NO. 20-8131

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

BRENT LANG - PETITIONER,

VS.

ERICA HUSS - RESPONDENT.

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

PETITIONER FOR WRIT OF CERTIORARI

BY: Brent Lang #347208
Petitioner, in pro se
Marquette Branch Prison
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Petition perfected By: Troy Allen Hite #188655
(a non-attorney)

QUESTION PRESENTED FOR REVIEW

I IS CERTIORARI APPROPRIATE WHERE THE UNITED STATES COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY IN AT LEAST ONE OF THE QUESTIONS THAT WAS PUT BEFORE THE COURT?

LIST OF PARTIES

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STATEMENT OF JURISDICTION

Petitioner seeks review of the December 8, 2020, denial of the United States Court of Appeals for the Sixth Circuit. This Court has jurisdiction where Petitioner is filing this petition within 90 days of the denial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. Constitutional Provisions:

United States Constitution - Sixth Amendment:

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 lave the Assistance of Counsel for his defense.

United States Constitution - Fourteenth Amendment:

Sec. 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.

RELEVANT FACTS AND STATEMENT OF CASE

a. Relevant Facts:

On July 24, 2012, Brant Lang, Petitioner in pro se, was convicted, after a trial by jury, of Murder, Second Degree, contrary to Mich. Comp. Laws § 750.317; Assault With Intent to Commit Murder, contrary to Mich. Comp. Laws § 750.83; Felon in Possession of a Firearm, contrary to Mich. Comp. Laws § 750.224f; and Felony Firearm, contrary to Mich. Comp. Laws § 750.227b-a, in the County of Wayne, before the Honorable Gregory Bill. (T 07/24/12, 56-57).

On August 7, 2012, Petitioner was sentenced to serve concurrent sentences of 35 years 5 months to 60 years; 270 months to 35 years; 5 years; and 5 consecutive years. (ST 08/07/12).

The case arose from a shooting incident occurring on September 21, 2011, at an abandoned house at 563 Rosedale, in the City of Detroit, where James Watson was killed and Angelo James was wounded in the shooting. The later subsequently testified at trial.

James testified that he was on the porch at the abandoned house with Watson and Courtney Putman on the evening of September 21, 2011. (T 07/23/12, 7). The house has no electricity and there were no lights on at the house or at the houses on either side of it; though there was a porch light on at a house across the street, two houses down; and there was a street light on that was also down the street from them. (ID. 23-24, 37-38). James was drinking Cognac; the others were not drinking; Watson smoked and sold marijuana from the location and other locations. (ID. 89, 36).

James stated at about 11:00 p.m., Petitioner, wearing all black clothing and a pulled-up hoodie, rode by on a black bicycle with silver spokes. He did not stop, but looked at James and continued riding. James didn't know Petitioner, but had seen him around the neighborhood over a period of six years. (ID. 11, 13 15,

38). James had never spoken with Petitioner and he had no problems with him. (ID. 38-39). James said he then went to a store with Watson and returned to the house to hang out on the porch. (ID. 8, 13).

At around 1:00 a.m., after a second trip to the store, James saw a different person, (TeTe), riding the same bike. TeTe was dressed all in black and also wore a hoodie. (ID. 40) TeTe rode up and spoke with James for awhile, and then left. (ID. 16-17). James and Watson continued sitting there. Later in the evening James heard a noise in the bushes or grass at the house next door; he stood up and saw two people, one of whom he identified as Petitioner, point guns and say "Don't move." (ID. 18-19, 45). Although James testified at trial that he was sure Petitioner was one of the two people, (ID. 35), and he knows Petitioner when he sees him, (ID. 24), he acknowledged that he, in his statement to the police, said he only got a "glimpse" of him. (ID. 25-26).

James stated he turned and started to run inside the house and he heard several gunshots ; he realized he had been shot in the leg, and could not keep running because the leg was broken, so he sat down inside the house; he later realized he also sustained a wound in his arm. (ID. 28-29). He said he heard three or four more gunshots and Watson walked into the house, but because it was dark inside of the house, he could not tell Watson was bleeding, but he did hear Watson gasping for air. James tried to stand, but both Watson and him collapsed to the floor. (ID. 29-30). Around thirty seconds transpired from when James noticed the two individuals and Watson coming into the house. (ID. 30, 46).

Putman and his brother came to the house and helped James to his car; while in route to the hospital, they saw an ambulance, so they stopped and James was placed in the care of the EMS personnel. (ID. 32-33).

James stated he knew that Watson possessed a .357 handgun, but he did not see Watson pull it out that night. (ID 43-44, 46).

Putman testified that he was inside the abandoned house with the others at about 11:00 p.m. He later went to the store with James at around 1:00 a.m. and then went to his home across the street. He sat down and started eating some food and heard six to seven gunshots. (ID. 94-96). Putman said he tried calling James and could hear James's phone, and then heard James call for him. (ID. 96, 98). He looked at the house and could see James crawling through the door. His brother and him then put James into his car and Putman started driving to the hospital, but when he saw the police and EMS, he stopped the car and told them where Watson was. (ID. 103-106)

Putman asked James whom had shot him and James replied "Englewood." (ID. 108-109).

Police Officer, Allen Williams, testified that he responded to the house at about 2:10 a.m. (ID. 70). There was no power to the house. He found bags of marijuana inside the walls of the house; a handgun, either a .38 or .357 revolver, he couldn't recall which, was found on the front porch. James's identification was found in the area of the handgun. Some shell-casings, some of which appeared to be old and some new, were found in the sidewalk area. (ID. 69-70, 73-74).

Evidence Tech, Lori Briggs, testified that the revolver found on the porch was a Taurus .357 (ID. 118). Shell-casings were found on the sidewalk and the street area next-door to the abandoned house. (ID. 116-117).

Sgt. Samuel Mackie testified that the revolver was not submitted for either fingerprints or DNA testing. (ID 129, 131).

Toolmark expert, Jeffrey Amley, testified three of the casings found were from a .45 caliber gun and one from a 9 mm handgun. (ID. 78-80. 86, 90). A fired bullet, which had been recovered from Watson's body, had been fired from the Taurus .357; also the Taurus was a five shot weapon with four live cartridges and

one fired case. (ID. 78-80. 91). A potion of a bullet recovered from the scene was consistent with being either a .38, .357, or 9 mm. (ID. 84).

Assistant Medical Examiner, Dr Francisco Diaz, testified that Watson died from two gunshot wounds, one of which was in the posterior of the right lower leg, the other to the right side of the chest, which caused damage to the lungs and aorta. (ID 61-63).

Any further facts will be included within each argument being presented to this Court.

b. Statement of Case:

At sentencing, Petitioner filed a timely notice of appeal of right to the Michigan Court of Appeals and a request for the appointment of appellate counsel. Appellate counsel, Neil J Leithauser (P33976), was appointed to represent Petitioner. Leithauser raised three questions on the appeal: (1) Does the weight of the evidence so preponderate against the verdict - based upon an incredible identification of Petitioner - that Due process of law is offended and should the verdict not be allowed to stand and should Petitioner be given a new trial? (2) Should the murder conviction be reversed where the prosecutor's evidence was insufficient to prove beyond a reasonable doubt that Petitioner killed the decedent? and (3) Was Petitioner denied his state and federal constitutional rights to confrontation, due process of law and a fair trial - guaranteed through the Sixth and Fourteenth Amendments - through: a. Misconduct of the prosecutor, which consisted of arguments improperly bolstering the character of the complaining witness; and b. Trial counsel's failure to object deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel?

On January 23, 2014, the Michigan Court of Appeals, in an unpublished opinion, affirmed Petitioner's conviction and sentence. (See Appendix A, People v. Lang, 2014 Mich. App. LEXIS 123 (Mich Ct. App. Jan. 23, 2014)).

Petitioner appealed the same three questions to the Michigan Supreme Court, which the court denied leave to appeal on September 29, 2014. (See Appendix B, People v. Lang, 497 Mich. 869 (2014)).

On July 27, 2015, Petitioner filed a timely writ of habeas corpus, which was docketed as case number 15-cv-00771. The case was summarily dismissed, without prejudice, due to Petitioner's failure to exhaust all claims that he was presenting. (See Appendix C, Lang v Trierweiler, 2015 U.S. Dist. LEXIS ____ (W.D. Mich. Aug. 6, 2015)).

To comply with the court's order to exhaust the additional claims in the state courts, Petitioner filed a Motion for Relief from Judgment, pursuant to Mich Ct. R. 6.500, et seq, within the Wayne County Circuit Court, raising an additional 5 questions (1) Was Petitioner deprived his constitutional right to a fair and impartial trial, where the prosecutor knowingly presented Dr. Francisco Diez to provide an opinion and conclusion as to the autopsy performed by Dr. Somerset, which Dr Diez did not attend? (2) Did the prosecutor commit a Brady violation, contrary to Petitioner's Fifth and Fourteenth Amendment rights, where it knowingly withheld exculpatory evidence, regarding the bullet(s) recovered during the autopsy performed by Dr Somerset? (3) Was Petitioner denied a fair and impartial trial by the prosecutor knowingly suppressing the gunshot residue, fingerprint evidence, and bullet casing taken from the decedent? (4) Was Petitioner deprived of a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments, where the trial court placed an "external constrain" upon his ability to aid in his own defense, by ordering Petitioner competent wit/ antipsychotic medications during trial court proceedings? and (5) Was petitioner denied his constitutional right to the effective assistance of counsel, where appellate counsel failed to raise the ineffectiveness of trial counsel, in conjunction to the issues raised herein, as-well-as, those articulated within

counsel's appeal to the Michigan Court of Appeals?

The Honorable Dana M. Hathaway, denied Petitioner Motion for Relief from Judgment. (See Appendix D, Wayne County Circuit Court Denial).

Petitioner then filed a timely application for leave to appeal to the Michigan Court of Appeals, which was denied on September 22, 2016. (See People v. Lang, (unpublished opinion) COA: 333444 (Mich Ct. App. Sept. 23, 2016)).

Petitioner filed for a leave to appeal within the Michigan Supreme Court challenging the lower courts denials. The Michigan Supreme Court denied leave to appeal pursuant to Mich. Ct. R. 6 508(D). (See Appendix E, People v. Lang, 500 Mich. 1001 (2017)).

Petitioner then re-filed a writ of habeas corpus presented all eight exhausted claims to the Federal Easter District Court, case number 17-cv-11975.

On July 8, 2020, the District Court denied the petition and declined to issue a certificate of appeal on any of the claims, though it did grant an informa pauperis to appeal. (See Appendix F, Lang v. Mackie, 2020 U.S. Dist. LEXIS ____ (E.D. Mich. July 8, 2020)).

Petitioner appealed the District Court's denial of a Certificate of Appealability to the United States Court of Appeals for the Sixth Circuit, and argued an additional question of: Was Petitioner's questions 4-7 never adjudicated on the merits because there was never cited any supporting authority. only conclusory arguments in the denial? case number 20-1765.

On December 8 2020, the Court upheld the District Court's determined and denied Petitioner a Certificate of Appeal on any of the claims presented. (See Appendix G, Lang v. Huss, 2020 U.S. Ct. App. LEXIS ____ (6th Cir. Ct. of App. Dec. 8, 2020)).

Petitioner is now before this Court raising the question as to whether he should have been granted a Certificate of Appealability, presenting the

information for six of the nine questions presented to the U.S Court of Appeals on why he should have been granted it. Petitioner, after reviewing the lower court claims, has decided to eliminate claims One, Six, and Seven from this petition where those arguments are not strong enough to present to this Court.

REASONS FOR GRANTING THE WRIT

CERIORARI IS APPROPRIATE WHERE THE UNITED STATES COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY IN AT LEAST ONE OF THE QUESTIONS THAT WAS PUT BEFORE THE COURT.

a. Introduction:

This case embodies a precise question that needs to be addressed where Petitioner was denied his United States Constitutional rights under the Sixth and Fourteenth Amendments in denying him a Certificate of Appealability for at least one of the claims that was presented to the United States Eastern District Court.

b Discussion:

A petitioner is entitled to a certificate of appealability if he makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2254(c) This Court held in Barefoot v. Estelle, 463 U S. 480, 493 (1983), that this means that the petitioner need not show that he would prevail on the merits, but must "demonstrate that the issues are debatable among jurists of reason" that this Court court resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."

Specifically, a petitioner must show that jurist would find it debatable (1) whether the petition states a valid claim of denial of a constitutional right and (2) whether the district court was correct in its procedural ruling. Payton v. Brigano, 256 F 3d 405 (6th Cir. 2001).

QUESTION I

DID THE WEIGHT OF THE EVIDENCE SO PREPONDERATE AGAINST THE VERDICT - BASED UPON AN INCREDIBLE IDENTIFICATION OF PETITIONER - IS DUE PROCESS OF LAW OFFENDED, SHOULD THE VERDICT BE ALLOWED TO STAND, AND SHOULD A NEW TRIAL BE ORDERED FOR PETITIONER?

The shooting incident lasted, according to James, only about twenty or thirty seconds from the time that he saw the two people outside, stood and entered the house and the fatally injured Watson followed him inside. (T 07/23/12, 46). In that time frame, he heard multiple gunshots, starting first as

he entered the door, and then three or four additional shots were heard once he was inside. (ID 28-29). Putman heard six or seven gunshots, but saw no one outside when he subsequently looked out. (ID 95-96).

Before the shots were fired, James saw two people by the house next door. The people were in an unlit area and it was after 1:00 a m., yet he claimed that one of the persons was Petitioner. (ID 19). He also claimed to have seen Petitioner hours earlier riding a bicycle and wearing a hoodie pulled up (ID 12-13) The lighting was bad, at best, on that dark night for the only lights were a porch light on a house on the otherside of the street and a street light, also down in that same area; neither house on either side of the abandoned house at 563 Rosedale, which had no electricity had any light on. (ID 23-24, 37). He did not personally know Petitioner and had only seen him around, nor had he ever spoken with him face to face. (ID 15).

Simply put, the conditions for making a reliable identification were absent, at best.

Further, at the time he admitted to the police that he only glimpsed the person (ID 25-26). He also spent time to focus enough attention to describe the guns carried as being "shiny." (ID 45-46). However, he did not see Watson pull a gun (ID 46). A victim's attention upon a weapon, i.e , "weapon focus", has been scientifically recognized and described as referring to "the eyewitness's tendency to focus his or her visual attention on the weapon. When an eyewitness does this, the eyewitness has less attention to focus on a perpetrator's facial or physical characteristics." United States v. Lester, 254 F.Supp.2d 602, 613 (D. va 2003) This is even more true when the only witness is a complete stranger U S. v Wade, 388 U.S. 218, 228 (1967). The vageries of eyewitness identification are well know; the annals of criminal law are rife with instances of mistaken identification. ID at 228 Also see Ferensic v. Birkett, 501 F 3d

469, 482-483 (6th Cir. 2007).

In the seconds surrounding the incident, Watson apparently sustained his wound from his own .357 revolver; the gun was found by police on the porch, near James's identification. (ID 69, 73, 78 80 91, 118). The casings found at the scene actually shed minimal light on the case. for, apparently there were old and new casings found by police. (ID 74-75) Among those taken into evidence were three .45 caliber casings, a 9 mm casing, and a fired .357 casing (ID 78-80)

James's explanation of the events does not explain, nor does it coincide with, the physical evidence. How did his identification and Watson's gun, which had been fired and Watson was shot with, end up in the same area on the porch? How did Watson get shot, and much more signif.cantly, whom was he shot by? Also, if Petitioner and another person were committing an armed robbery, why would they have left the .357 and all other items untouched?

That is, if James was correct that the perpetrator(s) had shiny guns, and if we are to infer that those guns were a .45 and a 9 mm, and the perpetrators were next door when the shots were fired, how did Watson sustain a fatal .357 wound while on the porch, where the .357 was subsequently found? In short. James's version is mistaken, untruthful, and incomplete, thus not reliable

It is noteworthy that when asked by Putman who shot him, James did not say Lang; instead, he said "Englewood." (ID 108-109) James also did not tell police who shot him until sometime after he had surgery on his leg (ID 14) He also did not tell Officer Przybyla who did it. (ID 125-126)

This Court has recognized "the difficulties inherent in eyewitness identification testimony during stressful events." In Watkins v Sowders, 449 U.S. 341, 352 (1981), It held:

> [D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant

commit the crime.

The Federal Standard of in-court identification is a 5 part test. See Neil v Biggers, 409 U S 188, 199-200 (1972) Also see Keene v. Mitchell, 524 F.3d 461, 465 (2008), explaining the 5 part test:

> First, we consider the opportunity of the witness to view the defendant at the initial observation, second, we consider the witness's degree of attention, third we consider the accuracy of the witness's prior description of the defendant, fourth we consider the level of certainty shown by the witness at the pretrial identification, and finally we consider the length of time between the initial observation and the identification. We must weigh these factors against the corrupting influence of the suggestive identification. (citations omitted).

First, the opportunity to observe the perpetrator was very limited. James has a glimpse of two people under very dark conditions from one yard to the next. (ID 23-26, 27). Further, he is basing the identification because of a dark hoodie sweet shirt, which he identified another person wearing that night. (ID 11, 40). Which is not surprising to see people in a black neighborhood wearing dark hoodie sweet shirts Second, James's degree of attention was extremely short where he had time to glimpse two people, see two shiny guns and run into the dark abandoned house. The entire incident only took 20 to 30 seconds, which includes 4 or 5 gunshots after he is in the house and Watson finally stumbling into the house shot. (ID 29-30 46). Third, there was no prior description of the shooter. (ID 108-109). Fourth, James told a neutral person, his friend Putman, that the shooter was Englewood, (ID 108 109), if he would have known that it was Petitioner he would have told his close friend this information. Fifth, James only said it was Petitioner after his surgery. (ID 34). This is important because as clearly indicated James was drinking that night, so his mind was foggy from the alcohol, and then he gets shot and goes into surgery and is injected with drugs that mix with the alcohol. This creates an event to imprint a persons face into the perpetrators dark hoodie in a dark area where no face could have been

seen.

Petitioner is innocent of the crime and the misleading identification has violated his constitutional right to due process and jurors of reason could debate this fact Because of the forgoing, a certificate of appealability should have been granted.

QUESTION II

MUST THE MURDER CONVICTION BE REVERSED WHERE THE PROSECUTOR"S EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER KILLED THE DECEDENT?

All elements must be proven beyond a reasonable doubt for there to be a valid conviction. In re Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307, 317 (1979).

The prosecutor's burden is to "establish guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J , concurring).

As noted above in Question I, supra, Watson was shot, and potentially killed, by a .357 Taurus revolver, his own .357. The casings submitted at trial were .357, .45 and 9 mm, the later were found on the street and sidewalk areas, where there were old and "fresh" casings. (T 07/23/12, 74-75, 79-80).

If the two men fired weapons from the area of the house next door, or the sidewalk, they did not fire a .357. Someone killed Watson, certainly and tragically; however, it does not appear to have been one of the two persons said by James to have been outside and next door, (ID 18-19), which if true, would justify why when Putman looked out he did not see anyone around the house. (ID 95-96). Yet, Putman testified that he could see James crawling through the door. (ID 103-104). There is no direct proof in this record that Petitioner fired any gunshots, and there is no inferential proof that he fired the fatal shot, though there is proof that James's identification card was found next to the .357, (ID 69-70 73-74), and there is proof that Watson sold drugs at different locations in the city. (ID 8-9, 36). The alleged perpetrators did not rob the victim, for they surely would have taken the .357 with them and any other items of value, thus, if they did the shooting, what would have motivated them to do it? James was clearly aware of the money Watson was making from drug sells, but nothing

indicates that Petitioner was aware of this, where there was not a robbery made. Further, because the doctor that did the autopsy did not testify see Question IV, infra, it cannot be stated as absolute that Watson did not die from the .357 gunshot wound.

The proofs were deficient to support a murder conviction, and that conviction must be vacated. U S. Constitution Amendment XIV; Winship, 397 U.S. at 364; Jackson, 443 U.S. at 317. Further, Petitioner would direct this Court to consider the fact that the Michigan Court of Appeals usurped the jury when it determined: "From Watson's leg wound, they extracted a fired bullet jacket and one core portion of the jacketed bullet. The bullet to his chest perforated his aorta, which was enough to kill him." (Exhibit A). Then, the U.S. District court went on to usurp the jury's roll further and violated the Sixth Circuit's ruling in Barker v. Yukins, 199 F.3d 867, 875-876 (6th Cir. 1999), where that Court found the court's evaluation of conflicting evidence, 'usurp[s] ... the jury's factfinding role.'

Petitioner is innocent of the crime where there is insufficient evidence to support such a conviction and the lower court's usurped the jury's roll to insure the conviction stood, thus a certificate of appealability should have been granted where jurists of reason could have debated this fact and the question is adequate to deserve encouragement to proceed further. Barefoot, 463 U.S. at 493.

QUESTION III

WAS PETITIONER DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS OF LAW AND A FAIR TRIAL, GUARANTEED HIM THROUGH THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION - THROUGH

1 Misconduct of the prosecutor, which consisted of arguments improperly bolstering the character of the complaining witness; and

2. Trial counsel's failure to object, which deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel?

1. Prosecutorial Misconduct:

Reversal is warranted when prosecutorial misconduct denied the accused the right to a fair trial guaranteed by the Due Process Clause of the Federal Constitution, Amendment Fourteen; Burger v. United States, 295 U.S. 78, 88-89 (1935); Donnelly v. DeChristoforo, 415 U.S. 637, 643 (1974). Further, the misrepresentation of facts/evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." Kincade v. Sparkman, 175 F.3d 444, 446 (6th Cir. 1999). This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the prosecutor is faithfully observing his obligation as a representative of the People, whose interest "in a criminal prosecution is not that it shall win a case, but that justice will be done." Burger, 295 U S. at 88.

Since the case Richardson v. Marsh, 481 U.S. 200, 211 (1987) came into being, the term "juries are presumed to follow their instructions" ID. is always referenced as a way to eliminate prejudice that a prosecutor knowingly injects into a defendant's trial to gain an upper hand, or rather, an unfair advantage in the case, such as in Petitioner's case. But, what court's have failed to look at is the entire statement made by this Court:

> The rule that juries are presumed to follow their instructions is a pragmatic one Rooted less in the absolute

> certitude that the presumption is true then in the belief that it represents a reasonable practical accommodation of the interest of the state and the defendant in the criminal justice process. ID at 211.

Petitioner stated that this terminology is only a "practical accommodation of the interest of the state" ID. and not a defendant accommodation or interest, unless he clearly and openly agrees to it. For something that directly effects a defendant's constitutional rights can only be waived by him whom's rights are being violated. The accommodation factor is to allow a criminal defendant to make the choice to accept or deny the violation to a fair trial by the prosecutor, not as an all correcting/curing factor for denying a defendant his right to a fair trial, as the state courts and the state prosecutorial system have been using it. For, such as vouching for a witness, for arguendo, if counsel would have objected and requested a curative instruction, then the "jury [would have] explicitly [been] instructed, as it always is, that arguments by counsel are not evidence." Ferensic v. Birkett, 501 F. 3d 469, 477 (6th Cir. 2007). This would not have eliminated the intentional injection of swaying the jury's outlook on looking at the witness with additional credibility then the evidence would have allowed, for once it is heard it cannot be unheard; but it is a way of white-washing a defendant's constitutional rights to a fair trial and making them look minor and unwarranted for an appellate court's attention.

As stated in Hodge v. Hurley, 426 F 3d 368, 378 (6th Cir. 2005) (citing United States v. Young, 470 U S 1, 18 (1985)):

> [T]here are two separate harms that arise from such misconduct. First, such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be trial solely on the basis of the evidence presented to the jury. Second, the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. (internal citations and quotations omitted).

In Hodge, the court found prejudice because there was little physical evidence and the result of the trial turned on who the jury believed. In such a situation, held the court, bolstering a prosecution witness's testimony "is particularly likely to affect the jury's verdict." ID at 387.

It is more than fair to say that the only evidence against Petitioner was the testimony of James, who had drunk at least a pint of Cognac before the shooting, (ID 8-9), who had, as he told police, only "glimpsed" the two men in the dark at the house next door, (ID 25-26), who had never had any interactions with Petitioner in the past, (ID 15, 38-39), and only picks Petitioner after he was injected with pain killers for surgery, which created an event to imprint a persons face into the perpetrators dark hoodie in a dark area where no face could have been seen. (ID 34).

Further, James admitted that Watson sold drugs from that abandoned house and from other places in the city thus, he was hanging out with a known drug dealer, who probably possessed quantities of money. (ID 36; T 07/24/12, 18).

The prosecutor spoke very highly of James in the closing argument, effectively vouching for his character:

> MR. BRAXTON [APA]: And I think a lot of things he said were very, very -- says a lot about his character. He was very open about what was going on out there. He told you they were drinking, told you that the deceased was smoking weed. he could have painted another picture, he didn't do that. He told us everything that was happening ....
>
> ... The State Police tells you that the gun that they analyzed, held five shots, one shot is missing. There was (sic) four shots in that revolver Well, that's consistent with a person that, and I think says a great deal about his character, because he tells you that the deceased carried a gun or at least he told him he carried a gun, he said it was a 357, the round that is retrieved from his body is a 357 ... (T 07/24/12, 9, 15).

The prosecutor's argument was not merely a reasonable inference from the evidence, it crossed the line to become a personal statement of opinion of

James's credibility, a vouching for the veracity of James's testimony to not only discredit the Petitioner, but to gain an upper hand in the trial and force the Petitioner to defend himself with proof to counter the allegedly credibly witness, or affect the jury's verdict. It was improper, it was error, and it adversely affected Petitioner's right to a fair trial and due process. Hodge, 426 F. 3d at 387; Young, U.S. at 18.

The court held in Hutchison v. Bell, 303 F. 3d 720, 750 (6th Cir. 2002)

> When a petitioner makes a claim of prosecutorial misconduct, the touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor. [R]elief is warranted when the prosecutor's conduct was so egregious so as to render the entire trial fundamentally unfair. In this Circuit, whether a prosecutorial remark raises to a due process violation depends on (1) whether the remark tended to mislead the jury or to prejudice the accused; (2) whether the remark was isolated of extensive; (3) whether the remark was accidentally or deliberately placed before the jury; and (4) the strength of the evidence against the accused. (internal citations and quotations omitted).

First, the prosecutor's vouching for the only witness in the case was done to mislead the jury against the questionable credibility of James's testimony, which did not coincide with the evidence that was presented, including the credible identification, and to prejudice the Petitioner, who's whole defense was misidentification made by James. (2) The prosecutor vouched for James's credibility at least twice in his closing arguments alone, (ID 9, 14-15). These two persuading arguments by the prosecutor were enough to sway the jury to accept the only witness's testimony against Petitioner, and very well may have persuaded them to believe the witness and find Petitioner guilty. (3) It can be said that a single misstatement is accidental, but two or more is done with malicious intent Hebert v. Louisiana, 272 U S. 312, 316 (1929), and in this case, it was atleast done twice during the very last things the jury would hear before going in to deliberate on the credibility of the only witness. (4) The only evidence against Petitioner was James's testimony that he was a shooter in the incident, which, as

argued supra, were made under questionable circumstances for any legitimate and legato manner.

Therefore, the prosecutor's nefarious and malicious discrediting Petitioner by vouching for the only witness in the case, was an extremely deciding factor that persuaded the jury to come back with a guilty verdict, thus violating Petitioner's U.S. Constitutional XIV Amendment rights to the Due Process Clause by denying him a fair trial and a conviction based only on the evidence.

2 Ineffective Assistance of Trial Counsel:

A defendant accused of a crime has the right to the effective assistance of counsel under the U S Constitution Amendment VI; Strickland v. Washington, 466 U.S. 668 (1984).

To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria He must first "show that counsel's performance was deficient This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." ID at 687. In doing so, defendant must rebut a presumption that counsel's performance was the result of sound trial strategy. ID at 690. Second, the defendant must show the deficient performance was prejudicial. ID at 687 Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. ID at 694.

Also, "[t]he label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel." White v. McAninch, 235 F.3d 988, 995 (6th Cir 2002). "The entire point of an ineffective assistance of counsel claim is to 'second guess' trial strategy, though with deference for legitimate - and reasonable 'strategic choices!'" Hodge v. Haeberlin, 579 F 3d 627, 655 (6th Cir 2009).

As determined by the Sixth Circuit, failure to object to inadmissible and prejudicial evidence does not constitute effective assistance of counsel. Combs v. Coyle, 205 F. 3d 269 (6th Cir. 2000). Also, it has been held that failure to object to prosecutorial misconduct, in closing arguments, constitutes ineffective assistance of trial counsel. Hodge v. Hurley, 426 F. 3d 368, 375-376, 383-385 (6th Cir. 2005).

First, counsel's performance was deficient when he failed to object, during closing arguments, to the prosecutor vouching for the only witness/evidence against Petitioner. There was no reason to not object to the prosecutorial misconduct when it vouched for the credibility of the only witness/evidence against Petitioner. This was not trial strategy, or if it was, it was incompetent strategy at the bare minimum. Strickland 466 U.S. at 687, 690. Second, the failure to allow the vouching in support of the only witness/evidence against Petitioner created a reasonable probability that, but for counsel's error, the result of the trial may have been different, where if it was brought to the attention of the jury that the prosecution was only trying to persuade the jury, through the prosecution's subliminal and direct vouching, that the witness was more credible then everything that was being presented, then the jury would have taken a second look at what the prosecutor was trying to maliciously persuade the jury into believing, and the jury very well may have found Petitioner not guilty. Strickland, 466 U.S. at 687, 694. The problem is, because there was no evidentiary hearing performed, which was against Petitioner's request, trial counsel's reasoning was never made a part of the record, which is why this case needs to be remanded and an evidentiary hearing held. Wellons, 130 S. Ct. at 727.

Petitioner is innocent of the crime and the prosecutorial misconduct of vouching for the only witness/evidence against him, and trial counsel's failure to point this out to the jury, denied his due process, thus a certificate of

appealability should have been granted where jurists of reason could have debated this fact and the question is adequate to deserve encouragement to proceed further Barefoot, 463 U S at 493

QUESTION IV

WAS PETITIONER DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, WHERE THE PROSECUTOR KNOWINGLY PRESENTED DR. FRANCISCO DIAZ TO PROVIDE AN OPINION AND CONCLUSION AS TO THE AUTOPSY PERFORMED BY ANOTHER DOCTOR, SOMERSET, WHICH DR. FRANCISCO DIAZ DID NOT ATTEND?

The Sixth Amendment of the United States Constitution, made applicable to States via the Fourteenth Amendment, provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, meaning, the right to confront those who bear testimony against him. A Witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The Court held in Crawford, in describing the class of testimonial statements covered by the Confrontation Clause as:

> Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... containing in formalization testimonial materials, ...; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Id. at 51-52 (internal quotation marks and citations omitted).

In Melendez Diaz v. Massachusetts, 557 U.S. 306, 313, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), this Court rejected an argument by the Respondent "that the analysts are not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband.... This finds no support in the text of the Sixth Amendment or in our case law."

This Court went on to state:

> The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." To the extent the analysts were witnesses, they certainly provided testimony against petitioner, proving one fact necessary for his conviction--that the substance he possessed was cocaine....
>
> In Kirby v. United States, 174 U.S. 47, 19 S. Ct. 574, 43 L. Ed. 890 (1899), the Court considered Kirby's conviction for receiving stolen property, the evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. Id. at 53, 19 S. Ct. 574, 43 L. Ed. 890. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Court nevertheless ruled that admission of the records violated Kirby's rights under the Confrontation Clause....
>
> Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to distortion or manipulation," and the testimony at issue here, which is the "resu[t] of neutral, scientific testing. Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because "one would not reasonably expect a laboratory professional ... to feel quite differently about the results of his scientific test by laving to look at the defendant. (internal citations omitted).
>
> This argument is little more than an invitation to return to our over-rules decision in Roberts, which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. What we said in Crawford in response to that argument remains true:
>
> "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination ....
>
> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes. Id. at 317-318 (internal citations omitted).

When an autopsy is performed, and the examiner is aware that the decedent

was shot, the examination now becomes a determination to support any criminal judiciary events related to the shooting. Otherwise, the examiner is performing a causa proxima-Lat: proximate cause, "most closely related cause. It is used to indicate legal cause. That which is sufficiently related to the result as to justify imposing liability on the actor who produces the cause, or likewise, to relieve from liability that actor who produces a less closely related cause." Barron's Law Dictionary, 5th Ed., page 70.

The prosecutor introduced the autopsy report that was performed and written by Dr. Somerset. The Prosecutor did not call Dr. Somerset to testify to the facts of the report, instead, the prosecutor called Dr. Francisco Diaz, who was not present during the autopsy.

There was never any mention, by the prosecutor, that Dr. Diaz did not perform the autopsy, was not present during it, or had firsthand knowledge of anything that transpired during it or the information that was written into the report. (T 07/24/12, 59-63).

Dr. Diaz testified regarding the recovery of a bullet from the Decedent's right lower leg, (ID 63), and to the toxicology report that resulted in a positive for cannabinoids. (ID 65).

The evidence at issue is based on Dr. Somerset's subjective observations and analytic standards that establish several critical facts necessary to prove the offense before the jury, i.e., the recovery of the bullet and the magnitude of the leg wound done by the gunshot on the Decedent.

This evidence was introduced through the testimony of Dr. Diaz, who had no first-hand knowledge about Dr. Somerset's observations or analysis of the physical evidence. Petitioner's counsel was unable, through the crucible of cross examination, to challenge the objectivity of Dr. Somerset and the accuracy of his observations and methodology, for he was denied his right to confront the

perpetrator of the evidence, autopsy report, against him. Melendez-Diaz, 557 U.S. at 329

The best that Dr. Diaz could do was speculate regarding Dr. Somerset's reasoning of his findings. Petitioner's trial counsel could not question or attack Dr. Somerset's results or the soundness of his judgment in failing to conduct additional tests, or to follow certain procedures, for Petitioner was denied his right to confront.

Once Dr. Somerset made a determination that the cause of death was by homicide, then the doctor knew that he was preparing a report to be brought into a criminal court and his determination and opinion would now be evidence against the accused by cause proxima. The purpose was to test the reliability through the crucible of cross-examination. Melendez-Diaz, 557 U.S. at 317. This did not transpire.

Therefore the introduction of Dr. Somerset's autopsy report, through the testimony of Dr. Diaz, falls squarely within the prohibited testimonial hearsay that is reasonably to be used by the prosecutor at trial and should not have been allowed. Crawford, 541 U.S at 59. Also see, Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011), reports memorializing the work performed by laboratory analysis's when carrying out forensic duties are testimonial statements subject to the requirements of the Confrontation Clause. (quoting Melendez-Diaz, 557 U.S. at 310-311). For the testimony by Dr. Diaz, during Petitioner's trial, goes far beyond the basis of determining the manner of death. Dr. Diaz provided testimony as to the bullet wounds to Decedent; the entry and exit wounds of the bullets, and how that determination was made; what organs were damaged by the bullets; and the recovery of the bullet. (ID 62-63). None of which could be brought into question, for Dr. Diaz did not perform the autopsy but was referencing a document perfected by another doctor, so did not know how these determinations were made.

inadvertently; and (3) prejudice must have ensued. (Internal citations and quotations omitted).

As argued within Claim V, supra, the prosecutor woefully utilized Dr. Diaz's testimony to incorporate the autopsy report into the record, all the while, failing to confirm the unavailability of Dr. Somerset, who had personal knowledge as to the chain-of-command, as well as, the size, and condition of the bullet(s) he retrieved from the body of Decedent. (T 07/23/12, 64; Ln.'s 13-18).

Further, throughout the trial record, there is nothing that can establish the order of the bullet wounds, i.e., the chest or the leg first. (Id. at 62). Appellant presented that the bullet recovered from Decedent's right leg very well could have been the gunshot that killed him and the gunshot to the chest was secondary.

The trial court, in its order of denial, relied solely on the non-testifying Dr. Somerset's autopsy report for denying this claim.

By the prosecutor suppressing detailed information about the bullet's size and weight, it deprived Appellant of a substantial defense that the killing gunshot came from the .357 and not any gun that the two perpetrators allegedly possessed, for the .357 was the Decedent's gun, found next to the identification card of James. Further, the withholding of the weight of the bullet disallowed to present that the wound to the leg was actually done by the .357. This is also supported by the medical examiner's report. (M.E. Report, pg.'s 2 and 3).

b. Conclusion:

WHEREFORE, because jurists of reason would find this issue debatable and it is a constitutional violation, Barefoot, 463 U.S. at 493.

QUESTION V

WAS PETITIONER DEPRIVED OF A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, WHERE THE TRIAL COULD PLACED AN EXTERNAL CONSTRAINT UPON HIS ABILITY TO AID IN HIS OWN DEFENSE, BY ORDERING PETITIONER COMPETENT WITH ANTI-PSYCHOTIC MEDICATIONS DURING THE TRIAL COURT PROCEEDINGS?

A criminal defendant has a constitutional right to a fair and impartial trial and to assist with the defense.

The matter as to whether a defendant could be forced to take medication during trial was resolved in Riggins v. Nevada, 504 U.S. 127 (1992), also see Washington v. Harper, 494 U.S. 210 (1990). Those cases indicate that the constitution permits the government involuntarily to administer anti-psychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial; but, only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking into account less intrusive alternatives, is necessary significantly to further important governmental trial-related interest.

Further, in Sell v. United States, 539 U.S. 166, a trial court must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair. ID. at 181, (quoting Riggins, 504 U.S at 142-145).

The trial court never conducted any type of an inquiry into the side effects of placing Petitioner on these anti-psychotic medications and the court showed no concern as to his ability to assist counsel while under those medications in conducting a trial defense.

As determined in Riggins, 504 U S. at 127:

> The involuntary administration of anti-psychotic drugs to the defendant during his trial violated his rights under the

Sixth and Fourteenth Amendments to testify, to follow the proceedings, and to communicate with counsel.

Petitioner did not have the ability to assist his trial counsel during the trial due to being heavily medicated. Drope v. Missouri, 420 U.S 162, 171 (1975) (The accused must have the ability to assist in his defense). This is why Petitioner requested an evidentiary hearing in the state courts, which he was not given, to place on the record the facts that counsel did not receive any assistance from Petitioner in the defense of his trial because he was predomenately incoherent as to what was transpiring around him because of the forced medications he was on to make him competent to stand trial.

Wherefore, because Petitioner could not assist his trial counsel with his own defense, because of the anti-psychotic medications the court ordered him placed upon without making any determination first as to whether it would not allow him to assist, he was denied his constitutional right to a fair trial, thus a certificate of appealability should have been granted where jurists of reason could have debated this fact and the question is adequate to deserve encouragement to proceed further. Barefoot, 463 U.S. at 493.

QUESTION IV

WAS PETITIONER DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHERE APPELLATE COUNSEL FAILED TO RAISE THE INEFFECTIVENESS OF TRIAL COUNSEL?

Defendant has a Sixth Amendment right to the effective assistance of counsel on direct appeal. Strickland, 466 U.S. at 668; Evitts v. Lucey, 496 U.S. 378, 391-400 (1984). Although appellate counsel is not required to present every non-frivolous issue on appeal, Jones v. Barnes, 463 U.S. 745, 754 (1983), the courts have held routinely, that Strickland mandates appellate counsel to have sound strategic reasons for failing to raise important and obvious appellate issues, or "dead-bang-winners." Smith v. Murray, 477 U.S. 527, 536 (1986). Also see, Meade v. Lavigne, 265 F.Supp.2d 849, 870 (E.D. Mich. 2003):

> [A]n appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner', even though counsel may have presented strong but unsuccessful claims on appeal.... A 'dead-bang winner' is an issue which was obvious from the trial record ... and must have leaped out upon even a casual reading of [the] transcripts' ... [this was] deficient performance, and one which would have resulted in a reversal on appeal. (internal citations omitted).

In a case like Petitioner's, where it rests solely on circumstantial evidence, the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt. Brown v. Smith, 551 F.3d 424 434-435 (6th Cir. 2008).

In the case at bar, appellate counsel did raise three claims on Petitioner's appeal by right. (See Questions I-III). But, with that being said, the errors committed by trial counsel clearly impacted the verdict rendered by the jury. If counsel would have objected to the testimony of Dr. Diaz and requested Dr. Somerset to testify, the actual facts of the autopsy would have been presented to the jury. Further, within the development of Dr. Somerset's testimony, the recovery of the bullet from the Dependent's leg would have come forth.

The errors presented herein cannot be considered to be logical or strategic trial strategy when they denied Petitioner a fair trial and a substantial defense and even to assist in his own defense.

The failure of an appellate counsel to present a particular issue is constitutionally ineffective only "if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. Howard v. Borchard, 405 F.3d 459, 485 (6th Cir. 2005).

In this case, appellate counsel was ineffective in failing to raise questions 4 and 5, retained herein. Though the issues that were raised by appellant counsel did have merit, the issues presented by Petitioner must be seen as "dead-bang winners" for they jump out of the paperwork through a casual review of it. Also, the issues Petitioner has presented are clear and long standing constitutional violations that had "a reasonable probability that inclusion of the issue[s] would have changed the result of the appeal." ID at 485. The failure of appellate counsel to present these issues was ineffective even though counsel raised meritorious issues which were unsuccessful. Carpenter v. Mohr, 164 F.3d 938, 947 (6th Cir. 1998).

Therefore, not only does the ineffectiveness of appellate counsel overcome the "cause and prejudice" standard, but they violated Petitioner's Sixth Amendment right, thus a certificate of appealability should have been granted where jurists of reason could have debated this fact and the question is adequate to deserve encouragement to proceed further. Barefoot, 463 U.S. at 493.

CONCLUSION

Petitioner, Brent Lang, in pro se, respectfully requests that this Court grant this petition for a writ of certiorari and any other relief that it deems is just and proper in this case.

Respectfully Submitted,

Dated: 3-5-21

Brent Lang

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DECLARATION

I, Brent Lang, swear and declares, with my signature below, that pursuant to 28 U S C. § 1746, that the forgoing information is true and correct.

Executed on: 3-5-21

Brent Lang

Brent Lang
Declarent herein