

No. 18-5453

IN THE SUPREME COURT OF THE UNITED STATES

MARK ELLIOTT,

Petitioner,

v.

CARMEN PALMER, WARDEN,

FILED
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SUPREME COURT, U.S.

Respondent.

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

PETITION FOR REHEARING

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Petitioner In Pro Se

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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. MCL 750.316, MCL 750.83.

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.

QUESTIONS PRESENTED

QUESTION I:

In Brady v. Maryland, this Court announced that it violates due process when the prosecution fails to disclose 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.

PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Mark Elliott, in pro se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the opinion of the Sixth Circuit Court of Appeals. In support of Elliott's rehearing petition, he states the following:

STATEMENT OF FACTS

In 2009, 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 commit murder. The State alleged that Elliott struck Sylvester Green and Jimmy Tyner with his truck one block away from the Next Level Bar in downtown Detroit. Green and Tyner were seriously injured, and Green later succumbed to his injuries.

According to the trial testimony of prosecution witnesses, Elliott arrived at the Next Level Martini Bar with Lynn Nelson (a male) and Antoinette Jones-Winn. Elliott is a photographer and was taking pictures and distributing his 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 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 a.m.

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, advising him the bar was operated 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 the 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 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 Elliott stopped at the traffic light. McCree thought Green and Tyner were crossing the street in front of the 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 his glasses from his face, and Tyner tried to take his camera. After the two men assaulted Elliott, 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 cruise at him. Jones-Winn similarly described Elliott's truck being surrounded and Elliott'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, 1/2 blocks away from Next Level where he had retreated to, 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 in to police six weeks later when he learned he was accused of hitting two people with his truck.

Elliott 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 the calls were made. Elliott's final call to 911 was made at 3:09 a.m. The calls reporting a hit and run came in at 3:16 a.m.

During deliberations the jury requested, *inter alia*, the CAD Records of Elliott's calls to 911. 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.

REASONS MERITING REHEARING

GROUND I: The Prosecutor Suppressed Requested Recordings Of Elliott's 911 Audio Recordings.

The Sixth Circuit's decision is clearly contrary to Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419 (1995) and their progeny.

By denying Elliott certiorari, this Court missed the opportunity, but must now, send prosecutors and bad cops a clear message: betray Brady and/or Kyles and/or it's progeny and you will lose your ill-gotten conviction. Unfortunately, this Court's denial of certiorari sends the opposite message.

Failing to grant Elliott a writ of certiorari is not just wrong, its dangerously broad—carrying with it far reaching implications for the administration of criminal justice, and more specifically, an accused's constitutional right to due process. That is, the denial of certiorari in the instant case effectively announces to prosecutors throughout this country: when a case is close (i.e., here, the State failed to prove both higher charged offenses—signaling the jury's apparent doubt regarding the veracity of the State's evidence) its best and/or safe to hide evidence helpful to the defense as there is a fair chance reviewing courts will look the other way, as has happened here. In short, prosecutors don't care about Brady, because courts don't make them care.

Here, the Sixth Circuit and subsequently this Court have shrugged off an egregious Brady violation. By affirming the findings of the courts below that Elliott's 911 audio recordings were immaterial to his defense, the Court of Appeals totally ignored the following overwhelming record support that the 911 audio recordings were, in fact, material to Elliott's defense:

A). That prior to trial, in anticipation of a full and vigorous defense, counsel repeatedly requested the audio recordings of Elliott's calls to 911 that were contemporaneously recorded as the charged events were taking place. This request was made to the prosecutor; the lead Detroit Police homicide investigator, Sgt. Kevin Hanus; and Detroit Police Communications/911. (Apx. 2-3, 4-5).

B). The trial court's issuance of a subpoena for the 911 audio recordings. (Apx. 6, Pg. 4, Line 16).

C). Defense counsel's very frustrated protestation to the chief judge of the trial court after being given numerous false excuses from the prosecutor and Detroit Police as to why Elliott's 911 audio recordings could not be made available: "There are some substantial discovery issues -- they were the 911

calls that were not retained for reasons unknown to me." (Apx. 7, Pg. 3) (emphasis added). In granting the trial adjournment counsel was seeking, 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. 7, Pg. 5).

D). That direct and cross examination of Elliott regarding his calls to 911 fill approximately 20 trial transcript pages. (Apx. 8). Yet Elliott had no means to definitively corroborate his trial testimony with the actual 911 audio recordings of his calls.

E). During closing arguments the prosecutor urged the jury, through implication, to disbelieve that Elliott even called 911: "He says he's trying to call 911." (Apx. 9). The prosecutor went on to ask 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." (Apx. 9, Pg.). These are issues and questions that could have been resolved, in the affirmative for Elliott, with his contemporaneously recorded 911 audio recordings that were in his own voice. In other words, the prosecutor could have never made these arguments without the nondisclosure of Elliott's 911 audio recordings.

F). The nondisclosure of Elliott's 911 audio recordings prevented the corroboration of defense counsel's closing argument. 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. 10, Pg. 17). 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 had retreated to wait for the police and Elliott drove off from what he feared would be an armed assault and/or carjacking.

The jury hearing Elliott's panicked voice on the 911 audio recordings and his urgent request for police assistance could have reasonably influenced a juror, some jurors or the entire jury that Elliott was in a panicked state of mind and that he had no intent to harm or kill Tyner and Green.

G). Further underscoring the importance—that is, materiality of Elliott's 911 audio recordings to his defense is the fact that the deliberating jury, deciding Elliott's innocence or guilt, requested the 911 documents of his calls to 911 during deliberations. (Apx. 11).

However, the inherent confusing characteristics of the 911 CAD records (Apx. 12) and Detroit Police Call Log (Apx. 13) that are abbreviated and filled with operational code, while also lacking audio, could never be construed as an adequate replacement for the nondisclosed 911 audio recordings. Stated another way, the defense's pretrial request for Elliott's 911 audio recordings gave Elliott an absolute due process right to allow the jury to hear those recordings that supported his defense.

This Court's intervention, in the instant case, is greatly needed because the nondisclosure of Elliott's 911 audio recordings is not a one of. Wayne County prosecutors and the Detroit Police Department regularly withhold 911 audio recordings when they benefit the defense and the courts of review below do nothing to hold the prosecution team accountable. See e.g., People v. Al-Hisnawi-Salman, 2016 Mich. App. LEXIS 1655 (2016)(The 911 audio recordings

showing that the complainant identified the crime's perpetrator wearing a green shirt, when surveillance video showed the defendant wearing a white shirt, were not made available to defense counsel); People v. Gilmore, 2015 Mich. App. LEXIS 235 (2015)(The prosecutor failed to preserve 911 audio recordings where the caller failed to identify the defendant); People v. Pinkney, 2012 Mich. App. LEXIS 2239, 21 (2012)(Defense counsel requested "whatever 911 tapes exist". The prosecutor vowed to "follow-up" but no response was given); People v. Thomas, 2010 Mich. App. LEXIS 2293 (2010)(The court directed the prosecutor to obtain the 911 recordings of the offense and make them available to defense counsel. No response by the prosecutor was given); People v. Baker, 2010 Mich. App. LEXIS 532 (2010)(A timely request for 911 tapes was made by defense counsel but no response was given by the prosecution and the tapes were allegedly destroyed); People v. Tinsley, 2010 Mich. App. LEXIS 2215 (2010)(The prosecutor failed to obtain and/or preserve a requested 911 audio recording that failed to identify the defendant as the perpetrator); United States v. Hill, 157 Fed. Appx. 830 (6th Cir. 2005)(When defense counsel requested "any 911 tape that was made" a Detroit Police sergeant falsely informed counsel that there was no 911 tape).

However, when 911 audio tapes support the prosecution's case, the Wayne County Prosecutor's Office and the Detroit Police Department have no problem obtaining and/or making that 911 audio available for trial. See e.g., People v. Chase, 2014 Mich. App. LEXIS 1965 (2014)(The prosecutor obtained an inculpatory version of a 911 recording regarding the charged offense but failed to disclose an exculpatory portion of the 911 recording); People v. Wright, 2017 Mich. App. LEXIS 825 (2017)(A 911 recording, contemporaneously recorded as the charged offense was taking place, was admitted into evidence by the prosecutor); Davis v. Napel, 2016 U.S. App. LEXIS 21741 (6th Cir. 2016)(The prosecutor introduced a 911 recording where witnesses identified the defendant as

the shooter); People v. Thompson, 2013 Mich. App. LEXIS 116 (2013)(The prosecutor introduced 911 recordings of the dying victim); People v. Smith, 2012 Mich. App. LEXIS 2372 (2012)(The prosecutor introduced 911 recordings that corroborated the testimony of a child prosecution witness); People v. Lee, 2012 Mich. App. LEXIS 2476 (2012)(The prosecutor introduced 911 recordings to impeach the defendant's version of the charged offenses); People v. Wilson, 2012 Mich. App. LEXIS 477, 10 (2012)(The prosecutor introduced 911 recordings that "included statements made by the victim"); People v. Childs, 2011 Mich. App. LEXIS 1778 (2011)(The prosecutor introduced 911 recordings where gunshots and other noises made it probable that a shooting took place on a specific date and at a specific time that was electronically stamped on the recording); Barnes v. Warren, 2010 U.S. Dist. LEXIS 2911, 5 (E.D. Mich. 2010) (The prosecutor introduced "an audiotape of a 911 emergency call for help made by (defendant's) husband moments after (being stabbed by the defendant")); People v. Nickson, 2006 Mich. App. LEXIS 2911, 5 (2006)(The prosecutor introduced 911 recordings of the "defendant's own statements that he had stabbed and killed the victim"); People v. Pipes, 2005 Mich. App. LEXIS 1356 (2005) (The prosecutor introduced 911 audio recordings of prosecution witnesses reporting a shooting); People v. Hamby, 2005 Mich. App. LEXIS 1443, 5 (2005) (The prosecutor introduced a 911 audio recording where a prosecution witness "repeatedly called 911 because he was concerned for the victim's safety"); People v. Smart, 2003 Mich. App. LEXIS 3261, 14 (2003)(The prosecutor introduced "a 911 tape that was admitted for impeachment" of the defendant's trial testimony); People v. Crawl, 2002 Mich. App. LEXIS 3388 (2002)(The prosecutor introduced 911 recordings to rebut a defense witness' testimony)

Its reasonable to believe that if the Wayne County Prosecutor's Office has no problem obtaining 911 audio for trial, from Detroit Police Communications, that supports it's theory of the case: the prosecutor's office should

equally be able to obtain/make available 911 audio recordings that are requested by counsel and crucial to the defense.

Moreover, the numerous above cited cases where the Wayne County Prosecutor's Office regularly used 911 audio recordings to bolster it's case against criminal defendants makes the Sixth Circuit's finding that Elliott's nondisclosed 911 audio recordings were immaterial to his defense palpably implausible. It cannot be true that 911 audio recordings are material when they benefit the prosecution's case but are immaterial when they support the defense.

This is not the usual case where the prosecutor was unaware of exculpatory evidence (i.e., Elliott's 911 audio recordings) being held by the police without her knowledge. Counsel repeatedly made specific requests to the Detroit Police Department and the prosecutor for Elliott's 911 audio recordings prior to trial. Among several other untruths, the Detroit Police ("D.P.D") and the prosecutor told defense counsel that Elliott's 911 calls/recordings did not exist. (Apx. 1-5). However, D.P.D 911 CAD Records and D.P.D Call Logs unequivocally show that D.P.D Communications received and recorded Elliott's calls to 911. (Apx. 12-13, respectively).

When public officials behave with such casual disregard for their constitutional obligations and the rights of the accused, and such transgressions are acknowledged yet forgiven by the courts, the courts endorse and invite their repetition.

Brady violations have reached epidemic proportions, and the federal and reporters bear witness to this unsettling trend. See e.g., Smith v. Cain, 132 S.Ct. 627 (2012); Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009); Horton v. Maye, 408 F.3d 970 (9th Cir. 2004); Simmons v. Beard, 590 F.3d 223 (3rd Cir. 2009); D'Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008).

This Court has made clear that evidence is material under Brady, if it creates "a reasonable probability of a different result." Kyles v. Whitley, 514 U.S. 419, 434 (1995). "A reasonable probability does not mean that the defendant would more likely than not received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." Smith v. Cain, 565 U.S. 73, 75 (2012) (quoting Kyles, 514 U.S. at 434).

For the reasons articulated here, and in Elliott's original petition, it is clear that Elliott's requested, purposely nondisclosed 911 audio recordings would have provided empirical support for his defense and would have "put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

This Court must grant Elliott a writ of certiorari to make it unequivocally clear to the Detroit Police Department and Wayne County Prosecutor's Office that the insidious, recurring practice of withholding evidence favorable to the defense -- especially when as here, the evidence is repeatedly requested prior to trial -- will no longer be tolerated.

GROUND II: Whether Initially Retained Counsel Was Constitutionally Ineffective For Failing To Secure Elliott's Suppressed 911 Recordings.

The Sixth Circuit's analysis of Elliott's ineffective assistance of counsel claim is clearly contrary to Strickland v. Washington, 466 U.S. 668 (1984) and its progeny.

Strickland, commands that the "proper measure of attorney performance" is "reasonableness under prevailing professional norms." 466 U.S. at 688. Moreover, Strickland confirmed that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 691. The Strickland Court further noted that "the court should keep in

mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. at 690

ABA Guidelines, which this Court has recognized as reflecting prevailing professional norms, emphasized that "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Wiggins v. Smith, 539 U.S. 510, 524 (2003)(quoting ABA Guidelines For The Appointment and Performance of Counsel in Death Penalty Cases).

Michigan does not have the death penalty. However, the above is relevant here because Elliott was charged, *inter alia*, with first-degree murder. In Michigan, a conviction for first-degree murder carries with it a mandatory life sentence without the possibility of parole.

Here, the record reflects that Elliott informed initial counsel, Marlon B. Evans, when he was retained at the start of the judicial proceedings, that he had no intention to harm and/or kill the complainants. Elliott went on to inform Evans that he had called 911 six times requesting police assistance so that a peaceful resolution could be reached after being robbed and assaulted by the complainants and their associates. Elliott provided Evans with his Sprint PCS detailed cellular phone bill, and screen shots from his smartphone, that showed his calls to 911. Elliott implored Evans to obtain copies of his 911 audio recordings for use at trial. (Apx. 2).

At that point, had Evans obtained and served a subpoena directly upon Detroit Police Communications/911 Dispatch, instead of relying solely on the state to provide Elliott's 911 audio recordings he could have obtained those recordings. See e.g., Anderson v. Johnson, 338 F.3d 382, 392 (5th Cir. 2003) (holding that, "A trial attorney is constitutionally deficient where he has

relied exclusively on the investigative work of the State and based his own pretrial investigation on assumptions devined from a review of the State's files"). Here, the record contains no evidence of any legal means (i.e., a subpoena), other than basic discovery, Evans employed to obtain Elliott's 911 audio recordings.

Evans' failure to obtain Elliott's 911 audio recordings proved to be a fatal error that substantively doomed Elliott's defense and chances of acquittal. That is, any competent lawyer would have understood that for the State to prove the intent and premeditation elements of first-degree murder (MCL 750.316) it had to attack the credibility of Elliott's calls to 911 because they showed Elliott's peaceful intentions and lack of intent.

The record shows, as it turned out, that a core element of the State's case consisted of attacking the credibility of Elliott's calls to 911. Yet, Elliott was deprived of the exact, audio representation of his 911 calls, that could have rebutted the State's attacks, because Evans failed to obtain the 911 audio recordings.

It cannot be said that Elliott's 911 audio recordings were not crucial to his defense. Further underscoring Evans' ineffectiveness in failing to obtain Elliott's 911 audio recordings is the fact that the deliberating jury, deciding Elliott's innocence or guilt, specifically requested the 911 documents regarding Elliott's calls. (Apx. 11). However, no abbreviated, code-filled paper documents could ever replace the actual, contemporaneously recorded 911 audio recordings. (Apx. 12-13). "All it would have taken is for one juror to have struck a different balance between the competing stories." Wiggins, 539 U.S. at 537.

Evans simply had no reason to believe that obtaining and investigating Elliott's 911 audio recordings was unnecessary. Under Strickland, Evans owed Elliott a duty at least to investigate the 911 recordings to evaluate and

weigh the risk or benefits of using such evidence to defend Elliott. See Strickland, 466 U.S. at 718 ("counsel's failure to make any significant effort to find out what evidence might be garnered . . . surely cannot be described as reasonable"). Also see Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)(A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them"); Sims v. Livesay, 970 F.2d 1575, 1580-1581 (6th Cir. 1992) (holding that counsel was constitutionally ineffective for failing to conduct an investigation into certain physical evidence that would undermine the prosecution's theory).

Evans was in no position to assess the relevance and wealth of information the 911 recordings held and/or make any "strategic decisions" regarding the 911 recordings because Evans never obtained and listened to Elliott's 911 recordings, even though Elliott implored him to do so.

The Sixth Circuit has opined that this Court's precedent in Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005) require that trial counsel's "strategic choices made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of . . . evidence." Dickerson v. Bagley, 453 F.3d 690, 696 (6th Cir. 2006). The Sixth Circuit went on to state: "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Id.*, at 696.

In sum, this Court has repeatedly made clear the duty incumbent on trial counsel to conduct pretrial investigation. Clearly, Evans had a constitutional duty to obtain and investigate Elliott's 911 audio recordings. Therefore, if this Court reconsiders it's denial of certiorari and finds Elliott's 911 audio recordings were material and would have been critical to his defense, it only follows that Evans failed to follow the substantive procedural

imperatives prescribed by this Court in Strickland and that such failure denied Elliott his Sixth Amendment right to the effective assistance of counsel.

GROUND III: Whether Elliott's Confrontation Right Were Violated By The Admission Of Hearsay Testimony.

Elliott's confrontation claim is governed by Crawford v. Washington, 514 U.S. 36 (2004). In Crawford, this Court held that the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Id.*, at 53-54.

Here, the prosecution's expert medical examiner witness, Dr. Somerset, blatantly violated Elliott's constitutional right to confrontation when he testified to, clearly, testimonial hearsay statements. That is, Dr. Somerset recited the findings of a Detroit Police Fatal Squad Report that was based on the further hearsay of unnamed witnesses. That testimony is as follows,

Dr. Somerset: "it says that Fatal Squad stated that the incident was intentional and that homicide will be handling the case." (Apx. 14).

Dr. Somerset: "it says that Zeldman . . . from Fatal Squad stated that the incident was intentional and Homicide will—" (Apx. 14)

Counsel: "All right and without reading into the record the rest of that statement." (Apx. 14)

Dr. Somerset: "According to Fatal Squad, someone there said it was intentional. (Apx. 14).

The Court: "Did you get any other testimony or facts, anything other than what you just read from the Police Department?" (Apx. 14).

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. 14).

Dr. Somerset: "—and advised them that according to Fatal Squad, that the incident was intentional and therefore, a homicide." (Apx. 14).

Dr. Somerset: "Basically my position would be that they're in Fatal Squad—because they're in Fatal Squad, they mus 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. 14).

Dr. Somerset's hearsay testimony went to the very heart of the State's case against Elliott when he spoke on the ultimate issue of intent—a necessary element of Michigan's second-degree murder statute: Mich. Compiled Laws 750. 317. Elliott was convicted of second-degree murder. Therefore, the violation of Elliott's right to confrontation could not be harmless.

Dr. Somerset's hearsay testimony allowed unreasonable inference to be made by the jury that Elliott was guilty of second-degree murder on the theory of intent. When Dr. Somerset repeatedly told the jury that Elliott intentionally struck Green, a conclusion Dr. Somerset did not reach himself, Dr. Somerset basically pointed his finger at Elliott and said, he's guilty. Cf., O'Dowd v. Linehan, 385 Mich. 491, 513 (1971)(holding, 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).

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 v. Evans, 400 U.S. 74 (1970), 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." 464 F.2d at 364. Furthermore, this Court has granted certiorari and reversal for far less egregious violations of the Confrontation Clause. See Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011)(A substitute analyst from the same laboratory testified concerning the testing device and the laboratory's testing procedures).

In sum, Dr. Somerset's testimony violating Elliott's constitutional right to confrontation went to the very heart of the State's case against Elliott—that is, that Elliott intentionally struck Sylvester Green.

GROUND IV: Trial Counsel Was Ineffective For Failing To Object To The Hearsay Testimony Of Dr. Somerset And For Failing To Request A Curative Instruction.

• In Crawford v. Washington, 541 U.S. 36, 69 (2004) this Court held "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional concerns is the one the constitution actually prescribes: Confrontation"). In Mattox v. United States, 156 U.S. 237, 244 (1895) this Court found that the right to Confrontation is a right that a defendant "shall under no circumstances be deprived of . . .".

The Sixth Amendment to the Constitution provides in pertinent part "that in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. Amend. VI. This Court stated that this right is "so fundamental and essential to a fair trial, and so, to due process of law, that it is obligatory upon the state by the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 335, 340 (1963). Inherent in the right to counsel is the right to the effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335 (1980).

According to this Court, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

Here, as explained in GROUND III, Dr. Somerset's repetitious hearsay testimony that Elliott intentionally struck Green (the decedent), a conclusion Dr. Somerset did not reach himself but relied upon a Detroit Police Fatal Squad Report compiled from unnamed witness statements, clearly violated Elliott's constitutional right to confront his accusers, therefore, violating the Confrontation Clause. (Apx. 14). Furthermore, Dr. Somerset testified to what investigation Fatal Squad performed to come to their conclusion that Green's death was intentional. "This testimony was not offered merely to explain why a government investigation was undertaken or to demonstrate the effect of the out of court statements . . ." United States v. Cromer, 389

F.3d 662, 676 (6th Cir. 2004).

As stated, Dr. Somerset's hearsay testimony from the Fatal Squad report was not harmless. Co-trial counsel, Leland McRae, realized the injurious affect Dr. Somerset's hearsay testimony presented. McRae requested that Dr. Somerset refrain from reading the Fatal Squad report into the record. (Apx. 14). However, counsel's mere request had no legal bearing and Dr. Somerset continued to testify from the Fatal Squad report. (Apx. 14). Counsel was, therefore, ineffective for failing to raise a contemporaneous objection and request a curative instruction from the court.

Consequently, the jury had no other choice but to believe that Dr. Somerset was testifying that Elliott's actions were investigated and those actions intentionally caused Green's death according to the hearsay Fatal Squad report. Stated another way, Dr. Somerset effectively told the jury, - Elliott is guilty. Because of such, Dr. Somerset gave substantive, unwarranted credibility to the State's theory that Green's death was intentional. See Daly v. Burt, 613 F. Supp.2d 916, 944 (E.D. Mich. 2009) ("A knowledge of the applicable law is essential to providing effective assistance, and considering the extensive Supreme Court law discussed above, no competent attorney could have failed to recognize the Confrontation Clause violations that occurred because of the introduction of the out-of-court statements").

Counsel's failures to lodge a contemporaneous objection, assert Elliott's constitutional right to confrontation, have the offending testimony stricken and request a curative instruction to prevent Dr. Somerset's highly prejudicial hearsay from entering into evidence was "so serious as to deprive the (petitioner) of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. As a result, counsel's performance "fell below an objective standard of reasonableness. Id.

GROUND V: Appellate Counsel Was Ineffective For Failing To Raise The Above Claims On Direct Appeal.

A defendant's constitutional right to counsel encompasses the right to the effective assistance of counsel under the United States and Michigan Constitutions. U.S. Const. Am VI; Strickland v. Washington, 466 U.S. 668, 685-686 (1984); Const. 1963, art 1 subsection 20; People v. Cline, 276 Mich. App. 634, 637 (Mich. App. 2007). The right to the effective assistance of counsel at trial also applies to appellate counsel. See Evitts v. Lucey, 469 U.S. 387, 396 (1985); Carpenter v. Mohr, 163 F.3d 938, 946 (6th Cir. 1998).

As a practicing attorney representing those convicted on appeal, it's reasonable to believe that appellate counsel, Jonathan B.D. Simon, fully understood the substantive difference in showing harm to Elliott from trial error -- especially constitutional error -- on direct appeal as opposed to the heavy, if not impossible, burden Elliott would face raising such errors on collateral attack. Armed with that information, Mr. Simon unreasonably prejudiced Elliott by failing to raise the substantive claims raised herein.

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.

Elliott respectfully submits that while Mr. Simon may have advanced appellate issues, there was no legitimate or reasonable reason for failing to raise the substantive constitutional error Elliott complains of here.

In regard to GROUND I: It is well settled that the withholding of exculpatory evidence by the prosecution offends a defendant's due process rights guaranteed by the Fourteenth Amendment. U.S. Const., Am XIV; Brady v. Maryland, 373 U.S. 83, 86-87 (1963). Here, the record (Apx. 1-5) and 911 documents (Apx. 12-13) provided overwhelming evidence that a Brady violation had taken place.

Furthermore, contrary to the Sixth Circuit's suggestion that Elliott's ineffective assistance of appellate counsel claim could be defaulted, state collateral review under Mich. Court Rule 6.500 et seq, is the first opportunity for criminal defendants to raise ineffective assistance of appellate counsel. See Whiting v. Burt, 395 F.3d 602, 614 (6th Cir. 2005); Hicks v. Straub, 377 F.3d 538, 558 (6th Cir. 2004). Moreover, 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. 446 (2000); Murray v. Carrier, 477 U.S. 478, 488 (1986). The State must bear the risk of constitutionally ineffective counsel and the default must be imputed to the state. Murray, 477 U.S. at 488.

CONCLUSION

Elliott's arguments and supporting evidence in his Petition For A Writ Of Certiorari (incorporated here by reference) and his instant Petition For Rehearing raise substantive constitutional violations that denied Elliott his constitutional right to a fair trial. Elliott turned himself in to the police, peacefully, when he learned he was wanted. All Elliott asked in return was for a fair trial, which clearly he did not get. This is the last Court, in a long line of courts who have turned a blind eye to the substantive violations Elliott complains of here.

Surely, the Framers of the Constitution never imagined that one day brilliant legal minds would eviscerate its worth, meaning and protections with a myriad of procedural barriers that disproportionately negatively affect pro se litigants. Elliott is not asking this Court to fling open the prison gates and release him. Elliott is only asking this Court to grant certiorari and/or a Certificate Of Appealability so that he may subsequently be able to receive the fair trial he should have received in the first instance.

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

Respectfully submitted,

Mark G. Elliott 10/29/18
Mark G. Elliott #183252
Michigan Reformatory
1342 W. Main Street
Ionia, Michigan 48846

CERTIFICATE OF SERVICE

I, Mark Elliott, do swear that on this date, October 29, 2018, as required by Supreme Court Rule 29, I have served the enclosed Petition For Rehearing and all it's attachments on each party to the above proceeding or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the appropriate hands of a prison official for mailing in the United States mail, properly addressed to each of them with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.

The name and address of those served are as follows:

Mr. Bruce H. Edwards
Office of the Attorney General of Michigan
525 W. Ottawa, Box 30217
Lansing, Michigan 48116

I declare under the penalty of perjury that the foregoing is true and correct.
Executed on October 29, 2018

Mark G. Elliott 10/29/18
Mark G. Elliott

No. 18-5453
IN THE SUPREME COURT OF THE UNITED STATES
MARK ELLIOTT,
Petitioner,
v.

CARMEN PALMER, Warden,
Respondent.

CERTIFICATE OF GOOD FAITH

COMES NOW Petitioner, Mark Elliott, and makes certification that his petition for rehearing is presented to this Court in good faith pursuant to Rule 44 of this Court. Petitioner further states the following:

1. This Court entered its judgment denying Petitioner a Writ of Certiorari on October 9, 2018. Petitioner believes that he presents this Court with substantive constitutional, due process violations that were sanctioned by the courts below when those courts refused to grant relief. Petitioner also believes that the due process violations he has raised before this Court provide adequate grounds to justify the granting of rehearing and subsequently, certiorari in this case. That is, Petitioner believes: that based upon the Constitution; the laws and/or precedent of this Court; and the facts of this case, he is entitled to relief which has been unjustly denied him.

2. Petitioner further believes: if the Sixth Circuit Court of Appeals, as well as the federal and state courts below are continually allowed to deny relief in the face of substantial due process violations, the entire United States judicial system will crumble—just as the far-to-long-neglected infrastructure of this country has.

3. Respectfully. Perhaps the most important function of this Court is as a last check of power. This Court, therefore, has an explicit duty to rein in tyrannical investigating agencies (i.e., the police) and prosecutors who abuse

the immense power bestowed upon them, especially, when the courts below fail and/or refuse to do so. Turning a blind eye to blatant, intentional due process violations at the investigative and trial stages only emboldens those who perpetrate such misconduct to more aggressively and frequently continue down that path.

Stated another way. This Court is the last resort for many convicted and/or incarcerated Americans that have lost their constitutional rights and freedoms at the hands of overzealous police and prosecutors who have abandoned the constraints of due process to instead obtain a conviction by any means necessary. What good are constitutional protections if no court is going to enforce such protections?

Without this Court's action in cases such as the instant case, large numbers of Americans will continue to be denied their constitutional right to due process.

3. This petition for rehearing is brought in good faith and is not for delay. Moreover, this petition for rehearing is restricted to the grounds specified in Rule 44(1)(2) of this Court.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of October 2018.

Respectfully submitted,

 Mark G. Elliott 10/29/18

**Additional material
from this filing is
available in the
Clerk's Office.**