IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

ARTHUR RONALD HAILEY, III

Petitioner,

Civil Action No.

Hon.

-vs-

KEN ROMANOWSKI, Warden,
Macomb Correctional Facility

Respondent.
_____/

MICHIGAN ATTORNEY GENERAL
Attorney for Respondent
_____

DOUGLAS W. BAKER (P49453)
Attorney for Petitioner
_____

PETITION FOR WRIT OF HABEAS CORPUS

MEMORANDUM IN SUPPORT OF PETITION

STATE APPELLATE DEFENDER OFFICE

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Petitioner **ARTHUR RONALD HAILEY III,** through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **DOUGLAS W. BAKER**, respectfully states:

1. Mr. Hailey is a citizen of the United States, is domiciled in the State of Michigan, and is currently incarcerated at the Macomb Correctional Facility in New Haven, Michigan.

2. Mr. Fleming is at present unconstitutionally detained and imprisoned at that facility by the Respondent, Ken Romanowski, Warden. Mr. Hailey is serving consecutive terms of ten-to-twenty-five and two years imprisonment, imposed by Judge Craig Strong S. Strong of the Wayne Circuit Court, after a jury found Mr. Hailey guilty of armed robbery (Mich. Comp. Laws § 750.529), carjacking (Mich. Comp. Laws § 750.529a), and felony-firearm (Mich. Comp. Laws § 750.227b).

3. Mr. Hailey has exhausted all state remedies available to him with regard to the Sixth and 14th Amendment ineffective-assistance-of-counsel issue raised in this petition by taking the following steps:

a. On appeal, Mr. Hailey sought and was granted remand to the trial court for a a so-called *Ginther* hearing to develop a factual basis for his ineffectiveness claim and to move for a new trial. A *Ginther* hearing is the appropriate method under Michigan law for developing an ineffectiveness claim. *People v Ginther*, 390 Mich. 436, 442-43 (1974); *see also* Mich. Court Rule § 7.211(C)(1) (motion to remand).

b. At the *Ginther* hearing, he elicited testimony from two witnesses—his brother and a family friend—who testified that they, not he, were responsible for committing the armed robbery/carjacking at issue, and that they would have so testified if called at defense witnesses at his trial. However, his trial attorney had never contacted them. His trial attorney also testified. She admitted that, though she knew from the start of Mr. Hailey's claim that the brother and friend, not he, committed the crimes in question, she never spoke to either man or considered calling either as a defense witness because she knew each had been charged with similar crimes and were represented by counsel; she assumed that counsel would advise each man not to testify.

c. Upon completion of the testimony he urged the judge to grant retrial on the ground that counsel was ineffective for failing to investigate and present the testimony of the brother and friend.

d. The trial judge denied the defense motion, ruling that counsel's failure to investigate or present the witnesses was not deficient performance because, based on her eight years of experience as a criminal defense lawyer, it was reasonable for her to conclude that the likelihood either man would testify was too remote to warrant investigation. (The trial judge's opinion and order is attached to the accompanying Memorandum of Law as Appendix A.) Mr. Hailey raised the ineffectiveness claim in his brief on appeal in the Michigan Court of Appeals. The point heading of the first issue presented in his brief on appeal was:

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE POTENTIAL WITNESSES JEROME HAILEY AND DEVAUGHN BROWN, WHO SWEAR THEY, NOT ARTHUR HAILEY, COMMITTED THE CRIMES FOR WHICH ARTHUR WAS CONVICTED IN FILE NO. 8941. ARTHUR HAILEY MUST BE RETRIED.

Moreover, Mr. Hailey specifically emphasized that his claim was brought under the federal constitution's Sixth and Fourteenth Amendments and that it was governed by the standards announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

f. On December 17, 2009, the Michigan Court of Appeals upheld the trial judge's ruling by a 2-1 vote. The majority gave two reasons: (i) that counsel's performance was not deficient because it was not unreasonable for her to forgo investigating the "highly unlikely scenario" that Mr. Hailey's brother and friend might admit that they, not he, were responsible for committing the crimes for which he stood trial, and (ii) that in any event the error was not prejudicial because Mr. Hailey was not "deprived of a substantial defense" in that he himself gave testimony that could have allowed the jury to infer that the friend and brother were guilty, and because the victim of the robbery/carjacking identified Mr. Hailey as one of the two perpetrators. The dissenting judge would have held that trial counsel's decision not even to talk to the brother or friend (or to even ask her own client about the likelihood they might testify) was unreasonable, and that there was at least a reasonable probability that had either man testified, the jury would have acquitted. *People v Hailey*, No. 27643 (Mich. Ct. App. 2009) (attached as Appendix B);

h. Mr. Hailey then filed an application for leave to appeal in the Michigan Supreme Court, in which he again raised the same Sixth and Fourteenth Amendment issue raised in this

Petition. The Michigan Supreme Court at first granted leave to appeal *People v Hailey*, 486 Mich. 963 (2010) (attached as Appendix C), but after oral argument, in an order dated January 28, 2011, vacated its previous order and denied leave to appeal, *People v Hailey*, 488 Mich. 1032 (2011) (attached as Appendix D).

5. As set forth in the accompanying Memorandum of Law, Mr. Hailey is being detained in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

6. Mr. Hailey has not filed any previous Petition for a Writ of Habeas Corpus in this or any other federal district court.

WHEREFORE, Mr. Hailey requests:

A. That Respondent be required to appear and answer the allegations of this Petition;

B. That after full consideration, this Court grant this Petition and order that Arthur Ronald Hailey III either be promptly retried or released from custody;

C. That this Court grant such other, further, and different relief as the Court may deem just and proper under the circumstances; and

D. That this Court grant oral argument in this matter.

Respectfully submitted,

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Dated: April 26, 2012.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

ARTHUR RONALD HAILEY, III

Civil Action No.

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Hon.

-vs-

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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Procedural History

Defendant-appellant Arthur Hailey III stood trial in three consolidated cases in Wayne Circuit Court, Judge Craig Strong S. Strong presiding. In both file no. 06-008940 (hereafter 8940) and file no. 06-008941 (hereafter 8941), he faced one count each of carjacking,[1] armed robbery,[2] and felony-firearm.[3] In file no. 06-008939 (hereafter 8939), he faced two counts of receiving or concealing a stolen motor vehicle (RCSV),[4] one count of receiving or concealing a stolen firearm (RCSF),[5] one count of carrying a concealed weapon (CCW),[6] and one count of felony-firearm. A jury acquitted him of all counts in file 8940, but convicted him of all counts in file 8941 and all but the felony-firearm count in file 8939. Judge Strong later sentenced Mr. Hailey to serve ten-to-twenty-five-year prison sentences for carjacking and armed robbery, a nine-months-to-ten-year sentence for RCSF, and nine-months-to-five-year sentences for RCSV and CCW. All but the felony-firearm sentence were to be served concurrently with each other; the felony-firearm sentence was to run consecutive to the armed-robbery and carjacking sentences.

[1] Mich. Comp. Laws § 750.529a.

[2] Mich. Comp. Laws § 750.529.

[3] Mich. Comp. Laws § 750.227b.

[4] Mich. Comp. Laws § 750.535(7).

[5] Mich. Comp. Laws § 750.535b.

[6] Mich. Comp. Laws § 750.227.

Mr. Hailey appealed by right to the Michigan Court of Appeals. His appeal in file 8941 was assigned the docket number 276423; his appeal in 8939, no. 276904. The files were consolidated for appeal.[7]

Mr. Hailey moved to remand[8] for an evidentiary hearing in docket 276423, asking to present evidence that his brother, Jerome Hailey, and Jerome's friend Devaughn Brown, not he, were guilty of the offenses. The Michigan Court of Appeals granted the remand motion by order dated December 20, 2007.

On remand, Arthur Hailey moved for a new trial and asked for an evidentiary hearing. On March 14, March 20, and April 9, 2008, Judge Craig Strong heard testimony and arguments. More than a year later, on April 29, 2009, Judge Strong issued an opinion and order denying relief.

Mr. Hailey thereafter filed a brief on appeal. The lead issue concerned Judge Strong's denial of his ineffective-assistance claim. In an opinion dated December 17, 2009, by a 2-1 vote, the Michigan Court of Appeals denied relief on the ineffectiveness claim and affirmed Mr. Hailey's convictions and sentences. (The opinion is attached as Appendix B.)

Mr. Hailey then sought leave to appeal in the Michigan Supreme Court. The Court at first granted leave to appeal, but following oral argument issued an order that vacated its previous order and denied leave to appeal.

Mr. Hailey has no further recourse in the Michigan courts.

[7] Order dated September 12, 2007.

[8] *See* Mich. Court Rule 7.211(C)(1).

The trial evidence

At about 11:40 p.m. on June 23, 2006, Eric McNary[9] was at a gas station at Harper and Cadieux Streets in Detroit, pumping gas into his blue, 2001 Jeep Grand Cherokee, when two men approached him. II 13.[10] While one asked for change, the other put a gun to his ribs and said, "Don't move." II 14-15. The first man emptied McNary's pockets, and the second man told him to run. He did, leaving his Jeep packed with band equipment (*see* II 7; III 85) behind. II 15.

The second man,[11] said McNary, was 5"10" or 6' tall, about 150 pounds, dark-complected with a "tight beard," and wearing a winter coat with a hood and fur collar. II 30-31. Though the hood was up, McNary "could see right inside" it. II 30. The gun the man held was an Uzi-style, short submachine gun. II 24.

* * * *

In the early morning of July 6, 2006, Mary Williams[12] was at a gas station at McNichols and Hubble Streets in Detroit. II 34-35. She had just finished pumping gas into her black 2002 Ford Taurus (II 34) when a van pulled up in front of her, and a man jumped out. II 37-38. The man, who was wearing a man wearing a winter coat with a fur-lined hood, ran over to her, pointed a gun at her head, and demanded her car keys. II 38-39. She said no and ran. II 39. He caught her, pushed her down, and grabbed her keys. II 40. Before she could get up, someone had driven away in her car. II 40.

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[9] McNary was the complainant in file no. 8941.

[10] References to the trial transcript are denoted by volume and page number. Volume II is the transcript of the proceedings of November 8, 2006.

[11] McNary never identified the first man. II 33.

[12] Williams was the complainant in file no. 8940.

Mary Williams described her assailant as a "short black medium complexioned male." II 52.[13]

* * * *

On July 7, 2006, in response to an anonymous tip, Harper Woods police officers went to the Eastland Mall and arrested eight people (II 71) for possessing three carjacked vehicles. II 62-63, 65-67. Mary Williams's Ford Taurus was one of the three. II 63.

Defendant-appellant Arthur Hailey, who had the keys to a stolen Chrysler Pacifica, was among the eight arrested. II 68, 71.

* * * *

Four days previous, on July 3, 2006, Police Officer Melvin Johnson had stopped Arthur Hailey for failing to signal a turn. II 77-78.[14] When it turned out that Mr. Hailey was missing a driver's license and had outstanding warrants, Officer Johnson arrested him and impounded his car, a white Dodge Intrepid (II 77-78). II 79-80.

* * * *

Sergeant David Pomeroy of the Detroit Police Department Robbery Task Force was one of the police officers who, on July 7, went to the Eastland Mall in response to the carjacked-vehicles arrests. II 99. Pomeroy "took over" the arrest scene. II 100. Upon learning that Arthur Hailey's Dodge Intrepid had been impounded "some time ago" by the Detroit Police Department, Pomeroy directed a subordinate, Officer Troy Debetes, to go to the impound lot and "inventory" the Intrepid. II 102-03.

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[13] A police officer would testify that she told him her assailant a "black male, 20, light complexion, clean shaven. . . ." II 59.

Debetes did as told. Upon checking under the Intrepid's hood, he found, sitting on the engine block, two guns: a Mac-11 rifle and a Glock automatic pistol. II 113-14, 118-19. These would be the guns Mr. Hailey would be accused of possessing in file 8939.[15] Eric McNary would also identify the Mac-11 as the gun used in the Jeep carjacking. II 24.

As a result of Debetes's search, Pomeroy would later order evidence technicians to "process" the Intrepid. II103. As a result, he learned that some of the parts on Mr. Hailey's car had been taken from another, carjacked Dodge Intrepid. II 105. Mr. Hailey would also be accused, in file 8939, of possessing the stolen Intrepid and the stolen Pacifica.

* * * *

On July 8, 2006, Mary Williams viewed a live lineup but identified someone other than Arthur Hailey as her assailant. II 49, 50-51. The next day, the police released Mr. Hailey from custody. II 151.

On July 18, 2006, a police officer showed Eric McNary four arrays of six photos. II 133. The officer told McNary that it was "okay" to make a "bad pick"—that if he chose someone other than "the suspect" the police would not charge that person. II 133. McNary pointed to Arthur Hailey's photo. II 134. McNary would identify Arthur Hailey again at trial. II 19.

Also on July 18, the police officer showed Mary Williams two arrays of six photos. II 136. She, too, now named Arthur Hailey as her assailant. II 136. She, too, would identify Mr. Hailey again at trial (though in the end the jury would be unpersuaded). II 43.

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[14] The transcript shows that Johnson answered "yes" when asked by the prosecutor whether the day was July 7, 2006. II 77. However, the prosecutor elsewhere referred to the day as July 3 (*see* II 7; III 94), including when he questioned Arthur Hailey about the incident, and Mr. Hailey agreed that the day was July 3 (III 65).

[15] The parties stipulated that a Glock bearing the same serial number (II 120) was stolen. II 111.

* * * *

Arthur Hailey's girlfriend Angelique Washington was also among the eight arrested at the Eastland Mall. II 71. Called as a prosecution witness, she denied telling the police that the Mac-11 was Arthur's and that he rented it out for use in robberies. III 18-20, 22-23. She had never *seen* him lend or rent the gun, she had only heard others talk about it. III 29. She had seen a gun in Arthur's house, but others had access to it, too. III 28-29. In any event, the Mac-11 offered in evidence by the prosecution was not the same gun she had seen at Arthur's house; that gun was smaller. III 24-25.

* * * *

Arthur Hailey testified in his own defense. He denied participating in the carjackings and robberies (III 59) or possessing the guns (III 54). He admitted buying the car parts from a friend for $50, but denied knowing they were stolen. III 46. He did not own a jacket with fur around the hood. III 57-58.

Arthur Hailey further testified that he did not remember where he was on June 23, the night Eric McNary's blue Jeep was carjacked, but that he did remember a summer night, maybe June 23, when his brother Jerome Hailey and cousin Devaughn Brown[16] arrived home with a blue Jeep Grand Cherokee. III 40-43. Jerome and Devaughn tried to bring some musical instruments into the house, but Jerome and Arthur's mother forbade it. III 42-43.

The remand-hearing evidence

Devaughn Brown testified that he was a friend of Arthur and Jerome Hailey. HI 20.[17] He was currently serving prison sentences for other carjackings and robberies he committed

[16] Devaughn is spelled "Devon" in the trial transcript.

[17] References to the hearing transcript are denoted HI (3-14-08), HII (3-20-08), and HIII (4-9-08).

together with Jerome Hailey. HI 17, 19-20. He and Jerome Hailey were the ones who carjacked the blue Jeep Grand Cherokee and robbed the car's owner. HI 23-25. Jerome was armed with a gun, a Mac 11. The robbery took place at about 11:30 p.m. or 12:00 a.m. (HI 22) at a gas station (either an Amoco or a BP) at the intersection of Cadieux and Harper streets in Detroit (HI 21). The man they robbed was Caucasian (HI 22) and about the same height as Devaughn (5'8" or 5'9" tall) (HII 23). When they spotted him, he was pumping gas. HI 22. They decided to rob him. HI 22. Devaughn approached the man to distract him by asking for change while Jerome came from behind. HI 22-23. Jerome pointed the gun to the man's stomach and told him to put his hands on the hood. HI 23. Jerome was wearing a coat with a fur-lined hood to hide his face. HI 24. Jerome took the man's keys; Devaughn took his wallet and cell phone. HI 24-25. Jerome told the man to run, and he did. HI 25. Jerome drove off in the man's Jeep. HI 25. Devaughn followed in Jerome's Chevy. HI 25.

Jerome drove to 12050 Nashville, where Jerome's brother Arthur, his mother, and sisters lived. HI 25. Inside the back of the Jeep, under a tarp, were musical instruments and equipment. HI 26. Intending to stash the equipment inside his mother's house, Jerome knocked at the door. HI 26. Jerome's mother and brother Arthur appeared at the door. HI 27. Jerome's mother told Jerome and Devaughn to leave. HI 27. They did, taking the musical equipment to the house of Jerome's "female companion" and unloading it there. HI 28. The next morning they took the equipment—at least two amplifiers, three or four guitars, a keyboard stand, and a bass drum—to a pawn shop. HI 28. Unable to get the price they wanted for it at the pawn shop, they eventually sold the equipment to someone Devaughn's cousin knew. HI 28-29. The Jeep they abandoned in the backyard of a vacant house after stripping it of its wheels. HI 29.

Devaughn learned that Arthur had been convicted of the Jeep Cherokee charges only after both were in prison. HI 30. Arthur wrote Devaughn a letter. HI 30. Devaughn decided to come forward. HI 31. Before testifying, he received a lawyer's advice about the possible consequences. HI 18. He knew he could receive a longer sentence than the ones he was currently serving. HI 48. He also knew he had the right to refuse to testify. HI 18. Nevertheless, had Arthur's trial lawyer asked him to be a witness for Arthur, he would have consulted his own lawyer but eventually "done the same thing that I'm doing today." HI 33.

* * * *

Jerome Hailey, Arthur Hailey's brother, was, like Devaughn Brown, serving prison sentences for robberies he and Devaughn committed together. HI 49-50. He testified that it was he, not his brother Arthur, who was the blue-Jeep gunman. HI 50. He and Devaughn had gone to a BP gas station at Harper and Cadieux with the plan to rob somebody. HI 50-51. Jerome was armed with his (HI 58, 71) Mac-11 gun. HI 51. They saw the blue Jeep Cherokee at a gas pump. HI 53. Jerome told Devaughn to ask the Jeep's owner, a white man in his 30's and about the same height as Jerome (6'1"), for money. HI 54. While Devaughn distracted the man, Jerome, wearing a doughboy coat with a fur lined hood to cover his face, came around the gas pump and put his gun to the man's back. HI 55. He grabbed the man's keys, and told Devaughn to grab the man's money and wallet. HI 55. That accomplished, Jerome told the man to run. HI 55.

Jerome jumped in the Jeep. HI 56. A cup of coffee the man had set on the top of the car fell as Jerome pulled off. HI 56. He drove to his mother's house on Nashville. HI 56. Devaughn followed in Jerome's car, a Chevy Caprice (HI 54). HI 56.

There was musical equipment in the back of the Jeep, including a drum set, equalizers, and a microphone and wires. HI 56. Devaughn popped the Jeep's hatch, preparing to unload the equipment, while Jerome went to the door and knocked. HI 56. His mom answered the door, took a look at the Jeep and its contents, and told Jerome to "get the hell on." HI 57. Arthur was behind her at the end of the steps. HI 57.

Jerome and Devaughn took the Jeep to a companion's house on Warren. HI 57. They took the equipment inside, and Jerome went to sleep. HI 57-58. The next morning, he sold the musical equipment to a friend. HI 58.

Jerome ended up putting his Mac-11 under the hood of his brother Arthur's car. HI 59. Needing to get it out of his mother's house, and with his own car parked elsewhere and Arthur's there in his mother's backyard, he choose Arthur's car as the place to hide it. HI 75. He planned to retrieve the gun later that day, but in the meantime Arthur drove the car and got pulled over by the police. HI 76. Jerome hadn't had the chance to warn him. HI 76.

Like Devaughn, Jerome had consulted a lawyer before testifying. HI 51-52. He knew he faced the risk of a longer sentence, and that he could refuse to testify, but he chose to testify anyway. HI 52. He would have testified at Arthur's trial if Arthur's lawyer had asked. HI 60-61. In fact, he remembered telling his own lawyer that he wanted to testify for Arthur. His lawyer, Richard Powers, had told him that it was his decision to make. HI 61.

He was not lying for his brother. HI 62. He committed the blue Jeep carjacking and robbery. HI 50.

* * * *

Jerome and Arthur's mother, Karen Simmons, remembered a night two summers previous when her son Jerome came knocking at her door, a blue Jeep Cherokee parked in her

driveway. HI 81-82. She went to the door. HI 82. Her other son, Arthur, who had been downstairs, also went to the door. HI 82.

Ms. Simmons opened the door and saw Jerome and the Jeep. HI 83. The Jeep's "hood" was up. HI 83. She asked Jerome what the hell he thought he was doing, and told him to get the hell away from her house. HI 83.

* * * *

Carolyn Rand was Arthur Hailey's trial lawyer. HII 4. In that role, she had received discovery documents that included a police report of a statement Arthur Hailey gave the police two days after his arrest. HII 5. In that statement, Arthur told the police he'd seen the blue Jeep Cherokee when his brother Jerome and friend Devaughn tried to bring drum sets from the Cherokee into his mother's home. HII 6. Arthur had also told her that he had nothing to do with the Cherokee, and that Jerome and Devaughn were the ones who had carjacked it. HII 7. Moreover, she believed him. HII 7. Nevertheless, she did not talk to either Jerome or Devaughn about being a witness for Arthur. HII 7. She knew that Jerome and Devaughn were on trial for similar (HII 11) crimes. HII 8. She also knew that, if she were representing a client in Jerome or Devaughn's position, she would advise that client not to testify. HII 9. She would have never expected them to come forward. HII 9. She had been practicing criminal law for eight years and had never seen such a thing happen. HII 9.

She did not call Karen Simmons as a witness because Ms. Simmons had been reluctant even to discuss the fact that her son was on trial. HII 11. She had the impression that Ms. Simmons was reluctant to take sides against her son Jerome. HII 12-13.

* * * *

Richard Powers was Jerome Hailey's lawyer in the multiple carjacking cases Jerome had in 2006. HII 14. He did not remember Jerome telling him he had committed the crime that with which Arthur was charged, or telling him that he wanted to admit guilt at Arthur's trial. HII 14. Such a thing would have been unusual, and Powers would have remembered it. HII 15-16. However, Jerome might have told him something more general—say, that Jerome wanted to be a witness at Arthur's trial—and he might have forgotten *that*. HII 19. He had represented many clients since Jerome, and he admitted having a hard time remembering even Jerome's first name. HII 18-19.

* * * *

Eric McNary was the owner of the blue Jeep Cherokee in question. HIII 5. It was he who was robbed at gunpoint at a BP gas station late at night on June 23, 2006. HIII 5. He now viewed a photographic array prepared by the prosecutor that included photos of Jerome Hailey, Devaughn Brown, and Arthur Hailey. HIII 6. As at Arthur's trial, he identified Arthur Hailey as the gunman. HIII 6.

Since the trial, Mr. McNary had viewed Arthur's picture on a website kept by the Michigan Department of Corrections, the Offender Tracking Information System (OTIS). HIII 7.

The hearing-court decision

Judge Strong denied Arthur Hailey's new-trial motion on two grounds: (i) that it was objectively reasonable for trial counsel to assume neither Jerome Hailey nor Devaughn Brown would testify for the defense, and therefore to decide not to investigate the possibility, and (ii) that information culled from investigative subpoenas and witness statements suggest that, even if

Arthur Hailey was not the gunman, he nevertheless had some other role in the carjacking and robbery. Opinion and order at pp. 10-12 (Appendix A).

Mr. Hailey thereafter filed a brief on appeal. The lead issue concerned Judge Strong's denial of his ineffective-assistance claim.

The Court of Appeals decision

A two-judge majority of the Court of Appeals affirmed in Docket No. 276423. The majority agreed with Judge Strong's analysis of the first ground but offered a different harmless-error analysis. The majority gave two reasons for thinking the error harmless: (i) that because Arthur Hailey was able to testify and himself suggest the guilt of Jerome Hailey and Devaughn Brown, their absence from his trial did not amount to deprivation of a "substantial defense," something that militated against a finding of prejudice; and (ii) that the victims of both[18] robberies identified Arthur Hailey as a perpetrator. A 28a-29a.

The dissenting judge would have ruled that counsel acted unreasonably when she failed even to ascertain Jerome or Devaughn's willingness to testify, where both men were easy to find and, because of their closeness to Arthur, may well have been willing to confess their own guilt to protect him from unwarranted punishment. The dissenting judge would have further ruled that counsel's performance was outcome-determinative—that it was reasonably probable that Jerome or Devaughn would have testified, if asked, and reasonably probable that their self-inculpatory testimony would have swayed the jury's verdict, particularly where trial counsel could have shown that Arthur had blamed them from the start and that the prosecution's case was not overwhelmingly strong. A 32a.

[18] The majority did not explain how its harmless error analysis was aided by Mary Williams's too-unreliable-to-support-conviction identification of Arthur Hailey as the perpetrator of a separate robbery.

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE POTENTIAL WITNESSES JEROME HAILEY AND DEVAUGHN BROWN, WHO SWEAR THEY, NOT ARTHUR HAILEY, COMMITTED THE CRIMES FOR WHICH ARTHUR WAS CONVICTED. THE MICHIGAN COURT OF APPEALS' RULING TO THE CONTRARY WAS AN OBJECTIVELY UNREASONABLE APPLICATION OF *STRICKLAND V. WASHINGTON*.[19]

Introduction

From the outset of the prosecution, Arthur Hailey told his trial lawyer that it was his brother, Jerome Hailey, and a mutual friend, Devaughn Brown, not he, who were guilty of the blue-Jeep-related offenses. He deduced their guilt because Jerome and Devaughn arrived at the Hailey house late one night driving the blue Jeep.

His trial lawyer chose not to investigate the possibility that Jerome Hailey and/or Devaughn Brown might appear as defense witnesses or provide information useful to the defense. Because she assumed they would refuse to testify, she did not even bother trying to talk to them.

At trial, the blue Jeep's owner identified Arthur Hailey as the gunman. Arthur Hailey swore that he was not the gunman, but in the absence of corroboration, the jury convicted.

Standard of review

The standard of review for a habeas petition is set forth in 28 U.S.C. § 2254(d). That section provides that the writ may be granted if the state appeal:

> (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 in light of the evidence presented in the state court proceeding.

[19] 466 U.S. 668 (1984).

A decision is "contrary to" the Supreme Court's clearly established precedent if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A decision is an "unreasonable application of Federal law" when it "unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. The decision must be "objectively unreasonable." *Id*.

Argument

Trial counsel was ineffective for not investigating the possibility that two potential witnesses would exonerate her client, and the contrary ruling by the Michigan Court of Appeals majority was an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The federal constitution guarantees a criminal defendant the right to the effective assistance of counsel. U.S. Const. amend. VI, XIV. The test for determining ineffective assistance is twofold: whether "counsel's performance was deficient," and if so, whether her "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Counsel's performance is deficient if it falls below an "objective standard of reasonableness" under "prevailing professional norms." *Id.* at 688. The defendant is prejudiced where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Counsel performs deficiently when she does not make a reasonable investigation. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "This duty includes the obligation to

investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Towns v Smith*, 395 F.3d 251, 258 (6th Cir. 2005). Though counsel's strategic decisions are entitled to deference, counsel's strategy must be based on reasonable investigative decisions. *Strickland*, 466 U.S. at 691.

Counsel's decision here not to talk to Jerome Hailey or Devaughn Brown about testifying for Arthur Hailey was plainly unreasonable. Counsel knew that Jerome Hailey and Brown, if willing to testify, would be critical witnesses in her client's defense. Counsel knew that Arthur Hailey had told the police from the very beginning that he had seen his brother Jerome Hailey and Devaughn Brown with the blue Jeep Cherokee. Arthur had himself told counsel that Jerome and Devaughn were responsible for the blue Jeep carjacking. Yet, because counsel assumed Jerome and Devaughn would each assert his right against self-incrimination, she spoke to neither. That decision was unreasonable. "Constitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of 'strategy'—based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of an investigation." *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007). An assumption that witnesses will refuse to testify is an unreasonable substitute for actual investigation.

Nor was it reasonable for counsel to wait for the witnesses themselves to come forward, or for her client to tell her to speak to them. A lawyer's duty is to *investigate*, not to wait for witnesses to come to her. *Towns*, *supra*. Her duty exists separate from what her client tells her. Indeed, it exists even when her client admits guilt. ABA Standards for Criminal Justice, Defense Function, Part IV, Investigation and Preparation, 4-4.1(a). She must make a *thorough* investigation, particularly when it comes to finding occurrence witnesses. *Rompilla v. Beard*,

545 U.S. 374, 381 (2005); *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). "Considerable ingenuity may be required to locate persons who observed the criminal act or who have information about it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times . . . ." Commentary to Standard 4-4.1; *see also Rompilla*, 545 U.S. at 375 (incorporating the ABA Standards in evaluating deficient-performance claims); *Wiggins*, 539 U.S. at 524 (same).

Counsel's failure to approach either prospective witness is particularly inexplicable when the potential benefits and the odds of success are balanced against the cost of investigation. Again, the potential benefit of talking to Jerome and Devaughn was obvious: either young man might exonerate her client. And the odds of success were much greater than contemplated by counsel (or by the two-judge Court of Appeals majority). As the dissenting Court of Appeals judge aptly noted, Jerome and Devaughn were not strangers to the defendant, and not without reason to help him even to their own detriment. They were his brother and close family friend. To presume they would be unwilling to make matters right, whatever additional, incremental punishment they may have faced, was to ignore this fundamental familial dynamic. Moreover, the cost of investigation was slight. As the dissenting judge below noted, even a "rudimentary investigation"—two telephone calls, perhaps—could have yielded information enough to allow a reasonable decision about the need for further investigation. Michigan Court of Appeals dissenting opinion at p. 3 (Appendix B).

Nor was it even necessary, to justify a rudimentary investigation, for counsel to expect the witnesses to come forward at trial. Admissions Jerome or Devaughn might make in an interview could be admitted at trial, as statements against penal interest, even if the two young men ultimately chose not to testify. *See* Mich. Court Rule 804(b)(3); *see also Sanders v. Ratelle*,

21 F.3d 1446, 1458-59 (9th Cir. 1994) (trial counsel performed deficiently in part by failing to offer in evidence, as statement against penal interest, client's brother's out-of-court confession to crime of which client accused).

The first *Strickland* prong is met. Counsel's investigation was deficient.[20]

The second prong is also met. It is reasonably probable[21] that an adequate investigation would have produced a different outcome. It is hard to conceive that the jury would have convicted Arthur Hailey in the blue-Jeep carjacking had it heard the testimony of Jerome Hailey and Devaughn Brown (or even heard other evidence of their confessions). Evidence that someone else committed the crime in question—third-party culpability—is perhaps the strongest evidence of innocence a defendant can offer. Such evidence is all the more powerful when it comes from the mouths of the third parties themselves. *See, e.g., Chambers v Mississippi*, 410 US 295, 93 S Ct 1038, 35 L Ed 2d 297 (1973) (constitutional error to prevent defendant from

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[20] Ruling to the contrary, the two-judge Court of Appeals majority pointed to two unpublished decisions of federal courts. Michigan Court of Appeals majority op. at p. 4 (Appendix B). Neither provides much support for the majority's position. In *Goldsby v United States*, 152 Fed. Appx. 431 (6th Cir. 2005), a defendant accused of possessing drugs discovered in his jacket pocket claimed that his trial lawyer should have called as a defense witness the passenger in a car in which his coat was found. The defendant's claim was premised solely on his own assertion that the passenger planted the drugs. He presented no reason for thinking that the passenger would *admit* having done so. Moreover, the circumstances strongly suggested that, even if the passenger blamed herself for the drugs, the jury would not have believed her—she had been under police surveillance throughout the time the defendant said she'd planted the drugs in his jacket. It was in this factual context that the Court ruled that counsel's choice not to investigate was not unreasonable.

The second case is even less helpful. *Culbreath v Bennett*, unpublished opinion of the United States District Court for the Western District of New York, issued August 11, 2004 (Docket No. 01-CV-6337). There, counsel in fact *did* investigate the uncalled witness, only to be told by the prospective witness's lawyer that, if called, the witness would invoke his Fifth Amendment privilege against self-incrimination. The Court ruled it reasonable for counsel to rely on the lawyer's assertion. Indeed, the client, Culbreath, admitted that the witness, if called, would have invoked the privilege. *Id*. at n.10. Culbreath nonetheless argued that use of the privilege would have been improper, because the witness was without reason to fear self-incrimination. It was this argument, given the facts of the case, that the Court called "highly doubtful."

[21] A "reasonable probability" is *less than* a preponderance of evidence. *Strickland*, 466 U.S. at 694; *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003).

presenting evidence that third party confessed to committing crime at issue, even though local evidentiary rule prohibited the evidence). *Cf. People v. Johnson*, 451 Mich. 115 (1996) (retrial necessary where counsel unreasonably neglected to call witnesses who would have corroborated defense); *People v. Bass*, 247 Mich. App. 385 (2001) (same).[22]

Moreover, the prosecution's evidence was far from overwhelming. The prosecution case was primarily based on (i) the complainant's identification of Arthur Hailey as the gunman, and (ii) the fact that the gun used was found under the hood of Arthur Hailey's car. The impact of point (ii) would have been blunted by Jerome Hailey's admission that the gun was his and that he had hidden it in Arthur's car. The complainant's identification was not conclusive, either. "The vagaries of identification evidence are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

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[22] Judge Strong did *not* actually "reject[] Devaughn and Jerome's after-the-fact testimony that they would have testified if asked." Michigan Court of Appeals majority op. at p. 4 (Appendix B). Instead, though initially having written he thought it "doubtful" either would have testified (Trial court opinion and order at p. 10) (Appendix A), in the end he *explicitly refrained* from making (or relying upon) such a finding:

> "**without making a determination regarding the credibility of the witnesses *assuming arguendo* [sic] that Brown and Jerome Hailey's testimony had been presented at trial**, the burden of demonstrating a reasonable probability that but for the alleged ineffective assistance of counsel the outcome of the trial would have been different has not been met." Opinion and order at p. 11 (Appendix A) (bold emphasis added; italicized emphasis in original).

And to the extent that Judge Strong believed that the defense needed to prove with certainty that Devaughn or Jerome would have testified at trial, he was mistaken. *See Towns*, 395 F.3d at 260 (to prevail on ineffectiveness claim, not necessary for defendant to prove uncalled witness would *definitely* have testified; reasonable probability, combined with reasonable probability that testimony would have swayed verdict, enough). Indeed, the judge's expression of doubtfulness did not foreclose the possibility that the defense burden was met. Again, a reasonable probability may be *less than* a preponderance of evidence. *Strickland*, 466 U.S. at 694. Thus, a proposition can be "doubtful"—that is, "uncertain" or "ambiguous," The Random House Dictionary of the English Language (unabridged ed., 1971)—and at the same time "reasonably probable."

"Eyewitness error is the most prevalent cause of wrongful convictions." *State v. Cheatam*, 150 Wash. 2d 626, 664, 81 P.3d 830, 849 (2003) (citing C. Ronald Huff et al., Convicted but Innocent: Wrongful Conviction and Public Policy 64, 66, 86-87 (1996)). Identifications initially made by photograph, as here, are more suspect than those that follow from a physical lineup. *Simmons v. United States*, 390 U.S. 377, 386 n.6 (1968); *People v. Franklin Anderson*, 389 Mich. 155, 177, 183 (1973), *overruled on other grds. People v. Hickman*, 470 Mich. 602 (2004). Cross-racial identifications, such as here, are particularly problematic. *Cheatam*, *supra* (citing Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. Miami L. Rev. 1059, 1064 (2001)). And a complainant's certainty of his identification has no correlation with reliability—people who say they are absolutely sure of their identifications are just as likely to be mistaken as people who admit to uncertainty. *Brodes v. State*, 279 Ga. 435, 440-42; 614 S.E.2d 766 (2005) (invalidating instruction that allowed jury to consider witness certainty in evaluating reliability of identification).[23]

Furthermore, there is strong reason to think the jury would have believed Jerome Hailey and Devaughn Brown. For one thing, their admissions of guilt were against penal interest. Both men knew that their testimony might lead to longer sentences. HI 48; HI 52. The law presumes statements made under these circumstances to be reliable—reliable enough to warrant admission even if the statement was unsworn and made outside of court and the declarant is unavailable for cross-examination. *See* Mich. R. Evid. 804(b)(3). For another, their admissions dovetailed with *what Arthur Hailey had told police from the very beginning*: that his brother Jerome and friend Devaughn were involved in the blue Jeep carjacking, not he.

[23] To the extent the Michigan Court of Appeals majority based its harmlessness determination on a *second* identification, that by Mary Williams, such reliance was misguided: the jury rejected the charges by Williams, presumably because it thought her identification unreliable. *See* Michigan Court of Appeals majority opinion at p. 5 (Appendix B).

The Michigan Court of Appeals majority ignored these factors in favor of a prejudice analysis that is utterly incompatible with *Strickland*. According to the majority, even if counsel performed deficiently by not calling her client's brother and friend as defense witnesses, the fact that her client was himself able to insinuate that Jerome and Devaughn were guilty "significantly weighs against a finding of ineffective assistance." Michigan Court of Appeals majority opinion at p. 4 (Appendix B). Here, the majority relied upon *People v. Dixon*, 263 Mich. App. 393, 398 (2004), one of a number of Michigan cases that have held that a defendant whose lawyer has performed deficiently by not calling certain witnesses cannot, as a matter of law, meet his burden of showing prejudice unless his lawyer's failure *entirely* deprived him of his defense; if he is able to offer some form of the defense, however abridged, his claim must fail. Again, though, *Strickland* teaches that a lawyer's deficient performance warrants reversal whenever it is "reasonably probable" that the trial's outcome would have been different absent her mistake. *Strickland*, 466 U.S. at 694. The "deprivation of a substantial defense" bright-line test employed by the majority imposes a higher-than-outcome-determination burden on the defense, and thus is by itself an unreasonable application of *Strickland*.

Counsel was ineffective for not making a reasonable investigation—an investigation that would have disclosed that Jerome Hailey and Devaughn Brown were willing to admit their guilt of the crime Arthur Hailey was accused of committing. The contrary ruling by the Michigan Court of Appeals majority was an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to grant the petition for a writ of habeas corpus.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

s/ Douglas W. Baker

BY: _____

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Date: April 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and have mailed a hard copy by U.S. Postal Service to the following:

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APPENDIX A

22653-T DWB

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs- Case No. 06-008941

HON. CRAIG S. STRONG

ARTHUR RONALD HAILEY,

Defendant,

_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said Court in the Frank Murphy Hall of Justice on

APR 29 2009

PRESENT: HON. HON. CRAIG STRONG

CIRCUIT COURT JUDGE

PROCEDURAL HISTORY

Defendant Arthur Hailey III stood trial in three consolidated cases. In both case no.06-008940 and case no. 06-008941, he was charged with carjacking, armed robbery, and felony firearm. In case no. 06-008939, he was charged with two counts of receiving or concealing a stolen motor vehicle, one count of receiving or concealing a stolen firearm, one count of carrying a concealed weapon, and one count of felony-firearm.

He was acquitted of the charges in case no. 06-008940, convicted on all charges in case no. 06-8941, convicted of receiving and concealing a stolen firearm, and carrying a concealed weapon in case no. 06-008939. Defendant received concurrent sentences of ten to twenty five years imprisonment for carjacking and armed robbery, a nine month to ten year sentence for receiving or concealing a stolen firearm, and nine months to five years for receiving and concealing a stolen motor vehicle and carrying a concealed weapon. He also received a consecutive two year term of imprisonment for the felony firearm conviction.

Defendant appealed by right and moved to remand for an evidentiary hearing. The Court of Appeals granted his motion and remanded to the trial court for an evidentiary hearing and decision whether defendant was denied the effective assistance of counsel or should be granted a new trial based on newly discovered evidence.

An evidentiary hearing was conducted by this Court. Defendant has filed supplemental briefs in support of his motion for new trial and the Prosecutor has filed a response.

SUMMARY OF TRIAL TESTIMONY[1]

At approximately 11:40 p.m. on June 23, 2006, Eric McNary was pumping gas into his blue, 2001 Jeep Grand Cherokee, at a gas station on Harper and Cadieux streets in the city of Detroit. Two men approached him and while one asked for change, the other put a gun to his ribs and said, "Don't move."[2] The first man emptied his pockets, and the second man told him to run. Mr. McNary left the area leaving behind his Jeep which was packed with band equipment.[3]

Mr. McNary did not identify the first man [4]and testified that the second man was 5'10" or 6' tall, about 150 pounds, dark-complected with a "tight beard" and wearing a winter coat with a hood and fur collar. [5] He indicated that although the hood was up, he "could see right inside" it. The man held an Uzi-style short submachine gun.[6]

On July 3, 2006, Police Officer Melvin Johnson stopped Arthur Hailey for failing to signal when making a turn.[7] After discovering that Mr. Hailey did not have his driver's license and had outstanding warrants, he was arrested and the white Dodge Intrepid he was driving was impounded.[8]

In the early morning hours of July 6, 2006, Mary Williams was at a gas station located at McNichols and Hubble streets in Detroit.[9] She had just finished pumping gas into her black 2002 Ford Taurus when a van pulled up in front of her and a man jumped out.[10] The man, who was wearing a winter coat with a fur-lined hood, ran over to her, pointed a gun at her head, and demanded her keys.[11] She said no and ran.[12] He caught her, pushed her down and grabbed her

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[1] References to the trial transcript are denoted by volume and page number. Volume II is the transcript of the proceedings of November 8, 2006.

[2] II 13, 14-15.

[3] II 15. (See II 7; III 85).

[4] II 33.

[5] II 30-31.

[6] II 24.

[7] II 77-78.

[8] II 79-80.

[9] II 34-35.

[10] II 37-38.

[11] II 38-39.

[12] II 39.

keys.[13] Before she could get up, someone had driven away with in her car. She described her assailant as a "short black medium complexioned male."[14]

On July 7, 2006, in response to an anonymous tip, Harper Woods police went to the Eastland Mall and arrested eight people[15] for possessing three carjacked vehicles.[16] Mary William's Ford Taurus was one of the three vehicles.[17] Defendant Arthur Hailey was among the eight persons who were arrested and he had the keys to a stolen Chrysler Pacifica in his possession.[18]

Sergeant David Pomeroy of the Detroit Police Department Robbery Task Force was one of the police officers who responded to the carjacked vehicle arrests.[19] Pomeroy "took over" the arrest scene[20] and upon learning that Arthur Hailey's Dodge Intrepid had been impounded, he directed Officer Troy Debetes to go to the impound lot and inventory it.[21] Upon checking under the Intrepid's hood, Officer Debetes found a Mac-11 rifle, and a Glock automatic pistol on top of the engine block.[22]

Further investigation by evidence technicians revealed that some parts of the Intrepid confiscated from Mr. Hailey's had been taken from another Dodge Intrepid.[23] On July 8, 2006, Mary Williams viewed a live lineup but identified someone other than Arthur Hailey as her assailant.[24] The next day, the police released Mr. Hailey from custody.[25]

On July 18, 2006, Eric McNary viewed four arrays of six photos.[26] The officer told Mr. McNary that it was "okay" to make a "bad pick"—that if he chose someone other than "the suspect" the police would not charge that person. Mr. McNary pointed to Arthur Hailey's

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[13] II 40.

[14] II 52.

[15] II 71.

[16] II 62-62, 65-67.

[17] II 63.

[18] II 68, 71.

[19] II 99.

[20] II 100.

[21] II 102-03.

[22] II 113-14, 118-19.

[23] II 103, 105.

[24] II 49, 50-51.

[25] II 151.

[26] 11 133.

photo. [27]He also identified him at trial.[28] The same day Mary Williams viewed two arrays of six photos. She too, identified Arthur Hailey and also identified him at trial.[29]

Arthur Hailey's girlfriend Angelique Washington was among the eight arrested with him at the Eastland Mall.[30] Called as a prosecution witness, she denied telling the police that the Mac-11 was Arthur's and that he rented it out for use in robberies.[31] She testified that she had never seen him lend or rent the gun; she had only heard others talk about it.[32] She had seen the gun in Arthur's house, but stated that other persons had access to it, too.[33] She indicated that the Mac-11 offered into evidence by the prosecution was not the same gun she had seen at Arthur's house because that gun was smaller.[34]

Mr. Hailey testified in his own defense. He denied participating in the carjackings and robberies and possessing the guns.[35] He admitted buying the car parts from a friend for $50.00 and denied knowing that the parts were stolen.[36] He stated that he did not own a jacket with fur around the hood.[37] He further testified that he did not remember where he was on June 23rd the night Eric McNary's blue Jeep was carjacked, but he did remember a summer night, possibly June 23rd, when his brother Jerome Hailey and cousin Devaughn Brown arrived home with a blue Jeep Grand Cherokee.[38] Jerome and Devaughn tried to bring some musical instruments into the house, but Jerome and Arthur's mother forbade it.[39]

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[27] II 134.

[28] II 19.

[29] II 43.

[30] II 71.

[31] III 18-20, 22-23.

[32] III 29.

[33] III 28-29.

[34] III 24-25.

[35] III 54.

[36] III 46.

[37] III 57-58.

[38] III 40-43.

[39] III 42-43.

SUMMARY OF EVIDENTIARY HEARING TESTIMONY[40]

Devaughn Brown testified that he was a friend of Arthur and Jerome Hailey.[41] He is serving prison sentences for carjackings and robberies he committed together with Jerome Hailey.[42] He stated that he and Jerome Hailey were the ones who carjacked the blue Jeep Grand Cherokee and robbed the car's owner.[43] Jerome was armed with a Mac11 gun. The robbery took place at about 11:30 p.m. or 12:00 a.m.[44] at either an Amoco or BP gas station at the intersection of Cadieux and Harper streets in Detroit.[45]

Brown stated that the man they robbed was Caucasian and about the same height as Devaughn, 5'8" or 5'9"tall.[46] When they spotted him, he was pumping gas.[47] They decided to rob him[48]. Devaughn approached the man to distract him by asking for change while Jerome came from behind. [49] Jerome pointed the gun to the man's stomach and told him to put his hands on the hood of the car.[50] Jerome was wearing a coat with a fur-lined hood to hide his face.[51] Jerome took the man's keys; Devaughn took his wallet and cell phone.[52] Jerome told the man to run, and he did, then Jerome drove off in the man's Jeep.[53] Devaughn followed in Jerome's Chevy.[54]

Jerome drove to 12050 Nashville Street, where Jerome's brother Arthur, his mother and sisters lived.[55] Inside the back of the Jeep, under a tarp, were musical instruments and

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[40] References to the Evidentiary Hearing transcript are denoted HI (3-14-08), HII (3-20-08), and HIII (4-9-08).

[41] HI 20. (Devaughn is spelled "Devon" in the trial transcript.)

[42] HI2 17, 19-20.

[43] HI 23-25.

[44] HI 22.

[45] HI 21.

[46] HI 22-23.

[47] HI 22.

[48] HI 22.

[49] HI 22-23.

[50] HI 23.

[51] HI 24.

[52] HI 24-25.

[53] HI 25.

[54] HI 25.

[55] HI 25.

equipment.[56] Intending to stash the equipment inside his mother's house, Jerome knocked at the door.[57] Jerome's mother and brother Arthur appeared at the door.[58] Jerome's mother told them to leave.[59] They did, taking the musical equipment to the house of Jerome's "female companion" and unloading it there.[60]

The next morning they took the equipment—at least two amplifiers, three or four guitars, a keyboard stand, and a bass drum---to a pawn shop.[61] Unable to get the price they wanted for it at the pawn shop, they eventually sold the equipment to someone Devaughn's cousin knew.[62] The Jeep they abandoned in the backyard of a vacant house after stripping it of its wheels.[63]

Devaughn learned that Arthur had been convicted of the Jeep Cherokee charges only after they both were in prison.[64] Arthur wrote Devaughn a letter.[65] Devaughn decided to come forward.[66] Before testifying, he received a lawyer's advice about the possible consequences.[67] He knew he could receive a longer sentence than the ones he is currently serving.[68] He also knew he had the right to refuse to testify.[69] Nevertheless, had Arthur's trial lawyer asked to be a witness for Arthur, he would have consulted his own lawyer but eventually would have done the same thing that he was doing on that day.[70]

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[56] HI 26.

[57] HI 26.

[58] HI 26.

[59] HI 27.

[60] HI 28.

[61] HI 28.

[62] HI 28-29.

[63] HI 29.

[64] HI 30.

[65] HI 30.

[66] HI 31.

[67] HI 18.

[68] HI 48.

[69] HI 18.

[70] HI 33.

Jerome Hailey, (Arthur Hailey's brother) is like Devaughn Brown, serving prison sentences for robberies he and Devaughn committed together.[71] He testified that it was he, not his brother Arthur, who was the blue Jeep gunman.[72] He and Devaughn had gone to a BP gas station at Harper and Cadieux with the plan to rob somebody. [73] He was armed with his Mac-11 gun.[74] They saw the blue Jeep Cherokee at a gas pump. He told Devaughn to ask the Jeep's owner, a white man in his 30's and about the same height as Jerome (6'1) for money.[75] While Devaughn distracted the man, Jerome, wearing a doughboy coat with a fur lined hood to cover his face, came around the gas pump and put his gun to the man's back. [76] He grabbed the man's keys and told Devaughn to grab his money and wallet.[77] That accomplished, he told the man to run.[78]

Jerome Hailey jumped in the Jeep.[79] A cup of coffee the man had set on the top of the car fell as he pulled off. He drove to his mother's house and Devaughn followed in Jerome's car, a Chevy Caprice.[80] There was musical equipment in the back of the Jeep, including a drum set, equalizers, and a microphone and wires.[81] Devaughn popped the Jeep's hatch, preparing to unload the equipment, while Jerome went to the door and knocked.[82] His mom answered the door, took a look at the Jeep and its contents, and told Jerome to "get the hell on".[83] Arthur Hailey was behind her at the end of the steps.[84]

Jerome and Devaughn took the Jeep to a companion's house on Warren.[85] They took the equipment inside and Jerome went to sleep.[86] The next morning, he sold the musical

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[71] HI 49-50.

[72] HI 50.

[73] HI 50-51.

[74] HI 58, 71.

[75] HI 54.

[76] HI 55.

[77] HI 55.

[78] HI 55.

[79] HI 56.

[80] HI 54-56.

[81] HI 56.

[82] HI 56.

[83] HI 57.

[84] HI 57.

[85] HI 57.

[86] HI 57-58.

equipment to a friend.[87] Jerome put the Mac-11 under the hood of his brother Arthur's car.[88] He planned to retrieve the gun later that day, but in the meantime Arthur drove the car and got pulled over by the police before Jerome had a chance to warn him that the gun was in the car.[89]

Jerome Hailey stated that he had consulted an attorney before testifying and was aware that he faced the risk of a longer sentence. He indicated that he knew he had the right to refuse to testify.[90] He said that he would've testified at his brother's trial if Arthur's lawyer had asked him to.[91] In fact, he remembered telling his own attorney that he wanted to testify and he was told that it was his decision to make.[92] He testified that he was not lying for his brother[93] and that he committed the carjacking of the blue Jeep.[94]

Karen Simmons, the mother of Arthur and Jerome Hailey, testified that she remembered a summer night when her son Jerome came knocking at her door, having parked a blue Jeep Cherokee in her driveway.[95] She went to the door, and along with her other son Arthur, and observed that the Jeep's hood was up.[96] She asked Jerome what the hell he was doing and told him to get the hell away from her house.[97]

Carolyn Rand was Arthur Hailey's trial lawyer.[98] While representing him she received discovery materials that included a police report of a statement Mr. Hailey gave the police two days after his arrest.[99] In that statement Arthur Hailey told the police he'd seen the blue Jeep Cherokee when his brother Jerome and friend Devaughn tried to bring drum sets from the Cherokee into his mother's home.[100] Arthur Hailey told her that he had nothing to do with the Cherokee, and that Jerome and Devaughn were the ones who carjacked it.[101] She believed him

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[87] HI 58.

[88] HI 59.

[89] HI 76.

[90] HI 51-52.

[91] HI 60-61.

[92] HI 61.

[93] HI 62.

[94] HI 50.

[95] HI 81-82.

[96] HI 82.

[97] HI 82.

[98] HII 4.

[99] HII 5.

[100] HII 6.

[101] HII 7.

but did not talk to either Jerome Hailey or Devaughn Brown about being witnesses for Arthur Hailey.[102]

She knew that Jerome and Devaughn were on trial for similar crimes.[103] She also said that, if she were representing a client in Jerome or Devaughn's position, she would advise that client not to testify.[104] She would have never expected them to come forward.[105] She has been practicing criminal law for eight years and had never seen such a thing happen.[106] She did not call Karen Simmons as a witness because Ms. Simmons had been reluctant even to discuss the fact that her son was on trial.[107] She had the impression that Ms. Simmons was reluctant to take sides against her son Jerome.[108]

Richard Powers was Jerome Hailey's lawyer in the multiple carjacking cases Jerome Hailey was charged with in 2006.[109] He did not remember his client telling him he had committed the crime that his brother Arthur Hailey was charged with and that he would testify to that at Arthur's trial.[110] Such a thing would have been unusual, he would have remembered it.[111] However, Jerome might have told him something more general—such as, he wanted to be a witness at Arthur's trial—and he might have forgotten that.[112] He had represented many clients since Jerome Hailey and he admitted having a hard time remembering even his first name.[113]

Eric McNary was the owner of the blue Jeep Cherokee in question.[114] He was robbed at gunpoint at a BP gas station late at night on June 23, 2006.[115] He now viewed a photographic array prepared by the prosecutor that included photos of Jerome Hailey, Devaughn Brown, and

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[102] HII 7.

[103] HII 8-11.

[104] HII 9.

[105] HII 9

[106] HII 9.

[107] HII 11.

[108] HII 12-13.

[109] HII 14.

[110] HII 14.

[111] HII 15-16.

[112] HII 19.

[113] HII 18-19.

[114] HIII 5.

[115] HIII 5.

Arthur Hailey.[116] He indentified Arthur Hailey as the gunman.[117] Since the trial, Mr. McNary had seen Arthur Hailey's picture on the Michigan Department of Corrections Offender Tracking Information System (OTIS).

ANALYSIS

Defendant alleges that trial counsel was ineffective for failing to investigate potential witnesses Jerome Hailey and Devaughn Brown. To establish ineffective assistance counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the attorney's error or error's a different outcome probably would have resulted. Counsel's overall performance is that which is reviewed, and a defendant must overcome the presumption that the challenged action or inaction was trial strategy.

Having made a comprehensive review of the record this court finds that trial counsel was not ineffective because it was reasonable for her to assume that Devaughn Brown and Jerome Hailey----pending carjacking charges of their own---would not have testified at defendant's trial and admitted to more such conduct. Moreover, even if counsel should have interviewed these two alleged witnesses, defendant cannot prove prejudice because (a) it is doubtful whether either witness actually would have testified; (b) if they had testified and were believed, their testimony would not have substantially benefited the defendant. *People v Bass,* 223 Mich App 241, 252-53 (1997) vacated in part on other grounds 457 Mich 866 (1998).

Defendant's trial attorney made a reasonable decision not to pursue Brown and Jerome Hailey's testimony. In *Strickland v Washington,* 466 U.S. 668, 690-01, 104 S.Ct. 2052, 2066, 80 L.Ed 2d 674 (1984), the United States Supreme Court opined that "strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment."[118]

Here, defendant and his attorney discussed trial strategy regarding what witnesses would be called.[119] Although defendant claimed that his brother and Brown had committed the carjacking, he never suggested calling either one as a witness.[120] Ms. Rand was in contact with

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[116] HIII 6.

[117] HIII 6.

[118] Strickland at 690-01.

[119] HII 8.

[120] HII 8.

the Hailey brothers' parents and neither one of them suggested that Jerome might testify for Arthur nor did they ask her to investigate that possibility.[121]

Moreover, Attorney Rand having practiced criminal law for eight years, said she would advise any client in Devaughn Brown or Jerome Hailey' position not to further incriminate himself, especially when similarly related charges were pending.[122] Similarly, Jerome's attorney (Richard Powers) testified that he had never in eighteen years had a client indicate a willingness to take a rap for someone else, would have advised any such client not to do so.[123] It was not unreasonable to pursue this avenue of investigation.

Defendant cites no binding authority for the proposition that Ms. Rand's actions were objectively unreasonable, the precedent he does rely upon is markedly distinguishable. In the unpublished case of *People v Patterson,* [124]the witnesses counsel did not investigate had little to lose by saying that the defendant wasn't the only one in the house with access to the computer on which child porn was discovered.

The defendant there did not allege that particular individuals had put the images on the computer and not him, or claim that they would have admitted it on the stand. Thus, while in *Patterson* it was unreasonable for counsel to "guess" that the witnesses would have taken the Fifth without actually talking to them, in this case the witnesses' silence was a near certainty in light of the pending charges against them, and considering the fact Jerome knew Arthur was facing these charges and yet did not volunteer to help him.

The Prosecution cites *People v Dendel*, 481 Mich 114, 748 NW2d 859 (2008) in support of its' argument that claim that the trial court is not only allowed but required to make credibility determinations in a *Ginther* hearing. However as noted by the Defendant in his supplemental brief, *Dendel* was an appeal from a bench trial. Because the same judge was the fact-finder throughout all of the proceedings the Supreme Court found held that the trial court could make a determination about the credibility of the witness which trial counsel failed to present.

The case at bar was tried before a jury, and this Court without making a determination regarding the credibility of the witnesses *assuming arguendo* that Brown and Jerome Hailey's testimony had been presented at trial, the burden of demonstrating a reasonable probability that but for the alleged ineffective assistance of counsel the outcome of the trial would have been different has not been met.[125]

To begin with, defendant's girlfriend testified on July 20, 2006 at an investigative subpoena hearing that he rented his Mac-11 out to Jerome Hailey, Devaughn Brown, and Katrell to commit crimes, and they gave him money and filled up the car with gas in return. Carissa Wilson, who is Jerome Hailey's girlfriend, testified similarly.

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[121] HII 9.

[122] HII 8-11.

[123] HII 15-16.

[124] HI 60.

[125] *People v Carbin*, 463 Mich. 590, 599-600 (2001). 11

Defendant also conceded in his statement to the police and in his investigative subpoena testimony that Devaughn and Jerome put gas in his (Arthur's) car using the stolen credit cards and told him they would get him a new car. The record is replete with testimony which supports the jury's verdict that Defendant Arthur Hailey is guilty of the crimes charged.

CONCLUSION

The decision to call certain witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *Id.* In this case, defendant cannot make the requisite showing with regard to the witnesses at issue.

Defendant maintains his innocence and states that the evidence weighs in favor of a new trial. However for the reasons stated this Court finds that counsel was not ineffective and accordingly the motion for new trial based on newly discovered evidence is hereby DENIED.

DATED: APR 29 2009

CIRCUIT COURT JUDGE

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

UNPUBLISHED
December 17, 2009

No. 276423
Wayne Circuit Court
LC No. 06-008941-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

No. 276904
Wayne Circuit Court
LC No. 06-008939-01

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

In Docket No. 276423, defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 10 to 25 years' imprisonment for the carjacking and armed robbery convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

In Docket No. 276904, defendant appeals as of right his jury trial convictions of receiving and concealing a stolen firearm, MCL 750.525b, two counts of receiving and concealing a stolen motor vehicle, MCL 750.535(7), and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to nine months to ten years' imprisonment for the receiving and concealing a stolen firearm conviction, and nine months to five years' imprisonment for each of the two receiving and concealing a stolen vehicle convictions and the carrying a concealed weapon conviction. We affirm.

In Docket No. 276423, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to interview or question two witnesses, Devaughn Brown and Jerome Hailey (defendant's brother). We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court "must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* A trial court's factual findings are clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008). Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, *supra* at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's argument fails for two reasons. First, trial counsel's actions did not fall below an objective standard of reasonableness under prevailing professional norms. Counsel is permitted to make – and must make – reasoned decisions about when further investigation into certain areas would be a waste of valuable time. *Rompill v Beard*, 545 US 374, 383; 125 S Ct 2456; 162 L Ed 2d 360 (2005). In *Bigelow v Williams*, 367 F3d 562, 570 (CA 6, 2004), the Sixth Circuit set forth the standards to apply in a case like the present one:

> Judicial review of the lawyer's performance must be "highly deferential," and "indulge a strong presumption" that a lawyer's conduct in discharging his duties "falls within the wide range of reasonable professional assistance," since reasonable lawyers may disagree on the appropriate strategy for defending a client. [*Strickland*, 466 US at 689]. While "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable[,][ ] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91; see also *O'Hara v Wigginton*, 24 F 3d 823, 828 (CA 6, 1994) ("[A] failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted."); cf. ABA Standards for Criminal Justice 4-4.1(a) (3d ed 1993) ("Defense counsel should conduct a prompt investigation of the

circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

Trial counsel admitted at the evidentiary hearing that she did not talk to Devaughn and Jerome because, in her professional opinion, they never would have confessed at defendant's trial. In fact, trial counsel testified that she had been practicing criminal law for eight years and never heard of such a thing happening. Trial counsel explained that she made this determination after (1) having knowledge that Devaughn and Jerome were *facing* other carjacking and robbery charges,[1] (2) talking and listening to defendant, and (3) talking and listening to defendant's (and consequently Jerome's) mother and father. No one at any time mentioned that Devaughn or Jerome were willing to testify, and of course by the time trial commenced, trial counsel was aware that neither witness came forward to exonerate defendant. Additionally, regarding prevailing professional norms, Jerome's defense counsel at the time testified at the evidentiary hearing that in his 18 years of experience, he never had heard of anyone, while facing similar charges themselves, confessing in open court at someone else's trial.[2] Therefore, defendant has failed to overcome his heavy burden of showing how his trial counsel's actions fell below an objective standard of reasonableness under prevailing professional norms.

The disagreement between our opinion and that of our dissenting colleague comes down to whether it is a reasoned professional judgment for an attorney to conclude that a prospective witness will not testify at trial that he committed the crime for which defendant is being prosecuted, and to therefore not contact that witness. Our dissenting colleague opines that trial counsel did not exercise reasonable professional judgment in deciding not to contact the two witnesses, particularly because those witnesses were defendant's brother and cousin. Although we certainly understand the reasoning of our dissenting colleague, we believe that the dissenting opinion does not give sufficient weight to the extremely high deference given to decisions like this one and ignores the circumstances existing at the time the decision was made.

In reaching our conclusion, we have kept in the forefront the principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." *Strickland*, 466 US at 689 (emphasis added). Moreover, as the *Strickland* Court repeatedly emphasized, review of ineffective assistance of counsel claims must avoid "intensive scrutiny of counsel," and to do so we must apply "a heavy measure of deference to counsel's judgments." *Id.* at 690-691.

With these principles in mind, we cannot help but conclude that counsel's decision to not contact the two witnesses because of the highly unlikely scenario that they would confess to the

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[1] The fact that both Devaughn and Jerome had pending carjacking cases against them, a fact that counsel knew, sets this case apart from the otherwise nonbinding decision relied upon by defendant, *People v Patterson*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2008 (Docket No. 273937).

[2] After the evidentiary hearing, the trial court found that it was doubtful that either witness would have testified at defendant's trial.

crime in open court, did not fall "outside the wide range of professional competent assistance." *Id.* at 690. Indeed, and although in unpublished opinions, while addressing an ineffective assistance of counsel claim both the Sixth Circuit and a federal district court have recognized that it is highly doubtful that an individual will incriminate himself just to provide a defense to the defendant. For instance, in *Goldsby v United States*, 152 Fed Appx 431 (CA 6, 2005), the Sixth Circuit held:

> It is highly unlikely that the testimony of Ms. Batchler would have aided Goldsby. *In order to provide helpful testimony, Ms. Batchler would have had to incriminate herself, an improbable scenario.* It is far more likely that Ms. Batchler would have supported the Government's contention, that the drugs were Goldsby's. Thus, calling Ms. Batchler as a witness would have in all likelihood have been positively harmful to Goldsby's case. In addition, the circumstances of the encounter with the police made it unlikely she could have planted the drugs, as she was under surveillance while the police dealt with Goldsby. *Given these facts, and the reasonable deference given to counsel's judgment, it was a reasonable decision to forego an investigation of Ms. Batchler, and spend the time on more promising avenues of investigation.* [Emphasis added; citation omitted.]

See, also, *Culbreath v Bennett*, unpublished opinion of the United States District Court for the Western District of New York, issued August 11, 2004 (Docket No. 01-CV-6337) (the court found defendant's argument that a witness would have had no fear of self-incrimination if called to testify to be "highly doubtful").

It bears repeating that at the time of trial, counsel relied on defendant's information as well as that from his parents in formulating a defense. See *Strickland*, 466 US at 691 (recognizing that defense counsel properly relies on, and makes informed strategic decisions based upon, the defendant's information). Trial counsel therefore relied on her experience as well as the information supplied by defendant to conclude that the defense of "I didn't do it, but my brother and cousin may have" could be presented, but that it was not worth the time and effort to contact potential witnesses who in all likelihood would not come forward and exculpate defendant by incriminating themselves.

Furthermore, the trial court's rejection of Devaughn and Jerome's after-the-fact testimony that they would have testified if asked was not clearly erroneous. Any objective view of the evidence supports the trial court's conclusion. Devaughn and Jerome had virtually nothing to lose in taking responsibility for the carjacking at the time of the evidentiary hearing since they were already serving lengthy prison sentences. Jerome also denied that a hand-written letter that was attributed to him, which confessed to the carjacking, was actually his.

Second, defendant cannot establish that there is a reasonable probability that there would have been a different outcome at trial had counsel contacted Devaughn or Jerome. *Davenport*, 280 Mich App at 468. For one, the failure to call these witnesses did not deprive defendant of a substantial defense, *People v Dixon*, 263 Mich App 393, 398 (opinion by Cooper, J.); 688 NW2d 308 (2004), which significantly weighs against a finding of ineffective assistance, *People v Dendel*, 481 Mich 114, 125, 125 n 10; 748 NW2d 859 (2008). Accord *Strickland*, 466 US 693 ("Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the

defendant must show that they actually had an adverse effect on the defense."). Here, defendant testified on his own behalf at trial and put forth the defense that it was Devaughn and Jerome who carjacked the Jeep. Defendant testified that Devaughn and Jerome showed up at defendant's house near midnight one night, presumably the night of the carjacking, with a blue Jeep and tried to unload musical equipment. Since the defense of Devaughn and Jerome being the actual carjackers was actually raised at trial, defendant was not deprived of a substantial defense. See *Dixon*, 263 Mich App at 398 (the defendant's defense of consent in a CSC case was actually raised at trial, so the fact that a witness was not called that could have contributed to this defense was insufficient to prevail). And, at trial defendant was identified by both victims as the perpetrator, and when defendant was arrested, one of the stolen vehicles was present at the scene. The trial court's decision that defendant was not denied the effective assistance of counsel was correct.

In Docket No. 276904, defendant argues that his trial counsel was constitutionally deficient because she did not move to suppress evidence of two guns and stolen car parts found on defendant's vehicle. We disagree.

As noted before, effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Defendant has failed to overcome this burden. Defendant argues that the search was an invalid inventory search. However, there is nothing on the record to show what standard procedures and policies were in place at the Detroit Police Department for an inventory search. Therefore, it is impossible to conclude that any policies were not adhered to.

Moreover, another well-established exception to requiring a warrant for a search such as this is the "automobile" exception. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). As long as the police have probable cause of finding evidence, a warrantless search of a readily mobile automobile is permitted. *Id.* at 418-419. So, even if an inventory search policy was not followed, probable cause supported the search of defendant's vehicle for the fruits of the carjackings where defendant was involved in the carjackings and his own vehicle was parked in the police impound lot. Furthermore, after July 3, 2006, when defendant's vehicle was impounded, the carjackers were not seen using the MAC-11 gun anymore. Therefore, the police could have suspected that the gun was located in defendant's vehicle. Since counsel's failure to make a meritless objection does not constitute ineffective assistance of counsel, *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995), defendant's counsel was not ineffective for failing to object to the admission of the items found pursuant to the search.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

UNPUBLISHED
December 17, 2009

No. 276423
Wayne Circuit Court
LC No. 06-008941-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

No. 276904
Wayne Circuit Court
LC No. 06-008939-01

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

M. J. Kelly, J. (*concurring in part and dissenting in part*).

Although I do not join their analysis, I concur with the majority's decision to affirm in docket no. 276904. However, in docket no. 276423, I conclude that defendant's trial counsel's failure to properly investigate defendant's allegation that his brother and cousin were the perpetrators of the carjacking at issue fell below an objective standard of reasonableness. Because I also conclude that this failure prejudiced defendant's trial, I would reverse defendant's convictions and sentences in docket no. 276423. For that reason, I must respectfully dissent from the majority's decision to affirm in docket no. 276423.

When evaluating a claim of ineffective assistance of counsel, Michigan courts must apply the standard established by the Supreme Court of the United States in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). In order to establish ineffective assistance of counsel warranting reversal, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 US at 687-688, 694.

The charges at issue in docket no. 276423 arose out of a robbery and carjacking by two men at a gas station. After robbing the victim at gunpoint, the perpetrators stole the victim's blue Jeep Cherokee, which was filled with musical instruments. After the police arrested defendant for the robbery and carjacking, defendant told them that his brother, Jerome Hailey (Hailey), and his cousin, Devaughn Brown, might have been the persons who committed the robbery and carjacking. A police officer recorded defendant's statement in a report, which was later provided to defendant's trial counsel. Despite this information, defendant's trial counsel did not try to contact Hailey or Brown before defendant's trial and did not ask defendant whether Hailey and Brown would be willing to testify on his behalf.

At trial, defendant denied that he was involved in the carjacking and robbery at issue. He stated that, although he did not remember what he was doing on the night at issue, he did recall a summer night when Hailey and Brown arrived at his home in a blue Jeep Cherokee around midnight. Defendant testified that Hailey and Brown tried to unload musical instruments from the Jeep, but that defendant's mother would not allow it and told them to leave. Defendant's trial counsel did not call Hailey or Brown as witnesses to corroborate defendant's testimony.

After defendant's conviction, the trial court granted defendant's motion for an evidentiary hearing to determine whether defendant's trial counsel provided defendant with effective assistance. At the hearing, both Hailey and Brown testified that they were currently serving prison sentences for carjackings and robberies that they committed together. They also stated that they were the persons who carjacked the Jeep at issue in defendant's trial and that defendant was not involved. They both also testified that they would have agreed to testify to these facts at defendant's trial had they been called. Finally, defendant's mother testified that she remembered a summer night when Hailey and Brown arrived at her house with a blue Jeep Cherokee and wanted to unload musical instruments, but that she ordered them away.

Defendant's trial counsel also testified at the hearing. She admitted that she never tried to contact Hailey or Brown despite knowing that defendant claimed that they committed the crimes at issue. She explained that she did not try to contact them because she knew that Hailey and Brown were facing separate carjacking and robbery charges and, on the basis of her eight years of experience in criminal defense, she did not believe that they would have confessed. She further stated that neither defendant nor his parents told her that Hailey or Brown would testify on defendant's behalf.

In *Strickland*, the Supreme Court of the United States explained that a defendant's trial counsel has a duty to make decisions concerning trial strategy only after reasonable investigations concerning the relevant law and facts:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland*, 466 US at 690-691.]

In this case, defendant's trial counsel's decision not to call Hailey or Brown as witnesses was not based on a reasonable investigation or reasonable professional judgment that supported the decision not to investigate. Defendant's trial counsel made the decision not to investigate in part on the basis of her experience that others do not typically confess to crimes. However, this was not by any measure a typical situation; the persons implicated were defendant's brother and cousin, and, they may very well have been willing to confess in order to clear defendant. Likewise, this was not a case where the witnesses were unknown or difficult to contact. Defendant's trial counsel had ready access to both Hailey and Brown. Yet she made absolutely no effort to contact them and ascertain whether they would testify on defendant's behalf. Indeed, defendant's trial counsel did not even ask her *own client* whether he thought his brother or cousin would be willing to testify. For this reason, I must conclude that defendant's trial counsel's decision not to call Hailey and Brown as witnesses fell below an objective standard of reasonableness under prevailing professional norms.

There is also a reasonable probability that, had defendant's trial counsel made a rudimentary investigation, she would have been able to call either Hailey or Brown at defendant's trial and elicited testimony that would have corroborated defendant's testimony. Even if a trial counsel's error is professionally unreasonable, it will not warrant reversal if it had no effect on the judgment. *Strickland*, 466 US at 691. Although a defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case, the defendant must show that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Id.* at 693-694. Thus, reversal will be warranted where "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

After holding the evidentiary hearing, the trial court did not explicitly find that Hailey and Brown would not have testified; rather, it determined that, even if they had testified, it was not reasonably probable that the testimony would have altered the verdict.[1] I cannot agree. Although the jury would have been free to disregard Hailey's and Brown's testimony as incredible, I cannot conceive of testimony more compelling than an admission of guilt by third parties, who were also willing to testify that defendant had no involvement in the crimes. Further, defendant's trial counsel could have established that defendant had implicated his brother and cousin from the moment of his arrest. This fact, along with defendant's testimony, would have lent considerable weight to an admission by either Hailey or Brown or both. Given the weaknesses inherent in the prosecution's case, I must conclude that there was a reasonable probability that the jury would have had a reasonable doubt respecting defendant's guilt. *Id.* at 695.

Finally, I do not agree that defendant necessarily cannot show prejudice because he was afforded the opportunity to implicate Hailey and Brown during his testimony. Although this Court has stated that a defendant who claims ineffective assistance of counsel premised on a

[1] The trial court did state that it was doubtful that they would have testified on defendant's behalf. However, this is not a finding that resolves a factual question; the term doubtful leaves open the possibility that they might have testified.

failure to call witnesses must show that he was deprived of a substantial defense as a result of the failure, see *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004),[2] this rule does not trump the prejudice prong set in *Strickland*. This Court must apply the standard set in *Strickland*, see *Hoag*, 460 Mich at 5; and *Strickland* does not provide such a bright-line rule for determining prejudice. See *Strickland*, 466 US at 696 (noting that there are no mechanical rules for determining whether there was ineffective assistance warranting relief and stating that the ultimate focus of the inquiry in every case must be on the fundamental fairness of the proceeding). In any event, the requirement that a defendant show that he was deprived of a substantial defense merely recognizes that the defendant has the burden to prove prejudice consistent with *Strickland* and that the failure to call a witness will normally not meet that standard absent a showing that the defendant was deprived of a substantial defense. In this case, defendant had the opportunity to deny participating in the crimes at issue and to implicate his brother and cousin, but this testimony standing alone was not particularly "substantial." Had Hailey or Brown testified that they were the perpetrators of the charged crimes and that defendant had no involvement, there is a reasonable probability that defendant's otherwise meager defense would have prevailed. See, e.g., *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996) (holding that the defendant was deprived of the effective assistance of counsel where the defendant's trial counsel unreasonably failed to call additional witnesses who could have testified that the defendant did not shoot the victim even though one witness did testify to that effect at trial).

Defendant demonstrated that his trial counsel's decision not to call Hailey or Brown as defense witnesses under the circumstances fell below an objective standard of reasonableness under prevailing professional norms and that there was a reasonable probability that this error altered the outcome of his trial. For that reason, I would reverse in docket no. 276423.

/s/ Michael J. Kelly

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[2] Many of the cases citing this proposition—including *Dixon*—trace their origins to *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985), which cited *People v Armstrong*, 124 Mich App 766, 771-772; 335 NW2d 687 (1983) for the proposition that a defendant must show that the failure to call a witness deprived the defendant of a substantial defense. However, in *Armstrong*, which predated the release of *Strickland*, this Court determined that the defendant failed to establish that his counsel was ineffective for failing to pursue an alibi defense because the defendant failed to present evidence that his trial counsel was aware of his claim of alibi and failed to present evidence that there were alibi witnesses who would have testified on his behalf. *Armstrong*, 124 Mich App at 771-772. The Court in *Armstrong* did not establish a bright-line rule that defendants who are afforded some opportunity to present a particular defense are necessarily incapable of showing that the failure to present additional evidence in support of that defense—including witness testimony—constitutes ineffective assistance of counsel.

APPENDIX C

Order

D. BAKER
J1653
J1671

Michigan Supreme Court
Lansing, Michigan

June 11, 2010

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

140514-5

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 140514-5
COA: 276423; 276904
Wayne CC: 06-008941-01
06-008939-01

ARTHUR RONALD HAILEY, III,
Defendant-Appellant.

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On order of the Court, the application for leave to appeal the December 17, 2009 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed whether trial counsel was ineffective for any of the reasons asserted by the defendant.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

0608

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 11, 2010

Clerk

APPENDIX D

24842, 43 LVG-SAD
DWB

Order

Michigan Supreme Court
Lansing, Michigan

January 28, 2011

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

140514-5

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 140514-5
COA: 276423; 276904
Wayne CC: 06-008941-01
06-008939-01

ARTHUR RONALD HAILEY III,
Defendant-Appellant.

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On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE our order of June 11, 2010. The application for leave to appeal the December 17, 2009 judgment of the Court of Appeals is DENIED, because we are no longer persuaded that the questions presented should be reviewed by this Court.

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I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 28, 2011

Corbin R. Davis
Clerk