IN THE SUPREME COURT OF THE UNITED STATES

E'MARIO C. ALLEN,

DOCKET NO:_____

Petitioner,

v

DALE A. ARTUS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

'APPENDIX'

E'MARIO C. ALLEN
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APPENDIX

A

MANDATE

W.D.N.Y.
17-cv-6074
Siragusa, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of July, two thousand twenty-one.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Circuit Judges.

E'Mario Allen,

Petitioner-Appellant,

v. 20-4183

Dale A. Artus,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 08/23/2021

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APPENDIX B

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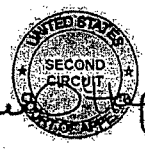

Catherine O'Hagan Wolfe

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APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EMARIO ALLEN,

Petitioner,

-vs-

DECISION AND ORDER

6:17-CV-6074 CJS

DALE A. ARTUS,

Respondent.

INTRODUCTION

Petitioner Emario Allen ("Allen" or "Petitioner") brings this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions after a jury trial, in New York State Supreme Court, Erie County, for Assault in the First Degree, Attempted Assault in the First Degree, and Robbery in the First Degree (2 counts), for which he was sentenced to determinate prison for terms of 25 years, 15 years, 25 years and 25 years, respectively, with the three 25-year sentences to run concurrently to each other but consecutively to the 15 year sentence, for a total sentence of 40 years. The Petition asserts three claims: 1) "the trial court erroneously denied Petitioner's *Batson* objection"; 2) "denial of effective assistance of counsel"; and 3) "the trial court violated Petitioner's right to due process and to remain silent." For the reasons explained below, the petition for a writ of habeas corpus is denied.

BACKGROUND

The following is a summary of the relevant facts that a jury could have reasonably found from the evidence at trial. During the early morning hours of November 12, 2011, Aaron Green ("Green") was celebrating his 25th birthday in nightclubs in the City of Buffalo. Green began the evening with approximately $600 of cash in his possession, and throughout the evening he

purchased drinks for himself, friends and acquaintances. At a nightclub called Buffalo Live, Green encountered Petitioner, who he had known since childhood. Green offered to buy Petitioner a drink, but Petitioner declined. At approximately 3:00 a.m., Green left that nightclub and drove with Frank Booker ("Booker") to another nightclub, Pandora's Sports Bar ("Pandora's"). At that time, Green still had approximately $300 in cash.

At approximately 3:15 a.m., Green and Booker parked their vehicles on Victoria Avenue and were walking toward Pandora's on the corner of Victoria and Fillmore Avenue when they were accosted in the middle of the street by Petitioner and two other individuals, Cordero Jones-Hicks ("Jones-Hicks") and Dwayne Gordon ("Gordon"), who had followed them after they left Buffalo Live. Petitioner, Gordon and/or Jones-Hicks announced it was a robbery. Petitioner, who was wearing a red hoodie sweatshirt and a baseball cap, then pulled a pistol from his waistband and fired at Booker, who turned and ran. Petitioner then fired a bullet into each of Green's legs, fracturing both femurs. As Green lay in the street, Petitioner, Gordon and/or Jones-Hicks beat and kicked him, then went through his pockets removing cash, keys and a phone.

Jones-Hicks or Gordon then commented that Petitioner needed to kill Green, since he knew Petitioner's name. Petitioner pointed the pistol at Green's face, and Green, turning his face away and closing his eyes, believing that he was about to die, heard several clicks from the pistol, but no further gunshot. Petitioner, Gordon and Jones-Hicks then drove off in a gray SUV.

Parts of the incident were witnessed by two residents of Victoria Avenue who called 911 after they were awakened by the gunshots. Ulysees Wingo ("Wingo") told the 911 operator that the individual who pointed a gun at Green, and who appeared to fire twice, was wearing a red jacket or red sweatshirt and a baseball cap, while Daria Pratcher ("Pratcher"), who could not see the actual assault and robbery from her vantage point, indicated that three males, one of whom

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was wearing red, ran past her home and fled from the scene in a gray SUV. Booker, who had returned to the scene by the time the police arrived, also told officers that the shooter was wearing a red sweatshirt and a baseball cap.

Based on a description of the gray SUV that Pratcher provided to the 911 operator, Buffalo Police pulled over the SUV moments later. Inside the vehicle were Petitioner, Gordon and Jones-Hicks. Within a few minutes thereafter, police brought Petitioner back to the scene for a show-up, and Booker identified Petitioner as the shooter.

During booking, officers found that Jones-Hicks possessed $320 and a cell phone. Officers searched for a gun, both inside the SUV and along the route that the SUV had traveled from Victoria Avenue before being stopped, but found no firearm.[1]

Petitioner was questioned at the police station by two detectives, who administered *Miranda* warnings. Petitioner waived his right to remain silent and indicated that he was surprised at being custody, since he had been asleep immediately prior to being arrested. One of the detectives, Cedric Holloway ("Holloway"), then attempted, without success, to goad Petitioner into explaining what had really happened, by telling him that the police had many witnesses against him, and that he should admit his guilt to help his co-defendants, one of whom (Gordon) was on parole. However, Petitioner remained silent in response to Holloway's statements. The entire interview lasted approximately thirteen minutes.[2]

On December 2, 2011, an Erie County Grand Jury returned a five-count Indictment (Indictment No. 02505-2011) against Petitioner, charging him with Attempted Murder in the First

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[1] Although not part of the evidence at trial, the record indicates that shortly after Petitioner, Gordon and Jones-Hicks were arrested, Jones-Hicks told an officer that he had not been involved in the incident, but that he had been with Petitioner and Gordon, and had gotten separated from them. Jones-Hicks stated that he then heard gunfire, after which Petitioner and Gordon rejoined him, and the three drove away. Jones-Hicks indicated that either Gordon or Petitioner had thrown the gun out of the car window somewhere along the route that they had driven, and he returned to the area with officers to help them search, but no gun was found.

[2] Transcript at p. 528.

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Degree, Assault in the First Degree, Attempted Assault in the First Degree and two counts of Robbery in the First Degree. Petitioner was indicted along with Jones-Hicks and Gordon, though Petitioner was later granted severance.

Petitioner's attorney filed pretrial motions, including an application for a *Huntley* hearing. On April 2, 2012, the trial court conducted a *Huntley* hearing, and on July 11, 2012, the trial court ruled that Petitioner's statements to the detectives were admissible.

On July 16, 2012, jury selection began. Toward the end of jury selection, the prosecutor exercised a peremptory challenge to an African American man, Leonard Lannie ("Lannie"). Lannie had indicated that he was 23 years of age, was a college student, worked part-time at a supermarket and resided with his parents.[3] Lannie further indicated that he knew a prosecution witness, police officer Darren Exum ("Exum"), who was the officer who had pulled over the gray SUV in which Petitioner, Gordon and Jones-Hicks were riding. The prosecutor asked Lannie how he knew Exum, and Lannie indicated that Exum was a friend of his sister. When asked if his familiarity with Exum would affect his ability to be fair, Lannie answered, "No, I don't think so."[4] When asked if he would evaluate Exum's credibility the same as any other witness, Lannie responded, "I think I could." Later, the prosecutor asked Lannie again if his acquaintance with Exum was a problem for him, and Lannie answered, "No, it's not." Similarly, the prosecutor asked whether Lannie would treat Exum fairly, and Lannie stated, "Yes."[5]

After the prosecutor exercised a peremptory challenge to Lannie, defense counsel raised a *Batson* objection. In that regard, defense counsel stated that prior to that point, there had been several African-American potential jurors, two of whom the prosecution had already excused using peremptory challenges. Defense counsel noted that other African-American potential

[3] Transcript at pp. 125-126.
[4] Transcript at p. 126.
[5] Transcript at p. 163.

jurors had also been excused, though not due to peremptory challenges by the prosecution. In response to the *Batson* challenge, the prosecutor indicated that he had challenged Lannie for essentially two reasons: First, because of Lannie's young age and perceived immaturity; and second, because Lannie knew Exum, who was going to be an important witness to the prosecution's case. The prosecutor noted that he had also used peremptory challenges to excuse white jurors similar in age to Lannie, since he felt that they were also too young or immature to serve on a jury considering an A level felony.[6] Further, the prosecutor indicated that he did not feel Lannie had been forthcoming about his feelings for Exum, stating: "And when I inquired of him whether he knew Officer Exum or whether that might be an issue for him, I wasn't satisfied that his answers were credible. It just seemed incredible to me that he has no feelings whatsoever about Officer Exum one way or the other. And given the fact that [Exum is] a key witness, for all of those reasons, we exercised a peremptory challenge."[7]

Defense counsel argued that the purported concern about Exum was pretextual, since Lannie had "answered the questions about his familiarity with [Exum] in all the detail that was requested of him," and had indicated that he could be fair and objective.[8] Defense counsel further argued that the prosecutor was treating Lannie disparately, since the prosecutor had not excused Kara Wutz ("Wutz"), a white female juror who was only two years older than Lannie.

The prosecutor responded that Wutz was not similarly situated to Lannie, since she was older, was employed full-time and did not live with her parents.[9] Further, with regard to Lannie's familiarity with Exum, the prosecutor reiterated that he felt uncomfortable with Lannie since he could not interpret Lannie's feelings for Exum "one way or the other":

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[6] Transcript at pp. 189-190.
[7] Transcript at p. 191.
[8] Transcript at p. 192.
[9] Transcript at p. 193.

> [W]ith respect to the relationship with Darren Exum, I just simply don't know what it is. I don't know if it's positive or if it's negative. It's most likely positive. Usually it is. He didn't indicate it was negative. But he wouldn't say one way or the other, and that was the concern. And that's the same reason we used on prospective juror Lisa Macaluso. She knows not just cops, she knows a witness. She knows Stu Easter. And we exercised a challenge on her. With respect to [Lannie], he doesn't just know cops, he knows a witness, a specific witness in this case. That's the reasons we're challenging him.
>
> And finally, Your Honor, with respect to Mr. Samuel [a black prospective juror against whom the prosecutor had previously exercised a peremptory challenge], I recognized he's a forty-six-year-old black man. We challenged him for wholly different reasons. Had nothing to do with his age. Had everything to do with the answers to the questions he gave. And I know there was no *Batson* challenge at that time by Mr. Terranova, but to suggest, somehow piggyback to say that because we challenged Mr. Samuel, that it means we're exercising non-race-neutral purposes here, Your Honor, I just want to respond and say that's not the case.[10]

The trial court then denied the *Batson* challenge, stating:

> I do have to find that, based on the District Attorney's explanations, that there are many race-neutral explanations for the challenge, and particularly knowing a witness per se pretty much would explain, no matter what the race of the prospective juror. In most cases, I'm sure you would agree, Mr. Terranova, that that is a reason, as in the Stuart Easter example, so the *Batson* challenge is denied.

(Transcript at p. 195). Defense counsel did not respond to the court's statement.

Turning to the testimony at trial, Green, the shooting victim, who was incarcerated at that time for a probation violation, initially indicated (outside the presence of the jury) that he did not want to testify, because Petitioner had confronted him the day before at the holding center where they were both housed. Green then decided to testify, and stated that he and Petitioner knew each other. Green, though, then testified in a manner inconsistent with his prior statements, and

[10] Transcript at pp. 194-195.

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indicated that he did not see the person who had shot him, since it was "dark" and he was "drunk."[11]

It then became evident that the prosecutor was about to impeach Green with a prior written statement, at which time defense counsel asked to address the court outside of the presence of the jury.[12] With the jury excused, defense counsel indicated that to the extent that the prosecution was going to impeach Green and/or ask to treat him as a hostile witness, Green's answers could subject him to criminal liability, which required the appointment of independent legal counsel to advise him.[13] The prosecutor and the trial court agreed with defense counsel, and adjourned the trial for the day to allow Green to consult with an attorney. The trial resumed the next day, and Green, having consulted an attorney, acknowledged on direct questioning by the prosecutor that he had not testified truthfully the day before when he said he did not see who had shot him. In that regard, Green indicated that he had testified falsely since he did not want to be labeled a snitch, and because he had been fearful that "something might happen to [him]."[14] Green stated that he had seen Petitioner in the jail law library, and Petitioner had told him, "Just basically, don't come to court."[15] Green further testified that earlier that week, when he and Petitioner and other inmates were in the court's holding cells, Petitioner had pointed him out to other inmates, after which an inmate whom Green did not know attacked him and punched him in the face.

After explaining his inconsistent testimony the previous day, Green testified that after he and his companions parked their cars on Victoria and began walking towards Pandora's, he saw Petitioner, who was wearing a "red hoodie," coming toward him with a gun in his hand. Green

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[11] Transcript at p. 355.
[12] Transcript at p. 355-356.
[13] Transcript at p. 357.
[14] Transcript at p. 362.
[15] Transcript at p. 363.

stated that Petitioner then shot him once in each leg, whereupon he fell in the street and then felt an individual, not Petitioner, going through his pockets and taking his money, phone and keys. Green testified that one of the persons with Petitioner then stated that Petitioner needed to kill Green, since Green knew Petitioner, whereupon Petitioner pointed the gun at Green's face. Green indicated that he closed his eyes, thinking that he was about to die, and heard four "clicks," after which Petitioner and those with him ran off.

Wingo, who lived in the house in front of which Green was shot, testified at trial that on the morning of the crime he was awakened by the sound of multiple gunshots, and looked out his window where he saw "three gentlemen beating, kicking a guy laying in the street."[16] He saw one of three attackers hand a pistol to another of the attackers who was wearing a red jacket and a baseball cap. Wingo stated that after the attackers took the victim's property, the individual in the red jacket and baseball cap "shot [the victim] a couple more times and then they ran."[17] In that regard, Wingo stated that it appeared that the individual in red had fired two shots at the person laying in the street, since the victim's body had moved as if he had been hit. Wingo indicated, though, that he could not say whether the victim had actually been hit with gunfire.[18]

Pratcher, who lived a few houses away from Wingo on Victoria Avenue, indicated that on the morning of the crime she was awakened by gunfire and called 911. Pratcher stated that while she was on the phone with the 911 operator, three males, one of whom was wearing red, ran by her home and drove away in a gray SUV.

Holloway, one of the detectives who had interviewed Petitioner, also testified. In conjunction with Holloway's testimony, the prosecutor played the audio tape of the 13-minute interrogation that had occurred on the morning of the shooting. The trial court permitted the

[16] Transcript at p. 419.
[17] Transcript at p. 421.
[18] Transcript at p. 430.

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prosecutor to play the recording in its entirety, over the defense's objection. Regarding the objection, Defense counsel indicated that while, following the *Huntley* hearing, the court had ruled that Petitioner's statements were admissible, he had not anticipated that the court would admit the entire recording. Defense counsel argued that it was unfair to play the entire recording, since the detective's statements to Petitioner suggested that there were many witnesses against Petitioner. Defense counsel further argued that by repeatedly urging Petitioner to speak, the detectives had improperly "shifted the burden" onto Petitioner to explain his silence.

The trial court overruled the objection, observing that defense counsel would have the opportunity to cross-examine Holloway, who had made the recording and who was then testifying. After the audio tape was finished playing, defense counsel made a motion for a mistrial, again arguing that the questioning by the detectives was highly prejudicial to Petitioner, since the detectives' questions shifted the burden of proof onto Petitioner to explain himself, in violation of his right to remain silent. The prosecutor responded, in part, by arguing that there was no burden shifting, and no improper conduct since Petitioner had agreed to waive his *Miranda* rights and make a statement:

> The question about his commenting or shifting the burden is absurd, Your Honor. There is no burden shifting here. The defendant chose to speak. He did not choose to remain silent. When early on in this interview he was asked about his involvement, he said, I was asleep, I'm surprised I'm here. That's what prompted the follow-up questions [by Holloway] and the long delays of silence by this defendant. And the case law is also clear that once a defendant chooses to speak, not only can we play or acknowledge his silence thereafter, we can comment on it if we want in summation or any point in the trial because he chose to speak, he chose to say something, and what he said is incompatible with what the evidence shows.

Transcript at p. 536. The court denied the application for a mistrial.

During summations, defense counsel revisited the recorded interview and spent some time arguing that Detective Holloway had acted "illegally" during the interview by attempting to shift the burden onto Petitioner to explain himself.[19] Defense counsel further told the jury that it would be "illegal" for them to consider the "long stretches of silence" during the interview as some evidence of guilt.[20] In response to this, during the prosecutor's summation, he emphasized to the jury that the recorded interview was significant not because of Petitioner's silence but because of what Petitioner said, which was inconsistent with the rest of the evidence:

> Defense counsel wants to make a big deal about all the silence and all the other things you heard when you heard the entire interview. It's not burden shifting. I wanted you to hear what the defendant had to say. And what – everything Cedric Holloway did was absolutely not illegal. He's investigating an attempted murder. It's not nice, and it's not his job to be nice to this defendant. I wanted you to hear that statement [(Petitioner's statement that he had been asleep and was surprised to find himself at the police station)] because it's completely untrue. He was observed running – this defendant was observed running to that gray Trailblazer. He was observed running in that direction by Ulysees Wingo, he was observed by Daria Pratcher getting in that vehicle and he was caught fleeing the scene in the same vehicle by Darren Exum. He was not sleeping. You can't be running and sleeping at the same time.

Transcript at p. 670.

Following the summations of counsel, the court instructed the jury, *inter alia*, that it could not draw any negative inference from Petitioner's silence, and that the detectives' questions to Petitioner were not evidence.[21]

On July 24, 2012, the jury returned with a partial verdict. The jury could not reach a unanimous verdict on Count I of the Indictment, charging Attempted Murder, but it found

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[19] Transcript at pp. 650-652.
[20] Transcript at p. 651 ("What a big mistake it would be, and how illegal it would be, for you to consider those long stretches of silence as . . . requiring my client to explain himself[.]").
[21] Transcript at pp. 691, 693-4.