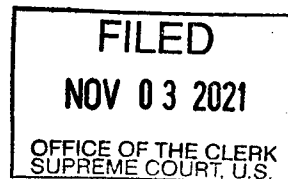


No. 21-6246

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Noble LeRoy Johnson ^{PRO SE}
(Your Name) — PETITIONER

Peterson vs. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Noble LeRoy Johnson #8506
(Your Name)

Norton Corr Facility, P.O. Box 546
(Address)

Norton, KS 67546
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

ISSUE(1) Whether The District Court Erred
in summarily dismissing Petitioner
KSA, 60-1507 Motion

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:

RELATED CASES

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Johnson V. State, No 54, 325, unpublished opinion

Filed March 31, 1983, rev, denied 233 Kan 1072, 1983, mandate

Court of Appeals

State of Kansas

§
;

Appellate Court NO

19-1211993-A

District Court 18 CV 238

3-22-21 The Supreme Court denied the petition for review
Judgment of District Court is Affirmed upon denial

TABLE OF AUTHORITIES CITED

CASES

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CLISBY V. JONES, 960 F.2d 925, 936 (11th Cir 1992)

STATUTES AND RULES

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 judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

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

☐ reported at Johnson v State 1996 KAN APP LEXUS; or, ^{UNPUB} COURT of Appeals-12-196 ^{opinion} Filed

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is Johnson v mckone 278 F.3d 1187 (10th Circuit, 2002)

☐ reported at State Court of Appeals; or, ^{Denied}

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Decision of State Trial Court court appears at Appendix B to the petition and is ^{Johnson Filed 225410 1997, Denied}

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 9-10-21.

☐ No petition for rehearing was timely filed in my case.

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

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

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

☐ For cases from state courts:

COURT OF APPEALS STATE OF KANSAS APPEAL CASE NO 19-1211993 - A. DISTRICT COURT 18CB238
the supreme court denied the petition for review
The date on which the highest state court decided my case was 3-12-21.
A copy of that decision appears at Appendix _____.

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

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

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

*Filed, UNITED STATES Court of Appeals
Tenth Circuit
SEPTEMBER 10, 2021 - DENIED
CASE NO. 21-3119
(DC. NO 5:21-CV-03185 -SAR
D. KAN)*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees in all Criminal Prosecutions that the accused shall enjoy the right to have the Assistance of Counsel. To be meaningful, the right to counsel guaranteed by this provision necessarily includes the right to effective assistance of counsel. The right is made applicable to state proceedings by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

SEE Pages Attached

1-15

STATEMENT OF THE FACTS

ON September 13, 2018, Petitioner Filed A motion to Vacate Set Aside Conviction and Sentence pursuant to KSA 60-1507, said motion Was Filed out of time. (Petitioner Was convicted and sentenced in 1975-76) [R.Vol. pg 7, R.Vol. 11 pg 9] Petitioner alleged that the District Court Jurisdiction to convict him of murder in the First degree, as charged in counts one and two of the Amended Complaint, because it failed to charge the Acts of Petitioner were done unlawfully, knowingly, and feloniously. [R.Vol 1 pg 10] Petitioner Further alleged that his trial counsel Was ineffective [R.Vol, 1, pg 13]. ON September 13, 2018, Filed By Petitioner, a Supplemental motion Pursuant to K.S.A. 60-1507 And MILLER v. State. Kansas Supreme Court CASE No. 103,915(2014) [R.Vol, 1, pg 21] Petitioner Further Contended that these Failings resulted in the actual innocence.

OF PETITIONER OF HIS CRIMES OF CONVICTION. PETITIONER ALLEGED THAT THE TRIAL'S COUNSEL PERFORMANCE WAS SO DEFICIENT, BASED UPON HIS FAILURE TO ARGUE THE DISTRICT COURT'S LACK OF JURISDICTION AND PETITIONER'S INNOCENCE AS SET FORTH IN THE PARAGRAPH, THE PETITIONER'S DEFENSE WAS PREJUDICED SO AS TO DEPRIVE HIM OF A FAIR TRIAL. PETITIONER ALLEGED THAT HE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL BASED UPON THEIR FAILURE TO CHALLENGE A JURY INSTRUCTION THAT DILUTED THE BURDEN OF PROOF (SPECIFICALLY THE INSTRUCTION THAT DIRECTED THE JURY TO ACQUIT PETITIONER IF THERE WAS REASONABLE DOUBT AS TO EACH AS OPPOSED TO ANY OF THE ELEMENTS OF THE CRIME. [R.VOL 1 PG 21]) ON MAY 30, 2019 A HEARING WAS HELD ON SAID MOTIONS. [R.VOL 1, 11 PGS 1, 4] PETITIONER TESTIFIED THAT HE DID NOT FILE HIS K.S.A. 60-1507 MOTION

Prior to September 2018 because he was not aware
of the case law relevant to his motions prior to this time.
[R. Vol. 1 PG 5, 6, 8.] Petitioner further testified he should be
allowed to file his motion out of time because I am aware
that the State of Kansas may very well argue to the
Court that my KSA 60-1507 motion is time barred, as
well as being a second or successive motion but I claim
that under the following circumstances that the Court
should not hesitate in finding that my motion should
not be barred and ruled successive, but means and
meets the exceptional circumstances standard. That
the petitioner failed to raise and present to the Court
all grounds for relief in his previous KSA 60-1507
filings because he suffers from a memory condition,
he does not have the mental ability to conduct legal research
he does not have the mental ability to know what
constitutes, and what does not constitute a legal

ISSUE TO BE Present to the COURT. He does Not have the Mental Ability to Know what the Facts would support an ISSUE or compile any argument. He does Not have the mental ABILITY to determine what Form or type of Petition or Motion he should File to Challenge his conviction AND sentence. IN addition to ALL OF THE ABOVE herein, as it relates to Petitioners ^{IN-}Mental ABILITIES HE has had to rely upon untrained At Law inmates to assist him in preparing and Filing his previous K.S.A. 60-1507 motions, as well as other motions in the COURT. His mental Conditions has played the actual CAUSE of having Not been able to read and understand the law as it relates to him to present ALL his grounds in his Previous K.S.A. 60-1507 Filings in the COURT. To sum it all up, the Petitioner at the time of the Filings of ALL of his Previous K.S.A. 60-1507 motions AS WELL as other Motions

Including his current motion KSA 60-1507, is and continues to be mentally UNABLE of Pursuing his own claims because of his mental CAPacity, in which may very well toll the 1 year time Limitations and excuse the Second or Successiveness Under KSA 60-1507. Allegations of mental incompetence alone however are generally insufficient to warrant Equitable tolling, See Robert V. Workman 45 F. Appx 852, 854 (10th Cir 2002). Equitable tolling of a Limitations period based on mental incapacity is warranted only in exceptional circumstances that may include an adjudicant of incompetence, institutionalization for mental incapacity, or evidence that the individual is Not capable of pursuing his own claim because of mental incapacity. Id (quoting, Brester V. Midwest Health Servs. 77 F. 3d, 1264, 1268 10th Cir. 1996). The District Court dismissed the case, finding that manifest injustice does not result from the

dismissal of said motion, [R VOL PG 5 52-53]
ON SEPT. 4, 2019, Petitioner Filed A Notice OF Appeal
[R VOL I PG 55] When a district Judge Summarily
denies A K.S.A. 60-1507 motion, an appellate court
reviews that decision using a de novo standard of
review. This standard requires an appellate court
to determine whether the motion, files, and records
of the case conclusively show the movant is not
entitled to any relief (Edgar v State, 294 Kan 828, 836-
37 (2012) citations omitted). K.S.A. 60-1507(F)(2) provides
that the one year time limitation to file a motion
pursuant to said statute, "may be extended by the
court only to prevent a manifest injustice for
purposes of finding manifest injustice under this
section the courts inquiry shall be limited to
determining why the prisoner failed to file
the motion within the one year time

Limitation) or whether the prisoner makes a colorable claim of actual innocence. As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence. First, Petitioner makes a claim that there was good cause for his failure to timely file the KSA 60-1507 motion. Petitioner testified said failure was because he was not previously aware of the case law relevant to his motions. Petitioner contends this explanation provides persuasive reasons of circumstances that prevented him from filing the 60-1507 motion within the 1 year limitation.

(Vontress v State 299 Kan 607, 616 (2014)) As such the District erred in determining Petitioner had not established the existence of manifest injustice.

Second, Petitioner makes a claim of actual innocence. When a KSA 60-1507 movant advances a claim of actual innocence as a gateway to overcome the procedural bar of untimeliness under KSA 60-1507, he is entitled to consideration of the merits of the motion if the claim of actual innocence meets the standard outlined in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) *Beauclair v. State*, 308 Kan. 284 Syl. (2015). This standard requires a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Murray*, 477, U.S. 496. Petitioner alleged that he was actually innocent of his conviction because of the lack of District Court's jurisdiction to convict him. The Court had jurisdiction to entertain the Petitioner motion filed pursuant to KSA 60-1507 because, his motion raises the claim of the court's

Lack of Jurisdiction to try him along with his
CLAIM OF ACTUAL innocence that excuses all
Procedural defaults that would otherwise bar
petitioner's litigation on his current motion
pending before the court, specifically when the
amended Complaint Filed in this case, Failed
to Charge that the Petitioner's Acts of First Degree
murder "were done unlawfully, knowingly and
Feloniously. Under these circumstances, this Court
should have no hesitation in holding Petitioner has
raised a colorable claim of lack of jurisdiction
of the court as well as a claim of actual
innocence and that not only meets the Manifest
Injustice Standard to excuse standard Untimeliness
but also the exceptional Circumstance Standard
to excuse Successiveness Petitioner Filed
Supplement Motion Pursuant to KSA 60-1507

and MILLER V. STATE, KANSAS Supreme Court Case
NO. 103,915 (2014) claim that he was denied his
right to effective assistance of trial and appellate
counsel under the Sixth Amendment by failing
to challenge an incorrect jury instruction that
diluted the state's burden of proof by directing
the jury to acquit if it had a reasonable doubt as
to each rather than any of the elements the
state was required to prove. The Sixth Amendment
to the United States Constitution guarantees in all
criminal prosecutions that the accused shall enjoy
the right to have the assistance for his or her
defense. To be meaningful the right to counsel
guaranteed by this provision necessarily includes the
right to effective assistance of counsel. The right
is made applicable to state proceedings by the
Fourteenth Amendment to the United States Constitution.

IN THIS CASE, the Petitioner CLAIMS that his incorrect
Written Jury instruction At issue read IF you have
reasonable doubt AS to the truth of each of the CLAIMS
required to be Proved BY the STATE, You must Find
defendant Not guilty. Petitioner CLAIMS that his trial
COUNSEL AND appellanT Counsel Knew or Should
have KNOWN SUBStitution effectively told the JURY
it COULD acquit MILLER only IF it had a reasonable
doubt as to any single element. Petitioner CLAIMS his
trial Counsel AND AppellanT Counsel, Should OF OR
have KNOWN that A Jury Verdict required by the Sixth
Amendment (to the United States Constitution) IS A
Jury Verdict OF guilt beyond A reasonable doubt. (Sullivan
V. LOUISIANA, 508 US 273, 278, 113 S CT 807, 124 L Ed
182 (1993) AND Harmless error ANALYSIS
DOES NOT APPLY TO A constitutionally deficient
reasonable doubt instructions 508 US 428)

THE PETITIONER CLAIMS THAT HIS TRIAL COUNSEL AND APPELLANT COUNSEL'S FAILURE TO CHALLENGE THE WRITTEN INSTRUCTION WAS OBJECTIVELY UNREASONABLE AND PREJUDICIAL. THE INCORRECT JURY INSTRUCTION CONSTITUTED STRUCTURAL RENDERING PETITIONER'S CRIMINAL TRIAL AND DIRECT APPEAL FUNDAMENTALLY UNFAIR TO THE POINT THAT ITS RESULTS IS AN UNRELIABLE INDICATOR OF HIS GUILT OR INNOCENCE. SEE RIVERA V. ILLINOIS, 556 US 148, 160, 129, 5 CT 1446, 173 L.ED. 320 (2009). WASHINGTON V. RECUENCO, 548 US 212, 218-19, 1265 CT 2546, 165 L.ED. 2CT 466 (2006). PETITIONER CLAIMS THAT HIS TRIAL COUNSEL AND APPELLANT COUNSEL KNEW OR SHOULD OF KNOWN THE JURY INSTRUCTION ERROR ALLOWED THE JURY TO FIND HIM GUILTY WITHOUT FINDING THE STATE PROVED BEYOND A REASONABLE DOUBT INSTRUCTION MISINFORMED JURY. PETITIONER FURTHERMORE CLAIMS THAT HAD HIS APPELLANT

counsel brought this error to the Attention on his direct appeal of his conviction. It would have resulted in his conviction being reversed

The Petitioner claims that his appellant Counsel did not provide reasonable assistance on direct appeal because he failed to conduct a sufficiently detailed review to identify deviations from the Pattern instructions (Miller, 268, P 3d 506, 2012 WL 401 601 A18.

Petitioner Was Denied Effective Assistance ^{of} Counsel

② Petitioner (Johnson) further alleged that his trial counsel was ineffective. Petitioner alleged that the trial counsel's performance was so deficient based upon his failure to argue the District Court's lack of jurisdiction and Petitioner's innocence as set forth in the preceding paragraph, that Petitioner's defense was prejudiced as to deprive

him a Fair Trial. Petitioner alleged that the District Court Lacked Jurisdiction to convict him OF Murder IN the First Degree AS Charged in Counts ONE AND TWO OF the Amended Complaint because it Failed to Charge that the Acts of Petitioner were done UNlawFULLY, Knowingly, will Fully AND Feloniously (R. Vol 1 pg 10) Petitioner Further contends that his FAILURE resulted in the actual innocence OF Petitioner to his Crime of Conviction (R. Vol. Pg 10 ON Sept. 13. 2018, Petitioner Filed A supplemental Motion Pursuant to KSA. 60 1501 AND MILLER V STATE Kansas Supreme Court CASE No. 103,915, (2014) (R. Vol 1, pg 21) Petitioner alleged that he was denied the Right to EFFECTIVE assistance OF TRIAL AND appellate based UPON their to Challenge a jury instruction that diluted the Burden OF Proof (Specifically the instruction that JURY to Acquit Petitioner if

There WAS reasonable as to each as opposed
to ANY of the elements of the crime. (R. Vol pg 21)
ON MAY 30, 2019, A hearing WAS held ON SAID
MOTIONS (R. Vol pg 64. Petitioner testified that
he did NOT FILE his 60-1507 Motion Prior
to 9-2018 BECAUSE He WAS NOT aware OF
the CASE LAW relevant to his Motions Prior
to this time.

Reasons For Granting The Writ

The District Court Lacked Jurisdiction to TRY Petitioner (Johnson) For murder IN the First Degree as Charged IN counts ONE AND TWO OF THE Amended Complaint Filed Herein, Because it Failed to Charge that the acts OF Petitioner Was done UNLAWFULLY, KNOWINGLY and WILLFULLY AND FELONIOUSLY. AS A result the Petitioner is ACTUALLY Innocence and his convictions CANNOT STAND. "a similar question was raised IN U.S. V DENNON 483 F.2d 1093 (8th Cir 1973) The Eighth Circuit REVERSED a conviction OF selling stolen Property FOR Failure to Allege IN the indictment that the defendant acted KNOWINGLY, UNLAWFULLY, AND WILLFULLY and REJECTED the governments Argument that Proper instruction Remedied the defect. The Court held: 483 F.2d At 1095. However, the FAILURE OF the indictment to Charge that the defendant acted KNOWINGLY, AND WILLFULLY AND UNLAWFULLY is FATALY defective to the Governments Prosecution!

OF this indictment. Morissette V US 342 US 246,
725 Ct 249^{xxx} 6) 96 L ed 258 (1952) holds that a
Criminal intent is AN essential Element of
an offense under s641. Despite this fact, the
government contends that the Courts proper
instruction requiring a finding of Criminal intent
has remedied the defect in the indictment. We
think a defect of the type Present in this case
is more than a matter of mere Form or technical
pleading and constitutes a substantive defect
in the indictment (HN 41). It is elementary
in American Jurisprudence that an indictment
must set forth the essential Elements of the offense
Charged. And if it does not, A conviction
based there on is fatally defective. The
dismissal of Petitioner (Johnson) Motion resulted
in a MANIFEST INJUSTICE KSA.60-1504(F)(2)

Provides that the one year time limitation to file a motion pursuant to said statute may be extended by the court only to prevent manifest injustice. That the Petitioner failed to raise and present to the court all grounds for relief in his KSA 60-1507 filings because he suffers from a memory condition which is on record of the mental health counseling he currently receives.

He does not have the mental ability to know what constitutes a legal research or legal issue to present to the court. He needs the assistance of untrained inmates. That even at the time of Petitioner's trial, evidence was presented showing this type of mental condition. SEE:

State v. Johnson, 223 Kan 237. In addition to all of the above herein, as it relates to Petitioner's mental disability, he has had to rely upon untrained at-law inmates to assist him in preparing and filing his previous KSA 60-1507 motions as well as other motions in the court.

To Sum it all up, Petitioner at the time of said

Filing of All of his current KSA. 60-1507 motion

is and continues to be mentally unable of

Pursuing his own claims because of his mental

capacity. in which very well toll the 1 year time

Limitation and excuse, the second or Successiness

Under KSA 60-1507.

CONCLUSION

Wherefore, Petitioner Prays that the Court Enter an order to Based ABOVE arguments And order to Based ABOVE Arguments and authorities, this matter Should Be remanded to the District Court of Appeals to determine the merits of said motion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Noble LeRoy Johnson #8506
PRO SE

Date: 11-1-2021

Jenny Braun
JENNY BRAUN
Notary Public - State of Kansas
My Appt. Expires 12-5-2022