

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS GLOVER-PETITIONER

vs.

JEFFREY WOODS, WARDEN-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

By: Thomas Glover #383099
Petitioner in *Pro Per*
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QUESTION(S) PRESENTED

- A. WERE THE VERDICTS OF GUILTY BASED UPON INSUFFICIENT EVIDENCE AND DID THIS CONSTITUTE A VIOLATION OF DUE PROCESS?**

- B. DID THE PROSECUTION'S MISCHARACTERIZATIONS OF CRITICAL EVIDENCE AND STATEMENTS UNDERMINE THE DEFENDANT'S THEORY OF SELF-DEFENSE, AND DID THIS DEPRIVE DEFENDANT OF HIS RIGHT TO PRESENT A DEFENSE AND DUE PROCESS RIGHT TO A FAIR TRIAL?**

- C. WAS DEFENDANT DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS AND MICHIGAN CONSTITUTION OF 1963, Art. 1, §§ 17, 20, WHERE DEFENSE COUNSEL FAILED TO, OR DID NOT INVESTIGATE AND/OR ADMIT WITNESSES AND OTHER EVIDENCE THAT WOULD HAVE SUPPORTED DEFENDANT'S CLAIM OF SELF-DEFENSE?**

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the coverpage.
- ☐ All parties **do not** appear in the caption of the case on the coverpage. 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

FEDERAL COURT OPINIONS

The Opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this petition and is reported at: 2017 U.S. App. LEXIS 18099; No. 17-1274.

The Opinion of the United States District Court for the Eastern District of Michigan appears at Appendix B to this petition and is reported at: 2017 U.S. Dist. LEXIS 16841; civil No. 2:14-CV-12630.

STATE COURT OPINIONS

The opinion of the Michigan Court of Appeals/the highest court to review the merits of the claims appears at Appendix C to this petition and is reported at: 2012 Mich. App. LEXIS 809; COA Dkt. No. 302412.

The opinion of the Michigan Supreme Court denying leave to appeal appears at Appendix D to this petition and is reported at: 2012 Mich LEXIS 1603; MSC Dkt. No. 145327.

The opinion of the Wayne County 3rd Judicial Circuit Court reviewing the merits of claims on post-conviction collateral review appears at Appendix E to this petition and is unpublished.

The opinion of the Michigan Court of Appeals denying leave to appeal on collateral review appears at Appendix F to this petition and is unpublished: COA Dkt. No. 321705.

The opinion of the Michigan Supreme Court denying leave to appeal appears at Appendix G to this petition and is reported at: 2015 Mich LEXIS 65; MSC Dkt. No. 149570.

STATEMENT OF JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **September 18, 2017**.

☒ 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: 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. §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

United States Constitution - Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution - Amendment 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 laws.

Michigan Compiled Laws Annotated § 750.83

Sec. 83. Assault with intent to commit murder-Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

M Crim JI 17.3 Assault with Intent to Murder

The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant tried to physically injure another person.
- (2) Second, that when the defendant committed the assault, [he / she] had the ability to cause an injury, or at least believed that [he / she] had the ability.
- (3) Third, that the defendant intended to kill the person [he / she] assaulted [, and the circumstances did not legally excuse or reduce the crime].

Michigan Compiled Laws Annotated § 750.317

Sec. 317. Second degree murder--All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

M Crim JI 16.5 Second-degree Murder

[The defendant is charged with the crime of / You may also consider the lesser charge of] second-degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death].
- (2) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [name deceased], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.
- [(3) Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]

Michigan Compiled Laws Annotated § 780.972

Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

- (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent imminent death of or great bodily harm to himself or herself or to another individual.
- (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has a legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

STATEMENT OF CASE

This case arises out of the death of Adrian Brown and the shooting of Willie Shears on June 26, 2010, in Detroit, Michigan. Petitioner, Thomas Glover, testified that the shooting occurred when he was shot in the back and returned fire in self-defense.

Petitioner, Thomas Glover, moved for a directed verdict, arguing that there was no premeditation or deliberation. Glover also asked that the first-degree murder charge be reduce to second-degree murder. Glover further argued that, with regard to the charge of assault with intent to murder Willie Shears, there was a wound to the ankle and no indication that he was shot anywhere else.

The prosecution argued that, with regard to Willie Shears, the doctrine of transferred intent applied and that the evidence showed the Glover shot Brown.

The Trial Court denied Glover's motion, finding sufficient evidence for the case to proceed to the jury and that the concept of transferred intent applied.

Thomas Glover, the petitioner herein, was found guilty by a jury of second-degree murder, Mich. Comp. Law Ann. § 750.317; assault with intent to commit murder, Mich. Comp. Law Ann. § 750.83; felon in possession of a firearm, Mich. Comp. Law Ann. § 750.224f; and, possession of a firearm during the commission of a felony, Mich. Comp. Law Ann. § 750.227b.

Petitioner filed an appeal of right in the Michigan Court of Appeals and on April 24, 2012 a decision affirming Petitioner's conviction was entered in an unpublished opinion. *People v Glover*, 2012 Mich. App. LEXIS 809; COA Dkt. No. 302412. See, Appendix C.

The Michigan Court of Appeals is the highest state court to issue an opinion as to the merits of Petitioner's claims raised on direct appeal. The Michigan Supreme Court denied leave to appeal on April 24, 2012. See, Appendix D.

On November 4, 2013, Petitioner filed a post-conviction Motion for Relief from Judgment pursuant to Mich. Ct. Rule 6.500 et seq., raising claims of prosecutorial misconduct and ineffective assistance of trial and appellate counsel, which was denied by the trial judge. Reasoning that it

could not review claims previously presented on direct appeal and that the claims lacked merit. see, Appendix E. The Michigan appellate courts denied petitioner leave to appeal. see, Appendix F & G.

On June 24, 2014, Petitioner filed a petition for writ of habeas corpus and requested that the proceedings be held in abeyance pending the exhaustion of the claims raised in his 6.500 motion for relief from judgment. The district court granted the request, giving Petitioner 90 days to file an amended petition.

In his amended petition, Petitioner essentially raised the following grounds:

- I. Verdicts of guilty for second-degree murder and assault with intent to commit murder were not supported by sufficient evidence because the prosecution failed to prove that he did not act in self-defense.
- II. Sentences imposed for second-degree murder and assault with intent to commit murder violate the constitutional guarantees against cruel and/or unusual punishment.
- III. The prosecutor committed misconduct by mischaracterizing Petitioner's testimony and medical records regarding his own gunshot wounds to defeat his theory of self-defense.
- IV. Trial counsel rendered ineffective assistance by failing to investigate and present witnesses and other evidence to support the theory of self-defense.

On February 7, 2017, the United District Court for the Eastern District of Michigan denied the petition with prejudice, claiming the first claim was not cognizable on habeas review and that the others lacked merit and denied a certificate of appealability. See, Appendix B.

Petitioner timely filed a Notice of Appeal and request for Certificate of Appealability. On September 18, 2017, the 6th Circuit U.S. Court of Appeals denied the request. See, Appendix A.

The facts in this case as distilled by the Michigan Court of Appeals show:

A. THE UNDERLYING EVENTS

This case arises out of the death of Adrian Brown and the shooting of Willie Shears on June 26, 2010, in Detroit, Michigan. At approximately 12:30 a.m. or 12:45 a.m., Brown; brothers, Willie and Robert Shears; and Bernard Crump arrived at a strip club called Starvin' Marvin's. The four men had driven to Starvin' Marvin's in two vehicles: Robert Shears and Crump were in a black Jaguar that Crump was driving, and Willie Shears and Brown were in Brown's van. They parked the vehicles in valet parking. Robert Shears, Willie Shears, and Crump then entered the club, while Brown initially remained outside. Brown came into the club five minutes later. The

men then ordered and drank a bottle of vodka. According to testimony, the men were in the club between 20 minutes to one hour. Brown then decided that he wanted to leave. The testimony of Willie Shears, Robert Shears, and Crump varies about what happened next.

According to Robert Shears, he and Brown walked out of the club first, exiting through the front door. Willie Shears and Crump came out just behind them. They stood and waited approximately 10 to 15 minutes for the valet to bring back Brown's van. But then someone from the valet service told them that Brown's van was not in the valet parking area. Brown then took his keys from the valet.

Robert Shears testified that he then heard five or six gunshots. After hearing the shots, Robert Shears then saw Brown fall to the ground. Robert Shears stated that at this time Willie Shears was standing near the front entrance of the club.

According to Robert Shears, after the shooting, although he did not believe that Brown was alive at that point, he called out to Crump to help him put Brown into the Jaguar. As Robert Shears was trying to get Brown into the Jaguar, another unidentified individual approached to help, so Robert Shears ran to look for Brown's van. Robert Shears found the van parked in a field on the next block. He drove to near the front entrance of the club and parked on the street. Robert Shears then found out that Willie Shears had also been shot, so he left to meet Willie Shears at the hospital. At the hospital, Robert Shears learned that Brown, who was at a different hospital, was in fact dead.

According to Willie Shears, after exiting the club, they waited for Brown's van for approximately six or seven minutes. Willie Shears then heard nine or ten gunshots. But he did not see where the shots were coming from at that time. After the gunshots stopped, Willie Shears saw Brown fall. According to Willie Shears, Brown then asked Willie and Robert Shears to put him in the Jaguar. They rushed over to him, but Willie Shears then heard six or seven more shots, and he was shot in the right ankle. Willie Shears testified that although he did not see him firing the gun, at that point, he saw Glover standing behind the Jaguar, holding a gun. Willie Shears did not see anyone else shooting. After getting shot, Willie Shears left Brown and "hopped" back into the club. He then lay inside the front entrance.

Willie Shears initially testified that he did not see where Glover went after he was shot. However, on cross-examination, he testified that he saw Glover run to the back of the parking lot and then he heard a third series of shots. In total, over the three series of shots, Willie Shears heard approximately 20 shots.

Willie Shears testified that he lay inside the club for approximately five or six minutes before the police arrived. An ambulance took Willie Shears to Henry Ford Hospital. At the hospital, Willie Shears identified a photograph of Glover as the person who shot him.

Crump testified that when they decided to leave the club, the three men left before him because he had ordered food and he had to wait for it. Approximately five minutes later, Crump walked to the door with his food, and someone at the door told him not to go outside because there was shooting in the parking lot. Crump did not hear any shooting, so he went out the door anyway. But after Crump got outside, he heard shooting. Crump did not see where the shooting was coming from because he

ducked when he heard the shots. As he was ducking, however, Crump saw Willie Shears run past him limping on one leg as if he had been shot. According to Crump, the shooting sounded close at first and then sounded like it moved further away. When the shooting was further away, Crump looked up and saw Robert Shears holding Brown and saying that Brown had been shot.

Crump testified that Robert Shears then told him to go find the van. According to Crump, he ran around the parking lot to find the valet to get the key, but the van was not in the lot. So then Crump got the Jaguar, and he and Robert Shears tried to put Brown in it, but they were not strong enough, so a security guard helped them. Crump testified that Robert Shears then told him that he was going to take Willie Shears to the hospital and told Crump to take Brown. Crump drove off and took Brown to Receiving Hospital, which was the only hospital with which Crump was familiar. Crump testified that while on the way to the hospital, Brown was "breathing hard." But at the hospital, Crump learned that Brown was dead.

When asked what Brown did for a living, Robert and Willie Shears and Crump all testified that Brown sold drugs. However, they all denied that they themselves sold drugs. All three men also testified that none of them had a gun that night, and they did not see anyone in their group with a gun, including Brown.

Roderick Williams, a reserve police officer for the Highland Park Police Department testified that, at the time of trial, he worked for Starvin' Marvin's Corporation. Reserve Officer Williams was at Starvin' Marvin's on June 26, 2010, at about 1:10 a.m., to see Charles Finn, a manager at Starvin' Marvin's. Reserve Officer Williams entered the club through the front door. He and Finn then went through the back door into an alley behind the club to discuss business because it was loud in the club. Finn testified that he was asking Reserve Officer Williams to lead the security team at Starvin' Marvin's. Both men testified that the alley was not well lit.

After approximately four to ten minutes, Reserve Officer Williams heard shots coming from the parking lot. Reserve Officer Williams testified that he heard three or four shots at first, and then he heard another three to five shots. Reserve Officer Williams then saw a man with a gun in his hand running down the alley toward him and Finn. Reserve Officer Williams, who was in full police uniform, "yell[ed] out police." According to Reserve Officer Williams, the man paused and then Reserve Officer Williams saw a muzzle flash, so he drew his firearm, yelled "drop your gun," and then returned fire with his .357 caliber Sig Sauer semi-automatic pistol. Reserve Officer Williams fired approximately three to five shots, from low to high. He believed that he hit the person he was shooting at because the man spun around, which happens "sometimes when you get shot[.]" The man was then out of sight. Reserve Officer Williams testified that he did not shoot at the man again after he saw him spin around. Instead, Reserve Officer Williams and Finn retreated back into the club.

Reserve Officer Williams later identified Glover as the person he had seen running toward him. According to Reserve Officer Williams, at the time of the incident, Glover had been wearing a white T-shirt and jeans. Reserve Officer Williams had two guns on him that day; in addition to his .357, he also had a .40 caliber HKP 2000 SK semi-automatic pistol, both of which he turned over to the police.

Starvin' Marvin's manager, Charles Finn, testified that he also works security at

Starvin' Marvin's. He testified that the likelihood of someone entering the club with a gun was slim because security personnel performed pat-down searches on everyone entering the club, except police officers with badges.

B. THE INVESTIGATION

Detroit Police officers David Gonzalez and Juan Serrata testified that they responded to the shooting at Starvin' Marvin's. When they arrived, Officer Gonzalez saw one victim, who appeared to be shot, lying in the doorway of the club. That victim was already being treated by emergency medical service workers. He saw another victim, who also appeared to be shot, in the back of the parking lot. Officer Gonzales observed several spent shell casings on the ground in the rear of the parking lot and on the side of the building on the west side of the parking lot. He also saw blood in the rear of the parking lot where that victim was lying. He also observed blood on a handgun that was lying on the other side of a fence in a yard next to the parking lot. Officer Gonzalez took Reserve Officer Williams' handguns as evidence.

Officer Serrata testified that he had contact with Glover in the parking lot behind the club while a medical unit was tending to him. Officer Serrata asked Glover what happened, and Glover said that he heard some shots, felt pain in his right leg, and went down to the ground. Glover said that he did not know where the shots came from. Officer Serrata also learned from a security guard that another victim that was shot had already been taken to an unknown hospital. Officer Serrata saw another person, who had been shot in the ankle, lying in the front doorway of the club. He placed into evidence a vehicle at the scene that had a bullet hole in the back end. Glover was on the ground near that vehicle, and there was blood on the ground.

Detroit Police Officer Eugene Fitzhugh testified that he was called to Starvin' Marvin's to process the scene of a homicide. Officer Fitzhugh collected evidence from the parking lot, from the alley behind the club, and from the fenced yard beyond the alley. He found two fired bullets near the entrance of the club and 13 .357 shell casings throughout the parking lot, alley, and yard. He also found a .357 caliber Sig Sauer semi-automatic pistol with blood on it. He testified that the pistol's slide was all the way to the rear. It was found nearby in the driveway of 4124 Clippert. Officer Fitzhugh saw a vehicle with a bullet impact to the rear and blood below the rear of the vehicle. He also collected blood from the foyer of the club.

Officer Gonzalez and Officer Fitzhugh testified that revolvers do not eject shell casings when they are fired. Conversely, Reserve Officer Williams, Officer Gonzalez, and Officer Fitzhugh all testified that shells are ejected when a semi-automatic gun is fired. Officer Fitzhugh testified that if a fired bullet missed its target it could go anywhere and that casings, when ejected from a semi-automatic weapon, do not necessarily fall straight to the ground. Therefore, according to Officer Fitzhugh, where the casing is found does not necessarily mean that is where the shot was fired. But he acknowledged that the ejection of shells from a semi-automatic weapon does "leave some sort of a trail[.]"

Detroit Police Officer Adam Szklarski testified that he was sent to recover property from Henry Ford Hospital. The property turned out to be a bullet. The parties stipulated that the bullet that Officer Szklarski recovered was the bullet taken from Glover's ankle.

Detroit Police Officer Gerald Williams, the officer-in-charge of this case, retrieved a bullet that the medical examiner's office recovered from Brown's body. He sent the bullet and the other evidence in this case to the Michigan State Police lab. He testified that he learned that multiple cell phones and approximately \$4,300 were also recovered from Brown.

Brian Schloff, a forensic scientist at the Michigan State Police forensic crime lab, was qualified at trial as an expert in DNA analysis. Schloff testified that he received five pieces of evidence in this case—three possible bloodstains from the foyer, the alley, and a Sig Sauer; a blood sample from Brown; and a buccal swab from Glover. He compared the DNA profiles obtained from the evidence and concluded that the bloodstain in the foyer was not from Brown or Glover, but that the bloodstains from the Sig Sauer and the alley matched Glover's DNA.

Dr. Anita Lal, of the Wayne County Medical Examiner's Office, was qualified at trial as an expert in forensic pathology.¹ She testified that there was a gunshot entrance wound to Brown's left abdomen. But there was no exit wound. Dr. Lal testified that the manner of death was homicide, and the cause of death was the gunshot wound to the abdomen.

Michigan State Police Sergeant Reinhard Pope was qualified at trial as an expert in firearms and tool mark identification. In this case, Sergeant Pope initially received two firearms, 13 casings, and three fired bullets. Several days later, he received an additional firearm. The third firearm was a .357 caliber Sig Sauer semi-automatic pistol. The parties stipulated that this gun was taken from the yard or alley near Starvin' Marvin's and was associated with Glover. Sergeant Pope testified that six of the casings came from one firearm, which the parties stipulated was Reserve Officer Williams' weapon. Sergeant Pope testified that the other seven casings came from the Sig Sauer associated with Glover. He also identified one of the fired bullets as having been fired from Reserve Officer Williams' weapon. (The evidence tag number for this bullet—E38015904—was the same evidence tag number for the bullet recovered from Glover—E38015904.) Sergeant Pope identified one of the other bullets, which was the one removed from Brown's body, as having been fired from the firearm associated with Glover. Sergeant Pope eliminated the remaining bullet, which was damaged, from having been fired from Reserve Officer Williams' firearm, but he could not identify or eliminate it as having been fired from the firearm associated with Glover. Michigan State Police Sergeant Reinhard Pope was qualified at trial as an expert in firearms and tool mark identification. In this case, Sergeant Pope initially received two firearms, 13 casings, and three fired bullets. Several days later, he received an additional firearm. The third firearm was a .357 caliber Sig Sauer semi-automatic pistol. The parties stipulated that this gun was taken from the yard or alley near Starvin' Marvin's and was associated with Glover. Sergeant Pope testified that six of the casings came from one firearm, which the parties stipulated was Reserve Officer Williams' weapon. Sergeant Pope testified that the other seven casings came from the Sig Sauer associated with Glover. He also identified one of the fired bullets as having been fired from Reserve Officer Williams' weapon. (The evidence tag number for this bullet -E38015904- was the same evidence tag number

¹ Dr. Lal did not perform the autopsy in this case. However, Dr. John Scott Somerset, who did perform the autopsy, was not available at trial, and Dr. Lal reviewed Dr. Somerset's work.

for the bullet recovered from Glover -E38015904.) Sergeant Pope identified one of the other bullets, which was one, removed from Brown's body as having been fired from the firearm associated with Glover. Sergeant Pope eliminated the remaining bullet, which was damaged, from having been fired from Reserve Officer Williams' firearm, but he could not eliminate it as having been fired from the firearm associated with Glover.

C. TRIAL

Petitioner, Thomas Glover, moved for a directed verdict, arguing that there was no premeditation or deliberation. Glover also asked that the first-degree murder charge be reduce to second-degree murder. Glover further argued that, with regard to the charge of assault with intent to murder Willie Shears, there was a wound to the ankle and no indication that he was shot anywhere else. The prosecution argued that, with regard to Willie Shears, the doctrine of transferred intent applied and that the evidence showed the Glover shot Brown. The Trial Court denied Glover's motion, finding sufficient evidence for the case to proceed to the jury and that the concept of transferred intent applied.

Glover testified that he lives on the east side of Detroit, and used to buy marijuana from Brown. He purchased marijuana from Brown for approximately three to five months in 2008, but then lost track of Brown. However, in the spring of 2010, Glover saw Brown at a strip club on the east side of Detroit. Glover asked Brown about buying marijuana. But, according to Glover, Brown got mad, and the men got into an argument. Glover explained that when he approached him, Brown acted like he did not recognize Glover. Glover tried to explain who he was and that he used to purchase marijuana from him, but Brown "blew up." Brown called him "the police" and said that Glover was a snitch. Brown told Glover to leave "if [he] didn't want any problems." Glover asked Brown why he was treating him like a "bitch," and Brown said because he was one. Glover told Brown the he was "messed up." After that, one of the men with Brown flashed a gun at Glover and Brown told Glover to not "ever end up in the same place with him ever again." At that point, Glover left.

After asking other people about Brown's reputation, Glover came to the conclusion that Brown "was going to be a problem" and someone that Glover needed to "watch[] out for." As a result, Glover started carrying a gun, which he had purchased off the street in 2009, when he went out on the weekends.

On the evening of the shooting, at approximately 11:30 p.m. or 12:00 a.m., Glover went to Starvin' Marvin's, which is on the west side of Detroit. Glover was avoiding the clubs on the east side. Glover went to the club alone and was carrying his gun. Glover testified that he was not patted down when he entered the club. After approximately an hour or an hour and a half, Glover noticed Brown staring at him, pointing, and shaking his head. Brown did not say anything, however, he just walked away. Glover then decided to leave the club. He intended to go through the parking lot, to the alley, and then to his car.

After leaving the club, as Glover was walking toward the back of the parking lot, he felt a shot in his back, on his left shoulder near his neck. Glover pulled his gun, saw two or three people shooting at him, and started running and shooting over his back. Glover testified that one the people shooting at him was Brown. Glover testified that he shot back because he was scared and, as he was shooting, he was trying to get

away. Glover ran to try to hide behind a truck located toward the back of the alley. As he was running, Glover was shot three more times. Glover testified that he got shot in the leg, the entrance wound was on the back of his leg, and the exit wound was on the front of his leg. Glover was also shot in the arm and hip. With regard to his hip, Glover testified that the entrance wound was on the back and the exit wound was on the front. According to Glover, after he fell, he shot two or three more times toward the front of the parking lot from which the shots at him were coming. Glover did not hear any more shots after that, so he tried to walk, but could not. He then tossed his gun over the fence, sat down, and passed out.

After the police arrived, Glover testified that he told them that he "got shot up." Glover testified that he did not point or shoot at anyone in a police uniform and that he did not fire shots toward the back of the building or in the alley. He only shot toward the front, where the people were that were shooting at him, and he did not intend to kill anyone.

On cross-examination, Glover testified that he determined the entrance and exit wounds on his leg on his own. Glover confirmed that, in fact, his medical records did not indicate the exit and entrance sites of the wound, but only stated "through and through or gunshot wound." Glover also testified that, with regard to the shot to his back, there was also a corresponding wound in the front. Glover claimed that the front wound was where doctors removed the bullet. But he admitted that he was not awake when they took it out, and he confirmed that his medical records did not denote an entrance and exit wound. Also on cross-examination, Glover denied that he knew Brown would be at Starvin' Marvin's that night or that he paid the valet to move Brown's van.

The jury found Glover guilty of second-degree murder, assault with intent to commit murder with regard to Willie Shears, felon in possession of a firearm, and felony-firearm. The jury acquitted Glover of first-degree murder and assault with intent to commit murder with regard to Reserve Officer Williams.

See, Appendix C, pgs. 1-7

SUMMARY OF ARGUMENT I.

I. VERDICTS OF GUILTY FOR SECOND-DEGREE MURDER AND ASSAULT WITH INTENT TO COMMIT MURDER WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE BECAUSE THE PROSECUTION FAILED TO PROVE THAT PETITIONER DID NOT ACT IN SELF-DEFENSE.

On direct appeal Petitioner raised sufficiency of the evidence claims in regards to the convictions of second-degree murder and the assault with intent to commit murder. The basis for the claim is that Petitioner claimed the affirmative defense of self-defense,² and as a result, the prosecution has failed to satisfy proof beyond a reasonable doubt of every element of the charged

² Mich. Comp. Law. Ann. § 780.971 through 780.974

offense(s).

MICHIGAN COURT OF APPEALS ANALYSIS OF CLAIM

The Michigan Court of Appeals recognized that Petitioner challenged the sufficiency of the evidence as it related to the second-degree murder conviction and the assault w/intent to commit murder. When ruling on this issue, the Michigan Court of Appeals held:

“The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goeke*, 457 Mich 442, 463-464; 579 N.W. 2d 868 (1998). “Malice is defined as the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464.

Here, the evidence that Brown died as a result of the gunshot wounds caused by Glover satisfies the first two elements of second-degree murder. The bullet removed from Brown’s body matched the gun associated with Glover, and Willie Shears testified that he saw Glover holding a gun. With regard to the third element, there was also evidence that Glover acted with malice. “[M]alice can be inferred from the use of a deadly weapon.” *People v Bulls*, 262 Mich. App. 618, 627; 687 N.W. 2d 159 (2004). And, Glover admitted to shooting a gun.

Glover, however, argues that the prosecution failed to prove beyond a reasonable doubt that he acted without justification or excuse. More specifically, he argues that the evidence showed that he acted in self-defense. “In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Roper*, 286 Mich. App. 77, 86; 777 N.W. 2d 483 (2009). “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich. App. 13, 20; 507 N.W. 2d 763 (1993).

The Michigan Court of Appeals rejected the claim, indicating that there was sufficient evidence that Petitioner did not honestly and reasonably believe that his life was in danger or that there was a threat of serious bodily harm.

The Michigan Court of Appeals recognized that there were two series of shots fired in the front of the building and then a third series when Petitioner ran to the back of the parking lot. The Michigan Court of Appeals failed to account for the spent slug that did not match Officer Williams’ gun and failed recognize that this slug could have come from the victim’s or his associate’s gun(s), despite their testimony that none of them carried a gun.

Testimony was offered by Petitioner that he was shot from behind, while admitting that his medical records did not denote entrance or exit wounds. Based upon this admission by Petitioner, it was imperative to his claim of self-defense, that defense counsel sought to admit the medical records and request an expert to determine the entrance and exit wounds to show that Petitioner was shot in the back while running away from the decedent and his associates, thereby proving his allegation that he was in fear of his life and had no other choice but to return fire in

self-defense³.

Relying on Reserve Officer Williams' testimony, the Michigan Court of Appeals affirmed the convictions, indicating that a rational trier of fact could have found that Petitioner was not shot from behind as he was running away, but rather that Officer Williams shot him in the front.

See, Appendix C, pgs. 7-9.

DISTRICT COURT ANALYSIS OF CLAIM

On petition for writ of habeas corpus, the United States District Court for the Eastern District of Michigan concluded that Petitioner's claim is non-cognizable on habeas review. The Court acknowledged that under Michigan law, self-defense is an affirmative defense, see, *People v Dupree*, 486 Mich. 693, 704; 788 N.W. 2d 399 (2010), that "*admits the crime but seeks to excuse or justify its commission. It does not negate the specific elements of the crime.*" *Id.* at 704, n.11. The U.S. District Court also acknowledged that under Michigan law, the prosecutor is required to disprove a claim of self-defense but that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required . . ." See, *Smith v United States*, 133 S. Ct. 714, 719 (2013). Further indicating, the Supreme Court and the Sixth Circuit have rejected the argument that the Constitution requires the prosecution to disprove self-defense beyond a reasonable doubt. See, *Gilmore v Taylor*, 508 U.S. 333, 359 (1993); *Martin v Ohio*, 480 U.S. 228, 233-236 (1987). See, Appendix B, pgs. 7-12.

The U.S. District Court further states, Petitioner does not challenge the sufficiency of the evidence in support of the essential state law elements of second-degree murder, assault with intent to commit murder . . . rather, "*he has only faulted the jury's refusal to credit his proffered affirmative excuse or justification*" for the killing. See, Appendix B, pg. 8.

The District Court further explains, that if Petitioner's claim were cognizable on habeas review, Petitioner would not be entitled to habeas relief, because the prosecution had presented evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that the petitioner did not act in lawful self-defense when he shot the victim.

³ Petitioner raises this issue as Argument III.. of this Petition.

In regards to the Assault with intent to Commit Murder, the U.S. District Court relied upon the Michigan Court of Appeals determination that, when a man fires a shot at a man with the intent to kill him and shoots a bystander instead in the leg, the intent to kill is transferred. See Appendix C, at 8.

SIXTH CIRCUIT COURT OF APPEALS ANALYSIS OF CLAIM

The 6th Circuit held that Petitioner did not make a substantial showing that the State failed to prove that he lacked justification for killing the victim, once again relying on the testimony of the victim's three companions, that no one in their group carried a firearm, and that the casings recovered at the scene came from either Petitioner or Officer Williams' gun. See, Appendix A, pg. 2.

A WRIT OF CERTIORARI SHOULD ISSUE

Petitioner submits that it is time for this Honorable Court to determine whether or not an affirmative defense such as, self-defense, is cognizable on habeas review when it is shown by clear and convincing evidence that the State has failed to establish all the elements of the underlying offense. A claim, such as the one raised by Petitioner, raises a question regarding Petitioner's culpability and the fact the he may be "*actually innocent*" of the crime(s) for what he was convicted and as such, it constitutes a "miscarriage of justice" to allow such a conviction to stand.

It is Petitioner's position that the U.S. District Court's reliance on *Martin v Ohio*, supra, which indicates that the claim is not cognizable on habeas review is misguided, as that case did not involve a sufficiency of the evidence claim based upon an affirmative defense. Rather, *Martin* alleged that the Ohio Statute for self-defense improperly shifted the burden of proof to the defendant thereby negating the presumption of innocence afforded a criminal defendant.

The U.S. District Court's allegation that, "Petitioner does not challenge the sufficiency of the evidence in support of the essential state law elements of second-degree murder, assault with intent to commit murder . . . rather, '*he has only faulted the jury's refusal to credit his proffered affirmative*

excuse or justification’ for the killing,”⁴ is also incorrect. As explained below, Petitioner does in fact allege that the State has failed to establish the essential state law elements and as a result his due process rights were violated. U.S. Const. Amend. XIV.

The U.S. District Court’s reliance upon the Michigan Court of Appeals determination that, “*when a man fires a shot at a man with the intent to kill him and shoots a bystander instead in the leg, the intent to kill is transferred*,”⁵ completely fails to take into account that the Petitioner had no duty to retreat under Mich. Comp. Laws Ann. § 780.972(2), and had a right to use deadly force against his attacker or other than deadly force because he truly believed that his life was in danger and had no choice but to return fire upon the deceased and his companions. For this reason, Petitioner once again asserts the affirmative defense of self-defense in regards to this charged offense.

Both the Michigan Court of Appeals and the 6th Circuit Court of Appeals’ reasoning in denying relief on this issue, completely ignores the fact that revolvers do not discharge casings; and that the decedent and his companions all left the scene of the shooting giving them ample time to ditch their guns.

ACTUAL INNOCENCE/MISCARRIAGE OF JUSTICE

Petitioner claims that all petitioners seeking habeas relief under 28 U.S.C.A. § 2254, should be entitled to a review of a claim raising an affirmative defense if there is a question regarding their culpability and whether or not they make a showing of “*Actual Innocence*.” To summarily dismiss a claim raising an affirmative defense, such as self-defense, as non-cognizable on habeas review represents a miscarriage of justice. In any event, Petitioner urges this Court to adopt the view that a petitioner can demonstrate actual innocence by showing, that he cannot, as a legal matter, have committed the crime because the law rendered petitioner’s conduct legal. Mich. Comp. Law Ann. § 780.972; *Phillips v United States*, 734 F. 3d 573, 581 (6th Cir. 2013).

⁴ See, Appendix B, pg. 8.

⁵ See Appendix C, at 8.

To establish that a claim such as this is entitled to review, we must look at the substance of the claim. Three Circuits have chosen to review otherwise procedurally defaulted claims raising an affirmative defense in regards to the “Actual Innocence” exception to the AEDPA’s Suspension Clause, and whether a petitioner was entitled to equitable tolling under an “actual innocence” claim. See, *Lee v Lampert*, 653 F. 3d 929, 932 (9th Cir. 2011) (en banc); *Lopez v Trani*, 628 F. 3d 1228, 1230-31 (10th Cir. 2010); *Souter v Jones*, 395 F. 3d 577, 602 (6th Cir. 2005); *Jarmillo v Stewart*, 340 F. 3d 877, 882 (9th Cir.); *Ellis v Hargett*, 302 F. 3d 1182, 1186 (10th Cir. 2010); *Finley v Johnson*, 243 F. 3d 215, 221 (5th Cir. 2001); *Britz v Cowan*, 192 F. 3d 1101, 1103 (7th Cir. 1999); *Jones v Delo*, 56 F. 3d 878, 883 (8th Cir. 1995).

In this case, there is no allegation the claim was procedurally defaulted, merely that the claim is not cognizable on habeas review. Because Petitioner raises a claim which shows he may be “*actually innocent*” of the crimes for which he was convicted, a miscarriage of justice has occurred when it was determined that his claim is not cognizable on habeas review. In reviewing the merits of this claim along with claim two, it becomes apparent that Petitioner is entitled to relief.

In *Jones v Delo*, 56 F. 3d 878, 883 (8th Cir., 1995), the Court indicated, “[a] prototypical example of ‘actual innocence’ . . . is the case where the State has convicted the wrong person of the crime,” *Sawyer v Whitley*, 505 U.S. 333; 120 L. Ed. 2d 269; 112 S. Ct. 2514, 2519 (1992), one is actually innocent if the State has the “right” person but he is not guilty of the crime with which he is charged. See, *Schlup v Delo*, 513 U.S. 298; 130 L. Ed. 2d 808; 115 S. Ct. 851, 864 (1995) (noting prisoner interest in relief “if he is innocent of the charge for which he was incarcerated.”)

Petitioner’s defense of self-defense, was shown by clear and convincing evidence (*through Petitioner’s testimony*), leaving the jury unable to satisfy the elements to convict of second-degree murder or assault with intent to murder. This meets the definition of actual innocence, both factual and legal innocence.

While the U.S. District Court went on to address whether the State Court’s decision was an

unreasonable application of the *Jackson* standard, it is in the interest of justice and comity to consider this claim to prevent summary dismissal or future claims of this nature.

DUE PROCESS VIOLATION

It is well settled that the “Due Process Clause of the Fourteenth Amendment protects the defendant in a criminal case against conviction ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged’” *Jackson v Virginia*, 443 U.S. 307, 315; 99 S. Ct. 2781; 61 L. Ed. 2d 560 (1979)(quoting *In Re Winship*, 397 U.S. 358, 264; 90 S. Ct. 1068; 25 L. Ed. 2d 368 (1970). The *Jackson* Court further limited the inquiry to sufficiency of the evidence of the elements of the crime:

In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Thereafter, the Court stated that “in a challenge to a state criminal conviction brought under 28 U.S.C.A. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt. N. 16” *Id.* at 324.

This Court, in *Engle v Isaac*, 456 U.S. 107; 102 S. Ct. 1558; 71 L. Ed. 2d 783 (1982), limited habeas corpus review to *elements* of the crime as defined by the state. *Engle v Isaac* involved, in part, a claim for habeas corpus relief based on insufficient evidence of the absence of self-defense. 456 U.S. at 119. The Sixth Circuit had determined that since Ohio designated the absence of self-defense as an element of the crimes involved, *In Re Winship* and its progeny required the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Id.* (citing *Isaac v Engle*, 646 F. 2d 1129 (6th Cir. 1980). This assumption that “due process required the State ‘to meet the burden that it chose to assume,’” *Id.* at 1135, was rejected by this Court in the following portion of its decision:

A careful review of our prior decisions reveals that this claim is without merit. Our

opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the States define the charged crime. Compare, *Mullaney v Wilbur*, [421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)], and, *Patterson v New York*, [432 U.S. 197, 53 L.Ed. 2d 281, 97 S. Ct. 2319 (1977)]. These decisions, however, do not suggest whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined circumstances as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes. The structure of Ohio's Code suggests that the Ohio Legislature or courts understood 2901.05(A) to go further than this, we decline to accept respondent's construction of state law. While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondent's trials may have violated state law."

456 U.S. at 120-21 (footnotes omitted).

Thus, the apparent meaning of *Engle v Isaac* is that a state may elect to carry the burden of proof with respect to a properly raised defense while insulating that portion of its case from habeas corpus review by *expressly not designating the lack of the affirmative defense as an element of the crime*. See, *Duffy v Foltz*, 804 F. 2d 50, 54 (6th Cir. 1986).

Because the State of Michigan choses to include as a part of its elements, "*without justification or excuse*", it is clear that the affirmative defense of self-defense has become part of the elements of the crime of second-degree murder. It is the affirmative defense of self-defense which is the "justification or excuse" thereby implicating the due process "sufficient evidence" guarantee established in *Jackson v Virginia*, and entitling Petitioner to review of this claim on habeas review.

SECOND DEGREE MURDER

In order for the state to convict under second-degree murder, the prosecution was required to prove, (1) a death, (2) caused by an act of the defendant, (3) with malice, and, (4) *without justification or excuse*. *People v Goeke*, 457 Mich 442, 464; 579 N.W. 2d 868 (1998); *People v Reese*, 491 Mich 127, 815 N.W. 2d 85, 94 (2012).

Michigan Criminal Jury Instructions 16.5 "Second-Degree Murder", states:

[The defendant is charged with the crime of / You may also consider the lesser charge of]

second-degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death].
- (2) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [name deceased], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.
- (3) Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.

It is the fourth element mentioned in *People v Goetze*, supra., and third element in M Crim JI 16.5, that calls into question the validity of Petitioner's conviction for second-degree murder. Petitioner contends that the death of Adrian Brown was "*justifiable homicide*" as a result of the Michigan Self-Defense Act; and, that he is actually innocent of second-degree murder because the prosecution failed to prove each element of the charged offense beyond a reasonable doubt.

ASSAULT WITH INTENT TO MURDER

M Crim JI 17.3 "*Assault with Intent to Murder*"

The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant tried to physically injure another person.
- (2) Second, that when the defendant committed the assault, [he / she] had the ability to cause an injury, or at least believed that [he / she] had the ability.
- (3) Third, that the defendant intended to kill the person [he / she] assaulted [, and the circumstances did not legally excuse or reduce the crime].

Elements of assault with intent to commit murder are assault with *specific* intent to murder, which, if successful, would make killing murder. *People v Eisenberg*, 72 Mich. App. 106; 249 N.W. 2d 313 (1976). Specific intent to kill is the only form of malice which supports a conviction of assault with intent to commit murder. *People v Gjidoda*, 140 Mich. App. 294; 364 N.W. 2d 698 (1985).

It is the third element in M Crim JI 17.3, which calls into question the validity of Petitioner's assault with intent to commit murder conviction. Petitioner contends that the shooting of Willie Shears was justified under the Michigan Self-Defense Act and that he is actually innocent of assault

with intent to murder Willie Shears because the prosecution failed to prove "Malice" or that the shooting was not justified beyond a reasonable doubt.

The prosecution failed to prove beyond a reasonable doubt that Petitioner had the specific intent to kill when he shot Willie Shears in self-defense. While the prosecution argued transferred intent applies, the testimony reveals that Petitioner was merely shooting out of self-defense because he truly felt he was in imminent danger of losing his life or being seriously wounded. Therefore, the circumstances of this incident legally excuse the crime for which petitioner is convicted.

SELF-DEFENSE

It is Petitioner's position that Michigan's "Self-Defense" statute clearly exonerates him of the murder of Adrian Brown and the assault with intent to commit murder of Willie Shears because his conduct was made legal. Mich. Comp. Law Ann. § 780.971 to 780.974

Michigan Compiled Laws Annotated § 780.972, states:

Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent imminent death of or great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has a legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

The record reveals that Petitioner was alone when he went to Starvin' Marvin's, a strip club on the west side of Detroit. Petitioner admitted to carrying a gun and testified that he was not patted down when he entered the club. After approximately an hour or an hour and a half, Petitioner noticed Brown (decedent) staring at him, pointing, and shaking his head. Brown did not say

anything to Petitioner, but Petitioner decided to leave the club.

Petitioner testified that as he was leaving the club he felt a shot in his back, on his left shoulder near his neck. Petitioner pulled his gun, saw two or three people shooting at him, and started running and shooting over his back. Petitioner testified that one of the people shooting at him was Brown. Petitioner testified that he shot back because he was scared. Petitioner testified that he was shot three more times. Petitioner testified that he got shot in the leg, the entrance wound was on the back of his leg, and the exit wound was on the front of his leg. Petitioner testified that he was also shot in the arm and hip. With regard to his hip, Petitioner testified that the entrance wound was on the back and the exit wound was on the front. According to Petitioner, after he fell, he shot two or three more times toward the front of the parking lot from which the shots at him were coming. Petitioner did not hear any more shots after that, so he tried to walk, but could not. He then tossed his gun over the fence, sat down, and passed out.

Petitioner testified that after the police arrived, he told them that he "got shot up." Petitioner testified that he did not point or shoot at anyone in a police uniform and that he did not fire shots toward the back of the building or in the alley, he only shot toward the front, where the people were that were shooting at him and he did not intend to kill anyone.

On cross-examination, Petitioner testified that he determined the entrance and exit wounds on his leg on his own. Petitioner confirmed that his medical records did not indicate the exit and entrance sites of the wound, but only stated "through and through or gunshot wound." Petitioner also testified that, with regard to the shot to his back, there was also a corresponding wound in the front. Petitioner claimed that the front wound was where doctors removed the bullet, but he admitted that he was not awake when they took it out and he confirmed that his medical records did not denote an entrance and exit wound. Petitioner denied knowing that Brown would be at Starvin' Marvin's that night or that he paid the valet to move Brown's van.

The record indicates that there was a two series of shots in the front of the building and a

third set when Petitioner ran into the alley and upon Officer Williams. Inferences could be drawn to conclude that the two series of shots in the front of the building could have come from different guns and that the decedent's associates were lying when they claimed that no one in their group had a gun.

Absolutely no evidence was presented to show that Petitioner was engaged in the commission of a crime at the time he used deadly force or that he had no legal right to be at Starvin' Marvin's. In fact, testimony reveals that Petitioner attempted to retreat after being shot in the back. Further testimony reveals that Petitioner honestly and reasonably believed that the use of deadly force was necessary to prevent imminent death or great bodily harm to himself.

The right of self-defense is universally accepted in this country today. A person who acts in self-defense is not excused from the consequences of an otherwise illegal act. Rather, such a person has done no wrong in the universally held view in this country and is actually innocent of the crime charged.

SUMMARY OF ARGUMENT II.

II. THE PROSECUTION'S MISCHARACTERIZATION OF CRITICAL EVIDENCE AND STATEMENTS UNDERMINED THE DEFENSE' THEORY OF SELF-DEFENSE, WHICH DEPRIVED DEFENDANT OF HIS RIGHT TO PRESENT A DEFENSE AND DENIED HIM DUE PROCESS OF LAW.

It is Petitioner's position that the prosecution improperly commented and suggested that his gunshot wounds in the front were the cause of the wounds to his back, thereby confusing the jury, while making an argument not supported by evidence of record. This line of questioning was highly inappropriate and not supported by competent evidence of record where the Petitioner's medical records were not admitted as evidence. Once this egregious line of questioning occurred, defense counsel had a duty and obligation to rebut the mischaracterization of evidence. This mischaracterization of evidence was not objected to or challenged by defense counsel and as a result has been presented in Argument III. as an ineffective assistance of counsel claim. See, Argument III., *infra*.

MICHIGAN COURT OF APPEALS ANALYSIS OF CLAIM

When denying this claim, the Michigan Court of appeals recognized:

it does not appear from the lower court record that Glover's medical records were admitted as evidence at trial. Therefore, the prosecutor could not have mischaracterized 'evidence' in referring to Glover's medical records, which were not evidence. "[I]t is impermissible to expand the record on appeal." *People v Powell*, 235 Mich. App. 557, 561 n. 4; 599 N.W. 2d 499 (1999). (Appendix C, pg. 12).

The Court concluded:

Based on our review of the transcripts, the prosecutor did not misstate Glover's testimony. The prosecutor merely asked Glover questions about his testimony and whether Glover's testimony was consistent with his own medical records. Even if the assumptions made in the prosecutor's questions were incorrect, Glover had the opportunity to answer the questions and correct any error. Glover agreed that his medical records did not make any indication of entrance and exit locations. Moreover, the jury was instructed that the lawyers' questions were not evidence. "[J]urors are presumed to follow instructions."⁶ The jury was then free to accept or reject Glover's testimony.

"Accordingly, we conclude that the prosecutor's conduct did not amount to plain error affecting Glover's substantial rights." (Appendix C, pg. 12-13).

U.S. DISTRICT COURT ANALYSIS OF CLAIM

The U.S. District Court recognized Petitioner's claims as: 1) The prosecution mischaracterized evidence contained within Petitioner's medical records; and, 2) The prosecution mischaracterized information pertaining to the locations of the wounds Petitioner sustained, suggesting the wounds to his front were the cause of the wounds to his back, to support a finding that Petitioner did not act in self-defense. (Appendix B, pg. 17).

Regarding these claims, the U.S. District Court recognized that the Michigan Court of Appeals found the prosecutor did not mischaracterize the medical records or petitioner's testimony in connection with the gunshot wounds; and, the Michigan Court of Appeals further found that Petitioner had the opportunity to answer the prosecutor's questions and correct any errors. *Glover*, 2012 WL 1415122, at *10-11.

When ruling on this issue, the U.S. District Court held:

⁶ *People v Graves*, 458 Mich 476, 486; 581 N.W. 2d 229 (1998).

[T]he questions posed pertaining to the gunshot wounds by the prosecution to petitioner were relevant to rebut petitioner's theory of self-defense. A prosecutor does not commit misconduct by asking witnesses relevant questions. See, *Slagle v Bagley*, 457 F. 3d 501, 518 (6th Cir. 2006). Because the questions concerning the wounds as documented in the medical report were relevant on the issue of self-defense and petitioner's credibility, the questions did not deprive petitioner of a fair trial. *Tan Van Le v Prelesnik*, No. 2006 WL 2620693, at *10 (W.D. Mich. Sept. 12, 2006) ("The [Supreme] Court has never found misconduct arising from a prosecutor's cross-examination on a central issue such as witness bias.")

Finally, the jury was instructed that the lawyers' questions were not evidence. (Tr. 12/08/2010, pp. 126-130). "[J]urors are presumed to follow their instructions." *Kansas v Marsh*, 481 U.S. 200, 206 (1987). Any prosecutorial misconduct pertaining to comments made in connection to petitioner's medical records or trial testimony was ameliorated by the trial court's instruction that the lawyers' comments and statements were not evidence. See, *Hamblin v Mitchell*, 354 F. 3d 482, 495 (6th Cir. 2003). Furthermore, the Michigan Court of Appeals concluded that the jury was free to accept or reject petitioner's testimony." *Glover*, 2012 WL 1415122 at *13.

Petitioner is not entitled to habeas relief on his prosecutorial misconduct claims. (Appendix B, pp. 17-18).

SIXTH CIRCUIT COURT OF APPEALS ANALYSIS OF CLAIM

The Sixth Circuit Court of Appeals held:

Glover's claim of prosecutorial misconduct does not deserve further consideration. In his Standard 4 brief, Glover complained that the questions the prosecutor asked him during cross-examination mischaracterized Glover's medical records and erroneously suggested that Petitioner was shot in the front or that the entry location of the bullets could not be determined. Glover contended that his medical records, which were first submitted in his Standard 4 brief, indicated that he was shot twice in the back, and he argued that certain 'bullets belonged to the victim(s), who somehow managed to conceal the weapons they possessed."

Jurist of reason would agree that the prosecutor's questions did not "so infect[] the trial with unfairness" as to render Glover's convictions "a denial of due process." *Darden v Wainright*, 477 U.S. 168, 181; 106 S. Ct. 2464; 91 L.Ed.2d 144 (1986) (quoting, *Donnelly v DeCristoforo*, 416 U.S. 637, 643; 94 S. Ct. 1868; 40 L.Ed.2d 431 (1974); see also, *Leonard v Warden, Ohio State Penitentiary*, 846 F. 3d 832, 852 (6th Cir. 2017). The Michigan Court of Appeals rejected the claim, concluding that the prosecutor could not have mischaracterized evidence that had not been admitted at trial and that "[t]he prosecutor merely asked Glover questions about his testimony and whether Glover's testimony was consistent with his own medical records." *Glover*, 2012 Mich. App. LEXIS 809, 2012, WL 1415122, at *10. Furthermore, even if the prosecutor's questions were deemed misleading, any misconduct was not flagrant. See, *United States v Johnson*, 581 F. 3d 320, 329-330 (6th Cir. 2009). The trial court instructed the jury that the lawyers' questions, statements, and arguments were not evidence, and the overall evidence against Glover was strong." *Id.* (Appendix A, pg. 2)

A WRIT OF CERTIORARI SHOULD ISSUE

Petitioner contends that this issue warrants relief when it is reviewed in conjunction with both Arguments I & III. When reviewed as a whole it is clear that Petitioner's due process right to a fair trial was violated. U.S. Const. Amend. XIV. While all three Courts to issue an opinion have recognized, the medical records were not admitted as - as such, the prosecution had no business misconstruing or mischaracterizing Petitioner's testimony concerning the gunshot wounds. However, once the prosecution sought to challenge Glover's testimony based upon evidence which was not admitted, trial counsel had an obligation to object to this line of questioning to prevent it from improperly influencing the jury or showing with competent evidence that the prosecution was erroneous in their mischaracterization of the evidence. See, Argument III.

SUMMARY OF ARGUMENT III.

III. DEFENDANT WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS WHERE DEFENSE COUNSEL FAILED TO ADMIT WITNESSES AND/OR INVESTIGATE OTHER EVIDENCE WHICH WOULD HAVE SUPPORTED DEFENDANT'S CLAIM OF SELF-DEFENSE.

Petitioner contends that he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and as a result of counsel's deficient performance his Fourteenth Amendment right to due process and a fair trial has been violated.

In Michigan, self-defense is a lawful act if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily injury. *People v Kurr*, 253 Mich. App. 317, 320-321' 654 N.W. 2d 651 (2002). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich. App. 13, 20; 507 N.W. 2d 763 (1993).

To establish the claim of self-defense, Petitioner chose to testify in his own behalf. Defense counsel admitted no other evidence to assist in establishing Petitioner's self-defense claim. During cross-examination, the prosecution attacked Petitioner's credibility by mischaracterizing or

improperly inferring that Petitioner was lying about the locations, or points of entry of his gunshot wounds. Defense counsel failed to object to the improper questioning concerning Petitioner's medical records, and failed to rebut any of the improper comments from the prosecution.

The improper questioning/mischaracterization of Petitioner's medical records and testimony eventually led to closing arguments, with the prosecution emphasizing the improper interpretation of defendant's testimony and medical records. The prosecution in closing states:

"He wants you to believe - he tries to tell you that the entrance wounds are on the BACK of his leg and the entrance wound is on the BACK of his back, but he agrees that his medical records don't say that, his doctors don't tell him that. He's telling you that to make you think that he was shot in the back. Or that he was shot in the BACK of the leg. He was shot from behind." (T.T., pg. 125) (emphasis added).

Defense Counsel failed to object to these closing statements. Just prior to the prosecutor making the statement, defense counsel by his own admission states: "*I know I made a few mistakes here in this case.*" (T.T., pg. 107). While counsel does not elaborate on his mistakes, it is apparent that the failure to investigate or seek the testimony of Petitioner's treating physician(s) and/or surgeon(s), is one of them that has greatly prejudiced Petitioner's claim of self-defense, where the treating physicians would have testified regarding the entry points of Petitioner's gunshot wounds. The entry points of the wounds goes directly to the credibility of Petitioner's claim that "*he was shot in the back*" by the decedent or his companions prior to him returning fire while retreating from the scene. Had this important evidence been submitted to the jurors it is more probable than not that, a reasonable jurist would have found doubt, resulting in a different outcome.

It is Petitioner's position that the records would have shown that he was in fact shot in four different locations, with only one spent bullet remaining in his body, a claim that could clearly support and corroborate his testimony concerning his use of deadly force in self-defense.

MICHIGAN COURT OF APPEALS ANALYSIS OF CLAIM

The Michigan Court of Appeals recognized Petitioner's claim that counsel was ineffective for: 1) failing to investigate; 2) failing to present evidence and witnesses to support the theory of

self-defense; 3) failing to introduce the decedent's [Brown] criminal history; and, 4) failing to object to instances of prosecutorial misconduct. The Court held that because Petitioner did not make a motion in the trial court for a new trial or evidentiary hearing that the claims were unpreserved and therefore the Court's review is "*limited to errors apparent on the record.*" *People v Sabin*, 242 Mich. App. 656, 658; 620 N.W. 2d 19 (2000). (Appendix C, pg. 13).

When addressing each individual claim, the Court held:

1. Failure to Investigate:

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich. App. 600, 626; 709 N.W. 2d 595 (2005). However, here, there is no evidence in the record that trial counsel failed to undertake an investigation. Indeed, Glover's argument that a private investigator went to the scene suggests that trial counsel did investigate.

2. Failure to Present Evidence and Witnesses to Support Self-Defense Theory:

What evidence to present and whether to call witnesses "are presumed to be matters of trial strategy." *People v Horn*, 279 Mich. App. 31, 39; 755 N.W. 2d 212 (2008). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich. App. 181, 190; 774 N.W. 2d 212 (2008). Trial counsel's decision to not call any witnesses of present evidence is presumed to be sound trial strategy. *Horn* 279 Mich. App. At 39.

Here, Glover has failed to overcome the presumption of sound trial strategy. Glover was still able to present his defense of self-defense. Thus, Glover has failed to show that "counsel's performance fell below an objective standard of reasonableness." *People v Seals*, 285 Mich. App. 1, 17; 776 N.W. 2d 314 (2009).

3. Failure to Introduce Brown's Criminal History:

Glover has failed to establish a claim of ineffective assistance of counsel regarding trial counsel's failure to present Brown's criminal record. Glover contends Brown was convicted of a felony for firearm possession and was also found not guilty of murder. This information, however, is not apparent from the record.

Regardless, even if Brown had a criminal record, Glover has failed to explain under what theory Brown's firearm conviction and acquittal of murder would have been admissible. Glover has also failed to show that the presentation of Brown's criminal history would have affected the outcome of the case. There was already testimony that Brown sold marijuana, and Willie Shears testified that Brown had gone to jail for "weed." Even if the jury had known that Brown had a previous firearm conviction, there was no evidence that Brown was armed that night. Therefore, there is no reasonable probability that, had the jury known of this conviction or that Brown had been acquitted of murder, the outcome of the trial would have been different.

4. Failure to Object to Prosecutorial Misconduct:

Because we have concluded that no prosecutorial misconduct occurred, trial counsel's failure to object did not fall "below an objective standard of reasonableness." *Seals*, 285 Mich. App. at 17. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *People v Ackerman*, 257 Mich. App. 434, 455; 669 N.W. 2d 818 (2003). There is also no reasonable probability that, had counsel objected, the result of the trial would have been different.

(Appendix C, pp. 13-15)

WAYNE COUNTY TRIAL COURT ANALYSIS OF CLAIM

Because Petitioner did not move for an evidentiary hearing or a new trial on direct appeal, the review of the Michigan Court of Appeals was confined to the facts of record. Therefore, Petitioner filed a Motion for Relief from Judgment pursuant to Mich. Ct. Rule 6.502, et seq., raising this claim with a request for an evidentiary hearing to expand the record for adequate review of this claim. The Wayne County Circuit Court denied this claim under Mich. Ct. Rule 6.508(d)(2), due to the claim being previously raised on direct appeal and failed to give an opinion on the merits of this claim. (Appendix E, pg. 5)

U.S. DISTRICT COURT ANALYSIS OF CLAIM

The U.S. District Court recognized Petitioner's claims that he was denied the effective assistance of counsel when counsel: 1) failed to investigate; 2) failed to present evidence and witnesses; 3) failed to introduce Brown's criminal history; and, 4) failed to object to the prosecutorial misconduct.

The U.S. District Court held:

Petitioner first argues that his trial counsel was ineffective for failing to investigate. The Michigan Court of Appeals denied this claim, citing to the fact that a private investigator went to the scene which would suggest that trial counsel did investigate. *Glover*, 2012 WL 1415122 at *11.

Petitioner argues in his motion for relief from judgment (referenced in his habeas petition) that trial counsel failed to interview state witnesses Robert Shears and Willie Shears, thereby denying petitioner's right to adequately cross-examine the Shears brothers. Trial counsel's performance did not constitute ineffective assistance of counsel where the record shows that counsel carefully cross-examined Robert and Willie Shears and in his closing argument emphasized the weaknesses in their testimony. See, *Krist v Foltz*, 804 F.2d 944, 948-949 (6th Cir. 1986) (defense counsel

was not ineffective where he carefully cross-examined prosecution witnesses, his cross-examination on issue of presence of weapon developed record upon which state court reversed on of armed robbery convictions, and in closing argument counsel emphasized inconsistencies in testimony of various witnesses). Defense counsel did not perform ineffectively by not more forcefully cross-examining the witnesses, particularly when the effect of further probing is entirely speculative on petitioner's part. See, *Jackson v Bradshaw*, 681 F. 3d 753, 764-765 (6th Cir. 2010) (Defense counsel did not perform ineffectively by not more forcefully pressing witnesses on the issues of her possible bias she may have harbored against defendant, particularly when the effect of further probing was speculative).

Petitioner also argues in his motion for relief from judgment (referenced by his habeas petition) that trial counsel failed to investigate the evidence technician's report and photos. A defense counsel has not obligation to present evidence or testimony that would not have exculpated the defendant. See *Millender v Adams*, 376 F. 3d at 527 (internal quotations omitted). The record reflects that the forensic evidence established that the spent casings only came from two guns, Petitioner's and Officer William's handgun. Presentation of the evidence technicians' report and photos would not have exonerated the petitioner.

Petitioner argues that trial counsel failed to present evidence and witnesses to support his theory of self-defense. Petitioner contends that had counsel called his treating doctors and witnesses at the crime scene, the outcome of the trial would have been different.

Although the petitioner briefly mentions counsel's failure to call his treating doctors and witnesses at the crime scene, which he contends should have been called on his behalf, petitioner failed to attach any affidavits from these witnesses to his supplemental brief, nor has he provided this Court with any affidavits from these witnesses concerning their proposed testimony and willingness to testify on the petitioner's behalf. Conclusory allegations of ineffective assistance of counsel, without any evidentiary support, do not provide a basis for habeas relief. see, *Workman v Bell*, 178 F. 3d 759, 771 (6th Cir. 1998). By failing to present any evidence to the state courts in support of his ineffective assistance of claim, petitioner is not entitled to an evidentiary hearing on his ineffective assistance of counsel claim with this Court. see, *Cooey v Coyle*, 289 F. 3d 882, 893 (6th Cir. 2002) (citing 28 U.S.C. § 2254(e)(2)(A)(ii)). Petitioner has failed to attach any offer of proof or any affidavits sworn by proposed witnesses. Petitioner has offered, neither to the Michigan courts nor to this Court, any evidence beyond his own assertions as to whether the witnesses would have been able to testify and what the content of these witnesses' testimony would have been. In the absence of such proof, petitioner is unable to establish that he was prejudiced by counsel's failure to call these witnesses to testify at trial, so as to support the second prong of an ineffective assistance of counsel claim. See, *Clark v Waller*, 490 F. 3d 551, 557 (6th Cir. 2007)

Petitioner argues that trial counsel was ineffective by failing to introduce Brown's criminal record. The Michigan Court of Appeals found that petitioner failed to explain under what theory Brown's record would have been admissible or how it would have affected the outcome of the case, since there was already testimony from Willie Shears that Brown had gone to jail for "weed." *Glover*, 2012 WL 1415122 at *12.

A defense counsel has no obligation to present evidence or testimony that would not have exculpated the defendant. See, *Millender v Adams*, 376 F. 3d at 527 (internal quotations omitted). Petitioner claims that presentation of Brown's criminal record would have affected the outcome of his case; however, the record contains trial testimony pertaining to Brown's criminal history. Because there is no evidence that Brown was armed that night, there is no reasonable probability that presentation of Brown's firearm conviction contained within his criminal record would have affected the outcome of the trial.

Petitioner next contends that counsel was ineffective for failing to object to the prosecutions remarks pertaining to the gunshot wounds and petitioner's claim of self-defense.

To show prejudice under Strickland for failing to object to prosecutorial misconduct, a habeas petitioner must show that but for the alleged error of his trial counsel in failing to object to the prosecutor's improper questions and arguments, there is a reasonable probability that the proceeding would have been different. *Hinkly v Randle*, 271 F. 3d 239, 245 (6th Cir. 2001). Because this Court has already determined that the prosecutor's questions did not deprive petitioner of a fundamentally fair trial, petitioner is unable to establish that he was prejudiced by counsel's failure to object to the remarks. *Slagle v Bagley*, 457 F. 3d at 528. Petitioner is not entitled to habeas relief on his fourth claim.

(Appendix B, pp. 20-23)

SIXTH CIRCUIT COURT OF APPEALS ANALYSIS OF CLAIM

The Sixth Circuit Court of Appeals recognized Petitioner's claims as: 1) his conviction for second-degree murder was not supported by sufficient evidence because the prosecution failed to prove that he did not act in self-defense; 2) his sentences violated the prohibition against cruel and unusual punishment; 3) the prosecutor committed misconduct by mischaracterizing Glover's testimony and medical records and his testimony to defeat his theory of self-defense; and, 4) trial counsel rendered ineffective assistance by failing to introduce Glover's medical records to support his theory of self-defense. The Court also noted that Glover argued that the district court erred by not holding an evidentiary hearing. (Appendix A, pg. 2)

The Court of Appeals failed to issue a Certificate of Appealability. The Court went on to briefly address claim 4, and whether or not Petitioner was denied the effective assistance of counsel at trial. The Court stated:

Jurists of reasons would not debate the district court's rejection of Glover's claim that trial counsel rendered ineffective assistance by failing to introduce his medical records to support his theory of self-defense. In his motion for relief from judgment,

Glover argued that trial counsel's failure allowed the prosecutor to argue facts not in evidence about gunshot wounds and to discredit his theory of self-defense. In light of the evidence against Glover, he failed to make a substantial showing that he suffered prejudice from any defect in counsel's performance. See, *Strickland v Washington*, 466 U.S. 668, 687; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984).

* * *

Finally, reasonable jurists would agree that Glover is not entitled to an evidentiary hearing because "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim(s) on the merits." *Cullen v Pinholster*, 530 U.S. 170, 181; 131 S. Ct. 1388; 179 L.Ed.2d 557 (2011).

A WRIT OF CERTIORARI SHOULD ISSUE

Counsel's failure to admit Petitioner's medical records and testimony from the treating physician(s)/surgeon(s) cannot be considered reasonable under prevailing professional norms. Especially considering Petitioner's theory of the case, self-defense, which, is in effect an element of the offense charged.

EVIDENTIARY HEARING IS NECESSARY

Petitioner filed a motion for relief from judgment under Mich. Ct. Rule 6.502, et seq. raising this issue and requesting an evidentiary hearing to expand the record for review of this claim, however, his requests were denied at each level of the state appellate process. The Trial Court denied this claim under the res judicata rule contained in Mich. Ct. Rule 6.508(d)(2), because the Petitioner previously raised an ineffective assistance of counsel claim on direct appeal. Subsequent attempts to obtain an evidentiary hearing and a review on the merits of this claim were denied at all levels of the state appellate court process, thereby denying Petitioner a full and fair review of this claim.

In *English v Romanowski*, 589 F. Supp. 2d 893, 903 (E.D. Mich. 2008), the petitioner was deprived of a reasonable chance of acquittal, or "conviction of a lesser offense" when trial counsel failed to call a witness to testify at trial. *Id.* In this case, the respondent cannot deny that the same premise exists as in *Romanowski*. When trial counsel did not submit the vital and necessary medical records, which would have helped establish one of the essential elements of his self-defense

claim, this omission deprived the Petitioner a reasonable chance of being acquitted. The failure of the state courts to conduct an evidentiary hearing to expand the record has denied Petitioner a fair and full review of the merits of this claim

Petitioner initially relied on *Barnes v Elo*, 231 F. 3d 1025 (6th Cir. 2000), to support his claim that he should be granted an evidentiary hearing. However, *Barnes* has been repudiated by the holdings enunciated in *Pinholster*, 131 S. Ct. at 1398, 1401. While the state trial court relied upon the res judicata rule to deny Petitioner a review of this claim, Petitioner contends that this claim is still reviewable pursuant to *Pinholster*.

In *Pinholster*, Justice Sotomayer dissented, stating, “There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim. The majority opinion does not foreclose this possibility.” *Pinholster* does not bar Glover from presenting evidence of his new IAC claim, because the claim was not adjudicated on the merits by the Michigan Courts. While the Michigan Court of Appeals did previously adjudicate a similar IAC claim, the new allegations and evidence fundamentally altered the claim. The new evidence creates a mitigation case that bears little resemblance to the naked *Strickland* claim raised on direct appeal. see, *Dickens v Ryan*, 740 F. 3d 1302, 1319-1320 (9th Cir. 2014).

The AEDPA permits a habeas petitioner to introduce new evidence in federal court “only if [the petitioner] was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed in 28 USC § 2254 were met. *Holland v Jackson*, 542 U.S. 649, 652-653; 124 S. Ct. 2736; 159 L.Ed.2d 683 (2004), citing *Williams v Taylor*, 529 U.S. 420, 431-437; 120 S. Ct. 1479; 146 L.Ed.2d 435 (2000). Fault cannot be attributed to petitioner as he sought an evidentiary hearing at each level of the state appellate process but was denied.

Because the review of the state court was limited to the existing record, Petitioner’s attempt to bring this claim to the state courts for review was futile due to their failure to grant an evidentiary hearing, which has denied him due process of law. A claim such as this deserves a full and fair

review considering the fact that Petitioner may establish a claim of “actual innocence.” A state must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process, even though it appears proper on the surface. *Mooney v. Holohan*, 294 U.S. 103; 55 S. Ct. 340; 79 L.Ed. 791 (1935).

Despite the State’s assertion that, 1) there was sufficient evidence to convict Petitioner of second-degree murder and assault w/intent to murder; 2) the prosecution did not commit misconduct; and, 3) Petitioner was not denied the effective assistance of counsel, the state has failed to take any consideration to the substance of Petitioner’s claim regarding the medical record evidence, or expected testimony from the treating physician(s)/surgeon(s) and merely dismissed Petitioner’s claim as unreviewable under the res judicata rule contained under Mich. Ct. Rule 6.508(d)(2), despite petitioner’s submission of “New Evidence,” not presented at trial, to support the claim.

INEFFECTIVE ASSISTANCE OF COUNSEL

To adequately defend Petitioner of assault with intent to murder & second-degree murder charge, defense counsel should be aware of the relevant elements of the crime charged. Let us now look at the jury instruction for these offenses:

M Crim JI 17.3 “Assault with Intent to Murder”

The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant tried to physically injure another person.
- (2) Second, that when the defendant committed the assault, [he / she] had the ability to cause an injury, or at least believed that [he / she] had the ability.
- (3) Third, that the defendant intended to kill the person [he / she] assaulted [, and the circumstances did not legally excuse or reduce the crime].

Elements of assault with intent to commit murder are assault with *specific* intent to murder, which, if successful, would make killing murder. *People v Eisenberg*, 72 Mich. App. 106; 249 N.W. 2d 313 (1976). Specific intent to kill is the only form of malice which supports a conviction of assault with intent to commit murder. *People v Gjidoda*, 140 Mich. App. 294; 364 N.W. 2d 698

(1985).

It is the third element in M Crim JI 17.3, which calls into question the validity of Petitioner's assault with intent to commit murder conviction. Petitioner contends that the shooting of Willie Shears was justified under the Michigan Self-Defense Act but without testimony from his treating physician(s) he was denied the opportunity to prove that he acted in self-defense when he returned fire after being shot in the back.

The prosecution argued transferred intent applies in this case, however, the testimony reveals that Petitioner was merely shooting in self-defense because he truly felt he was in imminent danger of losing his life or being seriously wounded. Therefore, the circumstances legally excuse petitioner's actions in this incident and the failure of trial counsel to advance the self-defense claim, using any/all means necessary was unreasonable.

The omitted medical records and physician/surgeon testimony were necessary to corroborate Petitioner's testimony that he was shot in the back and therefore had no other option but to run away while returning fire.

M Crim JI 16.5 "*Second-degree Murder*"

[The defendant is charged with the crime of / you may also consider the lesser charge of] second-degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

- (1) First, that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death].
- (2) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [name deceased], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.
- [(3) Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.]

The Michigan Supreme Court has defined the elements of second-degree murder as: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goeke*, 457 Mich 442, 463-464; 579 N.W. 2d 868 (1998).

Under Michigan Law, the killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich. 482, 502; 456 N.W. 2d 10 (1990). It is the fourth element, “*justification or excuse*” that is relevant to Petitioner’s claim. This critical element should have been defense counsel’s sole objective - to show that Petitioner’s life was truly in danger - and he had absolutely no choice but to return fire in defense of his own life. In this case, defense counsel failed his obligation to Petitioner when he failed to admit evidence that Petitioner was shot in the back rather than in the front as the prosecution suggested, leaving no choice but to return fire in self-defense. It was only through the omitted medical records and/or physician/surgeon testimony that this task was possible, because this evidence was not submitted to the jury, there was no way to corroborate Petitioner’s assertions that he was shot in the back and in fear of his life, prior to his returning fire on the decedent and his companions.

SELF-DEFENSE

We must now take a look at what a defendant asserting a claim of self-defense must comply with prior to using deadly force:

Michigan Compiled Laws Annotated § 780.972, states:

Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent imminent death of or great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has a legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

The record indicates that there was a two series of shots in the front of the building and a

third set when Petitioner ran into the alley and upon Officer Williams. Inferences could be drawn to conclude that the two series of shots in the front of the building could have come from two different guns and that the decedent's associates were lying when they claimed that no one in their group had a gun.

Absolutely no evidence was presented to show that Petitioner was engaged in the commission of a crime at the time he used deadly force or that he had no legal right to be at Starvin' Marvin's. In fact, testimony reveals that Petitioner attempted to retreat after being shot in the back. Further testimony reveals that Petitioner honestly and reasonably believed that the use of deadly force was necessary to prevent imminent death or great bodily harm to himself.

At Petitioner's jury trial, evidence showed that Petitioner had been shot in the back. The wound was to the left trapezoidal area of the upper part of his back. Further, he had gunshot metal fragments projecting over the mid chest covering the complete left chest interior. The off-duty police officer testified that he shot the Petitioner from the front in a low to high pattern. Petitioner's Medical records submitted on collateral review indicated that Petitioner suffered two wounds from a frontal direction. Petitioner was struck in the lower right leg and the right shoulder, which is consistent with the off duty officer's version of his shots. However, his scenario does not give any explanation as to how Petitioner sustained wounds to his upper back or left buttock/thigh area. The officer clearly indicated that he shot petitioner as he approached from the front. Clearly the wounds to the Petitioner's back and left buttock/thigh could not have come from the officer - according to the officer's own testimony. Additionally, the officer testified that he heard *two* separate volleys of shots and only after those volleys did he encounter Petitioner running towards the alley.

Of critical importance to Petitioner's claim of self-defense is the failure of defense counsel to admit Petitioner's medical records and present testimony from treating medical personnel concerning the gunshot wounds, procedures used to remove the bullets, and entry and/or exit locations of the wounds. Had this important evidence been submitted to the jurors it is more

probable than not that, a reasonable jurist would have found doubt, resulting in a different outcome. Petitioner contends that the records would have shown that he was in fact shot in four different locations, with only one spent bullet remaining in his body, a claim that clearly supports his affirmative defense of self-defense.

The wounds sustained by Petitioner are consistent with Petitioner's testimony, that he was shot in the back and left buttock/thigh by the decedent's group. Testimony by the treating physician(s)/surgeon(s) was necessary to show that these wounds to Petitioner's back did not occur as a result of being shot in the front. The failure of trial counsel to omit such critical evidence such as medical records or testimony that corroborates Petitioner's version of the shooting is unreasonable. In this case, the medical records as well as the treating physician(s)/surgeon(s) testimony would have been of critical significance.

This Court in *In re Winship*, 397 U.S. 358, 364; 90 S. Ct. 1068; 25 L.Ed.2d 368 (1920), held that the Due Process clause requires that criminal convictions be based on "*proof beyond a reasonable doubt of every fact necessary to constitute the crime.*" The fourth element of second-degree murder - *without justification or excuse* - is the element that absolutely could not have been proven beyond a reasonable doubt had the medical records admitted and treating physician(s)/surgeon(s) been required to testify regarding the entry points of Petitioner's wounds. The treating personnel's testimony would corroborate Petitioner's assertion that he was shot in the back and therefore felt that he was in imminent danger of death or serious bodily injury before he returned fire in self-defense.

The failure of counsel to use every piece of available evidence to show that [Petitioner] was in fear of losing his life or in imminent danger of serious bodily injury is unreasonable among prevailing professional norms. Because Petitioner was denied the opportunity to present this evidence, he lost an opportunity to show that he was justified in using deadly force against the decedent and his companions. Had trial counsel been prepared and presented this omitted

evidence/testimony, chances are great that Petitioner would have be acquitted of this crime.

In addition, each court to issue an opinion in this matter, failed to take into account the fact that revolvers do not discharge casings, relying on the mistaken belief that only two weapons were fired. This opinion is contrary to the testimony of reserve officer Williams' testimony. Testimony was offered by both Officer Gonzalez and Officer Fitzhugh which established revolvers do not discharge their casings and defense counsel failed to capitalize on this fact, leaving the jury to only believe that there were only two weapons fired, reserve officer Williams' gun and the Petitioner's gun. Additionally, Each court to issue an opinion failed to take into account that the decedent and his companions all left the scene of the shooting giving them ample time to ditch their gun(s), while ignoring the allegations of Petitioner that he was shot four times and that the failure of counsel to admit his medical records in support of Petitioner's claims was unreasonable. Had the medical records been submitted and testimony given by a medical expert, there is a likelihood that a different result would have occurred because it would have supported Petitioner's theory of self-defense and no jury would vote to convict.

The failure of the state courts to conduct an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel as it relates to counsel's failure to investigate; present the medical records; and, present testimony from treating physician(s)/surgeon(s), was unreasonable as is the State appellate court's failure correct this issue and is an unreasonable application of *Strickland*, within the meaning established in *Harrington v Richter*, 562 U.S. 86; 131 S. Ct. 770; 178 L.Ed.2d 624 (2011). The reasonableness of the state court decisions must be measured against Supreme Court precedent as of the time the state court enters its decision. *Greene v Fisher*, 565 U.S. 34; 132 S. Ct. 38; 181 L.Ed.2d 336 (2011). "[A] state court's application of federal law is unreasonable 'only if reasonable jurists would find it so arbitrary, unsupported or offensive to existing precedent as to fall outside the realm of plausible credible outcomes.'" *Barker v Yukins*, 199 F. 3d 867, 872 (6th Cir. 1999).

Because Counsel was not acting as the advocate guaranteed by the Sixth Amendment to the United States Constitution, Petitioner's Due Process rights have been violated entitling him to relief. The right of self-defense is universally accepted in this country today. A person who acts in self-defense is not excused from the consequences of an otherwise illegal act. Rather, such a person has done no wrong in the universally held view in this country and is actually innocent of the crime charged. For this reason and those above, Petitioner is entitled to relief.

CONCLUSION

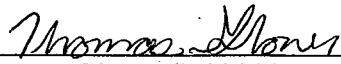
Based on U.S. Supreme Court precedence, when "a conscientious judge is in grave doubt as to the harmlessness of an error, the petitioner must win." *O'Neal v McAnich*, 513 U.S. 432, 436, 437; 115 S. Ct. 992; 130 L. Ed. 2d 947 (1995). The focus in such a situation is not merely whether there is enough evidence to support the result, apart from the portion affected by the error; it is whether the error itself has substantial influence. If a judge is left in grave doubt, the conviction cannot stand. "Only if a federal habeas court can say with certainty that a trial error had little or no impact on the judgment, should the judgment stand." *Barker v Yukins*, 199 F. 3d 867, 874 (6th Cir. 1999).

RELIEF REQUESTED

For the foregoing reasons, Petitioner respectfully requests for this Honorable United States Supreme Court to GRANT his petition for writ of certiorari; REVERSE Petitioner's conviction; ORDER that a new trial be conducted where the Petitioner is afforded due process of law; and GRANT any other relief this Honorable Court deems appropriate.

Respectfully Submitted,

Date: December 11, 2017


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