

19-7900

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

\_\_\_\_\_  
IN THE

SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

TANINO EMON MILLER — PETITIONER  
(Your Name)

VS.

STATE OF MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

TANINO EMON MILLER # 418780  
(Your Name)

ST. LOUIS CORRECTIONAL FACILITY  
8585 N. CROSWELL ROAD  
(Address)

ST. LOUIS MICHIGAN 48880  
(City, State, Zip Code)

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

## QUESTION(S) PRESENTED

- I WAS THE EVIDENCE INSUFFICIENT TO FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT FOR ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM?
- II HAD THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON RECKLESS DISCHARGE OF A FIREARM?
- III HAD THE TRIAL COURT ERRED IN THE PETITIONERS SCORING OF CERTAIN OFFENSE VARIABLES?

## LIST OF PARTIES

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

## RELATED CASES

*Spalla V. Foltz*, 615 F. Supp. 224 (E.D. Mich 1985)

*Newman V. Metrish*, 543 F. 3d 793 (6<sup>TH</sup> Cir. Mich 2008)

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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☐ is unpublished.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☐ is unpublished.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☒ is unpublished.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 December 23, 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

*Fifth Amendment United States Constitution*

*Sixth Amendment United States Constitution*

*Fourteenth Amendment United States Constitution*



### STATEMENT OF THE CASE

The petitioner was charged with one Count of first degree murder, two Counts of assault with intent to murder, and one Count of felony firearm.

Following a jury trial the petitioner was convicted of the lesser offense of Second degree murder, the lesser offense of assault with intent to commit great bodily harm, and felony firearm.

On October 4, 2017 the petitioner was sentenced to 20-30 years for the homicide, 6-10 years for each of the assault with intent to commit great bodily harm, concurrent with the homicide sentence, plus 2 years consecutive for the felony firearm.

This present case stems from the death of Mr. Walker, who was shot conducting a marijuana sale. On the morning of April 3, 2017 Mr. Walker along with Mr. Surls were smoking marijuana and went to purchase more. They met Mr. Collier to go purchase more.

Mr. Surls drove, Mr. Walker was in the passenger, and Mr. Collier was in the back as they went to a liquor store. There they seen the petitioner who was to sell the three marijuana. The petitioner walked up to the vehicle but Mr. Surls would not unlock the door for him.

Mr. Surls testified at trial that the petitioner gave Mr. Collier a bag of marijuana and stated that the petitioner told Mr. Collier that he still owed money from the last sale. Mr. Surls testified

that the petitioner went to reach in his pocket and that prompted at that point, Mr. Surls to drive off. The passenger, Mr. Walker then had said he was shot. Mr. Surls testified that he heard the shot and his rear window was shattered.

Mr. Surls drove Mr. Walker to the hospital and Mr. Walker told him to not come in, Mr. Surls testified that Mr. Walker instructed him to take his Marijuana, scale, and phone to his father. Then Mr. Surls went on to clean up the vehicle and replaced the back window, which was done on the same day as the shooting.

The following day Mr. Surls learned that Mr. Walker passed away. He called the police and reported the incident. It should be noted he filed a false police report as well. Mr. Surls testified he didn't believe anyone in his vehicle had a weapon, but could not say with 100% certainty that Mr. Collier, the individual in the back behind Mr. Walker did not have a gun. Mr. Surls did testify that he believed the petitioner shot at the vehicle.

The petitioner did testify at his trial and testified that Mr. Collier called him at 9:00 a.m. looking to purchase some Marijuana. The petitioner said he knew Mr. Collier from high school and seen him a week before at the store. The petitioner did testify that he was robbed, but other than that he did not go out with the intent to shoot anyone, nor was he upset with anyone.

The petitioner testified that when he got to the vehicle, he seen the three men pooling their money together to make the

Purchase. The petitioner went to Mr. Surls side of the vehicle because he thought he was getting in, but Mr. Surls did not let him in. The petitioner then testified he went to the other side of the vehicle where Mr. Collier and Mr. Walker were and went up to Mr. Collier.

As the petitioner was conducting the transaction with Mr. Collier, Mr. Collier pulled out a gun. At that point the vehicle took off. The petitioner testified Mr. Collier waived him away from the vehicle and as the vehicle took off Mr. Collier fired at the petitioner. The petitioner fired back but did not think he even hit the vehicle. The petitioner tried to call Mr. Collier right after but his number was blocked.

Mr. Collier testified at the petitioner's trial and was brought to the Courthouse pursuant to a warrant and held in custody until he testified. Further Mr. Collier was also given immunity for his testimony.

Mr. Collier testified that the petitioner came to his side of the vehicle. The petitioner gave him a bag of marijuana and when Mr. Collier went to give the petitioner the money after looking at the marijuana, Mr. Surls drove off.

Mr. Collier claims in his testimony that as they were driving off he looks and sees the petitioner holding a gun, it went off and broke the back window. Mr. Collier's claim in his testimony that it was only one shot is different from other testimony that claimed there was more than one shot.

Mr. Collier testified that they drove Mr. Walker to the hospital

because he was shot. Mr. Collier did not believe it was serious since Mr. Walker was talking. Afterwards Mr. Collier and Mr. Surls went back to the neighborhood and split and smoked the marijuana they took from the petitioner.

Mr. Collier denied planning to rob the petitioner that day. Mr. Collier also denied having a gun. The petitioner testified that Mr. Collier waved him away from the vehicle with a gun, which was seen on the store surveillance. Mr. Collier denies this event and claims the video shows him waving a scale and not a gun. Mr. Collier also denied firing any shots at the petitioner to get him away from the vehicle.

In this present case no gun was ever recovered by police. Further no shell casings were recovered and the only item that was recovered was a fraction of a bullet from Mr. Walker. No ballistic testing was done to obtain a caliber nor were any warrants issued to search for a gun that may have been used.

## REASONS FOR GRANTING THE PETITION

### ARGUMENT I

The evidence in this present case was insufficient to find the petitioner guilty beyond a reasonable doubt for not only assault with intent to commit great bodily harm but second degree murder as well.

The Michigan appellate courts application of federal law on if the prosecution presented sufficient evidence to sustain a conviction, viewed in the light most favorable to the prosecution and if it supported a rational trier of fact, was improper.

The petitioner was found guilty of two counts of assault with intent to commit great bodily harm on Mr. Collier and Mr. Surls. The plain language to the elements to the offense are, 1) an assault, 2) with intent to do great bodily harm less than murder, MCL 750.84.

The petitioner was charged with assault with intent to murder, to which the jury found the petitioner of the lesser assault with intent to commit great bodily harm. The improper application of the facts in this present case to the law, neither Mr. Collier or Mr. Surls were injured. It is clear what the statute says for MCL 750.84, assault with intent to commit great bodily harm. One cannot be charged with or found guilty on a crime to which the facts do not support.

All too often Prosecutions overreach, and in this present Case it is not only true but a practice the Wayne County (Michigan) Prosecution does often. Even the record is clear as neither Mr. Collier or Mr. Surls testified they were hurt or assaulted in anyway, so an assault with intent to Commit great bodily harm Simply does not exist.

B

When applying the facts and the evidence to the elements of Second degree murder it must be done with reason. There was no doubt Shots were fired. How many guns were present? The Police didn't recover a Single one. What was the Caliber of the gun? The Police didn't recover anything to Confirm a Caliber used. The only thing recovered was a fraction from Mr. Walker and the fragment didn't advance the answer to what Caliber.

So even if all persons involved in this marijuana purchase had a gun, Whos was responsible for Shooting Mr. Walker? The Prosecution's Case was lacking Support to say without a doubt that the petitioner's action was what Caused Mr. Walker's death. Applying the insufficient evidence Standard to the elements of the offense as defined by State Substantive law, we would only Speculate as to say who Shot Mr. Walker.

The petitioner would rely on the following United States Supreme Court Cases in Support for the argument, first the landmark *In re Winship*, 397 US 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), in that as a matter of federal Constitutional

law "the Due Process Clause protects the accused against Conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Then years later this Court stated in *Herrera V. Collins*, 506 US 390, 402, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), that "a Conviction based on evidence that fails to meet the Winship Standard [is an] independent Constitutional violation."

Here it is reasonable that the jury concluded the use of a gun, a deadly weapon, raised a presumption of Malice for the Conviction of Second degree murder. There was no gun recovered though. It is unknown who shot Mr. Walker and so for the jury to presume any element of a crime without evidence is UnConstitutional, as it would be here in this present case.

Because the petitioner was present for the sale, and was armed there was no proof that his shot was the one that hit Mr. Walker. Further the vehicle was cleaned and repaired before the Police were even contacted. Then the prosecution calls upon Mr. Collier who was brought to court pursuant to an arrest warrant, and given immunity for his testimony.

There was no guarantee that this testimony from Mr. Collier was reliable, in fact the petitioner would cite fundamental unfairness in the use of Mr. Collier's testimony as the coercive police and prosecutor actions do not support that the testimony was voluntary. The Fifth Amendment forbids the

introduction of Coerced Statements at trial.

As this Court noted in *Oregon v. Mathiason*, 429 US 492, 495, 97, S. Ct. 711, 50 L. Ed. 2d 714 (1977), any police interview of an individual Suspected of a Crime has "Coercive aspects to it." The testimony from Mr. Collier is no different when the facts are weighed.

The Prosecution in this present Case relied heavily on the testimony from a witness who had to be brought in by an arrest warrant and given immunity, and another witness responsible for destroying evidence by cleaning the vehicle.

Mr. Collier has nothing to lose if he plays by the rules. He testifies there was a lot of glass in the back of the vehicle. The driver Mr. Surls testified differently who said there was no glass in the vehicle. An officer even testified to the vehicle being cleaned.

It is reasonable then there was false testimony on the part of the prosecution's witnesses that effected the judgment of the jury, and this is a violation of the petitioner's Constitutional protections.

Mr. Surls filed a false police report, and this is moved by the prosecution to be Suppressed, Mr. Surls Should had testified to the facts for the day in question. The trial Court's abuse of discretion though allowed evidence to be Concealed. By doing so it kept the petitioner from raising a defense and limited questioning to obtain facts to find the truth of the matter.

C



This present case is lacking evidence to support the convictions of the petitioner. Further support on why this Court should grant the petition is the clear judicial interference. A judge should be neutral, independent, if one isn't at a criminal defendant's trial is it a due process violation?

The trial judge is neutral because there is already an adversary, the prosecution and defense. The trial judge as all others apply the law that is needed.

When the trial judge allowed the suppression of false police reports from Mr. Surls it created a judicial bias at the petitioner's trial. It also limited the petitioner's Constitutional right to present a defense.

The abuse of discretion also kept the jury from being fully informed, also a Constitutional right. They are not to know that a State witness is not truthful, that a State witness is not trustworthy, how is that a fully informed jury?

Police testimony was that it was possible that Mr. Walker was shot from inside the vehicle. Mr. Surls, the driver then files a false police report after he cleaned and repaired the vehicle. The trial judge's abuse of discretion concealed evidence and kept questioning to obtain the truth.

Why clean and repair the vehicle so quickly before contacting police? Why file a false police report? Why give immunity to a witness to testify only after he is brought to the Court pursuant to an arrest warrant? Does this equate to fundamental fairness and reasonably support the lower Courts affirmation?

## ARGUMENT II

There is a Constitutional requirement to have a properly instructed jury, that would conform to the right to a jury trial. In this Present Case the petitioner Moved to have a jury instruction admitted Covering reckless discharge of a firearm. The petitioner's trial Counsel argued that this instruction to this charge Comported with the facts that were admitted into evidence.

This Court in *United States v. Cronin*, 466 US 648, 80 L. Ed. 2d 657, 104 S. Ct. 2026 (1984) and *Arizona v. Fulminante*, 499 US 279, 310, 111 S. Ct. 1246 113 L. Ed. 2d 302 (1991) held opinions in regards to a meaningful adversarial testing and a right to a properly instructed jury being fundamental to a Criminal trial.

In this present case there was evidence presented that the petitioner acted with reckless disregard in discharging the firearm toward the vehicle. The petitioner admitted that he was not looking, Scientific testing of the Caliber of a bullet that struck Mr. Walker was never done, the ascertainment of how many guns were actually present was never done. As Such the trial Court abused its discretion by not allowing the instruction.

The trial Court Kept the jury from being fully and properly instructed. When weighed with the denial of presenting a defense with the denied police report that were false reports by Mr. Swils it was unduly prejudice against the petitioner and rendered the trial fundamentally unfair. As in *Darden v. Wainwright*, 477 US 168, 181-83 (1986), and *Sawyer v. Smith*, 497 US 227, 235 (1990) the errors injected an Unfairness and resulted in a due process violation.

### ARGUMENT III

The petitioner was incorrectly Scored for offense Variable 6 and 13. Offense Variable (OV) 13 allows for the Scoring of 25 points if the offense was part of a pattern of felonious Criminal activity involving 3 or more Crimes against a person. OV 6 allows for the Scoring of 25 points if the offender had unpremeditated intent to Kill, had the intent to do great bodily harm, or Created a very high risk of death or great bodily harm Knowing that death or great bodily harm was the Probable result.

The findings in *Townsend v. Burke*, 333 US 736 at 741 reasoned that the due process, under the Fourteenth Amendment gives a defendant the right to be Sentenced based on accurate information. Further Sentencing based on assumptions which are materially untrue is not Consistent with the due process of law.

A Sixth Amendment inquiry, whether a fact is an element of the Crime. When a finding of fact alters the legally prescribed Punishment so as to aggravate it, that fact forms a new offense and must be Submitted to the jury. OV 13, if the offense was part of a pattern of felonious Criminal activity involving 3 or more crimes against a person, MCL 777.43(i)(c).

This just did not exist in this present case. If any facts Used to increase the Minimum Punishment a Criminal defendant receives that is not found by a jury or admitted to by a defendant that would in fact violate the Sixth Amendment. There Was no reasonable facts to Support OV 13 in this present case, the jury did not weigh the evidence and facts at trial to Support OV 13,

nor had the petitioner admitted to anything that would find the elements to OV13.

In regards to OV6 the prosecution requested that it be scored at 25 points and not 10 points. MCL 777.36(1)(b) covers the 25 points in which the offender had unpremeditated intent to kill, had the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.

It was Constitutional error for the trial Court to allow OV6 to be scored at 25 points and not the 10 points it was scored at. MCL 777.36(2)(b) covers the 10 points in which must be scored if a killing is intentional within the definition of Second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.

The jury on weak circumstantial evidence found the petitioner guilty of Second degree murder. There was no evidence to support a finding of Malice. There was evidence that the petitioner was victimized by the three in the vehicle.

This Court held in *Apprendi v. New Jersey*, 530 US 466, 120 S.Ct. 2348 147 L. Ed. 2d 435 (2000), that the Sixth Amendment provides criminal defendants with the right to have a jury find those facts beyond a reasonable doubt. *Alleyne v. United States*, 570 US 99, 133 S. Ct. 2151 186 L. Ed. 2d 314 (2013) then extended the rule of *Apprendi*, *Supra*.

Applying the Constitutional right to be sentenced based on accurate

information, it is clear the prosecution's request to enhance the Score and guidelines, and the trial Courts abuse of discretion to do so violated the factual determination being supported by a preponderance of the evidence and Constitutional protections of the petitioner.

The errors altered the prescribed punishment and with OV13 and OV6 being re-scored the petitioner's guidelines would change and the range would be 180 to 300 months. This Court should grant this petition due to the punishment being altered in violation of Constitutional protections.

In the alternative this Court should grant this petition because of the improper application of the law to support there was sufficient evidence to convict the petitioner when there wasn't. This Court should grant this petition for the trial Courts failure to uphold the Constitutional protections to have a properly instructed jury.

This Court may also find that the petitioner's trial Counsel was ineffective as there was a failure to protect the petitioners interests, which would include pre-trial, trial and Sentencing hearings. The errors and failure to protect the petitioner's Constitutional interests were not only prejudice towards the petitioner but the outcome could have reasonably been different had trial Counsel not been ineffective. Sixth Amendment guarantees effective assistance of Counsel, protecting ones client and best interests.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Larino Emmer Miller

Date: 02-19-20