19-6727

Case No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE MARVIN ANDREWS,
Petitioner,

VS.

NOAH NAGY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SANCTION DECISONS OF THE MICHIGAN COURT OF APPEALS AND FEDERAL DISTRICT COURT THAT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE SIXTH CIRCUIT WITH RESPECT TO WHETHER TRIAL COUNSEL WAS INEFFECTIVE WHEN INVESTIGATING AN ALIBI DEFENSE AT TRIAL?

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is unreported. The opinion of the United States District Court appears at Appendix B to the petition and is unreported. The order of the Michigan Supreme Court appears at Appendix C and is unreported. The opinion of the Michigan Court of Appeals appears at Appendix D to the petition and is unreported.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided the case was May 9, 2019. Appendix A. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
>
> The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Similar to the United States Constitution, the Michigan Constitution states that, "[i]n every criminal prosecution, the accused shall have ... assistance of counsel for his defense...." Const 1963, art 1, §20.

The constitutional guarantee of the assistance of counsel is a fundamental component

of our criminal justice system. The assistance of a competent attorney is essential because it provides the means through which the other rights of the accused are secured. Consequently, without counsel's assistance, the right to a trial would mean little. See United States v. Cronic, 466 US 648, 653 (1984). Notable federal and Michigan jurists have long recognized the importance of the right to the assistance of counsel. Justice Sutherland, in his opinion in Powell v. Alabama, 287 US 45, 68-69 (1932), emphasized:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. [Emphasis added.]

Justice Cooley similarly noted the importance of the right, stating that "'[p]erhaps the privilege most important to the person accused of crime, connected with his trial, is that to defended by counsel.'" Pickens, 446 Mich at 311, quoting 1 Cooley, Constitutional Limitations (8th ed), p 696.

Because of its great importance in our adversary system, the right to the assistance of counsel includes the right to the effective assistance of counsel. Cronic at 654, citing McMann v. Richardson, 397 US 759, 771 (1970).

In People v. Pickens, supra, a majority of the Michigan Supreme Court held that the Michigan Constitutional guarantee of the right to effective assistance of counsel is coextensive with its federal counterpart. Consequently, the Michigan Supreme Court applied the two-part test announced in Strickland v. Washington, 466 US 668 (1984). The Strickland test requires examining whether counsel's errors fell below an objective

standard of reasonableness and whether the error so prejudiced the defendant so as to deprive him of a fair trial.

The Strickland performance/prejudice is not the sole indicia of ineffective assistance; it is the one applicable to the facts of this case.

Petitioner argued in the Michigan Court of Appeals that he was denied the effective assistance of counsel for two reasons. First, he argued that he was denied the effective assistance of counsel when his trial counsel failed to present an alibi defense at trial. Second, he argued that counsel's performance was deficient when counsel failed to inform him that he faced a mandatory minimum sentence of 25 years prior to him rejecting the prosecution's plea offer. The Michigan Court of Appeals addressed the merits of these claims, ultimately deciding against Petitioner in an opinion written on June 14, 2016. (Appendix D).

So too with the United States District Court for the Eastern District of Michigan. However, the district court failed to address the second claim in its opinion and order denying petition for writ of habeas corpus, issued February 20, 2019. (Appendix B). Likewise, the Sixth Circuit addressed the ineffective assistance of counsel as to the claim of alibi, but did not address the second claim that counsel failed to inform Petitioner about the plea offer.

STATEMENT OF FACTS AND PROCEEDINGS

A Wayne County, Michigan jury convicted Petitioner on January 8, 2015 of armed robbery, MCL 750.529, and possession of a firearm during a felony, MCL 750.227b. He was sentenced as a fourth-time habitual offender, MCL 769.12 on January 30, 2015.

The prosecution offered a settlement to Petitioner, put on the record on November 26, 2014 at final conference. (T 11/26/14, pp 3-4). The offer was to allow Petitioner to plead guilty to one count of unarmed robbery and felony firearm in exchange for

dismissal of the armed robbery charge and fourth-time habitual enhancement charge. (Id., 3). The agreement was that Petitioner would be sentenced to a term of 5 to 15 years pursuant to the unarmed robbery conviction plus the mandatory two years to be imposed for the felony firearm conviction. (Id.).

To this, defense counsel responded by asking that final conference be adjourned until December 12, 2014 because she had just been retained to represent Petitioner and Petitioner needed time to consider the offer. (Id., 3-4). The trial judge adjourned the matter until December 12, 2014. (T 12/12/14, p 3).

The prosecutor made the same offer to Petitioner on December 12, 2014. He stated that the minimum sentence, based on his calculation of the applicable sentencing guidelines on armed robbery charge, was 126 months to 420 months. (Id., 3). He said if the Petitioner were to be convicted of armed robbery following a trial he would seek a sentence of 420 months to 70 years in prison plus two years for the felony firearm conviction. (Id., 3). Defense counsel responded that Petitioner rejected the plea. However, Petitioner did not make a statement on the record. (Id., 3-4).

During trial, the prosecution theorized that at about 2:30 p.m. August 24, 2014, the Complainant Ronald Segars was leaving a store in the area of Sparling Street and St Charles Street, Detroit, Michigan, when a blue or green Nisan Maxima pulled up up close to him. The passenger, carrying a handgun, exited the vehicle and told him to, "[R]un your shit, run it all." (T 1/8/15, p 50). The prosecutor said Mr. Segars was wearing an expensive diamond necklace and nice watch, and carrying some cash. He claimed that the man threatened to kill Segars if he did not comply with his demand and put Segars in fear. (Id., 50). The prosecutor told the jury that prior to the robbery, Segars never saw the man who robbed him. Segars reported the robbery to police immediately after it happened. Segars was able to give a physical description of the robber but did not know his name or where he lived. (Id., 51-52). Mr. Segars conducted

his own investigation in the neighborhood, leading to identification of Petitioner, which was provided to police. (Id., 52-53).

Defense counsel informed the jury that the prosecution's entire case rested on the credibility of Mr. Segars, the only witness to the robbery, and that no other evidence was presented to confirm his claim that the items were stolen. (Id., 54).

RONALD SEGARS was at a liquor store on August 24, 2014 across the street from a housing project in the company of three men whom he identified as Quez, Dre and Nuke; Dre was Andre Wilson, Quez was Preston Rivers. He grew up with the three men. (T 1/8/15, pp 55-56). While they were standing by a liquor store, a blue or green Maxima stopped near the alley. (Id., 56-57). Petitioner got out of the passenger side of the Maxima, walked across the street towards Segars and his friends, walked past them and then turned around. Segars' friends ran away just before Petitioner pulled a pistol on him. Andre and Preston ran into the store. (Id., 58-60). Petitioner told Segars to "Run that she again" and held the gun in his hand while two and a half or three feet apart. Petitioner intended to rob him. (Id., 61-63).

Segars took off his chain and watch, giving both items to Petitioner. The watch was a Breitling diamond watch; the diamond necklace about 32 inches long. (Id., 63). He also gave Petitioner his car keys and approximately $150.00 from his pockets, after which he walked back to the Maxima starting to shoot at Segars. (Id., 64-66).

Altogether, the items were worth $25,000.00; he offered a reward on the street for information leading to their return. (Id., 80). Fifteen minutes after the incident Segars went to the police station, made a statement that day. (Id., 80-83).

Mr. Segars was impeached with the fact that the two page statement he gave to police was dated August 28. A couple of days after giving police a statement he returned to the police station with photographs of Petitioner. He acknowledged he had been

convicted of a crime involving theft or dishonesty within the past ten years. (Id., 83-84).

The alcohol Segars consumed before the robbery had no effect on his ability to remember what happened to him. (Id., 86).

OFFICER JOIELLE COBBS-SANDERS, Detroit Police Officer and officer-in-charge, went to the crime scene two or three days after the incident, where she learned there was no surveillance video available because the liquor store were not working. (T 1/8/15, pp 89-90). She did not find any shell casings in the area. Police received "quite a few" calls for shots in the area but her canvas did not result in finding any witness with useful information. (Id., 90-91).

She attempted to interview the people Mr. Segars sais he was with at the time of the robbery, but was unable to get a good address for those witnesses or make contact with them. She did not receive a phone number for either man, and did not know of any other evidence of witnesses that could presented in this case. (Id., 91-92, 95).

Officer Cobbs-Sanders did not know when Segars brought the photograph of Petitioner to the police station because she was not present when it happened. (Id., 98). While she spoke to witnesses in the area of the robbery, those people provided no information. (Id., 98-99). No police officers questioned Petitioner in order to determine whether he was associated at all with the blue or green Maxima. She did not investigate any of the area pawn shops to see if any of Segars' jewelry had been taken to one of them. She did not know the name of the person who provided Segars with Petitioner's photograph, and she never spoke to that person. (Id., 99-100).

The People rested. (T 1/8/15, p 104).

Petitioner did not testify. (T 1/8/15, pp 101-102). The defense rested without presenting any witnesses or evidence. (Id., 104).

The jury began its deliberations, after first having heard the arguments of counsel

and the trial court's instructions on the law, at 2:42 p.m. on January 8, 2015. (T 1/8/15, p 132). It returned verdicts of guilty as charged at 3:05 p.m. on that same date. (Id., 135).

Sentencing was held January 30, 2015. The trial judge sentenced Petitioner to 25 to 50 years as a fourth-time habitual offender, and a mandatory two years for felony firearm. (T 1/20/15, pp 9-10).

Petitioner filed a motion for new trial arguing that he was denied effective assistance of counsel when trial counsel failed to inform him that he faced a mandatory 25 year prison term for his status as a fourth habitual offender. Petitioner asserted that he would have accepted the plea had he been aware of it. (T 9/4/15, p 63). Additionally, he argued that trial counsel was ineffective when she failed to present his alibi defense. (Id., 62). An evidentiary was ordered and conducted on September 4, 2015, at which defense counsel Danien Woodson testified.

DANIEN WOODSON represented Petitioner in this case and a previous case; she was retained by Petitioner's mother, Ivy Andrews, to represent him in this case. (T 9/4/15, 9-11). Petitioner informed her that he had been at Great Lakes Crossing Mall in Auburn Hills during the afternoon of August 24, 2014 in the company of his grandmother. (Id., 11). Petitioner did not tell her that he was with any other family member at the time. (Id., 12). Woodson spoke with Petitioner's mother in order to obtain a phone number for the grandmother, Dorthy Simpson. Ms. Andrews told her that Ms. Simpson was very ill and had advanced dementia. (Id., 12). Petitioner offered his grandmother as an alibi witness in the other case in which she had represented him. (Id., 13).

She did not file a notice of alibi defense in this case or in the other case. Ms. Andrews never informed her that she had been with Petitioner at Great Lakes Crossing Mall on the day of the offense, albeit they had extensive communication with one

another. (Id., 13-14). She did not receive the receipts that Ms. Andrews had in her possession -- which showed a purchase made at the mall -- until the day of Petitioner's trial. (Id., 14).

Woodson did not want to have those receipts admitted during Petitioner's trial, because the receipts were two hours after the robbery occurred and the prosecution could have argued that defendant conducted the robbery and then used the cash and proceeds from the jewelry to go shopping. (Id., 14).

Ms. Woodson retained an investigator to see whether there was surveillance video from the mall that would substantiate Petitioner's alibi. The investigator did not secure or find any helpful witnesses or evidence. (Id., 16).

She informed Petitioner that he faced a mandatory minimum sentence of 25 years because he was being charged as a violent fourth-time habitual offender, and Petitioner "was adament that he did not want any offers regardless of the exposure that he was facing." Petitioner had full understanding of the sentencing ramifications he faced. (Id., 17-18). At trial, Ms. Woodson asked the trial judge to impose a minimum sentence at the low end of the minimum sentence range, albeit she knew the judge would not be able to impose such a sentence. (Id., 18). When asked why she did not make a response when the trial judge pointed out that she must impose a mandatory twenty-five year minimum sentence, Ms. Woods stated: "Because there is no response." (Id., 18). The 25-year mandatory minimum sentence was no surprise to her or to the Petitioner, albeit she never made a record of the fact that Petitioner faced a mandatory 25-year minimum, she discussed the issue with him. (Id., 19-20).

Woodson retained the investigator because Petitioner's grandmother was not available to testify as an alibi witness. She asked Ivy Andrews for the shopping receipts at the end of December and before the January 8, 2015 trial, when she understood that the grandmother would not be able to testify. (Id., 21-25).

Both receipts had Petitioner's name on them, one was dated August 4, 2014, and the second dated August 30, 2014 for an exchange. (Id., 27-28). The sale price was $339.17. (Id., 28).

She did not present this evidence because it might appear that Petitioner was using proceeds from the robbery to pay for the clothing. (Id.).

Woodson recommended that Petitioner ask for a bench trial given the nature of the complaining witness. Petitioner rejected the plea offer maintaining his innocence, albeit he understood he faced a 25-year mandatory minimum. (Id., 30-31).

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IVY ANDREWS, Petitioner's mother, retained Danien Woodson to represent him when she learned that he had been charged with armed robbery in this case. (T 9/4/15, pp 34-35). She informed Ms. Woodson that she was with her son and other relatives at Great Lakes Crossing Mall during the afternoon of the robbery; that her brother Michael Woodson, her mother, Dorthy Simpson, were also with them. (Id., 35-37).

Her mother did not suffer from dementia and she never told Danien Woods that she did. She never told any person that her mother suffered from dementia. (Id., 37). Ms. Woodson told her that she did not have to attend her son's trial and she did not attend. (Id., 38-39).

Ms. Andrews provided shopping receipts from August 24, 2014 to Ms. Woodson before the day of trial. (Id., 38-39).

Ms. Andrews communicated with Ms. Woodson by text, and in-person. She told Ms. Woodson that she was an alibi witness, explaining that on the day in question she was with her son at church in the morning, they went to Max and Erma's for lunch and then they went to the mall. Ms. Andrews and her mother were looking for items to buy for her sister's upcoming birthday. (Id., 41-43). Andrews and her family left the church, located around Seven Mile Rd. and Livernois, and then went to the Max and Erma's located across from the Great Lakes Crossing Mall. She was not shopping in the same stores that her son (Petitioner) shopped in that day. (Id., 45-47).

Andrews gave Woodson the receipts before trial and on the day of trial, or she may have given them to her the day of sentencing. She gave her the receipts outside the courthouse. (Id., 46-50).

Ms. Andrews acknowledged she sent a text message to Ms. Woodson on the day of trial, January 8, 2015, in which she said she was outside the courthouse. She gave Woodson the receipts and money when she met with her before trial. She acknowledged that the

text message stated she had receipts for the Petitioner's purchase and the message was dated January 8, 2015 (Id., 50-53).

DOROTHY SIMPSON, Petitioner grandmother, was with him at church on August 24, 2015; then they went to Max and Erma's restaurant and then at Great Lakes Crossing Mall. It did not make any sense to her that he was charged with a crime committed on August 24, 2015, because he was with her then. (T 9/4/15, pp 55-57).

She was never asked to testify as an alibi witness during her grandson's trial, but would have been willing to do so. (Id., 58).

Ms. Simpson did not have dementia, but had difficulty with her hearing. She has never been diagnosed with dementia and was capable of testifying. (Id., 58-59).

She and her daughter spent time at the mall window shopping for possible birthday gifts for her other daughter, Brenda, whose birthday was August 29th but they did not buy anything that day. (Id., 59-60).

They arrived at the mall between 3:00 p.m. and 3:30 p.m. and left between 6:00 p.m. and 6:30 p.m. (Id., 60).

The defense rested. (T 9/4/15, 61). Petitioner did not testify id., 61, but submitted an affidavit, which appears at Appendix E to the petition.

After hearing arguments, T 9/4/15, pp 62-68, the trial court stated she would issue a written opinion. (Id., 68). On September 14, 2015, the trial court issued an eight page opinion and order denying the motion for new trial. A copy of opinion and order appears at Appendix F).

The Travel of The Case

Petitioner timely appealed in the Michigan Court of Appeals, raising two claims:

I. DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE TRIAL COUNSEL FAILED TO PRESENT HIS DEFENSE OF ALIBI OR TO INFORM HIM OF THE MANDATORY TWENTY-FIVE YEAR SENTENCE HE FACED AS A FOURTH HABITUAL OFFENDER WHEN HE REJECTED THE PLEA AND SENTENCE OFFER MADE BY THE PROSECUTION.

II. THE INSUFFICIENT EVIDENCE PRESENTED DURING THE DEFENDANT-APPELLANT'S TRIAL, TO SUPPORT THE JURY'S VERDICTS OF GUILTY BEYOND A REASONABLE DOUBT OF ONE COUNT EACH OF ARMED ROBBERY AND POSSESSION OF FIREARM IN THE COMMISSION OF A FELONY (FELONY FIREARM), CONSTITUTES A DENIAL OF THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On June 14, 2016, the Michigan Court of Appeals affirmed Petitioner's conviction. (Appendix D). The Michigan Supreme Court denied leave to appeal. 500 Mich 900 (2016).

Petitioner timely filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, with these claims:

I. INEFFECTIVE ASSISTANCE OF COUNSEL. [THE] OFFENSE OCCURRED ON 08/24/2014[.] DEFENDANT HAS AN ALIBI FOR THE DATE AND TIME OF THE OFFENSE. DEFENDANT INFORMED HIS ATTORNEY OF THE ALIBI AND WITNESSES. THE ATTORNEY COLLECTED MONEY FROM DEFENDANT TO INVESTIGATE [THE] ALIBI, BUT NEVER DID. ALIBI WITNESSES NEVER [WERE] INTERVIEWED OR PRESENT AT TRIAL.

II. INSUFFICIENCY OF EVIDENCE PRESENTED DENIED DUE PROCESS OF LAW. DEFENDANT PAID [TO] HIRE [AN] INVESTIGATOR. NONE WAS HIRED OR VISITED IN JAIL. NO INVESTIGATOR INTERVIEWED DEFENDANT'S ALIBI WITNESSES. DEFENSE COUNSEL NEVER INFORMED DEFENDANT THAT NO ALIBI EVIDENCE WOULD BE PRESENTED AT TRIAL.

The district court denied the petition on February 2, 2019. (Appendix B).

On appeal, the Sixth Circuit, with respect to the ineffective assistance of counsel for failure to present the alibi claim, concluded that:

According to Andrews, he informed trial counsel that he had an alibi - that is, he was at a mall with four other individuals at the time of the crimes of conviction - but trial counsel never interviewed nor presented those witnesses. He also claimed that counsel had been provided - but did not present at trial - receipts corroborating his alibi. The state court of

> *appeals affirmed the state trial court's rejection of this claim because trial counsel credibly testified that she had been informed of only of the individuals, had been told that the individual suffered from dementia and could not testify, had further investigated the alibi to no avail, and that the receipts were potentially incriminating. In other words, counsel's performance did not "[fall] below an objective standard of reasonableness." . . . Because Andrews did not present clear and convincing evidence contrary to the factual determinations of the state courts and because the state courts reasonably applied Strickland, the district court denied the petition. Reasonable jurists would not debate that determination. [Appendix A, p 2; (Emphasis added).]*

Petitioner now brings this petition for writ of certiorari, asking the Court to vacate the decision of the Sixth Circuit and remand for further proceedings.

ARGUMENTS

Argument I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SANCTIONED DECISIONS OF THE MICHIGAN COURT OF APPEALS AND FEDERAL DISTRICT COURT THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE SIXTH CIRCUIT WITH RESPECT TO WHETHER TRIAL COUNSEL WAS INEFFECTIVE WHEN INVESTIGATING AN ALIBI DEFENSE AT TRIAL.

The Sixth Circuit sanctioned decisions of the Michigan Court of Appeals and Eastern District Michigan Federal District Court when those decisions conflict with decisions of this Court and other decisions of the Sixth Circuit with respect to whether trial counsel was ineffective for failing to investigate Petitioner alibi witnesses and the alibi defense.

The facts are rather straightforward and the case should not have been that complicated in the courts below. The uncontested evidence in the record is that the prosecution's theory was that the crime happened at 2:30 p.m., August 24, 2014. However, the alibi witnesses, if interviewed by defense counsel and called as witnesses, would have testified that Petitioner was with them and they all arrived at the mall between 3:00 and 3:30 p.m. that day. But that is not all. According to Petitioner's grandmother, even before going to the mall they went to church and then had lunch at Max and Erma's restaurant. They were together the whole time. Moreover, the grandmother herself testified that she did not have dementia, and was willing and able to testify, but counsel did not contact her. Nor did counsel contact Petitioner's uncle. Counsel did not send the investigator to the church or Max and Erma's restaurant in an effort to verify Petitioner's alibi. Counsel's explanation that she did not use the store receipts amounts to nothing more than a hindsight justification for her failure to properly investigate the alibi defense.

The failure to investigate and at least personally talk to Ms. Dorothy Simpson, Petitioner's grandmother, constituted deficient performance. Ms. Simpson was a major witness supporting Petitioner's alibi defense. Defense counsel acknowledged that she knew about Ms. Simpson as an alibi, but claims she was told by Petitioner's mother that the grandmother had dementia and could not testify. Petitioner's mother denied telling counsel that her mother had dementia and could not testify. In fact, Ms. Simpson herself testified that she did not and has never had dementia and that she was willing and able to testify, but counsel did not contact her. Even a superficial investigation would have led to Ms. Simpson, especially since counsel had hired an investigator to investigate the alibi. Petitioner can see no strategic reason in failing to investigate Ms. Simpson, his grandmother, as well as his uncle as potential favorable witnesses. As this Court stated: counsel "abandoned his investigation at an unreasonable juncture, making a fully informed decision with respect to [whether to demand production of the witnesses and evidence] impossible." See Wiggins v. Smith, 539 US 510, 527-28 (2003).

It is well established that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 US 668, 691 (1984). The duty to investigate derives from counsel's basic function, which is "'to make the adversarial testing process work in the particular case.'" Kimmelman v. Morrison, 477 US 365, 384 (1986)(quoting Strickland, 466 US at 690). This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence. Wiggins, 539 US at 527-28. See Combs v. Coyle, 395 F.3d 251, 258 (6th Cir. 2005); Bryant v. Scott, 28 F.3d 1411, 1419 (5th Cir. 1994); Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness on all the circumstances, applying a

heavy measure of deference to counsel's judgments." Strickland, 466 US at 691. "The relevant question is whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 US 470, 481 (2000); accord Clinkscale v. Carter, 375 F.3d 430, 443 (6th Cir. 2004). A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them." Towns, 395 F.3d at 258; Combs v. Coyle, 205 F.2d 269, 278 (6th Cir. 2000); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991).

Consistent with Wiggins, Courts have held, in a variety of situations, that counsel's failure to investigate constituted ineffective assistance in violation of the Sixth Amendment. See e.g., Combs, 205 F.3d at 287-88 (holding that defense counsel was constitutionally ineffective for failing to investigate adequately his own expert witness, who testified that, despite the defendant's intoxication at the time of the crime, the defendant nevertheless was capable of forming the requisite intent to commit the crimes); Blackburn v. Foltz, 828 F.2d 1177, 1183 (6th Cir. 1987) (holding that counsel''s failure "to investigate a known and potentially important alibi witness" constituted ineffective assistance because "[c]ounsel did not make an attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary"); see also Clinkscale, 375 F.3d at 443 (collecting cases in which counsel's failure to investigate a potentially important witness constituted ineffective assistance).

As the Sixth Circuit stated: "Where counsel fails to investigate and interview promising witnesses, and therefore 'ha[s] no reason to believe they would be of value in securing [defendant's] release,' counsel's inaction constitutes negligence, not trial strategy." Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992) (quoting United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 n.3 (7th Cir. 1984)).

The Michigan Court of Appeals reasoned that:

> Defendant first argues that he was denied the effective assistance of counsel when his trial counsel failed to present an alibi defense at trial. Defendant claims that he was at Great Lakes Crossing in Auburn Hills at the time of the robbery and that he told counsel this prior to trial. After defendant's [evidentiary] hearing, the trial court denied defendant's motion for a new trial, concluding defendant's counsel was not ineffective. The trial court accepted counsel's testimony that she was originally told that the only person who was with defendant at Great Lakes Crossing on the day of the robbery was Dorothy Simpson, defendant's grandmother. When counsel attempted to get Simpson's contact information, she was informed by Ivy Andrews, defendant's mother, that Simpson suffered from Dementia and was too sick to testify. Counsel then attempted to obtain receipts from the mall to corroborate defendant's claim, but did not receive them until the middle of defendant's trial. Finally, counsel hired an investigator to corroborate defendant's alibi, but the investigator could not find any evidence to support defendant's claim.
>
> In light of counsel's testimony, which the trial court accepted, it cannot be said that her performance "fell below an objective standard of reasonableness." . . . Decisions on what evidence to present and whether to call witnesses are presumed to be matters of trial strategy with which this Court will not interfere. . . . While defendant cites to the [evidentiary] hearing testimony of Andrews and Simpson that Simpson would have testified at trial and that counsel did receive the mail receipts prior to trial, the trial court clearly found counsel's testimony more credible. "The Court must give deference to the trial court's factual findings, particularly where the credibility of witnesses is involved. . . ." [Trial Court Opinion and Order, Appendix F, p 2 (emphasis added; citations omitted).]

The Court concluded that "[t]he facts found by the trial court support the trial court's conclusion that defense counsel utilized sound strategy with respect to the alibi issue." (Id.). The district court and Sixth Circuit accepted the state court findings.

First, even if Ms. Andrews did tell counsel that Ms. Simpson was sick and wouldn't be able to testify (she didn't), counsel still owed Petitioner a constitutional obligation to investigate this known potentially helpful alibi witness. It was unreasonable to accept someone else's say so that Ms. Simpson was unable to testify. Counsel simply abandoned her investigation at an unreasonable juncture. And even if

she was unable to testify, counsel could have interviewed Simpson and obtained a sworn affidavit or taken deposition testimony. Second, even if Simpson was unable to testify, counsel had no way of knowing this, as she never spoke with Simpson, nor did the investigator. Third, trial counsel should have obtained Ms. Simpson's contact information from Petitioner who, at the time, was lodged in the county jail and easily accessible to counsel. In Stewart v. Wolfenbarger, 468 F.3d 338 (6th Cir. 2006), the petitioner asserted that counsel was ineffective for failing to file a proper notice of alibi, and failure to investigate a known alibi witness, as suggested by the petitioner. Id. 355-36. There, the Sixth Circuit reasoned that counsel's failure to contact the witness was not deficient performance, because the witness "testified at the evidentiary hearing that he did not step forward earlier with his information because he was 'neutral' and 'didn't want to get involved' because he knew both Petitioner and the victim." Id. at 357.

The Sixth Circuit rejected this reasoning, id. at 357, with these words:

> This argument fails for three reasons. First, the fact that Williams was unwilling to step forward with this information on his own does not mean that Williams was unwilling to testify that Simpson was not at Williams' house on April 22, 1996. In fact, Williams testified that he gave a statement to another, unknown lawyer. In our view, this fact indicates that Williams most likely would have testified that at Petitioner's trial consistent with his testimony at the evidentiary hearing. Second, as noted by Petitioner, even if Williams was in fact reluctant to testify, O'Connell had no way of knowing this, as she never spoke with Williams. Third, even if Williams was reluctant to testify, the state trial court could have issued a subpoena and compelled Williams to testify. Perhaps most telling is the state court subpoenaed Williams to testify at the evidentiary hearing. Williams appeared before the state court, and Williams testified that Simpson was not at the house on the day the shooting occurred, even though Williams was reluctant to come forward on his own. There is no reason to believe that Williams would have acted any differently had he been subpoenaed to testify at trial, as Petitioner requested from O'Connell. In short, there is simply no excuse for O'Connell's failure to investigate Williams and her consequent failure to secure his testimony on behalf of Petitioner.

As noted above, the same applies here. Further, Ms. Simpson testified at the evidentiary hearing which took place immediately after trial. Simpson appeared before the trial court and testified that counsel did not contact her, and that Petitioner was with her and other family members most of the day and specifically during the time of the crimes. There is no reason to doubt she would have testified consistently at trial.

Petitioner believes that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 US at 694.

Because trial counsel failed to investigate and call Ms. Simpson (and other family members) as witnesses, the questionable testimony of the victim was allowed to go unchallenged. The victim was the only witness against Petitioner at trial. The state presented no other evidence, physical or testimonial, to support the theory that Petitioner Robbed the victim at gunpoint.

The difference between the case that was and the case that should have been is undeniable. The Court should therefore hold that Petitioner had ineffective assistance of counsel at trial.

The Court should find that the state court decision resulted in an unreasonable application of Strickland.

For all the foregoing, Petitioner asks the Court to reverse the decision of the Sixth Circuit and remand the case to the trial court for a new trial.

Respectfully submitted,

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