23-5091

No.

ORIGINAL

In The

Supreme Court of the United States

Javier H. Armengau. A708-691
London Correctional Institution
1580 S.R. 56
London, Ohio 43140

Petitioner

v.

Jenny Hildebrand, Warden
London Correctional Institution
1580 S.R. 56
London, Ohio 43140

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Sixth Circuit

Javier H. Armengau, A708-691
London Correctional Institution
1580 S.R. 56
London, Ohio 43140

S. Ct. R. 14.1(a)

1. When a state Supreme Court requires a specific material fact and element to be proven beyond a reasonable doubt in order to sustain a criminal conviction, does a federal appellate court erroneously deny a Certificate of Appealability when the district court in the same case confirms the state's failure to prove that specific and required element?

2. Did the United States Court of Appeals for the Sixth Circuit wrongfully deny Petitioner a Certificate of Appealability on his Sufficiency of the Evidence claim, thereby denying him his right to properly appeal the denial of his constitutional right to conviction upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, consistent with United States Supreme Court precedent, when the district court confirmed the state's failure to prove the specific and required element to sustain a conviction as required under state law and when the same Court of Appeals concluded in prior cases that the state was required to prove that specific element beyond a reasonable doubt?

S. Ct. R. 14.1(b)(iii)

List of Proceedings

1. Jury Trial, Case No. 13 CR 2217, Franklin County, Ohio Court of Common Pleas (June 9, 2014 – July 8, 2014).
2. First Direct Appeal, 14 AP 679, Tenth District Court of Appeals, Franklin County, Ohio (Decision, June 22, 2017) (2017-Ohio-4452) (Remanded for Resentencing).
3. Ohio Supreme Court declined jurisdiction, Case No. 2017-1074 (January 31, 2018) (2018-Ohio-365).
4. Motion for New Trial, denied in Case No. 13 CR 2217.
5. Appeal to the Tenth District Court of Appeals, Case No. 16 AP 355, decision affirmed on January 19, 2017 (2017-Ohio-197).
6. Ohio Supreme Court declined jurisdiction on June 21, 2017, Case No. 2017-0313 (2017 Ohio LEXIS 1261).
7. Motion for New Trial (2nd), denied in Case No. 13 CR 2217.
8. Appeal to the Tenth District Court of Appeals, Case No. 17 AP 852, decision was affirmed on October 23, 2018 (2018-Ohio-4299).
9. Ohio Supreme Court declined jurisdiction on January 23, 2019, Case No. 2018-1657 (2019-Ohio-173).
10. Petition for Post-Conviction relief denied by the trial court.
11. Appeal to the Tenth District Court of Appeals, Case No. 18 AP 276, decision affirmed on March 21, 2019 (2019-Ohio-1010).

12. Ohio Supreme Court declined jurisdiction on September 17, 2019 in Case No. 2019-0865 (2019-Ohio-3731).

13. First Resentencing hearing, March 27, 2018 in Case No. 13 CR 2217, from remand in 14 AP 679 (June 22, 2017).

14. Appeal to the Tenth District Court of Appeals, Case No. 18 AP 300 (2020-Ohio-3552), decision on June 30, 2020, second remand to trial court.

15. Ohio Supreme Court declined jurisdiction on September 13, 2020 in Case No. 2020-0889 (2020-Ohio-4811).

16. Second resentencing hearing from remand in 18 AP 300 held on October 19, 2022.

17. Petition for Writ of Habeas Corpus, U.S. District Court for the Southern District of Ohio, filed on March 27, 2019.

18. Amended Petition for Writ of Habeas Corpus, U.S. District Court for the Southern District of Ohio, filed on June 13, 2021.

19. Petition dismissed on December 7, 2023 (2022 U.S. Dist. LEXIS 221147). District Court granted a Certificate of Appealability on two issues:

    I. Did the serial amendments to the charges against Appellant deprive him of fair notice?

    II. Did the lack of specificity and differentiation in the indictment and bills of particulars violate the Double Jeopardy Clause?

    Petitioner requested a COA on three (3) additional issues:

    1. Was Appellant convicted upon legally sufficient evidence?

    2. Was Appellant denied his Constitutional right to a unanimous verdict?

3. Was Appellant denied his Constitutional right to a fundamentally fair trial?

The District Court denied the certificate on all three additional issues.

20. Appeal to the United States Court of Appeals for the Sixth Circuit. Case No. 22-4049 (Pending). Application to Expand Certificate of Appealability denied on June 1, 2023 (2023 U.S. App. LEXIS 13649) (Appendix – A).

21. Request for Reconsideration En Banc denied on June 28, 2023 (2023 U.S. App. LEXIS 16376) (Appendix – B) (Motion for Reconsideration, Appendix – C).

22. Petition for Writ of Certiorari to the United States Supreme Court regarding the denial of the Certificate of Appealability on the *Sufficiency of Evidence* claim.

S. Ct. R. 14.1 (c)

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IN THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below rendered on June 1, 2023 and followed by the denial for *En banc* reconsideration on June 28, 2023 (Appendix A and B).

S. Ct. R. 14.1 (d)

CITATIONS OF THE OPINIONS AND ORDERS

Report and Recommendations	2021 U.S. Dist. LEXIS 212260	November 3, 2021
Supplemental Rep. and Rec.	2022 U.S. Dist. LEXIS 25652	February 14, 2022
Decision on Rep. and Rec.	2022 U.S. Dist. LEXIS 221147	December 7, 2022
Decision Denying COA	2023 U.S. App. LEXIS 13649	June 1, 2023
Decision Denying En Banc	2023 U.S. App. LEXIS 16376	June 28, 2023

S. Ct. R. 14.1 (e)

BASIS OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1), 28 U.S.C. § 2253(c) and 28 U.S.C. § 2253(c)(2). *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed 2d 931 (2003); *Buck v. Davis,* 580 U.S.___, 137 S.Ct. 759, 197 L. Ed 2d 1 (2017), Garner *v. Louisiana,* 368 U.S. 157 (1961), *In re Winship,* 397 U.S. 358 (1970), *Jackson v. Virginia,* 443 U.S. 307 (1979).

The Decisions and Orders appealed from were filed on June 1, 2023 (Denial of Certificate of Appealability) and June 28, 2023 (Denial of En Banc Reconsideration). The petition is filed within ninety (90) days of each respective decision and order.

S. Ct. R. 14.1 (e)(i)

DATE OF JUDGMENT BEING REVIEWED

June 1, 2023, denial of Application for Certificate of Appealability by three (3) judge panel. Appendix - A

June 28, 2023, denial for Rehearing En Banc and Reconsideration. Appendix – B

(Copy of Motion for *En banc* Reconsideration, Appendix – C)

S. Ct. R. 14.1 (e)(ii)

DATE OF ORDER DENYING REHEARING

June 28, 2023, denial for Rehearing En Banc and Reconsideration. Appendix - B

S. Ct. R. 14.1 (e)(iv)

UNITED STATES SUPREME COURT JURISDICTION

28 U.S.C. § 1254(1)

The Decisions and Orders appealed from were filed on June 1, 2023 (Denial of Certificate of Appealability) and June 28, 2023 (Denial of En Banc Reconsideration). The petition is filed within ninety (90) days of each respective decision and order.

S. Ct. R. 14.1 (f)

CONSTITUTIONAL PROVISIONS AND STATUTES

1. 28 U.S.C. §1254(1) – Review of Appellate cases by Writ of Certiorari.

2. 28 U.S.C. § 2253(c)
3. 28 U.S.C. § 2253(c)(2) - A Certificate of Appealability should issue when the applicant has made a substantial showing of the denial of a constitutional right. An applicant only has to make a substantial showing of the denial of a constitutional right by showing that jurists of reasons could disagree with the district court's resolution of his constitutional claims or determine for that matter that the district court was wrong.
4. 28 U.S.C. § 2601 – Authority to affirm, vacate, reverse or set aside orders.
5. Fed. R. App. P. 22(b) – A petitioner must obtain a Certificate of Appealability from the district court or the U.S. Court of Appeals before he may appeal the denial of a Petition for Writ of Habeas Corpus.
6. 14th Amendment to the United States Constitution
7. Due Process Clause – An accused may only be convicted of a criminal offense upon proof beyond a reasonable doubt of every fact constituting the specific crime with which he is charged and state law, as pronounced by the state's highest court, determines the elements to be proven; once adopted, the state is required to prove each element beyond a reasonable doubt to sustain conviction of that offense.

S. Ct. R. 14.1 (g)

STATEMENT OF FACTS

Petitioner was indicted for eighteen (18) alleged sexually based offenses. Petitioner has asserted his actual innocence since the inception, maintaining the accusations to be patently false. Petitioner testified at trial. Petitioner was acquitted

of nine (9) counts. With respect to the relevant counts pertaining to this petition, Petitioner was indicted in Counts 8 through 18 for specific alleged factual incidents occurring in Franklin County, Ohio on unknown dates sometime between January 1, 2002 through December 31, 2008. After recognizing that Petitioner could not have committed the charged offenses and having valid and provable defenses to the charged crimes, prosecutors, over objection, mid-trial, amended the time frame of all relevant counts from 2002 to 2008, to 1999 to 2008, without identifying a date, month or year for any allegation. After amendment, the state argued that the offenses occurred sometime between 1998 and 2000.

After prosecutors amended the date range for all relevant counts, by their newly argued time frame, Petitioner had not been to the locations where the alleged victims initially claimed the incidents occurred. Prosecutors then, in closing, argued to the jury that the alleged crimes were not the crimes they indicted that occurred in Franklin County, Ohio, but rather that Petitioner was to be convicted of alleged crimes in Marion County, Ohio occurring four (4) years earlier than the indicted crimes. Petitioner was not indicted or charged, by any method, with any alleged crime occurring in Marion County, Ohio. Defense Counsel repeatedly moved for a mistrial advising the trial court that he was unprepared to defend any allegation in Marion

County, Ohio or during the unindicted time frame. The motions for mistrial were all denied.[1]

S. Ct. R. 14.1 (g)(ii)

BASIS OF COURT OF APPEALS JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §2253 and §2254 and the U.S. Sixth Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. §2253, §2254, §1291 and §1294.

S. Ct. R. 14.1 (h)

REASONS FOR ALLOWANCE OF THE WRIT

The district court and the Sixth Circuit refused to grant Petitioner a COA on the sufficiency claim, notwithstanding the Magistrate Judge recommending the certificate in his Report and Recommendation and in his Supplemental Recommendation. Without a COA, Petitioner "cannot obtain appellate review on the merits of his claim.". *McGee v. McFadden,* 139 S. Ct. 2608 (2019) (dissent, Sotomayor, J.). The "COA procedure should facilitate, not frustrate, fulsome review of potentially meritorious claims". *Id.* While the court below phrased its determination in proper

[1] Subsequent to Petitioner being indicted on May 22, 2013, Major Randy Caryer, from the Marion City Police Department in Marion County, was interviewed by the media and was asked about his agency's involvement in Petitioner's investigation. Major Caryer confirmed that the Marion Police Department had no involvement in the investigation because no crime was committed in Marion and all the allegations pertained to incidents occurring in Franklin County.

terms - that jurists of reason would not debate that Petitioner should be denied relief, it reached that conclusion only after essentially deciding the case on the merits. *Buck v. Davis,* 580 U.S. 100 (2017). *Id.* "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.". *Id.*

The district court did grant a Certificate of Appealability on two (2) issues: *Notice of the Charges* and *Double Jeopardy*. The certificate for the *Notice* claim is due to the amendments pertaining to the expansion of the time frame of four (4) years for the alleged conduct *and* the change in locations of the alleged offenses from those identified in the indictment, which is the subject of this petition.

The district court while denying the COA, confirmed Petitioner was charged in Counts 8 through 18 for alleged crimes occurring in Franklin County, Ohio but where convicted, convicted for alleged crimes in Marion County, Ohio (Indictment, Appendix – E) (*See,* fn 1). The Ohio Supreme Court requires that the state include the "county" of where the charged crime to be defended occurred in each respective count of the charging document as an element and the Ohio Supreme Court further requires the prosecution to prove beyond a reasonable doubt that the crime of conviction occurred in the "County and State as alleged in the indictment". *State v. Hampton,* 2012-Ohio-5688 citing *Knight v. State,* 54 Ohio St. 365 (1896) (Appx. F, G, H).

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of

every *fact* necessary to constitute the crime with which he is charged. The standard must be applied with explicit reference to the substantive elements of the criminal offense *as defined by state law. Jackson v. Virginia,* 443 U.S. 307 (1979). An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* In order for a conviction to be constitutionally sound, *every* element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This rule was recognized in Ohio law at *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991). It is state law which determines the elements of offenses, but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *Winship, Id.* The Ohio Supreme Court has adopted the location of the crime "i.e. the county" as a *material element of a statutory crime* in *Knight, supra.,* reaffirmed, *Hampton, supra.*

In the Sixth Circuit's decision to deny the added claim, a claim for which the Magistrate Judge recommended the certificate, the Court stated:

"As the district court explained 'under Ohio law, the location and time listed in the indictment are not material elements that must be proven by the prosecution' R. 134, PageID#15776; see also *Geboy v. Brigano,* 489 F.3d 752, 762-63 (6th Cir. 2007).".

The Sixth Circuit went further stating:

"So reasonable jurists would not debate the district court's conclusion that Claim I did not raise a federal constitutional question. See 28 U.S.C. §2254(a); *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991).".

The Sixth Circuit's own precedent and that of state and federal courts throughout Ohio, confirm the district court is incorrect in its conclusion. The Sixth Circuit has repeatedly acknowledged in *prior cases* that the location of the crime, specifically, the "County", *is* a material fact and material element that must be proven beyond a reasonable doubt, under Ohio law.

A problem the Sixth Circuit didn't note with regard to the district court's decision was that when acknowledging the Magistrate Judge's recommendation for the certificate to be granted on the sufficiency claim, the district court stated:

"[T]his Court understands the Tenth District's analysis of the underlying claim in Ground One differently than the Magistrate Judge did.". (Doc. 134, PageID 15808) However, prior to making this statement, the district court stated:

"The Tenth District's analysis [ ] does not address Petitioner's sufficiency of evidence argument, as presented here, and does not warrant deference from this Court on that claim.". (Doc. 135, PageID 15774)

In *Nash v. Eberlin,* 258 Fed. Appx. 761 (6th Cir. 2007), the Court held:

> "Where the elements of a state crime are sufficiently clear as a matter of state law, we cannot automatically uphold a conviction with insufficient proof of one of the elements on the theory that the state court in the very case has eliminated that element as a requirement. It would undermine the federal sufficiency-of-proof requirement to do so." *Id.*

In *Knight v. State,* 54 Ohio St. 365 (1896) cited in *State v. Hampton,* 2012-Ohio-5688 (at ¶ 22), the *Ohio Supreme Court* held:

> "Now can it be said that the *place of the offense*, i.e. *the county*, was not necessary to be proven, for how could a conviction be sustained without it? Neither can it be said that the *question of place* did not affect the substantial rights of the defendants, for how, *if not alleged, could they intelligently prepare*

> *their defense*, or how could the record serve the defendants to a bar to a second prosecution for the same offense? In general terms it may be said that as to this defect that the indictment fails to aver *all material facts necessary to a conviction. And such failure is fatal,* as well since *the statute* as at common law.". *Id.*

This passage confirms the element issue and its application to a statutory offense.

Knight is strictly a sufficiency, double jeopardy and notice case on the *exact issue* in Petitioner's case. Specifically, on the element issue, the Ohio Supreme Court held:

> "We have *also* stated that it is not essential that the *venue of the crime* be proven in express terms, provided it be established by all the facts and circumstances in the case *beyond a reasonable doubt,* that *the crime was committed* in the *County* and State as alleged in the indictment." (*Hampton,* ¶19).

The Magistrate Judge confirmed - *Hampton* "does hold location of the offense as alleged in the indictment must be proved beyond a reasonable doubt." (Doc. 97, PageID 15108). A state's *highest court determines the requirements for a criminal conviction.* Elements to be proven are determined by state statutes *and* case law. *Foy v. Donnelly,* 1992 U.S. App. 12881 (5th Cir.).

The District Court while denying the COA conceded all that was required to grant the writ - "[t]he initial indictment[2] against [Petitioner] alleged that the conduct underlying the charges occurred in Franklin County, but he was ultimately convicted for events that took place in Marion County on Counts 8, 10, 14-18." (Doc. 134, PageID 15769, pg. 35) (See, fn 1). This Court held in *Garner v. Louisiana,* 368 U.S. 157 (1961),

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[2] There was only one indictment in Appellant's case. Appellant only had witnesses subpoenaed for allegations pertaining to 2002 and 2008 and for allegations in Franklin County for Counts 8-18 which is the relevant time frame and location in the indictment. The trial court denied Appellant's counsel's repeated requests for a mistrial.

that the Court must look to Louisiana law *as set by the Louisiana Supreme Court* to analyze the evidence as to *what is required for conviction.*

While the Sixth Circuit in Petitioner's case stated that "reasonable jurists would not disagree" with the district court's conclusion, respectfully, reasonable jurists may not only disagree but would likely, if not probably, conclude that the district court's conclusion is incorrect. Appellant respectfully suggested to the Sixth Circuit that other Sixth Circuit Judges would likely conclude that the district court's resolution of Petitioner's *Sufficiency of the Evidence* claim was not just debatable but wrong, since the district court's conclusion of the issue and that of the specific panel that decided Petitioner's claim is in *direct conflict* with how other jurists from the Sixth Circuit decided *Kolvek v. Foley,* 2022 U.S. App. LEXIS 11462 (6th Cir.)[3], *In re Caraway,* 2022 U.S. App. LEXIS 4054 (6th Cir.); *also,* 2023 U.S. App. LEXIS 10876 and *Geboy v. Brigano,* 489 F.3d 752, 763 (6th Cir. 2007).

Well settled law should never be applied arbitrarily.

There is a clear conflict within the Sixth Circuit on the specific issue in Petitioner's case. There is also a direct conflict between the specific panel's analysis on the issue and the decisions of other district courts. There is also a conflict between how the district court in Petitioner's case decided the issue and how other district courts have decided the same sufficiency issue in other cases. The Sixth Circuit in Petitioner's case "has decided an important federal question (Sufficiency of the

[3] Supplemental Authority, filed May 8, 2022 (Doc. 126, Doc. 127).

Evidence) in a way that conflicts with a decision by a state court of last resort" – the Ohio Supreme Court. (S. Ct. R. 10)

In attempting to assist the Sixth Circuit with any possible confusion that may have existed within the Court, Petitioner filed a *Motion Requesting the Court Certify the Question* to the Ohio Supreme Court (Appendix - D). Both *Knight* and *Hampton*, as well as a multitude of other cases dating back to the 1800's, would have required the Ohio Supreme Court to answer the certified question in the *affirmative*, thereby resolving the Certificate of Appealability issue on the specific claim and, for all intent and purposes, should have put an end to Petitioner's litigation. The Sixth Circuit elected not to certify the question.

In *Geboy, supra.*, the Sixth Circuit noted that the petitioner was indicted for alleged crimes that occurred in Logan County, Ohio and convicted for alleged crimes occurring in Logan County, Ohio. The Sixth Circuit also noted that the petitioner in *Caraway* was indicted for alleged crimes occurring in Harlan County, Kentucky and convicted for alleged crimes occurring in Harlan County, Kentucky. The Sixth Circuit noted that petitioner in *Kolvek* was indicted for alleged crimes occurring in Summit County, Ohio and convicted for alleged crimes occurring in Summit County, Ohio.

Appellant was indicted for alleged crimes alleged to have occurred in Franklin County, Ohio but where convicted, assuming a unanimous or even majority verdict, convicted for alleged crimes in Marion County, Ohio. Appellant was never charged or indicted for any alleged crime in Marion County, Ohio (Indict., Appx. E).

The petitioners in *Geboy*, *Caraway* and *Kolvek* argued that they were tried for alleged crimes different than those supporting the indictment. But the Sixth Circuit specifically held, *repeatedly*, that *the indictment limited the proof* required to the "county" as alleged in the indictment. The Sixth Circuit's decision to deny the COA in Petitioner's case is in direct conflict with its prior decisions on the exact issue.

In *Geboy*, the Sixth Circuit, consistent with its prior *and* future decisions, noted that the indictment for the relevant counts provided a limited time frame and that the offenses occurred "within the County of Logan.". In fact, Sixth Circuit went on to highlight that:

> "Apart from the *limitation* to Logan County – a *limitation* that Petitioner does not challenge – these two counts do not specify that the charged offenses occurred at any particular locations.".

The Sixth Circuit noted that the indictment *limited the location* to the County of Logan. The Court further stated – "The *indictment alleges only* that Petitioner committed his offenses in Logan County" and "Petitioner has not suggested that the indictment was deficient under Ohio law for *lack of a more specific location* where these offenses were allegedly committed.". *Id.*

The Sixth Circuit was correct; Ohio law does not require a "more specific location" *beyond* "the County" of where the crime was committed to be proven beyond a reasonable doubt. The Sixth Circuit disregarded its own constitutional conclusion in *Geboy*. The Sixth Circuit had an identical issue in *In re Caraway*, 2022 U.S. App. LEXIS 4054 (6th Cir.); *also*, 2023 U.S. App. LEXIS 10876.

In *Caraway,* a pastor was convicted of having sex with a young girl. Claiming he was convicted for crimes outside the scope of the indictment, the Sixth Circuit stated:

> He states that the indictment charged him with crimes that allegedly took place at the Loyall Church of God on May 9 and 21, 2011, but that at trial, the prosecutor introduced evidence of a "new and different crime . . . that allegedly took place on May 6, 2011[,] some 10 miles from the church.".
>
> The indictment was not as specific as Caraway claims. Rather, for *each count*, it stated that "during the month of May, 2011, in Harlan County, Kentucky," Caraway committed the charged offenses. An Indictment must contain the elements of the offense, "sufficiently apprise [] the defendant of what he must be prepared to meet," and protect the defendant against double jeopardy. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) (quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S. Ct. 628, 39 L. Ed. 704 (1895)). Nothing in the indictment limited the prosecution to introducing evidence of only incidents that took place on May 9 and 21, 2011 at the Loyall Church of God.

According to the Sixth Circuit, *the indictment limited* the prosecution to proving that the charged conduct *occurred in* Harlan County, Kentucky. The defendant in *Caraway* was *tried and convicted* for his conduct in the *County* as alleged in the indictment, consistent with Ohio Supreme Court precedent.[4] In *State v. Lewis*, 21 Ohio St. 2d 203 (1970) the Ohio Supreme Court held:

> "The indictment, information, or affidavit in a criminal prosecution, necessarily confines the state to the [*211] charge made against the defendant, in order that the defendant shall know, as the Constitution provides, the nature of the accusation against him.".

The *confinement* referenced by the Ohio Supreme Court in *Lewis* is the "limitation" referenced by the Sixth Circuit in *Caraway* and *Geboy*. The facts for which one is tried

[4] While Caraway is a Kentucky case, the issue and this Court's analysis is relevant to Appellant's case as to what is required under Ohio law.

must fit the terms of the indictment. The Sixth Circuit disregarded its constitutional conclusion in *Caraway* in considering the COA in Petitioner's case.

Appellant provided the district court and the Sixth Circuit with its decision in *Kolvek v. Foley,* 2022 U.S. App. LEXIS 11462 (6th Cir.), where a different district court noted that the state is required to prove that the crimes resulting in conviction occurred in the "County" alleged in the indictment ("according to the indictment, the *conduct had to have occurred* in Summit County, Ohio" and "the *indictment alleged only* that the crimes took place in Summit County, Ohio") *Id.* [5] – consistent with Ohio Supreme Court precedent.

The fact that the Sixth Circuit addressed the sufficiency issue in the above cited cases, on the question of *location of the crime*, confirms that Petitioner's claim does, in fact, present a constitutional issue, as the Sixth Circuit has addressed the exact issue *before* in the same constitutional context - sufficiency of evidence.

Simply, the prosecution in Petitioner's case could not change, mid-trial, the alleged crimes they indicted that occurred in Franklin County, Ohio to different alleged crimes that occurred in Marion County, Ohio, three to ten (3-10) years earlier, simply because they couldn't prove what they indicted.

Petitioner submitted fifteen (15) sample indictments to the District Court to illustrate the Ohio Supreme Court's requirement and the recognition of that requirement by prosecutors and trial courts throughout Ohio (Doc. 54, May 13, 2021).

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[5] The trial court in *Kolvek* actually confirmed that the conduct had to occur in Summit County but that "it could be anywhere in Summit County".

Three of those indictments are referenced in Appendices – F, G and H. Each indictment confirms what the Ohio Supreme Court requires for a criminal conviction.

"A *conviction* for rape requires positive evidence, either direct or circumstantial, that sexual conduct of the type alleged in the indictment occurred on or about the time and *place* specified.". *State v. Lucas,* 2001 Ohio App. LEXIS 4227. Relatedly, the *same* district court in Petitioner's case concluded that a state indictment satisfies due process by "advising Petitioner of the precise nature of the charge...and of the *date, time and place*[when] the offense was alleged to have been committed.". *Brakeall v. Warden,* 2011 U.S. Dist. LEXIS 61868 (S.D. Ohio).

To whatever extent this Court finds it relevant, in granting the certificate on the Sixth Amendment *Notice* claim, the district court stated: "*This Court is also persuaded that reasonable jurists would debate whether the amendments at trial violated Petitioner's right to fair notice.*" (Doc. 134, PageID 15808). Respectfully, if the constitutional right to fair notice is or may be violated by changes to time frame and locations of where the charged crimes supposedly occurred, and this Court has held that it is well established that due process requires notice of the *precise* charge, then charging Petitioner with alleged crimes in Franklin County, Ohio sometime between 2002 and 2008 and then mid-trial, changing the evidence to be defended to alleged crimes occurring in Marion County, Ohio sometime between 1998 and 2001, may, or must, also raise a debatable sufficiency of evidence issue, as the crimes tried are not the crimes charged. See, *Jones v. State Board of Ed.*, 397 U.S. 31; *In re Ruffalo*, 390 U.S. 544.

County, Ohio. See, *Blake v. Morford,* 563 F.2d 246 (6th Cir. 1977) [federal court was required to follow Tennessee law as "laid down" by the *Tennessee Supreme Court*].

The Sixth Circuit's analysis as contained within *Geboy*, *Kolvek* and *Caraway* confirm Appellant's position and required relief on his sufficiency of the evidence claim. The Sixth Circuit's analyses and conclusions in those cases are consistent with Ohio Supreme Court (state law) requirements for conviction.

Giving the Sixth Circuit the benefit of the doubt, in that the decision to deny the certificate on the specific claim is not due to prejudice, bias or assumption that Petitioner should stand convicted simply because he was accused, any confusion or uncertainty in considering the issue, creates a conflict among lower federal courts and state courts and creates a conflict in and out of the circuit as citations to Sixth Circuit precedent would result in inconsistent analyses, conclusions and results.

If the Sixth Circuit's decision is allowed to stand, future defendants will stand trial under different constitutional requirements and standards than others. Some defendants may be properly convicted under United States Supreme Court precedent with respect to sufficiency of the evidence and others may be wrongfully convicted by an inconsistent analysis of the identical issue.

Respectfully, the Sixth Circuit's error must also be corrected not only with regard to this specific petitioner but in regards to other criminal defendants who will in the future challenge their convictions based upon evidence that was uncharged and unindicted and in violation of this Court's extensive precedent. Allowing the Sixth Circuit's denial of the COA in this case will grant prosecutors a license to simply

disregard constitutional notice and charging requirements and allow them to substitute uncharged and unnoticed crimes for the crimes they indict but can't prove.

The "AEDPA does not require petitioners to prove, before the issuance of a Certificate of Appealability, that some jurists would grant the petition for habeas corpus.". *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed 2d 931 (2003). "At the COA stage the only question is whether the claim is reasonably debatable.". *Buck v. Davis,* 580 U.S.___, 137 S.Ct. 759, 197 L.Ed 2d 1 (2017).

Petitioner respectfully prays for a grant of certiorari and eventual remand to the Sixth Circuit requiring the Court to expand the Certificate of Appealability to include Petitioner's *Sufficiency of the Evidence* claim. To the extent that such consideration is appropriate, Petitioner requests the Court consider *summary reversal.* Summary reversal is usually reserved for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error. *Andrus v. Texas,* 142 S. Ct. 1866 (2022), citing *Schweiker v. Hansen,* 450 U.S. 785, 791, 101 S. Ct. 1468, 67 L.Ed. 2d 685 (1981) (Marshall, J. dissenting). As Petitioner's cited authority herein hopefully confirms, the law is settled and stable and the facts are not in dispute. Respectfully, the Sixth Circuit's decision is in error.

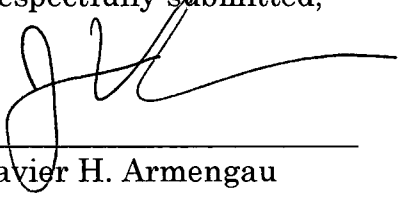
Alternatively, Petitioner respectfully prays for the Court to grant certiorari and consider the issues after a full briefing and review. Lastly, should the Court elect not to proceed as requested, Petitioner would ask the Court to issue a GVR order to the Sixth Circuit.

Assuming a GVR order is an appropriate exercise of the Court's discretionary certiorari jurisdiction, under 28 U.S.C. §2106, in this case, the Sixth Circuit has understood a GVR to require it to determine whether the original decision was correct. *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.* 962 F. 3d 882 (6th Cir. 2020). While there is no intervening precedent in this case, respectfully, existing and well established precedent confirms the decision to deny relief was clearly wrong. Such a redetermination, either through summary reversal, or GVR may determine the ultimate outcome of this litigation.

There was no legal precedent for the district court's decision to deny the writ on Petitioner's sufficiency of evidence claim as the district court's cited authority (*Geboy v. Brigano,* 489 F.3d 752, 762-63 (6th Cir. 2007)), confirms and validates Petitioner's sufficiency claim. In this regard, there could be no reason under §2253 to deny the Certificate of Appealability on that issue.

Allegations of sexual assault are extremely serious; false allegations of sexual assault are equally harmful. Petitioner appreciates the Court's consideration.

Respectfully submitted,



Javier H. Armengau