

No. 20-7391

ORIGINAL

Supreme Court, U.S.
FILED

JAN 19 2021

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS TURNER — PETITIONER
(Your Name)

vs.

WARDEN DAVID GRAY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE OHIO COURT OF APPEALS, NINTH APPELLATE DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marcus Turner Pro se

(Your Name)

#670-894 BELMONT CORRECTIONAL INSTITUTION P.O. Box 540

(Address)

St. Clairsville, Ohio 43950

(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

(1.) Does the Double Jeopardy Clause of the Fifth Amendment bar a second prosecution and punishment for the crimes of Felony-murder and Felonious assault following a prosecution for Aggravated Murder, Felony Murder and Felonious Assault? Which prosecution resulted in an acquittal on aggravated murder, and no event (hung jury) on felony murder and felonious assault. When the second prosecution presents the same case and evidence (ultimate issue of fact) as in the first trial. And felony murder and felonious assault are also lesser included offenses of aggravated murder of which the defendant was acquitted.

(2.) How does the defendant's due process right under the Fourteenth Amendment to not be convicted of a crime except upon proof beyond a reasonable doubt apply in this case. The prosecution's case clearly evidenced that someone other than the defendant caused the death of the victim this fact resulted in an acquittal in the first trial. However, the state departs from this constitutional guarantee to sustain a conviction on behalf of the state in a second trial based upon these same facts.

(3.) How does the Strickland Standard apply in this particular case? The defendant's appellate attorney fails to notify him of the Court of Appeals ruling affirming his conviction, causing him to miss the deadline to file an appeal in the State Supreme Court. This fact is not disputed. However, the Sixth Circuit Court of Appeals denies certificate of appealability on this issue because it agreed with the State that defendant should have argued ineffective assistance of counsel on this issue in an application to reopen his appeal. Which completely departs from state and federal law that communications or the lack thereof fall outside of the record, and cannot be raised in an application to reopen his appeal that only deals exclusively with matters on the record. Which he supports with case law. Is this a departure from the Strickland Standard in order to deny certificate of appealability?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Marcus Turner v. Gray, No. 5:18-CV-01285-PAG, United States District Court Northern District of Ohio, Eastern Division, Judgment Entered May 20, 2020.

Marcus Turner v. Gray, No. 20-3675, United States Court of Appeals For the Sixth Circuit, Judgment Entered October 15, 2020.

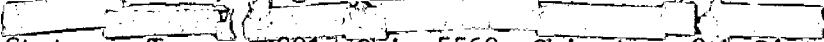

State v. Turner, 2017-Ohio-5560, Ohio App. 9th Dist. Jun. 28, 2017.

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Yeager v. United States, 557 U.S. 110, 129 S.Ct. 2360, 174 L.Ed. 2d 78 (2009)	
Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970)	
In Re Winship, (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368, 375.	
Jackson V. Virginia, (1979), 443 U.S. 307, 99 S.Ct. 278, 61 L.Ed. 2d 560.	
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)	

STATUTES AND RULES

N/A

OTHER

N/A

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 15, 2020.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 28, 2017.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED



United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases in the land or naval forces, or in the militia, when actual service in time of war or public danger, nor shall any person be subject for the same offense to 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.

United States Constitution, Amendment 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 witness against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV

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 any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Turner was indicted on charges of aggravated murder, felony murder, felonious assault, and having a weapon under disability. The jury convicted Turner of having a weapon under disability because a witness claimed to have seen him with a gun hours prior to the victim in this case being shot. The jury acquitted Turner of aggravated murder, and could not reach a verdict on the felony-murder and felonious assault charges. He was sentenced to 36 months of imprisonment for having a weapon while under disability, and retrial was scheduled for the felony-murder charges. Prior to retrial, Turner filed a motion to dismiss the felony-murder charge, and arguing that a retrial on that count would violate the Double Jeopardy Clause. The trial court denied the motion, the state appellate court affirmed, and the Ohio Supreme Court declined to accept jurisdiction over the appeal. State v. Turner, No. 27532, 2015 WL 1227869 (Ohio Ct.App. Mar, 18, 2015).

After retrial Turner was convicted by a jury of felony murder and felonious assault and received an aggregate sentence of 18 years to life imprisonment. The state appellate court affirmed his conviction and sentence, and the Ohio Supreme Court denied his motion for delayed appeal. His request for delayed appeal was based on the undisputed fact that his appellate attorney failed to notify him his claim of insufficient evidence under the Fourteenth Amendment had been denied and his convictions affirmed by the court of appeals. That lack of notification caused him to miss the 45 day deadline to move the Ohio Supreme Court to accept jurisdiction to review his case. The Ohio Supreme Court gave no reason for its denial of his request for delayed appeal, and never addressed his claim against counsel. State v. Turner, No. 28298, 2017 WL 2803118 (Ohio Ct.App. June 28, 2017).

After filing the motion for delayed appeal, Turner filed an application to reopen his appeal pursuant to Ohio Appellate Rule 26(B), arguing that he received ineffective assistance of appellate counsel for failing to raise the following errors on appeal: (1) Appellant's conviction for having a weapon under disability based upon insufficient evidence. (2) Counsel violate appellant's right to effective assistance of counsel in the manner in which he asserted his insufficient evidence argument. (The court ruled the argument was in essence a manifest weight of evidence argument and denied the argument). The Court erred by calling Carlton Smith as its own witness. (Smith was the witness that initially indicted Turner in the crime then admitted at the second trial he hadn't seen Turner or anyone else shoot the victim.) (4) The Court erred by denying defendant's motion for mistrial after unsworn testimony was given to the jury. The state appellate court denied the application, and the Ohio Supreme Court declined to accept jurisdiction over the appeal.

Turner then filed a petitioner for writ of habeas corpus, arguing that there was insufficient evidence in support of his convictions for felony-murder and felonious assault, he received ineffective assistance of appellate counsel, and his convictions for felony-murder and felonious assault violate the Double Jeopardy Clause. The district court denied the 2254 petition and decline to issue a certificate of appealability. Turner v. Gray, No. 5:18-CV-01285, 2020 WL 2572322 (N.D. Ohio May 20, 2020). The United States Court of Appeals for Sixth Circuit also denied his request for certificate of appealability. Turner v. Gray, No. 20-3675 October 15, 2020.

REASONS FOR GRANTING THE PETITION

In this case the State was permitted a second trial of the petitioner in violation of his Fifth Amendment Right to not be twice put in jeopardy for the same offense. In the first trial the jury decided the issue of ultimate fact. That the petitioner had not caused the death of the victim. So the question is why was the prosecution given a second bite at the apple? In the first trial the state had every opportunity to present a case for felony-murder and felonious assault. However, the prosecution presented not case for it, so the jury hung on those counts. This non-event by the jury was not due to any confusion of the evidence presented. Why are they given a second opportunity when defendant's across this country is only afforded one chance to prove thier defense.

The lower court decisions, both state and federal, are in conflict with precedent of this court on how to determine what the issue of ultimate fact is in a given case. Therefore, the lower court needs this court's guidance on these issues. More specifically, because the lower court's have taken on the position of being a friend to the prosecution, over defending the constitution. In this case the lower court's simply adopted the prosecution's position on this matter which set in place a deference to that decision when it is a clear violation of the double jeopardy clause. This case is a glaring example of the need for this court's discretionary jurisdiction to pull these lower courts back to neutrality as guaranteed by the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marcus Turner

Date: January 14 / 2021