

No. 20-7971

IN THE  
SUPREME COURT OF THE UNITED STATES

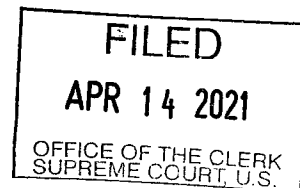
DEREK A. RIVERA-PETITIONER

VS.

CONNIE HORTON, Warden--RESPONDENT

On Petition For Writ of Certiorari To The  
United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI



Submitted by:

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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 FOR REVIEW**

- I. RIVERA WAS DENIED A FAIR TRIAL BY OTHER-ACTS EVIDENCE THAT HAD NO PROPER PURPOSE AND THUS ENCOURAGED THE JURY TO CONVICT HIM ON AN IMPROPER CHARACTER-TO-CONDUCT RATIONALE.**
- II. THE TRIAL JUDGE COMMITTED PLAIN ERROR BY REQUIRING THE DEFENSE EXPERT TO PREPARE A REPORT AS A PRECONDITION TO TESTIFYING. IN THE ALTERNATIVE, TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MAKING A TIMELY OBJECTION.**
- III. APPELLANT WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ESSENTIAL ELEMENTS OF SECOND-DEGREE MURDER BEYOND A REASONABLE DOUBT, AND THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT BASED ON THIS ISSUE.**
- IV. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT WAITING UNTIL AFTER DR. HOROWITZ TESTIFIED BEFORE ASKING FOR THE DIRECTED VERDICT.**

## 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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- I. RIVERA WAS DENIED A FAIR TRIAL BY OTHER-ACTS EVIDENCE THAT HAD NO PROPER PURPOSE AND THUS ENCOURAGED THE JURY TO CONVICT HIM ON AN IMPROPER CHARACTER-TO-CONDUCT RATIONALE.
- II. THE TRIAL JUDGE COMMITTED PLAIN ERROR BY REQUIRING THE DEFENSE EXPERT TO PREPARE A REPORT AS A PRECONDITION TO TESTIFYING. IN THE ALTERNATIVE, TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MAKING A TIMELY OBJECTION.
- III. APPELLANT WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ESSENTIAL ELEMENTS OF SECOND-DEGREE MURDER BEYOND A REASONABLE DOUBT, AND THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT BASED ON THIS ISSUE.
- IV. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT WAITING UNTIL AFTER DR. HOROWITZ TESTIFIED BEFORE ASKING FOR THE DIRECTED VERDICT.
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BECAUSE THE CUMULATIVE EFFECT OF THE ERRORS THAT  
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## REFERENCE TO OPINIONS BELOW

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*Rivera v. Horton*, 2020 U.S. Dist. LEXIS 165064

*Rivera v. Horton*, 2021 U.S. App. LEXIS 4175

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 12, 2021.

☒ 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).



## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **U.S. Const, Am. V**

Rights of persons charged with crimes; guaranty of life, liberty and property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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 deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. Const, Am. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **U.S. Const, Am. 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 enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner Derek Rivera and the decedent, Terry Alber, were homeless men who slept at night in a shack near a Volunteers of America building in Lansing, Michigan. One day they fought. Rivera won. Rivera later went to sleep. Alber stayed up for a while, drinking, before he too fell asleep. In the middle of the night he got up, perhaps to urinate, stumbled, and fell. He hit his head against a cinder block and died.

Derek Rivera's murder trial focused on causation. The prosecution's theory was that when Alber stumbled and fell, he was succumbing to injuries already inflicted by Rivera. The defense theory was that the death was accidental. Each side presented experts in support of its theory.

Mr. Rivera now argues that the lower court denied him a fair trial by allowing, over his objection, the prosecution to present evidence from two witnesses that he had acted violently toward them on other occasions, though such evidence had no purpose other than to encourage the jury to infer guilt from bad character.

Mr. Rivera further argues that the judge plainly erred by requiring the defense expert (a pathologist hired by the defense at the last minute because the judge refused to adjourn the trial to accommodate the schedule of the defense's preferred expert) to prepare a report as a precondition to testifying. The error was prejudicial because the prosecution seized on perceived inadequacies in the hastily prepared report as reason to question the expert's credibility. In the alternative, Mr. Rivera argues that his trial lawyer was ineffective for not timely objecting to the judge's erroneous precondition.

On May 4, 2014, at about 10:00 a.m., Thomas Young saw Terry Alber's dead body lying next to a fire pit near a shack located behind the Volunteers of America building in Lansing. The

shack and fire pit were a hangout for drinking. Young had been drinking there for three or four days, and had seen Terry Alber there, alive.

Now, seeing Alber's slumped body on the ground, Young looked around. There were three or four other men there, two of them asleep. A third, named Mark, was "awake kind of in and out from alcohol." Young asked Mark if Alber was all right. Mark responded that Alber was dead and had been for ten hours.

Also there at the fire pit were Derek Rivera and Ronnie Noeker. Noeker had blood on his hands. Young called 9-1-1, and when a police officer arrived led him to Alber's body.

Mark Cobb was at the fire pit when the police arrived. He'd been there the day before, too. That evening he'd seen a fight between Derek Rivera and Terry Alber. It was a fist fight that lasted about five minutes. Both men threw punches. Cobb did not see Alber fall. Nor did he see Rivera kick or stomp Alber, or hit him with a golf club.

Cobb agreed that he might have told police that Rivera was crazy; that he probably told them that Alber was afraid of Rivera; that he believed he'd told them that Alber didn't do anything, just Rivera, who was "pissed"; and that he did tell them that Rivera was the instigator.

Derek Rivera wore a leg brace and crutches, but his injured leg had recovered to the point that he bragged about being able to move around without the help of either.

Also a witness to the fight was Arthur Devine. He'd been at the homeless camp, drinking. He didn't know Alber or Rivera—he'd just met them that day. He watched as they had a "small fist fight." He had the impression it was over "some female. He saw Rivera "throw a couple blows" to the "head area," but in his view they were "nothing major . . . nothing to cause any kind of homicide and murder."

Devine acknowledged "probably" telling the police that he didn't want to be seen as a

snitch and that he didn't want to mention any names that they could get their "info" from examining the "clothing, shoes, and knuckles" of the people in the hospital. And when asked by the police if "Ronnie [Noeker] and [Derek Rivera] beat up Terry and he fell into the bricks," he "probably" answered that "Ronnie didn't beat up nobody." He also remembered telling the police that Rivera "hit [Alber] and kicked the fuck out of Ronnie."

Lawrence Fisher was a third witness to the fight. According to him, there were a group of people at the camp, and all of them were drunk. Terry Alber and Derek Rivera began to argue about a woman named Mersaides. Rivera wanted to know why Alber had sex with her while Rivera was in jail. Then Rivera began to hit Alber. He knocked Alber out cold and kept beating him in the face. When one of the others said "Leave him alone," Rivera threatened to hit the man with a golf club. There was a golf club there and Fisher had seen Rivera swinging it around, though he had not seen him hit anyone with it. Fisher decided it was time to leave, and left.

After the fight was over, and Derek Rivera had gone to sleep, Terry Alber and Arthur Devine stayed up for a couple hours, drinking. Still later, they huddled together under a dirty tarp and themselves fell asleep. As morning approached—the birds were chirping—Alber got up, walked a ways, and then stumbled and fell. Devine heard Alber gasp a couple times. After about 10 minutes, remembering those gasps, he got up to check on Alber. He shook him, but Alber did not respond.

Devine tried to tell the others their buddy was dead, but they said Alber had probably just passed out, and told Devine to go back to sleep.

A police officer who photographed Alber's body the next morning noticed that the fly to Alber's pants was open, but his belt still buckled.

Derek Rivera spoke about the incident to Angela Lewis and to the police. Angela Lewis

met Derek Rivera two weeks after Terry Alber died. Formerly homeless herself, she had known Alber for about a year and a half. At some point, Rivera told her he'd been involved with what happened to Alber. He admitted hitting Alber twice in the knees. He said he thought he would "have to do seven to ten years for that." He did not, however, admit to killing Alber. He said, "Terry fell and hit a rock and busted his melon."

Another time, in late November 2014, when Lewis and Rivera were out drinking, they argued. Later, when leaving, he'd told her that if she "ever spoke a word to Detective Looney about what happened with Terry the same thing would happen to [her]."

On December 29, 2014, Detective Looney and Detective Lee McAllister interviewed Derek Rivera. An audio recording of the interview, which consisted of two sessions, was admitted in evidence, and played for the jury.

The recording was not transcribed, but its contents were partly described for the record by Detective McAllister and, in closing argument, by the trial prosecutor. Mr. Rivera admitted to punching Alber and knocking him down, and then hitting him with the golf club (but not in the head) and stomping on or kicking his head.

When found the next morning, Terry Alber's face was "smashed quite closely up against a [cinder] block", as if he'd fallen and hit his head on it. The prosecution's expert was forensic pathologist John Bechinski, who conducted Terry Alber's autopsy. Dr. Bechinski acknowledged the possibility of a "terminal fall" but thought such fall could not account for "the constellation of injuries" presented by Albers. The autopsy showed Alber had suffered at least nine blows to the head. He had a broken nose and black eyes, and his face was swollen from what "more than likely" was "blunt force trauma". There was bleeding within the scalp and the muscles on the side of the head. There were also "acute bilateral subdural hematomas", or tear of the "bridging

veins” between the dura matter and the surface of the brain. And there was bleeding on the surface of the brain (or “subarachnoid bleeding,”), as well as a laceration of the mesentery. These various injuries were not all the result of someone just falling on his face.

In Dr. Bechinski’s opinion, the subdural bleeding and subarachnoid bleeding were the mechanisms of death. Albers could have lived for minutes and even hours with this bleeding before dying. Dr. Bechinski concluded Albers died from “blunt force trauma of the head” consistent with a fight six hours before his fall into the cinder block.

The defense expert, Dr. Ronald Horowitz, also a pathologist, saw it differently. In his opinion, Terry Albers died because of blunt force trauma caused when he fell and hit his head on the cinder block. He did not die and then fall; a bluish-red discoloration over his right eye meant that he was still alive when his head hit the rock. The blood clot in the back of his head was related to the injuries to his face caused by the fall. This was a case of a “coupcontrecoup” closed-head injury. When a moving head hits a fixed object (such as when a person falls and hits his head on the sidewalk), the injury caused at the point of impact (the “coup” may be less serious than the damage caused by the jolted brain’s movement within the skull (the “contrecoup”), which can tear the emissary veins and cause a subdural hematoma. According to Dr. Horowitz, Terry Alber had suffered just such an injury.

Dr. Horowitz was not the first choice for defense expert. On August 5, 2015, more than a month before trial, the defense sought funding for its first choice, Dr. Ljubisa J. Dragovic, the Oakland County Medical Examiner. The judge approved.

The week before trial defense counsel learned that Dr. Dragovic would not be available to testify

until September 15, days after the judge expected the trial to finish. The judge refused to grant an adjournment. Instead, he told counsel to find another expert.

Whether then or on a following day, the judge also informed counsel that the expert must prepare a report and make it available to the prosecutor.

The defense retained Dr. Horowitz and had him hastily prepare the required report. According to defense counsel, the report was provided to the prosecutor at 8:00 a.m. the day after the judge made clear a report was necessary.

Dr. Horowitz was the only defense witness. The prosecution called one rebuttal witness, Dr. Bechinski. The prosecutor began by asking about Dr. Horowitz's report: "[C]an you tell me which areas of his report you dispute?" Dr. Bechinski's answer was so long it took four pages to transcribe. He pointed to matters of "quality assurance." The decedent had not been identified except by name, for example. Nor did the report indicate that Dr. Horowitz had reviewed the microscopic slides of the brain, or the medical examiner's investigative report. The term "contrecoup" was misused at one point, he thought. The report assumed that the ground under Terry Alber was uneven which may have contributed to his fall; Dr. Bechinski questioned that assumption. He disputed Dr. Horowitz's statement that Alber's advanced liver disease would have caused a greater risk of bleeding; he did not view the liver disease as advanced. The report described multiple small contusions on the face; there was bruising as well.

After speaking at length about his own thinking regarding the mechanism of death, Dr. Bechinski returned to Dr. Horowitz's report. It failed to mention impact sites on the sides and back of the head. It also failed to mention their significance. Finally, there was no "cause of death and manner of death" section to the report.

On July 25, 2015, about a month-and-a-half before trial, the prosecution gave notice it

intended to introduce other-acts evidence at trial. The prosecution named six other-acts witnesses, including Mersaides Schmit and Angela Lewis.

According to the notice, Schmit would testify about, among other things, a "prior assault that occurred on January 23, 2014, where defendant Rivera kicked her in the arm that was broken by him the week before, as well as punched Terry Alber[s] in the head because he was jealous of their friendship."

Lewis would testify "that on November 26, 2014[,] she was thrown to the ground by defendant Rivera, which caused an abrasion to her eyebrow area."

The prosecution contended that the other-acts testimony was admissible to show "motive, intent, scheme, and identity."

Defense counsel opposed the proposed testimony of Schmit and Lewis about assaults they had suffered themselves, arguing that the evidence was offered for no proper purpose recognized by *People v VanderVliet*, but instead only to demonstrate Mr. Rivera's propensity to commit assaultive crimes. He conceded that Schmit's description of prior assaults by Derek Rivera against Terry Alber might be admissible.

The judge disagreed and ruled all of the other-acts evidence admissible. With respect to Schmit's testimony, he reasoned that the assault against her was part of the assault against Alber, and that "[y]ou can't explain part of the event without all the event."

On November 16, 2014, Angela Lewis was at a motel with Derek Rivera, "playing around." He painted her face with clown makeup. They were drinking, and he was "very drunk." They argued. She tried to call the police. He knocked her down, knocked the phone out of her hand, and started hitting her on the chest. She grabbed vodka Derek was drinking and ran outside with it. He chased her, knocked her down, and started banging her head against the



sidewalk.

After Derek left she called the police. A police officer took a photo of her, still in the clown makeup and with blood running down her face. The photo was admitted in evidence.

Mersaides Schmit testified that she was a friend of both Derek Rivera and Terry Alber. Her friendship with Terry caused Derek to be jealous. On January 23, 2014, she and Terry and Derek were drinking at a friend's apartment when Terry asked if she was all right. She answered "Yes." This exchange made Derek, who was already drunk, really angry. She was wearing a cast on her arm, which had been broken. He stomped on the cast until the cast broke off her arm. He then started to bang her head on countertops and stomp on her head with the heavy boots he was wearing.

The trial prosecutor asked her if it were fair to say "you were almost dead." She answered, "Correct. I felt like I had blood clots in my brain kind of like tumors or something because I had knots in the side of my head right here after the incident happened . . . .

The assault ended when Terry intervened. He and Derek ran into the bedroom and "Derek started beating on Terry, slamming his head, punching him numerous times." Derek ended up under arrest and in jail.

Mersaides Schmit had seen Derek beat Terry once before. The three of them were homeless, and at the time slept on a frail under a bridge in Saginaw. Terry received money once a month, and on the day in question he had some in his pocket. The three of them were laying down, under the bridge, when Derek began to "assault[] Terry with his feet and his fists just to get Terry's money out of his pocket." The assault lasted for what seemed like ten or fifteen minutes. She saw Derek punch and kick Terry in the face until Terry's nose and gums were bleeding. Derek was wearing the same heavy boots.

Ronald Noeker remembered nothing about the day or night of May 3, 2014, when Terry Alber died. He woke up the next morning with a bloody nose and blood on his sweatshirt and no memory of what happened. He did remember a time, a long time before, when Derek Rivera had kicked him in the face. The police had been called, and he'd been taken to the hospital.

Derek Rivera was "sometimes" violent when angry. Noeker might have told police Derek had assaulted him twice, when drunk.

During his final jury instructions the judge gave an instruction in which he limited consideration of the other-acts to two purposes: whether Derek Rivera "had a reason to commit the crime," or whether he "specifically meant to commit the crime":

You've heard some evidence that was introduced to show that the Defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the Defendant had a reason to commit the crime or that—and— and/or that the Defendant specifically meant to commit the crime. You must not consider this evidence for other purposes.

For example, you must not decide that it shows this Defendant to be a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that he committed the alleged crime or you must find him not guilty.

Petitioner Derek Aaron Rivera seeks certiorari in this Court for the following reasons.

## REASONS FOR GRANTING THE WRIT

### **I. MR. RIVERA WAS DENIED A FAIR TRIAL BY OTHER-ACTS EVIDENCE THAT HAD NO PROPER PURPOSE AND THUS ENCOURAGED THE JURY TO CONVICT HIM ON AN IMPROPER CHARACTER-TO-CONDUCT RATIONALE.**

Over defense objection, the Trial Court permitted the prosecution to present graphic evidence of Derek Rivera's violent assaults against two women not named as victims in this case on trial. He did so, as he would later instruct the jury, to shed light on two issues: motive and intent. Because other acts evidence did little to illuminate those issues but much to prejudice the jury, the evidence should have been excluded. Because the case was otherwise close, the experts were split on the causation issue-error was likely outcome determinative.

Mr. Rivera argues that the decision of the trial court violated his right to a fundamentally fair trial as guaranteed by the Fifth Amendment right to due process of law. *Ege v. Yukins*, 485 F.3d 364(6th Cir. 2007).

As mentioned above, there was no proper purpose for the testimony of these two women, as the alleged conduct did not give rise to any criminal charges, nor did any victim actually report the assaults/threats.

Mr. Rivera is aware of this courts holding in *Estelle v. McGuire*, 502 U.S. 62 (1991), which held that issues of regarding the violation of a state law are not cognizable on habeas review. Mr. Rivera insists, however, that this case and the facts arising from it are distinguishable from *Estelle*, in that a due process violation exists because the facts doesn't match the character-to-conduct rationale.

For these reasons, Mr. Rivera prays that this Honorable Court will grant certiorari and/or

remand this case to the Sixth Circuit Court of Appeals.

**II. THE TRIAL JUDGE COMMITTED PLAIN ERROR BY REQUIRING THE DEFENSE EXPERT TO PREPARE A REPORT AS A PRECONDITION TO TESTIFYING. IN THE ALTERNATIVE, TRIAL COUNSEL WAS INEFFECTIVE FOR NOT MAKING A TIMELY OBJECTION.**

The prosecution and defense experts disagreed about where Derek Rivera's conduct caused Terry Alber's death. The defense expert, Dr. Horowitz, was a last minute substitute for the preferred defense expert, Dr. Dragovic. As a precondition for Dr. Horowitz's testimony, Judge Collette required him to prepare a report and provide it to the prosecution. The doctor did so in necessary haste. The prosecution seized on the perceived inadequacies in the report as reason to reject Dr. Horowitz's causation testimony in favor of the prosecution expert's. In the alternative, counsel was ineffective for not registering a timely objection. Counsel performed deficiently when he failed to protest the judge's misunderstanding of the court rules, thus placing his client at risk that the prosecution would take advantage of the hastily prepared report. Nor can counsel failure be explained as trial strategy. Counsel himself made clear that the judge's decision was wrong and protested it, though belatedly. He did not have a strategic reason not to object. It is also reasonably probable that had counsel objected and thereby prevented the prosecutions attack on his expert's hastily prepared report, the trial's outcome would have been different.

A claim of ineffective assistance of counsel is reviewed under the two-part Strickland test described in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The test requires a showing (1) that counsel's performance fell below an objective standard of

reasonableness and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different.

Judge Collette plainly erred by requiring Dr. Horowitz to prepare a report as a precondition to his testimony. MCR 6.201 governs discovery in criminal cases. Rule 6.201 's plain language does not require an expert to prepare a report as a precondition to testifying. Instead, it requires only that "upon request," a party must provide "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]" MCR 6.201(A)(3) (emphasis added). The judge thus plainly erred in two ways: first, by requiring the defense to prepare a report in the absence of a prosecution request for one, and second (assuming the prosecution did at some point ask), not allowing the defense to comply with the court rule by offering a written description of the proposed testimony in lieu of a report.

The first prong is met. Counsel performed deficiently when he failed to protest the judge's misunderstanding of the court rules, thus placing his client at risk that the prosecution would take advantage of hastily prepared report. Nor can counsel's failure be explained away as trial strategy. Counsel himself made clear that he thought the judge's decision was wrong and protested it, though belatedly. He did not have a strategic reason not to object.

For the reasons already given, the second prong is also met. It is reasonably probable that had counsel objected and thereby prevented the prosecution's attack on his expert's hastily prepared report, the trial's outcome would have been different.

### **III. PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ESSENTIAL**

**ELEMENTS OF SECOND-DEGREE MURDER BEYOND A REASONABLE DOUBT, AND THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING APPELLANT'S MOTION FOR A DIRECTED VERDICT BASED ON THIS ISSUE.**

Petitioner asserts that there is insufficient evidence to prove guilt beyond a reasonable doubt for second degree murder. Specifically, Petitioner states the jury convicted him based on improperly admitted prior bad acts, as oppose to clear evidence to support each of the essential elements of second-degree murder. None of the witnesses testified to seeing the Petitioner stomp the victim or hit [him] with a golf club. The Trial court in denying a motion for a directed verdict relied on this non-evidence, which constitutes a violation of Petitioner's due process rights to a fair trial.

A claim that there was insufficient evidence for a conviction is cognizable on habeas corpus review. *Jackson v. Virginia*, 443 U.S. 307 (1979). The inquiry, viewed in the light most favorable to the prosecution, is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000). The reasonableness of the state court's determination of the *Jackson* standard "must be applied 'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Brown v. Palmer*, 358 F. Supp. 2d. 648 (E.D. Mich. 2005) (quoting *Adams v. Smith*, 280 F. Supp. 2d. 704, 714 (E.D. Mich. 2003)).

In *Dretke v. Haley*, 541 U.S. 386, 395; 124 S. Ct. 1847; 158 L. Ed. 2d 659 (2004), citing *In re Winship*, 397 U.S. 358; 90 S. Ct. 1068; 25 L Ed 2d 368 (1970), in which we held that due process required proof of each element of a criminal offense beyond a reasonable doubt.

Habeas relief can only be granted on the basis of insufficient evidence where the federal court conducts a thorough review of the full state court trial transcript. *Nash v. Eberlin*, 437 F.3d

519 (6th Cir. 2006) (reversing the district court's decision to grant habeas relief where no transcripts were included in the state court record).

There were several witnesses that testified that Mr. Rivera and Terry Alber (deceased) were fist fighting at eight or ten o'clock on May 3<sup>rd</sup>, and the police responded to the scene just before 11:00am on the 4<sup>th</sup> of May. The trial court denied the motion and went on to say, "Your client viciously, violently, and pretty much without any provocation attacked this gentlemen, hitting him, stomping him, kicking him in a violent, vicious attack and then hitting him with a golf club. Come on. What in the world am I if I don't think this constitutes murder? And I do believe there is plenty of provocation shown here. Past acts. Everything else. This guy is a violent man. It's terrible."

The trial court erroneously commented on facts not in the record. There was no evidence that Petitioner hit Mr. Alber with a gold club, or stomping him. To the contrary, Arthur Devine testified that after the fist fight happened, Mr. Alber went outside the hut and drank for a couple more hours. There was no evidence to support the notion that Mr. Rivera viciously attacked Mr. Alber resulting in his death.

#### **IV. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT WAITING UNTIL AFTER DR. HOROWITZ TESTIFIED BEFORE ASKING FOR THE DIRECTED VERDICT.**

Petitioner states that it was not a "sound trial strategy" for defense counsel to prematurely request a motion for a directed verdict prior to the testimony of Dr. Horowitz. This alleged strategy substantially prejudiced the Petitioner's trial because the prosecution was able to present rebuttal arguments to the jury regarding Dr. Horowitz' testimony. Petitioner further states that defense counsel introduced prejudice into the jury when [he] informed the Court of Petitioner's

option not to testify. Again, this does not amount to sound trial strategy as the Court will instruct the jury after closing arguments regarding Petitioner's right to remain silent. Lastly, defense counsel was ineffective for failing to sequester the witnesses. All of the prosecution's witnesses were able to sit-in on the proceedings and able to hear one another's testimony. This unfairly prejudiced the Petitioner and violated his right to a fair trial.

As provided in Argument II above, and following the test set forth in *Strickland v. Washington*, defense counsel's performance was deficient and it resulted in an outcome that could have been different if it weren't for counsel's ineffectiveness.

It should also be noted that defense counsel was ineffective for not having the witnesses sequestered in this case. The witnesses should not have been allowed in the courtroom while other witnesses were testifying.

Lastly, defense counsel was ineffective for advising Mr. Rivera not to testify. The right to testify has sources in both the State and Federal Constitutions which are of a fundamental magnitude. *Rock v. Arkansas*, 486 U.S. 44; 107 S. Ct. 2704; 97 L. Ed. 2d 37 (1987). Defense counsel erroneously advised Mr. Rivera not to testify under the grounds that the prosecution could impeach him with this criminal past, when said past was used against him anyway, therefore, this "strategy", albeit a bad one, cannot amount to a sound trial strategy.

This Court should grant certiorari or reverse the Sixth Circuit's February 12, 2021, decision denying Petitioner a certificate of appealability.



## SUMMARY and CONCLUSION

There was no evidence in this case to support a conviction of murder. Mr. Rivera and the decedent Terry Alber were friends, they lived together, drank together, and at times, the drinking would lead to petty fist fights that were often resolved over more drinking. The prosecutions attempt to gain a conviction by means that violated Mr. Rivera's fundamental rights to a fair trial are apparent in the alleged other-acts evidence. While Defense Counsel was apprised of the other-acts evidence, such evidence was so far-fetched that no reasonable attorney using sound professional judgment could defend against other-acts evidence, because the evidence pertains to Mr. Rivera's alleged uncharged criminal behavior in unrelated incidents. For the reasons stated above, Petitioner Derek A. Rivera, asks this Honorable Court to GRANT certiorari or REVERSE the Sixth Circuit Court of Appeals' February 12, 2021, Order denying certificate of appealability.

Respectfully submitted,

Date: April 13, 2021

Derek Rivera  
Derek A. Rivera, #967132