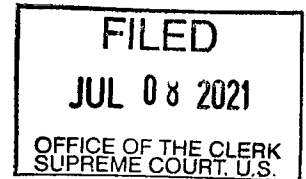


No. 21-5199

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

VINCENT JOHNSON Plaintiff

VS.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Vincent Johnson 688-089
Chillicothe Correction
P.O. Box 5500 45601
Chillicothe Ohio

QUESTION OF FEDERAL LAW FOR REVIEW

What is the correct vehicle and avenue inwhich a petitioner may challenge a COA violation by a circuit court pursuant to Buck v. Davis 137 S. Ct. 759 once Certiorari has been denied by the U.S. Supreme court.

RELIEF SOUGHT

To be immediately released from prision.

LIST OF THE PARTIES

all parties in the caption of the case on the cover page.

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

OPINIONS BELOW

Order by the Sixth Circuit denying rehearing en banc at Appendix A
Order denying COA by the Sixth Circuit at Appendix B
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JURISDICTION

The U.S. Southern District Court Eastern Division rendered its decision on movant's 60(d) on February 3, 2021. Vincent Johnson filed a timely request for COA to the Sixth Circuit which was denied on April 5, 2021. A timely petition for rehearing en banc was submitted it was denied on May 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTIONAL PROVISIONS

BILL OF RIGHTS

United states Constitution, Bill of Right

Amendment XIV

Section 1. All person born or naturalized in the United States and subject to the jurisdiction thereto, are citizens of the United States and of the wherein they reside. No state shall make or enforce any law which shall abridge the privilege 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 laws.

STATUTES

Federal R. of Civil Procedure 60 (b) & (d)

Rule 60 relief from a judgement order on motion and just terms the court may relieve a party or it's legal representative from a finale judgement or order or proceeding.

(d) other powers to grant relief. This rule does not limit a court (1) entertain an independent action to relieve a party from a judgement or order or proceeding.

28 U.S.C. 2253(c)(2)

In a habeas proceeding or a proceeding under 2255 before a district judge the finale order shall be subject to review on appeal by the court po of appeals for the circuit in which the proceeding is held. (c)(2) a certificate of appealability may issue under paragraph (1) only if applicant has made a substantial showing of the denial of a constitutional right.

2907.02 No person shallengage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

STATEMENT OF THE CASE

This case is being pursued to appeal the Sixth circuit's April, 5, 2021 order denying petitioner's request for COA. Petitioner believes during his initial habeas proceedings both the Dist. and the Sixth Cir. court of appeals improperly denied his request for COA. Because petitioner had pursued his appeal to this U.S. Supreme court. As normal procedure requires that the merits of a 60(b) be first presented to the Dist. court. To resolve the issue of the COA violation petitioner presented a 60(b) to the Dist. court. The 60(b) was submitted before a decision was made on petitioner's writ of certiorari so that the motion would be filed within the one year time frame of the Dist. court's initial denial of petitioner's request for COA. The 60(b) motion was denied. The Dist. court ruled, it lacked jurisdiction to make a determination on a COA violation once the Sixth cir. has denied a petitioner's application for COA. In response to this decision a 60(b) was presented to the Sixth Cir. court of appeals, arguing a COA violation pursuant to Buck v Davis 137 S. Ct. 759. The clerk for the Sixth Cir. refused to file the motion for the reason of the case being closed. Because petitioner had no other path or vehicle to resolve this issue. An independent action was submitted to the Dist. court arguing a COA violation by the Sixth Cir. pursuant to Buck v Davis. The motion was asking the Dist. court to issue a Coa so that the merits of the violation could be presented to the Appellate court. The 60(d) was denied. The Dist. court improperly construed the 60(d) as a motion for reconsideration of its previous denial of movant's 60(b).

The court again denied COA. A request for COA was submitted to the Sixth Cir. The request was denied. The court ruled the application for COA was not properly before the court. In light of this ruling petitioner now seeks this court's guidance. Asking, what is the proper path in which a petitioner must take to pursue a COA violation by a Circuit court once Certiorari has been denied.

STATEMENT OF THE FACTS

On Nov. 27, 2017 this United States Supreme Court denied Mr. Johnson's petition for a Writ of Certiorari of his initial habeas proceedings case No. 17-6045 see Appx. M . To persue a COA violation made by the Dist. court movant submitted a 60(b) to the Dist. court case No. 16-4076. The motion was denied Agust 17, 2017, see Appx. L . Petitioner attempted to submitte a 60(b) to the Sixth Cir. The clerk for the Sixth Cir. refused to file the motion for the reason of the case being closed, see Appxs. J,K . A writ of Mandamus was submitted to the Sixth Cir. to compell the clerk to file movant's 60(b) motion. It was denied July, 16, 2018, case No. 18-3492 see, Appx. I. A Enbanc was filed and denied Sept. 5, 2018 see Appx. H . A timely Writ of Certiorari was submitted to this Supreme Court case No. 18-7688 it was denied April 1, 2019, see Appx G . A Mandamus was then submitted to this Supreme Court case No. 19-5257 and was denied Oct. 7, 2019, see Appx F . A 2244 petition was then presented to the Sixth Cir case No. 20-3036 this was denied May 20, 2020, see Appx E . Mr. Johnson then attempted to submitte a 6(d) to the Sixth Cir. it was returned unfiled, see , Appx D . A 60(d) was submitted to the Dist. court case No.2:15-CV-00971 it was denied Feb. 3, 2021 see, Appx. C . An aplication for COA was submitted to the Sixth Cir. and denied April, 5 , 2021 see Appx. B . A Enbanc was presented in response and denied May, 18, 2021, see Appx. A .

Reasons this court should accept jurisdiction.

INTRODUCTION

This case deals with an issue of jurisdiction. It challenges the Sixth circuit decision in Sims v. United States 244 F. 3d. 509. Where the court ruled that an order ruling on a certificate of appealability is not appealable. The facts and circumstances of this case raises a question of exceptional importance that ask, what is the correct vehicle and avenue in which a petitioner may challenge a COA violation by a Circuit Court pursuant to Buck v. Davis 137 S. Ct. 759 once certiorari has been denied by the U.S. Supreme Court. To leave this question unresolved would lame this court's opinions in Miller El v. Cockrell 537 U.S. 322 and Buck v. Davis 137 S. Ct. 759, as there is no path in which to address a COA violation by an appeals court once certiorari has been denied. It is for these reasons petitioner now seeks this court's guidance as the issues presented have allowed the conviction of an innocent man to go unchallenged.

a. Question of exceptional importance.

In petitioner's original habeas proceedings the District court improperly barred a supplement argument to claim one and denied petitioner's request for COA. In denying the supplement argument, the Magistrate determined the claim presented in state appellate proceedings, argued generally that the trial court denied appellant equal protection and due process and was not supported with federal law. That would have alerted the State Appellate court to the nature of the claim that was being presented under Manson v. Brathwaite 432 U.S. 98(1977). Therefore the supplement to claim one which used Brathwaite as it's legal bases to show the state appellate court's decision was contrary to federal law, could not be presented in federal proceedings.

Based on the District court's reason for the procedural bar. Petitioner presented a clear showing that jurist-of-reason would find the procedural bar debatable, see Slack v. McDaniel 528 U.S. 473. COA should have been granted, as fair presentation does not require a habeas petitioner to alert the state Appellate court to the precedent being presented in federal proceedings, see Brown v. Allen 344 U.S. 443 and United States Ex Rel Kemp v. Pate 359 F. 2d 749. In response to the error in the Dist. court's decision. A request for COA was submitted to the Sixth Cir. court of Appeals, which was denied. The Sixth Circuit in it's April 27, 2017 order denying petitioner's request for COA comitted an error in the COA process pursuant to Buck v. Davis 137 S. Ct. 759 The Sixth circuit during the COA process, rather than treating the supplement argument as an addtion to claim one. Viewed the argument as a seperate claim. Thereby going into the merits of the procedural bar without excepting jurisdiction. This issue along with others were presented in a writ of Certiorari to this honorable court. The writ was denied on Nov. 27, 2017. To futher pursue the error comitted in petitioner's COA process. A 60(B) was presented to the Dist. court. As normal procedure requires that the merits of a 60(b) be adressed in the first instance by the Dist. Court, see, Abur Rahman 537 U.S. at 97. To be within the one year time fram of the Dist. court's decision. The motion was submitted while waiting to see if certiorari would be granted. The motion was denied Agust, 17, 2017. The district court ruled that it did not have jurisdiction to adress an issue concerning a COA violation once the Circuit court has made a ruling on the matter of weather COA should be granted.

In light of this ruling . Movant attempted to submit a 60(b) to the Sixth Circuit Court of Appeals, asking the court to set aside it's April, 27, 2017 order denying petitioner's request for COA. Arguing a COA violation pursuant to Buck. The clerk for the Sixth Cir. refused to file the motion, stating the case was closed. As a result, an independent action was submitted to the Dist. court for the reason that movant had no other avenue or vehicle inwhich to present the Buck violation comitted by the appeals court. Though the Dist. court lacked jurisdiction to adress the merits of the COA violation . It did however have the jurisdiction to grant a COA under 2253(c)(2). The Dist. court improperly considered the independent action as a motion for reconsideration of it's August, 17 2017 order. The court again ruled that it lacked jurisdiction to consider the COA violation. The District court went on to deny movant's request for COA of his independent action, ruling that reasonable jurist would not debate the court's decision. A request for COA was then filed with the Sixth Cir. The Sixth Cir. in it's April 5, 2021 order denying petitioner's request for COA ruled. In substance petitioner's Dec. 22, 2020 motion sought a certificate of appealability, and a order ruling on a COA is not appealable. The 60(d) presented was not attacking the district court's August, 17 order and was not in substance simply a motion for COA. The facts and circumstances which brought on the independent action raised a question of exceptional importance, whicked asked ,what is the correct vehicle and avenue inwhich a petitioner may challange a COA violation pursuant to Buck v. Davis 137 S.Ct. 759 once certiorari has been denied by the U.S. Supreme court. This question has been unresolved by both the District and the Federal Apellate court. The facts and circumstances that were raised have been conveniently overlooked.

They bring to light a different set of circumstances which challenges the Sixth circuit court's decision not only in this case but also the court's decision in Sims v. United States 244 F. 3d 509. Where the court determined that a order ruling on a certificate of appealability should be treated the same as a order ruling on a certificate of probable cause and therefore not appealable. Both court's decision in this case to deny COA have compromised judicial integrity and fairness in petitioner's pursuit of justice. Through out petitioner's original Habeas proceedings and in this case. The courts have demonstrated a pattern of manipulation to the application of the law. This has created circumstances which have presented an unfair disadvantage to the petitioner. The ruling by both courts in this case have made it impossible for a petitioner to know which path or vehicle one must take to attain relief from a COA violation by an Appeals court once certorari has been denied.

b. The circumstances in this case challenges the Sixth Cir. ruling in Sims v. United States 244 F. 3d 509.

The Sixth Cir. ruled that petitioner's request for COA of his independent action was not properly before the court. This decision was improperly predicated in part on the position that petitioner's 60(d) was challenging the district court's August 17, 2017 decision. The 60(d) submitted in this case was not asking for reconsideration of the Dist. court's ruling, rather it was addressing an error committed in the COA process by the Sixth circuit pursuant to Buck v. Davis 137 S. Ct. 759, and asking for the setting aside of the court's April 27, 2017 order. The issues of this case have created circumstances which challenges the Sixth circuit

ruling that an order ruling on a COA should be treated the same as an order ruling on a certificate of probable cause and therefore not appealable see, Sims v. United States 244 F. 3d 509. A violation of Buck v. Davis can only be made by a Court of Appeals, as the court is required to limit it's examination at the COA stage to a threshold inquiry into the underlying merits of a Habeas applicant's request for COA. Once a circuit court has denied a petitioner's request, the case is closed. If the U.S. Supreme Court has denied Certiorari. The only avenue to address a COA violation is by a 60(b). A COA violation by a court of appeals presents circumstances which raises question to whether an order ruling on a certificate of appealability should be treated the same as that of a order ruling on a certificate probable cause. In this case the Sixth Circuit in petitioner's original habeas proceedings reached the merits of a perceived procedural bar without excepting jurisdiction. To address this issue. Petitioner attempted to submit a 60(d). The 60(d) could not be filed with the Federal Appeals court. As the clerk refused to file the independent action for the reason of the case being closed. The action had to be filed with the District court. Where the court did not have the authority to over rule the circuit court's decision. The District court did however have the jurisdiction under 28 U.S.C. 2253 (c)(2) to make a determination on whether a substantial showing of a denial of a constitutional right was presented. Petitioner argues these circumstances gave the Sixth Cir. jurisdiction to review the order ruling on COA by the District court. As the COA violation was made by the Appeals court. Jurisprudence, deference and judicial integrity would demand that the appeals court have jurisdiction to remedy the error.

c. Argument for the reopening of the Sixth Cir. April, 27, 2017
order denying petitioner's request for COA.

Petitioner states, that the Sixth Cir. court misapplied the standard governing the issuance of a certificate of appealability, in view of Buck v. Davis 137 S. Ct. at 759. In Davis the Supreme court held, until a petitioner secures a COA a circuit court should not decide the merits on a application for a certificate of appealability see, Miller El v. Cockwell 537 U.S. 322,336. A COA may be issued only if petitioner makes a subtanial showing of the denial of a constituutional right 28 U.S.C. 2253(c)(2). A petitioner satifies this standard by demostrating that jurist of reason could disagree with the Dist. court's resolution of his constitutional claim or that jurist could conclud the issue presented are adequate to deserve encouragement to proceed futher. Miller El v. Cockwell 537 U.S. 322, 327(2003). In the case sub judice the court soley relied on the Dist. court's findings of a procedural bar and diregaured petitioner's supplement to ground one in it's initial analysis and essentially decided this case on the merits. To properly determin whether or not COA should have been granted. The court should have included the supplement argument to ground one in it's examination and ask only if the petitioner has shown the Dist. court's resolution debatable. Miller 537 U.S. at 327, 348. When reviewing the Circuit court's opinion there is nothing which would give one reason to conclud that the court considered the supplement argument in it's inquiry on whether there was a substantial showing of the denial of a constitutional right.

The threshold inquiry the court made to ground one was, whether the claim was cognizable for habeas review. See third paragraph of pg two

Appdx. 0 . This should not be the primary question at the COA stage. The Sixth Cir. misconstrued the supplement argument as a separate argument, when in fact it is an addition to claim one and therefore should have been examined as one argument. When reviewing the court's opinion of the supplement argument, the court ruled, "reasonable jurist could not disagree with the District court's conclusion that petitioner failed to exhaust this claim." See paragraph 2 pg. 3 Appdx. 0.

When the District court has denied a 2254 petition "on procedural grounds a petitioner must show" that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right that jurist of reason would find it debatable whether the Dist. court was correct in its procedural ruling." Slack v. McDaniel 528 U.S. 473, 484 (2000). In this case the court's inquiry into the procedural bar is not asking whether or not petitioner failed to make a showing the procedural bar is debatable among jurist of reason, rather the court is implying petitioner has failed to show the procedural bar is incorrect. Petitioner argues that this decision was reached by the court making a determination into the merits of the procedural default. This is evident by the court's opinion in the last sentence on pg. 3, as the court agreed with the District court's resolution it stated, "Because Johnson failed to support his argument with any Federal cases or state cases relying on federal law, did not allege facts well within the mainstream of constitutional law and has not cited any circumstances excusing his procedural default, reasonable jurist could not disagree with the district court's procedural ruling."

The COA inquiry is not coextensive with a merit analysis, see Buck v. Davis 137 S. Ct. 759. When dealing with a procedural bar at the COA stage, the only question is whether the applicant has shown "that jurist of reason would find the district court's procedural bar debatable". Slack v. McDaniel 528 U.S. 473, 484 (2000). Whether petitioner failed to support his argument with any federal cases or state cases relying on federal law, or cite any circumstances excusing the procedural default are ultimate merit determination of the procedural bar the court should not reach. At the COA stage a petitioner is not required to present circumstances excusing a perceived default. This places a heavy burden on petitioner at the COA stage, see Miller El 537 U.S. at 336,337. When a court of appeals sidesteps the COA process by first deciding the merits of an appeal and then justifying its denial of COA based on the adjudication of the actual merits it is in essence deciding an appeal without jurisdiction, see Buck v. Davis 137 S.Ct. 759.

The manner in which the court analysed and then denied petitioner's request for COA created a situation which cannot in equity be ignored. The Sixth Cir. interpretation of a COA inquiry required the petitioner to make a ultimate showing of merit rather than a preliminary showing of the claim being debatable. A review of the facts will show extraordinary circumstances in the court's analysis to deny petitioner's request. First the court separated the U.S. Supreme Court precedent presented in the supplementary argument to claim one from claim one. Second the threshold inquiry the court made to claim one was whether it was cognizable for habeas review. Third the court procedurally barred the supplementary argument based on its determination of the merits of the procedural default.

The decision by the Sixth Cir. to deny petitioner's request has allowed a fundamentally unfair trial which resulted in the conviction of an innocent man to stand.

d. Miscarriage of justice issue.

This miscarriage of justice claim relies on the same set of facts presented in petitioner's initial argument and supplement argument to claim one. The supplement was subsequently barred from review in the original habeas proceedings. The supplement argument that was presented, argued petitioner's guilt was established by unreliable and suggestive evidence which did not prove guilt and denied petitioner a fundamentally fair trial.

A person when first charged with a crime is intitled to a presumption of innocence, see In Winship 397 U.S. 358. In Winship the court held that the due process clause of the fourteenth admendment protects a defendant in a criminal case against conviction " except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which one is charged", 397 U.S. at 364. Petitioner argues durring trial the state felled to establish the element of sexual conduct as required by R.C. 2907.02, used false evidence to give the appearance of veracity to it's key witness testimony and to establish guilt in violation of his fourteenth admendment right to due process.

In Murray v. Carrier (1986) 477 U.S. 478, the Supreme court held inorder to invoke miscarriage of justice a habeas petitioner must show that a constitutional violation has probably resulted in a conviction of one who is actually innocent. The standard requires a petitioner to show that it is more likely than not no reasonable "jurior would have convicted him". The "reasonable" in that formulation is not without meaning. It must be presumed that such a jurior would conscientiously obey the instruction of the trial court requiring proof beyond a reasonable doubt. The meaning of actual innocence does not merly require a showing that reasonable doubt exist in light of the new evidence, but rather that no reasonable jurior would have found the defendant guilty. The habeas court must make it's determination concerning petitioner's innocence in light of all the evidence including that alleged to have been illegally admitted (but with due regaurd to any unreliability of it).

In the case being reviewed, during the trial proceedings the state's key witness testified that she was sexually assaulted by the defendant. One could argue that this testimony should be viewed in light most favorable to the proscution as there is on way for the court to judge the pulse of the witness's testimony, however this standard does not take into account the states knowing use of false evidence which directly affected the credibility of the witness's testimony, thereby deminshing it's reliability. The defendant denied there being any sexual conduct except that inwhich he and the state's witness both agreed upon. Which was a consensual act accuring within 72 hours of the time inwhich D.N.A. evidence can be recovered, see T.T. pg. 373 Lines 3-20 and, pg. 329 lines 11-16.

To impeach the defendant and to establish the element of sexual conduct as required by R.C. 2907.02, the state presented D.N.A. evidence in the form of defendant's semen. The state in its decision to use the semen as evidence never presented a legitimate inference to which the D.N.A. could assist the jury in the fact finding process, rather the state simply used the D.N.A. in a deceptive manner to persuade and give the illusion of veracity to the victim's testimony see: T.T. pg. 330-331 lines 9-1, pg. 445 lines 12-16 and pg. 446 lines 15-19. To insure the fairness of the trial proceedings the semen should not have been presented to the jury as evidence as it was unfairly suggestive and unreliable. see: Manson v. Bratwaite 432 U.S. 98 (1977); also Perry v. New Hampshire (132 S.Ct. 716). The semen was unreliable as proof to the sexual assault allegation, as there was testimony by the victim of a consensual act occurring with the defendant within a 72 hour time frame of the alleged offense; see: T.T. pg. 292 lines 14-17. The United States Supreme court has recognized the persuasiveness of D.N.A. evidence in the eyes of the jury and has stated it is important that it be presented in a reliable manner, see: McDaniel v. Brown 558 U.S. 120 at* 136 (2009). The introduction of the D.N.A. to the jury in the form of a "RAPE KIT" created a substantial likelihood that the jury would associate the semen to the rape of the victim, this affected the jury's ability to fairly consider the defendant's version of events. It must also be encompassed within the scope of this argument that the prosecution knew the D.N.A. was an unreliable source of proof to the sexual assault, see: T.T. pg. 444 lines 7-14 and pg. 445 lines 7-12.

Though Manson deals with the admission of unreliable state practices Manson makes clear reliability is the linchpin to the due process clause analysis, (432 U.S. 1147); see also : Id. at (127) (justice Marsall dissenting).

While the United States Supreme court has not specifically adressed the same set of facts inwhich the petitioner now relies on to constitute his due process violation the AEDPA does not prohibit a federal court from finding an applicastion of a principle unreasonable when it involes a set of facts different from those of the case inwhich the princiabile was annouced, Pannetti v. Quarterman, 127 S. Ct. at 2858. Here, application of the court's well established holding in Bratwaite. That the admission of unreliable indentification testimony stemming from an unecessarily suggestive process violates due process. Shows that the introduction of the semen in the form of a rape kit, along with unecessarily suggestive testimony of where the semen was found such as the anual and pubic aera demonstrate the very conner stones which swayed the fairness of the trial proceedings. The states presentation of the case dose not merly raise a question of fairness, by the prosecution fallacy the constitutional error is clear. The prosecution stated in closing arguments the semen found supported the victim's version of events, see: T.T. pg. 445 lines 14-18, when in fact the D.N.A. could not and did not substantiate this at all. The commision of the prosecution fallacy constitutes precisely the type of improper state conduct which allows the due process check for reliability.

The United States Supreme court in Perry supra, stated " the due process check comes into play only after the defendant establishes improper state conduct," see Perry S. Ct. at 726. The suggestive testimony and the manner inwhich the D.N.A. was presented to the jury along with the fallacy by the prosecution gave rise to a substantial likelihood of irreparable bias against the defendant version of events. This denied the defendant a fundamentally fair trial. The requirment of due process in safe gaurding the liberty of citzens against deprivation through, the action of the state embodies the fundamental conceptions of justice which lies at the base of our civil and political institutions, see: Herbert v. Louisiana, 272 U.S. 316, 317. In cases where the 'only' evidence of the crim or defendant's guilt is testimony of the victim, the admittance of unfairly prejudicial evidence can be especially detrimental to the fairness of the trial because of the lack of evidence confirming the allegation would mean that the trial was a close case. The case before this court illustrates what can go wrong when a trial court failes to gaurd against the introduction of unreliable prejudicial evidence. It is the responsibility of the trier of fact to fairly resolve conflicts in testimony to weigh the evidence and draw reasonable inference from basic facts to ultimate facts. This process was muddied by presenting the semen as evidence and the fallacy by the procution in closing arguments. Due process prohibits the state's knowing use of false evidence because such use violates any concept of order and liberty, Napue v. Illinosis 360 U.S. 264 (1954). A review of the record shows the only evidence used to support the element of sexual conduct was the state's witness's testimony and the defendant's D.N.A. .

The defendant's semen was false evidence as it had no probative value to the element of sexual conduct and therefore was not evidence of guilt. This evidence was used to support the victim's version of events as it went to the veracity of the witness's testimony making the testimony unreliable. Petitioner asserts the prosecution failed to prove the element of sexual conduct thereby making him innocent of the charged of rape and the improper use of the semen as evidence in violation of his due process rights resulted in his conviction. These facts demonstrate that it is more likely that a juror of reason would have found the defendant not guilty of rape.

e. conclusion

It is based on the facts presented herein petitioner states that this honorable court's guidance is needed. Therefore petitioner humbly ask that the court accept jurisdiction and grant petitioner's writ of certiorari.