No. 19-6071

IN THE

SUPREME COURT OF THE UNITED STATES

DEMETRIUS DESEAN MORGAN -- PETITIONER

VS.

STATE OF MICHIGAN -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Demetrius Morgan #807067
Petitioner In Propria Persona
Oaks Correctional Facility
1500 Caberfae Hwy
Manistee, MI 49660

STATEMENT OF QUESTIONS PRESENTED

1. Was the evidence of Petitioner's identity as the shooter sufficient to sustain the first-degree murder conviction where that evidence consisted of (1) the testimony of an eyewitness that he selected Petitioner's photo only because Petitioner "looks almost like" the shooter, who did not identify Petitioner as the shooter at trial and, in fact, who testified at trial that Petitioner differed from the shooter in five physical characteristics and that the shooter had been wearing a ski mask and a hood, and (2) a surveillance video showing that Petitioner left the Citgo gas station where the shooting occurred three minutes before the shooting wearing a white t-shirt and purple and pink shoes, and the same video shows the shooter appear three minutes later wearing a hoodie with black and white lettering and red shoes?

Petitioner says, "No."

Michigan Court of Appeals said, "Yes."

2. Was a juror's impartiality placed in reasonable doubt, in violation of Petitioner's Constitutional right to an impartial jury, where the juror said he had been the victim of a violent crime but never said he could set that experience aside and decide the case solely on the evidence?

Petitioner says, "Yes."

Michigan Court of Appeals said, "No."

3. Were the First Amendment and the Due Process Clause of the Fourteenth Amendment violated by the introduction of (1)

evidence that the "Chedda Ave" street gang "controlled" the neighborhood, including the Citgo gas station where the shooting occurred, without any evidence that Petitioner or the victim were affiliated with any gang or that the shooting was gang related and (2) that Petitioner was a member of a rap music group (not a gang) named "Chedda Ave" that had a lyric "another body up at the Citgo" and a music video with Petitioner dancing on the roof of the Citgo, without any evidence that the rap group had anything to do with the street gang or the shooting in this case?

Petitioner says, "Yes."

The Michigan Court of Appeals said, "No."

4. Was trial counsel constitutionally ineffective for (1) failing to move to suppress the eyewitness's selection of Petitioner's photograph and testimony that Petitioner only "looks almost like" the shooter, (2) failing to move to quash the bindover or for a directed verdict, (3) failing to rehabilitate or excuse the juror who said he had been the victim of a violent crime, and (4) failing to object to the admission of hearsay that Petitioner told someone that he heard that the victim's family was saying he was the shooter?

Petitioner says, "Yes."

Michigan Court of Appeals said, "No."

LIST OF PARTIES

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The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The decision of the Michigan Supreme Court appears at Appendix B to the petition and is reported at ___ Mich.___ ; 929 N.W.2d 341 (July 2, 2019).

JURISDICTION

On July 2, 2019, Michigan's highest court denied discretionary review. Appx B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const, Am I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

US Const, Am VI provides:

> 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 defence.

US Const, Am XIV, § 1 provides:

> 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.

STATEMENT OF THE CASE

On January 27, 2016 Petitioner Demetrius Morgan was convicted by a Michigan jury of one count each of first-degree premeditated murder, Mich. Comp. Laws § 750.316(1)(a), possession of a firearm by a felon, Mich. Comp. Laws § 750.224f, and use of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b. On February 22, 2016, Petitioner was sentenced for these convictions to mandatory life in prison without parole, 2 to 5 years in prison, and 2 years in prison, respectively.

The Michigan Court of Appeals summarized the facts as follows. Appx A (People v. Morgan, Mich. Ct. App. No. 335855; 2018 Mich. App. LEXIS 3577*, at *1-3; 2018 WL 6252031 (Nov. 29, 2018)).

> Defendant's convictions arose from a homicide that took place outside a Citgo gas station at the corner of Chalmers St. and Houston Whittier St. in Detroit during the early-morning hours of September 10, 2015. The victim was shot several times at close range. The prosecution's theory of the case was that defendant was affiliated with a gang that regarded that gas station as part of its territory and that the victim had "invaded" on the territory. The defense conceded that defendant was present at the gas station for some of the time that the victim was there, but maintained that defendant had left the premises at the time of the shooting and was misidentified as the shooter.
>
> The homicide was captured on surveillance video equipment, but it was not possible to identify the shooter from the resulting imagery, although the footage did appear to show the shooter wearing some apparel similar to what defendant was wearing earlier that night. The sole eyewitness to the homicide was a nonspeaking deaf man, who during the investigation twice selected defendant's image from a photographic lineup, and who at trial, with the assistance of two sign-language interpreters, identified defendant as the shooter -- albeit with some apparent equivocation. The

> prosecution also presented evidence that a gang known as "Chedda Ave" trafficked in narcotics in, and asserted control over, the area of the homicide, and that defendant was known publicly as a member of a rap group with the same name.
>
> Defendant's cousin told the police that defendant had come to her home that night and remained there through the time of the shooting. [FN 1] Defendant in turn testified that he went to his cousin's home from the Citgo station, but that he then changed clothes and visited a casino for about 15 minutes. A police officer testified that defendant had telephone conversations with his mother while he was incarcerated as a suspect in this case, and that in those calls they talked about an alibi and the mother advised defendant not to say anything about the casino.
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> ---
>
> 1. She later stated that she did not "know if he left or not because [she] went to sleep."

This summary of the trial testimony is highly misleading and contains several inaccuracies and material omissions.

First, the clothing worn by Petitioner and the shooter was not "similar." Officer Steven Ford testified that the video showed Petitioner leave the Citgo station at 2:39 a.m. and enter a black vehicle at 2:42 a.m. while wearing a white t-shirt and dark pants. TT 1/19/16, 141. By contrast, the video showed the shooter wearing clothing with only black and white lettering three minutes later, at 2:45 a.m., on the right hand side of the Citgo station, walking back and forth, and then shooting the victim at 2:47 a.m., before running away. Id., at 137. During Petitioner's testimony, the prosecutor said that the shooter's shoes were red in the video, and Petitioner testified that the shoes he was wearing when he was at the station only three minutes earlier were purple and pink. TT 1/25/16, 84-85.

Second, the Michigan Court of Appeals excluded the testimony of a forensic cell phone analyst (1) that Petitioner's cell phone made a call through a cell tower that serviced a 16-block area which included the Citgo station at 2:43 a.m., (2) that a 911 call was made by a different phone, reporting the Citgo shooting, at 2:48 a.m., and (3) that Petitioner's cell phone received a call through a tower that serviced a 16-block area north of the 16-block area that serviced the Citgo station at 2:49 a.m. TT 1/25/16, 47-48, 52.

Third, Dontae Stone testified that he arrived at the Citgo station at 2:34 a.m. in his black Envoy to buy cigarettes and chips and to pick up Petitioner and "Bugaloo" because Bugaloo called him and asked for a ride home. TT 1/25/16, 58, 60. The surveillance video shows that, six minutes after Stone arrived in his black Envoy and Petitioner entered the Envoy, the Envoy left the station; Stone testified that they drove straight to Bugaloo's house, about sixteen blocks away, then took Petitioner to the house of Petitioner's cousin Raynesha Walker; from there, Stone and Petitioner drove to a casino, where they stayed for 30 to 60 minutes. Id., 60-63. Stone also testified that he did not know the victim, had no problem with him, and that he and Petitioner were not at the Citgo station when the shooting occurred. Id., 64.

Fourth, and most importantly, the Michigan Court of Appeals's statement that the "nonspeaking deaf man" (Billy Price) "selected defendant's image from a photograpic lineup" is highly misleading, and the Michigan Court of Appeals' statement that

Price "identified" Petitioner at trial is simply not true. Appx A, at *2. Mr. Price never identified Petitioner as the shooter at trial, as the prosecutor himself admitted in his brief in the Michigan Court of Appeals, saying, "Though Price unequivocally identified Defendant in prior photographic line-ups and at the Preliminary Examination, he did not do so at trial." Brief in Opposition to Defendant's Motion in the Michigan Court of Appeals, p.22 (emphasis added).

At trial, when the prosecutor asked Price, "[D]o you see that person [the shooter] in court today?", Price said, in full, through an interpreter,

> Yes, looks like that person right there it almost like that person there. I really couldn't not exactly but looked almost like that person because it was a thin guy. It looks almost like that guy right there. It's hard to tell because he's bigger he was a thin guy. I remember that.

TT 1/20/16, 15 (emphasis added).

Despite being repeatedly pressed by the prosecutor for an identification, Price never gave one but instead maintained that Petitioner only "looked" "almost" "like" the shooter, repeating these words again and again. Id., 15, 16, 18, 19, 45, 46, 47. Price also explained that Petitioner looked different from the shooter in five specific ways: (1) Petitioner was bigger and less thin than the shooter, (2) Petitioner had a bigger face and head than the shooter, (3) Petitioner had darker skin than the shooter, (4) Petitioner had a less pointy nose than the shooter, and (5) Petitioner did not have a goatee, unlike the shooter.

Id., 14-20; Appx A, at *11-12. Price also said it was "hard" to make any identification because the shooter had been wearing a "ski mask" and a "hood up" and "I didn't understand the interpreter" at the photo lineup. Id.

In the Michigan Court of Appeals, the prosecutor, after admitting that Price never identified Petitioner at trial, relied instead on Price's preliminary examination testimony and his photo lineups. However, the preliminary examination testimony was never admitted as substantive evidence at Petitioner's trial and therefore could not have been considered by the jury in determining Petitioner's guilt or innocence. See People v. Garland, 286 Mich. App. 1, 7, 777 N.W.2d 732 (2009). As to the photo lineups, the evidence as to whether Price actually identified Petitioner as the shooter at the photo lineups is conflicting at best, with Price himself testifying at trial that he did not.. TT 1/20/16, 14-20.

The first photo lineup was conducted on September 17, 2015. It was not recorded, and no interpreter was present. TT 1/20/16, 95, 109-110. The second photo lineup was conducted on September 21, 2015, but it was merely a "re-enactment" of the first one, this time with an interpreter, who testified that Price identified Petitioner as the shooter. Id., 111-113, 116, 119. But Price himself testified at trial that he was not certain at all at the lineups that Petitioner was the shooter, repeatedly saying that he only selected Petitioner's photograph because Petitioner "looks almost like" the shooter. TT 1/20/16, 14-20.

In sum, Price never identified Petitioner as the shooter at

trial, and he directly contradicted the only substantive evidence that he had previously identified Petitioner as the shooter, i.e., the interpreter's testimony that Price identified Petitioner as the shooter at the "re-enactment" of the photo lineup. TT 1/20/16, pp.14-20.

The prosecution focused extensively at trial on Petitioner's membership in a rap music group that (1) happened to share a name with a street gang in the same area as the Citgo station, (2) mentioned violence that had occurred at the station in its rap songs, and (3) featured the station in its rap music videos. The prosecution presented no evidence that Petitioner was actually a member of the street gang, that Petitioner (or the street gang) had any problems with the victim in this case, or any other rational connection between the street gang and the charges in this case, other than the common knowledge that street gangs are prolific purveyors of gun violence.

On November 29, 2018, the Michigan Court of Appeals affirmed Petitioner's convictions. Appx A. On July 2, 2019, the Michigan Supreme Court denied discretionary review. Appx B.

Petitioner now seeks a writ of certiorari. Additional relevant facts are set forth below.

REASONS FOR GRANTING THE WRIT

I. THE EVIDENCE OF PETITIONER'S IDENTITY AS THE SHOOTER IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

If ever there was a case of insufficiency of evidence to sustain a conviction, this is it. This Court should grant certiorari to correct the fundamental miscarriage of justice caused by the convictions in this case and to make clear what this Court explained in Jackson v. Virginia, 443 U.S. 307, 315 (1979), but which many courts, including the Michigan Court of Appeals in this case, simply refuse to recognize, i.e., that more than a "mere modicum" of evidence is required to sustain a conviction because the "'no evidence' rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt." Jackson, 443 U.S. at 320. Compare Sup. Ct. Rule 10(c)(stating that the petition must show, among other things, that "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case from conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged.'" Jackson v. Virginia, 443 U.S. 307, 315 (1979)(quoting In re Winship, 397 U.S. 358, 364 (1970)). "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt

of the accused, the standard emphasizes the significance that our society attaches to the criminal sanction and thus to liberty itself." Jackson, 443 U.S. at 315.

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. "[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Id., at n.16.

Petitioner was convicted of first-degree premeditated murder, felony-firearm, and felon-in-possession of a firearm. Petitioner challenges the sufficiency of the evidence on the identity element of each offense. In Michigan, identity is an element of every offense. People v. Oliphant, 399 Mich. 472, 489, 250 N.W.2d 443 (1976).

Importantly, in Jackson, this Court explicitly rejected the "no evidence" rule (also known as the "some evidence" rule), whereby a conviction would be sustained if there were any evidence to support it, because the "'no evidence' rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt." Jackson, 443 U.S. at 320. By contrast, this Court adopted that "no evidence" (AKA "some evidence") rule for reviewing prison disciplinary decisions because the Constitution only requires such decisions to be based on a preponderance of evidence, rather than the standard of proof beyond a reasonable doubt required at criminal trials.

Superintendent v. Hill, 472 U.S. 445 (1985). Even so, courts reviewing prison disciplinary decisions after Hill have held that "'some evidence' does not mean any evidence at all that would tend, however slightly, to make the inmate's guilt more probable." Padilla ex rel Newman v. Rumsfeld, 243 F.Supp.2d 42, 55 (S.D.N.Y. 2003)(citing cases). "Rather, the evidence must prove the inmate's guilt in some plausible way . . . . Further, the evidence must carry some indicia of reliability." Id. (citing cases). Thus, "the 'some evidence' standard does not so cabin the scope of judicial review as to require that credence be given to that evidence which common sense and experience suggest is incredible." Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996)(reversing a prison disciplinary conviction for lack of "some evidence," even though it was supported by a witness's testimony, because that witness's testimony was "rendered so suspect by the manner and circumstances in which given as to fall short of constituting some basis in fact.").

In other contexts as well, where the standard of proof is only a preponderance of evidence, rather than beyond a reasonable doubt, this Court has required more than a "scintilla of evidence." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)(holding that, in deciding a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the

evidence that the plaintiff is entitled to a verdict . . . . In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt.")(citing Jackson, 443 U.S. at 318-319). Compare Scott v. Harris, 550 U.S. 372, 380 (2007)("Respondent's version of events is so utterly discredited that no reasonable jury could have believed him.").

Despite the recognition by many lower courts that the "some evidence" standard of Hill requires more than "any evidence" to sustain a prison disciplinary decision, those same courts consistently apply Jackson as if it required even less evidence to sustain a criminal conviction, even though this Court explicitly held the opposite in Jackson, i.e., that Jackson's standard requires more evidence than Hill's. The Michigan Court of Appeals, for instance, as in this case, consistently applies Jackson's standard to sustain convictions based on only a scintilla of evidence, as long as that evidence can be seen in any way favorably to the prosecution, rather than Jackson's standard, which only allows the court to draw "reasonable inferences" in the prosecution's favor. 443 U.S. at 319.

In this case, the insufficiency of the evidence on the identity element is clear from a reading of the Statement of the Case, above. There was literally no evidence linking Petitioner to the shooting, no fingerprints, no DNA, no gun, no surveillance footage, no eyewitness identification, and no circumstantial

evidence. There was evidence that Petitioner was at the scene of the shooting minutes before the shooting occurred, but the same evidence (a surveillance video) plus cell-tower location data and the testimony of Dontae Stone and Petitioner all indicated that Petitioner left the location minutes before the shooting and was not there when the shooting occurred.

The only way that the Michigan Court of Appeals found sufficient evidence was by mischaracterizing the evidence and making speculative and unreasonable inferences that are simply not supported by the evidence. This is contrary to Jackson, which only allows the reviewing court to "draw reasonable inferences from the basic facts to ultimate facts." 443 U.S. at 319.

First, the Michigan Court of Appeals focused on the testimony of the eyewitness, Billy Price, that he "selected defendant's image at the photographic lineups." Appx A, at *11. But the court ignored Price's testimony that the reason he "selected" Petitioner's photograph was not to indicate that Petitioner was the shooter but only to indicate that he thought Petitioner "looks almost like" the shooter. TT 1/20/16, 14-20. In fact, Mr. Price was very clear about this, explaining that he could not say Petitioner's photograph actually was a photograph of the shooter because, despite Petitioner looking "almost" like the shooter, Petitioner's physical characteristics differed from the shooter's in five specific ways explicitly listed by the witness, i.e., their body size, their face size, their skin color, their nose shape, and their facial hair, and the shooter

was wearing a ski mask and a hood, which made it difficult to make any identification. TT 1/20/16, 14-20.

The Michigan Court of Appeals dismissed all this as follows: "A jury could have reasonably viewed the eyewitness's apparent equivocation over a matter not actually in doubt (i.e., that the picture the eyewitness chose was a picture of defendant) as signaling that the witness's nervousness, or other excitement, in the trial setting caused him to pepper his identifications of defendant with impressions relating to how a photograph of a person might not perfectly match that person's later personal appearance." Appx A at *12. This is a clear misapplication of the Jackson standard for the following reasons.

First, it completely ignores Price's testimony that he selected Petitioner's photograph only because he "looks almost like" the shooter, not because he was the shooter.

Second, even viewing the evidence in the light most favorable to the prosecution, no rational juror could have concluded that Price was talking about "how a photograph of a person might not perfectly match that person's later personal appearance." There is nothing in Price's testimony that suggests this. Price neither said nor implied anything like this. He was clearly talking about how Petitioner looked different from the shooter, not how a person might look different than he did in an earlier photograph.

The Michigan Court of Appeals simply ignored Price's actual words, read words into his testimony that he never used and that contradict what he actually said, and thus unreasonably applied

the Jackson standard by making unreasonable inferences in the prosecution's favor.

The Michigan Court of Appeals said that a different alleged "inconsistency" in Price's testimony could also be explained in the prosecution's favor, i.e., Price's pretrial statements that he had seen the "shooter" many times before but had never seen the "defendant." Appx A, at *12. The interpreter said that some deaf people do not understand the word "defendant" so, before trial, Price may not have known what the word "defendant" meant and thus might have been referring to the victim, not the defendant, when he said he had never seen him before. Appx A, *13. The problem with this interpretation is that, when the interpreter said it, he was not saying what Price told him. Rather, he was merely speculating about what Price might have meant. No one ever asked Price whether he meant this or whether he meant what he actually said, i.e., that he had seen the shooter many times before but had never seen defendant. Indeed, the only conclusion that has support in Price's testimony is that Price meant what he said -- that he had seen the shooter before but not the defendant -- because the shooter and the defendant did not have the same physical characteristics or, in other words, they were not the same person.

The Michigan Court of Appeals' resolution of this so-called "conflict" (which was actually no conflict at all) in the prosecution's favor twists the Jackson standard beyond all recognition because the Jackson standard allows only "reasonable inferences" to be made in the prosecution's favor, not "all

possible inferences." 443 U.S. at 319. It is simply unreasonable to ignore what a witness actually said in favor of what an interpreter speculated he might have meant, especially when that speculation is the polar opposite of what the witness actually said and is contrary to the context of the witness's testimony. In other words, to make an inference that the witness meant "black" when he actually said "white" and when the rest of his testimony is consistent only with "white" renders the Jackson standard utterly toothless.

Even assuming that the Michigan Court of Appeals properly resolved this alleged "inconsistency" in the prosecution's favor, that still does not explain why Price said Petitioner and the shooter differed on five physical characteristics, as discussed above.

Next, the Michigan Court of Appeals said, "The eyewitness's deafness, combined with his apparent nervous or otherwise excited answers to questions, did indeed present special challenges to the jurors in weighing the witness's testimony. But even when a witness's identification of the defendant is less than 100% solid, the question remains one for the jury." Appx A, at *13. This is correct as a general rule. But, as shown above, Price simply never identified Petitioner as the shooter. This is not a case where Price said Petitioner was the shooter to a less-than-100% certainty. Rather, this is a case where Price never said Petitioner was the shooter. At most, Price said Petitioner "looks almost like" the shooter but that Petitioner and the shooter differed on five specific physical characteristics, and

the shooter was wearing a ski mask and hood, all of which prevented Price from identifying Petitioner as the shooter at all. No rational jury could find a defendant guilty beyond a reasonable doubt on the basis of such a non-identification. Even viewing the evidence in the light most favorable to the prosecution, there is simply no identification on which the jurors could find guilt beyond a reasonable doubt.

The Michigan Court of Appeals said that, besides Price's photographic-lineup and in-court identifications (which, as shown above, never occurred), "[a]lso in evidence was defendant's own account of being at the subject Citgo station near the time of the shooting. Also, even if not conclusive by itself, good circumstantial evidence linking defendant to the crime was that the shooter, as described by the eyewitnesses, was wearing black pants and red shoes similar to what defendant was wearing while admittedly at the Citgo." Appx A, at *13-14. This does not provide sufficient evidence to sustain the convictions for the following reasons.

First, in Michigan, a defendant's mere presence at or near the location of the crime scene when the crime occurs is insufficient, as a matter of law, to satisfy the identity element of the offense. People v. Killingsworth, 80 Mich. App. 45, 51 (1977)("Mere presence, even with knowledge than offense is about to be committed or is being committed, is not enough to make a person an aider and abettor or a principal"). Further, the evidence (including the surveillance footage, the cell phone location data, Petitioner's testimony, and Dontae Stone's

testimony) all showed -- even in the light most favorable to the prosecution -- that Petitioner left the station minutes before the shooting and was in a 16-block cell-tower area north of the Citgo station's 16-block cell-tower area at 2:49 a.m., exactly two minutes after the shooting occurred at 2:47 a.m. TT 1/25/16, 47-48, 52, 58, 60, 76-77. With inevitable clock-timing differences between the Citgo surveillance system and the cell-phone company, this is virtually the same time. In light of this, the fact that Petitioner was at the Citgo station minutes before the shooting simply is not sufficient evidence for a rational juror to find him guilty beyond a reasonable doubt.

Second, the Michigan Court of Appeals simply mischaracterized the evidence regarding the alleged "similarities" between Petitioner's clothing and the shooter's clothing: (1) While Petitioner wore a t-shirt, the shooter wore a hoodie, TT 1/19/16, 114, 141, (2) the shooter was wearing a ski mask, while Petitioner was not, id., 16, and (3) the shooter's shoes were red, while Petitioner's were purple and pink, TT 1/25/16, 84-85. Further, the fact that the shooter wore pants that were apparently "black" and that Petitioner wore pants that were apparently "dark" at 2:40 a.m. is hardly significant, as the Court may take judicial notice that a significant proportion of (if not most) pants worn by adult males in this country (blue jeans) appear black or dark at night. TT 1/19/16, 141.

Finally, the Michigan Court of Appeals pointed to the evidence that Petitioner admittedly stopped at his cousin's house after leaving the Citgo station to change his clothing then

briefly visited a casino, that his cousin gave different times of Petitioner's arrival at her house than Petitioner gave and different from the casino's surveillance video, and that Petitioner's mother told him on the phone not to mention going to the casino. Appx A, at *14-15. But there is absolutely nothing incriminating about someone changing his clothing before going to a casino or about staying for only a short period of time or mere discrepancies in the times remembered by two different people or receiving questionable legal advice from one's mother. If any of that is sufficient evidence to sustain these convictions, then any innocent person could be convicted of first-degree murder and imprisoned for life without recourse to the Constitutional guarantee of conviction only upon proof beyond a reasonable doubt.

The Michigan Court of Appeals cited no other evidence in support of the convictions.

If ever there was a case of insufficiency of evidence to sustain a conviction, this is it. This Court should grant certiorari to correct the fundamental miscarriage of justice caused by the convictions in this case and to make clear what this Court explained in Jackson v. Virginia, 443 U.S. 307, 315 (1979), but which many courts, including the Michigan Court of Appeals in this case, simply refuse to recognize, i.e., that more than a "mere modicum" of evidence is required to sustain a conviction because the "'no evidence' rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt." Jackson, 443 U.S. at 320.

II. A JUROR WAS NOT IMPARTIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The Court should grant certiorari because "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. Const., Am. VI. "The constitutional standard [is] that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented[.]" Patton v. Yount, 467 U.S. 1025, n.12 (1984). This is a question of law. Id. The preliminary question of "historical fact[] [is] did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." Id., at 1036 (emphasis added).

Further, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982).

In the absence of indications to the contrary, jurors are presumed to be impartial. Miller v. Webb, 385 F.3d 666, 673 (6th Cir. 2004). But if a potential juror, during voir dire, says something that "puts that juror's impartiality . . . in reasonable doubt," People v. Miller, 482 Mich. 540, 550; 759

N.W.2d 850 (2008), the question becomes, "'did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" Webb, 385 F.3d at 673 (quoting Patton, 467 U.S. at 1036). See also Rushen v. Spain, 464 U.S. 114, 123 (1983)(Stevens, J., concurring)("[T]here is a reasonable doubt concerning juror Fagan's impartiality. That doubt forecloses reliance on the harmless error standard enunciated in Chapman v. California, 386 U.S. 18 (1967)")(footnote omitted).

The right to an impartial jury, like the right to trial, cannot be waived by defense counsel but may be waived only by the defendant personally. Taylor v. Illinois, 484 U.S. 400, 418, n.24 (1988). "[T]he presence of a biased juror, like the presence of a biased judge, is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis." Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001)(quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

In this case, during jury selection, when asked if he had ever been the victim of a violent crime, Juror #12 said he had been robbed at knife point, but neither the trial court nor counsel asked him whether he could set that experience aside and decide the case based only on the evidence. TT 1/19/16, 29-30.

> JUROR NO. 12: Robbed at knife point as a paper boy long a long time ago.
>
> THE COURT: You got robbed at knife point?
>
> JUROR NO. 12: Yes.

THE COURT: So did I when I was a paper boy.

JUROR NO. 12: Free Press.

THE COURT: That's a coincidence.

Juror #12's revelation that he had been robbed at knife point as a paperboy in response to the question whether he had ever been a victim of violent crime put his impartiality in reasonable doubt because the defendant in this case was also charged with committing a violent crime. Indeed, that was the very purpose of asking the question. If the answer was "yes," then it was necessary to ask the juror to "swear that he could set aside any opinion he might hold and decide the case on the evidence[.]" Patton, 467 U.S. at 1036 (emphasis added). But Juror #12 was never asked this necessary question. Therefore, his impartiality remained in reasonable doubt, and he went on to serve on Defendant's jury that returned a guilty verdict, resulting in a jury that was not impartial beyond a reasonable doubt.

The Michigan Court of Appeals rejected this claim by saying that, some time after he revealed that he had been the victim of a violent crime, Juror #12 said he could be fair. Appx A, at *23; TT 1/19/16, 34, 53-54. But Juror #12 made that statement only in reference to the fact that he was a friend of an assistant Wayne County prosecutor and a district judge. Id. Juror #12 never said that he could set aside any opinion he might hold with respect to his being the victim of a violent crime. Thus, his statement that he could be fair despite his friendship

with an assistant prosecutor and a judge simply did not dispel the reasonable doubt in his impartiality created by his statement that he had been the victim of a violent crime.

The Michigan Court of Appeals also said that the details of Juror #12's violent crime were different from the details of the violent crime in this case. Appx A, at *23. But that is a distinction without a difference. It was still a violent crime and thus likely created strong opinions that might be difficult to set aside and make factfinding difficult or impossible in a case involving another, albeit not identical, violent crime.

The Michigan Court of Appeals said that Juror #12 "gave no hint that this crime that took place 'a long time ago' left him severely traumatized such that he could not be impartial in deciding a criminal case." Appx A at *23-24. But the question is not whether the robbery left him "severely traumatized." The question is whether it caused him to have any opinion that might prevent him from deciding the case based on the evidence, which he could have whether the robbery left him severely traumatized or not. Commonsense teachs that formative experiences create biases and prejudices without necessarily being severely traumatizing. None of the other potential jurors who revealed that they had been the victims of violent crime indicated that they had been severely traumatized by it, yet the court or counsel still asked them the follow-up question whether they could set aside those experiences and decide the case fairly and impartially, based solely on the evidence -- except when it came to Juror #12.

The Michigan Court of Appeals said,

> The [trial] court, in effect, signaled that it detected no lingering problems for that juror by asking no follow-up questions and conversationally volunteering that the court had suffered the same crime as a youth. The juror confirmed the court's impression by offering no further details about the incident other than the benign one that the newspaper for which he was delivering papers was The Detroit Free Press. [Appx A at *24]

This is illogical, purely speculative, and belied by the record as a whole. The trial court or counsel asked every single other potential juror who admitted being the victim of a violent crime whether he or she could set that experience aside and decide the case solely on the evidence, except Juror #12. Why was Juror #12 the sole exception? Was it really because the trial judge suddenly decided that for this one potential juror alone he was able to silently divine his impartiality, even though he never did the same with any other potential juror? Or is it more likely that the judge was simply thrown off from his regular procedure of asking the standard follow-up question by the striking similarity of Juror #12's experience to his own? The record itself provides the answer. When Juror #12 revealed his experience of being robbed at knife-point as a paperboy, the judge, instead of asking his usual follow-up question, said, "So did I when I was a paperboy. . . . That's a coincidence."

The Michigan Court of Appeals' baseless speculation that the trial judge -- uniquely in this instance -- wordlessly read Juror #12's mind and, for that reason, did not ask him (and only him) the normal follow-up question, is simply absurd. Equally absurd

is the Michigan Court of Appeals' statement that Juror #12 "confirmed the court's impression" of impartiality by volunteering no further details. How could one "confirm" what is never said or even implied?

Finally, the Michigan Court of Appeals said, "Defendant cites no authority that stands for the proposition that a distant history as the victim of a robbery per se refutes the presumption of juror impartiality." Appx A, at *24. This is a red herring because a "white horse case," i.e., one that is on "all fours" with this one, is unnecessary because, as shown above, the general principles from this Court's precedent are sufficient to reach the conclusion that Petitioner's right to an impartial jury was violated. However, as the Michigan Court of Appeals' opinion demonstrates, this may not be sufficiently clear to provide guidance to the lower courts. Therefore, this Court should grant certiorari to resolve this issue on direct appeal, unencumbered by the stringent standard of review applied in habeas corpus proceedings under 28 U.S.C. § 2254(d), and because "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

III. THE INTRODUCTION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE ABOUT STREET GANGS, RAP GROUPS, AND RAP LYRICS VIOLATED THE FREE SPEECH AND FREEDOM-OF-ASSOCIATION CLAUSES OF THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Court should grant certiorari because "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

A criminal defendant's First Amendment and Due Process claims regarding the admission of the same evidence are analyzed under different standards. See, e.g., Blackmon v. Booker, 696 F.3d 536, 555 (6th Cir. 2012)("Unlike a First Amendment claim, Petitioner's due process claim calls for the application of a general standard posing a greater potential for reasoned disagreement among fairminded judges"). The admission of evidence implicating a defendant's First Amendment rights violates the First Amendment when the evidence is irrelevant to any issue being tried. Dawson v. Delaware, 503 U.S. 159, 167 (1992). Similarly, "it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial." Estelle v. McGuire, 502 U.S. 62, 69 (1991).

"[T]he First Amendment protects an individual's right to join groups and associate with others holding similar beliefs." Dawson, 503 U.S. at 163. It also protects the right to free speech, including song lyrics. See U.S. Const., Am. I. ("Congress shall make no law . . . abridging the freedom of

speech . . .").

In Dawson, this Court held that the admission of evidence at a capital sentencing hearing that the defendant was a member of a "white racist prison gang," i.e., the Aryan Brotherhood, without more, violated the First Amendment right to freedom of association "because the evidence proved nothing more than Dawson's abstract beliefs," which were irrelevant to the issues being tried. Dawson, 503 US at 167.

By contrast, any evidence that is both irrelevant and "so unduly prejudicial that it renders the trial fundamentally unfair" violates the Due Process Clause. Payne v. Tennessee, 501 US 808, 825 (1991)(citing Darden v. Wainwright, 477 US 168, 179-183 (1986)).

In this case, a detective testified that a street gang known as "Chedda Ave" sold narcotics at and "control[led]" the Citgo gas station where the shooting occurred, causing fear in the local citizenry. TT 1/21/16, 48-53. There was also testimony that Defendant was a member of a rap group called "Chedda Ave," which had a song with the lyric "another body up at the Citgo" and a music video in which Petitioner was dancing on the roof of the Citgo station. The defense objected to the admission of this evidence on grounds of relevance, and the prosecution argued, without explanation, that it was relevant to the issues of motive and identity. Id., 49. The state courts sided with the prosecution. Appx A, at *18-19. They were wrong.

First, the evidence regarding the Chedda Ave gang was irrelevant because there was no evidence that the killing was

gang-related. The Michigan Court of Appeals found that it was relevant by pointing to the fact that there was no other evidence of motive and that the killing occurred in an area that the gang "controlled" and sold drugs in. Appx A, at *18-19. But, by the same reasoning, the fact that a murder occurred within the borders of the United States, without any evidence of motive, is evidence that the United States Government committed the murder because the United States Government is engaged in commerce in the area and "controls" it.

Absolutely no evidence was presented that the victim or shooter or Petitioner had any actual affiliation with any street gang or were engaged in any gang-related activities, not just at the time of the shooting but ever. Therefore, the mere fact that the shooting occurred in an area "controlled" by a street gang, without some evidence that either the shooter or the victim had anything to do with any street gang, is utterly irrelevant and highly prejudicial, given the normal associations that the average citizen has with respect to inner-city street gangs, i.e., pervasive gun violence, lawlessness, and danger that causes terror and fear in the minds and hearts of law-abiding citizens and the natural and understandable reaction of seeking to protect oneself from such a threat by any means necessary, even if the only means available is convicting someone who might be involved in such activity, despite the lack of actual evidence of his guilt.

It is true that the prosecution introduced evidence that Petitioner was a member of the "Chedda Ave" rap group. TT

1/25/16, 16-17, 20-21. But confusing a rap group with a street gang is the culturally illiterate equivalent of a Martian confusing Sylvester Stallone's "Rambo" with an actual Vietnam veteran. One is reality, and one is art as caricature of reality, and never the twain shall meet -- except, apparently, in a court of law in the United States of America, the one place where we would all hope logic and clear thinking would prevail over cultural prejudices or misunderstandings.

There was no evidence that Petitioner's "Chedda Ave" rap group had any affiliation with the "Chedda Ave" street gang other than the fact that they shared a name and a location. It is absurd to argue that a shared name and location shows their affiliation, just as it would be absurd to argue that the fact that the rock band "Boston" shares a name with the municipal corporation in the State of Massachusetts and may be located in the same area is evidence that the members of the rock bank are responsible for negligent police protection or refuse collection.

The Michigan Court of Appeals cited the fact that one of Petitioner's rap song lyrics was "'another body up at the Citgo'" as evidence that Petitioner "identified with that gang." Appx A, at *19-20. But this is a speculative leap untethered from any evidence or logic. There was simply no evidence that Petitioner's rap lyric was anything more than an observation or report as to what was occurring in his own neighborhood. He did <u>not</u> say, "I left another body up at the Citgo" but simply, "another body up at the Citgo." Finding that this was evidence that Petitioner had anything to do with the murder in this case

is like finding that a local TV journalist's reporting on the murder at the Citgo station is evidence that the reporter committed the murder because her television station covers that area and she mentioned the murder in her 11 o'clock news broadcast. Both the rap group's lyrics and the reporter's journalism were First-Amendment protected activity that merely reported on events in the area to the respective audiences of the two media. One reported to the inner-city youth, the other to a wider adult audience.

The state courts' cultural blindness on this issue perfectly illustrates the unfair prejudice that likely infected the jury by the introduction of this street-gang, rap-group, and rap-lyric evidence. If the learned jurists on the Michigan Court of Appeals, who are trained in logic and objective reasoning, were unable to separate art and reality in this context -- like a 9-year-old boy who believes the outcome of a professional wrestling match is determined by wrestling skill rather than the imaginations of television writers and producers -- then it is highly unlikely that the laymen who sat on Petitioner's jury were able to separate art from reality and, thus, that they were unfairly prejudiced by this irrelevant and highly inflammatory gang, rap-group, and rap-lyric evidence.

The Michigan Court of Appeals said, "evidence of membership in a rap group which adopted the name of the gang asserting control over the area at issue and whose expressive activities included publicly celebrating dominion over the Citgo station at issue showed at least a strong personal and regional affinity

with that gang, and thus had direct bearing on the prosecution's theory that the subject murder was committed as an assertion of territorial dominance." Appx A, at *21. This is wrong.

First, the assertion that Petitioner's rap group "adopted the name of the gang" it supported by absolutely no evidence. No evidence was presented that the rap group adopted the name of a gang rather than the name of a location that the street gang also adopted, like the rock band and the municipal corporation both sharing the name Boston, even though neither adopted the name of the other but of the location they share.

Second, there was no evidence that the expressive activity of the rap group included "publicly celebrating dominion over the Citgo gas station at issue [or] show[ing] at least a strong personal and regional affinity with that gang." Appx A, at *21. The only evidence as to the expressive activity of the rap group in this case was the single, out-of-context lyric "another body up at the Citgo" and a clip from a music video showing Petitioner dancing on the roof of the Citgo station. As discussed above, there was no evidence that the lyric was anything more than an observation of events in the neighborhood, and dancing on top of buildings in music videos is par for the course in that art form, like bowls of fruit in paintings.

Interpreting it as "celebrating dominion over the Citgo station" or as showing a "strong personal and regional affinity with the gang" displays a disheartening cultural disconnect between the judges sitting on the Michigan Court of Appeals and the citizens living in the inner cities of this country. It not

only perpetuates inaccurate racial and cultural stereotypes but crystalizes them into Constitutional law, allowing to be used against the country's inner-city citizens in the worst way possible, as evidence of guilt in a murder trial. Given the proliferation of social media, cell phone video cameras, and the resulting ease of making and posting music videos online, the type of reasoning employed by the Michigan Court of Appeals in this case could result not only in the injustice it caused in this case but also injustice in innumerable cases where innocent expressive activity is presented to a panel of culturally unaware jurors who then vote to convict out of fear and misunderstanding rather than actual evidence that the defendant had something to do with the charged offense.

This disconnect -- and the urgent need for corrective action from this Court -- is made even more stark when this case is compared to Dawson. Dawson was actually a member of an admittedly white racist prison gang. Yet, this Court held that the admission of this fact at his capital sentencing hearing violated his First Amendment right to freedom of association because it proved nothing more than his abstract beliefs. If Dawson's membership in a white racist prison gang is protected by the First Amendment such that it is inadmissible at a hearing to determine the appropriate sentence of that convicted murderer, even though, "in determining what sentence to impose. . . . a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider," United States v. Tucker, 404 U.S. 443, 446 (1972),

then Petitioner's membership in a rap group (not a gang), whose lyrics merely mentioned the violence in the community and danced on roof-tops in their videos in typical music-video fashion, is surely also protected by the First Amendment such that it is inadmissible under the much more stringent rules of relevance that govern the guilt-phase of a murder trial, especially where there is virtually no actual evidence of guilt, as shown in Issue I, supra.

In sum, the admission of the gang, rap-group, and rap-lyric evidence violated the First Amendment and the Due Process Clause because it was irrelevant and highly prejudicial, and the Court should grant certiorari.

IV. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO (A) MOVE TO SUPPRESS BILLY PRICE'S SELECTION OF PETITIONER'S PHOTOGRAPH, (B) MOVE TO QUASH THE BINDOVER OR FOR A DIRECTED VERDICT OF ACQUITTAL, (C) REHABILITATE OR EXCUSE THE BIASED JUROR, AND (D) OBJECT TO THE ADMISSION OF THE HOLMES FAMILY'S HEARSAY.

Counsel is constitutionally ineffective where (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

A defendant may show a "reasonable probability" of a different outcome "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id., at 694. "Moreover, a verdict or conclusion only

weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id., at 696. Because a unanimous jury verdict was required to find Petitioner guily, all it would have taken is for "one juror [to] have struck a different balance." Wiggins v. Smith, 539 U.S. 510, 537 (2003).

A. COUNSEL FAILED TO MOVE TO SUPPRESS BILLY PRICE'S SELECTION OF PETITIONER'S PHOTOGRAPH.

As discussed in Issue I, above, Billy Price first selected Petitioner's photograph at a showup where no real interpreter was present and then, subsequently, at a "re-enactment." A reasonable defense attorney would have conducted discovery, Kimmelman v. Morrison, 477 U.S. 365 (1986), and thus known that this was the only "evidence" of Petitioner's guilt. Knowing this, a reasonable defense attorney would have filed a motion to suppress the photo lineup and any in-court identification by Billy Price and requested an evidentiary hearing to explore the precise circumstances surrounding the photo lineups in an attempt to have the identification suppressed.

At the evidentiary hearing, there is a "reasonable probability" that Price would have testified as he later did at trial, i.e., without making an in-court identification of Petitioner and saying that he only selected Petitioner's photograph because Petitioner "looks almost like" the shooter but was different in five specific ways. TT 1/20/16, 14-20. With such testimony, there is a "reasonable probability" that the motion to suppress would have been granted, Neil v. Biggers, 409

U.S. 188, 198 (1972)(It is the "likelihood of misidentification that violates a defendant's right to due process."), and that, without Price's testimony, at least one juror would have had a reasonable doubt.

B. COUNSEL FAILED TO MOVE TO QUASH THE BINDOVER OR FOR A DIRECTED VERDICT OF ACQUITTAL.

Given the lack of evidence of guilt, as shown in Issue I, a reasonable defense attorney would have filed a motion to quash the bindover or for a directed verdict of acquittal.

The Michigan Court of Appeals rejected this claim by saying, "Our rejection of the sufficiency [of evidence] claim . . . obviates our need to consider appellate counsel's related arguments that defendant's trial attorney was ineffective for not having moved the trial court to quash the bindover or grant a directed verdict of acquittal." Appx A, at *15. This is wrong because, as the Michigan Supreme Court recently explained, a defendant's inability to show entitlement to a new trial "in connection with a specific trial court error does not necessarily mean that he or she cannot meet the ineffective-assistance standard regarding counsel's alleged deficient performance relating to that same error." People v. Randolph, 502 Mich. 1, 22; 917 N.W.2d 249 (2018). See also Kimmelman, 477 U.S. at 382 (holding that the habeas bar to Fourth Amendment claims does not bar claims that counsel was ineffective for failing to raise a Fourth Amendment claim because "Strickland's standard . . . differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim.").

Strickland's standard also differs from the elements of a sufficiency-of-evidence claim. The latter asks whether any juror could have found the defendant guilty beyond a reasonable doubt, viewing the evidence presented in the light most favorable to the prosecution. The latter asks (1) whether counsel was unreasonable, and (2) whether there is merely a "reasonable probability" (less than a preponderance) that, but for counsel's failure, the outcome of the directed-verdict motion would have been different. Strickland, 446 U.S. at 688, 693-694. Given the scant evidence of guilt, there is a "reasonable probability" that the motion would have been granted.

C. COUNSEL FAILED TO MOVE TO REHABILITATE OR EXCUSE THE BIASED JUROR.

As shown in Issue II, above, Juror #12's statement that he had been robbed at knife-point raised a reasonable doubt in his impartiality that required him to be asked whether he could set aside that experience and decide the case solely on the evidence or to be excused. Counsel's failure to ask that question or to move to excuse him was objectively unreasonable because, first, a reasonable defense attorney would have known that such a statement raises a reasonable doubt in a juror's impartiality. See Hinton v. Alabama, 571 U.S. 263, 274 (2014)("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland."); Kimmelman, 477 U.S. at 385 (finding counsel's performance deficient because it "betray[ed] a startling

ignorance of the law"). Second, there is no possible reasonable strategic basis for a defense attorney to allow the impaneling of a juror whose impartiality is in reasonable doubt. See Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001).

But for counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different because it resulted in the impaneling of a biased juror, which is a "structural error" that necessarily renders the trial unfair. Arizona v. Fulminante, 499 U.S. 279, 309 (1991). While some structural errors, such as the denial of a public trial, do not necessarily result in an unfair trial and thus do not necessarily result in Strickland prejudice, the impaneling of a biased juror always does. See Weaver v. Massachusetts, 137 S.Ct. 1899, 1913 (2017). Alternatively, prejudice resulted because the juror's bias, combined with the very weak evidence of guilt, as shown in Issue I, creates a reasonable probability that, without the biased juror, at least one juror would have had a reasonable doubt.

The Michigan Court of Appeals analyzed this claim as follows. Appx A, at *24.

> [D]efense counsel actively participated in jury selection, including by exercising multiple peremptory challenges. Contrary to Defendant's argument, there is simply no basis from which to conclude that counsel was ineffective by failing to further question the juror, especially when the juror explicitly stated (albeit in the context of discussing his friends in the legal system) that he could be a fair juror.

First, counsel's active participation in jury selection in

ways unrelated to Juror #12 and his exercise of challenges to other jurors says nothing about whether he was objectively unreasonable for failing to rehabilitate or excuse Juror #12. See Kimmelman, 477 U.S. at 386 (finding counsel's performance deficient for failing to conduct pretrial discovery, even though his "performance at trial [was] generally credible enough").

Second, there was a basis for counsel to question Juror #12 further, i.e., his statement that he had been the victim of a violent crime, which was the very purpose of asking him whether he had been the victim of a violent crime.

Finally, the juror's statement that he could be fair despite having friends in the legal system simply says nothing about whether he could be fair despite his being the victim of a violent crime.

In sum, the state court's analysis misses the point, and counsel was ineffective.

D. COUNSEL FAILED TO OBJECT TO THE ADMISSION OF THE HOLMES FAMILY'S HEARSAY.

Rakeem Holmes, the victim's cousin, testified that Petitioner called him after the candlelight vigil held for the victim and told Holmes that Petitioner "heard [Holmes'] family was saying that [Petitioner] did it[.]" TT 1/20/16, 89. Counsel knew or should have known this before trial because it was mentioned in police reports. Kimmelman, supra. This was hearsay that made it seem that the victim's family knew some evidence that the jurors did not know and therefore was highly prejudicial. A reasonable defense attorney would have objected

to its admission, and, because it was hearsay, the trial judge likely would have excluded it. Given the weakness of the evidence of guilt, there is a reasonable probability that that, without it, at least one juror would have had a reasonable doubt.

CONCLUSION

Petitioner Demetrius Morgan asks this Honorable Court to grant certiorari.

Date: 9/9/19

Respectfully submitted,

D Morgan

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