No. 24-

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW FRANKLIN WOODBURN, Petitioner

v.

BRYAN MORRISON

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Andrew Woodburn entitled to a remand for an evidentiary hearing and ultimately a new trial where he did not receive the effective assistance of counsel because his trial attorney did not sufficiently investigate to secure an expert for trial to present the only viable defense, the defense of temporary insanity based upon involuntary intoxication – an involuntary intoxication caused by the use of the prescribed medication Paxil?

PARTIES TO THE PROCEEDINGS

The petitioner is Andrew Franklin Woodburn, and the respondent is Bryan Morrison, Warden of the Lakeland Correctional Facility in Coldwater, Michigan.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Franklin Woodburn respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISION BELOW

Woodburn filed a petition for writ of habeas corpus in District Court which was denied. Woodburn appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the District Court in an opinion and order dated January 4, 2024. Woodburn's petition for rehearing was denied on January 29, 2024.

STATEMENT OF JURISDICTION

This Court now has jurisdiction under 28 U.S.C. § 1254 to consider Woodburn's petition for writ of certiorari.

STATEMENT OF THE CASE

Woodburn was tried and convicted by a jury in Michigan's Cheboygan County Circuit Court in January 2014 on charges of assault with intent to commit murder. Transcript, R. 6-6, PageID 682. He was

sentenced on February 18, 2014 to 17 to 35 years in prison. Transcript, R. 6-7, Page ID # 697.

The case against Woodburn arose from a traffic crash in which Andrew's truck ran into a police officer's [Deputy LaChapelle's] cruiser. Andrew was taking Paxil, a prescribed medication.

Andrew became so uncharacteristically agitated from the Paxil that his mother had called 911 for an ambulance. Eventually, Andrew left in his pickup truck and drove the short distance down the private gravel road to where LaChapelle had positioned his cruiser.

The trial centered around the issue of "intent". The main evidence against him consisted of a statement he made during the 911 call in which he stated that the first cop to respond would be "done" or "dead", and eyewitnesses to Andrew's driving and to his arrest.

Before trial, the trial judge ruled that "if you consume alcohol voluntarily it's not a defense to a specific intent crime, so it's not a defense here". Transcript, R. 6-4, Page ID # 228-229. The ruling meant that the defense and the defense witnesses could not present evidence of Andrew's prescribed antidepressant, Paxil, or his alcohol intoxication to argue that this intoxication negated his intent.

This was not permitted, because the defense of voluntary intoxication is not a recognized defense in Michigan, and because temporary insanity due to involuntary intoxication by Paxil could not be presented because defense counsel never filed a "notice of insanity" 30 days before trial as required.

The defense was permitted to argue that the collision was an accident but was not allowed to argue that Paxil induced intoxication negated his specific intent. Transcript, R. 6-4, Page ID # 229. The Court was never enlightened to the fact that Andrew was involuntarily intoxicated by Paxil and by alcohol on the day of the incident, as no defense expert was consulted or had given any opinion in support of these facts.

Deputy LaChapelle's Observations

Deputy LaChapelle was dispatched to the Woodburn residence, driving a fully marked Crown Victoria. Transcript, R. 6-4, Page ID # 275-276. Dispatch advised that Andrew might be seeking "suicide by cop" (to kill himself by provoking a confrontation with police). Transcript, R. 6-4, Page ID # 295. LaChapelle arrived on Black River Trail and pulled off to wait for back up. Transcript, R. 6-4, Page ID # 277. Before backup arrived, LaChapelle saw Andrew's truck coming down the road and had

a "gut feeling" that Andrew was going to do something "bad", whether it was hitting something or getting into a chase, so he pulled back onto the road and reactivated his lights. Transcript, R. 6-4, Page ID # 281. He pulled one or two car lengths onto Black River Trail, a one-lane private gravel driveway that dead ends at a residence, hoping that Andrew would stop and talk to him. Transcript, R. 6-4, Page ID # 282-283. His hope was that Andrew would stop, but ultimately LaChapelle did not want Andrew leaving the area and getting out onto the roadway. Transcript, R. 6-4, Page ID # 298. LaChapelle identified Andrew's truck based upon the dispatcher's description. Transcript, R. 6-4, Page ID # 283-284. As LaChapelle pulled into the intersection, he saw Andrew throw something out of the window and accelerate. The road was flat, and it seemed that the gravel began flying even more, appearing that the truck was accelerating. Transcript, R. 6-4, Page ID # 285. LaChapelle noticed the acceleration when Andrew was 300 to 400 feet away. He stopped his car and put it into reverse. He estimated that Andrew was going at least 60 mph. His car spun on the gravel, and Andrew's truck hit him without swerving. Transcript, R. 6-4, Page ID # 286-287. The pick-up would not have been able to make the turn on the roadway from

Black River Trail at the speed it was travelling. Transcript, R. 6-4, Page ID # 305.

When LaChapelle got out of his car, he saw Andrew's truck and a red car that was also in the accident, both in the ditch. Transcript, R. 6-4, Page ID # 289-290. He drew his gun and ordered Andrew to get out. Andrew did not comply immediately as he was slumped in the truck. Transcript, R. 6-4, Page ID # 290-291. Andrew then yelled at LaChapelle two or three times, "Just fucking shoot me". Transcript, R. 6-4, Page ID # 291, 295. Andrew then got out of his truck and LaChapelle, seeing that he had no weapons, holstered his gun and pulled his taser. LaChapelle ordered Andrew down two more times, then tased him. Transcript, R. 6-4, Page ID # 291.

Sharon Woodburn

Andrew's mother is Sharon Woodburn. She and her husband had recently moved to Michigan from Nevada with Andrew. Transcript, R. 6-5, Page ID # 438-439. On June 23rd, there was an argument that culminated in a 911 call. Andrew was arguing with his father about going to Florida and getting increasingly upset. Transcript, R. 6-5, Page ID # 440-441. Sharon called 911 and requested an ambulance and the police; she said Andrew was violent, but he wasn't initially. Transcript,

R. 6-5, Page ID # 441-442. She went to the bedroom and quietly called 911 so her husband and Andrew would not hear. Transcript, R. 6-5, Page ID # 442. Andrew was irrational. She had never called 911 before on Andrew and his behavior was out of character. Transcript, R. 6-5, Page ID # 443. While she was in the bedroom, Andrew threatened to kill her. Transcript, R. 6-5, Page ID # 451.

On the 911 call Sharon heard Andrew threaten to kill the first cop to respond. Transcript, R. 6-5, Page ID # 452. She was worried about him killing himself by having the police shoot him. Transcript, R. 6-5, Page ID # 453. During the 911 call, Sharon said that Andrew would kill anyone in his way because she was in panic mode and was scared for him. Transcript, R. 6-5, Page ID # 454-455.

Andrew wasn't angry, but agitated, confused, and irrational. Transcript, R. 6-5, Page ID # 457. While she was in the bedroom, Andrew threatened to break down the door, which is what she considered the violent part. Transcript, R. 6-5, Page ID # 459-460.

She was 69 years old, and Andrew had never threatened her before. Transcript, R. 6-5, Page ID # 461. During the day of the 23rd, she started the day out on the deck; Andrew joined her, and they started tearing down the railings. Transcript, R. 6-5, Page ID # 463-464. Andrew

was not agitated. Transcript, R. 6-5, Page ID # 464. After a short time, they went inside, Andrew lay down on the couch, and after some time got up and said, "I'm going to go to Florida." Transcript, R. 6-5, Page ID # 464-465. Andrew had taken his Ativan and his antidepressant, Paxil. Transcript, R. 6-5, Page ID # 465; R. 6-6, Page ID # 580.

Around 2:00, he jumped off the couch and announced his plan to go to Florida. He was wearing shorts and a tee shirt. Andrew and his dad started arguing at this point. Transcript, R. 6-5, Page ID # 467. Andrew was pacing around the room, and he was talking, not making a lot of sense. Transcript, R. 6-5, Page ID # 469. Sharon called 911 because she didn't know what was happening with Andrew. Transcript, R. 6-5, Page ID # 470.

The trial court repeatedly prevented Sharon from testifying to anything other than what she "saw" or "heard"; ordering her to not offer any "opinion", like Andrew was acting "irrational" or "confused" or that she "didn't know [him]". Transcript, R. 6-5, Page ID # 468-473.

Andrew Woodburn

Andrew Woodburn was 34 years old. He moved to Michigan in May 2013 with his mother and father. He brought his truck, a 1990 Ford F-250. Transcript, R. 6-6, Page ID # 575.

As of June 23, Andrew had been on a prescribed antidepressant, Paxil, for about three weeks. Dr. Baltzer prescribed him the Paxil. Andrew took his prescribed medication on June 23 around noon to 12:30 at the latest. Transcript, R. 6-6, Page ID # 580.

Andrew was extremely sore on June 23 (from some incidents that happened in days previous). He had "this inclination to get alcohol". He thought that the alcohol would make him "feel better somehow". He told his mother he was going to drive down to the mailbox, so he took his parents' Toyota and drove to the corner store and bought a pint of rum. For some reason all he bought the last five days was Captain Morgan rum. Andrew is not a big drinker, but he drank half the bottle on the way back to the house, and then, after eating lunch, "felt it necessary" to drink the rest of the bottle. Transcript, R. 6-6, Page ID # 581.

After the alcohol kicked in and took away the pain, he had an argument with his mother and father. This argument escalated to an extreme level that he doesn't think he had ever had with them before. Transcript, R. 6-5, Page ID # 357-358. His mind was working very strange. Transcript, R. 6-6, Page ID # 583. He heard part of the 911 tape where he said he would kill his mother; that is something he would never do. He does not think he said that the first cop who shows up is "dead"

but rather is "done". He did not intend to kill a police officer. Transcript, R. 6-6, Page ID # 584. Rather, he was having a temper tantrum, and he wasn't proud of it. Transcript, R. 6-6, Page ID # 585.

Eventually he left. He was wearing basketball shorts, firefighter boots, and a tee shirt. Transcript, R. 6-6, Page ID # 585. He did not pack any clothing. Transcript, R. 6-6, Page ID # 620. He hit some posts and the culvert. He was swerving in and out. Transcript, R. 6-6, Page ID # 587-588. He threw out some empty bottles that were in the truck because he was heading towards a public road; he also threw out a pack of cigarettes, which he doesn't know why and doesn't make sense. Transcript, R. 6-6, Page ID # 588. He thought he was probably accelerating intermittently because he was reaching down to grab the bottles. Transcript, R. 6-6, Page ID # 589. He thinks he first saw LaChapelle when he first threw the bottles out of his truck. Transcript, R. 6-6, Page ID # 590. He did not intend to kill LaChapelle, he was just leaving, heading towards Florida or Gaylord. Transcript, R. 6-6, Page ID # 591.

After the collision he got out of the truck and told LaChapelle to shoot him as a reaction to the gun being drawn on him, the awfulness of

the situation, and as an immediate instinctual reaction. Transcript, R. 6-6, Page ID # 592-593. LaChapelle tased him and he fell into the ditch.

Andrew believed he would never have made the corner if he had not hit the police car; he would have gone on into the field. Transcript, R. 6-6, Page ID # 595-596. He did not intentionally hit the police car, just as he did not intentionally hit the poles or the culvert. Transcript, R. 6-6, Page ID # 596. He believed that during the last 100 yards before he hit the police car, he was trying to throw the empty bottles out of the truck. Transcript, R. 6-6, Page ID # 596-597. He didn't brake because he was reaching down for the bottles and that he probably wasn't looking at the road. When asked again why he didn't brake, Andrew answered, "I - - that thought didn't even cross my mind to brake. It was - - I didn't - - I still, for some reason, thought I might just be able to pass this officer and he wouldn't pull me over". Andrew conceded that what he said was not logical but said "it's the truth". Transcript, R. 6-6, Page ID # 597-598.

Offer of Proof: Facts Presented to the State Court on Collateral Review and to Present at an Evidentiary Hearing Before the District Court on remand

During litigation of Mr. Woodburn's State Court motion, he sought to expand the record with a report and testimony from Dr. Healy, a psychiatric and psychopharmacological expert, and Dr. Healy's

curriculum vitae. Woodburn also sought an evidentiary hearing to include the following several witnesses and proposed testimony below:

Dr. Healy's Qualifications

Dr. David Healy is an MD FRCPsych. Dr. Healy's qualifications are listed in his 79-page *curriculum vitae.* Dr. Healy's Curriculum Vitae, R. 6-12, Page ID # 1365-1443. His professional experience with antidepressant medications, including SSRI's, dates back 40 years. His post-doctoral thesis, conducted from 1980 to 1985, was on serotonin reuptake mechanisms in patients with depressive disorders. He has published over 20 books on psychiatry, mostly linked to psychopharmacology, has authored 50 chapters in books on similar issues, and has authored over 200 peer-reviewed articles and over 250 other pieces, for the most part dealing with aspects of psychopharmacology. He has been invited to talk at close to 400 international meetings on all continents – largely on the issue of psychotropic drugs and in particular the antidepressant group of drugs.

Dr. Healy has also been a consultant to most of the SSRI manufacturers, including Eli Lilly, Pfizer and GlaxoSmithKline - the makers of Paxil.

He has reviewed virtually every study conducted on the most popular SSRI's. He has reviewed hundreds of thousands of pages of internal company documents concerning these drugs and dozens of depositions of company employees, scientists, academics, experts, and regulatory personnel.

Since 1997, Dr. Healy has been involved in a series of cases involving suicide or homicide on SSRI drugs. Four American SSRI civil cases have gone to trial, the Forsyth case (Prozac), Tobin (Paxil), Dolin (Paxil) and Kilker (Paxil). He has reviewed documents, prepared reports and been deposed in over 40 other civil cases, primarily in the United States. Dr. Healy has also testified in United States criminal cases involving homicides and prepared expert reports in several other homicide cases involving the death penalty, as well as criminal cases in the United Kingdom, Canada, and Australia.

In 2017, Dr. Healy was an expert witness in the Dolin case against GSK, the maker of Paxil, where it became clear that GSK was withholding data on suicides, suicidal acts and aggressive acts from the FDA and other regulators.

Paxil's Well-Documented Link to Aggression, Suicide, and Alcohol Abuse

Dr. Healy will testify that Paxil, like other SSRI's, can trigger suicidality through several mechanisms, all of which can lead to aggression and homicide. These included akathisia, emotional blunting, and psychosis.

He will also testify that SSRI's like Paxil can compromise decision making and can cause compulsive behavior as well as disinhibition. Dr. Healy report on: Andrew Woodburn, page 4, R. 6-12, Page ID # 1349-1363, 1352).

Dr. Healy will testify that research studies support the fact that SSRIs like Paxil can create alcohol cravings. Dr. Healy report on: Andrew Woodburn, pages 4-8, R. 6-12, Page ID # 1352-1356)

During the trial, Andrew Woodburn testified that he had been on Paxil for about 3 weeks, and he had "this inclination to get alcohol" and had to get Captain Morgan rum for some reason – he'd been drinking for the past five days. He also testified that he was "not a big drinker".

As an offer of proof, Dr. Font of McLaren Northern Hospital emergency room will testify that on June 21, 2013 Andrew reported a recent history of binge drinking (see below).

Dr. Healy's Analysis of Paxil and relating to Woodburn

Dr. Healy will testify that Andrew's early exposure to Paxil fits a pattern of Paxil-induced disinhibition and Paxil-triggered alcohol abuse. Dr. Healy report on: Andrew Woodburn, page 9, R. 6-12, Page ID # 1357.

Dr. Healy will testify that Paxil appears to have caused Andrew both alcohol cravings and behavior that might be described as disinhibited, perhaps better described as confused or disorganized.

He further concludes there was an intoxication with Paxil, an involuntary intoxication. Second, Dr. Healy will testify that, most unusually, there was an involuntary intoxication with alcohol secondary to an involuntary intoxication following Paxil. Andrew's drinking was compulsive rather than ordinary or voluntary. The compulsive nature of Andrew's drinking is confirmed by the similar pattern of behavior of pregnant women, a group that is highly motivated not to drink.

Dr. Healy's Conclusion and Expert Opinion

In Dr. Healy's opinion, Mr. Woodburn's behavior was significantly impacted by his Paxil intake, which led to a mental state that left him essentially delirious on the day of the offense. He could not conform his behavior either to his own intentions or to social norms. Dr. Healy report on: Andrew Woodburn, page 14, R. 6-12, Page ID # 1362.

Dr. Healy concludes that it is also his opinion, "based upon reading the trial testimony and subsequent reports, that in the interest of justice an effective defense for Mr. Woodburn would have explored these issues and put forth a medical defense in conjunction with involuntary intoxication. A failure to do so cannot be excused." Dr. Healy report on: Andrew Woodburn, page 14, R. 6-12, Page ID # 1362.

Attorney Craig Elhart

Attorney Elhart will be asked to explain why he did not consider, investigate, or present a temporary insanity defense based upon involuntary intoxication by Paxil (the only viable defense) and specifically why he did not seek out a qualified expert, such as Dr. Healy, to consult before trial, and to utilize during trial, and why he did not file a notice of insanity defense.

Sharon Woodburn

Sharon Woodburn, Andrew's mother, will testify as to the strange series of events that occurred in the days leading up to the incident on June 23rd.

She will testify to her observations of Andrew and his bizarre behavior since he began taking Paxil during the three weeks before the incident, including Andrew walking into the Black River and nearly

drowning before being rescued by neighbors, and the very next day, Andrew jumping out of his father's car travelling 30 mph and running away, only to be found lying in a field yelling for help.

Andrew Woodburn

Andrew Woodburn will testify to his history of medications and what occurred to him while he was taking Paxil during the three weeks before the incident, including his unexplained irrational behavior.

REASON FOR GRANTING THE WRIT

There has never been an evidentiary hearing at any stage of this case for the State trial court judge or the District Judge to make an informed decision on the issue of ineffective assistance of counsel. The trial court judge made his ruling on Woodburn's post-conviction motion without hearing testimony from the proposed witnesses and without fully and fairly considering the entirety of offers of proof presented when the evidentiary hearing was requested.

Relief was denied by the State courts, the District Court, and the Sixth Circuit, but none of these courts considered the issue of ineffective counsel fairly because – without an evidentiary hearing - the record was inadequate to make an informed decision.

I. It was contrary to U.S. Supreme Court law and an unreasonable determination of the facts to deny relief where Woodburn's trial attorney was ineffective for:

1. Failing to consult with a psychopharmacological expert; and

2. Failing to present a temporary insanity defense – the only viable defense - based upon involuntary intoxication caused by Woodburn's prescribed use of the antidepressant Paxil.

28 U.S.C. §2254(d) provides that habeas corpus may be granted if the state appeal: "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court."

28 U.S.C. § 2254(d)(2) should be read in conjunction with 28 U.S.C. § 2254(e)(1) which allows the presumption of correctness as to state court factual determinations to be rebutted by clear and convincing evidence.

To gain habeas relief involving state decisions "contrary to" federal law, a petitioner must show that "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that "the state court decide[d] a case differently than [the Supreme]

Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under the second category, involving the "unreasonable application of" federal law by a state court, a federal habeas court must ask whether the state court's application of clearly established federal law was "objectively reasonable." *Id.* at 409. If the federal court finds that, viewed objectively, the state court has correctly identified the governing legal principle from the Supreme Court's decisions "but unreasonably applie[d] that principle to the facts of the prisoner's case," it may grant the writ. *Id.* at 413.

As the Second Circuit has noted:

> "As an abstract proposition, we can only echo Justice O'Connor's virtually tautological statement that to permit habeas relief under the "unreasonable application" phrase, a state court decision must be not only erroneous but also unreasonable. Some increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions "so far off the mark as to suggest judicial incompetence. *Matteo*, 171 F.3d at 889. We do not believe AEDPA restricted federal habeas corpus to that extent." *Francis v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000).

Michigan Law Recognizes a Temporary Insanity Defense Caused by Involuntary Intoxication

Temporary insanity caused by involuntary intoxication from

prescribed medication is a viable defense in Michigan. It was Woodburn's only viable defense.

Michigan provides that involuntary intoxication caused by prescribed drugs is a permissible defense. *People v. Caulley*, 197 Mich. App. 177, 186-87 (1993) provides:

> "This Court recently distinguished between a defense based upon involuntary intoxication caused by drugs and a defense based upon voluntary intoxication. In *People v Wilkins*, 184 Mich App 443, 449; 459 NW2d 57 (1990), lv den 439 Mich 866 (1991), the panel held that the defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane. As in any case in which the defendant interposes an insanity defense, it remains incumbent upon the defendant to demonstrate that the involuntary use of drugs created a state of mind equivalent to insanity. *Id.* at 448-449."

Dr. Healy's report on Andrew Woodburn, R. 6-12, Page ID # 1349-1363, shows that he is willing to give his expert opinion that Andrew was involuntarily intoxicated based upon his use of the prescription drug Paxil. This involuntary intoxication caused compulsive behavior. As a result of this involuntary intoxication, due to the combination of Paxil and alcohol, Andrew's behavior became significantly disorganized and confused, leading to a mental state described as delirium. Dr. Healy

is willing to conclude that as a result, Andrew could not conform his behavior either to his own intentions or to social norms.

The law is so clear in Michigan regarding involuntary intoxication and prescribed medicine, it is incorporated into the standard jury instructions[1]. Any reasonable criminal defense attorney would be cognizant of the jury instructions or would take a few minutes and familiarize himself with those instructions most pertinent to a given case.

> 1. M Crim JI 7.14 Permanent or Temporary Insanity says that "Legal insanity may be permanent or temporary. You must decide whether the defendant was legally insane at the time of the alleged crime."
>
> 2. M Crim JI 7.10 Person Under the Influence of Alcohol or Controlled Substances says the following:
>
> (1) A person is not legally insane just because he was voluntarily intoxicated by alcohol or drugs at the time of the crime.
>
> (2) ***Drug intoxication is not voluntary and may be a defense if the defendant was unexpectedly intoxicated by the use of a prescribed drug.*** Intoxication was not voluntary where,
>
> (a) the defendant did not know or have

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[1]Male pronouns are used here because petitioner, Andrew Woodburn, is male.

reason to know that the prescribed drug was likely to be intoxicating,

(b) the prescribed drug, not another intoxicant, must have caused the defendant's intoxication, and

(c) as a result of the intoxication, the defendant was rendered temporarily insane or lacked the mental ability to form the intent necessary to commit the crime charged.

3. M Crim JI 7.11 Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof says the following:

(1) The defendant says that he is not guilty by reason of insanity. A person is legally insane if, as a result of mental illness or intellectual disability, he was incapable of understanding the wrongfulness of his conduct, or was unable to conform his conduct to the requirements of the law. The burden is on the defendant to show that he was legally insane.

(2) Before considering the insanity defense, you must be convinced beyond a reasonable doubt that the defendant committed the [crime / crimes] charged by the prosecutor. If you are not, your verdict should simply be not guilty of [that / those] offense[s]. If you are convinced that the defendant committed an offense, you should consider the defendant's claim that he was legally insane.

(3) In order to establish that he was legally insane, the defendant must prove two elements by a preponderance of the evidence. A preponderance of the evidence means that he must prove that it is more likely than not that each of the elements is true.

(4) First, the defendant must prove that he was mentally ill and/or intellectually disabled.

(a) "Mental illness" means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

(b) "Intellectual disability" means significantly subaverage intellectual functioning that appeared before the defendant was 18 years old and impaired two or more of his adaptive skills.

(5) Second, the defendant must prove that, as a result of his mental illness and/or intellectual disability, he either lacked substantial capacity to appreciate the nature and wrongfulness of his act, or lacked substantial capacity to conform his conduct to the requirements of the law.

(6) You should consider these elements separately. If you find that the defendant has proved both of these elements by a preponderance of the evidence, then you must find him not guilty by reason of insanity. If the defendant has failed to prove either or both elements, he

was not legally insane.

4. M Crim JI 7.13 Insanity at the Time of the Crime states, "You must judge the defendant's mental state at the time of the alleged crime. You may consider evidence about his mental condition before and after the crime, but only to help you judge his mental state at the time of the alleged crime."

Without a proper investigation, counsel rendered himself ignorant of the relevant law and facts that supported and recommended a temporary insanity defense. If counsel had investigated and spoken to Dr. Healy, he would have found out that Dr. Healy was willing to testify for the defense to support this temporary insanity defense. Other similarly credentialed experts would likely have also been willing to testify for the defense in support of a temporary insanity defense, given the large body of research (including Dr. Healy's own) showing the dangers and consequences to some individuals who are prescribed the antidepressant Paxil or other SSRI's.

Without this defense, counsel was left to futilely attempt to argue that the collision was an accident, but without facts and expert opinion to rebut the evidence of Andrew's statements about killing his mother and the first police officer he sees counsel could do no more than weakly argue that these statements were just "talk" and "words", and that

Andrew did not mean what he was recorded saying. Had he, instead, presented a temporary insanity defense based upon involuntary intoxication to the jury, Woodburn's behavior would have been understood in a different light and he would have had a reasonably likely chance of acquittal.

An accused's fundamental right to representation by counsel includes the right to effective assistance of counsel. US Const, Amend VI, XIV.

To justify reversal under the federal constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland,* 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687.

Counsel did not competently defend this case. He did not investigate the involuntary intoxication and insanity defense. Consequently, he failed to present Woodburn's only viable defense. The trial was focused exclusively on intent, yet Mr. Woodburn's counsel did not investigate or present the one defense that could refute the prosecution's intent evidence.

Failure to adequately prepare for trial is ineffective assistance of counsel. See *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992) (counsel ineffective for failing to prepare by contacting potential witnesses); *Blackburn v. Foltz*, 828 F.2d 1177, 1184 (6th Cir. 1987) (counsel ineffective for failure to prepare by procuring transcript to impeach witness). The failure to discover exculpatory information is also ineffective assistance of counsel. *Kimmelman v. Morrisson*, 477 U.S. 365, 383; 106 S.Ct. 2574; 91 L.Ed.2d 305 (1986); *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992).

To be effective, defense counsel must investigate, prepare, and timely assert all substantial defenses. *Kimmelman v. Morrison*, 447 U.S. 365 (1986). While "strategic choices made after thorough investigation of law and facts are virtually unchallengeable [,] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91; *see also O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994) ("[A] failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that

investigation was not warranted.").

In establishing prejudice, a defendant must demonstrate a "reasonable probability" that the result of his trial would have been different but for trial counsel's mistakes. *Strickland*, 466 US at 694. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome," *Id.*, but less than a showing that the outcome more likely than not would have been different. *Id.* at 693. The defendant need not conclusively demonstrate his "actual innocence," and the focus should be on whether the result of the trial was "fundamentally unfair or unreliable," *Lockhart v. Fretwell*, 506 U.S. 364, 369; 113 S.Ct. 838; 122 L.Ed.2d 180 (1993). An attorney representing a defendant in a criminal case is given latitude in making strategic and tactical choices. That latitude is contingent, however:

> "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 investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 690-691. The touchstone is making *informed* decisions and providing *informed* advice about the representation. *Sanders v. Ratelle*, 21 F.3d 1446, 1456, 1457 (9th Cir. 1994) (counsel ineffective for failure to investigate third-party's confession to the crime).

In *Miller v. Senkowski*, 268 F.Supp. 2d 296 (E.D. NY. 2003) the court granted a writ of habeas corpus in a case of sodomy and rape where defense counsel failed to consult an expert prior to cross-examination of the prosecution expert or to conduct any relevant research. *See also Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001) (defense counsel's failure to investigate prosecution's medical claims in sexual abuse case was unreasonable and denied petitioner the effective assistance of counsel).

In *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992), the Sixth Circuit affirmed the grant of a writ where trial counsel was ineffective for failing to investigate and present ballistics evidence consistent with claim that shooting had been accidental and at close range, contrary to the prosecution's theory.

In another Sixth Circuit case, *Blackburn v. Foltz*, 828 F.2d

1177 (6th Cir. 1987), the petitioner provided to his attorney the names of potential alibi witnesses. *Id.* at 1182. The trial attorney took some investigatory steps, but "failed to investigate a known and potentially important alibi witness." *Id.* at 1183. The court held that the trial attorney's failure to locate and question the alibi witness constituted ineffective assistance of counsel:

> "Counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary." *Id.* at 1183.

See also, Bigelow v. Williams, 367 F.3d 562 (6th Cir. 2004) (noting that the prosecution had "not even attempted to offer a strategic explanation for [the trial attorney's] failure to investigate [the alibi evidence] further once he learned of [the alibi witness's] evidence." *Id.*

Likewise, in Woodburn's case, there was no strategic reason for failing to present a temporary insanity defense. Given the prosecution's focus on the intent element, it was critical for Woodburn to negate the "intent", by explaining the damaging evidence against him - evidence of the eyewitnesses and the 911 call of Woodburn's stated "intent" to kill - as involuntary intoxication and temporary insanity.

If trial counsel was not aware of the existence of the temporary insanity defense based upon involuntary intoxication, ignorance of the law can constitute ineffective assistance, and in this case, trial counsel's ignorance of the law fell below an objective standard of reasonableness.

In *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991), for example, defense counsel failed to understand a recent change in the law. The Sixth Circuit held that counsel had been ineffective for failing to recognize the change in the applicable law. Mr. Woodburn's attorney did not have to recognize a change in the law – he had only to recognize the long-standing state of Michigan law regarding involuntary intoxication and the insanity defense. *See also Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) (trial counsel ineffective for conceding, in Florida felony murder prosecution, that defendant was guilty of armed robbery; Florida did not require proof of malice or intent to sustain conviction of felony murder; counsel "completely misunderstood the law of felony murder" and was constitutionally ineffective).

Counsel had a duty to make reasonable investigations. He knew that the evidence existed that Andrew was acting in a bizarre manner on the date of the incident and knew or should have known about the documented bizarre behavior on the days during the three weeks

preceding the incident. He also knew or should have known that Dr. Baltzer prescribed Andrew Paxil and Ativan three weeks before the incident.

Counsel made a half-hearted attempt on the first day of trial to suggest that he was going to elicit testimony of drug usage to explain that Andrew had no intent to murder. This attempt was precluded by the judge, who only allowed Attorney Elhart to argue that the collision was an accident, but not that the intoxication negated the intent.

Attorney Elhart had a duty to investigate the viability of an involuntary intoxication defense. He could have conducted some preliminary research and consulted with a psychopharmacologist, such as Dr. Healy, to see if there was any connection between Andrew's Paxil consumption and his bizarre and confused behavior on the day of the incident (within 3 weeks of the start of the regular usage of Paxil) and his bizarre and confused behavior in the days leading up to the incident.

If Attorney Elhart had consulted with Dr. Healy or a similar expert, he would have been armed with the knowledge to present an insanity defense based upon involuntary intoxication. Even without consulting an expert, Attorney Elhart could have searched the internet to see the various articles and studies of the danger of SSRI

antidepressants, including, specifically, Paxil. He would have been able to find cases where experts such as Dr. Healy have testified in wrongful death cases involving Paxil, where homicidal and suicidal behavior have been attributed to Paxil.

Once the jury heard the evidence on the 911 call, they were left with direct evidence of intent. Whether the word "done" or "dead" was used, Andrew's own words merely minutes before the collision proved to be too big of an obstacle for the defense to prevail.

The only viable defense to negate the prosecution's focus on Woodburn's alleged "intent" to murder was to present a temporary insanity defense supported by involuntary intoxication. Counsel took no steps to investigate or present this defense, and Woodburn was convicted as a result.

The flaws in the trial court judge's ruling denying relief from judgment

The District Court incorrectly concluded the following:

> "Given that physicians were not expected to be aware of Paxil's impact, the trial court reasonably applied *Strickland* in deciding that counsel was not ineffective for being unaware of Paxil's impact."
> Opinion and order denying petition for writ of habeas corpus and granting certificate of appealability in part, R. 9, Page ID # 2868.

This ruling improperly and unfairly conflates the population of the physicians in the United States (95% of whom may not be aware of Paxil's impact – according to Dr. Healy) with the population of the available expert witnesses in the United States that would have expertise in the negative side effects of Paxil. Most of these, if not all of these experts would be well versed in the negative effects that Paxil can have on certain individuals. Further, most pharmacists would be able to understand the negative effects of Paxil in certain individuals – especially if these pharmacists spent a few minutes reviewing the usage guides from the manufacturer and researching the peer reviewed articles pertaining to Paxil and other antidepressants, and the litigation surrounding Paxil.

This conclusion reached by the trial court judge appears to be a quick and reckless jump to a conclusion. It just does not make sense that an expert cannot easily be found just because 95% of practicing physicians are not aware that "SSRIs can cause alcohol problems", as Dr. Healy suggests.

Also, an attorney is not expected to be a pharmacological expert – that is why he must consult with the necessary relevant experts during his investigation into possible defenses. Here, the trial attorney, if he

thoroughly reviewed the records and had spoken with Woodburn, would have known that (1) Woodburn had begun taking Paxil three weeks before the incident; (2) Woodburn was not normally a heavy drinker; and (3) had just recently begun engaging in binge drinking and bizarre and dangerous behavior. Any reasonable attorney would have looked into the connection between Paxil and this behavior, as this behavior only began after Woodburn started taking his Paxil as prescribed.

Contrary to the Michigan judge's opinion, and the District Court and the Sixth Circuit opinions, there is reasonable probability of a different outcome at trial if a temporary insanity defense based upon involuntary intoxication from Paxil intoxication is presented. Once the testimony of Dr. Baltzer, Dr. Healy, Andrew Woodburn, and his mother Sharon Woodburn are presented – only then can an evaluation of the likelihood of success be done. The Michigan judge was ill equipped to make a prejudice determination under *Strickland* without hearing the testimony of Dr. Healy, Dr. Baltzer, Andrew Woodburn, and Sharon Woodburn pertaining to Andrew Woodburn's medical condition and his susceptibility to the negative effects of Paxil. The Michigan judge engaged in speculation by merely considering Paxil as a conduit to Woodburn compulsively drinking alcohol and becoming intoxicated by

alcohol alone, and not the intoxicating effects of Paxil itself – prior to any alcohol intoxication.

However, even with the existing evidence presented in Dr. Healy's report, Dr. Healy stated very strongly that the first intoxication was with Paxil, and this intoxication caused delirium. Dr. Healy's report says that Paxil can cause "compulsive behavior" and "disinhibition" (Dr. Healy's report, R. 6-12, Page ID 1352). His report also expresses concerns about mixing alcohol with SSRI's such as Paxil as follows, "There is a quite separate and growing literature pointing to a problematic interaction between SSRIs and alcohol that is germane to this case." (Id, Page ID 1354). Most importantly, Dr. Healy states, "The trial transcript of events on the day of his offense are consistent with the effects of Paxil when it causes problems like this - ***both the direct effects of Paxil*** and its indirect effects through ***and in combination with alcohol.*** Mr. ***Woodburn's behavior appears to have been significantly disorganized and confused at the time.*** (Id, Page ID 1358).

Finally, Dr. Healy concludes, "His interactions with his parents were unrealistic. He drove erratically. Among the many unusual features of the actual events in question was his repeated invitations to the police officer to shoot him. These were consistent with the behaviors

of the previous few days that led to ER evaluations and concerns about possible suicide attempts. ***These behaviors likely reflect a combination of the agitating, suicide inducing effects Paxil can have early in the course of treatment and its disinhibiting effects, whereby people will say and do things with a disregard for the consequences.***" (Id, Page ID 1358-1359).

Dr. Healy, as a medical expert, concludes that Woodburn had an involuntary intoxication with Paxil, "First, in this case there was an intoxication with Paxil. This was an involuntary intoxication." (Id, Page ID 1359).

Even if Dr. Healy testifies at trial solely to the contents of his report and review of the record, his credible testimony would be the linchpin behind a successful temporary insanity defense based upon the involuntary intoxication by the prescribed drug Paxil. But if Dr. Healy was to testify at trial, he would first speak with Andrew Woodburn and his mother Sharon Woodburn, as well as Dr. Baltzer (the prescribing doctor) to be able to give complete and expert testimony of Woodburn's condition while taking Paxil and his intoxication that resulted from his consumption of Paxil. The jury could have then been able to consider Woodburn's bizarre behavior and get a greater understanding of the

cause behind Woodburn's behavior – and give Woodburn a fair consideration as to whether he had the specific intent to kill the police officer blocking the roadway, and whether Woodburn's involuntary intoxication negated this intent.

This temporary insanity defense would have been the only way Woodburn could have won this trial.

The Sixth Circuit states in a footnote on the bottom of page 10 of its opinion,

> "To be sure, Woodburn argues that Paxil's primary intoxicating effect must be considered as well. He notes Dr. Healy's observation that Paxil can cause compulsive behaviors and disinhibition, compromise decision making, and trigger aggressive suicidality. But although Dr. Healy opines that Paxil caused Woodburn to become "confused or disorganized" and crave alcohol, he concluded that Woodburn's case likely did not involve "Paxil induced aggression or suicidality." State Docs., R.6-12 at PageID 1358, 1362 (expert report). In light of that record, we do not think the state court was unreasonable when it focused on Paxil's tendency to cause alcohol cravings. Moreover, its factual finding that alcohol caused the traffic collision is entitled to a presumption of correctness—a presumption that Woodburn has not overcome. *See* 28 U.S.C. § 2254(e)(2)."

This statement is not entirely true. What Healy actually said on R. 6-12, Page ID 1362 was, "But while Mr Woodburn was taking an SSRI (Paxil) and his behavior was aggressive and perhaps suicidal, based on

the records available to me this is not, in my opinion, a case of Paxil induced aggression or suicidality, ***although these possibilities deserve further exploration.*** Such an exploration would require access to a full set of medical records and an opportunity to assess Mr. Woodburn's likely mental state through his own testimony and that of significant others."

This left open the ability for Dr. Healy to learn more about Woodburn and his condition, and to conclude that this was a case of Paxil induced aggression or suicidality after access to additional medical records, after speaking with Woodburn, and after speaking with Woodburn's significant others about their memory of Woodburn's behavior around the time of the incident.

II. Because the existing record establishes that the state courts unreasonably rejected Woodburn's ineffectiveness claim, and because some factual questions remain unresolved, this Court should remand to the District Court to conduct an evidentiary hearing to determine whether Woodburn is entitled to habeas relief.

Woodburn requested an evidentiary hearing in state court, the District Court, and the Sixth Circuit but his efforts were improperly rejected.

Where state courts unreasonably deny relief without allowing the

petitioner an opportunity to develop the record to support his constitutional claim -- federal courts must follow a new two-step review process pursuant to 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). This process begins with 28 U.S.C. § 2254(e), and an earlier Supreme Court decision, *Williams v. Taylor*, 529 U.S. 420 (2000).

The question in *Williams* was whether petitioner "fail[s] to develop" his claim under Section 2254(e) when he tries to develop a factual record, but the state courts reject his efforts to do so. 529 U.S. at 430. The Court found that he does not, explaining, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. Applying this standard, the Court found that the petitioner in *Williams* had exercised proper diligence and therefore had not "failed to develop" his facts. Thus, a federal evidentiary hearing was appropriate. *Id.* at 440.

Importantly, *Williams* was a case in which the state courts had found "no merit to petitioner's claims" *Id.* at 427 (emphasis added). Thus, the Supreme Court's resolution implicitly recognizes that a federal evidentiary hearing will sometimes be necessary even when the state courts have resolved a claim "on the merits" as that phrase is used in a

separate AEDPA provision, §2254(d). That section provides that where a claim has been "adjudicated on the merits in State court proceedings," habeas relief is only available where the state court decision was "unreasonable." This "highly deferential standard requires a petitioner to "show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

The *Williams* decision highlights a tension between §2254(e) and §2254(d): Section 2254(e) seems to allow federal evidentiary hearings whenever the state courts rejected a petitioner's efforts to develop his facts, but Section 2254(d) permits relief only when a state court decision was "unreasonable." It is not obvious how a federal court could possibly assess the "reasonableness" of a state court decision based on a factual record that the state court itself never considered.

Applying the first step of this process to the instant case, Woodburn can satisfy §2254(d) based on the state court record alone because Michigan unreasonably rejected his claims in the face of strong factual allegations that would entitle him to relief – and without conducting an evidentiary hearing.

In the face of the undeveloped factual record, on collateral review Woodburn alleged every single fact that is necessary to prove his claim and requested that the Michigan Courts hold an evidentiary hearing.

By refusing to hold a hearing, the Michigan courts bound themselves to assume the truth of these allegations. And by finding that these facts did not give rise to a meritorious constitutional claim, it rendered a decision that was contrary to and represented an unreasonable application of U.S. Supreme Court law.

There remain factual questions, including the question of the reasons for defense counsel's decisions. Pursuant to §2254(e) and *Williams*, this Court should remand for a hearing to resolve these factual issues. The absence of a hearing deprives Woodburn of an opportunity to prove serious constitutional violations. An evidentiary hearing is required.

CONCLUSION

Mr. Woodburn respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

Date: April 29, 2024

s/ ***Mitchell T. Foster***
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