

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS HANSERD,

Petitioner,

v

TONY TRIERWEILER,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

- I. IS THERE A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW FOR FEDERAL RULES CIVIL PROCEDURE RULE 15(C), RELATE BACK PROVISION; DOES PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATE BACK TO HIS ORIGINAL TIMELY FILED PETITION AND DID THE SIXTH CIRCUIT COURT OF APPEALS FAIL TO CONDUCT A PROPER REVIEW OF THE RECORD TO DETERMINE WHETHER THE CLAIM SHARES A COMMON CORE OF OPERATIVE FACTS PRIOR TO DISMISSING THE CLAIM AS UNTIMELY?**

Petitioner answers "YES"

Respondent answers "No"

LIST OF PARTIES

All parties appear in the caption of the case on the coverpage.

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REFERENCE TO OPINIONS

The February 2, 2020, United States Court of Appeals Opinion appears at Appendix A to the Petition and is reported at *HANSERD v TRIERWEILER*, 2020 U.S. App. Lexis 5743; Case No. 18-2404

The June 2, 2020, United States Court of Appeals Opinion denying a rehearing appears at Appendix B to the Petition and is reported at *HANSERD v TRIERWEILER*, 2020 U.S. App. Lexis 5743; Case No. 18-2404

The October 30, 2018, United States District Court Opinion appears at Appendix C to the Petition and is reported at *HANSERD v TRIERWEILER*, 2018 U.S. Dist. Lexis 185159; Case No. 16-cv-11099.

The September 11, 2012, Michigan Court of Appeals Opinion appears at Appendix D to the Petition and is reported at *PEOPLE V HANSERD*, 2012 Mich App Lexis 1734.

STATEMENT OF JURISDICTION

Petitioner seeks review of the February 25, 2020 judgment of the Sixth Circuit Court of Appeals, *HANSERD v TRIERWEILER*, 2020 U.S. App. Lexis 5743; Case No. 18-2404.

A Petition for Rehearing was filed in this case, and on June 2, 2020, the Court of Appeals denied the request for rehearing. *HANSERD v TRIERWEILER*, 2020 U.S. App. Lexis 17406; Case No. 18-2404.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI

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.

U.S. Const. Amend. XIV § 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.

STATEMENT OF CASE

A jury convicted Petitioner of first-degree murder, Mich. Comp. Law § 750.316(1)(a); carjacking, Mich. Comp. Law § 750.529a; felon in possession of a weapon, Mich. Comp. Law § 750.224f; carrying a dangerous weapon with unlawful intent, Mich. Comp. Law § 750.226; and, four counts of possession of a firearm during the commission of a felony, Mich. Comp. Law § 750.227b. Petitioner was sentenced as a second-offense habitual offender, Mich. Comp. Law § 769.10, to concurrent terms of life for first-degree murder, 356 to 480 months for carjacking, 47 to 90 months for felon in possession of a firearm, and 47 to 90 months for carrying a dangerous weapon with unlawful Intent. Petitioner also received a consecutive two-year prison term for each count of felony-firearm, to be served concurrently to each other.

Petitioner timely filed an appeal of right in the Michigan Court of Appeals and the conviction and sentence were affirmed in an unpublished opinion on September 11, 2012. *People v Hanserd*, 2012 Mich App Lexis 1734; Appendix C. Petitioner timely filed an application for leave to appeal in the Michigan Supreme Court who declined to grant leave to appeal. *People v Hanserd*, 493 Mich 952; 828 NW2d 45 (2013).

Petitioner's Direct Appeal

On direct appeal Petitioner argued that there was insufficient evidence presented to establish his identity as the shooter. Specifically, Defendant argued that there were a number of inconsistencies between the identifying witness's testimony and her previous statements to police which render her identification of defendant unreliable. Defendant also argued that there were inconsistencies between various witnesses' testimony, further adding to the unreliability of the identification.

When making a ruling on the sufficiency of evidence claim, the Michigan Court of Appeals held:

. . . all problems that defendant points out with the identification are credibility and weight issues, which are determinations to be made by the jury. *Davis*, 241 Mich App at 700; ¹ *Hardiman*, 465 Mich at 428. ² We will not interfere with the jury's role in determining credibility. *Wolfe*, 440 Mich at 514. ³ When looking at the testimony in a light most favorable to the prosecution, a jury could have reasonably determined that defendant was the shooter. Defendant was identified as the shooter both in court and in a physical lineup before trial. An identification by a witness is sufficient evidence to support a conviction. *Davis*, 241 Mich App at 700.

People v Hanserd, 2012 Mich App Lexis 1734, at * 4; Appendix C.

Petitioner also argued on direct appeal that the trial court abused its discretion when it failed to grant Petitioner's motion to hire an expert witness in identification to explain problems associated with eyewitness identification.

When making a ruling on the sufficiency of evidence claim, the Michigan Court of Appeals held:

The trial court is not required to provide an indigent defendant with funds for an expert witness. *Tanner*, 469 Mich 442. ⁴ Instead, an expert must be provided for when the indigent defendant can demonstrate a nexus between the facts of the case and the need for an expert." *Id.* at 443 (internal quotation marks and citation omitted). The defendant must also demonstrate that he cannot safely proceed to trial absent the expert. *Id.* at 443-444.

Defendant goes through a lengthy analysis of *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1983), overruled on other grounds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), as well as psychological studies and cases discussing the problems with eyewitness identification.

However, nowhere in *Anderson* or current case law is there a holding that eyewitness identifications are inherently unreliable. Defendant does not cite nor is there any current case that forbids the use of eyewitness

¹ *People v Davis*, 241 Mich App 697; 617 NW2d 381 (2000).

² *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002).

³ *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992).

⁴ *People v Tanner*, 469 Mich 437; 671 NW2d 728 (2003).

identification. Again, the jury is responsible for determining the credibility of eyewitness identification. *Davis*. 241 Mich App at 700.

People v Hanserd, 2012 Mich App Lexis 1734, at * 8; Appendix C.

Petitioner also alleged on direct appeal that the unreliability of eyewitness identification made an expert necessary for proper investigation and trial testimony. Petitioner further alleged that the line-up procedures used in this case were impermissible and suggestive, and that an expert was necessary to explain the effects of a tainted lineup on identification.

When making a ruling on the sufficiency of evidence claim, the Michigan Court of Appeals held:

. . . defendant did not object to the lineup procedure when it occurred, nor did defendant object to the in-court identification. Furthermore, the record does not reflect procedures that were impermissibly suggestive. We will not review identification issues on appeal if not raised before the trial court, *People v Whitfield*, 214 Mich App 348; 543 NW2d 347 (1995). Moreover, defendant has not demonstrated that he could not safely proceed to trial absent an expert. *Tanner*, 469 at 443-444. In *People v Cooper*, 236 Mich 543, '358; 601 NW2d 409 (1999), this Court noted that it would be obvious to jurors that memories and perceptions of an eyewitness are sometimes inaccurate. Defense counsel extensively cross-examined each witness and raised the inconsistencies in testimony that defendant points to on appeal. The issues of identification raised by defendant were questions of credibility properly left to the determination of the jury. *Davis* 241 Mich at 700. The trial court did not abuse its discretion in denying defendant's request for an appointed expert. *Tanner* 469 Mich at 442.

People v Hanserd, 2012 Mich App Lexis 1734, at * 9-10; Appendix C.

Petitioner also alleged on direct appeal that he was denied a fair trial when the trial court denied his request for a special jury instruction on eyewitness identification.

When making a ruling on the sufficiency of evidence claim, the Michigan Court of Appeals held:

Defendant's proposed instruction was not a proper recitation of the applicable law. *McGhee* 268 Mich App at 606.⁵ It recapped commentary

⁵ *People v McGhee*, 268 Mich App 600; 709 NW2d 595 (2005).

in *Anderson* about the problems inherent in eyewitness testimony. However, as discussed above, nowhere in *Anderson* or current case law was there a holding that eyewitness identifications are inherently unreliable. Defendant's proposed instruction skewed *Anderson* and would likely have confused the jury. Defendant's proposed instruction was better suited as a possible defense argument rather than as an instruction for the jury. The instructions given by the trial court adequately protected defendant's rights. The jury had adequate instruction to be able to determine what weight and credibility to give the identification evidence, and the trial court did not abuse its discretion in declining to give the proposed instruction.

People v Hanserd, 2012 Mich App Lexis 1734, at * 15; Appendix C.

The Michigan Court of Appeals clearly recognized in their opinion that, "Defendant maintains that the prosecution's whole case was built around the eyewitness's testimony . . ."

People v Hanserd, 2012 Mich App Lexis 1734, at * 18; Appendix C.

Petitioner filed a post-conviction motion for relief from judgment in the trial court which was denied. Petitioner appealed the trial court's order denying relief by filing an application for leave to appeal, and on December 11, 2014, the Michigan Court of Appeals denied relief. The Court of Appeals also denied Petitioner's request for remand. *People v Hanserd*, 2014 Mich App Lexis 2960; COA Dkt. No. 322993. Petitioner timely filed an application for leave to appeal in the Michigan Supreme Court and on December 22, 2015 the Supreme Court denied relief. The Supreme Court also denied Petitioner's request for remand. *People v Hanserd*, 498 Mich 947; 872 NW2d 435 (2015).

On March 18, 2016, Petitioner filed his original § 2254 petition by placing it in the prison mail system. His original petition raised four grounds for relief—namely, that (1) there was insufficient evidence to support his convictions; (2) the trial court deprived him of a fair trial and his due process rights through improper evidentiary rulings, through instructional errors, and by denying funds for an expert witness to opine on eyewitness identification; (3) his trial counsel was ineffective for failing to call witnesses to establish his innocence; and (4) the evidence was

insufficient to convict him because the medical examiner testified that the autopsy showed that the crime could not have been committed in the manner that an eyewitness claimed. On or round November 2, 2016, Petitioner filed an amended petition in which he claimed that his trial counsel was ineffective for failing to object and file a motion to suppress eyewitness Dawn Leuder's in-court identification.

On October 30, 2018, the Federal District Court issued an opinion and order (1) denying petition for a writ of habeas corpus (ECF #1), and the amended petition (ECF #11), (2) declining to issue a certificate of appealability, and (3) granting leave to appeal in forma pauperis. *HANSERD v TRIERWEILER*, 2018 U.S. Dist. Lexis 185159; Case No. 16-cv-11099. See, *Appendix B*

Petitioner timely sought review in the United States Court of Appeals for the Sixth Circuit, and that Court granted a certificate of appealability as to one of the five claims raised in the district court. The Sixth Circuit granted the certificate of appealability on the ineffective assistance of counsel claim raised in Petitioner's amended petition.

On appeal, Petitioner presented his ineffective-assistance claim, and also argued that the district court (1) incorrectly found that his ineffective-assistance claim alleged that his trial counsel neglected to challenge Leuder's preliminary examination identification instead of her *in-court* identification, and (2) that the Court should have held an evidentiary hearing. The Respondent argued that Petitioner is not entitled to habeas relief because his ineffective-assistance claim is time-barred, is procedurally defaulted, and lacks merit. Petitioner claimed that his ineffective-assistance claim is timely because his original petition – filed before the statute of limitations expired – claimed that "the state failed to give [him] funds to appoint an expert in the field of eyewitness identification; challenged the sufficiency of the evidence; " and therefore relates back to the claim(s) raised in the original timely petition.

The Sixth Circuit Court of Appeals held that Petitioner's amended petition lacks a "common core of operative facts," with the claims raised in his timely original petition. See, February 25, 2020 Opinion/Order, pg. 4. The Court of Appeals further held:

we find that the ineffective-assistance claim raised in Hanserd's amended petition is barred by the statute of limitations. And because Hanserd's ineffective-assistance claim is time-barred, we need not address either the merits of the claim or the warden's argument that the claim is procedurally defaulted.

HANSERD v TRIERWEILER, 2020 U.S. App. Lexis 5743; Case No. 18-2404, at *6.

Petitioner submitted a Petition for Rehearing, and on June 2, 2020, the request for rehearing was denied. The Court indicated:

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

HANSERD v TRIERWEILER, 2020 U.S. App. Lexis 17406; Case No. 18-2404.

Petitioner's Petition for Writ of Certiorari is timely as it has been filed within 90 days of the June 2, 2020 Opinion/Order of the Sixth Circuit Court of Appeals denying a rehearing.

ARGUMENT

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW WHEN DETERMINING FEDERAL RULES OF CIVIL PROCEDURE RULE 15(C)'S RELATE BACK PROVISION; PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RELATES BACK TO HIS ORIGINAL TIMELY FILED PETITION AND THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO CONDUCT A PROPER REVIEW OF THE RECORD TO DETERMINE WHETHER THE CLAIM SHARES A COMMON CORE OF OPERATIVE FACTS PRIOR TO DISMISSING THE CLAIM AS UNTIMELY.

Standard of Review

Supreme Court Rule 10 governs review of claims in a petition for writ of certiorari. Rule 10 states in relevant part:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

* * *

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In this case, Petitioner asserts that there is a conflict among the circuits as to the proper standard of review to follow when addressing Federal Rules of Civil Procedure Rule 15(C)'s relate back provision. As a result, Petitioner was denied a full and fair review of the merits of the claim presented in his amended petition for writ of habeas corpus, a claim which if substantiated supports granting habeas relief to prevent a miscarriage of justice.

Facts

Petitioner asserts that the claim raised in his Amended Petition for Writ of Habeas Corpus does share a common core of operative facts with his original timely filed petition, making his amended claim timely and leaving no doubt that the Sixth Circuit Court of Appeals made a mistake when it affirmed the District Court's Opinion/Order denying habeas relief. Other Circuits make a de novo inquiry into the claim and the facts asserted to determine whether or not the claim(s) share a common core of operative facts before summarily dismissing an amended claim as untimely. The Sixth Circuit failed to conduct that analysis in this case. As a result, there is a conflict among circuits which this Honorable Court should provide guidance.

Conflict Among Circuits

Petitioner asserts that the Sixth Circuit Court of Appeals failed to conduct a de novo review of his claim to determine whether the claim rose in his amended petition relates back to the claim(s) raised in his original petition, and as a result, the Court of Appeals has failed to properly address his claim on the merits. The failure to conduct the appropriate review casts doubt on the fairness, integrity and public reputation of the judicial proceedings.

Several appellate courts apply a de novo standard of review to claims addressing Fed. R. Civ. Proc. 15(c), relate back requirement. See, *United States v Marulanda*, 226 Fed. Appx. 706 (9th Cir. 2007)(An appellate court reviews a district court's denial of a defendant's habeas petition de novo, including whether a claim raised in an amended petition relates back to an original, timely filed petition under Fed. R. Civ. Proc. 15(c)); *United States v Roe*, 913 F. 3d 1285, 1298 (10th Cir. 2019)(The relation back question implicates the timeliness of a proposed amendment to a 28 USCS § 2255 motion, review is de novo); *Hodge v United States*, 554 F. 3d 372 (3rd Cir. 2009)(An appellate court reviews a trial court's interpretation of the relation back

doctrine de novo); . Several other circuits apply an abuse of discretion standard to claims addressing Fed. R. Civ. Proc. 15(c), relate back requirement. See, *Davenport v United States*, 217 F. 3d 1341, 1343 n. 4 (11th Cir. 2000)(Application of Rule 15(c) is reviewed for abuse of discretion); *Dodd v United States*, 614 F. 3d 512 (8th Cir. 2010)(Appellate courts review a district court's application of Fed. R. Civ. Proc. 15(c) for an abuse of discretion); *Hill v Mitchell*, 842 F. 3d 910 (6th Cir. 2016)(The appellate court reviews the denial of a motion to amend for abuse of discretion; However, when the district court's decision is based on a legal conclusion that the proposed amendment would be futile, review is de novo. See, *Parry v Mohawk Motors of Michigan, Inc.* 236 F. 3d 299, 305 (6th Cir. 2001).

In this case, the U.S. District Court's legal conclusion that the amendment was untimely deserved a de novo review by the Sixth Circuit Court of Appeals.

Petitioner cites, *Sumpter v Bowersox*, 2017 U.S. Dist. Lexis 203099, where the court conducted a de novo review of a State habeas petitioner's claim(s) to determine whether or not the claims presented were tied to a common core of operative facts, where the petition failed to explain what the core of operative facts is and why it was common to his claims, *Id.* at *4-8, for the position that the Sixth Circuit Court of Appeals should have conducted the same inquiry before dismissing the amended claim as untimely. Especially where Petitioner made a substantial showing that the claim was based upon the same core of operative facts.

Because the Circuits are divided on the appropriate standard of review for a claim under the relation-back doctrine, this Honorable Court should intervene and provide guidance on the appropriate procedure to follow when addressing such claims.

A full review of Petitioner's amended claim will reveal that Petitioner's substantial rights were violated and that a different result is quite probable absent the error(s).

Policy on Amendments to a Petition for Writ of Habeas Corpus

Petitioner asserts that his amended petition for writ of habeas corpus was allowed by the Federal Rules of Civil Procedure and Habeas Corpus Rule 12.

A discrete set of rules govern federal habeas proceedings launched by state prisoners. The last of those rules, Habeas Corpus Rule 12, permits application of the Federal Rules of Civil Procedure in habeas cases, "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." See also, Fed. R. Civ. Proc. 81(a)(4) (the civil rules are applicable to procedures for . . . habeas corpus). Habeas Corpus Rule 12, Advisory Committee Note's caution, "permits application of the civil rule only when it would be appropriate to do so," and would not be "inconsistent or inequitable in the overall framework of habeas corpus." In addition to the general prescription on application of the civil rules in federal habeas case, 28 U.S.C. § 2242, specifically provides that habeas applications "*may* be amended as provided in the rules of procedure applicable to civil action." (emphasis added).

The civil rule governing pleading amendments, Federal Rules of Civ. Proc. R. 15, made applicable to habeas proceedings by § 2242; Federal Rules of Civ. Proc. R. 81 (a)(4); and Habeas Corpus Rule 12, allow pleading amendments with "leave of the court" any time during the proceeding. See, Federal Rules of Civ. Proc. R. 15(a)(2). Before a responsive pleading is served, pleadings may be amended once as a "matter of course," *i.e.*, without seeking leave of the court. Amendments made after the statute of limitations has run relate back to the original pleading if the original and amended pleadings "arose out of the conduct, transaction, or occurrence set - out or attempted to be set out - in the original pleading". Fed. Rules Civ. Proc. R 15(c)(1)(b); *Mayle v Felix*, 545 U.S. at 654-655.

The original "pleading" to which Rule 15 refers is the complaint in a civil case, and the petition in a habeas proceeding. Under Fed. R. Civ. Proc. 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v Gibson*, 355 U.S. 41, 47; 78 S. Ct. 99; 2 L. Ed. 2d 80 (1957). Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See, Advisory Committee's Note, Subdivision C of Habeas Corpus Rule 2 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important. . ."); see also, Advisory Committee's Note on Habeas Corpus Rule 4 ("[N]otice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error."). The prime purpose of Habeas Corpus Rule 2(c)'s demand that habeas petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to "show cause why the writ should not be granted." 28 U.S.C. § 2243. Under Habeas Corpus Rule 4, if "it plainly appears from the petition . . . that the petitioner is not entitled to relief in the district court," the court must summarily dismiss the petition without ordering a responsive pleading.

In this case, the district court granted leave to amend the petition and *DID NOT* summarily dismiss under Habeas Corpus Rule 4, indicating that the court was satisfied that the grounds raised in the Amended Petition sufficiently relate back to the Original Petition because the common core of operative facts in the amended petition "arose out of the same conduct, transaction or occurrence," as those in the original petition. Had the district court thought

otherwise, it could have summarily dismissed the amended pleadings without ordering a responsive pleading. See, Habeas Corpus Rule 4; and Exhibit A – May 19, 2017 *Opinion/Order*

This case turns on the meaning of Federal Rules of Civil Procedure R. 15(c)(1)(B)'s relation-back provision in the context of federal habeas proceedings and the AEDPA's one-year statute of limitations. Fed. R. Civ. Proc. 15(c)(1)(B), as earlier stated, provides that pleading amendments relate back to the date of the original pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Mayle*, 454 U.S. at 656.

In this case, there is no question that the ineffective assistance of counsel claim raise in the amended petition relates back to the claim(s) raised in the original habeas petition. A plenary review of the claim should have been sufficient to establish this fact. Of significance, this is the amended claim is the only claim for which a certificate of appealability was issued.

Petitioner's Amended Claim Relates Back

Under *Mayle v Felix*, 545 U.S. 644; 125 S. Ct. 2562; 162 L. Ed. 2d 582 (2005), habeas claims in an amended petition do not arise out of "the same conduct, transaction or occurrence" as claims in the original petition merely because the claims all challenge the same trial, conviction or sentence. *Mayle*, 545 U.S. at 655-664. Rather, under the construction of the rule approved in *Mayle*, Federal Rule of Civil Procedure 15(c)(1)(B) permits relation back of habeas claims asserted in an amended petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." *Mayle*, 545 U.S. at 657.

In Petitioner's original petition, he raised an "insufficient evidence claim." Petitioner asserted that there was not sufficient *credible* evidence submitted at trial to justify a finding of

guilt beyond a reasonable doubt. See, *Original Petition*, pgs. 8-9. The core facts of that claim involved: (1) the problems with the eyewitness identification, after a long period of time between the incident and later identification; (2) problems on how the identification was not obtained until after 6 years; and, (3) the conduct by the police at the lineup, each of which show why the identification was tainted and should have been challenged. See, *Original Petition*, pgs. 11-14 & 23. Petitioner also raised a claim about the denial of funds to hire and expert witness (identification expert). See, *Original Petition*, pgs. 23. The facts asserted in this claim are: (1) the known problems with eyewitness testimony, given the fact that the eyewitness was unable to identify Petitioner the night of the crime, but was able to identify Petitioner six (6) years after the crime allegedly because of nightmares; and, (2) the "dangers of positive identification testimony," see, *Original Petition*, pg. 24

In Petitioner's Amended Petition, he asserted that trial counsel was ineffective for failing to file a motion to suppress the eyewitness' suggestive in-court identification. The facts of the claim are based upon: (1) the conduct of police at the line-up, see, *Original Petition*, pg. 14; (2) how the identification was obtained see, *Original Petition*, pg. 8; and, (3) the lapse of time between the crime and confrontation see, *Original Petition*, pgs. 8 & 23. It is clear that the claim asserted in Petitioner's Amended Petition arose out of the same conduct, transaction and occurrence set forth in the Original Petition, and clearly shows that the core set of facts relate back those presented in the Original Petition.

The Sixth Circuit Court of Appeals erroneously thought the claim presented in the amended petition were based on facts which differed in both time and type from facts set forth in the original petition. Federal Rules of Civil Procedure Rule 15(c)(1)(B), merely requires that the

amendment assert a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original petition.

The single occurrence in this case, was how the Petitioner was identified; the suggestive identification procedure used; the lapse of time between the crime and the in-court identification, based upon the eyewitness' inability to identify a suspect on the night of the incident, all of which, Petitioner attempted to set forth in his original petition.

Under Fed. R. Civ. Proc. 15(c)(1)(B), an amendment is permitted to relate back to the date of the original pleading if the original and amended pleading "arose out of the same conduct, transaction or occurrence." Accordingly, while amendments that expand upon or clarify facts previously alleged will typically relate back, those that significantly alter the nature of a proceeding by injecting new and unanticipated claims are treated far more cautiously. *United States v Hicks*, 283 F. 3d 380, 388 (2002). So long as the original and amended petition state claims that are tied to a common core of operative facts, relation back will be ordered. *Mayle v Felix*, 545 U.S. 644, 664-665; 125 S. Ct. 2562; 162 L. Ed. 2d 582 (2005).

The Amended Petition clarifies the claims in the Original Petition because it highlights the constitutional violation/error that occurred which the jury, nor the Courts were aware of. The Amended Petition amplifies the claims in the Original Petition because it alerts the Court to the level of seriousness of the violation which occurred in this case at the line-up. It also sheds some light on the importance of the lapse of time between the crime and the confrontation; how the identification was obtained; and the importance of "positive identification testimony." All of these arguments occurred from the same core facts and were discussed within the text of the original habeas petition and therefore relate back to the Original Petition. See, *Mayle v Felix*, 545 U.S. 644; 125 S. Ct. 2562; 162 L. Ed. 2d 582 (2005).

In *Tiller v Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-581; 65 S. Ct. 421; 89 L. Ed. 465 (1945), this Court discussed Rule 15(c)'s relation-back provision as it relates to "conduct, transaction, or occurrence." In *Tiller*, a railroad worker was struck and killed by a railroad car. His widow sued under the Federal Employers' Liability Act to recover for his wrongful death. She initially alleged various negligent acts. In an amended complaint, she added a claim under the Federal Boiler Inspection Act for failure to provide the train's locomotive with a rear light. The U.S. Supreme Court held that the amendment related back, and therefore avoided the statute of limitations bar, even though the amendment invoked a legal theory not suggested by the original complaint and relied on facts not originally asserted.

There was but one episode in *Tiller*, a worker's death attributed from the start to the railroad's failure to provide its employee with a reasonably safe place to work. The widow in *Tiller* based her complaint on a single "occurrence," an accident resulting in her husband's death.

In this case, Petitioner has based his original and amended claims on a single "occurrence," an improper and/or suggestive identification procedure, which deprived him of his right to due process and the effective assistance of counsel.

This case is very similar to that of *Cowan v Stovall*, 645 F. 3d 815 (2011). In *Cowan*, the Petitioner filed her initial petition within the one-year limitations period, however, *Cowan's* petition did not include a specific ineffective assistance of counsel claim based on her lawyer's failure to interview people. After the one-year limitations period had passed, *Cowan* moved to file an amended petition that included the ineffective assistance of counsel claim. The district court thought that the claim was based on facts that "differ[ed] in both time and type" from the facts set forth in the original petition. Thus the claim would not relate back to the date of the original petition, which in turn meant the claim would be untimely. The district court therefore

denied leave to file the claim. Thus, the linchpin of the district court's refusal to consider Cowan's claim was that it did not share a common core of operative facts with the original petition.

The Sixth Circuit Court of Appeals acknowledged, "*Cowan* expressly asserted in both documents, therefore, that Perlman [attorney] should have interviewed witnesses who could have testified to her whereabouts on the date of the controlled buy." The motion to amend *merely added more detail with respect to who the witnesses were and what they would say*. The facts recited in the two documents differed not in kind, but in specificity. Even if one assumed that the original petition did not state a failure-to-interview claim – and the court had doubts about that assumption – her failure-to-interview claim as set forth in her motion to amend shared a common core of operative facts with her original petition, it related back, and it was timely. Ultimately, the Sixth Circuit reversed the district court's finding that the failure-to-interview claim was untimely and remanded for further proceedings consistent with the court's opinion.

Petitioner contends that his ineffective assistance of counsel claim for failing to file a motion to suppress eyewitness identification does relate back to the claim(s) raised in the original petition. The motion to amend merely added, in more detail, the facts of the claim. The facts recited in the two documents differed, not in kind, but in specificity. *Cowan v Stovall*, 645 F. 3d at 819.

Conclusion

Petitioner's amended habeas claim should be considered timely under an excusable neglect exception. Petitioner clearly intended to raise the issue on habeas review where he raised the claim in his post-conviction motion for relief from judgment, prior to filing his habeas petition. There is no legitimate reason to raise a federal constitutional violation on collateral

review merely to abandon the claim on federal review. The original petition indicates that the habeas petition was prepared by a Michigan Department of Corrections Prison Legal-Writer, who failed to present the claim in the original habeas petition. Once the state appellate remedies were exhausted, the legal-writer had an obligation to his client to properly present the claim on habeas review.

Petitioner discovered that the ineffective assistance of counsel claim was not properly presented in his original petition and immediately sought to amend his habeas petition. Based upon the acceptance of the amended petition, and the subsequent order requiring the State to respond, Petitioner believed that his amended claim was properly before the court. Petitioner believed that once his amended claim survived plenary review and the State was ordered to respond that no further action was necessary to obtain an opinion on the merits of the claim. While the State did argue the timeliness of the amended claim, the federal district court did not address the issue, instead ruling on the merits of the claim. Petitioner's efforts to present the claim in the federal district court clearly show diligence in presenting the issue for habeas review.

After the Sixth Circuit Court of Appeals granted a Certificate of Appealability on Petitioner's amended claim, indicating that the district court failed to recognize that Petitioner was raising a claim related to the in-court-identification, rather than the pre-trial identification. Petitioner filed a rule 60(b), motion on June 19, 2019, in the federal district court alleging mistake or inadvertence as it relates to the ineffective assistance of counsel claim. The district court did not make a ruling on the motion and denied it without further consideration because the Sixth Circuit Court of Appeals denied relief on the claim.

Because the claim does share a common core of operative facts with the claims raised in his original timely filed petition, a remand is required with directions to conduct a de novo review on Petitioner's amended ineffective assistance of counsel claim, addressing the merits of the claim presented.

Petitioner's claim sets out a valid claim of mistaken identity, based upon an impermissibly suggestive identification procedure. To allow such an egregious error of law to go uncorrected based upon a procedural bar definitely affects the fairness, integrity or public reputation of the judicial proceedings. It would be a manifest injustice to refuse to review Petitioner's claim where there is a substantial likelihood that he was mistakenly identified as the suspect, subsequently convicted, and then ordered to spend the rest of his life in prison.

RELIEF REQUESTED

Petitioner asks this Honorable Court to hold that the claims presented in his Amended Petition for Writ of Habeas Corpus relate back to the claims presented in his Original Petition for Writ of Habeas Corpus; REMAND the Matter to the Sixth Circuit Court of Appeals with instructions to adjudicate the merits of his amended claim on its proper grounds; and, GRANT Petitioner the proper relief it deems fair and just.

Respectfully Submitted,

August 27, 2020

 440115

Marcus Hanserd #440115
Bellamy Creek Correctional Facility
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Ionia, Michigan 48846

VERIFICATION

I declare under the penalty of perjury that the information contained within the foregoing Petition for Writ of Certiorari is true to the best of my knowledge, information and belief.

August 27, 2020

 440115

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