

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

STEVEN D. BURKE — PETITIONER  
(Your Name)

vs.

WARDEN, North Central — RESPONDENT(S)  
CORRECTIONAL INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

STEVEN D. BURKE #712-688  
(Your Name)

N.C.C.I. P.O. Box 1812  
(Address)

Marion, OH 43301  
(City, State, Zip Code)

N/A  
(Phone Number)

**QUESTION(S) PRESENTED**

DOES CHANGING THE STANDARD OF PROOF IN  
THE STATE COURT DENY A CRIMINAL DEFENDANT'S  
DUE PROCESS AND EQUAL PROTECTION OF LAW?

## **LIST OF PARTIES**

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

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

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Tibbs v Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652	7
Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 158	9
Powell v Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158	9
STATUTES AND RULES	
Ohio Revised Code 2901.05	6

## **TABLE OF CONTENTS**

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	10

## **INDEX TO APPENDICES**

APPENDIX A:	United States Court of Appeals Opinion
APPENDIX B:	United States District Court Opinion
APPENDIX C:	Tenth District Court of Appeals Opinion
APPENDIX D:	Ohio Supreme Court Opinion

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

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

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
☒ is unpublished.

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

[ ] reported at 2017 WL 6000613; 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[ ] is unpublished.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 C to the petition and is

[ ] reported at 2016-OHIO-822; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the TENTH DISTRICT COURT OF APPEALS court appears at Appendix D to the petition and is

[ ] reported at 2016 OHIO LEXIS 1737; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was June 11, 2018.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_A\_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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

The date on which the highest state court decided my case was 6/29/2016.  
A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.  
[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_A\_\_\_\_\_.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

In this case the Constitutional right of Due Process of Law as well as Equal Protection of Law are undermined by the lower courts when it is ruled that all evidence must be construed in favor of the prosecution. this theory clearly undermines the statutory provisions in Ohio under Ohio Revised Code(s) 2901.04 and 2901.05.

## STATEMENT OF CASE

In the case at bar Petitioner was charged by the Franklin County Grand Jury with one count Felonious Assault with Specification, in violation of Ohio Revised Code 2903.11; one count of Having a Weapon While Under Disability, in violation of Ohio Revised Code 2923.13.

On January 23, 2013 the alleged victim in this case was outside working on his girlfriend's car. Two witnesses were also in the area warming up their car. Approximately Petitioner allegedly was the passenger of Mr. Dille was helping Petitioner find an apartment which during the course of the day it took them to several locations and ultimately were to have ended up in the Wedgewood area, the location that is at issue in this case. There were to have been several witnesses to the event that were to have happened that day, but at trial the witnesses had changed their statements, they gave inconsistent accounts to what was to have happened that day.

What is certain there were several shots that were to have been fired at the Wedgewood address injuring Mr. Sizemore at approximately 12:30 pm on January 23, 2013. The only thing that the witnesses did agree upon and were consistent was the fact that the shooter was a black male. The rest of the facts from these witnesses were directly in conflict with each other and defy the laws of human capacity that the Petitioner was the shooter that day.

The responding officer that day stated that he asked the witnesses who was present, if they had saw who shot Mr. Sizemore, and there was no response from anyone at the scene. Mr. Sizemore was called next and confirmed that he was working on his girlfriends car. Mr. Sizemore affirmed that he was approached by police in the hospital and was asked if he could identify the shooter. By his own admission, he stated that he told the police to get out and that he could not

identify the shooter. However, now he is sure that Petitioner was the shooter and that he lied to the police as he did not want to cooperate because “he didn’t feel like it.”

On cross examination Mr. Sizemore confirmed that the detective had came to his hospital room several times urging him to identify the Petitioner as the shooter. On the first visit, Mr. Sizemore stated that he heard the shooter state “what’s up now” right before he got shot, but did not recognize the voice of the shooter. He also affirmed that he could not give any other description of the shooter than he was a black male, as he was turned and started running. Upon the second visit at the hospital, Mr. Sizemore again told the detective that he did not get a good look at the shooter. Upon the next visit the detective brought a picture of only the Petitioner, and upon questioning and pressure he stated that Petitioner was the shooter.

Other witnesses were called and stated specifically that the shooter was a black male, and the he ran eastbound through a grassy area and then got into a vehicle on the passenger and drove away. One witness claimed he was sure the shooter was 5 foot, 8 inches tall, Petitioner is 5 foot, 2 inches tall. The prosecution presented video evidence from a surveillance camera in the area to argue the fact that the camera had caught the Petitioner exiting a vehicle and being the shooter, however, the footage did not show a license plate, nor the shooter.

The next witness the prosecution presented stated that he allegedly saw the Petitioner pull out a gun, get out of the car, heard shots fired, but did not actually who fired the gun. This witness also admitted that he has a prior federal conviction for counterfeit notes, and that he was on heroin the day in question. He also testified that he has history of mental health issues and had been admitted to a hospital three times for a dual diagnosis of mental health and addiction concerns. After this testimony the prosecution rested.

Petitioners counsel then moved for Judgment of Acquittal pursuant to Ohio Criminal Rule 29, but was denied by the trial court. The Petitioner's counsel then called witnesses on Petitioner's behalf. The first witness testified she had a master's degree in public administration, health care management and that she was a doctorate candidate. In her testimony she stated that Petitioner was shot in 2012, and spent four months in the hospital recovering, and that he had gone back to the hospital for further treatment in the trauma center and underwent eight surgeries. She further testified that he had difficulty with his mobility without the aid of a walker or cane during the time of the shooting of Mr. Sizemore.

The defense called two more witnesses. The first witness testified that worked as a home health aid for seven years and had attended to Petitioner's wounds. She further testified that approximately one month prior to the shooting, Petitioner just had a feeding tube taken out of his stomach and had difficulty walking during the time that Mr. Sizemore was shot. The next witness testified that he was a retired correctional officer with 24 years experience, and during the time of Mr. Sizemore's shooting, Petitioner still walked with a limp, used a cane and could not walk very fast. The defense rested. Petitioner was then found guilty of all counts and a ten year prison term was imposed.

#### **REASONS FOR GRANTING PETITION**

In the state of Ohio, Revised Code 2901.04 holds that if there is any ambiguity in the statute or penalty, it must be construed in favor of the accused. This standard is also embodied in Revised Code 2901.05(A) when it clearly states:

"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof of all elements of the offense is upon the prosecution."

Holding this, the law clearly states that when viewing evidence it must be viewed in a light most favorable to the accused, not the prosecution, as the lower courts have previously ruled. By setting this standard, it lowers the burden of proof of proof beyond a reasonable doubt to convict an accused.

In this case the lower courts did not make a true and proper determination of the evidence for sufficiency to up hold the conviction in this case. With respect to sufficiency of the evidence, “sufficiency” is a term of art meaning that legal standard which is to be applied to determine whether a case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law, Black’s Law Dictionary (9<sup>th</sup> Ed. 2009). In essence, sufficiency is a test of adequacy. In addition, a conviction based on insufficient evidence, constitutes a denial of due process, *Tibbs v Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652.

The lower courts in this case did not make a determination on the “sufficiency” of evidence, instead it made a determination based on a lower standard, “manifest of weight” to support the Petitioner’s conviction. Manifest weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one sides theory on the issue rather than the other.

In a trial, the prosecution must present evidence that proves beyond a reasonable doubt that the Petitioner was the person that had in fact caused the alleged injuries or shooting. The evidence in this case is not sufficient to support a conviction. The essential element in this case is “knowingly”. The definition of “knowingly” in the State of Ohio is “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.

It is said that the Petitioner was out looking for an apartment on January 23, 2013 when he came upon Wedgewood Avenue in Columbus. There are several witnesses, but as to this fact there was no agreement. Sometime in the afternoon on January 23, 2013, Mr. Sizemore was hurt from six gun wounds, yet no one at the scene could identify the shooter, except to give a generic description that the shooter was black.

Mr. Sizemore even stated that even though he was looking at the shooter, he did not recognize the shooter. Mr. Sizemore state that the Petitioner had committed these crimes, yet this was stated after three interrogations at the hospital, and Petitioner was identified by a single picture line up presented to him by the detectives. Mr. Sizemore testified that the only description of the shooter he had was that he was wearing a hoodie.

Mr. Sizemore admits that the detectives only showed him one picture at the hospital to identify the alleged shooter and this was a photo of the Petitioner. The next witness was the person who allegedly drove the vehicle owned by Mr. Dille. Mr. Dille stated to the detective that he did not know of any crime that involved his vehicle. In fact he told the detective that he loaned his vehicle to another person in exchange for money to purchase drugs.

There is no weapon entered into evidence by any person to include the lead investigator. In fact, the shell casing recovered at the scene and taken into evidence has no fingerprints or D.N.A. evidence from the Petitioner. The Petitioner presented alibi evidence of a retired corrections officer and that he received a text message from the Petitioner at 11:50 am to pick him up on the day in question. He then testified that he arrived at the Petitioner's home between 12:10 and 12:15 pm. He then stated that he dropped the Petitioner off on Helen Street approximately between 12:25 and 12:30 pm.

With highly questionable witness testimony and evidence from the prosecution, and illusive answers from the victim, Mr. Sizemore, the Petitioner has demonstrated that the State of Ohio did not meet the burden of “proof beyond a reasonable doubt.”

The Sixth and Fourteenth Amendment to the United States Constitution protects and guarantees an accused criminal the right to effective assistance of counsel. In determining whether Petitioner’s counsel was so defective to require a reversal of the conviction the Petitioner must satisfy the two prong analysis in *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

It is a basic due process right and indeed essential to a fair trial that a defendant be afforded the reasonable opportunity to prepare his case, see *Powell v Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158. A criminal defendant in any case has the right to prepare a competent and meaningful defense under the United States Constitution Sixth and Fourteenth Amendment. Counsel is there to ensure that this right is not violated by the court or even by counsels own self.

In this case the Petitioner’s counsels’ performance fell below the normal standard when counsel failed to present doctor’s statements and testimony that establishes that Petitioner is physically incapable of committing the crime due to physical health and eye vision. The failure to secure this evidence and witnesses for trial was detrimental to Petitioner’s defense and right to a fair trial.

Had counsel obtained the presence of the doctor who cared for Petitioner and Petitioner’s medical records, it clearly supports the witnesses testimony presented at trial that Petitioner is physically incapable of committing the crime due to his poor physical health and eye vision.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Date: August 28th, 2018