

22-6185
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

NOV 22 2022

OFFICE OF THE CLERK

BRENT WILLIAM BOGSETH — PETITIONER
(Your Name)

vs.

STATE OF MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRENT WILLIAM BOGSETH
(Your Name)

2400 S. SHERIDAN DRIVE
(Address)

MUSKEGON MI 49442
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I.

Was the District Court's order for petitioner's §2254 petition final in that it actually adjudicated petitioner's impartial jury claim, VI Amendment Violation? Did the United States Court of Appeals for the Sixth Circuit have jurisdiction in Conformity of appellate jurisdiction to deny relief in this case, under 28 USC § 1291; *Collins v. Miller*, 252 U.S. 364 (1920)?

II.

Was Petitioner entitled to a Remmer hearing? Had the lower Court abused its discretion by not conducting a hearing in this case? Can there be a merits decision on an impartial jury claim without a Remmer hearing, would Petitioner be entitled to a hearing?

III.

If as the law is now, if a jury can't consider evidence not admitted at a trial to find guilt, can a reviewing Court consider that evidence to affirm a petitioner's conviction? Would findings of fact based on that evidence be reasonable or unreasonable §2254 (d)(2)? Are the lower Court's findings based on evidence in violation of the Turner rule reasonable in petitioner's case?

LIST OF PARTIES

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

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Covering Colorable claims of extraneous influence / impartial jury claims.

- Remmer v. United States, 347 U.S. 227 (1954).
- United States v. Davis, 177 F.3d 552 (6th Cir. 1999).
- Smith v. Phillips, 455 U.S. 209 (1982).
- Brown v. McGauley, 2021 U.S. Dist. LEXIS 42143 (W.D. Mich).

Covering Sufficiency of evidence Challenges and Conflicting Views on reasonable Speculation

- Newman v. Metrish, 543 F.3d 793 (6th Cir. 2008).
- Tanner v. Yukins, 867 F.3d 661, 673 (6th Cir. 2017).
- Austin v. U.S., 382 F.2d 129 (D.C. Cir. 1967).

RELATED CASES

Same County Similar Crime improper evidence, improper
Comments by Prosecutor.

- *Stermer v. Warren*, 360 F. Supp 3d 639 (E.D. Mich. 2018).

Merits decision and final orders.

- *Porter v. Zook*, 803 F.3d 694 (4th cir. 2015).

Federal evidentiary hearing permissible for non-adjudicated
Claim.

- *Cullen v. Pinholster*, 563 U.S. 170 (2011).

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(6th Cir., July 7, 2022).

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APPENDIX C : Bogseth v. Schiebner, 2022 U.S. App LEXIS 24446
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is BOGSETH V. SCHIEBNER, 2022 US APP
[X] reported at LEXIS 18783 (6th Cir., July 1, 2022); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is BOGSETH V. BURT, 2022 US DIST LEXIS 1112,
[X] reported at 2022 WL 34664 (W.D. Mich., Jan. 4, 2022); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 30, 2022, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

VI Amendment

XIV Amendment

STATEMENT OF THE CASE

A.

Petitioner was found guilty following a jury trial for the Murder of his wife and was Convicted of first degree Murder and Sentenced to life in prison Without parole. The petitioner did not testify. The present Case was Circumstantial and Stacked inferences Upon inferences (id 2779). There was no direct evidence linking the petitioner to the crime. Undisputed is the fact there was no evidence admitted at trial Concerning essential facts of the homicide, namely the location, the timing, the Murder weapon or Series of events that proceeded the offense. Facts needed for the demarcation of first and Second degree Murder, and to obtain the specific findings of premeditation and deliberation for the Current Conviction. The trial Court told the jury it must "decide this Case based Solely on the evidence you see and hear in this Courtroom." (1, 98)

The Prosecution's theory was that on September 1, 2015 the petitioner Murdered his wife Shortly after he picked her up for work. Police alleged that the two were arguing about an affair. The body of the petitioner's wife was found eight days later on September 9, 2015 in the Woods near their house in Grand Junction Michigan by the man whom she was having an affair with. The forensic entomologist testified that the death was within minutes to hours of the remains attracting bugs, death occurred between September 3-4, 2015.

The autopsy of the partially skeletonized remains showed the manner of death was cran cerebr al hemorrhaging from blunt force trauma. Scientific tests and testimony from the Michigan State Police forensics cleared four alleged murder weapons, all hammers, retrieved from the petitioner. The forensic anthropologist and pathologist testified to the injuries sustained. Neither could testify to the series of injuries or positively identify the actual murder weapon used. The cause of death was undisputed. The state conceded that it could not determine the actual implement used to commit the murder or the circumstances of the death, only speculation. There was simply no evidence admitted at trial on either issue.

From opening statements to closing arguments the prosecutor relied on what he believed was the murder weapon, a very distinctive hammer. The prosecutor repeatedly employed the jury to use and consider this evidence when he demonstrated a hypothetical reenactment of the homicide to fill in gaps on the absence of proofs. The prosecution openly asked the jury to find premeditation and deliberation based on his personal belief that this very specific hammer was used, along with circumstantial evidence. (1, 114-115). The hammer, referenced about 20 times throughout the petitioner's trial was never admitted, no murder weapon was. The hammer was more than just a simple aid.

This fact that the evidence was never admitted is conceded often by the State and the District Court in petitioner's habeas proceedings.¹ Then repeatedly, it seems that in the very next breath the lower Court's further concede that the jury Considered this non admitted evidence towards primary guilt.²

Petitioner's trial Counsel partially objected, More like interrupted when he Stated, "that was not covered on cross" to the use of the hammer when, while holding it in open Court, the prosecutor on further redirect examination asked an officer who Searched the petitioner's vehicle if he ever found a "hammer that looked like this one?" The trial Court allowed the prosecution to Continue questioning. The prosecution asked again if the officer ever found a hammer that looked "like this one?"

¹ Mich. Ct. App. Op. No. 335864 pg8. Id's 245, 250, 2782, 2784, 2785, 2830. Although in habeas proceedings the State admits that the appellate Court Concluded the evidence was properly admitted, Id 282. The clear Conflict in this habeas action demonstrates Confusion and implicates fundamental Constitutional law Concerning the fairness of the Petitioner's trial and the State's fact finding being reasonable.

² Mich. Ct. App. op. No. 335864 pg8. Id's 249, 250, 2785, 2790, 2830.

After this witness was excused from his Subpeona the petitioner's trial Counsel asked to make a brief argument outside the presence of the jury, where he made a formal objection to the "hammer stunt" that was shown in open Court. The prosecution (Simultaneously) argued before the trial Court that it was only being used as a demonstrative exhibit to help facilitate to the jury what it looks like. The prosecutor knew he couldn't admit the hammer as evidence and even told the trial Court that he could not or would not as part of this case, nor would he do that to the Court. The prosecutor then claimed to the trial Court it was the murder weapon he believed was used in this present case. (IV, 49-60).

The trial Court correctly pointed out that the hammer was not an exhibit, called for the jury's return and gave a verbal Cautionary instruction regarding the demonstrative evidence. It went on to state that a final instruction would be given for deliberations to clarify the issue. No final instruction concerning demonstrative evidence was ever given though for jury deliberations.

The petitioner was a subcontractor for a property management company. The petitioner's employer testified, laying the proper foundation to the fact that he once seen, though uncertain how long before September 1, 2015, that the petitioner had a hammer along with other tools and described them. The prosecution showed the demonstrative evidence

during questioning of the employer who said it was similar, but explained differences.

Petitioner Moved for a directed verdict which was denied. The prosecution stated, "it is in the absence of direct evidence that we find guilt in this particular case." The trial Court found the case "Circumstantial" and "Compelling", that significant evidence was presented that showed the "defendant committed the death." Further that the "Manner of killing here also supports an inference that defendant acted with premeditation."

There was no witness testimony concerning the actual homicide. No evidence of a location, timing, prior planning, threats or malice. No testimony regarding the absence of heated blood. No murder weapon was identified, found or admitted at trial. These facts are undisputed. The trial Court weighed the non admitted evidence in denying the petitioner's request for a directed verdict. (V, 76-87).

In closing the prosecution asked the jury to, "take a global view of all the evidence as a whole." They infer that the petitioner is lying by concocting a story then outright calls him a liar. The prosecutor then claims that the petitioner's wife was murdered with a hammer and does exactly what he told the Court he wouldn't do as part of this case. When showing pictures of the

reconstructed skull the prosecutor picked up the hammer, went to the jury, swinging it reenacting.

"Look at the pure amount of rage and anger that would have been involved to do something like that to somebody, to plunge a claw hammer like this one into somebody's skull ... over and over and over again to the point where the hammer actually gets caught and you rip the hammer out, ripping out pieces of the skull and the flesh. Right here. Claw hammer. Look at the bottom exhibit. Look at the two marks. Look at the claw end of this hammer. This is the claw that was used to create those marks of one of the many blows delivered during the fury of the defendant's attack." (v, 130).

The prosecution persistently, 9 times through closing, went on while holding the hammer and stated that the petitioner, contrary to testimony, "Carried a specific hammer, one like this." The prosecution explained to the jury that because it was never found that, "it's the murder weapon." The prosecutor claims that the Bogseth's got out of the vehicle and the petitioner retrieved his hammer and, "hit her over and over and over again, repetitively striking... with both sides of this claw hammer." "It's the murder weapon or a facsimile of the weapon that the defendant used to murder his wife in cold blood."

The prosecution approached the jury with the hammer and again reenacts the homicide stating, "He Smashes her in the back of the head with this, With a hammer... Strikes her over and over and over again with a claw hammer." (V, 200).¹ The Petitioner's trial Counsel not once objected to the prosecution's closing arguments or even ensured that the jury was provided with the Cautionary instruction for deliberations concerning the non admitted demonstrative extrinsic evidence that he himself requested. The jury convicted the petitioner after only one day of deliberations.

¹ In habeas the District Court downplays the series of events in the prosecutor's closing minimizing the Constitutional injury and prejudice. It is undisputed that the hammer was used to find primary guilt of the petitioner, along with the stacked inferences. This alone shows that a writ should have issued in petitioner's habeas proceedings.

B.

Petitioner appealed by right. The Michigan Court of Appeals affirmed the petitioner's Conviction and Sentence. *People v. Bogseth*, No. 335864, 2018 WL 842904 (Mich. Ct. App. Feb. 13, 2018) (per Curiam), perm. app. denied, 919 N.W.2D 793 (Mich. 2018), Cert. denied, 139 S. Ct. 1555 (2019). The trial Court denied Petitioner's postConviction motion for relief from judgment, and the Michigan appellate Court's denied leave to appeal. *People v. Bogseth*, 948 N.W.2D 561 (Mich. 2020) (Mem.).

In October 2020 Petitioner filed his § 2254 petition for Writ of habeas Corpus, Case No. 1:20-cv-977 in the United States District Court for the Western District. The parties consented to have the case adjudicated by a Magistrate judge. In petitioner's reply brief (ECF No. 16) he attempted to confine the habeas focus to four exhausted cognizable claims while dismissing weaker ones.

Petitioner consolidated claims II, IV, V for judicial efficiency as they center around the actions concerning the violation of his right to a fair and impartial jury trial.

- I - Insufficiency of evidence for first degree murder.
- II - Fair and impartial jury trial violation (extraordinary influence).
- IV - Ineffective assistance of Counsel.
- V - Prosecutorial Misconduct.

The federalized basis and merits for petitioner's claim II was never adjudicated in the State Court's. In petitioner's habeas action the claim allowed for a de novo review without AEDPA deference because the State Court's confined and only analyzed the admissibility aspect of the demonstrative evidence under State law.¹

Petitioner diligently sought adjudication in the lower Court's and in his habeas proceedings. Petitioner filed notice (ECF No. 28) to the District Court that he wanted to suspend claim I pending review and adjudication of claim II and ruling on a Motion for an evidentiary hearing. The request to suspend claim I was due to the antagonistic nature towards, and potential conflict of analysis with the insufficiency claim.

Petitioner clearly showed a colorable claim of extraneous influence concerning his impartial jury trial claim in his appeal and his habeas action. Petitioner requested an evidentiary

¹ Though unreasonable as the Court's rely on inapposite cases in which the demonstrative evidence was actually admitted at trial. In this present case it wasn't, this is uncontested in habeas, it was extrinsic demonstrative evidence. In violation of the Turner rule, See Turner V. Louisiana, 379 US 465, 472-73 (1965). Inapposite Cases, People v. Castillo, 584 N.W.2d 606, 608 (Mich. Ct. App. 1998); Campbell V. Menze Const. Co., 166 N.W.2d 624, 626 (Mich. Ct. App. 1968).

hearing' (ECF NO. 15) Concerning the disputed facts of whether the jury was improperly influenced and that jury bias resulted by the prosecutor's repeated use and comments regarding extrinsic evidence, a hammer, at trial

Petitioner was entitled to this Due Process hearing to prove actual prejudice. The hearing was Constitutionally meaningful and the merits of petitioner's claim II could only be determined by a complete record which did not happen. Petitioner's ineffective assistance of counsel claim was also denied due to not showing prejudice concerning claim II.

The District Court denied the petitioner's procedural rights and was Constitutionally prejudiced towards his entire habeas action by denying him this meaningful opportunity. The District Court did not recognize or adjudicate the federalized basis of petitioner's claim. The Court only addressed the non-cognizable issue of admissibility under State law, spending five pages on the matter which it lacked jurisdiction and province over in the first place (Id. 2782-2786). The District Court believed that the "record is adequate" (Id. 2814) and denied the petitioner's §2254 petition, request for an evidentiary hearing and COA. (ECF NO's. 30, 31, 32).

¹ Remmer hearing, Remmer v. United States, 350 US 377, 382 (1956), through Smith v. Phillips, 455 US 209, 215, 17 (1982).

Petitioner filed a Motion to stay, amend judgment, and adjudicate the merits of Claim II (With a full Remmer hearing) Under Fed. Rules Civ. Proc. #52(b); 54(b); 59(e). (ECF No. 35). Petitioner cited the failure to address Claim II on the merits would produce an error and issues with non-final judgments on appeal (appellate jurisdiction).¹

In the Motion the petitioner requested a relation back amendment under Rule 15(c)(1)(B) if the District Court somehow denied that petitioner fairly argued Claim II as an impartial jury violation and colorable claim of extraneous influence with extrinsic evidence never admitted at trial. Petitioner renewed his request for a COA.

The Motion was construed and confined as only a Rule 54(b) Motion and denied. (ECF No. 36). The District Court stated it did not fail to address the impartial jury claim and deemed it "Patently frivolous." The historical fact is the District Court failed to address the federalized merits, did not cite statute, case law or Supreme Court authority concerning the claim, which the District Court acknowledges and concedes was actually raised in the petitioner's habeas proceedings.

After notice of appeal (ECF No. 40), in the United States Court of Appeals for the Sixth Circuit, Petitioner timely filed a Motion for COA preserving claims I, II, IV, V from

¹ 28 USC §1292; §1291

Collins V. Miller, 252 US 364, 365 (1920)

his habeas action, requested Counsel and to consider dismissing the appeal for lack of jurisdiction where the District Court totally failed to adjudicate the merits of his impartial jury claim. Petitioner filed an interlocutory appeal concerning whether Jurists could debate if the District Court's order was final and if there can be a merits decision on the impartial jury claim without a Remmer hearing (for a full and complete record).¹

Petitioner filed a Supplemental Motion for COA for clarification and certification on the questions in his Motion for interlocutory appeal, to vacate and remand for lack of jurisdiction. Petitioner also sought an order which deletes his dismissed claims and judicial re-assignment in the District Court on the matters.

The United States Court of Appeals for the Sixth Circuit in its order dated July 7, 2022 denied Petitioner's COA, request for Counsel and interlocutory and deemed it "unnecessary." The Sixth Circuit relied on the stacked inferences the District Court noted was used by the State Court's findings of fact in its analysis for Petitioner's case, specifically claim 1 (the sufficiency challenge for first degree murder).

The Sixth Circuit also relied on the same inapposite case's all the lower Court's used in support

¹ Sixth Circuit Case No's. 10-1244/10-1192, Consolidated by Court.

regarding the prosecution's use of the non admitted extrinsic evidence, the alleged murder weapon, at the Petitioner's trial.

When addressing the requested evidentiary hearing (Remmer) the Sixth Circuit Confined the Constitutional Violation claimed by the petitioner as one that was not based on "a private communication by the prosecution to the jury." This is Contrary to the full holdings in Smith and Remmer by the Supreme Court. The Sixth Circuit held that a Remmer hearing would be irrelevant to Petitioner's impartial jury trial claim by means of extrinsic evidence that was never admitted at trial. The Court then stated that Jurists of reason would not find the Magistrate Judge's decision debatable.

Petitioner timely filed a Motion for rehearing (en banc requested) to address the demonstrably wrong decision concerning Constitutional law¹, procedure and appellate jurisdiction² for habeas appeals since the District Court never resolved Claim II. The United States Court of Appeals for the Sixth Circuit in its order dated August 30, 2022 denied Petitioner's Motion for rehearing. Petitioner now timely files this Petition for Writ of Certiorari to this Honorable Court.

¹ To maintain uniformity in the Circuit's authority since there's a Circuit and intra-Circuit Split (two circuits, Sixth and

Eighth, in which the Honorable Associate Justice Brett M. Kavanaugh is assigned), Concerning the Remmer rule's application in habeas, presumption of prejudice and proper venue for hearing. The Sixth Circuit is the extreme minority on the presumption and burden of proof with conflicting decisions on the proper venue. Further, in that the State and lower Court's in this present case agree that the jury Considered non admitted extrinsic evidence for establishing primary guilt of the petitioner, which is clearly at odds with Supreme Court and Constitutional holdings.

² 28 USC §1291.

REASONS FOR GRANTING THE PETITION

The reason this Honorable Court should grant this petition, first, Conformity and Uniformity in appellate jurisdiction. *Collins v. Miller*, 252 U.S. 364, 365 (1920). The federalized basis of petitioner's claim II in his habeas Corpus § 2254 petition, was not adjudicated in the State Court's or in petitioner's habeas proceedings. AEDPA allowed for a *de novo* review concerning claim II.

The District Court failed to adjudicate the actual merits of petitioner's exhausted fair and impartial jury trial claim, a violation of his VI Amendment right. The Sixth Circuit Court of Appeals states that the claim was abandoned. The District Court states it addressed the claim "at length" *Id.* 2830.

The District Court spent five pages addressing the non admitted demonstrative evidence, *Id.* 2782-2786. The Court's analysis confined the claim only to a State law issue and completely ignored the federalized basis of the claim itself.

This error required reversal under existing Sixth Circuit law. *Hannah v. Conley*, 49 F.3d 1194, 1196 (6th Cir. 2000). Further, due to the failure to adjudicate petitioner's claim in his habeas proceedings, the appellate Court lacked jurisdiction because there was no final judgment made under 28 USC § 1291; *Catlin v. United States*, 324 U.S. 299 (1945).

Petitioner diligently sought adjudication of his claim. Petitioner seeks this Honorable Court to remand for lack of jurisdiction and instruct the lower Court to fully adjudicate his VI Amendment violation claim.

II.

Second, petitioner's habeas claim II required further development of facts. The petitioner's allegations that the jury was impartial because they considered the non admitted evidence, an alleged murder weapon, to find petitioner guilty of first degree murder is now a historical fact.

The lower Court's hold the jury considered the non admitted evidence and did so to support elements to, and primary guilt of petitioner's first degree murder conviction. An evidentiary hearing can prove these facts of how the jury understood the evidence.

The consideration of this evidence is in direct conflict with Supreme Court precedent in that a jury can only consider properly admitted evidence at trial. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Smith v. Phillips*, 455 U.S. 209 (1982); and that a VI Amendment violation occurs when a jury is exposed to extrinsic evidence or other extraneous influence. *Tanner v. United States*, 483 U.S. 107 (1987).

The petitioner diligently requested the District Court to conduct an evidentiary hearing to prove actual jury bias

Concerning his fair and impartial jury trial claim, (ECF No. 15; Smith V. Phillips, 455 U.S. 209 (1982); Remmer type hearing Under Remmer V. United States, 347 U.S. 227 (1954)).

Petitioner was entitled to this Constitutionally Meaningful hearing and he reasserts his right under due process to a Remmer type evidentiary hearing for the opportunity, and an adequate argument of the Constitutional dispute for Claim II in his habeas.

Petitioner alleges the habeas Court's abused discretion and were procedurally prejudicial towards him by denying the hearing. Discretion in this present case is Contrary to Some of this Circuits own precedent found in Cases like United States V. Davis, 117 F.3d 552 (6th Cir. 1999) and Ewing V. Horton, 914 F.3d 1027 (6th Cir. 2019), for example, When a Colorful claim of extraneous influence is raised a hearing Must be held to afford Petitioner an opportunity to establish actual bias.

Petitioner Clearly Showed a Colorful claim of extraneous influence Concerning his impartial jury claim due to the prosecution's use of what he believed was the Murder Weapon in this present Case, a Very distinctive hammer. The Prosecutor used this extrinsic demonstrative evidence to Conduct reenactments of the homicide and relied on it 20 times throughout trial.

This evidence was disseminated to the jury and heavily so during the Prosecution's closing arguments when the reenactment

of the offense took place. The hammer, or as the prosecutor tells the jury, "the Murder Weapon" was never admitted at petitioner's trial, no Murder Weapon was. The State never proved the actual implement used. The State and District Court Concede to these facts.

The lower Court's to date Continue to rely on inapposite cases to support its decision that the prosecutor's use of the hammer to prove his Case in Point wasn't improper. In the inapposite cases the evidence in question was actually admitted at trial, whereas here it wasn't. It was extraneous, extrinsic, and had an influence upon the jury.

This demonstrative evidence, the hammer, in this present case was used then for the Court's fact finding and reasoning concerning the actual homicide to fill in gaps which there was simply no evidentiary support at trial. These facts were then used to support the premeditation and deliberation elements to the offense and Subsequent Conviction. Petitioner submits this logic meets the standard of unreasonable determination of facts in light of evidence presented at trial under 28 USC § 2254 (c)(2).

The State and lower Court's admit that the prosecutor used, and that the jury Considered the non admitted evidence to find primary guilt of the petitioner. This is a due process concern. The actions (Petitioner's habeas claims IV, V, see ECF NO. 16) which allowed the consideration of the non admitted evidence is proof in itself that the petitioner's

trial was not a fair one and these errors affected the verdict.

The lower Court's view that the prosecutor's use of the hammer wasn't improper caused an erroneous determination concerning the denial of Petitioner's ineffective assistance of counsel claim as well. Petitioner seeks this Honorable Court to remand, instruct the lower Court to hold a Remmer type evidentiary hearing for a complete record and adjudicate Petitioner's VI Amendment claim.

III.

Premeditation and deliberation were always under attack by the Petitioner throughout his appeal and in his habeas action. In affirmation of the Petitioner's conviction and subsequent denial of his §2254 petition the lower Court's rely on the extrinsic evidence, a demonstrative murder weapon that was never admitted. If the law as it is doesn't allow a jury to consider this type of evidence to find primary guilt or guilt in general, then a reviewing Court shouldn't be able to either.

The lower Court's admit to this error happening which goes against fundamental guarantees afforded by our Constitution. The lower Court's justification of the claimed Constitutional violation is an answer of, it wasn't improper and it could have been admitted at trial.

A compounded error occurs in this present case when the

District Court failed to properly analyze the elements of premeditation and deliberation, failed to distinguish reasonable speculation from sufficient evidence, and failed to address the State Court's finding of fact required under § 2254(d)(2).

The District Court does agree with the Petitioner's argument that the State Court's stacked inferences upon inferences. The Court said it was "inescapable" *Id.* 2779. But these stacked inferences were used along with the extrinsic evidence to manufacture a hypothetical series of events concerning the homicide. Undisputed is the State didn't prove the place, timing, murder weapon or series of events concerning the actual homicide. These are important facts which can't be created by speculation.

While *Jackson v. Virginia*, 443 U.S. 307 (1979) allows evidence viewed in light most favorable to the prosecution, it doesn't allow the consideration of non-admitted evidence, and it certainly doesn't allow "facts" that flow from stacked inferences.

This Honorable Court long ago in *United States v. Ross*, 92 U.S. 281 (1875) stated that no inference of fact or of law is reliable drawn from premises which are uncertain. As this present case was circumstantial, the circumstances must be proved not presumed. (Quotations omitted).

Petitioner's reply brief (ECF No. 16) and Motion for COA shows the assumptions from the stacked inferences and conflicting views in sufficiency challenges in the Sixth Circuit and here.

Since the decision was unreasonable and this is debatable amongst jurists, Petitioner seeks a remand and resentence to the lesser charge of Second degree Murder.

IV.

Law students learn how to psychologically highjack a jury and falsely argue a case by bringing up non-germane issues. Inferences frequently violate principles of logic and basic Scientific Methodology. Preceptions are inferences and not direct readouts of reality.

Remmer and Smiths roots are heavily invested in fairness and reliability of a trial and the verdict that comes from it. The Constitutional right to a fair and impartial jury trial is sacrosanct. It is at the heart of due process, *Irvin v. Dowd*, 366 U.S. 717 (1961). Indisputable evidence of actual influence or juror bias may only be proven through a full hearing under *Smith v. Phillips*, 455 U.S. 209 (1982).

That is the case here and that is exactly what the Petitioner was seeking in his habeas proceedings. See *Smith v. Nagy*, 962 F.3d 192 (6th Cir. 2021); *United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021). See also *Porter v. Zook*, 803 F.3d 694 (4th Cir. 2015) in that when a District Court fails to address the substance of an impartial jury claim in habeas the appellate court is without jurisdiction and must remand.

The Sixth Circuit Court of Appeals is not shy to admit

that it is in the extreme minority amongst other Circuits When it Comes to the application of Remmer and the presumption of prejudice. See United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988).

There's a Circuit and intra-Circuit Split Concerning the Remmer rule's application in habeas, presumption of prejudice and Conflicting Views on the proper venue for a hearing. Some of the Conflicting views ignore procedural rules. See United States v. Pennell, 737 F.2d 521 (6th Cir. 1984).

Should this Honorable Court remand this Case with instructions to adjudicate his habeas claim II with a Remmer hearing, Would petitioner enjoy a presumption of prejudice due to the prosecution's use of key evidence to prove his Case in point that wasn't admitted?

The lower Court's admit the jury Considered this non admitted evidence to find petitioner guilty. The Court's used it for Support in denying relief. Is this not Prejudice towards the petitioner?

The Sixth Circuit Stated that a hearing based on Remmer Would be irrelevant to petitioner's fair and impartial jury trial Claim. Then erred further by holding that Remmer hearings only apply to private Communications. There's more to this Honorable Court's holdings in Remmer than just "Private Communications."

Petitioner Seeks this Honorable Court to remand With

instructions to conduct an evidentiary hearing, Remmer, for a complete record and merits adjudication concerning his impartial jury trial claim. Further petitioner asks this Honorable Court to review Remmer's procedural components amongst the Sixth and Eighth Circuits and hold as a matter of law that a Remmer hearing would be constitutionally required, viewed as a due process mechanism, and necessary for a complete record and actual merits adjudication.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Grant Bognath

Date: November 21, 2022