No. 21-6243 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Barnhart Jr. — PETITIONER
(Your Name)

vs.

Warden (NCCI) — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court, Southern Dist. of Ohio, ~~Eastern~~ W.D.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Barnhart Jr.
(Your Name)

P.O. Box 1812
(Address)

Marion, Ohio 43301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

GROUND ONE

Is a Petitioner denied his due process rights when the Ohio Appellate Court applies an unreasonable application of U.S. Supreme Court precedent in regards to petitioner's Constitutional right to be free of illegal search and seizure?

GROUND TWO

Is a Petitioner denied his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment due process rights when appellate counsel failes to argue the sufficiency of evidence error but instead argues that the conviction was against the weight of evidence?

GROUND THREE

Is a Petitioner's due process rights as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution violated when the trial court fails to grant his motion for a new trial?

GROUND FOUR

Does trial counsel provide ineffective assistance of counsel when he knowingly submits a vital, yet factually incorrect affidavit in support of a motion for a new trial?

LIST OF ALL PARTIES

Richard Barnhart Jr.

(Appellant)

v.

Warden of North Central Correctional Institution (formerly Neil Turner)

(Appellee)

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

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

[X] reported at Barnhart v. Turner 2021 U.S. App. Lexis 28778; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at Barnhart v. Warden, 2021 U.S. Dist. Lexis 12966; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

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

[X] reported at State v. Barnhart, 2019 Ohio Lexis 1412; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Fourth Appellate Dist., Meigs County, Ohio court appears at Appendix D to the petition and is

[X] reported at State v. Barnhart, 2019-Ohio-1184; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Sept. 22, 2021.

[X] No petition for rehearing was timely filed in my case.

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

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

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was July 10, 2019. A copy of that decision appears at Appendix C.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

GROUND ONE

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

GROUND TWO

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This does not simply guarantee the mere existence of legal counsel but provides "the right to *effective* counsel—which imposes a baseline requirement of competence

The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law."

GROUND THREE

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.

GROUND FOUR

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This does not simply guarantee the mere existence of legal counsel but provides "the right to *effective* counsel—which imposes a baseline requirement of competence."

STATEMENT OF THE CASE

Appellant, Richard Barnhart, Jr., was involved in a motor vehicle accident on January 13, 2017, at approximately 10:10 p.m. on State Route 143 in Meigs County, Ohio. When first responders initially arrived at the scene of the accident, they found an individual identified as Jesse Carr deceased and underneath the vehicle in a ditch area. They also found Appellant, initially moaning but otherwise unresponsive, partially ejected through the windshield of the vehicle. The record reveals that the victim, Jesse Carr, had been pronounced dead and Appellant had already been transported to the hospital by the time law enforcement reached the scene of the accident. The investigation of the accident, however, ultimately led to Appellant's indictment on February 16, 2017 on multiple charges, including: 1) a first-degree felony in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b) and (c); 2) one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(2)(a) and (B)(3); 3) one count of vehicular manslaughter, a first-degree misdemeanor in violation of R.C. 2903.06(A)(4) and (D); 4) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d); and 5) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(f) and (G)(1)(d).

Appellant pleaded not guilty to the charges and the case proceeded through the discovery process. Appellant filed a motion to suppress on March 20, 2017. Appellant sought suppression of the evidence obtained from Appellant while he was at the hospital, specifically the test results from a blood draw ordered by law enforcement, claiming it was involuntary, unconstitutionally coerced and without cognizance of his mental capacity at the time. Appellant also argued that the withdrawal of his blood was not conducted within two hours of the alleged violation. Appellant further argued that the provisions of Ohio's Implied Consent statute contained in R.C. 4511.191 were not applicable because Appellant was not validly arrested.

A suppression hearing was held on May 24, 2017, and was followed by the submission of written arguments. The State presented testimony by Sergeant Robert L. Hayslip, the officer who initially responded and investigated the accident scene. The State also presented testimony by Trooper Chris Finley, the trooper who responded to the hospital and ordered a sample of Appellant's blood be drawn, as well as Kelci Wanat, the Holzer Medical Center Emergency Room nurse who was attending Appellant and who drew the blood upon Trooper Finley's request. The trial court ultimately denied Appellant's motion on June 29, 2017, finding that Appellant was unconscious at the time his blood was drawn pursuant to Ohio's Implied Consent statute and that he was never in custody or under arrest that night. The trial court further determined that Appellant's blood was drawn within the applicable three-hour time limitation. Further, in denying Appellant's motion, the trial court reasoned that a warrant to draw Appellant's blood was not needed due to the consent exception (here, implied consent), as well as the exigent circumstances exception to the warrant requirement.

Thus, the matter proceeded to a jury trial beginning on January 30, 2018. Defense counsel's theory at trial was that Appellant was not the driver of the vehicle and that even if he was the driver, his driving did not cause the accident which caused the death of Jesse Carr. Instead, he argued that the oncoming dark-colored SUV, reported by Mr. Haning to have been driving left of center, caused the accident to occur. The State argued that Appellant was, in fact, the driver of the vehicle. The State also argued Appellant, not the driver of the dark-colored SUV, caused the accident, relying on Mr. Haning's second statement which described the SUV as only driving on the center line, not being left of center, and stating that both vehicles should have been able to pass.

The jury ultimately accepted the State's version of events and found Appellant guilty on all counts of the indictment, as charged. Appellant was sentenced to an aggregate prison term of fourteen years.

REASONS FOR GRANTING THE PETITION

First, Petitioner was denied his due process rights when the Ohio Appellate Court applied an unreasonable application of U.S. Supreme Court precedent. Both sides agreed that petitioner was not under arrest, lawful or otherwise when the officer ordered the blood draw. As also agreed upon, upon arrival at the hospital, petitioner was "in and out of consciousness". As a result, law enforcement had the opportunity when petitioner was conscious, on more than one occasion, to request that petitioner take a breathalyzer test instead of the more intrusive blood draw. Therefore, the state of Ohio has violated petitioner's constitutional right to be free of illegal search and seizure and violated the long-established rule that a warrantless search may be conducted incident to a lawful arrest. As a result, the state court identified the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applied that principle to the facts of the petitioner's case. See Birchfield v. North Dakota, 136 S.Ct. 2160, 2162, 2172-2186, 195 L.Ed.2d 560 (2016). The Birchfield case and the case at bar demonstrates that "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"

Second, Petitioner was denied his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment due process rights. Barnhart argues that his appellate attorney's ineffective assistance serves as the cause to excuse his default. Ineffective assistance of counsel constitutes "cause" to excuse a default only if it is "so ineffective as to violate the

Federal Constitution," *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)—*i.e.*, it meets *Strickland*'s ineffectiveness standard. Based upon Ohio law, the sufficiency of evidence claim would have permitted petitioner a wider latitude in which to frame his arguments and petitioner's such claims fit perfectly within the parameters of that standard of review. However, Ohio's manifest weight of evidence standard of review is a sufficiently higher bar to meet and is intended as such. To choose the manifest weight of evidence standard of review - under these circumstances- falls well below what a competent licensed attorney in Ohio would undertake.

Third, Petitioner's due process rights as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution were violated. Petitioner introduced "new evidence" in the form of a witness who seen the victim of this accident, driving the vehicle in question. Had counsel properly presented the affidavit to the court, there would have been no inconsistencies in his testimony that would support the trial court's dismissal of petitioner's motion for a new trial. Such circumstances would, more likely than not, have created reasonable doubt at trial and more likely than not, no reasonable juror would have convicted him in light of the new evidence. Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005). Barnhart has identified new reliable evidence sufficient to undermine his convictions. As a result, Petitioner met the requirements for a certificate of appealability but was still denied review by the Sixth Circuit.

Fourth, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. Guidry v. Dretke, 397 F.3d 306, 325–27 (5th Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006) ("The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, where the witnesses are apparently credible,

brought into question whether, under subpart [2254](d)(2), its 'decision ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' "); *Taylor v. Maddox*, 366 F.3d at 1008(state court fact findings are found unreasonable under section 2254(d)(2) because state courts' failure to discuss or even mention key testimony shows that state courts "failed to consider key aspects of the record": "The state courts might have disbelieved [witness], or perhaps discounted his testimony, but they were not entitled to act as if it didn't exist."); Caliendo v. Warden, 365 F.3d 691, 698 (9th Cir.), *cert. denied*, 543 U.S. 927 (2004) ("AEDPA's presumption of correctness does not apply to state court findings arrived at through the use of erroneous legal standards."); Nunes v. Mueller, 350 F.3d 1045, 1054–56 (9th Cir. 2003), *cert. denied*, 543 U.S. 1038 (2004) ("state court's decision applied the law to the facts unreasonably" by making "factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations)" even though state court denied evidentiary hearing and "claimed to be determining ***prima facie*** sufficiency" of prisoner's argument that ineffective assistance of counsel was prejudicial: "with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings")

Federal habeas relief is available to redress *any* denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the fact-finding process. As MR. JUSTICE POWELL recognized in proposing that the Court re-evaluate the scope of habeas relief as a statutory matter in *Schneckloth* v. *Bustamonte*, 412 U.S., at 251(concurring opinion), "on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under 28 U.S.C. § 2254 or federal prisoners under § 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in

precisely the same manner as on direct review." The Supreme Court has on numerous occasions accepted jurisdiction over collateral attacks by state prisoners premised on Fourth Amendment violations, often over dissents that as a statutory matter such claims should not be cognizable. See, *e.g.*, *Lefkowitz*v. *Newsome*, 420 U.S. 283, 291-292, and nn. 8, 9 (1975); *Cardwell* v. *Lewis*, 417 U.S. 583 (1974); *Cady* v.*Dombrowski*, 413 U.S. 433 (1973); *Adams* v. *Williams*, 407 U.S. 143 (1972); *Whiteley* v. *Warden*, 401 U.S. 560 (1971);

CONCLUSION

Appellant asserts that sometimes evidence establishes guilt so clearly and compellingly that recital of evidence points unerringly to a conclusion of guilt, but in cases involving disputed questions of fact, such as this case, mere summarization of testimony does not necessarily point to a correct conclusion. This court must consider that if the reasons offered for conclusions are not persuasive, conclusion may be unsound; where accused's testimony at trial, corroborated by other evidence, raised substantial issues of fact as to most of offenses charged, situation, was one which required more information. United States v. Bennie, 10 C.M.A. 159, 27 C.M.R. 233, 1959 CMA LEXIS 358 (C.M.A. Jan. 30, 1959). Based upon the above mentioned facts, the Southern District's decision contains errors of fact and errors of law and should be reversed in order to prevent a manifest injustice in this matter and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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