

19-8096

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARVIN Noble — PETITIONER
(Your Name)

vs.

SHANE JACKSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARVIN Noble
(Your Name)

2500 S. SHERIDAN DR.
(Address)

MUSKEGON HEIGHTS, MI. 49444
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

ATTACHED

LIST OF PARTIES

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

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

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ 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☒ is unpublished.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☒ is unpublished.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 _____ 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☒ is unpublished.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 _____ 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☒ is unpublished.

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 3/1/18.
A copy of that decision appears at Appendix _____.

☐ 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

ATTACHED

STATEMENT OF THE CASE

ATTACHED

REASONS FOR GRANTING THE PETITION

ATTACHED

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: _____

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN NOBLE — PETITIONER
(Your Name)

VS.

SHANE JACKSON — RESPONDENT(S)

PROOF OF SERVICE

I, MARVIN NOBLE, do swear or declare that on this date, _____, 20____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 20____

(Signature)

CASE REVIEW

As an ever present peril for the criminal Justice System is the conviction of an innocent person. Recognizing that peril, the Supreme Court made clear in *Harrington v Richter*, 562 U.S. 86 (2011), habeas review by Federal Courts serves a crucial role in: "Guarding against extreme malfunctions in the state criminal justice system".

This case represents such an extreme malfunction, this case involves the murder of Mr. Washington, the deceased, in Detroit, Michigan, in 2013. Video footage was extracted depicting events before or after the shooting occurred. Specifically, a black vehicle pulling curb side of the Rite-Aid Store. The second clip depicts the unknown man walking through the pharmacy drive-thru crossing paths with the victim. The third clip depicts the unknown man fleeing up the alley. It should be noteworthy to add there is no video footage that captures the events of the actual shooting, or the multiple people in the alley, or multiple people hanging around or loitering around the abandoned house behind the store.

Ms. Joanna Smith's black Impala was parked in front of her apartment, three (3) blocks away from the crime scene. Without a warrant, the same day of the shooting, Smith's vehicle was towed and processed by Detroit police, Lori Briggs, per order of Officer Rutledge. DPD reports did not find any forensic evidence that would connect Smith or petitioner to the crime.

The following day of the shooting, August 6, 2013, Officer Rutledge interviewed the only eye witness to the crime, Ms. Martha Porter, who described the shooter to be approximately 5'6 in height and dark skin in complexion. When shown a six (6) man photo array, which included a photo of petitioner, Ms. Porter, again identified a dark skin in complexion blackman who she thought to be or resemble the shooter. Petitioner was not identified from said photo array, detracting away from police suspicion. It should be note worthy to add that Porter did not identify petitioner as the shooter at trial and she indicated he was with someone on a bike when he fled.

In hope that something might turn up incriminating Smith or that would connect petitioner to the crime, Officer Rutledge indicated in an affidavit that Smith admitted involvement in the homicide. This sworn statement was later proven to be a lie during petitioner's trial but the lie was utilized to secure Smith's phone records in hope that something might turn up, again, nothing ever turned up.

The police indicated in its request for warrant, investigation report, and affidavit that video surveillance captures Noble pulling out a gun and fatally shooting the victim, and witnesses positively identifying petitioner as the suspect. This sworn statement was utilized to deceive a judge to sign a warrant for petitioner's arrest where probable cause did not exist.

The police made a unilateral decision to exclude from its warrant request or affidavit that Smith was arrested for the investigation of the murder, and held in police custody for six (6) days without being committed before a magistrate on felony charges, and while in custody, Smith was repeatedly told by the police that petitioner was the man she dropped off at the store, or shooter.

The police knew when it brought the criminal charges against the petitioner, there was no physical evidence or eye-witness account linking him to the crime, and that at the time of his arrest he is listed as 5'10 in height and medium lightbrown skin in complexion, not 5'6 in height and darksin in complexion as Porter indicated.

The main evidence used against petitioner was video surveillance. The prosecutor paraded multiple witnesses into the courtroom, who watched the video after the fact and provided lay opinion testimony identifying the unknown man in the video as petitioner. All this occurred after the police introduced him as the suspect. None of the witnesses who testified observed first hand the crime, except, Porter, who, again, testified at trial she did not see the shooter in the courtroom.

During Smith's unlawful detainment she indicated to the police under oath, petitioner did not have a gun on the day of the crime. Smith later reiterated these facts at the preliminary examination hearing, and denied seeing a gun at trial when the prosecutor framed his questions as to assume she knew.

The homicide police testified they found no evidence or shell casings that would connect petitioner to the crime.

Expert witnesses and witnesses who had not observed first hand the fatal shooting were paraded into the courtroom to give their personal opinion as to who committed the crime and to talk about the petitioner's character in a prejudicial way to influence the jury.

The petitioner is innocent and the identification of the shooter by Porter and the fact that a warrant was built on corruption gives strong support to his claim. In *Schlup v Delo*, 513 U.S. 298, 315 (1995), the Supreme Court held: "that a credible claim of actual innocence will permit a petitioner to have his constitutional claims reviewed by a habeas review."

STATEMENT OF QUESTIONS PRESENTED

A.

MARVIN NOBLE IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSE, JACKSON V VIRGINIA, 443 U.S. 307 (1979), TO SUSTAIN MR. NOBLE'S CONVICTION OF FIRST DEGREE MURDER, FELON IN POSSESSION OF A FIREARM, FELONY FIREARM, AND CARRYING A CONCEALED WEAPON.

B.

MARVIN NOBLE IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE PROSECUTOR ATTACKED HIS GOOD CHARACTER BY ELICITING BAD ACT TESTIMONY FROM A WITNESS DEPICTING HIM AS A DRUG DEALER.

C.

MARVIN NOBLE IS ENTITLED TO HABEAS RELIEF, BECAUSE HE WAS DENIED HIS SIXTH AMENDMENT RIGHT, WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S LEADING A STATE WITNESS TO DEPICT PETITIONER AS A DRUG DEALER.

D.

MARVIN NOBLE IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE HE WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN TRIAL COUNSEL FAILED TO CROSS-EXAMINE PORTER REGARDING THE SHOOTER'S DESCRIPTION, CAUSING AN INNOCENT MAN TO BE INCARCERATED.

E.

MARVIN NOBLE IS ENTITLED TO HABEAS CORPUS RELIEF BECAUSE, HE WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN TRIAL COUNSEL, FAILED TO OBJECT TO THE LAY OPINION TESTIMONY OF VARIOUS STATE WITNESSES REGARDING THE IDENTITY OF INDIVIDUALS IN VIDEO SURVEILLANCE FOOTAGE.

F.

MARVIN NOBLE IS ENTITLED TO HABEAS RELIEF BECAUSE, HE WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND DEVELOP A DEFENSE BY OBTAINING THE ASSISTANCE OF AN EXPERT FIREARM EXAMINER.

G.

MARVIN NOBLE IS ENTITLED TO HABEAS RELIEF BECAUSE, HE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS

WHEN APPELLATE COUNSEL FAILED TO CALL TRIAL COUNSEL TO THREE POST CONVICTION HEARINGS HELD TO EXPLAIN WHY HE FAILED TO INVESTIGATE AND MOVE FOR THE SUPPRESSION OF THE FELONY CHARGES THAT WERE BROUGHT AGAINST PETITIONER MALICIOUSLY, AND APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE ON DIRECT APPEAL, CAUSING AN INNOCENT MAN TO BE INCARCERATED FOR A CRIME HE DID NOT COMMIT.

H.

MARVIN NOBLE IS ENTITLED TO HABEAS RELIEF BECAUSE, HE WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN APPELLATE COUNSEL FAILED TO CALL TRIAL COUNSEL TO THREE POST CONVICTION HEARINGS HELD TO EXPLAIN WHY HE FAILED TO OBJECT TO VARIOUS STATE WITNESSES OFFERING AN OPINION INDICATING PETITIONER WAS GUILTY.

I.

MARVIN NOBLE IS ENTITLED TO HABEAS RELIEF BECAUSE HE WAS DENIED HIS SIXTH AMENDMENT RIGHT WHEN APPELLATE COUNSEL FAILED TO MAKE AN OFFER OF PROOF TO ANY CLAIMS RAISED ON DIRECT APPEAL.

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CERTIORARY SHOULD BE GRANTED FOR THE FOLLOWING REASONS:

Reason 1.

In the instant case, without impermissibly stacking inferences there was insufficient evidence for a rational trier of fact to conclude that petitioner murdered the victim under the Jackson v Virginia, 443 U.S. 324 standard. Although a jury may infer facts from other facts that established by inferences, each link in the chain of inference must be sufficiently strong to avoid a lapse into speculation. Newman v Metrish, 492 F.Supp. 2d 721, Lexis 43488 (6th cir.2007) quoting Piaskowski v Bett, 256 F.3d 687, 693 (7th cir.2001).

The leap from inference to inference is irreconcilable with the requirement of proof of guilt beyond a reasonable doubt and is impermissible. People v Atley, 342 Mich 298 (1974). The chain that the prosecutor attempted to forge fails in many places in petitioner Noble's case.

First, the lower courts relied on the medical examiner's testimony indicating the victim's autopsy report shows he was shot in the head at close range. However, the brutal nature alone does not justify an inference of premeditation and deliberation of first degree murder. People v Hoffmeister, at 159; 394 Mich 155 (1975) reh den 394 Mich 944 (1975).

Second, the lower courts ignored testimony from Smith indicating it was her idea to go hang out at the house with her friends where the victim was shot. (TT3, 110: 18-19). After -

Smith told Noble where she was about to go, it was then that he asked for a ride to the store. The state or lower courts ignored Smith's testimony indicating petitioner never had a gun on the day of the crime. Smith testified petitioner never procured a gun or had a gun on his person or in Smith's vehicle when she dropped him off at the store, or after the fatal shooting, when she later picked him up. (TT3, 179: 13-23/180: 1-3).

Smith's claim was first validated at the probable cause hearing, when the prosecutor asked her if petitioner carried a gun on the day of the crime, Smith indicated petitioner was not carrying or concealing a gun on the day of the crime. When further asked, how did she know with certainty, Smith indicated she would know because the extended clip and the particular gun possessed in the past was the caliber to carry a extended clip and that is what petitioner always had. See appendix A.

It is clear that this line of questioning was unconstitutional and had nothing to do with the crime that occurred. Moreover, Smith's testimony supports petitioner's claim of innocence. Also, Smith's testimony undercuts the prosecutor's theory that petitioner Noble was a felon in possession of a firearm, or carried an unlicensed pistol, or procured a weapon to effectuate the crime of first degree murder.

The lower courts ignored testimony evidence from the homicide investigator, who indicated no shell casings associated with a semi-automatic weapon were recovered at the crime scene or recovered period, (TT2, 210: 1-5), further proof of petitioner's innocence.

The trial record shows the witnesses paraded into the courtroom did not identify petitioner with a gun or observe first hand the fatal shooting, with the exception of Porter, who identified a darkskin in complexion blackman who she thought to be the shooter, from a six man photo array. See appendix B. Moreover, Porter did not identify petitioner as the shooter during trial, from the multiple people in the alley, or multiple people loitering around the house, where the victim was shot. (TT2, 123: 11-17).

The trial record shows that the jury was emphatically told petitioner was a dangerous person by his very nature, and that he's a felon who concealed a gun in the past and is the sort of character who was likely to have fatally shot the victim. *Old Chief v United States*, 519 US 172 (1997).

Third, aside from the prosecutor's assumption, there was no physical evidence connecting petitioner to the crime, further proof of the prosecutor's leap in logic.

Fourth, The lower courts ignored the fact that the prosecutor was arguing facts not supported by the trial record, when it indicated Garza or Gallogoes witness petitioner shoot the victim (TT4, 94: 1-2). When in fact, neither witness observed the fatal shooting. Their testimony is limited to seating in the pharmacy drive-thru and hearing a gunshot. The trial record shows that both witnesses failed to identify petitioner at the crime scene from a six man photo array. See appendix C. (TT2, 78: 8-9/79: 17-21/86: 5-7), (TT2, 35-38, 45-46).

Neither witness testimony account of the events, says anything about what petitioner did in the alley just before the victim was shot. The trial record indicates both witnesses identified petitioner from a unconstitutional suggestive identification in-court process, (1) one year and (2) two months later, repeatedly, invading the province of the jury by opining the petitioner was guilty of being the shooter that cased out the area. (TT3, 23:4), (TT2, 24:6), (TT2, 33:22), (TT2, 26: 13-19).

Who shot the victim was an issue for the jury to determine, and because trial counsel failed to object to lay opinion impermissible testimony, their testimony invaded the province of the jury and impermissibly impugned fundamental fairness. *Cooper v Sowders*, 837 F.2d 284, 1998 US App Lexis 501, *People v Fomby*, 300 Mich App 46 (2013).

The trial record indicates that after the fatal shooting no witness who testified stuck around. (TT2, 120:19). Thus, flight could be the result of innocent people avoiding the line of fire, departing out of fear or panic. *People v Cutchall*, 200 Mich App 346 (1993). The trial record shows the petitioner was isolated by the prosecutor from the multiple people hanging around the house or the crime scene, creating the illusion that if only the petitioner and victim were alone behind the house, any reasonable jury could believe petitioner was the shooter and fled from guilt.

Again, Smith and Porte's testimony under cuts the prosecutor's theory that the victim and petitioner were alone. (TT3, 110: 5-8), (TT2, 115), (TT2, 127: 17-20).

Identification is an essential element in every criminal prosecution and the prosecution failed to establish such element. In *Re Winship*, 397 U.S. 358 (1970), *People v Oliphant*, 399 Mich 472 (1976).

It should be note worthy to add that at the time of petitioners arrest he is listed as 5'10 in height and mideum light-brown skin in complexion. See appendix A .

Fifth, the lower court placed strong emphasis on the testimony of David Lee, indicating petitioner sold drugs to the victim in the past.

The proscutor argued a drug deal gone bad could cause there to be friction that led to the victim's death. (TT4, 98: 15-19). Moreover, the lower courts ignored testimony from Lee indicating he was not an eye-witness, never found out who shot the victim, or that he had no personal knowledge about any disagreements (TT3, 65: 15-16), or bad blood between the victim and petitioner regarding drugs that led to the murder. (TT3, 71: 7-10).

The actions of the prosecutors in arguing assumptions, with no offer of proof amounted to a substantial error, because it is more probable than not that the jury was misled in a prejudicial way by attacking petitioner's character as a drug dealer, and significantly impacted the jury's deliberation. *Donnelly c Christoford*, 416 U.S. 637,646 (1974). *Washington v Hofbauer*, 228 F.3d 689, 700 (6th cir.2000).

The affects of the prosecutor's action so infected the trial by the attack on petitioner's character, making the resulting conviction a denial of due process. *Berger v United States*, 295 U.S. 78, 88 (1935).

The lower court ignored the fact even the trial court observed that the chain of inference, linking the victim's death to an alleged drug sale, or drug meeting, or drug dealing relationship, was pure speculation and showed no threshold linking underground rumbling from Lee to the instant crime. When the trial court asked officer Brue, if he was aware that cell phone records existed for the petitioner, the police said "yes", when further asked, if any calls were made "separate" or "apart" from Smith's phone in connection with the murder, the police said "no" (TT4, 58: 1-2).

It should be noteworthy to add the lower courts ignored testimony from Lee, who indicated the petitioner and the victim were on friendly terms (TT3, 66: 18-20).

Sixth, the pathologist testified that the victim's toxicology report revealed cocaine in his system. (TT3, 28: 15). The lower courts ignored the fact that the trial record is void of any evidence as to the victims whereabouts when he obtained and consumed cocaine or who he obtained it from, (TT3, 29:11-17). The trial record does show that petitioner was isolated by the prosecutor as the culprit, when, infact, Lee indicated that the victim routinely purchased cocaine from a number of drug dealers from the neighborhood. (TT3, 85: 7-9).

The prosecutor not only isolated petitioner Noble, but the prosecutor's claim impermissibly linked a fairly innocent lab report to the petitioner's reputation as a drug dealer in such a manner that his guilt was implied by the attack on his character itself. The prosecutor erred in attacking it because petitioner never put his character in issue. *Simpson v Warren*, 474 Fed.App.51 (6th cir.2012) *People v Johnson*, 409 Mich 552 (1980).

Seventh, the lower courts failed to evaluate mere presence, a factfinder must distinguish, based upon the totality of the circumstances between one who is present at the scene and one who is present with criminal intent. *Long v Stovall*, 450 F.Supp. 2d at 754 (2006)..

The trial record shows that there was no forensic evidence, no eye witnesses accounts, or physical evidence that petitioner was present with criminal intent. Mere presence even with the knowledge that an offense is about to be committed or is being committed is not enough to make a person an aider or abettor or a principal in the murder.

No evidence was introduced that the petitioner acted in pre-concert to perpetuate the crime of murder in the first degree. Thus, the prosecutor's arguments are founded upon a pyramid full of speculations, gaps, and inadmissible testimonies. A strong suspicion that petitioner was involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt. *Jackson v Virginia*, 443 U.S. 307,319 (1979).

Reason 2.

Petitioner argues his appellate counsel's failure to raise his ineffective assistance of trial counsel claim, by failing to investigate a malicious prosecution constituted ineffective assistance of coounsel. Petitioner also argues appellate counsel failed to challenge the trial court's decision to grant or deny petitioner a new trial, after petitioner made a preliminary showing that a warrant for his arrest was procured by fraud.

In the instant case, Officer Rutledge signed a affidavit and Request for a warrant for petitioner's arrest. (TT3, 202:5-6). The request for a warrant indicates video surveillance captures Noble pulling out a gun and killing the victim, Mr. Washington. See Appendix E. Moreover, this information turned out to be a lie.

Second, Officer Rutledge signed a affidavit stating Smith was brought in the Detroit Homicide Section to be interviewed, and during the initial interview, and the ones that followed she confirmed that on August 5, 2013, she drove petitioner to the area of Springwell and Vernor and dropped him off. See Appendix-E. This information turned out to be a lie. See Appendix F. And on the following day of August 8, 2013 smith told the police she dropped off a really short darkskin man with rotten teeth, by the name of Dee or Tee. See Appendix G.

Third, police documents show that it wasn't until after Smith was unlawfully arrested for the investigation of the murder See Appendix H, and was detained for (6) six days by the police,

(TT3,164:1), without being committed before a judge on felony charges, repeatedly interrogated about and told Noble was the killer by the police, and told she faced life in prison if she did not place petitioner in her car or at the scene, that she caved in.

Fourth, Officer Rultedge indicated in his affidavit that Smith was shown surveillance of the shooting, when, in fact, there is no video footage of the shooting, and it was the police who introduced Noble as the suspect to witnesses who did not observe first hand the fatal shooting.

Based on these facts, petitioner argues trial counsel performance worked at a disadvantage under Strickland v Washington, 466 U.S. 688 (1984) standard, and that he was denied effective assistance of counsel on appeal by right from appellate counsel. *Evitts v Lucy*, 469 U.S. 387,396 (1985), US Const, Am VI, XIV: Const.1963, art.1 sec.20, *People v Malbry*, #78 Mich 538 (1967)

At a post motion hearing (T2,17-22), dated: 10/30/15), petitioner informed the trial court that he would need a Franks Hearing, and the court informed petitioner he would be allowed to present his case that would support such a hearing. During the following motion hearing held with the trial court the petitioner made more than a preliminary showing that his Fourth Amendment rights were violated as a result of a malicious prosecution, despite no evidentiary hearing was held to have trial counsel explain his in-actions.

When the lower courts affirmed petitioner's conviction, all courts indicated that an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. The courts further indicated Noble is not a suppressible fruit, citing *United States v Crews*, 445 U.S. 463,474 (1980).

Unlike "Crews" petitioner's case is distinguishable, he argues that the in-court suggestive identification was the product of illegal police activity. Noble's identification was not known as a suspect (unlike Crews) before police misconduct and his presence in-court was indeed traceable to the Fourth Amendment violation.

It should be noteworthy to add that petitioner has never argued he is a suppressible fruit. Petitioner argument is that prejudice is presumed because lies were abridge in violation of petitioner's constitutional procedural right, *Ex Parte Royall*, 117 U.S. 241 (1886), *Hirmuz v City of Madison Heights*, 469 F.Supp 2d 466 (E.D.Mich.2007) not to have false information created in police reports or affidavits to detain petitioner or to build a case against him were probable cause never existed.

In *Brown v Illinois*, at 590 an arrest for a investigation of a murder amounts to an illegal and unconstitutional detainement. Again, Smith's statements were on the temporal extremes in relation to the illegal arrest and was obtained immediately after being pursued and arrested by six police, prior to that Smith

initially described someone else or identified someone else as the person she dropped off at the store. See AppendixG. Thus, petitioner has standing to challenge Smith's testimony. People v Bullard, 2013, Mich App Lexis 24, citing People v Yeoman, 218 Mich App 406, (1996).

Police documents show that The Duvalls contacted the police to inform them the man name Kenny was the neighborhood suspect, these documents further show the Duvalls independent recollection from Kenny shifted to Noble from police misconduct. See AppendixI. Police documents also show the police introduced petitioner as the suspect to David Lee, who watched a video after the fact and assumed the man in the video shown exiting a black vehicle to be petitioner on the assumption the vehicle looked like smith's and after being interviewed soley about petitioner, as police displayed a single photo of Noble to Lee. See AppendixJ .

Petitioner's claim of innocence also arises as a context within this court should view constitutional errors that alleges occurred at trial. Unlike and innocence claim under Herrera v Collins, (claims made with the assumption of an error free trial) Under Schlup v Delo, 513 US 248 (1995) where the claims of innocence is made in conjunction with allegations of constitutional error, the conviction may not be entitled to the same validity. Whereas here, the evidence of innocence is strong, petitioner must be allowed a gateway to argue the merits.

Reason 3.

Petitioner was denied his Sixth Amendment right to counsel when trial counsel failed to consult with an firearm expert, and request the funding of such expert to challenge the states case to aid the jury in understanding the evidence.

Prior to petitioner's trial, he was represented by trial counsel Larry Polk. During the pre-trial stages, counsel filed a Motion For Remand back to the Magistrate court.

Specifically, the issue was the victim's medical records raises a material issue as to the identity of the shooter by inferences suggesting the shooter is left handed and short in height. Whereas, the petitioner is right handed and stands at least 5'10 in height. Moreover, petitioner never disputed the cause and manner of death, but argues that he was incorrectly identified as the shooter. Subsequently, the trial court granted The Motion to Remand. See Appendix K.

At the remand hearing Dr. Hudson testified he could not determine whether the shooter was right or left handed. See (Appendix L. (P.E. on remand 24:10-13). At no time after the Remand hearing did counsel Polk consult with a firearm examiner to investigate options in confronting the prosecution's proof by preparing counsel to cross-examine the prosecutions expert or by providing rebuttal testimony or by indicating how the requested expert would be useful.

On August 21, 2014, William Winters was appointed to represent petitioner, two weeks before trial. During final conference hearings, trial counsel indicated he was unaware that the court received a letter from petitioner seeking assistance from a firearm examiner, but that all evidence needed to develop a defense to aid the jury in understanding the victim's gunshot infliction wound, as it relates to the identity of the shooter, would be brought through his representation. See Appendix-M Final conference Ti, 4, 23-25).

During petitioner's trial, Dr. Hudson testified that he had had seen hundreds of site imprints, but never saw a four (4) O'clock imprint. (TT3, 35:20-24). He also indicated he was not an expert in firearms or ballistics, therefore, he could not determine whether the shooter was right or left handed, short or tall in height, when asked. (TT3, 40:3-6), (TT3, 17:20-21), (TT3, 53:1-8)

Trial counsel did not request from the court, that an independent expert in firearms be appointed. As a result no evaluation was conducted, as a result trial counsel denied petitioner his opportunity to present a defense.. Counsel's conduct was therefore ineffective Under Strickland v Washington, 466 US at 690. Kimmelman v Morrison, 477 U.S. 365, 384 (1986).

An indigent petitioner who needs the services of an expert witness to safely proceed to trial, has the right to the state's assistance in paying for that witness. Ake v Oklahoma, 470 US 68 (1997).

Conclusively, the court held in *Hinton v Alabama*, 571 US 134 S ct 1081, 188 L. ed. 2d 1 (2014) "That it is unreasonable for an attorney to fail to seek all available funding for a necessary expert witness." Therefore, it is more important than ever that defense counsel seek adequate funding for expert assistance in cases involving indigent defendants, failure to do so violates defendants rights to effective assistance of counsel. Reason 4.

Several witnesses offered an opinion that the petitioner was guilty of murder. Specifically, Gallogoes, repeatedly indicated petitioner was the shooter. (TT,23:4), (TT2,24:6), (TT2, 26:16), (TT2,33:22), (TT2,34:15), (TT2,55:7), (TT2,37:19), (TT2, 61:20), (TT3,141:20-21). Officer Rutledge implied petitioner's guilt, (TT3, 210:11-15), as did Officer Arue, (TT4,65:9-23). In addition, the prosecutor elicited testimony from David Lee concerning his "reliability" about past drug transactions between the petitioner and the deceased, thereby, bolstering his credibility. (TT3,69:71-73).

A witness cannot express an opinion on the petitioner's guilt or innocence of the charged offense. *People v Fomby*, 300 Mich App 46, 53 (2013), quoting *People v Bragdon*, 142 Mich App 197 (1985), and that is exactly what the state witnesses did in the instant case.

In the case before this Honorable Court, when the prosecutor asked Gallogoes to make an in-court identification of the man she saw walk in the alley, Gallagoes refered to the petitioner as "the shooter" when she pointed at him.

Secondly, Officer Rutledge testified that the two men who matched the height, skin complexion, dress attire, and were seen loitering around Smith's vehicle after the crime, were innocent, but that he established evidence that petitioner was the culprit

Third, Officer Brue, testified the pattern in the calls between Smith and petitioner wer "abnorman" and indicated "criminal activity".

Fourth, David Lee testified that petitioner sold drugs to the victim or deceased in the past.

Petitioner now argues that officer Rutledge testimony invaded the province of the jury because his opinion suggest to the jury the innocence of others and the guilt of the petitioner.

Next, Officer Brue testimony suggest the guilt of the petitioner because, outside his testimony regarding cell tower signals identifying a geographical location through technology, there was nothing scientific, technical, or specialized about his particular opinion indicating the calls between Smith and the petitioner indicated criminal activity.

It should be note worthy to add that the police lied under oath regarding the pattern of call, when, in fact, the pattern

of calls indicate, in a nutshell that when Smith met the petitioner on the month of May of 2013, the pattern of calls are numerous or consistent with the amount of calls on the day of the fatal shooting, according to Smith's phone records.

Finally, Lee's testimony about what he allegedly observed in the past, was never proven to be a link or relevant to the instant case, because as Lee indicated he was not an eye-witness to the crime, and did not have personal knowledge about any disagreements regarding drug dealing between petitioner and victim that led to the fatal shooting. (TT3,71:7-10).

The testimony of the witnesses did not aid the jury in understanding any evidence, what it did was give an insider's opinion on who committed the crime, something that would have never happened had trial counsel objected.

If counsel had objected, there is a reasonable probability that the outcome of the trial would have been different, because the trial court would have likely sustained the objection, which means the jury would have considered the impermissible lay opinion offered.

The jury would have had to make its own decision and it is reasonably probable that it would not have concluded that petitioner was guilty, considering no physical evidence or eye witness accounts, and no conclusive motive was established in the prosecutors attempt to establish one.

In *Cooper v Sowders*, 837 F.2d 284 (1998), the court held the officer's testimony impermissibly impinged fundamental fairness because it offered an opinion on petitioner's guilt or innocence. The court held that petitioner was denied a fair trial when the trial court allowed a police informant to answer questions concerning the snitch's "reliability" in other cases thereby bolstering his credibility because the testimony about accepting responsibility for the arrest and conviction of other people was not relevant and therefore it was inadmissible.

Appellate counsel's failure to call trial counsel to any of the post motion hearings or his failure to seek the Ginter hearing to have trial counsel explain his in-actions, constituted negligence not strategy. Petitioner argues that the relevant question is not whether counsel's choices were strategic, but whether they were reasonable. A purportedly strategic, but whether they were reasonable. A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them. *Strickland* 466 U.S. at 690, *Comb v Coyle*, 205 F1.3d 264, 288 - (6th cir. 2000).

Reason 5.

Several witnesses testified to reviewing video surveillance footage, from the area surrounding the scene of the crime, and to identifying petitioner and the deceased as the people in the video. Christopher Duval, testified that he identified the pair from video footage (TT2, 176-189), as did Stacie Duvall (TT2, 190-195), David Lee (TT3, 66-68, 94), and Joanna Smith (TT3, 134-137). Neither of these witnesses were at the scene while the video's were being recorded and thus, did not observe firsthand, the events depicted in them.

Based on these facts, petitioner argues that these witnesses provided lay opinion testimony regarding the people in the video footage, and that trial counsel was ineffective for failing to object to the admission of their testimony on the basis of such.

Michigan Rules of Evidence (MRE) 701 permits the admission as provided:

If the witness is not testifying as an expert, the witness testimony in the form of opinions or inference 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.

Christopher and Stacie Duvall, David Lee, and Joanna Smith all identified individuals depicted in video surveillance footage as petitioner and deceased, and the purpose was to establish that petitioner was the person that went behind the Rite-Aid Store with the deceased, moments before the shooting and that petitioner was the person running through the alley moments later.

Neither of these witnesses testimony was rationally based on perception because, as stated, neither of them were at the scene while the video footage was being recorded, thus did not observe firsthand the events depicted in the video.

Instead, they all watched the video after the fact, and on the basis of what they saw in the video, provided their opinion regarding the identity of individuals in it. Their testimony was in no way helpful to clear a understanding of any other witnesses testimony or any fact at issue, because, again, the only fact at issue was the identity of people in the video and that should have been determined by the jury.

Identification was the central issue in this case and should have been decided by the jury. However, it was the witnesses conclusions and opinions of the identity of the individual in the video surveillance footage, and that was a question for the jury to decide.

A witness cannot express an opinion on petitioner's guilt or innocence of the charged offense. *People v Fomby*, 300 Mich App 46 53 (2013) (quoting *People v Bragdon*, 142 Mich App 197, 199 (1985)) and the witnesses in the instant case, did just that when they identified petitioner as the person in the video.

Neither of the witnesses were in any better position than the jury to determine if it was actually petitioner that was in the video, so their testimony was impermissibly lay opinion testimony and counsel was deficient for failing to object to it admission.

If counsel had object, there is a reasonable probability that the outcome of the trial would have been different because the trial court would have likely sustained the objection, which means that the witnesses would not have been allowed to give their opinion of petitioner being the person in the video.

The jury would have had to make that determination on its own and it is reasonably probable that it would not have concluded that petitioner was the person in the video, considering that people who claimed to have known him for years, and to have hung out with him everyday, had a hard time trying to determine whether it was him or not. If these witnesses could not make a clear determination, it is reasonably doubtful that the jury would have been able to.

The video surveillance footage is the only evidence linking petitioner to this offense, as there are no eye-witness accounts, no physical evidence, and no forensic evidence. The prosecutor will probably argue that the identification testimony of Silvia Galloes and Ester Garza linked petitioner to the murder, but this argument must fail because both these witnesses' claims regarding identification amounted to total non-sense, so it is highly unlikely that any reasonable juror afforded it any weight. Neither Garza or Galloes identified petitioner in a photo line up a week after the murder. (see Garza at TT2, 77-79) and appendix C.) (see Galloes at TT2, 35-38, 45-46 and appendix C.), yet they both

positively identified him in court over a year and two (2) months later. (Garza at TT2, 80: 7-13), (Gallagoes at TT2, 37: 14-25). this does not make any sense, so a reasonable juror would have disregarded it.

Christopher Duvall claimed he knew petitioner for at least two (2) years, prior to the incident in question (appendix I). He was only able to identify the boots that the person in the video wore as being similar to a pair that he had seen petitioner wear in the past. (TT2, 176-189); see also relevant prtions of Christopher Duvall's preliminary examination testimony, (P.E. 5-7), appendix N.

David Lee told the police that he hung out with petitioner everyday for four (4) to five (5) months straight and he could only assume that petitioner was the person in the video. (appendix J.)

In short, there can be no reasonable explanation for trial counsel's failure to object to the impermissible lay witnesses testimony, because there's a reasonable probability that the objection would have changed the outcome of the trial and would have been different. Counsel was therefore ineffective.

Reason 6.

Appellate counsel raise several arguments in his motion for a new trial. All claims went before the Trial Court and the Michigan Court of Appeals.

There were no appendixes, no references to any particular page number from the trial record introduced as an offer of proof no affidavits were introduced as a offer of proof and no evidentiary hearings were held to expand the record to support any argument. Instead, appellate counsel merely cited a numerous amount of case authorities, no facts from the trial record were included.

Before the Michigan Court of Appeals affirmed petitioner's conviction, he made efforts to have appellate counsel's conduct corrected or dealt with. (Motion Hearing 2,3,4,5, dated: 12/1/15) Petitioner contacted MAACS, Attorney Grievance Commission, the Trial Court and Chief Justice. (Post Motion Transcript 2,4,8-22, 5: 1-4) none of these agencies provided a solution for petitioner's plea for guidance. It was after petitioner grieved his appellate counsel's conduct, that the prosecutor indicated at page nine (9) of their brief, that appellate counsel failed to make an offer of proof to support each claim and merely cites numerous case authorities. It should be noteworthy to add, that the prosecutor's claim, in its rebuttal brief, is identical to petitioner's claim of ineffective assistance of counsel.

Based upon these facts, appellate counsel performance worked at a disadvantage on petitioner's appeal by right.

Again, appellate counsel acknowledge that a record needed to be developed to suport all claims before the trial court. (Post Motion Hearing T1, 2:17-22), Moreover, no record was developed. What the post motion record shows is appellate counsel violated two (2) court orders to review with petitioner the miscellaneous homicide file, trial record, and video footage, for the purpose of showing the trial court that all evidence detracted away from the police suspicion that petitioner was guilty and that his due process rights were violated when the police falsified report and lied under oath to establish probable cause to arrest the petitioner. Also, for the purpose of showing the court how the prosecutor mischaracterized video evidence with the knowledge the plice lied about what it depicts, to have petitioner arrested and to review the trial record to inspect strong issues on which trial counsel was deficient.

Appellate counsel informed the trial court that he tried to withdraw as counsel when the client and attorney relationship deteriorated. (post motion hearing T4, 29:19-25,31), yet the trial court and Chief Justice would not allow counsel to withdraw.

Because appellate counsel failed to file petitioner's supplemental brief to the Michigan court of Appeals that was filed with the trial court, and because appellate counsel failed to call trial counsel to any hearing to explain his in-actions, and because he violated two court orders, counsel's conduct clearly he abandoned petitioner at a critical stage.

All cumulative errors raised in this case committed by trial counsel, appellate counsel, the police, and lower courts was so fundamentally unfair that petitioner was deprived of his procedural due process rights, requiring reversal of his conviction. *Cooper v. Sowders*, 837 F.3d 284 (1988) quoting *Walker v. Engle*, 703 F.2d 959 (6th cir. cert. 464 U.S. 951 (1983)).

Mr. Noble has exhausted all state remedies as to the issues presented herein. He exhausted his state court remedies by taking the following steps:

A. On direct appeal, the Michigan Court of Appeals denied relief on December 15, 2016, under file No. 324885, in an unpublished opinion captioned *People v. Marvin Dwayne Noble*. See Appendix D. The Michigan Supreme Court denied leave to appeal on June 27, 2017. *People v. Marvin Dwayne Noble*, No. 155178 See Appendix F.

B. On August 1, 2017, Mr. Noble properly filed a Motion for Relief from Judgment pursuant to MCR 6.500 in the Wayne County Michigan Circuit Court, which was denied on October 19, 2017, - *People v. Marvin Dwayne Noble*, Wayne County Circuit Court, No. 14-000744-01FC. See Appendix A.

C. On December 7, 2017, Mr. Noble filed an Application seeking Leave to Appeal to the Michigan Court of Appeals. The Application was denied on February 9, 2018, *People v. Marvin Dwayne Noble*, C.O.A. file No. 34145. See Appendix R.

D. On March 1, 2018, Mr. Noble filed an Application to the Michigan Supreme Court, that Application was denied on October 12 2018, People v. Marvin Dwayne Noble, M.S.C. file No. 157277 and (18). See appendixS.

E. Mr. Noble filed a Petition for Writ of Habeas Corpus in the Eastern District Court of Michigan, the Habeas Corpus was denied on August 22, 2019. See appendixT. The United States Court of Appeals For The Sixth Circuit denied petitioner's request to proceed with a Certificate of Appealability. See appendixU.

(Dated: January 17, 2020).