No. 19-7431

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON J. LOFLAND -- PETITIONER

vs.

CONNIE HORTON -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

Brandon Lofland #790707
Petitioner In Pro Per
Chippewa Correctional Facility
4269 West M-80
Kincheloe, MI 49784

## QUESTIONS PRESENTED

1. Did the Court of Appeals decide an important federal question -- whether a "mere modicum" of evidence is sufficient to sustain the conviction -- in a way that conflicts with decisions of this Court by finding that the evidence in this case (which was a "mere modicum") was sufficient to sustain the conviction, where this Court held in Jackson v. Virginia, 443 U.S. 307 (1979), that a "mere modicum" of evidence is not sufficient to sustain a conviction?

2. Does a state court's invocation of a state procedural rule to deny a federal constitutional claim bar habeas relief on that claim where the state court based its invocation of the state procedural rule solely on a full adjudication of the merits of the federal constitutional claim and a finding that the federal constitutional claim lacked merit?

3. If such a procedural rule does bar the habeas claim, is it debatable among reasonable jurists whether Petitioner has satisfied the miscarriage of justice exception to the procedural default by showing that the victim's daughter told police that a third party threatened to kill the victim, along with the weak evidence of Petitioner's guilt?

4. Was Petitioner's constitutional right to a jury trial violated by the trial court's admission of the testimony of a witness identifying Petitioner in a photograph, where the witness had not seen Petitioner for months and where Petitioner's appearance at the time the photograph was taken had not changed

and thus the jury could have made any decision regarding identification itself?

5. Was trial counsel constitutionally ineffective for failing to present to the jury the third party's threat to kill the murder victim in this case?

## LIST OF PARTIES

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

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The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The opinion of the highest state court to review the merits, the Michigan Court of Appeals, appears at Appendix C to the petition and is unpublished.

The decision of the highest state court denying discretionary review, the Michigan Supreme Court, appears at Appendix D to the petition and is published at People v. Lofland, 898 N.W.2d 591.

## JURISDICTION

The United States Court of Appeals denied Petitioner's Motion for a Certificate of Appealability under 28 U.S.C. § 2253(c)(1)(A) on October 30, 2019. Petitioner did not file a timely petition for rehearing.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1, provides:

> 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.

U.S. Constitution, Amendment 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.

## STATEMENT OF THE CASE

On July 31, 2015, Petitioner Brandon Lofland was found guilty by a Michigan jury of felony murder, carjacking, possession of a firearm by a felon, and the use of a firearm during the commission of a felony. He was sentenced for these convictions to imprisonment for life without parole, 25 to 30 years, 25 to 30 years, 3 to 5 years, and 2 years, respectively. He is currently serving those sentences at Chippewa Correctional Facility, whose warden is Respondent Connie Horton.

Petitioner's convictions arise from events that occurred on the night of September 13, 2014, namely, the carjacking of Kevin Foy and the attempted carjacking and fatal shooting of Quinton Brown. The highest state court to review the merits found the facts as follows. See Appendix C (People v. Lofland, Mich. Ct. App. No. 329186; 2017 Mich. App. LEXIS 89; 2017 WL 252242, at *1 (Jan. 19, 2017)(paragraph breaks added to aid readability)).

> The prosecutor's theory at trial was that between 9:00 and 9:45 p.m., Foy was sitting in the passenger seat of the running Charger when defendant ordered him out of the vehicle at gunpoint, and then drove away in the car. The Charger, which had a pushbutton starter, could be driven without the key fob if it was already running, but it could not be restarted once it was stopped. The prosecution presented video evidence from a gas station showing the stolen Charger pull up to a gas pump after 10:00 p.m., and the driver ultimately abandoning the vehicle when he could not restart it after purchasing gas.
>
> Petitioner's former girlfriend, Nivra Bracey, identified defendant as the driver in still photographs obtained from the video.
>
> The video showed defendant walking away from the gas station in the direction where Brown was later

> found. The prosecution theorized that defendant walked from the gas station in search of another vehicle, encountered Brown sitting in his Cadillac, and then shot Brown, planning to take his vehicle. Brown, who was armed, managed to shoot defendant.
>
> At approximately 11:00 p.m., defendant called Bracey, informed her that he had been shot in the neck, and asked her to call 911; defendant informed Bracey of his location, but then later gave her a different location. Ultimately, at 11:18 p.m., police officers responded to a gas station half a mile away from where Brown had been shot, and found defendant with gunshot wounds to his throat and cheek. The defense theory at trial was misidentification.

The Michigan Court of Appeals affirmed the convictions and sentences on the merits (Appendix C, Lofland, supra), and the Michigan Supreme Court denied discretionary review (Appendix D, People v. Lofland, 898 N.W.2d 591 (Mich. 2017)).

Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising three claims (1) there was insufficient evidence that he was the perpetrator, (2) the trial court violated his right to a jury trial by allowing a witness to identify him from still photographs taken from a surveillance video, and (3) trial counsel was ineffective for failing to present exculpatory evidence at trial. On May 24, 2019, the district court denied the petition, rejecting the second claim as procedurally defaulted and the others on the merits. Appendix B (Lofland v. Horton, No. 2:18-cv-13006, 2019 WL 2247391 (E.D. Mich. 2019)).

Petitioner filed a timely notice of appeal and a motion for a certificate of appealability (COA), arguing that the same claims and the procedural issue were debatable among reasonable

jurists. On October 30, 2019, the Court of Appeals denied a COA. Appendix A (Lofland v. Horton, No. 19-1692 (6th Cir. 2019)).

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

## STANDARD OF REVIEW

A certificate of appealability (COA) may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, the jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 478 (2000).

For example, a COA should be granted if other circuits have decided the issue differently, if the issue has been identified as open or unresolved, Lynce v. Mathis, 519 U.S. 433, 436 (1997), Lozada v. Deeds, 498 U.S. 430, 431-432 (1991), if "a court could resolve the issue in a different manner," Barefoot v. Estelle, 463 U.S. 880, 893-894 & n.4 (1983), if the issue is "adequate to deserve encouragement to proceed further," id., or if the issue is not "squarely foreclosed by statute, rule or authoritative court decision," id. See Miller-El v. Cockrell, 537 U.S. 322,

336 (2003)(holding that 28 U.S.C. § 2253(c)(2) "codified [the] standard announced in Barefoot).

"The COA inquiry, [this Court] ha[s] emphasized, is not coextensive with a merits analysis." Buck v. Davis, 137 S.Ct. 759, 773 (2017). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (quoting Miller-El, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claim." Buck, 137 S.Ct. at 773 (quoting Miller-El, 537 U.S. at 336).

"That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." Buck, 137 S.Ct. at 774. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Buck, at 774 (quoting Miller-El, at 338). See also Tennard v. Dretke, 542 U.S. 274, 282 (2004)(reversing the Fifth Circuit's denial of a COA because that denial was merely "paying lip service to the principles guiding issuance of a COA.").

"A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. The Court considers the following factors in deciding whether to grant

certiorari. Id.

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (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;
>
> (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.

## REASONS FOR GRANTING THE PETITION

### I. THE EVIDENCE OF GUILT WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

The Court should grant certiorari on this claim because "a United States court of appeals . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). The Court of Appeals (and the district court and state courts) ignored this Court's clear holding in Jackson v. Virginia, 443 U.S. 307 (1979), that a "mere modicum" of evidence is insufficient to sustain a conviction, as shown below. Id., at 320.

"[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.

As stated above, a "mere modicum" of evidence is insufficient. Id., at 320. A "mere modicum" of evidence is evidence that makes a defendant's guilt only "slightly more probable than it would be without the evidence." Id.

In Jackson, this Court started from the rule established in In re Winship, 397 U.S. 358 (1970), that "the 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, 443 U.S. at 315 (quoting Winship, 397 U.S. at 364). "The Winship doctrine . . . require[s] that the

factfinder will rationally apply that standard to the facts in evidence." Jackson, 443 U.S. at 318. "[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.

As a result, in Jackson, this Court rejected the "no evidence" rule of Thompson v. Louisville, 362 U.S. 199 (1960). Under the "no evidence" rule, a criminal conviction would survive constitutional scrutiny as long as there was "some" or a "mere modicum" of evidence to support it. Jackson, 443 U.S. at 320. The Court explained that a "mere modicum" of evidence is "[a]ny evidence that is relevant -- that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401 . . . . But it could not be seriously argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." Jackson, 443 U.S. at 320 (quotation marks and citations omitted).

As the Michigan Supreme Court has correctly explained in adopting the Jackson standard, "the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt." People v. Hampton, 407 Mich. 354, 368, 285 N.W.2d 284 (Mich. 1979).

Thus, this Court concluded in Jackson that the "'no

evidence' rule is simply inadequate to protect against misapplication of the constitutional standard of reasonable doubt," even though "[a] mere modicum of evidence may satisfy the 'no evidence' standard." Id.

This Court later adopted the "no evidence" rule as providing sufficient protection to prisoners facing discipline because such a disciplinary decision need only be supported by a preponderance of evidence, rather that proof beyond a reasonable doubt, due to the lesser liberty interest at stake (good time credits) and the greater governmental interests at stake (security and order of the prison). Superintendent v. Hill, 472 U.S. 445 (1985). But, even so, courts reviewing prison disciplinary decisions after Hill have consistently held that "'some evidence' does not mean any evidence at all that would tend, however slightly, to make an inmate's guilt more probable." Padilla ex rel Newman v. Rumsfeld, 243 F.Supp.2d 42, 55 (S.D.N.Y. 2003)(Mukasey, J.)(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).

Similarly, this Court has held that, although the standard of proof required in federal civil cases is only a preponderance of evidence, rather than beyond a reasonable doubt, "[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." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Therefore, on a motion for summary judgment, "[t]he judge's

inquiry . . . 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." Id. (citing Jackson, 443 U.S. at 318-319). Obviously, however, more and/or stronger evidence is required for a reasonable jury to find guilt beyond a reasonable doubt than for a reasonable jury to find for a plaintiff by a preponderance of the evidence.

Thus, although the evidence must be viewed "in the light most favorable to the prosecution" under Jackson, 443 U.S. at 319, that does not mean that a court reviewing a criminal trial for the sufficiency of the evidence must credit the testimony of every prosecution witness. For even in civil cases, where the standard of proof is only a preponderance of evidence, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007)("Respondent's version of events is so utterly discredited [by the videotape] that no reasonably jury could have believed him."); Coble v. City of White House, 634 F.3d 865, 870 (6th Cir. 2011)(holding that factual allegations which were blatantly contradicted by an audio recording were not to be viewed in the non-movant's favor).

Compare Goff v. Burton, 91 F.3d 1185, 1192 (8th Cir. 1996)(holding that there was insufficient evidence to sustain a prison disciplinary decision, even though it was supported by a witness's testimony, because the 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.").

But the Michigan Supreme Court has held, "contrary to," 28 U.S.C. § 2254(d)(1), these holdings of this Court, that "it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." People v. Mehall, 454 Mich 1, 6, 557 N.W.2d 110 (1997)(emphasis added).

Given this understanding of the governing legal principles, it is debatable among reasonable jurists whether (1) there is sufficient evidence to sustain the jury's finding that Petitioner was the person who committed the offenses and (2) the Michigan court's finding that there is sufficient evidence is "contrary to" or involves an "unreasonable application of" clearly-established Supreme Court precedent under 28 U.S.C. § 2254. The Court of Appeals, district court, and state court all essentially said the same thing regarding this claim. Petitioner will focus on the district court's decision because the question is whether that decision is debatable among reasonable jurists and thus whether Petitioner is entitled to a certificate of appealability on this claim.

First, the district court found that "[t]he clothing that

petitioner wore shortly after the carjackings matched the [victims'] description of the clothing of the suspect." Appendix B, at *13. This is debatable among reasonable jurists because Mr. Foy actually testified that the carjacker "was wearing a gray and black hooded jacket" and dark pants, TT 7/29/15, pp.25, 80, and Petitioner was wearing a "black jacket and gray hooded sweatshirt" and light blue jeans, id., at 176; Appendix C, at *2.

The district court also said, "Petitioner was positively identified as this man [who exited Mr. Foy's red Charger at the gas station] by Ms. Bracey." Appendix B, at *13. But Ms. Bracey did not "positively" identify Petitioner as that man. Rather, when shown the still photographs of the surveillance footage at trial, she said that she "can't actually see the face of Mr. Lofland clearly" because it was "blurry" and because she "hadn't seen Mr. Lofland in months[.]" TT 7/29/15, pp.56, 128.

The district court said, "Mr. Brown told the police that he shot the suspect. A bullet fragment recovered from petitioner's neck at the hospital was the same caliber bullet as would have been fired from Mr. Brown's weapon." Appendix B, at *13-14. But the evidence clearly showed that only one round had been fired from Brown's gun, and Petitioner had two bullet wounds. TT 7/29/15, pp.80, 95, 167. The Michigan Court of Appeals' speculation that this mismatch could be explained by one bullet causing two wounds, Appendix C, at *2, n.1, is simply insufficient for a rational jury to conclude, beyond a reasonable doubt, that Petitioner was the person who shot Mr. Brown. Shootings in Detroit are a common occurrence. So, just because

there was a shoot-out involving Mr. Brown and his assailant that night and that Petitioner was found shot a half mile away, is no more than a "mere modicum" of evidence of guilt, and "it could not be seriously argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." Jackson, 443 U.S. at 320.

Therefore, it is at least debatable among reasonable jurists whether the evidence of Petitioner's identity as the shooter is sufficient for a rational juror to find him guilty beyond a reasonable doubt, and whether the state court's adjudication of this is "contrary to" or involves an "unreasonable application of" clearly-established Supreme Court precedent.

The only other evidence that the district court cited was the evidence that Petitioner called Bracey and asked her to call the police and made inconsistent statements about his location. Appendix B, at *14. Reasonable jurists could debate whether this is more than a "mere modicum" of evidence that Petitioner committed the charged offenses, and therefore whether this evidence could rationally support a finding of guilt beyond a reasonable doubt, because a person who is shot in the face can reasonably be expected to be disoriented and confused and unable to call the police or pinpoint his location while still being able to press a single button in his phone's contact or speed-dial list to call a trusted friend for help.

In summary, the Court of Appeals' (and district court's) ruling that the evidence is sufficient to sustain the conviction contravenes this Court's holding in Jackson that a "mere modicum"

of evidence is insufficient to sustain a conviction, and the Court of Appeals' adjudication of this claim contravenes this Court's holdings in Buck v. Davis, 137 S.Ct. 759, 773 (2017) and Miller-El, 537 U.S. at 327, that the inquiry at the COA stage is only whether the district court's ruling is debatable among reasonable jurists, not a full merits determination like the Court of Appeals conducted in this case. And the district court's ruling in this case is, at the very least, debatable among reasonable jurists for the reasons set forth above.

Therefore, certiorari should be granted.

II. THE ADMISSION OF TESTIMONY IDENTIFYING PETITIONER IN A PHOTOGRAPH VIOLATED PETITIONER'S RIGHT TO A JURY TRIAL, AND THIS CLAIM IS NOT PROCEDURALLY DEFAULTED BECAUSE THE STATE COURT'S REJECTION OF THE CLAIM IS BASED SOLELY ON ITS ADJUDICATION OF THE MERITS OF THE FEDERAL CONSTITUTIONAL CLAIM.

The Court should grant certiorari on this claim because "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 in a way that conflicts with relevant decisions of this Court[.]" Supreme Court Rule 10(c). That question is whether a state court's invocation of a state procedural rule to deny a federal claim bars habeas relief on that claim where the state court's invocation of that rule depends solely on the state court's antecedent ruling on the merits of the federal constitutional question. The Sixth Circuit has held that such a procedural bar does bar habeas relief. Appendix A, pp.4-5. But the reasoning of this Court's precedent is to the contrary, although some enigmatic and unexplained dicta of this Court has confused the issue and resulted in illogical decisions like the lower courts' decisions in this case.

A. The Claim is Not Procedurally Defaulted Because the State Court's Rejection of the Claim is Based Solely on its Ruling on the Merits of the Federal Constitutional Claim.

"A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Walker v. Martin, 542 U.S.

307, 315 (2011).

In Wainwright v. Sykes, 433 U.S. 72 (1977), this Court adopted the independent-state-law-grounds doctrine from its direct-review jurisprudence. On direct review, this Court lacks jurisdiction to review a federal claim where the state-court judgment would remain standing on an independent state-law ground regardless of the Court's ruling on the federal question. This is because the Constitution empowers this Court to hear only cases and controversies, not to issue advisory opinions. The Court reasoned that a state prisoner should not be allowed to circumvent the Court's jurisdictional limitation on direct review by filing a habeas corpus petition under 28 U.S.C. § 2254. Thus, the Court adopted the independent-state-law doctrine in federal habeas corpus proceedings.

In Harris v. Reed, 489 U.S. 255 (1989), the Court held that federal habeas courts are to apply the "plain statement rule" of Michigan v. Long, 463 U.S. 1032 (1983), to determine whether a state court decision is based on a state law ground, and any ambiguity as to whether the state court's holding was based on or intertwined with federal law requires the application of the Long rule. By the same token, the Court held that a state court "need not fear reaching the merits of a federal claim in an alternative holding." Harris, 489 U.S. at 264, n.10. "By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. Thus, by applying this

doctrine to habeas cases, Sykes curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision." Harris, supra (emphasis added).

Finally, in Coleman v. Thompson, 501 U.S. 722 (1991), this Court held that "[a] predicate to the application of the Harris presumption is that the decision of the last state court in which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." Coleman, 501 U.S. at 735.

This Court in Coleman also made an enigmatic statement that lies at the heart of the issue in this case. The Court acknowledged that it had previously held that Oklahoma's review for "fundamental trial error" before applying state's procedural default rule "was not independent of federal law so as to bar direct review because the State had made application of the procedural bar depend on an antecedent ruling on federal law." Coleman, 501 U.S. at 741 (citing Ake v. Oklahoma, 470 U.S. 68 (1985))(quotation marks and alterations omitted). The Court then, inexplicably, distinguished Ake, saying, "Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if Ake applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule." Id.

The Sixth Circuit has viewed this language in Coleman as indicating that this Court "does not find the mere reservation of

discretion to review for plain error in exceptional circumstances sufficient to constitute an application of federal law." Scott v. Mitchell, 209 F.3d 854, 868 (6th Cir. 2000). Petitioner does not dispute this interpretation but argues -- contrary to the lower courts' holdings here -- that it has no application to the instant case.

In the instant case, the district court and the Court of Appeals applied these principles to hold that the state court's rejection of Petitioner's federal constitutional claim on state procedural grounds constituted an adequate and independent state law ground to deny federal habeas review. However, in doing so, the lower courts lost sight of the rationale of the Sykes rule and simply failed to come to terms with the indisputable fact that the state court's ruling -- however framed -- was based primarily on federal law and did not rely on an independent state procedural law ground as an "alternative" or "separate basis" for its decision on the merits but, rather, relied solely on its decision on the federal-law merits of the claim to "apply" the state procedural rule. In other words, the state court's application of the state procedural rule was superfluous because the state court fully adjudicated the merits of the federal constitutional claim and then held that because the federal constitutional claim lacked merit, the state procedural rule barred relief. By absolutely no measure could this be considered a state-law ground that is "independent of the federal question[.]" Walker, 542 U.S. at 315. Therefore, the state court's ruling should not bar federal habeas relief.

Specifically, the Michigan Court of Appeals applied Michigan's "plain-error" standard of review to Petitioner's federal constitutional claim because Petitioner failed to follow the state's contemporaneous-objection rule by failing to object to the error at trial. Appendix C, at *3. The plain-error standard has four elements: (1) that the error occurred, (2) that the error was clear or obvious, (3) that the error resulted in prejudice, and (4) that the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. People v. Carines, 460 Mich. 750, 763, 597 N.W.2d 130 (1999). In this case, the state court relied solely on the first element to find that Petitioner was not entitled to relief, that is, solely on its finding that there was no merit to the federal constitutional claim. Thus, the state court's ruling relied solely on its adjudication of the federal constitutional question. Such a ruling cannot reasonably be characterized as "independent of the federal question[.]" Walker, 542 U.S. at 315. Therefore, it should not bar habeas relief.

The Court of Appeals' and district court's rulings to the contrary rely on inapposite precedent. None of the cases cited by the Sixth Circuit found the existence of an independent state procedural rule in circumstances similar to those in the instant case, i.e., where the state court based its state procedural ruling on a full merits determination of the federal constitutional question. Therefore, at the very least, the

district court's procedural ruling is debatable among reasonable jurists and a COA should issue.

* * *

The district court also rejected Petitioner's argument that, assuming there is an independent and adequate state procedural rule barring habeas relief, he can show actual innocence to overcome the rule. Appendix B, at *20-21. The district court's ruling on this procedural argument is also debatable among reasonable jurists.

Petitioner's actual innocence claim is based on three police reports written by different police officers, two of which recorded statements by Shakitta Calloway, the daughter of the fatal shooting victim, Mr. Brown, that she heard her stepfather, Carlton Shivers, threaten to kill Mr. Brown ("'I'm gonna kill that nigga!' 'I'm gonna shoot that nigga!'"). The third police report recorded a statement by Dorothy Williams, Mr. Brown's sister, that Shakitta told her the same thing. Id.

The district court rejected this claim, first, because "Ms. Calloway's statement to the police is hearsay and is thus presumptively unreliable for supporting an actual innocence claim," it is unsworn, and "Mr. Brown knew Mr. Shivers and told the police that he was not his assailant[.]" Appendix B, at *20-21 (citing Bell v. Howes, 701 F. App'x 408, 412 (6th Cir. 2017) and Herrera v. Collins, 506 U.S. 390, 417 (1993)). The Court of Appeals cited only the final one of these reasons -- that Mr. Brown told police his assailant was Shivers -- to hold that

Petitioner's actual-innocence claim is beyond reasonable debate. Appendix A, p.5. The district court's ruling is debatable among reasonable jurists for the following reasons.

First, it is arguable that Calloway's statement was admissible under several exceptions to the hearsay rule. See, e.g., People v. Barrera, 451 Mich. 261, 271, 547 N.W.2d 280 (1996)(holding that the statement-against-interest exception of Mich. Rule Evid. 804(b)(3) "encompasses disserving statements by a declarant that would have probative value in a trial against the declarant."); People v. McCoy, 258 Mich. App. 1, 14 (2003)(approving admission of a statement of future intent under Mich. Rule Evid. 803(3)).

Further, the statements bear several indicia of reliability and all of reliability indicia listed in Barrera as indicating admissibility under the statement-against-interest exception to the hearsay rule, i.e., they were made voluntarily, contemporaneously with the events referenced, to family, and spontaneously without prompting by the listener. Barrera 451 Mich. at 274. At the very least, it is debatable among reasonable jurists whether the statements were admissible hearsay under Michigan law.

Second, Bell v. Howes, 701 F. App'x 408, 412 (6th Cir. 2017), cited by the district court in support of its ruling, is an unpublished decision and therefore not binding. Thus, it is not an "authoritative" decision that "squarely foreclose[s]" Petitioner's argument. Barefoot, 463 U.S. at 893-894 & n.4. It therefore is not beyond reasonable debate whether the holding in

Bell controls on this issue.

Third, Herrera v. Collins, 506 U.S. 390, 417 (1993), also cited by the district court in support of its decision, does not actually support the district court's decision. Contrary to the manner in which the district court cited the case, Herrera does not say that unsworn statements cannot form the basis of an actual-innocence claim, and it does not otherwise "squarely foreclose[]" Petitioner's actual-innocence claim. In fact, in some ways Herrera actually supports Petitioner's claim. In Herrera, this Court rejected an actual-innocence claim that was based on affidavits made eight years after trial, which implicated a person who died after trial as the perpetrator of the crime. This Court found these affidavits insufficient to support the actual-innocence claim because (1) affidavits, though sworn, are obtained without cross-examination, (2) the particular affidavits consisted of hearsay, (3) criminal defendants often abuse new trial motions with false affidavits, (4) these affidavits were not made until eight years after trial and until after the death of the person they implicated as the perpetrator of the crime and they contained no explanation as to why an innocent man pled guilty to the murder, (5) they contained inconsistencies and failed to provide a consistent version of events, and (6) they conflicted with strong evidence of guilt. Herrera, 506 U.S. at 417-418.

The only one of the factors undermining the actual-innocence claim in Herrera that applies in the instant case is the first one, i.e., the statements were obtained without cross-

examination. The statements were arguably not hearsay, as shown above, they were not part of a new-trial motion but were known to the defense at the time of trial, they were statements made before trial to police officers (not after trial to the defendant), they did not contain inconsistencies, and the evidence of guilt was not overwhelming, as shown in Issue I, above. Therefore, Herrera simply does not support the district court's rejection of Petitioner's actual-innocence claim. Even if it does "support" the district court's decision, it certainly does not "squarely foreclose[]" Petitioner's actual-innocence claim. Therefore, Petitioner's claim is debatable among reasonable jurists. Barefoot, supra.

Finally, although it is true that Mr. Brown told police that Shivers was not the shooter, that could simply have been because the shooting occurred in the dark of night, preventing Brown from clearly seeing the shooter, and/or because Brown's memory, comprehension, or consciousness was impaired by his fatal gunshot wounds. Thus, this disclaimer does not remove Petitioner's actual-innocence claim from the realm of the debatable. Accordingly, a COA should issue on Petitioner's actual-innocence claim.

B. The admission of testimony identifying Petitioner as the person in photographs violated Petitioner's right to a jury trial.

The district court did not address the merits of this claim. Nevertheless, to obtain a COA, Petitioner must show "that jurists of reason would find it debatable whether the petition states a

valid claim of the denial of a constitutional right[.]" Slack, 529 U.S. at 478.

"[T]he Sixth Amendment protects the defendant's right to a trial by an impartial jury, which includes 'as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty."'" Barker v. Yukins, 199 F.3d 867, 874 (6th Cir. 1999)(quoting Sullivan v. Louisiana, 508 U.S. 275, 277 (1993)). "This right is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury." Barker, 199 F.3d at 874 (citing United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978)).

Because of these principles, witnesses are not allowed to testify that they person in a photograph is the defendant because the jury is capable of making that determination itself, unless (1) the witness had substantial and sustained contact with the person in the photograph or (2) the defendant's appearance before the jury is different from the photograph and the witness is familiar with the defendant as he appears in the photograph. United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993).

The state trial court allowed Petitioner's ex-girlfriend, Nivra Bracey, to identify Petitioner in still photographs taken from surveillance footage at the gas station where the stolen red Charger was abandoned. TT 7/29/15, pp.127-131. The state court denied this claim because "Bracey was substantially familiar with defendant" since "she had known defendant for 2-1/2 years, had been in a relationship with him, and had seen him on a consistent

basis" and thus "was in a better position than the jury to determine whether defendant was the person depicted in the still photograph." Appendix C. This adjudication was "based on an unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), because Ms. Bracey testified that it had "been awhile" since she had seen Petitioner, TT 7/29/15, pp.122-124, that the photographs were not clear, that they were taken from a distance, and that they did not show the person's face clearly, id., at 127, and there was no evidence that Petitioner's appearance at trial differed from the night of the shooting.

In sum, there is no "reason to believe that the witness is more likely to correctly identify the person than is the jury." LaPierre, 998 F.2d at 1465.

Therefore, reasonable jurists could debate this claim. Accordingly a COA should issue, and this Court should grant certiorari.

III. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO PRESENT THE STATEMENT OF A THIRD PARTY THAT THE THIRD PARTY, NOT PETITIONER, WAS GOING TO KILL ONE OF THE VICTIMS IN THIS CASE.

The Court should grant certiorari on this claim because "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure, as to call for an exercise of this Court's supervisory power[.]" Supreme Court Rule 10(a). Specifically, the Court of Appeals in this case -- as this Court said of the Court of Appeals in Tennard v. Dretke, 542 U.S. 274, 282 (2004) -- merely "pa[id] lip service to the principles guiding issuance of a COA" in denying a COA, even though it is clear that reasonable jurists could debate the district court's ruling. Id. See also Buck v. Davis, 137 S.Ct. 759 (2017); Miller-El v. Cockrell, 537 U.S. 322 (2003).

Certiorari should also be granted because "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). The district court held that AEDPA's standard of review in 28 U.S.C. § 2254(d) applies to Strickland's prejudice prong even where the state court did not adjudicate that prong. Appendix B, at *24-27. Specifically, the district court relied on dicta in Harrington v. Richter, 562 U.S. 86, 98 (2011), that suggests that AEDPA deference applies to the prejudice prong of an ineffective-assistance claim even if the state court did not address that prong. But this Court clearly

held in Rompilla v. Beard, 545 U.S. 374 (2005), that AEDPA deference does not apply in those circumstances. The Court should grant certiorari to resolve the conflict in the lower courts on this issue.

Counsel is constitutionally ineffective where (1) his performance is objectively unreasonable, and (2) but for his unreasonable performance, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

The state court held that counsel was not unreasonable for failing to present the statements of Mr. Shivers, discussed above, threatening to kill Mr. Brown, because (1) Brown told police Shivers was not the shooter, (2) Shivers' statements were hearsay, and (3) there is no other evidence that Shivers was the shooter. Appendix B, at *23-24. The Court of Appeals relied on the same reasoning, without addressing Petitioner's arguments that this reasoning is debatable among reasonable jurists. Appendix A, p.6.

Petitioner has already shown, on pages 22-25, above, that each of the three reasons cited by the lower courts are debatable among reasonable jurists. More fundamentally, however, the lower courts' reasoning boils down to a holding that counsel was not unreasonable for failing to present this evidence to the jury because the evidence is weak. But this misunderstands the Strickland inquiry.

In Strickland, this Court held that the relevant inquiry is whether counsel's performance was objectively unreasonable.

Thus, the question is whether, despite the weaknesses of the evidence, a reasonable defense attorney would neverthless have presented it to the jury in the hope that it would raise a reasonable doubt in the mind of at least one juror. See Wiggins v. Smith, 539 U.S. 510, 537 (2003)(holding that Strikland prejudice is shown if there is a reasonable probability that at least "one juror [would] have struck a different balance."). See also Buck v. Davis, 137 S.Ct. 759, 776 (2017).

It is not every day that a murder victim's daughter tells police that she overheard a third party threaten to kill the victim before the victim was killed. While this might not have been sufficient evidence to sustain a conviction of Shivers beyond a reasonable doubt, there is absolutely no doubt that any prosecutor who charged Shivers with Brown's murder would have presented Shivers' threat to kill Brown at Shivers' trial. Thus, how much more so would a reasonable defense attorney have presented Shivers' threat in Petitioner's trial? Simply put, just as no reasonable prosecutor would have omitted that evidence at a trial of Shivers for Brown's murder, no reasonable defense attorney would have omitted that evidence at Petitioner's trial for Brown's murder.

"Representation of criminal defendants entails certain basic duties." Strickland, 466 U.S. at 688. This includes "the overarching duty to advocate the defendant's cause[.]" Id. In the context of a trial, the defendant's cause is avoiding a guilty verdict. Thus, counsel's "overarching duty" is to do everything possible (consistent with professional ethics) to

avoid a guilty verdict. This does not mean proving his client's innocence beyond a reasonable doubt because the burden is not on the defense to prove anything. The burden is only on the prosecution to prove guilt beyond a reasonable doubt. Thus, defense counsel is only required to raise a reasonable doubt in the mind of at least one juror, since that is all that is necessary to avoid a guilty verdict. See Wiggins, supra.

Thus, notwithstanding the weaknesses of the evidence that Mr. Shivers was the person who killed Mr. Brown, no reasonable defense attorney who had no other viable defense would have foregone the opportunity to present the evidence -- evidence that a third party committed the offense -- because it obviously could have led at least one juror to have a reasonable doubt in Petitioner's guilt.

Thus, the state court's ruling on the performance prong of the Strickland test was "contrary to" or involved an "unreasonable application of" Strickland because, as shown above, it is unreasonable to conclude that a defense attorney could choose not to present the statement of the victim's daughter that a third party threatened to kill the murder victim while still fulfilling his "overarching duty to advocate the defendant's cause" of avoiding a guilty verdict. Strickland, 466 U.S. at 688. The third party's statement was the only affirmative evidence that anyone other than Petitioner committed the offense, and there is an arguable basis for its admission (as discussed in Issue II, above) and a reasonable argument as to why the murder victim himself would mistakenly say that the third party was not

the shooter (as also discussed in Issue II, above). Therefore, no reasonable defense attorney would have foregone the opportunity to at least try to present this evidence to the jury.

Accordingly, counsel's performance was unreasonable, and the state court's ruling to the contrary is contrary to or involves and unreasonable application of Strickland. Compare Rompilla v. Beard, 545 U.S. 374, 388 (2005)(holding that the state court's adjudication of an ineffective-assistance claim involved an unreasonable application of this Court's precedent because the state court held that "defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file. . . . We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion. It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forego examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony.").

The Court of Appeals did not address the prejudice prong of the Strickland test, but the district court's ruling on that prong reveals a strong basis to grant certiorari, i.e., "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). The district court held that

AEDPA's standard of review in 28 U.S.C. § 2254(d) applies to Strickland's prejudice prong even where the state court did not explicitly adjudicate that prong. Appendix B, at *24-27 In reaching this conclusion, the district court relied on Hodges v. Colson, 727 F.3d 517, 537 (6th Cir. 2013), which, in turn, relied on Harrington v. Richter, 562 U.S. 86, 98 (2011), where this Court said in dicta, "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated."

The district court referred to the above-quoted language in Harrington as a "holding" of that case. But it was not the Court's holding. Rather, it was only obiter dicta because the state court in Harrington did not adjudicate just one aspect of a multi-part claim but, rather, denied Richter's claim in a one-sentence, unexplained order, which means that the Court's above-quoted statement was unnecessary to the Court's decision in the case and thus non-binding obiter dicta. Further, this Court already decided the issue in Rompilla v. Beard, 545 U.S. 374 (2005). In that case, this Court actually held that Strickland's prejudice prong is reviewed de novo when the state court only analyzed Strickland's performance prong. Rompilla, 545 U.S. at 390. This makes sense because, as this Court has held, "The language of 28 U.S.C. § 2254(d) makes it clear that this

provision only applies when a federal claim was 'adjudicated on the merits in State court." Johnson v. Williams, 568 U.S. 289, 303 (2013)(emphasis in original). And there is no reason to believe that a state court that rejects a Strickland claim on the performance prong also "adjudicated" the prejudice prong unless it specifically says so. Its rejection of the claim on the performance prong is sufficient to reject the claim. If it does not go on to explicitly find the prejudice prong unsatisfied, there is no reason to believe it adjudicated that prong also.

Therefore, this Court should grant certiorari to resolve the confusion surrounding this issue occasioned by the dicta in Harrington.

On the merits of Strickland's prejudice prong, the district court cited only non-binding authority for the highly dubious proposition that counsel's failure to present evidence that another person committed the crime results in prejudice only if that evidence "'point[s] unerringly' to the guilt of the third party and the innocence of the accused." Appendix B, at *27. This is a highly dubious proposition because this Court clearly held in Strickland that "a defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case" and that prejudice may be shown "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland, 466 U.S. at 693-694. "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. Thus, all it

would have taken is for "one juror [to] have struck a different balance" by finding a reasonable doubt in Petitioner's guilt. Wiggins v. Smith, 539 U.S. 510, 537 (2003). See also Buck v. Davis, 137 S Ct. 759, 776 (2017). Thus, any requirement that a defendant must show that evidence of third-party guilt "'point[s] unerringly' to the guilt of the third party and the innocence of the accused" is contrary to Strickland.

In this case, given the weakness of the evidence of guilt, as shown in Issue I, above, it is at least debatable among reasonable jurists whether one juror would have had a reasonable doubt in Petitioner's guilt had counsel presented the evidence that Mr. Shivers threatened to kill Mr. Brown. Therefore, a COA should issue on this claim.

## CONCLUSION

Petitioner Brandon Lofland asks this Honorable Court to grant the writ of certiorari.

Respectfully submitted,

Date: 1-21-20

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