

SUPREME COURT OF THE UNITED STATES

JUNE TERM OF 2017

NO.

Michael Harwell

Petitioner,

-against-

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents

PETITIONER FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

Michael Harwell

Po. Box 69

London OH, 43140

QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit order to deny Petitioner, Micheal Harwell a Certificate of Appeal ability (COA) as to Petitioner's Claim; United States District Court for Southern District Western Division along with the denial of the Sixth Circuit court of appeals, violated Petitioner's Constitutional Rights and Due Process When the following questions were raised to the Southern District Western Division were denied, the questions presented/raised to the Sixth Circuit consist of the following;

- (1) An indictment is sufficient if it (1) contains the essential elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to defend against, and (3) enables the accused to plead a judgment under the indictment as a bar to any subsequent prosecution for the same offense.
- (2) The trial court violated the petitioner's rights to Due Process under the 14th Amend. and to a grand jury indictment under the 5th and 6th Amend, when it instructed the petit jury on elements not charged in the indictment (1-4).
- (3) The jury verdict of guilty for cts. 1-13 is contrary to law, as the jury verdict and the jury's verdict forms failed to include all of the essential elements and failed to charge an offense thereby violated Mr. Harwell's right to due process under the 14th Amend to the U.S. Constitution.
- (4) Mr. Harwell's conviction [Cts. 1-14] are based on insufficient evidence and were obtained in violation of the Due Process Clause under the 14th Amend. to the United States Const.
- (5) The trial court violated Mr. Harwell's rights to the 5th, 6th, and 14th Amend. to the U.S. Const. when it increased the felony level of the kidnappings cts. to felonies of the first degree when the defendant was only indicted for kidnappings in the second degree.
- (6) Trial counsel is ineffective in violation of the 6th Amend. to the U.S. Const. when he failed to object to the alternate juror being present while the jury was deliberating.
- (7) Trial counsel is ineffective in violation of the 6th Amend., to the U.S. Const. when he failed to object to the flawed jury instructions on complicity and causation.
- (8) Mr. Harwell right to appellate counsel was violated under the 6th Amend. to the U.S. Const. when Mr. Harwell did not knowingly, voluntarily, and intelligently waive his right to appellate counsel.

Wherefore, this clearly demonstrates why Petitioner additionally concludes that the Sixth Circuit Court of Appeals decision was an unreasonable Application of clearly well established Federal Law.

This case presents serious Constitutional questions for the Supreme Court that would amount to this Honorable Courts decision to not allow the infringement of a Constitutional Right as in this case. In the current case, Petitioner ask this Honorable Court the Constitutional Question of; Was there enough evidence to support a clear conviction? Petitioner asserts the answer is no!!!!

There were so many constitutional violations in this case, that the Ohio Court of Appeals ignored, along with the Southern District of Ohio at Dayton. The question before this Honorable Court constitutes whether the Courts overlooked the Totality of Circumstances of the Ineffective Assistance of counsel in this case, to the point that Counsels Performance fell weigh below the standard of Professionalism and violated Petitioner's constitutional Rights in this case.

When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, Must the federal court defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court?. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011); *Brown v. Payton*, 544 U.S. 133, 140, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Williams (Terry) v. Taylor*, 529 U.S. 362, 379, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)

Did the trial court violate the petitioner's rights to Due Process under the 14th Amend. and to a grand jury indictment under the 5th and 6th Amend, when it instructed the petit jury on elements not charged in the indictment (1-4)?

Did the trial court violate Mr. Harwell's rights to the 5th, 6th, and 14th Amend. to the U.S. Const. when it increased the felony level of the kidnappings cts. to felonies of the first degree when the defendant was only indicted for kidnappings in the second degree?.

PARTIES

Petitioner **Michael Harwell**, a prisoner at the London Correctional Institution. The Respondent as listed in the caption of this case. See Sup. Ct. R.14.1(b).

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Ohio Revised Code § 2905.01(A)(2),

Ohio Revised Code § 2903.11(A),

Ohio Revised Code § 2923.13(A)(3)

Ohio Revised Code § 2941.25,

**IN THE
SUPREME COURT OF THE UNITED STATES**

NO.

Michael Harwell Petitioner

vs.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari From the Denial of Appeal from the Sixth Circuit

Now into Court for Good Cause comes, Petitioner (*Hereafter Michael Harwell*) who most respectfully, prays for Writ of Certiorari to review the order of the United States Court of Appeals for the Sixth Circuit.

DECISION BELOW;

The order of the Court of Appeals for the Sixth Circuit Court of Appeals appears at Appendix A a Copy is attached to this Petition decision does not reflect the protections inside the United States Constitution and Petitioner suffered to the degree he is serving a life sentence based on constitutional misinterpretations along with the improper decision from the Court of Appeals Sixth Circuit in regards to the sufficiency of the Evidence in this case.

Petitioner Michael Harwell ask and applies for a COA to permit his case for close review of not only the insufficient evidence in this case, but to review the case with reasonable doubt of his guilt in the Murder of Jason Miller. Petitioner pleas for his life in manner consistent with the Law in this case, as the Constitution of the United States protects an Indictment that was insufficient as to count one through four(counts for felony murder and attempted to commit a murder) because it omitted the elements of the predicate offenses for Kidnapping and felonious assault, pursuant to Strickland v Washington Supra, counsel was ineffective for not objecting, and Petitioner should have prevailed on that issue alone.

JURISDICTION:

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 23rd 2017,. The District Court of Appeals decision was Unreasonable based on it is factually and legally predicated This District Court's decision was contrary to Federal Law, and was certainly an Unreasonable Application of Federal Law. A copy is filed with this Certiorari, respectfully requesting that this Court review and permission for good cause shown.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case rises to a level of high Constitutional Rights Concern. Petitioner asserts that although, "[T]here is no constitutional right in a state prosecution to a grand jury indictment with particular specificity. Petitioner asserts the Sixth Circuit along with the Southern Ohio District Western Division at Dayton failed to acknowledge that Petitioner had a Right to "[D]ue Process, the very due process mandates that the indictment provide the defendant with "Fair notice of the charges against him to permit adequate preparation of his defense." Citing Koontz, V Glossa, 731 F,2d 365,369 (6th Cir.1984).

Here, this case demonstrates that his defense relied upon being able to prepare for a proper defense at trial. Petitioner presents that he has a colorable due-process claim, based on his inability to present the proper defense. {1} First, constitutional and statutory Provision consist of the Sufficiency of the Evidence in this case. {2} Petitioner asserts the Constitutional Violation of the trial court erred in instructing the Jurors on the elements of the predicate offenses because those elements were omitted from counts one through four of the indictment; This constitutional Violation effected Petitioner's Right to a fair and impartial Jury..... Clearly the Sixth Circuit was in error in this violations, as Petitioner would have prevailed on appeal had the trial court not failed on this Decision.

{3} Petitioner asserts his Constitutional Rights were clearly violated when the Jury verdict forms (ct 1-13) failed to include all of the essential elements of the charged offenses and failed to charge an offense; Ohio Violated its on Law pursuant to State Pelfrey in which held that if the Jury verdict forms were in correct the Constitutional Violation that resulted from such an error. {4} As Stated above there was a serious violation with the Sufficiency of the evidence to support Petitioner's conviction in this case. (ct 1-14)

{5} This Constitutional violation is two fold and should not have been allowed and the Sixth Circuit court of appeals decision was Unreasonable application of clearly well established Federal Law in this case, by Counsel failing to object to Petitioner's Fifth argument of the trial court impermissible amending the Kidnapping charges in his indictment from second degree to first degree kidnapping. This violated a basic Constitutional Right in this case, Noting can be said to this clear violation of a Basic Constitutional Right to face charges and not have an amended of the offenses once a indictment has been handed down by the Grand Jury as in this case.

Alternate jurors were³ allowed to sit in while the jury deliberated

{6} Petitioner had a Right to fair effective assistance of counsel. This is a clear Constitutional Right of effective assistance in this case, Counsel was ineffective in several manners,,,, Counsel failed to object to the Constitutional violations in this case, which clearly allowed Petitioner Michael Harwell go down in flames in this case as a whole and looking at the totality of the circumstances before the United States Supreme Court.

Counsel failed to object to flawed jury instructions on complicity and causation

{7} Counsel as a whole and based on the Totality of this case, Petitioner asserts his Constitutional Rights were clearly a violated by his counsel(s) deficient performance at trial and on appeal. {8} In real of Petitioner's voluntarily waiving of appellate counsel, clearly was not a legal binding waiver in this case, and petitioner's waiver should have been made Knowingly, voluntary, or intelligently in this case and it clearly was not.

Petitioner Michael Harwell asserts his case involves constitutional and Statutory violations and grounds stated herein. Petitioner ask the Honorable Court to review the constitutional issues cited herein and allow his case to be reviewed by this United States Supreme Court.

STATEMENT OF THE CASE

Petitioner Michael Harwell was indicted by the Montgomery County Grand Jury on two counts of murder in violation of Ohio Revised Code § 2903.02(B), two counts of attempt to commit murder in violation of Ohio Revised Code § 2903.02(B)/2923.02(A), two counts of kidnapping in violation of Ohio Revised Code § 2905.01(A)(3), two counts of kidnapping in violation of Ohio Revised Code § 2905.01(B)(2), two counts of kidnapping in violation of Ohio Revised Code § 2905.01(A)(2), three counts of felonious assault in violation of Ohio Revised Code § 2903.11(A), all with attached firearm specifications, and one count of having weapons while under [*2] disability in violation of Ohio Revised Code § 2923.13(A)(3) (State Court Record. ECF No. 5, Page ID 74). The jury found Harwell guilty on Counts 1 to 13 with the firearm specifications and the trial judge found him guilty of having weapons under disability. After merger of allied offenses under Ohio Revised Code § 2941.25, Harwell was sentenced to a total of thirty-two years to life in prison.

Mr. Harwell appealed to the Second District Court of Appeals. He waived counsel on appeal and filed two briefs, raising thirteen assignments of error. The appellate court held attempted felony murder is not a crime in Ohio and vacated that conviction, but otherwise affirmed. *State v. Harwell*, 2015-Ohio-2966, 2015 Ohio App. LEXIS 2870 (2nd Dist. July 24, 2015); appellate jurisdiction declined, 143 Ohio St. 3d 1545, 2015-Ohio-4633, 40 N.E.3d 1181 (2015).

Mr. Harwell filed his Petition for Writ of Habeas Corpus on June 17, 2016, pleading the following grounds for relief: On June 23rd 2017 The Sixth Circuit denied Petitioner a Certificate of Appealability and this Appeal to the United States Supreme Court is Before the Court herein.

Basic for Federal Jurisdiction

The basis for Jurisdiction in this case, is to allow Petitioner's rights to be considered when the Ohio Court's decision reach to a level of "unreasonableness" along with decisions that are "Contrary to" decision that are well settled in Federal Law. The United States Supreme Court had the Jurisdiction when issue appear to have Constitutional and Statutory error in the Decisions by the Court of appeals as in this case.

Petitioner asserts that his case is one of constitutional and Statutory concern, to the level of mis-interpretation of the law and this Honorable court would be reasonable to review the Sixth Circuit Court of appeals decision and correct the clearly unreasonable application of clearly well established Federal Law as in the case before the United States Supreme Court herein.

Reason for Granting the Writ of Certiorari

This United States Supreme Court would be reasonable to grant this Certiorari to allow the review of the decision of the Sixth Circuit Court of Appeals. As This court's review and reason granting Petitioner opportunity to have a proper review to protect his Constitutional Rights in this case. Petitioner Michael Harwell has been violated by the Decision of the Court of Appeals in this case, and has been denied his opportunity to have his claims be adjudicated on the merits by the Statue court, has received substantial deference, and the writ should have been issued based on the States proceedings resulted in a decision that was "*contrary to*" or involved an "*unreasonable*" application of, clearly established Federal Law.

Second District's decision is contrary to or an unreasonable application of clearly established constitutional law as stated in holdings of the United States Supreme Court. [*18] *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2D 144 (2003). Therefore, the Sixth Circuit Court of Appeals, decision to uphold the lower court's decision was unreasonable application of Clearly Well established Federal Law.

Analysis

A. Conflict with Decisions of Other Courts

This case is directly in conflict with the Decisions in *Slack v McDaniel*, 529 U.S.473, 484 (2000) (quoting *Barefoot v Estelle*, 463 U.S. 880, 893 (1983) where this Petitioner met the standard by showing that reasonable jurists could debate whether the issues presented could have been resolved in a different manner, or that the issues presented were "adequate to deserve encouragement to proceed further."

Petitioner **Michael Harwell** asserts that his claim were adjudicated on the merits by the state court, and the state court's resolution of such a claim received substantial deference, and the writ should have been issued based on the state proceedings resulted in a decision that was "contrary to," or involved an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(D)(1)-(2).

Petitioner Michael Harwell cites *Souter v Jones* as conflict to the sixth circuit court of appeals decision in this case.

In *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit held:

[I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence [*22] means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter, 395 F.3d at 590.

Harwell's Affidavit does not meet the quality criteria imposed by *Schlup*. No new physical evidence is adverted to. Harwell provides double hearsay testimony about the results of a polygraph examination of a key state witness, Lori Peak. The scientific reliability of the polygraph, even when results are testified to by a certified examiner, remain very much in contention. The Sixth Circuit generally disfavors admitting the results of polygraph examinations. *King v. Trippett*, 192 F.3d 517, 523-24 & n. 3 (6th Cir. 1999); *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991). In *United States v. Scarborough*, 43 F.3d 1021 (6th Cir. 1994), a post-*Daubert* case, the court expressed its "long held

opinion that the results of a polygraph are inherently unreliable," without considering the impact of *Daubert*. The Supreme Court has acknowledged there remains no scientific consensus on reliability [*23] and has held there is no constitutional right to have results admitted at trials. *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

B. Importance of the Question Presented --

Petitioner *Michael Harwell* asserts that the importance of the questions presented in this case, is the need for a COA, to issue when Petitioner has established that ground for challenge to the sufficiency of the evidence warrants a COA. It is very important that this case be reviewed with out enough sufficiency of the evidence to support the conviction herein. After reviewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v Virginia*, 443 U.S. 307,319 (1979).

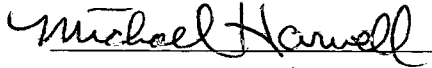
The Sixth Circuit Court of Appeals relied upon the deference afforded to the state courts under 2254(d), As the Sixth Circuit also stated; "even if this court were "to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, [this court] must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable." Citing; *Brown v Konteh*, 567 F. 3d 191, 205 (6th Cir. 2009) (Citing 28 U.S.C. § 2254 (D)(2)).

The above is important because "Generally" for a criminal defendant's conduct to be the proximate cause of a certain result, it must first be determined that the conduct was the cause in fact of the result, meaning that the result would not have occurred 'but for' the conduct. "State v Lovelace, 738 N.E. 2D 418, 425 (Ohio Ct. App. 1999). Petitioner asserts this is why theses questions are of such importance in this particular case.

CONCULSION

This case is the result of a clear conflict with the Trial Court and the Sixth Circuit court of appeals, along with the District Court of *Southern Ohio Eastern Division* siding with the trial court,

The United States Supreme Court has the authority to correct any miscarriage of Justice committed by the inferences used in this case, Particularly with the sufficiency of Evidence which is cognizable on a Federal Habeas Corpus Petition.

A handwritten signature in cursive script that reads "Michael Harwell". The signature is written in dark ink and is positioned above the typed name and address.

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