SUPREME COURT
OF THE UNITED STATES
WASHINGTON D.C., 20543-0001

BILLY GENE DRAKE,

Petitioner-Appellant,

V

LES PARISH-WARDEN,

Defendant-Appellee.

No. 18-9345
Judges: Roberts, Thomas, Brever, Ginsburg, Alito, Sotomayer, Kagan, Gorsuch, Kavanaugh.

MOTION FOR REHEARING

BY: Billy G. Drake #519089
Petitioner-Appellant In Pro se
Oaks Correctional Facility
1500 Caberfae Hwy
Manistee, MI. 49660

NOW COMES BILLY GENE DRAKE, a forma pauperis litigant pursuant to Rule 12.2 requesting a rehearing under Rule 44 in regards to the October 7, 2019 denial of Writ of Certiorari. Petitioner states this denial overlooks the injurious circumstances in which his conviction entails, and presents the following facts underlying why this Honorable Court should at least schedule an evidentiary hearing to verify the following as an "Interest of Justice."

As previously stated in Writ of Certiorari, the Petitioner was charged with Open Murder, Assault with intent, and Felony Firearm stemming from an altercation in which Travis Watson attempted to broker a peace treaty between the Petitioner's family and the Chapman/Dixon's. The latter became confrontational and attempted to combat the Petitioner once Watson beckoned him to the location after assuring him everything was fine. (See Writ of Certiorari, Pages 2, 21-22).

Surrounded, out-numbered and in fear of imminent harm, Petitioner branished firearm and fired. Subsequently, the Petitioner was convicted of First-Degree Premeditated Murder, although this evidence and information only suggest and support voluntary Manslaughter.

During trial, Judge James P. Adair denied the Petitioner's pro se motion for an emergency adjournment to allot new counsel Edward Marshall the appropriate time to familiarize himself with the evidence and formulate a proper defense against it. For reasons unbeknownst to the Petitioner, counsel pronounced his readiness to proceed to trial which was Constitutionally ineffective; (See Writ of Certiorari, Pages 2, 8).

Petitioner was harmed by this irrational decision on behalf of the court and trial counsel with a life sentence for not only did the trial court suspend the Petitioner's right to Due Process and Equal Protection, It allowed counsel to fabricate an alibi defense rather than challenge the States case

against the adversarial testing with an adequate defense. See United States V. Cronic, 466 U.S. 648 (1984).

On Direct appeal, appointed appellant counsel, Michael Faraone refused to raise this ineffective claim which would have immediately brought to the trial court's attention trial counsel's disregard of investigative duty. This negligence curtailed Petitioner's guaranteed review which in turn eliminated any remedy of unjust First-Degree Premeditated Murder conviction.

Due to a lack of clerical assistance (Standard 4 Brief); transcripts withheld; appellate counsel's refusal to recuse himself; and the trial court completely ignoring the Petitioner's Motion to Remove counsel and Brief. This injustice prevailed and still stands, (See Writ of Certiorai Appendix I) although this Court has held in Martel V. Clair, 565 U.S. 648, 664 (2012) that:

> Courts cannot properly resolve substitution of counsel motions without probing why a defendant wants a new lawyer. Moreover, an on-the-record inquiry into the defendants allegations permits meaningful appellate review of a trial court's exercise of discretion.

Overlooking this abuse of discretion, both Michigan Court of Appeals and Supreme court denied relief in succession. Returning to the trial court on post-conviction via MCR 6.500 et seq., Petitioner requested relief in regard to multiple claims, but stressed the importance of counsel's ineffectiveness in regards to the Manslaughter instruction by citing the following:

> "To show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation and there was not a lapse of time during which a reasonable person could control his passions." People v Pouncy, 437 Mich 382, 389; NW2d 346 (1991). Significantly, provocation is not an element of voluntary manslaughter. People v Moore, 189 Mich App 315, 320; 472 NW2d (1991). Rather, provocation is the circumstance that negates presence of malice. People v Scott, 6 Mich 287, 295 (1859).

The prosecution's theory of First-Degree Premeditated Murder was foundated upon testimony that Watson instructed Petitioner to "do it." This hearsay, alongside leading investigator Sgt. Joseph Plater's "inferential hearsay" that Petitioner was his primary suspect due to Watson's "corroborating" assistance (TT 976), coupled with trial counsel's inadequate representation (lack of objections), denied Petitioner of Due Process of Law.

This conduct was improper and impermissibly suggestive, for the state by its own admission knew Watson would be invoking his Fifth Amendment right against self-incrimination, in turn never testifying to the accuracy of such assertions and statements. (See Writ of Certiorari, Pages 13-17; citing United States V. Cromer, 389 F3d 662 (6th Cir. 2004), where the court found such conduct violated Constitutional rights); see also White v. Illinois, 502 U.S. 346, 365 (1992).

Nor was there ever testimony to suggest Watson and Petitioner conspired, which is required to establish the elements of premeditation and deliberation. Rather than rectifying this plain structural error in verdict instructions, the trial court denied relief under MCR 6.508(D) stating:

> Counsel's decision to proceed with an alibi was sufficient, for had it worked, defendant would have been exonerated of First and Second-Degree Murder. Therefore, Defendant's claim lacks merit. (See Writ of Certiorari Appendix L).

This response was contrary to clearly established Federal Law and is deemed a manifest abuse of discretion which caused a miscarriage of justice. As the record stands unrefuted, the trial Judges opinion an this matter insults the integrity of American Jurisprudence. For our Law is clearly established "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble

V. United States, 412 U.S. 205, 208; see also Beck V. Alabama, 447 U.S. 625, 634 (1980) (Providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the benefit of the reasonable doubt standard)(This option was warranted due to evidence & information proffered at trial.)

Every Court has adopted the above opinion, deeming counsel's conduct effective. Yet, decisions within their circuits reflect otherwise. In Towns V. Smith, 395 F3d 251, 258 (6th Cir. 2005) which cites Strickland, states:

> A purportedly strategic decision is not objectionably reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.

Furthermore, Ramonez V. Berghuis, 490 F3d 482, 489; 2007 US App Lexis 14296, states:

> Constitutional effective counsel must develop trial strategy in the true sense-not what bears a False label of "strategy"-based on what investigation reveals witnesses will actually testify to, not on what counsel guesses they might say in the absence of a full investigation.

See also People V Pickens, 446 Mich 298 (1994).

This is such a case. It is an unrefuted fact that trial counsel bolstered his alibi by stating in his opening argument that Robert Dafoe and John Grant, would inform the jury who the actual shooter was and looked like, instructing them to pay close attention to what he considered "impartial witnesses" (TT 433 lines 1-14). Yet, of his own admittance, counsel conceded he never met nor interviewed Mr. Defoe, nor Mr. Grant (TT 531 lines 18-35; TT 532 lines 1-2; TT 656 lines 19-21; TT 657 lines 20-23).

The Legislature and this Court has made the language clear and unambiguous so that laymen like the Petitioner could comprehend when their substantial

rights are to be invoked and when they are violated. This Court has applied a test of factual inquiry into the actual conduct of defense counsel and its effect on the outcome of criminal trials. Striackland V. Washington, 466 U.S. 668 (1984).

The lower Court has adopted the Strickland standard, requiring counsel to interview not only his own witnesses, but also that the government intends to call. Groseclose V. Bell, 895 F. Supp 935 (1995).

This language is clear and concise. This Court stated:

> "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Cronic, supra at 2046.

And counsel's alibi defense against the overwhelming evidence of Petitioner's presence did just that... Sacrificed him to the devices of the State. Federal R. Crim. P. 52(b) grants the Court of Appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default; for it was intended to afford a means for prompt redress of miscarriage of justice. See United States V. Frady, 456 U.S. 152, 163, 179 (1982).

Yet, the district Court refused to honor such. This Honorable Court has held that district courts must follow legal standards set forth by the supreme Court and shall be reversed if they deviate from those standards because "it is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." Schlup V. Delo, 523 U.S. 298, 316 (1995).

Under AEDPA, relief may be granted if the state court decision in question was either contrary to, or involved an unreasonable application of clearly established law or was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding. 28 USC §2254(d)(1)-(2).

To deny relief stating Petitioner would have been exonerated of First and Second degree Murder had counsel's alibi been believed was not only plain error, but a clear abuse of discretion. For the evidence and information on record clearly reflects the Petitioner was "actually innocent" of the elements of premeditation, deliberation and lying in wait. Had it been an issue of establishing a factual basis of such, an evidentiary hearing was requested at every level.

§2254(e)(2) prescribes:

> If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claims unless the applicant shows that;
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

This Honorable Court also stated the miscarriage of justice exception would allow successive claims to be heard if the petitioner "establishes that under probative evidence he has a colorable claim of factual innocence." Sawyer V. Whitley, 505 U.S. 333, 339 (1992).

This Honorable Court further stated, that the manifest miscarriage doctrine is mandatory, not discretionary. "If a petitioner presents sufficient evidence of innocence, the petitioner should be allowed to pass through the gateway and argue the merits." Delo, supra at 326-327.

No evidentiary hearing was ever held. Trial counsel's move for judgment of acquittal of First degree murder was denied. Rather than reviewing these facts de novo, each court relied upon the stipulated illustrations in appellate briefs from appellate counsel and the State.

A new trial based upon the weight of the evidence should be granted where the evidence preponderate's heavily against the verdict and a serious miscarriage of justice would otherwise result. People v Solloway, 316 Mich App

174; 891 NW2d 255 (2016); (see also Gilkey V. Burton, 2019 US App Lexis 8853 "A court reviewing a claim that there was insufficient evidence to support a conviction will review the record to determine whether sufficient evidence was introduced to justify a trier of fact in reasonably concluding that the defendant is guilty beyond a reasonable doubt).

An appellate court's reversal for insufficiency of evidence is in effect a determination that the governments case against a defendant was so lacking that the trial court should have entered a judgment of acquittal... To make the analogy complete-a reviewing court must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously. McDaniel V. Brown, 558 U.S. 120; 130 S. Ct. 665; 175 L ed 2d 582.

SUMMARY

Comity and finality on appeal could not be satisfied due to the disregard in the "Interest of Justice" prescribed in 18 USCS §3002A for substitution of counsel motions. Petitioner's motion was never acknowledged, therefore the above-mentioned issues weren't judiciously regarded and regarded properly.

There has never been sufficient evidence for the charge of First-Degree Premeditated Murder to remain the predicated offense. The statement "do it" was left open for interpretation with no tangibles to equate nor corroborate the statements of the eyewitnesses account that Watson stating "do it" actually meant shoot to kill. Nor did Watson testify that he made such a statement, or an agreement that him and the Petitioner established that "do it" would be the indication to shoot to kill.

This inadmissible hearsay which clearly violated Petitioner's Due Process Rights in regards to Confrontation, (Crawford V. Washington, 541 U.S. 38 (2004)) is clearly insufficient to not only establish, but uphold a First-degree Premeditated Murder conviction. This statement was and remains the

linchpin in which established the States intent. It insults the integrity of our Judicial process and should be immediately resolved, by this Court for every other Court has refused to review this ineffectiveness claim in its entirety to establish the insufficiency of both First and Second-Degree Murder.

RELIEF REQUESTED

Therefore, the Petitioner humbly requests this Honorable Court upon the Granting of Rehearing, request Petitioner's complete record, order a Evidentiary Hearing to fully develop these claims to truly establish the validity of this injustice. And upon clarification either Reverse and Remand for new trial, or vacate sentence and enter the Voluntary Manslaughter charge.

Date: October 28, 2019

Respectfully submitted,

Billy Drake

Billy Gene Drake #519089
Appearing In Pro se

Sworn Statement of Certification

I, Billy Gene Drake, the Pro Se Litigant/Petitioner certifies and swears that the Petition herein is submitted without ill-intent and undue delay, and stands in accordance with Rule 44.2 and presents the intervening circumstances of controlling effect. (e.g., "Interest of Justice." "Actual Innocence," and "Abuse of Discretion.")

The above mentioned is submitted to the best of my knowledge, belief, and information under the penalty of perjury.

Billy G Drake

Subscribed and sworn to before me this date: _____ 11/14/19

W. BRINKLEY
Notary Public, State of Michigan
County of Manistee
My Commission Expires Dec. 01, 2019
Acting in the County of _____

_____

Notary Public, _____ County, Michigan

My commission expires _____

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PROOF OF SERVICE

I declare under penalty of perjury, that the Original of a Motion for Rehearing was served upon this Court and (1) one copy was served upon the Opposing party on October 28, 2019 by U.S. Mail First-Class Postage Fully Prepaid, through the Expedited Mail Service of Oaks Correctional Facility.

Billy Gene Drake

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