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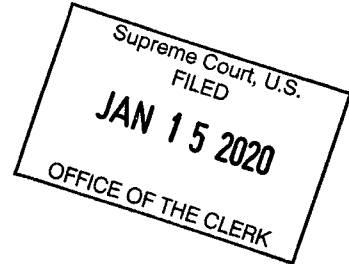
No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MILON JARR BROWN — PETITIONER
(Your Name)



VS.

STATE OF MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MILON JARR BROWN #389531
(Your Name)

St. Louis Correctional Facility 8585 N. Croswell Rd.
(Address)

ST. Louis, MI 48880
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- I - WAS THE PETITIONER DENIED A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE WHEN A WITNESS FOR THE DEFENSE INVOKED A SPECIOUS FIFTH AMENDMENT CLAIM AGAINST SELF-INCRIMINATION, AND WAS THIS IN CONJUNCTION A VIOLATION OF THE PETITIONERS SIXTH AMENDMENT CONFRONTATION CLAUSE?
- II - WAS THE PROVINCE OF THE JURY INVADED WHEN (A) LAY WITNESSES PROVIDED EXPERT OPINION THAT THE PETITIONER WAS THE PERSON DEPICTED IN VIDEOS?
- III - WAS INADMISSIBLE HEARSAY ADMITTED INTO THIS PRESENT CASE AGAINST THE PETITIONER UNDER THE GUISE OF AN EXCITED UTTERANCE EXCEPTION, WHEN THERE WAS TIME TO CONTRIVE AND MISREPRESENT THE STATEMENT, WAS THE INADMISSIBLE EVIDENCE A KEY COMPONENT IN CONVICTING THE PETITIONER?
- IV - WAS THE PETITIONER DENIED A FAIR TRIAL DUE TO A STRUCTURAL ERROR FROM JUDICIAL BIAS?
- V - WAS THERE AN ABUSE OF THE TRIAL COURTS DISCRETION TO ALLOW INFLAMMATORY PHOTOGRAPHS OVER TRIAL COUNSEL OBJECTION?

VI - WAS THE PETITIONER DENIED CONSTITUTIONAL PROTECTIONS
NAMELY; FAIR TRIAL PROTECTIONS UNDER THE FOURTEENTH
AMENDMENT, AND SIXTH AMENDMENT GUARANTEES IN
REGARDS TO THE DYING DECLARATION EXHORTATING THE
PETITIONER

LIST OF PARTIES

[X] All parties appear in the Caption of the Case on the Cover page.

RELATED CASES

BROWN V. PALMER, 441 F. 3d 347 (6TH Cir 2006).

PEOPLE V. LOPEZ, 316 MICH. APP. 704, 707; 892 NW2d 493, 494 (2016),

rev'd 501 MICH. 1044; 909 NW2d 264 (2018).

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

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the MICHIGAN COURT OF APPEALS court appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☒ For cases from state courts:

The date on which the highest state court decided my case was October 29, 2019 ~~May 16, 2019~~.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

V AMENDMENT, UNITED STATES CONSTITUTION

"No person shall be held to answer for a Capital, or otherwise infamous Crime, unless on a presentment or indictment of a Grand Jury, except in Cases arising in the land or naval forces, or in the Militia, when in actual Service in time of war or public danger; nor shall any person be Subject for the Same offence to be twice put in jeopardy of life or limb; nor shall be Compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just Compensation."

VI AMENDMENT, UNITED STATES CONSTITUTION

"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 defense."

XIV AMENDMENT, UNITED STATES CONSTITUTION

"All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, age 17 at the time of the offense, was charged in the Shooting death of Mr. Pennywell. The Petitioner was charged with the following Counts: felony murder, first-degree murder, two Counts of assault with intent to rob while armed, and four Counts of felony firearm.

The abovementioned incident occurred on June 26, 2016. Following a jury trial the petitioner was found guilty of felony murder, Second-degree murder, armed robbery, assault with intent to rob while armed, and four Counts of felony firearm. The Petitioner was Sentenced as a juvenile to 30-60 years on the murder charges, Consecutive to 2 years for the felony firearm offenses.

This present Case against the petitioner involves allegations that he shot and killed Mr. Pennywell along with threatening Mr. Thompson. There was no motive for the Shooting, and the key witness for the Prosecution was Mr. Thompson who knew Mr. Pennywell and the Petitioner. Mr. Thompson was subsequently charged in February 2018 with first-degree murder of a one Mr. Parham, as revenge in the Shooting death of Mr. Pennywell's brother.

Mr. Pennywell's Cause of death in this present Case was Multiple gunshot wounds. The dying declaration of Mr. Pennywell was "Cornel" in regards to who committed the Murder (Trial Transcript, Vol V p. 27).

At trial, over objections, videos were shown to lay witnesses who

end up identifying the petitioner as being within the videos. Immediately after the incident Mr. Thompson is observed as driving a Ford Expedition back to the apartment Complex to which the petitioner is not seen.

Mr. Thompson was with Mr. Pennywell when he got shot. Instead of taking Mr. Pennywell to get help, Mr. Thompson leaves Mr. Pennywell on the ground and takes off to a one Mr. Hoopers apartment, who they had previously seen, and where a call to the Police is finally made by one of Mr. Hoopers relative.

Mr. Thompson does not speak to the police that day, but does so the next day, and only identifies the shooter as "dude" never stating it was the petitioner. Mr. Thompson reported that the police told him he would be either a defendant or a witness, implying he may have set up Mr. Pennywell. Afterwards, and three months later Mr. Thompson provides the petitioners name only after being informed of potentially being a defendant.

The detective in this present case interrogating Mr. Thompson flatly says, "I told him he's either a witness, or he helped [Mr. Pennywell] get shot if he wasn't releasing a full statement to me. And that's what I explained to him." (Trial Transcript, Vol IV p. 56).

Correlating with Mr. Thompsons initial two statements to the Police, Mr. Hooper never mentions Mr. Thompson states the petitioner shot Mr. Pennywell. When speaking to police Mr. Hooper always stated Mr. Thompson says "Some dude" shot Mr. Pennywell. Mr. Hooper discloses this despite his testimony at trial that in an alleged excited utterance,

Mr. Thompson mentions the petitioner by name.

Mr. Hooper admits the police mentioned to him that he may be involved in the offense, that he could be charged and was then given the choice of being a witness or a defendant. Oddly enough similar to the exact choice Mr. Thompson was given in this present case.

After Mr. Hooper was threatened that he could in fact face incarceration, Mr. Hooper admits to asking the police, "What do you want to hear?" A detective admitted to telling Mr. Hooper he thought he was lying to which thereafter Mr. Hooper said the petitioners name. (Trial Transcript, Vol IV p. 49-53).

Ms. Vanburen-Buford testified at trial that she overheard some arguing and claims seeing shots being fired. While she identified the petitioner as being the shooter she testified that she never actually seen a gun in the petitioners hands, and that she may have been distracted due to having to keep an eye on her child. Although Ms. Vanburen-Buford claims to see the shooting she does not call police. (Trial Transcript, Vol III p. 156-177).

In this present case neither the cell phone purportedly taken from Mr. Pennywell was ever found, nor the gun that was used in the murder. At the petitioners interrogation, which was admitted at trial, questionable police tactics towards a juvenile who was not with an adult or counsel, contained the officer telling the petitioner "I know you did it." (Trial Transcript, Vol IV p. 88-92). The petitioner never confessed to the offense.

REASONS FOR GRANTING THE PETITION

ISSUE I

The petitioner in this present case needed the testimony of Ms. Kinnard to show not only show there was no plot but to raise reasonable doubt in the petitioners defense. The suggestion by the prosecution in this present case was that Ms. Kinnard provided the petitioner with a backpack containing a gun that was used to commit the murder. The gun was never recovered, the suggestion was false and Ms. Kinnard needed to tell the jury the truth.

In denying the petitioner the opportunity to dispel the prosecutions theory, the trial court in fact denied the petitioner his Constitutional right to present a defense.

The petitioners Sixth Amendment right to present a defense was violated by the trial court when a Fifth Amendment protection of the right against self-incrimination came into play. The Fifth Amendment protects a person from being compelled in any criminal case to be a witness against themselves.

To invoke a Fifth Amendment privilege a witness must show that he or she, has a reasonable belief of a real danger of incrimination from their answers. The Fifth Amendment also forbids the introduction of coerced statements at trial. The Fourteenth Amendment sets limits on such behavior like police trickery, and prosecutorial trickery should be no different.

The Fifth Amendment privilege cannot be invoked on a blanket basis, but can be invoked if an answer reasonably will tend to lead to prosecution. As found by this Court in *Hoffman v. United States*, 341 US 479, 486-88, 71 S Ct 814, 819, 95 L. Ed. 1118 (1951). A trial Court must conduct a particularized inquiry whether a witness's refusal to answer is justified.

Ms. Kinnard was facing her own trial and testified that her case was "loosely related" with the present matter. (Trial Transcript, Vol I p. 240-44). The Prosecution haphazardly mentioned that Ms. Kinnard was interviewed in regards to the murder investigation. The Prosecution believed Ms. Kinnard lied to the detective in the course of that interview.

The Prosecution subsequently charged Ms. Kinnard with a felony for lying to a police officer in an investigation, and that was the trial she was "facing next week." Absurdly advantageous and an abuse of power, as the prosecution went on that they believed Ms. Kinnard was very much involved in the incident in question. That she could be facing additional charges of taking part in the robbery and or the robbery that led to the shooting. The Prosecution hadn't made that "decision at this point in time."

Any Police interview of an individual suspected of a crime has a "Coercive aspects to it." *Oregon v. Mathiason*, 429 US 492, 495, 97, S Ct 711, 50 L. Ed. 2d 714 (1977) (per Curiam). Only those interrogations that occur while a suspect is in Police Custody, however, "heighten the risk" that statements obtained are not

the product of the suspects free choice. *Dickerson v. United States*, 530 US 428, 435, 120 S Ct 2326, 147 L. Ed. 2d 405 (2000).

There were no particularized questions that were being evaluated by the trial Court in this present case. It was merely the assertions of the prosecution despite Ms. Kinnard's testimony that her case was only "loosely related" to the Petitioner's trial.

The petitioner's trial Counsel mentioned that he had spoken to Ms. Kinnard and that her testimony would be favorable to the defense. Ms. Kinnard was granted a blanket Fifth Amendment privilege and this violated the petitioner's Sixth Amendment right to present a defense.

Questioning could have been tailored to the petitioner's case only, since that would be relevant. Ms. Kinnard could have then testified in areas where it would have not placed her in any self-incrimination pickle. Further, one would think the trial Court is intelligent enough to rationally question a witness and avoid areas of one's own criminal involvement. Ms. Kinnard's purported lying to the police and of her own robbery are in fact separate and distinct from the petitioner.

This Honorable Court stated in *Holmes v. South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L. Ed. 2d 503 (2006), the right to present a complete defense is "abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed

to serve." In this present case simply tailoring questions that would not infringe on Ms. Kinnard's rights against self-incrimination would have protected the petitioner's Constitutional right to present a defense and the Constitutional right to have a fully informed jury as they are the finders of fact to ascertain the truth of the matter.

In this present case, sad to state, but we cannot and should not take the word of the prosecutor, especially without an offer of proof and with only vague references to what might not even be facts. It was obvious the prosecution never wanted Ms. Kinnard to testify. The words from the prosecutor amounted to a threat against a witness, the threat of increased charges for Ms. Kinnard. This essentially forced her off the witness stand.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California*, 314 US 219, 236, 62 S Ct 280, 290, 86 L. Ed. 166 (1941). where the petitioner would include a prosecutorial trickery to be included against a Fourteenth Amendment due process test.

Further, let's not be fooled, the Saginaw County Prosecutor's office has a penchant for persuading witnesses, unfavorable to their narrative, from testifying. The petitioner would direct the Court to a recent case within this state, *People v. Lopez*, 316 Mich. App. 704, 707; 892 NW2d 493, 494 (2016), revid. 501 Mich. 1044; 909 NW2d 264 (2018).

Lopez was remanded "to the Saginaw Circuit Court for a determination of whether the witness was unavailable due to the prosecutor's procurement or wrongdoing for the purpose of preventing the witness from attending or testifying." *People v. Lopez*, 501 Mich. 1044; 909 NW2d 264 (2018).

While this present case may not rise to the level noted within Lopez it certainly shows that the prosecutor will use the tools at its disposal to suggest a particular story than promoting the truth finding function of a trial. Which to do so is at odds of a prosecutors Constitutional duty.

The Fifth Amendment privilege cannot be invoked on a blanket basis and should be true in this present case. Ms. Kinnard was a key witness for the defense and necessary to protect the petitioners right to present a defense. Further the only witness the defense called was a paramedic who verified that Mr. Pennywell, the victim in this present case, mentioned the name "Cornel" as the person who shot him. (Trial Transcript, Vol V p. 27).

The abovementioned coupled with Ms. Kinnards testimony verifying there was no gun in the backpack would have not only taken the sails out of the prosecutions theory but reasonably would have led the jury to an acquittal.

It cannot be said the exclusion of Ms. Kinnards testimony was not imperative for a complete, meaningful defense. The trial Court reversibly erred by giving Ms. Kinnard blanket protection from testifying.

It should be further noted when looking at the prosecutors actions in this present case that it was clear the prosecution overcharged the petitioner. It would only be reasonable in this present case if lets say the petitioner was caught in the act of committing the offense at hand, but that was not the case in the least. In fact no gun was ever recovered. The charges were not supported by the facts or evidence at hand and was an abuse of the prosecutions discretion to artificially inflate the charges against the petitioner.

ISSUE II

The petitioner was denied a Constitutional right to a fair trial when the trial Court abused its discretion, over objection from the petitioners trial Counsel, admitted testimony that invaded the province of the jury.

A jury should be fully independent, when one is not it can reasonably raise Constitutional questions of fair trial protections. In this present case when witnesses, who were not expert witnesses, were allowed to testify that the petitioner was a person in videos, the witnesses were no better positioned than the jury to make such a determination.

Prejudice against the petitioner comes when the unprofessional conduct on the part of the prosecution asks legally objectionable questions and obtains testimony which from non-expert witnesses would be inadmissible.

Professional testimony alone should be looked to for matters of fact

or opinion peculiarly within the learning and experience of professional witnesses. Let's say where the experience of proper skill or care on the part of a physician or surgeon is at issue, expert medical testimony is ordinarily essential, and the expert testimony would be required to establish the usual or even proper practice in the medical treatment.

In this present case the petitioners trial Counsel moved to preclude identifications of any individual who could be on the video, as to do so would be improper opinion testimony and invade the province of the jury. The trial Court did not agree and allowed the identification testimony into evidence.

Three witnesses testify at the petitioners trial in regards to identification evidence that the petitioner is in the videos and photographs. It should be noted a standing objection from the petitioners trial Counsel was denied.

One witness was informed of a shooting and went on to identify the petitioner. (Trial Transcript, Vol II p. 97-98, 101, 110-14, 121-22, 124, 131, 134). Another witness testifies that the petitioner is within photographs. (Trial Transcript, Vol III p. 42, 76-84). The third witness similarly testifies that the petitioner is within photographs. (Trial Transcript. Vol IV p. 39-41, 68-73).

None of the witnesses testify that the petitioner is the gunman. The United States District Court for the Eastern District of Michigan at Detroit in *Brown v. Palmer*, 441 F. 3d 347 (6th Cir. 2006) issued an unconditional writ of habeas Corpus because the State offered no evidence that Brown had ever met the gunman prior to

arriving at the gas station, that Brown possessed a weapon or even handed one to the gunman or that he knew that anyone was going to commit a robbery or carjacking. The Court went on that being present at the scene of the crime and having a brief relationship with the gunman were insufficient facts to establish beyond a reasonable doubt that he aided and abetted the gunman.

In this present case the petitioner cites not only similarities to that in the above-mentioned case but Rules of Evidence should not be exempt from Constitutional tests. In this present case MRE 701 would apply. MRE 701 states; "if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The testimony of identification was improper and invaded the province of the jury. While the testimony of the witnesses viewing the videos and still photographs was "rationally based on the perception of the witness," it was not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

It would be one thing if the petitioner had changed his appearance from the time of this incident to the time trial was held, but not only was that not an issue, none of the witnesses disclosed any differences in appearance.

Unlike a live line-up or even a photographic show-up

Where a subject of inquiry is known, in this present case the person in the video is not known and the witnesses are merely giving their opinion of who they think is within the video. Again they were in no better position to determine that than the jury was and can reasonably be seen as a conclusive presumption, removing the jury's function of finding guilt or innocence based on properly admitted evidence, independently, at trial.

Fair identification requirements are protected by due process. If procedures were not suggestive the identification evidence would not present a due process obstacle to admissibility. The identification evidence would be admissible if (a) the procedures were not suggestive or (b) the identification has independent reliability.

Reliability is the linchpin in determining the admissibility of any identification testimony. Fundamental fairness requires that identification testimony be reliable, even more so if a witness identifies a criminal defendant as a perpetrator of an offense. Reasonably it is essential to the very concept of justice. In this present case the identification testimony was suggestive which had a corrupting effect which itself intruded upon the Constitution protections.

Remember MS. Kinnard never testified for the defense to dispel the theory that the petitioner was given a backpack containing a gun, which was never recovered. Therefore the petitioner's trial counsel couldn't act in the petitioner's best interests. Further there was no evidence presented by the

petitioner even admitting to being in the vicinity.

The trial testimony of Suggestive identification that the petitioner was in videos and photographs sealed his fate, even despite the victim saying "Cornel" was who committed the shooting.

Had the positive identification not been admitted the outcome in this present case would have been an acquittal since the most damaging testimony came from two other witnesses who had a bias, a bias against being charged with the crime itself, Mr. Thompson and Mr. Hooper.

ISSUE III

In this present case inadmissible hearsay under the guise of an excited utterance found its way into the petitioners trial which not only denied the petitioner of a fair trial but it rendered the outcome of the trial in favor of a guilty verdict.

Reasonably had the evidence not been admitted the petitioner would not have been convicted due to the declarant never naming the petitioner, who he did know, until after he was threatened by the police to cooperate.

The initial reports clearly showed the declarant, Mr. Thompson reported to the police that "Some dude" shot Mr. Pennywell. Mr. Hooper even repeated this is what Mr. Thompson said as well, "Some dude." (Trial Transcript, Vol III p. 72-73, 103-09, 137-146).

As discussed earlier in this petition any police interview of an individual suspected of a crime has "Coercive aspects to it."

Oregon v. Mathiason, 429 US 492, 495, 97, 5 Ct 711, 50 L. Ed. 2d 714 (1977).

(per Curiam). Suspects in police custody for interrogations also have a heightened risk that the statements obtained are not the product of the suspects free choice. *Dickerson v. United States*, 530 US 428, 435, 120 S Ct 2326 147 L. Ed. 2d 405 (2000).

More troubling and as recent studies suggest all the more acute when the subject of custodial interrogations is a juvenile. They are more "susceptible to influence," *Eddings*, 455 US at 115, 102 S Ct 869, and "outside pressures," *Roper*, 543 US at 569, 125 S Ct 1183. All the parties involved in this present case are juveniles or very young adults.

"Hearsay" is a statement, other than one made by the declarant while testifying that is offered to prove the truth of the matter asserted. MRE 801(c). Hearsay evidence is inadmissible unless there is an exception. MRE 802. In this present case the trial court allowed Mr. Thompson's statement to Mr. Hooper pursuant to the excited utterance hearsay exception which was improper.

MRE 803(2) would cover the excited utterance exception and states that hearsay is admissible if it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The Michigan Supreme Court has set forth three criteria for admission of a hearsay statement under this exception, (1) it must arise out of a startling occasion, (2) it must be made before there has been time to contrive and misrepresent, and (3) it must relate to the circumstances of the startling occasion. In this present case there is no way the statement providing a name other than what

was long reported as "Some dude" now conforms to some exception when the petitioner becomes named as the assailant. (Trial Transcript, Vol III p. 137-46).

What is more important is a requirement that the proffered Statement have Circumstantial guarantees of trustworthiness equivalent to those of the Categorical hearsay exceptions. Some relevant factors include whether a Statement has: "guarantees of trustworthiness, (1) the Spontaneity of the Statement, (2) the Consistency of the Statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the Voluntariness of the Statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) Personal Knowledge of the declarant about the matter on which [he/she] spoke, (7) to whom the Statements were made ..., and (8) the time frame within which the Statements were made." *People v. Geno*, 261 Mich. App. 624, 634; 683 NW2d 687 (2004) (quotation marks and Citation Omitted).

Mr. Thompson's Statement was taken some time after the incident in question in this present case, at a different location, and in response to specific questioning by his Cousin Mr. Hooper. (Trial Transcript, Vol III p. 137-39). Mr. Thompson in fact had time to contrive and Misrepresent the Substance of his Statement.

The very same is true with Mr. Thompson's Cousin Mr. Hooper and the petitioner's trial testimony shows there was an opportunity to contrive. It was not exactly the the Spontaneity that Underlines the excited utterance exception to the hearsay rule. Further there is also the issues of what the Police in fact threatened both

Mr. Thompson and Mr. Hooper with, along with the above mentioned factors to include for the guarantees of trustworthiness found in *People v. Geno*.

Mr. Thompson's Statements to his Cousin Mr. Hooper were not admissible as an excited utterance, and upon the objection of the petitioners trial Counsel should have been barred by the trial judge. There was ample time and opportunity to contrive and misrepresent and the Statements naming the petitioner should have been excluded.

The petitioner clearly was prejudiced, significantly so by the admission of this prior, out-of-court statement from Mr. Thompson. The petitioners right to a fair trial was in fact violated by the prosecutions use of the inconsistent statement as substantive evidence, then to use it to bolster testimonial credibility of Mr. Hooper and Mr. Thompson compounded the violation against the petitioner.

The victim said it was "Cornel" and Mr. Thompson's initial statement was "Some dude" committed the murder, which was the same as Mr. Hooper's initial statement to the police. (Trial Transcript, VOL V p. 27).

ISSUE IV

In this present case the petitioner claims a structural error with the trial due to judicial bias. This Honorable Court in *Arizona v. Fulminante*, 499 US 279, 310 (1991) opined on structural error being in part a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

The weight of testimony should be left to an independent jury. The protection of an individual from arbitrary action is the very essence of due process of law. The balancing of relevant and conflicting factors at a trial should be between Counsels, until the factors at hand require an application of Constitutional law, i.e. when a judge should inject oneself.

In this present case the trial judge injected herself into the trial repeatedly. By doing so the trial judge altered the normal process of the trial itself. The trial judge cross-examined a witness and displayed bias favoritism. Reasonably if those actions were not in front of the jury an argument can be made that it was not prejudicial towards the petitioner.

The trial judge invading the prosecution's role and function so infected the trial with unfairness, which can even go a step further that the resulting conviction was a denial of due process. The petitioner would cite *Payne v. Tennessee*, 501 US 808, 825 (1991) on basic due process test as whether this error was "so unduly prejudicial that it renders the trial fundamentally unfair," *id.* at 831, *id.* at 836.

In this present case the trial judge exceeded the scope of permissive judicial questioning. Then to interrogate a witness, how is a juror to reasonably accept that. The trial judge in short abandoned the mantle of judicial impartiality. Excessive interference in examination of witnesses displaying certain remarks or rebukes displays an impatience in the jury's presence and it can reasonably be viewed as an attitude of partisanship.

THE COURT: Okay. Distress?

THE WITNESS: Yes

THE COURT: Okay. You can step down I mean, well, hang on. One more question.

THE WITNESS: Okay.

THE COURT: When you got to the hospital did you go in with him?

THE WITNESS: Yes

THE COURT: And what happened there?

THE WITNESS: He was still saying Cornel and we still had to hold him down, because he kept sitting up.

THE COURT: Okay.

THE WITNESS: And moved around.

THE COURT: What took place then, did they take over for you, did you watch what they were doing with him?

THE WITNESS: Yes. We moved him over to the bed, and they ended up sedating him because he was so combative.

THE COURT: Okay.

THE WITNESS: And talking, and saying Cornel.

THE COURT: And what kind of response was the hospital personnel taking, in terms of his injuries concern?

THE WITNESS: That it was very dire. That he needed treatment now.

(Trial Transcript, Vol. I p. 10-14).

First, the trial judge asked over and beyond just the one question. Second, all that was asked could have been done so by the jury if for some reason they needed more clarification from the

witness. Third and more importantly it was clear the trial judge was attempting to discredit the witness, interfering with the jury's role to weigh what credit to give testifying witnesses. Is this the trial judge acting as the thirteenth juror? The petitioner says yes.

Again the weight to be given to testimony, even when conflicting, should be left to a jury, it is not permissible for a trial judge to determine the credibility of witnesses in deciding a motion for a directed verdict, and in a jury trial this should be the same. In this present case it can be reasonably viewed that the trial judge's action could have found its way into the deliberation, which would put Constitutional Protections at stake.

A Criminal defendant has a right to a neutral and detached judge, the petitioner's trial judge questioning of the defense witness was excessively so. Furthermore the trial judge indicates disbelief of the witness to the jurors, then later misrepresents the facts to the jury.

The trial judge's actions in this present case tipped the scales and infected the fairness of the trial itself as the actions put external constraints that would not have been otherwise. Counsel can object to its adversary in the criminal process but that adversary should not be the judge.

With ease the trial court could have removed the jury and conducted as many series of questions it wanted to and never influenced the jury or put that at issue in this present case.

ISSUE V

The petitioner Moves this Honorable Court to Consider the argument of Rules of Evidence and Constitutional tests. Can fair trial rights be violated by an abuse of Rules of Evidence?

This present Case involves a shooting which resulted in the death of Mr. Pennywell. There was an autopsy done and at trial eight photographs were admitted. (Trial Transcript, VOL II p. 37). In America, gun violence is not new. The testimony from the Doctor about the autopsy was clear enough. Photographs were not needed to help the jury understand better. The Photographs were gruesome.

Payne v. Tennessee, 501 US 808, 825, 111 S Ct 2597, 115 L. Ed. 2d 720 (1991), Citing Darden v. Wainwright, 477 US 168, 179-83, 106 S Ct 2464, 91 L. Ed. 2d 144 (1986) had opinions from this Honorable Court on Prosecutions use of unduly prejudicial evidence, and that the use violates a defendants due process under the Fourteenth Amendment.

This Honorable Court knows well relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In the State of Michigan motive is not an element of murder. While relevant it is not essential to show proof. In this present Case the gun used to Commit the Shooting was never recovered. The

Case from this Honorable Court in *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80, L. Ed. 2d 674 (1984) asks: (1) whether Counsel was deficient in representing the defendant. In this present case there was ample time to challenge the use of the Photographs trial Counsel Knew were to be used, And (2) whether Counsels alleged deficiency prejudiced the defendant so as to deprive the defendant of a fair trial. id at 687.

Had the petitioners trial Counsel filed a motion in limine to (1) block the use of the autopsy photographs, or (2) limit the usage, and was Successful, there would be no doubt that the jury would have not prejudged the petitioner by using the eight autopsy photographs as evidence of motive, and as evidence of character proving Conduct, which is not admissible.

ISSUE VI

This present case had testimony regarding what is Commonly Known as a dying declaration from Mr. Pennywell who was the victim in this case. The testimony met the requirements under MRE 804(b)(2).

The Statement made by Mr. Pennywell that when asked who Shot him, was "Cornel." The testimony met a trustworthy test in that, (1) the Statement was spontaneous, (2) it Consisted of the Same answer when asked, (3) the declarant had no motive to fabricate as he believed he was dying, and (4) the declarant did in, after being attended to by medical Staff, fact pass.

With the trial Judge acting as the prosecution from the prior issue,

it considered the circumstances, inadvertently so, under which Mr. Pennywell's dying declaration was taken. It was clearly shown that Mr. Pennywell was in extremis and believed that death was impending. There is no other way the testimony established another fact other than that.

In order to be admissible, dying declarations must be such a narrative statement as a living witness might properly give on the witness stand. In this present case, this is accounted for as was other requirements that would be needed. Further a party may not object to the admission of a dying declaration on the basis of that it merely wasn't taken immediately after the fatal injury, which it was in this present case, or even that there was no notice of said declaration, which there was plenty of notice by both parties in this present case.

The prosecution had an effect on the fairness of the petitioners trial, from the actions conducted by how they dealt with Ms. Kinnard and the threats made with overcharging her to the use of highly prejudicial autopsy photographs, to the questionable reasons the prosecution wouldn't want a dying declaration made in this present case. The prosecution put external constraints on the petitioners trial counsel, unwarranted and adding confusion to the trial.

The question now triggered by the petitioner now is what qualifies

as actual prejudice? In this present case is it the actions of the prosecution? The petitioner would say "yes". Was the petitioners trial Counsel ineffective for failing to give an instruction or move the trial Court to include a jury instruction which in effect told the jury that Such Statements Could be Considered? The petitioner would Say "yes."

Should trial Counsel have moved for a directed verdict? It would have been reasonable, there was no gun recovered, a witness was in short threatened off the witness stand, another changes his initial Statements made to police and claims that the petitioner was the shooter, who would be later arrested for murder, for the revenge Killing of Mr. Pennywell.

The petitioners trial Counsel was in fact ineffective for failing to admit the proper jury instruction on Mr. Pennywells dying declaration and failed to, at least move the trial Court for a directed verdict. The petitioner Cites actual prejudice from the errors of the abovementioned.

If trial Counsel had been Successful on either, first the jury would have been fully informed. Second if granted, it would have been reasonable from a motion of directed verdict the trial Court would have granted the motion for at least the murder charges, as there was insufficient evidence as a matter of law to warrant Submitting to the jury the murder charges in this present case. The petitioners trial Counsel did not protect his clients interests and act as his advocate at trial, which is actual prejudice towards the petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Milon Jarr Brown

Date: January 14, 2020