

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HEATH W. GRAY — PETITIONER

VS.

ROBERT D. GILMORE, et, al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

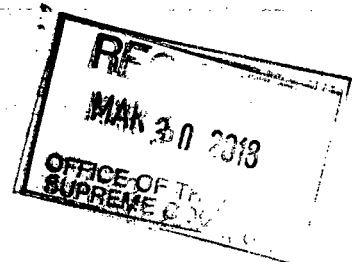
United States Court of Appeals/3rd Circuit/Middle District

PETITION FOR WRIT OF CERTIORARI

HEATH W. GRAY - Inmate#FP-0237

SCI Greene, 175 Progress Drive

Waynesburg, PA. 15370



QUESTION(s) PRESENTED

1. DID TRIAL JUDGE, THE HONORABLE JUDGE NANCY BUTTS, ABUSE HER DISCRETION AND VIOLATE THE PETITIONERS DUE PROCESS RIGHTS WHEN SHE FAILED TO RECUSE HERSELF FROM ALL THE PROCEEDINGS IN THIS COURT ACTION WHEN SHE WAS SOCIALLY, PROFESSIONALLY, AND HAD A FAMILIAR RELATIONSHIP WITH A COMMONWEALTH WITNESS AND THE VICTIM, KALIB BLASE? AND WHETHER ANY PROCEDURAL DEFAULT ON THE RECUSAL ISSUE SHOULD BE EXCUSED?

2. DID THE THIRD CIRCUIT OF APPEALS ERROR WHEN THEY FAILED TO EXCUSE THE PETITIONERS PROCEDURAL DEFAULT WHEN THE ISSUE WAS PRESENTED IN SOME FASHION THROUGH OUT THE PROCEEDINGS?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

~~xx~~ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The parties to this Court Action are;

(1) ROBERT D. GILMORE, SCI Greene Superintendent.

169 Progress Drive, Waynesburg, PA. 15370

(2) JOSH SHIOARO, Pennsylvania Attorney General.

Strawberry Square, Harrisburg, PA. 17120

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the 3rd Cir. Middle District court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1/9/18.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VI

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

=====

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section I. All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, not shall any Due Process of law, nor deny to any person within its Jurisdiction the Equal Protection of the laws.

=====

28 § U.S.C. §§ 2254

(a) The Supreme Court, a Justice thereof, a Circuit Judge, or a District Court shall entertain an application for a Writ of Habeas Corpus on behalf of a person in custody pursuant to the Judgment of a State Court only on the ground that he is in custody in violation of the Constitution, law, or treatise

of the United States.

(b)(1) An application for a Writ of Habeas Corpus on behalf of a person in custody pursuant to the Judgment of a State Court shall not be granted unless it appears that;

(A) the applicant has exhausted the remedies available in the Courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a Writ of Habeas Corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the Courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

STATEMENT OF THE CASE

On May 1, 2002, Petitioner, HeathW. Gray was arrested and charged with an open count of Criminal Homicide, Conspiracy, Arson, Burglary and Recklessly Endangering Another Person.

On May 28, 2002, Attorney Kyle Rude was appointed to represent the Petitioner.

On June 25, 2002, the Commonwealth filed its Notice to seek the Death Penalty, in light of this, Attorney Matthew Ziegler was appointed as a second attorney representing the Petitioner.

On July 24, 2002, a hearing was held before assigned judge, Nancy L. Butts,, in which the Petitioners co-defendant filed Motion for the recusal of judge Butts due to her familiarity with a Commonwealth witness. (Matthew Oldt)¹

The Honorable Judge Nancy L. Butts denied the Motion for her recusal.

On July 31, 2002, attorney Ziegler filed an Omnibus Motion on the Petitioners behalf, claiming several procedural and substantive violations, including a Motion to Suppress statements made by the petitioner to agents of the Williamsport Police Department. Judge Butts held the Omnibus hearing on April 9, 2003 and denied the Motion on April 23, 2003.

footnote

¹ Judge Butts is an active member of the Lycoming Fire Department where she is a EMT volunteer. Commonwealth witness Matthew Oldt is also an active member of the Lycoming Fire Department and was the first responder on scene of this crime. Commonwealth witness Matthew Oldt is also the Victim's Uncle.

On March 17, 2003, co-defendant Kieth Young (Young) plead guilty to all counts with the agreement that the Commonwealth would not seek the Death Penalty. During Young's guilty plea hearing Judge Butts explained to Young that there was differences between Life with a consecutive numbered sentence, compared to Life with a concurrent sentence. In all reality there is no difference within the D.O.C., however, after her explanation to Young, she offered to accept the Commonwealth's deal to let him plead guilty to a Life sentence. That one condition was for him to testify against the Petitioner if he chose to goto trial.

On September 19, 2003, following a pre-trial conference and on the advice of counsel, the Petitioner waived his right to a jury trial in exchange for the Commonwealth to withdraw the Death Penalty.

On October 27, 2003, before Judge Butts, the Petitioner's trial began. On October 31, 2003, the Petitioner was sentenced to Life W/O the possibility of parole, and all other charges ran concurrent to his Life sentence, but consecutive to each other.

On November 12, 2003, a timely appeal was filed on the Petitioners behalf. Trial counsel, attorney Rude, stayed on as Petitioner's appellate counsel through the Direct Appeal to the Pa. Superior Court. Trial Court denied appeal, and the Pa. Superior Court affirmed the lower courts denial, but expressed concern over the recusal issue, but stated that trial counsel did not properly preserve issue for their jurisdiction.

The Pa. Supreme Court also denied the Petitioner's allowance for appeal.

On February 15, 2007, the Petitioner filed a PCRA Petition, pro se, pursuant to 42 Pa. C.S. §§ 9541-9546. And on March 7, 2007, Attorney Paul Petcavage was appointed to represent the Petitioner during the PCRA proceedings, however attorney Petcavage filed a Turner/Finley no merit Letter". The Record does not reflect any "Turner/Finley Letter" being filed, but in any event the petitioners PCRA Petition was denied on October 16, 2007, by Judge Butts.

On October 16, 2007, Judge Butts denied the PCRA Petition and the Petitioner appealed to the Pa. Superior Court.

On October 17, 2008, the Pa. Superior Court reversed and remanded the PCRA Appeal. Attorney Edward J. Rymsza, was appointed to represent the Petitioner on the remand and in doing so advised the lower court that in its prior decision they concluded that an appearance of impropriety existed and found it incomprehensible that both the PCRA Court and PCRA Counsel had thereafter summarily discounted the Petitioners claims. The Superior Court also strongly recommended the Judge Butts recuse herself from the Petitioners appeals.

On June 9, 2009, attorney Rymsza filed an Amended PCRA Petition on the petitioners behalf, and also filed a Motion on December 2, 2009, to disqualify prior PCRA Counsel (attorney

Petcavage, from the Petitioners PCRA proceedings because he was now working in the Lycoming District Attorney's Office, but said Motion was denied on January 7, 2010.

The Petitioner was granted an Evidentiary Hearing and the hearing was held on February 14, 2011, and May 6, 2011. Four people testified at the hearing, The Petitioner, Trial Counsel Attorney Rude, prosecuting Attorney Michael Dinges, and Trial Judge Butts.

Hereafter special-presiding Judge Sholley was assigned to review the Petitioner's PCRA, Amended PCRA and the Record because Judge Butts recused herself because of the Impartiality that a lay person might find prejudicial. Judge Sholley denied the Petitioner's PCRA on June 12, 2012. (Appendix C)

The Petitioner again appealed to the Pa. Superior Court in which the Superior Court affirmed the Petitioner's convictions on November 7, 2013.

The Petitioner also filed for reargument, **En Banc** on November 21, 2013, but was denied on January 4, 2014.

The Petitioner filed for allowance of appeal to the Pa. Supreme Court but was denied on June 20, 2014.

On August 10, 2014, the Petitioner timely filed a Writ of Habeas Corpus to the 3rd Circuit District Court, Middle District. Once again the Petitioner was denied relief from the 3rd Circuit on June 14, 2016, with Judge Munley presiding and stating that there was no basis for an issuance of a Certificate of Appealability, and ordered the Clerk of Court to close the Petitioners case.

On July 11, 2016, the Petitioner filed a Motion to alter

or amend Judgment in the U.S.D.C. under Rule 59(e).

On January 17, 2017, the Petitioner filed a Motion for the Court to Amend current Motion under Rule 59(e), to add information he had just learned about a Judges qualification from the Continued Learning Education Board that the Petitioners trial attorney (RUDE) is not on the qualified Death Penalty attorney's list for Capital Cases.

On February 16, 2017, Petitioner received notice from the Court denying Petitioners request to add newly discovered facts, stating Rule 59(e) Motion was already denied on September 7, 2016. This was Petitioners first notice of Rule 59(e) denial.

On March 13, 2017, Petitioner filed a Notice of Appeal, and Application for a Certificate of Appealability.

COMES NOW, Petitioner, Heath W. Gray, filing the following MEMORANDUM in favor of a Appealability.

**ISSUES AS TO WHICH A CERTIFICATE OF
APPEALABILITY IS SOUGHT.**

In its Order denying relief, the 3rd Circuit also denied a Certificate of Appealability, but states that this Court's denial does not prevent the Petitioner from appealing the order denying his petition so long as he seeks, and obtains, a Certificate of Appealability from the Court of Appeals. See **Federal Rules of Appellate Procedure 22(b)(1),(2)**. The Court's Order denying relief in this matter recognizes the grounds for relief in the petition. The grounds are discussed below in the order in which they appear in petitioner's initial Memorandum for

petitioner's Habeas Corpus Writ.

GROUND ONE

DID TRIAL JUDGE, THE HONORABLE JUDGE NANCY BUTTS ABUSE HER DISCRETION AND VIOLATE THE PETITIONERS DUE PROCESS RIGHTS WHEN SHE FAILED TO RECUSE HERSELF FROM ALL PROCEEDINGS IN THIS COURT ACTION WHEN SHE WAS SOCIALLY, PROFESSIONALLY, AND HAD A FAMILIAR RELATIONSHIP WITH A COMMONWEALTH WITNESS AND THE VICTIM, KALIB BLASE? AND WHETHER ANY PROCEDURAL DEFAULT ON THE RECUSAL ISSUE SHOULD BE EXCUSED?

1. The issue that the Petitioner must address here is if the issue of the procedural default can be overcome and have the Court address Judge Butts failure to recuse herself from the Petitioners Bench Trial.

The 3rd Circuit maintained that the issue was procedurally defaulted. The Petitioner admits that he is procedurally defaulted and that there remains no available state remedy upon which Petitioner can challenge them. However, Petitioner overcomes the default of those portions pursuant to Martinez v. Ryan, 132 S.Ct. 1309 (2012), based on the ineffective failure of initial Post-conviction counsel to challenge them.

2. During Pretrial Motions the Petitioners co-defendant's attorney filed a Motion for the recusal of trial Judge Nancy Butts and the Petitioner's attorney Rude failed to Motion for same. The Pa. Superior Court remanded this case back to the PCRA Court and stated that "In the instant case, the fact that the trial judge was a volunteer of the same fire department as a witness who was the first responder to the fire and the victim's uncle RAISES the appearance of impartiality, especially in light of the trial court's role as finder-of-facts. We cannot address this concern, however, because COUNSEL has not properly preserved the issue."(Superior Court's Memorandum, pg.11, para.1)

In order to overcome the default, the petitioner must demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the petitioner must demonstrate that the claim has merit.

Martinez, 132 S.Ct. at 1318-19. (Appendix B Pa. Super. Opinion)

3. The 3rd Circuit of Appeals claims that the Petitioner was unable to clear the hurdle of the issue having merit, but in all reality the Pa. Superior Court admitted that there was impartiality shown. (Pa. Superior Court Memorandum, pg.11) The 3rd Circuit of Appeals also claims that the Petitioner has failed to show prejudice (3rd Circuit of Appeals Memorandum, at pg.15), also the 3rd Circuit of Appeal's Court stated that "Petitioner(Gray) has failed to demonstrate that counsel was deficient, and certainly has not demonstrated that any of trial counsel's alleged failures resulted in actual prejudice. Consequently, he is unable to show that the underlying ineffective assistance of counsel claim has any merit. Review of this claim is therefore precluded." (Memorandum, at pg.15)

4. PREJUDICE -

Strickland v. Washington, 466 U.S. 527 (1984), Strickland prejudice is present whenever "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. "The adjective is important." Kyles v. Whitley, 514 U.S. 419, 434 (1995), The question is not whether the defendant would more than likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in

a verdict worthy of confidence." Id; See also Strickland, 466 U.S. at 693.

Because a "reasonable probability" is one "sufficient to undermine the confidence in the outcome." Id., The Strickland prejudice standard is not "stringent" - it is, in fact, "less demanding than the preponderance standard." Jermyn v. Horn, 266 F.3d 149, 154 (3rd Circuit 1999)) see also Woodford v. Visciotti, 537 U.S. 19, 22 (2002) (Strickland "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered.") Williams v. Beard, 637 F.3d 195, 227 (3rd Cir. 2011).

Petitioner establishes prejudice. Trial Judge Nancy Butts should have recused herself from the proceeding and trial counsel, attorney Rude should have Motioned the court for the recusal of judge Butts because the appearance of impartiality was present and a significant minority of the lay community could reasonably question the court's impartiality. Quoting Commonwealth v. Stevenson, 829 A.2d 701, 705 (Pa. Super. 2003)(emphasis added).

See also CODE OF JUDICIAL CONDUCT CANON 3(C)("A judge should disqualify herself in a proceeding in which her impartiality might reasonably be questioned").

5. Quoting the Pa. Superior Court "Although the record does not indicate that Appellant followed the proper procedure regarding recusal, we are concerned by the trial judge's decision to sit as trier-of-fact in this case. Our inquiry is not whether the trial judge was in fact, prejudiced against Appellant but whether, even if actual bias, or prejudice is lacking, the conduct, statement, or AFFILIATION AND FAMILIARITY OF THE COURT

raises "an appearance of impropriety." Quoting Stevenson, Supra.

So the question of prejudice is addressed by the Pa. Superior Court and for that reason alone the Petitioner has shown he was prejudiced and trial judge Butts should have recused herself from all proceedings.

When asserting an ineffective of assistance claim on PCRA Counsel in a Federal Court, the Court must look to EVITTS V. LUCEY, 83 L.ed 2d 821, 469 U.S. 387 (1985), Due Process with regards to appellate review the United States Supreme Court holds that "When a State opts to act in a field where its action has significant discretionary elements, such as the establishment of a system of appellate review as of right although not required to do so, it must nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause of the Fourteenth Amendment."

During State Post-conviction-relief proceedings the State of Pennsylvania appoints Counsel as a right and attorney Petcavage was ineffective for failing to preserve petitioners trial counsel's ineffectiveness and the petitioner's procedural default should be excused.

GROUND TWO

DID THE THIRD CIRCUIT OF APPEALS ERROR WHEN THEY FAILED TO EXCUSE THE PETITIONERS PROCEDURAL DEFAULT WHEN THE ISSUE WAS PRESENTED IN SOME FASHION THROUGH OUT THE PROCEEDINGS?
AND WHEN PETITIONERS ISSUE DID HAVE MERIT PURSUANT TO THE PA.
SUPERIOR COURT'S OPINION.

Petitioner's claim that Judge Nancy Butts should have recused herself is backed up by the Pa. Superior Court and the Opinion thereof. The 3rd Circuit of Appeals made an Order dated January 9, 2018, in that Order the Honorable Judge Thomas L. Ambro referred to the "doubly deferential AEDPA standard of review," and stated that the petitioners trial counsel was not ineffective under that standard.

The Petitioner avers that he did overcome the default by demonstrating that the underlying claim of trial ineffectiveness was a substantial one and the claim does have merit. The Pa. Superior Court made it very clear that if not for the procedural default they would have granted the petitioner a new trial because of the fact that Judge Butts should have recused herself (Appendix D-10 at 2nd para.) "Although the record does not indicate that appellant followed the proper procedure regarding recusal, we are concerned by the trial judge's decision to sit as trier-of-fact in this case. Our inquiry is not whether the trial judge was, in fact, prejudiced against the Appellant, but whether, even if actual bias or prejudice is lacking, the conduct, statement, or affiliation and familiarity of the Court raises "an appearance of impropriety."

In the instant case, the fact that the trial judge was a volunteer of the same fire department as a witness who was a first responder to the fire and the victim's uncle RAISES THE

APPEARANCE OF IMPARTIALITY, ESPECIALLY IN LIGHT OF THE TRIAL

COURT'S ROLE AS FINDER-OF-FACTS. We cannot address this concern, however, because counsel has not properly preserved the issue. (Appendix D-11 at 1st para).

Therefore, the Petitioner has shown that but for Appellate Counsel's failure to address trial counsel's failure to Motion for the recusal of Judge Butts, and PCRA Counsel's failure to also address the meritorious issue of recusal the Petitioners claim would have been preserved for review and the Pa. Superior Court would have found the issue had merit and would have granted a new trial. But for the procedural default the Petitioner would have been granted a new trial. The 3rd Circuit should have excused the procedural default and granted the Writ.

REASONS FOR GRANTING THE PETITION

The Petitioner, Heath W. Gray avers that due to the manifest injustice in this Court Action and the fact that the Petitioner is innocent of the above named charges the United States Supreme Court should grant the petitioner's Writ of Certiorari and excuse the procedural default that exists due to trial Counsel's ineffective assistance of counsel for failure to Motion the Court for the recusal of the Honorable Judge Nancy Butts.

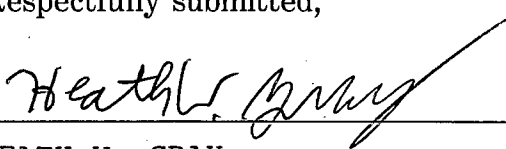
The record reflects that the Pa. Superior Court would have granted the Petitioner's Appeal but for trial counsel's failure to preserve this issue. Further the Pa. Superior Court issued an order that Judge Butts was not to Rule on the Petitioners PCRA Petition and Evidentiary Hearing. The Lower Court did in fact recuse Judge Butts and Special presiding Judge, the H Honorable Judge Michael H. Sholley did in fact hear testimony at the evidentiary hearing and denied the petitioners PCRA Petition on June 12, 2012.

Because of the Personal Animus between Judge Butts and the Commonwealth Witness and the fact that Judge Butts stood as sole Finder-Of-Fact during the Petitioner's Bench Trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



HEATH W. GRAY

Date: 3-25-18