No. _____

In the

Supreme Court of the United States

October Term, 2019

_____

KENNETH T. BLUEW, Petitioner

v

CONNIE HORTON, WARDEN, Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where Petitioner has never been allowed to develop the factual record which supports his claims of ineffective assistance of trial counsel, should this Court Grant Certiorari to Reverse the Decision of the Sixth Circuit Court and Grant Petitioner a Certificate of Appealability on his claims?

PARTIES TO THE PROCEEDINGS

Petitioner

Kenneth T. Bluew, Petitioner is an individual and has no corporate affiliations.

Respondent

State of Michigan.

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RULES & STATUTES

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's decision under 28 USC §1254(1). Hohn v. United States, 524 US 236 (1998).

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit (Appendix A: App 001-005) is not reported. The Opinion and Order of the federal district court denying the motion for relief and denying a certificate of appealability is not reported but is available at 2019 WL 4416312. (Appendix B: App 006-027). The last reasoned state court decision for purposes of §2254 review is the Opinion of the Michigan Court of Appeals denying Petitioner's claim and is included as Appendix C (App 028-036).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 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 defence.

28 USC §2253. Appeal

> (a) In a habeas corpus proceeding . . . the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State court; or

*

(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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

FRAppP Rule 22(b)

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, . . . , the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 USC §2253(c). . . If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

INTRODUCTION

In 2012, Petitioner was convicted in a Michigan trial court of First Degree Murder, assault of a pregnant individual, and other state crimes relating to the death of Jennifer Webb who was 8½ months pregnant with his child. The prosecution's theory and its presentation of circumstantial evidence was to convince the jury that Petitioner had choked Webb to death and staged the scene of her death to make it appear that she had hung herself. Petitioner's defense was that Ms. Webb was despondent about her relationship with Petitioner, a married man,

and committed suicide by self-hanging. Petitioner was principally sentenced to mandatory life without parole for the First Degree Murder conviction. Petitioner directly appealed his convictions and, as relevant here, raised claims of ineffective assistance of trial counsel for counsel's failure to present expert witnesses to refute the State's expert opinions regarding cause of death and manner of death.

In Michigan, claims of ineffective assistance of trial counsel are expected to be raised in a defendant's direct appeal. Petitioner's appellate attorney asked the Michigan Court of Appeals to remand the case to the trial court for a Ginther hearing, a state law evidentiary hearing to create a factual record of the attorney's conduct and rationales to enable the legal determination of ineffective assistance under Strickland v. Washington, 466 US 668 (1984). In her motion to remand, Petitioner's appellate attorney attached an affidavit of one proposed expert witness and an opinion letter of a second proposed expert witness. Both of these proposed experts refuted the testimony, findings, and conclusions of the People's expert witness, Dr. Kanu Virani, M.D., and supported Petitioner's defense theory. The Court of Appeals denied a remand for a Ginther hearing and, despite its denial of remand and the complete absence of any factual explanation for the attorney's failure to present expert defense witnesses, denied Petitioner's claims of ineffective assistance of counsel on the basis of "errors in the record before it" and what it considered overwhelming circumstantial evidence of Petitioner's guilt. Petitioner filed a pro se motion for discretionary leave to appeal to the Michigan Supreme Court. On March 3, 2015, the Michigan Supreme Court denied leave to appeal in a

standard order.

On June 1, 2016, Petitioner filed a timely petition under 28 USC §2254 raising his claims of ineffective assistance of trial counsel and other issues. On September 16, 2019, the district court entered an Opinion and Order denying all of the issues raised in Petitioner's §2254 Petition and denying Petitioner a Certificate of Appealability (R11: Opinion & Order, R12: Judgment). The district court essentially adopted the analysis of the Michigan Court of Appeals that the prosecution's evidence of Petitioner's guilty was "overwhelming" and this negated any prejudice from defense counsel's failure to present expert witnesses to challenge the State's theory of cause and manner of death. On October 15, 2019, Petitioner filed a timely Notice of Appeal to the Sixth Circuit Court of Appeals and requested a Certificate of Appealability for his claim of ineffective assistance of trial counsel and two other issues.

On February 11, 2020, Circuit Judge Jeffrey Sutton denied Petitioner a Certificate of Appealability in an Order attached as Appendix A. Judge Sutton essentially adopted the district court's analysis on all of Petitioner's issues. Petitioner's Petition of Certiorari to this Court is timely pursuant to this Court's Order allowing 150 days for filing.

Petitioner asks this Court to grant certiorari and find that Judge Sutton's adoption of the district court's unexamined and misplaced reliance of the Michigan Court of Appeals decision and its denial of the merits of Petitioner's §2254 claims of

ineffective assistance was erroneous because Petitioner made a "substantial showing" of the denial of his Sixth Amendment rights and the district court and Circuit Court's resolutions of this issue are at least debatable among jurists of reason.

STATEMENT OF THE CASE

A. PETITIONER'S PROCEEDINGS IN THE STATE COURT

1. Trial Court

Petitioner was charged with First Degree Premeditated Murder and other crimes in September 2011. Trial began in September 2012. On the first day of trial, the trial court asked Defendant's attorney about his lack of disclosure of any defense witnesses. The defense attorney replied:

> MR. O'FARRELL: Your Honor, those involve two potential expert witnesses, a Bruce Siddle, S-I-D-D-L-E, and Elizabeth Laposita, L-A-P-O-S-I-T-A. After conferring with those potential witnesses, the decision has been made not to produce them, and therefore, no reports were produced. And I had informed the prosecutor's office of that, I believe, in compliance shortly before the deadline that the Court had indicated.
>
> THE COURT: All right.

(People v. Bluew, Trial Transcript 9/19/12, p. 4). Petitioner's trial lasted 15 days. The People presented their expert witness, Medical Examiner Kanu Virani, M.D., who conducted the autopsy on Ms. Webb. Dr. Virani opined that Ms. Webb had died from a "neck compression, chokehold by another person causing unconsciousness, and then her body being suspended from the luggage rack." Dr. Virani dramatically

demonstrated this alleged "chokehold" on the prosecutor during his trial testimony. During Petitioner's cross-examination, Dr. Virani admitted that his autopsy findings were also consistent with self-hanging. (TR 10/10/12, pp. 65-67, 97). He also admitted that he did not list the manner of death as "homicide" until after he talked to investigators and visited the scene days after Ms. Webb's body was discovered. (Id, p. 65).

Petitioner was convicted of First Degree Premeditated Murder and sentenced in November 2012 to mandatory life without parole.

2. Direct Appeal

As relevant here, Petitioner raised these claims of ineffective assistance in his direct appeal:

I. Bluew Received Ineffective Assistance of Counsel Where Counsel Failed to Call an Expert in PPCT; Webb's Death Could Not Have Been Caused by Chokehold as Dr. Virani Described, and Therefore the Cause of Death Must Have Been by Hanging.

II. Bluew Was Denied Effective Assistance of Counsel Where Counsel Failed to Call an Independent Expert in Forensic Pathology to Testify That Webb's Death Was Caused by Hanging, and Not by Chokehold as Dr. Virani Speculated.

As is customary in Michigan direct appeals, Petitioner's appellate attorney filed a Motion to Remand Petitioner's case to the trial court for an evidentiary hearing to develop the record for Petitioner's Strickland claim. Petitioner's Motion to Remand included an Affidavit from John C. Leonard, an expert in neck

restraints, who reviewed Webb's autopsy report and photos, the crime scene photos and the trial testimony and preliminary examination testimony of Dr. Virani, the prosecution expert, and concluded that evidence did not establish that Petitioner caused the death of Ms. Webb by a neck restraint. (Appendix D: Leonard Affidavit, Pgs App 037-044). The Motion to Remand also included an Opinion Letter by Carl J. Schmidt, M.D., who reviewed Ms. Webb's autopsy report, other prosecution evidence and Mr. Leonard's Affidavit and concluded these prosecution materials "most accurately portray hanging as the cause of death." of Ms. Webb. (Appendix E : Schmidt letter, App 045-048). The Court of Appeals denied Defendant's motion to remand.

In its later opinion, the Michigan Court of Appeals stated its review was limited to "errors apparent in the record" because no Ginther hearing had been held. The Court of Appeals did not mention that it had denied Petitioner's request for a remand for the specific purpose of creating a record on these issues. The Michigan Court of Appeals cited Strickland v. Washington and Michigan cases relying on Strickland and stated:

> To establish a claim for ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. People v Uphaus (On Remand), 278 Mich App 174,185; 748 NW2d 899 (2008); see also Strickland v Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must

overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. People v Carbin, 463 Mich 590, 600; 623 NW2d 884 (2001). "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." Id. (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." People v Chapo, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

We first note that defense counsel is not required to continue seeking experts until he finds one who will offer favorable testimony, see People v Eliason, 300 Mich App 293, 300; 833 NW2d 357 (2013), and although defense counsel chose not to call them, he did consult with two experts, one in forensic pathology. Further, although the affidavits of Leonard and Schmidt may raise a question as to whether the victim died from hanging as opposed to a chokehold, they do not raise any reasonable question as to whether defendant killed the victim in light of the overwhelming evidence of guilt presented at trial. Specifically, there was extensive evidence of defendant's DNA and fingerprints on the victim's clothing and vehicle. Evidence such as defendant's DNA found underneath the victim's fingernails and in numerous bloodstains in the victim's vehicle, would not have been found if defendant was simply present at the scene to investigate the crime as part of his duties as a police officer. The evidence of phone calls between defendant and the victim shortly before she died, defendant's demeanor at the crime scene, and his injuries, further incriminate him. In the end, the means by which the victim died is immaterial where there is overwhelming evidence that defendant killed the victim by means of a violent assault. Accordingly, we conclude that defense counsel was not ineffective for failing to call an expert witness in PPCT and forensic pathology, particularly where they would not have deprived defendant of a substantial defense as to make a difference in the outcome of the trial.

(Appendix C: Michigan Court of Appeals Opinion, App 029).

3. Pro Se Application to Michigan Supreme Court

Petitioner filed a timely pro se Application for Leave to Appeal to the Michigan Supreme Court which again raised his issues of ineffective assistance of counsel. On March 3, 2015, the Michigan Supreme Court denied Defendant's Application for Leave to Appeal in a standard order.

B. Petitioner's §2254 Petition

On June 1, 2016, Petitioner filed in the Eastern District of Michigan a timely Petition for Writ of Habeas Corpus under 18 USC §2254 raising his claims of ineffective assistance:

- Petitioner was denied his Sixth Amendment right to effective assistance of counsel when his trial attorney failed to present expert witnesses to challenge the prosecutor's theory that Ms. Webb was murdered by Defendant's application of a physical neck restraint, a form of Pressure Point Control Technique, rather than by self-inflicted hanging, and to also challenge the testimony and conclusions of the prosecution's medical examiner who conducted the autopsy on Ms. Webb.

- The decisions of the Michigan courts were an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 USC §2254(d)(1).

In 2019, the district court issued an Opinion and Order denying Petitioner's claims of ineffective assistance under the doubly deferential standing for reviewing ineffective assistance claims announced in Harrington v. Richter, 562 US 86, 105 (2011). The Opinion and Order stated:

. . . Counsel did not simply ignore the possibility of presenting expert witnesses at trial. Counsel consulted two experts prior to trial but chose not to call them as witnesses. Petitioner fails to show that counsel's decision rendered counsel ineffective. Although some attorneys may have called an expert witness to testify, that is not the test for habeas review. The Supreme Court has held that there are "countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. Here, after consulting two experts, counsel chose to challenge Dr. Virani's testimony through cross-examination, which often "will be sufficient to expose defects in an expert's presentation." Harrington, 562 U.S. at 111. Counsel's cross-examination of the expert witness challenged Dr. Virani's observations and conclusions and constitutes capable advocacy. Ultimately, counsel elicited favorable testimony from Dr. Virani—that his autopsy findings were also consistent with the ligature having caused Webb's death. (ECF No. 4-20, PageID.1330.) For these reasons, the Michigan Court of Appeals' decision that defense counsel did not perform deficiently in failing to call an expert witness at trial was not contrary to or an unreasonable application of Supreme Court precedent.

Even assuming, arguendo, that counsel's performance was deficient, habeas relief is not warranted because the Michigan Court of Appeals reasonably determined that Petitioner was not prejudiced by any error. The Strickland standard for prejudice is a high bar. Petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The state court relied upon substantial evidence to conclude no prejudice resulted from counsel's decision not to call an expert witness: Petitioner's DNA and fingerprints were found on the victim's clothing and vehicle; Petitioner's DNA was found underneath the victim's fingernails and in numerous bloodstains in her vehicle; Petitioner and the victim exchanged several phone calls shortly before her death; Petitioner's demeanor at the crime scene was uncharacteristic and odd; and Petitioner's physical injuries indicated a struggle of some sort. Bluew, 2014 WL 3928790

> at *1. Additionally, the following evidence not specifically cited by the Michigan Court of Appeals also supported Petitioner's convictions: testimony of numerous witnesses that Webb was not depressed and was happy about her pregnancy; Petitioner initially telling Police Chief Booker that he was not the father of the child; Petitioner failing to respond to numerous radio checks and other attempts to contact him around the time of Webb's death; and Petitioner's computer showing several suspicious searches in the time before Webb's death, including ways to die from carotid artery compression and strangulation.
>
> In light of this substantial evidence, the state appellate court reasonably determined that defense counsel's failure to call expert witnesses was not prejudicial. Petitioner has not overcome the strong presumption that counsel rendered adequate assistance and "made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

(Appendix B: R11: Opinion & Order, App 017-018).

The district court denied Petitioner §2254 relief and a Certificate of Appealability. (Id, App 027).

C. The Sixth Circuit's Denial of a Certificate of Appealability.

Petitioner filed a timely notice of appeal to the Sixth Circuit Court of Appeals and requested a Certificate of Appealability on the denial of his claims of ineffective assistance of trial counsel and other claims.

Sixth Circuit Judge Jeffrey Sutton issued an Order denying Petitioner a Certificate of Appealability on all of Petitioner's claims. (Appendix A). Judge Sutton opined that reasonable jurists would not debate the district court's rejection of Bluew's ineffective assistance claims and quoted the Michigan Court of Appeals' "merits"

decision:

> "although [affidavits from experts retained after trial] may raise a question as to whether the victim died from hanging as opposed to a chokehold, they do not raise any reasonable question as to whether [Bluew] killed the victim in light of the overwhelming evidence of guilt presented at trial." Bluew, 2014 WL 3928790, at *1. Specifically, there was evidence that the victim planned to meet with Bluew, the father of her unborn child, the night of her murder to discuss child support issues; that the victim and Bluew exchanged phone calls shortly before her death; that Bluew, a police officer on duty, failed to respond to numerous radio checks and other attempts to contact him around the time of the victim's death; that Bluew's DNA was found under the victim's fingernails and in her vehicle; and that Bluew's internet history showed several searches regarding ways to die from carotid artery compression and how long such a death would take. Because of the deference due to state court determinations of state law, as well as the double deference due under Strickland and § 2254, reasonable jurists could not disagree with the district court's rejection of these claims. See Richter, 562 US at 105.

(Appendix A: Order, pp. 2-3, App 003-004).

Reason For Granting The Petition

I. Where Petitioner Has Never Been Able to Develop a Record of the Ineffective Assistance of His Trial Attorney, This Court Should Grant Certiorari to Reverse the Decision of the Sixth Circuit and Grant Petitioner a Certificate of Appealability.

A Certificate of Appealability (COA) may "only issue if the applicant has made a substantial showing of the denial of a constitutional right." 28 USC §2253(c)(2). A "substantial showing" is a showing that the resolution of the claims that were presented or their constitutionality is debatable. Miller-El v. Cockrell, 537 US 322, 336 (2003). When the district court has denied the constitutional

claims on the merits, the applicant must show that reasonable jurists could debate whether the district court's assessment of the constitutional claims should have been resolved in a different manner or deserve further consideration. Slack v. McDaniel, 529 US 473, 484-485 (2000).

A claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration that Petitioner will not prevail. Miller-El v. Cockrell, supra at 338. The determination that a COA should be granted is separate and distinct from the determination of the underlying merits. Slack, supra at 481. The question underlying the issuance of a COA is the debatability of the underlying constitutional claim, not the resolution of the debate. Miller-El, supra at 342.

The Michigan Court of Appeals decision was the last reasoned state court decision for purposes of §2254 review. In his §2254 Petition, Petitioner argued that his attorney was ineffective in failing to present defense expert witness testimony to establish that the prosecution's expert testimony did not support the prosecution's theory that Ms. Webb died from "a chokehold administered by another person." Petitioner also argued that his trial attorney was ineffective because he failed to present defense expert witness testimony that the prosecution's evidence was consistent with Ms. Webb hanging herself, not with death by chokehold. As to both issues, Petitioner argued that the determinations of the Michigan Court of Appeals that Petitioner's attorney was not ineffective were unreasonable because the

Michigan Court of Appeals had refused to remand Petitioner's case for a Ginther hearing and summarily denied Petitioner relief "on the record before [it]." That "record" before the Michigan Court of Appeals did not include the two Offers of Proof included in the Motion to Remand: (1) the Affidavit of John C. Leonard, the proposed defense expert who reviewed the testimony of Dr. Virani and the autopsy findings and concluded Dr. Virani's autopsy observations and his findings did not support Dr. Virani's conclusions that Ms. Webb died as a result of a chokehold administered by another person, and (2) a Letter of Opinion from Carl J. Schmidt, M.D., MPH, an expert in forensic pathology and the second proposed defense expert, who concluded Ms. Webb died from self-administered hanging, not any form of chokehold.

The district court and Judge Sutton concluded the Michigan Court of Appeals' decision was neither contrary to, or an unreasonable application of Strickland v. Washington, 466 US 668 (1984) (R11: Opinion & Order, Pg ID 2037) but also concluded that even if the trial attorney's failure to present expert testimony was deficient performance under Strickland, Petitioner was not prejudiced because circumstantial evidence supported the prosecution's theory of a physical struggle between Petitioner and Webb before her body was found. (Id, Pg ID 2039).

A. REASONABLE JURISTS COULD DEBATE THE DISTRICT COURT'S DENIAL OF PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The first prong of Strickland is whether the attorney performance was unreasonable under prevailing professional norms. 466 US at 688. An attorney's choices are strategic and entitled to deference only to the extent that they reflect sufficient investigation to warrant a particular strategy. 466 US at 690-91. As noted in Harrington v. Richter, "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert testimony." 562 US 86, 106 (2011).

Reasonable jurists could debate the district court and Judge Sutton's reliance on the Michigan Court of Appeals determination of no ineffective assistance of counsel which it based solely on the alleged "errors apparent in the record" before it. The Court of Appeals "record" consisted only of the following colloquy in the trial court:

> The COURT: All right. Also prior to today, I entertained motions for discovery filed by both parties as well as other various motions that I've made rulings on. And during those motions, Mr. O'Farrell, Mr. Thomas had requested discovery materials from you as far as reports and witnesses you intended to produce. I've given a deadline for doing so, and I didn't get anything from you, so what's your position on that, Mr. O'Farrell?
>
> Mr. O'FARRELL: Your Honor, those involve two potential expert witnesses, a Bruce Siddle, S-I-D-D-L-E, and Elizabeth Laposita, L-A-P-O-S-I-T-A. After conferring with those potential witnesses, the decision had been made not to produce them, and therefore, no reports were produced. And I had inform the prosecutor's office of that, I believe, in compliance shortly before the deadline that the Court has indicated.

The district court concluded the Michigan Court of Appeals' decision did not contradict Strickland because trial counsel provided competent assistance merely by "consulting" with two experts without any information as to the nature of the consultation or whether the expert's expertise had anything to do with Petitioner's actual proposed defense.

The district court stated: "It was the prosecution's theory that Petitioner choked Webb and staged the scene to make it appear that she hanged herself. The defense argued that Webb committed suicide by hanging. Overwhelming evidence supported the prosecution's theory of the case." (R11: Opinion and Order, Pg ID 2027-28). The "defense argument" cited by the district court was the precise focus of the claims of ineffective assistance. The prosecution's theory was that Petitioner choked Ms. Webb, but the prosecution's theory did not account for the facts that Ms. Webb weighed 246 pounds at the time of her death and under the prosecution's theory, her body was moved 270 feet down a dirt road without leaving tire marks or drag marks or other physical evidence and then hung from the roof rack of her car to make it look like she had committed suicide. There was no evidence to support any of these required parts on the prosecution's theory. The prosecution had abundant circumstantial evidence of a physical struggle between Petitioner and Ms. Webb and Ms. Webb was later found dead. The prosecution's critical connection between those facts was the prosecution's expert testimony of Dr. Virani as to the cause and manner of Webb's death. To raise reasonable doubt, Petitioner needed

defense experts who would directly contradict the prosecution's expert on his findings and conclusions on the cause and manner of Webb's death. Cross-examination of the state's expert Dr. Virani could not create the defense. Defense expert testimony was required to support the defense theory of the cause and manner of Webb's death by hanging and not a chokehold. Properly supported, the defense theory was supported by the lack of evidence from the scene and would have highlighted the critical gaps in the state's narrative and its theory of Petitioner's guilt.

Petitioner has made a substantial showing of the denial of his right to effective assistance. The "substantial showing" is at least debatable here. A Certificate of Appealability should issue if reasonable jurists could debate the resolution of Petitioner's claims. Reasonable jurists could debate the district court and Judge Sutton's adoption of the Michigan Court of Appeals' decision when the record before the Michigan Court of Appeals was inadequate for that court to determine whether Petitioner's trial attorney's statements to the trial court reflected a defense strategy or a failure of investigation, i.e., the lack of any evidence as to "why" the trial attorney abandoned any attempt, or any further attempt, to find an expert or experts who would substantiate the defense theories, rebut the prosecution's expert's findings and conclusions and lend support to Dr. Virani's concessions during cross-examination that his autopsy results were also consistent with self-hanging. Those experts were clearly available. Had they been

presented to Petitioner's jury, the result of the trial would have been different.

Because reasonable jurists could debate the district Court's resolution of Petitioner's claims of ineffective assistance of counsel, Judge Sutton should have issued a Certificate of Appealability.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari seeking a Certificate of Appealability should be granted.

Respectfully Submitted,

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