18-8374

No.

In The

Supreme Court of the United States

Naykima Tinee Hill - Petitioner

vs.

Shawn Brewer - Respondent

On Petition for a writ of Certiorari to

The United States Court of Appeals

For the Sixth Circuit

Naykima Tinee Hill
In Pro Per
3201 Bemis Road
Ypsilanti, Michigan 48197

ORIGINAL

Questions Presented for Review

I. Whether the Michigan Supreme Court was objectively unreasonable in application of harmless error analysis and made objectively unreasonable findings of fact in the light of the record?

II. Whether the failure to appoint an identification expert infringed upon the right to present a defense and denied a fair trial?

III. Whether the state's court application of Strickland v Washington was objectively unreasonable where counsel's deficiencies prevented advancing the defense and permitted introduction of inadmissable and prejudicial evidence?

IV. Whether habeas relief should have been granted upon merits review of significant and odvious issues that were meritorious and reasonably probable to have resulted in a different outcome?

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Statement of Jurisdiction

Prisoner seeks review by this court of the decision of the United States Court of Appeals for the Sixth Circuit Pursuit to 28 U.S.C. 1254 (1), where on March 22, 2018 Sixth Circuit Court of Appeals affirmed the District Court's Opinion and Order denying the Petition for Habeas Corpus.

Opinions Below

The following rulings or orders are attached:

(1) On March 22, 2018 the Sixth Circuit Court of Appeals denying Petitioner's Writ of Habeas Corpus;

(2) Opinion and order of the United States District Court, Eastern District of Michigan, Judge Judith E. Levy, denying petition but granting a certificate of Appealability, November 1, 2016;

(3) Order of the Michigan Supreme Court denying leave to appeal;

(4) Michigan Court of Apppeals order denying leave to appeaal;

(5) Trial Court Opinion denying Motion for Relief from Judgement;

(6) Michigan Supreme Court order reversing the Michigan Court of Appeals; and

(7) Michigan Court of Appeals Opinion granting a new trial.

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Constitutional Provisions Involved

United States Const. 6th Amend;

"In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confront-

ed with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Councel for his defense."

United States Const. 14th Amend;

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the 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 law."

Statement of the Case

Statement of Proceedings:

Petitioner was convicted, after jury trial of one count each of home invasion, unlawful imprisonment, extortion, and three counts of armed robbery. On December 11, 2003, she was sentenced by Judge William A. Crane to corresponding terms of 20-30 years, 14-22 years, 20-30 years and 25-60 years on the armed robbery counts.

An appeal of right was taken and the Michigan Court of Appeals reversed and remanded finding a confrintation issue was not harmless error in opinion of May 11, 2010 in docket no. 290031. The Michigan Supreme Court reversed the Michigan Court of Appeals and affirmed the convictions and sentences by order dated April 25, 2011, in docket no. 141122.

Petitioner filed a Motion for Relief from Judgment with the

trail court which was denied by Opinion and Order, July 25, 2012. Timely Motion for Reconsideration was filed and denied by Opinion and Order of October 17, 2012. Petitioner filed an application for leave to appeal those decisions and the Michigan Court of Appeals denied leave to appeal by order entered July 3, 2013. Petitioner sought leave to appeal from the Michigan Supreme Court and was denied leave to appeal by Order entered into docket no.

Petitioner filed in the District Court for Eastern Michigan seeking habeas relief and on November 1, 2016 Hon. Judith E. Levy issued an opinion and judgment denying the petition but granting a certificate of Apppealability. Petitioner sought appeal with the Sixth Circuit Court of Appeals, and on March 22, 2018, a panel issued an order affirming the Judgment of the District Court.
Statement of Facts:

On the morning of March 7, 2007, Sherry Crofoot and her 13 year old daughter, Samatha, were at their home on Cleveland Street in Saginaw. With them was Sherry's grandmother, Florence Karien. Samantha answered a knock at the door to find a black woman wearing a brown coat with a furtrimmed hood standing on the porch. The woman, who was swaying and appeared disoriented, asked to use the Crofoot's phone and for a ride, both of which Sherry refused. When Sherry attempted to close the door, the woman pushed her way in, knocking Sherry back into the room. Inside the house, the woman pinched Karien several times in the face, and then pulled Sherry into the bedroom. Grabbing a knife, the woman threatened Sherry with it and demanded money. Samantha br-

ought her Karien's purse, and some money of her own. Eventually, the woman left the home.

Michigan State Police Trooper Steven Escott was one who respondedto the incident on Cleveland Street. With his police tracking dog, he followed a trail that first led to the porch of 407 1/2 North Porter. Police later investigated the house, and recovereda brown coat with a knife in the pocket. Both the coat and the knife matched the victim's descriptions. However, no DNA was done on either one. The trail then led to a point near the corner of Holland and Bond Streets. Saginaw City police officers were responding to complaints of a "loud and boisterious" woman. The woamn in question turned out to be the petitioner, who was arrested. Before being taken to the police station, Petitioner was taken to the Cleveland Street Address, where all three victims identified her as the assailant while she was sitting in the backseat of the police car. Petitioner claimed that it was a case of mistaken identity.

ARGUMENT

1. THE MICHIGAN SUPREME COURT WAS OBJECTIVELY UNREASONABLE IN APPLICATION OF HARMLESS ERROR ANALYSIS AND MADE OBJECTIVELY UNREASONABLE FINDINGS OF FACT IN LIGHT OF THE RECORD.

Petitioner challenges her State of Michigan conviction of three counts of armed robbery, M.C.L.A.S. 750.529, and one count each of first degree home invasion, M.C.L.A.S. 750.110a(2), extortion, M.C.L.A.S. 750.213, and unlawful imprisonment, M.C.L.A.S. 750.349b.

The confrontation clause of the Sixth Amendement was designed to bar "admission of testimonial statements of a witness and

did not appear at trial unless he was unavailable to testify, and the defendent had had a prior opportunity for cross examination." Crawford v Washington, 541 U.S.36, 53-54 (2004). In writing it, the framers of the constitution wanted to ensure that "the accused has an opportunity, not only of testing the recollection and sifting the coscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge... whether he is worthy of belief." Barber v Page 390 U.S. 719, 721 (1968) (quoting Mattox v United States, 156 U.S. 237, 242-43 (1895).

When assessing violations of the confrontation clause, this Court has been less than clear as to how to evaluate the prejudice and harm the error had on the trial. Chapman v Claifornia 386 U.S. 18 (1967) which involved a violation of the Confrontation Clause-fashioned the modern harmless error rules for court, however, failed to articulate any principled means for distinguishing between errors subject to harmless error review and errors requiring automatic reversal; it merely noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

Delaware v Arsdall, 475 U.S. 673, 684 (1986) directed the confrontation clause violations were subject to harmless error, including the particial violation involved, (defendant restricted in cross-examination about a witness' agreement to testify).

Under Van Arsdall, an error is harmful in this context if the admission of eveidence in violation of the Confrontation Clause "affect(s) the reliability of the fact finding process at

trial." Supra 684. In Van Arsdall, this court declared that "the denial of the opportunity to cross-examine an adverse witness does not fit with in the limited category of constitutional errors that are deemed prejudicial in every case." 475 U.S. at 682. Van Arsdall, was issued prior to Crawford v Washington, 541 U.S. 36, 53-54 (2004). The violation at issue in Van Arsdall was a particial violation as not all cross-examinations concerning the matter at issue was denied.

Petitioner submits that under the standards applicable to nonstructural errors, no fair minded jurist could agree with the Michigan Supreme Court majority where it is painfully odvious that at the addition of the hearsay had a substantial and injurious effect on the verdict.

The habeas question raised is whether the introduced unconstitutional evidence "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v United States, 328 U.S. 750, 776 (1946).

Although Brecht is a preAEDPA case, this court has subsequently held that the Brecht test "subsumes" the AEDPA requirements such that a formal application of both tests is unnecessary. Fry v Pliler, 551 U.S. 112, 120 (2007). Thus the law in the Sixth Circuit is that "Brecht is always the test, and there is no reason to ask both whethere the state court "unreasonably" applied Chapman under the AEDPA and, further, whether the constitutional error had a substantial and injurious effect on the jury's verdict." Ruelas v Wolfenbarger, 580 F.3d 403, 412 (6th Cir. 2009).

Furthermore, as this court has clarified, "a prisoner who seeks fderal habeas corpus relief must satisfy Brecht, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limitations imposed by AEDPA." Davis v Alayala, 135 S. Ct. 2187, 2199 (2015).

The prosecutor's case was weak, as the eyewitness identification was compromised where the police investigating one crime, arrest Petitioner in a different location, put her in the back of the police car and then drive over to the other crime scene and ask the witnesses if the person arrested and sitting in the back of the police car was the unknown assailant.

The only physical evidence recovered was a coat and knife found; however, nothing connected either the coat or the knife to Petitioner.

At trial, the prosecutor contended that a coat (that belonged to the boyfriend of a Ms. Sistrunk and, on occasion was worn by Ms. Sistrunk), was actually the coat used by the Petitioner while committing the alleged crimes.

The prosecutor had no proof of the connection between the coat and Petitioner and manufactured one by hearsay that denied confrontation when asking the detective to tell the jury what the non-testifying Ms. sistrunk had told him:

"Sistrunk states earlier that Hill came by her house and had dinner with them. When asked about what (Hill) was wearing, Sistrunk described a brown hooded coat with fur around it saying, "It looks just like mine, but real dirty." (T IV, 76).

The prosecutor continued and asked the detective whose coat Ms. Sistrunk was talking about and the detective replied: "The

one Ms. Hill was wearing." (T IV, 78)

The state courts had no disagreement that a constitutional error occurred at trial, involving introduction of hearsay statements by a declarant who had not appeared at trial and was not subject to confrontation.

The Michigan Court of Appeals correctively identified and applied the harmless error standard and found the confrontation violation was not harmless error:

> "In order to demonstrate that a preserved constitutional error in a criminal case was harmless, the prosecutor bears the burden of demonstrating beyond a reasoable doubt that the error did not affect the outcome of the trial. People v Smith, 243 Mich App 657, 690; 625 NW2d 46 (2000). The prosecutor has not done so. Nor are we able to conclude, after examining the record, that the error was harmless beyond a reasonable doubt. The evidence against defendant consisted of the testimony of the three victims, as well as circumstantail evidence that supported the crediability of the testimony. One piece of circumstantial evidence was Sistrunk's statement, which connected the coat worn by the assailant to defendant. Without this connection, it is possible that the jury might have still credited the victim's testimony. But it is also possible that the discrepancy would have led the jury to believe that the victim had made a mistake in identifying defendant. Because we cannot say the error was harmless beyond a reasoable doubt, we reverse and remand for a new trial." (Mi Ct. App, Op., 3).

On appeal by the prosecutor, the Michigan Supreme Court reversed the Michigan Court of Appeals by way of order stating:

> "We REVERSE the judgment of the Court of Appeals in part because the admission of Jacqueline Sistrunks's out-of-court statement that she saw the defendant wearing "a brown-hooded coat with fur around it," was harmless error because it was clear beyond a reasonable doubt that the jury verdict would have been the same absent this error. People v Shepherd, 472 Mich 343, 348 (2005). The prosecutor presented eyewitness identification testimony of the three victims who each independently identified defendant as their assailant. Such identification testimony was clear and unambiguous, and occurred after each victim had a full and sustained opportunity to observe defendant duringtheir 25 to 30 minute ordeal. In addition, each victim identified the coat was the subject of Sistrunk's out-of-court statement as the one worn by the defendant during the attack. Therefore, even absent Sistrunk's out of court statement, the victims were able to connect the coat worn by their assailant to defendant. Further, two of the victim's identified the knife that was found in the pocket of the coat as the knife that was taken from their home and wielded by defendant during the attack. Accordingly, due to the substantial identification evidence, any error in the admission of Sistrunk's statement was harmless beyond a reasonable doubt." (MSC Order, 1-2).

The decision by the Michigan Supreme Court was not unanimous as justice Kelly dissented on this issue and made reference to

the actual record while determining if the error was harmless. Petitioner submits Justice Kelly's review of the record and findings made adhere to the standard of this court. When those factual findings are considered, thena any holding of harmless error would be irrational:

> "I disagree with the majority's reversal of the Court of Appeals decision to remand the case for a new trial. In my view, allowing the police officer to testify to Sistrunk's out-of-court statement was not harmless beyond a reasonable doubt. It is not clear that the jury verdict would have been the same absent this error. People v Shepherd, 472 Mich 343, 348 (2005).
>
> Sistrunk told police that defendant was wearing "a brown-hooded coat with fur around it." The majority opines that this statement was harmless in light of the three eyewitnesses who "independently identified defendant as their assailant." However, a careful review of the evidence reveals a less than airtight circumstantial case, and without this statement, the jury could have come to a different conclusion.
>
> Without Sistrunk's statement, the prosecution's case consisted primarily of: 1) the victim's identification of the defendant, 2) the fact that the dog followed a scent from the victim's house to the house where the defendant was arrested, and 3) the fact that the shoes defendant was wearing when arrested matched footprints found at the victim's house. None of this evidence is particularly compelling on its own

or without Sistrunk's statement.

First, although all three victims' did positively identify Petitioner, the circumstances of that identification were suggestive because it was done illegally. The police presented Petitioner to the victims at their home a few hours after the crime occurred, while she was seated in the back of a police car. This was an improper identification procedure as a police lineup at the station would have been more appropriate. Being in the police car suggested that Petitioner was the assailant. Before this, the only characteristics the victim had provided to the police was that the assailant was an African-American female wearing a brown hooded coat with fur who had bloodshot eyes. When Petitioner was arrested, she did not have blood shot eyes.

The police never did any DNA testing on the coat to prove whether or not it has Petitioner's DNA on it. So, the coat evidence was not really reliable.

All three testified that they did not see her hair, did not know what shade her complexion was, and that the assailant had worn a hooded coat through the entire attack. The hood covered her forehead reaching her eyebrows. The certainty of the statements is diminished by the circumstances of the identification. As the court of Appeals stated, "it is possible that the jury still might have credited the victim's testimony. But it is also possible that the discrepancy would have led the jury to believe that the victims made a mistake in identifying the defendant." People v Hill, unp-

ublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 290031).

Second, a dog tracked a scent from a victims' home to the Porter Street house and then to the Bond Street house where the defendant was arrested. Officers searched the Porter Street house where the defendant was arrested. Officers searched the Porter Street house the day of the attack and found nothing connecting the defendant with the crime. Curiously, the homeowner reported finding a coat with a knife in the pocket in the closet the next day and brought them to police. While it is possible that the police missed them, the coat was the main identifying characteristic of the attacker.

In addition, despite the fact that the dog and defendant were together in the front yard of the bond Street house, the dog never identified defendant as the source of the scent. In fact, Trooper Escott testified that he "went to the front yard to assist the officer dealing with this female." He further stated that Enzo lost the scent at the Bond Street house and was unable to pick it up again. The tracking dog was " right there" neardefendant and lost the scent.

Third, to the extent it is persuasive, defendant denied that the shoes she was wearing at the time of the arrest belonged to her, and she put them on because the police ordered her to do so.

Finally, the Court's order greatly overstates the connection between the defendant and the coat and the knife found at

the Porter Street house. There was two brown coats wi th fur around the hood. One was found at the Bond street house on the day of the crime, and the other showed up at the Porter Street house the next day, after the initial search. The coat found at the Bond Street house belonged to Sistrunk's boyfriend. It was brown leather with fur around the hood. Sistrunk's boyfriend and some other friends had traveled between the Bond Street house andthe Porter Street houses the evening before the crime.

Further clouding the accracy of the identification of the coat is the fact that the victims' initial statments varied. It was only the in-trial identification of the coat that matached. Their initial statements to the police focused primarily on the coat rather than on any of the assailant's features, and their descriptions of the coat varied from a coat with no mention of color to an olive green coat. In fact, the victim in the best position to view the assailant described the coat as a brown leather coat with fur around the hood.

The description fits the coat discovered at the Bond Street house. In addition, no other witnesses could testify to ever having seen the defendant wearing a coat matching that description. This also severly undercuts defendant's connection to the Porter Street house.

It is worth pointing out again that the standard of review for findinga constitutional error harmless is that it must be clear beyond a reasoanble doubt, that the jury verdict would have

have been the same absent the error. Neder v United States, 527 US 1, 19 (1999). The coat was the crucial characteristic's of the prosecution's case, and sistrunk's statement was the crucial place of evidence that connected all the dots.

While there is certainly evidence that implicates defendant and suggested she commited the crime, I cannot conclude that the high standard has been met, given the significance of Sistrunk's statement. Therefore, I dissent from the part of the Court's order and would affirm the Court of Appeal's decision to reverse defendant's conviction and remand the case for a new trial."

People v Hill, Kelly, J, dissent.

Both Opinions relied upon People v Shepherd, 472 Mich 343, (2005), which held:

"A constitutional error is harmless if (it is) clear beyond a reasonable doubt that a rational jury would have found the defendant guilty ansent the error." People v Mass, 464 Mich. 615, 640 n. 29, 628 N.W.2d 540 (2001), quoting Neder v United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).

As outlined above, when the entire record is considered, the eyewitnesses can be said to have identified a coat, each witness giving a different description of the coat, but the eyewitnesses could only provide generalized and vague descriptions of the coat, but the eyewitnesses could only provide only generalized and vague descriptions about the assailant. It is only when the petitioner was shown to the witnesses, already under arrest and seated in the back of a police car that Petitioner became involved, and peitioner had been arrested for something entirely different and unrelated. Apart from the inherently prejudicial identific-

ation procedure which undermines any reliability in the said identication and the only other evidence provided by the prosecutor that connected the Petitioner to the brown coat with fur trim was the hearsay statement of Ms. Sistrunk. A reasonably instructed juror would have a reasonable doubt about the identification of Petitioner based upon the circumstances presented of a highly suggestive and inherently reliable identication procedure, absent the hearsay testimony of Sistrunk. It would defy logic and reason to maintain a rational juror could make the connection and the coat beyond a reasonable doubt when the offending evidence is removed.

The District Court denied relief finding the state's court harmless error ananlysis was not objectively unreasoable. In light of Justice Kelly's dissent, a Certificate of Appealability was granted. The Sixth Circuit affirmed the District Court denial of the Petition and claimed the harmless error ananlysis was not objectively unreasonable pointing to record eveidence that witnesses identified Petitioner and the coat, Petitioner was drunk when arrested and she had blood on her pants.

Petitioner contends that the state court analysis was objectively unreasonable and was arbitrary in reversing the reasoned decision of the Court of Appeals and justifying the same by casual references to the record, that upon examination do not support the contentions made.

For example, the Michigan Supreme Court referred to the three identifications but declined to acknowledge the inherently unreliable circumstance of Petitioner as being presented to the

witnesses as an arrested person sitting in the back of the police car. In addition, the Michigan Supreme Court also ignored that the referenced coat was described as being a different coat by each of the witnesses as worn by their assailant but only the coat. One victim identified the coat that matched Ms. Sistrunk's boyfriend's coat, but could not connect the Petitioner to the coat. That sole connection came soley by way of the alledged offending statements of the non-testifying Ms. Sistrunk presented by the prosecutor through the officer over objection by the defense. No fair minded jurist could find a rational jury would convict without the critical but inadmissable evidence. No fair minded jurist would agree with the analysis or conclusion of the Michigam Supreme Court majority.

This is especially so when considering the several factors beyond reliabilty that bear on the harmlessness determination, as provided by this Court, such as the importance of the witnesses (sic) testimony in the prosecutions's case, whether the testimoney was cumulative, the presence or absence of evidence corroborating or contradicting the testimoney of the witness on material points, the extent of the cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684.

Each of the above factors predominate in favor of the Petitioner. The violation itself demonstrates the inherent unreliability of the hearsay in this case. That hearsay testimony was described by Justice Kelly as the "linchpin" of the prosecution's case. No other witness said the coat in question was worn by Pe-

titioner Hill. As demonstrated by even casual review of the available record, the prosecutor's case was weak and circumstantial.

No fair minded jurist could agree that removing the only evidence to connect Petioner to the coat in question would not have had a substantial and injurious effect on the jury's verdict.

In the least, fair minded jurists would have "grave doubt" about whether a trial error had a substantial or injurious effect upon the jury's verdict, and, therefore, habeas relief in the form of a new trial is required. O'Neal v McAninch, 513 U.S. 432 (1995).

Petitioner submits that the difference in the views between both the Michigan Court of Appeals and Justice Kelly and the Michigan Supreme Court majority is the result of the majority making unreasonable determinations of fact in light of the record and accounts for objectively unreasonable determinations of facts in light of the record and accounts for the objectively unreasonable application of harmless error as provided by this court.

Here the state court findings of fact are unreasonable where they are rebutted by clear and convincing evidence and do not support the record. Matthews v Ishee, 486 F.3d 883, 889 (6th Cir. 2007).

Both the Michigan Court of Appeals and the findings of the dissenting justice of the Michigan Supreme Court, rebutted the generalized, incomplete and extraolated findings of the Michigan Supreme Court, by setting forth clear and convincing supportive evidence from the same record.

Petitioner submits federal courts have no reason to defer to the findings of the Michigan Supreme Court where clear and convincing evidence has demonstrated the unreliability and inaccuracy of those state court findings.

Habeas relief is warranted on this issue in this case for two seperate and independent reasons.

First, is that the Michigan Supreme Court was objectively unreasonable in their harmless error annalysis to the undisputed constitutional violation. 28 U.S.C.S 2254(d)(1).

Second is that the state court made an unreasonable determination of facts in light of the record as demonstrated by the findings after extensive review of the same record by the Michigan Court of Appeals and by Justice Kelly. 28 U.S.C.S 2254(d)(2).

Another reason for this Court to grant review, is to provide clarification of whether the complete denial of the right to confrontation, as in this case, constitutes a structural error.

The court in Sullivan v Louisiana, 508 US 275 (1993) noted structural errors characterized by "consequences that are necessarily unquanifiable and indeterminate...." Supra, at 282.

Petitioner notes that since the witness was not produced and could not be confronted, the reviewing courts would be forced to engage in pure speculation as to the impact vigorous cross examination would have upon the reasonably instructed juror. As this court has indicated the rationale for presuming prejudice for structural error is the assessment of the particular effect of some errors is exceptionally difficult. United States v Marcus, 560 U.S. 258, 263 (2010).

Van Arsdall involved a limited or partial violation of the confrontation clause, not a complete denial. Since Crawford , this Court has not addressed whether all Confrontation Clause violations remain subject to some form of harmless error review. In this case there was a complete denial of that procedural safeguard as Ms. Sistrunk never testified, was not subject to cross-examination, yet her purported "testimoney" introduced as hearsay by a detective was used to convict Petitioner.

The Crawford court declined to address whatever harmless error review continued to apply to Confrontation Clause violations, noting only in a footnote that it "expressed no opinion" as to whether "the confrontation violation, if it occurred, was not harmless." 541 U.S. at 42 n.1.

In United States v Gonzalez-Lopez, 548 U.S. 140 (2006), this court compared violations of the newly informed right of confrontation with a structural defect:

"Since, it was argued, the purpose of the Confronatation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore, "indicia of reliability," the Confrontation clause was not violated. We rejected the argument...in Crawford... saying that the Confrontation Clause "commands, not that evidence be reliable, but the reliability be assessed in a particular manner: by testing in the crucial of cross examination." So also with the Sixth Amendment right to councel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided..." United States v Gonzalez-Lopez, 548 U.S. 140, 146 (2006)

The court held the denial of the right to councel of choice

was a structural defect because it defied ananlysis by harm-less error standards." supra at 148.

Petitioner's case involves a complete denial of the right of confrontation, and reversal should be automatic for being a structural error not amenable to harmless error review.

II. THE FAILURE TO APPOINT AN IDENTIFICATION EXPERT INFRINGED UPON THE RIGHT TO PRESENT A DEFENSE AND DENIED A FAIR TRIAL.

A critical and essential issue in this case was identification presented where the "eyewitnesses" were victimized by a stramger who then leaves and then these witnesses are asked hours later if the person in custody in the backseat of a police car was the assailant.

In general, some jurists would debate about whether this procedure was per se unreasonable as similiar circumstances have been held to constitute an unreliable and impermissable identification procedure that violates due process and the Unites States Constitution. Se United States v Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); Simmons v United States, 390 US 377: 88 S Ct 967; 19 L ED 1247 (1968): People v Franklin Anderson 389 Mich 155 (1973); People v Kachar, 400 Mich 78 (1977).

Where a witness was given only two people to choose from, the identification was unlawfully suggestive. Carter v Bell, 218 F3d 581 (CA 6, 2000). Here, there was only one. In Stovall v Denno, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1189 (1967), the court held that the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemened."

A defendant has a constitutional right not to be identified

through the use of suggestive or unreliable identification procedures. Simmons v Unites States, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968); People v Franklin Anderson, supra; People v Kachar, supra; US Const, Amend XIV; Const 1963, Art 1, S 17. Pretrial identification procedures violate due process where the procedures are "unnecessarily suggestive and conducive" such that they risk "irreparable mistaken identification." Stovall v Denno 388 U.S. 293, 301-302, 87 S Ct. 1967, 18 L.Ed.2d 1199 (1967).

The courts have often recogbized that the identification of a stranger, through clear and positive identication, is often incorrect, for the reasons that have been analyzed by the courts. See United States v Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1247 (1968); People v Franklin Anderson, 389 Mich 155 (1973); People v Kachar, 400 78 (1977).

In people v Franklin Anderson, supra, the court took judicial notice of the severe limitations on the ability of witnesses to accurately identify perpetrators of a crime, especially when the perpetrator is a stranger. The court held that it is a "scientifically and judicially recognized fact that there are serious limitations on the reliability of eyewitness identification of defendants." 389 Mich at 172.

It is a "scientifically and judicially recognized fact that frequently employed police and prosecution procedures often (and frequently unintentionally) mislead eyewitnesses into misidentification of the defendant." 389 Mich at 172.

In this case there was no lineup. If the identification was not going to be suppressed, the jury needed assistance in receiving and assessing identification testimony. Courts have fou-

nd expert testimony on eye witness identification of strangers to be admissible and helpful toward getting a correct and accurate assessment of the identification testimony. See United States v Smithers, 212 F 3d 306 (6th Cir. 2000); United States v Downing, 753 F2d 1224 (3rd Cir. 1985).

The right of the accussed to present a defense in a criminal trial deprives from the Compulsory Process Clause of the 6th footing than the other Sixth Amendment rights that we have previously held applicable to the states." Taylor v Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed 2d 798 (1988). In fact, "few rights are more fundamental than that of the accussed to 646 (quoting Chambers v Mississippi), 410 U.S. 284, 302, 93 S. Ct. 1038 35 L. Ed 2d 297 (1973).

As this court reiterated in United States v Scheffer, 523 U.S. 303, 308, 118 S Ct. 1261, 140 L. Ed 2d 413 (1998) (quoting Rock v Arkansas), 483 U.S. 44, 56, 107 S Ct. 2704, 97 L. Ed 2d 37 (1987), 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." See also Scheffer, 523 U.S. at 330, 118 S. Ct. 1261 (Stevens, J., dissenting) ("As the court noted today, restrictions on the defendants right to present relevant evidence... must comply with admonition in Rock...") (citations omitted).

Petitioner was appointed councel. In recognition of the right to present a defense, the State of Michigan provides that indigent defendants will be appointed an expert when a "defendant must show a nexus between the facts of the case and the need for an expert." People v Tanner, 255 Mich. App. 369, (2003).

Defense council moved for an identification expert and the trial court denied the request. Interlocutory appeal was requested and denied. No appeal was taken to the Michigan Supreme Court. On appeal the Michigan Court of Appeals did not consider this issue having granted relief for the confrontation issue. The Michigan Supreme Court did not address this issue either.

The District Court ruled the issue had been precedurally defaulted, however, the 6th Circuit disagreed and properly considered the merits of the claim considering "whether the exclusion of evidence infringes upon a "weighty interest" of the defendant in an "arbitrary or disproprortionate" manner, and, if so, whether the resulting constitutional error could be deemed prejudicial under Brecht. United States v Scheffer, 523 U.S. 303, 308 (1998); Forensic v Birkett, 501 F.3d 469, 472, 475-76 (6th Cir. 2007).

The 6th Circuit found that the Petitioner has advance a substantial right, that is to present a defense, and that the state court had acted arbitrarily. (6th Cir. Op,. 8). Relief was not granted as the error was not viewed as being prejudicial holding:

> "Here, substantial evidence indicated Hill's guilt, as described above. The evidence did not consist entirely of eyewitness identifications, see id. at 470, but also evidence such as footprints, tracking by a dog and blood. Furthermore, there was no clear indication from the jury of uncertainty about the eyewitnesses' identification of Hill. See id. at 483-84. Although the jury did send a note to the judge that it "would like some further testimony," the record does indicate that the testimony pertained to eyewitness identification, nor can that be reasonablybe assumed."

As demonstrated in the first issue, the substantial nature of the evidence against Petitioner was grossly overstated and simplistically presented by the 6th Circuit without any depth of understanding of the record, and without sufficient support from the record.

Additionally, while the 6th Circuit referred to Ferensic, the application of established law provided in Ferensic dictates a different result.

The circumstances of the case are relevantly similiar to Ferensic v Birkett, 501 F.3d 469 (6th Cir. 2007), where the failure to introduce expert witness testimony on eyewitness identication was prejudicial, despite all the other procedural safeguards provided by cross examination.

In Ferensic, the District Court noted that identiication was the only issue and under that circumstance the jury's inability to properly assess identification testimoney interfaced with the right to present a defense and as the 6th Circuit noted when affirming the granting of habeas relief: "this possibility was enough, in the district court's opinion, "to undermine confidence in the outcome (Ferensic's) trial." Supra at 474.

When finding prejudice from being deprived of expert witness the court in Ferensic set forth the basis for, finding prejudice which is applicable to Petitioner's case:

"We agree with the district court that "other means" of attacking eyewitness identification do not effectively substitute for expert testimony on their inherent unreliability. This court's decision in United States v Smithers, 212 F.3d 306 (6th Cir. 2000), provides direct support for the distr-

ict court's conclusion that the typical methods of challenging inconsistencies in the eyewitnesses testimony "were not an effective substitute" for what Dr. Shulman would have offered."

The facts are startling similiar from identification being the only issue to the denial of the motion because of being filed late - the exact same circumstances presented by the Petitioner.

Petitioner has established a substantila right, was arbitrarily denied and she was prejudiced as a result. Habeas relief is warranted. Rock, Supra, Scheffer, supra.

III. THE STATE COURT"S REFUSAL TO APPLY STRICKLAND AND THE FEDERAL COURT"S MISAPPLICATION OF STRICKLAND V WASHINGTONWAS OBJECTIVELY UNREASONABLE WHERE COUNSEL'S DEFICIENCIES PREVENTED ADVANCING THE DEFENSE AND PERMITTED INTRODUCTION OF INADMISSABLE AND PREJUDICIAL EVIDENCE.

In this case, Petitioner, through trial council requested an eyewitness identification expert be appointed, but trial council was late in filing said motion and the motion was not considered. Interlocutory appeal was filed and denied "because immediate appellate review was not deemed necessary." People v Hill, COA. 290 unpublished 5/11/2010, p.2. Application to the Michigan Supreme Court was not timely filed, as again, trial councel misunderstood the court rules and laws concerning review of the appellate courts. As the record provides, trial councel, having obtained a stay of trial proceedings to pursue relief before the Michigan Supreme Court, labored under an erroneous impression that he could still file an application beyond the 56 day jurisdictional period provided by law, opining he could file a "delayed application" to the Michigan Supreme Court. (Hrng, 7/21/2008, 4-6).

In this record, there is no dispute that councel was deficient

in not timely filing a motion for appointment of expert, as well as being deficient in not seeking pretrial relief with the Michigan Supreme Court. Appelate councel did not raise an ineffective assistance of councel claim regarding these failures to timely file on behalf of the Petitioner as further discussed in issue IV.

Neither is there any dispute that the issue of whether an eyewitness identication expert was merited has not been addressed by either the Michigan Supreme Court or the Michigan court of appeals. ("We decline to address (the trial court's denial of her motion to appoint an expert) because the trial court's reason for the denial was a lack of timeliness, and in light of our resolution of this matter, the issue is moot.") People v Hill, COA, 290031, unpublished, 5/11/2010, p.3. When the Michigan Supreme Court reversed The Michigan Court of Appeals, the basis preventing review was removed, but the issue has never been adjuicated.

Petitioner submits she was prejudiced by ineffective assistance of councel demonstrated by trial councel's conduct, including:

a) trial councel's failure to timely file motion for appointment of eyewitness identification expert;

b) trial councel's failure to seek review by the Michigan Supreme Court of denial of interlocutory appeal;

c) trial councel's incompetent decision to admit excludable prejudicial and inadmissible evidence through examination of witnesses; and,

d) cumulative effect of attorney errors on fundamental fairness of defendant's trial.

A criminal defendant is entitled to the effective assistance of councel. Strickland v Washington, 466 US 668; 10 S.Ct. 2052; 80 L Ed 2d 674 (1984); Beasley v United States, 491 F2d 687 (CA 6, 1974). US Const, Amend VI. The standard employed under Strickland asks two questions. First were the attorney's advice and ac-

tions "within the range of competence demanded of attorneys in criminal cases," or, statedly differently, were the actions and advice "reasonable under prevailing professional norms." Strickland, at 687, 688. The second question is whether the representation failing to meet these standards prejudiced the Defendant.

The claim of ineffective assistance of councel is being made on three independant and seperate levels, as well as cumulatively, as the impacted upon a fair trial as mandated by the VI Amend. U.S. Const.

Failure of defense councel to adequately investigate or present a defense constitutes inaffective assistance of councel. Sims v Livesay, 970 F.2d 1575 (6th Cir. 1992); Landers v Rees, 782 F.2d 1042 (6th Cir. 1985); Wilson V Cowan, 578 F.2d 166 (6th Cir. 1978); Beasley v United States, 491 F.2d 687 (6th Cir. 1974); United States v Porterfield, 624 F.2d 122 (10th Cir 1980); Gaines v Hopper, 575 F.2d 1147 (5th Cir. 1978); Sullivan v Fairman, 819 F.2d 1382, 1391-1392 (7th Cir. 1987). As the court held in Beasley v United States:

> "Defense councel must investigate all apparently substantial defenses available to the defendant andmust assert them in a timely manner."

As the court held in Moore v United States, 432 F.2d 730 (3rd Cir. 1970):

> "Adequate preparation for the trial may often be a more important element in the effective assistance of councel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The exercise of the utmost skill during the trial is not enough if councel has neglected the necessary investigation and preparation."

a) trial counsel's failure to timely file a motion for appointment of eyewitness identification expert:

b) trial counsel's failure to seek review by the Michigan Supreme Court of denial of interlocutory appeal:

In this case, there is no dispute that defense counsel was obligated to be aware of the relevant time periods in presenting motions and claims and failed to take timely action in filing a request for appointment of an expert. It is important to note that trial counsel acknowledged, by his conduct, to having determined, as a matter of strategy, that it was reasonably necessary and strategic to obtain any eyewitness identification expert and present that evidense to the jury as part of the defense of his client when he prepared and filed such motion, but his deficient conduct prevented to motion from being heard.

The same is true for failure to seek review by the Michigan Supreme Court where counsel states on the record that he is seeking review and obtains a stay from the trial court but then fails to take timely action based upon misunderstanding of applicable laws and rules.

Where an attorney takes action based upon erroneous understanding of the law, such conduct is viewed to meet the first prong of deficient performance as provided by Strickland, supra. Lewandowski v Makel, 949 F.2d 884 (6th Cir. 1991); United States v Gordon, 156 F3d 376 (CA 2, 1998); Beckham v Wainwright, 639 F.2d 262 (5th Cir. 1981); Bell v Lockhart, 795 F.2d 655 (CA 8, 1986); People v Sclafani, 132 Mich. App. 268 (1984), (Here, however, the advice was based not on trial strategy, but on a clear misunderstanding").

The first prong of deficient performance, Strickland v Washington, supra, is established by the record itself with respect to

the first two sub-issues, the failure to take action was not strategic, it remains to be demonstrated whether the deficiency was also prejudicial. The trial court held that there was no prejudice because the denial of the motion was not an abuse of discretion. (Op.2). Petitioner submits that it was. Initially, the motion and the appeal would have been successful and refernce is made to Issue II.

There were witnesses to be consulted and appointed available to trial councel as experts advertised such services throughout the state, including the bar journal, (for example, Steve Miller Phd, was advertising these services prior to and at the time of this case); and where was one of the premier academics in eyewitness identification misidentifications was also located in Saginaw: Francis C. Dane, who since 2002 has been the James v Finkbeiner Endowed Chair of Ethics, College of Arts and Behavioral Sciences, Saginaw Valley State University.

Petitioner submits there is no factual basis for councel's inability to obtain an expert prior to trial. The only reasonable inference where the information is readily available not accessed in a timely fashion, is negligence and failure to investigate which is deficient performance.

Petitioner submits leave would have been granted under the unique circumstances of this case when there is an objectively unreasonable application of established law with respect to identifications and appointment of expert witness. Petitioner submits there is no factual basis for counsel's inability to obtain an expert prior to trial. The only reason inference where the information is readily available and not accessed in a timely fashion is

negligence and a failure to investigate which demonstrates constitutionally defient performance.

c) Indroducing prejudicial hearsay.

There was inadmissable hearsay that was prejudicial in the form of connecting Petitioner to a coat that was found and claimed to have been seen earlier by the witness. The witness to whom this hearsay was stated, testified while the hearsay declarant did not testify. Trial councel through examination, introduced hear say statements made to the testifying witness, and then claimed the prosecutor could not do the same and further hearsay statements should be excluded. The trial court properly denied that request, as it denies due process and fair trial where the court makes unequal rulings on admissibility of evidence, It is unconstitutional to give an advantage to one side not shared by the adversary and denies due process of law. Wardius v Oregon, 412 U.S. 470; 93 S Ct. 2208; 37 L.Ed.2d 82 (1973); U.S. Const., Amend XIV.

In other words, there was no legitimate nor reasonable basis to introduce only part of a hearsay statement and expect the court to exclude portions of the same statement. There was simply no basis to explain trial councel's action other than a failure to research and prepare for trial which caused improper decision making based upon clearly erroneous understanding of applicable law. Such conduct is constitutionally deficient.

Petitioner calims that the deficient performance and resulting error was not harmless. Prejudice is seem where this inadmissible evidence was the only substantiating evidence connecting Petitioner to the charged offenses. In this case, a reasonable juror would have found Petitioner not guilty if this inadmissable evidence had

not been provided which provided a form of corraboration to the other suspect identification testimony.

The trial court opined that since the Michigan Supreme Court had held confrontation violation was harmless in light of the eyewitness identification testimony there could be no prejudice. The trial court addressed this issue in a vacuum with regard to the effect on the jury where the jury has been provided assistance for addressing identification testimony. If not relevant to this sub issue, it becomes even more apparent when evaluated for cumulative error.

Prejudice is manifest when the consideration of this issue is made in the context of a trial where identification testimony should have been suppressed, or at a minimum, the evaluation of which would be assisted with expert testimony.

Petitioner submits it was deficient performance for councel to seek to introduce only a portion of a hearsay statement and deny the prosecutor the same opportunity, blindly relying upon some unknown force, divine or otherwise, to exclude the remainder of the statement, despite the complete lack of legal authority which would prevent the remainder of a statement to be introduced to provide the jury with context. Wardius v Oregan, 412 US Const., Amend. XIV. Again, this was deficient performance based upon misunderstanding of applicable law.

d) Cumulative error

Petitioner submits that should this court not find prejudice form the individual errors, it must still review for cumulative error to determine if the combined effect of individually harmless

errors was so prejudicial as to render her trial fundamentally unfair. United States v Parker, 997 F.2d 219, 221 (6th Cir. 1993). This is so because "errors that might not be so prejudicial as to amount of deprivation of due process when considered alone... may cumulatively produce a trial setting that is fundamentally unfair." United Sates v Hernandez, 227 F.3d 686, 697 (6th Cir. 200) (Citing Walker v Engle, 703 F.2d 959, 963 (6th Cir. 1983)) (internal quotation marks omitted).

As recently observed by the 10th Circuit Court of Appeals in Hooks v Workman, 689 F.3d 1148 (10th Cir. 2012):

> "We could, as the OCCA did, resolve each of Mr. Hook's allegations of ineffective assistance on prejudice grounds. That, however would not be sufficient to dispose of the claim because a further ananlysis of "cumulative prejudice" would be necessary. See Sears, 343 F.3d at 1251 (considering the cumulative impact of prejudice "assuming that (petitioner's attorney was deficient" in two respects); Cargle v Mullin, 317 F.3d 1196, 1212 (10th Cir. 2003) ("(A) decision to grant relief on ineffective assistance grounds is a function of prejudice flowing from all of councel's deficient performance..." (emphasis added)). The cumulative-prejudice analysis is sometimes difficult to conduct because, whether we assume or determine that councel performed unreasonably, we must assess the agregate impact of these numerous errors and decide whether they collectively "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Wilson v Sirmons, 536 F.3d 1064, 1122 (10th Cir. 2008) (quoting Thornburg v Mullin, 422 F.3d 1113, 1137 (10th Cir. 2005)) (internal quotation marks omitted).

In Strickland v Washington, supra, The Supreme Court held that prejudice is shown from ineffective assistance of councel when "there is a reasonable probability that, but for councel's unprofessional errors, the result of the proceeding would have been different." 466 S.S. at 664. Under Strickland, the defendant need not make the higher showing that "councel's deficient performance more likely than not altered the outcome of the case." 466 U.S. at 693. However, in this case both the lower standard of Strickland and the

higher standard rejected by Strickland are met.

As the court held in Strickland:

"A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Here, as in Lord V Wood, 184 F3d 1097 (CA 9, 1999), "trial counsel had at their fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence... Their performance therefore fell outside the wide range of professionally competent assistance that Strickland requires."

Prejudice is determined by whether the errors involved undermined the integrity of the proceedings. It is not necessary to show that the evidence not pursued by counsel would have changed the result. A reviewing court should focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v Scroggy, 99 F3d 1302, 1311 (CA 6, 1996):

> "On balance, the benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of Adversarial process that the (proceeding) cannot be relied upon as having produced a just result." Id at 1311-12 (quoting Strickland, 466 US at 686, 104 S Ct. 2052).

As court held in Kyles v Whitley, 514 US 419, (199%);

> "The question is not whether the defendant would more likely than not have recieved a different verdict with the evidence but whether in its absence he recieved a fair trial understood as a trial resulting in a verdict worthy of confidence."

We cannot have confidence in the verdict where unreasonable actions taken by counsel deprived the jury of relevant and critical evidence that supported the defense and would have provided a basis for a reasonable juor to find her not guilty and denied the Peititioner of her constitutional rights.

The court should grant a new trial at which Petitioner is

afforded representation as required by the Sixth Amendment of the United States Constitution.

The Strickland Standard states:

> "It is always held that missing deadlines and abandonment of a defendant is ineffective assistance of counsel. Because this type of misconduct is not considered "reasonable under prevailing professional norms." Strickland at 687-88.

It is also always prejudicial to a defendant to not be able to pursue their case in court on the merits because their lawyer missed a deadline or failed to continue to bring the issue to a higher court for appelate review. This issue has never been adjudicated by any state court. However, the federal courts misapplied the Strickland holdings to the facts. Thier decisions are contrary to this Court's decision in Strickland.

Thus, a reversal should be granted by this court.

IV. HABEAS RELIEF SHOULD HAVE BEEN GRANTED UPON MERITS REVIEW OF SIGNIFICANT AND ODVIOUS ISSUES THAT WERE MERITORIOUS AND REASONABLY PROBABLE TO HAVE RESULTED IN A DIFFERENT OUTCOME.

A criminal defendant is entitled to the effective assistance of counsel. Strickland v Washington, 466 U.S. 6681 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). This right includes the right to the effective assistance of councel on appeal. Evitts v Lucey, 469 U.S. 387; 105 S. Ct. 830: 83 L.Ed.2d 821 (1985); Penson V Ohio, 488 U.S. 75; 109 SCt. 346; 102 L.Ed.2d 300 (1988).

It is reasonably probable that Petitioner would have gotten a reversal on her appeal of right, but for inaction of appellate counsel. See Mapes v Coyle, 171 F3d 408 (CA 6, 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were significant and odvious.

Under Mapes v Coyle and many other cases, a court may find ineffective assistance of councel (appellate) from the failure to raise particular issues on appeal if the issues were odvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise this issues could have helped in Ms. Hill's appeal in any way.

CONCLUSION

The petition for a writ of certiorari should be granted .

Respectfully submitted,

Daykins Hall

Date: 1/20/19