22-6399

IN THE SUPREME COURT OF THE UNITED STATES

Kerry Drake Simpson – PETITIONER

VS.

Warden Tom Watson – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kerry Simpson #727041

PO Box 1812

Marion OH 43301

QUESTIONS PRESENTED

1. **Did the Federal Appellate Court Apply the Correct Standard in the Determination of Prejudice?**

2. **Manifest Weight of the Evidence.**

3. **Can a "Jurist of Reason" Ignore DNA Evidence?**

LIST OF PARTIES

[X] 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 the court whose judgment is the subject of this petition is as follows:

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Schlup v. Delo, 513 U.S. 298 (1995)

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Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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Ohio Rev. Code § 2907.02(A)(2)

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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

[X] 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 *Simpson v. Watson*, 2022 U.S. App. LEXIS 23521; 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[] is unpublished.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 Simpson v. Turner, 2022 U.S. Dist. LEXIS 15328; or,

[] has been designated for publication but it 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[] is unpublished.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. Simpson*, 2018-Ohio-328; or,

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

[] is unpublished.

The opinion of the court appears at Appendix D to the petition and is:

[] reported at _____; 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[] is unpublished.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 August 22, 2022.

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

[X] For cases from state courts:

The date on which the highest state court to review the merits decided my case was January 26, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment 4 Unreasonable searches and seizures.

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.

U.S. Constitution Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution Amendment 14 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.

STATEMENT OF THE CASE

At trial J.W., the victim, testified as follows. In 2005, she was fifteen years old when she met appellant, whom J.W. knew was 40 years old, through S.S., an elementary school friend. At that time, J.W. was addicted to crack cocaine, and appellant initially supplied her and S.S. with crack cocaine for free. Later that year, she moved in with appellant without her mother's knowledge. Afterward, she did not feel free to leave because she wanted the drugs and was terrified of appellant. He would not allow her to leave the apartment without supervision.

She recalled once when appellant became very angry at her and yanked her hair because she had used a neighbor's phone to report that S.S. had overdosed on drugs. Appellant took her away while the police responded to the call because he was afraid he would get in trouble. S.S. confirmed that she had once overdosed on drugs.

J.W. testified that appellant forced J.W. and S.S. to prostitute themselves at his apartment or on "dates" he arranged. J.W. and S.S. were forced to give appellant the money they were paid and he supplied them with crack cocaine. J.W. recalled numerous times when she refused to comply with appellant's demands or had not returned home soon enough after an encounter and he had hit her with his hands, a bat, or a belt. She also saw him hit S.S. once and other women at the apartment numerous times. Appellant would also force J.W. to hit S.S.

S.S., who was serving time for complicity to commit aggravated robbery and murder, also testified at trial and confirmed J.W.'s testimony. S.S. admitted she had been a 13-year-old runaway and met appellant when she purchased drugs from him. She introduced J.W. to appellant, who supplied them with crack cocaine and later forced them to prostitute themselves and give him the money in order to get drugs. S.S. further testified that while appellant would arrange sexual encounters or send S.S. out to find her own encounters, he never let J.W. leave the apartment alone. He also made S.S. have sex with drug dealers four or five times in order to obtain crack cocaine. S.S. complied with appellant's demands because she wanted a place to live and access to the drugs. S.S. testified appellant forced her to have sex a few times and she saw him having sex with J.W. who appeared uncomfortable. S.S. was afraid of appellant because she had seen him become violent and hit J.W. with his hand and a belt. He also manipulated them

into hitting each other to destroy their friendship. S.S. also saw J.W.'s mother at the apartment using drugs with J.W. and appellant.

N.S., who had a prior conviction for making a false statement relating to her drug use in 2005, testified that she used crack cocaine at appellant's house in 2005 and sometimes slept there. She confirmed J.W. lived at the apartment and usually hid in the bedroom. N.S. saw J.W. use crack cocaine at the apartment and saw J.W. leave the house four or five times and return with money she gave appellant. N.S. also saw appellant implicitly threaten J.W. and other girls by wearing a belt around his neck and giving them a look. She saw one girl who had been beaten, but did not know who had beat her.

J.W. admitted that she had consensual sex with appellant but sometimes had complied to avoid being hit or because he forced her. She recalled the turning point event that led to her escape from appellant. On the evening of September 9, 2005, appellant became angry and beat her repeatedly with a bat because he thought she had not properly responded to his friend. She recalled deciding that night that she had to get away from him. The next morning, appellant wanted J.W. to have sex with him and when she objected, he told her that she would do whatever he told her to do. He forced to have vaginal and anal sex with him, causing her pain and injury and to become hysterical. Afterward, he sent her out with a man who also wanted to have anal sex. She jumped out of the car and ran to her grandmother's home before going to a hospital, where she stayed until being discharged the following day.

J.W.'s medical records were introduced into evidence. An analysis of the rape kit was analyzed by the Bureau of Criminal Investigations ("BCI"). The BCI found DNA from a vaginal swab that indicated a match to appellant's DNA at a ratio of 1:536,800 people. While the DNA taken from a fabric sample and an anal swab indicated the presence of a male's DNA, there was insufficient genetic material to identify or exclude a particular source. Photographs of J.W.'s bruising were also admitted, which J.W. testified were caused by being hit with the bat. The records also documented numerous vaginal and anal tears. The assault history completed at the hospital indicated that the assault had occurred at 5:30 p.m. on September 10, 2005, but the report was prepared at 2330 hours on September 10, 2005. An officer who was called to

investigate the matter testified that she took J.W.'s statement that day and took possession of the rape kit, which was secured in the policy department's property room.

J.W. testified she did not return to appellant after these events, but she would not cooperate with the prosecution of appellant at that time because she was afraid of him. She asserted she returned home to live with her mother who had met appellant once. Appellant had previously threatened to kill her family if she did not return from her prostitution calls. J.W. also testified she never spoke to S.S. again and saw appellant once four years later. S.S. also testified that she saw J.W. several times after S.S. recovered from overdosing and met appellant through J.W. a few times and hung out with appellant at a club once. S.S. did not clarify the time period when these meetings occurred.

The Toledo police detective began his investigation of the case in early 2015 with an untested rape kit obtained from J.W. in 2005. He spoke with the victim and other witnesses. J.W. testified that she finally agreed to cooperate with the prosecution in 2015 to prevent another girl from being harmed by appellant. The detective identified appellant as the suspect and found him in Mississippi. After appellant was brought back to Toledo, the detective interviewed appellant and obtained DNA evidence from him. He denied the rape accusation, but admitted only to having had vaginal sex with J.W., without knowledge of her age. Initially, he denied prostitution was occurring out of his apartment, but he later admitted J.W. and the other women were prostitutes who paid their own way.

REASONS FOR GRANTING THE PETITION

1. Did the Federal Appellate Court Apply the Correct Standard in the Determination of Prejudice?

In denying petitioner's request for a COA, the Federal Appellate court wrote the following:

> In his claim of ineffective assistance of appellate counsel, Simpson argues that counsel should have relied on the BCI report to support his manifest-weight challenge to the rape conviction
>
> Jurists of reason would agree that, because sufficient evidence supported Simpson's rape conviction, he did not suffer prejudice from appellate counsel's failure to rely on the BCI report. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ...
>
> A conviction is supported by sufficient evidence if "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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The Federal Appellate Court cites *Strickland v. Washington* (*supra*) to justify its decision to deny petitioner a COA, claiming that because "sufficient evidence" supported the rape conviction, no prejudice was suffered. But the Strickland Standard does not rely upon "sufficiency" of the evidence, so the court has applied the wrong standard. In *Strickland*, the Supreme Court ruled that in order to meet the prejudice prong of the two-pronged standard, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

The Supreme Court, in *Strickland*, did not cite *Jackson v. Virginia* at all, so the Federal Appellate Court is conflating two independent rulings.

When the Supreme Court finds that a Court of Appeals has applied the wrong standard, it vacates the appellate court's decision. See, *Schlup v. Delo*, 513 U.S. 298 (1995), *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 2014.

The court has applied the wrong standard. This petitioner requests a rehearing to have his claims re-evaluated using the proper standard because there is a reasonable probability that the

result of his appeal would have been different if appellate counsel had used the BCI report to support his manifest weight of the evidence challenge.

Furthermore, petitioner made a manifest weight of the evidence claim which the court converted to a "sufficiency of the evidence claim." The two are not the same. This petitioner has not had the manifest weight of the evidence claim addressed. A rehearing is required to properly adjudicate this claim.

U.S. Supreme Court Rule 10 (c). Considerations Governing Review on Certiorari, states that the Court is likely to accept jurisdiction when the following is true:

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In the instant case, the United States Court of Appeals for the Sixth Circuit has decided the question of whether petitioner's trial counsel provided constitutionally ineffective assistance in a way that conflicts with the Supreme Court's decision in *Schlup v. Delo, supra.* Therefore, petitioner urges the Supreme Court to accept jurisdiction in this case.

2. Manifest Weight of the Evidence

The federal appellate court also relied upon what it claims is evidence of anal rape, writing:

> Jurists of reason would agree that Simpson failed to demonstrate that his rape conviction was not supported by sufficient evidence. In Ohio, a person commits rape by "engaging] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Ohio Rev. Code § 2907.02(A)(2). The state appellate court concluded that the evidence presented at trial proved that Simpson had raped J.W., and Simpson has failed to rebut the court's factual findings with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). **The DNA report tendered by Simpson appears to contain only the first of three pages and therefore is incomplete.**

Although not stated explicitly, the above excerpt seems to suggest that in denying appellant's request for a COA, the Appellate Court ignored the DNA report tendered by this appellant because it was incomplete. Appellant's argument relies on this DNA report. The DNA report says that Appellant is EXCLUDED as a contributor from the anal DNA sample:

> Relying on the DNA evidence of vaginal sex, the evidence of an unspecified male's DNA on the anal swab, and J.W.'s testimony, the court concluded that the finding of guilt was not against the manifest weight of the evidence. 2018-Ohio-328, [WL] at *3-4.

The federal appellate court once again implies that it is unclear whether this petitioner's DNA was found in the anal swab. This court is misrepresenting the evidence. The DNA report is clear that this petitioner's DNA is EXCLUDED from the DNA sample on the anal swab. The fact that the DNA of an unspecified male was found on the swab should be seen as exculpatory evidence, not evidence of guilt. The presence of unspecified male DNA on the swab means that some other male, not the petitioner, had anal sex with the victim prior to the DNA swab being taken. So if the victim was having anal sex with other unspecified men, but not mentioning that at trial, and falsely claiming that she had anal sex with petitioner, the casts doubt on the truth of her testimony. It also raises the possibility that any injuries found on her body were put there by other, unspecified men.

But the argument being made here is not about credibility. The DNA swab says this petitioner is excluded as a contributor to the anal swab, period, end of story. There is no ambiguity about this point, even though this court and the district court are both working very hard to make it same as if there is.

In addition, the court said specifically that it relied on the evidence of unspecified male DNA when it concluded that there was sufficient evidence of guilt. So, the court has, in effect, relied on exculpatory evidence to support its conclusion of guilt.

The prosecution gets to have its cake and eat it too. If the DNA report includes the accused, that is proof the accused is guilty. If the DNA report excludes the accused, that does not prove that he is not-guilty. This is unfair and the Supreme Court should eliminate this unfairness because it affects thousands of criminal cases every year. This is an important question of federal law that has not been, but should be, settled by this Court, thereby satisfying Supreme Court Rule 10(c).

3. Can a "jurist of reason" ignore DNA evidence?

The federal appellate court repeatedly invokes the hypothetical "jurist of reason" in its denial of this petitioner's request for a COA. Somehow, the court feels that a "jurist of reason" would not be persuaded by a BCI report saying that petitioner is excluded as a possible contributor to the anal swab of DNA. The court cites no authority for reaching that conclusion. It just states

"jurists of reason would agree..." as a sort of magical incantation that makes all the claims that follow it irrefutable.

But a jurist of reason would examine ALL of the evidence when assessing a manifest weight of the evidence. And here, all of the evidence includes the BCI report which shows that petitioner is not guilty of anal rape. A jurist of reason can't simply ignore evidence that is inconvenient for the prosecution's case, because that would not be reasonable.
The U.S. Supreme Court should offer some guidance here on what, exactly, a jurist of reason may do, and how, exactly, a jurist of reason assesses claims of manifest weight of the evidence. This is an important question of federal law that has not been, but should be, settled by this Court, thereby satisfying Supreme Court Rule 10(c).

In the instant case, a jurist of reason who chose to believe the BCI DNA report would find this petitioner not-guilty of anal rape.

CONCLUSION

For the foregoing reasons, appellant prays that this court grants his motion, reconsiders its denial, and issues a certificate of appealability.

Respectfully Submitted,

Kerry D. Simpson #727041

Kerry D. Simpson #727041
PO Box 1812
Marion, OH 43301