No. _____

In The
Supreme Court of the United States

REBECCA JEAN SHIMEL,

Petitioner,

v.

MILLICENT WARREN, WARDEN OF WOMEN'S HURON VALLEY CORRECTIONAL FACILITY, YPSILANTI, MICHIGAN,

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

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QUESTION PRESENTED

Whether it is a reasonable application of clearly established federal law to require a habeas petitioner, claiming ineffective assistance of counsel in connection with a guilty plea, to demonstrate under the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 688 (1984), that but for counsel's ostensible deficient performance:

(1) petitioner, or a rational person in petitioner's position, would have pled not guilty *and received a favorable outcome at trial*, as required by the Sixth and Ninth Circuits;

rather than

(2) petitioner, or a rational person in petitioner's position, would simply have pled not guilty, as required by the Third, Fourth, Seventh, and Tenth Circuits.

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

Rebecca Jean Shimel respectfully petitions this Court for a writ of *certiorari* to the U.S. Court of Appeals for the Sixth Circuit, to reverse the denial of habeas corpus relief from her conviction and sentence for murder in the State of Michigan.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 838 F.3d 685. The opinion of the district court, App. 31a, is unreported, but available at 2015 U.S. Dist. LEXIS 150817. The opinion of the Michigan Court of Appeals, App. 67a, is unreported, but available at 2013 Mich. App. LEXIS 1351.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2016. On December 9, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to February 19, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution provides, in relevant part:

> No State shall deprive any person of . . . liberty . . . without due process of law. . . .

STATEMENT

For most of her life, Petitioner Rebecca Shimel has trusted others, only to be abused and abandoned. From childhood sexual abuse, to a nearly thirty-year marriage marked by physical abuse and rape, to a lawyer who failed her at a crucial moment, Petitioner has again and again been exploited and harmed by the very people who should have supported and helped her.

On December 28, 2009, during a violent argument, she shot and killed her abusive husband. She was charged with murder. Her attorney, whose communications with his client were scant, (a) did not meaningfully investigate Petitioner's claims of abuse; (b) misadvised her as to the sentence she would face if she pled guilty; (c) did not inform her that he had reached a plea agreement with the state, and did not consult with her on the terms of that agreement; and (d) after

Petitioner, caught completely off-guard at the plea hearing, followed his direction and pled guilty to second degree murder, presented no material evidence or argument at her sentencing. Petitioner was sentenced to 18-36 years.

Petitioner subsequently moved to withdraw her plea. The trial judge found, based in part on his own observations during the plea hearing, that counsel was ineffective; he granted the motion.

The state appealed. The Michigan Court of Appeals reversed, finding in pertinent part that to succeed on such a motion Petitioner had to establish that, had she pled not guilty, she would have prevailed at trial – a burden she did not carry. After the Michigan Supreme Court denied her leave to appeal, Petitioner filed this petition for habeas corpus under 28 U.S.C. § 2254 with the Eastern District of Michigan, arguing that her trial counsel was ineffective, and her guilty plea should be set aside. The petition was denied, and she appealed to the United States Court of Appeals for the Sixth Circuit, which granted a certificate of appealability.

The Sixth Circuit, like the state appellate court, held that Petitioner could not establish the requisite prejudice, in part because she did not show that she would have prevailed had she gone to trial.

Petitioner respectfully submits that the rule applied by the Sixth Circuit – which is also followed in the Ninth Circuit – is incorrect, an unreasonable reading of this Court's jurisprudence, and unjust. To

establish prejudice in the guilty plea context, the correct rule – which is followed in the Third, Fourth, Seventh, and Tenth Circuits – requires a petitioner to prove only that she, or a rational person in her position, would have pled not guilty and exercised her constitutional right to stand trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

This Court has recently granted *certiorari* on a nearly-identical issue. *United States v. Lee*, *cert. granted*, 85 U.S.L.W. 3288 (U.S., Dec. 14, 2016) (No. 16-327). Petitioner respectfully requests that *certiorari* be granted in this case, or, at a minimum, disposition of this petition be stayed until this Court resolves the *Lee* case.

A. Factual Background

1. On February 3, 2011, Petitioner was brought into a courtroom in Bay City, Michigan, where Judge Kenneth Schmidt led her through an open plea of guilty to second degree murder[1] and possessing a

[1] MCL § 750.317. In Michigan, the elements of second degree murder are "(1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse." *People v. Smith*, 148 Mich. App. 16, 21, 384 N.W.2d 68, 70 (1985). "Malice" means "the intent to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter." *People v. Watts*, 149 Mich. App. 502, 513-14, 386 N.W.2d 565, 571 (1986).

firearm when committing a felony[2] in the death of her husband, Rodney Shimel ("Shimel").

Petitioner had last heard from her attorney, E. Brady Denton, on January 11, when he spent at most twenty minutes with her – not bothering to take off his coat – and told her that he was working on a plea deal involving a sentence of "7 to 15 years or less." According to Petitioner, it was Denton's second, and last, non-courtroom meeting with his client, who was charged with an offense carrying a potential sentence of life without parole. The first meeting lasted less than an hour.

In the courtroom, Denton announced that his client was there to plead guilty to "two counts contained in an Amended Information in exchange for other considerations." He had not told his client this before she entered the courtroom. After some confusion and a whispered exchange with Denton, Petitioner assented. Asked whether she understood the plea agreement, Petitioner responded: "Sorta." Judge Schmidt explained that the sentence would be "determine[d] at the time of sentencing." Denton added, "I've explained to her that there are such things as guidelines and that your Honor is virtually bound to stay within those guidelines." Judge Schmidt agreed, and noted, "I don't have an idea of what those guidelines are at this time."

With no pre-court counseling from Denton as to her constitutional rights, the effect of a plea, and the

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[2] MCL § 750.227b.

consequent waiver of those rights, and based on her 20 minute visit with Denton weeks prior as well as her understanding from the court's colloquy – that (a) her attorney had set out to negotiate a deal with a sentence of "7 to 15 years or less," (b) her potential sentence was "virtually" compelled by the state sentencing guidelines, and (c) Judge Schmidt could not speak to her potential sentence because he had not calculated the guidelines – Petitioner agreed to go forward with the plea.

During the plea colloquy, Petitioner explained that she had fired a gun at her husband because "I wanted him to stop." Asked for elaboration, she said, "He was coming after me, sir." Judge Schmidt accepted that – "He was coming after you. Okay." – and proceeded to take the plea.

A year and a half later, Judge Schmidt looked back on the plea hearing and recalled, "I wasn't sure if she knew what was going on. I wasn't positive of it. And at the time, I assumed that she was fully aware of what the likely sentence would be. At least the sentencing guideline range." Finding that her lawyer was ineffective, Judge Schmidt granted her motion to withdraw the plea.

2. What was not said in court that day, and indeed, was never completely explored by anyone – including Denton, the attorney – until well after Petitioner had been given a sentence of 18-36 years, was Petitioner's claim that her nearly thirty-year marriage to Shimel was marked by serial physical abuse and

forcible rape. According to Petitioner, her husband regularly strangled her, punched her, threw objects at her, slapped her, kicked her, pulled her hair, bit her, pushed her against walls and onto the floor, pinched her, held flames to her arm, banged her head against objects, dragged her from one room to another, twisted her arms, bent her legs back painfully to prevent her from escaping. He threatened her with a gun, threatened her with a knife, threw hot coffee on her, poured liquor directly into her mouth, and once tried to push her out of a moving car. These physical assaults were often accompanied by sexual assaults, including forced vaginal penetration, oral sex, and anal penetration. Shimel repeatedly threatened to kill Petitioner.

Petitioner reported that, in the months preceding the shooting, she perceived that her husband's sexual violence was becoming more frequent and more forceful. She said Shimel – whose violence was often accompanied by heavy drinking – was drinking more frequently and yelling more often. She reported a "jittery, walking on eggshells" sense of danger much of the time.

Shimel's drunken rapes of his wife were an echo of another hidden tragedy in Petitioner's life, which her attorney also failed to investigate and present: a history of childhood sexual abuse by her alcoholic father. Petitioner describes a long-term, severe pattern of her father, smelling of liquor, bringing her to the basement and molesting her. This reportedly continued from the time she was in grade school into her pre-teen years.

Petitioner reports that, two nights before the shooting, Shimel, who had been drinking all day, woke Petitioner up and forced himself on her sexually. The smell of alcohol and the unwanted sexual contact brought back memories of her childhood abuse, and "sickened" her. A dark mood and continuous arguing hung over the following two days.

On December 28, 2009, with three of the couple's children downstairs, as another argument raged, Shimel followed Petitioner into their bedroom. While there, the fight again turned physical. Perceiving that her life was in danger, Petitioner grabbed a pistol, which was kept loaded under the mattress, and fired it repeatedly at her husband. He suffered nine bullet wounds, seven of which entered his body through his back. Petitioner locked the door to keep the children out and waited for the police to arrive.

3. Petitioner was charged with "open murder," meaning the charging instrument did not specify a degree (and the state was not required to show, pre-trial, probable cause for a finding of premeditation).[3]

After a prior attorney withdrew, citing a conflict of interest, Petitioner's family retained Denton, for a fee of $10,000.

Petitioner reports that Denton never telephoned or wrote to his client, and ignored her letters to him; nor did he accept her calls (being incarcerated, she

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[3] MCL § 767.71; *People v. Johnson*, 427 Mich. 98, 124, 398 N.W.2d 219 (1986).

called collect). Jail records show only two jailhouse meetings between Petitioner and her lawyer, which she recalls totaling less than an hour and a half. Their only other communications took place during two courtroom encounters, first at Petitioner's plea hearing, and then at her sentencing. Ultimately, he brought her into court to plead guilty under the terms of a plea agreement that the prior attorney had negotiated, months earlier.

During their brief meetings, Petitioner described to Denton years of abuse by her husband, and gave him the names of at least a half dozen witnesses to the abuse, but when one of those witnesses called his office and left a detailed message saying she was aware of Petitioner's abuse and would be willing to testify, he never returned the call.

An attorney from the National Clearinghouse for the Defense of Battered Women, Dale C. Grayson, Esq., likewise called Denton on October 7, 2010 – over two weeks before records show any contact between Denton and his client, Petitioner – offering assistance in developing the spousal abuse aspect of the case. Denton indicated that he did not think she was "that abused." Over the five months that followed, Grayson called Denton some 18 times. Grayson declares that he never took the calls.

Denton had never handled a matter involving a victim, like Petitioner, of what some courts, including

Michigan's, call "battered spouse syndrome" ("BSS").[4] He did not have Petitioner evaluated by any of the BSS experts whose contact information Grayson provided. If he had, he would have learned that victims of domestic violence frequently reach a point at which they genuinely believe their only options are "enduring the abuse, striking back, or committing suicide." *Wilson*, 194 Mich. App. at 599. He would have learned that a long history of abuse can cause the "fight or flight system" to activate, leading to "instantaneous as well as instinctive" defensive violence – action "of the nature of reflexes" – by the abused.[5] He would have learned that strangulation of the sort that Petitioner experienced "triggers immediate and complete helplessness"

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[4] BSS "generally refers to common characteristics appearing in women who are physically and psychologically abused by their mates." *People v. Wilson*, 194 Mich. App. 599, 603, 487 N.W.2d 822, 824 (1992). A "continued cycle of violence and contrition results in the battered woman living in a state of learned helplessness," in which she "may feel partly responsible for the batterer's violence, she may believe that her children need a father, or fear reprisal if she leaves. The battered woman lives with constant fear, coupled with a perceived inability to escape." *Id*. Many experts now prefer the term "battering and its effects," a more inclusive and accurate term. It refers to the defendant's experiences of abuse, including "the nature and dynamics of battering, the effects of violence, battered women's responses to violence, and the social and psychological context in which the violence occurs." Sue Osthoff and Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and its Effects*, in CURRENT CONTROVERSIES IN DOMESTIC VIOLENCE 225, 231 (2d ed. Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh 2005).

[5] ROA.1-7, PgID #408-09.

even though it often leaves no marks,[6] and that domestic violence victims frequently do not report, and even actively conceal, incidents of abuse. Lora Bex Lempert, *Women's Strategies for Survival: Developing Agency in Abusive Relationships*, 11 J. Family Violence 269, 274 (1996).

All of these unexplored facts would have been relevant and material to his client's defense. Evidence of BSS, or of abuse generally, can provide the basis for a self-defense justification in a Michigan murder prosecution, potentially leading to acquittal. *Wilson*, 194 Mich. App. at 604; *People v. Giacalone*, 242 Mich. 16, 217 N.W. 758 (1928). Further, Michigan has a history of cases in which evidence of abuse may have helped lower the charge of conviction to manslaughter, like *People v. Sandoval-Ceron*, No. 286985, 2010 Mich. App. LEXIS 1493 (Ct. App. Aug. 3, 2010) (unpublished), in which a woman stabbed her unarmed boyfriend in the heart, after (a) he struck her once, then retreated, (b) she went into the house and returned armed with a butcher knife, (c) she announced her intention to kill him, and (d) she "chased him down and stabbed him to death." *Id.*, at *5. The jury, having heard about the defendant's history of abuse at the hands of her victim, convicted her of manslaughter. Indeed, as Judge Schmidt later observed in Petitioner's case, a "strong[ ] argu[ment]" existed that "a defense lawyer [could]

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[6] Thomas, K.A., Joshi, M. & Sorensen, S.B., "*Do you know what it feels like to drown?" Strangulation as a tactic of coercive control in intimate relationships*, 38 Psychol. of Women Q. 124-137 (2014); ROA.1-7, PgID #405.

convince a jury that [Petitioner's shooting of her husband] was either justifiable or perhaps voluntary manslaughter[.]"[7]

But rather than consult with Petitioner about a guilty plea in the context of the potential mitigating effects of evidence of abuse, Denton instead told his client that, if she pled guilty, her sentence would be controlled by the guidelines, and that he was working on a plea deal that would involve a sentence of 7 to 15 years, "or less." In his sole response to Grayson's letters and calls, over a month after Petitioner pled guilty, Denton said, "The Judge is bound by the MI sentencing guidelines which by my calculation could be as little as 8 years, although I would expect 10-11 years." (Denton, when later asked where these numbers came from, answered, "My feeling from the prosecutor – from talking to the prosecutor that it would be – they would ask for 10 to 11." But the deal that the prosecutor had offered, and that Petitioner had already taken at the time of the letter, included no sentencing recommendation.)

Denton's representations notwithstanding, under the Court's guidelines calculation (to which Denton did not object), Petitioner's *minimum* sentence would be

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[7] App. 108a-109a. Manslaughter in Michigan is "a homicide which is not the result of premeditation, deliberation and malice but, rather, which is the result of such provocation that an ordinary man would kill in the heat of passion before a reasonable time had elapsed for the passions to subside and reason to resume its control." *People v. Younger*, 380 Mich. 678, 681-82, 158 N.W.2d 493, 495 (1968). The killing "must have been the product of an act of passion; it must have been committed in a moment of frenzy or of temporary excitement." *Id*.

between 13½ and 22½ years; her maximum sentence was life. Under Michigan sentencing law, the court had discretion to depart from the minimum guidelines sentence if there were a "substantial and compelling reason" to do so. MCL § 769.34(3).

Denton directed her to, and she did, plead guilty, despite having provided no pre-court counseling as to her constitutional rights, the effect of a plea, and the consequent waiver of those rights. Immediately after the plea, she wrote him a letter expressing confusion and dismay:

> I am writing to you in regards to the "plea hearing" that occurred today at 1:30. What happened? Why was I not notified by you or your office . . . ? Why didn't I get to meet/speak with you before court so you could explain what this plea deal you had was all about? How could you do this to me? What did I just plea to? . . . What is the difference of "open murder" and "second degree" murder? . . . I would appreciate a written response to this letter, please do not disregard this as you did with my previous letters[.]

Again, Denton did not respond. The next time Petitioner saw or heard from her attorney, it was at her sentencing.

4. At sentencing, Denton filed no memorandum and put on no presentation to justify leniency or establish mitigation. Instead, he offered only a brief statement that seemed primarily aimed at justifying his own performance in the case:

> I think that defenses that we could have raised could've been raised and – and under some circumstances could've been accepted by the jury.
>
> But I would – I feared that the jury would not accept a defense and she'd end up doing the rest of her life in prison.
>
> I recommended to her that she plead guilty to Second Degree Murder because it was, and I think the prosecutor was – I commend the prosecutor for his foresight. That I recommended that she plead guilty so that she could do what she always wanted to do and that's to return to her family and to her children. . . .
>
> [S]he realizes that, that it looked to me like the only sure way that she would be able to see them. . . .
>
> Given her background and given the fact that she was in – involved in a difficult relationship with her husband doesn't justify a homicide and that's why she pled guilty to Second Degree Murder[.]

Denton ultimately asked Judge Schmidt to sentence her at the bottom of the guidelines range, although he offered no reasons to do so:

> [T]he range is that under some circumstances 162 months [13½ years] is an entirely appropriate sentence. And four or five hundred months would be an inappropriate sentence. We're asking your Honor in this case to stay within the guideline range, not to deviate

from it, but to sentence her to 162 months for – for this crime.

Judge Schmidt was not convinced. At age 46, Petitioner was sentenced to 18-36 years in prison.

5. Represented by new counsel, Petitioner moved on September 21, 2011 to withdraw her plea, arguing that Denton had been ineffective.

Judge Schmidt referred to his recollection of the plea hearing, the evidence of Denton's various deficiencies, and the fact that a "strong[ ] argu[ment]" existed that "a defense lawyer [could] convince a jury that it was either justifiable or perhaps voluntary manslaughter," and granted the motion.

B. Procedural History

1. The state appealed the order allowing withdrawal of the guilty plea. The Michigan court of appeals reversed the trial court, holding in part that, "contrary to defendant's argument, she had to do more than merely allege that she would have gone to trial instead of pleading guilty but for her attorney's alleged deficient performance. Rather, she was required to show that the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty." App. 88a. The court held that Petitioner could not establish, on the available record, that she would have been acquitted had she gone to trial, and she was

therefore not entitled to withdraw her guilty plea.[8] The Michigan Supreme Court denied leave to appeal. App. 66a.

2. Petitioner filed this petition for writ of habeas corpus with the Eastern District of Michigan, arguing that she had been denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and that she should be allowed to withdraw her plea. The district court denied the petition, holding in part that the state courts had reasonably determined that Petitioner was required to "show a reasonable probability that she could have prevailed had she gone to trial, or that she would have received a lesser sentence than she did by pleading guilty," a burden that she did not carry. App. 60a.

3. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the denial of her petition. The Sixth Circuit panel, in a published opinion, concluded, like the district court, that the state court had applied the right test and was reasonable in determining that Petitioner had "failed to establish a reasonable probability that expert testimony on battered spouse syndrome would have improved her result." App. 29a. The court went on, "There

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[8] The court also held that – because Denton had spoken to, and obtained materials from, Grayson regarding BSS – the trial court had erred in finding that Denton had failed to meaningfully investigate BSS; as a result, the court held it was error to find his performance was deficient. App. 85a-86a. The court did not analyze whether the totality of Denton's performance, beyond the BSS investigation aspect, was deficient.

is no reasonable probability that Shimel's battered spouse syndrome self-defense theory would have succeeded at trial. Shimel is unable to establish prejudice, and therefore, her claim for habeas relief fails." App. 30a. This petition follows.

REASONS FOR GRANTING THE PETITION

There has for years been widespread disarray among the state and federal courts over the proper application of the "prejudice" standard outlined in this Court's opinion in *Hill v. Lockhart*, 474 U.S. 52 (1985). This confusion has now hardened into a split of authority.

In *Hill*, this Court outlined how to apply, in the context of a guilty plea, *Strickland v. Washington*'s now-familiar two-part test for ineffective assistance of counsel claims. The first part, centering on the lawyer's performance, simply requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Hill*, 474 U.S. at 57 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). As to the second part, *Hill* explained:

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, **in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he**

> **would not have pleaded guilty and would have insisted on going to trial**.

Id. at 59 (emphasis added).

Evidence of prejudice thus defined can take many forms, and depends on the specifics of the case:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Id. Interpretation of this passage underlies the conflict of authority that gives rise to this petition. This Court later emphasized that the "prejudice" test is an objective one, requiring the petitioner to show not that *she personally* would have gone to trial but for counsel's

deficient performance, but that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

A. There Is a Split of Authority Over What Proof Is Required to Establish "Prejudice" Under *Strickland/Hill* in the Context of Guilty Pleas.

The federal courts of appeals are divided over whether the *Hill* prejudice analysis requires a showing that, but for counsel's deficient performance, a rational person in the client's position (a) would have gone to trial, or (b) would have gone to trial *and received a favorable outcome*. State courts of last resort are likewise in conflict. This disagreement reflects misunderstanding about the proper reading of the above-quoted passage in *Hill*. The resolution of this split is of exceptional importance, given the prevalence of guilty pleas in our criminal justice apparatus, and even more so given the quantity of post-conviction ineffective assistance of counsel claims. This Court recently granted *certiorari* in a case raising a nearly-identical issue in the context of deportable offenses. *United States v. Lee*, *cert. granted*, 85 U.S.L.W. 3288 (U.S., Dec. 14, 2016) (No. 16-327). Petitioner respectfully submits that the issue extends beyond deportable offenses, and that *certiorari* should be granted in this case to assess the more common context for the problem. At a minimum, disposition of this petition should be stayed until this Court resolves the *Lee* case.

1. The Michigan Court of Appeals in this case applied a reading of *Hill* that required Petitioner to show that, absent her lawyer's putative deficiencies, she would have pled not guilty and *received a favorable outcome at trial*. In doing so, it followed a line of reasoning arising from this Court's dictum in *Hill* that the "prejudice" assessment in many cases can involve, "in large part," gauging the "likelihood" that facts or arguments not examined due to counsel's deficiency would "likely" have changed the outcome at trial:

> The parties dispute the nature and extent of the prejudice requirement. Defendant argues that all that the prejudice prong of the *Strickland-Hill* test requires "is that the defendant allege that but for her attorney's deficient performance, she would have gone to trial rather than plead guilty." On the other hand, the prosecution argues that a defendant must also show, and the court must find, that the defense that defense counsel failed to investigate "would have changed the outcome at trial." As previously discussed, the United States Supreme Court held in *Hill*, 474 U.S. at 59, that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court explained that the "prejudice" inquiry in guilty plea cases
>
> > where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence . . .

> will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. . . . [*Hill*, 474 U.S. at 59-60. . . .]
>
> Thus, contrary to defendant's argument, she had to do more than merely allege that she would have gone to trial instead of pleading guilty but for her attorney's alleged deficient performance. Rather, **she was required to show that the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty**.

App. 86a-88a (emphasis added).

On habeas review, the Sixth Circuit took the same approach. After first citing a lack of evidence that Petitioner *herself* would have elected to go to trial but for her lawyer's ineffectiveness, the court went on to hold:

> Even assuming that a reasonable defendant in Shimel's position would have rejected the second-degree murder plea agreement, she has failed to establish a reasonable probability that expert testimony on battered spouse syndrome would have improved her result. . . . **There is no reasonable probability that Shimel's battered spouse syndrome self-defense theory would have succeeded at trial. Shimel is unable to establish prejudice, and therefore, her claim for habeas relief fails**.

App. 29a-30a (emphasis added). The Sixth Circuit panel in this case was following a line of Sixth Circuit cases endorsing the same analysis. *See, e.g.*, *Hodges v. Colson*, 727 F.3d 517, 539 (6th Cir. 2013) ("*Hill* instructs us to examine how competent counsel might have influenced the outcome of a hypothetical trial . . . and there is virtually no chance that Hodges could have avoided convictions by proceeding to trial."); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (finding no prejudice where defendant "had no realistic chance of being acquitted at trial" and if she had proceeded to trial, "had no rational defense, would have been convicted and would have faced a longer term of incarceration").[9]

The same showing is required in the Ninth Circuit. In *Elmore v. Sinclair*, 799 F.3d 1238 (9th Cir. 2015), *cert. denied sub nom. Elmore v. Holbrook*, 137 S. Ct. 3 (2016), for example, the petitioner's trial counsel had advised him to plead guilty to murder, exposing himself to the death penalty, despite evidence of (a)

[9] A possible indication of the disarray below is that, in an earlier case bearing some factual similarities to the present one, the Sixth Circuit seemed to articulate the standard differently when reversing the district court's denial of habeas corpus. *Dando v. Yukins*, 461 F.3d 791, 802 (6th Cir. 2006) ("For purposes of evaluating prejudice under *Hill*, we need not determine to an absolute certainty that a jury would have acquitted Dando based on a defense of duress."). To the extent *Dando* represents a different reading of *Hill* than the one endorsed in the present case, it shows that, in recent years, the Sixth Circuit has moved *away* from that reading, and has settled on an improper one, although it did not articulate, in petitioner's case, the clearly improper "absolute certainty" test.

debilitating brain damage, and (b) possible mental disorders, childhood sexual and physical abuse, adult sexual trauma, and neuropsychological impairment. The Ninth Circuit, assuming without finding that this advice was deficient, held that "Elmore has not demonstrated prejudice because reports from the mental health experts did not establish a reasonable probability that the defense would have succeeded." *Id*. at 1252. The court explained:

> [A] defendant does not establish prejudice from a guilty plea, where, as here, there is no doubt about the guilt of a defendant. . . . Given the evidence against Elmore, including the damning tape-recorded confession, **it is highly likely that a jury would have still convicted him of the same crime, even if he had not pleaded guilty**.

Id. (emphasis added, internal citations and quotations omitted).[10] Isolated panels of other circuits have also followed this reading of *Hill*. *See, e.g.*, *Chandler v.*

[10] *See also Womack v. McDaniel*, 497 F.3d 998, 1004 (9th Cir. 2007) ("Womack has not shown that he suffered prejudice for any such error because there is neither factual nor legal support for his claim that he could have raised a defense to the kidnapping charge[.]"); *Lambert v. Blodgett*, 393 F.3d 943, 982 (9th Cir. 2004) ("Courts have generally rejected claims of ineffective assistance premised on a failure to investigate . . . where the additional evidence was unlikely to change the outcome at trial."); *Haskins v. Grounds*, No. LA CV 13-8251 GHK (JCG), 2015 U.S. Dist. LEXIS 161022, at *10-11 (C.D. Cal. Sep. 23, 2015) (unpublished) (following *Elmore*, and holding: "Quite simply, Petitioner was not prejudiced because there is no doubt as to his guilt on this charge. . . . On this record, even if Petitioner had not pled, it is highly unlikely that a jury would have acquitted him").

Armontrout, 940 F.2d 363, 365 (8th Cir. 1991) ("[To establish prejudice,] [t]here must be a reasonable probability that but for counsel's errors, the result of the trial would have been different. . . . In light of the substantial evidence against Chandler, a failure to investigate Richard's testimony and verify its veracity would not have changed the end result of Chandler's plea.").

The opinions articulating this rule generally find support in *Hill*'s language indicating that, in many cases, "the resolution of the 'prejudice' inquiry will depend largely on whether [an unexplored] affirmative defense likely would have succeeded at trial," and in other cases "will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Hill*, 474 U.S. at 59-60. *See, e.g.*, *Shimel*, App. 87a-88a (quoting *Hill*).

2. The Third, Fourth, Seventh, and Tenth Circuits interpret the passage from *Hill* differently, and have explicitly endorsed a contrary rule. In *Miller v. Champion*, 262 F.3d 1066 (10th Cir. 2001), the district court had taken the position that the petitioner "was not entitled to habeas relief unless he established a reasonable probability both that he would have gone to trial and that he would have successfully prevailed in his case to a jury." *Id*. at 1073. The Tenth Circuit corrected the district court, explaining first that *Hill* only requires a showing that the deficient performance "affected the outcome of the *plea process*. In other words . . . that there is a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty* and would have insisted on going to trial." *Id*. at 1072

(quoting *Hill*, 474 U.S. at 59 (emphasis in *Miller*)). *Hill*'s discussion of the "likelihood" of success at trial, the Tenth Circuit went on, posits that "the strength of the prosecutor's case" is often "the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial," but it does not create an additional, standalone requirement for habeas petitioners challenging a guilty plea. *Id*.

> **[T]he district court erred by requiring Miller to prove a reasonable probability existed not only that he would have insisted on trial but for his counsel's mistakes, but also that there was a likelihood that he would have prevailed at trial**. Of course, the "assessment [of whether the defendant would have insisted on changing his plea] will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial," *Hill v. Lockhart*, 474 U.S. at 59, but the ultimate issue that the court has to determine is whether the defendant would have changed his plea.

Id. at 1074-75 (emphasis added).[11]

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[11] Perhaps further evidencing the confusion among the courts below, the *Miller* opinion had to correct not only the district court but another panel of the Tenth Circuit, saying "*Braun v. Ward* [, 190 F.3d 1181 (10th Cir. 1999)] . . . concluded that a petitioner must show a reasonable probability exists that he would have prevailed had he gone to trial. *See* 190 F.3d at 1188-89 (stating that *Lockhart*'s prejudice inquiry 'requires [the petitioner] to establish a reasonable probability that he would have pled not guilty and that a jury either would not have convicted him of first

Similarly, the Fourth Circuit, in *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995), *overruled on other grounds*, *O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir. 1996), had to correct the district court's reading of *Hill*, by explaining the significance of the *Hill* standard:

> In its first opinion, the district court applied the wrong legal standard to Ostrander's ineffective assistance claim. It used the *Strickland v. Washington* test instead of the more specific *Hill v. Lockhart* standard for guilty pleas induced by ineffective assistance. There is a significant difference between the tests. Under *Strickland*, the defendant shows prejudice if, but for counsel's poor performance, there is a reasonable probability that the outcome of the entire proceeding would have been different. Under *Hill*, the defendant must show merely that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.

Id. at 352. Likewise, the Third Circuit corrected a district court in *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011), *abrogated on other grounds*, *Chaidez v. United States*, 133 S. Ct. 1103 (2013), saying "[t]he District Court ultimately based its determination that there was no prejudice on its finding that Orocio had not shown that he would have been acquitted, had he gone to trial," but "[t]he Supreme Court . . . requires

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degree murder or would not have imposed the death penalty' (emphasis added)). The underlined portion of this statement goes too far." *Id*. at 1073.

only that a defendant have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice." *Id*. at 643.

And in *Pidgeon v. Smith*, 785 F.3d 1165 (7th Cir. 2015), the petitioner claimed that he pled no contest because his attorney had advised him, incorrectly, that if he was convicted at trial, he would face a sentence of life without parole. The Seventh Circuit rejected the government's argument that there was no prejudice because petitioner would have had a worse outcome at trial, explaining:

> [A] petitioner . . . can show prejudice even if he got a "good deal" – that is, even if his expected sentence at trial (probability of conviction times the length of incarceration if convicted) was greater than what he received in a plea deal. **The correct prejudice inquiry is not whether he would have been better off going to trial, but whether he would have elected to go to trial in *lieu* of accepting a plea**. *See Ward v. Jenkins*, 613 F.3d 692, 700 (7th Cir. 2010) ("**We need not assess the likely success of [petitioner's] defense**; [his] claim that he would have insisted on going to trial to pursue it is enough. . . ."). Pidgeon had a constitutional right to a trial; if his attorney's deficient performance led him to forego that right, that is prejudice in itself.

Pidgeon, 785 F.3d at 1173 (emphasis added); *see also DeBartolo v. United States*, 790 F.3d 775, 780 (7th Cir.

2015) ("The probability that [petitioner] will come out ahead by [withdrawing his guilty plea] may be small, but it is not trivial. He is entitled to roll the dice.").

3. A similar split of authority can be seen among the state high courts trying to follow *Hill*'s mandate. States clearly reading *Hill* to require a showing that but for the attorney's deficiency the client would have gone on to receive a favorable outcome at trial include Michigan, Ohio, Indiana, and Mississippi. *See Shimel*, App. 88a; *State v. Ketterer*, 11 Ohio St. 3d 70, 79-80 (2006) ("In view of the compelling evidence of Ketterer's guilt, any rational jury or panel of three judges would have convicted him whatever his plea. Thus, Ketterer has failed to establish a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." (quotation and citations omitted)); *Segura v. State*, 749 N.E.2d 496, 503 (Ind. 2001) ("*Hill* standing alone requires a showing of a reasonable probability of success at trial if the alleged error is one that would have affected a defense."); *Mowdy v. State*, 638 So. 2d 738, 742 (Miss. 1994) ("Mowdy and Scrivner's claim fails on its face due to their failure to delineate facts which, if proven, would show the likelihood of success at trial.").

States clearly following the opposite rule include Tennessee, Connecticut, Nebraska, California, and Florida. *See Grindstaff v. State*, 297 S.W.3d 208, 216-17 (Tenn. 2009) ("The primary consideration is whether the deficiency in performance affected the outcome of the plea process. The petitioner is not, however, required to demonstrate that he would have fared better

at trial than by a plea of guilt." (citations and quotations omitted)); *Carraway v. Comm'r of Corr.*, 317 Conn. 594, 600 n.6, 119 A.3d 1153, 1156 (2015) (rejecting a characterization of the prejudice prong as "a reasonable probability that the result of the trial court proceedings would have been different" and explaining that "the petitioner must demonstrate that, but for counsel's alleged ineffective performance, the petitioner would not have pleaded guilty and would have proceeded to trial"); *State v. Yos-Chiguil*, 281 Neb. 618, 631-32, 798 N.W.2d 832, 844 (2011) ("[A] postconviction petitioner does not need to show that a defense of which counsel failed to advise him would have succeeded at trial. Instead, he must show only a reasonable probability that he would have insisted on going to trial."); *People v. Sandoval*, 73 Cal. App. 4th 404, 417-18, 86 Cal. Rptr. 2d 431, 441-42 (1999) ("[W]hether a different outcome would result if the matter proceeded to trial is not determinative on the issue of prejudice suffered during the plea process."); *Griffin v. State*, 114 So. 3d 890, 899-900 (Fla. 2013) ("The defendant does not have to show that he actually would have prevailed at trial.").

4. The fact that, in some cases, the state court's rule conflicts with that of the circuit in which it sits highlights the depth of the disagreement and the arbitrariness faced by defendants seeking to challenge a counseled guilty plea. *Compare Grindstaff*, 297 S.W.3d at 216-17 (Tennessee) *with Shimel*, App. 30a (Sixth Circuit); *Sandoval*, 73 Cal. App. 4th at 417-18 (California) *with Elmore*, 799 F.3d at 1252 (Ninth Circuit); *Segura*,

749 N.E.2d at 503 (Indiana) *with Pidgeon*, 785 F.3d at 1173 (Seventh Circuit).

B. The Sixth Circuit Applies the Wrong Standard.

The standard favored by the Sixth Circuit is inconsistent with this Court's precedent. It is also inconsistent with the usual understanding of a criminal defendant's role in decision making *vis-à-vis* her case, and with fundamental notions of fairness. If the Sixth Circuit's rule were correct, a client whose attorney was constitutionally deficient could find that (1) the burden has shifted to her to prove that the government's case is a loser, rather than *vice versa*; (2) she must meet that burden on an incomplete record; and (3) her right to a jury trial has been forfeited.

1. This Court's holding in *Hill* is straightforward: "[T]o satisfy the 'prejudice' requirement [in a guilty plea case], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. The opinion goes on to discuss how this inquiry, in many cases, can involve, "in large part," gauging the "likelihood" that facts or arguments not examined due to counsel's deficiency would "likely" have changed the outcome at trial. Courts that read this passage to require proof that the petitioner would have prevailed at trial ignore its conditional language, which refers to "many" – not all – cases and which notes that the prejudice inquiry will depend "in large part," but not totally, on the

merits of the defense. Certainly the "likelihood" that a petitioner would have won at trial goes to whether a rational petitioner would have insisted on foregoing a guilty plea; but that does not equate to a binary rule that, unless petitioner can affirmatively show that her trial would have been a winner, she has not been prejudiced. Rather, a rational defendant, in deciding how to plead, would gauge that likelihood, and would weigh it against her risk-averseness and the likelihood of the relative expected outcome of a trial. This is commonsense and logical, and comports with this Court's holding in *Hill* that the prejudice inquiry "focuses on whether counsel's constitutionally ineffective performance affected the outcome of **the plea process**." *Id*. (emphasis added).

This Court made this explicit in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which dealt with whether a petitioner had been prejudiced if his attorney's deficiencies led him to forego an *appeal*. The Court held that, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id*. at 484. The Court explained: "[A]lthough showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to specify the points he would raise were his right to appeal reinstated will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would

have appealed." *Id*. at 486. The Court added that this rule is the same as *Hill*'s: "We believe this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill v. Lockhart*." *Id*. at 485.

This makes sense, the Court explained, because in the case of a foregone appeal, as in the case of a foregone trial (via a guilty plea), counsel's deficient performance led to the *complete forfeiture of a proceeding*. *See id*. at 483. If a *court* arbitrarily denied a defendant an appeal (or trial), the error would be reversible without a further showing of harm – the mere denial of the proceeding is harm enough. *See id*. In the context of ineffective assistance of counsel, the "prejudice" inquiry – requiring that the defendant, or a rational person in her position, would have actually gone to trial – ensures that the defendant would have actually availed herself of the proceeding. This test selects for those defendants who truly are in the same position as the defendant whose rights were denied by the trial court: "[C]ounsel's deficient performance must actually cause the forfeiture [of the proceeding in question]. If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have [availed himself of that proceeding], counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." *Id*. at 484; *see also Johnson v. State*, 169 S.W.3d 223, 231-32 (Tex. Crim. App. 2005).

To the extent that it was ever "reasonable," for purposes of 28 U.S.C. § 2254(d)(1), to apply *Hill* to require an affirmative showing that the defendant would

have received a favorable outcome at trial, such confusion was conclusively cured by *Flores-Ortega*. *Flores-Ortega* explained unambiguously that this Court "requir[es] a showing of actual prejudice (*i.e.*, that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presum[es] prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent," *id.*, and specifically traced this approach to *Hill*. *Id*. at 485. It is an unreasonable application of *Hill*, in light of *Flores-Ortega*'s holding, to require a defendant challenging a counseled guilty plea to show that she "might have prevailed" at trial. *Id*. at 484.

2. The Sixth Circuit's standard is inconsistent with the usual understanding of criminal law. It is well-settled that the decision to plead guilty belongs to the defendant; there is no exception for clients whose defense is a lost cause. *See, e.g.*, *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (quoting American Bar Association, Model Rule of Professional Conduct 1.2(a)). Where counsel was constitutionally deficient – *i.e.*, the lawyer was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland*, 466 U.S. at 687 – that decision is effectively taken from the defendant; the appropriate corrective is to give that decision back to the defendant. The Sixth Circuit's rule would not do that unless the defendant can establish a likelihood of prevailing at trial.

The Seventh Circuit explained:

> A mentally competent criminal defendant who decides to stand trial even though he's almost certain to be convicted, and who by pleading guilty would be assured of a much lighter sentence than if convicted after a trial, nevertheless can't be ordered by the judge to plead guilty; a judge can't plead a defendant guilty however much the plea would be in the defendant's best interest. Why should the rule be different if the defendant, upon belated discovery of a [consequence of the plea] about which his counsel failed to warn him, chooses to withdraw a plea of guilty and risk a trial that may result in a long sentence?. . . . [T]he usual understanding of the criminal process . . . is that a criminal defendant . . . has a right to a jury trial no matter how slight his chances of prevailing.

DeBartolo, 790 F.3d at 778.

3. The Sixth Circuit's rule is also unfair. It shifts the burden to the defendant to establish her innocence, and may require her to do so on a record, if any, developed for another purpose. In this case, for example, the appellate courts determined that Petitioner was unlikely to succeed at trial based on transcripts of a hearing aimed only at examining her counsel's performance. Indeed, in that hearing, Judge Schmidt was explicit: when defense counsel objected to the cross-examination of his client saying "We're not trying the murder case here. . . . This is a . . . hearing limited to conduct of trial counsel," the judge agreed, saying

"Well, I'm certainly not trying the defense of self-defense." Later in the proceeding, he denied a motion for appointment of an expert witness on BSS with the comment, "The Court of Appeals is not gonna consider any such evidence. . . . They'll rely on the record that's made here."

Despite the fact that the judge *expressly* and *intentionally* so limited the record evidence, the state court of appeals found that Petitioner could not withdraw her guilty plea because *that evidence* did not demonstrate that she likely would have won. This rule is unfair and puts defendants in an untenable position. *Cf. Flores-Ortega*, 528 U.S. at 484-86 ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion. . . . We similarly conclude here that it is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit." (citations and quotations omitted)).

C. This Case Squarely Presents a Recurring Issue of Substantial Legal and Practical Importance.

The standard governing habeas challenges claiming ineffective assistance of counsel in the guilty plea context is unquestionably an important issue. This Court recently granted *certiorari* in a case raising a nearly-identical issue in the context of deportable

offenses. *United States v. Lee*, *cert. granted*, 85 U.S.L.W. 3288 (U.S., Dec. 14, 2016) (No. 16-327). But the issue goes well beyond deportation. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id*. (quoting Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). Further, ineffective assistance of counsel is the most frequently-raised issue in habeas corpus petitions from state convictions. Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* at 14 (1995).

This is no coincidence. The incentives for overworked criminal defense attorneys to seek a readily-available plea without meaningfully testing their clients' cases are high.

The *Hill* standard is thus implicated in countless cases, and unresolved confusion in the courts below will lead to (a) continued inconsistency, and (b) injustice for habeas petitioners, like Petitioner, who place their trust in attorneys who "plead them out" without providing effective assistance and real advocacy.

This case presents an ideal opportunity to resolve this important and recurring issue. This case squarely presents a discrete question of federal law. The case's procedural history reveals no jurisdictional questions or material disputed issues of fact that would interfere with this Court's resolution of the question presented.

The issue has been thoroughly discussed by numerous federal and state courts. The issue is ripe for review, and nothing would be gained from delaying review.

CONCLUSION

The petition for a writ of *certiorari* should be granted. At a minimum, disposition of this petition should be stayed until *United States v. Lee*, *cert. granted*, 85 U.S.L.W. 3288 (U.S., Dec. 14, 2016) (No. 16-327) is resolved.

Respectfully submitted.

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FEBRUARY 2017

Shimel v. Warren

United States Court of Appeals for the Sixth Circuit

July 26, 2016, Argued; September 22, 2016, Decided; September 22, 2016, Filed

File Name: 16a0239p.06

No. 15-2419

Counsel: ARGUED: James S. Brady, DYKEMA GOSSETT PLLC, Grand Rapids, Michigan, for Appellant.

Laura Graves Moody, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

ON BRIEF: James S. Brady, Alison L. Carruthers, DYKEMA GOSSETT PLLC, Grand Rapids, Michigan, for Appellant.

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Judges: Before: SILER, JULIA SMITH GIBBONS, KETHLEDGE, Circuit Judges.

Opinion by: JULIA SMITH GIBBONS

Opinion

JULIA SMITH GIBBONS, Circuit Judge. Rebecca Shimel was convicted of second-degree murder and possession of a firearm in the commission of a felony pursuant to a plea deal in the shooting death of her husband. After sentencing, the Michigan trial court

conducted an evidentiary hearing under *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (Mich. 1973). The court concluded that Shimel's trial counsel was ineffective for failing to investigate a battered spouse self-defense theory and granted her motion to withdraw her guilty plea. The Michigan Court of Appeals, however, reversed. It concluded that the trial court clearly erred in impermissibly substituting its judgment for that of trial counsel on a matter of strategy. On collateral review, the district court denied Shimel's claims that trial counsel was ineffective for failing to spend sufficient time consulting with her and for advising her to plead guilty rather than taking the case to trial and presenting a battered spouse self-defense theory. Shimel is unable to establish prejudice. Therefore, we affirm.

I.

The facts as recited by the Michigan Court of Appeals are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1).[1] *Wagner v. Smith*, 581 F.3d 410, 413. According to the Michigan Court of Appeals:

> Defendant was charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in the shooting death of her husband, Rodney Shimel. Defendant fired

[1] Shimel's argument that deference is owed to the state trial court's version of the facts, rather than the court of appeal's factual findings and legal conclusions, is without merit. *See infra* Section II.B.

seven shots, reloaded the gun, and continued to fire. Shimel sustained nine gunshot wounds, seven of which entered his body through his back. Defendant was arrested on the same day that the shooting occurred.

Defendant was represented by four different attorneys, two court-appointed and two retained, before she entered her guilty plea. The court-appointed attorneys represented defendant only briefly. Before defendant's preliminary examination, while she was represented by her first retained attorney, the assistant prosecutor, J. Dee Brooks, offered to allow defendant to plead guilty to second-degree murder and felony-firearm with no sentence recommendation in exchange for the dismissal of the open murder charge. The offer remained open until the day before the preliminary examination. Although defendant decided to accept the plea offer, Brooks withdrew it because defendant's attorney did not inform him that defendant wanted to accept it until the morning of the preliminary examination. Thus, because the plea offer was not accepted before Brooks's deadline, the offer was withdrawn. Following the preliminary examination, defendant was bound over for trial.

Thereafter, the trial court granted defense counsel's motion to withdraw, and defendant retained attorney E. Brady Denton to represent her. On October 5, 2010, the trial court entered a stipulation to adjourn trial that indicated that Denton was investigating a

"battered spouse" defense and intended to hire an expert to interview defendant. Denton spoke several times with attorney Dale Grayson at the National Clearinghouse for the Defense of Battered Women. Grayson sent Denton a packet of materials regarding the defense, including articles, appellate decisions in cases involving the defense, and information regarding courts' positions on the defense. According to Denton, he discussed the possibility of a battered spouse defense with defendant and her family and friends as well as the prosecutor. Ultimately, he decided not to pursue a battered spouse defense and did not hire an expert.

Over the next few months, Denton and Brooks had several discussions regarding a possible guilty plea. Brooks refused to consider a plea to manslaughter and refused Denton's request for a second-degree murder plea with a sentence cap. In January 2011, Brooks offered defendant the same plea that he had previously offered, i.e., second-degree murder and felony-firearm with no sentence recommendation in exchange for dropping the open murder charge. Defendant accepted the plea and pleaded guilty on February 3, 2011. The trial court sentenced defendant to 18 to 36 years in prison for the murder conviction, to be served consecutive to 2 years' imprisonment for the felony-firearm conviction.

On September 21, 2011, defendant filed a motion to withdraw her plea, to correct her invalid sentence, and to amend the presentence

investigation report. In her motion to withdraw her plea, defendant argued that Denton had rendered ineffective assistance of counsel for failing to investigate a battered spouse syndrome defense and/or hire an expert to examine defendant. Defendant asserted that her plea was therefore involuntary. She requested the appointment of a battered spouse syndrome expert at public expense as well as a *Ginther*[2] hearing.

At the *Ginther* hearing, Denton admitted that he signed the stipulation to adjourn trial in part to investigate a battered spouse syndrome defense. He obtained the packet of materials from Grayson regarding the defense, talked to defendant, and reviewed the police reports. He asserted that he originally intended to hire an expert witness regarding the defense, but ultimately determined after reviewing the case materials that the defense was not worth pursuing. One of Denton's biggest concerns was the fact that defendant reloaded her gun and continued shooting. Also, there was not much evidentiary support to show a history of physical abuse against defendant. There was only one documented incident of domestic violence. When asked whether he thought that self-defense or a battered spouse defense was a viable defense, Denton responded, "I don't think it could be sold to a jury."

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[2] *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922; 390 Mich. 436, 212 N.W.2d 922 (1973) (footnote in original).

Denton testified that he met with defendant while she was incarcerated at least two or three times and probably wrote letters to her during the seven months that he represented her. Denton scored defendant's sentencing guidelines before the plea hearing but he did not tell defendant the sentence that she was likely to receive. Denton admitted that he told Grayson in a letter dated March 10, 2011, that defendant could receive "as little as 8 years, although [he] would expect 10 to 11 years" based on his calculation of the sentencing guidelines. Denton told defendant that her sentence would be controlled by the sentencing guidelines. Denton testified that one of his concerns was defendant's desire to be with her children. Defendant had told Denton that she wanted an opportunity to get out of prison and be with her children someday. Denton testified that considering defendant's desire to be with her children and his belief that a battered spouse defense would not be successful, he thought the second-degree murder plea was a good option because it would give defendant a chance to be released from prison one day.

Dr. Karla Fischer testified as an expert witness on domestic violence and battered spouse syndrome. She maintained that battered spouse syndrome is "not a defense per se, but the expert testimony helps to support a theory of self-defense." She opined that a battered spouse defense presented to a jury typically

results in a reduction of charges, most commonly from first-degree murder to second-degree murder.

Fischer conducted a domestic violence evaluation of defendant in prison in October 2011 after defendant moved to withdraw her plea. Defendant told Fischer that Shimel [her husband] had abused her physically and emotionally throughout their 30-year marriage and had threatened to kill her. Defendant claimed that Shimel had punched her, strangled her, kicked her, restrained her, and committed acts of sexual violence against her. Defendant admitt[ed] stabbing Shimel with a knife while he was choking her early in their relationship. Fischer opined that, based solely on the information that defendant provided, defendant had acted in self-defense. Fischer admitted that she did not have a "full grasp" of the forensic evidence and that a battered spouse assessment is based on a defendant's perception of events, which might not match up with other facts. Defendant told Fischer that she was having financial difficulties at the time of the shooting, but Fischer did not believe that that information was important. When asked whether it would have had any significance if defendant had a gambling problem and defendant and Shimel had conflict about it, Fischer responded:

> A. Well, my job in understanding the history of domestic violence doesn't necessarily in – that wouldn't necessarily be

> psychologically significant in the evaluation of domestic violence and its effects. So, I guess the answer would be no, it wouldn't necessarily be important.
>
> Q. So you wouldn't consider other motivation for the shooting?
>
> A. I'm not really sure how to answer that question. I mean, my job is not to understand the motivation underlying the shooting. My job is to understand the history of . . . domestic violence, how it affected her and whether or not it led her to act in self-defense.

Defendant testified that she never received any phone calls or correspondence from Denton while she was in jail. She claimed that Denton visited her twice, the first time for "under an hour and the second time lasted for about 10, 15 minutes." According to defendant, Denton told her at the second meeting that he was going to speak to Brooks and try to negotiate a plea deal with a sentence of 7 to 15 years or less. Defendant maintained that the next time that she saw Denton was when she walked into the courtroom for the plea hearing. After defendant pleaded guilty, she wrote a letter to Denton that stated:

> I'm writing you to – I'm writing to in regards to – to the plea hearing that occurred today at 1:30. What happened? Why was I not notified by you or your office or by Mr. Jacob Kolinski, your legal assistant who was with you today? Why

> didn't I get to meet or speak with you before the court – before court so you could explain what this plea deal you had was all about? How could you do this to me? What did I just plea to? How much time am I looking at? What is the difference of Open Murder and Second Degree Murder? I'm extremely confused, distraught, and frankly, I don't remember much about what happened today in court.

Defendant admitted that it was a priority for her to be able to be released from prison one day so that she could be with her children. Defendant also admitted that she told a different story about the shooting when she first spoke to a detective and persons at the forensic center. She initially did not tell the detective that she thought that Shimel was going to kill her that day. Later, defendant claimed that she did not tell the detective that she thought that Shimel was going to kill her because she wanted to protect her family from the media. Defendant admitted that she was an avid gambler and had financial problems. She "possibly" bounced two checks on the day of the shooting, and she "might have told" a friend that she could not support herself financially without Shimel. Defendant also admitted that she talked to her daughters on the phone from jail and tried to get them to remember the abuse that Shimel allegedly inflicted on her. Defendant testified that her daughters "probably" told her that they did

not recall any abuse. Defendant also acknowledged that her daughters testified at the preliminary examination that they did not recall any physical abuse.[3]

Grace Ombry, defendant's best friend in high school, testified that defendant began dating Shimel after she dropped out of high school in the beginning of her senior year in 1981. Defendant and Shimel moved into an apartment together in 1983 before they married. Ombry visited the apartment once, during which time defendant showed Ombry bruises on her leg and claimed that Shimel had beaten her. She also showed Ombry a gun that Shimel owned and said that Shimel had threatened her with it. Later in 1983, shortly after defendant and Shimel married, defendant told Ombry that she was unhappy and wanted to get a divorce because Shimel was mean to her. Ombry had not had regular contact with defendant since they were teenagers.

Brooks testified that from the beginning of the case, he believed that defendant had only two possible defenses – insanity and self-defense under a battered spouse theory. Brooks viewed defendant's videotaped statements to the police in which she admitted that she shot Shimel several times during an argument in their bedroom while three of their children

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[3] It is unclear how old defendant's daughters were at that time, but they were younger than defendant's oldest son, who was 24, and older than her youngest son, who was 12 (footnote in original).

were home. No other weapons were involved to suggest that defendant was in any danger. Brooks testified that in his early conversations with Denton, Denton mentioned that he was considering a self-defense defense under a battered spouse theory, but Brooks did not believe that the evidence supported such a defense. Brooks maintained that the police had spoken to "dozens and dozens" of people, and Brooks did not believe that there was any substantiating proof of any serious prior violent acts between defendant and Shimel. In fact, Brooks testified that all four of defendant's children "denied that they had ever seen any physical violence or threats of physical violence" between their parents. Brooks told Denton that, in his view, the shooting was precipitated by the couple's financial problems, and specifically defendant's gambling problem. Shimel was working extra jobs on the side to earn money for the family during the holidays, and funds were missing, including a recent payment for a job in the form of a check. Brooks learned from family members and a friend that Shimel was considering leaving the home and either divorcing or separating from defendant. According to Brooks, the physical evidence was also inconsistent with self-defense. Shimel suffered seven gunshot wounds to his back, two of which were fatal and would have disabled Shimel very quickly. Although the chamber of the gun held only seven bullets, Shimel suffered nine gunshot wounds. The theory that defendant reloaded the gun and then continued to shoot

was consistent with the children's description of what they had heard from downstairs. Brooks reviewed Fischer's report and testified "with absolute certainty" that it would not have convinced him to change the plea offer or his assessment of the strengths and weaknesses of his case. Brooks viewed Fischer's report as contradictory and self serving.

The trial court granted defendant's motion to withdraw her plea. With respect to counsel's performance and the first prong of the *Strickland*[4] test, the court stated:

> [C]ertain things, listening to the testimony, strike me. One is that Mr. Denton spent, from the record, probably no more than 1.5 hours maximum time speaking to his client on a capital felony life offense without parole should she be convicted as charged. Presumably it was an open murder, but let's assume it was a murder one that she was convicted of. As no doubt the prosecution would argue.
>
> Mr. Denton spent approximately maximum of 1.5 hours time with the defendant before negotiating a plea that ultimately was taken.
>
> In my opinion, and I also find, that Mr. Denton did not meet with the defendant

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (footnote in original).

in – in jail or even in lockup prior to coming into the courtroom and having his client accept the plea after it was negotiated with Mr. Brooks.

I believe the defendant when she indicates that the first time she saw Mr. Denton the day of the plea was when she walked into the courtroom here.

I find it somewhat incredible that the lawyer would not go over the plea even the day of the plea one last time and say, do you really want to do this? Do you understand what's going on? Not sitting at counsel table as does counsel right now for [defendant.]

I find that he didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.

He failed to inform her of what she was even in court for on the day she took the plea, to talk to her one last time as I already said. I find that that's the case. I believe her.

> And that he failed to discuss, also, the likely sentence or disclose the likely sentence based upon an adequate analysis of the guidelines. And that's reflected by that – the – the – some of the exhibits that are here, and frankly, by the testimony.
>
> There was no independent investigation of the self-defense aspect of the case. . . . In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.
>
> So, in my opinion, the first test of *Strickland* is met. I'm sorry. The test of *Strickland* is met. It's the test of *Strickland-Hill* then comes into play.

The trial court then addressed the second prong of the test, regarding prejudice resulting from counsel's deficient performance. In its ruling, the court declined to address the issue of prejudice under *Strickland* and *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 . . . (1985). The court stated:

> *THE COURT*: The second prong, the *Hill* part of it requires that the defendant allege that but for his attorney's deficient performance, "she" in this case, would've gone to trial rather than pled guilty.
>
> Well, of course, by the very nature of these motions that's what she's asserting here.

That remains to be seen, her prerogative later on whether or not to make – do that or not.

Very difficult for me in light of some of the standards, as [the prosecutor] indicates here on the record, that I'm supposed to make some sort of educated guess rather was [sic] to likelihood of success, and I don't think – I think I can decline to do that.

One can certainly strongly argue that maybe a – a defense lawyer can convince a jury that it was either justifiable or perhaps voluntary manslaughter which would greatly reduce her sentence from what it presently is.

On the other hand, a jury could easily convict of first degree and/or second degree.

I want – on a personal note and I alluded to this with [the prosecutor], the transcript doesn't reflect the atmosphere that existed in this courtroom that I personally observed. A transcript is a black and white summary of what was said, basically and – not summary, but verbatim, what was said by me and what was said by her.

And I will indicate this. I – I know I thoroughly covered the aspects of the plea in this case. And there's a reason I did it. And the reason is, is I wasn't sure if she

knew what was going on. I wasn't positive of it. And at the time, I assumed that she was fully aware of what the likely sentence would be. At least the sentencing guideline range.

Of course, I would have the prerogative to sentence her simply to life without a guidelines range as well. But I recall without even reading the transcript one of the things she said to me was that "I just wanted him to stop" or words to that effect. That's my recollection, and again, I didn't review – actually I didn't review the plea taking transcript for today. And prior to the *Ginther* hearing, I – I don't recall reviewing the transcript either then. But I remember her saying, vividly, "I just wanted him to stop." And that's when I went into, I think, and again, I didn't review it for today's purposes, but the self-defense and waiving defenses and the like.

And I did that because I was very cautious in that I really wanted to make sure she knew what she was doing by pleading guilty in light of a potential defense that she had.

And perhaps that will come back to haunt her, as [the prosecutor] suggests it should. But from a personal standpoint, I think she was confused.

And I did not know until the – after the fact, that Mr. Denton had not spoken to

> her that morning or afternoon prior to the plea taking process other than on the record here, that she met him for the first time in the courtroom. She testified to that, as I recall. And I believe her on that.
>
> I tried my best to determine that she understood what was going on, the gravity of her plea and the likely course of action that I would take. I did find her plea was voluntarily (sic). But again, that plea – voluntariness was not found, ah, because I was aware [sic] that counsel hadn't informed her of these various and sundry things. And having heard that now on this post-sentence proceeding, I have to also find that in my opinion that based upon her ineffective assistance of counsel, that her plea was not knowingly and voluntarily made.
>
> Accordingly, the trial court granted defendant's motion to withdraw her guilty plea.

People v. Shimel, No. 312375, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *1-7 (Mich. Ct. App. Aug. 6, 2013).

The Michigan Court of Appeals reviewed the trial court's findings of fact for clear error and questions of constitutional law *de novo*. 2013 Mich. App. LEXIS 1351, [WL] at *7. The Michigan Court of Appeals reversed the trial court's grant of Shimel's motion to withdraw her plea, finding that she was not denied the effective assistance of counsel and that her plea was

knowing and voluntary. 2013 Mich. App. LEXIS 1351, [WL] at *13.

Specifically, the court first found that "the trial court clearly erred by determining that Denton failed to conduct an investigation regarding a battered spouse self-defense theory and improperly substituted its judgment for that of trial counsel on a matter of trial strategy." 2013 Mich. App. LEXIS 1351, [WL] at *8. In so holding, the court relied on the following:

> The *Ginther* hearing testimony established that Denton is an experienced attorney, he was the elected county prosecutor for Saginaw County for four years beginning in 1972, and he had handled approximately two hundred homicide cases. Denton testified that he had spoken on several occasions with Dale Grayson at the National Clearinghouse for the Defense of Battered Women regarding the battered spouse syndrome defense and had obtained materials from Grayson regarding the defense. Denton was concerned about the fact that defendant fired several shots into Shimel's back, reloaded the gun, and continued to fire. He was also concerned that none of her four children had witnessed any physical abuse or threat of physical abuse to defendant, and there was very little evidentiary support to substantiate a history of physical abuse. Denton explained that he decided not to pursue the defense because he did not believe that "it could be sold to a jury." In fact, he testified that he believed that defendant would have been convicted of first-degree

> murder had she proceeded to trial. Because defendant's primary goal was to one day be released from prison in order to be with her children, Denton believed that a plea to second-degree murder was her best option.

Id.

The Michigan Court of Appeals also held that the trial court erred in its analysis of whether Shimel was prejudiced. 2013 Mich. App. LEXIS 1351, [WL] at *9-10. Relying on record evidence, the court found that Shimel "would not have received a better outcome if she had gone to trial and argued that she acted in self-defense based on a battered spouse theory," because of the lack of a history of domestic violence, the fact that seven of the bullets entered Shimel's body through his back, and Fischer's testimony that a successful battered spouse defense commonly results in second-degree murder charges – exactly the outcome Shimel received. 2013 Mich. App. LEXIS 1351, [WL] at *10. The court then considered the voluntariness of Shimel's plea and found that even if Denton's performance was deficient, Shimel could not establish prejudice because "she chose to accept the same plea offer before her preliminary examination, but the offer was withdrawn because defendant's attorney at that time did not timely communicate defendant's acceptance of the offer to the prosecution." 2013 Mich. App. LEXIS 1351, [WL] at *11.

The Michigan Supreme Court denied Shimel's application for leave to appeal. *People v. Shimel*, 495 Mich. 916, 840 N.W.2d 312 (Mich. 2013).

Thereafter, Shimel filed a petition for a writ of habeas corpus in the federal district court. The district court denied Shimel's Petition, but granted her a certificate of appealability on her ineffective assistance of counsel claim. Shimel timely appealed.

II.

A.

In a 28 U.S.C. § 2254 habeas appeal, we review the district court's legal conclusions *de novo* and factual determinations for clear error. *Loza v. Mitchell*, 766 F.3d 466, 473 (6th Cir. 2014); *Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006). A state court's determination of factual issues "shall be presumed to be correct" unless the petitioner rebuts this presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Federal habeas corpus relief is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court's decision is an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407-08, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous" – it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). The phrase "clearly established Federal law" in § 2254(d)(1) "refers to the *holdings*, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412 (emphasis added); *see also Lopez v. Smith*, 135 S. Ct. 1, 4, 190 L. Ed. 2d 1 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450, 185 L. Ed. 2d 540 (2013))).

The Supreme Court's holding in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), provides the "clearly established Federal law" relevant to Shimel's claim of ineffective assistance of counsel. *See Williams*, 529 U.S. at 391. To prevail, Shimel must first "show that counsel's performance

was deficient" by "an objective standard of reasonableness," meaning that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687-88. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Second, the defendant must show that the deficient performance prejudiced the defense," meaning that Shimel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In the case of ineffectiveness in regard to the acceptance of a plea deal, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

The *Strickland* inquiry coupled with AEDPA review is doubly hard to meet. *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *Bell v. Cone*, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

B.

We are first tasked with determining to which state court decision we must defer. Generally, this court reviews the decision of "the last state court to issue a reasoned opinion on the issue[s]" raised in a habeas petition. *Joseph v. Coyle*, 469 F.3d 441, 450 (6th

Cir. 2006) (internal quotation marks and citation omitted). In this case, the Michigan Court of Appeals was "the last state court to issue a reasoned opinion." *Id.*

Shimel argues, however, that this court should review the decision of the trial court and ignore the factual findings and legal conclusions of the Michigan Court of Appeals. She contends that "[d]eference must be given to both findings of fact and legal conclusions made by a trial court following a *Strickland* evidentiary hearing," which in this case would mean deferring to the credibility determinations and legal conclusions made by the trial judge at the *Ginther* hearing. Appellant Br. at 20-21. In contrast, the government contends that AEDPA deference is due to the opinion of the Michigan Court of Appeals. The government is correct: the Michigan Court of Appeals "is the last state court to adjudicate the claim on the merits" and its opinion is therefore "[t]he relevant state court decision." *Pudelski v. Wilson*, 576 F.3d 595, 607 (6th Cir. 2009). The cases cited by Shimel are not to the contrary.

In *Foster v. Wolfenbarger*, the defendant was convicted, the trial court conducted a *Ginther* hearing and found trial counsel ineffective for failing to investigate and present an alibi defense, and the Michigan Court of Appeals reversed, finding that the decision not to put on an alibi defense was a strategic decision. 687 F.3d 702, 707 (6th Cir. 2012). Then, on § 2254 review, the district court found that trial counsel was deficient, and this court agreed. *Id.* at 707-09. In arriving at its conclusion, the panel noted that this court "give[s] due

deference to the conclusions of the trial judge on the effectiveness of counsel, because '[t]he judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.'" *Id.* at 708 (quoting *Massaro v. United States*, 538 U.S. 500, 506, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003)). This statement, however, must be read in light of the court's conclusion that the Michigan Court of Appeal's decision was an unreasonable application of clearly established Federal law. *Id.* at 709. Although the *Foster* court noted the trial court's superior position to assess credibility, it did not rely on the trial court's ruling as a dispositive basis for granting relief. *See id.* at 708-09. Rather, it applied AEDPA deference to the opinion of the Michigan Court of Appeals. *See id.*

Likewise, *Ramonez v. Berghuis* does not require this court to ignore the findings of the Michigan Court of Appeals and defer to the determinations of the state trial court. 490 F.3d 482, 490 (6th Cir. 2007). In stating that "in the context of a *Strickland* evidentiary hearing, it is for the judge to evaluate the credibility of the criminal defendant and the former defense counsel in deciding what advice counsel had in fact given to the defendant during his trial, and such findings are entitled to the Section 2254(e)(1) presumption," this court was merely illustrating the distinction between credibility determinations within the judge's or jury's province. *Id.* Such a statement does not divest a state appellate court of its ability to review the factual findings and legal conclusions of a state trial court. As in

Foster, the *Ramonez* court applied AEDPA's double deference to the opinion of the Michigan Court of Appeals. *Id.* at 486-87.

Nor does § 2254(e)(1) support Shimel's position. The statute speaks only to the factual determinations made by a "State court" – it does not differentiate between state trial and state appellate courts:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

It would be an inappropriate exercise of federal habeas review to ignore the factual and legal conclusions of the Michigan Court of Appeals and instead look to the state trial court's findings. *See Rose v. Lundy*, 455 U.S. 509, 518-19, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). Shimel's argument boils down to a complaint that the Michigan Court of Appeals unreasonably applied the state-mandated standard of review. This is not a ground on which we can grant habeas relief. As this court has previously opined, AEDPA sets forth "a precondition to the grant of habeas relief . . . not an entitlement to it." *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007) (citing *Fry v. Pliler*, 551 U.S. 112, 119, 127 S. Ct. 2321, 168 L. Ed. 2d

16 (2007)). Therefore, we apply § 2254(e)(1)'s presumption of correctness to the factual findings of the Michigan Court of Appeals and AEDPA double deference to the legal conclusions of the Michigan Court of Appeals.

C.

Shimel must establish that trial counsel's performance was deficient and that his deficiencies prejudiced the defense. *Strickland*, 466 U.S. at 687. Although we have doubt that Denton's performance was deficient, we resolve Shimel's claim on the prejudice prong because there can be no finding of ineffective assistance of counsel without prejudice. *Phillips v. Bradshaw*, 607 F.3d 199, 216 (6th Cir. 2010) (citing *Strickland*, 466 U.S. at 691-92).

To satisfy the prejudice requirement in the context of guilty pleas, "the defendant must show that there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. In the Sixth Circuit, a petitioner "cannot make that showing merely by telling [the court] now that she would have gone to trial then if she had gotten different advice." *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012). "The test is objective, not subjective; and thus, 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)).

"[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hodges v. Colson*, 727 F.3d 517, 534 (6th Cir. 2013) (quoting *Hill*, 474 U.S. at 59). This is such a case, as Shimel contends that her counsel was deficient for his failure to present a theory of self-defense. "[I]n determining whether a defendant has shown prejudice, a court must predict whether correction of the deficient performance might have enabled the defendant to succeed at trial." *Id.* at 538.

With these considerations in mind, Shimel has not established a reasonable probability that, but for counsel's advice to plead guilty, she would have gone to trial. Nor has she proven that there is a reasonable probability that the presentation of a battered spouse syndrome theory of self-defense at trial would have resulted in a better outcome for her than a conviction of second-degree murder.

Shimel argues that she would have rejected the plea and insisted on going to trial and that she would have received a better outcome at trial. She asserts that at trial, she would have used Fischer's expert testimony on battered spouse syndrome "to explain the reasonableness of the battered spouse's perception that danger or great bodily harm is imminent, and also to rebut the prosecution's inference that the defendant could have left rather than kill the spouse." Appellant Br. at 33 (quoting *People v. Wilson*, 194 Mich. App. 599,

487 N.W.2d 822, 824 (Mich. Ct. App. 1992)). In response, the government contends that Shimel cannot show that she would have chosen to go to trial and that if she had, even with Fischer's expert testimony, she likely would have been convicted of the more serious charge of first-degree murder, which would have subjected her to a non-parolable life sentence.

Shimel was charged with open murder under Michigan Comp. Law 750.316, which "shall be punished by imprisonment for life without eligibility for parole." *Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *1. In contrast, second-degree murder pursuant to Michigan Comp. Law 750.317 "shall be punished by imprisonment in the state prison for life, or any terms of years, in the discretion of the court trying the same." In discussions with Denton, Shimel expressed her desire to have the opportunity to be released from prison and someday return to her four children. *Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *2, 4. Therefore, Denton's belief that "the second-degree murder plea was a good option because it would give defendant a chance to be released from prison one day" was reasonable. 2013 Mich. App. LEXIS 1351, [WL] at *2. Indeed, Shimel was sentenced to eighteen to thirty-six years in prison, which leaves open the possibility that she might be reunited with her children someday. Nowhere has Shimel stated that if she had better advice or spent more time with her trial counsel, she would not have pled guilty; nor would a reasonable person have chosen to proceed to trial under the circumstances. Shimel's statement in her briefs

that she would have rejected the plea agreement and insisted on going to trial are belied by the fact that she had agreed to plead guilty to second-degree murder prior to her preliminary examination but, because of a miscommunication between her former counsel and the prosecutor, the deal expired. 2013 Mich. App. LEXIS 1351, [WL] at *1. Shimel's statements to the contrary are insufficient to rebut the Michigan Court of Appeals' findings on this matter. *See* 28 U.S.C. § 2254(e)(1). A reasonable defendant in Shimel's situation would have accepted the second-degree murder plea, especially in light of the prosecutor's stance that, even with expert testimony on battered spouse syndrome, he would not have further reduced the charge to manslaughter. *See Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *2, *4. In reaching this conclusion, the Michigan Court of Appeals did not unreasonably apply clearly established Federal law. 2013 Mich. App. LEXIS 1351, [WL] at *11.

Even assuming that a reasonable defendant in Shimel's position would have rejected the second-degree murder plea agreement, she has failed to establish a reasonable probability that expert testimony on battered spouse syndrome would have improved her result. Michigan law does not permit a defendant to plead battered spouse syndrome as a freestanding defense but rather as part of a self-defense claim. *See Seaman v. Washington*, 506 F. App'x 349, 360 (6th Cir. 2012) (citing *People v. Christel*, 449 Mich. 578, 537 N.W.2d 194, 202 (Mich. 1995)). "In Michigan, the killing of another person in self-defense is justifiable

homicide if the defendant honestly and reasonably believes that [her] life is in imminent danger or that there is a threat of serious bodily harm." *People v. Heflin*, 434 Mich. 482, 456 N.W.2d 10, 18 (Mich. 1990). Shimel would have been unable to meet this burden. Her husband suffered nine gunshot wounds, seven of which entered his body through his back, *Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *1, which weighs against a self-defense theory. *See Cain v. Redman*, 947 F.2d 817, 822 (6th Cir. 1991). Further, the government would have presented evidence that "the shooting was precipitated by the couple's financial problems, and specifically defendant's gambling problem" and that Shimel had reloaded the gun and then continued to shoot her husband. *Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *4. There is no reasonable probability that Shimel's battered spouse syndrome self-defense theory would have succeeded at trial. Shimel is unable to establish prejudice, and therefore, her claim for habeas relief fails.

III.

For the reasons stated above, we affirm.

Shimel v. Warren

United States District Court for the
Eastern District of Michigan, Northern Division

November 6, 2015, Decided;
November 6, 2015, Filed

Case No. 14-cv-14882

Counsel: For Rebecca Jean Shimel, Petitioner: Alison L. Carruthers, Dykema Gossett, Ann Arbor, MI; James S. Brady, Dykema Gossett, PLLC, Grand Rapids, MI.

For Millicent Warren, Warden, Respondent: Andrea M. Christensen-Brown, Michigan Department of Attorney General, Lansing, MI; Laura Moody, Michigan Department of Attorney General, Appellate Division, Lansing, MI.

Judges: Honorable THOMAS L. LUDINGTON, United States District Judge

Opinion by: THOMAS L. LUDINGTON

Opinion

OPINION AND ORDER GRANTING PETITIONER'S MOTION TO AMEND THE MEMORANDUM IN SUPPORT OF HER PETITION FOR HABEAS CORPUS, DENYING PETITIONER'S PETITION FOR HABEAS CORPUS, AND GRANTING A CERTIFICATE OF APPEALABILITY

Petitioner, Rebecca Shimel, confined at the Huron Valley Women's Correctional Facility in Ypsilanti,

Michigan, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, through her attorneys James S. Brady and Alison L. Carruthers. Petitioner was convicted on her plea of guilty in the Bay County Circuit Court of second-degree murder, Mich. Comp Laws § 750.317; and possession of a firearm in the commission of a felony [felony-firearm], Mich. Comp Laws § 750.227(b). She was sentenced to eighteen to thirty six years in prison on the second-degree murder conviction and two years in prison on the felony-firearm conviction. Petitioner now contends that her trial counsel was ineffective for failing to spend sufficient time consulting with her and for advising her to plead guilty to second-degree murder rather than taking the case to trial and presenting a Battered Spouse Syndrome defense. Respondent has filed an answer to the petition, asserting that the claims lack merit. The Court agrees that Petitioner's claims are without merit, and therefore her petition will be denied.

A.

Because here the Michigan Court of Appeals overturned the initial findings of fact made by the Trial Court, this Court first must address the issue of which state court findings of fact it must defer to. Pursuant to 28 U.S.C. § 2254(e)(1) the findings of fact made by a state court are presumed correct unless the petitioner shows by clear and convincing evidence that the factual findings were erroneous. *Id.* "This presumption of correctness also applies to the factual findings of a

state appellate court based on the state trial record." *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). *See also Brumley v. Wingard*, 269 F.3d 629, 637 (6th Cir. 2001).

At a *Ginther* hearing on August 22, 2012, the State Trial Court agreed with Petitioner that her counsel had been deficient. *People v. Shimel*, No. 312375, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549 *5-6 (Mich. Ct. App. Aug. 6, 2013); *See also People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922, 924-25 (Mich., 1973). Specifically, the trial judge found that Attorney Denton was ineffective for failing to adequately investigate a battered spouse defense and for failing to sufficiently meet with Petitioner for a sufficient amount of time. *Shimel*, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *9, 12. For these reasons, the State Trial Court allowed Petitioner to withdraw her guilty plea 2013 Mich. App. LEXIS 1351, [WL] at *5.

On August 6, 2013, the Michigan Court of Appeals overturned the decision of the Trial Court. The Court of Appeals held that the trial court committed clear error in its factual determination that Petitioner's counsel had not properly investigated a potential battered women's defense. The Court of Appeals also held that the trial court erred as a matter of law in failing to apply the prejudice prong of the *Strickland* test, since Petitioner could not prove that she would have received a better outcome had she gone to trial. 2013 Mich. App. LEXIS 1351, [WL] at *9,12. The Court of Appeals also concluded that the trial Court erred as a matter of law in determining that Attorney Denton was ineffective for failing to sufficiently meet with Petitioner, since

again Petitioner could not show prejudice under the second prong of *Strickland*. Petitioner appealed the appellate decision to the Michigan Supreme Court, which denied her leave to appeal.

The question for this Court is thus whether it should defer to the state Trial Court's findings of fact, or whether it should defer to the state Appellate Court's findings of fact. This Court will defer to the factual findings of the state appellate court for two reasons. First, the state appellate court overturned the decision of the trial court under a deferential, "clear error" review. 2013 Mich. App. LEXIS 1351, [WL] at *8-9 (finding that the trial court clearly erred in its factual finding that Attorney Denton failed to investigate a battered spouse self-defense theory and "improperly substituted its judgment for that of trial counsel on a matter of trial strategy.") Second, Petitioner now challenges the state appellate court's findings of fact, not the state trial court's findings of fact.[1]

B.

Accordingly, this Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009):

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[1] This question is dicta on the facts of this case. Even if this Court deferred to the state Trial Court's factual findings that Attorney Denton was ineffective as a matter of fact, this Court would still find against Petitioner as a matter of law because the Trial Court failed to conduct a prejudice inquiry as required by *Strickland*.

Defendant was charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in the shooting death of her husband, Rodney Shimel. Defendant fired seven shots, reloaded the gun, and continued to fire. Shimel sustained nine gunshot wounds, seven of which entered his body through his back. Defendant was arrested on the same day that the shooting occurred.

Defendant was represented by four different attorneys, two court-appointed and two retained, before she entered her guilty plea. The court-appointed attorneys represented defendant only briefly. Before defendant's preliminary examination, while she was represented by her first retained attorney, the assistant prosecutor, J. Dee Brooks, offered to allow defendant to plead guilty to second-degree murder and felony-firearm with no sentence recommendation in exchange for the dismissal of the open murder charge. The offer remained open until the day before the preliminary examination. Although defendant decided to accept the plea offer, Brooks withdrew it because defendant's attorney did not inform him that defendant wanted to accept it until the morning of the preliminary examination. Thus, because the plea offer was not accepted before Brooks's deadline, the offer was withdrawn. Following the preliminary examination, defendant was bound over for trial.

Thereafter, the trial court granted defense counsel's motion to withdraw, and defendant retained attorney E. Brady Denton to represent her. On October 5, 2010, the trial court entered a stipulation to adjourn trial that indicated that Denton was investigating a "battered spouse" defense and intended to hire an expert to interview defendant. Denton spoke several times with attorney Dale Grayson at the National Clearinghouse for the Defense of Battered Women. Grayson sent Denton a packet of materials regarding the defense, including articles, appellate decisions in cases involving the defense, and information regarding courts' positions on the defense. According to Denton, he discussed the possibility of a battered spouse defense with defendant and her family and friends as well as the prosecutor. Ultimately, he decided not to pursue a battered spouse defense and did not hire an expert.

Over the next few months, Denton and Brooks had several discussions regarding a possible guilty plea. Brooks refused to consider a plea to manslaughter and refused Denton's request for a second-degree murder plea with a sentence cap. In January 2011, Brooks offered defendant the same plea that he had previously offered, i.e., second-degree murder and felony-firearm with no sentence recommendation in exchange for dropping the open murder charge. Defendant accepted the plea and pleaded guilty on February 3, 2011. The trial court sentenced defendant to 18 to 36 years in prison for the murder conviction, to be served

consecutive to 2 years' imprisonment for the felony-firearm conviction. On September 21, 2011, defendant filed a motion to withdraw her plea, to correct her invalid sentence, and to amend the presentence investigation report. In her motion to withdraw her plea, defendant argued that Denton had rendered ineffective assistance of counsel for failing to investigate a battered spouse syndrome defense and/or hire an expert to examine defendant. Defendant asserted that her plea was therefore involuntary. She requested the appointment of a battered spouse syndrome expert at public expense as well as a *Ginther*[2] hearing.

At the *Ginther* hearing, Denton admitted that he signed the stipulation to adjourn trial in part to investigate a battered spouse syndrome defense. He obtained the packet of materials from Grayson regarding the defense, talked to defendant, and reviewed the police reports. He asserted that he originally intended to hire an expert witness regarding the defense, but ultimately determined after reviewing the case materials that the defense was not worth pursuing. One of Denton's biggest concerns was the fact that defendant reloaded her gun and continued shooting. Also, there was not much evidentiary support to show a history of physical abuse against defendant. There was only one documented incident of domestic violence. When asked

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[2] *People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973) (footnote original).

whether he thought that self-defense or a battered spouse defense was a viable defense, Denton responded, "I don't think it could be sold to a jury."

Denton testified that he met with defendant while she was incarcerated at least two or three times and probably wrote letters to her during the seven months that he represented her. Denton scored defendant's sentencing guidelines before the plea hearing but he did not tell defendant the sentence that she was likely to receive. Denton admitted that he told Grayson in a letter dated March 10, 2011, that defendant could receive "as little as 8 years, although [he] would expect 10 to 11 years" based on his calculation of the sentencing guidelines. Denton told defendant that her sentence would be controlled by the sentencing guidelines. Denton testified that one of his concerns was defendant's desire to be with her children. Defendant had told Denton that she wanted an opportunity to get out of prison and be with her children someday. Denton testified that considering defendant's desire to be with her children and his belief that a battered spouse defense would not be successful, he thought the second-degree murder plea was a good option because it would give defendant a chance to be released from prison one day.

Dr. Karla Fischer testified as an expert witness on domestic violence and battered spouse syndrome. She maintained that battered spouse syndrome is "not a defense per se, but

the expert testimony helps to support a theory of self-defense." She opined that a battered spouse defense presented to a jury typically results in a reduction of charges, most commonly a reduction from first-degree murder to second-degree murder.

Fischer conducted a domestic violence evaluation of defendant in prison in October 2011 after defendant moved to withdraw her plea. Defendant told Fischer that Shimel had abused her physically and emotionally throughout their 30-year marriage and had threatened to kill her. Defendant claimed that Shimel had punched her, strangled her, kicked her, restrained her, and committed acts of sexual violence against her. Defendant admitting [sic] stabbing Shimel with a knife while he was choking her early in their relationship. Fischer opined that, based solely on the information that defendant provided, defendant had acted in self-defense. Fischer admitted that she did not have a "full grasp" of the forensic evidence and that a battered spouse assessment is based on a defendant's perception of events, which might not match up with other facts. Defendant told Fischer that she was having financial difficulties at the time of the shooting, but Fischer did not believe that that information was important. When asked whether it would have had any significance if defendant had a gambling problem and defendant and Shimel had conflict about it, Fischer responded:

> A. Well, my job in understanding the history of domestic violence doesn't necessarily in – that wouldn't necessarily be psychologically significant in the evaluation of domestic violence and its effects. So, I guess the answer would be no, it wouldn't necessarily be important.
>
> Q. So you wouldn't consider other motivation for the shooting?
>
> A. I'm not really sure how to answer that question. I mean, my job is not to understand the motivation underlying the shooting. My job is to understand the history of . . . domestic violence, how it affected her and whether or not it led her to act in self-defense.

Defendant testified that she never received any phone calls or correspondence from Denton while she was in jail. She claimed that Denton visited her twice, the first time for "under an hour and the second time lasted for about 10, 15 minutes." According to defendant, Denton told her at the second meeting that he was going to speak to Brooks and try to negotiate a plea deal with a sentence of 7 to 15 years or less. Defendant maintained that Denton did not explain the sentencing guidelines to her, nor did he ask if she had any prior convictions. Defendant testified that the next time that she saw Denton was when she walked into the courtroom for the plea hearing. After defendant pleaded guilty, she wrote a letter to Denton that stated:

> I'm writing you to – I'm writing to in regards to – to the plea hearing that occurred today at 1:30. What happened? Why was I not notified by you or your office or by Mr. Jacob Kolinski, your legal assistant who was with you today? Why didn't I get to meet or speak with you before the court – before court so you could explain what this plea deal you had was all about? How could you do this to me? What did I just plea to? How much time am I looking at? What is the difference of Open Murder and Second Degree Murder? I'm extremely confused, distraught, and frankly, I don't remember much about what happened today in court.

Defendant admitted that it was a priority for her to be able to be released from prison one day so that she could be with her children. Defendant also admitted that she told a different story about the shooting when she first spoke to a detective and persons at the forensic center. She initially did not tell the detective that she thought that Shimel was going to kill her that day. Later, defendant claimed that she did not tell the detective that she thought that Shimel was going to kill her because she wanted to protect her family from the media. Defendant admitted that she was an avid gambler and had financial problems. She "possibly" bounced two checks on the day of the shooting, and she "might have told" a friend that she could not support herself financially without Shimel. Defendant also admitted that she talked to her daughters on the

phone from jail and tried to get them to remember the abuse that Shimel allegedly inflicted on her. Defendant testified that her daughters "probably" told her that they did not recall any abuse. Defendant also acknowledged that her daughters testified at the preliminary examination that they did not recall any physical abuse.

Grace Ombry, defendant's best friend in high school, testified that defendant began dating Shimel after she dropped out of high school in the beginning of her senior year in 1981. Defendant and Shimel moved into an apartment together in 1983 before they married. Ombry visited the apartment once, during which time defendant showed Ombry bruises on her leg and claimed that Shimel had beaten her. She also showed Ombry a gun that Shimel owned and said that Shimel had threatened her with it. Later in 1983, shortly after defendant and Shimel married, defendant told Ombry that she was unhappy and wanted to get a divorce because Shimel was mean to her. Ombry had not had regular contact with defendant since they were teenagers.

Brooks testified that from the beginning of the case, he believed that defendant had only two possible defenses – insanity and self-defense under a battered spouse theory. Brooks viewed defendant's videotaped statements to the police in which she admitted that she shot Shimel several times during an argument in their bedroom while three of their children were home. No other weapons were involved

to suggest that defendant was in any danger. Brooks testified that in his early conversations with Denton, Denton mentioned that he was considering a self-defense defense under a battered spouse theory, but Brooks did not believe that the evidence supported such a defense. Brooks maintained that the police had spoken to "dozens and dozens" of people, and Brooks did not believe that there was any substantiating proof of any serious prior violent acts between defendant and Shimel. In fact, Brooks testified that all four of defendant's children "denied that they had ever seen any physical violence or threats of physical violence" between their parents. Brooks told Denton that, in his view, the shooting was precipitated by the couple's financial problems, and specifically defendant's gambling problem. Shimel was working extra jobs on the side to earn money for the family during the holidays, and funds were missing, including a recent payment for a job in the form of a check. Brooks learned from family members and a friend that Shimel was considering leaving the home and either divorcing or separating from defendant. According to Brooks, the physical evidence was also inconsistent with self-defense. Shimel suffered seven gunshot wounds to his back, two of which were fatal and would have disabled Shimel very quickly. Although the chamber of the gun held only seven bullets, Shimel suffered nine gunshot wounds. The theory that defendant reloaded the gun and then continued to shoot was consistent with the children's description

> of what they had heard from downstairs. Brooks reviewed Fischer's report and testified "with absolute certainty" that it would not have convinced him to change the plea offer or his assessment of the strengths and weaknesses of his case. Brooks viewed Fischer's report as contradictory and self serving.

People v. Shimel, No. 312375, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *1-4 (Mich. Ct. App. Aug. 6, 2013) (additional footnotes omitted).

The trial judge granted Petitioner's motion to withdraw the plea, finding that counsel had been deficient for only visiting Petitioner for approximately one and a half hours in jail. The judge further ruled that counsel had been ineffective for failing to investigate Petitioner's self-defense claim. 2013 Mich. App. LEXIS 1351, [WL] at * 5-6. The trial judge concluded that Petitioner had established that she was prejudiced by defense counsel's deficient performance and that, but for trial counsel's deficiencies, she would not have pleaded guilty. 2013 Mich. App. LEXIS 1351, [WL] at * 6.

C.

Applying a deferential "clear error" standard of review, the Michigan Court of Appeals reversed the trial court judge's decision to set aside the guilty plea and reinstated Petitioner's conviction. The Michigan Court of Appeals first concluded that the trial judge clearly erred in its factual finding that trial counsel had not adequately investigated Petitioner's case:

In this case, the trial court found that Denton failed to fully and independently investigate a self-defense defense based on a battered spouse theory, thus satisfying the first prong of the *Strickland* test. The trial court's finding was clearly erroneous. The *Ginther* hearing testimony established that Denton is an experienced attorney, he was the elected county prosecutor for Saginaw County for four years beginning in 1972, and he had handled approximately two hundred homicide cases. Denton testified that he had spoken on several occasions with Dale Grayson at the National Clearinghouse for the Defense of Battered Women regarding the battered spouse syndrome defense and had obtained materials from Grayson regarding the defense. Denton was concerned about the fact that defendant fired several shots into Shimel's back, reloaded the gun, and continued to fire. He was also concerned that none of her four children had witnessed any physical abuse or threat of physical abuse to defendant, and there was very little evidentiary support to substantiate a history of physical abuse. Denton explained that he decided not to pursue the defense because he did not believe that "it could be sold to a jury." In fact, he testified that he believed that defendant would have been convicted of first-degree murder had she proceeded to trial. Because defendant's primary goal was to one day be released from prison in order to be with her children, Denton believed that a plea to second-degree murder was her best option. Thus, the record

> shows that the trial court clearly erred by determining that Denton failed to conduct an investigation into a battered spouse theory of self-defense. Moreover, the trial court's findings indicate that it impermissibly substituted its judgment for that of Denton regarding matters of strategy.

People v. Shimel, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *8.

The Michigan Court of Appeals also concluded that the trial court erred as a matter of law by failing to apply the correct prejudice standard in assessing the petitioner's ineffective assistance of counsel claim. The Court rejected Petitioner's argument that, to establish prejudice in the context of her ineffective assistance of counsel claim, she merely had to establish that but for counsel's allegedly deficient representation, she would have gone to trial. The Michigan Court of Appeals concluded that under established U.S. Supreme Court precedent, in order to establish prejudice so as to support her ineffective assistance of counsel claim, Petitioner "was required to show the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty." *People v. Shimel*, No. 312375, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *9.

The Michigan Court of Appeals concluded that Petitioner failed to show that she would have prevailed had she rejected the plea agreement and gone to trial:

> Moreover, the record establishes that defendant would not have received a better outcome if she had gone to trial and argued that she acted in self-defense based on a battered spouse theory. Other than defendant's claims of abuse, the only testimony showing that Shimel was physically abusive toward defendant was Ombry's testimony that in 1983 defendant showed Ombry bruises on her leg and told Ombry that Shimel had threatened her with a gun. None of defendant's friends or family members corroborated defendant's claims of physical abuse, even after defendant tried to get her daughters to recall the alleged abuse when defendant talked to them on the telephone from jail. Defendant's children told the police that what they heard while downstairs in the home was consistent with defendant shooting, stopping to reload the gun, and continuing to fire. In addition, seven of the bullets entered Shimel's body through his back. Thus, the evidence simply did not support a self-defense theory. Moreover, Fischer testified that in cases involving a battered spouse defense, charges are typically reduced from first-degree murder to second-degree murder, which is exactly what occurred in this case as a result of defendant's plea. Accordingly, the record does not show that defendant would have received a better outcome had she gone to trial instead of pleading guilty. As such, defendant has failed to establish the prejudice prong of the *Strickland-Hill* test.

People v. Shimel, 2013 Mich. App. LEXIS 1351, 2013 WL 4006549, at *10.

The Michigan Supreme Court denied Petitioner leave to appeal. *People v. Shimel*, 495 Mich. 916, 840 N.W.2d 312 (2013).

Petitioner now seeks a writ of habeas corpus on the following ground:

> I. Deference must be given to the state trial court's ruling, following a *Strickland* evidentiary hearing, that petitioner may withdraw her guilty plea because her trial counsel was ineffective for failing to investigate a Battered Women Syndrome defense as well as inadequate communication.

Petitioner has also filed a motion to amend the memorandum in support of her habeas petition.

II.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the standard of review federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

As amended, 28 U.S.C. § 2254(d) permits a federal court to issue the writ only if the state court decision on a federal issue "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or it

amounted to "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2); *Franklin v. Francis*, 144 F. 3d 429, 433 (6th Cir. 1998). Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520-21. Additionally, state court factual determinations are presumed correct. 28 U.S.C. § 2254(e)(1).

The Supreme Court has explained that, under section 2254(d), a state court decision is only "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent." *Williams*, 529 U.S. at 405-06.

The Supreme Court has also explained that, under 2254(d), a state court decision involves an "unreasonable application" of Supreme Court precedent when the application of the law to the facts of the prisoner's case is "objectively unreasonable." *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010). The Court has explained:

> "[A]n unreasonable application of federal law is different from an incorrect application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment

> that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable. This distinction creates a substantially higher threshold for obtaining relief than *de novo* review. AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt.

Id. (finding that the state court's rapid declaration of a mistrial on grounds of jury deadlock was not unreasonable even where "the jury only deliberated for four hours, its notes were arguably ambiguous, the trial judge's initial question to the foreperson was imprecise, and the judge neither asked for elaboration of the foreperson's answers nor took any other measures to confirm the foreperson's prediction that a unanimous verdict would not be reached") (internal quotation marks and citations omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (noting that the Supreme Court has held on numerous occasions that it is not "an unreasonable application of clearly established Federal law . . . for a state court to decline to apply a specific legal rule that has not been squarely established by this Court") (internal quotations omitted); *Phillips v. Bradshaw*, 607 F. 3d 199, 205 (6th Cir. 2010).

Finally, although the trial judge in this case concluded that Petitioner's trial counsel was ineffective, this Court need not defer to that resolution in favor of Petitioner. The AEDPA's standard of review is only a

precondition to habeas relief, not an entitlement to it. See *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007).

III.

As an initial matter, Petitioner has filed a motion to amend the memorandum in support of her habeas petition. Respondent has not opposed this motion. The decision to grant or deny a motion to amend is within the discretion of the district court. *See* Fed. R. Civ. P. 15; *Clemmons v. Delo*, 177 F.3d 680, 686 (8th Cir. 1999). Notice and the possibility of substantial prejudice to the opposing party are the critical factors in determining whether a motion to amend should be granted. *Coe v. Bell*, 161 F.3d 320, 341-42 (6th Cir. 1998). Such a motion may be denied when it has been unduly delayed and when granting the motion would prejudice the nonmovant. *Smith v. Angelone*, 111 F.3d 1126, 1134 (4th Cir. 1997) (internal citations omitted). However, delay by itself is not sufficient to deny a motion to amend. *Coe*, 161 F.3d at 342.

Petitioner's proposed amended memorandum in support of her habeas petition alleges additional support for the claims already raised in her original petition. The amended memorandum in no way changes the petition itself. The motion was not unduly delayed, and granting the motion will not unduly prejudice Respondent. Accordingly, the unopposed motion to amend will be granted.

IV.

Petitioner first argues that she was denied the effective assistance of trial counsel because her trial counsel failed to spend sufficient time consulting with her. Petitioner also contends that counsel was ineffective for advising her to plead guilty to a reduced charge of second-degree murder rather than investigating and pursuing a Battered Spouse Syndrome (BSS) defense.

A.

To show she was denied the effective assistance of counsel under federal constitutional standards, a petitioner must satisfy a two prong test. First, a petitioner must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In so doing, a petitioner must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id*. In other words, a petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689.

Second, a petitioner must show that such performance prejudiced her defense. *Id*. To demonstrate prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." *Strickland*, 466 U.S. at 694. The Supreme Court's holding in *Strickland* thus places the burden on a petitioner raising a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009).

Furthermore, on habeas review, "the question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. at 123 (internal quotations omitted). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 556 U.S. at 123.

Consequently, the § 2254(d)(1) standard applies a "doubly deferential judicial review" to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[A] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington*, 562

U.S. at 101. "Surmounting *Strickland's* high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)). Because of this doubly deferential standard, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. at 105. A reviewing court must not merely give defense counsel the benefit of the doubt, but must also affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did. *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1407, 179 L. Ed. 2d 557 (2011). Reliance on hindsight to cast doubt on a plea that took place over four years ago is precisely what *Strickland* and AEDPA seek to prevent. *See Harrington v. Richter*, 562 U.S. at 107.

B.

Petitioner initially suggests that she was constructively denied the assistance of counsel because her trial lawyer only visited her in jail twice, for a total of one and a half hours. Petitioner argues that counsel's failure to visit her more frequently during the pretrial period amounted to a *per se* denial of the effective assistance of counsel such that Petitioner does not need to show that the insufficient time in fact resulted in prejudice.

Where defense counsel entirely fails to subject the prosecution's case to "meaningful adversarial testing,"

there has been a constructive denial of counsel, and a defendant need not make a showing of prejudice to establish ineffective assistance of counsel. *Moss v. Hofbauer*, 286 F. 3d 851, 860 (6th Cir. 2002). However, in order for a presumption of prejudice to arise based on an attorney's failure to test the prosecutor's case such that reversal is warranted without inquiring into prejudice, the attorney's failure to test the prosecutor's case must be complete. *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

The case of *Mitchell v. Mason*, 325 F. 3d 732 (6th Cir. 2003) upon which Petitioner relies does not support Petitioner's position that she was constructively denied the assistance of counsel. In *Mitchell*, the Sixth Circuit interpreted the Supreme Court's holding in *Cronic* to require a presumption of prejudice against a petitioner's ineffective assistance claims. The Sixth Circuit decided in favor of the petitioner in that case based on evidence that the defense counsel only met with the petitioner for six minutes immediately before trial despite representing the petitioner for seven months, together with the fact that counsel had been suspended from the practice of law in the month prior to trial, and therefore did not appear at any motion hearings or do any other work on the case. *See Id.* at 742-44.

Petitioner's case is distinguishable from the petitioner's circumstances in *Mitchell.* Unlike in *Mitchell*, Petitioner's counsel was not suspended from the practice of law. Petitioner does not allege that Denton failed to meet with her at all, only that Denton met with her

twice in jail for a total of one and a half hours. However, both the trial court judge and Petitioner ignored Denton's testimony from the *Ginther* hearing in which he stated that he believed he communicated with Petitioner over the telephone and in writing, and that he believed that he visited Petitioner at least three times in jail, if not more. (Tr. 3/22/12, pp. 18-19). The evidence also shows that Denton spent time investigating Petitioner's defense and negotiating a plea bargain.

In *Mitchell*, the Sixth Circuit distinguished that case from the circumstances present in this case, observing that if the issue had been only the failure of counsel to meet with the petitioner to sufficiently prepare during a thirty-day period prior to trial, "it might have been proper to apply the *Strickland* analysis, for as *Bell* notes, counsel's failure in particular instances is evaluated under *Strickland*." *Mitchell*, 325 F. 3d at 742. "In short, *Mitchell* is a case involving unique facts – a complete failure to consult combined with counsel's suspension from the practice of law immediately prior to trial – and its holding is cabined by those unique facts." *See Willis v. Lafler*, 2007 U.S. Dist. LEXIS 103504, No. 2007 WL 3121542, * 29 (E.D. Mich. October 24, 2007).

The Sixth Circuit has applied the *Strickland* standard in evaluating and rejecting an ineffective assistance of counsel claim based upon counsel's failure to consult with a habeas petitioner. *See Bowling v. Parker*, 344 F. 3d 487, 506 (6th Cir. 2003) (trial attorneys' alleged failure to consult with defendant did not prejudice defendant in capital murder case, and thus could

not amount to ineffective assistance, although attorneys allegedly met with defendant for less than one hour in preparing defense, where defendant failed to show how additional consultation with his attorneys could have altered outcome of trial). Accordingly, the petitioner's ineffective assistance of counsel claim is subject to the *Strickland* standard, and she is required to show actual prejudice to obtain habeas relief.

Here, Petitioner has not shown that she was prejudiced by the amount of time her counsel spent with her. She has not met her burden under *Strickland* of showing that her case would have been successful, but for her counsel's failure to spend more time with her. Consequently, she cannot succeed on this theory of ineffective assistance of counsel.

C.

Petitioner's [sic] next argues that she was denied effective assistance of counsel when her trial counsel advised her to plead guilty to second-degree murder instead of raising a BSS defense. This theory of ineffective counsel is also without merit.

Plea bargaining plays a crucial role in the judicial process. The Supreme Court has explained:

> Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when

> actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger.

Premo v. Moore, 562 U.S. 115, 124-25131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

The Supreme Court has warned that failure to adhere to the *Strickland* standard in reviewing plea bargains creates at least two problems. *Id*. at 125. First, hindsight review often distorts and overlooks the nuances of a negotiation process and ignores the special insights that an attorney has based on his or her experience and past dealings with a particular prosecutor or particular court. *Id*. Second, "ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect" in that the lack of assurance that reviewing courts will adhere to the strict requirements of the AEDPA and *Strickland* "could lead prosecutors to forgo plea bargains that would benefit defendants." *Id*.

In addition to showing actual prejudice, in order to satisfy the prejudice requirement for an ineffective assistance of counsel claim in the context of a guilty plea, a defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty, but would have insisted on going to trial. *Premo*, 562 U.S. at 129. An assessment of whether a defendant would have gone to trial but for counsel's errors "will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

The Sixth Circuit has interpreted *Hill* to require a federal habeas court to always analyze the substance of the habeas petitioner's underlying claim or defense to determine whether, but for counsel's error, petitioner would likely have gone to trial instead of pleading guilty. *See Maples v. Stegall*, 340 F. 3d 433, 440 (6th Cir. 2003). A petitioner therefore has the burden to show a reasonable probability that but for counsel's errors, she would not have pleaded guilty, because there would have been a reasonable chance that she would have been acquitted had he or she insisted on going to trial. *See Garrison v. Elo*, 156 F. Supp. 2d 815, 829 (E.D. Mich. 2001). A habeas petitioner's conclusory allegation that, but for an alleged attorney act or omission he or she would not have pleaded guilty is insufficient to prove such a claim. *Id.* The test of whether a defendant would not have pleaded guilty if she had received different advice from counsel is objective, and so a petitioner must demonstrate that rejecting the plea

bargain would have been rational under the circumstances. *Pilla v. U.S.*, 668 F. 3d 368, 373 (6th Cir. 2012).

Finally, "[W]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining," a federal court is required to "use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 134 S. Ct. 10, 13, 187 L. Ed. 2d 348 (2013).

Petitioner has failed to show that trial counsel was ineffective for advising her to plead guilty instead of presenting a BSS defense. Petitioner has also failed to show a reasonable probability that she could have prevailed had she gone to trial, or that she would have received a lesser sentence than she did by pleading guilty. *See Shanks v. Wolfenbarger*, 387 F. Supp. 2d 740, 750 (E.D. Mich. 2005).

In this case, Petitioner was originally charged with open murder under Michigan Law. Such a charge gives a circuit court jurisdiction to try a defendant on first and second degree murder charges. *See Taylor v. Withrow*, 288 F.3d 846, 849 (6th Cir. 2002). Under Michigan law, a conviction for first-degree murder requires a non-parolable life sentence, whereas a conviction of second-degree murder is parolable. *See Perkins v. LeCureux*, 58 F.3d 214, 216 (6th Cir. 1995). Petitioner's trial attorney negotiated a plea agreement whereby Petitioner was able to plead guilty to a reduced charge of second-degree murder, which eliminated the very real risk of conviction for first-degree

murder at trial and spending the rest of her life in prison. Under the plea agreement, Petitioner received a sentence of eighteen to thirty six years in prison on the second-degree murder conviction.

Petitioner has not met her burden of showing her defense counsel's advice to accept that plea bargain and forego a defense of self-defense based on BSS was unreasonable or that she would have been successful with such a defense had she insisted on going to trial. Under Michigan law, BSS is not a defense in itself. *Seaman v. Washington*, 506 F. App'x 349, 360 (6th Cir. 2012). Instead, the syndrome is viewed solely as a mental condition about which an expert may testify when "'relevant and helpful to the jury in evaluating a [BSS] complainant's credibility." *Id.* BSS is therefore raised as part of a defendant's claim that she honestly and reasonably believed she was acting in self-defense.

Under Michigan law, one acts lawfully in self-defense if he or she honestly and reasonably believes that he or she is in danger of serious bodily harm or death, as judged by the circumstances as they appeared to the defendant at the time of the act. *Blanton v. Elo*, 186 F. 3d 712, 713, fn. 1 (6th Cir. 1999). To be lawful self-defense, the evidence must show that: (1) the defendant honestly and reasonably believed that he was in danger; (2) the danger feared was death or serious bodily harm or imminent forcible sexual penetration; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *See Johnigan v. Elo*, 207 F. Supp. 2d

599, 608-09 (E.D. Mich. 2002). A defendant is not entitled to use any more force than is necessary to defend himself or herself. *Johnigan*, 207 F. Supp. 2d at 609. "[T]he law of self-defense is based on necessity, and a killing or use of potentially lethal force will be condoned only when the killing or use of potentially lethal force was the only escape from death, serious bodily harm, or imminent forcible sexual penetration under the circumstances." *Johnigan*, 207 F. Supp. 2d at 609 (internal citation omitted).

Here, Petitioner's defense counsel considered a number of factors in determining that any self-defense claim would likely be unsuccessful. First, there was very little evidence supporting Petitioner's claims of long-standing physical abuse by the victim. Petitioner's four children indicated they had never seen any instances where the victim physically abused or threated Petitioner. Additionally, Petitioner did not initially tell the police that she feared the victim was going to kill her that day.

Second, the victim suffered nine gunshot wounds, seven of which entered his body through his back. Petitioner reloaded the gun after discharging seven of the shots and then resumed firing. The fact that the victim was shot multiple times in the back undercuts any credible self-defense claim and constitutes evidence of premeditation. *See Cain v. Redman*, 947 F. 2d 817, 822 (6th Cir. 1991) *See also*, *e.g.*, *Young v. Withrow*, 39 F. App'x 60, 62 (6th Cir. 2002). Additionally, the firing of multiple gunshots at the victim was sufficient to establish premeditation and deliberation, so as to

support a conviction for first-degree murder. *See Crawley v. Curtis*, 151 F. Supp. 2d 878, 888-89 (E.D. Mich. 2001). The fact that Petitioner reloaded her gun before continuing to fire her weapon is also evidence of premeditation that would support a first-degree murder conviction. *Id.* Finally, there was no evidence that the victim was armed at the time of the shooting, further damaging Petitioner's self-defense claim. *See Johnigan*, 207 F. Supp. 2d at 609.

Even if a jury could have believed that Petitioner was a battered spouse, they still could have rejected her claim of self-defense under the facts of this case. *Seaman v. Washington*, 506 F. App'x at 360. Due to the limited application of BSS defenses under Michigan law and the lack of any evidence suggesting that Petitioner acted in self-defense, Petitioner has not met her burden of showing that her defense counsel was ineffective for failing to pursue a BSS defense. *Id.* In contrast, the evidence supporting a conviction for first degree murder was substantial. Under the circumstances, trial counsel's advice to plead guilty to a reduced charge of second-degree murder was a reasonable strategy. *See Bonior v. Conerly*, 416 F. App'x 475, 479 (6th Cir. 2010). Petitioner is therefore not entitled to habeas relief, and her petition will be denied.

IV.

A habeas petitioner must receive a certificate of appealability ("COA") in order to appeal the denial of

a habeas petition for relief from either a state or federal conviction.[3] 28 U.S.C. §§ 2253(c)(1)(A), (B). A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if a petitioner demonstrates that reasonable jurists could find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Petitioner will be granted a certificate of appealability. The fact that the trial judge found that trial counsel was ineffective shows that reasonable jurists could decide Petitioner's claim of ineffective assistance of counsel differently. *See Robinson v. Stegall*, 157 F. Supp. 2d 802, 820, fn. 7 & 824 (E.D. Mich. 2001). Accordingly, Petitioner will be granted a certificate of appealability.

V.

Accordingly, it is **ORDERED** that Petitioner's motion for leave to file an amended memorandum in support of her petition, ECF No. 6, is **GRANTED**.

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[3] Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254.

It is further **ORDERED** that the petition for writ of habeas corpus, ECF Nos. 1 and 2, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **GRANTED.**

/s/ Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: November 6, 2015

JUDGMENT

In accordance with the Opinion and Order Denying Petitioner Shimel's Petition for a Writ of Habeas Corpus entered on this date;

It is **ORDERED AND ADJUDGED** that the Petition for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED**.

/s/ Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: November 6, 2015

People v. Shimel

Supreme Court of Michigan

December 23, 2013, Decided

SC: 147781

Judges: Robert P. Young, Jr., Chief Justice. Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Justices.

Opinion

Order

On order of the Court, the application for leave to appeal the August 6, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

People v. Shimel

Court of Appeals of Michigan

August 6, 2013, Decided

No. 312375

Judges: Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

Opinion

PER CURIAM.

The prosecutor appeals by leave granted[1] the trial court's order granting defendant's motion to withdraw her guilty plea on the basis that she received ineffective assistance of counsel. Because the trial court clearly erred by determining that trial counsel failed to investigate a battered spouse self-defense theory of defense, the court impermissibly substituted its judgment for that of trial counsel on a matter of strategy, the court failed to apply the "prejudice" prong of the test for determining whether defendant received ineffective assistance of counsel, and the court erroneously determined that defendant's guilty plea was not knowingly and voluntarily made on the basis that she received ineffective assistance of counsel, we reverse and remand for further proceedings.

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[1] *People v Shimel*, unpublished order of the Court of Appeals, issued January 14, 2013 (Docket No. 312375).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in the shooting death of her husband, Rodney Shimel. Defendant fired seven shots, reloaded the gun, and continued to fire. Shimel sustained nine gunshot wounds, seven of which entered his body through his back. Defendant was arrested on the same day that the shooting occurred.

Defendant was represented by four different attorneys, two court-appointed and two retained, before she entered her guilty plea. The court-appointed attorneys represented defendant only briefly. Before defendant's preliminary examination, while she was represented by her first retained attorney, the assistant prosecutor, J. Dee Brooks, offered to allow defendant to plead guilty to second-degree murder and felony-firearm with no sentence recommendation in exchange for the dismissal of the open murder charge. The offer remained open until the day before the preliminary examination. Although defendant decided to accept the plea offer, Brooks withdrew it because defendant's attorney did not inform him that defendant wanted to accept it until the morning of the preliminary examination. Thus, because the plea offer was not accepted before Brooks's deadline, the offer was withdrawn. Following the preliminary examination, defendant was bound over for trial.

Thereafter, the trial court granted defense counsel's motion to withdraw, and defendant retained attorney E. Brady Denton to represent her. On October 5, 2010, the trial court entered a stipulation to adjourn trial that indicated that Denton was investigating a "battered spouse" defense and intended to hire an expert to interview defendant. Denton spoke several times with attorney Dale Grayson at the National Clearinghouse for the Defense of Battered Women. Grayson sent Denton a packet of materials regarding the defense, including articles, appellate decisions in cases involving the defense, and information regarding courts' positions on the defense. According to Denton, he discussed the possibility of a battered spouse defense with defendant and her family and friends as well as the prosecutor. Ultimately, he decided not to pursue a battered spouse defense and did not hire an expert.

Over the next few months, Denton and Brooks had several discussions regarding a possible guilty plea. Brooks refused to consider a plea to manslaughter and refused Denton's request for a second-degree murder plea with a sentence cap. In January 2011, Brooks offered defendant the same plea that he had previously offered, i.e., second-degree murder and felony-firearm with no sentence recommendation in exchange for dropping the open murder charge. Defendant accepted the plea and pleaded guilty on February 3, 2011. The trial court sentenced defendant to 18 to 36 years in

prison for the murder conviction, to be served consecutive to 2 years' imprisonment for the felony-firearm conviction.

On September 21, 2011, defendant filed a motion to withdraw her plea, to correct her invalid sentence, and to amend the presentence investigation report. In her motion to withdraw her plea, defendant argued that Denton had rendered ineffective assistance of counsel for failing to investigate a battered spouse syndrome defense and/or hire an expert to examine defendant. Defendant asserted that her plea was therefore involuntary. She requested the appointment of a battered spouse syndrome expert at public expense as well as a *Ginther*[2] hearing.

At the *Ginther* hearing, Denton admitted that he signed the stipulation to adjourn trial in part to investigate a battered spouse syndrome defense. He obtained the packet of materials from Grayson regarding the defense, talked to defendant, and reviewed the police reports. He asserted that he originally intended to hire an expert witness regarding the defense, but ultimately determined after reviewing the case materials that the defense was not worth pursuing. One of Denton's biggest concerns was the fact that defendant reloaded her gun and continued shooting. Also, there was not much evidentiary support to show a history of physical abuse against defendant. There was only one documented incident of domestic violence. When asked whether he thought that self-defense or a battered

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

spouse defense was a viable defense, Denton responded, "I don't think it could be sold to a jury."

Denton testified that he met with defendant while she was incarcerated at least two or three times and probably wrote letters to her during the seven months that he represented her. Denton scored defendant's sentencing guidelines before the plea hearing but he did not tell defendant the sentence that she was likely to receive. Denton admitted that he told Grayson in a letter dated March 10, 2011, that defendant could receive "as little as 8 years, although [he] would expect 10 to 11 years" based on his calculation of the sentencing guidelines. Denton told defendant that her sentence would be controlled by the sentencing guidelines. Denton testified that one of his concerns was defendant's desire to be with her children. Defendant had told Denton that she wanted an opportunity to get out of prison and be with her children someday. Denton testified that considering defendant's desire to be with her children and his belief that a battered spouse defense would not be successful, he thought the second-degree murder plea was a good option because it would give defendant a chance to be released from prison one day.

Dr. Karla Fischer testified as an expert witness on domestic violence and battered spouse syndrome. She maintained that battered spouse syndrome is "not a defense per se, but the expert testimony helps to support a theory of self-defense." She opined that a battered spouse defense presented to a jury typically

results in a reduction of charges, most commonly a reduction from first-degree murder to second-degree murder.

Fischer conducted a domestic violence evaluation of defendant in prison in October 2011 after defendant moved to withdraw her plea. Defendant told Fischer that Shimel had abused her physically and emotionally throughout their 30-year marriage and had threatened to kill her. Defendant claimed that Shimel had punched her, strangled her, kicked her, restrained her, and committed acts of sexual violence against her. Defendant admitting stabbing Shimel with a knife while he was choking her early in their relationship. Fischer opined that, based solely on the information that defendant provided, defendant had acted in self-defense. Fischer admitted that she did not have a "full grasp" of the forensic evidence and that a battered spouse assessment is based on a defendant's perception of events, which might not match up with other facts. Defendant told Fischer that she was having financial difficulties at the time of the shooting, but Fischer did not believe that that information was important. When asked whether it would have had any significance if defendant had a gambling problem and defendant and Shimel had conflict about it, Fischer responded:

> *A.* Well, my job in understanding the history of domestic violence doesn't necessarily in – that wouldn't necessarily be psychologically significant in the evaluation of domestic violence and its effects. So, I guess the answer

> would be no, it wouldn't necessarily be important.
>
> *Q.* So you wouldn't consider other motivation for the shooting?
>
> *A.* I'm not really sure how to answer that question. I mean, my job is not to understand the motivation underlying the shooting. My job is to understand the history of . . . domestic violence, how it affected her and whether or not it led her to act in self-defense.

Defendant testified that she never received any phone calls or correspondence from Denton while she was in jail. She claimed that Denton visited her twice, the first time for "under an hour and the second time lasted for about 10, 15 minutes." According to defendant, Denton told her at the second meeting that he was going to speak to Brooks and try to negotiate a plea deal with a sentence of 7 to 15 years or less. Defendant maintained that Denton did not explain the sentencing guidelines to her, nor did he ask if she had any prior convictions. Defendant testified that the next time that she saw Denton was when she walked into the courtroom for the plea hearing. After defendant pleaded guilty, she wrote a letter to Denton that stated:

> I'm writing you to – I'm writing to in regards to – to the plea hearing that occurred today at 1:30. What happened? Why was I not notified by you or your office or by Mr. Jacob Kolinski, your legal assistant who was with you today? Why didn't I get to meet or speak with you

> before the court – before court so you could explain what this plea deal you had was all about? How could you do this to me? What did I just plea to? How much time am I looking at? What is the difference of Open Murder and Second Degree Murder? I'm extremely confused, distraught, and frankly, I don't remember much about what happened today in court.

Defendant admitted that it was a priority for her to be able to be released from prison one day so that she could be with her children. Defendant also admitted that she told a different story about the shooting when she first spoke to a detective and persons at the forensic center. She initially did not tell the detective that she thought that Shimel was going to kill her that day. Later, defendant claimed that she did not tell the detective that she thought that Shimel was going to kill her because she wanted to protect her family from the media. Defendant admitted that she was an avid gambler and had financial problems. She "possibly" bounced two checks on the day of the shooting, and she "might have told" a friend that she could not support herself financially without Shimel. Defendant also admitted that she talked to her daughters on the phone from jail and tried to get them to remember the abuse that Shimel allegedly inflicted on her. Defendant testified that her daughters "probably" told her that they did not recall any abuse. Defendant also acknowledged

that her daughters testified at the preliminary examination that they did not recall any physical abuse.[3]

Grace Ombry, defendant's best friend in high school, testified that defendant began dating Shimel after she dropped out of high school in the beginning of her senior year in 1981. Defendant and Shimel moved into an apartment together in 1983 before they married. Ombry visited the apartment once, during which time defendant showed Ombry bruises on her leg and claimed that Shimel had beaten her. She also showed Ombry a gun that Shimel owned and said that Shimel had threatened her with it. Later in 1983, shortly after defendant and Shimel married, defendant told Ombry that she was unhappy and wanted to get a divorce because Shimel was mean to her. Ombry had not had regular contact with defendant since they were teenagers.

Brooks testified that from the beginning of the case, he believed that defendant had only two possible defenses – insanity and self-defense under a battered spouse theory. Brooks viewed defendant's videotaped statements to the police in which she admitted that she shot Shimel several times during an argument in their bedroom while three of their children were home. No other weapons were involved to suggest that defendant was in any danger. Brooks testified that in his early conversations with Denton, Denton mentioned

[3] It is unclear how old defendant's daughters were at that time, but they were younger than defendant's oldest son, who was 24, and older than her youngest son, who was 12.

that he was considering a self-defense defense under a battered spouse theory, but Brooks did not believe that the evidence supported such a defense. Brooks maintained that the police had spoken to "dozens and dozens" of people, and Brooks did not believe that there was any substantiating proof of any serious prior violent acts between defendant and Shimel. In fact, Brooks testified that all four of defendant's children "denied that they had ever seen any physical violence or threats of physical violence" between their parents. Brooks told Denton that, in his view, the shooting was precipitated by the couple's financial problems, and specifically defendant's gambling problem. Shimel was working extra jobs on the side to earn money for the family during the holidays, and funds were missing, including a recent payment for a job in the form of a check. Brooks learned from family members and a friend that Shimel was considering leaving the home and either divorcing or separating from defendant. According to Brooks, the physical evidence was also inconsistent with self-defense. Shimel suffered seven gunshot wounds to his back, two of which were fatal and would have disabled Shimel very quickly. Although the chamber of the gun held only seven bullets, Shimel suffered nine gunshot wounds. The theory that defendant reloaded the gun and then continued to shoot was consistent with the children's description of what they had heard from downstairs. Brooks reviewed Fischer's report and testified "with absolute certainty" that it would not have convinced him to change the plea offer or his assessment of the

strengths and weaknesses of his case. Brooks viewed Fischer's report as contradictory and self serving.

The trial court granted defendant's motion to withdraw her plea. With respect to counsel's performance and the first prong of the *Strickland*[4] test, the court stated:

> [C]ertain things, listening to the testimony, strike me. One is that Mr. Denton spent, from the record, probably no more than 1.5 hours maximum time speaking to his client on a capital felony life offense without parole should she be convicted as charged. Presumably it was an open murder, but let's assume it was a murder one that she was convicted of. As no doubt the prosecution would argue.
>
> Mr. Denton spent approximately maximum of 1.5 hours time with the defendant before negotiating a plea that ultimately was taken.
>
> In my opinion, and I also find, that Mr. Denton did not meet with the defendant in – in jail or even in lockup prior to coming into the courtroom and having his client accept the plea after it was negotiated with Mr. Brooks.
>
> I believe the defendant when she indicates that the first time she saw Mr. Denton the day of the plea was when she walked into the courtroom here.

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[4] *Strickland v Washington*, 466 U.S. 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

I find it somewhat incredible that the lawyer would not go over the plea even the day of the plea one last time and say, do you really want to do this? Do you understand what's going on? Not sitting at counsel table as does counsel right now for [defendant.]

I find that he didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.

He failed to inform her of what she was even in court for on the day she took the plea, to talk to her one last time as I already said. I find that that's the case. I believe her.

And that he failed to discuss, also, the likely sentence or disclose the likely sentence based upon an adequate analysis of the guidelines. And that's reflected by that – the – the – some of the exhibits that are here, and frankly, by the testimony.

There was no independent investigation of the self-defense aspect of the case. . . . In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.

> So, in my opinion, the first test of *Strickland* is met. I'm sorry. The test of *Strickland* is met. It's the test of *Strickland-Hill* then comes into play.

The trial court then addressed the second prong of the test, regarding prejudice resulting from counsel's deficient performance. In its ruling, the court declined to address the issue of prejudice under *Strickland* and *Hill v Lockhart*, 474 U.S. 52; 106 S Ct 366; 88 L Ed 2d 203 (1985). The court stated:

> *THE COURT*: The second prong, the *Hill* part of it requires that the defendant allege that but for his attorney's deficient performance, "she" in this case, would've gone to trial rather than pled guilty.
>
> Well, of course, by the very nature of these motions that's what she's asserting here. That remains to be seen, her prerogative later on whether or not to make – do that or not.
>
> Very difficult for me in light of some of the standards, as [the prosecutor] indicates here on the record, that I'm supposed to make some sort of educated guess rather was [sic] to likelihood of success, and I don't think – I think I can decline to do that.
>
> One can certainly strongly argue that maybe a – a defense lawyer can convince a jury that it was either justifiable or perhaps voluntary manslaughter which would greatly reduce her sentence from what it presently is.

On the other hand, a jury could easily convict of first degree and/or second degree.

I want – on a personal note and I alluded to this with [the prosecutor], the transcript doesn't reflect the atmosphere that existed in this courtroom that I personally observed. A transcript is a black and white summary of what was said, basically and – not summary, but verbatim, what was said by me and what was said by her.

And I will indicate this. I – I know I thoroughly covered the aspects of the plea in this case. And there's a reason I did it. And the reason is, is I wasn't sure if she knew what was going on. I wasn't positive of it. And at the time, I assumed that she was fully aware of what the likely sentence would be. At least the sentencing guideline range.

Of course, I would have the prerogative to sentence her simply to life without a guidelines range as well. But I recall without even reading the transcript one of the things she said to me was that "I just wanted him to stop" or words to that effect. That's my recollection, and again, I didn't review – actually I didn't review the plea taking transcript for today. And prior to the *Ginther* hearing, I – I don't recall reviewing the transcript either then. But I remember her saying, vividly, "I just wanted him to stop." And that's when I went into, I think, and again, I didn't review it for today's purposes, but the self-defense and waiving defenses and the like.

> And I did that because I was very cautious in that I really wanted to make sure she knew what she was doing by pleading guilty in light of a potential defense that she had.
>
> And perhaps that will come back to haunt her, as [the prosecutor] suggests it should. But from a personal standpoint, I think she was confused.
>
> And I did not know until the – after the fact, that Mr. Denton had not spoken to her that morning or afternoon prior to the plea taking process other than on the record here, that she met him for the first time in the courtroom. She testified to that, as I recall. And I believe her on that.
>
> I tried my best to determine that she understood what was going on, the gravity of her plea and the likely course of action that I would take. I did find her plea was voluntarily (sic). But again, that plea – voluntariness was not found, ah, because I was aware [sic] that counsel hadn't informed her of these various and sundry things. And having heard that now on this post-sentence proceeding, I have to also find that in my opinion that based upon her ineffective assistance of counsel, that her plea was not knowingly and voluntarily made.

Accordingly, the trial court granted defendant's motion to withdraw her guilty plea.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's decision granting a defendant's motion to withdraw a guilty plea. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *Id.* at 132. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings on questions of fact for clear error, and review questions of constitutional law de novo. *Id.*

III. LEGAL ANALYSIS

"A defendant pleading guilty must enter an understanding, voluntary, and accurate plea." *Brown*, 492 Mich at 688-689. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 U.S. at 56 (quotation marks and citation omitted). "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.* (quotation marks and citation omitted).

In *Strickland v Washington*, 466 U.S. 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court articulated a two-part standard for determining whether a defendant was denied the effective assistance of counsel: (1) "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. In *Hill*, 474 U.S. at 57, the Court held that the same two-part test "applies to challenges to guilty pleas based on ineffective assistance of counsel." The Court stated:

> In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence. . . . The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.
>
> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover

> potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. [*Id.* at 58-59.]

A. BATTERED SPOUSE SYNDROME DEFENSE

The prosecution argues that the trial court erred by finding that Denton failed to adequately investigate a battered spouse syndrome defense. The trial court stated:

> I find that he [i.e., Denton] didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.
>
> * * *

> There was no independent investigation of the self-defense aspect of the case. . . . In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.

As discussed below, the trial court clearly erred by determining that Denton failed to conduct an investigation regarding a battered spouse self-defense theory and improperly substituted its judgment for that of trial counsel on a matter of trial strategy.

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). A substantial defense is a defense that might have made a difference in the outcome of the case. *Id.* The failure to reasonably investigate a possible defense can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

In this case, the trial court found that Denton failed to fully and independently investigate a self-defense defense based on a battered spouse theory, thus satisfying the first prong of the *Strickland* test. The trial court's finding was clearly erroneous. The *Ginther* hearing testimony established that Denton is an experienced attorney, he was the elected county prosecutor for Saginaw County for four years beginning in 1972, and he had handled approximately two hundred homicide cases. Denton testified that he had spoken on several occasions with Dale Grayson at the

National Clearinghouse for the Defense of Battered Women regarding the battered spouse syndrome defense and had obtained materials from Grayson regarding the defense. Denton was concerned about the fact that defendant fired several shots into Shimel's back, reloaded the gun, and continued to fire. He was also concerned that none of her four children had witnessed any physical abuse or threat of physical abuse to defendant, and there was very little evidentiary support to substantiate a history of physical abuse. Denton explained that he decided not to pursue the defense because he did not believe that "it could be sold to a jury." In fact, he testified that he believed that defendant would have been convicted of first-degree murder had she proceeded to trial. Because defendant's primary goal was to one day be released from prison in order to be with her children, Denton believed that a plea to second-degree murder was her best option. Thus, the record shows that the trial court clearly erred by determining that Denton failed to conduct an investigation into a battered spouse theory of self-defense. Moreover, the trial court's findings indicate that it impermissibly substituted its judgment for that of Denton regarding matters of strategy. *See People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008) ("We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.")

Further, the trial court erred by failing to apply the prejudice prong of the *Strickland-Hill* test. The

parties dispute the nature and extent of the prejudice requirement. Defendant argues that all that the prejudice prong of the *Strickland-Hill* test requires "is that the defendant allege that but for her attorney's deficient performance, she would have gone to trial rather than plead guilty." On the other hand, the prosecution argues that a defendant must also show, and the court must find, that the defense that defense counsel failed to investigate "would have changed the outcome at trial." As previously discussed, the United States Supreme Court held in *Hill*, 474 U.S. at 59, that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." The Court explained that the "prejudice" inquiry in guilty plea cases

> where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. *See, e.g.*, *Evans v. Meyer*, 742 F.2d 371, 375 (CA7 1984) ("It is inconceivable to us . . .

> that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, 466 U.S., at 695. [*Hill*, 474 U.S. at 59-60 (brackets in original).]

Thus, contrary to defendant's argument, she had to do more than merely allege that she would have gone to trial instead of pleading guilty but for her attorney's alleged deficient performance. Rather, she was required to show that the defense would have been successful if she had gone to trial in that she would have received a better outcome than she received after pleading guilty.

The record shows that the trial court declined to apply the second prong of the *Strickland-Hill* test and refused to speculate about the success of a self-defense defense if defendant had proceeded to trial. The trial court stated:

> Very difficult for me in light of some of the standards, as [the prosecutor] indicates here on the record, that I'm supposed to make some sort of educated guess rather was [sic] to likelihood of success, and I don't think – I think I can decline to do that.

The trial court's comments were consistent with its previously-expressed views regarding the second prong of the *Strickland-Hill* test. During a discussion with the prosecutor, the trial court stated:

> [*THE PROSECUTOR*]: In terms of applying the second prong in cases where there's a plea, this requires a showing that but for the attorney's errors, defendant would not have pled guilty and instead would have insisted on going to trial.
>
> However, this requirement is not satisfied simply by defendant's claim that she would have insisted on going to trial. Rather, this requirement requires an evaluation of whether the evidence would have caused counsel to change his recommendation regarding the plea and whether the evidence would have changed the outcome at trial.
>
> *THE COURT*: Well, that would cause me to – I have some difficulty with that kind of standard 'cause I then have to make a best guess whether the person is guilty or not based upon what I have – what little I have in front of me.
>
> I – I have some real trouble with that. I understand it's there and you're quoting it correctly, but – so I have to guess whether a jury might convict this person of whatever they might convict this person of or any other person matter (sic) – that this kind of issue would come before me.

> I – I do have some difficulty with that portion of this. I know it's there and you're quoting it. So, I just want to put that on the record though.

Accordingly, the record shows that the trial court was aware of the correct standard to apply and acknowledged that the prosecutor was quoting the test correctly, but nevertheless declined to apply it. Thus, the trial court legally erred by failing to apply the prejudice prong of the *Strickland-Hill* test. "A trial court necessarily abuses its discretion when it makes an error of law." *Waterstone*, 296 Mich App at 132.

Moreover, the record establishes that defendant would not have received a better outcome if she had gone to trial and argued that she acted in self-defense based on a battered spouse theory. Other than defendant's claims of abuse, the only testimony showing that Shimel was physically abusive toward defendant was Ombry's testimony that in 1983 defendant showed Ombry bruises on her leg and told Ombry that Shimel had threatened her with a gun. None of defendant's friends or family members corroborated defendant's claims of physical abuse, even after defendant tried to get her daughters to recall the alleged abuse when defendant talked to them on the telephone from jail. Defendant's children told the police that what they heard while downstairs in the home was consistent with defendant shooting, stopping to reload the gun, and continuing to fire. In addition, seven of the bullets entered Shimel's body through his back. Thus, the evidence simply did not support a self-defense theory.

Moreover, Fischer testified that in cases involving a battered spouse defense, charges are typically reduced from first-degree murder to second-degree murder, which is exactly what occurred in this case as a result of defendant's plea. Accordingly, the record does not show that defendant would have received a better outcome had she gone to trial instead of pleading guilty. As such, defendant has failed to establish the prejudice prong of the *Strickland-Hill* test.

B. VOLUNTARINESS OF DEFENDANT'S PLEA

The trial court also determined that Denton's performance fell below an objective standard of reasonableness because he spent only 1-½ hours speaking to defendant during his representation of her, Denton did not discuss the sentencing guidelines or defendant's likely sentence with her, and he failed to speak with her on the day that she entered her guilty plea in order to review the plea with her a final time. The trial court opined that, based on Denton's deficient performance, defendant's guilty plea was not knowingly and voluntarily made.

We again conclude that defendant has failed to establish prejudice. Defendant did not testify, and was not asked, whether she would have rejected the prosecution's plea offer and proceeded to trial but for Denton's lack of communication with her. It appears unlikely that she would have done so given that she chose to accept the same plea offer before her preliminary examination, but the offer was withdrawn

because defendant's attorney at that time did not timely communicate defendant's acceptance of the offer to the prosecution. In addition, the plea hearing transcript establishes that defendant understood the consequences of her plea, including that she was not promised any particular sentence. At the plea hearing, the trial court questioned defendant as follows:

> *THE COURT*: Gi – Your [sic] full name for the record, please, ma'am?
>
> *THE DEFENDANT*: Rebecca Jean Shimel.
>
> *THE COURT*: And do you understand the charges that are levied against you in the Information as amended?
>
> *THE DEFENDANT*: Yes.
>
> *THE COURT*: Okay. And do you understand the plea agreement?
>
> *THE DEFENDANT*: Sorta.
>
> *THE COURT*: What don't you understand about the plea agreement?
>
> *MR. DENTON:* You know that Counts 1 and Counts 2 are going to be dismissed in – in exchange for a plea to Count 3 and Count 4.
>
> *THE DEFENDANT*: Right. I – I'm just not aware of what the plea agreement – how many years it consists of.
>
> *THE COURT*: You mean the sentence?
>
> *THE DEFENDANT*: Correct.

THE COURT: Well, I – I would determine that at the time of sentencing. I don't know what it's going to be either, ma'am.

MR. DENTON: I've explained to her that there are such things as guidelines and that your Honor is virtually bound to stay within the guidelines.

THE COURT: Yeah. There are such things as guidelines. Mr. Denton is correct. And I don't have an idea of what those guidelines are at this time.

Those are not prepared until approximately the time of sentencing – before sentencing. But I don't know what they are right now. Maybe – Maybe Mr. Brooks and maybe Mr. Denton have an idea, but as far as I'm – as far as I know, I don't know what they are right now, ma'am. Okay?

THE DEFENDANT: (No response)

THE COURT: Understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: And I can't predict what my sentence will be in this case. I – I don't – I simply don't know. Understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you want to proceed?

THE DEFENDANT: Yes.

THE COURT: All right. So, you understand the plea agreement then? You're pleading guilty to – the essence of it is you're pleading guilty to Counts 3 and 4 which are, respectively, Second Degree Murder and Felony Firearm, in exchange for dismissal of Count 1, Open Murder, and Count 2, Felony Firearm.

Do you understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: All right. Any other questions about just the plea agreement?

THE DEFENDANT: May I take it back if I choose to?

THE COURT: I'm sorry?

THE DEFENDANT: May I take it back if I choose to?

THE COURT: Generally – I will indicate to you, the – the law gives me the authority to allow you to withdraw your plea. But as a general proposition, un – if you're making your pre – plea freely and willingly today and with full knowledge of what's going on, I generally wouldn't allow a person to withdraw their plea.

You have a right to go to a trial, ma'am. I'm gonna tell you that in a couple of minutes anyway, so if you'd rather go to trial, that's up to you.

> But I can't tell you on this record today that if you decided to change your mind that I would allow you to withdraw your plea.
>
> *THE DEFENDANT*: Okay.
>
> *THE COURT*: Okay what? You want to go to trial?
>
> *THE DEFENDANT*: No. I understand.
>
> *THE COURT*: Okay. You want to go – You want to go ahead with the plea, is that right?
>
> *THE DEFENDANT*: Correct.
>
> *THE COURT*: I'm sorry?
>
> *THE DEFENDANT*: Correct.

Thereafter, defendant indicated that she was pleading guilty voluntarily and of her own free will and that she understood that nobody was recommending a particular sentence and that the court was not aware of what defendant's sentencing guidelines might be. Defendant also indicated that she understood that she could be sentenced to life or any term of years on the murder count. With respect to the defense of self-defense, the trial court inquired as follows:

> *THE COURT*: All right. Now, as – Mr. Denton, I'm sure, has indicated to you that there is a possibility of a defense of self-defense or justifiable homicide, perhaps is another way of saying it, I don't know. But self-defense would be one way of saying it. There may be other ways of saying the same thing, that you had some sort of justification for doing this.

> But by pleading guilty here, you're waiving any such defense, if indeed it would be a valid defense. I can't say whether it would be or not, of course. A jury would make that decision. Not me – Well, it's a jury trial, so I wouldn't make the decision, but a jury would make that decision whether or not it's justifiable.
>
> By pleading guilty, ma'am, you would be waiving that defense, if it indeed exists. In other words, if it's a valid defense. I can't say, of course, one way or the other without knowing lots more, if – if indeed I could say at all because that's up to the jury.
>
> So, are you willing to waive that defense, if indeed it is a defense for you?
>
> *THE DEFENDANT*: Yes.
>
> *THE COURT*: I'm sorry?
>
> *THE DEFENDANT*: Yes.

Thus, defendant agreed to forego any claim of self-defense and plead guilty.

The record shows that the trial court complied with the procedures set forth in MCR 6.302[5] and

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[5] MCR 6.302(B) and (C) are designed to allow a court to determine whether the plea is understanding and voluntary:

> Under MCR 6.302(B), which relates to an understanding plea, the court must speak directly to the defendant and determine that he or she understands the name of the offense and the maximum possible prison sentence, the trial rights being waived, and loss of the right to appeal. Pursuant to MCR 6.302(C), which relates to a

determined that defendant's plea was knowingly and voluntarily made. In fact, in accepting the plea, the court stated:

> I do find the defendant understands the nature of the charge, is acting voluntarily with understanding here this afternoon and that no one has forced her or coerced her to do this, that she understands the things I have explained here on the record which would include her trial rights, the consequences of her plea, the maximum sentence available to the Court under the law, the – if I haven't said it, the trial rights, and frankly, all the consequences of her plea and the things that have gone on here this afternoon, I think she understands.

Therefore, the trial court determined that defendant's plea was knowingly and voluntarily made at the time that defendant rendered the plea. Because the trial court's decision to allow defendant to withdraw her plea was based on its erroneous determination that defendant was denied the effective assistance of counsel, the trial court abused its discretion by allowing defendant to withdraw her plea. We thus reverse the trial court's order granting defendant's motion to withdraw

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voluntary plea, the court must make inquiries regarding the existence and details of any plea agreements and whether the defendant was promised anything beyond what was in the agreement, if any, or otherwise. The court must also ask the defendant whether he or she had been threatened and if the plea was his or her choice. [*People v Plumaj*, 284 Mich App 645, 648 n 2; 773 NW2d 763 (2009).]

the plea and remand this case for the court to address defendant's motions to correct her sentence and to amend the presentence investigation report, which were rendered moot when the court allowed defendant to withdraw her plea.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

STATE OF MICHIGAN

IN THE EIGHTEENTH CIRCUIT COURT
FOR THE COUNTY OF BAY

PEOPLE OF THE
STATE OF MICHIGAN

v

FILE: 09-11150 FC

REBECCA JEAN SHIMEL,

Defendant. /

ORAL ARGUMENTS ON MOTION TO
WITHDRAW PLEA MOTION TO CORRECT
INVALID SENTENCE MOTION TO AMEND
PRESENTENCE INVESTIGATION REPORT

BEFORE THE
HONORABLE KENNETH W. SCHMIDT, JUDGE

Bay City, Michigan – Wednesday, August 22, 2012

APPEARANCES:

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* * *

[31] THE COURT: All right. I – I'm – I'm gonna just rule.

First of all, let me acknowledge that there – there are several motions before the Court today, first and foremost and the one that is argued is the Motion to Withdraw Plea.

There is the Motion to Correct an Invalid Sentence, a Motion to Amend Presentence Report and a Motion for Appointment of an Expert Witness on Battered Spouse Syndrome to Assist in the Appeals Process that wasn't mentioned today either.

But a *Ginther* hearing, of course, was set by the Court and I had ordered that a expert report should be [32] provided to the Court and counsel and we – that was – that was initially submitted under seal and then we scheduled our first *Ginther* hearing – first portion of the *Ginther* hearing back in March of 2012 and then we continued it to a conveniently scheduled date for counsel and the like. We concluded the hearing and then after some machinations over scheduling and the like, we're here today to orally argue it.

There is – I would compliment both counsel on the – the filings that have been prepared and submitted to the Court in support of their respective positions with regard to this case. They're well written papers that have been filed with the court.

I want to say that because I'm going to refer to something that neither counsel also referred to as what I believe is an excellent summary of – of what the law is here.

And that – if you want to get your pens out, fine; if not, fine, also; it'll be on the record. It's a *Northwestern University Law Review* article, Fall of 2011, 105 NW, U.L., ah – Review, 1707 is the – probably the official cite. 105 Nw., and frankly, we can give that to counsel after the fact.

But I'm just gonna quote ad hoc parts of the – of the opinion and perhaps paraphrase a word or two.

First, the article – and I – I find it to be the law [33] that really applies, and rather than re – me reinvent the wheel, I'll just quote from that article at times. And again, it's primarily what counsel have said in their – in their papers here.

> "In *Strickland*, the Supreme Court held that a defendant's right to effective" assistance of "counsel is not violated as long as counsel's performance does not fall 'below an objective standard of reasonableness' and prejudice the defendant by affecting the outcome of the proceeding."

Then the scrivener of the article indicates that:

> "Surprisingly, in *Hill* versus *Lockhart*, the Court decided that the *Strickland* test was likely to function properly in the guilty plea context."

And the first prong of *Strickland* remains the same. The second prong requires that the defendant allege – not prove, but allege that for – "but for his attorney's deficiency" – in this case, it's her attorney's deficiency – deficient performance, she "would have gone to trial rather than plead guilty."

It goes on:

> "Determining the effect of counsel's performance based on the outcome of a trial is difficult and subjective."

[34] And I clearly agree with that.

"The challenge is amplified in a plea setting. Guilty pleas produce thin records and leave little support for a defendant's claim of prejudice. Additionally, courts tend to rely heavily on rote assurances" – and I'm underlying, the article doesn't – "rote assurances from the defendant at the time a plea is entered, stating that the plea is voluntary, and stating that she was not promised anything that was not disclosed to the court in exchange for her plea. These assurances provide a method of" – and this is a quote, an internal quote from the article, "'reversal proofing' guilty pleas; the underlying purpose of establish" (sic) "this record is to insure the defendant's plea is voluntarily" (sic) "and entered with knowledge of its consequences."

And then it goes on to note a bunch of other things, of course, ov – noting in addition that an overwhelming number of defendants resolve their cases through guilty pleas. I think earlier in the article, it talked

about 95 percent or so nationwide. Which is certainly probably true in this circuit as well.

And I'm gonna quote at length from this particular article here:

[35] "When entering a guilty plea, a defendant must stand in open court and enter an admission that she committed the charged acts for which she is pleading guilty. Because these actions require the defendant to waive her trial-related constitutional rights including the right to be tried by a jury of her peers and the right to be confronted by the witnesses against her," and by the way, I'm changing the gender in this article to reflect this is a female defendant – "the plea is not valid unless the defendant waives these protections knowingly. Additionally, because the defendant has a Fifth Amendment right not to 'be compelled in any criminal case to be a witness against herself,' the plea must be entered into voluntarily without threat of 'physical harm,' or 'mental coercion' in order to be vali – valid. Although the requirement that a plea be both" voluntarily (sic) "and intelligent was readily established," citing *Boykin v Alabama*, "added the requirement that the record of the proceeding affirmatively disclose both items when the plea is entered. Reversal-proofing pleas contributed to this Court's interest in developing this record.

[36] "When the defendant challenges the voluntariness of a plea, a mu – a court must consider 'all of

the relevant circumstances surrounding a plea,' including counsel's representation. After pleading guilty based upon the advice from counsel, a defendant may only attack the voluntary and intelligent nature of the plea by showing that the advice she received from counsel violated the standard set forth in *Strickland-Hill*. A guilty plea entered by a well-informed and an appropriately counseled defendant is not subject to postconviction attack because the applicable law changed or because hindsight indicated that the plea entered was not as 'sensible' as it appeared to be at the time."

Then it goes on to say:

"Courts rely heavily on the defendant's affirmative statements to indicate that the plea was, in fact, voluntarily – voluntary. However, these statements should not be viewed as conclusive, judgment-proof statements of defendant's understanding of what she is giving up by pleading guilty. 'The plea bargain is the typical last act of the courthouse drama.' Courts "engage defendants in monotone" – I hope [37] not – "and sometimes mumbled pe – plea colloquies" – I hope not. "Defendants bark 'yes' and 'no' – and I'll put a little sidebar here.

I see defendants all the time lean over to their lawyer and say, What do I say? Yes or no? Sometimes is – it is, Are you John Doe? I've seen them lean over to their lawyer and say, What do I say? Yes, I am John Doe. That's how counsel is relied upon at times during the plea taking process.

And there are oftentimes, and it's not unusual for me to say to counsel, Mr. X or Miss Y, Counsel, please, let the defendant answer these questions 'cause I'm trying to figure out whether the plea is voluntarily and under – knowingly and understandingly made. You can't give an answer to the question: Do you understand the maximum penalty provided by law that I just told you about? It's not – It's not the counsel's job to answer that question. It's the individual's job, the defendant's job.

So, "Defendants bark 'yes' or 'no,' as required . . . " They are "instructed to consult with their lawyer should they forget what the line goes – what line goes where." And I see that. "Defendants may fear the consequences of not playing their role will negatively impact the sentence that is ultimately assigned by the judge."

[38] " . . . the applicable remedy depends on wha – when counsel's errors occurred and when the defendant raised his ineffective assistance claim. If performance was ineffective only during the sentencing phase, the court may require a new penalty phase without vacating the conviction or entiter – or – or enti – ordering an entirely new trial."

And it goes on. I mean, it's a – it's a long article. I just wanted to cite the particular portions as a good summary of the law.

Now, I – I know this is a – an important case for me to make here because the standard of review, as I understand it, is an abuse of discretion. And I must

necessarily exercise my discretion at this level and it's – the Court of Appeals then, according to the standard – at least in one case that I read – is that the Court of Appeals can only reverse me if an unprejudin – prejudiced person consisting – considering the facts upon which the trial court acted would say there's no justification or excuse for the ruling, or if the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. That's the only way, according to one case, at the Court of Appeals level, that I can be reversed on an abuse of discretion.

[39] So, the – the Court of Appeals cannot substitute their discretion for mine. So it becomes a very important decision for both the prosecution and the defense at this level. I take it seriously, obviously, as I do all my decisions.

In saying that, I've considered this record. And some things I do want to state on the record.

Both counsel have pointed out and advocated very well in their filings here, summarized their – the points in their favor in – in their – in their papers post hearing that they've emphasized.

But certain things, listening to the testimony, strike me. One is that Mr. Denton spent, from the record, probably no more than 1.5 hours maximum time speaking to his client on a capital felony life offense without parole should she be convicted as charged. Presumably it was an open murder, but let's assume it

was a murder one that she was convicted of. As no doubt the prosecution would argue.

Mr. Denton spent approximately maximum of 1.5 hours time with the defendant before negotiating a plea that ultimately was taken.

In my opinion, and I so find, that Mr. Denton did not meet with the defendant in – in jail or even in lockup prior to coming into the courtroom and having his client accept the plea after it was negotiated with Mr. Brooks. I [40] believe the defendant when she indicates that the first time she saw Mr. Denton the day of the plea was when she walked into the courtroom here.

I find it somewhat incredible that the lawyer would not go over the plea even the day of the plea one last time and say, Do you really want to do this? Do you understand what's going on? Not sitting at counsel table as does counsel right now for Miss Shimel.

I find that he didn't do an investigation into what he could characterize as a duress defense, but probably more of a self-defense aspect of the case. Even asking for an adjournment and an opportunity to do so, representing to the Court that he wanted to look into that defense. And when he – I think he failed to thoroughly investigate the self-defense aspect of the case.

He failed to inform her of what she was even in court for on the day she took the plea, to talk to her one last time as I already said. I find that that's the case. I believe her.

And that he failed to discuss, also, the likely sentence or disclose the likely sentence based upon an adequate analysis of the guidelines. And that's reflected by that – the – the – some of the exhibits that are here, and frankly, by the testimony.

There was no independent investigation of the [41] self-defense aspect of the case. He re – In my opinion, he's testified that he primarily relied upon the prosecutorial representations as to the strength of their case without doing any independent investigation that I've heard of.

So, in my opinion, the first test of *Strickland* is met. I'm sorry. The test of *Strickland* is met. It's the test of *Strickland-Hill* then comes into play.

The second prong, the *Hill* part of it requires that the defendant allege that but for his attorney's deficient performance, "she" in this case, would've gone to trial rather than pled guilty.

Well, of course, by the very nature of these motions that's what she's asserting here. That remains to be seen, her prerogative later on whether or not to make – do that or not.

Very difficult for me in light of some of the standards, as Miss Linton indicates here on the record, that I'm supposed to make some sort of educated guess rather was to her likelihood of success, and I don't think I – I think I can decline to do that.

One can certainly strongly argue that maybe a – a defense lawyer can convince a jury that it was either

justifiable or perhaps voluntary manslaughter which would greatly reduce her sentence from what it presently is.

On the other hand, a jury could easily convict of [42] first degree and/or second degree.

I want – on a personal note and I alluded to this with Miss Linton, the transcript does not reflect the atmosphere that existed in this courtroom that I personally observed. A transcript is a black and white summary of what was said, basically and – not summary, but verbatim, what was said by me and what was said by her.

And I will indicate this. I – I know I thoroughly covered the aspects of the plea in this case. And there's a reason I did it. And the reason is, is I wasn't sure if she knew what was going on. I wasn't positive of it. And at the time, I assumed that she was fully aware of what the likely sentence would be. At least the sentencing guideline range.

Of course, I would have the prerogative to sentence her simply to life without a guideline range as well. But I recall without even reading the transcript one of the things she said to me was that "I just wanted him to stop" or words to that effect. That's my recollection, and again, I didn't review – actually I didn't review the plea taking transcript for today. And prior to the *Ginther* hearing, I – I don't recall reviewing the transcript either then. But I remember her saying, vividly, "I just wanted him to stop." And that's when I

went into, I think, and again, I didn't review it for today's purposes, but the [43] self-defense and waiving defenses and the like.

And I did that because I was very cautious in that I really wanted to make sure she knew what she was doing by pleading guilty in light of a potential defense that she had.

And perhaps that will come back to haunt her, as Miss Linton suggests it should. But from a personal standpoint, I think she was confused.

And I did not know until the – after the fact, that Mr. Denton had not spoken to her that morning or afternoon prior to the plea taking process other than on the record here, that she met him for the first time in the courtroom. She testified to that, as I recall. And I believe her on that.

I tried my best to determine that she understood what was going on, the gravity of her plea and the likely course of action that I would take. I did find her plea was voluntarily (sic). But again, that plea – voluntariness was not found, ah, because I was aware that counsel hadn't informed her of these various and sundry things. And having heard that now on this post-sentence proceeding, I have to also find that in my opinion that based upon her ineffective assistance of counsel, that her plea was not knowingly and voluntarily made.

Therefore, I will grant the motion to set aside [44] her plea. I'll sign an order that [sic] effect.

One assumes that this case will be appealed so I would otherwise set a scheduling order, but I know it's – it's at the appellate level – well, no, it's just an application's been filed so far, right? Or no?

MR. FLANAGAN: Your Honor, no pleadings have been filed. I filed the motion within the six months required, so . . .

THE COURT: Okay. So, I –

MR. FLANAGAN: There's no pleadings in the Court of Appeals pending.

THE COURT: Counsel, I'm going to ask you to prepare the motion – or the order then setting aside the plea and submit it to the Court.

And I will issue a scheduling order shortly thereafter, but I'm going to have to assume that the prosecution will intend to appeal the – my decision. Is that a fair statement right now?

MS. LINTON: Yes, that would be a fair statement.

THE COURT: Okay. But I nonetheless feel obligated to issue a scheduling order.

So, having said that, with regard to the other motions then, the Motion to Correct an Invalid Sentence is now moot.

The Motion to Amend the Presentence Report is moot [45] in the sense that unless and until there's a – a sentencing in this case, I can deal with it at that point

in time. It's not moot per se, but it has – it can be dealt with in the future.

The Motion for Appointment of Expert Witness on Battered Spouse Syndrome to Assist in the Appeal Process is denied.

The – The Court of Appeals is not gonna consider any such evidence. In my opinion. They'll rely on the record that's made here.

MS. LINTON: Thank you, your Honor.

THE COURT: Thank you.

MR. FLANAGAN: May I have one moment to clarify?

Would you like me to include the moot-ness of those two other motions in the order granting the motion to withdraw?

THE COURT: I – I think that's appropriate.

We'll be in recess.

MR. FLANAGAN: Thank you, your Honor.

(At 2:32 p.m., proceedings concluded)

* * *

[46] STATE OF MICHIGAN)
) SS.
COUNTY OF BAY)

I certify that this transcript, consisting of 46 pages is a complete, true and correct transcript of the proceedings held in this case on Wednesday, August 22, 2012.

Sharon M. Lindke, CER-2978
1230 Washington Avenue, Ste. 219
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September 5, 2012