

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT GORDON PAYNE — PETITIONER
(Your Name)

vs.

CONNIE HORTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Gordon Payne

(Your Name)

Scott Payne, 650743

Muskegon Correctional Facility

(Address)

2400 S. Sheridan Rd.

Muskegon, Michigan 49442

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Question #1:

THE SIXTH CIRCUIT'S REASONS FOR DENYING COA CONFLICTS
WITH THE SECOND CIRCUIT AND NINTH CIRCUITS FACTUAL
PATTERN FOR FINDING REVERSED COUNTS HARMFUL TO REMAINING
COUNTS AND GRANTING HABEAS RELIEF.

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Warden Connie Horton, Michigan Department Of Corrections.

URGENT

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APPENDIX (E)(Jury Instructed that Confrontation Clause violation evidence from R.F. and C.K. is permissible in J.B. and S.C. cases. Trial Tr. Vol.#8 page 65 at 13 - 66 at 3)

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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

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix (A) to the petition and is

☒ reported at Oct. 12, 2017 No. 17-1324; 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☐ is unpublished.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

☒ reported at 2017 U.S. Dist. LEXIS 28613; or,
☐ has been designated for publication but is 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☐ is unpublished.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 _____ to the petition and is

☒ reported at People v. Payne, 486 Mich. 925 (2010); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Michigan Court of Appeals court appears at Appendix (C) to the petition and is

☒ reported at People v. Payne, 2009 Mich.App. LEXIS 1592; 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 October 12, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

X] For cases from state courts:

The date on which the highest state court decided my case was 2010.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(2) Certificate of Appealability.

28 U.S.C. § 2254(d).

Federal Constitution, Sixth Amendment Confrontation Clause.

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STATEMENT OF THE CASE

FACTS MATERIAL TO THE CONSIDERATION
OF QUESTIONS PRESENTED #1.

In 2007 five sexual assault cases were joined for a single jury trial. Payne was acquitted on the fifth case. Fetting ("R.F.") May 25, 1989 and Kolk ("C.K.") June 20, 1989 were reversed by the Michigan Court of Appeals on the ground that non-testifying DNA analysts in both cases violated the Confrontation Clause under this Court's precedent announced in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Please see APPENDIX (C)(*People v. Payne*, 2009 Mich.App. LEXIS 1592 at *197). The Sixth Circuit denied COA in the remaining counts Bryant ("J.B.") August 6, 1989 and Carter ("S.C.") May 15, 2004.

APPENDIX (A)(Sixth Circuit Denial of COA. SCOTT GORDON PAYNE v. CONNIE HORTON, Oct. 12, 2017. No. 17-1324, at page 4).

"The DNA laboratory reports properly admitted in the J.B. and S.C. cases resulted in positive matches to Payne's DNA. See *Payne*, 774 N.W.2d at 724 n.6, 727 n.7. Moreover, Payne admitted to soliciting S.C. for sex, and both S.C. and J.B. identified Payne as their attacker. Under these circumstances, reasonable jurists could not disagree with the district court's conclusion that the trial court's improper admission of DNA laboratory reports in the C.K. and R.F. cases was harmless error as to jury's verdict in J.B. and S.C. cases. See *Brecht*, 507 U.S. at 637."

The S.C. case involved prostitution, and the Petitioner stealing his money back from S.C. after consensual sex. The only properly admitted independent evidence besides the DNA report was S.C.'s and Petitioner's testimony. The Sixth Circuit's reasons for finding constitutional error harmless under Brecht in a consensual sex case is illogical to even contemplate as a legitimate basis for harmlessness. In the J.B. case, the District Court determined (APPENDIX (B) Denial of COA. 2017 U.S. Dist. [LEXIS 28613] that J.B. testified that it "very well could be the person" who attacked her. Counsel conducted "extensive cross-examination regarding the differences between the preliminary report [DNA] ...and his final report." Petitioner's fingerprints were excluded as the source left by the perpetrator on a cigarette pack.

**CONFLICT WITH OTHER
CIRCUITS FACTUAL PATTERN FOR
GRANTING HABEAS RELIEF:**

The Sixth Circuit's denial of COA conflicts with the decisions of the Ninth Circuit and Second Circuit's factual pattern for finding constitutional error in reversed cases harmful in remaining cases. In the habeas context, when fewer than all cases are overturned "the courts must consider the spillover effect on the remaining counts." *Lindstadt v. Keane*, 239 F.3d 191, 205 (2d Cir. 2001)(Writ of Habeas Granted)(citing *United States v. Morales*, 185 F.3d 74, 82 (2d Cir. 1999)).

In Petitioner Payne's case he has consistently argued that the reversed Confrontation Clause violation cases R.F. and C.K. were harmful to J.B. and S.C. cases because the State urged the jury to consider R.F. and C.K. for method of operation in J.B. and S.C. cases. And the Court instructed the jury that evidence in other cases were permissible for modus operandi consideration in separate case.

OPENING STATEMENT:

APPENDIX (D)(OPENING STATEMENT, Trial Tr. Vol.#3(A) page 89 at 9)(MS. BRINKMAN: "DNA testing determines that the defendant's buccal swab not only matches the sperm in Shakara Carter's case but also matches the three cold cases from 1989.")

APPENDIX (D)(OPENING STATEMENT, Trial Tr. Vol.#3(A) page 89 at 20)(MS. BRINKMAN: "The only issue, I believe, in this case is identity. All of these victims indicated they were raped. Shakara Carter actually identifies - - you'll hear her identify the defendant in the courtroom. The DNA connects the defendant to the four of the five victims.").

APPENDIX (D)(OPENING STATEMENT, Trial Tr. Vol.#3(A) page 85 at 19)(MS. BRINKMAN: "Preliminary tests on the rape kits of all three victims revealed the presence of sperm. So they all have sperm, they're similar, but the cases go unsolved. Later the cases are all submitted under Cold Case, and DNA determines that the perpetrator in all three of the cases are the same person.").

APPENDIX (D)(OPENING STATEMENT, Trial Tr. Vol.#3(A) page 90 at 4)(MS. BRINKMAN: "The Judge will give you a cautionary instruction on the use of one case to determine the guilt in another case. The similarity in the modus operandi, as we like to call it, or the way he commits these crimes, is something you can consider from case to case to case.").

JURY INSTRUCTION:

APPENDIX (E)(Jury Instructed that Confrontation Clause violation evidence from R.F. and C.K. is permissible for elements of guilt in J.B. and S.C. cases. Trial Tr. Vol.#8 page 65 at 13 - 66 at 3)(THE COURT: "...you're allowed to look at that similar conduct and similar way of doing something - - the modus operandi if you will - - you're allowed to consider that in determining whether you believed the defendant considered a particular - - or committed a particular act here in one of the charges. You can go outside that one act and look to the other to see if that helps you.").

CLOSING ARGUMENT:

As a matter of clarity the "Wyoming" cases are the Confrontation Clause violation Cold Cases R.F. May 25, 1989 and C.K. June 20, 1989. The "Kentwood" case is Cold Case J.B. August 6, 1989, and the "Grand Rapids" case is S.C. May 15, 2004. Please see APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 18 at 4)(MS. BRINKMAN: "Later, in fact in the year 2000 is the first time that DNA is done, run on this case. But, later, when they finally run all these cases for DNA, the DNA matches the Wyoming case, Kentwood case, and the Grand Rapids case. And eventually, in 2004 or 2005, the DNA matches the defendant.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 24 at 8)(MS. BRINKMAN: "The DNA matches the sperm fraction from the Wyoming and Grand Rapids cases long before Shakara Carter or Melissa Smith come into play. The defendant's DNA matches the sperm fraction of vaginal swab once Michelle Clark from Kentwood gets his DNA swab, and again, the numbers are 17.2 quintillion.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 26 at 20)(MS. BRINKMAN: "The DNA in the sperm fraction matches the Wyoming and Kentwood cases. And you'll recall that in the meantime we've heard he was out of State between the last one and this one, and the defendant's DNA matches. And the odds of someone else, again, is 17.2 quintillion.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 27 at 10)(MS. BRINKMAN: "Notice that his modus operandi, or his method of doing these events, is the same with Shakara Carter as it was back then, in that he attacks them, he chokes them, the same MO.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 30 at 7)(MS. BRINKMAN: "But let's see if this is the same guy, and sure enough, from DNA testing, the sperm in her case not only matches Shakara Carter, but also matches the three cold cases from 1989.

Again, the defendant is out of State in the interim, and he's back a couple months prior to Carter's assault in 2004. Again, the odds of anyone else matching the same DNA profile is 17.2 quintillion.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 33 at 1)(MS. BRINKMAN: "Each case rises and falls on its own, but you may consider the other cases as it helps you with his modus operandi.

Dose it help you believe what Melissa Smith says when you consider how he behaved with the other victims? Is this part of his method of operation? And I submit to you it is. For these reasons, you may consider the other cases. Is this the way he acts, is this the way he performs, is this what he does? Does that make their testimony more credible?

And that's the reason why - - and for those reasons you can consider the other rapes when considering the individual rapes.")

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 33 at 16)(MS. BRINKMAN: "Again, we have the victim's ID, the defendant's admission that it was him, and his modus operandi in Shakara Carter's case, not to mention the modus operandi from the three prior cases where he attacks the victims the same way. He just immediately attacks them.").

APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 36 at 18)(MS. BRINKMAN: "His modus operandi, the way he does this, he approaches and he attacks, they are all the same. He approaches with a question. Again, it fits in the Wyoming case - - I mean the '89 cases. It all fits and points to his guilt. He grabs them around the neck with his arm. Again, it all fits and points to his guilt.

He threatens the use of a knife in the 1989 cases. Again, it fits, it points to his guilt. He takes the money from the victims right before he leaves. Again, he's got a pattern of operation in the 1989 cases, and it points to his guilt.").

The above demonstrates that it is objectively unreasonable to determine that the trial Court's jury instructions, and the Prosecution's systematic use of reversed Confrontation Clause evidence (R.F. and C.K.) for elements of guilt in J.B. and S.C. is harmless under Brecht. This very same fact pattern is prejudicial under the doctrine of "spillover evidence" from dismissed counts in the Ninth Circuit and Second Circuit.

(Habeas Relief Granted)

[Bean v. Calderon, 163 F.3d 1073, 1091 (9th Cir. 1998)]

"...not only did the trial court join counts for which the evidence was not cross-admissible, but the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristics of Bean's criminal activities. Thus, the jury not "'reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime,'" United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987), when the State's closing argument and import of several of the instructions it heard urged it to do just the opposite."

(as cited in Lindstadt, 239 F.3d at 205)

[United States v. Morales, 185 F.3d 74, 82 (2d Cir. 1999)]

"In assessing a claim of prejudicial spillover from dismissed counts,...Thus, a defendant is likely to make a successful argument of prejudicial spillover only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, and this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts..."

The Sixth Circuit reasoned that, 1). The DNA laboratory report in S.C. was properly admitted, 2). The DNA report resulted in a positive match to Payne's DNA, 3). Payne admitted to soliciting prostitute S.C. for sex, and 4). Shakara Carter identified Payne as her attacker in court. Please see APPENDIX (A)(Sixth Circuit Denial of COA. SCOTT GORDON PAYNE v. CONNIE HORTON, Oct. 12, 2017 No. 17-1324, at page 4).

CONSENSUAL SEX TESTIMONY:

In the S.C. case Petitioner presented the only evidence in support of his consensual sex defense. Logically, one would expect that the properly admitted DNA report would be a "positive match" and reflect Payne's testimony that he had consensual sex. And Payne "admitted to soliciting" S.C. for sex, and Carter "identified Payne." None of the Sixth Circuit's reasons are legitimate for finding error harmless, and denying COA in a consensual sex defense.

Please see trial transcript APPENDIX (G)(Petitioner's CONSENSUAL SEX Testimony in S.C. case). "She's a prostitute, and I picked her up off Division Street by, I believe it's the Short Stop Party Store,..." Id. page 44 at 21.

"I picked her up from the same general area, over by the Short Stop Party Store, and I took her to the same, same spot to where a lot of prostitutes go, over by the Hall overpass and 131, and when I picked her up she wanted - - I had, I had some crack. I had ten \$20 rocks of crack cocaine, and I knew that she smokes crack, which the prostitutes do, and probably a lot of guys that pick'em up, and she wanted some money, not just drugs.

So I, I forget how much money I gave her, but probably twenty or thirty dollars, somewhere in that general area, and we sat and smoked probably six to eight \$20 pieces of crack over by the Hall overpass, and we had sex." Id. page 46 at 13.

"I swiped some money back from her, I'm not sure how much, but whatever I gave her, I took it back out of her pants pockets when we were having sex." Id. page 47 at 2.

"Because I wanted to get more crack, and I got through smoking eighty to a hundred dollars' worth of drugs with her." Id. page 47 at 6.

"Yes, she--when I was going to drop her off, she--she had asked me what, you know, what happened to her money.....I acted stupid and didn't say nothing. I said, "'don't know, where did you put it'"....The she did get--she was pissed off then, she was mad....I hit the brakes, I stopped and told her to get out, and she, she either hit or kicked the side of my Blazer, I'm not sure, and I drove off." Id. page 47 at 14.

"No, I didn't have to force myself upon her to have sex." Id. page 48 at 8.

Q. "And in both circumstances, was that consensual with Shakara Carter?"

A. "Yes." Id. page 48 at 21.

SHAKARA CARTER TESTIMONY:

In between the preliminary examination and the trial, Ms. Carter passed-away. At trial her preliminary testimony was played for the jury. Please see APPENDIX (H)(SHAKARA CARTER Testimony from Preliminary Examination Played for the Jury).

Ms. Carter evaded and dodged Detectives to the point that she had to be arrested and held on a material witness warrant to ensure she testified at the prelim. Id. page 53 at 20. Ms. Carter forgot the made-up story she told the nurse examiner on the night of her allegation. At the prelim she changed her story from two acts of sexual intercourse, and two acts of oral sex, to one act of sexual intercourse, and suggested that the nurse examiner was lying about sex acts she told her.

[Page 58 at 9]

Q. "How many times--did he ever get his penis into your mouth?"

A. "No."

Q. "Not even slightly?"

A. "Just on the lips"

Q. "Just on the lips?"

A. "Yeah."

Q. "Okay. And how many times did he engage in sexual penetration with you?"

A. "Just once."

Q. "Okay. If you told the nurse examiner that he put his penis into you and there was oral sex; and then he put his penis into you again and had a second event of oral sex. does that remind you of anything; or--"

the 2004 cases. Please see APPENDIX (J)(JOINDER OF CASES, and use of MODUS OPERANDI evidence).

"Then he is out of state and in prison for a little over ten years. When he returns, shortly after he returns, his MO has changed over this period of time, but now he's taking prostitutes off South Division, driving them away, and then sexually assaulting them and attacking them." Id. page 5 at 8.

"Your Honor, the dates on the first three are as follows: The first one is 5/25/89. The second one is the next month, 6/20/89. And there is a pattern there." Id. page 7 at 13.

The Court opined that if he did sever the cases, it would be the "oldest ones" the 1989 cases for the first trial, and the 2004 cases for the second trial. Id. page 10 at 10.

"I do recognized that there are some distinctions where the more recent two involve prostitutes, the first three did not." Id. page 12 at 4.

The Joinder of the two Confrontation Clause violation cases, C.K. and R.F. allowed the State to incessantly induce the jury to convict in Carter case on modus operandi evidence.

Under Brecht the epitome of constitutional error causing harm is when the error had "influence in determining the jury's verdict." Id. Brecht, 507 U.S. 623, 638 n.9 (quoting Kotteakos v. U.S., 328 U.S. 750, 756 (1946)). In Payne's trial the court instructed the jury that on the grounds of modus operandi, "You

can go outside that one act and look to the other to see if that helps you." Id. APPENDIX (E)(Trial Tr. Vol.#8 page 65 at 13-66 at 3). The Prosecution in opening statement, and closing argument urged the jury to "consider from case to case to case" for elements of guilt. Id. APPENDIX (D)(Trial Tr. Vol.#3(A) page 90 at 4); "...but you may consider the other cases as it helps you with his modus operandi." Id. APPENDIX (F)(Trial Tr. Vol.#8 page 33 at 1).

"It is well established that a jury is presumed to follow its instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). After the prosecution and the court instructed the jury that other cases may influence their determination of guilt in separate cases, it would be beyond the bounds of possibility to determine that C.K. and R.F. cases did not influence Carter case.

The DNA match is what one would expect in consensual sex. There was no physical evidence to corroborate Carter's allegation of choking. Essentially, it came down to a credibility contest. C.K. and R.F. evidence in the guise of modus operandi evidence in Carter case bolstered Carter's testimony and discredited Payne's testimony of consensual sex. "This potential bolstering weighs against finding harmless error." *Jensen v. Romanowski*, 564 Supp.2d 740, 749 (E.D. Mich. 2008); *Jensen v. Romanowski*, 590 F.3d 373, 379-380 (6th Cir. 2009)("The prosecution drew detailed parallels between the two offenses throughout vior dire, opening statement, trial and closing argument, hypothesizing that the consistency of Jensen's behavior when perpetuating the two offenses suggested that he had a deliberate method or scheme of having sexual contact with young girls. The jury received an

instruction that they might consider the two alleged events together as indicative of a deliberate scheme, an instruction tending to bolster A.M.'s credibility and undermine Jensen's testimony."

The C.K. and R.F. DNA reports were not cumulative to any other evidence that was permissible in supporting the State's theory of modus operandi in Carter case. The prosecution repeatedly emphasized in its closing argument the importance of C.K. and R.F. modus operandi evidence as guilt in Carter case. APPENDIX (F)(CLOSING ARGUMENT, Trial Tr. Vol.#8 page 33 at 16)("Again, we have the victim's ID, the defendant's admission that it was him, and his modus operandi in Shakara Carter's case, not to mention the modus operandi from the three prior cases where he attacks the victims the same way. He just immediately attacks them.")

The State's dependence on C.K. and R.F. case to support unconstitutional theory of modus operandi in Carter case exacerbated the error and substantially swayed the jury verdict. Under this Court's precedent it can hardly be doubted "that reasonable jurists could debate whether (or, for that matter, agree that) the petition could have been resolved in a different manner" *Jordan v. Fisher*, 135 S.Ct. 2647, 2650 (2015). The standard, "does not require a showing that the appeal will succeed." *Id. Fisher*, 135 S.Ct. at 2650 (citing *Miller-El*, 537 U.S. at 337).

JUDITH BRYANT CASE:

In denying a COA the Sixth Circuit focused its harmless error analysis solely on the weight of the properly admitted DNA report that was a positive match to Payne's DNA. The Court never considered the effect of C.K. and R.F. cases influence on the Jury's verdict in J.B. case. Rather, the Court surmised that Payne would have been convicted without the error.

Ms. Bryant testified that the perpetrator handled a pack of cigarettes that was left at the crime scene. The "examiner was able to obtain identifiable finger prints from two fingers on the cellophane.....Known fingerprints taken from Petitioner and concluded that the fingerprints were not Petitioner's." APPENDIX (B)(Denial of COA, 2017 U.S. Dist. LEXIS 28613 at *11-13). The prints were also excluded as being Bryant's. Without explanation, a "draft" DNA report was released. "Defense counsel conducted extensive cross-examination regarding the differences between the preliminary report prepared by Donald and his final report." APPENDIX (B)(Denial of COA, 2017 U.S. Dist. LEXIS 28613 at *21).

At no time, did Petitioner ever look like the person that Ms. Bryant described at the preliminary as assaulting her in 1989. Concerning Bryant's in-court identification of Petitioner as her attacker, please see APPENDIX (B)(Denial of COA, 2017 U.S. Dist. LEXIS 28613 at *56-59).

[at *58]

"Counsel cannot be deemed ineffective when the witness changed her testimony from preliminary examination. Although counsel did not directly impeach the witness with her preliminary examination testimony, the jury could reasonably infer from counsel's questions and Bryant's responses, that her testimony at trial was not entirely consistent with her testimony at the preliminary examination. In fact, counsel's questions brought out the fact that Bryant was relying on the DNA evidence to be certain about her identification. Otherwise she could only say that Petitioner "'very well could be the person'" who attacked her."

The District Court's factual findings attest to the fact that the identity element in the Bryant case was not conclusive. Prints obtained from cigarette pack handled by perpetrator were not Payne's. There were differences between DNA preliminary report and final report. Ms. Bryant changed her preliminary testimony from not identifying Petitioner as her attacker - to - her trial testimony of "very well could be the person" who attacked her.

The Sixth Circuit violated the harmless error analysis announced in *Brecht v. Abrahamson*, 507 U.S. 619, 642-643 (1993) ("The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional

error had not taken place. Kotteakos is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," 328 U.S. at 764, and that "the judgment was not substantially swayed by the error," (quoting Kotteakos v. U.S., 328 U.S. 750, 765 (1946)). Considering the bolstering effect of the Prosecution's modus operandi argument in J.B. case, and the Court's instruction that C.K. and R.F. cases may influence their decision, reasonable jurists could disagree with the District Court, and Sixth Circuit's denial of COA.

REASONS FOR GRANTING THE PETITION

Petitioner argues that if the vacated counts R.F. and C.K. satisfy the factual pattern for causing harm in J.B. and S.C. cases under the doctrine of prejudicial spillover? Then certainly Petitioner has satisfied the threshold inquiry of whether the District Courts decision to deny COA was debatable. *Buck v. Davis*, 137 S.Ct. 759, 774 (2017).

If a habeas Petitioner demonstrates prejudicial spillover from reversed counts under said doctrine, then logic dictates that he has demonstrated that reversed counts "had substantial and injurious effect or influence in determining the jury's verdict" in the remaining counts. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

The Ninth Circuit and Second Circuit have both granted habeas relief for prejudicial spillover from reversed counts. Specifically, the Second Circuit has implicitly concluded that, because the prejudicial spillover rule is clearly established in a set of facts involving joinder, see, e.g., *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993); *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), it also is clearly established in the context of a set of facts involving retroactive misjoinder. Accord *Panetti v.*

Quarterman, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007)("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes that, to the contrary, that even a general standard may be applied in an unreasonable manner."). Please see the above rational fro prejudicial spillover being a habeas matter. *Daly v. Lee*, 2014 U.S. Dist. LEXIS 47244 at *64.

Petitioner humbly request that this Court decide the following important question of federal law that has not been, but should be, settled by this Court:

When a State vacates some, but not all, of the counts in a multiple counts trial on constitutional grounds, should the habeas Court assess harm under the prejudicial spillover doctrine? Habeas Courts apply this Court's four pronged analysis for assessing harmless error in Confrontation Clause error. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Stallings v. Bobby*, 464 F.3d 576, 582 (6th Cir. 2006). Habeas Courts are guided by *Strickland v. Washington*, 466 U.S. 668 (1984) in assessing a claim of ineffective assistance of counsel.

Petitioner Payne has never used the term "prejudicial spillover" but, he has consistently argued that vacated counts influenced the jury's verdict in remaining counts.

This Honorable Court should exercise its supervisory power and announce a standard of review for assessing harm from reversed counts on remaining counts, thereby establishing consistency within the Federal Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott Payne

Date: December 19, 2017

W/17-11