No. 21-6101

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL D. TIMMS
Petitioner,

vs.

BOBBY LUMPKIN, DIRECTOR--T.D.C.J.--CID
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

*** PETITION FOR WRIT OF CERTIORARI ***

Respectfully Submitted,

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QUESTIONS PRESENTED

(1) When a federal district court denies a state prisoner's 28 U.S.C. §2254 petition based upon an improper standard of review; (Harrington v. Richter 131 S.Ct. 770(2011) any theory that could have supported denial of relief); contrary to the requirements of the AEDPA and this Court's holdings in Ylst v. Nunnemaker 501 U.S. 797(1991) and Wilson v. Sellers 138 S.Ct. 1188(2018); could jurists of reason, contrary to the Fifth Circuits ruling, debate the district court's resolution of that petition, or conclude the issue is deserving of encouragement to proceed further? And would Federal Rule of Civil Procedure 60(b)(6) relief be appropriate in this instance?

(2) When a state court decision is concededly contrary to Supreme Court precedent and the district court then denies relief based upon the Respondent's hypothetical Harrington theory; Harrington v. Richter 131 S.Ct. 770(2011); or Wilson v. Sellers "most likely relied on other grounds" standard; 138 S.Ct. 1188,1186(2018), as being reasonable applications of Supreme Court law, did that court impermissably expand the AEDPA to require petitioner to overcome both the contrary to and unreasonable application clauses of 28 U.S.C. §2254 (d)(1) before receiving de novo review of his constitutional claim?

(3) When this Court's decision in Wilson v. Sellers 138 S.Ct. 1188(2018) resolved an intra-circuit split within the Fifth Circuit in favor of the petitioner's previous federal filings was it unreasonable to deny the petitioner's pro-se request for a 14 day extension of time so that he may petition that court for rehearing en banc?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

The opinion of the United States Court of Appeals appears at Appendix 4 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 3 to t the petition and is unpublished.

The date on which the United States court of appeals decided my case was July 23, 2021. No petition for rehearing was timely filed in my case because the Fifth Circuit denied my pro-se request for an extension of time.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 and 28 U.S.C. §2 §2254(d)- An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or 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.

BASIS OF JURISDICTION

Mr. Timms, the petitioner, was convicted of aggravated robbery in the 364th DistrictyCourt of Lubbock County, Texas. He was sentenced by the judge to Life

imprisonment. Appeal was taken to Texas' Seventh District Court of Appeals, (7th COA);(Timms v. State 2010 Tex. App. Lexis 3407), which was affirmed on April 23, 2010.(Appndx. 1). Mr. Timms then petitioned that court for rehearing which was also denied.(Timms v. State 2010 Tex. App. Lexis 4274). Mr. Timms then filed a Petition for Discretionary Review(PDR)to the Texas Court of Criminal Appeals(TCCA) which was summarily denied without a written opinion on September 15, 2010.(In Re Timms 2010 Tex. Crim. App. Lexis 1105). On February 22, 2011 this Court denied certiorari review. A state writ of habeas corpus was then filed, pro-se, which was denied without written order on July 3, 2013.

On July 8, 2013 Mr. Timms timely filed, pro-se, a petition forra writ of of habeas corpus in the United States district court for the Northern District of Texas, Lubbock Division.(U.S.D.C. No. 5:13-CV-148). That petition was denied on July 27, 2016.(Appndx. 2) Mr. Timms then sought a certificate of appealability(COA) from the Fifth Circuit,(No. 16-11249), which was denied on June 20, 2017; a timely filed petition for rehearing en banc was denied as well. Mr. Timms returned to this Court and was ednied certiorari review for a second time on Jamuary 8, 2018.(No. 17-6366).

On November 13, 2019 Mr. Timms filed his second writ of habeas corpus in state court. That application was dismissed as being subsequent under Tex. Code of Crim. Procedure art. 11.07 §4(a) on December 18, 2019. Mr. Timms then, pro-se, presented a Federal Rule of Civil Procedure motion under Rule 60(b)(6) to the district court on June 8, 2020, which was denied on November 9, 2020.(Appndx 3). Mr. Timms again sought a COA in the Fifth Circuit which was denied on July 23, 2021.(No. 20-11188; Appndx. 4). He then requested a 14 day extension of time to file a motion for rehearing en banc. That request was denied on August 11, 2021. (Appndx. 5) The instant petition is filed within 90 days of the Fifth Circuits denial of Mr. Timms request for a COA and is therefore timely.(S.Ct. Rule 13.1)

STATEMENT OF THE CASE

In 2009 Mr. Timms was convicted under Texas' law of parties for an aggavated robbery that occured while he was in jail, and then sentenced by the judge to Life imprisonment. At trial Mr. Timms called, as his sole defense witness, his alleged codefendant Donnie Green to the stand. Almost a year prior to being called as Mr. Timms witness Green had pled guilty to the offense in question, was sentenced to two--25 years terms in prison, and because he had chosen not not to appeal his conviction it had long become final.(see Defense Exhibit 1).

Over Mr. Timms objection, and without inquiring into the legitimacy of Green's assertion, the trial court allowed Green to invoke his Fifth Amendment right to remain silent. Mr. Timms then established on the trial record, outside the presence of the jury, that Green's testimony would be relevant and material to his defense, would prove Mr. Timms was not acting as a party with Green in his commission of the offense, and offered into evidence a jailhouse phone recording, from after the incident, of Green telling his mother Mr. Timms had nothing to do with the crime. The state voiced no objections to this proposed testimony exonerating Mr. Timms who argued to the trial court he had a constitutional right to compel Green's testimony.(Reporters Record(R.R.) Vol. 8 p. 159-166; Defense Exhibits 2-3)

Mr. Timms then presented his Sixth Amendment compulsory process claim to the 7th COA on direct appeal insisting that, under this Court's decision in Washington v. Texas 388 U.S. 14,19, 87 S.Ct. 1920(1967), he was entitled to a new trial because the trial court refused to compel Green's testimony and in doing so denied Mr. Timms defense. The 7th COA denied Mr. Timms claim based upon the TCCA's state-created rule in [1]Ross v. State 486 S.W.2d 327(1973). In Ross

1. Although the 7th COA's opinion cites Boler v. State, it was the Ross decision the Boler court relied upon for its reasoning.

the TCCA decided, without citing to any pre-existing authority, if a witness invokes Fifth Amendment protections on the advice of counsel "a trial court need not make any inquiry into the validity of one's reliance upon the Fifth Amendment."(Appndx. 1 p.7) Relying on that proposition the 7th COA determined Mr. Timms trial record established Green invoked Fifth Amendment protections on the advice of counsel, and since the trial court was not obligated to inquire into the validity of that assertion Mr. Timms could not establish a compulsory process violation.(id.)

Almost two years after the 7th COA rendered their decision the TCCA considered whether a trial court's refusal to compel testimony from a defense witness who has invoked Fifth Amendment protections, based soley on the advice of counsel, and without first determining whether a reasonable basis for "a real and substantial fear of prosecution" exists, violates a defendants right to due process and due course of law. see Walters v. State 359 S.W.3d 212(Tex. Crim. App. 2011). Citing Ohio v. Reiner 532 U.S. 17,21, 121 S.Ct. 1252(2001) the Walters court determined their earlier decision in Ross "conflicts with Supreme Court case law," overruled that decision, along with almost 40 years of precedent, and held trial court's are obligated to inquire into the reasonableness of a witnesses Fifth Amendment assertion. Walters 359 S.W.3d at 215.

Acting pro-se, Mr. Timms then timely presented, inter-alia, his Sixth Amendment compulsory process claim in a 28 U.S.C. §2254 petition, and the district court issued an order to show cause.(Document 3)[2]. In setting out the controlling law to Mr. Timms 2254 petition the Respondent cited Harrington v. Richter 131 S.Ct. 770(2011) as requiring, under AEDPA provisions, "a federal court must consider every justification that a state court provided--and **it must** hypothesize every justification that a state court **could have** provided,"

2. All documents referenced are as found on the district court's docketting statement.

when adjudicating a state prisoner's claim under 2254(d).(Appndx. 6 p.9). The Respondent then conceded the 7th COA's reliance on Ross v. State , supra., was not only "misplaced"(id. p.12), but was "wrong" as well.(id. p.19)(see also Appndx. 3 p.4 where the district court acknowledges "the Amarillo court's opinion relied on bad law.")

The Respondent then presented a theory that because the trial court heard Green invoke his Fifth Amendment protections a week earlier in the trial of Tammy Timms(another alleged codefendant)and was therefore familiar with Green's background, involvement in this crime, "and possibly others," the judge "**could have** reasonably believed that Green would be exposed to additional liability if he testified."(Appndx. 6 p.16). The Respondent further hypothsized that, in summarily denying Mr. Timms PDR--

> the court of criminal appeals clearly rejected Timms argument that Judge Underwood should have made a more detailed inquiry into the reasons why Green invoked his Fifth Amendment privilege based on Grayson and Hoffman. While the Seventh District Court of Appeals may have been wrong to have relied on Ross, the court of criminal appeals was certanly right to have rejected Timms claim under Hoffman given the inquiry Judge Underwood did make on the record combined with his familiarity with Green and his criminal history.see Brown v. Collins 937 F.2d 175,182(5th cir.1991)(quoting Clark v. Maggio 737 F.2d 471, 475-76 for the proposition that "We do not grant a writ of habeas corpus in every instance in which the state has failed to conform to constitutional requirements.")

(Appndx. 6 p.19-20)(hereafter referenced as Respondent;s hypothetical Harrington theory.)

Mr. Timms filed a written response to the Respondents answer. He argued that becuse the Ross decision the 7th COA relied on to deny his direct appeal had been overturned as being in conflict with Supreme Court law, AEDPA no longer governed his issue and he was entitled to de novo review of his claim.(Doc. 10 p.1-2). Ignoring Mr. Timms assertion the district court adopted the Respondent's hypothetical Harrington theory as being an reasonable application of Supreme Court law and denied relief, "Based upon the facts and law clearly set

forth in the Respondent's answer,"(Appndx. 2 p.3), and the district court itself chose not to apply its own legal reasoning to the facts of Mr. Timms claim.

After the district court denied relief Mr. Timms, continuing pro-se, t timely presented an application for a COA and a motion for rehearing and rehearing en banc to the Fifth Circuit.(No. 16-11249). In both of those filings Mr. Timms argued, inter-alia, it was error for the district court to deny relief on his compulsory process claim because the Respondent's hypothetical Harrington theory relied on facts external to Mr. Timms trial record, contrary toothe requirements of Cullen v. Pinholster 131 S.Ct. 1388(2011), which demanded adjudicating Mr. Timms claim based soley on the record that was before the 7th COA, and in denying relief that court was endorsing a deviation from those requirements.(see p.6,11-12 of COA brief)(see also motion for rehearing p.2-3; "The district court's acceptance of the Respondent's application of Hoffmanin de denying relief when the Hoffman inquiry concerning the validity of Green's Fifth Amendment assertion was based on matters external to the record is a clear deviation from Pinholster's requirements."; "In denying Mr.Timms request for a COA...this court has endorsed that deviation." p.9 of motion). The application for COA and the motion for rehearing were denied.

Mr. Timms then, pro-se, argued to this Court it was error to deny his compulsory process claim based upon the conflict between the Respondent's hypothetical Harrington theory and Pinholster's requirements.(Pinholster required the district court to review the Petitioner's claim on the record that was before the 7th COA"; Cause No.17-6366 p.24 of certiorari);(Because the Respondent decided Petitioner was not entitled to relief on his compulsory process claim by relying in part, or in whole on Tammy's trial, the Respondent's answer ignores Pinholster's requirements that his claim was to be decided on the record that was before the state court."(id. p.25 of certiorari). Liberal construction of Mr. Timms pleadings establish he was arguing, at every legal

avenue available to him, Harrington's could have supported reasoning did not apply to his federal petition. His argument fell upon deaffears.

When Mr. Timms was arguing it was error to deny his 2254 petition based upon the Respondent's hypothetical Harrington theory there was an intra-circuit split within the Fifth Circuit, and federal district court's across Texas, as to whether Harrington v. Richter's any theory that could have supported denial of relief controlled a state prisoner's petition, or Ylst v. Nunnemaker 501 U.S. 797(1991) and the "look through" doctrine was controlling. In 2018 this Court, in Wilson v. Sellers 138 S.Ct. 1188, resolved that spli by reaffirming Ylst's "look through" doctrine when, as here, there is a reasoned state court opinion. The Wilson decision resolved the Fifth Circuit's intra-circuit split in favor of Mr. Timms previous federal filings leading him to file a motion under Federal Rule of Civil Procedure 60(b)(6). In those proceedings Mr. Timms argued it was an abuse of discretion, and contrary to the requirements of AEDPA, for the district court to have decided his claim on a standard of review that was not relevant to thoseproceedings. And because no court, state or federal, has reviewed the merits of Mr. Timms compulsory process claim based upon a constitutionally correct rule of law, or a standard of review relevant to established proceedings, he has been subjected to a fundamental miscarriage of justice and denied his right to a fair and meanigful review of his claim.(see Doc. 28 p. 1-2, 38; see also Appndx. 3 p.2) The district court denied Mr. Timms 60(b) motion, and the Fifth Circuit denied Mr. Timms request for a COA, resulting in the instant petition.

REASONS FOR GRANTING THE PETITION

This Court particularly considers certain issues in deciding whether to grant certiorari review. Among them are situations in which "a state court or United States court of appeals has decided an important federal question in a

way that conflicts with relevant decisions of this Court." see Supreme Court Rule 10(c). The Fifth Circuit, in declining Mr. Timms request for a COA, has allowed the district court to deny Mr. Timms 2254 petition on a standard of review that conflicts with Ylst v. Nunnemaker 501 U.S. 797(1991); and Wilson v. Sellers 138 S.Ct. 1188(2018); and contravenes AEDPA provisions which place non-discretionary measures upon federal habeas court's. Furthermore, the district court's decision, first in 2254 proceedings, then again in 60(b) proceedings, expanded the AEDPA to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 28 U.S.C. §2254(d)(1) before receiving a de novo review if his meritorious Sixth Amendment compulsory process claim.

QUESTION ONE

Whena federal district court denies a state prisoner's 28 U.S.C. §2254 petition based upon an improper standard of review;(Harrington v. Richter 131 S.Ct. 770(2011) any theory that could have supported denial of relief); contrary to the requirements of AEDPA and this Court's holdings in Ylst v. Nunnemaker 501 U.S. 797(1991); and Wilson v. Sellers 138 S.Ct. 1188(2018); could jurists of reason, contrary to the Fifth Circuits ruling, debate the district court's resolution of that petition, or conclude the issue is deserving of encouragement to proceed further? And would Federal Rule of Civil Procedure 60(b)(6) relief be appropriate in this instance?

Argument and Authorities

Mr. Timms is attempting to appeal the Fifth Circuits denial of his request for a COA concerning the district court's dismissal of his Rule 60(b)(6) motion. "Before an appeal may be entertained," a habeas petitioner "must first seek and obtain a COA" as a "jurisdictional prerequisite." Miller-El v. Cockrell 537 U.S. 322, 335-36, 123 S.Ct. 1029(2003). To receive a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). This standard is satisfied by "demonstrating that his application involves issues that are debatable among jurists of reason, that another court could resolve the issue differently, or that the issues are

suitable enough to deserve encouragement to proceed further." Hernandez v. Johnson 213 F.3d 243,248(5th cir. 2000)(citations omitted). The court limits its examination at the COA stage "to a threshold inquiry into the underlying merit of the claims." Rhoades v. Davis 852 F.3d 422,427(5th cir.2017)(citing Buck v. Davis 137 S.Ct. 759,773(2017). When a state appellate court is divided on the merits of the constitutional claim, issuance of a COA "should ordinarily be routine." Rhoades 852 F.3d at 429.

Denial of a Rule 60(b)(6) motion is reviewed for an abuse of discretion. Therefore, "the COA question is...whether a reasonable jurist could conclude that the district court abused its discretion in decling to reopen the judgement." Buck 137 S.Ct. at 777. Though a court may reopen a judgement for "any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6), it will do so only on a showing of "extraordinary circumstances." Gonzales v. Crosby 545 U.S. 524,535(2005)

Thirty years ago this Court decided when a federal habeas court is reviewing a state prisoner's constitutional claims it must presume that, "Where there has been one reasoned state judgement rejecting a federal claim later unexplained orders upholding that judgement or rejecting the state claim rest upon the same ground." Ylst v. Nunnemaker 501 U.S. 797,803(1991). Accordingly, when there is a state court opinion available to federal habeas court's they are required to "look through" any unexplained orders to that opinion, focusing "exclusively on the actual reasons given by the lower state court, and... defer to those reasons under AEDPA," if they are reasonable. Wilson v. Sellers 138 S.Ct. 1188(2018)(citations omitted). This approach is "easier to apply in practice, than to ask the federal court to substitute for silence the federal court's thought as to more supportive reasoning." Wilson 138 S.Ct. at 1197.

In 2011 this Court held in order to "award habeas relief to a state prisoner

in state custody, a federal court must consider every justification that a state court provided--and it must hypothesize every justification that a state court could have provided--and conclude the denial of habeas relief was so outrageous and unreasonable that every fairminded jurist would condemn it." Harrington v. Richter 131 S.Ct. 770(2011). The Harrington Court was addressing a situation where there was no reasoned state court opinion to "look through" to.

When Mr. Timms first presented his 2254 petition to the district court he argued, inter-alia, that he had been denied his Sixth Amendment right to compulsory process at trial, the Fifth Circuit, and district court's across Texas, had been split within on whether Ylst's "look through" doctrine was controlling, or Harrington's "could have supported" reasoning controlled. see Bledsue v. Johnson 188 F.3d 250,256(5th cir. 1999); Register v. Thaler 681 F.3d 623(5th cir. 2012); Green v. Stephens 2015 U.S. District Lexis 22402; Langley v. Prince 890 F.3d 504 n.15(5th cir. 2018); Guevall v. Davis 750 Fed. Appx. 330(5th cir. 2018); all relying on Ylst's "look through" doctrine; but see Evans v. Davis 875 F.3d 210,216(5th cir. 2017); Clark v. Thaler 673 F.3d 410,418(5th cir. 2012) relying on Harrington's could have supported reasoning.(These are just a few relevant decisions)

Some of those court's, like the district court herein, were relying on whatever standard best suited denial of relief. Compare the case at bar where both the Respondent and the district court concede the 7th COA's direct appeal opinion was contrary to Supreme Court law, and then denying relief based upon the TCCA's summary denial of Mr. Timms PDR and Harrington's could have supported reasoning;(see Appndx. 3 p.4, the district court's order denying 60(b) relief; "Respondent acknowledged that the Amarillo court's opinion relied on bad law"); with the companion case of Tammy Timms v. Thaler 5:12-CV-32 where the 7th COA's

direct appeal opinion was not contrary to Supreme Court law the district court readily utilized Ylst and the "look through" doctrine to deny relief.(see also Kaizer v. Stephens 2017 U.S. District Lexis 217834 where that court held "Federal court's must determine what theories or arguments...could have supported denial of relief, but "...if a decision by a state court is silent...a federal court can "look through"...to last reasoned decision.")

Recently, this Court not only resolved the Fifth Circuits intra-circuit split, but resolved it in a manner favorable to all of Mr. Timms initial federal habeas pleadings. This Court held AEDPA review applies to "the last state court [decision] to decide a prisoner's claim." Wilson v. Sellers 138 S.Ct. 1188,1192(2018). But, when that decision lacks reasoning, as the TCCA's summary refusal of Mr. Timms PDR did, the reviewing "federal court should 'look through' the unexplained decision to the last state court decision that does provide a relevant rationale...and preseume that unexplained decision adopted the same reasoning." id.(reaffirming Ylst v. Nunnemaker) This inquiry is "straight forward" requiring "the federal habeas court to 'train its attention on the particular reasons--both legal and factual--why state court's rejected a state prisoner's federal claims" and defer "to those reasons if they are reasonable." id. at 1191-1192. Importantly, this inquiry, as Mr. Timms has previously argued to this Court, is "limited to the record that was before the state court" and focuses on what "a state court knew and did." Cullen v. Pinholster 131 S.Ct. 1388(2011)(supra. p.6-7)

The substance of Mr. Timms Federal Rule of Civil Procedure 60(b)(6) motion was that, in relying on Harrington's could have supported reasoning, "the district court decided his 2254 petition contrary to the requirements of AEDPA, which places non-discretionary measures upon the court, by adopting a standard of review that was not relevant to Mr. Timms federal petition. This error of

law precluded the district court from reaching the true merits of Mr. Timms claim."(see Cause No. 20-11188, p.20 of Mr. Timms COA brief to Fifth Circuit) (see also Doc. 28 p.1-3,38 of Mr. Timms 60(b) motion). The first question to be considered then, did the district court in fact rely upon Harrington's could have supported reasoning to deny 2254 relief? If so, that court abandoned its duty under AEDPA provisions, and this Court's jurisprudence. This question is easily answered in the affirmative.

The district court denied 2254 relief based upon the facts and law clearly set forth in the Respondent's answer and that court chose not to apply its own legal reasoning to the facts of Mr. Timms petition.(see Appndx. 2 p.3). Mr. Timms would respectfully ask this Court to review the Respondent's answer at Appendix 6. In setting out what is required of the district court, under AEDPA provisions, to decide Mr. Timms petition the Respondent cites Harrington v. Richter as holding a federal habeas court must consider every justification a state court provided, and **it must hypothesize every justification a state court could have provided**.(id. at p.7-11) The Respondent then concedes the 7th COA's opinion is contrary to Supreme Court law, then offers several arguments the TCCA, in summarily denying Mr. Timms PDR, could have relied on to deny relief.(id. at p.11-20). Clearly the Respondent relied exclusively on Harrington's could have supported reasoning, and the district court relied exclusively on the Respondent's hypothetical Harrington theories to deny relief. In doing so the district court abused its discretion concerning AEDPA requirements.

In response to Mr. Timms 60(b) motion the district court insisted "the Wilson Court also held a state may rebut the preseumtion by showing that the unexplained affirmance most likey relied on different grounds," and after acknowledging the "Amarillo court's opinion relied on bad law," the Respondent

was actually arguing the TCCA "most likely relied on different grounds to deny" relief.(Appndx. 3 p.4). "In support of that argument," according to the district court the "Respondent offered lengthy excerpts from the record to show the TCCA 'undoubtedly relied on the record and [controlling law]'" to decide Mr. Timms compulsory process claim was without merit.(id.) This reasoning is flawed for several different reasons.

First, it wasn't the Wilson Court that held a state may attempt to rebut the presumption an unexplained affirmance most likely relied on different grounds. This rebuttable preseumption concept had been available for twenty-five years when the Respondent answered Mr. Timms 2254 petition. see Ylst v. Nunnemaker 501 U.S. 797,803(1991). Therefore, it would be illogical to believe the Respondent cited Harrington, argued it must be followed, but really meant to rebut a presumption "the Wilson Court" held was available, when that legal avenue had been available to the Respondent under Ylst all along.

Secondly, the lengthy excerpts mentioned by the district court were nothing more than opinion evidence provided by Detective Lofton. At trial the state relied upon various jailhouse phone recordings to prove their case. Yet, no one disputes Mr. Timms is not heard in any of them telling anyone to commit this crime.(see Appndx. 7 p.3-4). Det. Lofton was allowed to place these recordings into a context for which he testified it was his opinion they proved Mr. Timms conspired with his wife Tammy and Green to commit this crime.(R.R. 8 p.100-101). Det. Lofton's testimony went uncontested at trial because that court allowed Green to invoke Fifth Amendment protections [3] without inquiring into the validity of that assertion. Green's proposed testimony completely contradicts Det. Lofton's and clearly establishes Mr. Timms innocence. Additionally, it

3. This is the proposition of law that rendered the 7th COA's decision contrary to Supreme Court law and was overturned by the TCCA.(see supra., at p.3-4

would be even more illogical to believe the TCCA "undoubtedly relied on the record and [controllin law]" to deny Mr. Timms claim when, at the time Mr. Timms presented his PDR to the TCCA, the Ross decision used to deny his direct appeal had not yet been overturned and was still controlling. There is no compelling reason in the record to believe the TCCA was not following the Ross decision, as it had been doing for almost 40 years. Moreover, the Wilson Court specifically acknowledged it would be improper for a federal court "to substitute for silence the federal court's thought as to more supportive reasoning." Wilson 138 S.Ct. at 1197. Accordingly, it was error for the district court to do so here.

Because the district court, in the first instance, decided Mr. Timms 2254 petition outside the paramaters of the AEDPA, and contrary to this Court's holdings in Ylst v. Nunnemaker 501 U.S. 797(1991), and Wilson v. Sellers 138 S.Ct. 1188(2018); and because the Respondent's hypothetical Harrington theory relied on facts outside of Mr. Timms trial record(as he previously argued to this Court)contrary to the requirements of Cullen v. Pinholster 131 S.Ct. 1388 (2011), reasonable jurists could conclude the district court abused its discretion in decling to reopen this judgement. see Buck v. Davis 137 S.Ct. 759, 777(2017). Furthermore, because the Wilson decision resolved the Fifth Circuits intra-circuit split in favor of Mr. Timms previous federal filings, and because no court, state or federal, has yet to review Mr. Timms meritorious Sixth Amendment compulsory process claim on a constitutionally correct rule of law, or a standard of review relevant to established proceedings, reasonable jurists could conclude Mr. Timms issue is deserving of encouragement to proceed further.

Importantly, it should be noted that because the district court, when denyinh Rule 60(b)(6) relief, changed its legal position from relying upon the Respondent's hypothetical Harrington theory to deny 2254 relief, to relying on

Wilson as holding the Respondent was actually showing the TCCA, in summarily denying Mr. Timms PDR, most likely relied on grounds other than the reasons set out in the 7th COA's opinion has itself debated the correctness of its 2254 ruling. And for those same reasons that court determined Mr. Timms had not shown extraordinary circumstances justifying relief. In so holding, the district court failed to conduct a required fact-intensive inquiry. see Gonzales v. Crosby 545 U.S. 524,535(2005). This Court has held in evaluating extraordinariness "it is appropriate to consider the risk of injustice to the pa parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the publics confidence in the judicial process." Liljeberg v. Health Servs. Aquisition Corp. 486 U.S. 847, 866(1988).

In his COA application to the Fifth Circuit Mr. Timms named 15 relevant factors to the required inquiry.(see Cause No. 20-11188; COA brief p.25-27). In the interest of brevity Mr. Timms would respectfully refer the Court to his COA filing, but will briefly address the most compellin factors.

First, the risk of injustice to the parties involved. Mr. Timms preserved his Sixth Amendment compulsory process claim at trial. He then prsesented his claim to the 7th COA who relied on the Ross decision to deny relief. Two years later the Ross decision is overturned as being in conflict with Supreme Court law. In federal habeas proceedings both the Respondent and district court concede the 7th COA's decision was contrary to Supreme Court law then, ignoring Mr. Timms argument he was entitled to de novo review of his claim, the district court expanded(see Question Two below)the AEDPA, first under Harrington, then in 60(b) proceedings under Wilson, to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 2254(d)(1). This Court and

the Fifth Circuit disregarded Mr. Timms initial federal filings arguing the Respondent's hypothetical Harrington theory conflicted with the requirements of Cullen v. Pinholster 131 S.Ct. 1388(2011), and that his claim must be decided on the record that was before the 7th COA. At this time Mr. Timms has been completely denied his constitutional right to a fair and meaningful review of his meritorious constitutional claim. There can be no greater injustice to a person who has been convicted of a crime that occured while he was sleeping in a jail cell, and then sentenced to Life imprisonment.

The state, however, has received an unquestioned windfall of wins that began with the trial court's refusal to inquire into whether Green had a valid Fifth Amendment right to invoke, then to having Mr. Timms Sixth Amendment compulsory process claim denied on direct appeal by a state-created rule of law that was later determined to be unconstitutional. Federal review has been fully inconsistent with the requirements of the AEDPA and this Court's longstanding precedent. There has been nothing advarsarial about any part of these proceedings.

Next, the risk of undermining the publics confidence in the judicial proceedings can be no greater than when federal habeas court's are allowed to disregard established procedures, or expand them in a way that conflicts not only with this Court's decisions, but every other circuit court of appeals. Under a proper standard of review Mr. Timms is entitled to, at a minumum, a de novo review of his claim and certainly a new trial thereafter. The risk the denial of relief will produce injustice in other cases will be discussed below under Question Two.

For the above reasons Mr. Timms has shown Rule 60(b)(6) relief would have

been appropriate, and it was error for the Fifth Circuit to deny Mr. Timms a COA.[4]

QUESTION TWO

When a state court decision is concedely contrary to Supreme Court precedent and the district court then denies relief based upon the Respondent's hypothetical Harrington theory;(Harrington v. Richter 131 S.Ct. 770(2011); or Wilson v. Sellers "most likey relied on other grounds" standard; 138 S.Ct. 1188,1196(2018), as being a reasonable application of Supreme Court law, did that court impermissably expand the AEDPA to require petitioner to overcome both the contrary to and unreasonable application clauses of 28 U.S.C. §2254 (d)(1) before receiving de novo review of his constitutional claim?[5]

Argument and Authorities

Mr. Timms, in his brief requesting a COA, specifically argued that:

It should also be noted that because the Respondent, and the district court both conceded the 7th COA's decision was contrary to Supreme Court law, AEDPA provisions no longer apply to his claim and he is entitled to de novo review. In fact, Mr. Timms made this argument in his reply to Respondent's Answer before the district court denied his §2254 petition.(Doc. 10 p.2). That argument, like the one he made about the Respondent's hypothetical [Harrington] theory not applying to his petition, fell upon deaf ears.

Apparently, the fact Mr. Timms met his burden under AEDPA's contrary to clause was not enough for the district court. That court, ignoring those facts, went on to adopt the Respondent's hypothetical [Harrington theory] as being a reasonable application of Supreme Court law. But, AEDPA does not require Mr. Timms to overcome both the contrary to and unreasonable clauses. It was error for the district court to hold otherwise, and for not conducting a de novo review of Mr. Timms claim after adopting the Respondent's position that the 7th COA's decision was contrary to Supreme Court law.

(Cause No. 20-11188; p.11-12 of Mr. Timms COA brief to Fifth Circuit). Based upon the above, and the argument presented in Question One, Mr. Timms believes he has adequately established the Respondent and the district court both conceded the 7th COA's direct appeal opinion was contrary to Supreme Court law,

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4. It should also be noted the Fifth Circuit has held when state court's are divided on a constitutional issue it should "ordinarily be routine" that a COA is issued.(supra., at p.8-9). Because the TCCA overturned the Ross decision relied on by the 7th COA to deny Mr. Timms claim on direct appeal a COA should have issued the first time he was before the Fifth Circuit..

5. This question of law should be considered subsidiary of Question One and according to Supreme Court Rule 14.1(a) would be properly before the Court.

and then relied upon the Respondent's hypothetical Harrington theory as being a reasonable application of Supreme Coutr law, thus expanding the AEDPA to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of §2254(d)(1).

As a pro-se litigant, unlearned in the law, it sometimes takes Mr. Timms a minute to fully grasp some legal concepts. For example, in 60(b) proceedings the district court(for the first time)decided to apply its own legal reasoning to Mr. Timms 2254 petition. In doing so that court further expanded this Court's precedent to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 2254(d)(1).

In denying 60(b) relief the district court held even though the Respondent cited Harrington, and then said the court must hypothesize any theory that could have supported denial of relief, what the Respondent actually meant to do was rebut...

> the presumption that the TCCA relied on the same grounds as the Amarillo court by offering evidence of alternative grounds that were clear from the record and were the likely basis for the decision. Thus, review in this case was entirely consistent with the Supreme Court's later Wilson decision.

(see Appndx. 3 p.4). Mr. Timms would again point out the Respondent, and the district court alike, had at their disposal at the time they decided Mr. Timms 2254 petition case law from this Court allowing them to argue the TCCA "most likely relied on different grounds," and failed to make this argument. see Ylst v. Nunnemaker. It was not, as the district court held, the "later Wilson decision" that offered this legal avenue.

Additionally, this newly taken legal position by the district court does exactly what the Respondent's hypothetical Harrington theory did, it ignored that because the 7th COA's direct appeal opinion is concededly contrary to

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6. It should be noted thse alleged "alternative grounds" further ignore §2254(e)'s requirement of defering to reasonable factual determinations made by the 7th COA.(see Mr. Timms COA brief to Fifth Circuit p.22-23; Cause No. 20-11188)

Supreme Court law, under AEDPA provisions Mr. Timms has met his burden entitling him to a de novo review of his claim. The district court's reasoning here expands this Court's decision in Wilson to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 2254(d)(1) under the guise the TCCA's unexplained affirmance "most likely relied on other grounds,"(Appndx. 3 p.1-4), as being a reasonable application of Supreme Court law. Allowing such a holding to stand not only changes the landscape of 2254(d)(1) but denial of relief will almost assuredly produce unjust results in other cases. In other words, federal court's will continue to be inclined to ignore state court decisions that are contrary to, or unreasonably apply Supreme Court precedent if this Court allows this expansion of AEDPA requirements to stand.

It was an abuse of discretion for the district court to expand the AEDPA to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 28 U.S.C. §2254(d)(1) in order to justify denial of, first Mr. Timms 2254 petition, and then Rule 60(b) relief. In declining Mr. Timms request for a COA the Fifth Circuit has endorsed this expansion.

QUESTION THREE

When this Court's decision in Wilson v. Sellers 138 S.Ct. 1188(2018) resolved an intra-circuit split within the Fifth Circuit in favor of petitioner's previous federal filings was it unreasonable to deny the petitioner's pro-se request for a 14 day extension of time so that he may petition the court for rehearing en banc?

Argument and Authorities

The Fifth Circuit denied Mr. Timms application for a COA on July 23, 2021. (Appndx. 4) Mr. Timms did not receive that notice until August 2, 2021 when the prison's mailroom called him down for legal mail.

On that same day Mr. Timms placed in the Allred unit's mailbox a motion to the Fifth Circuit requesting a 14 day extension of time so that he may

petition the court for rehearing en banc. Mr. Timms pointed out in his motion that, according to Federal Rule of Appellate Procedure 40(1), he was only allowed 14 days to petition the court for rehearing. And, since it took 10 days for Mr. Timms to receive the Fifth Circuit's denial of the COA he would be unable to comply with those rules without the extension of time. It should be noted Mr. Timms invoked the mailbox rule in his motion.

On August 10, 2021, Mr. Timms placed his motion for rehearing in the prison's mailbox, again invoking the mailbox rule so that his motion would be considered timely filed.(see Appndx. 7). On August 11, 2021, the Fifth Circuit ordered Mr. Timms motion for extension of time be deniad.(Appndx. 5). Mr. Timms then received a letter from the Fifth Circuit informing him that, because his motion for extension of time had been denied, his motion for rehearing was considered untimely filed, and the court would take no further action in this matter, rendering the appeal closed.(Appndx. 8)

According to Federal Rule of Appellate Procedure an en banc hearing or rehearing is not favored, and will only be granted in limited circumstances. see Fed. R. App. P. 35(a)(1)(2). Mr. Timms believes his request for rehearing meets those limited circumstances. In deciding his previous federal filings contrary to this Court's decision in Ylst v. Nunnemaker 501 U.S. 797(1991), and then expanding the AEDPA to require Mr. Timms to overcome both the contrary to and unreasonable application clauses of 2254(d)(1), the Fifth Circuit has placed itself squarely at odds with every other United States court of appeals, as well as this Court's well-settled jurisprudence. In this instance Mr. Timms has established en banc review would be appropriate.

Moreover, this available legal avenue is important to Mr. Timms for another reason. If, en banc, the Fifth Circuit granted review on the basis Mr. Timms alleged in his motion for rehearing,(Appndx. 7), determined he was legally

correct in his arguments, but then determined--for whatever reason, Rule 60(b) relief was not appropriate, that court could choose to go back to Mr. Timms initial federal filings and rehear the case in the first instance.

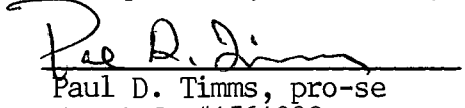
Additionally, if pro-se litigants are denied the opportunity to present thse petitions only because they are not notified of a court's denial for 10 days after the fact, and their timely request for extensions of time are denied, the Federal Rules will tend to apply differently to indigent pro-se litigants than to those who have the means to hire counsel. Thus, the court house doors effectively become closed to pro-se litigants.

Because Mr. Timms has presented compelling, meritorious arguments in favor of a full court's en banc rehearing, he would respectfully ask for a remand to the Fifth Circuit to consider his motion for rehearing en banc timely filed.

PRAYER

Mr. Timms prays the Court grant certiorari and, on hearing the case, vacate his conviction or remand his case back to the Fifth Circuit to be decided on a constitutionally correct rule of law, and a correct standard of review, or order all relief the Court may deem appropriate.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

It is Mr. Timms belief, as a pro-se litigant, this Petition for Writ of Certiorari complies with all Supreme Court Rules and requirements.

Paul D. Timms, pro-se

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of September 2021 a true and correct copy of this Writ of Certiorari was served on Jessica Manojlovich Assitant Attorney General, at P.O. Box 12548, Austin, Texas, 78711, by placing said petition in the prison mailbox on the above date postage pre-paid.

Paul D. Timms, pro-se