

22-7788

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

MAY - 9 2023

OFFICE OF THE CLERK

DEANDRE BASKERVILLE — PETITIONER
(Your Name)

VS.

TIM MCCONAHAY, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

DEANDRE J. BASKERVILLE
(Your Name)

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Mansfield, OH 44901
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

Question #1: Was Petitioner's due process and equal protection of law rights to a fair trial under the 14th Amendment of the U.S. Constitution violated when the trial court instructed the jury with a confusing, misleading and vague self-defense instruction.

Question #2: Was Petitioner's due process and equal protection right's to a fair trial under the 14th Amendment of the U.S. Constitution were violated when the trial court did not instruct the jury on the lesser included offenses of Involuntary Manslaughter and Voluntary Manslaughter.

Question #3: Was Petitioner's due process and equal protection in violation of the 5th and 14th Amendments to the U.S. Constitution because his Murder and Felonious Assault convictions were against the manifest weight of evidence and would require his conviction on those counts to be vacated.

Question #4: Did the prosecutors conduct throughout trial rose to the level of prosecutorial misconduct and deprived Mr. Baskerville of his rights to due process of law and a fair trial in violation of his 5th, 6th and 14th Amendment's rights under the U.S. Constitution.

Question #5: Was Petitioner denied his right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the U.S. Constitution by counsel's failure to object, request jury instructions or move for mistrial.

Question #6: Was Petitioner's due process clause of the 14th Amendment to the U.S. Constitution was violated when the State found him guilty upon insufficient evidence.

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:

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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

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[x] reported at Baskerville v Sheldon Case No. 5:18 CV2277; 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

[X] reported at Baskerville v. McConahay Case No. 22-3427 ; 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 October 31, 2022.

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: February 9, 2023, and a copy of the order denying rehearing appears at Appendix B.

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

Involved herein is the Fourteenth Amendment to the United States Constitution:

Amendment V:

"No person shall be...deprived of life, liberty, or property, without due process of law..."

Amendment XIV:

"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

On August 19, 2015, DeAndre Baskerville was threatened by Terrance Rogers who was legally drunk and acting aggressively. Terrance pulled a knife and Mr. Baskerville had only two options – defend himself or die.

That evening Mr. Baskerville went to chapel hill mall to pay a cell phone bill. Tr. Vol. IV at 454. Prior to paying his bill, he stopped at a kiosk just outside of Footlocker to get information on a cell phone repair. Tr. Vol. VII at 758. By chance, he ran into Terrance who was walking into Footlocker to buy shoes for his three-year-old son. Tr. Vol. III at 283. Terrance's fiancée was with Terrance and testified that Terrance's decision to go to the mall was unplanned and last minute. *Id.* At 283, 324, 326. In fact, his fiancée describes the meeting as a "happenstance." *Id.* At 326. She also testified that Terrance was "obviously" drinking before going to the mall. *Id.* At 325. This was confirmed by the coroner who testified that Terrance had over 1.25 BAC at the time of the autopsy – 50% over the legal limit. Tr. Vol. VI at 631.

The meeting began with Mr. Baskerville and Terrance shaking hands and engaging in a cordial conversation. Tr. Vol. II at 223; State Ex. 35. Mr. Baskerville was upfront and honest with the jury, explaining that Terrance failed to follow through on an agreement with Mr. Baskerville months earlier. Upon running into him at the mall Mr. Baskerville asked Terrance for an explanation of what happened. It was undisputed and corroborated by multiple witnesses that Mr. Baskerville was not acting angry or aggressive with Terrance. Tr. Vol. V at 577, 764. In fact, video evidence reveals and witness testimony confirmed that soon after the cordial meeting began, it was Terrance that became agitated and aggressive. *Id.*; Tr. Vol. III, 293; Ex. 35

The state's version of the initial meeting between Mr. Baskerville and Terrance, as portrayed in opening, was as follows: Mr. Baskerville saw Terrance in the mall, greeted him, shook his hand, and began a cordial conversation; Tr. Vol. II at 223. Terrance called his fiancée over to ask her a question whereby Terrance's fiancée claims Terrance was confrontational, accusing Mr. Baskerville of telling his fiancée about Terrance's infidelity; *Id.* At 224, 293, 295, 296. Terrance was enraged that Mr. Baskerville had disclosed Terrance's cheating. Soon thereafter, Terrance is seen on video "leaning and stepping" at Mr. Baskerville. Ex. 35 *Id.* At 224. Multiple witnesses testified that within mere minutes of the conversation starting it was Terrance that became angry and threatened Mr. Baskerville stating let's "take this outside". *Id.* At 224, 295, 296; Vol. VII at 813.

Mr. Baskerville testified that Terrance had a reputation as a "snake and a bully". Tr. Vol. VII at 802. He also had a reputation for carrying a weapon. Tr. Vol. VIII at 318. Terrance was bigger and stronger than Mr. Baskerville. Tr. Vol. V at 499-500; Vol. II at 803. Mr. Baskerville tried to calm Terrance telling him he was overreacting and "all this was not necessary". Tr. Vol. IV at 443, 445. Then, Mr. Baskerville began walking to exit the mall to "get out of there" and hopefully "diffuse the situation." Tr. Vol. VII at 815. Mr. Baskerville's cousin had driven Mr. Baskerville to the mall and said "let's get out of [here]."*Id.* The cousin began walking ahead of Mr. Baskerville to the exit where the vehicle was parked and he exited first. Tr. Vol. III, at 301, 333, 337-339. Mr. Baskerville followed. *Id.* Terrance walked with Mr. Baskerville confrontational and arguing all the way. Terrance twice yelled to his fiancée who was following behind for her to stay back as if something dangerous was about to happen. Tr. Vol. II at 305.

A mall employee observed the encounter in the mall and testified that he witnessed Terrance continually getting louder, not Mr. Baskerville. Tr. Vol. VI at 764-765. When walking

down the hall toward the exit, it was Terrance who was loud and Mr. Baskerville was heard telling him it was not necessary to get loud because it was not that serious. *Id* at 768.

Mr. Baskerville and Terrance walked out the doors where Mr. Baskerville was parked. Tr. Vol. VII at 796. It was necessary for Mr. Baskerville to utilize this exit to get to his vehicle. *Id*. Terrance was parked on the opposite side of the mall. Tr. Vol. III. At 284.

Upon exiting the mall, an independent witness testified that Mr. Baskerville ("the shorter one") was closest to the mall with Terrance ("the bigger one") blocking Mr. Baskerville's way to the street. Tr. Vol. V at 499-500. At that point, Terrance, still yelling and arguing, threatened Mr. Baskerville telling him he would "leave [Mr. Baskerville] where he stands." Tr. Vol. VII at 828. Terrance then quickly reached for something. *Id*. At 819, 820. While Mr. Baskerville did not initially see the weapon Terrance pulled, which was a knife, Mr. Baskerville testified he felt threatened and was scared that he would be hurt. *Id*. At 819, 823. Everything happened quickly and Mr. Baskerville, out of fear for his life, reacted and struck Terrance once with a pocket knife. *Id*. At 820. Terrance's fiancée testified that while she could not see or hear everything that happened outside the mall, she witnessed what appeared to be a "steady argument" over the course of a minute or so when Mr. Baskerville suddenly punched Terrance. Tr. V. III at 305. Mr. Baskerville testified that he did not know where he struck Terrance initially and certainly did not intend to kill him. Tr. V. VII at 821.

Terrance immediately walked back into the mall holding his neck and shortly thereafter passed away from a stab wound. It was undisputed that near Terrance's body, the Akron Police found a weapon (a nearly 7-inch serrated knife) that was unfolded and "the blade was out". Tr. Vol. II at 3, Vol. III at 314, 319, 421-422; See also Ex. 23 (leaving no doubt this knife was a weapon). Terrance's fiancée testified Terrance had the weapon at the mall and the knife belonged

to Terrance. Tr. Vol. III at 319, 341. Forensic testing demonstrated that the knife contained only Terrance's DNA. As the trial judge succinctly pointed out "...the only testimony we have is that the victim carried a, my characterization, a scary looking knife, that was open, unfolded at the scene of the crime." Tr. Vol. IV at 530-531.

Mr. Baskerville's immediate reaction was shock and fear. He left the scene in his vehicle emotionally traumatized by the events and his judgement was clouded. Mr. Baskerville proceeded to park the vehicle at his father's home and left town.

The events occurring shortly after the incident confirm that Mr. Baskerville reacted to Terrance's threat and was only trying to defend and protect himself. The state acknowledged in opening that within hours of the incident, Mr. Baskerville called his father and told him he was "defending" himself. Tr. Vol. II at 232. The state then called Mr. Baskerville's father to testify as the state's witness. He repeated that within hours of the incident, Mr. Baskerville called him and told him about the vehicle and the argument and said he felt threatened by Terrance and reacted to protect himself. Tr. Vol. IV at 442, 444, 446.

Mr. Baskerville was arrested and charged with Count 1- Aggravated Murder (2903.01(A)), Count 2- Murder (2903.02(A)), Count 3- Felony Murder (2903.02(B)), Count 4- Felonious Assault (2903.01) and Count 5 (2923.12(A)(1))- Carrying a Concealed Weapon. Jury instructions on each of the charges went to the jury.

As the prosecutor conceded from the beginning of the trial, Mr. Baskerville did not deny stabbing Terrance but rather claimed it was done in self-defense. The state's theory was that Mr. Baskerville was enraged because Terrance owed him money and had been avoiding him, so he purposely killed Terrance. The state represented to the jury that Mr. Baskerville wanted to teach him a lesson. This was the state's repeated theme. However, not a single piece of evidence,

including any of the testimony from the witnesses, supported this theory. There was no testimony whatsoever that Mr. Baskerville was observed acting aggressively. In fact, the state's theory was contradicted and debunked by its own witnesses.

The state was clearly uncomfortable with the strength of its theory and therefore, commenced a strategy to rouse the jury's emotions and disparage Mr. Baskerville's character. Although there was no dispute that Mr. Baskerville's actions resulted in the death of Terrance, the state called numerous witnesses whose only purpose was to comment on the amount of blood at the scene. In furtherance of this inflammatory tactic, the state showed the jury over 60 photographs depicting blood from the scene. Tr. Vol. III at 410-423. It introduced multiple autopsy photos of Terrance, many of which did not show Terrance's injury. Rather the photo showed a large incision created by the autopsy and medical care. The photos are very disturbing and hard to view. This evidence addressed no relevant issue in the case and could only have been used to inflame the passion of the jurors.

The defense moved for dismissal of the aggravated murder charge because the state's own witnesses testified the meeting was by happenstance and there was no evidence of planning. The court found that there was a scant amount of evidence that Mr. Baskerville could have been standing at the kiosk waiting for Terrance. The motion was overruled. The defense requested instructions on Voluntary Manslaughter which was overruled but failed to request Involuntary Manslaughter instructions due to a mistaken interpretation of the law. The court charged on the crimes alleged in the complaint and no lesser included offenses.

The jury found Mr. Baskerville not guilty of Aggravated Murder (Count 1). The jury convicted Mr. Baskerville of Murder, Felony Murder, Felonious Assault and Carrying Concealed

Weapon. The state elected to merge the verdicts into Murder (Count 2 and 3) for sentencing and Mr. Baskerville was sentenced to 15 years to life.

REASONS FOR GRANTING PETITION

The Petitioner's petition should be granted due to the facts that this case is a clear showing of self-defense. In this case before the Court, the Petitioner was denied a fair trial when the courts gave a faulty misleading and vague self-defense instruction. This likely lead the jury to believe that just by Mr. Baskerville starting a conversation with Mr. Rogers he was precluded from claiming self-defense.

Question #1:

This Honorable Court has held in *Rowe v. United States* 164, "though the defendant may have originally provoked the conflict, if he withdrew from it in good faith, his rights of self-defense revived". He (Rowe) and the deceased had said some offensive words to each other. In reply to the words, defendant kicked at the deceased lightly on the lower leg. After that, according to the defendant, he had stepped back and leaned up against a bar counter in withdrawal of further conflict. Deceased immediately attacked the defendant with a knife and, in response, defendant shot the deceased with his gun. Defendant was convicted of manslaughter. On appeal, the court reversed the conviction finding that it should have been submitted to the jury whether the act of the defendant in stepping back and leaning against the counter should have been reasonably interpreted as being a withdrawal by the accused in good faith from further controversy with the deceased. Here Mr. Baskerville attempted to deescalate the situation and get to his car to leave the mall.

Also in *Brown v. United States* 256 U.S. 335 On certiorari, the Court held that because defendant and the victim had a long history of conflict and because there was evidence that the victim had initiated the fatal attack, the trial court erred by instructing the jury that defendant was required to attempt retreat before claiming self-defense. In reversing, the Court held that the jury could have reasonably concluded that defendant feared for his life and that there was substantial evidence that the shooting was in self-defense. It was not necessary for defendant to engage in detached reflection before firing the fatal gunshot. Here the courts tell you Mr. Rogers initiated the physical confrontation by becoming aggressive stating "let's take this outside" and he followed Mr. Baskerville to the side where his car was parked.

In *State v. Burchfield* 66 Ohio St.3d 261, 263, 1993 Ohio 44, 611 N.E.2d 819 (1993), Justice Pfeiffer, writing for a unanimous court, in taking issue with a particular instruction from OJI, noted that "while OJI is widely used in this state, its language should not be blindly applied in all cases." Accord *State V. Martens* 90 Ohio App.3d 338, 343, 629 N.E.2d 462 (3d Dist.1993) ("The instructions found in [OJI] are not mandatory. Requiring a trial court to rigidly follow these instructions would remove judicial flexibility necessary to manage the various situations that arise during a jury trial."); *State v. Mitchell* 10th Dist. Franklin No. 88AP-695, 1989 Ohio App. LEXIS 1632, 1989 WL 47083, * 3 (May 2, 1989) ("Ohio Jury Instructions are not officially sanctioned instructions. Rather, they are the product of a committee of the Ohio Judicial Conference which suggests model instructions, but which have no force or effect as a rule of

law. They are merely the suggestions of one or more trial or appellate judges as to what those judges feel is an appropriate instruction. They are promulgated for the guidance of trial judges as a guide, not as a 'bible.'").

In State v Thomas 2015-Ohio-2935 Although it is not defined by OJI, "at fault" in the context of self-defense is clearly defined by case law and generally means that "the defendant must not have been the first aggressor in the incident." State v. Hendrickson, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, ¶ 61. However, an initial aggressor may still act in self-defense in certain circumstances. The classic example is what allegedly happened here when a fist fight turned into a gun fight.:

A "non-deadly aggressor" who begins an encounter may justifiably defend himself against a deadly attack. He may do so because the use of deadly force by the victim in response to non-deadly aggression is an unlawful use of force. 2 Wayne R. LaFave, *Substantive Criminal Law*, Section 10.4(e) (2d Ed.2003). For instance, if the initial aggressor slaps the victim with an open hand, should the law preclude that aggressor from defending himself if the victim pulls a gun and starts shooting? To adopt such a policy would be to encourage victims to overreact with deadly force rather than restricting the victims to only the degree of force necessary to repel the initial attack.

Here Mr. Baskerville stabbed Mr. Rogers once after Rogers threatened Baskerville stating "I'll leave you where you stand" and drew a knife. This same knife was found open right next to Rogers body. Testimony by the states witness and BCI reports confirms this knife was Mr. Rogers as only his DNA was found on it.

In regards to the duty to retreat the elements are 1) Defendant was "at fault" in creating the situation giving rise to 2) did not have reasonable grounds to believe and an honest belief that he was in imminent danger of death or great bodily harm or 3) he had a reasonable means to escape from the danger other than the use of deadly force. See *Katz and Gianelli Criminal Law*. The without fault first aggressor rule states: Only a defendant who "was not at fault" in creating the situation giving rise to the affray may resort to the use of force. Thus a person may generally use deadly force to repel deadly force.

Mr. Baskerville took the statement, "I'll leave you where you stand", as a threat to kill and didn't know if Rogers was reaching for a gun or knife. I don't know anyone who can out run a bullet so in order to protect himself from deadly force he used deadly force.

- 1) Mr. Baskerville was not "at fault" in creating the situation giving rise to the affray
- 2) he had reasonable grounds to believe he was in imminent danger of death or bodily harm
- 3) did not have a reasonable means of escape from the danger other than the use of deadly force, so he had not violated a duty to retreat.

Jury instructions are critically important to assist the jury in determining how to apply the facts to the applicable law. Therefore, they must be correct as applied to the facts.

By failing to provide alternative definitions of "at fault" that passed constitutional muster. The terms were never qualified for the jury and there was a reasonable likelihood that the jurors were led down an unconstitutional path by the instruction. Thus, because the "self-defense" instruction was unconstitutionally infirm petitioner was denied a fair trial.

Question #2:

A criminal defendant is entitled to an instruction on a lesser included offense if 1) a proper request is made 2) the elements of the lesser offense are identical to part of the elements of the greater offense 3) the evidence would support a conviction on the lesser offense and 4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater and convict on the lesser.

Providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard. In U.S. Colon 268 F.3d 367 The U.S. Court of Appeals 6th Circuit has held that if a defendant asks for a lesser included offense instruction, it is generally reversible error not to give it.

Regarding Voluntary Manslaughter, Baskerville requested this instruction. Under Ohio Law Voluntary Manslaughter is a lesser included offense of Murder. R.C. 2903.03 (A) Defines Voluntary Manslaughter as: No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another. It is the general rule that passion resulting from fright or terror may be sufficient to reduce a homicide from Murder to Manslaughter and such a killing may be closely akin to killing in self-defense.

Before giving the instruction the trial judge must determine whether there was reasonable sufficient evidence of provocation by the victim to warrant instruction. To make this determination, the trial court should give consideration to the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time. When viewing the evidence in the light most favorable to Mr. Baskerville the evidence shows that it would be reasonable for a jury to determine he was provoked by Mr. Rogers actions. Rogers was legally drunk with a blood alcohol level of .13 and angry, quickly causing what intended to be a cordial conversation to elevate to an argument. Rogers was bigger and acting aggressively inside (video) and outside the mall especially when he told Mr. Baskerville "I'll leave you where you stand" and pulled a deadly weapon. Words alone do not constitute reasonable provocation in most situations, but going for a weapon after threatening a person surely does. So out of fear Mr. Baskerville did pull his knife and stabbed Mr. Rogers once to repel the deadly force.

In *State v Hodges*, 2016-Ohio-5461 the courts state "It is the very act of displaying, brandishing, indicating possession, or using the weapon that constitutes the threat to inflict harm because it intimidates the victim. While Hodges regarded a theft offense, certainly pulling a weapon under the facts of this case also constitutes a threat of harm and provocation requiring this instruction. The Voluntary Manslaughter instruction was warranted and failure to provide it is reversible error.

In regards to Involuntary Manslaughter under Ohio law it is a lesser included offense of Aggravated Murder distinguished by the lack of intent to kill. In determining that Involuntary Manslaughter is a lesser included offense of Murder, the common element shared by these two offenses is the causing of the death of another with the only distinguishing factor being the mental state involved in the act. It is manifestly obvious that these two mental states are mutually exclusive and that in any given killing the offender may be possessed of only one. Murder and Involuntary Manslaughter are statutorily defined in such a way that the elements of Involuntary Manslaughter, aside from the mental state are always met whenever a Murder is committed. Mens rea is defined as the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime. There are only two states of mind which constitute mens rea, intent and reckless. Mr. Baskerville testified he stabbed Rogers once to repel deadly force and did not know where he hit him. This doesn't constitute an intentional act. Under these conditions, circumstances and Mr. Baskerville's mental and emotional state the trial judge should have given instructions to the jury on Involuntary Manslaughter. Admittedly, Petitioner's trial counsel failed to request the instruction, waiving any possible claim of error (ineffective assistance), but this should have been reviewed under plain error. Failure to provide this instruction was fundamentally unfair and is reversible error.

Question #3 &6:

An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause under the 14th Amendment to the U.S. Constitution. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct.2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L. Ed. 2d 368. In order for a conviction to be constitutionally sound every element of the crime must be proven beyond a reasonable doubt.

First in all sufficiency-of-evidence challenges the "evidence is to be considered in the light most favorable to the prosecution." Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "any rational trier of fact to find the essential elements of the crime beyond reasonable doubt." Relevant to this petition, a person commits Murder when he either "purposely causes the death of another" or causes the death of another approximate result of his committing or attempting to commit an offense of violence that is a felony of the 1st and 2nd degree...R.C. 2903.02

(A)(B). A person commits Felonious Assault when he either knowingly "causes serious physical harm to another" or "causes physical harm to another by means of a deadly weapon or deadly ordnance." R.C. 2903.11 A (1)(2). There is no dispute that Mr. Baskervilles Felonious Assault charge served as the predicate offense for his felony Murder charge.

Where a defendant has used deadly force he must prove that 1) he was not "at fault" in creating the violent situation 2) had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force and 3) that he did not violate any duty to retreat or avoid danger.

The undisputed evidence, as brought out in the state's case was Mr. Baskerville saw Rogers got his attention and began a cordial conversation. It was Rogers who escalated the conversation into an argument and became aggressive. Tr. Vol. VI p. 763,764 Tr. Vol VII p. 808-813 Rogers fiancée testified it was Rogers who was confrontational accusing Baskerville of telling his fiancée about his infidelities. Tr. Vol. III p. 296 Soon after Rogers is seen on video "leaning" and "stepping at" Baskerville. The store clerk and Baskerville testified it was Rogers that said "Let's take this outside" and Baskerville replied "It's not that serious we don't have to go there." Tr. Vol. VI p. 768 Tr. Vol. VII p. 812 Rogers fiancée testified that they parked on the other side opposite of the incident and that he, Rogers, turned around twice and cautioned her "to take their son and get back." Tr. Vol. III p. 284,305 Mr. Baskerville testified he was trying to defuse the situation and was trying to get to his car and leave. He, Baskerville was parked on the side this incident occurred. Tr. Vol. VII p. 815 Crime scene photos of the blood trail will show where the men were positioned while outside. This will show Mr. Baskerville's back was along the wall of the Sears Store and Rogers opposite. Mr. Baskerville testified Rogers told him "I'll leave you where you stand" and went for a weapon. There's no doubt Rogers pulled a knife on Baskerville. The knife was found at the scene next to his body with the blade open.

As noted previously, there is no basis under the law to claim Mr. Baskerville was "at fault" (first aggressor) in creating the violent situation. Words alone are not provocation and certainly saying hello to someone cannot eliminate one's rights to self-defense. Mr. Baskerville testified he thought he was in imminent danger when Rogers stated "I'll leave you where you stand" and reached for a weapon. His father testified Mr. Baskerville told him the same night of the incident he stabbed him because he thought Rogers was about to do something to him. Tr. Vol. IV. P. 444,445 The facts are he was in imminent danger. Rogers went for a weapon had it been a gun Mr. Baskerville couldn't out run a bullet but Rogers did pull a knife. If Mr. Baskerville did not react to protect himself, he would have died. Displaying and using a deadly weapon is surely a threat of harm. Finally, Baskerville attempted to avoid the danger by trying to leave. He

testified he walked out the exit doors where his vehicle was parked and was trying to leave.

If Mr. Baskerville was a police officer and Rogers, while arguing with him, went for and pulled a knife, the officers response in using deadly force would be justified. In fact, the use of self-defense by any person in this situation should be justified. This is why the prosecutor needed to engage in a character assassination of Mr. Baskerville to prevent the jury from acquitting him. The law of self-defense is the same whether you are a felon or a police officer. The great thing about America is that equal protection applies to all of us, the best, the average and the worst.

Question #5:

In *Strickland v. Washington*, (1984), 466 U.S. 668 the Supreme Court set forth the test to determine if a defendant was rendered ineffective assistance of counsel. The record must demonstrate that 1) that counsel's performance was deficient to the extent that counsel was not functioning as the counsel guaranteed the defendant by the 6th Amendment and 2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. The *Strickland* court went on to define a deficient performance as one that fell below an objective standard of reasonable professional assistance and not a matter of sound strategy. *Id.* The petitioner alleges the following constituted those kind of failures falling below an objective reasonable professional behavior.

(A) Trial counsel failed to object to the Courts confusing, misleading and vague instructions to the jury as set forth in Question one herein which incorporated herewith by reference. See also, Tr. Vol. VIII, p. 936-937. Trial counsel's failure to object prejudiced the petitioner by fostering jury confusion in considering the all-important issue of self-defense, as well as limiting review on appeal to the narrower and strict plain error review. As noted in Question one, the Court's lack of definition of terms associated with the self-defense instruction allowed for confusion on the part of the jury. The court charged:

To establish a claim of self-defense the defendant must prove by a preponderance of the evidence that he was not at fault in creating the situation giving rise to the altercation with Terrance Rogers... (Tr. Vol. VIII at 936-937).

The Court left it to the jury to speculate as to the meaning of "at fault" and they could have easily believed that if Mr. Baskerville started a verbal discussion then he could not avail himself of the defense of self-defense. This is simply not law.

The failure of counsel to object or request further definition likely allowed for confusion of the jury and also limited the scope of review on appeal.

(B) Counsel failed to object to repeated references to the deceased as "the

Victim." Counsel failed to object to said references at following pages: Vol III. P. 361, 362, 385, 393; Vol IV p. 645; Vol. VI. P. 715, 716, 723. Petitioner alleges that trial counsel's failure to object to such clearly improper conclusory testimony severely prejudiced him in his attempt to establish that the killing was in self-defense.

(C) During cross-examination of the petitioner the defense posed objections to the prosecutor's repeated attempts to inject completely speculative and misleading statements (thinly disguised as questions) about what the deceased or other persons may have been thinking. While counsel did pose numerous objections, the prosecutor repeatedly returned to the same tactic even after being warned by the court and after numerous objections were sustained. The petitioner submits that the prosecutor's repeated interjection of improper speculative questions/statements deprived him a fair trial and trial counsel should have moved for mistrial or at very least moved to strike the questions ruled improper by the Court when objections proved pointless.

Petitioner contends that by repeatedly making statements incorporated in questions the prosecutor attempted, and very likely accomplished the objective of injecting matter designed to mislead the jury in consideration of legitimate self-defense testimony and evidence. As such, the foregoing questions were improper and the prosecutor's repeated disregard of the court ruling was misconduct. Improper comments by a prosecutor can form the basis of reversal. *State v. Dougherty*, 2011-Ohio-788 (12th Dist.Ct.App.2011). The test is whether the remarks were improper and whether they prejudicially affected substantial rights of the defendant. Also, it has been held that it's not enough that there be sufficient other evidence to sustain the conviction in order to excuse the prosecutor's improper remarks. "Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty.") *United States V. Hasting* 1983) 461 U.S. 499.

Petitioner submits that the comments by the prosecutor and improper themes injected into the case should have prompted counsel to move for a mistrial as clearly mere objections were not enough. The failure of counsel to move for mistrial or at very least move to strike the comments fell below an objective standard of reasonableness and calls for reversal.

(D) Petitioner contends that trial counsel rendered ineffective assistance when he mistakenly believed that he was precluded from requesting a charge to the jury on the lesser included offense of Involuntary Manslaughter. Appellate Court found that trial counsel waived any claim of error by not requesting the instruction even though it may have been based upon mistaken understanding of the law by counsel. Petitioner submits that pursuant to *Strickland*, *supra* he was deprived of the right to effective assistance of counsel due to counsel failure. Involuntary Manslaughter is a lesser offense of Murder and should have been requested in this case. The fact that counsel mistakenly believed that it was not a lesser offense demonstrates that it was not a tactical decision but rather a failure to obtain a correct understanding of the law which would not have required more than minimal effort.

Trial counsel had filed an Ex-Parte brief, for the courts consideration. In this brief defense counsel stated that he knew that Involuntary Manslaughter was the lesser included offense of Murder and would request instructions on it if he deems it appropriate.

Petitioner submits that all of the foregoing constituted deficient performance resulting in a deprivation of the Petitioner's Sixth and Fourteenth Amendments to effective assistance of counsel. As such, his conviction should be vacated.

Question #4:

(A) The petitioner's deprivation of a fair trial due to misconduct of the prosecutor in

Repeatedly injecting improper comments and questions in front of the jury during cross-examination if the Petitioner as set forth in question #5 and incorporated herewith by reference. As previously noted, the test to be employed is to determine if the comments were improper and whether, beyond a reasonable doubt the jury would have found the Petitioner guilty absent the comments. (United States V. Hasting, (1983), 461 U.S. 499

As previously noted, the prosecutor repeatedly disregarded the Courts rulings and asked questions or made statements which were designed to invite the jury to speculate on matters not evidence. See Tr. Vol. VII, p. 871, 872, 887, 880, 888.

(B) The prosecutor called a 14-year-old boy to the stand who was an independent

Witness to some of the encounter between Mr. Baskerville and Rogers at the mall. Over defendant's objection, he repeatedly asked the teen whether he overheard Mr. Baskerville saying something about a gun. Tr. Vol. V at 510. When the witness clearly indicated "no", which was not the answer the state wanted, the state began referencing a videotaped statement the witness previously gave to a police officer. The prosecutor mentioned the videotaped statement at least five times to the jury, implying Mr. Baskerville was threatening Rogers with a gun. After the tape was played to the witness to refresh his recollection, the witness testified that he indicated to the officer he thought Mr. Baskerville said something about guns but it was equally possible it was Mr. Rogers who said it. This was corroborated by another State witness who was this witness's friend and also at the mall. The friend said it was impossible to know who said what because the boy's backs were turned. Again unhappy with the answer, the prosecutor began impeaching his own witness on the gun comment. This case involved a stabbing, not a shooting. This examination was irrelevant and improper. The sole purpose was to attack Baskerville's character.

(C) The State continued to improperly attack Mr. Baskerville's character at every turn.

The cross examination of Mr. Baskerville was designed to portray him as a person of bad character-a drug dealer with a history of prison a carrying guns. Tr. VIII, Baskerville cross. In fact, the prosecutor was admonished repeatedly for his comments. The state's closing, particularly the rebuttal was also extremely prejudicial. Rather than correctly discussing the

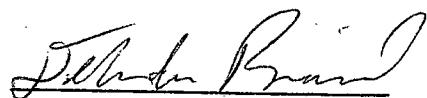
law, the state substantively told the jury they should convict Mr. Baskerville because he was a drug dealer and a bad person. This was the theme of the case, and it worked.

Mr. Baskerville was denied a fair trial in this case. The volume of prejudicial statements and testimony in this case, as evidenced above, made it impossible to get a fair trial. The fact that this was an experienced prosecutor only solidifies that these tactics were purposeful and intended to be prejudicial. When the facts and law did not support his case, he chose to attack the defendant. Because of the pervasive inappropriate comments, actions and arguments of the state, the verdicts should be reversed.

CONCLUSION

The issues before the Court are one's of great importance, as it involves the clear violation of due process and fairness within trial and resulted in a wrongful conviction resulting in manifest injustice. Therefore, petition for a writ of certiorari should be granted.

Respectfully Submitted,



DeAndre Baskerville #681-303

Date: May 8, 2023