22-5289

No.

ORIGINAL

In The
Supreme Court of the United States

Phillip A. Brown II,
Petitioner,
v.
Cindi Curtin et. al.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals Sixth Circuit

(Brown v. Curtin, #14-1876) (Habeas Corpus)
(Brown v. Bergh, 2:09-cv-14850 (E.D. Mich.)

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Petitioner Phillip A. Brown II respectfully petitions this Court for a Writ of Certiorari to review the judgement of the Sixth Circuit Court of Appeals in *Brown v. Curtin*, 2022 U.S. App. Lexis 7535 (6th Cir. March 22, 2022) (#14-1876; R. 103-2).

1. **Whether The Circuit Court Must Recall The Mandate In Extraordinary Cases Where It Lacked Subject Matter Jurisdiction Over A Final Judgment Resulting From The District Court's Failure To Adjudicate At Least (4) Habeas Claims Contrary To *Collins v. Miller*, 252 U.S. 364 (1920)?**

In this case, the Sixth Circuit lacked an arguable basis for jurisdiction where it admitted, "The district court did not address the appellate counsel ineffectiveness as a freestanding claim," and neither court considered important affidavits or compelled a *Remmer* Hearing for a complete record and merits decision on the impartial jury claim. *See Brown v. Curtin*, 661 F. App'x 398, 412 (6th Cir. 2016). This violated the Court's rule for complete and final judgments which produced a jurisdictional defect. *See, e.g., Porter v. Zook*, 803 F.3d 694, 695-97 (4th Cir. 2015)

The Sixth Circuit acted without appellate jurisdiction contrary to 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 54(b) which requires a final judgment on all claims. In fact, the District Court failed to adjudicate at least four claims on the merits. When Mr. Brown filed a Motion to Recall the Mandate For Lack of Jurisdiction (R. 94) and a Petition for Rehearing (R. 101) in the Sixth Circuit, the Court improperly applied *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) and erred concerning key facts. The court suggested that the claims were "collectively addressed" below. Upon these errors, and against its duty to vacate for lack of jurisdiction, the Sixth Circuit acted

contrary to *Collins v. Miller*, 252 U.S. 364, 370 (1920) since habeas judgments "must not only be final, but complete" on all claims. The Court's ruling below also contradicts the rule permitting challenges to subject matter jurisdiction "at any time." *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2005).

2. Whether the Unadjudicated Impartial Jury Claim Must Receive A Full *Remmer* Hearing And Complete Record To Be Ripe For Judicial Review And Whether The Presumption Of Prejudice And Meaningful Opportunity To Show Prejudice Must Be Enforced By The Courts Where The Colorable Claim Standard Has Been Met?

There is a Circuit split of authority and an intra-Circuit split on the *Remmer* Doctrine, presumption of prejudice, burden of proof, and proper venue for a hearing. *See Barnes v. Joyner*, 751 F.3d 229, 242 (4th Cir. 2014); *Cunningham v. Shoop*, 23 F.4d 636, 648-49 (6th Cir. 2022). These Circuit conflicts are now ripe for this Court.

The Sixth Circuit is in the extreme minority as a matter of law and the only Circuit which does not honor the *Remmer* presumption of prejudice. This must be addressed. Nearly 40 years ago, the Court held that "*Phillips* reinterpreted *Remmer*" concerning how Courts should handle "unauthorized communications" with jurors. *See United States v. Pennell*, 737 F.2d 521, 531-32 (6th Cir. 1984) and *United States v. Zelinka*, 862 F.2d 92, 94-96 (6th Cir. 1988). Since that time, the Sixth Circuit has shifted the burden of proof and often misapplied or failed to follow the *Remmer* Rule.

The Ninth Circuit (and all others) properly honors established federal law which protects the integrity of jury verdicts from extraneous influence. These circuits hold that when a state prisoner shows a credible claim of jury bias or extraneous influence concerning the matter pending before the jury, then the presumption of

prejudice applies, and a *Remmer* Hearing is required. *See Godoy v. Spearman*, 861 F.3d 956, 962-65 (9th Cir. 2017) (en banc)

Some Courts properly grant relief for a *Remmer* Hearing in state court for them to decide actual prejudice on a complete record. *See Ewing*, 914 F.3d at 1031-34. However, the Sixth Circuit now conflates the procedural and substantive components of *Remmer*'s Constitutional rule, while acting as the 13th juror. In these cases, the Court has conducted a *sua sponte* harmless analysis without a hearing or complete record while totally ignoring the presumption of prejudice applicable on State Courts. (Here, it did so despite the fact that the state court and district court never addressed this claim.) *See Brown*, 661 F. App'x at 410-11.

This violates established Sixth Circuit precedent which requires a *Remmer* Hearing for a full record prior to any merit's decision on prejudice. *See United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999) (holding that "[w]ithout the benefit of a hearing...neither the district court nor this court has any basis for concluding that the extraneous communication was harmless...")

In recent cases, the Sixth Circuit also demonstrates an intra-Circuit split on proper venue where an evidentiary hearing is required. *See Thompson v. Parker*, 867 F.3d 641, 646-48 (6th Cir. 2017) (hearing in federal court); *compare with Ewing v. Horton*, 914 F.3d 1027, 1031-34 (6th Cir. 2019) (hearing granted in state court). These conflicting decisions now require clarification of existing case law for the *Remmer* Rule after the AEDPA to create Circuit uniformity and settle this Constitutional conflict.

3. **Whether The Federal Court Is Required To Adjudicate Mr. Brown's Critical Stage Claims In His Petition Which Includes The Denial Of Counsel, Confrontation, Public Trial, And Due Process For The Right To Be Present At Trial When The Judge Sent A Signed Note To The Deliberating Jury Which Declared, "Answer: There Were No Fingerprints Found On The Knife."**

After over a decade of Habeas Litigation, the Federal Courts have refused to say the words "critical stage" or adjudicate the actual merits of all the claims in Mr. Brown's Amended Petition. This result is a patent denial of a full and fair litigation on these habeas claims for judicial review and is contrary to Art. 1, Sec. 9, cl. 2.

LIST OF PARTIES

Petitioner is Phillip A. Brown II, a prisoner incarcerated within the jurisdiction of the Michigan Department of Corrections pursuant to a State criminal conviction.

Respondent Cindi Curtin was a warden of the facility where petitioner was incarcerated at the time the initial habeas petition.

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OVERVIEW

This habeas case concerns the unconstitutional conviction and death sentence of life without parole imposed by Michigan in a self-defense case. After over a decade of litigation, the federal courts refuse to order a *Remmer* hearing, consider key affidavits, or adjudicate the actual merits of his critical stage claims on a full record. Mr. Brown's case is extraordinary by any standard which now requires intervention.

Petitioner now seeks review of the Sixth Circuit's refusal to recall the mandate for lack of appellate jurisdiction over a non-final order. (App. A & B)

Mr. Brown was not present at this critical stage of supplemental instruction when the government presented false evidence and testimony never admitted by any witness during trial. These events took place in closed courtroom where Brown was unable to consult counsel, confront, or object to the statement.

The District Court did not address at least four habeas claims while ignoring critical affidavits from defense counsel and Mr. Brown himself. The Court conceded there was an insufficient record. The unconsidered affidavits refute any stipulation, prove Brown was denied counsel, and show facts for *Remmer* hearing on actual prejudice.

The Sixth Circuit expanded the Certificate of Appealability ("COA") to include freestanding ineffective assistance of appellate counsel ("IAAC") claims making a total of nine issues on appeal. On Re-Hearing, the Court held for the first time that many claims were subject to a de novo review in this Federal Habeas. The Circuit Court then lumped these five issues into one analysis, did not remand for a *Remmer* Hearing, and declared "any error" to be harmless. The Court Admitted the IAAC claim

was never addressed by the district court. *See Brown*, 661 F. App'x at 410-12. The Sixth Circuit also improperly concluded that Mr. Brown's confrontation claim under *Crawford v. Washington*, 541 U.S. 36 (2004) (Issue III) was defaulted.[1]

STATEMENT OF THE CASE

Introduction

1) In this case, all twelve jurors considered extraneous material evidence and false testimony during deliberations when the trial judge sent them a written note which declared, "Answer: There were no fingerprints found on the knife." (App. F) An hour later, the jury convicted.

The State Court and the District Court did not address whether this violation was prejudicial, harmless[2], or hold any kind of *Remmer* Hearing. The truth was that the prosecution had introduced no evidence or testimony whatsoever regarding fingerprints on the knife. This was very important to the jury's verdict.

When this decisive piece of testimony was given to the jury, Petitioner Phillip Brown was sitting in a jail cell, a mile away from the courtroom. Worse still, this

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[1] Mr. Brown's case is extraordinary because he has the only *Crawford* claim in the country that is fully retroactive where this new Constitutional rule was decided while his direct appeal was still pending in State Court. *See Griffith v. Kentucky*, 479 U.S 314, 328 (1989) (holding that a new Constitutional rule decided while a state appeal is pending must be applied retroactively and reviewed on the merits with "no exceptions"). The Sixth Circuit also improperly relied on the wrong state decision, incomplete factual record, and Mr. Brown was totally absent at this critical stage which precludes any valid waiver or default. *See Carter v. Sowders*, 5 F.3d 975, 981 (6th Cir. 1993).

[2] The term "unfair prejudice" to a defendant speaks to the capacity of relevant evidence to lure the fact finder into declaring guilt on a ground different from specific proof and the tendency to suggest decision on an improper basis. *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Concurrently any idea that a judge or appellate court's factual findings can supplant the right to a jury trial or be considered harmless contradicts established federal law. *See Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993).

piece of evidence had never been introduced at trial; the judge ***simply made it up*** during deliberations. Petitioner did not learn about this until after the jury had sent him away to prison for the rest of his life. There is perhaps not a more fundamental right, than the right to be present in the courtroom when your liberty is at stake. We do not send people to prison or convict in absentia based on evidence never introduced at trial; nor based on judicial finding that judges make up later. Yet, that was the result here. This is the precise kind of extreme malfunction in our system that the writ of habeas corpus should remedy.

Pertinent Facts

2) In 2003, a jury convicted Petitioner of first-degree murder for the death of Randy Pardy and felonious assault against Brian Weigold, his housemate, and the key witness. This was a self-defense case in which the conflict occurred in Mr. Brown's home after a trespass and confrontation.

Randy Pardy, a very large man, barged in suddenly slamming the door and told Petitioner to "lick my balls, you fuck." (III, 69) He appeared hostile and aggressive. Petitioner testified that 300-pound Randy Pardy later threatened him with a five-inch hunting knife. Petitioner retreated to the utility room, grabbed a compound bow off the wall, and shot an arrow into Pardy's arm. Pardy dropped the knife. With Pardy still threatening, Petitioner quickly picked up the knife and stabbed him twice. (See App. I)

Petitioner testified that he did not specifically intend to kill Pardy and was in fear for his life (III, 69-74). Petitioner maintains his innocence to premeditation.

According to Police records, this death "was a result of a verbal confrontation just prior to the assault." (ECF #4, p. 33: ID 295). The central dispute at trial concerned who was the first deadly aggressor.

After the incident, Brian Weigold called Mrs. Pardy and told her that there had been "an accident." (I, 159) However, at trial 10 months later he provided elaborate and specific testimony as the key witness for the prosecution. Although charged with five felonies in another case, the trial court issued a protective order and substantially limited his cross-examination.

The prosecution argued that Pardy never possessed the knife in question. No witness testified to this. They also claimed Petitioner struck the fatal blow to Pardy's chest while he was defenseless on the bathroom floor. No witness testified to this either and the forensic evidence tended to refute it.

On cross-examination, the prosecutor asked Mr. Brown to explain to the jury why Pardy's fingerprints were not on the knife (objection sustained), he replied, "There should be his fingerprints on the knife." (III, 113).

3) The resulting conviction rests on several egregious Constitutional violations. During deliberations, the jury sent a series of written questions to the trial judge. These notes requested key evidence and trial testimony. (IV, 27-37) (App. E & F).

The first jury note requested the crime scene video and diagram of the scene including blood layout. The Court provided these items. The jury then asked for a "Forensic Report –fingerprints on knife?" The Court responded that, "A fingerprint report was not introduced into evidence." The next note said, "Testimony of Sheriff's

Department? Re: fingerprints on the knife." This time the Court responded, "Please rephrase your question. You need to be more specific." In the final question, the jury asked, "Is there any testimony regarding Randy Pardy's fingerprints on the hunting knife that was used in the murder? Some of the jurors seem to remember testimony about the knife, but there is some uncertainty." (App. F) In open Court, the judge promised the public and jury (three times) that he would "search the record" to answer their question. He then adjourned court for the weekend.

During a closed courtroom on Monday, the trial judge held proceedings while Mr. Brown was completely absent. At this private off-record side bar conference, the judge formulated and sent a written note to the sequestered jury which declared, "Answer: There were no fingerprints found on the knife." (App. F) About an hour later, the jury convicted.

This supplemental response and critical stage violated Petitioner's fundamental rights to be present, to consult with counsel, to a public trial, confrontation, an impartial jury, and a fair trial. Essentially, the judge's declaration added critical new "testimony" never presented at trial. This judicial fact finding was beneficial to the prosecution's burden of proof, degree of homicide, and theory of the case. Concurrently, it unfairly damaged Brown's self-defense claim and trial testimony because it allowed the judge and prosecutor to be a witness.

STATE COURT PROCEEDINGS

4) On direct appeal, the Michigan Court of Appeals found "no evidence" to support an inference that Weigold might be biased or slant his testimony. The court also found that Defendant had stipulated to the judge's note which "waived any challenge" and "extinguished any error" even though Petitioner was completely absent during this important proceeding. The Court did not find overwhelming evidence of guilt. *See People v. Brown*, 2004 WL 1857995, at *6 (Mich. Ct. App. Aug. 19, 2024.)

In a first 6.500 Motion, Petitioner raised his Constitutional challenges to the jury note and procedure (confrontation, impartial jury, and due process), the right to be present at a critical stage, to consult with counsel (constructive denial), and ineffective appellate counsel by requesting a *Ginther* Hearing. *See Brown v. Bergh*, 2:09-cv-14850 (E.D. Mich.) (ECF #96-1)

The freestanding ineffective appellate counsel issue concerns the failure to investigate and raise the clearly stronger Constitutional claims on direct appeal, and to obtain a complete trial record and *Remmer* Hearing. The Michigan Supreme Court improperly enforced an inapplicable procedural rule under MCR § 6.502(G) on all claims.[3] Brown then proceeded to habeas corpus.

Meanwhile, Brown obtained two important affidavits from trial counsel. These affidavits disprove any alleged stipulation, refute actual strategy, and condemn the supplemental instruction as "highly prejudicial." Counsel's affidavits state, "I did not stipulate or expressly approve the jury instruction" and "my thoughts at the time were

[3] The Sixth Circuit later found (on Re-Hearing), that the Michigan Supreme Court "clearly applied the wrong rule" which cannot bar habeas review. *See Brown*, 661 F. App'x at 410.

that the court and prosecutor overpowered me, and I was bound by the court's response[.]" (App. G & H)

FEDERAL HABEAS PROCEEDINGS

5) Petitioner has diligently requested a *Remmer* Hearing twice (ECF #93; Pg ID 3521). The District Court clearly instructed him not to raise this issue again (ECF #98).

In denying habeas relief, the District Court found an insufficient record regarding the jury note transaction and did not consider either of counsel's affidavits or Mr. Brown's (ECF #3, ID 62-65). The Court stated:

> "There is no state court record indicating the reasons for defense counsel's decision...Again, because the state court record does not reveal what occurred or defense counsel's reasons for his actions there could be any host of reasons for agreeing to the answer given to the jury question...This uncertainty works against Petitioner." (ECF #109; Pg ID 3751-52)

The District Court did not adjudicate the impartial jury claim, freestanding IAAC claim, or denial of counsel arguments (Issue VI, A-C) for this critical stage (*Id.* at Pg ID 3746-47). However, the District Court did certify eight issues on appeal to the Sixth Circuit.

6) The Sixth Circuit expanded the COA to include one highly relevant question on whether the court must first address the freestanding IAAC claim independently. (*See Brown v. Curtin*, #14-1876; R. 10, p. 5)

On Re-Hearing, the Amended Opinion (App. C; R. 82-1) admitted that several claims were entitled to a de novo review. *See Brown*, 661 F. App'x at 410. The Court improperly found the confrontation claim under Crawford was somehow defaulted "under Michigan's waiver rule" because counsel allegedly "stipulated to the judge's note." *Id.* at 408.

The Panel admitted the judge's response introduced new "evidence that had not been adduced at trial" and the judge should have said "there was no evidence introduced that would indicate the knife had been examined for fingerprints." Importantly, the Court did not adjudicate Mr. Brown's critical stage claims that it certified.

Instead of remanding for an evidentiary (*Remmer*) hearing[4], the Court concluded that any error was harmless because the issue of fingerprints was "insignificant" to the jury and "did not contradict Petitioner's theory of the case" or disprove self-defense. The Panel then retried the case on paper and re-weighed the evidence for credibility to conclude that Petitioner's testimony proves "he was the aggressor and rebuts his claim of self-defense" since Pardy was allegedly backing up during this incident. (*Id.* at 410-11)

The United States Supreme Court denied Mr. Brown's Petition for Writ of Certiorari. *See Brown v. Curtin*, 2016 U.S. Briefs 1462.

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[4] The Sixth Circuit holds as a matter of law that an impartial jury claim requires a complete record and a *Remmer* Hearing before a merit's decision against a prisoner for lack of prejudice. *See United States v Davis*, 177 F.3d 552, 557 (6th Cir. 1999) ("Without the benefit of a hearing...neither the district court nor this court has any basis for concluding that the extraneous communication was harmless...").

Within a year, Mr. Brown diligently attempted to re-open habeas for his critical stage claims that were unadjudicated on the merits. These efforts were unsuccessful below.

Mr. Brown then filed a Motion to Recall the Mandate For Lack of Jurisdiction in the Sixth Circuit (#14-1876; R. 94) since his impartial jury and other critical stage claims were never adjudicated on the merits. The Sixth Circuit previously admitted the district court did not address the freestanding IAAC claim in this matter.

The Sixth Circuit denied Recall of the Mandate (R. 96-2) and the Motion for Re-Hearing (R. 101). *See Brown v. Curtin*, 2022 U.S. App. Lexis 7535 (March 22, 2022) (R. 103-2). Petitioner now seeks the Writ of Certiorari and Mandamus.

REASONS FOR GRANTING WRIT

I. The Sixth Circuit Erred And Abused Discretion By Refusing To Recall The Mandate Where It Lacked Subject Matter Jurisdiction In This Extraordinary Case Since At Least Four Habeas Claims Remain Unadjudicated In Mr. Brown's Amended Petition.

A. Courts Have A Duty To Address Jurisdictional Questions.

B. The Court Has Inherent Power To Recall The Mandate.

C. The *Calderon* Holding Does Not Apply On Its Face.

D. The Court Erred When Applying Calderon v. Thompson.

E. The Practical Test For Finality Looks To Substance, Not Form.

F. The Circuit Admitted The IAAC Claim Was Not Addressed.

II. The Impartial Jury Claim Requires A Full *Remmer* Hearing For A Complete Record To Be Ripe For Review And The State Court Must Apply A Presumption Of Prejudice With A Meaningful Opportunity To Show Actual Prejudice And/Or Juror Bias For This Claim.

A. The Federal Courts Have Not Considered Important Affidavits.

B. The Sixth Circuit Must Adhere To Both *Mattox* And *Remmer*.

C. There Is A Circuit Split On *Remmer's* Presumption And Burden.

D. There Cannot Be A Merits Decision Without A Remmer Hearing.

III. The Federal Court Is Now Required To Adjudicate The Merits Of Freestanding IAAC, And Critical Stage Claims For The Denial Of Counsel, Confrontation, Public Trial, And Due Process For The Right To Be Present At A Critical Stage When The Judge Sent A Signed Note To The Deliberating Jury Which Declared, "Answer: There Were No Fingerprints Found On The Knife."

A. Habeas Corpus Requires An Adequate & Effective Remedy.

B. Petitioner Has Been Denied A Full & Fair Opportunity.

C. The Constitutional Violations In This Case Were Prejudicial.

D. Ten Reasons Why This Habeas Case Is Extraordinary.

OPINIONS BELOW

The Opinion of the Sixth Circuit's Order Denying Re-Consideration is reported at *Brown v. Curtin*, 2022 U.S. App. Lexis 7535 (6th Cir. March 22, 2022) and is reproduced with the Order Denying Recall of the Mandate for Lack of Jurisdiction (10/1/21) as App. A & App. B respectively. *See Brown v. Curtin*, #14-1876 (R. 103-2) and (R. 96-2).

JURISDICTION

The Sixth Circuit Court of Appeals rendered its original decision on October 1, 2021 and denied timely petition for rehearing on March 22, 2022. This Court has jurisdiction under 28 U.S.C § 1254 (1) and 28 U.S.C § 1651 for Writ of Mandamus.

I. The Sixth Circuit Erred And Abused Discretion By Refusing To Recall The Mandate Where It Lacked Subject Matter Jurisdiction In This Extraordinary Case Since At Least Four Habeas Claims Remain Unadjudicated In Mr. Brown's Amended Petition.

Standard of Review: The decision to recall the mandate is reviewed for as an abuse of discretion, but the legal questions are reviewed de novo. *See Bell v. Thompson*, 545 U.S. 794, 796 (2005).

The Sixth Circuit lacked an arguable basis for jurisdiction where its own prior appeal judgment admitted that at least one claim it certified was not addressed by the district court. *See Brown*, 661 F. App'x at 412.

This Court must decide the "fundamental question" of whether the lower court's judgment was a final decision under 28 U.S.C § 1291 to establish appellate jurisdiction. *See Collins v. Miller*, 252 U.S. 364, 370-71 (1920) (holding that a habeas judgment "must be not only final, but complete" on all claims to be ripe for appellate jurisdiction.); Fed. R. Civ. P. 54(b).

A. Courts Have A Duty To Address Jurisdictional Questions.

For over 200 years, the Court has had a duty and "special obligation" which emphasizes jurisdictional rules as "inflexible and without exception." *See Steel Co v. Citizens United*, 523 U.S. 83, 94-95 (1998); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Without jurisdiction, any judgment issued by the Court "will always remain void." *Pennoyer v. Neff*, 95 U.S. 714, 728, 733 (1877). Most importantly, a challenge to a void judgment for lack of jurisdiction "may be raised even after the judgment becomes final." *United States v. Espinoza*, 559 U.S. 260, 270 (2010); *see also Kontrick v. Ryan*,

540 U.S.443, 455 (2004) (holding a party may challenge jurisdiction "at any time"); *IAL Aircraft v. FAA*, 211 F.3d 1304, 1306 (11th Cir. 2000) (recalling the mandate for lack of jurisdiction.) The Sixth Circuit below clearly erred in this regard.

B. The Court Has Inherent Power To Recall The Mandate.

The Supreme Court has recognized courts' inherent power to recall their mandate. *See Calderon v. Thompson*, 523 U.S. 538, 549 (1998). In *Calderon*, the Court addressed whether the Ninth Circuit abused discretion by sua sponte recalling the mandate to grant habeas relief in a (pre-AEDPA) death penalty case.

The Court's limited holding in *Calderon* applies where a Circuit Court seeks to recall the mandate "to revisit the merits of an earlier decision denying habeas corpus relief." *Id.* at 553. In those cases, the miscarriage of justice standard will apply. *Calderon* still recognizes a presumption of finality against recalling the mandate where all the claims have been adjudicated. Finally, *Calderon* also advises future courts to consider the AEDPA's bar against successive claims when deciding to recall.

C. The *Calderon* Holding Does Not Apply On Its Face.

As explained in the Petition for Re-Hearing (R. 101, p. 7), Mr. Brown was not seeking to recall the mandate to re-adjudicate claims actually decided on the merits. Thus, the limited holding in *Calderon* does not squarely apply. This distinction is important and underscores the need to rebut the presumption of finality for Brown's unadjudicated claims.

The Sixth Circuit Court cited *Calderon* to hold that it lacked power to recall and was barred by the AEDPA in this case (R. 96-2). This was an error. Brown's case is

post-AEDPA and not all his claims were adjudicated on the merits. The *Calderon* holding is relevant where he can rebut finality with relevant facts.

D. The Court Erred When Applying *Calderon v. Thompson.*

The Sixth Circuit's refusal to recall the mandate (App. A and B) shows material error of law and fact on three points. First, the Court held that the underlying District Court's decision was a final judgment in this case. Second, it held that the AEDPA prevented the Court from exercising authority to recall due to successive claims. However, it did not actually find Brown's specific claims were adjudicated on the merits, but said the District Court had "collectively addressed the claims at issue." Third, it ruled the law precluded a challenge to jurisdiction after the mandate by distinguishing finality. These conclusions rest on clear errors of law and fact.

The Court defines a "final decision" as on that "ends litigation on the merits and leaves nothing for the Court to do but execute the judgment." *See Catlin v. United States*, 324 U.S. 229, 233 (1945). Stated another way, a final order is one that disposes of "the whole cause and adjudicating all rights." *Id.*

Under Federal Rule Civil Procedure 54(b) and 28 U.S.C. § 1291, unless all the claims in a petition are actually adjudicated on the merits or adequately addressed, there cannot be a final judgment for appellate jurisdiction. *See Swanson v. DiSantis*, 606 F.3d 829, 831-32 (6th Cir 2010) ("It takes just one jurisdictional defect to deprive a court of authority to hear a case."); *see also Porter v. Zook*, 803 F.3d 694, 695-97 (4th Cir. 2015) (holding the failure to address the impartial jury claim in substance deprived the appellate court of jurisdiction.); *Porter v. Zook*, 898 F.3d 408, 414, 425-26

(4th Cir. 2017) (after remand) (holding the failure to address the merits of an impartial juror claim with a *Remmer* Hearing requires the court to vacate and remand.) Petitioner contends that at least four claims were not adjudicated on the merits.

E. The Practical Test For Finality Looks To Substance, Not Form.

The final judgment rule has an ancient history in federal procedure and is "essentially practical" on whether a judgment is final, or not. This rule counsels against piecemeal litigation and promotes resolution of all claims on a complete record. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 306-08 (1962). As the Fourth Circuit stated in *Zook*, 803 F.3d at 696, this inquiry "looks to substance, not form" when analyzing the finality of a judgment for determining whether an impartial jury claim was resolved.

The District Court's Opinion clearly does not address several claims in the Amended Petition. Rather, it overlooked some and improperly applied AEDPA deference to the wrong judgment while attempting to lump several other claims together. (See App. D) The record overwhelmingly supports Brown's basis for relief.

(1) The Impartial Jury Claim Was Not Adjudicated (Issue IV).

The impartial jury claim was not adjudicated on the merits. First, the District Court's own description of this claim (Issue IV) declares this was an "impartial Judge" claim. (ECF #109; ID 3729) That is error since Brown did not raise an impartial judge claim.

Second, the District Court did not address Mr. Brown's second motion for a *Remmer* Hearing to develop facts on his impartial jury claims. Instead, the Court indefinitely suspended his Motion for an Evidentiary (*Remmer*) Hearing (ECF #93; ID

3521), calling it "premature," while also advising him not to bring it up again since the Court was uncertain whether it would be addressing the merits of these claims. (ECF #98) However, without a *Remmer* Hearing there cannot be a merits decision in this case. *See United States v. Davis,* 177 F.3d 552, 557 (6th Cir. 1999) ("Without the benefit of a hearing... neither the district court nor this court has any basis for concluding that the extraneous communication was harmless . . .")

Third, the general discussion of the jury note transaction and side-bar conference does not substantially address or mention the impartial jury claim. (ECF #109; ID 3746-3748.) It cites no relevant Supreme Court authority, ignores the *Remmer* doctrine, and improperly applies AEDPA deference to the wrong state decision. In fact, the opinion never mentions the words "critical stage" or "impartial jury." The analysis improperly relies on *Buell v. Mitchell,* 274 F.3d 337 (2001) and did not consider any affidavits by counsel on Mr. Brown. These factors prove the District Court did not adjudicate the actual merits of the impartial jury claim or develop a complete record. Without a *Remmer* Hearing, a merits decision is simply impossible.

(2) Denial Of Counsel At This Critical Stage (Issue VI, A-C).

Mr. Brown's Amended Petition focused on his critical stage claims for the supplemental jury note during deliberations. He can prove the fact that he was unable to consult with his counsel due to the State's actions. In fact, he was totally absent during this proceeding. Essentially, he has been denied the right to counsel under the VI Amendment because the Court severed all contact at this critical stage. He also claimed the State's actions created undue interference and that counsel totally failed

to contest the State's evidence. (ECF #3, Pg ID. 47, 49, 72, 82) (ECF #3-3, PageID.136-143) Thus, all three prongs of *United States v. Cronic*, 466 U.S. 648 (1984)'s presumption of prejudice should apply for habeas relief. (*See* Affidavit, ECF #3, Pg ID. 65, para.47-56) ("I was not able to communicate with counsel at the supplemental hearing.") Brown's affidavit was never considered.

Alternatively, Brown argued that even if he was not denied his right to counsel at this critical stage, then counsel was still ineffective for waiving his right to be present and for not objecting. (D-E) (See ECF #3, ID 136, 140 "CONTINGENCY ARGUMENT") He never claimed counsel stipulated to the court's note as the factual basis for habeas relief, yet that is the only claim the Court ruled on. (App. D)

The District Court never addressed his denial of counsel at a critical stage claims (Issue VI, A-C). In fact, it did not even acknowledge them. (ECF #109; ID 3746-3753) Instead, the Court addressed a hypothetical argument that counsel was ineffective under Strickland for stipulating to the judge's note. Again, an argument never claimed. The Court admitted "the existing State record" was insufficient and this "uncertainty works against Petitioner." (ID 3752-53) The Court used an incomplete record and never addressed the merits of the claims.

(3) Statement Taken In Violation Of Counsel (Issue VII).

The District Court never addressed this VI Amendment claim on the merits, it only addressed the *Miranda* issue and improperly applied AEDPA deference (ECF #109, ID 3753-3754)

Mr. Brown alleged the Prosecutor's introduction and use of an alleged incriminating statement at trial violated his VI Amendment right to counsel and his V Amendment right against self-incrimination. The Amended Petition clearly states "ISSUE VII – DENIAL OF RIGHT AGAINST SELF-INCRIMINATION / RIGHT TO COUNSEL." (ECF #3, ID 37, 50-51). *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977)

The prosecutor repeatedly used an incriminating statement at trial claiming Brown told detectives that he "acted in a violent manner." (III, 177–185) This alleged statement was deliberately elicited about seven months after proceedings began when Detectives confronted and questioned him in November 2002 while he was incarcerated at the Oakland County Jail awaiting trial. (See Petition, ECF #3-3, ID 147-150; ECF #88, ID 2638, 2640-43) (Affidavit, ECT #3, ID 65, para. 57-80) The Brief also discusses the State's failure to hold a due process hearing upon objection, perceived involuntariness of the statement, and the lack of any *Miranda* warnings in this case.

The right to counsel claim was fairly presented, explicitly stated, and was the focus of Mr. Brown's argument. (See Brief, ECF #3-3, ID 146-150) These facts show the Court did not reach the merits of the right to counsel claim for an incomplete judgment.

(4) The Freestanding IAAC Claim Was Not Addressed (Issue XIV).

As found by the Sixth Circuit, the District Court failed to reach Brown's Freestanding ineffective appellate counsel claims on the merits. (ECF #128, ID 4112-4113); *Brown*, 661 F. App'x at 412; (See App. C).

The Sixth Circuit then improperly applied look through analysis and invoked AEDPA deference upon the wrong state court judgment. The Court justified deviation from the standard practice of remanding in these situations citing "judicial economy." This result conflicts with longstanding circuit precedent which requires the Court to remand for unadjudicated claims. *Henderson v. Palmer*, 730 F.3d 554, 561-63 (6th Cir. 2013)

F. The Sixth Circuit Admitted The IAAC Claim Was Not Addressed

The Sixth Circuit's admission that the freestanding IAAC claim was not adjudicated should have triggered a jurisdictional assessment. Under these facts, there is no arguable basis for jurisdiction in the absence of a complete and final judgment. Importantly, the Sixth Circuit itself certified this key question when it expanded the COA. This proves the claim deserved encouragement to proceed further.

II. The Impartial Jury Claim Requires A Full *Remmer* Hearing For A Complete Record To Be Ripe For Review And The State Court Must Apply A Presumption Of Prejudice With A Meaningful Opportunity To Show Actual Prejudice And/Or Juror Bias For This Claim.

During deliberations, the jury asked a series of questions about important exhibits and evidence introduced at trial. After several questions, the jury was instructed (told) that no fingerprint report was introduced into evidence. The jury's final question asked specifically whether there was "any testimony concerning Randy Pardy's fingerprints on the knife. Some of the jurors seem to remember testimony about the knife, but there is some uncertainty." (*See* Jury Notes, App. F)

After this question was received on Friday (2/7/03), the trial judge adjourned for the weekend and promised all 12 jurors in open court (three times) that he would "search the record" to answer their question. (IV, 34-35) (App. E)

On Monday morning, the Court held an off-the-record side bar conference in a closed courtroom without the Defendant or the public. At this point, the judge formulated and sent a signed a written note to the sequestered jury which declared, "Answer: There were no fingerprints found on the knife." Within about an hour, the jury convicted as charged. (*See* Jury Notes & Responses, App. F)

A. The Federal Courts Have Not Considered Important Affidavits.

The Federal Courts have failed to consider important affidavits from defense counsel or Mr. Brown about this critical stage of trial. Counsel's affidavit states, "I did not stipulate or expressly approve the jury instructions." (12/10/09 Affidavit, para. 14) (App. G & H)

Mr. Brown's affidavit declares, "All twelve jurors were exposed to this extraneous evidence" when the trial judge engaged in "substantive communication with the jury [that] was conducted in absentia" and this "instruction was detrimental to my defense and testimony." (Affidavit, ECF #3, ID 64, para. 36, 38, & 40) His affidavit also states this instruction was inaccurate, misleading, and erroneous since no evidence, witness or "testimony" about fingerprints was introduced by the State during trial. (ID 64, para. 31, 32)

Mr. Brown asserted his impartial jury trial rights in his first 6.500 Motion and requested an evidentiary hearing (ECF #96-1). This raised a credible claim of

extraneous influence requiring a *Remmer* Hearing. *See, e.g., Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (holding that "evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection...."); *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Tanner v. United States*, 483 U.S 107, 120 (1987); *see also Parker v. Gladden*, 385 U.S. 363, 363-66 (1966) (After a *Remmer* Hearing, the Supreme Court held that "it would be blinking reality not to recognize the extreme prejudice inherent" in statements made to the jury by the court or its officers since the right to jury trial guarantees the accused twelve "impartial and unprejudiced jurors.") The State was required to follow *Remmer* and grant a hearing.

B. The Sixth Circuit Must Adhere To Both *Mattox* And *Remmer*.

The State and Federal Courts have totally ignored clearly established Supreme Court law in *Mattox v. United States*, 146 U.S. 140, 149-150 (1892) and *Remmer v. United States*, 347 U.S. 227, 229-30 (1954). These precedents require a reviewing Court to consider the affidavits and conduct a *Remmer* hearing with juror testimony.

The denial of this meaningful opportunity is itself a constitutional due process violation. *See Ewing v. Horton*, 914 F.3d 1027, 1031-34 (6th Cir. 2019) and *Nian v. Warden*, 994 F.3d 746, 755-59 (6th Cir. 2021).

C. There Is A Circuit Split On *Remmer*'s Presumption And Burden.

There are three important Circuit splits concerning the *Remmer* doctrine. First, whether the presumption of prejudice remains viable after *Smith v. Phillips*, 455 U.S. 209, 215-19 (1982). The Fourth Circuit has recognized the split. *See Barnes v. Joyner*,

751 F.3d 229, 242 (4th Cir. 2014) (Describing the Circuit split on whether *Remmer's* presumption is still good law after the holding in *Smith v. Phillips* and the AEDPA.)

Secondly, the Sixth Circuit is the only circuit who has shifted the burden of proof to the prisoners in cases that warrant a *Remmer* hearing for the government's burden of proof. *See Cunningham v. Shoop*, 23 F.4d 646, 648-49 (6th Cir. 2022) (recognizing the Sixth Circuit as the only Circuit who shifts the burden of proof under *Remmer*.)

Third, there is an intra-circuit split on the question of venue for whether a *Remmer* Hearing should be conducted in the Federal District Court or in the State Court. *See Ewing*, 914 F.3d at 1031-34, *compare with Thompson*, 867 F.3d at 646-48. These issues should be resolved by this Court.

D. There Cannot Be A Merits Decision Without A *Remmer* Hearing.

Despite clear authority, the Sixth Circuit ignores the Supreme Court and its own decisional law requiring a *Remmer* hearing prior to any merits adjudication for actual prejudice. *See Davis*, 177 F.3d at 557 (holding that "Without the benefit of a hearing...neither the District Court nor this Court has any basis for concluding that the extraneous communication was harmless..."); *see also Ewing*, 914 F.3d at 1031-34 ("Without a hearing, there is too much that is unknown about the deliberations.") Yet, that is precisely what it did.

In Mr. Brown's case, neither the State Courts nor the District Court followed the law, addressed the merits, or held a *Remmer* Hearing. (Despite Brown's repeated and diligent requests.) On Re-Hearing before the Sixth Circuit (who lacked

jurisdiction), the Court realized for the first time that this claim was subject to a de novo review. The Court assumed Constitutional error and purported to conduct a sua sponte harmless analysis without a hearing or complete record. This cannot be a merits decision as a matter of law.

III. The Federal Court Is Now Required To Adjudicate The Merits Of Freestanding IAAC, And Critical Stage Claims For The Denial Of Counsel, Confrontation, Public Trial, And Due Process For The Right To Be Present At A Critical Stage When The Judge Sent A Signed Written Note To The Deliberating Jury Which Declared, "Answer: There Were No Fingerprints Found on the Knife."

A. Habeas Corpus Requires An Adequate & Effective Remedy.

The historical purpose of habeas corpus guarantees an adequate and effective judicial remedy for claims of unlawful detention. *See In Re Neagle*, 135 U.S. 1, 72 (1890). It now stands to "[g]uard against extreme malfunctions in the state criminal justice system." *See Davis v. Ayala*, 576 U.S. 257, 276 (2015). This privilege entitles the prisoner "to a meaningful opportunity to demonstrate that he is being held" in violation of the Constitution or established Supreme Court law. *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (holding that judicial officers must have adequate authority to make a determination in light of the relevant law on the facts of a claim.)

B. Petitioner Has Been Denied A Full & Fair Opportunity.

Mr. Brown has been repeatedly denied a full and fair opportunity to prove that he is detained in violation of the United States Constitution. The claims he raised were not actually adjudicated for a final order. This result is proven by the fact that his critical stage claims have still not been adjudicated on the merits. After a decade of habeas litigation, this case is extraordinary for a variety of reasons.

After over a decade of habeas litigation, the Courts have failed to provide him with a meaningful *Remmer* Hearing and complete record contrary to Federal law. This itself is a due process violation. *See Rushen v. Spain*, 464 U.S. 114, 117-121 (1987). The matter is no less complicated by the Federal Courts blind misapplication of AEDPA deference to claims that were never adjudicated on the merits in State Court.

C. The Constitutional Violations In This Case Were Prejudicial

Mr. Brown is the only man in the United States serving a natural life sentence where his trial judge and prosecutor excluded him from a critical stage of his own trial during a supplemental jury instruction in a closed courtroom. There they sent the jury new important testimony declaring: "Answer: There were no fingerprints found on the knife." Within an hour, the jury convicted as charged.

These events denied Brown access to counsel, a right to be present, confrontation, a public trial, the right to object, and due process since the State manufactured testimony (and found facts) that were never admitted at trial. In short, Mr. Brown was convicted in absentia at this critical stage. On appeal, his appellate counsel failed to raise any of these clearly stronger claims and did not adequately investigate. The judge and prosecutor participated as jurors by sending a signed note to all 12 jurors which declared this "Answer" as a supplemental instruction. The presented extraneous information and influenced jurors with "testimony" from the judge with his official prestige.

The Court's procedure and response violated due process and fundamental fairness since no such evidence or "testimony" was presented at trial. This statement

was extremely prejudicial since it tended to disprove Mr. Brown's trial testimony for self-defense and supported the prosecution's theory with proof of an important fact.

The judge's statement had a substantial and injurious impact on the jury's verdict based on the series of questions show in their notes and the time after which they returned with a guilty verdict. (App. F) *See Bollenbach v United States*, 326 U.S. 607, 612-14 (1946) (holding that appellate judges should not substitute their belief in guilt to find harmless error because the "influence of the trial judge on the jury is necessarily and properly of great weight...Particularly in a criminal trial, the judge's last word is apt to be the decisive word.")

D. Ten Reasons Why This Habeas Is Extraordinary

(1) Judges Cannot Participate In Juror Deliberations Or Find Facts.

(2) The Impartial Jury Claim Requires A Full *Remmer* Hearing.

(3) The Due Process Right To Be Present Was Never Adjudicated.

(4) The Confrontation Claim Was Improperly Found To Be Defaulted.

(5) The Crawford Holding Is Inherently Retroactive To Brown's Case.

(6) Due Process Requires A Complete Record For This Critical Stage.

(7) The Denial Of Counsel At A Critical Stage Was Not Adjudicated.

(8) The Sixth Circuit Did Not Address Public Trial Jurisprudence.

(9) The Federal Courts Did Not Consider Important Affidavits Of Fact.

(10) The Freestanding IAAC Claim Was Not Adjudicated On The Merits.

CONCLUSION

For all the forgoing reasons, Petitioner respectfully request that this Court GRANT the Writ and review this matter under *Collins* v. *Miller* since the Sixth Circuit has a duty to recall its mandate for lack of appellate jurisdiction over a non-final judgment. *See Will v. United States*, 389 U.S. 90, 95 (1967) (mandamus lies to compel a lower court "to exercise its authority when it is its duty to do so"). Alternatively, this Court could order full briefing or VACATE the Sixth Circuit's decision and REMAND this case for either a *Remmer* Hearing, a new trial, or enter an order dismissing this case in its entirety.

Respectfully Submitted,

Phillip A Brown II

Phillip A. Brown II

7-28-22