NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS ROY BURNS,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

Douglas Roy Burns #805126
In Propria Persona
Chippewa Correctional Facility
4269 West M-80
Kincheloe, Michigan 49784

QUESTION[S] PRESENTED

I

WHETHER A STATE COURT MUST CONSTITUTIONALLY RECOGNIZE AND ALLOW A DEFENSE IN THE FORM OF TESTIMONY AND OR OTHER RELEVANT EVIDENCE WHICH DISPROVES THE REQUISITE MENS REA, AND NEGATES THE ELEMENT OF SPECIFIC INTENT, TO BE SUBMITTED TO THE TRIER OF FACT?

Petitioner answers "yes"
The State answers "no"

LIST OF PARTIES

[X] 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:

1) Michigan Court of Appeals order denying application for leave to appeal judgement dated; September 18, 2012 case No. 334600.

2) Michigan Supreme Court order denying application for leave to appeal dated; March 4, 2013 case No. 146149.

3) United States District Court for the western district of Michigan dated; October 31, 2017 case No. 2:14-CV-13862.

4) United States Court of Appeals for the sixth circuit dated; April 4, 2018 case No. 17-2464.

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APPENDIXI'S ATTACHED HERETO

A) Michigan Court of Appeals order denying application for leave to appeal judgement dated; September 18, 2012 case No. 334600.

B) Michigan Supreme Court order denying application for leave to appeal dated; March 4, 2013 case No. 146149.

C) United States District Court for the western district of Michigan dated; October 31, 2017 case No. 2:14-CV-13862.

D) United States Court of Appeals for the sixth circuit dated; April 20, 2018 case No. 17-2464.

E) Petitioner's petition for Writ of Habeas Corpus Filed in the Federal District Court; case No. 2:14-CV-13862.

F) Petitioner's Application for a Certificate of Appealability case No. 17-2464.

STATEMENT OF JURISDICTION

The Michigan Supreme Court entered its final order on February 20, 2018 case No. this court has jurisdiction pursuant *to* 28 U.S.C. §1254(1) and 28 USC §2241 (1) to grant certiorari and issue a writ of habeas corpus to a prisoner held in violation of the constitution of the united states.

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STATUTES AND RULES

STATEMENT OF THE CASE

The Petitioner Douglas Roy Burns was convicted on two counts of assault with intent to commit murder, *M.C.L.A. 750.83*, and two counts of possession of a firearm during the commission of a felony contrary to *M.C.L.A. 750.227b* following a jury trial before Honorable Colleen A. O'Brien, in the Oakland County Circuit Court May 11, 2011. On May 31, 2011 Judge O'Brien sentenced him to serve two concurrent 17 to 30 year sentences on each Assault with Intent to Murder conviction, and two years for each Felony Firearm conviction to be served consecutive to the other convictions, yet concurrent to each other. The Petitioner was represented by Attorney Frederick J. Miller in all of the prior proceedings from the preliminary hearing, through sentencing, and the people were represented by Assistant Prosecuting Attorney Bret Schundler Mr. Burns timely filed a claim of appeal and Attorney Daniel J. Rust was appointed and timely filed a brief in the Court of Appeals raising the following claim[s].

> ISSUE I: DEFENDANT-APPELLANT IS ENTITLED TO A NEW TRIAL WHERE HE WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHERE THE TRIAL COURT DENIED DEFENSE THE OPPORTUNITY TO PRESENT EVIDENCE OF DEFENDANT'S HISTORY OF MENTAL ILLNESS.

Mr. Burns also raised the following claims in his Standard-4 Supplemental Brief:[1]

> ISSUE I: DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE CONSTITUTIONAL RIGHT TO COUNSEL AND THE STATE AND FEDERAL DUE PROCESS CLAUSES, WHERE DEFENSE COUNSEL FAILED TO:
>
> a. CROSS EXAMINE THE PROSECUTOR'S WITNESSES AND ONLY HAD THEM REPEAT WHAT THEY'D ALREADY SAID DURING DIRECT EXAMINATION.
>
> b. CHALLENGE DIFFERENCES BETWEEN WITNESS'S STATEMENTS IN POLICE REPORTS VERSUS TESTIMONY DURING TRIAL.
>
> c. RAISE LACK OF SUPPORTING PHYSICAL EVIDENCE DURING CROSS EXAMINATION. SPECIFICALLY:

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1 PURSUANT TO ADMINISTRATIVE ORDER 2004-6 MINIMUM STANDARDS FOR INDIGENT CRIMINAL APPELLATE DEFENSE SERVICES STANDARD 4

i. THERE WERE NO MEDICAL REPORTS ON ALLEGED GUNSHOT WOUNDS TO THE POLICE.

ii. THERE WAS NO POWDER RESIDUE ON DEFENDANT'S HANDS NOR WERE DEFENDANT'S FINGER PRINTS FOUND ON THE GUN (IE: DIDN'T TOUCH GUN).

iii. THE SERIAL NUMBER ON THE GUN WAS NEVER TRACED. IT WAS NEVER LINKED TO DEFENDANT, OR ANYONE ELSE.

iv. THE IMPROBABILITY OF STATEMENT FROM OFFICER TERRY WHERE HE CLAIMED THAT HIS GLASSES WERE HIT BY A BULLET BUT HIS HEAD WAS NOT. THE POLICE SUGGESTED A VERY IMPROBABLE CAUSE FOR THE PATH OF THE BULLET THAT ALLEGEDLY STRUCK OFFICER TIM MORTON IN THE ARM.

v. DEFENSE COUNSEL DIDN'T QUESTION POLICE AS TO WHY SURVEILLANCE CAMERAS IN POLICE CARS WEREN'T WORKING.

d. RESPOND TO PROSECUTOR'S OBJECTION TO PHOTO OF DEFENDANT AFTER HE WAS BEATEN BY POLICE

e. CONTACT WITNESSES WHO WOULD TESTIFY ON BEHALF OF DEFENDANT.

f. OBJECT TO PROSECUTOR'S USE OF HIS THREAT OF PROSECUTING DEFENDANT'S WIFE FOR PERJURY IF SHE TESTIFIED.

g. INVESTIGATE POLICE OFFICER MORTON'S GUNSHOT AIMED AT DEFENDANT THAT ENDED UP IN DEFENDANT'S PIANO.

h. QUESTION POLICE AS TO WHY THEY BROKE IN THE FRONT DOOR AFTER THEY'D ALREADY BROKE IN THE SLIDING GLASS DOOR IN THE BACK.

i. REQUEST ALL POLICE DOCUMENTS/RECORDS PERTAINING TO DEFENDANT AND HIS WIFE.

ISSUE II: DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS WHEN THE COURT DIDN'T RESPOND TO DEFENDANT'S LETTERS WHERE DEFENDANT WANTED TO FIRE HIS ATTORNEY.

On September 18, 2012, the Michigan Court of Appeals affirmed the trial court's conviction of Mr. Burns. This case was unreported, Docket No. 305037. Petitioner filed an application for leave to appeal in the Michigan Supreme Court, which denied leave to appeal on March 4, 2013, Docket No. 146149. Petitioner Petitioned this Honorable Court for certiorari, which was filed on May 17, 2013 and placed on the docket May 29, 2013 as No. 12-10500. The Petition was subsequently denied. On October 1, 2014 Petitioner filed a mixed Habeas Corpus Petition with the U.S. Federal Court for the Eastern District of Michigan which contained both exhausted and unexhausted issues. The District Court Judge; Honorable Nancy G. Edmunds issued an order on October 15, 2014 administratively closing the case to allow the petitioner the opportunity to return to the state court in order to exhaust the unexhausted claims. The Petitioner next filed a motion with the court in order to lift the stay in order to proceed on his exhausted issue[s]. The Eastern District of Michigan issued its order On October 31, 2017 that denied the petition for the issuance of the writ of habeas corpus, with prejudice. The Court further denied Petitioner a Certificate of Appealability pursuant to 28 U.S.C. § 2253(C)(2). and leave to appeal In Forma Pauperis. Petitioner filed a Notice of Appeal, November 29, 2017. Petitioner followed with an application to the 6th Circuit Court of Appeals, and was denied a certificate of appealability on April 20, 2018, No. 17-2464. Petitioners now seeks certiorari review and issuance of the Habeas Corpus Writ or remand from this Honorable Court.

ISSUE I:

A STATE COURT MUST CONSTITUTIONALLY RECOGNIZE AND ALLOW A DEFENSE IN THE FORM OF TESTIMONY AND OR OTHER RELEVANT EVIDENCE WHICH DISPROVES THE REQUISITE MENS REA, AND NEGATES THE ELEMENT OF SPECIFIC INTENT, TO BE SUBMITTED TO THE TRIER OF FACT?

DISCUSSION

Petitioner can demonstrate a constitutional deprivation that violate traditional and fundamental standards of due process, in line with the In re Winship doctrine. These constitutional deprivations also violate Petitioner's V, VI, and, VIX amendment constitutional rights. The per se exclusion of testimony violated the petitioner's US const. amend. VIX due process right to be heard and offer testimony. The exclusion of petitioner's testimony also violated the compulsory process of US const. amend. VI granting petitioner a right to call witnesses in her own favor. The exclusion violated the petitioner's US const. amend. V guarantee against compelled testimony because the right to testify in one's own behalf was a necessary corollary to that guarantee. *Rock v Arkansas*, 483 US 44, 107 S. CT. 2704, 97 L Ed. 2d 37 (1987).

It is well recognized and understood that the constitution guarantee's defendants a meaningful opportunity to defend, and the right to present a complete defense. *Crane* v *Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986), (quoting *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984)). The government, whether state or federal cannot arbitrarily abridge that right do to the name or banner that defense is presented under, insanity, diminished capacity due to mental illness or disease, self-defense, or any other reasonable defense with reliable evidentiary support. This diminishes not only the defendant's inherent rights yet we the peoples' right to know and decide cases and criminal culpability, in

crimes, in line with that which society deems excusable, in any given situation, or circumstance.

Although state and federal law makers have broad latitude under the federal constitution to establish rules excluding evidence from criminal trials, a criminal defendant's federal constitutional right to a meaningful opportunity to present a complete defense is abridged by evidence rules that (1) infringe upon a weighty interest of the accused, or (2) are arbitrary or disproportionate to the purpose that such rules are designed to serve. *Holmes v South Carolina,* 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

DISCUSSION OF BASIS FOR APPEAL

The U.S. Sixth Circuit Court of Appeals, made the ruling in denying the issuance of the COA, based on The Federal District Courts denial, The Circuit Court's reason for finding, was based in part on the following factors: the district court found that the state court adjudication of the matter was not an unreasonable application of Supreme Court precedence. *See* 28 USC § 2254 (d) (1). The constitution does not require [a state] to recognize the defense of diminished capacity. *Wong v Money*, 142 F3d 313, 324 (6th Cir. 1998); *see Schorling v Warren*, 458 F. App'x 522, 523 (6th Cir. 2012) ("The right to present a diminished capacity defense has never been recognized by clearly established federal law."). The Michigan Court of Appeals determined that Burns' constitutional right to present a defense was not violated because Michigan does not recognize a diminished capacity defense short of insanity for the purpose of negating specific intent.

Petitioner asserts that the determinations made in his case and on appellate review are all clearly erroneous, contrary to, and unreasonable, in the application of this honorable courts precedential holdings. The Federal Circuit Court relies on the holdings of its own prior opinions, and fails to consider thus answer the constitutional questions left open by the prior

adjudication of the petition. This causes the petitioner an exaggerated burden in the quest for the certificate of appealability. At the first stage, the only question is whether the applicant has shown that jurists of reason could disagree with the District Court's resolution of the Constitutional claims or conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El v Cockrel*, 537 U.S. 322, 327.

The District Court failed to consider that "an unreasonable application can also occur where the state court either extends a legal principal from court precedence to a new context where it should not apply or unreasonably refuses to extend that principal to a new context where it should apply," *Green v French*, 143 F3d 865 (1998); *Williams v Taylor*, 529 U.S. 362; 120 S. Ct. 1495, 146 L Ed.2d 389 (2000). The questions, which were never answered and, are still left open are not whether Michigan recognizes the diminished capacity defense, yet whether this blanket rule by the state to exclude evidence, denies individuals of their constitutional guarantees, as outlined in *Rock v Arkansas*, 483 US 44, 107 S. CT. 2704, 97 L Ed. 2d 37 (1987), and argued further herein. Also whether this blanket rule infringes on the individual weighty constitutional interest, is arbitrary, and or whether it is disproportionate to [what?] purpose it is designed to serve. The state has not been required to answer the latter, "What interest this rule, (state law) has been designed to serve". Petitioner is also of the position that this places an impermissible limitation on his right to testify in his own behalf.

FOR FURTHER DISCUSSION

The Petitioner is able to demonstrate how the issues involved are a violation of the right to a fundamentally fair trial. How it violates the (individual) due process right, when the state impedes him from using mental disease and or capacity evidence directly to rebut the prosecutions' evidence that he did form mens rea for the requisite intent. The Petitioner contends that in this limited circumstance of asserting this defense, the burden of proof would fairly be placed on defendants. Even to a degree of a heightened burden, as expert opinions in any field of inquiry used and admitted in any sense may lead or mislead a jury into thinking more of the opinion than it either holds or was offered to accomplish. Yet the diagnosis is only one aspect to

be considered by the trier of fact. The degree of the mental illness, (where there is history) along with the opinion[s], facts, and circumstances surrounding the crime, along with the "expert" opinion[s], will be where the truth lies. Evidence of mental illness and or disease may only mislead if left unchecked, which there is every confidence that no state would ever allow such, after the decision to charge has been initiated. Petitioner agrees that there rightfully should be a restriction on psychiatric testimony and expert opinions, to the extent that like any other testimony which seeks any impermissible fact, and or opinion outside of the experts' ability to competently testify to. Meaning that ultimate issue questions, and whether a particular defendant's mental condition satisfies the "legal test for insanity". Actually Petitioner submits that no state, state legislature, or court is in any position to determine sanity or insanity and thus the professional opinion, and that this determination on the conditions surrounding an individuals' state of mind, must be submitted to the trier of fact after examination and proofs.

The same as the question of innocence or guilt, is it better to continue to incarcerate mentally disabled individuals whom can't or don't meet the mens rea, or should they be given the opportunity and availability through their due process constitutional right to present a defense in line with fair practice. The insanity question cannot displace the intent question as the intent question is the basis of the state's case, and a theory to be proven on the criminal culpability. The defendant only asserts mental illness or disease as a defense (in which the state may easily apply a demanding standard and so instruct the jury) as to overcome the criminal culpability. To totally remove the availability from individuals whom cannot or did not actually form the requisite mens rea is a unfair due process violation of the most basic type.

There can be no doubt that the Due Process clause mandates that the state give the criminal defendant fair notice of the charges against him to permit adequate preparation of his

defense. US Const, Am XIV. That same clause, as well as the Sixth Amendment, further provides that the defendant have a complete opportunity to present a defense to the charge against him. US Const, Am VI; Const 1963, art 1, §17, § 20, *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974), *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Hackett*, 421 Mich 338, 353; NW 2d 120 (1984). As the Supreme Court has explained, "[w]hether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727, 1731; 162 LEd2d 932 (2006), quoting *Crane v Kentucky*, 476 US 683, 690; 106 SCt 2142; 90 LEd2d 636 (1986).

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this petition for writ of certiorari, order responsive pleading, and or briefing. Or issue the Writ of Habeas Corpus, or any other relief that this Court deems equitable.

Respectfully Submitted,

Date: 7-19-18

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