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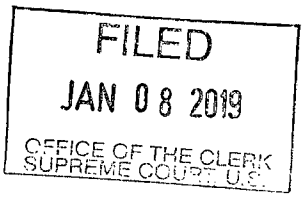

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS LEACHMAN #723742

Vs.

MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CURTIS LEACHMAN #723742
E.C. BROOKS CORRECTIONAL FACILITY
2500 SOUTH SHERIDAN DRIVE
MUSKEGON [redacted], MICHIGAN [redacted] 49444

QUESTION PRESENTED FOR REVIEW

WAS PETITIONER DENIED THE RIGHT TO COMPULSORY PROCESS WHEN THE TRIAL COURT FAILED TO GRANT FUNDS FOR A PSYCHOLOGICAL EXPERT TO AIDE THE JURY IN DETERMINING PETITIONER'S CAPABILITY TO "REASON" COMPARED TO THE USE OF "REASONABLY" IN THE MICHIGAN SELF-DEFENSE ACT MCL 780.971 ET. SEQ. AND MICHIGAN CRIMINAL JURY INSTRUCTION SECTION 7.15 AND WAS TRIAL COUNSEL INEFFECTIVE FOR NOT MAKING A SECOND REQUEST FOR FUNDS AS DIRECTED BY THE TRIAL COURT TO DO?

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List of Parties Involved Pursuant to USSC Rule 12.6

1. CURTIS LEACHMAN #723742 The Petitioner.

2. Michigan Attorney General Dana Nessel the Respondent for the State.

3. The Solicitor General the Respondent for the United States.

TABLE OF AUTHORITIES

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CITATION OF OPINION BELOW

The Michigan Court of Appeals issued an order and opinion in *People v Leachman*, 2015 Mich. App. LEXIS 10 (Jan. 13, 2015 COA #317508 Unpublished). The Michigan Supreme Court issued order denying the Petitioner Leave to Appeal in *People v. Leachman,* 498 Mich. 855 (2015)(unpublished) The United States District Court for the Southern District of Michigan Denied Petitioner's Writ of Habeas Corpus in *Leachman v. Winn*, 2017 U.S. Dist. LEXIS 205362, on December 14, 2017. The District Court issued an Amended Order Denying the same at 2018 U.S. Dist. LEXIS 9506, on January 22, 2018. Subsequently, the United States Court of Appeals for the

Sixth Circuit denied the Petitioner's appeal in *Leachman v. Winn*, 2018 U.S. App LEXIS 28781, on October 11, 2018. See Appendix A-D.

JURISDICTION

A petition for a Writ of Certiorari to review a judgment in any civil or criminal case entered by a State Court of last resort or Federal Court of Appeals is timely when filed with the Clerk of the USSC within 90-days after entry of the judgment. See USSC R. 13.1. The United States Court of Appeals for the Sixth Circuit denied the Petitioner's Writ of Certiorari in *Leachman v. Winn*, 2018 U.S. App LEXIS 28781, on October 11, 2018. Petitioner is within the 90 days allowed.

MICHIGAN STATUTES INVOLVED

§ 780.971

Short title.
Sec. 1.
This act shall be known and may be cited as the "self-defense act".

§ 780.972

Use of deadly force by individual not engaged in commission of crime; conditions.
Sec. 2.

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

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

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

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

§ 780.973

Duty to retreat; effect of act on common law.

Sec. 3.

Except as provided in section 2, this act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force.

§ 780.974

Right to use deadly force; effect of act on common law.

Sec. 4.

This act does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006.

M Crim JI 7.15

Use of Deadly Force in Self-Defense

(1) The defendant claims that [he / she] acted in lawful self-defense. A person has the right to use force or even take a life to defend [himself / herself] under certain circumstances. If a person acts in lawful self-defense, that person's actions are justified and [he / she] is not guilty of [state crime].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense. Remember to judge the defendant's conduct according to how the circumstances appeared to [him / her] at the time [he / she] acted.

(3) First, at the time [he / she] acted, the defendant must have honestly and reasonably believed that [he / she] was in danger of being [killed / seriously injured / sexually assaulted]. If the defendant's belief was honest and reasonable, [he / she] could act immediately to defend [himself / herself] even if it turned out later that [he / she] was wrong about how much danger [he / she] was in. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.

(4) Second, a person may not kill or seriously injure another person just to protect [himself / herself] against what seems like a threat of only minor injury. The defendant must have been afraid of [death / serious physical injury / sexual assault]. When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: [the condition of the

people involved, including their relative strength / whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant / the nature of the other person's attack or threat / whether the defendant knew about any previous violent acts or threats made by the other person].

(5) Third, at the time [he / she] acted, the defendant must have honestly and reasonably believed that what [he / she] did was immediately necessary. Under the law, a person may only use as much force as [he / she] thinks is necessary at the time to protect [himself / herself]. When you decide whether the amount of force used seemed to be necessary, you may consider whether the defendant knew about any other ways of protecting [himself / herself], but you may also consider how the excitement of the moment affected the choice the defendant made.

STATEMENT OF FACTS

On November 9, 2012, Leachman, then 25 years old, moved into a two-bedroom apartment in Isabella County that was leased by Valerie Sprague. The building that housed the apartment had retail space on the first floor and two apartments on the second floor. The apartments were labeled apartment A and apartment B. Leachman lived in apartment A. Leachman was permitted to rent the spare bedroom in that apartment because Sprague was injured and was temporarily unable to live there. Sprague instructed Leachman to keep the apartment clean, not to have any parties, and to stay out of her bedroom. Leachman, however, allowed his then-close friend, Brandon Harner, to live in the apartment with him and sleep in Sprague's bedroom.

On November 23, 2012, Harner arrived home in the early evening after spending time with a woman who he had been dating. Harner encountered Leachman outside, near the apartment. The two men returned to the apartment together and talked for about 25 minutes. Leachman told Harner about his plans for the evening, which included seeing a woman who Leachman had been dating. After they finished talking, Leachman left the apartment and did not return for several hours.

Once Leachman returned home, he and Harner remained in the apartment for some time. At approximately 10:00 p.m., Leachman and Harner heard a bang on the wall outside of his apartment. When Leachman checked to see what caused the noise, the hallway was empty, but a

hole had been made in the wall to the left of the apartment's front door. Leachman grabbed a bucket of drywall from his apartment, walked down to apartment B, and asked its occupant, Reyes Hinojosa Jr., who was going to fix the hole. Hinojosa appeared intoxicated. The conversation between Leachman and Hinojosa started off calm, but then escalated. There was an exchange of words, which included obscenities, and Leachman threw down the bucket of drywall. Leachman then picked up the bucket, and returned to his apartment. The interaction with Hinojosa lasted about two minutes.

Sometime after midnight on November 24, 2012, someone pounded on the door of Leachman's apartment. Leachman answered the door, seemingly upset about the banging. Hinojosa, Tyrone Stanley, and Chino Alaniz were in the hallway. Taylor Gepford and Alsina Waboose were behind them. Harner remained inside of the apartment, a couple of feet from the door. The conversation between Leachman and the three men started off calm. Leachman and Stanley then began arguing. Stanley threatened to beat up Leachman, and the two men discussed where Harner's loyalty would lie if Leachman and Stanley fought. It was Harner's impression that because Leachman allowed Harner to live in the apartment, Leachman wanted Harner to side with him. Harner, however, told Stanley and Leachman that he would not choose sides because he was friends with both of them. Gepford encouraged Leachman and Stanley to fight. The conversation lasted less than five minutes and ended without a physical altercation. After Leachman closed the door, he purportedly overheard Hinojosa, Stanley, and Alaniz discussing the need to get additional people to come to the building. Leachman told Harner that he was not a good friend because he would not fight for him. At that time, it was obvious to Harner that Leachman wanted to fight.

Approximately 15 minutes later, Leachman told Harner that he wanted to go to Michael and Jacob Partie's house to see Leachman's brothers, Ethan and Andrew. Leachman and Harner walked to the Parties's house, which was five minutes away, but Ethan and Andrew were not there.

Leachman then attempted to recruit people to come back to his apartment because he believed that he was going to get "jumped." Joe Babosh agreed to return to Leachman's apartment, so Leachman, Harner, and Babosh walked back.

Harner wanted to remove himself and Babosh from the situation and discourage Leachman from pursuing a fight. As such, once they returned to the apartment, Harner lied to Babosh and told him that there were eight people interested in fighting Leachman. Around 4:00 a.m., Babosh heard yelling and banging on the walls outside of Leachman's apartment. As a result, Babosh called Caleb Donley to pick him and Harner up. Donley arrived at Leachman's apartment shortly thereafter with Nicole Coan, Karena Tucker, and Stephanie Alwood. Donley and Alwood entered apartment A, and greeted Leachman, Harner, and Babosh. Alwood then went and spoke with Stanley who was standing outside of the door to apartment B. Donley stayed in apartment A and teased Leachman, Harner and Babosh for hiding in the apartment. Donley then joined Coan, Tucker, and Alwood, outside of apartment B and spoke with Stanley. Donley had been concerned that Leachman was going to get "jumped," but Stanley told him that he intended to fight Leachman one-on-one.

Over the course of the evening, people became aware of the possibility that Stanley and Leachman may fight, so there were many people congregating in the hallway between apartments A and B. Leachman eventually exited his apartment and he and Stanley began exchanging words from opposite ends of the hall. The situation began to escalate, so Harner briefly went to speak with Stanley, who was near apartment B, in an effort to alleviate the tension. The exchange of negative words continued between Leachman and Stanley; Stanley being more verbal than Leachman. According to Leachman, Stanley then removed a gun that he had in his waistband and handed it to Hinojosa, who pointed it at Leachman. Stanley joked with Alaniz that he needed a belt to use on Leachman, so Alaniz handed Stanley his belt. Leachman then went inside of

apartment A, purportedly to retrieve a knife for his protection. It was the impression of several witnesses that the confrontation was over at that time.

Within a minute, Leachman exited apartment A, passed the stairwell, and headed toward Stanley, who was by the door of apartment B. Leachman stopped approximately eight feet from Stanley and continued arguing with him. Stanley then approached Leachman and they continued to exchange words. Then Stanley (with a belt in hand), and Leachman (holding a knife) simultaneously advanced toward each other. Leachman then stabbed Stanley in his left armpit region, and also inflicted minor knife wounds to Stanley's left shoulder and left cheek. Leachman reported to law enforcement that he only used light force when he stabbed Stanley in the armpit and believed that he penetrated Stanley's skin an inch to an inch and a quarter. However, the forensic pathologist who performed the autopsy testified that the wound to Stanley's armpit was over four inches deep.

After the stabbing, Leachman returned to apartment A with the bloody knife in hand. Stanley returned to apartment B and collapsed outside of the bathroom. Waboose called 911 at approximately 4:21 a.m. about 10 minutes after the stabbing. Alaniz and Gepford applied pressure to Stanley's wound until Stanley stopped breathing, which was shortly before the ambulance arrived at 4:38 a.m.. The knife that killed Stanley was identified as a decorative knife belonging to Sprague that was one of a pair of knives that fit together and were kept on a stand in Sprague's bedroom.

Harner, Babosh, Alwood, Coan, Tucker, and Donley immediately left the building, and Donley drove them all to the Parties's house. Leachman arrived at the Parties's house shortly thereafter looking for Harner. Many of those at the Parties's house had become aware of the stabbing, and Leachman was told that Harner did not want to speak with him. Tucker overheard Leachman say "Where are the witnesses at? I'm going to stab them." Tucker responded by

shouting to no particular person that Leachman was going to kill them. Leachman was escorted out of the house, at which time he told Jacob Partie that Stanley was hitting him with a belt, and he did not know what else to do.

INVESTIGATION

After leaving the Parties's house, Leachman returned to his apartment building. The police were present. Leachman was detained without incident in a patrol car for questioning, and was transported to the police department. Leachman did not identify himself as the person who stabbed Stanley, but rather was detained because he lived in the building. While being questioned regarding what happened that evening, Leachman recommended to Officers Nathan Koutz and Dale Hawks, two of the investigating officers, that they look for a gun in apartment B. Police recovered parts of a plastic air soft gun from inside and around the building where Leachman lived. The gun had been separated into four parts and did not have an orange tip, which would alert the public that it was not a real firearm. After the incident, law enforcement also recovered a pair of gloves in front of 510 Main Street, which is situated between Leachman's apartment and the Parties's house

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully requests based upon the grounds hereafter, this Honorable Court **GRANT** the within writ and reverse the judgment of the court below. The petition for a Writ of Certiorari should be granted as Petitioner was denied his Federal Constitutional Rights.

GROUND ONE

PETITIONER WAS DENIED THE RIGHT TO COMPULSORY PROCESS WHEN THE TRIAL COURT FAILED TO GRANT FUNDS FOR A PSYCHOLOGICAL EXPERT TO AIDE THE JURY IN DETERMINING PETITIONER'S LEVEL OF "REASONABLENESS" WITH REGARDS TO THE MICHIGAN SELF-DEFENSE ACT MCL 780.971 ET. SEQ. AND MICHIGAN CRIMINAL JURY INSTRUCTION SECTION 7.15 AND TRIAL COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING FUNDS FOR A SECOND TIME?

Petitioner asserts based on his documented mental health history, he should have been provided a psychological expert to determine if his understanding of "reasonableness" meets the required level of "reasonableness" in the Self-Defense Act in Michigan MCL 780.972. This is based on Petitioner's right to the compulsory clause, which includes an accused's right to introduce evidence in his defense. *Washington v. Texas*, 388 U.S. 14; 97 S.Ct. 1920; 18 L.Ed.2d 1019 (1967); *US Const, Am VI; XIV*; *Olden v. Kentucky*, 488 U.S. 227; 109 S.Ct. 480; 102 L.Ed.2d 513 (1988); *California v. Trombetta*, 467 U.S. 479, 485; 104 S.Ct. 2528; 81 L.Ed.2d 413 (1974).

The United States Supreme Court "has repeatedly recognized that the right to present a complete defense in a criminal proceeding is one of the foundational principles of our adversarial truth-finding process." *Gagne v. Booker*, 606 F.3d 278, 283 (6th Cir. 2010). A defendant's right to due process in a criminal trial is, "in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294; 93 S. Ct. 1038; 35 L. Ed. 2d 297 (1973). However, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410;108 S. Ct. 646; 98 L. Ed. 2d 798 (1988). In other words, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308; 118 S. Ct. 1261; 140 L. Ed. 2d 413 (1988). The exclusion of evidence in a criminal trial "abridge[s] an accused's right to present a defense" only where the exclusion is "'arbitrary' or 'disproportionate to the purpose[ ] [it is] designed to serve.'" Id. (quoting *Rock v. Arkansas*, 483 U.S. 44, 56; 107 S. Ct. 2704; 97 L. Ed. 2d 37 (1987)). In applying the Rock standard or some earlier formulation thereof, the Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Scheffer*, 523 U.S. at 308 (citing *Rock*, 483 U.S.

at 58, *Chambers*, 410 U.S. at 302, and *Washington v. Texas*, 388 U.S. 14, 22-23; 87 S. Ct. 1920; 18 L. Ed. 2d 1019 (1967)).

Petitioner was convicted of 2nd degree Murder stemming from an incident wherein Petitioner stabbed the decedent during a confrontation. Petitioner claimed self-defense. Trial counsel made an attempt to obtain funds from the court for a psychological expert. The court denied the defense motion for the reasons he believed articulated in *People v. Shahideah*, 482 Mich. 1156 (2008), which held that a defendant seeking a privately retained psychologist "for the purpose of evaluating the merits of an insanity defense" (Id at 1157) was required to first file notice of intent to assert an insanity defense.

However, the defense **was not** trying to raise an insanity defense, and therefore *People v. Shahideah, supra,* was completely inapplicable. Defense counsel made it clear to the court during the motion for a new trial that he had not been seeking an insanity defense. Instead, counsel wanted to know how the defendant would react verses how a normal person would react (Hearing Transcript "HT" of December 20, 2012).

The trial court advised counsel that he (counsel) could send the Petitioner to the forensic center, and after that he (counsel) could **then again** ask the court for the funds for a psychological expert (Defendant's Ex Parte Motion for a Psychological Expert; Hearing Transcript "HT" of December 20, 2012, pg. 7). Needless to say, because of counsel's ineffectiveness he did not make a "second request" for the funds. Counsel reasoned in the Motion for New Trial, "and that subjecting Mr. Leachman to a competency or criminal responsibility analysis and having record of that analysis available to the prosecutor, creates a disadvantage" (Motion For New Trial Transcript of 7/19/13, pages 4-7).

In Michigan the only reason for a Court to require anyone to go to the Forensic Center would be if the individual's sanity was at issue. In this case the trial court was completely off base

for requiring counsel to send his client to the forensic center first, then ask a **second time** for funds for a psychological expert. This court clearly held in *McWilliams v. Dunn*, 137 S.Ct. 1790; 198 L.Ed.2d. 341; 2017 U.S. LEXIS 3876 (2017), that when certain threshold criteria are met, the state must provide a defendant with access to a "mental health expert who is sufficiently available to the defense and **independent from the prosecution** to effectively 'conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" *McWilliams, at 1792* [Emphasis added]. The Forensic Center in Michigan is an extended arm of the State, thus, not independent from the prosecution.

To establish whether or not Petitioner's case triggers the protections that *Ake v. Oklahoma*, 470 U.S. 68; 105 S.Ct. 1087; 84 L.Ed.2d 53 (1985), provides with regards to entitlement to a psychological expert, a look at the Self-Defense Act statute and Michigan Criminal Jury Instruction is necessary. Mich. Crim. JI §7.15 states in part:

> (3) First, at the time [he / she] acted, the defendant must have honestly and **reasonably** believed that [he / she] was in danger of being [killed / seriously injured / sexually assaulted]. If the defendant's belief was honest and **reasonable**, [he / she] could act immediately to defend [himself / herself] even if it turned out later that [he / she] was wrong about how much danger [he / she] was in. In deciding if the defendant's belief was honest and **reasonable**, you should consider all the circumstances as they appeared to the defendant at the time. [**emphasis added**]

In conjunction with the jury instruction, the pertinent section included in the Self-Defense Act states:

> Sec. 2.
> **(1)** An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
> **(a)** The individual honestly and **reasonably** believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

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

See MCL 780.972. [**emphasis added**]

The insistence in both the above is, that a person has to "reasonably" believe something. But, under either predicate there is no mention of what level or capabilities the "person" must have. In other words, one would not expect a perfectly healthy adult to understand circumstances of a traumatic situation in the same way a traumatized adult might understand them.

In Michigan, courts have defined a "reasonable person" vaguely, as a comprehension of a person of ordinary intelligence. *People v. Allen*, 466 Mich 86; 643 N.W.2d 277 (2002). This begs the question, what if the person in question has less than ordinary intelligence and comprehension? What if the person a juror is told to consider does not have the same level of capabilities [as that juror] to appreciate what "reasonably" means? Would it not be prudent to have a psychological expert called to explain why the person being judged might not understand "reasonably" in the same way as the panel of jurors might understand "reasonably?"

In most cases where insanity is the defense, an expert would be called to determine if an individual understands what is taking place, and able to participate in his own defense. Although not absolute, it's nonetheless a practiced science. In cases such as this one, however, with no expert to testify about a defendant's limited ability to understand "reasonably" at the same level as a juror, or ordinary person, **the defendant is left at a complete disadvantage against the State**.

Jurors render decisions based on "their" understanding of what "reasonably" means to "them" as it pertains to the *Michigan Criminal Jury Instruction §7.15.* For example, an ordinary person might have simply tried to flee a confrontation, even when the law does not require it. Another person, who **(1)** was first hospitalized at age 11 in a psychiatric hospital **(2)** who has intermittent explosive disorder **(3)** poor organizational strategies during initial encoding of material **(4)** history of impulsivity based on his psychosocial history as well as testing **(5)** whose speed of processing is below average and; **(6)** someone with psychological and emotional factors that interfere with his daily functioning, like this Petitioner has, might understand a confrontation differently than someone without all of the above documented mental health problems.

Unfortunately this is not a circumstance like "Battered Woman Syndrome" or another accepted syndrome recognized by the judicial community that augments Self-Defense. Many States have allowed the testimony of a psychological expert. The following state appellate courts have held that expert testimony on the battered woman syndrome is admissible to prove self-defense. *People v. Aris*, 215 Cal. App. 3d 1178; 264 Cal. Rptr. 167 (1989); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (cf. *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983)); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Ct. App. 1982); *Chapman v. State*, 258 Ga. 214; 367 S.E.2d 541 (1988); *Smith v. State*, 247 Ga. 612; 277 S.E.2d 678 (1981); *People v. Minnis*, 118 Ill. App. 3d 345; 455 N.E.2d 209; 74 Ill. Dec. 179 (1983); *State v. Hodges*, 239 Kan. 63; 716 P.2d 563 (1986), over'd on other grounds, *State v. Stewart*, 243 Kan. 639; 763 P.2d 572 (1988); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985); *Commonwealth v. Rose*, 725 S.W.2d 588 (Ky. 1987), over'd in part, *Commonwealth v. Craig*, 783 S.W.2d 387 (1990); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989); *State v. Williams*, 787 S.W.2d 308; 1990 Mo. App. LEXIS 282 (1990); *State v. Clay*, 779 S.W.2d 673 (Mo. App. 1989) (recognizing expert testimony admissible under statute); *State v. Kelly*, 97 N.J. 178; 478 A.2d 364 (1984); *State*

v. Gallegos, 104 N.M. 247; 719 P.2d 1268 (1986); *People v. Torres*, 128 Misc. 2d 129; 488 N.Y.S.2d 358 (1985); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *State v. Moore*, 72 Ore. App. 454; 695 P.2d 985 (1985); *Commonwealth v. Stonehouse*, 521 Pa. 41; 555 A.2d 772 (1989); *State v. Hill*, 287 S.C. 398; 339 S.E.2d 121 (1986); *State v. Furlough*, 797 S.W.2d 631; 1990 Tenn. Crim. App. LEXIS 293 (Apr. 10, 1990); *Fielder v. Texas*, 756 S.W.2d 309 (1988); *State v. Ciskie*, 110 Wash. 2d 263, 751 P.2d 1165 (1988); *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984); *State v. Steele*, 359 S.E.2d 558 (W. Va. 1987). A number of state appellate courts have held such testimony to be inadmissible. *Hill v. State*, 507 So. 2d 554 (Ala. 1986) (dicta); *Fultz v. State*, 439 N.E.2d 659 (Ind. App. 1982) (court of appeals upheld trial court's refusal to admit expert testimony on facts of particular case; does not appear to establish per se rule); *State v. Necaise*, 466 So. 2d 660 (La. App. 1985); *State v. Felton*, 106 Wis. 2d 769; 318 N.W.2d 25, (App. 1981), aff'd in part, rev'd in part, 110 Wis. 2d 485; 329 N.W.2d 161 (1983); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981).

The nexus between "battered woman syndrome" and what Petitioner is asserting is the idea of a person's state of mind and ability to comprehend "reasonably." The assertion that there are only two possibilities in a particular circumstance as suggested by the Michigan's Criminal Jury Instruction §7.15 is a mere wish. There has to be a middle ground. One individual may in fact be insane, thus require psychological assistance from the court, *Ake v. Oklahoma, supra*. Another individual may be perfectly ordinary, able to function at what society deems a "normal level," and not need psychological expert assistance.

What about the third individual in our society who lingers between insanity and normalcy? The individual who has not yet digressed to insanity. How is to be said that a jury should be left to determine what is "reasonable" when they have never been through any of the experiences of mental health illnesses similar to Petitioner's. The Supreme Court acknowledged

that "there are more possible classifications of mentality than the sane and the insane." *Fisher v. United States*, 328 U.S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382 (1946). Should there not be some explanation by an expert in the field, able to testify how Petitioner's "reasonable thinking" has been effected based on his documented mental health history?

Petitioner's not attempting to introduce evidence about his ability, or lack thereof to form a specific intent. This was not a diminished capacity defense. In Michigan, the insanity defense is "an all or nothing" defense, "evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276, 283 (Mich. 2001). Petitioner's claim rests solely on if "his" ability to understand is at the same level of "reasonably" as that contained in the Mich. Crim. JI §7.15, and as that of "comprehension of persons of ordinary intelligence." *People v. Allen, supra.*

The critical issue is whether a juror sitting in judgement can actually step outside him or herself, and understand the circumstances surrounding a confrontation in the same way as Petitioner would. As recited earlier, the jury instruction reads:

> If the defendant's belief was honest and reasonable, [he / she] could act immediately to defend [himself / herself] even if it turned out later that [he / she] was wrong about how much danger [he / she] was in. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.

Certainly no lay witness would be capable of testifying with any level of reliability about what may have been "reasonably perceived" by Petitioner given his mental health status. Instead, one need look to the advisory note to FRE 702 for guidance which provides, "whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best

possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.'" [Id. Citations omitted.]

INEFFECTIVE ASSISTANCE OF COUNSEL

Standard of Review. The issue of whether trial defense counsel's performance was constitutionally deficient is governed by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446 Mich 298 (1994). To prevail on this argument, a defendant must show that trial counsel's representation fell below an objective standard of reasonableness under professional norms, that but for counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich. 281, 302–303; (2000).

Discussion. Counsel's errors are apparent from the face of the record and may be reviewed on appeal. *People v Rodriguez*, 251 Mich. App. 10, 38 (2002) Here, counsel did not make an honest attempt to take the court's advice and request funding for a psychological expert a second time. Irrespective of the trial court's misapplication of *People v. Shehideah, supra*, and lack of understanding, trial counsel still should have made a second request for funds ON THE RECORD. As the Court explained in *Cone v Bell*, 243 F3d 961, 978 (CA 6, 2001), reversed on other grounds, 535 US 685; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), "qualifies as 'clearly established Federal law'" for purposes of evaluating ineffective-assistance-of-counsel claims. *Williams v. Taylor*, 529 U.S. at 391, 120 S.Ct. 1495. Pursuant to *Strickland*, Petitioner must demonstrate that his attorneys' performances were deficient and that the deficient performances prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

"[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* A petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id. at 688, 104 S.Ct. 2052.* "Judicial scrutiny of counsel's performance must be highly deferential." *Id. at 689, 104 S.Ct. 2052.* "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101; 76 S.Ct. 158; 100 L.Ed. 83 (1955)).

A trial lawyer accused of constitutional ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer's "strategy." But the noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," *Random House Dictionary* 1298 (Rev.ed.1975), **must be reasonable**.

Counsel's error was plain and violates *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Certainly failing to make an ever important request for funds to obtain a psychological expert for his client cannot be said to have been sound trial strategy. No sound attorney would put his client's liberty on the line by failing to make such an easy request of the trial court.

Trial counsel during Petitioner's motion for a new trial admitted that he was ineffective for failing to retain a psychological expert **(7/19/13 Tr. at 3-7.)**. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted).

The constitutional right to effective assistance of counsel is inherent within a defendant's fundamental right to representation by counsel. *US Const, Am VI, XIV; Mich. Const 1963, Art 1, §17, 20*; *Powell v Alabama*, 287 US 45, 71; 53 S Ct 55; 77 L Ed 158 (1932); *Strickland v Washington*, 466 US 104 S Ct 2052; 80 L Ed 2d 674(1984); *People v Pickens*, 446 Mich 298, 303, 309; 521 NW2d 797 (1994); *Beasley v United States*, 491 F 2d 687, 696 (CA b 1974); *People v Degraffenreid*, 19 Mich App 702; 173 NW2d 317 (1969); *McMann v Richardson*, 397 US 759; 90 S Ct 1441; 25 LEd2d 763 (1970); *People v Carbin*, 463 Mich 590, 623 NW 2d 884 (2001). The right to effective assistance of counsel also applies to appellate counsel. *People v Reed*, 449 Mich 375, 378-379; 535 NW 2d 496 (1995); *Evitts v Lucey*, 469 US 387; 105 S Ct 830, 396-397; 83 L Ed 2d 821 (1985); *Maupin v Smith*,785 F 2d 135, 147 (CA 6, 1986).

Pursuant to the United States Constitution, a defense attorney is ineffective when his/her actions or omissions are not the result of "reasonable professional judgment" and when his/her performance is "deficient." *Strickland, supra, at 2064-2066.* A defendant can establish ineffectiveness under the federal standard by showing counsel's errors were so serious that he/she was not functioning as counsel guaranteed by the Sixth Amendment and the errors prejudiced the defense *Strickland, supra, at page 2064.* Prejudice to the defendant exists where "there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." *Strickland, supra, at page 2068-2069.* This is further explained in *Strickland, supra, (US pg. 695)* that a "reasonable probability" is one that undermines confidence in the outcome. In *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993) the Supreme Court said:

> "An analysis focusing solely on the outcome determination, without attention to whether the results of the proceeding was fundamentally unfair or unreliable is defective."

The importance of the ineffectiveness in this instance is that counsel deprived Petitioner of a **fair opportunity to present a defense** when counsel failed to obtain a psychological expert to conduct [a] an examination; [b] assist in evaluation; [c] preparation, and [d] presentation of that defense.

CONCLUSION

For the above reasons Mr. Leachman requests that this Honorable Court grant his Petition for a Writ of Certiorari reverse the Sixth Circuit's decision or allow the parties to submit briefs on the merits of the Sixth Circuit's decision.

DECLARATION OF SERVICE

The petitioner certify under 28 USC 1746 that a copy of this document was served to all parties by U.S. Mail.

SUBMITTED BY:

Curtis Leachman

CURTIS LEACHMAN #723742

DATED: Jan 8th, 2019