No. 23-5423

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRE MONTEEK EDWARDS — PETITIONER
(Your Name)

vs.

KIM CARGOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANDRE EDWARDS #256304
(Your Name)

3500 North Elm Road
(Address)

Jackson, Michigan 49201
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1(a). DOES A SECOND DEGREE MURDER CONVICTION PRECLUDE A SHOWING OF PREJUDICE WHEN COUNSEL'S ERRORS WHICH PRECLUDED THE JURY'S CONSIDERATION OF MICHIGAN'S DEFENSE OF ACCIDENT UNDER CJI2D 7.2 INSTRUCTIONS TO EXCUSE THE DEFENDANT'S DISCHARGE OF THE GUN IF THE KILLING WAS ACCIDENTAL, THEREBY, LEFT THE JURY'S CHARGE ON IMPLIED MALICE FROM THE USE OF A GUN SATISFIED?

1(b). DID TRIAL COUNSEL FAIL TO INVESTIGATE AND PRESENT "ACCIDENT" AS A DEFENSE, TO INSTEAD, PRESENT AN INSUFFICIENT SELF-DEFENSE CLAIM AFTER A LESS THAN THOROUGH INVESTIGATION OF THE LAW AND FACTS RELEVANT TO PLAUSIBLE OPTIONS?

2(a). WAS THE SIXTH CIRCUIT'S PRECLUSION OF PREJUDICE BY DRAWING A CONSCIOUSNESS OF GUILT FROM BASIC FACTS, (WHICH, DESPITE COUNSEL'S MISREPRESENTATIONS, THE JURY COULD HAVE REASONABLY CREDITED AS BEING COMMITTED WITH AN INNOCENT STATE OF MIND), CONTRARY TO OR AN UNREASONABLE APPLICATION OF STRICKLAND?

2(b). WAS COUNSEL'S MULTIPLE ACTS OF MISREPRESENTATION, DURING A TRIAL PREMISED ON CREDIBILITY, SUFFICIENT TO ESTABLISH STRICKLAND PREJUDICE?

LIST OF PARTIES

[x] 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:

RELATED CASES

People v. Edwards, No. 294826, Michigan Court of Appeals. Judgment entered June 21, 2011.

People v. Edwards, No. 143502, Michigan Supreme Court. Judgement entered November 7, 2012.

People v. Edwards, No. 08-023861-FC, Genesee County (Michigan) Circuit Court. Judgment entered August 14, 2017.

People v. Edwards, No. 341475, Michigan Court of Appeals. Judgment entered May 11, 2018.

People v. Edwards, No. 157818 & (19)(20(21), Michigan Supreme Court. Judgment entered December 21, 2018.

People v. Edwards, No. 08-023861-FC, Genesee Couunty (Michigan) Circuit Court. Judgment entered July 27, 2020.

RELATED CASES

People v. Edwards, No. 356301, Michigan Court of Appeals. Judgment entered May 26, 2021.

People v. Edwards, No. 163175, Michigan Supreme Court. Judgment entered January 4, 2022.

Edwards v. Winn, No. 2:19-cv-10376, U.S. District Court for the Eastern District of Michigan. Judgment entered March 31, 2022

Edwards v. Nagy, No. 22-1701, U.S. Court of Appeals. Judgment entered March 15, 2023 and May 31, 2023.

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REFERENCE TO OPINIONS BELOW

The March 15, 2023, opinion of the United States Court of Appeals for the Sixth Circuit is unreportred as Edwards v. Nagy, 2023 U.S. App. LEXIS 6222. The May 31, 2023, United States Court of Appeals for the Sixth Circuit order denying en banc rehearing is unreported as Edwards v. Nagy, 2023 U.S. App. LEXIS 13433.

The March 31, 2022, opinion of the United States District Court for the Eastern District of Michigan is unreported as Edwards v. Winn, 2022 U.S. Dist. LEXIS 61234.

The January 4, 2022, Michigan Supreme Court order is unreported as People v. Edwards, 967 N.W.2d 606 (Mich. 2022).

The May 26, 2021, opinion of the Michigan Court of Appeals is unreported as People v. Edwards, 2021 Mich. App. LEXIS 3310.

The July 27, 2020 order of the Genesee County (Michigan) Circuit Court order and its December 3, 2020 order denying reconsideration is unreported as People v. Edwards, Case No. 08-023861-FC.

The December 21, 2018, Michigan Supreme Court order is unreported as People v. Edwards, 920 N.W.2d 592 (Mich. 2018).

The May 11, 2018, opinion of the Michigan Court of Appeals is unreported as People v. Edwards, 2018 Mich. App. LEXIS 2229.

The August 14, 2017 order of the Genesee County (Michigan) Circuit Court order and its October 3, 2017 order denying reconsideration is unreported as People v. Edwards, Case No. 08-023861-FC.

The November 7, 2012, Michigan Supreme Court order is reported as People v. Edwards, 821 N.W.2d 885 (Mich. 2012).

The June 21, 2011, opinion of the Michigan Court of Appeals is unreported as People v. Edwards, 2011 Mich. App. LEXIS 1094.

The United States Court of Appeals for the Sixth Circuit unreported opinion, its order denying enbanc rehearing; the United States District Court for the Eastern District of Michigan unreported opinion; the August 14, 2017 order of the Genesee County (Michigan) Circuit Court; and the June 21, 2011, unreported opinion of the Michigan Court of Appeals are all reproduced in the appendix to this petition.

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

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

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

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

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

The opinion of the highest state court to review the merits 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 _____ 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 15, 2023.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 31, 2023, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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. § 1254(1).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, 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 _____ (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

U.S.C.S. Const. Amend. 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the United States and the 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.

U.S.C.S. Const. Amend. 14: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States 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 any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

Petitioner Edwards was tried in the Genesee County (Michigan) Circuit Court on charges of open murder, felon in possession of a firearm, and felony firearm for the shooting death of Mr. Tyrell Lee. Since Edwards was the only eyewitness, his trial consisted of the State seeking to undermine his ONLY account of what occurred, (Appx. F, pg. 221); (Appx. I, pg. 837), which explained that Lee was parked on the street when he entered Lee's car, where Lee retrieved a gun, told him to get out, then, while armed, attacked him. (Appx. I, pg. 778-780); (Appx. K, pg. 27). After he disarmed Lee of Lee's gun, while still being attacked, he fired one shot to create a distraction so he could exit the car, he didn't intend to shoot or kill Lee and didn't know Lee was shot when he left. (Appx. I, pgs. 781-784). Hence, the United States Court of Appeals for the Sixth Circuit observed that, "the jury heard from Edwards, through his recorded police interview, that Lee's vehicle was parked on the street, when he fired the [one] gunshot, NOT THE DRIVEWAY." (Appx. A, at *9) (emphasis added). Furthermore, the trial judge made a finding of fact entitled to deference, making it is absolutely clear that Edwards testified that he accidentally shot Lee. (Appx. K, pg. 18-19). In short, Edwards explained that he accidentally shot Lee with Lee's gun while Lee was parked in the street.

Consequently, by the time Edwards gave his video statement, approximately a week after the incident, (Appx. H, pg. 597); the police's investigation had already painted a picture of what they assumed had occurred in the driveway premised on the one shell casing they found next to Lee's vehicle which was parked in the driveway at the time of the investigation. Therefore, the State's multiple trial theories consistently insisted that Edwards took the gun over to East York Street and intentionally killed Lee in the driveway of 906 East York. (Appx. F, pgs. 213, 222); (Appx. I, pgs. 826, 844, 848, 852); (Appx. J, pg. 896,

904-905, 907, 911, 912, 913, 917, 918-919). Since there was only one gunshot, (Appx. I, pg. 840), the State noted that the investigators only "found one cartridge casing from a gun at the scene." (Appx. F, pg. 222). NOTABLY, the State misled the jury by NEVER mentioning the existence of the second shell casing that Lee's mother, Mrs. Maxine Lee, attempted to hand over to investigators, which was found, "close to the scene". (Appendix L). Furthermore, Sgt. Roderick Legardye offered opinion testimony indicating that the one shell casing they found in the driveway was the starting point of his investigation. (Appx. G, pgs. 516-517, 519). An investigation, he testified, had been conducted WITHOUT using what anybody else told him. (Id., at 527).

Defense counsel undermined Edwards's account first by influencing him into proclaiming self-defense for an accidental killing, (Appx. F, pgs. 234); (Appx. I, pgs. 821, 858-861); (Appendix M), and also with the following six(6) unnecessary acts of harmful misrepresentation:

First, in total disregard to [1] the fact that there was ONLY one gunshot, [2] the existence of a second shell casing, and [3] the fact that Edwards places the shooting on the street, not in the driveway; during opening statements, counsel misrepresented where Edwards said the shooting occurred by misrepresenting to the jury that the shell casing found in the driveway was found where Edwards said the shooting occurred. (Appx. F, pgs. 235, 236). Beyond this, during closing, counsel emphasized this misreprentation by providing a detailed misrepresentation portraying this shooting as having occurred in the driveway. (Appx. I, pg. 879-882). Above all, not once did counsel challenge the foundation of the State's case with the fact that this shooting actually occurred in the street. Nor did he ever challenge the State's driveway theory by mentioning or questioning anyone about the second shell casing. (Appx. K, pg. 29). And, never mentioned the fact that the shell casing found in the driveway

WAS NOT and could not be the casing from this accidental killing. Instead, counsel's misrepresentation of where Edwards said the shooting occurred not only supplied credence to an intentional killing having occurred in the driveway, but also undermined Edwards's account of accidentally shooting Lee with Lee's gun while in the street.

Second, during opening statements, counsel misrepresented that, during Edwards's video recorded statement, Sgt. Mitch Brown pointed to an injury Edwards sustained during the armed physical assault. (Appx. F, pg. 232). Thereafter, Sgt. Brown refuted this misrepresentation by telling the jury that Edwards acknowledged that it was an old scar not due to the attack, (Appx. H, pg. 608), and further testified that, a week after the incident, there were no visible injuries to Edwards. (Id. at 597, 608-609). At the same time, the State introduced photographs depicting how Edwards looked a week after the incident, (Id. at 609-610), and then, during closing, capitalized on and exploited counsel's misrepresentation to also undermine Edwards's account. (Appx. I, pg. 847). Moreover, the jury watched Edwards's video statement during trial and deliberations. (Appx. H, pgs. 623, 636) (Appx. J, pg. 952). And yet, all counsel should have done was appeal to the jury's common sense by arguing that the minor injuries sustained by Edwards, healed within a week's time.

Third, counsel misrepresented to the jury Edwards did not know that his girlfriend at the time, Ms. Victoria McCree, was throwing him a birthday party. (Appx. F, pgs. 225-226). This misrepresentation undermined the reason Edwards gave in his video statement for being on York Street that night. And harmed his testimony that he went on York Street to "see if anybody out there" and was gonna ask them if they wanted to come to his party. (Appx. I, pgs. 772-773).

Fourth, to explain the damage to the car door, counsel misrepresented Edwards's testimony as though he testified that he was "pulling" and "yanking"

on the car door. (Id., at 830). Edwards never gave such testimony. Nevertheless, this misrepresentation allowed the State to capitalize on and exploit the unreasonable aspects of this misleading argument to undermine Edwards's account. (Appx. J, pg. 902).

Fifth, counsel misrepresented to the jury that Lee weighed 270 pounds in an attempt to mislead the jury into believing that Edwards was outmatched. (Appx. I, pg. 879). However, the autopsy report shows that Lee weighed 207 pounds, (Appendix O), and, Edwards never claimed to be outmatched.

Finally, in an attempt to mislead the trial judge into overruling an objection made by the State, counsel misrepresented Edwards's testimony as though he did not say that he did not know why Lee was called "Balls". However, the trial judge immediately recalled that Edwards testified that he did not know why Lee was called "Balls". (Appx. I, pgs. 776-777).

Edwards's jury was instructed on the charges of first degree murder, second degree murder, manslaughter, felon in possession of a firearm and felony firearm (Appx. J, pgs. 934-937, 940-941, 942-943), and most importantly, the jury was instructed to infer malice from the use of a deadly weapon and the "type of wound inflicted". (Id., at 937). The jury was also provided self-defense and the defense of duress instructions. (Id., at 938-940, 941-943).

Edwards was found guilty of second degree murder, felon in possession of a firearm and felony firearm, fourth habitual.

After Edwards was sentenced to 600 to 900 months, 60 to 180 months, and two years, he exercised his right to appeal. The Michigan Court of Appeals affirmed his conviction June 21, 2011. People v. Edwards, 2011 Mich. App. LEXIS 1094. The Michigan Supreme Court denied permission to appeal on November 7, 2012. People v. Edwards, 821 N.W.2d. 885 (2012). Thereafter, Edwards filed his first Motion for Relief from Judgment ("6.500 Motion") in the Genesee County (Michigan)

Circuit Court, Case #08-023861-FC, where he advanced, amongst other claims, the following two(2) ineffective assistance of counsel claims:

> **(1) TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT "ACCIDENT" AS A DEFENSE, INSTEAD, COUNSEL PRESENTED AN INSUFFICIENT SELF-DEFENSE CLAIM AFTER A LESS THAN "THOROUGH INVESTIGATION OF THE LAW AND FACTS RELEVANT TO PLAUSIBLE OPTIONS."**
>
> **(2) TRIAL COUNSEL WAS INEFFECTIVE WHEN HE MISREPRESENTED FACTS IN EVIDENCE.**

The trial court concluded: "Defendant's Motion for Relief from Judgment is DENIED, the Court being convinced that Defendant's motion fails to meet the requirements of MCR 6.508(D), and furthermore, that the motion is without merit." (Appx. D, pg. 7). His reconsideration motion was denied October 3, 2017. His appeals were unsuccessful, People v. Edwards, 2018 Mich. App. LEXIS 2229, May 11, 2018, perm. app. denied 2018 Mich. LEXIS 2531, December 21, 2018.

After submitting his pro per Petition for Writ of Habeas Corpus, Edwards submitted a Successive 6.500 Motion back into the Genesee County (Michigan) Circuit Court, Case #08-023861-FC, which the successor trial judge denied July 27, 2020. His reconsideration motion was denied December 3, 2020. His appeals were unsuccessful, People v. Edwards, 2021 Mich. App. LEXIS 3310, May 26, 2021, perm. app. denied 2022 Mich. LEXIS 7, January 4, 2022.

The United States District Court denied Edwards's Writ of Habeas Corpus, March 31, 2022. Edwards v. Winn, 2022 U.S. Dist. LEXIS 61234. Thereafter, the Sixth Circuit Court of Appeals ("Sixth Circuit") denied his petition for a Certificate of Appealability, March 15, 2023. Edwards v. Nagy, 2023 U.S. App. LEXIS 6222, and his petition for panel rehearing and rehearing en banc were unsuccessful. 2023 U.S. App. LEXIS 13443, May 31, 2023. The Sixth Circuit and "the district court sidestepped any procedural-default analysis and instead adjudicated Edwards's claims on the merits." (Appx. A, at *10). In so holding, any procedural-default has been effectively waived. Lambrix v. Singletary, 520 U.S. 518, 525 (1997).

REASONS FOR GRANTING THE PETITION

I. EDWARDS'S DUE PROCESS RIGHTS TO FUNDAMENTAL FAIRNESS WAS VIOLATED BY THE SIXTH CIRCUIT COURT OF APPEALS AND HIS TRIAL COUNSEL.

This case presents a denial of fundamental fairness underlying the Sixth Circuit's unreasonable departure from established principles of law to preclude Strickland prejudice for Sixth Amendment claims where (1) counsel's errors precludes the jury from considering the defense of accident under CJI2d 7.2, and (2) counsel commits multiple acts of misrepresentation in a case where credibility was pivotal to the claim of innocence. These important questions of federal law should be answered by this Court pursuant to Rule 10.

This Court has long held that the right to counsel is a fundamental right of criminal defendant's. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). The essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, Id., at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id., at 694.

1(a). A SECOND DEGREE MURDER CONVICTION DOES NOT PRECLUDE A SHOWING OF PREJUDICE WHEN COUNSEL'S ERRORS WHICH PRECLUDED THE JURY'S CONSIDERATION OF MICHIGAN'S DEFENSE OF ACCIDENT UNDER CJI2D 7.2 INSTRUCTIONS TO EXCUSE THE DEFENDANT'S DISCHARGE OF THE GUN IF THE KILLING WAS ACCIDENTAL, THEREBY, LEFT THE JURY'S CHARGE ON IMPLIED MALICE FROM THE USE OF A GUN SATISFIED.

The Sixth Circuit unreasonably precluded Strickland prejudice on the basis of a second degree murder conviction in the following manner:

> "Edwards asserted that counsel should have proceeded on an accident theory because, although he intentionally discharged the firearm, he did not intend to kill or otherwise harm Lee. Rather, he insisted that he fired the gun only to create a distraction so that he could escape from the vehicle once Lee started assaulting him. But Edwards cannot show that he was prejudiced by counsel's decision not to pursue an accident defense because

> the jury, by virtue of its guilty verdict, necessarily found that he 'possessed some form of intent to establish the malice for second-degree murder.' People v. Robinson, No. 314906, 2014 WL 4930707, at *4 (Mich. Ct. App. Oct. 2, 2014)(per curiam)." (Appx. A, at *6).

This Court should grant certiorari because the Sixth Circuit's prejudice analysis conflicts with, atleast, four(4) settled fundamental principles of law which calls for an exercise of this Court's supervisory power to settle these constitutional infirmities under Rule 10, even more so, since, there is a very robust possibility that such an erroneous decision has affected and will affect law abiding citizens who, during the course of exercising their constitutional right to bare arms, finds themselves stuck in prison for a second-degree murder conviction after admitting that they were in a situation where their intentional warning shot resulted in someone being accidentally killed, simply because their lawyer's errors precluded the jury's consideration of instructions for the Defense of Accident which would have allowed the jury to excuse the voluntary act if the consequences was unintended. E.g., Michigan's Defense of Accident under CJI2d 7.2. To illustrate:

First, by implementing a prejudice analysis that turned on its view that Edwards cannot show prejudice "because the jury, by virtue of its guilty verdict, necessarily found that he possessed some form of intent to establish the malice for second-degree murder," the Sixth Circuit's prejudice analysis is in conflict with the pattern established in cases such as Strickland and Lockhart v. Fretwell, 506 U.S. 364, 369 (1993), because the court failed to give attention to the fact that, as shown in full detail below, not only would CJI2d 7.2 have charged the jury to excuse the use of the gun since Edwards did not mean to cause death or great bodily harm, CJI2d 7.2, but most important, without such instructions, the Constitution could not abide because an admission of discharging the gun will always provide some form of intent for a second-degree

murder conviction when the jury is instructed to infer the requisite malice for murder from the use of the gun. See Lockhart, Id. ("[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or reliable, is defective"). Moreover, a Strickland prejudice analysis does not turn on whether there is sufficient evidence.

In effect, a second-degree murder conviction is not determinative of Strickland prejudice in CJI2d 7.2 cases and so is not directly relevant to the question of whether counsel's errors precluding the jury's consideration of the Defense of Accident under CJI2d 7.2 is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Second, a conflict exists where the Sixth Circuit failed to conduct the required "case by case prejudice inquiry that has always been built into the Strickland test." Lockhart, supra, at 369 n.2. Instead, the court relied on the prejudice determination from People v. Robinson even though that case addressed a situation where counsel fails to pursue Michigan's Defense of Accident under CJI2d 7.1 (involuntary acts), which is easily distinguishable from claims based principally on counsel's failure to pursue Michigan's Defense of Accident under CJI2d 7.2 (not knowing consequences of act).

To illustrate, in Michigan, the Defense of Accident under CJI2d 7.2 would have allowed the jury to excuse Edwards's discharge of the gun if he did not mean to kill. CJI2d 7.2. See People v. McKenzie, 206 Mich. App. 425, 432 (1994). Also see (Appendix N, People v. Childs, unpublished per curiam opinion of the Michigan Court of Appeals, issued July 7, 2016 (Docket No. 326054), 2016 Mich. App. LEXIS 1306, *9-10, (finding that "M. Crim. JI 7.2 squarely matches with defendant's testimony that he did not mean to kill Braden, that he drew and fired on impulse after being struck by Braden, and that he did not even know

that he had actually shot Braden until after the incident")).

In stark contrast, CJI2d 7.1 allowed acquittal if the defendant did not mean to pull the trigger. CJI2d 7.1. Moreover, in Robinson, the Michigan Court of Appeals's rationale is that by finding Robinson guilty of second-degree murder, "the jury inherently rejected the notion that defendant's act in shooting the gun was unintentional or accidental." Robinson, Id. at *4.

As noted, Edwards does not claim that the gun accidentally discharged, he actually testified that after he disarmed Lee of Lee's gun during an attack, while still being attacked and without pointing or aiming the gun at Lee, he fired one shot to create a distraction so he could exit the car, that he didn't intend to shoot or kill Lee and didn't know Lee was shot, (Appx. I, pgs. 781-784). Therefore, the Sixth Circuit erred fundamentally by relying on Robinson which never conceptualized Strickland prejudice to claims based primarily on CJI2d 7.2 where "the defendant acknowledges the act was voluntary but the consequences unintended." See Use Note, CJI2d 7.2.

In short, since CJI2d 7.1 claims and CJI2d 7.2 claims are legitimately distinct in the requisite elements of proof, the Sixth Circuit had a duty to evaluate THIS question independently of Robinson. See Lockhart, supra.

Third, because the Sixth Circuit completely overlooked jury instructions under CJI2d 7.2, it never considered the question presented by this case: whether "a reasonable probability exists" that, had the jury been instructed under CJI2d 7.2, the jury would have had a reasonable doubt respecting guilt. Strickland, supra, at 695.

This is a critical departure from Strickland because, as Edwards made the court aware, his jury was instructed to infer the requisite malice for murder from his use of the gun, (Appx. J, pg. 937), which necessarily left jurors, following such an instruction, feeling compelled to find that his admission of

intentionally firing the gun provided some form of intent to establish the malice required for a second-degree murder conviction, WITHOUT REGARD TO HIS INTENT TO KILL. See People v. Bull, 262 Mich. App. 618; 687 N.W. 2d 159, 165 (Mich. 2004) (The "mere use of a deadly weapon" alone can establish malice in Michigan). Indeed, "intent to kill is not a necessary element of second-degree murder in Michigan." People v. Gillis, 474 Mich. 105; 712 N.W. 2d 419, 438 (Mich. 2006).

NOTABLY, CJI2d 7.2 would have required the State to carry the heavy burden of convincing the jury, beyond a reasonable doubt, that Edwards did not fire the gun to create a distraction and that he knew he would probably cause a death or great bodily harm. CJI2d 7.2. A burden the prosecutor most certainly did not carry. After all, nothing in the instructions told the jury that the firing of the gun could be excused. Henderson v. Kibbe, 431 U.S. 145 (1977). Thus, since "[it is] logical to assume that the jurors would have responded to an instruction [that was not given] consistently with their determination of the issues that were comprehensively explained," Id., at 156, it is also logical to assume that had the jury been instructed that, "If [Edwards] did not mean to kill or did not realize that [his firing of the gun to create a distraction] would probably cause death or great bodily harm, then he is not guilty of murder", CJI2d 7.2, a "reasonable probability" of a different outcome exist. Strickland, supra, at 695. The absence this instruction, in cases like this, is "sufficient to undermine confidence in the outcome." Id. at 694.

Finally, and most important, the Sixth Circuit's defective analysis caused it to completely overlook the fact that instructions under CJI2d 7.2 was all but indispensible to any chance of Edwards truly contesting the charges against him. Especially since no juror who found that Edwards accidentally shot Lee could vote to acquit under self-defense instructions.

To clarify: It is well understood that an accidental killing is inconsistent with a self-defense killing. Mathews v. United States, 485 U.S. 58, 63 (1988). In fact, a self-defense killing "necessarily implies that the killing is intentional." Dixon v. United States, 548 U.S. 1, 24 (2006). As this Court has historically recognized, "all authorities agree that the taking of life in defense of ones person cannot be either justified or excused, except on the ground of necessity." Beard v. United States, 158 U.S. 550, 561 (1895).

Drawing on this line of cases, Edwards points out that the jury heard from him, through his statement, (Appx. I, 750), and his testimony, (Id., at pg. 792), that he NEVER believed it was necessary to take Lee's life. And the trial judge made it absolutely clear that Edwards testified that he accidentally shot Lee. (Appx. K, pgs. 18-19). Consequently, since Edwards's trial counsel misled him into proclaiming self-defense for an accidental killing, (Appx. I, pg. 821); (Appendix M), Edwards' jury was instructed, in pertinent part, that "A person may only use deadly force in self-defense only where it is necessary to do so." (Appx. J, pg. 940). Of course, no juror could have logically concluded that an accidental killing satisfied the necessity element. Beard, supra.

Indeed, the Defense of Accident under CJI2d 7.2 is the only defense that offered Edwards an ample opportunity of obtaining an acquittal. Hence, counsel's failure to pursue the defense is implicative of Edwards's right to a fundamentally fair trial. Strickland, supra, at 696.

For these reasons, Edwards contends that this Court's precedent compels the conclusion that the Sixth Circuit's prejudice analysis runs contrary to or was an unreasonable application of the Strickland prejudice prong. Edwards therefore respectfully request that this Court grant summary action to decide whether "a reasonable probability exists" that, had the jury received Michigan's Defense of Accident instructions under CJI2d 7.2, the jury would have had a reasonable

doubt respecting guilt. Strickland, supra, at 695. Or remand this case to the Sixth Circuit for further consideration of a Strickland prejudice analysis independent of People v. Robinson's rationale. Especially since an admission of intentionally firing the gun not only provides sufficient evidence to support a second-degree murder conviction, but is also a pivotal element for obtaining an acquittal based on Michigan's Defense of Accident instructions under CJI2d 7.2.

1(b). TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT "ACCIDENT" AS A DEFENSE, INSTEAD, COUNSEL PRESENTED AN INSUFFICIENT SELF-DEFENSE CLAIM AFTER A LESS THAN THOROUGH INVESTIGATION OF THE LAW AND FACTS RELEVANT TO PLAUSIBLE OPTIONS.

Here's how the Sixth Circuit unreasonably rejected this claim, in part, by relying on the defective prejudice analysis just addressed:

> "Edwards argued that counsel inadequately investigated whether he shot Lee accidentally, but he failed to explain what additional evidence counsel would have discovered had he investigated the accident theory more rigorously. And, as just mentioned, Edwards failed to make a substantial showing that he was prejudiced by counsel's failure to pursue an accident theory." (Appx. A, at *8-9) (citations omitted).

This Court has long held that "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986). To fulfill this constitutional mandate counsel must conduct "some investigation into...various defense strategies." Id. More importantly, Strickland requires a reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

Drawing heavily on this line of cases and the prejudice just shown, Edwards first points out that, contrary to the Sixth Circuit's view of this claim, there was no dispute over the need for counsel to explore or discover "additional evidence" in support of the accident defense. because all the evidence necessary for the defense of accident, was already well developed before counsel was appointed. As such, all was needed was for counsel to explore and discover the

fact that Edwards's account hinged on an excuse that Michigan law recognized--the defense of accident under CJI2d 7.2. The relative importance of this defense was not a peripheral issue, but was a central part of Edwards's account of what occurred, before and during his trial in August of 2009.

In fact, the trial record clearly demonstrates that, by failing to raise the defense of accident under CJI2d 7.2, counsel abandoned his investigation into various defense strategies at an unreasonable juncture, making a fully informed decision with respect to a self-defense claim impossible. Wiggins v. Smith, 539 U.S. 510, 527-528 (2003).

In particular, the record established that Edwards not only told the police, in his video recorded statement, that he didn't know he had shot Lee, (Appx. I, pg. 818), but clearly that he NEVER believed it was necessary to take Lee's life, (Appx. I, pg. 750); which is inconsistent with the necessity element of a self-defense killing. Beard, supra. "[A] reasonable attorney (would have thereby been led) to investigate further." Wiggins, supra, at 527.

Beyond this, Edwards's trial testimony made it even more clear that he NEVER believed it was necessary to take Lee's life. (Appx. I, pg. 792). And, the trial judge made it absolutely clear that Edwards testified that he accidentally shot Lee. (Appx. K, pgs. 18-19). Thereupon, counsel's choice to rely on a self-defense claim can only be viewed as a misapprehension of the law and facts.

NOTABLY, counsel made no reference to the defense of accident, at no time during his discussions with Edwards (Appendix M), nor at anytime during trial, indicating that counsel either did not explore the defense or did not discover its relevance, and thereby, failed to ensure that Edwards had a fair opportunity to contest the charges against him. Kimmelman, supra, at 393. Most important, while counsel has wide latitude to make strategic decisions, a self-defense claim "necessarily implies that the killing was intentional," Dixon, supra, and

therefore distorted the true essence of Edwards's statement and testimony.

As set forth above, CJI2d 7.2 is the only instructions that offered Edwards an ample opportunity of obtaining an acquittal. Mathews, supra, at 63 ("[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"). It is therefore not possible to discern a strategy in counsel's failure to discover and argue CJI2d 7.2, only negligence. Such an omission "clearly demonstrate that trial counsel did not fulfill [his] obligation to conduct a thorough investigation" into various defense strategies. Taylor, 529 U.S. at 396. Moreover, such a complete failure "put[] at risk both [Edwards's] right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process." Kimmelman, supra, at 385 (quotations and citations omitted).

Hence, counsel's failure to discover the defense of accident is implicative of Edwards's right to a fundamentally fair trial. Strickland, supra, at 696.

2(a). THE SIXTH CIRCUIT'S PRECLUSION OF PREJUDICE BY DRAWING A CONSCIOUSNESS OF GUILT FROM BASIC FACTS, WHICH, DESPITE COUNSEL'S MISREPRESENTATIONS, THE JURY COULD HAVE REASONABLY CREDITED AS BEING COMMITTED WITH AN INNOCENT STATE OF MIND WAS CONTRARY TO OR AN UNREASONABLE APPLICATION OF STRICKLAND.

The Sixth Circuit rejected Edwards's claim of counsel misrepresenting facts in evidence, as follows:

> "Edwards further claimed that counsel 'misrepresented facts in evidence,' such as the location of Lee's vehicle at the time of the shooting, Lee's body weight, and Edwards's reason for being outside during the early morning hours on the day in question (Edwards testified that he was out walking his dogs at the time he encountered Lee). But even so, Edwards failed to show that the outcome of his trial would have been different but for counsel's purported misrepresentations, especially considering the other evidence of his guilt that the State presented evidence that Edwards fled from the scene after he fired the fatal gunshot dispose of the gun and his clothing, and evaded the police for several days, thus evidencing a consciousness of guilt. And when the police finally located Edwards approximately one week after the shooting, they did not observe any noticeable injuries on his hands, neck, or face to substantiate his assertion that Lee had physically attacked him." (Appx. 1, at *10-11).

In light of the prejudice shown below and for the following reasons, the Sixth Circuit rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Taylor, 529 U.S. at, 339.

Primarily, Edwards notes that counsel [1] misrepresented where Edwards said the shooting occurred; [2] misrepresented that during Edwards's video recorded statement, Sgt. Brown pointed to an injury Edwards sustained during the armed physical assault; [3] misrepresented that Edwards did not know that Ms. McCree was throwing him a birthday party; [4] misrepresented that Edwards testfied he was "pulling' and "yanking" on the car door; [5] misrepresented that Lee weighed 270 pounds; and [6] misrepresented Edwards's testimony in an attempt to mislead the trial judge. See Statement of the Case where Edwards outlined these unnecesery harmful misrepresentations in full detail above.

Being that this is a case where credibility was pivotal to the jury's appraisal of Edwards's innocence, (Appx. F, pg. 221); (Appx. I, pg. 837), and counsel's multiple acts of misrepresentation attacked the very essence of credibility, the Sixth Circuit's prejudice analysis conflicts with controlling legal principles because it not only failed to accord appropriate weight to the pervasive negative effect counsel's multiple misrepresentations had on the jury's assessment of "inferences to be drawn from the evidence," Strickland, Id. at, 695-606, and, failed to consider the prejudicial effect of these misrepresentations as a whole and cumulatively, Taylor, supra, at 398, but also Strickland required consideration of the totality of the evidence before the jury. Strickland, 466 U.S. at, 695. Most importantly, since this is not an insufficiency of the evidence claim, the evidence was not to be viewed in the light most favorable to the verdict. Strickland, supra, at 694.

Rather than complying with these controlling legal principles, the Sixth

Circuit's prejudice analysis turned on a consciousness of guilt determination which "put every deduction which could be drawn against" Edwards from the basic facts, while omitting and obscuring "the converse aspects". Hickory v. United States, 160 U.S. 408, 423 (1898).

For this reason alone, this Court should feel obligated to say that the Sixth Circuits prejudice analysis "crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed...and prejudices are necessarily called into play." Id., at 425. After all, the Sixth Amendment, the Due Process Clause and the language in Hickory stands for the proposition that this Court has a duty that extends to "promptly rebuke" such an analysis "to take care that wrong is not done in this way." Id., at 425 (quoting Reynolds v. United States, 98 U.S. 145, 168 (speaking through Mr. Chief Justice Waite)).

NOTABLY, by omitting and obscuring the exculpatory aspects of the basic facts, the Sixth Circuit's consciousness of guilt determination was actually a thinly veiled credibility determination in favor of the State, which ran up against the Sixth Amendment and the Due Process Clause which prohibited the court from making credibility determinations. United States v. United States Gypsum Co., 438 U.S. 442, 446 (1978). Frankly, this Court has long recognized that "greater weight has sometimes been attached to [consciousness of guilt] than they have fairly warranted." Hickory, supra, at 418 (citation omitted). This is such an occasion.

In particular, the Sixth Circuit did not mention that Edwards voluntarily gave a statement to the police. The court also did not mention that Edwards testified that he did not know Lee was shot when he left the scene, (Appx. I, pg. 784), he threw Lee's gun in the field at the corner of North and York so it could be returned to Lee, (Id., 802), and that he left his clothes behind his

mother's couch. (Id., 803). The court failed to even mention that Edwards cooperated with the police by not only telling the police where he placed his clothing and the gun, but also showed the police exactly where he left the gun. (Id., 784, 799); (Appx., J, pg. 907). Furthermore, while it is true that Edwards didn't turn himself in and didn't want to go to jail, he clearly testified that he was not running from the police; he was staying away from the area where Lee's brothers and cousins can come shoot him. (Appx. I, pgs. 787-788).

Moreover, Edwards's jury was instructed that, "There's been some evidence that the defendant ran away or hid after the alleged crime. THIS EVIDENCE DOES NOT PROVE GUILT. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of consciousness of guilt. SO YOU GET TO DECIDE THAT. (Appx. J, 932-933) (emphasis added). As Justice Stevens, dissenting, said in United States v. Schaeffer, 523 U.S. 303, 336 (1998): "The strong presumption that juries will follow the court's instructions, applies to exculpatory as well as inculpatory evidence." Id. (citing Richardson v. Marsh, 481 U.S. 200, 201 (1987).

Accordingly, there is a strong presumption that the jury could have reasonably decided that Edwards's actions was committed with an innocent state of mind by finding that [1] he understandably left the location to get away from Lee whom had just attacked him and he did not know had been accidentally shot; [2] it was reasonable to leave Lee's gun in the field instead of keeping Lee's gun; [3] it was logical for Edwards to place his clothes behind his mother's couch instead of on the couch; and [4] that just because the gun was no longer in the field after a week and his sweatshirt was no longer with his other clothes, that does not mean that he did not leave these items where he said. Also, the jury could have reasonably concluded that Edwards didn't turn himself in for innocent reasons, as described in Hickory, supra, at 418-419. Moreover,

had counsel appealed to the jury's common sense instead of misrepresenting that Sgt. Brown pointed to an injury Edwards sustained from the attack, the jury could have reasonably concluded that the minor injuries Edwards sustained had obviously healed within a weeks time. As common sense suggest, time heals all injuries.

In short, since the jury heard evidence suggesting an innocent explanation for Edwards's actions, there is a reasonable probability that the jury decided that these facts did not prove guilt. However, there is also a reasonable probability that, since counsel's multiple acts of misrepresentations undermined the very essence of credibility, counsel's misrepresentations effectively hindered the jury's assessment of a bona-fide credibility issue--whether Lee was accidentally shot in the street or intentionally killed in the driveway.

Further, absent the Sixth Circuit's improper consciousness of guilt determination and counsel's egregious representation, the State's case against Edwards was obviously weak. Strickland, supra, at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

Under Strickland, the question to be answered in this case is whether there is a reasonable probability that, absent counsel's misrepresentations, a reasonable juror would have entertained a reasonable doubt. Id. at 694.

It follows that the Sixth Circuit rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Taylor, supra. For this reason, and the fact that counsel's misrepresentations had an injurious effect on the jury's determination of the credibility of Edwards's account, the verdict must be set aside. Strickland, supra, at 691.

2(b). COUNSEL'S MULTIPLE ACTS OF MISREPRESENTATION DURING A TRIAL PREMISED ON CREDIBILITY WAS SUFFICIENT TO ESTABLISH STRICKLAND PREJUDICE.

DEFICIENT PERFORMANCE

Counsel's multiple acts of misrepresention was so egregious that counsel performed constitutionally deficient under any standard. To illustrate, this Court has long held that counsel on both sides must confine arguments within proper bounds. United States v. Young, 470 U.S. 1, 8 (1985). Furthermore, Strickland teaches that defense counsel's representation is confined to a "range of LEGITIMATE decisions regarding how best to represent a criminal defendant." Id., at 456 U.S. 689 (emphasis added). Likewise, "the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." Nix v. Whiteside, 475 U.S. 157, 168 (1986). Also see ABA Standard for Criminal Justice-7.8; MRPC, Rule 8.4(b); and MCR 9.104(A)(3), which ALL prohibits acts of misrepresentation.

Drawing on these principles of settled law, in this case, defense counsel undoubtedly breached his professional obligations. And, there is absolutely no valid justification for counsel to have committed these act of misrepresentation. In other words, it is unquestionable that counsel's actions were "outside the wide range of professionally competent assistance." Strickland, supra, at 690.

PREJUDICE

The answer to whether counsel's multiple acts of misrepresentations during a trial premised on credibility sufficed to establish prejudice, the law is simple and easy of solution. Here's how:

The Strickland prejudice prong allows Edwards to prevail by showing that the result of his trial "is unreliable because of a breakdown in the adversarial process." Id. 466 U.S. at 696. Beyond this, Taylor requires that the prejudicial

effect of counsel's multiple acts of misrepresentation be considered as a whole and cumulatively. Id., at 529 U.S. 398-399.

Drawing heavily on these legal principles, Edwards stresses the point that since he was the ONLY EYEWITNESS and credibility was pivotal to his innocence, viewed as a whole or cumulatively, counsel's multiple acts of misrepresentaion clearly went against the very essence of credibility and thereby "might have influenced the jury's appraisal of" his credibility in a negative manner. Taylor, supra, at 398. After all, counsel's actions most certainly upset the adversarial balance by tipping the balance in the prosecutor's favor by not only creating multiple injurious inferences bearing on the credibility of Edwards's account, Strickland, supra, at 695-696, but also by depriving him of the basic right to have to prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." Cronic, supra, at 656.

In particular, Edwards points out, again, that counsel's misrepresentations effectively hindered the jury's assessment of a bona fide credibility issue--whether Lee was accidentally shot in the street or intentionally killed in the driveway. **NOTABLY**, counsel's arguments should have focused on emphasizing the fact that Edwards explained that he accidentally shot Lee with Lee's gun during an incident which occurred while Lee was parked in the street, not the driveway, with instructions for the Defense of Accident under CJI2d. 7.2 of course. Instead, counsel distorted the facts as though Edwards claimed that he had to take Lee's life during an outmatched attack that occurred in the driveway, which effectively precluded the jury from understanding that the State failed to carry it burden of proving beyond a reasonable doubt that Edwards intentionally killed Lee in the driveway of 906 East York.

Accordingly, Edwards insists that established Federal law and common sense suggests that "a reasonable probability exists" that, with adequate

representation, the jury would have had a reasonable doubt respecting guilt. Strickland, supra, at 695. Edwards's constitutional right to the effective assistance of counsel as defined in Strickland v. Washington, 466 U.S. 688 (1984), was violated.

Edwards therefore respectfully request that this Court find that Edwards has presented compelling reasons for this Court to decide these important federal questions. Rule 10. Or, has presented a compelling reason for this Court to remand this case to the Sixth Circuit for further consideration of a Strickland prejudice analysis independent of the court's consciousness of guilt determination. Especially since the basic facts tends equally to sustain either of two inconsistent beliefs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 7, 2023