

23-6224

No. _____

ORIGINAL

FILED

DEC 04 2023

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Terry Daum — PETITIONER
(Your Name)

vs.

Stewart Eckert — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eastern District of New York

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Terry Daum #97-A-1295
(Your Name)

Auburn Correctional Facility, Box 681
(Address)

Auburn, New York 13024
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

FIRST QUESTION: Does the "reasonable probability standard, established in Brady v. Maryland, conflict with the "clear and convincing evidence" criteria, defined under Sawyer v. Whitely, once a petitioner initially meets the high bar, regarding a 28 U.S.C. § 2244 (b) application?

SECOND QUESTION: Does the denial of a Certificate of Appealability application pursuant to 28 U.S.C. § 2253 (c), conflict with the clear and convincing evidence standard, that was met by petitioner through gatekeepers?

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

Daum v. Eckert, 2021, WL 4057190, dated:
September 7th, 2021; Second Circuit Court of Appeals.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1. <i>Brady v. Maryland</i> , 373 U.S. 83	8
2. <i>Sawyer v. Whitely</i> , 505 U.S. 333	8, 11
3. <i>McQuiggin v. Perkins</i> , 569 U.S. 383, 396-397	8
4. <i>Kyles v. Whitley</i> , 514 U.S. 419, 434	11
5. <i>Chinn v. Shoop</i> , 598 U.S. --- (2023)	11
6. <i>Williams v. Taylor</i> , 529 U.S. 362, 405-406	11
7. <i>Schlup v. Delo</i> , 513 U.S. 298	9, 11
8. <i>Jackson v. Virginia</i> , 443 U.S. 337	11
9. <i>Murray v. Carrier</i> , 447 U.S. 478	11
10. <i>Rivas v. Fischer</i> , 687 F.3d 514	8
11. <i>Quezada v. Smith</i> , 624 F.3d 514	9
12. <i>LaBounty v. Adler</i> , 933 F.2d 121, 123	9
13. <i>Thorsen v. Annucci</i> , 2021 WL 2156454	10
 STATUTES AND RULES	
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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 I 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 United States district court appears at Appendix H to the petition and is

☐ reported at _____; 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 DG 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 Richmond County, Supreme Court court appears at Appendix F 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 July 26, 2023.

[] No petition for rehearing was timely filed in my case.

ferrydaan ✓ [✱] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 12, 2023, and a copy of the order denying rehearing appears at Appendix J.

[] 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 ~~2-24-22~~ 2-24-22 *ferrydaan* ✓. A copy of that decision appears at Appendix B G.

[] 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

FIRST AMENDMENT of the United States
Constitution

FOURTEENTH AMENDMENT of the United States
Constitution

28 U.S.C. § 2244 (b)

28 U.S.C. § 2253 (c)

28 U.S.C. § 2254 (e)

STATEMENT OF THE CASE

1. Petitioner was arrested on January 29th, 1996, for a spree of armed robberies, based on a joint investigation, between Kings and Richmond Counties, in the State of New York. After Petitioners arrest he was placed in multiple lineups at the 70th Precinct, located in Brooklyn, New York. Petitioner was then identified by several witnesses for robbery offenses in both Counties.
2. Petitioner plead not guilty after being arraigned on a sealed indictment, in the Richmond County, Supreme Court, for three separate armed robberies. Subsequently the case proceeded to a court ordered identification hearing. At this hearing, POLICE OFFICER PETER BATTISTA (Battista), testified to the identification and lineup procedures. Immediately after direct examination, defense counsel advised the hearing judge, no discovery material was disclosed. This court ordered the release of four Police reports, but those reports did not pertain to any witness that failed to identify petitioner. It was defense counsels position that the identification procedures were contaminated. Counsel also attempted to extract testimony involving witnesses negative photo identifications. However, the hearing court, over multiple objections from counsel, precluded any information from being disclosed regarding negative identifications, including the identities of those viewers. At the close of the hearing, the court ordered defense counsel to return those police reports back to the prosecutor. He complied.
3. On the eve of trial, the prosecutor released discovery materials. Upon inquiry from the trial judge, the prosecutor advised the court, certain witnesses were unavailable, one involving NICHOLAS SAAVEDRA (Saavedra), The Brady witness. Based on their response, the court directed the prosecutor to present direct evidence, supporting Mr.Saavedra's unavailability.
4. At the trial, the prosecutor presented Officer Battista's testimony, regarding his unsuccessful efforts to locate Mr.Saavedra. In addition to their direct case, the prosecution presented three eyewitnesses and a lay-witness. Each eyewitness testified to the robbery and or, petitioners identification:
 - (a) SHAZAD SOHAIL (Sohail), an employee at 200 Rhine Avenue, Staten

Island, New York, testified, while in the store's basement, he witnessed petitioner, with a gun, jump over the counter, removed currency without permission. Mr Saavedra, an employee who was working the night of the robbery, was manning the register. According to Sohail, while witnessing the event from the basement's store monitor, he located a pipe and rushed upstairs to defend the store. Upon arrival, the petitioner was gone, but Sohail encountered a second perpetrator who was unarmed, being physically jumped on and restrained by other employers. Petitioner immediately returned to the store, with the same weapon and demanded the release of his accomplice. Sohail also testified that he positively identified the petitioner in the photo array and lineup procedures and that, such identification was based on the petitioner having nothing covering his face during the robbery;

(b) RAFAEL ZEAS (Zas), an employee at 1805 Forest Avenue, Staten Island, New York, testified, during late hours, three men, one with a weapon in his pocket, went behind the counter and robbed the establishment. Zeas was positioned down the aisle, when confronted by an accomplice, who slammed him on his back and removed currency from from his wallet. Zeas observations, according to him, were made while on his back, identifying petitioner when he exited the store. Although Zeas testified to his positive identification, but swore, that he never identified petitioner's picture in the photo array. In an alarming tone, the trial judge instructed the prosecutor to correct that testimony since Battista testified to Zeas photo array identification, during the identification hearing. In addition to Zeas testimony, the prosecutor presented a video surveillance recording, of a fleeting, poor quality, exposure of a robbery. The trial court agreed with defense counsel, that such video lacked any probative value for the prosecution, but still, the court admitted the tape into evidence, stating it can support the petitioner's defense of a misidentification;

(c) Because of the flawed video recording, which failed to clearly identify the petitioner on tape, the prosecution and by late

notice, presented lay-witness testimony from OMA DEVI DEONARINE (Deonarine), to confirm an all black wool hat, allegedly the petitioner owned, depicted in a still photograph, generated from the video surveillance recording;

(d) SILVESTER OREA (Orea), he testified for the 956 Richmond Avenue robbery. For the most part, he testified to the robbery and his positive identification of petitioner during the lineup and in court, and

(e) POLICE OFFICER PETER BATTISTA, testified at trial involving the investigation, the identification procedures, including his diligence in attempting to locate certain unavailable witnesses. As part of Battista's testimony, he claimed that Saavedra could not be located, after multiple attempts. He further testified that he interviewed witnesses and presented a photo array depicting the petitioner in spot two. After apprehending the petitioner in, Brooklyn, New York, Battista gathered eyewitnesses overall, waited to view petitioner's lineup and was then escorted out of the precinct. After the viewing, they did not return to the waiting room with other potential witnesses. According to Battista, each of his witnesses identified petitioner in seat number five.

5. As part of the petitioners defense, he presented a misidentification case and also tried to show the jury on how, the investigation was contaminated, including flawed. As mentioned above, late disclosures occurred involving Brady material. The prosecutor disclosed a photo array viewing of another unavailable witness, Bharat Patel, involving the Zeas robbery. Mr. Patel failed to identify the petitioner in the photo array. Due to the late disclosure and no contact information (of any unavailable witness), the court admitted into evidence Mr. Patel's hearsay, negative viewing. Outside of that, no other information pertaining to Brady was disclosed, no contact information or any other information.
6. Petitioner appealed the conviction to the New York State Appellate Division, Second Department, but that decision was affirmed on December 26th, 2000 (APPENDIX-A [Decision; and Appellate Briefs for petitioner and respondent]).

POST CONVICTION/NEW AND SUPPRESSED EVIDENCE

7. After exhausting the petitioner's direct appeal and his Federal Writ of Habeas Corpus, years later, petitioner employed a private investigator, JOHN OLIVIERI (Olivieri), from Olivieri Investigations, located in Staten Island, New York. Petitioner supplied the names of the testifying and non-testifying witnesses to Olivieri for investigation purposes.
8. The Olivieri investigation revealed that Mr. Saavedra, the declared unavailable witness, revealed in his 2014 Affidavit, the following statements: "My name is Nicholas Saavedra on October 23rd, 1995, I was working at the register in My Deli located at 200 Rhine Avenue, when I was held up at gunpoint by a masked man who seemed shorter than me (5'5") jump over the counter and rifle the register when a second person walked in on the side of the Deli and after rifling through his pockets left and I jumped over the counter he must have been 6 feet tall or so, mixed race and was struggling on the floor at some point he got help and was able to get loose to leave the store. Sometime after the robbery a Detective came to the store with a photograph where I could not pick up or I.D them from the pictures at the time of the robbery, I live in the same location in Staten Island and at no time did the police department or district attorney attempt to contact me during this robbery. In October 1995 I give statement to the police I reviewed a police document dated October 25th, 1995 wher it states that I gave a description of 3 people had robbed store and remember only encountering 2 people. I make this statement on my own free will" (APPENDIX-B [2014 Affidavit]).
9. The trial witness Sohail, revealed in his 2014 Affidavit, the following statements: "My name is Syed Shahzad, I reside at 351 Atlantic Avenue S.I.N.Y 10305. On October 23rd, 1995, I was a worker in a store called My Deli, which is located at 200 Rhine Avenue, Staten Island N.Y. In the early morning of that day the store was robbed. Sometime after the robbery I was asked to go to

the police precinct and look at photographs. At that time I could not recognize anyone. Sometime after the police came to my store and showed me some photographs I do not recall picking anyone out of those photographs. I did look at a copy of the photos say they showed me but at this I do not recall seeing those photos. I did see my signature on the back of the photo's it appears to be my. I then went to a Police Precinct in Brooklyn. The Police asked me to look at a lineup & could not pick anyone out. I was then asked by a police officer who was in the room with me after I looked at the lineup and could not pick anyone out. "Which one looked the closest to the person that robbed your store? I said number five, but his hair is different. This happened inside the room with the window that I looked through. I write this statement of my own free will. I have not been threatened or forced to make this statement" (APPENDIX-C [Sohail's 2014 Affidavit]).

10. The trial witness Zeas, who was the eyewitness in the second robbery, unwilling to sign an affidavit, but revealed to the investigator Olivieri, the following statements: " I John Olivieri, being duly sworn, deposes and says that the following statements are true:
 1. That during my investigation involving your present conviction, I also interviewed Rafael Zeas on October 14th, 2014, whom resides at 152 Graham Avenue, Staten Island, New York.
 2. During the interview, Zeas advised me that on October 30th, 1995, he was an employee at the 24-Hour Deli located at 1805 Forest Avenue, in Staten Island. He explained that on the aforementioned date, the store was robbed and that he was present for the incident.
 3. According to Zeas, in late January, Detectives came to his home and picked him up and escorted him to Brooklyn, to view a lineup. Zeas states that he was placed in the precincts waiting room with other people he believed to be witnesses. He surmised this because everyone was talking about stores getting robbed. Prior to Zeas viewing the lineup, another person who just viewed the lineup came into the waiting room and stated that "the person is in seat number 5" referring to the suspect. Zeas stated that after hearing this statement, he was then called upon to view the same lineup and he

too identified the suspect in seat number 5.

4. Zeas further stated that he felt strongly Intimidated by the District Attorney's Office during the trial. Often times he did not want to appear and express this to the District Attorney's Office. During these times, he was threatened with prosecution himself if he did not comply.
5. Although Zeas did not sign an Affidavit, but Zeas advised me that, if he were called into court to testify, he would be willing to reveal what occurred in the precincts waiting room." (APPENDIX-D [Olivieri's 2014 Affidavit]).

POST-CONVICTION PROCEEDINGS

11. Petitioner then submitted an application, pursuant to 28 U.S.C. 2244(b), to the Second Circuit Court of Appeals. On November 16th, 2016, the Mandate was issued. The Circuit Court "GRANTED" the application, citing Brady v. Maryland, 373 U.S: 83 (1963), for "not disclosing that an eyewitness, Nicholas Saavedra, had been unable to identify him in a photo array" (APPENDIX-E [MANDATE]).
12. Upon transfer and receipt of the petition, the Eastern District of New York, issued an order, requiring petitioner to exhaust only the Brady claim in state court. After nearly six years of state delay on November 21st, 2021, Honorable Alexander Jeong, denied the motion without a hearing (APPENDIX-F [State Court Decisision], ["SCD"]).
13. The State Court determined that petitioners's claim involving the negative identification was not direct exculpatory evidence, Such determination was based on state court analysis of People v. Marshal, 26 NY3d 495, ftn.1 (NY Ct. of App., 2015); 337751, at *8 (EDNY, 2016).

14. To be more specific, the state court denied petitioner relief based on the position that :
- (a) "the failure to identify someone in an identification procedure, in and of itself, a Brady violation" (Id. @ 16);
 - (b) claiming Nnodimele was un-persuasive since Nnodimele was "definitely not the perpetrator" and, reciting that there " was the combination of exculpatory statements", along with " the non-identification" (Id. @ 16); and,
 - (c) according to the state court, the "failure to identify the Defendant does not have any bearing", on the trial's witness's positive identification (Id. @ 17).
15. Petitioner then sought leave to appeal from the New York State Appellate Division, Second Department, but such application for further review was denied on February ~~4th~~^{15th}, 2022 (APPENDIX-G).
16. After exhausting the Brady claim in state court, The United States District Court for the Eastern District of New York denied the second petition with out a hearing, adopting in part, the state courts decision. However, the District Court came to different conclusion involving suppression. In fact, the District Court determined " Daum has at most established only that the fact Saavedra had viewed a photo array was suppressed " (APPENDIX-H [District Court Decision, @ *7 ["DCD"]).
17. The District Court also made other determinations regarding the new/suppressed evidence:
- (a) "It is true that Saavedra's 2014 affidavit contradicts Battista's testimony at trial"(DCD @ *9);
 - (b) "Sohail's and Battista's testimony differs slightly from Sohail's 2014 affidavit (DCD @ *9);
 - (c) "the lineup in which Zea's participated is somewhat more troubling" and "Zea's identification may have been compromised" based on Battista's lineup procedures (DCD @ *9).
 - (d) "due diligence is a close call" (DCD @ *11).

18. Petitioner then sought a Certificate of Appealability, to appeal the District Court decision. On July 26th, 2023, the Second Circuit Court of Appeals, denied that request, claiming that petitioner failed to make a "substantial showing of the denial of a constitutional right", pursuant to 28 U.S.C 2253 (c) (APPENDIX-I [COA Decision]).
19. Subsequently, petitioner then pursued another request asking the Second Circuit to reconsider and or, in the alteration, for reconsideration en banc. However, that too was denied on October 12th, 2023 (APPENDIX-J [COA Reconsideration Decision]).

REASONS FOR GRANTING THE WRIT

FIRST QUESTION: Does the "reasonable probability" standard, established in Brady v. Maryland conflict with the "clear and convincing evidence" criteria, defined under Sawyer v. Whitley, once petitioner initially meets the high bar, regarding a 28 U.S.C 2244(b) application ?

20. The clear & convincing evidence criteria, 28 U.S.C 2244 (b), verses, the reasonable probability standard, involving Brady. The Second Circuit has interpreted 2244 as a strict and demanding requirement (Rivas v. Fischer, 687 F.3d 514 [C.A. 2 2012]). Likewise, Congress required second or successive habeas petitioners "to meet a higher level of proof", when incorporating the clear & convincing evidence criteria into the statute, including the standard for federal evidentiary hearings (McQuiggin v. Perkins, 569 U.S 383, 396-397).

21. In order to satisfy the statute, petitioner was required to show gatekeepers, the Circuit or District Court, during the application process: (i) diligence; and (ii) the clear and convincing evidence criteria (28 U.S.C 2244 (b)), during the screening of his application. Three gatekeepers determined a constitutional protected right, *Brady v. Maryland*, was violated "by not disclosing that an eyewitness, Nicholas Saavedra, had been unable to identify him in a photo array" (Circuit Judges: Amayla L. Kearse; Raymond J. Lohier, Jr; and, Christopher F. Droney). However these gatekeepers also instructed the District Court, to review petitioner's "other" claims, citing 28 U.S.C 2244 (see, APPENDIX-E [MANDATE]).
22. Once the Circuit Court determined petitioner established "probable cause", under the highly intense procedure, involving at least one of the presented claims, i.e, *Brady*. Then and only then, was he able to file the entire petition with the District Court and proceed to obtain relief, as required by statute (*Quezada v. Smith*, 624 F.3d 514 [C.A 2 2010]; 28 U.S.C 2254 [e]).
23. Despite that, the standard needs to be interpreted by the Supreme Court, on what was meant, regarding the statute, based on the Circuit and District Court roles, and functions, when faced with second and or, successive petitions.
24. As stated, the criteria of 28 U.S.C. 2244(b), based on the statute and intent of Congress, including Supreme Court interpretation, such application procedure is demanding. During the screening process, the facts considered are accepted as true (*LaBounty v. Adler*, 933 F.2d 121,123 [C.A.2 1991]). Based on careful screening of those facts, i.e, new reliable information (*Schlup v. Delo*, 513 U.S 298)... Then, the legal question for gatekeepers, is whether or not, petitioner's constitutional rights were violated. If gatekeepers determine that it did offend well established federal law, then petitioner established probable cause, for filing the petition within the District Court, for purpose of obtaining relief.

25. We understand, jurisdictionally, District Courts resolve factual disputes, based on submissions and or, at evidentiary hearings, pursuant to 28 U.S.C 2254(e). Depending on District Court action, if the allegations presented to the gatekeepers, are in fact true, a determination granting the writ, should have been awarded by the District Court, by law.
26. It should be settled law by Supreme Court, regarding 2244 and its definition and instructions for District Courts, when facing an already approved 2244 application. Although 2244 requires District Courts, to ensure that the criteria was met before granting releief. However, the statute did not authorize a second look retrospectively as interpreted by the District Court (Thorsen v. Annucci, 2021, WL 2156454 [NDNY October 27th, 2021]).
27. Petitioner argues a second look would potentially be necessary, only when, ensuring that the factual part of the petition, are in fact true, since opposition could present a disputed fact and so, would warrant District Court resolve and final overview, regarding potential-supplemented-facts, when viewing the federal protected law.
28. Besides that, second-looks was not what Congress intended, instead, it should be interpreted as, District Courts role, is to endorse the facts, if true, then enforce the Mandate, based on procedures and functions of the District Court, when faced with an already approved application.
29. In the instant case, the only factual issues that were in dispute at the District Court level were:(a) diligence; and (b) suppression. Although the District Court made reference to diligence being a "close call" without conducting a specific fact-finding inquiry; but also, determined that the negative photo array viewing "was at most suppressed" (Id. @). Without a hearing and based on submissions, ~~the District Court made a favorable suppressions~~ (TD) the District Court made favorable suppression determination and then, when relief should of been issued, denied the petition. Instead, the District Court decided to re-evaluate and eventually overrule the MANDATE.

30. During the District Court's analysis of the Brady claim, the Court determined that a reasonable probability did not exist. By law, this was a huge conflict since the Supreme Court has emphasized, the relatively low burden of materiality, for purposes of Brady (Kyles v. Whitley, 514 U.S. 419,434). In fact the "reasonable probability" standard is not, under no circumstance, the same as the "more likely than not" or "preponderance of the evidence" standard; (Chin v. Shoop, 598 U.S. ---[2023]). In fact it is "contrary to" precedent to equate the "reasonable probability" materiality standard with the more-likely-than not standard (Williams v. Taylor, 529 U.S. 362, 405-406).
31. The clear and convincing evidence standard, verses all other standards (compare, Sawyer v. Whitley, 505 U.S. 333 [clear and convincing evidence]; Schlup v. Delo, 513 U.S. 298 [more likely than not]; Jackson v. Virginia, 443 U.S. 337 [sufficiency of the evidence]; Murray v. Carrier, 447 U.S. 478 [miscarriage of justice]; and also, the COA criteria, involving a "substantial showing of a denial of a constitutional right" (28 U.S.C 2253 [c])).
32. Despite that, the District Courts determination conflicted with, the already approved application, a MANDATE issued by gatekeepers in the Circuit Court, when petitioner satisfied the clear and convincing evidence criteria.
33. Based on the confusion with the statute, the role and functions of the procedure, petitioner was denied his constitutional right to obtain relief and or, a fair review by the District Court.

SECOND QUESTION: Does the denial of a Certificate of Appealability application, pursuant to 2253 (c), conflict with the clear and convincing evidence criteria, 2244 (b), that was met by petitioner through gatekeepers ?

34. During the Appeal application, the Circuit Court denied petitioner a COA, a standard that should have been automatically met once petitioner survived 2244 (b [i],[ii]). Petitioner should have protected right, to be heard on appeal, once receiving passage from gatekeepers, during the initial screening.
35. The Circuit Court has maintained that the COA application process, requires a "substantial showing of the denial of a constitutional right", in order to proceed further on appeal (28 U.S.C. 2253 [c]). Petitioner failed to meet that criteria (see, APPENDIX-H [MANDATE-11]). Does that determination conflict with an, already approved 2244 application, when that criteria is more demanding ?
36. Petitioner suggest to the Supreme Court that, second and or, successive petitioners, satisfies all criteria's once obtaining a MANDATE, authorizing the filing of a second/successive petition, pursuant to 28 U.S.C 2244 (b [i] [ii]), a standard petitioner already met and such, should also satisfy 28 U.S.C 2253 (c).
37. The denial of a COA violated petitioner's right to be heard on appeal and the Supreme Court should make a determination, regarding the rights of petitioners, when one satisfies 2244 (b). A petitioner should have a hall-pass, as of right, once satisfying 28 U.S.C 2244 (b [ii]).
38. If petitioner was heard on appeal, he would have established a lessor burden, the reasonable probability standard and would of been awarded relief. However, he was denied his First and Fourteenth Amendments of the United States Constitution.

THANK YOU FOR CONSIDERING PETITIONER'S APPLICATION.

Respectfully,

Terry Daum
Terry Daum
-Petitioner-

11/26/23