No. ________

In The
Supreme Court of the United States

IAN AULDEN CAMPBELL,

Petitioner,

v.

DONALD W. STEPHENS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE T. CUNNINGHAM, JR.
Counsel of Record
225 North Bennett Street
Southern Pines, NC 28387
910 693-3999
910 695-0983 fax
btcunningham545@gmail.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

It is clearly established federal constitutional law that the Due Process Clause of the Fourteenth Amendment applies at state-created post-conviction procedures. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). An impartial judge is at the very core of the process that is due to all criminal defendants who file a post-conviction motion seeking a new trial on the grounds of ineffective assistance of counsel.

The Question Presented is

WHETHER THE FOURTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION THAT PETITIONER'S CLAIM OF THE LACK OF AN IMPARTIAL JUDGE TO CONSIDER HIS POST-CONVICTION MOTION SEEKING A NEW TRIAL, RAISED IN A 42 U.S.C. § 1983 ACTION, WAS FRIVOLOUS AND FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AUTHORITY INVOLVED	2
PROCEDURAL AND FACTUAL BACKGROUND	2
REASONS WHY REVIEW SHOULD BE GRANTED	4
REVIEW IS NECESSARY TO ADDRESS WHETHER A STATE DEFENDANT HAS A FEDERAL REMEDY FOR A VIOLATION OF HIS FEDERAL RIGHT TO AN IMPARTIAL JUDGE AT A POST-CONVICTION HEARING, WHEN THE VIOLATION OCCURRED AFTER THE DEADLINE FOR FEDERAL HABEAS CORPUS REVIEW	4
A. THE FAILURE OF JUDGE STEPHENS TO COMPLY WITH STATUTORY REQUIREMENTS FOR ORDERS INVOLVING FEDERAL CONSTITUTIONAL CLAIMS	7
B. THE BREVITY OF THE ORDER DENYING THE PETITIONER'S MOTIONS SUGGESTS A LACK OF IMPARTIALITY	7

TABLE OF CONTENTS – Continued

Page

C. THE ORDER WAS A HANDWRITTEN NOTE APPENDED TO THE BOTTOM OF THE ORDER DENYING THE MOTION FOR APPROPRIATE RELIEF 8

CONCLUSION 12

APPENDIX

Opinion of the United States Court of Appeals For The Fourth Circuit.................................... App. 1

Order of the United States Court of Appeals For the Fourth Circuit .... App. 3

Order of the District Court For The Eastern District of North Carolina .... App. 4

Judgment of the District Court of The Eastern District of North Carolina .... App. 13

Judgment of the United States Court of Appeals For The Fourth Circuit.................................. App. 14

Motion For Appropriate Relief .... App. 15

Motion to Recuse .... App. 43

Order Denying Motion For Appropriate and Motion to Recuse .... App. 46

Complaint for Injunctive Relief in the District Court For The Eastern District of North Carolina .... App. 48

TABLE OF AUTHORITIES

Page

CASES

Campbell v. Ohio, 583 U.S. ___ (2018), No. 17-6232 (decided March 19, 2018) 9

Offutt v. United States, 348 U.S. 238, 10 S.Ct. 1610, 64 L.Ed.2d 182 (1980) 10

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) 8

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 4337, 71 L.Ed. 749 (1927) 6

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 4

U.S. Const. amend. XIV 2, 5

STATUTES

28 U.S.C. § 1254(1)...2

28 U.S.C. § 2254 ....4, 5

42 U.S.C. § 1983 ....*passim*

N.C. GEN. STAT. § 15A-1420 7

RULES

Sup. Ct. R. 10(c) 2

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ian Aulden Campbell, respectfully petitions this Court to issue its Writ of Certiorari to the Fourth Circuit Court of Appeals to review the judgment of January 3, 2018, denying the Petitioner's request for a Certificate of Appealability.

OPINIONS BELOW

On August 1, 2017, the District Court for the Eastern District of North Carolina entered an Order and Judgment dismissing the Petitioner's Complaint. The federal question presented herein was the sole claim presented in Petitioner's 42 U.S.C. § 1983 action. App. 4.

On November 28, 2017, a three judge panel of the Fourth Circuit Court of Appeals denied the Petitioner's request for a Certificate of Appealability. The federal question presented herein was the sole claim supporting the request for a Certificate of Appealability. App. 1.

On January 3, 2018, the Petition for En Banc review was denied by the Fourth Circuit Court of Appeals. The federal question presented herein was the sole issue presented in the Petition for En Banc review. App. 14.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10(c) of the Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that " . . . nor shall any person be deprived of life, liberty or property without due process of law."

PROCEDURAL AND FACTUAL BACKGROUND

Petitioner was convicted of First Degree Murder in Wake County, North Carolina Superior Court during the May 19, 2003 session of court.

The North Carolina Court of Appeals affirmed the conviction on May 16, 2006. A Petition for Discretionary Review was denied by the North Carolina Supreme Court on August 17, 2006.

On October 4, 2013, Petitioner filed a Motion for Appropriate Relief in Superior Court of Wake County contending that his attorney was ineffective for failing to challenge, pretrial, the State's use of two aggravating factors which would have been essential to supporting a capital trial, rather than a noncapital trial. App. 15.

Simultaneously with the Motion for Appropriate Relief, the Petitioner filed a "MOTION REQUESTING THAT WAKE COUNTY RESIDENT SUPERIOR COURT JUDGE DONALD STEPHENS REQUEST CHIEF JUSTICE PARKER TO DESIGNATE A SUPERIOR COURT JUDGE FROM OUTSIDE OF WAKE COUNTY TO CONSIDER THE DEFENDANT'S MOTION FOR APPROPRIATE RELIEF," contending that determination by the Resident Superior Court for Wake County, the Honorable Donald Stephens, possessed at least an appearance of bias because the Petitioner's defense lawyer, who was the brother of another Wake County Superior Court Judge, was ineffective. App. 43.

On December 3, 2013, in a one sentence handwritten notation, Judge Stephens rejected Petitioner's request for a post-conviction judge from outside of Wake County, and entered a one-paragraph Order denying Petitioner's extensive, and complicated, Motion for Appropriate Relief seeking a new trial. App. 46-47.

Petitioner exhausted state remedies concerning the alleged violation of his federal right to an impartial judge by petitions for writ of certiorari to the North Carolina Court of Appeals, and the North Carolina Supreme Court.

On November 30, 2016, Petitioner filed a civil complaint, pursuant to 42 U.S.C. § 1983, against Judge Stephens, seeking a declaratory judgment that Judge Stephens, acting under color of state law, violated the Petitioner's federal constitutional right to an impartial judge at his post-conviction proceeding. App. 48.

On August 1, 2017, the federal district court for the Eastern District of North Carolina entered an Order denying Petitioner's Complaint on the grounds that the action "was frivolous and failed to state a claim upon which relief could be granted." App. 4.

On November 28, 2017, the three judge panel of the Fourth Circuit Court of Appeals rejected the Petitioner's request for a Certificate of Appealability. App. 1.

On December 12, 2017, the Petitioner filed a Petition for En Banc Review in the Fourth Circuit, which was denied by Order dated January 3, 2018.

REASONS WHY REVIEW SHOULD BE GRANTED

REVIEW IS NECESSARY TO ADDRESS WHETHER A STATE DEFENDANT HAS A FEDERAL REMEDY FOR A VIOLATION OF HIS FEDERAL RIGHT TO AN IMPARTIAL JUDGE AT A POST-CONVICTION HEARING, WHEN THE VIOLATION OCCURRED AFTER THE DEADLINE FOR FEDERAL HABEAS CORPUS REVIEW.

Traditionally, federal courts have been the primary protectors of claims by state defendants of ineffective assistance of counsel, in violation of the Sixth Amendment. The procedural vehicle used for such challenges is most commonly a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254.

However, due to passage in 1996 of the Antiterrorism and Effective Death Penalty Act, and the requirement that federal judges must be "highly deferential" to Orders of state court judges in their review of allegations of violations of federal constitutional rights, the Petitioner respectfully submits that the task of being the primary protector of federal constitutional rights has fallen to state judges. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). If the position of the District Court that the Complaint did not state a claim upon which relief can be granted is allowed to stand, Petitioner fears that, in the post-conviction context, the relationship between federal judges and state judges concerning protection of federal rights will shift from "deference" to "complete abdication."

The one-year statute of limitations for filing 28 U.S.C. § 2254 habeas actions had run by the time Petitioner filed his state post-conviction motion seeking a new trial and further requesting that a Judge other than local Superior Court Judge Donald Stephens decide whether counsel was ineffective by not seeking a pretrial ruling that the State could not try the Petitioner capitally.

For two reasons, the Petitioner could not seek habeas relief in federal district court for the alleged violation of the Fourteenth Amendment that his post-conviction Motion for Appropriate Relief had been denied by a judge who was not impartial.

First, the one-year statute of limitation for habeas actions had expired at the time of the violation of Petitioner's constitutional rights. Second, the relief sought did not involve the release of the Petitioner or a new trial or sentence. Instead, the relief sought by Petitioner in his § 1983 action was a second determination of the Motion for Appropriate Relief by an impartial judge from outside of Wake County.

Therefore, Petitioner filed a civil action contending that his federal right to due process, in the form of an impartial judge to decide his post-conviction motion, had been violated under color of state law.

It is clearly established federal constitutional law that a judge must be impartial in *appearance* as well as impartial in fact. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 4337, 71 L.Ed. 749 (1927).

The one page Order of Judge Stephens denying Petitioner's request that Judge Stephens recuse himself due to an appearance of bias is set forth in the Appendix at App. 46, with the original handwritten denial by Judge Stephens on App. 47.

Petitioner respectfully argues that the Order itself presents ample evidence of an appearance of bias to justify federal review of the question of whether Petitioner's right to due process at post-conviction had been denied.

The following aspects of the Order denying the recusal of Judge Stephens support at least the inference that Petitioner's right to an impartial judge at post-conviction was violated.

A. THE FAILURE OF JUDGE STEPHENS TO COMPLY WITH STATUTORY REQUIREMENTS FOR ORDERS INVOLVING FEDERAL CONSTITUTIONAL CLAIMS.

N.C. GEN. STAT. § 15A-1420(c)(7) provides that Orders such as the one entered by Judge Stephens to deny the Motion for Appropriate Relief must include "conclusions of law and a statement of the reasons for its determination." This requirement is necessary to support the possibility of federal review and make clear that a decision was not made solely on state law grounds. No such findings were made with respect to the Order denying recusal, as well as the Order denying the Motion for Appropriate Relief.

B. THE BREVITY OF THE ORDER DENYING THE PETITIONER'S MOTIONS SUGGESTS A LACK OF IMPARTIALITY.

The Petitioner's Motion for Appropriate Relief was 26 pages long, plus exhibits, and raised complex issues of federal constitutional law dealing with death qualification of juries, the requirement of a fair cross section of jurors in the venire, pretrial *Watson* hearings, issues deriving from *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), vagueness of criminal statutes, and ineffective assistance of counsel, among other issues.

The entire Order denying this complicated Motion for Appropriate Relief consisted of three sentences, with *no authorities cited in rebuttal to Petitioner's contentions.*

The Order denying the recusal request reads in its entirety, "The motion to assign the case to an out-of-county judge is also denied." App. 46-47.

C. THE ORDER WAS A HANDWRITTEN NOTE APPENDED TO THE BOTTOM OF THE ORDER DENYING THE MOTION FOR APPROPRIATE RELIEF.

The Motion for Appropriate Relief was a serious effort for relief, supported by numerous authorities. Petitioner presented an understandable concern that the determination by a local Wake County Judge of whether defense counsel was ineffective should be made by a judge who would not be called upon to render judgment about the brother of a fellow colleague on the local bench.

With all due respect, a handwritten note denying a serious attempt to seek relief from Petitioner's sentence of Life Without Parole suggests an absence of the neutrality required by the Due Process Clause. The

Petitioner agrees with the recent statement of Justice Sotomayor in her opinion related to the denial of review in *Campbell v. Ohio*, 583 U.S. ___ (2018), No. 17-6232 (decided March 19, 2018). "In recent years this Court has recognized that, although death is different, 'life without parole sentences share some characteristics with death sentences that are shared by no other sentences'."

Rather than allowing the Petitioner's Complaint to move forward in litigation, the District Court Complaint was dismissed for failure to state a claim upon which relief could be granted.

The fundamental question presented by this Petition is whether or not there exists a mechanism to challenge the violation of a federal right in a state post-conviction proceeding, when such proceeding was not initiated until after the statute of limitations for federal habeas corpus had run.

Most simply, the Petitioner contends that a federal right with no means of protecting that right in federal court, is no federal right at all.

The basis for the dismissal of the § 1983 Complaint was that the allegations did not pass frivolity review pursuant to 28 U.S.C. § 1915. A Complaint must be dismissed if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted."

It is difficult to ascertain whether the district court rested its decision on the failure of the Complaint to state a claim upon which relief could be granted, or whether there exists such a legal claim, but the facts presented in support of the claim are frivolous. Petitioner will address both aspects of the test.

The deficiencies set out above support at least an inference of lack of impartiality by any reasonable standard. Judge Stephens' handwritten Order sends a message that the recusal request was not taken seriously. As this Court said in *Offutt v. United States*, 348 U.S. 238, 10 S.Ct. 1610, 64 L.Ed.2d 182 (1980), "Justice must satisfy the appearance of justice."

Petitioner strenuously argues that his claim that Judge Stephens did not "satisfy the appearance of justice" stated a claim upon which relief can be granted and is not factually frivolous.

Therefore, it follows that the basis for the dismissal of the action is that, as a matter of law, the claim itself is not justiciable. That is, a defendant may not challenge the impartiality of a post-conviction judge by way of a § 1983 civil action. Such position is problematic for two reasons.

First, the district court based the dismissal on a bit of circular reasoning. Judge Boyle stated in his Order, "Here a declaratory judgment would not serve a useful purpose in clarifying and settling the legal relations at issue because defendant, a state court judge, already has decided the issues presented in his superior court rulings." App. 7.

In his § 1983 action, Petitioner was not challenging *what* the Order denying the Motion for Appropriate

Relief said, but instead *who said it.* Respectfully, under the district court's bootstrapping logic, the Petitioner's claim that his motion was denied by a judge who lacked an appearance of impartiality was defeated because that allegedly biased judge had already entered an Order that he was not biased.

The district court closed the door on any meaningful review of a claim of bias by a post-conviction judge, by saying that " . . . allowing plaintiff to proceed with this action would permit plaintiff to circumvent both the state court appellate and federal collateral review processes already in place." Again, Petitioner does not attempt to circumvent any process whatsoever. He simply challenges the impartiality of the person involved in that process.

So, the dilemma presented to this Court is as follows: Is the due process right of a criminal defendant to pursue his post-conviction claims under the Due Process Clause a hollow right because there is no way to seek a remedy for a violation of the guarantee of a decision by an impartial judge, once the habeas deadline has passed?

Federal habeas review is not available because the one-year statute of limitations has passed, and declaratory relief under a § 1983 action is not available because the decision of whether the judge is biased had already been made by the allegedly biased judge.

Petitioner's Proposed Remedy

As Chief Justice Rehnquist was fond of saying, "we are not an error-correction court."

For certain, Petitioner asks that this Court grant his Petition for Writ of Certiorari. However, rather than docketing this matter for briefing and oral argument, Petitioner requests relief in the form of a "GVR" Order, granting the petition, vacating the Order from the Fourth Circuit affirming the district court dismissal, and a remand to the Fourth Circuit for a review on the merits of the Petitioner's § 1983 claim.

By that process, the Fourth Circuit would be the forum in which the factual support of the Petitioner's claim against Judge Stephens would be litigated, and decided. With a ruling by this Court that Petitioner possesses the potential for relief, the Fourth Circuit would be tasked with deciding whether there is a sufficient factual basis for the granting of such relief.

To not allow Petitioner to go forward with his effort to give substance to his Due Process Right for an impartial post-conviction judge, the right itself would be rendered useless.

CONCLUSION

Based upon the authorities and arguments set forth above, the Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari, vacate the decision of the Fourth Circuit and remand the matter for further proceedings.

Respectfully submitted this the 3rd day of April, 2018.

Bruce T. Cunningham, Jr.
Counsel of Record
225 North Bennett Street
Southern Pines, NC 28387
910 693-3999
910 695 0983 fax
btcunningham545@gmail.com
Counsel for Petitioner