21-7363

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE VORNELL LEWIS - PETITIONER,

vs.

WILLIE O. SMITH - RESPONDENT.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

BY: Jessie Vornell Lewis* #733348
Petitioner in propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

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

QUESTION PRESENTED FOR REVIEW

I. Did the United States District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit erroneously denied Mr. Lewis's request for a certificate of appealability in this habeas corpus case where jurists of reason could clearly debate whether the denial of constitutional rights was shown?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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On July 26, 2016, in an unpublished opinion, the court denied Petitioner's appeal. *People v. Lewis,* 2016 Mich. App. LEXIS 1405 (Mich. Ct. App. July 26, 2016). (*Appendix A*).

Petitioner then filed for leave to appeal to the Michigan Supreme Court raising the same four questions, which was docketed as MSC #154343.

On March 7, 2017, the Michigan Supreme Court denied leave to appeal. *People v. Lewis*, 500 Mich. 947, 890 N.W.2D 361 (2017). (*Appendix B*)

Petitioner then filed a Writ of habeas Corpus within the Federal Western District Court, Southern Division raising the same four questions as present in the State Courts, which was docketed as Case No. 1:18-cv-535.

On January 01, 2021, District Court Judge Gordon J. Quist held that after conducting a full de novo review of the report and recommendation, and pertinent portions of the records, concluded that the R&R should be adopted, denied the Petitioner claims, and for a Certification of Appealability. *Lewis v. Smith*, 2021 U.S. Dist. LEXIS 14806 (W.D. Mich. Jan. 27, 2021). (*Appendix C*).

Petitioner filed a timely notice of appeal and request for a certificate of appealability to raise the four claims denied by the district court, within the Federal Court of Appeals for the Sixth Circuit, which was docketed as COA #21-1344.

On December 3, 2021, the Sixth Circuit denied Petitioner a certificate of appealability. *Lewis v. Davids*, 2021 U.S. App. LEXIS 35834 (6th Cir. Dec. 3, 2021). (*Appendix D*).

STATEMENT OF JURISDICTION

Petitioner seeks review of the December 3, 2021, opinion of the Michigan Supreme Court, the highest court in the State. This Court has jurisdiction pursuant to *28 U.S.C.A. § 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS:

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. 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 defense."

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jessie Vornell Lewis, (known hereafter as "Petitioner") *in propria persona*, states the following in support of his application.

On September 15, 2014, Petitioner was found guilty of: (1) Second Degree Murder, contrary to *Mich. Comp. Laws § 750.317*; (2) Armed Robbery, contrary to *Mich. Comp. Laws § 750.529*; and (3) Felony Firearm, contrary to *Mich. Comp. Laws § 750.227b-a*, following a four-day jury trial conducted in the Berrien County Circuit Court, State of Michigan. The Honorable Dennis M. Wiley presided over the trial, and Petitioner was being represented by appointed counsel Scott Sanford (P45550).

A. PRE- TRIAL AND JURY TRIAL

On July 28, 2014, a final pretrial conference was held before the Hon. Daniel Hathaway. Defense counsel, Mr. Weitzman and Co-Defendant's counsel, Mr. McWilliams, presented a motion to quash and the prosecutor presented a motion to admit autopsy photographs at trial. (T 7-28-2014, p 3, 5). The Court denied the motions to quash, and granted the motion regarding the pictures. (T 9-15-2014, p 7, 9-10).

TRIAL:

On September 3, 2014, the prosecutor called its first witness.

PROSECUTOR'S WITNESS NORMA LYTE:

Ms. Lyte is the aunt of Lewis, by marriage. The witness lives at 13515 Maine Street in Detroit with her mother-in-law and her husband. (T 9-3-2014, p 67-69).

On April 7, 2014, there was an argument across the street. It started sometime in the morning and may have lasted until 2 p.m. The witness did not

notice Lewis there at the time. (T 93-2014, p 69-70). Later, when the witness was in her living room watching TV, she heard a car crash. She had seen Lewis walking down the street talking on his cell phone a little while earlier. He was on the sidewalk coming towards the witnesses' house. He had an angry look on his face. The witness went to the kitchen and got something to drink, then return and sat down, then heard the crash. She looked out her window and saw that her car had been hit. She called to her daughter and husband after the crash, who were in other parts of the house. When she saw Lewis, he was wearing gray pants, a grey jacket, and a black skull cap. The witness called 911. A few seconds later she heard three gunshots and then went outside. (T 9-3-2014, p 70-74).

The witness saw someone run down the street, wearing all gray and black skullcap. She told the police that she thought that Lewis had fired the shots, even though she didn't see it. Did not mention it in her first statement, given on April 7, but told the police she was 99% sure it was him in her April 23 statement. The witness did not go outside and look at the vehicles until after the 911 call. (T 9-3-2014, p 74-78).

When she went out there was nobody in the vehicle, but she saw a man lying face down on the ground outside, with his foot still up in the car. After the witness got off the phone, she saw her neighbor bring the man a blanket. She did not see anyone else try to help the man. She just saw Lewis leaving the area. It was rainy, wet and cold. After she was done talking to 911, everyone started coming out. Her nieces and their children were leaving. (T 9-3-2014, p 82-84).

On cross by, Lewis's attorney, she just recently got to know Mookie. The witness has been living at 13515 for 6 to 8 years, the house belongs to her mother-in-law. (T 9-3-2014, p 85-86). The commotion earlier in the day at the nieces' home involved four or five adults. (T 9-3-2014, p 89). Later in the day, when she was watching television she looked out of her window and saw Lewis talking on the phone before the accident. He is on the witness' side of the street coming from Victoria toward Davison. She could see his facial expression, but did not know the reason for it. She went to her kitchen for a few minutes, then came back in the living room. She was sitting back down when she heard the accident and the gunshots. (T 9-3-2014, p 92).

The gunshots happened almost immediately after the crash, and she did not see who was doing the shooting. (T 9-3-2014, p 94). Nobody in the house immediately looked out the window. She is 99% sure that when she looked out the window, she saw Lewis running. She is not 99% sure that he did any shooting. She did not see Lewis running until after she called 911. (T 9-32014, p 95-97).

The commotion across the street happened while General Hospital was on, from 2 to 3 p.m. The crash and shooting was just before the 911 call, at 5: 46 p.m. (T 9-3-2014, p 115). She knows the man at the end of the street as Blue, and does not know his legal name. (T 9-3-2014, p120). She did not see the shooter, and does not know who shot, but she saw someone running after the gunshot and crash, after she completed her 911 call. (T 9-3-2014, p 122). Tawana and Star left the area in the same hurried manner. (T 9-3-2014, p 123).

PROSECUTOR'S WITNESS STAR LYTE:

Star is Lewis' sister, and she identifies him for the record. She identifies Glenn as someone she knows as Jarvo. (T 9-4-2014, p 8-9). On April 7, 2014, her baby daddy, Demarcus, and his brother, Dontaye, were arguing. It was outside, and never got physical, then it stopped. Lewis was there earlier that day, and they went to the store, but she doesn't remember everything. Although the Prosecutor had the witness testify before, the witness does not recall saying they went to Tuxedo. Lewis was staying with his girlfriend, Ms. Gaston, on Tuxedo. They also went to the Burger King where she works on Woodward. After that, the witness returned to her home. (T 94-2014, p 10-13). The Prosecutor refreshes her recollection with the April 25, 2014 transcript. The transcript indicates they went to Burger King at around 3 or 4 0'clock. (T 9-4-2014, p 14-16). The witness is uncomfortable because she was threatened by the detectives. The detectives said she has warrants, which she denies, and said she could go to jail and they would call CPS. Then he told her if she didn't say certain things, they would take her children. (T 9-42014, p 19-23).

On April 7, Star was in the house when she heard a crash, and she also heard shots, but she can't remember which she heard first. The witness identifies her signature on the bottom of her statements and acknowledges that the Prosecutor asked her to review it this morning but she refused. The Prosecutor now goes over the investigative subpoena line by line. She saw a guy she knew outside, called Jarvo. The witness asserts that this is what she was told, and threatened, to say. She now denies that she saw anyone outside. The witness keeps talking about

threats, while the Prosecutor goes over the prior testimony. Jarvo was wearing a black hoodie and black skullcap. The witness does agree with her prior testimony that she heard the crash before the shots. (T 9-4-2014, p 24-31). In her prior testimony, she thought her Aunt Norma could have seen Jarvo. The witness acknowledges making a change to her statement, indicating that she saw her cousin Nay-Nay standing on the porch yelling. She had not seen the guy who got shot before and did not go over to the body at all. She had never seen the car before. (T 9-4-2014, p 36-39). In her prior testimony, the witness indicated she left so quickly because she was scared and she indicated her brother was there but earlier in the day. (T 9-4-2014, p 42).

The Prosecutor continues the same manner with the transcript, indicating that Officer Jeb Rutledge entered the room at 6: 40 p.m. The witness continues to deny the answers to all questions indicating that she saw Jarvo outside, and what he was wearing. Then the investigative subpoena goes back over what she did that morning driving her brother around as well as the confrontation in front of her house. (T 9-4-2014, p 63-72). The Court interrupts the Prosecutor to point out that they are going over the same information again transcript, and he would like to avoid rehashing the whole thing. (T 9-4-2014, p 72-74). The Prosecutor continues, reading about the witness taking Lewis to Tuxedo and back to Maine. They cover the whole day again. The witness agrees with her prior testimony that it was only her, her sister, and their kids at the house when crash and shooting occurred. Mookie had been gone for a while. In her prior testimony, she had not remembered

Mookie texting or calling anybody while they were driving around. The Detective covers the information about Jarvo again, in the investigative subpoena and the witness in the courtroom begins talking about him threatening her again. She contends that she is saying what he told her to say at the investigative subpoena. (T 9-4-2014, p 75-95).

On cross examination by Mr. McWilliams, on April 7, Star and her sister were home with seven children, total. The Star has never spoken to Mr. McWilliams before. She heard the crash but she never saw anybody outside. She understands that what she saying today doesn't line up with what she said investigative subpoena. She is telling the truth today. She testified differently before because she was being threatened with her kids. (T 9-4-2014, p 98-107).

On re-cross, the Prosecutor questions Star about her testimony at the preliminary exam. Once again she indicates she identified Mr. Glenn at the preliminary exam because of threats from the Officer. The Court describes the witness holding up her index finger and middle finger of her right hand and we're going back and forth indicating that was what Officer Rutledge was doing to her. (T 9-4-2014, p 113-117). The Prosecutor begins questioning her about her brother who was murdered, noting that she was the Prosecutor on that case. (T 9-4-2014, p 117-118). The Star agrees she gave similar testimony at the preliminary exam to what she gave at the investigative subpoena. She asserts that she's telling the truth today. (T 9-4-2014, p 120-122). The Court noted that the witness had been impeached by her previous statement to police, Investigative subpoena, and her

preliminary exam testimony. He does not see that those items are admissible so the motion to admit them was denied. (T 9-4-2014, p 122-123).

PROSECUTOR'S WITNESS MERCEDES GASTON:

Ms. Gaston knows Lewis and identifies him for the record. She does not know Jarvo. She lives at 6411 Tuxedo with her mother and her sister who is in a relationship with Lewis. He stays at their home and keeps his belongings there from time to time. (T 9-4-2014, p 165-167). The police came to talk to her sometime after April 7, 2014. She told them that she saw Lewis between 10: 45 and 11: 00 p.m. on April 7th. He was there for about half an hour said he was going to the store and left. (T 9-4-2014, p 167-168). The Prosecutor confronts her with her statement written by the police signed by her. She agrees with some of her statement and disagrees with the parts. Lewis was wearing a black hoodie, blue jeans, and gray Jordan's, she recalls the police searching the house and asking her questions about things they found. The witness did not own any weapon and had never seen Mookie with the gun. She did give them his phone number, which she took out of her cell phone. She reads the number off her statement, 313978-6036. (T 9-4-2014, p 169-172). Exhibit 12 is a picture of her home. She asked police to return a cord they took from her house. She never asked for a PlayStation. The witness, her sister and mother did not have any guns or ammunition. (T 9-4-2014, p 173-174). The witness has known Lewis for about a year and sometimes he stays at the house. On April 7, Lewis came in using her sister's key. He did not seem agitated or upset. They did not discuss what had happened that day. She has

never been to the house by East Davison. She has never seen Lewis with a gun. She saw him an average of three times per week during the course of the year. (T 9-4-2014, p 175-179). Lewis brought a bag of stuff when he came to the apartment that night. He was at the apartment for about 30 minutes, they did not talk for 30 minutes. He could do whatever he wanted in the house but he did not have a key, he was using her sister's key. Also she hasn't been to the house by East Davison, she did drop him off once, a few months before the incident. (T 9-4-2014, p 180-181).

PROSECUTOR'S WITNESS OFFICER NATHAN JOHNSON:

Mr. Johnson is an Officer of the Detroit Police Department, assigned to the Crime Scene Services as an evidence tech, received a call to 13515 Maine Street, on April 7, 2014 with a partner. (T 9-9-2014, p 9-10). The body was removed prior to their arrival. (T 9-9-2014, p 11). He observed a silver Chrysler, wrecked into a vehicle on the West side of Maine, in front of 13515. The driver's door was open and there were a couple of cell phones laying on the ground. Exhibits 7, 8, 9, 10, 11, 61, 62, 60, 75, and 76 are the photographs he took of the scene as part of the investigation. Exhibits 8, 9, 60 and 62 show the vehicles that were crashed. Exhibit 9 is a photograph of the opposite side of the street, showing vacant lots in an abandoned house. Exhibit 10 shows the license plate of the Chrysler, but also shows the open door and the cell phones, as does Exhibit 11. Exhibit 61 is a photograph of the driver's seat and steering wheel, and another cell phone plugged into the vehicle dashboard. (T 9-9-2014, p 11-18). The cell phones were collected,

and put on evidence. Exhibit 39 is both of the phones that were found outside the car, and Exhibit 40 is the phone with the cord that was found inside the vehicle. The Silver phone is missing from the bag with the evidence tag number, admitted as Exhibit 39. (T 9-9-2014, p 19-21). The witness and his partner were directed to the hospital to photograph the victim, specifically the hands. Exhibits 75 and 76 are the left and right hand, respectively. (T 9-9-2014, p 21-22). Exhibit 38 is a sketch the witness did of the scene, not drawn to scale. (T 9-9-2014, p 23 24). The witness arrived at 6: 55 p.m., and the victim had already been removed. He has no knowledge whether the cell phones were moved at all. (T 9-9-2014, p 27).

PROSECUTOR'S WITNESS DETECTIVE SERGEANT DAVID BOIKE:

Mr. Boike is a Detective Sergeant for the Michigan State Police, and is assigned to the Computer Crimes Unit. (T 9-9-2014, p 120). The witness received three cell phones, one of them a Huawei phone, which he identifies as Exhibit 39.1. (T 9-9-2014, p 122). The witness took some text messages off the phone, put them on a CD, and gave them to the Officer in Charge to review. Exhibit 27 is a portion of the text messages. The beginning date is April 7, 2014, the time is 5: 13p.m. but the time is off by four hours. The witness also extracted phone numbers, and the associated name if it's an address book. (T 9-9-2014, p 125-130). Exhibit 27 looks like a conversation with Jarvis. The witness reads it into the record. (T 9-9-2014, p 130-132). Mr. Weitzman The witness also took some photographs off the phone, Exhibits 51, 52 t 53, 54, 55, 28, 29, 30, 31, 32, and 33. (T 9-9-2014, p 132). Counsel objected and the Court noted that there had been a pretrial motion on the issue.

Further, the Court instructed the jury that photographs are for the purpose of identifying individuals, they are not evidence in terms of a firearm, or this particular alleged event. (T 9-9-2014, p 133-134). The witness describes the pictures. Exhibits 53, 54, 55, 20 28, 29, 30, 31, 32 and 33 all include firearms. (T 9-9-2014, p 135-137). The witness would have to see his original data to tell date and time which file was created. He does not know the facts of the case. The date and time of the text message is determined by the software. (T 9-9-2014, p 138-139). The witness has no way of knowing who sent the text messages. (T 9-9-2014, p 146). At the September 10, 2014 continued Jury Trial before Judge Hathaway, Defendant-Appellant was present, represented by Counsel, Mr. Weitzman; Co-Defendant was present with Mr. McWilliams. (T 9-10-2014, p 4).

PROSECUTOR'S WITNESS OFFICER JEB RUTLEDGE:

Mr. Rutledge is an Officer of the Detroit Police Department, and is the Officer in Charge of this case. On April 7, 2014 he responded to the scene at 13515 Maine, with his partner, who is also his supervisor, Sergeant Timothy Firchau. (T 9-10-2014, p 72-74). The witness spoke with five witnesses at the scene. (T 9-10-2014, p 80). The victim's ID was located at the hospital. And they determined who owns the car, and asked that person who was driving. (T 9-10-2014, p 81-82). The witness searched the victim's phone, emphasizing that the deceased does not have an expectation of privacy. Then he searched the other phone where he finds the name Jarvo that he got from Star Lyte. Then he looks through the pictures, and they are no pictures of the victim. He shows the phone to Star and she identifies one of the

pictures as Mook. Exhibits 51 and 52 are pictures he saw on the cell phone. Once he realized it wasn't the victim's phone, stopped going through the phone because he did not have consent. He then typed up a search warrant, and got it signed the next morning, and sent it to the cell phone provider. He also obtained a Court order allowing him to look at the phone. He gave the phone to Trooper David Boike, who took information off the phone. (T 9-10-2014, p 91-97). He went back and talked to Nonna Lyte, who said that Mook was her nephew Jessie Lewis. (T 9-10-2014, p 97). He reviewed the text messages, including Exhibit 27. Exhibit 80 is the Metro PCS subscriber number showing that the subscriber for phone number 313-718-3196 was Penny Glenn. He spoke to Penny Glenn, and she said the phone belongs to her son. He then obtained the search warrant for 6411 Tuxedo, where they recovered mail with the name Denzel Lewis. The witness believed Denzel to by Jessie Lewis' middle name. They also recovered the cell phone box, and compared it to the felony found the victim. The identification numbers matched. (T 9-10-2014, p 98-107). At that time the witness thought he had probable cause to arrest both Lewis and Glenn. (T 9-10-2014, p 107). He also obtained a search warrant for 13444 Bloom, when they sent Officers there to arrest Glenn. (T 9-10-2014, p 107-108). He believes that Investigative Subpoenas were obtained for Norma Lyte, Star Lyte, Ronald Wardlow, and possibly Brenda Lyte. (T 9-10-2014, p 110). The Officer was interrogating Lewis when the investigative subpoena of Star Lyte began, so he arrived late. He had some questions based upon his Interrogation of Lewis. (T9-10-2014, p 110-113). The witness consulted with Stan Brue. The investigation showed

that Glenn was a passenger in CJ's car for an undetermined amount of time. (T 9-10-2014, p 116-177). The witness interviewed Glenn after he was in custody. Exhibit 34 is the Constitutional Rights Certificate used in the interview, admitted over Mr. McWilliams's objection. The witness reads the statement into the record. He admits to being with CJ on the day he died. The statement stopped when Glenn requested an attorney. (T 9-10-2014, p 117-122). The witness returned CJ's phone to one of his sisters. (T 9-10-2014, p 123). Mr. Wardlow never testified that Lewis was the person who robbed anybody, or was seen shooting a gun. Star said she saw Jarvo, but never said she saw Lewis at the time of the shooting. Norma Lyte said she saw Lewis on the phone talking. (T 9-10-2014, p 135-136). The Prosecutor objects, and the Court notes that Norma Lyte testified that she did not see anyone shoot. (T 9-10-2014, p 136). Mr. McWilliams asked on cross whether Norma Lyte was the most objective and cooperative witness, and the Officer disagreed. Mr. McWilliams asked whether she pointed out her nephew is the perpetrator, and the Prosecutor objected that was not her testimony, and the Court sustained the objection. (T 9-10-2014, p 139). She identified him as being in front of her house before the shooting, then saw him run away after the shooting. She never said that she saw Glenn. (T 9-10-2014, p 139-141). There were no fingerprints taken from the vehicle, or the cell phones, due to the rain. DNA swabs were taken from the vehicle, but were not tested. No gun was found that matched the slugs taken from the deceased. There is no proof of who, in fact, was holding the respective cellphones. (T 9-10-2014, p 141-142). When the Prosecutor asked the witness

whether either of the scenarios given by each Defense Counsel as to how CJ died were possible, the witness responded: "Yes, that's something that we may never know." (T 9-10-2014, p 155). The witness denies ever threatening to call CPS if Star didn't say that Glenn was there. Upon receiving the answer, the Court comments: "Okay, that's what I thought." (T 910-2014, p 156). The Prosecutor rested her case, and the jury was excused for the day. (T 9-10-2014, p 164-65).

Mr. McWilliams made a motion for directed verdict on behalf of Glenn. Mr. Weitzman joined in the motion on behalf of Lewis. The Prosecutor opposed the motion, and the Court denied it. (T 9-10-2014, p 165-170).

At the September 11, 2014 continued Jury Trial, Mr. Weitzman informed the Court that Lewis wished to testify. The Court questioned him about whether it was his own decision and whether he understands that the jury couldn't hold it against him if he did not testify, and Lewis indicated that he still wishes to testify. The Prosecutor noted that Lewis was charged in another case, and there is a video of him on the stolen cell phone talking about armed robberies, and the Prosecutor would want to present that, also noting he had a Home Invasion. Defense Counsel objected. The Court ruled that the Home Invasion could come in, but wanted to reserve ruling on the video. (T 9-11-2014, p 3-6). Glenn indicated that he is going to take the stand, and the Court advised him of his rights. Mr. McWilliams also indicated that he is going to waive his opening statement. (T 9-11-2014, p 6-8).

After a brief recess, the Court indicated that the Prosecutor could inquire into the area of prior robbery for impeachment purposes, but that he would instruct the

jury that it is not proof of the crimes alleged in this instance. (T 9-11-2014, p 9-10).

DEFENSE'S WITNESS PETITIONER JESSIE VORNELL LEWIS:

Lewis, age 23, is called Mook, or Mookie, and his girlfriend calls him Damook. He lives at 6411 Tuxedo. His aunt, and his sisters live on Maine, and his mother was in the area. He has six brothers, including one named Denzel Lewis. He was working at Technicolor, but now his girlfriend is being taking care of him, Sharvae Gaston. There are no guns at his home. He acknowledges the photographs of him holding a gun, and indicates that those were little videos because he raps. He pled guilty to armed robbery in 2010, and went to prison. He committed that crime, but he did not commit the crimes he is charged with today. (T 9-11-2014, p 12-16). Lewis does not have a car, friends drive him, and sometimes his girlfriend dropped him off. On April 7 his sister drove him around as well. He uses his cell phone a lot. The only thing different about his cell phone that day than the one shown in the pictures, is that his had a case on it. He has no idea what happened to the case. (T 9-11-2014, p 16-18).

On April 7, 2014, Lewis got up at 9 a.m. and got his neighbor Tone to drive him over to his sister's house. He knocked on Tone's door to request the ride, and he did not call his sisters to see if he can come over, because he always just shows up. He doesn't personally know Ronald Wardlow, but he knows of him, and knew where he lived. He's been visiting his sisters on Maine since he was released from prison a year ago. He knew Norma before he went to prison. He knows a few other people in the area, including his sisters baby daddies, Demarcus and Donte. (T 9-

11-2014, p 18-21). He knows Glenn, but they don't really hang out like that. He knows Glenn's brother. He was present when Demarcus and Donte were fighting and tried to defuse the situation. They stopped arguing and Donte left. (T 9-11-2014, p 21-23). After that, he stayed for a little while talking and drinking. Then he asked his sister to take him to Burger King to get something to eat. His girlfriend works there. At Burger King he got a sandwich, and the keys to his house on Tuxedo. They went to his house, and he dropped something off, then they went back to Maine. At around 3:30, he decided to go for a walk around the neighborhood. At that time Tawana, Star, and their kids were the only people at Maine. He went to Pete's house, who lives with some females, and apparently there is some prostitution going on. (T 9-11-2014, p 24-28). Lewis decided to steal a cell phone and computer from the house, but wanted to text a friend for a ride so he could get away quickly. He realizes he shouldn't have done that, but he didn't kill anybody, and he wasn't involved in selling drugs for CJ. He did not know Mr. Robinson at all. (T 9-11-2014, p 28). The text messages were about trying to arrange a ride so he could steal the phone and computer, and get away from the house quickly. He has a couple brothers who sell drugs, so if you wanted to sell drugs he would work for them, not Mr. Robinson. The house was on McDougal, four blocks from his sisters. He walked over there. He was texting V-Man for a ride, that is Glenn's brother. Glenn had first called him on that number, so he saved it under his name. He is sorry for Mr. Robinson's family's loss, but he is not involved. (T 9-11-2014, p 29-33). Lewis walked back to Maine. As he was walking up the

block, he was arguing with his girlfriend on the phone. He saw Blue and another individual with a hoodie on the corner. He did not pay much attention to them. When he got close to his auntie's house, he heard a gunshot, and drops to the ground. He looked around to see who was shooting, but his instinct was to run. He had been shot in that area before. When he got up, he took off through the field. He heard a crash and some more gunshots. He did not recognize the car involved in the crash. He was afraid he might go back to prison for being in the area of the shooting. He ran through the fields, and realized he no longer had his cell phone. He assumed he dropped it in the field while running. He borrowed a cell phone and called for a ride back to Tuxedo. (T 9-11-2014, p 33-38). The next day he found out what happened, and a few days after that he found out they were trying to say he was involved because they had his cell phone. He stayed at Tuxedo for a couple weeks, then on April 18 or 19 he left. He did not know who was in the car, because he was riding so he would not get shot. He did not know where his phone was. His phone case should have been close by. (T 9-11-2014, p 38-39). He did not participate in this crime at all. (T 9-11-2014, p 40). He pled guilty when he committed a crime in the past. (T 9-11-2014, p 41).

On cross, Lewis acknowledges that the phone found by the vehicle was his. And he agrees that he went to Burger King, then to Tuxedo, then back to Maine. After the shooting, he found someone to take him back to Tuxedo as well. He acknowledges that he went to Battle Creek and he did not talk to his parole officer. He acknowledges that he steals, but he is not a murderer. He is not a pimp. He is

not a drug dealer. (T 9-11-2014, p 42-44). Lewis was incarcerated at the time of his brother's murder. (T 9-11-2014, p 45,). Lewis does not know Shantell Russell. He has many rap videos on YouTube, and other people record him. He acknowledges having access to a .357 revolver. He did not know anything about the bullets at Tuxedo. (T 9-11-2014, p 46-47). When he was texting V-Man, some of the texts were left out, because he told him about the females. He walked from McDougall and Victoria back to Maine. (T 9-11-2014, p 70).

Mr. Weitzman then rested his case on behalf of Lewis as did Mr. McWilliams on behalf of Glenn. (T 9-11-2014, p 74-75).

The Prosecutor had rebuttal witnesses. (T 9-11-2014, p 75). Tyrone Thomas is Curtis Robinson's older brother. His brother sold drugs for a living. He identified Lewis as working for his brother. (T 9-11-2014, p 77-80).

Agent Stan Brue testified again about how he changed the time on the text messages and call records. (T 9-11-2014, p 81-82).

On September 12, 2014, trial continued and the jury sent a note, which the Court discussed with Counsel, asking for clarification between first and second Degree Murder. The Court determined to reread the First-degree Felony Murder, and Second-degree Murder jury instructions, and point out that felony murder has the element that the act caused the death of Curtis Robinson. (T 9-12-2014, p 3). The jury is brought out, and re-instructed. And the Court makes some remarks distinguishing between the 2 counts. (T 9-12-2014, p 4-7).

The jury sent another note asking if armed robbery is considered a high risk

situation that reference the paragraph 3 of the Instructions 16.04 and 16.05. The Court indicated it had discussed the matter with Counsel, the instruction they had agreed upon. The jury was brought out, and the Court explained to them that paragraph 3 of each instruction deals with the Petitioner's state of mind, and it is not discussing the Armed Robbery, it's discussing the shooting. (T 9-12-2014, p 710).

On September 15, 2014 the Court received a note that the jury was hung, and, after consulting with Counsel, sent a note back asking if they were able to reach a verdict as to any of the counts for either Defendant. The jury sent another note indicating they had reached an agreement with respect to Lewis, but only had a partial verdict as to Glenn. The Court determined to take the verdict, and declare a mistrial as to the Counts on which they were unable to reach a verdict. (T 9-15-2014, p 3).

The jury found Lewis guilty of Second-degree Murder, Armed Robbery and Felony Firearm. (T 9-15-2014, p 5). The jury found Glenn guilty of Armed Robbery, but was unable to reach a verdict on the other 2 counts. (T 9-15-2014, p 6).

B. SENTENCING

On October 3, 2014 Petitioner was sentenced before the Honorable. Daniel Hathaway. The Prosecutor requested that OV 6 is scored at 25 points, and OV 14 be scored at 10 points, and the Court agreed. Specifically, with respect to OV 14, she requested that it be scored because the jury found Lewis was the shooter. The OV total was raised from 105 to 130, however the range remained 315 to 525

months. (T 10-3-2014, p 5-7). The Court sentenced Lewis to 40 to 70 years for Second-degree Murder, 20 to 35 years for Armed Robbery, Habitual 3rd, 2 years for Felony Firearm, to be served consecutive to the first two counts, with credit for 170 days. (T 10-3-2014, p 16-17).

C. POST-CONVICTION PROCESS

Petitioner filed a timely notice of appeal and the request for appointment of counsel. Appellate counsel, Lee A. Somerville (P41168) was appointed to represent petitioner on his appeal of right, raising four claims in the Michigan Court of Appeals: (1) insufficient evidence presented at trial to support the verdict; (2) that the verdict was against the great weight of the evidence; (3) he was denied the effective assistance of counsel; and (4) he was entitled to be resentenced as his guidelines were scored based on judicial-fact finding. the same questions that are not being present to this Court. It was docketed as MCOA #324267.

On July 26, 2016, in an unpublished opinion, the court denied Petitioner's appeal. *People v. Lewis,* 2016 Mich. App. LEXIS 1405 (Mich. Ct. App. July 26, 2016). (*Appendix A*).

Petitioner then filed for leave to appeal to the Michigan Supreme Court raising the same four questions, which was docketed as MSC #154343.

On March 7, 2017, the Michigan Supreme Court denied leave to appeal. *People v. Lewis*, 500 Mich. 947, 890 N.w.2D 361 (2017). (*Appendix B*)

Petitioner then filed a Writ of habeas Corpus within the Federal Western District Court, Southern Division raising the same four questions as present in the

State Courts, which was docketed as Case No. 1:18-cv-535.

On January 01, 2021, District Court Judge Gordon J. Quist held that after conducting a full de novo review of the report and recommendation, and pertinent portions of the records, concluded that the R&R should be adopted, denied the Petitioner claims, and for a Certification of Appealability. *Lewis v. Smith*, 2021 U.S. Dist. LEXIS 14806 (W.D. Mich. Jan. 27, 2021). (*Appendix C*).

Petitioner filed a timely notice of appeal and request for a certificate of appealability to raise the four claims denied by the district court, within the Federal Court of Appeals for the Sixth Circuit, which was docketed as COA #21-1344.

On December 3, 2021, the Sixth Circuit denied Petitioner a certificate of appealability. *Lewis v. Davids*, 2021 U.S. App. LEXIS 35834 (6th Cir. Dec. 3, 2021). (*Appendix D*).

Petitioner is now before this Court in hopes to get a just and proper reviewing of the denial of his request for a certificate of appealability.

Any additional facts are retained *infra*.

REASONS FOR GRANTING THE WRIT

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

A. ARGUMENT:

This Court in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)), again determined the proper procedure for granting a certificate of appealability:

> At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merits of the claims. Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that juris of reason could disagree with the district court's resolution of his constitutional claims or that juris could conclude the issues presented are adequate to deserve encouragement to proceed further.

Petitioner states that a certificate of appealability should have been granted to review the following four claims where he meets the standard addressed within *Miller-El, supra.*

I. Petitioner Lewis Is Entitled To Entry Of A Judgment Of Acquittal On All Charges As There Was Insufficient Evidence.

A. ARGUMENT:

The standard to determine sufficiency of the evidence at trial requires, after viewing the evidence in a light most favorable to the prosecution, sufficient evidence to permit a rational juror to find proof beyond a reasonable doubt of all elements of the crime. *U.S. Const. Am's. V & XIV; In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *Scott v. Mitchell*, 209 F.3d. 854, 885 (6th Cir. 2000). The reasonableness of the state court's determination of the Jackson standard "must be applied 'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Brown v. Palmer*, 358 F.Supp.2d. 648 (E.D. Mich. 2005) (quoting *Adams v. Smith*, 280 F.Supp.2d. 704, 714 (E.D. Mich. 2003)).

The Petitioner asserts that there was Insufficient Evidence presented at his trial to sustain his convictions where the evidence is absent from his trial to suggest that he was the shooter or that he possessed a weapon. Even when viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were not proved beyond a reasonable doubt, there still is not enough evidence to convict.

Both state and federal courts factual allegations are just hypothetical assumptions, for example: On April 07, 2014 the police responded to a 911 call regarding a vehicle crash and gunshots. When they arrived, they found the victim lying face down outside his vehicle who had been shot two times. The police

discovered two cell phones near the victim and one of the phones belonged to the Petitioner. However, ATF Agent Stan Brue testified that on April 7, 2014 through the time of the 911 call, Petitioner, Glenn, and Mr. Robinson were text messaging but acknowledges that it cannot be determined that they were actually at the crime scene, did not know who was holding Petitioner's phone at the time of messaging, or calls being sent, and received. Could not identify anyone as holding a phone at any time. The prosecution presented no eyewitness testimony or other evidence suggesting that Petitioner's possession of a firearm or weapon at the scene of the crime and the actual weapon used was never recovered which would have linked him to these charges. These facts entail an actual assumption that, all evidence is circumstantial evidence, and no reasonable inferences should be permitted to support a conviction where the prosecution fails to meet its constitutionally based burden of proof beyond a reasonable doubt, where only circumstantial evidence brings doubt. As such, both state and federal courts have ignored several undisputed facts (1) that the victim was a drug dealer and (2) was shot by someone standing outside of the victim's vehicle.[1] (3) Witnesses also testified that the victim had revealed to them the victim was having problems with his drug business in that neighborhood, prior his death, and that the Petitioner worked for him, however, the Prosecution offered no proof of a scheme that the Petitioner made plans to steal the victim's cellphone because the victim's cell phones, was not removed from the victim or his vehicle. Equally is the fact that the Prosecution presented no eyewitness

[1] Someone he was more likely than not - he was selling drugs too.

testimony that the Petitioner shot and killed the victim, and even in light of this fact, the Prosecution never presented any evidence that the Petitioner possession of a firearm that was used at the scene of the crime because the actual weapon used was never recovered by the police.[2] The only evidence that was proven beyond a reasonable doubt was (1) the victim was a known drug dealer in that neighborhood; (2) the victim was having problems with his drug business in that neighborhood; (3) the victim was shot by someone standing outside of his vehicle; and (4) the only circumstantial evidence presented by the Prosecution indicated that the Petitioner worked for the victim selling drugs. In the present case, the Petitioner was found guilty of an inference that he was the shooter and possessed a weapon that killed the victim.

These findings of facts were insufficient to convict the Petitioner of Second Degree Murder, Armed Robbery, and Possession of a Firearm during the Commission of a Felony, and preponderates so heavily against the verdict that the Petitioner's conviction on these charges would be a miscarriage of justice to allow the verdict to stand because the essential elements of these crimes were not proven beyond a reasonable doubt as our Supreme Court stated in *In re Winship,* 397 U.S. at 361-362; *Jackson,* 443 U.S. at 316; *United States v. Gaudin,* 515 U.S. 506, 510 (1995). These case citations from this Court reflect the fundamental value in our society regarding the criminal justice system that it is far worse to convict an innocent man than to let a guilty man go free. In light of these grave constitutional

[2] For example, collaborating proof of gunshot residue found on either the Petitioner's hands and his clothing.

concerns, the Petitioner believes this court should grant him a Certification of Appealability based on a credible showing that he is innocence as it relates to the ultimate question of his guilt or innocence that will result in a miscarriage of justice if this court were to allow the Petitioner's verdict to stand.

II. Petitioner Is Entitled To A New Trial As The Verdict Was Against The Great Weight Of The Evidence.

A. ARGUMENT:

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Likewise, the Due Process Clauses of the state and federal constitutions prohibit a criminal conviction unless the prosecution establishes the essential elements of the crime beyond a reasonable doubt. Therefore, Due Process requires reversal if, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that the evidence is insufficient to establish each element of the offense beyond a reasonable doubt. *See In re Winship,* 397 U.S. at 361-362; *Jackson*, 443 U.S. at 316.

Petitioner asserts the same factors in Claim I, to support this Claim.

Petitioner states his conviction is against the great weight of the evidence to sustain his convictions where the evidence is absent from his trial to suggest that he was the shooter or that he possessed a weapon. Even when viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of

fact could find that the essential elements of the crime were not proved beyond a reasonable doubt, there still is not enough evidence to convict.

On April 07, 2014 the police responded to a 911 call regarding a vehicle crash and gunshots. When they arrived, they found the victim lying face down outside his vehicle who had been shot two times. The police discovered two cell phones near the victim and one of the phones belonged to the Petitioner. However, ATF Agent Stan Brue testified that on April 7, 2014 through the time of the 911 call, Petitioner, Glenn, and Mr. Robinson were text messaging but acknowledges that it cannot be determined that they were actually at the crime scene, did not know who was holding Petitioner's phone at the time of messaging, or calls being sent, and received. Could not identify anyone as holding a phone at any time. The prosecution presented no eyewitness testimony or other evidence suggesting that Petitioner's possession of a firearm or weapon at the scene of the crime and the actual weapon used was never recovered which would have linked him to these charges.

The forgoing facts entail an actual assumption that, all evidence is circumstantial evidence, and no reasonable inferences should be permitted to support a conviction where the prosecution fails to meet its constitutionally based burden of proof beyond a reasonable doubt, where only circumstantial evidence brings doubt. As such, both state and federal courts have ignored several undisputed facts (1) that the victim was a drug dealer and (2) was shot by someone

standing outside of the victim's vehicle.[3] (3) Witnesses also testified that the victim had revealed to them the victim was having problems with his drug business in that neighborhood, prior his death, and that the Petitioner worked for him, however, the Prosecution offered no proof of a scheme that the Petitioner made plans to steal the victim's cellphone because the victim's cell phones, was not removed from the victim or his vehicle. Equally is the fact that the Prosecution presented no eyewitness testimony that the Petitioner shot and killed the victim, and even in light of this fact, the Prosecution never presented any evidence that the Petitioner possession of a firearm that was used at the scene of the crime because the actual weapon used was never recovered by the police.[4] The only evidence that was proven beyond a reasonable doubt was (1) the victim was a known drug dealer in that neighborhood; (2) the victim was having problems with his drug business in that neighborhood; (3) the victim was shot by someone standing outside of his vehicle; and (4) the only circumstantial evidence presented by the Prosecution indicated that the Petitioner worked for the victim selling drugs. In the present case, the Petitioner was found guilty of an inference that he was the shooter and possessed a weapon that killed the victim.

These findings of facts were insufficient to convict the Petitioner of Second Degree Murder, Armed Robbery, and Possession of a Firearm during the Commission of a Felony, and preponderates so heavily against the verdict that the

[3] Someone he was more likely than not - he was selling drugs too.

[4] For example, collaborating proof of gunshot residue found on either the Petitioner's hands and his clothing.

Petitioner's conviction on these charges would be a miscarriage of justice to allow the verdict to stand because the essential elements of these crimes were not proven beyond a reasonable doubt as our Supreme Court stated in *In re Winship,* 397 U.S. at 361-362; *Jackson,* 443 U.S. at 316; *United States v. Gaudin,* 515 U.S. 506, 510 (1995). These case citations from this Court reflect the fundamental value in our society regarding the criminal justice system that it is far worse to convict an innocent man than to let a guilty man go free. In light of these grave constitutional concerns, the Petitioner believes this court should grant him a Certification of Appealability based on a credible showing that he is innocence as it relates to the ultimate question of his guilt or innocence that will result in a miscarriage of justice if this court were to allow the Petitioner's verdict to stand.

III. Petitioner Is Entitled To A New Trial As He Was Denied Effective Assistance Of Counsel.

A. ARGUMENT:

Petitioner had a right to counsel under the United States Constitution. *U.S. Const., Am. VI.* This Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington,* 466 U.S. 668, 686 (1984).

A successful ineffective assistance of counsel claim requires the defendant to show two things: that trial counsel performed deficiently and that he or she suffered prejudice as a result of counsel's missteps. *Strickland,* 466 U.S. at 687. The first *Strickland* prong is met when defense "counsel's representation fell below an objective standard of reasonableness considering all the circumstances." *Strickland,*

466 U.S. at 688. To establish the second prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id* at 694. That standard is lower than a preponderance of the evidence standard, and "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id* at 693.

Trial counsel put forth the defense that Petitioner was not a participant in the crime. Petitioner asserts that he requested his counsel to file certain motions, request an evidentiary hearing, and pursue certain lines of questioning at trial, and this was not done. (T 10-3-2014, p 11.).

At sentencing, Petitioner asked counsel to return the written requests that he had made. This was not done, and because they were not returned Petitioner was not able to fully explain the nature of these requests to appellate counsel. Further, trial counsel did not provide a copy of his file to appointed appellate counsel.

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-691.

A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make "an independent examination of the facts, circumstances, pleadings and laws involved. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). This

Includes pursuing "all leads relevant to the merits of the case." *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987).

Petitioner asserts that one of the motions that trial counsel should have brought, but did not, was a motion for separate trials. At trial in this case, while Petitioner's defense was that he was not involved, apparently co-defendant's defense involved suggesting that Petitioner was the lone perpetrator, or that Petitioner's relative named Glenn as being present, so she would not have to say Petitioner was present. Clearly the defenses raised were antagonistic. Trial counsel did not move for a separate trial, nor did he request a separate jury. In analyzing the common cases, which had separate juries, the *People v. Hana*, 447 Mich. 325, 360 (1994) court noted:

> The presence of two juries in the defendants' cases is significant. Where mutually antagonistic defenses are presented in a jomt trial, there is a heightened potential that a single jury may convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another. That dilemma is not presented to dual juries. Each jury is concerned only with the culpability of one defendant; thus, they both can find the defendants Innocent or guilty without the uneasiness of Inconsistency that would be presented to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened.

In this case, Petitioner has asserted there was insufficient evidence to support the verdict. He asserts, as suggested in *Hana*, that the jury convicted him of Second Degree Murder, in order to rationalize their "hung" status regarding Glenn. Had counsel moved for a separate trial, or at least a separate jury, the jury could have focused on the lack of evidence against Petitioner, instead of looking at the

very muddy water created by the finger pointing of his co-defendant's counsel to ensure that Petitioner was found guilty and not his client.

After Petitioner testified, the Prosecutor offered the testimony of a family member of the deceased as a rebuttal witness. Trial counsel did not inquire whether this person had been in the Courtroom at all during the trial. The Court had issued a sequestration order, and this rebuttal witness could have been avoided. (T 9-2-2014, p 3-4; T 9-3-2014, p 3).

Finally, Petitioner assets that defense counsel's failure to object to the guideline scoring issues raised *infra.*, was constitutionally ineffective assistance, entitling Petitioner to resentencing.

IV. Petitioner Is Entitled To Be Resentenced.

A. ARGUMENT:

The *Due Process Clause* of *U.S. Constitution Amendment XIV* requires that a trial court impose a sentence based on accurate information. See *Townsend v. Burke,* 334 U.S. 736 (1948).

Whether the facts that increase the mandatory minimum sentence have been submitted to the jury and found beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 103, 107 (2013). *U.S. Const., Am. VI.*

In *People v. Lockridge*, 498 Mich. 358, 374 (2015), the court held that Michigan's sentencing guidelines scheme violates the Sixth Amendment of the United States Constitution. The Court's ruling followed this Court's decision in *Alleyne*, 570 U.S. at 107, which held that judicial fact-finding that increases the

mandatory minimum sentence violates a defendant's Sixth Amendment rights. *Lockridge*, 498 Mich. at 374. The sentencing guidelines scheme violates the *Sixth Amendment* because it allows judges to find, by a preponderance of the evidence, facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives. *Id.* at 399. To remedy the constitutional violation, the Court severed *Mich. Comp. Laws § 769.34(2)* to the extent that it makes the sentencing guidelines mandatory. *Id.* at 392. The Court explained that a sentencing court must still score the guidelines to determine the applicable guidelines range, but a guidelines range calculated in violation *Alleyne* was now advisory only. *Id.* at 393.

In order for *Lockridge* to apply, the Court held that the defendant must first demonstrate that his OV level was calculated using facts not found by a jury beyond a reasonable doubt or admitted by the defendant. *Id.* The defendant must also make a showing that without this erroneous calculation, he would have fallen within a different minimum sentencing range. *Id.*

The *Lockridge* Court explained that the appropriate remedy is a *Crosby* remand for a determination whether the trial court would have imposed a materially different sentence but for the constitutional error. *Id.* at 396-397. (citing *United States v. Crosby*, 397 F.3d 103, 118 (2nd Cir. 2005)]. "If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id.* at 397.

Petitioner asserts that offense variables (OVs) 5, 13 and 14 were scored based

on factors not proven to a jury so as to be reflected in their verdict. Additionally, he asserts that OV 14 was not supported by a preponderance of the evidence, and should not have been scored under *People v. Hardy*, 494 Mich. 430, 438 (2013), as determined in *People v. Rhodes*, 305 Mich. App. 85, 90-91 (2014):

> We remain of the opinion that defendant's exclusive possession of a gun during the criminal transaction is some evidence of leadership, however it does not meet the preponderance of the evidence standard found m Hardy. This fact alone does not support the finding by the trial coult that defendant issued orders that Adams did not. The record simply fails to reflect any other evidence of leadership. Under the dictionary definition of leadership, we cannot conclude that merely posing a greater threat to a joint victim is sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the transaction itself. We are therefore constrained to reverse the trial court's scoring of OV 14, which should have been scored at zero points.

OV 5 is governed by *Mich. Comp. Laws § 777.35*, and scored for psychological injury to a member of the victim's family. It can be scored either 15 or 0, depending on whether there was serious psychological injury requiring professional treatment to a victim's family member. There is nothing in the jury's verdict that reflects psychological injury. Presumably the judicial fact finding was based on the victim impact statement at sentencing. (T 10-3-2014, p 8-9.) Petitioner asserts that this score violated his right to trial by jury. *Alleyne*, 570 U.S. at 107; *Lockridge*, 498 Mich. at 374.

OV 13 is governed by *Mich. Comp. Laws § 777.43*, and was scored at 25 points at sentencing. The statute provides two ways in which OV 13 can be scored at 25 points, gang involvement, or a pattern of criminal activity involving three

climes against a person within a five-year period.

Mich. Comp. Laws § 777.43(1)(b) and (c):

> "(c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."

The instant case involves two crimes against a person, and Mr. Lewis did have one other felony against a person within five years of the instant conviction. While there is a preponderance of evidence to support this score, it did involve judicial fact-finding, as the jury's verdict only involved two crimes against a person. *Hardy*, 494 Mich at 438; *Alleyne*, 570 U.S. at 107; *Lockridge*, 498 Mich. at 374.

OV 14 is governed by *Mich. Comp. Laws § 777.44*, and is scored for the Offender's Role. OV 14 only has two possible scores: 10 if the defendant is a leader, and O if the defendant is not the leader. At sentencing, the Prosecutor asked that OV 14 be scored at 10 because the jury found that Petitioner was the shooter, and the court agreed. (T 10-3-2014, p 7).

As argued in *Hardy*, 494 Mich. at 438, as determined in *Rhodes*, 305 Mich. App. at 90-91:

> We remain of the opinion that defendant's exclusive possession of a gun during the criminal transaction is some evidence of leadership, however it does not meet the preponderance of the evidence standard found m Hardy. This fact alone does not support the finding by the trial court that defendant issued orders that Adams did not. The record simply fails to reflect any other evidence of leadership. Under the dictionary definition of leadership, we cannot conclude that merely posing a greater threat to a joint victim is sufficient to establish an individual as a leader within the meaning of OV 14, at least in the absence of any evidence showing that the individual played some role in guiding or initiating the transaction itself. We are therefore constrained to reverse the trial court's scoring of OV 14, which should have

been scored at zero points.

Petitioner asserts that leadership was not reflected in the jury's verdict, even though they were hung on the murder charge regarding Glenn. Scoring OV 14 in this instance involved judicial fact-finding. Further, that fact finding was not supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438; *Alleyne*, 570 U.S. at 107; *Lockridge*, 498 Mich. at 374.

While conceding that the court could find a preponderance of the evidence to score OV 5 and OV 13 based on the Pre-Sentence Report and the victim impact statement at sentencing, Petitioner asserts that this involved judicial fact-finding, as the psychological injury to a victim's family, as well as whether there was a pattern of criminal activity. *Mich. Comp. Laws § 777.35; Mich. Comp. Laws § 777.43.*

Petitioner concedes that changing the score for OV 14, which was not supported by a preponderance of evidence, will not change his guidelines sentence range. Yet, if the scores for all of the OV's which were not reflected in the jury's verdict were corrected, he would be at level II of the Second Degree Murder Sentencing Grid, as opposed to level III used at sentencing. Since Petitioner would be eligible for a re-sentencing under a lower sentencing grid, he should be remanded for a *Crosby* hearing. *Lockridge*, 498 Mich. at 397

For the foregoing reasons state above this Court should grant a Certification of Appealability for some or all of the issues for the following reasons:

CONCLUSION

Petitioner, Jessie Vornell Lewis, 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,

Executed on: 3-2-22

Jessie Vornell Lewis #733348
In propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

DECLARATION

I, Jessie Vornell Lewis, Petitioner swears, with his signature below, that the forgoing is true and accurate pursuant to *28 U.S.C. § 1746.*

Executed on: 3-2-22

Jessie Vornell Lewis
In propria persona