No. _____

In The

Supreme Court of the United States

ALI MOHAMED ELATRACHE,

Petitioner,

vs.

SHANE JACKSON, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER REASONABLE JURISTS COULD DIFFER AS TO WHETHER PETITIONER WAS DEPRIVED OF A CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO TRIAL BY JURY WHEN THE STATE COURT REFUSED TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES TO MICHIGAN'S FIRST-DEGREE "CAPITAL" MURDER CHARGE.

II.

WHETHER JURISTS OF REASON COULD FIND IT DEBATABLE WHETHER THE ERRONEOUS JURY INSTRUCTION ON UNANIMITY WAS PROCEDURALLY DEFAULTED.

III.

THE RIGHT OF CONFRONTATION AND *BRADY* VIOLATIONS.

IV.

PROSECUTORIAL MISCONDUCT.

V.

ADMISSION OF OTHER BAD ACTS.

VI.

WHETHER PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

PARTIES TO THE PROCEEDINGS

Ali Mohamed Elatrache is the Petitioner in this cause, as he was in the District Court for the Eastern District of Michigan, wherein the Respondent was Anthony Stewart, the warden of the state prison wherein Elatrache was incarcerated. On appeal to the Sixth Circuit Court of Appeals the respondent was Shane Jackson, again the warden of the state prison which held Mr. Elatrache.

RELATED CASES

People v. Elatrache, No. 14-000096-01-FC, Wayne County Circuit Court, Michigan. Judgment entered November 3, 2014.

People v. Elatrache, No. 324918, Michigan Court of Appeals. Judgment entered April 19, 2016.

People v. Elatrache, No. 153913, Michigan Supreme Court. Judgment entered November 30, 2016.

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STATE STATUTES, COURT RULES AND RULES OF EVIDENCE

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Petitioner, ALI MOHAMED ELATRACHE, asks this Court to grant a Writ of Certiorari to review the Order of the United States Court of Appeals for the Sixth Circuit, entered on December 23, 2020.

OPINIONS AND ORDERS BELOW

The Sixth Circuit Court of Appeals' Order affirming the decision of the District Court for the Eastern District of Michigan, denying a Certificate of Appealability is reproduced in the Appendix 1-13. The Opinion and Order of the District Court for the Eastern District

of Michigan, Southern Division is reproduced in the Appendix 14-50.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on December 23, 2020 (App. 1-9). This Court has jurisdiction to review the Order Denying a Certificate of Appealability. *Hahn v. United States*, 524 U.S. 236 (1998); 28 U.S.C. §2254(a); 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

28 U.S.C. §2253(c)(1)(A): "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . ."

28 U.S.C. §2253(c)(2): "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

INTRODUCTION AND STATEMENT OF THE CASE

The issues presented in this case address whether the Sixth Circuit Court of Appeals erroneously deprived Petitioner Elatrache appellate review of the district court's denial of his petition for a writ of habeas corpus by denying a Certificate of Appealability on six, separate constitutional claims.

After a jury trial in the Wayne County (Michigan) Circuit Court in October of 2014, Elatrache was found guilty of second-degree murder and first-degree felony murder, while he was acquitted of the crimes of first-degree premeditated murder, and first-degree home invasion. Elatrache received a mandatory life sentence without the possibility of parole for the felony murder conviction;[1] he received a concurrent sentence of three to five years on his guilty plea for an aggravated stalking charge, which plea was entered before trial.

The district court summarized the facts from the trial as follows:

> The charges arose from allegations that Elatrache stalked his girlfriend ("S") and later killed her father during a home invasion.[1] In February 2013, Elatrache and S began dating after meeting at her job. *Id.* S testified that within several weeks of dating, Elatrache began acting jealous and erratic and caused issues for her at work. *Id*. Because of these

[1] The trial judge vacated the second-degree murder conviction.

issues, S wanted to break up with Elatrache but ultimately ended up staying with him because she was afraid of him and what he might do to her. *Id*.

At some point during the relationship, Elatrache got a hold of S's apartment keys. *Id.* After this, S noticed a number of events that caused her concern, including that her laptop and phones went missing, her father's laptop went missing, her apartment's door was set on fire, suspicious voices would interrupt her phone calls with Elatrache, her father's car was vandalized, and her bank account was emptied with a missing a debit card. *Id.* at *1-3. Elatrache told S that he believed the events were the result of someone that was after her father. *Id.* at *1-2. S soon became suspicious that Elatrache was involved in the events, and after she confronted him about them, he admitted to everything. *Id.* at *3. Following his admission, Elatrache started stalking S and threatening her and her father. *Id.*

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[1] The Court will refer to the girlfriend as "S" to be consistent with how the state appellate court referred to her in its dispositive opinion.

During this time, Elatrache was in and out of the country. *Id.* at *1-3. When he returned to the United States in May 2013, S began to receive "creepy," aggressive, and inappropriate texts from an unknown number. *Id.* at *3. Even though she suspected the messages

were from Elatrache, she continued to speak with him because she wanted to keep him calm. *Id*. But the messages only got more aggressive and threatening. *Id*. at *4. On July 18, 2013, S returned home from work, found her apartment door open, and found her father dead on the floor of his bedroom. *Id.* After the murder, S looked through her father's personal belongings and discovered that Elatrache was sending threats directly to her father as well. *Id.* Elatrache was arrested in Canada after attempting to call S. *Id*. (Pet. App. 15-16).

THE PROSECUTION'S CASE

It should not be disputed that the murder case against Elatrache was entirely circumstantial. He was not identified either as the killer, or even having been at the scene of the fatal altercation on the night the deceased, Mohamed Aljbaili, the father of Sophia,[2] died. There was no incriminating DNA or fingerprints, no trace evidence and no murder weapon connected to him. The prosecution's case rested on Elatrache's alleged abusive love affair with Mohamed Aljbaili's daughter, Sophia, and a questionable confession which

[2] Elatrache refers to "S" as Sophia as revealed in the transcripts of the trial and filed with the Rule 5 materials in this case.

Elatrache allegedly made to a convicted jail house informant, Mark Fragel[3] ("Fragel").

A. CAUSE OF DEATH

Integral to the prosecutor's case was the theory that Aljbaili was murdered by being manually strangled by an intruder who broke into his apartment. The defense, in direct contrast, contended that Mr. Aljbaili died from a heart attack, possibly brought on by a sudden confrontation, and that therefore defendant Elatrache was not guilty of any crime, or, at worst, responsible for the offense of manslaughter, either voluntary or involuntary.

To support their strangulation theory, the state relied, almost exclusively, on the testimony of Dr. Leigh Hlavaty, an assistant Wayne County Medical Examiner. Dr. Hlavaty, alone, as an expert, testified that Mr. Aljbaili died due to manual strangulation.

The determination of the cause of death was critical to the defense, regarding the issue of whether the trial judge should have instructed the jury on the lesser included offenses of voluntary and involuntary manslaughter, which were requested by the defense, but rejected by the trial judge. To disprove the state's theory of murder, the defense presented three expert witnesses, qualified in the fields of forensic pathology

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[3] The only version of the fatal confrontation between Petitioner Elatrache and the deceased, which was presented to the jury, was Fragel's.

and cardiology, who testified unanimously that, in effect, Mr. Aljbaili died of a heart attack, possibly triggered by a sudden, unexpected event, and not, by any objective evidence, of strangulation.

B. THE ALI ELATRACHE – SOPHIA ALJBAILI RELATIONSHIP

The prosecution's most critical witness against Petitioner Elatrache was Sophia Aljbaili, daughter of the deceased. Sophia and Ali met in early 2013, began dating and soon became intimate. Sophia claimed that later Ali became jealous, took her cell phone, spied on its contents and confronted her regarding what he found. Later, in March and April 2013, there were several break-ins and an arson at the Aljbaili's apartment. In each of those instances, not only did Sophia not choose to accuse Ali Elatrache of the crimes, but actually told the police that she believed the offenses were committed by a former boyfriend, who was then living in Lebanon.

On the other hand, Ali Elatrache's brother, Dr. Mazen Elatrache, a respected physician at Detroit's Henry Ford Hospital, testified to another side to the relationship. Based on what Dr. Elatrache actually observed, it was his opinion that his brother Ali was the party who clearly ended the romantic relationship. On the day Mr. Aljbaili died, July 18th, Dr. Elatrache saw Ali in the morning at the family home and again around 6:30 p.m. Ali left home then, well-dressed and

acting normal, and he returned home at 7:30 p.m., with no visible injuries.

C. ALLEGED PREVIOUS BAD ACTS OF PETITIONER ELATRACHE

At trial the State made a clever and calculated choice to expose the jury to testimony and evidence of multiple break-ins and an arson at the apartment where the deceased lived with his daughter Sophia. The jury heard this testimony without any actual evidence pointing to defendant as the perpetrator, and in the face of direct evidence, from Sophia herself, that another, identified person was responsible for these crimes. The break-in evidence was both crucial and inflammatory, inasmuch as the prosecution charged that Aljbaili's killer broke into his apartment on the night of his death.

Contradicting the State's theory connecting Elatrache to the alleged burglary and/or arson, the defense presented two independent and unbiased witnesses who directly refuted any such allegation. Lewis Rutherford, the maintenance supervisor at the Aljbaili's apartment complex, testified regarding an unsolved break-in at the complex on April 25, 2013, for which Mr. Rutherford was called upon to do repairs to the apartment door. He was again called to the home three months later when Mr. Aljbaili was found dead. Rutherford was certain that any and all damage to the apartment door on July 18, 2013 was identical to what he observed in the aftermath of the April 25, 2013

break-in, thus undercutting the theory that there was a break-in on the night of the July homicide, and the possibility of a felony murder.

As to the prior suspicious apartment door fire, a defense arson expert, who was a former Detroit Fire Department Lieutenant, testified that it was practically impossible that Elatrache could have set the critical fire, largely because, although a gasoline-arson fire was set, the gasoline was distributed both outside *and inside* the apartment. Any gasoline spread inside could hardly have been done by Elatrache, who had no access into the apartment, whereas either Sophia or Mohamed Aljbaili, for example, would have had unlimited access.

D. OTHER RELEVANT PROSECUTION TESTIMONY

Mark Fragel was a jailhouse informant with an extensive criminal record, consisting of over 20 convictions. He was, perhaps conveniently, housed with Elatrache in the Wayne County Jail. Facing life in prison, he cut a deal with the prosecutors in exchange for his testimony. According to Mr. Fragel, Ali Elatrache, a complete stranger to him, freely and unsolicitedly admitted to going to the Aljbaili apartment on July 18th, just to talk to Sophia's father. Then Ali, for no explained reason whatsoever, confided to Fragel alone that a fight ensued there after an argument,

Aljbaili got knocked down, and, most interestingly, Elatrache "finished him off with a belt."[4]

The prosecution also presented the Aljbaili's downstairs apartment neighbor, Sallam Baker. Significantly, Ms. Baker on the night of Aljbaili's death saw a red Chevrolet unusually positioned in the parking lot, occupied by "two dark passengers," who seemed to be nervously checking out the area. Baker, who had seen Ali Elatrache at the apartment before, testified that he was not one of the suspicious men.

E. FURTHER SIGNIFICANT UNRESOLVED PROBLEMS WITH THE STATE'S CASE

The prosecution never answered the question of why Sophia Aljbaili, even when she began dating Ali Elatrache, was recording his conversations and, in fact, seemingly preparing for testimony and accumulating physical evidence before her father was ever involved, threatened or attacked by anyone.

More importantly, when the police arrived at Aljbaili's apartment on the night of his death, a veteran senior officer failed to even notice an important and visually obvious medallion on a chain, located suspiciously near the deceased's body. It was only *after*

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[4] A belt was found at the scene of the homicide, draped over Aljbaili's body. However, the State's pathology expert, Dr. Hlavaty, testified that there was no ligature strangulation, therefore ruling out even the possibility that the suspicious belt had anything to do with the homicide. Nevertheless, the State held to the proposition that Mark Fragel should be believed.

Sophia arrived at the scene that the curious medallion was discovered. Interestingly, as it turns out, Sophia swore that it was a medallion *only* and *always* worn by Ali, in what appeared to be an attempt to prove that therefore he must have been the killer. However, a friend of Sophia and Ali testified that he saw Sophia wearing that same medallion in his home shortly before the homicide. Furthermore, police investigators found locks of human hair in the medallion's chain which were far too long to be Ali's. Unbelievably, this potentially crucial evidence regarding who had been in possession of the object on the evening of the homicide was never even submitted for DNA, or similar analysis, even though the hair likely fit the prosecution's theory of belonging, along with the medallion, to the murderer. A laboratory analysis of the medallion revealed no latent fingerprints.

REASONS FOR GRANTING THE WRIT

I.

REASONABLE JURISTS COULD DIFFER AS TO WHETHER PETITIONER WAS DEPRIVED OF A CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO TRIAL BY JURY WHEN THE STATE COURT REFUSED TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES TO MICHIGAN'S FIRST-DEGREE "CAPITAL" MURDER CHARGE

The Sixth Circuit judge's Order, denying the appeal from the district court, which had refused to grant

a certificate of appealability, relied on cases in that Circuit, and concluded that the "Constitution does not require a lesser included offense instruction in non-capital cases." (Pet. App. 1a).[5] This Court in *Beck v. Alabama*, 447 U.S. 625, 638 (1980) held that a defendant in a capital murder case has a constitutional right to have the jury instructed on a lesser included offense when the facts support that lesser crime. In a footnote, the Court expressly reserved judgment on "whether the Due Process Clause would require the giving of such instructions in a non-capital case." (*Id*., fn 14). Since then, the circuits have split on whether *Beck, supra*, in a habeas corpus proceeding, supports the proposition that the failure to instruct on a lesser included offense in a non-death penalty, life offense prosecution is constitutional error. In *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3d Cir. 1988), the Third Circuit applied the *Beck* holding to non-capital cases, citing this Court's decision in *Keeble v. United States*, 412 U.S. 205, 212-213 (1973). A majority of federal circuits disagree with a general due process right to a jury instructed on lesser included offenses in non death penalty cases. *Valles v. Lynough*, 835 F.2d 126 (5th Cir. 1988); *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000); *Chavez v. Kerby*, 848 F.2d 1101 (10th Cir. 1988); *Perry v. Smith*, 810 F.2d 1078 (11th Cir. 1987). Even within the Sixth Circuit, panels disagree on whether there is a due process right to instructions on lesser included

[5] As this Court in *Parker v. Matthews*, 567 U.S. 37, 49 (2012) warned, "[t]he Sixth Circuit's reliance on its own precedents [cannot] be defended . . . on the ground that they merely, reflect what has been clearly established by our cases."

offenses for non-capital cases. *Compare Ferrazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir. 1984) (holding that this Court's ruling regarding the due process requirement on lesser offense instructions "is not limited to capital cases and should be applied here.") *with Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001) ("[T]he Constitution does not require a lesser included offense instruction in non-capital cases."). Ironically, the order denying the writ in Elatrache's case cites to *Bagby v. Sowders*, 894 F.2d 792, 796-797 (6th Cir. 1990) (en banc), which held that a due process violation occurs in a non-capital case when the failure to instruct on lesser included offenses is "a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." The 1st, 7th and 8th Circuits agree. *Tata v. Carver*, 917 F.2d 670, 671 (1st Cir. 1990); *Williford v. Young*, 779 F.2d 405 (7th Cir. 1985); *Pitts v. Lockhart*, 911 F.2d 109 (8th Cir. 1990).[6]

While this Court has often stated that there is a significant constitutional difference between the death penalty and lesser punishments, the State of Michigan, along with 23 other states [now "24," as Virginia

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[6] The State courts are also split on this constitutional question. *State v. Bruns*, 429 So.2d 307 (Fla. 1983) (due process right to lesser included offense instruction required when requested). *State v. Oldroyd*, 685 P.2d 551 (Utah 1984) (no due process right to lesser included offense instruction); *State v. Whittle*, 752 P.2d 494 (Ariz. 1988) (no federal due process right to sua sponte lesser included in non-capital case); *State v. McIntosh*, 506 A.2d 104 (Conn. 1986) (no federal due process right to lesser included offense instruction in non-capital case).

changed its law on March 24, 2021], do not allow capital punishment for any crime.[7] *Beck*, 447 U.S. at 637. The penalty for first-degree murder in Michigan is mandatory, non-parolable life imprisonment (M.C.L. 750.316 (a) and (b)). Those defendants facing mandatory life are often described as facing "capital" charges.[8]

In addition, the State of Michigan requires a trial judge to instruct on a lesser included offense if a rational view of the evidence supports the instruction. *People v. Cornell*, 466 Mich. 335 (2002). In a homicide case, voluntary and involuntary manslaughter are lesser offenses which must be submitted to the trier of fact if the evidence supports the instruction. *People v. Mendoza*, 468 Mich. 527 (2003). This Court in *Hopper v. Evans*, 456 U.S. 605, 611 (1982) held that in a capital case "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction."

Given these different views on the constitutional significance of the request for lesser included offenses, among the federal circuits and within the Sixth Circuit

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[7] While this Court in *Beck* did not require lesser included offense instructions in a non-capital case, the primary concern of the Court appeared to be the integrity of the fact-finding process, as opposed to the punishment, and therefore the *Beck* holding would be equally applicable in a non-capital case.

[8] Michigan Court Rule 6.412(E)(1) commentary, regarding rules on criminal jury selection, grants extra challenges in capital offenses.

itself,[9] Judge Contie, of the Sixth Circuit, in his dissent in *Bagby*, summarized *Vujosevic* as follows: "In short,

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[9] It must be stressed that the essential question of whether a state court, especially in a non-death penalty, "capital" punishment case, must instruct a jury on a necessary and included lesser offense, where the evidence warrants it, is far from a settled matter.

Certainly in *Beck, supra*, this Court specifically reserved judgment on the question, *id*. at fn 14, while ruling that the instruction was mandated in death penalty cases. The facile justification for the penalty reasonably found in the finality, and possibly the cruelty, or a death sentence. However, it may be that lesser offense instructions, when supported by the evidence, are more reasonably required by Fourteenth Amendment Due Process.

The case now before this Court was a type of "capital" case, inasmuch as conviction for first degree murder in Michigan carries an automatic sentence of life in prison with no possibility of parole. The facts supported possible verdicts of both voluntary and involuntary manslaughter. There is a compelling argument that Fourteenth Amendment due process required a manslaughter instruction to prevent jurors who concluded that Elatrache committed a serious crime, but not murder, from convicting him of the only crime before them – capital murder.

In the Sixth Circuit decision most clearly relied upon by the lower courts leading to this appeal, an *en banc* decision in *Bagby v. Sowders*, 894 F.2d 792 (1990), the plurality opinion specifically relied on *Beck, supra*, and the principle that unless the death penalty was a consequence, the Eighth Amendment does not demand a lesser offense instruction. However, that interpretation of *Beck* is simply wrong because *Beck* never went that far.

Furthermore, as four Sixth Circuit judges argued in dissent in *Bagby*, this Court's decision in *Beck* was clearly grounded in concerns "arising from the Due Process Clause of the Fourteenth Amendment." *Bagby, supra*, 894 F.2d at 802 (Contie, J., dissenting). On top of this uncertainty, there is a clear split in the circuits as to whether the Eighth or the Fourteenth Amendment controls the right to the crucial jury instruction. *See*, *e.g.*, *Vujosevic v.*

the requirement that lesser-included offenses be given where warranted by the evidence is *grounded in due process, in a concern for the fairness of the proceeding*." *Bagby*, 894 F.2d at 801. (Emphasis added). It appears clear that reasonable jurists could debate, or for that matter agree, that the petition should have been resolved in a different manner, or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Of course, satisfying that standard "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The Certificate of Appealability determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988), wherein the court reasoned:

> In capital cases, a court must give a requested instruction on lesser included offenses where it is supported by the evidence. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). This court applies that requirement to non-capital cases as well. *Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980), *cert. denied*, 452 U.S. 917, 101 S.Ct. 3053, 69 L.Ed.2d 421 (1981). This requirement is based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free. *See Keeble v. United States*, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 1997-98, 36 L.Ed.2d 844 (1973).

Finally, the constitutional right to trial by jury, and to have the prosecution prove all the elements of the crime charged beyond a reasonable doubt also form the basis of a constitutional violation when the trial judge erroneously fails to give requested lesser included offenses. *See Matthews v. United States*, 485 U.S. 58, 63 (1988); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978); *Duncan v. Louisiana*, 391 U.S. 145, 156-157 (1968). The jury alone must determine the facts, upon proper instruction, and no court, neither trial nor appellate, may substitute its opinion for the trier of the facts.

In *Matthews, supra*, a non-capital case, Chief Judge Rehnquist, writing for the majority, noted that:

> [a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable juror to find in his favor. . . . a parallel rule has been applied in the context of a lesser included offense instruction. . . . In *Stevensen* [*v. United States*, 162 U.S. 313 (1896)], this Court reversed a murder conviction . . . holding . . . that the evidence was sufficient to entitle the defendant to a manslaughter instruction . . . *Matthews*, 485 U.S. at 63.

The Sixth Circuit judge, in deciding this appeal, rejected application of *Matthews* because it "is not a constitutional case." (App. 1).

II.

JURISTS OF REASON COULD FIND IT DEBATABLE WHETHER THE ERRONEOUS JURY INSTRUCTION ON UNANIMITY WAS PROCEDURALLY DEFAULTED

Petitioner was charged in a criminal Information with felony murder, but that document did not specify for alternative theories of the underlying felony. Yet the trial judge gave the jury an instruction which did not require unanimity on guilt of a particular underlying felony, in violation of Petitioner's constitutional right to have the prosecution prove all of the elements of that crime beyond a reasonable doubt. While both the state appellate court and the federal district court addressed the merits of this claim, after discussion of "waiver" by failing to object, the Sixth Circuit relied exclusively on the procedural default doctrine. The lower courts improperly merged the failure to object with "waiver." Both this Court and the Michigan Supreme Court have distinguished a difference between forfeiture and waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Olano*, 507 U.S. 725, 733 (1993); *Freytag v. Commissioner*, 501 U.S. 868, 894, fn 2 (1991) (Scalia, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); *People v. Carter*, 462 Mich. 206, 215-216 (2000). Mere forfeiture does not extinguish an error. While defense counsel initially "approved" all of the instructions, when the specific question of unanimity was raised by the jury, and the state trial judge gave the constitutionally infirm instruction, counsel failed to

object. The state court erroneously applied its own procedural rule, and therefore the procedural default doctrine does not apply. *See Cone v. Bell*, 556 U.S. 449, 465-466 (2009) ("[T]he adequacy of state procedural bars . . . is itself a federal question."). Here, the jury may very well have based its verdict on acts not charged in the Information, thereby requiring reversal. *Stirone v. United States*, 361 U.S. 212, 218-219 (1960).

III.

THE RIGHT OF CONFRONTATION AND *BRADY* VIOLATIONS

Since the prosecution had no eyewitness to the homicide, nor physical or scientific evidence to connect Elatrache to the crimes, they had to rely on the testimony of a career criminal, jail-house informant, Mark Fragel. That self-motivated and questionably reliable witness claimed that Elatrache, whom he had never met, confessed his involvement in the homicide to him, and him alone, while the two men shared a crowded cell in the Wayne County Jail. When the defense requested discovery of Fragel's complete criminal record, his psychiatric history, his prior cooperation with law enforcement, his history of drug and alcohol abuse, all matters which would be contained in his prior judicial presentence reports ("PSRs"), the state trial court denied the request, and the prosecutor refused to voluntarily disclose this essential (and obviously available) impeachment evidence. Those refusals deprived

Elatrache of his constitutional right of confrontation as recognized by this Court in *Davis v. Alaska*, 415 U.S. 308, 317 (1974); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); and *Idaho v. Wright*, 497 U.S. 805, 813 (1990) and Elatrache's right to due process under this Court's doctrine in *Brady v. Maryland*, 373 U.S. 83 (1963) *et seq*. The trial court's refusal to allow counsel to pursue defendant's right to examine pertinent documentation, which directly related to the witnesses' career as a criminal, would necessarily impact upon the issue of the credibility of Fragel, and cannot be held harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993). Jurists of reason could easily disagree with the district court's resolution of these claims.

IV.

PROSECUTORIAL MISCONDUCT

The district court agreed with the state appellate court that the prosecutor in his opening remarks to the jury "did nothing more than repeat defendant's own words," and any statement made was supported by the evidence (App. 36-40). While the prosecutor introduced numerous text messages from Elatrache, it was the purpose and manner in which he used them that was both incendiary and prejudicial, to the inevitable result that Elatrache was denied a fair trial. While the district court conceded that the prosecutor's remarks were "pronounced and persistent," it was the repeated use of these messages to attack Elatrache's character, and to show that he was a very evil person, that

stepped well over the line. The state prosecutor's use of the language was not a "hard blow," but rather a "foul one." *Berger v. United States*, 295 U.S. 78, 88 (1935). He called Elatrache a "devil," "psychotic," "sociopathic, jealous boyfriend from hell," compared to Sophia, whom he intoned was a "nice lady." Of importance, the above messages were all directed toward Sophia, not the victim. It was the exploitation of this incendiary evidence, without any limitation, that unfairly infected the trial from the very beginning, leading the jury to try the case on the false issue of whether Elatrache was a horrible person, and not on whether he committed the crimes charged. The prosecutor engaged in "improper methods calculated to produce a wrongful conviction." *Viereck v. United States*, 318 U.S. 236, 248 (1943). Elatrache's right to due process was violated by the prosecutor's misconduct. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (*per curiam*). The district court's determination that the Michigan Court of Appeals' resolution of this claim was objectively reasonable could be debated among reasonable jurists.

V.

ADMISSION OF OTHER BAD ACTS

As a compliment to the character assassination outlined in Claim IV, above, the prosecutor was allowed to introduce evidence of extensive, inadmissible and unproven criminal activity, attributed to Elatrache,

which must have led to prejudicing the jury fatally against him. This litany of "crimes" included evidence of aggravated stalking, multiple break-ins, thefts, credit card fraud and arson (App. 40). The vast majority of the testimony in the case focused on these "other bad acts" admitted by the trial court. The district court initially ruled that there is no Supreme Court precedent which holds that a state court ruling violates due process by admitting propensity evidence in the form of other bad acts or by a misjoinder of charges (App. 41-42). That interpretation of this Court's precedent is too narrow to be controlling in this case. This Court held that state evidentiary rulings *generally* are not cognizable as grounds for *habeas* relief in *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). However, a habeas federal court is not precluded from ruling that evidentiary rulings render a trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Sixth Circuit gave a very narrow interpretation to this Court's precedents in order to hold that unfounded character attacks against a defendant in a brutal murder case are unworthy of federal review. That decision was at least debatable among reasonable jurists.

VI.

PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

The prosecutor improperly elicited testimony from the jail-house informant, Fragel, that Elatrache plotted and planned to kill both the state prosecutors and the officer-in-charge of the case. Neither the state appellate court nor the district court found that the testimony was properly elicited, and that therefore no objection was warranted. Instead, the lower courts speculated that the failure to object could be construed as a "tactical matter in order to avoid drawing attention to it" (App. 46-47). Initially, it should be noted that the prosecutor surprised the defense with these inflammatory allegations as part of his opening statement, without the required notice under M.R.E. 404(b).[10] While defense counsel did previously make a motion for mistrial on the basis of the opening statement, he did not address this obvious problem at that time, nor did the trial court:

> DEFENSE COUNSEL: I'll be very brief with this. I believe that Mr. Reynolds' final argument, excuse me, opening statement, was totally argumentative, went completely over the top. And because it concentrated so much on the evidence as to what Ali Elatrache may have done to Sophia Aljbaili, which is a completely side issue in this case, that we are left

[10] The Michigan Rule of Evidence does not differ on a notice requirement from its federal counterpart, F.R.E. 404(b).

> with the side show just having swallowed the circus.
>
> I don't think that anything that I could say or that we can do to the rest of this trial is going to undue the harm that was done by that opening statement, and I ask the Court to declare a mistrial.

Later, the prosecutor called Mark Fragel, the jailhouse informant, as a witness. Her leading questions obviously foreshadowed an attempt to elicit the damning testimony of Elatrache's plot to kill both prosecutors and the detective in charge, all of whom were in the jury's actual presence, every day of this almost month-long trial. This testimony was elicited by the prosecutor:

> APA Gerard: And did Mr. Elatrache ever mention any members of the prosecution?
>
> Fragel: Yes.
>
> APA Gerard: Who and how so?
>
> Fragel: Started making just like threats toward you, Ms. Gerard and Mr. Reynolds, as well as Detective Delgreco.
>
> APA Gerard: What did he say?
>
> Fragel: When he got out of there, when he was back in the Middle East, he was going to take a picture of his member and

	send it back to them like as a ha, ha type thing.
APA Gerard:	Did he ever make any, voice any threats?
Fragel:	Yes. Typically I'm going to have them killed type stuff.

The deficient performance by failing to object and the resulting prejudice of the evidence in this homicide case fell clearly within the definition of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1994). The district court's conclusion to the contrary is debatable among reasonable jurists.

In addition, trial counsel failed to request an accident instruction based on the evidence introduced by the prosecution and the defense. The standard jury instruction, MI Crim. JI 7.2, Accident in a Murder Case, would have informed the jury that Elatrache was not guilty of murder if he did not mean to kill or did not realize what he did would probably cause a death or great bodily harm. As noted, the head injuries sustained by Mr. Aljbaili were not severe, were non-fatal and were indicative of a fight. Elatrache was entitled to have the jury instructed on the defense that the deceased did not die as the result of strangulation, and even if the jury concluded that defendant was the perpetrator, but that he did not intend the death, he could not be guilty. Elatrache had a constitutional right to have the jury instructed on this defense as part of his Sixth Amendment right to trial by jury. *Matthews v. United States*, 485 U.S. 58, 63 (1988); *Duncan v.*

Louisiana, 391 U.S. 145, 146, 156-157 (1968). The district court's rejection of this constitutional claim is debatable among reasonable jurists.

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should reverse the Sixth Circuit and remand for relief consistent with this Court's opinion.

Respectfully submitted,

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