

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Stephen D Herto,

Petitioner,

v.

John T. Murphy,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A District Court failed to adjudicate a single claim from the petitioner in its final order dismissing his petition under 28 U.S.C. § 2254. The petitioner filed a Motion to Amend Judgement and Findings under Fed. R. Civ. P. Rule 59(e). The District Court for the first time adjudicated the claim in response in a footnote, denying the motion, and denying a certificate of appealability. The District Court committed a fallacious error in its response forsaking all evidence before it and denying a certificate of appealability(COA).

Can the district court deny a merit claim based on an entirely fabricated basis, that is contrary to the record and not argued by either party?

Can a certificate of appealability be denied under 28 U.S.C. § 2253(c)(2) by the District Court without evidence in the record to support its stated reasons for meritorious denial and the only evidence in the record supporting the petitioners claim? Can the US Court of Appeals confirm such a denial of a certificate of appealability?

LIST OF PARTIES

1. Stephen D. Herto, Petitioner.
2. John T. Murphy, Respondent.

RELATED PROCEEDINGS

1. *Herto v. Murphy*, No. 24-6961, 2025 WL 444423 (4th Cir. Feb. 10, 2025) Dismissing Appeal.
2. *Herto v. Murphy*, No. 5:17-CV-54, 2024 WL 4132670 (N.D.W. Va. Sept. 10, 2024), report and recommendation adopted. Petition dismissed.
3. *State v. Stephen H.*, No. 15-0801, 2016 WL 3165791 (W. Va. June 6, 2016) direct appeal denied.
4. *State Ex Rel. Herto v. Plumley*, Case No. 16-C-172,(W.Va. July 7, 2017) Habeas Corpus dismissed as mooted upon parole.
5. *State of W.Va. v. Herto*, Case No. 13-F-65 (Filed April 20, 2020, Pending) Petition for Writ of Error Coram Nobis

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OPINIONS BELOW

The citation to the Opinion of the District Court below final Order denying his Motion to Amend Judgment and Findings and dismissing his petition and denying a certificate of appealability is unpublished as *Herto v. Murphy*, No. 24-6961, (N.D.W. Va. Sept. 23, 2024, and appears at **Appendix A**.

The citation to the 4th Cir. Opinion below is *Herto v. Murphy*, No. 24-6961, 2025 WL 444423 (4th Cir. Feb. 10, 2025) is unpublished(Doc. 7) and appears at **Appendix B**.

The citation to the 4th Cir. Denial for rehearing (Doc. 11) is *Herto v. Murphy*, No. 24-6961, 2025 (4th Cir. Mar. 11, 2025) and appears as **Appendix C**.

The citation to the US District Court ORDER (Doc. 123), *Herto v. Murphy*, No. 5:17-cv-54 (September 10, 2024) appears at **Appendix D**.

The citation to the US District Court, Report and Recommendation(Doc. 120), *Herto v. Murphy*, No. 5:17-cv-54 (August 12, 2024) appears at **Appendix E**.

JURISDICTION

The Fourth Circuit United States Court of Appeals decided my case on Feb. 10, 2025. *Herto v. Murphy*, No. 5:17-CV-54, 2024 (N.D.W. Va. Sept. 10, 2024) adopting the report and recommendation (Doc. 123). A petition for rehearing was timely filed. The petition for rehearing was denied by the 4th Cir. and dismissed on March 11, 2025(Doc. 11), and is attached at Appendix C. This Court has jurisdiction under § 1254(1) to review denials of applications for certificates of

appealability by a circuit judge or a court of appeals panel. *Hohn v. United States*, 524 U.S. 236, 236, 118 S. Ct. 1969, 1970, 141 L. Ed. 2d 242 (1998)

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 2253 Appeal

(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.

28 U.S.C.A. § 2254 State custody; remedies in Federal courts

STATE CODE

W. Va. Code §62-1F ELECTRONIC INTERCEPTION OF PERSON'S CONDUCT OR ORAL COMMUNICATIONS IN HOME BY LAW ENFORCEMENT.

§62-1F-2. Electronic interception of conduct or oral communications in the home authorized.

(a) Prior to engaging in electronic interception, as defined in section one of this article, an investigative or law-enforcement officer shall, in accordance with this article, first obtain from a magistrate or a judge of a circuit court within the county wherein the nonconsenting party's home is located an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law-enforcement officer or an informant that establishes probable cause that the interception would provide evidence of the commission of a crime under the laws of this state or the United States.

§62-1F-1. Definitions.

(a) For the purposes of this article, the following terms have the following meanings:

(1) "Body wire" means: (a) An audio and/or video recording device surreptitiously carried on or under the control of an investigative or law-enforcement officer or informant to simultaneously record a nonconsenting party's conduct or oral communications.

STATEMENT OF THE CASE

Two civilian clothed law enforcement officers arrived at the petitioner's home in an unmarked vehicle and requested to enter the petitioner's home to ask some questions concerning anonymous emails.

Lt. Swiger: We traveled to Dr. Herto's residence in an unmarked vehicle. I believe at that time I had a Dodge Durango. And we went in civilian clothes, we wanted to do things very low key, to conduct the interview of Dr. Herto in his residence.

[Doc. 39-3 at 50, p. 97 line 17-21]

The petitioner cooperated and was interviewed by the officers inside his home. The petitioner admitted to co-owning the email address, knowing the alleged victim and sending some emails. The officer secretly recorded the 1 hour 28-minute interview without permission from the petitioner or without a court order, an unlawful act in West Virginia under W. Va. Code §62-1 F. Electronic Interception of Person's Conduct or Oral Communications in Home by Law Enforcement.

The illegally obtained recording was entered into evidence and testified about by law enforcement at trial without objection. Following the trial the jury requested to listen to the interview themselves during their deliberations, and the request was granted without objection. [Doc. 39-4 at 41- 42(pages 80-82)] Defense counsel failed to suppress the illegal recording or object to any of the evidence being used against the petitioner. The petitioner was convicted of the email offenses and acquitted of a lone contact allegation.

Procedural History of Claim of Ineffective Assistance of Counsel(IAC).

1. The petitioner filed a direct appeal to the West Virginia Supreme Court of Appeals who affirmed his convictions but declined to adjudicate the claim for IAC as it requires a record provided from a lower court to review, normally provided by a hearing. *State v. Stephen H.*, No. 15-0801, 2016 WL 3165791 (W. Va. June 6, 2016)
2. The petitioner filed a Petition for Writ of Habeas Corpus under W. Va. Code §53-4A-1, *State ex rel. Herto v. Plumley*, Case. No. 16-C-172 (2016). That petition was dismissed by the Circuit Court, again without a hearing, on July 7, 2017 when the defendant was paroled, as the case was considered moot.
3. The petitioner presented the same ground for relief to the federal court in a §2254 Habeas petition on April 26, 2017. That case was dismissed without a hearing. *Herto v. Murphy*, No. 5:17-CV-54, 2024 WL 4132670 (N.D.W. Va. Sept. 10, 2024) adopting the report and recommendation.
4. The petitioner motioned the District Court under Rule 59(e) to amend the findings as his claim had not been adjudicated. That motion and a COA were denied, again without a hearing on Sept. 23, 2024. [Doc. 126, Appendix A]
5. The petitioner presented the same ground for relief to the WV state trial court on April 20, 2020, in a petition for Writ of Error Coram Nobis. The State trial court has subsequently granted a hearing for the IAC failure to suppress claim(the same claim the federal District Court herein denied

without a hearing) on November 17, 2025, with a pending second hearing date of April 10, 2026.

The petitioner has argued for his convictions to be overturned due to ineffective assistance of counsel by failure to suppress compelling evidence against him.

GROUND ONE: PETITIONER WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Supporting Fact 9

Defense counsel failed to prepare for a pre-trial suppression hearing and missed critical evidence, including the state's use in trial of an unlawfully obtained, secretly recorded audio surveillance of the petitioner inside his home, in violation of state law W. Va. Code §§ 62-1F-1 to -9.

[Doc. 106-1 at 2] Amended Petition for Writ of Habeas Corpus

Petitioner argued that a hearing must be held with his former counsel to examine his actions or lack thereof and how the illegal recordings admissions effected his strategy at trial and the verdict.

The District Court Order adopted the report and recommendation [Doc. 123] and failed to provide a de novo analysis of this claim. The petitioner argued this lone claim to the District Court in his Motion to Amend Judgement and Findings. [Doc. 125]The District Court agreed that the claim was not adjudicated and addressed this lone argument in response in a footnote.

Petitioner cites W.Va. Code § 62-1 F in his argument that police should have had a warrant to record a police interview in his home. [Doc. 125 at 1—7]. The definition of “electronic interception” in W.Va. Code § 62-1 F- requires “recording with a body wire.” The definition of “body wire” in that same code section states that “body wire” means, “recording device surreptitiously carried. . . .” There is no indication that the police interview conducted at

petitioner's house was conducted with any "surreptitiously carried" recording equipment.

[Doc. 126 at 3, fn. 1] ORDER (Denying Motion to Amend Judgement and denying a COA) Appendix B

The District Court finds that:

"There is no indication that the police interview conducted at petitioner's house was conducted with any "surreptitiously carried" recording equipment."

Explicit trial testimony provided to the court directly opposes this finding. **This is why a certificate of appealability is warranted in this case.**

Testimony from law enforcement presented to the District Court clearly shows that the in-home recording was made secretly from a recording device concealed inside his pocket.

Prosecutor: And is that something - - - can you describe how you do those recordings?

Lt. Swiger: Typically I carry a digital voice recorder in my pocket and record interviews from start to finish, from the time I get out of the car till the time I get back in the car.

Prosecutor: And you did that in this case?

Lt. Swiger: **Yes.**

[Doc. 39-3 at 52, p. 102 line 16-23] Transcript, [Doc. 118 at 10] Resp. Reply to Petitioner's Response to M. for Judgement on the Pleadings add to Appendix and later when questioned by defense counsel,

Defense Counsel: You've got a hidden recording device.

Lt. SWIGER: **Yes.**

[Doc. 39-3, p. 107, L 5-6]transcript [Doc. 116 at 24] Response to Respondent's M. for Judgement on the Pleadings [Doc.125 at 2] Petitioner's M. to Amend Judgement and Findings

The District Court finding is fallacious and mistaken that there was “no indication” the recording was made secretly by a “recording device surreptitiously carried”. **The only evidence in the record before the court from both the petitioner and respondent is the exact opposite.** A reasonable jurist could find after reviewing the above testimony that the court decision was debatable or outright wrong. **This is why a certificate of appealability is warranted in this case.**

Even if the District Court were right that it found “no indication” that the recording was made with a hidden recorder, the court also had no indication the recording was made with permission of the petitioner or with a valid warrant under W. Va. Code § 62-1f'. The District Court had no fact finding to dismiss the petition at this early stage. The petitioner must clearly allege constitutional violations which are presumed correct until unsubstantiated by fact finding in the record or by an evidentiary hearing. When, as here, the district court denies relief without an evidentiary hearing, “the facts must be viewed in the light most favorable to the § 2255[4] movant” – drawing all reasonable inferences in his favor. *Id.* (internal quotations omitted); *United States v. Paylor*, 88 F.4th 553, 565 (4th Cir. 2023).

Finally, a district court is obligated to hold an evidentiary hearing on a petitioner's *Strickland* claim “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]” 28 U.S.C. § 2255(b). Although “whether to hold a hearing ordinarily is a matter of district court discretion, a hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed facts beyond the record, or when a credibility determination is necessary to resolve the claim.” *Mayhew*, 995 F.3d at 176–77; *see Paylor*, 88 F.4th at 565.

United States v. McNeil, 126 F.4th 935, 942–43 (4th Cir. 2025)¹

¹ Case granted a COA by the US Appellate Court, vacated and remanded for a hearing with nearly identical IAC claim for failure to suppress evidence. (Warrantless entry by law enforcement)

The District Court denied his motion without a hearing and denied the petitioner's certificate of appealability(COA) [Doc. 126 at 4, Appendix A] in response to the Rule 59(e) Motion to Amend Judgement[Doc. 125]. The petitioner appealed directly to the U.S. Court of Appeals for the Fourth Circuit for a COA and requested a remand for a hearing. The petitioner provided a Memorandum of Support for Certificate of Appealability. [Doc. 6] The 4th Cir. dismissed his appeal stating simply that the petitioner "has not made the requisite showing" [Doc. 7 at 2, Appendix B] A Petition for Rehearing was filed. [Doc.9]. That petition was also denied. [Doc. 11, Appendix C]

A CERTIFICATE OF APPEALABILITY AND HEARING IS REQUIRED BECAUSE THE GOVERNMENT HAS NOT SHOWN PETITIONER IS CONCLUSIVELY UNENTITLED TO RELIEF.

The Standard for Issuance of a COA.

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); see *710 *Miller–El v. Cockrell*, 537 U.S. 322, 336–38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner, the court was clearly wrong, or

that the issues presented were adequate to deserve encouragement to proceed further.²

The burden of proof placed upon the petitioner for merit does not exist at this early stage of the his §2254 Habeas proceeding. He must simply allege that his counsel was ineffective because he failed to suppress the illegally obtained recording from evidence before the court. The petitioner should have the right to a COA for a clearly fallacious finding from the District Court that forsakes the only evidence from trial. Until a COA is issued the 4th Cir. cannot address the merits of the case.

There are no findings that indicate that law enforcement requested permission to record the interview or sought out a court order to obtain a secret recording inside the petitioner's home. The only evidence from testimony supports the petitioners claim the recording was secretly obtained by a recording device hidden on the officer.

A hearing is required with former counsel to ascertain:

1. Why he failed to suppress the illegally obtained recording which violated state law;
2. How the recordings entrance into evidence affected his trial strategy and defense and;
3. Determine the extent of reliability of the convictions that fall into question absent the illegally obtained audio recordings being played for the jury and testified about by law enforcement.

In short, at this early stage the petitioner needs to allege a denial of a constitutional right by evidence in the record. He may have the opportunity to

² See 28 U.S.C. § 2253 APPEAL. Notes of Decisions 170. Numerous cases citing this standard.

prove such an allegation during a hearing with his former counsel who can explain his actions. The petitioner must be given a hearing unless his allegations and the record of the case conclusively show he is not entitled to relief. 28 U.S.C. § 2255(b); *Paylor*, 88 F.4th at 565. The petitioner has cleared this hurdle.

Competent counsel would have filed a motion to suppress the recording and would have argued that the officer's warrantless recording inside his home was an illegal under W. VA. Code §62-1F. The police would be crucial witnesses for the government at the suppression hearing, because the government would carry the burden of proving that the recording was lawful.

To deny the petitioner at this early stage with the only evidence in testimony supporting his allegation that he was secretly recorded by a hidden device by law enforcement without a warrant from a court without granting a COA would violate the intent of 28 U.S.C. § 2253(c)(2). The District Court made a mistaken finding and failed to recognize the only testimony in the record on point indicative of "surreptitiously carried" recording equipment by law enforcement. Reasonable jurists could find the District Court's findings debatable or outright wrong. The District Court's findings are not just false. It's an acknowledgement that under the true facts, that the recording was secretly made, and the petitioners claim is meritorious and deserves further proceedings by granting a COA.

REASONS FOR GRANTING THE PETITION

The District Court has departed from the accepted and usual course of judicial proceedings for granting a COA that calls for an exercise of this Court's supervisory

power. The Appeals Court has sanctioned the departure. This is one of the rare factual cases descrving the Court's attention because it is so blatant.

COA's are the last means that prisoners have afforded to them by statute to correct a wrong by a judicial body upon appeal. To deny the petitioner further adjudication of this lone meritorious claim due to an oversight by the District Court would result in a manifest injustice reducing the COA to merely a rubberstamp checkbox by simply citing "petitioner has failed to make 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2)". [Doc. 126 at 4]

CONCLUSION

The petitioner for good cause asks this Honorable Court to intervene and remand this case to grant a COA and remand for a hearing for ineffective assistance of counsel or provide other remedies to prevent a manifest injustice. To deny a COA with such a blatant error without remedy serves to negate the intent of 28 U.S.C. § 2253(c)(2). Petitioners cannot prove the merits of their cases without first gaining evidence through an evidentiary hearing with former counsel for ineffective assistance of counsel claims.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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