

21-5138

NO. 21-

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In The

**Supreme Court of the United States**

In re Willie S. Smith

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ORIGINAL

**PETITION FOR WRIT OF HABEAS CORPUS**

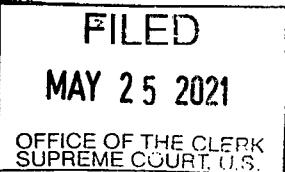
**NON-CAPITAL CASE**

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Willie S. Smith  
P.I.N. A-312-990  
Richland Correctional Inst.  
1001 Olivesburg Road  
Post Office Box 8107  
Mansfield, Ohio 44901-8107

Petitioner *pro se*

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## **NON-CAPITAL CASE**

### **QUESTIONS PRESENTED**

Mr. Smith's habeas petition presents exceptional circumstances that, by all accounts, appear to be a case of first impression, and requires interpretation of a statutory mandate that directly conflicts with this Court's prior decisions defining acquittals and the finality of a jury's verdict.

#### **The Questions Presented Are:**

1. Whether transfer to the District Court for a hearing pursuant to this Court's original habeas jurisdiction is warranted in this exceptional non-capital case where the petitioner submitted unrefuted evidence that he was acquitted of every element of every offence for which he stood trial, the lower federal court refused to address his innocence in his first habeas petition, and no State of Ohio or federal district court, or federal court of appeals has addressed the issue thereafter?
2. When federal courts fail to address the not guilty verdicts that are contained in the state record in petitioner's first habeas petition, does the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") preclude a stand-alone innocence claim raised for the first time in a successive petition based on the same evidence the federal court failed to review in the first petition?

**PARTIES TO THE PROCEEDINGS BELOW**

This petition stems from a Habeas Corpus proceeding in which petitioner, Willie S. Smith was the movant before the United States court of Appeals for the Sixth Circuit. Mr. Smith is a prisoner sentenced to ten to twenty -five years, plus Life. And is in the custody of Kenneth Black Warden of the Richland Correctional institution.

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**APPENDIX B: 1995 SENTENCING JOURNAL ENTRY**

**APPENDIX C: 28 USCS §2241 (POWER TO GRANT THE WRIT)**

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## **PETITION FOR WRIT OF HABEAS CORPUS**

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Petitioner Willie S. Smith respectfully requests that this Court transfer for hearing and determination of his application for habeas corpus to the District Court in accordance with its authority under 28 U.S.C. § 2241(b).

### **OPINION BELOW**

The opinion of the United States Court of Appeals for the Sixth Circuit is cited as *In re Smith*, 2019 U.S. App. LEXIS 31062 and is attached at Appendix A.

### **STATEMENT OF JURISDICTION**

The Order of the Court of Appeals denying authorization to file a successive petition was entered on October 17, 2019. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the United States Constitution.

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Fourteenth Amendment of the United States Constitution **states**, in relevant part: “Nor shall any State deprive any person of life, liberty, or property, without due process of law ...”

The Eighth Amendment of the United States Constitution **states**, in relevant part: Nor cruel and unusual punishment inflicted.

The Sixth Amendment of the United States Constitution **states**, in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Fifth Amendment of the United States Constitution **states**, in relevant part: nor shall any person be subject for the same offence 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.

**28 U.S.C. §2241 (2021): Appendix C**

**28 U.S.C. §2244 (2021): Appendix E**

**28 U.S.C. §2254 (2021): Appendix D**

## **STATEMENT OF FACTS**

From the time Mr. Smith was sentenced, Willie S. Smith has challenged the validity of his convictions. Following direct review, with the assistance of counsel, Mr. Smith filed numerous collateral proceedings. These facts emerge from those filings.

On April 8, 1995, information from an unknown source was given to the Warrensville heights police department, in Cuyahoga County Ohio, that a body was floating in a creek behind an apartment complex on Dalebridge road.

Officer Raymond Thomas responding to the information, proceeded to that location and found a male body with no identification. Several hours later after hearing that her son, Reginald Gary Lewis, (Reggie) had died, Mary Lewis contacted the Cuyahoga county coroner's office regarding her son who had been missing since March 28, 1995. As a result, Mary Lewis went to the coroner's office and identified her son's body.

July 3, 1995 defendant was arraigned, plea of Not guilty entered on all indictments.

On June 5, 1995 Mr. Smith was indicted on one count of kidnapping, Case No.CR-323987 and on June 28, 1995 Mr. Smith was issued a separate three count indictment Case No.CR-325283 in which he was charged as follows: count one Aggravated Murder; count two- Aggravated Murder; count three Having a weapon while under Disability. Both Aggravated Murder charges contained firearm specifications and also Felony Murder specifications

On August 21, 1995 the trial court consolidated the two indictments and renumbered the charges as follows: Count one -Kidnapping; Count two -Aggravated Murder; Count three- Aggravated Murder; and Count four -Having a weapon while under disability.

On October 6, 1995 the jury returned the verdict as follows: Guilty on count one –Kidnapping; Not Guilty on Count two- Aggravated Murder; Guilty on Count Three-Aggravated Murder; and Not Guilty of- Having a weapon while under disability.

Significantly, the jury also stated the following: "We find and specify that the defendant Did not have a firearm on or about his person, or under his control while committing the offense charged in the indictment.

In addition the jury determined: In regards to specification One, specification two: We the jury find defendant **"Not Guilty"** of committing this offense while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit Kidnapping and defendant was the principal offender in the Aggravated murder, or if not the principal offender, committed the Aggravated murder with prior calculation or design."

**(Sentencing Journal Entry at Appendix B)**

With respect to evidence introduced at trial, the state presented evidence that Lewis died from two bullet wounds to the head and that there were blunt force injuries to his head, and extremities.

The State of Ohio also established that Mr. Lewis was killed at the home of William Marshall, the state's key witness, and Mr. Smith's cousin. Mr. Marshall testified, that he had been shot in February of 1995, by an unknown assailant, which he described as an attempted robbery, he also testified that rumor's in the neighborhood were that the shooter was Reggie, but that he was unsure who shot him.

Regarding the events on March 28, 1995, Marshall testified that he left school early that day after being in a fight, and that he arrived home, where he lived alone with his grandmother, at approximately 1:30 pm. He also testified that his grandmother was not home when he arrived.

Marshall testified that after he arrived home Willie Smith and his brother, Ashunte Smith, Marshall's cousins, brought Lewis to his house in a small white car, and said that Lewis was the individual that shot Marshall.

Mr. Marshall also testified that when his cousins entered the house they told Marshall to tie Lewis up, and that he got an extension cord from upstairs, returned to the basement, but that his cousins tied Lewis to the pole. Mr. Marshall also testified that he went back upstairs to answer the phone and spoke to his grandmother, and returned to the basement, and told his cousins that whatever they were going to do they better do because grandmother was coming home. Marshall then claimed his cousins told him to go upstairs, and while he was upstairs he heard two shots, and when he looked downstairs Lewis lay dead.

In 1998, Mr. Smith by and through counsel, filed a motion for a new trial and a petition for post - conviction relief. Mr. Smith presented the trial court with seven affidavits from various relatives and friends that did not testify at trial, and one affidavit from Shenell Owens, a hostile witness for the state who testified that she witnessed Mr. Smith and his brother grab Mr. Lewis and force him into a small white car.

The trial court denied both pleadings without a hearing, but in State of Ohio v. Smith, 1999 Ohio App, Lexis 1575. The Ohio Eighth Appellate District court reversed with instructions to hold an evidentiary hearing.

Brother's Clarence Brown and Rasheen Bledsoe testified at the evidentiary hearing January 3, 2000, that both of these witnesses offered statements to the Warrensville Heights Police Department, after Willie Smith was arrested and before his trial commenced that another suspect (Shawn Laney) who is also a relative of all defendants in this case along with (Ronnie Johnson) who was an additional suspect was last seen with the victim Gary Lewis before his death.

Both witnesses at the hearing gave testimony that they were receiving threatening calls to their home from unknown sources telling them both not to show up to the trial in 1995.

Kitt Marshall-Laster who is the aunt of all the suspects in this case testified at the evidentiary hearing that William Marshall admitted to her that he was the one that killed Lewis.

Shenell Owens, who was not related to anyone involved in the crime, testified at trial to seeing Mr. Smith and his brother force Lewis into a small white car. Ms. Owens testified at the hearing that she lied at trial because Mr. Smith was rumored to be scheduled to testify against her brother in an unrelated murder case.

Ms. Owens however recanted her recantation after being threatened by the trial court with perjury charges and prison time. The sum of the State's case against Mr. Smith was the testimony of William Marshall, and Ms. Owens. Assuming arguendo that Ms. Owens trial testimony was believed by the jury, the fact remains that Ms. Owens testimony does not place Mr. Smith at the scene of the Murder.

#### **A. The court of appeals decision**

On October 17, 2019, a panel of the court of appeals denied Mr. Smith permission to file a second habeas petition in which he asserted a manifest injustice for being incarcerated for a charge that he was acquitted of committing. The lower court held that the judicially created exception to the restrictions on second or successive habeas petitions did not survive the enactment of the Antiterrorism and Effective Death Penalty Act, (Appendix at A.)

Mr. Smith respectfully submits that as shown fully below this case does not fit the narrow procedural confines delineated by the "AEDPA". This case is however precisely the type of occasion that warrants judicial intervention from this Honorable Court.

## REASONS FOR GRANTING THE WRIT

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is clearly inadequate". *Ex parte Fahey*, 332 U.S. 258 (1947). Title 28 U.S.C. § 2244 (b)(3)(E) Prevents this Court from reviewing the court of appeals' order denying Mr. Smith leave to file a second or successive habeas petition by appeal or by writ of certiorari. The provision however has not repealed this Court's authority to entertain original habeas petitions, *Felker v. Turpin*, 518 U.S. 651, 660 (1996), Nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. §2241(b).

Rule "20" of this court requires a petitioner seeking a writ of habeas corpus to demonstrate that (1) adequate relief cannot be obtained in any other form or any other court; (2) "exceptional circumstances" warrant the exercise of this power; and (3) the writ will be in aid of this Court's appellate jurisdiction."

Further this Courts authority to grant relief is limited by 28 U.S.C. § 2244(b). See *Felker*, 518 U.S. at. 662-63. Mr. Smith's last hope for any court to recognize the significance of the fact that he was acquitted by the jury of every Element that the State of Ohio was required to prove lies with this court. His case presents exceptional circumstances that warrant the exercise of this court's discretionary powers.

## **I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT**

As required by Rule 20.4 and U.S.C. §2241 and §2242, Mr. Smith states that he has not applied to the district court because the Circuit court prohibited such an application, **See : (Appendix A)** Mr. Smith exhausted his state remedies for his acquittal argument when the Ohio Supreme court declined to accept jurisdiction to review the denial of his Common Law motion to Correct a void judgment. **See:** State of Ohio v. Smith 154 Ohio St.3d 1425 (Ohio 2018). **(Appendix F)**

Since Mr. Smith exhausted his remedies in the state courts, and was denied permission by the Court of Appeals to file a second Habeas petition, he also in December of 2019 filed a Motion to Recall the mandate, based on fraud upon the court by federal court officials, and sought relief from judgment by filing a 60(b)(4) Motion that there was a defect in the integrity of his initial "2002" Habeas §2254 proceeding. Both motions were denied and again the "AEDPA" was cited to bar any form of relief.

The Sixth Circuit went as far as to state on page 3 of the February 3, 2021 order **See: (Appendix J)** That No Mandate was ever issued to recall in connection with this case", when clearly from **(Appendix I)** Docket # 29 **See:** also **(Appendix K )** USCA Mandate of December 5,2003, that statement was a reckless disregard for the truth, which is also endorsing fraud. Mr. Smith cannot obtain relief in any form or from any other court.

## **II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION**

The Courts that have reviewed the issue of acquittal raised by Mr. Smith refused to address the merits of the claim based on procedural arguments that are in direct contradiction of this Court's jurisprudence.

Few- if any - cases where a defendant was acquitted of every element of the charged offense has resulted in the incarceration for that offense.

### **A. A JURY DETERMINATION OF NOT GUILTY OF EVERY ELEMENT OF THE CHARGED OFFENSE IS RARE AND EXCEPTIONAL**

This court has consistently stated that: Our cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense".

*Evans v. Michigan*, 568 U.S. 318, 319.

A study of federal habeas case law has revealed no case in which a jury issued a verdict of Guilty for an Aggravated Murder charge, and a verdict of Not guilty to each and every element of that same Aggravated murder charge.

This court has consistently stated; that "with few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment" *United States v. Powell*, 469 U.S. 57, at 67.

The fact that Mr. Smith was acquitted of each element that the State of Ohio was required to prove does not require consideration of newly discovered documents. All of the facts related to the acquittal are contained in the sentencing journal entry.(**Appendix B**)

Pursuant to both *Powell* and *Evans*, once the jury entered a verdict of "**NOT GUILTY**" to every element constituting the charge of Aggravated murder, the litigants were required to accept the jury's collective judgment. Powell 469 U.S. at 67

Pursuant to *Evans*, " An acquittal cannot be disregarded at any stage of the proceedings. *Evans*, 568 U.S. at 318-319, citing *Burks v. United States*, 437 U.S. 1, 10, and *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571.

The fact that the sentencing entry, (**Appendix B**) shows a **Not Guilty** verdict to each element of the charge of Aggravated murder for which Mr. Smith is incarcerated, coupled with the fact that he was denied review under 28 U.S.C §2244(b), establishes the exceptional circumstances required to warrant the exercise of this court's jurisdiction.

**B. THE LOWER FEDERAL COURTS DENIED MR. SMITH ANY “MEANINGFUL” AVENUE TO AVOID A MANIFEST INJUSTICE” IN HIS FIRST HABEAS PETITION**

Only rarely – if ever- does a person find themselves incarcerated for a crime that a jury acquitted them of committing. It is even more rare that an acquittal that appears on the face of the sentencing journal entry would slip through the cracks of the federal habeas system and require the petitioner to bring a stand- alone innocence claim in a second habeas petition.

Ordinarily, there would be no reviewing process once the jury issued a verdict of Not guilty, and a person in Mr. Smith’s position would not be required to further establish his innocence in a first or second habeas petition. The District Court and Appellate Court continued to ignore the manifest injustice in Mr. Smith’s second habeas petition stating: this judicially created exception to the restrictions on second or successive petitions did not survive the enactment of the Antiterrorism and effective Death Penalty Act. (Appendix A).

### **III. The Court of Appeals erred in denying Mr. Smith's second petition**

The court of appeals denied Mr. Smith permission to file a second petition, specifically stating: Congress required second-or successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof (clear convincing evidence) and to satisfy a diligence requirement that did not exist prior to the AEDPA'S passage. (**Appendix A.**) 28 U.S.C. §2244(b).

Although this procedural requirement "inform" this Court's consideration of original Habeas petitions, this court has not decided whether it is bound by them.

**See:** *Felker*,518 U.S. at 663 (pretermitted the question of whether the court is bound by §2244 (b)(2) finding the provision "informs its decision").

The purpose of §2244 (b)(2) that "informs" this court's consideration of Mr. Smith original habeas petition are twofold: Section §2244(b)(2)(B)(ii) requires that the claim raised in a second petition "impugn" the reliability of the underlying conviction. Mr. Smith's claim of innocence does not require consideration of new facts or withheld evidence. The jury specifically and unquestionably found Mr. Smith "Not guilty" of every element of Aggravated murder.

**A. THE APPELLATE COURT'S MISCARRIAGE OF JUSTICE ANALYSIS IS INCONSISTENT WITH THIS COURT'S MISCARRIAGE -OF JUSTICE"JURISPRUDENCE.**

This court has applied the "miscarriage of justice" exception to overcome procedural default issues as well as successive petition issues. *Kuhlmann v. Wilson*, 477 U.S 436, 454. See: also *McCleskey v. Zant*, 499 U.S. 467 at 494-495.

The appellant court cited *McQuiggin v. Perkins*, 569 U.S. 383 in support of their assertion that a miscarriage of justice exception requires "clear and convincing proof" and a diligence requirement" that did not exist prior to the AEDPA'S passage (**Appendix A** at 2).

Conversely, in *McQuiggin*, this court emphasized that the miscarriage of justice exception is rooted in the "equitable discretion of habeas court- to see that federal constitutional errors do not result in the incarceration of an innocent person.133 S.Ct.at 1931-1932.

This case does not present the type of "actual innocence" claim presented in *Schlup v. Delo*, 513 U.S. 298, or *House v. Bell*, 547 U.S. 518, in which new evidence questioned the validity of the jury's verdict. Such proceedings reasonably require diligence and substantial proof of innocence.

**B. The Court of Appeals Erred in Holding that the “Manifest injustice Exception” Required a “Higher Level of proof”. and “A diligence Requirement”.**

The court below came to a questionable and counterintuitive conclusion that the **AEDPA** closes the door to petitioners who were “acquitted of the crimes” for which they are incarcerated. By holding that an acquittal is simply not enough, the court of appeals is showing a complete disregard for the purpose of the **AEDPA’S** judicially created exceptions to successive petitions, the legislative history, or this Courts prior construction of the statute.

This Court has specifically stated that, “**AEDPA’S** central concern [is] that the merits of concluded criminal proceedings not be revisited *in the absence of a strong showing of actual innocence*”. *Calderon v. Thompson*, 523 U.S. 538,558 (1998) (emphasis added).

The house Conference report on **AEDPA** explained that **AEDPA** “limited [second petitions] to those petitions that contained newly discovered evidence that would seriously undermine the jury’s verdict”. **See:** H.R. Conf. REP.104-518, at 111 (1996), reprinted in U.S.C.C.A.N.

The senate legislative history shows §2244(b)(2)(B)(ii) was intended to contain a “**safety valve**” for innocence. Here the court of appeals shut off the “**safety valve**” citing procedural anomalies that have no application to Mr. Smith’s situation.

Specifically, Mr. Smith presented the lower court with the sentencing journal entry showing that he was acquitted of each element of the charge for which he is incarcerated. The same sentencing journal entry that was presented to and considered by the lower federal court in Mr. Smith's first habeas petition.

Even in cases where the petitioner's guilt was not in question, this Court has resisted interpretations of §2244 that would produce troublesome results, *See: Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (holding that a petition filed second in time was not second or successive" as such a literal reading of §2244 would lead to "perverse" results).

*Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (finding that a petition filed second in time is not a second or successive petition" so as to protect that "vital role" that the writ of habeas corpus plays in protecting constitutional rights").

**IV. Mr. Smith's second petition meets the requirements of 28 U.S.C. §2254**

Under AEDPA'S amendments to §2254 a federal court may grant habeas relief if the state court's decision was "contrary to or involved an unreasonable application" of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C §2254(d)(1), or was based on an unreasonable determination of the facts presented in the state proceedings."28 U.S.C. §2254(d)(2).

Moreover, under 28 U.S.C. §2254(e)(1), factual determination made by the State courts are presumed correct unless rebutted by clear and convincing evidence. Mr. Smith's direct appeal was decided on November 6, 1997. Wherein the Ohio appellate Court Affirmed his conviction and sentence, Significantly, one issued raised by appellate counsel concerned inconsistent verdicts in which counsel argued that it was inconsistent for the jury to find Mr. Smith guilty of Aggravated Murder and not guilty of the corresponding firearm specification, See: *State of Ohio v. Smith*, 1997 Ohio App. Lexis 4892.

Because the actual innocence in this case is based on a jury verdict and not newly discovered evidence of innocence, it is outside of the intended purposes of the AEDPA'S procedural restrictions. More importantly, applying the filing restrictions created by the enactment of AEDPA, questions this court's "miscarriage of justice analysis in *McQuiggin*, 133 S.Ct. at 1931-1932, and this court's definition of an acquittal, *Evans*,<sup>1</sup>

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<sup>1</sup> Procedural Due Process, Double Jeopardy

The United States Supreme Court's cases have defined an "acquittal" to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. Thus an "acquittal" includes a ruling by a court that the evidence is insufficient to convict, a factual finding that necessarily establishes a criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence.

As set forth by the Sixth circuit in their October 17, 2019 order, which is the subject of this petition: ‘In 2017, Smith filed a Common Law motion in state court to Correct a void judgment, arguing that the jury’s not-guilty finding on the felony-murder specifications negated an essential element of the aggravated murder offense.(Appendix A at 1).

In denying Mr. Smith’s Common law motion the Ohio appellate court stated: This court affirmed Smith’s conviction, holding that ‘a finding upon a specification cannot change the finding of guilt as to the principal charge since specifications are considered only after and in addition to, the finding of guilt upon the principal charge. *State v. Smith*, 2018-WL-3599318 at ¶ 9.

With regards to 28 U.S.C. §2254(d)(2)’s unreasonable determination of the facts, two “facts” are at issue. The first being the State courts description of Mr. Smith’s argument. Specifically, Mr. Smith did not argue that the not- guilty finding on the felony –murder specification negated an essential element of the Aggravated Murder offense. Mr. Smith argued then as he does now, that the not-guilty finding on the felony murder specification negated every element of the charge of aggravated murder, thereby rendering that jury finding an acquittal.

Justice Stevens reasons: That the Constitution barred an appeal from an acquittal”. And that a “True” acquittal is based upon the insufficiency of evidence to prove an element of the offense. *Martin Linen Supply Co*; 430 U.S at 578, 579.

Thus, Mr. Smith submits that the state courts reasoning, that inconsistent verdicts on a firearm specification has the same impact as a not guilty finding on every element of Aggravated Murder, is an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

With respect to the facts presented to the state court, the sentencing journal entry, (**Appendix B**), was submitted to the trial court, the Ohio appellate court, and the federal district court. In light of the jury's finding as depicted in (**Appendix B**) The state courts "unreasonable determination of the facts" cannot be more clear.

With respect to 28 U.S.C. § 2254(d)(1)'s unreasonable application of clearly established law, the finding is actually less complicated. For over 50 years this court has held that it is fundamental principle of constitutional law that no person may be convicted of a crime absent *proof beyond a reasonable doubt of every fact necessary to constitute the crime charged*. See: *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d. 364, 368, 384, (1970) (**emphasis added**).

Clearly established federal law, for the purpose of § 2254(d)(1), refers to rulings of the United States Supreme Court in place at the time of the "last" state-court adjudication on the merits. *Green v. Fisher*, 132 S.Ct. 38, 44 (2011).

A decision is contrary to clearly established federal law if the state court arrives at a different conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts. *Williams v. Tayler*, 529 U.S.362, 413(2000)

The last state courts opinion addressing Mr. Smith's acquittal was the Ohio Eighth Appellate district **See:** *State v. Smith*, 2018-WL- 3599318 in which the appellate court stated the following: "Smith was found Guilty of aggravated Murder, in violation of R.C. § 2903.01, Unlawfully and purposely causing the death of another, to Wit: Gary Reginald Lewis, while committing or attempting to commit kidnapping." Id. at ¶ 11.

In the same paragraph cited above the Ohio appellate court stated the following: He [Mr. Smith] was found "**NOT GUILTY**" of the corresponding felony murder specification as follows: and the offense presented above was committed while the offender was committing, attempting to commit or fleeing immediately after committing or attempting to commit *kidnapping* and either was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with *prior calculation and design*. "at ¶ 11 **See:** also (Appendix G).

For the sake of clarity, Ohio has two versions of Aggravated murder. The first version is Ohio revised code § 2903.01(A), Which requires proof that the murder was committed with "prior calculation and design".

The second version of Ohio's Aggravated murder statute is found in Ohio Revised code §2903.01(B), which requires proof that the accused committed murder "while committing, attempting to commit, or fleeing immediately after committing or attempting to commit, a felony" during the commission of the murder (**Appendix L**)

The sentencing journal entry (**Appendix B**) clearly shows that the jury found Mr. Smith Not guilty of being the principal offender, not guilty of prior calculation and design, and not guilty of kidnapping, attempting to kidnap, or fleeing immediately after kidnapping, or attempting to kidnap. (**Appendix M & L**)

Thus this Court's holding in *In re Winship* could not have been applied in a more unreasonable manner. The fact that the state appellate court actually stated Mr. Smith was found guilty of Aggravated Murder, and in the same breath, acknowledges that the jury also found him not guilty of the kidnapping element, simply defies logic.

The only fact that overshadows the Ohio appellate court's conclusion, is that every court, state and federal, was made aware of the jury's verdict as shown in (**Appendix B**) and allowed Mr. Smith to remain illegally incarcerated. Moreover, for any Court of law, state or federal to allow Mr. Smith to remain incarcerated based on the facts presented herein, goes beyond this Court's prior interpretation of Legislative intent with respect to §2254(d) & (2).

**V. THE CONTINUED INCARCERATION OF MR. SMITH BASED ON THE JURY'S ACQUITTAL RAISES SERIOUS CONSTITUTIONAL ISSUES**

Mr. Smith's continued incarceration, after a jury found him not guilty of every fact that formed the basis of the charged offense, violates his federal constitutional rights to due process and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments, and also the Fifth Amendment requirement of proof beyond a reasonable doubt, and the Sixth Amendment requirement of a jury verdict which are interrelated. **See:** *Sullivan v. Louisiana*, 508 U.S. 275, 277, 278. at HN 2 and 3.

In *Herrera v. Collins*, 506 U.S. 390, five Justices of this court unequivocally found that the execution of an innocent person violates the Constitution. **See:** 506 U.S. at 419. Nevertheless, this Court in *Herrera*, only "assume[d]", without deciding that the execution of an innocent man is unconstitutional. *Id.* at 417 (opinion of Rehnquist, C.J.)

In the years following this Court's "assumption" that the execution of the innocent is unconstitutional, the basis for this Court's Eighth Amendment analysis has eroded. Significantly the *Herrera* court based its Eighth amendment analysis on the presumption that "Constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person". *Id* at 398-99.

While petitioner has found no Eighth Amendment, case authority regarding the wrongful incarceration,

in a non- capital case, neither has petitioner found a case where, as in this case, the jury acquitted the person of the crime for which he was incarcerated. Notwithstanding, this court has held that the Eighth Amendment, applicable to the states through the fourteenth Amendment, provides that [e]xcessive bail shall not be required, nor excessive punishment, well as cruel and unusual punishment that may or may not be excessive.” *Atkins v. Virginia*, 536 U.S. 304, 31, n.7.

Moreover, this court explained in *Atkins*, that Eighth Amendment’s protection against excessive or cruel and unusual punishment flows from the basic ‘precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense. See: also *Kennedy v. Louisiana*, 554 U.S 407, at 419, citing *Weems v. United States*, 217 U.S.349, at 367. The *Atkins* Court specifically stated that; whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791, but the norms that ‘currently prevail.’” 536 U.S. at 311.

In *Graham v. Florida*, 560 U.S. 48, this Court went as far as to state: “Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment, and goes far beyond the manner of determining a defendant’s sentence.” Id. at 59 citing *Weems*, supra, 217 U.S. at 367; See: also *Harmelin v. Michigan*, 501 U.S. 957, 997-998.

The above cited case notwithstanding, public consensus now shows that, in some cases, constitutional protections are simply insufficient to protect the innocent from an erroneous capital conviction<sup>2</sup>

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<sup>2</sup> SEE: [www.innocenceproject.org/know](http://www.innocenceproject.org/know).

Since *Herrera* was decided, this country has become more than a little skeptical of the infallibility of our criminal justice system. Such skepticism is justified in the wake of the number of convictions being overturned by new DNA technology; faulty eyewitness identification, the use of false testimony from co-defendants. To that point, public skepticism is completely justified when the state trial court is given a free pass for imposing a sentence of life for crimes that the jury acquitted the defendant of committing.

The fact that petitioner is currently incarcerated as a result of a trial in which he was acquitted by a jury of every element of every crime for which he stood trial supports that skepticism. The fact that the lower courts refused to review Mr. Smith's acquittal, and based that decision on the current interpretation of **AEDPA'S** evolving statutory changes, raises serious and growing concerns about how far the Constitutional protections on which this country was founded have eroded.

In this case Mr. Smith has been unable to obtain relief from being incarcerated for a crime a jury acquitted him of committing, based on the evolving interpretation of the changes to 28 U.S.C. §2244(b) following the enactment of the **AEDPA**. Those evolving changes however have allowed the State of Ohio courts and the lower federal courts to completely disregard this Court's clearly established case authority defining exactly what constitutes an acquittal.

Specifically, in **Evans v. Michigan**, 568 U.S. 318, this court stated: *Our cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.* Id at 318- 319.

Because (Appendix B) Shows that the jury found insufficient proof for “**Every element**” of the offense for which Mr. Smith continues to be incarcerated, every aspect of the Sixth Amendment’s jury trial Guarantee has been rendered meaningless-along with this Court’s holding in *In re Winship*, *supra*; *Evans v. Michigan*, *supra*; and every other case in which this court defined exactly what constitutes an acquittal, and/or finality of a jury’s verdict.

In *Bullington v. Mo.*, 451 U.S. 430, This court stated: “A defendant may not be retried if he obtains a reversal on the grounds that the evidence was insufficient to convict, *Id.* at 442 citing *Burks v. United States*, 437 U.S. 1 (1978). While *Bullington* deals with double jeopardy issues, the reasoning is relevant here. Specifically:[Reversal] for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. The same cannot be said when a defendant’s case has been overturned due to a failure of proof at trial. *Id.* at 443, citing *Burks*, at 15-16.

Mr. Smith is not asking this Court to review a claim of insufficient evidence, nor is he asking this court to review any issues of trial error. To be clear, the trial was conducted, it concluded, and the jury issued its verdict as set forth in (Appendix B). That verdict shows that the state failed to prove any element of the charged offense as required by *In re Winship*.

What Mr. Smith is asking this Court to do is give meaning to that jury verdict as the United States Constitution requires. And to place Mr. Smith in the position that the jury verdict mandates.

“As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.” *United States v. Ball*, 163 U.S. 662, 671, at HN 4.

With respect to cruel and unusual, this Court has held that; [t]he Eighth Amendment is not limited to capital punishment, but applies to all penalties.” See: *McCleskey v. Kemp*, 481 U.S. 279, at 293, citing *Solem v. Helm*, 463 U.S. 277, at 289-90. While *McCleskey* deals with the use of irrelevant factors in determining a sentence, the *McCleskey* Court was clear when stating that: “arbitrary and capricious punishment is the touchstone under the Eighth Amendment.” Id. Moreover this Court has been clear. The Eighth Amendment “protection against [all forms of] disproportionate punishment, is the central substantive guarantee of the Eighth Amendment...*Graham v. Florida*, supra.

As applied here, Mr. Smith maintained his innocence throughout his incarceration. However, the issue here is that he has been incarcerated for over twenty- five years (25) years for a crime that the jury declared was lacking sufficient evidence. It is Mr. Smith’s position that being sentenced to any term of imprisonment in spite of the jury’s decision, constitutes the very type of “arbitrary and capricious” punishment that was denounced in *McCleskey*, supra.

Mr. Smith's situation is rooted in an even more basic principal which Justice Kennedy stated best: "**Our laws must not become so caught up in procedural niceties that it fails to sort out simple instances of right and wrong and give some redress for the latter.**" *ABF Freight System v. NLRB*, 510 U.S. 317, 325. (**emphasis added**). Those "procedural niceties" of which Justice Kennedy spoke, has manifested in this case in point that they have become the sole reason for refusing to address the Eighth and Fourteenth Amendment violations that are exhibited in this case.

With respect to the Eighth Amendment, there can be no doubt that Mr. Smith has suffered and continues to suffer a cruel and unusual punishment. The mere fact that Petitioner can find no other example of a defendant being sentenced to prison after a jury found them not guilty of every element of the charged offense speaks volumes.

This is a fact bound case, and the facts are plain on the face of the record. Those facts, simply stated are; Mr. Smith relied on his trial counsel, and numerous other retained counsel, to advocate on his behalf. After the jury verdict was read into the record, trial counsel stood silent while the trial court imposed sentence **under the color of law**. And, the rest of retained counsel performed with equal enthusiasm, providing Mr. Smith with the same quality of assistance. Each and every attorney retained to advocate on Mr. Smith's behalf failed to recognize and /or address the clear and unambiguous verdicts depicted in (**Appendix B**).

Adding insult to injury, in his initial appeal in the state Court's and his initial Habeas petition, each attorney raised an issues of inconsistent verdicts. That argument was however, based on the jury finding Mr. Smith not guilty of having a weapon while under disability as charged in count four of the indictment.

That argument and for that matter the jury verdict states that Mr. Smith did not have a firearm on or about his person, during the time he allegedly committed the murder in question- a murder where the victim died from two bullet wounds in the head, and for which the jury determined lacked any evidence of the required elements charged in the felony murder specifications. (**Appendix B**).

*Martin Linen Supply Co.* 430 U.S. 564, Justice Stevens, in a concurring opinion defined an acquittal in the following manner: [a] true acquittal is based upon the insufficiency of evidence to prove **an element** of the offense, 430 U.S. at 578-579 (**emphasis added**).

Over twenty -five years ago Mr. Smith exercised his right to be judged by a jury of his peers. Mr. Smith sought and received justice when the jury found him "NOT GUILTY" of every element of the offense for which he stood trial. That justice however was taken from him when the trial court imposed a sentence in complete disregard for the jury's verdict and the United States Constitution. Mr. Smith has entered the hall of justice on numerous occasions, but found no justice. He now seeks justice from this Honorable Court.

The jury trial under our Constitution is supposed to be the cornerstone of criminal adjudication. The jury verdict finding of "NOT GUILTY" of any of the elements that form the basis of the charged offense, was a determination that the evidence was legally insufficient, committing or attempting to commit contemporaneously the offense of kidnapping and prior calculation and design was the requirement the State of Ohio was required to prove beyond a reasonable doubt. The sentencing journal entry shows the theory and charges offered to the jury were rejected. (**Appendix L & M & N & B**).

The fact that Mr. Smith is incarcerated on a sentencing journal entry, that exonerates him of all criminal liability goes beyond the violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments, it is simply wrong. For that reason, Mr. Smith is asking this Court to recognize that there are extraordinary circumstances in this case and to right the wrong the State of Ohio committed in State of Ohio v. Willie S. Smith, case No.CR-323987 and CR-325283.

## CONCLUSION

The petition for writ of habeas corpus should be transferred to the district court with instructions consistent with the facts set forth herein, and any other relief this Honorable Court deems appropriate, in this extraordinary situation.

Respectfully submitted,

Willie S. Smith  
Willie S. Smith  
P.I.N. A312-990  
Richland Correctional Inst.  
1001 Olivesburg Road  
P.O. Box 8107  
Mansfield, Ohio 44901-8107

Petitioner pro se