No. _____

IN THE

Supreme Court of the United States

ANGELO MCMULLAN,

Petitioner,

v.

RAYMOND BOOKER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in holding, in conflict with the decisions of five other circuits, that the United States Constitution does not require a trial court to instruct a jury on lesser included offenses in noncapital cases, even when the requested instructions are central to the theory of the defense and are supported by evidence in the record.

2. Whether the United States Court of Appeals for the Sixth Circuit erred in holding, based on reasoning that conflicts with that of two other circuits, that the Michigan courts' rejection of Petitioner's jury-instruction claim did not result "in a decision … based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding[s]," so as to authorize federal habeas relief under 28 U.S.C. § 2254(d)(2).

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PETITION FOR A WRIT OF CERTIORARI

Angelo McMullan respectfully submits this petition for a writ of certiorari.

OPINIONS

The opinion of the Court of Appeals for the Sixth Circuit (Pet.App. 1–32a) is reported at 761 F.3d 662.

JURISDICTION

The Sixth Circuit entered judgment on August 5, 2014. Mr. McMullan applied for an extension of time to file a petition for a writ of certiorari (No. 14A427), which Justice Kagan granted on October 21, 2014, extending the time to file until January 2, 2015. Because the Court will be closed on January 2, the petition is due on January 5, 2015. *See* S. Ct. Rule 30.1. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant constitutional provisions and statutes, including the Sixth Amendment, the Fourteenth Amendment, and 28 U.S.C. § 2254.

STATEMENT OF THE CASE

Consistent with due process and the jury-trial guarantee of the Sixth Amendment, the First, Third, Seventh, Eighth, and Ninth Circuits all recognize that the federal constitution requires lesser included offense instructions in noncapital trials, at least when the requested instruction is supported by the evidence and central to the theory of the defense. And, consistent with plain statutory language, both the First and Second Circuits recognize that 28 U.S.C. § 2254(d)(2) makes federal habeas relief available when a State court makes an unreasonable determination of the facts and that determination serves as the basis for denying, or finding no error in the denial of, a requested jury instruction. In the decision below, the Sixth Circuit rejected both of those propositions on its way to affirming the denial of Mr. McMullan's habeas petition.

That decision warrants this Court's review. Not only does the panel's opinion implicate two splits among the circuits, but it also addresses important questions about the federal rights of defendants and of the many individuals who are in custody due to conviction in State courts.

A. Legal Framework

1. This petition arises out of the denial of Mr. McMullan's petition for a writ of habeas corpus, in which he challenges his Michigan conviction for second-degree murder. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2241(a), and 28 U.S.C. § 2254. Because he is "in custody pursuant to the judgment of a State court," Mr. McMullan can obtain relief if "he is in custody in violation of the Constitution or laws or treaties of the

United States." 28 U.S.C. § 2254(a). Mr. McMullan satisfies that standard because the State courts' failure to require an instruction on the lesser included offense of involuntary manslaughter violated his rights under the Sixth and Fourteenth Amendments. However, the federal appellate courts have divided on whether, and when, the constitution requires lesser included offense instructions in non-capital cases. This petition presents the Court with an opportunity to resolve the confusion surrounding that issue.

2. To obtain habeas relief, Mr. McMullan also must satisfy 28 U.S.C. § 2254(d). This petition involves § 2254(d)(2), which "allows habeas petitioners to avoid the bar to habeas relief imposed with respect to federal claims adjudicated on the merits in state court by showing that the state court's decision was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson* v. *Corcoran*, 131 S. Ct. 13, 16-17 (2010) (per curiam). Because the Michigan Supreme Court adjudicated Mr. McMullan's jury trial claim on the merits, a federal court's application of the § 2254(d)(2) standard must focus on the Michigan Supreme Court's decision. *See Glebe* v. *Frost*, 135 S. Ct. 429, 430 (2014) (per curiam).

As discussed below, the Michigan Supreme Court's adjudication of Mr. McMullan's jury trial claim was "based on an unreasonable determination of the facts." However, the Sixth Circuit held that § 2254(d)(2) does not apply to a State court's decision regarding whether or not to give jury instructions. The federal circuit courts have reached differing

conclusions on that issue. This Court should grant Mr. McMullan's petition in order to settle the matter and to bring clarity to this important area of habeas law.

B. Factual Background And Procedural History.

1. Factual Background.

Mr. McMullan and Mr. Jimmy Smith were related by marriage, and as of July 6, 2001, they had been friends for thirty years. Pet.App. 2a. Unfortunately, both men were addicted to drugs, and they regularly used drugs together and shared drugs. *Id.* On July 6, 2001, Mr. McMullan attended a party with his wife. *Id.* Mr. Smith, along with his friend Gregory McDowell, went to the party to confront Mr. McMullan concerning Mr. Smith's belief that Mr. McMullan had sold him fake Vicodin pills. *Id.* When he arrived, Mr. Smith retrieved Mr. McMullan from the party, and the two men entered Mr. Smith's car, which was parked outside. *Id.*

Mr. McMullan and Mr. Smith smoked crack cocaine together inside the car. *Id.* When they had finished, Mr. McMullan gave Mr. Smith an additional rock of crack cocaine, and he then asked Mr. Smith to pay him for that rock. *Id.* In response, Mr. Smith threw the bottle of purportedly fake Vicodin pills at Mr. McMullan and refused to pay for the crack rock. *Id.*

Mr. McMullan and Mr. Smith then exited the car and began to fight. *Id.* Mr. McMullan's wife was standing near the fistfight, and at some point Mr. McMullan walked over to her and snatched from her a loaded revolver. *Id.*; *see also* Pet.App. 3a; Pet.App. 80a. By this point, Mr. Smith had gotten back inside his car, but he began to exit the car when he saw Mr.

McMullan holding the gun. Pet.App. 85a. The two men then pushed the car door in opposite directions, with Mr. Smith struggling to get out of the car and Mr. McMullan struggling to stop Mr. Smith from getting out of the car. *Id.* During this struggle, Mr. McMullan pointed the gun approximately one foot from Mr. Smith's chest. Pet.App. 3a. The gun fired. *Id.* As a result, Mr. Smith suffered a gunshot to the chest.

Immediately following the shooting, Mr. McMullan attempted to save Mr. Smith's life, including by driving Mr. Smith to the hospital in order "to try and get him some help." Pet.App. 89a. Mr. McMullan's grief was apparent, as he had "tears in his eyes" during the drive to the hospital. Pet.App. 84a. Unfortunately, Mr. Smith later died from his injury. Pet.App. 3a.

2. Mr. McMullan's Trial.

The State of Michigan charged Mr. McMullan with first-degree murder. *Id.* Because it was undisputed that Mr. McMullan was holding the gun when Mr. Smith was shot, the trial primarily concerned Mr. McMullan's mental state at the time of the shooting, including whether he intended to fire the gun. For its part, the State offered the testimony of Mr. McDowell, who testified that Mr. McMullan pushed Mr. Smith into the driver's seat of the car immediately before shooting him, and that Mr. McMullan took approximately $200 in cash from Mr. Smith's pockets immediately following the shooting. *Id.*

Mr. McMullan took the stand. He testified that he never intended to shoot Mr. Smith, but instead intended only to scare him with the gun. *Id.* Mr.

McMullan also testified that he did not push Mr. Smith into the car seat prior to the gunshot, and that he did not take money from Mr. Smith's pockets following the gunshot. *Id.* Most important for present purposes, Mr. McMullan specifically testified that he did not recall cocking, aiming, or firing the gun, and that he did not know how the "gun g[o]t cocked." *Id.*; Pet.App. 88a. The prosecution offered no evidence about who cocked the gun.

At the close of the evidence, the trial court instructed the jury on first-degree murder and the lesser-included offenses of second-degree murder [1] and voluntary manslaughter.[2] Pet.App. 8a; Pet.App. 94-99a.

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[1] Under Michigan law, "[t]he elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." Pet.App. 65-66a. "Malice is defined as 'the intent to kill, the intent to cause 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.* (citation and quotation marks omitted).

[2] "To show voluntary manslaughter" under Michigan law, the prosecution "must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People* v. *Reese*, 815 N.W.2d 85, 94-95 (Mich. 2012) (citation omitted). To establish the requisite *mens rea*, the prosecution must prove that the defendant caused the death "with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Id.* at 154 (quotation marks and citation omitted).

However, Mr. McMullan asked the trial court to instruct the jury on involuntary manslaughter.[3] Pet.App. 7a. Counsel for Mr. McMullan explained that an instruction on involuntary manslaughter was required because Mr. McMullan's testimony supported the theory that Mr. Smith's death was a terrible accident and established the elements of involuntary manslaughter. In particular, Mr. McMullan testified (1) that he did not intend to kill Mr. Smith, (2) that he did not recall cocking the gun, (3) that he did not recall the gun being discharged, and (4) that the door of the car was being pushed back and forth as Mr. McMullan and Mr. Smith struggled in the moments leading up to the discharge. Pet.App. 93a. The trial court, however, declined to give the requested instruction on involuntary manslaughter. Pet.App. 7a.

As relevant here, the jury convicted Mr. McMullan of second-degree murder. Pet.App. 4a. Based on that conviction, the trial court sentenced Mr. McMullan to prison for 30 to 75 years. Pet.App. 115-16a.

3. Mr. McMullan's Direct Appeal to the Michigan Court of Appeals.

On direct appeal, Mr. McMullan challenged the trial court's refusal to instruct the jury on involuntary manslaughter. Pet.App. 60-76a. The Michigan Court of Appeals recognized that, "[i]f a defendant is charged with murder, the trial court

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[3] Under Michigan law, involuntary manslaughter is "the unintentional killing of another, committed with a … *mens rea* of gross negligence or an intent to injure, and not malice." Pet.App. 61a (quotation marks and citation omitted).

should instruct the jury on common law involuntary manslaughter … if the instruction is supported by a rational view of the evidence." *Id.* at 61a.

However, over a dissent, the Court of Appeals held that an instruction on involuntary manslaughter was not supported by a rational view of the evidence because "the evidence supports only a finding of malice and not a lesser mens rea of gross negligence." *Id.* at 62a. In doing so, the Court of Appeals entirely credited the testimony of Mr. McDowell, agreeing with him that Mr. McMullan pushed Mr. Smith down into the car seat before shooting him and that Mr. McMullan took money from Mr. Smith's pockets after the shooting. *Id.* at 63a. The Court of Appeals also determined—without any support in the record—that Mr. McMullan "cocked back the hammer of the revolver" and "pulled the trigger, shooting the victim at close range in his chest." *Id.* at 63a. These factual determinations, the Court of Appeals held, "support a finding of malice, and preclude a finding of involuntary manslaughter." *Id.* at 63a; *see also id.* (basing holding on determinations that Mr. McMullan "demanded a loaded weapon from his wife after the physical altercation concluded, … returned to the victim and maintained a dominant position over him by physically forcing the victim back into the vehicle, … pointed the gun within close to the victim's chest, cocked the hammer, pulled the trigger, and stole the victim's money").

Judge Bandstra dissented in relevant part. "Reviewing the evidence presented at trial," Judge Bandstra explained that Mr. McMullan was entitled to an involuntary manslaughter instruction because

the evidence rationally supported it. *Id.* at 71a. While Mr. McMullan clearly fired the gun, "the crucial question … was his state of mind in doing so." *Id.*

On that key point, "[a] rational fact-finder could have believed [Mr. McMullan] when he said that he did not intend to fire the weapon [and that] he was using [it] merely to scare Smith, i.e., that he did not intend to do the act (firing the weapon) that caused Smith's death." *Id.* at 73-74a. Indeed, "[t]hat conclusion would be consistent with [(1)] the long history" of friendship between Mr. McMullan and Mr. Smith; (2) Mr. McMullan's "attempts to help [Mr.] Smith [by, among other things, driving him to the hospital,] following the shooting," (3) Mr. McMullan's "apparent grief at what had occurred"; and Mr. McMullan's "corroborated accounts of being under the influence of drugs at the time the shooting occurred." *Id.* at 74a. Based on that evidence, the jury could have found a lack of malice; but, "[b]y failing to instruct the jury on involuntary manslaughter and thus precluding that possible outcome, the trial court erred." *Id.*

Judge Bandstra also rejected the State's argument that the error was harmless because the jury found Mr. McMullen guilty of second-degree murder, rather than the lesser-included offense of voluntary manslaughter. As he explained, the jury "might well have" rationally rejected the voluntary manslaughter instruction because an essential element of that offense—"provocation induced passion"—was lacking. Judge Bandstra also concluded that Mr. McMullan's mental state

"nonetheless warranted a conviction of involuntary manslaughter." *Id.* at 75a.

Judge Bandstra rejected the State's argument that the failure to instruct on involuntary manslaughter was harmless because "the jury convicted [Mr. McMullan] of second-degree murder," "necessarily [finding] that [Mr. McMullan] acted with malice." *Id.* Here, that error could not be harmless because Mr. McMullan was plainly guilty of a homicide, such that the jury was likely to resolve any doubt in favor of conviction. *Id.* at 76a (citation omitted). Given those circumstances, the failure to give an instruction that would "allow[] the jury to agree with" Mr. McMullan's "view of the events in this case"—especially regarding his mental state—"undermines the reliability of the verdict." *Id.*

4. The Decision of the Michigan Supreme Court.

In a 5-2 split decision, the Michigan Supreme Court affirmed. Pet.App. 55-59a. The court began by explaining that, in determining whether a lesser included offense instruction is required, a court "must … review *all* of the evidence irrespective of who produced it to determine whether it provides a rational view to support an instruction on the lesser charge." *Id.* at 56a. The Supreme Court first determined that the Court of Appeals erred by "accepting as fact evidence that [Mr. McMullan] disputed"—including by crediting Mr. McDowell's testimony that Mr. McMullan pushed Mr. Smith into the car before shooting him and that Mr. McMullan took money from Mr. Smith following the shooting. *Id.* at 56a.

Nevertheless, the Michigan Supreme Court held that "a rational view of the evidence in this case does not support an instruction on involuntary manslaughter." *Id.* at 56a. Specifically, the Court held that "[t]he facts inescapably show that [Mr. McMullan] acted with malice," rather than with "an intent merely to injure or with non-malicious gross negligence," because, the court wrote, Mr. McMullan "does not dispute that the gun was in his hand when it was cocked and then fired," and because "the firearm had to be specifically cocked in order to fire." *Id.* at 57a.

Chief Judge Kelly, joined by Judge Cavanagh, dissented. *Id.* at 58-59a. Echoing Judge Bandstra's dissent in the Court of Appeals, the dissenters explained that Mr. McMullan's "conviction must be reversed" because "[a] rational fact-finder could have believed [Mr. McMullan] when he said that he did not intend to fire the weapon he was using merely to scare Smith." *Id.* at 58a (citation omitted).

5. Mr. McMullan's Petition for a Writ of Habeas Corpus.

Mr. McMullen, proceeding pro se, filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Michigan. As relevant here, Mr. McMullan argued that the state courts denied his request for an involuntary manslaughter instruction based on "erroneous" findings of fact, and that, in denying that jury-instruction claim, they violated the rights guaranteed him by the federal constitution. Pet.App. 121-22a; 130-36a.

The district court denied Mr. McMullen's petition. Pet.App. 33-54a. In rejecting Mr.

McMullan's claim that he was entitled to an instruction on the lesser-included offense of involuntary manslaughter, the district court limited its analysis to 28 U.S.C. § 2254(d)(1). The district court concluded that a "failure to give the jury an instruction on a lesser included offense in a non-capital case is not contrary to, or an unreasonable application of, clearly established federal law," as determined by this Court. Pet.App. 38-39a. Relying heavily on the Michigan Supreme Court's analysis, the district court also held that "the trial court's failure to give the jurors an instruction on involuntary manslaughter was not … an unreasonable application of clearly established federal law" because "the evidence at trial suggested" that the "gun [did not go off] accidentally." Pet.App. 41a. The district court did not analyze Mr. McMullan's jury-instruction claim under 28 U.S.C. § 2254(d)(2). Because both the Michigan Court of Appeals and the Michigan Supreme Court divided on the merits of Mr. McMullan's jury-instruction claim, the district court issued a certificate of appealability as to that claim. Pet.App. 51a.

6. The Sixth Circuit's Decision Below.

The Sixth Circuit affirmed, holding that § 2254(d)(2) did not entitle Mr. McMullan to habeas relief on his claim that the trial court's refusal to instruct on involuntary manslaughter violated his constitutional rights. Pet.App. 1-32a.

a. The Sixth Circuit first held that Mr. McMullan was not entitled to relief under § 2254(d)(1). Specifically, the Sixth Circuit reasoned that Mr. McMullan could not obtain relief under § 2254(d)(1) because this Court has never held that the

Constitution requires a lesser-included offense instruction in non-capital cases. *Id.* at 9a.

b. The Sixth Circuit then analyzed Mr. McMullan's claim under § 2254(d)(2), which authorizes habeas relief when the state court's rejection of a claim on the merits is based on an "unreasonable determination of the facts." *Id.* at 9a. The Sixth Circuit offered three grounds for its rejection of Mr. McMullan's argument under § 2254(d)(2).

First, the Sixth Circuit held that Mr. McMullan had not shown the violation of a right protected by the federal constitution. *Id.* at 9a. While the Court did not revisit the discussion of the due process clause contained in its § 2254(d)(1) analysis, it did hold that the Sixth Amendment "jury-trial right does not prohibit judges from declining jury instructions on lesser included offenses in non-capital cases." *Id.* at 12a; *see also id.* at 14a ("The fact that the capital/non-capital offense distinction is relevant … to a § 2254(d)(1) analysis does not make it relevant 'only' to § 2254(d)(1)."). According to the Sixth Circuit, the Sixth Amendment merely precludes judges from "dictat[ing] the outcome" of a trial, and thus does not apply to a court's decision regarding whether or not a lesser included offense instruction is warranted because such decisions do not "literally … dictate the outcome." *Id.* at 14a.

Second, the Sixth Circuit held that "a trial court's decision about whether to provide a jury instruction is not the kind of fact-based determination subject to scrutiny under § 2254(d)(2)." *Id.* at 15a. In the Sixth Circuit's view, § 2254(d)(2) applies only to "basic, primary, or

historical facts," and "issues that depend on a trial court's appraisal of witness credibility and demeanor." *Id.* at 16a. Applying that view to Mr. McMullan's case, the Sixth Circuit apparently determined that decisions regarding whether to grant or deny a jury instruction do not involve factual determinations because they are legal decisions, "similar to … evidentiary [decisions]—the proper domain of the trial court." *Id.* at 16a.

Third, the Sixth Circuit held that, even if the decision to reject Mr. McMullan's jury-instruction claim "were a fact-based one," it "was [not] unreasonable," as required by § 2254(d)(2). *Id.* at 18a. The court reasoned that "the mere 'use of a deadly weapon' can establish malice in Michigan." *Id.* (citation omitted). Working from that premise, the Sixth Circuit expressed its view that "[t]he subsidiary fact involved—that McMullan used a gun and that Smith was shot by that gun—was uncontested." *Id.* at 17a. The Sixth Circuit thus concluded that "there was evidence in the record to support the trial court's finding that malice was present and that the involuntary-manslaughter instruction was not necessary." *Id.* at 18a (citation omitted).

Judge Clay concurred in the judgment of the lead opinion, but wrote separately to criticize portions of the lead opinion that he viewed as unnecessary to this resolution of Mr. McMullan's case. Specifically, Judge Clay would have based the rejection of Mr. McMullan's jury instruction claim solely on the ground that "[i]t was not unreasonable for the trial court to … conclude that no rational view of the facts could support a jury instruction for involuntary

manslaughter." *Id.* at 30a. Judge Clay "disagree[d] with the lead opinion's remarks regarding the scope of the Sixth Amendment jury trial right." *Id.* at 31a. Moreover, Judge Clay would not have addressed whether the constitution requires lesser included offense instructions in non-capital cases and whether § 2254(d)(2) applies to decisions not to instruct on lesser included offenses. *Id.* at 31a.

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. McMullen's petition for a writ of certiorari. *First*, the Sixth Circuit's decision reflects a well-developed circuit split regarding whether a criminal defendant is entitled to a lesser included offense instruction in a non-capital case, where the instruction is both supported by the evidence and central to the defendant's theory of the case. *Second*, the Sixth Circuit's decision deepened a division among the circuits concerning whether jury instruction decisions can be subject to federal habeas review under § 2254(d)(2). This petition presents the Court with an opportunity to resolve these important issues concerning the rights of the accused and convicted and the authority of federal habeas courts.

I. THE COURT SHOULD MAKE CLEAR THAT THE CONSTITUTION REQUIRES LESSER INCLUDED OFFENSE INSTRUCTIONS IN NONCAPITAL CASES.

The decision in this case represents one side of a well-developed, three-sided circuit split regarding whether, and when, a defendant in a non-capital case is constitutionally entitled to a lesser included offense instruction. The Court should grant this petition to resolve that conflict among the circuit courts.

A. The Circuits Are Split Over Whether, And When, the Constitution Requires Lesser-Included Offense Instructions In Non-Capital Cases.

In *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court held that the constitution entitles a defendant in a capital case to lesser included offense instructions. *Id.* at 638. The federal circuits have since divided over whether, and when, the constitution entitles a defendant in a non-capital case to lesser included offense instructions.

1. Following *Beck*, the Third Circuit held that, in noncapital cases, the constitution requires that "a court … give a requested instruction on lesser included offenses where it is supported by the evidence." *Vujosevic* v. *Rafferty*, 844 F.2d 1023, 1027 (3d Cir. 1988). The court reasoned that, when a defendant advances the theory that he committed a lesser included offense—but not the crime charged—and the evidence supports that theory, failure to instruct on the lesser included offense deprives the defendant of his right "to have the jury decide whether his version of the facts [is] correct." *Id.* at 1026-27.

The Ninth Circuit reached a similar conclusion following *Beck*. Specifically, that court has recognized that, while a defendant does not *always* have a constitutional right to a lesser included offense instruction, the constitution *does* entitle the defendant to such an instruction if the evidence supports the instruction and it is needed to present the "theory of defense" to the jury. *Bashor* v. *Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984), *overruled on other grounds by Tolbert* v. *Page*, 182 F.3d 677 (9th

Cir. 1999) (en banc). In other words, the Ninth Circuit, like the Third Circuit, has acknowledged that the constitution guarantees a defendant a lesser included offense instruction when such an instruction is necessary "to have the jury decide whether his version of the facts [is] correct." *Vujosevic*, 844 F.2d at 1026-27.

2. Other federal circuits have concluded that the constitution guarantees a noncapital defendant the right to instructions regarding lesser included offenses, but only when the absence of such an instruction would constitute a "fundamental defect," or when the omission of such an instruction would be "inconsistent with the rudimentary demands of fair procedure." *DeBerry* v. *Wolff*, 513 F.2d 1336, 1338 (8th Cir. 1975) (quotation marks and citation omitted); *see Tata* v. *Carver*, 917 F.2d 670, 671 (1st Cir. 1990) (holding that "a due process violation occurs … when the failure to give [a lesser included offense instruction] in a noncapital case amounts to so fundamental a defect as to cause a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure" (quotation marks and citation omitted)); *Nichols* v. *Gagnon*, 710 F.2d 1267, 1272 (7th Cir. 1983) ("[W]e … review failures to instruct [on lesser included offenses] under the … fundamental miscarriage of justice" standard."). Courts taking this position have grounded their analysis in the due process clause's requirement that the defendant's trial be fundamentally fair. *See Tata*, 917 F.2d at 671; *Nichols*, 710 F.2d at 1272. This standard differs from the approach employed by the Third and Ninth Circuits in that it permits the trial court some leeway to engage in assessing the evidence: "A

fundamental miscarriage of justice occurs from a failure to tender an instruction when *credible* evidence in the record would support a verdict based on the omitted instruction." *Wilson* v. *McCaughtry*, 994 F.2d 1228, 1238 (7th Cir. 1993) (quotation marks and citation omitted).

3. Still other federal circuits, including the Sixth Circuit in this case, have held that a defendant in a noncapital case never has a constitutional right to lesser included offense instructions. *See* Pet.App. 9a; *Valles* v. *Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988) ("In a non-capital murder case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue."); *Campbell* v. *Coyle*, 260 F.3d 531, 541 (6th Cir. 2001) ("[T]he Constitution does not require a lesser-included offense instruction in non-capital cases."); *Chavez* v. *Kerby*, 848 F.2d 1101, 1103 (10th Cir. 1988) (holding that failure to instruct on lesser included offense in a noncapital case does not present a federal constitutional question cognizable on habeas corpus review); *Perry* v. *Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987) (per curiam) ("[T]he Constitution's Due Process Clause does not require a state court to instruct the jury on lesser included offenses" "in a noncapital murder case.").[4]

* * *

In sum, at least nine federal appellate courts have addressed whether the constitution requires

[4] The Second, Fourth, and District of Columbia Circuits have not determined whether, and when, the constitution requires a lesser included offense instruction in a noncapital trial.

lesser included offense instructions in noncapital cases in the more than thirty years since *Beck*. Given the depth of the split, this Court's intervention is needed to resolve this important issue concerning the constitutional rights of the accused. This Court should grant Mr. McMullan's petition for writ of certiorari.

B. This Court Should Hold That the Constitution Entitles Defendants In Noncapital Cases To Lesser Included Offense Instructions.

This Court should make clear that the constitution entitles defendants in noncapital cases to lesser included offense instructions, at least when—as in Mr. McMullan's case—the requested instruction is consistent with the theory of the defense and supported by the evidence. The Sixth Amendment jury trial guarantee and the due process clause of the Fourteenth Amendment, as well as decisions interpreting those constitutional provisions, compel that conclusion.

1. The Court should make clear that the Third and Ninth Circuits were correct when they recognized that a defendant's constitutional rights are violated whenever a trial court refuses to instruct the jury on a lesser-included offense that is supported by the evidence and central to the defendant's theory of the case. This conclusion is compelled by the Sixth Amendment, which "[p]rovide[s] an accused with the right to be tried by a jury of his peers." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). A central aspect of this right is that issues of fact—including, as relevant in this case, the issue of intent—must be submitted to, and decided

by, the jury. *See Morrissette* v. *United States*, 342 U.S. 246, 274 (1952). A judge therefore "may not withdraw or prejudge" an issue of fact through its instructions to the jury. *Id.*

One way in which a judge may "withdraw or prejudge" an issue of fact—in violation of the defendant's Sixth Amendment rights—is by refusing to instruct the jury on a lesser included offense that is supported both by the evidence and the accused's theory of the defense. As the Sixth Circuit put it: A "judge's decision to deny a lesser-included-offense instruction is a way in which the 'jury's discretion is … channeled.'" Pet.App. 17a (quoting *Hopper* v. *Evans*, 546 U.S. 605, 611 (1982)). When a judge refuses to give a lesser-included-offense instruction that is supported by the evidence and the defendant's theory of the case, the judge "channels"—which is to say, eliminates—the jury's ability to consider the defendant's factual allegations and theory, and thus impermissibly deprives the defendant of his Sixth Amendment right "to have the jury decide whether his version of the facts [is] correct." *Vujosevic*, 844 F.2d at 1026-27. In sum, the Sixth Amendment entitles a defendant to a lesser included offense instruction whenever that instruction is supported by the evidence and the theory of the defense.

2. The due process clause likewise entitles a defendant to an instruction on a lesser included offense when that defense has some evidentiary support and is central to the defendant's theory of the case. This Court has emphasized that the due process clause "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, 467 U.S.

479, 485 (1984). Of course, the constitutional right to present a complete defense would be meaningless if it did not carry with it a right to an instruction that would allow the jury to consider the theory of the defense.

Thus, courts across the nation have recognized that the due process clause requires that the jury be adequately instructed on the defendant's theories of the case, if those theories have some support in the evidence. *See Kornahrens* v. *Evatt*, 66 F.3d 1350, 1354 (4th Cir. 1995) ("[I]f a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it."); *United States* v. *Douglas*, 818 F.2d 1317, 1322 (7th Cir. 1987) ("It is essential for purposes of the [due process clause's] requirement of a fair trial that the jury be able to evaluate[,] … following appropriate instructions, the adequacy of the defendants' theory of defense." (quotation marks and citation omitted)); *United States ex rel. Means* v. *Solem*, 646 F.2d 322, 331-32 (8th Cir. 1980) (holding that failure to instruct on defendant's theory of case violated due process where instruction had support in evidence and instructions provided did not present defendant's theory of the case to the jury); *Conde* v. *Henry*, 198 F.3d 734, 739 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case."). Indeed, in the context of a direct appeal of a federal sentence, the Sixth Circuit has held that a trial court's failure to instruct the jury on a lesser included offense constitutes structural error when the lesser included offense instruction is supported by the evidence and essential to the defendant's theory of the case. *See United States* v. *Monger*, 185

F.3d 574, 577-78 (6th Cir. 1999) (holding that failure to give lesser included offense instruction that is central to the theory of the defense is "intrinsically harmful constitutional error").

At a minimum, a trial court's refusal to instruct the jury on a lesser included offense violates a defendant's constitutional rights whenever the omission of such an instruction would be fundamentally unfair. After all, "fundamental fairness" is "the touchstone of due process." *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973); *see Application of Gault*, 387 U.S. 1, 26 (1967) (listing "fairness" among "the essentials of due process"); *Lisenba* v. *California*, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is … to prevent fundamental unfairness."). For that reason, the First, Seventh, and Eighth Circuits have held that the omission of a lesser included offense instruction in a noncapital case violates due process whenever that omission constitutes a "fundamental defect" or is "inconsistent with the rudimentary demands of fair procedure." *DeBerry*, 513 F.2d at 1338 (quotation marks and citation omitted); *Tata*, 917 F.2d at 671; *Nichols*, 710 F.2d at 1272; *see also Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973) (asking "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process"); *Davis* v. *Strack*, 270 F.3d 111, 116, 123-24, 131-32 (2d Cir. 2001) (in capital case, failure to instruct on defendant's "credible" theory of justification "infected the entire trial" and rendered the "result … [un]fair," thus "violat[ing] due process").

***

The bottom line is that the Sixth Amendment and the due process clause of the Fourteenth Amendment require lesser included offense instructions in noncapital cases in at least some circumstances. Many courts have acknowledged as much, in decisions well-grounded in both constitutional text and precedent. This Court should grant this petition to make clear that those decisions are correct, and that the constitution requires a lesser included offense instruction whenever supported by the evidence and key to the defendant's theory of the case.

C. The Michigan Courts Violated Mr. McMullan's Constitutional Rights When They Refused to Instruct the Jury on Involuntary Manslaughter.

Once it is recognized that the constitution entitles a defendant to a lesser included offense instruction in some circumstances, it becomes clear that Mr. McMullan was entitled to an instruction on involuntary manslaughter in this case. That instruction was the centerpiece of Mr. McMullan's theory of the case, it was well-supported by the evidence, and its denial was a fundamental defect in Mr. McMullan's trial.

First, the involuntary manslaughter instruction was central to Mr. McMullan's theory of the case, which was that "he wanted to scare Smith … by threatening him with a gun," that he did not intend to fire the weapon or to shoot Mr. Smith, and that the gun "just [went] off" accidentally. Pet.App. 72a. Only an instruction on involuntary manslaughter could have presented that theory to the jury. This is because involuntary manslaughter in Michigan is

"the unintentional killing of another, committed with a … mens rea of gross negligence or an intent to injure, and not malice." Pet.App. 61a (quotation marks and citation omitted). Thus, by refusing to instruct on involuntary manslaughter, the trial court deprived Mr. McMullan of his right to present his theory to the jury, so that the jury could "decide whether his version of the facts [is] correct." *Vujosevic*, 844 F.2d at 1026-27.

Second, the evidence presented to the Michigan courts "could reasonably have led to a verdict of guilt of [the] lesser offense" of involuntary manslaughter. *Hopper* v. *Evans*, 456 U.S. 605, 610 (1982). Indeed, the evidence in the record supported a finding that the killing of Mr. Smith was "unintentional" and that Mr. McMullan acted with "gross negligence" and without "malice." Mr. McMullan specifically testified that he did not intend to fire the gun, but instead intended only to scare Mr. Smith. Pet.App. 72a Mr. McMullan also testified that he did not recall cocking, aiming, or firing the gun, and that he did not know how the "gun g[o]t cocked." Pet.App. 4a; Pet.App. 87-88a. [5] In addition, Mr. McMullan testified that he did not take money from Mr. Smith following the shooting, which is consistent with Mr. McMullan's theory—and testimony—that the shooting was a terrible accident. Pet.App. 4a. The record also contained additional evidence supporting Mr. McMullan's testimony that he did not intend to kill Mr. Smith, including evidence: (1) that Mr. Smith and Mr. McMullan had known each other for

[5] In fact, the record contains no evidence that Mr. McMullan cocked the gun, or that he knew it was cocked at some point before Mr. Smith was shot. *See infra* at 31-32.

thirty years, were friends, and were related by marriage, (2) that Mr. McMullan assisted in transporting Mr. Smith to the hospital "to try to get him some help," and (3) that Mr. McMullan had "tears in his eyes" during the drive to the hospital. Pet.App. 2a; 89a; 84a. The Michigan courts deprived Mr. McMullan of his constitutional rights when they limited the jury's ability to consider this evidence by refusing to instruct on involuntary manslaughter.

Third, Mr. McMullan's constitutional rights were violated even under the approach adopted by the First, Seventh, and Eighth Circuits, because the Michigan courts' refusal to instruct on involuntary manslaughter was a "fundamental defect," *DeBerry*, 513 F.2d at 1338 (quotation marks and citation omitted), that rendered "the result" of Mr. McMullan's trial "unfair," *Strack*, 270 F.3d at 116, 123-24. It was and is undisputed that Mr. McMullan was holding the gun when it fired the shot that ultimately killed Mr. Smith. Therefore, the central issue at trial was not whether Mr. McMullan's actions killed Mr. Smith, but instead was the state of Mr. McMullan's mind in undertaking those actions.

By refusing an involuntary manslaughter instruction, the Michigan courts robbed Mr. McMullan of any opportunity to have the jury consider his position on that outcome-determinative issue. The effect was to tie Mr. McMullan's hands, while leaving the government unbound. That is both a "fundamental defect" and "inconsistent with the rudimentary demands of fair procedure," *DeBerry*, 513 F.2d at 1338 (quotation marks and citation omitted), and it rendered the result of the trial—Mr.

McMullan's murder conviction—"unfair," *Strack*, 270 F.3d at 116, 123-24.

If there were any doubt on this point, it evaporates in light of (1) the substantial, credible evidence supporting Mr. McMullan's requested involuntary manslaughter instruction,[6] *see supra* at 24-25, and (2) the fact that no reasonable jury would have acquitted Mr. McMullan of homicide charges given the undisputed fact that he approached the victim in order to threaten him with a weapon, even if the jury had doubts regarding whether the government had proved the elements of the greater offenses. Thus, by taking the well-supported involuntary manslaughter instruction off the table, the Michigan courts essentially directed—or at least guaranteed—a conviction of second-degree murder. That, no doubt, qualifies as a "fundamental defect" and "miscarriage of justice."[7]

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[6] "A fundamental miscarriage of justice occurs from a failure to tender an instruction when *credible* evidence in the record would support a verdict based on the omitted instruction." *Wilson*, 994 F.2d at 1238 (quotation marks and citation omitted).

[7] Assuming that a prejudice standard applies in cases involving a "miscarriage of justice"—which would seem by definition to cause prejudice—any such standard obviously is satisfied in this case for the reasons stated in the text. *See Fry* v. *Pliler*, 551 U.S. 112, 116 (2007) (prejudice inquiry for federal habeas proceedings asks whether an error "had substantial and injurious effect or influence in determining the jury's verdict" (quotation marks and citation omitted)).

It makes no difference that the court charged Mr. McMullan with voluntary manslaughter. The voluntary manslaughter instruction did not place Mr. McMullan's theory of the case before the jury. Moreover, the two offenses differ, in

(continued…)

that voluntary manslaughter requires a showing that the defendant killed in the heat of a provocation-induced passion, without an adequate time to cool off, whereas involuntary manslaughter requires a showing that the defendant acted with gross negligence or intent to injure. *Compare supra*, n.2 *with supra* n.3. Thus, the "jury might well have concluded that there was no 'provocation induced passion' to support a voluntary manslaughter conviction but that defendant's mental state nonetheless warranted a conviction of involuntary manslaughter." Pet.App. 75a. Indeed, here that result was an absolute certainty, or at a minimum a near certainty, given that there was very little, if any, evidence of the provocation and uncooled passion necessary for voluntary manslaughter, but a great deal of persuasive evidence supporting involuntary manslaughter. *See supra* at 4-6 (recounting evidence that Mr. McMullan had to walk to retrieve the gun from his wife, thus allowing time to cool down, and that Mr. McMullan had time to form an intent to "scare" Mr. Smith). The giving of an unsupported—or *at best* weakly supported—voluntary manslaughter instruction thus did nothing to lessen the prejudice caused by the omission of the well-supported involuntary manslaughter instruction that encapsulated Mr. McMullan's theory of the case.

It likewise makes no difference that the jury convicted Mr. McMullan of second degree murder. This case involved a death that was caused by a handgun and that resulted from a drug-related struggle. Faced with a choice between (1) acquitting Mr. McMullan of all homicide offenses, (2) finding him guilty of voluntary manslaughter despite the lack of evidence of uncooled provocation-induced passion, and (3) convicting him of murder, the jury naturally chose murder—the *charged* offense that most closely fit the facts of this case. Of course, the evidence strongly supported involuntary manslaughter, but the trial court's refusal to instruct on that offense took it off the table, guaranteeing a murder conviction.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT CONCERNING APPLICATION OF 28 U.S.C. § 2254(D)(2).

The Sixth Circuit's decision in this case also represents one side of another circuit split. This circuit split concerns the application of 28 U.S.C. § 2254(d)(2). Under that provision, a court may grant a state prisoner's "application for a writ of habeas corpus" if the state court's "adjudication of the claim … resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The federal circuits disagree over whether Section 2254(d)(2) applies to a State court's determination of the facts when that determination of the facts serves as the basis for denying, or finding no error in the denial of, a requested jury instruction.

1. Two circuits have held that Section 2254(d)(2) has no application to a state court's order finding no error in the denial of a requested jury instruction. In its opinion in this case, the Sixth Circuit began the relevant portion of its analysis with a categorical holding that "a trial court's decision about whether to provide a jury instruction is not the kind of fact-based determination subject to scrutiny under § 2254(d)(2)." Pet.App. 15a. Similarly, the Tenth Circuit has held that "a question concerning the sufficiency of the evidence to support the giving of a lesser included offense instruction … is a mixed question law and fact and is thus reviewable under § 2254(d)(1)," not § 2254(d)(2). *Gilson* v. *Sirmons*, 520 F.3d 1196, 1233 (10th Cir. 2008).

In stark contrast, the Second Circuit has held that a writ of habeas corpus will be granted pursuant to Section 2254(d)(2) when a State court's decision that the denial of a requested jury instruction was not error was "based on an unreasonable determination of the facts in the light of the evidence." *Strack*, 270 F.3d at 133 (granting writ where State court refused to give justification jury instruction based on factual determinations that were "without reasonable basis"). The First Circuit, too, has recognized that Section 2254(d)(2) applies to factual determinations that bear on whether or not a requested jury instruction should have been given. *See Brown* v. *O'Brien*, 666 F.3d 818, 824-25 (1st Cir. 2012) (applying § 2254(d)(2) applied to State court's determination that evidence did not support intoxication instruction, but holding that evidence in fact did not support instruction), *abrogated on other grounds*, *Harrington* v. *Richter*, 131 S. Ct. 770, 785 (2011).

2. This Court should grant this petition in order to make clear that Section 2254(d)(2) applies where a State court denies, or finds no error in the denial of, a requested jury instruction based on an unreasonable determination of the facts. The reason is simple: Section 2254(d)(2) contains no exception for decisions relating to jury instructions. Instead, the statutory language makes plain that Section 2254(d)(2) applies whenever a State court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

And, to be sure, a court's decision regarding whether to grant a requested jury instruction frequently will depend on the court's determination of the facts. The standard governing whether to grant or deny a defendant's requested jury instruction is record-intensive: A court must give the requested instruction if the evidence rationally supports the factual conclusions embodied in the instruction. *See Hopper*, 456 U.S. at 612 ("The federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater.'" (citation omitted)); *Mathews* v. *United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."); Pet.App. 56a (instruction on a lesser included offense should be given "if the instruction is supported by a rational view of the evidence"); *People* v. *Kolanek*, 817 N.W.2d 528, 545 (Mich. 2012) (A defendant is entitled to an instruction on a defense if he "present[s] evidence from which a reasonable jury could conclude that the elements of the defense have been met."). In examining the evidence to determine what a reasonable jury could have found as fact, courts sometimes make their own determinations of fact, just as the State courts did in Mr. McMullan's case. And, when they do, Section 2254(d)(2) by its very terms applies. *See Strack*, 270 F.3d at 133; *Brown*, 666 F.3d at 824-25.

3. The Sixth Circuit in this case erred in holding that the Michigan Supreme Court's rejection of Mr. McMullan's jury-instruction claim was not

based on an unreasonable determination of the facts within the meaning of § 2254(d)(2). The Michigan Supreme Court based its holding that an involuntary manslaughter instruction was not required on its conclusion that "[t]he facts inescapably show that [Mr. McMullan] acted with malice because, at a minimum, he intended to do an act in wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." Pet.App. 57a (quotation marks omitted) (emphasis omitted). And that conclusion was in turn based on the Michigan Court's conclusive factual determinations (1) that "the firearm had to be specifically cocked in order to fire," and (2) that Mr. McMullan "does not dispute that the gun was in his hand when it was cocked and then fired." *Id.* Thus, the linchpin of the Michigan Supreme Court's rejection of Mr. McMullan's jury-instruction claim was its conclusive factual determination that Mr. McMullan cocked the gun, and in fact conceded that he had done so.

That factual determination was unreasonable. Mr. McMullan *never* conceded that the gun was in his hand when it was cocked. Rather, Mr. McMullan testified that he did not recall cocking, aiming, or firing the gun, that he in fact did not know how the "gun g[o]t cocked," and that the gun just "went off." Pet.App. 87-88a. Nor is there other evidence in the record demonstrating—much less conclusively demonstrating, as required to preclude a jury instruction—that Mr. McMullan cocked the gun, or knew it was cocked, before Mr. Smith was shot. In short, the Michigan Supreme Court's decision is based on an unreasonable determination of the facts because the record contains no evidence supporting

that court's conclusive factual determination that Mr. McMullan cocked the gun before Mr. Smith was shot.[8] For that reason, Mr. McMullan is not barred from obtaining habeas relief. *See* § 2254.

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[8] The Sixth Circuit concluded that the State court's decision was not based on an unreasonable determination of fact because "the mere 'use of a deadly weapon' *can* establish malice in Michigan." Pet.App. 18a (quoting *People* v. *Bulls*, 687 N.W.2d 159, 165 (Mich. App. 2004) (emphasis added)). For two reasons, the Sixth Circuit erred in reaching that conclusion.

First, the Sixth Circuit erred by substituting its own factual determination for that of the Michigan Supreme Court. By its text, § 2254(d) instructs a federal habeas court to evaluate *the State court's* factual determinations. Here, the Michigan Supreme Court based its decision that Mr. McMullan "did not act with an intent to merely to injure or with non-malicious gross negligence," Pet.App. 40a, on its unsupported determination that Mr. McMullan cocked the gun, rather than the simple fact that the Mr. McMullan "use[d] a deadly weapon." *See also* Pet.App. 63a (likewise basing decision on factual determination that Mr. McMullan "cocked back the hammer of the revolver" and "[t]hen … pulled the trigger."). That state-court factual conclusion is the only proper focus of the § 2254(d)(2) inquiry.

Second, the Sixth Circuit erred by answering the wrong question. The question was not whether use of a weapon *could* give rise to an inference of malice. Instead, the relevant question—which is to say, the question before the Michigan courts and at issue in these habeas proceedings—was whether a rational view of the evidence supported an instruction on involuntary manslaughter. To paraphrase Judge Clay's separate opinion, "[t]he fact that the use of a deadly weapon can establish the requisite malice for murder" might support "the trial court's decision to include the murder instruction; it does not justify its refusal to give an involuntary manslaughter instruction." Pet.App. 31a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

ANGELO MCMULLAN, *Petitioner-Appellant*, v. RAYMOND BOOKER, *Respondent-Appellee*.	No. 12-1305

Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor. No. 5:11-cv-11870—John Corbett O'Meara, District Judge.

Argued: October 9, 2013

Decided and Filed: August 5, 2014

Before: BOGGS, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Thomas R. Chiavetta, Jr., JONES DAY, Washington, D.C., for Appellant. Bruce H. Edwards, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Thomas R. Chiavetta, Jr., Eric Dreiband,

Sherron N. Thomas McClain, JONES DAY, Washington, D.C., for Appellant. Bruce H. Edwards, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

BOGGS, J., delivered the opinion of the court, in which GILMAN, J., joined and CLAY, J., joined in the result. CLAY, J. (pp. 22–24), delivered a separate opinion concurring in the judgment.

OPINION

BOGGS, Circuit Judge. Angelo McMullan appeals the district court's denial of his petition for a writ of habeas corpus. A Michigan jury convicted McMullan, inter alia, of second-degree murder. McMullan presents three grounds for habeas relief: (1) the state trial court unreasonably declined to give the jury an involuntary-manslaughter instruction; (2) trial counsel rendered ineffective assistance; and (3) the state unlawfully withheld exculpatory evidence. The district court denied McMullan's petition. For the reasons set out below, we affirm the district-court judgment.

I

A

McMullan and Jimmy "Butch" Smith were friends of thirty years and were related by marriage. The two men were drug addicts and regularly used and shared drugs.

On July 6, 2001, McMullan and his wife were attending a party at the apartment of Willie Henry Russell, Jr., a friend of McMullan's. Smith, who was not at the party, was angry because he believed that McMullan had sold him Vicodin pills that were fake. Smith sought a refund from McMullan. Smith, accompanied by his friend Gregory McDowell, drove to Russell's apartment to find McMullan. Smith retrieved McMullan from the party, and both men returned to Smith's car in the parking lot.

Inside the car, McMullan smoked some of his crack cocaine with Smith. McMullan also handed Smith some additional crack cocaine. In response to McMullan's request for payment for the crack, Smith threw McMullan the bottle of purportedly fake Vicodin pills that McMullan had sold him and refused to pay for the crack.

A fistfight ensued in the parking lot. During the fight, McMullan snatched a revolver from his wife, who was standing nearby. McMullan pointed the gun one foot from Smith's chest. The gun fired, and Smith was shot. Smith later died from the gunshot wound to the chest.

The State of Michigan charged McMullan with first-degree murder. Both McMullan and McDowell testified at trial, and their testimony differed in several respects. McMullan testified that at the time he grabbed the revolver from his wife, she was three-to-four feet from him; McDowell testified that she was fifteen-to-thirty feet away from McMullan. McDowell also testified that, immediately before McMullan shot Smith, McMullan pushed Smith down into the driver's seat of Smith's car; McMullan testified that he did not push Smith. McMullan also

testified that he did not recall aiming the gun, cocking the gun, and shooting Smith; McMullan testified that he only intended to scare Smith with the gun and did not intend to shoot him. McDowell testified that immediately after Smith was shot, McMullan grabbed cash from Smith's pockets; McMullan denied this.

At the time McDowell testified, he had a pending cocaine-possession charge. Because McDowell had denied ever using crack cocaine at a preliminary hearing, McMullan's counsel sought to cross-examine him about the charge in order to impeach McDowell's credibility. The trial court denied this request.

At the close of all evidence, the trial court instructed the jury not only on first-degree murder but also on second-degree murder and voluntary manslaughter. McMullan's counsel requested an involuntary-manslaughter instruction, which the trial court considered and denied.

On January 25, 2002, the jury convicted McMullan of second-degree murder, under Mich. Comp. Laws. § 750.317; possession of a firearm during the commission of a felony, under § 750.227b; and being a felon in possession of a firearm, under § 750.224f. The court found McMullan to be a fourth-felony habitual offender, under § 769.12.

That same day, the trial court in McDowell's case granted the government's motion to downgrade McDowell's cocaine charge from a felony to a misdemeanor. As part of this plea bargain, McDowell agreed to testify as needed against McMullan.

On February 21, 2002, at McMullan's sentencing, McMullan's counsel sought permission to file a motion for a new trial because of McDowell's plea

deal. The prosecutor, Kennan M. DeWitt, told the court that "there was absolutely no connection between Mr. McDowell's case [and McMullan's case] either in facts or procedure. . . . There was no consideration given to McDowell connected to this case. . . . [McDowell's plea] had nothing to do with this case."

B

On appeal to the Michigan Court of Appeals, McMullan argued that the trial court erred in declining to provide the involuntary-manslaughter instruction; that his trial counsel was ineffective for failing to cross-examine McDowell about the plea bargain; and that the government engaged in misconduct by failing to disclose the plea agreement. The Court of Appeals affirmed, with one judge dissenting from the panel's conclusion that the trial court did not err in declining to give the involuntary-manslaughter instruction. *See People v. McMullan*, 771 N.W.2d 810, 813 (Mich. Ct. App. 2009).

The Michigan Supreme Court granted leave to appeal on the sole issue of whether the involuntary-manslaughter instruction was warranted, *People v. McMullan*, 777 N.W.2d 139, 140 (2010), and that court affirmed, *People v. McMullan*, 789 N.W.2d 857, 857 (2010). The Supreme Court held that, under Michigan law, a trial court should instruct a jury on involuntary manslaughter when a "rational view of the evidence" supports the instruction. *Id.* at 858. The court ruled 5-2 that a rational view of the evidence, "even absent [disputed] questions of fact," did not support an involuntary-manslaughter instruction. *Ibid.* Specifically, the Supreme Court noted that McMullan did not "dispute that the gun

was in his hand when it was cocked and fired" and that "the firearm had to be specifically cocked in order to fire." *Ibid.*

Proceeding pro se, McMullan petitioned the district court for a writ of habeas corpus, seeking relief on the same three grounds as in his direct appeal. The district court denied the petition. *See McMullan v. Booker*, 2012 WL 603990, at *10 (E.D. Mich. Feb. 24, 2012). Because two Michigan Supreme Court justices would have reversed McMullan's conviction for failure to provide the involuntary-manslaughter instruction, the district court granted McMullan a certificate of appealability for that claim. *Id.* at *9. McMullan timely appealed, and we subsequently expanded the certificate of appealability to include all McMullan's claims and appointed McMullan counsel on appeal. We now affirm.

II

Habeas relief is available to McMullan "only on the ground that [a prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A court may not grant a habeas petition for "any claim that was adjudicated on the merits in State court proceedings" unless the state proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d). The "unreasonable application" clause authorizes federal courts to grant the writ when a "state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 409 (2000). For a federal court to grant habeas relief, the state-court application of federal law must be "objectively unreasonable." *Ibid.*

On habeas review, we examine a district court's legal conclusions de novo. *Davis v. Lafler*, 658 F.3d 525, 530 (6th Cir. 2011) (en banc).

III

A. Involuntary-Manslaughter Instruction

McMullan contends that the state trial court erred in refusing to instruct the jury on involuntary manslaughter, and he argues that he is entitled to habeas relief under both § 2254(d)(1) and § 2254(d)(2).

1. § 2254(d)(1)

First, McMullan claims that the state court's refusal to instruct the jury on involuntary manslaughter violated the Due Process Clause of the Fourteenth Amendment. This claim fails because McMullan cannot point to any "clearly established [f]ederal law" requiring a trial court to instruct the jury on a lesser included offense in a non-capital case. § 2254(d)(1).

Instructing a jury on a lesser offense benefits the prosecution because it can afford the state a conviction when the evidence cannot establish the crime charged or when the jury is reluctant to convict on the harshest charge; this practice also benefits the defendant in that "it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck v. Alabama*, 447

U.S. 625, 633 (1980). A lesser-included-offense instruction provides the jury with a valuable "third option." *Id.* at 634. For this reason, Michigan, like a number of other states, requires a trial judge to instruct on a lesser included offense if a rational view of the evidence supports the instruction. *People v. Cornell*, 646 N.W.2d 127, 139 (Mich. 2002); *see Beck*, 447 U.S. at 636 n.12 (collecting state cases). In homicide cases, Michigan requires an involuntary-manslaughter instruction if a rational view of the evidence supports the instruction. *People v. Mendoza*, 664 N.W.2d 685, 693 (Mich. 2003). The corollary is that a trial court need not instruct on involuntary manslaughter when a rational view of the evidence does not support the instruction. *See People v. Gills*, 712 N.W.2d 419, 439 (Mich. 2006).

Federal courts may grant habeas relief only on the basis of federal law that has been clearly established by the Supreme Court. § 2254(d)(1). The Supreme Court, however, has never held that the Due Process Clause requires instructing the jury on a lesser included offense in a non-capital case. *See Beck*, 447 U.S. at 638 n.14. Simply put, "the Constitution does not require a lesser-included offense instruction in non-capital cases." *Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001) (citing *Bagby v. Sowders*, 894 F.2d 792, 795–97 (6th Cir. 1990) (en banc)). What is determinative, at any rate, is that the Supreme Court has never so held.

Here, Michigan charged McMullan with first-degree murder. The trial court instructed the jury on second-degree murder and voluntary manslaughter, and it declined to instruct the jury on involuntary manslaughter. The jury convicted McMullan of

second-degree murder. Habeas relief is available to McMullan only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). Because the Supreme Court has never held that due process requires lesser-included-offense instructions in a non-capital case, McMullan's claim rests on no such federal ground. Therefore, his claim fails.

2. § 2254(d)(2)

a. Relevant Background

On appeal, McMullan argues that he is entitled to relief also under§ 2254(d)(2), the statute's "unreasonable determination of the facts" clause. This clause permits federal courts to grant a habeas petition when a state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). The State of Michigan asserts that McMullan's § 2254(d)(2) argument constitutes an improper attempt to amend his habeas petition on appeal. McMullan responds that his petition should be read to encompass a § 2254(d)(2) claim because he filed it as a pro se litigant.[1] We need not resolve whether McMullan's petition properly raises a § 2254(d)(2) claim; McMullan's claim fails under § 2254(d)(2) because the trial court's decision to withhold an involuntary-manslaughter instruction did not rest on an unreasonable determination of fact.

Michigan, like other states, distinguishes between murder and involuntary manslaughter. Under Michigan law, a homicide committed with the mens

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[1] After the district court entered its judgment, we appointed McMullan counsel on appeal.

rea of malice is murder. *Gillis*, 712 N.W.2d at 438. A homicide committed with the lesser mens rea of gross negligence or an intent only to injure is involuntary manslaughter. *Ibid.* The state establishes malice by showing that the accused had: an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Ibid.*

At McMullan's trial, the prosecutor objected to instructing the jury on both voluntary manslaughter and involuntary manslaughter. The court indicated that the voluntary-manslaughter instruction was necessary but that the court was undecided about the involuntary-manslaughter instruction. *Ibid.* The court asked McMullan's counsel why it should give an involuntary-manslaughter instruction. *Ibid.* McMullan's counsel replied:

> [McMullan] doesn't recall [the gun] being discharged. He doesn't recall cocking it back. He recalls the door being pushed back and forth when the gun was discharged. Holding a gun in front of another person I think may rise to the level of [] gross negligence, and [] there was testimony from Mr. McMullan that he did not intend to kill.

Ibid. The court listened to this evidence and ultimately determined that malice existed. The court found it relevant that McMullan shot Smith during a fight. *Id.* at 1150. In addition, the court reasoned that "when a gun is pointed a foot or so away from a person's chest, that sounds pretty intentional." *Ibid.* There is no basis in the record to conclude that the trial court disregarded the evidence cited by McMullan's counsel.

The Michigan Court of Appeals, reviewing the record de novo, determined that a rational view of the evidence did not support an involuntary-manslaughter instruction. *McMullan*, 771 N.W.2d at 813. Again reviewing all the evidence presented at trial, the Michigan Supreme Court found that "the facts inescapably show that defendant acted with malice because, at a minimum, he intended to do an act in wanton and willful disregard of the likelihood that the natural tendency of his behavior [was] to cause death or great bodily harm." *McMullan*, 789 N.W.2d at 858 (internal quotation marks and alterations omitted). The court specifically found that the evidence did not show mere gross negligence or intent to injure, the two ways of establishing the mental element for involuntary manslaughter. *Ibid.*

b. McMullan's Jury-Trial Argument

We owe "considerable deference" to state courts in the "application of their own law." *Bagby*, 894 F.2d at 794. "That is because where, as here, the highest court of a state has reviewed a defendant's request for a lesser included offense instruction and concluded that it is not warranted by the evidence elicited at trial, that conclusion is axiomatically correct, as a matter of state law." *Id.* at 795. Even if the trial court erred as a matter of state law, we emphasize that "it is not the function of a federal habeas court to correct errors in state law." *Id.* at 795. When reviewing a state-court judgment, we do not act as a super state appellate court. *Payne v. Janasz*, 711 F.2d 1305, 1310 (6th Cir. 1983).

Both parties agree that a court may grant habeas relief "only on the ground" that a defendant's custody violates clearly established *federal* law. § 2254(a);

see Resp't Br. 22; Reply Br. 9. The Supreme Court has clarified that § 2254(d)(2) functions to allow "habeas petitioners to avoid the bar to habeas relief imposed with respect to *federal claims adjudicated on the merits in state court* by showing that the state court's decision was based on an unreasonable determination of the facts . . . ." *Wilson v. Corcoran*, 131 S. Ct. 13, 16–17 (2010) (internal quotation marks omitted) (emphasis added).

The federal law that McMullan invokes is the Sixth Amendment's jury-trial right. *See* Pet'r Br. 13; Reply Br. 9. It is true that the Sixth Amendment affords criminal defendants the right to trial by jury. It is also true that this right includes "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). What that means, though, is that a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." *Ibid.* (holding that the giving of a constitutionally deficient reasonable-doubt instruction is a structural error). The jury-trial right does not prohibit judges from declining jury instructions on lesser included offenses in non-capital cases.[2]

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[2] McMullan also argues that the jury-trial right "extends to prohibit judges from weighing evidence and making credibility determinations, as these are properly within the sphere of the jury." Reply Br. 10. He cites *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), as an example of a case in which a jury instruction that removed the issue of intent from the jury was found to have improperly invaded the jury's factfinding function. *U.S. Gypsum Co.*, taken out of context, is misleading. In that case, the government charged six major gypsum manufacturers with violating section 1 of the Sherman Act. *Id.* at 427. The judge instructed the jury that if it found that the manufacturers'

McMullan relies on *Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007), in support of the proposition that we should ask whether the trial court based its denial of the jury instruction on a view of the facts that a rational jury could have rejected. *Reed* was a capital case where the defendant sought a jury instruction

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actions had the effect of fixing prices, the jury could presume that the manufacturers intended that result. *Id.* at 430. The Court held that the Sherman Act was not a strict-liability regime and that intent was an element of a criminal offense under the Sherman Act. *Id.* at 435–36. Specifically, the Court found that the Sherman Act's intent element is satisfied when a perpetrator acts with knowledge of the anticipated consequences. *Id.* at 446. The Court's ultimate conclusion that the jury instruction was improper and that "the issue of intent must be left to the trier of fact alone" rested on its interpretation of the Sherman Act—not the Sixth Amendment jury-trial right. *See id.* (The opinion does not even reference the Sixth Amendment.)

McMullan also relies on our decision in *Barker v. Yukins*, 199 F.3d 868 (6th Cir. 1999), where a defendant's sole defense was that she stabbed and killed an 81-year-old victim in order to prevent an imminent rape. *Id.* at 875. Although the trial court instructed the jury that a defendant may use lethal force to prevent serious bodily injury, it did not specifically instruct that a defendant is entitled to use deadly force to prevent rape. *Id.* at 870. The Michigan Supreme Court determined that the trial court erred but that the error was harmless because no reasonable juror would have believed the defendant's self-defense claim. *Ibid.* Under these circumstances, our court concluded that the trial court's failure to instruct specifically on the issue of rape was so prejudicial that the defendant had met her burden of showing that the "improper instruction so infected the entire trial that the resulting conviction violates due process." *Id.* at 876.

To the extent that *Barker* is germane, it does not support McMullan's § 2254(d)(2) argument. There, the panel granted a conditional writ of habeas corpus on the ground that the Michigan Supreme Court decision involved an unreasonable application of the harmless-error test—a § 2254(d)(1) finding.

on a lesser included non-capital offense. *Id.* at 488–89. McMullan asserts that the distinction between a capital and non-capital case is "potentially relevant" only to a § 2254(d)(1) analysis. Reply Br. 9 n.1. We cannot agree. The fact that the capital / non-capital offense distinction is relevant, under *Beck*, to a § 2254(d)(1) analysis does not make it relevant "only" to § 2254(d)(1). In addition, the *Reed* standard was applied in the course of granting a certificate of appealability—not a writ of habeas corpus. We note that in Michigan, "the use of a deadly weapon" alone can establish the requisite malice for murder. *People v. Bulls*, 687 N.W.2d 159, 165 (Mich. 2004). Here, no one disputes that McMullan used a deadly weapon.

McMullan is also correct that, as a general matter, a trial court that "dictate[s] the outcome" "has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause." *Herrington v. Edwards*, No. 97-3542, 1999 WL 98587, at *3 (6th Cir. Jan 26, 1999) (per curiam). But in *Herrington*, the trial judge literally did dictate the outcome by telling the jury, in response to a jury question, that "it would be impossible for you to find [the defendant] guilty of one count and not guilty on the other." *Ibid.* That is quite a different matter from denying a requested jury instruction.

c. "Unreasonable determination of the facts"

Under what circumstances, then, can a habeas petitioner obtain relief under § 2254(d)(2)? Federal courts have struggled with this question, especially in the context of the application of deference to mixed questions of law and fact. Section 2254(d)(2), on the one hand, envisions federal review of a state court's "unreasonable determination of the facts." On the

other hand, § 2254(e)(1) dictates that "a determination of a factual issue made by a State court shall be presumed to be correct." The Supreme Court has declined to clarify the relationship between these two provisions, and it has "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)." *Wood v. Allen*, 558 U.S. 290, 299 (2010); *accord Rice v. Collins*, 546 U.S. 333, 339 (2006). Other circuits have also declined to resolve the issue. *See, e.g., Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007).[3] As with the Supreme Court, we do not—and need not—resolve this tension here.

Even without the § 2254(e)(1) presumption in its favor, the trial court's decision was not an unreasonable determination of facts in light of the evidence presented. First, a trial court's decision about whether to provide a jury instruction is not the kind of fact-based determination subject to scrutiny under § 2254(d)(2). Second, the decision to withhold the jury instruction was not unreasonable.

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[3] The question whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination was "unreasonable" or whether § 2254(e)(1) "additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence" has divided the courts of appeals. *Wood v. Allen*, 558 U.S. 290, 298 (2010). Our circuit has not opined on the issue, and we refrain from doing so now. In *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007), the panel assumed that a petitioner satisfies § 2254(d)(2) by showing that a "state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' *and* do not have support in the record." *Id.* at 888 (emphasis added). We do not read this as taking a clear position on the split.

To the extent that McMullan argues that the trial court's decision to refuse the jury instruction was itself an unreasonable determination of facts, this argument fails as well. A trial court's decision about whether to provide a jury instruction is not the kind of fact-based determination subject to scrutiny under § 2254(d)(2). Factual issues are "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (applying superseded § 2254) (internal quotation marks omitted). Factual issues also include a defendant's competency to stand trial and a juror's impartiality; these issues depend on a trial court's appraisal of witness credibility and demeanor. *Id.* at 111. Some circuits have found that similar "non-historical" factual issues include whether a petitioner made a *Batson* prima facie showing of racial discrimination, *Tolbert v. Page*, 182 F.3d 677, 684 (9th Cir. 1999) (en banc), and whether a petitioner waived the state-law right to appeal, *Meeks v. Cabana*, 845 F.2d 1319, 1323 (5th Cir. 1988). Issues that are legal, not factual, include the voluntariness of a confession, the effectiveness of counsel's assistance, and the "in custody" determination for *Miranda* purposes. *Thompson*, 516 U.S. at 111–12.

In holding that refusing a lesser-included-offense instruction does not necessarily implicate a question of fact, we observe that the decision is similar to an evidentiary one—the proper domain of the trial court. In federal practice, any party may request a particular jury instruction. *See* Fed. R. Crim. P. 30. A federal judge must decide whether a "proper evidentiary foundation" exists to give the instruction. *United States v. Palma*, 511 F.3d 1311, 1315 (11th

Cir. 2008). When deciding, the judge must view the evidence "in the light most favorable to the accused." *Ibid.* For federal judges, the decision ultimately is "a matter within the trial court's discretion." *United States v. Blood,* 435 F.3d 612, 623 (6th Cir. 2006).

In the specific context of a lesser-included-offense instruction, federal judges should give such an instruction "if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater." *Hopper v. Evans*, 456 U.S. 605, 612 (1982) (internal alterations omitted). A federal judge's decision to deny a lesser-included-offense instruction is a way in which the "jury's discretion is thus channelled." *Id.* at 611. Even in capital cases, "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Ibid.* The decision whether to instruct is fundamentally a legal one, and it is one that belongs to the judge. This has been so for over a hundred years: "[T]he instructing or refusing to instruct . . . rests upon legal principles or presumptions which it is the province of the court to declare for the guidance of the jury." *Sparf v. United States*, 156 U.S. 51, 102 (1895) (Harlan, J.).

The difference between questions of law and fact can be "slippery," *Thompson*, 516 U.S. at 111, but here, the trial court's decision not to give the jury instruction was not a factual issue. It did not rest upon a subsidiary finding of historical fact or an appraisal of witness credibility. The subsidiary fact involved—that McMullan used a gun and that Smith was shot by that gun—was uncontested. It also did not involve assessing McDowell's credibility or

demeanor. We are aware of McMullan's theory of the case: that he did not intend to kill Smith, his longtime friend. *See* Pet'r Br. 21–22; Reply Br. 12; R. 9-9, p. ID # 1194 ("What we have here is just a terrible situation."). But intent to kill is not a necessary element of second-degree murder in Michigan. *See Gillis*, 712 N.W.2d at 438.

Even if the trial court's decision were a fact-based one, we cannot say that decision was unreasonable. Section 2254(d)(2)'s unreasonableness requirement imposes "a daunting standard—one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). We agree with the Ninth Circuit standard: "[W]e must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Ibid.* As noted above, the mere "use of a deadly weapon" can establish malice in Michigan, *Bulls*, 687 N.W.2d at 165, and no one disputes that McMullan used a deadly weapon. Thus, there was evidence in the record to support the trial court's finding that malice was present and that the involuntary-manslaughter instruction was not necessary. We cannot conclude that that decision was an unreasonable one. Therefore, McMullan cannot prevail with his argument under § 2254(d)(2).

3. Conclusion

In short, we may not reverse the denial of McMullan's habeas claim, whether his jury-instruction claim is construed under § 2254(d)(1) or § 2254(d)(2). First, defendants do not have a constitutional right to a lesser-included-offense instruction in non-capital cases. *Campbell*, 260 F.3d

531, 541 (6th Cir. 2001); *accord Calloway v. Montgomery*, 512 F.3d 940, 944 (7th Cir. 2008) (holding no due-process violation by refusing to instruct on involuntary manslaughter, even when petitioner was convicted of *voluntary manslaughter*, because "on this issue in a noncapital case, there is no clearly established Supreme Court precedent"); *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004) (adhering to a "rule of automatic non-reviewability" on habeas "for claims based on a state court's failure, in a non-capital case, to give a lesser included offense instruction."). Second, McMullan has not alleged that the trial court unreasonably determined any of the underlying facts in deciding whether to give the lesser-included-offense instruction. Finally, a trial court's decision to refuse to give a proffered jury instruction is a legal decision and not a factual determination to which § 2254(d)(2) would apply.

B. Ineffective Assistance of Counsel

McMullan also contends that his trial counsel's failure to cross-examine McDowell about McDowell's potential plea bargain or expectation of leniency in exchange for testifying constituted ineffective assistance of counsel. Because the Michigan Court of Appeals did not unreasonably decide that McMullan received effective assistance of counsel, we cannot grant habeas relief on this claim.

Under federal law, to establish ineffective assistance of counsel, a criminal defendant must first show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This inquiry looks at whether trial counsel fell below the standard of a competent attorney. *See id.* at 688–91. There is

a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Second, to succeed on an ineffective-assistance claim, a criminal defendant must show that counsel's ineffectiveness prejudiced him. *Id.* at 692. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. It is very difficult for a defendant to surmount *Strickland*'s high bar. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1404–08 (2011) (rejecting defendant's ineffective-assistance claim even when counsel failed to investigate at all before a penalty-phase hearing that resulted in a death sentence); *see also Bobby v. Van Hook*, 558 U.S. 4, 9–13 (2009) (rejecting defendant's ineffective-assistance claim based on counsels' failure to investigate more thoroughly and present more mitigating evidence), *rev'g Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009).

On habeas, our review of a state court's determination that a criminal defendant received effective assistance is particularly deferential. We do not apply *Strickland* directly. Rather, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). Were we to apply *Strickland* directly, "the analysis would be no different than if, for example, [this court] were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court." *Ibid.* The combination of the highly deferential standards of *Strickland* and of § 2254(d) makes for "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

In this case, the Michigan Court of Appeals did not unreasonably apply the federal ineffective-assistance standard. Although that court identified and applied a state-law ineffective-assistance standard, Michigan has adopted the *Strickland* test as state law. *See People v. Grant*, 684 N.W.2d 686, 691–92 (Mich. 2004). In deciding McMullan's direct appeal, the state appellate court noted that there was no evidence that a plea bargain between McDowell and the government existed at the time McDowell testified. *See McMullan*, 771 N.W.2d at 815. It relied on the fact that McDowell testified on cross-examination on January 23, 2002; and the trial court in McDowell's case did not docket the plea agreement until January 25, 2002, *see* Plea Agreement, *People v. McDowell*, No. 01-008403-FH (Genesee Cnty. Cir. Ct. Jan. 25, 2002) (no. 18), case notes (no. 17) *available at* http://www.co.genesee.mi.us/roaccsinq/default.aspx (enter case number, i.e., "01-008403"; then select "Case Detail"). Based on these facts, we cannot say that the Michigan court was unreasonable in concluding that McMullan's counsel was not ineffective for failing to cross-examine McDowell about any purported plea agreement when there was no affirmative evidence that a plea agreement existed. *Ibid.*

Nor was the state appellate court unreasonable in concluding that McMullan could not show a reasonable probability that the outcome of the trial would have been different if McMullan's counsel had cross-examined McDowell about an expectation of leniency. This is so because McMullan's own testimony provided sufficient evidence of the necessary malice. Under Michigan law, second-degree murder is the unexcused causing of the death

of another, with malice. *People v. Smith*, 731 N.W.2d 411, 414–15 (Mich. 2007). As the state court noted, McMullan admitted that he was in an altercation with Smith; that he snatched a gun from his wife to scare Smith; that he held the gun and pointed it at Smith; that the gun fired; that Smith was shot; and that Smith died. *See McMullan*, 771 N.W.2d at 815–16. The state court did not unreasonably conclude that McMullan could not show a reasonable probability that the trial outcome would have differed if McMullan's counsel had cross-examined McDowell about any expectation of leniency. Therefore, McMullan cannot obtain habeas relief on this ground.

C. *Brady* Obligation

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McMullan also seeks habeas relief on the ground that the state appellate court unreasonably determined that the government was not obligated to disclose McDowell's plea bargain. We deny relief because McMullan cannot establish that the Michigan Court of Appeals unreasonably concluded that no reasonable probability existed that the trial outcome would have differed if the prosecutor had disclosed a putative plea agreement.

Clearly established federal law imposes a duty on prosecutors to disclose exculpatory evidence. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Under current law, a prosecutor must disclose exculpatory evidence, regardless of whether the defendant requests it. *See Kyles v. Whitley*, 514

U.S. 419, 433 (1995). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Thus, to establish a *Brady* violation, a defendant must show that exculpatory evidence was withheld and that there is a reasonable probability that this evidence would have affected the outcome of the trial. A prosecutor's *Brady* obligation extends to disclosing the "inducements" and the "possibility of a reward" held out by the government for its witnesses, whether formalized in an agreement or not. *Id.* at 683.

Here, the Michigan Court of Appeals did not unreasonably conclude that McMullan could not establish a reasonable probability that his trial outcome would have been different if the prosecutor had disclosed a plea agreement with McDowell or any possible expectation of leniency that McDowell may have had. *See McMullan*, 771 N.W.2d at 816–17. The state court found that there is not a reasonable probability that the withheld evidence would have undermined the jury's conviction for second-degree murder. It relied on the fact that McMullan acknowledged that he was involved in an altercation with Smith; that he snatched a gun from his wife; that he intended to use the gun to scare Smith; and that Smith was shot. The state court concluded that McDowell's testimony echoed McMullan's in the crucial respects such that disclosing McDowell's plea bargain would not have affected the outcome of McMullan's trial. The state appellate court was not unreasonable in so concluding.

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Although McMullan cannot succeed on his *Brady* claim, the prosecution in this case may not be wholly blameless. *Brady* establishes a floor—not a ceiling—for proper prosecutorial conduct. One criticism of *Brady* is that it is a weak rule. *Brady* creates little incentive for a prosecutor to disclose exculpatory evidence if the prosecutor believes that the evidence is not "material" within the meaning of *Bagley*. Further, defendants may never learn of undisclosed *Brady* material or learn of it only with great difficulty. *See, e.g., Bagley v. Lumpkin*, 719 F.2d 1462, 1463 (9th Cir. 1983) (*Brady* evidence disclosed from defendant's filing a request under the Freedom of Information Act), *rev'd sub nom. United States v. Bagley,* 473 U.S. 667 (1985). A third problem with *Brady*—one illustrated by this case—is that prosecutors must make an ex ante decision about whether to disclose impeachment evidence, but the *Brady* standard of materiality is ex post—materiality is judged in light of all the evidence at trial. In this case, even though there is considerable question over whether the prosecution should have made a disclosure, any withholding would have been harmless error.

In holding that McMullan cannot show that the state court unreasonably applied *Brady*, we assume, without deciding, that the prosecutor should have disclosed McDowell's plea agreement. The Supreme Court has not hesitated to reverse a state-court conviction when withheld impeachment evidence undermines confidence in the verdict. *See Smith v. Cain*, 132 S. Ct. 627, 630–31 (2012); *Banks v. Dretke*, 540 U.S. 668, 692–703 (2004). The Michigan Court of

Appeals noted that state-court rules impose on prosecutors a "duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement." *McMullan*, 771 N.W.2d at 816 (citing MCR 6.201(B)(5)). Additionally, the Michigan Rules of Professional Conduct call for prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense." MRPC 3.8(d); *see also* Model Rules of Prof'l Conduct R. 3.8(d) (identical text). On its face, this rule contains no *Bagley* materiality requirement.

In this case, there is no direct evidence that McDowell had a plea bargain or an expectation of one at the time he testified on cross-examination on January 23. Two days later—the day that the jury reached a verdict in McMullan's case—a different judge in the same court granted the government's motion to reduce McDowell's cocaine charge to a misdemeanor. *See* Plea Agreement, *People v. McDowell*. Under "Additional Considerations," the plea agreement states: "Lenient Sentencing & Δ agrees to testify truthfully against Angelo McMullin [sic] as needed." At the bottom of the agreement, someone also handwrote: "Criminal Case for Angelo McMullin [sic]: 01-008582." Further, McDowell's docket sheet indicates: "DEFT AGREES TO TESTIFY TRUTHFULLY AGAINST ANGELO MCMULLEN [sic] AS NEEDED (CASE # 01-8582-FC)." The use of the present verb tense on both the plea agreement and docket sheet is odd, for McDowell had already concluded his testimony in McMullan's case and the jury had already begun deliberations. It might be conceivable that this note refers to

McDowell's agreement to testify against McMullan in *future* cases—were it not for the express inclusion of McMullan's homicide case number. It is also plausible that a plea bargain had been in the works prior to January 25.

One month later, at McMullan's sentencing, McMullan's counsel informed the court that McDowell had received a plea bargain on the morning of the day that the jury convicted McMullan. McMullan's counsel told the court: "[After learning about the plea bargain,] I was a little hot. I'll say that." According to McMullan's counsel, the assistant prosecuting attorney for McMullan's case, Kennan M. DeWitt, stated that he "had absolutely nothing to do with [McDowell's plea deal]." McMullan's counsel also asserted that, on January 25, he had spoken with McDowell's defense attorney, who stated "that there was no deal that had been made for Mr. McDowell."

DeWitt emphatically denied any connection between McMullan's case and McDowell's cocaine-charge downgrade. "[T]here was absolutely no connection between Mr. McDowell's case either in facts or procedure," DeWitt told the court. "There was no consideration given to McDowell connected to this case." DeWitt further stated: "[McDowell] resolved a case that was pending against him, and that's it, period. It had nothing to do with [McMullan's] case." If DeWitt did not know that his own prosecutor's office had agreed to downgrade McDowell's charge in exchange for McDowell's truthful testimony against McMullan, he should have known. McDowell was his witness, and the Genesee County Prosecutor's Office felony division consists of

only roughly six prosecutors.[4] *See* Genesee County, Prosecutors Office, Criminal Division – Circuit Court, http://www.gc4me.com/departments/prosecutors_office/criminal_division-circuit_court.php (last visited August 4, 2014).

The conduct of the Genesee County Prosecutor Office appears troubling. It is one matter to withhold impeachment evidence, albeit evidence that is not "material" within the meaning of *Bagley*. It is another matter to delay strategically formalizing a witness's plea agreement until after a witness finishes testifying in order to deny plausibly that a plea agreement existed at the time the witness testified. And it is yet another matter entirely for a prosecutor to perjure himself before a judicial tribunal.

The State of Michigan has not attempted to square DeWitt's statement with the January 25, 2002, docket entry stating that McDowell "agrees" to testify against McDowell.[5] In its brief, the State of Michigan does not defend the prosecutor's decision not to

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[4] "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[5] In July 2008, DeWitt was fired from the Genesee County Prosecutor's Office amid allegations of prosecutorial misconduct. Sally York, *Assistant fired; Motel meeting sparked continuing probe*, Flint Journal, July 30, 2008. Specifically, DeWitt was under investigation for conducting an improper personal relationship with Dana Bacon, a convicted embezzler whom DeWitt had prosecuted. *Ibid*. Lapeer County agreed to cease its investigation of DeWitt in exchange for DeWitt agreeing not to seek his job back. Bryan Mickle, *No charges, no job for DeWitt*, Flint Journal, Oct. 11, 2008.

disclose McDowell's plea; instead, it rests its *Brady* argument solely on the ground that disclosure would not have affected the trial outcome. *See* Resp't Br. 53–56. The State of Michigan, in fact, acknowledges that "disclosure of McDowell's anticipated plea agreement or expectation for lenience in anticipation of an agreement arguably would have allowed for more effective cross-examination." *Id.* at 54. The Michigan Court of Appeals held that even if the prosecutor should have disclosed the "anticipated plea agreement," McMullan failed to satisfy the *Brady* standard. *McMullan*, 771 N.W.2d at 816. Although we do the same, we observe:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, *The Federal Prosecutor*, 24 Am. Jud. Soc'y 18 (1940), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/. It was true in 1940, and it is true today.

IV

Under 28 U.S.C. § 2254(d), McMullan's petition for a writ of habeas corpus cannot succeed on any of the three grounds asserted. No clearly established

federal law required the state court to instruct the jury on the lesser included offense of involuntary manslaughter. The state court did not unreasonably apply the standards either of *Strickland* or of *Brady*. Accordingly, we AFFIRM the district court's judgment.

CONCURRENCE IN THE JUDGMENT

CLAY, Circuit Judge, concurring in the judgment. I concur with the judgment of the lead opinion, but write separately because the lead opinion contains a substantial amount of dicta that I do not endorse.

This Court is unable to grant McMullan habeas relief under 28 U.S.C. § 2254(d)(1) because the Supreme Court has never held that the Due Process Clause requires a lesser-included offense instruction in a non-capital case. *See Beck v. Alabama*, 447 U.S. 625, 638 n. 14 (1980) (declining to decide whether the Due Process Clause would require giving lesser-included offense instructions in a non-capital case). The lead opinion quotes a Sixth Circuit case for the proposition that "the Constitution does not require a lesser-included offense instruction in non-capital cases." Lead Op. at 6 (quoting *Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001)). This out-of-context quotation is not only superfluous but also somewhat misleading. This Court has never held that the Due Process Clause does not require a lesser-included offense instruction in a non-capital case; we have merely recognized that failure to deliver such an instruction in a non-capital case does not give rise to a claim that is "cognizable in federal habeas corpus review." *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (en banc). The lead opinion's statement that "defendants do not have a constitutional right to a

lesser-included-offense instruction in non-capital cases," Lead Op. at 13, must be understood in the context—and within the confines—of the habeas case before this Court. Whether the Due Process Clause requires a lesser-included offense instruction in non-capital cases is not a question before this Court. Accordingly, to the extent that the lead opinion purports to answer this question, its statements must be considered dicta.

This Court is also unable to grant McMullan habeas relief under 28 U.S.C. § 2254(d)(2). The state trial court's refusal to give the involuntary manslaughter instruction was not based on an unreasonable determination of the facts presented at trial. In his own testimony, McMullan admitted to getting the gun from his wife's bag and pointing the loaded gun at Smith's chest during their altercation. McMullan acknowledged that the gun had to be cocked in order to be fired, and offered no explanation for how or why the gun could have discharged without him cocking it. Only now, for the first time, does McMullan set forth the theory that the gun could have already been cocked when he retrieved it from his wife's bag. It was not unreasonable for the trial court to view the evidence as it did, and to conclude that no rational view of the facts could support a jury instruction for involuntary manslaughter.

I disagree with the lead opinion's analysis of McMullan's § 2254(d)(2) argument inasmuch as it suggests that the presence of facts *sufficient* to establish the requisite malice for murder rendered the instruction for involuntary manslaughter unnecessary. *See* Lead Op. at 10, 13. The fact that

"the use of a deadly weapon alone can establish the requisite malice for murder," *People v. Bulls*, 687 N.W.2d 159, 165 (Mich. 2004), supports the trial court's decision to include the murder instruction; it does not justify its refusal to give the involuntary manslaughter instruction.

I also disagree with the lead opinion's remarks regarding the scope of the Sixth Amendment jury trial right, and I note that the lengthy discussion in section 2.b of the lead opinion is wholly unnecessary to the resolution of this habeas case. The lead opinion purports to hold that the Sixth Amendment "does not prohibit judges from declining jury instructions on lesser included offenses in non-capital cases." Lead Op. at 9. This statement is pure dicta, as we need not opine on the scope of the Sixth Amendment jury trial right in order to reject McMullan's argument for relief under § 2254(d)(2). Similarly, the prolonged academic discussion in section 2.c is unnecessary, and does not create binding precedent in this Circuit. "Dictum settles nothing, even in the court that utters it." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 352 (2005).

I agree with the lead opinion's conclusion that McMullan's ineffective-assistance argument fails because the state court did not unreasonably apply *Strickland*. The state court correctly articulated the law, and noted that there was no evidence that a plea bargain existed at the time McDowell testified. Because the state court's application of *Strickland* was not unreasonable, McMullan cannot obtain habeas relief on this ground.

Similarly, McMullan cannot show that he was entitled to habeas relief under 28 U.S.C. § 2254(d)(1) based on the government's failure to disclose McDowell's plea agreement. The state court did not unreasonably apply *Brady*. After considering the similarities between the testimony of McMullan and that of McDowell, the state court concluded that there was not a reasonable probability that McMullan's trial outcome would have been different if the prosecutor had disclosed any purported plea agreement. This conclusion was not unreasonable.

For the foregoing reasons, I concur in the judgment, but do not subscribe to the lead opinion and the gratuitous dicta therein.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELO ROCHELLE McMULLAN,	Civil No. 5:11-CV-11870
Petitioner,	HONORABLE JOHN CORBETT O'MEARA UNITED STATES DISTRICT JUDGE
v.	
RAYMOND BOOKER,	
Respondent, /	

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS, GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY, AND GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS

Angelo Rochelle McMullan, ("Petitioner"), presently confined at the Ryan Correctional Facility in Detroit, Michigan, has filed a, *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges his conviction for second-degree murder, M.C.L.A. 750.317; felon in possession of a firearm, M.C.L.A. 750.224f; possession of a firearm in the commission of a felony, M.C.L.A. 750.227b; and being a fourth felony habitual offender,

M.C.L.A. 769.12. For the reasons stated below, the petition for writ of habeas corpus is DENIED.

I. Background

Petitioner was convicted of the above offenses following a jury trial in the Genesee County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals in affirming petitioner's conviction on his appeal of right, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(l). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> Defendant was angry at the victim over payment for a cocaine deal and had a fistfight in an apartment complex parking lot. The fight ended and the victim got into his station wagon. Defendant then repeatedly demanded that his wife give him his loaded revolver. When defendant's wife refused to give him the gun, defendant grabbed it from her and returned to and escalated the altercation with the victim. He approached the victim's car and pushed the door to prevent the victim from getting out of his vehicle. After the victim fell back into his seat, defendant pointed the gun at the victim, within one foot of his chest. Defendant cocked back the hammer of the revolver, which was the only way the gun could fire. Then, defendant pulled the trigger, shooting the victim at close range in his chest. Thereafter, defendant rifled through the critically injured victim's pockets and took his money.

People v. *McMullan,* 284 Mich. App. 149,153,771 N.W.2d 810 (2009)(Bandstra, J., concurring in part and dissenting in part).

The Michigan Supreme Court granted petitioner leave to appeal with respect to his claim that the trial court judge erred in refusing to instruct the jurors on the lesser offense of involuntary manslaughter. *People v. McMullan,* 485 Mich. 1050, 777 N.W.2d 139 (2010). The Michigan Supreme Court subsequently affirmed petitioner's conviction. *People v. McMullan,* 488 Mich. 922, 789 N.W.2d 857 (2010)(Kelly and Cavanagh, JJ., dissenting).[1]

Petitioner seeks a writ of habeas corpus on the following grounds.

> I. PETITIONER WAS DEPRIVED OF DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE TRIAL COURT ERRED REVERSIBLY BY DENYING PETITIONER A REQUESTED JURY INSTRUCTION ON INVOLUNTARY OR ANY MANSLAUGHTER CHARGE, OR SUFFICIENCY OF THE EVIDENCE TO SUPPORT GIVING THE LESSER INCLUDED OFFENSE INSTRUCTION

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[1] With respect to his state court appeals, petitioner had earlier filed a delayed application for leave to appeal, which had been denied. *People* v. *McMullan,* No. 251977 (Mich.Ct.App. March 1, 2004); *reconsideration den.* No. 251977 (Mich.Ct.App. April 2, 2004); *Lv. den,* 471 Mich. 920; 688 N.W. 2d 829 (2004). This Court subsequently granted petitioner a writ of habeas corpus, finding that petitioner had been deprived of his constitutional right of due process and equal protection under the law, because he was unable to file an appeal of right due to the trial court's failure to appoint appellate counsel in a timely manner to perfect an appeal on petitioner's behalf. This Court ordered the State of Michigan to reinstate petitioner's appeal of right in the Michigan Court of Appeals and to appoint appellate counsel to assist petitioner if he was unable to obtain his own counsel. *McMullan v. Jones,* No. 05-70807; 2007 WL 2983951 (E.D. Mich. October 11, 2007).

WHERE THE INTENT TO DO THE INJURY, THE GROSS NEGLIGENCE MANNER, AND A FIGHT THAT LED TO A UNINTENTIONAL KILLING BY ACCIDENT BY FIRING A FIREARM WHERE NO MALICE ELEMENT WAS ESTABLISHED TO BE MURDER CONVICTION.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING PETITIONER MOTION FOR NEW TRIAL IN VIOLATION OF USCA 14TH AMS DUE PROCESS AND USCA 6TH AMS EFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE KEY WITNESS AGAINST HIM (MR. MCDOWELL) MADE A PLEA AGREEMENT BY TESTIFYING AGAINST PETITIONER IN THIS CASE, BU THE EXISTENCE AND TERMS OF THE AGREEMENT WERE NOT DISCLOSED TO THE JURY AND WAS CLEAR ERROR, UNREASONABLE, CAPRICIOUS AND ARBITRARY.

III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING PETITIONER REQUEST FOR AN EVIDENTIARY HEARING ON CLAIM THAT THE STATE DENIED HIS RIGHT OF USCA 14TH AM DUE PROCESS OF LAW BY FAILING OF PROSECUTOR TO DISCLOSE TO DEFENDANT THAT WITNESS MCDOWELL HAD REASONABLE EXPECTATIONS OF CONSIDERATION FOR HIS TESTIMONY AGAINST PETITIONER (BRADY CLAIM FAILURE TO DISCLOSE).

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of

1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams* v. *Taylor,* 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

The Supreme Court has explained that "[A] federal court's collateral review of a state-court decision must

be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett,* 130 S. Ct. 1855, 1862 (2010)((quoting *Lindh v. Murphy,* 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti,* 537 U.S. 19, 24 (2002) *(per curiam*)). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter,* 131 S. Ct. 770, 786 (2011) (citing *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003). Furthermore, pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or...could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.*

III. Discussion

A. Claim # 1. The lesser included instruction claim.

Petitioner first contends that the trial court erred in refusing to instruct the jurors on the lesser included offense of involuntary manslaughter. Petitioner was originally charged with first-degree murder. The judge instructed the jurors on the lesser included offenses of second-degree murder and

voluntary manslaughter, but refused to instruct the jurors on the lesser included offense of involuntary manslaughter.

The United States Supreme Court has declined to determine whether the Due Process Clause requires that a state trial court instruct a jury on a lesser included offense in a non-capital case. *See Adams v. Smith,* 280 F. Supp. 2d 704, 717 (E.D. Mich. 2003)(citing to *Beck v. Alabama,* 447 U.S. 625, 638, n. 4 (1980)). Thus, a state trial court's failure to give the jury an instruction on a lesser included offense in a non-capital case is not contrary to, or an unreasonable application of, clearly established federal law as required for federal habeas relief. *Id.; See also David* v. *Lavinge,* 190 F. Supp. 2d 974, 986, n. 4 (E.D. Mich. 2002). *Beck* has been interpreted by the Sixth Circuit to mean that "the [federal] Constitution does not require a lesser-included offense instruction in non-capital cases." *Campbell v. Coyle,* 260 F. 3d 531, 541 (6th Cir. 2001). Thus, the failure of a state trial court to instruct a jury on a lesser included offense in a non-capital case is not an error cognizable in federal habeas review. *Bagby v. Sowders,* 894 F. 2d 792, 797 (6th Cir. 1990); *See also Scott v. Elo,* 302 F. 3d 598, 606 (6th Cir. 2002).

Although petitioner was originally charged with first-degree murder, which carries a sentence of life imprisonment without parole, petitioner was not facing a capital conviction within the meaning of *Beck* that would entitle him to a jury instruction on any lesser included offenses. In *Scott v. Elo,* 302 F. 3d at 606, the Sixth Circuit held that a criminal defendant who had been convicted of first-degree murder in Michigan and had been sentenced to life

imprisonment without parole was not entitled to habeas relief based upon the trial court's failure to instruct on the lesser offense of involuntary manslaughter. In so ruling, the Sixth Circuit characterized the defendant's first-degree murder charge as being a conviction for a non-capital offense. *Id.* Moreover, several other circuits have concluded that cases in which a defendant receives a sentence of life imprisonment without parole instead of the death penalty should be treated as a non-capital case, as opposed to a capital case, for determining whether due process requires that a trial court is required to instruct jurors on lesser included offenses. *Creel v. Johnson,* 162 F. 3d 385, 390 (5th Cir. 1998); *Pitts v. Lockhart,* 911 F. 2d 109, 112 (8th Cir. 1990); *Rembert v. Dugger,* 842 F. 2d 301, 303 (11th Cir. 1988); *Trujillo v. Sullivan,* 815 F. 2d 597, 602 (10th Cir. 1987).

Moreover, the Michigan Supreme Court ultimately rejected petitioner's claim, agreeing with the Michigan Court of Appeals that a rational view of the evidence in this case did not support an instruction on involuntary manslaughter:

> The facts inescapably show that defendant acted with malice because, at a *minimum,* he "inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of [his] behavior is to cause death or great bodily harm," and did *not* act with an intent merely to injure or with non-malicious gross negligence—the two recognized types of involuntary manslaughter. Defendant admitted that, after a physical altercation with the victim, he left to obtain a loaded gun in order to threaten or scare the victim. Some evidence further

> showed that, when the defendant returned, the victim was shot in the chest when defendant and the victim again began to struggle at the victim's car. Defendant does not dispute that the gun was in his hand when it was cocked and then fired. The evidence indisputably established that the firearm had to be specifically cocked in order to fire. In particular, defendant conceded that the weapon is "designed to prevent it from firing unless you want it to fire." Based on this chain of events, and for the reasons otherwise stated by the Court of Appeals, we conclude that defendant's actions constitute a malicious series of intentional acts; they do not demonstrate a grossly negligent handling of a firearm that inadvertently caused death. Therefore, the trial court did not err in denying defendant's request for the jury to be instructed on involuntary manslaughter.

People v. McMullan, 488 Mich, at 923 (emphasis original, footnotes omitted).

Under Michigan law, involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. *Koras v. Robinson,* 123 Fed. Appx. 207, 215 (6th Cir. 2005)(citing *People v. Clark,* 453 Mich. 572, 578; 556 N.W.2d 820 (1996)).

In the present case, the trial court's failure to give the jurors an instruction on involuntary manslaughter was not error, even though petitioner testified that the gun went off accidentally, when the

evidence presented at trial suggested otherwise. *Scott v. Elo,* 302 F. 3d at 606. Testimony at trial both from the police and from petitioner himself indicated that the murder weapon was a revolver that had to be specifically cocked to be fired. Petitioner acknowledged that the gun was "designed to prevent it from firing unless you want it to fire." Moreover, prior to the shooting, petitioner asked his wife to give him his revolver. When she refused to give it to him, petitioner grabbed it and returned to the victim, who was sitting in his car. Petitioner pointed the weapon at the victim from about a foot away and shot him in the chest. In light of the fact that petitioner was angry at the victim, grabbed the revolver from his wife when she refused to hand it to him, returned to the victim and pointed the firearm at the victim from about a foot away before the victim was shot in the chest, as well as the fact that there was no suggestion from petitioner that the gun at hand discharged like an automatic weapon or had a sensitive trigger, the Michigan Supreme Court's conclusion that petitioner was not entitled to an instruction on the lesser included offense of involuntary manslaughter was not an unreasonable application of clearly established federal law. *See Abdus-Samad v. Bell,* 420 F.3d 614, 629 (6th Cir. 2005). Petitioner is not entitled to habeas relief on his first claim.

B. Claims # 2 and # 3. The ineffective assistance of counsel/prosecutorial misconduct claims.

The Court will discuss petitioner's second and third claims together because they are interrelated. In his second claim, petitioner alleges that his trial counsel was ineffective for failing to cross-examine witness Gregory McDowell about the fact that he testified

against petitioner in expectation of receiving lenient treatment from the prosecutor in the form of an anticipated plea agreement involving a pending charge for possession of cocaine. In his third claim, petitioner alleges that the prosecutor committed misconduct by failing to disclose to the defense this anticipated plea agreement between the prosecutor and McDowell.

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. *"Strickland*'s test for prejudice is a demanding one. 'The likelihood of a different result must be substantial, not just conceivable.'" *Storey v. Vasbinder,* 657 F.3d 372, 379 (6th Cir. 201 l)(quoting *Harrington,* 131 S. Ct. at 792). The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of

ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes,* 130 S. Ct. 383, 390-91 (2009).

More importantly, on habeas review, "the question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable-a substantially higher threshold.'" *Knowles v. Mirzayance,* 129 S. Ct. 1411, 1420 (2009)(quoting *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter,* 131 S. Ct. at 785. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 129 S. Ct. at 1420 (citing *Yarborough v. Alvarado,* 541 U.S. at 664). Pursuant to § 2254(d)(l) standard, a "doubly deferential judicial review" applies to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[A] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself *"Harrington,* 131 S. Ct. at 785. "Surmounting *Strickland*'s high bar is never an easy task." *Id.* at 788 (quoting *Padilla v. Kentucky,* 130 S. Ct. 1473, 1485 (2010)).

Because of this doubly deferential standard, the Supreme Court has indicated that:

> Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel' s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington v. Richter, 131 S. Ct. at 788.

Finally, this Court is aware that "[R]eliance on 'the harsh light of hindsight' to cast doubt on a trial that took place" ten years ago "is precisely what *Strickland* and AEDPA seek to prevent." *Harrington* v. *Richter,* 131 S. Ct. at 789.

In rejecting petitioner's ineffective assistance of counsel claim, the Michigan Court of Appeals first noted that there was no evidence that at the time McDowell testified, a plea agreement existed. Although McDowell had been charged with possession of cocaine, he did not enter a guilty plea until two days after testifying. Accordingly, defense counsel could not have been deficient for failing to cross-examine McDowell "regarding a nonexistent agreement." *McMullan,* 284 Mich. App. at 155. Moreover, assuming that counsel should have anticipated that McDowell's plea agreement, the Michigan Court of Appeals concluded that petitioner was not prejudiced by counsel's failure to question McDowell about his expectations of leniency, because McDowell's testimony about the events surrounding the shooting was the same as petitioner's except with regard to whether or not petitioner searched the

victim's pockets after the shooting. Given the evidence relating to the actual shooting of the victim, the Michigan Court of Appeals concluded that "there was clearly overwhelming evidence to convict [petitioner] of second-degree murder on the basis of [petitioner's] testimony alone." *Id.,* at 156. The Michigan Court of Appeals further rejected petitioner's argument that absent McDowell's testimony regarding petitioner's search of the victim's pockets, the jury would have been more likely to convict petitioner of the lesser offense of voluntary manslaughter. *Id..* The Michigan Court of Appeals specifically noted that there was a lapse of time after the fistfight between petitioner and the victim ended and the victim retreated to his car. Petitioner during this time repeatedly asked his wife to give him the revolver and she refused. Petitioner then went to his wife and "snatched" the revolver from her. *Id.,* at 156-57. Because of this lapse of time, "during which a reasonable person could have controlled his passions," the Michigan Court of Appeals concluded that the jury could not have found petitioner guilty of voluntary manslaughter. The Michigan Court of Appeals held that petitioner failed to show a reasonable probability that the outcome would have been different but for the defense counsel's failure to anticipate McDowell's plea agreement and to cross-examine him about it. *McMullan,* 284 Mich. App. at 157.

The failure to cross-examine or impeach a witness about a leniency deal to testify against a criminal defendant is not ineffective assistance of counsel if the witness' testimony is not material to the conviction. *See Frierson v. Woodford,* 202 Fed. Appx. 152,158 (9th Cir. 2006). In the present case,

McDowell's account of the shooting was almost identical to petitioner's testimony, with the exception that McDowell testified that petitioner removed money from the victim's pockets after the shooting. Indeed, contrary to petitioner's claim, some of McDowell's testimony would have actually supported a finding that the shooting had been done in the heat of passion, so as to reduce the murder to manslaughter. McDowell acknowledged on cross-examination that he went with the victim to petitioner's apartment because the victim wanted to confront petitioner about some fake Vicodin pills that petitioner had given him. McDowell indicated that the victim was at petitioner's apartment for only seven to eight minutes before the shooting took place. (Tr. 1/23/2002, pp. 49-54). McDowell further indicated that when petitioner initially got into the victim's car, petitioner did not point a gun at the victim. McDowell indicated that the men had argued for a couple of minutes. Petitioner, however, did not ask the victim to get out of the car to fight. Instead, the victim, who was still angry about the pill issue, got out of the car himself, where the two men continued to argue. McDowell testified that the two men continued to argue about the fake pills and that the argument became "hot and heavy." McDowell acknowledged that petitioner did not say as he was getting out of the victim's car that he was going for a gun, nor did he threaten to kill the victim. McDowell, in fact, was not sure who started the fistfight. McDowell further admitted that the victim, who had gotten back into his car after the initial argument, had taken and forced the door open and was getting out of the car when the shot was fired. McDowell never heard petitioner indicate that he was going to

kill the victim. McDowell admitted that petitioner did not flee the scene and later saw him at the hospital where the victim had been taken. (*Id.,* pp. 87-89; 101-07; 111-15, 120-22; 126-27). Because McDowell's testimony was in most respects identical to petitioner's and even favorable, his testimony was not material to petitioner's conviction, therefore, counsel's failure to impeach him with his anticipated plea agreement did not prejudice petitioner.

In any event, counsel did impeach McDowell by cross-examining him about the fact that he had been a heroin addict for twenty years and had purchased drugs from the victim and that he had tried crack cocaine. Counsel also elicited admissions from McDowell that he was receiving methadone treatment for his heroin addiction. McDowell acknowledged that on the day of the shooting, he had drank beer after taking his methadone, even though alcohol can enhance the effects of methadone. (Tr. 1/23/2002, pp. 21-28, 31). Although McDowell acknowledged at trial that he had tried crack cocaine, counsel impeached him with his prior testimony from the preliminary examination, in which he denied ever trying cocaine. (*Id.,* pp. 31-35). Counsel impeached McDowell with a number of other discrepancies between his trial testimony and his preliminary examination testimony. (*Id.,* pp. 56-60, 120-21). Finally, in response to defense counsel's question, McDowell admitted that he did not remain at the hospital where the victim had been taken in order to give a statement to the police, but left the hospital and was only questioned by the police the following day. (*Id.,* pp. 128-29).

Counsel's failure to impeach McDowell about his anticipated plea agreement did not undermine confidence in outcome of the case, since a variety of other impeachment evidence was admitted in this case. *See Wolfe v. Bock,* F. Supp. 2d 657, 676-77 (E.D. Mich. 2006).

In his related third claim, petitioner contends that the prosecutor committed misconduct by failing to disclose McDowell's anticipated plea agreement. To prevail on his claim, petitioner must show (1) that the state withheld exculpatory evidence and (2) that the evidence was material either to guilt or to punishment irrespective of good faith or bad faith of the prosecution. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 683 (1985). In *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999), the Supreme Court articulated three components or essential elements of a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. "Prejudice (or materiality) in the *Brady* context is a difficult test to meet." *Jamison v. Collins,* 291 F. 3d 380, 388 (6th Cir. 2002).

"It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over

under *Brady." Bell v. Bell,* 512 F. 3d 223, 233 (6th Cir. 2008)(citing *Giglio v. United States,* 405 U.S. 145, 154-55 (1972)). "The existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate." *Id.* However, the mere fact that a witness desired favorable treatment in return for his testimony, does not, standing alone, demonstrate the existence of an implied agreement with the prosecutor. *Id.*

The Sixth Circuit has observed that "it is well settled that 'the test for prejudice under *Brady* and *Strickland* is the same.'" *Montgomery v. Bobby,* 654 F. 3d 668, 680, n. 4 (6th Cir. 2011); *See also Hutchison v. Bell,* 303 F. 3d 720, 749 (6th Cir. 2002). This Court has already determined that petitioner was not prejudiced by counsel's failure to question McDowell about his anticipated plea agreement, in light of the fact that McDowell's testimony was not material to petitioner's conviction. The failure of the prosecution to disclose a witness's plea agreement is not a violation of *Brady* where the witness' testimony is not material to the defendant's conviction. *See U.S. v. Neeley,* 308 Fed. Appx. 870, 881 (6th Cir. 2009). This is particularly so where the offenses that the witness pleaded guilty to did not involve the fabrication of testimony. *Id.* McDowell pleaded guilty to possession of cocaine, a charge that does not involve the fabrication of testimony. Moreover, in light of the fact that his testimony was almost identical to petitioner's own testimony, which in itself was sufficient to establish petitioner's guilt to the second-degree murder charge, the failure to disclose McDowell's anticipated plea agreement was not material to petitioner's conviction. Finally, as mentioned in rejecting petitioner's ineffective

assistance of counsel claim, McDowell was impeached with a variety of other evidence. In light of the fact that McDowell had been extensively impeached by counsel, particularly with respect to his long standing drug problems, the failure by the prosecutor to disclose McDowell's anticipated plea agreement was not material to petitioner's conviction and would thus not entitle petitioner to habeas relief. *Doan v. Carter,* 548 F. 3d 449, 460 (6th Cir. 2008). Petitioner is not entitled to habeas relief on his second and third claims.

IV. Conclusion

The Court will deny the petition for writ of habeas corpus.

A habeas petitioner must receive a certificate of appealability ("COA") in order to appeal the denial of a habeas petition for relief from either a state or federal conviction.[2] 28 U.S.C. §§ 2253(c)(l)(A), (B). A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000).

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[2] Effective December 1, 2009, the newly created Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 1l(a), 28 U.S.C. foll. § 2254; *See also Strayhom v. Booker,* 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

Although the Court believes that its decision to deny habeas relief was correct, the Court will nonetheless grant petitioner a certificate of appealability on his first claim involving the trial court's failure to instruct the jurors on the lesser included offense of involuntary manslaughter. Judge Bandstra dissented from the portion of the Michigan Court of Appeals' opinion that rejected petitioner's instructional error claim, concluding that there was sufficient evidence to require the giving of an instruction on involuntary manslaughter. *People v. McMullan,* 284 Mich. App. at 158-65. Justice Marilyn Kelly of the Michigan Supreme Court likewise issued a dissent from the majority decision of the Michigan Supreme Court, in which she was joined by another Michigan Supreme Court justice. *See People v. McMullan,* 488 Mich, at 923. "When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." *Jones v. Basinger,* 635 F. 3d 1030, 1040 (7th Cir. 2011). The fact that one Michigan Court of Appeals judge and two Michigan Supreme Court justices would have reversed petitioner's conviction based on the trial court's failure to instruct on the lesser included offense of involuntary manslaughter shows that jurists of reason could decide the issues raised in this petition differently or that the issues deserve encouragement to proceed further. *See Robinson v. Stegall,* 157 F. Supp. 2d 802, 820, fn. 7 & 824 (E.D. Mich. 2001)(habeas petitioner entitled to certificate of appealability from district court's determination that state appellate court reasonably applied federal law in determining that any Confrontation Clause error was harmless, where one judge on the Michigan

Court of Appeals dissented and indicated that he would have reversed petitioner's conviction; dissent showed that a reasonable jurist found that the issue should have been decided differently). Accordingly, the Court will grant petitioner a certificate of appealability with respect to his first claim.

Petitioner is not entitled to a certificate of appealability on his second or third claims, because he has failed to make a substantial showing of the denial of a federal constitutional right with respect to these claims. *Allen v. Yukins,* 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001).

Petitioner is also granted leave to proceed on appeal *in forma pauperis,* as any appeal would not be frivolous. A court may grant *in forma pauperis status* if the court finds that an appeal is being taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a); *Foster v. Ludwick,* 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002).

V. ORDER

Accordingly, **IT IS ORDERED** that the petition for writ of habeas corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** with respect to petitioner's first claim and **DENIED** with respect to his remaining claims.

IT IS FURTHER ORDERED that petitioner is granted leave to proceed on appeal *in forma pauperis.*

s/ John Corbett O'Meara
United States District Judge

Date: February 24, 2012

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, February 24, 2012, using the ECF system and/or ordinary mail.

s/ William Barkholz
Case Manager

APPENDIX C

Michigan Supreme Court
Lansing, Michigan

ORDER

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

November 3, 2010

139209

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANGELO ROCHELLE MCMULLAN,
Defendant-Appellant. /

SC: 139209
COA: 281844
Genesee CC: 01-008582-FC

On Order Of The Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we

hereby **AFFIRM** the June 2, 2009 judgment of the Court of Appeals. Because a rational view of the evidence did not support an instruction of involuntary manslaughter when considering the particular facts of this case, the trial court did not err in denying defendant's request for the court to instruct the jury regarding involuntary manslaughter. However, we take this opportunity to clarify the opinion of the Court of Appeals.

As the Court of Appeals correctly noted, if a criminal defendant is charged with murder, the trial court should instruct the jury on involuntary manslaughter if the instruction is supported by a rational view of the evidence.[1] Reversal of a trial court's jury instruction decision is appropriate only where the offense was clearly supported by the evidence; an offense is clearly supported where there is substantial evidence to support it.[2] An appellate court must therefore review *all* of the evidence irrespective of who produced it to determine whether it provides a rational view to support an instruction on the lesser charge.

Here, the reasoning of the Court of Appeals relied too heavily on the prosecutor's evidence, accepting as fact evidence that defendant disputed. Specifically, the Court of Appeals assumed as fact two disputed issues: First, that defendant pushed the victim into the car and then shot the victim; defendant contends that he and the victim were engaged in a struggle at the car door when he discharged the weapon. Second,

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[1] *People v Mendoza* , 468 Mich 527, 541 (2003).

[2] *People v Silver*, 466 Mich 386, 388 (2002); *Mendoza*, 468 Mich at 545.

that defendant robbed the victim after the fact, which defendant denies. Even though the Court of Appeals majority partially erred to the extent that it accepted these contentions as proven fact, even absent these additional questions of fact, the lower courts properly concluded that a rational view of the evidence in this case does not support an instruction on involuntary manslaughter.

The facts inescapably show that defendant acted with malice because, at a *minimum,* he "inten[ded] to do an act in wanton and wilful disregard of the likelihood that the natural tendency of [his] behavior is to cause death or great bodily harm,"[3] and did *not* act with an intent merely to injure or with non-malicious gross negligence-the two recognized types of involuntary manslaughter.[4] Defendant admitted that, after a physical altercation with the victim, he left to obtain a loaded gun in order to threaten or scare the victim. Some evidence further showed that, when the defendant returned, the victim was shot in the chest when defendant and the victim again began to struggle at the victim's car. Defendant does not dispute that the gun was in his hand when it was cocked and then fired. The evidence indisputably established that the firearm had to be specifically cocked in order to fire. In particular, defendant conceded that the weapon is "designed to prevent it from firing unless you want it to fire." Based on this chain of events, and for the reasons otherwise stated by the Court of Appeals, we conclude that defendant's actions constitute a malicious series of intentional

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[3] *People v Goecke*, 457 Mich 442, 464 (1998).

[4] See *People v Holtschlag*, 471 Mich 1, 21-22 (2004).

acts; they do *not* demonstrate a grossly negligent handling of a firearm that inadvertently caused death. Therefore, the trial court did not err in denying defendant's request for the jury to be instructed on involuntary manslaughter.

KELLY, C.J. *(dissenting).*

I would reverse the Court of Appeals decision. I believe that the dissent correctly concluded that defendant's conviction must be reversed because there was substantial evidence to support an instruction on involuntary manslaughter:

> A rational fact-finder could have believed defendant when he said that he did not intend to fire the weapon he was using merely to scare Smith, i.e., that he did not intend to do the act (firing the weapon) that caused Smith's death. That conclusion would be consistent with the long history defendant had with Smith, his attempts to help Smith following the shooting, his apparent grief at what had occurred and especially his corroborated accounts of being under the influence of drugs at the time the shooting occurred. As was the case with the defendant's "intoxication" in *People v Droste,* 160 Mich 66, 78-79; 125 NW 87 (1910), the fact-finder here might have concluded that, "at the moment" the gun discharged, defendant's drug use was sufficient "to rob his act of the necessary elements of murder."[5]

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[5] *People v McMullan*, 284 Mich App 149, 162-163 (2009) (BANDSTRA, J., dissenting).

Although this Court has recognized that the Legislature has generally abolished the defense of voluntary intoxication, see *People v Nickens*, 470 Mich 622, 631 n 7 (2004), the actions

CAVANAGH, J., joins the statement of KELLY, C.J.

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occurring in this case occurred before MCL 768.37 went into effect. Accordingly, we need not consider any possible effect of MCL 768.37 on *Droste*.

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANGELO ROCHELLE MCMULLAN, Defendant-Appellant.	FOR PUBLICATION June 2, 2009 9:00 a.m. No. 281844 Genesee Circuit Court LC No. 01-008582-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

SAAD, C.J.,

A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 30 to 75 years in prison for the second-degree murder conviction, 5 to 15 years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant

appeals and, for the reasons set forth below, we affirm.[1]

I. Jury Instruction

Defendant claims the trial court erred when it refused to give the jury an involuntary manslaughter instruction. This Court reviews de novo questions of law arising from jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). To warrant reversal of a conviction, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

A homicide committed with malice is murder. *People v Mendoza*, 468 Mich 527, 534-536; 664 NW2d 685 (2003). In contrast, the unintentional killing of another, "'committed with a lesser mens rea of gross negligence or an intent to injure, and not malice," is common law involuntary manslaughter. *Gillis*, *supra* at 138, quoting *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). Common law involuntary manslaughter is a necessarily included lesser offense of murder. *Id.* at 540-542. If a defendant is charged with murder, the trial court should instruct the jury on common law involuntary manslaughter, but only if the instruction is supported by a rational view of the evidence. *Id.* at 541. Unlike the dissent, we do not

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[1] Although defendant initially failed to file a timely claim of appeal, the Eastern District of Michigan granted habeas relief to defendant and ordered the state of Michigan to reinstate his appeal as of right with this Court. *McMullan v Jones*, unpublished order of the Eastern District of Michigan, entered August 30,2006 (Docket No. 05-70807-DT), slip op, p 11.

believe that a rational view of the evidence supports an instruction for involuntary manslaughter.

Here, were we to agree that one of the bases for the trial court's refusal to give the instruction was incorrect that defendant committed a felony by stealing the victim's money after the shooting nonetheless, a rational view of the evidence does not support an instruction for involuntary manslaughter. To find involuntary manslaughter, a defendant must not act with malice. *Gillis*, *supra* at 138. "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "[M]alice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart." *Id.* at 467. It can also "be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Here, the evidence supports only a finding of malice and not a lesser mens rea of gross negligence, as defendant claims. Defendant was angry at the victim over payment for a cocaine deal and had a fistfight in the apartment complex parking lot. The fight ended and the victim got into his station wagon. Defendant then repeatedly demanded that his wife give him his loaded revolver. When defendant's wife refused to give him the gun, defendant grabbed it from her and returned to and escalated the altercation with the victim. He approached the victim's car and pushed on the door to prevent the victim from exiting his vehicle. After the victim fell

back into his seat, defendant pointed the gun at the victim, within one foot of his chest. Defendant cocked back the hammer of the revolver, which was the only way the gun could fire. Then, defendant pulled the trigger, shooting the victim at close range in his chest. Thereafter, defendant rifled through the critically injured victim's pockets and took his money. These facts support a finding of malice, and preclude a finding of involuntary manslaughter.

The only evidence suggesting that defendant did not commit this homicide with malice is his own testimony that he did not intend to kill the victim, that he assisted in taking the victim to the hospital, and that he displayed remorse. This does not constitute the kind of substantial evidence necessary to support a lesser offense instruction, *People v Silver*, 466 Mich 386, 393; 646 NW2d 150 (2002), and certainly, the facts do not "rationally fit within the legal purview of manslaughter ...." *Holtschlag*, *supra* at 15 n 8.[2] Again, in light of evidence that defendant demanded a loaded weapon from his wife after the physical altercation concluded, he returned to the victim and maintained a dominant position over him by physically forcing the victim back into the vehicle, he pointed the gun within close to the victim 's chest, cocked the hammer, pulled the trigger, and stole the victim's money, no rational jury could conclude that

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[2] We acknowledge that defendant claims not to remember cocking the hammer or pulling the trigger and that he denies searching the victim's pockets for money, but the gun could not have discharged without the deliberate act of pulling back the hammer and he acknowledged that firing a revolver at a person's chest is likely to cause serious injury or death. Moreover, a witness testified that defendant indeed searched the victim's pockets immediately after shooting him.

defendant acted without malice. Defendant's alleged display of remorse does not alter this conclusion. Once defendant saw the gruesome result of his act he may have regretted his conduct, but this does not alter the fact that his actions denote malice. To rule otherwise opens the door to ex-post facto rationalizations of cold blooded murder, like the one defendant committed here. The trial court correctly refused to give the jury an instruction on involuntary manslaughter.

II. Assistance of Counsel

Defendant contends that his attorney was ineffective because he did not know that one of the prosecution witnesses, Gregory McDowell, may have received lenience in anticipation of his testimony against defendant and counsel failed to cross-examine McDowell about his plea agreement.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485. Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Grant*, *supra* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an

objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant*, *supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

There is no evidence that, at the time McDowell testified, a plea agreement existed. McDowell had been charged with possession of cocaine, but did not enter a guilty plea until two days later. Defense counsel's performance cannot fall below an objective standard of reasonableness for failing to cross-examine the witness regarding a non-existent agreement.

Defendant also claims that defense counsel should have anticipated the future entry of a plea agreement for McDowell because: 1) McDowell testified for the prosecution, but was also facing charges, and 2) McDowell was granted supervised release even though he failed to appear at his arraignment. Were we to agree, counsel's performance did not so prejudice defendant that he was deprived of a fair trial. *Grant*, *supra* at 485-486. McDowell's testimony was the same as defendant's except with regard to whether defendant searched the victim's pockets after the shooting. Based on evidence, detailed above, relating to the actual shooting of the victim, there is clearly overwhelming evidence to convict defendant of second-degree murder based on defendant's testimony alone.

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or

excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The victim died as a result of a gunshot inflicted by defendant. Defendant admitted to the fistfight and explained that the victim's failure to pay for the cocaine would have disrupted his ability to support his habit.

Notwithstanding that the evidence clearly supports a conviction of second-degree murder, defendant claims that, absent McDowell's testimony regarding the search of the victim's pockets, the jury would have been more likely to convict defendant of voluntary manslaughter. The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). A lapse of time occurred when the fistfight stopped and the victim retreated by getting into his car. Meanwhile, defendant repeatedly asked his wife to give him the revolver and she refused. Thereafter, defendant approached his wife and "snatched" the revolver from her. Given this lapse of time, during which a reasonable person could have controlled his passions, the jury could not have found defendant guilty of voluntary manslaughter beyond a reasonable doubt. Thus, defendant fails to show a reasonable probability that the outcome would have been different but for the defense counsel's failure to anticipate the future entry of a plea agreement and to cross-examine McDowell accordingly. *Grant*, *supra* at 486.

III. Prosecutorial Misconduct

Defendant also asserts that, if his ineffective assistance of counsel claim fails, the prosecutor engaged in misconduct by failing to disclose McDowell's plea agreement.[3]

Pursuant to MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. Similarly, pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecutor must disclose any information that would materially affect the credibility of his witnesses. See *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). To establish a *Brady* violation, a defendant must prove:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 281-282.]

Were we to find that the prosecutor should have disclosed information about McDowell's anticipated plea agreement, defendant failed to satisfy the fourth prong of the *Brady* test. Defendant has not shown that a reasonable probability exists that the outcome

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[3] This Court reviews preserved claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

of the proceedings would have been different if the prosecutor disclosed evidence of a plea agreement or expectations for lenience in anticipation of an agreement. *Lester, supra* at 282. Again, regardless of McDowell's testimony, there was substantial evidence for the jury to reject the voluntary manslaughter instruction and to convict defendant of second-degree murder. "Furthermore, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Lester*, *supra* at 283. Evidence of the plea agreement or expectations for lenience would only have served as an additional basis to impeach McDowell, who had already been impeached by discrepancies between his preliminary examination testimony and his trial testimony. In light of defendant's failure to prove this element of the *Brady* test, we need not remand for an evidentiary hearing to address whether the prosecutor fulfilled his duty to disclose.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANGELO ROCHELLE MCMULLAN, Defendant-Appellant.	FOR PUBLICATION June 2, 2009 No. 281844 Genesee Circuit Court LC No. 01-008582-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

BANDSTRA, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that the trial court did not err in failing to provide the jury the requested instruction on involuntary manslaughter as a necessarily included lesser offense. In all other respects, I concur with the majority opinion.

The Supreme Court most recently and comprehensively articulated our standard of review in *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002). "[T]he failure to instruct the jury regarding ... a necessarily lesser included offense is error requiring reversal ... if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial 'clearly' supported the lesser included instruction," *id.* at 388, meaning that

there was "substantial evidence to support the requested lesser instruction" at trial. *Id.* at 388 n 2.

Reviewing the "entire cause," I begin by noting that the trial court erred by considering the request for the instruction on involuntary manslaughter under *People v Ryczek*, 224 Mich 106; 194 NW 609 (1923). The trial court relied on *Ryczek's* description of the *elements* of involuntary manslaughter and concluded that, under the facts of this case, those elements could not be satisfied. However, as explained in *People v Holtschlag*, 471 Mich 1, 11; 684 NW2d 730 (2004), "*Ryczek's* description of involuntary manslaughter was never meant to define the elements of the crime of manslaughter." (Emphasis in original). Most notably, the trial court here concluded that *Ryczek* prohibited an involuntary manslaughter instruction because the victim was killed in the context of a felony.[1] *Holtschlag* reasoned that, at least since *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), whether "a 'felony' has been committed is simply not dispositive in determining whether either 'murder' or 'manslaughter' has been committed and, thus, the 'felony' language in *Ryczek's* manslaughter description is essentially irrelevant." *Id.* at 10.

The crucial difference between second-degree murder (of which defendant was convicted) and

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[1] The felony was defendant's alleged taking of money from the victim's pockets following the shooting. However, even if the *Ryczek* rule that a killing in the context of a felony could not be involuntary manslaughter was still good law, the jury might nonetheless have properly found defendant guilty of involuntary manslaughter if it believed his account that he did not take money from the victim.

involuntary manslaughter (concerning which the requested instruction was denied) is the presence or absence of malice. "[T]he only element distinguishing murder from manslaughter is malice . . . . [T]he elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

"Malice is defined as the intent to kill, the intent to cause 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." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In contrast, the killing of another, "committed with a lesser mens rea of gross negligence or an intent to injure, and not malice . . . is not murder, but only involuntary manslaughter." *Holtschlag*, *supra* at 21-22. In other words, conviction of involuntary manslaughter rather than murder is appropriate in such a "lesser mens rea" case because "the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Mendoza*, *supra* at 541 (citation omitted).

Reviewing the evidence presented at trial, I conclude that no reasonable fact-finder could find that defendant did not shoot the gun that killed the victim. However, the crucial question that remained was his state of mind in doing so.[2] There was ample

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[2] To the extent the trial court considered the malice question at all, it merely concluded that: "Well, here, we know they're in a fight situation. Where there's a fight, there's malice." While the fact of the altercation between defendant and the victim is relevant in determining defendant 's state of mind at the time

evidence in the record from which a reasonable fact-finder could have concluded that defendant acted without malice. He and the victim, Jimmy Smith, had been long time associates, using and selling controlled substances together for 30 years. On the evening of the altercation that resulted in Smith's death, he and defendant were arguing about a previous transaction in which Smith claimed defendant had supplied him with fake Vicodin pills. Smith claimed that, as a result and in compensation for that, Smith should not be required to pay for cocaine that defendant had supplied to him, a proposition with which defendant vociferously disagreed. The resulting fist fight did not settle the matter as Smith still refused to give defendant the money he thought he was owed for the cocaine.

Defendant testified that he wanted to scare Smith into giving him the money, by threatening him with a gun. He testified that, at the time, he had ingested rock cocaine and that this made him feel like "a big man." Further, he testified that, earlier in the day, he had taken a dose of methadone, which he claimed provided a "high." A witness, Gregory McDowell, testified that he considered defendant to be under the influence of controlled substances because he fidgeted and paced. Further, the director of a methadone treatment center confirmed that defendant was in treatment at the time of the shooting. Defendant testified that he did not intend to shoot Smith and that he could not recall cocking the hammer or pulling the trigger to do so. He claimed that the gun merely "went off."

---

he brandished the gun, it does not necessarily establish malice in that regard.

Following the shooting, the record shows that defendant took steps to assist Smith. Together with William Henry Russell, Jr., defendant laid Smith in the rear passenger seat of a car and took him to the emergency room entrance of a hospital. Russell testified that defendant had tears in his eyes at the time.

Notwithstanding all of this, a rational fact-finder could certainly have disbelieved defendant as to his intent and state of mind and concluded that the malice necessary to support a second-degree murder conviction existed at the time the gun was fired. That would be the proper analysis if defendant claimed that there was insufficient evidence to support the conclusion that he was guilty of second-degree murder. As the majority points out, for example, malice can be inferred simply from the use of a deadly weapon such as occurred here and a challenge to the second murder conviction would properly be rejected. There was ample evidence to conclude that defendant acted with malice.

However, considering the argument defendant actually raises, I conclude that the evidence here was sufficient to allow a rational fact-finder to conclude otherwise, i.e., that defendant acted with a "lesser mens rea" and that his "mental state [was] not sufficiently culpable to reach the traditional malice requirements." *Holtschlag*, *supra* at 21-22; *Mendoza*, *supra* at 541. Malice may be inferred from the use of a deadly weapon, but it does not have to be. A rational fact-finder could have believed defendant when he said that he did not intend to fire the weapon he was using merely to scare Smith, i.e., that

he did not intend to do the act (firing the weapon) that caused Smith's death. That conclusion would be consistent with the long history defendant had with Smith, his attempts to help Smith following the shooting, his apparent grief at what had occurred and especially his corroborated accounts of being under the influence of drugs at the time the shooting occurred. As was the case with the defendant's "intoxication" in *People v Droste*, 160 Mich 66, 78-79; 125 NW 87 (1910), the fact-finder here might have concluded that, "at the moment" the gun discharged, defendant's drug use was sufficient "to rob his act of the necessary elements of murder." While *Droste* is an ancient precedent, its conclusion in this regard was recently cited with approval in *Mendoza*, *supra* at 542-543. This is not to say, of course, that the jury would have found a lack of malice; it is merely to say that, based on the record, it could have. By failing to instruct the jury on involuntary manslaughter and thus precluding that possible outcome, the trial court erred.

I reject the prosecutor's arguments that any error in this regard was without prejudice to defendant. The prosecutor argues that "defendant fails to show plain error affecting his substantial rights" because "the trial court instructed the jury on the lesser offense of voluntary manslaughter." Apparently, the argument is that, because the fact-finder did not find defendant guilty of voluntary manslaughter, it would necessarily have also rejected involuntary manslaughter if it had been instructed to consider it. That argument overlooks the fact that voluntary manslaughter and involuntary manslaughter are different offenses with different elements. "In contrast to the case of voluntary manslaughter . . .

the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Mendoza*, *supra* at 541, quoting *United States v Browner*, 889 F2d 549, 553 (CA 5, 1989). The jury might well have concluded that there was no "provocation induced passion" to support a voluntary manslaughter conviction but that defendant's mental state nonetheless warranted a conviction of involuntary manslaughter.

Further, I reject the prosecutor's claim that, because the jury convicted defendant of second-degree murder, it necessarily found that defendant acted with malice, so that "an instruction on common law involuntary manslaughter would not have produced a different result." The prosecutor's argument here is that the jury would simply have acquitted defendant if it concluded that he acted without malice. That argument has been specifically rejected by our Supreme Court in *Silver*, *supra* at 393 n 7:

> One might argue that the jury would have acquitted defendant if it believed his testimony. However, this is too facile. The United States Supreme Court rejected such an argument in *Keeble v United States*, 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973), when it stated:
>
> > [I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a

> lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

The facts of this case are somewhat similar to those in *Silver*. At issue there was the state of mind of a defendant who had clearly and admittedly entered a residence without permission. *Id.* at 392. Nonetheless, the defendant claimed that he had no intent to steal or commit any other offense while in the dwelling. The trial court instructed the jury regarding first-degree home invasion but denied defendant's request for an instruction on the lesser included offense of breaking and entering without permission. *Id.* at 390. The Supreme Court reasoned that "if the jurors believed defendant [acted without the appropriate criminal motive], they realistically could not act on [that belief] unless they had an instruction that gave them that choice. Not to give them an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict." *Id.* at 393.

The same is true here. As was the result in *Silver*, I would reverse defendant's conviction of second-degree murder and remand the case for a new trial with a properly instructed jury. *Id.* at 394.

/s/ Richard A. Bandstra

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN

vs

ANGELO ROCHELLE MCMULLAN,

Defendant /

Case No. 01–8582–FC

JURY TRIAL – VOLUME III OF VI
BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE
FLINT, MICHIGAN – FRIDAY, JANUARY 18, 2002

APPEARANCES:

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For the Defendant: Mr. Kevin L. Rush (P42156)
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Recorded by:	Via Video Recorder
Transcribed by:	Amy Green, CSR#4731 Certified Stenographic Reporter (810) 424-4454

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believe it was a gun?

A. Of course. Yes. I mean, he was shot.

Q. All right. How many times did Angelo say to his wife Bridget, give me my shit?

A. Several times.

Q. And where was Bridget?

A. She was on the landing.

Q. How far away from Bridget?

A. Well, she was between -- he was between us and -- and the landing and her, so --

Q. Okay. After he said, give me my shit.

A. He was closer to her than she would have been to me, so --

Q So initially, as Jimmy's approaching the car, Angelo's going towards him, right? And then he says, give me my shit?

A. Yes.

Q. And at a certain point you saw Angelo as he's saying, give me my shit, right?

A. Yes.

Q. And how far away is he from Bridget?

A. I'd say about half the distance, about 15 feet.

Q. All right. And how far is he away from Jimmy, who's getting into the car?

A. They're a lot closer together.

***

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESSEE

PEOPLE OF THE STATE OF MICHIGAN

vs

ANGELO ROCHELLE MCMULLAN,

Defendant /

Case No. 01–8582–FC

JURY TRIAL – Volume IV of VI

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

FLINT, MICHIGAN – Wednesday, January 23, 2002

APPEARANCES:

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something else.

MR. DEWITT: I suppose–

MR. RUSH: I don't–

MR. DEWITT: –he could ask–

MR. RUSH: –what that is.

MR. DEWITT: –how he appeared.

THE COURT: How did he appear, on the way to the hospital?

THE WITNESS: You're asking me, your Honor?

THE COURT: I am.

THE WITNESS: He appeared–he was nervous, had tears in his eyes, is all I know.

CROSS-EXAMINATION (continuing)

BY MR. RUSH:

Q He had tears in his eyes, didn't he?

A Right.

Q Did you guys talk a lot on the way to the hospital?

A If he was talkin', I wasn't payin' him any attention. I didn't hear a word he was sayin'.

Q I think you had said that the windows were down, there was traffic, correct?

A Correct.

Q You also said that you did not turn around to look at Mr. Smith, because you were apparently trying to drive, is that right?

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just–I don't know if I–if–if–if–if I–if I swung and–swung on him, or he swung on me. But I know we was–we was doin' this. And I can just only keep hearing my wife screamin', and hearin'–and I'm screamin', and he's screamin', and, you know, this–this was goin' on. It went on and went on. And then for a second there, I guess we–we both just stopped. And I'm like, "yeah, okay," you know. And at that time, I went to–I went to walk away again. He got on–he–he got back in the car. And Bridget was standin'–she was standin' like, maybe about three feet–three to four feet away from me. And I'm like, "give me my shit," you know. And when I–when I–when I did that, Butch–Butch said, "you not gonna shoot me," you know, "nigger." You know, I'm like, "man," – and I said this to my wife, "give me my shit." But she was like, "no," you know. And I turned around, and I'd say she was about–bout three feet, maybe four feet away. I'm not–somethin'–somethin' like that. But anyway, I–I turned around, and I snatched the gun from her. And at that time, Butch was sayin', "M-F, nigger, you not gonna shoot me," you know. And he was gettin' back out the car again. And I turned around, and I got the gun in my hand. And when he–when he went to pushin' on the door to get out, I'm pushin' the door back for him to stay in the car. And I–my intention was just to really scare him with the gun. I wasn't gonna shoot Butch. But with all of this goin' on, I don't–I don't–at that–I don't know what happened then. All I know is with all the

chaos gain', the gun went off, and it was, "oh, man, I had–I done–I done messed up." That's–that's–that's the best I can just tell you, to my–to my recall of–of how–of how this–how this–this tragic thing happened between us.

Q You're absolutely sure, Mr. McMullan, about what happened here?

A Not absolutely sure about–I'm not absolutely sure about a whole lot of things, because I know, at this time–at that time, that it just–it happened so quick. And after–I mean, I was hearing, you know–I'm–like I say, we screamin', he–I'm screamin', he screamin', and my wife screamin', and–and it was just–that's the–that's the best–the best I can recall what happened between–between me and Butch.

Q Okay. So you're admitting that you had the gun in your hand, right?

A Yes, I did.

Q Came back over there to that car where Butch was, right?

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A (No audible response).

Q Mr. McMullan?

A Yeah.

Q Why didn't you run?

A I honestly don't–I don't–I don't know why I–it just–running–running, I just–it was no need–was–wasn't no need to run. Just–

Q What did you do?

A (No audible, response).

Q Mr. McMullan, what did you do?

A I–I say–I–after I snatched–after I snatched the–the gun from my wife, I turn around, and with all of the chaos going on, I don't–after I heard–after–after the gun went off, I don't even know.

Q Did you push Butch down into his seat?

A No. What–

Q Did you shove him down, like–

A Butch was pushin' one way, I was pushin' the door another way: If–if he–if–I never pushed him down. If he–if he slipped back in the car seat, I don't know. But no, I never did push Butch down. I was pushin' the door, tryin' to keep Butch in the car.

Q Do you remember taking that gun, putting your hand out–

A No, I don't.

Q –doing one of these type of things (indicating), where your arm is extended, and shooting? Do you remember that?

A No, I don't–I don't–I don't remember doin' nothing like that.

Q How did the gun get cocked?

A I honestly don't re–I honestly don't even remember. I just–

Q Do you remember cocking that gun?

A No, I don't. I just don't. I just–with all of the chaos going on, I–I just remember snatchin' the gun, and tryin' to scare Butch, and turnin' around with the gun. That's–I don't remember cockin' no gun to–to–to shoot Butch.

Q After–and isn't it–is it true that Mr. McDowell ran?

A After–after that, yes, Butch fell. And he–well, he said–he–he said, "you, motherfucker, you don't shot me," you know. And–and I'm looking at him. And now things is–now things is–is really goin'–goin' real fast right now. Becau–but he's–he don't appear to be–he don't even appear to be hurt. But he-evidently he was. Because after that, he–he took a step or so, and he went to goin' down. And he went to goin' down, you know, the–the–the side of the car. And that's when I–I knew it was–it was–it was–I asked him for help, or asked him to come back?

A I asked–I asked–I asked-I asked Greg to–to come over and–and–and help. And Greg didn't say nothing. He just got out the car, and just start to walkin'.

Q Okay. Do you recall Henry Russell appearing?

A Yes. Uh, uh, uh, shortly, right after that, I seen him comin', and I–and I–and I–I asked him to help me put him–put Butch in the car.

Q What happened next?

A We got–we got him in the car. And I took the gun, and I laid it ri–right by the, uh, the front seat, between–between my legs, I believe. Yes, it was between my legs. And we immediately went up out of Sussex Apartments to–to Hurley Hospital.

Q Why did you go to Hurley Hospital with Butch?

A To–to try to get him some help.

Q Did you think that he was dead when you took him to that hospital?

A I don't know. I didn't–I was so scared and–and out of it. But I don't know. I know he was–he needed help. I just, you know, I know I had–I had to try to do something, after I had did what I did.

Q Okay. You got to the hospital, correct?

A Yeah.

Q Did you go inside?

***

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY GENESEE

PEOPLE OF THE STATE OF MICHIGAN

vs

Case No. 01–8582–FC

ANGELO ROCHELLE MCMULLAN,

Defendant /

JURY TRIAL – VOLUME V OF VI
BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Thursday, January 24, 2002

APPEARANCES:

For the People:	Mr. Kennan M. DeWitt (P40436) Assistant Prosecuting Attorney 100 Court House Flint, Michigan 48502 (810) 257-3232
For the Defendant:	Mr. Kevin L. Rush (P42156) Attorney at Law 934 Church Street Flint, Michigan 48502 (810) 232-0171

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THE COURT: You're speaking -- you're objecting to voluntary manslaughter?

MR. DEWITT: I'm objecting to any type of manslaughter.

THE COURT: Okay. Just a moment, please. I think we need to give the voluntary manslaughter instruction. I'm still thinking about involuntary. Why should we be giving that, Mr. Rush

MR. RUSH: Well, your Honor, involuntary manslaughter; dealing with a gross negligence standard. I think that there's been testimony introduced here that Mr. McMullan had the gun. That he doesn't recall it being discharged. He doesn't recall cocking it back. He recalls the door being pushed back and forth when the gun was discharged. Holding a gun in front of another person I think may rise to the level of a gross negligence, and that there was testimony from Mr. McMullan that he did not intend to kill. And I think that that would suffice as enough evidence to support a reading of the involuntary manslaughter instruction.

For that reason, I would also be asking that the negligent homicide instruction be given as well, essentially for the same reasons I've just stated.

MR. DEWITT: Your Honor, the defendant has admitted that he -- that he had the gun. That he shot

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In this case you've heard testimony from police officers. You give that testimony the same weight and effect and value that you would any witness that testifies. A citizen, a police officer, any witness, treat them the same way.

Now, let me start to get into the crimes themselves. The crime of first degree premeditated murder requires proof of something that we call a specific intent, and I'm going to talk about that some more in just a minute. What it means is the prosecution must prove not only that the defendant did certain acts, but that he did those acts with the intent to cause a particular result.

So for the crime of first degree premeditated murder, this means that the prosecution must prove that this defendant intended to kill, and the defendant's intent may be proved by what he said, what he did, how he did it or by any other facts and circumstances in his case -- in this case. Now, the defendant says that he could not have specifically intended to kill because he was intoxicated by alcohol or drugs. So you're going to have to decide whether the defendant's mind was so overcome by alcohol and drugs that he could not have formed that intent.

Now, when you're doing that, it may help you to think about the following questions. Ask yourself how the defendant looked or at -- or near the time of the incident. How did he look? How did he act? What did he say? Ask yourself how much alcohol or drugs he had used. Ask yourself if there's some other circumstances surrounding the incident that can help you decide that. The prosecutor must prove beyond a reasonable doubt that the defendant could and did

specifically glean to kill or you must find the defendant not guilty of first degree premeditated murder.

The charge of premeditated murder has these elements. Remember, I told you I was going to tell you about elements. To prove this charge the prosecutor must prove certain elements to you beyond a reasonable doubt. The first thing he must prove to you is that this defendant caused the death of the victim in this case, Mr. Jimmy Charles Smith. That is to say that Jimmy Charles Smith died as a result of being shot. It's the first thing that has to be proven.

Now, the second thing that has to be proven is that the defendant intended to kill. That's that specific intent part I was talking to you about.

The third thing is that this intent to kill was premeditated. Now, that means thought out beforehand.

Fourth, that the killing was deliberate, which means that the defendant considered the pros and cons of the killing and thought about it and chose his actions before he did it. Now, there must be real and substantial reflection for long enough to give a reasonable person time to think twice about an intent to kill. The law does not say how much time is needed, so you have to decide if enough time has passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought and reflection.

The fifth thing is that it must be shown that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. And since I mentioned the word lesser crime, you may

also consider a lesser charge called second degree murder. Now I'm going to tell you about the elements of that, and you're going to find that some of them sound similar and some of them don't.

To prove second degree murder, the prosecutor must prove, first of all, that the defendant caused the death of Jimmy Smith, that is, that he died as a result of being shot. Here's the different part. The second thing they have to prove is that the defendant had one of these three states of mind -- state of mind. He either intended to kill or he intended to do great bodily harm with Jimmy Smith or he 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 actions.

Third, that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. Let me go through and compare first degree and second degree murder to you for a minute. Here's what they have in common. There has to be proof of the victim's death. There has to be proof the death was caused by the defendant. There has to be proof that the death was not justified or excused or mitigated to manslaughter. That's what they have in common.

Now, here's where they're different. On first degree murder, they have to prove the defendant actually intended to kill and defendant premeditated victim's death and defendant deliberated victim's death. Whereas on second degree murder, they have those optional states of mind that they have to prove the defendant actually intended to kill the victim or the defendant intended to do great bodily harm to the victim or the defendant 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 actions.

The crime of murder may also be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. Now, for manslaughter, there's two things that have to be present.

First of all, when the defendant acted, his thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted on impulse without thinking twice from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. And the law doesn't say what things are enough to do this because that's for you to decide.

The second thing to consider is that the killing itself must result from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. And the law doesn't say how much time is needed. That's for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

And stay with me, because I'm almost done. Do you need a -- do you need to stand up or shake it out or anything like that? You're okay? All right.

You're thinking about the evidence and deciding what the defendant's state of mind was -- well, start out by thinking about all the evidence and understand that a defendant's state of mind may be inferred from the kind of weapon used, the type of

wound inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged killing. You may infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon. And a gun is a dangerous weapon. And, frankly, a dangerous weapon is any instrument that is used in a way that is likely to cause serious physical injury or death.

Now, premeditation and deliberation may be inferred from any actions of the defendant which show planning or from any other circumstances surrounding the killing. The prosecutor, like I said before, need not prove a motive for the killing, but you may consider evidence of motive in deciding if there was premeditation and deliberation. Motive by itself does not prove premeditation and deliberation.

Now, let me move into a separate crime called possessing a firearm at the time he committed a felony. And, by the way, I'm going to send in with you a verdict form which lists the charges and the choices.

To prove a crime of possessing a firearm at the time of the committing of a felony, the prosecutor must prove to you first that this defendant committed the crime of murder, and we've already defined that to you. It doesn't matter whether it's first degree, second degree or manslaughter, and it's not necessary, frankly, that the defendant be convicted of those crimes.

And then, second, they have to prove that at the time the defendant committed those crimes or that crime, he knowingly carried or possessed a firearm.

Two things that have to be proved. And a pistol is a firearm. So I suppose there's three things they have to prove.

Okay. There's a third charge. This is called felon possessing firearm, and he's charged with having possessed or used a firearm in this

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APPENDIX H

STATE OF MICHIGAN

THE SEVENTH JUDICIAL COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE OF MICHIGAN

-vs-

Case No. 01–8582–FC

ANGELO ROCHELLE MCMULLAN,

Defendant /

SENTENCING

BEFORE THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan - Thursday, February 21, 2002

APPEARANCES:

For the People: MR. KENNAN M. DEWITT (P40436)
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Flint, Michigan

February 21, 2002, 9:51 a.m.

THE COURT: Angelo Rochelle McMullan is here on file 01-8582.

MR. DEWITT: May we approach, your Honor?

THE COURT: Yes, sir.

(Bench conference held from 9:51 a.m. to 9:53 a.m.)

THE COURT: Do you want it to be on the record or off the record? We're on the record right now.

MR. RUSH: Off.

THE COURT: Off. Okay. Off the record.

(Discussion held off the record from 9:51 a.m. to 9:53 a.m.)

THE COURT: Mr. McMullan, you are here for sentencing this morning on three charges; Murder in the Second Degree, Habitual Offender Fourth; Felony Firearm, Habitual Offender Fourth; and Felon in Possession of a Firearm, Habitual Offender Fourth. Have you read through the report that talks about you?

MR. MCMULLAN: Yes, I did.

THE COURT: Did you see in that report any mistakes, anything that needed to be corrected?

MR. MCMULLAN: No, not nothing of significance, no.

THE COURT: Getting through that issue first, Mr. Rush, did you see -- did you see any additions or corrections?

MR. RUSH: No additions or corrections to the report. I have a request regarding the guidelines.

THE COURT: Okay. Let's talk about that.

MR. RUSH: It's fairly quick, though.

THE COURT: Let's talk about that.

MR. RUSH: Judge, I understand -- Mr. Dewitt might want to listen to this, while he's talking. May I approach, your Honor? There are a couple things Mr. McMullan wanted you to see.

THE COURT: Okay.

MR. RUSH: For the record, that's a letter on behalf of Mr. McMullan and some AA sheets that Mr. McMullan has been -- shows he's been attending at the County Jail.

Your Honor, dealing with the issue -- I don't want to snooker Mr. Dewitt here. There we go. There's a request that I have regarding the guidelines. And admittedly, these are -- this is purely request. Mr. McMullan has a criminal record history that is sporadic. Admittedly there are no ten-year gaps in his -- in between his felony matters. Although in the 1990s he has two possession of cocaines. The one before that is in 1987, possession of a sawed off shotgun. And at the end of the 70s, there was an unarmed robbery. I would ask the Court not to consider those matters in the 1970s. I think that they are distant. They are -- admittedly the one in 1978, and there's a '79. The next offense is almost ten years later. It's '87 I think.

And my -- I would simply ask the Court regarding the one offense, which he was scored 25 points on in the guidelines, that would be the unarmed robbery from '78. And I understand that there are no ten-year gaps, your Honor, but I would ask that the Court not consider that in scoring. And I would also ask that the Court not consider the other matter in

the 1970s in your scoring. If so, it would drop the points on his prior record variable down to approximately 45 points, and that would put him in a category of a Level 2F. Excuse me. I want to do that again. Approximately a level 2 for the offense variable and a prior record level of D.

Now, I know the guidelines don't necessarily call for that, Judge, and I admit I've gone through it, there's not a ten-year period of inactivity. But it's very close. And with the fact that during the 1990s it was just two possession for cocaines, essentially for the last 20 years he's had just one offense dealing with the short barreled shotgun. And essentially 24 years ago was the most severe matter, other than this, that he's ever had. I'd ask you not to consider those matters. That would be my argument with regard to the sentencing guidelines.

MR. DEWITT: Judge, at the Department of Corrections, the presentence investigator properly considered and included those in the report because there is no ten-year gap. And -- and we're asking that you do consider those and what he says in terms of the time lag goes to mitigation and the extent to which the Court would find them relevant.

However, it is properly part of his criminal history, and we're asking the Court to consider it in the guidelines and as part of his background for sentencing in this offense.

THE COURT: I think I have to continue that in the guidelines scoring, because it -- it shows the continuous activity which led us to this sad event.

MR. RUSH: Thank you, Judge. Other than that, I have no additions or corrections to the report itself.

THE COURT: But you did want to address an evidence issue, Mr. Rush?

MR. RUSH: Yes, your Honor. If the Court will recall, there was a side bar that we had, and I'm asking the Court to make it part of the sentence for appeal purposes, that it be transcribed, where there was a question I wanted to ask the witness, a Gregory McDowell, about a then pending possession of cocaine charge that he had. I wanted to ask him about this largely because it was an issue going to credibility. With that case pending, it certainly would go to an issue of his perception as to whether or not he would get a deal and such in the matter, and motivation in terms of him testifying the way that he did.

The Court had stated at side bar after we discussed it between the prosecutor, myself and your Honor, that you were not going to let me get into that conviction, and, in fact, I did not. Subsequently, on the morning that the verdict came in, the verdict actually was about 5 o'clock in the afternoon, there was a situation where I happened to have been over in Judge Ransom's courtroom, Mr. McDowell was in there, Mr. McDowell was up for trial on that possession of cocaine charge, and in fact Mr. McDowell received a plea bargain that morning of a reduction down to a misdemeanor.

I immediately came over here. I was a little hot. I'll say that. I discussed it with Mr. Dewitt. Mr. Dewitt had told me he absolutely had absolutely nothing to do with that. And at that point, the attorney for Mr. McDowell walked in, Jeffrey Childers. Mr. Childers also stated to me that there was no deal that had been made for Mr. McDowell,

that he had just that morning gone to the second floor, talked with the chief assistant prosecutor Randy Patrities and had received an offer.

Still, your Honor, even though I do believe that Mr. Dewitt had no knowledge of it, I do believe that Mr. Childers had no knowledge of it, and I don't believe there was a deal necessarily that was struck until that morningm, I do believe still, however, that that was a motivational situation for Mr. McDowell to testify the way that he did, because of that pending charge. I would ask the Court to allow me to file a Motion for a New Trial based on that issue.

THE COURT: It is true that you discussed those issue with the Court at sidebar. However, if you want to bring that kind of Motion, I think you'll have to put it in writing and bring it postjudgment.

MR. RUSH: I'll do so, your Honor.

MR. DEWITT: Your Honor, for the record, there was absolutely no connection between Mr. McDowell's case either in facts or procedure. They were separate instances. There was no consideration given to McDowell connected to this case. And I believe his testimony -- I believe he testified at preliminary exam which was consistent with how he testified at trial, if I'm not mistaken, and that's not an issue that I would deal with or approach him or his attorney on. And he resolved a case that was pending against him, and that's it, period. It had nothing to do with this case.

THE COURT: Bring your Motion, if you choose. We'll proceed today;.

MR. RUSH: Thank you, judge

THE COURT: Mr. Dewitt, does the victim's family wish to speak?

MR. DEWITT: Yes. Nadine Smith, the wife of the victim, would like to address the Court.

THE COURT: Mr. McMullan, sit there, please. Good morning.

MS. SMITH: Good morning. I'm very pleased with the verdict, but I have found it in myself to forgive Angelo, because I must forgive him so I can go on with my life. And I'm glad that we're coming to closure, and I hope that he finds peace within himself with God to go on with your life. You know what you did. Go to God for forgiveness and go on.

So many people have been hurt. So much division in the family. I pray for my husband's brothers and sisters. They will find peace within themselves and peace with God and they can go on also, because if we can't forgive, we can't heal ourselves. That's all I needed to say.

THE COURT: All right.

MR. DEWITT: Thank you. That was Nadine Smith, your Honor.

THE COURT: Thank you, Mrs. Smith. Do you wish to make a statement?

MR. MCMULLAN: Yes, I would. Nadine, Fred, Sammy, Cheryl, Rae, you all, I'm sorry. You know, I didn't mean to do this. And I hope, you know, that you all get closer too, you know. And I hope that for Bridget's sake that you all, you know, embrace her, because what I did, I'm sorry. I didn't mean to do this.

MS. SMITH: I forgive you and I'll pray for Bridget.

MR. MCMULLAN: Thank you. Thank you.

THE COURT: Mr. Rush?

MR. RUSH: Yes, your Honor. I'll try to be brief. You heard all the testimony, and generally in those situations there's not a lot to say. I'll say this. This is probably one of the toughest, saddest cases I've ever been involved with. And I've been involved unfortunately in some real sad ones.

What struck me throughout the entire trial was this family back here. Both sides sat together throughout this entire trial. They're sitting together today. They were a family, and this certainly wasn't one of those situations that unfortunately we have to deal with. And I think you had a sentencing this morning, some people involved in a stabbing and such with people that didn't even know each other. We are involved with robberies. We are involved with all kinds of stuff in our business unfortunately.

This wasn't one of those stiutations, Judge. This was, as you know from the testimony, people who knew each other, people who essentially lived together, stayed together, were friends, celebrated holidays together. And this happened as you know according to the testimony, in a period of, according to the witnesses, six to eight minutes. Zero to a hundred miles an hour in about 6 to 8 minutes. And that's real sad.

I don't think that Angelo McMullan would be a threat to anybody if he would walk out that door today. I think he's devastated by this whole thing. I think that in all honesty, he displayed that after this incident. As you know, he instantly was telling witnesses that he had shot Mr. Smith. There was testimony that he was asking for help. He went to

the hospital with Mr. Smith. Whether or not the argument is that he knew that Mr. Smith had passed away at that point or not, I don't think necessarily is the issue. The fact is he went. And he went to the hospital and he stayed there and he went into custody with police, and he's here today. So I just ask you to consider those things also in this sentencing.

He didn't run away. This is not some random crime. This is very sad. I imagine Mr. Smith was a pretty nice guy from everything that I've heard from all the testimony. He and my client were better than good friends. They were, essentially, relatives. I feel terrible for this family. I feel terrible for Mrs. McMullan. I feel terrible for Nadine Smith and the rest of the family. I'm impressed by her words this morning.

I would only ask you to take into consideration all those factors that I've just stated as well as the testimony that you've just heard and find the sentence certainly at the bottom end of these guidelines, and perhaps even less would be fair. I would ask you not to sentence him as a habitual offender. I would ask that you consider the testimony.

And certainly I understand that Mr. McMullan has to be punished for this. But this is such a different arena, Judge, such a different arena for a case like this than the ones that we normally get. And I'd ask you to consider that when you're sentencing and take it a little bit out of the normal circus that we're in in these courtrooms when we try these cases and kind of put it off to the side a little bit and judge it on its own.

I know that Mr. McMullan had problems with drugs. Mr. Smith and Mr. McMullan were compatriots in that type of a situation. And I think that if any -- anybody wishes in the whole world that this thing could be undone, it's this man who's standing next to me. I don't know whether anybody other than Mr. Smith's children and wife are in -- is any more devastated than Mr. McMullan, absolutely devastated.

And I'll just say this to -- to finish off. This is not testimony that ever would have come out in a trial, but when I first saw Mr. McMullan, right after he was arrested, he was on the third floor of the county jail on a suicide watch. Some of that testimony came out. He was dressed in a garb. They had taken away everything. They took away belts and shoe laces and everything else, because he had threatened to kill himself over what had happened with Mr. Smith. And he stayed there for about three weeks under this suicide watch. That may be the best example for you as to how it was for Mr. McMullan immediately after this situation. He was devastated.

I know he's remorseful, and I'd ask you to consider that, Judge.

THE COURT: Do you want to add anything to that, Mr. McMullan?

MR. MCMULLAN: No, other than the fact that I am very sorry, and -- and -- and I'm just remorseful about this whole thing.

THE COURT: Mr. Dewitt?

MR. DEWITT: Your Honor, it is -- he was convicted of Second Degree Murder, and it's not only the most serious offense against the victim and the

victim's family, because he took his life, but also against the People of the State of Michigan. And the sentence of incarceration is obviously appropriate and required under the law. And going below the guidelines we do not feel would be appropriate in light of the nature of this offense. And it's just another example of how the mix of guns and drugs and dealings between people lead to bad results in this community. And we feel incarceration is appropriate and the Court should not deviate below the guidelines. And we're also asking that the sentence be enhanced, because he does have an habitual offender fourth.

THE COURT: There's an oddity here. On Count II, the felony firearm, on the coverpage it says the maximum is 15 --

MR. DEWITT: It should be two years. It's not subject to enhancement, your Honor.

THE COURT: That's what I was thinking.

MR. DEWITT: But the credit I believe is accurate.

THE COURT: Okay. I'll tell you one thing, Mr. McMullan, this presentence report shows me that you're a textbook example of going down the road to hell.

MR. MCMULLAN: Yes.

THE COURT: Because you've been in trouble all your life, and it shows up in the guidelines. I have never seen guidelines score as high as they have for you. I mentioned that to Mr. Rush and he said something about 4 digits. According to these guidelines, the high side of the minimum is 1,050 months. That's 87 years. The low side is 26 years. I mean, if I just give you the minimum minimum,

you're still going to live the rest of your life in prison. And the guidelines are that high because you've been in and out of trouble all that time. You're a classic example of what happens when somebody's messed up with drugs and alcohol all the time.

I truly believe you that you love your family, you love your friends, that you and Mr. Smith were friends. A classic example of what high -- you guys were on a tear. You were getting high all over the place that weekend. That week. And it turns you violent. The drugs and the alcohol made you a violent man, made you an impulsive man, made you a man that could not control yourself.

And as I said before, the sad thing is that so many people in this community have weapons available, and you had a gun handy, and you gunned the man down. I believe that if you didn't have a gun, you probably would have whooped on him a while, and then the two of you would have walked away. So it's sad that you have this history of substances abuse. It's sad that you have this criminal history. It's sad that you had a weapon nearby, and it's sad that poor Mr. Smith died from all that.

MR. MCMULLAN: Yes.

THE COURT: I can't help but notice that you've been under any number of treatment programs, and that didn't do any good. You were on methadone. You were in a methadone treatment when this happened, and still you weren't committing yourself to being clean, because you were out on an alcohol and drug tear when his happened.

MR. MCMULLAN: Your Honor, may I speak?

THE COURT: Yes.

MR. MCMULLAN: I have -- I done been had a heroine addiction. It's a -- it's a sickness, man. That's -- that's all I can tell you, since I been 16 to 17 years old. And I been fighting this demon. I been fighting this demon all my life. I can go -- I can go to prison, I can go to jails, and don't nothing scare me to not to go -- not to back to pick up that -- that -- that drug. Once I picked it up, I mean I wasn't even -- I was never even fearful about the consequences of -- of being in jail because of using it because it -- it has it's hooks in me so bad that it's a physical and also a mental disease that I have. And it's been -- it's been happening like this since I can -- since I can almost remember out of -- out of high school.

Sixteen, seventeen years old I been mainlining heroine and doing drugs, and it's just been a -- it's been a merry-go-round for me all my life with the drugs. I've tried, I've tried and I've tried. God knows I've tried to -- to not to use drugs. To sink myself into work, to -- to sink myself into religion. And every time, this -- this demon it just -- it -- it's always been there and I've never been able to shake it. I just -- I haven't.

I mean, even when I was in prison, I used the drugs. I just -- it's all I've -- it's all I've ever did. And it's like -- it's like a comforter to me. Best way I can explain it, everytime I -- I put this stuff in my arms and use it, it's like a blanket, a security blanket. And I can't explain no better than that. But that's -- the drugs, it done ruined my life from a long time ago, not -- and now to led up to this incident here. This got to be the worst thing ever, the worstest thing that ever happened to me while under the influence. And I know I cannot downplay my actions, because I have

to be responsible for that, for -- for the things that I have done, and I'm willing to accept that. But I do know, I've been at this – this disease ever since I can remember, and everything I done -- ever done to try to -- to shake this thing, it's to no avail. It just-- it works for a minute. Long term treatments and long term incarceration, that demon is just there. I've been fighting it all my life, and that's all I can -- you know, all I can do now.

I mean, I see -- I see right now where I'm at today and all of the people that I done hurt with my addiction. And I'm just -- I'm just -- I'm all messed up about this. The drugs, the drugs is my whole problem. I'm not no bad person. The drugs just distort my reasoning, my thinking. I try to do the right things. And the more I try to do the right things, the drugs won't let me do the right things because I have to go out and contastantly work, work hard trying to support a habit.

And I've had -- I've had this habit by mistake I guess because I thought I could handle it. And next thing I know I -- I had to get up before I could hardly wash my face in the morning or brush my teeth, to go find me a do just to make me able to -- to deal with society. And -- and it's scary. I just -- it's just something I -- I don't know. I don't understand it, and I never will understand it, but it's -- it's done been-- it's done been messing with me all my life. And it's been a cause to everybody and everything that I love to be hurt and effected by my actions.

THE COURT: I wish all the kids in high school could be here to hear you say that. You will be sentenced, Angelo Rochelle McMullan, and the Count I, Second Degree Murder charge, habitual offender

fourth, as a habitual offender, to be remanded to the custody of the Michigan Department of Corrections with initial placement at the Reception and Guidance Center in Jackson for a minimum term of 360 months. A maximum of 900 months.

On Count II, which is the felony firearm, as you know, that's a two-year sentence, which is to be completed prior to your beginning to serve Count I and III, because Count II is a consecutive sentence. You get credit for 233 days served on that.

On Count III, the felon in possession of a firearm, habitual offender fourth, on an enhanced sentence, you will serve a minimum of 60 months, a maximum of 180 months in prison, which is concurrent to Count I, but subsequent to and consecutive after Count II. So no credits for time served on Counts I or III.

If you want to appeal any of this, you may have the right to ask the Court to give you a free lawyer, and a copy of a record transcript. Not may. Guaranteed. Because you were convicted by a jury, you are guaranteed the right to have an appeal. And Mr. Rush is going to give you a paper. If you want the services of a free lawyer to assist you in an appeal, you need to fill that paperwork out, sign your name to it, and get it back to the Court no later than 42 days from today.

MR. RUSH: Your Honor, if I may, it's obvious in this situation it's really necessary to make sure his appellate rights are preserved and so on and so forth for someone else better than me to review this later on. I need to make it clear that he is making the request at this time for an attorney for appellate reasons to review the file for purposes of a potential appeal. He has signed the form underneath the

section dealing with receipt of Notice of Appeal rights and the request of appointment of lawyer and affidavit of indigence. He has signed both of the lines. I have dated it with today's date, if I may tender this back to the Court?

THE COURT: Yes.

MR. RUSH: Thank you, Judge.

THE COURT: I'm sorry for all of you.

(Proceedings concluded at 10:23 a.m.)

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STATE OF MICHIGAN

COUNTY OF GENESEE

I certify that this transcript, consisting of 22 pages, is a complete, true, and accurate transcript, to the best of my ability, of the proceeding and testimony taken in this matter, via digital video recorder, before the Honorable Geoffrey L. Neithercut on February 21, 2002, as recorded by the clerk.

Said video proceedings were recorded and provided to this reporter by the circuit court and this reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the videotape provided.

Dated: October 9, 2002

_____

Amy Green, CSR#4731

Certified Stenographic

Reporter (810) 424-4454

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN, DIVISION

ANGELO ROCHELLE MCMULLAN	Case:2:11-cv-11870 Judge: Lawson, David M. MJ: Majzoub, Mona K. Filed: 04-28-2011 At 09:04 AM HC MCMULLAN V. RAYMOND BOOKER (EB)
In, pro, se PETITIONER	Mich Sup Ct: 139209
VS.	Mich Sup Ct: 281844 Trial Ct.: 01-8582-FC
WARDEN OF RYAN CORRECTIONAL FACILITY: R. BOOKER RESPONDENT	PETITION FOR WRIT OF HABEAS CORPUS 28: USCA 2254/ STATE PRISONER:
/	
ATTORNEY FOR RESPONDENT MICHIGAN	ANGELO R MCMULLAN

ATTORNEY GENERAL APPELLATE DIVISION: G. Mennen William Building 525 Ottawa NW, P.O. Box 30212 Lansing, MI. 48909	ç157052 RYAN CORRECTIONAL FACILITY 17600 Ryan Road Detroit, MI 48212

PETITION FOR WRIT OF HABEAS CORPUS

USCA 28: 2254

MEMORANDUM OF LAW TO SUPPORT

PETITION/BRIEF

Respectfully,

/s/ A.M.

Angelo R. McMullan

Petitioner

PETITION

NOW COMES, Mr. Angelo Rochelle McMullan * Id 157052, a state prisoner who is confined RYAN CORRECTIONAL FACILITY, at 17600 Ryan Road, Detroit, Michigan * 48212.

1). Hereinafter, Petitioner throughout the memorandum and law identifies his title as "*Defendant"* in this matter and who is the petitioner that is challenging his state court Judgment of sentence (*Docket 01-008582-FC* in the Genesee County 7th Judicial Circuit Court in the city of Flint, Michigan * 48502.

2) Petitioner was convicted in a jury trial of second-degree Murder MCL 750.317, Felon in posession of a firearm, MCL 750.224f, and Felony firearm MCL 750.227b.

The trial court sentenced petitioner as a fourth habitual offender, MCL 769.12, and to 30 to 75 years in prison for the second degree murder, and 5 to 15 years for the posession of a firearm, and 2 years for Felon firearm.

3). Petitioner after sentencing on Feburary 21, 2002. requested a appointment of counsel that day. It was stated that No claim of appeal was filed and the State appeals court denied petitioners application for leave to appeal and the State Supreme court denied his application for leave to appeal that decision.

Here this court conditionally granted Petitioner's Petition for writ of habeas corpus on October 11, 2007 stating that the state shall reinstate the petitioner's direct appeal of right in the Michigan Appeals court. This was an order dated November 16, 2007 and Ordered Remand to the trial court to file a new claim of appeal form with the court on December 19, 2007.

4). Petitioner new claim of appeal was filed and he was appointed Appellate counsel Mr. Patrick K Ehlmann (P-31644). He filed back in the trial court A Motion for A new trial w/Brief n Support on Feburary 7, 2008. The following (3) issues are:

A. The trial court erred reversibly by denying defendant's request that the jury be instructed on Involuntary Manslaughter.

B. The trial court abused its discretion by denying defendant's Motion for a new trial based on

ineffective assistance, and due process of law where the key witness against him (Mr. McDowell) made a plea agreement to testify against him in this case, but the existence and terms of the agreement were not disclosed to the jury.

C. The trial court abused its discretion by denying defendants request for an "Evidentiary Hearing" on a claim that Prosecutor denied his right to due process and "Brady Claim" by failing to disclose to defendant that witness McDowell had reasonable expectations of consideration for his testimony against defendant (Prosecutorial Misconduct).

The trial court entered An Opinion and Order Denying Petitioners Motion for A New trial in a held session in Genesee County 7th Circuit on Wednesday April–*23, 2008 in docket No: 01-8582–FC*, stating that No basis in its findings that warrant a new trial. (see Opinion and Order attached).

(5). Appeal Attorney Ehlmann filed a Brief on Appeal requesting Oral Argument on June 25, 2008. He raised the (3) claims filed in the trial court and the Michigan Appeals court in *Docket: 281844*, denied in a publication opinion on June 2, 2009. Petitioner then appealed the same issues to the Michigan Supreme Court in *Docket No; 139209*. On order of leave being granted, and the briefs and oral arguments of the parties. This court affirmed the judgment of the court of appeals stating that the rational view of evidence did not support involuntary manslaughter.

6) Petitioner is Now filing this claim of issues in this court of the U.S District Court/Eastern District. Southern Division, because he has exhausted these issues throughout the state trial, appellate, and

Supreme court of this request for relief that he ask this court to review under constitutionality.

This court reviews a state courts unreasonably applying supreme court precedent , thus warranting habeas relief, If it identify the correct governing legal principle from the supreme court's decisions, but unreasonably applies that principle to the facts of the prisoners case here. 28 USCA 2254(d).

Under 28 USCA 2254 (e)(1). A state court decision involving a unreasonable determination of the facts in light of the evidence presented in the state court proceedings, as may warrant habeas relief, Only If it is shown that the state courts presumptively correct factual findings do not enjoy support in the record.

Habeas Relief Requested

Petitioner is entitled to habeas relief granted on the grounds that the state trial court factfinding was erroneous to support the charge of second degree murder here. Petitioner is entitled to have been charged with involuntary or voluntary Manslaughter, because a absence element of "Malice" was clearly established, and the instructional error supported this case facts. Sufficiency of evidence of involuntary manslaughter is when a person committs a felony on accident, grossly negligence, and unintentional acts of killing a person.

This is the case here that petitioner ask for a habeas relief granted.

Respectfully,

Angelo R. McMullan 157052
Petitioner/ Defendant

STATEMENT OF FACTS

In a jury trial, Defendant-Appellant was convicted of murder in the second degree, MCL 750.317, being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of two years on the third conviction, to be served consecutively with concurrent sentences (as an habitual offender 4th, MCL 769.12) of 360-900 and 60-180 months on the first and second convictions.

Plaintiff claimed that Defendant shot and killed (with malice and premeditation) Jimmy Smith on July 6, 2001, in the City of Flint. Defendant admitted the shooting, but claimed that the shooting and any harm were not intended.

At trial, Officer Manuel Cervantes, Jr., testified that, on July 6, 2001 at 8:19 p.m., he responded to a call informing him that a shooting victim was at Hurley Hospital. There, he saw a station wagon parked in the area used by ambulances. He saw a handgun in a makeshift holster under the seat, and a pill bottle and four bullets on the seat (II Tr 55). He later detained Defendant near the entrance to the emergency room. When he searched him, he found four bullets, a pill bottle, a crack pipe, and a pack of cigarettes. He later saw that the bullets that had been in the car were no longer there (II Tr 60-61). Defendant was cooperative. The handgun recovered from the car had to be "manually cocked" to be fired (II Tr 91).

Officer Brian Willingham testified that he arrived at Hurley Hospital at 8:01 and saw a beige station wagon there. He spoke with Defendant, who told him that he was playing cards with Henry and went

outside to get things from his car. He said he saw the body half-in and half-out of the station wagon. He and Henry brought him to the hospital (II Tr 100).

Qazi Azher testified that he is a pathologist. He performed an autopsy on Jimmy Charles Smith, who had been 46 years old. He was 5'8" tall and weighed 180 pounds. He had suffered a single gunshot wound to the chest on the left side (II Tr 120). The witness observed no "tattooing", indicating that the shot was not fired from a distance of less than 16 inches (II Tr 121-123). The victim had "fresh" abrasions on the left side of his nose and above his right eyebrow (II Tr 123, 147). The bullet penetrated the pericardium, the outer covering of the heart (II Tr 127), and the heart (II Tr 128). It followed a downward path, penetrating the diaphragm and the liver. Such a wound would cause death "in minutes" (II Tr 134). He removed a "slug" from the victim's body. He could not determine the position of the deceased or of the shooter at the time of the shot (II Tr 143).

Sergeant Mitch Brown testified that he arrived at the Sussex Apartments at 9:00 p.m. on July 6th, then went to the hospital. He looked in the station wagon and saw a prescription drug bottle inside. Later, he saw a prescription drug container with white pills in it; the label indicated it contained hydrocone prescribed for John McMullan (III Tr 30). A different container was recovered from Defendant's person; it had Defendant's name on it (III Tr 74). He saw blood on the front seat of the vehicle. He saw a handgun in a black vinyl gun case in the station wagon. It was a .22 caliber gun with five live rounds and one spent one in the cylinder (III Tr 31). Such a revolver must be cocked for it to be fired (III Tr 35).

Deputy Mark Giguere testified that he was involved in "booking" Defendant on July 7, 2001. Jail records showed that a watch, a necklace, and $317 in cash were removed from Defendant's person at the jail (III Tr 84).

Gregory McDowell testified that he was a friend of Jimmy "Butch" Smith. On July 6, 2001, Mr. Smith (driving a beige station wagon) picked him up about 6:00 p.m. (III Tr 93) They went to a gas station, where Smith paid with a $20 bill; Smith had $200 in $20 bills, a $50 bill, and "a little more". Smith told the witness that he was going to get money from Angelo. Smith had a pill bottle with Vicodin (hydrocodone) in it, but the pills were not the right pills (III Tr 100). He was going to get his money back (III Tr 104). Defendant and Smith were "close"; Smith's sister was married to the brother of Defendant's wife (III Tr 106). They went to Defendant's house; he was not there. Smith then drove to the Sussex Apartments. Smith saw Defendant's truck and parked nearby. Smith had the pill bottle in his pocket. Smith got out and knocked on the door of a building. Defendant came out and had a conversation with Smith. Smith asked Defendant if he had two "20s". Smith got back in the driver's seat; Defendant got in the backseat (III Tr 125). Defendant was "reluctant", but gave Smith what the witness thought were two "20s" of crack cocaine. Defendant asked Smith for payment; Smith "tossed" Defendant the pill bottle and told Defendant "he was paid" (III Tr 130). Defendant was "mad" and told Smith to give him the money (III Tr 137). Smith told Defendant to get out of the car. Both men got out and fought; they punched each other. Bridget McMullan, Defendant's wife, stood on the landing

and screamed for them to stop. Smith got back in the car. Defendant was "hollering" to Bridget to "give him his shit" several times (III Tr 143). She said no. Defendant went to her and took a black bag or sock from her. He came toward the car and Smith began to get out of the car. Defendant tried to close the car door on Smith. Defendant shot him while Smith was in the driver's seat (III Tr 154). Smith had no weapon. Defendant shot him from "about a foot" away (III Tr 155). Defendant "went through" Smith's pockets and took money out, some $20 bills and a $50 bill (III Tr 161). The witness left, went to a public phone, and called 911. He saw the station wagon leave. Bridget McMullan stopped and gave him a ride to the hospital in Defendant's truck (III Tr 167).

The Court precluded Defendant from questioning the witness on a pending charge involving cocaine (IV Tr 11). McDowell said he did not see any struggle for the gun and did not see Smith "grab" for anything (IV Tr 15). The witness and Smith shared drugs. Smith and Defendant shared drugs (IV Tr 23). Smith had seemed "upset" over the pills (IV Tr 45). Both Defendant and Smith were "mad" when they were fighting outside the car.

Officer Jason Groulx testified that he was near the emergency room entrance when the station wagon arrived. Defendant, Henry Russell, and the victim were in it (IV Tr 154). The victim appeared to be dead (IV Tr 165). After the witness saw some bullets and a pill bottle in the car, Defendant and Russell got back in to move the car. Later, he did not see the bullets or the pill bottle in the car (IV Tr 162-163). When a security officer tried to move the station wagon, he found that its reverse gear was inoperable.

Willie Henry Russell, Jr., testified that he was at home (at Sussex Apartments) with his girlfriend, Vera Brown (Bridget McMullan's sister), on July 6th. Earlier, Jimmy Smith had been at the apartment and left. At 8:00 p.m., Defendant and his uncle, Johnny McMullan, were there drinking and playing cards. About 8:15, Defendant's wife came in and said, "'Angelo has shot Butch," (IV Tr 186). The witness went outside. Defendant had a gun in his hand (IV Tr 188). Defendant was "begging for help" to get Smith in the car and take him to the hospital (IV Tr 189-190). Smith was outside the station wagon; Defendant put him in and took him to the hospital. At the hospital, they did not get back in the car. Reverse gear on the station wagon did not work. Plaintiff rested.

Defendant testified that he is 45 years old and had known Jimmy Smith for 30 years (IV Tr 243). They used drugs together and "traded" drugs; both were addicts. His wife's brother was married to Smith's sister. They had never fought. He had been with Smith, using heroin, every day in July of 2001. Mr. Smith had some Vicodin that he wanted to sell; Defendant gave him some pills and told him to sell them as well. He took Smith to the south side, where Smith sold the pills (IV Tr 251-252). On the day of the shooting, Defendant gave his wife a "package"; the gun was in it (IV Tr 260). Mr. Smith asked him if he had anything; Defendant said that he did not have anything (IV Tr 263). He sat in Smith's car. He had just bought three rocks of crack cocaine for $50 (IV Tr 264). Smith asked him for two of the rocks. Defendant was going to "let him smoke some" and Smith "was gonna buy the other one" (IV Tr 266). He and Smith smoked crack in the car, using

Defendant's "straight shooter" (IV Tr 266). He also gave Smith one rock. Smith threw a pill bottle into the back seat (IV Tr 268-269). Smith said that he had to take the pills back from where he had sold them (IV Tr 269). Defendant told Smith to give him money (IV Tr 270). Smith did not. They both got out of the car and had a "shovin' and pushin' match" (IV Tr 272). His wife was yelling at him to stop. He told his wife to "'give me my shit'" and "snatched the gun from her" (IV Tr 274). Smith got back in the car. Defendant approached him with the gun in his hand (IV Tr 274). Smith was pushing on the car door trying to get out; Defendant pushed on the door trying to keep him in. He wanted to scare Smith with the gun. The gun went off (IV Tr 275). He did not remember cocking it (IV Tr 280). McDowell ran. He did not go through Smith's pockets. He had money and had just been paid; his pay stub was introduced (IV Tr 281). Henry and Defendant put Smith in the car and drove him to the hospital (IV Tr 284).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN, DIVISION

ANGELO R.
MCMULLAN
In, Pro, se

PETITIONER	U.S. District No:
VS	Mich. Sup. Ct: 139209
WARDEN OF RYAN CORRECTIONAL FACILITY	Mich. App. Ct: 281844
	Trial Ct: 01-8582-FC

R. Booker

RESPONDENT
_____/

MEMORANDUM OF LAW TO SUPPORT PETITION

ARGUMENT I.

PETITIONER WAS DEPRIVED OF DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE TRIAL COURT ERRED REVERSIBLY BY DENYING THE PETITIONER A REQUESTED JURY INSTRUCTION ON INVOLUNTARY OR ANY MANSLAUGHTER CHARGE, ON

SUFFICIENCY OF THE EVIDENCE TO SUPPORT GIVING THE LESSER INCLUDED OFFENSE INSTRUCTION WHERE THE INTENT TO DO THE INJURY, THE GROSS NEGLIGENCE MANNER, AND A FIGHT THAT LED TO A UNINTENTIONAL KILLING BY ACCIDENT BY FIRING A FIREARM. WHERE NO MALICE ELEMENT WAS ESTABLISHED TO BE MURDER CONVICTION

Stnadard of Review:

Sufficiency of evidence to support giving of lesser included offense instruction is review under a mixed question of law and fact and reviewable in habeas corpus cases under 28: USCA 2254(d)(1). A person may be convicted of involuntary Manslaughter, when he committs a felony w/ Intent to injure, or in a grossly negligent manner and unintentionally kills another. Here the petitioner was entitled to have been charged with involuntary manslaughter, or voluntary manslaughter, where the malice element was not established and this was not a harmless error, but had substantial and injurious effect in the determination of a jury's verdict.

Therefore the state court decision of denial made on their point was said that it was contrary to clearly established federal law as determined by the U.S Supreme Court in *Taylor v Workman* 554 F3rd 879 (CA, 10 2009) and the case of *Smith v Quarterman* 515 F3rd 392 (CA 5,2008).

This court should review this claim that the trial court erred by denying petitioner in his trial a

requested instruction of a necessary lesser included offense "de'novo, ie , and for substantial evidence in supporting of offense, *People v Cornell* 466 Mich 335: 646 NW2d 127 (2002). *People v Gillis* 474 Mich-105: 712 NW2d 419 (2006), *People v Riddle* 467 Mich 116-124, 649 NW2d 30 (2002).

When a defendant is charged with "Murder", a court must instruct the jury on involuntary manslaughter at the defendant's request. If the instruction is supported by a rational view of the evidence. *People v Mendoza* 468 Mich 527: 533, 541: 664 NW2d 285 (2003): *Cornell*, pg 357

An error in failing to instruct on the applicable law is reviewed for de'novo and for abuse of discretion by the facts of the record included in order to reverse this state courts decision in this instant case. This is the case here of petitioners claim that a instruction must be given here in accord to a lesser charge , where defendant clearly requested an instruction on the involuntary manslaughter (" . . . what I would be asking for would be the standard instructions, the request for the manslaughter instruction, it's involuntary and voluntary. I believe there's evidence to support both." V Tr 117). Plaintiff stated that they opposed instruction on either form of manslaughter (V Tr 119). The Court stated that it would instruct on voluntary manslaughter and asked Defendant why it should instruct on involuntary. Defendant stated:

> Well, your Honor, involuntary manslaughter, dealing with a gross negligence standard, I think that there's been testimony introduced here that Mr. McMullan had the gun. That he doesn't recall it being discharged. He doesn't recall cocking it

back. He recalls the door being pushed back and forth when the gun was discharged. Holding a gun in front of another person I think may rise to the level of a gross negligence, and that there was testimony from Mr. McMullan that he did not intend to kill. And I think that that would suffice as enough evidence to support a reading of the involuntary manslaughter instruction. (V Tr 119)

The Court denied the request, stating:

No, I don't think we can give the involuntary manslaughter. *People* vs. *Ryczek*, R-y-c-z-e-k, 224 Michigan 106. It's a 1923 case, has this definition of involuntary manslaughter. Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony or naturally tending to cause death or great bodily harm or in negligently doing some act lawful in itself or by the negligent omission to perform the legal duty.

Now, I can just tick it off when I go through this definition. Killing another without malice. Well, here, we know they're in a fight situation. Where there's a fight, there's malice. Unintentionally, I suppose you can argue about that, except that when a trigger -- when a gun is pointed a foot or so away from a person's chest, that sounds pretty intentional. But in doing some unlawful act not amounting to a felony, well, the allegations are that he robbed the victim of his money, or naturally tending to go to cause death or great bodily harm or in negligently doing some act lawful in itself.

Well, we know that he was not doing any lawful acts at the time this was going on. He's not

> performing a legal duty, so we're not going to give the involuntary manslaughter instruction. (V Tr 120-121)

As indicated in the statement of facts, *supra*, Gregory McDowell testified that Defendant came toward the car and Smith began to get out of the car. Defendant tried to close the car door on Smith. Defendant shot him while Smith was in the driver's seat (III Tr 154). Smith had no weapon. Defendant shot him from "about a foot" away (III Tr 155). Defendant testified that he and the victim fought outside the victim's car, then the victim re-entered the car, and Defendant got his gun from his wife. He testified:

> And at that time, Butch was sayin', "M-F, nigger, you not gonna shoot me," you know. And he was gettin' back out of the car again. And I turned around, and I got the gun in my hand. And when he--when he went to pushin' on the door to get out, I'm pushin' the door back for him to stay in the car. And I--my intention was just to really scare him with the gun. I wasn't gonna shoot Butch. But with all of this goin' on, I don't--I don't--at that--I don't know what happened then. All I know is with all the chaos goin', the gun went off, and it was, "oh, man, I had--I done--I done messed up." That's--that's--that's the best I can just tell you, to my--to my recall of--of how--of how this--how this--this tragic thing happened between us. (IV Tr 274-275)

He did not remember pointing the gun at the victim (V Tr 52; he did not remember pulling the trigger (V Tr 57). He did not remember cocking the gun (V Tr 60). He testified, on cross-examination:

> He was not down when I shot him, sir. He was up. He was pushing on the door when I shot -- when the gun went off. (V Tr 59)

He was asked if he fired the gun and responded, "The gun went off, sir. I don't remember it going off." (V Tr 75)

In *People v Holtschlag*, 471 Mich 1; 684 NW2d 730 (2004), the Supreme Court clarified its earlier opinions regarding the elements of involuntary manslaughter. It specifically rejected claims that involuntary manslaughter could not be shown based on (1) a defendant's actions involving the commission of an unlawful act constituting a felony; and (2) gross negligence in committing an unlawful act. The Court stated that the "description" of involuntary manslaughter contained in *People v Ryczek*, 224 Mich 106; 194 NW 609 (1923) "was never meant to define the elements of the crime of manslaughter" (Emphasis in original).

The *Holtschlag* Court stated that involuntary manslaughter "has, first and foremost, always been considered the 'catch-all' homicide crime". It stated that every unintentional killing is involuntary manslaughter if it is neither murder nor voluntary manslaughter and is not jusitified or excused. The Court quoted from its decision in *People v Andrus*, 331 Mich 535, 546; 50 NW2d 310 (1951), in which it stated, "[W]here there is testimony from which the jury might find the absence of such a felonious intent as is necessary to constitute murder [i.e., malice], an instruction that they might convict of manslaughter should be given". One type of involuntary manslaughter is gross negligence or an intent to injure, absent malice; gross negligence in the

commission of an unlawful act not naturally tending to cause great bodily harm is involuntary manslaughter, *Mendoza*, p 536. This is so even if the unlawful act is a felony; the key question is the presence of malice, *Holtschlag*.

took the stand and denied intending to kill or shoot the victim .If the testimony was believed. The evidence still supported the conclusion that he was "Grossly" Negligently in handling of the gun. Requiring the jury to acquit him entirely If it believed him undermined the reliability of the verdict. Petitioner did not deny his responsibility for the victim's death, despite his claim that his "Intention was not to shoot or kill the victim. The evidence at trial strongly support a (Fight) gross negligence. The evidence in support was substantial and support a lesser offense of involuntary manslaughter, If the jury had been instructed properly the outcome would of change the verdict to manslaughter.

The proper remedy here is that this court GRANT PETITIONER HABEAS RELIEF BACK TO THE STATE TRIAL COURT FOR ENTRY OF A LESSER OFFENSE OF INVOLUNTARY CHARGE OF MANSLAUGHTER, OR A NEW TRIAL ON GROUNDS OF CHARGING INSTRUMENT ERROR (murder)

ARGUMENT II.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING PETITIONER MOTION FOR A NEW TRIAL IN VIOLATION OF USCA 14th AMS DUE PROCESS AND USCA 6th AMS EFFECTIVE ASSISTANCE OF COUNSEL ,WHERE THE KEY WITNESS AGAINST HIM (MR.

MCDOWELL)MADE A PLEA AGREEMENT BY TESTIFYING AGAINST PETITIONER IN THIS CASE, BUT THE EXISTENCE AND TERMS OF AGREEMENT WERE NOT DISCLOSED TO JURY AND WAS CLEAR ERROR, UNREASONABLE, CAPRICIOUS AND ARBITRARY.

Standard of review

This court review denials of a Motion for New trial for 'Abuse of Discretion" , when its finding are erroneous, and erroneous interpretation of law was unreasonable, arbitrary, and fanciful. *ILOR LLC VS GOOGLE INC.* 631 F3rd 1372 (CA 6, 2011) and *U.S v LAWRENCE* 555 F3rd 254 (CA 6, 2009). This court independently review question of law and facts to determine whether the state courts decision was "contrary to" an "Unreasonable" application *Williams v Taylor* 529 US 362, 120 Sct 1495, 146 Led2d 389 (2000). This court review trial courts denial of motion for a new trial for abuse of discretion and clear error *People v Crear* 242 Mich App 158. (2000). Petitioner submitts that one of the most appropriate standard of review is that for a mixed question of fact and law concerning a constitutional issue; this Court should review factual findings for clear error and make a *de novo* application of constitutional standards; see *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *LeBlanc*, the Supreme Court discussed the appropriate review standard and applied the one cited above to issues raised and decided on a motion for new trial.

Defendant filed a motion for new trial, alleging that Defendant was denied a fair trial because his

jury was not informed that Gregory McDowell (with Defendant, the only eyewitnesses to the shooting) had entered a plea agreement (or had a reasonable expectation of doing so) requiring him to testify against Defendant "as needed". Trial counsel had sought to impeach McDowell by cross-examining him (on January 23, 2002) concerning his pending trial (on January 25, 2002) for possession of cocaine (IV Tr 3-12). In arguing for admission of the evidence, counsel did not argue that it could show bias, but only that the witness's cocaine use might affect his credibility. The Court precluded him from asking the witness about his pending trial, and no evidence of his pending charge was introduced (IV Tr 9-10). In his motion for new trial, Defendant claimed that the Court's docket entries showed that McDowell had been charged with possession of cocaine and being an habitual offender (3rd felony), that he failed to appear for arraignment, that he nonetheless was released on his own recognizance on December 12, 2001, that he pled guilty to use of cocaine on January 25, 2002, and that his plea agreement included a provision that "DEFT AGREES TO TESTIFY TRUTHFULLY AGAINST ANGELO MCMULLAN AS NEEDED (CASE NO. 01-8582-FH)". Defendant claimed that he was either denied due process of law by the prosecution's failure to disclose the agreement or denied the effective assistance of counsel by his attorney's ignorance of the law. He requested a new trial or, alternately, an evidentiary hearing on his claims (Relief Requested, p 5). Plaintiff responded, stating that any error was not prejudicial (without addressing the factual basis for the claim). A hearing at which oral arguments were heard was held. The Court, stating that the facts were uncertain (p. 1, fn 1,

of its opinion of April 23, 2008), denied the motion, stating:

> This Court notes that in all but one material respect the Defendant and witness Mcdowell testified the same. Both testified that the victim went to the Defendant's house and obtained drugs. Both testified that the Defendant gave the victim drugs. Both testified that rather than pay the Defendant the requested money, the victim attempted to give the Defendant a vial of prescription drugs in trade. Both testified that the Defendant refused to accept the prescription drugs in trade and demanded the money. Both testified that the victim and the Defendant had a physical altercation. Both testified that the Defendant asked his wife to get his gun. Both testified that the Defendant took the gun from his wife and pointed it at the victim. Both testified that the Defendant used the gun in an attempt to get the requested money from the victim. Both testified that the gun fired and the victim was shot.
>
> The key difference in the testimony between the Defendant and the witness is that McDowell testified that after the shooting the Defendant took money from the victim. The Defendant denied taking the money. It should be noted that the Defendant admitted having a similar amount of money on his person. However, the Defendant argued that he had recently been paid and submitted into evidence a pay stub from his employer showing that he had recently been paid a similar amount of money.
>
> To determine whether McDowell's testimony would have or could have been prejudicial to the

jury, this Court will hypothetically remove it from evidence to see whether the jury could have reached the same verdict without it.

It is clear to this Court based on the Defendant's testimony alone that the People could have proved the first element of Second Degree Murder, that the Defendant caused the death of the victim or that the victim died as a result of Defendant's shooting.

It is also clear based on the Defendant's testimony alone that the People could have proved the second element, i.e., that the Defendant 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 actions.

This Court can now turn to the third and last element. It is here that Defendant hangs his appellate hat. It is Defendant's argument that the killing was merely an accident and that such an accident is a circumstance that would reduce the charge to manslaughter.

This Court notes that there is no physical causal connection between an accidental shooting and a taking of money, i.e., whether the shooting was an accident or not, the Defendant was free to take his money or not. Or to put it another way, this Court cannot see any physical basis as to how the taking of the money made it more or less likely that an accident had earlier occurred. Defendant testified that the money was owed and that he desperately wanted it, so those facts are not in dispute.

To better explain the lack of physical causal connection, this Court could imagine a conflict as

to whether the trigger of the gun was working incorrectly which could have led to an accidental shooting. The Defendant could have testified that the trigger was not working correctly, i.e., that it was a hair-trigger which caused it to fire too easily. If so, any contrary evidence that the trigger was in fact working properly after the shooting would be physical evidence that the shooting was not an accident. To put it another way, subsequent evidence of the physical condition of the gun *could* make it more or less likely that an accident had earlier occurred. As shown above, that is not the instance here. There is simply no physical causal connection in this case between the alleged taking of the money and whether an accident occurred.

However, this Court does recognize that evidence that the Defendant took the money could possibly be construed as evidence of premeditation. For the Defendant to obtain a gun, threaten to shoot the victim for his money, carry out that threat, and then obtain the money, could show planning which would be proof of premeditation. To put it simply, to announce what you are going to do and then to do what you announced is a good indication of a prior deliberation. However, it is clear that Defendant was not convicted of First Degree Murder. Accordingly, any premeditation, deliberation, or forethought by the Defendant is not an issue in this motion.

Based on the foregoing, it is clear to this Court that even without the testimony of McDowell, the Jury had a reasonable basis to find that the Defendant was guilty of Second Degree Murder. Therefore, this Court relies on both the Michigan

> Supreme Court and the United States Supreme Court and finds "no reasonable possibility that the evidence complained of might have contributed to the conviction." Accordingly, this Court finds no basis to grant a new trial, finds that any error of trial counsel is harmless, and denies Defendant's motion.
>
> (Footnotes omitted)

Defendant has a constitutional right to the effective assistance of counsel. To prevail on such a claim so as to warrant a new trial, a defendant must first show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. A defendant must also show that he was prejudiced by his attorney's error(s) to the extent that he was denied a fair trial and that a reasonable probability exists that, but for those errors, the result of the proceeding would have been different, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

Counsel made a serious error by not seeking to inquire into the reasonable expectations of leniency (or actual promises of leniency) which might have been harbored by witness McDowell when he testified. Counsel obviously wished to impeach witness McDowell (IV Tr 1-12), recognizing that his credibility was important to the prosecution's case. Defendant submits that impeachment of a witness for bias is one of the strongest forms of impeachment. This factor has led courts to impose special rules

requiring disclosure (upon request) of information concerning promises of consideration for testimony, *Napue v Illinois*, 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1217 (1959), and the reasonable expectation of such consideration, *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). Here, counsel knew that witness McDowell faced pending charges. A review of the readily reviewable docket entries in his case, showing that he had been released on his own recognizance after failing to appear for his arraignment, would have suggested that such consideration had already been given in this case. Even absent such a review, counsel should have been alert to the likelihood that a witness testifying in a murder case might expect some consideration in a small drug possession case. The desirability of impeaching Mr. McDowell by exploring his expectations should have been obvious to counsel.

It is hard to imagine any rational tactical purpose for failing to ask about consideration the witness had been offered or expected. Even if the witness denied having any such expectations, jurors might well have doubted him. Absent such an inquiry, the jury knew nothing of the pending charges. It had no information on which it might have drawn its own conclusions regarding how the charges might have affected the credibility of the witness. Since counsel clearly wanted the jury to know of the pending charges, it is impossible to conclude that he might have believed Defendant would have been damaged by such a disclosure.

To prevail on a claim of ineffective assistance of counsel, Defendant must show that he was prejudiced, i.e., that it was reasonably probable that

counsel's error made a difference in the verdict, *Strickland*; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). The trial court must have concluded that such prejudice did not occur, since it claimed to apply a different standard which would appear easier for a defendant to meet ("no reasonable probability that the evidence complained of might have contributed to the conviction"), Opinion, pp 3-4.

In denying the motion for a new trial, the trial court (in essence) chose to proceed directly to the issue of prejudice (or harmless error) without making findings on Defendant's factual allegations. Defendant submits that its implicit conclusion that Defendant was not prejudiced was wrong.

The Court's opinion, in large part, examines the sufficiency of the evidence to show murder in the second degree, absent consideration of McDowell's testimony. Such an approach does not adequately assess the effect of counsel's error. Defendant's claim is that a reasonable probability exists that the jury would have acquitted him (or, more likely, convicted him of manslaughter), despite the sufficiency of the evidence, if McDowell had been effectively impeached.

With no consideration of the differences between the testimony of Defendant and that of McDowell, the jury was highly likely to convict Defendant of some form of homicide. In large part, the critical issue in the case was the credibility of Defendant, not that of McDowell. Defendant's testimony left no room to argue that Defendant did not shoot and kill the victim. The evidence, particularly Defendant's post-shooting actions, must have created considerable doubt about his intent. McDowell's testimony pretty strongly supported a finding of premeditated murder,

but the jury must not have been persuaded. Defendant's post-shooting actions (and testimony by others concerning his relationship with the victim) was strong evidence that Defendant did not intend to kill the victim.

McDowell's testimony that Defendant took money from the victim's pockets was probably the most significant reason for jurors to doubt Defendant's credibility. This suggested that the shooting was part of a chain of highly purposeful behavior, obviously including the shooting. To give weight to McDowell's credibility was to subtract weight from Defendant's credibility. Unless the jury found Defendant to be credible, it was likely to convict him of murder.

In addition, jurors were far less likely to find provocation if it believed that the shooting was part of a series of highly purposeful acts by Defendant. Although the Court focused on Defendant's claim that the shooting was an accident (P 3 of its opinion) the was not instructed on involuntary manslaughter. It was instructed on manslaughter voluntary. If jurors though that defendant , then immediately went through his pockets, it was far less likely to believe that the shooting was result of the defendant acting out of temporary emotional excitement from which he had not had time to calm down: see *Mendoza supra* (specifically with regard to the claim that he took the victim's money). would have affected the jury's view of the charge of voluntary manslaughter. Here defendant was prejudiced by his attorney derelict of duties and errors which likely caused the jury to find him guilty of murder, rather than manslaughter.

To establish a claim of ineffective assistance of counsel. A petitioner "Must" show that counsel's representation fell below an "Objective" standard of reasonableness. *Strickland v Washington* 466 US 668, 104 Sct 2052, 80 Led2d 674, (1984), and but for counsel errors. There was a reasonable probability that petitioner results of the proceedings would of been different. *Rompilla v Beard* 545 US 374, 125 Sct 2456, 162 Led2d 360 (CA 6, 2005).

ARGUMENT III.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING PETITIONER REQUEST FOR AN EVIDENTIARY BEARING ON CLAIM THAT THE STATE DID DENIED HIS RIGHT OF USCA 14th AM DUE PROCESS OF LAW BY FAILING OF PROSECUTOR DISCLOSE TO DEFENDANT THAT WITNESS MCDOWELL HAD REASONABLE EXPECTATIONS OF CONSIDERATION FOR HIS TESTIMONY AGAINST PETITIONER. (BRADY CLAIM FAILURE TO DISCLOSE)

Standard of review:

The prosecutor withholding of "Exculpatory evidence" favorable to a and requested by an "accused" violates due process, where the evidence is said material either to guilt or punishment , irrespective of the good or bad faith of the prosecution. *Brady v Maryland* 373 US 83, 83 SCt 1194, 10 Led2d 215 (1963)

To prove that the state failure to tender evidence constitute a "Brady-violation". The burden rest on petitioner here to show that undisclosed evidence was (1) favorable to petitioner , because it was exculpatory, or impeaching (2) Material to the defense, ie prejudice must have ensued and (3) that the prosecution had materials and failed to disclose them. *U.S. v Wilson* 624 F3rd 640 (CA 4, 2010) and *U.S v Bagely* 473 US 667, 105 Sct 3375, 87 Led2d 481 (1985) and *Moseley v Branker* 550 E3rd 312-318 (CA 4, 2008).

This court has stated that it reviews a trial court's decision on a motion for a new trial for abuse of discretion. Petitioner requested an evidentiary hearing on his filed "Motion for a new trial". Because the trial court used the standard for preserved constitutional error (see fn 15, p 4 of its opinion) which would be applicable If state failed to disclose Mr. McDowell's reasonable expectation of leniency in its analysis of prejudice (as an element of a claim of ineffective assistance of counsel). Petitioner was not prejudiced by not being allowed to establish his claim factually in a evidentiary hearing. If this court however holds that the correct (strickland prejudice) standard is not met, but the harmless beyond a reasonable doubt standard is or could be

Here Petitioner is entitled to be granted habeas relief for a conditional order for a evidentiary hearing to establish that constitutional error.

Under 28 USCA 2254, a state prisoner submitting habeas corpus petition may proceed in federal court solely on claims , He has previously exhausted , where claim is that prosecution had failed to reveal that its witness has been promised immunity, and

this issue is not so intertwined with remaining exhausted claims concerning prosecution failure to reveal exculpatory evidence as inappropriate.

This issue warrant further review by this court as a mixed question of law and facts, and for clear error in the factfinding by the state courts asessment.

Argument III conclusion:

Habeas corpus Rule (6)(A) provides that a party shall be entitled to invoke the process of discovery, and to the extent, that the judge exercise judicial discretion for "good cause" shown and granted leave to do so.

GRANT HABEAS RELIEF FOR ENTITLEMENT TO A TOWNSEND AND TAMAYO REYES HEARING DETERMINATION

This court has held that the court "Must" Grant an evidentiary hearing to a habeas applicant under two requirements. *Townsend v Sain* 372 US 293 (1963) and *Keeney v Tamayo Reyes* 504 US 1 (1992).

Petitioner submitt the requirements under *Townsend Requirement for hearing*: because the state trial, Appellate, and State highest court clearly erred in findings of facts, and factual determination, on grounds of:

1) The merits of the factual dispute were not resolved in the state hearing on the grounds of a lesser offense of involuntary manslaughter conviction.

2) The state factual determination is not fairly supported by the record as a whole. The prosecution failure to disclose witness plea agreement for his testimony (Prosecutorial misconduct– Exculpatory evidence– Brady material claim)

3. The factfinding procedure employed by the state court was not adequate to afford a full and fair hearing. (denied Motion for a new trial)

4). The material facts were not adequately developed at the state court trial hearing on *April 23, 2008* by Hon Judge Geoffrey L Neithercut, and for any reason denied a full and fair fact hearing of trier of facts in the record.

The purpose of holding this hearing is mandatory, becuase the material facts are in dispute and the holding of a hearing is in the discretion of this federal court to Grant Petitioner habeas relief he seeks. In the interest of justice. Due process is the necessary element of this proceeding.

A statutory presumption of correctness, applies to the state courts findings of facts.

PETITIONER/ DEFENDANT. Mr Angelo R. McMullan hereby prays that this here honorable court (on Argument I and II) Grant habeas relief and Order a condition writ to the Genesee 7th Judicial Circuit Court to ORDER A RE-ENTRY OF A LESSER INCLUDED CONVICTION OF INVOLUNTARY MANSLAUGHTER OR RETRY SECOND DEGREE MURDER TRIAL FOR PETITIONER WITH EFFECTIVE ASSISTANCE OF COUNSEL.

Second, on (Argument III) Grant a *Townsend Hearing* on this issue for a New Trial on a hearing for petitioner's claim of improper nondisclosure, prosecutor's misconduct, and Instructional error , where the outcome determinative would be different by a verdict on a lesser charge Manslaughter and not Murder.

Respectfully, submitted:

/s/ Angelo R. McMullan .

Angelo R. McMullan 157052

Petitioner/ In, pro, se
Ryan Correctional Facility
17600 Ryan Road
Detroit, MI...48212

Notary Public:

Subscribed and sworn before me, this 25th day of April, 2011, a Notary Public in and for Wayne County, Michigan.

/s/

(Signature)
NOTARY PUBLIC
My Commission
expires Jan. 30, 2014

APPENDIX J

U.S. Const. Amend. 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.

U.S.C. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or

as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 2254

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

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to

statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.