20-5271

NO. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

TOSHI EDWARD WILLINGHAM,

Petitioner,

v.

CATHERINE BAUMAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Toshi Edward Willingham #970310
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*NOTICE: This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTIONS PRESENTED

1. DID THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY MR. WILLINGHAM'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER WILLINGHAM'S CONSTITUTIONAL RIGHTS WERE VIOLATED?

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The United States Court of Appeals for the Sixth Circuit denied Mr. Willingham a certificate of appealability in an unpublished Order dated April 22, 2020. This Order is reproduced in the appendix to this petition as Appendix A and is cited at *Willingham v. Bauman*, 2020 U.S. App. LEXIS 12989 (6th Cir. Apr. 22, 2020).

The United States District Court for the Western District of Michigan dismissed Mr. Willingham's petition for writ of habeas corpus with prejudice under Rule 4 of the Rules Governing § 2254 Cases for failure to raise a meritorious federal claim in an unpublished Opinion and Judgment dated December 4, 2019. The court went on to deny Mr. Willingham a certificate of appealability as to all issues in the petition in the same opinion and Order dated December 4, 2019. This Opinion, Judgment and Order is reproduced in the appendix to this petition as Appendix B and is cited at *Willingham v. Bauman*, 2019 U.S. Dist. LEXIS 208731, 2019 WL 6522143 (W.D. Mich., Dec. 4, 2019).

The Michigan supreme court denied Mr. Willingham leave to appeal on direct appeal of his State court judgment in an Order dated September 12, 2018. This Order is reproduced in the appendix to this petition as Appendix C and is cited at *People v. Willingham*, 503 Mich. 857, 917 N.W.2d 79 (2018).

On direct appeal of Mr. Willingham's State court judgment, the Michigan court of appeals affirmed Mr. Willingham's convictions and sentence in an unpublished Opinion dated August 15, 2017. This Opinion is reproduced in the appendix to this petition as Appendix D and is cited at *People v. Willingham*, 2017 Mich. App. LEXIS 1331, 2017 WL 3495609 (Mich. Ct. App., Aug. 15, 2017).

On direct appeal of Mr. Willingham's State court judgment, the Michigan court of appeals Michigan Court of Appeals Denied Remand to Trial Court for Evidentiary Hearing in an unpublished Order dated February 2, 2017. This Order is reproduced in the appendix to this petition as Appendix E.

STATEMENT OF JURISDICTION

The final judgment dismissing Mr. Willingham's habeas corpus petition in this case was entered by the United States District Court for the Western District of Michigan on December 4, 2019. On the same date, the district court denied a certificate of appealability with respect to all of the grounds raised in the habeas petition in the same opinion and order that it issued denying the writ. See Appendix B. The Petitioner filed a timely notice of appeal. The United States Court of Appeals for the Sixth Circuit subsequently issued an order denying a certificate of appealability on April 22, 2020. See Appendix A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1); *United States v. Hohn*, 524 U.S. 236, S.Ct. 1969, 141 L.Ed.2d 242 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253(c):

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner Toshi Edward Willingham is a state prisoner confined at the Alger Correctional Facility in Munising, Michigan. On October 31, 2019, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the habeas petition, Petitioner challenged his state-court convictions of one count of assault with intent to murder, Mich. Comp. Laws § 750.83, one count of possession of a firearm during the commission of a felony Mich. Comp. Laws § 750.227b and Fourth-Offense Habitual Offender Sentence Enhancement, Mich. Comp. Laws § 769.12.

Petitioner was convicted following a jury trial in the Berrien County Circuit Court. The Michigan Court of Appeals described the relevant facts as follows:

> On May 11, 2015, Ashley Davis went to J&B's Liquor Store (J&B's) with Demetrious Howard and Kashmir Zahoui. Davis spoke with her cousin, Angela Hemphill, in J&B's parking lot. While Davis and Hemphill were talking, Zahoui told Davis that [Petitioner], whom Davis had dated in the past, was behind her. Davis wanted to avoid [Petitioner] because she had fought with defendant's sister just a few days before. She returned to Howard's car, but [Petitioner] confronted her before she could leave.
>
> Hemphill testified that an argument between [Petitioner] and Davis ensued and that as Howard began driving away, Davis called [Petitioner] or his sister a "bitch," and in response [Petitioner] took out a firearm and started shooting at Howard's car as it drove away. Because Davis was unavailable for trial, Benton Harbor Public Safety Department Officer Benjamin Ingersoll testified to Davis's account of the events as relayed to him during an interview conducted shortly after the shooting. According to Ingersoll, Davis indicated that she and Howard were leaving J&B's parking lot when [Petitioner] pulled out a gun and started shooting at Howard's car.
>
> Howard was also unavailable for trial, but a recording of his preliminary examination testimony was played for the jury. Howard testified that [Petitioner] was not the man who had shot at his car. Rather, the man who had shot at the car later approached Howard, identified himself as "Boo Man," apologized, and offered

to pay for damages to the vehicle. Ingersoll testified, to the contrary, that when he interviewed Howard about the shooting, Howard stated that an unnamed person had come up to his car before the shooting and said to him, "Drive off, I'm gonna shoot," at which point Howard drove from the parking lot and the person shot at Howard's car. Ingersoll also testified that Howard never mentioned a person named "Boo Man" after the shooting.

Davis called 911 from Howard's car. A recording of the 911 call was played for the jury. In the call, Davis stated that [Petitioner] had shot at her and that she was not going back to J&B's because she did not think that it was safe. Ingersoll met Davis at her home while another officer went to J&B's to secure the scene. At Davis's home, Ingersoll interviewed Davis and Hemphill, and recorded those interviews with his body camera. Recordings of those interviews were played for the jury. Ingersoll also investigated Howard's car at Davis's home and confirmed that four bullets had impacted the car.

The officer who responded to J&B's canvassed the parking lot and found seven shell casings. Ingersoll also canvassed J&B's at a later time and found an eighth shell casing. The shell casings were sent to the Michigan State Police (MSP) for analysis. An expert in firearm examinations testified that the casings were from nine-millimeter luger rounds that required a nine-millimeter caliber luger firearm to fire.

In an unrelated investigation, Benton Township Police Department Detective Brian Smit found a gun during a search of the residence where a Daniel Autry was staying. Shortly before the gun was found, defendant's brother, Kayjuan Spears, was seen leaving the home. The gun was sent to the MSP for analysis. An expert in firearm examinations testified that the gun was a nine-millimeter caliber luger firearm capable of firing the ammunition from the casings that were recovered at J&B's. The expert further concluded, based on his examination of four of the eight casings, that the ammunition was fired from the firearm that had been recovered by Smit. The results of the examination of the other four casings were inconclusive.

[Petitioner] was subsequently interviewed by MSP Detective Sergeant Michael Logan. According to Logan, [Petitioner] originally told him that he had purchased the gun for $150 from a man nicknamed "Little Joe" and that he had sold the gun to Autry for $300 in May 2015. However, in a subsequent interview, [Petitioner] said that those statements were not true and that he had

made them up to protect his brother, whom he knew was under investigation. [Petitioner] stated that the only time he had handled the gun was when his brother handed it to him and he posed for a picture with it. That picture was entered into evidence at [Petitioner's] trial.

Before trial, the prosecution sought to admit, under Mich. Comp. Laws § 768.27c, the recordings of the 911 call and Davis's interview with Ingersoll. [Petitioner] objected, arguing that Davis's statements did not meet any hearsay exception and that, even if they did, the admission of Davis's statements would violate the Confrontation Clause. At a hearing on the matter, the trial court granted the prosecution's motion, and also held that Davis's statements were admissible as excited utterances and present sense impressions. The trial court also held that Davis's statements did not violate the Confrontation Clause because they were made to assist the police in addressing an ongoing emergency.

After the jury convicted [Petitioner], he filed two motions regarding sentencing. First, [Petitioner] objected to being treated as a fourth-offense habitual offender, because his September 6, 2010 conviction for resisting and obstructing a police officer in Illinois was a misdemeanor and therefore could not be counted as a prior felony, and because he did not have a conviction for possession of marijuana in September 2012. Second, [Petitioner] contested numerous alleged errors in his presentence investigation report (PSIR), and the scoring of several sentencing guideline variables, including the assessment of 50 points for Offense Variable (OV) 6.

At sentencing, the trial court did not address any of [Petitioner's] challenges to the PSIR or any scoring challenges, including [Petitioner's] challenge to OV 6. The trial court only addressed part of [Petitioner's] challenge to his habitual offender status, determining that [Petitioner's] conviction for resisting and obstructing a police officer in Illinois could be considered a felony in Michigan for habitual-offender purposes. After the trial court held that this conviction was a felony, it concluded that [Petitioner] could be sentenced as a fourth-offense habitual offender. When the trial court asked defense counsel whether he had any other additions or corrections, defense counsel stated that the trial court had addressed each concern that [Petitioner] had raised in his two motions as well as his objections to the PSIR. [Petitioner] was then sentenced as a fourth-offense habitual offender, Mich. Comp. Laws § 769.12, to consecutive prison terms of 2 years for felony-firearm Mich. Comp. Laws § 750.227b, and 30 to 90 years for assault with intent to commit murder, Mich. Comp. Laws § 750.83.

People v. Willingham, No. 331267, 2017 Mich. App. LEXIS 1331, 2017 WL 3495609 (Mich. Ct. App., Aug. 15, 2017). See Appendix D. Petitioner's conviction was affirmed on appeal. *See id.*; lv. den. 503 Mich. 857, 917 N.W.2d 79 (Mich. 2018). See Appendix C.

Mr. Willingham subsequently filed a petition for writ of habeas corpus in the United States District Court for the Western District of Michigan, which is the subject of the instant petition for certiorari. The district court had jurisdiction over this habeas proceeding under 28 U.S.C. § 2254. Mr. Willingham's petition raised the following five grounds for relief: (I.) Petitioner's Fifth and Fourteenth Amendment rights to due process of law were violated because the evidence was insufficient to convict him of the crimes charged; (II.) The trial court committed an error of law and abused its discretion by admitting evidence of a 911 call and interview with Ashley Davis because (1) the evidence was not admissible under Mich. Comp. Laws § 768.27c and (2) admission of the evidence violated Petitioner's right of confrontation and his right to a fair trial by the admission of testimonial hearsay in violation of the Fifth, Sixth, and Fourteenth Amendments; (III.) The trial court erred with regard to the scoring of OV-6; alternatively, counsel was ineffective for failing to object in violation of the Sixth and Fourteenth Amendments; (IV.) Petitioner was improperly sentenced as a fourth habitual offender where the prosecutor failed to properly specify the alleged convictions, any possible convictions were either misdemeanors or pleas where Petitioner was not represented by counsel and in the alternative, Petitioner's counsel was ineffective for failing to object; in violation of the Sixth and Fourteenth Amendments; (V.) Petitioner was denied his due process right to a fair trial where the trial court allowed the admittance of a firearm as an exhibit that was not found in the possession or vicinity of Petitioner and in the alternative counsel was ineffective for failing to object or file a motion for the suppression of the highly prejudicial evidence; in violation of the Fifth, Sixth, and

Fourteenth Amendments. See Appendix B. On December 4, 2019, the district court dismissed Willingham's habeas corpus petition with prejudice under Rule 4 of the Rules Governing § 2254 Cases for failure to raise a meritorious federal claim and declined to grant a certificate of appealability. See Appendix B.

Mr. Willingham timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On April 22, 2020, the Sixth Circuit denied Mr. Willingham's request for a certificate of appealability. See Appendix A.

Mr. Willingham asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with respect at least some, if not all, of the claims raised his habeas petition, and he petitions this Court for permission to do so.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. WILLINGHAM'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER WILLINGHAM'S CONSTITUTIONAL RIGHTS WERE VIOLATED.

Mr. Willingham raised five grounds for relief in his petition for writ of habeas corpus in the district court. Mr. Willingham has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2), with respect to at least some of the grounds raised in the habeas petition, which allege that: (I.) Petitioner's Fifth and Fourteenth Amendment rights to due process of law were violated because the evidence was insufficient to convict him of the crimes charged; (II.) The trial court committed an error of law and abused its discretion by admitting evidence of a 911 call and interview with Ashley Davis because (1) the evidence was not admissible under Mich. Comp. Laws § 768.27c and (2) admission of the

evidence violated Petitioner's right of confrontation and his right to a fair trial by the admission of testimonial hearsay in violation of the Fifth, Sixth, and Fourteenth Amendments; (III.) The trial court erred with regard to the scoring of OV-6; alternatively, counsel was ineffective for failing to object in violation of the Sixth and Fourteenth Amendments; (IV.) Petitioner was improperly sentenced as a fourth habitual offender where the prosecutor failed to properly specify the alleged convictions, any possible convictions were either misdemeanors or pleas where Petitioner was not represented by counsel and in the alternative, Petitioner's counsel was ineffective for failing to object; in violation of the Sixth and Fourteenth Amendments; (V.) Petitioner was denied his due process right to a fair trial where the trial court allowed the admittance of a firearm as an exhibit that was not found in the possession or vicinity of Petitioner and in the alternative counsel was ineffective for failing to object or file a motion for the suppression of the highly prejudicial evidence; in violation of the Fifth, Sixth, and Fourteenth Amendments.

Prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat 1214, a certificate of probable cause was required before an appeal from a federal district court order could be taken in habeas cases. In order to obtain a certificate of probable cause a petitioner was required to make a "substantial showing of the denial of (a) federal right" *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). Under *Barefoot*, all doubts are to be resolved in favor of the petitioner in making this determination. *Barefoot, supra*, 463 U.S. at 893, n. 4. The probable cause standard in this context was intended to be a low hurdle to surmount, and has been noted to require only "something more than the absence of frivolity." *Barefoot, supra*, 463 U.S. at 893.

Obviously, Mr. Willingham is not required to show that he should prevail on the merits as in every case where a certificate of appealability is requested the district court has made a determination against the petitioner on the merits.

Under *Barefoot*, this Court has instructed that the certificate should be issued when a petitioner shows that "the issues are debatable among jurists of reason," or "a court could resolve the issues in a different manner," or "the issues are adequate to deserve encouragement to proceed further," or the issues are not "squarely foreclosed by statute, rule or authoritative court decision or [not] lacking any factual basis in the record." *Barefoot, supra*, 463 U.S. at 894.

While *Barefoot, supra*, was obviously issued when the required certificate was one of probable cause, this Court, along with several circuits, has held that there is no real change from the showing required for a certificate of probable cause now that the required certificate is one of appealability under the AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). *See also Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996). In fact, the intent of Congress in this respect when passing the AEDPA was to codify the *Barefoot* standard. *Slack v. McDaniel, supra*, 120 S.Ct. at 1603; *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997) (noting that "the AEDPA merely codifies the *Barefoot* standard" and that the only difference in the statutory language is an applicant seeking a certificate of appealability must make "a substantial showing of the denial of a *constitutional* right.") (emphasis added).

In *Miller-El v. Cockrell*, 537 U.S. 322, 336, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), this Court reaffirmed its prior holding in *Slack* when it stressed that the AEDPA's section 2253(c) "codified our standard, announced in *Barefoot v. Estelle* [ ], for determining what constitutes the requisite showing [for obtaining leave to appeal a district court's denial of habeas

corpus relief]. Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner' or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El, supra.* This Court further stressed in *Miller-El* that the standard for a certificate of appealability is "much less stringent" than the standard for success on the merits, and that petitioners need not show that they are likely to succeed on appeal or that any reasonable jurist would, after hearing the appeal, rule in their favor. *Id.* Rather, the petitioner need only show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Id.*

A fair review of the issues that Mr. Willingham raised in his habeas petition (see Appendix F), demonstrates that at least some of the claims raised in the habeas proceedings below are substantial in that reasonable jurists could, at the very least, debate whether most, if not all, of the grounds raised in the habeas petition should have been resolved in a different manner by the district court judge.

Rather than reiterate what has already been adequately outlined and argued in the district court pleadings below, Mr. Willingham will, for the most part, rely on the arguments he raised in his habeas petition (see Appendix F), incorporated here by reference, in support of his position that at least some of the issues raised in the habeas proceedings are adequate to deserve encouragement to proceed further on appeal.

However, in addition to these arguments, Mr. Willingham would strongly emphasize that the district court's Opinion, Order and Judgment dismissing the petition for writ of habeas corpus with prejudice under Rule 4 of the Rules Governing § 2254 Cases for failure to raise a meritorious federal claim and declining to grant a certificate of appealability was based, in large

part, upon the findings of fact made by the Michigan Court of Appeals. (See Appendix D). Like that last reasoned state court decision, the district court's Opinion, Order and Judgment did not and could not in its cursory Rule 4 dismissal consider or review facts favorable to the petitioner's claims. See *Burden v. Zant,* 498 U.S. 433 (1991) (finding lower court erred in failing to apply presumption of correctness to facts favorable to petitioner where finding or stating facts favorable to the petitioner).

Moreover, sua sponte dismissal of habeas actions is appropriate only when the petition presents obviously untenable arguments that further factual development, legal explication, or the assistance of counsel cannot make tenable. *Cuadra v. Sullivan,* 837 F.2d 56, 58–59 (2nd Cir. 1988); *Williams v. Kullman,* 722 F.2d 1048, 1050 (2d Cir. 1983). In *Blackledge v. Allison,* 431 U.S. 63 (1977); the Supreme Court held that "the critical question" which must be answered affirmatively to justify summary dismissal is whether the "allegations, when viewed against the record [available to the court are] so 'palpably incredible,' so 'patently frivolous or false,' as to warrant summary dismissal." See also, *Machibroda v. United States,* 368 U.S. 487, 495 (1962); *Pennsylvania ex rel. Herman v. Claudy,* 350 U.S. 116, 119 (1956)).

For the "palpably incredible" and "patently frivolous" standard to be met, the petition's legal argument must be wholly foreclosed by prior precedent or wholly unreasonable. *Norman v. McCotter,* 765 F.2d 504, 509 (5th Cir. 1985).

Additionally, pro se petitions are held to a less stringent summary dismissal standard than petitions filed by counsel. *Brown v. Roe,* 279 F.3d 742, 745–46 (9th Cir. 2002). Accordingly, the courts have viewed pro se habeas corpus petitions and analogous pleadings "with the greatest liberality" in deciding whether or not to dismiss them summarily. *Estelle v. Gamble,* 429 U.S. 97, at 106 (1976).

Unless patently false, the facts alleged in the petition must be presumed to be true for summary dismissal purposes. *Blackledge v. Allison,* 431 U.S. 63, 76 (1977); *Walton v. Johnson,* 407 F.3d 285, 295 (4th Cir. 2005) (district court's grant of summary judgment "cannot stand because ... the court resolved a factual dispute in favor of the Government" rather than following rule that "truth of the facts alleged in Walton's petition" must be "assume[d]"). If the facts alleged "point to a 'real possibility of constitutional error,'" summary dismissal is not appropriate. *Blackledge,* 431 U.S. at 75 n.7 (quoting Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts [summary dismissal should not occur in a fact-dependent case until the state makes all the relevant records {including "transcripts, sentencing records, and copies of state court opinions"} available to the court pursuant to Habeas Rule 5]). Consequently, summary dismissal generally is inappropriate in fact-bound cases until the court carefully examines all state court opinions, transcripts of state court hearings, and other records relevant to the petition.

At-Issue Ruling:

This case involves allegations that Petitioner Toshi Edward Willingham fired multiple shots at a car driven by Demetrious Howard that Ashley Davis was a passenger in as they were leaving J&B's Party Store (aka BJ's). The complaining witness, Ms. Davis, did not appear at the preliminary examination or the trial. The trial judge admitted a 911 call from Davis as well as an interview conducted by Officer Benjamin Ingersoll at Davis's residence after the shooting in which she implicated Mr. Willingham as the shooter; holding that Davis's statements did not violate the Confrontation Clause because they were made to assist the police in addressing an ongoing emergency. (See Appendix G.)

Favorable Facts not Considered or Reviewed:

The following facts favorable to Petitioner's claims were not considered or reviewed by the state courts and district court: (1) Davis called 911 from Howard's car. A recording of the 911 call was played for the jury. In the call, Davis stated that defendant had shot at her and that she was not going back to J&B's because she did not think that it was safe. She believed that the shooting had something to do with a fight she had at Union Park, where Petitioner's twin sister, Toshia, stabbed her. (TR I at 97-101)[1]; (2) officer Ingersoll met Davis at her home located on 1337 Agard, while another officer went to J&B's to secure the scene. At Davis's home, Ingersoll began interviewing Davis and Hemphill, and recorded those interviews with his body camera. Ingersoll was dispatched to an unrelated shooting at J&B's and when he returned to 1337 Agard, he completed the interviews (TR I at 97-111); (3) during Ingersoll's interview with Angela Hemphill, Ashley Davis yelled out several times "Toshi Edward Willingham" (TR I at 97-101); (4) Hemphill told Ingersoll she heard an argument between Ashley and Toshi at J&B's. She heard Ashley calling Toshi's sister a bitch (TR I at 141); (5) Demetrius Howard drove Ashley Davis to J&B's. He stated that he went to the store and that after he got in his car, it was hit by bullets several times. He testified he would recognize the shooter again if he saw him and that he was positive that Toshi was not the shooter. He stated a few days after the incident a person who identified himself as "Booman" apologized for the damage for the car and said that he would pay for the damage. He didn't know how to find Booman. He reiterated that he was positive that Toshi Willingham was not the shooter. (TR II at 18-24)[2] (The parties stipulated that Demetrius Howard was unavailable for trial and that a CD of his preliminary examination testimony would be played for the jury.); (6) Hemphill's initial trial testimony as to Petitioner was that there were

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[1] All references to "TR I" in this Petition are as to Appendix H.
[2] All references to "TR II" in this Petition are as to Appendix I.

15-20 people at the store when she arrived. When she was asked whether she saw the shooting at preliminary examination she initially testified that "there was a lot of people up there" and the majority of the people at the store were wearing dreadlocks, the same style as Toshi. (TR I at 150). She agreed that after the prosecutor mentioned that there was a recording of the interview, she agreed that Toshi was the shooter. (TR I at 151); (7) In its decision admitting Davis' 911 call and interview conducted by Officer Benjamin Ingersoll; the trial court relied upon the second unrelated shooting as justification of an ongoing emergency rendering Davis' statements non-testimonial. (Appendix G at 31-35.)

In failing to consider or review the above facts favorable to Petitioner, the Michigan Court of Appeals, district court and for that matter the Sixth Circuit Court of Appeals adopted the rationale that Petitioner was not denied the right to confront Ms. Davis.

The problem with this rationale is that it is based on mistaken facts limited to those that may tend to indicate that Davis' statements were gleaned during an ongoing emergency and thus, non-testimonial; where a fair reading of the complete record that bears the presumption of correctness to facts favorable to both the state and Petitioner (*Burden v. Zant, supra* and *Blackledge v. Allison, supra*), indicate that Ashley Davis' statements were testimonial in both nature and context.

More importantly, the failure to consider or review facts in the complete Habeas Rule 5 record precludes review of the list of factors articulated in *Delaware v. Van Arsdall,* 475 U.S. 673 (1986) to evaluate whether a Confrontation Clause violation was harmless 475 U.S. at 684. See also, *Reiner v. Woods,* 955 F. 3d 549 (6th Cir., Apr. 7, 2020).

So, any finding from an incomplete record that Ashley Davis' statements were non-testimonial or given in an emergent situation and not a violation of Mr. Willingham's rights

under the Confrontation Clause is speculative and in error. *Crawford v. Washington,* 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Davis v. Washington,* 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)

Ashley Davis' 911 Call and Interview Were Testimonial and Thus, did not Arise From an Emergency:

The court of appeals expressly relied on *Crawford v. Washington,* 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), *Michigan v. Bryant,* 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), and *Davis v. Washington,* 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), in determining whether Petitioner's confrontation rights were violated by the admission of Ashley Davis's 911 call and interview. See Appendix G. Crawford emphasized that out-of-court statements raised confrontation concerns only if the statements were testimonial. However, Crawford "[left] for another day any effort to spell out a comprehensive definition of 'testimonial'" *Crawford,* 541 U.S. at 68.

The United States Supreme Court picked up the task of defining which statements are testimonial, particularly with regard to statements to police, in *Davis* and *Bryant.* In *Davis,* the court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822 (footnote omitted). The Supreme Court characterized the officer's questioning of the victim and the completion of the affidavit as determining "what had happened" as opposed to "what is happening." *Id.* at 830.

In *Bryant,* the Supreme Court provided additional guidance to assist in drawing the line between testimonial and nontestimonial statements to police officers as they respond to emergency calls. The *Bryant* Court determined that the inquiry into whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency depends on an objective evaluation of the circumstances in which the encounter occurs and the statements and actions of the parties. *Bryant,* 562 U.S. at 359. The Court explained:

> As we suggested in Davis, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Id. at 370-71 (footnote omitted). Among the circumstances the Bryant Court considered were the intentions of the police, whether a gun was involved, and whether the assailant had been located or captured.

Here, Ashley Davis initiated the 911 call after she had left the scene, where, by her own admission did not feel safe. Thus, her call was initiated after she had reached safety and was addressing; "what had happened" as opposed to "what is happening" *Davis,* at 830. In short, there was no present emergency.

The interview with Ingersoll occurred over a mile from the scene in front of Ashley Davis' home. The fact that Ingersoll left that interview to respond to an unrelated shooting at

J&B's speaks to Petitioner's position that there was no ongoing emergency and that neither Davis, Hemphill or Ingersoll were in danger. Davis's demeanor during the interview also revealed that it did not appear that she believed there was an ongoing emergency.

The trial court erroneously ruled that the unrelated shooting at J&B's was part of the ongoing emergency. In both state and federal court pleadings the Petitioner argues; "the news of an unrelated shooting had no bearing on whether there was an ongoing emergency in this matter. The nature of the interview made it clear that the conversation was geared toward a subsequent prosecution."

Appearing to ignore the trial court's ruling, the Michigan Court of Appeals and likewise the district court misconstrued Petitioner's argument of irrelevance the unrelated shooting at J&B's had to this matter; overlooking officer Ingersoll's leaving the Davis/Hemphill interview location to respond to the unrelated shooting at J&B's as **obvious indicia that there was <u>not</u> an ongoing emergency as to the Davis interview.** This substantiates the last reasoned state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2) and likewise, the district court erred in summary dismissal by not ordering production of and reviewing Habeas Rule 5 materials along with ordering the state answer to the petition in this matter. *Blackledge,* 431 U.S. at 75 n.7

Petitioner was Denied his Confrontation Rights as to Ashley Davis:

The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." U.S. Const., Am. VI; *Pointer v. Texas,* 380 U.S. 400, 403-05, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (applying the guarantee to the states through the Fourteenth Amendment). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the

context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Confrontation Clause therefore prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross examination. *Crawford v. Washington,* 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

As argued above, Ashley Davis' 911 and police interview statements were testimonial and did not arise from an emergency. As such, Petitioner had an absolute right to be provided the opportunity to confront and cross-examine Ashley Davis as to her motives for implicating Petitioner in the shooting and exercise of undue influence on Angela Hemphill.

Davis had a prior relationship with the Petitioner and had recently been involved in a violent altercation with Petitioner's sister Toshia; giving Davis dual motive against Petitioner and his sister to fabricate Petitioner's involvement in the shooting.

Moreover, it has been established that Davis was volatile (calling Petitioner's sister a "bitch" at J & B's), prone to violence (recent violent altercation with Petitioner's sister) and was present during officer Ingersoll's interview with Angela Hemphill; where Davis was repeatedly yelling Petitioner's name for the purpose of Ingersoll's body cam recording. Demetrius Howard did not identify Petitioner as the shooter and named another party ("boo man") instead. Angela Hemphill was the only other party beyond Davis identifying Petitioner as the shooter. At trial, where Davis was not present, Hemphill initially denied her identification of Petitioner as the shooter until the state reminded Hemphill of her identification in the officer Ingersoll body cam recording where Davis was present.

Petitioner should have been afforded confrontation opportunity to cross-examine and determine indicia of reliability of the prone to violence and volatile Davis not limited to her

motives for implicating Petitioner in the shooting and how her presence during the Hemphill/Ingersoll body cam interview exercised undue influence on Hemphill during said interview. *Crawford v. Washington, supra; Maryland v. Craig, supra.*

For all of the above reasons and light of the erroneous findings of fact that were utilized by the state courts, Petitioner contends that reasonable jurists could conclude that the decision of the Michigan Court of Appeals affirming Mr. Willingham's convictions "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). As such, to the extent that the district court judge relied on the Michigan Court of Appeals' erroneous findings of fact in denying all of the issues raised in Mr. Willingham's habeas petition, Petitioner strongly suggests that "reasonable jurists could debate whether the petition should have been resolved in a different manner" or that the issues presented were "adequate to deserve encouragement to proceed further" on appeal. *See Miller-El, supra.*

Mr. Willingham would strongly urge that the decisions of the district court and Sixth Circuit Court of Appeals in declining to issue a certificate of appealability in this instance, with respect to at least some of the claims raised in the habeas petition, was such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power to intervene in the matter because the pertinent question—to wit, whether the Michigan Court of Appeals' decision affirming Mr. Willingham's convictions "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"— is clearly and unequivocally debatable among reasonable jurists, a court *could* resolve this issue in a different manner, the issue is not lacking *any* factual basis in the record, and, ultimately, the issue deserves encouragement to proceed further.

The denial of a certificate of appealability here would effectively preclude appellate review in relation to all of the grounds raised in the habeas corpus petition, despite the fact that at least some, if not all, of the claims raised in the habeas petition deserve encouragement to proceed further on appeal. The requirement of a certificate of appealability is designed to bar frivolous appeals, not to preclude appellate review of cases involving substantial issues. *See* Moore's Federal Practice (2d Ed), § 220.03. Nonetheless, that is just what has happened here; substantial issues are being passed upon without the benefit of full appellate review. A fair review of the record in this case clearly demonstrates that a certificate of appealability should issue with respect to at least some of the claims raised and that the decisions of the district court and Sixth Circuit Court of Appeals declining to issue the same without benefit of full review of Habeas Rule 5 materials were an extraordinary departure from the accepted and usual course of judicial proceedings in these types of cases.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Willingham respectfully asks this Honorable Court to grant certiorari in this case and remand this matter to the United States Court of Appeals for the Sixth Circuit for full appellate review of all issues that were raised in Willingham's petition for writ of habeas corpus that this Court determines has met the appropriate standard for full appellate review.

Respectfully Submitted,

Date: 7-15-20

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