

18-9541
No. _____

Supreme Court, U.S.
FILED

MAY 22 2019

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

2019

DARIUS GILKEY,

Petitioner,

v.

DEWAYNE BURTON,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

BY: Darius Gilkey #767577
In *pro per*
R.A. Handlon Correctional Facility
1728 W. Bluewater Hwy
Ionia, Michigan 48846

QUESTION PRESENTED

I

Should this Court grant Certiorari to determine if consensual sex that later turned into a homicide, resulting from adequate provocation amounts to felony murder?

II

Is a breakdown in attorney-client relation committed on the record prior to trial a violation of Petitioner's Sixth Amendment right to counsel?

LIST OF PARTIES

Petitioner, DARIUS GILKEY, is an individual and has no corporate affiliations. Petitioner is proceeding in *pro per* with the aid of a Michigan Department of Corrections Legal Writer.

Respondent, DEWAYNE BURTON is the Warden of the Facility where the Petitioner currently housed and is represented by the Michigan Attorney General's Office

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

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On March 22, 2019, the Decision/Opinion of the Sixth Circuit Court of Appeals, Affirming the decision of the district court. (Appendix pg.1).

On June 1, 2018, the Decision of the Eastern District Federal Court of Michigan, Granted Certificate of Appealability, is Reported at, 2018 U.S. Dist. LEXIS 92693. (Appendix pg. 2).

On September 6, 2016, the decision of the Michigan Supreme Court denying Leave to Appeal is Reported at, 500 Mich. 857, 883 N.W.2d 769 (2016). (Appendix pg. 3).

On April 19, 2016, the Decision of the Michigan Court of Appeals Affirming the conviction is Reported at, 2016 Mich. App. LEXIS 754, 2016 WL 1579041, (2016) (Appendix pg. 4).

JURISDICTION

Petitioner seeks review of the January 2, 2019, opinion of the Sixth Circuit Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions

U.S. Const. Amend. VI: The Sixth Amendment guarantees criminal defendants the right to counsel for his defense. U.S. Const. Am VI. This right is “required at every stage of a criminal proceeding where substantial rights of [the] accused may be affected

U.S. Const. Amend. XIV: “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 to any person within its jurisdiction the equal protection of the laws.”

B. Statutory Provisions

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Procedural History

During a bench trial, the prosecution alleged that Petitioner-Appellant Gilkey committed first-degree premeditated murder in violation of Mich. Comp. Laws 750.316(a), first-degree felony murder Mich. Comp. Laws 750.316b and two counts of first-degree criminal sexual conduct (CSC) Mich. Comp. Laws 750.520B, against victim Quaylana Rodgers (penis in genital and in anal openings). That each sexual transpired while armed with a weapon, or any article used or fashioned in a manner to lead her to reasonably believe it to be a weapon, or using force or coercion and causing her to sustain personal injury.

The offenses were alleged to occur on June 19, 2012, south of 17926 Woodward in the city of Detroit. James Alexander testified that he was a friend of Rogers and was with her on the night of June 18, 2012, and into the early morning hours of June 19, 2012 at 725 Whitmore, the home of a friend named Howard. At about 5:30 a.m. she became upset and argued with two people named “TT” and “Vil.” She left the house and walked alone east on Whitmore toward Woodward (T2, Pgs. 36-40).

Touria Sanders testified that Rogers was her friend. On June 18, 2012, they were together at an apartment on Whitmore. At 3:00 or 4:00 a.m. they argued. Rogers left, walking toward Woodward. Sanders’ last contact with Rogers was a text message received 15 minutes later. (T2, Pgs. 62-66).

Detroit Police Officer Serina Kelley testified that on June 18, 2012, she was on patrol in the area of Woodward and Six Mile with her partner, Officer Kevin Briggs. They were flagged down by a transsexual prostitute she knows as Breeland, at around 6:30 a.m. (T2, Pgs. 67-69).

Breeland told her that he had seen a dark-skinned short female wearing pink and white walking on Woodward toward Eight Mile being followed by a man. She appeared upset and was forced into an abandoned apartment building on Woodward at Nevada by the man. Breeland thought that “something just didn’t seem right” and asked Kelley to check out the building. Kelley went and looked around but saw nothing.

Detroit Police Officer Sergeant Firchau testified that the body of Ms. Rogers, still partially clothed in a pink and white dress, was found at around 2:00 p.m. in an adjacent plot to an abandoned building that was overgrown with vegetation. He testified that on June 19, 2012, he went to the scene where Rogers was located. The next day he went to the morgue where he requested to have a rape kit performed. An autopsy revealed that she died from a stab wound to her neck, but no weapon was recovered. Samples taken from the victim's vagina, rectum, and underwear tested positive for the presence of seminal fluid. DNA analysis indicated that Gilkey's DNA profile matched the samples to a very high degree of probability.

In 2015, petitioner was convicted by the court of all charges, and was then sentenced to an aggregate term of life in prison. He then appealed to the Michigan Court of Appeals, in affirming his conviction. That court concluded that “evidence was sufficient for the trial court to find beyond a reasonable doubt that Gilkey had used a weapon to force the victim into a concealed area, assaulted her at knifepoint, stabbed her, and left her to die.” *People v. Gilkey*, No. 326172, 2016 Mich. App. LEXIS 754, 2016 WL 1579041, (Mich. Ct. App. Apr. 19, 2016). The Michigan Supreme Court denied leave to appeal, *People v. Gilkey*, 500 Mich. 857, 883 N.W.2d 769, 769-70 (Mich. 2016).

In 2017, Petitioner Gilkey filed his habeas petition, claiming that: 1) there was insufficient evidence for the state trial court to convict him of murder and criminal sexual conduct; 2) the state

trial court abused its discretion by denying his request to appoint substitute counsel, in violation of the Sixth Amendment; 3) he was deprived of due process, in violation of the Fourteenth Amendment, when the prosecution presented evidence regarding his other murder conviction; and 4) he did not voluntarily and knowingly waive his right to a jury trial when he opted for a bench trial.

The district court denied Mr. Gilkey's petition on the merits on June 1, 2018, but granted a certificate of appealability on all claims. He filed a timely Notice of Appeal and submitted his brief in the Sixth Circuit Court of Appeals, which affirmed the districts court's decision on March 22, 2019.

REASONS FOR GRANTING THE WRIT

The compelling reasons that exist for this Court to grant Certiorari, is that the lower courts decisions are in conflict with the decisions from the 1st, 2nd, 5th, its own 6th Circuit, 7th, 8th, 9th, and the 11th Circuit Courts of Appeals.

The importance of the case is not only to Petitioner Gilkey, but to others similarly situated as to whether sexual assault and at least the second element of first-degree felony murder, is highly debatable where there was evidence of a consensual sexual encounter, and the decedent died in a situation caused by adequate provocation in the heat of passion.

For others similarly situated, the other reason for granting the writ is Mr. Gilkey's Sixth Amendment right to counsel was violated when the trial court refused to appoint substitute counsel, where there was a breakdown in attorney-client communication on the record, prior to the start of trial.

ARGUMENT I

THERE WAS INSUFFICIENT EVIDENCE THAT PETITIONER COMMITTED HOMICIDE OR SEXUAL ASSAULT TO SUSTAIN HIS CONVICTIONS.

Discussion

The Due Process Clause of the United States Constitution prohibits a criminal conviction unless the prosecution establishes guilt of each of the essential elements of a criminal charge beyond a reasonable doubt. In re *Winship*, 397 U.S. 358, 361-364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Jackson v. Virginia*, 443 U.S. 307, 313-314, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The reasonable doubt requirement is a safeguard, which developed to protect citizens from dubious and unjust convictions, which result from improper forfeitures of life, liberty and property. In re *Winship*, *supra*, 397 U.S. at 362.

Appellant was entitled, as a matter of clearly established federal law, to a directed verdict of acquittal where the prosecutor failed to present sufficient evidence of his guilt. See e.g. *People v. Hampton*, 407 Mich. 354, 368 (1979), citing *Jackson*, *supra*:

“A reviewing court must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a reasonable trier of fact in finding guilt beyond a reasonable doubt.” (See *Id.* 407 Mich. at 366).

In any criminal prosecution, the state must prove not only that the charged crime occurred by presenting legally sufficient evidence on each of the essential elements of the crime, but also that the accused is criminally responsible for its commission. The evidence here on the causation in which the victim died, and facts surrounding the sexual encounter with petitioner is insufficient to conclude that petitioner raped her at knifepoint, and murdered her following in order to conceal the rape. Petitioner was erroneously convicted of first-degree Criminal Sexual Conduct and felony murder predicated upon the underlying Criminal Sexual Conduct charge. While Appellant’s DNA

is evidence that he had a sexual encounter with Rogers (decedent), there was no evidence that the sexual encounter occurred by force with a weapon, and that the death occurred in a situation other than hot blood brought about by adequate provocation, only speculation.

In its affirmation, the 6th Circuit Court of Appeals reasoned that” to convict Petitioner Gilkey of first-degree felony murder, the prosecution had to prove that he (1) ‘kill[ed] a human being’; (2) ‘with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice]’; (3) ‘while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated’ in Michigan Compiled Laws § 750.316(1)(b). *People v. Smith*, 478 Mich. 292, 733 N.W.2d 351, 365 (Mich. 2007) (quoting *Carines*, 597 N.W.2d at 136). First-degree criminal sexual conduct is a specifically enumerated offense. See Mich. Comp. Laws § 750.316.”

Finally, first-degree criminal sexual conduct required a "showing of an intrusion into the genital or anal opening of another person, accompanied by one of several possible statutorily enumerated circumstances." *Farley v. Lafler*, 193 F. App'x 543, 548 (6th Cir. 2006) (citing Mich. Comp. Laws § 750.520b(1)(f)). In this case, the prosecution was required to prove that he used "a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon in order to facilitate the sexual assault." Mich. Comp. Laws § 750.520b(1)(e). And the prosecution needed to prove that the victim was alive at the time of the penetration. See *People v. Hutner*, 209 Mich. App. 280, 530 N.W.2d 174, 176 (Mich. Ct. App. 1995).

Here, as it relates to the killing of a human being, this amounts to the elements of second-degree murder; i.e., the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result,

malice. The only factor to escalate a second-degree murder to a first-degree felony murder is the enumerated felony of a sexual assault.

Presently, there was no evidence from which a reasonable juror could infer that petitioner killed Ms. Rogers with a murderous intent, simply because a sexual assault occurred. A reasonable juror could equally infer that Rogers was killed by Petitioner Gilkey following a consensual paid-for-sexual-act performed. It is common knowledge that Ms. Rogers was meandering in an area highly known for prostitution. As easily as a juror could consider circumstantial evidence that petitioner sexually assaulted her, one could just as easily infer the following series of facts as they transpired.

That as it may, petitioner, or Ms. Rogers elicited the services of a sexual encounter for the exchange of money. Money exchanged hands, the sexual encounter ensued, and following the sexual encounter Mr. Gilkey noticed that his wallet had gone missing. The same wallet he had just removed the money from, prior to the sexual encounter to pay Ms. Rogers out of. He then inquired as to the whereabouts of his wallet and Ms. Rogers responded with, "I gotta go." As she attempted to leave petitioner then grabbed her and noticed the bulge in the breast area of her dress, as he reached for turned out to be his wallet. A struggle ensued over the wallet with Ms. Rogers scratching and biting Mr. Gilkey, as she held on to the wallet.

At that time, he produced a knife to recover his wallet and bring the struggle to an end. Upon seeing the knife, Ms. Rogers stuffed the wallet in her underwear, went on the offense and lunged at petitioner. That's when he lost all sense of control and began stabbing her with the knife about her neck and upper torso area. Mr. Gilkey recovered his wallet from her underwear and fled the scene. No testimonial, physical, or circumstantial evidence was produced that Mr. Gilkey used "a weapon (the knife) or any article used or fashioned in a manner to lead the victim (Ms. Rogers)

to reasonably be in fear of danger, apprehension, and/or death" in order to engage in a sexual encounter. There was never any evidence produced that petitioner produced a knife to facilitate a sexual assault upon Ms. Rogers. The key element required to sustain a conviction for criminal sexual conduct in the State of Michigan.

Furthermore, there was never any of the above mentioned evidence presented that the killing of Ms. Rogers was anything other than a death that resulted in her stealing his wallet, and transpired in hot blood brought on by adequate provocation. Totally negating "the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result i.e., malice" the element necessary to elevate a homicide to a degree of murder.

The Michigan Supreme Court has specifically held that the corpus delicti of felony murder may not be established without evidence, independent of the accused person's confession, of the essential element distinguishing first-degree murder from second-degree murder. *People v. Allen*, 390 Mich. 383, 385 (1973). The corpus delicti of felony murder is not established until the prosecution has introduced evidence from which the trier of fact may reasonably find that acts constituting all the essential elements of the offense have been committed and that someone's criminality was responsible for the commission of those acts. *People v. Allen*, 39 Mich. App. 483, 496 (1972), Judge Levin dissenting; adopted in: 390 Mich. 383; 385 (1973) (emphasis in original).

In *Allen*, the defendant's confession had been erroneously admitted because the prosecution had failed to present independent evidence that the murder was committed during the attempted perpetration of a robbery. *Allen, supra*, 494. In *People v. Williams*, 422 Mich. 381 (1985) that court specifically distinguished *Allen* because it had involved felony-murder. The Court failed to specify the reason for the distinction. However, the difference between the two-forms of murder

is obvious. Premeditated murder is a single crime, of which premeditation and deliberation are elements. Felony murder, on the other hand, is a compound crime, consisting of a murder coupled with a felony. Accordingly, here the elements of both the felony of the sexual assault and the murder must be established. Where the corpus delicti of the felony is not established, there is no corpus delicti of felony murder, and the charge can be no greater than voluntary manslaughter.

The presence of DNA, in and of itself does not tend to establish murder or sexual assault, without other corroborating evidence. There is circumstantial evidence which equally supports a theory of guilt in this case as well as a theory of reasonable doubt. Therefore, the State of Michigan unreasonably applied federal law in denying relief on petitioner's insufficient evidence claim.

In this case, as in *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir, 2008), cert den 558 US 1158 (2010), the evidence only creates a "reasonable speculation" that Petitioner is probably guilty and is insufficient to satisfy the Jackson standard. *Newman, supra*, the Sixth Circuit affirmed the grant of habeas corpus relief based upon insufficient evidence in a murder case. This Court concluded that the evidence suggested that petitioner owned at least one of the two weapons found by two men on the side of the road, which was used in a homicide, without evidence Appellant was at the crime scene, nor any evidence that he used those weapons on the day of the killing, the evidence was insufficient to justify a conviction as it only amounted to a reasonable speculation. *Id.*

See *O'Laughlin v. O'Brien*, 568 F.3d 287, 301 (1st Cir, 2009), (Reversing district court's denial of writ of habeas corpus due to insufficient evidence that prisoner was the assailant where evidence gave equal weight to theories of guilt and innocence), accord, *United States v. Hawkwins*, 547 F. 3d 66, 71 (2nd Cir. 2008), same, *United States v. Elashyi*, 554 F. 3d 480, 492 (5th Cir, 2008), *United States v. Caseer*, 399 F. 3d 828, 840 (6th Cir. 2005), (same), *United States v. Johnson*, 592

F.3d 749, 755 (7th Cir. 2010), same, *United States v. Wright*, 835 F. 2d 1245, 1249 n1 (8th Cir, 1987). *Gonzales v. Gipson*, 701 Fed. Appx. 558, 560-562 (9th Cir. 2017).

In this case, all of the circumstantial evidence could support an inference of guilt of solicitation of a prostitute for sexual purposes, as well as an inference of a killing that transpired in hot blood as a result of having his wallet stolen. Petitioner who denied having a sexual encounter could easily be understood to be embarrassed and ashamed to admit to solicitation of a prostitute. Therefore, since there is insufficient evidence of guilt concerning the first-degree CSC charge, the related felony-murder conviction which is predicated upon the CSC charge must be reversed.

In support, petitioner points out that the 11th Circuit Court of Appeals, applying the Jackson standard, granted habeas relief and dismissed a burglary charge finding that possession and pawning of a stolen camera a day or two after the burglary without corroborating evidence was insufficient to support burglary conviction. See e.g., *Crosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Likewise, the presence of DNA on the deceased without more, is insufficient to support a conviction for CSC First-degree and felony murder.

The majority of federal courts of appeals have concluded that under *Jackson v. Virginia*, supra, reversal of the conviction is required “...if the evidence [viewed in the light most favorable to the prosecution] gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain reasonable doubt.”

Here, the decision of the Sixth Circuit Court of Appeals is in stark contrast to its own rulings in *Newman v. Metrish*, *United States v. Caseer*, and in conflict with 1st, 2nd, 5th, 7th, 8th, 9th and 11th Circuits. Failing to grant Certiorari would drastically affect others similarly situated. For those reasons, allowance of the writ of certiorari would be appropriate.

ARGUMENT II

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT SUBSTITUTE COUNSEL.

Discussion

The right to counsel is one of the most fundamental of all constitutional rights guaranteed by the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342-344 (1963). U.S. Const. Ams. VI, XIV. An indigent defendant is guaranteed the right to assigned counsel, however, a defendant is not entitled to appointed counsel of his or her own choice, or to a new appointed attorney simply because he or she requests one.

In protecting this right, courts are careful to ensure that substitute counsel is appointed where there is an irreconcilable and legitimate strategy dispute between the defendant and court appointed counsel. *People v. Williams*, 386 Mich. 565, 578; 194 N.W.2d 337, 343 (1972). Rather, a defendant is entitled to substitute counsel upon a showing of good cause, and where the substitution will not unreasonably disrupt the judicial process. *People v Buie*, 298 Mich. App. 50, 67; 825 N.W.2d 361, 372 (2012).

The Sixth Amendment requires a good-faith motion, timely made to the trial court in order to evaluate the breakdown in the attorney-client relationship, and determine the need for substitute counsel. Here, petitioner Gilkey requested substitute counsel citing a lack of sufficient communication regarding the matter and counsel's failure to obtain funding for an independent DNA analysis. Counsel replied that he was only able to obtain funding for an independent review of the initial lab protocol, and that he visited petitioner twice, corresponded with him and spoke with him in the court's holding cell on hearing dates. Trial counsel provided the following:

“So I feel I communicated with him plenty of times, there was nothing fancy about this matter in terms of what he was looking for. No witnesses he needed me to search out. No investigator to do any type of research. His position is quite simple; that this is something that was placed on him by police.

And I can try this matter and I’ve been ready to try this matter, but we had to wait for the analysis to come back from Speckin labs and we just got that last week.” (T2, Pgs. 9-10).

There is no evidence presented that Mr. Gilkey engaged in any intentional dilatory tactics in order to delay, or impede progress in his adjudication proceedings. He had a reasonable and legitimate difference of opinion on a fundamental trial strategy with trial counsel regarding the retesting of DNA evidence. Without counsel fully explaining each aspect of the case along with available defenses, or related plea options.

Furthermore, trial counsel’s refusal to obtain independent testing of the DNA destroyed all trust between petitioner and trial counsel. There was good cause to appoint substitution of counsel under the facts of this case. A strategy dispute is good cause for the appointment of substitute counsel. *Williams, supra* at 565; *Buie, supra* at 67.

In *Christeson v. Roper*, ___ U.S. ___, 135 S.Ct. 891, 190 L Ed.2d. 763 (2015), The Supreme Court held that the district court abused its discretion in denying the petitioner’s second request for substitution of appointed counsel under the “interests of justice” standard. Reversed the judgment of the Eighth Circuit, and remanded the case for further proceedings.

The petitioner’s first federal habeas petition was dismissed as untimely. Because his appointed attorneys – who had missed the deadline – could not be expected to argue that he was entitled to the equitable tolling of the statute of limitations because of their conflict of interest, the petitioner requested substitute counsel who would not be laboring under a conflict of interest. The district court denied the motion and the Eighth Circuit affirmed. In doing so, they contravened the Court’s decision in *Martel v. Clair*, 565 U.S. 648, 132 S. Ct. 1276, 182 L. Ed. 2d. 135 (2012).

Petitioner's first attorneys acknowledged the nature of their conflict, which were contrary to their client's interest and manifestly served their own professional and reputational interest. *Clair* makes clear that a conflict of this sort is ground for substitution.

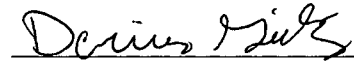
Here, Petitioner Gilkey has demonstrated that the decision of the Sixth Circuit Court of Appeals is in conflict with the Eighth Circuit and this Court's decision in *Christeson* and *Clair*. For those reasons, allowance of the writ of certiorari would be appropriate.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that his petition for certiorari be read and granted.

Dated: May 21, 2019

Respectfully submitted,



Darius Gilkey #767577

In *pro per*

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