

ORIGINAL

Case No. 19-6591

Supreme Court, U.S.

FILED

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**In The
Supreme Court of the United States**

In re, KENNTEH UNCAPHER
Petitioner,

v.

DEWAYNE BURTON
Respondent.

Petition for Writ of Habeas Corpus

Kenneth Uncapher #430066
Petitioner in Pro Se
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QUESTIONS PRESENTED FOR REVIEW

- I. Was the Petitioner denied a fair trial where a member of the jury told the judge he was accosted outside of the courtroom by members of the victim's family, where other jurors were tainted by comments and disparaging remarks made during the trial, and the court's refusal to grant a mistrial on these grounds?
- II. Did the trial court's misinterpretation of *Carpenter* deny the petitioner of his VI and XIV Constitutional right to due process when the trial court used the case to preclude evidence, thereby denying Petitioner a full defense?
- III. Is Petitioner entitled to a new trial where newly discovered evidence was discovered after his appeal of right, regarding the adverse side effects of the Petitioner's prescription to Zolofit?
- IV. Was Petitioner denied his VI Amendment right to effective assistance of appellate counsel and his XIV Amendment right to due process and a fair appeal of right where counsel failed to raise significant and obvious issues?
- V. Was Petitioner denied his XIV Amendment right to due process where trial court refused to hold an evidentiary hearing on his non-record claim of newly discovered evidence as mandated by state and federal law and the court's failure to apply the appropriate test in review of his newly discovered evidence?

PARTIES TO THE PROCEEDING

All Parties in the caption of the case appear on the cover page

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OPINIONS AND ORDERS

The order of the Michigan Court of Appeals denying Petitioner's Application for Leave to Appeal appears in Appendix C of this petition and is unpublished. *People v. Uncapher*, No. 246222 (Mich. Ct. App. Apr. 13, 2004).

The order of the Michigan Supreme court denying Petitioner's Application for Leave to Appeal appears in Appendix D of this petition and is unpublished. *People v. Uncapher*, No. 126299 (Mich. Oct. 25, 2004).

The order of the Michigan Court of Appeals denying Petitioner's second Application for Leave to Appeal appears in Appendix K of this petition and is unpublished. *People v. Uncapher*, No. 01-014257-01 (Mich. Jan. 13, 2011)

The order of the Michigan Court of Appeals denying Petitioner's second Application for Leave to Appeal appears in Appendix L of this petition and is unpublished. *People v. Uncapher*, No. 304009 (Mich. Ct. App. August 16, 2011)

The order of the Michigan Court of Appeals denying Petitioner's second Application for Leave to Appeal appears in Appendix M of this petition and is unpublished. *People v. Uncapher*, No. 143737 (Mich. Dec. 28, 2011)

The order of the U.S. District Court Granting Reopening of Petitioners Habeas Proceedings appears in Appendix E of this petition and is unpublished. *Kenneth Uncapher v. Berghuis*, 5:08-cv-10583 (Feb. 3, 2012)

The order of U.S. District Court Transferring Petitioner's Case to the U.S. Court of Appeals is unpublished. *Kenneth Uncapher v. Berghuis*, 5:08-cv-10583 (Feb. 24, 2015).

The Order of the 6th Circuit U.S. Court of Appeals Denying Petitioner's Application for a Successive Habeas Petition appears in Appendix F of this petition and is unpublished. *In re: Kenneth Uncapher*, No. 16-1846 (Sept. 8, 2015)

The Order of the 6th Circuit U.S. Court of Appeals Denying Petitioner's second Application for a Successive Habeas Petition appears in Appendix F of this petition and is unpublished. *In re: Kenneth Uncapher*, (Feb. 15, 2017)

JURISDICTION

This Court has jurisdiction to review a petition for habeas corpus pursuant to 28 U.S.C § 2254 and Supreme Court Rule 20 governing Extraordinary Writs.

**REASONS FOR NOT FILING APPLICATION
IN DISTRICT COURT**

The reasons Petitioner is filing with this Court are discussed in the Reasons for Granting the Writ on pages 10-13.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Michigan Compiled Law § 768.21a

(1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the public Acts of 1974, being section 300.1400a of the Michigan compiled Laws, or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Publics Acts of 1974, being section 300.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

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 being 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 fair, and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution

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 its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. §2254, Petitioner in pro se, petitions this Court for a writ of habeas corpus in this matter for the following reasons:

Petitioner is currently incarcerated with the Michigan Department of Corrections at the Richard a. Handlon Correctional Facility in Ionia, Michigan. His MDOC number is 430066.

Following a jury trial in the Wayne County Circuit Court for the state of Michigan, Petitioner was convicted by a jury of first-degree murder (M.C.L. 750.316) and second degree murder (M.C.L. 750. 317). On October 3, 2002 the trial court sentenced Petitioner to life imprisonment as to the first-degree murder charge and 25-50 years as to the second-degree murder charge.

Following his conviction, Petitioner filed an appeal of right to the Michigan Court of Appeals raising the following issues:

- I. The trial court's improper evidentiary rulings denied appellant his constitutional right to present evidence in support of his defense.
- II. The evidence presented at Appellant's trial was insufficient to convict him of first-degree murder.

The Court of Appeals affirmed Petitioner's conviction on April 13, 2004 (Appendix B).

The Petitioner then filed for Leave to Appeal in the Michigan Supreme Court raising the following issues:

- I. This Court erroneously interpreted MCL 768.21 in *People v. Carpenter* to preclude the introduction of mental deficiency evidence short of legal insanity that negates the specific intent element of a crime.
- II. This Court erroneously held in *People v. Carpenter* that a state may restrict a criminal defendant's presentation of diminished capacity evidence without violating his right to

due process under the United States Constitution (US Const. Ams.V & XIV).

- III. The holding in *Carpenter* caused the trial court to erroneously preclude admission of Defendant's mental deficiencies as they affected his specific intent.

The Michigan Supreme Court denied Petitioner's application by Order on October 25, 2004.

(Appendix D)

The Petitioner filed, with this Court, a petition of Certiorari raising the following issue:

- I. May a state constitutionally bar a criminal defendant from presenting evidence of a mental deficiency short of insanity that negates the specific intent element of a crime where the evidence is exculpatory and, according to the state's law, relevant and competent?

This Court denied the Petitioner's petition on March 21, 2005.

The Petitioner next filed a motion for relief from judgment in the Wayne County Circuit Court on March 20, 2006 raising the following issues:

- I. Petitioner was denied a fair trial where a member of the jury told the judge he was accosted by members of victims' family. Petitioner's attorney filed for a mistrial which the court denied.
- II. Defendant's trial and appellate counsels were ineffective for failing to object to the juror's continued presence on the jury and for failing to raise the issue on direct appeal to the Michigan Court of Appeals.

The circuit court denied relief on April 10, 2007 (Appendix C). The Michigan Court of Appeals denied leave to appeal on December 19, 2007 (Appendix D). The Michigan Supreme Court also denied Petitioner's Application for Relief from Judgement on February 7, 2008 (Appendix E).

The Petitioner next filed with the U.S. District Court a petition for habeas corpus raising the constitutional claims addressed within his application for relief from judgment on February 8, 2008 (5:08-cv-10583). While his petition for habeas was pending, the Petitioner also filed a writ of jurisdiction with the U.S. District court on March 16, 2008 which was denied on July 7, 2008 (Appendix J).

The Petitioner next learned of new exculpatory evidence and filed with the U.S. District Court for a stay and abeyance on habeas proceedings on June 23, 2010, which was granted and petitioner was directed to exhaust his new claims of:

- I. Petitioner is entitled to a new trial where newly discovered evidence has recently materialized regarding the adverse side effects —violent, angry, and aggressive involuntary acts and behavior—caused by the prescription Zolof.
- II. Petitioner was denied his sixth amendment right to the effective assistance of appellate counsel and his fourteenth amendment due process right to to a full and fair appeal of right where counsel failed to raise significant and obvious issues on appeal.
- III. Petitioner was denied his fourteenth amendment due process right to a full and fair hearing where the state courts refused to hold an evidentiary hearing on his non-record claim of newly discovered evidence, as mandated by state and federal law.

These issues were denied by the trial court (filed: July 20, 2010/denied: January 13, 2010); the Michigan Court of Appeals (filed: March 20, 2011/denied August 16, 2011); and the Michigan Supreme Court (filed: September 14, 2011/denied: December 38, 2011) (Appendices K-M respectfully).

Petitioner next filed with the U.S. District Court on January 13, 2012, a motion to reopen and amend habeas petition which was granted on Feb. 3, 2012 (5:08-cv-10583) (Appendix F).

while this matter was pending, the Petitioner filed a motion for evidentiary hearing and appointment of counsel with the District Court on April 20, 2012 which was denied on August 14, 2012.

On February 15, 2015 the U.S. District Court transferred the Petitioners case to the U.S. Court of Appeals pursuant to U.S.C. 28 §1631 stating that the Petitioner's habeas petition was successive and he would have to file an application for a second or successive habeas petition with the 6th Circuit Court (Appendix G).

Petitioner filed an Application for an Order Authorizing the District Court to Consider a Second or Successive Application (No. 15-1239) which was denied on September 8, 2015 (Appendix H). Petitioner next filed a motion for a panel rehearing pursuant to the Federal Rules of Procedure Rule 40(a) on September 22, 2016 which was returned without filing by the clerk of the court on September 24, 2016.

On June 21, 2016, Petitioner filed an additional Application for an Order Authorizing the District Court to Consider a Second or Successive Application (No. 16-1846) raising only the newly discovered claims, which was also denied (Appendix I).

Petitioner subsequently filed, pursuant to the Federal Rules of Civil Procedure 60(b) a motion for relief from judgment with the U.S. District Court (April 21, 2017) which was denied, and the 6th Circuit Court of appeals (September 27, 2018; March 25, 2019; & May 30, 2019) in which two were lost in the mail and the third was returned without filing. These motions explicated the erroneous ruling of the District Court and subsequent erroneous rulings of the 6th Circuit Court which stemmed from the Petitioner's Writ of Jurisdiction being re-characterized to a petition for habeas.

Petitioner, pursuant to 28 U.S.C. §2254 and Supreme Court Rule 20, raises the following constitutional claims with this Court.

- I. Was the Petitioner denied a fair trial where a member of the jury told the judge he was accosted outside of the courtroom by members of the victim's family, where other jurors were tainted by comments and disparaging remarks made during the trial, and the court's refusal to grant a mistrial on these grounds?
- II. Did the trial court's misinterpretation of *Carpenter* deny the petitioner of his VI and XIV Constitutional right to due process when the trial court used the case to preclude evidence, thereby denying Petitioner a full defense?
- III. Is Petitioner entitled to a new trial where newly discovered evidence was discovered after his appeal of right, regarding the adverse side effects of the Petitioner's prescription to Zolofit?
- IV. Was Petitioner denied his VI Amendment right to effective assistance of appellate counsel and his XIV Amendment right to due process and a fair appeal of right where counsel failed to raise significant and obvious issues?
- V. Was Petitioner denied his XIV Amendment right to due process where trial court refused to hold an evidentiary hearing on his non-record claim of newly discovered evidence as mandated by state and federal law and the court's failure to apply the appropriate test in review of his newly discovered evidence?

The Petitioner is being held unconstitutionally because the errors listed above entitle him to relief. The decisions of the Michigan Courts, U.S. District Court, and the 6th Circuit Court of Appeals were contrary to and based on an unreasonable application of clearly established law as determined by the U.S. Supreme Court. 28 U.S.C. §2254(d)(1). The decisions of Michigan Courts, U.S. District Court, and the 6th Circuit Court of Appeals in this case were based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. §2254(d)(2)

REASONS FOR GRANTING THE WRIT

I. Petitioner was denied his constitutional right under Article 1 § 9, cl. 2 which guarantees federal review of constitutional claims arising from trial.

In the case at bar, the claims presented in this petition involve an array of constitutional violations including ineffective assistance of counsel, abuse of discretion, and due process violations. However, because the U.S. District Court erroneously re-characterized Petitioner's Writ of Jurisdiction (Appendix I), none of these claim have been adjudicated on their merits in any federal court, thereby depriving Petitioner of his constitutional right to federal review.

At least since 1953, this Court has the federal habeas statute to encompassed novo post-conviction review of federal claims brought on by state prisoners. See *Brown v. Allen*, 344 U.S. 443 (1953). Accordingly, the federal courts have continued to exercise habeas jurisdiction to provide state prisoners with their one "appeal as of right" in federal courts. On February 8, 2008 Petitioner, through counsel, timely filed a habeas corpus petition with the U.S. District Court (5:08-cv-10583). While this petition was pending, the Petitioner filed also with the U.S. District Court a Writ of Jurisdiction pursuant to 28 U.S.C. § 1331; 22 U.S.C. § 611 & § 622; and Title 4 U.S.C. § 101 & § 102 (1:08-cv-457). This writ challenged the validity of Petitioner's trial judge and prosecutor's ability to legally practice law and was dismissed as "quasi-legalistic ramblings" by Judge Scoville on July, 7, 2008. (Appendix I)

While Petitioner's writ of habeas still pending in the District Court, the Petitioner learned of new evidence which was not available during Petitioner's trial, appeal of right, or habeas filing and filed a stay and abeyance which was granted on December 10, 2009. (5:08-cv-10583) Petitioner exhausted his claim in the state courts and was denied in the trial court (case no. 01-014257-01); the Michigan Court of Appeals (case no. 304009); and the Michigan Supreme Court (case no. 143737). Petitioner then filed a motion to lift stay and amend habeas petition which

was granted by the U.S. District Court on February 25, 2012. However, on February 24, 2015 the U.S. District Court transferred the Petitioner's case to the 6th Circuit Court of Appeals pursuant to 28 U.S.C. § 161 stating the Petitioner had already exhausted his habeas review and that his amended habeas petition was second or successive. Petitioner then filed two applications with the 6th Circuit Court of Appeals explaining the error and was denied on both applications (Appendices G & H). Petitioner argues that he was never afforded his right to federal review and that it is not only within this Court's jurisdiction to review his habeas petition, but it also within this Court's discretionary powers to grant his petition.

II. The U.S. District Court as well as the 6th Circuit U.S. Court of Appeals have decided an important question in a way that conflicts with relevant decisions of this Court.

The District Court abuses their discretion when re-characterizing a pro se litigant's petition or motion without issuing a warning or affording the litigant to withdraw or amend the petition or motion. This Court ruled in *Castro v. United States* that District courts may not re-characterize any motion as one filed pursuant to §2255 or §2254 without the petitioner's consent and unless the court provides notice of its intent to do so and provides the petitioner the opportunity to withdraw or amend the petition. *Castro v. United States*, 540 U.S.375, 376 (2003) & *In re Shelton* 295, F.3d 620, 622 (6th Cir. 2002).

When the District Court re-characterized the Petitioner's Writ of Jurisdiction to be Petitioner's one and only writ of Habeas Corpus, it did so without warning or informing the Petitioner and further failed to give the Petitioner the opportunity to withdraw or amend his motion. Additionally, the Writ of Jurisdiction was not filed under §2254 or §2255 and should not therefor have been considered as a habeas petition. When a filing is some other type of pleading, it should not be viewed as a petitioner's first application for habeas relief. *Castro id.* See also *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) & *Corrao v. U.S.*, 152 F.3d 188 (2nd Cir.

1998). In the case at hand, the Petitioner's true and original habeas petition was already filed and pending in the U.S. District Court when he filed the Writ of Jurisdiction.

The District judge was obviously confused, as evident in his labeling the Writ of Jurisdiction as "quasi-legalistic ramblings" but since he ruled that the writ was in fact a petition for habeas review the precedent held in *Ching and Slack* should have governed the court's decision and Judge Scoville should have filed the 'second motion' as a motion to amend. *Ching v. United States*, 298 F.3d 174 (2002); *Slack v. McDaniel*, 529 U.S. 473. In order to bring the AEDPA's gatekeeping provisions, the earlier petition must qualify as an adjudication on the merits and a second motion must be construed as a motion to amend. See *Jacobs v. McCaughty*, 251 F.3d 596 (7th Cir. 2001); *Goodrum v. Busby*, 824 F.3d at 1191; *Whab v. U.S.*, 408 F.3d 116 (2nd Cir. 2001) & *Douglas v. Workman*, 560 F.3d 1156, 1198-90 (10th Cir. 2009). Because the District Court went against clearly established Supreme Court precedent by issuing an erroneous ruling that amounted to a fundamental miscarriage of justice, the Petitioner argues that this Court is the last resort for obtaining federal review.

In order to correct the violation of Petitioner's procedural due process, he must be afforded the right to present evidence. This right mandates that petitioner have to opportunity to be heard. See *Francis v. Henderson*, 452 U.S. 536 (1976); *Wainwright v. Sykes*, 433 U.S. 72; *Swarthout v. Cooke*, 562 U.S. 216. The Petitioner argues that:

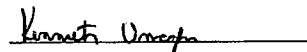
1. He was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection, and
2. The procedures available to him did not provide due process of law.

Petitioner argues that he has made the prima facie showing of cause and prejudice where the error in question worked toward the petitioner's actual substantial disadvantage. *See U.S. v. Ford*, 456 U.S. at 170 (1982). The Petitioner acknowledges that the granting of a writ of habeas corpus in the United States Supreme Court is extraordinarily rare but argues that his case falls within the narrow exceptions as set forth under 28 U.S.C §2254 and Supreme Court Rule 20. By showing that:

1. Exceptional circumstances exist
2. No other form of relief is available
3. Relief is not available from any other court

Wherefore, the Petitioner prays that this honorable Court grant this petition and for such other relief as equity and justice require, including an opportunity to expand the record, an evidentiary hearing, and an oral argument on the petition. Or, in the alternative, remand the petition to the U.S. District Court where Petitioner's constitutional claims may finally be adjudicated on their merits.

Respectfully submitted,



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Dated: 11-6-2019