No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE JASON BLAKE BRYANT

PETITION FOR WRIT OF MANDAMUS

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July 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _____ Case Name: In re Jason Blake Bryant

Name of counsel: James P. Danly and Daniel A. Horwitz

Pursuant to 6th Cir. R. 26.1, Jason Blake Bryant
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

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s/ James P. Danly

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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No. _____

IN THE UNITED STATES COURT OF APPEALS
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IN RE JASON BLAKE BRYANT

PETITION FOR A WRIT OF MANDAMUS

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully submits that oral argument will not aid in resolving the instant petition. The record is brief, the facts are not in dispute, and the petition turns on a pure question of law.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which provides that: "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*

INTRODUCTION

In 1998, Petitioner Jason Bryant was sentenced to three consecutive life sentences without the possibility of parole for crimes that he committed as a fourteen-year-old child. Accordingly, Mr. Bryant became entitled to presumptive retroactive sentencing relief following the United States Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which gave retroactive effect to the Supreme Court's earlier decision in *Miller v. Alabama*, 567 U.S. 460 (2012).

After *Montgomery* was decided, Mr. Bryant's counsel agreed to assist Mr. Bryant in vindicating his constitutional rights by representing him *pro bono*. Thereafter, Mr. Bryant's *pro bono* counsel moved this Court for an order authorizing Mr. Bryant to file a second or successive petition under 28 U.S.C. § 2254 based on the Supreme Court's retroactive ruling in *Montgomery*.[1] On May 17, 2017, this Court held that Mr. Bryant had made a prima facie showing for relief and granted his motion.[2] The following day, Mr. Bryant's *pro bono* counsel filed a Petition for Writ of Habeas

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[1] Motion Under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2254 or § 2255, *In re Bryant*, No. 17-5066 (6th Cir. filed Jan. 23, 2017), ECF No. 1.

[2] *In re Bryant*, No. 17-5066, Order at 3 (6th Cir. May 17, 2017), ECF No. 7-2.

Corpus seeking sentencing relief in the U.S. District Court for the Middle District of Tennessee, where Mr. Bryant is presently incarcerated.[3]

Significantly, all parties to this case reside in the Middle District of Tennessee.[4] So, too, do all of Mr. Bryant's anticipated witnesses.[5] Most importantly, however, Mr. Bryant's lead and local *pro bono* counsel resides in the Middle District of Tennessee, and the record contains uncontroverted evidence that requiring his *pro bono* counsel to litigate this case in the Eastern District of Tennessee would severely compromise Mr. Bryant's *pro bono* relationship due to increased litigation costs and inconvenience.

Of note, the record also contains uncontroverted evidence that Respondents' anticipated witnesses do not reside in the Eastern District of Tennessee, either.[6] Further, there is evidence of "intense, recent, and profoundly prejudicial media coverage" in the Eastern District of Tennessee

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[3] Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed May 18, 2017), ECF No. 1.

[4] Pet'r's Resp. to Resp'ts' Mot. to Transfer Pet'r's Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 10 at 4.

[5] *Id.*

[6] *Id.*

regarding Mr. Bryant's case that could seriously undermine his ability to receive a fair hearing in that venue.[7]

For all of these reasons, Mr. Bryant's *pro bono* counsel filed his successive petition under 28 U.S.C. § 2254 in the Middle District of Tennessee, which had undisputed statutory jurisdiction to consider it.[8] Despite these concerns, however—and over Mr. Bryant's strenuous objections—the District Court for Middle District of Tennessee granted the Government's motion to transfer Mr. Bryant's case to the Eastern District of Tennessee at Greeneville,[9] relying exclusively on two considerations that are not contemplated by the transfer statute.

In ruling that Mr. Bryant's case should be transferred, the District Court considered only the following two factors: (1) the fact that "[w]hile Petitioner's place of confinement may change over time, the district of his conviction will not," and (2) the fact that the Eastern District was "more familiar with the Petitioner's case."[10] Neither of these factors appear in 28

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[7] *Id.* at 4-5.

[8] *See* 28 U.S.C. § 2241(d) ("[T]he application may be filed in the district court for the district wherein such person is in custody . . . .").

[9] *Bryant v. Parker*, No. 3:17-cv-00860, Order at 1-2 (M.D. Tenn. June 16, 2017) (Crenshaw, J.), ECF No. 12.

[10] *Id.* at 2.

U.S.C. § 1404(a) which instead provides that venue may be transferred "[f]or the convenience of parties and witnesses, in the interest of justice."

Accordingly, Mr. Bryant has filed the instant petition because the District Court's order represents both a gross misapplication of law and an error that cannot meaningfully be vindicated after a final judgment because his *pro bono* representation and his legal interests will be irreparably impaired in the interim.

The District Court's order represents an error of law in the following three regards:

First, although this Court has repeatedly articulated and reaffirmed the factors that district courts must consider when ruling on motions for a change of venue,[11] the District Court failed to consider any of them.

Second, if the two alternative factors that the District Court *did* consider in its Order controlled motions for change of venue in habeas cases, then habeas petitions could never be heard in a petitioner's district of

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[11] *See Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991) ("[I]n ruling on a motion to transfer under [28 U.S.C.] § 1404(a), a district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'") (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988)).

incarceration, because a petitioner's district of conviction will *always* remain static and will *always* be "more familiar with the Petitioner's case."

Accordingly, the District Court's holding must be wrong as a matter of law because 28 U.S.C. § 2241(d) expressly contemplates that habeas petitions "may be filed in the district court for the district wherein such person is in custody." *Id.*

Critically, the Middle District of Tennessee is the only district court within this Circuit to justify venue transfers of habeas petitions based on this unlawful reasoning—and it has come to do so *as a matter of established District policy*.[12] Nevertheless, this repeated and pervasive error has so far evaded appellate review because the aggrieved habeas petitioners are almost uniformly *pro se* litigants who have neither the ability nor the wherewithal to challenge their unlawful transfers. Thus, the Middle District's repeated and unreviewed violation of this Court's clearly articulated law alone justifies the issuance of a writ of mandamus.

Third and finally, the instant petition presents an important question of first impression for this Circuit in cases where, as here, a litigant is

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[12] *See, e.g.*, *Orange v. Chapman*, No. 3:12-MC-0069, 2012 WL 5197899, at *1 (M.D. Tenn. Oct. 19, 2012) ("[T]he *consistent practice* in the federal courts of Tennessee [is] to transfer habeas petitions to the judicial district in which the convicting court is located." (emphasis added)).

represented by *pro bono* counsel. Although the District Court declined to give any weight to Mr. Bryant's *pro bono* relationship, another jurist in the Middle District of Tennessee has held that the fact of a *pro bono* relationship alone is a "very significant" consideration with respect to transfer motions.[13] That court further stated that "where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action."[14] Critically, several other federal courts have agreed with this position.[15] As such, Mr. Bryant respectfully submits that this Court should

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[13] *Azarm v. $1.00 Stores Servs., Inc.*, No. 3:08-1220, 2009 WL 1588668, at *6 (M.D. Tenn. June 5, 2009) (Trauger, J.).

[14] *Id.*

[15] *See, e.g., Sanders v. Johnson*, No. Civ.A. H-04-881, 2005 WL 2346953, at *2 (S.D. Tex. Sept. 26, 2005) ("Plaintiff's counsel is handling this case *pro bono*. It is unclear whether Plaintiff could obtain new counsel in the proposed transferee district."); *Montemayor v. Fed. Bureau of Prisons*, No. Civ.A. 02-1283 GK, 2005 WL 3274508, at *6 (D.D.C. Aug. 25, 2005) ("Transfer of this action at this late date will only . . . impose hardship on Plaintiff's pro bono counsel. Defendant can cite . . . no substantive prejudice it will suffer from completing litigation in this District."); *Joslyn v. Armstrong*, No. 3:01CR198 (CFD), 2001 WL 1464780, at *4 (D. Conn. May 16, 2001) ("There are also several factors indicating this case should proceed in the District of Connecticut, including . . . [that] plaintiffs' counsel, who are litigating this case *pro bono*, would not be able to pursue this case in the Western District of Virginia because of increased costs . . . ."). *See also Bryant v. Fed. Bureau of Prisons*, No. 2:11-cv-00254-(CASx), 2014 WL 1266241, at *3 (C.D. Cal. Mar. 26, 2014) *(cont'd)*

expressly adopt this holding and instruct the District Court to consider it upon remand.

If the District Court's transfer order is not overturned, it will strongly discourage future *pro bono* representation because lawyers who agree to undertake future *pro bono* work will risk being forced to litigate cases hundreds of miles away from their principal place of business. Thus, this Court's ruling on Mr. Bryant's petition will shape future *pro bono* representation throughout this Circuit—encouraging such representation if the instant petition is granted, or discouraging it if Mr. Bryant's petition is denied.

STATEMENT OF ISSUES

The following four issues are presented for review:

1. Whether the District Court abused its discretion by granting Respondents' Motion to Transfer without considering the factors set forth in 28 U.S.C. § 1404(a) or *Moses* , 929 F.2d at 1137 (6th Cir. 1991);

(cont'd from previous page)
("[P]laintiff's pro bono counsel is not based in Arizona, and represents that they are not admitted to the bar in Arizona, and '[n]umerous courts have found that, where a transfer of venue would upset or destroy a pro bono counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action.'" (alteration in original) (quoting *Azarm*, 2009 WL 1588688, at *6)).

2. Whether a district court can establish a policy wherein habeas petitions under 28 U.S.C. § 2254 must always be heard in a petitioner's district of conviction;

3. Whether a motion to transfer should be denied where the transfer of venue would upset or destroy a habeas petitioner's representation by *pro bono* counsel; and

4. Whether, under the circumstances in the instant case, these errors are so severe as to warrant the issuance of a writ of mandamus.

STATEMENT OF THE CASE

Petitioner Jason Bryant seeks a writ of mandamus to correct the unlawful transfer of his habeas corpus petition from the Middle District of Tennessee to the Eastern District Tennessee. Specifically, Mr. Bryant requests that this Court issue a writ of mandamus: (1) compelling the transfer of his habeas corpus petition back to the Middle District of Tennessee; and (2) instructing the Middle District on remand to reconsider the Respondents' Motion to Transfer in accordance with the terms of 28 U.S.C. § 1404(a) and Sixth Circuit precedent instead of in accordance with the Middle District's categorical policy of transferring habeas petitions to the district of the petitioner's conviction.

This relief is necessary to preserve the petitioner's *pro bono* representation; to prevent irreversible prejudice to his legal interests; to correct an oft-repeated and fundamental misapplication of the transfer statute; and to effectuate Congressional intent to confer concurrent habeas jurisdiction upon the district court of a petitioner's incarceration.

RELIEF SOUGHT

Petitioner seeks a writ of mandamus from this Court that:

1. Orders the Eastern District of Tennessee to transfer Petitioner's Petition for Writ of Habeas Corpus back to the Middle District of Tennessee;

2. Orders the Middle District of Tennessee to reconsider Respondents' Motion to Transfer under the factors set forth in *Moses* , 929 F.2d at 1137 (6th Cir. 1991); and

3. Orders the Middle District of Tennessee to consider the additional factor that "where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action." *Azarm*, 2009 WL 1588668, at *6.

SUMMARY OF THE ARGUMENT

Mandamus is an extraordinary remedy, granted in exceptional cases in which there has been a clear abuse of discretion. In the instant case, Mr. Bryant satisfies every element of the Court's five-factor test to determine whether mandamus should issue.

First, Mr. Bryant has no other adequate means to obtain the relief required, because transfer orders are not amenable to interlocutory appeal. No other adequate remedy exists to right this wrong.

Second, Mr. Bryant's injury cannot be corrected on appeal because his *pro bono* representation and legal interests will be irreparably damaged if he is required to await a final judgment on the merits before being permitted to challenge the District Court's unlawful transfer order.

Third, the District Court's order is clearly erroneous as a matter of law. The District Court granted the Respondents' motion to transfer venue without considering any of the required statutory factors (convenience of the parties, interests of justice) or any of the factors established by Sixth Circuit precedent (convenience of parties and witnesses, the interests of justice). Moreover, the District Court based its decision entirely on two irrelevant, alternative factors: that the transferee district was more familiar with Petitioner's case and that the district of conviction will remain static while the district of incarceration my change.

These irrelevant factors—which undergird the Middle District's unlawful, categorical *policy* of always transferring habeas petitions to the district of conviction—frustrate Congress's establishment of concurrent jurisdiction in the habeas statute and do violence to the very real concerns

embodied in the mandatory factors that district courts are obliged to consider when deciding transfer motions.

Fourth, the district court's order is an oft-repeated error. The Middle District of Tennessee, as a matter of District policy, *always* transfers habeas petitions to the district of the petitioner's conviction. In conformity with this policy, dozens of unlawful transfers have been effected over the last decade in direct violation of both the transfer statute and established Sixth Circuit precedent.

Fifth, the district court's order raises new and important problems and an important issue of law of first impression. The instant petition raises two new and important problems of first impression. This is the first time a habeas petitioner has challenged a venue-transfer order for having failed to consider the consequences of the transfer on the petitioner's *pro bono* representation. This is also the first time a habeas petitioner has ever challenged the Middle District's unlawful venue-transfer policy.

STANDARD OF REVIEW

This Court has held that "it has long 'been settled that an order granting a transfer or denying a transfer is interlocutory and not

appealable.'"[16] However, this Court has also held on several occasions that motions to transfer may be reviewed via a writ of mandamus.[17] Several other circuits are in accord and have granted writs of mandamus when district courts have committed errors under 28 U.S.C. § 1404.[18]

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[16] *See Miller v. Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009) (order) (quoting *Lemon v. Druffel*, 253 F.2d 680, 683 (6th Cir. 1958)).

[17] *Lemon v. Druffel*, 253 F.2d 680, 684 (6th Cir. 1958) ("[W]e are of the opinion that considering solely the power of the Court to so act, the question is correctly settled in this circuit that the Court has such power."). *See also In re Peregoy*, 885 F.2d 349, 350 (6th Cir. 1989) (considering writ on the merits, but finding no extraordinary circumstances); *Panhandle E. Pipe Line Co. v. Thornton*, 267 F.2d 459, 461 (6th Cir. 1959) (same).

[18] *See, e.g.*, *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950) (stating that venue transfer orders are the "kind of interlocutory order with which this court can properly deal by way of such a writ" of mandamus); *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 364 (4th Cir. 1967) (issuing writ of mandamus when district court failed to correctly apply statutory factors); *In re Volkswagen AG*, 371 F.3d 201, 202-03 (5th Cir. 2004) ("This Court will issue a writ of mandamus to correct a denial of a 28 U.S.C. § 1404(a) motion to transfer venue if the district court failed to correctly construe and apply the relevant statute, or to consider the relevant factors incident to ruling upon the motion, or otherwise abused its discretion in deciding the motion."); *Caleshu v. Wangelin*, 549 F.2d 93, 96 (8th Cir. 1977) (granting petition after finding that "use of the mandamus power . . . is a proper remedy to correct an erroneous transfer"); *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 953-55 (9th Cir. 1968) (granting petition for writ as district court failed to give consideration to relevant factors); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983) ("The remedy of mandamus, although 'a drastic one, to be invoked only in extraordinary circumstances,' is available on rare occasions to review transfer orders." (citation omitted)); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008) (granting mandamus after finding that petitioner "demonstrated a *(cont'd)*

This Court has stated that a writ of mandamus should be granted: (1) in "exceptional" cases, (2) in cases when there is "a clear abuse of discretion," and (3) in cases where there has been "usurpation of judicial power."[19] "To ensure that mandamus remains an extraordinary remedy," however, the Supreme Court has instructed that "petitioners must show that they lack adequate alternative means to obtain the relief they seek and carry 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable."'"[20]

While reserved for extraordinary cases, a petitioner's burden with respect to seeking a writ of mandamus is not insurmountable. Indeed, this Court has not hesitated to grant the writ in cases that genuinely warrant extraordinary relief.[21] In determining whether a writ of mandamus should issue, this Court has adopted the following five-factor test:

(cont'd from previous page)
clear and indisputable right to a writ" based on the district court's flawed 28 U.S.C. § 1404 analysis).

[19] *Lemon*, 253 F.2d at 685.

[20] *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309 (1989) (alteration in original) (citations omitted).

[21] *See In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (granting petition for writ of mandamus after petition demonstrated clear and indisputable right to prompt ruling); *John B. v. Goetz*, 531 F.3d 448, 461 (6th Cir. 2008) (mandamus relief warranted for discovery orders authorizing forensic imaging of state and private computers; *In re Collins*, 73 F.3d 614, 615-16 *(cont'd)*

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.)
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

In re NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993) (quoting *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984)).

A petitioner need not satisfy all five of the *NLO* factors to be granted mandamus relief. Uncharacteristically, however, in the instant case, every *NLO* factor militates in Petitioner's favor. Consequently, although this Court has recognized that "'[r]arely, if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable,'"[22] the instant petition is, in fact, such a unicorn.

(cont'd from previous page)
(6th Cir. 1995) (granting petition for writ of mandamus after holding that the district court abused its discretion in denying the motion to alter or amend pretrial discovery orders).

[22] *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 655 (9th Cir. 1977)).

ARGUMENT

I. THE ERRONEOUS TRANSFER JEOPARDIZES PETITIONER'S *PRO BONO* REPRESENTATION SUCH THAT THERE IS "NO OTHER ADEQUATE MEANS TO OBTAIN RELIEF." ACCORDINGLY, THE TRANSFER WILL PREJUDICE PETITIONER "IN A WAY NOT CORRECTABLE ON APPEAL."

This petition satisfies the first two *NLO* factors because the harm caused by the venue transfer to Petitioner's *pro bono* representation is not "correctable on appeal" and, since transfer orders are interlocutory, a petitioner has "no other adequate means to obtain relief." *NLO*, 5 F.3d at 156.

A. *Waiting for a decision on the merits will impair Petitioner's pro bono representation and risks irreparably harming his legal interests.*

As a *pro bono* case involving an intellectually impaired petitioner who has difficulty reading and whose formal education concluded when he was incarcerated at the age of fourteen, the instant petition easily satisfies the first two *NLO* factors. Here, the record contains uncontroverted evidence that Mr. Bryant's *pro bono* representation will be gravely jeopardized by the venue transfer.[23] Given his near illiteracy and his lack of formal education,

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[23] Pet'r's Resp. to Resp'ts' Mot. to Transfer Pet'r's Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 10 at 1-3.

Petitioner cannot reasonably be expected to proceed *pro se* without his lead and local counsel in the Eastern District, obtain a final judgment there, and then seek to correct the unlawful transfer order on direct appeal thereafter. Without a lawyer to help him along the way, he may take irreversible positions in his pleadings, lose his only opportunity to cross examine witnesses who later become unavailable, or otherwise compromise his legal interests in ways that can never be undone. Thus, even if Mr. Bryant succeeds in securing a final judgment on the merits in the Eastern District, the harm to his legal interests is likely to be irreparable.

It is worth emphasizing that there is only one reason why Mr. Bryant is among a small minority of eligible defendants in Tennessee who filed a timely successive habeas petition following *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and avoided becoming permanently time-barred. Simply stated: Mr. Bryant's claim is only viable today because he has *pro bono* counsel protecting his interests. Severing that *pro bono* relationship will do immediate and irreversible damage to those interests and is antithetical to the interests of justice.

B. *Orders Granting Transfer of Venue are Interlocutory and Not Immediately Appealable.*

Had any option other than mandamus been available to challenge the Middle District's Order, Mr. Bryant would have availed himself of it.

However, as this Court has clearly stated: "it has long 'been settled that an order granting a transfer or denying a transfer is interlocutory and not appealable.'"[24] Accordingly, mandamus is Mr. Bryant's one and only means of avoiding irreparable harm to his legal interests.

Mr. Bryant also respectfully submits that the issues presented for review in this case are narrow and will not establish precedent for widespread interlocutory appeals of transfer motions. Few litigants ever receive *pro bono* counsel, and the issues presented in this Petition are inapplicable to represented litigants or litigants whose *pro bono* attorneys would have no difficulty continuing to represent their clients in the transferee jurisdiction. Instead, any ruling here can safely be cabined to those rare cases involving litigants whose *pro bono* representation is impaired by a venue transfer.

II. THE DISTRICT COURT'S ORDER IS "CLEARLY ERRONEOUS AS A MATTER OF LAW."

This petition satisfies the third *NLO* factor because the District Court's decision was "clearly erroneous as a matter of law" in two regards. *NLO*, 5 F.3d at 156.

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[24] *Miller*, 554 F.3d at 655 (6th Cir. 2009) (order) (quoting *Lemon v. Druffel*, 253 F.2d 680, 683 (6th Cir. 1958)).

First, although this Court has repeatedly articulated the factors that district courts must consider when ruling on motions for a change of venue,[25] the District Court failed to consider any of them. *Second*, in direct contravention of 28 U.S.C. § 2241(d), the District Court effectively held that petitions under 28 U.S.C. § 2254 can never be heard in a petitioner's jurisdiction of incarceration.

The Petitioner also submits that this Court should explicitly adopt *Azarm's* holding that "where a transfer of venue would upset or destroy a

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[25] *Moses*, 929 F.2d at 1137 ("[I]n ruling on a motion to transfer under [28 U.S.C.] § 1404(a), a district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" (citing *Steward Org.*, 487 U.S. at 30)). The Supreme Court has explained the purpose of the venue transfer statute thus:

> [T]he purpose of the [statute] is to prevent the waste "of time, energy and money" and to "protect litigants, witnesses and the public against unnecessary inconvenience and expense . . . ." To this end it empowers a district court to transfer "any civil action" to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice.

Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (ellipsis in original) (citations omitted).

pro bono counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action."[26]

A. *This Court has announced the factors that district courts must consider when ruling on motions to transfer. The District Court failed to consider any of them.*

The record contains uncontroverted evidence that:

1. The Middle District would be more convenient for the Parties, all of whom reside in the Middle District;[27]

2. The Middle District would be more convenient for Mr. Bryant's anticipated witnesses, all of whom reside in the Middle District;[28]

3. The Middle District would be equally convenient for the Respondents' anticipated witnesses, who reside outside the country or throughout the State of Tennessee;[29]

4. The Eastern District of Tennessee at Greeneville has been compromised by profoundly prejudicial media coverage regarding Mr. Bryant's case; and, most importantly:[30]

5. **Transferring Mr. Bryant's case to the Eastern District would compromise Mr. Bryant's *pro bono* relationship with his lead and local counsel.**[31]

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[26] *Azarm*, 2009 WL 1588668, at *6.

[27] Pet'r's Resp. to Resp'ts' Mot. to Transfer Pet'r's Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 10 at 4.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 4-5.

Accordingly, every factor listed in *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991), is satisfied.

Notwithstanding these considerations, the District Court granted Respondents' Motion to Transfer.[32] Although the District Court acknowledged Mr. Bryant's arguments that "his petition should remain in the Middle District of Tennessee for the convenience of his pro bono attorneys, the parties, and anticipated non-party witnesses," and "that he would be prejudiced in the event that he receives a new sentencing hearing in Greeneville, and that Respondents suffer no prejudice from his petition remaining in the Middle District," it did not consider them.[33] Instead, the District Court held that Mr. Bryant's petition should be transferred for two alternative reasons:

(1) Because "[w]hile Petitioner's place of confinement may change over time, the district of his conviction will not,"[34] and

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(cont'd from previous page)

[31] *Id.* at 1-3.

[32] *See Bryant v. Parker*, No. 3:17-cv-00860, Order at 2 (M.D. Tenn. June 16, 2017) (Crenshaw, J.) ECF No. 12.

[33] *Id.* at 1-2.

[34] *Id.* at 2.

(2) Because the Eastern District "is more familiar with the Petitioner's case."[35]

The District Court's failure to consider any of the factors set forth in *Moses* represented a clear legal error. The *Moses* factors, informed by 28 U.S.C. § 1404(a), are not voluntary recommendations or guidelines. Thus the District Court did not have discretion to ignore them, and it certainly did not have discretion to consider factors that *contravene* them.[36] Having applied an incorrect legal standard when ruling on the Respondents' transfer motion, the District Court committed a clear error of law that amounted to an abuse of its discretion.

B. *Petitions under § 2254 may be heard in a petitioner's jurisdiction of incarceration.*

28 U.S.C. § 2241(d) provides that a petition for habeas corpus "may be filed in the district court for the district wherein such person is in custody." *Id.* It further provides that the district court where a petitioner is

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[35] *Id.*

[36] The District Court's reasoning that the Eastern District is "more familiar with the Petitioner's case" is entirely irrelevant to the statutory requirements for transfer, which expressly specify that "convenience of parties and witnesses" is a consideration, 28 U.S.C. § 1404(a), while "convenience of the court" is not mentioned. *Accord In re Scott*, 709 F.2d at 721 ("The law is well established that a federal court may not order transfer under section 1404(a) merely to serve its personal convenience.")

incarcerated "*shall have* concurrent jurisdiction to entertain the application." *Id.* (emphasis added). Accordingly, the text of 28 U.S.C. § 2241(d) unmistakably establishes that district courts in a petitioner's jurisdiction of incarceration may consider habeas petitions even though a petitioner was convicted elsewhere.

The District Court's Order in the instant case does violence to the unambiguous text of 28 U.S.C. § 2241(d) and to clearly expressed congressional intent. According to the District Court, *notwithstanding all other factors to the contrary*, a habeas petition that has been filed in a petitioner's jurisdiction of incarceration should nonetheless be transferred to his jurisdiction of conviction because "[w]hile Petitioner's place of confinement may change over time, the district of his conviction will not." According to the District Court, this factor is also *outcome-determinative*—at least under circumstances where the district of conviction "is more familiar with the Petitioner's case."[37]

The problem with the District's Court's reasoning is that these two factors will necessarily be present in every habeas case. A petitioner's district of conviction will never change in any case, ever. Further, a petitioner's district of conviction will always be "more familiar with the

[37] *Bryant*, Order at 2.

[p]etitioner's case," not only because the conviction took place there, but also because—based on the circular reasoning implicit in the District Court's Order—no other jurisdiction will ever be able to consider it. Accordingly, if the District Court's Order is approved, whenever a petitioner's jurisdiction of incarceration differs from his jurisdiction of conviction, there will never be any circumstance in which the jurisdiction of incarceration would be able "to entertain the application." 28 U.S.C. § 2241(d).

As such, Mr. Bryant respectfully submits that the District Court's Order must be unlawful because it renders a significant provision of 28 U.S.C. § 2241(d) meaningless. *See, e.g., Ford Motor Co. v. United States*, 768 F.3d 580, 587 (6th Cir. 2014) ("We 'must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" (quoting *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998)). *See also Milner v. Dep't of Navy*, 562 U.S. 562, 575 (2011) ("[S]tatutes should be read to avoid making any provision 'superfluous, void, or insignificant[.]'" (citation omitted)).

C. *Every applicable standard militates against granting a transfer when the transfer would destroy a petitioner's pro bono relationship.*

The record contains significant evidence that transferring the Petitioner's case from the Middle District at Nashville—where his lead and local *pro bono* counsel is located—to the Eastern District at Greeneville (which is located 250 miles away from his *pro bono* counsel's solo law practice, and where his *pro bono* counsel has absolutely no intention of becoming licensed to practice) "would introduce substantial, unanticipated litigation costs into Mr. Bryant's representation and would significantly complicate it."[38] The evidence on this point was also undisputed.

Under similar circumstances not involving a habeas petition, another jurist in the Middle District of Tennessee has held that: (1) the fact of a *pro bono* relationship alone is a "very significant" consideration with respect to transfer motions; and (2) that "where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action."[39] Other federal courts outside this Circuit appear to have uniformly agreed with the

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[38] Petitioner's Response to Respondents' Motion to Transfer Petitioner's Petition for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 10 at 3.

[39] *Azarm*, 2009 WL 1588668, at *6.

court's holding in *Azarm*.[40] For its part, however, in this case, the District Court did not find the fact of Petitioner's *pro bono* relationship to be worthy of *any* consideration at all—much less "very significant" consideration.

The District Court's failure to consider the effects of a transfer on Mr. Bryant's *pro bono* relationship is especially troubling in light of 28 U.S.C. § 1404(a)'s requirement that district court's consider "the interest of justice" when ruling on transfer orders.[41] It also ignores this Court's

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[40] *See, e.g.*, *Sanders*, 2005 WL 2346953, at *2 ("Plaintiff's counsel is handling this case *pro bono*. It is unclear whether Plaintiff could obtain new counsel in the proposed transferee district."); *Montemayor*, 2005 WL 3274508, at *6 ("Transfer of this action at this late date will only . . . impose hardship on Plaintiff's pro bono counsel. Defendant can cite . . . no substantive prejudice it will suffer from completing litigation in this District."); *Joslyn*, 2001 WL 1464780, at *4 ("There are also several factors indicating this case should proceed in the District of Connecticut, including . . . [that] plaintiffs' counsel, who are litigating this case *pro bono*, would not be able to pursue this case in the Western District of Virginia because of increased costs . . . ."). *See also Bryant*, 2014 WL 1266241, at *3 (C.D. Cal. Mar. 26, 2014) ("[P]laintiff's pro bono counsel is not based in Arizona, and represents that they are not admitted to the bar in Arizona, and '[n]umerous courts have found that, where a transfer of venue would upset or destroy a pro bono counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action.'" (second alteration in original) (citation omitted)).

[41] It is worth noting that 28 U.S.C. § 2241(d), the transfer provision in the habeas statute, similarly requires that transfers be effected "in furtherance of justice." However, the district court did not rely on this provision in *(cont'd)*

mandate in *Moses* that district courts must consider "other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Moses*, 929 F.2d at 1137.

Mr. Bryant respectfully submits that destroying a petitioner's *pro bono* relationship with an unnecessary transfer does not further justice.

Thus, this Court should adopt the holding that "where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action."[42] Such a holding will further the interests of justice for existing *pro bono* petitioners like Mr. Bryant, and it will also have the added benefit of encouraging—rather than discouraging—more *pro bono* representation throughout this Circuit.

D. *The transferee jurisdiction has been compromised by recent, pervasive, negative media coverage.*

Independent of the fact that transferring this case to the Eastern District will be inconvenient for the parties, the witnesses, and the parties' attorneys and will destroy Mr. Bryant's *pro bono* relationship, the interests of justice militate against a transfer for a separate reason: the transferee

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making its ruling. See *Bryant v. Parker*, No. 3:17-cv-00860, Order at 2 (M.D. Tenn. June 16, 2017) (Crenshaw, J.) ECF No. 12.

[42] *Azarm*, 2009 WL 1588668, at *6.

jurisdiction has been compromised by recent, pervasive, negative media coverage regarding Mr. Bryant's petition.[43] *Cf.* 28 U.S.C. § 2241(d); 28 U.S.C. § 1404(a); *Moses*, 929 F.2d at 1137. Once again, there is undisputed evidence in the record that due to intense, widespread, and recent negative press coverage about Mr. Bryant across the Eastern District, and in Greeneville specifically, transferring the case to Greeneville would result in substantial injustice.[44]

III. THE DISTRICT COURT'S ORDER REPRESENTS AN OFT-REPEATED ERROR EXCLUSIVE TO THE MIDDLE DISTRICT.

This petition satisfies the fourth *NLO* factor[45] because the District Court's Order represents "an oft-repeated error or manifests a persistent disregard of the federal rules." *NLO*, 5 F.3d at 156. The District Court's transfer order is but one in a series of unlawful orders arising out of the Middle District of Tennessee, which has consistently granted transfers as a

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[43] *See* Pet'r's Resp. to Resp'ts' Mot. to Transfer Pet'r's Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 10 at 4-5.

[44] *Id.*

[45] *See In re NLO, Inc.*, 5 F.3d 154, 156 (6th Cir. 1993) (holding mandamus appropriate where "(4) [t]he district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules").

matter of *established district policy* absent consideration of the required statutory factors that govern transfer motions.

A. *The District Court's Order Represents an Oft-Repeated Error.*

The Middle District of Tennessee routinely grants motions to transfer venue as a matter of course without regard to the venue transfer statute's express requirements or applicable Sixth Circuit case law.

In their motion to transfer venue, Respondents argued that Mr. Bryant's petition should be transferred "in accordance with [the Middle District's] usual customs and practices"—an apt description of the Middle District's policies.[46] Indeed, such transfers are so routine that the Middle District of Tennessee considers it to be "the consistent practice in the federal courts of Tennessee to transfer habeas petitions to the judicial district in which the convicting court is located." *Orange*, 2012 WL 5197899, at *1 (M.D. Tenn. Oct. 19, 2012). For the reasons expressed in the preceding section, however, that policy—although pervasive—is erroneous as a matter of law.

The Middle District has granted countless motions to transfer venue habeas petitions to a petitioner's jurisdiction of conviction simply as a

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[46] Resp'ts' Mot. to Transfer Pet'r's Pet. for Writ of Habeas Corpus, *Bryant v. Parker*, No. 3:17-cv-00860 (M.D. Tenn. filed June 12, 2017), ECF No. 8 at 2.

matter of course.[47] Notably, however, in not a single of these cases did the district court examine either the factors specified in the venue transfer statute.[48] Nor did they consider any of the factors required by this Court in *Moses*.[49] Accordingly, none of these transfers appears to have been conducted in accordance with applicable law.

B. *The District Court's Order Error Is Unique to the Middle District.*

The Middle District stands alone in formulating a district-specific policy of transferring habeas petitions to a petitioner's jurisdiction of conviction as a matter of course. No district court in the Sixth Circuit *other*

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[47] *See, e.g.*, *Orange,* 2012 WL 5197899 at *1; *Young v. Tennessee*, No. 3:08-0268, 2008 WL 824307, at *1 (M.D. Tenn. Mar. 24, 2008); *Hanebutt v. Colson*, No. 3:11-0494, slip op. (M.D. Tenn. June 30, 2011); *Scruggs v. Johnson*, No. 3:13-0056, slip op. at 1 (M.D. Tenn. Jan. 29, 2013); *Stout v. Carpenter*, No. 3:14-cv-00976, slip op. at 1 (M.D. Tenn. Apr. 28, 2014); *Owens v. Steward*, No. 3:14-cv-00689, slip op. at 1 (M.D. Tenn. Mar. 17, 2014); *Letsinger v. Steele*, No. 3:13-0766, slip op. at 1 (M.D. Tenn. Aug. 8, 2013); *Lewis v. Holloway*, No. 3:14-1258, slip op. at 1 (M.D. Tenn. June 12, 2014); *Tipton v. Johnson*, No. 3:12-0399, slip op. at 1 (M.D. Tenn. Apr. 27 2012); *Hammond v. Jobe*, No. 3:11-0432, slip op. at 1 (M.D. Tenn. May 11, 2011).

[48] *See* 28 U.S.C. § 1404(a) (actions may be transferred for "the convenience of parties and witnesses, in the interest of justice").

[49] *See Moses*, 929 F.2d at 1137 (the "district court should consider the "private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness").

than the Middle District of Tennessee has established such a policy, and other districts appear to resolve transfer motions correctly following thorough consideration of the required statutory factors.[50]

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[50] *See, e.g.*, *Weatherford v. Gluch*, 708 F. Supp. 818, 820 (E.D. Mich. 1988) ("Since the material events took place in the Northern District of Indiana and records and witnesses are also likely to be located there, it would be easier and less costly for the State of Indiana to litigate Petitioner's claims in that state. Should a hearing prove necessary, as Respondent contends, the cost and inconvenience of bringing records and witnesses from Indiana to Michigan outweighs the cost and risk of transporting Petitioner from Michigan to Indiana."); *Maxon v. Berghuis*, No. 1:07-cv-363, 2010 WL 727218, at *3 (W.D. Mich. Feb. 25, 2010) (This Court typically retains a habeas case filed by a prisoner who was lodged in this district when he initiated the action, even if he is subsequently transferred to the Eastern District. The Eastern District is not necessarily a more convenient venue because parties in habeas corpus actions rarely are required to appear in Court. In addition, Petitioner may be moved to another facility at any time; indeed, given Petitioner's outstanding request for a stay, some significant time may pass before the petition is heard, making an intervening transfer increasingly likely."); *Phillips v. Robinson*, No. 5:12CV2323, 2013 WL 3990756, at *15 (N.D. Ohio Aug. 2, 2013) (""The district court must weigh a number of case-specific factors such as the convenience of parties and witnesses, public-interest factors of systemic integrity, and private concerns falling under the heading "the interest of justice."" (quoting *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 537 (6th Cir.2002))). *Phillips v. Quitana*, No. 5:14-210-DCR, 2014 WL 5107146, at *4 (E.D. Ky. Oct. 7, 2014) ("District courts possess authority to transfer civil actions to different districts pursuant to 28 U.S.C. § 1404(a), but only if such a transfer would promote 'the convenience of parties and witnesses, in the interest of justice.' In this case, the interest of justice would not be served by re-characterizing Phillips' § 2241 petition as a petition for writ of habeas corpus under § 2254 and transferring it to the proper federal court in Florida." (quoting 28 U.S.C. § 1404(a))).

Significantly, the very establishment of such a district-specific transfer policy flies in the face of this Court's assessment of the venue statute's purpose: that "Congress intended to give district courts the discretion to transfer cases on an individual basis by considering convenience and fairness."[51] It also violates the Supreme Court's finding that the transfer statute contemplates "individualized, case-by-case consideration of convenience and fairness." *Van Dusen*, 376 U.S. at 622; *see also Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960) ("where . . . one District Court [is] more convenient than another, the trial judge can, *after findings*, transfer the whole action to the more convenient court." (emphasis added)).

In other words: District Courts are obligated to resolve venue transfer motions on a case-by-case basis following careful consideration of specifically-delineated, statutorily-compelled factors. The Middle District Court's conflicting, district-specific policy plainly contravenes this obligation, and a writ mandamus overruling that policy should issue as a result.

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[51] *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 537 (6th Cir. 2002).

IV. THIS PETITION "RAISES NEW AND IMPORTANT PROBLEMS" BECAUSE NO HABEAS PETITIONER HAS CHALLENGED THE MIDDLE DISTRICT'S TRANSFER POLICY AND BECAUSE THE COURT FAILED TO CONSIDER THE PETITIONER'S *PRO BONO* REPRESENTATION.

This petition satisfies the fifth *NLO* factor because it "raises new and important problems, or issues of law of first impression." No habeas petitioner has ever challenged the Middle District's venue transfer policy, and no habeas petitioner has sought review of a transfer order based upon the transfer's effect on a petitioner's *pro bono* representation. *NLO*, 5 F.3d at 156.

A. *No Habeas Petitioner Has Ever Challenged the Middle District's "Consistent Practice" of Transferring Habeas Petitions to the District of a Petitioner's Conviction.*

A thorough review of Sixth Circuit case law reveals no cases challenging the Middle District's erroneous, categorical policy of transferring habeas petitions to the petitioner's district of conviction. While the Middle District's policy is pervasive and clearly contrary to the language of 28 U.S.C. § 1404(a) and Sixth Circuit precedent, this case appears to represent the first challenge to that policy filed by any habeas petitioner.

The fact that the Middle District's unlawful transfer policy has escaped review is, however, unsurprising. All of the above-cited habeas

transfer cases were pursued by *pro se* litigants who likely lacked the wherewithal or ability to state or preserve an objection and then seek relief in this Court via mandamus or following a final judgment on the merits. Consequently, while the Middle District's systematic misapplication of the transfer statute has been a continuous problem for at least the preceding decade, it has consistently escaped this Court's review, and the instant case represents the first instance in which any petitioner has challenged it.

B. *No Habeas Petitioner Has Ever Sought Appellate Review of a Transfer Based on the Effect that a Transfer Would Have on their Pro Bono Representation.*

Likewise, a thorough search of federal law has uncovered no cases in which a petitioner's transfer was challenged based on the consequences that the transfer would have on the continued viability of the petitioner's *pro bono* representation. This result appears to be a consequence of the fact that in every court in which the damage to a petitioner's *pro bono* representation has been raised except this one, district courts have uniformly declined to approve a transfer—rendering appellate review on the issue unnecessary.[52]

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[52] *See supra* note 44.

Thus, the instant case presents a new and important problem that is worthy of this Court's attention and will have significant bearing on future *pro bono* representation throughout the Circuit.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus that transfers the habeas petition back to the Middle District of Tennessee, compels it to consider the statutory factors that govern motions to transfer, and adopts the holding that "where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action."[53]

Respectfully submitted,

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July 18, 2017

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[53] *Azarm*, 2009 WL 1588668, at *6.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 21(d)(1), I hereby certify that the foregoing document contains no more than 7,800 words (7,672 using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, statement regarding oral argument, and certificates of counsel.

Respectfully submitted,

/s/ James P. Danly

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Counsel for Jason Blake Bryant

July 18, 2017

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 21(a)(1), I hereby certify that on this eighteenth day of July 2017, the foregoing petition was served upon opposing parties' counsel and the district court judges by mail.

Respectfully submitted,

/s/ James P. Danly

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July 18, 2017

ADDENDUM

Statutes:

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Respondents' Motion to Transfer Petitioner's Petition for Writ of Habeas Corpus, ECF No. 10.....18

ITEM No. 1

Statutory Provision:

28 U.S.C. § 1404. Change of Venue

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 87. District Courts; Venue (Refs & Annos)

28 U.S.C.A. § 1404

§ 1404. Change of venue

Currentness

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 937; Oct. 18, 1962, Pub.L. 87-845, § 9, 76A Stat. 699; Oct. 19, 1996, Pub.L. 104-317, Title VI, § 610(a), 110 Stat. 3860; Pub.L. 112-63, Title II, § 204, Dec. 7, 2011, 125 Stat. 764.)

Notes of Decisions (4818)

28 U.S.C.A. § 1404, 28 USCA § 1404
Current through P.L. 115-43.

End of Document

ITEM No. 2

District Court Order:

Order Granting Change of Venue

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JASON BRYANT,	)	
	)	
Petitioner,	)	
	)	
v.	)	**NO. 3:17-cv-00860**
	)	**CHIEF JUDGE CRENSHAW**
TONY C. PARKER, et al.,	)	
	)	
Respondents.	)	

ORDER

Petitioner's counsel's Motion for Admission Pro Hac Vice (Doc. No. 9) is **GRANTED**. Before the Court is Respondent's Motion to Transfer Petitioner's Petition for Writ of Habeas Corpus. (Doc. No. 8.)

In 1998, Petitioner was convicted and sentenced in the Circuit Court for Greene County, Tennessee, located in the Eastern District of Tennessee. (Doc. Nos. 1-2 at 2-3); 28 U.S.C. § 123(a). In 2005, Petitioner filed a habeas corpus petition in the Eastern District of Tennessee, Greeneville Division (Doc. Nos. 1-2 at 8-15), which was dismissed. Bryant v. Carlton, No. 2:05-CV-151, 2007 WL 2263067 (E.D. Tenn. Aug. 3, 2007). In May 2017, the Sixth Circuit granted Petitioner's motion authorizing a second or successive petition. (Doc. No. 1-1.)

On May 18, 2017, Petitioner filed a habeas corpus petition in this district. (Doc. No. 1.) Petitioner is an inmate at the Turney Center Industrial Complex, located in the Middle District of Tennessee. 28 U.S.C. § 123(b). Thus, the Middle and Eastern Districts of Tennessee have concurrent jurisdiction over the pending petition. 28 U.S.C. § 2241(d). Respondent requests that the Court transfer the petition to the Eastern District of Tennessee at Greeneville "in accordance with its usual customs and practices." (Doc. No. 8 at 2.) Petitioner argues, however, that his petition

should remain in the Middle District of Tennessee for the convenience of his pro bono attorneys, the parties, and anticipated non-party witnesses. (Doc. No. 10 at 1-4.) Petitioner also contends that he would be prejudiced in the event that he receives a new sentencing hearing in Greeneville, and that Respondents suffer no prejudice from his petition remaining in the Middle District. (Id. at 4-5.)

While Petitioner's place of confinement may change over time, the district of his conviction will not. Further, the Eastern District of Tennessee is more familiar with the Petitioner's case, being the district that considered his first habeas corpus petition. Accordingly, Respondents' motion to transfer (Doc. No. 8) is **GRANTED**. The Clerk is directed to **TRANSFER** this action to the United States District Court for the Eastern District of Tennessee, Northeastern Division at Greeneville. 28 U.S.C. § 1404(a).

IT IS SO ORDERED.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

ITEM No. 3

District Court Submission:

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO TRANSFER PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

JASON BRYANT, *Petitioner,* *v.* TONY C. PARKER, Commissioner, Tennessee Department of Correction, and KEVIN GENOVESE, Warden, Turney Center Industrial Complex, *Respondents.*	)	Case 3:17-cv-00860 CHIEF JUDGE CRENSHAW

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO TRANSFER PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner Jason Bryant, by and through undersigned counsel, and respectfully responds to Respondents' Motion to Transfer this case to the Eastern District of Tennessee. For the reasons provided herein, Respondents' Motion should be denied.

As grounds for their Motion, Respondents assert that "[i]n the interests of justice, judicial economy, and convenience of the parties and witnesses, this Court should transfer this action to the United States District Court for the Eastern District of Tennessee, at Greeneville." (Doc. 8, PageID #105.) Respondents offer no evidence to support any of these assertions, and none exists.

The following four independent reasons all support denying Respondents' motion:

First, as a threshold matter, Petitioner's attorneys are representing him *pro bono*,

and transferring this case to the Eastern District would add significant and unanticipated litigation costs that would strain and possibly compromise Petitioner's representation. *See* **Exhibit A**. Petitioner's lead counsel resides in Nashville, Tennessee. *Id.* His co-counsel presently resides in Washington, D.C., but regularly travels to Nashville to visit his family. *Id.* Neither of Petitioner's attorneys is a member of the Eastern District bar, and neither attorney has any plans to become a member of the Eastern District bar. *Id.* Thus, inconveniencing Petitioner's volunteer attorneys by forcing them to commute back and forth to a court located more than two hundred and fifty (250) miles away from either one of them just to attend court appearances would significantly burden Petitioner's counsel and would likely force Petitioner to represent himself *pro se*. *Id.*

Critically, in light of the judiciary's profound interests in accommodating and encouraging the type of *pro bono* representation that Petitioner's attorneys are providing in the instant case, this Court and several other courts have heavily discouraged transferring a case if doing so would upset or destroy a *pro bono* relationship. *See, e.g., Azarm v. $1.00 Stores Servs., Inc.*, No. 3:08-1220, 2009 WL 1588668, at *6 (M.D. Tenn. June 5, 2009) ("that [the Plaintiffs] are being represented by *pro bono* counsel is very significant. Numerous courts have found that, **where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action.**") (emphasis added) (citing *Sanders v. Johnson*, 2005 WL 2346953, *2 (S.D.Tex. Sept.26, 2005) ("Plaintiff's counsel is handling this case pro bono. It is unclear whether Plaintiff could obtain new counsel in the proposed transferee district."); *Montemayor v. Fed. Bureau of Prisons*, 2005 WL 3274508, *6 (D.D.C. August 25, 2005) ("Transfer of this action at this late date will . . . impose hardship on Plaintiff's pro bono counsel. Defendant can cite to

no substantive prejudice it will suffer from completing litigation in this District."); *Joslyn v. Armstrong*, 2001 WL 1464780, *4 (D.Conn. May 16, 2001) ("There are also several factors indicating this case should proceed in the District of Connecticut, including . . . [that] plaintiffs' counsel, who are litigating this case pro bono, would not be able to pursue this case in the Western District of Virginia because of increased costs")). *See also Bryant v. Fed. Bureau of Prisons*, No. 2:11-CV-00254-CAS, 2014 WL 1266241, at *3 (C.D. Cal. Mar. 26, 2014) ("Plaintiff's pro bono counsel is not based in Arizona, and represents that they are not admitted to the bar in Arizona, and numerous courts have found that, where a transfer of venue would upset or destroy a *pro bono* counsel relationship due to increased costs and inconvenience, that fact weighs against transfer of the action.") (quotation omitted).

Given, among other things: the magnitude of this case; the importance of the constitutional interests involved; the Petitioner's indigency; and the fact that the unpopularity of the Petitioner has effectively rendered it impossible for him to retain alternative counsel, both of Petitioner's attorneys have volunteered to represent him *pro bono* in furtherance of the fundamental duties of members of the legal profession. *See* **Exhibit A**. However, as noted, requiring Petitioner's counsel to commute back and forth to Greeneville simply to attend proceedings in this case would introduce substantial, unanticipated litigation costs into Mr. Bryant's *pro bono* representation and would significantly complicate it. *Id.* Accordingly, Petitioner respectfully submits that the Government should not be permitted to compromise his *pro bono* relationship with his counsel by having this case transferred hundreds of miles away from the jurisdiction where his attorneys are located. *Id.*

Second, and perhaps even more importantly, transferring this case to the Eastern

District would actually be *less* convenient for everyone involved in this litigation, rather than more convenient. Like the parties' attorneys, the parties in the instant case themselves reside in the Middle District of Tennessee. *See* **Exhibit A**. Further, all of Petitioner's anticipated non-party witnesses—specifically, the employees and individuals at his prison who have observed Petitioner's personal growth throughout his incarceration—reside in the Middle District as well. *See id*. *See also Azarm*, 2009 WL 1588668, at *4 ("the convenience of potential non-party witnesses, who are not subject to the control of the parties, is a particularly weighty consideration, because it is generally presumed that party witnesses will appear voluntarily in either jurisdiction, but non-party witnesses, with no vested stake in the litigation, may not."). Additionally, the only other non-party witnesses who could even plausibly have testimony relevant to this proceeding—victim Peter Lillelid (who lives in Stockholm, Sweden[1]) and the Petitioner's co-defendants (who are incarcerated throughout Tennessee)—are not located in the Eastern District, either. *Id*. Consequently, Respondents' unsupported assertion that transferring this case to the Eastern District would be *more* "convenien[t] [for] the parties and witnesses" rather than less so is plainly without merit. (Doc. 8, PageID #105.)

Third, the Government has seriously compromised Petitioner's ability to receive a fair proceeding in Greeneville by participating in and repeatedly fanning the flames of highly inflammatory and profoundly prejudicial media coverage regarding Petitioner's case—both throughout East Tennessee and in Greeneville in particular.[2] Petitioner's

[1] John North, *20 years later: 'Evil' killing of Powell family resonates*, WBIR, http://www.wbir.com/news/crime/20-years-later-evil-killing-of-powell-family-resonates/428998778 ("Today, Peter Lillelid lives in the Stockholm, Sweden, area").

[2] *See, e.g.*, Ken Little, *2 Defendants In Lillelid Murders Want Sentence Reduced*, GREENEVILLE SUN (Mar. 25, 2017) ("Dan Armstrong, 3rd Judicial District attorney general, said this week the defendants do not merit consideration on the basis of the Supreme Court rulings because of the nature of the crime."); Matt

habeas petition specifically requests a new sentencing hearing as one possible option for relief in this matter. (Doc. 1-2, PageID #34.) Crucially, a jury determination may also be constitutionally compelled in order to trigger the sentencing enhancement that the Government seeks to maintain in this case—rendering such prejudicial coverage extraordinarily significant. *See* Exhibit A. As such, it goes without saying that the Government should not be permitted to take advantage of its highly questionable behavior by forum shopping Petitioner's case to a specific jurisdiction that it has so thoroughly and deliberately prejudiced. The Respondents' Motion to Transfer should be denied for this reason as well.

Fourth and finally, this Court has undisputed concurrent jurisdiction over this case, and the Respondents have not identified even the slightest prejudice that they will experience if this Court retains jurisdiction over this matter. The Eastern District is neither more qualified nor better situated than this Court to adjudicate this case. Additionally, notwithstanding Respondents' Motion to Transfer, 28 U.S.C.A. § 2241(d) plainly contemplates concurrent jurisdiction as a matter of course in federal habeas proceedings. *Compare* 28 U.S.C.A. § 2241(d) ("the application may be filed in the district court for the district wherein such person is in custody") *with* Doc. 8, PageID #106 ("in accordance with its usual customs and practices, this Court should transfer this matter . . . "). Further, even if exercising concurrent jurisdiction were in some way peculiar, "usual

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Lakin, *Greene County District Attorney General Dan Armstrong speaks about Karen Howell*, KNOXVILLE NEWS SENTINEL (Apr. 2, 2017), https://www.youtube.com/watch?v=33-FQctcXiQ (Greeneville District Attorney Dan Armstrong offering on-camera interview declaring that "the nature of this crime puts it outside of those new Supreme Court decisions"). *See also* Sheila Burke, *Tennessee Prisoner Sentenced to Life at 15 Asks for Freedom*, THE NEW YORK TIMES (Jun. 9, 2017), https://www.nytimes.com/aponline/2017/06/08/us/ap-us-roadside-slayings.html ("'We think if there's any case in the world that meets that exception, it's the Lillelid case,' Greene County District Attorney Dan Armstrong said. 'That family was basically lined up in a ditch, begging for their lives and shot. And then that wasn't enough, they ran the van over them as they left.'").

customs and practices" in habeas corpus cases typically do not involve, *inter alia*: *pro bono* counsel located in the district where a petitioner is incarcerated; pure questions of law arising from retroactive, constitutionally-based U.S. Supreme Court decisions; or nearly all relevant witnesses to a petitioner's successive habeas petition residing in his jurisdiction of incarceration, rather than in his jurisdiction of conviction. As such, Respondents' claim that "usual customs and practices" should compel this Court to abandon its undisputed jurisdiction over the instant case is without merit as well.

Conclusion

Accordingly, for the foregoing reasons, Respondents' Motion to Transfer should be DENIED.

Respectfully submitted,

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Pro Bono Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2017, a copy of the foregoing was sent via CM/ECF, and/or by email to the following:

Office of the Attorney General
John Sevier Building
500 Charlotte Avenue
Nashville, TN 37243
615-741-2850
michael.stahl@ag.tn.gov

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz, Esq.

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JASON BRYANT, *Petitioner,* *v.* TONY C. PARKER, Commissioner, Tennessee Department of Correction, and KEVIN GENOVESE, Warden, Turney Center Industrial Complex, *Respondents.*	)	Case 3:17-cv-00860 CHIEF JUDGE CRENSHAW

AFFIDAVIT OF DANIEL A. HORWITZ, ESQ.

1. My name is Daniel A. Horwitz, I have personal knowledge of the facts affirmed in this Affidavit, I am competent to testify regarding them, and I swear under penalty of perjury that they are true.

2. Along with my co-counsel, Mr. James Danly, I represent Jason Bryant, who is the Petitioner in this matter.

3. I serve as both Mr. Bryant's lead counsel and his local counsel.

4. I reside in Nashville, Tennessee. Nearly the entirety of my law practice is located in Nashville, Tennessee. I have no plans to practice law in East Tennessee for any reason.

5. Mr. Danly resides in Washington, D.C. However, several of Mr. Danly's family members live in Nashville, so he regularly visits Nashville. Mr. Danly's law firm

does not have offices located in East Tennessee, either.

6. Neither I nor Mr. Danly is a member of the Eastern District bar.

7. Greeneville, Tennessee—the jurisdiction where Respondents seek to have this case transferred—is located approximately two hundred and fifty (250) miles away from my office and well over four hundred (400) miles away from Mr. Danly's office.

8. Given, among other things: the magnitude of this case; the importance of the constitutional interests involved; the Petitioner's indigency; and the fact that the unpopularity of the Petitioner has effectively rendered it impossible for him to retain alternative counsel, both I and Mr. Danly have volunteered to represent Mr. Bryant *pro bono* in furtherance of the fundamental duties of members of the legal profession. However, requiring us to commute back and forth to Greeneville simply to attend proceedings in this case would introduce substantial, unanticipated litigation costs into Mr. Bryant's representation that would significantly complicate it. If I have to commute two hundred and fifty (250) miles back and forth to Greeneville simply to attend a court appearance on Mr. Bryant's behalf, I do not know that I will be able to continue undertaking Mr. Bryant's representation.

9. Upon information and belief, all parties in this case reside in the Middle District of Tennessee. Mr. Bryant is incarcerated at Turney Center Industrial Complex, which is located in the Middle District of Tennessee. The Warden of Turney Center Industrial Complex, who is a respondent sued in his official capacity in this case, is also located in the Middle District of Tennessee. The Commissioner of the Tennessee Department of Correction, who is also a respondent sued in his official capacity, is similarly located in the Middle District of Tennessee.

10. Upon information and belief, all of Mr. Bryant's anticipated non-party

witnesses—specifically, the employees and individuals at Turney prison who have observed Petitioner's personal growth throughout his incarceration—reside in the Middle District of Tennessee as well.

11. Upon information and belief, all other non-party witnesses who could plausibly have testimony relevant to this proceeding—specifically, victim Peter Lillelid (who lives in Stockholm, Sweden) and Mr. Bryant's co-defendants (who are incarcerated throughout Tennessee)—are not concentrated in the Eastern District of Tennessee, either.

12. Based on the intense, recent, and profoundly prejudicial media coverage that the Government has participated in throughout East Tennessee and in Greeneville in particular, I have serious concerns and a good-faith belief that Mr. Bryant would not be able to receive a fair sentencing hearing in the Eastern District of Tennessee if this case were transferred there.

FURTHER Affiant sayeth naught.

Sworn this the 12th day of June, 2017.

Daniel A. Horwitz, Esq.

Sworn to and subscribed before me this the 12th day of June, 2017.

EFRAIN MARTINEZ II
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY

Notary Public

My commission expires: 11 SEP 2017

ITEM No. 4

District Court Submission:

RESPONDENTS' MOTION TO TRANSFER PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

JASON BRYANT,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 3:17-cv-00860**
	)	**CHIEF JUDGE CRENSHAW**
KEVIN GENOVESE,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION TO TRANSFER PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

Presently before the Court is the petitioner's petition for the writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. (E.C.F. 1.) Petitioner is challenging the legality of his sentence pursuant to his 1998 Greene County, Tennessee convictions which were obtained through the petitioner's guilty pleas to three counts of first-degree murder; one count of attempted first-degree murder; two counts of especially aggravated kidnapping; two counts of aggravated kidnapping; and one count of theft over $1000. Greene County is located in the Eastern Judicial District of Tennessee, Northeastern Division. 28 U.S.C. § 123 (a)(2).

This Court is granted discretion, pursuant to 28 U.S.C. § 2241(d), to transfer Petitioner's application for the writ of habeas corpus to the district court for the district within which the State court was held which convicted and sentenced him. In the interests of justice, judicial economy, and convenience of the parties and witnesses, this Court should transfer this action to the United States District Court for the Eastern District of Tennessee, at Greeneville. Additionally, this case is before this Court upon order by the Sixth Circuit authorizing petitioner a second or successive habeas petition. Petitioner's first habeas petition was filed in the Eastern District of Tennessee, at

Greeneville, case no. 2:05-cv-00151. Petitioner's motion to the Sixth Circuit seeking permission to file a second or successive habeas petition originated from the Eastern District of Tennessee at Greeneville, case no. 2:05-cv-00151. As such, and in accordance with its usual customs and practices, this Court should transfer this matter to the Eastern District of Tennessee for further proceedings.

Respectfully submitted,

HERBERT H. SLATERY III,
Attorney General and Reporter

/s/ *Michael M. Stahl*
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CERTIFICATE OF SERVICE

On June 8, 2017, the foregoing Motion was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a copy in the United States mail, postage prepaid, to their address of record.

/s/ *Michael M. Stahl*
MICHAEL M. STAHL
Assistant Attorney General