20-5430 Case No.

IN THE SUPREME COURT OF
THE UNITED STATES

ANTHONY GAGE MEYERS,

Petitioner

vs.

Cathy Jess,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO UNITED STATES
COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION

FOR WRIT OF CERTIORARI

Anthony Gage Meyers
Pro Se Petitioner
Inmate No. 520337
O.S.C.I
OSHKOSH WI, 54903

PHONE NUMBER N/A

QUESTIONS PRESENTED

1. Was there sufficient evidence of utter "utter disregard for human life" to support a first degree reckless homicide conviction?

2. Should additional jury instructions, specifically JI-810 have been requested to point out Meyers had no duty to retreat in his own home?

3. Was trial counsel ineffective for failing to request second degree reckless homicide as a lesser-included offense?

4. Was defense counsel ineffective for agreeing not to introduce the victim's violent past known to the defendant at the time of the homicide occurred?

5. Was trial counsel ineffective for failing to request additional and/or different jury instructions for the self-defense, of which pointed out that Meyers had no legal duty to retreat in his own home?

6. Was trial counsel ineffective for failing to argue, move, and/or in any other way put forth the notion that there was a totality of the evidence showing that "utter disregard" of the victim's life would be an inappropriate finding in this case?

LIST OF PARTIES

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

TABLE OF CONTENTS

CASE OF AUTHORITIES CITED

IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI.

OPINIONS

For the cases from Federal Courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is in denial of Certificate of Appealability and is published dated April 23, 2020.

For the cases from State Courts: N/A

JURISDICTION

For the cases from Federal Courts:

Decision and Order denying Petition for Writ of Habeas Corpus dated March 27, 2019.

No Petition for Rehearing or no timely Petition for Rehearing and no e extension of time to file the Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

For Cased from the State Court: N/A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment 6:

In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense,

effective assistance of counsel at all stages of a defendant's case.

Constitution of the United States, Amendment 14:

No State shall . . . deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

This Petition seeks to clarify whether or not:

a) The evidence presented at trial was sufficient to prove Meyers acted with "utter disregard" for human life.

b) Trial counsel, John Keuch and Linda Myer was truly ineffective for several reasons including: failing to request JI-Crim 810, waiving Meyer's right to elicit his knowledge of the victim's violent past, failing to move.

c) The use of additional and/or different jury instructions regarding self-defense should have been employed and requested by the defense, especially the pronouncement there is no duty to retreat.

d) The 7th Circuit Court of Appeals was correct affirming the Eastern District decision to deny Meyers Certificate of Appealability.

In 2009, after the death of Shon Potschaider (Shon), a jury in Winnebago County Circuit Court, convicted Anthony Gage Meyers of first-degree reckless homicide and misdemeanor bail jumping. In 2016, Mr. Meyers filed a timely Petition for a Writ of Habeas Corpus under 28 U.S.C. 2254, and in 2019 Federal Court denied Meyers 2254 Petition and Certificate of Appealability. On April 23, 2020 the 7th Circuit Court of Appeals denied

Meyers Certificate of Appealability. Now this Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

"The purpose of the right to effective assistance of counsel is to preserve a defendant's right to a fair trial; the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trail." ***U.S. v. Cronic***, 466 U.S. 628, 568 (1984).

The petition should be granted for multiple reasons. First, the 7th Circuit Court of Appeals of the U.S. failed to apply Strickland v. Washington standards to Meyers Certificate of Appealability. The Federal Court also failed to apply ***Strickland v. Washington*** and ***U.S. v. Cronic*** **Id.** to Meyers 2254 Habeas Corpus Petition. Second, there was insufficient evidence to prove Meyers showed "utter-disregard" for the victim's life in this case. Third, the use of additional and/or different jury instructions regarding self-defense should have been employed at trial and requested by defense, especially the pronouncement that Meyer's had no duty to retreat in his own home. Finally, Meyer's trial counsel should have brought into evidence the prior bad acts of the victim known to Meyers the time the stabbing occurred, and not waived Meyer's right to do so.

ARGUMENTS

Issue I. THERE WAS INSUFFICIENT EVIDENCE OF "UTTER DISREGARD FOR HUMAN LIFE" TO SUPPORT A FIRST-DEGREE RECKLESS HOMICIDE CONVICTION.

Trial Judge, Scott Woldt described the incident between Shon and Meyers as follows:

> "...In My opinion, it was not a fight because a fight takes two people throwing fist participating. In my - - in my estimation of this, based upon the evidence that was before this court, it was a beating. Shon was beating the crap out of [Meyers], plain and simple. That's what happened. (*See* R. Exhibit Q, Doc. 10-17, pg 40, lines 15-20)

Additionally, the victim in this case was not a blameless or vulnerable victim, but a grown man who attacked Meyers only moments before the stabbing occurred; punching him 15-20 times in two separate beatings and then putting him into a chokehold. The victim was sober, 35 years old, and had a 50-pound weight advantage over Meyers, who at the time was 19 years old, weighed 125 pounds and was intoxicated with a B.A.C. of .182. The above facts were never considered "Collectively", by any of the lower courts.

Under ***Jackson v. Virginia,*** 433 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). federal courts must look to the state law for "the substantive elements of the criminal offense",433 U.S., at 324, n. 16, 99 S. Ct. 2781, 61 L. Ed. 2d 560, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely matter of federal law. In ***Coleman v. Johnson***, (566 U.S.,132 S. Ct 2060, 182 L. Ed. 2d 978 (2012)) the United States Supreme Court applied ***Jackson*** in an opinion that considers the facts collectively, without weighing each piece individually.

Discussing in ***In re Winship,*** U.S. (1970) ***In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068. 25 L. Ed. 2d 368 (1970). the Supreme Court in ***Jackson v. Virginia,*** U.S. (1979) **Id.**, declared that:

> "An essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient ... evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

The Court must address claims of sufficiency of the evidence in such a case because the Double Jeopardy Clause of the Fifth Amendment precludes retrial when the evidence is insufficient, citing ***Burks v. United States***, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

Applying the standards set forth in: ***Jackson v. Virginia***, ***In re Winship***, ***Burks v. United States***, and ***Coleman v. Johnson***; Meyers must be acquitted of first-degree reckless homicide. The uncontested evidence presented at trial of Meyers calling 911 to get and ambulance for the victim, along with him staying on the scene until police arrive, and then asking about the victim's well-being show some regard for human life collectively.

Furthermore, every theory the State presented during Meyers appeals for why he showed "no regard for human life", were theories never presented to the jury at trial. This is because the State only argued at trial that Meyers was guilty of first-degree intentional homicide. For this reason when the lower courts denied Meyer's appeals on the States arguments, all of them relied upon made up theories never presented to the jury when they denied Meyer appeals. Which required the courts to guess what the jury would have done if given the theories.

Issue II. MEYER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A DUTY TO RETREAT JURY INSTRUCTION AT TRIAL.

Meyer's duty to retreat was a central focus of the State's arguments at trial. The State specifically informed the jury how Meyers' ability to retreat affected his self-defense claim:

"This was not an act done in self-defense. This was an act done after a fight had concluded that was instigated by the defendant upon Shon Potschaider as he was attempting to get ready to go to work that morning; it was an act done that took his life after the fight concluded and after the defendant, in a rage, *passed a door* that led out to the garage on the outside of the home." Doc. 10-15 pg 128-129 lines 20-25 and 1-2

The State also referred to Meyer's opportunity to leave his own home several other times throughout trial, including:

> "...he *passes an exit door* in the dining room that leads to the garage, that then leads to the outside of the residence out the back – and that's important, and I'll come back to that in a minute...." Doc. 10-15 pg 124 lines 14-18
>
> "He *passes an exit door* in the dining room that leads to the garage and out the back of the home...Doc. 10-15 pg 125 lines 15-20
>
> "...*he again passed that exit door* that led out to the garage in the back of the residence." Doc. 10-15 pg 129 lines 10-12
>
> "...when Mr. Meyers goes *past the door* to the garage that leads outside...." Doc. 10-15 pg 164 lines 21-22
>
> "...again *past this door* again..." Doc. 10-15 pg 165 line 4

"...had to take all the steps of *running past the door*, of going in the knife drawer, rummaging through the knife drawer, grabbing the knife, coming back, *passing the same door...*" Doc. 10-15 pg 166 lines 17-20

"*...pass the same outer access door where he could have left...*" Doc. 10-15 pg 190 lines 2-3

(Emphasis added to all quotes)

The state led the jury to believe that Meyers should have retreated. In Wisconsin, Meyers had no duty to retreat in his own home. Shon was the original aggressor, and hit Meyers approx. 15-20 times in two separate beatings, and put Meyers into a chokehold moments before the stabbing occurred (***See*** R. Exhibit P, Doc. 10-16, pg 72, lines 16-23, and pg 74, lines 2-22). If given Wis. Jury instruction 810 the jury may have believed that because:

1) Meyers was beat in two separate beatings, and put into a chokehold, he did not believe he could have retreated with safety;
2) Meyers was intoxicated with a B.A.C. of .182, he did not know he had the opportunity to retreat;
3) Meyers did not provoke the beatings; he also did not have to exhaust all other reasonable means to escape before resorting to deadly force.

For the above reasons, a duty to retreat instruction would have benefited Meyer's defense at trial. The State made it a point for the jury to consider the fact that Meyers could have left the home. That was a question for the jury to answer, NOT the State. Trial counsel should have instructed the jury Meyers had no duty to retreat in his own home. Trial counsel was ineffective for failing to instruct the jury that although there was a door Meyers could have retreated out of, he had no duty to retreat in his own home.

Trial counsel's ineffectiveness prejudiced Meyer's self-defense claim at trial, because there is a reasonable probability that if the jury knew Meyers had no duty to retreat in his own home, they may have acquitted him of all charges. Meyer's trial counsel was ineffective "contrary to his right to effective assistance of counsel as guaranteed by the Sixth Amendment, and made applicable by the Fourteenth Amendment to the U.S. Constitution. Meyers has met his AEDPA burden of proving that the court of appeals adjudication of this claim resulted in a decision that was "contrary to" or an "unreasonable application of' ***Strickland***. Meyers is entitled to relief on this claim.

Issue III. TRIAL COUNSEL WAS INEFFECTIVE FOR WAIVING HIS RIGHT TO ELICIT HIS KNOWLEDGE OF THE VICTIM'S VIOLENT PAST.

Meyer's strategy of self-defense would have benefited from the jury believing Meyers *intended* to kill Potschaider. It was also required that the jury believed so.

The jury in this case was instructed using jury instructions for intentional-degrees of homicide. The jury instructions stated in relevant part:

The defendant is guilty of second degree intentional homicide if the defendant caused the death of Shon A. Potschaider with the intent to kill and actually believed the amount of force used was necessary to prevent imminent death or great bodily harm to himself but the belief of the amount of force was unreasonable.

The defendant is guilty of first-degree intentional homicide if the defendant caused the death of Shon A. Potschaider with the intent to kill and did not actually believe the force used was

necessary to prevent imminent death or great bodily harm to himself.

The defendant is guilty of first-degree reckless homicide if the defendant caused the death of Shon A. Potschaider by criminally negligent - - or criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life. You will be asked to consider the privilege of self-defense in deciding whether the elements of first-degree reckless homicide are present. (Doc 10-16:143 #'s 7-25, Exhibit P)

For the jury to believe that Meyers acted lawfully in self-defense, they *had* to believe he *intended* to cause the death of Potschaider. Trial counsel's strategy made his performance deficient because his decision removed a vital piece of Meyer's self-defense claim. That deficient performance prejudiced Meyers because the jury, having been properly instructed, of Meyer's state of mind at the time of the stabbing, may have concluded Meyers was acting out of fear when he stabbed Shon, and not out of a vindictive axe to grind. The jury could have also easily believed that Meyers was so afraid of a man who was an ex-prisoner who bragged about fighting, and was violent towards his mother and sister in the past, that he needed a knife to defend himself. Introducing *McMorris*-type evidence would not have given any more risk to Meyer's self-defense claim at trial. The jury had to understand Meyer's state of mind when determining if the amount of force was 'reasonable'.

Additionally, trial counsel never discussed the strategic decision to waive the right to bring *McMorris*-type evidence, and that makes trial counsel's performance deficient. Meyers invites this court to second-guess the wisdom of Trial counsel's choice to deprive Meyers of the option to introduce *McMorris*-type evidence at trial. Meyers would have wanted the jury to know his state of

mind at the time the stabbing occurred. Trial counsel's non-consented strategic decision foreclosed any opportunity for Meyers to explain to the jury a vital piece of the threat perception that Shon presented to him, and that is what prejudiced Meyer's defense at trial. Meyers is asking this Court to grant a new trial because he wanted the jury to understand his state of mind during the time the stabbing occurred.

Meyers has met his AEDPA burden of proving that the court of appeals adjudication of this claim resulted in a decision that was "contrary to" or an "unreasonable application of" ***Strickland***, and the court's decision was based on an unreasonable determination of the facts in light of the evidence presented. There is a reasonable probability the jury would have acquitted Meyers if counsel had elected to present the *McMorris*-type evidence at trial.

CONCLUSION

Petitioner respectfully requests that this court grant this Petition for Writ of Certiorari.

Dated at O.S.C.I., in Oshkosh, WI, July 31st, 2020,

Respectfully Submitted,

Anthony Gage Meyers

Pro se defendant

Inmate No. 520337

APPENDIX-A UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECISION DENYING CERTIFICATE OF APPEALABILITY DATED APRIL 23, 2020.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 17, 2020
Decided April 23, 2020

Before

WILLIAM J. BAUER, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-1810

ANTHONY G. MEYERS,
Petitioner-Appellant,

v.

CATHY JESS,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 16-CV-249

David E. Jones,
Magistrate Judge.

ORDER

Anthony Meyers has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Meyers's request for a certificate of appealability is **DENIED**.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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NOTICE OF ISSUANCE OF MANDATE

May 15, 2020

To: Gina M. Colletti
UNITED STATES DISTRICT COURT
Eastern District of Wisconsin
Milwaukee , WI 53202-0000

No. 19-1810	ANTHONY G. MEYERS, Petitioner - Appellant v. CATHY JESS, Respondent - Appellee

Originating Case Information:

District Court No: 2:16-cv-00249-DEJ
Eastern District of Wisconsin
Magistrate Judge David E. Jones

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

RECORD ON APPEAL STATUS: No record to be returned

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are

to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:	**Received by:**
05/15/2020	/s/ D. LaBrie

form name: **c7_Mandate**(form ID: **135**)