

18-7089 ORIGINAL

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

Supreme Court, U.S.  
FILED

SEP 22 2018

OFFICE OF THE CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

ESAU MAUDEE MILLINER

— PETITIONER

(Your Name)

vs.

KATHY LITTERAL, Warden

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ESAU M. MILLINER

(Your Name)

EKCC 200 ROAD TO JUSTICE

(Address)

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(City, State, Zip Code)

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was denied the effective assistance of counsel to which he was constitutionally entitled when trial counsel failed to present readily available evidence to support a self-defense theory at trial.

2. Whether Petitioner was denied the effective assistance of counsel to which he was constitutionally guaranteed when trial counsel provided Petitioner with erroneous advice that resulted in him making an unknowing and involuntary waiver of his right to appeal the guilt/innocence phase of his jury trial.

3. Whether Petitioner was denied the effective assistance of counsel to which he was constitutionally guaranteed when trial counsel failed to object to improper argument and offers of proof during closing argument and failing to object to the playing of 911 tapes.

4. Whether Petitioner was denied the effective assistance of counsel guaranteed him under federal law when trial counsel waived his inherent right to personally testify without consulting him.

5. Whether Petitioner was denied the effective assistance of counsel guaranteed him under federal law when trial counsel failed to prepare or present a defense to the charge of first degree burglary, which was the basis of the Commonwealth creating aggravating circumstances and penalties.

6. Whether Petitioner was denied the effective assistance of counsel guaranteed him under federal law when trial counsel argued to the jury that Petitioner was in fact the initial aggressor.

7. Whether the District Court, as well as the Sixth Circuit Court of Appeals acted contrary to, or under an unreasonable application of federal law when it deemed multiple issues as procedurally barred, despite the manifest injustice of failing to entertained key, exculpatory issues and claims.

8. Whether Petitioner was denied the effective assistance of counsel to which he was constitutionally guaranteed when trial counsel admitted guilt without consulting with Petitioner prior to making admissions, to wit: confessions to the charged criminal offenses.

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OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals affirming the decision of the District Court was filed March 5, 2018 and is contained in the appendix hereto. The order of the United States Sixth Circuit Court of Appeals denying Petitioner's petition for rehearing was issued on July 20, 2018, and is attached to the appendix hereto.

The Opinion and ORDER OF THE United States District Court for the Western District of Kentucky was entered on April 10, 2017, and is contained in the appendix hereto.

JURISDICTION

The Court's jurisdiction is pursuant to 28 U.S.C. §1257(a). The United States Court of Appeals for the Sixth Circuit decision sought to be reviewed is dated March 5, 2018. The Sixth Circuit Court of Appeals denied petitioner's petition for rehearing on July 20, 2018.

Pursuant to Rule 10.1(C) of the United States Supreme Court Rules this case presents important questions of Federal law decided by a United States Court of Appeals which have not been settled by this Court and/or contrary to the established precedent of this Court.

### CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the present case are:

#### United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATEMENT OF THE CASE

On January 25, 2006, Petitioner went to the home of his child's mother to give her money for his child as he always visited. No other reason or intention was meant. It was Petitioner's understanding that this was supposed to be the theory for his defense.

Petitioner had visited his child since birth, all while knowing that his child's mother lived with her other children's father. Petitioner, by arrangement with his child's mother, only visited when Coleman was at work./

Once Petitioner arrived and knocked on the door after not seeing Coleman's car outside the residence, Coleman opened the door with his hands to his side. He asked Petitioner what he wanted and Petitioner replied where is the baby? This is when Coleman lunged at Petitioner with two (2) knives as he stood on the outside porch causing Petitioner to fight this life threatening attack by Coleman off by pushing him back down inside the house as he was stabbing Petitioner repeatedly over and over. Petitioner tried to fend him off. Petitioner knocked on the door unarmed, and when Coleman answered Petitioner asked where is the baby and was attacked with deadly force by Coleman on the front porch. Petitioner's DNA outside on the porch wall proves this along with Petitioner's bloody handprint with fingers pointing inside the residence is the key evidence that proves Petitioner is actually innocent of these crimes which he has contested the whole time.

Rather than advocate and argue the foregoing plain facts, trial counsel violated Petitioner's constitutional rights to a fair trial and admitted him to the charges of burglary and murder prejudicing Petitioner and making the entire trial fundamentally unfair as the prosecutor alledged Petitioner forced his way into the residence and killed Coleman. Petitioner's trial counsel effectively joined in and in so doing both ethically and constitutionally

violating his duty to both Petitioner and the State. The underlying record contains nothing whatsoever indicating Petitioner's consent and/or even awareness that trial counsel would ignore what Petitioner believed to be their shared defense and become a second prosecutor.

With Petitioner's trial counsel becoming a second prosecutor by admitting him to crimes for which he maintains he is both actually and factually innocent, the jury had no choice but to find him guilty in the one-sided trial that was highly tainted causing extreme prejudice by the surprise attack and double prosecution blindsiding Petitioner at the most critical part of or stage of his legal need, all with Petitioner's very life and liberty on the line.

Petitioner, Esau Milliner is actually innocent of the criminal charges underlying this matter, and has contested them to the best of his pro se ability at all time since his trial. The judicial proceedings against him were constitutionally improper, and were applied in a manner designed to prejudice him at every stage of prosecution. Milliner was cheated out of his inherent right to a direct appeal of his criminal conviction and asks this Esteemed Court to please seek justice for him.

REASONS FOR GRANTING THE PETITION

This Court is requested to recognize that the Sixth Circuit Court of Appeals acted contrary to, or under an unreasonable application of federal law, when it failed to grant habeas corpus relief for ineffective assistance of counsel, as mandated by Strickland v. Washington, 466 U.S. 668 (1984) due to trial counsel failing to present readily available evidence and/or proofs that Petitioner's blood was found outside the entrance of the Coleman residence - examination of this blood splatter evidence would have conclusively proven that Petitioner was wounded by Coleman stabbing him prior to defending himself against Coleman's ongoing knife attack, with such defense requiring that he move forward, thus preventing Coleman from producing a full swing of either the knife or meat fork he had utilized as weapons upon opening the door of his residence and attacking Petitioner.

The Sixth Circuit elected to concentrate upon the trial court decision not to raise a prior physical altercation between Coleman and Petitioner, implying that this prior altercation justified a self-defense defense - this rational misses the mark. Trial counsel performed deficiently when he acted under the erroneous belief that prior acts of violence are inadmissible under Kentucky Rules of Evidence. The Sixth Circuit Court of Appeals denied meaningful review of this key issue under the guise that "... any argument that Milliner was still afraid of Coleman would have been severely undermined by the uncontroverted fact that Milliner went to Coleman's home after dark, banged on his front door, and pushed his way inside." This negative interpretation of the facts denies a full understanding of the facts of this particular case.

Ignored by the Sixth Circuit is the fact that Coleman was under an active Domestic Violence Order, as well as an Emergency Protective Order issued by the Jefferson County Family Court due to Coleman having recently, again,

beaten the mother of Petitioner's infant child. Coleman was prohibited by law from being within Ms. Brock's immediate area. Petitioner was fully aware of this plain fact, and as Ms. Brock had been beaten on more than one (1) occasion by Coleman, Petitioner was entitled to ensure the safety of both his infant son and the mother of his child.

Certiorari should be granted in this matter in order to cure the manifest injustice which has resulted from Petitioner being sentenced to a life term of imprisonment without the benefit of probation or parole for a minimum of twenty-five (25) years based upon what appears to be a purposeful misinterpretation of key facts underlying this case. Petitioner was denied the effective assistance of counsel as mandated by Strickland, *supra*, Bell v. Cone, 535 U.S. 685, 695 - 698 (2002), and/or Smith v. Robbins, 528 U.S. 259, 287 (2000) to name just a few authorities in place to compel the effective assistance of counsel which Petitioner was denied.

## II.

Key to Petitioner's underlying litigation is the issue of both trial court and trial counsel deceiving him as to the appellate consequences of entering into a sentencing agreement rather than receive the jury recommendation to which Kentucky law entitled him. Petitioner, upon being convicted of both murder and burglary, entered into a sentencing agreement which not only imposed upon him the most severe penalty Kentucky has to offer, short of a death penalty which likely would not be carried out, but also required that he waive any inherent right to appeal, what Petitioner believed to be, the sentence imposed. Upon conviction the penalty imposed did not concern Petitioner because of the paramount trial court errors which occurred, and were compounded by multiple incidents of ineffective assistance of counsel.

Within Petitioner's Objections to the Magistrate's R & R he detailed the colloquy verbatim wherein it was conclusively established that by

Petitioner accepting the recommended sentence of life without for twenty-five years he agreed to waive any appeal concerning the sentencing imposed - this judicial exchange in no manner or fashion gave Petitioner cause to believe that he was in fact waiving his inherent right to appeal the travesty of his guilt/innocence phase of his trial, a trial which contained multiple judicial errors as well as mis-steps by trial counsel, several of which offend any meaningful standard of effective assistance of counsel.

This esteemed Court is requested to review and consider the merits of his Sixth Circuit Court of Appeals litigation, particularly as concerns the waiver of his right to appeal. Petitioner maintains that the colloquy conducted by trial court made plain that Petitioner was agreeing to a recommended sentence, and that as the condition of receiving said recommended sentence Petitioner would not be appealing the sentence imposed - it was the conviction itself - not the recommended sentence which violated the Constitutions of both Kentucky and the United States. Petitioner did not intend to waive any right of appealing his conviction; Petitioner elected simply, on the advice of trial counsel, and based upon the colloquy between trial court and himself, to waive any challenge to the sentence imposed, with no mention whatsoever as to waiver of the right to appeal each and every trial court error which denied him a fair trial.

Without further review of this issue and claim it appears plain that a manifest injustice will ensure the prolonged incarceration of an individual compelled to endure a less than fair trial as guaranteed by Strickland and its progeny. The Sixth Circuit acted contrary to the spirit and intent of Strickland in adopting the Magistrate's position that "... the evidence does not support such a conclusion ..." when alleging to consider Petitioner's claim that "... counsel render[ed] ineffective assistance by allegedly telling Milliner that the waiver of his right to appeal was an automatic consequence

of entering into a sentencing agreement thereby causing him to unknowingly and involuntarily relinquish his right to appeal." (page 31 of R&R). The Court below held that as Petitioner failed to "... show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (citing Strickland, 466 U.S. at 694).

While the foregoing is of course standard Strickland application, in the instant matter the Court denied relief under the guise that Petitioner was required to conclusively prove a different outcome rather than prove simply that he had been denied a constitutionally protected right to appeal an adverse judicial decision. Certiorari should be granted in this matter.

### III.

The Sixth Circuit Court of Appeals acted contrary to and with an unreasonable application of Darden v. Wainwright, 477 U.S. 168, 181 (1986) as well as Berger v. United States, 295 U.S. 78, 88 (1935) in holding that the prosecutor in Petitioner's case was able to create and attribute a very inculpatory statement to Petitioner provided this inculpatory statement contributed to the "theme" of the prosecution. (see page 33 of R&R).

The prosecution in Petitioner's case based its attempt at imposing the death penalty on Petitioner acting under the guise that Petitioner killed Coleman for disrespecting him by laughing at him. The Kentucky Court of Appeals "... noted that the Commonwealth agreed that Milliner had made no such statement" as "how dare you disrespect me". While finding that Petitioner did not at any time make any statement to Coleman concerning respect, all underlying Courts have elected to ignore the prejudicial effects of the State advancing false statements, particularly false statement designed to inflame the passions of the jury. The Sixth Circuit Court of Appeals agreed with the Kentucky Court of Appeals in holding that Petitioner's trial counsel did not provide ineffective assistance of counsel for failing to object to the

introduction of false information which was designed to inflame the jury.

Certiorari should be granted particularly as concerns this issue as it would be manifestly unjust to compel the continued incarceration of one who is actually, as well as factually innocent of the crimes for which he has been convicted. To allow the State to offer its own false testimonial and tainting words when said words have not basis in reality is simply contrary to any notion of fundamental fairness; to say that the presenting of false testimonial from a State actor is permissible simply because it fits a "theme" is contrary to and an unreasonable application of multiple constitutional mandates, including but not limited to the Fifth Amendment guarantee of due process; the Sixth Amendment guarantee of "the Assistance of Counsel for his defence"; all applicable to the States through the Fourteen Amendment.

#### IV.

The remaining issues underlying Petitioner's litigation were held by the lower courts as being procedurally defaulted based upon irregularities resulting from appointed counsel either failing to include said issues and claims in appellate litigation, and/or said issues and claims were brought on the state level via CR 60.02 (protesting the manifest injustice of failing to hear said issues) rather than via RCr 11.42 which in Kentucky tends to address traditional ineffective assistance of counsel issues.

The Sixth Circuit Court of Appeals elected to apply a too narrow interpretation of Martinez v. Ryan, 566 U.S. 1 (2012) wherein this Court expressly held that "... a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceedings, there was no counsel or counsel in that proceeding was ineffective." Id., 566 U.S. at 17. As concerns issues deemed by the lower courts to be procedurally barred, the ineffectiveness of state-provided appellate counsel has been exposed as being the root cause for

said default. The only issue which should have been of significance to the lower courts was whether or not petitioner could, and did, "... demonstrate that the underlying ineffective-assistance-of-trial-counsel is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id., 566 U.S. at 14. (emphasis added).

The Sixth Circuit Court of Appeals ignored the fact that the "procedural default" issues were "substantial", which the United States Supreme Court itself defines as simply having "some merit". Id. These exact issues and claims included: (1) the normally inherent right to testify at trial; (2) the failure to present a defense to the burglary charge; (3) stating in closing argument that Petitioner was the initial aggressor; (4) Baston v. Kentucky violations; (5) a sentencing agreement based upon false/perjured testimony; and (6) the failure to conduct a pretrial investigation in order to meaningfully subject the prosecutions case to adversarial testing as defined and mandated by Strickland v. Washington, supra.

Certiorari should be granted in this matter, whereby this Esteemed Court may avail itself to a lower federal court decision which has "so far departed from the accepted and usual course of judicial proceedings ... [that] an exercise of this Court's supervisory power" is justified, if not required, as each of the forecited issues and/or claims involve fundamental cornerstones upon which judicial integrity in our Nation is built. While it is well settled that "cause" for a procedural default of a federal claim "... does not entitle the prisoner to habeas relief ..." it is equally well settled that "It ["cause"] merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." Martinez v. Ryan, 566 U.S. at 17.

During the course of his state level litigation of the instant action Petitioner, based upon his poverty and lack of judicial training, was compelled

to accept or be burdened with the advocacy of state-provided counsel who for reasons never documented nor explained, abandoned key issues and claims which either individually or collectively would have more readily exposed ineffective assistance of counsel to the point wherein had the errors or omissions not occurred, there existed a reasonable probability of a different outcome, be that outcome straight acquittal or a mitigated sentence.

While the Sixth Circuit Court of Appeals alleged to have review Petitioner's issues and claims de novo, considering the District Court's R & R with fresh eyes where legal conclusions and mixed questions of law held and/or addressed, the "substantial" nature of the constitutional violations underlying Petitioner's issues escaped the lower court's recognition of the fact that the majority of procedurally defaulted issues were the end result of state-provided counsel either abandoning said issues without conferring with Petitioner, or counsel simply abandoning the issue despite the claim being presented containing "some merit" under the Martinez criteria.

As there can be no doubt whatsoever that the constitutionally based issues presented below by Petitioner contained "some merit" at the least, the only remaining question should have been does the Martinez criteria apply "... to Kentucky's legal framework". This question was resolved in Woolbright v. Crews, 791 F.3d 628, 636 (6th Cir. 2015) with the express holding that both Martinez and Trevino v. Thaler, 133 S.Ct. 1911 (2013) do and shall apply to Kentucky.

It is respectfully asserted that by the Sixth Circuit Court of Appeals failing to examine any procedurally defaulted issue for "some merit" Petitioner was additionally denied any and all opportunity of meeting the stringent standard which dictates whether or not Certificate of Appealability (COA) will be granted, whereby issues and claims adversely decided in the District Court may be examined for merit by the Sixth Circuit.

In the matter of Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) this Esteemed Court expressly held that a "... court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims" and inquiry strictly and solely as to whether or not "... the District Court's decision was debatable." Petitioner was denied meaningful consideration at the COA stage under the guise that six (6) of his issues and claims were procedurally defaulted; all without consideration as to whether or not the "cause" for default, if default occurred, was itself "debatable". By the Sixth Circuit simply adopting in full the recommendation of the Magistrate that the forecited issues and claims, vital to due process as they were, could not be considered due to being procedurally defaulted, the Court elected to ignore a fundamental tenet of Coleman v. Thompson, 501 U.S. 722, 732 (1991) holding that "cause" for any procedural default may exist when and where the "... failure to consider the claims will result in a fundamental miscarriage of justice."

Throughout Petitioner's litigation below he has consistently raised the point that he is actually innocent of murder as well as the burglary which was utilized by Kentucky to purportedly justify his trial being death qualified. By and through ineffective assistance of state-provided trial counsel, as well as state-provided appellate counsel, Petitioner has been effectively denied any and all opportunity to present and advance key issues from which at the very minimum ensure that a reasonable probability exists of not only a different outcome, but also that would provide cause to recognize that confidence in the outcome is undermined. The case of Harrington v. Richter, 562 U.S. 86, 112 (2011), in reflecting upon Strickland v. Washington mandates held that confidence in a judicial outcome may be based upon issues and claims which are "substantial", that is to say possess "some merit". Any issue based upon our Constitution possesses merit by its very existance.

The majority of Petitioner's instant and underlying litigation was designed to expose the plain fact that he was denied a fair trial, and that this failure was the end result of ineffective assistance of counsel. While the Kentucky appellate court system was of course allowed to evade or avoid issues held as procedurally defaulted upon "an adequate and independent state ground", when this state ground is itself rooted in and caused by ineffective and/or incompetent state-provided counsel whom it appears existed solely to ensure that vital evidence exposing actual, as well as factual innocence, remained suppressed, it must be recognized that it would be, by definition, a fundamental miscarriage of justice" to allow, if not ensure, that the truth would remain hidden thereby maintaining the false perception that justice has been done in the instant matter.

Because Petitioner has demonstrated both "cause and prejudice" under the spirit and intent of Dretke v. Haley, 541 U.S. 386, 388 (2004) as well as Coleman v. Thompson, supra, it would be manifestly unjust, as well as a miscarriage of justice, to allow Kentucky to maintain a life sentence against a man whose only crime was being too poor to obtain the services of competent trial counsel at the time of his greatest need.

#### CONCLUSION

For all the above reasons, petitioner Esau Milliner respectfully requests this Court to grant his petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals.

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Petitioner, pro se

NOTICE

Please take notice that the foregoing writ of certiorari has been mailed first-class, postage prepaid, to: Clerk, United States Supreme Court, 1 1st Street, NE, Washington, D.C., 20543-0001. This writ should be filed upon receipt and placed before the Court for its timely review and consideration. Done this 18th day of October, 2018, and logged via institutional legal mail.

*Esau Maudee Milliner 206445*

Esau Maudee Milliner, #206445  
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Petitioner, pro se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Writ of Certiorari has been mailed first-class, postage prepaid, to: Office of the Attorney General, Attn: Hon. Todd D. Ferguson, 1024 Capital Center Drive, Ste. 200, Frankfort, Kentucky, 40601-8204. Done this 18th day of October, 2018, and logged out of the institution via legal mail log for immediate delivery to all parties.

*Esau Maudee Milliner*  
Esau Maudee Milliner, Petitioner