

No. 20-7963

IN THE
SUPREME COURT OF THE UNITED STATES

Lugene L. Scott

(Your Name)

vs.

Neil Turner (Warden)

PETITIONER

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI | TC

FILED
APR 21 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

United States Court of Appeals for the Sixth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lugene L. Scott

(Your Name)

P.O. Box 1812

(Address)

Marion, Ohio 43301

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Is the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution violated when a defendant is denied credit for time served when a defendant is convicted and sentenced for felonious assault and later reconvicted for manslaughter due to the death of the victim?

JURISDICTION

§1254. Courts of Appeals; certiorari; certified questions:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Ohio v. Johnson (1984), 467 U.S. 493, 499.

State v. Konicek (1984), 16 Ohio App. 3d 17

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State v. Thomas (1980), 61 Ohio St. 2d 254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

28 U.S.C. § 2254

Due process Clause of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Sections 9, 10 and 16, Article I of the Ohio Constitution.

Ohio Revised Code 2967.191

LIST OF PARTIES

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

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 2021 U.S. App. LEXIS 3229; 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 is unpublished.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 2020 U.S. Dist. LEXIS 156750; 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 is unpublished.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 _____ 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 February 4, 2021.

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 _____.
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).

STATEMENT OF THE CASE

Appellant was convicted following a bench trial of aggravated assault, felonious assault, and having a weapon while under disability. State v. Scott, 2016-Ohio-5929, 2016 WL 5371844, at *1 (Ohio Ct. App. 2016). He was sentenced to a total of nine years of imprisonment, and the state appeals court affirmed. *Ibid.* In 2013, one of Mr. Scott's victims died of complications from the injuries he sustained during the shooting. *Ibid.* Mr. Scott struck a bargain with the state in which he pleaded guilty to voluntary manslaughter and having a weapon while under disability; in exchange, he would receive consecutive sentences of ten years for the manslaughter count and two years for the weapons charge. *Ibid.*

On direct appeal, the Ohio Court of Appeals vacated the two-year sentence for having a weapon while under disability but otherwise affirmed his convictions and sentence. 2016-Ohio-5929, Id. at *3, 5. The Ohio Supreme Court denied further review. On remand, the trial court sentenced Mr. Scott to ten years of imprisonment for the voluntary manslaughter conviction. He did not appeal from his resentencing but later applied to reopen his appeal in the Ohio Court of Appeals. The court denied his application as untimely, State v. Scott, No. 103696, 2017 WL 6987680 (Ohio Ct. App. Jan. 17, 2017), and the Ohio Supreme Court denied further review.

In 2018, Mr. Scott filed a § 2254 petition in federal district court, alleging that the trial court's sentence violated his right to be free from double jeopardy. The magistrate judge issued a report and recommendation to dismiss the petition. Scott v. Schweitzer, No. 1:18-CV-00485, 2020 U.S. Dist. LEXIS 156748, 2020 WL 6568666 (N.D. Ohio July 8, 2020). Over Mr. Scott's objections, the district court adopted the report and recommendation, dismissed the petition as meritless, and denied a COA. Scott, 2020 U.S. Dist. LEXIS 156750, 2020 WL 5087059 (N.D. Ohio Aug. 28, 2020).

REASONS FOR GRANTING THE PETITION

Appellant, appeals pro se from the District and Sixth Circuit court's judgment dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In his present application, Mr. Scott reasserts his double-jeopardy claim. He also contends that, despite the trial court's sentencing statement that it would credit Mr. Scott for the time he had already served, he never received that credit.

Mr. Scott argues that the trial court subjected him to double jeopardy by failing to credit him for time already served on his earlier felonious-assault conviction. Contrary to the Sixth Circuit's deliberate misinterpretation appellant's claim, appellant does not contend that his convictions were for offenses that should have been merged. As a result, both of the lower federal courts deliberately applied the wrong standard of review in order to justify ignoring this blatant miscarriage of justice. The state and federal courts were required to follow the simple law as stated below to resolve this matter but for reasons of their own, ignored this statute:

§ 2967.191 Reduction of prison term for related days of confinement.

(A) The department of rehabilitation and correction shall reduce the prison term of a prisoner, as described in division (B) of this section, by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2) (h)(i) of section 2929.19 of the Revised Code, and confinement in a juvenile facility. The department of rehabilitation and correction also shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner by the total number of days, if any, that the prisoner previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

(B) The reductions described in division (A) of this section shall be made to the following prison terms, as applicable:

- (1) The definite prison term of a prisoner serving a definite prison term as a stated prison term;
- (2) The minimum and maximum term of a prisoner serving a non-life felony indefinite prison term as a stated prison term;
- (3) The minimum and maximum term or the parole eligibility date of a prisoner serving a term for which there is parole eligibility.

The Double Jeopardy Clause generally protects a criminal defendant from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. North Carolina v. Pearce (1969), 395 U.S. 711, 717.

The double jeopardy proscription generally bars prosecution for a greater offense after the defendant has been convicted or acquitted of a lesser included offense. Brown v. Ohio (1977), 432 U.S. 161. A well-established exception to this rule, however, allows a second prosecution if an element of the greater offense did not occur until after the prosecution for the lesser offense. Brown, supra, at 169, n.7; Diaz v. United States (1912), 223 U.S. 442.

In Diaz, defendant's conviction for assault and battery did not bar a subsequent prosecution for homicide when the victim **later died**. Diaz has consistently been applied to permit a second prosecution based upon the additional fact of the victim's death. State v. Thomas (1980), 61 Ohio St. 2d 254 (robbery and involuntary manslaughter); State v. Konicek (1984), 16 Ohio App. 3d 17 (traffic offenses and aggravated vehicular homicide).

In the case at bar, Scott's victim did not die until after his trial for felonious assault and the state was not barred from entering into a plea agreement with Scott for manslaughter. Any potential prejudice in the form of multiple punishments was supposed to be prevented by the requirement that Scott be given credit for time served. Such a promise is why he took such a plea in the first place. See Pearce, supra, at 718; Ohio v. Johnson (1984), 467 U.S. 493, 499.

This case boils down to nothing more than a situation in which a court has broken their promise and none of the reviewing courts want to stand up for what is right and simply grant Scott with credit for the years he has already been in custody for the same act. The lower courts deliberate acts of misinterpreting Scott's arguments and claims is a shameful abuse of discretion and brings even further mistrust of our system of justice.

CONCLUSION

The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system. As this court knows all too well, we live in an imperfect world, one which includes a criminal justice system that can err in frightening ways. It is unrealistic to believe that all such errors can be eliminated at the source, but McKinney submits, it is not asking too much to insist that the system take reasonable steps to correct such injustices once they do come to light.

The U.S. Constitution Amendment XIV guarantees that no person will be deprived of life, liberty, or property by the State without due process of law. While no defendant can be guaranteed a perfect trial process, each defendant must be guaranteed a fundamentally fair trial, for our fairness in our dealings with the government is the cornerstone of our faith, trust and support in the government's system. Due process of law is breached when the government's procedure pass beyond the line of tolerable imperfection and fall into the field of fundamental unfairness.

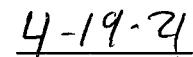
Justice can, and does miscarry in a variety of ways. This court has an opportunity to right a wrong before such a severe punishment is fully served and appellant cannot get the stolen years of his life back, once wrongfully taken. Appellant respectfully requests an evidentiary hearing on

this matter with permission to expand the record if need presents itself. The petition for a writ of certiorari should be granted. It is so prayed.

Respectfully submitted,



North Central Correctional Complex
P.O. Box 1812
Marion, Ohio 43301



Date

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lugene L. Scott

Lugene L. Scott

Date: 4-19-21