No. 16-2301

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMAL THOMAS,

Petitioner-Appellant,

v.

GEORGE STEPHENSON

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan, Case No. 2:09-CV-12958

BRIEF OF APPELLANT JAMAL THOMAS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-2301 Case Name: Jamal Thomas v. George Stephenson

Name of counsel: Emmett E. Robinson

Pursuant to 6th Cir. R. 26.1, Jamal Thomas
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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 12, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Emmett E. Robinson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Court should hear oral argument in this case, in which it has granted a certificate of appealability and appointed counsel. Oral argument would give petitioner the opportunity to answer any questions the Court might have regarding the nuances of Michigan case law on the subject of specific intent to kill, the application of that case law to the facts at issue here, and the broader implications of a ruling in favor of or against petitioner.

JURISDICTIONAL STATEMENT

Mr. Jamal Thomas is a prisoner in the custody of the Michigan Department of Corrections. Mr. Thomas filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan on July 27, 2009. Habeas Petition, RE 1, PageID# 1-11. The district court had jurisdiction over the petition pursuant to 28 U.S.C. §§ 1331 and 2254. It denied Mr. Thomas's petition on August 17, 2016, denied a certificate of appealability, and entered a final judgment. Order, RE 28, PageID# 1100; Judgment, RE 29, PageID# 1102. Mr. Thomas filed a notice of appeal on September 8, 2016. Notice of Appeal, RE 30, PageID# 1103-04. This Court construed the notice as an application for a certificate of appealability and granted the application (on the limited basis discussed below) via an order filed on April 24, 2017. Order, Docket Entry 9-2, at 1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4(a).

STATEMENT OF THE ISSUES

Concerning Mr. Thomas's conviction for assault with intent to commit murder, was the district court correct in concluding that the record evidence reasonably supported a finding of guilt beyond a reasonable doubt, where a present specific intent to kill is a necessary element of the offense and where the record evidence supposedly supporting that element consisted in its entirety of a threat to possibly shoot the victim in the future, the levelling of a pistol, and, arguably, brief blows to the victim by Mr. Thomas's accomplice?

STATEMENT OF THE CASE

Facts[1]

In April 2005, Larry Davidson played a trick on victim Rodney Harrison in order to gain access to Mr. Harrison's home. 4/10/06 Trial Tr., RE 25-3, PageID# 666-68. Once inside the home with Mr. Harrison, Davidson pulled a gun on Mr. Harrison and called Mr. Thomas on the telephone. *Id.* at PageID# 668-70. Mr. Thomas arrived at the house, and Davidson instructed him to watch Mr. Harrison while Davidson ransacked the house looking for money supposedly hidden there. *Id.* at PageID# 671, 675-76, 713. Mr. Thomas, armed with a pistol, instructed Mr. Harrison to sit on the couch with his hands under his legs and warned him to stay put, telling Mr. Harrison that if he tried to move or make noise, he would kill him. *Id.* at PageID# 671. At some point, Mr. Thomas pointed the pistol at Mr. Harrison. *Id.* at PageID# 673.

Davidson later returned to the room where Mr. Harrison was being held. Mr. Harrison's arms then were tied behind his back, his legs tied together, and he was placed on the ground with his stomach toward the floor. *Id.* at PageID# 676. Davidson kicked him in the lower back three to four times and struck him once with the butt of his pistol in an attempt to force Mr. Harrison to divulge the

[1] Because, in this procedural posture, the Court must view the evidence "in the light most favorable to the prosecution," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), this statement of the facts assumes the veracity of the testimony presented by the prosecution at trial.

location of the money purportedly hidden in the house. *Id.* at PageID# 682, 679, 718. Eventually, Mr. Harrison's wife arrived home, spotted Mr. Thomas inside the house, and fled to the home of a neighbor, who called the police. 4/11/06 Trial Tr., RE 25-4, at 766-69. Davidson and Mr. Thomas left the scene. 4/10/06 Trial Tr., RE 25-3, at PageID# 686. Mr. Harrison was taken to the hospital as a precautionary measure and was released a few hours later. *Id.* at PageID# 699-700.

Procedural History

As a result of his April 2005 wrongdoing, Mr. Thomas was charged with assault with intent to commit murder, first degree home invasion, felonious assault, possession of a firearm by a felon, and possession of a firearm in the commission of a felony. Arraign. Tr., RE 25-2, PageID# 588. He was found guilty on all five charges at the conclusion of the April 2016 jury trial at which he and Davidson were tried jointly. 4/12/16 Trial Tr., RE 25-5, PageID# 985-87. He received a *minimum* sentence of 78 years in prison: consecutive sentences of 50 to 100 years' imprisonment for assault with intent to commit murder, 26 to 50 years for home invasion, and two years for possession of a firearm during the commission of a felony.[2] Sentencing Tr., RE 25-6, PageID# 1005-08. His maximum sentence is thus over 150 years, and even if he prevails on this appeal and the assault-with-

[2] He was also sentenced to 28 to 48 months for felonious assault and 40 to 60 months for possession of a firearm by a felon.

intent-to-commit-murder conviction is vacated, he still, barring resentencing, faces a minimum prison term of 28 years for the home invasion, felonious assault, and firearm convictions.

Mr. Thomas appealed his convictions. The Michigan Court of Appeals affirmed and the Michigan Supreme Court denied leave to appeal on April 28, 2008. Mich. Sup. Ct. Order, RE 10-4, PageID# 188. He subsequently filed a petition for habeas corpus relief in the Eastern District of Michigan on July 27, 2009. Habeas Pet. I, RE 1, PageID# 1-11. Because one of the six claims raised by Mr. Thomas in the habeas petition (no longer at issue in this appeal) had not been exhausted in State court, the district court stayed the petition on September 20, 2010, and held further proceedings in abeyance pending exhaustion of that claim in State court. Stay Order, RE 14, PageID# 314-15. At the conclusion of the State proceedings on that claim, Mr. Thomas moved to reopen his habeas case. Mot. to Reopen, RE 17, PageID# 349-51. That motion was granted on March 9, 2014. Order on Mot. to Reopen, RE 18, PageID# 354.

The district court ultimately denied the petition for habeas relief on all grounds, and denied a certificate of appealability, on August 17, 2016. Op. & Order Denying Writ, RE 28, Page ID# 1084-1101. It was from that final order, and the final judgment stemming therefrom, Judgment, RE 29, PageID# 1102, that Mr. Thomas appealed to this Court on September 9, 2016. Notice of Appeal, RE

30, PageID# 1103-04. This Court construed the notice of appeal as an application for a certificate of appealability and, on April 24, 2017, granted the application only with regard to the sufficiency of the evidence supporting Mr. Thomas's conviction for assault with intent to commit murder. Order, Docket Entry 9-2, at 1. "Reasonable jurists could, in fact, disagree," this Court said, "with the district court's conclusion that the state courts reasonably denied Thomas's insufficient-evidence claim regarding assault with intent to murder." *Id.* at 3.

SUMMARY OF ARGUMENT

The evidence presented at Mr. Thomas's trial was plainly insufficient to prove that he, beyond a reasonable doubt, was guilty of assault with intent to commit murder ("AWIM"). Under Michigan law, to prevail in an AWIM case, the prosecution must present evidence beyond a reasonable doubt that the defendant possessed the specific intent to kill. No such evidence was presented here. Mr. Thomas's pointing of his pistol and his warning to Mr. Harrison that he would kill him if he moved or made noise plainly were not intended, in and of themselves, to cause Mr. Harrison's death. Rather, they were intended to ensure Mr. Harrison's cooperation. Reason and Michigan case law make clear that such exhortations, however opprobrious, do not evidence a present, specific intent to kill. Reason and case law likewise make plain that the facts that Davidson kicked Mr. Harrison in the lower back three to four times and hit him once with the butt of his pistol are

also insufficient to prove—indeed, ultimately irrelevant to proving—*Mr. Thomas's* intent to kill beyond a reasonable doubt.

ARGUMENT

The Record Evidence Is Insufficient to Support Mr. Thomas's Conviction for Assault with Intent to Commit Murder.

Neither the Michigan Court of Appeals nor the district court provided any meaningful legal or factual analysis to support their conclusions that the evidence at trial was sufficient to prove AWIM beyond a reasonable doubt. The district court, in fact, provided no independent analysis whatsoever. Rather, its discussion of the AWIM sufficiency-of-the-evidence issue consisted entirely, after recitation of the relevant standards, of a five-paragraph block quote from the Michigan Court of Appeals's opinion and a summary statement that "[i]n light of the direct and circumstantial evidence presented, . . . the Michigan Court of Appeals' decision that a rational trier of fact could find the essential elements proven beyond a reasonable doubt was reasonable." *Thomas v. Lafler*, No. 09-CV-12958, 2016 WL 4376173, at *4-5 (E.D. Mich. Aug. 17, 2016). The Michigan Court of Appeals, for its part, likewise did little more than recite the facts in prosecution friendly terms (as was appropriate), and state the conclusion that "the prosecution presented sufficient evidence to show that defendant committed the offense of assault with intent to murder." *People v. Thomas*, No. 270679, 2007 WL 4355431, at *2-3

(Mich. Ct. App. Dec. 13, 2007). Both courts unquestioningly relied on Mr. Thomas's warning as proof of intent to kill

But, as explained in detail below, these two courts' analyses were not only scant, but fundamentally flawed. The prosecution did not provide sufficient evidence from which a reasonable factfinder could conclude that Mr. Thomas, beyond a reasonable doubt, possessed the specific intent to kill Mr. Harrison. Mr. Thomas is therefore entitled to habeas corpus relief from this Court.

A. Applicable Legal Standards

Habeas corpus relief is appropriate where a State-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "Under the *Winship*[3] decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." *Jackson v. Virginia*, 443 U.S. 307 (1979).

"[T]he critical inquiry" when assessing such a sufficiency-of-the-evidence claim is "whether the record evidence could reasonably support a finding of guilt

[3] *In re Winship*, 397 U.S. 358 (1970).

beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. But even in this prosecution-friendly setting, it is still the case that a "mere modicum" of evidence cannot "rationally support a conviction beyond a reasonable doubt." *Id.* at 320 (citation omitted).

Not even a modicum of evidence proving Mr. Thomas's intent to murder is present here. But the Michigan Court of Appeals affirmed his AWIM conviction nonetheless. The district court thus erred in denying habeas relief as to Mr. Thomas's assault-with-intent-to-commit-murder conviction. This Court reviews such a denial *de novo*. *Thomas v. Westbrooks*, 849 F.3d 659, 662 (6th Cir. 2017).

In Michigan, assault with intent to commit murder consists of three elements: "(1) an assault, (2) *with an actual intent to kill*, (3) which, if successful, would make the killing murder." *Warren v. Smith*, 161 F.3d 358, 361 (6th Cir. 1998) (emphasis added; quoting *People v. Plummer*, 581 N.W.2d 753, 759 (Mich. Ct. App. 1998)). The intent to kill must be specific; an intent to inflict great bodily harm is insufficient to prove intent to kill. *Warren*, 161 F.3d at 361. And "likelihood that the natural tendency of [one's] acts will . . . cause death" is also not enough to prove intent to kill in the AWIM context. *Id.* *See also People v.*

Taylor, 375 N.W.2d 1, 7 (Mich. 1985) (same). Rather, the perpetrator must assault the victim with the "specific" and "actual" present intent to kill. *Warren*, 161 F.3d at 361. Accordingly, the intent requirement for assault with intent to commit murder is even more rigorous than the intent required to support a murder conviction. *Taylor*, 375 N.W.2d at 7. While "an intent to inflict great bodily harm, or a wanton and wilful disregard of the likelihood that the natural tendency of the actor's behavior is to cause death or great bodily harm" is sufficient in the context of murder, only actual intent to kill will suffice with regard to AWIM. *Id.*

B. Mr. Thomas's Warning to Mr. Harrison and Levelling of His Pistol Do Not Support a Beyond-a-Reasonable-Doubt Finding of Present Intent to Kill.

In concluding that the evidence presented at Mr. Thomas's trial was sufficient to support a beyond-a-reasonable-doubt finding of specific present intent to kill, both the Michigan Court of Appeals and the district court relied primarily on the trial testimony that Mr. Thomas pointed a gun at Mr. Harrison and warned that he *would* shoot Mr. Harrison *if* he made noise. *People v. Thomas*, 2007 WL 4355431, at *2; *Thomas v. Lafler*, 2016 WL 4376173, at *4. *See also* 4/10/06 Trial Tr., RE 25-3, PageID# 671 (Mr. Harrison testifying Mr. Thomas instructed him to "[s]it down on the sofa . . . . If you move, make a sound, I'll kill you."). Such a threat, conditioned on Mr. Harrison's commission of a future affirmative act, is

self-evidently not an attempted murder,[4] not a manifestation of a *present* specific intent to kill. To the contrary, by Mr. Harrison's own testimony,[5] the assault here—Mr. Thomas's pointing of the gun at Mr. Harrison—was committed not with the purpose of actually effecting Mr. Harrison's death (Mr. Thomas surely didn't think the warning would kill Mr. Harrison), but rather to compel Mr. Harrison's cooperation. The warning to not move or make noise makes it abundantly clear that the intent was to coerce Mr. Harrison's cooperation, not to take his life. While unquestionably reprehensible conduct, this evidence cuts against, rather than proves beyond a reasonable doubt, a specific intent to kill.

Michigan v. Cameron is on all fours with Mr. Thomas's case, except that the facts there are *more* egregious than those at issue here. No. 306391, 2013 WL 951213 (Mich. Ct. App. Feb. 26, 2013). There, the defendant, angry that the victim—who managed an apartment complex—had sent eviction notices to some of his friends, "assaulted the victim by forcing her up against a wall and pressing [a]

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[4] Assault with intent to commit murder and the more familiar concept of attempted murder are cognate offenses under Michigan law: Attempted murder is defined by statute as an "attempt to commit the crime of murder . . . *by any means not constituting the crime of assault with intent to commit murder*." Mich. Comp. L. 750.91 (emphasis added). Per the statute, then, AWIM is simply an attempted murder with the added element of an assault. But assault with intent to commit murder is nevertheless classified as a species of attempted murder: Though the attempted murder statute explicitly excludes AWIM from its operative ambit, it nevertheless acknowledges it as an "attempt to commit the crime of murder." *Id.*

[5] Mr. Harrison's testimony was the only evidence presented at trial concerning the threat to kill should Mr. Harrison move or make noise.

gun into the side of her face. With the gun pressed firmly into her cheek, defendant told [her] to 'quit f with his people.'" *Id.* at *1. He proceeded to warn the victim "that if he came back, he would kill her and her daughter." *Id.* He "then 'bashed' [her] head into the wall," leaving her unconscious and suffering from a concussion. *Id.*

The defendant was convicted of assault with intent to commit murder, but the Court of Appeals vacated the conviction. The court noted that "[t]he requisite intent to kill for purposes of AWIM must be present at the time the defendant commits the assault." *Id.* at *2. But Cameron "did not attempt to fire his weapon or inflict any other fatal injury on the victim. Viewing this evidence in a light most favorable to the prosecution, the evidence supports only that [the] defendant threatened to kill the victim in the *future* if she did not stop evicting his friends." *Id.* at *3.

Just as in *Cameron*, here Mr. Thomas warned Mr. Harrison that he would kill him *if* he moved or made noise. He thus did not manifest a *present intent* to kill. That the defendant in *Cameron* warned that he would kill the victim upon return "if she did not stop evicting his friends," *id.* at *3, while Mr. Thomas warned that he would kill Mr. Harrison if the latter moved or made noise is a distinction without a difference. Though it presumably would have taken more time for Cameron's warning to transform into a present intent to kill, the upshot is

still the same: In both cases, the defendant "did not attempt to fire his weapon or inflict any other fatal injury on the victim." *Id.* And in both cases, the defendant stated that he might kill the victim in the *future* in order to coerce desired conduct. That that future could have theoretically been only moments away in the present case does not change the fact that there was no actual specific intent to kill.

Indeed, "'[i]ntent is the purpose to use a particular means to effect [a] result.'" *Michigan v. Hoffman*, 570 N.W.2d 146, 148 (Mich. Ct. App. 1997) (quoting Black's Law Dictionary (5th ed.)). But plainly neither the act of warning that he would kill Mr. Harrison if he moved or made noise nor the act of pointing a pistol at Mr. Harrison was intended to produce Mr. Harrison's death. To the contrary, both of these means make it plain that Mr. Thomas did not intend Mr. Harrison to die from receiving the warning (however ominous) or having the pistol pointed at him. Rather, both the warning and the leveling of the pistol were the "means" used to "effect [the] result" of *Mr. Harrison's cooperation* with his captors, not his *death*.[6] Mr. Thomas did not attempt to murder Mr. Harrison. He

[6] In fact, far from evidencing an intent to kill, Mr. Thomas' warning to Mr. Harrison that he would kill him if he moved or made noise shows an intent to *avoid* the threatened action. When a parent warns a child that he will not be allowed to leave the house for a week if he fails to clean his room, it cannot reasonably be said that the parent has the present, specific intent to confine the child at home or that the warning is uttered to effectuate the child's confinement. To the contrary, the intent is to compel the child to clean his room and to avoid the threatened confinement altogether.

attempted to keep him quiet. *See Cameron*, 2013 WL 951213, at *3 (no assault with intent to commit murder where the defendant "did not pull the trigger of the gun"). One could reasonably infer from these facts that, in order to secure Mr. Harrison's cooperation, Mr. Thomas also intended, by warning Mr. Harrison and pointing the gun, to place Mr. Harrison *in fear* of being murdered, but intent to place a victim in such fear is insufficient to prove assault with intent to murder. *See Michigan v. Burnett*, 421 N.W.2d 278, 285 (Mich. Ct. App. 1988) (reversing AWIM convictions where "the trial court erroneously instructed the jury that . . . an intent to place the victim in fear of being murdered was sufficient to find [him] guilty").

This case, then, stands in sharp contrast to, for example, *People v. Davis*, wherein the defendant's AWIM conviction was affirmed, in part because he "*pulled the trigger several times* (but no bullets fired)." 549 N.W.2d 1, 4 (Mich. Ct. App. 1996) (emphasis added). There, by pulling the trigger of the gun while pointing it at his victim, the jury *could* reasonably infer that the defendant did use the means to effect the victim's death.

Along similar lines, in considering whether or not an intent to murder has been proved beyond a reasonable doubt, a factfinder "may, and should" take into account a number of considerations, including and the defendant's "declarations prior to, at the time, and after the assault" (the declaration here, as discussed,

weighs *against* a finding of specific intent to kill) and "whether the instrumentation and means used were naturally adapted to produce death." *People v. Taylor*, 375 N.W.2d at 8. A pistol (the instrumentation at issue here) most assuredly *can* be used in a way that is naturally adapted to produce death, *i.e.*, it can be fired. *See, e.g.*, *People v. Willingham*, No. 331267, 2017 WL 3495609, at *3 (Mich. Ct. App. Aug. 15, 2017) (finding defendant used an "instrument and means" that were "naturally adapted to produce death" because he "pulled out a handgun . . . *and discharged the weapon* in [the victim's] direction" (emphasis added)). But simply pointing a pistol at someone (the means employed here) is *not* naturally adapted to result in the death of the victim. In fact, Mr. Thomas is not aware of a single Michigan case, other than his own, in which the pointing of a gun at a victim was held sufficient to prove intent to kill.

Rather, a survey of AWIM case law illustrates the sort of "instrumentation and means" that must be employed before an intent to kill may be inferred. As this Court put it in its order granting Mr. Thomas's certificate of appealability, "intent-to-kill . . . is amenable to inference, but such inference usually proceeds from an attempted or consummated battery that has the clear potential to be imminently lethal." Order, Docket Entry 9-2, at 4. Michigan case law shows that the Court is correct, except that it appears there is no need for the "usually" modifier. Thus, in *Warren v. Smith*, the AWIM conviction was upheld where the defendant placed

duct tape over the victims' noses and mouths. 161 F.3d 361-62. The same result obtained in *Stokes v. McKee*, No. 2:09-CV-10171, 2014 WL 5460638, at *4 (E.D. Mich. Oct. 27, 2014), where the defendant doused his victims with gasoline and set them on fire. And in *People v. Plummer*, 581 N.W.2d 753, 759 (Mich. Ct. App. 1998), the defendant actually shot the victim. In all of these cases and many others,[7] the defendants, unlike Mr. Thomas, committed acts which a reasonable person would naturally expect to result in the death of the victim. *See People v. Johnson*, 220 N.W.2d 705, 706 (Mich. Ct. App. 1974) (affirming AWIM conviction where the defendant shot at the victim because "[t]he usual result and purpose of such an assault is death"). Indeed, far from committing acts that would be reasonably expected to kill Mr. Harrison, the evidence does not even show that Mr. Thomas tried to physically injure him at all. *See People v. Hunter*, 367

[7] *See also, e.g.*, *Cass v. MacLaren*, No. 5:13-CV-10984, 2014 WL 2116693 (E.D. Mich. Mar. 21, 2014) (defendant shot a woman in the chest at point-blank range); *People v. Johnson*, No. 310443, 2013 WL 3106940, at *2 (Mich. Ct. App. June 20, 2013) (defendant said "you bitches are going to bleed," and carried out the threat by firing bullets into a crowd); *Hudson v. Lafler*, 421 F. App'x 619, 627 (6th Cir. 2011) (defendant shot victim); *Neal v. Berghuis*, No. 04-10153-BC, 2006 WL 2270036 (E.D. Mich. Aug. 8, 2006) (defendant doused the victim with gasoline and set him on fire); *People v. Pate*, No. 262696, 2006 WL 3613792 (Mich. Ct. App. Dec. 12, 2006) (defendant shot at police and used a hostage as a shield from gunfire); *People v. Al-Dilaimi*, No. 236323, 2003 WL 21660773, at *1, *4-5 (Mich. Ct. App. July 15, 2003) (victim repeatedly stabbed); *Michigan v. Hoffman*, 570 N.W.2d 146, 150 (Mich. Ct. App. 1997) (defendant stuffed a stock in the victim's mouth, taped her mouth shut, repeatedly slammed her head into a paved sidewalk, punched her in the eye, and hit her in the head with a baseball bat).

N.W.2d 70, 75 (Mich. Ct. App. 1985) ("to be convicted of assault with intent to commit murder, it must be established beyond a reasonable doubt that the defendant tried to physically injure another person"); Mich. Model Crim. Jury Instruction 17.3, Assault with Intent to Murder, http://courts.mi.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Documents/Criminal%20Jury%20Instructions.pdf (including as element of AWIM that "the defendant tried to physically injure another person").

C. The Actions Taken by Larry Davidson Were Insufficient to Prove Intent to Kill Beyond a Reasonable Doubt as to Mr. Thomas.

As previously stated, Larry Davidson—Mr. Thomas's accomplice—did kick Mr. Harrison in the lower back and strike him once with the butt of his pistol. But these acts likewise cannot support a beyond-a-reasonable-doubt finding of intent to kill as to Mr. Thomas. First, while not to diminish the severity of the crime at issue, as a practical matter it cannot be said that three to four kicks to the lower back and a single hit with the butt of a pistol were "naturally adapted to produce death." *Taylor*, 375 N.W.2d. at 8. As the cases just discussed show, *supra* at 15-17 "instrumentation and means" of assault or battery must be much more severe before they can support a conviction for assault with intent to commit murder. And intent to inflict great bodily harm is insufficient to prove intent to kill. *Warren*, 161 F.3d at 361. Once again, Mr. Thomas is unaware of a single Michigan case in which the acts supporting an assault-with-intent-to-commit-

murder conviction were as unlikely to produce death as those committed by Davidson here. The closest the case law comes is perhaps *Cameron*, wherein the defendant bashed the victim's head into a wall, causing unconsciousness and a concussion. 2013 WL 951213, at *1. But even that battery was much more likely to result in death than the one that occurred here, and the *Cameron* court *vacated* the AWIM conviction.

Additionally, Mr. Thomas can only "be convicted as an aider and abettor in a specific intent crime" such as AWIM "if he participated in the crime and either [1] possessed the specific intent to commit the crime or [2] *knew that the principal possessed that intent*." *People v. King*, 534 N.W.2d 534, 539 (Mich. Ct. App. 1995) (emphasis added). Thus, two separate levels of inference separate Davidson's actions from Mr. Thomas's intent. Not only must the prosecution marshal evidence sufficient to show that Davidson possessed the specific intent to kill Mr. Harrison via his kicks to the back and single blow with the pistol butt (already a non-starter given that, as discussed, the "usual" and "natural" consequence of such actions is not death), before Davidson's actions can be used to infer a beyond-a-reasonable-doubt intent to kill on Mr. Thomas's behalf, the evidence must show that Mr. Thomas *knew* that Davidson possessed the specific intent to kill Mr. Harrison when he struck him. The "modicum" of intent-to-kill evidence here—Davidson's blows to Mr. Harrison—is insufficient to bear the weight of proving

Davidson's own intent to kill beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 320. But even if this Court disagrees and concludes that some rational trial of fact somewhere could conceivably conclude, for what appears to be the first time in Michigan, that the blows were sufficient to prove Davidson's intent to kill beyond a reasonable doubt, *still* the evidence would be insufficient to support *Mr. Thomas's* assault-with-intent-to-commit-murder conviction, as the further logical leap that Mr. Thomas was aware of Davidson's specific intent at the time the crime was committed would be left entirely unsupported—or at the best supported only by conscripting that same modicum into double duty. Either way, the "evidence" that Davidson intended to kill Mr. Harrison and, certainly, that Mr. Thomas knew of that intent in the moment, is wholly insufficient to satisfy the requirement of proof beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, Petitioner Jamal Thomas respectfully requests that this Court reverse the district court's judgment with respect to his conviction for assault with intent to murder and issue a writ of habeas corpus vacating his conviction for the same.

Dated: October 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,752 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1). As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied on the word count function of Microsoft Word in preparing this certificate.

2. I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Emmett E. Robinson
Emmett E. Robinson

Attorney for Appellant Jamal Thomas

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, this Brief of Appellant Jamal Thomas was filed with the United States Court of Appeals for the Sixth Circuit via the Court's ECF system. Counsel of record will receive notice of, and be able to access, the filing via the ECF system.

/s/ Emmett E. Robinson
Emmett E. Robinson

Attorney for Appellant Jamal Thomas

RULE 30(g)(1) ADDENDUM
DESIGNATING RELEVANT DOCKET ENTRIES

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Petitioner Jamal Thomas designates the following documents from the lower court record as relevant to the instant appeal:

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1	Application for Writ of Habeas Corpus	1-11
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