No. 24-5355 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

2024

DARIUS GILKEY,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

BY: Darius Gilkey #767577
In *pro per*
Muskegon Correctional Facility
2400 S. Sheridan Drive
Muskegon, MI 49442

QUESTION PRESENTED

I.

Should this Court grant Certiorari to determine whether evidence supports homicide or sexual assault?

II.

Should this Court grant Certiorari to determine whether a breakdown in attorney-client relation committed on the record prior to trial amounts to a violation of Petitioner's Sixth Amendment right to counsel?

III.

Should this Court grant Certiorari to determine whether ineffective assistance of counsel violated Petitioner's right to due process of law and whether prejudice resulted?

LIST OF PARTIES

Petitioner, DARIUS GILKEY, is an individual and has no corporate affiliations. Petitioner is proceeding in *pro per* with the aid of a Michigan Department of Corrections Legal Writer.

Respondent, STATE OF MICHIGAN is the state where the Petitioner is currently housed and is represented by the Michigan Attorney General's Office

All parties appear in the caption of the case on the cover page.

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January 22, 2024 Decision of the U.S. District Court, Eastern District of Michigan, denying petition for writ of habeas corpus, denying certificate of appealability, and granting Petitioner to proceed *in forma pauperis* on appeal (Appendix "B").

September 6, 2016, Decision of the Michigan Supreme Court denying leave to appeal is reported at 500 Mich. 857 (2016) (Appendix "C").

January 26, 2016, Decision of the Michigan Court of Appeals affirming Petitioner's convictions is reported at *People v Gilkey*, No. 323507, 2016 WL 362661 (Mich. Ct. App. Jan. 26, 2016) (Appendix "D").

STATEMENT OF JURISDICTION

Petitioner seeks review of the June 14, 2024, opinion of the U.S. Court of Appeals for the Sixth Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions

U.S. Const. Amend. VI: The Sixth Amendment guarantees criminal defendants the right to counsel for his defense. U.S. Const. Am VI. This right is "required at every stage of a criminal proceeding where substantial rights of [the] accused may be affected

U.S. Const. Amend. XIV: "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."

B. Statutory Provisions

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Procedural History

Darius Leigh Gilkey, a *pro se* state prisoner, appeals the U.S. Court of Appeals for the Sixth Circuit opinion and order denying certificate of appealability to his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

A Michigan jury convicted Gilkey of first-degree murder and first-degree criminal sexual conduct after the lifeless body of Stephanie McGee was found in an abandoned building. The trial court sentenced Gilkey to life and 30 to 50 years in prison for the murder and criminal sexual conduct convictions, respectively. The Michigan Court of Appeals affirmed the convictions and sentences. *People v. Gilkey*, No. 323507, 2016 WL 362661 (Mich. Ct. App. Jan. 26, 2016) (per curiam). The Michigan Supreme Court denied an application for appeal. *People v. Gilkey*, 880 N.W.2d 583 (Mich. 2016) (mem.).

In August 2017, Gilkey filed his § 2254 petition, asserting that insufficient evidence supported his convictions, the trial court should have appointed substitute counsel, and the admission of other-acts evidence denied him a fundamentally fair trial. The warden responded that Gilkey did not show the state court's denial of the first two claims to be unreasonable and that the third claim was procedurally defaulted, non-cognizable, and without merit. The district court denied the petition. First, the court found that circumstantial evidence supported both convictions. Second, the court determined that Gilkey did not have an absolute right to counsel of his choosing, the disagreement between Gilkey and trial counsel was not a constructive denial of representation, and Gilkey failed to show prejudice. Third, the court determined that Gilkey's challenge to the admission of evidence was not cognizable on habeas review and, alternatively, that the admission of that evidence did not result in a fundamentally unfair trial. The court did not certify any claims

for appeal.

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for this Court to grant Certiorari. Especially where conflict exists with the lower state and federal courts decisions and the decisions from the U.S. Courts of Appeals for the 1st, 2nd, 5th, its own 6th Circuit, 7th, 8th, 9th, and the 11th Circuits.

The importance of the case is not only to Petitioner Gilkey, but to others similarly situated as there was no sexual encounter, no weapon located, no eyewitnesses accounts, and no physical evidence linked to the offense.

Additionally, for others similarly situated, another reason for granting the writ is Mr. Gilkey's Sixth Amendment right to counsel was violated where the trial court refused to appoint substitute counsel when a breakdown in attorney-client communication was made record, prior to the start of trial.

ARGUMENT I

THERE WAS INSUFFICIENT EVIDENCE THAT PETITIONER COMMITTED HOMICIDE OR SEXUAL ASSAULT TO SUSTAIN HIS CONVICTIONS.

Discussion

The Due Process Clause of the United States Constitution prohibits a criminal conviction unless the prosecution establishes guilt of each of the essential elements of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). *Jackson v. Virginia*, 443 U.S. 307, 313-314 (1979). The reasonable doubt requirement is a safeguard, which developed to protect citizens from dubious and unjust convictions, which result from improper forfeitures of life, liberty and property. *In re Winship, supra*, 397 U.S. at 362.

Appellant was entitled, as a matter of clearly established federal law, to a directed verdict of acquittal where the prosecutor failed to present sufficient evidence of his guilt. See *e.g. People v. Hampton*, 407 Mich. 354, 368 (1979), citing *Jackson, supra*:

> "A reviewing court must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a reasonable trier of fact in finding guilt beyond a reasonable doubt." (See *Id.* 407 Mich. at 366).

In any criminal prosecution, the state must prove not only that the charged crime occurred by presenting legally sufficient evidence on each of the essential elements of the crime, but also that the accused is criminally responsible for its commission. The evidence here on the causation in which the victim died, and facts surrounding the sexual encounter with Petitioner, is insufficient to conclude that Petitioner raped her at knifepoint and murdered her to conceal the rape. Petitioner was erroneously convicted of first-degree criminal sexual conduct and felony murder predicated on the underlying charge of criminal sexual conduct. While Appellant's DNA seems to point that

he had a sexual encounter with decedent McGee, trial counsel failed to subject the prosecution's DNA evidence case to any meaningful, adversarial testing. Defense Counsel's failure was complete. *United States v. Cronic*, 466 U.S. 648 (1984). Specifically, Defense Counsel failed to challenge the state's only evidence—Mr. Gilkey's DNA evidence. Further, Defense Counsel failed to demand expert witness testimony to impeach the state's expert witnesses concerning DNA evidence and scientific evidence. In minimizing Mr. Gilkey's need for an expert, Defense Counsel supported the prosecution's argument that "an expert would not have helped Mr. Gilkey as the prosecutor's testing of Defendant's DNA evidence and forensic evidence contained no errors." Actually, nobody knows if errors exist as nobody challenged the evidence. This harmful error occurred because Defense Counsel failed to retain competent expert witnesses to challenge the testimony of the prosecution's expert witnesses. *People v. Agar*, 314 Mich. App. 636, 645-646 (2016) (citing *Hinton v. Alabama*, 571 U.S. 263 (2004)).

In its affirmation, the U.S. Court of Appeals for the Sixth Circuit reasoned that "to convict Petitioner Gilkey of first-degree felony murder, the prosecution had to prove that he (1) 'kill[ed] a human being'; (2) 'with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice]'; (3) 'while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated' in Michigan Compiled Laws § 750.316(1)(b). *People v. Smith*, 478 Mich. 292, 733 N.W.2d 351, 365 (Mich. 2007) (quoting *Carines*, 597 N.W.2d at 136). First-degree criminal sexual conduct is a specifically enumerated offense. See Mich. Comp. Laws § 750.316."

Finally, first-degree criminal sexual conduct required a "showing of an intrusion into the genital or anal opening of another person, accompanied by one of several possible statutorily

enumerated circumstances." *Farley v. Lafler*, 193 F. App'x 543, 548 (6th Cir. 2006) (citing Mich. Comp. Laws § 750.520b(1)(f)). In this case, the prosecution was required to prove that he used "a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon in order to facilitate the sexual assault." Mich. Comp. Laws § 750.520b(1)(e).

Here, as it relates to the killing of a human being, this amounts to the elements of second-degree murder; *i.e.*, the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and malice. The only factor to escalate a second-degree murder to a first-degree felony murder is the enumerated felony of a sexual assault.

No evidence exists outside the unchallenged DNA evidence that Petitioner Gilkey killed Stephanie McGee. No knife was found. No eyewitness accounts place Gilkey in the area. No testimonial, physical, or circumstantial evidence was produced that Mr. Gilkey used "a weapon or any article used or fashioned in a manner to lead the victim (Ms. McGee) to reasonably be in fear of danger, apprehension, and/or death" in order to engage in a sexual encounter. There is no evidence Petitioner produced a knife to facilitate a sexual assault upon Ms. McGee. This key element is required to sustain a conviction for criminal sexual conduct in the State of Michigan.

The Michigan Supreme Court has specifically held that the *corpus delicti* of felony murder may not be established without evidence, independent of the accused person's confession, of the essential element distinguishing first-degree murder from second-degree murder. *People v. Allen*, 390 Mich. 383, 385 (1973). The *corpus delicti* of felony murder is not established until the prosecution has introduced evidence from which the trier of fact may reasonably find that acts constituting all the essential elements of the offense have been committed and that someone's

criminality was responsible for the commission of those acts. *People v. Allen*, 39 Mich. App. 483, 496 (1972), Judge Levin dissenting; adopted in 390 Mich. 383; 385 (1973) (emphasis in original).

In *Allen*, the defendant's confession had been erroneously admitted because the prosecution had failed to present independent evidence that the murder was committed during the attempted perpetration of a robbery. *Allen*, *supra*, 494. In *People v. Williams*, 422 Mich. 381 (1985) that court specifically distinguished *Allen* because it had involved felony-murder. The Court failed to specify the reason for the distinction. However, the difference between the two-forms of murder is obvious. Premeditated murder is a single crime, of which premeditation and deliberation are elements. Felony murder, on the other hand, is a compound crime, consisting of a murder coupled with a felony. Accordingly, here the elements of both the felony of the sexual assault and the murder must be established. Where *corpus delicti* of the felony is not established, there is no *corpus delicti* of felony murder, and the charge can be no greater than voluntary manslaughter.

The presence of DNA, in and of itself does not tend to establish murder or sexual assault, without other corroborating evidence. There is circumstantial evidence which equally supports a theory of guilt in this case as well as a theory of reasonable doubt. Therefore, the State of Michigan unreasonably applied federal law in denying relief on petitioner's insufficient evidence claim.

In this case, as in *Newman v. Metrish*, 543 F3d 793, 796 (6th Cir, 2008), *cert den* 558 US 1158 (2010), the evidence only creates a "reasonable speculation" that Petitioner is probably guilty and is insufficient to satisfy the *Jackson* standard. In *Newman*, *supra*, the Sixth Circuit affirmed the grant of habeas corpus relief based upon insufficient evidence in a murder case. That Court concluded that the evidence suggested that petitioner owned at least one of the two weapons found by two men on the side of the road, which was used in a homicide, without evidence Appellant

was at the crime scene, nor any evidence that he used those weapons on the day of the killing, the evidence was insufficient to justify a conviction as it only amounted to a reasonable speculation. *Id.*

See *O'Laughlin v. O'Brien*, 568 F.3d 287, 301 (1st Cir, 2009), (reversing district court's denial of writ of habeas corpus due to insufficient evidence that prisoner was the assailant where evidence gave equal weight to theories of guilt and innocence), accord, *United States v. Hawkwins*, 547 F.3d 66, 71 (2nd Cir. 2008), same, *United States v. Elashyi*, 554 F.3d 480, 492 (5th Cir, 2008), *United States v. Caseer*, 399 F.3d 828, 840 (6th Cir. 2005), (same), *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010), same, *United States v. Wright*, 835 F.2d 1245, 1249 n1 (8th Cir, 1987). *Gonzales v. Gipson*, 701 Fed. Appx. 558, 560-562 (9th Cir. 2017).

In this case, since there is insufficient evidence of guilt concerning the first-degree CSC charge, the related felony-murder conviction which is predicated upon the CSC charge must be reversed.

In support, petitioner points out that the 11th Circuit Court of Appeals, applying the *Jackson* standard, granted habeas relief and dismissed a burglary charge finding that possession and pawning of a stolen camera a day or two after the burglary without corroborating evidence was insufficient to support burglary conviction. See *e.g.*, *Crosby v. Jones*, 682 F.2d 1373 (11th Cir. 1982). Likewise, the presence of DNA on the deceased without more, is insufficient to support a conviction for CSC first-degree and felony murder.

The majority of federal courts of appeals have concluded that under *Jackson v. Virginia*, *supra*, reversal of the conviction is required "...if the evidence [viewed in the light most favorable to the prosecution] gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain reasonable doubt."

Here, the decision of the U.S. Court of Appeals for the Sixth Circuit is in stark contrast to its own rulings in *Newman v. Metrish* and *United States v. Caseer,* and in conflict with 1st, 2nd,5th, 7th, 8th, 9th and 11th Circuits. Failing to grant Certiorari would drastically affect others similarly situated. For those reasons, allowance of the writ of certiorari is appropriate.

ARGUMENT II

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT SUBSTITUTE COUNSEL.

Discussion

The right to counsel is one of the most fundamental of all constitutional rights guaranteed by the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342-344 (1963). U.S. Const. Amends. VI, XIV. An indigent defendant is guaranteed the right to assigned counsel, however, a defendant is not entitled to appointed counsel of his or her own choice, or to a new appointed attorney simply because he or she requests one.

In protecting this right, courts are careful to ensure that substitute counsel is appointed where there is an irreconcilable and legitimate strategy dispute between the defendant and court appointed counsel. *People v. Williams*, 386 Mich. 565, 578; 194 N.W.2d 337, 343 (1972). Rather, a defendant is entitled to substitute counsel upon a showing of good cause, and where the substitution will not unreasonably disrupt the judicial process. *People v Buie*, 298 Mich. App. 50, 67; 825 N.W.2d 361, 372 (2012).

The Sixth Amendment requires a good-faith motion, timely made to the trial court in order to evaluate the breakdown in the attorney-client relationship, to determine the need for substitute counsel. Here, Petitioner Gilkey requested substitute counsel citing a lack of sufficient

communication regarding the matter and counsel's failure to obtain funding for an independent DNA analysis. Counsel replied that he was only able to obtain funding for an independent review of the initial lab protocol, and that he visited Petitioner twice, corresponded with him and spoke with him in the court's holding cell on hearing dates. Trial counsel provided the following:

> "So I feel I communicated with him plenty of times, there was nothing fancy about this matter in terms of what he was looking for. No witnesses he needed me to search out. No investigator to do any type of research. His position is quite simple; that this is something that was placed on him by police.
>
> And I can try this matter and I've been ready to try this matter, but we had to wait for the analysis to come back from Speckin labs and we just got that last week." (T2, pp. 9-10).

Nothing suggests that Mr. Gilkey engaged in any sort of intentional dilatory tactics in order to delay, or impede progress in his adjudication proceedings. He had a reasonable and legitimate difference of opinion on fundamental trial strategy with trial counsel regarding the retesting of DNA evidence. Furthermore, trial counsel's refusal to obtain independent testing of the DNA destroyed all trust between petitioner and trial counsel. There was good cause to appoint substitution of counsel under the facts of this case. A strategy dispute is good cause for the appointment of substitute counsel. *Williams*, *supra* at 565; *Buie*, *supra* at 67. In *Christeson v. Roper*, 574 U.S. 373 (2015), the Supreme Court held that the district court abused its discretion in denying the petitioner's second request for substitution of appointed counsel under the "interests of justice" standard. Reversing the judgment of the Eighth Circuit, the case was remanded for further proceedings.

Here, Petitioner Gilkey has demonstrated that the decision of the Sixth Circuit Court of Appeals is in conflict with the Eighth Circuit and this Court's decision in *Christeson*. For those reasons, allowance of the writ of certiorari would be appropriate.

ARGUMENT III

TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE VIOLATED PETITONER'S RIGHT TO DUE PROCESS OF LAW, AND LIFE IMPRISONMENT REFLECTS ACTUAL PREJUDICE.

Discussion

The Sixth Amendment of the United States Constitution, as applied to the States through the Due Process Clause of the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense." U.S. Const, Amend VI. The Michigan State Constitution also guarantees a defendant's fundamental right to counsel. See, Const 1963, art 1, § 20.

For an indigent defendant, this right is "required at every stage of a criminal proceeding where substantial rights of [the] accused may be affected." *Mempa v Rhay*, 389 U.S. 128, 134 (1967); *Gideon v Wainwright*, 372 U.S. 335, 342-344 (1963).

The standard of review for a claim of ineffective assistance of counsel is whether or not the performance by counsel fell below an objective standard of reasonable professional judgment and whether there is a reasonable probability that the result would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). As for the evidence dispute, this Court previously ruled it is ineffective assistance of counsel when counsel fails to present an expert DNA witness. *Ake v. Oklahoma*, 470 U.S. 75, 77 (1985).

The Sixth Amendment requires a timely and good faith motion, which Petitioner made to the trial court. With the Sixth Amendment in mind, federal courts have recognized the principle that "when an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court has a responsibility to determine the reasons for defendant's dissatisfaction with his current counsel." *United States*

v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990) (quoting LaFavre and Israel, Criminal Procedure (1984), § 11.4, p. 36) (citing *McMahon v Fulcomer*, 821 F.2d 934, 942 (3rd Cir. 1987). The need for inquiry is triggered once the defendant evidences his dissatisfaction with his counsel via a motion or "anything that approximates such a motion." *Iles*, *supra*, 906 F.2d at 1131.

In this case, the record Petitioner brought before his trial judge is clear. In denying relief, the Michigan Court of Appeals failed to navigate the federal standard, *i.e.*, *Mempa v. Rhay*, or *Gideon v. Wainwright*. Thus, the state court's decision resulted in an adjudication that was contrary to clearly established federal law. See *e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (holding that the state court's failure to apply *Strickland* to defendant's ineffective counsel claim resulted in an adjudication that was contrary to clearly established federal law for which habeas relief may be granted. Citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)).

More than 90 years ago, in *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the United States Supreme Court reversed under the Fourteenth Amendment due process clause the "Scotsboro Boys" convictions. This Court found counsel's duty of representation—the giving of effective aid in the preparation and trial of the case—was not discharged. Later, the Supreme Court made the existence of an implicit Sixth Amendment constitutional right to effective assistance of counsel quite clear. In 1970, the decision of *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), this Court observed that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." As the Court in *McMann* explained, the existence of a right to effective assistance of counsel follows logically and necessarily from the existence of the Sixth Amendment basic right to the assistance of counsel: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984) and *Strickland v.*

Washington, 466 U.S. 668, 686 (1984) follow in lockstep with *McMann* and *Powell*, moving forward the Constitutional guarantee of more than just the appointment of counsel. This guarantee extends equally to indigent defendants' and their cases.

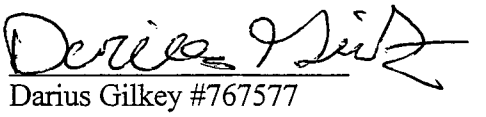
Here, Petitioner had appointed counsel who failed to test the State's case, *i.e.*, Petitioner's DNA evidence. In other words, the State's evidence and theory of the case was sufficiently left unchallenged. Petitioner timely brought his concerns to his trial judge's attention, but the judged ruled his concerns arbitrary. Subsequent convictions of first-degree murder and first-degree criminal sexual conduct along with a death sentence of life without parole plus thirty years, confirm these concerns are not arbitrary. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court forcefully concluded that: "This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. . . . Unless a defendant charged with serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. . . . When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. . . . *Id.* at 344. Cf. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) ("deprivation of the right to counsel ... requires automatic reversal of the conviction because [it] infects[s] the entire trial process") (footnote omitted).

Here, Petitioner Gilkey has demonstrated that the decision of the U.S. Court of Appeals for the Sixth Circuit is in conflict with law decided by this Court as it concerns ineffective assistance of counsel. For those reasons, allowance of the writ of certiorari would be appropriate.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that his petition for certiorari be read and granted.

Respectfully submitted,



Dated: August 7, 2024

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Pro per
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