No. 02-524

In the
Supreme Court of the United States

KURT JONES,
Petitioner,

v.

DUYONNE ANDRE VINCENT
Respondent.

On Petition for Writ of Certiorari
To The United States Corut of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

2. Whether defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

3. Whether this Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and within the Sixth Circuit Court of Appeals and State Courts on the question of whether double jeopardy principles were violated in factually similar situations.

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3. Whether this Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and a split of opinion within the Sixth Circuit Court of Appeals and State Courts on the question of whether double jeopardy principles were violated in factually similar situations.

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Petition for a writ of certiorari to the United States Court of Appeals, 6th Circuit.

Now comes Kurt Jones, Petitioner, by Arthur A. Busch, Prosecuting Attorney in and for the County of Genesee, Michigan, by Donald A. Kuebler, Chief Appellate Counsel, and prays that a *writ of certiorari* will issue to review the judgment of the United States Court of Appeals, 6th Circuit, filed June 6, 2002, mandate issued July 2, 2002, which affirmed the United States District Court's *vacatur* of Michigan defendant Duyonn Andre Vincent's conviction for first degree murder on double jeopardy grounds, with direction that the Michigan trial court sentence defendant for the offense of second degree murder.

Citations to opinions below

The decision of the Michigan Court of Appeals was filed February 16, 1996 and is reported as *People v Vincent*, 215 Mich App 458; 546 NW2d 662 (1996). That opinion vacated the defendant's conviction for first degree murder on double jeopardy grounds and remanded to the Genesee County Circuit Court for sentencing on the charge of second degree murder.

Thereafter the people of Michigan obtained leave to appeal to the Michigan Supreme Court. On July 15, 1997 the Michigan Supreme Court reversed the Michigan Court of Appeals and ordered that defendant's first degree murder conviction be reinstated in *People v Vincent*, 455 Mich 110; 565 NW2d 629 (1997). Rehearing was denied at 456 Mich 1201. Defendant's petition for *certiorari* was denied by the United States Supreme Court November 10, 1997. Defendant filed for *habeas corpus* relief under 28 U.S.C. sec. 2254 in the United States District Court for the Eastern District of Michigan which vacated his conviction for first degree murder on Double Jeopardy grounds. *Vincent v Jones*, 98-40007 (Nov. 7, 2000). Petitioner Jones appealed to the United States Court of Appeals, Sixth Circuit. On June 6, 2002 the Court of Appeals entered its opinion affirming the District Court below and on July 2, 2002 the Court issued its mandate. *Vincent v Jones*, 292 F3d 506 (Cir. 6 2002). [Copies of the opinions below and the referenced order of mandate are included in the appendix to this petition, *infra*., App. 1a-75a]

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JURISDICTION

...

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

Constitutional provision involved in this case

The constitutional provision involved in this petition is Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Concise statement of the case

A jury in Genesee County, Michigan convicted defendant Duyonn Andre Vincent of first degree murder, MCL 750.316 and felony firearm, MCL 750.227b. [App 2a; Tr. Vol VII, p 70] Co-felon Dameon Perkins was convicted by the same jury of first degree murder and felony firearm. Co-felon Marcus Hopkins was convicted by a separate jury of involuntary manslaughter and felony firearm. [Tr. Vol. VII, p 70; App. 3a]

The Michigan Court of Appeals vacated defendant Vincent's first degree murder conviction and reduced it to second degree murder on double jeopardy grounds. *People v Vincent*, 215 Mich App 458 (1996); [App 1a-14a] The Genesee County Prosecuting Attorney was granted leave to appeal to the Michigan Supreme Court and that Court reversed the Court of Appeals and ordered reinstatement of defendant's first degree murder conviction. *People v Vincent*, 455 Mich 110 (1997) [App 15a-39a]

Defendant Vincent's petition for a *writ of certiorari* was denied by the United States Supreme Court on November 10, 1997 at 522 US 972, 139 L Ed 2d 325, 118 S Ct 424, 1997 LEXIS 6803.

On January 8, 1998 Petitioner Vincent filed for a writ of *habeas corpus* under 28 U.S.C sec. 2254 in the US District Court for the Eastern District of Michigan. Defendant contended "the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United States Supreme Court precedent." The case was referred to the magistrate judge who recommended granting the writ. The District Court, considering the matter *de novo* found that the statements of the trial court were sufficient to rise to the level of an acquittal of the first degree murder charge under United States Supreme Court precedent and that continuation of the trial constituted a violation of the double jeopardy clause of the fifth amendment. See Report and Recommendation of Magistrate, App 40a-60a and Opinion and Order of Gadola, J., granting *habeas corpus.*

Petitioner Jones appealed the United States Court of Appeals, 6th Circuit.

On June 6, 2002 the United States Court of Appeals, Sixth Circuit, affirmed the District Court and held as a matter of law, the statements of the trial judge constituted a directed verdict of acquittal such that jeopardy attached, and that the trial court

could not reverse that decision later in the trial and permit the case to go to the jury for decision. The Court said it was irrelevant whether the trial judge informed the jury of his decision. The Court found that the trial judge had made a determination on the facts that there was insufficient evidence of first degree murder and that by later submitting the case to the jury on the charge of murder, the trial judge subjected the petitioner to prosecution for first degree murder in violation of the Double Jeopardy Clause. [App. 67a-74a] The Court of Appeals issued its Mandate on July 2, 2002. [App. 75a]

Reasons for Granting the Writ

The case *sub judice* presents this Honorable Court with the opportunity to resolve the question of whether the trial court's oral response to defendant's motion for directed verdict, which was never communicated to the jury, represented a resolution in defendant's favor, correct or not, of factual elements of the charged offense of first degree murder, thus barring further proceedings on the charge of first degree murder.

The United States Court of Appeals, Sixth Circuit, in the case *sub judice*, has decided federal questions and interpreted the Fifth Amendment in a way that is in conflict with decisions of other courts, state and federal, and within the Sixth Circuit, and this Court.

The opinion of the Sixth Circuit Court of Appeals is not supported by any recent decision of the United States Supreme Court. Moreover, recently decided cases of State Courts, other United States Courts of Appeals and within the Sixth Circuit, give substantial support to the contention of Petitioner that under the facts of this case Defendant Vincent's Fifth Amendment protection against double jeopardy was not violated.

Question 1 – Argument

The Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

Where a state court adjudicates a petitioner's constitutional claim on the merits, 28 USC sec. 2254(d) provides the standard of review in a subsequent *habeas corpus* action. *Harpster v Ohio*, 182 F3d

322, 326 (6th Cir. 1997). The writ may issue only if the state court's consideration of the claim "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." Sec. 2254(d)(1), or was based on an "unreasonable determination of the facts in light of the evidence presented." Sec. 2254(d)(2). In applying the "unreasonable application" clause, the court must conclude that the "state court's application of clearly established federal law was objectively unreasonable. *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 1521; 146 L Ed 2d 389, 428 (2000). The court, on *habeas corpus*, "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." Id., at 1522, 146 L Ed 2d at 429; *Nevers v Killinger*, 169 F3d 352 (6th Cir. 1999).

The Michigan Supreme Court found that Defendant's motion for directed verdict had not, in fact, been granted by the trial court. The Court thus did not reach the double jeopardy question. [App. 17a]

The Court first noted that two panels of the Michigan Court of Appeals affirmed the convictions of defendant Vincent's cofelons and denied relief on double jeopardy claims in each case, finding that the trial court had not, in fact, directed a verdict of acquittal on the first degree murder charge. 455 Mich 110, 115-117. Only the Michigan Court of Appeals panel considering defendant Vincent's appeal had reached the conclusion that an order had been granted. [App. 20a-23a]

The Michigan Supreme Court acknowledged that a directed verdict is an acquittal for purposes of the double jeopardy clause, and that its determination of whether the trial court's statements constitute a dispositive order was crucial to the claim. The Court said that under *People v Hampton*, 407 Mich 354 (1979), the trial court considering a motion for directed verdict must evaluate the evidence and determine the legal sufficiency thereof in the light most favorable to the prosecution. The Court said that a retrial is not allowed if the court evaluated the evidence but did not find it to be insufficient, citing *People v Mehall*, 454 Mich 1, 6 (1997). The record fact that the trial judge in this case had not done so was a factor in the Michigan Supreme Court's conclusions:

"We are not convinced that the standards articulated in *Hampton* and *MeHall* were met in this trial judge's statement of his impressions, nor are we convinced that the judge's statement rose to the requisite level of certainty and finality to constitute a directed verdict. There was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. *Mehal* at 6. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected because there was no mention of them reflected in the express remarks of the court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was considering all the factors, there was no indication which factors he had actually considered or rejected.

Accordingly we hold this general inconclusive statement to be no more than a judge thinking out loud. The foundation laid to support this conclusory impression was inadequate. When ruling on the sufficiency of the evidence, a court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis for the decision and a clear

statement that the motion is either granted or denied. " [App. 26a-28a]

The Court also noted the well accepted rule that courts speak through their judgment and decrees and not by what is stated in open court. That is, " a judgment or order is reduced to written form, ... until reduced to writing and signed, the judgment did not become effective...." Id., at 122, 123. [App. 27a-28a]

The Michigan Supreme Court then noted the similarities between the case *sub judice* and decisions from other jurisdictions such as *State v Collins*, 112 Wash 2d 303, 771 P2d 350 (1989); *People v Jackson*, 647 NYS2d 764 (1966); *State v Newfield*, 788 P2d 1366 (Ariz. App. 1989) where those courts in similar circumstances found that the defendants' double jeopardy rights had not been violated, citing *United States v Bruno*, 873 F2d 555, 562 (CA 2, 1989). The Michigan Supreme Court found that a decision to submit the case to the jury implicitly denies the motion for directed verdict.

In the District Court, Gadola, J., Petitioner Jones argued that the Michigan Supreme Court's conclusion that the trial court had not rendered a final judgment on the defendant's motion for directed verdict was a factual conclusion entitled to the

presumption of correctness under 28 USC sec. 2254(e)(2).

The Court of Appeals in the case *sub judice* rejected the argument and agreed with the District Court that whether the state trial judge acquitted the petitioner of first-degree murder is a question of law and not one of fact. [App 72a] But the Court then goes on to review the language of the Michigan trial judge and concluded that his statement was not ambiguous and that his later comments reflected his belief that he had granted a motion for directed verdict. The Court also cites to a docket entry which makes reference to the motions for directed verdict and the entry stating "Court amended Ct: 1 Open murder to 2nd Degree Murder." [App 73a] The Court concluded "Thus, the trial judge made a determination on the facts that there was insufficient evidence of first degree-murder. By later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause. [App 74a]

Question 2- Argument

Defendant Vincent was not placed in jeopardy by the action of the trial court in

first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

Petitioner Jones submits that the Court of Appeals decision herein is contrary to the prevailing jurisprudence. The question of whether there is an acquittal depends largely on state law. *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983); *Schiro v Clark*, 754 F Supp 646, 660 (N.D. Ind. 1990). In *US v Lanzotti*, 90 F3d 1217, 1217 (7th Cir. 1996) the Court said an "acquittal" in the context of double jeopardy means a "resolution, correct or not, of some or all of the factual elements of the offense charged." [citing *Burks v US*, 437 US 1, 10, 98 S Ct at 2147] Thus, for a ruling to be considered a functional acquittal, it must speak to the factual innocence of the defendant. 437 US 1, 15, 98 S Ct at 2149, *Scott*, 437 US at 97, 98, 98 S Ct at 2197, 98..." See also *US v Kennings*, 861 F2d 381 (CA 3 1988) In *US v Branch*, 91 F3d 699 (CA 5 1996) the Court of Appeals held that the district judge's comments at a bench conference expressing his misapprehension regarding the validity of inconsistent jury verdicts did not reflect any doubt regarding

the sufficiency of the evidence and, thus, the double jeopardy clause did not bar reinstatement of the verdict. See also *US v Affinito, 873 F2d 1261 (CA 9 1989)* where the prosecutor appealed from an order of the district court granting a motion for a judgment of acquittal in a mail fraud case. The Court of Appeals held that the lower court's order granting acquittal was erroneous and that the trial court never stated that the evidence was insufficient to demonstrate a deprivation of money or property rights. The Court observed that the trial court's *ore tenus* ruling evidenced ambivalence about the best way to rectify the defective indictment and jury instructions.

Other state courts have held that even where there has been an order directing a verdict of acquittal, the order may be set aside where the jury has not been discharged. See 75 Am Jur 2d, Trial, sec. 1042, citing *Campbell v Schoering*, 735 SW2d 145 (1988). See also *State v Iovino,* 524 A2d 557 (RI 1987) where the court, citing *Martin Linen Supply Co.* said "... the distinction ... lies in the facts that the reconsideration in this case had no effect on the continuance of the trial in which it was made, that the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of

reprosecution beyond the jury already assembled to hear his case." [524 A2d at 558, 559] See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997).

Question 3- Argument

This Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and a split of opinion within the Sixth Circuit and State Courts on the question of whether double jeopardy principles were violated in factually similar circumstances.

The Court of Appeals in the case *sub judice* failed to refer to or acknowledge the existence of 6th Circuit jurisprudence on the issue at hand. That is, the Court did not cite or discuss the recent decision in *US v Baggett*, 251 F3d 1087 (CA 6 2001), *rehrg.* denied July 31, 2001, 2001 U.S. App LEXIS 19012, *Cert. Denied* Feb. 25, 2002 reported at 2002 LEXIS 1269. There the Court said that whether the government may appeal a judgment of acquittal entered by the district court under Fed. R. Crim. P. 29 depends on the timing of the court's decision. The Court said the central question is whether the district court granted the defendant's motion

for judgment of acquittal prior to the jury's verdict, in which case double jeopardy would deprive the Court of Appeals of jurisdiction under 18 USC sec. 3731, or whether it reserved decision on the motion until after the jury's verdict in which case double jeopardy did not prevent review. The court found that ambiguity in the record of the proceedings rendered the question difficult to answer, but found that several factors suggested that the trial court intended to reserve decision on defendant's motion until after the jury returned a verdict. Judge R. Guy Cole, Jr., of the Sixth Circuit summarized the proceedings involved as follows:

> First, the District Court stated, "I will grant the government's request to allow it to go to the jury – and to hold the Court's ruling in abeyance until after that." This statement immediately followed a discussion between counsel and the court regarding the government's concern that it would be prohibited from appealing if the court granted the motion before submitting the case to the jury. It appears,

> therefore, that the government's desire to preserve its ability to appeal was the direct cause of the court's decision to "hold its ruling in abeyance." [251 F3d at 1094]

While the written order granting the defendant's motion was filed in the clerk's office and entered on the docket on September 9, 1999, the jury's verdict was returned in open court and entered on the docket on September 8, 1999. The Court also found that it was significant that the court entertained closing arguments by counsel, instructed the jury on the applicable law, and allowed the jury to deliberate and return a verdict. The Court found that such a course of action would have been entirely unnecessary if the court had rendered an effective judgment of acquittal at the close of all the evidence. Notwithstanding the district court's confused handling of the Defendant's Rule 29 motion, the Court was persuaded that the district court reserved its decision until after the jury returned its verdict. The Court found that both the Second and Ninth Circuits have held that double jeopardy principles were not violated in factually similar situations, citing *US v Byrne*, 203 F3d 671

(9th Cir. 2000) and *US v LoRusso,* 695 F3d 45 (2d Cir. 1982). The Court concluded that both *Bryne* and *LoRusso* stand for the proposition that an oral grant of a Rule 29 Motion outside the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of a judgment. As in *Bryne* and *LoRosso,* the jury in *Baggett* was not present or informed of the Judge's oral ruling on the Defendant's motion for acquittal. The jury deliberated and returned a guilty verdict. The *Bagget* Court said "This fact more than any other supports our conclusion that the double jeopardy clause does not bar the government's appeal. Because reversal of the district court's judgment on appeal does not require the government to retry defendant, but rather requires only reinstatement of the jury's guilty verdict, the double jeopardy clause is not offended." [Citation omitted] [251 F3d at 1095]]

Petitioner Jones submits that a similar ruling should have entered in the case *sub judice,* as in *State v Iovino,* 524 A2d 557 (R.I. 1987), *supra*, where the Court citing *Martin Linen Supply Co.* held in pertinent part that the double jeopardy clause does not prohibit a conviction where the defendant is not faced with any threat of reprosecution beyond the jury already

impaneled to hear his case. [524 A2d @ 558, 559]. Cf., also App. 23a, fn. 4 where the Michigan Supreme Court cites and discusses the *Iovino* decision. See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997). Such was the situation in the case at bar where defendant Vincent's jury was not informed of proceedings involving the motion for directed verdict and proceeded to decision on the charge of first degree murder following defendant's presentation of evidence, closing arguments of the prosecuting attorney and defense counsel, and jury instructions.

Where the case involves important legal questions and the Courts of Appeals have previously rendered contrary results, this Court has granted certiorari to resolve the conflict. See e.g., *United States v Muinz*, 374 US 150, 83 S Ct 1050; 10 L Ed 2d 805 (1963).

Petitioner Jones submits that on the record in this case and the jurisprudence, *certiorari* should be granted, and Sixth Circuit Court of Appeals decision should be reversed and Defendant Vincent's conviction for first degree murder reinstated.

Date: September 20, 2002

Respectfully Submitted,

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Appendix for Petitioner