

No. 20-7142

Supreme Court, U.S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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**LEWIS FOX – PETITIONER/APPELLANT**

**V.**

**DAVID GRAY (WARDEN) – RESPONDENT/APPELLEE**

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**On Petition for Writ Of Certiorari to the  
United States Court Of Appeals For The Sixth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**ORIGINAL**

### **QUESTION PRESENTED**

Lewis Fox's federal habeas corpus petition case (Insufficient Evidence Claim) raises a pressing issue of national importance: Did the United States Court of Appeals for the Sixth Circuit impose an improper burden and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent when it denied Fox a COA to obtain a merits review of his claim to sustain his conviction of felonious assault; specifically, against Mary Griffin whom was not threatened or harmed in any manner.

**LIST OF ALL PARTIES**

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

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## **PETITION FOR WRIT OF CERTIORARI**

Lewis Fox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, see **Fox v. Gray, 2020 U.S. App. LEXIS 32822.**

## **OPINIONS BELOW**

The opinion of the United States Court of Appeals denying the petitioner's COA application is reported at **Fox v. Gray, 2020 U.S. App. LEXIS 32822.** (See Appendix A – Page #. 12). The decision of district judge of the United States District Court for the Southern District of Ohio denying habeas relief is reported at **Fox v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 18829.** (See Appendix B – Page #. 17). The magistrate's report and recommendation is reported at **Fox v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 4314.** (See Appendix C – Page #. 21). Lastly, the opinion of the Ohio Court of Appeals is reported at **State v. Fox, 2018 Ohio 501.** (See Appendix D – Page #. 39.)

## **STATEMENT OF JURISDICTION**

The United States Court of Appeals issued its order denying the petitioner's COA application on 10/16/20. This Court has jurisdiction under 28 USC 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourteenth Amendment to the United States Constitution provides in relevant part:

“[N]or shall any state deprive any person of life, liberty, or property with due Process of law”

This case involves the application of 28 USCS 2253(c), which states in part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## **STATEMENT OF THE CASE**

Lewis R. Fox asserts that his petition is specific to the part of his conviction, one count of felonious assault in violation of O.R.C. 2903.11, against Mary Robinson (the grandmother of Mary Griffin) where there was insufficient evidence to sustain a conviction.

Petitioner was arrested on the evening of October 29, 2015 where two women arrived at petitioner's house for one purpose: "to beat his ass." Unaware of whom was at the door, awoken from his sleep by his fiancée's frantic falls and loud voices downstairs, petitioner grabbed his gun, came downstairs to protect his home and fiancée from unwanted intruders.

Upon observing the noises were at the entry door, Fox proceeded with caution with his pistol held in his non-dominant hand where extensive/ongoing rehabilitation had been administered to contend against pre-existent arm/hand nerve damage. Upon opening the entry door, noticing the screen door was already held open by Mary Robinson's granddaughter, a verbal to physical confrontation emitted, resulting in the gun to be accidentally discharged. Mary Robinson was not harmed by any means in anyway.

Petitioner was indicted on and charged with two counts of felonious assault in violation of O.R.C. 2903.11 with 3-year firearm specifications.

This matter proceeded to a jury trial in January 2017. The petitioner was found guilty and sentenced to 10 years on both counts.

Petitioner, represented by counsel, timely appealed his conviction raising a claim that:

"The trial court erred and deprived appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article One Section 10 of the Ohio Constitution by finding him guilty of felonious assault as those verdicts were not supported by sufficient evidence and was also against the weight of the evidence."

Petitioner's conviction was upheld by the 10<sup>th</sup> District Ohio Court of Appeals on February 8, 2018, see State v. Fox, 2018 Ohio 501. (See Appendix D- Page #. 39).

Petitioner timely appealed his claims to the Ohio Supreme Court who declined to accept his case for review, see State v. Fox 152 Ohio St. 3d 1484, 2018 Ohio 1990, 98 N.E.3d 296.

Petitioner timely filed a federal 2254 habeas petition to the United States District Court for the Southern District of Ohio, which denied habeas relief, see Fox v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 18829. (See Appendix B – Page #. 17), based upon the

magistrate's report and recommendation, see Fox v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 4314. (See Appendix C – Page #. 21).

Petitioner timely appealed the District Court's adverse decision denying habeas relief and filed a request for a COA in the Sixth Circuit. On 10/26/20, the Sixth Circuit declined to issue a COA, see Fox v. Gray, 2020 U.S. App. LEXIS. 32822. (See Appendix A – Page #. 12).

Henceforth this writ of certiorari was filed by the petitioner.

## **REASONS FOR GRANTING THE WRIT**

### **A. No Person Shall be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged.**

It is well established that “A COA will issue if the requirements of 28 USC 2253 have been satisfied.” see Miller-El v. Cockrell, 537 U.S. 322, 336.

“Under the controlling standard, a petitioner must show that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, see Slack, 529 U.S. 484 (quoting Barefoot, Supra at 893, n.4); Miller-El, 537 U.S. 336.

The issue presented in this case is/was whether there was sufficient evidence to sustain a conviction of felonious assault in violation of O.R.C. 2903.11, against Mary Robinson (the grandmother of Mary Griffin—upon whom the other count/charge/conviction exists).

The standard for sufficiency of evidence requires only that jurors draw reasonable inferences from basic facts to ultimate facts, see Jackson v. Virginia, 443 U.S. 307, 319; Coleman v. Johnson, 566 U.S. 650 (2012).

In addition, federal courts must look to state law for “the substantive elements of the criminal offense,” Jackson, 443 U. S. 324, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law, see Coleman, At 655.

### **State Appellate Court**

The 10<sup>th</sup> District Ohio Court of Appeals stated in pertinent part that “testimony indicated that Mary Robinson was standing close behind Mary Griffin when Fox fired the two shots, and thus she was also in the line of fire.” (See Appendix D – Page #. 43). This is critical because in order

for the state to sustain a conviction for felonious assault (against Mary Robinson), requires the culpability of “knowingly” to be satisfied.

Ohio’s law states that “A person acts knowingly, regardless of purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact, see O.R.C. 2901.22(B). When determining whether a defendant acted knowingly his state of mind must be determined....Evidence that a defendant fired a gun in a person’s in direction is sufficient evidence of felonious assault, see **State v. Jefferson, 2017 Ohio 7272, @ 17 citing State v. Jordan, 8th Dist. Cuyahoga No. 73364, 1998 Ohio App. LEXIS 5571, \*31 (Nov. 25, 1998).** (See Appendix D. – Page #. 42).

On this basis the alone the state court’s decision was objectively unreasonable in which this unreasonable determination is further expounded on throughout this petition.

#### **Federal Habeas/District Court**

A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury, see **Cavazos v. Smith, 565 U.S. 2.** On habeas review a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable, see **Cavazos citing Renico v. Lett, 559 U.S. 766, 773, (2010).** Also see **Coleman @ 651.**

While a double layer of deference must be afforded to state review, petitioner strongly disagrees with the credibility/reliability of Mary Griffin’s testimony.

Mary Griffin stated that that her grandmother was right behind her (of which the state relied upon) when the gun was accidentally discharged.

However, Mary Robinson (the grandmother) stated to not being behind her granddaughter, “but down and away” “in the grassy area” - - How reliable/credible is the granddaughter’s testimony to support a felonious assault conviction against Mary Robinson whom was not injured in anyway, and testified that the petitioner did not threaten (hear any threats) nor point the gun at or towards her direction.

According to law, a gun must be fired in the direction of a person to be applicable/sufficient to satisfy the “knowingly” requirement, see State v. Jefferson, 2017 Ohio 7272 @ P17. Moreover, “close proximity” is not only subjective and debatable among reasonable jurists, it was not discussed in Jefferson.

The District Court acknowledged petitioner’s objection to the magistrate’s report & recommendation that “the state appellate court unreasonably determined that the evidence is constitutionally sufficient to sustain his conviction on felonious assault against Mary Robinson, because the record indicates that she was not standing close to Mary Griffin or in the line of fire, but in the grassy area off the porch.” (See Appendix B – Page #. 18). The magistrate’s report & recommendation was accepted denying relief.

#### Federal Habeas Appellate/Circuit Court

As stated in the beginning, a petitioner seeking a COA “a petitioner must show that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, see Miller-El, 537 U.S. 336.

To show a constitutional violation, diagrams filed within petitioner’s original habeas

petitioner was used to support the § 2253 requirement.

Such diagrams showed a top-down view of petitioner's property. Mary Robinson stated that she was "down and away" off the porch, "in the grassy area." Such grassy area was not against the house, but separated by a combination of a hedge row of bushes and then a sidewalk (measuring over 5 ½ feet combined wide) and greater than ninety degrees from the threshold of petitioner's entry door. Reasonable inference given, Mary Robinson did not, as she stated could not have seen Fox point a gun at her, unless he would have stepped out onto the porch's corner. Of course, there was no testimony that Fox stepped onto the porch during the accidental discharge of the gun.

In reference to "close proximity" there was at least a minimum of 5 ½ Feet (not including the elevation difference) between Mary Robinson and her granddaughter.

Again, in its denial of Fox's COA, the Federal Appellate Court relied on the state court's objectively unreasonable testimony of the granddaughter stating "Robinson was standing close behind" Id @ 229-30. (See Appendix A – Page #. 14).

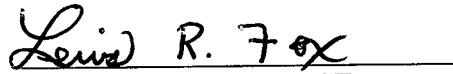
Between both Mary Robinson's testimony and the diagrams proffered shows that the granddaughter's testimony was implausible. The state court's reliance of such testimony that Mary Robinson was "standing close behind" her granddaughter when the gun was accidentally fired is not only objectively unreasonable, but moreover, impossible.

Under the threshold inquiry, reasonable jurist could debate whether the district court's resolution was debatable. At a minimum reasonable jurist could agree that petitioner's sufficiency claim of felonious assault against Mary Robinson was "adequate to deserve encouragement to proceed further with an issuance of a COA, see Miller-El @ 336.

## CONCLUSION

For all of the foregoing reasons, Mr. Fox's case is extraordinary. At a minimum, reasonable jurist could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve, but to maintain the public's confidence that courts will not permit a criminal defendant's conviction where insufficient evidence exists to sustain all of part of their conviction.

RESPECTFULLY SUBMITTED

  
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