24-6049

ORIGINAL

No. 24-_____

In The
SUPREME COURT OF THE UNITED STATES

MARIO RAY CHILDS,
Petitioner,

v.

JEFF TANNER, Warden
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mario Ray Childs, #132248
Petitioner, *in pro per*[*]
Macomb Correctional Facility
34625 26 Mile Road
Lenox Township, MI 48048

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

QUESTIONS PRESENTED FOR REVIEW

First Question

Was Petitioner Denied His Constitutional Right To Fair Trial And The Effective Assistance Of Counsel Where A Multitude Of Inactions On The Part Of Trial Counsel, Denied Him A Fair Trial Proceeding, Pursuant To U.S. Const., Amends VI, XIV; Mich. Const. 1963, Art. 1, §20, Where;

Second Question

Petitioner Submits That He was denied his due process right to a properly instructed jury and the effective assistance of counsel where his attorney did not object when the trial court failed to instruct the jury that Mr. Childs was not obligated to attempt to retreat before using deadly force to defend himself and that his belief that deadly force was necessary was presumptively reasonable, Pursuant To U.S. Const., Amends VI, XIV; Mich. Const. 1963, Art. 1, §20, Where;

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Ray Childs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, denying a certificate of appealability (July 2, 2024), appears at APPENDIX A to the petition and is reported at *Childs v Tanner*, 2024 U.S. App. LEXIS 16217. The final opinion and order of the United States District Court - E.D. Mich., denying the petition for writ of habeas corpus and declining to issue a certificate of appealability appears as APPENDIX B to the petition and is reported at *Childs v Tanner*, 2024 U.S. Dist. LEXIS 17109, 2024 WL 386836, Dk. No. 23-cv-10864, (E.D. Mich., January 31, 2024). The final order from the Michigan Supreme Court is reported at *People v Childs*, 510 Mich. 1065, 981 N.W.2d. 474, 2022 Mich. LEXIS 2031 (Mich. Sup. Ct., No. 164359, Nov. 30, 2022). The final opinion of the Michigan Court of Appeals is reported at *People v Childs*, 2022 Mich. App. LEXIS 1229, 2022 WL 726786, (Mich. Ct. App. No. 354401, March 10, 2022). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on July 2, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470

Mich 634, 641; 638 NW2d 597 (2004) (citing *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Petitioner Mario Ray Childs (hereinafter "Petitioner") commenced this action as a State prisoner in the District Court pursuant to 28 U.S.C. § 2254, by filing a petition for A Writ of Habeas Corpus on April 9, 2023. On January 31, 2024, District Court Judge George Caram Steeh entered an Opinion and Order denying the petition for writ of habeas corpus, declining to issue a certificate of appealability, and denying leave to appeal *in forma pauperis.* **(See APP. B, Opinion and Order)**.

The final order of the United States Court of Appeals, 6th Circuit, denying COA Application was issued on July 2, 2024. **(See APP. A, Order and Judgment)**. Judgment was entered on the same date.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Petitioner is serving a prison term of 40 to 70 years' imprisonment for his conviction of Second-degree murder, (M.C.L.A. 750.317), Petitioner was sentenced as a fourth-offense habitual offender, (M.C.L.A. 769.12).

On March 3, 2019, Mr. Childs and Mr. Swanigan got into an argument over money in the AFC's downstairs dining room. A few minutes later, they were arguing inside of Mr. Childs' apartment, when Mr. Childs inserted a steak knife into Mr. Swanigan's abdomen.

Mr. Swanigan died before paramedics could get him out of Mr. Child's room. Mr. Childs was charged with second degree murder.

Mr. Childs testified that Mr. Swanigan came at him with the steak knife, and that he was able to grab it, and turn it around and into Mr. Swanigan's stomach. He

testified that he was acting to save his own life. Practically all of the testimony from all of the witnesses was in agreement. The primary, if not sole, dispute between the parties was how the evidence should be interpreted and whether the government had proven beyond reasonable doubt that Mr. Childs was not entitled to use deadly force to protect himself.

March 2, 2019, was a Saturday. Ms. Stevens was staying with Mr. Childs that weekend. She testified they were drinking Saturday evening, started back up again at breakfast on Sunday, and continued drinking until dinner. TII 22, 50; TIII 55. They were also smoking crack. Ms. Stevens believed the last time they smoked crack on March 3 was about a half hour before EMS arrived at the AFC. TII 40, 50. Mr. Childs only recalled smoking crack at around 7:00 a.m. and 12:00 p.m. that day. TIII 56. Aside from Mr. Childs and Mr. Swanigan, Ms. Stevens was the only witness to what transpired between the two men. She testified that she believed she was of clear mind and could accurately recall what occurred. TII 53-54.

At some point on March 3, Mr. Childs gave Mr. Swanigan some money to buy a fifth of LTD whiskey and a pack of Newports. TII 22-23; TIII 56-58. When Mr. Swanigan returned to the AFC that evening with Mr. Childs' cigarettes and liquor, the two men got into a heated argument about Mr. Childs' change. TII 23-25, 43-44; TIII 58.

Ms. Thompson testified that after she finished making dinner, she called everyone downstairs. TI 155. When Mr. Childs got downstairs, Lisa and Kenneth, who were also residents, were already eating. TI 197; TII 8.

Ms. Thompson recalled that Mr. Childs said something to Mr. Swanigan about owing him $30, and "that was it." TI 155; TII 8-9.

Lisa recalled that Mr. Childs "told Cedric that he owed him $30, and either Cedric's gonna beat his ass or Mario's gonna beat Cedric's ass." TI 197.

Mr. Childs acknowledged that Lisa's recollection was more accurate than Ms. Thompson's, and that he had threatened to beat Mr. Swanigan's ass. He testified when he got downstairs he said something to Mr. Swanigan about wanting his change, which started an argument.

TIII 58. Then:

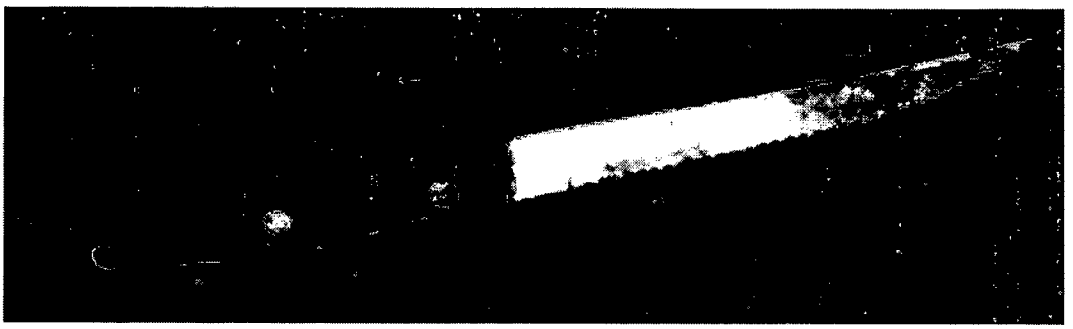
> I walked up to him, asked him for my stuff, asked him ... give me my change.
> He said he ain't got my stuff. We started arguing back and forth. Then I said "I'll beat yo' ass if you don't give me my money." [TIII 94]

Mr. Childs also said: "Bitch, you gonna give me my money." TIII 93-94. According to Mr. Childs, Mr. Swanigan did not threaten him with physical violence, but was not silent. He "called me a bunch of names [and was] like 'bitches, I don't owe you nothing.' " TIII 114. "Then we still argued again. I walked away. Went up to my room, closed the door, start eating my food." TIII 94.

Ms. Thompson, TI 155, Lisa, TI 198, and Mr. Childs, TIII 94, all testified that Mr. Childs went upstairs with his plate first, and that Mr. Swanigan went upstairs afterward.

When Ms. Thompson got upstairs, she saw Mr. Childs in the doorway of his room standing over Mr. Swanigan, holding his legs. TI 156, 175. When she looked back over, she noticed he had the steak knife in Mr. Childs' hand. TI 156-58; Px 19. She told him to drop it, and he tossed it. TI 182. It bounced off Lisa's shirt, and fell on the floor. TI 208. Another resident picked it up and put it in the sink. TI 209; Px

33. Ms. Stevens testified she believed the knife was on the dresser on March 3, but she did not see Mr. Childs or Mr. Swanigan pick it up off the dresser. TII 57; Px 19.



Mr. Childs testified: "I walked over to sit down on my bed because I was like shocked at this moment; [I] couldn't believe he was trying to stab me." TIII 73.

Mario Childs is convicted of Murder

Mr. Childs was arraigned on a warrant charging him with second degree murder on March 5, 2019, and was subsequently bound over for trial. He was referred to the Center for Forensic Psychology for both competency and criminal responsibity evaluations, and was deemed competent to stand trial and not legally insane. 6/21/19, 10, 13.

Prior to trial, Mr. Childs' counsel deferred to his request that she not field any plea offers due to his innocence. 6/21/19, 7. At trial, she deferred to his request that she call the officer in charge as a witness for the defense. TI 229-31. The officer testified that he could not provide a "yes or no," answer to counsel's question about whether Mr. Childs told police he had a defense to murder while being interrogated on March 3:

> He gave a story ... He gave a story. He gave a story. ... I don't know how to answer that because you asked me 'yes or no'. I can't say what's a defense and what's not. ... My job is to find the facts. ... I find the facts. [TIII 45]

As a result of the officer's unresponsive testimony and other issues that are described below, the jury found Mr. Childs guilty of second degree murder. TIV 62. The trial court then sentenced him to 40 to 70 years in prison.

Mr. Childs ask that this Court grant the petition for a writ of certiorari?

REASONS FOR GRANTING THE PETITION

I. **Mario Childs was denied his right to a fair trial and to the effective assistance of counsel where, among other errors that misled the jury, the prosecutor falsely claimed Mr. Childs was bragging about being a killer and that the decedent had defensive wounds on his hands, and where his attorney incorrectly conceded Mr. Childs waited hours before telling police he acted in self-defense. US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.**

Standard of Review

Questions of law are reviewed de novo. *People v Chavis*, 468 Mich 84, 91 (2003).

A "defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error." *People v Watson*, 245 Mich App 572, 586 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763 (1999).

Defendants may raise an ineffective assistance of counsel claim for the first time on appeal because it involves a constitutional error that likely affected the outcome of the trial. *People v Henry*, 239 Mich App 140 (1999). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579 (2002). Such claims are reviewed on the existing record. *People v Ullah*, 216 Mich App 669, 684 (1996).

Discussion

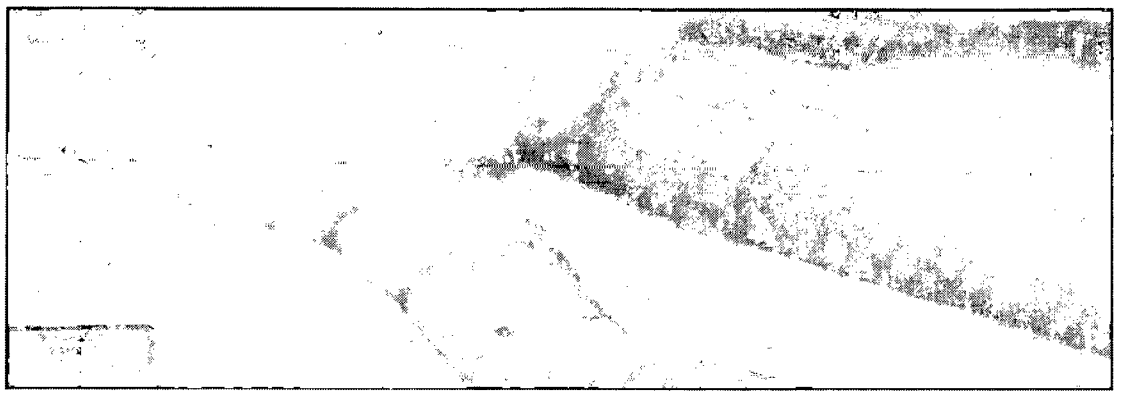
There was no evidence showing that Mario Childs did not act in self-defense, let alone proof beyond reasonable doubt. The jury's verdict was the result of his attorney's failure to adequately prepare for trial and raise timely objections to

prejudicial and misleading exhibits and evidence, and the prosecutor's targeted exploitation of his counsel's deficient performance.

Defendants have a due process right to a fair trial. *Lisenba v California*, 314 US 219, 236 (1941); US Const, Ams V, XIV; Const 1963, art 1, § 17. This right is infringed when a prosecutor engages in unfair tactics to gain an advantage. *Id.* A fair trial also requires the effective assistance of counsel, which is guaranteed by the Sixth Amendment. US Const, Amend VI; Const 1963, Art 1, § 20. *Strickland v Washington*, 466 US 668 (1984). The prosecutor's improper tactics and his counsel's complete lack of diligence resulted in a verdict that was based on lies. Mr. Childs is entitled to a new trial.

A. The prosecutor's argument that Mr. Swanigan had defensive wounds on his hands caused by a serrated knife was false and rejected by the prosecutor's expert

Petitioner testified that he believed Mr. Swanigan had the knife by its handle in his right hand when he charged towards him. TIII 66, 6970. An evidence tech testified that after Mr. Swanigan died, he "secure[d] his hands for any further evidence that might be found." TIII 6. The tech took five photos of Mr. Swanigan's hands, which were admitted into evidence, and depicted some sort of abrasions. TIII 5-9, Px 35-40. There was no other testimony about his hands.



The autopsy report, which was also admitted into evidence, addressed the presence of the abrasions on Mr. Swanigan's hands in the photo, and noted:

> There was a 2 x 1.5-inch cluster of multiple healing excoriations on the posterior aspect of the right hand. [Px 23, 2]

The prosecutor did not ask the pathologist who performed the autopsy about Mr. Swanigan's hands when she testified. The prosecutor did, however, ask the pathologist if she identified any wounds other than the fatal stab wound:

> Q. Did you note other injuries to the external part of the body?
>
> A. No. There were no other injuries present. [TII 76]

The pathologist testified: "we exam[ined] the external body and we document[ed] **all the injuries** and identifying features that would be present," TII 73, and there was a "**single injury** on the body," "there was **one injury present**, which was a stab wound," and "[t]here were **no other injuries** present." TIII 73-76. She testified that Exhibit 29, a photo of Mr. Swanigan after his death, was taken "to indicate evidence of treatment as well as no other injuries." TII 80-81.

"[I]f the prosecutor desires to get facts before the jury of which he was knowledge, they should be presented by him as a witness, and not by way of argument." *People v Williams*, 159 Mich. 518, 522 (1910). The prosecutor did not challenge her expert on this point. The prosecutor did not ask the pathologist about

the photos of Mr. Swanigan's hand or about the possible source of the excoriations she noted in the autopsy report. She did not ask if it was possible that a serrated steak knife could have caused the cuts on Mr. Swanigan's hands, or if there would have been time for his wounds to heal in the fifty minutes between when he was stabbed and pronounced dead.[1] The prosecutor did not call another witness to provide a different opinion than her expert about the cause of the abrasions on Mr. Swanigan's hands.

Instead, after the proofs were closed, the prosecutor argued that the cuts were defensive wounds, which had been inflicted by a serrated knife. She argued that this meant that Mr. Childs could not have been acting in self-defense and was lying when he testified that Mr. Swanigan came at him with a knife and that he "twisted it and then I just pushed, pushed the knife in his body." TIII 68.

In closing, the prosecutor claimed:

> I submit to you that, ladies and gentlemen, these marks and these little cuts you see on the victim's hands, these are defensive wounds from trying to stop those pointed blades from that steak knife going into his body.
>
> So those are those cuts and scrapes you see, that's from someone trying to stop a blade from going into their body, not holding a handle and having that handle turned on you. [TIII 137] ...
>
> The defendant is the one that had the knife in his hands and not Cedric. Cedric did not have the knife in his hand. ... You can see that from the little serrated cuts on the victim's hand from the knife. You wouldn't get those cuts if you're holding the handle. [TIII 148]
>
> Think about ... the cuts on the victim's hands. [TIII 149]

---

1 Ms. Thompson called 9-1-1 at 6:08 p.m., within a few minutes of the time Mr. Swanigan was stabbed, Px 2, he arrived at the hospital at 6:54 p.m., and "was PEA and pronounced," at 6:56 p.m. Px 23, 5.

If the apparent "cuts" on Mr. Swanigan's hands were caused by the steak knife, the prosecutor would have been right, and Mr. Childs' explanation for what occurred would not have made sense. The numerous abrasions would have meant that Mr. Swanigan was grasping onto the knife's blade and was cut at least eight separate times, as Mr. Childs repeatedly attempted to stab him. But the 'cuts' were not caused by the serrated blade of the steak knife and they were not incurred at the time of Mr. Swanigan's death. The prosecutor violated due process by alleging that they were.

The prosecutor is "permitted to state to the jury such inferences of fact as he in good faith draws from all the circumstances of the case in making his argument to the jury, and what would very likely follow if such inferences should turn out to be correct." *Henry C Hart Mfg Co v Mann's Boudoir Car Co*, 65 Mich 564, 565 (1887). Stated more succinctly: "The prosecutor may argue all reasonable inferences from the evidence in the record, ***unless the prosecutor knows an inference to be false***." ABA Standards for Criminal Justice (4th ed), Standard 3-6.8 (emphasis added).

Even if the prosecutor had not known these allegations were false, her argument would have still been improper. Like the prosecutor's argument, the jury's verdict also must be based on the evidence presented. M Crim JI 3.5; *People v Smith*, 190 Mich App 352, 354-55 (1991). While "factfinders may and should use their own common sense and everyday experience when evaluating evidence ... the scope of the doctrine is limited strictly to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *People v Simon*, 189 Mich App 565, 568 (1991), citing 9 Wigmore, Evidence (Chadbourn rev) § 2570, p 728.

The conclusion that the abrasions on Mr. Swanigan's hands were defensive wounds caused by a serrated greatly exceeds matters of elemental experience. See *People v McFarlane*, 325 Mich App 507, 518 (2018) ("This case required expert medical testimony because it was beyond the ken of ordinary persons to evaluate the medical evidence and assess the nature and extent of KM's injuries, the timing of those injuries, and the possible mechanisms of injury implicated by the medical evidence").

The jury would have assumed that the prosecutor was knowledgeable and being forthright about what could be discerned about the source and timing of the excoriations based on her experience prosecuting violent crime, her certainty about their cause, and defense counsel's failure to object. See *Berger v United States*, 295 US 78, 88-89 (1935) ("It is fair to say that the average jury ... has confidence that [prosecutor's ethical] obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.").

Defense counsel recognized and argued that the prosecutor had not shown that Mr. Swanigan did not have the abrasions on his hand prior to March 3, TIV 21, but did not object to the prosecutor's repeated arguments about the purported defensive wounds. This was objectively unreasonable. That the prosecutor could not produce a photo of Mr. Swanigan's hand taken on March 2, 2019 would not have surprised the jury. That the prosecutor would claim that the abrasions were defensive wounds when the pathologist who examined Mr. Swanigan concluded they were not would have shocked the jury. Counsel's failure to object created the

impression the argument was proper and the inference was reasonable. See *Hodge v Hurley*, 426 F3d 368, 378 (CA 6, 2005) ("trial counsel's failure to object to any of the numerous improper statements in the prosecution's closing argument is well outside this range [of objective reasonableness]").

After failing to object, counsel also performed deficiently in failing to remind the jury that state's expert testified Mr. Swanigan had "no other injuries," and in failing to point out that autopsy report described the marks as "healing excoriations." Counsel compounded the prejudice to Mr. Childs when she conceded it was possible that they were caused by Mr. Swanigan and Mr. Childs "struggling over a knife, a serrated steak knife." TIV 22. This was exactly what the prosecutor argued because it conflicted with Mr. Childs' testimony about how he ended up stabbing Mr. Swanigan.

The trial court's instruction that the attorneys' arguments were not evidence, but was "only meant to help you understand the evidence," and that the jury should "only accept things the lawyers say that are supported by the evidence or by your own common sense," TIV 36, enhanced the prejudice. While the jury may have believed it could use its own common sense to conclude the marks were recent defensive wounds caused by a serrated knife, they would have been wrong. "[T]he scope of the doctrine [permitting jurors to use common sense to draw reasonable inferences] is limited strictly to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *Simon*, 189 Mich App at 568. The time, source, and cause of the excoriations greatly exceeded such matters. See also *McFarlane*, 325 Mich App at 518.

The prejudice is obvious and substantial. There was no evidence, aside from the prosecutor's emphatic assurances that rebutted Mr. Childs' testimony that he acted in self-defense. Had the prosecutor limited her argument to the admitted evidence or had defense counsel objected and insisted that she do so, Mario Childs would have been acquitted.

B. Evidence and argument based on video-exhibits of Mr. Childs in the backseat of a patrol car immediately after his arrest unfairly and inaccurately implied that he was happy and proud that he killed Mr. Swanigan

Mr. Childs' right to a fair trial and the effective assistance of counsel was also violated where, without objection, the prosecutor admitted and published seven to twenty second video clips of Mr. Childs in the backseat of the patrol car, which were inflammatory and misleading. Px 41-45. These clips were extracted from a 69-minute video, which was not published. Px 32. The video shows Officer Nicholas Urista's patrol car after Mr. Childs was arrested and placed in the backseat. TIII 15-17; Px 32.

The shorter clips and the entire video contained inflammatory character evidence. Because Exhibits 41 through 45 were extracted from Exhibit 32, they were needly cumulative and lacking in probative value. The clips were unfairly prejudicial when taken out of context, and misled the jury about what Mr. Childs' statements following Mr. Swanigan's death. They should have been excluded under MRE 403.

1. Overview of the exhibits and the argument pertaining to the exhibits

Nine minutes into Exhibit 32, Mr. Childs is placed in the back of the patrol car. He immediately begins speaking to himself and/or Officer Urista about 'dope' and other matters that may or may not involve Mr. Swanigan. Urista remained in the vehicle with Mr. Childs for the next hour. TIII 17.

When the prosecutor admitted and published Prosecutor's Exhibits 41 through 45, she explained, "these are just different segments so that we don't have to watch the whole hour and a half of the backseat video." Defense counsel said she did not object. TIII 18.

The timeline of the admitted exhibits and statements that are relevant, but that were not published, include Mr. Childs' saying:

- *Unpublished* – "I just get locked up and die. Whatever." [located at approximately10:25 of Px 32, and immediately preceding Px 41]

- Exhibit 41 – "If the n**** don't die he should die." [located at approximately 10:35 of Px 32]

- *Unpublished* – "He picked up the knife and I took it from him and I stabbed him." [located at approximately 15:00 of Px 32]

- Exhibit 42 – "I'm a killa baby [indiscernible] pull it out and I'll kill you." [located at approximately 16:50 of Px 32]

- Exhibit 43 – "I don't like most people baby. I tolerate 'em. I [indiscernible] I joke. I'll kill you." [located at approximately 17:30 of Px 32]

- *Unpublished* – "How you gonna give me this much time bruh? He came at me, and picked the knife off my table, I musta twist his wrist, took it, and I stabbed him." [located at approximately 17:50 of Px 32]

- Exhibit 44 – "You deserve to die." [located at approximately 19:00 of Px 32]

- *Unpublished* – "Bring me down. Fuck me up. Make me listen to what he got to say. Yeah I stabbed him. [indiscernible] gonna stab

me. He picked the knife up off the dresser. I took it from him. And I stabbed him. [] reached for the knife and that's that. And I stabbed him." [located at approximately 20:40 of Px 32]

- o *Unpublished* – "He try to stab me and I come out the best. I [inaudible] I stabbed him. That's a stab wound. I stabbed him. I took him out. He was trying to take me out. I'm fighting for survival. I just happened to win that time. He had the knife up. ...walked passed my dresser. Going [indiscernible] my bed. He picked the knife up. [located at approximately 37:20 of Px 32]

- Exhibit 45 – "I stabbed him. [indiscernible] I'm a killer. A true killer." [located at approximately 40:00 of Px 32]

- o *Unpublished* – "I kill you man. I ain't got time for you to be coming by busting me on my head. My neck [indiscernible] You wanna fight?" [immediately following Px 45, and located at approximately 40:20 of Px 32]

During her closing argument, the prosecutor repeatedly cited Mr. Childs' statements in which he purportedly was: "bragging about being a killer," "wishing the victim dead," and saying, "he deserves to die." TIII 142-143, 145, 147, 148, 150.

The prosecutor also asked Mr. Childs to explain his statement during her cross examination. TIII 104-105. She did not ask Mr. Childs when he first told the police he acted in self-defense. She did not address when he first asserted this defense during her closing either. Mr. Childs' attorney first addressed this subject during her closing argument:

> Mr. Childs is taken to the DDC by officers. We know the statement was concluded at 9:54, still on March 3. So we're only talking a couple of hours. And they know that within a couple of hours that Mario Childs said Cedric took the knife and came at me. ... They know that that same night. Not a month later. Not a Week later. We're talking just a couple of hours after the incident. Just a couple of hours after Mr. Childs has been drinking and smoking. [TIV 10-11] ...
>
> The only evidence we have of how it occurred is from Mr. Childs. He told the police right after the incident. It's not the first hour because the first hour he is stuffed handcuffed in the back of the

> scout car. As soon as they brought him to the detention center he told him exactly what happened. [TIV 28]

The prosecutor recognized that defense counsel had not reviewed Exhibit 32, in which Mr. Childs repeatedly says that Mr. Swanigan came after him with a knife. During her rebuttal, the prosecutor exploited counsel's oversight by arguing Mr. Childs' failure to assert he was acting in self-defense until hours after his arrest indicated the claim was fabricated:

> It wasn't because it took the Defendant sitting in the back of the cop car for a couple of hours to be able to say, "well, he came at me with a knife, that's what happened." That's when he tells police three hours later, "oh yeah, he came at me with a knife." [TIV 30-31] ...
>
> Defense counsel argued that he wouldn't say it was selfdefense and also say, "well, I wanted to kill my friend."
> I submit to you that he wouldn't say both of those things, and initially he said he hoped his friend died. He sat in the back of that cop car - I will play the clip again. (Video being played)
>
> That's what he said until three hours later he made it to the police station, and he talked to the police. He didn't say it was self-defense, he didn't tell anyone in the house it was self-defense. He said "if he doesn't die, he should die."
>
> That's the intent to kill, ladies and gentlemen. [TIV 32 -33]

During its deliberations, the jury sent a note asking: "Was Mario advised by counsel before making a statement to police." TIV 57. The trial court told the jury that this was "a legal issue that you are not to consider at all." TIV 57. Following this, the jury returned a verdict finding the government had proven beyond reasonable doubt that Mr. Childs had not acted in self-defense and was guilty of second degree murder. TIV 61-62.

2. In a murder trial, evidence that the defendant has referred to himself as a "killer," a "true killer," "do[es]n't like most people," and "will kill you," is extremely prejudicial character evidence, and was explicitly cited by the

prosecutor as evidence of Mr. Childs' intent to murder Mr. Swanigan

Evidence that Mr. Childs described himself as "a killer," and "a true killer," (Px 32, 42, 45) and that he said "I don't like most people baby. I tolerate 'em," "I joke," and "I'll kill you," (Px 32, Px 43) was evidence of Mr. Childs' character, which the prosecutor repeatedly argued established he murdered Mr. Swanigan. They were inadmissible pursuant to MRE 404(a).

Exhibits 32 and 41-45 should have also been excluded pursuant to MRE 403 because they had little-to-no probative value.[2] Any probative value they had was heavily outweighed by the practical inevitability that Mr. Childs would be unfairly prejudiced by their admission. The videos depict Mr. Childs' nonsensical stream of consciousness rant, during which he appears, as he testified, "very high." TIII 79. The jury would have considered Mr. Childs' statements repeatedly referring to himself as "a killer," as evidence that he was a killer, has killed before, and acted with malice when he killed Mr. Swanigan. In other words, that it would "cause the jury to prejudge the defendant because of his 'bad general record and deny him a fair opportunity to defend against a particular charge.' " *People v Crawford*, 485 Mich 376, 384 (1998), quoting *Michelson v United States*, 335 US 469, 476 (1948).

This was exactly how the prosecutor urged the jury to consider the statements during her opening statement:

> You're gonna hear statements made by the defendant where he says ... *"I'm a killer baby"* ... *"I don't like most people. I tolerate people, but I'll kill you."* ... These are statements that the

2 Unpublished portions of Exhibit 32 had the ability to rebut the charge Mr. Childs only fabricated his claim Mr. Swanigan initially attacked him with the knife after speaking with an attorney and/or having hours to come up with the 'story'. Because he was not asserting an insanity defense and he admitted he stabbed Mr. Swanigan to the home's other residents, a paramedic, the police, and when he testified, it is difficult to see any other purpose for which the videos could be properly considered.

> defendant made in the back of that cop car unprompted. ... These are the statements he made freely in the back of the cop car that night. [TI 143-44]

This was also how the prosecutor urged the jury to consider the statements during her closing argument:

> These jury instructions tell you that some of the things you can look at are the defendant's own words and actions in determining if you believe he had an intent to kill.
> (Video played)
> You have the defendant there, in the back seat, saying "*I'm a killer baby. I'm a killer.*"
>
> (Video played)
> You have the defendant there saying "I don't like most people, baby. I tolerate them. I speak to them. I joke, but I'll kill you."
>
> (Video played)
> There you have the defendant there saying "*I stabbing him. I'm a killer, a true killer.*"
>
> But the defendant got up here and testified to you, "well, I wasn't trying to stab him. I was just trying to get the knife away. I'm not sure if I stabbed him."
>
> You all are the ones that will be determining which evidence you believe and which evidence or what testimony you don't believe. [TIII 142] ...
>
> You heard in those clips from the backseat of the cop car you heard the defendant bragging "*I'm a killer baby, I'm a killer.*" Does that seem like someone who honestly and reasonably believed they're about to be killed or seriously injured? ...
>
> And then he gets in the back of the cop car and he's bragging about it, saying "*I'm a killer. I'll kill you. I'll kill people.*" [TIII 147-48]

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." MRE 404(a). Exhibits 32 and 41 through 45 were admitted precisely to show that Mr. Childs acted in conformity with his antisocial and murderous character. See

People v Bynum, 497 Mich 610, 631-32 92014) (plain error to allow testimony that defendant acted in conformity with traits commonly associated with gang members).

Additionally, and obviously, Mr. Childs' statements about being a 'killer' were unfairly prejudicial because they caused the jury to infer that these statements were accurate, and he really was a killer and acted with malice, and not in self-defense, when he killed Mr. Swanigan. See *Crawford*, 485 Mich at 393, quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p. 45 (it is "widely accepted," that "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently."). These statements weakened the presumption of innocence by assuring the jury that even if Mr. Childs did not murder Mr. Swanigan, they would not be voting to convict an innocent man. See *People v Denson*, 500 Mich 385, 410 (2017) and *People v Allen*, 429 Mich 558, 569 (1988).

It is difficult to imagine a more obvious example of unfairly prejudicial character evidence than evidence that a defendant charged with murder repeatedly referred to himself as a killer. Objectively reasonable counsel would have objected to the admission of Exhibits 32, 41-45. Objectively reasonable counsel would have also objected when the prosecutor repeatedly called on the jury to consider her client's statements referring to himself as a killer as evidence of his intent to kill. It was plain that Mr. Childs' statements would be considered for their forbidden purposes because they were not relevant for any proper purpose. The resulting prejudice is and was obvious: the jury heard Mr. Childs repeatedly say he is a killer, was told to consider those statements as evidence that he acted with malice when he killed Mr.

Swanigan, and apparently did exactly that, when it found that Mr. Childs' unrebutted testimony that he acted in self-defense had been disproven beyond reasonable doubt.

3. Contrary to the concession of Mr. Childs' attorney during her closing argument, and the prosecutor's false arguments during rebuttal, Mr. Childs immediately told police that Mr. Swanigan came at him with a knife and he was acting in self-defense

Defense counsel's assertion in her closing that Mr. Childs did not inform the police that he acted in self-defense until hours after his arrest demonstrated counsel failed to adequately prepare for trial by reviewing the prosecutor's proposed exhibits. The prosecutor would have heard Mr. Childs repeatedly say Mr. Swanigan attacked him with a knife while reviewing Exhibit 32, while locating and extracting Mr. Childs' statements about being a killer. That the prosecutor only argued that it took Mr. Childs hours to fabricate his claim of self-defense during her rebuttal, after it became clear defense counsel did not know this was false, demonstrates the prosecutor knew Mr. Childs immediately said Mr. Swanigan came at him first with a knife, and was simply exploiting defense counsel's failure to review the evidence in order to convict Mr. Childs of murder.

A defendant's "failure to come forward is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances." *People v Cetlinski (After Remand)*, 435 Mich. 742, 761 (1990). The charge of a witness' subsequent fabrication is probative and significant enough to the issue of credibility, that a specific exception to the hearsay rules was created to allow the charge to be rebutted. MRE 801(d)(1)(B). See also *People v Edwards*, 139

Mich. App 711, 717 (1984) (erroneous exclusion of consistent statement of defense witness sufficiently prejudicial to the defense to require reversal).

All of the witnesses–Ms. Thompson, Ms. Stevens, Lisa, the responding officer, the EMT, and Mr. Childs himself–testified that Mr. Childs immediately acknowledged to everyone he spoke with that he stabbed Mr. Swanigan. Given that Mr. Childs was certainly not invoking his right to remain silent about Mr. Swanigan's death, the jury would have been right to question the credibility of his trial testimony that Mr. Swanigan charged at him with a knife first, since it was told he did not come forward with this information for several hours. Mr. Childs' purported failure to do so was extremely damaging to his credibility and this theory of defense.

Inexplicably, it was Mr. Childs' own attorney, not the prosecutor, who first claimed he had not immediately come forward to say he acted in self-defense. TIV 10-11, 13, 28. This unquestionably constituted deficient performance. At a minimum, to satisfy *Strickland*'s objective reasonableness standard, defense attorneys must make an independent examination of the facts, circumstances, and pursue "all leads relevant to the merits of the case." *People v Grant*, 470 Mich. 477, 486–87 (2004), quoting *Von Moltke v. Gillies*, 332 US 708, 721 (1948). It is evident that Mr. Childs' counsel failed to satisfy this standard, as she was unaware that Mr. Childs repeatedly said he acted in self-defense in the backseat of Officer Urista's patrol car.

Counsel was at least aware there were questions about Mr. Childs' sanity at the time of Mr. Swanigan's death, as she asked to have his criminal responsibility evaluated. 4/17/19, 3. Having failed to review the video showing what Mr. Childs

said and how he was acting within minutes of the time he stabbed Mr. Swanigan, counsel could not have made an informed decision to forego pursuing an insanity defense or to agree that Mr. Childs was capable of waiving his *Miranda* rights later that evening. 4/15/19, 4. Counsel also could not have made an informed decision that Exhibit 32 was admissible without having reviewed it.

While no one testified that Mr. Childs mentioned Mr. Swanigan's attack before the police interrogation later that night, no one testified he did not come forward with this information earlier. Defense counsel's decision to assume that Mr. Childs did not tell police Mr. Swanigan attacked him with the knife simply because those statements were not published to the jury at trial was obviously unreasonable. Instead of making excuses for why one's client did not immediately come forward with exonerating information, competent counsel would have familiarized herself with the evidence and used it to secure an acquittal.

Because counsel did not know Mr. Childs asserted self-defense in the backseat of the patrol car, she could not object when the prosecutor argued that he had not done so, or when she claimed that his silence undermined the credibility of his trial testimony. TIV 30-33. See *Cetlinski (After Remand)*, 435 Mich. at 761. Because the prosecutor knew that Mr. Childs had asserted self-defense as soon as he was arrested, her rebuttal argument that he waited hours to come forward with this information was improper and violated Mr. Childs' right to a fair trial.

The errors of defense counsel and the prosecutor were outcome determinative. The jury would have acquitted Mr. Childs if it had not been led to believe he waited hours before claiming self-defense. The jury was extremely interested in what he said about self-defense and when he first said it. After

entering deliberations, it sent a note asking: "Was Mario advised by counsel before making a statement to police," and asked for a copy of the complete statement he provided at that time. TIV 57. Mr. Childs testified that he gave a "partial[]" statement to those officers because: "I was waiting til I get representation before I took – say what I had to say." TIII 79. He did not recall even mentioning a knife at that point. TIII 79. The only information provided to the jury about Mr. Childs' statement was that he acknowledged stabbing Mr. Swanigan and claimed he acted in self-defense. It was clear the jury was asking if Mr. Childs spoke to counsel before providing this statement because wanted to know if an attorney may have helped him fabricate a story about Mr. Swanigan first attacking him. It is completely unclear why defense counsel agreed to an instruction that kept the truth from the jury and allowed it to continue wondering if Mr. Childs received such assistance. TIV 57.

The evidence proved that Mr. Childs almost immediately told police what happened. These statements were admissible as excited utterances and to rebut the allegation of a recent fabrication.

But for defense counsel's failure to review the evidence and erroneous concessions based on her false assumptions about what was within the admitted evidence, and the prosecutor's exploitation of these errors and false argument, the jury would have credited Mr. Childs' testimony and returned a not guilty verdict.

4. Counsel's agreement to the admission of separate exhibits, extracted from an exhibit that had already been admitted, was objectively unreasonable because

It was objectively unreasonable for counsel to agree to the admission of Exhibit 32 without first familiarizing herself with its contents. It unreasonable for

counsel to admit to Exhibits 41 through 45 for the same reason, and also because the prosecutor told counsel that those exhibits were "just different segments [of Exhibit Number 32] so we don't have to watch the whole hour and a half of the back seat video." TIII 18.

"MRE 402 provides that "[e]vidence which is not relevant is not admissible." MRE 403 provides for exclusion of relevant evidence: "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

From the prosecutor's offer of proof, it was evident that Exhibits 41 through 45 had no probative value and should have been excluded pursuant to MRE 402 and MRE 403. "Evidence is probative if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v Denson*, 500 Mich 385, 317 (2017), quoting MRE 401 and *Crawford*, 485 Mich at 389-90. Even though "the threshold is minimal," *id.*, Exhibits 41 through 45 could not satisfy the requirement.

Exhibits 41 through 45 did not make the existence of any fact more or less probable than it would have been without their admission because they did not document anything that was not documented in Exhibit 32, which had already been admitted. The prosecutor's explanation regarding those exhibits also made it clear that they should have also been excluded pursuant to MRE 403 because their admission resulted in the "needless presentation of cumulative evidence."

Even if counsel's failure to review the entire video contained in Exhibit 32 prior to trial had not been objectively unreasonable, her agreement to the admission

of separate exhibits that had been extracted from Exhibit 32 was. An objectively reasonable defense attorney, even one with no knowledge of the case, would have foreseen that the shortened segments selected by the prosecutor would include only those portions the prosecutor wished to highlight to the jury. At best, these segments would be cumulative and damaging to the defense. At worst, they would be edited to exclude information that was beneficial to the defense and/or taken out of context to mislead the jury.

While the prosecutor could have used bookmarks or the fast forward button to play only those portions she wished to publish, counsel's agreement to the admission of separate exhibits allowed them to be taken to deliberations, enabling the jury to focus only on those segments the prosecutor considered helpful, and to ignore Exhibit 32.

Had counsel reviewed the entire video before trial, she would have known that the shortened segments were likely to mislead the jury. The shortened segments misled defense counsel about when her client first told police he acted in self-defense. TIV 10-11, 28.

Additionally, at least Exhibit 41, in which Mr. Childs say: "If the n**** don't die he should die," was misleading it could be reasonably inferred that Mr. Childs was referring to Mr. Swanigan as the person who "should die." This is exactly what the prosecutor argued:

> He saying he deserve to die. If he doesn't die, he should die. That's an intent to kill.
>
> He has an intent for the victim to die while he's sitting in the back of a cop car away from any danger to himself. [TIII 143]

In reality, Mr. Childs appeared to be considering the possibility that he would die in prison and expressing remorse for his actions, not wishing death upon Mr. Swanigan. His full statement was:

> I just get locked up and die. Whatever. If the n**** don't die he should die. [Px 32, 10:25]

If the jury reviewed Exhibit 32 in its entirety it would have found out for themselves that both the defense attorney and prosecutor were wrong about when Mr. Childs first asserted self-defense. They would have understood that Mr. Childs' was having an ongoing dialogue with himself with a vast range of subjects, and was not boasting about being a murderer or wishing death upon Mr. Swanigan, as Exhibits 41 through 45 indicated.

There is no reason to believe the jury reviewed Exhibit 32 before reaching its verdict when his attorney did not review it before or during the trial.

C. The prosecutor did not have a good faith basis to ask Mr. Childs if he had been convicted of any crimes involving theft or dishonesty in the last ten years. His attorney performed deficiently when she objected and prevented Mr. Childs from truthfully answering: "No".

In the middle of the prosecutor's cross examination of Mr. Childs, she asked him: "do you have any prior felony convictions involving theft or dishonesty in the last ten years?" Mr. Childs asked her to repeat herself. When she did, defense counsel objected. Following a bench conference, the prosecutor said that she would "strike that question." TIII 114-15.

Mr. Childs had not been convicted of any felonies or misdemeanors in the preceding ten-plus years. PSIR, 10. It was improper for the prosecutor to ask the question without having a good faith belief that Mr. Childs had been convicted of

such an offense. See *United States v Craig*, 953 F3d 898 (CA 6, 2020) (cross-examiner may ask about specific instances of conduct to attack a witness's credibility but only if the questioner has a good faith basis that the instance actually occurred).

Inquiries of this type, without any basis in fact and without any of the necessary protections afforded by the trial court, are improper. *People v Dorrikas*, 354 Mich 303, 317-318, 326-327 (1958); *People v Whitfield*, 425 Mich 116, 131-133 (1986). The trial court erred by allowing a " 'groundless question to waft an unwarranted innuendo into the jury box.' " *People v Meshkin*, _Mich_ (2022) (Docket No 161324). Even if the prosecutor believed Mr. Childs had been convicted of such a crime, she would have still lacked a good faith basis for asking about it because she was prohibited from utilizing this evidence until after she provided notice and after "the court determine[d] that the evidence has significant probative value on the issue of credibility." MRE 609(a)(2)(A).

Defense counsel's objection was objectively unreasonable. It was not strategic, and demonstrated her lack of familiarity with her client's background. Appellate courts frequently characterize an attorney's failure to object to an improper questions as reasonable strategy to avoid emphasizing the question to the jury. See, e.g., *People v Barker*, 161 Mich App 296, 304 (1987). Here, counsel's objection emphasized the question to the jury, prevented Mr. Childs from honestly answering "no," and likely caused the jury to assume that he had been convicted of a theft crime in the preceding ten years.

D. Mario Childs was prejudiced by the cumulative impact of the errors of his attorney and the prosecutor

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *LeBlanc*, 465 Mich at 591. In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence, and the cumulative effect of the errors must undermine the confidence in the reliability of the verdict. *People v Dobek*, 274 Mich App 58 (2007); *People v Knapp*, 244 Mich App 361, 387-88 (2001).

The above errors are of consequence. Standing on their own, they each individually require undermine the reliability of the verdict and entitle Mr. Childs to a new trial. However, if the Court disagrees, it should consider the cumulative effect of these errors. The errors combined to incorrectly portray Mr. Childs as a maniacal and dishonest killer, whose testimony about being attacked with a knife by Mr. Swanigan was fabricated hours after Mr. Swanigan died and was disproven by the physical evidence. This was not true. Had the jury not been misled about any, and especially all of these points, it would not have found Mr. Childs guilty. He is entitled to a new trial.

II. **Mr. Childs' was denied his due process right to a properly instructed jury and the effective assistance of counsel where his attorney did not object when the trial court failed to instruct the jury that Mr. Childs was not obligated to attempt to retreat before using deadly force to defend himself and that his belief that deadly force was necessary was presumptively reasonable. US CONST, AMS VI, XIV; CONST, 1963, ART 1, §§ 17, 20.**

Standard of Review

This Court reviews de novo claims of instructional error. *People v Traver*, 502 Mich 23, 31 (2018). This Court also reviews claims of ineffective assistance of counsel de novo. *People v McMullan*, 284 Mich App 149, 152 (2009).

Discussion

According to Mr. Childs, Mr. Swanigan pushed open the door of his closed room while he was sitting down to eat a meal, and then attempted to assault him with a steak knife. TIII 61, 65-69, 95.

In instructing the jury on self-defense, the trial court failed to instruct the jury on the duty to retreat (M Crim JI 7.16(2)) and the rebuttable presumption regarding fear of death or great bodily harm (M Crim 7.16a). This violated Mr. Childs due process right to a properly instructed jury. US Const, Ams VI and XIV; *Estelle v McGuire*, 502 US 62, 72 (1991). His counsel's failure to to object violated his right to the effective assistance of counsel. See *People v Eisen*, 296 Mich App 326, 330 (2012) (explaining that "trial counsel should have objected to" plainly erroneous "jury instructions and that this conduct fell below an objective standard of reasonableness").

A. Mr. Childs' jury should have been instructed he was not required to retreat before using deadly force

Mr. Childs was entitled to have his jury instructed on M Crim JI 7.16(2):

> A person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack

There was no dispute that the altercation between Mr. Childs and Mr. Swanigan in Mr. Childs' home and that Mr. Swanigan was in Mr. Childs' room when he was stabbed. Mr. Swanigan's body landed near Mr. Childs' bed. Px 20, 31.

According to Mr. Childs, while he and Mr. Swanigan were arguing:

> he slapped the plate of food out of my hand. ...
>
> [Then] [h]e grabbed the knife off my dresser right there and come at me [and] tried to stick it in me. [TIII 66-67] ...
>
> I grabbed his wrist and this part of his arm and I twisted it and then I just pushed, pushed the knife in him in his body. [TIII 68]

In *People v Richardson*, 490 Mich 115, 120-121 (2011), this Court agreed that "[a]n instruction that omitted the general duty to retreat [M Crim JI 7.16(1)] and informed the jury only that defendant had no duty to retreat might have been clearer," but held defendant was not prejudiced by his attorney's failure to request such an instruction "because the jury was, in fact, informed that a person attacked in his or her home has no duty to retreat." Conversely, in this case Mr. Childs was prejudiced by his attorney's failure to request the instruction because his jury was instructed that it could consider whether Mr. Childs could have potentially protected himself or avoided using deadly force by retreating. TIV 49-50.

According to Mr. Childs, he was standing within his own doorway when Mr. Swanigan walked to the back of his room and grabbed a knife off of the dresser. TIII

66. The jury could and likely did consider whether Mr. Childs knew that another way of protecting himself would have been to retreat through the hall and down the stairs, given the layout of the house and the relative positions of both men. Px 21. The jury likely also questioned whether Mr. Child's use of deadly force was immediately necessary, given that he could have potentially retreated when he saw Mr. Swanigan grab the knife.

But Mr. Childs was entitled to stand his ground and was under no obligation to retreat before using deadly force to protect himself. MCL 780.974; *People v Riddle*, 467 Mich 116, 119-121 (2002).

Counsel's failure to have the jury instructed on this issue undermines confidence un the jury's verdict. The instruction clearly applicable and was necessary to prevent the jury from considering whether Mr. Childs could have avoided the physical confrontation and the need to use deadly force by retreating from his room.

B. Mr. Childs' jury should have been instructed it could presume he honestly and reasonably believed that death or great bodily harm was imminent

Mr. Childs was entitled to have his jury instructed on M Crim JI 7.16a, which have instructed the jury that Mr. Childs' belief of imminent death or great bodily harm was presumptively reasonable. MCL 780.951(1). The prosecutor had not rebutted this presumption. Because the Instruction was applicable, increased the prosecutor's burden, and would have led to Mr. Childs' acquittal, his attorney's failure to request the instruction or object when the instruction was read constituted ineffective assistance of counsel.

Mr. Childs testified that following a verbal argument between he and Mr. Swanigan, he went upstairs, went into his room, and closed his door. TIII 109.

Moments later, Mr. Swanigan pushed his door open without knocking, came into his room, and continued the argument. TIII 61, 95. Mr. Childs walked out to the hallway, at which point, Mr. Swanigan grabbed the knife off of Mr. Childs' dresser and came at him with a knife. TIII 66-67. It is not clear exactly where they were when this happened, but Mr. Swanigan had to have been inside Mr. Childs' room when he was stabbed based on the location of his body. Px 20, 31. Mr. Childs testified that he was. TIII 65-66.

MCL 780.951(1) provides in relevant part:

> it is a rebuttable presumption in a ... criminal case that an individual who uses deadly force ... has an honest and reasonable belief that imminent death of ... or great bodily harm to himself ... will occur if both of the following apply:
>
> (a) The individual against whom deadly force ... used is in the process of breaking and entering a dwelling ... committing home invasion or has broken and entered a dwelling ... or committed home invasion and is still present in the dwelling ...
>
> (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a).

MCL 780.951(2)(a) provides that the presumption does not apply if, among other exceptions, the individual against whom deadly force is used "has the legal right to be in the dwelling."

The presumption did apply. Mr. Childs alleged Mr. Swanigan pushed open his closed door without knocking and without seeking his permission, and attempted to assault him with a steak knife while inside. These actions qualified as both breaking and entering and home invasion. Mr. Childs reasonably understood what Mr. Swanigan was doing and acted to protect himself.

MCL 750.115(1) provides that a person may commit breaking and entering by breaking and entering a hotel or private apartment without permission. "[A]ny amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking." *People v Toole*, 227 Mich App 656, 659 (1998). "[B]ecause [Swanigan] was not lawfully permitted to enter [Childs' room], his opening the door from the [hallway] was sufficient to satisfy the element of breaking." *Id.*

MCL 750.110a(3) provides that a person may commit home invasion by entering a dwelling without permission and committing an assault while present in or exiting the dwelling. Mr. Swanigan and Mr. Childs lived at the same "semi-independent living home," or adult foster care with five other adults. TI 151-52; TII 6-7, 93. Mr. Swanigan and Mr. Childs were not part of the same household. Their AFC was defined as an 'adult foster care small group home'. MCL 400.703(7). Such AFCs are, by definition, not private residences. See MCL 400.733 and *City of Livonia v Department of Social Services*, 423 Mich 466 (1985). While Mr. Swanigan in Mr. Childs' room without an explicit or implicit license, he did not "ha[ve] the legal right to be in the dwelling." MCL 780.951(2)(a).

Entry of an apartment or dorm room constitutes entry of a dwelling within the meaning of MCL 750.110a. See, e.g., *People v Garland*, 286 Mich App 1 (2009). Mr. Swanigan was prohibited from entering Mr. Childs' room without permission for the same reason MCL 750.110a prohibits tenants of a dormitory or apartment complex from entering their neighbors' dorm room or unit without permission. See *People v Walters*, 186 Mich App 452, 455 (1990) ("our examination of the types of "buildings" enumerated in the statute reveals that the use of the structure is the

primary concern, rather than its physical character. ... If a mobile home is used as a person's primary place of residence, it is a dwelling house. ... The same reasoning is applicable to the present case.").

While Mr. Swanigan had the legal right to be in his own room and the common areas within the building, he did not have the right to enter Mr. Childs' room without permission. and Mr. Childs' testimony indicated he viewed the unauthorized entry as a trespass. Any contrary holding would deny the presumption to an individual who lives in an apartment or dorm room simply because her attacker lives in the same building or would deny individuals living in adult foster care facilities the same right to privacy and protection afforded to other adults because their needs are different. This was not the Legislature's intent, would violate Equal Protection, and would deny the presumption to those, like Mario Childs, who are most likely to need and benefit from its protection.

But for counsel's failure to request M Crim JI 7.16a be read it is reasonably probable Mr. Childs would have been acquitted. The Instruction applied to the facts of the case and created a presumption the prosecutor had not overcome.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Petitioner submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Mario Childs

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