INDEX TO APPENDIXES

Harris relies and hereby fully incorporates all exhibits as indicated in the index to appendixes to support and get redress in this court of his protected constitutional rights.

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

Executed on November 14, 2023.

Prepared by,

Isaiah S. Harris Sr.

Isaiah S. Harris Sr. #570016
P.O. Box 8107
Mansfield, Ohio 44901

No.

In The

SUPREME COURT OF THE UNITED STATES

Isaiah S. Harris Sr., Plaintiff-Appellant

vs.

Deborah S. Hunt, et al., Defendant-Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT

OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

A-T

Isaiah S. Harris Sr., #570016
Richland Correction Institution
P.O. Box 8107
Mansfield, Ohio 44901

Pro se Litigant

Solicitor General of the United States,
Room 5614, Department of Justice,
950 Pennsylvania Ave., N.W.,
Washington, DC. 20530-0001

Appendix A

(Sixth Circuit Court's November 3, 2023 Order)

3-pages

Harris v. Hunt, 2023 U.S. App. LEXIS 29468
Copy Citation
United States Court of Appeals for the Sixth Circuit

November 3, 2023, Filed

No. 22-4028

Reporter
2023 U.S. App. LEXIS 29468 *

ISAIAH S. HARRIS SR., Plaintiff-Appellant, v. DEBORAH S. HUNT, et al., Defendants-Appellees.

Notice: CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.
Harris v. Hunt, 2022 U.S. Dist. LEXIS 198032, 2022 WL 16552976 (N.D. Ohio, Oct. 31, 2022)

Core Terms

district court, state-law, cause of action, judicial notice, motions, reasons, officers and employees, fail to state a claim, constitutional right, federal civil rights, federal claim, federal court, defendants', Appeals, moot

Counsel: ISAIAH HARRIS, Plaintiff - Appellant, Pro se, Mansfield, OH.

Judges: Before: SUTTON, Chief Judge; SUHRHEINRICH and DAVIS, Circuit Judges.

Opinion

ORDER
Isaiah Harris, a pro se Ohio prisoner, appeals the district court's judgment dismissing his federal civil rights complaint upon initial screening under 28 U.S.C. § 1915(e)(2). Harris moves the court to take judicial notice of certain facts related to his case. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a). For the reasons that follow, we affirm the district court's judgment and deny as moot Harris's motions to take judicial notice.

Harris filed a federal civil rights complaint for money damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971),1Link to the text of the note in the district court against various officers and employees of the United States Supreme Court and the Sixth Circuit Court of Appeals, raising claims under the First, Fifth, and Fourteenth Amendments, the Privileges and Immunities Clause, and 18 U.S.C. §

242. Harris claimed that the defendants' failure or refusal to file various motions and pleadings related to his 28 U.S.C. § 2254 habeas corpus petition violated his rights to due process, equal protection, and access to the courts. Harris also filed [*2] state-law loss-of-consortium claims on behalf of himself and his children.

The district court concluded that, as officers or employees of the federal courts, the defendants were entitled to absolute quasi-judicial immunity from suit and dismissed Harris's federal claims against the defendants under § 1915(e)(2)(B). The court declined to exercise supplemental jurisdiction over Harris's state-law claims and dismissed those claims without prejudice.

Under § 1915(e)(2)(B), a district court must dismiss any action that "fails to state a claim for relief" or that "seeks monetary relief against a defendant who is immune from such relief." And on de novo review, see Flanory v. Bonn, 604 F.3d 249, 252 (6th Cir. 2010), we affirm the district court's dismissal of Harris's complaint, albeit for different reasons. See Seaton v. TripAdvisor LLC, 728 F.3d 592, 601 n.9 (6th Cir. 2013) ("[W]e may affirm the district court's judgment on any basis supported by the record.").

Harris's complaint failed to state a claim against the defendants because the United States Supreme Court has never recognized a Bivens cause of action for prisoners who claim that officers and employees of the federal judiciary have violated their constitutional rights. See Elhady v. Unidentified CBP Agents, 18 F.4th 880, 882-83 (6th Cir. 2021), cert. denied, 143 S. Ct. 301, 214 L. Ed. 2d 132 (2022); see also Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 523 (6th Cir. 2020) ("[T]he Court has never recognized a Bivens action for any First Amendment right.") (emphasis [*3] added). And subjecting the government to the costs and burdens of defending lawsuits arising out of the day-to-day operations of the clerk of court's office is a "special factor" that counsels against implying a new Bivens cause of action in this context. See Elhady, 18 F.4th at 883 (stating that federal courts are "not well-suited to decide when the costs and benefits weigh in favor of (or against) allowing damages claims"); Marinaccio v. United States, No. 21-11167, 2022 U.S. Dist. LEXIS 128593, 2022 WL 2833960, at *8 (D.N.J. July 20, 2022) (declining to extend Bivens to the plaintiff's First Amendment access-to-the-court claim against a district court clerk of court). And the United States is entitled to sovereign immunity from suit to the extent that Harris sued the defendants in their official capacities. See Muniz-Muniz v. U.S. Border Patrol, 741 F.3d 668, 671 (6th Cir. 2013).

To the extent that Harris attempted to sue the defendants under 18 U.S.C. § 242, which makes it a crime to willfully violate someone's constitutional rights, the district court correctly concluded that a private cause of action was not available to him. See United States v. Oguaju, 76 F. App'x 579, 581 (6th Cir. 2003).

Finally, the standard practice is for district courts to decline jurisdiction over a plaintiff's supplemental state-law claims and dismiss them without prejudice after granting judgment to the defendants on his federal claims. See Burnett v. Griffith, 33 F.4th 907, 915 (6th Cir. 2022). In any event, Harris does not contest the district court's dismissal [*4] of his state-law claims. Consequently, he has forfeited that issue on appeal. See Geboy v. Brigano, 489 F.3d 752, 767 (6th Cir. 2007).

For these reasons, we AFFIRM the district court's judgment dismissing Harris's complaint. We DENY Harris's motions to take judicial notice as moot.

Footnotes

1Link to the location of the note in the document

Harris actually filed his complaint under 42 U.S.C. §§ 1983, 1985, 1986, and 1988. But because he sued federal officers and employees only, we construe the complaint as arising under Bivens. See Hartman v. Moore, 547 U.S. 250, 254 n.2, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ISAIAH S. HARRIS, SR., *et al.*,	)	CASE NO. 1:22-CV-1255
	)	
Plaintiffs,	)	JUDGE CHARLES E. FLEMING
	)	
vs.	)	
	)	**MEMORANDUM OPINION AND**
DEBORAH S. HUNT, *et al.*,	)	**ORDER**
	)	
Defendants.	)	
	)	
	)	

I. INTRODUCTION

Pro se plaintiff Isaiah S. Harris, Sr., an inmate at Richland Correctional Institution, filed this civil rights action under 42 U.S.C. §§ 1983, 1985, and 1986, on behalf of himself and three purported family members and against the following court personnel: Deborah S. Hunt, Clerk of Court for the Sixth Circuit; Clarence Maddox, Circuit Executive of the Sixth Circuit; Susan Rogers, Chief Deputy Clerk of the Sixth Circuit; Marc Theriault, Circuit Executive of the Sixth Circuit; Julie Cobble, Chief Deputy Clerk of the Sixth Circuit; "Amy TBD," "Executives, Clerks, and Supervisors of the Sixth Circuit;" John and Jane Does, "Executives, Clerks, and Supervisors of the Sixth Circuit;" Clayton R. Higgins, Jr., Case Analyst of the United States Supreme Court; Scott S. Harris, Clerk of the United States Supreme Court; and John and Jane Does, "Executives, Clerks, and Supervisors of the United States Supreme Court." (ECF No. 1).

Harris's complaint centers on Defendants' actions surrounding the appeal of this Court's judgment dismissing Harris's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Id.* Harris seeks compensatory and injunctive relief. *Id.*

II. BACKGROUND

According to the complaint, Harris filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Ohio. *Id.* The Court dismissed his petition, finding Harris's claims were barred by the statute of limitations and he was not entitled to equitable tolling. *Id.* This Court also denied Harris's motion for reconsideration and certified that an appeal would not be taken in good faith. *See Harris v. Clipper*, No. 1:14CV846, 2017 U.S. Dist. LEXIS 88213 (N.D. Ohio June 8, 2017). Harris appealed the order dismissing his petition to the United States Court of Appeals for the Sixth Circuit. (*Id.*, ECF No. 30). The Sixth Circuit denied Harris's application for a certificate of appealability ("COA"). (*Id.*, ECF No. 35). Harris subsequently filed a petition for a writ of certiorari with the United States Supreme Court. (ECF No. 1). The Supreme Court returned Harris's filing, noting that the time to file a petition for a writ of certiorari had expired and the Court had no power to review the petition. *Id.*

In this action, Harris alleges that the Defendants violated 42 U.S.C. §§ 1983, 1985, and 1986 and have denied his access to the courts. He contends that Hunt "illegally" denied his COA in the Sixth Circuit because it was not issued by a circuit judge, and Maddox, Rogers, and "Does 1-10" failed to correct this action. Harris also alleges that Theriault, Cobble, Hunt, Amy, and Does 1-10 failed to file and docket Harris's application for a COA and motion to recall the mandate. Regarding the Supreme Court filing, Harris appears to allege that Higgins caused Harris's petition for a writ of certiorari with the United States Supreme Court to be deemed untimely and he continues to be a hindrance to Harris's filings. Finally, Harris claims that Higgins, Scott S. Harris, and John/Jane Does "failed to supervise, train, or intervene" and therefore "displayed a deliberate

indifference to any documented widespread abuses which highlight the culture of their office in relation to *pro se* litigants." (ECF No. 1, PageID 11).

Harris appears to also allege that the defendants' actions constitute a violation of 18 U.S.C. § 242. On behalf of his alleged family members, Harris also raises state claims of loss of consortium.

III. STANDARD OF REVIEW

Plaintiff filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. By separate order, the Court grants that application. Accordingly, because Plaintiff is proceeding *in forma pauperis*, his complaint is before the Court for initial screening under 28 U.S.C. § 1915(e)(2).

Pro se pleadings are liberally construed. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The Court, however, is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). A claim lacks an arguable basis in law or fact when it is premised on an indisputably meritless legal theory or when the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

A cause of action fails to state a claim upon which relief may be granted when it lacks plausibility in the Complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007). Explaining "plausibility," the Supreme Court stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, "[t]he

plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 677–78. The factual allegations in the pleading must be sufficient to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true. *Twombly*, 550 U.S. at 555. The plaintiff is not required to include detailed factual allegations, but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading that offers legal conclusions or a simple recitation of the elements of a cause of action will not meet this pleading standard. *Id.*

In reviewing a complaint, the Court must construe the pleading in the light most favorable to the plaintiff. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir. 1998).

IV. DISCUSSION

As an initial matter, a party may plead and conduct his or her case personally or through a licensed attorney. *See* 28 U.S.C. § 1654. A *pro se* litigant, however, may not represent anyone other than himself or herself. *See e.g. Gonzales v. Wyatt*, 157 F.3d 1016, 1021 (5th Cir. 1998) ("[I]n federal court a party can represent himself or be represented by an attorney, but [he] cannot be represented by a nonlawyer."); *Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) ("While a non-attorney may appear *pro se* on his own behalf, 'he has no authority to appear as an attorney for others than himself.'"); *see also Jackson v. Kment*, No. 13CV10819, 2016 WL 1042538, * 7 (E.D. Mich. Mar. 16, 2016) (finding Plaintiff lacks standing to seek injunctive relief

on behalf of "his friends and family members"). An adult litigant who wishes to proceed *pro se* must personally sign the complaint or petition to invoke the Court's jurisdiction. *Steelman v. Thomas*, 848 F.2d 194 (6th Cir. 1988); *Banks v. Valaluka*, No. 1:15 CV 1935, 2015 WL 7430077, *3 (N.D. Ohio Nov. 18, 2015) (citing 28 U.S.C. § 1654).

Here, the complaint attempts to raise claims on behalf of Harris's three children. Upon review, the Court finds that only Harris signed the complaint. The Court is therefore without jurisdiction to hear the claims of any adult child. And there is no indication from the complaint that Harris is a licensed attorney. Harris therefore lacks standing to seek relief on behalf of his children. Accordingly, the Court will address only Harris's claims.

Harris's complaint concerns the actions taken by quasi-judicial officers, including the Clerk of Court for the Sixth Circuit, Circuit Executives of the Sixth Circuit, Chief Deputy Clerks of the Sixth Circuit, the Clerk of the United States Supreme Court, Case Analyst of the Supreme Court, and the "Executives" of the Supreme Court. Even construing this *pro se* complaint liberally, Harris's complaint is barred by the doctrine of judicial immunity.

Judicial officers are absolutely immune from civil suits for money damages for all actions taken in the judge's judicial capacity, unless these actions are taken in the complete absence of any jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 9 (1991); *Brookings v. Clunk*, 389 F.3d 614, 617 (6th Cir. 2004) ("It is well-established that judges enjoy judicial immunity from suits arising out of the performance of their judicial functions."). The Supreme Court has specifically held that state judges are absolutely immune from liability under 42 U.S.C. § 1983. *Brookings*, 389 F.3d at 617 (citing *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983)). And this immunity applies even if the action at issue was performed in error, done maliciously, or exceeded his or her authority. *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

Likewise, this absolute judicial immunity has also been extended to non-judicial officers who perform "quasi-judicial" duties. *See Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). "Quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Id.* The fact that an error is made is immaterial. *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988). Court clerks and other court officials and employees have therefore been accorded absolute immunity from civil rights actions on claims arising from conduct intrinsically associated with a judicial proceeding. *See, e.g., id.* (court clerk); *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973) (municipal court clerk); *Bush*, 38 F.3d at 847 (court administrator and referee).

The named Defendants in this case are court clerks, executives, and analysts. The acts about which Harris complains, including docketing pleadings and accepting court filings, are integral parts of the judicial process. There is no suggestion in the complaint that these actions were taken in the complete absence of any jurisdiction. These Defendants are therefore entitled to absolute judicial immunity. *See Pelmear v. O'Connor*, No. 3:18-cv-01480, 2018 WL 4335634 (N.D. Ohio Sep. 11, 2018).

Moreover, even if Harris's claims were not barred by judicial immunity, his claims concerning the appeal to the Sixth Circuit in 2017 and the petition for a writ of certiorari in the Supreme Court in 2018 would be barred by the statute of limitations because they have occurred more than two years before the filing of this action. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (finding the district court may sua sponte dismiss a complaint under Section 1915(e)(2) as time-barred where, as here, the defect is obvious on the face of the pleading); *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (Ohio's two-year statute of limitations for bodily injury applies to Section 1983 claims).

Additionally, it appears that Harris alleges the defendants violated 18 U.S.C. § 242 (deprivation of civil rights). Section 242 is a criminal statute and provides no private right of action to civil plaintiffs. *See Bey v. State of Ohio*, No. 1:11 CV 1306, 2011 WL 4944396, at *3 (N.D. Ohio Oct. 17, 2011) (citing *U.S. v. Oguaju*, 76 F. App'x 579, 2003 WL 21580657, *2 (6th Cir. 2003)). To the extent Harris is attempting to bring criminal charges against the defendants, he lacks standing. *See Williams v. Luttrell*, 99 F. App'x 705, 707 (6th Cir. 2004) (A private citizen "has no authority to initiate a federal criminal prosecution [against] defendants for their alleged unlawful acts.") (citing *Diamond v. Charles*, 476 U.S. 54, 64–65 (1986)); *Poole v. CitiMortgage, Inc.*, No. 14-CV-10512, 2014 WL 4772177, at *5 (E.D. Mich. Sept. 24, 2014) (a private citizen lacks standing to initiate criminal proceedings) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). The Court therefore dismisses any claims alleging a violation of Section 242.

Finally, to the extent Harris has raised any state law claims, the Court declines to exercise supplemental jurisdiction over those claims. A district court "may decline to exercise supplemental jurisdiction over a claim" if that court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Because Harris's complaint does not allege any cognizable federal claim, and there is no basis in this action for original diversity jurisdiction, the Court declines to exercise supplemental jurisdiction over any state law claim Harris may also be attempting to assert. *Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006) ("[A] federal court that has dismissed a plaintiff's federal law claims should not ordinarily reach the plaintiff's state-law claims.") (citing 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)).

Accordingly, any state law claims Harris may have asserted are dismissed without prejudice. *Bullock v. City of Covington*, 698 F. App'x 305, 307 (6th Cir. 2017) ("Normally, when

a court declines to exercise supplemental jurisdiction, the court dismisses the [state] claims without prejudice.").

Plaintiff's complaint fails to state a claim upon which relief may be granted.

CONCLUSION

Accordingly, this action is dismissed pursuant to 28 U.S.C. § 1915(e)(2). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Date: October 31, 2022

Charles Fleming

CHARLES E. FLEMING
UNITED STATES DISTRICT JUDGE

Appendix B

(Sixth Circuit Court Clerks unpublished COA Order)

3-pages

No. 17-3326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 28, 2017
DEBORAH S. HUNT, Clerk

ISAIAH HARRIS,

Petitioner-Appellant,

v.

DAVE MARQUIS, Warden,

Respondent-Appellee.

ORDER

Isaiah Harris, a pro se Ohio prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Harris moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

In May 2009, Harris was convicted after a bench trial of domestic violence, violating a protection order, rape, aggravated burglary, and intimidation. The trial court sentenced Harris to an aggregate term of twenty-three-and-a-half years of imprisonment. The Ohio Court of Appeals affirmed Harris's convictions, *State v. Harris*, Nos. 09CA009605, 09CA009606, 09CA009607, 2010 WL 1016085 (Ohio Ct. App. Mar. 22, 2010), and the Ohio Supreme Court denied leave to appeal, *State v. Harris*, 932 N.E.2d 339 (Ohio 2010). Harris did not seek state post-conviction relief.

In April 2014, Harris filed a § 2254 petition, and in February 2015 a supplement to the petition, raising a total of five claims: (1) he is actually innocent of the crimes of conviction; (2) the evidence was insufficient to find him guilty beyond a reasonable doubt; (3) the habeas statute of limitations should be equitably tolled; (4) and (5) he received ineffective assistance of appellate counsel. Over Harris's objections, the district court adopted a magistrate judge's report

and recommendation that concluded that Harris's claims were barred by the one-year 28 U.S.C. § 2244(d)(1) statute of limitations and that Harris was not entitled to equitable tolling based on his asserted inability to access the prison law library or his claim of actual innocence. The district court declined to issue a COA.

When a district court denies a habeas petition on procedural grounds, the court may issue a certificate of appealability only if the applicant shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Harris's claims are untimely under § 2244(d)(1)(A) because he filed his petition in 2014, more than one year after his convictions became final in November 2010, when his time for filing a petition for a writ of certiorari in the United States Supreme Court expired. *See Payton v. Brigano*, 256 F.3d 405, 409 n.3 (6th Cir. 2001). Harris does not argue that his petition is timely under any other provision of § 2244(d)(1). Reasonable jurists therefore would not debate the district court's conclusion that Harris's petition is barred by the statute of limitations.

The statute of limitations is not jurisdictional, however, and may be equitably tolled by the court upon a credible showing of actual innocence by the petitioner. *See Souter v. Jones*, 395 F.3d 577, 588-89 (6th Cir. 2005). The petitioner must support his actual innocence claim with new, reliable evidence that establishes that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012). Harris's actual innocence claim is based on allegedly newly discovered evidence that the victim in the case, his former girlfriend K.T., had falsely accused him of domestic violence in the past. Harris claims that the prosecution failed to disclose this evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that it could have been used to impeach K.T. at trial, and that he probably would not have been convicted because the outcome of his trial hinged on her credibility. The district court concluded that Harris failed to make a credible showing of actual innocence.

Although the trial record shows that the prosecution did not disclose to Harris that K.T. had previously made domestic violence allegations against him that the police determined were unfounded, the record also shows that Harris's attorney acquired this information independently before trial. Consequently, the prosecution's failure to disclose the impeaching evidence was harmless. *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (stating that there is no *Brady* violation if the information was available to the defendant from another source). Moreover, the trial judge permitted Harris to testify, albeit in a limited fashion, that K.T. had previously made false accusations against him. Additionally, K.T. admitted on cross-examination that she had previously lodged false domestic violence charges against Harris and that she was nearly charged with making a false complaint. Consequently, the allegedly new impeachment evidence is cumulative and does not show that it is more likely than not that no reasonable juror would have convicted Harris. *See Byrd v. Collins*, 209 F.3d 486, 518-49 (6th Cir. 2000). Reasonable jurists therefore would not debate the district court's conclusion that Harris is not entitled to equitable tolling of the statute of limitations because he has not made a credible showing of actual innocence.

Finally, reasonable jurists would not debate the district court's conclusion that Harris is not entitled to equitable tolling based on his asserted inability to access the prison law library while he was on lockdown status. *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 751 (6th Cir. 2011).

Accordingly, the court **DENIES** Harris's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix C

(§2253(c)(1)(c)(2))

1-page

28 USCS § 2253

Copy Citation

Current through Public Law 117-102, approved March 15, 2022.

- United States Code Service
- TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)
- Part VI. Particular Proceedings (Chs. 151 — 190)
- CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Appendix D

(Cir. R. 25(d)(3))

4-pages

USCS Ct App 6th Cir, Cir R 25
Copy Citation

Current through changes received October 23, 2023.

USCS Federal Rules AnnotatedUnited States Court of Appeals for the Sixth CircuitTitle VII. General Provisions

Cir. R. 25. Filing and Service; Electronic Case Filing
(a) Electronic Filing Required.
(1) Requirement. All documents must be filed electronically using the Electronic Case Filing (ECF) system unless these rules or a court order provide otherwise. These rules and the Guide to Electronic Filing govern electronic filing.
(2) Form of Electronic Filing. Electronically filed documents must be in PDF format and must conform to technical requirements established by the Judicial Conference or the court. When possible, documents must be in Native PDF format and not created by scanning.
(3) Paper Filings Not Accepted. When these rules require electronic filing, the clerk will not accept a paper filing.
(b) Exceptions to Electronic Filing.
(1) Case Initiating Documents—Exceptions to Electronic Filing.
(A) Definition. The following are "case initiating documents" governed by this subrule (b)(1):
(i) A petition for permission to appeal under Fed. R. App. P. 5;
(ii) A petition for review or application for enforcement of an agency order under Fed. R. App. P. 15;
(iii) A motion for a stay filed with a petition for review of an agency order;
(iv) A petition for a writ of mandamus or prohibition or other extraordinary writ under Fed. R. App. P. 21;
(v) A motion to authorize filing in the district court of a second or successive application for a writ of habeas corpus under 6 Cir. R. 22(b); and
(vi) Any other document initiating an original action in this court.
(B) Manner of Filing. A party represented by counsel must file a case initiating document electronically, as either a PDF file attached to an e-mail directed to the clerk's office or in CD format, as provided in the Guide to Electronic Filing.
(2) Other Exceptions. The following must be filed in such electronic format as directed by the court or provided for in the Guide to Electronic Filing or in paper format:
(A) Pro Se Filings. A document filed by a non-incarcerated party in a civil action who is not represented by counsel, also referred to as a pro se or in pro per party, may file in paper format or by submitting permissible documents to an email box designated for that purpose.
(B) Attorney Misconduct Proceedings. Documents involving complaints of attorney misconduct should be transmitted in paper format, or such means as authorized by the clerk.
(C) CJA Representation. Documents involving compensation or expense reimbursement for representation under the Criminal Justice Act must be submitted in the e-Voucher system.
(D) Large Documents. A document that exceeds the limit for the size of electronic filing, as specified in the electronic case filing section of the court's web site, should be provided electronically as directed by the court.

(3) Filing in Paper Format. Unless these rules require otherwise, a party filing in paper format must file only a signed original.
(4) Proof of Filing in Paper Format. When the court allows or requires filing in paper format, the filer may obtain a file-stamped copy at the time of filing in person or by providing the clerk with a preaddressed stamped envelope and an extra copy of the document.
(c) ECF Registration and Use.
(1) Requirements for ECF Registration. To use the ECF system, an attorney must register. To register, an attorney must:
(A) be permitted to practice in this court and be in good standing;
(B) have a valid Public Access to Court Electronic Records (PACER) account or be a member of an office that has a valid PACER account;
(C) register for appellate court electronic filing at the PACER Service Center; and
(D) have a valid e-mail address.
(2) Registration Is Consent to Electronic Service. An attorney's registration is written consent:
(A) to electronic service of documents as provided by the Federal Rules of Appellate Procedure and these rules, and
(B) to receive electronic correspondence, orders, and opinions from the court.
(3) Login Name and Password. The clerk will issue a login name and password to an attorney who registers. The attorney may change the password after receiving it. Use of an attorney's login name and password by another, with the attorney's authorization, is deemed the attorney's use. If a login name or password is compromised, the attorney must notify the court as provided in the Guide to Electronic Filing.
(4) Changes in Information.
(A) Requirement to Give Notice. An attorney whose email address, mailing address, telephone number, or fax number has changed must change the information in his or her PACER account accordingly, and must file a notice of the change with the clerk and serve the notice on the parties in cases in which the attorney entered an appearance.
(B) Service on Obsolete Address. Service on an obsolete email address is valid service if the attorney failed to give notice of a change.
(d) Signatures.
(1) Attorney Signature. An attorney's use of the attorney's login name and password to submit a document electronically serves as that attorney's signature on the document. The attorney must use a signature block in substantially the following form, without a graphic or electronic signature:
/s/ Attorney Name
Attorney Name
ABC Law Firm
1234 First Street
Cincinnati, Ohio 45202
Telephone: (513) 987-6543
E-mail: AttorneyName@abclawfirm.com
Attorney for _____
(2) Multiple Attorney Signatures. The filer of a document with multiple signatures (such as a stipulation) must file in one of the following forms:

(A) Use an "/s/ Attorney Name" signature block for each attorney. By submitting the document, the filer certifies that the other attorneys expressly agreed to the form and substance of the document and authorized the filer to submit it electronically.
(B) Submit a scanned document with the signatures.
(3) Pro Se Filers Signatures. Pro Se filers must provide a written signature on documents submitted via electronic or paper means.
(4) Clerk and Deputy Clerks; Court-Issued Documents. The clerk's or a deputy clerk's filing of a document using that individual's login and password is the filing of a signed original. An order, opinion, judgment, or other court-issued document filed electronically without the signature of the judge, clerk, or deputy clerk has the same effect as if it were signed.
(e) Filing; Entry; Official Record.
(1) Filing and Entry—ECF—Filed Documents.
(A) Filing by Party.
(i) Filing and Entry. Electronic transmission of a document and transmission of the Notice of Docket Activity (NDA) from the court constitute filing the document under the Federal Rules of Appellate Procedure and entry of that document in the docket under Fed. R. App. P. 45(b)(1).
(ii) Time of Filing. An electronically-filed document is filed at the time shown on the NDA. Electronic filing does not alter a filing deadline. Where the deadline is a specific time of day, the electronic filing must be completed by that time.
(B) Filing by Court.
(i) Electronic filing of an order, decree, notice, opinion, or judgment constitutes entry in the docket under Fed. R. App. P. 36 and 45(b)(1) and (c).
(ii) The filing by the court of documents electronically transmitted to the clerk by a pro se party will constitute entry in the docket. An electrically transmitted document filed via email pursuant to § (b)(2) of this rule will be deemed filed at the time it is received by the court via email.
(2) Official Record. The electronic version of filed documents—including those originally filed in paper format—is the official record. Modification of a filed document or docket entry is not permitted unless the court authorizes it.
(3) Disposal of Paper Filings. The clerk will discard paper documents once they have been made a part of the electronic record, unless the electronic copy is incomplete or of questionable quality or unless the court orders otherwise.
(f) Service of Documents Filed Electronically.
(1) Method of Service.
(A) NDA Constitutes Service. The ECF system sends a Notice of Docket Activity (NDA) to registered attorneys in the case. This constitutes service on them and no other service is necessary.
(B) Service on Unregistered Parties and Attorneys. The filer must serve parties not represented by counsel and attorneys not registered for electronic filing by other means under Fed. R. App. P. 25(c).
(2) Certificate of Service. A document presented for filing must contain a proof of service. Fed. R. App. P. 25(d). The NDA does not replace the proof of service.
(g) ECF Technical Failures.
(1) Extension of Time. There is a technical failure in the ECF system if the clerk finds that the system is unable to accept filings continuously or intermittently for more than one hour after 12:00 noon Eastern time. In that case, filings due that day that were not filed because of that technical failure are due the next business day. A delayed filing must include a declaration or

affidavit attesting to the filer's failed attempts to file electronically at least two times after 12:00 noon separated by at least one hour on each day of delay because of the technical failure.
(2) Help Desk. A filer experiencing difficulty with electronic filing should contact the ECF help desk, as provided on the court's website and in the Guide to Electronic Filing.
(h) Sealed Documents.
(1) Sealing or Limiting Access to Orders and Opinions. An order or opinion is generally part of the public record. A party that seeks to seal or restrict access to an order or opinion must do so by motion.
(2) Motion. A motion to file sealed documents may be filed electronically unless prohibited by law, local rule, or court order. At the same time as filing the motion, the movant must provide the court and other parties a copy of the documents at issue. The movant must consult with the clerk before submitting the documents. The movant may provide the court's copy by sending a CD or an email to the clerk's office with a PDF file as provided in the Guide to Electronic Filing.
(3) Order. If the court grants the motion, the order authorizing filing of sealed documents may be filed electronically unless prohibited by law.
(4) Filing. Upon this court's entry of an order granting a motion to seal documents, those documents are to be filed via the court's electronic filing system (ECF).
(5) Sealed Documents From Lower Court or Agency. Documents sealed in the lower court or agency must continue to be filed under seal in this court. The filing 54 must comply with the requirements of the court or agency that originally ordered or authorized the documents to be sealed.

Appendix E

(Cir. R. 45)

1-page

USCS Ct App 6th Cir, Cir R 45

Copy Citation

Current through changes received March 28, 2022.

- USCS Federal Rules Annotated
- United States Court of Appeals for the Sixth Circuit
- Title VII. General Provisions

Cir. R. 45. Duties of Clerks—Procedural Orders

(a) Orders That the Clerk May Enter. The clerk may prepare, sign, and enter orders or otherwise dispose of the following matters without submission to the court or a judge, unless otherwise directed:

(1) Procedural motions;

(2) Motions involving production or filing of the appendix or briefs on appeal;

(3) Orders for voluntary dismissal of appeals or petitions, or for consent judgments in National Labor Relations Board cases;

(4) Orders for dismissal for want of prosecution;

(5) Orders appointing counsel under the Criminal Justice Act of 1984, as amended, in criminal cases in which the appellant is entitled to the appointment of counsel under the Sixth Circuit Plan for the Implementation of the Criminal Justice Act and in any other case in which an order directing the clerk to appoint counsel has been entered;

(6) Bills of costs under Fed. R. App. P. 39(d);

(7) Orders granting remands and limited remands where the motion includes a notice under Fed. R. App. P. 12.1(a); and

(8) Orders dismissing a second appeal as duplicative, where the court has docketed a jurisdictionally sound appeal from the same judgment or final order.

(b) Notice. A clerk's order must show that it was authorized under 6 Cir. R. 45(a).

(c) Reconsideration. A party adversely affected by a clerk's order may move for reconsideration by a judge or judges. The motion must be filed within 14 days of service of notice of entry of the order.

(d) Remand from the Supreme Court. The clerk refers remands from the Supreme Court of the United States to the panel that decided the case. Counsel need not file a motion concerning the remand—it is referred when the clerk receives a certified copy of the judgment. The clerk's office will advise counsel of further proceedings.

Appendix F

(Defendant Higgins, November 9, 2018 correspondence)

1-page

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

November 9, 2018

Isaiah Harris
#570016
Richland Corr Inst.
P.O. Box 8107
Mansfield, OH 44901

RE: Harris v. Marquis

Dear Mr. Harris:

The above-entitled petition for a writ of certiorari was postmarked February 16, 2018 and received February 23, 2018. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was September 28, 2017. Therefore, the petition was due on or before December 27, 2017. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

Sincerely,
Scott S. Harris, Clerk
By: Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

Page 1.

AFFIDAVIT OF ISAIAH S. HARRIS SR.

STATE OF OHIO) SS:

RICHLAND COUNTY, OHIO)

I, Isaiah S. Harris Sr., being first duly sworn according to the laws of the State of Ohio, deposes and says that I am the Plaintiff in the above entitled Complaint and inmate here at the Richland Correctional Institution, PO Box 8207, Mansfield, Ohio 44901.

I hereby certify swear and attest under the penalty of perjury that in November 2018 I talked to Defendant Higgins on Speaker phone with prison case manager Ms. Rebecca Jentes.

On the phone defendant Higgins told me that he lost my December 10, 2017 motion for a 60-day extension of time. Also, defendant Higgins told me that he actively looked for that filing and that's why he did not respond until nine-months after I filed the writ of certiorari and that there are two available remedies to still file the writ timely. (1) Send mailing affidavit regarding the December 10, 2017 motion pursuant to Supreme Court Rule 29.2. (2) File a motion to direct the clerk to proceed with the out of time certiorari as if it is timely.

I certify that each of the following foregoing statements are true and correct to the best of my knowledge and belief.

Executed this 27 day of April, 2022.

Isaiah S. Harris Sr., Affiant.

Subscribed and sworn before me

On this 27th day of April, 2022

NOTARY PUBLIC

KELLY ROSE
Notary Public
State of Ohio
My Comm. Expires
May 17, 2025

My Commission Expires: May 17, 2025

Appendix H

(Defendant Higgins' second letter dated February 15, 2019)

1-page

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

February 15, 2019

Isaiah Harris
#570016
Richland Corr Inst.
P.O. Box 8107
Mansfield, OH 44901

RE: Harris v. Marquis
USAP6 No. 17-3326

Dear Mr. Harris:

The above-entitled petition for a writ of certiorari was originally postmarked February 16, 2018 and received again on November 28, 2018. The papers are returned for the following reason(s):

The petition is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was September 28, 2017. Therefore, the petition was due on or before December 27, 2017. Rules 13.1, 29.2 and 30.1. When the time to file a petition for a writ of certiorari in a civil case (habeas action included) has expired, the Court no longer has the power to review the petition.

This Office has no record of receiving a request for an extension of time within which to file the petition for writ of certiorari.

Sincerely,
Scott S. Harris, Clerk
By:
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

page 1.

Appendix I

(proof of postage for Application to Justice Kagan)

1-page

Legal Mail 1 Lb .50 oz

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
8	30

Institution:	Date:
Richland	3-7-19

Name: Supreme Court of the United States / Justice Elena Kagan

Address: 1 First Street NE,

City:	State:	Zip Code:
Washington DC	Washington DC	20543-0001

☑ Postage ☐ Copies ☐ ID ☒ Misc. Tracfone ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature:	Number:	Block & Cell Number:
Rodah Harris Sr.	570-016	3-C-3

Approved By:	Witnessed:

Ship VIA:	Date Processed:
	3/8/19

DRC 1004 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

CRC LETT

Page 1.

Appendix J

(2020 proof of postage of follow up letter for Application to Justice Kagan)

1-pages

Legal mail Send Certified

Personal A/C Withdrawal Check Out-Slip

Dollars: 4 Cents: 75

Institution: Richland Date: 3-26-2020

Name: Supreme Court of the United States/Justice Elena Kagan

Address: 1st Street N.E.

City: Washington DC State: Washington DC Zip Code: 20543-0001

☑ Postage ☐ Copies ☐ ID ☐ Misc. _____ ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: Daniel Harris Jr. Number: 570-016 Block & Cell Number: 3-D30

Approved By: _____ Witnessed: Sgt Hall

Ship VIA: _____ Date Processed: 3-27-20

DRC 1004 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only
For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee $ 3.55
Extra Services & Fees (check box, add fee as appropriate)
☐ Return Receipt (hardcopy) $ _____
☐ Return Receipt (electronic) $ _____
☐ Certified Mail Restricted Delivery $ _____
☐ Adult Signature Required $ _____
☐ Adult Signature Restricted Delivery $ _____
Postage $ 1.20
Total Postage and Fees $ 4.75

Postmark Here: MAR 30 2020 MANSFIELD OHIO 44901

Sent To: Supreme Court of the United States
Street and Apt. No., or PO Box No.: 1st St NE
City, State, ZIP+4®: Washington DC 20543-0001

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

7016 0750 0000 1950 7598

Appendix K

(Supreme Court Rule 14.5)

3-pages

USCS Supreme Ct R 14

Copy Citation

Current through changes received March 28, 2022.

- USCS Federal Rules Annotated
- Rules of the Supreme Court of the United States
- Part III. Jurisdiction on Writ of Certiorari

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b)

(i) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties);

(ii) a corporate disclosure statement as required by Rule 29.6; and

(iii) a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court. For each such proceeding, the list should include the court in question, the docket number and case caption for the proceeding, and the date of entry of the judgment. For the purposes of this rule, a case is "directly related" if it arises from the same trial court case as the case in this Court (including the proceedings directly on review in this case), or if it challenges the same criminal conviction or sentence as is challenged in this Court, whether on direct appeal or through state or federal collateral proceedings.

(c) If the petition prepared under Rule 33.1 exceeds 1,500 words or exceeds five pages if prepared under Rule 33.2, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;
(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and
(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.
(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).
(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(I).
(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.
(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.
(i) An appendix containing, in the order indicated:
(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;
(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);
(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;
(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;
(v) material required by subparagraphs 1(f) or 1(g)(i); and
(vi) any other material the petitioner believes essential to understand the petition.
If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter will be deemed timely.

Appendix L

(Supreme Court Rule 39.8)

2-pages

USCS Supreme Ct R 39

Copy Citation

Current through changes received March 28, 2022.

- USCS Federal Rules Annotated
- Rules of the Supreme Court of the United States
- Part VII. Practice and Procedure

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the court below appointed counsel for an indigent party, no affidavit or declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be

prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis*.

Appendix M

(March 3, 2022 Plaintiff Harris's COA proof of postage)

1-page

Legal Certified mail with 20-digit tracking number & return receipt 21022.412

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
17	45

Institution: Ricc

Date: 3-3-2022

Name: United States Court of Appeals

Address: 100 E. Fifth Street Room 540

City: Cincinnati

State: Ohio

Zip Code: 45202-3988

☑ Postage ☐ Copies ☐ ID ☐ Misc. _____ ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: Mark L. Hamilton

Number: 270-016

Block & Cell Number: 3-C-71

App 7020 2450 0002 2481 7619

Witnessed: Sgt Hall

Ship VIA: Certified with 20-digit tracking number & Receipt

Date Processed: 3/7/22

DRC 1002 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

Put in Mail Box on March 3, 2022 Certified Mail CO

7020 2450 0002 2481 7619

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®

OFFICIAL USE

Certified Mail Fee	$ 3.75
Extra Services & Fees (check box, add fee as appropriate)	
☑ Return Receipt (hardcopy)	$ 3.05
☐ Return Receipt (electronic)	$
☐ Certified Mail Restricted Delivery	$
☐ Adult Signature Required	$
☐ Adult Signature Restricted Delivery	$
Postage	$ 10.65
Total Postage and Fees	$ 17.45

Postmark Here 10 2022

Sent To: Office of the Clerk United States Courts of Appeals

Street and Apt. No., or PO Box No.: 100 E Fifth Street, Room 540

City, State, ZIP+4®: Cincinnati OH 45202-3988

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

Appendix N

(March 14, 2022 Defendant John Doe signed for the U.S. Certified Mail)

1-page

United States
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box•

Isaiah Harris SR #570016
PO Box 9107
Mansfield, OH
44901

ECM

9590 9402 2116 6132 0369 71

USPS TRACKING #

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Office of the Clerk, United States
Court of Appeals
00 E Fifth Street, Room 540
Cincinnati, OH 45202-3988

9590 9402 2116 6132 0369 71

2. Article Number *(Transfer from service label)*

7020 2450 0001 2483 7619

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X [signature] ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* [illegible] C. Date of Delivery 3/14

D. Is delivery address different from item 1? ☑ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

Appendix O

(May 11, 2022 Motion to Recall the Mandate proof of postage)

1-page

Legal Certified Mail with 20-digit tracking number & return receipt 3161602 (P)

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
18	20

Institution: Ruci

Date: 5-11-2022

Name: U.S. Court of Appeal for the Sixth Circuit / Potter Stewart Courthouse

Address: 100 E. 5th Street, Room 503

City: Cincinnati | State: Ohio | Zip Code: 45202

☑ Postage ☐ Copies ☐ ID ☐ Misc. _____ ☐ Check-out CK # _____

The inmate's signature on this withdrawal request verifies that the information listed above has been read to or by the inmate and is correct. In the event of an error in the address which results in the return of this package, the inmate shall assume financial responsibility.

Inmate's Signature: Asolah S. Harris Sr. | Number: 570016 | Block & Cell Number: 3-C-71

Approved By: | Witnessed: Soffold (S)

Ship VIA: Certified Mail with 20-digit tracking number & Return Receipt | Date Processed: 5-12-22

DRC 1004 (Rev. 3/01) DISTRIBUTION: WHITE - Cashier CANARY- Inmate Pink- _____ ACA 4046

Put in mailbox on 5-11-2022 Certified Mail

Recall the mandate

Recall the Immediate

(P)

3160802

Personal A/C Withdrawal Check Out-Slip

Dollars:	Cents:
10	55

Institution: Ruci

Date: 5-11-2022

Name: Dave Yost

Address: State Office Tower, 30 East Broad Street, 16th floor

City: Columbus | State: Ohio | Zip Code: 43215

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Appendix P

(Two Published Sixth Circuit Orders before Judges)

2-pages

United States v. Hudson, 2022 U.S. App. LEXIS 11119

Copy Citation

United States Court of Appeals for the Sixth Circuit
April 22, **2022**, Filed

No.21-3650

Reporter
2022 U.S. App. LEXIS 11119 *

UNITED STATES OF AMERICA,) Plaintiff-Appellee, v. EARL HUDSON, Defendant-Appellant.

Notice:

Opinion

[*1] DEBORAH S. HUNT, Clerk O R D E R

Before: STRANCH , Circuit Judge.

Earl Hudson appeals the district court's order denying his motion for a compassionate release. The district court appointed counsel for Hudson, and counsel now moves to extend his appointment on appeal. Pursuant to Fed. R. App. P. 27(c), a single judge of the court addresses the motion.

In post-conviction cases, a defendant enjoys neither a constitutional nor a statutory right to counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Manso-Zamora*, 991 F.3d 694, 696 (6th Cir. 2021). Rather, the court has discretion whether to appoint counsel for a particular motion. Upon review of the record, noting the sealed documents at issue, the summary nature of the district court's order, and the nature of the district court's arguments, the court would benefit from counseled briefing in this appeal.

Accordingly, counsel's motion to extend is **GRANTED**, and counsel is appointed under

the Criminal Justice Act, 18 U.S.C. § 3006A.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Li v. Revere Local Sch. Dist., 2022 U.S. App. LEXIS 11112

Copy Citation

United States Court of Appeals for the Sixth Circuit
April 22, 2022, Filed

No.21-3422

Reporter
2022 U.S. App. LEXIS 11112 *

CINDY LI, a natural guardian of minor other T.L.,) DEBORAH S. HUNT, Clerk Plaintiff-Appellant, v. REVERE LOCAL SCHOOL DISTRICT, et al., Defendants, REVERE LOCAL SCHOOLS BOARD OF EDUCATION, Defendant-Appellee.

Notice:

Opinion

[*1] ORDER

Before: NORRIS, McKEAGUE, and STRANCH, Circuit Judges.

Plaintiff Cindy Li appeals the district court's order dismissing a lawsuit filed by her and her husband (collectively, "the Lis"), on their own behalf and on behalf of their then-minor son, T.L. By the same order, the district court denied the Lis' motion, brought after T.L. turned eighteen, to amend their complaint to name T.L. as a plaintiff. Defendant Revere Local Schools Board of Education ("the Board") moves to dismiss the appeal for lack of jurisdiction, asserting that Cindy Li lacks standing to bring the appeal on T.L.'s behalf because T.L. is no longer a minor. Cindy Li opposes dismissal, and the Board replies.

No. 21-3422

The Board's standing argument is entwined with Cindy Li's challenge to the district court's denial of leave to amend. The merits panel is therefore best situated to consider the Board's standing argument upon the conclusion of briefing.

Accordingly, the motion to dismiss is REFERRED to the merits panel. The Clerk is

DIRECTED to issue a briefing schedule, and the parties are DIRECTED to address the issue of standing in their briefs, along with any other relevant issue(s).

ENTERED BY ORDER OF [*2] THE COURT

Deborah S. Hunt, Clerk

Appendix Q

(Two Published Sixth Circuit COA's before Judges)

17-pages

Cleveland v. United States, 2022 U.S. App. LEXIS 11113

Copy Citation

United States Court of Appeals for the Sixth Circuit
April 22, 2022, Filed

No.21-3758

Reporter
2022 U.S. App. LEXIS 11113 *

DOCKERY CLEVELAND,)) DEBORAH S. HUNT, Clerk Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

Notice:

Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Opinion

[*1] ORDER

Before: LARSEN, Circuit Judge.

Dockery Cleveland, a federal prisoner proceeding pro se, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. The court construes Cleveland's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). Cleveland has filed a motion to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In October 2015, federal agents learned that certain individuals had conspired to transport ten kilograms of cocaine from California to Warren, Ohio, by hiding the drugs inside of a damaged car that was loaded onto a transport truck. Before the delivery occurred, the agents lawfully intercepted the car, seized ten kilogram-sized bricks of cocaine, and replaced the drugs with bricks of fake cocaine packaged in wrapping that had been laced with a powder visible under fluorescent ultraviolet light. The agents then permitted the delivery to proceed and eventually witnessed two men, later identified as Cleveland and Larone Williams, arrive at the delivery location and take possession of the car. The agents then tailed the duo as Cleveland drove the drug-laden car, with Williams following [*2] in his own car, to Williams's residence. The agents later observed a third man, Menford McCain, enter the residence carrying a backpack, then leave about a half-hour later.

Based on these activities, the agents obtained and executed a warrant to search Williams's residence while Cleveland and Williams were inside. In the kitchen, agents discovered one of the fake cocaine packages cut open, as well as an electronic scale, two surgical masks, a razor knife, a drill charger, and a screwdriver. In the bathroom, agents found a loaded firearm. And in the detached garage, agents found three kilograms of the fake cocaine and an electronic scale stored inside the transported car. The

agents also examined Williams's and Cleveland's hands under fluorescent ultraviolet light, which revealed trace amounts of the powder used in packaging the fake cocaine. Both men were arrested, as was McCain, who was apprehended after fleeing the house with $3,000 on his person and $108,000 in his backpack.

A federal grand jury indicted Cleveland on one count of conspiring to possess five or more kilograms of cocaine with the intent to distribute, and two counts of attempting to possess five or more [*3] kilograms of cocaine with intent to distribute. *See* 21 U.S.C. §§ 841(a)(1), 846. The indictment did not distinguish the two attempt charges, other than specifying that one occurred on October 19 and the other on October 20. Cleveland pleaded not guilty, and the matter proceeded to trial, where a jury found him guilty as charged. The district court sentenced Cleveland to 360 months of imprisonment on each count, to run concurrently, followed by five years of supervised release. This court affirmed Cleveland's convictions on direct appeal. *United States v. Cleveland*, 907 F.3d 423, 439 (6th Cir. 2018).

In July 2020, Cleveland filed a § 2255 motion, which he later supplemented, attacking his conviction and sentence on twelve grounds. The district court denied Cleveland's motion, explaining that his claims were either not cognizable or meritless. It also declined to issue a COA. This appeal followed.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that

the issues presented are adequate to deserve encouragement [*4] to proceed further." *Miller-El*, 537 U.S. at 327.

Claim One. Cleveland first claims that the Comprehensive Crime Control Act of 1984, the statute that provided for promulgation of the sentencing guidelines, is unconstitutional because it became "substantive law" by way of amendment to a joint resolution making "continuing appropriations" for the operation of the federal government, not as a standalone bill.1 The joint resolution, however, was passed by both houses of Congress and signed by the President. That's all the Constitution requires. *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). It makes no difference as a constitutional matter that the law is titled a "joint resolution" instead of a "bill."

United States v. Powell, 761 F.2d 1227, 1235 (8th Cir. 1985); *United States v. Brinkley*, 82 F.3d 411 (4th Cir. 1996) (per curie

Cleveland also argues that the Crime Control Act was not enacted in perpetuity, seizing on language in the joint resolution providing that the appropriations are temporary. *See* Pub. L. No. 98-473, § 102, 98 Stat. 1837 (1984). But as the district court explained, the temporal limit for the fiscal appropriations in Title I of the resolution does not apply to the provisions in Title where the Crime Control Act appears. *Id.* § 201 ("Section 102 of this joint resolution . . . shall not apply with respect to the provisions enacted by this title."). Reasonable jurists could not debate the district court's denial of this claim.

Claim Two. Cleveland [*5] next claims that trial counsel rendered ineffective assistance in several ways. To prove ineffe assistance of trial counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that prejudiced as result.

Strickland v. Washington, 466 U.S. 668, 687 (1984). This court must "indulge a strong presumption that counsel's con within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption tha circumstances, the challenged action might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v.*

1 This cla like several others Cleveland raised, appears to be procedurally defaulted because Cleveland did not r trial or direct appeal. But the government failed to raise Cleveland's default before the district court, so that defe forfeited. *See Carpenter v. United States*, 12 F.4th 572, 580 (6th Cir. 2021).

No. 21-3758

- 3 -

Louisiana, 350 U.S. 91, 101 (1955)). Generally, prejudice means "a reasonable probability" that "but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694.

Cleveland first argues that counsel should have challenged the indictment on multiplicity grounds. "'Multiplicity' is charging a single offense in more than one count in an indictment," [*6] and therefore carries a risk that the defendant is punished twice for the same crime, in violation of the Double Jeopardy Clause of the Fifth Amendment. *United States v. Myers*, 854 F.3d 341, 355 (6th Cir. 2017) (quoting *United States v. Swafford*, 512 F.3d 833, 844 (6th Cir. 2008)). To the extent that Cleveland argues that the government could not charge both a conspiracy and an attempt to possess cocaine, his argument runs into nearly a century of precedent to the contrary.

"[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389 (1992).

But to the extent Cleveland believes his lawyer should have argued that he could not be convicted or punished for both attempt counts, that argument may have more merit. Cleveland's attempt convictions raise a seemingly novel question: Can a defendant be convicted of multiple attempts to possess the same fake narcotics when the defendant believed he maintained continuous possession of real narcotics? After all, had Cleveland been charged with actual-rather than attempted-possession of the same narcotics on subsequent days, he likely could have been convicted of only a single count because possession is a continuing offense. *See United States v. Jones*, 533 F.2d 1387, 1390-92 (6th Cir. 1976) (holding that defendant could be convicted of only a single count of unlawful firearm possession when the possession was uninterrupted); [*7] *United States v. Fiallo-Jacome*, 784 F.2d 1064, 1066-67 (11th Cir. 1986) (similar as to drug possession); *see also United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 226 (1952) (holding that criminal provision proscribing "a course of conduct" cannot constitute more than one offense). Yet Cleveland could *never* have gained actual possession; there were no drugs to possess. But does that mean every overt act taken in the furtherance of an intent to possess seemingly real drugs is a separate attempt offense?

This is a classic "unit of prosecution" question, and the Court has told us that the answer to such queries lies in the words of the statute that define the "offence." U.S. Const. amend. V.

See Bell v. United States, 349 U.S. 81, 82-83 (1955) ("Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?"); *see also*

Akhil Reed Amar. *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1817-18 (1997) ("The

[Double Jeopardy] Clause takes substantive criminal law as it finds it . . . ."). Although Congress did not define the term "attempt" in § 846, courts have long interpreted it to consist of two elements: (1) intent to commit the proscribed criminal act and (2) the commission of an overt act.

United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999). So unlike a continuous offense, it seems as a general matter that an attempt could be, as the [*8] Supreme Court once said, "committed *uno ictu*"-in one blow. *Ex parte Snow*, 120 U.S. 274, 286 (1887) (recognizing the distinction between continuous and discrete offenses). But the court could locate no authority discussing how to characterize a discrete attempt to commit a continuous offense.2 We have already concluded that Congress, in criminalizing possession of an illegal firearm, did not "wish[] to punish each act of dominion." *Jones*, 533 F.2d at 1391. Why, then, would each "act of dominion" become punishable under the attempt statute?

These questions are difficult, and they are made more so by the fact that Cleveland raises them through the lens of ineffective assistance of counsel. On one hand, establishing that counsel was deficient for failing to raise an isolated legal error is particularly difficult. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011). And that bar gets even higher when one considers that, even if counsel had successfully raised this argument, the effect on Cleveland's incarceration would have been nil in light of his concurrent sentences. *See Glover v. United States*, 531 U.S. 198, 204 (2001).

On the other hand, at least one circuit has held that an error similar to the one made by Cleveland's counsel constituted ineffective assistance of appellate counsel. *Jackson v. Leonardo*, 162 F.3d 81,

2 The court does not consider the implications of a case [*9] involving multiple *failed* efforts to possess the same contraband. None of the evidence at trial suggested that Cleveland tried, but failed, to take possession of the sham cocaine.

85-87 (2d Cir. 1998). Another has found plain error in similar circumstances. *United States v. Benjamin*, 711 F.3d 371, 379-80 (3d Cir. 2013). And two more have found *Strickland* prejudice based on an unlawful sentence, even when it runs concurrently with a lawful one. *See United States v. Sellers*, 657 F. App'x 145, 148 (4th Cir. 2016) (per curiam); *United States v. Bass*, 310 F.3d 321, 330 (5th Cir. 2002).

This issue, in short, raises several tough questions. But the court need not resolve them today. "[A] COA does not require a showing that the appeal will succeed." *Miller-El*, 537 U.S. at 337. All that matters at this point is whether reasonable jurists could conclude that this issue is

"adequate to deserve encouragement to proceed further." *Id.* at 327. This issue meets that standard, and the court will therefore issue a COA on this ground.

With that issue resolved, the court can turn to the other reasons Cleveland says his trial counsel was ineffective. Cleveland argues that counsel should have requested a bill of particulars.

"The purpose of a bill of particulars is to give a defendant key factual information not contained in the indictment, so as to enable him or her to prepare a defense and avoid surprise at trial."

United States v. Page, 575 F. App'x 641, 643 (6th Cir. 2014). Cleveland contends [*10] that he was blindsided at trial by the government's assertion that he, not Williams, drove the drug-laden car from the pick-up spot to Williams's house. Had counsel requested a bill of particulars, says Cleveland, he could have had the car fingerprinted to rebut the government's assertion. But surely

Cleveland and his defense team knew the car would be an essential part of the government's case; a bill of particulars was hardly the key to unlocking that part of a defense strategy. Accordingly, Cleveland can show neither that defense counsel acted unreasonably nor that he was prejudiced by counsel's decision-especially when, as we have already said, the evidence against Cleveland was

"compelling." *Cleveland*, 907 F.3d at 439.

Cleveland also faults counsel for not requesting a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), based on conflicting statements from two agents concerning which defendant drove the drug-filled car to Williams's residence. Cleveland says that, when testifying at trial, agent Kim Nusser inaccurately claimed that Cleveland was the driver, whereas agent Melanie

Gamble's affidavit in support of a search warrant had accurately described Williams as the driver. Cleveland seems to misunderstand the purpose [*11] of a *Franks* hearing, which is to challenge intentionally false statements made in support of a warrant. *See United States v. Brown*, 857 F.3d 334, 339 (6th Cir. 2017). Here, counsel could not have requested a *Franks* hearing because Cleveland maintains that the statements made in support of the warrant were true. *See Franks*, 438 U.S. at 171 (A *Franks* hearing request must "point out specifically the portion of the warrant affidavit that is claimed to be false" and "those allegations must be accompanied by an offer of proof.") And in any event, a *Franks* hearing would have done Cleveland no good, because it is not a vehicle for contesting statements made at trial. Counsel cannot be deficient for failing to request a *Franks* hearing when that request would certainly have been denied. *See Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009).

Cleveland next complains that counsel's pretrial investigation was deficient in several ways. He says first that counsel should have sought information about the reliability of the confidential informant who first tipped off law enforcement. But Cleveland never explains why that information would have mattered. The informant didn't testify at trial, nor was his tip essential to finding probable cause to search the drug car since a narcotics canine had also alerted on it during a lawful stop of the truck. Cleveland [*12] also argues that counsel should have asked for the details of his co-conspirators' plea deals. But again, he doesn't explain why that would matter; neither co-conspirator testified against Cleveland at trial. Finally, Cleveland asserts that counsel should have fingerprinted the car and asked for surveillance footage of the pick-up spot. Here too, Cleveland fails to establish prejudice. He never denied being *at* the pick-up spot, only that he was the driver; but given the strong evidence against him-including being found at Williams' home next to three kilos of fake cocaine, evidence that he called the truck driver to arrange the pick-up, and the fluorescent powder on his hands-it is difficult to see why the identity of the driver would have made a difference to the verdict.

Fifth, Cleveland contends that counsel should have objected to a video played at trial in which two men are heard discussing the ersatz cocaine. The government, Cleveland says, didn't

do enough to authenticate the voices on the video, *see* Fed. R. Evid. 901, and counsel was deficient for not saying so. There are numerous problems with this argument. For one thing, the government never purported to identify the men based [*13] on their voices in the recording, so it didn't need to lay a foundation for such an identification. *See id.* (It had already, Cleveland must admit, laid a foundation for the video itself.) For another, the government's witness explained that the video was taken just minutes before police entered the house to arrest Cleveland and Williams, and that the two were alone at the time-an explanation which itself likely would have satisfied the low bar of Rule 901. Counsel cannot have been ineffective for failing to raise a baseless objection.

Knowles, 556 U.S. at 126.

Cleveland next argues that counsel was deficient for failing to object to the drug quantity attributed to him. He does not point to any new evidence undermining the forensic expert's calculation of the drug amount or otherwise suggest that there was less cocaine than the government said. Rather, he contends that he didn't have "the knowledge of such drugs." But that was exactly the defense his lawyer *did* raise at trial-attacking the government's proof of Cleveland's culpable mental state. Cleveland similarly criticizes counsel for failing to challenge the drug quantity at sentencing, but he never explains how that failure prejudiced him. His guidelines range [*14] was controlled by his career-offender designation, not the drug quantity. *See*

USSG § 4B1.1(b).

Cleveland's seventh complaint is that counsel failed to object to trial exhibits not being marked with his last name in compliance with Northern District of Ohio Local Rule 23.2(b). It's unclear whether that rule even applied. Rule 23.2(b) applies to "trial" exhibits "[i]f there are multiple defendants," but Cleveland was the only defendant going to trial in a multi-defendant case. In any event, Cleveland can hardly establish that he was prejudiced by a mere labeling error.

Eighth, Cleveland argues that his lawyers should have objected when law enforcement officers relayed to the jury what they had been told by a confidential informant regarding the transportation of drugs from California to Ohio. He does not explain why counsel could have objected-perhaps on hearsay or Confrontation Clause grounds-but it ultimately doesn't matter.

Each time the tip was mentioned, the testimony did not implicate Cleveland (or anyone else); it established only that drugs were being brought to Ohio on a vehicle loaded on a transport truck. Cleveland cannot establish prejudice.

Cleveland's ninth complaint is an overarching attack on defense counsel's communication-that [*15] Cleveland and his lawyer did not have adequate "dialogue" on defense strategy. The record suggests otherwise, though. Cleveland asked the district court for substitute counsel nearly a year before trial, but the court denied that motion, apparently believing that the relationship had not so soured as to warrant new representation. Moreover, at one point, defense counsel moved to continue Cleveland's trial date,

noting that while Cleveland opposed the continuance, counsel believed it to be in Cleveland's best interests. In other words, Cleveland and defense counsel were communicating, but Cleveland didn't like counsel's strategic decisions. Cleveland had a right to "reasonably effective assistance," *Strickland*, 466 U.S. at 687, but the Constitution did not guarantee him a harmonious relationship with his lawyer or that counsel would acquiesce to each of his requests, *see Jones v Barnes*, 463 U.S. 745, 751 (1983). Nothing in the record suggests a breakdown in communication so substantial that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Cleveland next asserts that counsel was ineffective for waiving his statutory speedy-trial rights. Broadly, the Speedy Trial Act requires the government to bring a defendant to trial within seventy [*16] days after indictment, *see* 18 U.S.C. § 3161(c)(1), excluding delays due to certain specified events, *see* § 3161(h)(1), or when "the ends of justice served by [the reason for the delay] outweigh the best interest of the public and the defendant in a speedy trial," § 3161(h)(7)(A). Cleveland contends that 113 non-excludable days passed between when his speedy-trial clock started and his trial commenced. To merit relief on this claim, however, Cleveland needs to show not only that a speedy-trial motion would have succeeded but also that the district court would have, in its discretion, dismissed the indictment with prejudice. *Sylvester v. United States*, 868 F.3d 503, 511 (6th Cir. 2017). Cleveland made no such showing in his § 2255 motion, nor could he have, given

that the charges against him were serious, the delays were not taken in bad faith, and Cleveland suffered little, if any, prejudice from the delay. *see id.* at 512.

Cleveland argues eleventh that defense counsel should have moved to have agent Nusser, the government's final witness, sequestered during the other witnesses' testimony. *See* Fed. R. Evid. 615. But Cleveland never explains how he was prejudiced by Nusser's presence in the courtroom. *See United States v. Mohney*, 949 F.2d 1397, 1405 (6th Cir. 1992). Sequestration is intended to avoid one witness's testimony from improperly influencing another's, *William L.Comer Family Equity Pure Trust v. CIR*, 958 F.2d 136, 140 (6th Cir. 1992), [*17] but Nusser testified primarily about unique aspects of his role in the investigation and about inferences he drew from documentary evidence in the case. It's difficult to see how Cleveland could have been prejudiced from counsel's failure to move to exclude Nusser.

Twelfth, Cleveland asserts that counsel was ineffective for not challenging the agents' seizure of his cellphone by arguing that the affidavit supporting the search warrant failed to adequately link him, and thus his cell phone, to drug trafficking. Even if that were true-a dubious assumption given law enforcement's extensive surveillance of Cleveland and Williams's activities leading up to the warrant application-Cleveland yet again fails to establish prejudice. The only material evidence the government retrieved from Cleveland's cell phone were records of calls made from that phone to the truck driver. But in light of the other strong evidence against Cleveland, he cannot show that counsel's failure to challenge the admissibility of the cell phone evidence was prejudicial.

Thirteenth, Cleveland argues that counsel was ineffective for failing to communicate a plea offer to him. In support of his contention that the government [*18] had extended a formal plea offer, Cleveland cites a portion of the trial transcript during which the district court asked the prosecutor,

"[y]ou did go over the plea in this case, didn't you?" But the government never offered a plea deal in this case, and the district court noted that its reference to "the plea in this case" did not refer to a plea offer, but to Cleveland's (not guilty) plea generally. Cleveland argues that his case is analogous to *Byrd v. Skipper*, 940 F.3d 248, 260 (6th Cir. 2019), an "unusual" case in which this

court held that the petitioner's counsel was ineffective for failing to pursue a plea bargain, even though the government had never offered a deal. But the court there had ample evidence that counsel had all-but expressly communicated to the prosecution his disinterest in a deal-driven by counsel's unreasonable view of his client's chance of success at trial; and but for these circumstances, there was evidence that the prosecution would have offered one. *Id.* at 258. No such evidence of a potential plea deal exists here, and without it, Cleveland cannot even begin to show "a reasonable possibility that . . . the outcome of the plea process would have been different."

Id.

Cleveland's fourteenth complaint [*19] is that counsel should have moved for judgment of acquittal at the close of the government's case. *See* Fed. R. Crim. P. 29(a). But the trial transcript unequivocally shows that counsel did just that: "The Court: The Government has rested. . . . . I'll take it that the Defense has made a motion pursuant to Rule 29 and it's overruled. [Defense

Counsel]: Yes. we will make that motion." R. 130, PageID 1314.

Finally. Cleveland argues that his sentencing counsel was ineffective for failing to challenge his designation as a career offender. Cleveland does not explain precisely what arguments his lawyer could have made, but he does assert that counsel should have challenged his

"priors" based on several Supreme Court cases concerning the categorical approach. *E.g.*, *Mathisv. United States*, 136 S. Ct. 2243 (2016). And in other parts of his brief, Cleveland argues that two of his predicate offenses are not categorically crimes of violence. Therefore, this court liberally construes his brief to assert that counsel was ineffective for failing to make those same arguments at sentencing. Specifically, Cleveland argues that his Nevada conviction for second-degree murder is not a "crime of violence" under the elements clause of the career-offender guideline, USSG § 4B1.2(a)(1), because one can [*20] be convicted of that offense with a merely reckless mental state. If Cleveland is right about Nevada law-a big if-that argument might have had some purchase at the time. *Cf. United States v. Verwiebe*, 874 F.3d 258. 262 (6th Cir. 2017), *abrogated by Borden v. United States*, 141 S. Ct. 1817 (2021), (explaining turbulent state of the law regarding the mental state required for the elements clause to apply). But counsel's efforts would have been all for

naught since Nevada second-degree murder would almost certainly have counted as "murder" under the enumerated-offenses clause, USSG § 4B1.2(a)(2). *Cf. United States v. Hopskin*, 702 F.

App'x 335, 337 (6th Cir. 2017) (holding that Michigan second-degree murder "falls well inside the generic definition of murder"). Perhaps counsel could instead have argued that Cleveland's conviction for battery under Nevada law does not qualify as a crime of violence, another argument Cleveland raises directly in his § 2255 motion. But with both the murder and aggravated assault3convictions on the table, it wouldn't have mattered. The career-offender enhancement requires just two predicate offenses. USSG § 4B1.1(a). As with many of his other complaints, the arguments Cleveland wanted sentencing counsel to make were destined to fail. Counsel cannot be deemed ineffective for failing to raise those claims. *Knowles*, 556 U.S. at 126.

Considering [*21] the foregoing, Cleveland failed to make a substantial showing that he was deprived of the effective assistance of counsel as to all but one of his claims. The court will issue a COA as to the double-jeopardy claim but deny it with respect to the others.

Claim Three. Cleveland claims that the district court violated his Sixth Amendment right to counsel and committed structural error by denying his request for substitute counsel. As discussed above, Cleveland filed a motion for substitute counsel nearly a year before trial, due to an alleged breakdown in the attorney-client relationship, as well as his appointed attorney's alleged incompetence and unwillingness to file certain motions. The district court denied the motion following a hearing on the matter. Had Cleveland raised this argument on direct appeal, this court would have applied a multifactor balancing test to assess whether the district court abused its discretion in denying Cleveland's request. *See United States v. Vasquez*, 560 F.3d 461, 466 (6th

Cir. 2009). But in reviewing Cleveland's § 2255 motion, all we ask is whether the district court's decision resulted in a denial of Cleveland constitutional rights. *See* 28 U.S.C. § 2255(a). The

3 Cleveland does not contend that aggravated assault is not a crime of violence. [*22] Although this court has very generously construed Cleveland's pro se motion, it cannot make entirely new arguments on his behalf. *See, e.g.*, *United States v. Tibbs*, 685 F. App'x 456, 460 n.3 (6th Cir. 2017) (deeming pro se petitioner's undeveloped argument forfeited); *United States v. Fleming*, 658 F. App'x 777, 783 (6th Cir. 2016) (same).

Sixth Amendment does not guarantee the right to counsel of choice for defendants with appointed counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006), who "have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts," *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). As just explained, Cleveland failed to make a substantial showing that he received inadequate legal representation (except with respect to the double-jeopardy claim, which Cleveland does not cite as a basis for his motion to substitute counsel). Therefore, reasonable jurists would not debate the district court's rejection of this claim.

Claim Four. Cleveland claims that the government presented insufficient evidence that he had knowledge of and agreed to participate in the conspiracy to distribute cocaine. When reviewing a sufficiency-of-the-evidence claim, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a [*23] reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When assessing the sufficiency of the evidence, the court does not "weigh the evidence, assess the credibility of the witnesses, or substitute [its] judgment for that of the jury." *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). "[A] defendant's knowledge of and participation in a conspiracy may be inferred from his conduct and established by circumstantial evidence." *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005).

"To sustain a conviction for conspiracy under 21 U.S.C. § 846, the government must have proved: (1) an agreement to violate the drug laws, in this case 21 U.S.C. § 841; (2) knowledge and intent to join the conspiracy; and (3) participation in the conspiracy." *United States v. Sliwa*, 620 F.3d 630, 633 (6th Cir. 2010) (quoting *United States v. Deitz*, 577 F.3d 672, 677 (6th Cir. 2009)). In this case, the government introduced call logs showing that two outgoing calls had been made from Cleveland's cellphone to the truck driver who transported the drug-filled car to Ohio. The government also presented evidence that Cleveland took possession of the car upon its delivery, drove the car to Williams's residence, and was present both when McCain entered the house with a bag later found to contain $108,000 and when agents found the fake cocaine, loaded

firearm, and other drug paraphernalia. *See Cleveland*, 907 F.3d at 429. Moreover, the government presented evidence that Cleveland's hands, when observed [*24] under a fluorescent ultraviolet light, revealed visible traces of the powder the agents had used in packaging the fake cocaine. *See id.* Considering this evidence, Cleveland failed to make a substantial showing that his conspiracy conviction was supported by insufficient evidence. Reasonable jurists could not debate the district court's denial of this claim.

Claim Five. Cleveland asserts that he is actually innocent of his crimes of conviction. A freestanding actual-innocence claim, however, is not cognizable in a non-capital federal habeas proceeding. *See Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010) (discussing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). Moreover, Cleveland's "actual innocence" argument does not include any new evidence undermining his guilt; rather, he simply rehashes why the evidence presented at trial was insufficient to establish his guilt-the same *Jackson* claim rejected above. Reasonable jurists would not debate the district court's denial of this claim.

Claims Six, Seven, Eight, & Eleven. As discussed above, Cleveland also asserts that the district court misclassified him as a career offender. Section 2255, however, cannot be used "to attack collaterally his designation as career offender under the Sentencing Guidelines." *Bullard*, 937 F.3d at 661. While Cleveland advocates for a [*25] "miscarriage of justice" exception to this general rule, *Bullard* explicitly rejected the notion that such an exception exists. *Id.* at 660. Reasonable jurists could not debate the district court's rejection of these claims.

Claims Nine & Ten. Cleveland asserts that he is entitled to the writs of error coram nobis and audita querela. But neither writ is available to a petitioner who is still in custody. *See UnitedStates v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001) (coram nobis); *see also Frost v. Snyder*, 13

F. App'x 243, 245 n.1 (6th Cir. 2001) (audita querela). Reasonable jurists could not debate the district court's resolution of these claims.

Claim Twelve. Finally, Cleveland claims that the district court committed the following errors at his sentencing hearing: (a) failed to make the requisite findings to hold him accountable for his coconspirators' activities as relevant conduct under USSG § 1B1.3(a)(1)(B), thus skewing

his base offense level under the guidelines, (b) misapplied the dangerous-weapon enhancement under USSG § 2D1.1(b)(1), (c) misapplied the career-offender enhancement, and (d) failed to grant him a mitigating-role reduction under USSG § 3B1.2. However, as previously mentioned, a non-constitutional challenge to the calculation of an advisory guideline range is generally not cognizable in a § 2255 proceeding. [*26] *Billard*, 937 F.3d at 657; *Snider v. United States*, 908 F.3d 183, 189 (6th Cir. 2018). Cleveland also argued that the district court improperly denied his request for a sentence reduction under Amendment 782 to the Sentencing Guidelines. But

Cleveland's sentence was not "based on a sentencing range that has *subsequently* been lowered."

18 U.S.C. § 3582(c)(2) (emphasis added). Amendment 782 became effective on November 1, 2014, and Cleveland was sentenced on September 7, 2017. *See* USSG App. C, amend. 782. Based on the foregoing, Cleveland's final claim is not adequate to deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

Accordingly, the court **GRANTS** Cleveland a COA on the following issue: Whether

Cleveland's trial counsel was ineffective for failing to challenge Cleveland's two attempt convictions and sentences as a violation of the Double Jeopardy Clause of the Fifth Amendment.

Cleveland's COA application is **DENIED** in all other respects. Cleveland's motion for pauper status is **GRANTED**. The clerk's office is directed to appoint counsel under the Criminal Justice

Act, 18 U.S.C. § 3006A(a)(2)(B), and to issue a briefing schedule on the certified issue.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

King v. Mays, 2022 U.S. App. LEXIS 11117

Copy Citation

United States Court of Appeals for the Sixth Circuit
April 22, 2022, Filed

No.21-5110

Reporter
2022 U.S. App. LEXIS 11117 *

JEFFREY KING,)) DEBORAH S. HUNT, Clerk Petitioner-Appellant, v. TONY MAYS, Warden, Respondent-Appellee.

Notice:

Opinion

[*1] ORDER

Before: STRANCH, Circuit Judge.

Jeffrey King, a pro se Tennessee parolee, appeals a district court judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

To obtain admissible evidence of drug crimes, the State, from October 2008 through late March 2009, made several applications for authorization to wiretap 23 specific telephones. Authorization was granted each time. After several months of phone monitoring, police arrested 39 defendants in five Middle Tennessee counties.

King was one of those defendants. His charges were dismissed in two counties. In the other three, he moved to suppress the evidence gleaned from the wiretaps. Each trial court held an evidentiary hearing and denied the motion. He then reached a global plea deal with the State. Under the agreement, all charges in all counties were to be resolved and King given an overall effective sentence of 40 years with release eligibility at 35% of his sentence served. Accordingly, he entered conditional guilty pleas to a total of 24 crimes in the three counties: Sumner (five counts of drug crimes, [*2] seven of money-laundering, one of felony firearm), Davidson (five of drug crimes, four of money-laundering), and Rutherford (two of drug crimes). In conjunction with each plea, King reserved for appeal nine certified questions of law concerning the legality of the wiretaps.

But on direct appeal, the Tennessee Court of Criminal Appeals held that five questions were not dispositive. Hence, under state law the court lacked jurisdiction to decide them. The court also read King's reply brief as having narrowed the scope of one of the other certified questions. This left three original questions and the narrowed question. Holding that the trial courts had not erred

in denying the suppression motions, the court of criminal appeals affirmed the judgments of conviction entered against King in each of the three counties. *State v. King* ("*Direct-Appeal Decision*"), 437 S.W.3d 856 (Tenn. Crim. App. 2013). The Tennessee Supreme Court denied King permission to appeal.

King filed post-conviction petitions in Davidson, Rutherford, and Sumner Counties. The trial courts denied relief. The court of criminal appeals affirmed. *See King v. State* ("*DavidsonPost-Conviction Case*"), No. M2016-01224-CCA-R3-PC, 2017 WL 2805200 (Tenn. Crim. App. June 28, 2017), *perm. app. denied* (Tenn. Oct. 4, 2017); *King v. State*, No. M2016-01646-CCA-R3-PC, 2017 WL 2805202 (Tenn. Crim. App. June 28, 2017) (Rutherford convictions), [*3] *perm. app.denied* (Tenn. Oct. 4, 2017); *King v. State*, No. M2016-02166-CCA-R3-PC, 2017 WL 3974093 (Tenn. Crim. App. Sept. 8, 2017) (Sumner convictions), *perm. app. denied* (Tenn. Nov. 16, 2017).

The three appellate decisions use almost identical language, so henceforth, when discussing the court of criminal appeals decisions in post-conviction proceedings, this court will refer only to the *Davidson Post-Conviction Case*.

On January 5, 2018, King filed a § 2254 petition attacking the Davidson County convictions (M.D. Tenn. No. 3:18-cv-00017) and another attacking the Rutherford County convictions (M.D. Tenn. No. 3:18-cv-00018). The Sumner County convictions he attacked in a petition filed on February 5, 2018 (M.D. Tenn. No. 3:18-cv-00112). The filings in the three § 2254 cases are substantially identical. In them, King raised seven claims:

(1) Counsel was ineffective at trial in promising King that, if he accepted the plea bargain, his certified questions of law would be determined on the merits on appeal, when counsel had not ensured that all the certified questions were dispositive and had not informed King that the appellate court could deem a certified question not dispositive and decline to address it for that reason.

(2) Counsel was ineffective on appeal in raising a challenge based [*4] on the wrong subsection of the statute.

(3) Counsel was ineffective at trial in failing to assert that the prosecutor's wiretap application had not established something the statute required: probable cause for belief that particular communications concerning a charged offense would be obtained by tapping King's cellphone.

(4) Counsel was ineffective at trial in failing to adequately argue for suppression or to raise a properly certified question that the trial court had acted as a rubber stamp for the prosecutors' wiretap applications.

(5) Counsel was ineffective at trial in failing to advise King that the plea agreement required him to admit guilt on certain charges that he otherwise could not have been convicted of.

(6) Counsel was ineffective at trial in failing to seek the dismissal of the prosecution or the disqualification of the prosecutor based on his conflict of interest.

(7) Counsel was ineffective at trial in failing to challenge the prosecutors' retaliatory acts: filing charges in multiple counties and targeting for forfeiture assets not involved in illegal activity.

The district court denied the § 2254 petition and denied a COA. King timely appealed.

A COA shall issue [*5] "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v.McDaniel*, 529 U.S. 473, 484 (2000).

King fails to meet this standard.

All his claims allege ineffective assistance of counsel. King had more than one counsel, but the one who represented him in Sumner County and negotiated his global plea agreement was

his primary trial attorney for all relevant purposes. She also represented him on direct appeal. Hence any claim of trial or appellate counsel's ineffectiveness will be considered aimed at her.

To obtain [*6] a COA on any of his claims, King must make a substantial showing that

(1) counsel's performance was deficient-objectively unreasonable under prevailing professional norms-and (2) it prejudiced the defense. 28 U.S.C. § 2253(c)(2); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability of a different result is a *substantial* likelihood of a different result

Cullen v. Pinholster, 563 U.S. 170, 189 (2011). Trial and appellate counsel are judged under the same standard. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). That standard applies in the guilty-plea context. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). There, showing prejudice at the trial level means that the defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. To show prejudice on appeal, the defendant must show a reasonable probability that, but for counsel's errors, he would have prevailed on appeal. *See Robbins*, 528 U.S. at 285-86.

In Claim 1, King argues that it was ineffective of trial counsel to promise him that, if he accepted the plea bargain, his certified questions of law would be determined on the merits on appeal, even though she had not ensured that all the [*7] certified questions were dispositive and had not informed King that the appellate court could deem a certified question not dispositive and, for that reason, decline to address it.

Citing *Strickland*, the court of criminal appeals in post-conviction proceedings held that counsel had not been ineffective. The court found that counsel did advise King of the possibility that the appellate court would not deem his questions dispositive and, hence, that there was a risk his issues would not be heard. *Davidson Post-Conviction Case*, 2017 WL 2805200, at *12-13; *see also id.* at *3-11. The court also found that counsel advised King of the following: Not all the questions would be deemed dispositive, but she chose to include the extra questions anyway

because it was her experience in the past that the appellate court would sometimes overlook whether a question was dispositive and choose to review it. This,

however, was not "guaranteed" by [counsel], and [King] testified [at the post-conviction hearing] that he was informed of that.

Id. at *13. The district court held that the state court had reasonably applied *Strickland*. *See*

28 U.S.C. § 2254(d)(1).

Jurists of reason could not disagree. The state-court factual findings must be presumed

correct, for King has not rebutted them by clear and convincing [*8] evidence. *See* 28 U.S.C.

§ 2254(e)(1). Once they are accepted, the premise for the entire claim collapses.

In Claim 2, King argues that appellate counsel ineffectively briefed the certified question

that was narrowed on appeal. According to him, she cited the correct statute but argued the wrong subsection, thus forfeiting the better argument. King raised this claim in somewhat different form in state post-conviction proceedings. The court of criminal appeals held that appellate counsel's performance had not been deficient. *Davidson Post-Conviction Case*, 2017 WL 2805200, at *12-13. The district court held that the state court had again reasonably applied *Strickland*.

Neither as raised in state court nor as raised here does this claim make a substantial showing of the denial of a constitutional right. Reasonable jurists could not disagree.

At the time in question, the relevant section of the state Wiretap Statute read as follows:

> Upon an application the judge may enter an ex parte order, as requested or as modified, authorizing interception of wire, oral or electronic communications within the district in which the judge is sitting, and outside that district but within the state of Tennessee in the case of a mobile interception device, if the judge determines on the basis [*91] of the facts submitted by the applicant that:
>
> (1) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in § 40-6-305;
>
> (2) There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;
>
> . . . ; and
>
> (4) There is probable cause for belief that the facilities from which, or the place where, the wire, oral or electronic communications are to be intercepted are being used, or about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person.

Tenn. Code Ann. § 40-6-304(c) (West 2011). The "facilities" are, in this case, the telephones to be tapped. *See Direct-Appeal Decision*, 437 S.W.3d at 867-68 nn.14-15.

Put simply, the statute requires probable cause to believe that the targeted person is committing the charged offense ((c)(1)), the proposed wiretap will obtain particular communications concerning that offense ((c)(2)), and the telephone to be tapped (or the place to be tapped) is being used, or about to be used, in connection with that offense ((c)(4)). But (c)(4) has an alternative way of being satisfied: by showing probable cause to believe that the telephone (or [*10] place) to be tapped is *leased to, listed in the name of, or commonly used by* the targeted person.

In King's initial brief to the court of criminal appeals, counsel argued this: To understand the statutory probable-cause requirement, one has to read subsections (c)(1), (2), and (4) together. When so read, the statute requires probable cause to believe there is a nexus between the phone to be tapped and the illegal activity to be proven. In the reply brief, counsel wrote that the State had failed to provide "information linking any of the target telephones directly to illegal activity." She continued, "This statutory probable cause deficit is the heart of [King's] probable cause challenge to these wiretaps."

The court of criminal appeals interpreted this to mean that King had clarified the question under discussion in such a way as to narrow it. Under this reading, he was not challenging the

State's wiretap applications under both subsections (c)(2) and (4). He was contending only

that the State failed to satisfy the nexus requirement set forth in subsection (c)(4) of the Wiretap Statute, which requires probable cause to believe that the targeted telephone is "being used, or [is] about to be used, in connection with the commission of the offense."

Direct-Appeal Decision, 437 S.W.3d at 867 n.14 [*11] (quoting Tenn. Code Ann. § 40-6-304(c)(4)). Therefore, the court declined to address "any potential contention" that subsection (c)(2) had not been satisfied. *Id.*

Focusing, accordingly, only on (c)(4), the court held that it functioned in the disjunctive. One could satisfy it by showing probable cause to believe that the telephone to be tapped *either* was being used, or about to be used, in connection with the offense *or* was leased to, listed in the name of, or commonly used by the targeted person. The first means of satisfying (c)(4)'s probable-

cause requirement did demand a nexus between the phone and the crime. The alternative means did not. *See id.* at 867-68, 870. The court then upheld all the wiretap applications on the basis that each satisfied that alternative probable-cause requirement. *Id.* at 871, 873-74; *see also id.* at 874 n.17 (specifically noting that the court, therefore, need not address whether the wiretap applications had established probable cause to believe the phones were being used, or about to be used, in connection with the offense).

In post-conviction proceedings, King argued that direct-appeal counsel had been ineffective in the reply brief when she forfeited the (c)(2) argument. But he conceded that she had raised the (c)(2) argument in the initial brief. In short, his theory was that she first advanced the argument, then inadvertently withdrew [*12] it.

In federal habeas proceedings, King seems to raise a slightly different claim. He still accuses direct-appeal counsel of ineffectiveness in forfeiting the (c)(2) argument. But now he seems to contend that she never raised a true (c)(2) argument, not even in the initial brief.

In fine, his argument is this: Sections (c)(2) and (4) have different requirements. Section (c)(4) has a nexus requirement. Section (c)(2) does not. But (c)(4) also has an alternative means of being satisfied. And in this case, that alternative means *could* be satisfied, making a (c)(4) argument "guaranteed to fail." Direct-appeal counsel should have known this. Instead, she confused the (c)(2) and (4) requirements. She may have mentioned (c)(2), but by focusing on lack of nexus, she was really only advancing a (c)(4) argument. She should have advanced a distinct (c)(2) argument. Under this, the issue was not whether the State had shown that King had used his particular cell phone to commit the target offenses (that there was a nexus between the phone and the offenses). The issue was whether the State had shown that King had in general used cell phones *as a means* to commit the target offenses. If so, there was probable cause for belief that particular communications [*13] concerning those offenses would be obtained by tapping his cell phone. But if not, the wiretap evidence had to be suppressed. King argues it is reasonably probable he would have obtained relief had this argument been advanced.

The district court read this claim as advancing the version of the claim advanced in state court. That version will be considered first. The court of criminal appeals held that direct-appeal

counsel argued all the prongs of the statute in her initial brief, including (c)(2), but that in her reply brief she chose to home in on the particular issue that the State had focused on in its response brief. The court held that this was a reasonable strategic decision. *See Davidson Post-Conviction Case*, 2017 WL 2805200, at *13. The district court held this a reasonable application of *Strickland*.

Reasonable jurists could not disagree. It was certainly reasonable of the state court to hold that direct-appeal counsel had advanced the (c)(2) argument in her initial brief, as King had *conceded* that point. And it was reasonable to hold that she had

made a reasonable strategic decision to focus on a particular argument that the State had used in its response. It was not professionally deficient to fail to realize that the court of [*14] criminal appeals would interpret that focusing as a retroactive narrowing of the entire claim. This was particularly true considering that she had begun the reply brief's discussion of the claim with the words "The Defendants rely on the very thorough Arguments set forth in their initial Brief with the following *additions* and observations based on the State's brief." (Emphasis added.)

As for the version of the claim that King seems to be raising here: Even assuming it is preserved or that its merits could otherwise be reached, reasonable jurists could not find that it makes a substantial showing of the denial of a constitutional right. As explained under Claim 3, it was professionally reasonable of counsel to rely on the nexus argument.

In Claim 3, King argues that trial counsel was ineffective because in neither the suppression motion nor the certified questions did she assert that the prosecutor's wiretap application had failed to establish what Tenn. Code Ann. § 40-6-304(c)(2) required: probable cause for belief that particular communications concerning the charged offense would be obtained through the interception of King's calls. The district court held this claim defaulted.

Whether or not defaulted, this is not [*15] a valid claim of the denial of a constitutional right. Jurists of reason could not debate that. For as the district court pointed out, trial counsel in her suppression motion did raise a (c)(2) challenge to the wiretaps. And she did include a (c)(2) challenge in the certified questions. *See Direct-Appeal Decision*, 437 S.W.3d at 863. She just included it within her nexus argument. She cannot have been ineffective for not doing what she did do.

King denies that (c)(2) contains a nexus requirement. According to him, the subsection requires only a showing of probable cause for belief that the targeted person uses "the specific type of communications (telephones) as a means of committing the criminal offense." Hence trial counsel's use of the nexus argument for both (c)(2) and (4) shows that she was confusing their requirements and was really arguing-as the court of criminal appeals later held-only (c)(4). But as King admitted, this was an issue of first impression so far as state law was concerned. And caselaw interpreting the comparable federal statute did require just such a nexus between the telephone and criminal activity. It is not professionally deficient to use a line of argument accepted in the caselaw.

The district court [*16] held that Claims 4-7 were defaulted and the defaults unexcused. Reasonable jurists could not disagree.

King admits that the claims were not raised in state court. They may not be presented there now, because he is allowed only one state post-conviction petition and he has already filed it. *See*

Tenn. Code Ann. § 40-30-102(c) (West 2021). Nor (in an effort to get around that limitation) may he reopen his original petition, for he does not meet the requirements. *See* Tenn. Code Ann. § 40-30-117(a) (West 2021).

Claims that could have been, but were not, presented to the state courts and that are now barred by state procedural rule are deemed procedurally defaulted. *See Murray v. Carrier*, 477 U.S. 478, 485 (1986). Default is excused if the petitioner demonstrates (a) cause for the default and actual prejudice flowing therefrom or (b) that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *modifiedon other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012). Ineffective assistance of counsel may constitute cause. *Id.* at 753-54.

King cites the ineffective assistance of trial-level post-conviction counsel as cause. *SeeMartinez*, 566 U.S. at 9; *Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014). To establish that, King must demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say" that the claim "has some merit." *See Martinez*, 566 U.S. at 14. None of [*17] the claims overcomes that hurdle.

Realistically, then, King's options before deciding whether to accept the plea deal were trial or deal-as-offered, not trial or modified deal. The plea deal offered a total effective sentence of 40 years. Trial offered no better. Assume for the sake of argument that King would have been convicted of no money-laundering counts and only one conspiracy. Assume [*21] further that he would

otherwise have been sentenced exactly as under the plea agreement. Even under that optimistic scenario, he would still have an effective sentence of 40 years.

Consider the exact counts that make up that effective sentence. None is for money-laundering. And no matter how one analyzes it, no more than one conspiracy conviction is needed to help reach that 40-year sentence.

In Davidson County alone, he was given 40 years for conspiracy to sell over 300 pounds of marijuana. In Sumner County, he was given 20 years for conspiracy to possess over 70 pounds of marijuana and 20 years for possession of over 70 pounds of marijuana, to be served consecutively, for a total of 40 years. In Rutherford County, he was given 20 years for conspiracy to sell over 70 pounds of marijuana and 20 years for possession of over 70 pounds of marijuana, to be served consecutively, for a total of 40 years. These three 40-year sentences were to be served concurrently. All the other sentences for all the other convictions were to be served concurrently to each other and to those 40-year sentences.

In short, going to trial and defeating the money-laundering and "extra" conspiracy [*22] charges would not have made the total effective sentence any better. And it easily could have been much worse. The global plea deal offered a surety. Trials are unsure.

King asserts that concern about those money-laundering and conspiracy charges factored into his decision to plead guilty. He concedes that the major factor causing him to agree to so plead were what he calls "promises" from his attorneys that the certified questions of law had been properly preserved. "Though not outweighing this issue," he continues, "these promises were exaggerated with threats of extensive sentencing under indictments that would result in conviction for the numerous offenses of money laundering, conspiracies and other drug related offenses."

Denying that no harm flows from the concurrent sentences, he points to the collateral consequences: "future sentencing enhancements if he was ever to find himself in trouble again."

Even so, it is simply not credible that King would have undermined the entire plea agreement just to challenge charges that did not affect the overall length of his sentence. He knew the global nature of the plea agreement, knew the wiretap evidence would likely convict him if he went [*23] to trial, and understood he would likely get a heavy sentence there. True, he was willing to

risk that to challenge the wiretaps. Were they to be ruled unlawful, all the charges against him would be dismissed. That is why it was so important to him to reserve those certified questions for appeal. All of them concerned the wiretaps. But as the district court noted, it was the certified questions that caused him to accept the plea deal, not King's "professed assumption that all charges in all counties were viable." Reasonable jurists could not debate that this claim is not substantial.

In Claim 6, King argues that trial counsel was ineffective in failing to seek the dismissal of the prosecution or the disqualification of the prosecutor based on his conflict of interest. According to King, the prosecutor represented the State both in King's criminal trial-where the prosecutor both investigated and prosecuted-and in civil-forfeiture proceedings against King and a codefendant, both of whose assets the prosecutor sought for the benefit of the 20th Judicial District Drug Task Force, which in turn was connected to the prosecutor's office. King asserts that prosecution by this [*24] conflicted prosecutor and his conflicted office violated King's due-process rights. The district court held this claim insubstantial. Reasonable jurists could not disagree.

Among the reasons the district court gave for holding this claim insubstantial were these two, each sufficient. King failed to show that counsel's performance was deficient. And he failed to show prejudice.

Performance. Trial counsel's performance was not objectively unreasonable under prevailing professional norms. As the district court explained:

In the wake of the trial court's denial of [counsel's] suppression motion and the appellate court's refusal to entertain an interlocutory appeal, counsel might have jeopardized plea negotiations by pursuing concerns over the propriety of the prosecution's entanglement with the drug task force, the hats being simultaneously worn by [the prosecutor], or issues with the civil forfeiture proceedings against Petitioner.

Prejudice. Even had trial counsel successfully raised the argument King now suggests, it is not reasonably probable the outcome would have changed. The charges would not have been dismissed. At most, different prosecutors and prosecutors' offices would have been [*25] appointed to proceed against him. *See State v. Eldridge*, 951 S.W.2d 775, 784 (Tenn. Crim. App. 1997). The

State's case would have been just as strong, the pressure to plead guilty just the same. Reasonable jurists could not debate this claim's insubstantiality.

In Claim 7, King argues that trial counsel was ineffective in failing to challenge the prosecutors' retaliatory acts of (a) filing charges in multiple counties to keep him from making bail and from being able to retain counsel in Davidson and Rutherford Counties and (b) targeting for forfeiture assets that were not involved in illegal activity. King alleges that the prosecutors' actions interfered with his rights to effective counsel, counsel of choice, bail, and due process. King further alleges that, had trial counsel done as he now suggests, the charges would have been dismissed at trial or on appeal. The district court held this claim insubstantial. Reasonable jurists could not disagree.

King has failed to make a substantial showing that trial counsel's performance was deficient. As the district court found, she

did challenge the multi-county, forfeiture-focused prosecution in negotiations with [the prosecutor], but strategically withheld more stringent demands on these [*26] points in order to secure the [S]tate's agreement to Petitioner's most important positions, namely [King's] insistence on not cooperating and on retaining a right to certify questions for appeal.

(Emphasis added.) This was professionally reasonable.

That leaves Claims 4-7 barred by a state procedural rule this court has held to be an adequate and independent state ground to foreclose federal relief. *See Hutchison v. Bell*, 303 F.3d 720, 736-41 (6th Cir. 2002).

King has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix R

(Defendant Higgins' 2021 correspondence about Harris's letter to Justice Kavanaugh)

1-page

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

August 17, 2021

Isaiah Harris
#570016
Richland Corr Inst.
P.O. Box 8107
Mansfield, OH 44901

RE: Isaiah S. Harris

Dear Mr. Harris:

In reply to your letter or submission referred to this office by Justice Kavanaugh on August 16, 2021, I regret to inform you that the Court is unable to assist you in the matter you present.

Under Article III of the Constitution, the jurisdiction of this Court extends only to the consideration of cases or controversies properly brought before it from lower courts in accordance with federal law and filed pursuant to the Rules of this Court.

Your papers are herewith returned.

Sincerely,
Scott S. Harris, Clerk
By:
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

Appendix S

(Defendant Higgins' April 21, 2022 correspondence about Mandamus Rehearing on Defendant Hunt; Plaintiff Harris's letter in response; and Supreme Court Rule 44)

4-pages

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

April 21, 2022

Isaiah Harris
#570016
Richland Corr Inst.
P.O. Box 8107
Mansfield, OH 44901

RE: In Re Isaiah S. Harris
No: 21-6978

Dear Mr. Harris:

The petition for rehearing in the above-entitled case was postmarked March 29, 2022 and received April 12, 2022 and is herewith returned for failure to comply with Rule 44 of the Rules of this Court. The petition must briefly and distinctly state its grounds and must be accompanied by a certificate stating that the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 15 days of the date of this letter, the petition will not be filed. Rule 44.6.

Sincerely,
Scott S. Harris, Clerk
By:
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

Isaiah S. Harris Sr.
#570016
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

April 27, 2022

Supreme Court of the U.S.
Office of the Clerk
Washington, DC., 20543-0001

Re: In re Isaiah S. Harris Sr. Petition for Rehearing.

Dear Mr. Scott S. Harris,

Let the record reflect that in ***Case No. 21-5256*** my petition of habeas corpus was denied on October 4, 2021. My petition for rehearing was filed or mailed out ***in less than 72-hours on October 7, 2021.***

Now ***Higgins April 21, 2022*** letter reveals 3 important details. ***(1)*** In Case ***No. 21-6978*** the petition for rehearing was filed and postmarked less than ***24-hours later on March 29, 2022***. ***(2)*** Higgins is actively denying me access to the court because he sent my paper work back to me for no legitimate reason at all. ***(3) An evil, insidious, bare faced misrepresentation of this courts rule 44.***

Supreme Court Rule 44.2 clearly states in relevant part: "The petition shall be presented together with a certificate of counsel (or of party unrepresented by counsel) ... and it is present in good faith and not for delay". The reasons why Higgins April 21, 2022 letter ***does not accurately profess*** what Rule 44 requires is because my current petition for rehearing is, was, and still is in compliance with this Court Rules and Should be docketed. See attached letter from Higgins in comparison to this Court's Rule 44.

I have sent this "corrected" action first class U.S. mail on ***April 27, 2022*** to comply with this court's rule 44's strict 25-day deadline.

Sincerely,

Isaiah S. Harris Sr.

Isaiah S. Harris Sr. #570016
P.O. Box 8107
Mansfield, Ohio 44901

Enclosures

USCS Supreme Ct R 44

Copy Citation

Current through changes received March 28, 2022.

- USCS Federal Rules Annotated
- Rules of the Supreme Court of the United States
- Part VIII. Disposition of Cases

Rule 44. Rehearing

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The time for filing a petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ will not be extended. **The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate.** The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely. (Amended effective October 1, 2007; further amended effective February 16, 2010; amended effective July 1, 2013.)

Appendix T

(Sixth Circuit Court's February 22, 2023 response to the March 3, 2022 petition)

2-pages

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

DEBORAH S. HUNT
CLERK

TELEPHONE
(513) 564-7000

February 22, 2023

Mr. Isaiah S. Harris, Sr. #570-016
Richland Correction Institution
P.O. Box 8107
Mansfield, Ohio 44905

RE: Case 17-3326, *Harris v. Black*

Dear Mr. Harris:

This court received your letter of March 3, 2022 accompanied by a motion for leave to proceed in forma pauperis, a motion for leave to supplement COA pursuant to USCS Fed Rules App. Proc. R. 22(b), and a Habeas Corpus Petition for Certificate of Appealability with appendices. After careful review, please find all of your submissions returned unfiled and without ruling. If you wish to pursue a new petition for relief in habeas corpus, you may need to file a motion for permission to file a second or successive petition under 28 U.S.C. § 2244.

The electronic docket reflects that a single judge of the court denied your application for a certificate of appealability on September 28, 2017. Orders of this court authored by a single judge did not at that time identify the authoring judge, which is not required by the Federal Rules of Appellate Procedure or the Sixth Circuit Rules of Procedure.

To the extent you suggest that the clerk of court signed the orders in this appeal without authority, please be assured that the court has delegated to the clerk the signature of orders presented by the court for entry; separate judicial signature of an order is not required. See 6th Cir. R. 25(d)(3) ("An order, opinion, judgment, or other court-issued document filed electronically without the signature of the judge, clerk, or deputy clerk has the same effect as if it were signed."). The clerk signed the order on behalf of and at the direction of the authoring judge. This is indicated on the signature block by the designation that the order was entered "BY ORDER OF THE COURT." This is entirely within this office's standard procedures.

Your case is closed, and you should anticipate that no further filings will be accepted.

Sincerely,

/s/Alicia Harden
Case Management Supervising Attorney

Enclosures