NO. 22-6346

SUPREME COURT OF THE UNITED STATES

ORIGINAL

ROBERT D. JOHNSON PETITIONER ,	)	
VS.	)	
WARDEN DOUGLAS FENDER RESPONDENT.	)	PETITION FOR WRIT OF CERTIORARI ,

PETITION FOR WRIT OF CERTIORARI

Petitioner

Robert D. Johnson

LAECI

P.O BOX 8000

CONNEAUT, OH 44030

Respondent attorney

Ohio attorney general

Jerri L. Fosnaught

150 east gay street

Columbus, oh 43215

QUESTION(S) PRESENTED

IS IT NOT ERRONEUOSLY FACTUAL AND A MISAPPLICATION OF LAW, RULE OR STATUE FOR THE STATE COURTS AND DISTRICT COURTS TO CONCUR WITH A CONTINUANCE THAT WAS NOT MADE APART OF THE STATE COURT RECORD?? IS IT STATUTORILY SOUND? IS THIS NOT A DIRECT RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL NOT TO HAVE RAISED THIS CLAIM ON APPEAL PURSUANT TO THE 6 AND 14 AMENDMENT? DOES NOT THE SPEEDT TRIAL CLOCK RESUME IN ITS RUNNING AFTER A NEW EVENT OR COURT DATE IS ESTABLISHED?

IS IT SUFFICIENTLY SOUND TO CONCUR WITH AN INACCURATE FACTUAL FINDING OF GUILT THAT WAS NOT ACHIEVED PERTAINING TO EACH AND EVERY ELEMENT OF THEE OFFENSE CHARGED BY LAW? IS A CITIZEN NOT ACTUALLY INNOCENT, IF FOUND NOT GULITY? DOES NOT INSUFFICENCY OF EVIDENCE LEAD TO ACTUAL INNOCENCE? UNDER THIS CLAIM AM I NOT ENTITLED TO EQUAL PROTECTION PURSUANT TO THE 14 AMENDMENT?

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:

WARDEN, Douglas Fender
LAECI
501 Thompson rd
Conneaut Oh 44030

Respondent Cattorney
Ohio Attorney General
Jerri L. Fosnaught
150 East Gay st
Columbus Oh 43215

RELATED CASES

N/A

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TABLE OF AUTHORITIES

State v. Mockbee, 2015-Ohio-3469Court of Appeals of Ohio, Fourth Appellate District,

Scioto County August 18, 2015, Date of Journalization Case No. 14CA3601.

United States v. Bailey, 553 F.3d 940

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UNITED STATES v. FIGUERA, 666 F.2d 1375*Jackson v. Virginia*, 443 U.S. at 319

McDaniel v. Brown, 130 S. Ct. 665, 673, 175 L. Ed. 2d 582 (2010)

State v Geraldo (1983) 13 O. App. 3d, 27*Woodby v. INS*, 385 U.S. 276, 282, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966))

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989)

State v. Reed, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456"

Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

State v Mincy (1982) 2 O.S. 3d, 6.

State v Benson (1985) 29 O. App. 3d, 321.

State v Clements Court of Appeals for Clairmont County, Case No. 91C8090-04-033 (12/24/90

State v. Allen, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638

State v. Johnson, 2018-Ohio-3999

State v. Johnson, 2019-Ohio-3178 Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County August 6, 2019, Released; August 6, 2019, Journalized No. 106532,

Bluffton v. Cathcart, 1992 Ohio App. LEXIS 6341 Court of Appeals of Ohio, Third Appellate District, Hancock County December 10, 1992.

State v. Hawkins, 2011-Ohio-6197 court of Appeals of Ohio, Ninth Appellate District, Wayne County0 December 5, 2011, Decided C.A. No. 11CA0007

Johnson v. Fender, 2022 U.S. App. LEXIS 20777

United States Court of Appeals for the Sixth Circuit July 27, 2022, Filed No. 22-3049

State v. Johnson, 2018-Ohio-3999

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga CountySeptember 27, 2018, Released; September 27, 2018, JournalizedNo. 106532

Opinion

I. Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County
September 27, 2018, Released; September 27, 2018, Journalized
No. 106532

State v. Johnson, 2018-Ohio-3999

Judgment affirmed.
It is ordered that appellee recover of appellant costs herein taxed.
The court finds there were reasonable grounds for this appeal.
It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
LARRY A. JONES, SR., JUDGE
EILEEN A. GALLAGHER, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

II. Supreme Court of Ohio
January 23, 2019, Decided
2018-1609.

State v. Johnson, 2019 Ohio LEXIS 102

State v. Johnson.

Notice:

DECISION WITHOUT PUBLISHED OPINION

III. State v. Johnson, 2019-Ohio-3178
Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County
August 6, 2019, Released; August 6, 2019, Journalized
No. 106532

Accordingly, the court denies the application to reopen.
LARRY A. JONES, SR., JUDGE
EILEEN A. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

IV. State v. Johnson, 2019 Ohio LEXIS 2354

Supreme Court of Ohio
November 12, 2019, Decided
2019-1255.

State v. Johnson.

Notice:
DECISION WITHOUT PUBLISHED OPINION

V. Johnson v. Fender, 2021 U.S. Dist. LEXIS 72589

United States District Court for the Northern District of Ohio, Eastern Division
April 14, 2021, Decided; April 15, 2021, Filed
CASE NO. 1:20 CV 18

CONCLUSION

The Motion to Expand the Record is granted in part and denied in part. Specifically, the motion to expand is GRANTED with respect to the portions of the trial transcripts from the state court proceedings, and DENIED with respect to the Uber records, Johnson's affidavit, and the police report, which are not part of the state court record and do not constitute new, reliable evidence sufficient to support a gateway claim of actual innocence. By no later than Friday, May 14, 2021, Respondent is hereby ordered to supplement the state court record with the trial transcript of *Ohio v. Johnson*, Cuyahoga County Common Pleas Court case no. CR-17-614774.
IT IS SO ORDERED.
/s/ Jonathan D. Greenberg
Jonathan D. Greenberg
United States Magistrate Judge
Date: April 14, 2021

VI. Johnson v. Fender, 2021 U.S. Dist. LEXIS 244841

United States District Court for the Northern District of Ohio, Eastern Division
November 29, 2021, Decided; November 29, 2021, Filed
CASE NO. 1:20-CV-00018-DAP

VI. Conclusion

For all the reasons set forth above, it is recommended that the Petition be DISMISSED IN PART AND DENIED IN PART.
Date: November 29, 2021
/s/ Jonathan Greenberg
Jonathan D. Greenberg
United States Magistrate Judge

VII. Johnson v. Fender, 2021 U.S. Dist. LEXIS 244260

United States District Court for the Northern District of Ohio, Eastern Division
December 22, 2021, Decided; December 22, 2021, Filed
Case No. 1:20-cv-00018

CONCLUSION

The Court has reviewed the R & R and carefully considered Johnson's objections. For the reasons stated above, Johnson's objections (ECF Doc. 21) are **OVERULED**, and Magistrate Judge Greenberg's Report and Recommendation (ECF Doc. 19) is **ADOPTED IN FULL**. Additionally, Johnsons' request for a Certificate of Appealability is **DENIED**. Accordingly, the Petition (ECF Doc. 1) is **DENIED IN PART** and **DISMISSED IN PART**. Specifically, Grounds One and Two are **DENIED** on the merits, and Grounds Three and Four are **DISMISSED**.
IT IS SO ORDERED.
/s/ Dan Aaron Polster December 22, 2021
Dan Aaron Polster
Unites States Court Judge

JUDGMENT ENTRY
For the reasons stated in the Opinion and Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby **ORDERED, ADJUDGED AND DECREED** that the above-captioned case is hereby terminated and dismissed as final.

Furthermore, pursuant to 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b), there is no basis upon which to issue a certificate of appealability. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal from this decision could not be taken in good faith.
IT IS SO ORDERED.
/s/ Dan Aaron Polster December 22, 2021
Dan Aaron Polster
Unites States Court Judge

VIII. Johnson v. Fender, 2022 U.S. App. LEXIS 20777

United States Court of Appeals for the Sixth Circuit
July 27, 2022, Filed
No. 22-3049

For these reasons, Johnson's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

Jurisdiction

In 2017, an Ohio jury convicted Johnson of attempted rape, aggravated burglary, burglary, abduction, assault, and criminal damaging or endangering. Johnson had been fighting with his pregnant ex-girlfriend over the course of two days when he ultimately broke into her home, ripped off her dress, took off his own clothes, put his hands around her neck, ripped out her hair extensions, and tried to rape her. One of the victim's children called the police, and the victim was able to push Johnson out of the house, where police found and arrested him. *See State v. Johnson*, 2018- Ohio 3999, 121 N.E.3d 776, 778-79 (Ohio Ct. App. 2018), *perm. app. denied*, 154 Ohio St. 3d 1482, 2019-Ohio-173, 114 N.E.3d 1208 (2019). The trial court sentenced him to twelve years of imprisonment: eight years on the attempted-rape conviction, which merged with the abduction conviction for sentencing purposes; a consecutive term of four years on the aggravated-burglary conviction, which merged with the burglary conviction; and concurrent terms of 180 days on the criminal-damaging-or-endangering and assault convictions. His direct appeal did not succeed. *Id.* at 778. Neither did his application to reopen his appeal under Ohio Appellate Rule 26(B). *State v. Johnson*, No. 106532, 2019-Ohio-3178, 2019 WL 3764605 (Ohio Ct. App. Aug. 6, 2019), *perm. app. denied*, 157 Ohio St. 3d 1485, 2019-Ohio-4600, 134 N.E.3d 205 (2019).

Johnson then filed this § 2254 petition, asserting four claims: his appellate attorney was ineffective for failing to raise (1) a speedy-trial argument and (2) a claim that there was insufficient evidence to support his attempted-rape conviction, and the trial court erred by (3) failing to merge his attempted-rape and aggravated-burglary convictions and (4) imposing the maximum sentence for his attempted-rape conviction. A magistrate judge recommended denying claims one and two on the merits and three and four as procedurally defaulted and noncognizable. *Johnson v. Fender*, No. 1:20-CV-00018-DAP, 2021 U.S. Dist. LEXIS 244841,

2021 WL 6503757 (N.D. Ohio Nov. 29, 2021). The district court adopted that recommendation over Johnson's objections, denied the petition, and declined to issue a COA. *Johnson v. Fender*, No. 1:20-CV-00018, 2021 U.S. Dist. LEXIS 244260, 2021 WL 6061273 (N.D. Ohio Dec. 22, 2021). Johnson sought a COA from the sixth circuit court of appeals on each of his claims. On July 27 2022 the sixth circuit court of appeals denied petitioners C.O.A. Petitioner now seeks a writ of certiorari.

Constitutional and statutory provisions involved

USCS Const. Amend. 14, Part 1 of 15

Sec. 1. [Citizens of the United States.] 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.

USCS Const. Amend. 6, Part 1 of 17

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 defense.

ORC Ann. 2945.71

(C) A person against whom a charge of felony is pending:

(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

ORC Ann. 2945.02

The court of common pleas shall set all criminal cases for trial for a day not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

No continuance shall be granted for any other time than it is affirmatively proved the ends of justice require.

Whenever any continuance is granted, the court shall enter on the journal the reason for the same.

Criminal cases shall be given precedence over civil matters and proceedings. The failure of the court to set such criminal cases for trial, as required by this section, does not operate as an acquittal, but upon notice of such failure or upon motion of the prosecuting attorney or a defendant, such case shall forthwith be set for trial within a reasonable time, not exceeding thirty days thereafter.

Ohio Crim. R. 29 Motion for acquittal

(C) Motion after verdict or discharge of jury If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If the evidence shows the defendant is not guilty of the degree of crime for which the defendant was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly and shall pass sentence on such verdict or finding as modified. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF CASE AND FACT

On the night of February 22, 2017, Johnson was trying to talk to his ex-girlfriend, who was carrying their baby. After going to her home, he argued through the door. When he broke a window and the outer front door, she called the police, and he fled.

In the early morning hours of February 24, 2017, he returned to his ex-girlfriend's home and broke windows using a bar and punched out the Plexiglas of the back door. When he heard screaming from the house, he fled again. He returned a short time later and this time broke down the back door. Upon entering the home, he seized his ex-girlfriend, choked her, pulled out her hair extensions, ripped off her clothes, and tried to rape her. Responding to a call from one of the ex-girlfriend's children, the police arrived at her residence and arrested Johnson. Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, August 6, 2019, Released; August 6, 2019, Journalized, No. 106532 State v. Johnson, 2019-Ohio-3178.

Reason for granting the petition

Although a petition for writ of certiorari is rarely granted it is important for this court to understand that both of petitioner claims involve a misapplication of law and plethora of erroneous factual findings. With the court's consent the compelling reason that exist is that the lower courts firmly do not have a conscience understand on how to correctly interpret law which however warrants this court's attention. It is a great national importance of having this court decide this matter because the precedence set in *Jackson v. Virginia*, 443 U.S. at 319 involving the evidence in the light most favorable to the prosecution, being *any* rational trier of fact has not been found to be always true regarding one's testimony. If the essential elements of a crime are not met it should be understood that reasonable doubt attach. Juror across this nation should be properly instructed and given a course on what that should be and what their job as a juror entails. The sixth circuit court of appeals decision in petitioner case conflicts with its self because in the **bailey** remand the court found that the evidence regarding the police report and testimony were insufficient because they were contradictory to each other. However in the 11th circuit involving **figuera** the statements regarding hi jacking of the aircraft were not considered a threat and his claim was reversed. In acting on this issue It can prevent others that may be indicted tried and convicted of this same crime or worse from going through this issue such as petitioner has. Laws and statutes are in place for a reason. It is a judges oath to abide by them and if this would have occurred before hand then petitioner would have been given relief earlier on in this process.

Not to mention petitioner's speedy trial rights were violated before he was even tried and convicted for this alledged crime.

WRIT OF CERTORARI

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.

Petitioner states to this honorable that a conflict exist between Johnson v. Fender, 2022 U.S. App. LEXIS 20777 in the 6th circuit court of appeals and in the 11th circuit court of appeals involving UNITED STATES v. FIGUERA, 666 F.2d 1375 which is a violation of petitioners 6 amendment right to due process of law and his right to 14th amendment under equal protection.

It is of imperative public importance because any member of the public could be placed in this same predicament as petitioner has been and be convicted by a threat of force and not be able to challenge the validity of the statement to protect himself from defamation or unlawful incarceration.

In theory petitioner asks why is the burden of circumstantial evidence not broader? Why are jurors or the public of today not properly instructed with indirect and direct threat?

Theoretically speaking, to justify deviation from normal appellate practice would be contrary to law because from the rules of appellate practice and procedure state regarding an attorney's performance are vital to a person liberties. State v. Mockbee, 2015-Ohio-3469Court of Appeals of Ohio, Fourth Appellate District, Scioto County August 18, 2015, Date of Journalization Case No. 14CA3601. It is required that immediate determination in this Court be addressed expeditiously because the ends of justice were not met and there has been great undue delay being that petitioner should have been discharged or given a new trial years ago for this wrongful conviction.

Jackson standard, our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. at 319, which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*; *see also McDaniel v. Brown*, 130 S. Ct. 665, 673, 175 L. Ed. 2d 582 (2010) (reaffirming this standard). *Jackson* thus establishes a two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence. First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319. This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial. *See id.* at 318-19. Rather, when "faced with a

record of historical facts that supports conflicting inferences" a reviewing court "must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326; *see also McDaniel*, 130 S. Ct. at 673-74.

Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. This second step protects against rare occasions in which "a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]" *Id.* at 317. More than a "mere modicum" of evidence is required to support a verdict. *Id.* at 320 (rejecting the rule that a conviction be affirmed if "some evidence" in the record supports the jury's finding of guilt). At this second step, however, a reviewing court may not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," *id.* at 318-19 (quoting *Woodby v. INS*, 385 U.S. 276, 282, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)) (internal quotation marks omitted), only whether "*any*" rational trier of fact could have made that finding, *id.* at 319. In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); and *State V. Reed*, 74 Ohio St.3d 534, 1996-Ohio-21, 660 N.E.2d 456.In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient.

Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689.Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what he thinks are the most promising arguments out of all possible contentions. The court noted: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638.Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

Insufficiency of evidence claim As to review question A, Petitioner wants to object to these claims raised by the sixth circuit court of appeals dealing with insufficiency of evidence. Petitioner asserts that he can overcome this hurdle and cure the phrase of actual innocence meaning factual innocence not mere legal insufficiency. Reasonable jurist can debate the district court of appeals and appellate court's decision as to claims of insufficiency because the basis of an actual innocence claim does not just have to stand on new evidence only. Calderon. V Thompson,523 u.s 538 . Petitioner states that the misapplication of rule and law should suffice dealing with an erroneous decision. Petitioner states that the jury was not reasonable and lost its way. Plainly speaking it is a fact that a miscarriage of justice occurred when petitioner motion for rule 29 was not granted. State v. Hawkins, 2011-Ohio-6197 ourt of Appeals of Ohio, Ninth Appellate District, Wayne County0 December 5, 2011, Decided C.A. No. 11CA0007

Criminal rule 29 (c) states: Ohio Crim. R. 29 Motion for acquittal

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen-day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If the evidence shows the defendant is not guilty of the degree of crime for which the defendant was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly and shall pass sentence on such verdict or finding as modified. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Petitioner should have been acquitted of this charge according to this rule because every element of the offense was not met like in Bailey. In United States v. Bailey, 553 F.3d 940 the standard explains this rule:

In evaluating defendant's insufficient-evidence claim, the prior panel opinion relied heavily on a witness's written and oral statements made at the scene of the arrest stating that she had seen defendant place the gun under his seat in the car. These statements constituted one of four key components of evidence in support of defendant's conviction under § 924(c)(1)(A)(i) and the only evidence in support of defendant's conviction under § 922(g)(1). On rehearing, the appellate court found that the prior opinion's reliance on anything the witness said or wrote at the scene of the arrest was mistaken. Once the court removed these statements from

the body of evidence that it could consider, there remained insufficient evidence to convict defendant under either §§ 924(c)(1)(A)(i) or 922(g)(1). There was no evidence to establish that defendant had direct physical control over the firearm. The mere fact that defendant was driving the car in which the police found the firearm was not enough to establish dominion over the premises and thereby dominion and control over the firearm.

Petitioner argues that the focus here should be about testimony not being credible and contradictory like in bailey. In United States v. Bailey, 553 F.3d 940 United States Court of Appeals for the Sixth Circuit September 18, 2007, Argued; January 20, 2009, Decided; January 20, 2009, Filed.

In this instant case there was no lesser included offense offered in the jury instructions and the indirect and direct threat threshold was not achieved to find petitioner guilty of the offense charged that being attempted rape. Petitioner states there was no d.n.a in his case so the only way to suggest actual innocence in a threat of force case would be testimony not material. Specifically, here we are talking about "words" and words that were not spoken until after the alleged incident occurred.

Petition states that he is arguing the same exact thing as in bailey because if the court was to remove the contradictory testimony from the body of evidence there would remain insufficient evidence to convict him.

Furthermore addressing the conflict that exist between petitioner case and the 11th circuit court of appeals case UNITED STATES v. FIGUERA, 666 F.2d 1375. Defendant was convicted of attempted aircraft piracy in violation of 49 U.S.C.S. § 1472(i)(1) based on a threatening note he gave to the captain of a commercial airplane requesting that he be taken to Cuba. Defendant was arrested without any resistance or a weapon when the plane landed to re-fuel. The court left the jury's verdict on the insanity issue undisturbed because it was free to accept or reject the testimony of either defendant's or the government's expert. The court reversed the conviction, finding that the government's evidence did not prove that defendant used force or violence in the attempted hijack as charged by the grand jury indictment. The court found that the government's proof of "threats and intimidation" constituted constructive amendment of the indictment, rather than a simple variance, causing defendant per se prejudice to his right to be tried only on charges in the grand jury indictment. The court remanded the case with directions to enter a judgment of conviction of the lesser-included offense of interference with flight crew members or flight attendants in violation of 49 U.S.C.S. § 1472(j) and for resentencing.

The Facts The case arose from events which transpired on September 14, 1980 when Figueroa was aboard Eastern Airlines Flight 115 travelling from Tampa to Miami. About fifteen minutes prior to landing Figueroa handed the flight attendant a note and asked that she give it to the captain. The note in unedited form was as follows:

This is a request to take me to Cuba ... Now! This aircraft is in no danger. But don't take any chances. The life of many people is in your hands. A powerful explosive device is set to go-off on pre-set time in a public location in Tampa. Many innocent people are going to die-Any

loss of life as a result of your haste and negligence and this airline management will be your responsibility. Copy of this note is in the mail to all major T-V networks news media, relatives and Friends-They will know what happen in the ground and, who can help at the time Once in Cuba-Not Before. I will tell you exact location and how to disarm safely the device. Time is essential. THANKS-

Carlos The attendant took the note to the cockpit where it was read to the captain. Another Eastern pilot, Captain Laurie Hosford, was "dead heading" on the flight and occupied the observer's seat. Hosford went back to the cabin and told Figueroa that they did not have enough fuel to go to Cuba and that they would stop in Miami for fuel. Figueroa did not object. Hosford returned to the cockpit but shortly came back and sat by Figueroa for the remainder of the flight. He asked Figueroa why he was doing this, telling him that he could find another way to go to Cuba. Figueroa said he had lost everything and was totally broke. A passenger said something about people on the airline being in danger and he said that was the way things had to be. He apologized three or four times, however, for causing inconvenience. When the plane landed at Miami Figueroa was arrested by the Dade County Police. Figueroa was described as being between five feet five inches and five feet seven inches tall and weighing 135-145 pounds. When arrested he offered no resistance whatever. He was carrying no weapon.

Petitioner asserts that in his statement of threat of force, he was tried and convicted. The factual inaccuracy occurred when the direct and indirect threat were not established because no harm was suggested in the actual statement and also officer Mathis testimony about hearing petitioner make this statement was after the alleged incident actually occurred not before. The officer actually encountered petitioner in the hallway after petitioner had already entered. Petitioner never entered again.

In State v. Johnson, 2018-Ohio-3999 the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County stated that the statement had to be made prior to petitioner entering the home. B.B. testified that on February 22, 2017, Johnson came to her house and attempted to gain access to her house by breaking in the outer front door and a window after arguing with her about the "baby situation." B.B. testified that Johnson broke into the outer front door with his body weight: "He was pushing, you know, trying to open the door, ramming with his like shoulder and body weight, and he physically got in one of the doors and was trying the second one." Thus, while there may have been sufficient evidence of burglary (Johnson was convicted of burglary pursuant to R.C. 2911.12(A)(1)), there was no evidence that Johnson trespassed at that time to commit attempted rape and/or assault; therefore, we find that an aggravated burglary did not occur at that time. The second instance occurred on February 24, 2017, when Johnson came to the house around 3:30 or 4:00 a.m. According to B.B.'s testimony, Johnson told her he was mad that B.B. was ignoring him, that if she did not let him in he would break the windows, and that if he could not come in then she could not live there. At this point, Johnson began

breaking windows around the house with his pull-up bar and pushed out the Plexiglas window of the outer back door. He left via Uber after B.B.'s kids woke up and started screaming. After a thorough review of the record, we conclude that it is unknown at this point why Johnson wanted to gain access to B.B.'s home — he had not yet stated he wanted to have sex with her or threatened to harm her.

Therefore, we must conclude that the aggravated burglary had not yet occurred. The third instance occurred when Johnson returned while B.B. was consoling her children in the kitchen. According to B.B., **Johnson told her he went to the store, and "he had thought about it, I needed to give him some [sex] so he could go to work, and he would leave me alone."** Thus, it was at this point, during Johnson's trip to the store, that he created the animus to have sex with B.B.

However, the contradiction of testimony occurred in trial when X.B stated that petitioner did not say a word to his mother prior to entering the home X.B stated:

transcript page 481 line 1-2

Q. and was he conversing with your mother?

A. no.

This is the reason petitioner asserts that the element of threat of force was not **met**

Because in the jury instructions it states that to be found guilty of the threat of force element the defendant must be guilty of direct and indirect threat.

Petitioner states for him to have been found guilty X.B would have had to testify and say that he actual **heard** petitioner make these statement to B.B prior to returning from the store and he did not.

Petitioner states that if mere legal insufficiency is not enough to overturn a verdict of guilt. Then what is?

How is it that if a jury finds a person guilty of as crime and a judge can then after a motion for a rule 29 is filed overturn the same conviction in its finding, Is it not still mere legal insufficiency? Can a judge or jury not lose its way? Can A judge or jury not err or error?

It's clear the state court judge's ruling in this case was contrary to the finding in the jury instructions. How does that not amount up to a constitutional violation of ineffective assistance? If a person is found to be innocent by a judge or jury after going to trial, are they not actually innocent under law? This is not about moral or values; this is about law is it not?

Simple put a misapplication of law and rule occurred when the rule 29 was not granted by the lower court. Petitioner ask this court to set his case as precedence and overturn this conviction.

Lastly petitioner would like to state for the record that the alleged victim in this case was nonchalant about seeking medical attention **B.B** stated:

Were you offered an ambulance?

a.yes

Were you offered medical care?

A.yes.

Q. and did you avail yourself of that offer?

. yes. well I declined I had a lot going on and that was the last of my worries at the time. Petitioner asks that the court remand this issue with instruction to dismiss this charge and resentence petitioner under the remaining counts.

In petitioners **second** argument it is mentioned that a 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:

(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;

Petitioner states to this honorable that a conflict exist between his case state v. Johnson, 2019-Ohio-3178 Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County August 6, 2019, Released; August 6, 2019, Journalized No. 106532 and Bluffton v. Cath cart, 1992 Ohio App. LEXIS 6341 Court of Appeals of Ohio, Third Appellate District, Hancock County December 10, 1992, Entered CASE NO. 5-92-25 Which is a violation of Petitioner 6 and 14th

amendment rights under ineffective assistance of counsel.

Speedy trial claim

As to review question (B) under Strickland was it not objectively unreasonable and ineffective for counsel not have to raised a violation of speedy trial and for the district court to agree? Petitioner spent 7 months in lieu of bail and was not brought to trial until then. Even the eighth district court of appeals said in its own words that it may appear that more than 90 days had elapsed. The only logical reason for them to say this is because it did. The purposeful miscalculation was done as an error not an err! The district court of appeals did not address petitioner's calculation or go into the merits of the claim or even question the lower court as to why they didn't credit those specific days that were not mention. The actual record was devoid of a correctly stated journalize entry relating to a continuance against petitioner. On June 15,2017 where petitioner was not brought to trial at all, no journal entry was entered on the record. The lower court still tolled 44 days against petitioner and virtually violated his statutory right to speedy trial. Not to exclude the fact that the triple count provision was not applied to petitioner speedy trial calculation but the state said that is was however the record does not

reflect this assertion. The issue relevant here is on June 6,2017 petitioner attended a hearing on a motion he filed to disqualify counsel. At the end of that court date petitioner decided to keep his attorney. The court then journalized that trial was scheduled for June 15,2017, however, the continuance was not stated at defendant request. On June 15 2017 the court did not journalize on the record or bring defendant to trial.

Petitioner will now submit his calculation and a question to this court in hopes that this court correctly reviews petitioner statutory speedy trial claim.

Petitioner is only bound by continuances that are occasioned by a reason pursuant to O.R.C 2945.02. With the aforementioned in mind both parties agree with the calculation from Feb. 24,2017 to march 15,2017 and then from April 5,2017 to May 8,2017 awarding Petitioner 50 days. It is also agreed that the next calculation which was from May 12,2017 to May 16,2017 adding 4 more days for a total of 54 days. However, that is were both sides begin to disagree. The court charged a continuance against Petitioner because the court was engaged in trial. Assuming that this is correct and going from May 16,2017 to June 6,2017 when Petitioner filed a motion to disqualify his counsel and had a hearing on that day the speedy trial clock should tolled at that moment still leaving petitioner at 54 days credit. The next event was on may 24,2017 were petitioner had a pretrial, strangely enough the opinion in the appeal court did not mention this event. The speedy trial clock supposedly should have tolled then. At this point going from may 24,2017 to june 6,2017 you would add another 12 days to the count because there was not a continuance charge against defendant bringing the total to 66 days. Now from the hearing to disqualify counsel which was June 6,2017 a continuance was not charged against either side however a trial date was scheduled for June 15,2017 where Petitioner was not

brought to trial as stated by the court. With that being said you would count from June 6,2017 to July 5,2017 because the record does not reflect a request to continue from Petitioner bringing the count now to 95 days. From July 5,2017 when there was a continuance made by Johnson the clock was tolled. The next event would be July 25 ,2017 were there was another continuance, made tolling the count all the wat to July 31,2017. At that point a pretrial was held on July 31,2017 and another continuance was made tolling the clock to august 15,2017. The next event would be august 15, 2017.From august 15, 2017 to September 19,2017 which was the day trial began, another 35 days would be added to the count, bring the total to 130 days. Now assuming that Johnson gave new counsel reasonable time to prepare for trial which would be 30 days, we would start from July 25, 2017 when new counsel was appointed and the count was at 95 days.30 days from that would be august 24, 2017.From august 24,2017 to September 19 2017 would be 26 days bringing the total count to 121 days all which are subject to three for one pursuant to 2945.71(e) all in lieu of bail now bringing the count to 363 days. petitioner's right to speedy was violated.

Now relating to the question at hand, on the day of June 6,2017 ,9 days before trial the prosecutor said in his own words:

****Mr.McNair**:I don't remember all the other issues but I don't want anyone to think that the lack of motion or docket activity has in any way indicated a lack of work on the part of his attorney. She has and I mean this in the nicest possible way, has been giving me a constant hole in the head about this case. So I don't want anyone to have the impression that she is not actively working it and thoroughly familiar with all the facts and evidence we intend to produce at trial***state v Johnson, Cuyahoga county common pleas court case number cr-17-614774, june 6 2017, hearing –Transcript-page 42, lines 3-13.

Docket history

(See Appendix (f)

The actual docket states:06/06/2017 06/08/2017 N/A JE

Defendant in court. Counsel Deanna Robertson present. Prosecutor(s)Eben Mc Nair present. Court reporter present. Pretrial held 06/06/2017.trial remains set for 06/15/2017 at 8:30 am. backup trial date of 07/05/2017.06/06/2017 cplrb 06/08/2017 14:57:28. In state v. Johnson, 2019-Ohio-3178 Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County August 6, 2019, Released; August 6, 2019, Journalized No. 106532

The court of appeals noted in their opinion that:

There is no entry for May 12, 2017, the scheduled trial date. The next docket entry, dated May 16, 2017, states the previously scheduled trial was rescheduled to June 15, 2017, at

defendant's request. Thus, four more days counted toward the speedy-trial time for a total of 54. While awaiting trial, Johnson filed a pro se motion to disqualify his attorney on May 22, 2017. At a pretrial on June 6,2017, the judge conducted a hearing on the motion to remove counsel, and Johnson agreed to keep his attorney. The trial judge, the prosecutor, and defense counsel then agreed to a back-up trial date of July 5, 2017. (Tr. 40-41.) Thus, the record shows that the speedy-trial time was tolled until July 5, 2017.

Now correctly speaking on May 16,2017 the court was engaged in trial with another defendant not petitioner. Is this even legal?

The docket states: 05/16/2017 05/18/2017 N/A JE
Defendant in court. Counsel Deanna Robertson present.Prosecutor(s) Eben McNair
Present. Court reporter Suzanne vadal present.Trial previously scheduled is rescheduled
For 06/15/2017 at 8:30am at the request of defendant.reason for continuance :court
Engaged in trial.(Cr-613257.05/16/2017 cplrb 05/18/2017 10:35:48

However even if the court construed that this continuance is binding it would have only tolled until the next event which would have been on May 24.2017 where petitioner had a pretrial as scheduled. The docket entry states:05/24/2017 05/24/2017 N/A JE Pretrial set for 06/06/2017 at 9:00am. Trial remains set for 06/15/2017 at 8:30.05/24/2017 cplrb 05/24/2017 12:17:40

This entry should have tolled the speedy trial clock. and although the record did not mention this event in State v. Johnson, 2019-Ohio-3178, it should be understood that at the end

of that event a continuance was not filed against either side See; Bluffton v. Cathcart, 1992 Ohio App. LEXIS 6341 headnote 4, supra. With that being said by a continuance not being filed against either side the speedy trial clock continued to run up until June 6,2017, because that is when the next event occurred. And on June 6,2017 the speedy trial clock was again tolled. But once again at the end of that event a continuance again was not filed against either side. As explained in Bluffton v. Cathcart, 1992 Ohio App. LEXIS 6341 headnote 4 its states that when this type of situation occurs the continuance is charged against the state and not the defendant and that is controlling.in Carthar. In the overview concerning Bluffton v. Cathcart, 1992 Ohio App. LEXIS 6341 Court of Appeals of Ohio, Third Appellate District, Hancock County December 10, 1992, Entered CASE NO. 5-92-25 The prosecution argued that the trial court erred in sustaining the motion to dismiss the charges for an alleged failure to bring defendant to trial pursuant to Ohio Revised Code Ann. § 2945.71 because the time had been extended pursuant to § 2945.72. The court adopted in toto and incorporated by reference the trial court's decision, which held that the trial court's journal entry failed to set forth the basis for the last granted continuance, failed to identify the party to whom the continuance was charged, and did not set forth the basis for the continuance as required by § 2945.72. The journal entry was deficient as a matter of law and such time had to be charged against the prosecution, which resulted in more than 90 days having elapsed since defendant was arrested. **Outcome** The court affirmed the trial court's decision.

Also in *State v Geraldo* (1983) 13 O. App. 3d, 27, the Court of Appeals for Lucas County found that a journal entry continuing a case must identify the party to whom the continuance is

chargeable, and must indicate briefly the underlying reasons necessitating the continuance. The time elapsed during the period of any continuance not properly recorded will be charged against the State for the purpose of computing time pursuant Revised Code § 2945.71 - .73. See *State v Mincy* (1982) 2 O.S. 3d, 6. See also *State v Benson* (1985) 29 O. App. 3d, 321. In *State v Clements* Court of Appeals for Clairmont County, Case No. 91C8090-04-033 (12/24/90, the Court of Appeals held that when granting a continuance, Ohio Revised Code § 2945.02 provides that the Court shall enter on the journal the reasons for the continuance. It is clear in this case that a journal entry was provided and signed by the Court. However, this entry fails to set forth the basis for the continuance fails to identify the party to whom the matter is charged, and does not set forth the basis for the continuance as required by Revised Code § 2945.72.

Petitioner states that this case is controlling and that his speedy trial rights were violated. Petitioner concedes that his constitutional speedy trial rights were not violated but does want to employ the fact that his claim was federalized for review under ineffective assistance of counsel

under statutory law. Petitioner asks this court to dismiss the entire indictment and discharge him completely.

Petitioner wishes to concede to the states argument regarding procedural Barr involving petitioners Maximum sentence and Merger claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: DEC 12, 2022

Notorized statement and declaration

I Robert D. Johnson declare that this writ of certiorari was deposited in the institutional mail system on Dec 12, 2022 before the last day for filing which is Dec.20,2022.This was done in compliance with 28 U.S.C. § 1746,to be hand delivered by the United States postal service first class and has been prepaid by petitioner.

Damian Padilla 12/12/2022
Notary signature
and date

DAMIAN PADILLA
NOTARY PUBLIC, STATE OF OHIO

Damian Padilla
NOTARY PUBLIC
STATE OF OHIO
My Commission Expires
2/2/2027

Robert D. Johnson Dec 12, 2022
Petitioners signature
and date