No.

In The

Supreme Court of the United States

DELAWRENE A. KING,
Petitioner

v.

CHARMAINE BRACY, Warden
Respondent

On Petition for Writ Of Certiorari
To The 6th Circuit Court and Northern District Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

Delawrence A. King, #472975
Northeast Ohio Correctional Center
2240 Hubbard Road
Youngstown, Ohio 44505
Defendant, pro se

QUESTION(S) PRESENTED

Did the Sixth Circuit Court error when it failed to grant Petitioner a Certificate Of Appealability after previously ruling in his favor, by stating that he had the right to challenge his underlying conviction and sentence after receiving an de novo resentencing? King v. Morgan, 807 F.3d 154

As well Petitioner would like this Honorable Court to determine whether he was denied his due process protection right as guaranteed by the United States Constitution, when the state painted an uncharacteristic picture of Petitioner and in flame the passion of his jury by attacking his defense of self-defense and stating that he was in their backyard, in their city, and so forth.

Petitioner believes that the 6th Cir. error in their determination that he did not make a substantial showing of the denial of a federal constitutional right according to U.S.C. §2253(c)(2) and asserts that there were no doubt that jurists could debate whether 1) was he fully given fair notice as to the charges against him because his indictment failed to list the requisite mens rea, as to counts three (3) and four (4), as require by Ohio's Constitution and the Fifth, Sixth, and Fourteenth Amendment United States Constitution. 2) His conviction was against the manifest and sufficiency of the evidence, after presenting evidence of perjured testimony from several of the state's witnesses, and as well the inconsistency in the states theory as to that of physical evidence, and with that of Petitioner's testimony along with the testimony of 12 year old Jamie Williams [at the time], his conviction and sentence was in fact against the sufficiency and manifest weight of the evidence. 3) He did receive ineffective

assistance of Appellant Counsel for counsel's failure to raise grounds five through seven in his direct appeal for Petitioner. Petitioner has proved through clear and convincing evidence that Grounds Five, Six and Seven should not, nor can not, be procedurally defaulted due to the State's claim of procedural bar because he had the right to file a 26(B), Application to reopen direct appeal, pursuant to Ohio Rule of Criminal Procedure after receiving an de novo resentence. And as well Petitioner has shown that his constitutional right was violated by the State's improper remarks that denied him affair trial and due process of law. And he was denied the effective assistance of trial counsel for his failure to object to the State's improper remarks that allowed the jury to believe that the state's remarks were true and correct.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is a follows:

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's fifth, sixth, and fourteenth Amendments to these United States Constitution were violated when the trail court failed to provide him with fair notice of the charges against him.

Petitioner's fourteenth Amendment to the United States Constitution rights were violated when his conviction was against the manifest weight of the evidence.

Petitioner's fifth, sixth, and fourteenth Amendment rights to these United States Constitution were violated when he was denied effective assistance of appellant and trial counsel, and as well he was denied a fair and impartial trial when the state committed misconduct to attain an conviction.

Petitioner's Fifth Amendment right to the United States Constitution were violated when he is twice put in jeopardy for being convicted of allied offenses for the same person.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts**:

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

[ ] reported at Case No. 17-3408, (King vs Bracy); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at King vs Morgan 807 Fd 3d 154, 157 (6th cir.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

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

[ ] reported at State v. King; Find on attached Paper; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Ninth District Appellate court appears at Appendix N/A to the petition and is

[ ] reported at State v. King;Cont. Attached Pg.; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 27, 2018.

[X] No petition for rehearing was timely filed in my case.

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

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

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Next Pg. 1a.
A copy of that decision appears at Appendix _____.

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

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

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

(١٨) For cases from state courts:

The date on which the highest state court decided my case was, application for delayed appeal, (Ohio 2011)

And, (Ohio Aug. 24, 2011)

() For cases from state courts:

State v. King, 939 N.E.2d 1265 (Ohio 2011) (table).

State v. King, No. 2011-0887 (Ohio Aug. 24, 2011)(entry).

() The opinion of the Ninth District Appellate court appears at Appendix N/A to the petition and is

reported at State v. King, 10CA009755, 2010 WL 3619914 (Ohio Ct. App. Sept. 20, 2010)

State v. King, No 10CA009755 (Ohio Ct. App. Apr. 13, 2011)

STATEMENT OF THE CASE

Delawrence King, a pro se Ohio prisoner, appeals the Sixth Circuit court judgment denial his petition for certificate of appealability ("COA") and to proceed in forma pauperis ("IFP") on appeal pursuant to Fed. R. App. P. 22(b), 24(a)(5).

In 2004, a jury convicted King of two counts of felony murder (Counts 3, 4) and one count of felonious assault (Count 5), each with a gun specification. The trial courts sentenced King to a total effective sentence of 21 years in prison. The Ohio Court of Appeals affirmed his convictions on direct appeal. State v. King, No. 04CA008577, 2005 WL 1962967 (Ohio Ct. App. Aug. 17, 2005) (unpublished decision and journal entry), perm. Appeal denied, 840 N.E.2d 205 (Ohio 2005).

In 2006, King filed his first § 2254 petition. The district court denied the petition, and the Sixth Circuit declined to issues a COA. King v. Hudson, No. 07-3336 (6th Cir. Oct. 12, 2007).

In 2009, King moved to vacate his conviction in state court because his criminal judgment did not include a required term of post-release control. The trial court conducted a de novo resentencing hearing, where it increased King's aggregate sentence to 33 to life in prison and three years of post-release control. The Ohio Court's of Appeals affirmed King's conviction and sentence. State v. King, No 10CA009755, 2010 WL 3619914 (Ohio Ct. App. Sept. 20, 2010). (Unpublished, decision and journal entry). The Ohio Supreme Court denied his pro se motion for delayed appeal. State v. King, 939 N.E.2d 1265 (Ohio 2011).

On December 16th, 2010 Petitioner moved to reopen his direct appeal from his resentencing, asserting that his appellant counsel rendered ineffective assistance by failing to raise major claims in his direct appeal challenging his conviction. See Ohio R. App. P. 26(B). The

Ohio Court of Appeal denied the motion, State v. King, No. 10CA009755 (Ohio Ct. App. Apr. 13, 2011), and the Ohio Supreme Court dismissed Petitioner's appeal. State v. King, No. 2011-0887 (Ohio Aug. 24, 2011).

In his second § 2254 petition, filed in 2012, Petitioner asserted that: (1) the indictment did not include the mens rea for Counts 3 and 4; (2) his convictions were against the manifest weight of the evidence; (3) his due process rights were violated by harsher penalty after resentencing; (4) the Ohio Court of Appeals abused its discretion by denying his Rule 26(B) motion; and appellate counsel rendered ineffective assistance by not arguing that (5) the felony murder and felonious assault charged were allied offenses of similar import, (6) the prosecutor committed misconduct during the closing argument, and (7) trial counsel rendered ineffective assistance by failing to object to the prosecutor's misconduct.

A magistrate judge recommended dismissing the first, second, fifth, sixth, and seventh claims as impermissible successive claims under 28 U.S.C. § 2244(b). The magistrate judge reasoned that the third claim was procedurally defaulted due to King's untimely appeal to the Ohio Supreme Court and that the fourth claim was not cognizable on federal habeas review because it raised an issue of state law. Over Petitioner objections and upon de novo review, the district court accepted the magistrate judge's report and denied the § 2254 petition and the court denied a COA as to the remaining claims.

The Sixth Circuit Court granted Petitioner a COA on the issue of whether Petitioner's second § 2254 petition was successive, the Court concluded that it was not King v. Morgan, 807 F.3d 154, 157 (6th Cir. 2015). Accordingly, the Sixth Circuit vacated the district court's judgment

and remanded the action further consideration of the first, second, fifth, sixth, and seventh claims.

On remand, the magistrate judge again recommended denying the § 2254 petition. The magistrate judge reasoned that the first claim was not cognizable on federal review, that the second claim lacked merit (when construed as a challenge to the sufficiency of the evidence), and that the remaining claims were procedurally defaulted. Over Petitioner objections, the district court accepted the magistrate judge's report and recommendation and denied his § 2254 petition and the court declined to issues a COA.

In his COA application, Petitioner reasserts his first, second, fifth, sixth, and seventh claims. And he made a substantial showing that reasonable jurists could debate whether his petition should have been resolved in a different manner, but however, the Sixth Circuit denied his petition and IFP motion as moot.

REASONS FOR GRANTING THE PETITION

Petitioner feels that this Honorable court should grant his petition for the following reasons as stated below following the latest court ruling.

Petitioner has shown the lower courts why his appeal should have been granted by a denial of his constitutional rights and he will try to provide this court to the best of his ability. Petitioner also prays this Court review them and construes them liberally under less stringent standards than those drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed.2d 652 (1972). Petitioner will identify [1] the potions of the proposed findings, recommendations or report to which [he] has been denied was erroneous and was not based on present law, but that of misapplied state law because [2] the basis for the state court ruling was done by an state procedure case law that was later overruled by the Sixth Circuit's decision in King v. Morgan, 807 F.3d 154.

PETITIONER HAS SHOWN THAT GROUND ONE OF HIS PETITION IS COGNIZABLE FOR FRDERAL REVIEW AND RECOMMENDATION THAT THE GROUND BE RULED ON UPON THE MERITS.

Petitioner Ground One is cognizable in habeas corpus proceedings. Petitioner's Ground One was related to his indictment being defective as it failed to provide him with an adequate description of the charge of felony murder, which he asserts led to his being convicted without a mens rea for the crime of felony murder.

Petitioner understands that the Fifth Amendment right to indictment has not been incorporated into the Due Process Clause of the Fourteenth Amendment as applicable to the states. See Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884); Albright v.

Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994)(noting that the Fifth Amendment right to indictment was not among the Bill of Rights provisions incorporated into the Fourteenth Amendment). Therefore, the specific requirement of the Fifth Amendment pertaining to federal indictments are among the few provisions of the Bill of Rights not incorporated into the Fourteenth Amendment requirements imposed on the states.

This Court has found that fair notice is an essential due process right in all criminal prosecutions, state or federal. Valentine v. Konteh, 395 F.3d 626, 631-632 (6th Cir. 2005) (quoting Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L.Ed 644 (1948)).

Thus, the Constitutional issue which arises on review of an indictment is whether the indictment provides the defendant with sufficient information of the charged offense, to enable him to defend himself against the accusations. Roe v. Baker, 316 F.3d 557, 570 (6th Cir. 2002), cert. denied, 540 U.S. 853, 124 S. Ct. 140 (2003). See also Russell v. United States, 369 U.S. 749, 763, 82 S. Ct. 1038 (1962); Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514 (1948).

Due process mandates that the defendant be provided with "fair notice of the charges against him to permit adequate preparation of his defense." Williams v. Haviland, 467 F. 3d at 535 (quoting Koontz v. Glossa, 731 F. 2d 365, 369 (6th Cir. 1984)); Olsen v. McFaul, 843 F.2d 918, 930 (6th Cir. 1988). Fair notice is given when the charged offense is "described with some precision and certainty so as to apprised the accused of the crime with which he stands charged." Williams v. Haviland, 467 F.3d at 535 [emphasis added]; see also Russell, 369 U.S. at 763; Olsen, 843 F.2d at 930; Koontz, 731 F.2d at 369. Where the defendant was fairly informed of the charges, and had sufficient information to be able to admit or deny the charges and to

adequately prepare any defense that was available to him/her, there will be no federal due process violation.

This Court has found that due process protection, rooted in the Sixth and Fourteenth Amendments, is not limited to indictments, and applies to all criminal prosecutions, whatever the charging method employed:

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682, and cases there cited**** It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. State of Oregon, 299 U.S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278." Cole, 333 U.S. at 201; see also Valetine, 395 F.3d at 631-632 (citing cases); Olsen, 843 F.2d at 930; Koontz, 731 F.2d at 369.

The Sixth Circuit has distinguished[1] those cases involving the sufficiency of an indictment "when the notice given in the indictment fairly but imperfectly apprises the accused of an offense for which he is to be tried, " from " the very different situation present in [a case such as] Watson v. Jago [558 F.2d 330 (6th Cir. 1977, where the Sixth Circuit stated that "[t]here is no question that the Fourteenth Amendment encompasses the right to fair notice of criminal charges.")], when a constitutional violation occurs because an accused is not given proper notice in the indictment of an offense for which he is to be tried." Blake, 563 F.2d at 250. See

[1] But, yet the Sixth Circuit Court still refused to apply the correct standards to Petitioner's case.

also Gautt v. Lewis, 489 F.3d 993, 1006-1007 (9th Cir. 2007), cert. denied, 552 U.S. 1245, 128 S. Ct. 1477 (2008).

In addition, Petitioner bases his argument on a right to fair notice and a fair trial, which are rights of every citizen of the United States. Petitioner's issue would certainly be cognizable under his claim to the violation of these rights. Petitioner's argument also hinges on Oh. Const. Art. I, § 10, where the Ohio Constitution requires "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof..." Surely the denial of a proper indictment would constitute a violation under 28 USCS § 2254 (d), where the deprivation "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."

Under Ohio law, felony murder requires as a predicate offense of a felony of the first or second degree that is not voluntary or involuntary manslaughter. Although Ohio courts have held that an indictment that "tracks the language of the statute is not defective," (State v. Buehner, 110 Ohio St.3d 403) Petitioner asserts that- while this may be true for most statutes in Ohio—it is inadequate for statutes requiring a specific predicate offense to be void of that offense. Petitioner contends that in order for the State of Ohio to have the fair notice in their doctrine it has to first appear in some form of the constitution, therefore, any violation of this doctrine must result in the denial of his constitutional rights. Petitioner's indictment failed to

make him aware of the charges against him with proper specificity and did not allow him to prepare a proper defense nor gave him a complete understanding of the charges against him.

Petitioner's indictment was devoid of any mention of the required underlying predicate offense; neither by adequate description nor by provision of the number of the statute. Petitioner was indicted for two different felonies that the State of Ohio claimed could have fulfilled the predicate offense for the murder charge at issue, but was acquitted of charge of improperly discharging firearm at or into habitation, Ohio Revised Code 2923.161, a felony of the second degree. Petitioner was also acquitted of Count Six (6) of his indictment, which was the second count of felonious assault, R.C. 2903.11 (A), a felony of the second degree. This left him with no possible underlying predicate offense to one of the counts of felony murder, which will be addressed below.

Petitioner also add that the Northern District Court of Appeals did not provide a merit review on the issue as deemed cognizable in the argument presented above.

PETITONER HAS SHOWN THAT HIS GROUNDS WERE NOT PROCEDURALLY BARRED AND/OR DEFAULTED

Procedural default inferred for Ground Two – Petitioner contends that the Northern District and the Sixth Circuit[2] inferred that his sufficiency of the evidence argument may be procedurally defaulted. (Doc#: 31, PageID#: 2015, F.N. 4) The Federal Courts clearly ignored the clear and convincing evidence that he had presented showing he exercised due diligence with regards to following the State rules and procedures to get his legal work and all necessarily documents timely filed to all courts including the Ohio Supreme Court.

[2] By their refusal to grant a Certificate of Appealability.

Petitioner explained that he was housed in a level 4B institution (maximum security) on a 23 hour locked down at the Southern Ohio Correctional Facility (SOCF), in Lucasville, Ohio, where he was denied access to the courts due to the State's interference[3].

It is clear when this Honorable Court has held that the state must ensure inmates the "capability" to pursue "actionable," civil rights or post conviction claims; this goal is usually accomplished through some combination of legal assistance and access to legal materials and/or a law library. See Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174 (1996) (To plead a violation of this right, a plaintiff must allege that the state's interference led to an "actual injury" by "frustrate[ing]," "imped[ing]," or "hinder[ing] his efforts to pursue a legal claim."); Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491 (1977). Furthermore, to state a constitutional claim that he has been denied access to the courts, an inmate must demonstrate that lack of state assistance prevented him from filing an actionable claim or caused an otherwise actionable claim to be rejected. Casey, 116 S. Ct. at 2182.

"The 'cause' standard requires a petitioner to show that some objective factor external to the defense impeded...efforts to comply with the state's procedural rule. Examples of external include the discovery of new evidence, a change in the, or interference by state officials." Murray v. Carrier, 477 U.S. 478, 488. Further, "[i]nterference by officials which makes compliance with a state procedural rule impracticable can rise to the level of cause for failure to act." Beavers v Saffle, 216 F.3d 918, 2000 U.S. App. LEXIS 14048.

Petitioner has shown that he timely provided legal filing to the institutional representative and that representative did not return the documents to him in a time or

[3] Ohio penal institutions are agents for the state.

manner that would allow him to file by the Ohio Supreme Court's legal deadline. This was a denial of access to the courts by SOCF officials that was beyond Petitioner's control and which prevented him from being compliant with Ohio's procedural rules. The State cannot cause the procedural default and then penalize the Petitioner for their action/inaction.

The Federal Court's clearly overlooked this principle supported by the evidence. Prejudice to Petitioner is obvious, as he was denied jurisdictional review of his issues to the Ohio Supreme Court and was accounted a procedural default that prevented the review of his Grounds on the merits on his habeas corpus petition. Therefore, Petitioner has shown that he was prejudice by the state interference and states that the reviewing appeals court erred in their determinations.

Petitioner now contends that Grounds Five, Six, and Seven of his petition was not procedurally defaulted because these Grounds were presented in an Application of Reopening Petitioner's Appeal pursuant to Ohio App. R. 26 (B) following his de novo resentencing in the State trial courts. The State courts claimed procedural default on the grounds of res judicata, and did not adjudicate his Grounds on their merit[s]., nor did the Federal Court's even though a district court has jurisdiction to determine whether res judicata was properly applied. Krumpelman v. Heckler, 767 F.2d 586, 588 (9th Cir. 1985) "Habeas corpus actions are exempt from res judicata because conventional notions of finality of litigation have no place where life or liberty is at stake***." Sanders v. United States (1963), 373 U.S. 1, 8.

However, due to Petitioner's resentencing being de novo, he asserts that he was entitled to the right[s] of the direct appeal of the sentencing, which would include a claim of

ineffective assistance of appellate counsel[4]. This is the only mechanism with which to make this claim to the Ohio Appellate Courts is via App.R. 26(B). With the Sixth Circuit's decision in King v. Morgan, 807 F.3d 154, the court recognized that "res judicata generally does not apply to habeas challenges even when a petitioner raises the same claim after resentencing as he had in an earlier petition, see Felker, 518 U.S. at 664; McCleskey, 499 U.S. at 480-81." Thus, federal courts readily recognize this principle. With regard to a resentencing and the procedures that follow, the Sixth Circuit also held that "a court's choice to reenter a different judgment does not. Petitioner was also ruled to have filed his appeal properly and was remanded to the Northern District Court of Appeals for proceedings related to his petition. One of the most telling findings in King, supra regarding raising different claims on the same convictions following a de novo resentencing is as follows:

> "Making that task more complicated is the reality that leaves a petitioner unable to raise a now-more-critical challenge free from the "second or successive" limits. King, supra many habeas petitioners are not represented (and, even when represented, are not always well represented). Figuring out whether a claim relates to a conviction, sentence, or both may be no easy feat for the litigants, to say nothing of the courts, clerk's offices, and staff attorneys that must review these filings. If habeas petitions made up a small part of each court's docket, any such complication could be overlooked. But that is hardly the world in which we live.
>
> A contrary approach also would shortchange some prisoners whose incentives to challenge a conviction may differ after being resentenced." id. At 158. [Emphasis added]

Petitioner provided the Court with the argument that the Sixth Circuit Court of Appeal's decision, as noted above, justified his second appeal – which would be a direct appeal – and would, therefore, justify the filing of his Application of Reopening pursuant to App.R. 26(B), arguing the "decision and remand 'negated the State, Respondent, Magistrate, and the Sixth

[4] Which is a 26(B).

Circuit claims that Petitioner's grounds were barred from review by the State courts, as he was entitled to a successive appeal on the issues following a resentencing.' (Doc. 30, at 7). But he presents no authority for the proposition that an appellate court's remand of a federal habeas case to the district court for consideration of certain claims somehow cures a Petitioner's procedural default of the remanded claims, and the undersigned can find none." Doc. 31, PageID# 2018.

Petitioner has addressed the issue that his *de novo* resentencing reset his appellate rights related to his case by the ruling in King, supra., making the procedural bar imposed by the state improper. If this is not the case, and the Northern District Court of Appeals, Magistrate Judge could find no case law regarding this issue, then the bar should not be imposed, but the case should be viewed as one of the first impression.

Black's law Dictionary (9th ed. 2009) defines a "case of first impression" as one "that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction." See also S. Lindquist, F. Cross, Empirically Testing Dworkins Chain Novel Theory: Studying the Path of Precedent, 80 N.Y.U.L.Rev. 1156, 1179 (October 2005)(A case of first impression is, by definition, one that presents a novel legal question and is not ruled by prior precedents.")

Petitioner would ask this Court to review the case and make a ruling on the issue as a first impression regarding the proper application and upholding of a state's procedural bar related to *res judicata* when ruling of the Sixth Circuit clearly stated that Petitioner was entitled to appeal the issues ---- where he was entitled to counsel on a direct appeal, making the filing of

an App.R. 26(B) Application proper by Rule and, therefore, a substantive right ---- following his *de novo* resentencing and his direct appeal related to this sentence.

The Northern District Judge applied State v. Fischer, 128 Ohio St.3d 92 (2010), to make his finding that the state court properly applied a *res judicata* bar. This decision should be considered *ex post facto* with regard to Petitioner, as his original offenses and sentencing took place in 2003 and 2004, respectively. The state court made this finding by denying Petitioner's issues related to his conviction, stating that he was only entitled to argue his sentence. The Sixth Circuit, in *King*, addressed this issue:

Magwood v. Patterson, 561 U.S. 320, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010), fills in some of the gap by focusing on whether the inmate challenges an intervening judgment. In this Court's words: "[W]here. . . there is a new judgment intervening between the two habeas petitions, . . . an application challenging the resulting new judgment is not 'second or successive' at all." Id. at 341-42(quotation omitted). Because petitions seek the "invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement," *Magwood* tells us, no part of the petition counts as second or successive as long as it is the first to challenge the new judgment. Id. at 332. That means that, if an initial federal habeas petition (or state—court collateral challenge) leads to an amended judgment, the first petition that follows the entry of the new judgment is not second or successive, even if it raises claims that the inmate could have raised in the first petition. Id. at 328-29, 331.(Emphasis added)

The same principle should apply here. The Ohio courts never ruled on the merits of the issues in his Application for Reopening under App.R. 26 (B), comprising Grounds Five, Six, & Seven in his current habeas petition. When a state court fails to reach the merits due to the improper application of a procedural bar, the State is afford no deference and the merits should be ruled on *de novo. Bies v. Sheldon,* 775 F.3d 386, 395 (6th Cir. 2014) The Northern District Judge claimed the state court did not rule on the merits, as the state court claimed a res *judicata bar.* Petitioner ask this Honorable Court to make a determination as to whether the

bar was properly applied, using Ohio's *res judicata* standard. *Doe v. Jackson Local Schs. Sch. Dist.*, 422 Fed. Appx. 497 (6th Cir. 2011), and as well this Court's decision in *Magwood v. Patterson, supra,* also adding the Sixth Circuit ruling in King v Morgan supra.

In the state court ruling on the issue, the reference to State v. *Fischer, supra,* was inappropriate, as the *Fischer case* was based on a sentence that was considered "voidable" and not "void". Petitioner's adjudication was a *de novo* resentencing of a sentence deemed void ---- - not voidable ----- where the trial court specifically found the following at sentencing:

"Given the state of the law, Mr. Griffin [court-appointed attorney for the defense], we're back to square one. This is a sentence given after a jury trial."

I'm going to advise [Petitioner] of his [appellate] rights under Criminal Rule 32.

Sir, you have the right to appeal my decision in this case and to appeal the conviction..." (Resentencing transcripts, pgs. A – 10 & A – 11, emphasis added, federal headings for evidentiary labeling were overwritten by Respondents of the Clerk and are unreadable.)

Under Ohio law, "[a] 'judgment of conviction' is defined as including both a plea or verdict of guilty and the imposition of sentence." (Emphasis added.) State v. Dapice (1989), 57 Ohio App. 3d 99, 102, 566 N.E.2d 1261; citing State v. Henderson (1979), 58 Ohio St. 2d 171, 179, 389 N.E.2d 494.

To further prove Petitioner's claim that his sentence was void, the Ohio Ninth District Court of Appeals made the following ruling regarding his resentencing in *State v. King,* C.A. no. 10CA009755, cited as 2010-Ohio-4400, at ¶51:

> "We have recently explained that Pearce is inapplicable to a case in which an appellant's resentencing occurred as a result of a void judgment entry. Honaker, supra. 'Simply put, it is as if [King's] sentence handed down in [2004], never existed. Logically speaking,

> [King's] sentence from [December 17, 2009], cannot, therefore, constitute an increase or a decrease from a nullity.' Id. at ¶19" [bracketed wording contained in the original ruling.]

The Respondent and/or the State of Ohio cannot have it both ways and still provide Petitioner with a fair and meaningful opportunity to defend him self. They cannot, on one hand, claim the conviction was a legal nullity that entitled the trial court to resentence him to consecutive sentences after first sentencing him concurrently; and then claim the conviction was not a legal nullity and forbid him a direct appeal on the issues. If the State of Ohio is permitted thus, the Petitioner is left without remedy to oppose his convictions, which violates fundamental fairness required under the U.S. Constitution.

Petitioner also provides the impropriety of applying a *res judicata* bar. Ohio's highest court denied an absolute barring of the merits being heard by *res judicata* on issues submitted to the court ---- even in post-appeal motions-----by calling for justice over procedural bars:

"Thus, in a case where the time for direct appeal had elapsed, *Murnahan* sought to balance a just application of *res judicata* against the merits of the defendant's claim of ineffective of appellate counsel. *Murnahan* thus envinced a preference against purely procedural dismissals." *State v. Davis,* 119 Ohio St.3d 422.

Since the underlying rationale for the doctrine of res judicata is fairness, it should not be rigidly applied. *Brown v. City of Dayton,* 1998 Ohio App. LEXIS 5879, citing Shimman v. Frank (C.A. 6, 1980), 625 F.2d 80, 89. While the doctrine is a necessary judicial development involving considerations of finality and multiplicity, it should not be permitted to encroach on fundamental and imperative rights. *Whitehead v. General Tel. Co.* (1969), 20 Ohio St.2d 108,

116, or to contravene and overriding public policy, or result in a manifest injustice. A "manifest injustice" has been defined as a clear or openly unjust act. *State ex rel. Schneider v. Kreiner,* 83 Ohio St.3d 203, 208, 1998 Ohio 271. There can be no doubt that to consider Petitioner's resentencing based on a supposition of "voidable" sentences, injustice for assessing the improper application of Ohio's *res judicata* bar. *Doe,* supra.

Res judicata does not bar issues presented in a subsequent proceeding upon a proper showing of changed circumstances. See *Set Products, Inc. v. Bainbridge Twp. Bd. Of Zoning Appeals (*1987), 31 Ohio St.3d 260. Certainly, a *de novo* resentencing and the ruling by the Sixth Circuit Court of Appeals would constitute a change of circumstances. Petitioner's understanding at the time of his first sentencing-----having complete ignorance of Ohio law----was that his concurrent sentencing for the murder charges were fair for the crime for which he was convicted, never agreeing with the verdicts. He also prevailed on the issue of his felonious assault charge was improperly ran consecutive with the murder charge. Even though it is now concurrent to his other sentences[5] After having been subject to layman experience with the law, he now knows that his convictions were improper and his sentencing unfair. As he had discovered that his convictions were improper, he sought to rectify the same through the proper venue, appeal from the conviction----as stated by both the trial and appellate reviewing courts-----following a de novo resentencing and the courts' concession that his first conviction was a "nullity." King, 2010 Ohio 440 supra.

[5] He still maintains that it is an allied offense for which he should not have a conviction.

With further regard to the application of Fischer, the appellate court ruled that Petitioner was not entitled to an appeal following his resentencing, which made him ineligible to file the appeal of his issues. The trial court explained his appellate rights; Petitioner was given counsel under the precepts of the United States Constitution; Petitioner is afforded the right to effective assistance of counsel under the same founding document; the only way to address the ineffective assistance of counsel during a direct appeal as of right under Ohio law is to file an Application for Reopening pursuant to App.R. 26(B); to deny Petitioner his right to file his Application under App.R. 26(B) is to deprive him of a remedy for justice. Thus, Petitioner objects to the Northern District Courts of Appeals denial of his habeas petition and the Sixth Circuit refusal to grant a certificate of appealability on these Grounds. Ground Five – In F.N. 5 of the Northern District Court of Appeal, addressed the merits of Petitioner's Grounds. For Ground Five, he claims that Petitioner would not be entitled to relief on the issue of allied offenses due to his sentences for allied offenses being run concurrently. A second sentence----- whether ran concurrent or not-----prejudices a defendant under the Double Jeopardy Clause of the U.S. Constitution.

It has previously been established that a conviction consists of both a verdict of guilt and a sentence. Dapice, supra. The Ohio Supreme Court has held:

"R.C. 2941.25 (A) clearly provides that there may be only one conviction for allied offenses of similar import. Because a defendant may be convicted of only one offenses for such conduct, the defendant may be sentenced for only one offense. This court has previously said that allied offenses of similar import are to be merged at sentencing. See State v. Brown, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, P 43; State v. McGuire (1997), 80 Ohio St. 3d 390, 399, 1997 Ohio 335, 686 N.E.2d 1112. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to

multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary. Therefore, we conclude that when a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court." State v. Underwood, 124 Ohio St. 3d 365 at ¶26.

Prejudice is also present when a second conviction/sentence is present for an allied offense, even when ran concurrent. State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, explains that trial courts have a mandatory duty to merge allied offenses, that imposition of concurrent sentences for allied offenses is not authorized by law, and that an offender is prejudiced by having more convictions than authorized by statute. The Ohio Supreme Court has also unequivocally ruled:

"A court only has authority to impose a sentence that conforms to law, and R.C. 2941.25 prohibits the imposition of multiple sentences for allied offenses of similar import. Thus, when a sentencing court concludes that an offender has been found guilty of two or more offenses that are allied offenses of similar import, in conformity with State v. Whitfield, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, it should permit the state to select the allied offense to proceed on for purposes of imposing sentence and it should impose sentence for only that offense. Accordingly, imposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void. Therefore, res judicata does not preclude a court from correcting those sentences after a direct appeal...the court imposed concurrent sentences on each of the three offenses instead of sentencing on only one offense. However, the imposition of concurrent sentences is not the equivalent of merging allied offenses, State v. Damron, 129 Ohio St.3d 86, 2011-Ohio-2268, 950 N.E.2d 512, ¶ 17..." State v. Williams, 2016-Ohio-7658

Therefore, concurrent sentences do not correct the appellate counsel's error and result in cumulative punishments----even when ran concurrently----and Petitioner objects to the improper application of a legal standard.

Ground Six & Seven – Petitioner argued that appellate counsel was ineffective for failing to address prosecutorial misconduct during closing arguments. The Northern District Court then lists some of the statements constituting the misconduct in his Recommendation in F.N. 5, providing a minimal summary of Petitioner's argument presented in his Traverse. The Northern District Court's decision is based on the interpretation of the evidence adduced at trail, justifying the prosecutor's improper and prejudicial remarks that contributed to the Petitioner's convictions. Petitioner objected to the failure to address the issue of the arguments presented.

The Northern District Court of Appeals did not address the Petitioner's claim of prejudice due to the prosecutor's use of the "Golden Rule" argument. At no time did testimony support the prosecutor's use of the "Golden Rule" argument, where he put the jury in the position of looking at Petitioner from the point of view of their own circumstances and possible danger from Petitioner. The prosecutor inflamed the jury by telling them that Petitioner was "going to come to us here in Elyria." Doc#: 30, PageID#: 1986. This was improper, prejudicial and walled Petitioner off from the jury while creating a cohesive bond between the prosecutor and the jurors, his "neighbors," and appealed to the jury to "abandon their position of impartiality" by referring to their being a possible victim of the Petitioner if he was released. In re Johnson, 2011 Ohio 2466 at ¶18. His comments were made with the singular intention of inflaming and impassioning the jury. As the Petitioner's credibility was at issue under a self defense claim-----he having to sustain a burden of proof----the comments were prejudicial and prevented him from receiving a fair trial.

While there is case law that supports use of the word "lie" and "liar" to a Petitioner's testimony based on the evidence in certain circumstances---- which Petitioner asserts in unsupported here----the Northern District and Six Circuit uses the example of Petitioner's admission of being a drug dealer to justify the prosecutor's remarks labeling him a "liar". However, Petitioner never denied selling drugs, making the comment unjustifiable in that regard. There was no excuse for using the words "garbage" and "garbage lies" in reference to the Petitioner and his defense of self-defense. Additionally, the prosecutor referred to Petitioner's testimony as a "con." Doc# 30, Page ID# 1988. This would appear to require evidence outside of the record, as he was never accused of being a "con man" related to any of his charges. This, too, is improper.

The Northern District Court's decision on the issue of ineffective assistance of counsel and the relation to prosecutorial misconduct to be dismissed due to the strength of the evidence contradicting Petitioner's testimony," Id., PageID #2021, f.N.5. was inaccurate because the strength of the evidence against Petitioner should not nor cannot have an effect on the determination of ineffective assistance of counsel regarding the prosecutor's misconduct.

"It strikes us that courts have been too quick to label prosecutorial behavior misconduct, justifying an affirmance of the conviction on the ground that the evidence of guilt was overwhelming. See [State v. Maurer [1984], 15 Ohio St.3d 239 and State v. DePew (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, certiorari denied (1989), 489 U.S. 1042, 109 S. Ct 1099] the incongruity of this rationale is that the better the state's case, the more leeway is given to the prosecutor to overstep. As the state court's asked almost a decade ago, if the argument is harmless because the evidence of guilt is overwhelming, why must the prosecutor overstep in final argument? State v. Arnold (Mar. 17, 1983), Muskingum App. No. 82-CA-13, unreported, 1983 WL 5076. It is in the close case that the conduct is scrutinized more closely. Thus a

prosecutor [*8] jeopardizes his case by misconduct in direct proportion to its prosecutive merit. We believe the consequences of misconduct should be resolved essentially without regard to the merit of the evidence. The quality and quantity of the evidence is almost always subject to an independent assignment of error and judicial review." State v. Draughn (1992), 76 Ohio App. 3d 664,671-72, 602 N.E.2d 790, 794

The Petitioner put forth the affirmative defense of self defense. In doing so, "the burden of going forward with the evidence of an affirmative defense, and the burden of proof by a preponderance of the evidence, for an affirmative defense, is upon the accused in according to the State." Martin v. Ohio, 480 U.S. 228. Questions that make factual assertions of unproven information rely on the jury to balance the credibility of the prosecutor, who in all likelihood was not present when asserted facts were taking place, with that of the defendant. State v. Daugherty (1987), 41 Ohio App. 3d 91, 534 N.E.2d 888. To unfairly and improperly undermine Petitioner's credibility, when the acceptance of his defense by the trier of fact was basically a contest of credibility, was prejudicial, as the prosecution----as he represents the State (i.e., the "good guys") and has not been charged with a crime----is always given more credibility from the jury than an accused. The prosecutor's misconduct tainted the jury on the issue of Petitioner's credibility, and counsel's failure to address constitutes ineffective assistance of counsel.

The repeated pattern of intentionally misleading the jury and unfairly prejudiced Petitioner's defense and contributed to his wrongful convictions, surely a denial of Due Process. Hodge v. Hurley, 425 F.3d 368; see also Darden v. Wainwright, 477 U.S. 168, 181. The Petitioner "suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." Alexander v. Phillips, 2006 U.S. Dist. Lexis 8926, at ¶40-41

Therefore, due to the Northern District Court improper evaluation of the evidence and the lack of application of the proper legal standard, Petitioner feels that the Northern District Court of Appeals was wrong in their judgment that Grounds Six & Seven as being without merit and thus request this Honorable Court to overturn the lower court's ruling.

PETITIONER'S CLAIM OF MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE DID NOT SUPPORT HIS CONVICTIONS.

Petitioner's second ground for relief should not have been dismissed for the reasons set forth below.

The evidence adduced at trial provides sufficiency under the well-known Jackson and Winship standards. There Standards encompass both substance and persuasiveness of the evidence supporting the charges beyond a reasonable doubt. Petitioner has shown that the evidence relied upon to support his convictions came from the relatives and friends of the victims. The comments made regarding the witnesses were made to preface the argument of sufficiency.

The issue is not purely one of witness credibility, but that the witnesses' testimonies were not supported by the evidence. There was a witness, a twelve year old girl, Jamie Williams, who was not related to or friends with any party of the altercation, whose testimony should have been relied upon more so due to lack of bias. She testified that the victim, Corlew, was in possession of a firearm at the scene. It is not unheard of for other people at a scene to grab a weapon, either to cover up the crime of a friend or their own involvement in the affray.

The Court's claims that Petitioner did not argue the facts as presented at trial. Direct evidence is that type of evidence which seeks to prove the guilt of a defendant directly or immediately, but circumstantial or indirect evidence does not do so, but it seeks to prove the guilt of a defendant by proof of other facts and circumstances, sustaining by their consistency the theory of guilt. In order to convict upon circumstantial evidence, the proven facts and circumstances must not only be consistent with the theory of guilt, but must exclude beyond a reasonable doubt any other theory except that of the guilt of the accused. United States v. Bedgood, 1954 U.S. Dist. LEXIS 4690.

Petitioner put forth argument directly related to the testimony and evidence provided at trial. He did not try nor created a new story, but showed by clear and convincing evidence from the record that the theory put forth by the State was not supported by the evidence. The trial of bullet casings show Petitioner was in a clear pattern of retreat from the affray. They led away from the building, with one directly in front of the door of the dwelling and the rest in a line leading away from the scene.

The Coroner's report showed the pattern of wounds to the victim show a distinct pattern of traveling up the body, starting at the ankle, the next one to the thigh, and two to the chest in a downward trajectory. This is consistent with immediately firing a weapon after withdrawing it from a waistband in close range while retreating. The downward trajectory of the bullets through the chest show the victim was bent over at the time the bullets struck him, which is consistent with being struck in the lower extremity first. This is not reconstruction, but proper evaluation of the evidence as presented.

Additionally, the prosecutor labeled the Petitioner a "career criminal." Doc#31, PageID#2024. This statement is untrue, prejudicial, and would require evidence outside of the record to make it true. Petitioner was not convicted of being a conman. Petitioner has only one prior conviction as an adult, serving less than three years for a conviction in Nebraska. This would hardly constitute a "career" of criminal activity. Additionally, Petitioner committed the offense in Nebraska at the age of seventeen, a juvenile. The prosecutor in Ohio also brought up Petitioner's Ohio juvenile record, which also used against him at sentencing. The Ohio Supreme Court has determined in State v. Hand, 2016-Ohio-5504 that the use of a juvenile record at an adult proceeding in not just improper, but prejudicial and unconstitutional. Id.,citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Alleyne v. United States, U.S. , 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). This is extremely important, as Petitioner's credibility was at issue due to his claim of self defense. Petitioner would point out that Ohio is the only state to shift the burden of proof to the defendant for this defense. To improperly undermine his credibility was highly prejudicial. The Magistrate's Recommendations, then, are surely objectionable.

As noted above, the jury found Petitioner not guilty of the second felonious assault charge and not guilty of shooting into a habitation. The jury left no predicate felony upon which a second charge of murder under R.C. 2903.02(B) could be charged. The pertinent part of the statute reads, " No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." The conviction for felony murder is dependent on the predicate offense, which did not

exist due to the jury's acquittal of the same. It would be a manifest injustice to maintain Petitioner's conviction for the second count of felony murder when the underlying predicate offense does not exist.

With regard to the felony murder, a 15 years to life sentence, the Ohio statute for involuntary manslaughter, R.C. 2903.04, a 3 – 11 year flat term, has identical criteria. The statute reads, "(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony." When two statutes share the same language, but have different punishments, Petitioner is entitled to be sentenced for the lesser offense. (State v. Wilson, 58 Ohio St. 2d 52, "Therefore, if the statutes prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause.")

CONCLUSION

As the evidence was misrepresented, the Petitioner was improperly labeled by the prosecution, the underlying predicate offense was non-existing for the second felony murder charge, and Petitioner's juvenile record was improperly related to the jury and used to gain his conviction, the jury made the finding of sufficient evidence under the thick veil of prejudice draped over them by the prosecution. THEREFORE, Petitioner respectfully request that this Honorable Court to review his entire proceedings and overturn the decisions of the State and Federal Courts of Appeals.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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