No. 21-5180

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC MIGUEL DOWDY – PETITIONER

VS.

FREDEANE ARTIS, WARDEN – RESPONDENT

ON PETITON FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WAS PETITIONER DENIED HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHT TO DUE PROCESS AS GUARANTEED UNDER BOTH STATE AND FEDERAL CONSTITUTIONS, WHEN THE SIXTH CIRCUIT COURT OF APPEALS NOT ONLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, BUT ALSO SANCTIONED THE LOWER COURT'S DEPARTURE, WHICH CALLS FOR THIS HONORABLE COURT'S EXERCISE OF SUPERVISORY POWER TO CORRECT THIS MANIFEST INJUSTICE?

Petitioner answers **"YES"**

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:

Michigan Attorney General

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OTHER

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 judgments below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at **Appendices G, H** and **I** to the petition and are unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 6, 2021, and which *en banc* reconsideration was decided June 17, 2021, and which *en banc* consideration was subsequently denied on July 2, 2021. The jurisdiction of this Court is invoked under ***28 USC §1254(1).***

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const, Am V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; 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; nor shall private property be taken for public use, without just compensation.

US Const, Am 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 defence.

US Const, Am XIV, Section 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.

Supreme Court Rule 10 – Considerations Governing Review on Certiorari – Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (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***;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(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.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. [Emphasis added].

STATEMENT OF THE CASE

Petitioner respectfully submits that the Sixth Circuit Court of Appeals abused its discretion when it departed from the accepted and usual course of judicial proceedings, and then, sanctioned such a departure by the lower court – which invokes this Honorable Court's supervisory power to correct a manifest injustice.

From the time of Petitioner's sentence in 1987 and up until 2018, Petitioner was under the distinct impression that he was serving two concurrent 30-to 45-year sentences. It was not until 2018, that Petitioner was informed by and through the Michigan Supreme Court Justice Cavanagh in his concurring opinion in (**APPENDIX D**) that the Michigan Parole Board had Petitioner listed as a "lifer" and thus, took no interest in processing any parole board applications for consideration of parole. Petitioner reiterates that this is the first time that he was made aware of the fact that he was listed as a "Lifer" and not serving concurrent 30-to 45-year sentences.

The Michigan Trial Court, although denying relief, on January 11, 2018, reaffirmed that Petitioner was serving two concurrent 30-to 45-year sentences, but refused to correct the record in regards to the Michigan Parole Board listing of Petitioner as a "lifer." (**APPENDIX A**). Petitioner's State appeals fell on deaf ears in Orders dated May 24, 2018, June 22, 2018 and October 11, 2019 being (**APPENDIX B, C** and **D**, respectively). It should be noted that even the Michigan Supreme Court misstated the facts of the case in its concurring opinion. It was this Order that made Petitioner realize why the Michigan Parole Board listed Petitioner as a "lifer." Justice Cavanagh stated in a concurring opinion that "the trial court granted the motion, converting defendant's sentence to "parolable life." This is a misstatement of the facts as clarified by the Trial Court's decision in (**APPENDIX A**).

When Petitioner filed his Habeas Petition it was summarily dismissed on November 9, 2020, and the District Court refused to issue a Certificate of Appealability and denied Leave to Appeal in Forma Pauperis. (**APPENDIX E**). On the same day, the Clerk issued a Judgment that stated the opinion and order entered on November 9, 2020 dismissed the case **with prejudice**. (**APPENDIX F**).

The U.S. District Court erroneously concluded that Petitioner was not only time-barred, but not entitled to equitable tolling because Petitioner did not display due diligence to the satisfaction of the Court. The U.S. District Court, however, omitted the fact that Petitioner presented newly discovered evidence.

On pages 4 and 5 of its Order (**APPENDIX E**), that Court opined that Petitioner was not only time-barred, but not entitled to equitable tolling as well. Petitioner respectfully submits that this is wrong for the following reasons:

(1) Petitioner filed his Habeas Petition based on newly discovered evidence and in a timely manner. When the Michigan Supreme Court denied relief October 11, 2019, Petitioner diligently filed his Habeas Petition on March 16, 2020. This encompassed a period of 157 days or 5 months and 5 days.

(2) Petitioner had no knowledge that the Michigan Parole Board deemed him a "Lifer." The position of the Michigan Department of Corrections contravenes the Wayne County Circuit Court's holding that Petitioner is serving two concurrent 30- to 45-year sentences. This fact was certainly conveyed to the Michigan Parole Board and which situation places Petitioner on the horns of a dilemma.

The Michigan Parole Board has chosen to ignore the Court Order from the Wayne County Circuit Court and has taken no interest in Petitioner because of his alleged "Lifer" status.

Moreover, this erroneous status brings with it hurdles that other prisoners who are eligible for parole do not have to face. Petitioner has now already served past the minimum amount of time needed to be considered for parole. This places Petitioner in a serious position under the mandate of ***Glover v. United States***, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed2d 604 (2001), where the Court held:

> "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." ***Id.,*** 531 U.S. at 203, 121 S.Ct. at 700, 148 L.Ed2d at 611.

(3) Petitioner submits that even though this Court erroneously denied due to lack of diligence, Petitioner respectfully reminds this Court that he falls under the doctrine of newly discovered evidence pursuant to the Wayne County Circuit Court Order of January 11, 2018. There, for the first time, a Michigan Court affirmed the fact that Petitioner was serving a 30- to 45-year sentence and not a "life" sentence.

When Petitioner asked the Circuit Court to send a certified copy of that Order to the Michigan Department of Corrections, that request fell on deaf ears. As such, Petitioner was left with no choice but to exhaust that issue through the State Courts and now the Federal Courts.

From January, 2018 to the present time, Petitioner has actively pursued relief in the Courts. The only hiatus was the eight-month period from October 18, 2020 to May 11, 2021, when this prison law library was closed due to the Covid-19 pandemic. However, this fact alone did not stop Petitioner from pursuing his relief. Thus, Petitioner submits that he exercised due diligence in spite of the prison lockdown due to the Covid-19 pandemic..

Even so, this newly discovered evidence was foreclosed due to State interference under the mandates of ***Murray v. Carrier, infra*** and ***Vroman v. Brigano, infra***. As such, this diligence, pursuant to newly discovered evidence, justifies the application of equitable tolling.

(4) Petitioner had no idea that the Michigan Parole Board classified him as a "Lifer," nor was he supposed to under the circumstances of his case. Moreover, this classification is contained in the Parole Board's own files and is not something that is considered public information or knowledge. Specifically, prisoners in Michigan are precluded from obtaining any information under FOIA except for their criminal files as espoused in the case of ***Proctor v. White Lake Twp. Police Dep't.***, 248 Mich App 457; 639 NW2d 332 (2001). There, the Court held

> "It is the public policy of this state that all persons, ***except those persons incarcerated in state or local correctional facilities***, are entitled to full and complete information, regarding the affairs of government and official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. ... These provisions plainly and unambiguously exclude incarcerated prisoners from the class of persons entitled to obtain public records. Seaton v. Wayne County Prosecutor (On Second Remand), 233 Mich App 313, 315-316; 590 NW2d 598 (1998)." Id., at 462-463. [Emphasis added].

Thus, Petitioner's inability to obtain records outside of his criminal file falls under the doctrine of "*dehors*" the record as espoused in ***Waley v. Johnson***, 316 U.S. 101, 104-105, 62 S.Ct. 964, 86 L.Ed 1302 (1942), and as such, since this discovery was outside the record, Petitioner cannot be held responsible for its late discovery. As such, for any Court to hold that Petitioner did not establish due diligence flies in the face of common sense and logic. To comply with a Court's mandate would require Petitioner to be a psychic with the gift of clairvoyance; something that Petitioner certainly does not possess. In the same light, the State and its agencies

have been closed and/or civil servants have been working from home where possible since the Covid-19 outbreak in Michigan; delaying any investigation and/or inquiries all the more difficult

(5) More recently, the prison facility and its law library where Petitioner is housed have been closed since October 19, 2020 due to the Covid-19 pandemic. Again, Petitioner had no control over the closing or the limited re-opening of the law library as of May 11, 2021. In that time period, Petitioner had no access to any legal materials, or the ability to conduct any legal research whatsoever, and the reason why Petitioner puts this on the State is because the State's employees infected the prison population; not the other way around. As such, this became an impediment under the auspices of ***Murray v. Carrier***, 477 U.S. 478, 488-489, 106 S.Ct. 2639, 2645-2646, 91 L.Ed2d 397, 408-409 (1986), the United States Supreme Court held:

> "Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see Reed v. Ross, 468 U.S. at 16, or ***that some interference by officials***, Brown v. Allen, 344 U.S. 443, 486 (1953), ***made compliance impracticable***." ***Id.***, 477 U.S at 488-489, 106 S.Ct. at 2645-2646, 91 L.Ed2d at 408-409. [Emphasis added].

See also, ***Vroman v. Brigano,*** 346 F.3d 598, 604 (6th Cir. 2003), and holding that "Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably rose from circumstances beyond that litigant's control. ***Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.***, 209 F.3d 552, 560-561 (6th Cir. 2000)."

(6) Additionally, Petitioner respectfully requests that this Court be mindful of the fact that Petitioner is a State prisoner and one who is not schooled in the law. While it is true that ignorance of the law is no excuse, even for an incarcerated prisoner under ***Spencer v. White***, 265 F.Supp2d 813, 818 (E.D. Mich, 2003), relying on ***Rose v. Doyle***, 945 F.2d 1331, 1335 (6th Cir. 1991), that all the time that the so-called proceedings in question took place in Petitioner's

absence and without his knowledge, Petitioner was represented by Counsel. It is a well settled doctrine of law that a defendant is not expected to act in the capacity of co-counsel, or even know if Counsel is being ineffective or absent. ***People v. Strodder,*** 394 Mich 193, 220; 229 NW2d 318 (1975), ***Spriggs v. Collins***, 993 F.2d 85, 90 n.8 (5th Cir. 1993), ***Mitchell v. Mason***, 60 F.Supp2d 655, 658 (E.D. Mich. 1999) and ***Kimmelman v. Morrison***, 477 U.S. 365, 378, 106 S.Ct. 2574, 2584, 91 L.Ed2d 305 (1986). In ***People v. Thompson***, 69 Mich App 465; 245 NW2d 93 (1973), the Court said it best when it held:

> "A criminal trial is a sophisticated undertaking. Proper representation in this adversarial setting requires a good deal of training and skill. Most lawyers (hopefully) have these attributes; most defendants assuredly do not." ***Id.*** at 467.

(7) Lastly, Petitioner submits that the U.S. District Court erred when it denied relief in the absence of an evidentiary hearing under the mandate in ***Townsend v. Sain***, 372 U.S. 293, 312-313, 83 S.Ct. 745, 759, 9 L.Ed2d 770, 785-786 (1963). There, this Honorable Court remanded the case for a hearing to avert a possible miscarriage of justice. Petitioner submits that his case requires an evidentiary hearing to resolve disputed facts. See also, ***Abdur'Rahman v. Bell,*** 226 F.3d 696, 706 (6th Cir. 2000), holding that a district court may order an evidentiary hearing to settled disputed issues of material fact. See further, ***Banks v. Dretke,*** 540 U.S. 668, 690-691, 124 S.Ct. 1256, 1272, 137 L.Ed2d 1166, 1189 (2004), holding same. Moreover, the U.S. District Court's denial of relief in the absence of an evidentiary hearing contravenes the mandate in ***Madewell v. Roberts,*** 909 F.2d 1203, 1206 (8th Cir. 1990), where that Court held that a hearing is mandatory in light of the allegations presented that contradict the State's and this Court's own version of the record.

Having failed to convince the U.S. District Court of its errors in making its determination of Petitioner's case, Petitioner filed a timely notice of appeal with the Sixth Circuit construed sa an application for a certificate of appealability.

The Sixth Circuit erroneously concluded on page 1 of its Order (**APPENDIX G**) that Petitioner was resentenced to a parolable life sentence on September 4, 1987, when the fact is that Petitioner was never resentenced in the first place as evidenced by the State's Circuit Court ruling by the Hon. Kevin J. Cox, on January 1, 2018 (**APPENDIX A**).

This is a misstatement of the facts of Petitioners case. The Honorable Kevin J. Cox, Wayne County Circuit Court Judge assigned to Petitioner's post-conviction motion, opined on page 3 of Opinion and Order dated January 11, 2018 (**APPENDIX A**), as follows:

> "Defendant asserts that he was resentenced on September 4, 1987 without his presence and his due process rights were violated. The courtroom transcripts indicate that Defendant's counsel did motion the trial court to resentence Defendant, but the motion was denied. ... ***Defendant's sentence was never modified by the court.***" [See Opinion and Order attached]. [Emphasis added].

For the Sixth Circuit to hold that Petitioner was resentenced to a parolable life sentence without being aware of the proceeding, much less not being in attendance to the proceeding, violates this own Court's mandate in ***United States v. Flack***, 941 F.3d 238 (6th Cir. 2019), where the Sixth Circuit held:

> "We have previously held –albeit on direct review- that 'Upon a general remand for resentencing, a defendant has a right to a plenary resentencing hearing at which he may be present and allocate.' United States v. Garcia-Robles, 640 F.3d 159, 161 (6th Cir, 2011). Every other circuit to have decided the issue has held the same." ***Id.***, at 240.

Based on this fact, Petitioner respectfully asked the Sixth Court to reconsider its Order of May 6, 2021 in light of the corrected facts before it. Unfortunately, this request fell on deaf ears.

The Sixth Circuit further exacerbated Petitioner's situation when it erroneously stated that Petitioner pleaded guilty in two separate cases to two counts of second-degree murder and two counts of being a felon in possession of a firearm. The fact is that Petitioner has two separate cases in which he pleaded guilty in one case and was found guilty by a jury in the second case. Moreover, Petitioner was never charged or convicted or sentenced to the crime of felon in possession of a firearm. Rather, the proper charge against Petitioner was felony-firearm. These are two distinct and separate offenses.

On page 1 of its Order, the Sixth Circuit's Order (**APPENDIX G**), Court stated:

> "In 1987, Dowdy pleaded guilty in two separate cases to two counts of second-degree murder and two counts of being a felon in possession of a firearm"

This is a gross misstatement of the facts of Petitioner's case. Under Case No. 1986-0006250-FC, Petitioner was found guilty by a jury for one count of Second Degree Murder and one count of Felony Firearm. Under Case No. 1986-0006219-FC, Petitioner pled guilty to one count of Second Degree Murder and one count of Felony Firearm. Petitioner was never charged with being a felon in possession of a firearm. Petitioner was charged with felony-firearm. These are two separate and distinct crimes. Thus, Petitioner respectfully submitted that the Court's Order was in error because the Court considered facts foreign to Petitioner's case when this Court rendered its decision. This matter was never corrected on reconsideration.

Petitioner lastly filed a Motion for Reconsideration *En Banc* which was initially denied by a panel by Order dated June 17, 2021 (**APPENDIX H**). The Order did order the Clerk to refer the matter to the remaining active members of the Court for further consideration. On July 2, 2021 (**APPENDIX I**), the Court formally denied the petition for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Sixth Circuit Court of Appeals and the lower Federal Courts have taken a position that is far removed from this Court's mandate as espoused in ***Rosales-Mireles v. United States***, _____ U.S. _____, _____, 138 S.Ct. 1897, 1907, 201 L.Ed2d 376, 386, 387(2018). In ***Rosales***, this Court held:

> "'To a prisoner,' this prospect of additional 'time behind bars is not some theoretical or mathematical concept.' Barber v. Thomas, 560 U.S. 474, 504, 130 S.Ct. 2499, 177 L.Ed2d 1 (2010) (Kennedy, J., dissenting). 'Any amount of actual jail time' is significant, Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed2d 604 (2001), and 'has exceptional severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration,' United States v. Jenkins, 854 F.3d 181, 192 (CA2, 2017). ... It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.' T.Tyler, Why People Obey the Law 164 (2006)." ***Id.,*** 138 S.Ct. at 1907, 201 L.Ed2d at 386-387.

It is specifically the ***Glover*** case this Court relied on in ***Rosales*** that Petitioner based his claim. The ***Glover*** case was also relied on in the State Courts in ***People v. Gardner***, 482 Mich 41, 49 n.11; 753 NW2d 78 (2008). Moreover, the ***Glover*** case was well known and relied on in the federal District Court and the Sixth Circuit as evidenced in ***United States v. Campbell***, 224 F.Supp3d 549, 555, 569 (E.D. Ky. 2016) and ***Phillips v. White,*** 851 F.3d 567, 582 (6th Cir. 2017).

Therefore, Petitioner argues that the State and Federal Courts ignored Petitioner's arguments, and which was compounded by the fact that each Court rendered an opinion that contained facts that were not only foreign to Petitioner's case, but contrary to the facts of the case. The result of these errors is that Petitioner – at this very moment – has served more than his minimum sentence to be accorded review and an interview by the Michigan Parole Board.

Of course Petitioner understands that he has no right to be released prior to serving his maximum sentence. But, Petitioner's prison record; or the lack of negative elements in his prison file make him an excellent candidate for early release.

Yet, that is not issue here before this Honorable Court. The issue is that Petitioner has never been given the opportunity to be considered for parole due to factors beyond his control.

CONCLUSION

Petitioner has shown that the errors in his case were only exacerbated by each State and Federal Court's interjection of erroneous information that had nothing to do with Petitioner's case. Petitioner avers that the opinions presented herein contravene directives from the State Courts, the Federal District Court, the Sixth Circuit and sister Circuits. Of course, first and foremost, those opinions contravene the directives from this very Honorable Court as outlined and argued herein.

Error is error – regardless what form and to what extent, because it continues to deprive Petitioner of the prospects of liberty contrary to the mandates of the ***5th***, ***6th*** and ***14th Amendments***. This is so because Petitioner's liberty continues to be taken in a manner inconsistent with Due Process. ***Antoine v. Atlas Turner, Inc.,*** 66 F.3d 105, 108 (6th Cir. 1995); ***Kiesgen v. St. Clair Marine Salvage, Inc.,*** 724 F.Supp2d 721, 729 (E.D. Mich. 2010).

RELIEF REQUESTED

WHEREFORE, based on the aforementioned arguments and as supported by authority, Petitioner respectfully requests this Honorable Court will:

1. Accept this Certiorari as properly and timely filed, and,

2. Grant Certiorari, or,

3. Order this case remanded to the Sixth Circuit to either entertain Petitioner's Habeas Corpus Petition, and/or,

4. Order this case remanded to the Sixth Circuit to conduct the requested Evidentiary Hearing to resolve any and all disputed facts, and/or,

5. Grant any and other relief this Honorable Court deems just and appropriate.

Under the penalty, I declare that the facts contained herein are true to the best of my information and knowledge.

Respectfully submitted,

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Dated: July 12, 2021

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