

CASE NO. 24-6346

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL MOORE,

Petitioner-Appellant

v.

FILED

JAN 10 2025

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MISTY MACKEY, WARDEN,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question No. I:

Where the Petitioner-Appellant's case presented a substantial showing of a denial of a constitutional right, and where the issues presented were debatable amongst jurists of reason, should the Sixth Circuit have granted a certificate of appealability?

Question No. II:

Where the decision of the state court 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, does the district court err by denying Petitioner-Appellant's petition for writ of habeas corpus?

LIST OF PARTIES AND RELATED CASES

A. List of Parties.

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case.

B. Related Cases.

There are no cases filed in this Court that are directly related to this case.

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OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

Exhibit A: United States Court of Appeals for the Sixth Circuit
Moore v. Mackey, 6th Cir. No. 24-3534, 2024 U.S. App. LEXIS 25933 (6th Cir., Oct. 15, 2024) (Application for Certificate of Appealability denied; Motion to Proceed *In Forma Pauperis* denied as moot.)

Exhibit B: United States District Court for the Northern District of Ohio, Eastern Division
Moore v. Fender, N.D. Ohio No. 1:21-CV-1450, 2024 U.S. Dist. LEXIS 97566, 2024 WL 2803378 (N.D. Ohio, May 31, 2024) (Report and Recommendation adopted, Objection overruled, Writ of Habeas Corpus denied, Certificate of Appealability denied)

Exhibit C: United States District Court for the Northern District of Ohio, Eastern Division
Moore v. Fender, N.D. Ohio No. 1:21-CV-1450, 2023 U.S. Dist. LEXIS 238193, 2023 WL 11798207 (N.D. Ohio, May 5, 2023) (Report and Recommendation)

Exhibit D: The Supreme Court of Ohio
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Exhibit E: Ohio Court of Appeals, Fifth Appellate District, Richland County
State v. Moore, 5th Dist. Richland No. 2020 CA 0038, 2021-Ohio-287, (Jan. 29, 2021)

Exhibit F: Court of Common Pleas, Richland County, Ohio
State v. Moore, Richland County Common Pleas No. 2019-CR-0516 (Sentencing Entry for Sex Offender) (Mar. 25, 2020)

STATEMENT OF THE BASIS FOR JURISDICTION

On October 15, 2024, the Sixth Circuit Court of Appeals issued an Order denying Petitioner's requests for an Application for Certificate of Appealability and denied Petitioner's Motion to Proceed *In Forma Pauperis* as moot. See *Moore v. Mackey*, 6th Cir. No. 24-3534, 2024 U.S. App. LEXIS 25933 (6th Cir., Oct. 15, 2024) (Exhibit A).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision.

U.S. Const. 14th amend.

Petitioner claim that his conviction was not supported by sufficient evidence for a rational jury to find him guilty beyond a reasonable doubt violates the Due Process Clause under *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

B. Statutory Provisions.

The relevant statutes involved in this case are:

- 28 U.S.C. §2253(c)(1) (requirements for issuance of certificate of appealability)
- 28 U.S.C. §2253(c)(2) (requirements for issuance of certificate of appealability)
- 28 U.S.C. § 2254(d) (AEDPA requirement for issuance of writ of habeas corpus by person in state custody)

- Ohio Revised Code § 2907.02(A)(1)(c) (rape, when the other person's ability to resist or consent is substantially impaired because of a mental condition and the offender knows, or has reasonable cause to believe, that the other person's ability to resist or consent is substantially impaired because of a mental condition)

- Ohio Revised Code § 2907.02(A)(2) (rape, when a defendant engages in sexual conduct with another and purposely compels another person to submit by force or threat of force)

STATEMENT OF THE CASE

A. State courts procedural history.

On July 29, 2019, Petitioner was indicted by the Richland County, Ohio Grand Jury in Richland County Court of Common Pleas, Case No. 2019 CR 0516, with two counts of Rape, felonies of the first degree, in violation of Ohio Revised Code Chapter 2907.02(A)(1)(c) (when the other person's ability to resist or consent is substantially impaired because of a mental condition and the offender knows, or has reasonable cause to believe, that the other person's ability to resist or consent is substantially impaired because of a mental condition) (Counts One and Three); and two counts of Rape, felonies of the first degree, in violation of R.C. 2907.02(A)(2) (when a defendant engages in sexual conduct with another and purposely compels another person to submit by force or threat of force).

Petitioner, through counsel, entered a plea of "not guilty" to the charges and the case proceeded to a jury trial.

On March 3, 2020, a jury trial commenced and concluded on March 10, 2020, with the jury convicting Petitioner on all four counts.

A sentencing hearing was held on March 10, 2020, and the trial court merged Count One with Count Two and merged Count Three with Count Four. The state elected to proceed on Counts One and Three. Whereupon, the court imposed consecutive sentences of 11 years on each count, with a 5½-year indeterminate tail; for a total sentence of 22 to 27½ years. (Exhibit F).

On April 20, 2020, Petitioner, through counsel, filed a Notice of Appeal in the Ohio court of appeals for the Fifth Appellate District. In his brief, he raised the following assignments of error:

1. The trial court erred by providing the jury with a jury instruction about authority figures applying psychological force for purposes of rape pursuant to *State v. Eskridge*.
2. Appellant's rape convictions are not supported by the weight of the evidence.

The state of Ohio filed its Brief on September 29, 2020.

On January 29, 2021, the Fifth District affirmed the trial court's judgment.

State v. Moore, 5th Dist. Richland No. 2020 CA 0038, 2021-Ohio-287, at 55-58. (Exhibit E).

Acting *pro se*, Petitioner filed an appeal to the Supreme Court of Ohio on March 15, 2021. In his Memorandum in Support of Jurisdiction, Petitioner raised the following propositions of law:

Proposition of Law I:

Due process of law and its equal protections under the Fourteenth Amendment to the United States Constitution prohibits a trial court from abusing its discretion by providing a jury with instruction regarding the authority figures applying psychological force for purposes of rape.

Proposition of Law No. II:

II. Due process of law and its equal protections under the Fourteenth Amendment to the United States Constitution prohibits a trial court from convictions of rape that are not supported by the weight of the evidence.

The state of Ohio filed its Memorandum in Opposition to Jurisdiction on April 9, 2021.

On May 25, 2021, the Supreme Court of Ohio declined to accept jurisdiction of Petitioner's appeal. *State v. Moore*, 163 Ohio St. 3d 1429, 2021-Ohio-1721, 168 N.E.3d 525. (Exhibit D).

B. Federal courts procedural history.

Petitioner, acting *pro se*, filed a Petition under 28 U.S.C. § 2254 for Writ of Habeas by a Person in State Custody on July 26, 2021, and presented the following grounds for relief:

Ground One: The trial court erred by providing the jury with a jury instruction about authority figures applying psychological force for purposes of rape pursuant to *State v. Eskridge*.

Due process of law and its equal protections under the Fourteenth Amendment to the United States Constitution prohibits a trial court from abusing its discretion by providing a jury with instruction regarding the authority figures applying psychological force for purposes of rape.

Supporting facts: The trial court abused its discretion when instructing the jury that evidence of physical restraint is not required when the victim is a minor of sixteen[] years old, and the Defendant being the victim's alleged uncle, but they were not particularly close. This Instruction was not harmless, as it did in fact misle[a]d the jury in a matter materially affecting Defendant's substantial rights, because it did, beyond a reasonable doubt, contribute to the verdict, rendering the trial fundamentally unfair. In addition, ... the jury's verdict is against the manifest weight of the evidence and not supported by sufficient evidence.

Ground Two: Appellant's rape convictions are not supported by the weight of the evidence.

Due process of law and its equal protections under the Fourteenth Amendment to the United States Constitution prohibits a trial court from convictions of rape that are not supported by the weight of the evidence.

Supporting facts: there was no evidence of overt force or threat of force that rendered the conviction against the manifest weight of the evidence, and is not supported by sufficient evidence, that resulted in a

misdemeanor of justice. The court of appeals decision was an unreasonable application of Federal Law and was contrary to clearly established Federal law under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ECF No.1, at 16-17.

The Warden filed a Return of Writ on December 10, 2021 (ECF No. 5), and Petitioner filed a Traverse on January 6, 2022. (ECF No. 6).

The habeas petition was referred to a magistrate judge for preparation of a report and recommendation, pursuant to 28 U.S.C. § 636 and Local Rule 72.2(b)(2).

On May 5, 2023, the magistrate judge issued a Report and Recommendation ("R&R), recommending the Court deny the habeas petition. Specifically, the magistrate judge recommends denial of Ground One because to the extent Petitioner argues the trial court violated state law when it used jury instructions from *State v. Eskridge*, 38 Ohio St. 3d 56, 526 N.E.2d 304 (Ohio 1988), that claim alleges state law violation that is not cognizable, and to the extent Petitioner alleges a federal constitutional claim, Petitioner does not "come close to persuading the Court that it 'should harbor grave doubt' that the trial court's alleged improper jury instruction on Counts Two and Four affected the verdict's outcome." ECF No. 7 at PageID 997-999. The magistrate judge recommended denying Ground Two because the Ohio Court of Appeals found Petitioner's conviction was supported by sufficient evidence, and Petitioner failed to explain how that court's decision was unreasonable. *Moore v. Fender*, 2023 U.S. Dist. LEXIS 238193, 2023 WL 11798207 (N.D. Ohio, May 5, 2023) (ECF No. 7 at PageID #: 992) (Exhibit C).

On June 22, 2022, Petitioner filed Objections to the Report and Recommendation. First, Petitioner objects "to the magistrate judge's erroneous factual or legal findings regarding Petitioner's claim that the state court's 'authority-figure' jury instruction was harmless beyond a reasonable doubt under ground for relief one." ECF No. 10 at PageID #: 1009. Second, Petitioner objects "to the factual or legal error in the magistrate judge's analysis involving Petitioner's argument that his conviction for rape is not supported by sufficient evidence." ECF No. 10 at PageID #: 1013. Petitioner separated his second objection into two parts, arguing first that the victim was not "substantially impaired because of a mental or physical conviction" to support a conviction under ORC § 2907.02(A)(1)(c). ECF No. 10 at PageID #: 1015. Petitioner then contends that "where the decision of the State court of appeals unreasonably applied clearly established federal law, as it did in this case, and where the magistrate judge relied solely on the State court's findings to support his recommendation, the magistrate judge's analysis of the State court findings constitutes a factual or legal error and must, therefore, be rejected by the Court." ECF No. 10 at PageID #: 1017.

On July 6, 2023, Respondent filed a response to the objections, arguing Petitioner did not show the magistrate judge's decision was clearly erroneous or contrary to law and the Court lacks jurisdiction to consider two of Petitioner's claims. See ECF No. 11.

On July 14, 2022, Petitioner replied, asking the Court to liberally construe his arguments and make a de novo review of his objections. ECF No. 12 at PageID #: 1037.

Over Petitioner's objections, the district court adopted the magistrate judge's report and recommendation in its entirety and denied habeas relief. The district court also denied Petitioner a certificate of appealability and leave to proceed in forma pauperis. *Moore v. Fender*, 2024 U.S. Dist. LEXIS 97566, 2024 WL 2803378 (N.D. Ohio, May 31, 2024) (ECF No. 13; Judgment Entry ECF No. 14) (Exhibit B).

On June 12, 2024, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. The Court construed Petitioner's timely notice of appeal as an application for a certificate of appealability. See Fed. R. App. P. 22(b). Petitioner also filed a motion to proceed in forma pauperis.

On October 15, 2024, the Court denied Petitioner's application for a certificate of appealability and denied his motion to proceed in forma pauperis as moot. *Moore v. Mackey*, 2024 U.S. App. LEXIS 25933 (6th Cir., Oct. 15, 2024) (Exhibit A).

It is from these proceedings that Petitioner is now before the Supreme Court of the United States requesting it to grant certiorari.

REASONS FOR GRANTING THE PETITION

REASON NO. I:

WHERE THE PETITIONER'S CASE PRESENTED A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT, AND WHERE THE ISSUES PRESENTED WERE DEBATABLE AMONGST JURISTS OF REASON, THE SIXTH CIRCUIT ERRED BY DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

A habeas petitioner may not appeal the denial of his habeas petition unless the District Court or Court of Appeals “issues a certificate of appealability.” *Hernandez v. Peery*, ____ U.S. ____, 141 S.Ct. 2231, 2234, 210 L.Ed.2d 977 (2021); 28 U. S. C. §2253(c)(1); see also *Gonzalez v. Thaler*, 565 U. S. 134, 143, n. 5, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” §2253(c)(2). To make that showing, a habeas petitioner must demonstrate “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U. S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). AEDPA does not “require petitioner[s] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.” *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Rather, “[a]t the COA stage, the only question is whether” the “claim is reasonably debatable.” *Buck v. Davis*, 580 U.S. 100, 116-117, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017).

In this case, the issue confronting the Sixth Circuit was whether reasonable jurists could debate the District Court's disposition of Petitioner's habeas petition. That question, in turn, depends on whether reasonable jurists could argue that the Ohio court of appeals' decision contravened or unreasonably applied clearly established federal law. They certainly could.

Here, however, the Sixth Circuit declined to issue a COA on the basis that Petitioner could not prove that some jurists would grant the petition for habeas corpus, instead of whether the "claim is reasonably debatable." This Petitioner contends is contrary to clearly established law. Therefore, the Court should grant certiorari.

REASON NO. II:

WHERE THE DECISION OF THE STATE COURT 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, THE DISTRICT COURT ERRED BY DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." Id. at 409.

Under Ground for Relief No. I, Petitioner argued that his due process rights were violated by improper jury instructions as to counts two and four about "authority figures applying psychological force for purposes of rape." This, Petitioner contends, was of constitutional magnitude, impacting Petitioner's rights to due process and a fair trial because the instructional error altered an element of the offence.

More specifically, Petitioner argues that the trial court abused its discretion when it instructed the jury on counts two and four, which charged Petitioner with "sexual conduct with another, when the offender purposely compels the other person to submit by force or threat of force, in violation of Ohio Revised Code § 2907.02 (A)(2). Petitioner argued that the trial court should not have instructed the jury "that evidence of physical restraint is not required" when the victim is a 16-year-old minor, and that, while Petitioner is the victim's uncle, "they were not particularly close."

In addressing this issue on appeal, the Ohio court of appeals failed to apply the harmless error standard in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Without further explanation the ruling in this case is so egregious that it resulted in a denial of fundamental fairness and violated Petitioner due process.

Under Ground for Relief No. II, Petitioner argued that his rape convictions are not supported by sufficient evidence.

In this case, the State indicted Petitioner on Count 1 and Count 3, Rape (when the other person's ability to resist or consent is substantially impaired because of a mental condition and the offender knows, or has reasonable cause to believe, that the other person's ability to resist or consent is substantially impaired because of a mental condition), in violation of Ohio Revised Code § 2907.02(A)(1)(c), and Count 2 and Count 4, Rape (when a defendant engages in sexual conduct with another and purposely compels another person to submit by force or threat of force), in violation of RC. 2907.02(A)(2).

R.C. 2907.02(A) states:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

...

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially

impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

With respect to Count 1 and Count 3, Petitioner contends that E.M.'s ability to resist or consent was not substantially impaired because of her mental condition, and submits that because there was "no evidence of overt force or the threat of force, as defined by Ohio Revised Code § 2907.02 (A)(2), his convictions for rape are not supported by sufficient evidence.

This Court has indicated that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, the crucial question on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Where the adjudication of the Ohio court of appeals resulted in a decision that was contrary to, or involved an unreasonable application of clearly established law, the district court erred by failing to grant habeas relief.

CONCLUSION

For the above-stated reasons, and in the interest of justice, Petitioner respectfully requests the Court to grant certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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