25-5937

ORIGINAL

Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY SIMMS,	:
Petitioner,	:
-vs-	:
JERRY SPATNY, Warden,	:
Respondent.	:

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

PETITION FOR WRIT OF CERTIORARI

FOR PETITIONER:

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Habeas Corpus provisions of the AEDPA, constitute a legislative usurpation of the Judicial prerogative to issue a Writ of Habeas Corpus, in violation of the Separation of Powers Doctrine?

II. Whether the limitations period of the AEDPA, in its' application, constitutes a suspension of the writ as prohibited by Article I, §9, Cl. 2 of the United States Constitution?

III. Whether, pursuant to 28 U.S.C. §2254(e)(2), where the failure to fully develop the factual record in the state court is not attributable to the Petitioner, but rather to failures of the state courts, a hearing is warranted on Federal Habeas review and whether the AEDPA restrictions usurp the authority of the Federal Judiciary?

IV. Whether a Court of Appeals reviewing an application for a Certificate of Appealability under 28 U.S.C. §2244 which demonstrates that reasonable jurists might disagree with the district court may deny the issuance of the Certificate on the basis that the Court believes that the Applicant might not prevail on the merits?

V. Whether a Magistrate Judge and a District Court judge who openly display a propensity of bias in favor of the State on Habeas Corpus Review must recuse himself upon proper Application therefor, and whether it is error to refuse to do so?

VI. Whether a prisoner who presents substantive evidence of actual innocence and Constitutional infirmity in obtaining a wrongful conviction is entitled to the Issuance of a Writ of Habeas Corpus under **Harris v Nelson**?

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BASIS FOR JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied Petitioner's Application for Certificate of Appealability on August 4, 2025. This timely Petition for Writ of Certiorari is being submitted within the ninety (90) day period provided by Rule in which to do so, rendering this Petition timely. This Court has original jurisdiction to issue a Writ of Certiorari pursuant to Article III of the United States Constitution, and to issue all writs in aid of its jurisdiction pursuant to 28 U.S.C. §1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §9, Cl. 2, United States Constitution:

"The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Case of Rebellion of Invasion, the public safety may require it".

Fifth Amendment, United States Constitution:

"No person shall [...] be deprived of life, liberty or property without due process of law [...]".

Sixth Amendment, United States Constitution:

"The accused [...] shall enjoy the right [...] to the assistance of counsel for his defence..."

Fourteenth Amendment, United States Constitution:

"[...] nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

28 U.S.C. §2253(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 [...]
(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. §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 in 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 or laws or treaties 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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254

History

June 25, 1948, ch 646, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105; April 24, 1996, P. L. 104-132, Title I, § 104, 110 Stat. 1218.

STATEMENT OF THE CASE

Petitioner Timothy Simms was convicted in state court of multiple counts of rape, gross sexual imposition, tampering with evidence and disseminating matter harmful to juveniles and was ultimately sentenced to serve, inter alia, multiple terms of life without parole. During his appeal process, the complaining witness, his daughter, issued a full recantation in a sworn, counselled deposition, during which she admitted to having made the entire story up and did not realize how serious it was, and that the police and prosecutor had told her hat to say (Appendix K). Upon the filing of an attendant Motion for New Trial, the state prosecutor and state court trial judge, who openly voiced a propensity of prejudice against defendants charged as Simms was, conspired to work together to intimidate and coerce the witness to "recant" her recantation. However, they were not successful in doing so; they merely intimidated the witness to the point where she acquiesced in an attorney, appointed by the trial judge and not her original counsel, refusing to permit her to take the stand at the state court hearing, which resulted in the denial of relief to Simms.

Following exhaustion of all available state remedies, on June 16, 2022, Appellant filed his Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 seeking the issuance of a Writ of Habeas Corpus based upon, inter alia, actual innocence.

Following the submission of the Respondent's Return of Writ and Petitioner's Traverse thereto, (and the unrequested substitution of Magistrate Judge Michael R. Merz at his own behest for the initially assigned Magistrate Peter B. Silvain, Jr.,) Magistrate Merz issued a Report and Recommendation, on 06/20/2023, recommending dismissal without a hearing and with prejudice (Doc. # 21), to which Appellant filed timely Objections (Doc. 22).

Based upon clear errors of law and fact, including the miscalculation of the limitations period dates, Judge Sargus recommitted the case for additional review on July 10, 2023 (Doc. #23)

resulting in the submission of a second Report and Recommendation by Magistrate Merz, dated the following day, July 11, 2023, again recommending dismissal without a hearing and with prejudice (Doc. #. 24). Following timely submission of proper Objections, and based upon additional clear errors of law and fact, Judge Sargus recommitted the case for additional review on July 25, 2023 (Doc. #26) resulting in the submission of a Third Report and Recommendation, by Magistrate Merz, dated six (6) days later, and again recommending dismissal without a hearing and with prejudice on August 1, 2023 (Doc. #. 27).

Appellant filed a Motion for Extension of Time to file Objections thereto, which was granted, as well as a Motion to Remit the case back to the original Magistrate, (Doc. # 28) which was denied, and timely Objections to the Magistrate's Third Report and recommendation were filed (Doc. # 32).

On September 13, 2023, the District Court Judge Sargus issued an Order "Adopting the Report and Recommendations" (being the Magistrate's third Report and Recommendation), and dismissing the case with prejudice (Doc. #35 & 36), and the following day, vacated that judgment as erroneous, and recommitted the case back the Magistrate based upon the additional clear errors of law and fact committed in the Third Report and Recommendation (Doc. # 38).

On September 18, 2023, a mere four days later, the Magistrate issued his Fourth Report and Recommendation, again presenting clear errors of law and fact and recommending dismissal without a hearing and with prejudice (Doc. # 39).

Appellant filed timely objections, once again establishing that the Fourth Report and Recommendation was riddled with clear errors of law and fact, on September 28, 2023, (Doc. # 40); placing the case before Judge Sargus for review and disposition as of that date.

Following the passage of almost an additional year, with nothing coming from Judge Sargus, Appellant filed a Motion to Proceed to Hearing and Judgment, advising the Court that he has been diagnosed with terminal cancer and may not have long to live, (Doc. # 45), which was denied on May 13, 2024 (Doc. # 46).

Despite the fact that Judge Sargus reviewed and responded to each of the first three Report and Recommendations by Magistrate Merz within 3 days, 1 day and 7 days of the submissions of Petitioner's Objections, respectively, the District Court Judge persistently and without reason refused to adjudicate the case which was properly before him (See, e.g. **Will v Calvert Insurance Co.** (1976) 437 U.S. 655, 661-662).

Simms then filed an Affidavit of Prejudice and a Motion for Recusal as to both Magistrate Judge Merz and District Judge Sargus. Magistrate Judge Merz denied the Motion as to himself, and issued a Report and Recommendation recommending denial as to Judge Sargus (Doc. #s 50 & 51, respectively). Following Objections, and waiting for over a year for any activity, with a Motion to Proceed to Hearing and Judgment being denied, Simms then filed an Original Action in Procedendo in The United States Court of Appeals for the Sixth Circuit, seeking an Order to the District Court to proceed to a judgment, in Case No. 24-3021.

On November 11, 2024, Judge Sargus adopted the Report and Recommendation and refused to recuse himself (Doc. # 56), and additionally issued a blanket Order overruling all of Simms' objections and dismissing the case denying the issuance of a Certificate of Appelability (Doc. #57). In March 10, 2025, the Procedendo was dismissed as moot.

A timely Application for Certificate of Appealability was filed and, on August 4, 2025, the Sixth Circuit Court of Appeals denied the Application, (Case No. 24-4063, Appendix J). This Timely Petition for Writ of Certiorari follows.

FIRST QUESTION PRESENTED FOR REVIEW

Whether the Habeas Corpus provisions of the AEDPA, constitute an unconstitutional legislative usurpation of the Judicial prerogative to issue a Writ of Habeas Corpus, in violation of the Separation of Powers Doctrine?

LAW AND ARGUMENT

Article I, §9, Cl. 2, United States Constitution provides, "the privilege of the Writ of Habeas Corpus shall not be suspended unless when in Case of Rebellion or Invasion, the public safety may require it". The ability to issue a Writ of Habeas Corpus by a Federal District Court and this Court has been codified under the All Writs Act (28 U.S.C. §1651) and under 28 U.S.C. §§2241 and 2254.

The AEDPA revisions to 28 U.S.C. §2254 served to extremely narrow the scope of Federal Habeas Corpus relief for State prisoners, as well as severely curtail the authority and jurisdiction of the Federal Judiciary to issue a Writ. These revisions, inter alia, served to place a time limitation on the filing of a Petition, enhanced the presumptions of correctness afforded to a state court's factual determinations, as well as their legal conclusions, and created additional and more difficult procedural barriers to obtaining Federal Habeas Corpus review of unconstitutional infirmities relating to criminal convictions in state courts. Notably, the congressional record establishes that every one of these specific revisions were all initially deemed unconstitutional and a suspension of the Writ by Congress when first introduced by Senator Arlen Spector in 1993 and again in 1994, and only passed as part of the omnibus AEDPA in response to the bombing of the Federal Building in Oklahoma City in 1995, under the title of "Anti-Terrorist and Effective Death Penalty Act of 1996", nowhere mentioning that the first three pages of the Bill consisted entirely of Senator Spector's habeas corpus reform act, verbatim.

This Court was asked to determine, in **Felker v Turpin** (1997) 528 U.S. 651, whether any federal habeas petition is and must be subject to the restrictions established under the AEDPA. The question in **Felker** was whether such restrictions were constitutional, or whether they constituted an unconstitutional suspension of the Writ. This Court held the AEDPA restrictions did not constitute an unconstitutional suspension of the Writ for the sole reason that this Court "retains original jurisdiction" over Habeas Corpus and retains the authority to issue a writ, once requested.

Not only has the effect of the decision in **Felker** been disastrous for the country, as well as usurping the Constitutional prerogative of the Judiciary by interfering with their ability to issue a Writ of Habeas Corpus, the doctrine of Stare Decisis should have prevented the arrival by the Court at the decision in **Felker.** The AEDPA revisions inherently conflict with the purpose of the Writ, and it warrants revisiting and overturning by the Court as an unconstitutional limitation of the constitutional power of the federal judiciary. Petitioner submits that the **Felker** decision warrants revisiting, because, even upon issuance, it directly conflicts, severely and inherently, with the prior decision of the Court in **Harris v Nelson** (1969). 394 U. S. 286, in which the Court held:

> "The Writ of Habeas Corpus "is the fundamental instrument for safeguarding individual freedom from arbitrary and lawless state action. Its' pre-eminence is recognized by the admonition in the Constitution that the privilege of the Writ of Habeas Corpus shall not be suspended. [...] the scope and flexibility of the writ, its' capacity to reach all manner of illegal detention – its' ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility to ensure that miscarriages of justice within its reach be surfaced and corrected." (id, at 290).

Surely there are other means by which to address potential abuses of the Writ that do not close the courthouse door on prisoners.

Notably, since the issuance of this Decision, this Court, while faced with dozens upon dozens of requests, has issued exactly zero Writs of Habeas Corpus, while untold numbers of

Habeas petitioners have had their Petitions summarily tossed out due to AEDPA restrictions, many of which prisoners have subsequently eventually ultimately been exonerated. Specifically, an examination of some of the records of both the National Registry of Exonerations and the Ohio Innocence Project establish that there is an unacceptably high number of prisoners whose federal Habeas Corpus petitions have been rejected due solely to AEDPA restrictions and reforms, and were later found to have been innocent all along.

A review of the 42 listed exonerees in the report from the Ohio Innocence Project (University of Cincinnati College of Law) shows that 12 of the 42 had Federal Habeas Corpus petitions thrown out under the AEDPA and were later exonerated, an astonishing rate of 33.333%. A review of 128 listed names (mostly beginning from alphabetical order) from the National Registry of Exonerations which samples approximately 5% of the approximately 3300 exonerees on the list, establishes that 21 of the 128 had Federal Habeas Corpus petitions thrown out under the AEDPA and were later exonerated, compiling an astonishing rate of 33/167 or approximately 24%. A five percent sample of all exonerees listed demonstrates that 24% of people found to be completely innocent of crimes after being incarcerated for up to 4 or 5 decades, had their opportunity for federal review of the Constitutional violations resulting in their wrongful convictions usurped by AEDPA technicalities, resulting in more years of incarceration. During this time, this Court has issued ZERO writs of Habeas Corpus.

In **Marbury v Madison** (1803) 5 U.S. 137; 1 Cranch 137, This Court first encountered, and determined, the question of the separation of powers of the three co-equal branches of government, and held that "this Court has the power to invalidate laws on the ground that they exceed the constitutional power of congress or violate some specific prohibition of the Constitution". **Griswold v Connecticut** (1965) 381 U.S. 479, quoting **Fletcher v Peck** (1810) 6

Cranch 87, 10 U.S 87. In **Williams v Taylor** (2000) 529 U.S. 437, this Court further held, "At the core of this power is the Federal Court's independent responsibility, independent from its co-equal branches in the federal government, and independent from the constitutional authority of the several states, to interpret federal law".

This Court, therefore, has an obligation and a duty to restore the power and authority of the federal judiciary that has been unconstitutionally stripped by the Legislature, and to adhere to the doctrine of stare decisis and follow this Court's well-reasoned and thorough decision in **Harris v Nelson**, supra, and "jealously guard" the "scope and flexibility of the writ, its' capacity to reach all manner of illegal detention – its' ability to cut through barriers of form and procedural mazes..." and examine the results of the promulgation and application of the AEDPA to the courts' constitutional prerogative to issue a Writ of Habeas Corpus under Article I, §9, Cl. 2 of the United States Constitution.

SECOND QUESTION PRESENTED FOR REVIEW

Whether the limitations period of the AEDPA, in its' application, constitutes a suspension of the Writ as prohibited by Article I, §9, Cl. 2 of the United States Constitution?

LAW AND ARGUMENT

As noted above, Article I, §9, Cl. 2, United States Constitution provides, "the privilege of the Writ of Habeas Corpus shall not be suspended unless when in Case of Rebellion or Invasion, the public safety may require it".

It is well established that, even with all of the restrictions associated with the AEDPA revisions to Habeas Corpus practice, a colorable claim of actual innocence is sufficient to require merit review of claims deemed untimely under the AEDPA. See, e. g. **In re: Davis** (2009) 557 U.S. 952, citing, inter alia, **Triestman v U.S.** (CA 2, 1997) 124 F3d 361, 377-380; **McQuiggin v**

Perkins (2013) 569 U.S. 383. See also **Souter v Jones** (6th Cir., 2005) 395 F3d 577. This is because the Writ of Habeas Corpus "is the fundamental instrument for safeguarding individual freedom from arbitrary and lawless state action. Its' pre-eminence is recognized by the admonition in the Constitution that the privilege of the Writ of Habeas Corpus shall not be suspended. [...] the scope and flexibility of the writ, its' capacity to reach all manner of illegal detention – its' ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative ad flexibility to ensure that miscarriages of justice within its reach be surfaced and corrected". **Harris v Nelson**, supra.

The District Court, in issuing its final decision, disregarded Appellant's showing of actual innocence as a gateway through which to provide merit review of his issues (Doc. # 57, PAGEID# 1675). The District Court's analysis encompassed adopting the Magistrate's findings, which erroneously afforded a presumption of correctness to the state court's factual determinations, which were actively contradicted by clear and convincing evidence sufficient to remove the presumption of correctness therefrom.

Specifically, the Judge, by adopting the Magistrate's findings, erroneously determined that the recantation by the complaining witness was "not credible", and, thus, cannot support an actual innocence claim to establish a merit review gateway.

Notably, in his first R&R the substitute Magistrate Judge initially completely ignored the actual innocence arguments set forth by Appellant. After timely objections were made, the substitute Magistrate acknowledged that he had erred in determining the timeliness of the New Trial Motion issues, and then argued that, since Appellant had not raised the actual innocence previously, it was waived. Upon objection to the Second and Third R&Rs of the substitute

Magistrate with these findings, the substitute Magistrate again acknowledged his errors in his subsequent R&Rs, but then argued that, because the trial judge had not found the recantation upon which the actual innocence arguments are based credible, it is insufficient to support the actual innocence claim. Upon proper objection to that finding, upon which the actual innocence arguments are based, the substitute Magistrate crafted a new argument now claiming that the "length of time between recantation and presentation to the courts..." (Doc. # 27, PAGEID# 1533) was the basis for his argument against actual innocence (id). In doing so, the substitute Magistrate completely ignored the substance of the underlying claims, that is, that the trial judge and the prosecutor colluded to intimidate the recanting witness, and lied about it, on the record. Moreover, the substitute Magistrate erroneously argued "When the actual delayed motion for new trial came on for hearing, E.J. [the complaining witness] recanted her recantation and declined to testify on advice of counsel..." (id, PAGEID#1534). The substitute Magistrate further erroneously claimed that the recantation was "later retracted" (id, PAGEID# 1535). These factual findings are not only unsupported by the record, but are actively contradicted by the record (Appendix L), rendering the District Court Judge's reliance thereupon in its final judgment clearly erroneous.

The record establishes that the complaining witness, after recanting her false allegations, was badgered, threatened and intimidated by the prosecutor and the trial court judge in their attempt to dissuade her from telling the truth. The trial court divested the witness of her own chosen counsel, appointed some court lackey, and without hearing from the witness, permitted the "new attorney" to waive her presence, despite the subpoena and the fact that she wanted to tell the truth. These are the facts in the record that the substitute Magistrate completely ignored, despite being presented in Appellant's arguments and within multiple objections to the multiple R&Rs in this case.

The determination of this issue is fact intensive and virtually every purported fact "found" by the Magistrate and adopted by the District Court is clearly erroneous as established by the face of the record. Notably, even the substitute Magistrate agreed to the fact that there were multiple errors throughout his first four (4) Report and Recommendations, each of which contained still more factual and legal errors added from the last.

The refusal to acknowledge record evidence establishing a colorable actual innocence claim, instead substituting non-record evidence with erroneous factual determinations, deprived Appellant of access to the courts guaranteed by the First Amendment, and perpetuated his wrongful conviction and imprisonment in violation of the Fifth, Eighth and Fourteenth Amendments. Moreover, the limitations period contained within Arlen Spector's unconstitutional Habeas Corpus Reform Act of 1993 and 1994, codified in the AEDPA in 1996, have worked to suspend the Writ in this case.

THIRD QUESTION PRESENTED FOR REVIEW

Whether, pursuant to 28 U.S.C. §2254(e)(2), where the failure to fully develop the factual record in the state court is not attributable to the Petitioner, but rather to failures of the state courts, a hearing is warranted on Federal Habeas review and whether the AEDPA restrictions usurp the authority of the Federal Judiciary?

LAW AND ARGUMENT

In this case, the District Court adopted the factual finding rendered by the Magistrate, over objection, that "The Supreme Court has severely limited the authority of District Courts to hold such hearings, and has largely confined us to deciding cases entirely from the state court record. **Cullen v Pinholster**, 563 U.S. 170 (2011)" (Doc. #46, PAGE ID#1609). Petitioner objected to this passage as the sole response to his request for an evidentiary hearing in this case, and submits that the AEDPA limitations to evidentiary hearings in Habeas Corpus are limited specifically, by plain statutory language to cases in which any failure to fully develop the factual record is solely

attributable to acts or omissions by the Petitioner. (28 U.S.C. §2254(e)(2)). Where, as here, the failure to develop the factual record is not attributable to the Petitioner, but rather to failures of the state courts, a hearing is warranted. See, e.g. **Williams v Taylor** (2000) 529 U.S. 437; **Robinson v Howes** (6th Cir., 2011) 663 F3d 819, 824-25.

In this case, the transcript of proceedings from the hearing on Simms' Motion for New Trial proceedings establishes that the recanting witness was coerced and intimated by the trial court judge working in concert with the prosecutor and the hand-picked "appointed" counsel and not permitted to testify (Appendix L). As a result, Simms sought an evidentiary hearing on Habeas review to fully develop the record.

As noted above, the complaining witness who recanted her coerced testimony was badgered and threatened by the trial judge and the prosecutor, working in tandem. As a result, her sworn testimony in open court was not produced and is not a part of the record. If the District Court were to conduct a hearing, she would be free to testify, without pressure, bias or coercion, to the truth. The only reason that this testimony is not part of the record is due solely and completely to conduct of the state and the trial court judge, and is not, in any way, attributable to Simms. As the record demonstrates that a full, fair hearing was never conducted in the state courts, despite all of Simms' efforts to do so, and especially with regards to an interview of the recanting witness, a hearing was surely warranted in this case.

In response, the District Court refused to hold a hearing. Simms submits that the AEDPA limitations to evidentiary hearings in Habeas Corpus are limited specifically, by plain statutory language to cases in which any failure to fully develop the factual record is solely attributable to acts or omissions by the prisoner (28 U.S.C. §2254(e)(2)). Where, as here, the failure to develop the factual record is not attributable to the Petitioner, but rather to failures of the state courts, a

hearing is warranted. The refusal to conduct a hearing by the lower courts is contrary to the statutory language set forth in the AEDPA revisions to 28 U.S.C. §2254(e)(2), and this Court should clarify the actual standards for the lower courts to follow. The overriding problem is that, even when following the AEDPA provisions as written, the lower courts are unconstitutionally deprived of the authority to conduct a hearing which they may deem necessary to determine the truth of the issues before it.

As the record demonstrates that a full, fair hearing was never conducted, especially with regards to an interview of the recanting witness, a hearing was surely warranted in this case.

FOURTH QUESTION PRESENTED FOR REVIEW

> Whether a Court of Appeals reviewing an Application for a Certificate of Appealability under 28 U.S.C. §2244 which demonstrates that reasonable jurists might disagree with the district court may deny the issuance of the Certificate on the basis that the Court believes that the Applicant might not prevail on the merits?

LAW AND ARGUMENT

The statutory provisions created by the AEDPA as set forth in 28 U.S.C. §2253(c)(3) served only to codify the standards established by this Court for the issuance of a then-Certificate of Probable Cause" to appeal in **Barefoot v Estelle** (1983) 463 U.S. 880, which held that a prospective habeas appellant must make a "substantial showing of the denial of a Constitutional right", and that the case presents issues that are "debatable among jurists of reason" (id). See, e.g. **Slack v McDaniel** (2000) 529 U.S. 473. A COA may issue where the issues are sufficient to deserve encouragement to proceed further, **Barefoot** and **Slack**, supra. Where a District Court disposes of a Habeas petition on procedural grounds, a COA shall issue where the appellant shows that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling. The most important point herein is that, even with the AEDPA revisions to Habeas Corpus

practice, the determination as to whether to permit an appeal did not change under the AEDPA, the same standards as always apply, they were merely codified. **Slack**, supra.

In **Miller-El v Cockrell** (2003) 537 U.S. 322, this Court held that, when considering whether to issue a COA, only a cursory review of the underlying merits of the claims is permitted, and the question is not whether the prospective appellant is likely to succeed on appeal, but rather whether the issues are debatable (id).

A merits analysis is not coexistent with the "debatable among reasonable jurists" standard and may not be used to deny the issuance of a COA via threshold analysis. **Buck v Davis** (2017) 580 U.S.100. Moreover, merely because a reasonable jurist might agree with the district court is insufficient cause to deny the issuance of a COA (id). The only question is whether it is debatable".

Where a Magistrate Judge or a District Court Judge renders factual findings, the standard of review of said factual findings is whether the findings are "clearly erroneous". See, e.g. **Anderson v Bessemer City** (1997) 470 U.S 564. Clear error exists where the reviewing court, after reviewing all record evidence, is "left with a definite and firm conviction that a mistake has been committed" (id, citing **U.S. v United States Gypsum Co.** (1948) 333 U.S. 364, 395. Where the record evidence presents "two permissible views" of the facts, clear error cannot be found (id), citing **United States v Yellow Cab Co.** (1949) 338 U.S. 338, 342. The legal conclusions of a Magistrate Judge or a District Court Judge are subject to de novo review. See, e.g. **U.S. v Raddatz** (1980) 447 U.S. 667.

In this case, the Sixth Circuit simply adopted the findings of the lower courts without any legitimate analysis of whether Simms made a "substantial showing of the denial of a Constitutional right" (**Barefoot**, supra). The Court completely overlooked Simms' arguments, focusing instead on whether Simms could win if provided the opportunity for appellate review. Likewise, the Court

failed to address the hearing issue, only adopting the erroneous conclusion that the state court held a "thorough hearing" and ignored his actual innocence gateway claim.

A review of the Sixth Circuit's decision demonstrates that the conclusions reached mirror the District Court on the merits, rather than simply assessing whether the proposed Assignments of Error present constitutional claims and whether the lower courts could reasonably be disagreed with by reasonable jurists.

This Court has held that the standard for the issuance of a "Certificate of Probable Cause" did not change with the advent of the AEDPA, but rather it only served to codify the **Barefoot** standards (**Slack v McDaniel,** supra). The Sixth Circuit's decision ignores all of the precedents of this Court relating to a Certificate of Appealability and, instead, simply constitutes a cursory, deferent merit review, completely obliterating the function of the process. This Court should issue a Writ of Certiorari to aid in the jurisdiction of this Court, clarify the law, and correct the errors of the lower courts.

FIFTH QUESTION PRESENTED FOR REVIEW

Whether a Magistrate Judge and a District Court judge who openly display a propensity of bias in favor of the State on Habeas Corpus review must recuse himself upon proper Application therefor, and whether it is error to refuse to do so?

LAW AND ARGUMENT

I. The District Court's acceptance of the Magistrate's Order refusing to recuse himself. (Doc. # 57, PAGEID# 1675).

It is well-established that a fair and unbiased judiciary is guaranteed by Article III of the United States Constitution as well as being required by the Due Process Clause of the Fifth and Fourteenth Amendments. See, e.g. **Caperton v A.T. Massey Coal Co.** (2009) 556 U.S. 868, 884; **In re: Murchison** (1955) 349 U.S. 133, 136-139; **Tunney v Ohio** (1927) 273 U.S. 510, 522.

28 U.S.C. §§144 and 455 provide mechanisms for the recusal of a Judge or Magistrate. The Sixth Circuit Court of Appeals has suggested that any doubts about bias be resolved in favor of recusal. See, e.g. **U.S. v Dandy** (6th Cir., 1993) 998 F. 3d 1344, 1349. In this case, the substitute Magistrate not only refused to recuse himself upon the filing of a proper affidavit and request to do so, but also intercepted the Affidavit of Bias and Motion to recuse the District Court Judge and rendered an opinion on that. Despite proper and timely Objections, the District Court adopted the Magistrate's decision (Doc. No. 56) on both counts. The problem is that the Magistrate Judge has demonstrated inherent bias against habeas petitioners throughout his entire career, and even has come out of retirement, without being asked, to interfere in habeas corpus cases assigned to other Magistrate judges, as he has done in this case.

Magistrate Merz responded to the motion to recuse himself by stating that he is an "expert" at federal Habeas Corpus litigation, that he returned from retirement to take this case to "help the court in the complex litigation" and, despite having three Report and Recommendations rejected and returned by the Judge, asserted that he has "no bias against" Simms (Doc. #29), thereby denying the converted motion for recusal (id).

As noted in the Affidavit of Prejudice and Motion to Recuse the Magistrate Judge, it is a clear and "undisputable fact that Magistrate Merz has a clear and demonstrable bias *in favor of* the State of Ohio in federal Habeas Corpus litigation, as established below, sufficiently to mandate recusal.

"In conducting a cursory review in Federal Court decisions available on LEXIS, Magistrate Michael R. Merz has ruled in favor of the State of Ohio by recommending denial of Habeas Corpus relief a total of 6,568 times out of 6,569 cases he has handled as a Magistrate Judge; the State of Ohio is the adverse party in this case.

"In the four (4) different Report and Recommendations (R&Rs) Magistrate Merz has issued in this case, there have been glaring errors of fact and law which are blatant and obvious, all of which were error in favor of the State of Ohio, and in the first three R&Rs, upon proper objection, the District Court Judge found merit to the objections, and remitted the case back to Magistrate Merz to re-review, and in these three cases, Magistrate Merz has acknowledged the errors, while issuing new errors, all in favor of the State of Ohio in each succeeding R&R.

"The fact that Magistrate Merz rules in favor of the State of Ohio a total of 6,568 times out of 6,569 and routinely commits material errors of fact and law establishes that a reasonable person would find that Magistrate Merz has a consistent and ongoing bias in favor of the State of Ohio and against any litigant opposing the State of Ohio, including the Appellant herein.

"In this case, simple research in the LEXIS database reveals that, despite Magistrate Merz's self-proclaimed "expertise in federal Habeas Corpus litigation" (See Doc. # 29), in reality, not only has the District Court Judge rejected Magistrate Merz's initial report and Recommendation in over nine hundred (975) separate cases, and moreover, that his Report and Recommendations have been rejected twice, three times or even more times in approximately 18% of these cases within a random sampling of cases reflected in the LEXIS search. The facts belie the self-serving assertions both of expertise and of impartiality on the part of Magistrate Merz. Most telling in establishing his bias towards a party to the litigation, being the State of Ohio, is the fact that Magistrate Merz has only recommended granting Habeas Corpus relief one single solitary time in one single solitary case in his entire career as a Federal Magistrate the case of **Gillespie v City of Miami Twp.** (S.D. Ohio) 2020 U.S. Dist. LEXIS 172735. In all of his other cases, totaling 6,569 cases in a cursory search of LEXIS, Magistrate Mertz has recommended ruling in favor of the State of Ohio all but one time.

In addition, the fact that, in the instant case, Magistrate Merz has admittedly made multiple mistakes, including factual and legal errors in his four (4) Report and Recommendations (R&R), each of which recommended tossing this case out and even recommending against even permitting appellate review, in his efforts to sway the results in favor of the respondent, is yet another case in his continuing and ongoing career-long pattern of bias in favor of the State of Ohio.

Magistrate Merz attempted to argue that having his Report and Recommendations rejected and sent back four (4) times in this case was not due to errors (Doc. #50, PageID#1631). This argument is completely contrary to the content of each successive Report and Recommendation in each of which Magistrate Merz has **admittedly** made multiple mistakes, including factual and legal errors, and each of which recommended tossing this case out and even recommending against even permitting appellate review, in his efforts to sway the results in favor of the respondent, which is yet another case in his continuing and ongoing career-long pattern of bias in favor of the State of Ohio. Notably, two of these "corrections" in the Reports and Recommendations involved clear errors in attempting to erroneously bar this case under the Statute of Limitations, both of which were admitted to be clearly erroneous in the following successive Report and Recommendation. Regardless of the claims that rejection of a Report and Recommendation does not mean it was erroneous, in this case, it does and, Simms asserts, it has done for all of the cases in which two, three, four and even more Report and Recommendations were necessary before some poor innocent prisoner's case was tossed onto the scrap heap. In this case, if Simms had not happened upon a paralegal who was an *actual* habeas corpus expert, his case would have been tossed after the first Report and Recommendation, as was the plan of the Magistrate.

Magistrate Merz also made a false claim that the "state of habeas corpus law" compels him to have an inherent bias towards the State of Ohio. He erroneously states:

"[f]or example, that a completely meritorious habeas claim filed eleven months after the conviction became final must be dismissed with prejudice as barred by the statute of limitations" (Doc. #50, PageID#1633). Magistrate Merz, who has asserted himself to be a "habeas corpus expert" has apparently failed to read the limitations period attendant to the AEDPA, which provides that the limitations period is "one year", not "eleven months" (28 U.S.C. §2244(d)). Magistrate Merz was, once again, and consistently throughout these proceedings, (and indeed his entire career) factually and legally incorrect and, further, Magistrate Merz has consistently showed bias towards and in favor of the State of Ohio during his entire career in each and every one of thousands of Federal Habeas Corpus cases over which he presided as Magistrate with only one single exception. Any reasonable person reviewing the relevant facts would reasonably conclude that Magistrate Merz has exhibited bias in favor of the State of Ohio during his entire career and as his impartiality might reasonably be questioned, under the above objective test of reasonableness. By showing favoritism to Simms' Habeas opponent throughout his career, Magistrate Merz was required to recuse himself under 28 U.S.C. §§144 and 455. Therefore, it was error to refuse to recuse himself, and error for the District Court to overrule Appellant's Objections and confirm it. A COA should issue on this Proposed Assignment of Error.

II. The District Court accepting the Magistrate's R&R and refusing to recuse himself.

As noted above, it is well-established that a fair and unbiased judiciary is guaranteed by Article III of the United States Constitution as well as being required by the Due Process Clause of the Fifth and Fourteenth Amendments. See, e.g. **Caperton v A.T. Massey Coal Co.** (2009) 556 U.S. 868, 884; **In re: Murchison** (1955) 349 U.S. 133, 136-139; **Tunney v Ohio** (1927) 273 U.S. 510, 522.

28 U.S.C. §§144 and 455 provide mechanisms for the recusal of a Judge or Magistrate. This Court has suggested that any doubts about bias be resolved in favor of recusal. See, e.g. **U.S. v Dandy** (6th Cir., 1993) 998 F. 3d 1344, 1349. In this case, the substitute Magistrate intercepted the Affidavit of Bias and Motion to recuse the District Court Judge. Despite proper and timely Objections, the District Court adopted the Magistrate's decision (Doc. No. 56).

While Magistrate Merz acknowledged "the decision on recusal must be made by Judge Sargus himself" (Doc. #51, PageID#1635), the Magistrate erroneously claimed the right to issue a Report and Recommendation on the issue (id), without any legal basis to do so. Contrarily, it is well-settled in the Sixth circuit that it is solely the duty of the judge to determine an Affidavit of Bias and Motion for Recusal. See, e.g. **United States v Bell** (6th Cir., 1965) 351 F2d 868. Therefore, the Magistrate completely lacked jurisdiction to even address the Motion specifically addressed to Judge Sargus, and, despite Simms' proper objections, Judge Sargus adopted the R&R issued without authority to do so.

Notably, the Magistrate, in his "Report and Recommendation" regarding the recusal of Judge Sargus, also erroneously attempted to claim that there was no affidavit attached to the pleading, when the record demonstrates that there was, in fact, a proper Affidavit. As with the Magistrate's Order addressing his own Affidavit of Bias and Motion for Recusal (from which virtually this entire Report and Recommendation was cut and pasted with the same errors of law and fact), Magistrate Merz erroneously asserts that the Affidavit of Bias attached to the Motion for Recusal was not present. The Magistrate Stated:

"Simms' purported Affidavit of Bias is not an affidavit at all..." (Doc. #51, PageID#1639). A review of the documents belies this clearly erroneous assertion and establishes that an Affidavit of Bias, sworn to under penalty of perjury, and with "28 U.S.C. 1746" designed under the

signature, was attached. The false claim that there was no affidavit constituted grounds to reject the entire Report and Recommendation if it were legitimate, yet the District Court judge simply adopted it over proper objection.

Judge Sargus has consistently showed bias towards and in favor of the State of Ohio during his entire career in each and every one of thousands of Federal Habeas Corpus cases over which he presided as Judge, with only four lone exceptions. In conducting a cursory review in Federal Court decisions available on LEXIS, Judge Edmund A. Sargus, Jr. has ruled in favor of the State of Ohio by denying Habeas Corpus relief a total of1,189 times out of 1,193 cases he has handled as a District Court Judge; thereby providing sufficient evidence to establish that a reasonable person would perceive a bias on the part of Judge Sargus in favor of the adverse party to Simms in this case, being the State of Ohio.

Notably, when presented with the longstanding pattern of bias and the plethora of errors all rendered in favor of the State of Ohio, on the part of Magistrate Merz, within Simms' Objections to Magistrate Merz's refusal to recuse himself, rather than find, as a reasonable person, that Magistrate Merz is, in fact, or at the least, in appearance, biased in favor of the State of Ohio, Judge Sargus elected to attempt to argue that the fact that over 975 times in which Magistrate Merz made errors significant enough to warrant a District Court Judge to reject his R&R (all such errors being in favor of the State of Ohio), "in no way reflects any finding that a report and recommendation is in error" (Doc. #33), which is clearly disingenuous. Notably, Judge Sargus followed that inexplicable finding up with an order closing the case, denying relief and *sua sponte* rejection of a Certificate of Appealability, only to backtrack after finding that Petitioner had, in fact, actually filed timely Objections to Magistrate Merz's Fourth R&R. Notably, a Motion to Proceed to

Judgment (on the grounds that petitioner is dying of cancer) was also flatly rejected, holding that the case will be decided "in due course".

Petitioner Simms submits that a reasonable person reviewing the relevant facts would reasonably conclude that Judge Sargus has exhibited bias in favor of the State of Ohio during his entire career and as his impartiality might reasonably be questioned, under the above objective test of reasonableness, by showing favoritism to the adverse party of Petitioner in this litigation, throughout his career, Judge Edmund A. Sargus, Jr. was required to recuse himself under 28 U.S.C. §§144 and 455. The failure to do so completely compromised and tainted the federal habeas corpus proceedings in this case.

SIXTH QUESTION PRESENTED FOR REVIEW

Whether a prisoner who presents substantive evidence of actual innocence And Constitutional infirmity in obtaining a wrongful conviction is entitled to the issuance of a Writ of Habeas Corpus?

LAW AND ARGUMENT

A review of Appellant's allegations set forth relating to his claim in the state court reveals that the argument was raised as:

"In the instant case, Simms issued a subpoena for E.J. yet the trial court prevented counsel from calling E.J. to the witness stand. Furthermore, the trial court did not conduct a colloquy, did not inform E.J. of counsel's questions, and did not inquire whether E.J. would assert her Fifth Amendment right as to all questions asked. Moreover, because E.J. did not take the witness stand, she did not directly assert her Fifth Amendment right".

A review of this passage clearly demonstrates that the claim was "couched in mainstream constitutional terms" sufficient to put the court on notice of the constitutional nature of the claim. Any first year law student, or even a paralegal, knows that the refusal to enforce a subpoena by a judge stands in violation of the Right to Compulsory Process, guaranteed by the Sixth Amendment to the Constitution. See, e.g. **Washington v Texas** (1967) 388 U.S. 14, **Chambers v Mississippi**

and the concepts of perjury, and subsequent to ensuring that the statement was voluntary (pp. 5-8).

Upon coming forward to come clean, Ms. Jehn became the focus of a targeted attack by the prosecutors and the trial judge, who, it has been uncovered, was predisposed to rule against Mr. Simms (See Memo form the Franklin County Public Defender, Emily Huddleston in record). This targeted attack consisted of berating, threatening and verbally abusing the witness to the point that she felt intimidated and the lawyer appointed by the judge and prosecutor (not her personal counsel), and not the witness herself, declined for her to testify at the hearing. Appendix L, the transcript from the hearing on the Motion for Leave to File Delayed Motion for New Trial based partly upon the recantation in the Sworn deposition, demonstrates the concerted effort on the part of Judge Michael J. Holbrook and Prosecutor Sheryl Prichard to harass, intimidate and threaten the recanting witness, to the point of appointing her a lawyer who threatened her with criminal prosecution if she testified. Notably, the possibility of perjury charges was thoroughly explained to the witness during the deposition (Appendix K, Tr. p. 6-7) along with assurances that the witness was not being coerced to recant (id., pp. 7-9).

The content of the deposition sufficiently establishes both voluntariness and awareness of potential legal consequences to the recanting witness that the campaign of intimidation by the trial court and the prosecutor was absolutely unnecessary in terms of providing "protections" for the witness, and can only reasonably be deemed what they were, campaign to intimidate the witness to refuse to testify to the recantation (which the witness stands by to this day).

Mr. Simms is currently suffering from Prostate, Liver and Lung Cancer, (stage 4), and is undergoing what is likely futile chemotherapy treatments from the prison hospital. His Petition for Writ of Habeas Corpus in the Federal District Court was recently denied, after being sent back to

the Magistrate Judge four (4) times due to demonstrable and admitted errors in factual findings and legal conclusions all directed towards rejecting relief, ultimately being denied after Mr. Simms complained of the interminable delay. A request for permission to appeal that denial was then denied by the U.S. Court of Appeals for the Sixth Circuit, in Case No. 24-4063, and, frankly, Mr. Simms is afraid he will die before the current process is complete.

Mr. Simms submits that the evidence of innocence is overwhelming and only due to the undue restrictions in the court system has he been unable to obtain any relief. Therefore, he seeks the issuance of a Writ of Certiorari and the underlying Writ of Habeas Corpus to issue, and he so prays.

CONCLUSION

The decision of the District Court in this case abandons the purpose of the Writ and, by basing the ultimate legal conclusions upon clearly erroneous determinations of fact by the state court, for which the presumption of correctness is completely overcome by record evidence, the District Court erred and abused its' discretion. The Sixth Circuit also erred in adopting this reasoning in rejecting the issuance of a Certificate of Appealability.

For the foregoing reasons, this Court should accept jurisdiction, conduct full briefing, and, ultimately, reverse the lower court and order that it issue a Writ of Certiorari and, ultimately, grant the requested Writ of Habeas Corpus, and Petitioner so prays.

Respectfully submitted,

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