No. 24-

24-5139

ORIGINAL

In The
SUPREME COURT OF THE UNITED STATES

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LAMAR MCKAY,
*Petitioner,*

v.

JEFF TANNER, Warden
*Respondent.*



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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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**Lamar McKay, #165513**
Petitioner, *in pro per*[*]
Macomb Correctional Facility
34625 26 Mile Road
Lenox Township, MI 48048

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

## QUESTIONS PRESENTED

I. WHERE THE TRIAL COURT DENIED PETITIONER, LAMAR LORENZO MCKAY'S MOTION FOR A DIRECTED VERDICT ON – FIRST DEGREE MURDER WHERE THE EVIDENCE PRESENTED WAS LEGALLY INSUFFICIENT TO ESTABISH PREMEDITATION BEYOND REASONABLE DOUBT, RENDERING THE JURY'S VERDICT UNRELIABLE. DOES DUE PROCESS REQUIRE REVERSAL? US CONST, AMS V, VI, XIV; MICH. CONST, 1963, ART 1, §§ 17, 20.

II. WAS PETITIONER DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO REQUEST A REFERRAL FOR A MENTAL STATUS EXAMINATION, AND FAILING TO HAVE ALL OF THE ITEMS RECOVERED FROM THE SCENE BY AUTHORITIES AND ENTERED INTO EVIDENCE TESTED FOR DNA? THIS COURT SHOULD REMAND THIS MATTER FOR AN EVIDENTIARY HEARING. US CONST, AMS VI, XIV; CONST, 1963, ART. 1, §20?

## PARTIES TO THE PROCEEDING

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

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his

defense." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich. 634, 641; 638 N.W.2d 597 (2004) (citing *Gideon v Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)).

**28 U.S.C. 1254(1)**: Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

**28 U.S.C. 1915(a)(1)**: Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

# STATEMENT OF THE CASE

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

### INTRODUCTION

#### SUMMARY

Petitioner Lamar McKay (hereinafter "Petitioner") commenced this action as a State prisoner in the District Court pursuant to 28 U.S.C. § 2254, by filing a petition for A Writ of Habeas Corpus on February 12, 2022. On September 11, 2023, District Court Judge George Caram Steeh entered an Opinion and Order denying the petition for a Writ of Habeas Corpus, declining to issue a Certificate of Appealability, and denying Leave to Appeal In Forma Pauperis (**See APP. B, Opinion and Order**). Judgment was entered on the same date.

The final order of the United States Court of Appeals, 6th Circuit, denying a certificate of appealability was issued on March 29, 2024. (**See APP. A, Order and Judgment**). Judgment was entered on the same date.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Petitioner is serving a prison term of Life without the possibility of parole for his conviction of First-degree premeditated murder, (M.C.L.A. 750.316), and 2 to 20 years for the Felon-in-possession of a firearm conviction, (M.C.L.A. 750.224f), and a consecutive prison terms of 2 years for each of his convictions of Felony-Firearm, (M.C.L.A. 750.227b).

The trial in this matter took just three days to complete with the Prosecutor calling ten (10) witnesses.[1] Petitioner did not call any witnesses for the defense nor did he testify on his own behalf. The jury reached its verdict in this case after deliberating for approximately 3 hours and 15 minutes over two days. Petitioner's arrest and convictions resulted from the shooting death of a man named Jamel Alphonzo McIntyre, who Petitioner reportedly had known for nearly ten years and who was somehow involved with preforming work at a home believed to be owned by Petitioner where the shooting occurred. (Transcript of the Trial (hereinafter, "TT") dated: 8/5/2019, pp. 124-126, 141-142 and 158).

Among the witnesses to testify for the prosecution was Mr. Edward Fuller, who reported being present at the time of the shooting on February 5, 2018. (TT, 8/5/2019, pp. 123-125). Mr. Fuller testified that he, Petitioner, and two other men (known only as Bobby and Allen)[2], were present in the home where the shooting occurred. Mr. Fuller added that he and Petitioner were actually present at this house the entire day.

On cross examination, Mr. Fuller admitted giving two conflicting statements to the police about the shooting. In the first statement on or about February 5, 2018, he admitted to being asked whether Petitioner owned a weapon and Mr. Fuller reported that "he did not". During his testimony however, Mr. Fuller admitted this

[1] The transcripts provided were prepared using video recordings of the proceedings and contained numerous omissions of certain testimony throughout. At times, these omissions made it difficult to understand the testimony of the witnesses.

[2] The officer-in-charge, homicide detective John Mitchell, reported speaking with Allen, but was unable to locate the other individual named Bobby. (TT, 8/6/2019. pp. 89-90 and 93-94). While Allen apparently admitted to being present when the shooting occurred he denied seeing anything.

response was wrong and was changed in his second statement. (TT, 8/5/2019, p. 146). Mr. Fuller also admitted to lying about not touching the shotgun before the shooting. (TT, 8/5/2019, p. 146). On direct examination, Mr. Fuller admitted to seeing the weapon about a month before the subject shooting and reported putting it away after Petitioner got drunk. (TT, 8/5/2019, p. 128).

Following the testimony of several other witnesses for the prosecution, both parties rested and the trial judge instructed the jury. The jury found there was insufficient evidence to support the charge of First-degree Felony murder and acquitted Petitioner of this charged offense, (TT, 8/7/2019, pp. 6-7). However, the jury did find the evidence sufficient to support Petitioner acted with premeditation and found him guilty of First-degree murder. The jury also found Petitioner guilty of being a felon in possession of a firearm, and guilty of two counts of felony firearm.

On 8/22/2019, Petitioner was sentenced to serve a term of incarceration for life without the possibility of parole for his first-degree premeditated murder, additionally Petitioner received a concurrent sentence of 2 to 20 years imprisonment for the felon in possession of a firearm conviction, and 2 years for each conviction of felony firearm to be serve consecutively.

## SUMMARY OF THE ARGUMENTS

The U.S. District Court for the Eastern District of Michigan denied a Writ of Habeas Corpus, and declined to issue a certificate of appealability finding that there was sufficient evidence presented to establish premeditation and deliberation and that Petitioner had not been denied the effective assistance of trial counsel, for

failing to request a mental status examination in order to raise an insanity defense, and for failing to request additional testing for DNA under the circumstances of this case. *McKay v Stephenson*, 2023 U.S. Dist. LEXIS 160371.

The U.S. Sixth Circuit denied Petitioner a COA, holding that the State did present sufficient evidence and that reasonable jurists would agree that the state court's rejection of this claim was not an unreasonable application of federal law. *McKay v Tanner*, 2024 U.S.App. LEXIS 7514.

The central question in this case was whether Petitioner was afforded his constitutional guarantee of a full and fair criminal trial within the parameters of Due Process of Law, and if not does the violation raise to the level of a denial of constitutional magnitude requiring reversal?

The Due Process Clause of the Constitution, US Const, Am XIV, requires a prosecutor to prove the elements of a crime beyond a reasonable doubt in order to convict a defendant. *See generally, In re Winship*, 397 US 358 (1970); *Jackson v Virginia,* 443 US 307 (1979). The mere existence of *some* evidence to support the conviction *is not enough,* there must be "sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Hampton*, 407 Mich 354, 366 (1979); *People v Wolfe,* 440 Mich 508, 514 (1992). Reviewing for sufficiency of the evidence requires considering the evidence as a whole:

> "The concept of sufficiency . . . is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law. . . . In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror

in reasonably concluding the existence of that fact beyond a reasonable doubt."

*Hampton*, 407 Mich at 367-68.

Here, there was no evidence that Petitioner planned, orchestrated, or conspired to kill the victim in this case.

Lastly, in light of the extensive history of Petitioner's mental illness, Mr. Watkins argued that the limitations period should be equitably tolled on this basis.

premeditated and deliberate. *People v Youngblood*, 165 Mich. App. 381, 387; 418 N.W.2d 472 (1998) (citing *People v Burgess*, 96 Mich. App. 390; 292 N.W.2d 209 (1980)).

The prosecution in this matter failed to present sufficient evidence, even when viewed in a light most favorable to the prosecution, to enable a rational and reasonable trier of fact to have found the requisite elements of premeditation and deliberation. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364; 90 S. Ct. 1068; 25 L. Ed. 2d 368 (1970).

At the close of the prosecution's case-in-chief, trial counsel for Mr. McKay made a motion for directed verdict on the premeditated murder charge, arguing the prosecution had failed to present sufficient evidence to support presenting that charge to the jury. (TT, dated August 6, 2019, pp. 123-126). The trial court, without providing any detail in support, denied the motion and the jury was subsequently given the first-degree murder option during the final instructions. (TT, dated August 6, 2019, 166-167).

The trial judge reversibly erred in denying the motion for directed verdict on the premeditated murder charge. The jury should not have been given the option to convict Mr. McKay on that charge, as the homicide allegation should have gone to the jury on no higher charge than second-degree murder. On the facts of this case,

the prosecution failed to present sufficient evidence to permit a jury to find, beyond a reasonable doubt (even assuming for the sake of argument that Mr. McKay fired the fatal shots), that he acted with premeditation and deliberation.

"To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problems." *People v Morrin*, 31 Mich. App. 301, 329-330; 187 N.W.2d 434 (1971). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich. App. 527, 537; 531 NW2d 780 (1995). Premeditation cannot be inferred solely from the use of a deadly weapon, *People v Gill*, 43 Mich. App. 598, 601-602; 204 N.W.2d 699 (1972); from the bizarre nature of the wound, *Morrin*, *supra* at 310; or from the number or brutality of the wounds. *People v Hoffmeister*, 394 Mich. 155, 159; 229 N.W.2d 305 (1975).

On review, this Court must consider the facts in conjunction with one another and "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich. 392, 400, 404; 614 N.W.2d 78 (2000). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime charged. *People v Carines*, 460 Mich. 750, 757; 597 N.W.2d 130 (1999) (quoting *People v Allen*, 201 Mich. App. 98, 100; 505 N.W.2d 869 (1993)).

"Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing;

(3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Anderson, supra* at 537.

The record of this matter shows that the shooting of Mr. McIntyre, even viewed in a light most favorable to the prosecution, was an instantaneous incident that occurred as a result of some sort of reported on-going argument about money between Mr. McKay and Mr. McIntyre. Mr. Fuller testified Mr. McKay stated he was not going to take any more "ass whoopings" from Mr. McIntyre any more, but there was evidence to suggest this statement meant Mr. McKay was going to kill Mr. McIntyre. When Mr. McIntyre arrived at the home on Fleming Street on the evening of February 5, 2018, he parked his vehicle across the driveway suggesting he was not planning to stay very long. There was AQ evidence to support what sort of exchange (physical or verbal) occurred between the two men when the side door was opened.

If Mr. McKay's reported statement to Mr. Fuller is to believed, it is certainly possible Mr. McIntyre may have said or done something to Mr. McKay to trigger a violent response[3]. If true, what happened in response was a spur-of-the-moment action on behalf of Mr. McKay, that did not provide an opportunity for him to deliberate or reflect on the actions taken. It was, at least, arguable Mr. McKay was impacted by anger at the time, rather than any premeditated plan to injure Mr. McIntyre. See e.g., *People v Plummer*, 229 Mich. App. 293; 581 N.W.2d 753 (1998).

[3] It should be noted, Mr. McIntyre is no stranger to violence. In 2012, he entered a plea to the charge of weapons - firearms - careless discharge causing injury or death in Wayne County Circuit Court. (See case No.: 2012-005428-01-FH).

Mr. Fuller acknowledged there was no evidence of any pre-existing bad blood or altercations between Mr. McKay and Mr. McIntyre. There was no evidence that Mr. McKay had any motive to harm Mr. McIntyre unrelated to this unanticipated argument between the two men over money. There was no evidence Mr. McIntyre had threatened harm against Mr. McIntyre.

The prosecution presented no evidence that Mr. McKay planned to get into any sort of altercation with Mr. McIntyre, let alone to shoot or intend to kill him. Instead, this was a highly volatile situation fueled by anger and had nothing to do with deliberation and planning.

While it is acknowledged there is no required time lapse between the formulation of the intent to kill and the act itself in order to prove premeditation, *People v Oros*, 502 Mich. 229, 243; 917 N.W.2d 559 (2018), there still must be some reasoned basis to distinguish between the two degrees of murder, particularly given the differing sentencing consequences between first and second-degree murder. If the facts of the case at bar demonstrate a constitutionally sufficient allegation of premeditated murder, there will remain little if any difference between those two degrees. The mere fact that Mr. McIntyre was shot with a dangerous weapon does not mandate a finding of premeditation. *Gill, supra.*

The dissent in *Oros* raised this same concern, writing, "[i]f intent to kill plus any time window during which one could have accomplished premeditation and deliberation now amounts to proof beyond a reasonable doubt, then I find it hard to imagine what second degree murder wouldn't also be a first-degree murder. That

can't be constitutional." *Oros, supra* at 263 (McCormack, J., dissenting). On this record, the trial judge should have granted the defense's motion for a directed verdict on the premeditated murder count, and should not have submitted that charge to the jury.

The Michigan Court of Appeals in *People v Vail*, 49 Mich. App. 598; 212 N.W.2d 268 (1975), held it reversible error in all cases where the trial judge submitted a charge to the jury unsupported by legally sufficient evidence, regardless of whether a lesser included offense was present. Subsequently, the Court in *People v Graves*, 458 Mich. 476; 581 N.W.2d 229 (1998), held this situation is instead subject to the harmless error standard announced in *People v Gems*, 457 Mich. 170; 577 N.W.2d 422 (1998). The Graves Court noted, however, that while the automatic reversal rule of Vail was being discarded, the fact a jury acquits on the erroneously submitted charged offense and convicts only on a lesser offense does not automatically lead to a conclusion of harmless error:

> If, however, sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances. That is to say, a different result may be reached, under a *Gearns* review, where the jury is presented an erroneous instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) **as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense**.
> *Graves, supra* at 487-488. (Emphasis added).

In *Graves*, the defendant was charged with first degree murder, but convicted only on manslaughter, with the jury additionally rejecting conviction on second-

degree murder. Under those circumstances, the Court found harmless error in the submission of the premeditated murder charge to the jury.

On the facts of this case, the premeditated first-degree murder conviction should be reversed and the matter remanded to the trial court for a new trial on the homicide charge, where the highest charge Mr. McKay can face is second-degree murder.

(counsel failed to protect client's interests in refusing to pursue insanity claim). See also *Thomas v Lockhart*, 738 F.2d 304 (8th Cir., 1984); *Blackburn v Foltz*, 828 F.2d 1177 (6th Cir., 1987). With respect to the failure to raise possible defenses, the Court in *Beasley v United States*, 491 F.2d 687, 696 (6th Cir., 1974), stated:

> **"Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner."**

In this case, based on the statements or testimony of Mr. Fuller, Petitioner appeared to act out of rage or anger that would appear to warrant a referral to the Wayne County Forensic Center for a criminal responsibility evaluation. To allegedly shoot someone three times with a shotgun at least one time at close range and then allegedly beat that person with the weapon while they lay in the street is not how a sane person would act over a dispute involving money. The record in this case does not show that any of the attorneys who represented Petitioner in this matter requested a referral for a mental status evaluation. The failure to do so denied Petitioner his constitutional due process rights to present a defense. U.S. Const., Amends. V, VI, XIV; *Holmes v California*, 547 U.S. 319; 126 S. Ct. 1727; 164 L.Ed.2d 503 (2006); *Bennett Scroggy*, 793 F.2d 772 (CA 6, 1986); *People v Gambrell*, 429 Mich. 401; 415 N.W.2d 202 (1987).

The other possibility is that Petitioner's aggressive actions were in response to his fear of Mr. McIntyre's violent tendencies. Mr. Fuller's testimony about Petitioner refusal to take any more beatings from Mr. McIntyre suggests Mr. McIntyre physically attacked Petitioner in the past. Based on Mr. McIntyre's prior criminal record, Petitioner's defense would have been better served making

to have the other items recovered by authorities tested for DNA to potentially raise some doubt about who was the actual shooter in this case. In addition, even though counsel suggested the individual seen walking down Lumpkin Street in the residential video was not carrying a weapon as suggested, the trail of items recovered by authorities followed this same path. If the results of DNA tests taken of the other items recovered by authorities were not all positive, the defense's suggestion the individual shown in the video was not Petitioner could have proved helpful in this case.

Counsel's failure or refusal to ask the trial court to order the People to test these items, or to request appointment of an independent expert to do so, fell below the objective standard of reasonableness and created a reasonable probability that this error affected the outcome of Petitioner's trial.

***Conclusion***:

Defense counsel's performance in this case fell below an objective standard of reasonableness, as Petitioner's mental status should have been reviewed before the matter proceeded to trial. The seemly unprovoked shooting, followed by the beating with the weapon, suggests more than just a dispute over money caused this incident. In addition, since there was no evidence linking all the shotgun parts recovered by authorities to one weapon, counsel should have asked the trial court judge to order the Prosecutor to test the DNA associated with all the items recovered, or, in the alternative, appoint an expert for the defense to accomplish this task. Given this was not done, the jury was free to link the items recovered to

the path the People suggested was taken by the person shown in the videos -- Which the People maintained was Mr. McKay. Defense counsel should have made an effort to have all of the items introduced into evidence tested for DNA.

Accordingly, Mr. McKay was denied effective assistance of counsel and his convictions should be vacated or set aside and the matter remanded for a new trial. In the alternative, this Court should remand the matter for a Ginther[5] hearing to establish a better record to review this issue.

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[5] People v Ginther, 390 Mich. 436; 212 N.W.2d 922 (1973).

## CONCLUSION AND RELIEF SOUGHT

**WHEREFORE**, Petitioner submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari, further Petitioner ask that the Court reverse his convictions and remand this matter to the Sixth Circuit Court of Appeals for reconsideration of the issues raised in the supplemental petition, or in the alternative with appropriate instructions to reconsider its holdings in *Hill v Mitchell* and *Watkins v Deangelo-Kipp* as they apply to mentally ill petitioners.

Respectfully submitted,

/s/ La Mar McKay

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Dated: June 12, 2024