NO. 19-5146

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

ISIAH GILLIAM,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the
Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

Isiah Gilliam, #874008
In Propria Persona
Chippewa Correctional Facility
4269 West M-80
Kincheloe, Michigan 49784

QUESTIONS PRESENTED

I. WAS MR. GILLIAM DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTION FAILED TO PROVIDE TIMELY DISCOVERY AS REQUIRED?

II. WAS MR. GILLIAM DENIED THE RIGHT TO A FAIR TRIAL AND A MISTRIAL SHOULD HAVE BEEN GRANTED WHERE THE TRIAL COURT INSINUATED IN RESPONSE TO A JURY QUESTION THAT MR. GILLIAM HAD THREE PRIOR CONVICTIONS?

III. IS MR. GILLIAM GUILTY OF THE ASSAULTIVE OFFENSES WHEN THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SUCH CONVICTIONS SINCE MR. GILLIAM WAS ACTING IN LAWFUL SELF-DEFENSE?

IV. IS MR. GILLIAM ENTITLED TO RESENTENCING AS A NON-HABITUAL OFFENDER WHERE THE PROSECUTORS OFFICE FAILED TO SERVE THE HABITUAL OFFENDER NOTICE AS REQUIRED BY STATUTE AND COURT RULE?

V. WAS THE SEARCH AND SEIZURE OF THE GRAY YUKON IN VIOLATION OF THE U.S. AND MICHIGAN CONSTITUTIONS AND SO MUST RESULT IN THE SUPPRESSION OF THE CELL PHONE AND TEXT MESSAGES THAT WERE SEIZED FROM THAT VEHICLE AS THE FRUIT OF A POISONOUS TREE?

VI. DID THE SEIZURE WITHOUT A WARRANT OF THE TEXT MESSAGES TAKEN FROM THE CELL PHONE DURING A SECOND SEARCH VIOLATE THE U.S. AND MICHIGAN CONSTITUTIONS AND THEREFORE MUST BE SUPPRESSED?

VII. DID DEFENSE COUNSEL'S PERFORMANCE AT TRIAL FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THEREFORE VIOLATE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES

State Cases:

Federal Cases:

REFERENCE TO OPINIONS BELOW

[X] For cases from **state courts**:

The February 4, 2019 , opinion of the highest state court (Michigan Supreme Court) to review the merits appears at **Appendix A** to the petition and is

[X] reported at *People v. Gilliam, 2019 Mich. LEXIS 126)* or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The May 15, 2018, opinion of the Michigan Court of Appeals appears as **Appendix B** to the petition and is

[X] reported at *People v. Gilliam 2018 Mich. App. LEXIS 2321* or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

ORDERS BELOW

The order entered by the Michigan Supreme Court denying Petitioner's application for leave to appeal is attached at Appendix A.

The order entered by the Michigan Court of Appeals affirming Petitioner's conviction and sentence is attached at Appendix B.

STATEMENT OF JURISDICTION

The order denying Petitioner's application for leave to appeal was entered by the Michigan Supreme Court on February 4, 2019.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V

Rights of persons charged with crimes; guaranty of life, liberty and property.
No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

Trial of criminal cases; rights of accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Citizenship; security of persons and property, due process and equal protection clauses.
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 citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner (Mr. Gilliam) states that the exchange of gunfire between himself and the burgundy car was out of self-defense. During trial, the Court allowed the Prosecution to present evidence in violation of discovery rules, which prejudiced him by tainting his trial strategy. The Prosecution claimed that the initial phone dump failed to contain information that the prosecution knew to be on the phone. Mr. Gilliam asserts that if they knew this information was on the phone, why wasn't it retrieved in the initial phone dump.

Mr. Gilliam further asserts that the trial court injected prejudicial remarks into the proceedings when it stated to the jury that he had three prior felony convictions, painting Mr. Gilliam as a career criminal. The Court failed to grant a defense motion for a mistrial, and only offered a special instruction to the jury, which defense counsel rejected because prejudice was already presumed.

There was also insufficient evidence to support the convictions where Mr. Gilliam acted in self-defense. Mr. Gilliam testified at trial, stating that the burgundy vehicle was driving wildly and when the vehicle Mr. Gilliam was in tried to slow down, the burgundy vehicle slowed down as well. This evidence supports Mr. Gilliam's self-defense theory, thereby disproving the elements of the assault with intent to commit murder.

One of the biggest rules in any criminal prosecution is due process. A criminal defendant must be notified of the charges against him. In this case, the prosecution failed to file a proof of service notifying him of their intent to seek an enhanced sentence based on his prior criminal history.

Mr. Gilliam also asserts that his constitutional protections as guaranteed by the fourth amendment of the United States constitution was violated when investigators seized and or searched items that were not listed on the search warrant. For these reasons along, the items seized and or searched must be suppressed.

Finally, Mr. Gilliam states that his constitutional right to the effective assistance of counsel was violated where counsel's performance fell below an objective standard of reasonableness.

REASONS FOR GRANTING THE WRIT

ISSUE I

MR. GILLIAM WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTION FAILED TO PROVIDE TIMELY DISCOVERY AS REQUIRED.

In the case at bar the prosecution presented evidence that resulted in a violation of constitutional magnitude. The prosecuting attorney's job and responsibilities include but are not limited to: obtaining and forwarding all evidence non-exculpatory and exculpatory known to the prosecutions office. The prosecuting attorney must also obtain police reports and the police officer(s) knowledge must be imputed to the prosecuting attorney.

The cell phone evidence obtained must be held to the same standard as mentioned above, the prosecution must make all exculpatory evidence available to the defense in a timely manner. This included all relevant information obtained and that which the prosecuting attorney was unable to obtain.

The rules of discovery, which apply to the prosecutor's office and all members of that office, they are bound by and must follow them. Such examples include but are not limited to:

(A) Mandatory Disclosure... [A] party upon request must provide all other parties:

(2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(6) A description of and opportunity to inspect any tangible physical evidence at trial,

including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of cost of reproduction, including the cost of providing copies of electronically recorded statements. On good cause shown, the court may order that a party be given the opportunity to test without destruction of tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(3) any written or recorded statements, including electronically recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial[.] MCR 6.201.

It is the duty of the prosecution to provide all relevant materials to the defense for preparation of a defense. The Michigan Court of Appeals has long held that a prosecutor's violation of a discovery order "even if inadvertently in good faith," requires reversal of the resulting conviction "unless it is clear that the failure to divulge was harmless beyond a reasonable doubt" quoting *People v Pace* 102 Mich. App 522, 530-31 (1980)

A person cannot incur the loss of liberty for a criminal offense without notice and a meaningful opportunity to defend, and such opportunity, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused; accordingly, a criminal conviction based upon a record wholly devoid of any relevant evidence of a crucial element of an offense is constitutionally infirm, the most elemental of due process rights being freedom from a wholly arbitrary deprivation of liberty.

In the case at bar the prosecuting attorney withheld relevant materials related to the cellphone records of seized a phone from the search and seizure of Mr. Gilliam's residence and

of Mr. Gilliam's Uncles vehicle that being the Yukon. The information contained within the records was relevant to the crime Mr. Gilliam was charged with and ultimately convicted of.

The defense in this case was not provided with the information obtained from a search and cell phone dump of all information contained on the cell phone until essentially half-way through trial. This action CANNOT be deemed harmless. The prosecution then throws a monkey wrench into the equation by inserting new, previously unavailable evidence effectively denying the defense ample opportunity to put the prosecution's theory to adversarial testing.

Again, there is no way this can be harmless to the defense. The defense has absolutely no obligation to present evidence, it does however have a right to know what evidence will be presented, in advance.

This is especially true where the defense starts trial with a particular defense in mind. Defense counsel was effectively denied a right to present a defense "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation Clause of the Sixth Amendment . . , the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986) citing *California v. Trombetta,* 467 U.S. 479, 485 (1984).

There was absolutely no reason stated for the late admission of the records or information obtained from the cell phone. Defense counsel did make a proper objection to the late admission of this evidence. The defense was precluded form presenting mitigating evidence that could have been beneficial to the theory of the defense due to this late admission of evidence.

The prosecution's obligation extended well beyond the initial rules of discovery into that right before trial. The trial Court had a moral, civil and ethical obligation to grant the defense at the bare minimum a continuation to effectively review the records obtained from this cell phone

in order to be prepared for trial and ultimately for its defense.

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d, at 169. See *Brady v Maryland* 83 S. Ct. 1194, 1197 (1963).

Here, Mr. Gilliam has laid the foundation to show this late admission of evidence has precluded his constitutional right to exculpatory evidence, that being the prosecution waited until the beginning of trial to hand the defense the results of a cell phone dump.

The late admission of this evidence precluded the defense from securing expert testimony in the event it needed to challenge the records. Furthermore, the defense had no foreseeable notice that these records would be used nor were they available. This Court is now confronted with a plethora of problems stemming from the admission of this evidence.

Can this Court reasonably say the defense was effective when it did NOT file a motion for adjournment due to the lack of notice of the late admission of this evidence? Then we additionally face an issue of whether the defense had reasonable notice to this evidence and failed to prepare. These claims are limitless and defense counsel could have moved for an adjournment to secure witnesses.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of

challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). As is the case here had Mr. Gilliam's trial attorney been given ample notice of the want or need to use the information he could had produced witnesses favorable to the defense.

The defendant, Mr. Gilliam will further show how the late admission of further evidence prejudiced and prevented his trial attorney from effectively representing him at trial.

ISSUE II

MR. GILLIAM WAS DENIED THE RIGHT TO A FAIR TRIAL AND A MISTRIAL SHOULD HAVE BEEN GRANTED WHERE THE TRIAL

COURT INSINUATED IN RESPONSE TO A JURY QUESTION THAT MR. GILLIAM HAD THREE PRIOR CONVICTIONS.

The issue at hand in the present case is a response that was elicited from the trial court in response to a question from the jury. The jury posed a question regarding the stipulation Mr. Gilliam has a prior conviction and by Michigan and Federal law was unable to legally possess any firearm whatsoever.

In presenting a question from the jury the judge stated the following:

"... We do have three prior - -"(Jury Trial Transcript pg. 154 and 165-66 of: 09/26/2016)

The admission of "...three prior - -"gave the panel of jurors the impression that the defendant was a repeat offender and essentially a complete menace to society. Where error and mistake are egregious, the trial court has a duty, upon proper motion, to declare a mistrial. The trial court has a duty to control the proceedings, and to limit introduction of evidence and argument to relevant and material matters. The trial court may not defer to jurors in determining whether error was harmless. M.C.L. 768.29; *People v. Spencer,* 130 Mich. App. 527 (1983).

The defense properly moved for mistrial, and the trial court effectively deferred to the jurors in determining the outcome of the error as harmless or allowing them to weigh its prejudice. The trial judge has a duty to control the proceedings and in this case he should have at the bare minimum elicited from the members of the jury whether or not this error amount to any determining factor of innocence or guilt, by voir dire.

This conduct while it may not rise to the level of intentional bias or malicious behavior. A trial judge must avoid any invasion of the prosecutor's role and must exercise caution so that his comments will not be prejudicial, unfair, or partial. *People v Sterling*, 154 Mich App 223, 228 (1986). A judge's influence on a jury "is necessarily...of great weight and his slightest word

or intimation is received with deference, and may be prove controlling." *Garcia v United States,* 289 US 466, 470 (1932); see also *United States v Hickman,* 592 F2d 931, 936 (CA 6, 1979). A judge destroys the right to a fair trial when he injects prejudicial comments or berates defense counsel in front of the jury. *Conyers, supra,* at 404; *i*); *People v Wigfall*, 160 Mich App 765, 771-775 (1987); *People v Neal*, 290 Mich 123, 129 (1939).

This statement even assuming the court says it was an error or mistake, undoubtedly left a negative impression on the members of the jury. This admittance that the defendant has three prior convictions leaves the impression on the jury, this defendant is some kind of career criminal or menace to society that is incapable of rehabilitation or reform.

The United States Supreme Court has held "A defendant tried by jury has a right to a fair and impartial jury." *Duncan v Louisiana* 391 US 145; 88 S Ct. 1444 (1968). Consistent with the right to a jury trial the jury shall only consider the evidence presented to them in open court. *People v Stokes*, 312 Mich. App. 181 (2015).

In this case while the defense did agree to the stipulation the defendant did have priors and was ineligible to carry, own or otherwise possess a firearm. The trial Judge stating the defendant had three prior convictions certainly left an impression upon the jurors in determining a question of fact they had relevant to the case.

The jurors were influenced by this information and it unduly prejudiced the defendant resulting in a denial of his right to a fair trial. While Mr. Gilliam in fact did testify he fired a weapon in self-defense this admission by the trial court that Mr. Gilliam was a repeat offender guilty of "three priors" tarnished his credibility and made him out to be a savage, career criminal incapable of reform or rehabilitation.

Thus, for the reasons stated above the Court of Appeals decision is improper and the defendant should be afforded a new trial, due to the abuse of discretion resulting from the trial courts denial of the defendant's Motion for Mistrial.

ISSUE III

MR. GILLIAM CANNOT BE GUILTY OF THE ASSAULTIVE OFFENSES WHEN THERE IS INSUFFICIENT EVIDENCE TO

SUPPORT SUCH CONVICTIONS SINCE MR. GILLIAM WAS ACTING IN LAWFUL SELF-DEFENSE.

It is and was the contention of the defendant, Mr. Gilliam, that he was in immediate danger and his welfare, wellbeing and life were in imminent danger. The prosecuting attorney is required to disprove a claim of self-defense. Under Michigan common law, self-defense may otherwise justify intentional homicide.

The reasonableness of a defendant's belief he was in immediate danger "depends on what an ordinary prudent and intelligent person would do on the basis of the perceptions of the actor." *People v Orlewicz*, 293 Mich. App. 96, 102. The burden of producing "some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist." *People v Dupree* 486 Mich. 693, 709-10 (2010).

The test of "honest belief" means only that a defendant's conduct should be judged "from the circumstances as they appeared to him at the time." *People v. Tubbs,* 147 Mich. 1 (1907). The right of self-defense commences when necessity, real or apparent, begins, and ends when it ceases. *People v. Giacalone,* 242 Mich. 16 (1928). Once a defendant introduces evidence that she or he acted in self-defense, the prosecution has the burden of disproving self-defense beyond a reasonable doubt. The burden does not lie with defendant to prove a self-defense claim. *People v. Watts,* 61 Mich. App. 309 (1975).

The defendant had reasonably stated to the jurors that he'd been subject to robberies, attempts on his life and had reason to believe there were threats, either perceived or actual, upon his life or overall welfare. The defendant introduced evidence from which a jury could conclude that his possession of the firearm was justified because he reasonably and honestly believed that his life was in imminent danger.

The victim(s) Mr. Richardson and Mr. Johnson was driving reckless and erratic while behind the defendant, Mr. Gilliam, upon seeing this behavior Mr. Gilliam became scared and defensive. It wasn't until Mr. Gilliam heard the sounds of gunshots and the vehicle he was riding in was struck, that he returned fire in a perceived threat upon his life.

Mr. Gilliam acted in a rational manner of an individual who has reasonable suspicion of danger for his safety and wellbeing. This being after seeing a vehicle driving with excessive speeds, tailgating the vehicle Mr. Gilliam was traveling in and then the sounds of gunshots and ultimately bullets hitting his vehicle. It was upon discovering the above facts Mr. Gilliam felt it was reasonably necessary to return fire, two shots, upon the perceived threat of the vehicle driven by a one Mr. Richardson and Mr. Johnson.

Mr. Richardson and Mr. Johnson's actions following the incident indicate a level of guilt that they initiated the altercation and that Mr. Gilliam only acted with a reasonable amount of force that being equal to what was initiated against him.

The reasonableness of the state court's determination of *Jackson v Virginia* 443 U.S. 307 (1979), standard "must be applied 'with explicit reference to the substantive elements of the criminal offense as defined by state law." *Brown v. Palmer*, 358 F. Supp. 2d. 648 (E.D. Mich. 2005). The Michigan Court of Appeals and Michigan Supreme Courts review of sufficiency of evidence is premised upon the holdings of the United States Supreme Courts holding in *Jackson* and *In re Winship* 397 U.S. 358 (1970).

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

This inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In the case at bar there is not sufficient evidence to convict Mr. Gilliam if the charges in the instant case, especially where he reacted to actual or perceived threat upon his life and those of whom were in the car with him. Mr. Gilliam is not requesting style points or credit that he only fired two shots back at the vehicle who fired first upon him. This case could easily have been a case where Mr. Johnson and Richardson were facing the same exact charges had Mr. Gilliam been hit after failing to return fire at the persons who presented a threat upon his life.

The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.

In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

However, this is not the case, instead, Mr. Gilliam acted within the sound discretion of protecting himself from the victim's attempts upon his life and this Court should remand this case for further considerations.

ISSUE IV

MR. GILLIAM IS ENTITLED TO RESENTENCING AS A NON-HABITUAL OFFENDER WHERE THE PROSECUTORS OFFICE FAILED TO SERVE THE HABITUAL OFFENDER NOTICE AS REQUIRED BY STATUTE AND COURT RULE

Mr. Gilliam should be resentenced without the habitual offender enhancement where the prosecution failed to timely file the proof of service. The court file does not contain any proof that service has been or was served. The Michigan Court of Appeals, improperly suggest that it can be harmless for this notice to not being filed.

This assertion however, is totally incorrect where the defense has a due process right to be notified of the prosecutions intent to enhance the defendant's sentence without first timely filing the enhancement notice. Michigan's legislative intent, court rule and both the constitution of Michigan and the United States are clear on the issue of due process. The defendant still has the right to due process of law and where a court is given discretion to enhance a sentence based upon a legislative scheme. The defendant maintains the right to be given timely notice so to challenge or at the bare minimum prepare a defense or object to the enhancement.

The court rule and statue require that the defendant be served notice and a verbal notice is not sufficient to serve as an alternate to the required filing in accordance to the statute and court rule. The proper review of this issue is for plain error affecting substantial rights, *People v Lockridge* 498 Mich. 358, 392 (2015). The plain error doctrine is clear, "To establish entitlement to relief under plain error review, the defendant must establish that an error occurred, that the error was plain, i.e. clear or obvious, and that the plain error affected the substantial rights." *Lockridge*, supra at 392-93.

In the instant case Mr. Gilliam's habitual offender status is void due to the fact the prosecution failed to meet the filing AND service requirements in accordance with MCL 769.13 and MCR 6.112(F) the requirements were not met and therefore the enhance should be voided. The error has been established to have occurred, the error did affect the substantial

rights of the defendant due to the fact it increased the sentencing guideline range, due to the habitual offender status.

A sentence enhanced pursuant to an untimely habitual offender charge may be deemed invalid and set aside. See MCR 6.429(1); *People v Miles* 454 Mich 90; 559 NW2d 299 (1997); *In re Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991). A trial court does not have authority to sentence a defendant pursuant to a habitual supplementation that is not filed within the twenty-one-day time limit. See *People v Ellis*, 224 Mich App 752, 757; 569 NW2d 917 (1997).

If a prosecutor wishes to file a supplemental information alleging that a defendant is a habitual offender, he must do so "promptly." *People v Fountain,* 407 Mich. 96, 98; 282 N.W.2d 168 (1979).

In defining "promptly," our Supreme Court has stated:

> The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense. We conclude that a standard which would find a filing on the day of trial to suffice is an inadequate one. We recognize that any "rule" which we might establish is subject to the criticism that it is arbitrary. However, we believe that the imposition of a "rule" is preferable to the ad hoc decision-making which has been the practice heretofore.

In the *Fountain* opinion the court stated: Accordingly, we hold that a supplemental information is filed "promptly" if it is filed not more than 14 days after the defendant is arraigned in circuit court (or has waived arraignment) on the information charging the underlying felony, or before trial if the defendant is tried within that 14-day period. We believe that such a rule allows the prosecutor sufficient time to make a decision concerning supplementation while at the same time providing notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony. *People v Shelton,* 412 Mich. 565, 569; 315

N.W.2d 537 (1982). While the timeframe in which the notice may be filed has since increased as stated below, the language referring to the fact information shall be "promptly" filed is still applicable.

The Legislature has seen fit to enlarge the time within which a prosecutor may file an habitual offender information to twenty-one days:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). [MCL 769.13; MSA 28.1085, as amended by 1994 Pa. 110.] As this Court has recently held, this statute reflects a bright-line test for determining whether a prosecutor has filed a supplemental information "promptly." *People v Bollinger,* 224 Mich. App. 491, 492; 569 N.W.2d 646 (1997).

Mr. Gilliam should be resentenced without the habitual enhancement. This is due in part to the prosecuting attorney failing to follow the statutory requirements and Michigan Court Rules.

ISSUE V

WAS THE SEARCH AND SEIZURE OF THE GRAY YOUKON VIOLATIVE OF THE U.S. AND MICHIGAN CONSTITUTIONS AND SO MUST RESULT IN THE SUPRESSION OF THE CELL PHONE AND TEXT MESSAGES THAT WERE SEIZED FROM THAT VEHICLE AS THE FRUIT OF A POISONOUS TREE?

The search and seizure of the gray GMC Yukon violated the defendants 4th amendment right of the United States constitution and article 1 section 11 of the Michigan constitution due to the fact it was NOT one of the item listed in the information on the warrant.

During this illegal search and seizure of the above referenced vehicle a cell phone was recovered, a Microsoft Windows cellphone. Since the above mentioned vehicle was not listed within the confines of areas to be searched the subsequent search and seizure of all evidence within the vehicle MUST be suppressed under the fruit of the poisonous tree.

The defense did move the trial court to suppress the illegally obtained evidence the grounds raised there are different from those raised herein. This is due to the fact this is a constitutional issue and was decisive in the outcome of this case. It has been held that if a defendant raises an issue of constitutional error and it has been heard for the first time on appeal the Court of Appeals will hear this issue, while the Court of Appeals did in fact hear the issue, its ruling is incorrect.

In this case it is not disputed the police department did in fact search and seize items from the gray GMC Yukon. Officer James Johnson admitted in his trial testimony that he in fact DID search a vehicle without obtaining a warrant to search the Yukon previously mentioned.

The main concern with the search and seizure of this vehicle is the officer obtained a cellphone, previously described above, the cellphone evidence undermined the defense's theory of self-defense, due to the prejudicial nature of the information contained within the illegally seized phone.

Both the United States and Michigan Constitutions protect citizens from illegal search and seizures. It is unreasonable to search an area without both a warrant and reasonable or probable cause to believe evidence of wrongdoing might be located at the place searched. As described

and verified by the officer who searched the vehicle this was done without a warrant and all item obtained within the confines of the vehicle must be suppressed.

The United States Supreme Court has held that any and all contents of a phone may be searched only upon first obtaining a warrant to do so. The Court held a warrant is required before police may search the contents within the seized item, *Riley v. California*, 573 US ____; 134 S Ct. 2493 (2014). The illegally searched Yukon that resulted in a cell phone being discovered and the information therein contained must be suppressed.

In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, the United States Supreme Court has held that evidence seized during an unlawful search could not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.

In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd v. United States*, 116 U.S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks v. United States*, 232 U.S. 383.

The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 Mr. Justice Holmes, speaking for the Court in that case, in holding that the Government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the

Government's own wrong cannot be used by it in the way proposed." 251 U.S., at 392.

The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 227 F.2d 598.

Here, as indicated from the United States Supreme Court, the unlawful search seizure and ultimately the use of the illegally obtained evidence, should have been excluded and barred from use. Had this evidence not been illegally obtained the credibility and integrity of the defense would not have been undermined and the jury would have had this evidence excluded from its determination and during deliberation.

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

As described above, not all evidence is fruit of the poisonous tree, however, in the case at bar the subsequent information contained within the illegally seized evidence is subject to the "fruit of the poisonous tree" doctrine.

The defendant has established through United States Supreme Court precedent that the decision of both the trial Court and the Michigan Court of Appeals is in error and the only relief that can be warranted is reversal on the grounds warranting a new trial with the illegally obtained evidence excluded from subsequent proceedings.

ISSUE VI

DID THE SEIZURE WITHOUT A WARRANT OF THE TEXT MESSAGES TAKEN FROM THE CELL PHONE DURING A SECOND SEARCH VIOLATE THE U.S. AND MICHIGAN CONSTITUTIONS AND THEREFORE MUST BE SUPPRESSED?

Here, Mr. Gilliam, challenges the use and admission of the information contained within the illegally obtained cell phone. This argument while similar to ISSUE V is in its own accord unique and distinct. The primary issue here is that after obtaining this illegally seized cellphone the police department waited in excess of 4 months to search the contents of the phone, thus effectively, the agency had conducted a second search of the cellphone. While the agency did in fact obtain a warrant to initially search (March 16th, 2016) the cell phone and did send it to the Michigan State crime lab, it then conducted a second search in September 2016. The issue at hand is whether the second search constituted a violation of clearly established United States Supreme Court precedent?

Most of the federal courts of appeals to have considered the question, including the Sixth Circuit, have held that a single search warrant may authorize more than one entry into the premises identified in the warrant, as long as the second entry is a reasonable continuation of the original search. *United States v. Bowling*, 351 F.2d 236, 241 (6th Cir. 1965), cert. denied, 383 U.S. 908, 15 L. Ed. 2d 663, 86 S. Ct. 888 (1966); *United States v. Squillacote*, 221 F.3d 542, 557 (4th Cir. 2000); *United States v. Gerber*, 994 F.2d 1556, 1559 (11th Cir. 1993); *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988).

As is the case here the first warrant terminated upon the search of the Michigan State crime lab and the second search was done independently and sought additional incriminating information of the defendant. Therefore, the second search cannot reasonably be deemed a continuation of the first warrant the police department executed. This is especially true when the information seized in the form of

The Sixth Circuit Court held in their decision of *United States v. Keszthelyi*, 308 F.3d 557, Our decision in Bowling, however, does not permit the police unlimited access to the premises identified in a warrant throughout the life of the warrant. Courts have long recognized the dangers of official abuse that inhere in such a rule. As one state supreme court in our circuit explained nearly fifty years ago:

> If for no other reason than that the officer still has it in his possession, a search warrant once served, but not returned, can be used a second time within [the life of the warrant] for the purpose of a second search of the premises described, then, logically, it would seem to follow that such officer, with his squad of assistants, may use it to make an indefinite number of such searches during that [time period]. Thus, the warrant could become a means of tyrannical oppression in the hands of an unscrupulous officer to the disturbance or destruction of the peaceful enjoyment of the home or workshop of him or her against whom the efforts of such officer are directed. *McDonald v. State*, 195 Tenn. 282, 259 S.W.2d 524, 524-25 (Tenn. 1953).

In *United States v Keszthelyi* 308 F. 3d 557, 569 the Court noted in their decision several cases regarding second searches. Our decision in *Bowling* did not reject the general rule that a warrant authorizes only one search. See *United States v. Gagnon,* 635 F.2d 766, 769 (10th Cir. 1980) ("We agree that once a search warrant has been fully executed and the fruits of the search secured, the authority under the warrant expires and further governmental intrusion must cease."), cert. denied, 451 U.S. 1018, 69 L. Ed. 2d 390, 101 S. Ct. 3008 (1981).

The language here is clear the detective in the instant case secured the cellphone had executed the search warrant by or through the Michigan State Police and then several months later executed his own search of the phone. Thus, the warrant had expired and the second search had been in violation of the initial warrant.

In the *Keszthelyi* opinion the court cites "[A] warrant may be executed only once, and thus where police unsuccessfully searched [the] premises for a gun and departed but then returned an hour later and searched further because in the interim an informant told the police of the precise location of the gun, the second search could not be justified as an additional search under the authority of the warrant." The example cited here is almost exactly the same after the execution of the initial warrant and the detective did not express satisfaction with the findings of the Michigan State Police Crime lab he took it upon himself to make a search this is a violation due to the expiration of the initial warrant and cannot be justified as a reasonable continuation of the first search, it must be deemed an additional search under the authority of the warrant. *Bowling* merely recognized that, under certain circumstances, police may temporarily suspend the initial execution of a search warrant and continue the search at another time. Two aspects of the reasonable continuation rule must therefore be observed.

First, the subsequent entry must indeed be a continuation of the original search, and not a new and separate search. Thus, other courts that have followed *Bowling* have appropriately cast the legal question as whether subsequent entries ostensibly carried out under a single warrant are properly characterized as reasonable continuations of the original search or as separate searches requiring separate warrants. *Gerber*, 994 F.2d at 1559 ("We view the opening of the hood on the following Monday as the continuation of the search for which the agents had a valid warrant on the preceding Friday."); *Kaplan*, 895 F.2d at 623; Carter, 854 F.2d at 1107

("The question is not whether there were two entries pursuant to the warrant, but rather, whether the second search was a continuation of the first."); *United States v. Huslage*, 480 F. Supp. 870, 875 (W.D. Pa. 1979) ("The question is not whether the police went through the door of the vehicle twice, but rather, whether the search conducted at 10:00 A.M. was a continuation of the search that had been initiated at 4:10 A.M.").

Second, the decision to conduct a second entry to continue the search must be reasonable under the totality of the circumstances. See Gerber, 994 F.2d at 1559; see also *Stack v. Killian*, 96 F.3d 159, 162 (6th Cir. 1996) ("It is well established that those who execute lawful search warrants must do so in a reasonable manner.").

The *Keszthelyi* court further noted, we note that a search conducted pursuant to a lawful warrant may last as long, and be as thorough, as reasonably necessary to fully execute the warrant. *United States v. Jackson*, 120 F.3d 1226, 1228-29 (11th Cir. 1997). Thus, law enforcement agents generally may continue to search the premises described in the warrant until they are satisfied that all available evidence has been located. *United States v. Menon*, 24 F.3d 550, 560 (3d Cir. 1994) ("Any reasonable agent looking for evidence in a clearly circumscribed area would continue the search until she was certain that no more evidence existed which could not happen until the entire [area] was searched."). Once the execution of a warrant is complete, however, the authority conferred by the warrant terminates. *Bills v. Aseltine*, 958 F.2d 697, 702 (6th Cir. 1992) ("The execution of the first warrant was complete by the time Meisling arrived at plaintiff's home. Therefore, it cannot be maintained that the officers were acting 'in execution of the warrant' at the time Meisling was permitted to 'tour' the premises."); see also *United States v. Freeman*, 685 F.2d 942, 953 n.6 (5th Cir. 1982).

The reasonableness of a search under the Fourth Amendment is determined by "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) (quotation omitted). Reasonableness depends upon "whether the totality of the circumstances justifies a particular sort of search or seizure." Id. at 8-9.

Here the nature and quality of the search must be weighed against the intrusion of the defendants Fourth amendment rights and the issues of the legality of the second search. The circumstances outlined herein, as cited in several controlling cases does not justify nor excuse the conduct of the detective in conducting his additional search and thus the information obtained and ultimately used need be suppressed and excluded from any and all subsequent proceedings.

ISSUE VII

DID DEFENSE COUSEL'S PERFORMANCE AT TRIAL FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND

THEREFORE VIOLATE APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

Here, Mr. Gilliam argues that his trial counsel was ineffective for failing to argue the issue of suppression of evidence related to the illegal search and seizure of the Microsoft Windows cellphone. Counsel is responsible for making sufficient challenge to the prosecution's case at bar.

Such examples include but are not limited to filing pre-trial motions, making timely objections and potentially securing the use of expert witnesses. In the case at bar trial counsel failed to timely challenge the admission of evidence of a cellphone that was illegally seized from a vehicle not listed in the affidavit nor upon the search warrant issued by the magistrate.

The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U.S. 198, 203-204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Mempa v. Rhay* , 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), and capital cases, see *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

As stated above "the constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." This applies to pre-trial motions and proceedings that may result in admission of evidence. As in the case at bar the defendants trial attorney made no pre-trial motion to challenge the admission of the evidence obtained in violation of an illegal search and seizure.

The defendant's trial counsel, instead, proceeded to present a defense that Mr. Gilliam acted in self-defense, this defense was undermined by the admission of the illegally obtained cellphone. This performance is consistent with the behavior of deficient performance. Largely this deficient performance was in part due to the fact, defense counsel did elect to present a defense. While not obligated to present a defense, counsel had knowledge of cellphone evidence that would undermine the credibility of the defense that counsel had elected to present.

In *Strickland v Washington*, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

The goal of a just result is not divorced from the reliability of a conviction, see *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In *Kimmelman v. Morrison*,

477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), the Court held that an attorney's failure to timely move to suppress evidence during trial could be grounds for federal habeas relief.

The Court rejected the suggestion that the "failure to make a timely request for the exclusion of illegally seized evidence" could not be the basis for a Sixth Amendment violation because the evidence "is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" Id., at 379, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (quoting *Stone v. Powell*, 428 U.S. 465, 490, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)). "The constitutional rights of criminal defendants," the Court observed, "are granted to the innocent and the guilty alike.

Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." 477 U.S., at 380, 106 S. Ct. 2574, 91 L. Ed. 2d 305. The same logic applies here.

Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

Thus, a remedy must "neutralize the taint" of a constitutional violation, id., at 365, 101 S. Ct. 665, 66 L. Ed. 2d 564, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution, see *Mechanik*, 475 U.S., at 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences").

As is the case her the defense counsel failed to challenge the admission of evidence obtained in violation of the 4TH amendment of the United States Constitution. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Mr. Gilliam has established that the evidence was illegally obtained, by the affidavit of a witness. The testimony of the affiant was not presented to a jury, which could have been used as testimonial weight against that of the detective or been used in a pre-trial motion to attack the admission of this evidence.

However, trial counsel failed to investigate the affiant, failed to challenge the validity of the evidence used to undermine the failed effort to present a defense. This cannot serve as a defense to justify the decision not to challenge the evidence used against Mr. Gilliam. Again, this is especially true where the affiant would have testified the warrant did not include his vehicle, the cellphone seized was within the confines of his vehicle and would have served to challenge the testimony of the detectives.

Where the prosecution is shown to have suppressed *Brady* or *Giglio* matter relevant to its presentation of evidence known to be false, the "materiality" standard is less stringent. "To prove that the prosecutor's failure to correct false testimony violated due process rights, a petitioner must demonstrate that: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Rosencrantz v. Lafler*, 568 F.3d 577, 583-84 (6th Cir. 2009). "A conviction obtained by the knowing use of perjured [**31] testimony must be set

aside 'if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" Id. at 583 (quoting *Giglio*, 405 U.S. at 154).

Instead of asking, as under *Brady*, "whether 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different,'" a court addressing a *Giglio* false-testimony claim "ask[s] only 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 584 (citations omitted); see *Napue v. Illinois*, 360 U.S. 264, 272, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

The distinction in the two standards matters "because while a traditional *Brady* materiality analysis obviates a later harmless-error review under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), courts may excuse *Brady/Giglio* violations involving known and materially false statements as harmless error." *Rosencrantz*, 568 F.3d at 584 (footnotes omitted).

It is the contention of Mr. Gilliam the court should address the claim under *Giglio* because the affiant is claiming the detective in question lied about where the evidence was obtained. As a result of the lie not presented to the court nor to a jury for determination in rendering its decision it has prejudiced Mr. Gilliam. The defendant has established through several examples that counsel's performance was deficient and absent the deficient performance the results of the proceeding would have been different. Mr. Gilliam request this court grant this application and remand for new trial or further proceedings consistent with the opinion or decision

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this petition for writ of certiorari, or, in lieu of granting a writ of certiorari, any relief this Honorable Court Deems necessary and in the interest of justice.

Respectfully Submitted,

Date: June 27, 2019

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