STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 76-005890-01-FC
Hon. QIANA D LILLARD

vs.

CHARLES LEWIS,

Defendant.
_____/

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THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION, WHERE DEFENSE COUNSEL ARGUED TO THE JURY THAT THE DEFENDANT WAS GUILTY

During the trial in this matter the Defendant was represented by 70 year old Italian mob lawyer Arthur Arduin. Defense counsel's performance in this case was constitutionally inadequate and rendered Defendants trial unfair and unreliable. See, People v Trakhtenberg 493 Mich 38, 826 N.W.2d 136 (2012). Both the Michigan and United States Constitutions require that a criminal defendant be afforded the assistance of counsel in his or her defense. U.S. const. amend. VI; Const. 1963 art 1, sec 20. To be constitutionally effective, counsel's performance must meet an "objective standard of reasonableness." To show that this standard is not met, a defendant must overcome a strong presumption that counsel's performance is born from a sound trial strategy. But a court cannot insulate a review of counsel's performance by calling it trial strategy; counsel's strategy must be sound, and the decisions as to it objectively reasonable. Courts must determine whether the strategic choices are made after less than complete investigation, or if a reasonable decision makes particular investigations unnecessary.

To obtain relief for a denial of the effective assistance of counsel, the defendant must show that counsel's performance falls short of this "objective standard of reasonableness" and that, but for counsel's deficient performance, there is a reasonable probability that an outcome of the defendants trial will be different. The reasonable probability is a probability sufficient to undermine confidence in the outcome. People v Ackley, 497 Mich 381; 870 N.W.2d 858 (2015) On July 6, 1977 the Defendants attorney Arthur Arduin gave the following opening statement to the jury:

OPENING STATEMENT OF ARTHUR ARDUIN (TRIAL TRANSCRIPT PG 21-24)

Good morning ladies and gentleman. Now we start the trial. You'll have to excuse me a little bit: I'm pretty warm. I wish I didn't have to wear a tie but those are the rules. You guys can get away with it, I can't. Now, as you probably know at this time you know just about what the case is going to be. There's been a killing; there's been an attempted robbery; there's been a attempted robbery prior to this matter at issue today. Now we have here only one Defendant. But originally there were four young blacks. If they are part of a gang, I don't know. But let's assume they're part of a gang.

MR. MORGAN: I object, Your Honor. "Let's assume" in an opening statement

THE COURT: What are you there for.

MR. ARDUIN: Your Honor, I'm telling the jury that this is what we're going to prove.

MR. ARDUIN: We're going to prove by all the witnesses that are going to testify in this case, by all the witnesses I mean the Peoples wutnesses , there own witnesses -- and I may have a witness or two for the defense. We' re going to prove four lads who are part of a gang who are -- who are expertise. Expertise, - they knew how to steal cars and God only knows if they knew how to rob. Now that's what we're going to prove. And they started out on this day, July 31st, four of them -- four of them -- to steal a car and to go out and commit a robbery. And they took with them the tools of their trade.

What are the tools of their trade? Screwdrivers, coat hanger -- to steal a car. And a sawed-off shotgun that did not belong to Mr. Lewis. It belonged to one of the other lads who are going to testify against him, - but who are all members of this gang. You are going to hear testimony of a lot of witnesses; the testimony is going to be fantastic, fantastic, but in no way, shape or form, ties this man to the killing. Except, exception of the other three lads who, as Mr. Morgan said, were under 17 so therefore, they were treated as juveniles.

And I'm going to prove to you that these lads made a deal, they made statements with the understanding that they would not be prosecuted in this court. And I'm going to prove to you that the prosecution depends on the efforts of the police and they did not make any effort to prosecute these lads. That was the agreement: for them to testify against their pal and friends. We're going to prove to you that at the time another crime was committed this shotgun was a one-shell shotgun.

It was an old thing, it was stored in the garage of one of the other lads who used his garage as a gang get-together. And we are going to prove to you that this one shell was fired from this gun in this other attempt aborted hold-up as Mr. Morgan has stated to you: that that gun was never refilled. Never refilled with another live shell. That the prosecution is depending on the proof that that was the gun that killed the deceased. That's my opening statement; that's what we hope to prove. (TRIAL TRANSCRIPT PG 21-24)

The above opening statement fell below an objective standard of reasonableness. There is a reasonable probability that the result would have been different if counsel had argued that the defendant plead "not guilty" and was innocent. Defense counsel must perform at least as well as a lawyer with ordinary skill and training in criminal law and must conscientiously protect interest undeflected by conflicting considerations. People v Garcia, 398 Mich 250; 247 N.W.2d 547 (1976).

The constitutional guarantee of the right to counsel at trial requires, as a minimum, that the defendant's interest be represented by counsel until the trial is over. See, People v Fisher, 119 Mich App 445: 326 N.W.2d 537 (1982). Clearly, Arthur Arduin had conflicting considerations. Defense counsel didn't tell the jury that Leslie Nathaniel was arrested for the murder an hour after the murder. Counsel's failure to make that argument to the jury left the defendant defenseless and at the mercy of the jury. A plea of 'not guilty' has at least two dimensions recognizable by this court.

First, in pleading 'not guilty' a defendant reserves in to those constitutional rights fundamental to a fair trial. Included in this category of constitutional rights is the accused's right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Second, in pleading 'not guilty,' a defendant exercises his right to make a statement in open court that he intends to hold the government to strict proof beyond a reasonable doubt as to the offense charged.. Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty' or perhaps more accurately not to plead guilty, entails the

obligation of his attorney to structure the trial of the case around his clients plea.

The Court in Wiley found a Petitioner was deprived of effective assistance of counsel when his own lawyer admitted his clients guilt, without first obtaining his clients consent to this strategy. Wiley v Sowders, 647 F.2d 642 (1981). In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin, supra....Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied the petitioner his constitutional right to have his guilt or innocence decided by the jury.

Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of Petitioner's guilt nullified the adversarial quality of this fundamental issue. "A criminal defendant has a constitutional right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with reasonable competetence and diligence. People v Fisher, 119 Mich App 445: 326 N.W.2d 537 (1982). Boykins v Alabama, 395 U.S. 238, 89 S.Ct 1709, 23 L.Ed.2d 274 (1969), Wiley v Sowders, 647 F.2d 642 (1981).

Defense counsel's admission of guilt in this case was not agreed to on the record by the Defendant. Nor, was the decision by attorney Arthur Arduin to argue to the jury in his opening statement that the Defendant was guilty a sound trial strategy. Here are the facts of the case from judge Deborah A. Thomas's

August 19, 2008 opinion: JUDGE DEBORAH A. THOMAS' AUGUST 16, 2006

OPINION PT. 1. FACTS On July 31, 1976, at approximately 1:30 in the morning, off duty Detroit Police Officer, Gerald Swpitkowski was shot and killed on the corners of Harper and Barrett. Dennis Van Fleteren, an off duty Detroit Police Officer and partner of the deceased was an eye witness to the murder. Van Fleteren testified that he met the deceased on the night of the murder. (TT pg 69). He also testified that he and the deceased went to several bars and ended up at Oty's Saloon where they had a few drinks. (TT pg 71). Van Fleteren testified that some time before 1:30 Swpitkowski left the bar and headed down to Harper Street. (TT pg 72). Van Fleteren testified further that he was talking to Swpitkowski when a white Mark IV pulled up on Harper with the lights out next to Swpitkowski. (TT pg 73). He further testified that he saw Swpitkowski fall into the street and simultaneously heard a shotgun blast come from the driver’s side of a white Mark IV. (TT pg 75). Van Fleteren testified that he ran into the street and attempted to stop the Mark IV by waving his hands. (TT pg 77). Van Fleteren testified that the driver of the white Mark IV sped up and nearly ran him down. (TT pg 76-78).

Van Fleteren testified that he crouched down, directed his full attention towards the license plate number and memorized the license plate number. (TT pg 76-78). Van Fleteren testified that at the time of the incident he thought that the shot that killed his partner Swpitkowski came from the white Mark IV. (TT pg 78). And, that there was no other traffic in the streets.

Jay Smith testified that he was driving down Harper in his Ford LTD with the following passengers, Kim Divine, front passenger, Gloria Ratachek, back seat passenger side, and Donald DeMarc, back seat, drivers side. (TT pg 135). Jay Smith testified that he pulled up in front of Oty's Saloon and double parked in the street to let Kim Divine out. Jay Smith further testified that he looked in his rear view mirror and saw a flash come from the drivers side of a white Mark IV that was traveling down Harper with the lights out heard a shotgun blast come from the side of Harper that the white Mark IV was on. Jay Smith also testified that he saw the headlights of the white Mark IV go off after the shot was fired. (TT pg 137). Jay Smith further testified that the white Mark IV was traveling west on Harper at a high rate of speed.

Detroit Police Officers Joseph Grayer and Lorraine Williams were the first officers to arrive on the scene of the crime. Lorraine Williams was the only officer that arrived on the scene that testified. Williams testified that Dennis Van Fleteren was irrational and intoxicated. (TT pg 230).

Andrew Kuklock, Gerald O'Connor, Michael Kudla, and Michael Yanklin also arrived on the scene of the crime. Some of the Officers took statements from witnesses and some of the officers transported witnesses from the scene of the crime to the police homicide section. One of the officers was given the license plate number of a white Mark IV. The police later learned that the white Mark IV was owned and driven by Leslie Nathaniel. An arrest warrant was issued for Leslie Nathaniel and a SWAT TEAM was sent to apprehend Mr. Nathaniel and impound his white Mark IV.

Three hours after the murder Leslie Nathanial was arrested. Mr. Nathanial made a statement to homicide detective Gilbert Hill. In his statement, Mr. Nathaniel said that he was driving his white Mark IV down Harper with the lights out on the night that the deceased was killed, and that he did not hear a gunshot or see anyone get shot. Mr. Nathaniel was later released from custody and his car was destroyed in the Seventh Precinct impound lot. (TT pg 399-412).

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The above STATEMENT OF FACTS, is from a Court opinion issued by judge Deborah Thomas denying Defendants MOTION FOR RELIEF FROM JUDGMENT. The above facts are recited to show the contrast between what defense counsel Arthur Arduin said to the jury in his opening statement to the jury and the facts that were found by Judge Deborah Thomas in the trial transcript. In Wiley v Sowders, 647 F.2d 642 (6th cir.1981) the Sixth Circuit ruled: "However, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea."

In People v Carter, 41 I'll.App.3d 425, 354 N.E.2d 482 (1976), the Appellate Court of Illinois analyzed a factual and legal situation similar to the case at bar. In Carter, the Defendant was charged with armed robbery. The victim testified that after the defendant lost his money in a dice game, he pulled a gun and stated that this was a stickup. The defendant took the stand and denied robbing the victim or taking a gun to the apartment. Defense counsel, during closing argument, not only stated that his client was not very brilliant in doing

what he did, but specifically declined to discuss the factual discrepancy concerning whether the defendant was armed.

The Defendant's trial attorney was grossly ineffective. Arthur Arduin refused to tell the jury that off duty Detroit Police Officer, Dennis Van Fleteren testified that he was talking to the deceased when Leslie Nathaniel pulled up next to the deceased and shot and killed him. The result would have been different if Arduin had argued to the jury that eye witnesses identified Leslie Nathaniel as the killer. In this case one of the eye witnesses, Dennis Van Fleteren, was also an off duty Detroit Police Officer,and the best friend and partner of the deceased.

Defense counsel completely abandoned the then seventeen year old juvenile and left him totally defenseless. The defendant's lawyer was ineffective for failing to make that argument to the jury that Leslie Nathaniel shot and killed the deceased. Six eye witnesses testified that the shotgun blast that killed the deceased came from a white Mark IV. Defense counsel for the Defendant failed to make that argument to the jury.

The result would have been different if Arduin had argued to the jury that eye witnesses identified Leslie Nathaniel as the killer. Judge Deborah Thomas concluded that it was scientifically impossible for the victim to have been standing at a bus stop facing the street when he was shot. And, further that it was impossible for four juveniles in two cars, to be on Harper and not be seen by anyone. In this case there was overwhelming evidence against mob hit man, Leslie Nathaniel.

All of the evidence against Leslie Nathaniel was exculpatory evidence for the Defendant. Defense counsel abandoned the Defendant when he chose to reject all of the evidence against Leslie Nathaniel. It is imperative that this Court understand that seventeen-year-old juvenile, Charles Lewis never had a chance. He was defended by seventy-year-old Italian mob lawyer Arthur Arduin. It is abundantly clear that Arthur Arduin had conflicting interests. Arduin's primary concern was to make sure that mob hit man Leslie Nathaniel was never charged.

To ensure that Leslie Nathaniel would never get charged, Arthur Arduin argued to the jury that the Defendant was guilty. The Defendant was at the local 212 playing with the band Pure Pleasure on the night of the murder. Defense counsel ignored the Defendant’s alibi. Defense counsel never contacted any of the Defendants alibi witnesses. Defense counsel never functioned as Defense counsel, and left the defendant without an attorney. Defense counsel never ever told the jury to find the defendant not guilty. The trial was not adversarial because both sides argued that the defendant was guilty. JUDGE DEBORAH THOMAS'S AUGUST 16, 2006 OPINION ISSUE III PG 5.

In the Defendant's third argument he asserts that the original trial judge Joseph E. Maher directed the jury to find him guilty during his instructions. This is a very complicated issue that has been argued by the Defendant before. This Court believes that this is controlled by the law of the case doctrine. However, this Court will still address this issue. Judge Maher gave the jury the following instruction: “Now you have heard evidence tending to show that the Defendant, Charles Lewis was GUILTY of another shooting in the course of an armed

robbery for which he is now on trial here." (TT Pg 666). The United States Court of Appeals for the Sixth Circuit concluded that the above instruction was harmless error. This Court disagrees.

This Court believes that the above instruction was a structural defect which defies analysis by the harmless error standard of review. I would reverse this case based on the above instruction. This Court is of the opinion that at any time a judge instructs a jury that a defendant is GUILTY of any element of the offense, regardless of his motives that it should be deemed reversible error. The above instruction in this case was especially offensive.

Two versions of the deceased's death were presented to the jury. The three juveniles testified collectively that Jeffrey Mulligan was driving a stolen yellow Grand Torino, and that Ronald Pettway was a passenger in the front seat and the Defendant was a passenger in the back seat, seated on the passenger's side of the car with a sawed off shotgun. The three also testified that the yellow Grand Torino pulled up to the curb, and further that the deceased was standing at a bus stop when the defendant requested his wallet then shot him in the head with a sawed-off shotgun. What is disturbing is the fact that the jury had to reject the testimony of Dennis Van Fleteren, an eye witness who was also a Detroit Police Officer, and the partner of the deceased, to convict the Defendant.

The jury had to also reject the testimony of Jay Smith, who was also an eye witness to the murder. Both Dennis Van Fleteren and Jay Smith testified that the fatal shot that killed the deceased came from the driver's side of a white Mark IV. The jury had to also reject the testimony of Kim Divine, Gloria Ratachek,

Donald DeMarc and William Eichmann. The jury had to totally disregard the testimony of the first alleged perpetrator Leslie Nathaniel.

Mr. Nathaniel testified that he was driving down Harper with his lights out on the night of the murder. The white Mark IV that was driven by Leslie Nathaniel, it should be noted was destroyed in the Seventh Precinct impound lot. To convict, the jury had to reject the scientific impossibility that the three juveniles' version of the murder presented. To convict the jury had to believe that the deceased was standing at a bus stop when he was shot in the head, and the force of the fatal shotgun blast blew the deceased from the bus stop into the street. The coroner testified that the deceased was shot at close range with a 12 gauge shotgun that was loaded with double "0" buck shot.

The high hurdles that the jury overcame to convict is clear evidence that the jury was swayed by the judge's instruction. It is the opinion of this Court that the complained of instruction pierced the veil of judicial impartiality. See People v Collier, 168 Mich App 687; 425 NW.2d 218 (1998). It is hard to fathom that a jury would summarily dismiss the testimony of a police officer in favor of three juveniles. I also have some questions about how four juveniles in two cars could be missed by everyone on the scene of the crime. It is the opinion of this Court that the above instruction by Judge Maher had a devastating effect on the jury.

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The above opinion is cited to show the depth of defense counsel's ineffectiveness. Defense counsel failed to object to the instruction by Judge Maher that the Defendant was guilty. Defense counsel refused to argue to the

jury that Leslie Nathaniel was initially arrested because six witnesses said that he committed the murder.

In People v Trakhtenberg, 493 Mich 38, 826 N.W.2d 136 (2012), the Supreme Court discussed trial counsel's performance. The Court ruled: In this case, the trial court and the Court of Appeals erred by failing to recognize that defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct any investigation of the case in the first instance. Accordingly, no purported limitation on her investigation of the case can be justified as reasonable trial strategy.

In this case it would be an error for this court to conclude that Arthur Arduin exercised reasonable professional judgment when he argued to the jury that the Defendant was guilty. It would also be an error for this court to conclude that counsel was not ineffective for failing to request the written terms of the agreements between the three juveniles and the prosecution.

For all of the above reasons the Defendant moves this Honorable Court to conclude that he was denied the effective assistance of trial counsel and dismiss the pending matter and order a retrial for the reasons so stated herein.

Respectfully submitted,

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