21-7607

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVUNAIRE D. SIMS - PETITIONER,

vs.

STATE OF MICHIGAN - RESPONDENT.

On Petition for Writ of Certiorari to the
Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

BY: DeVunaire D. Sims* #954340
Petitioner in propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

* NOTICE: This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTION PRESENTED FOR REVIEW

I. Did the Michigan Supreme Court err in denying this issue when Petitioner was denied his Sixth Amendment right to the effective assistance of counsel where counsel failed to adequately represent him at the critical stage of his plea hearing?

II. Did the Michigan Supreme Court err in denying this issue when Petitioner was denied his Sixth Amendment right to the effective assistance of appellate counsel and his Fourteenth Amendment due process right to a full and fair appeal where counsel failed to raise the only "significant" and "obvious" issue?

III. Did the Michigan Supreme Court err in refusing to hold an evidentiary hearing to expand the record on ineffective assistance of trial counsel and appellate counsel?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The June 13, 2019, order of the Michigan Circuit Court denying Petitioner's motion for relief from judgment. (*Appendix A, Michigan State Circuit Court Denial of Motion for Relief from Judgment, Dated September 25, 2020*).

The June 15, 2021, Michigan Court of Appeals denial of Petitioner's application for leave to appeal. (*Appendix B, People v. Sims, 2020 Mich. App. LEXIS 2848 (Mich. Ct. App. Apr. 17, 2020)*).

The January 4, 2022, Michigan Supreme Court's denial of Petitioner's application for leave to appeal. (*Appendix C, People v. Sims, ___ Mich. ___; 961 N.W.2d 159 (Mich. Sup. Ct. July 6, 2021)*).

STATEMENT OF JURISDICTION

Petitioner seeks review of the January 4, 2022, opinion of the Michigan Supreme Court, the highest court in the State. This Court has jurisdiction pursuant to *28 U.S.C.A. § 1257(a).*

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.

STATEMENT OF THE CASE

DeVunaire D. Sims, (known hereafter as "Petitioner") *in propria persona*, states the following in support of his application.

On January 21, 2015, Petitioner was convicted by a plea of nolo contendere: (1) Second Degree Murder, contrary to *Mich. Comp. Laws § 750.317* and (2) Felony Firearm, contrary to *Mich. Comp. Laws § 750.227b-a*, (See Plea Transcripts[1], 4)in the Saginaw County Circuit Court. The Honorable Robert L. Kaczmarek presided over the proceeding. Petitioner was being represented by Philip R. Sturtz (P21115).

On March 2, 2015, Petitioner was sentenced to serve (1) 25 years to 40 years; (2) 2 years consecutive to count 1.

Petitioner filed a timely notice of appeal and Dana B. Carron (P44436), was appointed to represent him, who raised 2 Issues on his leave to appeal:

> I. Whether Petitioner's 6th and 14th Amendment rights were violated by judicial fact-finding which increased the floor of the permissible sentence in violation of *Alleyne v United States*?
>
> II. Whether Petitioner is entitled to appellate review of his sentence because the 27-year minimum prison term violates his federal and state due process rights at sentencing by being disproportionate to the offense and this offender and an abuse of sentencing discretion?

The case was assigned COA # 327642. The Court of Appeals denied the application, for lack of merit, on July 8, 2015.

Petitioner, not knowing about the time limit for filing within the Michigan Supreme Court filed his application late, and it was time barred on February 19,

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[1] Plea Transcripts will be known by "PT" followed by the page number. Sentencing Transcripts will be known by "ST" followed by the page number.

2016.

On January of 2018, Petitioner filed a Motion to Reissue Judgment within the Michigan Court of Appeals to try and reinstate his jurisdictional time limit to refile within the Michigan Supreme Court. The Court of Appeals denied the motion on March 19, 2018.

In 2020, Petitioner filed a motion for relief from judgment within the Saginaw trial court arguing two issues:

> I. Was Petitioner denied his Sixth Amendment right to the effective assistance of counsel where counsel failed to adequately represent him at the critical stage of his plea hearing?
>
> II. Was Petitioner denied his Sixth Amendment right to the effective assistance of appellate counsel and his Fourteenth Amendment Due Process right to a full and fair appeal where counsel failed to raise the only "significant" and "obvious" issue?

On September 25, 2020, the trial court denied his motion for relief from judgment. (*Appendix A, Michigan State Circuit Court Denial of Motion for Relief from Judgment, Dated September 25, 2020*).

Petitioner sought leave to appeal the circuit court's order denying his motion for relief from judgment with the Michigan Court of Appeals. However, on June 15, 2021, the court of appeals issued an order denying leave to appeal indicating "The delayed application for leave to appeal is DENIED because Petitioner has failed to establish that the trial court erred in denying the motion for relief from judgment." in Docket No. 356916. (*Appendix B, People v. Sims, 2020 Mich. App. LEXIS 2848 (Mich. Ct. App. Apr. 17, 2020)*).

Petitioner sought leave to appeal the Michigan Court of Appeals' order

denying his application for leave to appeal to the Michigan Supreme Court. However, on January 4, 2022, the court issued an opinion denying leave to appeal, in Docket No. 163419. (*Appendix C, People v. Sims, ___ Mich. ___; 961 N.W.2d 159 (Mich. Sup. Ct. July 6, 2021)*).

Petitioner is now before this Court in hopes to get a just and proper reviewing of the claims the state courts have refused to follow the relevant standing precedent upon. *Sup. Ct. Rule. 10(b)(c).*

Any additional facts are retained *infra.*

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN SUPREME COURT ERRED IN DENYING THIS ISSUE WHEN PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO ADEQUATELY REPRESENT HIM AT THE CRITICAL STAGE OF HIS PLEA HEARING.

A. ARGUMENT:

Petitioner had a right to counsel under the United States Constitution. *U.S. Const., Am. VI.* This Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A successful ineffective assistance of counsel claim requires the petitioner to show two things: that trial counsel performed deficiently and that he or she suffered prejudice as a result of counsel's missteps. *Strickland*, 466 U.S. at 687. The first *Strickland* prong is met when defense "counsel's representation fell below an objective standard of reasonableness considering all the circumstances." *Id.* at 688. To establish the second prong, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694. That standard is lower than a preponderance of the evidence standard, and "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

"Defense counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable and professional

judgment.'" *Strickland*, 466 U.S. at 690. Yet, "[t]he label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel." *White v. McAninch*, 235 F.3d 988, 995 (6th Cir. 2000). "The entire point of an ineffective assistance of counsel claim is to 'second-guess' trial strategy, though with deference for legitimate-and reasonable—strategic choices." *Hodge v. Haeberlin*, 579 F.3d 627, 655 (6th Cir. 2009) (Boyce F. Martin, Circuit Judge, dissenting).

A criminal defendant has the constitutional right to the effective assistance of counsel during all critical stages of the proceedings. *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012). This includes during the plea-bargaining process. *People v. Douglas*, 496 Mich. 557, 591-592 (2014).

In *Frye*, this Court discussed the importance of the plea process and having adequate assistance of counsel:

> "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system. [Petitioners] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable

> but take a chance and go to trial. In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." (internal citations and quotations omitted).

Id. 566 U.S. at 143-144.

In *Lafler*, this Court determined: "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* 566 U.S. at 145.

Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* 466 U.S. at 686. The goal of a just result is not divorced from the reliability of a conviction. *United States v. Cronic*, 466 U.S. 648, 658 (1984). Here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that proceeded it, which caused the Petitioner to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

In the case at bar, Defense Counsel, Mr. Sturtz was ineffective and provided deficient performance when he threatened Petitioner with life in prison if he did not accept the plea offered.

On January 21, 2015, at a plea hearing, Petitioner expressed to the trial court that he did not want to accept a plea deal and that he was ready to proceed with a jury trial. (PT 3).

Petitioner was then taken to a holding cell and changed into civilian clothes.

(PT 4). He was then chained to a bench in this cell for four hours without food and water. Mr. Sturtz repeatedly came to the door of the cell and continuously threatened Petitioner with life in prison if he did not accept the plea offer. Petitioner repeatedly refused them. In Mr. Sturtz final attempt, he brought Petitioner's mother to the cell door as a manipulation tool to force Petitioner to consider taking the plea. Under extreme duress, Petitioner finally broke and agreed to take the plea even though he still did not want to. (*Appendix D, Affidavit of Tina M. Gonzales*).

Petitioner was then ushered back into the courtroom and coerced by Mr. Sturtz into pleading nolo contendere. (PT 4-5).

At the time of the hearing, Mr. Sturtz had in his possession a letter sent to the court and co-defendant's, Aaron Robert Turner, counsel that he, Mr. Turner, was the sole perpetrator of the crimes that he and Petitioner stood accused of jointly committing. Mr. Sturtz's failure to utilize the information on the record, which potentially could have proved Petitioner's innocence, constitutes the very definition of ineffectiveness embodied in *Strickland* and its progeny.

This was not the "exercise of reasonable and professional judgment" *Strickland*, 466 U.S. at 690; for "a confession is like no other evidence .... Certainly, confessions have a profound impact on the jury." *Bruton v. United States*, 391 U.S. 123, 139-140 (1968). No reasonable competent counsel would have overlooked the value of this evidence and intimidated their client into accepting a plea. Mr. Sturtz did not even investigate the confession and inform Petitioner of it.

A trial counsel's performance falls below objective standard of reasonableness when counsel fails to exercise reasonably professional judgment in deciding to forego investigation relevant to defense. *Strickland*, 466 U.S. at 691-692. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). Someone admitting, on the stand, that they were the sole perpetrator of a crime would have swayed a jury as a co-defendant's testimony against someone will do.

Also see *Bigelow v. Williams*, 367 F.3d 562, 574 (6th Cir. 2004), citing *Wiggins v. Smith*, 539 U.S. 510, 533 (2003), where it held:

> "Wiggins demonstrates that it does not invariably suffice that a lawyer make some efforts to investigate a case; the proper inquiry is 'whether the known evidence would lead a reasonable attorney to investigate further.'" (Emphasis in original)

Therefore, Mr. Sturtz's actions/inaction fell below an objective standard of reasonableness when he failed, at the bear minimum, to do any type of an investigation into the matter and tell Petitioner he had a clear viable defense where his co-defendant confessed to being the only person involved. Petitioner had a right to know that this evidence existed before he went into court to accept the plea. *Strickland*, 466 U.S. at 687-688.

If not for Mr. Sturtz's unreasonable performance, there is a reasonable probability that the result of the proceeding would have been different where Petitioner would have never plead guilty and he would have gone to trial. Yet, because of Mr. Sturtz, he suffered two types of prejudice, first he forfeited his *U.S. Const. Am. XIV* rights to the Due Process Clause, where Petitioner expressed his

willingness to proceed with a jury trial, thus his mind was set. Mr. Sturtz even acknowledged Petitioner had full knowledge of all witnesses and evidence that the State was going to present against him, and yet, he still held sound to going to a jury trial. (PT 3). Mr. Sturtz's performance in creating extreme duress conditions, using threatening and intimidating statements that he would get life in prison, and then using Petitioner's mother as a manipulation tool, at the critical stage, cause Petitioner to have a mental breakdown and concede into accepting a plea deal. Second, Petitioner's separate and yet equally important *U.S. Const. Am. VI* right to counsel, as outlines in *Lafler, supra*, was egregiously violated. Petitioner's documented learning disability made him rely more on the assistance of counsel than most similar situated defendants. (*See Appendix E, Documented Learning Disabilities*). Mr. Sturtz exploited his Client's vulnerability with Gestapo tactics and the use of his Mother against him. Mr. Sturtz knew that Petitioner was innocent because of the confession he held in his hands, yet, because of his unpreparedness to go into trial, he forced and coerced Petitioner into giving away his rights and freedom.

If not for Mr. Sturtz's actions/inactions, Petitioner would have gone to trial and very well may have been acquitted of any charges where the confession by his co-defendant that he did the crime alone was persuasive. *Strickland*, 466 U.S. at 693-694.

II. THE MICHIGAN SUPREME COURT ERRED BY DENYING THIS ISSUE WHEN PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FULL AND FAIR APPEAL WHERE COUNSEL FAILED TO RAISE THE ONLY "SIGNIFICANT" AND "OBVIOUS" ISSUE.

A. ARGUMENT:

A criminal defendant has a right to the effective assistance of counsel in his appeal of right to the Michigan Court of Appeals. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974); *Coleman v. Thompson*, 501 U.S. 722, 756 (1991); *Evitts v. Lucey*, 469 U.S. 387, 391-400 (1984).

The *Strickland* standard is generally utilized and deference, though certainly not unlimited, is afforded to counsel's decisions. This Court has recognized that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). However, courts have routinely insisted that *Strickland* mandates appellate counsel to have sound strategic reasons for failing to raise important and obvious appellate issues, or "dead bang winners." *Smith v. Murray*, 477 U.S. 527, 536 (1986). Also see *McColgane v. Lavigne*, 265 F. Supp. 2d 849, 870 (E.D. Mich. 2003):

> "[A]n appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal.... A 'dead-bang winner' is an issue which was obvious from the trial record ... and must have leaped out upon even a casual reading of [the] transcript' was deficient performance, and one which would have resulted in a reversal on appeal." (internal citations omitted).

B. NEGLECTED STRONG AND CRITICAL ISSUES:

Though appellate counsel, Dana Carron, raised two questions within the

Michigan Court of Appeals on Petitioner's leave to appeal:

> I. Whether Petitioner's 6th and 14th Amendment rights were violated by judicial fact-finding which increased the floor of the permissible sentence in violation of *Alleyne v United States*?
>
> II. Whether Petitioner is entitled to appellate review of his sentence because the 27-year minimum prison term violates his federal and state due process rights at sentencing by being disproportionate to the offense and this offender and an abuse of sentencing discretion?

In comparing to the issues raised by appellate counsel, the issue raised in this motion is longstanding, open and obvious issue under state and federal jurisprudence. In the context of this case, the issue was of substantial importance and must be considered outcome determinative.

The issues raised by Mr. Carron, had no merit "WHAT-SO-EVER". Counsel told Petitioner that he was going to get him a "time cut." Yet, judicial fact finding, was not a part of the plea, (Mr. Carron's *Issue I, supra*); and he could not be given any lessor time then the 27 years that he received, for that was the plea agreement (Mr. Carron's *Issue II, supra*). So Mr. Carron did nothing but collect a check by filing two frivolous issues in the Court of Appeals and wasting Petitioner's one solid chance of getting a review of his case. This is why the appointed appellate counsel organizations' have been revamped and are still under scrutiny is for actions such as Mr. Carron did. What makes matters even worse, Petitioner told counsel he wanted to challenge trial counsel's ineffectiveness and explained all the actions/inactions that are retained within this brief. (*Issue I, supra.*).

Further, Mr. Carron's performance was outside the range of professional judgment, for he refused to argue Issue I, supra, and the ineffective assistance of

trial counsel, and he had in his hands the entire criminal record, including Petitioner's plea transcripts, documentation of Petitioner's learning disability, and the confession made by co-defendant Aaron Turner exonerating Petitioner as being a part of the crime. (*Appendix F, Confession of Aaron Turner*). Therefore, Mr. Carron's unprofessional errors in failing to raise the within "dead bang winner". *Smith*, 477 U.S. at 536; *McColgane*, 265 F.Supp.2d at 870, meets the "good cause" and where there is a reasonable probability that the issue would have resulted in a plea withdraw, it was prejudicial to Petitioner for it not being raised. Further, the court should address the merit of the issue because he suffered and continue to suffer from a miscarriage of justice where he is factually innocent of the crimes. *Schlup v. Delo*, 513 U.S. 298, 314-315 (1995).

III. THE MICHIGAN SUPREME COURT ERRED BY FOR REFUSING TO HOLD AN EVIDENTIARY HEARING TO EXPAND THE RECORD ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL.

A. ARGUMENT:

In *Ballinger v. Prelesnik*, 844 F. Supp. 2d 857, 867 (E.D. Mich. 2012) (citing *Brown v. Smith*, 551 F.3d 424, 429-30 (6th Cir. 2008)), the court stated: "the Sixth Circuit determined that deciding an ineffective assistance of counsel claim without a hearing when the record was not sufficiently developed did not even count as an 'adjudication on the merits' ... let alone a reasonable one." *Id.* at 867.

In *Townsend v. Sain*, 372 U.S. 293 (1963), this Court held that state and federal factual determinations not fairly supported by the record cannot be conclusive of federal rights.

Petitioner requested an evidentiary hearing, pursuant to *Mich. Ct. Rule 6.508 (c)* [State Circuit Court]; *Mich. Ct. Rule 7.211(c)* [Michigan Court of Appeals]; *Mich. Ct. Rule 7.305(C)(8)* [Michigan Supreme Court]; and *People v. Ginther*, 390 Mich. 436 (1973) to expand the record dealing with ineffective assistance of trial and appellate counsel as argued within *Issues I-II, supra.* Thus, Petitioner was clearly due diligent in requesting for an evidentiary hearing to expand the record. *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").

The record needs to be expanded to further delve into the constitutional violations that transpired during Petitioner's trial and on his appeal by right.

CONCLUSION

Petitioner, DeVunaire D. Sims, respectfully requests that this Court grant this petition for a writ of certiorari and any other relief that it deems is just and proper in this case.

Respectfully submitted,

Executed on: 4-1-22

DeVunaire D. Sims

DeVunaire D. Sims #954340
In propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

DECLARATION

I, DeVunaire D. Sims, Petitioner swears, with his signature below, that the forgoing is true and accurate pursuant to *28 U.S.C. § 1746.*

Executed on: 4-1-22

DeVunaire D. Sims

DeVunaire D. Sims
In propria persona