit of the Fourteenth Amendment requires

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[8] "The trial judge has broad discretion to refuse to ask questions that are irrelevant or vexatious. Thus were the claimed prejudice is of novel character, the judge might require a preliminary showing of relevance or of possible prejudice before allowing the question ." Id. *Ham*, 409 U.S. at 533, (Opinion: Justice Thurgood Marshall).

the prosecution in State courts be free of racially prejudicial slurs in argument," and held "the standard has as high regard as to the federal Fifth Amendment's due process clause." *Id. 481 F.2d at 159.* The Sixth Circuit described the racial reference as either a "magnificent irrelevance" or "the gratuitous reference to the race...as a deliberate attempt to employ racial prejudice." ***See, United States v. Grey*, 422 F.2d 1043, 1046 (6th Cir. 1970)** More recent decisions of the courts continues to illustrate racial argument prohibited under the due process clause. In ***Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000)**, the Prosecutor highlighted the relevant testimony in a way that went beyond merely providing evidence of motive and intent, which persuading the jury to "give into their prejudices and buy into the [racial bias] stereotypes that the prosecutor was promoting." *Id.* As a matter of Prosecutor misconduct "whether the remarks occur during the prosecution's presentation of evidence or argumentation," misconduct at the onset and summation of trial violates a defendant's right to due process just the same. *Id.* In another more recent decision the courts extended the scope of the Fourteenth Amendment to prohibit racially biased Prosecutorial arguments, ***Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012)**, reversing a conviction in finding instead of revealing possible prejudice, "a prosecutorial statement that includes racial references likely to incite racial prejudice," where it is common knowledge that jurors hear the facts, but more commonly act on implicit emotions violates the Fourteenth Amendment. *Id. 698 F.3d 769.*

The court has further recognized the unreliability of racial comments which "invokes race for a purpose that is either illogical or of very slight and uncertain validity, [increasingly] does so at a distinct risk of stirring racially prejudice attitudes," ***McFarland v. Smith*, 611 F.2d 414, 419 (2nd Cir. 1979)**, constituting a harmful violation of a constitutional right to an impartial jury trial. The dangers of an unreliable assumption pertaining to race, as "a race-conscious argument is not constitutionally permissible unless the basis for it has a sufficient high degree of reliability to warrant the risk inevitably taken when racial matters are interjected into any important decision-making."*Id.*

II. This case presents an excellent opportunity to address the common misconception by State Courts as to the scope and definition to the Sixth and Fourteenth Amendment right to impartial jury and due process, as it applies to the Prosecutor's role in State Court proceedings as a safeguard to maintaining adequate voir dire examination and a fundamentally fair trial.

In general under *Rule 24(a), West Virginia Rules of Criminal Procedure*, if the trial court examines prospective jurors, it [may] permit the attorney(s) for the parties to ask further questions that the court consider proper; or submit questions to the court that the court may ask if it considers them proper. *Id.* In the present case, the trial court examined the jurors as to any bias or prejudice concerns, the Prosecuting attorney presuming a particular race question was needed, apparently formulated a strategy not to present the question to the trial court to be considered proper or not. Instead, presented the question with a careless presumption the question was proper. Accordingly, such a presumption was simply inappropriate and abused his discretion to question prospective jurors as to racial bias or prejudice issues *sua sponte*. Thereafter, he attempted to support this questioning with the interjection of impermissible racial slurs and prejudicial comments to an all-white jury during opening statements. **Appx (I:3)**.

The Supreme Court of Appeals of West Virginia, adopting ***United States v. Leon*, 534 F.2d 667 (6th Cir. 1976)**, held that the Prosecutorial misconduct was "isolated" and having no prejudicial effect on the trial, but yet failed to rule on the federal issue rising to the level of a structural constitutional violation. *Id.* *Johnson v. Ballard*, 13-0292 (W.Va. 2014). **Appx (F).** However, the U.S. Court of Appeals decision in *Odom*, *supra*, would suggest that such cases where the Prosecutor's comments are so "permeated with such uniquely prejudicial character as are, for instance, an appeals to racial prejudice," which was also condemned in ***Miller v. North Carolina*, 583 F.2d 701, 706-07 (4th Cir. 1978)**, then this prosecutorial misconduct would violate constitutional rights to a level that

would entitle Petitioner to a new trial whether isolated or not. *Id. 736 F.2d at 118.*

The confusion in the State court is further demonstrated when a Prosecuting attorney oversteps the bounds of "propriety and fairness," ***Berger v. United States*, 295 U.S. 78 (1935)**, in his argument. The Court reversed a conviction where the Prosecutor falsely claimed without evidence in the record that a particular fact in the case occurred, and on the grounds his statement contained, "improper insinuations and assertions calculated to mislead the jury." *Id. 295 U.S. at 85.* Noting that, "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id. 295 U.S. at 88.*

The risk of "a prejudicial racial argument by the Prosecutor poses a serious threat of acquiring a fair trial" with an impartial jury. *Id. 583 F.2d at 701.* This is so because Prosecutors occupy a position of trust, and their exhortations carry significant weight with implicit juries[9] in his argument, and "not only does it undermine the jury's impartiality, but it also disregards the Prosecutor's responsibility as a public officer." *Id. 583 F.2d at 706.*

In *Miller*, *supra*, the court viewed the Prosecutor's summation by deliberately injecting the issue of race into what was essentially a racially sensitive prosecution, so infected the trial with unfairness as to deny appellants due process of law.[10] Likewise, the Prosecutor's strategic formed question from the onset so infected the jury with a racial prejudice question and comment before any instruction, and with no attempt to offer the trial judge an effort to prevent the damage of presenting a race prejudice question. "[E]ven if this were a case where prejudice could be dispelled by curative instructions [protecting the Sixth and Fourteenth Amendment], the efficacy of curative instructions is not in issue since none were given." *Id. 583 F.2d at 707.*

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[9]Elek & Hannaford-Agor. 51 Ct. Rev.: J. Am. Judges Ass'n. 522, _____(2015).

[10]The scope and meaning of the Sixth and Fourteenth Amendment is clearly described and laid out where "the impartiality of the jury must exist at the onset of the trial and it must be preserved throughout the entire trial..." *Id. 583 F.2d at 706-07.*

III. The issue raised in this Question Presented represents significant public policy concerns, involving racial interface equality and how far differences of race will make up the basis for denying equal protection and a fair trial within the criminal justice system.

Since the institution of the Bill of Rights into the United States Constitution, the law of the United States has consistently prohibited the use of race as a device in America's judicial system of justice. As a matter of the loss of liberty and the racial stigma existing in today's society are heightened by uncertainty of fairness, the protection which courts can provide are extremely valuable, if these courts are inclined to use such influential motivated devices. The dangers of having a race constructed concept in the criminal system, in its social sense, brings race as the implications for the way people are treated. In its diversion, its found that racial prejudice never shows much reason, "even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudices," *Id. 611 F.2d at 417*, not intended for the jury to consider.

In *Accord,* ***United States ex rel. Haynes***, ("For the introduction of racial prejudice into a trial helps further embed the already too deep impression in public consciousness that there are two standards of justice in the United States, one for whites and another for blacks. Such an appearance of duality in our racially troubled times is quite simply intolerable from the stand point of the future of our society."), this Court affirmed and held that the improper remarks were not improperly provoked by defendant's counsel to cause the Prosecutor's reply to go "beyond the bounds of propriety, passing those of due process." *Id. 481 F.2d at 161.*

There is no need to recite the plethora of historical instances of prosecutorial race-baiting to inflame and prejudice jurors in cases where a victim is white and the defendant is black; history speaks for itself where implicit bias can play a negative role on a juries decision when race is an issue, especially toward African-American defendants. And, if constitutionally the point is to avoid unnecessarily injecting race into the criminal justice system, so as to ensure fundamental fairness and

equity to avoid imposing on the jury questions of race where there is no need, then that point was missed by the state. It was the prosecutor in this matter who blatantly introduced a racial component to the case. The first instance was during voir dire, *Id.* (Tr. Vol. I, p.28) **Appx. (I:3)**; and the other instances were during open arguments where he insinuated, in a manner of wording that the defendant was racist. *Id.*(Tr. Vol. I, p.65-66) **Appx. (I:3)**

"Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans, for example, harbor negative implicit attitudes toward blacks and other socially disadvantaged groups,"[11] considering "there is no constitutional presumption of juror bias for or against members of any particular racial or ethnic group, the courts must begin every trial with the idea of not focusing juror's attention on the participants' membership in those particular groups." ***Rosales-Lopez v. United States*, 451 U.S. 182 (1981)** ("We cannot ignore continuing incidents of racial prejudice that infect the dispensation of justice. Racial prejudice is a persisting malady with deep and complicated historical roots. [Therefore,] every criminal trial cannot be conducted as though race is an issue simply because the trial participants are of different races. If racial prejudice is ever to be eliminated, [then] society's general concerns about such prejudice must not be permitted to erode the court's efforts to provide impartial trials for the resolution of disputes"). Particularly because we are a "heterogeneous society," where "implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways,"[12] courts should not indulge in the divisive assumption...that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id. 424 U.S. at 596.* Many of the misconceptions about the criminal justice system stem from the

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[11]Smith & Levinson, Vol. 35:795-97____ (2012).

[12]Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, Vol. 35: 795-97 (2012).

different ethnic experiences that people have with the justice system. It is difficult for society to see the need for change when one has not encountered negative experiences with the criminal system. In applying to a black defendant which finds himself at a disadvantage from the onset of his prosecution, where a Prosecutor directs the jury to make its guilt or innocence of life or death determination on the basis of the race of the victim in argument, shows it is impossible to say the jury was not adversely influenced by this misconduct. This disadvantage is magnified exponentially and raises extreme constitutional concerns as society grows more and more in multiracial diversity.

IV. The U.S. Court of Appeals decision overlooks the District Courts arbitrary application on several Constitutional related principles regarding AEDPA effective due process; and applies conclusive reasoning based on misappropriate facts, omissions and misstatements to justify its determination of Summary Judgment.

The District Court's arbitrary rulings to deny a COA, overlooks how this statute [W.Va. Code § 58-5-4, *infra.*] applies in the West Virginia state court. At the time of the commission of the Appellant's preparatory Habeas corpus appeal, *West Virginia Code Section § 58-5-4* (hereinafter, § 58-5-4, as amended), provided:

> No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed was entered: Provided, That the judge of the circuit court may, prior to the expiration period of four months, by order entered of record extend and re-extend such period for such additional period or periods, not to exceed a total extension of two months, for good cause shown, if request for preparation of the transcript was made by the party seeking such appellate review within 30-days of entry of such judgment, decree or order. (*Amended 1998*).

Petitioner contented that he was denied a fair due process to properly appeal his conviction and sentence by the actions and errors of state circuit court's appellate delays and misfil[ings] as well as, failure to notify of a re-sentencing order. Also, the W.Va. Court of Appeals failure to address the constitutional issues and failure to notify of a final court ordered decision. ***See, Plymail v. Mirandy,***

19-6412 (4th Cir. Aug. 10, 2021). Even though, the District Court admitted that the appeals procedural history was "convoluted," **Appx. (B)** [ECF No. 26 p.10], and injurious throughout the entire appeal procedure.[13] Notwithstanding, the District court by an inaccurate assessment of the facts and rulings on the AEDPA effectiveness of due process summarily dismissed the § 2254 petition as untimely.

When issues in a § 2254 petition were raised and "adjudicated on the merits in State court proceedings" federal habeas relief is available only if the state court's decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> *Id. 28 U.S.C. § 2254(d).*

The two issues presented for review is whether a state circuit court's order re-sentencing [Appellant], *In re Johnson, infra.*,pursuant to § 58-5-4; 53-4A-7(c) - on failure to properly provide transcripts timely for appeal is AEDPA effective[ness] when a void of former sentence and [he] has received a new [Final] judgment. Thereafter, whether AEDPA effectiveness, on such re-sentencing is applied with specific intent to reset 1-year statute of limitations.

In State ex rel Johnson v. McKenzie, (W.Va. 1976) 226 S.E. 2d 721 (*In re Johnson*), the State court concluded, "[I]f a timely request for a transcript has been made and no transcript is forthcoming, a trial court should extend the appeal period, as authorized by W.Va. Code § 58-5-4, as amended. If the transcript is finally furnished less than thirty days before the expiration of the extended period, the circuit court should upon request entertain a proceeding pursuant to its authority under W.Va. Code, 53-4A, [58-5-4], and void the former sentence." [*Id.*, at 727] *See*, W.Va. Code

[13]Several substantial delays were caused by documents misplaced from clerk's mailings. Appellate counsel complained to the circuit clerk of Cabell county about not receiving mail from the court. **Appx. (I:5)** [Ex.1].

§ 53-4A-7(c), [adopting: *State ex rel Bradley v. Johnson*, 166 S.E.2d 137 (W.Va. 1969)].

The Petitioner's Notice of Appeal and request for transcript was timely filed in the state circuit court. **Appx. (I:4)** [ECF No. 22, Appx. 6 p.2(Seq. 81, 83)] The state circuit court still caused delays and a misfiling that hindered the timely disclosure of transcripts. Consequently, Appellate counsel (counsel), requested by motion under *§ 58-5-4*, to extend and re-extend the time to file an appeal. Each motion between October 12, 2010 and May 13, 2011, pinpointed the expiration deadline when to submit an appeal. The state circuit court granted every motion and ordered an extension of time within two months of every designated expiration deadline, **Appx. (I:4)** [ECF No. 22,Appx.4], in accordance with § 58-5-4, as amended. *See*, W.Va. Code, § 58-5-4.

On May 13, 2011, prior to the May 15, 2011 expiration deadline, counsel submitted a motion requesting re-extended time to appeal to May 31, 2011 **Appx. (I:4,5)** [ECF No. 22, Appx. 4] & [Ex.2] Counsel argued the delayed delivery of transcripts, committed "insufficient time to prepare and perfect [Appellant's] appeal." *Id.*, at Appx.4]; [Ex.2] Subsequently, to this motion state circuit court, *Sua Sponte*, voided the former sentence and entered an order re-sentencing Appellant for the purposes of an appeal. [*Id.*, at Appx. 5 p.1] However, immediately following the state circuit court's order, the court granted the May 13th motion and entered a separate order extending time to appeal by May 31, 2011. [*Id.*, at Appx.4 p.4]; [Ex.2 p.3]

Under the compliance of the extended time order, on May 26, 2011 - five days before the deadline to file, counsel submitted Appellant's Docketing Statement and Appeals Brief of memorandum to the circuit clerk of Cabell County. **Appx. (I:4,5)** [ECF No. 22, Appx.6 p.3(Seq. 96)]; [Ex.3] The state circuit clerk delayed the transfer of Appellant's [alleged untimely] petition to the [WVSCA] until June 16, 2011. [*Id.*, at Appx.6 p.3(Seq. 98-99)]; [Ex.4] The circuit clerk as an attempt to rectify the delay, [sua sponte], resubmitted the court's previous order granting extended time to appeal conviction, "entered June 9, 2011." **Appx. (I:4,5)** [ECF No. 22, Appx.10 p.4]; [Ex.5]

On appeal, Appellant contended the interpretation of the re-sentencing order was intended for a new [Final] judgment, and that order was sufficient to restart the AEDPA statute of limitations. Where "re-sentencing extended the start date for the running of the one-year statute of limitations, because the [Appellant's] judgment was not yet final, as provided for in 28 U.S.C. 2244(d)(1)(A)." ***See, Whitlow v. Ballard*, 2017 U.S. Dist. LEXIS 36170 (S.D.W.Va. Feb 2, 2017).** The U.S. Magistrate and District court disagreed, concluding that the re-sentencing order only served as a statutory-granted extension of time, and only entitled [him] to additional four months to file a state habeas corpus appeal to the [WVSCA]. **Appx. (B)** [ECF No. 26]

Herein, the District court notes that Courts have generally looked to the nature of the re-sentencing to determine whether the time period in which a petitioner may raise a challenge to his conviction restarts the AEDPA statute of limitations. **Appx. (B)** [ECF No. 26, p.11] This specific timeliness issue has received little attention from either the District court or Fourth Circuit. The three most relevant cases that appear in the West Virginia district courts. The first, ***Mercer v. Ballard*, 2013 U.S. Dist. LEXIS 50928 (N.D.W.Va. April 9, 2013)**, cites to the relevant language, *In re* ***Williams v. Florida*, 221 Fed.Appx 867, 870 (11th Cir. 2007)**, but does not engage in any independent application or analysis of the rule. [*Id.*, at *13*] The second, ***Harper v. Ballard*, 2013 U.S. Dist LEXIS 21578 (S.D.W.Va. Jan. 24, 2013)**, where it cites to the relevant intent, *In re Johnson*, state procedural function and does not cite to *Williams*, but does analyze the application of the AEDPA that the District court recognizes as proper. In, ***Shoop v. Ballard*, 2016 U.S. Dist. LEXIS 102984 (N.D.W.Va. Aug. 5, 2016)** argues "*Williams* is no longer supported by Eleventh Circuit case law. *Id.* ***See, Burton v. Stewart*, 549 U.S. 147, 156 (2007)** (Final judgment in a criminal case means the sentencing.); ***also See, Jimenez v. Quarterman*, 555 U.S. 113, 119 (1009)** ([t]hat Jimenez is instructive, where Petitioner was given the opportunity (via: re-sentencing) to file an appeal after the

time to do so had expired and before he filed a federal habeas petition.). [*Id., at 14*] The district court relied on for example, infra *Frasch v. Peguese*, (analyzing whether proceeding employed...was "collateral review" or "direct review for determining timeliness.") [*Id., at 522*] This application is irrelevant and misapplied involving a re-sentencing order for failure to timely provide transcripts, it lacks sufficient distinguishing characteristics for this cause discuss herein because there was no re-sentencing.

This Court vacated, *In re* ***Ferriera v. McDonough*****, 549 U.S. 1200 (2007)**, by instructing on remand ordered the Eleven circuit to consider the Final judgment defined, *In re Burton v. Stewart*. *Id.* On review, ***Ferreira v. Sec'y for Dep't of Corr*****, 494 F.3d 1286 (11th Cir 2007)**(*Ferreira II*), analyzing what constitutes the judgment for the statute of limitations when a petitioner has his sentence corrected. Applying the Supreme Court's statutory interpretation, *In re Burton*, the statute of limitations is triggered "by the date the judgment which is based on conviction and the sentence [he] is serving becomes final." [*Id., at 1293*]

Appellant urges this Court to grant review to resolve these important questions of law. In the Argument for Review which follows, appellant will demonstrate that AEDPA permits and does not preclude the admission to reset statute of limitations, pursuant to W.Va. § 58-5-4[53-4A-7(c), when the applied [Johnson rule], *adopting Bradley's* "authority of a circuit court to re-sentence" as new final judgment. [*Id., at 726*] After a short sketch of the District court's analysis based on an incorrect matter of fact and procedural background, in Part A, we demonstrate how the court's opinion conflicts with the decision of the U.S. Supreme Court and other U.S. Court of Appeals. Further, in Part B, we will demonstrate how factual and procedural background evidence supports a probative reasoning of extraordinary circumstance beyond control qualified for equitable tolling to procure a timely filed 28 U.S.C. § 2254 petition.

ARGUMENT FOR REVIEW

While this Court has previously upheld the re-sentencing process that imposes a correction of error or reinstatement of rights protected by the State and U.S. Constitution, on how the state court should apply AEDPA statute of limitations. However, there is no factual determinations under these circumstances upon an order to re-sentence due to the delay of transcripts hindering the time to properly appeal ever been addressed in this Court, making it a first impression to the Court. There has been a case-by-case basis recognized by the Court, which any such material fact that provides an increase indication of the nature of purpose the re-sentencing is compelled to, is allowed to identify the statutory actions permitted. This Court has instructed that, for purposes of interpreting how AEDPA interacts with immediate state procedural rules, "[we must] look to how a State procedure functions." ***See, Carey v. Saffold*, 536 U.S. 214, 223 (2002)**, (analysis should be on case-by-case basis), [See, dissenting in, ***Frasch v. Peguese*, 414 F.3d 518, 526 (4th Cir 2005)**]. Where as, in the instant case, the finding of particular facts in the re-sentencing process, would legally entitle Appellant to a reinstatement of appeal rights from either the conviction and sentence; from the ending of a direct review; or time thereof from a new final judgment. *Id.*

A. ***The Re-sentencing Order***

The provisional statements appearing in the District court's opinion, pursuant to § 58-5-4 are inaccurate and misleading to the extent they imply an Order Extending Time to appeal conviction can allow a span up to "the original four-month period." **Appx.(B)** [ECF No. 26, p.10] A fair review of the language of the statute, as phrased compels an "extend or reextend such...additional period or periods, not to exceed a total extension of two months," and it is susceptible of no other interpretation. *Id. See*, W.Va. Code § 58-5-4. This statute is mandatory and jurisdictional and the Legislators amended this statute not to be taken ambiguously. As the court determines the re-sentencing order only served to extend the statutorily-granted time in which Appellant could file an

appeal, **Appx. (B)** [ECF No. 26, p.10], this opinion conflicts with the uniformity of its own assessment. *See*, Harper v. Ballard, [quoting: "W.Va. Courts...re-sentence [Appellants]...to afford them... additional four months to file a direct appeal].[Id., at 12]. Accordingly, this re-sentencing has held the basis to reopen direct review, even after AEDPA statute has expired. *See*, *In re* **Daniels v. Waid, 2011 U.S. Dist. LEXIS 28542 at *8(S.D.W.Va. March 18, 2011)**[on habeas review, if resentenced, this is an event which may reopen the right to file direct review.]. *Id.* A similar pattern is followed, *In re* **Ferreira II**, after an [Appellant] has appealed on direct review, the court found a re-sentencing as a final judgement that holds [Appellant] in confinement, which constitutes reinstated AEDPA statute of limitations. [*Id.*, *494 at 1293*].

Also, the court misstates the date the state petition for appeal was filed; and omits an order extending time to appeal entered on May 20, 2011 and June 9, 2011. **Appx. (B)** [ECF No. 26, p17] When the court alleged the index sheet supported the order extending the time, "as a procedural device," for re-sentencing order. [*Id.*, at p.11] The court noted to the "docket sheet" [that] "a smattering of various motions and orders to extend time until the re-sentencing order is reached in May 2011, well over the four-month appeal period," the court attempts to limit the authority of the motions to extend time. In addition, the court declares, "[Appellant] did not file his petition for appeal from the circuit court until June 17, 2011," implying the re-sentencing order is what allowed the access to file a timely appeal in state court. [*Id.*, at p.11] The problem with these prevarications on material facts and evasive omissions, the court overlooked the record. According to the record the various motions and orders to extend time were filed in compliance with the statute, including a May 20, 2011 order extending time to appeal, that set a deadline to appeal by May 31, 2011.[14]

[14]The circuit court filed and entered five following motions, orders and deadlines extending time from Notice of Appeal, August 2010; 1) Motion: Oct 12, 2010 - Order Deadline: Jan. 7, 2011; 2) Motion: Dec. 27, 2010 - Order Deadline: Mar. 7, 2011; 3) Motion: Mar 2, 2011 - Order Deadline: May 15, 2011; 4) Motion: May 13, 2011 - Order Deadline: May 31, 2011; Order entered: June 9, 2011.

Appx. (I:4) [ECF No. 22, Appx. 4] This deadline negates the four month extension and contradicts the court's claim the order extending time was a "procedural device." *Id.* The court overlooked that Appellate counsel met the deadline by submitting the docketing statement and petition for appeal timely with the circuit clerk of Cabell County on May 26, 2011, and was marked filed with the clerk of circuit court on May 27, 2011, **Appx. (I:4,5)** [ECF No. 22, Appx. 6 p3 (Seq. 96)];[Ex. 3(1 p4)], pursuant to §53-4A-1(a), [§58-5-4]. *See* W. Va. Code. Lastly, the court omits an order extending time to appeal submitted and entered June 9, 2011, [*Id.*, at Appx. 10 p4], by the circuit clerk, [*sua sponte*], to rectify the delayed transfer of Appellant's appeal to the W. Va. Supreme Court of Appeals until June 17, 2011.[15] What makes this last order such a pivotal event is the clerk of the courts direct indication the re-sentencing order had little, if no, authority on the state habeas appeal's timeliness.

As the clerk's [*sua sponte*] order attempts to extend the time to appeal further, the state circuit clerk omitted the filings of the re-sentencing order and the petition for appeal on the submitted index sheet, **Appx. (I:5)** [*Id.* Ex. 10], which the courts conclusions were determined from these inaccurate material facts and consequential omissions. This created confusion, as another example of the clerk's mishand[lings] of the appeal, as later discussed. Makes it widely impossible for the court to clarify from this assessment the full scope of the re-sentencing procedure and conclude it had no influence on AEDPA statute of limitations. Thus, this reveals the Court should grant review to settle an important question of law.

This Court has advised lower courts to clarify the interaction of federal statute with state procedural rules, *In re Safford*, to look to how a state procedure functions. [*Id.*, *See, 536 U.S. 223*] As such, however, West Virginia law does not regard a re-sentencing order and order extending time as equivalents. The clarification on how § 58-5-4 and § 53-4A procedures function on appeal in this

[15]On June 16, 2011, the clerk sent a letter to Appellate Counsel notifying the appeal had been mailed to the WVSCA as requested. **Appx. (I:5)** [Ex. 4].

case is clear, *In re Johnson*, when a timely request for a transcript was made and no transcripts were forthcoming. *Id.* The state court extended the appeal period five times, as authorized by W. Va. § 58-5-4, as amended. The transcripts were eventually furnished, however, delayed and delivered less than thirty days before the expiration of the extended period. *Id.* The Appellate counsel resent a motion request, expressing the delayed delivery of transcripts were insufficient in time to allow counsel to prepare and perfect [Appellant's] appeal. The trial court entertained counsel's request, in a proceeding [*sua sponte*] ordered re-sentencing, pursuant to its authority under W. Va. Code § 53-4A-7(c), as a result, the court voided the former sentence and a new sentence became final judgement. *Id.*

Even if West Virginia recognized a re-sentencing order, as an equivalent procedure to an order extending time for purpose of habeas appeals, the two procedures would differ with respect to the federal statutory question in this case. When a state court files an order extending time, the original final judgement of conviction remains pending in state court, but when a state court files an order of re-sentencing - for delay [or failure] to provide transcripts - there is a void of former sentence and thus, a new final judgement of conviction in which [Appellant] is in custody is conclusive. *Id.*, ***See, Ferriera II*, 494 F.3d 1286 (11th Cir. 2007)**, [*also See*, *In re **Hepburn v. Moore***, 215 F.3d 1208 (11th Cir. 2000)]. Of course, the Fourth Circuit has looked to the Eleventh Circuit to make determinations of clarifications on the timeliness issues in the past. *See*, *Mercer v. Ballard*, [citing *Williams v. Florida*, (11th Cir.)]. *Id.* Although these cases are distinguishable, they have assisted in clarity on how to perceive the West Virginia sentencing procedures. *Id.*

The court's determination as a result of these misapprehensible interpretations on material facts and omissions, should be seen as unreasonable and rejected for its lack of clarity on questions of law, this Court has authority to solve, and interpret a statute in such a manner as to avoid violations of due process to an Appellant that has re-established AEDPA appeal rights that were

[believed] to have been previously lost. Unresolved, this bears the risk the state court allowing re-sentencing to be represented under the guise of a procedural device to a motion extending time versus a legal constitutional statutory ruling.

B. *Equitable Tolling*

Assuming this court agrees with the arguments, in part A, herein Appellant seeks review of a novel constitutional issue involved in the eligibility determination: whether the failure to receive notification of a court's decision - as to a re-sentencing order's late discovery- as "sufficient evidence to establish grounds for equitable tolling." ***See, Pallum v. McKie*, 2013 U.S. Dist. LEXIS 131376 at * 12-14 (D.S.C. Aug. 5, 2013)** (in his opposition memorandum to respondent's motion, argues that the statute of limitations should be equitably tolled.). It is Appellant's contention that presented evidence supported by the record, shows the state circuit clerk did not reach statutory requirements on its service, where the clerk's failed notification of a re-sentencing order created "extraordinary circumstances" that prevented timely filing. ***See, Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549 (2010)**, and even with a higher degree of due diligence the re-sentence order would not have been discovered prior to August 17, 2018.[16] **Appx. (I:4)** [ECF No. 22, Appx. 1-5 (Seq. 205)] The district court disagrees that the evidence was sufficient to demonstrate "extraordinary circumstances," and held Petitioner lacks a show of due diligence. *Id.* However, the district court mistaken and misstates material facts, which prompted a non-liberal assessment to the evidence presented. **Appx. (B)** [ECF No. 26] This assessment conflicts with this Court and other U.S. circuit courts, when *pro se* pleadings must be construed liberally, as a habeas review has accorded liberal construction in making determinations. ***See, Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978)** (quoting: ***Estelle v.***

[16] The re-sentencing order was hard to find and was not recorded on any post conviction docket, post conviction ruling or post-conviction record. On request for the criminal docket revealed the order.

***Gamble*, 429 U.S. 97, 106 (1976)); *Williams v. Lockhart*, 849 F.2d 1134, 1138 (8th Cir. 1988)** (when reviewing the sufficiency of a pro se habeas petition the standard is less stringent); ***Roy v. Lampert*, 465 F.3d 964, 967 (9th Cir. 2006)** (we must "construe pro se habeas filings liberally.").

The duty of the U.S. court appeals is not to weigh the evidence and determine the truth of the matter but to determine whether there are issues to be tried. ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)**. In making that determination, the court is to draw all inferences in favor of the party against whom summary judgement is sought, viewing the factual assertions in materials such as affidavits, exhibits and depositions in the light most favorable to the party opposing the motion for summary judgement. [*Id., at 255*] Thus, liberal review should be heavily considered for the purpose of determinations concerning the Constitution.

The district court declared Appellant had no reasonable claim to statutory tolling, the District court held the evidence in the record was not sufficient enough to prove a collateral attack was filed before the 1-year statute of limitations time had expired. **Appx. (B)** [ECF No. 26] Therefore, an impediment did not exist that would grant statutory tolling. The Appellant conceding not to argue that his impediment claim qualified for statutory tolling stood, whereas, the re-sentencing order which entails a new judgement of conviction, would have rendered the former sentence irrelevant.

In a non-liberal review the district court abates the evasiveness of a former counsel in a letter of correspondence with Appellant. [*Id.* at 26:16] Counsel enjoin not to give knowledge of a re-sentencing order. Albeit, correspondence of counsel may not have been conclusive, counsel still revealed vaguely an ability "unable to recall," having knowledge of the re-sentencing order. Still, there may be a dispute but the non-liberal approach overlooked the nuance of agitation counsel expressed toward Appellant for filing an ineffective assistance of counsel claim against him. **Appx. (I:4)** [ECF No. 22, Appx. 8] Also, the clerk alleges the order was mailed first class to Appellate

counsel. [*Id.*, at Appx. 9] Understanding an incarcerated Appellant represented by counsel could not reasonably have expected to respond to a re-sentencing order or motion submitted without notification by the state court, especially without the acceptable reliance on professional counsel. ***See, U.S. v. Moradi*, 673 F.2d 725 (4th Cir. 1982)**. If for [arguendo] counsel did receive notice of an order, then no reason for a copy not to be referenced in counsel's file. Also, counsel should know failure to provide Appellant with copies of orders and appropriate information about the status of a recent court's decision could lead to a violation of due process. The record reveals counsel's actions were in accordance, under an Order Extending Time to Appeal from the state circuit court, not the re-sentencing order. As indicated on the docket statement and timely filing an appeal before May 31st deadline, *Id.* **Appx. (I:4,5)** [ECF No. 22, Appx. 6-3 (Seq. 96)];[Ex. 3], from such evidence Counsel appears was unaware of a re-sentencing order being filed. Therefore, the only question is whether there is a pattern of deliberate action or inaction on the part of Appellate counsel in response to the re-sentencing order. Either way the non-liberal approach fails to acknowledge the statutory required service.

The non-liberal approach continues, when the court increases the validity of the clerk's letter over the contrary material facts not in support in the record. **Appx. (I:4)** [ECF No. 22, Appx. 9] The state circuit clerk asserts the re-sentencing order was faxed to the facilities that held Appellant in confinement. [*Id.*, at Appx. 9] The courts assessment implies the faxed document carries a weight of reliability that Appellant received notice of the re-sentencing because '[he] failed to submit a copy of the faxed order.' **Appx. (B)**. A liberal review of the record would reveal the fax document was not intended for Appellant, nor was received by Appellant. **Appx. (I:5)** [Ex. 7] However, when Appellant requested for a copy of the faxed order from the facilities' Records Department [Mount Olive Corr. Complex], they informed Appellant the faxed re-sentencing order was not received until June 6, 2021. **Appx. (I:5)** [Ex. 7]. The clerk affirmed the strict following of the directive by no

attempt to send an order out intended for Appellant. *Id.* Still, under the required service all notice of orders or judgements, served by the clerk of the state court "shall make a note of the mailing in the docket." *See*, W. Va. R. Civ. P. 77(d), [such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules]; And, the fax or the mailing to "attorney" is not supported by note on the docket in record. **Appx. (I:4)** [ECF No. 22, Appx. 1, 6, 9] At the commission of this re-sentencing order, the state clerk's [Jeffery Hood] administration was not in office.[17] This is what makes a liberal review of the record extremely essential, rather than forgo the doubt of [an officer] of the court which did not witness to or administered the directives ordered by the state court.

It is clear that *pro se* status, on it's own is not enough to warrant equitable tolling. But, the clear principle of a required liberal view should reaffirm whether the failure of notification of the re-sentencing order was sufficient evidence to equate to "(1) extraordinary circumstances, (2) beyond [Appellant's] control or external to his own conduct, (3) that prevented him from filing on time." *Id. See, Pellum*, at *13(quoting, ***Rouse v. Lee***, 339 F.3d 238, 246 (4th Cir. 2003); *see also*, ***Supermail Cargo***, Inc. v. U.S., 68 F.3d 1204, 1207 (9th Cir. 1995) (Application can only be dismiss on statute of limitations if read with required liberality.). The decision to equitably toll under § 2244(d) "must be made on a case-by-case basis." ***See, Munchinski v. Wislon*, 694 F.3d 308, 329-30 (3rd Cir. 2012)**(quoting: *Holland*, 130 S.Ct. At 2563). In each case, there is a need for "flexibility," "avoiding mechanical rules," and "awareness ... that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." ***Pabon v. Mahanoy*, 654 F.3d 385, 399 (3rd Cir. 2011)**. There are "no bright lines in determining whether equitable tolling is warranted in a given case." *Id.* Rather, "to determine if a petitioner has been [reasonably] diligent in pursuing his

[17] In May 2011, Adell Chandler was active clerk of Cabell County, and processed Appeals proceedings. Jeffery Hood was not elected until many years later.

petition, courts consider the petitioner's overall level of care and caution in light of his or her particular circumstances." [*Id., at 330*] And, in some extraordinary way be prevented from asserting his or her rights. [*Id., at 329*] Generally speaking, a petitioner is entitled to tolling if he shows, (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. [*Id.* (*See* Holland, 130 S.Ct. At 2563)].

Although, the Fourth Circuit allows a much more fact-intensive *de novo* review of the circumstances in record. As a court is permitted, it should use the entire record of conviction to make the determination of reasonable diligence and extraordinary circumstances. As recognized, *In re* Burton, the re-sentencing "is the [final] judgement." *Id. 549 U.S. at 156* [*See* Harper, 2013 U.S. Dist. LEXIS 21578 *12]; *also see,* Ferriera, 494 F.3d at 1292-93. In the record the district court avers Appellant does not provide explanation why he is entitled to equitable tolling, but the court relies on a misapplied filing date of Appellant's appeal, as material fact to determine equitable tolling should not be granted. **Appx. (B)** [ECF No. 26, p 17-19] Herein, the court's conclusion is flawed in at least two major aspects, for Appellant's Notice of Appeal was filed under, **Appx. (I:5)** [Ex. 6], the unrevised W. Va. RAP, therefore, the appeal was timely filed on May 27, 2011 to the state circuit clerk. *Id.* Still, in Appellant's Objection to the Magistrate's PF&R, he argues the statute of limitations should be equitably tolled because the notice of the re-sentencing order did not reach statutory requirements on its service, and referred the court to Appellant's Opposition to Respondent's Motion for detailed facts concerning due diligence and extraordinary circumstances. **Appx. (I:2)** [ECF No. 17, p 3-28] Over the last decade, Appellant has vigorously pursued relief in state and federal court and did what he reasonable thought was necessary to preserve his rights, based on information he received under the circumstances. [*Id. 694 F.3d at 331*] He initially filed a letter of notice - requesting to preserve time to file "federal habeas petition" - to the state court. **Appx. (I:4)** [*Id.*, 22, Appx. 2] Throughout this process, he has filed five petitions for post-conviction relief,

all raising substantial and difficult questions about his conviction. Even after time expired on original 1-year limitations and after a delay of being notified of an order re-sentencing - [which reset 1-year limitation] - was hidden [disguised] from him. He continued to investigate and collect evidence, when on August 17, 2018 uncovered the re-sentencing order from a docket sheet. **Appx. (I:4)** [*Id.*, 22 Appx. 1] On June 21, 2019 he filed a § 2254 petition within 1-year after the uncovered discovery of the re-sentencing order; Moreover, only 1-month after a WVSCA decision denying a Habeas corpus petition. [*Id.*, *See* Munchinski, 694 F.3d at 33].

CONCLUSION

Therefore, AEDPA effectiveness due process 1-year statute of limitations may allow restart from this re-sentencing judgement or when the judgement was discovered, and the running of 1-year statute of limitations period may be suspended for the time a state post-conviction proceeding is "pending." ***See, Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000)**. Petitioner prays that this Court finds equitable tolling up to the time the re-sentencing order was discovered, which allows a full review of the Constitutional issue on the merits. For the forgoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

John R. Johnson, Petitioner - *pro se*