NO.

IN THE SUPREME COURT OF THE UNITED STATES

2018

MARK GERALD ELLIOTT,

Petitioner,

v.

CARMEN PALMER, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

By: Mark Gerald Elliott #183252
In pro se
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QUESTIONS PRESENTED

QUESTION I:

In Brady v. Maryland, this Court announced that it violates due process when the prosecution fails to dis close material information favorable to the accused. 373 U.S. 83, 87 (1963). The question presented is: whether under Brady and its progeny, could reasonable jurist debate whether the prosecution team's intentional nondisclosure of Petitioner's requested 911 audio recordings requires that his convictions be set aside or that remand is necessary for the issuance of a COA.

QUESTION II:

In Strickland v. Washington, this Court recognized the Sixth Amendment right to counsel exists and is needed in order to protect the fundamental right to a fair trial. 466 U.S. 668, 684 (1984). The question presented is: whether under Strickland and its progeny, could reasonable jurist debate if initially retained, pretrial counsel was ineffective for failing to use any legal means other than basic discovery to obtain Petitioner's 911 audio recordings that Petitioner made counsel aware of when he was retained, implored counsel to obtain said recordings and that were critical to his defense; and, if such ineffectiveness requires Petitioner's convictions to be set aside or a remand for a COA to issue

QUESTION III:

In Crawford v. Washington, this Court announced that where testimonial evidence is at issue, the Sixth Amendment demands unavailability, a prior opportunity for cross-examination, or plainly, confrontation of one's accusers. 541 U.S. 36, 37-38 (2004). The question presented is: whether under Crawford and its progeny, could reasonable jurist debate whether the expert medical examiner's hearsay testimony, from a Detroit Police Fatal Squad report that was compiled from unnamed witnesses' statements on the ultimate issue of intent, violated Petitioner's Sixth Amendment right to confrontation and if such violation requires Petitioner's convictions to be set aside or a remand is necessary for a COA.

QUESTION IV:

In Strickland v. Washington, this Court recognized the Sixth Amendment right to counsel exists and is needed in order to protect the fundamental right to a fair trial. 466 U.S. 668, 684 (1984). The question presented is: whether under Strickland and its progeny, could reasonable jurist debate whether trial counsel was constitutionally ineffective for failing to object and request a curative instruction to the, obvious, highly prejudicial hearsay testimony of the expert medical examiner that came from a document prepared by the Detroit Police Fatal Squad and was compiled from unnamed witnesses statements; and, does such ineffectiveness require Petitioner's convictions to be set aside or a remand is necessary for a COA.

QUESTION V:

In Evitts v. Lucey, this Court announced that nominal representation on an appeal of right, like nominal representation at trial, do not suffice to render the proceedings constitutionally adequate. 469 U.S. 387, 396 (1985). The question presented is: whether under Evitts and its progeny, could reasonable jurist debate whether appellate counsel was constitutionally ineffective for failing to investigate and raise the above substantive constitutional violations in Petitioner's right to appeal and if such ineffectiveness constitutes cause and prejudice to excuse the procedural default of the above claims or a remand is necessary for the issuance of a COA.

LIST OF PARTIES

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TABLE OF AUTHORITIES

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

1. The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix 1 to the petition and is reported at: Elliott v. Palmer, 2017 U.S. App. LEXIS 10654.

2. The opinion of the United States District Court, E.D. Mich., appears at Appendix 2 to the petition and is reported at: Elliott v. Palmer, 2016 U.S. Dist. LEXIS 131, 842.

3. The opinion of the United States Court of Appeals, for Panel Rehearing appears at Appendix 3 and is reported at: Elliott v. Palmer, 2018 U.S. App. LEXIS 666.

4. The opinion of the Michigan Supreme Court appears at Appendix 4 to the petition and is reported at: People v. Elliott, 496 Mich. 864 (2014).

5. The opinion of the Michigan Court of Appeals appears at Appendix 5 to the petition and is reported at: People v. Elliott, 2014 Mich. App. LEXIS 2856.

6. The opinion of the Third Judicial Circuit, Wayne County, Michigan appears at Appendix 6 and is unpublished

JURISDICTION

1. The date on which the United States Court of Appeals decided my case was June 14, 2017. (Apx. 1).

2. A timely petition for panel rehearing was denied by the United States Court of Appeals on January 10, 2018. (Apx. 3).

3. An extension of time to file the petition for a writ of certiorari was granted to and including May 15, 2018 on March 23, 2018 in Application No. 17A1012. (Apx. 0)

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

The 6th Amendment to the United States Constitution provides:

> 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 previously been 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 defense

The 14th Amendment to the United States Constitution provides:

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

This case further involves: (1) 28 U.S.C. § 2254(d)(1), (2); (2) 28 U.S.C. § 2253(c)(2); and Michigan Court Rule (MCR) 6.508 and its various subsections.

Additionally, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even though, respectfully, Petitioner has not been adjudicated a terrorist and is not under a sentence of death.

REASONS FOR GRANTING THE WRIT

This case presents precisely the type of evidence withholding, Confrontation Clause violation and Ineffective Assistance of Counsel this Court has repeatedly said, violates an accused's Sixth Amendment rights to due process and a fair trial.

However, the invocation of a myriad of procedural barriers perpetrated against the pro se litigant, in concert with ineffective assistance of trial and appellate counsel, effectively rob many accused of the constitutional protections every citizen of the United States is entitled to.

A trial cannot possibly be fair and conducted according to due process when substantive constitutional violations have taken place such as those Petitioner has shown herein.

It is imperative that this Court act, to remind state courts throughout the United States that it will not tolerate blatant disregard for an accused's constitutional rights to due process and a fair trial. Moreover, this Court should resolutely send a message to states that they cannot violate an accused's constitutional rights then hide behind procedural barriers to subvert the actual purpose of the constitutional right that was violated. This is the reason the writ should be granted.

A. STATEMENT OF THE CASE

In 2009, Petitioner Mark Elliott, was charged in the State of Michigan, County of Wayne, with violating one count of Michigan Compiled Law (MCL) § 750.316: premeditated, first degree murder and one count of violating MCL § 750.83: assault with intent to murder. The state alleged that Elliott struck Sylvester Green and Jimmy Tyner with his truck about a block away from the Next Level Bar in downtown Detroit. Both Green and Tyner were seriously injured, and Green later succumbed to his injuries. The state further alleged that Elliott premeditated on and/or intentionally struck Green and Tyner because of an earlier fight between Elliott and Green that occurred inside the bar. (Apx. 2, Pg. 2 ¶ 3).

B. PRETRIAL PROCEEDINGS RELEVANT TO QUESTION ONE AND TWO

On August 14, 2009, prior to surrendering himself to the Detroit Police, Elliott met with and retained attorney Marlon B. Evans. At that meeting, Elliott described to Evans that prior to the charged events taking place he was robbed by Green, Tyner and their associates, and that, Green and Tyner had assaulted him inside of Next Level. Elliott went on to describe that as he made it to his truck and was attempting to leave Next Level his truck was surrounded by Tyner, Green, Next Level's bouncer, several other individuals and he was robbed of his professional Nikon camera. Elliott described calling 911, retreating to 1 1/2 blocks away from Next Level (Apx. 7) and calling 911 five more times because the police were not showing up. As Elliott waited for the police he noticed Tyner approaching his vehicle alongside a bus and fearing another robbery and/or being shot, Elliott sped off at a high rate of speed. Elliott thought he may have sideswiped the bus. (Apx. 2, Pgs. 4-5). Being his only physical evidence of peaceful intentions, Elliott implored Evans to obtain the audio recordings of his 911 calls. (Apx. 8).

After several required court proceedings relevant to the judicial process, Elliott's trial date was set for on or about February 1, 2010. However, after Evans had assured Elliot for months that he'd obtained his 911 audio recordings and was prepared to use them at trial, Evans visited Elliott at the jail just days before the start of trial to inform him that he'd made a "mistake" and did not actually have Elliott's 911 audio recordings. An argument ensued and Elliott fired Evans. (Apx. Pgs. 3-7).

On January 28, 2010, the trial court heard Evans' emergency motion to be removed from the case. (Apx. 9). At the proceeding and without objection from the prosecutor, Evans stated that: (1) "the Detroit Police Department . . . said there were [no 911 recordings]" ; and (2) "the information I received from the prosecution, there was no recording of those tapes." (Apx. 9, Pg. 4).

Moreover, at the above proceeding, the trial court asked Elliott: "if the Detroit Police Department is denying receipt of those calls, what is it that you want Mr. Elliott (sic) [should be Evans] to do?" (Apx. 9, Pg. 6). Stated another way, its clear the trial court was effectively convinced that the audio recordings of Elliott's 911 calls did not exist. At the conclusion of the proceeding, the court removed Evans from the case, and later off record, appointed attorney, Sharon C. Woodside to represent Elliott.

Mrs. Woodside met with Elliott, learned the facts of the case, realized how crucial Elliott's 911 audio recordings were to his defense and diligently raised the nondisclosure of those recordings with the trial court:

1. At a pretrial conference on February 18, 2010, the prosecutor stated that Elliott's 911 audio recordings could not be made available for "budgetary reasons" and a failure of the Prosecutor's Office to understand how to place 911 audio onto a compact disk (CD). (Apx. 10, Pgs. 3-5).

However, legal research on LexisNexis shows that prior to, during and after the time of Elliott's case, Wayne County Prosecutor's regularly entered

inculpatory or otherwise beneficial-to-the-prosecution 911 audio into evidence against defendants at trial. (Apx. 11).

2. At a pretrial conference on March 5, 2010, Mrs. Woodside stated that the prosecutor gave her: "a [compact] disk of 911 dispatch calls from [the] location of [the] particular incident", but, that disk didn't include any of Elliott's calls to 911. (Apx. 12, Pgs. 3-4). This was the prosecution's stratagem to have the court and counsel believe that she was complying with the discovery order and subpoena for Elliott's 911 audio recordings.

Nevertheless, a Detroit Police Department ("D.P.D") Call Log (Apx. 13) and 911 Computer Aided Dispatch (CAD) Records (Apx. 14) unequivocally show that Elliott's calls to 911, from his cell phone number: 954-882-1192 (Apx. 15) were received and recorded by 911 dispatch/D.P.D Communications. That is, whomever on the prosecution team (i.e., the Prosecutor's Office and/or D.P.D) transferred the 911 information to the compact disk, intentionally left Elliott's calls off the disk given to defense counsel.

3. On June 7, 2010, Elliott's trial was adjourned a second time due to the non-disclosure of his 911 audio recordings. At that proceeding, Mrs. Woodside protested to the chief judge of the court: "There are some substantial discovery issues -- they were the 911 calls that were not retained for reasons unknown to me." (Apx. 16, Pg. 3) (emphasis added). In granting the adjournment, the chief judge commented: "It does seem to me that [the 911 information] is **critical** to the defense in order to determine what evidence may be available for the defense in this first degree murder case." (Apx. 16, Pg. 5).

The above adjournment proceeding also made clear that lead D.P.D homicide investigator, Sgt. Kevin Hanus had convinced counsel that 911 audio recordings are only retained for forty-five days. (Apx. 16, Pg. 4). However, in July 2015, after Elliott's convictions were affirmed in his right to

appeal and while doing collateral review legal research on LexisNexis, Elliott discovered a habeas proceeding also protesting the nondisclosure of 911 audio recordings by the Detroit Police Department and the Wayne County Prosecutor's Office. In that proceeding the Hon. Mark A. Goldsmith, United States District Judge, E.D. Mich., found credible evidence: "that requested 911 recordings are regularly produced after 90 days[]" by the City of Detroit. Tinsley v. Burgh, 2013 U.S. Dist. LEXIS 99497 (U.S. Dist. E.D. Mich. July 17, 2013); (Apx. 17, Pg. 2 ¶ 2).

Moreover, at trial, Sgt. Hanus inadvertently testified that he was in possession of the 911 audio recordings regarding this incident before the warrant for Elliott's arrest was issued. (Apx. 18, Pgs. 101-102, 128-130, 139). The incident took place on June 21, 2009 and the warrant for Elliott's arrest was issued on July 24, 2009 for a total of 33 days. Therefore, Sgt. Hanus' possession of the 911 audio recordings was well within even his own alleged forty-five day retention period for 911 audio recordings. (Apx. 18, Pgs. 101-102).

The above untruths regarding the availability of the audio recordings of Elliott's calls to 911 make it glaringly clear that Sgt. Hanus and the prosecutor went to great lengths to ensure that the jury would never have an opportunity to hear the verbatim, contemporaneously recorded, audio version of Elliott's calls to 911 that showed his peaceful intentions.

C. PETITIONER'S TRIAL PROCEEDINGS AS ELUCIDATED BY THE DISTRICT COURT

According to the trial testimony of prosecution witnesses, Elliott arrived at the Next Level bar with Lynn Nelson (a male) and Antoinette Jones-Winn. Elliott is a photographer and was taking pictures and distributing business cards inside the bar. At some point Elliott either dropped his glasses or set them on the bar and went to the dance floor. Green handled the glasses, and when Elliott saw this, words were exchanged and a fight between the two men

ensued. Green got the better of Elliott, and Green was on top of Elliott and punching him in the face. Security guards grabbed both men and removed them from the bar. This occurred near 2:00 am.

Green was subsequently allowed back in the bar. Several witnesses noticed Elliott sitting in his truck in front of the bar. Nelson went outside to talk to Elliott and advised him the bar was owned by Green's family and that he should leave.

Sometime after 3:00 a.m., Green and Tyner came out of the bar and walked towards a parked bus. Bobbie Sparks was the bus driver. As Green and Tyner were standing outside the bus talking with Sparks, Elliott was seen revving his engine, turning the corner, and then hitting both Green and Tyner with his vehicle and striking the bus. Sparks testified that Green and Tyner first tried to ask him a question from the closed door of his bus, and then walked around to his street-side window when they were struck by the truck. Sparks testified that the force of the impact pushed him out of his seat and into the aisle of the bus.

Witnesses saw that Tyner was stuck under the truck as Elliott drove away. Elliott eventually struck a curb, freeing Tyner from under his vehicle. Green was laying in the street in front of the bus. Bar patrons Willie Webb and Tniesha Green (decedent's sister) identified Elliott as the driver of the truck.

Samuel McCree, who was driving in the area, testified that he saw Elliott at a traffic light. McCree flashed his lights at Elliott to signal that Elliott's headlights were off. McCree saw Green and Tyner walking on the sidewalk at the same time Petitioner was stopped at the traffic light. McCree thought Green and Tyner were crossing the street in front of a parked bus. McCree saw Elliott accelerate from the light and strike the bus. McCree stopped to make sure the bus driver was okay and then noticed Green on the

ground in front of the bus. McCree called 911.

Elliott testified in his own defense. He testified that he had been assaulted by Green and Tyner at the bar. Green snatched the glasses from his face, and Tyner tried to take his camera. After the two men assaulted him, he was told to leave the bar.

Elliott testified that while he waited in his truck about eight people including Green and Tyner exited the bar, surrounded his truck and started to curse at him. Jones-Winn similarly described Elliott's truck being surrounded and Petitioner's camera being taken from the truck. Elliott testified that he called 911 to report the robbery, and he waited as instructed by the 911 operator for police to arrive. While he was waiting, 1 1/2 blocks away from Next Level where he had retreated to (Apx. 7), a bus parked in front of him. Elliott then saw Tyner approaching his truck walking in the street. Elliott was afraid that Tyner was armed, so he pulled out of his parking space, sideswiped the bus, and drove away. Elliott turned himself into police six weeks later when he learned he was accused of hitting two people with his truck.

Petitioner introduced 911 call records showing that he did, in fact, call 911 six times, and that he reported an armed robbery. The records documented the time Elliott's 911 calls were made, that they were made from Elliott's cell phone, and Elliott's location when he made the calls. Elliott's final call to 911 was made at 3:09 am. The calls reporting the hit and run came in at 3:16 am. See (Apx. 2, Pgs. 2-5).

During deliberations the jury requested, inter alia, the CAD records of Elliott's calls to 911. (Apx. 19). Based on the above evidence, the jury found Elliott guilty of the lesser offenses of second-degree murder, see MCL § 750.317; and felonious assault, see MCL § 750.82. Elliott was sentenced to concurrent terms of 27 to 50 years for the murder conviction and 2 to 4 years for the assault conviction.

D. ARGUMENT

This case presents precisely the type of evidence withholding that this Court has consistently recognized in it's Brady jurisprudence as a violation of an accused's right to a fair trial mandated by the Due Process Clause.

1. Procedural Default Of Question One.

To the extent this Court agrees with the courts below, that Elliott's Brady claim is procedurally defaulted -- because appellate counsel ignored the overwhelming record support that a Brady violation had taken place: this Court has held that the suppression and materiality elements of a Brady claim mirror the "cause and prejudice" elements of the procedural default analysis. Therefore, Elliott's showing that a Brady violation did in fact occur would excuse procedural default of this issue. See Strickler v. Greene, 527 U.S. 263, 282 (1999) ("[c]ause and prejudice parallel two of the three componenents of the alleged Brady violation itself."); also see Banks v. Dretke, 540 U.S. 668, 691 (2004); Brady v. Maryland, 373 U.S 83 (1963).

Moreover, the state's nondisclosure of Elliott's 911 audio recordings -- after counsel's repeated requests (Apx. 9-10, 12, 16) -- support the fact that trial counsel's preparation was hindered and that in the exact circumstances of this case, counsel was prevented from "bringing to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). In some circumstances a court must simply presume prejudice resulted,

> "In certain Sixth Amendment contexts, prejudice is presumed . . . so are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." Strickland, 466 U.S. at 692 (internal citations removed)

Also see Amadeo v. Zant, 486 U.S. 214, 222 (1988) (This Court finding, the government's intentional suppression of evidence that prevented trial

counsel from making a jury challenge objection was cause to excuse procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977)).

2. The Court Of Appeals' Materiality Standard Is Inconsistent With Brady And Does Not Effectively Protect Due Process.

Despite the plain import of Elliott's 911 audio recordings showing his peaceful intentions on the night of the incident -- in a case where the prosecutor alleged premeditation, an intentional killing, an intentional attempt to kill and malice -- the Sixth Circuit Court of Appeals concluded that the state's nondisclosure of this exculpatory evidence was basically not material and/or was harmless simply because the jury acquitted on first degree murder and opted to convict on second degree murder. See (Apx. 1, Pg. 6 ¶ 1) ("The district court found that Elliott failed to establish he was prejudiced because the verdict rendered by the jury shows that it did not accept that [Elliott] acted with . . . premeditation because it only found [Elliott] guilty of second-degree murder . . ."") (internal quotations omitted).

The prelude to the Sixth Circuit's conclusion above was the erroneous belief that Elliott solely argued, in the state and federal appellate courts, that his nondisclosed 911 audio recordings would have only undercut the prosecution's premeditation theory—that is, "Elliott claims that this evidence would have undercut the prosecution's theory of premeditation." (Apx. 1, Pg. 5, ¶ 3). While the Court of Appeals was correct that Elliott argued the nondisclosed recordings' affect on not being able to undercut premeditation, that was not Elliott's sole argument. Elliott also argued,

a. That unlike the 911 Call Logs and CAD Records (Apx. 13-14) that are only cold printed documents with abbreviations, incomplete information and confusing operational code: the 911 audio recordings are an audio, verbatim version of each of Elliott's calls to 911—exactly what Elliott said to the 911 operators and exactly what the 911 operators said to him. Those conversa-

tions would have shown Elliott giving 911 operators his full name, phone number and vehicle description—information not normally given to law enforcement by a person planning to murder someone. (Apx. 20, Pgs. 15-16, 22-25)

b. That the nondisclosed recordings prevented Elliott from corroborating his trial testimony regarding his calls to 911. (Apx. 20, Pg. 24; Apx. 21, Pgs. 98-99, 105, 111, 141; Apx. 22, Pgs. 3-17).

c. That Elliott had no way to answer the deliberating jury's request for 911 information with his verbatim, audio recordings. (Apx. 19)

d. That the nondisclosed 911 recordings supported counsel's closing argument. (Apx. 23, Pgs. 14-15).

Additionally, the Sixth Circuit could have been misguided by the district court's finding that: "The record shows that while the actual recordings were not produced at trial, [the 911 Call Logs and CAD] records were presented indicating that [Elliott] made 911 calls and claimed to have been robbed." (Apx. 2, Pg. 20 ¶ 2). However, the inherent, confusing characteristics of the 911 documents are difficult for the jury to understand and easy for the prosecution to attack as in the instant case. (Apx. 24, Pg. 22, Lines 22-24). The Michigan Court of Appeals has found this type of evidence to be of no evidentiary value. See People v. Gilmore, 2015 Mich. App. LEXIS 235, 18-19 (2015) (recognizing that "it is apparent from the very brief descriptions in the 911 call logs that the logs are not full transcriptions and do not include everything said by the caller").

Even as in Elliott's case where defense counsel is forced to bring in a surrogate 911 operator/expert witness, who didn't take any of the original calls, because of nondisclosed 911 audio recordings, the Michigan Court of Appeals has equally found this type of evidence to have no value. See People v. Tinsley, 2010 Mich. App. LEXIS 2215, 4-5 (2010) (finding no value in a surrogate 911 operator's expert testimony because she was "not the 911 oper-

ator who took [the caller's 911] call, and she did not have personal knowledge of either the . . . incident or the 911 call").

Likewise, compare the trial testimony of expert 911 operator, Betty Hayes, who testified for the defense, but, because of the missing information and/or ambiguity of the D.P.D Call Logs and 911 CAD Records (Apx. 13-14) could not definitively state that it was even Elliott making the calls to 911. Therefore, Ms. Hayes' testimony offered no credible evidence to rebutt the State's case,

Ms. Hayes: MT is meet.

The Court: Does that mean that it had to be a man that was calling; it could have been a woman telling y'all to meet a man . . .

Ms. Hayes: Right, it could have been a third person.

The Court: It could have been anyone. (Apx. 21) (emphasis added).

Elliott's 911 audio recordings would not have been ambiguous. Those recordings included: Elliott's full name, phone number (954-882-1192), address, vehicle description, and an articulation -- in Elliott's own voice -- of the crimes Tyner and Green committed against him. Moreover, those recordings included the entire, verbatim conversation Elliott had with each of the 911 operators he spoke with. The 911 recordings would have provided substantive proof of Elliott's state of mind—that is, fear, frustration and want for the police to intervene, in real time as the incident was taking place.

Furthermore, as observed by the district court, during trial the prosecutor led the jury to believe that this entire incident stemmed, merely, from a bar fight that Elliott allegedly lost. See (Apx. 2, Pg. 2 ¶ 2) ("The incident stemmed from an earlier [bar] fight between [Elliott] and Green . . ."). The prosecutor never conceded that Green, Tyner and their associates robbed and assaulted Elliott. Had the jury heard the audio version of Elliott's calls to 911 reporting being robbed by two men at Next Level and found the

present sense characteristics of those calls to be credible, the prosecution's narrative of how this incident began, and for motive (Apx. 23, Pg. 8, Line 4), would have been subtantively changed in Elliott's favor. That is, instead of the prosecution being able to assert to the jury that Elliott was the aggressor, Id. at Pgs. 8-9), she would of had to defend against Green and Tyner robbing and assaulting Elliott. Stated another way, Elliott's nondisclosed 911 audio recordings "could reasonably be taken to [have] put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995); also see United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000)("A 911 call is one of the most common -- and universally recognized -- means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help"); United States v. Drake, 456 F.3d 771, 775 (7th Cir. 2016)("[W]e therefore presume the reliability of an eyewitness 911 call reporting an emergency situation . . . particularly when the caller identifies [their self]").

Moreover, the summations of both the prosecutor and defense counsel made reference to Elliott's 911 calls but in markedly antithetical arguments,

a. The prosecutor urged the jury, through implication, to disbelieve that Elliott even called 911: "He says he's trying to call 911." (Apx. 23, Pg. 22). Also, the prosecutor asked the jury: "Do you believe that [Elliott] honestly and reasonably believed that he was fearful for his life . . . [t]hink about the testimony of [Elliott] . . . you'll have to judge the credibility." Id., at Pg. 9. These are issues and questions that could have been resolved in the affirmative for Elliott by his contemporaneously recorded 911 calls that were in his own voice and could have given the jury an informed view of Elliott's peaceful state of mind. As pointed out by this Court, "a jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269 (1959). Surely,

such a recognition by this Court is far more relevant when the witness being assessed for truthfulness is the defendant.

The Fist Circuit Court of Appeals reversed a defendant's conviction in the face of similar prosecutorial misconduct. In doing so, the first Circuit noted that capitalizing on suppressed evidence created a "double-acting prosecutorial error." United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993).

When prosecutors exploit suppressed evidence in their closing arguments, it proves the evidence's materiality. After all, closing argument time is precious: prosecutor's use it to emphasize key points. Here the prosecutor continued to place doubt in the jury's minds by implying that Elliott had not called 911——that is, had no peaceful intentions and instead wanted to kill Green and Tyner, an argument that worked only because the prosecutor hid key evidence—Elliott's 911 audio recordings. When as here, the prosecution capitalizes on suppressed evidence with misleading arguments, reversal is warranted. Just as in Udechukwu, the state failed to "communicate salient information" that it had an obligation to disclose and then made "a deliberate insinuation that the truth [was] to the contrary." Id., 11 F.3d at 1106.

b. During summation, defense counsel stated to the jury: "In [Elliott's] mind he thought what you should do is call the police. He did that. He retreated . . . he tells the police . . . I'm the one in the black F 150 . . . I'm calling the police six times." (Apx. 23, Pg. 17, Line 3). Counsel went on to say: "Just going to sit and wait on the police." Id., at Pg. 19. And finally, just before concluding, defense counsel told the jury: "[Elliott] calls the police six times." Id., at Pg. 21.

Defense counsel's closing argument makes clear that her diligent pretrial efforts to obtain Elliott's 911 audio recordings were specifically meant to corroborate Elliott's defense——that is, Elliott had no state of mind to harm or kill Tyner and Green; that Elliott was seeking a peaceful resolution; and

that Tyner and Green were only struck, accidentally, as they approached the location where Elliott retreated to wait for the police, and Elliott fled what he feared would be an armed assault and/or carjacking. (Apx. 2, Pg. 4: Apx. 23, Pgs. 20-21).

The jury hearing Elliott's numerous requests for the police to respond and his panicked voice on the 911 audio recordings could have reasonably influenced the entire jury, some jurors or a juror that Elliott was in a panicked state of mind, that he had no intent to harm or kill Tyner and Green, and that they were accidentally struck as Elliott panicked and drove off. After all, it was Tyner and Green that approached Elliott's location, not vise versa.

This Court has relied on the "natural tendency to influence" standard as a definition of materiality. Neder v. United States, 527 U.S. 1, 22 n.5 (1999). See als, Escobar, where this Court noted: "[T]he term 'material' means having a natural tendency to influence, or be capable of influencing . . ." Universal Health Servs. v. United States ex rel Escobar, 136 S.Ct. 1989, 2002 (2016).

Furthermore, Elliott exercised his constitutional right to a trial by jury. It should have been the jury who resolved the materiality and worth to Elliott's defense of his 911 audio recordings, not the state and federal appellate courts, especially but not limited to, because defense counsel requested this evidence far in advance of trial. Allowing the Sixth Circuit's denial of a COA to stand would only further encourage prosecutors to withhold vital, exculpatory evidence.

In affirming the district court's denial of Elliott's habeas petition and a COA, the Court of Appeals failed to recognize and address the district court's erroneous materiality analysis, that was not in its autority. The district court speculated,

> "[T]he jury presumably found that [Elliott] drove into the victims not with premeditation and deliberation but rather only when the opportunity presented itself. Thus even if the recordings contain the information [Elliott] believes that they do, presenting them would not undermine the jury's finding that he was guilty of second-degree murder. Nothing [Elliott] told the 911 operator, and nothing the operator told him, change the fact that he hit the victims with his truck as they stood next to the bus and attempted to engage the bus driver in conversation. There is no reasonable probability, therefore, that the result of the trial would have been more favorable had the recording been presented at trial. (Apx. 2, Pgs. 20-21).

The district court went on to speculate, "[b]ased on the evidence presented at trial, even had the 911 recordings shown that [Elliott] was instructed to stay in the area, the jury was sufficient to permit the jury to find him guilty of second-degree murder." (Apx. 2, Pg. 27).

3. The Court of Appeals' Review of The District Court's Adjudication of Elliott's Brady Claim Is Inconsistent With Brady and Its Progeny.

This Court has already rejected the "sufficiency of the evidence" approach employed by the district court and affirmed by the Sixth Circuit, explicitly stating in Kyles, that materiality "is not a sufficiency of evidence test." 514 U.S. at 434. The Court disagreed with the dissent for "assum[ing] that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." Id. at 435 n. 8. The Court emphasized that the suppressed evidence was still material under Brady even if it (1) "would have left two prosecution witnesses totally untouched", (2) would not cause the jury to doubt al eyewitnesses, and (3) was "perfectly consistent" with the government's case.Id.

A court cannot substitute its judgment for what the jury may have concluded had exculpatory, inconsistent evidence been presented. "One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. See also Wearry v. Cain, 136

S.Ct. 1002, 1006 (2016)("Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury"). The district court found that Elliott's 911 "information would have potentially undermined part of the prosecutor's argument in support of premeditation and deliberation. It would have tended to negate the theory that [Elliott] waited outside the bar for a considerable period of time and all along was planning on attacking the victims." (Apx. 2, Pg. 20). This is exactly the type of Brady material Elliott should have been given an opportunity to present to the jury to negate the intent and malice elements of second-degree murder and felonious assault for which Elliott was convicted. Accordingly, contrary to the Court of Appeals affirmation of the district court's denial of Elliott's habeas petition and a COA, "it is not necessary that 'every item of the State's case would have been directly undercut if the Brady evidence had been disclosed.'" Bies v. Sheldon, 775 F.3d 386, 399 (6th Cir. 2014)(quoting Kyles, 514 U.S. at 451).

Significantly, missing from the Court of Appeals analysis was a meaningful assessment of the impact the suppressed evidence would have had on the defense's strategy at trial. That is, how Elliott never had the opportunity to show the jury a contemporaneous view of his peaceful intentions/state-of-mind through the audio of his 911 calls that were in his own voice; how Elliott's trial testimony went uncorroborated regarding his calls to 911 (Apx. 22, Pgs. 4-22); how the defense 911 expert witness testimony went uncorroborated; how Elliott's testimony that Green and Tyner robbed him went uncorroborated (Apx. 2, Pg. 4); and, how defense counsel's closing argument was left uncorroborated (Apx. 23, Pgs. 10-21).

Here the materiality of Elliott's suppressed 911 audio recordings to the defense is further underscored by defense counsel's numerous specific requests for those recordings (Apx. 9-10, 12, 16); the trial court's issuance

of a subpoena for the 911 audio recordings (Apx. 16, Pg. 4, Line 16); defense counsel's protestation to the court that: "There are some substantial discovery issues" regarding the nondisclosure of Elliott's 911 audio recordings (Apx. 16, Pg. 3, Line 20)(emphasis added); the deliberating jury's request for Elliott's 911 information (Apx. 19); and the numerous pretrial proceedings discussing the nondisclosed 911 audio recordings. (Apx. 9-10, 12, 16). Plainly, the court and counsel, knowing the exact circumstances of the instant case, did not waste their valuable time pursuing and/or attempting to resolve a piece of evidence they deemed to be immaterial to the case. Moreover, the jury's request for Elliott's 911 information during deliberations is itself: substantive proof that Elliott's calls to 911 were material to his defense. Notably, none of the courts below even bothered to mention the significance of the jury's request for Elliott's 911 CAD records as they deliberated his guilt or innocence. That is, the courts below failed to analyze how the abbreviated, confusing nature of the 911 CAD records (Apx. 14) prevented Elliott from giving the jury an exact audio reproduction of his 911 calls. Evidence the jury apparently needed to determine Elliott's guilt or innocence. (Apx. 19).

In Brady v. Maryland, this Court held that "the suppression by the prosecution of evidence favorable to the 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." 373 U.S. at 87. This Court has since instructed that favorable evidence is "material" for Brady purposes "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). In this regard, a defendant seeking relief under Brady need not show that he "more

likely than not" would have been acquitted had the withheld evidence been disclosed. Smith v. Cain, 565 U.S. 73, 75 (2012). Instead, the defendant must only show that the withheld evidence "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434.

The potential effect of the undisclosed evidence on the outcome of Elliott's trial becomes even more readily apparent when viewed in light of the quality of evidence the State presented. As stated by this Court, "if the vedict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt." United States v. Agurs, 427 U.S. 97, 113 (1976).

The State's case rested on witnesses who had significant credibility problems and/or were connected to Tyner and Green. After eleven prosecution witnesses and just three defense witnesses, the prosecution failed to convict on either of the higher charged offenses. The jury, apparently, had some doubt as to the veracity of the State's case. The withheld 911 audio recordings would have given Elliott a meaningful way to build on that evidence. The critical fact would have been bolstered by the suppressed evidence—that: Elliott's state of mind was for a peaceful outcome, and that, he had no intention to harm or kill Tyner and Green.

4. The Decision Below Conflicts With The Approach Taken By Other Courts Of Appeals.

a). The Second and Tenth Circuits have both recognized that a new trial is warranted where suppressed evidences' "exculpatory character harmonize[s] with the theory of the defense case." See United States v. Triump Capitol Grp., 544 F.3d 149, 164 (2nd Cir. 2008)(finding, suppressed consulting contract notes that bolstered the defense material); United States v. Rivas, 377 F.3d 195, 199 (2nd Cir. 2004)(finding, the nondisclosure of a critical piece of evidence supporting the defense theory required a new trial);

Dennis v. Secy. Pa. Dept. Of Corr., 834 F.3d 263 (3rd Cir. 2016)(finding a receipt that was withheld material because it coroborated the defense view of the case); Trammell v. McKune, 485 F.3d 546, 551-552 (10th Cir. 2007) (finding, an Amoco gas station receipt, withheld by the prosecution, material under Brady because it bolstered the defense and "undermine[d] confidence in the outcome of the trial.")(quoting, Kyles, 514 U.S. at 434).

b). The First and Fifth Circuits have both recognized that a new trial is warranted when the prosecution both suppresses defense-favorable evidence and capitalizes upon that concealment, and for good reason. When defense-favorable evidence is suppressed, it deprives a defendant of the opportunity to use it for whatever benefit it could yield. In that context, the materiality standard announced in Brady and its progeny make sense. But the harm to the defendant is compounded when the prosecution capitalizes on the absense of the suppressed evidence to paint a misleading picture for the jury. Capitalization is a distinct error, only possible after evidence has already been improperly suppressed. When prosecutors mislead juries with argument that could only be made in the absense of suppressed evidence, that conduct confirms the materiality of the suppressed evidence.

Based on the record as a whole, it is painfully clear that the State's failure to turn over Elliott's 911 audio recordings can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

When prosecutors intentionally suppress evidence favorable to the defense and mislead juries about that same evidence, they frustrate the search for the truth and corrupt the jury process. In this circumstance, the State should bear a heavy burden of proving that the jury's verdict is not so tainted so as to be worthy of respect.

When courts discover and acknowledge, but excuse, (Apx. 2, Pg. 20, ¶ 2), the suppression of exculpatory evidence of plain import to the defense, they endorse that conduct and erode the public's trust in the justice system. This is the quintessential case of evidence suppression; unless reversed, it makes Brady a "dead letter."

E. Factual Background Relevant to Question Two.

On August 14, 2009 just prior to surrendering himself to the Detroit Police, Elliott met with and retained attorney, Marlon B. Evans. At that meeting, Elliott described to Mr. Evans being robbed, assaulted, calling 911 several times for assistance, and being approached where he had retreated to by the perpetrators: Green and Tyner, prior to the offense for which he was charged. Elliott gave Evans copies of his Sprint PCS detailed cellular phone bill (Apx. 15) and screen-shots from his smartphone showing his calls to 911.

Prior to retaining Mr. Evans, every attorney Elliott contacted stressed the importance of immediately obtaining his 911 audio recordings from Detroit Police Communications/911 Dispatch. Elliott made Evans aware of such information and implored him to immediately obtain the 911 audio recordings of his calls. Evans assured Elliott that he'd immediately obtain the audio recordings of his 911 calls. However, as explained supra at Pg. 2, contrary to Evans' assurances: he failed to obtain the audio recordings of Elliott's calls to 911. Moreover, while Evans "said" he attempted to obtain the 911 recordings from the prosecutor through regular discovery, Evans never took any other legal steps (i.e., a subpoena) to obtain Elliott's 911 audio recordings. (Apx. 9, Pgs. 3-7; Apx. 16, Pg. 3).

F. ARGUMENT.

The Court of Appeals found that Evans' "failure to obtain the recordings was not prejudicial" and that "reasonable jurist could not disagree" based on

the premise that Elliott's 911 audio recordings were immaterial to his defense against his second-degree murder conviction. (Apx. 1, Pg. 8). However, if this Court finds that Elliott's 911 audio recordings were, in fact, material to his defense as a whole, it only follows that Evans rendered deficient performance under Strickland, when he failed to obtain and investigate the audio recordings of Elliott's 911 calls.

This Court has found that the pretrial period constitutes a "critical stage" because it encompasses counsel's constitutionally imposed duty to investigate. See Strickland v. Washington, 466 U.S. 668, 691 (1984). See also Powell v. Alabama, 287 U.S. 45, 57 (1932)(describing the pretrial period as "perhaps the most critical period of the proceedings . . . that is to say, from the time of [] arraignment until the beginning of [] trial, when consultation, through-going investigation and preparation [are] vitally important").

The justifications Evans offered for his failure to obtain Elliott's 911 recordings—that is, that the prosecutor and D.P.D told him that Elliott's 911 calls did not exist even though Evans had physical evidence that Elliott did call 911 (Apx. 9, Pgs. 3-5), betray a "startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation." See Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). Evans never obtained a subpoena for Elliott's 911 audio recordings, and furthermore, only discovered he had the wrong 911 tapes just days before trial but six months after being retained. (Apx. 9, Pgs. 3-7). Such a complete lack of pretrial preparation deprived Elliott of both his right to an "ample opportunity to meet the case of the prosecution, and the the reliability of the adversarial testing process." Kimmelman, 477 U.S. at 385.

1. Reasonable Jurist Could Disagree With The Court of Appeals Resolution of Elliott's Ineffective Assistance of Counsel Claim.

The decision below conflicts with numerous Circuit Courts of Appeal that

effective counsel has a duty under Stricland, to investigate evidence that either shows a client's factual innocence or mitigates the charges and/or punishment against the client. See,

Stitts v. Wilson, 713 F.3d 887, 895-97 (7th Cir. 2013)(trial counsel was ineffective for failing to perform any type of . . . investigation that would have undermined the prosecution's case).

Blystone v. Horn, 664 F.3d 397, 427 (3rd Cir. 2011)(trial counsel was ineffective for not conducting an adequate investigation into mitigating circumstances).

Elmore v. Ozmint, 661 F.3d 783, 851 (4th Cir. 2011)(counsel was ineffective for failing to investigate forensic evidence).

Hamilton v. Ayers, 583 F.3d 1100, 1114-1115 (9th Cir. 2009)(counsel was ineffective for failing to investigate and present the jury with mitigating evidence).

United States v. Gray, 878 F.2d 702 (3rd Cir. 1989)(deficient performance found, where counsel made no effort to locate or interview witnesses who could have supported a potentially effective defense that was unsuccessfully advanced at trial).

Lindstadt v. Keane, 239 F.3d 191, 204-205 (2nd Cir. 2001)(counsel was ineffective for failing to investigate evidence that could have corroborated the defendant's defense).

Moreover, Evans' failure to obtain and investigate Elliott's 911 audio recordings was unreasonable, especially, because Evans admits that Elliott gave him evidence of his 911 calls in the form of his Sprint PCS phone bill and screen shots from his smart phone. (Apx. 9, Pgs. 4-6). This Court has found that reasonableness turns on whether the evidence known to the attorney at the time the decision was made would have led a reasonable attorney to investigate further. See Wiggins v. Smith, 539 U.S. 510, 527 (2003).

Additionally, the Sixth Circuit failed to take into account even its own precedent when deciding that reasonable jurist could not debate the denial of a COA on Elliott's IAC claim. That is, the fact that Elliott made Evans aware, with proof, of his calls to 911 prior to trial and implored Evans to obtain those recordings for his defense should have weighed heavily on the Court of Appeal's determination whether reasonable jurist would disagree with the denial of the COA. See Couch v. Booker, 632 F.3d 241, 247 (6th Cir. 2011)("[I]t particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself asks his counsel to obtain"); als see Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992)(holding, counsel was ineffective for failing to conduct an investigation into certain physical evidence that would have undermined the prosecution's theory).

While Elliott was "not entitled to an attorney who will leave not the smallest stone unturned", since he had "but one stone, it should at least [have been] nudged." Bigelow v. Williams, 367 F.3d 562, 573 (6th Cir. 2004) (quoting Coleman v. Brown, 802 F.2d 1227, 1234 (10th Cir. 1986); se also Williams v. Taylor, 529 U.S. 362, 395 (2000)(finding both ineffectiveness and prejudice where counsel "failed to conduct an investigation"). This record shows that in the circumstances of this case, Elliott's 911 audio recordings would have been critical to his defense as explained above in his argument relevant to Question One. Clearly Mr. Evans' failure to obtain Elliott's 911 audio recordings for use at trial constituted deficient performance that prejudiced Elliott's entire defense and chances of acquittal.

G. Factual Background Relevant To Question Three: Confrontation Clause Violation.

On September 30, 2009 the prosecution called expert witness, Dr. John Scott Somerset, Assistant Wayne County Medical Examiner. Defense counsel stipulated to Dr. Somerset being an expert in forensic pathology. Dr. Somerset gave testimony regarding the autopsy he performed on the decedent, Sylvester

Green. During that testimony, Dr. Somerset read into evidence parts of a report that was prepared by the Detroit Police Department's Fatal Squad that was compiled from witness' statements, possibly prepared by an Officer Zeldman, was testimonial in nature and clearly violated the Confrontation Clause. That testimony is as follows,

Dr. Somerset: "[i]t says that Fatal Squad stated that the incident was intentional and that homicide will be handling the case." (Apx. 24, Pg. 118).

Dr. Somerset: "[i]t says that Zeldman, Z-E-L-D-M-A-N, from Fatal Squad stated that the incident was intentional and homicide will-" (Apx. 24, Pg. 121).

Counsel: "All right and without reading into the record the rest of that statement." (Apx. 24, Pg. 122)(emphasis added).

Dr. Somerset: "[a]ccording to Fatal Squad, someone there said it was intentional." (Apx. 24, Pg. 122).

The Court: "Did you get any other testimony or facts, anything other than what you just read from the Police Department?" (Apx. 24, Pg. 124)(emphasis added).

Dr. Somerset: "Correct, that someone from Fatal Squad who does that for a living says that that (sic) did all the measurements, I assume did all the measurements and their conclusion was it was a homicide." (Apx. 24, Pg. 125).

Dr. Somerset: "—and advised them that according to Fatal Squad, that the incident was intention (sic) and therefore, a homicide." (Apx. 24, Pg. 128).

Dr. Somerset: "[b]asically my position would be that they're in Fatal Squad—because they're in Fatal Squad, they must know what they were doing, you know; and if they say, you know, that it was intentional they must have something to base it on—." (Apx. 24, Pg. 129).

Dr. Somerset's repetitious out-of-court statements that Green's death was intentional and his statements regarding what investigation Fatal Squad performed to arrive at their conclusion that Green's death was intentional went far beyond explaining the reason for the autopsy or why Dr. Somerset classified Green's death as a homicide. That is, Dr. Somerset's out-of-court statements went to the very heart of the prosecution's case against Elliott. The prosecutor asserted throughout trial and closing argument that Green's death was intentional. (Apx. 23, Pgs. 5-10, 21-26).

Argument.

In finding the instant Confrontation Clause violation harmless, the Sixth Circuit, relying on the district court's findings, clearly erred when finding: "[t]he eyewitnesses testified that [Elliott] puposely accelerated his truk into the . . . victims," Elliott's "defense was basically self-defense," "[t]he medical examiner's testimony that he relied on statements that were also testified-to at trial did not increase the evidence in the prosecutor's case". (Apx. 1, Pg. 7 ¶ 1). However, such findings by the courts below imply that the courts impermissibly judged the credibility of the prosecution's witnesses by deciding which witnesses the jury believed. However, the jury's verdict does not support such findings. That is, this case was a credibility contest—there was no physical evidence proving exactly what happened. The jury's acquittal of Elliott on the first-degree murder and assault with intent to murder charges show that the jury found some witnesses and parts of the prosecution's case to be incredible,

In light of the above, this Court should consider Michigan's own caselaw that has found expert testimony, in terms of all credibility, trumps all other witnesses. See People v. Bynum, 2013 Mich. App. LEXIS 698, 9 (2013)("There is always the concern that jurors will disregard their own sense and give inordinate or dispositive weight to an expert's testimony"); People v. Beckley, 434 Mich. 691, 721-22 (1990)("To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat"); People v. Peterson, 450 Mich. 349, 374 (1995)(noting the potential that a jury might defer to an expert's seemingly objective view of the evidence").

Furthermore, Dr. Somerset's hearsay testimony could not have possibly been harmless. Dr. Somerset presented extensive hearsay testimony that can only be characterized as improperly stating, by implication, that Elliott

intentionally killed Green. Such hearsay encroached on the jury's function to determine intent. See O'Dowd v. Linehan, 385 Mich. 491, 513 (1971)(holding that it was error to allow the expert to "fix blame for the accident" because there was nothing exceptional about the evidence that required an expert opinion on the ultimate issue).

The courts below observance that the jury was instructed on self-defese and therefore Elliott's Confrontation Clause must fail because self-defense implies intent is understandable but unwarranted here. A review of the entire trial record shows that at no time did Elliott and/or his defense counsel tell the jury that Elliott intentionally struck Tyner and Green in self-defense. Instead, counsel asked for the self-defense instruction in the event the jury found that Elliott accidentally struck Tyner (the self-defense instruction was exclusive to Tyner only because Elliott testified he only saw Tyner approaching his vehicle; Apx. 2, Pg. 4 ¶ 4) as he fled what he believed was a life-threatening situation.

Additionally, the lower courts erred in finding that counsel's failure to object to the hearsay testimony was trial strategy: "defense counsel used the medical examiner's hearsay testimony to undermine the medical experts conclusion that Green's homicide was intentional." (Apx. 1, Pg. 7 ¶ 1). When Dr. Somerset began to testify from the hearsay D.P.D Fatal Squad document/s counsel instructed: "[a]ll right and without reading into the record the rest of that statement." If it was counsel's intention to allow Dr. Somerset to testify freely from the hearsay document/s then later assail his testimony, counsel would have never requested that Dr. Somerset refrain from reading the Fatal Squad document/s into the record.

Moreover, counsel's brief and uninformative statement during closing argument: "[w]hat was interesting is that Dr. Somerset told you, well Zeldman from fatal [squad] said it was intentional. That's strange, when Fatal Squad

never came neither did you hear from Zeldman", does not indicate a well-planned strategy and did very little to rebut the damning hearsay testimony Dr. Somerset spread before the jury. Given the scope of Dr. Somerset's hearsay testimony on the ultimate question—intention, the only thigs that could have possibly prevented prejudice to Elliott was an objection on Confrontation Clause grounds and a request for a curative instruction from the court.

The impact of Dr. Somerset's out-of-court statements on the jury is aparant in the conflicting verdicts. The jury found that Elliott did not attempt/intent to murder Tyner when they acquitted him of assault with intent to murder, instead convicting him of felonious assault. Tyner was equally culpable in the robbery and assault of Elliott and was struck simultaneous to Green. However, directly contrary to the verdict reached regarding Tyner, the jury found that Elliott intended to kill Green whenthey convicted him of second-degree murder. A reasonable person could find that Dr. Somerset's testimony -- replete with statements that Green's death was intentional and exclusive to Green only -- played a significant role in Elliott's second-degree murder conviction.

It also bears mentioning, Dr. Somerset's out-of-court statements did not directly implicate Elliott as the person who intentionally struck Green. However, the jury had no other choice but to believe Dr. Somerset was testifying that Fatal Squad, based on un-named witness statements, was saying that Eliott intentionally struck Green because Elliott was the only person on trial for Green's death.

This Court has found that to implicate the defendant's Confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit. See e.g., Dutton v. Evans, 400 U.S. 74, 77 (1970)(holding that, "[a] statement's implied assertion can constitute hearsay").

Similarly, in Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972) the Fifth Circuit held that the defendant's confrontation rights, as defined by Dutton, were violated because "testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged." Favre, 464 F.2d at 364. The Farve court went on to say "[a]lthough the officer never testified to the exact statements made to him by the informers, the nature of the statements . . . was readily inferred." Id., at 362. Here, Dr. Somerset was the surrogate for officer Zeldman and/or the D.P.D Fatal Squad.

1. Reasonable Jurist Could Disagree With The Court of Appeals Resolution of Elliott's Confrontation Clause Claim.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Pointer v. Texas, 380 U.S. 400, 406 (1965). This Court has held that "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and subjecting him to the ordeal of cross-examination. This the law says, he shall under no circumstances be deprived of . . . ." Mattox v. United States, 156 U.S. 237, 244 (1895).

A reasonable jurist could not disagree that Dr. Somerset's out-of-court statements from the Detroit Police Fatal Squad report were testimonial and prejudicial. Witnesses testified that after Tyner and Green were struck Elliott drove off leaving the scene. (Apx. 2, Pgs. 3-4).Therefore, when the police and/or Fatal Squad arrived at the scene and began to take witness statements, there was no ongoing emergency taking place. Any person giving information to the police in such a situation has to know that its primary purpose is for potential prosecution purposes. And there can be no doubt that those statements were extremely prejudicial.

Crawford v. Washington, 541 U.S. 36 (2004), established that only testimonial statements are subject to the Confrontation Clause. And in Davis v. Washington, 547 U.S. 813 (2006), this Court addressed "statements given to law enforcement officers" by victims of domestic abuse, while adopting the primary-pupose test for out-of-court statements. Id. at 822. Under the primary-purpose test, statements made to the police are testimonial if the primary purpose of the interrogation "is to establish or prove past events potentionally relevant to a later criminal prosecution." Id. Again, the primary purpose of the un-named witnesses who told the police/Fatal Squad that Elliott intentionally struck Tyner and Green was for Elliott's later prosecution.

Moreover, this Court held in Melendez-Diaz v. Massachusetts, 557 U.S. 35 (2009) that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "be confronted with the analysts at trial." Id. at 2532. Presumably, of course with this Court's direction, this Court would have reached the same conclusion in Melendez-Diaz if the forensic analyst became the surrogate for the police. That is exactly what took place in Elliott's case. The expert medical examiner gave in-court testimony of out-of-court statements from the Detroit Police Fatal Squad report which he was not the author of. E.g., see Commonwealth v. Avila, 912 NE2d 1014 (Mass. 2009) (holding that Crawford and Melendez-Diaz require a testifying "expert witness' testimony [to be] confined to his or her own opinions", Id. at 1232-33, and that when a forensic examiner "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about underlying factual findings of another as contained in the autopsy report", the prosecution transgresses the Confrontation Clause). Id. at 1029

Harmless Error

The state court never decided whether a Confrontation Clause error occurred, instead opting to foreclose Elliott's Confrontation Clause claim on procedural grounds because appellate counsel failed to raise the issue on direct appeal. (Apx. 6, Pg. 5). Therefore, the Sixth Circuit was not constrained by AEDPA deference as to whether there was constitutional error in the first place. See Wiggins v. Smith, 539 U.S. 510, 534 (2003)("review is circumscribed by a state court conclusion with respect to prejudice , as neither of the state courts below reached this prong of the Strickland analysis"); Rompilla v. Beard, 545 U.S. 374, 390 (2005)("Because the state courts found the representation adequate, they never reached the issue of prejudice . . ., and so we examine this element of the Strickland claim de novo").

In finding harmless error, (Apx. 1, Pgs. 6-7), the Court of Appeals could not possibly have meticulously weighed Dr. Somerset's extremely prejudicial hearsay testimony through the lens of Delaware v. Van Arsdall, 475 U.S. 673 (1986). That is, irrespective of any other testimony given at trial for the jury to weigh the crediblity of: after repeatedly telling the jury, through implication, that Elliott intentionally killed Green, Dr. Somerset went even further by basically using the credibility of his title and office -- the Wayne County Medical Examiner's Office -- to explicitly state that Elliott is guilty of intentionally killing Green, a proposition based on hearsay: "[b]asically my position would be that they're in Fatal Squad--because they're in Fatal Squad, they must know what they were doing, you know; and if they say you know, that it was intentional they must have something to base it on-." (Apx. 24, Pg. 129). Again, that's in addition to the four other times Dr. Somerset told the jury Green was intentionally killed. Id. at 118-129).

If the Sixth Circuit's denial of Elliott's COA is allowed to stand, it would set a precedent that allows expert surrogate hearsay testimony. Allowing surrogate expert hearsay investigation testimony prevents scrutiny of

the investigator's "honesty, proficiency, and methodology." Melendez-Diaz, 577 U.S. at 321. As such, the Sixth Circuit's holding below -- that the Confrontation Clause violation here was harmless -- is not just incorrect but is in stark contrast to Crawford and its progeny.

H. Factual Background Relevant To Question Four: Counsel's Failure To Object To The Confrontation Clause Violation.

At trial, Elliott was represented by attorneys: Sharon Woodside and Leland McRae. McRae conducted the cross-examination of Dr. Somerset. It is unequivocal that McRae realized the highly prejudicial nature of Dr. Somerset's hearsay testimony from the Detroit Police Fatal Squad report that said Green's death was intentional. That is, McRae requested of Dr. Somerset: "[a]ll right and without reading into the record the rest of that statement." (Apx. 24, Pg. 122). However, when Dr. Somerset continued testfying from the highly prejudicial Fatal Squad document, neither McRae nor Woodside objected. (Apx. 24, 118-128).

Counsels' failures to lodge a contemporaneous objection, assert Elliott's constitutional right to Confrontation, have the offending testimony stricken and request a curative instruction allowed Dr. Somerset to repeatedly spread before the jury that Green's death was intentional.

Statements are testimonial in nature when the primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006). "Statements taken by police officers in the course of interrogations are . . . testimonial." Crawford, 541 U.S. at 52.

It should have been obvious to defense counsel that an objection under the Confrontation Clause would be sustained. Elliott derived no possible tactical advantage from Dr. Somerset's repeated, hearsay, testimony that Green's death was intentional and the risk of prejudice was immense. (Apx. 24, Pgs.

118-128). Dr. Somerset's testimony basically pointed the finger at Elliott and said, this man intentionally killed Green—a conclusion Dr. Somerset based entirely on out-of-court statements. Even though this Court's review of "counsel's performance must be highly deferential", Strickland, 466 U.S. at 689, here, counsels' performance clearly fails to surmount such review.

The courts below findings that Elliott was not prejudiced by the admission of Dr. Someset's out-of-court statements and that counsel was not ineffective is an unreasonable application of Crawford and Strickland. The evidence of Elliott intentionally striking Green and Tyner was far from overwhelming and rested almost exclusively on incredible prosecution witness testimony. No court below took into consideration or reasoned why the jury acquitted Elliott of attempted murder, relevant to Tyner, but convicted Elliott of second-degree murder, relevant to Green, when both men perpetrated crimes against Elliott and both men were struck simultaneously. As stated above, Dr. Somerset's out-of-court statements, exclusive to Green only, had to of affected the jury's view of intent.

If counsel had of raised a Confrontation Clause violation objection and if the trial court followed this Court's controlling precedent, Dr. Somerset's hearsay statements would have been excluded and a curative instruction given. Had the jury not heard Dr. Somerset's recitation of the Fatal Squad's findings, there is a reasonable possibility that the jury would have changed it's assessment of Elliott's intent to kill Green just as it did with Tyner. Therefore, Eliott's counsel was so deficient that the attorneys were not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687.

1. Procedural Default of The Confrontation Clause Claim

A federal court may excuse procedural default and address the merits of habeas claim if the petitioner establishes "cause and prejudice" or if a

petitioner can show that the failure to consider a claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 1991).

This Court has said, to establish "cause" a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Haliym v. Mitchell, 492 F.3d 680, 690-91 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). Prejudice . . . requires a showing that errors at trial "worked to [the petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 168 (1982). Elliott has asserted ineffective assistance of counsel to excuse his procedural default where counsel failed to object to Dr. Somerset's highly prejudicial hearsay testimony. If this Court finds that Elliott's constitutional right to Confrontation was, in fact, violated, it only follows that trial counsel was ineffective for failing to object.

I. Factual Background Relevant To Question Five: Ineffective Assistance of Appellate Counsel.

On or about November 10, 2010, attorney Jonathan B.D. Simon was appointed to represent Elliott in his Right To Appeal the above named convictions. Subsequent to being appointed, yet prior to preparing Elliott's Brief on Appeal, Mr. Simon visited Elliott at the Bellamy Creek Correctional Facility in Ionia, Michigan.

Elliott, having no requisite knowledge of state and federal law, and no copy of his trial transcripts, discussed with Mr. Simon the prosecutor's withholding of his 911 audio recordings and initially retained counsel's failure to obtain those recordings. Later after becoming adjusted to prison life and going to the law library, Elliott learned of the additional constitutional violations also complained of here: Confrontation Clause violation, as well

as, counsel's failure to object to the Confrontation Clause. Mr. Simon assured Elliott he fully look into the substantive errors that took place at trial and raise them in Elliott's right to appeal but he only raised weak and/or frivolous state issues.

1. Argument.

The district court's finding, in which the Court of Appeals reviewed, stated that: "[Elliott] was represented by an experienced criminal appellate attorney, Jonathan B.D. Simon . . ." (Apx. 2, Pg. 19, ¶ 2). However, the same court found that Simon "performed deficiently by failing to investigate [a] petitioner's claim of ineffective assistance of trial counsel and by failing to request a Ginther hearing to support it." See McClellan v. Rapelje, 2011 U.S. Dist. LEXIS 63053, 19 (E.D. Mich. 2011). In finding Simon ineffective, the court stated: "[h]ad Simon conducted an adequate investigation, there is a reasonable proability that the outcome of [the] [p]etitioner's appeal would have been different." Id., at 21.

Likewise to the above, Simon's failure to properly investigate and develope the subtantive constitutional trial violations that were apparent from the record and denied Elliott a fair trial, constitutes deficient performance. That is, in comparison to the substantive constitutional trial error Elliott raised in his Motion For Relief From Judgment (Apx. 6, Pgs 1-2), the issues Simon raised in Elliott's appeal by right were weak, frivolous, improperly investigated and easily defeated. In Evitts v. Lucey, 469 U.S. 387, 396 (1985), this Court stated,

> "Nominal representation on an appeal of right, like nominal representation at trial, do not suffice to render the proceeding constitutionally adequate. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id.

Although this court has stated that appellate counsel need not raise all non-frivolous claims, Jones v. Barnes, 463 U.S. 745 (1983), Elliott's claims show

serious constitutional violations. As an appellate advocate, Simon was duty bpound to present the irregularities in the proceedings that affected the outcome as Elliott has done herein and in the courts below.

Therefore, if this Court finds that Elliott's constitutional right to due process and a fair trial were violated on any of the grounds raised herein, it only follows that appellate counsel was ineffective for failing to raise the above grounds in Elliott's right to appeal under this Court's precedent in Strickland v. Washington, 466 U.S. 668 (1984), and thus, the cause and prejudice prong would be met to excuse procedural default of the above issues. That is, this Court has found that ineffective assistance of appellate counsel constitutes good cause for having failed to raise an issue in an appeal of right. See Edward v. Carpenter, 529 U.S. 466 (2000); Murray v. Carrier, 477 U.S. 478, 488 (1986).

Conclusion

For the foregoing reasons, Elliott respectfully requests that the Petition For A Writ of Certiorari be granted.

Respectfully submitted,

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