NO. 18-7933

IN THE

SUPREME COURT OF THE UNITED STATES

KEITH CHARLESTON-PETITIONER

VS.

JACK KOWALSKI, Warden--RESPONDENT

On Petition for Writ of Certiorari to

United States Court of Appeals for The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by: Keith Charleston

KEITH CHARLESTON #592692
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, Michigan 49788

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LIST OF PARTIES

KEITH CHARLESTON-PETITIONER

VS.

JACK KOWALSKI, Warden--RESPONDENT

OPINIONS BELOW

DIRECT APPEAL

1.) The Michigan Court of Appeals affirmed the petitioner's conviction, docket No. 316771, in their unpublished opinion on March 12TH, 2015.

2.) The Michigan Supreme Court, docket No. 151316, affirmed the Court of Appeals decision on September 29th, 2015.

COLLATERAL REVIEW

3.) The United States District Court for the Eastern District of Michigan issued its Order denying the habeas corpus petition on January 9TH, 2018.

4.) The, United States Court of Appeals for The Sixth Circuit, order denying the Certificate of Appealability May 31st, 2018 (*KEITH CHARLESTON v. CONNIE HORTON*) is currently unpublished. A request for En Banc was timely filed June 14th, 2018 and ultimately denied August 21st, 2018.

CONCISE STATEMENT OF JURISDICTION

THE UNITED STATES SUPREME COURT HAS JURISDICTION UNDER 28 USC 1253 AND 28 USC 2101, The date on which the United States Court of Appeals decided the case was May 31ST, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on t August 21st, 2018, and a copy of the order denying rehearing appears at appendix .

Under Rule 29.4 The Michigan Attorney General will be served a copy of the Petition.

CASES

Statutes

Constitutional amendments

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

Rights of persons charged with crimes; guaranty of life, liberty and property.
No person shall be held to answer for a capitol, 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 deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

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

Amendment XIV

Citizenship; security of persons and property, due process and equal protection clauses.
Section 1. 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.

CONCISE STATEMENT OF THE CASE

The Petitioner avers that State court unreasonable application of clearly established United State Supreme court law; when the petitioner's statement was unconstitutionally obtained by his voluntary intoxication of Alcohol and sleep deprivation which prevented him from making a knowing and intelligent wavier of his Federal and State Constitutional right to remain silent and the trial court refused to suppress his statement.

There was insufficient evidence of premeditation and deliberation of First degree murder and the prosecution failed present sufficient evidence to disprove self-defense beyond a reasonable doubt.

The Petitioner's Trial Counsel, failed to file a proper pretrial motion in the third Judicial Circuit Court pertaining to the Illegal Warrantless entry into his Mother's home in which he was a guest, to make an arrest for outstanding misdemeanor traffic tickets, in which the Detroit Police and Federal officers used as pretext for a homicide investigation, where the Petitioner made a statements. recognizing that Miranda does not remove the taint of a fourth amendment violation.

CONCISE ARGUMENT AMPLIFYING THE REASONS

REASONS FOR GRANTING THE WRIT

This Court should grant Writ of Certiorari in this case under Rule 10 which states:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resorts; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.
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> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> * * *
>
> (c) a state court or a United States court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

The petition for a writ of certiorari should be granted

STATEMENT OF THE CASE

Petitioner Keith Romond Charleston was charged with first degree premeditated murder [M.C.L. § 750.316], felon in possession of a firearm [M.C.L. § 750.224f] and felony firearm [M.C.L. § 750.227b] in the death of Charles Walls. The offenses were alleged to have been committed on August 1, 2012, in front of 381 Holbrook in the City of Detroit.

After his January 10, 2013, preliminary examination, Petitioner was bound over to the Wayne County Circuit Court for trial. On February 22, 2013, a *Walker* hearing was conducted and suppression of his statement was denied. (M pp. 4-58). On April 22, 2013, he appeared for trial. After jury selection (T1 pp. 9-119, 126), preliminary jury instructions (T1 pp. 126-135) and opening statements (T1 pp. 135-141) the following witnesses testified:

Kim Walls was Charles Walls' sister. On August 1, 2012, she identified his body at Ford Hospital. She did so again on August 1, 2012, to the Wayne County Medical Examiner. (T1 pp. 145-147).

Palace Abrams stated that on August 1, 2012, she received a call from Petitioner, whom she knew as "Pistol Pete" (T1 pp. 150-152). He asked her to admit him to her building because a person inside owed him money. She did not let him in. Minutes later she heard gunshots, looked out her window and saw a man lying face up. (T1 pp. 150-156). She provided the incoming phone number to police. According to her phone records, the call was received at 8:04 p.m. (T1 pp. 157-160). She also identified Petitioner to the police as "Pistol Pete" from a six photograph array. (T1 pp. 161-163).

Karla Nash was down the street at the time and heard five or six gunshots in rapid succession from a single location. She looked up and saw two men at the apartment building. One turned and fell. He had nothing in his hands. The other, a 25-35year old black male weighing 165-

200 pounds who wore blue jeans, white gym shoes and a Tiger's jersey, ran toward Beaubien. (T1 pp. 167-172).

Detroit Police Officer Terrence Washington stated on August 1, 2012, he and his partner, Officer Pugh, were dispatched to 381 Holbrook on a report of a person shot outside of the location. He arrived and saw a person lying in blood on the ground. He did not detect a pulse. (T1 pp. 177-180). The parties stipulated that Charles Walls was pronounced dead on arrival at Henry Ford Hospital by Dr. Rivers and was then transported to the office of the Wayne County Medical Examiner. (T1 p 182).

Lawrence Helzer stated that for the six months preceding August 1, 2012, he purchased crack cocaine from Petitioner. On that date he saw Petitioner and another person at his apartment building. Petitioner requested the $10.00 Helzer owed. He asked Petitioner to wait until Friday. Petitioner punched and kicked Helzer. Walls, who was also a resident of the building, pulled Petitioner off of Helzer. The men jumped on Walls. Helzer ran to his apartment and retrieved a sword. Petitioner and the other man ran from the building and prevented Helzer and Walls from following. (T1 pp. 184-193). Helzer called Petitioner three or four times. Petitioner called back an hour or two later, telling Helzer not to come outside. As he was on the phone he saw Petitioner outside the building on a bicycle holding a pistol in his hand and heard a shot. (T1 pp. 194-207). According to Helzer, Petitioner was wearing a basketball or football jersey and blue jeans. (T2 p 207).

Detroit Police Homicide Investigation Officer Derick Maye arrived at the location at 9:50 p.m., August 1, 2012, to locate witnesses, collect evidence and try to find out what happened. (T2 pp. 5-6). He observed blood and 9 mm shell casings in front of the building. (T2 pp. 7, 23). He did not locate a weapon near the decedent. (T2 p 10). Petitioner was arrested at about 3:00 p.m. on

December 26, 2012. He met with and interviewed Petitioner over four hours later. (T2 pp. 10-11). After advising Petitioner of his rights, (T2 pp. 13-15), Petitioner first stated he was out of town that day. He then answered questions and signed a statement written by Maye, (T2 pp. 17-19), indicating that Petitioner called Larry, who owed Petitioner money for crack. Larry complained about the poor quality of the crack and stated that he would not pay. Petitioner went to Larry's apartment building with a person named Leaf. Walls ran at him with a sword. Petitioner and Leaf ran from the building and prevented Walls from exiting. Petitioner then ran to an alley and retrieved a nine millimeter handgun hidden under some logs, which he kept for protection. He returned to the building and again called Larry. As he spoke with Larry, Walls again approached. When Walls reached to his back area, Petitioner shot 3-4 times in perceived self-defense. Walls stumbled. Appellant ran, dropping the gun in the alley. He later disconnected his phone and moved to Atlanta. (T2 pp. 19-22).

Detroit Police Officer Eugene Fitzhugh is an evidence technician. (T2 p 26). At 10:40 p.m., August 1, 2012, he went to scene. Over the next two hours he prepared a sketch, removed three spent nine millimeter shell casings from the front of the building and took photographs. Avneesh Gupta, an Assistant Wayne County Medical Examiner, is an expert in forensic pathology. (T2 pp. 42-47). On August 3, 2012, he performed an autopsy on Charles Walls, (T2 p 48), noting seven gunshot wounds. One perforated the right ear, went to the brain and outside the left side of the temple. Fragment was recovered from the left ear. A second grazed the left shoulder. A third was to the chest. It went through the lung and was recovered in the back. A fourth perforated the right side of the back and right lung and went out on the front of the chest. A fifth penetrated the left back, which went through the back muscle and the cervical spine where it was recovered. A sixth perforated the left arm and the lung and went outside the back. The seventh was to the right hand,

which fragmented the left thumb. (T2 pp. 50-52). There was no evidence of close range firing. (T2 p 54). The cause of death was gunshot wounds. The manner of death was homicide. (T2 pp. 52-54). Detroit Police Officer Robert Bolden stated that on December 26, 2012, he went to 16425 Collingwood in Detroit to assist in the arrest of Petitioner, who was in a bedroom closet. (T2 pp. 60-63).

For purposes of count two, the parties stipulated that Petitioner had been convicted of a prior specified felony and that his right to possess a firearm had not been restored. (T2 p 66). The People then rested. (T2 p 68). Directed verdict was denied, (T2 pp. 69-74), and the defense rested. (T2 pp. 79-80). After closing arguments (T2 pp. 82-99) and final jury instructions (T2 pp. 99-128), Petitioner was found guilty as charged on April 23, 2013. (T2 pp. 137-140). On May 5, 2013, Petitioner was sentenced to concurrent terms of life for count one, 3-5 years for count two, consecutive to a term of two years for count three. (S p 10).

On December 20, 2013, Petitioner's appellate counsel filed his Brief On Appeal Petitioner submitted a Standard 4 *pro per* brief and Motion to Remand in the Court of Appeals on March 15, 2014, raising the additional third claim contained herein. The Michigan Court of Appeals denied Petitioner's Motion to Remand on April 22, 2014, and affirmed Petitioner's convictions and sentences on March 12, 2015. Mr. Charleston submitted an Application for Leave to Appeal to the Michigan Supreme Court raising the claims presented herein on March 25, 2015. The Michigan Supreme Court denied leave to appeal on September 29, 2015.

Petitioner's application for a writ of habeas corpus was filed on October 1, 2014, challenging his conviction for first degree premeditated murder, *M.C.L.A. 750.316 (1) (a)*, felon in possession of a firearm, *M.C.L.A. 750.224f*, and possession of a firearm during the commission of a felony, *M.C.L.A. 750.227b*. The Court issued an Opinion and Order which

denied the Petition for Writ of Habeas corpus and declined to issue a certificate of appealability or leave to appeal in forma pauperis. The United States District Court for the Eastern District of Michigan issued its Order denying the habeas corpus petition on January 9, 2018.

Petitioner filed a timely Notice of Appeal and request to proceed *in forma pauperis* with the District Court. Petitioner thereafter filed an Application for Certificate of Appealability with the Sixth Circuit. On May 31, 2018 the Court denied the Application for a Certificate of Appealability, and denied Petitioner's motion to proceed in forma pauperis on appeal as moot.

The petitioner timely filed his petition for En Banc rehearing regarding his denial of certificate of appealability on June 14th, 2018. The Sixth Circuit Court of Appeals denied the petitioners request on August 21st, 2018.

The petitioner now timely files this request for Writ of Certiorari to the United States Supreme Court.

ISSUE I.

PETITIONER'S STATEMENT WAS UNCONSTITUTIONALLY OBTAINED AS HIS INTOXICATION AND LACK OF SLEEP PREVENTED A KNOWING AND INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS, AND THE TRIAL COURT ERRED IN DECLINING TO SUPPRESS HIS STATEMENT.

The first issue is whether there was a knowing and intelligent waiver of the petitioners Miranda rights and whether or not his confession was validly obtained. Both the federal and state due process clauses bar the use of involuntary or coerced confessions at trial. U.S. Const., Ams. V and XIV; Mich. Const. 1963, art 1, § 17; *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

In regards to the "intelligently and knowingly" prong of the analysis, the Court asserted that the mental state necessary to validly waive *Miranda* rights involves being cognizant at all times of the State's intention to use one's statements to secure a conviction. *Id.* at 640. Here it cannot be said that Petitioner was cognizant at all times for the simple fact that he was intoxicated with alcohol, under the influence of marijuana, and sleep deprived from staying awake most of the previous evening. (M pp. 29-38).

Petitioner's intoxication and drug use the day of his arrest and interrogation was corroborated by testimony from Linda Moore. (M pp. 40-42). "He was intoxicated, 'No question or doubt about it.'" (M p. 43). The circuit court unreasonably applied federal law when it denied Petitioner's Motion to Suppress his statement premised exclusively on testimony of Officer Maye, and the court's observation of Petitioner's demeanor in the video of the interrogation.

The trial court's judicial fact-finding was unreasonable because Officer Maye made no inquiries or conducted no sobriety tests to arrive at the conclusion that Petitioner was not inebriated. Officer Maye's testimony and the trial court's review of a portion of the interrogation

video resulted in opinions of observation only. That alone should not have been enough to negate the testimony of Petitioner and Linda Moore and the trial court's conclusion that it did was unreasonable and contrary to the holdings in *Mincey v. Arizona,* 437 U.S. 385; 98 S.Ct. 2408; 57 L.Ed.2d 290 (1978) and *Beecher v. Alabama,* 389 U.S. 35; 88 S.Ct. 189; 19 L.Ed.2d 35 (1967) .

A defendant's constitutional rights are violated if a "conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity." *Miranda*, 384 US at 465. Absent proper safeguards, the ordeal of custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

The ultimate test for constitutionally permissible interrogation pursuant to the Fourteenth Amendment is the test of voluntariness. *Columbe v. Connecticut,* 367 U.S. 568, 602; 81 S.Ct. 1860; 6 L.Ed.2d 1037 (1961). A "totality of the circumstances" test is employed in evaluating voluntariness. See *e.g. Brown v. Illinois,* 422 U.S. 590; 95 S.Ct. 2254; 45 L.Ed.2d 416 (1975); *People v. Cipriano,* 431 Mich. 315; 429 N.W.2d 781 (1988). In *Cipriano*, the Supreme Court of Michigan defined the test: "whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker.'" *People v. Cipriano, supra*, at 333-334, quoting *Columbe v. Connecticut*, *supra* at 602.

In applying these principles, the focus is on the defendant's state of mind, the events surrounding the interrogation, and the impact of those circumstances. The *Cipriano* Court set out a non-exhaustive list of circumstances to be evaluated:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave

> the confession; **whether the accused was injured, intoxicated or drugged,** or in ill health when he gave the statement; **whether the accused was deprived of food, sleep, or medical attention**; whether the accused was physically abused; and whether the suspect was threatened with abuse. *Id.* at 334. (emphasis supplied).

The voluntariness prong of the inquiry centers on the question of police coercion. In *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), the Court explained that "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception . . . ." The knowing and intelligent prong centers on the level of the suspect's understanding, regardless of police behavior. This requires an inquiry into the defendant's state of mind, divorced from the question of possible coercion.

In *Moran v Burbine,* 475 US 412, 421 (1986), the Supreme Court explained that two distinct inquiries are necessary to determine an effective waiver:

> **First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an un-coerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.**

Here it cannot be said that the statement made to the interrogating police agency was knowingly, intelligently and voluntarily made. This is especially true due to the fact of the severe intoxication, an issue that was of no dispute or discrepancy. There was testimony to not only corroborate this, but it supported the defenses theory the interrogation was not made of sound reasoning or based upon knowing intelligence.

The circumstances under which Mr. Charleston's statement was elicited are very reminiscent of those deemed unconstitutional in *Mincey v. Arizona,* 437 U.S. 385; 98 S.Ct. 2408;

57 L.Ed.2d 290 (1978). The Supreme Court determined that a statement cannot be obtained from an intoxicated defendant. The same result was reached in *Beecher v. Alabama,* 389 U.S. 35; 88 S.Ct. 189; 19 L.Ed.2d 35 (1967), where the Court reversed a conviction that was based on a confession obtained after police shot the defendant, and while he was in the hospital being treated with pain medication. *Id.* at 30-31.

The same result is compelled here, where, because of alcohol, sleep deprivation, and drug intoxication, Mr. Charleston had no ability to voluntarily, knowingly or intelligently waive his rights or discuss the events in question. The petitioner, as well as his mother, testified at his *Walker* hearing that Petitioner was heavily intoxicated from the consumption of alcohol and drugged from very potent marijuana. It was unreasonable for the trial court and Michigan Court of Appeals to disregard such testimony and favor the testimony of Officer Maye.

Consequently, the interrogating detective conducted no tests to determine Petitioner's Intoxication or sleep deprivation. Merely presuming that "Defendant did not appear to be drunk or tired" (COA Opinion, p 3) should not eliminate the value of testimony from Petitioner and Petitioner's mother who testified otherwise.

The Court of Appeals' holding was an unreasonable application of the United States Supreme Court's holding in *Columbe,* where Petitioner demonstrated three factors that would require suppression of his statement. The trial courts' denial of Petitioner's motion to suppress his statement and the Court of Appeals incorrect standard of review regarding the trial court's ruling requires this Court to grant this petitioner's Writ for Certiorari.

ISSUE II:

PETITIONER'S CONVICTION FOR PREMEDITATED MURDER MUST BE REVERSED WHERE (1) THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION; AND, (2) THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.

Petitioner submits that the evidence shows that he went to collect a debt from an individual named Helzer, and that Helzer and the victim (Charles Walls) chased him with a sword. Petitioner returned later with a gun. There was witness testimony that a number of shots were heard, and that Walls died from a number of gun-shot wounds. However, there were no eye witnesses to the actual shooting.

Petitioner's statement to the police indicates that Petitioner acted in self-defense. There was no evidence presented by the prosecution which proved premeditation or deliberation, or disproved self-defense. At most, this case contains the properties of an imperfect self-defense.

Insufficient-evidence claims are reviewed to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1980) *Jackson v. Virginia*, 443 U.S. 307 (1980) *People v. Wolfe*, 440 Mich. 508, 515 (1992); *People v. Hampton*, 407 Mich. 354, 368 (1979), cert. den. 449 U.S. 885 (1980). Conflicts in the evidence presented are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich. at 515.

Due process requires that a verdict be supported by legally sufficient evidence for each element of the crime. U.S. Const. Am. XIV; *In re Winship*, 397 U.S. 358 (1970); *Jackson*, 443 U.S. at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime with which he is charged.'" *People v. Patterson*, 428 Mich. 502, 525 (1987) (quoting *Winship, supra*).

In *Jackson v. Virginia, supra*, the United States Supreme Court held that when determining whether a decision is based on sufficient evidence, the state court "must consider not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v. Hampton, supra* at 366. In *People v. Wolf, supra*, the Michigan Supreme Court stated: "This standard was articulated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979), and has been applied regularly by the courts of this state." *Id.* at 514.

The prosecution did not present evidence to justify a reasonable juror in concluding that Petitioner was guilty of premeditated first degree murder. All that was proven was that Petitioner shot the victim. Petitioner provided a statement indicating that he shot the victim out of fear and duress, believing that during the moment the victim was approaching him, he appeared to be reaching for something towards the middle of his back. Petitioner further stated that when he shot the victim he believed he was defending himself. Nowhere in the record was testimony given which would allude or show that Petitioner planned to murder Mr. Walls.

In finding Petitioner guilty of first degree murder for the shooting death of Walls, the jury rejected lesser included offenses of second degree murder and manslaughter. To prove first degree murder rather than the lesser offenses, the prosecution needed to show premeditation, the specific intent to kill, a deliberate killing, and a time of reflection prior to the killing. M.C.L. § 750.316.

First degree murder requires a state of mind of deliberation and premeditation to commit such crime. If *mens rea* was a necessary element of the crime at common law, a court will not interpret the statute as dispensing with knowledge as a necessary element. *Morissette v. United*

States, 342 U.S. 246; 72 S.Ct. 240; 96 L.Ed 288 (1952). The evidence at trial negated these elements of deliberation, specific intent to kill and premeditation. Moreover, the evidence at trial did not disprove Petitioner's assertion of self-defense.

The prosecution violated Petitioner's due process rights where he had a valid self-defense claim that the prosecution failed to rebut. *See In re Winship*, 397 U.S. 358, 363; 90 S.Ct. 1068; 25 L.Ed.2d 368 (1970) in order to find imperfect self-defense, a defendant must first have a valid self-defense claim. "Imperfect self-defense applies when self-defense fails *only* because the defendant was the initial aggressor." *People v Butler,* 193 Mich App 63, 67; 483 NW2d 430 (1992) Once a self-defense claim is established, the prosecution bears the burden of disproving the claim beyond a reasonable doubt. *People v Fortson,* 202 Mich App 13, 20; 507 NW2d 763 (1992). The prosecution never contested Petitioner's self-defense claim at all.

Although, it is true that Petitioner went and retrieved a weapon, it was also not refuted that Mr. Walls came at Petitioner a second time, while reaching for something in his waist band towards his back. The first time Mr. Walls encountered Petitioner he chased him with a sword. It is also not unreasonable to conclude that verbal threats were made during the encounter. Petitioner had every reason to believe that when Mr. Walls approached him a second time his safety was in jeopardy.

The Circuit Panel fails to address this flaw in connection with the argument that the Petitioner advances in favor of the issuance of the COA. The whole argument in the petition and the application for the issuance of the COA demonstrates 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).

In *Matin v Ohio*, 480 US 228, 234, the court readily acknowledges that the "affirmative" defense of self-defense may tend to negate the aggravated murder elements of "purpose" and "prior calculation and design". When dealing with the lack of proof to disprove self-defense, *Mullaney v Wilbur*, 421 US 648(1975), adds support to this supposition, "proving that a defendant did not act in the heat of passion [self-defense] on sudden provocation is similar to proving any other element of intent," the state must prove all elements of a crime beyond a reasonable doubt.

If an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof of that defense may not be placed on defendant, *Wood v Marshall*, 790 F2d 548 (6th Cir.1986). Petitioner raised this issue implicating the Federal Supremacy Clause, USCS const. Art VI, cl 2.

Although a federal defendant bears the burden of production on the issue of self-defense, once that burden is met, the government must prove beyond a reasonable doubt that the defendant did not act in self-defense. *United States v Otter Robe*, 333 Fed. Appx. 160 (8th Cir. 2009). further "[In] certain limited circumstances Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged, *McMillan v Pennsylvania*, 477 US 79, 86 (1986).

Wherefore for the reasons stated herein requires this Court to grant this petitioner's Writ for Certiorari.

ISSUE III:

PETITIONER'S GUARANTEED FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED UNDER THE UNITED STATES CONSTITUTION 6TH AND 14TH AMENDMENTS; THE MICHIGAN CONSTITUTION OF 1963, ARTICLE 1 § 17 AND 20, WHEN TRIAL COUNSEL WAS INEFFECTIVE FOR (1) FAILING TO DO AN ADEQUATE AND THOROUGH INVESTIGATION; (2) FAILING TO ADDRESS THE ILLEGAL WARRANTLESS ENTRY INTO HIS MOTHER'S HOME TO ARREST PETITIONER ON OUTSTANDING TRAFFIC TICKETS; AND, (3) FAILING TO CHALLENGE THE UNREASONABLE DELAY IN PROVIDING PROBABLE CAUSE HEARING WHERE PETITIONER WAS ARRESTED WITHOUT A WARRANT ON DECEMBER 26, 2012, AND WASN'T ARRAIGNED UNTIL DECEMBER 29, 2012.

Petitioner was denied the effective assistance of counsel where trial counsel failed to investigate and present a substantial defense, i.e. crucial *Walker*[1] hearing witnesses. These witnesses would have testified at trial, as they did at the *Walker* hearing, that Petitioner was highly intoxicated and drugged at the time of the incident which would have allowed the jury to conclude that it was reasonable to believe that Petitioner feared Mr. Walls was drawing a weapon on Petitioner where the victim had possessed and chased Petitioner with a weapon (sword) previously.

Counsel also failed to address the illegal and warrantless entry of police into the Petitioner's mother's home to make arrest. Counsel also failed to challenge the unreasonable delay from arrest until arraignment. There is more than the required reasonable probability that the outcome of the trial would have been different had these witnesses testified. The decision of the Michigan Court of Appeals is an unreasonable application of the principles established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

1 *People v. Walker*, 374 Mich. 331; 132 N.W.2d 87 (1965).

A defendant is entitled to the effective assistance of counsel. U.S. Const. Amends. VI,

XIV;

Strickland, supra. The test for evaluating claims of ineffective assistance of counsel under the United States Constitution was set forth in *Strickland:*

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were as serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*, at 687.

Ultimately, a defendant must overcome the presumption that the challenged action was sound trial strategy and show that, but for counsel's error, there was a reasonable probability that the result would have been different. *Strickland, supra.* While there is a presumption that counsel's performance constituted "sound" trial strategy, a finding that counsel was operating according to a "strategy" does not insulate his decisions from review. See *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 526-528 (2003); *Washington v. Hofbauer*, 228 F.3d 689, 704 (6th Cir. 2000); *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984).

A reviewing court is obligated to assess whether that strategy was arrived at in a constitutionally sufficient manner and whether the strategy chosen was constitutionally sound. *Id. Strickland* makes clear that "strategic choices made after less than full investigation will not pass muster as an excuse when a full investigation would have revealed" helpful evidence. *Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006).

Regarding the prejudice prong, a defendant does not need to show that counsel's error(s) more likely than not altered the outcome of the trial nor show by a preponderance of the evidence that the outcome was determined by the error(s). *Strickland*, 466 US at 693-694; *Matthews v.*

Abramajtys, 319 F.3d 780, 790 (6th Cir. 2003). A defendant need only show that there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different. *Id.*

In the present case, defense counsel failed to investigate and present witnesses Linda Moore and Atairalita Love to testify at trial. These witnesses would have testified that in lieu of Petitioner's intoxication and drug use the day of the shooting, it is reasonable to believe Petitioner feared and believed Mr. Walls was drawing a weapon to use against Petitioner at the time of the offense. These witnesses' testimony would have further negated the *mens rea* specific intent required for first degree murder, and corroborated Petitioner's account of imperfect self-defense. Had Petitioner's counsel investigated these witnesses' possible testimony further they would have bolstered Petitioner's version of the events and supported his imperfect self-defense claim.

To be effective, defense counsel must investigate, prepare, and timely assert all substantial defenses. *Strickland*, 466 U.S. at 691; *Kimmelman v. Morrison*, 477 U.S. 365, 384-387 (1986); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). "**[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.**" *Strickland,* 466 U.S. at 691 (Emphasis added).

Additionally the Michigan Court of Appeal order fails to state any position on the *County of Riverside v McLaughlin* ,500 US 44 (1991) argument where counsel was clearly in violation of Strickland v Washington, 466 US 668 (1984). Counsel failed to properly preserve this claim for appellate review.

Also probable cause did not exist until after the procuring of the invalid statement obtained in violation of the petitioners *Miranda* rights. Further the *County of Riverside v McLaughlin*, claim is not predicated on coercion. The order also misstates the fact (page -8-) that

the, Petitioner did not make the argument in his petition of the State Court's determination concluding that police had probable cause to arrest Mr. Charleston for homicide, is mistaken. Page 25-26 of the petition, states "The police did not have an arrest warrant pertaining to a homicide investigation until two days after Petitioner's arrest." That fact is admitted, yet disregarded, by the Court of Appeals.

Moreover, Petitioner did not live at Linda Moore's home, but was merely a guest who happened to be there at the time the police arrived. Therefore, the arrest warrant used to arrest Petitioner was not for homicide, but for traffic tickets, and was further, illegally used to further the investigation of police." Neither did the panel consider the law, recognizing that Miranda does not remove the taint of a fourth amendment violation. *Brown v Illinois*, 422 US 590 (1975).

It is for the reasons stated herein and those previously mentioned that the petitioner prays this Honorable Court will grant this Writ for Certiorari.

CONCLUSION

The rulings by the Michigan state courts on these claims resulted in decisions that were contrary to or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Further the opinion of the Sixth Circuit Court of Appeals denial of a certificate of appeal-ability is clearly erroneous where Petitioner has shown a violation of his constitutional rights of which could be debatable amongst reasonable jurists. Petitioner requests that the writ of certiorari be granted.

Respectfully submitted,

2-6-19
DATED

/S/ Keith Charleston
KEITH CHARLESTON