

The Supreme Court of Ohio

11-0916

IN THE MATTER OF THE PETITION
FOR WRIT OF HABEAS CORPUS FOR
DAVID J. ZANDER

)
) CASE NO. _____
)

Trumbull Correctional Institution
No. 563-263
5701 Burnett Road
Leavittsburg, Ohio 44430

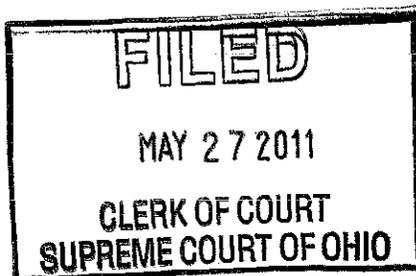
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Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS

BENNIE KELLY, Warden,
Trumbull Correctional Institution
5701 Burnett Road
P.O. Box 901

Respondent.



MIKE DeWINE,
Ohio Attorney General
Corrections Litigation Section
150 East Gay Street
Columbus, Ohio 43215

COUNSEL FOR RESPONDENT.

The Supreme Court of Ohio

IN THE MATTER OF THE PETITION
FOR WRIT OF HABEAS CORPUS FOR
DAVID J. ZANDER,

) CASE NO. _____
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Petitioner.

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TO THE HONORABLE CHIEF JUSTICE
AND JUSTICES OF THE SUPREME COURT OF OHIO:

#

Introduction

This action is brought, first, due to Petitioner has no other adequate remedy in the ordinary course of the law for the extraordinary purpose of addressing an ineffective assistance of an appellate counsel claim whom has pursued an appeal to (this Court) the Ohio Supreme Court and failed to continue exhausting a sufficiency of evidence claim, and; secondly, to comply with the requirements of Title 28 United States Code, Section 2254 (b), (c) and the United States Supreme Court's exhaustion requirements that a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirement. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999).

Jurisdiction

- 1.) This Honorable Court has jurisdiction of this action pursuant to Article IV, Section 2 (B) (1) (c) of the Ohio Constitution.
- 2.) David Zander, hereinafter "Petitioner", respectfully represents that he is currently imprisoned and restrained of his liberty by Bennie Kelly, Warden, of the Trumbull Correctional Institution, located at 5701 Burnett Road in Leavittsburg, Ohio.
- 3.) Such imprisonment is without legal authority, but under color of an order of commitment by the Common Pleas Court, Summit County, Ohio – a copy of which order is attached hereto and marked Exhibit "A".

Claim for Relief

Procedural History

- 4.) On September 4, 2008, Petitioner was indicted with two co-defendants by the Summit County Grand Jury on two counts of Aggravated Murder (R.C. 2903.01(B)) with firearm specifications, one count of Aggravated Robbery with firearm specification, and one count of Having a Weapon While Under Disability.
- 5.) Petitioner pled not guilty and on February 12-24, 2009, the matter was tried to a jury under a complicity theory.
- 6.) After the State rested, Petitioner moved for acquittal pursuant to Crim.R.29, and renewed his motion at the close of his case, which the trial court denied the motions in both instances.
- 7.) At the conclusion of said trial the jury returned a verdict of **guilty** of one count of Aggravated Murder, R.C. 2903.01(B), but **not guilty** of the other count of Aggravated Murder, and **not guilty** of the Aggravated Robbery, Having a Weapon While Under Disability, and **not guilty** of any firearm specifications.
- 8.) On March 13, 2009, the common pleas court sentenced Petitioner to life in prison with eligibility for parole after twenty-five (25) years.
- 9.) Before the court pronounced sentence, however, the Summit County Prosecutor (oddly) had this to say in reference to a negotiation which Petitioner declined accepting:

“Mr. LoPRINZLE: (at Tr. pg. 1127, line 22 to Tr. page 1128)

... even though we have standing before the Court for sentencing an aggravated murder conviction, the State decided that it might be in the best interest of the State and also the defendant, we both have something to gain or lose both ways, so I decided to negotiate with Mr. Hicks (defendant's trial counsel) regarding potentially vacating that aggravated murder conviction and having him plead to a lesser offense of the straight murder, which would be a 15 to life sentence, which would automatically save Mr. Zander 15 to the board – or 5 years to the board. ...”

See Attached.

- 10.) Upon information and belief, Petitioner asserts, in all due reasoning, why would the prosecution be negotiating to vacate a conviction already successfully secured, unless it was aware that it was not properly obtained and that by influencing Petitioner to accept an agreement – which also consisted of foregoing any and all appeals – the prosecution was attempting to “fix” the conviction, which in doing so, would have potentially left Petitioner no avenue for a remedy once an agreement was secured due to invited error.

There was an Insufficiency of Evidence to Support the Conviction

- 11.) Petitioner states that there is insufficient evidence to support the aggravated murder conviction in this case, being the only conviction here, due to the Supreme Court of Ohio in *State v. Liberatore*, 4 Ohio St.3d 13 (1983), has held that murder requires proof of underlying felony in order to sustain conviction under section (R.C. 2903.02(B)) of aggravated murder statute.
- 12.) Petitioner was found **not guilty** of the *corpus delicti* of aggravated robbery, which was the underlying felony element for the Aggravated Murder required to be found by R.C. 2903.01(B) “while” directly associated as part of one continuous occurrence with the aggravated murder.¹
- 13.) Petitioner states his insufficiency of evidence claim should not be confused with an inconsistent jury verdict argument and has nothing to do with the *Powell* or *Dunn* cases.²
- 14.) Petitioner’s appellate counsel, Anthony Koukoutas #0066500, pursued a direct appeal to the Ninth Appellate District, Summit County, raising as one of his assignment of errors the sufficiency of the evidence and manifest weight of the evidence.
- 15.) The Ninth Appellate District, in their February 24, 2010 decision, Case No. 24706, conducted a numerous page review of the manifest weight of the evidence, but at the end in finding the manifest weight argument without merit stated, “[h]aving found that Zander’s conviction is not against the manifest weight of the evidence, we also conclude that there is sufficient evidence to support the conviction.” Ninth Appellate District Court decision, Case No. 24706, 2010-Ohio-631, dated February 24, 2010.

¹ See *State v. Williams*, 74 Ohio St.3d 569 (1996).

² This claim of sufficiency of the evidence should not be confused with the problems caused by an inconsistent verdicts argument, as the United States Supreme Court has clearly clarified in *United States v. Powell*, 469 U.S. 57, 67 (1984) that “a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate court. *This review should not be confused with the problems caused by inconsistent verdicts.*” *Id* at 67-68 (*emphasis added*). The Court was also observant to point out that in the *Powell* case, that the issue of insufficient evidence was never raised or submitted as an argument in that case. See FN6.

- 16.) Petitioner asserts that even though the Court of Appeals thoroughly reviewed the “facts” in weighing the evidence, they never *properly* determined whether the evidence was legally sufficient as a “question of law” to support the conviction which was a question of law.³
- 17.) Petitioner submits that the Court of Appeals in reviewing the issue concerning the sufficiency of the evidence relied improperly upon the facts to which Petitioner was acquitted in concluding that their finding of the manifest weight of the evidence thereby concludes a finding that the evidence was sufficient.⁴

Ineffective Appellate Counsel to the Supreme Court of Ohio

- 17.) Petitioner states that his appellate counsel in the Court of Appeals, was also his appellate counsel who pursued his appeals to the Supreme Court of Ohio in Case No. 10-0628.
- 18.) Petitioner states his appellate counsel was ineffective for failing to continue pursuing or having raised the issue brought in the Court of Appeals concerning the sufficiency of the evidence, which prejudiced Petitioner’s federal exhaustion requirements and what Petitioner believes was a meritorious constitutional question or a question of great public interest to this Court that it is believed would have changed the outcome of the court’s decision.
- 19.) Petitioner states that he has no other adequate remedy in the ordinary course of the law to address this ineffective assistance of appellate counsel claim in (*this Court*) his Supreme Court appeal due to S.Ct. Prac. R. 11.6 only allows reopening in death penalty cases.

³ In *State v. Thompkins*, 78 Ohio St.3d 380 (1997), the state asserted that sufficiency of the evidence and weight of the evidence are synonymous legal concepts. This Court, however, held “[t]hey are not. The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.” *Id.* at 386-387. Thus, the proper analysis for sufficiency of the evidence is “whether, after viewing the evidence in light most favorable to the prosecution any rational trier of fact could have found the *essential elements* of the crime proven beyond a reasonable doubt.” *State v. Williams*, 74 Ohio St.3d 569,576 (1996); in other words, whether the state proved, beyond a reasonable doubt, all the essential elements of the crime.

⁴ Even though Petitioner does not wish his insufficiency of evidence issue to be confused with an inconsistent jury verdict theory, for the purposes of comparison with this statement that the Court of Appeals relied upon facts for which Petitioner was acquitted, in the case of *Dunn v. United States*, 284 U.S. 390 (1932), Mr. Justice BUTLER (dissenting) explained the exact reasoning in support of a situation such as this case wherein he held, “[w]here there is a verdict of not guilty on one count and a verdict of guilt on another, and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, then, in determining whether the evidence was sufficient to sustain the finding of guilt, the court must exclude from consideration the facts so found in favor of the accused. And so in every such case the question of law for the court always is whether, outside the facts eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction. (citations omitted)”.

Compliance with Federal Exhaustion Requirements

- 20.) Petitioner states that since his appellate counsel in the Supreme Court of Ohio failed to exhaust his sufficiency of evidence issue in his supreme court discretionary appeal, he has no other adequate remedy in the ordinary course of the law but the instant action to fully comply with the federal and United States Supreme Court's exhaustion requirements of 28 U.S.C. § 2254 (b), (c) that a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirements. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999).
- 21.) Petitioner states that he has been denied due process under State and Federal Constitutions when the state failed to prove each and every element of the offense of aggravated murder beyond a reasonable doubt as the jury concluded the *corpus delicti* of aggravated robbery was not proven. The Due Process of Clause of the Fourteenth Amendment protects against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

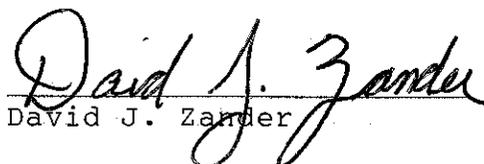
Relief

Your Petitioner therefore prays due to the extraordinary circumstances discussed above that a writ of habeas corpus issue to said Bennie Kelly, Warden of the Trumbull Correctional Institution, and that Petitioner be brought before this Court and discharged from his imprisonment and the unlawful restraint of his liberty.

Petitioner herein states that he has read the foregoing petition and verifies the accuracy that the statements contained therein are within his knowledge and believed by him to be true.

Affidavit attached seperately.

Respectfully submitted,


David J. Zander

Trumbull Correctional Institution
No. 563-263
5701 Burnett Road
Leavittsburg, Ohio 44430

Petitioner.

Instructions to the Clerk:

Please perform and perfect the required service in accordance with law by Certified Mail upon the Respondent at the address listed above.

The Supreme Court of Ohio

IN THE MATTER OF THE PETITION)
FOR WRIT OF HABEAS CORPUS FOR)
DAVID J. ZANDER)

CASE NO. _____

Trumbull Correctional Institution)
No. 563-263)
5701 Burnett Road)
Leavittsburg, Ohio 44430)

Petitioner.)

AFFIDAVIT OF INDIGENCY AND IN ACCORDANCE WITH R.C. 2969.25

David J. Zander

Trumbull Correctional Institution
No. 563-263
5701 Burnett Road
Leavittsburg, Ohio 44430

Petitioner.

BENNY KELLY, Warden,
Trumbull Correctional Institution
5701 Burnett Road
P.O. Box 901

Respondent.

MIKE DeWINE,
Ohio Attorney General
Corrections Litigation Section
150 East Gay Street
Columbus, Ohio 43215

COUNSEL FOR RESPONDENT.

The Supreme Court of Ohio

IN THE MATTER OF THE PETITION)
FOR WRIT OF HABEAS CORPUS FOR)
DAVID J. ZANDER)

CASE NO. _____

Trumbull Correctional Institution)
No. 563-263)
5701 Burnett Road)
Leavittsburg, Ohio 44430)

Petitioner.)

AFFIDAVIT OF INDIGENCY AND IN ACCORDANCE WITH R.C. 2969.25

State of Ohio)

County of Trumbull)

SS:

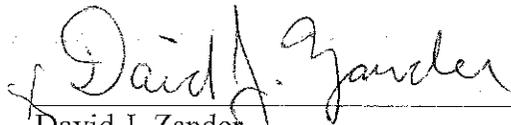
Verity

I, David J. Zander, being first duly sworn according to law, and competent to testify to the facts herein, deposes and states:

- 1.) I am the Petitioner in relation to the action for writ of habeas corpus filed in the above-entitled cause.
- 2.) Affiant/Petitioner herein states that he has read the foregoing petition and verifies the accuracy that the statements contained therein are within his knowledge and believed by him to be true; and verifies the attachments as true copies of the originals.
- 3.) I do hereby state that I am without the necessary funds, or any other cash and things of value, to pay the costs associated with this action due to I am incarcerated at the Trumbull Correctional Institution and am requesting pursuant to Rule XV, Section 3, of the Rules of Practice of the Supreme Court of Ohio that the filing fees and all security deposits, if applicable, be waived.

4.) In accordance with R.C. 2969.25 an attached statement certified by the institutional cashier,
and;

5.) I have not filed any civil action in the past five years.



David J. Zander

Sworn to, or affirmed, and subscribed in my presence this 6TH day of May,
2011.



MARK S. BURSON
Notary Public, State of Ohio
My Commission Expires 10/20/2013



Notary Public

Ohio Department of Rehabilitation and Correction

SECTION I - To be completed by cashier prior to this form being presented

To the inmate for completion of SECTION II - Affidavit of Indigency.

I, Donna Crawford, cashier at the Jamhill Correctional Institution certify that the following is a true and accurate reflection of the account maintained at this institution for the benefit of:

Inmate Name: <u>David Zander</u>	Inmate Number: <u>563-263</u>
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The Prison Litigation Reform Act (PLRA) requires that the time period to be considered is the preceding six months. It also requires that, "...if financial activity is less than six months due to less than six months of incarceration, then note this fact on the statement. If lack of history is due to recent transfer, then obtain missing month-end reports from sending cashier to complete the six month period. The sending cashier must similarly certify the month-end reports."

The time period being reported below is: Six months Fewer than six months, beginning _____

The time period is fewer than six months, because: Period of Incarceration Transfer

Account Balance as of 107.29 4/25/2011 \$ 107.29
Total state pay credited for the report period; \$ 48.75
Average Monthly state pay for the report period; \$ 8.13
Total funds received from all sources, excluding state pay, for the report period; \$ 1048.00
Total amount spent on inmate's commissary during the same period; \$ 428.05

Signature of Cashier: <u>Donna L Crawford</u>	Date: <u>4/25/2011</u>
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AFFIDAVIT OF INDIGENCY

SECTION II - To be completed by inmate after cashier's statement is completed.

I, David Zander, being first duly sworn says that he does not have sufficient funds to pay the filing fee and other costs of processing this action and submit the cashier's statement (Section I) in support of said allegation of Indigency.

I hereby represent that the Information set forth in the cashier's statement concerning my financial condition is true and complete to the best of my knowledge and belief.

Signature of Inmate <u>David Zander</u>	Inmate Number: <u>563-263</u>
--	----------------------------------

Sworn to and subscribed to me in the presence this 6th day of May, 2011

Notary Public: <u>Mark S Burson</u>
--



MARK S BURSON
Notary Public, State of Ohio
My Commission Expires 06/06/2013

COPY

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

DANIEL M. HERRIGAN

THE STATE OF OHIO

2009 MAR 17 AM 9:04

Case No. CR 08 08 2815 (B)

vs.

DAVID J. ZANDER

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

THIS DAY, to-wit: the 13th day of March, A.D., 2009, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, DAVID J. ZANDER, being in Court with counsel, DONALD HICKS and KRISTEN KOWALSKI, for sentencing; having heretofore on February 25, 2009, been found GUILTY by a jury trial of AGGRAVATED MURDER, as contained in Count Two (2) of the Indictment. The jury further found that the Defendant "did not" have a firearm on or about his person or under his control while committing the offense, or displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense as contained in FIREARM SPECIFICATIONS 1 TO COUNTS 1, 2, and 3; found Defendant NOT GUILTY of the crime of AGGRAVATED MURDER, as contained in Count 1 of the Indictment; found the Defendant NOT GUILTY of the crime of AGGRAVATED ROBBERY, as contained in Count 3 of the Indictment; and found Defendant NOT GUILTY of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count 4 of the Indictment.

Thereupon, the Court inquired of the said Defendant and his counsel if they had anything to say why judgment should not be pronounced against the Defendant; and having nothing but what they had already said, and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, DAVID J. ZANDER, be committed to the Ohio Department of Rehabilitation and Correction for LIFE IMPRISONMENT with parole eligibility after Twenty Five (25) full years, for punishment of the crime of AGGRAVATED MURDER, as to the death of JASON REID, as contained in Count Two (2) of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, which offense occurred on or about August 20, 2008.

IT IS FURTHER ORDERED pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that credit for time served is to be calculated by the Summit County Adult Probation Department and will be forthcoming in a subsequent journal entry.

COPY
COPY

5

IT IS FURTHER ORDERED, upon the Court's finding of indigence, the imposition of any court costs and fines herein is WAIVED.

Thereupon, the Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court, and further appoints Attorney JEFFREY JAMES to represent the said Defendant for purposes of appeal.

APPROVED:
March 16, 2009
mjl



ROBERT M. GIPPIN, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Brian LoPrinzi /Tom Kroll
Criminal Assignment
(Attorneys Donald Hicks, Kristen Kowalski, Jeffrey James)
(Court Convey-EMAIL)
Adult Probation Department - JAIL CREDIT
(Kristie Gowens, Court Reporter - EMAIL)

1 ask that the Court inquire of Mr. Zander.

2 THE COURT: Mr. Zander, would you mind
3 standing for a moment, please.

4 Mr. Zander, I had given your attorneys
5 and the prosecution copies of an order that was
6 filed this morning concerning the motions that
7 were filed on your behalf for acquittal or new
8 trial. Have you been -- either have you either
9 read that order or have you been advised by
10 your attorneys concerning it?

11 THE DEFENDANT: I have read it.

12 THE COURT: All right.

13 Counsel, did you want to be more specific
14 as to the offer which has been made this
15 morning?

16 MR. LoPRINZI: Well, Judge, I can do
17 that. Obviously, the written record,
18 documentation of this case will show that Mr.
19 Hicks had filed that motion for judgment of
20 acquittal or retrial and has raised the issue
21 regarding the instructions of law.

22 Based on that, even though we have
23 standing before the Court for sentencing an
24 aggravated murder conviction, the State decided
25 that it might be in the best interest of the

1 State and also the defendant, we both have
2 something to gain or lose both ways, so I
3 decided to negotiate with Mr. Hicks regarding
4 potentially vacating that aggravated murder
5 conviction and having him plead to a lesser
6 offense of the straight murder, which would be
7 a 15 to life sentence, which would
8 automatically save Mr. Zander 15 to the
9 board -- or 5 years to the board. And that's
10 if he were to get the lowest sentence on the
11 aggravated murder.

12 Mr. Hicks then responded with a
13 counteroffer and -- which the State has
14 declined. And if he wishes to put the
15 counteroffer on the record, that's -- I don't
16 mind, I just didn't know if he wanted it on the
17 record or not.

18 THE COURT: Mr. Hicks.

19 MR. HICKS: Mr. Zander doesn't wish to
20 put the counteroffer which had been proposed on
21 the record.

22 THE COURT: All right.

23 Mr. Zander, do you understand what the
24 State has proposed?

25 THE DEFENDANT: Yes. They want me to