court copy

19-5524 ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TONG LOR - PETITIONER

v.

WARDEN SHANE JACKSON
STATE OF MICHGAN-RESPONDENT

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

TONG LOR #833580
Brooks Correctional Facility
2500 S. Sheridan Drive
Muskegon Heights, MI 49444

Respondent's Office of the
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909

QUESTIONS PRESENTED

QUESTION ONE

DOES THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA) REQUIRE THE PRESUMPTION OF CORRECTNESS TO BE APPLIED TO THE STATE COURT'S FINDING OF FACT WHEN THE PETITIONER IS CHALLENGING THAT FACT, UNDER 28 U.S.C.A. § 2254(d)(2) [THAT] RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING BEFORE JUDICIAL REVIEW?

QUESTION TWO

IF, A PETITIONER OVERCOMES THE UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING IS HE OR SHE STILL REQUIRED TO OVERCOME THE PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C.A. 2254 (e)(1); "THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMPTION OF CORRECTNESS BY CLEAR AND CONVINCING EVIDENCE."

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:

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TABLE OF AUTHORITIES CITED

JURISDICTION

On October 29, 2018, the United States District Court for the Eastern District of Michigan, Southern Division, denied the Petitioner's habeas corpus petition. Case no. 2:16-cv-11028, Tong Lor v. Shane Jackson, [2018 U.S. Dist. LEXIS 184574, *24. Petitioner then timely filed for certificate of appealability in the Sixth Circuit Court of Appeals, and on March 6, 2019, the Clerk of Court denied the certificate for appealability. Case no.18-2355 Tong v. Shane Jackson.

AMENDMENT V

RIGHTS IN CRIMINAL CASES

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.

AMENDMENT XIV

CIVIL RIGHTS

Section 1. All persons born or naturalized in 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.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

WHY CERTIORARI SHOULD BE GRANTED

The Michigan's Trial and Appellate Courts conduct factual reviews, however they want it to be done. They do not cite where in the record their factual conclusion were ascertained, thus allowing for illogical inferences of evidence to be made, and false narratives portrayed to circumvent a fair fact finding process on appeal by right. A true de novo review of record should be a mandated constitutional right.

The current application of deference and presumption of correctness that the State Court's will follow federal law is misplaced as sanctuary cities are growing and previous case law shows states have no problem disregarding federal law, as in Mooney v. Holohan, 55 S.Ct 340 (1935); Brady v. Maryland 83 S.Ct 1199 (1963); Napue v. Illinois 79 S.Ct 1172 (1959), and; Miller v. Pate, 87 S.Ct 785 (1967). So, applying defence to a state court decision when challenged under 28 U.S.C. § 2254(d)(2) "an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." is misplaced, as well as presuming it is correct.

REASONS WHY DEFERENCE SHOULD NOT BE GIVEN

The Courts in the State of Michigan, the Federal District and Sixth Circuit Court of Appeals have deliberately overlooked (because of deference and presumption of correc||ness) evidentiary facts from the record that proves "the petitioner did not fire his rifle". This continuous application of deference and the presumption of correctness to facts that have been proven to be misapphensions of the record and refuted by clear and convincing evidence of state court record, have violated his Due Process Rights and Equal Protection of Law.

Petitioner has refuted Vang's testimony with cl||ar and convincing evidence pointing out the Michigan Courts have made an objectively unreasonable determination of the facts, under 28 U.S.C.A. § 2254(d)(2). The Federal District Court and the Sixth Circuit Court of Appeals have also made an objectively unreasonable determination of facts from the trial court record, based on: other eyewitnesses testimony, lack of physical evidence found at the crime scene, common sense, logic, how a semi-automatic weapon operates based on the State's own forensic expert testimony that rationally proves the petitioner did not fire his rifle.

The State and lower Federal Court's have continued in this false narrative to find sufficient evidence under (AEDPA's) substantial deference to state court's determination of the fact "the Petitioner fired his assault rifle". Then where are all the shell casings from the assault rifle? There is seven spent .45 shell casings that came the Petitioner's brother semi-automatic Taurus handgun, two spent bullets recovered came from an unidentified shooter of .44 caliber revolver. No one testified to hearing three different sounds or types of gunfire, not one witness testified to hearing more than 8 shoots. If, the Petitioner fired his rifle, than there would be testimony of a third type of gunfire and shelling recovered from an assault rifle. This lack of evidence is proof beyond a reasonable doubt that the Petitioner has a constitutional right to.

The fundamental principle of liberty and justice which lie at the base of the American civil and political institutions are founded on "the truth",

and finding it shall set you free. Than Congresses (AEDPA) statutory scheme of deference hidden under the guise of comity, finality, and federalism is unconstitutional when it allows the state courts to conduct appeals by right however they choose, and then forces the federal lower courts to disregard the actual case facts to circumvent Constitutional claims renders the Supreme Clause, Article VI, Sec. 2, null and void.

BACK GROUND INFORMATION

Petitioner Tong Lor and his Tou Lor are Hmong and born in Loas, as children they moved to a refugee camp in Thailand in 1993. In 1998, their parents and them immigrated to the United States, and became American citizens.

The Lor family does not understand the English language well. He is filing this petition pro se, and is untrained in the law, the art of legal writing, but does know the facts of the case. He is respectfully requesting this Honorable Court to hold this filing to a lessor standard of that of an attorney. See Haines v. Kerner, 92 S.Ct. 595 (1972).

The Lor family retained the services of Attorney Marvin Barnett (P34033) to represent their sons. Petitioner was unhappy with being represented by the same attorney as his brother Tou. Mr. Barnett then provided Attorney Ali Hammound (P73076) from his law firm represent the petitioner.

On February 13, 2013, the jury trial commenced, the petitioner and his brother were tried together but by separate juries in the 67th Judicial Circuit Court of Oakland County in the State of Michigan, before the Honorable Martha D. Anderson presiding.

STATEMENT OF THE CASE

On June 12, 2011, at approximately 1:00 a.m., in the City of Pontiac, the petitioner held a graduation party for his sister Gee Lor at his home, Tou Lor was present. Tou Lor is the main perpetrator, who fired his semi-automatic .45 caliber handgun killing Cher Kue.

The Incident

Cher Kue and friends: Nicholas Vue, Nou Lee, and Mou Lee drove to the Petitioner's home, arriving unannounced in a red Ford Explorer. Phong

Vang and Sue Kue came in a black Mazda. They were standing around the Explorer as a group, when Petitioner and other party members walked out into the front yard to confront the Cher group, and the shooting commenced causing of death Cher Kue. No one in the Cher group had any type of weapons.

Co-defendant Tou Lor

The prosecution considered Petitioner's brother Tou Lor as a co defendant, even after he admitted during a custodial interrogation to shooting a .45 caliber Tauras semi-automatic handgun and having a valid CCW permit to carry it.

At trial, Tou Lor was not identified as one of shooters, however it was proven by ballistics evidence, he fired his gun seven times leaving the spent shell casings in the front yard. The police did not find any other type of spent shell casings during their searching for evidence.

Cher Kue's death was cause by two gunshot-wounds: one to upper chest and one to the right leg. Do to exist wounds the pathologist and the police were unable to recover the two bullets that hit him.

Tou Lor was convicted of second degree murder, two counts of felonious assault MCL 750.82, and three counts of felony-firearm.

Principal Tong Lor

The prosecution during their investigation made the determination that Petitioner Tong Lor was the principal actor. Most likely do to incident taking place at his residence, and that he was standing out-in-front of the crowd when the two groups meet up.

During trial, eyewitnesses Nicholas Vue, Nou Lee and Mou Lee all identified Petitioner wearing a white or tannish colored shirt, and carrying a big

gun or rifle. Not one of these witnesses testified to seeing him fire his rifle.

Mou Lee's testified that there was a third person in the crowd, who had a gun, and described the third gun as being a medium size handgun. (He showed the jury with his hands). (Vol.III, 136-137). Nicholas Vue and Nou Lee also corroborated Mou Lee's testimony with their testimony of hearing two gunshots that were louder than the other ones. The police also recovered two .44 caliber revolver spent bullets: one bullet was found in Cher's Explorer passenger side rear tire, and the other bullet from inside the house across the street. The prosecution firearm expert Rachel Grace identified those bullets as revolver ammunition. She also testified that there was no evidence that a rifle or shotgun was fired.

The prosecution had to solely rely on Phong Vang to prove the Petitioner fired his rifle. Phong was not placed on the prosecution's endorsed witness list, and after the third of trial and everyone who was a res gestae witnesses testified that "the Petitioner did not fire his rifle or communicate to shoot or give assistance or encouragement to shoot Cher". The prosecution suddenly learned of Phong Vang as a witness, and requested a bench warrant to be issued.

Phong testified that he could not identify the Petitioner, but did see him fire his rifle. He also testified that Petitioner was wearing dark clothing.

Phong described Peitioner's rifle as an assault rifle with a magazine sticking out the bottom of the gun as a handle. He pointed the rifle a Cher and Nou Lee and fired it multiple times. However, there was no spent shell casings recovered from a

rifle. The only shell casings recovered were from his brother's .45 caliber semi-automatic handgun.

In closing argument, prosecutor Mr. Hall stated, "There been testimony that the gun was approximately this big, this big. The defendant was holding the gun with two hands.

You decide whether it's a long gun, it's a hand gun, it's a revolver. Doesn't really matter for where I'm going."(Vol.V, 127).

"We know that this individual was the person up front, the person with the white collard shirt is the person up front. Is there direct evidence that you heard at trial that he, in fact, is the person that pulled the trigger and killed, murdered Cher Kue? There certainly is. Phong Vang testified although he was mistaken as to the color of his shirt that the person who was up front, that the person came from the back, that the person that had the long gun turned, pointed and fired two shots. Does that matter? It does not matter because he is part and parcel of a concerted action on that day."(Vol.V, 128).

Petitioner Tong Lor was convicted under the prosecution's theory of aiding and abetting of second degree murder, contrary to MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and three counts of possession of a firarm during the commisssion of a felony MCL 750.227b.

APPEAL BY RIGHT

On direct appeal, Mr. Barnett represented both Tong and Tou, so ineffective assistance of counsel certainly was not to be raised. Unfortunately Mr. Barnett missed the time limit for filing Motion for New Trial, and the trial court denied the motion for lack of jurisdiction.

The Michigan Court of Appeals reviewed the Petitioner's claim of insufficient evidence to the murder charge that was based on the trial court's ruling on Defense's Motion for a Direct Verdict.

Judge Anderson ruled on the Motion for Direct Verdict, stating "Now, as it relates to your motion for direct verdict, the evidence, as this has heard it, indicates that Tong Lor was identified not by Mr. Vang but the other individuals that were present as the person with the long gun. And that he came out of the back yard with more than one person and that he aimed that gun.

Mr. Vang identified the person with the long gun as having done the two -- having shot twice before he crouched and made his exit. That is sufficient evidence as far as this Court is concerned to indicate that the issue of the open murder will go to the jury.

As it relates to the assault with intent to commit the crime of murder, in addition to that, when the defendant, Tong Lor, goes up to the car and after someone says, "Shoot them," he asks, "Who are you," he is pointing the gun. He -certainly the jury could find based upon the testimony that's been presented that he had the intent to do -- to commit murder.

I don't see any questions with respect to whether the assault charges should be dismissed because the testimony from all of the witnesses would substantiate the committing of an assault and battery. And, all of the crimes were committed with a firearm. So this Court is denying your request for a direct verdict. The matter will go to the jury on all counts." (Vol.IV, 203-204).

In conclusion, Mr. Barnett's ineffective assistance of appellate counsel forfeited the Petitioner's right to the procedure for remand back to trial court for a proper hearing to make a record as to whether the "Petitioner actually did fire his rifle or not", based on all the evidence and oral arguments.

Petitioner timely filed an application for leave to appeal in the Michigan Supreme Court, and was denied leave. During this one year period to file a petition for habeas corpus, Mr. Barnett did not tell Petitioner, that he had been disbarred and could not represent him, leaving him with less than 30 days to find a new attorney file a petition for habeas corpus.

HABEAS CORPUS PETITION

On March 22, 2016, retained Attorney Dana B. Carron (P44436) to file a petition for writ of habeas corpus in the United States District Court Eastern District of Michigan Southern Division Case no. 2:16-11028, Tong Lor v. Shane Jackson. The Honorable Avern Cohn, presiding, Mr. Carron's argument was:

"THE MICHIGAN COURT OF APPEALS UNREASONABLE APPLIED THE SUPREME COURT'S HOLDINGS IN JACKSON v. VIRGINIA AND NYE & NISSEN v. U.S., IN FINDING THAT PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS, AND TO BE CONVICTED ONLY UPON SUFFICIENT EVIDENCE, WAS NOT VIOLATED, WHERE HE WAS CONVICTED AS AN AIDER AND ABETTER TO SEVERAL OFFENSES, FOR SIMPLY POINTING A WEAPON AT A MEMBER OF THE VICTIM'S GROUP MOMENTS BEFORE SEVERAL UNKNOWN ASSAILANTS FIRED MANY SHOTS."

A. "The Michigan Court of Appeals factual determination that Petitioner shot his rifle, was clearly erroneous, where the evidence was so impeached that it deprived of all probative value."

DISTRICT COURT'S RULING

On October 29, 2018, the District Court issued a

Memorandum and Order Denying Petition for a Writ of Habeas Corpus and Denying a Certificate of Appealability premised on the petitioner's failure to overcome the presumption of correctness, under 28 U.S.C. § 2254(e)(1), do to counsel's ineffective assistance.

APPEAL TO THE SIXTH CIRCUIT

Petitioner in pro se filed a Certificate of Appealability in the Sixth Circuit. Case no. 18-2355, Tong Lor v. Shane Jackson. He raised the following three issue:

ISSUE ONE

"A REASONABLE JURIST WOULD FIND THE DISTRICT COURT'S FACTUAL ASSESSMENT OF THE FACTS SUPPORTING PETITIONER'S CONSTITUTIONAL CLAIM DEBATABLE OF WRONG "THAT PETITIONER SHOT HIS RIFLE". THE COURT'S DECISION ON THIS GROUNDS FOR RELIEF IS WRONG."

ISSUE TWO

"A REASONABLE JURIST WOULD DEBATE OR FIND AN ERROR BY THE DISTRICT COURT NOT APPLYING THE PRESUMPTION OF CORRECTNESS TO THE TRIAL COURT'S DETERMINATION OF NOU LEE'S TESTIMONY AND CONSIDERING THE PHYSICAL FIREARM EVIDENCE OF SEVEN .45 CALIBER SHELL CASINGS FOUND IN THE FRONT YARD AND TWO .44 CALIBER BULLETS FIRED FROM A REVOLVER RECOVERED AT THE CRIME SCENE TO EXONERATE THE PETITIONER FROM AN ERRONEOUS FACT FINDING PROCESS THAT CLAIMS HE FIRED HIS RIFLE BY THE MICHIGAN COURT OF APPEALS AND THE DISTRICT COPURT. PETITIONER CHALLENGED THAT FACT, UNDER 2254(d)(2).

ISSUE THREE

"A REASONABLE JURIST WOULD FIND THE DISTRICT COURT HAS COMMITTED AN ERROR UNDER THE REQUIREMENTS OF AEDPA WHEN CONFLATING 28 U.S.C.A. § 2254(e)(1) CLEAR AND CONVINCING EVIDENCE STANDARD INTO THE PETITIONER'S CHALLENGE UNDER 2254(d)(2) THAT THE STATE COURT'S DECISION RELIED ON THE ERRONEOUS FACT THAT PETITIONER FIRED HIS RIFLE, THIS WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE STATE COURT PROCEEDING WHICH RELIEF CAN BE GRANTED. THE STATE COURT'S ERRONEOUS FACTUAL DECISION IN TURN LEAD TO AN OBEJECTIVELY UNREASONABLE ADJUDICATION OF THE SUFFICIENCY OF EVIDENCE, UNDER JACKSON v. VIRGINIA 443 U.S. 307 (1979), AND BEYOND A REASONABLE DOUBT STANDARD, UNDER IN RE WINSHIP 397 U.S. 358 (1970) AND AIDING AND ABETTING OF NYE & UNITED STATES, 336

U.S. 613 (1949), FOR RELIEF UNDER 2254(d)(2)."

SIXTH CIRCUIT COURT OF APPEALS DECISION

On March 6, 2019, Sixth Circuit Court of Appeals, Clerk of the Court Deborah S. Hunt, issued an order denying the COA and denied the motion for leave to proceed IFP. Ms. Hunt personally answered the Petitioner's Certificate of Appealability. and points out the fact, Ms. Hunt is not a Circuit Court Judge, and argues that she has made several errors when making factual determinations from the record that are clearly erroneous, it has affected her ability to conduct a proper adjudication of the claims presented in his certificate of appealability, it is denying him a full and fair review under the Due Process and Equal of Law Clauses, under the Fifth and Fourteenth Amendments.

Petitioner has made an addendum of the facts based the record to assist this Court in determining whether her errors have denied him a fair and full review as a Circuit Court Judge would act as a reasonable jurist while reviewing a COA. Ms. Hunt's major error starts here:

On page 4, of the (COA) opinion it states,

"Because none of the eyewitnesses mentioned seeing a third gun, three eyewitnesses testified that some of the gunshots sound different than others, and Vang specifically testified that he saw the man with the long weapon- identified by others as Lor--fire two shots. the jurors could have reasonably concluded that Lor fired his weapon."

Petitioner contest Ms. Hunt's claim that "none of the eyewitnesses seen a third gun" is a serious misapprehension of the record. At trial, Mou Lee's testified, that he did see three guns that night, and was about fifty feet away when he did. (Vol.III, 136-137). See (Appendix A, at p.10, ¶ 38). Mou Lee's testimonial evidence is direct evidence establishing a third person carrying a handgun, and is corroborated by two .44 caliber bullets determined to be revolver ammunition that was recovered at the scene. (Vol.III, 190-191)(Appendix A, p.24-26, ¶ 96). (A third person having a gun was a plausible option for jury to consider, if defense counsel was't so ineffective). Ms. Hunt fact finding error here has permeated her further determinations of what actually happened.

On page 5 of the (COA) opinion it states,

"Here, Vang testified that he saw the man holding the long gun fire two shots. That testimony did not have to be corroborated by physical evidence. See Tucker v. Palmer, 541 F.3d 652, 658-59 (6th Cir. 2008); O'Hara v. Brigano, 499 F.3d 492, 500 (6th Cir. 2007). Vang's testimony was supported by circumstantial evidence because, as discussed above, other eyewitnesses testified that some of the gunshots were loader than others and that only Lor and one other man had a gun. Grace even testified that she was 95 percent sure that two and only two guns were fired." (emphasizing the underlined).

Petitioner has proven Ms. Hunt's finding of fact "... that only Lor and one other man had a gun" is a clear error based Mou Lee testimony of seeing a

third gun. Her allegation that circumstantial evidence supports her reasoning is misplaced by the physical evidence recovered at the scene: seven .45 caliber spent shell casings fired by the Petitioner's brother Tou Lor, (Vol.III, 186, 188 and Vol.IV, 16). And two spent .44 caliber bullets recovered by Detective/Officer Shawn Werner, that were later tested by Ms. Grace, turning-out-to-be .44 caliber revolver ammunition. (Vol.III, 190-191). Explains why there is no other spent shell casings from the third person with the gun, it's a revolver the shell casings have to be manually dumped. Therefore, Ms. Hunt's premise no witnesses testified to seeing a third person with a gun is a clear error, and her continuance relying on Phong Vang's testimony of seen the Petitioner fire his rifle is disproven by clear and convincing evidence, based on the record, under 2254(e)(1). See (Appendix A, at pages 24-26, ¶ s 95-98).

On pages 5 and 6, of the (COA) opinion, Ms. Hunt states,

"Vang's testimony also was not contradicted definitively by the physical evidence. No weapons were recovered from the scene, and although Grace testified that none of the ballistics evidence came from a shotgun, a rifle, or an Uzi, she did not testify that these were the only long-barreled weapons in existence or that a short-barreled firearm could not be modified to appear larger. The jury also could reasonably have concluded that, because the offense occurred at night, the witness misperceived the size of Lor's weapon. Alternatively, it is possible that some ballistic evidence was simply not found. In any event, it is not the job of a habeas court to

"judge the credibility of [Vang's] testimony." O'Hara, 499 F.3d at 500."

Petitioner argues Vang's testimony is definitively proven false multiple facets: First, by the physical evidence recovered at the scene seven of spent shell casings belonged to .45 caliber semi-automatic handgun owned by the Petitioner's brother; Second, the total number of nine shots fired matches up with the two .44 caliber revolver bullets recovered; Third, all the other prosecution's eyewitness testimony heard two different types of gunfire contradicting Vang's version, why because if the Petitioner fired his rifle there would be three types of gunfire heard and shell casings on the ground from a rifle.

As, the Petitioner has proven with clear and convincing evidence Ms. Hunt's factual finding is a flagrant mischaracterization of the record and the State's own evidence.

A total of nine shots were fired the prosecution's own witnesses never testified to hearing more than eight. Petitioner's brother Tou Lor fires his .45 caliber seven times leaving seven spent shell casings on the ground. (Vol.II, 155-156) (Appendix A, p.17-18, ¶'s 72-75). The third person with a revolver fired it two times leaving two spent .44 caliber revolver bullets recovered, totalling nine shots fired. Officer

Shawn Werner testified, if a individual was using a revolver, they would have to manually drop the shell casings. (Vol.II, 175). Explaining why no .44 caliber shell casings recovered.

Nicholas Vue testified to hearing 8 shots fired. (Vol.II, 259-261) (Appendix A, at p.2, ¶ 4). He seen that Tong had a long gun and knew it wasn't a handgun. (Vol.II, 269-270)(Appendix A, p.3, ¶ 10).

Nou Lee testified Tong was holding a rifle with both hands, it appeared to be a rifle, and knows the difference between a rifle and pistol. (Vol.III, 34-35)(Appendix A, p.3, ¶ 11). Nou didn't hear the same type of gunfire one was louder than the other. He heard four to six shots, and two or three shots were louder. (Vol.III, 43-44 92, 97-99) (Appendix A, p.4 ¶'s 14-15, p.6 ¶'s 24-25). At trial, Judge Martha Anderson and Prosecutor Hall both clarified, to what Nou Lee's testimony was. Mr. Hall stated, "The witness never testified that the person with the long gun ever shot, he testified that he heard the small gun shoot, he heard two distinct sounds." (Vol.III, 71).

Judge Anderson stated, "Mr. Barnett, this witness testified that he saw shoots coming from the handgun. He did not see shots coming from the long gun. He testified that there was different

sounds, he heard two different sounds." (Vol.III, 72)(Appendix A, p.5, ¶'s 19-20).

Nou seen Tong carrying the long gun by his side, it was about two foot long, he then pointed it at them using both hands, he never saw Tong shoot the gun. (Vol.III, 90-92)(Appendix A, p.6, ¶'s 22-25).

Mou Lee testified, Petitioner told them to leave, then somebody fired two shots from the back of the crowd. It was not Tong who fired the shots, there was a second gun. Tong was out front and the group behind fired the guns. (Vol.III, 113-114, 115-116)(Appendix A, p.7-8 ¶'s 29-30). Mou heard a total of eight shots, the first two were fire and then the next couple shots were fired after. Those shots came from the back, then he hears six more shots. (Vol.III, 121). Not all the shots sounded the same, two were louder. (Vol.III, 144-145) (Appendix A, at p.8, 11, ¶'s 32 and 43-44).

As, conclusive proof that Ms. Hunt got it wrong, so did the District Court. There is proof a third person with a gun. Mou Lee described the guns to jury, first was Tong's gun, and the smaller gun, and third gun using his hands to show the jury. (Vol.III, 148-149)(Appendix A, p.12 ¶ 46).

Ms. Grace testified revolvers are louder than semi-automatics. (Vol.IV, 56). She was 100 percent

sure there was not only one gun shot, and opine the potential that just two guns used was 99.9 and sure it was a semi-automatic and revolver. (Vol.IV, 30-31). Seven of spent cartridges ID to one gun and second fired revolver ammunition was used. None of the evidence came from a rifle and she has never seen a two foot handgun. If a revolver is fired she would not expect to see the casings. (Vol.IV, 46-47)(Appendix A, p.29, ¶'s 97-99). Again, hearing two different types of gunfire is beyond a reasonable doubt that the Petitioner did not fire his rifle.

On pages 5 and 6 of the (COA) opinion, Ms. Hunt stated in her findings,

"... Lor fired his weapon was entitled to a presumption of correctness because the evidence cited by Lor does not clearly and convincingly show that the finding is incorrect. See 28 U.S.C. § 2254(e)(1)."

In the Petitioner's brief for Certificate of Appealability he cited where in recorded a reasonable jurist would conclude he did not fire his rifle. See (Appendix B, Petitioner's COA brief). He also challenged the District Court's finding of facts to over come the presumption of correctness, under 2254(e)(1). He proven how the Michigan Court of Appeals' decision was not just wrong but "objectively unreasonable" in determining that the Petitioner fired his rifle. So, how did the Michigan Court arrive that

decision, it was solely based on Judge Anderson's denial for motion for direct verdict, she made that finding of fact when ruling on the motion.

PHONG VANG'S TESTIMONY LOR'S HAS AN ASSAULT RIFLE

Phong Vang testified, that the lighting was dim, so he could not see their faces to identify them, but did see an assault weapon in person's hands, and defense objected. (Vol.IV, 85-87).

THE COURT: Go ahead and indicate what you saw in people's hands, if you saw anything in people's hands.

THE WITNESS: To clarify your point, it sure as hell does not look like a pistol. (Vol.IV, 88).

Prosecutor Mr. Hall asked Phong, "How do you draw a conclusion when you use the word "assault rifle?" What are basing that on? Phong "With--with a magazine stuck out as another support for two handed weapon." (Vol.IV, 88). (Petitioner concedes to the fact, that he did have a SKS semi-automatic assault rifle). Vang described it in his testimony, however Petitioner does not concede to firing the rifle.

A reasonable jurist would conclude based all the prosecution's eyewitness testimony it was an assault rifle: Nicholas Vue testified, Tong was carrying a big gun almost two feet long. (Vol.II, 238-239)(Appendex A, p.1, ¶ 2). Nou Lee testified that it appeared to be a rifle, and he knows the difference between a rifle and pistol. (Vol.III, 34-35)(Appendix A, p.3, ¶ 11). Mou Lee was unable

to determine what type of gun it was. Mr. Hall asked him how big the gun was? He relied "about this big , showing the jury with his hands. He did not see anyone else with a gun, Tong told them to leave, then somebody fired two shots from the back of the crowd. (Vol.III, 113). It was not Tong who fired the shoots, there was a second gun. (Vol.III, 114) (Appendix A, p.7-8, ¶'s 29-30). These facts all corroborate Phong Vang's testimony Petitioner was carrying a semi-automatic assault rifle with a clip out the bottom. Ms. Grace testified how a semi-automatic weapon operates, pull the trigger once it fires the bullet while simultaneously ejecting the shell casing out. Each pull of trigger fires a bullet until the magazine is empty. (Vol.III, 171-172) (Appendix A, p.24, ¶ 93)

Phong testified to what he saw that night. Tong was carrying the gun with two hands in front of him he was one of the first two people and said "Go home." (Vol.IV, 88-89). The person with him was standing to his left just behind him, He seen a pistol in this person hands after he seen this the statement "Go home" was made the guy with the bigger gun fired the assault rifle. (Vol.IV, 89-90) He never seen the other person with a handgun shoot. The assault rifle he heard shot <u>four</u> to

five times, he seen the first two shots then was scrambling on the ground trying to flee. (Vol.IV, 95). The person with the pistol and the person with the assault rifle were wearing dark clothes, that's all he could make out. (Vol.IV, 95).

The physical evidence recovered at the scene is seven .45 caliber spent shell casings on the ground, not one spent shell casings from an assault rifle that was supposedly shot four or five times. This fact alone of no spent shell casings from an assault rifle and not hearing a third type of gunfire does reveal a plausible option for Vang's testimony. He simply seen the muzzle flash of the Petitioner's brother Tor Lor firing his semi-automatic .45 caliber handgun ejecting the seven shell casing onto the front yard. Otherwise, there would be four or five shell casing from assault rifle. And the fact, Ms. Grace testified that the other two bullets that were fired are .44 caliber revolver ammunition explains why there is no .44 caliber revolver shell casings. Not one witness testified to hearing three types of gunfire, nor did they testified to hearing 12 or 13 shots being fired.

WHEREFORE, Petitioner Tong Lor is respectfully requesting this Honorable Court to grant certiorari and determine whether the presumption of correctness applies to his challenge, under 28 U.S.C.A 2254(d)(2) that "petitioner fired his rifle", or not and remand him back to the district for a re-determination whether the State Court's decision was an objectively unreasonable determination of the facts in-light of State Court's proceeding, and that the presumption of correctness should be not applied, ultimately granting the writ of habeas corpus, under 28 U.S.C. § 2254(d)(2).

Respectfully submitted

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