

19-8920

No. 19-1920

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DESHAWN COLBERT JR — PETITIONER
(Your Name)

vs.

SHERRY BURT — RESPONDENT(S)

FILED
JUN 23 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

DESHAWN COLBERT #728086

(Your Name)

2400 South Sheridan drive

(Address)

Muskegon, Michigan 49442

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTIONs PRESENTED

THE APPELANT'S RIGHT TO CONFRONTATION PURSUANT TO THE SIXTH AMENDMENT OF
THE UNITED STATES CONSTITUTION WAS VIOLATED AS A RESULT OF INEFFECTIVE
ASSISTANCE OF COUNSEL WHEN IT DENIED APPELLANT A NEW TRIAL 4

THE APPELLANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR ATTEMPTED TO USE
HIS SILENCE WHILE BEING ARRESTED BOTH AS AN ADMISSION OF GUILT AND TO IMPEACH
HIS SUBSEQUENT STATEMENTS TO OFFICERS THAT HE WAS MERELY PRESENT AT THE SCENE
OF THE ROBBERY AND MURDER 9

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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 A 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 is unpublished.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 B 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 is unpublished.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 D 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 is unpublished.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 C 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 is unpublished.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 _____. A copy of that decision appears at Appendix D.

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).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S Const amend.V

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, wherein 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, limb, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S Const.amend.VI

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused should enjoy the right to a speedy and public trial...the right to confront and cross examine accuser...and to have the assistance of counsel for his defense.

U.S Const.amend.XIV § 1

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 inforce 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

Deshawn Colbert Jr. was convicted by a jury of felony murder in violation of MCL 750.316 and Arm Robbery in violation of MCL 750.329. Deshawn Colbert Jr. was sentenced as a habitual offender in violation of MCL 769.10. Deshawn Colbert Jr. is serving a life sentence with a concurrent term of 30-60 years. On August 10, 2012, Deshawn Colbert Jr. conviction arose from the shooting death of Larry Evans in Battle Creek, Michigan. Deshawn Colbert Jr. was charged in the homicide with several co-defendants. One of the co-defendants' was his father, Deshawn Colbert Senior. Separate trials were granted because of the issues presented by United States v Bruton, 88 S.Ct 1620 (1968). Deshawn Colbert senior was therefore unavailable, and was unavailable for cross examination at Deshawn Colbert Jr.'s trial.

The appellant maintains that based on the facts and circumstances of this case, appellant's rights guaranteed by the confrontation Clause of the Sixth Amendment to confront witnesses against him was violated. The Sixth Amendment demands that if there are testimonial statements by a witness those statements will not be produced, then the testimony will not be allowed, unless the appellant had a prior opportunity to cross examine the witness. Crawford v Washington, 541 US 36, 53-54 (2004). Pursuant to Crawford, statements which were taken as a result of custodial interrogation, such as the statement of appellant's father, Deshawn Colbert Sr. have been held to be testimonial. Crawford, *supra* at 52.

Appellant's trial attorney rendered ineffective assistance at trial when he did not object to a detective Brad Wise answering numerous questions that the non-testifying co-defendant allegedly made in response to questioning. The following questioning and responses occurred at appellant's trial without

appellant being able to cross examine damaging testimony. The transcript reveals the following questioning of detective Brad Wise, who testified he had 29 years with the Battle Creek Police Department:

Q. Okay, you have the occasion during the course of your involvement to interview Deshawn Cobert Junior?

A. Did you have the occasion to interview his father?

A. I did. Deshawn Cobert Senior

Q. Yes, sir

A. Yes.

Q. How many times did you speak with him?

A. I spoke with him once at the station and then he sent messages out twice from the jail that he wanted to speak with me.

Q. Thank you. At any point during your conversation with him did he make any admissions to you?

A. In regard to being present, he admitted that he was there.

Q. Did he never change his story to you, Detective Wise?

A. He added to it quite-each time i talked with him he gave me more details.

Q. Did there come a time here he admitted to being at that location?

A. He did.

Q. Did there come a time when he admitted being there with his son?

A. Yes.

Q. Did there come a time where he admitted knowing what was going on at that particular date and time?

A. Yes.

Q. Did there come a time where he admitted or told you that the two Nelson boys had guns with them on that particular night?

A. Yes, he did.

A. Yes

Q. Did there come a time where he admitted to you at that point where-the reason for going over there was to secure marijuana?

A. Yes

Q. By purchasing it through force?

A. Through force.

Q. Did there come a time he indicated to you that he saw his own son with a gun that particular day and times?

A. Yes, he did.

Q. The first, second, third coversation?

A. That was the third conversation.

MICHIGAN COURT OF APPEALS:

The Court of Appeals held that the appellate counsel for appellant has shown that counsel's performance fell below an objective standard of reasonableness, but he has not shown that, but for counsel's deficient performance, a different result would have been reasonable probable." The Court of Appeals found that appellant's confrontation rights were violated and that counsel rendered ineffective assistance of counsel. (unpublished opinion, No. 391452, 2015 WL 1227657 at *2-4

POST SILENCE ARREST

At trial, officer Gancer gave testimony about how he and another oficer apprehended Deshawn Colbert Jr. The prosecutor's questioning and officer Gancer's response read as follows:

Q. Okay, while you handcuffed Desahwn Colbert Jr. did he say anything to you, either to you or in your presence?

Q. Did he tell you a man inside had been beaten or shot?

A. No. sir

Q. Did he tell you that he was just there because it was a dope house, he was there to either smoke or buy dope?

A. No, sir

Q. Did he tell his father was also located inside the home?

A. No, sir

Q. Did he ever indicate who, if anyone, had beat the person that was contained within the home?

No, sir

Q. And at no time when you were chasing him, securing him, or placing him in a patrol vehicle did he say anything to you?

A. No, sir.

ARGUMENT 1

THE APPELLANT'S RIGHT TO CONFRONTATION PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL WHEN IT DENIED APPELLANT A NEW TRIAL.

The use of the testimony by the detective of these statements which implied defendant-appellant violated US Constitution Amendments XI and XIV and case law. The United States Supreme court held in *Bruton v United States*, 319 US 123 (1968), that the admission at a joint trial of a co-defendant's confession that in turn implicated another defendant violates a defendant's right to confrontation of witnesses against him. Further, in *crawford v Washington*, the United States Supreme Court held that all testimonial statements are inadmissible under the Confrontation Clause unless the declarant was unavailable and the defendant had a prior opportunity for cross-examination. Although the Crawford did not provide a comprehensive list or definititon of testimonial, it clearly included prior testimony and statements given to the police in response to interrogation. *Crawford*, *supra* at 68.

The testiony that the detective gave was detailed and in response to

leading questions. Further, the testimony provided an alleged rationale or motive for the murder and implicated appellant alleged involvement with the homicide going so far as to claim the non-testifying co-defendant claimed appellant had a gun that day. The right of confrontation must include the right to cross examine witnesses. *Davis v Washington*, 547 US 813 (2006); *Pointer v Texas*, 380 US 400,406 (1965). That right to confront witnesses--if the witness is unavailable--can be admitted if the defendant had the prior opportunity to cross examine. Witness is unavailable--can be admitted if the defendant had a prior opportunity to cross examine the witness. *Barber v Page*, 390 US 719,725 (1968); *People v Bean*, 457 Mich 677,690 (1998). The actual demeanor of the witness testifying is crucial to a jury's decision regarding a witness's credibility. In *People v Dye*, 431 Mich 58,65 (1988) the Court held regarding this crucial issue that:

Demeanor is the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the liberal meaning of his words....his tone of voice, the evidence of fear which grips him at the height of cross examination, or even his defiance--that his evidence is not to accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. *People v Dye*, 431 Mich 58,65 (1988).

The Michigan court of appeals held that these questions and answers were not violations because there is no evidence in the record that appellant had been given Miranda Warnings or that he invoked his right to remain silent. 2015 WL 12227657, at *5. In *Jenkins v Anderson*, 100 S.Ct 2124 (1980), the Court held that the Fifth Amendment as applied by the Fourteenth Amendment was violated by

the use of pre-arrest silence to impeach the defendant's credibility. In Jenkins, the defendant testified on the stand at his trial. In the case at bar, Appellant did not testify on the stand at his trial.

In *Lilly v Virginia*, 527 US 116; 119 S.Ct 1887 (1999), a firm justice plurally explicitly held that "accomplices" confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our confrontation Clause jurisprudence." *Lilly*, 119 S.Ct at 1889 In light of this more recent pronouncement by the court, *Newman* is no longer good law, and the statements against penal interest exception is not a primarily rooted exception for purposes of confrontation Clause analysis. See *Bruton v Phillips*, 64 F.Supp 2d 669,679 (1999). The Sixth Circuit has determined that the accomplices confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule; therefore, the appellant is entitled to relief under the Sixth Amendment. The violation of appellant's right to confrontation is structural error and harmless error does not apply. The District Court applied the wrong law to the appellant's case. In other words, the District Court judgement conflicts with the Sixth Circuit's holding.

The defense maintained at trial that Defendant-appellant had been merely present at the scene. The only individual who testified differently was Mr. Ehab Kelly who claimed that appellant had come downstairs and looked for other people. That testimony was directly contradicted by earlier statements Kelly had given that he in fact could not see who in fact had come into the basement. The appellant maintains that the use further maintains that on the facts of this case, the statements in conjunction with the content of those statement shows its admission affected appellant's substantial rights. Further, the admission of those were the result of ineffective assistance of trial counsel.

Strickland v Washington, 466 US 668 (1984) provides the standard of what equals ineffective assistance of counsel. Appellant was deprived of his right to a fair trial when his trial counsel clearly rendered ineffective assistance of counsel. US Constitution Amendment VI, XVI; Const 1963, Art 1 § 20; Strickland, supra and People v Pickens, 446 Mich 298 (1994). Strickland held that the Sixth Amendment provides a guarantee of effective assistance of counsel and that a defendant must make a showing that counsel's performance was deficient and must show counsel made errors so serious the purpose of the Sixth Amendment to ensure a fair trial was frustrated. Strickland, supra at 687. The Court of Appeals agreed that trial counsel rendered ineffective assistance of counsel in the case at bar.

Here, appellant was granted a separate trial because his co-defendant made statements which implicated appellant in this homicide. Those statements were introduced in his trial, and he was deprived his constitutional right to confrontation which was violated, and which destroyed the very purpose of the co-defendants having separated trial. The violation was blatant enough that appellant himself recognized its inadmissibility and that these damning statements were hearsay and not subjected to cross examination. Defendant-appellant stated a lot of things that was done at the trial that was unfair. Like when Detective Wise was allowed to testify to what supposedly co-defendant said when that co-defendant should have been brought in the courtroom. I felt that was unfair because the jury was meant to believe hearsay. ." (ST, 11/21/13; Pg 3-4).

Defendant himself could have rendered more effective assistance for himself than trial counsel did.

Appellant must also show that counsel's deficient performance prejudiced the defense in the outcome of trial. To meet this requirement, appellant must

show counsel's errors were substantial enough to deprive him of a fair trial. The appellant maintains he can and did meet the standard. Appellant's defense was mere presence. The defense maintains he can not meet the standard. Appellant absolute right to present a defense was destroyed by the admissible and improper use of the non-testifying co-defendant's statements all given without any opportunity to cross examine or confront the witness. The non-testifying co-defendant allegedly told the detective that defendant-appellant went there to get marijuana by force and also that he allegedly had a gun. Here, the victim was robbed for marijuana, at great force, and was subsequently murdered, being beaten and shot. It would be difficult to articulate more prejudicial facts and responses by the non-testifying co-defendant whose statements were clearly inadmissible.

The Court of Appeals found that appellant's confrontational rights were violated and that his counsel rendered ineffective assistance of counsel under those circumstances. The Court of Appeals erroneously holds that although all of these violations occurred, the Court refused to reverse under plain error review because there was other strong evidence of guilt. The appellant maintains that the Court of Appeals has misrepresented some of the evidence on the record. For example, the Court claims Appellant' shoes were "covered" in blood. And that there was blood on Appellant's clothes. No testimony says how much blood was on the shoe, nor where it was located on the shoe.

The appellant maintains that the Court of Appeals has erred by ruling that appellant is not entitled to a new trial. A criminal defendant is guaranteed the right to confront witnesses against him. Dendel, *supra* at 452-453. The Sixth Amendment also bars the use of their statements as demonstrated above. US Constitution, Amendments VI,XIV; *Crawford v Washington*, *supra* at 53-54. This error was plain error affecting substantial rights. *Piper*, *supra* 270; *People v*

Carines, 460 Mich 750,763 (1999). Based on the above analysis, the appellant maintains that he has shown error and prejudice on the facts and circumstances of this case.

ARGUMENT &

The Michigan Court of Appeals concluded in its judgement that there was no record to determine whether appellant invoked his right to remain silent. (Tr;IV 48-53). The Michigan Court of Appeals misapplied the facts of Miranda to appellant's case.

The standard for determining "CUSTODY" was articulated by the United States Supreme Court in *Miranda*, 384 US at 478, but was subsequently modified in *Beheler*, 463 US at 1125, where the court established that a suspect is "in custody" for purposes of *Miranda* when "there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest". To apprise accused persons of their right to silence and to assure a continuous opportunity to excercise it, the following safeguards must be observed. At the outset, if a person in custody is to be subject to interrogation, he must first be informed in clear unequivocal terms that he has the right to remain silent. The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. The need for counsel to protect the Fifth Amendment privileged comprehends not merely a right to consult with counsel prior to questioning if the defendant so desires. see *United States v Rivas-Lopez*, 988 F.supp 1424 citing *Miranda v Arizona*, 384 US 436; 86 S.Ct 1602(1966). An individual need not make a pre-interrogation request for a lawyer. While such affirmatively secure his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effect waiver of the right to counsel during

interrogation can be recognized unless specifically made after the warnings herein delineated have been given.

The presumption of correctness applies only to purely factual findings. Many seemingly factual conclusions are, upon closer analysis, actually mixed questions of law of fact to which presumption of correctness does not apply. For example, a state court decision concluding that the defendant's confession is voluntary is a mixed question of law of fact to which the presumption of correctness is inapplicable. see *Miller v Fenton*, 474 US 104(1985). I want this court to reconsider the legal conclusion that the Michigan Court of Appeals drew from the facts concerning the silence of the record. (Colbert, No. 319452, 2015 WL 1227657, at 9,10). The Court of Appeals found that there was no evidence in the record that suggested that appellant invoked his right to remain silent. (Colbert, No.319452, 2015 WL 1227657, at *10). The presumption of correctness will not apply to a state court's ultimate conclusion that appellant waived certain constitutional rights. As soon as Deshawn Colbert Jr. was in custody, he was interviewed but the District court concluded that the appellant did waive his right to be silent. In the District Court, it stated in its opinion that appellant was given his Miaranda warning. (Vol II; at 48-53). The state ground that the Michigan Court of Appeals relied on is not regularly followed. See *Georgia v Ford*, 498 US 411, 423-24. Was Deshawn Colbert Jr. given a Miranda warning? Is the record silent? If detective Blocker gave appellant his miranda warning, then the District court lifted the bar or sanctions when it addressed the merits to the miranda issue. see *Ylst v Nunnemaker*, *Coleman v Thompson*, and *Harris v Reed*, 489 US 255 (1989). It will be a miscarriage of justice for this court not to reconsider the state court's procedural default rule regarding if the record is silent or if the appellant invoked his right to remain silent. The holding of Miranda is clear. "If a person in custody is the

subject of interrogation, he must first, be informed in clear that he has the right to remain silent". Miranda, supra, cited by Doyle v Ohio, 426 US 610,617; 96 S.Ct 2240 (1976). Whether the appellant's confession is voluntary is a mixed question of law of fact. In other words, the Fifth Amendment attaches when the arresting officer clearly informed Deshawn Colbert Jr. that he is under arrest and he has the right to remain silent. The appellant can not waive his right to remain silent. The violation of appellant's post silence arrest is structural error and harmless error analysis does not apply. Appellant's confession did not establish felony murder. (Vol II, pg 63-65). Deshawn Colbert Jr. did not say that he went to the house to rob anybody. Based on the record, there is no overwhelming evidence of appellant's guilt. In regard to the murder of Larry Evans, the Michigan Court of Appeals concluded , "Deshawn Colbert Jr's air jordan sneaker swabs identified the victim, Larry" as the major donor, with all four co-defendant's excluded". The DNA of the donor was insufficient for further comparisons. The District court did not mention or consider the fact that Heather Goff processed several samples taken from appellant's clothing. Based on the same blood test report, Deshawn Colbert Jr. provided with the District court, it was not the victim's blood that was found on appellant's clothes. Without the admission of Deshawn Colbert's prohibited confession and the unreliable prohibited admission of Deshawn Colbert Sr's confession, this case comes down to DNA. Appellant has shown actual innocence by direct exclusion of DNA. The confession of Deshawn Colbert is not harmless. The prohibited confession of Deshawn Colbert Sr. is not harmless. The constitutional error resulted in the conviction of one who is actually innocent of the underlying offense.

REASONS FOR GRANTING THE WRIT

In *Fleming*, 556 F3d 520,532 (6th Cir 2009), a panel of the Sixth Circuit held that the AEDPA deference applies to any underlying plain error analysis of a procedure default claim. In a subsequent decision, the Sixth Circuit held that the plain error review is not equivalent to adjudication on the merits, so as to trigger AEDPA deference. see *Frazier v Jenkins*, 770 F3d 485,496 n.5 (6th Cir 2014). ("We have repeatedly held that plain error review is not equivalent to adjudication on the merits, which would trigger AEDPA deference"). The Sixth Circuit noted that the approaches of *Fleming* and *Frazier* are in conflict. *Trimble v Bobby*, 804 F3d 767,777 (6th Cir 2015). When confronted by conflicting holdings of the Sixth Circuit, this court must follow the earlier panel's holding until it is over ruled by the United States Supreme Court's or by the Sixth Circuit sitting en banc. see *Darrah City of Oak Park*, 255 F3d 301,360 (6th Cir 2001).

There is another conflict in the United States Court of Appeals in regard to pre-Miranda silence. In *Jones v Trombley*, 2009 US App Lexis 1366, the prisoner alleged that the prosecutor improperly elicited testimony indicating that he had remained silent when he was initially stopped by the police but before he was advised of his right to remain silent under Miranda.... The district court held that the the claim was procedurally defaulted because he had not raised a contemporaneous objection at trial. ..Appellate court found that the prisoner did not raise an ineffective assistance claim in state court and could not now claim ineffective assistance to establish cause. In applying this test, the federal courts examine the holdings of the Supreme court as they existed at the time of the relevant state court decision. *Williams v Taylor*, 529 US 362,421(2000). However, the reviewing court may look to the decisions of

other courts that interpret or explain the Supreme Court holdings to determine whether a legal principle was clearly established by the court. *Smith v Stegall*, 385 F3d 993,998(6th Cir 2004). The proper inquiry is whether the state court's decision was "objectively unreasonable" and not simply erroneous or incorrect. *Taylor*, 529 US at 409-11. The constitutionality of using a defendant's pre-Miranda silence as substantive evidence of guilt had not been addressed by the the United States Supreme Court. The Ninth, Fifth, and Eleventh Circuit Courts of Appeals have held that the prosecution may comment on the defendant's silence if it occurred before the time he was required to be given his Miranda warnings. see *US v Oplinger*, 150 F3d 1061,1066-1067(CA 9,1998);*US v Vanabria*, 74 F3d 590,593(CA 5,1996). However, the Sixth, Tenth, First, and Seventh Circuits have held that it is a violation of the defendant's Fifth Amendment right against self incrimination for the prosecution to comment on a defendant's pre-Miranda silence as substantive guilt. This court's deciion in *Combs v Coyle*, 205 F3d 269,281(6th Cir), cert denied, 531 US 1035(2000), granting habeas relief on the ground that the use of prearrest, pre-Miranda silence as substantive evidence of guilt violates the Fifth Amendment right against self-incrimination, is not controlling because it is a pre-Miranda decision and therefore decided under de novo standard of review. see also *Narlock v Hofbauer*, 118 F.Appx 35,35(per curiam) (holding that a state court's admission of postarrest, pre-Miranda silence could not be said to be contrary to or an unreasonable application of clearly established federal law); *Mitchell v Lafler*, 118 F.Appx 24,27 (per curiam) (holding that a state court's admission as substantive evidence of the petitioner's prearrest silence did not warrant relief under the AEDPA), cert. denied, 544 US 983,125 S.Ct 1851(2005).

Jenkins, Combs, and Jones issues were reviewed under plain error analysis. The state court reviewed appellant-defendant claim's under a plain error

standard of review. Even though appellant did not object to the testimony of Brad wise, the lawyer objected on a different ground. To be more specific the appellant's lawyer objected to the testimony of Ganger. The court of appeals agreed that defendant had a right to confront his accuser. The lawyer did object to the prosecutor's pre-arrest silence to impeach the credibility of appellant. The lawyer did object to the prosecutor's using pre-arrest silence as substantial evidence of guilt. In regard to the prosecutor's using pre-arrest, pre-miranda silence as evidence of guilt, the appellant never took the stand. In Jenkins the defendant took the stand and testified that he killed in self defense. Jenkins, id at 232. Since the defendant did not take the stand, the Savory and Griffin reasoning is applicable to the case at bar. Since the defendant in the case at bar did not take the stand, the application of Doyle do not apply. The application of Griffin does apply. see Savory, 832 F2d at 1017. Ronald Combs's lawyer did not object to the "talk to my lawyer" statement. In Frazier the court determined that Frazier did not assert in the district court that his waiver was invalid due to his mentally incapacity. The District refused to address the merits of Frazier's claim. 770 F3d at 497. The circumstances in Coimbs is exactly like appellant's failure to object to Brad Wise testimony.

There is still one single problem. The Supreme Court of the United States has not determined whether commenting on a defendant's pre-miranda as substantiver guilt is a violation? The case at bar is exactly like Jones v Trombley. The Jones court reviewed defendant's claim under plain error review even though he did not raise an objection at trial. Jones, 2003 Mich App Lexis 2209; 2003 WL 22113959 at *1. This writ need to be ordered because the District court addressed the merits of appellant's pre-Miranda silence claim. The District court addressed the merits of appellant's Crawford claim. In regard to

the Crawford claim, the state court agreed that appellant did satisfy cause. The state courts refused to address the merits because it had other independent evidence of guilt. In other words Deshawn Colbert Jr.'s confession. One minute the district court agree that the confession was harmless but the next minute the District court agree that co-defendant, Deshawn Colbert's senior's out of court testimony was harmless. Petitioner agrees with the Sixth Circuit on behalf of his pre-miranda claim. The Jones court stated, "because the United States Supreme Court has not resolved the conflict in the circuits, the District court's conclusion can never be based on an unreasonable application of Supreme Court precedent". see Jones v Trumbley. The appellant asks this court to resolve the conflict in regard to plain error review. The Fleming v Metrish analysis conflicts with Harrington v Richter holdings. The appellant contends that the AEDPA deference should not apply to plain error review because the deference imposes a heavier burden on appellant's standard of review. The appellant asks this court to over rule Fleming v Metrish precedent. When the prosecutor admitted the testimony of co-defendant, Deshawn Colbert Senior, appellant's Fifth Amendment right was violated because the appellant did not take the stand. The appellant respectfully request that this court grant certiorari to resolve the split of authority and to reaffirm the principles set forth in Frazier. In addition petitioner sks that this court grant certiorari to resolve this split of authority in regard to whether the prosecutor's use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment. Petitioner alternatively asks that this court reverse the decision of the District court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DeShawn Covert

Date: 6-22-20