NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO Q. ALVARADO,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

BY: Rolando Q. Alvarado #220885
Alger Correctional Facility
N6141 Industrial Park Drive
Munising, Mich. 49862

QUESTION PRESENTED FOR REVIEW

IS THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS INASMUCH AS IT IS BASED ON AN INCOMPLETE RECORD, THROUGH NO FAULT OF THE PETITIONER AND IS SUCH OPINION CONTRARY TO THIS COURT'S PRECEDENT ON 28 U.S.C.S. §2254(d)(2).

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The unpublished March 8, 2016, per curiam opinion and order of the Michigan Court of Appeals, the September 6, 2016, summary order of the Michigan Supreme Court published at 500 Mich 857 (2016), the unpublished January 18, 2019, order of the United States District Court denying habeas relief and the February 12, 2020, order of the United States Court of Appeals for the Sixth Circuit declining to issue a certificate of appealability are reproduced in the appendix to this petition. See Appendix pgs. 17-25.

STATEMENT OF JURISDICTION

Petitioner seeks review of the February 12, 2020, opinion of the United States Court of Appeals for the Sixth Circuit. This Court has jurisdiction pursuant to **28 U.S.C. § 1257.**

CONSTITUTIONAL, STATUTORY PROVISIONS AND COURT RULES INVOLVED

A. Constitutional Provisions

U.S. Const., Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const., Amend. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. State Statutory Provisions

Mich. Comp. Laws § 750.83-

Sec. 83.
"Assault with intent to commit murder–Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."

Mich. Comp. Laws § 750.227

Sec. 227.
"(1) A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person.

(2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

(3) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00."

Mich. Comp. Laws §769.12

Sec. 12.
"(1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

(a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only.

(b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.

(c) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term of not more than 15 years.

(d) If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461.

(2) If the court imposes a sentence of imprisonment for any term of years under this section, the court shall fix the length of both the minimum and maximum sentence within any specified limits in terms of years or a fraction of a year, and the sentence so imposed shall be considered an indeterminate sentence. The court shall not fix a maximum sentence that is less than the maximum term for a first conviction.

(3) A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section.

(4) An offender sentenced under this section or section 10 or 11 of this chapter for an offense other than a major controlled substance offense is not eligible for

parole until expiration of the following:

(a) For a prisoner other than a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge at the time of sentence unless the sentencing judge or a successor gives written approval for parole at an earlier date authorized by law.

(b) For a prisoner subject to disciplinary time, the minimum term fixed by the sentencing judge.

(5) This section and sections 10 and 11 of this chapter are not in derogation of other provisions of law that permit or direct the imposition of a consecutive sentence for a subsequent felony.

(6) As used in this section:

(a) "Listed prior felony" means a violation or attempted violation of any of the following:

(i) Section 602a(4) or (5) or 625(4) of the Michigan vehicle code, 1949 PA 300, MCL 257.602a and 257.625.

(ii) Article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, that is punishable by imprisonment for more than 4 years.

(iii) Section 72, 82, 83, 84, 85, 86, 87, 88, 89, 91, 110a(2) or (3), 136b(2) or (3), 145n(1) or (2), 157b, 197c, 226, 227, 234a, 234b, 234c, 317, 321, 329, 349, 349a, 350, 397, 411h(2)(b), 411i, 479a(4) or (5), 520b, 520c, 520d, 520g, 529, 529a, or 530 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.82, 750.83, 750.84, 750.85, 750.86, 750.87, 750.88, 750.89, 750.91, 750.110a, 750.136b, 750.145n, 750.157b, 750.197c, 750.226, 750.227, 750.234a, 750.234b, 750.234c, 750.317, 750.321, 750.329, 750.349, 750.349a, 750.350, 750.397, 750.411h, 750.411i, 750.479a, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, and 750.530.

(iv) A second or subsequent violation or attempted violation of section 227b of the Michigan penal code, 1931 PA 328, MCL 750.227b.

(v) Section 2a of 1968 PA 302, MCL 752.542a.

(b) "Prisoner subject to disciplinary time" means that term as defined in section 34 of 1893 PA 118, MCL 800.34.

(c) "Serious crime" means an offense against a person in violation of section 83, 84, 86, 88, 89, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520g(1), 529, or 529a of the Michigan penal code, 1931 PA 328, MCL 750.83, 750.84, 750.86,

750.88, 750.89, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, and 750.529a."

STATEMENT OF THE CASE

Petitioner Rolondo Q. Alvarado was charged with assault with intent to murder **Mich. Comp. Laws (MCL) 750.83,** and carrying a concealed weapon (CCW), **MCL 750. 227.** Petitioner was sentenced by the trial court as a fourth-offense habitual offender under **MCL 769.12** to 35-70 years' imprisonment for the assault with intent to murder and CCW convictions.

The facts surrounding the incident that led to Petitioner's convictions were recited by the Michigan Court of Appeals. See *People v Alvarado*, 2016 Mich App LEXIS 451 at *1-3. Petitioner's convictions derive from a disagreement between Petitioner and his roommate who told Petitioner to either move out, or control his drinking. Petitioner told his roommate that he would move out but demanded his half of the money that he invested into their sliding installation business. *Id.* pgs. 1-2.

Price told Petitioner to leave and followed Petitioner as he walked to the door of the home. As they reached the door of the home, Price testified that Petitioner turned around and stabbed him in the stomach. The two men fought and Price picked up a bat and swung the bat at the Petitioner and Petitioner started to leave, then according to Price, as he turned and walked up the steps to call 911, Petitioner stabbed Price in the back. Price testified that he turned around and swung the bat at Petitioner hitting him in the knees and then and fell to the ground and Petitioner got on top of him and started stabbing him. *People v Alvarado,* supra, at *2

The Court of Appeals affirmed Petitioner's convictions in an unpublished per curiam opinion. The Court also denied Petitioner's request to remand for an evidentiary hearing to create a record to support Petitioner's ineffective assistance of counsel claim. *People v Alvarado,* supra, at *3. Petitioner's application for leave to appeal to the Michigan Supreme Court was denied. *People v Alvarado,* 500 Mich 857 (2016).

The United States District Court denied Petitioner's pro per petition for a writ of habeas corpus and declined to issue a certificated of appealability.

On February 12, 2020, the United States Court of Appeals for the Sixth Circuit rejected Petitioner's request for a certificate of appealability based on his lone Sixth-Amendment ineffective assistance of counsel claim. The opinion stated in pertinent part:

> "In February 2014, Alvarado stabbed his housemate, Michael Price, several times with a knife following a disagreement about money. Price, who survived the stabbings, testified at trial that Alvarado first stabbed him in the stomach as he tried to usher Alvarado out of the house. Price testified that he and Alvarado proceeded to fight outside, with Alvarado swinging the knife at him while he swung a baseball bat at Alvarado. Eventually, Alvarado turned and exited a gate in front of the home, at which time Price turned to walk up the front porch steps so that he could reenter the house and call 9-1-1. Price testified that as he stepped on the first step, Alvarado stabbed him in the back. Price then swung the bat at Alvarado and fell **[*2]** to the ground, whereupon Alvarado got on top of him and repeatedly stabbed him before leaving the scene. *People v. Alvarado*, No. 325121, 2016 Mich. App. LEXIS 451, 2016 WL 902225, at *1 (Mich. Ct. App. Mar. 8, 2016) (per curiam), *perm. app. denied*, 500 Mich. 857, 883 N.W.2d 759 (Mich. 2016).
>
> A Michigan jury convicted Alvarado of assault with intent to murder, in violation of Michigan Compiled Laws § 750.83, and carrying a concealed weapon, in violation of Michigan Compiled Laws § 750.227. The trial court sentenced Alvarado as a fourth-offense habitual offender, *see* Mich. Comp. Laws § 769.12, to concurrent terms of 35 to 70 years' imprisonment. On direct appeal, Alvarado argued that trial counsel rendered ineffective assistance by not impeaching Price with information contained in the police report and hospital records. Specifically, Price's statement to the police omitted any mention of Alvarado stabbing him at the bottom of the porch steps, and the hospital records allegedly showed that Price's injuries were less significant than he claimed in his trial testimony. Alvarado contended that, had counsel impeached Price with this information, the jury might have convicted him of the lesser charge of assault with intent to commit great bodily harm. The Michigan Court of Appeals affirmed. *Alvarado*, 2016 Mich. App. LEXIS 451, 2016 WL 902225, at *4.
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> In June 2017, Alvarado filed a § 2254 petition, in which he reasserted the claim that he advanced on direct appeal. Over Alvarado's objections, **[*3]** the district court adopted the magistrate judge's recommendation to deny the habeas petition on the merits and not issue a COA. Alvarado now seeks a COA on his sole habeas claim. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*

v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

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The Michigan Court of Appeals, relying on state case **[*4]** law that incorporates the *Strickland* standard, *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002), rejected Alvarado's claim because Alvarado failed to establish that trial counsel had performed deficiently. *Alvarado*, 2016 Mich. App. LEXIS 451, 2016 WL 902225, at *2-3 (citing *People v. Trakhtenberg*, 493 Mich. 38, 826 N.W.2d 136, 143 (Mich. 2012)). This was because counsel adequately "questioned Price about the stabbing that Price claimed to have occurred at the bottom of the porch" and subsequently cross-examined an eyewitness "regarding discrepancies with Price's account, in an attempt to impeach Price." 2016 Mich. App. LEXIS 451, [WL] at *3. The state appellate court noted that, although the police report might have "contained additional information that defense counsel could have used to further impeach Price," counsel was "not ineffective in failing to exhaustively impeach a witness on every conceivable point; rather, defense counsel was required to develop [Alvarado's] defense by adequately impeaching the witnesses against him." *Id.* It further determined that it was sound trial strategy for counsel to not question Price about his police statement lest the jury perceive counsel "as bullying Price about a statement he had made in the hospital after receiving surgery to repair the life-threatening injuries he had sustained." *Id.* With respect to counsel's failure to impeach Price with the hospital **[*5]** records, the state appellate court determined, in part, that those records "contain[ed] numerous statements regarding the seriousness of Price's injuries and the fact that he had sustained several serious wounds to his back," and thus it was sound trial strategy for counsel not to provide the jury with that evidence. *Id.*

The district court adopted the magistrate judge's conclusion that the state appellate court's resolution of Alvarado's claim did not involve an unreasonable application of *Strickland*. It also adopted the magistrate judge's conclusion that the record strongly supported the state appellate court's analysis. In reaching the latter conclusion, the magistrate judge noted that Alvarado understated the effectiveness of counsel's impeachment effort, as evidenced by the prosecutor's efforts during closing argument "to diminish the significance" of the eyewitness's and Price's divergent testimony. The magistrate judge also determined that Alvarado overstated the benefit of further impeaching Price with either the police report or the hospital records. This was because the police report suggested that Alvarado stabbed Price as he lay helplessly on the ground, whereas Price's trial **[*6]** testimony—which "suggested an uninterrupted physical battle, with both parties landing blows, from the first swing of the bat to [Alvarado] inexplicably walking away"—strengthened Alvarado's claim that Price provoked the stabbings. And

> although the hospital records did not describe the depth of Price's stab wounds, there was ample evidence in the record concerning the life-threatening nature of those wounds. Thus, the magistrate judge concurred with the state appellate court that counsel's decision to forego additional impeachment of Price with the police report or hospital records was strategic. Considering the foregoing, reasonable jurists could not debate the district court's resolution of this claim.

The Michigan Court of Appeals opinion that the Sixth Circuit relied on in reaching its decision was based on an unreasonable determination of the facts. Specifically, the Court of appeals prohibited Petitioner from fully developing his claim by denying Petitioner's timely and properly filed motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 444-445; 212 NW2d 922 (1973).

The Michigan Court of Appeal stated in pertinent part:

"Defendant was convicted as described above. *Defendant moved this Court to remand the case to the trial court for a Ginther hearing on the issue of the effectiveness of his trial counsel, arguing that his counsel was ineffective in failing to introduce portions of Forner's police report, and portions of Price's medical records, to impeach Price regarding his version of the events. This Court denied his motion.* This appeal followed, limited to the issue of defense counsel's effectiveness. (Emphasis added), footnotes omitted.

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III. ANALYSIS

Defendant contends that he was denied the effective assistance of counsel when defense counsel did not impeach Price with information contained in excerpts of the police report and hospital records. We disagree.

To establish ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. [*People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).]

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). In ruling on claims of ineffective assistance of counsel, we affirmatively consider the range of possible reasons that defense counsel may have proceeded as he did. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).

This Court "will not substitute our judgment for that of defendant's counsel, nor will we **[*5]** use the benefit of hindsight to assess counsel's performance." *People v Unger (On Remand)*, 278 Mich App 210, 258; 749 NW2d 272 (2008). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). However, "[c]ounsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446, 465 (2014).

The excerpts of the police report and hospital records that defendant attached to his brief on appeal are not contained in the lower court record. Additionally, because this Court denied his motion to remand, these documents were not made a part of the post-trial record. However, because defendant argues that his counsel's failure to make these documents a part of the lower court record was the basis for his claim of ineffective assistance, we will nonetheless consider them in reviewing his claim. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (failure to introduce evidence may be ineffective assistance of counsel if it deprives defendant of a substantial defense).

Our review of the record reveals that defense counsel's cross-examination of Price was adequate to develop defendant's defense that Price was not credible and that defendant did not have the intent to murder the victim. **[*6]** *Lane*, 308 Mich App at 68. Defense counsel questioned Price about the stabbing that Price claimed to have occurred at the bottom of the porch. Toward the end of defense counsel's cross-examination, defense counsel asked Price whether he knew there was an eyewitness to the attack; Price responded that he did not. Defense counsel's trial strategy was clearly to show that Price was not credible. Questioning Price on his recollection to firmly establish his version of the events, and cross-examining the eyewitness regarding discrepancies with Price's account, in an attempt to impeach Price, was sound trial strategy for defense counsel even though it did not work. *Matuszak*, 263 Mich App at 61. Defense counsel's conduct in attempting to impeach Price was not objectively unreasonable. *Lane*, 308 Mich App at 68. Although defendant argues that the police report contained additional information that defense counsel could have used to further impeach Price, counsel is not ineffective in failing to exhaustively impeach a witness on every conceivable point; rather, defense counsel was required to develop defendant's defense by *adequately* impeaching the witnesses against him. *Lane*, 308 Mich App at 68. Moreover, by not questioning Price about his statements to Forner, defense counsel did not risk **[*7]** being seen as bullying Price about a statement he had made in the hospital after receiving surgery to repair the life-threatening injuries he had sustained. This strategy was within the range of possible reasons that defense counsel may have acted as he did. *Gioglio (On Remand)*, 296 Mich App at 22. Therefore, defendant cannot demonstrate that failing to explicitly impeach Price using statements contained in the police report, rather than relying on his impeachment through the eyewitness's testimony, was not sound trial strategy. *Trakhtenberg*, 493 Mich at 51.

Defendant's argument that defense counsel was ineffective in failing to impeach Price about the length of his hospitalization, or about Price's statement that he saw the tip of the knife protruding from his chest, as reflected in the medical records, is also without merit. First, defendant makes no showing that those portions of the hospital records were admissible at trial, as the length of Price's hospitalization and whether he could see the knife's tip protrude from his

chest, arguably were not "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Second, **[*8]** even assuming the hospital records could have been admitted at least for impeachment purposes, MRE 613(b), nothing in the records attached to defendant's motion to remand or brief on appeal supports defendant's contention that Price was hospitalized for less than one month (as defendant suggests), or that Price could not have seen the tip of the knife protruding from his chest. Additionally, because the hospital records contain numerous statements regarding the seriousness of Price's injuries and the fact that he had sustained several serious wounds to his back, it was sound trial strategy for defense counsel not to provide the jury with additional evidence of Price's injuries. *Gioglio (On Remand)*, 296 Mich App at 22. Therefore, defendant has failed to establish that defense counsel was deficient in this regard so as to overcome the presumption of effective assistance of counsel. *Lockett*, 295 Mich App at 187."

Petitioner Alvarado now seeks certiorari from this Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI IS APPROPRIATE BECAUSE THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS INASMUCH AS IT IS BASED ON AN INCOMPLETE RECORD, THROUGH NO FAULT OF THE PETITIONER AND IS CONTRARY TO THIS COURT'S PRECEDENT ON 28 U.S.C.S. §2254(d).

Introduction, this case presents the opportunity for this Court to determine whether it is inconsistent with **28 U.S.C. §2254(d)(2)** for a state court to deny relief on a federal constitutional claim after denying a party's timely request to create a testimonial record to support such a claim when the record is incomplete. Petitioner respectfully submits that the state court unreasonably determined the facts under section 2254(d)(2) when it denied his ineffective assistance of counsel claim without granting an evidentiary hearing or other opportunity for him to fully develop his claim. As a result, Petitioner was unfairly prejudiced.

A. The State Court's Denial of Petitioner's Ineffective Assistance of Counsel Claim Without Providing Him an Opportunity to Present Evidence In Support Of His Claim At An Evidentiary Hearing Involved An Unreasonable Application Of Clearly Established Supreme Court Law And Was Based On An Unreasonable Determination Of The Facts In Light Of The Evidence Presented.

First, Petitioner points out that he does not have a GED and relies on the state funded Michigan Department of Corrections Legal Writer Program to convey his claims to this court. Second, Petitioner respectfully submits that the state court record is devoid of any evidence as to whether trial counsel made a strategic decision not to impeach the complaining witness with hospital records. It is also unclear whether trial counsel even investigated the reports that Petitioner used to supplement the record with on appeal.

Finally, it is equally unclear whether there were additional records not used by counsel

that could have undermined the Complainant's credibility. As the court of appeals noted, the hospital records were not a part of the trial court record and it is likely that appointed appellate counsel did not investigate the entire hospital file in search of appealable issues. Appellate counsel used the reports that Petitioner believed would help him. However, Petitioner being unskilled in the law was ill prepared to search the investigative file for irregularities.

Petitioner should not be punished because he was unable to display legal acumen and communicate all of trial counsel's errors to appellate counsel. To hold Petitioner to such a high standard would make enforcement of the Sixth Amendment right to counsel contingent upon a criminal defendant's ability to identify mistakes or legal errors made by incompetent counsel.

Thus, it was fundamentally unfair for the court of appeals to deny Petitioner's ineffective assistance of counsel claim without granting the requested remand for an evidentiary hearing. See e.g., *People v. Bouden*, 393 Mich. 253, 227 N.W.2d 213 (1974) (Court of Appeals' refusal to grant remand for evidentiary hearing on ineffective assistance of counsel claim was error). It is impossible to ascertain whether trial counsel investigated the entirety of the hospital records, or whether counsel made a strategic decision not to employ the documents submitted by Petitioner in support of his defense.

Although the court of appeals found a reason to justify counsel's inaction, this reason would be unreasonable if counsel never even investigated the documents and made a strategic decision not to use them at trial. See e.g., *Ramonez v. Berguis*, 490 F. 3d 482 (CA6, 2007),

B. 28 U.S.C. §2254(d)(1)

In *Panetti v. Quarterman,* 551 U.S. 930, 948, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), the Court held that deficiencies in the state court fact-finding process constitute an unreasonable application of federal law. *Id.*, 551 U.S. at 954 (section **2254(d)(1)** is satisfied when the "fact

finding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'") (quoting *Ford v. Wainwright*, 477 U.S. at 423-24 (Powell, J., concurring)); cf. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (state court decision was an unreasonable application of *Strickland* for resolving claim without conducting assessment of the facts to determine whether counsel's investigation was adequate).

In a case applying *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the Fifth Circuit held that "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation as Rivera did, the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (ruling that section 2254(d)(1) was satisfied); see also *Nunes v. Mueller*, *supra*, 1054-55 (section 2254(d)(1) satisfied; where petitioner made prima facie showing of ineffective assistance of counsel but state court denied hearing, state court appears unreasonably to require more than the prima facie showing required by *Strickland*).

Recent case law confirms that application of section **2254(d)** under *Panetti* has not changed following the Supreme Court's decisions in *Cullen v. Pinholster, supra*, and *Harrington v. Richter, supra*. For example, prior to *Pinholster* and *Richter*, the Fourth Circuit held that when the state court refused petitioner discovery and an evidentiary hearing, the state court adjudication "was materially incomplete" and its decision was not an "adjudication on the merits" subject to **2254(d)** limitations. *Winston v. Pearson (Winston I),* 592 F.3d 535, 555-58 (4th Cir. 2010).[1]

[1] Cf. *Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc) ("When the state court relies solely upon the record evidence, and denies both the claim itself and an evidentiary hearing on the proffered non-record evidence without any alternative holding based upon the

Following the Supreme Court's decisions in *Pinholster* and *Richter*, the Fourth Circuit reexamined *Winston I. Winston v. Pearson (Winston II)*, 683 F.3d 489 (4th Cir. 2012).

In *Winston II*, the court declined to overrule *Winston I,* because neither *Richter* nor *Pinholster* were contrary controlling authority: neither case resolved the contours of a state court's "adjudication on the merits." *Winston II, supra*, at 498-500. In *Pinholster*, the parties did not dispute the existence of a state court "adjudication." Id. at 501-02. In *Richter,* the Court only decided that a decision's summary nature did not preclude its characterization as a merits adjudication. The Fourth Circuit held that *Richter* did not address other possible defects in state court decisions and therefore did not govern a case in which the petitioner contests the state court's unreasonable denial of his request for an evidentiary hearing. *Id.* at 502.

Other courts have reached similar conclusions. See, e.g., *Mosley v. Atchison*, 689 F.3d 838, 849 (7th Cir. 2012) (summary denial of ineffectiveness claim unreasonable without a fully developed factual record); *Fanaro v. Pineda*, 2012 U.S. Dist. LEXIS 70146, 2012 WL 1854313 (S.D. Ohio May 21, 2012) (state court decision unreasonable for rejecting prima facie showing of ineffectiveness without hearing).

As discussed above, Petitioner has demonstrated that the allegations raised in his application for leave to appeal in the Michigan Court of Appeals, and subsequently in the Michigan Supreme Court, established a prima facie case for relief with respect to his ineffective assistance of counsel claim. As such, he was entitled to have the state court hear and resolve his claims following an evidentiary hearing. The state court's failure to do so was contrary to clearly established federal law. See *Angel v. Bullington*, infra; *McNeal v. Culver,* infra; *Davis v. Wechsler,* infra. This on its own satisfies section **2254(d)(1).**

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proffered evidence, there is no adjudication on the merits that would warrant deferential review.").

C. 28 U.S.C. §2254(d)(2)

Petitioner respectfully submits that the state courts' determination of the facts as to his ineffective assistance of counsel claim was unreasonable. The "unreasonable determination" clause of **§ 2254(d)(2)** relates to the state court's factual findings. See *O'Neal v Balcarcel,* 933 F. 3d 618, 624 (6th Cir. 2019). Satisfaction of **(d)(2)** can be premised on numerous theories, including that: (1) the state's factual finding is not supported by sufficient evidence; (2) no factual finding was made by the state court at all; or (3) the state-court process is defective. *Wiggins v. Smith*, 539 U.S. 510, 528-30, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003).

"[T]he simplest [means of satisfying **(d)(2)**] is the situation where the state court should have made a finding of fact but neglected to do so." In such a case, "the state-court factual determination is perforce unreasonable . . . ." *Id. Wiggins,* supra, 539 U.S. at 528-30. Under Michigan's criminal procedure, defendant's seeking to raise claims of ineffective assistance of trial counsel must move the court to make a testimonial record as a prerequisite to appellate review.

Historically, this Honorable Court has held that when federal constitutional claims are "plainly and reasonably made" a state court must engage in meaningful fact-finding to resolve them. See e.g., *Angel v. Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, 91 L. Ed. 832 (1947); see also *McNeal v. Culver*, 365 U.S. 109, 110, 81 S. Ct. 413, 5 L.Ed.2d 445 (1961) (state court must hold hearing to determine facts when petition alleged constitutional violation "with reasonable clarity"); *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 68 L. Ed. 143 (1923) (states may not create "unreasonable obstacles" to resolution of federal constitutional claims that are "plainly and reasonably made").

As the Court explained, "[t]he powers of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course,

subject to the restrictions imposed by the Federal Constitution." *Angel,* 330 U.S. at 188.

This Honorable Court, therefore, has invalidated state decisions made without adequate fact-finding where constitutional claims were supported by "factual allegations not patently frivolous or false." See *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118-19, 76 S. Ct. 223, 100 L.Ed. 126 (1956); see also *Cash v. Culver*, 358 U.S. 633, 638, 79 S. Ct. 432, 3 L. Ed. 2d 557 (1959) (allegations of the habeas petition "made it incumbent upon the Florida courts to determine what the true facts were").

The Supreme Court also has reversed state court decisions that purport to resolve federal constitutional claims but fail to provide adequate procedures for doing so. In *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986), for example, the Court held that the state's failure to permit adversarial proceedings for a competency determination and related constitutional claims created "a much greater likelihood of an erroneous decision." *Id.* 477 U.S. at 414-415 (a decision based on inadequate proceedings "will be distorted"). The Court therefore rejected the state's resolution of the constitutional issue, concluding that state proceedings were "inadequate to . . . protect the federal interests." *Id.*, 477 U.S. at 416.

The Courts have consistently held that if a state court makes evidentiary findings without holding an evidentiary hearing and giving the petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination of the facts." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004); see also *Hurles v. Ryan*, 650 F.3d 1301, 1311-14 (9th Cir. 2011), opinion substituted, aff'd in part and rev'd in part at 752 F.3d 768 (9th Cir. 2014) ("[T]he state court fact-finding process was fundamentally flawed" because the state court "granted no evidentiary hearing or other opportunity for [petitioner] to develop his claim" resulting in a decision that was based on an "unreasonable determination of the facts" and "not entitled to a

presumption of correctness under AEDPA"), accord, *Plummer v. Jackson*, 491 F. App'x. 671, 680-81 (6th Cir. 2012) (holding that the state court unreasonably denied petitioner's claim without an evidentiary hearing despite the parties' factual disputes); *Miller-El v. Cockrell,* 537 U.S. 322, 347, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

In *Williams v. Woodford*, 859 F.Supp.2d 1154, 1156-59 (E.D.Cal. 2012). In *Williams,* supra, the petitioner raised an ineffective assistance of counsel claim to which he had made diligent attempts to obtain an evidentiary hearing in the state courts. The petitioner's claim was rejected by the state courts on direct review because the record was inadequate to demonstrate the constitutional violation; yet Williams' attempt to demonstrate the constitutional violation via a state habeas petition was rejected by the state courts on the basis that the appeal was adequate. *Id.* The federal district court found:

> *Williams* overcomes the § 2254(d)(2) bar based on the record that was before the state court when it adjudicated his case. That is the statutory requirement, as section 2254(d)(2) permits "federal post-conviction relief . . . only if the state . . . court's adjudication 'resulted in a decision that was based on an unreasonable determination of the facts **in light of the evidence presented in the State court proceeding**.'" (citations omitted) (emphasis in original). . . . Here "the state court fact-finding process was fundamentally flawed" because it "granted no evidentiary hearing or other opportunity for [Williams] to develop his claim." (citation omitted). The Court of Appeals' IAC ruling was based on the facts available in the record on appeal, which did not include the extensive evidence Williams tried in vain to present to the state courts.
>
> Because the state court's decision "was based on an unreasonable determination of the facts," section 2254(d) does not preclude *Williams*' claim. . . .
>
> "[W]ith the state court having refused [*Williams*] an evidentiary hearing, we need not of course defer to the state court's factual findings—if that is indeed how those stated findings should be characterized—when they were made without such an evidentiary hearing." (citation omitted). Moreover, this Court may permit

> Williams, at long last, to expand the record to develop his IAC claim. [*Williams v. Woodford,* supra, at 1160-61].

The *Williams* Court was careful to point out the differences between the case before it and the *Pinholster* case when it reasoned that *Pinholster* was irrelevant for purposes of their review under **§ 2254(d)(2):**

> *Pinholster* held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." Id. at 1398. But *Williams* makes his challenge under 2254(d)(2), not 2245(d)(1). *Pinholster* isn't relevant where, as here, petitioner surmounts section 2254(d) because he was not allowed to develop the record in state court. *Pinholster* had a full opportunity to develop the record in state court and may have been free to return yet again. Id. at 1412 (Breyer, J., concurring in part and dissenting in part). Here, by contrast, "it would [be] futile for petitioner to return to the [state] courts," *Williams v. Taylor*, 529 U.S. 420, 444, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), because the state courts have made it perfectly clear they will not grant Williams an opportunity to develop his IAC claim. [*Williams v. Woodford*, at 1161].

Without a reasoned opinion from the state court in relation to his ineffective assistance of counsel claim, it is not possible to establish definitively whether counsel's actions and omissions were objectively unreasonable, whether counsel had reasonable strategic motives for his actions and omissions, and whether the result of the trial would have been different had it not been for counsel's actions and omissions.

In *Hurles v. Ryan,* supra, the court stated "We have repeatedly held that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference." *Id.* at 1312, See also, *Lor v. Felker*, 2012 U.S. Dist. LEXIS 64058, 2012 WL 1604519 (E.D. Cal., May 7, 2012) (section **2254(d)(2)** satisfied where the state court's "failure to conduct an evidentiary hearing violated petitioner's right to a fair process for developing the

record supporting his claim"); *Palazzolo v. Burt*, 778 F.Supp.2d 805, 811 (E.D. Mich. 2011) (same).

D. Trial counsel performs unreasonably by failing to present sources of evidence that could mitigate the crime or punishment or prove innocence.

Generally, it is unreasonable for counsel not to introduce sources of evidence that are helpful to the defense. See e.g., *Wiggins v Smith*, supra, 539 U.S. at 528-530 (2003), (It was objectively unreasonable and inconsistent with professional norms for trial counsel not to investigate and present evidence that was favorable to the defense at sentencing).

In *Ramonez v. Berguis*, supra, the court held that the Michigan Court of Appeals' decision that counsel exercised reasonable trial strategy was itself an unreasonable application of clearly established federal law. Having recognized the possibility that the three witnesses could provide testimony beneficial to defendant, it was objectively unreasonable for counsel not to interview them. See also, *Issa v. Bradshaw,* 904 F. 3d 446, 461-62 (6th Cir. 2018), accord, *Bennett v. Stirling*, 170 F. Supp. 3d 851, 861 (DCSC, 2016).

Thus, the state court's decision lacks a foundation in evidence that trial counsel investigated or made a reasonable decision not to investigate all the Price's medical records. Likewise, the record is devoid of evidence that trial counsel made a strategic decision not to further impeach Price with medical records and create doubt, or lessen the culpability in the eyes of the jury.

It is the Petitioner's position that had counsel further impeached Price, there is a reasonable likelihood that he would have been found guilty of the lesser included offense of assault with intent to do great bodily harm less than murder, which carries with it a 10-year maximum penalty, as opposed to the more serious assault with intent to murder.

CONCLUSION

Petitioner Rolando Q. Alvarado respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

By: Rolando Alvarado

Dated: May 22, 2020