

7
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JOSEPH HARDEN — PETITIONER
(Your Name)

vs.

MICHAEL BOWERSOX — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH HARDEN #286322 HU3B-129

(Your Name)

SOUTH CENTRAL CORRECTIONAL CENTER

255 WEST HIGHWAY 32

(Address)

LICKING, MISSOURI 65542-9069

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Due Process standard of Jackson v. Virginia requires a court to consider "all of the evidence" in deciding a reasonable fact finder could have found guilt beyond a reasonable doubt as this Court held in Jackson, or may a conviction be based entirely on circumstantial evidence and impermissible inferences be upheld under Jackson by piecemeal review of the evidence, in holding that the state court's finding that Joseph Harden knowingly caused the death of the victim after deliberation was based on sufficient evidence.
2. Whether the Due Process standard of Jackson v. Virginia allows an inference to prove the required element of knowingly causing the death of another after deliberation to prove first degree murder under the reasonable doubt standard where, under the facts of the case, the elements are negated and there was no rational way a trier of fact could make the connection permitting the inference which caused the conviction to be based on speculation and surmise because the ultimate facts and basic facts demonstrate that the state failed to present any evidence linking Joseph Harden to the crime scene or that he killed the victim after deliberating upon the matter.

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:

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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 17-2394; 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☐ is unpublished.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 C to the petition and is

☒ reported at 4:14-CV-00383 NAB; 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 D to the petition and is

☒ reported at STATE V. HARDEN SD30479; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 10-16-17.

☐ 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: 11-1-17, and a copy of the order denying rehearing appears at Appendix B.

☐ 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).

☒ For cases from **state courts**:

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

☒ A timely petition for rehearing was thereafter denied on the following date: 7-5-11, and a copy of the order denying rehearing appears at Appendix E.

☐ 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

The following statutory and constitutional provisions are involved in the case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and to 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 it's jurisdiction the equal protection of the laws.

28 U.S.C. SECTION 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(C) An applicant shall not be deemed to have exhausted the remedies available in courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus

by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall provide that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial

opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Section 565.020, RSMo: A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

Section 571.015, RSMo: A person commits the crime of armed criminal action if the person committed a felony and the crime was committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.

Section 565.002, RSMo: Defines deliberation as cool reflection for any length of time no matter how brief.

STATEMENT OF THE CASE

On January 28, 2010, Joseph Harden was charged in Count I of an amended information, that he: in violation of Section 565.020, RSMo, committed the class A felony of murder in the first degree, punishable upon conviction under Section 558.011. 1, RSMo, in that on or about July 8, 2008, in the County of Pemiscot, State of Missouri, Joseph Harden, after deliberation, knowingly caused the death of Albert Lynn Harper by striking and stabbing him; and, in Count III, that Mr. Harden committed the felony of armed criminal action (ACA) in violation of Section 571.015, RSMo by committing the felony of murder in the first degree, by, with and knowingly through the use, assistance and aid of a dangerous instrument, to wit: a concrete block.

Mr. Harden was also charged in Count II, V and VI with additional armed criminal action charges, and in Count IV, robbery in the first degree. On July 7, 2008, Danny Singletary (Danny), who lived in Dyersburg, Tennessee, called Mr. Harden for a ride to Albert Harper's house (Al) in Paragould, Missouri. Harden and his wife drove to Dyersburg, picked up Danny, and drove him to Al's house. Danny, Al, and Harden went to an ATM machine, Al took out \$200 and gave Harden \$70 for the ride. Harden and his wife drove back to Kennett, Missouri. Pet.App. D .

Later that evening, Danny called Harden a second time for a ride back to Dyersburg to pick up more clothes and drugs. Harden and his wife did so. After stopping in Kennett, Danny, Al, and Harden

headed back to Dyersburg. Danny was driving and they were all drinking and using drugs. Just before reaching Hayti, Missouri, Danny tried to pass a truck and ran off the road into the grass blowing out the front and rear tires on the driver's side. Danny was trying to get over the median to the right side of the road when they were stopped by Officer Brad Jones of the Hayti Police Department and was arrested for DWI. The stop occurred at 3:30 am near Highway 84, in front of First State Bank. Id.

Officer Jones' trial testimony was that Harden was wearing a sleeveless T-shirt, black jeans, a red baseball cap and a pair of boots, not flip flops. Harden's booking photo depicts his appearance on July 8th during his arrest, as well as how his hair was worn. Officer Jones did a pat down search of Harden and found a pocket knife, but the knife posed no threat to the officer. However, Officer Jones' police report did not indicate that a knife was taken from Harden. Al Harper was wearing a white T-shirt with sleeves, blue jeans, sandals and a camouflaged hat. Id.

At approximately 4:00 am, after the car had been searched and the occupants had been searched, Harden and Al were released. When Jones left to take Danny to the police station, Al and Harden were at or near First State Bank's ATM machine. Officer Jones did not observe any animosity or resentment between the two, both were alive, well, and getting along. Two ATM cash withdrawals on July 8th, one at 4:23 am and the other at 4: am, were documented on video and by bank records. The first withdrawal was for \$20 and the second for \$200. Id.

At about 5:30 am on July 8th, Chakita Johnson drove past Brown's Grocery store en route to pick up her brother to take him to work. She saw two men, one on the pay phone and one sitting down. After taking her brother to work, she returned home passing Brown's, and the two men were sitting down and appeared to be waiting for someone. The men were white, one was skinny and the other was a little chubby. They were close to the store near the trash can and pay phone. Id.

At approximately 7:30 am, Bruce Sams was driving westbound on Highway 84 en route to work. As he passed Neely's Shop, Sams saw a white male wearing a baseball cap and blue jeans, cut off at the knees, coming out from Neely's shop. He appeared to be walking towards old 84. The man was shirtless and had tattoos on his chest and arms. Sams thought it looked like he had on two caps, one forwards and one backwards, like an old trucker hat. The man wasn't carrying anything. He was stocky but not overweight and in his late 30's to early 40's. Id.

Neely Mitchell's shop is located at 50 West State Highway 84, just west of Hayti Heights and about 250-300 yards from Brown's Grocery. At about 7:35 am, July 8th, Neely Mitchell was driving west on Highway 84 and saw a white male walking east on the north side of the highway carrying something in one of his hands. When Mitchell saw him, the man was 25 to 30 feet west of the drive of Brown's Grocery. The man wore blue jeans and was shirtless. Mitchell noticed the man's hair was visible on the neck and he had letters, approximately an inch

high tattooed across the upper part of his back. The man was just right across the road that runs on the west side of Brown's. On cross-examination, Mitchell acknowledged that he had told the prosecution that this man had long stringy hair. The man was not wearing a hat. Mitchell acknowledged he could not identify the man he saw. Mr. Sams and Mr. Mitchell provided two separate descriptions of two different white males wearing two different sets of clothing, and two different kinds of tattoo's in different areas of their bodies. One was carrying something, the other was not. Each white male was walking in different directions and areas near Highway 84. Id.

Mr. Mitchell arrived at his shop, got out of his truck, let his dog out, then, walked to the rear north side of his shop and saw a man, dead, lying face up, with a white T-shirt covering his head and face. A ladder, chained to the shop, was partially over him. In the area of the body were various sized rocks, remnants of the foundations of a former demolished tenant dwelling. Mitchell called the sheriff, his phone records indicates he placed the call at 7:40 am. Almost simultaneously, Deputy Joe Bryant drove past the shop and Mitchell waved at him. Seconds later, Bryant received a call about the dead body and went there. Bryant was close to Browns Grocery, but did not see anyone at or in the vicinity . Id.

On the west side of Mitchell's shed, which was visible from the roadside, Bryant found an accumulation of blood and drag marks indicating that someone had been dragged from that spot to the rear of the building out of view of the road. Id.

Chief Sheckell testified that Harden became a suspect because he was in the car with Al and Danny when the car was stopped. Harden's father and brother called and asked Sheckell why the police were looking for Harden, and eventually Mr. Harden called and spoke to Sheckell. Harden said he had done nothing wrong; that he had been helping a black lady move a T.V. that morning and she gave him a ride to Kennett. Harden did not know the black lady's name. Harden also said he and Al had gone to the bank; Al withdrew some money from the ATM, gave him \$100 and they then separated. Id.

Officer Bryant testified that it is approximately a mile from First State Bank to Brown's Grocery and a few hundred yards from Brown's to Mitchell's shop. He estimated that Elinore Booth's house on North Walnut Street is about a half mile from Brown's Grocery. On a lot adjacent to Booth's house, under a concrete porch, Bryant found a camouflage baseball hat and a white sleeveless T-shirt. Id.

On July 8, 2008, Lt. Ryan Holder and Mo. State Highway Patrol Officer Sargent Stoelting, interviewed Harden at the Kennett Police Station. According to Stoelting, in response to questions that he and Holder asked, Harden said he did not know where Al was, that he last saw Al walking west from Brown's Grocery. Al got \$200 from the ATM and gave him \$75. They walked together to Brown's Grocery and he used Al's phone card to call his wife and a friend, Gene Turner, for a ride. After waiting for Turner, who never came, Harden began walking towards Kennett. On Pascola

Road he helped a black woman and man load a TV into their car, then rode with them to another house to unload it. Harden asked the woman if he could pay her for a ride to Kennett she said she was going anyway and would take him. He offered her \$40 and gave her \$15. After pumping gas for her in Kennett near Walmart, he called his brother from Dairy Queen. His brother took him to Paragould to get his wife, and then back to Kennett. Harden was arrested after returning to Kennett. Id.

According to Stoelting, Harden first denied going to Walmart but eventually said he bought jeans, a shirt, and shoes, and gave the pants to an employee to throw away because they were sweaty and nasty. When Stoelting accused Harden of lying, Harden said he did not kill Al and wanted an attorney. At some point before this, Harden agreed to give a buccal swab. Later, Harden said that if he could get a cigarette he would think about telling him what happened. Harden got the cigarette then said that earlier in the evening Al and Danny had gotten into a fight and Harden got blood on his jeans breaking up the fight. Id.

Sheckell's investigation led him to Elinore Booth and her son Donald Booth. Sheckell spoke to Donald who said the white guy put a shirt and hat under some steps on the vacant lot next to their house. Sheckell and Bryant found a baseball hat and T-shirt in the lot next to the Booth's house which was seized by Officer Bryant. Id.

Elinore Booth testified that she and her son were picking up a television when a white man came up and spoke to her about someone they both knew.

The man helped her load the TV and offered to pay her to take him to Kennett. Ms. Booth stopped at her house to unload it, then they drove to Kennett. She stopped for gas, paid for it, Harden pumped it, and she let him out in front of the Kennett Walmart. Id.

Donald Booth testified that when they got to his mother's house to unload the TV, the man threw clothes down in the porch in the lot next door. However, Donald had previously testified that he would not know the guy who helped them load the truck if he saw him again. He further testified that he wasn't paying attention to see if the man put something under or by the porch. That, it was when he was going home that he saw it under the porch, and it looked like a red handkerchief. Finally, Donald testified he did not tell the police he saw someone put something under the porch. Id.

After leaving Ms. Booth, Harden went to Walmart and employee Tim Fortune saw Harden come out of the fitting room. Harden had bought a pair of pants, a belt, a shirt and a pair of boots. Fortune said Harden told him he got gas soaked working on his vehicle. At the register, Harden gave Fortune his old pants to throw away. Surveillance tapes from the Kennett Walmart showed Harden entering and shopping at the store. The pants given to Fortune had stains from Al's blood. Id.

Investigators found a black leather wallet belonging to Al in a trash can outside Browns Grocery, near a phone against the store building. The wallet had Al's debit/credit card and personal

items, it did not contain any money. On July 11, 2008, after Harden was arrested and confined, investigator's found a knife midway between Brown's Brocery and Mitchell's shop. That same area had been combed thoroughly by the police three days prior, and nothing was recovered in that same area. Id.

Diane Higgins, a forensic scientist for the Missouri State Highway Patrol Crime Lab, tested the evidence seized. Higgins' test revealed that the blood on a concrete block seized from Mitchell's farm, the stains on Harden's jeans, and the stain on the sleeveless T-shirt, were all consistent with Al Harper's blood. Blood on the blade of the black knife seized from the roadside between Mitchell's farm and Brown's Grocery produced a partial DNA profile consistent with Al Harper. The state argued the black knife was Harden's because Danny identified State's Exhibit #6 as a picture of the knife Harden had cutting sandwiches at Al's house. Id.

Higgins' testing of the inside of the sleeveless T-shirt revealed a mix of the DNA of at least two individuals, Harden and Al could not be excluded as contributors to the mix. Al could not be excluded as the source of the DNA on the inside of the camouflage cap. There was insufficient DNA on the handle of the black knife for DNA tests, although testing of the knife handle revealed alleles that did not natch Joseph Harden's DNA profile. Id.

There were no fingerprints on the wallet found at Brown's Grocery. Higgins testified that DNA from one person will transfer to another person by physical contact, such as squeezing someone's hand or pulling

up a pair of pants, could transfer DNA to another person's hand or to the pants. Id.

The autopsy report performed by Dr. Zaricor and the accompanying lab report were admitted into evidence by stipulation. According to the report, the time of death was 7:30 am, and cause of death, primarily massive blunt trauma which crushed Al's head and face. Ms. Booth also testified that Mr. Harden was helping her load the TV at 7:30 am, and the video of Harden pumping gas for Ms. Booth in Kennett was at 8:12 am. The city of Kennett is 19 1/2 miles from Hayti. Harden would have had at 32 minute window to murder Al, get to Ms. Booth's to load the TV, drive to her house to unload the TV, then ride 19 1/2 miles to Kennett all in 32 minutes. Id.

The report also revealed knife wounds to Al's neck were inflicted while he was still alive, the stab wounds on his chest appeared to be post mortem. Lab analysis found measurable amounts of Diazepam. Nordiazepam, Cocaine and Tramadol, in Al's blood. Dr. Zaricor wrote that at death, Al was grossly intoxicated and potentially stuporous with toxic levels of cocaine, alcohol and Tramadol in his body. Id.

Gene Turner testified Harden did call him on July 8th at about 5:45 am. Harden said he was in front of Brown's Grocery with another guy and wanted to go to Kennett. He told Turner he had alot of money and might ask him to take him to Paragould. Turner and his wife told Hraden he had an early doctors appointment with an eye doctor and would not have time to get him., but, if he wasn't there

by 6:15 am, he was not coming. Mr. Turner never came. Id.

Mr. Harden testified in his defense that, after being stopped in Hayti, he and Al went to an ATM. Al tried to take out \$200 and got \$20. He helped him get \$200 and Al gave him \$75 for bringing Danny to Dyersburg. While the car was being loaded onto the tow truck, he put his boots into the car and got his flip flpos. Al and Harden began walking. When they reached the railroad tracks in Hayti Heights, Al who had downed some prescription pills when the car was pulled over, fell down face first and rolled into a ditch busting his nose and mouth. Harden said he sat down to pull Al out of the ditch and in doing so, got blood on his pants. Id.

Harden and Al got to Brown's and stopped. Al's shirt was bloody from the fall, and Harden gave his shirt to Al to wipe his face. Using Al's phone card, Harden called his wife and Gene Turner for a ride. Mr. Turner agreed to come so Al and Harden waited until, eventually, Turner did not come. Harden said he saw a woman loading a TV into a truck, and he told Al to wait and he went to help and see if he could get a ride if he offered her some money. Harden testified that was the last he saw of Al, that, after the TV was loaded and unloaded, the woman drove pass Brown's Grocery but Al was not there. The woman drove to Kennett. Harden testified he did not have any arguments with Al, they were trying to help Danny. Id.

In Kennett, Harden testified he pumped gas for the lady and offered her \$20. He called his brother

from Walmart and while waiting he bought shoes, blue jeans, and a shirt. Harden learned the Hayti police were looking for him from his father. He called Chief Sheckell, who would not tell him what was going on, only that he would pick him up. Harden said him and his wife went to a friends house where he called Sheckell again. While Harden was on the phone talking to him, Holder and Stoelting arrived and took him to the police station. Id.

Harden testified Holder and Stoelting asked him stupid questions such as whether Al made certain homosexual advances, so he responded with stupid answers. In response, Harden said he told the police he had not harmed or killed Al and Al fell and busted his face; that he had no quarrel with Al and Al had paid him as agreed. Harden further testified he did not take anything from Al or try to rob him, and, that there was not enough time to kill someone, move a TV set, and get to Kennett, all in 32 minutes.

Harden testified he was sorry that he gave stupid answers to Stoelting's questions, and denied he went to Mitchell's shed and killed Al. Id.

Under the thoery of this case, the prosecution had to prove the elements of first degree murder, as set forth in Section 565.020 , RSMo, that Harden: (1) Knowingly caused the death of Al; and (2) did so, after deliberation upon the matter. Id. To prove Harden guilty of Armed Criminal Action (ACA), the prosecution had to prove the elements as set forth in Section 571.015, RSMo, that Harden: (1) Committed the felony of first degree murder; and (2) did so, by with, or through the use, assistance and aid of a dangerous instrument. Id.

At the close of all the evidence, Harden moved for judgment of acquittal, which was denied. After a bench trial, the trial court found him guilty of first degree murder and armed criminal action as charged in Counts I and III. Harden was also found guilty of first degree robbery and armed criminal action as charged in Counts IV and VI. On March 29, 2010, Harden was sentenced to a term of life imprisonment without parole in Count I, Life imprisonment without parole in Count IV, to be served consecutively with Count I, and two ten year consecutive sentences in Counts III and VI. Harden was found not guilty in Counts II and V. Id.

A. Direct Appeal Proceedings

On March 29, 2010, Harden filed a timely notice of appeal. Harden raised the point that the evidence was insufficient to support his convictions for first degree murder and armed criminal action, and for first degree robbery and armed criminal action. The Missouri Court of Appeals, Southern District, reviewed the claim under the standard of Jackson v. Virginia, 443 U.S. 307, 319 (1979). Pet. App.D 2.

The appellate court disagreed that the evidence was insufficient to support Harden's convictions based on its conclusion that proof of deliberation may be inferred, although it still must be proved beyond a reasonable doubt. Id. at 9. The court cited State v. Martin, 291 S.W.3d 269, 275 (Mo.App. 2009), for the proposition that when the defendant has committed a murder which, because of the particular means of attack, required some time to complete, deliberation may be

inferred. Id. at 10. The court relied on State v. Strong, 142 S.W.3d 702, 717 (Mo.banc 2004), for the proposition that deliberation may ne inferred when there are multiple wounds or repeated blows. Id.

The court reviewed the matter in the light most favorable to the judgment, the evidence and reasonable inferences derived therefrom were sufficient for the trial court to conclude beyond a reasonable doubt that Mr. Harden was the person who killed Al. Id. The court concluded there was evidence from which the court could have inferred that Harden and Al were together at Brown's Grocery at 5:45 am. That location was only a few hundred yards from where Al's body was later discovered. Id.

The court also inferred that Harden was the shirtless man with a tattoo on his back seen leaving the farm shop between 7:00 am and 7:30 am. Id. This person had something in one of his hands. Id. Al's head and face had been crushed with a concrete block which had Al's DNA on it. Id. the police later recovered a knife near the murder scene, a knife identified in court as belonging to Harden, that contained blood on the blade consistent with Al's DNA. Id. Sometime after 7:30 am, Harden threw away a white sleeveless t-shirt and a camouflaged baseball cap on a vacant lot. The shirt contained a mixture of DNA profiles consistent with Harden and Al. The DNA on the hat was consistent with Al's profile. Id. at 10-11.

At a Walmart store, Harden lied about why he was not wearing a shirt. He bought new clothing and had the clerk discard the old clothes. Police recovered those clothes, and Harden's jeans were

covered with blood stains. The DNA from the blood was consistent with Al's profile. The court concluded that the DNA evidence linking Harden to the crime was very strong, and that evidence alone provided a sufficient basis for the trial court to conclude Harden killed Al. Id.

Finally, in viewing in the light most favorable to the judgment, the evidence and reasonable inferences derived therefrom were sufficient for the trial court to conclude beyond a reasonable doubt Harden deliberated before killing Al. Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time...Like most elements of mens rea, deliberation is ordinarily shown through proof of the circumstances surrounding the killing. Therefore, the court reasonably could have inferred that the attack on Al took some time to complete and the Harden had a chance to stop the attack after it began. Id. This was sufficient to prove that Harden had at least a cool moment of reflection before killing Al, which is all that is required for deliberation to exist. Id. 11-12.

The Southern District affirmed. Id. at 12.

B. Federal District Court Proceedings

Harden timely filed a petition for relief under 28 U.S.C. Section 2254 on February 27, 2014. Applying the standard of review applicable under 28 U.S.C. Section 2254 (d)(1), as explained in Williams v. Taylor, 529 U.S. 362, 412 (2000), United States Magistrate Judge Nannette A. Baker granted the petition on separate grounds, but denied the petition on ground 2 (Murder and Armed Criminal Action) Pet. App. C 12.

On April 12, 2007, the district court adopted the decision of the Missouri Court of Appeals, and denied ground 2 of Harden's petition. Pet. App. C; Id. at 12-13. The district court concluded the Court of Appeals decision that the evidence was sufficient to support Harden's murder and armed criminal action convictions is entitled to deference and was neither incorrect nor unreasonable. Id. at 13. The district court further ordered that no certificate of appealability will issue. Id. at 28.

Harden filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) on May 12, 2017. The motion was denied June 5, 2017. Thereafter, Harden filed a timely notice of appeal June 19, 2017. Harden's certificate of appealability was filed August 14, 2017. On September 20, 2017, the district court denied the application. Id.

C. The Eighth Circuit Proceedings

Harden filed a timely notice of appeal on June 27, 2017 in the Eighth Circuit Court of Appeals. Harden's application for a certificate of appealability was filed July 6, 2017. The Eighth Circuit denied the application October 16, 2017. Pet. App. A. Harden filed his petition for rehearing or rehearing en banc November 1, 2017. Pet. App. B. On November 28, 2017, the Eighth Circuit denied the petition for rehearing. The court issued its mandate December 5, 2017. Pet. App. B.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Adjudication of Harden's Jackson v. Virginia Claim Conflicts With The Decision Of This Court And Other Court's Of Appeals.

1. This Court should grant the petition for a writ of certiorari because the federal court departed fundamentally from this Court's test for reviewing a claim of insufficient evidence. Instead of viewing "all of the evidence" in the light most favorable to the prosecution, Jackson v. Virginia, 443 U.S. 307, 319 (1979), the court employed piecemeal review of the evidence, and applied unreasonable inferences to prove the essential elements of first degree murder and armed criminal action by drawing unreasonable conclusions from factual scenarios, which jeopardized Joseph Harden's right to be convicted only upon proof beyond a reasonable doubt. Jackson, 443 U.S. at 318-319; In re Winship, 397 U.S. 358, 363-364 (1970).

2. Its error is particularly egregious because this case involves habeas review of a state court judgment, which requires the application of an additional layer of deference under AEDPA. Left unreviewed, the federal court's opinion will be cited for the proposition that (1) the Due Process standard of Jackson v. Virginia allows convictions based on piecemeal review of the evidence and unreasonable inferences in complete disregard of ultimate and basic facts negating such inferences; (2) eliminate Jackson's requirement that sufficiency review be applied "with explicit reference to the substantive elements of the criminal defense as

defined by state law; (3) allow evaluation of each factor in isolation rather than in the context of the total circumstances of all the evidence admitted at trial; and (4) allow courts to uphold convictions based on speculation and surmise alone, by crediting inferences that are unsupported by ultimate and basic facts.

3. The federal court's application of Jackson conflicts with Jackson itself, as well as decisions of other Courts of Appeals. Its decision conflicts with Jackson's clear teaching that " a federal court has a duty to assess the historical facts when it is called upon to apply the constitutional standard to a conviction obtained in a state court." Jackson, 443 U.S. at 318. Here, the federal court accepted at face value the state trial judge's base assertion of the thoroughness of his approach and the state appellate court's acquiescence in that assertion. That is plainly insufficient to discharge a federal court's duty under Jackson and Section 2254(d)(1), as other Circuits have recognized.

4. In Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir.), cert. denied, 122 S. Ct. 282 (2001), the First Circuit made clear that in deciding whether a state court has applied Jackson unreasonably, a federal habeas court must assess the evidence independently and cannot rely on the state court's conclusion that the evidence was sufficient. Id. In Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir. 2001), cert. denied, 122 S. Ct. 1463 (2002), the Fifth Circuit likewise made clear that the state court's mere invocation of the Jackson standard does not obviate the requirement of an independent review of the

evidence. Id.

There thus remains a pressing need to bring clarity and national consistency to the standard of review under Section 2254(d)(1) and Jackson, or the Eighth Circuit will continue to generate conflicts with other Circuit's applying federal law in cases under Section 2254(d)(1) and Jackson v. Virginia, and will deny habeas corpus petitioner's in that Circuit the right to review that Congress and this Court intended.

4. Petitioner Harden was found guilty after a bench trial of first degree murder and armed criminal action under Sections 565.020, RSMo and 571.015, RSMo. Under section 565.020, the prosecution had to prove the elements that Harden: (1) knowingly (2) caused the death of Al Harper (3) after deliberation upon the matter. Id. To prove Harden guilty of ACA, the prosecution had to prove the elements that Harden: (1) Committed the felony of first degree murder (2) by, with, or through the use, assistance or aid of a dangerous instrument. Id. Deliberation is defined under Section 565.002, RSMo as "cool reflection for any length of time no matter how brief." Concerning the element of deliberation for first degree murder, the Missouri Supreme Court stated: "both second degree murder and first degree murder require that the act be intentionally done. Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." State v. O'Brien, 857 S.W. 2d 212, 218 (Mo. 1993). The trial court found Harden guilty of first degree murder and ACA as charged in Counts I and III.

5. The state appellate court found substantial evidence to support the trial court's finding that Harden, under Jackson, viewed in the light most favorable to the judgment, the evidence and reasonable inferences derived therefrom were sufficient for the trial court to conclude beyond a reasonable doubt that Harden was the person who killed Al Harper.

The state appellate court acquiesced to the following inferences made by the trial court: Section (1a) that Harden and Al were together at Brown's Grocery at 5:45 am; Section (2a) that location was only a few hundred yards from where Al's body was later discovered; Section (3a) that Harden was the shirtless man with a tattoo on his back seen leaving the farm shop at 7:30 am, with something in one of his hands; Section (4a) that the DNA evidence alone was sufficient for the trial court to conclude Harden killed Al; Section (5a) that Al's DNA was transferred when Harden killed Al; Section (6a) that this evidence and reasonable inferences were sufficient for the trial court to conclude beyond a reasonable doubt that Harden deliberated before killing Al; and Section (7a) because Al had multiple injuries, inferring the attack on Al took some time to complete, that was sufficient to prove Harden deliberated before killing Al. Pet. App. D 9-12.

6. The federal habeas court and the Eighth Circuit followed the state appellate court's findings under Jackson v. Virginia. However, the Eighth Circuit and federal habeas court's holdings conflict with Jackson itself, and in principle with the holdings

of other Circuits because the Eighth Circuit accepted at face value the trial judge's approach, and failed to perform an independent review of "all the evidence", and not merely the evidence that might support a conviction. Jackson, 443 U.S. at 319. Relatedly, merely adopting the state court's assessment, is plainly insufficient to discharge a Circuit Court of Appeals duty under Section 2254(d)(1), as other Circuits have recognized. Hurtado, 245 F.3d at 18; Santellan, 271 F.3d at 193.

Both matters are critical in reviewing Mr. Harden's insufficiency claim, and neither the state court's guilty verdict nor the state appellate court's application of Jackson in evaluating that verdict explained how a reasonable factfinder could have found guilt beyond a reasonable doubt based on "all of the evidence".

7. Instead, the state court's, federal habeas court and the Eighth Circuit, ignored all the important evidence contradicting the hypothesis of guilt which, removed the option of using an inference by the trier of fact, to prove the elements of the crimes because there were not **any ultimate facts or basic facts for the trier of fact to rely on to resort to an inference.** Such an action also conflicts with Jackson, Id. at 319, and other Circuits. See Cty. of Ulster County, New York v. Allen, 442 U.S. 140, 157 n.12 (1979) (An...inference, does not shift the burden of proof, unless it affects the application of the beyond a reasonable doubt standard...if, under the facts of the case, there

is no rational way the trier could make the connection permitted by the inference...); United States v. Quattrone, 441 F.3d 153, 169 (2d Cir. 2006) (Courts cannot credit inferences within the realm of possibility when those inferences are unreasonable).

8. The prosecution and Mr. Harden presented important contradicting evidence of guilt. Specifically, in contradiction to Sections (1a), (2a) and (3a) above, the prosecution did not present any evidence to conclude Mr. Harden remained with Al Harper after 5:45 am. It also did not produce any physical or forensic evidence, such as, Harden's DNA evidence, or any items touching or underneath Al's body, which linked him to the killing or to the crime scene. The prosecution did not present any evidence Harden personally caused Al's death.

To support its theory, the prosecution bolsters the testimony of Bruce Sams, Neely Mitchell, Danny Singletary, and Harden and Al's DNA on Al's camouflage hat and the white t-shirt found on a vacant lot adjacent to Ms. Booth's home, the mother of Donald Booth.

9. Bruce Sams testified that at 7:30 am he was driving westbound on Highway 84 en route to work. As he passed Neely's shop building, he saw a white male, wearing a baseball cap and blue jeans, cut off at the knees, walking down the gravel drive way coming out from Neely's shop. The man appeared to be walking towards old 84. The man was shirtless, and had tattoos on his chest and arms. Sams thought

it looked like he had two caps on, one forwards and one backwards, like an old trucker hat. The man was not carrying anything. Sams said the man was stocky, but not overweight and in his late 30's to early 40's. Later, while talking to an officer, Sams saw a man getting into a Chevy Suburban and thought it was the man he had seen leaving Neely's shop building.

10. At about 7:35 am on July 8th, Neely Mitchell was driving west on Highway 84 and also saw a white male "walking east on the north side of 84 highway" carrying something in one of his hands. When Mitchell saw him, the man was 25 to 30 feet west of the drive to Brown's Grocery. Neely Mitchell's farm shop is at 50 West State Highway 84, just west of Hayti Heights and about 250-300 yards from Brown's Grocery. Mitchell said the man wore blue jeans and was shirtless, with hair "visible on the neck". He had letters approximately an inch high tattooed across the upper part of his back. The man was "just across the road that runs on the west side of Brown's. On cross-examination, Mitchell acknowledged that he told the prosecutor the man had "long, stringy hair" and "was not wearing a hat".

11. This evidence contradicts the hypothesis of Mr. Harden's guilt and removes from the trier of fact ultimate facts and basic facts to resort to an inference that Harden was the shirtless man seen by Mr. Sama and Mr. Mitchell because, Sams and Mitchell provided "two separate and distinct

descriptions of a white, shirtless man walking in two different areas of highway 84, wearing two sets of different clothes, with different kinds of tattoo's on different areas of the body. One had long, stringy hair (visible on the neck), the other was wearing what looked to be two hats (one forward, one backward). One looked as if he had something in one of his hands, the other was not carrying anything. One had tattoo's on his chest and arms, the other letters across his upper back approximately an inch high. One had on blue jeans cut off at the knees, the other was wearing blue jeans.

Finally, one got into a Chevy Suburban. These men were obviously two different white men.

12. That Sams and Mitchell described two different white males is crucial because, Mr. Harden's appearance at the time of his arrest does not coincide with either description. Harden's booking photo shows Harden had short hair, with a goatee, and dragon tattoo's on both arms. Relatedly, when stopped before Al was killed by Officer Brad Jones, Harden wore a white wife-beater and black jeans. This contradicting evidence was overlooked and not considered under the Jackson inquiry and removed the option to use an inference by the trier of fact that Harden was one of the shirtless men.

Likewise, there was also contradicting evidence presented at trial which refuted the prosecutions DNA theories in Sections (4a) and (5a).

13. The prosecution bolstered at trial that Al's DNA was transferred to Harden's black jeans and white T-shirt. Forensic scientist, Diane Higgins,

testified that the testing of the inside of Harden's tank top showed a mix of the DNA of at least two individual's and, Harden and Al could not be excluded. The amount of Al's blood on Harden's white tank top was not as significant as the prosecution portrayed, considering the bloody crime scene.

The stains on Harden's jeans were also consistent with Al's blood. However, Higgins testified that DNA from one person will transfer to another person by physical contact; squeezing someone's hand or pulling up a pair of pants could transfer DNA to the other person's hand or to the pants.

14. Mr. Harden testified that after being stopped by Officer Jones, him and Al began walking and when they reached the railroad tracks, Al, who had downed prescription pills when stopped, fell down face first and rolled into a ditch busting his nose and mouth. Harden sat down to pull Al out of the ditch, and in doing so, Harden got blood on his pants. When they got to Brown's and stopped, Al's shirt was bloody from his fall and Harden gave his shirt to Al to wipe his face.

Although this evidence comes exclusively from Harden's own statements, and the state and federal court's found the trial court was free to disregard Harden's inference in favor of the competing inference that Al's DNA was transferred when Harden killed Al. While this is certainly true, the prosecution failed to offer any contrary evidence in its place.

15. Simply because Harden's self-serving statements may not be credible does not give the trier of fact

license to speculate on what happened when there is nothing else to go on. Certainly, the trier of fact was not required to believe Harden, but neither was it permitted to invent a version of facts, unsupported by any evidence that fits the crimes charged. In short, the prosecution failed to produce sufficient evidence from which a reasonable trier of fact could conclude the DNA was not transferred from Al's falling on the railroad tracks and Harden, helping, got his blood on his black jeans, and then gave Al his shirt to wipe the blood from his face.

In fact, Al's blood on Harden's white tank top was consistent with someone wiping blood rather than blood splatter from a bloody crime scene. The prosecution failed to present any evidence to contrary, and the photo's depicts such a conclusion. This contradicting evidence removed the reliance by the trier of fact on an inference to prove the elements of the crime to satisfy the prosecutions theories in Sections (4a) and (5a) above.

16. Finally, there was never any evidence presented by the prosecution that Harden actually killed Al Harper, let alone, that he deliberated in doing so. The federal court and Eighth Circuit's reliance on the state appellate court's inference that there was sufficient evidence for the trial court to conclude beyond a reasonable doubt that Harden deliberated before killing Al based on his multiple injuries, inferring that attack took some time to complete, is unreasonable and based on speculative, unreasonable

forced inferences. State v. Clark, 490 S.W.3d 704, 707 (Mo.banc 2016) (quoting State v. Whalen, 49 S.W.3d 181, 184 (Mo. banc 2001) (overruled on other grounds)). And, as will be shown below, there is no evidence in this case from which a reasonable trier of fact could have found or inferred Mr. Harden personally committed Al Harper's murder or personally deliberated in his killing, under a proper Jackson and Section 2254(d)(1) review.

17. Here, a reasonable trier of fact could have found or inferred from the relevant and admissible evidence that: (1) Al and Harden were together at an ATM machine where Al withdrew \$220, and gave Harden \$70; (2) Al and Harden subsequently went to Brown's Grocery located nearby; (3) Harden placed a call using Al's phone card to Gene Turner to get them a ride to Kennett at 5:30 am to 5:45 am; (4) Harden left Al at Brown's Grocery to help Elinore Booth load and unload a TV set with her son; (5) Harden was with Ms. Booth at 7:30 am as acknowledged by Ms. Booth; Harden got a ride to Kennett with Ms. Booth who rode past Brown's and saw the police but Harden did not see Al; (6) Ms. Booth took Harden to Kennett and arrived at 8:12 am after driving 19 miles; and (7) Al's DNA was transferred to the inside waist band of Harden's black jeans and white tank top.

18. However, there was no evidence that Harden personally killed Al Harper after deliberating on the matter, or that he even participated in Al's murder. While the federal court and the Eighth

Circuit relied on the state appellate court's inference that because of the multiple injuries to Al, and thus, Harden deliberated on the matter, this conclusion has no merit under the circumstances of this case. Simply put, because there was no evidence Harden actually participated in the act of killing Al, the manner of his death cannot be used to support an inference that he deliberated because there was not sufficient evidence from which a reasonable trier of fact could have found or inferred that Harden personally deliberated in Al's death. Such a finding allowed the court's to supply missing evidence and give the prosecution the benefit of unreasonable, speculative, and forced inferences, something the state and federal court's was not allowed to do. Clark, 490 S.W.3d at 707.

19. Here, there was no direct or circumstantial evidence that Harden was even present when Al was killed. The evidence proved Harden was not either of the two white males seen walking by Mr. Sams and Mr. Mitchell because Harden did not even remotely fit the descriptions provided. The record is devoid of any evidence that "whom ever" killed Al deliberated in any fashion. The trier of facts conclusion that Harden killed Al is only rank speculation to say he premeditated. No evidence supports such an inference.

That Harden was previously with Al is not sufficient evidence to prove he killed Al or deliberated in doing so. State v. Castaldi, 386 S.W.2d 392, 395 (Mo. 1965) (Evidence that an accused had an opportunity to commit a crime, or which merely raises a suspicion and gives rise to conjecture, is insufficient as the basis for

a judgment of conviction); State v. Roby, 756 S.W.2d 629, 632 (Mo.App.W.D. 1988) (An inference that gives rise to a verdict based on no more than suspicion, conjecture or on surmise, no matter how strong is not sufficient to support a criminal conviction).

There was no witnesses to Al's murder. No one saw who murdered him. The prosecution simply had no direct evidence that Harden killed Al. The trier of fact made a big inferential leap in this case.

20. "Where a fact to be proved is also an element of the offense...it is not enough that the inferences in the governments favor are permissible...[T]he inferences [must be] sufficient support to permit a rational juror to find that the element...is established beyond a reasonable doubt." United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995). The law demands that the trier of fact be rational, and that their inferences be reasonable. Jackson, Id. at 319. This means a reviewing court must be able to point to the evidence that supports an element and then explain, in a reasonable way, how that evidence supports a finding of guilt beyond a reasonable doubt. Because, in this case, no reasonable person can do this, reasonable doubt is present. This case is a perfect example of a trier of fact jumping to conclusions without support of a reasonable explanation linked to the evidence on record.

21. In this case, The Eighth Circuit relied on the state appellate and federal habeas court's "piecemeal review" of Harden's insufficiency of the evidence

claim, whom did not review "all of the evidence", and applied inferences from the circumstantial evidence which lacked support to uphold Harden's conviction in conflict with the Due Process standard of Jackson v. Virginia and other Court's of Appeals and Section 2254(d)(1).

If left uncorrected, The Eighth Circuit's "piecemeal approach" to evaluating Jackson claims under Section 2254(d)(1) will, as a practical matter, eliminate the substantive protection of Jackson under that provision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Z. Harden

Date: February 15th 2018