

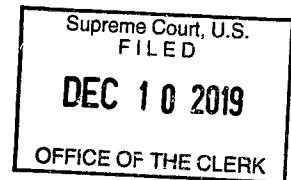
19-7024  
No. \_\_\_\_\_

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

\*\*\* October Term, 2019 \*\*\*



GERMIRA LAMAR CARTER,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court for the State of Michigan

Submitted by:

Germira Lamar Carter, #488589  
In Propria Persona  
Lakeland Correctional Facility  
141 First Street  
Coldwater, Michigan 49036

Dated: December 10, 2019

## STATEMENT OF QUESTIONS PRESENTED

(I)

WHERE THE STATE COURTS OF MICHIGAN HAS CONVICTED A CRIMINAL DEFENDANT IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IS RELIEF AVAILABLE ON CERTIORARI TO CORRECT THE CONSTITUTIONAL VIOLATION UNDER THE STRICKLAND TEST?

Petitioner answers ..... YES

Respondent (State of Michigan Courts) answered ..... NO

(II)

IS RELIEF AVAILABLE WHERE THE STATE OF MICHIGAN HAS CONVICTED A CRIMINAL DEFENDANT ON INSUFFICIENT EVIDENCE WHERE THE ELEMENTS OF THE CRIME WERE NOT PROVEN BEYOND A REASONABLE DOUBT AS MANDATED BY DUE PROCESS REQUIRING A NEW TRIAL?

Petitioner answers ..... YES

Respondent [State of Michigan Courts] answered ..... NO

## LIST OF PARTIES

The parties associated with the Petition for Writ of Certiorari are listed on the cover sheet of the Petition.

Petitioner: Germira Lamar Carter, #488589, is incarcerated under the custody of the Michigan Department of Corrections and can be contacted at the below address as:

Germira Lamar Carter, #488589  
Lakeland Correctional Facility  
141 First Street  
Coldwater, Michigan 49036

Respondent: The State of Michigan is listed as the Respondent in this Certiorari Petition and can be addressed by way of the Michigan Attorney General's Office below:

Dana Nessel, Attorney General  
Department of Attorney General  
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525 W. Ottawa Street  
Post Office Box 30212  
Lansing, Michigan 48909

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Petitioner,

-vs-.

**STATE OF MICHIGAN,**

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI**

---

**To The Supreme Court of the State of Michigan**

Petitioner, Germira Lamar Carter, hereby petitions this US Supreme Court to issue an order granting his Writ of Certiorari, to review the Opinion and Orders rendered in this case, by the State of Michigan, through its Supreme Court, denying his post conviction appeal, challenging his unconstitutional conviction rendered in violation of this Court's ruling under *In re Winship*, 397 US 358, 363 (1970). The decisions below were contrary to this Court's rulings on an issue of the same magnitude regarding the Sixth Amendment right to have the effective assistance of counsel during the course of the jury trial, which was clearly established law. Accord, Strickland v Washington, 466 US 668 (1984). The decisions below conflicts with the decisions of this Court

on a due process violation under *Winship*, where the evidence submitted by the state prosecutor was insufficient to justify the conviction on each and every element beyond a reasonable doubt, rendering the state court trial fundamentally unfair.

Further, Petitioner is very mindful that this Court's posture rarely, if at all, grants a pro. per. indigent prisoner certiorari pleadings. However, because his case is one of exceptional circumstances, that is, he stands convicted on a multitude of serious felonies, the State Courts below, have trampled on his Sixth and Fourteenth Amendment right to fundamental due process and interferred with counsel's representation at a critical stage of the criminal process against him, he urges this Court to *abandon* its denial of pro. per. litigants an opportunity to be heard in his cause. Petitioner states in support of his petition for writ of certiorari as follows:

### The Opinions Below

The September 30, 2019, order from the Michigan Supreme denying the appeal from the Michigan Court of Appeals, is unpublished and can be found in the Joint Appendix. (J.A. at p 1a). The opinion and order from the Michigan Court of Appelas, which was rendered on August 9, 2018, denying the appeal from the trial court's denial of the post conviction motion, is unpublished and can be found in the Joint Appendix, at (J.A. p 2a). The opinion and order from the Macomb County Circuit Court, denying the motion for relief from judgment on a violation under *In re Winship*, which was rendered on November 22, 2017, is also unpublished and can be found in the Joint Appendix at (J.A. pp 3a-4a).

### Basis for Jurisdiction

Petitioner Carter seeks review in this Honorable Court from the Opinion and Order entered on September 30, 2019, by the Michigan Supreme Court in *People v Carter*, S. Ct. No. 158386 (2019), denying his appeal from the Michigan Court of Appeals and the Macomb Circuit Court denying his constitutional claims under *In re Winship*, and the Sixth Amendment claim under *Strickland v Washington*. The State Courts failed to conduct a hearing on either claim and summarily denied relief. Petitioner urges this Court to grant certiorari and resolve the conflict for all future litigation which will arise if the Court fails to correct the contrary to -unreasonable application of,

clearly established law from this Court. Accord, US Const. Amends. VI and XIV.

Accordingly, this Court is urged to address the claims in such a fashion that will preclude future, and needless litigation on this subject matter of what, constitutes "ineffective assistance" inquiries on the right to have competent counsel during the state court trial proceedings where defense counsel admits he had to forgo a defense due to a violation under *Brady v Maryland*, 373 US 83 (1963).

This Petition is timely, from the State of Michigan's order denying relief, pursuant to Rule 13.1 of the Rules of this US Supreme Court. Jurisdiction is invoked pursuant to 28 USC § 1251.

Jurisdiction of this Court is also invoked under the supervisory authority vested in Title 28 USC § 1251; U.S. Const. Art III, and US Const. Amends. VI and XIV. Furthermore, Petitioner seeks supervisory jurisdiction of this Court to determine whether the state courts below arrived at, but completely disregarded the ruling in *Strickland v Washington*, *supra*, when determining the "right to effective assistance of counsel" and a claim of insufficiency of the evidence beyond a reasonable doubt under the due process clause. Thus, this Court should invoke its supervisory jurisdiction and hear the claims asserted. US Const. Art III. Accord, US Supreme Court Rule 10(a); *Strickland v Washington*, *supra*. These cases were clearly established at the time of Petitioner's post appeal.

### Constitutional and Statutory Provisions Involved

The issue presented for certiorari to this Court are in direct violations of the constitutional amendments, and the statutory provisions listed infra:

1). US Const. Amend VI (1791)

In all criminal prosecutions the accused shall have the right to ... have the assistance of counsel to assist in his defense.

2). US Const Amend. XIV, § 1 (1868)

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.

3). Michigan Const. 1963 Art 1, §§ 17. (Due Process of Law - Fair Investigation Clause]

4). State Statutes, MCL § 750.529(a).

\* \* \*

This Court has previously determined that a claim can be properly addressed before the Court on proper citations to governing law. *Albrecht v United States*, 273 US 1, 11 (1926). Thus, Petitioner urges this Court to address the constitutional right to effective assistance of counsel under the Sixth Amendment of the US Constitution as applied to the instant case.

### Reasons for Allowance of Writ of Certiorari

Petitioner urges this Court to grant his petition for writ of certiorari and clarify that a claim of denial of effective assistance of counsel violates the Sixth Amendment which affords greater protection than the right to counsel under the Fourteenth Amendment's due process clause.

The focus of the certiorari inquiry is, does the Sixth Amendment right to counsel, attaches in a state trial court where materials were withheld under *Brady v Maryland*, causing the trial attorney to forgo a certain defense for his client, and thereby resulting in an unconstitutional conviction, under the Sixth and Fourteenth Amendments of the US Constitution?

Petitioner asserted a significant inquiry as to whether or not his claim give rise to the grant of relief under either *Strickland v Washington*, or the decision in *In re Winship*, *supra*. In *Winship*, this Court opined:

"Under the due process clause of the Fifth Amendment, the prosecutor is required to prove each and every element of the crime charged, beyond a reasonable doubt." *Cf.* 397 US at 364.

.\*.

Petitioner asks this Court to grant certiorari to clarify, once and for all, that where, as here, when a criminal defendant has been convicted in a state court where the evidence was insufficient to justify upholding the conviction on appeal, the due process clause requires relief. *Winship*, 397 US, at 363.

A Fortiori to grant certiorari in this case, this Court should grant certiorari and correct the errors of the courts below, or remove any conflicting decisions relating to *Strickland*, on the right to have effective assistance of counsel, such as the instant case presents, and reverse the judgments of

the State Courts below which applied a contra to, as well as an unreasonable application of the right to counsel under *Strickland* as opposed to the inquiry under *People v Pickens*, 446 Mich 298, 388; ; 521 NW2d 797 (1994), Alledging adopting the two prong test of the inquiry under *Strickland*.

Certiorari should be granted in this case, to assure that Petitioner has not been the victim of the denial of the Sixth Amendment protection of the right to counsel after his trial attorney admitted in open court that had the *Brady* materials been turned over by the prosecution, he would not have abandoned a certain defense for his client. (Tr IV pp 16-17). This Court is called upon to correct the constitutional violations that occurred in the case. US Const. Amend. VI.

Petitioner Carter asserts that Certiorari should be granted to overrule the erroneous application of the *Strickland* decision which allows the inquiry to focus on the Sixth Amendment guarantee of the right to have the effective assistance of counsel.

Petitioner should be granted the same relief as was afforded *Winship*, or his conviction should be reversed on the Sixth Amendment denial of effective assistance of counsel. That is, he is entitled to have his criminal convictions reversed for a new trial. US Const. Amendments VI and XIV. Accord, *Rhode Island v Innis*, 446 US 291, 298 (1980).

### Consideration Governing Review on Certiorari:

"(b). a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"; and;

"(c). a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

\*\*\*

Because the State of Michigan denied relief on the erroneous notion that because Petitioner's motion for reconsideration of that Court's previous order was warranted, and denied relief, created a conflict between this Court and a State Court of last resort on a Sixth Amendment claim which should be addressed by this Court for clarification to the state courts below. Accord, *Strickland v Washington*, 466 US at 698.

This court applied the *Strickland* rationale in its decision in *Lafler v Cooper*, 132 S Ct 1376 (2012), and remanded for consideration as to the plea deal offered. Thus, Petitioner Carter should be entitled to the same relief, i.e., a remand back to the State of Michigan for it to conduct a hearing on the Sixth Amendment claim. This Court is urged to apply that same logic to the facts of the instant case and grant certiorari. US Const. Article-III

Petitioner is entitled to relief in this case, and certiorari should be granted on the inquiry on his claim of denial of a right to counsel after the state prosecutor withheld material evidence in violation of *Brady v Maryland*, causing defense counsel to forgo a certain defense which would have made a difference in the outcome of the trial, i.e., a lesser included offense conviction. As this Court announced in *Engle v Isaac*, 71 L Ed 2d 783, 799, and opined:

"The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate fundamental fairness." *Wainwright v Sykes*, 433 US, at 97; 53 L Ed 2d 594; 97 S Ct 2497. (Stevens, J., concurring).

On this well written principle of law, Petitioner is entitled to have his writ of certiorari heard on the merits of the claims presented. US Const. Amends. VI and XIV.

This Court has stated that: "The defendant must be acquitted if the government fails to meet its burden of proof." *In re Winship*, 397 US, at 363. Therefore, by way of the due process clause, this Honorable Court should grant the writ of certiorari, reverse the unconstitutional conviction of Petitioner, and remand the case back to the State Courts of Michigan consistent with the Court's grant of certiorari relief. US Const. Amend. VI and XIV.

### CONCISE STATEMENT OF FACTS

Defendant, Germira Lamar Carter, was convicted on numerous felony counts. Initially, he was accused of kidnapping Kenny Jones, the son of lottery multi-millionaire winners April and James Bonner. The child was abducted at gun point from the home. Defendant drove away in the Bonner's Escalade, which led the police on a high speed chase ending in an accident and him being shot three times and ultimately arrested. The child was not injured during this event. (Tr II pp 11-12; p 15).

At trial, defense attorney Tank argued that Defendant did not go to the home of the Bonners to kidnap the child, but to drop off proceeds from one of Mr. Bonner's crack cocaine houses in Detroit. (Tr II pp 30-32). At that time, Defendant and Mr. Bonner engaged in a fight about the money being short. Bonner threatened Defendant at gunpoint, and Defendant fled the house by driving Bonner's car which was running in the driveway. (Tr II p 33).

James Bonner, testified that on the morning of June 17, two men with guns jumped out of bushes next to his home and ran towards him. (Tr II pp 53-54). He took off running down Jefferson screaming for help. (Tr II pp 58-60, p 62). One of the men chased him down the busy thoroughfare, through yards, and finally a woman came out of her home and handed him a phone. She had called 911 for help. (Tr II p 62). He said that while he was on the phone with the police, Defendant drove up in the Escalade with Kenny standing up in the front seat and demanded \$100,000, from him for the return of his son. (Tr p 63).

On cross examination, Defense counsel focused on undermining Bonner's versions of the chase and establishing his criminal record. He asked Bonner if he had seen any cars on Jefferson which was a busy street and Bonner said that no one stopped to help him, including two people on a bicycle. (Tr II pp 103-104). He said no one came out to help but the woman who gave him the phone and he did not know the woman. (Tr II pp 131-137). During his testimony, he admitted he had a criminal record for selling drugs once. (Tr II pp 141-151).

April Bonner testified that she was awoken on June 17, 2003, by a mask man pointing a gun at her head. (Tr II p 205). The man demanded her son, all of the phones in the house, and the keys to the Escalade. (Tr II pp 205-209). She said the man left with her son in the Escalade. (Tr II p 211).

On cross examination, defense counsel challenged her testimonial version of how the man was physically able to hold a gun, her son, and three phones. (Tr II pp 227-231).

The next day of trial, the prosecution offered Defendant a plea deal for the first time in the case, after hearing testimony from both parents. The plea deal was rejected and the prosecution, revealed that they had a recording of the 911 call and a statement from the woman who handed James Bonner the phone. (Tr III p 6). The woman had not appeared on the prosecution's witness list. Her statement had not been provided to the defense nor was the tapes of the 911 call. (Tr III pp 6-7).

Following a full day of testimony from various police officers describing the high speed chase. On cross examination, defense counsel learned that a State Police Officer and other police officers had prepared supplemental reports which were not provided to the defense. (Tr III pp 129-130, p 136). Defense counsel moved for a mistrial to protect Defendant's rights. (Tr IV p 5). Attorney Tank explained that because of the prosecution's failure to turn over evidence, the defense was compromised and his ability to represent his client was impacted. (H.Tr IV pp 7-8): (Tr IV pp 16-17). He requested a mistrial claiming that he was unable to defend his client. (Tr IV p 25). Counsel admitted that among the choices he had made, was due to the prosecutor's failure to turn over this evidence, and have Defendant waive his right and take the stand on his behalf. (Tr IV pp 22-23).

Defense counsel informed the court that, as a consequence of his decision, he did not move to suppress two separate statements Defendant gave to Detective Bowlin, and those inculpatory statements were presented to the jury. (Tr V p 23, p 41). The statements from Defendant were made while he was hospitalized from three gunshot wounds from the arresting officers, in Critical Care Unit, with his jaw broken from being punched by one of the officers. (Tr V p 97). Defendant testified that he was fading in and out of consciousness during the interviews from the medication. (Tr V p 98). Counsel argued Defendant's statements could have been suppressed as involuntary because of his medical condition. (Tr IV pp 23-24). Defendant said his cash was short and Bonner threatened him, so he jumped in the Escalade which was running in the driveway, (Tr V pp 90-90, and fled. It was only after leaving did he discover Kenny in his [child's] car seat. (Tr V p 92). He fled from the police because he was scared. (Tr V p 93). Additional facts are asserted below for argument clarity.

## ARGUMENT I

PETITIONER CARTER IS ENTITLED TO RELIEF SUCH AS A NEW TRIAL BECAUSE THE STATE OF MICHIGAN CONVICTED HIM IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STRICKLAND TEST. US CONST. AMENDS. VI AND XIV.

### Standard of Review:

Petitioner Carter asserts that a constitutional claim of ineffective assistance of counsel is a mixed question of law and facts which is normally reviewed *de novo*, which require an evidentiary hearing to fully examine the facts and the applicable law. The two prong test announced in *Strickland v Washington*, *infra*, is the focal point of this inquiry. Thus, he urges this Court to review his claim through the lens of the Sixth Amendment guarantee. US Const. Amend. VI.

### Discussion

It is well established law that criminal defendant has a constitutional right to have the effective assistance of counsel during the entire adversary process. This right extends beyond the trial and encompasses the direct appeal of right. US Const. Amends. VI and XIV; Mich Const. 1963, Art 1, § 17 and 20. Implicit in this concept of constitutional law, the Sixth Amendment also includes the right to consult with counsel during the critical pretrial stages. Counsel should be allowed wide latitude to communicate with his/her client to adequately investigate and prepare a defense. A defense attorney who fails to perform these basic tasks will result in a denial of effective assistance of counsel as the instant case will clearly demonstrate. *Mitchell v Mason*, 257 F 3d 554 (6th. Cir. 2001); See too, *Bell v Cone*, 122 S Ct 1834 (2002); *People v LeBlanc*, *infra*.

Furthermore, as a criminal defendant he had the right to be represented by competent counsel at every stage of the proceedings against him where his rights might be affected. This right was recognized in *Powell v Alabama*, 287 US 45 (1932); *Coleman v Alabama*, 399 US 1 (1970). This constitutional right is not just to be represented, but to be assisted as well, *United States v Cronic*, 466 US 648, 654 n. 22 (1984). In the case of *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984), this Court set forth a two prong test on the right to the assistance of

counsel. This right entails the effective assistance of counsel guaranteed by the Sixth Amendment. Accord, *Gideon v Wainwright*, 372 US 335; 83 S Ct 792 (1963); *Strickland v Washington*, 466 US 668; 104 S Ct 2052 (1984). Since *Strickland*, the US Supreme Court decided *Hill v Lockhart*, 474 US 52; 106 S Ct 366 (1985), and addressed the circumstances surrounding a guilty plea. Thereafter, the Court decided *Lafler v Cooper*, *supra*, as a prejudicial inquiry for a defendant rejecting a plea on the advice of his counsel. This is the subject matter before this court.

#### Background

Defendant was tried and convicted for numerous felony counts, including 'carjacking' MCL § 750.529(a). He was represented by attorney, Craig Tank. During the course of the trial, the prosecution offered a plea deal which was rejected by counsel without explaining the full benefits of the plea, or the consequences of not accepting the plea and continuing the trial on the multiplicity of the charges embedded in the indictment, including kidnapping a three year old boy. Counsel simply rejected the plea offer, (Tr III p 4). After this plea offer was rejected, the prosecution revealed that there were numerous documents and evidence which were not disclosed to the defense. cf (Tr III pp 6-7). Because of this missing evidence, defense counsel moved for a mistrial. (Tr IV p 5, pp 16-17, p 19; pp 22-23, p 25). The motion was denied by the Court when defense counsel failed to provide sufficient case law authority to support the Court's decision to grant a mistrial, after she indicated she would so grant upon the law provided by defense counsel, (Tr IV pp 24-25; p 104, p 105, p 109, p 141). Counsel failed to be prepared for his argument for a mistrial with case law such as *Brady v Maryland*, 373 US 83 (1963), or *People v Stanaway*, 446 Mich 643; 521 NW 2d 557 (1994).

This failure by defense counsel to provide the Judge with adequate case law authority for reasoning that a motion for a mistrial would be granted, was a direct result of not investigating the case prior to trial, or having case law at the ready for his support for a mistrial. Additionally, the only thing defense counsel did with a degree of certainty, was to plead his client guilty in front of the jury for 'fleeing and alluding' the police, a criminal act ipso facto. (Tr II pp 33-37); Tr V p 141). Notwithstanding his failure to fully explain the ramifications of the plea deal, or continuing the trial. (Tr III p 4). These failures reek with sufficient evidence to support a claim of ineffective assistance of

counsel under the two prong test announced in *Strickland v Washington*, 466 US 668 (1984).

Defendant's Legal Claim

Years after his jury trial where he was offered a plea deal in the midst of the trial, which was not explained to him by his trial attorney, the US Supreme Court decided both *Lafler v Cooper* and *Missouri v Frye*, *supra*. These ruling are pertinent to this MCR 6.500 motion for a retroactive analysis for its application to the instant case, purposes of the post conviction hurdle as the Wayne County Circuit Court System has allowed several cases on collateral review the benefit of those rulings. Thus, under the US Supreme Court's announcement in *Tyler v Cain*, 533 US 656, 688; 121 S Ct 2478 (2001), those rulings can be applied to the instant case, as the Supreme Court indicated:

"[A] majority of the Court recognized that it could make a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." 533 US, at 688, *id.*

\*-

As previously stated, the Wayne County Court System has applied *Lafler v Cooper* retroactively on post conviction proceedings on numerous occasions. Therefore, the ruling is applicable here. See, i.e. *People v Walker*, case number: 01-003031-01, [Judge Thomas Jackson--02-04-2016]; *People v McCauley*, case number: 07-009190-01-FC [Judge Craig Strong-- 01-10-2014], and *People v Beasley*, case number: 96-503595-01-FC [Judge Gregory Bill --07-10-2015] all of which were on post conviction proceedings after appellate finality, where the life sentences were reduced to the plea deals offered by the prosecution, is relevant here. This Court is not limited on applying *Lafler v Cooper* in a retroactive manner, as the Supreme Court explained in *Danforth v Minnesota*, 552 US 264, 282; 128 S Ct 1029, 1042 (2008).

Ineffective Assistance Claim

It is clear by its own term that, a criminal defendant claiming ineffective assistance of counsel has a heavy burden. This was addressed by the Supreme Court in *People v Carbin*, 463 Mich 590; 623 NW 2d 884 (2001). There, the Court stated that a defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a reversal under either constitution, a convicted defendant must satisfy the two-

part test articulated by the US Supreme Court in *Strickland v Washington*, *supra*. See also, *People v Pickens*, 446 Mich 298, 302; 521 NW 2d 797 (1994). in both instances the defendant must show:

First, that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment. *Strickland*, 466 US, at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted trial strategy. *Strickland*, at 690. *Id.*

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland*, at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, at 694. 'A reasonable probability is a probability' sufficient to undermine confidence in the outcome.' *Id.*

\*-

The Court went on to hold that because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW 2d 57 (1999). *cf. Carbin*, *supra*, at 599-600.

In the case *sub judice*, it is clear that trial counsel failed to convey the plea offered deal from the prosecution. (Tr III p 4). Had this plea deal been conveyed to defendant, with a full explanation of the ramifications of not accepting the plea and continuing the multiple count trial, it is not unreasonable to assume that it would not have been accepted under the circumstances of the case. This would have indeed resulted in a different outcome of the proceeding, and would have satisfied the 'prejudice' prong of the *Strickland* inquiry. 466 US, at 694. Therefore, since prejudice has been established, the first prong would become satisfied under the deficient performance inquiry. *Strickland*, 466 US, at 687. Accordingly, the two prong test announced in *Strickland*, which was officially adopted in *People v Pickens*, has been satisfied under the prejudice prong and Defendants are entitled to relief. *Accord*, MCR 6.508(D)(3)(b)(iii). *Cf. People v Pickens*, 446 Mich, at 338.

Defendants asserts that the aforementioned standards applies to a claim of ineffective assistance arising from the lack of advice whether to accept a prosecutor's plea offer to a time certain prison sentence term. *Hill v Lockhart*, *supra*. More to the point, the US Supreme Court held that defense counsel's deficient performance that resulted in the defendant foregoing a favorable plea offer may entitle him to a second opportunity to accept that offer. Indeed, in *Lafler*, the Court explained:

"If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial ... the proper exercise of discretion to remedy the constitutional injury may be to require the prosecutor to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. Cf. 132 S Ct, at 1389. Id.

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To be entitled to relief on an ineffective assistance claim in the guilty plea context, a claimant must show: (1) that counsel's representation in the plea negotiation and plea taking stage fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding results would have been different. 132 S Ct, at 1384.

As to the first prong, a defense attorney must provide advice that is sufficient to allow the defendant to 'make an informed and voluntary choice between trial and a guilty plea'. Cf. *People v Corteway*, 212 Mich App 442, 446 (1995). Although the decision to plead guilty -- first, last and always -- rests with the accused, not his/her lawyer, defense counsel has a clear legal obligation to fully inform his client of the available options and of the ramifications of selecting those options. *Smith v United States*, 348 F 3d 545, 552 (6th. Cir 2003). Counsel thus carries the paramount duty to ensure that the client's decision to accept or reject the opportunity to enter a plea agreement is as informed as possible with respect to the legal ramifications of his decision to accept or reject a plea offer. *Miller v Straub*, 299 F 3d 570, 580 (6th. Cir. 2002).

Here, the deficient performance by defense counsel, lies in his failure to convey the (10 to 20) year plea-deal offer to his clients, from the trial APA. (Tr III p 4). Defendant had no knowledge of the full 'ramifications' of not accepting this offer as opposed to continuing the trial, after it was discovered that other evidence was being made available, which weighed in favor of the prosecution. Additionally, Defendant Carter was shot (3) times while fleeing from the policy in Ms. Bonner's Escalade and her son in the vehicle. Therefore, the evidence against him was considerable and the plea offer was not 'illusory.' Thus, the non-advice on the plea-deal offer to a lower charge which would have given Defendant a lesser sentence, such as the minimum 171 months calculated by the PSIR, was *prima facie* ineffectiveness under both *Missouri v Frye*, or *Lafler v Cooper*, *supra*. Obviously, Defendant was prejudiced by the failure of Attorney Tank's deficient performance.

*Lafler v Cooper*, 132 S Ct, at 1384. In the plea context a defendant must show that:

"... but for the ineffectiveness of counsel there is a reasonable probability that the plea offer would have been presented to the court; that the defendant would have accepted the plea and the prosecutor would have not have withdrawn it in light of intervening circumstances, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 132 S Ct, at 1385.

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The requirements of *Lafler v Cooper* are met here. The plea offer was communicated to defense counsel, (Tr III p 4). The terms of the plea offer was communicated to defense counsel. Counsel, however, instead of informing his client of the benefit of the plea offer, must have presumed that he would win the case after a mistrial was granted. The offer was not so unreasonable that Defendant would not have accepted it. Consequently, but for counsel's failure to inform his client on the benefit of the offer, or the ramifications of rejecting the offer, he would have accepted that offer. This offer would have allowed Defendant to serve his entire maximum term of (20) years and would have allowed him to suffer a less onerous conviction for a lesser offense, rather than for a 'kidnapping/robbery charge.' Prejudice is established and Defendant must, as a matter of fundamental due process protection, be given the opportunity to accept the plea offered by the prosecution. (Tr III p 4).

Defendant maintained his actual innocence of the fifteen felony charges levied against him. This would not preclude him from accepting a plea offer to a reduced charge with a reduced term of imprisonment under the circumstances. That is, the child was found in the vehicle and a weapon was also found when he was arrested. The US Supreme Court indicated that a criminal defendant's guilty plea does not prohibit a claim of 'actual innocence' depending on the circumstances of the case. See for example, *Bousley v United States*, 523 US 614, 624; 118 S Ct 1604 (1998). Therefore, Defendant's claim of innocence of the robbery/kidnapping charges would not preclude this Court from addressing the plea offer claim on the merit. Defendant is entitled to relief in this post conviction proceeding. cf MCR 6.508(D)(3)(b)(iii), Const. 1963, Art 1, § 17; US Const. Amends. VI and XIV.

## ARGUMENT II

PETITIONER CARTER IS ENTITLED TO A NEW TRIAL WHERE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO JUSTIFY THE CONVICTION OF CARJACKING WHERE THE ELEMENTS OF THAT CRIME WERE NOT PROVEN BEYOND A REASONABLE DOUBT REQUIRED BY THE DUE PROCESS CLAUSE. US CONST. AMEND. XIV.

### Standard of Review:

Petitioner Carter asserts that a claim of insufficiency of the evidence to convict under the due process clause, requires a de novo inquiry. In a criminal prosecution, the prosecution must prove each and every element of the crime charged beyond a reasonable doubt. This Court said so when deciding *In re Winship*, 397 US 358, 362 (1970). In deciding that case, this Court opined:

"... Under the due process clause, the prosecution is required to prove beyond a reasonable doubt every element of the crime with which the Defendant was charged. Due process protects a criminal defendant from being convicted of a crime without proof beyond a reasonable doubt as to each and every element of the crime." Cf. 397 US, at 362-363. Id.

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### Petitioner's Legal Posture and Points of Law

In this certiorari proceeding, the State of Michigan never proved, beyond a reasonable doubt that Petitioner "carjacked" the Cadillac Escalade when he, allegedly, abducted the son of April and James Bonner, under state law, MCL § 750.529a. Indeed, this statute subscribes that: [MCL § 750.529a] ... A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or any term of years.

In prosecuting "carjacking" the prosecutor must prove: (1) that defendant took a motor vehicle from a person; (2) defendant did so in the presence of that person, or a passenger, or any other person in lawful possession of the vehicle, and (3) defendant did so by force or violence, or by putting another in fear. *People v Green*, 288 Mich App 684;580 NW2d 444 (2010); *People v Davenport*, 230 Mich App 57; 583 NW2d 919 (1998); *People v Davis*, 250 Mich App 589; 549 NW 2d

118 (2002). Here, there was insufficient evidence to even suggest an aiding and abetting theory of carjacking. *cf. Brown v Palmer*, *infra*.

#### Discussion

In our system of justice, the due process clause, which is applicable to the states by way of the Fourteenth Amendment, guarantees fundamental fairness during the entirety of the trial. The US Supreme Court envisioned the clause as requiring proof of each and every element of the crime beyond a reasonable doubt. *Accord, Jackson v Virginia*, 443 US 307, 319 (1979). This clause acts as a safety valve throughout the trial for both parties. The Constitution guarantees the right to a fair trial. US Const. Amend. XIV. *cf. Chambers v Mississippi*, 410 US 284; 93 S Ct 1038 (1973).

#### The Trial Courts' Evidence

At trial, April Bonner testified that she was awoken by a man who put a gun to her face and demanded all the phones in the house. He left with the phones, her son and her car keys. (Tr I pp 207-208). She testified that she saw the man walk to her Escalade which was parked in the driveway and slammed her door, (Tr I p 212, pp 244-248). She found another phone and called 911 (Tr I p 215). There is nothing on this record to suggest a 'carjacking.' In fact, defense counsel told the jury in his opening statement that his client was only guilty of fleeing and alluding the police. (Tr II pp 34-37; Tr V p 141). Defendant testified that he did not intend to rob, carjack or kidnap. (Tr V p 103). There is no further evidence to support a felony carjacking theory by statutory mandate. This claim was not addressed on direct appeal and it is ripe for adjudication on the merit.

Defendant urges this Court to rule that the failure to present sufficient evidence on the carjacking count must result in dismissal on that count, under the review standard announced in both *Winship*, and the case of *Jackson v Virginia*, *supra*.

Michigan adopted the decision of *Jackson v Virginia*, *supra*, in *People v Hampton*, 407 Mich 354, 366; 285 NW 2d 384 (1979), and ruled that under the *Winship/Jackson* inquiry *Hampton* was entitled to a new trial as there was no proof as to him being the shooter. The Michigan Supreme Court, relying on the decision of *In re Winship*, reversed the conviction and prohibited retrial of *Hampton*, on the notion that there was insufficient evidence to retry the case ordering discharged.

Application of the De Novo Review

The evidence in this case, viewed in a light most favorable to the prosecution was an insufficient basis upon which to convict Defendant Carter for the statutory crime of 'carjacking' where no evidence supported the fact that, Ms. Bonner was within the reach of her vehicle, which was addressed in *People v Raper*, 222 Mich. App 475; 563 NW 2d 709 (1997). She was not within the presence of Defendant when he drove away her vehicle as required by the ruling in *People v Green*, *supra*. She was not physically separated from her vehicle. She was not in the vehicle when it was taken as ruled by the Supreme Court in *People v Davis*, 468 Mich 77; 658 NW 2d 800 (2003). Therefore, the crime of 'carjacking' viewed under the denovo inquiry, as articulated in *People v Erickson*, 288 Mich App, at 195, and viewed through the lens of the due process clause, the evidence on each and every element was not established, beyond a reasonable doubt to sustain the guilty verdict of this charge. Thus, like both *People v Tanner*, 469 Mich 437, habeas petition granted, *Tanner v Yukins*, 776 F 3d 434 (6th. Cir. 2015), and *People v Newman*, habeas petition granted, *Newman v Metrish*, 543 F 3d 793 (6th. Cir. 2008), the evidence in this case was insufficient to justify the conviction on the 'carjacking' theory submitted by the prosecution.

Accordingly, under the ruling set out in *Winship*, *supra*, the carjacking conviction shouldnot be allowed to stand in light of the due process mandate that each and every element of the crime be proven beyond a reasonable doubt. Const. 1963, Art 1, § 17.

The required term of, *beyond a reasonable doubt*, is missing form the elements of 'carjacking' in this case. Beyond a reasonable doubt means-beyond a reasonable doubt. Not a mere speculation. Additionally, there was no testimony that the victim was present in the vehicle when it was taken. There was no testimony that the victim was 'physically removed' from the vehicle, and therefore, the prosecution failed to sustain its burden on this charge. The 'carjacking' theory was simply hidden inside the other felonies to confuse the jurors. Furthermore, Defendant was not committing a larceny from a motor vehicle which is an element under MCL § 750.529(a). Thus, the beyond a reasonable doubt, mandated by *Winship*, or the *Jackson* ruling was not satisfied in this prosecution for 'carjacking.' As such, relief is warranted. MCR 6.508(D)(3)(b)(iii); US Const. Amend. XIV.

## CONCLUSION

WHEREFORE, and for all the foregoing reasons as set forth above, Petitioner Carter prays that this Honorable Court will grant his Petition for Writ of Certiorari and reverse the State Courts of Michigan and order a new trial on the claim of ineffective assistance of counsel under the Sixth Amendment, or on the claim of insufficiency of the evidence under the due process clause of the Fourteenth Amendment. Or, alternatively, issue an order to show cause to the State of Michigan why Certiorari should not be granted in this case.

Respectfully submitted,



Dated: December 10, 2019

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