ORIGINAL

24-6029

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

GLENNA DURAM-PETITIONER

VS.

JEREMY HOWARD-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GLENNA DURAM INMATE NO. 400855
HURON VALLEY CORRECTIONAL FACILITY
3201 BEMIS ROAD
YPSILANTI, MICHIGAN 48197

NO PHONE

QUESTION(S) PRESENTED

I. Whether the trial court violated Glenna Mary Duram's constitutional protections of due process by admitting unfairly prejudicial hearsay evidence from an internet website. The admission of the hearsay website was unfairly prejudicial to defendant-appellant and misleading to the jury. Should the trial court have excluded the evidence?

II. Whether both defense attorneys provided state and federal constitutionally ineffective assistance as trial counsel for failing to call any witnesses on Ms. Duram's behalf, allowing biased jurors to remain, failing to file any pretrial motions to exclude evidence, and failing to procure expert forensic, DNA, and medical experts on Ms. Duram's behalf.

III. Whether both defense attorney provided state and federal constitutional ineffective assistance as appellate counsel for failing to raise the issues of merit in issue I above and for failing to advise Ms. Duram of the potential conflict of interest and consequences of having both trial attorneys also act as appellate counsel on her behalf.

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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[✓] is unpublished.

The opinion of the United States district court appears as Appendix B to the petition and is

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[✓] is unpublished.

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

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 as 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 September 16, 2024

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, 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. §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

UNITED STATES CONSTITUTUION VI AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and pubic trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION XIV AMENDMENT § I

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNSEL FOR FAILING TO CALL ANY WITNESSES ON MS. DURAM'S BEHALF, ALLOWING BIASED JURORS TO REMAIN, FAILING TO FILE ANY PRETRIAL MOTIONS TO EXCLUDE EVIDENCE, AND FIALING TO PROCURE EXPERT FORENSIC, DNA, AND MEDICAL EXPERTS ON MS. DURAM'S BEHALF.

ISSUE II

BOTH DEFENSE ATTORNEYS PROVIDED STATE AND FEDERAL CONSTITUTIONALLY INEFFECTIVE ASSISTANCE AS APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUES OF MERIT IN ISSUE I ABOVE AND FOR FAILING TO ADVISE MS. DURAM OF THE POTENTIAL CONFLICT OF INTEREST AND CONSEQUENCES OF HAVING BOTH TRIAL ATTORNEYS ALSO ACT AS APPELLANT COUNSEL ON HER BEHALF.

On December 23, 2019 the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal in a standard order.

Petitioner filed a Writ of Habeas Corpus on or about December 21, 2020 raising the following issue:

Ground One: THE TRIAL COURT VIOLATED GLENNA MARY DURAM'S CONSTITUTIONAL PROTECTIONS OF DUE PROCESS BY ADMITTING UNFAIRLY PREJUDICIAL HEARSAY EVIDENCE FROM AN INTERNET WEBSITE. THE ADMISSION OF THE HEARSAY WEBSITE WAS UNFAIRLY PREJUDICIAL TO DEFENDANT-APPELLANT AND MISLEADING TO THE JURY. THE TRIAL COURT SHOULD HAVE EXCLUDED THE EVIDENCE.

On December 21, 2020 Petitioner filed a Writ of Habeas Corpus and a Motion to Stay Habeas Proceedings. On March 22, 2021 the U.S. District Court for the Eastern District of Michigan, Southern Division issued and Opinion and Order holding in abeyance the Petition for Writ of Habeas Corpus.

On or about April 13, 2022, Appellant filed a Motion for Relief from Judgment pursuant MCR 6.500 in the Wayne County circuit court, raising the following issues:

ISSUE I

BOTH DEFENSE ATTORNEYS PROVIDED STATE AND FEDERAL CONSTITUTIONALLY INEFFECTIVE ASSISTANCE AS TRIAL COUNSEL FOR FAILING TO CALL ANY WITNESSES ON MS. DURAM'S BEHALF, ALLOWING BIASED JURORS TO REMAIN, FAILING TO FILE ANY PRETRIAL MOTIONS TO EXCLUDE EVIDENCE, AND FAILING TO PROCURE EXPERT FORENSIC, DNA, AND MEDICAL EXPERTS ON MS. DURAN'S BEHALF.

ISSUE II

BOTH DEFENSE ATTORNEYS PROVIDE STATE AND FEDERAL CONSTITUTUIONALLY INEFFECTIVE ASSISTANCE AS APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUES OF MERIT IN ISSUE I ABOVE AND FOR FAILING TO ADVISE MS. DURAM OF THE POTENTIAL CONFLICT OF INTEREST AND CONSEQUENCES OF HAVING BOTH TRIAL ATTORNEYS ALSO ACT AS APPELLATE COUNSEL ON HER BEHALF.

On April 4, 2023 the Honorable Kevin Drake denied the Motion for Relief from Judgment.

Petitioner filed an application for leave to appeal in the Michigan Court of Appeals raising the above two issues which was denied on October 11, 2022. Petitioner appealed to the Michigan Supreme Court raising the same two issues which was denied on April 4, 2023.

Petitioner filed a Petition under 28 USC § 2254 for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan and presented the following grounds:

Ground One: THE TRIAL COURT VIOLATED GLENNA MARY DURAM'S CONSTITUTIONAL PROTECTIONS OF DUE PROCESS BY ADMITTING UNFAIRLY PREJUDICIAL HEARSAY EVIDENCE FROM AN INTERNET WEBSITE. THE ADMISSION OF THE HEARSAY WEBSITE WAS UNFAIRLY PREJUDICIAL TO DEFENDANT-APPELLANT AND MISLEADING TO THE JURY. THE TRIAL COURT SHOULD HAVE EXCLUDED THE EVIDENCE.

Ground Two: BOTH DEFENSE ATTORNEYS PROVIDED STATED AND

FEDREAL CONSTITUTUIONALLY INEFFECTIVE ASSISTANCE AS TRIAL COUNSEL FOR FAILING TO CALL ANY WITNESSES ON MS. DURAM'S BEHALF, ALLOWING BIASED JURORS TO REMAIN, FAILING TO FILE ANY PRETRIAL MOTIONS TO EXCLUDE EVIDENCE, AND FIALING TO PROCURE EXPERT FORENSIC, DNA, AND MEDICAL EXPERTS ON MS. DURAM'S BEHALF.

Ground Three: BOTH DEFENSE ATTORNEYS PROVIDE STATE AND FEDERAL CONSTITUTIONALLY INEFFECTIVE ASSISTANCE AS APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUES OF MERIT IN ISSUE I ABOVE AND FOR FAILING TO ADVISE MS. DURAM OF THE POTENTIAL CONFLICT OF INTEREST AND CONSEQUENCES OF HAVING BOTH TRIAL ATTORNEYS ALSO ACT AS APPELLANT COUNSEL ON HER BEHALF.

On February 1, 2024, United States District Judge Sean F. Cox issued an Order Denying Appellant's petition for writ of habeas corpus, certificate of appealability and leave to appeal in forma pauperis under 28 U.S.C. § 2254, case no. 2:19-cv-11166. (ATTACHMENT B).

On or about February 24, 2024, Petitioner timely filed a Notice of Appeal and an application to proceed with an appeal without prepayment of fees and costs in the United States District Court Eastern District of Michigan.

On or about October 27, 2022, Petitioner filed a Motion for Certificate of Appealability and a motion/application for prisoner to proceed without prepayment of fees or costs, with a certified prisoner account statement attached in the United States Court of Appeals for the Sixth Circuit. On September 16, 2024, a panel of the United States Court of Appeals for the Sixth Circuit denied Petitioner's COA application.

Petitioner's constitutional rights have been violated under the United States Constitution VI and XIV Amendment where he was convicted of assault with intent to do great bodily harm less than murder and armed robbery base on legally insufficient evidence

REASONS FOR GRANTING THE PETITION

This petition should be granted because the United States District Court for the Eastern District of Michigan issued an Order denying Ms. Duram's petition under 28§ 2254 for Writ of Habeas Corpus which was in error. The Petitioner has shown that her United States Constitutional rights have been violated and the decisions of the state courts resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States in their interpretation of the United States Constitution for fair and impartial, due process and equal protection in criminal trials.

Petitioner was denied due process under the United States Constitution, Ams VI and XIV when her due process was violated by admitting unfairly prejudicial hearsay evidence from an internet website; when both defense attorneys provided ineffective assistance as trial counsel for failing to call any witnesses on her behalf, allowing biased jurors to remain; and both defense attorneys gave ineffective assistance for failing to raise the issues of merit and failing to advise Petitioner of the potential conflict of interest and consequences of having trial attorneys also act as appellant counsel on her behalf. While it is the Respondent's position that Petitioner "failed to make a substantial showing of the denial of a federal constitutional right," "the Court denied her petition for writ of habeas corpus."

Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *Napue v Illinois*, 360 US 264, 269, 272 (1959). All defendants enjoy a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. US Const amends VI; XIV; Const 1963, art 1, § 20. An important element of a fair trial is that only

relevant and competent evidence is introduced against the accused. *Bruton v United States,* 391 US 123, 131 (1968). This right requires a fair trial of the issues involved in the particular case and a determination of disputed questions of fact on the basis of only properly admitted evidence.

Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. All relevant evidence of the Defendant's guilt is always prejudicial, but where the evidence is relevant and probative, it should be excluded only where it is unfairly prejudicial. Evidence offered against a party is prejudicial by nature. The test is whether or not the evidence's probative value is substantially outweighed by unfair prejudice.

A hearsay statement may be admitted under MRE 803 (24) if the statement satisfied four factors. The evidence must:

1. Demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions;
2. Be relevant to a material fact;
3. Be the most probative evidence of that fact reasonably available; and
4. Serve the interests of justice by its admission.

The court stated that in a review of the first requirement, courts should consider all factors that add or detract from the statements reliability. The second requirement is met provided that the evidence is relevant to a fact that is significant or essential to the issues or matter at hand. The evidence will satisfy the third requirement of it is the most probative evidence reasonably available to prove the truth of the matter asserted. Essentially a "best

evidence" requirement. The fourth element requires exclusion of any evidence that meets the first three factors if the court determines that the purpose of the rules and interests of justice will not be well served by the statement's admission.

Trial counsel objected to the admission of the Ruger websites referenced in Detective Hoffman's testimony. (T VII, 96-117). The basis of the objection at trial was two part. First, that the evidence was unfairly prejudicial and was inadmissible under MRE 403. The People never determine the content of the website and it therefore lacks any element of trustworthiness. The intended purpose of the evidence was to prove that Defendant-Appellant accessed the website to learn how to use the firearm, thus proving the element of premeditation. However, without knowing the actual content, the evidence called for speculation by the jury, lacked probative value, and was misleading.

Second, trial counsel argued that the evidence was inadmissible under MRE 803 (24). The trial court failed to properly apply the analytical standards as set forth in the *Katt* decision. The trial court failed to consider that the lack of specific content detracted from the evidence's reliability. Further, there was no proof who the person was who actually used the phone. The evidence was not the most probative or best evidence available. That would have been the actual full content of the website, not just a reference to the site. It is highly unlikely that the jury would have found premeditation absent this testimony and website evidence.

Defendant-Appellant submits to this court that the trial court's admission of the website references by Detective Hoffman improperly influenced the trial's outcome. Reliance of this evidence helped establish the element of premeditation and was the only such evidence4 presented at trial. This is the scenario that falls outside the range of reasonable and principled

outcomes that defines an abuse of discretion per *People v. Unger*. As a result, Defendant-Appellant's right to due process was violated.

Both the Federal and Michigan Constitutions guarantee a criminal defendant the right to assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 687; 104 S Ct. 2052; 80 L Ed 2d 6 (1984).

Providing a claim of ineffective assistance of counsel requires that the defendant demonstrate that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, supra, at 687. This Court evaluates trial counsel's performance from counsel's perspective at the time of the alleged error and in light of the circumstances. *Strickland* at 689. In challenging counsel's reasonableness, the defendant must overcome the presumption that the challenged action could have been trial strategy.

The Sixth Amendment requires counsel to reasonably investigate all potentially viable defenses. See *Cando v Yukins*, 461 F3d 791, 799 (CA 6, 2006); see also *Beasley v United States*, 491 F2d 687, 696 (CA 6, 1974). A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. The importance of defense counsel's pretrial investigation and preparation cannot be overemphasized. It has been repeatedly started that a criminal defendant is denied the effective assistance of counsel when his or her attorney fails to investigate and present a meritorious insanity defense.

Effective assistance requires that defense counsel make reasonable investigations into the prosecution's case and into various defense strategies. *Kimmelman v. Morrison*, 477 US 365, 384; 106 SCt 2574; 91 Led2d 305 (1986). Ineffective assistance of counsel can be premised on a

failure to call witnesses or present other evidence which would have supported a substantial defense that might have made a difference in the outcome of the trial. In order to overcome the resumption of sound trial strategy, the defendant must show that counsel's failure to prepare resulted in a failure to present valuable evidence that would have substantially benefitted the accused.

Both Trial Counsel performed deficiently by not seeking out an expert to rebut the prosecution's forensic, DNA, digital, and medical testimony. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Am VI, XIV. The test for determining ineffective assistance is twofold: whether "'counsel's performance was deficient,'" and if so, whether his "'deficient performance prejudice the defense.'" *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1984)). Counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms.

Trial counsel's performance fell below that of prevailing professional norms. Those norms place on counsel "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691; *see also* ABA Standards for Criminal Justice, Defense Function, Part IV, Investigation and Preparation, 4-4.1(a). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005). Though counsel's strategic decisions are entitled to deference, counsel's strategy must be based on reasonable investigative decisions. *Strickland*, 466 US at 691.

One way in which counsel can fail to meet his investigative duty is by failing to consult an expert when an expert's assistance would be critical to the defense. *Harrington v Richter*, 562 US 86; 131 S Ct 770; 178 L Ed 2d 624 *2911 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both"); *see e.g., Dando v Yukins*, 461 F3d 791, 798-99 (CA 6, 2006) (counsel performed deficiently by not exploring battered-women's-syndrome defense to robbery charges). Thus, it has been held that counsel has performed deficiently by failing to consult a pathologist to determine how best to rebut prosecution expert testimony that the defendant's actions caused death. *Couch v Booker*, 632 F3d 241, 246-47 (CA 6, 2011); *Cornwell v Woodford*, 312 Fed Appx 58, 59-60 (CA 9, 2009); *Weddell v Weber*, 290 F Supp 2d 1011, 1021-24 (SC, 2003).

Counsel failed to meet their investigative duty. The DNS was on the Ruger and bullet casings were at issue. The cell phone data was at issue, especially with respect to premeditation. Whether or not Ms. Duram was physically conscious after the bullet wounds to her head were at issue. Counsel's job was to subject the prosecution's interpretation to adversarial testing. They could not perform that job without first determining whether another expert might dispute the prosecution expert's interpretation.

A defendant bringing an ineffectiveness claim bears the burden of demonstrating that trial counsel lacked a valid strategic reason for his asserted mistake. However, counsel will still be found ineffective on the basis of a strategic decision if the strategy employed was not a sound or reasonable one.

The defendant is prejudiced by counsel's deficient performance where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A "reasonable probability" is less than a preponderance of evidence. *Strickland*, 466 US at 693 ("we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case"); see also *Nix v Whiteside*, 475 US 157, 175; 106 S Ct 988; 89 L Ed 2d 123 (1986) ("a defendant need not establish that the attorney's deficient performance more than likely than not altered the outcome in order to establish prejudice under *Strickland*"). It is "probability sufficient to undermine confidence in the outcome." Id. at 694.

There is at least a reasonable probability that a jury unconvinced that the death-scene physical evidence, the DNA evidence, the cell phone evidence, medical evidence, and/or the forensic evidence pointed conclusively toward guilt would have returned guilty verdicts. By far the prosecution's strongest evidence was the testimony of a parade of witnesses giving opinions about the inferences to be drawn from the physical evidence, the DNA evidence, the cell phone evidence, medical evidence, and/or the forensic evidence. Those witnesses seemed to foreclose even the possibility that someone other than Ms. Duram was the shooter, and the defense offered virtually no response. And the defense called absolutely no witnesses whatsoever. Thus, any concerns about how to assess the other circumstantial evidence faded into the background; the more objective physical, forensic, medical, DNA evidence, etc., seemingly told a clear story. Had defense counsel produced experts that likely would have provided a different viewpoint, and the jury thus learned that the story told by the evidence was not at all clear, the jury would then have had to weigh much more carefully the other circumstantial evidence. And the story that evidence told was not clear, either. Although aspects of Ms. Duram's behavior were admittedly

suspicious, there were other circumstances that pointed toward another shooter. It is hard to conceive that a juror relying solely on the other circumstantial evidence would have viewed that evidence as proof beyond a reasonable doubt. There is certainly a reasonable probability that hearing both sides of the evidence story would have created reasonable doubt for at least one of the jurors.

Likewise, Defense Counsel was ineffective for allowing biased jurors to remain on the jury. Defense Counsel was not out of challenges. Turning more specifically to the issue of challenging a juror for cause, in *Groppi v Wisconsin*, 400 US 505; 91 S Ct 490; 27 L Ed 2d 571, 575 (1971), the United States Supreme Court re-affirmed the due process right, under US Const, Am XIV, to a fair and impartial jury in a state criminal jury trial:

> The issue in this case is not whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant on a charge such as the appellant faced here. The issue concerns, rather, the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord. We had occasion to consider this precise questions almost 10 years ago in *Irvin v Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961). There we found that an Indiana conviction could not constitutionally stand because the jury had been infected by community prejudice before the trial had commenced. What the Court said in that case is wholly relevant here:
>
> > In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 US 258; 68 S Ct 499; 92 L Ed 682 (1948); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749; 50 ALR 1243 (1927). 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942, 946 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155b. his verdict must be based upon the evidence developed at the trial. Cf. *Thompson v City of Louisville*, 362 US 199; 80 S Ct 624; 4 L Ed 2d 651; 80 ALR2d 1355 (1960). This is true, regardless of the heinousness of the crime charged, the apparent guilty of the

> offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 ...."

366 US at 722; 6 L Ed at 755 [footnotes omitted].

In *State v Chastain*, 947 P2d 57 (Mont, 1997), overruled in part on other grounds in *State v Herrman*, 70 P3d 738 (Mont, 2003), the Montana Supreme Court, applying the *Strickland* standard, found that defense trial counsel's failure, in a sexual assault case involving three young girls, to challenge two jurors for cause amounted to ineffective assistance, and remanded for a new trial. The first juror reported that her sister had previously been abducted at age sixteen, that the juror had strong feelings, and the incident could taint the juror's judgment against the defendant. The second juror stated that pre-trial publicity had evoked strong feelings and it was hard for the juror to say of the publicity impaired her judgment. The *Herrman* court held that "we overrule *Chastain's* holding that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record which is silent as to the lawyer's reasoning." *Herrman, supra*, p 745.

The Montana Supreme Court recognized that "[d]efense counsel had a clear duty to ensure Chastain's right to a fair trial by a panel of impartial jurors" *Id*, p. 60. The Court then found that defense trial counsel breached that duty and the defendant was prejudiced:

> In this case, the statements of both prospective jurors quoted above demanded, at a minimum, additional inquiry. Both prospective jurors expressed reservations about their ability to judge this case fairly. Yet counsel failed to follow up with additional questions asking whether those prospective jurors could set aside their feelings and render a fair verdict. Nothing in the record explains this failure. Other than counsel's bare comment that the first prospective juror was "a vital part of being on the jury or not on the jury," the record does not reflect a tactical decision by defense counsel not to challenge these two jurors. Nor does the record explain counsel's failure to exclude these two jurors under the preemptory challenges allowed....

> The evidence against Chastain was not so overwhelming that defense counsel's failure to examine these jurors for cause or to exercise even one for-cause challenge can be viewed as harmless error. Chastain was acquitted on one of the charges of sexual intercourse without consent. There was no physical evidence. Three years passed between the camping trip and when Chastain was arrested and formally charged. The accusations were made by children of a young age. Chastain had never before been accused of similar acts.
>
> Where, as here, defense counsel abandons his client's right to challenge a juror for no apparent reason, error must be attributed to the lawyer.... [T]he presence on the jury of even one juror who could not fairly assess the credibility of the witnesses must be presumed prejudicial. Thus, the two prongs of the *Strickland* test for ineffective assistance of counsel are met. We hold that, under the circumstances here presented, counsel's failure to take steps to prevent the presence on the jury of two jurors who may not have been able to fairly serve amounts to ineffective assistance of counsel [*Id*, p. 60]

Similarly, in *Hughes v United States*, 258 F3d 453 (CA 6, 2001), the Sixth Circuit reversed and remanded for a new trial in a case involving the robbery of a deputy federal marshal, where a juror had disclosed during voir dire that she had a nephew who was a police officer, she was close to a couple of detectives, she did not think she could be a fair juror, and defense trial counsel failed to challenge the juror for cause. Citing *United States v Martinez-Salazar*, 529 US 304, 316; 120 S Ct 774; 145 L Ed 2d 794 (2000), the Sixth Circuit concluded that seating the juror, without any assurance that the juror would be fair, could not be legitimate trial strategy, and that the presence of the biased juror was structural error requiring a new trial without showing actual prejudice. *Hughes, supra*, p 463.

More recently, in *Franklin v Anderson*, 434 F3d 412 (CA 6, 2006), the Sixth Circuit held, among other things, that the trial court violated the habeas petitioner's right to an impartial jury by refusing to dismiss a juror who, despite the trial court's repeated correction, had repeatedly stated during jury selection that she believed the defendant had the burden of proving innocence.

See also, *Brown v State*, 164 So3d 1016; 2014 WL 5555001 (Miss App, 2014) (juror said it would it would be hard to be impartial and agreed it would probably be better if she did not sit; trial counsel ineffective in failing to challenge the juror); compare *Holder v Palmer*, 588 F3d 328 (CA 6, 2009) (no due process violation where jurors expressed opinions against interracial relationships be stated under oath that they could set those opinions aside).

Furthermore, where a juror has expressed bias, courts take a dim view of any subsequent assurance of impartiality the juror make in response to leading questions:

> [C]oaxed recantations of admissions of bias are merely fodder for appeal.... It is not a district court's role to rehabilitate jurors whose spontaneous, and thus most reliable and honest, responses on voir dire expose a serious question about their ability to be fair and impartial [*State v Freshment*, 43 P3d 968, 973-974 (Mont, 2002) (internal quotation marks and citation committed)]

See also, *Matarranz v State*, 133 So3d 473 (Fla, 2013), in which the Florida Supreme Court held that the trial court improperly denied a challenge for cause of a juror who initially expressed doubt she could be impartial in a burglary case where her family's residence had been burglarized during Christmas, notwithstanding the juror's later statement that she could maintain an open mind. The Supreme Court distinguished between bias resulting from not being familiar with the judicial system, which may be rehabilitated, from bias based on life experiences, which cannot.

In the present case, during jury selection, it came out that the jurors in seats 2 and 3 were against open carry and guns in general. J 60-62. Both jurors deliberated on the verdict. Defense trial counsel's failure to challenge these two jurors, whose initial, and most reliable responses were that they were flat out that they did not like guns or open carry, was objectively unreasonable.

Furthermore, there was no legitimate trial strategy in failing to challenge these two jurors for cause. Seating the two biased jurors likely affected the verdict, because the case involved guns which was the direct cause of death in this case. For all of these reasons, due process requires a new trial, or at least a remand for a *Ginther* hearing. Const 1963, art 1, § 17, 20; US Const, Ams VI, XIV.

The Federal Constitution guarantee a criminal defendant the right to assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 687; 104 S C5 2052; 80 L Ed 2d 6 (1986). The Michigan Rules of Professional Conduct proscribe for attorneys specific expectations and standards for the practice of law. MRPC 1.7(b) governing conflicts of interest states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Both Mr. Miller and Mr. Prysock fall within the parameters of this rule because their representation of Ms. Duram had the potential to be materially limited by their own interests in not to be found to have provided ineffective assistance during trial. Nor was it likely that Mr. Miller would have pointed out on appeal that Mr. Prysock was ineffective or vice versa. The potential existed for both lawyers to want to avoid being labeled ineffective or reprimanded. And, in fact, neither attorney referred to any form of ineffective assistance provided by themselves, although Ms. Duram would argue there is ample evidence to support all of the claims of ineffectiveness in this motion.

The rule is violated when a client is represented by an attorney whose representation *may*

be limited due to a personal interest. *See* MRPC 1.7(b). Even if Mr. Miller and Mr. Prysock thought their representation would not be adversely affected, there is no record that Ms. Duram provided informed consent for the potential conflict. *See* MRPC 1.7(b); *CenTra, Inc. v Estrin*, 538 F.3d 402, 414 (6th Cir. 2008). Even had Ms. Duram consented, the Rule would still have been violated as the Comment notes that when a disinterested attorney would not advise a client to agree to the representation under the circumstance, a client's consent cannot cure the conflict.

Although neither Mr. Miller nor Mr. Prysock are MAACS roster attorneys, there is a similar caution in MAACS Regulations, Section III (B)(4) which reads:

> The Administrator shall have discretion to approve or deny a defendant's request to be represented on appeal by his or her trial counsel, provided that such a request must follow an explanation by the trial court, on the record, about the potential consequences of such representation.

The exceptional nature of this violation requires that this court grant Ms. Duram a new trial. While violations of MRPC are generally remedied through disciplinary procedure, the purpose of the rules is to protect the public through sanctions aimed at deterring unethical conduct. When this purpose is not fulfilled, sanctions are proven inadequate and a more effective remedy is necessary. The conflict of interest rules are:

> 'a frank recognition that, human nature being what it is, a dual relationship involving adverse or conflicting interests, constitutes enormous temptation to take advantage of one or both parties to such relationship' and that '[t]he purpose of [the conflict of interest rules] is to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom.'

Barkley v Detroit, 204 Mich App 194, 202-203 (1994) (citing Formal Opinion 160 (November 13954) (quoting Formal Opinion 132 (January 1950)). As the MRPC did not fulfill their purpose of protecting the public, the courts are justified in using remedies typically found in the

criminal and civil context to compel compliance.

Ms. Duram also demonstrates a Sixth Amendment violation stemming from the conflict of interest and violation s under MPRC 1.7 and MPRC 1.10. A defendant has a right to an attorney without any conflicting interests, whose only interest in the case is vindicating the rights of his client. *Robinson v Stegall*, 343 F. Supp. 2d 626 (E.D. Mich. 2004) (citing *Holloway v Arkansas*, 435 US 475, 483-84 (1978)). The right to effective assistance of counsel can be violated when there is a conflict of interest. *Cuyler v Sullivan*, 446 US 335, 349 (1980). The Supreme Court held that, "the conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" *Sullivan*, 446 U.S. at 349 (quoting *Glasser v. United States,* 315 U.S. 60, 76 (1942). Once a conflict is established, a showing of prejudice is not required as assessing the effect of conflicting interests on attorney strategies and tactics is nearly impossible. *Sullivan*, 446 U.S. at 350; *Holloway*, 435 U.S. at 491. The remedy is reversal of the conviction.

To demonstrate a violation of Sixth Amendment rights, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan, supra*, 446 U.S. at 348. An actual conflict of interest meant that it was in Mr. Miller's and Mr. Prysock's interest to avoid addressing their own ineffectiveness in the appeal. Here actual performance was absolutely affected, most notably, the decision by counsel to omit the instances of their own ineffectiveness at trial in their appellate brief. See Appellant Brief. Prejudice can be shown, and the actual conflict requires a new trial. *Sullivan, supra.*

The record does not reflect that either Mr. Miller or Mr. Prysock informed the court of the potential of a conflict of interest. The record also does not reflect that Ms. Duram was properly

informed of the potential conflict or given an opportunity to provide informed consent. If properly informed, Ms. Duram would have had the knowledge necessary to object to Mr. Miller's and Mr. Prysock's subsequent representation of her on appeal. If Ms. Duram objected, a trial court's refusal to inquire into the conflict may have required automatic reversal. *Sullivan*, 446 U.S. at 347; 1 A Mich. Litig. Forms & Analysis § 22:1 ("Where there exists an appearance of a conflict of interest and the potential for unethical conduct, it is reversible error for the trial court to deny a motion to disqualify opposing counsel").

Of not, neither attorney has had much, if any, experience in criminal appeals according to a search done on the appellate courts website Mr. Miller and Mr. Prysock in their joint brief filed on Ms. Duram's behalf. The brief discussed various facts of the case of multiple pieces of evidence that should have been suppressed (notes found on the scene, cell phone records, etc.) but only argued the cell phone record suppression. This was a *ten-day* trial. Former Appellate Counsel's brief consisted of a whopping *ten pages* exclusive of table of contents and appendixes with one sole issue raised despite the fact there were multiple other viable issues to raise, including their own ineffectiveness. This just further proves Ms. Miller's and Mr. Prysock's complete ineptitude in protecting Ms. Duram's rights.

Although an appellate attorney is not required to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful appellate issues may still be deficient and prejudice his client by omitting a significant and obvious issue which would have resulted in reversal on appeal. *Matthews v. Abramajtys*, 92 F.Supp.2d 615 (E.D. Mich, 2000), aff'd on other grds 319 F. 3d 780 (CA6, 2003).

The issues raised in above have merit. Due process provisions of the Fourteenth

Amendment entitle a criminal defendant to the effective assistance of counsel in his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). In *Franklin v Anderson*, 434 F.3d 412 (CA6 2006), petitioner's trial counsel was ineffective in failing to challenge a juror who was not impartial, and appellate counsel's failure to raise the issue on appeal amounted to ineffective assistance of counsel. This issue, along with issues ineffectiveness for failure to procure expert witnesses (or call any witnesses whatsoever) on Ms. Duram's behalf were much stronger than the single issue appellate counsel raised regarding a weak evidentiary issue that the Court of Appeals denied.

For all of these reasons, due process requires a new trial. Const. 1963, art 1, §§ 17, 20; US. Const, Ams VI, XIV.

Petitioner was denied her federal constitutional right to the effective assistance of counsel when trial counsel failed to when both defense attorneys provided ineffective assistance as trial counsel for failing to call any witnesses on her behalf, allowing biased jurors to remain; and both defense attorneys gave ineffective assistance for failing to raise the issues of merit and failing to advise Petitioner of the potential conflict of interest and consequences of having trial attorneys also act as appellant counsel on her behalf. A defendant accused has the right under the Federal and State Constitutions to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, §20; *Strickland, supra*, at 668. To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. She must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that he was not performing as the 'Counsel' guaranteed by the Sixth Amendment." *Id* at 687. Second, she must show the deficient performance was prejudicial. *Id.* At 687. Prejudice is established where there is a reasonable probability that, but for

counsel's error, the result of the proceeding would have been different. *Id.* At 694; *People v LaVearn*, 448 Mich 207, 216 (1995).

Because the trial court failed to respond to the statement of bias by Juror Six on voir dire, counsel's failure to respond in turn was objectively unreasonable pursuant to *Strickland.* "When a venire person expressly admits bias on voir dire, without a court response or follow-up, for counsel not to respond [to the statement of partiality] in turn is simply a failure 'to exercise the customary skill and diligence that a reasonable competent attorney would provide.'" *Miller v Webb*, 385 F3d 666, 675. (Internal citations omitted). [T]here is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." *Miller v Webb*, 385 F3d 666, 676. Moreover, "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.. . . because Defendant's trial counsel impaneled biased jurors, prejudice under *Strickland* is presumed, and a new trial is required." *Id* at 676. Also see *Hughes v United States*, 258 F3d 453 (CA 6, 2001) (Citing *United States v Martinez-Salazar*, 528 US 304 (2000)), concluding that seating the juror, without any assurance that the juror would be fair, could not be legitimate trial strategy, and that the presence of the biased juror was structural error requiring a new trial without showing actual prejudice. *Hughes*, 258 F3d at 463. Or, if this court's determination is contrary to the forgoing precedent, then "A defendant may prove that his counsel's failure to strike a juror prejudiced him only by showing 'that the juror was actually biased against him.'" *Miller v Francis*, 269 F3d 609, 616 (CA 6, 2001). In this case, it is clear that Juror Six was biased against the defense for he was automatically accepting as fact the prosecution's case and stated that the defense had to present "positive proof or evidence to contradict what she's [prosecutor] saying." (t2 17).

Voir dire is universally recognized as having critical importance in a criminal trial and there can be no doubt that a defendant's constitutional right to counsel includes the right to question prospective jurors so that the defendant may intelligently exercise peremptory challenges and challenges for cause. *Powell v Alabama*, 287 US 45, 69 (1932); *Morgan v Illinois*, 504 US 719 (1992), mandating an adequate voir dire to identify unqualified jurors. Defense counsel, who had remaining peremptory challenges, could have excused the biased jurors with no further inquiry. Had counsel conducted further inquiry, it is likely that actual prejudice would have been revealed by his presence on Defendant's jury and he would have been excusable to cause. MCR 2.551 (D) (2), (3) or (4).

Moreover, trial counsel's failure to conduct necessary follow-up, which would have likely led to a successful cause challenge, constituted ineffective assistance of counsel and requires the grant of a new trial for that reason as well.

The constitutional right to counsel entitles a criminal defendant to the effective assistance of counsel. *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). This Court's standard for reviewing ineffective assistance claims is set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 08 L Ed 2d 674 (1984).

Petitioner's U.S. Const., Fourteenth Amendment right to effective assistance of appellate counsel was violated. Unbeknownst to Ms. Glenna Duram, trial counsels, Mr. Miller and Mr. Prysock took it upon themselves to file one issue in Ms. Duram's direct appeal. They were not appointed by the court to assist Ms. Duram in perfecting her direct appeal nor were they hired by Ms. Duram.

In addition to showing that trial counsel made unreasonable and serious errors during the

court proceedings, Defendant must also show that she was prejudiced by defense counsel's deficient performance. Defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different." *Strickland,* 466 US at 694; *Williams v Taylor,* 529 US 362 (2000).

Appellant-Defendant asserts that the mistakes of appellate counsels Mr. Miller and Mr. Prysock, are apparent from the record and that any deficiency in the record was caused and created by the attorneys who were responsible for the creation of the record in the first place. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on a first appeal, as of right. *Evitts v Lucey*, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985).

The performance of appellate counsel is subject to scrutiny under the *Strickland* standard, and the issue of appellate counsel's failure to inform Defendant of the possibility of a conflict of interest is tantamount to ineffective assistance of appellate counsel. Trial counsels Mr. Miller and Mr. Prysock, acting as appellate Counsels were ineffective for not presenting ineffective assistance of trial counsel on direct appeal. Had the issue of ineffective assistance of trial counsel been filed as an issue, the outcome of Defendant's appeal would have been different. Further Mr. Miller and Mr. Prysock failed to move for *Ginther* or an evidentiary hearing under these circumstances, can constitute reversible error. Here, as shown, the grossly sub-par trial presentation of Ms. Glenna Duram should have compelled appellate counsels Mr. Miller and Mr. Prysock to file for *Ginther* relief, and they should be made to explain their failure to do so at a hearing.

A fundamental component of our criminal justice system is an accused's right to be represented by counsel at every critical stage of the proceedings. *Powell v. Alabama*, 287 U.S. 45 (1932). The federal and state constitutions guarantee an accused the right to the assistance of counsel. U.S. Const. Am. VI. A criminal defendant has a constitutional right to counsel at every stage of the proceedings where his rights may be affected. *Coleman v. Alabama*, 399 U.S. 1 (1970) .

Mr. Miller's and Mr. Prysock's conduct, and failure to address or litigate same both constitute a deviation from the recognized Minimum Standards governing the appellate representation of indigent criminal defendants. Ineffective assistance of counsel claims are governed by the Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Under *Strickland,* counsel's assistance is only constitutionally ineffective if it is both deficient and prejudicial." *English v. Romanowski,* 602 F.3d 714, 725 (6th Cir.2010). . Mr. Simons' conduct clearly prejudiced Ms. Glenna Duram's outcome on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Glenna Duram-Petitioner

Date: November 13, 2024