19-5432

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN MICHAEL-DORMAN BELTOWSKI,
PETITIONER,

V.

SHAWN BREWER,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Submitted By:

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Petitioner, pro se
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ISSUES PRESENTED FOR REVIEW

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FEDERAL DISTRICT COURT, AND STATE TRIAL COURT ALL HAVE DECIDED AN IMPORTANT FEDERAL QUESTION WITH RESPECT TO WHETHER INSTRUCTIONAL ERROR OCCURRED IN A WAY THAT CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED HARMLESS-ERROR PRECEDENTS.

A. The Courts Arbitrarily Picked A Period It Believed The Victim No Longer Posed A Threat To Petitioner.

B. The Courts Impermissibly Focused On The Sufficiency Of The Evidence.

C. The District Court Made Impermissible Credibility Determinations.

D. Failed To Consider The Related Newly Discovered Evidence In Context With The Erroneous Jury Instruction.

E. The Harmless-Error Findings Below Substantially Impaired Petitioner's Right To Present A Complete Defense.

F. The Effect Of The Error In Relation To All Else That Happened.

G. The Sixth Circuit Panel Did Not Conduct A Harmless-Error Review.

OPINIONS BELOW

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT APPEARS AT APPENDIX A TO THE PETITION AND IS UNPUBLISHED. THE OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN APPEARS AT APPENDIX B TO THE PETITION AND IS UNPUBLISHED. THE ORDER OF THE MICHIGAN SUPREME COURT APPEARS AT APPENDIX C TO THE PETITION AND IS REPORTED AT 493 MICH 968: 829 N.W.2D 210 (2016)(TABLE). THE ORDER OF THE MICHIGAN COURT OF APPEALS APPEARS AT APPENDIX D TO THE PETITION AND IS UNPUBLISHED. THE OPINION OF THE WAYNE COUNTY, MICHIGAN, TRIAL COURT APPEARS AT APPENDIX E TO THE PETITION AND IS UNPUBLISHED.

JURISDICTION

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED PETITIONER'S CASE WAS MARCH 12, 2019. THE MANDATE ISSUED ON APRIL 3, 2019: IT APPEARS AT APPENDIX A.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: that no person shall "be deprived of life, liberty, or property without due process of law....."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right .... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, of property, without due process of law."

Relevant provisions of the Michigan Compiled Laws are reproduced and appear at Appendix F.

I. STATEMENT OF THE CASE

A. MICHIGAN'S SELF-DEFENSE LAW

AT COMMON LAW, A CLAIM OF SELF-DEFENSE, WHICH "IS FOUNDED UPON NECESSITY, REAL OR APPARENT," MAY BE RAISED BY A NON-AGRESSOR AS A LEGAL JUSTIFICATION FOR AN OTHERWISE INTENTIONAL HOMICIDE. 40 AM JUR 2D, HOMICIDE, §138, P 509. WHEN A DEFENDANT ACCUSED OF HOMICIDE CLAIMS SELF-DEFENSE,

> *[t]he question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to save himself from such apparent threatened danger?*

SEE PEOPLE V. LENNON, 71 MICH 298,300-301 (1888): PEOPLE V. RIDDLE, 467 MICH 116,126-27 (1998).

THUS, THE KILLING OF ANOTHER PERSON IN SELF-DEFENSE IS JUSTIFIABLE HOMICIDE ONLY IF THE DEFENDANT HONESTLY AND REASONABLY BELIEVES HIS LIFE IS IN IMMINENT DANGER OR THAT THERE IS A THREAT OF SERIOUS BODILY HARM AND THAT IT IS NECESSARY TO EXERCISE DEADLY FORCE TO PREVENT SUCH HARM TO HIMSELF. SEE PEOPLE V. DANIELS, 192 MICH APP 658,672 (1991).

IN 1998, THE MICHIGAN SUPREME COURT "REAFFIRM[ED] .... THAT THE TOUCHSTONE OF ANY CLAIM OF SELF-DEFENSE, AS A JUSTIFICATION FOR HOMICIDE IS NECESSITY. RIDDLE, SUPRA, 467 MICH AT 127(EMPHASIS IN ORIGINAL). THE COURT EXPLAINED THAT AN ACCUSED'S CONDUCT IN FAILING TO RETREAT, OR TO OTHERWISE AVOID THE INTENDED HARM, MAY IN SOME CIRCUMSTANCES - OTHER THAN THOSE IN WHICH THE ACCUSED IS THE VICTIM OF A SUDDEN, VIOLENT ATTACK - INDICATE A LACK OF REASONABLENESS OR NECESSITY IN RESORTING TO DEADLY FORCE IN SELF-DEFENSE. ID. WHERE A DEFENDANT "INVITES TROUBLE" OR MEETS NONIMMINENT FORCE WITH DEADLY FORCE, HIS FAILURE TO PURSUE AN AVAILABLE, SAFE AVENUE OF ESCAPE MIGHT PROPERLY BE BROUGHT TO THE ATTENTION OF THE FACTFINDER AS A FACTOR IN DETERMINING WHETHER THE DEFENDANT ACTED IN SELF-DEFENSE. ID.

IN THIS CASE, THE TRIAL COURT'S SELF-DEFENSE INSTRUCTION WAS SO BAD IT CONVEYED TO THE JURY THAT IT COULD REJECT PETITIONER'S SELF-DEFENSE CLAIM IF HE: (1) "ACTED WRONGFULLY," RATHER THAN "COMMITTING A CRIME"; (2) BROUGHT ON THE ASSSULT," RATHER THAN "BEING THE INITIAL AGGRESSOR"; (3) THAT THE FORCE USED BY THE OTHER PERSON MUST BE UNLAWFUL; (4) THE RIGHT TO SELF-DEFENSE LASTS ONLY "AS LONG AS IT IS NECESSARY FOR THE PURPOSE OF PROTECTION"; AND (5) THE INSTRUCTIONS OMITTED ESSENTIAL LANGUAGE THAT PETITIONER HAS A RIGHT TO USE FORCE "OR EVEN TAKE A LIFE," AND WHEN DECIDING IF PETITIONER WAS AFRAID OF DEATH OR SERIOUS PHYSICAL INJURY, THE JURY SHOULD "CONSIDER ALL THE CIRCUMSTANCES."

THE TRIAL COURT IS CHARGED WITH KNOWING THE LAW. TO BE SURE, ANY COURT MIGHT ERROR, BUT WHEN PETITIONER ENDEAVORS TO REMEDY A COURT'S ERRORS, FOLLOWING A TRIAL WHERE THE PETITIONER STANDS IN JEOPARDY OF SPENDING ANYWHERE FROM 20 TO 40 YEARS OF HIS LIFE IN PRISON IT IS INCONCEIVABLE THAT THE TRIAL COURT COULD NOT EVEN BE BOTHERED TO CHECK THE GUIDANCE MICHIGAN APPELLATE COURTS PROVIDED LONG BEFORE THE TRIAL IN THIS MATTER. RATHER, AFTER CONCEDING ERROR, THE TRIAL COURT DOUBLED DOWN ON AND COMPOUNDED THE ERRORS BY VIEWING TESTIMONY AND FACTS IN ISOLATION AND OUT OF CONTEXT IN ITS HARMLESS-ERROR ANALYSIS.

EVERY COURT, STATE AND FEDERAL, TO REVIEW THE CASE AFTER THE TRIAL COURT MADE THE SAME ERRORS. HOWEVER, NONE OF THE REVIEWING COURTS HAVE SQUARELY ADDRESSED THE QUESTION LEFT BY THE TRIAL COURT, THAT IS, DID THE TRIAL COURT'S HARMLESS-ERROR ANALYSIS COMPORT WITH THE CLEARLY ESTABLISHED PRECEDENTS OF THIS COURT?

THERE WERE NO EYEWITNESSES TO THE INCIDENT. THE CASE WAS VIRTUALLY A SHOUTING MATCH, WITH THE VICTIM'S BROTHER, JEFFREY ("JEFF") MORACZEWSKI (WHO CLAIMED THAT PETITIONER TOLD HIM THAT WHEN THE VICTIM WAS CHOKING HE TRIED TO "TAP-OUT," WHICH MEANS "GIVE-UP," BUT PETITIONER WOULD NOT ALLOW HIM TO THIS TIME), AND BROTHER-IN-LAW, MICHEAL ("MIKE") MITCHELL, ON ONE SIDE, AND PETITIONER ON THE OTHER SIDE.

IN RIDDLE, 467 MICH AT 128, THE MICHIGAN SUPREME COURT QUOTED APPROVINGLY JUDGE CARDOZO'S CAUTION (IGNORED IN THIS CASE) IN PEOPLE V. TOMLINS, 213 N.Y. 240,245; 107 N.E. 496 (1914):

> *"General statements to the effect that one who is attacked should withdraw, must be read in light of the facts that led up to them."*

THUS, THE GENERALLY APPLICABLE ELEMENT OF NECESSITY CONTEMPLATES THREE RETICULATE RULES THAT ARE APPLICABLE IN CERTAIN SPECIFIC FACTUAL SCENARIOS: (1) THERE IS NO DUTY TO RETREAT FROM SUDDEN VIOLENT ATTACK; (2) THERE IS A DUTY TO RETREAT IN ONE NARROW SET OF CIRCUMSTANCES: "WHERE A DEFENDANT - WHO IS NOT IN HIS 'CASTLE' - IS VOLUNTARILY ENGAGED IN MUTUAL, NONDEADLY COMBAT THAT ESCALATES INTO SUDDEN DEADLY VIOLENCE"; AND (3) RETREAT IS NOT A FACTOR IN ONE'S OWN DWELLING. RIDDLE, 467 MICH AT 128-34.

B. MICHIGAN SELF-DEFENSE ACT

IN 2006, THE MICHIGAN LEGISLATURE ENACTED THE SELF-DEFENSE ACT ("MSDA"), MICHIGAN COMPILED LAWS ("M.C.L.") 780.971 ET SEQ. EFFECTIVE OCTOBER 1, 2006, THE MSDA "CODIFIED THE CIRCUMSTANCES IN WHICH A PERSON MAY USE DEADLY FORCE IN SELF-DEFENSE OR IN DEFENSE OF ANOTHER PERSON WITHOUT HAVING A DUTY TO RETREAT." SEE PEOPLE V. DUPREE, 486 MICH 693, 708 (2010). SPECIFICALLY, SECTION 3 OF THE MSDA MODIFIED THE COMMON LAW DUTY TO RETREAT THAT WAS PREVIOUSLY IMPOSED ON INDIVIDUALS WHO WERE ATTACKED OUTSIDE THEIR OWN HOME OR WERE SUBJECTED TO A "SUDDEN, FIERCE, AND VIOLENT ATTACK." PEOPLE V. CONYERS, 281 MICH APP 526,530 N 2 (2008). HOWEVER, THE ACT CONTINUES TO REQUIRE THAT A PERSON HAVE AN HONEST AND REASONABLE BELIEF THAT THERE IS DANGER OF DEATH, GREAT BODILY HARM, OR SEXUAL ASSAULT IN ORDER TO JUSTIFY THE USE OF DEADLY FORCE. PEOPLE V. GUAJARDO, 300 MICH APP 26,38,41 (2013), CITING DUPREE,

486 MICH AT 709-10.

SECTION 2 OF THE MSDA PROVIDES, IN RELEVANT PART:

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

SEE M.C.L. 780.972(1)(A),(2).

C. PETITIONER'S CASE

PETITIONER'S ATTORNEY WAS ASSURED AND, IN TURN, ASSURED PETITIONER THAT MI CJI2D 7.15 (WHICH ESSENTIALLY MIRRORS M.C.L. 780.972(1)) WOULD BE READ TO THE JURY. HOWEVER, AFTER DISCUSSIONS REGARDING INSTRUCTIONS, IN-CHAMBERS AND NOT ON THE RECORD, MI CJI2D 7.15, THOUGH ESSENTIAL TO PETITIONER'S DEFENSE, WAS NOT READ. INSTEAD, IN A CASE WHERE FIRST-DEGREE MURDER WAS CHARGED, THE TRIAL COURT INEXPLICITLY INSISTED ON CRAFTING (AND FOLLOWING) ITS OWN NON-STANDARD JURY INSTRUCTION, ONE NOT IDENTICAL TO MI CJI2D 7.15, AND SO LACKING AND RIDDLED WITH OMISSIONS THAT THEY FAILED TO CONVEY TO THE JURY (AS THE STANDARD JURY INSTRUCTION WOULD HAVE) THAT PETITIONER COULD NOT ONLY "USE FORCE" BUT ALSO "TAKE A LIFE" IN SELF-DEFENSE.

THIS CASE IS INVOLVES THE DEATH OF TIMOTHY ("TIM") MORACZEWSKI ON SEPTEMBER 26, 2010 BY ASPHYXIA. KEVIN MICHAEL-DORMAN BELTOWSKI ("PETITIONER") WAS THE OWNER OF A ROOFING COMPANY, EVERLAST HOME IMPROVMENT: TIM WORKED FOR HIM IN THAT BUSINESS. THE TWO MEN WERE ALSO CLOSE FRIENDS AND TOGETHER CONDUCTED A MARIJUANA GROW OPERATION AT A HOUSE THAT TIM LIVED AT ON CADIEUX STREET IN DETROIT, MICHIGAN. THESE FACTS ARE HARVESTED FROM PETITIONER'S HABEAS PETITION: EXCERPTS APPEAR AT APPX H, P 4.

THE PROSECUTOR CLAIMED PETITIONER AND TIM HAD BEEN FUEDING AND PETITIONER WANTED TO TERMINATE THEIR RELATIONSHIP, AND THEN KILLED TIM BY STRANGLING HIM. THE DEFENSE THEORY WAS THAT TIM WAS WEARING A RIFLE WITH A STRAP ACROSS HIS NECK AND CHEST WHEN AN ARGUMENT ENSUED FOLLOWED BY A FIGHT. DURING THE FIGHT THE RIFLE STRAP BECAME TWISTED AROUND TIM'S NECK, AND PETITIONER HELD ON TO THE STRAP UNTIL HE THOUGHT HE COULD LEAVE SAFELY. PETITIONER ARGUED HE DID NOT INTEND TO KILL TIM AND HIS ACTIONS WERE IN SELF-DEFENSE. FURTHER, TIM HAD BEEN ABUSING XANAX AND VICODIN, BECOMING UNSTABLE AND VIOLENT. WHEN PETITIONER SAID HE WAS ENDING THEIR DRUG BUSINESS, TIM BECAME ANGRY AND FIRED A RIFLE SHOT AT PETITIONER. (APPX H, P 4).

PETITIONER MET WITH AND RETAINED COUNSEL THE FOLLOWING MORNING, AND THEN TURNED HIMSELF IN TO POLICE. (APPX H, P 5).

BEFORE TRIAL, A PLEA OF 5 TO 15 YEARS' IMPRISONMENT WAS PROFFERED AND APPROVED BY TIM'S FAMILY: HOWEVER, PETITIONER DID NOT WISH TO CONSIDER ANY TYPE OF PLEA OFFER. (APPX H, 5).

RELEVANT TESTIMONY OF THE PROSECUTION'S WITNESSES (INCLUDING CHIEF WITNESS JEFFREY ("JEFF") MORACZEWSKI, TIM'S BROTHER) AND EVIDENCE ADMITTED AT TRIAL, APPEARS AT APPX H, 5-10. DEFENSE WITNESSES (INCLUDING PETITIONER BELTOWSKI) APPEARS AT APPX H, 11-16. ALL OF THIS WILL BE DISCUSSED INFRA, AS NECESSARY.

THERE WERE NO EYEWITNESSES TO THE INCIDENT. THE CASE WAS LITERALLY A SHOUTING MATCH. ON ONE SIDE, THE VICTIM'S BROTHER, JEFFREY ("JEFF")

MORACZEWSKI (WHO CLAIMED PETITIONER TOLD HIM THAT WHEN TIM WAS CHOKING HE TRIED TO "TAP-OUT," WHICH MEANS "GIVE-UP," BUT PETITIONER WOULD NOT ALLOW HIM TO THIS TIME), AND BROTHER-IN-LAW, MICHAEL ("MIKE") MITCHELL, AND PETITIONER ON THE OTHER SIDE.

JEFF CLAIMED PETITIONER CONTINUED TO HOLD TIM SO HE COULD NOT GET UP. (APPX H, P 8; APPX B, PP 4-5). PETITIONER TESTIFIED HE ACTED IN SELF-DEFENSE AND TIM'S DEATH HAPPENED BY ACCIDENT. (APPX H, PP 12-15; APPX B, PP 7-9). THE CENTRAL ISSUE WAS WHETHER THE JURY BELIEVED PETITIONER'S VERSION, THAT HE ACTED IN LEGAL SELF-DEFENSE. ON THE DEFENSE SIDE, TIM, ENRAGED AND UNPREDICTABLE SUDDENLY AND VICIOUSLY ATTACKED PETITIONER; THERE WAS A STRUGGLE AFTER WHICH PETITIONER LEFT TIM UNCONSCIOUS WITH A LOOSE STRAP AROUND HIS NECK WHEN HE EXITED THE HOME, STILL IN FEAR FOR HIS LIFE.

THE STATE CLAIMED PETITIONER INTENTIONALLY KILLED TIM, THE DRUGS (XANAX AND VICODIN) IN HIS SYSTEM MADE HIM "SLEEPY AND DOCILE," AND THAT WHEN TIM WAS FOUND (BY JEFF AND MIKE), THE STRAP WAS TIGHT AROUND HIS NECK. THE STATE'S CASE WAS SUBSTANTIALLY BOLSTERED BY DR. BECHINSKI, A FORENSIC PATHOLOGIST AND ASSISTANT MEDICAL EXAMINER FOR WAYNE COUNTY, MICHIGAN, WHO, WITHOUT THE SLIGHTEST EXPERT KNOWLEDGE OF THE EFFECTS OF XANAX AND VICODIN, CLASSIFIED THE DRUGS AS CENTRAL NERVOUS SYSTEM DEPRESSANTS. (APPX H, P 16; APPX B, PP 23). DR. BECHINSKI COULD NOT EVEN SAY WHETHER THE DRUGS WERE A CONTRIBUTING FACTOR IN THE CAUSE OF DEATH. (APPX I, 3).

OWING TO DEFENSE COUNSEL'S INCREDIBLE BLUNDER, NO INDEPENDENT EXPERT TESTIFIED AT TRIAL FOR THE DEFENSE. (APPX H, PP 63-65).

HERE AGAIN, PETITIONER WAS ASSURED BY COUNSEL THAT THE TRIAL COURT WOULD USE THE STANDARD CRIMINAL JURY INSTRUCTION, MI CJI2D 7.15, WHICH ESSENTIALLY MIRRORS THE MSDA. HOWEVER, AFTER IN-CAMBERS (OFF-THE-RECORD) DISCUSSION, MI CJI 2D 7.15 WHICH WAS VITAL TO THE DEFENSE, WAS NOT EVEN READ. NOTABLY, MI CJI2D 7.15 WAS AMENDED IN 2006 IN RESPONSE TO THE MSDA. AGAIN, MI CJI2D APPEARS AT APPX G. THE FULL SELF-DEFENSE INSTRUCTION GIVEN BY THE TRIAL JUDGE APPEARS AT APPX I.

DURING DELIBERATIONS, THE JURY SEND TWO NOTES REQUESTING TO VIEW JEFF'S VIDEO STATEMENT, AND A COPY OF PETITIONER'S TESTIMONY. THE TRIAL JUDGE ALLOWED THE JURY TO SEE JEFF'S VIDEO STATEMENT, BUT IN A STRIKING AND ARBITRARY MOVE, DENIED THEIR REQUEST FOR PETITIONER'S TESTIMONY. (APPX H, P 41).

THE JURY ALSO ASKED THE FOLLOWING, UNANSWERED, QUESTIONS DURING DR. BECHINSKI'S TESTIMONY: "WOULD THE PRESENCE OF THE DRUGS VICODIN AND XANAX SPEED UP THE PROCESS OF DEATH OR ASPHYXIATION?" DUE TO HIS LIMITED KNOWLEDGE ON THE SUBJECT, THE GOOD DOCTOR COULD NOT ANSWER THE QUESTION (APPX H, P 47), LEAVING THE JURORS TO FIGURE IT OUT.

THE JURY ULTIMATELY FOUND PETITIONER GUILTY OF SECOND DEGREE MURDER CONTRARY TO M.C.L. 750.317. ON APRIL 27, 2011, THE TRIAL JUDGE SENTENCED HIM TO TWENTY TO FORTY YEARS' IMPRISONMENT, AS A THIRD HABITUAL OFFENDER CONTRARY TO M.C.L. 769.11.

The Direct Appeal

PETITIONER RAISED FOUR ASSIGNMENTS OF ERROR IN THE MICHIGAN COURT OF APPEALS, NONE OF WHICH ARE THE SUBJECT OF THIS PETITION. IT IS WORTH MENTIONING THOUGH, THAT PETITIONER'S STANDARD 4 BRIEF - THE PLEADING IN WHICH PETITIONER WAS REQUIRED TO PREPARE AND FILE ISSUES ON HIS OWN RAISING CLAIMS HE FOUND, AND THAT APPELLATE COUNSEL REFUSES TO INCLUDE IN THE PRINCIPLE APPELLATE BRIEF - AND MOTION TO EXTEND TIME TO FILE THAT BRIEF, WERE DENIED. ON OCTOBER 9, 2012, THE MICHIGAN COURT OF APPEALS AFFIRMED PETITIONER'S CONVICTION. SEE PEOPLE V. BELTOWSKI, UNPUBLISHED OPINION OF THE MICHIGAN COURT OF APPEALS, DOCKET NO. 304254. A SUBSEQUENT, PRO SE, APPLICATION FOR LEAVE TO APPEAL IN THE MICHIGAN SUPREME COURT WAS DENIED IN AN ORDER DATED APRIL 29, 2013, DOCKET NO. 146272.

Postconviction Proceedings

ON JUNE 27, 2014, PETITIONER FILED A MOTION FOR RELIEF FROM JUDGMENT

("MRJ") UNDER MICHIGAN COURT RULE ("M.C.R.") 6.500 ET SEQ., IN WAYNE COUNTY, MICHIGAN, CIRCUIT COURT. HE RAISED SIX CLAIMS, TWO OF WHICH ARE RELEVANT TO THIS PETITION, REPEATED AND SUMMARIZED BELOW FOR COURT'S CONVENIENCE AND CONTEXT, WHICH SEEMS TO HAVE BEEN LOST ON THE COURT'S BELOW.

> *I. Defendant Beltowski Was Denied Due Process Of Law And A Fair Trial When An Erroneous Self-Defense Instruction Was Given, Which Deprived Him Of The Defense By Instructing The Jury That He Could Not Claim Self-Defense If: (1) He "Acted Wrongfully," (2) "Brought On The Assault," (3) "And Was Limited To Using Self-Defense Only To Protect Himself From Imminent Unlawful Use Of Deadly Force By Another," And (4) Only For Such Time "As It Seems Necessary For The Purpose Of Protection.*

IN SUBSTANCE, PETITIONER ARGUED IN THE MRJ THAT THE THESE ERRONEOUS INSTRUCTIONS EFFECTIVELY PRECLUDED HIS RIGHT TO SELF-DEFENSE BY IMPOSING LANGUAGE FROM THE MSDA TO DEFEAT A COMMON LAW RIGHT TO SELF-DEFENSE WHEN, IN FACT, THE MSDA ONLY ADDRESSES THE DUTY TO RETREAT OUTSIDE ONE'S HOME, OR TO STAND ONE'S GROUND AND NOT RETREAT, WHICH DID NOT EXIST AT COMMON LAW, AND THE ACT DID NOT ABROGATE A DEFENDANT'S COMMON LAW RIGHT TO SELF-DEFENSE. HE IDENTIFIED FIVE DISTINCT, BUT RELATED, DEFECTS IN THE TRIAL COURT'S INSTRUCTIONS WHICH DEPRIVED HIM OF THE DEFENSE ALTOGETHER, DISCUSSED BELOW.

FIRST, BY INSTRUCTING THE JURY THAT "THE PERSON CLAIMING SELF-DEFENSE MUST NOT HAVE ACTED WRONGFULLY AND BROUGHT ON THE ASSAULT[,]" THE COURT LED THE JURORS TO BELIEVE PETITIONER'S CLAIM OF SELF-DEFENSE MUST BE REJECTED IF THEY BELIEVE HE ACTED "WRONGFULLY" IN ANY MANNER (E.G., "BY COMING TO THE HOUSE, ENGAGING MORACZEWSKI IN AN ARGUMENT OVER THE GROW OPERATION, OR ANOTHER WRONG THE JURY COULD CONJURE UP"), OPPOSED TO, AS THE MSDA PUTS IT: "HAS NOT ENGAGED IN THE COMMISSION OF A CRIME AT THE TIME...." (APPX H, 19-28; APPX B, 14-16). SECOND, BY INSTRUCTING THE JURORS THAT SELF-DEFENSE IS PRECLUDED IF PETITIONER "BROUGHT ON THE ASSAULT," THE TRIAL COURT EFFECTIVELY ALLOWED THE JURY TO REJECT PETITIONER'S SELF-DEFENSE BECAUSE HE WAS THE AGGRESSOR AND BROUGHT

ON THE ASSAULT BY GOING OVER TO THE HOUSE OR BY ENGAGING TIM IN THE AFFRAY, AND THE JURY COULD HAVE FOUND THAT PETITIONER COULD HAVE "STAYED HOME" OR SENT SOMEONE ELSE OVER TO THE HOUSE, OR PREVIOUSLY TERMINATED THE GROW OPERATION, ETC. (APPX B, 16: APPX H, 28-29).

THIRD, THE COURT SHIFTED THE BURDEN TO PETITIONER BY INSTRUCTING THE JURY THAT IN ORDER TO CLAIM SELF-DEFENSE PETITIONER MUST HAVE HONESTLY AND REASONABLY BELIEVED HE HAD TO USE FORCE "TO PROTECT HIMSELF FROM THE IMMINENT UNLAWFUL USE OF FORCE BY ANOTHER," AS OPPOSED TO WHAT THE MSDA REQUIRES: "THAT THE USE OF DEADLY FORCE IS NECESSARY TO PREVENT THE IMMINENT DEATH OF OR IMMINENT GREAT BODILY HARM OF HIMSELF...." PETITIONER CONTENDED THAT THE DEFECTIVE INSTRUCTION TOOK THE JURY'S FOCUS OFF HIS CONDUCT AND STATE OF MIND ("TO PREVENT IMMINENT DEATH OR IMMINENT BODILY HARM TO HIMSELF") AND PUT THAT FOCUS SQUARELY ON TIM ("WHETHER HE WAS ACTING LAWFULLY OR NOT," A MATTER FOR WHICH THE COURT PROVIDED NO GUIDANCE WHATEVER. IN OTHER WORDS, PETITIONER ARGUED, IF THE JURY CONCLUDED THAT TIM WAS LAWFULLY ARMED IN HIS HOUSE, LAWFULLY ENGAGED IN THE AFFRAY, PETITION COULD NOT CLAIM SELF-DEFENSE. (APPX B, 16: APPX H, 29).

FOURTH, PETITIONER ARGUED THAT THE COURT ERRONEOUSLY INSTRUCTED THE JURY THAT SELF-DEFENSE IS AVAILABLE ONLY "AS LONG AS IT SEEMS NECESSARY FOR PURPOSES OF PROTECTION," AND FAILS TO DEFINE WHAT IS MEANT BY "SEEMS NECESSARY" AND "PROTECTION." THIS LANGAUGE, CRAFTED AND EMPLOYED BY THE TRIAL COURT, APPEARS NOWHERE IN THE MSDA. PETITIONER ASSERTED THAT THE DEFECTIVE INSTRUCTION LEFT THE JURY TO REJECT HIS SELF-DEFENSE BY CONCLUDING THAT HE NO LONGER "SEEMED" TO NEED "PROTECTION" (IN THE JURY'S VIEW, RATHER THAN - AND HERE AGAIN - AS IT APPEARED TO PETITIONER AT THE TIME) IN HIS LIFE AND DEATH STRUGGLE WITH TIM OVER THE RIFLE. (APPX B, 17: APPX H, 30). FIFTH, PETITIONER ARGUED THAT THE COURT'S INSTRUCTION OMITTED STATUTORILY REQUIRED LANGUAGE THAT SELF-DEFENSE PERMITS THE USE OF FORCE, "OR EVEN TO TAKE A LIFE," AND FAILED TO LIST VARIOUS FACTORS THE JURY COULD CONSIDER IN DETERMINING WHETHER PETITIONER HAD A REASONABLE BELIEF OF DEATH OR SERIOUS BODILY INJURY.

(APPX B, 17; APPX H, 30-31).

FACED WITH THESE ARGUMENTS AND THE FACTUAL RECORD, THE TRIAL COURT ACKNOWLEDGED ERROR IN THE FIRST AND SECOND CLAIMS (I.E., THAT PETITIONER COULD NOT CLAIM SELF-DEFENSE IF HE "ACTED WRONGFULLY" AND "BROUGHT ON THE ASSAULT"), BUT WAS "PERSUADED THAT THE ERROR INVOLVED HERE WAS NOT DECISIVE OF THE OUTCOME." THE COURT CONCLUDED THAT "BOTH OF THESE TERMS ESSENTIALLY DESCRIBE A PERSON WHO IS THE AGGRESSOR, OR INITIATOR OF AN ALTERCATION CANNOT TURN AROUND AND ESCALATE OR USE DEADLY FORCE, IF THE OTHER PERSON CHOOSES TO FIGHT BACK." THE COURT SAID THE JURY WAS GIVEN A CHOICE TO BELIEVE PETITIONER'S OR THE PROSECUTION'S VERSION, AND IF THEY BELIEVED PETITIONER HE WAS PROTECTED BY THE MSDA, "EVEN OF HE USED DEADLY FORCE." ADDITIONALLY, SPEAKING FOR THE JURORS, THE COURT STATED THAT ULTIMATELY THE JURY DID NOT BELIEVE PETITIONER'S TESTIMONY AND DEEMED HIM THE AGGRESSOR. AS SUCH, THE COURT CONCLUDED PETITIONER HAS NOT SHOWN "THAT THE ERROR SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS." THIS IS MERELY A TINY SAMPLING OF THE TRIAL COURT'S DENSELY-PACKED, MULTI-LEGAL FINDINGS. THE ENTIRE OPINION IS REPRODUCED AND APPEARS AT APPX B, P 17; APPX H, PP 25-27. THE TRIAL COURT DID NOT ADDRESS THE THREE REMAINING INSTRUCTIONAL ERRORS. (ID.)

A COURT'S HARMLESS ERROR ANALYSIS MUST TAKE ACCOUNT OF ALL THAT HAPPENED AT TRIAL, THUS MAKING THE OTHER ERRORS RAISED BY PETITIONER RELEVANT TO THE INSTRUCTIONAL ERROR. PETITIONER WILL NOW BRIEFLY DISCUSS THE NEWLY DISCOVERED EVIDENCE CLAIM (AS IT IS MOST CRUCIAL) AND SAVE THE OTHER CLAIMS FOR DISCUSSION, INFRA, AS NECESSARY.

IV. The Newly Discovered Evidence That High Levels Of Hydrocodone And Alprazolam Ingested By The Deceased Significantly Contributed To His Death Requires A Retrial.

THE MRJ REITERATED PERTINENT TRIAL FACTS OF DR. JOHN BECHINSKI, THE ASSISTANT WAYNE COUNTY MEDICAL EXAMINER IN THIS CASE, WHO TESTIFIED THAT TIMOTHY MORACZEWSKI DIED OF ASPHYXIA BY STRANGULATION. IN HIS SYSTEM, THERE WAS HIGH LEVELS OF XANAX AND VICODIN (WHICH CONTAIN THE

ACTIVE DRUG ALPRAZOL) AND VICODIN (WHICH CONTAIN THE ACTIVE DRUG HYDROCODONE). THE GOOD DOCTOR COULD NOT DETERMINE IF THE DRUGS CONTRIBUTED TO TIM'S DEATH, BECAUSE HE WAS ADMITTEDLY UNQUALIFIED. HE DID SAY A PERSON IS RENDERED UNCONSCIOUS WITHIN 10 TO 15 SECONDS, BUT DEATH THROUGH ASPHYXIA (WHEN THE BODY DOES NOT HAVE ENOUGH OXYGEN) DOES NOT OCCUR FOR ANOTHER 3 TO 5 MINUTES.

BECHINSKI TESTIFIED, AFTER DRAWN-OUT BY THE PROSECUTOR, THAT THE DRUGS MADE TIM "MORE DOCILE" AND "HELPLESS," WHICH VERY LIKELY CONVINCED THE JUROR'S THAT TIM WAS OVERWHELMED BY PETITIONER. (APPX B, 3; APPX H, 42-43).

PETITIONER, ON THE OTHER HAND, ARGUED THAT HIGH LEVELS OF THESE DRUGS ACTUALLY REDUCED THE RATE AND DEPTH OF RESPIRATION AND SUPPRESSED THE RESPIRATION RECOVERY PROCESS, WHICH LEADS TO DEATH BY SUFFOCATION; THUS, ONCE TIM PASSED OUT, THE HIGH CONCENTRATION OF THESE TWO DRUGS WOULD PREVENT A RETURN TO NORMAL BREATHING, EVEN AFTER PETITIONER RELEASED HIS STRANGULATION HOLD WHEN TIM WAS STILL ALIVE. ALSO, THE HIGH LEVELS OF ALPRAZOLAM WOULD CAUSE TIM TO ENGAGE IN HIGH-RISK, AGGRESSIVE, BEHAVIOR, RATHER THAN BEING DOCILE AND HELPLESS (AS THE PROSECUTOR SUGGESTED). (APP B, 28-29; APPX H, 43).

THE NEWLY DISCOVERED EVIDENCE CONSISTED OF AN ANALYSIS AND OPINION OF DR. RANDALL COMMISSARIS, PHD, AND EXPERT PHARMACOLOGIST AND TOXICOLOGIST, WHICH DIRECTLY SUPPORTED PETITIONER'S DEFENSES OF ACCIDENTAL DEATH AND SELF-DEFENSE. (APPX B, 29; APPX H, 43,49). IT STATED, "[W]HILE DR. BECHINSKI ADMITTED HE WAS NOT QUALIFIED TO GIVE AN OPINION WHETHER THE DRUGS CONTRIBUTED TO THE DEATH OR ASPHYXIA ... DR. COMMISSARIS IS BOTH QUALIFIED AND HAS AN EXPERT OPINION ... THAT HIGH LEVELS OF HYDROCODONE CAN 'LEAD TO SERIOUS AND POTENTIALLY FATAL CONSEQUENCES' AND 'AN OVERDOSE OF HYDROCODONE IS FOLLOWED BY THE CESSATION OF BREATHING AND THE PATIENT SUFFOCATES.'" FURTHER, COMMISSARIS OPINED THAT "[H]YDROCODONE REDUCES THE RATE OF RESPIRATION (NUMBER OF BREATHS/MINUTE) AND REDUCES THE DEPTH OF RESPIRATION (SMALLER AIR EXCHANGE PER BREATH.")." (APPX B, 29; APPX H, 46. HE ADDED, "PERHAPS WORST OF ALL, HYDROCODONE REDUCES THE BODY'S PERCEIVED NEED TO BREATHE

... [AND] PATIENTS SIMPLY SLOWLY STOP BREATHING AND DIE FROM THE LACK OF OXYGEN ... [AND] THE INTERACTION OF THE TWO DRUGS AGGRAVATE THE PROBLEM." "[T]HIS SUPPRESSION OF RESPIRATION BY HYDROCODONE WILL BE MADE WORSE BY A HIGH DOSE OF ALPRAZOLAM." IN SHORT, THE HIGH LEVELS OF HYDROCODONE AND ALPRAZOLAM PREVENTED A RETURN TO NORMAL BREATHING ONCE PETITIONER RELEASED PRESSURE FROM THE STRAP. DEATH, IN DR. COMMISSARIS EXPERT OPINION, WAS ESSENTIALLY CAUSED BY OPIOID INTOXICATION, EXACERBATED BY THE HIGH LEVELS OF ALPRAZOLAM. (APPX B, 29; APPX H, 47).

WITH THIS, PETITIONER ARGUED THAT HAD THE JURY BEEN APPRISED OF THIS CRITICAL EVIDENCE, IT IS HIGHLY PROBABLE THAT PETITIONER WOULD HAVE BEEN ACQUITTED OF THE HOMICIDE. PETITIONER REITERATED THAT THE JURY SPECIFICALLY ASKED DR. BECHINSKI DURING TRIAL, "WOULD THE PRESENCE OF THE DRUGS VICODIN OR XANAX SPEED UP THE PROCESS OF DEATH OF ASPHYXATION[,]" TO WHICH DR. BECHINSKI RESPONDED, "I DON'T KNOW." HOWEVER, DR. COMMISSARIS WOULD ANSWER FOR THE JURY IN THE AFFIRMATIVE, AND THEREFORE A NEW TRIAL IS WARRANTED. (APPX H, 47).

THE TRIAL COURT FOUND THAT THE COMMISSARIS TOXICOLOGIST REPORT DOES NOT MEET THE REQUIREMENTS OF NEW EVIDENCE BECAUSE IT COULD HAVE BEEN OBTAINED DURING TRIAL OR APPEAL WITH REASONABLE DILIGENCE. THE COURT NOTED THAT THE TOXICOLOGIST REPORT ISSUED BY THE WAYNE COUNTY MEDICAL EXAMINER AND UTILIZED DURING TRIAL, AND THE EVIDENCE PRESENTED BY COMMISSARIS WOULD NOT LEAD TO A DIFFERENT RESULT PROBABLE ON RETRIAL: "AS THE JURY DID NOT BELIEVE THE DEFENDANT LOOSENED THE RIFLE STRAPS THAT WERE FOUND TIGHTLY AROUND THE DECEDENT'S NECK WHEN HE WAS FOUND DEAD IN HIS HOME BY HIS BROTHER JEFFREY MORACZEWSKI." THE COURT STATED THAT PETITIONER'S THEORY, SUPPORTED BY DR. COMMISSARIS (THAT PETITIONER RELEASED THE PRESSURE AROUND THE DECEDENT'S NECK AND HIGH CONCENTRATION OF AN OPIATE DRUG LIKE HYDROCODRONE SUPPRESSED THE COMPLAINANT'S RESPIRATORY RECOVERY PROCESS, WHICH LED TO HIS DEATH VIA SUFFOCATION) IS ONLY PLAUSIBLE "IF THE DECEDENT WASN'T STILL IN A STATE OF STRANGULATION." (APPX E, 6-7; APPX H, 48). RELYING ON TESTIMONY OF

JEFF (TIM'S BROTHER), THAT "THE DECEDENT WAS 'FOUND' WITH THE SHOULDER STRAP OF THE RIFLE TWISTED AROUND HIS NECK[,]" AND A FRIEND, "MICHEAL MITCHELL TESTIFIED THAT JEFF HAD TO UNTWIST THE STRAP THREE REVOLUTIONS TO REMOVE IT FROM AROUND THE COMPLAINANT'S NECK[,]" THE TRIAL COURT CONCLUDED WITH THESE WORDS: "AS THE DECENDENT WAS IN A STATE OF STRANGULATION FOR MORE THAN 3-5 MINUTES, HIS DEATH IS CONSISTENT WITH STRANGULATION RATHER THAN FROM OPIATE INDUCED SUFFOCATION. AS SUCH, DEFENDANT FAILS TO MEET THE CRITERIA FOR ESTABLISHING MERIT FOR A NEW TRIAL." (APPX E, 7).

PETITIONER'S NEWLY DISCOVERED EVIDENCE (OR CLAIM OF INNOCENCE) ARISES AS A FACTUAL CONSIDERATION WITHIN THE CONTEXT OF EVALUATING WHETHER HE HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

THE MICHIGAN COURT OF APPEALS AND SUPREME COURT DENIED LEAVE TO APPEAL IN THEIR STANDARD, TERSE, ORDERS ON JUNE 22, 2015 AND JULY 26, 2016, RESPECTIVELY, STATING THAT "THE DEFENDANT HAS FAILED TO MEET THE BURDEN OF ESTABLISHING ENTITLEMENT TO RELIEF UNDER MCR 6.508(D)."

THE PETITION FOR WRIT OF HABEAS CORPUS, FILED IN THE DISTRICT COURT WITH RESPECT TO THE SIX CLAIMS IDENTIFIED IN THE MRJ, ASSERTED THAT THE STATE COURT DECISION INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW. (APPX H, 19-33: JURY INSTRUCTION; 42-49: NEWLY DISCOVERED EVIDENCE).

AS TO THE INSTRUCTIONAL ERRORS, THE DISTRICT COURT WAS VERY QUICK TO POINT OUT THAT "PETITIONER'S ARGUMENT HAS SOME FORCE [BECAUSE] THE [T]HE INSTRUCTION READ BY THE TRIAL COURT DEVIATED FROM MICHIGAN'S STANDARD INSTRUCTION ON SELF-DEFENSE AND THE LANGUAGE OF MICHIGAN'S SELF-DEFENSE ACT...." (APPX B, 18). THE DISTRICT COURT FOUND THAT THE TRIAL COURT "FAIL[ED] TO ADDRESS EACH OF PETITIONER'S OBJECTIONS TO THE SELF-DEFENSE INSTRUCTION INDIVIDUALLY...." (ID AT 17). AFTER RESTATING PETITIONER'S CLAIMS AND MAKING REFERENCES TO MICHIGAN'S SELF-DEFENSE STANDARDS AND CASELAW, THE DISTRICT COURT STATED, "THERE IS NO REASONABLE PROBABILITY THAT THE JURY REJECTED PETITIONER'S SELF-DEFENSE CLAIM ON ANY OF THESE HYPOTHETICAL BASES." THE DISTRICT COURT

SAID, "[T]HIS MIGHT BE A DIFFERENT CASE IF PETITIONER HAD SHOT THE VICTIM AND INSTANTLY KILLED HIM DURING THE COURSE OF AN ACTIVE FIGHT." (ID. AT 19-20).

THE DISTRICT COURT DETERMINED THAT "THE EVIDENCE PRESENTED AT TRIAL INDICATES PETITIONER RENDERED THE VICTIM UNCONSCIOUS BY STRANGLING HIM WITH A RIFLE STRAP. THE MEDICAL EXAMINER TESTIFIED THAT A PERSON WOULD HAVE BEEN RENDERED UNCONSCIOUS, AND OBVIOUSLY HELPLESS, AFTER TEN TO FIFTEEN SECONDS OF BEING STRANGLED WITH A LIGATURE." THE DISTRICT COURT THEN REFERENCED JEFF'S TESTIMONY, WHOM PETITIONER ALLEGEDLY TOLD (VERY CONVENIENTLY, FROM THE PROSECUTION'S STANDPOINT) "MINUTES AFTER THE INCIDENT THAT HE 'CHOKED OUT' THE VICTIM, AND HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS AFTER HE PASSED OUT." (ID. AT 20). THE DISTRICT COURT WENT A STEP, OR TWO, BEYOND THE STATE TRIAL COURT'S FINDINGS, WITH THIS:

> *The problem for petitioner and his defense is the period of time after he rendered the victim helpless. At that point, the victim was unconscious and no longer presented a threat. According to petitioner, the victim was still breathing and he immediately left without knowing that the rifle strap was wrapped around the victim's neck. But this testimony runs contrary to the testimony of the victim's brother who said that petitioner told him that he continued to choke the victim for another thirty seconds after he lost consciousness. Though petitioner testified that the victim's brother was lying about this statement, the brother told a police officer the same thing hours after the incident at the hospital. Additionally, both the victim's brother and mitchell found the victim with the strap twisted around his neck so tightly that they could not get their fingers underneath it.*
>
> *Given, this evidence, there is no substantial probability that the jury erroneously rejected self-defense because it thought that Petitioner's conduct after he rendered the victim unconscious was "wrongful," that the victim was using unlawful force at that point (he was unconscious), or that the continued use of force was required for "purposes of protection." That is, none of the hypothetical findings posited by Petitioner applied to the facts of the case after Petitioner rendered the victim unconscious and helpless. After Petitioner refused to allow the victim to "tap-out," a reasonably debatable act of self-defense turned into a clear case of murder. [Appx B, 20-21.]*

THE DISTRICT COURT ULTIMATELY CONCLUDED THAT PETITIONER IS NOT

ENTITLED TO HABEAS RELIEF BECAUSE ANY ERROR IN THE SELF-DEFENSE INSTRUCTION DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE VERDICT IN LIGHT OF THE LACK OF EVIDENCE TO SUPPORT PETITIONER'S SELF-DEFENSE CLAIM AND THE STRONG EVIDENCE INDICATING THAT PETITIONER MURDERED THE VICTIM AFTER HE RENDERED HIM UNCONSCIOUS. (Id. AT 21).

THE DISTRICT COURT ALSO ADDRESSED THE NEWLY DISCOVERED EVIDENCE CLAIM ("THAT THE HIGH LEVELS OF HYDROCODONE AND ALPRAZOOM WERE A SIGNIFICANT CONTRIBUTING FACTOR IN THE VICTIM'S DEATH [AND] THESE DRUGS SUPPRESSED THE RESPIRATION RECOVERY PROCESS THAT WOULD NORMALLY OCCUR AFTER A PERSON LOSES CONSCIOUSNESS"). THE DISTRICT COURT NOTED THAT PETITIONER'S ALLEGATIONS WERE SUPPORTED BY DR. COMMISSARIS, AN EXPERT IN PHARMACOLOGY AND TOXICOLOGY. (APPX B, 28-29). INITIALLY, THE DISTRICT COURT FOUND THE CLAIM MERITLESS "BECAUSE IT CANNOT BE SUPPORTED BY CLEARLY ESTABLISHED SUPREME COURT LAW." IT CRITICIZED PETITIONER'S RELIANCE ON SEVENTH CIRCUIT PRECEDENT. (Id. AT 29). THE DISTRICT JUDGE THEN STATED:

> *In any event, Commissaris' opinion that the victim's use of drugs suppressed his ability to start breathing again on his own ignores two key facts. First, Petitioner was the one who strangled the victim and put him in the position of needing to restart his own breathing to survive. Under Michigan law, one "takes his victim as he finds [him]," meaning that "any special susceptibility of the victim to the injury at issue" does not exonerate a defendant. .... Second, the evidence indicated that even without the drugs the victim would not have regained consciousness because Petitioner left the strap tightly wound around the victim's neck preventing any blood flow. This claim does not state a basis for granting habeas relief. [Appx B, 29-30.]*

THE DISTRICT COURT BYPASSED THE PROCEDURAL DEFAULT QUESTIONS, FINDING IT MORE EFFICIENT TO PROCEED TO THE MERITS, "ESPECIALLY BECAUSE PETITIONER ALLEGES THAT HIS ATTORNEYS WERE INEFFECTIVE FOR FAILING TO PRESERVE THE DEFAULTED CLAIMS." (APPX B, 14). IT DENIED HABEAS RELIEF ON THE REMAINDER OF PETITIONER'S CLAIMS. AS TO CLAIM 5 (THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT TOXICOLOGY EVIDENCE THAT HIGH LEVELS OF HYDROCODONE AND ALPRAZOLOM SIGNIFICANTLY CONTRIBUTED TO THE DEATH), THE DISTRICT COURT FOUND THAT

DR. COMMISSARIS' "REPORT FAILS TO ACCOUNT FOR THE FACT THAT THE RIFLE STRAP WAS STILL TIGHTLY CONSTRICTING THE VICTIM'S NECK AFTER HE PASSED OUT." IT FOUND "[T]HE SAME THING IS TRUE FOR THE EXPERT'S OPINION THAT THE DRUGS MAY HAVE MADE THE VICTIM MORE AGGRESSIVE." (APPX B, 34-35). IT THEN CONCLUDED, ID. AT P 35:

> *Even if that were true, the victim was certainly no longer aggressive after he lost consciousness and Petitioner continued to apply pressure for another thirty seconds and then left him helpless with the strap tightly constricting his neck. That is the critical passage of time that turned a case of arguable self-defense into murder. Counsel did not perform deficiently by failing to hire a toxicologist, nor was he prejudiced by the failure to offer testimony similar to that contained in the Commissaris report.*

THE DISTRICT COURT GRANTED A CERTIFICATE OF APPEALABILITY ("COA") WITH THESE WORDS: "....JURISTS OF REASON COULD DEBATE WHETHER PETITIONER IS ENTITLED TO RELIEF ON HIS JURY INSTRUCTION CLAIM." (APPX B, 37-38). PETITIONER FILED A MOTION TO EXPAND THE COA TO INCLUDE HABEAS CLAIMS TWO THROUGH SIX. ON JUNE 28, 2018, A PANEL OF THE SIXTH CIRCUIT HELD THAT REASONABLE JURISTS WOULD NOT DEBATE THE DISTRICT COURT'S CONCLUSION OF CLAIMS TWO THROUGH FIVE. IT GRANTED A COA WITH RESPECT TO THE ASSOCIATED INEFFECTIVE ASSISTANCE OF COUNSEL IN CLAIM SIX.

ON FEBRUARY 1, 2019 THE PANEL "DETERMINED THAT ORAL ARGUMENT IS NOT REQUIRED."

ON MARCH 3, 2019, THE SIXTH CIRCUIT PANEL AFFIRMED THE DISTRICT COURT, FIRST, AS TO THE ERRONEOUS JURY INSTRUCTION AND CONCOMITANT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. (APPX A). IN DOING SO, THE PANEL ADDRESSED EACH OF INSTRUCTIONAL DEFECTS. AS TO THE "ACTED WRONGFULLY AND BROUGHT ON THE ASSAULT" ERROR, THE PANEL FOCUSED THE ARGUMENT ON THE SEVERAL HYPOTHETICALS; IT CITED THE PRINCIPLE THAT "A JURY INSTRUCTION DOES NOT VIOLATE DUE PROCESS SIMPLY BECAUSE THERE IS A HYPOTHETICAL 'POSSIBILITY' THAT THE JURY MISAPPLIED THE INSTRUCTION." (ID. AT 3-4, QUOTING WADDINGTON V. SARAUSAD, 555 US 179,191 (2009)(INTERNAL QUOTATION MARKS OMITTED; EMPHASIS ADDED)).

SECOND, THE PANEL FOUND THE TRIAL COURT'S INSTRUCTION THAT "THE DEFENDANT MUST HAVE HONESTLY AND REASONABLY BELIEVED THAT HE HAD TO USE FORCE TO PROTECT HIMSELF FROM THE IMMINENT UNLAWFUL USE OF FORCE BY ANOTHER ..... ALMOST EXACTLY TRACKED THE LANGUAGE IN MICHIGAN'S SELF-DEFENSE STATUTE" AND STATED THAT BOTH STATUTE AND "THE INSTRUCTION REQUIRED THE JURY TO ASSESS THE REASONABLENESS OF BELTOWSKI'S BELIEF, NOT THE UNLAWFULNESS OF MORACZEWSKI'S ACTIONS." (ID. AT 4)(CITING PEOPLE V. ORLEWICZ, 809 N.W.2D 194,201 (MICH.CT.APP. 2011)).

THIRD, THE PANEL FOUND THAT THE TRIAL COURT'S USE OF THE WORDS "PROTECTION" AND "SEEMS," (WHICH APPEAR NOWHERE IN STATUTE) "ARE SIMPLY ANOTHER WAY OF SAYING THAT THE PERSON MUST REASONABLY BELIEVE THAT THE ACT OF SELF-DEFENSE IS NECESSARY." (ID. AT 4). FOURTH, IN RESPONSE TO THE ARGUMENT THAT THE TRIAL COURT SHOULD HAVE INCLUDED THE LANGUAGE IN MICHIGAN'S MODEL JURY INSTRUCTIONS, THE PANEL FOUND "THE SELF-DEFENSE INSTRUCTION 'AS A WHOLE' SHOWS THAT THESE OMISSIONS DID NOT RENDER BELTOWSKI'S ENTIRE TRIAL FUNDAMENTALLY UNFAIR." (ID. AT 5).

THE PANEL THUS CONCLUDED THAT PETITIONER'S RELATED CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ARGUE THAT THE SELF-DEFENSE INSTRUCTION VIOLATED HIS CONSTITUTIONAL RIGHTS, "WOULD LACK MERIT." (ID. AT 5).

THE CENTRAL THRUST OF PETITIONER'S ARGUMENTS HAVE BEEN LOST IN THE BYZANTINE MORASS OF ARBITRARY, UNNECESSARY, AND UNJUSTIFIABLE IMPEDIMENTS PRESENT IN OUR TRIAL, APPEAL AND POST-CONVICTION SYSTEMS. THERE IS NO WAY OF KNOWING WHETHER, ON THE BASIS OF THE NUMEROUS DEFECTIVE INSTRUCTIONS GIVEN, IF ANY OF THE JURORS DID IN FACT REJECT PETITIONER'S SELF-DEFENSE, AND IF THEY ACTUALLY BELIEVED JEFF'S CONVENIENT "TIGHTLY WRAPPED AROUND THE NECK" TESTIMONY OVER PETITIONER'S CONTRARY TESTIMONY. OR BETTER, IF A REASONABLE JUROR ON RETRIAL WOULD BELIEVE JEFF OVER PETITIONER. THE COURT'S BELOW HAVE IMPERMISSIBLY FOCUSED ON THE SUFFICIENCY OF EVIDENCE IN HARMLESS-ERROR ANALYSIS; IMPERMISSIBLY FOCUSED ON THE VICTIM NOT BEING AGGRESSIVE AFTER RENDERED UNCONSCIOUS (RATHER THAN A THREAT TO PETITIONER, IN HIS OWN MIND, BASED

ON HOW HE VIEWED AND FILTERED ALL THE CIRCUMSTANCES); IGNORES PETITIONER'S STATE OF MIND ALTOGETHER; REJECTS PETITIONER'S TESTIMONY OUTRIGHT (EVEN THOUGH REASONABLE JURORS WOULD NOT); PLACES TOO MUCH EMPHASIS ON WHAT THE LANGUAGE OF THE STATUTE SAYS, RATHER THAN WHAT THE TRIAL JUDGE ERRONEOUSLY INSTRUCTED AND ITS EFFECT ON THE JURY IN THE REAL WORLD. THE COURT'S BELOW ALSO HAVE EXPENDED AN EXORBITANT AMOUNT OF TIME AND FOCUS ON HYPOTHETICALS, TREATING THEM AS SUBSTANTIVE ARGUMENTS, RATHER THAN EXACTLY WHAT THEY ARE: POSSIBLE SCENARIOS PROPOSED BY PETITIONER, BUT NOT NECESSARILY REAL OR TRUE. INDEED, PETITIONER IS NOT REQUIRED TO SPECIFY WITH EXACT PRECISION THE SCENARIO OF WHICH JURORS LED ASTRAY. THESE HYPOTHETICALS WERE MERELY A WAY OF DEMONSTRATING THAT THE JURY WAS LED ASTRAY IN MULTIPLE AND VARIOUS WAYS. ALSO, IT IS NOT FOR THESE COURTS TO INVADE THE PROVINCE OF THE JURY, AND THE COURT MUST NOT DICTATE THE OUTCOME OF PROCEEDINGS.

THAT IS THE FINAL STICKY POINT, WHICH DRAWS THIS SECTION TO AN OVERDUE CONCLUSIONS AND ALSO PREPARES THE WAY FOR PETITIONER'S ARGUMENTS, IN THE NEXT SECTION. IT IS IMPORTANT FROM PETITIONER'S STANDPOINT TO PUT THESE ISSUES IN THE REARVIEW, AND MOVE ON.

PETITIONER NOW TURNS TO HIS ARGUMENTS FOR GRANTING THE WRIT OF CERTIORARI, ASKING THE COURT TO RESOLVE THEM IN HIS FAVOR.

ARGUMENT
I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FEDERAL DISTRICT COURT, AND STATE TRIAL COURT ALL HAVE DECIDED AN IMPORTANT FEDERAL QUESTION WITH RESPECT TO WHETHER INSTRUCTIONAL ERROR OCCURRED IN A WAY THAT CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED HARMLESS-ERROR PRECEDENTS.

THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSES GUARANTEE A DEFENDANT'S CONSTITUTIONAL RIGHT TO A TRIAL BY JURY. AS THIS COURT HAS RECOGNIZED, THE SIXTH AMENDMENT PROTECTS THE DEFENDANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY, WHICH INCLUDES "AS ITS MOST IMPORTANT ELEMENT, THE RIGHT TO HAVE A JURY, RATHER THAN THE JUDGE, REACH THE REQUISITE FINDING OF 'GUILTY.'" SULLIVAN V. LOUISIANA, 508 US 275,277 (1993). THIS RIGHT IS FURTHER INTERPRETED AS PROHIBITING JUDGES FROM WEIGHING EVIDENCE AND MAKING CREDIBILITY DETERMINATIONS, LEAVING THESE FUNCTIONS FOR THE JURY. UNITED STATES V. UNITED GYPSUM CO., 438 US 422,446 (1978)(HOLDING THAT A JURY INSTRUCTION WHICH EFFECTIVELY TOOK FROM THE JURY THE ISSUE OF INTENT IMPROPERLY INVADED THE JURY'S FACT-FINDING FUNCTION); HERRINGTON V. EDWARDS, 1999 U.S.APP.LEXIS 1220, NO. 97-3542, 1999 WL 98587, AT *3 (6TH CIR. JAN. 26,1999)(UNPUBLISHED DISPOSITION)("THE COURT MUST NOT DICTATE THE OUTCOME [OF THE PROCEEDINGS]. IF IT DOES SO, IT HAS INVADED THE PROVINCE OF THE JURY PROTECTED BY THE SIXTH AMENDMENT AND DUE PROCESS CLAUSE."). GENERALLY, THE SIXTH CIRCUIT HAS FOLLOWED THESE PRINCIPLES, AS IS UNMISTAKABLY CLEAR BY ITS DECISION IN BARKER V. YUKINS, 199 F.3D 867,874 (6TH CIR. 1999).

IN THIS CASE, HOWEVER, BY FINDING THAT THE MULTIPLE ERRONEOUS JURY INSTRUCTIONS DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE VERDICT, THE COURTS BELOW DID PRECISELY WHAT THIS COURT SAID THEY SHOULD NOT DO. THE SIXTH CIRCUIT BYPASSED THE HARMLESS ERROR QUESTION ALTOGETHER, INSTEAD CONCLUDING THAT "THE STATE COURT REASONABLY FOUND THAT THE INSTRUCTION DID NOT VIOLATE DUE PROCESS."

Standard Under The Antiterrorism And Effective Death Penalty Act (AEDPA).

"A STATE COURT FACTUAL DETERMINATION IS UNREASONABLE IF IT IS SO CLEARLY INCORRECT THAT IT WOULD NOT BE DEBATABLE AMONG REASONABLE JURISTS." JEFFRIES V. WOODS, 114 F.3D 1484,1500 (9TH CIR.1997)(INTERNAL QUOTATION OMITTED). THIS COURT STATED IN WILLIAMS V. TAYLOR, INTERPRETING 28 U.S.C. §2254(D)(1), THAT THE WRIT MAY ISSUE WHEN "THE STATE COURT'S APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW WAS OBJECTIVELY UNREASONABLE." 529 US 362,407-08 (2000). 28 U.S.C. §2254(D)(2) PROHIBITS THE GRANT OF THE WRIT UNLESS THE ADJUDICATION RESULTED IN A DECISION BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS.

THE FIRST LINE OF ANALYSIS UNDER THE AEDPA INVOLVES THE CONSISTENCY OF THE STATE-COURT DECISION WITH EXISTING FEDERAL LAW. A STATE COURT DECISION IS CONSIDERED "CONTRARY TO .... CLEARLY ESTABLISHED FEDERAL LAW" IF IT IS DIAMETRICALLY DIFFERENT, OPPOSITE IN CHARACTER OR NATURE, OR MUTUALLY OPPOSED." WILLIAMS, 529 US AT 405(EMPHASIS AND QUOTATION MARKS OMITTED). ALTERNATIVELY, TO BE FOUND AN "UNREASONABLE APPLICATION OF .... CLEARLY ESTABLISHED FEDERAL LAW, THE STATE COURT DECISION MUST

BE OBJECTIVELY UNREASONABLE" AND NOT SIMPLY INCORRECT. ID. AT 409-11.

THE SECOND LINE OF ANALYSIS UNDER THE AEDPA CONCERNS FINDINGS OF FACT MADE BY THE STATE COURTS. THE AEDPA REQUIRES FEDERAL COURTS TO ACCORD A HIGH DEGREE OF DEFERENCE TO SUCH FACTUAL DETERMINATIONS. "A FEDERAL COURT IS TO APPLY A PRESUMPTION OF CORRECTNESS TO STATE COURT FINDINGS OF FACT FOR HABEAS CORPUS PURPOSES UNLESS CLEAR AND CONVINCING EVIDENCE IS OFFERED TO REBUT THIS PRESUMPTION. THE FEDERAL COURT GIVES COMPLETE DEFERENCE TO THE STATE COURT'S FINDINGS OF FACT SUPPORTED BY THE EVIDENCE. MCADOO V. ELO, 365 F.3D 487,493-94 (6TH CIR.2005); TAYLOR V. WITHROW, 288 F.3D 846,850 (6TH CIR.2002), QUOTING 28 U.S.C. §2254(D).

THE "CLEAR AND CONVINCING EVIDENCE" BEING OFFERED TO REBUT THE PRESUMPTION OF CORRECTNESS DUE TO A STATE COURT'S FACTUAL FINDINGS REFERS TO EVIDENCE FOUND WITHIN THE STATE COURT RECORD. SEE CULLEN V. PINHOLSTER, 563 US 170,181 (2011); BRAY V. ANDREWS, 640 F.3D 731,737 (6TH CIR.2011). MOREOVER, FEDERAL COURTS ARE EXPLICITLY LIMITED BY THE STATUTORY LANGUAGE ITSELF TO EVIDENCE THAT WAS BEFORE THE STATE COURT WHEN 28 U.S.C. §2254(D)(2) IS APPLICABLE. PINHOLSTER, 563 US AT 185.

The State Court And Federal District Court's Harmless-Error Review Resulted In A Decision That Is An Unreasonable Application Of Clearly Established Federal Law.

THE TRIAL COURT, THE ONLY STATE COURT TO LOOK AT THE MERITS OF THE PETITIONER'S CLAIMS, CONCLUDED "THAT THE ERROR INVOLVED HERE WAS NOT DECISIVE OF THE OUTCOME" AND "THERE IS NO BASIS FOR CONCLUDING THAT

THE ERROR SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS." (APPX E, 3). THE DISTRICT COURT "CONCLUDE[D] THAT PETITIONER IS NOT ENTITLED TO HABEAS RELIEF BECAUSE ANY ERRORS IN THE SELF-DEFENSE INSTRUCTION DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE VERDICT IN LIGHT OF EVIDENCE TO SUPPORT PETITIONER'S SELF-DEFENSE CLAIM AND THE STRONG EVIDENCE INDICATING THAT PETITIONER MURDERED THE VICTIM AFTER HE RENDERED HIM UNCONSCIOUS." (APPX B, 21). ALTHOUGH THE STATE TRIAL COURT DID NOT CITE CHAPMAN V. CALIFORNIA, 386 US 18 (1967), IT IS CLEAR THAT A HARMLESS-ERROR ANALYSIS WAS BEING CONDUCTED, ALBEIT, IT DID NOT COMPORT WITH THE RULE SET FORTH BY THIS COURT THAT STATES MUST APPLY WHEN EVALUATING THE EFFECT OF NON-STRUCTURAL CONSTITUTIONAL ERROR IN CRIMINAL PROCEEDINGS. "[B]EFORE A FEDERAL COURT CONSTITUTIONAL ERROR CAN BE HELD HARMLESS, THE COURT MUST BE ABLE TO DECLARE A BELIEF THAT IT WAS HARMLESS BEYOND A REASONABLE DOUBT." CHAPMAN, 386 US AT 24. THE DISTRICT COURT CONDUCTED ITS HARMLESS-ERROR REVIEW SET FORTH BY THIS COURT IN BRECHT V. ABRAHAMSON, 507 US 619 (1993), BUT IT TOO WAS UNREASONABLE. THE SIXTH CIRCUIT DID NOT CONDUCT A HARMLESS ERROR REVIEW, BUT CONDUCTED AN INDEPENDENT REVIEW OF THE CLAIMS AND APPEARS TO HAVE OVERRULED THE STATE COURT AND DISTRICT COURT, AND WENT BEYOND THE RECORD THAT WAS BEFORE THE STATE COURT.

STATE COURT HARMLESS ERROR CONCLUSIONS MUST COMPLY WITH THE RULE SET FORTH BY CHAPMAN V. CALIFORNIA. FEDERAL COURTS ON HABEAS REVIEW MUST APPLY THE "LESS STRICT .... MEASURE OF HARMLESSNESS" SET FORTH IN BRECHT V. ABRAHAMSON; O'NEAL V. MCANINCH, 513 US 432,438 (1995).

THE BRECHT TEST "FOR DETERMINING WHETHER HABEAS RELIEF MUST BE GRANTED IS WHETHER THE .... ERROR 'HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT.'" BRECHT, 507 US AT 623 (QUOTING KOTTEAKOS V. UNITED STATES, 328 US 750,776 (1946)).

THE BRECHT TEST REQUIRES THE COURT TO ASSESS THE IMPACT OF THE CONSTITUTIONAL ERROR ON THE JURY'S DECISION, AN ANALYSIS THAT IS DIFFERENT THAN SIMPLY MEASURING THE SUFFICIENCY OF THE EVIDENCE AFTER SUBTRACTING THE OFFENDING ITEM, AS THE COURTS BELOW DID IN THIS CASE. AS THE SIXTH CIRCUIT EXPLAINED, "THE BRECHT TEST DOES NOT SAY 'ONLY ERRORS THAT TURN ACQUITTALS INTO CONVICTIONS ARE HARMFULL.' AS JUSTICE STEVENS PUT IT IN BRECHT, THE QUESTION IS NOT WERE THEY [THE JURORS] RIGHT IN THEIR JUDGMENT, REGARDLESS OF THE ERROR OR ITS EFFECT UPON THE VERDICT. IT IS RATHER WHAT EFFECT THE ERROR HAD OR REASONABLY MAY BE TAKEN TO HAVE HAD UPON THE JURY'S DECISION." SEE KYGER V. CARLTON, 146 F.3D 374,382 (6TH CIR. 1998)(QUOTING BRECHT, 507 US AT 642-43 (STEVENS,J., CONCURRING)). "[I]T IS IMPROPER IN A BRECHT INQUIRY TO FOCUS ON THE SUFFICIENCY OF THE UNTAINTED EVIDENCE." IBID.

IN THIS CASE, THE COURTS BELOW IMPERMISSIBLY FOCUSED ON THE WEIGHT OF THE EVIDENCE (THAT THE REVIEWING COURTS PERCEIVED AS BEING UNTAINTED), WITHOUT CONSIDERING WHAT WEIGHT A JURY ON RETRIAL WOULD GIVE THAT EVIDENCE. APPLYING THE BRECHT STANDARD, THIS COURT SHOULD REJECT THE CONCLUSIONS THAT THE ERROR WAS HARMLESS AND DID NOT HAVE A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT."

THE TRIAL COURT AND DISTRICT COURT RELIED ALMOST EXCLUSIVEY ON THE THE TESTIMONY OF JEFF MORACZEWSKI (THE VICTIM'S BROTHER) AND MICHAEL MITCHELL (THE VICTIM'S BROTHER-IN-LAW) WHEN REACHING THEIR CONCLUSIONS THAT THE ERRORS WERE HARMLESS. AFTER FINDING THE TWO TERMS "ACTED WRONGFULLY" AND "BROUGHT ON THE ASSAULT," "BOTH ... ESSENTIALLY DESCRIBE A PERSON WHO IS THE AGGRESSOR, OR INITIATOR OF AN ALTERCATION [AND] CANNOT TURN AROUND AND ESCALATE OR USE DEADLY FORCE, IF THE PERSON CHOOSES TO FIGHT BACK," THE TRIAL COURT THEN STATED:

> *Here, the jury was given the choice to either believe the events as testified to by the defendant, or as laid before them by the prosecution. Conversely, if the jury did believe the defendant, he would have been protected under the SDA, even if he used deadly force. Ultimately, the jury did not believe the defendant's testimony, and deemed him the aggressor in this situation. [Appx E, 5.]*

AS AN INITIAL MATTER, PETITIONER DISAGREES WITH THE COURT'S CONCLUSION THAT "DEEMED HIM THE AGGRESSOR"; IT IS BELIED BY, AMONG OTHER THINGS, THE FACT THAT THE JURY REJECTED THE PROSECUTION'S THEORY OF FIRST DEGREE MURDER, OPTING TO CONVICT HIM OF SECOND DEGREE MURDER. THE DISTRICT COURT ALSO RELIED ON THE EVIDENCE PRESENTED AT TRIAL, WHICH TRANSLATED INTO FINDINGS THAT "THE EVIDENCE PRESENTED AT TRIAL INDICATES PETITIONER RENDERED THE VICTIM UNCONSCIOUS BY STRANGLING HIM WITH THE RIFLE STRAP"; THAT "PETITIONER TOLD THE VICTIM'S BROTHER MINUTES AFTER THE INCIDENT THAT HE 'CHOKED OUT' THE VICTIM AND HE HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS AFTER HE PASSED OUT." (APP B, 19-20). THE DISTRICT COURT THEN STATED:

> *The problem for Petitioner and his defense is the period of time after*

he rendered the victim helpless. At that point, the victim was unconscious and no longer presented a threat. According to Petitioner, the victim was still breathing and he immediately left without knowing that the rifle strap was wrapped around the victim's neck. But this testimony runs contrary to the victim's brother who said that Petitioner told him he continued to choke the victim for another thirty seconds after he lost consciousness. Though Petitioner testified that the victim's brother was lying about this statement, the brother told a police officer the same thing hours after the incident at the hospital. Additionally, both the victim's brother and Mitchell found the victim with the strap twisted around his neck so tightly that they could not get their fingers underneath it.

Given this evidence, there is no substantial probability that the jury erroneously rejected self-defense because it thought that Petitioner's conduct after he rendered the victim was merely "wrongful," that the victim was using lawful force at that point (he was unconscious), or that the continued use of force was required for "purposes of protection." That is, none of the hypothetical findings posited by Petitioner applied to the facts of the case after Petitioner rendered the victim unconscious and helpless. After Petitioner refused to allow the victim to "tap out," a reasonably debatable act of self-defense turned into a clear case of murder. [Appx B, 20-21(Emphasis added).]

THE STATE COURT DENIED RELIEF BASED LARGELY ON TESTIMONY OF THE VICTIM'S BROTHER THAT PETITIONER ADMITTED HE "CHOKED OUT" TIM AND HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS AFTER HE PASSED OUT," AND THE STRAP WAS FOUND SO TIGHT AROUND TIM'S NECK, HE COULD NOT GET HIS FINGERS UNDERNEATH IT; IT IS SUPPORTED BY TESTIMONY OF THE BROTHER-IN-LAW, MIKE. THE DISTRICT COURT MADE A PASSIVE REFERENCE TO PETITIONER'S "TESTI[MONY] THAT THE VICTIM'S BROTHER WAS LYING ABOUT THIS STATEMENT," BUT WENT ON TO CREDIT THE BROTHER BECAUSE HE "TOLD A POLICE OFFICER THE SAME THING" HOURS LATER. INDEED, THIS CASE IS "A BATTLEFIELD OF WITNESS CREDIBILITY." SEE PEOPLE V. LEMMON, 456 MICH 625,542 N 22 (1998). YET, THE COURTS BELOW NEVER CONSIDERED THAT A REASONABLE JUROR VERY LIKELY WOULD HAVE BELIEVED THAT THE VICTIM'S BROTHER AND BROTHER-IN-LAW MAY BE BIASED AND HAVE AN INTEREST IN

SLANTING THEIR TESTIMONY.

BIAS IS ALWAYS RELEVANT IN ASSESSING WITNESS CREDIBILITY. SCHLEDWITZ V. UNITED STATES, 169 F.3D 1003,1015 (6TH CIR.1999)(CITING UNITED STATES V. LYNN, 856 F.2D 430,432 N 3 (1ST CIR.1988)) AND VILLAROMAN V. UNITED STATES, 87 U.S.APP.D.C 240,184 F.2D 261,262 (D.C.CIR.1950)). SEE PEOPLE V. ALLEN, 51 MICH APP 535,539-40 (1975).

THIS COURT HAS DEFINED BIAS AS THE RELATIONSHIP BETWEEN A PARTY AND A WITNESS WHICH MIGHT LEAD THE WITNESS TO SLANT, UNCONSCIOUSLY OR OTHERWISE, HIS TESTIMONY IN FAVOR OR AGAINST A PARTY." SEE UNITED STATES V. ABEL, 469 US 45,52 (1984). BIAS IS NOT LIMITED TO PERSONAL ANIMOSITY AGAINST A DEFENDANT (ALBEIT, APPARENT IN THIS CASE) OR PECUNIARY GAIN. COURTS HAVE FOUND BIAS IN A WIDE VARIETY OF SITUATIONS, INCLUDING FAMILIAL OR SEXUAL RELATIONSHIPS, EMPLOYMENT OR BUSINESS RELATIONSHIPS, FRIENDSHIPS, COMMON ORGANIZATIONAL MEMBERSHIPS, AND SITUATIONS IN WHICH THE WITNESS HAS A LITIGATION CLAIM AGAINST ANOTHER PARTY OR WITNESS. SEE 4 WEINSTEIN'S FEDERAL EVIDENCE §§ 607.04[5]-[7] (1997)(COLLECTING CASES). SEE MCCRAY V. VASBINDER, 499 F.3D 568,574 (6TH CIR.2007).

RELATEDLY, IN THE CONTEXT OF A MOTION FOR NEW TRIAL, THE SIXTH CIRCUIT HAS CONSISTENTLY FOUND AFFIDAVITS FROM FAMILY MEMBERS "SUSPECT" AND DO NOT PROVIDE THE SORT OF EXTRAORDINARY SHOWING NEEDED TO ESTABLISH A PETITIONER'S INNOCENCE. SEE E.G., FREEMAN V. TROMBLEY, 438 FED.APP'X 51,60 (6TH CIR.2012)(FINDING THAT CREDIBILITY OF PETITIONER'S GIRLFRIEND AND MOTHER WERE "SUSPECT" AND THEIR ALIBI AFFIDAVITS SUBMITTED YEARS AFTER PETITIONER'S TRIAL WAS INSUFFICIENT TO ESTABLISH A CREDIBLE

ACTUAL-INNOCENCE CLAIM): CHAVIS-TUCKER V. HUDSON, 348 FED.APP'X 125,134 (6TH CIR.2009)(FINDING THAT THE AFFIDAVITS OF PETITIONER'S WIFE AND MOTHER WERE UNLIKELY TO CONVINCE A REASONABLE JURY THAT MORE LIKELY THAN NOT THAT PETITIONER WAS ACTUALLY INNOCENT).

THIS COURT HAS HELD THAT EVIDENCE FROM EYEWITNESSES WITH "EVIDENT MOTIVE TO LIE .... HAS MORE PROBATIVE VALUE THAN .... [FROM] FRIENDS OR RELATIONS OF THE ACCUSED." SEE HOUSE V. BELL, 547 US 518,552 (2006).

THE COURTS BELOW NOT ONLY FAILED TO CONSIDER THAT THESE TWO WITNESSES (THE STATE'S LINCHPIN) WERE FAMILY MEMBERS WHO HAD A PERSONAL STAKE IN CONVICTING PETITIONER OF MURDER, VASBINDER, 499 F.3D AT 574, BUT ALSO FAILED TO TAKE ACCOUNT OF THE FACT THAT THEY WERE NOT EYEWITNESSES. THE COURT'S BELOW CITED PORTIONS OF JEFF AND MIKE'S TESTIMONY IN ISOLATION, WHILE IGNORING OTHER PERTINENT PARTS. THEIR TESTIMONY IS LACED WITH INTERNAL CONTRADICTIONS AND CONFLICTS WITH EACH OTHER ON MATERIAL MATTERS. IT IS IMPORTANT TO PUT THE RELEVANT TESTIMONY IN CONTEXT.

TO KEEP THE RECORD PURE, PETITIONER NOW SUMMARIZES PERTINENT, OMITTED, TESTIMONY AS SAID BY THE WITNESSES (PETITIONER, JEFF, MIKE) THEMSELVES, WITHOUT THE NEED FOR CONSTANT REPETITION OF "ACCORDING TO "JEFF," "MIKE SAID," OR "PETITIONER STATED," OR LIKE LANGUAGE.

JEFFREY MORACZEWSKI (the brother), had knowledge of the grow operation which he learned from Tim; he had to guess about how the proceeds were split and what Petitioner's role was, save financing. (T 4/5/2011, 65-67). He received a call from Petitioner at 6:02; ignored it, and received a text at "call me 9-1-1 at 6:03." (Id., 86). he called Petitioner back. In a conversation Petitioner said he choked Tim out

til' he turned purple and then held him for 30 seconds, so he wouldn't get up. (Id., 83, 85, 87-88)(emphasis added). Jeff recounted details of the struggle, but did not mention the rifle strap. (Id., 89-108). Jeff called his sister rather than police, picked up his brother-in-law Michael Mitchell, and proceeded to the house to check on his brother, as instructed by Petitioner. (Id., 108-110). When he saw Tim, there was a shoulder strap around his neck; the gun on the rear or back of his body. (Id., 113-15).

In Jeff's opinion (which he delivered as expert), the strap made Tim stop breathing: "it was extremely tight," and Tim was not breathing; he was a grayish color, and appeared dead. (Id., 116-17). He couldn't get his fingers between the strap and tim's neck; he told mike to get the strap off Tim's neck. (Id., 117). Mike had to lift Tim's body so he could untwist the strap, "four revolutions." (Id., 118-19, 122). Again, in Jeff's opinion, Tim was not breathing. (Id., 121). Mike was with him the whole time. (Id., 122-23).

On cross, he told police that the strap was actually twisted once in the front and at least five times in the back. (Id., 210, 212).

Defense counsel attempted to have Jeff re-enact the strap being around a person's neck, but was rebuffed by the trial court. (Id., 211).

The following colloquy takes place:

> Q. Did you tell Detective, Dectective Williams, once in front, and five times in the back?
>
> A. I possibly could have, yes.
>
> Q. You're not sure?
>
> A. We're in a rush to get the thing off his neck.

Q. No, you're not sure what you told him?

A. I know I told him, four or five times behind his ... his neck.

Q. But you don't recall, as you sit here, that you -- that it was once, twisted in front, and five in back?

A. There may have been twist in the front.

Q. Did you tell everybody, not five minutes ago, that that's what it was?

A. There may have been a twist in front, when we were undoin' it, we weren't sure if we had to twist it once in the front.

Q. When you first asked, when I asked you the question, did -- were you aksed, and did you answer: "Yes, one twist in the five in the back?

A. Yes, I did. [T 4/5/11, 212-13 (Emphasis added).]

Jeff's testimony was evasive with respect to whether he told Gerald Kapinsky that Petitioner choked Tim out, or what all he said to Kapinsky, and about Jeff telling Kapinsky about Tim's drug usage. (Id., 217, 218, 219); calling a lawyer (Id., 220); whether he talked to Tim about Mario (Id., 222); and whether he told Kapinsky how the gun was attached to Tim's neck (Id., 223). Jeff did not call police because he did not know the address and believed Petitioner did not know (which does not make sense, as he knew it was a house his brother and Petitioner shared for the grow operation). (Id., 223-25).

MICHAEL MITCHELL (the brother-in-law), was married to their sister for 18 years. (T 4/6/2011, 23-24). Mike's testimony was pretty consistent with Jeff's with respect to Jeff picking him up and going to the house to check on Tim. (Id., 30-33). They knocked on the door because they heard it was a gun there and, after getting no answer, pounded on the door and windows, yelling Tim's name. (Id., 33). Jeff told Mike about only parts of the conversation he had with Petitioner. (Id., 34). They found Tim in a twisted position with the rifle on his back. Jeff instructed Mike to

get the riffle off Tim's back, but he wasn't able to; it was stuck. He tried again, then Jeff found the strap on his neck. (Id., 35-37).

The following exchange takes place:

> Were you able to untwist, or turn the strap?
>
> No, we initially -- Jeff tried pullin' the strap up. He said, Mike, help me get it off. We tried pulling it up, off his neck, but we couldn't move it, its -- we couldn't even get a finger underneath it. [Id. at 38(Emphasis added).]

The strap was taunt. Jeff yelled out, "You didn't loosen the strap," meaning Petitioner (albeit, he was never asked how he knew this outburst referred to Petitioner). (Id., 38-39). Tim was not breathing. (Id., 39). Mike looked for a knife but couldn't find one; as Jeff was folding up body, Mike saw the rifle move and realized it was twisted around Tim's neck. (Id., 39-40, 60-62). They did not try to untwist the strap; the twisting was on the back, not front. (Id., 41). They twisted off the strap three revolutions, or three sticks out in his mind. (Id., 41-42, 62). They didn't call police or 9-1-1 because they had heard how slow EMS responded, and wanted to get Tim to the hospital. (Id., 44).

On cross, Mike would not say they untwisted the strap four revolutions. Jeff did the untwisting. (Id., 63).

KEVIN BELTOWSKI (Petitioner), was fearful and believed "if he let up on the straps" "he would have shot me." Tim had already shot at him. (T 4/8/2011, p 220). At no point did Petitioner see where the twisting or knotting of the strap was. (Id. 221). During the struggle

he could see the side of Tim's face as "[h]e's grasping at the straps, trying to pull them off his neck," and drifted into unconsciousness. Petitioner looked down and Tim was still breathing, lips moving, positioned on Petitioner's chest with the rifle between them. (Id., 222-23). Petitioner described the rhythm of Tim's breathing and explains that "[h]e still has adrenlin in his system." (Id., 223). "maybe three seconds after he stopped moving, I looked at his lips, which were changing a pale color; his face was not." (Id., 223). Petitioner released pressure, sat up, rolled Tim over face down, as they found him. (Id.). No manual pressure was applied beyond that point: "when I saw him breathing, I said, I held it three more seconds, and I let go, the pressure, and I sat him up, and put him down on the couch. And I let go of the straps, and held him down with my open hands, and turned around to see if I could find my keys that were on the floor." (Id., 223-24). After finding his keys, he looked back at Tim, and "didn't see any twisting on ... the straps, and they appeared to have slack on them." (Id., 224). When defense counsel asked, "do you know whether or not it maintained pressure or not," Petitioner replied, "I only know it maintained pressure because his brother said it was tight when he arrived on the scene"; he did not examine the straps closely, because he was concerned with "[r]unning out the door, with my life." (Id., 224)(emphasis added).

This discussion follows:

Q. What were you concerned about; at that point?

A. Running out the door, with my life.

Q. Did you have any concern about retaliation?

A. I was certain, in my mind, that he was going to spring to his feet, and come after me, and shoot me as I was running to the truck.

Q. So, what do you do?

A. Ran. [T 4/8/11, 224(Emphasis added).]

As insurance that Tim wouldn't get up and jump in his own vehicle and chase him, Petitioner grabbed the keys to Tim's vehicle and, as he was running to his own vehicle, Petitioner still feared Tim would come after him. (Id., 224-25).

Petitioner called Jeff, "'cause he's the only person that could stop his, his enraged brother from doing something to me," and at that point, he still believed Tim a threat. (Id., 225-27).

Petitioner, in his own words, provided some context which explains why he chose the method to subdue Tim at the time when he applied pressure, as opposed to some other option, if any:

> "I've seen dozens of choke holds applied, and in a fighting situation, when somebody's choked, within ten seconds, they spring to their feet, as though they're still involved in a fight.
>
> "That was partially what created the fear that I was gonna be shot in the back when I ran out the door." [Id., 232.]

When Petitioner left the house he was certain Tim was okay, 'Cause I didn't put as many twists as they described on the straps. I didn't turn the gun at all. It may have been turned in the struggle, and I was unaware of that." (Id., 233). That's why Petitioner was "awestruck" that Tim was dead, because he "thought it was just criss-crossed."

Petitioner provided alternative theory:

> "It's also possible that the straps were maybe twisted once, and then when they were folded towards the back, with the rifle on his back, they couldn't unravel their selves.
>
> "To me, that was the only logical explanation, as to why they maintained pressure on his neck." [Id., 233.]

Petitioner did not turn the gun and use it as a turniquet, in an effort to strangle Tim, and did not intend to end Tim's life. (Id., 233). He intended to get out of there, alive, and sustained injuries himself, verified by photographs in evidence. (Id., 234-38).

At home, still very fearful of retaliation from Tim, Petitioner searched for and eventually found an old army knife in the garage, and put it in his pocket. (Id., 239). Petitioner told an employee (whose son was present) about the fight with Tim and being worried about Tim. (Id., 239-41). Then, Petitioner heard Tim was dead, and immediately called his brother-in-law, Mr. Rohrkohl, because he needed someone to talk to, after which he went to the brother-in-law's house to talk in-person. (Id., 241-42).

THE COURT'S BELOW STRAYED FROM THIS COURT'S HARMLESS-ERROR REVIEW IN NUMEROUS WAYS.

A. The Courts Arbitrarily Picked A Period It Believed The Victim No Longer Posed A Threat To Petitioner.

WHEN ADDRESSING THE CLAIMS THAT THE JURY ERRONEOUSLY REJECTED HIS SELF-DEFENSE BECAUSE IT THOUGHT PETITIONER ACTED "WRONGFULLY" AND "BROUGHT ON THE ASSAULT" (BY, FOR EXAMPLE, GOING TO THE HOUSE AND ARGUING WITH THE VICTIM), THE REVIEWING COURTS SEIZED ON TESTIMONY THAT THE VICTIM WAS RENDERED UNCONSCIOUS AND AT THAT POINT, THERE WAS NO NEED FOR CONTINUED USE OF FORCE FOR "PURPOSES OF PRECTION." INDEED, IN THE DISTRICT COURT'S VIEW, "[A]T THAT POINT, THE VICTIM WAS UNCONSCIOUS AND NO LONGER PRESENTED A THREAT." (APPX 3, 20). IT HELD

THAT "[G]IVEN THIS EVIDENCE, THERE IS NO SUBSTANTIAL PROBABILITY THAT THE JURY ERRONEOUSLY REJECTED SELF-DEFENSE BECAUSE IT THOUGHT THAT PETITIONER'S CONDUCT AFTER HE RENDERED THE VICTIM UNCONSCIOUS WAS MERELY 'WRONGFUL,' [AND] THAT THE VICTIM WAS USING LAWFUL FORCE AT THAT POINT (HE WAS UNCONSCIOUS), OR THAT THE CONTINUED USE OF FORCE WAS REQUIRED FOR 'PURPOSES OF PROTECTION.'" (Id., 21). STATED PLAINLY, THE DISTRICT COURT REJECTED PETITIONER'S CLAIMS BECAUSE IT BELIEVED TIM WAS NO LONGER A THREAT AFTER BEING RENDERED UNCONSCIOUS, AND THUS THERE WAS NO NEED FOR PETITIONER TO PROTECT HIMSELF.

THERE ARE SEVERAL PITFALLS TO THE DISTRICT COURT'S CONCLUSION. FIRST, IT IGNORES THAT PETITIONER HIMSELF HONESTLY AND REASONABLY BELIEVED HIS LIFE WAS IN IMMINENT DANGER OR THAT HE FACED A THREAT OF SERIOUS BODILY HARM AND THAT IT WAS NECESSARY TO EXERCISE DEADLY FORCE. IN THIS REGARD, IT FAILED TO CONSIDER ALL THE CIRCUMSTANCES, AS IT APPEARED TO PETITIONER AT THE TIME. SECOND, IT TOOK THE QUESTION OF "NECESSITY" (AND PETITIONER'S STATE OF MIND) FROM THE JURY. THIRD, THE DISTRICT COURT MADE IMPROPER CREDIBILITY DETERMINATIONS ON THE EVIDENCE, AND IT ONLY CONSIDERED SELECTED PARTS OF THE WITNESS TESTIMONY; FOURTH, THE DISTRICT FAILED TO CONSIDER IF THE ERRONEOUS INSTRUCTIONS DEPRIVED PETITIONER OF HIS RIGHT TO SELF-DEFENSE.

AT MICHIGAN COMMON LAW, A SELF-DEFENSE, WHICH "IS FOUNDED UPON NECESSITY, REAL OR APPARENT," MAY BE RAISED BY A NONAGRESSOR AS A LEGAL JUSTIFICATION FOR OTHERWISE INTENTIONAL HOMICIDE. PEOPLE V. RIDDLE, SUPRA, 467 MICH AT 126, CITING 40 AM JUR 2D, HOMICIDE, §138, P 609. WHEN THE DEFENDANT CLAIMS SELF-DEFENSE,

[t]he question to be determined is, did the accused, under all the circumstances of the assault, as it appears to him, honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save his himself from such apparent threatened danger?

RIDDLE, 467 MICH AT 127(QUOTING PEOPLE V. LENNON, 71 MICH 298,300-01 (1888)(EMPHASIS ADDED).

THUS, THE KILLING OF ANOTHER PERSON IN SELF-DEFENSE IS JUSTIFIABLE HOMICIDE ONLY IF HE BELIEVES HIS LIFE IS IN IMMINENT DANGER OR THAT THERE IS A THREAT OF SERIOUS BODILY HARM AND THAT IT IS NECESSARY TO EXERCISE DEADLY FORCE TO PREVENT SUCH HARM TO HIMSELF. ID., CITING PEOPLE V. DANIELS, 192 MICH APP 658,672 (1991). AS REAFFIRMED IN RIDDLE, THE TOUCHSTONE OF ANY SELF-DEFENSE CLAIM IS NECESSITY. ID. AT 127.

HERE, THE DISTRICT COURT EMBARKED ON A HARMLESS-ERROR ANALYSIS THAT IGNORED WHAT WAS IN PETITIONER'S MIND AT THE TIME HE RENDERED THE VICTIM UNCONSCIOUS, ARBITRARILY ASSIGNED A POINT DURING THE FIGHT THAT THE VICTIM NO LONGER POSED A THREAT, AND PETITIONER WAS NO LONGER IN DANGER (IN THE COURT'S VIEW), AND TOOK THESE DETERMINATIONS FROM THE JURY UPON HYPOTHETICAL RETRIAL.

TO BEGIN WITH, THE UNCONTESTED FACTS ESTABLISHED THAT PETITIONER AND TIM SHARED THE HOUSE AS A COMMON AREA IN THEIR JOINT MARIJUANA GROW OPERATION. THUS, UNDER MICHIGAN LAW RETREAT IS NOT A FACTOR IN DETERMINING WHETHER THIS DEFENSIVE KILLING WAS NECESSARY BECAUSE IT OCCURRED IN PETITIONER'S OWN DWELLING, THAT IS, HIS "CASTLE." RIDDLE, 467 MICH AT 134-40. FURTHER, PETITIONER DESCRIBED PAST ACTS OF VIOLENCE BY THE VICTIM, AND HIS PAST EXPERIENCES THAT WHEN A PERSON IS CHOKED OUT AND RENDERED UNCONSCIOUS HE WILL GET UP IN A FEW SECONDS FIGHTING

AS IF NOTHING HAD HAPPENED. HE ALSO WITNESSED WRESTLING EVENTS WHERE THIS FREQUENTLY HAPPENED. INDEED THIS PLAYED INTO PETITIONER'S THINKING AND FEARS THAT DAY, AND HE ALREADY HAD IT IN HIS MIND THAT TIM WAS CAPABLE OF MURDERING OR SERIOUSLY INJURING HIM WITHOUT HESITATION. HE ALSO DESCRIBED AN ARGUMENT FOLLOWED BY A SUDDEN, VIOLENT ATTACK UPON HIMSELF BY TIM WHO ATTEMPTED TO SHOOT HIM WITH A RIFLE; THEY STRUGGLED UNTIL PETITIONER RENDERED TIM UNCONSCIOUS. PETITIONER WAS AFRAID OF TIM PRIOR TO THE INCIDENT, DURING THE INCIDENT, AND AFTER TIM WAS ALLEGEDLY UNCONSCIOUS. EVEN WHEN HE GOT INTO HIS VEHICLE AND AWAY FROM THE SCENE, PETITIONER THOUGHT TIM WAS ALIVE AND WOULD RETALIATE. MOREOVER, THE DISTRICT COURT ASSUMES, WITHOUT EVIDENCE, THAT TIM WAS RENDERED HELPLESS, AND THAT PETITIONER KNEW HE WAS HELPLESS AT THE TIME, ALBEIT PETITIONER STILL CONSIDERED HIM A SERIOUS THREAT TO HIS LIFE OR BODILY HARM.

PRACTICALLY SPEAKING, THE DISTRICT COURT'S HOLDING WOULD REQUIRE PETITIONER, WHILE IN THE MIDDLE OF A LIFE AND DEATH STRUGGLE, TO STOP AND PONDER AND USE LOGIC AND REASON, AND BE ABLE TO MAKE A RATIONAL DECISION ABOUT WHAT TO DO NEXT. HOWEVER, WHEREAS HERE, IMMEDIATE DANGER TO LIFE OR GREAT BODILY HARM IS THREATENED UPON THE INNOCENT VICTIM, HE "CANNOT BE REQUIRED WHEN HARD PRESSED, TO DRAW VERY FINE DISTINCTIONS CONCERNING THE EXTENT OF THE INJURY THAT AN INFURIATED AND RECKLESS ASSAILANT MAY PROBABLY INFLICT." RIDDLE, 467 MICH AT 130, CITING BROWNELL V. PEOPLE, 38 MICH 732,738 (1878). JUSTICE HOLMES, WRITING VERY ELOQUENTLY FOR THIS COURT IN BROWN V. UNITED, 256 US 335,343 (1921), PUT IT THIS WAY: "[D]ETACHED REFLECTION CANNOT BE DEMANDED

IN THE FACE OF AN UPLIFED KNIFE." THERE, JUSTICE HOLMES CONCLUDED THAT "IT IS NOT A CONDITION OF IMMUNITY THAT ONE IN THAT SITUATION SHOULD PAUSE TO CONSIDER WHETHER A REASONABLE MAN MIGHT NOT THINK IT POSSIBLE TO FLY WITH SAFETY....." ID., CITING ROWE V. UNITED STATES, 164 US 546, 558 (1896).

CLEARLY, BASED ON THE FOREGOING, THERE IS A SUBSTANTIAL PROBABILITY THAT THE JURY REJECTED THE SELF-DEFENSE BASED ON THE ERRONEOUS INSTRUCTIONS (INSTRUCTING JURY THAT PETITIONER COULD NOT CLAIM SELF-DEFENSE IF HE ACTED "WRONGFULLY," "BROUGHT ON THE ASSAULT," AND THAT SELF-DEFENSE IS ONLY AVAILABLE FOR "AS LONG AS IT SEEMS NECESSARY FOR THE PURPOSES OF PROTECTION"). ALL THREE OF THESE INSTRUCTIONS IMPERMISSIBLY LIMITED THE JURY'S ABILITY TO MAKE A REASONABLE DETERMINATION ABOUT WHETHER PETITIONER ACTED REASONABLY UNDER THE CIRCUMSTANCES AS IT APPEARED TO HIM. IF THE JURY BELIEVED PETITIONER'S CONDUCT WAS MORALLY "WRONG" (OPPOSED TO ILLEGAL), THEY REJECTED SELF-DEFENSE. IF THE JURORS BELIEVED PETITIONER DID SOMETHING, ANYTHING, TO BRING THE ASSAULT ON HIMSELF (EVEN SOMETHING AS MINUTE AS BEING AN ANNOYANCE, SAYING THE WRONG THING, OR LAUGHING, ALL DEPENDING ON CONTEXT), OPPOSED TO BEING THE AGGRESSOR, THEY REJECTED THE SELF-DEFENSE. MOREOVER, THE DISTRICT COURT'S CONCLUSION THAT AFTER PETITIONER RENDERED TIM UNCONSCIOUS HE WAS NO LONGER A THREAT, ACTUALLY UNDERSCORES PETITIONER'S CONTENTION THAT THE JURY REJECTED SELF-DEFENSE BECAUSE THE INSTRUCTION ERRONEOUSLY TOLD THE JURY THAT HE COULD ONLY USE SELF-DEFENSE AS LONG AS IT WAS NECESSARY FOR PURPOSES OF PROTECTION. CLEARLY, THE JURY (LIKE THE DISTRICT COURT) COULD HAVE FOUND THAT IT

DID NOT "SEEM" (TO THEM, NOT PETITIONER) THAT PETITIONER NEEDED TO DEFEND HIMSELF, WITHOUT MAKING A DETERMINATION ABOUT WHETHER PETITIONER WAS REASONABLY IN FEAR OF DEATH OR GREAT BODILY HARM TO HIMSELF.

B. The Courts Impermissibly Focused On The Sufficiency Of The Evidence.

THROUGHOUT ITS ANALYSIS, THE DISTRICT COURT IMPROPERLY FOCUSED ON THE STRENGTH OF THE STATE'S CASE. IT RELIED TRIAL EVIDENCE THAT PETITIONER "CHOKED OUT" TIM AND HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS AFTER HE PASSED OUT, THE TESTIMONY OF TIM'S BROTHER AND BROTHER-IN-LAW (WHICH THE DISTRICT COURT CREDITED), THAT PETITIONER REFUSED TO ALLOW TIME TO "TAP OUT." IT THEN STATED, "A REASONABLY DEBATABLE ACT OF SELF-DEFENSE TURNED INTO A CLEAR CASE OF MURDER." (APPX B, 19-21). THE DISTRICT COURT "CONCLUDE[D] THAT PETITIONER IS NOT ENTITLED TO HABEAS RELIEF BECAUSE ANY ERRORS IN THE SELF-DEFENSE INSTRUCTION DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE VERDICT IN LIGHT OF THE LACK OF EVIDENCE TO SUPPORT PETITIONER'S SELF-DEFENSE CLAIM AND THE STRONG EVIDENCE INDICATING THAT PETITIONER MURDERED THE VICTIM AFTER HE RENDERED HIM UNCONSCIOUS." (APPX B, 21).

IN MADRIGAL V. BAGLEY, 276 F.SUPP.2D 744 (N.D.OHIO 2003), THE OHIO SUPREME COURT ASKED "WHETHER THERE WAS ENOUGH TO SUPPORT THE RESULT, APART FROM THE PHRASE AFFECTED BY ERROR," AS THE KOTTEAKOS COURT SAID IT SHOULD NOT. THE OHIO SUPREME COURT, AS HERE, FOUND ADMISSION OF THE OUT-OF-COURT STATEMENTS HARMLESS EVEN AS IT RECOGNIZED THAT "MADRIGAL'S DEFENSE ATTEMPTED TO PLACE BLAME FOR THE CRIME ON CATHCART,

WHICH WOULD HAVE MADE THE NEED FOR CROSS-EXAMINATION EVEN MORE CRUCIAL IN THIS CASE." Id. AT 770. THE COURT FOUND, 276 F.SUPP.2D AT 770, THAT

> *In finding that the admission of Carthcart's out-of-court statement was harmless, the Ohio Supreme Court said that "the strength of the state's case found in the testimony of the eyewitnesses..... The testimony of these witnesses was credible and compelling, compared to Cathcart's statement, which were self-serving and lacking in credibility. Therefore, the admission of Carthcart's statement, while error, was harmless beyond a reasonable doubt." .... With this description, the Ohio Supreme Court obviously confused the issue. The State used Carthcart's untested statement to buttress other witnesses' testimony. It did not ask the jury to disregard Cathcart's statement as "self-serving and lacking credibility."*

THIS COURT DESCRIBES THE HARMLESS ERROR DOCTRINE AS FOLLOWS:

> *If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected the error. It is rather, even so, whether the error itself had a substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*

KOTTEAKOS V. UNITED STATES, 328 US AT 765(EMPHASIS ADDED).

THE COURT SHOULD HOLD THAT THE DISTRICT COURT PUT TOO MUCH EMPHASIS ON THE WEIGHT OF THE STATE'S EVIDENCE.

C. *The District Court Made Impermissible Credibility Determinations.*

THE DISTRICT COURT MADE IMPERMISSIBLE CREDIBILITY DETERMINATION IN FAVOR OF THE STATE'S WITNESSES WHILE DISCREDITING PETITIONER'S TESTIMONY. INITIALLY, PETITIONER NOTES THAT THE STATE TRIAL COURT HAD

ALREADY FOUND THAT "THE JURY WAS GIVEN A CHOICE TO EITHER BELIEVE THE EVENTS AS TESTIFIED TO BY DEFENDANT, OR AS LAID BEFORE THEM BY THE PROSECUTION." IT HELD, "[U]LTIMATELY, THE JURY DID NOT BELIEVE THE DEFENDANT'S TESTIMONY AND DEEMED HIM THE AGGRESSOR IN THIS SITUATION," AND FOUND NO ERROR WITH THE JURY INSTRUCTIONS. (APPX E, 5)(EMPHASIS ADDED). THE DISTRICT COURT ASSERTED THAT "PETITIONER TOLD THE VICTIM'S BROTHER MINUTES AFTER THE INCIDENT THAT HE 'CHOKED OUT' THE VICTIM, AND HELD THE STRAP TIGHT FOR THIRTY SECONDS AFTER HE PASSED OUT."

THE DISTRICT COURT REITERATED SELECTED PORTIONS OF PETITIONER'S TESTIMONY THAT "THE VICTIM WAS STILL BREATHING AND HE IMMEDIATELY LEFT WITHOUT KNOWING THAT THE RIFLE STRAP WAS WRAPPED AROUND THE VICTIM'S NECK. (APPX B, 20). IT THEN FOUND THAT TESTIMONY "RUNS CONTRARY TO THE TESTIMONY OF THE VICTIM'S BROTHER WHO SAID THAT PETITIONER TOLD HIM THAT HE CONTINUED TO CHOKE THE VICTIM FOR ANOTHER THIRTY SECONDS AFTER HE LOST CONSCIOUSNESS." THE DISTRICT COURT THEN DISCREDITED PETITIONER'S TESTIMONY (AND DEFENSE) WITH THESE WORDS: "THOUGH PETITIONER TESTIFIED THAT THE VICTIM'S BROTHER WAS LYING ABOUT THIS STATEMENT, THE BROTHER TOLD A POLICE OFFICER THE SAME THING HOURS AFTER THE INCIDENT AT THE HOSPITAL. (Id.).

AS NOTED EARLIER, THE TESTIMONY OF TIM'S BROTHER AND BROTHER-IN-LAW IS THE LINCHPIN OF THE STATE'S CASE. AS NOTED BY THE DISTRICT COURT, "BOTH THE VICTIM'S BROTHER AND MITCHELL FOUND THE VICTIM WITH THE STRAP TWISTED AROUND HIS NECK SO TIGHTLY THAT THEY COULD NOT GET THEIR FINGERS UNDERNEATH IT." (Id.).

HENCE, IT IS APPARENT THAT THE TRIAL COURT AND DISTRICT COURT'S DETERMINATIONS THAT THE ERRONEOUS JURY INSTRUCTIONS WAS HARMLESS NECESSARILY MEANS THAT THESE COURTS BELIEVED SOME EVIDENCE AND DISCREDITED OTHER EVIDENCE. THIS, HOWEVER, THESE COURTS CANNOT DO AND REMAIN IN COMPLIANCE WITH THIS COURT'S CONSTITUTIONAL GUARANTEES. AS NOTED EARLIER, IT IS NEITHER THE PROPER ROLE FOR ANY COURT, STATE OR FEDERAL, TO STAND IN PLACE OF THE JURY, WEIGHING COMPETING EVIDENCE AND DECIDING THAT SOME EVIDENCE IS MORE BELIEVABLE THAN OTHERS. SULLIVAN V. LOUISIANA, 508 US AT 277; UNITED STATES V. UNITED STATES GYPSUM CO., 438 US AT 446; SEE BARKER V. YUKINS, 199 F.3D AT 874. RATHER, IN THIS CASE, IT IS FOR THE JURY, WITH THE PROPER SELF-DEFENSE INSTRUCTION (NOT GIVEN), TO DECIDE WHETHER THE AMOUNT OF FORCE WAS JUSTIFIABLE OR UNJUSTIFIABLE, AND WHETHER PETITIONER REASONABLY BELIEVED HE WAS FACING IMMINENT DEATH OR GREAT BODILY HARM. SIMILARLY, IT IS FOR THE JURORS TO DETERMINE WHETHER THEY BELIEVED THE VICTIM'S BROTHER AND BROTHER-IN-LAW THAT PETITIONER SAID HE CHOKED THE VICTIM AND WOULD LET HIM "TAP-OUT," THAT THE STRAP WAS TIGHTLY AROUND THE VICTIM'S NECK, AND THE STATE PROSECUTOR'S ASSERTIONS THAT THE VICTIM WAS "HELPLESS," OR WAS INSTEAD STILL ALIVE AND BREATHING WHEN PETITIONER LET UP ON THE STRAP AND EXITED THE HOUSE, AND WAS CAPABLE OF CONTINUING THE ATTACK ON PETITIONER. ONLY THE JURY HAS THE RESPONSIBILITY OF ARRIVING AT A FINAL DETERMINATION OF PETITIONER'S GUILT OR INNOCENCE, AND A STATE TRIAL COURT OR FEDERAL DISTRICT COURT CANNOT USURP THIS ROLE. BARKER, SUPRA.

BEFORE MOVING ON, PETITIONER MUST POINT OUT, MOREOVER, THAT ASIDE FROM THE TRIAL COURT'S SAY SO, THERE IS NOTHING IN THE RECORD INDICATING THAT THE JURY BELIEVED PETITIONER WAS THE AGGRESSOR, AND THE COURT POINTS TO NO SUCH EVIDENCE. THE DISTRICT COURT DOES NOT EXPLAIN WHY IT GAVE MORE WEIGHT TO THE BROTHER AND BROTHER-IN-LAW'S TESTIMONY, SAVE THAT THE BROTHER REPEATED THE SAME THING TO POLICE. BUT THAT DOES NOT EXPLAIN EITHER WHY JEFF'S STATEMENT WOULD BE MADE MORE BELIEVABLE BECAUSE IT WAS REPEATED TO A POLICE OFFICER - HE COULD HAVE LIED AND SIMPLY CONTINUED TO LIE. INDEED, PETITIONER CONSISTENTLY MADE THE SAME STATEMENT TO A CO-WORKER, HIS BROTHER-IN-LAW, AND POLICE SHORTLY AFTER THE INCIDENT; HOWEVER, NO SUCH OR SIMILAR CREDIT (OR EVEN CONSIDERATION) WAS GIVEN HIS TESTIMONY.

FINALLY, AS DISCUSSED EARLIER IN GREATER DETAIL, THE REVIEWING COURTS BELOW FAILED TO GIVE ANY CONSIDERATION TO THE FACT JEFF AND MIKE ARE THE VICTIM'S FAMILY MEMBERS AND WERE BIASED AND HAD REASONS TO SLANT THEIR TESTIMONY. SEE SUPRA, PP 27-34, THIS TEXT. RELATEDLY, THE TRIAL COURT AND DISTRICT COURT QUOTED ONLY PORTIONS OF WITNESS TESTIMONY TENDING TO FAVOR THE STATE'S CASE. MOST GLARING, THEY QUOTED JEFF MORACZEWSKI AS SAYING, "PETITIONER TOLD THE VICTIM'S BROTHER MINUTES AFTER THE INCIDENT THAT HE 'CHOKED OUT' THE VICTIM, AND HE HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS AFTER HE PASSED OUT." (APPX B, 20; APPX E, 6). END QUOTE. BUT THE FULL QUOTE ADDS THE PHRASE, "SO HE WOULDN'T GET UP." (T 4/5/2011, PP 87-88). READ IN CONTEXT, IF THE JURY CHOSE TO BELIEVE JEFF'S TESTIMONY, PETITIONER SAID HE CHOKED OUT TIM AND HELD HIM FOR ANOTHER THIRTY SECONDS SO HE WOULDN'T GET UP.

WHICH WOULD TEND TO SUPPORT PETITIONER'S TESTIMONY THAT HE WAS IN FEAR THAT TIM WOULD GET UP AND RETALIATE AGAINST HIM. THESE COURTS WERE QUICK TO QUOTE THE FRONT END OF JEFF'S TESTIMONY, BUT LEFT OUT THE BACK END. THE DIFFERENCE OF COURSE, MAKES ALL THE DIFFERENCE. LIKEWISE, THESE COURTS RELIED HEAVILY ON JEFF AND MIKE'S TESTIMONY THAT THEY FOUND TIM WITH THE STRAP WRAPPED VERY TIGHTLY AROUND HIS NECK, SO TIGHT THEY COULDN'T GET THEIR FINGERS UNDERNEATH IT. (APPX B, 20; APPX E, 6). HOWEVER, READ IN CONTEXT, JEFF AND MIKE'S TESTIMONY WAS NOT AS AIRTIGHT AS THESE COURTS WOULD HAVE THIS COURT BELIEVE. INDEED, THEY WERE NOT SURE HOW MANY TIMES THE STRAP WAS TWISTED AROUND TIM'S NECK, AND CONTRADICT THEMSELVES INTERNALLY AND EACH OTHER EXTERNALLY. MOREOVER, IT APPEARS FROM THEIR OWN TESTIMONY ABOUT HOW THEY HANDLED THE BODY AND PULLED ON THE STRAPS BEFORE REALIZING IT WAS AROUND TIM'S NECK, THAT JEFF AND MIKE MAY HAVE INADVERTENTLY TIGHTENED THE STRAPS THEMSELVES. THIS WOULD ALSO GIVE THEM REASON TO SLANT THEIR TESTIMONY. A REASONABLE A JUROR WOULD FIND JEFF AND MIKE'S TESTIMONY (THAT PETITIONER TOLD JEFF ABOUT CHOKING TIM OUT AND NOT LETTING HIM TAP OUT, AND MIKE HEARD JEFF SAY, "HE DIDN'T LOOSEN THE STRAPS"), ALL TOO PERFECT, OPPORTUNE, MAYBE EVEN INHERENTLY INCREDIBLE THAT A MURDERER WOULD ACTUALLY DESCRIBE TO HIS VICTIM'S BROTHER JUST HOW HE MURDERED THE VICTIM - IT WAS JUST ENOUGH TO REFUTE A SELF-DEFENSE CLAIM AND WAS LIKELY CONTRIVED. SEE WITNESS TESTIMONY, SUPRA, PP 28-34, THIS TEXT.

AS AN ASIDE, A REVIEW THIS SAME TESTIMONY REVEALS THAT JEFF AND MIKE

GAVE EXPERT TESTIMONY, WITHOUT OBJECTION FROM DEFENSE COUNSEL, THAT TIM WAS DEAD WHEN THEY ARRIVED (WHEN INDEED HE STILL COULD HAVE BEEN ALIVE, AS PETITIONER NOTED), THAT TIM WAS NOT BREATHING, AND THE TIGHT STRAP KILLED TIM. OF COURSE, NEITHER WITNESS WAS QUALIFIED AS AN EXPERT IN THESE MATTERS.

THIS COURT SHOULD HOLD THAT THE STATE TRIAL COURT AND FEDERAL DISTRICT COURTS' FINDINGS OF HARMLESS ERROR IMPROPERLY RESTS SQUARELY ON CREDIBILITY JUDGMENTS AND THEIR EVALUATION OF CONFLICTING EVIDENCE.

D. Failed To Consider The Related Newly Discovered Evidence In Context With The Erroneous Jury Instruction.

AS DISCUSSED IN DETAIL EARLIER, SUPRA, PP 11-15, THIS TEXT, PETITIONER ARGUED THAT THE NEWLY DISCOVERED EVIDENCE THAT HIGH LEVELS OF HYDROCODONE AND ALPRAZOLAM WERE A SIGNIFICANT CONTRIBUTING FACTOR IN THE VICTIM'S DEATH. SPECIFICALLY, PETITIONER ASSERTED THAT THESE DRUGS SUPPRESSED THE RESPIRATORY RECOVERY PROCESS THAT WOULD NORMALLY OCCUR AFTER A PERSON LOSES CONSCIOUSNESS. THESE CONTENTIONS WERE SUPPORTED WITH A REPORT PREPARED BY DR. RANDALL COMMISSARIS, AN EXPERT IN PHARMACOLOGY AND TOXICOLOGY.

IN LIGHT OF THE ABOVE ANALYSIS, THE TRIAL COURT'S CONCLUSION (THAT THE NEWLY DISCOVERED EVIDENCE OFFERED BY DR. COMMISSARIS WOULD NOT LEAD TO A DIFFERENT RESULT ON PROBABLE RETRIAL, BECAUSE THE JURY DID NOT BELIEVE PETITIONER LOOSENED THE RIFLE STRAPS FOUND TIGHTLY WRAPPED AROUND TIM'S NECK WHEN HE WAS FOUND DEAD BY HIS BROTHER)(APPX E, 6), AND THE DISTRICT COURT'S CONCLUSION (THAT PETITIONER WAS THE ONE WHO

STRANGLED THE VICTIM AND PUT HIM IN POSITION OF NEEDING TO RESTART HIS OWN BREATHING TO SURVIVE AND TAKES HIS VICTIM AS HE LEAVES HIM, AND THE EVIDENCE INDICATED THAT EVEN WITHOUT THE DRUGS THE VICTIM WOULD NOT HAVE REGAINED CONSCIOUSNESS BECAUSE PETITIONER LEFT THE STRAP TIGHTLY WOUND AROUND THE VICTIM'S NECK PREVENTING BLOOD FLOW)(APPX B, 29-30), ARE SIMPLY UNSOUND.

AS IS ABUNDANTLY CLEAR NOW, THE INFORMATION IN DR. COMMISSARIS' REPORT WAS NOT AVAILABLE AND PRESENTED AT TRIAL, AND HIS TESTIMONY THAT HIGH LEVELS OF THESE DRUGS SUPPRESSED TIM'S RESPIRATORY ABILITY TO REVIVE, EFFECTIVELY CAUSING HIM TO DIE OF DRUG INGESTED SUFFOCATION. COMMISSARIS' TESTIMONY THAT THE HIGH LEVELS OF THESE DRUGS WOULD HAVE SUPPORTED PETITIONER'S TESTIMONY THAT TIM'S BEHAVED AGGRESSIVELY, WHICH WAS REBUTTED BY THE PROSECUTOR'S SUGGESTIONS THAT THE DRUGS RENDERED TIM "HELPLESS" (LANGUAGE REPEATED BY THE DISTRICT COURT, APPX B, 20) OR "DOCILE." MOREOVER, WHERE DR. BECHINSKI, THE STATE'S EXPERT, COULD NOT ANSWER THE JURY'S DIRECT QUESTION ("WOULD THE PRESENCE OF THE DRUGS VICODIN OR XANAX SPEED UP THE PROCESS OF DEATH OF ASPHYXIATION?" TO WHICH HE RESPONDED, "I DON'T KNOW"), DR. COMMISSARIS COULD, AND IN THE AFFIRMATIVE. THIS QUESTION WENT TO THE HEART OF PETITIONER'S DEFENSE.

THE FACT THE JURY ASKED THE QUESTION INDICATES THEY WERE, IN FACT, PONDERING WHETHER INFLUENCE OF THESE DRUGS CAUSED TIM'S DEATH WHICH STRONGLY SUGGESTED THEY WERE NOT AT ALL CONVINCED PETITIONER INTENTIONALLY STRANGLED HIM. THE QUESTION ITSELF FLIES DIRECTLY IN

THE FACE OF THE TRIAL COURT AND DISTRICT COURTS HOLDING THAT DR. COMMISSARIS' REPORT WOULD BE IRRELEVANT BECAUSE PETITIONER HAD CHOKED OUT TIM AND HELD THE STRAP TIGHT FOR ANOTHER THIRTY SECONDS. THESE COURTS ONLY CONSIDERED HOW THEY VIEWED THE EVIDENCE AND FAILED TO CONSIDER WHAT REASONABLE JURORS WOULD DO WHEN ASSESSING WHETHER THE ERROR WAS HARMLESS.

WITH THIS, THE HOLDINGS BY THE COURTS BELOW (THAT THE INSTRUCTIONAL ERRORS ARE HARMLESS BECAUSE PETITIONER WOULDN'T LET TIM "TAP OUT," RENDERED HIM UNCONSCIOUS, AND HELD THE STRAP TIGHT AROUND HIS NECK FOR ANOTHER THIRTY SECONDS) DOES NOT RENDER THE COMMISSARIS REPORT IRRELEVANT; NOR DOES IT MEAN THE ERRORS ARE HARMLESS.

MOREOVER, THE COURTS BELOW SHOULD HAVE CONSIDERED THE COMMISSARIS REPORT BECAUSE IT WENT DIRECTLY TO PETITIONER'S SELF-DEFENSE CLAIM AND WOULD HAVE SUPPORTED HIS VERSION, AND SUPPORTS THE CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE, AN ISSUE THE SIXTH CIRCUIT AGREED TO HEAR.

ACCORDINGLY, THIS COURT SHOULD FIND THAT THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO GIVE ANY WEIGHT TO THE NEWLY DISCOVERED EVIDENCE.

E. The Harmless-Error Findings Below Substantially Impaired Petitioner's Right To Present A Complete Defense.

IN DISCUSSING THE CLAIM, THE REVIEWING COURTS FAILED TO CONSIDER THAT THE ERRONEOUS JURY INSTRUCTIONS DEPRIVED PETITIONER OF HIS

THE JURY TO SPECULATE THAT IF PETITIONER COULD HAVE BROUGHT THE ASSAULT BY TIM UPON HIMSELF FOR ANY NUMBER OF REASONS (AND BASED UPON EACH INDIDIVIDUAL JURORS' MORALS AND PRINCIPLES). THE ERRONEOUS INSTRUCTION ESSENTIALLY TOLD THE JURY TO SPECULATE ABOUT WHEN THEY BELIEVED TIME NO LONGER A DANGER TO PETITIONER (IN THEIR MINDS) AND PETITIONER NO LONGER NEEDED TO PROTECT HIMSELF, RATHER THAN WHEN, IN PETITIONER'S OWN MIND, HE NO LONGER REASONABLY BELIEVED HE WAS IN DANGER AND NEEDED TO PROTECT HIMSELF. STATED PLAINLY, THE TRIAL COURT'S LIMITING INSTRUCTIONS TOOK AWAY THE JURY'S ABILITY TO MAKE A DETERMINATION ABOUT "NECESSITY," WHICH UNDER MICHIGAN LAW, IS THE VERY BENCHMARK TEST FOR SELF-DEFENSE. SEE RIDDLE, SUPRA, 467 MICH AT 125-27(NOTING THAT "SELF-DEFENSE ... IS FOUNDED UPON NECESSITY," AND THAT "THE TOUCHSTONE OF ANY CLAIM OF SELF-DEFENSE, AS A JUSTIFICATION FOR HOMICIDE, IS NECESSITY.")(EMPHASIS IN ORIGINAL). THE INSTRUCTION TOOK AWAY (OR DISTORTED) THIS ESSENTIAL ELEMENT OF SELF-DEFENSE.

BY FASHIONING ITS OWN NON-STANDARD LANGUAGE THE TRIAL COURT EFFECTIVELY UNDERMINED PETITIONER'S DEFENSE, AND HE SIMPLY CANNOT BE CONSIDERED TO HAVE HAD A MEANINGFUL DEFENSE WHEN THE JURY WAS SO PLAINLY MISINSTRUCTED ON A MATTER SO CRUCIAL TO HIS DEFENSE. BARKER, 199 F.3D AT 875. THAT THE SELF-DEFENSE INSTRUCTION AT ISSUE IS VITALLY IMPORTANT TO A FULL AND VIGOROUS DEFENSE IS UNDERSCORED BY THE FACT THAT MICHIGAN LAW ITSELF REQUIRES THE INSTRUCTION BE GIVEN WHEN THERE IS A SUFFICIENT EVIDENTIARY BASIS TO SHOW THAT THE DEFENDANT USED SELF-DEFENSE TO PREVENT IMMINENT DEATH OF GREAT BODILY HARM. PEOPLE V. DUPREE, 486

MICH 693,708-09 (2010). THAT EVIDENTIARY BASIS INCLUDES INTRODUCING EVIDENCE THAT DEFENDANT ACTED OUT OF NECESSITY. INSTEAD OF HAVING A MEANINGFUL OPPORTUNITY TO PRESENT A FULL AND VIGOROUS DEFENSE, THEN, PETITIONER'S CLAIM OF SELF-DEFENSE WAS SIGNIFICANTLY IMPEDED AND HIS DUE PROCESS RIGHTS TO PRESENT A DEFENSE SEVERELY PREJUDICED.

THIS COURT SHOULD FIND THAT THE FINDING OF HARMLESS ERROR BY THE COURTS BELOW SUBSTANTIALLY IMPAIRED PETITIONER'S DUE PROCESS RIGHT TO PRESENT A FULL DEFENSE.

F. The Effect Of The Error In Relation To All Else That Happened.

THE CRUCIAL THING IN THE BRECHT ANALYSIS IN THE CASE AT BAR IS THE IMPACT THE EVIDENCE (THE TESTIMONY OF JEFF AND MIKE, BUTTRESSED BY THE STATE'S EXPERT) HAD ON THE MINDS OF THE JURORS, NOT THE TRIAL COURT, OR DISTRICT COURT, AND CERTAINLY NOT THE SIXTH CIRCUIT PANEL (WHO DID NOT CONDUCT HARMLESS ERROR REVIEW), IN THE TOTAL SETTING. THIS MUST TAKE ACCOUNT OF WHAT THE ERROR MEANT TO THEM, NOT SINGLED OUT AND STANDING ALONE (AS HAPPENED HERE), BUT IN RELATION TO ALL ELSE THAT HAPPENED. FIRST, PETITIONER BELIEVES THE COURTS BELOW JUDGED THE JURORS' REACTIONS BY THEIR OWN CONCLUSIONS, WITHOUT ALLOWANCE FOR HOW THE JURORS MIGHT REACT AND NOT BE REGARDED GENERALLY AS ACTING WITHOUT REASON. WHILE THE KOTTEAKOS COURT, 328 US AT 764, NOTED THIS AS A VERY IMPORTANT DIFFERENCE IN THE TEST, IT WAS IGNORED HERE BY THE TRIAL COURT AND DISTRICT COURT, CLEARLY BECAUSE (IN THEIR VIEW), THE SENSE OF GUILT

CAME STRONGLY FROM THE RECORD. SEE ALSO BRECHT, 507 US AT 642(PASSAGE QUOTED IN TEXT IS ONE "THAT SHOULD BE KEPT IN MIND BY ALL COURTS THAT REVIEW TRANSCRIPTS"); UNITED STATES V. LANE, 474 US 438,449 (1986)(CITED APPROVINGLY IN IMPORTANT PASSAGE IN BRECHT, 507 US AT 737: "'THE INQUIRY CANNOT BE MERELY WHETHER THERE WAS ENOUGH [EVIDENCE] TO SUPPORT THE RESULT APART FROM THE PHRASE AFFECTED BY THE ERROR. IT IS RATHER, EVEN SO, WHETHER THE ERROR ITSELF HAD A SUBSTANTIAL INFLUENCE.'"(QUOTING KOTTEAKOS AT 765)); SEE HOUSTON V. DUTTON, 50 F.3D 381,386-87 (5TH CIR.1995)(ANALYZING FACTUAL AND LEGAL ANALYSIS JURY "PROBABLY" EMPLOYED AS A RESULT OF UNCONSTITUTIONAL INSTRUCTION).

THERE ARE RELATIVE WEAKNESSES OF OTHER EVIDENCE ADMITTED AT TRIAL AND OTHER FACTORS BEARING ON THE QUESTION WHETHER THE CONSTITUTIONAL ERROR DID OR DID NOT AFFECT THE THING OR DELIBERATIVE PROCESSES OF THE ACTUAL JURORS. SEE BRECHT, 507 US AT 639(CONSIDERING STRENGTH OF GUILT AS ONE AMONG SEVERAL FACTORS RELEVANT IN ASSESSING WHETHER ERROR "SUBSTANTIALLY INFLUENCE[D]" JURY).

PETITIONER RAISED SIX CLAIMS IN THE TRIAL COURT, FOUR OF WHICH WERE ADDRESSED. AS TO THE INSTRUCTIONAL ERROR, THE NEWLY DISCOVERED EVIDENCE, AND THE ISSUE REGARDING GREAT WEIGHT OF EVIDENCE, THE TRIAL COURT DENIED RELIEF BECAUSE IT BELIEVED THERE WAS SUFFICIENT EVIDENCE TO CONVICT PETITIONER ON RETRIAL. (APPX E, 3-5,6-7,7-8). WITH RESPECT TO THE ISSUES OF PROFESSIONAL MISCONDUCT BY THE TRIAL JUDGE AND PROSECUTORIAL MISCONDUCT CLAIMS, THE TRIAL COURT IMPERMISSIBLY REFUSED TO ADDRESS THEM UNDER THE LAW OF THE CASE DOCTRINE. (APPX E, 8). PETITIONER ARGUED

AT EVERY STEP THEREAFTER THAT LAW OF CASE IS INAPPLICABLE. HOWEVER, ALL THE LOGIC AND REASON (NOT TO MENTION CLEAR CASELAW) WAS IGNORED BY THE STATE COURTS AND DISTRICT COURT.

IN SUM, THE REVIEWING COURTS NEVER TOOK INTO CONSIDERATION FACTS AND EVIDENCE THAT THE TRIAL JUDGE UNDERMINED PETITIONER'S DEFENSE WHEN HE TOOK ON THE ROLE OF PROSECUTOR WHEN HE QUESTIONED DR. BECHINSKI, THE STATE'S EXPERT, ABOUT THE RIFLE, AND DISPUTED WITH THE GOOD DOCTOR ABOUT HIS OPINION. IN ANOTHER INSTANCE, THE TRIAL COURT REFUSED THE JURY'S REQUEST TO REVIEW PETITIONER'S TESTIMONY WHILE, IN THE SAME BREATH, GRANTING THE JURY'S REQUEST TO SEE THE VIDEO STATEMENT OF JEFF MORACZEWSKI. CLEARLY THE REQUEST FOR BOTH INDICATES THAT THE JURY HAD QUESTIONS ABOUT WHO WAS TELLING THE TRUTH IN THIS CREDIBILITY CONTEST. HAD THE REQUEST FOR PETITIONER'S TESTIMONY BEEN ALLOWED, THE JURY COULD HAVE VIEWED ALL THIS EVIDENCE TO HIS ADVANTAGE. BUT, JEFF'S VIDEO STATEMENT WAS THE LAST THEY HEAR ON THE MATTER. ALLOWING THE JURY REVIEW PETITIONER'S TESTIMONY IS PRECISELY WHAT IS ESSENTIAL TO PROVING HE ACTED OUT OF NECESSITY, IN SELF-DEFENSE. IN ADDITION, THE POLICE DID NOT FIND TIM WITH THE STRAP WRAPPED TIGHTLY AROUND HIS NECK - THE BROTHER AND BROTHER-IN-LAW DID. THERE ARE NO PHOTOGRAPHS OR OTHER EVIDENCE SUPPORTING THEIR TESTIMONY.

IS ALL THIS DISPOSITIVE? YES INDEED, ACCORDING TO KOTTEAKOS AND BECHT.

G. The Sixth Circuit Panel Did Not Conduct A Harmless-Error Review.

THE STATE COURT AND DISTRICT COURT CONCLUDED THAT THE INSTRUCTIONAL

ERROR WAS HARMLESS. THE SIXTH CIRCUIT, HOWEVER, DID NOT CONDUCT A HARMLESS ERROR REVIEW OF THE ISSUE. INSTEAD, THE PANEL CONDUCTED ITS OWN INDEPENDENT REVIEW OF THE CASE, ADDRESSING EACH INDIVIDUAL INSTRUCTIONAL ERROR, AND CONCLUDING THAT, "THE STATE COURT REASONABLY FOUND THAT THE INSTRUCTION DID NOT VIOLATE DUE PROCESS." (APPX A, 5).

EVERY READER KNOWS BY NOW THAT THE STATE TRIAL COURT SAID "THAT THE ERROR INVOLVED WAS NOT DECISIVE TO THE OUTCOME"; IT DID NOT FIND "THAT THE INSTRUCTION DID NOT VIOLATE DUE PROCESS." MOREOVER, THE DISTRICT COURT, RECOGNIZING THAT IT WAS BOUND BY THE STATE COURT RECORD, CONDUCTED A HARMLESS ERROR REVIEW, ULTIMATELY FINDING THE "ERRORS IN THE SELF-DEFENSE INSTRUCTION DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE ON THE VERDICT....." (APPX B, 21).

THIS COURT EXPLAINED THAT "[A] FEDERAL COURT'S COLLATERAL REVIEW OF A STATE-COURT DECISION MUST BE CONSISTENT WITH RESPECT DUE STATE COURTS IN OUR FEDERAL SYSTEM. MILLER-EL V. COCKRELL, 537 US 322,340 (2003). THE "AEDPA THUS IMPOSES A 'HIGHLY DEFERENTIAL STANDARD FOR EVALUATING STATE-COURT RULINGS, AND DEMANDS THAT STATE-COURT DECISIONS BE GIVEN THE BENEFIT OF THE DOUBT.'" RENICO V. LETT, 559 US 766,773 (2010)(QUOTING LINDH V. MURPHY, 521 US 320,333 N7 (1997)); WOODFORD V. VISCOTTI, 537 US 19,24 (2002). "A STATE-COURTS DETERMINATION THAT A CLAIM LACKS MERITS PRECLUDES FEDERAL HABEAS RELIEF SO LONG AS 'FAIRMINDED JURISTS COULD DISAGREE' ON THE CORRECTNESS OF THE STATE COURT'S DECISION." HARRINGTON V. RICHTER, 562 US 86,101 (2011)(CITING YARBOROUGH V. ALVARADO, 541 US 652,664 (2004)). THIS COURT HAS EMPHASIZED "THAT EVEN A STRONG CASE FOR RELIEF DOES NOT MEAN THE STATE'S

CONTRARY CONCLUSION WAS UNREASONABLE." Id.(CITING LOCKYER V. ANDRADE, 538 US 63,75 (2003). FURTHERMORE, PURSUANT TO 2254(D), "A HABEAS COURT MUST DETERMINE WHAT ARGUMENTS OR THEORIES ARE SUPPORTED OR .... COULD HAVE SUPPORTED, THE STATE COURT'S DECISION; AND THEN IT MUST ASK WHETHER IT IS POSSIBLE FAIRMINDED JURISTS COULD DISAGREE THAT THOSE ARGUMENTS OR THEORIES ARE INCONSISTENT WITH THE HOLDING IN A PRIOR DECISION" OF THE SUPREME COURT. Id.

ADDITIONALLY, UNDER 2254(D)(2), THE "UNREASONABLE DETERMINATION" SUBSECTION, "A DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED CORRECT," WOOD V. ALLEN, 558 US 290,293 (2010), AND "[A] STATE-COURT'S FACTUAL DETERMINATION IS NOT UNREASONABLE MERELY BECAUSE THE FEDERAL HABEAS COURT WOULD HAVE REACHED A DIFFERENT CONCLUSION IN THE FIRST INSTANCE." BURT V. TITLOW, 571 US 12,15 (2013) (INTERNAL QUOTATION MARKS AND CITATION OMITTED).

THIS COURT SHOULD FIND THAT THE SIXTH CIRCUIT PANEL ABUSED ITS DISCRETION BY FAILING TO CONDUCT A HARMLESS ERROR REVIEW AND IN FINDINGS THAT, IN ITS INDEPENDENT REVIEW, THAT NO ERRORS OCCURRED.

THE COURT SHOULD REMAND TO THE SIXTH CIRCUIT FOR A DETERMINATION OF WHETHER THE STATE-COURT'S HARMLESS ERROR REVIEW WAS UNREASONABLE.

II. CONCLUSION AND RELIEF SOUGHT

WHEN REVIEWING THE JURY INSTRUCTIONS IN THEIR ENTIRETY, ONE IS LEFT WITH THE DISTINCT IMPRESSION THAT THE TRIAL JUDGE ADOPTED A RATHER CAVALIER MODE OF IMPRESSING UPON THE JURY THE OBLIGATION OF THE PROSECUTION TO PROVE ITS CASE ACCORDING TO THE STANDARDS, AS WELL AS THEIR RESPONSIBILITY TO DETERMINE IF PETITIONER ACTED IN LAWFUL SELF-DEFENSE. THE TRIAL JUDGE, FOR REASONS NOT DISCERNIBLE FROM THE RECORD, CHOSE TO LINK THE SELF-DEFENSE STANDARD OF PROOF TO SITUATIONS IN WHICH PETITIONER "ACTED WRONGFULLY," DID SOMETHING "BROUGHT ON THE ASSAULT"; WHEN THE VICTIM ENGAGED IN "UNLAWFUL USE OF FORCE." THE INSTRUCTION ALSO PLACED A "TIME LIMITATION" ON ON THE USE OF SELF-DEFENSE, AND "OMITTED REQUIRED LANGUAGE."

THE REVIEWING COURTS ATTEMPT TO AVOID THESE ERRORS BY SIMPLY STATING THAT THE TERMS ESSENTIALLY DESCRIBE A PERSON WHO IS THE AGGRESSOR OR INITIATOR OF AN ALTERCATION. HOWEVER, THE AMBIGUITY IS NOT EXTINGUISHED BY CONTEXT OR ALTERNATE DEFINITIONS PROVIDED BY THE REVIEWING COURTS. RATHER, USE OF THE ADJECTIVE SKEWS THE FOCUS AT THE TIME OF TRIAL FROM WHAT EFFECT THE ERROR HAD OR REASONABLY MAY BE TAKEN TO HAVE HAD UPON THE JURY'S DECISION, BRECHT, 507 US AT 642-43 - TO RENDERING THE ERROR HARMLESS BECAUSE THE TRIAL JUDGE BELIEVED THE ERROR CONVEYED THE EXACT SAME MESSAGE.

THESE ERRORS ARE MERE SLIP OF THE TONGUE AND SUGGEST THAT THE JURY REJECTED SELF-DEFENSE BECAUSE OF THEIR INDIVIDUAL BELIEFS ABOUT HOW A PERSON IN A SIMILAR SITUATION SHOULD ACT, NOT BASED ON WHAT THEY BELIEVE (BASED ON ALL THE EVIDENCE AND CIRCUMSTANCES) WAS IN

PETITIONER'S MIND AND HOW IT APPEARED TO HIM AT THE TIME.

PETITIONER IS MINDFUL THAT A HABEAS PETITIONER FACES AN UPHILL BATTLE IN ESTABLISHING THAT AN ERRONEOUS JURY INSTRUCTION IS SO PREJUDICIAL THAT HE OR SHE IS ENTITLED TO HABEAS RELIEF. THE PETITIONER MAY NOT SIMPLY SHOW THAT THE INSTRUCTION WAS UNDESIRABLE, ERRONEOUS, OR EVEN UNIVERSALLY CONDEMNED. SEE CUPP V. NAUGHTEN, 414 US 141,146 (1973). INSTEAD, THE PETITIONER MUST SHOW THAT THE IMPROPER INSTRUCTION "SO INFECTED THE ENTIRE TRIAL THAT THE RESULTING CONVICTION VIOLATES DUE PROCESS." ID. AT 147. ALTHOUGH THIS BURDEN IS UNDENIABLY HEAVY, OF COURSE, THIS DOES NOT MEAN THAT A JURY INSTRUCTION MAY NEVER RISE TO SUCH PROPORTIONS, SEE ID., AND THIS COURT SHOULD FIND THAT THE ERRONEOUS INSTRUCTIONS WAS SO PREJUDICIAL TO PETITIONER'S DEFENSE IN THIS CASE THAT BURDEN HAS BEEN SATISFIED.

IN SUM, THIS COURT SHOULD CONCLUDE THAT THE COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON SELF-DEFENSE HAD A SUBSTANTIAL AND INJURIOUS INFLUENCE ON THE JURY'S VERDICT AND RESULTED IN PREJUDICE TO PETITIONER. ON THAT BASIS, THE COURT SHOULD HOLD THAT THE MICHIGAN TRIAL COURT ENGAGED IN AN UNREASONABLE APPLICATION OF THE HARMLESS ERROR TEST UNDER 28 U.S.C. §2254(D). FURTHER, THE COURT SHOULD CONCLUDE THAT THE TRIAL COURT'S FINDING OF HARMLESS ERROR VIOLATED PETITIONER'S RIGHT TO A TRIAL BY JURY AND TO PRESENT A COMPLETE DEFENSE.

FOR THE FOREGOING REASONS, THE COURT SHOULD REVERSE THE SIXTH CIRCUIT'S DENIAL OF HABEAS RELIEF, AND ORDER THAT A CONDITIONAL WRIT

OF HABEAS CORPUS BE GRANTED UNLESS THE STATE OF MICHIGAN COMMENCES TRIAL PROCEEDINGS AGAINST PETITIONER WITHIN 90 DAYS OF THE COURT'S OPINION. ALTERNATIVELY AND AT A MINIMUM, THE COURT SHOULD REMAND TO THE SIXTH CIRCUIT FOR A HARMLESS ERROR REVIEW.

Respectfully submitted.

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Dated: May 20th 2019

CERTIFICATE OF SERVICE

Kevin Beltowski, Petitioner in pro se, certifies that on the undersigned date he mailed a copy of the foregoing document to Respondent's attorney of record, Christopher M. Allen, Office of Michigan Attorney General, P.O. Box 30217, Lansing, Michigan 48909, by expedited legal mail through an authorized agent of G. Robert Cotton Correctional Facility.

Kevin Beltowski

Executed on 7-10, 2019, at G. Robert Cotton Correctional Facility.