No._____

In The
Supreme Court of the United States

SHAWNTELE CORTEZ JACKSON,

Petitioner,

v.

KATHY LITTERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit's decision in *Ruelas v. Wolfenbarger*, 580 F.3d 403 (6th Cir. 2009) acknowledged that this court's seminal decision in *Fry v. Pliler*, 551 U.S. 112 (2007) did not overule *Mitchell v. Esparza*, 540 U.S. 12 (2003) *(per curiam*). In *Ruelas*, the Sixth Circuit held that a federal habeas court is free to apply the *Esparza* harmless error standard to determine whether a state court of appeals reasonably applied the *Chapman* harmless error standard on direct review. In the decision below, *infra,* App. 3a, the court of Appeals applied this standard. However, the Kentucky Supreme Court did not apply the *Chapman* harmless error standard on direct review.

This case presents the following questions:

1. Whether the Sixth Circuit erred in applying the *Esparza* harmless error standard, instead of the *Brecht* harmless error standard on federal habeas review, when the state court failed to apply *Chapman* on direct review.

2. Whether a trial court's erroneous denial of a request for a self-protection instruction as to the lesser included offenses of second-degree manslaughter and reckless homicide may be deemed harmless.

PARTIES TO THE PROCEEDINGS

1. Petitioner Shawntele Cortez Jackson, a prisoner serving a capital sentence at the Eastern Kentucky Correctional Complex, was the petitioner-appellant in the court of appeals.

2. Respondent Kathy Litteral, former Warden of the Eastern Kentucky Correctional Complex, was the respondent-appellee in the court of appeals.

LIST OF THE PROCEEDINGS

Jackson v. Litteral
U.S. Court of Appeals
Sixth Circuit
Case No. 3:16-cv-00091-DJH-DW
Decision Date: August 16, 2019

Jackson v. Litteral
U.S. Court of Appeals
Sixth Circuit
Case No. 3:16-cv-00091-DJH-DW
Decision Date: November 27, 2018

Jackson v. Litteral
U.S. District Court
Western District of Kentucky
Louisville Division
Case No. 3:16-cv-00091-DJH-DW
Decision Date: November 6, 2017

Jackson v. Commonwealth
Kentucky Supreme Court
Case No. 2007-SC-000392-MR
Decision Date: January 21, 2010

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PETITION FOR A WRIT OF CERTIORARI

Shawntele Cortez Jackson respectfully petitions for a writ of *certiorari* to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit affirming the district court's judgment denying petitioner's petition for federal habeas corpus relief is unpublished. App. 1a – 8a. The opinion of the Sixth Circuit granting petitioner a certificate of appealability is unpublished. App. 9a – 11a. The opinion of the district court denying the petitioner federal habeas relief is unpublished but can be found at 2017 WL 5148358. App. 12a – 34a. The opinion of the Kentucky Supreme Court is unpublished but can be found at 2010 WL 252244. App. 82a – 110a.

JURISDICTION

The Sixth Circuit entered its judgment on August 16, 2019. App. 1a – 8a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2254(d)(1)

> (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

Petitioner Shawntele Cortez Jackson was convicted of murder and tampering with physical evidence following a May 2006 altercation that took place late at night outside a housing project in Louisville, Kentucky. App 2a. Jackson and a friend paid the victim and his girlfriend to drive them to a convenience store. App. 13a. While at the convenience store, Jackson and the victim got into an argument which continued until the group go back to the housing project. App. 13a. After they parked, the victim's girlfriend retrieved a gun out of the trunk and handed it to the victim. App. 13a. The victim then approached Jackson and threatened to kill him. App. 13a. A struggle over the gun ensued and during the entanglement the gun fired, striking the victim in the back of the head. App. 13a.

The victim's girlfriend testified that Jackson was pistol whipping the victim causing the gun to go off and kill the victim. App 14a. Another witnessed testified that he heard the gun go off but did not recall seeing anyone with a gun prior to the incident. App. 14a. The murder weapon was not recovered. App. 2a.

In 2007 Jackson was found guilty of murder and tampering with physical evidence. App. 9a. The jury fixed his punishment at fifty years imprisonment for the count of murder and one-year imprisonment for the count of tampering with physical evidence, recommending that the sentences run concurrent with one another. App. 86a.

A. Kentucky Supreme Court

On appeal direct appeal, Jackson raised ten allegations of error in his underlying trial. App. 86a - 110a. Including that the trial court erred in failing to instruct the jury on self-protection as to the two lesser included offenses of second-degree manslaughter and reckless homicide. App. 101a-103a. The court held that the trial court did err in failing to instruct the jury on self-protection of the lesser included offense. App. 101a. However, the court held that the error was harmless because there was no evidence to suggest that "'the error itself had substantial influence' upon [Jackson's] trial. App. 102a. The Kentucky Supreme Court affirmed Jackson's convictions and sentence. App. 58a.

B. Western District of Kentucky

In Jackson's petition for federal habeas corpus relief, he raised ten claims that he had exhausted in his state direct appeal and six claims of ineffective assistance of counsel. App. 2a-8a. A magistrate judge recommended that the petition be denied, and the district court adopted the magistrate judge's recommendation. App. 12a. The district court held that Jackson could not prove that the failure to instruct the jury on self-protection prejudiced him, in

light that he was convicted under the a correctly worded charge of murder. App. 18a.

C. Partial Certificate of Appealability

The Sixth Circuit granted Jackson a partial certificate of appealability on: (1) whether Jackson was erroneously denied an instruction on self-protection for the lesser-included charges of reckless homicide and second-degree manslaughter; (2) whether Jackson's cross-examination of prosecution witness Amber Baker was improperly limited in violation of the Confrontation Clause; and (3) Jackson contends that testimony that he had been carrying a different handgun several days before the murder was erroneously admitted. App. 10a.

D. U.S. Sixth Circuit Court of Appeals

The Sixth Circuit affirmed the Kentucky Supreme Court's holding that the state court's failure to instruct the jury on the proper self-protection instruction to the lesser included offenses of second-degree manslaughter and reckless homicide were harmless. App. 3a. The court held that "because the jury was properly instructed on the offense of conviction, the state court reasonably concluded that the trial court's error did not have a substantial and injurious effect on the verdict." App. 3a.

This petition for writ of certiorari arises from the Sixth Circuits error in applying the wrong harmless error standard on federal habeas review.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Did Not Apply the Correct Harmless Error Standard on Collateral Review.

1. This Court's seminal decision in *Fry v. Pliler* is clear:

> in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*[1], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard in *Chapman*[2].

Fry, 551 U.S. at 121.

However, since *Fry*, the circuit courts have differed in their interpretation of its holding. For example, the Sixth Circuit, in *Ruelas v. Wolfenbarger*, 580 F.3d 403, 413 (6th Cir. 2009), noted that *Mitchell v. Esparza*, 540 U.S. 12, 18-19 (2003) *(per curiam)*[3],

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[1] *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

[2] *Chapman v. California*, 386 U.S. 18, 24 (1967).

[3] *Esparza* held that "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable." *Fry*, 551 U.S. at 119 (describing *Esparza*); *see* 28 U.S.C. § 2254(d)(1) (the Antiterrorism and Effective Death Penalty Act (AEDPA) states: an application for writ of habeas corpus shall not be granted

was not overruled by *Fry* and said, "[p]er that case, a habeas court remains free to, before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable." *Id.* "If it was reasonable, the case is over." *Id.*

This is the standard the Sixth Circuit applied here. The court held that, "because the jury was properly instructed on the offense of conviction, the state court reasonably concluded that the trial court's error did not have a substantial and injurious effect on the verdict." App 4a. However, the court of appeals disposed of the petitioners claim in a manner inconsistent with *Fry* and the Sixth Circuit's own precedent. The court of appeals affirmed the state court's finding of harmless error, under *Esparza*. However, the *Esparza* standard is only applied when the state court conducts a harmless error analysis under *Chapman*.

Here, the Kentucky Supreme Court did not conduct a harmless error analysis under *Chapman*. App 103a – 104a. The court held: "we believe that this error was harmless, as we cannot say that 'the error itself had substantial influence' upon Appellant's trial." App 103a. The court neither cited *Chapman* in its holding nor does the language suggest that the court applied the *Chapman* "harmless beyond a reasonable doubt" standard. In fact, the court's language suggest that it applied the *Brecht* harmless error standard—a standard this Court held to be

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unless the adjudication of the underlying claim involved "an unreasonable application of, clearly established Federal Law.").

appropriate only for collateral review. *See Brecht*, 507 U.S. at 623.[4]

Thus, the Sixth Circuit erred when it applied the *Esparza* harmless error standard on collateral review, because *Esparza's* application is dependent on the state court of appeals conducting a harmless error analysis under *Chapman*. This is the error that this court sought to address in *Fry*. *See Fry*, 551 U.S. at 114. In *Fry* this Court held that the *Brecht* standard would apply, regardless of whether the state court conducted a harmless error review under *Chapman*. *Id*. at 121.

Therefore, this Court should grant Jackson's petition for writ of certiorari to clarify the appropriate standard of harmless error review on direct and collateral review.

II. The Circuit Courts of Appeals have differed in their interpretations of *Fry*.

[4] This Court applies different standards on habeas than applied on direct review. *See Brecht*, 507 U.S. at 634. The distinction between direct and habeas review is due to the separate interest these proceedings seek to achieve. On direct review, the *Chapman* "harmless beyond a reasonable doubt standard" is applied to prevent constitutional errors that affect substantial rights of a party from being treated as harmless. *Chapman*, 386 U.S. at 23. While on collateral review, *Brecht's* "substantial and injurious effect" standard is applied to protect States' interest in finality and minimize infringement upon their sovereignty over criminal matters. *Brecht*, 507 U.S. at 633.[4] Moreover, the *Brecht* standard "is better tailored to the nature and purpose of collateral review," because it is less onerous than *Chapman*. *Id*. at 623.

Four years after *Esparza* was decided, this court granted certiorari in *Fry* to decide the appropriate harmless error standard on habeas review of a constitutional error at trial. While *Fry* did not expressly overrule *Esparza*, the practical effect of this holding was that the *Brecht* standard alone was sufficient and appropriate for assessing harmless error on collateral review. *Id*. This Court noted that there is no need for the formal application of both *Esparza* (AEDPA) and *Brecht*, because *Brecht* "subsumes" the requirements that § 2254(d) imposes. *Id*. at 129.[5] However, despite *Fry*'s holding, there is still a lack of unanimity as to the interpretation of *Fry* and the harmless error standard on federal habeas review. The Circuits use three different approaches.

A. The Second Circuit has concluded that *Fry* bars the use of *Esparza*.

In *Wood v. Ercole*, 644 F.3d 83, 93–94 (2d Cir. 2011), the Second Circuit noted that this Court's holding in *Fry* appeared to settle the debate as to which harmless error standard applied on federal habeas corpus review. *Id*. It held that "the unreasonable application of [the] *Chapman* standard does not survive *Fry*." *Id*. The court said that the Supreme Court has provided "clear instruction as to

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[5] *See Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (noting that *Esparza* was not abrogated in light of the holding in *Fry* because *Brecht* "subsumes" the requirements that § 2254(d) imposes when a federal habeas petitioner contest a state court's determination that a constitutional error was harmless under *Chapman*).

the standard to be applied, it is our responsibility to follow that instruction and apply that standard." *Id.*

B. The Fifth and Seventh Circuit apply a two-step test.

In contrast, in *Gongora v. Thaler*, 710 F.3d 267, 273 (5th Cir. 2013), the Fifth Circuit evaluates whether a constitutional error is harmless under two steps. First, the court decides "under 28 U.S.C. § 2254(d)(1) whether fairminded jurist could disagree that a [constitutional] error occurred." *Id.* Then, the court must determine whether the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*

In *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009), similarly applied a two-step harmless error analysis. The Seventh Circuit said that, when the state court has conducted a harmless error analysis, "the federal court must decide whether that analysis was reasonable application of the *Chapman* standard." *Id.* If the state court's analysis was reasonable "then the federal case is over and no collateral relief issues." *Id.* But, if the state court's harmless error analysis was not reasonable—"either because the state court never conducted a harmless-error analysis, or because it applied *Chapman* unreasonably"—then the federal court must apply the *Brecht* standard to determine whether the error was harmless. *Id.*

C. The Sixth and First Circuit apply a "flexible" approach where the courts are free to use either the *Esparza* standard or the *Brecht* standard.

In *Ruelas*, 580 F.3d at 413, *supra*, the Sixth Circuit held that a habeas court remains free to inquire whether the state court's *Chapman* analysis was reasonable, before turning to *Brecht*. *Id*. The Sixth Circuit applied this flexible standard in its decision below. App. 3a-4a. Stating: "because the jury was properly instructed on the offense of conviction, the state court reasonably concluded that the trial court's error did not have a substantial and injurious effect on the verdict. App. 3a-4a.

Similarly, in *Connolly v. Roden*, 752 F.3d 505, 511 (1st Cir. 2014), the First Circuit held that "when a state court decides that a constitutional error is harmless beyond a reasonable doubt under *Chapman*, a federal court on habeas review may choose between two equally valid options." *Id*.

Given the differences in the application of *Fry*, this Court should grant certiorari and clarify the appropriate standard.

III. The Trial Court's Unconstitutional Exclusion of the Petitioner's Warranted Theory of Defense to a Lesser Included Offense Cannot be Characterized as a Harmless Error.

It is well established that the writ of habeas corpus is regarded as an extraordinary remedy, reserved for

convictions that violate fundamental fairness and for those "whom society has grievously wronged." *Brecht*, 507 U.S. at 654 (O'Connor, J., dissenting). However, a prisoner who has been convicted "because of constitutional trial error *ha[s]* suffered a grievous wrong." *Id*. (emphasis in original). This case is not about a refusal to instruct on a fantastic, improbable defense that the jury was unlikely to adopt nor is this case about a minor error of state law explaining legal standards. Rather the trial court's ruling completely deprived the petitioner of his credible defense to second-degree manslaughter and reckless homicide.

The Eighth Amendment requires that "a jury be able to consider and give effect to all relevant mitigating evidence." *Gilmore v. Taylor,* 508 U.S. 333, 342 (1993). A trial court may not refuse to charge a jury on a valid defense that has been raised by the evidence at trial. *See U.S. v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005).[6] This Court has recognized that there are "some constitutional errors which in the setting of a particular case are so unimportant and insignificant . . . that they may be deemed harmless." *Brecht*, 507 U.S. at 630 (quoting *Chapman*, 386 U.S. at 22). That is not the case here. The nature of the right at issue is an important equitable consideration. The petitioner was precluded from asserting a core

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[6] The burden of presenting evidence sufficient to support a jury instruction on a theory of defense is "extremely low." *Arias*, 431 F.3d at 1340. "[T]he defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *Id*. at 1340 (quoting *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir.1986)).

constitutional privilege—the opportunity to present a complete defense.[7] This privilege is critical to the reliability of the criminal process.

Here, the trial court erroneously denied the petitioner's request for a self-protection instruction as to the lesser offenses of second-degree manslaughter and reckless homicide. App. 101a-104a. The Kentucky Supreme Court agreed that this was an abuse of discretion and acknowledged that "an erroneous instruction on a lesser included offense can be grounds for reversal even if the defendant was convicted of [a] higher offense." App. 101a-104a. Conversely, the court held that this error was harmless, despite its holding being contrary to its established precedent App. 101a-104a.[8] The court reasoned that because the appellant was convicted under a correct instruction the trial court's error was harmless. App. 101a-104a. Such a narrow view of the right at issue ignores the constitutional safeguards provided by the eighth amendment and due process. Judicial disregard for the sound and established

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[7] This Court has previously stated the "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Gilmore v. Taylor,* 508 U.S. at 343; *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also Arias*, 431 F.3d at 1340 (citing *Mathews v. United States*, 485 U.S. 58, 63 (1988)) ("A criminal defendant has the right to a jury instruction on his theory of defense, separate and apart from instructions given on the elements of the charged offense.").

[8] Since *Elliott v. Commonwealth*, 976 S.W.2d 416, 422 (Ky. 1998), the Kentucky Supreme Court "has found error where a trial court, nevertheless, denies an otherwise warranted self-protection instruction within a homicide instruction requiring a mens rea short of intent or specific intent." *Id.*

principles that inform the proper issuance of the writ of habeas corpus increase the likelihood that a conviction will be preserved despite an error that affected the reliability of the trial. *See Harrington v. Richter*, 562 U.S. 86, 92 (2011).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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