

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRENT WILLIAM BOGSETH - PETITIONER
(Your Name)

VS.

People of the State of Michigan - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brent William Bogseth
(Your Name)
St. Louis Correctional Facility
8585 N. Croswell Road
(Address)

St. Louis MI 48880
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. If there is no evidence to show that a defendant actually committed the offense of murder can premeditation and deliberation then exist as the lower Courts believe in this present case, or is that conviction in fact a violation of fundamental due process rights as per the V and XIV Amendments of the United States Constitution? Would the affirmation of said conviction by the State Court of Appeals then be in violation of due process as well?

II. Is using non disclosed, non admitted demonstrative evidence at trial as support in a prosecution's closing arguments a violation of fair trial rights and due process?

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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OTHER

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 _____ to the petition and is

☐ reported at _____; 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☐ is unpublished.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 _____ to the petition and is

☐ reported at _____; 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☐ is unpublished.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 A to the petition and is

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☒ is unpublished.

The opinion of the Michigan Court of Appeals court appears at Appendix B 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 _____.

☐ 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ 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 December 4, 2018.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ 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

V Amendment United States Constitution

"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 offence 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."

XIV Amendment United States Constitution

"All Persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are Citizens of the United States and of the 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 its jurisdiction the equal Protection of the laws."

STATEMENT OF THE CASE

The defendant was found guilty of first degree murder by a jury on September 16, 2016 in the Circuit Court for Van Buren County in the State of Michigan. The defendant was sentenced on November 7, 2016 to life in prison without possibility of parole. On November 7, 2016 the defendant requested appointment of appellate Counsel which was granted, and defendant appealed by right. The defendant issued a Standard 4 brief in conjunction with appellate Counsel's brief. The Michigan Court of Appeals affirmed the defendant's conviction on February 13, 2018.

Defendant acting pro se filed an application for leave with the Michigan Supreme Court raising the question of Constitutional Protections under the V and XIV Amendments of the United States Constitution to convict with insufficient evidence amongst other issues. The Michigan Supreme Court accepted the application for leave on April 3, 2018. On December 4, 2018 an order was issued that the Michigan Supreme Court denied the application as they were not persuaded by the questions presented by the defendant. The defendant now files a petition for a writ of Certiorari to the Supreme Court of the United States due to the Michigan Court of Appeals and Michigan Supreme Courts double standard opinion on sufficient evidence presented by the prosecution at trial to Constitutionally convict a defendant along with using non disclosed non admitted demonstrative evidence as support in the prosecutions closing argument.

This Present Case stems from the arrest of the defendant for the

alleged murder of his wife in September 2015. At the outset it is important for this Court to note that the defendant claims and maintains his innocence. The present case was entirely based on Circumstantial evidence as there was no evidence linking the defendant to the offense. Infact there was no evidence regarding the defendant actually Committing the offense, evidence of prior threats or evidence that the defendant arranged the Circumstances or intentionally procured a weapon to effectuate the Crime.

Sufficient evidence claims have been decided by this Court and how they hold up to the Constitution. Jackson v. Virginia on if there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Thompson v. Louisville, the no evidence doctrine, violation of due process to Convict and Punish a man or woman without evidence of ones guilt. In Winslip, the requirement under fundamental due process rights that the prosecution must prove every element of the charge beyond a reasonable doubt as set forth in the United States Constitution Amendments V and XIV.

In this present case the Prosecution failed to Present Sufficient evidence, even when viewed in the light most favorable to the prosecution, to enable a rational and reasonable trier of fact to Convict. Defense did move for a directed verdict at trial. (TR 5 at 86-87). The trial Court denied the request Contrary to a rational view of the evidence and law. The motion should have been granted based upon there being no evidence that the defendant Committed the offense.

In this present case the Conviction was first degree murder.

and if it would appease this Court to state that first degree murder is Second degree murder with an added element, Premeditation. Many murders are committed in a Consuming frenzy or heat of passion and these are in law only murder in the Second degree.

Premeditation of a murder would be giving thought before acting to the idea of taking a human life. Then reaching the definite decision to Kill, the formation of a specific intent to kill in short. Going further into deliberation, the Consideration and reflection upon the preconceived design to Kill. Turning it over in the mind and giving it second thoughts, the formation of a design can be instantaneous as quick as thought itself. The mental process of deliberation upon such a design does require that an appreciable time elapse between formation of the design and the fatal act which there is in fact deliberation.

Premeditation and deliberation characterize a thought process undisturbed by hot blood. None of the evidence admitted at trial in this present case shed any light to the defendants state of mind prior the murder. Infact the apparent savagery of the attack made on the victim would arrive at the rational conclusion that a person who inflicted such an attack was dispossessed of any mental awareness, not of in support of Premeditation.

The double standard with the Michigan Court of Appeals is in People v. Banks, the Court reversed the conviction and remanded due to the lack of evidence to support an inference of premeditation

and deliberation which rendered the first degree verdict against the great weight of the evidence. The Court went on to grant the defendant's motion for directed verdict on the charge of first degree murder.

In *People v. DiGiorgio*, the Court reversed, remanded and stated that the defendant was entitled to the directed verdict on the charge of first degree murder, as no evidence was adduced at trial for which the jury could infer the element of premeditation.

In *People v. Wells*, the Court reversed and remanded the case because absent the defendant's confession there was no independent proof for premeditation which was a requirement. The Court found lacking any evidence by which the jury could reasonably have inferred the existence of premeditation. Apart of the confession there was no evidence regarding the actual commission of the offense.

The Michigan Supreme Court in *People v. Hoffmeister* reversed a first degree murder conviction on the ground that the brutality of the killing did not justify an inference of premeditation and deliberation.

In *People v. Aaron*, the Court reversed and remanded stating in order to convict defendant of murder as defined by Michigan law, it must be shown that he acted with intent to kill. The Michigan Supreme Court has been firm in requiring proof of the commission of a crime, the conviction would not be allowed without some cumulative evidence. The principle is

fundamental and imbedded within the system of Criminal jurisprudence, an unalterable measure of justice. Further with the charge of homicide; first degree, second degree or Manslaughter, producing the dead body does not establish the Corpus delicti; it only establishes the Corpus and is not by itself sufficient to convict. There must be some evidence tending to not only show the commission of a homicide, but that the accused committed it before a conviction should be permitted.

Again this present case was entirely based on circumstantial evidence, no evidence that the defendant committed the offense, evidence of prior threats or evidence that the defendant arranged the circumstances or intentionally procured a weapon to effectuate the crime are missing as well.

There are gaps within this present case with the prosecutions evidence to establish when the murder in fact took place, where the offense happen and furthermore what the murder weapon was as that was never positively identified. While this is for the jury to decide as fact finders the inferences should not be based on speculation.

If these facts then cannot be established without evidence and only by speculation, then it cannot be reasonable to infer further that without any proof that an actor acted, that the defendant actually committed the offense in this present case. Thus Premeditation and deliberation does not and cannot exist with the defendant as the lower Courts believe.

This Conviction Cannot Constitutionally Stand as it must
appear to the Standard of Proof beyond a reasonable doubt as
established and opionated by this Court time and time
again and recognized by lower Courts as well. Why does this
Standard not apply to this present case?

II.

In this present case the Prosecution believes that the

murder weapon was a hammer, a very distinctive one at that.
When the Prosecutor asked the forensic anthropologist at trial
whether the marks "were possibly consistent with that of a
hammer?" and again "Specifically I guess I would say possibly
a claw hammer?", the forensic anthropologist agreed then went
on to testify that she "wouldn't be able to say that, yes, that
is definitely what caused that." (TR 4 at 78). When asked later
if a muzzle end of a Shotgun barrel could have possibly caused
the injuries, she stated it done in a "jabbing Motion." (TR 4 at 81).

The forensic Pathologist testified he could not say with
Certainty that the injuries were from a hammer. (TR 5 at 24).
The forensic Pathologist went on to testify "I would say the
most specific description would include the possibility of

multiple objects." (TR 5 at 45).

Prior this testimony the Prosecutor asked a Michigan State
Police officer if he ever found "a hammer that looked like this
one?" (TR 4 at 49). At this point the Prosecutor was showing
the officer and jury a hammer which matched one tested and

testified to by a forensic Scientist with the Michigan State Police Forensic Science Division as not having evidentiary value. (TR 5 at 61-62).

The prosecutors exclusion of the tested evidence is a denial of due process on its own. The fact that the Prosecutor then violated Michigan Rule of Evidence 404(b)(2), which is identical to Rule 404(b) of the Federal Rules of Evidence which states that in a Criminal Case the prosecution shall provide notice at least 14 days in advance of trial of any such evidence it intends to introduce at trial and the rationale for admitting the evidence.

This rule allows a determination of the admissibility of the evidence. In the State of Michigan the Courts have drawn a distinction between reenactment evidence and demonstrative evidence and determining admissibility. The Courts have adopted the following rule for evidence that attempts to recreate specific conditions.

To start there must be a showing that the evidence reasonably and faithfully reproduces the conditions that existed at the time in question. This faithful reproduction standard has been described as requiring virtual identity between the proffered evidence and the event the evidence purports to recreate.

When the evidence is being offered not to recreate a specific event but to provide a demonstrative aid in conjunction with a witness's testimony, there need not be as exacting a replication of the circumstances of the event, but

Merely Substantial Similarity. Further unless the demonstrative evidence bears enough Similarity to some factual Circumstances at issue in the trial, the evidence is not relevant in accord with the Michigan Rules of Evidence 401-402 because it advances no germane factual proposition that can meaningfully assist the trier of fact.

Michigan Rule of Evidence 401 is identical with Rule 401 of the Federal Rules of Evidence. Michigan Rule of Evidence 402 is patterned after Rule 402 of the Federal Rules of Evidence with modifications necessary to accommodate application to the Michigan Courts.

In this present case not only does the prosecution not give notice of the evidences intended use prior trial, or orally on the record showing good Cause, this evidence never gets admitted in the traditional sense and is then used as demonstrative evidence then later at trial in closing arguments as reenactment evidence. This affected the fairness of trial and violated due process as well.

With all evidence, to be admissible the evidence must satisfy traditional requirements for relevance and probative value in light of policy Considerations for advancing the administration of justice. The rules provide limitations on otherwise relevant but prejudicial evidence, although relevant, evidence may be excluded if its probative value is Substantially outweighed by the danger of unfair prejudice, Confusion of the issues, or Misleading the jury.

Not giving notice of intended use, defense was improperly

disadvantaged and unable to fairly prepare for this, it also removed the option to determine the probative value if any prior its use or if it would create an unfair prejudice.

Not admitting the evidence then referencing to it deprives the jury the opportunity to evaluate the evidence independently which is also a due process violation due to the lack of fairness. In this present case this action by the prosecutor affected the fairness of the trial.

Even if this Court were to say after review of the record, as the Michigan Court of Appeals had, that the prosecutor was free to reference the hammer in closing arguments there was still no notice of intent to the defense and it still deprived the jury to evaluate it independently.

The other issue to the reference is this, prior any testimony at trial in this present case as to what could have possibly caused the injuries, the cause of death, positive identification of the victim or if anyone seen the defendant with any tools the prosecution lacked proper foundation to even ask a Michigan State Police officer if he ever found "a hammer that looked like this one?" (TR 4 at 49).

Defense Counsel did object on the grounds it exceeded the scope of his cross-examination. The trial Judge did not agree to that limitation and permitted the prosecution to use the hammer as demonstrative evidence, still not being properly admitted. The prosecution asked again showing the Court and jury a second time the non admitted evidence, defense Counsel moved to make an

argument outside the presence of the jury about the "hammer stunt."

Defense Counsel made his case about the use of the hammer from no discussion about it on cross-examination to there being no foundation. Defense Counsel asked for a special instruction for the jury to disregard the hammer and raised further grounds for the objection, all still outside the presence of the jury. (TR 4 at 52-54).

The Prosecutor stated the hammer was, "Simply a demonstrative exhibit that was used as a facsimile of the hammer he believed that" the defendant "used to commit the murder." When the exchange continued on a cautionary instruction the Prosecutor's position was to give an instruction that it was a demonstrative exhibit.

The Prosecution went on to state:

"all we ever intended it to be was to give the witness a reference point so that they may examine it and say, yep, that's what that type of hammer looks like." "... I'm not intending to introduce it as an exhibit because I can't say that it's the exact same type of hammer. I wouldn't do that in this courtroom. I wouldn't do that as part of this case because I can't tell if it's the exact same length, the exact same year, the exact same, you know, specifications that were utilized in this case. I simply can't do that. But as a facsimile of the

hammer that was alleged to have been held by "the defendant, "and used by" the defendant, "in this case, it is relevant - it has great relevancy for the witness to at least be able to examine it and describe to a jury, for the jury to be at least able to see that this is what something like this appears to look like." (TR4 at 57-58).

If this was just an aid in conjunction with a witness's testimony then there must have been proper foundation for the demonstrative evidence to bear some similarity to some circumstance at issue, it was not relevant and did not meaningfully assist the trier of fact. Besides the foundation was not there to start.

To still use the demonstrative evidence and have a witness, "examine it and describe to a jury, for the jury to be at least able to see that," it should have been properly admitted to allow the jury to evaluate it independently and not cause any improper speculation or assumptions in deliberations.

If the above was all there was to the demonstrative evidence then the prejudicial error would only be with the jury not being able to evaluate independently, but the prosecution used this as a springboard to backdoor the demonstrative evidence in his closing arguments. It is reasonable to state that the prosecutor knowingly did this.

The fairness of trial becomes affected with the prosecutions

closing arguments, with defense unable to rebut or refute with what was entered into the record the prosecutor uses the demonstrative evidence as reenactment evidence as follows; while showing the jury pictures of the reconstructed skull:

"look at the pure amount of rage and anger that would have been involved to do something like that to somebody, to plunge a claw hammer like this one into somebody's skull."... "right here. claw hammer. look at the bottom exhibit. look at the two marks. look at the claw end of this hammer. This is the claw that was used to create those marks of one of the many blows delivered during the fury of the defendant's attack." (TR 5 at 131).

Again the testimony from the forensic anthropologist and forensic pathologist could not say with certainty that the murder weapon in this present case was in fact a hammer nor this specific one at that. This not only went against what he told the Court when it came to the cautionary instruction, but also goes against the faithful reproduction standard. Requiring virtual identity between the proffered evidence and the event the evidence purports to recreate, and conditions that existed at the time in question.

This Court can clearly see the unfair prejudice in regards to this demonstrative evidence turned reenactment evidence. The

Prosecution deluded the Court then mislead the jury and allowed improper speculations and assumptions in deliberations. By withholding the tested hammers that had no evidentiary value the Prosecutor created a false circumstance by telling the jury that this hammer was never recovered, that it was never found because it's the murder weapon. The due process violation was already done, this was just clearly a miscarriage of justice at this point. The defendant believes this Court will view the actions as a denial of the defendant's due process and if so to grant a writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant Certiorari for the following reasons. To Start as discussed in the Statement of the Case the double standard within the Michigan Court of Appeals and other cases that were reversed and remanded for new trials due to lack of evidence to support elements for first degree murder.

This present case is no different, infact there is even less that the other cases had. This Court will see within the Michigan Court of Appeals opinion not reasonable review. On the sufficiency of the evidence challenge they argue that the defendant didn't challenge that he killed the victim and did so with malice.

The Court appointed attorney did argue the insufficient evidence to reasonably find any premeditation and deliberation true, but the argument also covered the lack of evidence and the case being completely circumstantial. The Michigan Court of Appeals also would overlook the plea of not guilty by the defendant. Further the law states that the prosecution must prove the elements beyond a reasonable doubt. The Michigan Court of Appeals shifted the argument to overlook the prosecutions error.

The Michigan Court of Appeals would go on to negate the evidence that the defendant was not the last person to see the victim, State then that there was evidence from which the jury could have found that the defendant was

less likely the person who committed the murder. This is reasonable doubt. Then the Michigan Court of Appeals would come up with a new theory without supporting evidence. The Court's review was to determine that the prosecution presented evidence legally sufficient to establish a jury Submissible Case, which it didn't. How could it have if there was no evidence to show the defendant committed a crime. The Court chose to establish a new theory to justify the Prosecutions Case, one that took a year to compile all from circumstantial evidence.

The Courts review was to uphold the Constitution and the rules that are grounded within it. The safeguard that men and women are protected from dubious and unjust convictions that results in forfeitures of life, liberty and property.

In Cases, like this present case, where the Prosecution does not introduce sufficient evidence to justify a trial of fact in reasonably Concluding that a defendant is guilty beyond a reasonable doubt, and in this present case there was in fact reasonable doubt. The error then is the trial Courts failure to grant a defendant's motion for a directed verdict, which was done in this present case, and is an error which cannot be remedied by ordering a new trial.

If reasonable doubt no longer matters in Criminal Cases then we as a society are at risk of violating Constitutional Protections, the thing is, is more juries are in fact overlooking reasonable doubt in Cases and Convicting defendants. Furthermore

When a case is based on circumstantial evidence then it is easy to present a case to a jury, violating Constitutional protections making it appear as if anyone was the perpetrator even with it not being the case.

Circumstantial evidence could be good but only to a certain point. It must not replace the direct proof requirement. This defendant, like many others, are in prison for a crime he didn't commit. Why? Because the prosecution presented select circumstances that made it appear, but not show directly, that the defendant was suspicious of the crime. Bolster a case with improper misconduct, like this present case and anyone can be convicted of just about any crime.

This is why this country has these Constitutional protections correct? This is why this Court has opined the way it has in sufficiency cases past. The lower courts in this present case misapplied Constitutional protections when they are obligated to uphold these protections found within the Constitution.

II.

Further reasons this Court should grant Certiorari for this case is due to the use of non admitted evidence. First the Michigan Court of Appeals reasoning to support the prosecutions use of the non admitted evidence is clear error because not only was it highly prejudicial based on the

use with the prosecution's context, but it was not disclosed to the defense on its intended use. Even if it were somehow to be shown what the murder weapon was proven to be in this present case, disclosure is always favored. Further it is not like the prosecution did this on a whim, there was a strategy behind the use that much is clear. It had to be purchased to start, then worked into trial somehow.

The injustice becomes clear when the prosecutor explains the use to the trial court, it becomes more than that because that was his intended use for the demonstrative evidence.

That being said trial by surprise is not welcomed as it goes against the adversary process. To use non disclosed evidence, to not properly admit the evidence for the jury to be independent with it in deliberations also goes against the adversary process as it clearly creates an unfair balance.

Evaluated by this Court the prosecution's actions had an effect on the fairness of the trial, that fairness is assured to the adversary criminal process. That fundamental fairness is due process, it is clear to see the violation within this present case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brent Byrnes

Date: January 29, 2019