CAPITAL CASE

No. 18-9468

In the Supreme Court of the United States

MELVIN BONNELL,

Petitioner,
v.

TIM SHOOP, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – EXECUTION DATE 2/12/2020

QUESTION PRESENTED

Whether, when a state court enters a nunc pro tunc judgment to attempt to cure a jurisdictional defect in a capital defendant's conviction, the first federal habeas petition challenging the constitutionality of such judgment is "second or successive" within the meaning of 28 U.S.C. 2244(b) as interpreted by *Magwood v. Patterson*, 561 U.S. 320 (2010)?

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INTRODUCTORY STATEMENT

Respondent effectively finds himself in the unenviable position of arguing that the Sixth Circuit should be permitted to overrule the Ohio Supreme Court's interpretation of the requirements of Ohio law. In so arguing, Respondent ignores that:

1) Petitioner's original judgment entry contained a jurisdictional defect under Ohio law when it omitted the *fact* of conviction (*see State v. Lester*, 958 N.E.2d 142 (2011));
2) The Ohio Supreme Court has held that when a trial court omits the *fact* of conviction, the trial court may not enter a *nunc pro tunc* entry to remedy the omission (*Id.*); and,
3) Contrary to Ohio law, which applies equally to all others in Ohio with the exception of Petitioner, the state courts entered a *nunc pro tunc* entry to remedy the omission.

Relying on Sixth Circuit authority, Respondent argues this was simply a clerical error.

Awkwardly, the State of Ohio casts away comity and respect of its own sovereign authority – for a federal court's general interpretation of the law. Unfortunately for Respondent, Petitioner's case is controlled by AEDPA. Therefore, as this Court consistently reminds inferior federal courts, Sixth Circuit rulings must give way to Ohio's interpretation of the law. Comity demands it.

Petitioner mostly stands on his Petition for Writ of Certiorari. However, glaring mischaracterizations must be addressed.

A. If Ohio Says It Is Not A Clerical Error, It Is Not A Clerical Error.

Respondent contends that cert is not appropriate because "the Sixth Circuit properly ruled for the State." BIO p. 9. Respondent's sole contention in support of this proposition is a smattering of federal cases dealing with true clerical errors. Respondent, ordinarily an advocate for comity, suggests that Ohio's determination that the error herein is not a clerical error – rather, a substantive revision of the judgment entry – and must not be respected.

Respondent suggest that any change is a clerical error when the *nunc pro tunc* simply corrects a discrepancy in oral and paper pronouncements. BIO p. 10-11. Of course, this ignores Petitioner's circumstances. Respondent fails to acknowledge that the Ohio courts in Petitioner's case reviewed the journal entries, the oral pronouncements, and the statutorily required capital sentencing opinion; and yet, no combination of those materials reflected the ***fact of conviction***. Without a conviction, you cannot be sentenced – the very reason that Ohio law prohibits *nunc pro tunc* of substantive matters. Applying the above standard, the courts in Petitioner's case found the fact of conviction never to be mentioned.

The federal authority cited by Respondent involves distinctly different scenarios. The majority of the cases involved federal convictions concerning true clerical errors. Of course, none of the cited cases indicate that true substantive changes to a judgment would not constitute a second or successive 2254 or 2255 petitions. *See United States v. Brown*, 915 F.3d 1200, 1202 (8th Cir. 2019) (noting

that substantive changes would not be subject to a successor bar). Stated another way, none of those cases foreclose the filing of a petition when a judgment was not clerical. The circuit authority concerning state convictions cited by Respondent all involved what amounted to clerical matters under state law and looked to the requirements of the particular state in making that determination. *May v. Kansas*, 562 F. App'x 664 (10th Cir. 2014) (citing to Kansas statute); *Wells v. Sec'y, Dept. of Corr.*, 769 F. App'x 885, 887 (11th Cir. 2019) (citing to four Florida cases as to the requirements of Florida law). Of course, if Ohio law were to be given effect – the error herein is not clerical – and Respondent seeks to avoid comity and deference to Ohio's interest in equal application of its law.

Respondent identifies a subsumed question, part and parcel to Petitioner's *certiorari* question, regarding whether state or federal law controls the definition of "new judgment." Respondent then mistakenly advances that only the Ninth Circuit has applied state law, and that no other circuits follow this approach. This is in error. A quick read of *May* and *Wells* disclose that the Tenth and Eleventh Circuits look to state law.

Respondent then cites *In re Stansell*, 828 F.3d 412 (6th Cir. 2016), for the proposition that the Sixth Circuit "only relying on federal law" makes the determination of judgment. BIO p. 12. Respondent does not accurately convey the basis of *Stansell*, which was decidedly determined in the context of the requirements of Ohio, not federal law:

> But calling post-release control a technical correction does not make it so. If an individual's sentence does not include post-release control, he

> is free from the State's oversight when his term of imprisonment expires. *See State v. Holdcroft*, 137 Ohio St. 3d 526, 2013- Ohio 5014, 1 N.E.3d 382, 389 (Ohio 2013). A sentence with post-release control, by contrast, "significantly confine[s] and restrain[s] his freedom" upon his release. *Jones*, 371 U.S. at 243. The parole board may tell him where to live (in "a community-based correctional facility" or "a halfway house"), restrict his movement (by placing him under "house arrest" or imposing "a term of electronic monitoring"), subject him to "drug and alcohol use monitoring, including random drug testing," or require him to participate in "education or training" programs. Ohio Rev. Code §§ 2929.16-.17; *see id.* §§ 2967.01(N)—(O), 2967.28(D)(1). The parole authority may sanction individuals who violate conditions of post-release control, in some cases by sending them back to prison for up to nine months per violation (and for up to one-half of their original prison terms in total, which, for someone like Stansell, could mean ten years of additional prison time). *Id.* § 2967.28(D)(1), (F)(3).
>
> The centrality of post-release control to Ohio's sentencing scheme may explain why the General Assembly has ordered courts to inform defendants of their term of post-release control at sentencing. *Id.* § 2929.19(B)(2)(c)—(e). It may explain why, for a time, the Ohio Supreme Court vacated defendants' entire sentences and ordered complete resentencing if the trial court failed to comply with that legislative mandate. *E.g., State v. Bezak*, 114 Ohio St. 3d 94, 2007 Ohio 3250, 868 N.E.2d 961, 963-64 (Ohio 2007), *overruled in relevant part by State v. Fischer*, 128 Ohio St. 3d 92, 2010 Ohio 6238, 942 N.E.2d 332 (Ohio 2010). And it may explain why the Ohio Supreme Court has held that a sentence that incorrectly omits post-release control may be corrected at any time during the inmate's prison term, even if the standard appeal period has run. *Fischer*, 942 N.E.2d at 339-41; *see Holdcroft*, 1 N.E.3d at 387-89. That court has summed up its holdings in this area by noting that "[t]he failure to impose a statutorily mandated period of postrelease control is more than [an] administrative or clerical error. It is an act that lacks both statutory and constitutional authority." *Fischer*, 942 N.E.2d at 339-40. Given the significant restraints that come with this period of state supervision, we agree. When a court alters a sentence to include post-release control, it substantially and substantively changes the terms under which an individual is held "in custody." 28 U.S.C. § 2254(a), (b)(1). That means it has created a new judgment for purposes of the second or successive assessment.

Stansell, 828 F.3d at 417-418. In stating that the Sixth Circuit "only" looked to federal law, Respondent misrepresents *Stansell* and the state law premise upon which it

rested to find the exception under *Magwood v. Patterson*, 561 U.S. 320 (2010) to be satisfied.

In sum, Respondent argues against himself. The Sixth Circuit (in *Stansell*), the Ninth Circuit (in *Gonzalez v. Sherman*, 873 F.3d 763 (9th Cir. 2017), the Tenth Circuit (in *May*), and the Eleventh Circuit (in *Wells*), all reviewed state authority in making their determination. But herein, the panel's deviation from Sixth Circuit reported authority, and all other Circuits, reflects the outlier nature of this ruling and the need for correction in a capital case so that there is equal justice under the law.

The inaccuracy of relying on a clerical error, when it is not a clerical error, reflects the rot that is Respondent's opposition to certiorari. It is a mistaken argument that only a clerical error has taken place. Under Ohio law, the Ohio Supreme Court's authority dictates that the error herein is substantive. In addition to voiding Ohio law, the Sixth Circuit improperly avoided this Court's requirements of *Magwood*.

Perhaps Respondent's misunderstanding is fueled by their lack of knowledge of what occurred in this case. Respondent suggests that the problem with the judgment entry was an omission of the sentence. BIO p 13-14.[1] Nothing could be further from the truth. In actuality, the **fact of conviction *was omitted***. You cannot sentence without a conviction – and here, the fact of conviction did not exist. Under

[1] Inconsistently, Respondent later recognizes that Petitioner challenges the omission of the fact of conviction. BIO p. 16-17.

Ohio law, the fact of conviction constitutes a substantive requirement. *Lester*, 958 N.E.2d 142.

Petitioner raises an underlying federal question. Petitioner challenges the constitutionality of the 2015 *nunc pro tunc* judgment, which the trial court entered at the direction of the state intermediate court in contravention of applicable state law. This deprived Petitioner of his due process rights and of equal protection of the laws.

Petitioner does not request fact correction – he suggests that under AEDPA the Sixth Circuit cannot give short-shrift to the authority of the Ohio Supreme Court. Rather, Petitioner simply requests that the Sixth Circuit respect this Court's *Magwood* decision. It is not too much to ask or expect a circuit court to respect the principles of comity due to Ohio law and to follow this Court's precedent. As he initially stated, the Sixth Circuit's logic challenges the limits of circularity: it would have a lower court's determination that its own prior determination that a judgment was not a judgment preclude Petitioner from challenging the judgment itself, when the Ohio Supreme Court says otherwise.

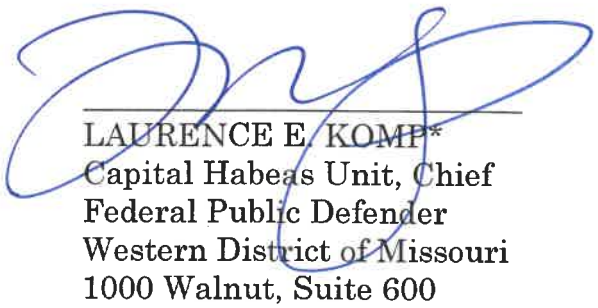
B. Petitioner Is Not Raising A *Hurst* Claim.

While it is true that Petitioner's jury never made a finding regarding the sole aggravating and eligibility factor, Petitioner has not pursued that issue in the current matter. Thus, to the extent Respondent's argues a claim not raised herein, Respondent's arguments should be disregarded.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for writ of certiorari. Alternatively, this Court should grant, vacate, and remand for reconsideration of Petitioner's case in light of *Magwood*.

Respectfully Submitted,



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