

No. 19-5756

IN THE
SUPREME COURT OF THE UNITED STATES

In Re: JAMES BRYANT

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On Petition For Rehearing
On Petition For An Extraordinary Writ
In Aid of this Court's Appellate Jurisdiction
Pursuant to its Original Jurisdiction Under Article III
of the United States Constitution
28 U.S.C § 1251

PETITIONER'S PETITION FOR REHEARING
FROM A DENIAL OF MOTION FOR LEAVE TO FILE
PETITION FOR A WRIT OF HABEAS CORPUS BY A PRO SE PRISONER
IN AID OF THIS COURT'S APPELLATE JURISDICTION

NOW COMES James Bryant Petitioner In Pro Se and moves this Honorable Court for Rehearing pursuant to S.Ct. Rule 44, from this Court's denial of Petition for Writ of Habeas Corpus. This Petition is filed within ~~14~~ days of the order denying Petition for Writ of Habeas Corpus. In Re: James Bryant, U.S. S.Ct. Order No. 19-5756 (Oct. 7. 2019).

Petitioner states the following grounds for rehearing:

REHEARING SHOULD BE ORDERED IN PETITIONER'S CASE, SINCE THE COURT HAS A DUTY TO ASSESS THE HISTORIC FACTS WHEN IT IS CALLED UPON TO APPLY A CONSTITUTIONAL STANDARD TO A CONVICTION OBTAINED IN A STATE COURT.

Petitioner contends that, "[A] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

The constitutional standard in question in this matter is doctrine that guilt must be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

Petitioner seeks this Court to thoroughly examine the manifest injustice instituted before and after the ruling in **People v. Aaron**, 409 Mich 672 (1980), which to date demonstrates that the Ends of Justice has not been met. This Court's decision to deny Petitioner's writ of habeas corpus is in conflict with the **In re Winship** decision, *supra*.

The Court in this matter need only look to the finding of Michigan's Supreme Court in the overview to determine the multifarious due process violations. See **People v. Aaron**, 409 Mich 672, 717-18.

The Aaron Court held:

" The court held Michigan did not have a statutory felony-murder rule, and the court abolished the common-law doctrine of felony-murder. The court stated that such a rule was unnecessary and in many cases **unjust** in that it violated the basic premise of individual moral culpability upon which criminal **law** was based. The court further held that in order to convict defendant of murder it should have been shown that he acted with the intent to kill or to inflict great bodily harm or with wanton and willful disregard of the likelihood that he would cause such harm. Lastly, the court held that the issue of malice must always be submitted to a jury."
Id. at 672.

Therefore, it is a violation of due process to convict and punish a man without evidence of his guilt. **Thompson v. Louisville**, 362 U.S. 199, 206 (1960). In Winship, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. A "reasonable doubt" has often been described as on "based on reason which arises from the evidence or lack of evidence." **Johnson v. Louisiana**, 406 U.S. 356, 360 (1972).

Petitioner has demonstrated that Michigan admits its errors in **Aaron**, and that there were instructional errors, such, that the issue of malice must always be submitted to a jury. **Id. at 672.**

This Court in **Henderson v. Kibbe**, 431 U.S. 145 (1977), held, "[A]n appraisal of the significance of an error in the instruction to the jury requires a comparison of the instructions which were actually given, with those that should have been given." **Id. at 154.** In this case, per the Michigan Supreme Court's ruling in **Aaron**, pre-**Aaron** the issue of malice was not submitted to the jury.

State law error may warrant habeas relief if the error rise for some other reason to the level of a denial of rights protected by the United States Constitution. **Barclay v. Florida**, 463 U.S. 939, 957-58 (1983).

Petitioner can show he has been (1) diligently pursuing his rights, and (2) an extraordinary circumstance stood in his way. See **Holland v. Florida**, 560 U.S. 631, 653-54 (2010). Petitioner contends an improperly imposed limited retro-activity application created an extraordinary circumstance and impediment of the **Aaron** ruling being properly addressed. See **People v. Aaron**, 409 Mich at 728.

Petitioner further contends, the law-of-the-case doctrine is not an appropriate basis for denying relief when the statement of law in an appellate opinion is both dictum and in error. **Landrum v. Anderson**, 813 F3d 300 n.1 (6th Cir. 2016). The law-of-the-case is persuasive, not binding. The law-of-the-case directs a court's discretion, it does not limit the tribunal's power. **Southern R. Co. v. Clift**, 260 U.S. 316, 319 (1922).

This Court may properly hear this matter under its discretionary powers.

REHEARING SHOULD BE GRANTED WHERE THE WATERSHED EXCEPTION IS SATISFIED BY NEW RULE IN AARON, FINDING DUE PROCESS VIOLATED FROM A DEFICIENT REASONABLE DOUBT INSTRUCTION CONTRARY TO THE FOURTEENTH AMENDMENT. U.S. CONST. AM XIV

Petitioner contends that **Teague v. Lane**, would allow retroactivity of the **Aaron** ruling. This Court in Teague held, " a motion based on new case law will be heard only if the new case states a new rule that either 'places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' or 'requires the observance of those procedures that . . . are implicit in the concept of liberty.'" **Teague v. Lane**, 489 U.S. 288, 307 (1989)(plurality opinion).

The Respondent cannot dispute that Bryant's jury instructions **pre-Aaron** did violate constitutional due process holdings in **Winship** and **Sandstrom**. A federal court may grant habeas relief on account of constitutional errors only if it determines that the constitutional error had a "substantial and injurious or influence in determining the jury's verdict." See **Kotteakos v. United States**, 328 U.S. 750, 776 (1946).

A **Sandstrom**-type error has been held to be a "trial error" to which the harmless error rule applies. See **Rose v. Clark**, 478 U.S. 570 (1986)(holding harmless error analysis appropriate for jury instructions that erroneously charged jury on element of malice); **California v. Roy**, 519 U.S. 2 (1996)(holding that a jury instruction that did not include a statement informing the jury that they must find intent should be reviewed for harmless error).

It is axiomatic, that manifest injustice occurs when a missing or erroneous instruction pertains to a basic and controlling issue in the case. See e.g., *People v. William Johnson*, 187 Mich App 621 (1991), lv den 439 Mich 972 (1992); *Middleton v. McNeil*, ___ U.S. ___; 124 Sct. 1830; 158 LEd2d 701 (2004).

Without question the **pre-Aaron** application of felony-murder, allows such a manifest injustice to occur by not submitted the element of "malice". The pre-Aaron felony-murder statute usurped the requirement of law and due process, that guilt be proven beyond reasonable doubt on every element of the crime that a defendant was charged. This right was so basic to a fair trial that its infraction can never be treated as harmless. See *Chapman v. California*, 386 U.S. 18, 23 (1967).

Thus, it is evident that Petitioner has diligently complained of the manner of the use of evidence against him, and notably that the Michigan Supreme Court agreed with him but has placed a limited retroactivity to his type of cases. Petitioner contends that **Aaron was wrongfully decided**, since the review was a question of constitutional law, whether the law per **the Aaron** ruling created a structural and/or trial error for harmless error review.

Chapman, answers this question of **harmless error**, holding; "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, *supra* at 23.

Michigan contrary to the due process constitutional standards long established before **Aaron**, supports that Michigan not only allowed such constitutional due process violations, they create **it** in an unconstitutional application of law.

This Court and the Circuits have consistently found due process violations, where jury instructions violate due process. See e.g., **Fiore v. White**, 531 U.S. 225, 228-29 (2001)(per curiam)(due process violated by conviction of defendant without proving each element of crime beyond reasonable doubt);**Jackson v. Edwards**, 404 F3d 612, 627-28 (2d Cir. 2005)(federal habeas relief granted because jury instruction violated due process);**Cockerham v. Cain**, 283 F3d 657, 663 (5th Cir. 2002)(same);**Sanders v. Cotton**, 398 F3d 572, 583 (7th Cir. 2005)(same);**Turrentine v. Mullin**, 390 F3d 1181, 1194 (10th Cir. 2004)(same).

Notably, in **gaines v. Kelly**, 202 F3d 598 (2d Cir. 2000), the Second Circuit determined that petitioner satisfied the watershed exception by new rule, and finding due process violation from deficient reasonable doubt instruction. **Id. at 605.**

These cited case demonstrate that a finding of due process violation in the jury instruction is reason to grant habeas relief. Petitioner has shown that a due process violation occurred in his trial, that there was both a missing and erroneous instruction given to his jury. Proof of deficient instruction is shown by the abrogation effects of **Aaron**, for all purposes of law determining the nugatory language of felony-murder statute and the fallacious reasons of such common-law defined felony murder.

The **pre-Aaron** - ruling violates due process, was not harmless and had a substantial and injurious effect on petitioner's jury's verdict. Judgment must be found in favor of this habeas petitioner. **O'Neal v. McAnninch**, 513 U.S. 432, 435 (1995).

Rehearing should be ordered, grant of habeas petition and order further proceeding upon issuance of new order.

REHEARING SHOULD BE GRANTED WHERE THIS COURT HAS JURISDICTION TO DECIDE WHETHER THE MICHIGAN SUPREME COURT IN AARON, CORRECTLY REFUSED TO GIVE FULL RETROACTIVE EFFECT TO SUBSTANTIVE NEW RULES IN ITS FELONY-MURDER STATUTE. US CONST. AM XIV

Petitioner contends that rehearing should be ordered since the Michigan Supreme Court erred in its decision to limit retroactivity on reasoning of absence of a common-law doctrine of felony-murder. Though the Aaron Court abrogated the non-existent felony-murder doctrine, it declined to address the questions of the ensuing constitutional violations, e.g., instruction error of a missing element of "malice", and the compulsory right to present a defense. The Aaron Court thereafter mandated that the jury must always be instructed on malice, and the instituting of defenses. See **People v. Aaron**, 409 Mich 672, 730 n. 32-35 (1980).

Pre-Aaron deprived defendants of Proving Elements Beyond a Reasonable Doubt, contrary to **In re Winship**, 397 U.S. 358, 364 (1970). See also **Apprendi v. New Jersey**, 530 U.S. 466, 488-92(2000)(holding, a state may not distinguish between similar offenses that have different maximum penalties without requiring the prosecution to prove beyond a reasonable doubt the facts that distinguish the two offenses).

Pre-Aaron deprived the defendants of his compulsory right to present a defense. See **Washington v. Texas**, 388 U.S. 14, 19 (1967); **Holmes v. South Carolina**, 547 US 319, 324 (2006)(affirming criminal defendant's right to "meaningful opportunity to present a complete defense")(quoting **Crane v. Kentucky**, 476 US 683, 690 (1986)). Aaron reinstated that right to present a complete defense, as shown, **Id. at 730**.

In these carious rulings, **pre-Aaron and Aaron**, the Michigan Supreme Court plugged a single hole by abrogation regarding the non-existent felony-murder doctrine, but opened the entire dam to a plethora of other constitution due process violations that had been in effect at the time of defendant's trial, and appeal of rights. The Court failed to concede that its rulings to add constitutional rights to defendants retroactively were substantive.

Petitioner will concede to this Court per its anser to habeas review under **Desist v. United States**, 394 U.S. 244 (1969), "[T]he habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.* at 263.

In consideration of rehearing, this Court is directed to turn its attention to **Yates v. Aiken**, 484 U.S. 211 (1988), which reviewed a state habeas petitioner's Fourteenth Amendment claim that the jury instruction at his trial lessened the State's burden to rpove every element of his offense beyond a reasonable doubt. That case involved a conviction that was final, but the critical fact that **Yates's** claim depended upon was an old rule, settled at the time of his trial. *Id.* at 217. This Court reversed the state habeas court for its refusal to consider that the jury instructions violated that old rule.

Rehearing should be granted, where the state's conviction denied due process under the then existing laws at the time of his conviction pursuant to the ruling in **Desist**, *supra*.

SUMMARY AND CONCLUSION

Section 2254(d)(1) [of the federal habeas statute] refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." **Cullen v. Pinholster**, 563 U.S. 170, 181-82 (2011).

Here, Petitioner has shown that the law in effect at the time of his trial in 1971 and finality of conviction was the 1970 holding of **In re Winship**. He has further demonstrated by due proofs, and the written ruling in **Aaron** that the Michigan Supreme Court ordered that courts must use and submit to the jury the issue of "malice". Malice is and at the time of petitioner's trial and element to his charge murder offense to establish the degree.

The **Aaron** ruling also supplies proof of another due process violation, which prevented the petitioner from presenting a complete defense. See **Washington v. Texas**, 388 U.S. 14, 19 (1967). See also **Thompson v. Louisville**, 362 U.S. 199, 206 (1960); **Johnson v. Louisiana**, 406 U.S. 356, 360 (1972), as case law in effect at time of finality - citing due process violation(s).

Petitioner's arguments should be taken of the facts of violation of the then established federal law in effect, and a showing that the State Court's applied **Aaron** to limit retroactivity, when clearly it was fully retroactive under the application as cited in **Yates**, *supra* at 217.

In conclusion, "[A]nytime due process is violated, the court immediately loses subject-matter jurisdiction." See *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) ("If the Bill of Rights is not complied with the court no longer has jurisdiction to proceed, the judgment . . . pronounced by a court without jurisdiction is void").

Further as the constitutional errors complained of may not be found harmless, since they have deprived the petitioner of the 'basic' protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and the criminal punishment may not be regarded as fundamentally fair. See *Arizona v. Fulminate*, 499 U.S. 279, 310 (1991).

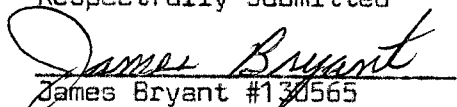
Rehearing should be granted, a new opinion/order issued or remand this case to the federal district court - Eastern District of Michigan for further proceeding as justice demands or retain jurisdiction and review under the applicable habeas corpus law of 28 U.S.C. §2254.

RELIEF REQUEST

WHEREFORE, by the reasons stated James Bryant humbly prays that this Honorable Court grant rehearing of his habeas petition, issue a new opinion/order granting relief or legal opinion to his claims, order the respondent to answer the petition pursuant to Habeas Rule 5, allow responsive pleading, or remand this matter to the appropriate court of jurisdiction for further proceedings.

Date: October 12, 2019

Respectfully submitted



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**Additional material
from this filing is
available in the
Clerk's Office.**