

**IN THE
SUPREME COURT OF THE UNITED STATES**

Anthony D. Phillips

Petitioner

v

Supreme Court No.: 18-8132

Noah Nagy, Warden

Respondent

PETITIONER'S REPLY BRIEF

PETITIONER ANTHONY D. PHILLIPS (hereinafter "Petitioner"), in pro se, replies to Respondent's Brief in Opposition to his Petition for Writ of Certiorari pursuant to Supreme Court Rule 15.6 and states the following:

1. On June 3, 2019, Petitioner received a copy of Respondent's Brief in Opposition.

2. References to Questions Presented. Counsel for Respondent unfairly states in its reasons for Denying the Petition that Petitioner's first question does not present a circuit split, but only an intra-circuit dispute (R. Brief in Opposition at pages 17-20). Petitioner refers the Court to his Petition specifically at pages 13-15 which gives a clear split between the federal circuit court of appeals.

3. Respondent's claim of procedural bar. Counsel for Respondent unfairly states several of Petitioner's claims are barred

by procedural default (R. Brief in Opposition at page 20). Counsel has failed to state exactly which claims it believes are procedurally defaulted and which ones are not. Petitioner finds it difficult to decide which ones Counsel is referring to. The Court should take this as a waiver to any default defense involving his constitutional claims. Sup. Ct. R 15.2.

4. Next Counsel for Respondent argues Petitioner's case is a poor vehicle to resolve the first question in the petition (R. Brief in Opposition at pages 17-20). Counsel then ask of the Court to "wait for a case in which the court below reached a holding on the question and that holding made a difference to the outcome of the case." *id.*, at 19. Petitioner contends his case would be a good case to resolve the issue as to whether the application of the plain-error standard to a constitutional claim, constitutes an adjudication on the merits. Any further delay in resolving this issue would continue to leave the lower federal courts in conflict. In addition, Counsel for Respondent attacks the manner in which the Sixth Circuit panel resolved the claim. Yet, counsel argues this Court should allow the Sixth Circuit ruling to stand. Furthermore, all three judges of the Sixth Circuit panel reached different conclusions, depending on what standard should be applied. *Id.* Petitioner asserts this Court should grant certiorari and clearly establish the correct standard for a constitutional claim that was adjudicated by a state court under the plain-error doctrine.

5. Next, Counsel for Respondent argues that all state and

federal courts have concluded Petitioner is not entitled to relief and seeks only error correction (R. Brief in Opposition at pages 20-22). Petitioner objects to this misleading argument by Respondent's counsel. Judge Moore of the Sixth Circuit panel wrote separately to say how Petitioner should be entitled to habeas corpus relief. Pet. App. 1a-29a. Petitioner did argue in his lower federal court proceedings that relief was warranted under 28 U.S.C. §2254 (d)(1) or (d)(2). As this Court has explained, when a federal court needs to decide whether relief is warranted under §2254 (d)(1), it requires federal courts to "focus[] on what a state court knew and did," and measure state court decisions "against this Court's precedents" as of "the time the state court renders its decisions." *Greene v Fisher*, 565 U.S. 34, 38 (2011)(citation omitted). Contrary to Counsel for Respondent's argument, once a state court addresses a constitutional claim, it is a necessary requirement on habeas review to determine whether relief is warranted under §2254 (d). A failure of a federal court to apply §2254 deferential standard of review to the Petition, would result in a federal court ignoring the congressional enacted habeas corpus statutes See *Williams v Taylor*, 529 U.S. 362, 374-379 (2000). Petitioner does recognize the language found in Sup. Ct. R 10, however, it would not prevent this Court from performing its judicial duties under §2254 (d).

6. Furthermore, Petitioner did argue he is entitled to relief under §2254 (d)(2). As noted by Judge Moore of the Sixth Circuit,

the Michigan Courts vastly overstated the State's description of the other evidence linking Petitioner to the crime. In regards to Petitioner's claim the prosecutor introduced false evidence in his case, Counsel for Respondent says the state and lower Federal Courts have all found no factual or legal error. Petitioner contends Judge Moore seems to be the only judge to review his case that understands the "presumption of correctness" applies to facts not only favorable to the state, but also to facts favorable to Petitioner. See Petition for Writ of Certiorari at page 24. Counsel for Respondent has totally failed to present any argument in relation to Petitioner's legal argument under §2254 (d)(2) and obviously waives any legal defense against relief being granted under this provision. Sup. Ct. R 15.2.

7. Next, Counsel for Respondent argues that Petitioner's case is distinguishable from the holding reached in **Miller v Pate, 386 U.S. 1 (1967)** in one crucial respect. The prosecutor in Petitioner's case did not know that the jacket had been seized from Petitioner's home before the murder (R. Brief in Opposition at pages 21-22). Petitioner has argued in his petition that the prosecutor knew or reasonably should have known the jacket was not seized in the post killing search of his home. Petition at pages 16-20.

Petitioner finds guidance for rejecting the Respondent's argument from the holding in **Kyles v Whitley, 514 U.S. 419 (1995)**. In the Kyles case, the court was asked to decide whether the

prosecutor violated due process by failing to disclose evidence favorable to the petitioner Kyles. The State asked for some leeway based upon some of the favorable evidence was not disclosed even to the prosecutor until after the trial. The Kyles court was not unsympathetic to the State's argument, but rejected the argument that the prosecutor did not violate due process where those acting on the government's behalf failed to share material evidence. 514 U.S. at 438-440.

In comparison to the Kyles case, Petitioner's case presents one where the police did provide the prosecutor with the information that nothing was seized during the 1987 search. The Kyles court did impose upon the individual prosecutor a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *Kyles, supra*. Although Petitioner does not present a Brady claim, he finds the Kyles standard should be applied in his case. In Petitioner's case, after prosecutor Hutting received information about a jacket tested by Paula Lytle, he chose to ignore the information stating nothing was seized and impermissibly argued the jacket was worn by Petitioner during the killing. No reasonable steps were taken by prosecutor Hutting to ensure fairness during Petitioner's criminal trial. *Berger, supra; Kyles, supra*. Petitioner asks of the Court to consider one key point. Counsel for Respondent was silent on. What was presented in the postconviction motion that made prosecutor Hutting admit the jacket should not have

been introduced? Quite simply, it was the "same" information that Hutting admitted on the stand to reading prior to Petitioner's trial. The return to search warrant and inter-office memorandum, Pet. App. at 84a-86a. In *Miller*, as here, Petitioner's conviction was obtained in violation of due process and he is entitled to a new trial as the state court decision was contrary to and/or an unreasonable application of clearly established federal law, 28 U.S.C. §2254 (d)(1).

8. Furthermore, the Michigan courts assessment of the facts in relation to this claim was unreasonable in light of the evidence presented during the state court proceedings. 28 U.S.C. §2254 (d)(2). Petitioner contends it would be objectively unreasonable to view the facts supporting this claim and find a state prosecutor did not violate due process after becoming aware no evidence was seized during the 1987 search, only to later argue false evidence before the jury. As stated earlier, Counsel for Respondent waived any legal defense to relief being granted under §2254 (d)(2). Sup. Ct. R 15.2 . Counsel for respondent would have this Court to tolerate a state prosecutor having prior knowledge about key information, simply disregard it, and then impermissibly argue before the jury in direct contradiction what he or she knows as a prosecutor to be true. Would this be consistent with fundamental fairness for a state prosecutor to learn of favorable evidence, then refrain from knowing it and seek to obtain a criminal conviction in contradiction to said known information? This Court's precedents would answer in the negative.

9. Petitioner refers the court back to his petition at page 19 to respond to Respondent's argument the confrontation clause was not violated based upon the use of Paula Lytle's report at trial. (R. Brief in Opposition at page 22).

10. Ineffective assistance of trial counsel. Failure to Investigate. Counsel for Respondent argues that Petitioner's trial counsel was not ineffective for failing to discover the jacket had nothing to do with the murder and moving to exclude it on that basis. (R. Brief in Opposition at pages 22-24). Firstoff, Counsel argues no significant legal error led to the decision below, nor any splits in authority whose resolution might affect this case. Petitioner totally disagree with this argument. As previously stated, Counsel completely ignores the Court's duties to determine whether habeas corpus relief is warranted under §2254 (d). **Williams, supra.** Second, Counsel for Respondent erroneously states that trial counsel's performance was not deficient under **Strickland v Washington, 46 U.S. 668 (1984)** holding. Under AEDPA's habeas corpus statutes and this Court's precedents, the real question is what happened in the state court proceedings, i.e., what happened in the last explained state court ruling. **Ylst v Nunnemaker, 501 U.S. 797 (1991).**

The last explained judgment in the Michigan court to address this claim was the Michigan Court of Appeals. Pet. APP. at 66a-82a. Counsel for Respondent statements that the district court rejected this claim is irrelevant. Under Ylst, there is a presumption that the

highest court followed the same reasoning as the lower court, unless the higher court explained otherwise. Which the Michigan supreme Court did not. Pet. App. at 65a. "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that or rejecting the same claim rest upon the same ground." *Ylst, supra*. Therefore, the Michigan Court of Appeals decision that trial counsel's performance in investigating the seizure of the jacket fell below an objective standard of reasonableness, manifests error under Strickland's deficient prong. *Ylst, supra*.

In regards to Strickland's second prong, whether trial counsel's performance did prejudice the defense, even under §2254 (d)(1) deferential standards, "no fair-minded jurists would disagree with Petitioner's argument that trial counsel should have investigated the jacket and moved for its exclusion." *Harrington v Richter*, 562 U.S 86, 102 (2011).

Trial counsel's performance did prejudice Petitioner's defense under Strickland standards and it is reasonably likely the jacket affected the judgment of the jury and he is entitled to habeas corpus relief under this claim. Petitioner refers the Court to his petition for further support as to why he is entitled to habeas relief and why certiorari should be granted. Petition at pages 20-26.

11. Finally, Counsel for Respondent misconstrues Petitioner's third argument. As stated by Counsel for Respondent (R. Brief in Opposition at pages 25-27), the Michigan and federal courts

considered the evidence and determined it would not have changed the outcome of this case.

Serious concerns arise in a state criminal case, where a prosecutor knew or reasonably should have known evidence to be false, secures a conviction and receives the benefit of having the evidence "viewed in a light most favorable to the prosecution." Petitioner contends that once a State admits (like they did in his case), that damaging evidence should not be viewed in a light most favorable to the prosecutor.

Petitioner finds **McDaniel v Brown, 558 U.S. 120 (2010)** inapposite to his case. The McDaniel case is distinguishable from Petitioner's case in several ways. First, no suggestion was made in the McDaniel case by either party "that the evidence adduced at trial was insufficient to convict unless some of it was excluded." **558 U.S. at 130.** Petitioner has argued in his petition that absent the jacket evidence, the remaining evidence fails to meet Jackson's reasonable doubt standards. Petition at pages 27-29. The Michigan Court of Appeals adjudication of this claim unreasonably determined the untainted evidence. As noted by Judge Moore of the Sixth Circuit, the Michigan panel "vastly overstated the remaining evidence." Petition at pages 22-23.

Second in **McDaniel**, both parties agreed the lower court resolution of the Jackson claim was in error. **558 U.S. at 129.** Petitioner has appealed the district court's resolution of this claim to

the Sixth Circuit, and quite naturally has petitioned this Court to reverse the judgment entered by the Sixth Circuit. Therefore, McDaniel fails to govern Petitioner's case.

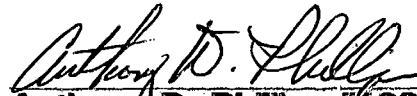
Petitioner did find **Parker v Matthews, 567 U.S. 37, 43 (2012)** to provide the proper perspective he ask of the Court to adopt. How did the jacket evidence affect the juries responsibility to decide Petitioner's guilt or innocence for first degree murder? Petitioner asserts it would invade the province of the jury to attempt to decide what degree some illegally introduced evidence affected their verdict. Petitioner respectfully request Oral Argument and the Appointment of Counsel to properly brief and argue the appropriate standard of review of this type of claim.

CONCLUSION

Petitioner Anthony D. Phillips respectfully request of this Supreme Court to consider the points as argued herein and agree Petitioner has satisfied the necessary requirements to have the Writ of Certiorari granted, vacate his conviction and order a new trial. If the Court finds it necessary, then grant certiorari, appoint Petitioner counsel and schedule briefing and oral argument.

Respectfully submitted

Date June 11, 2019


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