No. 21-5294

ORIGINAL

IN THE SUPREME COURT IF THE UNITED STATES

* * * * *

WILSHAUN KING, Petitioner

v

MICHIGAN, Respondent

* * * * *

On Petition for Writ of Certiorari to
The Sixth Circuit Court of Appeals

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

/s/ Wilshaun King
Wilshaun King #642708
Kinross Correctional Facility
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QUESTIONS PRESENTED

I. PETITIONER'S TRIAL COUNSEL WAS APPROACHED AT THE TIME THE JURY RETIRED FOR DELIBEARITONS BY PROSECUTING ATTORNEY SCOTT EHLFELDT TENDERING A PLEA OFFER FOR PETITIONER. TRIAL COUNSEL CHOSE NOT TO INFORM PETITIONER KING ABOUT THE PLEA OFFER. SUBSEQUENTLY, PETITIONER WAS FOUND GUILTY ALL CHARGES AND SENTENCED TO A MANDATORY LIFE WITHOUT PAROLE SENTENCE, 10 TO 50 YEARS, AND 2 YEARS 11 MONTHS TO 10 YEARS SENTENCE. COUNSEL PROVIDED AN AFFIDAIVT DETAINING THAT HE FAILED TO INFORM PETITONER OF THE PLEA THAT WAS OFFERED. DOES THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL EXTEND TO PLEA OFFERS DURING JURY DELIBERATIONS?

II. DURING THE COURSE OF PETITIONER'S TRIAL, A NON-TESTIFYING EXAMINER'S AUTOPSY REPORT, OPINION AND CONCLUSIONS WERE USED BY A SUBSTITUTE MEDICAL EXAMINER, TESTIFYING FACTUALLY OF HER EXPERT OPINIONS AND USING AN ANATOMICAL SKETCH BASED ON THE NON-TESTIFYING MEDICAL EXAMINER'S OPINIONS AND CONCLUSIONS. DOES THE SIXTH AMENDMENT INVOKE THE CONFRONTATION CLAUSE MAKING THE AUTOPSY REPORT TESTIMONIAL WHEN IT IS SPECIFICALLY PERFORMED FOR USE IN LATER CRIMINAL PROSECUTIONS?

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THE UNITED STATES SUPREME COURT

The Petitioner respectfully seeks that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals rendered in these proceedings on April 20, 2021.

OPINION BELOW

The Sixth Circuit Court of Appeals affirmed Petitioner's conviction in its Case No. 20-2074. The Opinion is unpublished and is reprinted in this appendix to this petition. See Appendix

JURISDICTION

The original opinion of the Sixth Circuit Court of Appeals was entered on April 20, 2021.

The jurisdiction of this Court is invoked under 28 USC § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Statutory and Constitutional provision(s) are involved in this case.

U.S Const. Amend 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 defence.

U.S. Const. Amend XIV

Section 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.

28 USC § 2254

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estoppel from reliance upon the requirement unless the State, through upon the requirement unless the State, through counsel expressly waives the requirement.

(C) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e)(1) In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of Correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such state court proceedings to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant,because of indigency or other reasons is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State official. If the State

cannot provided such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the state court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing a factual determination by the state shall be admissible in Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectivenss or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceedings arising under section 2254.

STATEMENT OF THE CASE

Petitioner Wilshaun King, was convicted by jury of murder in the first degree MCL 750.316, one count of assault with the intent to murder MCL 750.83, and one count of assault with intent to do great bodily harm less than murder. His trial was presided over by Judge Annette Berry, in the Wayne County Circuit Court for the State of Michigan. On May 18, 2007, he was sentenced to imprisonment to the following sentences; life without the possibility of parole, 10 to 50 years and 2 years and 11 months to 10 years for all of the charges mentioned above. A timely appeal was filed. Petitioner also filed a Motion for new trial and request for Ginther hearing which were denied on November 2, 2007 prior to the filing of his direct appeal of right to the Michigan Court of Appeals. On January 12, 2010 the Michigan Court of Appeals affirmed his conviction and sentences. Petitioner sought leave to appeal in the Michigan Supreme Court which was denied on July 2, 2010.

Petitioner by and through attorney Daniel J. Blank filed a timely Writ of Habeas Corpus in the Eastern District of Michigan Southern Division. Thereafter a motion to hold in abeyqnce was filed to exhaust state court remedies, which upon the discovery of newly reliable evidence from petitioner's trial counsel Mr. Terry A. Price, a plea was offered to Petitioner which trial counsel stated in an affidavit that he failed to inform petitioner about. On August 2, 2013 Judge Avern Cohn, granted the motion to hold the writ in abeyance for this claim to be properly exhausted.

Petitioner then filed a Motion for Relief from Judgment in the Wayne County 3rd Circuit Court in Michigan for the county of Wayne on or about September 28, 2013. On January 3, 2014 after the prosecution responded to the Petitioner's motion, the Honorable Circuit Court Judge Megan Maher Brennan Ordered that "an Evidentiary Hearing on Defendant's Motion for Relief from Judgment is hereby GRANTED." (See January 3, 2014 Order).

Shortly after the GRANT of Petitioner's Motion, between January 4, 2014 and July 2014 the Prosecution sought for Hon. Judge Megan Maher Brennan to return the case to the Judge Annette Berry who now worked as a judge on the civil docket. The prosecution stated that justice Berry would be in a better position to rule on the Motion and apparently Hon. Judge Brennan agreed.

Upon Judge Berry resuming control over the case docket, she immediately dismissed the Motion for Evidentiary Hearing that was granted and set the order of Hon. Judge Brennan aside and again ordered the prosecution to respond. On January 9, 2015 Judge Berry then Summarily denied Petitioner's Motion for Relief from Judgement and denied Petitioner's request for an Evidentiary Hearing as well.

Petitioner proceeded in a timely fashion to address this claim in the Michigan Court of Appeals and the Michigan Supreme Court which were both denied (See exhibits). On April 8, 2017 in accordance with Justice Cohen's order, Petitioner filed his motion to add the newly discovered issue of ineffective assistance of counsel for failure to properly advise him of a plea offer, within the 60 days after fully exhausting his state court remedies.

The facts above were added to the following fact of the 1st issue which petitioner presented in his initial filing for Writ of Habeas Corpus in the Eastern District of Michigan Southern Division. After jury selection trial counsel Terry A. Price objected to the anticipated testimony of a substitute medical examiner insisting that it would be violative of Petitioner's Confrontation Clause Rights. It was known to the prosecution that Dr. Pasquale-Styles, had since taken a position in New York. The prosecution instead of attempting to secure this witness, decided to call a substitute medical examiner Dr. Cheryl Lowe. Dr. Lowe was not present during the autopsy

nor did she assist Dr. Pasquale-Styles in any form including the anatomical sketch, photos, opinions and conclusions of the victims manner of death. Prior to giving her testimony, Dr. Lowe extensively reviewed Dr. Pasquale-Styles morgue file, photographs, reports and anatomical sketch. (T.T. 3-20-07 pp 234-242). Gathering the same information from Dr. Pasquale-Styles autopsy report, opinions and conclusions which contained information provided by the Homicide section that the victim died as a result of being intentionally struck by a motor vehicle. Dr. Lowe, stated the similar language of Dr. Pasquale-Styles' report, that the deceased died from a head injury consistent with being struck by an automobile. (T.T. 3-20-07 pp. 234-238).

On August 1, 2005, the victim and a person referred to as L.B. were fighting after L.B. kicked a Ms. Claybourne in the face over a money dispute. After the fight L.B. left the area and returned with a person by the name of Guy Washington and a second fight ensued. Ms. Claybourne and the victim went to her mother's home and her mother called several family members to come over. The victim, along with Ms. Claybourne, and the family members who were called went back to the area looking for L.B. Witnesses testified that Petitioner was driving the SUV that struck and killed the victim. (T.T. 3-20-07 pp. 20-150).

Ardrella King testified that Petitioner left her residence at 9:30 am. Petitioner was taking his son, to Belle Isle. Mrs. King testified that Petitioner was driving with his son in a 1997 Neon car when he left her home. She further testified that Petitioner returned home around 1:30 pm or 2:00 pm. (T.T. 3-21-07 pp 140-141).

Petitioner testified that he left Mrs. Kings home around 9:30 am to take his son to Belle Isle, and that he was driving a Neon car. He further testified that he never owned nor drove a Ford Explorer or SUV on the day in

question. On his way to taking his son to Belle Isle, he observed a large crowd of people fighting in the area of Cyril and St. Thomas street. He saw his cousin in a headlock and exited his car. At this time a person presumably L.B. pulled up in a SUV truck and stated to Ms. Claybourne "bitch where is my m/f money." At this time Petitioner punched the person who had his cousin in a headlock in the jaw with his fist. The individual let his cousin go and Petitioner got back in his car and left the area with his son. (T.T. 3-21-07 pps 151-162).

In the prosecutions closing argument the prosecution focused on the testimony of the substitute medical examiner to prove that the victim died as a result of being intentionally struck by a SUV truck and not from the injuries sustained in the multiple fights he was involved in that day. The prosecution stated:

> "She [medical examiner] testified in her expert opinion based on her experience and expertise, these injuries that she saw on Tyree Jones were consistent with the injuries sustained in a motor vehicle crash."

He further stated:

> "These injuries are, according to the medical examiner, from a motor vehicle crash. That does not change. Mr. Price can harp on it all he wants about what you would expect to find despite what the medical examiner said. He can argue with you until he's blew in the face that these injuries sustained at the hand of a beating, but when you couple them altogether the medical examiner's opinion says, no, not from a beating at all." (T.T. 3-22-07 pp 15-16). (emphasis added).

It is clear that the prosecution relied heavily on the opinions and conclusions of Dr. Pasquale-Styles' who did not testify whose information and opinions were based on information provided by the homicide section that the victim was **intentionally struck** by a motor vehicle. The facts further demonstrates that the substitute medical examiner's opinions, conclusions and testimony were also formed from the bias of information provided by the

non-testifying medical examiner's autopsy report which contained opinion and conclusions from homicide section that the victim was **intentionally struck** by a motor vehicle. All other relevant facts necessary are included with the REASONS FOR GRANTING THE WRIT.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S MISAPPLICATION AND UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW FROM STRICKLAND V WASHINGTON, AND LAFLER V COOPER WARRANTS THIS COURTS ATTENTION FOR REVIEW.

SECTION A:

The Sixth Circuit erred in its decision when it misapplied first, that an evidentiary hearing for Petitioner's ineffective assistance of counsel claim did not apply. At the time of Petitioner King's trial he was unaware that the assistant prosecutor offered a plea deal at the time the jury went into deliberations. Petitioner during the filing of his initial habeas corpus was represented by attorney Daniel J. Blank. Attorney Blank filed Petitioner's Habeas petition prior to the expiration of the (1) one year time limit event though an additional (90) ninety days was available, on or about July 1, 2011. Petitioner filed a motion to Stay on or about July 30, 2013 when through his appellate counsel that trial counsel Terry A. Price had information concerning a plea offer that was made to Petitioner that he never informed petitioner King about, on or about July 30, 2013. The Eastern District of Michigan GRANTED the motion to stay the timely filed Habeas petitioner on August 2, 2013 so that this claim could be properly exhausted.

On August 20, 2013 Petitioner received an affidavit via his retained counsel Mr. Blank from his trial counsel Mr. Terry A. Price. In the affidavit attorney Price offered sworn admissions that he failed to inform Petitioner of a plea that was offered during the course of trial when the jury retired to begin deliberations.

On January 3, 2014 a reasonable jurist in the form of the Honorable judge Megan Maher Brennan, after a presentation of the petitioner's evidence Ordered for an Evidentiary Hearing to be held. It is notable that Justice Brennan stated:

> "After a thorough review of the record, there is evidence to support a claim of ineffective assistance of trial counsel. An attorney must notify his/her client of any and all settlement offers, mediations, evaluations and plea bargains. As such, the allegations and evidence presented in this motion are sufficient to warrant an evidentiary hearing on the basis of ineffective assistance of counsel under the standards provided for relief pursuant to MCR 6.500." Id page 4-5 of Justice Megan Maher Brennan's January 3, 2014 Order. (emphasis added).

The prosecution after the grant of this motion pursued a more favorable decision and moved to request that the original trial judge Annette Berry resume authority over the case stating that Judge Berry would be in a better position to rule on an ineffective assistance of counsel claim in the instance case. Petitioner ask this court to consider what made Judge Berry's position better to rule on Petitioner's claim of ineffective assistant of counsel than Judge Brennan's upon the evidence submitted for determination? i.e. the sworn affidavits of Petitioner's trial counsel stating that he failed in his Sixth Amendment rights to petitioner to inform him of a plea offer. Petitioner's father's affidavit and Petitioner's affidavit stating that he was unaware of a plea offer that was made to him until he received the information from his appellate counsel in July of 2013. And that had he known about the offer he would have accept the plea agreement.

This ruse by the prosecution worked! Upon, justice Berry resuming control over the case she quickly moved to reverse the GRANT of Justice Brennan's Evidentiary hearing that was granted to Petitioner, and Order the prosecution to respond. On January 9, 2015 Judge Berry summarily denied Petitioner's motion for relief from judgment and denied petitioner's request for an evidentiary hearing as well. Petitioner then traversed the ordinary appellate process filing timely applications for appeal in the Michigan Court of Appeals and Michigan Supreme Court which were denied. It must be noted that Petitioner continued to request for an evidentiary hearing in all respective courts which was denied.

What is most interesting about Judge Berry's opinion is that its reasons for denying Petitioner's evidentiary hearing and motion for relief from judgment are the very factors that would have been brought to light at the very same evidentiary hearing that was denied. Nor does her opinion mention whether or not the court would have accepted or denied the plea offer which is a factor that must be considered when a criminal defendant is offered a plea bargain. This Court held, "Where a petitioner makes "specific and detailed factual assertions" an evidentiary hearing must be scheduled. **Price v Johnston** 334 US 226 (1941); 28 USC § 2254. As petitioner can show by Justice Breannan's Order to first GRANT the evidentiary hearing, it is clear that is was not conclusively shown that this claim is without merit, thus Petitioner should have receive an evidentiary hearing in Federal Court as well. **Machibroda v United States** 368 US 487, 495-96 (1962). This Court in **Stephens** v **Kemp** 469 US 1043 (1984) held:

> "....whether the petitioner's response is elected in writing or through oral arguments the governing standard is clear; if the response pleads facts that, if true, would entitle the petitioner to relief, an evidentiary hearing must be held to determine those facts. **Sanders v United States supra at** 21-22. **Townsend** v **Sain** 372 US 293, 313 (1963), further held evidentiary hearing must be held :unless the state court trier of fact has after a full hearing reliably found the relevant facts." **Id** (emphasis added).

There was no reliable found facts by any full and fair hearing from the state-court trier of fact in the instant case. In fact the prosecutor provided no affidavits from prosecutor Scott Ehlfeldt stating that a plea was never offered to petitioner's counsel to present to his client. The trial court only took the prosecutions response as facts over the sworn affidavit from trial counsel stating that a plea was offered and he failed to inform petitioner. These facts would have been presented at the very same evidentiary hearing that Judge Brennan GRANTED, but Judge Berry decided to reverse the decision and denied the motion and evidentiary hearing.

This Court recognized that "any amount of actual jail time has Sixth Amendment significane" when evaluating **Strickland's** prejudice prong. **Glover v United States** 531 US 198, 203 (2001). In this case for petitioner to be offered a plea at the behest of the prosecution, once the case was closed and in the hands of the jury, provided significant implication for the right to the effective assistance of counsel. At this stage, once counsel ignored the timing of such offer and failed to convey the plea offer to petitioner amounted to factual and actual prejudice.

Attorney Terry A. Price provided an affidavit on August 8, 2013 detailing his ineffectiveness by failing to advise petitioner King of the plea offer by the prosecution while the case was in the hands of the jury at the time of deliberations. As a result of this the petitioner received much more prison time than he would have but for the constitutional violation that occurred by not informing petitioner of the plea.

This Court held that: "[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement." **Linretti v United States** 516 US 29, 50 (1995). **Strickland** explained that counsel has a duty to consult with the defendant on important decisions and keep the defendant informed of important developments in the cause of the prosecution." **Id 466 US at 688.**

Here where counsel admits to being derelict in these duties the two prong test of **Strickland** was met and petitioner relinquishment of the plea offer because it was unknown to him must afford him an opportunity to a remedy that neutralizes the taint and an appropriate relief tailored to these circumstances must be given. See **United States v Morrison** 449 US 361, 365 (1981).

Petitioner submitted an affidavit attesting to the fact that had he known about a plea offer that was tendered by the prosecution at such a critical

stage as during jury deliberations he would have jumped at the opportunity for accepting it. A reasonable probability exist where but for counsel's errors petitioner would have accepted the plea offer rather than proceed to verdict, the prejudice prong of **Strickland** is satisfied.

Petitioner suffered injury by his conviction and receiving a more severe sentence than he would have received had he been appropriately counseled and accepted the plea. So this outcome is not a just result. **Strickland** 466 US at 685, because it would not exist absent counsel's "constitutional deficiency." **Padilla** 130 SCt at 1482.

In **Santobello v New York**, the Court considered the appropriate remedy to be imposed after the prosecution breached a plea deal with the defendant. Instead of selecting a specific remedy, the Court remanded the case concluding that "[t]he ultimate relief to which petitioner is entitled" should be left "to the discretion of the state court, which is in a better position to decided whether the circumstances of the case necessitated specific performance of the plea agreement or the opportunity for the defendant to withdraw his plea entirely. 404 US 257, 262-63 (1971).

The trial court reviewing this ineffective assistance of counsel claim was in the best position to craft a remedy that addressed the injury suffered from the constitutional violation without unnecessarily infringing on competing interest. **Morrsion** 449 US at 364. This could have only been done if the trial court held a proper evidentiary hearing as the facts of this case affords but the trial court denied granting a hearing.

The interesting thing about his case is Petitioner filed a timely writ of habeas corpus. On August 2, 2013, the Honorable Avern Cohn of the United States District Court for the Eastern District of Michigan stayed the matter pending resolution of the ineffective assistance of counsel claim. This was based on Petitioner's appellate counsel receiving newly discovered evidence

via an affidavit from petitioner's trial counsel Terry A. Price stating that he failed to advise petitioner of a plea that was offered by the prosecution during jury deliberations. Attorney Price submitted an affidavit to appellate counsel on August 20, 2013 stating that "the jury begin its deliberations at approximately 11:42 am and during this time trial counsel was approached by prosecutor Scott Ehlfeldt with a plea agreement in which petitioner King would be offered a (10) ten year minimum sentence of incarceration.

On or about September 30, 2013, Petitioner by and through attorney Patrick J. McQueeny, filed a Motion for Relief from Judgment in the trial court. The motion was accepted and on January 3, 2014 before the Honorable Judge Brennan Petitioner's claim of ineffective assistance of counsel was granted and an evidentiary hearing was ordered. A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on fact not of record, it is incumbent on him to make a testimonial record at the trial court level. See **People v Ginther** 390 **Mich** 436, 443 (1973).

Petitioner asserts as the Michigan Supreme Court has emphasized: "A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claim with evidence as a precondition to invoking the process of the appellate courts...." Id

So, Petitioner was granted an evidentiary hearing to establish the claim of ineffective assistance of counsel by Judge Brennan. Before the hearing could be held petitioner's case was transferred to the original trial court judge Annette Berry. Judge Berry move quickly and set-aside Judge's Brennan's

order for the evidentiary hearing which was based on the affidavits of trial counsel Terry A. Price, swearing that a plea was offered and he failed to advise petitioner of the plea. Judge Berry instead ordered the prosecution to respond to the motion a second time and upon the prosecutions response denied petitioner's motion for relief from judgment and the motion for an evidentiary hearing. Although, Petitioner presented sufficient proof that this case warranted an evidentiary hearing from the sworn affidavit of trial counsel stating that he failed to advise petitioner King of the plea offer that was made during the jury's deliberation by the prosecution.

> "The negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to the effective assistance of counsel." **Paddilla v Kentucky** 559 US 356, 373 (2010) citing **Hill v Lockhart** 474 US 52, 57 (1985). Plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. **Missouri v Frye** 566 US 134, 143 (2012).

Absent unusual circumstances, where counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, the defendant can make an informed and voluntary choice whether to pleas guilty or go to trial without a specific recommendation from counsel. Here Petitioner, was never informed about the plea offer. **Missouri v Frye** dictates that counsel **"MUST"** inform his/her client of a plea offer made by the prosecution. When defense counsel allows [such an] offer to expire without advising the defendant or allowing his [or her] to consider it, defense counsel [does] not render the effective assistance the Constitution requires. **Id.**

Petitioner King, received via a sworn affidavit from his trial counsel August 8th, 2013. The affidavit consisted of the fact that trial counsel was offered a plea to present to his client before the jury returned with its verdict. Counsel admitted via his sworn affidavit, that he did not communicate the offer to Petitioner King, who allowed the process to proceed to verdict. Like **Frye**, counsel's failure in the instance case to present the plea offer to Petitioner violated his rights to the effective assistance of counsel. This Court stated:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendant must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice..., it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." **Id Frye 566 US at 147-48.** (emphasis added).

Counsel's failure to inform Petitioner of the plea offer prejudiced him, because of counsel's failure to advise petitioner of the plea he received a mandatory life without the possibility of parole sentence, along with current terms of 10 to 50 years, and 2 years 11 months to 10 years for all the charges he was found guilty under.

When petitioner shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence; the remedy like other Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. **Lafler v Copper 566 US at 170-71.**

SECTION B: MISAPPLICATION OF EQUITABLE TOLLING

Petitioner, states that the Sixth Circuit misapplied the equitable tolling. Petitioner can clearly show that extraordinary circumstances stood in his way and prevented the filing of this issue on direct appeal to the state courts. The affidavit of Petitioner's trial attorney Terry A. Price presented substantial evidence that warrants an evidentiary hearing. The evidence of trial counsel's affidavit is newly discovered evidence and upon learning of this information around June or July of 2013. Petitioner by and through his attorney Mr. Blank quickly moved to stay the proceedings in his federal habeas corpus which the Hon. Judge Avern Cohn GRANTED. Taking the equitable tolling time into account this Court held:

> "State criminal convictions are final for the purpose of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition had been finally denied." **Banks v Beard 524 US 406 (2004).** (emphasis added).

Petitioner filed a timely petition for writ of habeas corpus. While the timely filed petition was still pending, Petitioner learned of critical information that would prove that he received ineffective assistance of counsel. Specifically, when the jury retired for deliberations the prosecutor Scott Ehlfeldt proposed a plea offer to trial attorney Terry A. Price, which Mr. Price never advised Petitioner that the plea was offered. Petitioner did not learn of this information until after his timely filed petition was submitted. So the standards set forth in **Holland v Florida 560 US 631, 649 (2010);** and **Pace v DiGuglielmo 544 US 408, 418 (2005)** should apply here, where trial counsel's failure to advise petitioner of the plea bargain offer at the close of the prosecutions case during jury deliberations was an extraordinary circumstance that stood in the way and prevented the timely filing of this issue if this court applies a time bar to the issue.

Where the facts are in dispute the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state-court, either at trial or in a collateral proceeding. **Townsend v Sain** 372 US 293, 312 (1963); see also 28 USC § 2254(d). After the introduction of trial counsel Price's affidavit stating he failed to inform petitioner of a plea offer and the grant of an evidentiary hearing to afford a full and fair hearing on this matter. For a second judge to reverse the decision to hold an evidentiary hearing should have afforded the habeas court greater reason to follow the mandates as set forth above. **Townsend v Sain supra;** see also 28 USC § 2254(d).

Petitioner seeks redress in this Court for the purpose of clarifying whether the Sixth Amendment right to the effective assistance of counsel is guaranteed; Where a plea is offered at the time when a jury commences its deliberations? Also, where trial counsel admits that he failed to inform his client of the plea should an evidentiary hearing be mandated for the purpose of establishing facts that are not of record?

Because the Sixth Circuit Court of Appeals applied an unreasonable application of Strickland and mischaracterized Petitioner's affidavit(s) stating that he and his father knew of the plea offer where the affidavits presents no such evidence, certiorari must be granted. Further review of the questions presented herein warrants this Court's supervisory powers, as to how far does the the Sixth Amendment right to the effective assistance of counsel extend in the trial process?

For the these reasons presented herein this Court should GRANT certiorari.

II. THE SIXTH CIRCUIT'S MISAPPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW FROM BULLCOMING V NEW MEXICO, MELENDEZ-DIAZ V MASSACHUSETTS AND CRAWFORD V WASHINGTON WARRANT'S THIS COURT'S ATTENTION FOR CONSIDERATION.

The Sixth Circuit misapplied the standards established by the above Supreme Court decisions. The questions Petitioner presents warrants certiorari review by this Court, for the purpose of establishing: Whether the Confrontation Clause is invoked for the purpose of autopsy reports, anatomical sketches, etc., which are specifically prepared for later use in a criminal prosecution? Especially, when a substitute medical examiner is called upon to testify about the conclusions and opinions of the non-testifying medical examiner?

In **Bullcoming v New Mexico** 564 US, 665 (2011), this Court held that a "scientific report is testimony as explained ante at 666-664, 180 LEd2d at 623-624, in **Melendez-Diaz v Massachusetts** 577 US 305 (2009), "we held that "certificate of analysis," completed by employees of the State Laboratory Institute of Massachusetts Department of Public Health" **id at 308, 129 SCt 2527, 174 LED2d 314**, "were testimonial because they were "incontraverbily...' "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact," id at 310.

An autopsy report is prepared specifically for the purpose of establishing or proving some fact, which in all cases is the manner of death. When the words used in the autopsy report reflects phrases such as **INTENTIONAL SHOOTING, INTENTIONALLY STRUCK BY A MOTOR VEHICLE, or INTENTIONALLY....**in any form speaking to the manner of a victims death. It is clear that the purpose of the report is to prove a fact that some form of criminal intent occurred in the homicide.

It is clear that Dr. Lowe's testimony was used for the "primary purpose" of establishing or proving past events relevant to the criminal prosecution at hand. Dr. Lowe's findings were conducted after the initial investigation, thus, her conclusions and opinions are far removed from the investigation stage and moves into the realm of proving facts that the victim in this case was killed as a result of being intentionally struck by a SUV which the Petitioner was accused of driving. In the instance case because Dr. Lowe's conclusions and reports were prepared for the primary purpose of being used in Petitioner's criminal trial. The non-testifying medical examiner's autopsy report became testimonial in nature for the purpose of cases such as this.

Here Dr. Lowe's report was conducted when it was clear that there was a particular suspect and the facts found in Dr. Pasquale-Styles initial report were ultimately relevant to prove facts in a criminal trial. Petitioner's Confrontation Clause rights where violated because the trial court denied the objection and ultimately allowed the use of Dr. Pasquale-Styles' a non-testifying medical examiner's autopsy report and any opinions and conclusions from in report to be read as if Dr Lowe performed the examination. (see T.T. 3-19-07 pp. 137) By proxy the trial court allowed Petitioner's confrontation clause rights to be circumvented and the non-testifying author's report was admitted via Dr. Lowe's testimony, thus violating Petitioner's rights.

The harmless error analysis was misapplied by the Federal court in the instance case where, Petitioner had no chance to cross-examine Dr. Pasquale-Styles and Dr. Lowe's testimony was based on the contents of the autopsy, photographs and opinions of the non-testifying medical examiner. Although Dr. Pasquale-Styles' autopsy report may not have been primarily prepared for he purpose of use in a later criminal prosecutions. The use of the substitute medical examiner, in the instant case was produced by the

prosecution for the purpose of the criminal prosecution of the Petitioner. If this were not so, the prosecution would have made an attempt to at a minimum provide the medical examiner Dr. Pasquale-Styles by way of subpoena or other means at its disposal. Instead, the prosecution intentionally chose to subvert petitioner Kings rights to confront Dr. Pasquale-Styles and chose to present a substitute medical examiner by way of Dr. Cheryl Lowe. Dr. Lowe's testimony was allowed to inject portions of Dr. Pasquale-Styles' autopsy report, opinions and conclusions into evidence without being tested by the crucible of cross-examination. Which were those that were consistent with the prosecutions theory.

Defense counsel did object at trial to the introduction of Dr. Lowe's testimony stating the following:

> Mr. Price: Well, Judge, I can brief this for you in the morning, but its really an oral motion in limine and it goes to the testimony of the medical examiner in this manner.
>
> The Court: Okay.
>
> Mr. Price: And we believe that the routine factual findings contained in the autopsy report are not testimonial statements under Crawford v Washington, but the examiner's opinions based ion facts in the autopsy report, since this is not the examiner that prepared that report, we think that those opinions and any statement that seem to project opinions are testimonial under Crawford and if those statements are read out of the autopsy report we believe the only person that could read them should be the person who prepared the report. Under Crawford, that is. So we would ask for a redaction of the medical examiner's record in totality except when it comes to issues that are pure facts, but there's quite a lot of opinion and quite a lot of opinion interwound in that we think the Court should allow us the opportunity to present you with a redacted copy and then you can view it to see if what's left is purely fact and this is because the person who prepared the report is no longer employed by the medical examiner and I'm aware of the fact that there is an evidentiary rule that says that the medical reports are business records exception, but Crawford is a constitutional rule and I think that the case itself evokes a constitutional rule to confront and question the

> witness against you and I think, Judge, that the part of the autopsy report is testimonial and if its testimonial it should be stricken unless the person who prepared it is here to testify about it. (T.T. 3-19-07 pp 134-135).

When a medical examiner performs an autopsy report, the report given is based on the medical examiniers experiences, knowledge of anatomy, and opinions of the particular examiner. The opinions are in large part based on the individual medical examiner's knowledge, and information provided by police officers which was gather at the initial point of investigation. At this point of the investigation of every emergency situation the police are gathering information which is largely based on opinions until the facts of the matter are rooted out, for the purpose of criminal charges. However, when officers are called to the scene for the purpose of particular matters, all information and evidence is gather specifically for the purpose of use in a later criminal prosecution including the autopsy report.

The medical examiner's testimony in the instance case was offered for the truth of the matter and thus, falls inside the scope of the Confrontation Clause. The medical examiner's testimony was offered as a factual bases of the victims death occurring because he was hit by an SUV. And to dispute the factual evidence that the victim was involved in several fights and his injuries were not sustained due to these fights. Dr. Lowe's testimony was identical to the opinions of the non-testifying medical examiner Dr. Pasquale-Styles opinions using additions or subtractions of words from the original report such as the non-testifying medical examiner wrote the following:

> "Tyree L. Jones, a 50 year old black male, died of blunt force craniocerbal injuries. As reported he was a pedestrain who was intentionally struck by a motor vehicle. (See Dr. Pasquale-Styles autopsy report). (emphasis added).

Interestingly to note, the description of Mr. Jones' death as given by Dr. Pasquale-Styles' autopsy report sates (2) two significant factors which is proof that the report was being prepared for the purpose of use in a latter

prosecution which are **INTENTIONALLY STRUCK**. The testifying medical examiner after reviewing the autopsy opinions and conclusions of the non-testifying medical examiner. Dr. Lowe state in here testimony the following:

> Mr. Tyree L. Jones, who was a fifty year old black male, died of cranial cerebral injury, essentially head and skull injury, as a consequence of a pedestrian who reportedly was intentionally struck by a motor vehicle. (T.T. 3-20-07 p. 234) (emphasis added).

Again, the words **INTENTIONALLY STRUCK** shows that the purpose of this testimony was offer for the truth of the matter which aligns the petitioner's Confrontation Clause rights to be subjected to a violation in cases such as this. It can be seen that the testimony of Dr. Lowe is indistinguishable from the autopsy report, opinions and sketch the Michigan Court of Appeals stated the trial court ruled was inadmissible. However, this determination was not true the trial court in-point-of-fact allowed the non-testifying medical examiner's opinions, conclusions and autopsy report to be allowed in by proxy of Dr. Lowe's testimony. Thus, violating Petitioners right to Confrontation. US **Const. Amend. VI** see also **Crawford v Washington** 541 US 36 (2004).

Petitioner request that this Court reexamine its decision in **Williams v Illinois** 567 US 50 (2012), the dissent written by justice Kagan is in line with the argument set forth herein. Trial counsel actually objected to the use of anything other than the factual information that the original medical examiner reported which the court never allowed a determination of what was factual and what was opinions and conclusions. There was no attempt by the state to subpoena Dr. Pasquale-Styles, to secure her testimony for the purpose of Petitioner's trial. The prosecution intentionally chose to move forward with a medical examiner, who did not perform the original autopsy report. One can only guess at why the prosecution choose to move forward with such a violation, even after defense counsel's objection to the medical examiner

testifying about opinions and conclusions from the original report taken by Dr. Pasquale-Styles as evidence. Although, when a judge sits as a trier of fact, it is presumed that the judge will understand the limited reasons for the disclosure of the underlying inadmissible information. Accordingly both Michigan and Federal law bars experts from disclosing inadmissible evidence. **Fed. Rule Evid. 703. MRE 703.**

Where a non-testifying medical examiners autopsy report and other relevant conclusions are used by a secondary medical examiner who neither took part in or witnessed the autopsy is violative of a Petitioners Sixth Amendment right. Petitioner never had an opportunity to question Dr. Pasquale-Styles in an adversarial setting which is critical to the crucible of confrontation in regards to her notes, opinions, and conclusions which were reported to her by the homicide section. This information was the bases for Dr. Lowe's testimony and use of the anatomical sketch. **Commonwealth v Avil 454 Mass** 744 (2009), was found to be most persuasive by a Michigan Court of Appeals panel in the published case of **People v Dendel 289 Mich App** 445 (2010), and to be mist consistent with the Supreme Court's holding in **Melendez-Diaz**, it is also the most factually analogous to this case. The court in Avil held that statements in an autopsy report prepared by a nontestifying medical examiner were subject to confrontation, notwithstanding the statements served as the facts underlying the testifying expert's opinion. Similarly, the court in **State v Locklear** 363 **N.C.** 438 (2009), concluded that statements in an autopsy report and forensic dentistry reports were subject to confrontation. These holdings are fully consistent with this Courts ruling in **Melendez-Diaz.**

The non-testifying medical examiner's autopsy report and opinions were bootstrapped into evidence through a substitute medical examiner. The crucial factor here is that the trial court according to the Michigan Court of Appeals and the Sixth Circuit specifically excluded the use of the non-testifying

medical examiners autopsy report opinions and conclusions. Taking the position of these courts the intentional bootstrapping of the non-testifying medical examiners autopsy report opinions and conclusions by allowing a substitute medical examiner to testify was violative of petitioners rights.

Both Dr. Pasquale-Styles and Dr. Lowe reported that the victim died as a result of being **INTENTIONALLY STRUCK** by a motor vehicle. This information was exclusive relayed to the medical examiner by way of the homicide section. Petitioner, never had the opportunity to question/confront Dr. Pasquale-Styles regarding these opinions of the victims cause of death being a result of being intentionally struck by a motor vehicle. Dr. Lowe's testimony regarding the cause of death could only come form the opinion of the non-testifying medical examiner. In this case as the Sixth Circuit, the Eastern District of Michigan Federal Court, and the Court of Appeals properly recognized the trial court did not allow the autopsy report or any of the opinions and conclusions of the author of the report to be admitted. (see Court of Appeals, Eastern District of Michigan and Sixth Circuit opinions attached). Yet, the most critical opinion and conclusions of the testifying medical examiners autopsy report was intentionally allowed to enter the jury's sphere. That is that Mr. Jones' death occurred as a result of being "intentionally struck by a motor vehicle."

Even taking the prior Courts error of the conclusion that, Petitioner did not contest the factual data. Trial counsel specifically asked for a redacted version of the report to be done first. This was not afforded to the Petitioner. The trial court according to the lower courts did not allow the autopsy report, conclusions and opinions of Dr. Pasquale-Styles to be introduce as evidence. The anatomical sketch that was used were based on Dr. Pasquale-Styles' opinions and conclusions, the manner of death, that was also opinions and conclusions based on the information provided by the homicide section.

Trial counsel even renewed his objection after Dr. Lowe's testimony stating:

> I want to renew my objection to this Medical Examiner even being allowed to testify to this autopsy report because we think its testimonial, her additional statements and it's a Crawford violation. It's a violation of his 6th Amendment rights. (T.T. 3-20-07 p. 278)

Because the question presented here shows United States Court of Appeals continue to be in conflict with the other United States Court of Appeals concerning this issue of autopsy reports calling upon a Petitioner's right to Confrontation. See **Bailem v Florida** 2017 US **Dist.** LEXIS 97912; **Nardi v Pepe** 442 F3d 107, 112 **(1st Cir** 2011)(Even now[after Melendez-Diaz and Bullcoming,] it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial); **United States v** James 712 F3d 79, 99 **(2nd Cir** 2003)(holding that an autopsy report is not testimonial); **United States v Ignasiak** 667 F3d 1217, 1230-31 **(11th Cir.** 2012)(holding that autopsy reports are testimonial); **Garlick v Miller** 2020 US **Dist.** LEXIS 74546 **(2nd Cir); Hensely v Roden** 755 F3d 724 **(1st Cir** 2014); **Mitchell** v Kelly 520 F. **App'X** 329, 331 **(6th Cir 2013)** ([T]he decision...[that an autopsy report was admissible as a nontestimonial business record] was not an unreasonable application of Crawford given the lack of Supreme Court precedent establishing that an autopsy report is testimonial."); **Davidson v Bowersox** 2014 US **Dist.** LEXIS 3097 **(8th Cir)**(autopsy report is not testimonial.

Petitioner states that this question presents a review of this Court's supervisory powers which are necessary as the Circuit Courts are in conflict as to: When an autopsy report is prepared for the later use of criminal prosecutions is a criminal defendants right to the Confrontation invoked? State Courts and United States Court of Appeals continues to decide this question which should be addressed by this Court.

CONCLUSION

Petitioner Wilshaun King, presents two questions which calls upon this Court to decide critcal matters that affects important factors in State and Federal trials. The GRANT of CERTIORARI and ruling upon these questions will be in aid of the Court's appellate jurisdiction. This case warrants this Court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court.

For the reasons stated herein this Court should GRANT this Writ of Certiorari.

Wilshaun King