No. _____

In The

Supreme Court of the United States

CAVANTA MCLILLY,

Petitioner,

v.

ADAM DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. MCGRATH
Counsel of Record
503 South Saginaw Street
Suite 715
Flint, Michigan 48502
(810) 238-8540
mcgrathtph@aol.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I. Whether police testimony identifying Mr. McLilly as the perpetrator seen on a surveillance video from the crime scene had a substantial and injurious effect or influence in determining the jury's verdict.

II. Whether a trial court's one-sentence statement that there is no need for resentencing because the court would not impose a materially different sentence fails to cure an *Alleyne* violation.

PARTIES TO THE PROCEEDING

Petitioner Cavanta McLilly is currently held in custody at the Saginaw Correctional Facility, Freeland, Michigan. Respondent Adam Douglas is the Warden at the facility.

RELATED CASES

Cavanta McLilly v. *Noah Nagy, Warden*, United States Court of Appeals for the Sixth Circuit (21-2887), Opinion Issued January 3, 2023

Cavanta McLilly v. *Anthony Stewart, Warden*, United States District Court for the Eastern District of Michigan (18-10397), Opinion and Order Issued August 17, 2021

People of the State of Michigan v. *Cavanta McLilly*, Michigan Supreme Court (155644); Order Issued December 27, 2017

People of the State of Michigan v. *Cavanta McLilly*, Michigan Court of Appeals (335694); Order Issued March 29, 2017

People of the State of Michigan v. *Cavanta McLilly*, Genesee County Circuit Court (13-033099-FC), Opinion and Order Issued October 21, 2016

People of the State of Michigan v. *Cavanta McLilly*, Michigan Supreme Court (151073), Order Issued July 28, 2015

People of the State of Michigan v. *Cavanta McLilly*, Michigan Court of Appeals (318627), Opinion Issued January 22, 2015

People of the State of Michigan v. *Cavanta McLilly*, Genesee County Circuit Court (13-033099-FC), Judgment of Sentence Issued September 27, 2013

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PETITION FOR A WRIT OF CERTIORARI

Cavanta McLilly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is not reported. App. 1-16. The district court's opinion is not reported. *Id*. at 17-38.

JURISDICTION

The Sixth Circuit entered judgment on January 3, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254 provides in pertinent part:

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

STATEMENT OF THE CASE

Mr. McLilly was tried in the Circuit Court for the County of Genesee in connection with the armed robbery of a Flint, Michigan gas station and the shooting of the cashier, Hergid Singh. App. 2, 18. Testimony at trial established that on December 21, 2012, three teenage boys entered the gas station, purchased drinks and snacks, and then left. *Id*. at 2. They went back inside a short time later and one of them dropped a bottle on the floor, causing it to shatter. *Ibid*. When Singh came out from behind the station's bullet proof enclosure to clean up the shattered glass, masked men ran into the store to rob him. *Ibid*. One of the men held Singh up at gunpoint and eventually shot him in the chest. *Ibid*.

The state maintained at trial that Mr. McLilly was the person who shot Singh. In support of its theory, the state offered testimony from Detective William Jennings and Officer Michael Dumanois. *Id*. at 23. Each identified Mr. McLilly as one of the masked men who appeared in a surveillance video of the store taken during the robbery. *Id*. at 4-5, 23. Jennings also identified Mr. McLilly as one of the perpetrators depicted in still photos created from the surveillance video. *Id*. at 23. Defense counsel objected to the police identifications, but the trial court overruled the objections on the ground that the witnesses were permitted to testify about what they saw when they conducted the actual scene identification. *Id*. at 23-24.

After Jennings and Dumanois testified, the prosecutor called the young men that entered and then reentered the gas station prior to the robbery. Demetrius Robinson, Anthony Watkins, and Allah' Jawan Reeder each testified that prior to the robbery, an individual who resembled Mr. McLilly offered them money to drop a bottle on the floor. *Id*. at 5. Robinson and Watkins conceded, however, that prior to coming clean about their involvement in dropping the bottle, they had falsely claimed that Mr. McLilly tried to sell them marijuana. *Ibid*.

Toward the end of the state's case, Singh was called to describe what transpired during the robbery. He identified Mr. McLilly as one of the robbers and the man who had shot him in the chest. *People* v. *McLilly*, No. 318627, 2015 WL 302676, at *4 (Mich. Ct. App. Jan. 22, 2015). Defense counsel wondered how Singh could be so sure that the identification was correct given that the perpetrator was wearing a mask covering everything below the bridge of his nose. App. 7. Singh noted that the man's height and weight were consistent with Mr. McLilly's and emphasized that he had no reason to lie. *Ibid*.

Mr. McLilly testified in his own defense. He admitted that he had been inside the gas station before Singh was shot but insisted that he played no role in the robbery or the shooting. *McLilly*, 2015 WL 302676, at *1. He acknowledged having spoken with the three teenage boys. App. 7. But he denied asking Robinson to break a bottle. *Ibid*. He maintained that Robinson had offered to sell him some marijuana. *Ibid*.

The jury convicted Mr. McLilly of armed robbery, assault with intent to murder, carrying a concealed weapon, possession of a firearm by a felon, and possession of a firearm in the commission of a felony (commonly referred to as "felony-firearm"). *Id*. at 19. He was later sentenced to concurrent terms of 40 to 60 years for armed robbery, 43 to 65 years for assault with intent to murder, 2 to 10 years for carrying a concealed weapon, and 5 to 30 years for felon in possession of a firearm. *Ibid*. He was sentenced to an additional consecutive 2-year term in connection with the felony-firearm conviction. *Ibid*.

Mr. McLilly's primary argument on direct appeal to the Michigan Court of Appeals was that the trial court erred by permitting Jennings and Dumanois to offer lay opinion testimony about the identity of the masked individual in the surveillance video. *Id*. at 8-9. The court of appeals acknowledged that the opinion testimony was improper, but found that the error was harmless. *McLilly*, 2015 WL 302676, at *4. In support of its conclusion, the court noted that the jury viewed the surveillance video and was permitted to draw its own conclusions. App. 24. The court also pointed out that multiple witnesses—including the victim—positively identified Mr. McLilly at trial. *Ibid*. The Michigan Supreme Court denied Mr. McLilly's application for discretionary review.

In a subsequent motion for relief from judgment filed in the trial court, Mr. McLilly argued that: (1) the admission of opinion testimony regarding the identity of the person in the surveillance video resulted in the

denial of a fair trial by a jury; (2) trial and appellate counsel were ineffective for failing to challenge the trial court's undisputed accomplice instruction; (3) trial and appellate counsel were ineffective for failing to challenge the upward departure as to Mr. McLilly's armed robbery sentence; and (4) the sentence imposed as to Mr. McLilly's assault with intent to murder conviction is invalid because it was increased on the basis of facts that were not found by the jury beyond a reasonable doubt. The trial court denied the motion and both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. App. 9.

Mr. McLilly later filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. He asserted the same claims that he had made in his state court motion for relief from judgment. *Id*. at 9, 20. The district court disagreed with the contention that the police testimony identifying Mr. McLilly as the person in the surveillance video rendered his trial fundamentally unfair. The court emphasized that multiple individuals identified Mr. McLilly as the person who offered them money to break the bottle, and Singh himself identified Mr. McLilly as the person who shot him. *Id*. at 25-26. As to Mr. McLilly's argument that his attorneys were constitutionally ineffective, the district court concluded that the alleged shortcomings in their performance did not result in prejudice. *Id*. at 31-32, 34. Finally, although the district court agreed that the use of judge-found facts to increase the upper limit of Mr. McLilly's sentencing guidelines range violated the

Sixth Amendment, the court believed that any error committed at sentencing was harmless. *Id*. at 35. The district court issued a certificate of appealability as to Mr. McLilly's challenge to the officers' identification of the individual in the surveillance video and his claim that sentence was imposed in violation of the Sixth Amendment. *Id*. at 9-10.

He then appealed to the United States Court of Appeals for the Sixth Circuit. With respect to his first claim, the Sixth Circuit acknowledged that "the trial court's errors likely amounted to a violation of McLilly's right to a fair trial." *Id*. at 12 (citing *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991)). The court found that officers "invaded the province of the jury" by providing "an insider's opinion" that Mr. McLilly was the person shown on the surveillance video. *Id*. The court concluded, however, that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Id*. at 13 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 627 (1993)). Turning to the sentencing claim, the court noted that even the state "concede[d] that McLilly's sentence violated the Sixth Amendment." *Id*. at 14-15. However, pointing to the trial court's alternative holding that it "would not have imposed a materially different sentence" under an advisory guidelines system, the Sixth Circuit found that "the trial court granted McLilly constitutionally adequate relief for the defect in his sentence." *Id*. at 15-16 (citation omitted).

REASONS FOR GRANTING THE PETITION

I. POLICE TESTIMONY IDENTIFYING MR. MCLILLY AS THE PERPETRATOR SEEN ON A SURVEILLANCE VIDEO FROM THE CRIME SCENE HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT

This Court has long recognized that when the introduction of evidence is "so unduly prejudicial that it renders [a] trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne* v. *Tennessee*, 501 U.S. 808, 825 (1991) (citing *Darden* v. *Wainwright*, 477 U.S. 168, 179-183 (1986)). In this case, the Sixth Circuit acknowledged that by permitting Jennings and Dumanois to "provide an insider's opinion on who committed the crime," the trial court likely violated the Due Process Clause. *See* App. 12. But that was not the end of the inquiry. Since this is a habeas case, Mr. McLilly also had to clear the hurdles imposed by both 28 U.S.C. § 2254(d) and *Brecht*.

With respect to the first hurdle, § 2254(d) requires that habeas relief be denied unless the state court proceedings resulted in a decision that was "contrary to" or "an unreasonable application of" clearly established federal law, or a decision that was "based on an unreasonable determination of the facts[.]" *Id*. A state court decision is only entitled to deference, however, if it adjudicated the claim in question on the merits. *Johnson* v. *Williams*, 568 U.S. 289, 292 (2013). Here, the Sixth Circuit concluded that the state court's decision was

not an adjudication on the merits, and was thus not entitled to deference under § 2254(d), because "the [Michigan] Court of Appeals did not address whether the trial court's misapplication of the Michigan Rules of Evidence rose to the level of a due process violation." App. 11.

The second hurdle was, in the Sixth Circuit's view, more problematic. Under *Brecht*, the standard for determining whether habeas relief may be granted is whether the constitutional violation in question had a "substantial and injurious effect or influence in determining the jury's verdict." *Id*., 507 U.S. at 623 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). The court acknowledged that when they identified Mr. McLilly in the video, Jennings and Dumanois "almost certainly colored the jury's own viewing of the surveillance footage[.]" App. 12. But the court noted that the prosecution's case against Mr. McLilly—which included identifications from Singh and the three teenage boys—was "powerful" while Mr. McLilly's own version of the events was "implausible." *Id*. at 13. The prosecution's case was too strong, the court concluded, for the identifications made by Jennings and Dumanois to have had a sufficiently prejudicial impact to warrant habeas relief. *Id*. at 14.

While multiple perpetrators committed the actual robbery, Mr. McLilly was the only principal to stand trial. Since Mr. McLilly consistently denied any involvement in the robbery, police were unable to obtain a first-hand account of how it was planned and carried out. Nor were investigators able to develop any

tangible, physical link between Mr. McLilly and the robbery. Without testimony from insiders or physical evidence linking Mr. McLilly to the robbery, the state was forced to build a circumstantial case.

Identity was the key issue. The prosecutor set the tone early on by having both Jennings and Dumanois identify Mr. McLilly as the perpetrator seen on the surveillance video. *Id.* at 4-5. Jennings testified that in his opinion, the man who visited the gas station before the robbery was the same person that came back and robbed the store. *Id*. at 5. When he was asked to identify the robber, he pointed to Mr. McLilly. *Ibid*. And in even more dramatic fashion, the trial court permitted the prosecutor to have Mr. McLilly stand next to a still photo made from the surveillance video while Dumanois testified that "it looks exactly the same person." *Id*. at 4.

Although the Sixth Circuit conceded that the identifications made by Jennings and Dumanois invaded the province of the jury, the court concluded that their testimony was not damaging enough to satisfy the standard set forth in *Brecht*. The court emphasized that the three teenage boys and Singh all provided independent identifications. *Id*. at 13. The testimony of the teenage boys and Singh was given far more weight than it deserved. Robinson and Watkins carried with them the baggage of having initially made false statements to police about the incident. *Id*. at 3. And while Robinson and Reeder could identify Mr. McLilly as the person they saw in the gas station prior to the robbery, neither could identify him as the person who

subsequently went into the gas station with a gun. ECF No. 5-7, Page ID ## 689, 756. Singh identified Mr. McLilly as the shooter by his height and weight. App. 7. But he also offered inconsistent descriptions of the shooter. He told Officer Marcus Wilson that the assailants were not wearing masks. ECF No. 5-6, Page ID # 520. During the trial, however, he testified that the face of the person who shot him was partially covered. ECF No. 5-7, Page ID # 787.

"[O]f all the evidence that may be presented to a jury, a witness's in-court statement that 'he is the one' is probably the most dramatic and persuasive." *United States* v. *Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976). The state's case against Mr. McLilly depended on witnesses being able to identify him as the shooter. The prosecutor called several witnesses to establish identity. But only two of them—Jennings and Dumanois—were unhindered by previous false or inconsistent statements, or an inability to identify Mr. McLilly as a perpetrator of the robbery. And, as the Sixth Circuit acknowledged, their identifications "almost certainly colored the jury's own viewing of the surveillance footage[.]" App. 12. The trial court's decision to allow Jennings and Dumanois to identify Mr. McLilly as the robber based on their own viewing of the surveillance video was not only wrong. It was outcome determinative. The decision cleared the way for the state to offer untainted identification testimony that was unavailable through any other witness. This Court should grant certiorari, find that Mr. McLilly's trial was fundamentally unfair, and order that he be retried.

II. A TRIAL COURT'S ONE-SENTENCE STATEMENT THAT THERE IS NO NEED FOR RESENTENCING BECAUSE THE COURT WOULD NOT IMPOSE A MATERIALLY DIFFERENT SENTENCE FAILS TO CURE AN *ALLEYNE* VIOLATION

Michigan's sentencing guidelines system operates by "'scoring' offense-related variables (OVs) and offender-related, prior record variables (PRVs)." *Robinson* v. *Woods*, 901 F.3d 710, 716 (6th Cir. 2018). Once OV and PRV point totals are scored, the totals are then "inputted into the applicable sentencing grid to yield the guidelines range, within which judges choose a minimum sentence." *Ibid*. In this case, the trial court scored OV6 based on its own finding that Mr. McLilly had a premeditated intent to kill when he shot Singh. App. 8, 34. The trial court's finding increased Mr. McLilly's sentencing guidelines range for the assault with intent to murder conviction from 135-450 to 225-570 months' imprisonment. *Id*. at 8. The trial court ultimately sentenced him to a term of 45-60 years for assault with intent to murder. *Ibid*. Without the finding of premeditation, the highest within-guidelines minimum the trial court could have imposed for the assault with intent to murder conviction was 450 months (or 37.5 years).

Approximately two months before the trial court sentenced Mr. McLilly, this Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013). At the time the trial

court sentenced Mr. McLilly, the Michigan Court of Appeals adhered to the argument that judicial fact-finding in scoring a defendant's sentencing guidelines does not establish a mandatory minimum, but rather "inform[s] the trial court's sentencing discretion[.]" *People* v. *Herron*, 845 N.W.2d 533, 539 (Mich. Ct. App. 2013). After Mr. McLilly was sentenced, however, the Michigan Supreme Court concluded that Michigan's guidelines produce minimum sentences that are "just as mandatory as those at issue in *Alleyne*." *People* v. *Lockridge*, 870 N.W.2d 502, 518 (Mich. 2015). To remedy the constitutional problem created by acknowledging that the Sixth Amendment applies to Michigan's sentencing guidelines system, the court made the guidelines advisory by severing Mich. Comp. Laws § 769.34(2) and striking down the requirement that departures from the guidelines be justified by "substantial and compelling reasons." *Id*. at 520. Going a step further, the court authorized so-called *Crosby* remands—hearings in which sentencing courts addressing *Lockridge* errors consider on remand whether they "would have imposed a materially different sentence but for the constitutional error." *Id*. at 523 (citing *United States* v. *Crosby*, 397 F.3d 103, 118 (2d Cir. 2005)).

After *Alleyne* and *Lockridge* were decided, Mr. McLilly filed a post-conviction motion in the trial court asserting that the court violated the Sixth Amendment when it used judicial fact-finding to increase the sentencing guidelines range for his assault with intent to murder conviction. The trial court rejected the claim,

concluding that *Lockridge* does not apply to cases on collateral review. App. 35. As an alternative ground for rejecting the Sixth Amendment claim, the trial court stated that even if the guidelines had been advisory rather than mandatory at the time of sentencing, "the Court would not have imposed a materially different sentence for defendant's Armed Robbery conviction." *Id*. at 9. The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *Ibid*.

Respondent has conceded for the purposes of habeas review that Mr. McLilly's sentence violated the Sixth Amendment. *Id*. at 14-15. The only issue, then, is whether the trial court's alternative holding is a sufficient remedy for the constitutional violation. Both the district court and the Sixth Circuit concluded that it is. The district court found that the trial court's alternative holding "comports with *Alleyne* and the state law counterpart." *Id*. at 37. And the Sixth Circuit concluded that "[b]y considering whether it would have imposed a materially different sentence under advisory guidelines, the trial court granted McLilly constitutionally adequate relief for the defect in his sentence." *Id*. at 16 (citing *Reign* v. *Gidley*, 929 F.3d 777, 783 (6th Cir. 2019)). This Court should grant certiorari and reverse.

The trial court's alternative holding "comports with" neither *Alleyne* nor *Lockridge*. Nothing in *Alleyne* suggests that being given the mere opportunity to ask a sentencing judge whether he or she would resentence if unconstrained by a mandatory guidelines system is a sufficient remedy for a violation

of the Sixth Amendment. If anything, *Alleyne* supports the argument that something more is needed to cure a Sixth Amendment violation. *Id*., 570 U.S. at 117-118 (vacating the judgment below and "remand[ing] the case for resentencing consistent with the jury's verdict"). In *Lockridge*, the Michigan Supreme Court did authorize "[a] remand for determination of *whether* to resentence." *Id*., 870 N.W.2d at 523 (emphasis in original). But even *Lockridge* requires that a decision whether to resentence be supported by "an appropriate explanation[.]" *Id*. at 524 (quoting *Crosby*, 397 F.3d at 120). The trial court's one-sentence conclusion in this case that it would not have imposed a materially different sentence under an advisory guidelines system was accompanied by no explanation at all.

And the trial court did not grant Mr. McLilly "constitutionally adequate relief" for the defect in his sentence. Relief for a Sixth Amendment violation cannot be constitutionally adequate if it does not entail reasonable consideration of whether the offending sentence ought to be changed. Here, the trial court addressed whether it would have imposed a materially different sentence as to Mr. McLilly's armed robbery conviction. But it was the trial court's sentence for assault with intent to murder—not the armed robbery sentence—that ran afoul of *Alleyne*. The Sixth Circuit acknowledged the trial court's mistake, but suggested that since the court "had no reason to address . . . the armed robbery sentence," the mistake must have been a mere "scrivener's error." App. 16. There is a basis, however, for concluding that the mistake was more

than a slip of the pen: the trial court contemplated the substance of the armed robbery sentence, albeit in the context of Mr. McLilly's ineffective assistance of counsel argument. *Id*. at 32. While the trial court's mistake might have been a scrivener's error, it might also have arisen from the trial court erroneously applying *Lockridge* to the armed robbery sentence it had just finished examining in connection with the ineffective assistance of counsel claim. *See* ECF No. 5-14, Page ID ## 1099-1100. The record provides no basis for concluding that one explanation for the mistake is any more likely than the other.

Mr. McLilly's case offers an opportunity for this Court to resolve important questions regarding the proper remedy following a determination that a defendant has been sentenced under an unconstitutional sentencing scheme. There is an acknowledged split of authority concerning whether a violation of the Sixth Amendment requires a full resentencing or only a limited remand. *See Orrick* v. *Trierweiler*, No. 1:19-cv-56, 2019 WL 697022, at *8 (W.D. Mich. Feb. 20, 2019) (comparing cases from the First, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits following the limited remand approach with cases from the Fourth, Sixth, Eighth, and Tenth Circuits requiring resentencing). If conducting a *Crosby* hearing is an insufficient remedy for a Sixth Amendment violation, then the trial court's alternative holding in this case could not be considered constitutionally adequate relief for the defect in Mr. McLilly's sentence.

Even if a *Crosby* remand is a sufficient remedy for a constitutionally invalid sentence, this case would provide the Court with an appropriate vehicle for clarifying what such a hearing must entail. At a minimum, a sentencing court deciding not to resentence after conducting a *Crosby* hearing should be required to reasonably explain the basis for its decision. *See Chavez-Meza* v. *United States*, ___ U.S. ___, ___, 138 S.Ct. 1959, 1964 (2018). The trial court's order denying Mr. McLilly's post-conviction motion gave no meaningful explanation for the court's decision not to resentence. And the single sentence of relevant analysis in the order referred to a punishment other than the one that implicated the Sixth Amendment. Congress has directed that habeas petitions be "dispose[d] of . . . as law and justice require." 28 U.S.C. § 2243. Compliance with that mandate calls for more than a cursory, off-point statement of unwillingness to consider a different sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. MCGRATH
Counsel of Record
503 South Saginaw Street
Suite 715
Flint, Michigan 48502
(810) 238-8540
mcgrathtph@aol.com

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