NO. 24-6991

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

ORIGINAL

JESSICA LYNN MORRIS - PETITIONER

v.

JEREMY HOWARD – RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

JESSICA LYNN MORRIS #600884

PETITIONER IN *PRO SE*

WOMEN'S HURON VALLEY CORRECTIONAL FACILITY

3201 BEMIS RD.

YPSILANTI, MI 48197

NO TELEPHONE

QUESTION(S) PRESENTED

I. IS CERTIORARI APPROPRIATE BECAUSE PETITIONER WAS DENIED HER RIGHT TO PRESENT A DEFENSE IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS V, VI AND XIV?

II. IS CERTIORARI APPROPRIATE BECAUSE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF US CONSTITUTIONAL AMENDMENT VI?

III. IS CERTIORARI APPROPRIATE BECAUSE THE PROSECUTOR'S WITNESSES WERE ALLOWED TO INVADE THE PROVINCE OF THE JURY BY NARRATING THE VIDEOS ENTERED INTO EVIDENCE IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS VI AND XIV?

IV. IS CERTIORARI APPROPRIATE BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF ROBBERY OR UNLAWFUL IMPRISONMENT TO SUSTAIN THE JURY'S VERDICT IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS VI AND XIV?

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:

RELATED CASES

- *Mich. v. Morris,* No. 351875, State of Michigan Court of Appeals, Judgment entered August 12, 2021.
- *People v. Morris,* No. 163635, State of Michigan Supreme Court, Judgment entered September 6, 2022.
- *Morris v. Howard,* No. 2:23-CV-12299, United States District Court – Eastern District of Michigan – Southern Division, Judgment entered July 15, 2024
- *Morris v. Howard,* No. 24-1645, United States Court of Appeals for the Sixth District, Judgment entered January 7, 2025.

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THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

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[X] is unpublished.

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

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[X] is unpublished.

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

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

[X] reported at 510 Mich 876; 978 NW2d 824 ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion(s) of the State of Michigan Court of Appeals appears as Appendix D to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was January 7, 2025.

[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).

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

The date on which the highest state court decided my case was September 6, 2022. A copy of that decision appears at Appendix C .

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand 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 offence 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., Amendment VI: " in all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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 of obtaining witnesses in his favor, and to have the assistance of counsel for this defense."

U.S. Const., Amendment 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."

STATEMENT OF THE CASE

On September 19, 2019, Petitioner Jessica Lynn Morris, was convicted after a jury trial of Homicide-Murder 1st Degree Premeditated/Felony, Robbery Armed, and Unlawful Imprisonment as a Second Habitual Offender. On November 14, 2019, Petitioner was sentenced pursuant to MCL 750.316(1)(a), MCL 750.316(1)(b), MCL 750.529, MCL 750.349b, and MCL 769.12 to Life without Parole; 300 to 600 months, 120 to 270 months, concurrent, credit for 328 days. Appellate counsel served a copy of Petitioner's Brief on Appeal on September 14, 2020 and also subsequently filed a Motion to Remand on Petitioner's behalf which was denied on December 9, 2020. The Court of Appeals affirmed Petitioner's convictions on August 12, 2021. The Michigan Supreme Court denied leave to appeal on September 6, 2022.

Petitioner Morris filed a petition for writ of habeas corpus raising four claims of constitutional error. On July 15, 2024, the Honorable Linda V. Parker of the United States District Court – Eastern District of Michigan – Southern Division issued an Opinion and Order Denying Petition for Writ of Habeas Corpus and Certificate of Appealability and granting Petitioner's IFP Motion. Petitioner timely filed a notice of appeal. On January 7, 2025, the Honorable Alan E. Norris from the United States Court of Appeals for the Sixth Circuit denied the application for a Certificate of Appealability. Petitioner is currently in prison at the Huron Valley Correctional Facility, 3201 Bemis Road, Ypsilanti, Michigan 48197.

Petitioner was denied the Fifth, Sixth and Fourteenth Amendment rights to present a defense when her jury was not allowed to hear Mr. Blanchong's statement, and her counsel was not allowed to question the officer who took the statement about it.

Further, her counsel impaired her right to present a defense when counsel would not raise the issue of a prior arrest where a large amount of cash was taken from her, to counter the prosecutor's argument that her use of cash was evidence that she had robbed Wappner. Finally, the instruction, M Crim JI 8.5 Mere Presence Insufficient, was not given to the jury, although counsel raised the argument in his closing argument.

Petitioner's Sixth Amendment rights were violated as counsel was ineffective by not objecting to the omission of M Crim JI 8.5, after he argued that she was merely present in his closing argument as the Michigan Court of Appeals opined "defense counsel's failure to request the instruction or object to its omission cannot be considered sound trial strategy"; further, he did not bring out evidence of Petitioner's prior arrest with a large amount of cash to counter the prosecutor's argument that Mr. Wappner was murdered because she and Blanchong needed money; counsel did not bring a motion in limine regarding the co-defendant's statement, which the trial court relied on, in part, to exclude the statement; and he did not object to narration of the video evidence, invading the province of the jury.

Petitioner's due process rights were violated, US Constitutional Amendments VI and XIV as the prosecutor's witnesses were allowed to invade the province of the jury by narrating the videos and other pictures entered into evidence.

Petitioner further submits due process rights were violated, US Constitutional Amendments V and XIV, due to insufficient evidence for convictions of armed robbery and unlawful imprisonment.

For the reasons that follow, Petitioner submits that the petition for writ of certiorari should be granted because the decision of the state court is contrary to, and involves an unreasonable application of clearly established federal law, as interpreted by the United States Supreme Court and is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE AS PETITIONER WAS DENIED HER RIGHT TO PRESENT A DEFENSE IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS V, VI AND XIV.

Argument

Petitioner was denied her Fifth, Sixth and Fourteenth Amendment rights to present a defense. The right of an accused to present a defense has long been recognized as a "fundamental element of due process." *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). A violation of the fundamental right to present a defense is not established merely by showing that the trial court excluded evidence relevant to a defense. Rather, a petitioner must show that the exclusion of evidence "significantly undermined fundamental elements of the defendant's defense." *United States v. Scheffer*, 523 U.S. 303, 315, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). Put another way, the exclusion of evidence is unconstitutionally arbitrary or disproportionate "only where it has infringed upon a weight interest of the accused." *Id.* at 308 (citing *Rock v. Arkansas*, 483 U.S. 44, 58, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

The Sixth Circuit has held that the right to present a defense is abridged by an evidentiary ruling excluding defense evidence "[o]nly if 'an evidentiary ruling is so egregious that it results in denial of fundamental fairness.'" *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004); accord *Alley v. Bell*, 307 F. 3d 380, 394-95 (6th Cir. 2002) (finding that exclusion of evidence is unconstitutional only when it eviscerates a defense). '[S]tate court evidentiary rulings cannot rise to the level of due process violation unless they 'offend [ ] some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000). (Quoting *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).

1. Blanchong's Statement to the Police – Statement Against Penal Interest and Trustworthiness

The Sixth Amendment provides an accused with the right to "compulsory process for obtaining witnesses in his favor." U.S. Const. Amend VI, 'a crucial part of the Constitution's more basic' guarantee of "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). As applied to the states by the Due Process Clause of the Fourteenth Amendment, the accused has the right to present testimony that is "relevant,", "material," and vital to the defense." *Washington v. Texas*, 388 US at 16. The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Id.* at 19.

In criminal trials, statements against penal interest are offered into evidence in three principal situations: (1) as voluntary admissions against the declarant' (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish

the guilty of an alleged accomplice of the declarant. *Lilly v. Virginia*, 527 U.S. 116, 127, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

The Court of Appeals concluded that Blanchong's out-of-court statement was inadmissible and the trial court properly excluded the statement from evidence and opined Blanchong's statement was not against his penal interest as the statement did not tend to subject Blanchong to criminal liability at the time he made it and because corroborating circumstances did not support the trustworthiness of Blanchong's statement and the exclusion of the statement did not deprive defendant of the right to present a defense.[1]

Petitioner in her affidavit stated, "That, to the best of my knowledge, Raymond Blanchong was acting to defend both of us."[2] By indication of Petitioner's statement, Blanchong's statement was crucially important to defendant's theory of defense. Also, at trial, Petitioner testified that "a friend of ours, by the name of Paul, had called us and told us that there was prior other people told us basically to lay low because there's other people that were trying to rob us." (T 9-18-2019, p. 104).

Blanchong's statement to the police **was** against his penal interest. While Blanchong's statement indicated that he was acting in defense of both himself and Petitioner, Blanchong's stated, "I'm in trouble because I protected me and my wife so now I'm in big time trouble."[3] Mr. Blanchong's statement is further shown as being

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[1] Court of Appeals Opinion, pgs. 7-8.
[2] Affidavit of Petitioner filed in the Court of Appeals, Point 12, pg. 2 of 2.
[3] Raymond Blanchong's Statement to Detectives Rothman and Peterson filed in the Court of Appeals, Pg. 38 of 44

against penal interest by Detective/Sargent Peterson, who stated, "I'll say this much Ray, it looks very bad."[4] Mr. Blanchong did not make this statement to curry favor with authorities. Mr. Blanchong also admitted to an altercation resulting in the death of Mr. Wappner which resulted in a murder investigation exposing him to prosecution.

Statements against penal interest are not limited to direct confessions. *United States v. Slaughter*, 891 F. 2d 691, 698 (9th Cir 1989); *United States v. Barrett*, 549 F. 2d 244, 251 (1st Cir. 1976) (it is sufficient if the statement would be "important evidence" against the declarant). Moreover, it is well-established that a particular piece of evidence need not by itself prove the declarant guilty. The proffered statement need only be a 'brick in the wall' of proving the declarant's guilt. MRE 804(b)(3) like its federal counterpart, "encompasses disserving statements by a declarant that would have probative value in a trial against the declarant." *United States v. Thomas,* 571 F.2d 285, 288 (5th Cir. 1978). By the same token, the statement would be against the declarant's penal interest if it intensified his culpability such as by shifting criminal liability away from the accused and toward the declarant. *United States v. Lopez*, 777 F2d. 543, 554 (10th Cir. 1985).

Blanchong's statement was a disserving statement that would have probative value in a trial. The statement was against his penal interest as it shifted criminal liability away from Petitioner and toward himself. Also, the statement need not have been incriminating on its face, as long as it was self-incriminating when viewed in

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[4] Raymond Blanchong's Statement to Detectives Rothman and Peterson filed in the Court of Appeals, Pg. 41 of 44

context. *Williamson v. United States*, 512 U.S. 594, 613, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). Blanchong's statement was in context self-incriminating as the prosecutor disputed that Blanchong was acting in defense of himself and Petitioner, as the prosecutor's theory was that Mr. Wappner was being robbed. Regardless, the out-of-court statement is clear that only Blanchong was in a physical altercation with Mr. Wappner.

In regard to the instant case, Blanchong stated he was in a romantic relationship with Petitioner, but this factor alone should not be a wholly deciding factor as to the trustworthiness of Blanchong's statement. While the trial court excluded Blanchong's statement from evidence, there is no question that Blanchong chose to speak with police after he had been advised of his *Miranda* rights. After being advised of his *Miranda* rights and asked if he understood them, Blanchong replied "uh huh." After being asked if he wanted an attorney, Blanchong stated, "I just told you what happened, that's all I'm gonna' say right now."[5]

There is no question that Blanchong's statement was in fact made, which is a considerable factor when reviewing whether a witness should be allowed to repeat the statement at trial." *Donnelly v. United States*, 228 U.S. 243, 277, 33 S. Ct. 449, 57 L. Ed. 820 1913) (Holmes, J., dissenting). Blanchong's provided his statement after he had been advised of his *Miranda* rights. During the statement, Blanchong expressly stated, "You ain't forcing me to do nothing."[6]

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[5] Raymond Blanchong's Statement to Detectives Rothman and Peterson filed in the Court of Appeals, Pgs. 16 and 39 of 44.

[6] Raymond Blanchong's Statement to Detectives Rothman and Peterson filed in the

There was also corroborating circumstances that supported Blanchong's statement, not just the statement of Petitioner. There was additional evidence to corroborate Blanchong's statement that he was in a struggle with Wappner, as there is evidence of injuries on Blanchong. Detective Sgt. Michael Peterson indicating during his testimony that Blanchong had been bit. (T 9-17-2019, p. 39-41). Also, when interviewing Blanchong, Detective Rothman observed bite marks on Mr. Blanchong, the jail staff saw the one on his neck. He saw also Mr. Blanchong's black eyes in the Quality Inn videos. (T 9-17-2019, p. 80-81).

The Court must not focus "on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself. *United States v. Johnson*, 581 F.3d 320, 327 (6th Cir. 2009). In making this determination, the court need not be completely convinced as a prerequisite to admission that the...statements are true. Rather, [it] need only find that sufficient corroborating circumstances exist which indicate the statement's trustworthiness. *United States v. Price*, 134 F.3d 340, 347 (6th Cir. 1998).

The more crucial the statement is to the defendant's theory of defense; the less corroboration a court may constitutionally require for its admission. *Rivera v. Director Dept. of Corrections,* 915 F.2d 280, 281 (7th Cir. 1990) (excluding vital evidence was an abuse of discretion). Because the explanation for Mr. Wappner's stabbing was evidence crucial to defendant's theory of defense, the constitutional right to present the evidence

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Court of Appeals, Pg. 40 of 44.

limited the threshold of corroborating circumstances that the trial court could have required of Mr. Blanchong's statement.

Blanchong was later convicted of felony murder, armed robbery, and unlawful imprisonment. He was subsequently sentenced to life in prison without parole. Blanchong was not promised a deal or that he would not face the full punishment of the law for anything that he would say. Given that he had been advised that anything he said could have been used against him, Blanchong was fully aware that any admissions by him could implicate him in a crime as he also acknowledged that he required an attorney.

Despite his statement of self-defense, Blanchong stated he was "in big time trouble" and had made an inculpatory statement when admitting to killing Wappner as evidenced when he inquired, "I don't know what charges you're going to put on me but..".[7] Blanchong, a reasonable person in the declarant's shoes, realized that the statement could implicate him in a crime. See *Williamson v. United States*, 512 U.S. at 603. Consequently, the prosecutor developed other theories of the case stating in closing argument, "We feel as though we can show that the defendant in this case is guilty of premeditation murder or felony murder." (T 9-18-2019, p. 166).

The admittance of Mr. Blanchong's out-of-court statement was crucial to Petitioner's defense and the exclusion resulted in a fundamentally unfair trial which violated Petitioner's due process rights.

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[7] Raymond Blanchong's Statement to Detectives Rothman and Peterson filed in the Court of Appeals, Pg. 39 of 44

2. Petitioner's Prior Arrest

A defendant's right to present a defense "generally includes the right to the admission of competent, reliable exculpatory evidence" to negate an element of the offense. *United States v. Pohlot*, 827 F.2d 889, 900-01 (3d Cir. 1987).

Petitioner's trial counsel refused to introduce evidence of Petitioner's prior arrest while in possession of a large sum of money. Petitioner requested that she was arrested, on a prior occasion, while in possession of $38,000.00. Petitioner testified that that she would carry cash in her bra, as much as $20,000, as low as $1,000 (T 9-18-2019, p. 103). Petitioner also testified that other people were aware of Blanchong's inheritance, Blanchong and Morris were warned that people were trying to rob them and to "stop carrying that money around and put [it] in the bank account." (T 9-18-2019, p. 103-104).

Petitioner's trial counsel even addressed the relevancy of this testimony stating "It's relevant because one of the theories of the case and motive is having this sum of money and I just wanted to see if the witness knew how this information got disseminated." (T 9-18-2019, p. 104).

Notwithstanding Petitioner's prior arrest, the introduction of evidence of Petitioner carrying large amounts of cash would have been exculpatory and supported her defense that she did not need to rob or kill Wappner to obtain drugs. The Court of Appeals implicitly conceded the evidence's relevance by stating its prejudicial effect, but regardless of its potential prejudicial effect this evidence related to a material fact at issue at trial of whether Wappner was robbed by Petitioner to obtain drugs due to lack

of funds. To be material, a fact need not relate to an element of a crime or defense, but it must be "within the range of litigated matters in controversy."

Petitioner's prior arrest was material to her defense, as it was "within the range of litigated matters in controversy." Materiality does not mean that the evidence must be directed at an element of a crime or an applicable defense. A material fact "need not be an element of a crime or cause of action or defense, but it must at least, be 'in issue'" in the sense that it is within the range of litigated matters in controversy. *United States v. Dunn*, 805 F.2d 1275, 1281 (6th Cir. 1986). Petitioner's prior arrest was "a single link in the chain of proof' or rather a link in her defense to illustrate that it was more probable that she and Blanchong were being robbed as opposed to robbing Wappner.

As to any prejudicial effect of this evidence or any multiple or further inferences by the jury, Petitioner's prior arrest and habit of carrying cash on her was very relevant in her trial. Petitioner's trial counsel failed to present evidence concerning her prior arrest, as it supported the defense theory that there was no reason for Petitioner to rob Wappner for drugs due to lack of funds and it was relevant to the truthfulness of Petitioner's statement and testimony that she had a habit of carrying a large amount of cash on her person and did so when she and Blanchong went to meet Wappner to purchase drugs. Petitioner was denied the right to present a defense by the exclusion of this evidence.

3. Jury Instructions

It is indisputably federal law as announced by the Supreme Court that a defendant in a criminal trial has the right to "a meaningful opportunity to present a

complete defense." *California v. Trombetta,* 467 U.S. 479, 485, 81 L. ED 2d 413, 104 S. Ct. 2528 (1984). A necessary corollary of this holding is the rule that a defendant in a criminal trial has the right under appropriate circumstances to have the jury instructed on his or her defense, for the right to present a defendant would be meaningless were a trial court completely free to ignore that defense when giving instructions. *Taylor v. Withrow*, 288 F.3d 846, 851-852 (6th Cir. 2002). This right compels the trial court to instruct the jury as to all relevant defenses. *Id.* The question is whether flawed instructions infected the entire trial to such an extent that the resulting conviction violates due process. *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A jury instruction is not to be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Jones v. United States*, 527 U.S. 373, 391, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999).

In this case M Crim JI 8.5 Mere Presence Insufficient, was not given to the jury. It provides:

> Even if the defendant knew that the alleged crimes was planned or was being committed, the mere fact that [he / she] was present when it was committed is not enough to prove that [he / she] assisted in committing it. M Crim JI 8.5.

This instruction dovetailed with defense counsel's closing argument: "Petitioner was just really present." (T 9-18-2019, 207). All jury instruction discussions in this matter were conducted off the record, so it is unclear whether defense counsel requested this instruction. However, the Court had a duty to given the instruction, as it was related to defense counsel's theory of the case. Although the jury heard counsel's closing argument, they were instructed that the law to apply to the facts comes from the Judge.

Unfortunately, the trial judge did not give this instruction. In light of the aiding and abetting theory on the prosecutor's part, the lack of this instruction may have been outcome determinative.

The Court of Appeals opined when viewing Petitioner's ineffective assistance of counsel claim, "**defense counsel's failure to request the instruction or object to its omission cannot be considered sound trial strategy.**" Nevertheless, our review of the whole record indicates that this deficiency did not prejudice defendant.[8] Petitioner was denied the right to present a complete defense as the "flawed instructions infected the entire trial to such an extent that the resulting conviction violates due process." *Estelle v. McGuire, supra.*

II. CERTIORARI IS APPROPRIATE AS PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF US CONSTITUTIONAL AMENDMENT VI.

Argument

Petitioner was denied the Sixth Amendment Right to Effective Assistance of Counsel. The Sixth Amendment to the U.S. Constitution guarantees criminal petitioners the right to the assistance of counsel during their criminal proceedings. *Strickland v. Washington*, 466 U.S. 688, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984.) Claims of ineffective assistance of counsel have two parts: "A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citing *Strickland v. Washington,* 466 U.S. at 687. This Court assesses performance using an

[8] Court of Appeals Opinion, pg. 10

"objective standard of reasonableness" and "prevailing professional norms." *Strickland*, 466 US at 688. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.

1. Failure to request or object to omission of Mere Presence Instruction

As argued above, and incorporated herein by reference, Petitioner's jury was not given the Mere Presence Instruction. M Crim JI 8.5. The record contains no indication Petitioner's lawyer waived appellate review of the jury instructions by voicing his agreement with the instructions. However, if this Court finds waiver, then trial counsel performed deficiently in failing to request the instruction at issue, or objects to its omission. This instruction goes directly to defense counsel's argument to the jury. The jury was instructed that they must take the law from the Judge. Omission of this instruction may have been outcome determinative, given the prosecutor's aiding and abetting theory. The Court of Appeals stated, **defense counsel's failure to request the instruction or object to its omission cannot be considered sound trial strategy.** Nevertheless, our review of the whole record indicates that this deficiency did not prejudice defendant.[9]

The Court of Appeals opinion was incorrect that defendant waived appellate review of this issue. Trial counsel's failure to request the trial court to include M Crim JI 8.5 as jury instructions and by failing to object when the trial court did not do so was ineffective. The attorney's overall ineffectiveness is apparent from the record, and

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[9] Court of Appeals Opinion, pg. 10.

ignorance of directly relevant law to request an instruction of mere presence can never be considered strategy. See *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002). Therefore, it is patently obvious that the defense was not employing an "all or nothing" strategy by intentionally refusing to obtain an acquittal for Defendant.

The Michigan Supreme Court held, "'mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent.'" *People v. Burrel*, 253 Mich. 321, 323, 235 N.W. 170 (1931). To be convicted, the defendant must either himself possess the required intent or participate while knowing that the principal possessed the required intent. While presence, either actual or constructive, is a necessary requisite for any conviction of aiding and abetting, it must also be demonstrated "that the defendant supported or encouraged the principal in the commission of the charged offense, and that the defendant himself entertained the requisite intent of the charged offense". *LaFave & Scott, Criminal Law* (2d ed), § 64, p 503.

In this case, however, it is apparent that trial counsel failed to request the obvious instruction of mere presence to the charge of first degree premeditated murder, felony murder, armed robbery, and unlawful imprisonment (T IV, 214). This was either due to an oversight or lack of knowledge of the law. Assuming the latter, ignorance of the law directly relevant to a decision eliminates the possibility of any legitimate strategy. *Bullock v. Carver*, 297 F.3d at 1049. But in any event – the analysis is still generally the same because whether the inaction was due to oversight or ignorance, the central

focus still considers the circumstances of the entire case to assess the reasonableness of counsel's performance at trial. See *Bullock*, supra at 1051 citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)

It would be easy to review this entire trial and come to the conclusion that counsel did a fine job in terms of his efforts to inject reasonable doubt as to the essential elements of murder and he mentioned at closing argument that Defendant was mere presence. But it is all for naught when it came down to the end and counsel did not request the instruction of mere presence. As such, there is no legitimate argument that when viewed as a whole, counsel performed in an objectively reasonable manner. His actions (or inaction) defy both logic and the law.

The prejudice to Petitioner occurred when the jury was deprived of the ability to render consistent acquittals, as was the case here. The jury was presented with two different theories, and yet the instructions precluded the jury from returning an acquittal of the charges. The jury should have been given an opportunity to consider the mere presence instruction. Failure to make any request for the instruction was error. Counsel's performance as a whole was objectively unreasonable as the prejudice is overwhelming and there is no reasonable argument that counsel satisfied Strickland's deferential standard. Also , the omission of M Crim JI 8.5 constituted plain error that affected Petitioner's substantial rights. In *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), the third requirement generally requires showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, p 734.

Indeed, the failure to request the instruction could not be the result of any trial strategy at all, let alone a reasonable and sound strategy. Had counsel requested the proper instruction, incorporated with objecting to the narrative of the surveillance videos and failing to file a motion in limine, the jurors would have had a different outcome. These instructions would have told the jury to judge the testimonies under different, more stringent standards. They would have been specifically instructed about assisting in committing the alleged crime, not just mere fact of being presence. M Crim JI 8.5. The jury would have been far less likely to accept their claims as proving guilty beyond a reasonable doubt. Given the crucial role the eyewitnesses played to the prosecution's case, there is a reasonable probability that had the jury been given instructions on mere presence, the trial's outcome would have been different, as a key pillar of the prosecution's case would have fallen. The failure to request the instruction thus amounted to ineffective assistance of counsel, requiring reversal and a grant of a new trial on all counts. Defense counsel's failure to request this instruction was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690.

2. Failure to introduce evidence of prior arrest.

Petitioner asked her attorney to bring out the fact that she had previously been stopped by police and had $38,000 confiscated as documented on Petitioner's affidavit. This would have supported her position that she and Blanchong carried a lot of cash, and were known to do so. It would also have countered the prosecutor's argument that the fact that they paid cash for everything, and the counter argument that they needed money, to support the armed robbery charge. Counsel did not do this, although he did

try to support the fact that they had money by introducing paperwork from the probate court case, showing that Blanchong had inherited a large sum of money and/or property. As argued below, there was no direct evidence that a robbery occurred. Demonstrating their odd habit of carrying large amounts of cash would have countered the prosecutor's argument that the circumstantial evidence of payment in cash for everything supported he robbery. Any claim that the reason to omit the evidence was so that the jury did not hear that Petitioner was previously arrested must fail, as Petitioner referred to a prior arrest in her statement to police, which was played to the jury. Additionally, Detective Peterson testified to previous arrests. (T 9-16-2019, p. 229-230).

3. Failure to file a motion in limine to introduce Blanchong's out-of-court statement

Counsel's attempt to introduce Blanchong's statement was denied on two grounds: That the statement had been excluded from Blanchong's trial based on the *Miranda* violation; and because defense counsel had not raised the issue in a motion in limine. To the extent counsel's failure to bring such a motion was a valid reason to preclude admission of the statement, counsel was ineffective. It was not reasonable trial strategy. This exclusion by defense counsel did not satisfy *Strickland's* deferential standard. Counsel, can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance. *Strickland*, 466 U.S. at 686. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed 158 (1932).

4. Failure to object to the narration of the videos and picture evidence

At no time during the trial did counsel object to the narration of the videos and picture evidence by the prosecutor's witness. In other words, as argued below and incorporated herein by reference, he did not object to the invasion of the province of the jury. *People v. Fomby*, 300 Mich. App. 46, 52-53, 831 N.W.2d 887 (2013). Petitioner asserts that he should have objected, and allowed the jury to draw their own conclusions as to what they were looking at, and the failure rendered counsel ineffective. However, "failure to object at trial does not preclude appellate review of an alleged violation of constitutional rights." *People v. Schumacher*, 29 Mich. App. 594, 596, 185 N.W.2d 633, appeal granted, case remanded, 384 Mich 831, 186 NW2d 562 (1971).

The reviewing court must assess whether counsel's strategy itself was constitutionally deficient. *Martin v. Rose*, 744 F2d 1245, 1249 (6th Cir. 1984) (stating that "even deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance") (internal quotations and citation omitted). If counsel's performance is deemed deficient, a defendant must show that those deficiencies were prejudicial to the defense. See *Strickland*, 466 US at 692. To make this showing, the defendant must demonstrate that there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Ward v. United States*, 995 F.2d 1317 (6th Cir. 1993)).

The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide

range of professionally competent assistance." *Strickland*, 466 US at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691. This is not the case in this instant.

Petitioner asserts that there was no reasonable trial strategy, and defense trial counsel rendered deficient performance in failing to object to the narration of the surveillance videos. The conduct of defense counsel in this case cannot possibly be labeled a reasonable "strategic choice." There was no possible advantage to counsel failing to object to witnesses' testimony. It was deficient performance for Petitioner's attorney to fail to object to witnesses' testimony. *Strickland v. Washington, supra.* Turning to the substantive issue, both the due process guarantees of the Michigan and United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. See generally, *Lisenba v. California*, 314 U.S. 219, 62 S. Ct. 280, 86 L Ed 166 (1941).

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based in scientific, technical, or other specialized knowledge within the scope of rule 701. MRE 701.

The Michigan Supreme Court in *Fomby* held that a witness may not identify an individual depicted in a photograph or video when that witness is in no better position to identify the individual than is the jury. *Id.*; see also *United States v. Rodriguez-Adorno*, 695 F.3d 32, 40 (1st Cir. 2012). Under MRE 701, a lay witness's testimony is limited to opinions and inferences that are rationally based on the witness's perception and "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." A witness cannot provide his opinion on a matter when the jury is equally capable of reaching its own conclusion on that same issue because this invades the province of the jury. *People v. Drossart*, 99 Mich. App. 66, 79-80, 297 N.W. 2d 863 (1980). In the case at hand, the officers were in no better position than the jury to determine whether the woman in the video was defendant. Accordingly, the officer's testimonies invaded the province of the jury. *Id.* We conclude that the trial court erred by allowing the police offices to testify that the woman depicted in the video was defendant. *See Drossart* at 80-82.

Counsel's decision not to object to Sargent Peterson and Trooper Pearson providing their opinion about the videos was predictably prejudicial. It allowed the witnesses who had been elevated by extensive testimony about their training and experience to act as a thirteenth juror on an issue that was outcome determinative. It also allowed the prosecutor to act as the fourteenth juror.

Sargent Peterson and Trooper Pearson, however, were in no better position than the jury to make identifications from the video, whether of the Defendant or another individual, and in any case could not permissibly express an opinion as to Petitioner'

guilt or innocence. Unlike the videos at issue in *Fomby*, the video here was neither complicated nor lengthy. The task at hand was a simple one: to decide whether one of the two individuals depicted in the video was Petitioner -- that is, whether Petitioner was guilty of the crime with which she had been charged. This question, of course, was precisely the question to be decided by the jury.

By purporting to identify Petitioner and interpret her actions in the video, Sargent Peterson and Trooper Pearson impermissibly usurped the essential role of the jury. Because the question of Petitioner's guilt or innocence was one exclusively for the jury to decide, and because, as a police officer, Sargent Peterson" testimony would have been particularly persuasive, the trial court should not have allowed Sargent Peterson' to share his opinion concerning Petitioner' guilt or innocence. By permitting Sargent Peterson and Trooper Pearson to opine definitively that the video depicted Petitioner and interpret the actions of Petitioner on the video and testify as to the time and locations of these actions, the trial court effectively removed from the jury the decision on the ultimate issue of her guilt or innocence. *See Freed v. Salas*, 286 Mich. App. 300, 347, 780 N.W.2d 844, 872 (2009) (It is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury.) Sargent Peterson and Trooper Pearson had no personal knowledge of the events of the charged offense, and no better basis than the jurors in deciding what the video portrayed.

Trial counsel's failure to object clearly prejudiced Petitioner. The evidence of guilt was not overwhelming. The defining issue in the case was the narration of the

surveillance videos. It was wholly unnecessary to introduce these videos in this fashion, "official" witness to show that Defendant was present at the scene. Given the significance in this case of the surveillance video evidence Petitioner as an accomplice to the area of the murder and robbery near the time of that charged offense, the error in allowing these witnesses to insert their opinions into the jury's deliberations was highly prejudicial and denied Petitioner a fair trial. *Fomby*, supra. Had counsel objected before the damaging testimony was allowed, the outcome would likely have been different. Defendant is entitled to a new trial.

Overall, the Court of Appeals' conclusory analysis is in error as it conflicts with and disregards the findings of the lower court and the controlling authorities of the United States Supreme Court decisions as discussed in the above argument. Petitioner's ineffective assistance of counsel claims. Petitioner presented multiple instances of ineffective assistance of counsel to the Court of Appeals. In this case, trial counsel failed to fulfill each of these duties, thereby rendering constitutionally deficient performance. *See Strickland*, 466 U.S. at 690-691.

III. CERTIORARI IS APPROPRIATE AS THE PROSECUTOR'S WITNESSES WERE ALLOWED TO INVADE THE PROVINCE OF THE JURY BY NARRATING THE VIDEOS ENTERED INTO EVIDENCE IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS VI AND XIV.

Argument

Petitioner was denied the Sixth and Fourteenth Amendment rights to a trial by jury, meaning that the jury was the trier of fact. The United States Supreme Court has recognized state and federal statutes and rules ordinarily govern the admissibility of

evidence and jurors are assigned the task of determining the reliability of evidence presented at trial. *Kansas v. Ventris*, 556 U.S. 586, 594, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).

Petitioner asserts that her right to a trial by jury was infringed when videos were shown to the jury, and witnesses were asked to tell what they saw in the exhibits, while the jury was also looking at the exhibits.

> Where a jury is as capable as anyone else of reaching a conclusion based on certain facts, it is error to permit a witness to reason from those facts to a conclusion. By allowing such testimony, the province of the jury was invaded. *Evans v People*, 12 Mich 27 (1863).
>
> *People v. Walker*, 40 Mich. App. 142, 145, 198 NW2d 449 (1972).

Witness opinion testimony is improper when it goes to a disputed issue at trial, and the jury is as capable as the witness of reaching a conclusion. Under Michigan Rule of Evidence 701, lay opinion testimony must be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701. Opinions by lay witnesses are not helpful when the jury is as capable as the witness of reaching its own conclusion. Such opinions invade the province of the jury. *People v. Drossart*, 99 Mich. App. 66, 80, 297 NW2d 836 (1980) ("where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury."); see also *People v. Fomby*, 300 Mich. App. 46, 831 NW2d 887 (2013).

In the present case, various videos were played to the jury. The jury was able to see the videos, yet the prosecutor continually asked that certain portions be narrated by witnesses.

Detective Sargent Peterson was asked to narrate the videos taken from the Bedford Inn surveillance cameras. (T 9-16-2019, p. 221-228). There is no testimony that Peterson knew any of the people he is identifying in the videos at the time, or that he has any special knowledge allowing him to identify things in the videos that the jury could not see for themselves. See *United States v. Fulton*, 837 F.3d 281, 292 (3rd Cir. 2016) (holding officers' video narration testimony comparing the defendant to the subjects on a surveillance video unhelpful when the officers lacked sufficient familiarity with the defendants before trial).

An interview of Petitioner is played for the jury, and the following day, Detective Peterson answers questions about that videos, then narrates videos from the Red Room Inn and the Caress Carwash, including speculation about what he things he may see in the carwash videos. (T 9-17-2019, p. 39-41, 49-58, 77). The prosecutor asks Peterson to speculate on who he sees in the videos from the Quality Inn, "as far as you could tell." T 9-17-2019, p. 61). If he's guessing, he should not be guessing for the jury. Further, presumably the jury is looking at the same thing. Detective Peterson's "guessing" may have provided to the jury an erroneous interpretation of the video which could have swayed the jury. *United States v. Kilpatrick*,798 F.3d 365, 379 (6th Cir. 1015).

In *United States v. LaPierre*, 998 F.2d 1460, 1465 (CA 9, 1993), an officer provided lay opinion testimony that the defendant was the individual captured in surveillance photographs from the bank that was robbed. The Ninth Circuit concluded that the trial court abused its discretion by admitting this testimony and remanded the case. *Id.* The Ninth Circuit identified two situations under that circuit's precedent

illustrative of when such testimony was admissible. The *LaPierre* court opinion that the "common thread" of this authority was "reason to believe that the witness is more likely to identify correctly the person that is the jury." *Id.* the court concluded that the issue of whether the defendant in the courtroom was the person pictured in a surveillance photo "was a determination properly left to the jury." *Id.* see also *United States v. Rodriguez-Adorno*, 695 F.3d 32, 40 (CA 1, 2012) (holding that when a witness is in no better position that the jury to make an identification from a videos or photograph, the testimony is inadmissible under FRE 701.

Additionally, the prosecutor attempted a further invasion of the province of the jury by asking Trooper Pearson what conclusion he drew from Wappner's pockets being pulled out when his body was discovered. One problem with this line of questioning, was that the civilian witness who discovered the body was not called as a witness, the civilian whom she notified was called by the prosecutor. (T 9-16-2019, p. 151-153). Trooper Pearson did not think that it was unusual for the pocket to be pulled out, and it did not lead him to believe anything. (T 9-16-2019, p. 176). This was not the answer the prosecutor wanted, so he limited himself to whether the pockets were pulled out, with other witnesses. The testimony of Detective Sargent Peterson and Trooper Pearson affected the outcome of the proceedings; was a clear and obvious error when Sargent Peterson narrated the events that took place in the Surveillance videos footage; and Trooper Pearson's testimony did not invaded the province of the jury.

The prosecutor requested the witnesses to interpret various videos, to the benefit of the prosecution's theory, based solely on their personal opinion. The province of the

jury was invaded when the jury was able to see the videos, yet the prosecutor continually asked that certain portions be narrated by these witnesses. These opines by lay witnesses were not helpful when the jury was as capable as the witnesses of reaching its own conclusion. The significance in this case of any identification evidence would places Petitioner as an accomplice, and in the area of the murder and robbery at the time of the charged offense, the error in allowing these witnesses to insert their opinions into the jury's deliberations was highly prejudicial and denied Petitioner a fair trial.

Detective Sargent Peterson identified Petitioner as one of the individuals depicted in the surveillance videos footage. The videos were played for the jury during the trial, at no time was there a connective indication Detective Sargent Peterson had substantial or sustain contact with Petitioner. Or that Petitioner's appearance had changed from the time of the production of the videos footage. Therefore, Detective Sargent Peterson was not in any better position than the jury to identify individuals on the videos. Province is for the jury to determine all questions of fact. Detective Sargent Peterson being asked to tell what he saw in the exhibits, while the jury was also looking at the exhibits had invaded that province of the jury.

Trooper Pearson's testimony was inappropriate as he did not have personal knowledge in the matter. However, the perception was already set. Under MRE 701, lay opinion testimony is permissible only if it is both rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Under MRE 602, a witness may only testify to a matter if there is a sufficient showing in support of a finding that the witness has personal

knowledge of the matter. Under the 602 rule, the testimony given was him interpreting various business surveillance videos as they were being shown to the jury, which was not helpful nor necessary for the jury decision.

Detective Sargent Peterson and Trooper Pearson had no personal knowledge of the events, other than what the videos depicted. They were not witnesses to any events during the alleged offense and their testimony about the contents of the videos recording failed the test for admissibility under MRE 602. The witnesses' belief and identification from what they felt the videos illustrated was a narrative guide for the jury and placed Petitioner in the area at the time of the alleged murder and robbery. Their opinions were based only on their perception of the videos, not a perception of the actual events, and were not helpful or necessary for the jury to reach their decision. See *People v. Beckley*, 434 Mich. 691, 711, 456 NW2d 391 (1990).

The jurors heard Detective Sargent Petersons' and Trooper Pearson's testimony and were perfectly capable, on their own and without consideration of either one of these opinions, in deciding whether the videos contributed to a finding of proof beyond a reasonable doubt that Petitioner was guilty of premeditated murder, felony murder, armed robbery, and unlawful imprisonment. The evidence – the videos tape – spoke for itself, without the need for interpretation, opinion, or narration by the investigating detective or the trooper officer. Opinion testimony, like all other testimony, must have a probative value that is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403; *Beckley*, 434 Mich. at 724-25.

The jury's sole authority to decide the facts in the case should not have been influenced to any degree by the personal opinion of the two experienced police officer, to which some or all of the jurors may have given deference. Detective Sargent Petersons' and Trooper Pearson's testimony should have been limited to testimony regarding the investigation and testimony regarding the police officers obtaining the videos. These witnesses should not have been allowed to provide commentary or narration for the videos.

See *People v. McCaskill*, unpublished opinion per curiam, issued November 18, 2014 (Docket No. 312409), The Court of Appeals concluded that the trial court erred by permitting a police officer to testify that defendant was the person depicted in still photographs that CVS had created from a surveillance videos, which was shown at trial, because the officer was in no better position to identify the person pictured than was the jury. In *McCaskill*, the case hinged on the identification of the defendant in the photographs that had been created from a surveillance videos, while in Petitioner's case, the prejudicial testimony is not limited to the identification of Petitioner but also encompasses the interpretation of the actions of the Petitioner and the other individuals depicted in the videos. As the testimony in the *McCaskill* case invaded the province of the jury, so did the testimony of Detective Sargent Peterson and Trooper Pearson.

In Petitioner's case, the videos were crucial evidence, as the jury view the videos during deliberations and then reached their verdict within an hour and twenty-six minutes (JT IV p. 4). Thus, testimony identifying individuals and interpreting the actions of those individuals on the videos would clearly prejudice Petitioner and affect

the outcome of the trial and Detective Sargent Peterson' and Trooper Pearson' testimony thus clearly affected the outcome of Petitioner's trial and her substantial rights. Detective Sargent Peterson and Trooper Pearson were in no better a position than the jury to interpret the actions in the videos as to the guilt or innocence of Petitioner. Because their prejudicial opinion testimony impermissibly encroached and invaded the province of the jury and effectively foreclosed its ability to determine Petitioner' guilt or innocence, the conviction should be vacated.

The narration of the video by Detective Peterson and testimony of Trooper Pearson denied her a fair trial, and was a denial of Due Process. Only when evidence "is so extremely unfair that its admission violated fundamental conceptions of justice," *Dowling v. United States*, 494 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), have we imposed constraint tied to the Due Process Clause.

IV. CERTIORARI IS APPROPRIATE AS THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT IN VIOLATION OF US CONSTITUTIONAL AMENDMENTS VI AND XIV.

Argument

Petitioner was denied Due Process in violation of the Fifth and Fourteenth Amendments due to insufficient evidence for conviction. Due Process requires that the prosecutor introduce sufficient evidence which would justify the factfinder in reasonably concluding that a defendant is guilty beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979). "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the

crime with which he is charged.'" *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). While the trier of fact can draw reasonable inferences from the evidence presented, mere suspicion and "meager circumstantial evidence" cannot sustain a verdict of guilt beyond a reasonable doubt. *Newman v. Metrish*, 492 F. Supp. 2d 721, 729 (E.D. Mich 2007).

A. Insufficient Evidence for Armed Robbery

To prove armed robbery, it is necessary to establish the following:

> (1) the defendant, in the court of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v. Gibbs*, 299 Mich. App. 473, 490, 830 N.W.2d 821 (2013).

"In the course of committing a larceny" includes "acts that occur in an attempt to committing the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. MCL 750.530(2).

In this case, that any robbery took place was completely speculative. In response to defense counsel's question, Peterson bases his conclusion that there was a robbery on the pictures of Wappner's pockets being pulled out when his body was found. (9-17-2019, p. 74). There was no property of Wappner's found on Petitioner. There was testimony from Wappner's girlfriend that he had money and drugs on December 1, 2018. There

was testimony from Mr. Walker, the man who took Wappner's truck, went to find someone else to have sex with, went to work the next day, and was about to give someone a ride when police caught up with him, that Wappner had money and drugs. However, Walker admitted to consuming some of those drugs, and admitted that he was in the shower when Wappner left the motel room, so he did not know what Wappner had when he left. Further, the person who located the body was not called as witness, and the prosecutor objected when defense counsel asked the civilian who was called, why the person who discovered the body called him instead of police. The prosecutor was successful in keeping that information out of the record.

That nothing was found in Wappner's truck was not determinative, as it is unclear, from the record, how many people had access to the truck; whether the person he met for sex was in the truck; whether it was locked the night he slept at Arthur's house; whether it was locked while Walker was at work the next day; whether it was locked overnight at Antoinette's house.

The Felony Murder charge depends upon at least the crime of Armed Robbery having been committed, so it must fail as well. As to First Degree Premeditated Murder, there is no proof of premeditation, and no proof that Petitioner was anything but merely present. Further, it was the duty of the prosecutor to prove beyond a reasonable doubt that the killing was not done in self-defense. If a new trial is granted, the self-defense instruction must be clarified to include Blanchong. If the jury convicted on the aiding and abetting theory, that Blanchong could be the one acting in self-defense, in order to find Petitioner, as the aider and abettor, not guilty. Under Michigan law, first-degree

premeditated murder requires a finding that the defendant committed a homicide with premeditation and deliberation. *Marsack v. Howes,* 300 F. Supp. 2d 483, 490 (E.D. Mich. 2004). "The elements of [first-degree] premeditated murder are:

> (1) an intentional killing of a human being (2) with premeditation and deliberation." *People v. Gayheart,* 285 Mich. App. 202, 210, 776 N.W.2d 330 (2009).

There is no proof of premeditation or deliberation. The prosecutor took the position that Blanchong and Morris had time to premeditate and deliberate when they pretended to go get more money. That is not proof, it is merely opportunity. There is no proof on the record that they were seeking to do anything but purchase drugs, apparently their way of disposing of Blanchong's inheritance.

It is clear that Wappner was killed in that vehicle that night, however Klempner testified to a passenger attacking the driver, Blanchong, which would support the self-defense claim. Because no one else saw anything that happened, and Morris did not clearly see, herself, as she was trying to control the vehicle once Blanchong was being pulled into the back seat. Once he was pulled into the back seat, Blanchong may have been acting in self-defense, or he may have become "[] disturbed by hot blood." *People v Plummer,* 229 Mich App 293, 300, 581 NW2d 753 (1998). With respect to the aiding and abetting, as argued at trial, whatever Petitioner did was after the fact, and she has not been charged with accessory after the fact.

B. Insufficient Evidence for Unlawful Imprisonment

To prove unlawful imprisonment, it is necessary to establish the following:

(1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

(a) The person is restrained by means of a weapon or dangerous instrument.
(b) The restrained person was secretly confined, which means to keep the confinement or location of the restrained person a secret.
(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony. [See *Bosca*, 310 Mich. App. at 18, citing MCL 750.349b].

The term restrain means "to forcibly restrict a person's movements or to forcibly confined the person so as to interfere with that person's liberty without that person's consent or without lawful authority." MCL 750.349b(3)(a). The term "secretly confined" means either "[t]o keep the confinement of the restrained person a secret[,]" or "[t]o keep the location of the restrained person a secret." MCL 750.349b(4).

There is no proof beyond a reasonable doubt of Unlawful Imprisonment, MCL 750.349b. There is no proof that Wappner was restrained in Blanchong's truck. Presumably if restraints were found in the truck, or near the body, this would have been mentioned at trial. No evidence of restraint was brought out through the medical examiner. Detective Peterson was candid in admitting that Wappner voluntarily entered the truck twice, and that he found no evidence that he was restrained either of those times. (T 9-17-2019, p. 72-73). Wappner was not secretly confined, as he voluntarily got into the Avalanche twice, communicating between these times with Walker, that he expected Morris, Blanchong and the Avalanche to return. Further, Amber Klempner testified that someone, a passenger, was hitting the male driver. So Wappner was able to be seen, and was not restrained. (T 9-17-2019, p. 91-92).

The evidence is insufficient to support a conclusion that Petitioner committed each element of the charges of armed robbery, and unlawful imprisonment. The evidence does not support the contention that Petitioner acted with the necessary intent to sustain these convictions. Additionally, even if this Court finds sufficient evidence to infer necessary intent, the prosecution failed to present evidence sufficient to negate Petitioner's assertion that Petitioner participated in robbing and unlawfully restraining the victim or in the alternative that at best the prosecution presented evidence or proof beyond a reasonable doubt.

In the instant case, Petitioner did nothing to assist in the events other than merely being present. This Court held a reviewing court must find there was "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson* at 316 (explaining that an "essential" guarantee of due process is the protection against conviction except where there is "evidence ...to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense").

In this case, it is apparently clear, Petitioner's sole interest was to purchase drugs. There is nothing in the record of evidence that reflect a rational trier of fact to determine beyond a reasonable doubt that Petitioner had the requisite intent to commit the charged offenses. So unless "sufficient evidence" against the defendant has been introduced, a "judgment of acquittal should be entered." The prosecution's case that Petitioner had knowledge that the crime was planned or mere presence violates constitutional standards. Mere presence during the commission of a crime, even if there

is knowledge that a crime will be committed, is not enough to make someone an aider and abettor. *People v. Casper*, 25 Mich. App. 1, 5 (1970).

There was insufficient evidence to establish anything more than mere presence. Petitioner was sitting inside the Chevy Avalanche when Mr. Blanchong stabbed Mr. Wappner. The murder weapon was never found. There is no evidence that Petitioner and Mr. Blanchong planned or discussed the stabbing, even in the moments preceding it. Petitioner's only expectation was to cop some drugs and to get high. The prosecution failed to prove that Petitioner intended to kill Mr. Wappner, or had knowledge that Mr. Blanchong intended to kill Mr. Wappner at the time of the allegedly struggle that ensued between Blanchong and Wappner. With respect to each crime, there is no testimony putting a weapon in Petitioner's hand. Therefore, applying the above principles to the instant case, mandates reversal of Petitioner's convictions.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Petitioner Jessica Lynn Morris respectfully requests this Court grant this Petition for Writ of Certiorari.

Respectfully Submitted,

JESSICA LYNN MORRIS #600884
Petitioner in *Propria Persona*
Women's Huron Valley Correctional Facility
3201 Bemis Rd.
Ypsilanti, MI 48197

Dated: April 02, 2025