No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

Riodejuonerol Hudson,

Petitioner,

v.

Charles Bradley, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Ohio has a two step procedure under Ohio App R 26 when one claims the ineffective assistance of appellate counsel. First, there must be a timely "application" to the Court of Appeals. If there is a "genuine issue" of counsel's ineffectiveness, the case is then re-opened by the Court and there is additional briefing "on the merits" and a decision by the Court.

Does the denial of an "application" alone constitute a decision "on the merits" that warrants AEDPA deference ?

II. When there is testimony in favor of a complete defense that one was defending his mother from a physical attack yet counsel fails to request the standard jury instruction in support of that complete defense, is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Riodejuonerol Hudson respectfully petitions this Court for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINION BELOW

The order denying a certificate of appealability by the Sixth Circuit U.S. Court of Appeals is *Riodejuonerol Hudson v. Charles Bradley, Warden*, Case No. 18-3519 and is reproduced at Pet. App. 1a.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit U.S. Court of Appeals was entered March 12, 2019 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

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 defense.

Fourteenth Amendment: Section 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 to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 2254

Ohio Appellate Rule 26

SUMMARY OF THE ARGUMENT

Mr. Hudson is serving a life sentence for Murder. He had a complete defense under Ohio law commonly called "defense of another". In this case, the defense of his mother. Mr. Hudson testified at his trial and provided a factual basis for this defense.

Unfortunately, trial counsel failed to request the standard jury instruction available under Ohio law. Appellate counsel failed to raise trial counsel's ineffectiveness in not requesting the jury instruction; however, new counsel raised appellate counsel's ineffectiveness in a timely application in the Ohio Court of Appeals under Ohio App R 26 attacking appellate counsel's deficient performance and arguing that Hudson was prejudiced.

Mr. Hudson's timely Ohio App R 26 application was denied without briefing on the merits. A timely Petition for writ of Habeas Corpus was denied in U.S. District Court; the Sixth Circuit granted a certificate of appealability but denied relief.

The Sixth Circuit incorrectly found that a denial of an "application" in the Ohio Court of Appeals concerning appellate counsel's ineffectiveness was a decision "on the merits" contrary to the language of Ohio App R 26 and thus incorrectly found AEDPA deference is owed to that decision.

In addition, the Sixth Circuit incorrectly decided that Hudson was not prejudiced when counsel failed to request the standard jury instruction that provided a "complete defense" to the charge of Murder, i.e. that Hudson was defending his mother's life.

STATEMENT OF THE CASE

Mr. Hudson stands convicted of Murder and is serving a life sentence. The facts are recited in the Ohio Court of Appeals opinion and are presumed correct on habeas review. See State v. Hudson, 2012 Ohio 1345; 28 U.S.C. 2254(e)(1).

In August of 2010, Hudson was at a Cleveland hospital because his girlfriend was about to have a baby. However, Hudson had forgotten his seizure medication so his mother drove him home to get it. Hudson at para. 3.

When Hudson and his mother parked outside the home, Hudson saw a neighbor, Mario Seaborn, drinking an alcoholic beverage called Four Loko; Seaborn began yelling profanities at Hudson and threatening his life. A physical altercation ensued in which each man struck the other. Hudson extricated himself from the fight and went towards his home but Seaborn was "threatening his and his mother's lives." Hudson at para.3-4.

Hudson retrieved his medicine from inside the house and a knife from the kitchen. Hudson intended to scare Seaborn with the knife, get in the car and return to the hospital. Another confrontation occurred where Hudson showed the knife to Seaborn, asked to leave and Seaborn swung a chain at Hudson.

Hudson was trying to protect himself and his mother. He went into a "defense" mode as victim approached him. Hudson struck Seaborn and Seaborn fell to the ground. A chain and two knives were found at the scene. Seaborn died from a knife wound five months later. Hudson at para. 5-7.

Hudson testified on his own behalf.

The jury was instructed on self defense. However, Hudson also testified that he was defending his mother from Seaborn, a large, drunk and belligerent man. Hudson's mother had remained near the car throughout this scenario and had been knocked to the ground by Seaborn. Hudson grabbed a knife from his home because his mother was in danger. Mr. Seaborn was about 6' 1" was Mr. Hudson was about 5' 6".

Unfortunately, Hudson's trial counsel did not request the standard boilerplate Ohio jury instruction on "defense of another" that is a complete defense to Murder if accepted by the jury. Ohio law has long recognized a privilege to defend the members of one's family. State v. Williford, 551 N.E.2d 1279, 1281 (Ohio 1990). Hudson's testimony that he was defending his mother was uncontradicted and supported by the facts. The "defense of another" was a separate and stronger defense than "self defense"in this case.

On direct appeal, Hudson had new counsel. Unfortunately, appellate counsel did not raise the issue that trial counsel was constitutionally ineffective by failing to request the "defense of another" jury instruction. State v. Hudson, 2012 Ohio 1345.

However, Hudson secured new counsel to timely file an application to determine if appellate counsel was constitutionally ineffective with respect to his failure to raise the lack of a jury instruction concerning "defense of another." State v. Hudson, 2012 Ohio 4928.

The application was denied in the Ohio court without briefing "on the merits." The Sixth Circuit decided the Ohio 26 (B) decision was "on the merits" even though the Ohio rule explicitly differentiates between the "application" and then if the application is successful, further briefing for a decision "on the merits." The Sixth Circuit's decision was contrary to the plain language of Ohio App R 26(B) and Johnson v. Williams, 133 S. Ct. 1088 (2013).

The "defense of another" in this fact scenario is actually stronger than the claim of "self defense"; Hudson escaped the initial confrontation, went to his home, retrieved his seizure medication and a knife from the kitchen to protect his mother and then stabbed the victim who was threatening and had assaulted his mother and who was drunk, large and belligerent. Any factual finding otherwise is contrary to 28 U.S.C. 2254(d)(2), i.e. an unreasonable determination of the facts.

The jury was deprived of the law to apply to the facts as the jury found them; the jury could reasonably reject self defense but yet believe Hudson was defending his mother. Counsel should have requested the boilerplate Ohio jury instruction and the failure to do so at trial and then raise the issue on direct appeal violated Strickland and Evitts v. Lucey.

PROCEEDINGS BELOW

A timely Petition for Writ of Habeas Corpus under 28 U.S.C. 2254 was filed in U.S. District Court. The District Court denied the Petition and a certificate of appelability.

A timely Notice of Appeal was filed in the Sixth Circuit and an application for certificate of appealability. The Sixth Circuit granted a COA but denied relief after briefs were filed. See Hudson v. Bradley, No. 18-3519, March 12, 2019.

The Sixth Circuit held that AEDPA deference was due the Ohio decision on appellate counsel's Constitutional ineffectiveness; and that 28 U.S.C. 2254(d)(1) and (2) were not violated when a jury instruction on "defense of another" was not requested by trial counsel and appellate counsel did not raise the issue on direct appeal.

Mr. Hudson timely files this Petition.

REASONS FOR GRANTING WRIT

The defenses at trial were "self-defense" and that Mr. Hudson was protecting his mother's life and well being, i.e "defense of another."

However, trial counsel failed to request a jury instruction on the well recognized "defense of another." A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence. State v. Williford, 551 N.E.2d 1279, 49 Ohio St.3d 247 (1990); Stevenson v. United States, 162 U.S. 313 (1896); Mathews v. United States, 485 U.S. 58, 63 (1988). Since at least 1850 Ohio has recognized the defense of another as a complete defense. Williford at 250.

Appellate counsel never raised the issue of trial counsel's ineffectiveness for failing to request the standard jury instruction for "defense of another."

Mr. Hudson timely filed an application concerning appellate counsel's ineffectiveness under Ohio App R 26(B) but it was rejected by the Ohio Court of Appeals without briefing on the merits. No decision on the merits was thus made by the Ohio court.

In short, Mr. Hudson submitted that appellate counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) and Evitts v. Lucey, 469 U.S. 387 (1985), for failing to raise the assignment of error contained in the Ohio App R 26(B) application, i.e. trial counsel should have requested a jury instruction for "defense of another."

The Ohio Court of Appeals rejected the application without briefing on the merits. Ohio has a two step process for timely raising appellate counsel's ineffectiveness.

First, there is an "application" that must be timely made as was done in this case. Then, if there is a "genuine issue" of counsel's ineffectiveness, the appeal is re-opened for further briefing and a decision on the merits. See Ohio App R 26(B).

Mr. Hudson's case never went beyond the timely "application" stage of the process under Ohio App R 26(B) and thus no AEDPA deference is owed. Mr. Hudson has rebutted the presumption the Ohio courts decided the claim on the merits. See Johnson v. Williams, supra. The Sixth Circuit's decision otherwise is incorrect.

The rebuttal lies in the Ohio R 26(B) procedure itself. In order to have a decision on the merits, the Ohio court must first find a "genuine issue" and then re-open the appeal for a "merits decision" and further briefing. Here, the Ohio court found no "genuine issue" of appellate counsel's ineffectiveness and thus never reached a decision on the merits and certainly didn't have further briefing on the issue. The application is a very limited process not worthy of deference under AEDPA. See State v. Hudson, 2012 Ohio 4928.

Hudson is entitled to a "complete defense" and not "half of a defense." Because Hudson extricated himself from the confrontation and returned to the safety of his home, the "defense of his mother" is a stronger defense than the weaker defense of self defense. It was only when he returned from the house with a knife that deadly force was used and then in complete defense of his mother.

However, the jury was never told that under Ohio law Hudson had a right to defend his mother. In fact, Hudson's mother testified she was knocked to the ground by the victim.

It is not necessary that the person being defended be aware of danger or necessity for using force. State v. Harris, 718 N.E.2d 488, 129 Ohio App.3d 527 (1998); Ohio Jury

Instructions, Comments 421.19.6, November 2008, Lexis Nexis.

The Sixth Circuit's conclusion that Hudson offered no evidence to suggest he had a reasonable belief his mother was in danger is clearly contradicted by the record. (Hudson grabbed knife because mother in danger; needed to protect himself and mother; Page ID # 674; could not run away). The finding that Hudson's mother was not in danger is an unreasonable determination of the facts in violation of 2254(d)(2).

Mr. Hudson is entitled to a jury instruction to "any recognized defense" for which there is evidence for a reasonable jury to find in his favor. Mathews v. United States, 485 U.S. 58, 63-64 (1988); Stevenson v. United States, 162 U.S. 313 (1896). See also Newton v. Million, 349 F.3d 873, 878-879 (6th Cir. 2003).

The "defense of another" is a well recognized defense in Ohio. Counsel had a duty under Strickland to request such a jury instruction; the failure to do so prejudiced Mr. Hudson. The jury never had the opportunity to evaluate the facts as testified to by Mr. Hudson and Ohio law. The credibility and force of such evidence must be for the jury. Stevenson v. United States, 162 U.S. 313, 315 (1896). On appeal, counsel had a duty to raise trial counsel's ineffectiveness for failing to request the jury instruction. Evitts

Whether rooted in the Due Process Clause of the Fourteenth Amendment [Chambers v. Mississippi, 410 U.S. 284 (1973)] or Confrontation clauses of the Sixth Amendment [Washington v. Texas, 388 U.S. 14 (1967); Davis v. Alaska, 415 U.S. 308 (1974)] the Constitution guarantees every criminal defendant "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479,485 (1984); Strickland at 684-84 (The Constitution guarantees a fair trial through the Due Process Clauses but it defines the basic

elements of a fair trial through the several provisions of the Sixth Amendment). See Crane v. Kentucky, 476 U.S. 683 (1986); Mathews v. United States , 485 U.S. 63 (1988)(right to jury instruction); Taylor v. Withrow, 288 F.3d 846, 851-52 (6th Cir. 2002)(right to a jury instruction when sufficient evidence supporting it).

It has long been held it is a violation of Due Process for a trial court to refuse to give a jury instruction on self defense. Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999). The same analysis applies here for a "defense of another" jury instruction.

The roots of self- defense are well said in Blackstone's Commentary: Citing Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, "the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame." 4 W. Blackstone, Commentaries on the Laws of England 182 (reprint 1992).

Under Ohio law, the defense of a family member is based on the law of self defense and Blackstone's Commentary applies equally in this situation. See Williford, supra.

There are several Circuit Court cases from around the country that support Mr. Hudson. A trial court denies Due Process by refusing to instruct the jury on an accused's theory of the case. Harris v. Alexander, 548 F.3d 200 (2d Cir. 2008); Conde v. Henry, 198 F.3d 734 (9th Cir. 2000).

A trial court's denial of a defense request for a jury instruction on "justification" violates Due Process. Jackson v. Edwards, 404 F.3d 612 (2d Cir. 2005); Davis v. Strack, 270 F.3d 111 (2d Cir. 2001).

A trial court's refusal to instruct on state law defense of entrapment violated the Due Process right to present a full defense. Bradley v. Duncan, 315 F.3d 1091 (9th Cir. 2002).

Mr. Hudson was clearly entitled to a jury instruction under Ohio law on "defense of another." Counsel should have raised this complete defense/jury instruction under the facts of this case. See Strickland and Evitts.

The Sixth Circuit's decision is contrary to law and must be remedied.

Conclusion

Mr. Hudson is serving a life sentence for Murder and he had a factual basis for a complete defense, i.e. he was defending his mother. Yet, counsel at trial and on direct appeal were ineffective and their performance was deficient to the prejudice of Mr. Hudson. The jury was never instructed on boilerplate Ohio law that "defense of another" is a complete defense and separate from the claim of "self defense." The Sixth Circuit's decision that deference is owed to the Ohio court is contrary to law and its decision that Hudson did not receive the ineffective assistance of counsel is contrary to 28 U.S.C. 2254.

For the foregoing reasons and pursuant to Sup Ct. R. 10, the petition for writ of certiorai should be granted.

Respectfully submitted,

/s/John P. Parker *
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PROOF OF SERVICE

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I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by regular U.S. Mail postage prepaid to Ms. Watson, Assistant Attorney General, 150 E. Gay Street, 16th Floor, Columbus, Ohio 43215 this 10th day of June 2019.

/s/John P. Parker
Counsel for Petitioner