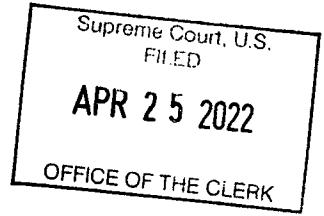


21-7811
No. _____

APR 25 2022
U.S. SUPREME COURT
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U.S. SUPREME COURT

IN THE
SUPREME COURT OF THE UNITED STATES

KUSHAWN MILES-EL — PETITIONER
(Your Name)



vs.

MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF THE STATE OF MICHIGAN
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KUSHAWN MILES-EL #237011
(Your Name)
4533 W. INDUSTRIAL PARK DRIVE
KINROSS CORRECTIONAL FACILITY
(Address)

KINCHELOE, MICHIGAN 49788
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED *** (CAPITAL CASE) ***

I WHETHER PETITIONER S DIRECT APPEAL AS OF RIGHT SHOULD BE REINSTATED BECAUSE HIS DIRECT APPEAL WAS NOT ADJUDICATED IN ACCORDANCE WITH THE DUE PROCESS OF LAW WHERE HIS APPELLATE ATTORNEY WAS INEFFECTIVE AND DEPRIVED PETITIONER OF HIS RIGHT TO PERFECT HIS APPEAL OF RIGHT WHEN APPELLATE COUNSEL FAILED TO REQUEST OBTAIN & REVIEW ALL TRANSCRIPTS & LOWER COURT RECORDS (SPECIFICALLY PETITIONERS JANUARY 28, 1994) WALKER HEARING TRANSCRIPT ON ATTORNEYS MOTION TO WITHDRAW AS COUNSEL AND INVESTIGATE CONSTITUTIONAL & STRUCTURAL ERRORS CONTAINED THEREIN

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

STATE OF MICHIGAN

WAYNE COUNTY PROSECUTOR'S OFFICE

MICHIGAN SUPREME COURT

MICHIGAN COURT OF APPEALS

THIRD JUDICIAL CIRCUIT OF MICHIGAN WAYNE COUNTY CIRCUIT COURT

RELATED CASES

**PEOPLE OF THE STATE OF MICHIGAN v KUSHAWN MILES-EL,
WAYNE COUNTY CIRCUIT COURT NO. 93-10422-FC**

PEOPLE OF THE STATE OF MICHIGAN v KUSHAWN MILES EL

MICHIGAN SUPREME COURT CASE NO 163192

MICHIGAN COURT OF APPEALS CASE NO 356260

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Handy v. United States, 375 U.S. 277, 279-282 (1964)</u>	
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<u>Wiggins v. Smith, 539 U.S. 510, 521 (2003)</u>	
<u>Griffin v. Illinois, 351 U.S. 12 (1956)</u>	
<u>Mayer v. Chicago, 404 U.S. 189, 194 (1971)</u>	
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<u>People v. McLeod, 77 Mich App 327 (1977), aff'd 407 Mich 632, 655 (1980)</u>	
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<u>Harris v. Rees 794 F.2d 1168 (6th Cir. 1986)</u>	
<u>People v. Kelly 127 Mich 587, 590 (1983)</u>	
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People v Gorka 381 Mich 515 521 (1969)
Smith v Robbins 528 U S at 286
People v Williams 386 Mich 565 (1972)
Wilson v Mintzes 761 F 2d 275 280 (6th Cir 1985)
Fields v Bagley 275 F 3d 478 483 485 (6th Cir 2001)
Miller 882 F 2d at 1434
Page v United States 884 F 2d 300 302 (7th Cir 1989)
Banks v Reynolds 54 F 3d 1508 1515 1516 (10th Cir 1995)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the WAYNE COUNTY CIRCUIT COURT court appears at Appendix B-1 to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was *N/A*.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: *N/A*, and a copy of the order denying rehearing appears at Appendix .

[] An extension of time to file the petition for a writ of certiorari was granted to and including *N/A* (date) on (date) in Application No. *A*.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was *OCTOBER 8 2021*. A copy of that decision appears at Appendix *B*.

[] A timely petition for rehearing was thereafter denied on the following date: *JANUARY 4 2022*, and a copy of the order denying rehearing appears at Appendix *A*.

[] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. *A*.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

U.S. CONST. AMEND. VI.

U.S. CONST. AMEND. XIV.

MICHIGAN CONSTITUTION OF 1963

ART. 1, <17

ART. 1, sec. 20

STATEMENT OF THE CASE

Petitioner Kushawn Miles El was arrested on August 31 1993 and charged with two (2) counts of First Degree Premeditated and Deliberate Murder pursuant to M C L 750 316 and two (2) counts of Felony Firearm pursuant to M.C.L. 750.227b-A Petitioner was bound over to Recorder's Court of Detroit for trial on One (1) count of First Degree Premeditated Murder Felony Firearm and Assault with Intent to Commit Murder Felony Firearm

Petitioner was Order to undergo a Psychological Examination relative to a Claim of Insanity and Competency to Stand trial October 1 1993 at the Recorder's Court Psychiatric Clinic Petitioner was given a psychological examination But never was given a competency hearing before going to trial

Petitioners Trial Attorney had refused to go see him in the county jail and the only time Petitioner saw his trial attorney was in the bull pen moments before Petitioner was taken into the courtroom Petitioner filed numerous complaints to the trial judge and Attorney Grievance Commission against his trial attorney regarding trial counsel's failure to investigate interview witnesses adequately prepare his defense and lack of communication and the loss of confidence in his trial attorney and requested numerous times to have counsel replaced or substituted three (3) months before trial On January 24 1994 trial attorney Carl R Rolden Jr filed a Motion To Withdraw as Counsel. On January 28 1994 a Hearing was Held on counsel's motion to withdraw "WITHOUT PETITIONER BEING PRESENT."

Trial counsel's motion to withdraw was DENIED and Petitioner was FORCED TO TRIAL with his trial attorney (who stated in his motion that "there was an irreversible breakdown in the attorney-client relationship to the extent that he would no longer be able to ADEQUATELY REPRESENT the Defendant.") As a result Petitioner was denied his right to the assistance of counsel for his defense; denied his right to the effective assistance of counsel at trial; he was denied his right to a fair trial; and was denied his right to present an adequate defense; and denied his right to conflict free representation

Petitioner was convicted of all counts and sentenced to LIFE imprisonment 5 to 10 years and a consecutive 2 years Petitioner filed a timely notice of appeal and request for the appointment of appellate counsel

Daniel J Rust was appointed to represent Petitioner on his Direct Appeal as of

right. The trial court issued an order to produce Petitioner's Trial and Sentencing Transcript. See Appendix C. Appellate counsel never was provided or given the January 28, 1994 Motion Hearing Transcript or Trial Counsel's Motion to Withdraw. See Appendix C.

Appellate counsel file Petitioner's Direct Appeal Brief November 1994 without Requesting, Obtaining and Reviewing the January 28, 1994 Motion Hearing Transcript.

In 2006 the Michigan Supreme Court adopted and implemented a New Rule of law MCR 6.42B MOTION TO REISSUE JUDGMENT.

Which provided If Appellate Counsel failed to provide effective assistance on Appeal the trial court shall reissue judgment to restart the time for taking appeal

In 2020 Petitioner recently Discovered that his Appellate counsel failed to request obtain and review the January 28 1994 Motion Hearing Transcript before filing his Brief on Appeal

Petitioner filed a MCR 6.42B Motion to Reissue Judgment in the Wayne County Circuit Court August 2020. The Motion Was DENIED. Petitioner then filed a Motion For Reconsideration in Wayne County Circuit court. Petitioner filed an Application For Leave To Appeal in the Michigan Court of Appeals. The Michigan Court of Appeals issue a one line opinion and order denying leave to appeal "for lack of merit in the grounds presented" April 28 2021. Petitioner filed an Application For Leave to Appeal in the Michigan Supreme Court. Leave was Denied October 5 2021 and Reconsideration was denied January 4, 2022

Now Petitioner seeks an Order of this court to Grant his Petition For Certiorari Vacate The Lower Courts Order and Remand the case back to the trial court for an evidentiary hearing on his ineffective assistance of appellate counsel claim

REASONS FOR GRANTING THE PETITION

Petitioner was DENIED his Constitutional and Statutory rights to the Assistance of Counsel for his Defense during his Direct Appeal as of Right; His Right to the Effective Assistance of Counsel on Direct Appeal and His Due Process Rights for an Opportunity to have claims of Constitutional Violation that may have warranted reversal on Direct Appeal reviewed by the Michigan Court of Appeals

Under Michigan Law the RECORD is the foundation and focal point of any Appeal. The Michigan Court of Appeals scrutiny of a case is usually limited to those [errors preserved on] (or made part of) the proceedings below. See People v. McLeod 77 Mich App 327 (1977) aff'd 407 Mich 632 655 (1980); Wade v. Ray City 57 Mich App 581, 588 (1975). A complete record is the Appellate advocates most valuable tool and an absolute Prerequisite to rendering Effective Defense Services on Direct Appeal. This Court has addressed a number of situations in which an attorney's performance has been found deficient. See Entsminger v. Iowa, 386 U.S. 748, 750-751 (1967) (Holding counsel's waiver of petitioner's right to a FULL TRANSCRIPT violated Due Process guarantees of Adequate and Effective Appellate Review). See also Hardy v. United States, 375 U.S. 277, 282, 84 S.Ct. 424, 428 (1964) (counsel's duty as an advocate 'cannot be discharged unless he has a transcript of testimony and evidence presented and jury charge'). Therefore it seems clear that failing to obtain review a significant and important part of the lower court record and transcript on Direct Appeal constitutes deficient performance. See also Harris v. Rees, 794 F.2d 1168 (6th Cir. 1986); People v. Cross, 30 Mich App 326, 344 (1971), adopted and aff'd 386 Mich 237 (1971).

The standard record on Direct Appeal in Michigan State Courts consists of the Original Papers Filed in the Lower Court or a Certified Copy of the Lower Court File, the Transcript of Any Testimony or [Other Proceedings] in the case appealed and the exhibits introduced. See MCR 7.210(A)(1). In addition the substance or transcript of excluded evidence offered at trial and the proceedings at trial in relation to it must be included as part of the record on Direct Appeal. See MCR 7.210(A)(3).

The transcript The Court Reporter's Record of testimony and other (on record) proceedings in the trial court is the primary source of appellate issues. The

failure to provide the Court of Appeals with an appropriate transcript to support an issue may constitute an `abandonment` of the issue on direct appeal See People v. Kelly, 127 Mich App 587, 590 (1983).

An Indigent Appellants rights to a complete record on direct appeal or in postconviction proceedings is also governed by MCR 6.433(A). This Rule recognizes three stages in Michigan upon which the Breadth of the Right to a Complete Record varies.

In the instant case Petitioner s appeal brief was filed November 1994 by appellate attorney Daniel J Rust without having the January 28, 1994 Motion Hearing Transcript on Counsel`s Motion to Withdraw. Appellate counsel did not receive the January 28 1994 Motion Hearing transcript until August 1995 (9 Months After Petitioner s Appeal Brief had been filed)

The January 28 1994 Motion Hearing Transcript contained several issues within that would have warranted relief on petitioners direct appeal (1) Petitioner was denied his right to Conflict Free representation; (2) Petitioner was denied his right to counsel; (3) Petitioner was denied his right to the Effective Assistance of Counsel at trial; (4) Petitioner was denied the assistance of counsel for his defense; and (5) Petitioner was denied his right to be present at a critical stage of his criminal proceeding (See Appendix D)

In this case Petitioner s appellate counsel was at a minimum put on notice by Miles El that there were important significant and obvious appellate issues that should be included in his direct appeal brief for appellate review and consideration Because these issues had a high likely chance of prevailing on Direct Appeal and warranting reversal of Miles El s unlawful conviction that was obtained in violation of the Due Process Clause Instead appellate counsel failed to request obtain and review the January 28 1994 motion hearing transcripts on trial counsel s motion to withdraw

Petitioner s appellate counsel s performance fell below an objective standard of reasonableness In Strickland v. Washington, 466 U.S. 668, 690-691 (1984) this Court explained that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments supports the limitation on

investigations In other words counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations or to make a reasonable decision that makes particular investigations unnecessary Not having represented Petitioner at trial appellate counsel Rust had no (reliable way of finding out whether Miles El had substantial important and obvious claims of constitutional violation or structural errors other than obtaining and reviewing the January 28 1994 motion hearing transcript (or at a minimum speaking to trial counsel) See e.g. Hardy, supra, 375 U.S. at 279-280(stating that appellate counsel who did not represent defendant at trial cannot discharge his obligations as counsel without requesting obtaining and reviewing the trial transcripts) Petitioner s Appellate counsel did neither As Justice Goldberg noted in his Concurring Opinion in Hardy v. United States, supra:

As any effective appellate advocate will attest the most basic and fundamental tool of his profession is the complete trial transcript,^ through which his trained eyes may roam in search of an error a lead to an error or even a basis upon which to urge a change in an established and hitherto accepted principle of law Anything short of a complete transcript is incompatible with effective advocacy.^

Id. at 288. (Goldberg J concurring)(footnote omitted)

The Michigan Supreme Court has issued several orders citing Hardy v. United States, supra to the effect that a Complete Record is the Appellate Advocates most valuable tool and absolute prerequisite to rendering effective defense services on direct appeal That the transcript and other on record proceedings in the trial court is the primary source of appellate issues Appellate counsel s duty cannot be fully discharge the obligation the courts has placed upon him unless he can read the entire transcripts See People v. LaFave, 451 Mich 869, 872 (1996); People v. Neal, 459 Mich 72, 78 (1998); People v. Walker, 450 Mich 917, 919 (1995); People v. Piper, 451 Mich 866, 868; People v. Lee, 391 Mich 618, 629 (1994); People v. Gorka, 381 Mich 515, 521 (1969).

Miles El was simply denied an adequate opportunity for appellate review by appellate counsel s failure to complete a basic rudimentary step in the direct appeal process as mandated by the Michigan Supremes Administrative Order 1981-7, Minimum Standards For Assigned Appellate Counsel, Standards (1-9). The prejudice is overwhelming because a critical constitutionally safeguarded step in the criminal

process was lost altogether. Nor does the fact that Miles El filed substandard MCR 6 500 Motions For Relief From Judgments mitigate the severe prejudice here.

In this case it was unreasonable for appellate counsel to proceed with Petitioner's direct appeal without conducting any investigation whatsoever into the January 28 1994 Motion hearing transcript issues after being apprised to do so by Petitioner. See Wiggins v. Smith, 539 U.S. 510, 521 (2003). (discussing counsel's duty to investigate or make a reasonable determination that certain investigations is unnecessary)

Petitioner was prejudiced by appellate counsel's failure to request obtain, and review the January 28 1994 motion hearing transcript. There is no doubt that appellate review and the Court of Appeals decision would have been different in that the court would have engaged in an adequate detail review issues contained within the January 28 1994 transcript. Prejudice resulting from appellate counsel's failure to request obtain and review the critical and significant January 28 1994 motion transcript satisfies the Strickland test because a reasonable probability exists but for that failure (not attributable to Petitioner) the outcome of Petitioner's direct appeal would have been different. See Strickland *supra* 466 U.S. at 694. See also Smith v. Robbins 528 U.S. at 286.

Petitioner's assertion under the second prong of Strickland can be reached after considering (1) The liberal standard under Michigan law for granting substitution of counsel. See People v. Williams, 386 Mich. 565 (1972); (2) The liberal standard under Michigan law on criminal defendants right to be present at all critical stages of a criminal proceeding; (3) the liberal standard under Michigan Law on a defendant's right to counsel; the effective assistance of counsel at trial and the assistance of counsel for his defense and his right to a fair trial.

A criminal defendant is entitled to have his assigned attorney replaced upon a showing a showing of good cause and where substitution will not unduly disrupt the judicial process. Id. 570-571. See also Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985) (Good cause exists to substitute counsel when there is a legitimate difference of opinion between a defendant and appointed counsel with regard to a fundamental trial tactic a conflict of interest a complete breakdown in communications; or an irreconcilable conflict between counsel and client.)

The issue to be decided under Strickland is whether there is a reasonable probability that the outcome of Miles El's direct appeal specifically his attempt to find error in the denial of his attorney's motion to withdraw would have been different but for his appellate counsel's errors and deficient performance in

failing to request obtain and review the January 28 1994 Motion Hearing transcript on trial counsel s motion to withdraw that the claims of constitutional violations were not perfected for Direct Appeal Because the Petitioner was denied any possibility of an opportunity to have the omitted claims of constitutional violations contained in the January 28 1994 hearing transcript reviewed on direct appeal and because there was a reasonable that the outcome of the direct appeal would have been different had the record been obtained and reviewed and made available to the Michigan Court of Appeals

In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956), the Supreme Court held

The Equal Protection and Due Process Clauses require States to provide indigent defendants with trial transcripts to prepare an appeal That Griffin guarantees a record of sufficient completeness to permit proper consideration of a [defendant s] claims See also Mayer v. Chicago, 404 U.S. 189, 194 (1971).

The Sixth Amendment guarantees an accused the assistance of counsel not just at trial but wherever it is necessary to assure a meaningful defense. See United States v. Wade, 388 U.S. 218, 225 (1967).

The Petitioner asserts that he was prejudiced and denied the effective assistance of counsel on Direct Appeal within the meaning of Strickland and Evitts v. Lucey See Entsminger, supra (finding that an appeal submitted without the full record, briefs, arguments of counsel, (did not constitute [adequate appellate review])): See Fields v. Pagley, 275 F.3d 478, 483-485 (6th Cir. 2001)(finding a lack of effective assistance of counsel in part because appellate counsel did not have the full record of the suppression hearing before it) Miles El was also prejudiced by the lack of assistance by counsel for his defense

Appellate counsel was required to ensure that the lower court file was complete and that all potentially useful or necessary proceedings are in the Register of Actions and transcribed Before filing the appellate brief counsel must review[] the relevant transcripts and lower court records See People v. Neal, 459 Mich 72 (1998) The Michigan Supreme Court held

It was error to deny a transcript of jury voir dire for purposes of his appeal because his appellate counsel was not his trial counsel Therefore in order to fully discharge his duty to assert all claims of error supported by the record defendant s appellate counsel had to have access to transcripts of all proceedings so that all issues of legal merit could be raised Michigan Supreme Court found the remarks of Hardy v. United States, supra are equally applicable to the circumstances of the case of Neal Id. 459 Mich at 77-79. See also People v. LaFave, 451 Mich

869 (1996)(Dissent Opinion)(stating in Michigan appellate counsel for indigent defendant is generally a lawyer other than trial counsel considering the request for a complete transcript the United States Supreme Court commented on the enhanced risk in shielding appellate counsel from a complete record of the proceedings But when as here new counsel represents the indigent on appeal how can he faithfully discharge the obligation which the Court has placed on him unless he can read the entire transcripts Hardy, supra, 375 U.S. at 279-280. Even if the constitution does not require that every assistance available to the wealth that holds the potential to reveal an error be provided freely to the poor a record of jury voir dire is as critical to a meaningful appeal as a transcript of a preliminary or postconviction hearing. Id. at 872.

The Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Consequently appellate counsel engage in process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail See Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667 (1985). The weeding out of weak claims to be raised on appeal is the hallmark of effective advocacy. (omitted) because every weak issue in an appellate brief or argument detracts from the attention of a judge can devote to the stronger issues and reduces appellate counsel's credibility before the court See Miller, 882 F.2d at 1434.

An 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 See Page v. United States, 884 F.2d 300, 302 (7th Cir. 1989). Although courts have not defined the term dead bang winner courts have concluded it is an issue which is obvious from the trial record

In the instant case Petitioner argues that although appellate counsel presented several strong but unsuccessful claims on direct appeal counsel omitted a dead bang winner - i.e. the conflict of interest issue; the right to be present at all critical stages of a criminal proceeding; abuse of discretion; the right to counsel and the right to the effective assistance of counsel at trial and thus rendered ineffective assistance See also Ranks v. Reynolds, 54 F.3d 1508, 1515-1516 (10th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: April 1, 2022