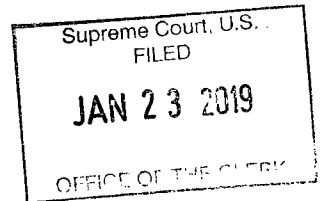


18-7820

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



KELLY WINTON PIERCE — PETITIONER
(Your Name)

VS.

ERIK A. HODDS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KELLY WINTON PIERCE
(Your Name)

NASH CORRECTIONAL INSTITUTION
2869 U.S. HWY 64-A
(Address)

NASHVILLE, NC 27856
(City, State, Zip Code)

(252) 459-4455
(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER A TRIAL JUDGE'S JURY INSTRUCTIONS BECOME UNCONSTITUTIONAL IN VIOLATION OF DUE PROCESS WHEN THE TRIAL JUDGE CHANGES AND EXPANDS THE DEFINITION OF AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.
2. WHETHER A CRIMINAL DEFENDANT IS DENIED OF THE RIGHT TO BE FOUND NOT GUILTY OF THE CRIME CHARGED WHEN THE TRIAL JUDGE'S JURY INSTRUCTIONS CHANGES AND EXPANDS THE DEFINITION OF AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.
3. WHETHER THE GOVERNMENT IS RELIEVED OF ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT WHEN THE TRIAL JUDGE CHANGES AND EXPANDS THE DEFINITION OF AN ESSENTIAL ELEMENT.
4. WHETHER A CRIMINAL DEFENDANT'S CONVICTION IS OBTAINED UPON INSUFFICIENT EVIDENCE WHEN A TRIAL JUDGE CHANGES AND EXPANDS THE DEFINITION OF AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, JUST BECAUSE THE DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER.

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:

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OTHER

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☒ is unpublished.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 _____; 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 _____ 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 _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; 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 DECEMBER 4, 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 _____.
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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV. SEC. 1.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

NORTH CAROLINA GENERAL STATUTE § 14-208.9. (a).

IF A PERSON REQUIRED TO REGISTER CHANGES ADDRESS, THE PERSON SHALL REPORT IN PERSON AND PROVIDE WRITTEN NOTICE OF THE NEW ADDRESS NOT LATER THAN THE THIRD BUSINESS DAY AFTER THE CHANGE TO THE SHERIFF OF THE COUNTY WITH WHOM THE PERSON HAD LAST REGISTERED. IF THE PERSON MOVES TO ANOTHER COUNTY, THE PERSON SHALL ALSO REPORT IN PERSON TO THE SHERIFF OF THE NEW COUNTY AND PROVIDE WRITTEN NOTICE OF THE PERSON'S ADDRESS NOT LATER THAN THE TENTH DAY AFTER THE CHANGE OF ADDRESS.

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of Wilkes County, North Carolina, the Petitioner was convicted of failing to notify the Sheriff's Office of a change of address as a registered sex offender, in violation of N.C. GEN. STAT. 14-208.9(a) (2011), on November 7, 2013. Petitioner pled guilty to attaining habitual felon status and was sentenced to a mandatory minimum term of 87 months, to a maximum of 117 months. *State v. Pierce*, 766 S.E.2d 854, 855 (N.C. Ct. App. 2014). Petitioner's conviction was affirmed on direct appeal. Petitioner filed a state post-conviction motion for relief alleging ineffective assistance of counsel and that his conviction was obtained in violation of due process, due to the trial judge's unconstitutional instructions that relieved the State of its burden of proof by changing and expanding the definition of "moved" "changed residence", making it mean something other than actually "moved" and "changed residence" if the person is required to register as a sex offender, which allowed the jury to consider things other than real evidence and to convict him on insufficient evidence. Petitioner's due process claim was erroneously determined to be procedurally defaulted by the state court, and the U.S. District Court, and the U.S. Court of Appeals, as petitioner shows herein.

REASONS FOR GRANTING THE PETITION

- 1) THE COURT OF APPEAL ERRED IN UPHOLDING THE U.S. DISTRICT COURT'S BASIS AND FINDINGS THAT PETITIONER'S DUE PROCESS CLAIM WAS PROCEDURALLY DEFAULTED.

SEE U.S. COURT OF APPEALS' DECISION AT APPENDIX-A, AND U.S. DISTRICT COURT'S DECISION AT APPENDIX-B.

AT PAGE 15 PARAGRAPH No. 3, OF THE DISTRICT COURT'S ORDER, THE DISTRICT JUDGE CORRECTLY ACKNOWLEDGED THAT THE CLAIM RAISED BY PETITIONER IN HIS STATE POSTCONVICTION MOTION (MAR) IS SUBSTANTIVELY DIFFERENT FROM THE CLAIM RAISED ON PETITIONER'S DIRECT APPEAL. HOWEVER, THE DISTRICT JUDGE LEFT PETITIONER'S CLAIM UNRESOLVED ON ITS MERITS, BY ERRONEOUSLY DECLARING THE CLAIM TO BE PROCEDURALLY DEFAULTED AT PAGE 16, OF ITS ORDER, BASED ON AN AMBIGUOUS STATE COURT ORDER DENYING PETITIONER'S MAR DATED FEBRUARY 1, 2017. THE ACTUAL ORDER, WHICH THE DISTRICT JUDGE DOES NOT QUOTE, STATES AT PAGE 2, PARAGRAPH No. 2, OF THE CONCLUSIONS OF LAW THAT "ALL CLAIMS RAISED BY THIS DEFENDANT... ARE PROCEDURALLY DEFAULTED... BECAUSE THE DEFENDANT WAS IN

A POSITIONAL IN HIS APPEAL TO THE NORTH CAROLINA COURT OF APPEALS TO RAISE THESE CLAIMS AND DID NOT DO SO - OR - THESE ARE THE SAME CLAIMS THAT HAVE BEEN RULED UPON...". SEE STATE TRIAL COURT ORDER AT APPENDIX-C. THE DISTRICT COURT IN ITS ORDER IS CLEARLY ATTEMPTING TO REWRITE THE STATE COURT ORDER AND MAKE A DECISION AFTER THE FACT, FOR THE STATE JUDGE WHO WROTE THE ORDER, TO ELIMINATE THE AMBIGUITY. THE STATE JUDGE DID NOT SPECIFY IN ITS ORDER, WHICH SUBSECTION OF THE STATUTE HE WAS APPLYING TO ANY PARTICULAR CLAIM OF PETITIONER'S MAR. THE STATE COURT ORDER USES THE TERMS "ALL CLAIMS" AND "THESE CLAIMS", WHEN REFERRING TO PETITIONER'S CLAIMS. BECAUSE OF THE AMBIGUITY OF THE STATE COURT'S ORDER, IT IS VERY REASONABLE TO BELIEVE THAT THE STATE COURT ONLY ADDRESS THE TITLE OF PETITIONER'S CLAIM, AND NOT THE SUBSTANCE, AND CONCLUDED IT WAS THE SAME CLAIM RAISED ON DIRECT APPEAL PERTAINING TO INSUFFICIENT EVIDENCE, WHEN THE CLAIM WAS SUBSTANTIVELY

DIFFERENCE. THE U.S. COURT OF APPEALS SHOULD HAVE REVERSED THE DISTRICT JUDGE'S FINDING THAT PETITIONER'S DUE PROCESS CLAIM WAS PROCEDURALLY DEFAULTED, AND REMANDED THE DUE PROCESS CLAIM TO THE DISTRICT COURT TO BE RESOLVED ON ITS MERITS. THE STATE COURT JUDGE'S ORDER IS CLEARLY AMBIGUOUS, AND THE AMBIGUITY SHOULD HAVE BEEN RESOLVED IN PETITIONER'S FAVOR. THE STATE JUDGE DID NOT FOLLOW THE RELEVANT STATUTORY MANDATE. N.C. GEN. STAT. §15A-1420.(C)(7), REQUIRES THE STATE COURT JUDGE TO MAKE "SPECIFIC" FINDINGS OF FACT, AND CONCLUSIONS OF LAW AS TO EACH CLAIM ASSERTING A VIOLATION OF ANY RIGHT PROTECTED BY THE UNITED STATES CONSTITUTION.

SEE ALSO THE DISTRICT COURT'S ORDER REGARDING PETITIONER'S DUE PROCESS CLAIM AT PAGE 13-21, BUT SPECIFICALLY AT PAGE-16, PARAGRAPH 16.2, AND THE FOOTNOTE AT (3), AT THE BOTTOM OF PAGE 16, FOR THE DISTRICT COURT'S REASONING, AND MODIFYING

OF THE STATE COURT JUDGE'S ORDER. EVERYTHING ELSE IN THE DISTRICT COURT JUDGE'S ORDER AFTER THIS IS IRRELEVANT, BECAUSE ITS BASED UPON THE DISTRICT COURT JUDGE'S ERRONEOUS DETERMINATION THAT PETITIONER'S DUE PROCESS CLAIM IS PROCEDURALLY DEFAULTED, WHEN, IN FACT, ITS NOT.

2) THE QUESTIONS PRESENTED WARRANTS THIS COURT'S REVIEW. ALL QUESTIONS PRESENTED ARE SUPPORTED BY THE SAME FACTS.

A. THE QUESTION PRESENTED WHETHER A CRIMINAL DEFENDANT'S CONVICTION IS OBTAINED UPON INSUFFICIENT EVIDENCE WHEN A TRIAL JUDGE CHANGES AND EXPANDS THE DEFINITION OF AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, BECAUSE THE DEFENDANT WAS REQUIRED TO REGISTER AS A SEX OFFENDER. WARRANTS THIS COURT'S REVIEW, BECAUSE IT CAN APPLY TO, AND AFFECT EVERYONE THAT HAS TO REGISTER AS A SEX OFFENDER.

A FEDERAL COURT MAY GRANT THE WRIT BASED ON ERRORS IN STATE JURY INSTRUCTIONS ONLY IN EXTRAORDINARY CIRCUMSTANCES. LEWIS V. JEFFERS, 497 U.S. 714, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). THE QUESTION IN A COLLATERAL PROCEEDING IS 'WHETHER THE AILING INSTRUCTION BY ITSELF SO INFECTED THE ENTIRE TRIAL THAT THE RESULTING CONVICTION VIOLATES DUE PROCESS'. CUPP V. NAUGHTEN, 414 U.S. 141, 147 (1973). NOT MERELY WHETHER THE INSTRUCTION IS UNDESIRABLE, ERRONEOUS, OR EVEN UNIVERSALLY CONDEMNED.' *id.*, AT 146. HENDERSON V. KIBBE, 431 U.S. 145, 154 (1977)

SEE TURY INSTRUCTIONS AT APPENDIX-E, SPECIFICALLY, AT PAGE 305, LINE 18-22, WHERE THE TRIAL COURT BROADENS THE DEFINITION OF THE WORD "MOVED", AN ESSENTIAL ELEMENT OF THE OFFENSE, WHEN IT COMES TO A PERSON WHO HAS TO REGISTER AS A SEX OFFENDER. BY INFORMING THE JURY THAT - "THERE ARE A MULTITUDE OF FACTS THAT THE JURY MIGHT LOOK TO WHEN ANSWERING WHETHER A SEX OFFENDER HAS CHANGED

His OR HER Address." HERE, THESE ADDITIONAL INSTRUCTIONS CHANGES AND EXPANDS THE ESSENTIAL ELEMENT "MOVED", AND IS UNCONSTITUTIONAL IN THAT IT RELIEVES THE STATE OF ITS BURDEN OF PROOF, AND IT ALSO ALLOWS THE JURY TO CONVICT PETITIONER ON THINGS OTHER THAN PROOF OF THIS ESSENTIAL ELEMENT, JUST BECAUSE PETITIONER IS LABELED A SEX OFFENDER. WORDS UNDEFINED IN A STATUTE MUST BE GIVEN THEIR PLAIN AND ORDINARY MEANING. WOODSON V. ROWLAND, 329 N.C. 330 (1991). THE DEFINITION GIVEN IN WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS FOR THE WORD "MOVED", IS CHANGE ONE'S RESIDENCE. THE TRIAL JUDGE DOES NOT HAVE AUTHORITY TO CHANGE OR MODIFY AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE ENACTED BY THE GENERAL ASSEMBLY. SEE PETITIONER'S INDICTMENT AT APPENDIX-F, WHICH CLEARLY AND SPECIFICALLY ALLEGES WHAT MUST BE PROVEN BY EVIDENCE, THAT THE PETITIONER MOVED FROM BURKE COUNTY, NORTH CAROLINA TO WILKES COUNTY NORTH CAROLINA, AND THEREBY CHANGED HIS ADDRESS TO WILKES COUNTY, NORTH CAROLINA, WITHOUT NOTIFYING THE

WILKES COUNTY SHERIFF OF HIS CHANGE OF ADDRESS. THIS UNCONSTITUTIONAL INSTRUCTION ALLOWED THE JURY TO CONVICT PETITIONER OF THE OFFENSE UPON INSUFFICIENT EVIDENCE. THE EVIDENCE PRESENTED AT TRIAL IS SUMMARIZED IN THE DISTRICT COURT'S ORDER AT PAGE 2, OF APPENDIX-B. THE EVIDENCE PRESENTED BY PETITIONER AND THE STATE ONLY SHOWS THAT PETITIONER MADE FREQUENT TRIPS TO VISIT HIS EX-WIFE SOAN, IN WILKES COUNTY, AND THAT HE HAD MOVED AND CHANGE HIS ADDRESS TO WILKES COUNTY. AT TRIAL PETITIONER PRESENTED EVIDENCE THAT HIS EX-WIFE SOAN WAS DISABLED, AND THAT HE WAS HER DAILY SOURCE OF TRANSPORTATION; THAT HE HELP SOAN MOVE TO AN APARTMENT IN WILKESBORO, WHICH IS WILKES COUNTY, NORTH CAROLINA; THAT HE SPENT A LOT OF TIME HELPING SOAN IMPROVE HER APARTMENT; THAT HE SPENT A LOT OF TIME TRAVELING BACK AND FORTH BETWEEN HIS HOME IN MORGANTON, WHICH IS BURKE COUNTY, NORTH CAROLINA, TO SOAN'S APARTMENT IN WILKES COUNTY, NORTH CAROLINA; THAT THERE

WERE TIMES WHEN HE SPENT ONE OR TWO NIGHTS WITHIN A WEEK AT SOAN'S APARTMENT, AND ONE OCCASION WHEN HE SPENT THREE OR FOUR DAYS AT SOAN'S APARTMENT, BECAUSE HIS CAR HAD BROKEN DOWN; THAT THE LOCATION OF ALL HIS PERSONAL BELONGINGS, THE ADDRESS OF ALL HIS BILLS, DRIVER'S LICENSE, REGISTRATION, TAXES, DISABILITY CHECK, AND BANK STATEMENT, WAS WHERE HE LIVED IN BURKE COUNTY, AT 1038 BLUERIDGE VENTURES, MORGANTON, NORTH CAROLINA.

THE STATE'S EVIDENCE WAS TOTALLY INSUFFICIENT. THE STATE FAILED TO PRESENT ANY EVIDENCE THAT THE PETITIONER HAD "MOVED" FROM HIS RESIDENCE IN BURKE COUNTY. WITHOUT THIS ADDITIONAL INSTRUCTION, THE PETITIONER WOULD NOT HAVE BEEN CONVICTED OF THIS OFFENSE. ALSO SHOWN BY THE EVIDENCE PRESENTED AT TRIAL, THE PETITIONER HAS ALWAYS COMPLIED WITH THE TERMS AND CONDITIONS OF HIS REGISTRATION. HERE, PETITIONER COMMITTED NO VIOLATION AT ALL, BUT ENGAGED IN CONDUCT THAT IS PROTECTED BY THE U.S. CONSTITUTION, MAINLY HIS RIGHT TO TRAVEL, AND HIS RIGHT TO ASSOCIATE. THE WORD

"MOVED" should HAVE THE SAME DEFINITIONAL WHEN BEING APPLIED TO PETITIONER, AS IT DOES WHEN BEING APPLIED TO EVERYONE ELSE. IT SHOULD NOT TAKE ON A SECRET MEANING.

RELIEF SOUGHT

WHEREFORE, PETITIONER RESPECTFULLY REQUEST THAT THIS COURT VACATE HIS CONVICTIONS UPON A FINDING THAT HIS CONVICTIONS VIOLATES DUE PROCESS, OR REMAND TO DISTRICT COURT TO BE RESOLVED ON ITS MERITS, OR GRANT SUCH RELIEF AS TO THE COURT MAY SEEM PROPER.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelly W Pierce

Date: JANUARY 22, 2019