

No. \_\_\_\_\_

19-6807

IN THE  
SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

Marcus Robinson — PETITIONER  
(Your Name) FILED  
NOV 13 2019  
vs. OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Les Parish, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marcus Robinson #646375  
(Your Name)

1500 Caberfae Highway  
(Address)

Manistee, MI 49660  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

QUESTION(S) PRESENTED

Could the District Court or the State Court make a decision to deny the Petitioner's Ineffective Assistance of Counsel claim based on U.S. Supreme Court Precedent Case law, without a Ginther or Evidentiary hearing to acquire the facts as to whether counsel

1. Knew whether he could raise inconsistent claims and defenses, and 2. whether counsel made an investigation into whether to raise inconsistent claims or defenses. 3 or made a decision not to request the accident instruction. The petitioner contends that this court should consider this question under an unreasonable application of Strickland v. Washington.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[✓] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[✓] is unpublished.

[ ] For cases from **state courts**:

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

[ ] reported at 497 Mich. 1022, 862 N.W.2d 652; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the State of Appeals court appears at Appendix A to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[✓] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Aug 21, 2019.

[ ] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Sep 13, 2019, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

MAY 20, 2015

The date on which the highest state court decided my case was Mar 20, 2018. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment U.S. Constitution right to the effective assistance of Counsel. The petitioner contends that trial counsel had no knowledge of his right to assert conflicting defenses. The courts unreasonably applied Strickland when to conduct a ginther hearing to determine these facts.

The court failed to support its presumption that trial counsel's decision was trial strategy because no ginther hearing was held to establish whether counsel even knew of petitioner's right to present conflicting defenses, or whether he investigated the matter. The court has held, "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 a unreasonable performance under Strickland." Hinton v. Alabama 134 S.Ct. 1081 (2014).

## **STATEMENT OF THE CASE**

STATEMENT OF THE ISSUES

Was petitioner denied his sixth amendment right to effective assistance of counsel at trial when his counsel failed to request an "accident" instruction for the jury where proofs presented an "accident" defense (rather than, or in addition to the "self-defense" instruction defense counsel sought)?

STATEMENT OF THE CASE

On January 22, 2013, Petitioner Marcus Trinal Robinson was convicted following a jury trial in Kalamazoo County Circuit Court, with the Hon. Pamela L. Lightvoet presiding, of second degree murder, MCL § 750.317; assault with intent to do great bodily harm less than murder, MCL § 750.84; felon in possession of a firearm, MCL § 750.224f; carrying a concealed weapon, MCL § 750.227; and three counts of possession of a firearm in the commission of a felony, MCL §750.227b. The trial occurred on January 9-22, 2013. On February 13, 2013, Judge Lightvoet sentenced Mr. Robinson, as a fourth felony offender, to three concurrent prison terms of two years, to be followed by concurrent terms of 45 to 75 years, 20 to 40 years, and 3 to 5 years, with an additional term of 3 to 5 years to run concurrently with the 2-year sentences.

The charges leading to Petitioner's conviction arose from an incident that occurred on April 22, 2012 in the parking lot of an apartment complex, where various parties met to resolve a conflict

STATEMENT OF JURISDICTION

Petitioner Marcus Robinson filed a timely writ for habeas corpus on May 13, 2016 with the U.S. District Court for the Eastern District of Michigan. The district court had subject matter jurisdiction over this habeas corpus case through its federal question jurisdiction, 28 U.S.C. §§ 1331, 1343, 2201, and 2202. This action was brought pursuant 28 U.S.C. § 2254 and alleged that the state of Michigan is confining Mr. Robinson in violation of his federal constitutional rights to effective assistance of counsel.

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, which provides jurisdiction for appeals from final decisions of district courts, and under 28 U.S.C. § 2253, which specifically provides that a district court's final order in a habeas corpus proceeding is subject to appellate review by the court of appeals for that circuit.

The district court entered final Judgment and an Opinion and Order denying Mr. Robinson's petition for writ of habeas corpus on March 28, 2018, and granted a certificate of appealability at that time to argue the issues raised herein.

Mr. Walker filed a timely notice of appeal, on April 24, 2018, pursuant to Fed. R. App. P. 4(a)(1).

from the night before. These parties included the Petitioner and the deceased. At around 6:00 p.m. on that day, Petitioner drove Cortez Howard to an apartment complex so that he could speak to Jared Boothe. Mr. Howard testified there was no discussion or planning during the drive of shooting or seeking to injure anyone at the meeting, as Mr. Howard believed they were only "going to go over there and talk it out and be done with it." (Trial Tr. V, 1107-1108).

Petitioner testified that when they arrived at the parking lot, Mr. Howard still had the gun from the incident the night before, which they'd come to talk about, and Mr. Howard intended to take the gun with him to speak to Mr. Boothe. Petitioner stated he took the gun away from Mr. Howard, worried the incident might become heated, but acknowledged that he put the gun in the waistband of his pants, under his hoodie, and took it out of the car with him, testifying he was worried about their safety. (Trial Tr. VI, 1324, 1351).

When Petitioner and Mr. Howard arrived, they saw Jared Booth with Brian Tolson in the parking lot area, and the four men approached one another to talk in the middle of the lot. (Trial Tr. V, 1113-1115).

The descriptions of the events surrounding the shootings were consistent between the four primary eyewitnesses who testified at trial - Petitioner, Cortez Howard, Jared Boothe, and Caitlin

Bannister (a friend of Jared Boothe's who had been talking to him just prior to the incident). All witnesses indicated Mr. Boothe and Mr. Howard started talking about an incident with a gun from the prior night, which was the purpose of this meeting, and that their discussion became heated. (Trial Tr. VI 1325-1326). Mr. Boothe characterized Mr. Howard as looking "scared" during the argument. (Trial Tr. IV, 779-781; VI 1326). At this point, Petitioner sought to separate the men by putting his arm between them, and trying to move Mr. Howard away. (IV, 684-687; VI, 1326). Mr. Boothe then started to walk away, towards the apartment building where he lived.

There was inconsistent testimony on what Mr. Boothe stated as he was walking away and what their intentions were at this moment.

Mr. Howard testified he heard Mr. Boothe state he was going to get his brothers, which he took to be a threat. (Trial Tr. V, 1118, 1180).

Petitioner heard Mr. Boothe state "I'm going to get my gun." (VI, 1326-1327).

Mr. Boothe asserted he saw Petitioner pull a handgun from the waistband of his pants, which prompted him to say "have a good day" and walk away. (Trial Tr. IV, 687-690).

Mr. Boothe testified he heard Mr. Tolson state in relation to the presence of the handgun to not "creep up on my brother like that." (Trial Tr. IV, 693).

Petitioner agreed that after he tried to intercede between Mr. Howard and Mr. Boothe, he pulled out the gun, but stated he only "had it down by my side" and never pointed it at either Mr. Boothe or Mr. Tolson. (Trial Tr. VI 1327, 1329). This was meant as a defensive move and, while pulling the gun, he told Mr. Boothe he was not going to allow him to go get a gun to threaten them. (Trial Tr. VI, 1327-1329).

Within moments of Petitioner pulling out the gun, Mr. Tolson, who was then standing to the side of Petitioner, grabbed Petitioner in a bear hug, and slammed them both onto the ground. (Trial Tr. II, 579, 586-588, 599-602; V, 1120-1124; VI, 1329-1331). The trial testimony indicated Mr. Tolson was around 6'2" tall and weighed somewhere near 338 pounds. (Trial Tr. IV, 824-827). Petitioner is listed in the court records as being 6' tall and 164 pounds. Mr. Howard was described at trial as being around 5'6" tall and weighing 120 pounds. (Trial Tr. II, 526). Clearly, based on their sizes, this encounter was a mismatch.

During their struggle on the ground, Petitioner's handgun fired once, hitting Mr. Tolson in the chest, and killing him. (Trial Tr. IV, 808, 812-814).

Petitioner testified that when Mr. Tolson grabbed him and slammed him to the ground, the gun went off during their struggle. (Trial Tr. VI, 1331).

"[H]e picked me up, he slammed me. He landed on top

of me - and the impact from me - as soon as we fell, the gun - that is when the gun went off. I never shot him, the gun went off. As he slammed me to the ground." (Trial Tr. VI, 1331).

Mr. Boothe testified his back was turned and he was walking away from the parking lot when he heard the gunshot. (Trial Tr. IV, 693). He turned around and saw Mr. Tolson and Petitioner near each other. Mr. Boothe admitted he then ran up behind Petitioner, struck him with his fists several times on the back and head, and grabbed him around the waist and also threw him to the ground, in a wrestling move termed a "suplex." (Trial Tr. IV, 698-701, 784-787; VI, 1333-1334). This resulted in Mr. Boothe on the ground, on his back, with Petitioner lying on top of him but facing away from him. The gun then fired again, hitting Mr. Boothe in the chest area. (IV, 702-704).

Mr. Boothe testified that Petitioner "never turned to face [him]", and that he did not see if the gun was in Petitioner's right or left hand, and that he did not know how the gun fired. (Trial Tr. IV, 787-789).

Petitioner testified when Mr. Boothe attacked him, he was in fear for his safety and tried to fire a warning shot into the ground to stop Mr. Boothe attacking him. (Trial Tr. VI, 1334). He stated he was very scared during the entire incident, fearing Mr. Boothe and/or Mr. Tolson might have a gun, or would get other men to help them beat up him and Mr. Howard. (Trial Tr. VI, 1325, 1334-

1335, 1352-1353).

The primary defense theory forwarded by Petitioner's trial counsel was self-defense. Judge Lightvoet instructed the jury on the law of self-defense. (Trial Tr. VI, 1423-1426).

At the conclusion of the prosecution's proofs, defense counsel moved to have the jury instructed on second degree murder, and involuntary manslaughter as a lesser included offense. The prosecutor objected, arguing that the evidence did not support that charge. (Trial Tr. VI, 1297). Judge Lightvoet did not rule on the question at that time, deferring the ruling until after Petitioner's testimony.

Following the defense's presentation of evidence, the issue of whether the jury would be instructed on involuntary manslaughter as an alternative to the murder charge was resolved. Judge Lightvoet ruled that the "involuntary manslaughter" instruction would not be given. (Trial Tr. VI, 1367-1368). Petitioner later raised this as an issue in his habeas corpus petition, but was denied on the issue by the lower court and given no certificate of appealability for the same.

Pursuant to this ruling regarding Count I, the judge instructed the jury only on first degree premeditated murder and the lesser included offense of second degree murder, plus not guilty. (Trial Tr. VI, 1415-1418).

Furthermore, an "Accident" instruction was not requested by

the defense, and none was given *sua sponte* by the judge.

On January 22, 2013, Petitioner Marcus Trinal Robinson was convicted of second degree murder, MCL § 750.317; assault with intent to do great bodily harm less than murder, MCL § 750.84; felon in possession of a firearm, MCL § 750.224f; carrying a concealed weapon, MCL § 750.227; and three counts of possession of a firearm in the commission of a felony, MCL § 750.227b. The jury had acquitted Petitioner on the charged offense of premeditated murder, but convicted him on the lesser included offense of second degree murder. (Trial Tr. VII, 1451).

On February 13, 2013, Judge Lightvoet sentenced Petitioner.

Petitioner filed a Claim of Appeal on March 18, 2013 in the Michigan Court of Appeals. On October 2, 2014, the Michigan Court of Appeals affirmed Petitioner's convictions.

On November 19, 2014, Petitioner filed an Application for Leave to Appeal to the Michigan Supreme Court, which was summarily denied on May 20, 2015, without any analysis of the merits of the issues raised.

On May 13, 2016 Petitioner sought Habeas Corpus in the United States District Court for the Eastern District of Michigan, on the grounds that (1) he'd been denied the Constitutionally protected right to effective assistance of counsel when his attorney at trial failed to request an instruction of 'accident' as a defense to the charges; and (2) he'd been denied his Constitutionally protected

right to a fair trial when the judge declined to read an instruction of involuntary manslaughter to the jury.

On March 28, 2018 the District Court denied the petition of habeas corpus but granted a certificate of appealability to Petitioner on his claim that he'd been denied the Constitutionally protected right to effective assistance of counsel when his trial attorney failed to request an instruction of 'accident' as a defense to the charges.

#### SUMMARY OF THE ARGUMENT

The failure of Petitioner's trial counsel to request an 'Accident' jury instruction was devoid of any legitimate strategic reasoning, and with this failure Petitioner was constitutionally denied his rights to a fair trial and due process by the ineffective assistance of his counsel.

#### ARGUMENT

##### **PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN COUNSEL FAILED TO REQUEST A JURY INSTRUCTION FOR ACCIDENT**

This appeal follows a denial Petitioner's claim of habeas corpus, upon being denied his Constitutional rights to due process, a fair trial and right to counsel, due to the ineffective assistance of his trial counsel. U.S. Const. Amd.

VI, XIV; *Strickland v. Washington*, 466 US 668 (1984).

At trial, Petitioner's counsel failed to request a jury instruction as to 'accident.' Petitioner sought redress of this in state court before turning to the federal court for habeas corpus.

It has been consistently held that defense counsel's failure to take the proper steps to protect his client's constitutional rights during criminal prosecution constitutes ineffective assistance and denies a defendant a fair trial. See e.g., *Kimmelman v. Morrison*, 477 US 365 (1986).

However, in ruling on the habeas corpus petition, the Court below did not believe trial counsel's failure to request an 'accident' instruction for the jury in this case was ineffective assistance, but acknowledged reasonable minds could disagree, and so granted a certificate of appealability on this issue.

## II.

In Petitioner's case, the state court's interpretations of the federal Constitution, and clearly established Supreme Court and federal court precedents, were unreasonable. This led to Petitioner's request for habeas corpus.

A federal court should grant a writ of habeas corpus where the petitioner has been imprisoned pursuant to a state court adjudication that:

## REASONS FOR GRANTING THE PETITION

<sup>Court</sup>  
The <sup>+</sup> abused its discretion when it unreasonably applied Strickland.

A strong presumption must be supported by the record. The petitioner contends that he has a Sixth Amendment right to the effective assistance of counsel, that this right was deprived when counsel failed to investigate and ask for the accidental instruction.

The opinion of the Court's is not supported by the record. Trial counsel has a duty to investigate or make a determination not to investigate. Here the record is silent, as to whether counsel was aware of the petitioner's right, or whether counsel made a decision not to exercise the right; for this reason the petitioner respectfully ask this court to grant his petition.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marcus Robinson

Date: 11-13-19