

CASE NO. 10-1198

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

REGINALD WALKER

Petitioner-Appellant

-vs-

GREG McQUIGGAN, Warden,

Respondent-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Avern Cohn

BRIEF FOR PETITIONER-APPELLANT

STATE APPELLATE DEFENDER OFFICE

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioner-Appellant Reginald Walker hereby requests that this Court grant oral argument in this matter. Oral arguments are necessary to resolve any questions the Court may have regarding the complex facts and issues in the case, and to allow Petitioner to more fully develop the relief he is requesting herein.

STATEMENT OF JURISDICTION

Petitioner Reginald Walker filed a timely writ for habeas corpus on December 21, 2006. The district court had subject matter jurisdiction over this habeas corpus case through its federal question jurisdiction, 28 U.S.C. §§ 1331, 1343, 2201, and 2202. This action was brought under 28 U.S.C. § 2254, and alleged that the state is confining Mr. Walker in violation of his federal constitutional rights.

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, which provides jurisdiction for appeals from final decisions of district courts, and under 28 U.S.C. § 2253, which specifically provides that a district court's final order in a habeas corpus proceeding is subject to appellate review by the court of appeals for that circuit.

The district court entered final Judgment and an Opinion and Order denying Mr. Walker's petition for writ of habeas corpus on January 14, 2010. Mr. Walker filed a timely Notice of Appeal on February 11, 2010. The district court granted a Certificate of Appealability on February 18, 2010, allowing Mr. Walker to raise the issue argued herein.

STATEMENT OF ISSUE PRESENTED

- I. THE STATE COURT UNREASONABLY APPLIED FEDERAL LAW IN FINDING THAT MR. WALKER WAS NOT PREJUDICED BY TRIAL COUNSEL'S OBJECTIVELY UNREASONABLE FAILURE TO RAISE AN INSANITY DEFENSE.**

STATEMENT OF THE CASE AND RELEVANT FACTS

On March 1, 2001, a Wayne County jury convicted petitioner Reginald Walker of first degree murder, MCL 750.316, and possession of a firearm in the commission of a felony, MCL 750.227b, before Circuit Judge Kym L. Worthy. Record Entry (“RE”) No. 10, #16, Trial Transcript 03/01/01, pp. 45-46. On March 19, 2001, Judge Worthy sentenced Mr. Walker to life imprisonment for first degree murder plus two years consecutive imprisonment for felony firearm. RE No. 10, #17-18, Sentencing Transcript 03/19/01, pp. 10-11.

Mr. Walker appealed as of right, raising one constitutional challenge, the denial of his constitutional right to effective assistance of counsel for failing to investigate and present the defense of insanity. RE No. 11, #5-6, Appellant’s Brief on Appeal.

On January 3, 2003, the Michigan Court of Appeals held that trial counsel made an objectively unreasonable, non-strategic mistake in failing to properly investigate and raise an insanity defense. The Court of Appeals found that “trial counsel’s decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant’s testimony, was objectively unreasonable.” RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. The Court of Appeals remanded for an evidentiary hearing on the

remaining question of prejudice. RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, pp. 3-4.

After a five day hearing on the question of prejudice, Judge Worthy concluded that no prejudice existed because trial counsel had not made any mistake. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 9; RE No. 11, #4, Evidentiary Hearing Transcript 06/04/03, p. 26. On March 22, 2005, the Court of Appeals affirmed the trial court's findings that Mr. Walker failed to establish the required level of prejudice. RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3.

Petitioner then filed a timely application for leave to appeal to the Michigan Supreme Court, raising the same federal constitutional claim made in the Court of Appeals. On September 28, 2005, the Michigan Supreme Court denied leave to appeal without analysis. RE No. 11, #9, Michigan Supreme Court Order, 128669.

Petitioner applied for a writ of habeas corpus on the grounds that the state court made an unreasonable application of federal law in finding no prejudice. On November 13, 2009, Magistrate Judge Paul Komives issued a report and recommendation to deny the petition. RE No. 14, Report and Recommendation. On January 14, 2010, the United States District Court, by the Honorable Avern Cohn adopted the report and recommendation and denied the petition. RE No. 17, Order

Adopting Report and Recommendation. The District Court found that the state court's decision on prejudice was not an unreasonable application of federal law.

The District Court granted Mr. Walker a certificate of appealability on this single issue of "whether the state court's determination that Petitioner was not prejudiced by counsel's failure to raise the defense of insanity was an unreasonable application of federal law." RE No. 24, Order Granting Motion for Certificate of Appealability.

Factual Background

Reginald Walker was convicted of first degree murder for the shooting death of Larry Troup on April 11, 2000. It was undisputed that Troup died as a result of multiple gunshot wounds and that the manner of death was homicide. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 15. Troup suffered two gunshots, one to the back of the head and one to the left upper arm that re-entered his chest wall on the left side. Two bullets were recovered from the body, one of them found in the upper right of Troup's neck, 1" below the earlobe. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 12-13, 122. Troup also had abrasions to his forehead consistent with having fallen to the ground. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 15. The gunshots were not close range, having been fired from more than 12" away, but the pathologist could not say which wound was caused first or how Troup and the

shooter were oriented relative to each other at the time of the shooting. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 18-19, 24.

Ron Yaldo testified that on April 11, 2000, he was working at Sam's Drugs at 14200 Fenkell in Detroit. Yaldo knew Mr. Walker as "Quick," testifying that he was a regular customer of the store. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 29, 39. At about 12:10 a.m., Yaldo was behind the counter when two young men came into the store and made a purchase. One of them then decided to purchase something else. As the two men were discussing whether to make another purchase, they backed up and one of them bumped into Mr. Walker, who had come into the store and was behind them. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 28-30. One of the men said, "excuse me," or "watch out," to which Mr. Walker replied, "What do you mean, 'excuse me'?" As the two walked away to add something to their purchase, one of them said, "Hey, let's just go. . . It's not that serious." RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 29, 31-32, 47. Mr. Walker then paused, paid Yaldo, turned to walk out with his items and paused again. Mr. Walker then pulled a gun from under his brown and white Pelle Pelle jacket and fired what sounded like two shots, killing one of the other two men, who were ten to twelve feet away at the time. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 31-32. Yaldo then heard a clip fall to the ground, at which point Mr. Walker picked it up, put it in

his pocket and walked out of the store. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 33-34.

Yaldo did not know whether the other two men had a gun, but he did not see any other guns in the area other than his own behind the counter. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 45-46, 58. Once Mr. Walker left, Yaldo locked the store and called 911. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 49, 56. The decedent's companion, Walter Gaiter, started going crazy, trying to take Yaldo's gun and chase Walker. Yaldo refused and wrestled with him, as Gaiter kept trying to take the gun. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 34, 49, 58. Gaiter did not leave the store until police came. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 58.

Walter Gaiter and Larry Troup had gone to the store to get beer. Neither man knew Yaldo or Mr. Walker. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 80-81. Gaiter testified that after he paid for the beer, he leaned back into Mr. Walker, then apologized, after which Mr. Walker told him he did not like being touched. Gaiter and Troup giggled at that and continued on with their decision about what else to drink. They took a couple of steps, then Gaiter heard Mr. Walker say again that he did not like to be touched. Mr. Walker then turned around quickly with what looked like an automatic handgun and fired three or four shots. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 82-83, 89. The only time Gaiter saw Mr. Walker with his

hands outside of his pockets was with a gun in his hand. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 97.

When he first heard the shots, Gaiter went behind an aisle. At some point, he returned. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 102. He turned over his friend's body and prayed. Gaiter testified that neither he nor Troup had a gun that night, but that he wanted one after his friend was shot. Gaiter tried to get a gun from the man behind the counter, who would not give him one, and who instead locked the store. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 84-85.

Police arrived at the scene at about 12:20 a.m. and found Gaiter, Yaldo, and Gary Rayford in the store. The decedent was lying on his back with a substantial amount of blood on the floor around him. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 66, 111; #14-15, Trial Transcript 02/28/01, p. 37. Police found two shell casings as well as two live rounds, all of which were similar to .22 caliber rounds and were marked with a "C". RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 110, 121-122. They did not find any guns near the decedent. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 67, 113; #14-15, Trial Transcript 02/28/01, p. 39.

Based on information they received at the store, police went to 15717 Strathmore (because they believed Mr. Walker lived there) and spoke with Sharon Bass. Based on information they received from her, they went two houses down. Officer Raphael Clements described the home as shabby, with an unkempt yard and

broken windows. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 69-70, 113; #14-15, Trial Transcript 02/28/01, pp. 39-41. Officers described the residence as an abandoned house, unsecured from the rear, with broken windows and nonfunctional plumbing, though electricity was wired from another house with extension cords. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 41, 63. Inside, the house appeared to be ransacked, with cabinets missing, dirty mattresses and old clothing on the floor, plumbing hanging out of the walls, and no running water. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 48-49, 60. Officer Donald Rem noted that at first the residence, 15707 Strathmore, appeared to be unoccupied, but it turned out that someone was living there. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 124. Officer Anthony Lyons also testified that the house appeared vacant, and from the outside the lights seemed to be off, but lights were on inside the house. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 29-30.

Inside, police found Mr. Walker with one Dionne McKissack and arrested them both. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 72; #14-15, Trial Transcript 02/28/01, p. 31. Mr. Walker was wearing a tan and blue leather Pelle Pelle coat. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 60-61. Police seized a pair of Nike Air sneakers with blood spots from Mr. Walker. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 135. In the bathroom, officers found a handgun in a hole in the wall. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 128. The gun was

a black .22 automatic with a “C” on the bottom of the handle and 13 rounds in the magazine. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 131. Clements did not notice any blood trail inside the house or any injury to Mr. Walker’s hand. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 73, 78. Officer Rem noted blood droplets fifteen to twenty feet from the bathroom. RE No. 10, #12-13, Trial Transcript 02/27/01, p. 130.

The firearms examiner testified that the two live rounds from the scene and the two casings found at the scene were classified as “.22-caliber long rifle,” while the two bullets found inside the decedent were “.22-caliber.” He further testified that the bullets recovered from the decedent were fired from the weapon recovered from Mr. Walker, based on the “lands and grooves” found in the bullets and those found in bullets he test-fired from the weapon. The unfired shells were caliber-compatible with the weapon. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 8-10. He also noted that the “C” head stamp was not an unusual designation, nor was a .22-caliber bullet an unusual caliber. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 11. The weapon itself would normally hold fifteen rounds, plus one in the chamber, but was able to hold four extra rounds because it was broken. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 12-13.

Officer William Niarhos performed a gunshot residue test on Mr. Walker at about 4:05 a.m. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 21-22. The

results of that test were inconclusive, but one unique gunshot residue particle was found on his forehead. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 56-57. Niarhos indicated that one usually does not get good results from .22 firings because .22-caliber bullets do not contain all the components used by most types of gunpowder. He also indicated that powder could also be removed by washing one's hands or rubbing one's clothing. He did not believe he tested Mr. Walker's clothing because it was contaminated with blood. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 22-25. Niarhos also noted that Mr. Walker had minor bleeding to his right hand. However, he could only speculate as to the causes, indicating it was possibly consistent with a bullet grazing the hand, or with other causes such as hitting something with a fist or suffering a fall. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 25, 27-28.

Sharon Bass testified as a defense witness that she lived at 15717 Strathmore and that Barbara Jones stays two doors down from her. Jones was in the process of moving out, but her place was not vacant. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 81. Bass did not tell police where Mr. Walker might be when they spoke with her in April. The police only asked when was the last time she had seen him, which was 3:00 p.m. She testified that Mr. Walker was a close family friend and would sometimes be found visiting Barbara Jones. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 79-80. At the time police visited Jones' house, Jones was in

drug rehabilitation so was not there, though her boyfriend would be in and out from time to time. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 81-82.

46-year-old Reginald Walker testified that he did not intend to kill anyone that night. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 96. He had gone to Sam's Drugs to buy liquor and cigarettes. During the late afternoon and evening before going to the store, he had consumed two forty-ounce beers and a significant quantity of vodka. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 86-87. He was very skeptical about the neighborhood and believed it dangerous because of the high rate of crime and violence in the area. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 88. In the store, he stood in line behind Gaiter as Troup inquired of Yaldo about some CD players on the wall and the two moved down to another register. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 89-90. Mr. Walker testified that Gaiter put his arm around Mr. Walker, who had about \$1500 worth of jewelry on, and said, "That's some nice jewelry you got on, man, old man." RE No. 10, #14-15, Trial Transcript 02/28/01, p. 91. Gaiter had his hand in his pocket. Mr. Walker described Gaiter as commenting about Mr. Walker being drunk, then telling him, "Don't you know that as old as you are, you could get stuck up, man? I could rob you for that." RE No. 10, #14-15, Trial Transcript 02/28/01, p. 92. According to Mr. Walker, Gaiter was trying to get him to move over into one of the aisles, and Mr. Walker was just trying to get his arm off his neck. Troup started to return and Yaldo turned to put

the merchandise away behind the counter. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 92-93.

According to Mr. Walker, the following then took place. Troup pulled up his shirt and said, “You heard what he said, old man. Go on and step over there, and don’t try to run,” showing him a pistol in his belt. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 93-94. That is when the bumping incident occurred, as Troup bumped Mr. Walker as he walked past him. At that, Mr. Walker pulled his pistol from his waist area. As he did so, Gaiter yelled, “He got a gun, man,” pulled out a gun and shot Walker, hitting him in the hand. Having his hand on the trigger, Walker’s gun went off. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 94-95. Troup was crouching down making a motion to get his gun. When Walker’s clip fell out of the gun, he picked it up and just walked out – he did not know Troup was shot. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 96. Mr. Walker admitted having lied to police by giving them aliases on three different occasions. RE No. 10, #14-15, Trial Transcript 02/28/01, p. 105. The jury convicted Mr. Walker as charged. RE No. 10, #16, Trial Transcript 03/01/01, pp. 45-46.

Evidentiary Hearing

On the first day of the post-conviction hearing, the defense expert, Dr. Stephen Miller, Ph.D., L.P., was qualified without objection as an expert in the field of psychological assessment to determine criminal responsibility, diminished capacity,

and intoxication. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 14, 16, 20. He related Mr. Walker's mental health history, as documented in voluminous records, as follows:

Mr. Walker's first contact with mental health professionals was at the age of 16, at the time of his father's death, and lasted for three or four years – during which he also developed a substance abuse problem. In 1983 he was diagnosed with severe depression and mental confusion, including hallucinations. “In other words, in every admission to the hospital from 1983 up through and including his admission to the Wayne County Jail and the records that I have obtained. . . indicate that he had a schizophrenic type of diagnosis.” RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 20-21.

Both the prosecution and defense experts agreed that Mr. Walker had been in at least ten hospitals or treatment facilities over the last thirty years and had received numerous diagnoses for schizophrenic type disorders. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 21; RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 39-41, 44. He had been prescribed antipsychotic medications since 1983. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 21-22. He was on Social Security Disability for mental illness and had made about seven suicide attempts. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 41.

Dr. Miller testified that Reginald Walker was mentally ill at the time of the offense here, and his diagnosis was Schizo-affective Disorder (a form of schizophrenia), with a bipolar component to it. The first time Mr. Walker had been given that particular diagnosis was in 1990 – before that, the diagnosis had been “schizophrenia, paranoid type,” an undifferentiated type of schizophrenia. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 23.

Both defense and prosecution experts agreed that Schizo-Affective Disorder is a psychotic type of disorder. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 24; RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 18. The delusional side of this disorder consisted, in Mr. Walker’s case, of hearing voices, including negative voices about what other people are trying to do to him. His symptoms included a generalized paranoia, which Dr. Miller termed “ideas of reference”: a sense that others were generally out to hurt him, as opposed to some fixed delusion (e.g., that the CIA in particular was out to get him). RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 25.

Mr. Walker would respond to these hallucinations, interacting with the voices. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 26. As such, Mr. Walker suffered from a disorder that significantly impaired his capacity to recognize reality and significantly impaired his judgment and behavior in other respects. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 26. As a result of that

mental illness, Mr. Walker lacked the substantial capacity to appreciate the nature and quality of his acts, lacked the substantial capacity to appreciate the wrongfulness of his conduct, and lacked the substantial capacity to conform his conduct to the requirements of the law. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 27.

In Dr. Miller's opinion, then, Mr. Walker was legally insane at the time of the offense. The extensive psychiatric history was relevant to that determination, and his assessment was supported by the fact that Mr. Walker had been involuntarily committed mere months before the instant offense. Dr. Miller described Mr. Walker as suffering from a settled condition of insanity. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 28.

Even though Mr. Walker was intoxicated at the time of the offense, he was still legally insane. The intoxication did not undermine Dr. Miller's opinion that Mr. Walker was not criminally responsible under the statute. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 42-43, 45-46; RE No. 1, Forensic Psychological Evaluation of Criminal Responsibility, Dr. Steven Miller, admitted into the post-conviction record and attached to initial habeas petition.

The prosecution's expert witness, Dr. Dexter Fields came to the contrary conclusion: that Mr. Walker was criminally responsible and not diminished in his ability to form the intent to commit the offense. In fact, Dr. Fields found that Mr.

Walker was not even mentally ill at the time of the incident. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 64; RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 48. His diagnosis of Mr. Walker was of an unspecified personality disorder with a history of substance abuse. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 15. He was aware of Mr. Walker's prior mental health hospitalizations, but they did not have much effect on his opinion. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 71. Dr. Fields had, however, himself judged Mr. Walker to be mentally ill in a prior case when referred for a criminal responsibility evaluation. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 44.

Dr. Fields also testified that Mr. Walker had been prescribed antipsychotic medications at the time of his interview, including Navane, an antipsychotic with serious and possibly irreversible side effects, which one would not just casually prescribe. A psychiatrist at the jail would have had to prescribe that medication for Mr. Walker. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 32-34. After Dr. Fields interviewed Mr. Walker at the jail, he recommended that Mr. Walker be continued on his medications. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 35.

According to Dr. Miller, Mr. Walker's overall compliance with his medication regime was poor. The records documented that, within six months to a year of being

prescribed medication, family members would indicate that he resisted taking his medications. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 22; Apx 29, RE 11, Evidentiary Hearing Transcript 04/25/03, p. 26. According to Dr. Fields, Mr. Walker told him he was taking medication at the time of the offense. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 68. He admitted, though, that the records consistently described Mr. Walker as not complying with his medication regime. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 49.

Dr. Fields acknowledged that in November 1999, Mr. Walker was involuntarily committed to Aurora Psychiatric Hospital by his mother, with the petition stating, “Not taking medication, not sleeping. He said he wants to kill himself. Drinking Vodka, using crack cocaine. Not eating. Talking to himself all day and all night.” RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 43. The records indicated, “The patient is a danger to self and others.” RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 43. He was discharged in December 1999, some four months before the instant offense. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 44.

Dr. Miller acknowledged that blackouts in general are typically caused by intoxication, rather than by the mental illness itself, and referred in his report to the possibility that Mr. Walker’s trial testimony was confabulated. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 31. Here, it was possible that Mr.

Walker, recalling only bits and pieces from an alcohol-related blackout, confabulated the rest to arrive at the set of facts to which he testified. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 32. Dr. Miller distinguished confabulation from malingering, in that malingering was a deliberate attempt to fake mental illness, while confabulation was filling in the blanks left by an incomplete memory of an event. Apx 20-21, RE 11, Evidentiary Hearing Transcript 04/25/03, pp. 17-18. It was quite possible that the particular version that Mr. Walker related was significantly influenced by misperception of reality brought on by his mental illness. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 33-35. Per Dr. Miller, “if you get the original premise wrong, you get the original facts wrong, then it carries on into other factors.” RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 36.

Dr. Miller provided a specific example of possible confabulation here: Mr. Walker had described an incident that took place several months prior to the instant offense, in which two individuals broke into his niece’s house and shot him in the hand. He could well have confused the source of his hand injury, resulting in the “memory” here that he was shot in the hand by the decedent. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 45-46. Dr. Miller described Mr. Walker as having very little insight into his mental illness – that he has been developing more over time, but certainly at the time of the offense he had very little,

consistent with the state of denial typically experienced by those who suffer from mental illness. Apx 9-10, RE 11, Evidentiary Hearing Transcript 04/25/03, pp. 6-7.

Dr. Miller testified that goal-directed behavior has very little weight in the calculus, as there were examples where the patient's actions seemed goal-directed, but it turned out that the patient's delusion was very involved in the behavior. For instance "goal-directed behavior" in response to little green men could still constitute legally insanity resulting from a condition of mental illness. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 39-40. It is important to distinguish between making assumptions from behavior and making a cognitive assessment of that behavior based on what the accused says and based on one's clinical findings. Here, while one could look at the defendant's leaving the scene as an acknowledgement of wrongdoing, Dr. Miller would not so conclude because Mr. Walker has cycled through the same confused mental processes many times in the past, and this had been documented before. Apx 35-36, RE 11, Evidentiary Hearing Transcript 04/25/03, pp. 32-33.

Dr. Fields agreed that one could exhibit goal-directed behavior but still be legally insane at the time. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 27-29. He agreed that one could engage in what appears to be goal-directed behavior, such as fleeing police and hiding a gun he was carrying, but still be suffering from delusions such that he lacked the substantial capacity to appreciate the

nature and quality of his acts. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 30-31. He specifically agreed that one could engage in some of the behaviors Mr. Walker did – specifically placing the gun into the wall and picking up the clip to remove it from the scene – and still be legally insane. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 17. Dr. Fields did not believe Mr. Walker was malingering during their interview. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, p. 15.

The trial attorney, William Winters, testified that he had been licensed as an attorney since 1983 and had handled over a thousand criminal cases. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 76. While he believed that it was the prior trial attorney who had requested the competency and criminal responsibility evaluations, Winters agreed that he thought insanity was a defense worth exploring, that he would have considered it anyway, that he told Mr. Walker he was considering it, and that he made an affirmative decision not to raise it. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 77-78, 84-89.

Mr. Winters was aware of Mr. Walker's mental health history and that he was hearing voices, but he was not sure if Mr. Walker told him he heard voices on the day in question. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 81, 100. He believed that Mr. Walker was mentally ill, and was aware that Dr. Fields had previously found him to be mentally ill. RE No. 11, #1, Evidentiary Hearing

Transcript 04/25/03, pp. 100-101. Although Dr. Fields' report found Mr. Walker criminally responsible, Winters did not seek an independent evaluation. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 79-80, 89. Winters admitted that there was no legitimate reason for not seeking such a second opinion. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 80, 89.

Winters discussed the insanity defense with Mr. Walker, but could not recall whether Mr. Walker agreed with his decision not to raise the defense at trial. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 80-81. He did testify, however, that Mr. Walker did not refuse to raise that defense. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 89.

Winters decided to pursue self-defense rather than an insanity defense at trial because he thought the insanity defense would fail and that the self-defense theory was more likely to succeed. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 84, 88. At the time he decided to abandon the insanity defense, he knew that there were no other witnesses who would support Mr. Walker's version of events. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 93. Yet, counsel's preference was that Mr. Walker would not testify at all. He told Mr. Walker as much and he did not even know if Mr. Walker would testify until immediately before his actual testimony at trial. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 90-91.

Winters was aware that of what Mr. Walker's anticipated testimony would be if he did testify, and it was consistent with what Mr. Walker had told him about being robbed by the two men in the store and fearing for his life. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 83. He specifically expected Mr. Walker to testify to the version of events to which he ultimately did testify. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 92-93. 96. At the time he decided to abandon the insanity defense, he knew that police would verify that no guns were found on Gaiter or the decedent or in the store – except for Yaldo's gun behind the counter – and that the store owner did not know witness Walter Gaiter. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 98. He also knew that Gaiter tried to get Yaldo's gun after the shooting so that he could chase Mr. Walker. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 96. Counsel realized that his theory would have to be that both men were lying and that he would also have to also discredit the police. RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 98, 106.

The trial court's findings and conclusions amounted to, in large part, a recitation of the testimony and arguments at the hearing. Judge Worthy opined that even had Winters obtained an independent report he would still have rejected the insanity defense. RE No. 11, #4, Evidentiary Hearing Transcript 06/04/03, p. 21. Although she made findings on prejudice, Judge Worthy's ultimate conclusion was

that trial counsel's error was not prejudicial because it was not an error at all, but a "sound, legal, strategic decision." RE No. 11, #4, Evidentiary Hearing Transcript 06/04/03, pp. 5, 19-28, 26.

In the opinion affirming the trial court, the Court of Appeals held that Mr. Walker failed to show counsel was ineffective because he failed to demonstrate that he had a colorable insanity defense. RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3. The Court of Appeals also found that Mr. Walker did not have a likely chance of acquittal and that counsel's decision to advance a claim of self-defense did not deprive him of a substantial defense. RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3.

SUMMARY OF ARGUMENT

Mr. Walker was denied the effective assistance of counsel where trial counsel failed to investigate and present an insanity defense. The Michigan Court of Appeals correctly found that counsel made an “objectively unreasonable” decision to present a frivolous self-defense claim rather than a potentially valid insanity defense. RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. At a trial court evidentiary hearing, a properly qualified defense expert presented his finding that Mr. Walker was legally insane at the time of the shooting.

The subsequent decision of the Michigan Court of Appeals finding no prejudice is an unreasonable application of the principles established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). It is not in dispute that counsel performed deficiently, and a defense expert made a finding of insanity at a post-conviction hearing. Under these circumstances, counsel’s failure to present a valid insanity defense made the trial “fundamentally unfair and unreliable due to counsel’s deficient performance.” *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993).

In finding otherwise, the Michigan Court of Appeals unreasonably applied federal law on prejudice for ineffective assistance of counsel claims for two reasons. First, the Court of Appeals justified counsel’s rejection of the insanity defense, a finding already belied by the court’s conclusion of deficient performance. Second,

the court made findings regarding the potential success of an insanity defense based on interpretations of fact and credibility of the expert witnesses. “The actual resolution of conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides.” *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003).

The district court’s decision denying Mr. Walker’s petition for a writ of habeas corpus must be reversed where as a matter of law, the denial of a valid insanity defense undermined the reliability of the trial’s outcome and prejudiced the defense. *Strickland, supra*. The state court’s finding to the contrary based on fact-finding, an evaluation of expert witnesses, and a justification for deficient performance unreasonably applied federal law.

STANDARD OF REVIEW ON APPEAL

This Court reviews the district court's denial of a petition for writ of habeas corpus *de novo*, but it reviews the district court's factual findings only for clear error. *Durr v. Mitchell*, 487 F.3d 423 (6th Cir. 2007). Where the district court's factual determinations were made only on the basis of the review of transcripts and other court records, this Court also reviews its factual conclusions *de novo*. *Dando v. Yukins*, 461 F. 3d 791, 795-796 (6th Cir. 2006), citing *Wolfe v. Brigano*, 232 F. 3d 499, 501 (6th Cir. 2000).

A federal court must grant a petition for writ of habeas corpus where the state court ruling “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.” 28 U.S.C. §2254(d). A court acts “contrary to” clearly established law when it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or when it decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A court unreasonably applies clearly established law if it either (1) correctly identifies the governing legal principle from the Supreme Court's decisions but then unreasonably applies that principle to the facts of the case, or (2) unreasonably extends, or unreasonably declines to extend, a clearly established legal principle to a new context. *Id.* at 412.

Habeas relief also is warranted where the state court ruling “resulted in a decision that was based on an unreasonable determination in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Section 2254(d)(2) should be read in conjunction with 28 U.S.C. § 2254(e)(1) which allows the presumption of correctness as to state court factual findings to be rebutted by clear and convincing evidence. However, the performance and prejudice components of an ineffective assistance of counsel inquiry are mixed questions of law and fact, not subject to the § 2254(e)(1) presumption of correctness. *Combs v. Coyle*, 205, F.3d 269, 278 (6th Cir. 2000).

ARGUMENT

I. THE STATE COURT UNREASONABLY APPLIED FEDERAL LAW IN FINDING THAT MR. WALKER WAS NOT PREJUDICED BY TRIAL COUNSEL'S OBJECTIVELY UNREASONABLE FAILURE TO RAISE AN INSANITY DEFENSE.

Mr. Walker was denied the effective assistance of counsel where trial counsel failed to investigate and present the substantial defense of insanity. After initially finding deficient performance, the subsequent decision of the Michigan Court of Appeals finding no prejudice is an unreasonable application of the principles established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

A defendant is entitled to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland, supra*. To show ineffectiveness, Mr. Walker must satisfy the two pronged *Strickland* test. First, counsel's performance was deficient and fell below an objective standard of reasonableness. 466 U.S. at 687-88. Second, counsel's errors must have prejudiced Mr. Walker's defense so as to deprive him of a fair trial. *Id.* There must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

The likelihood of a different result only need be reasonable; a defendant need not prove prejudice by a preponderance of the evidence. *Id.* A "single, serious error" may support a claim of ineffective assistance of counsel. *Kimmelman v Morrison*,

477 U.S. 365, 383 (1986). If the result of the proceeding is fundamentally unfair and unreliable due to counsel's deficient performance, then prejudice is presumed, regardless of whether the error can be shown as outcome determinative. *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993).

In Mr. Walker's case, the Michigan Court of Appeals found that in failing to investigate and raise an insanity defense, Mr. Walker's trial counsel performed deficiently, below an objective standard of reasonableness. Following this decision, a defense expert testified at an evidentiary hearing that Mr. Walker was legally insane at the time of the shooting. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 23-28. The Court of Appeals unreasonably applied federal law when it found that Mr. Walker had nevertheless only satisfied the first prong of the *Strickland* test and failed to establish prejudice to his defense. RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3.

A. The state court found counsel's failure to raise an insanity defense met the deficient performance prong of the test for ineffective assistance of counsel.

The Court of Appeals held that trial counsel made non-strategic errors that an objectively reasonable attorney would not have made, such that a new trial is required if prejudice could be shown. RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. In finding that trial counsel's representation fell below an objective standard of reasonableness, the Michigan Court of Appeals held that:

Even though an indigent defendant in Michigan, such as defendant in this case, may request an independent psychiatric evaluation by a clinician of his choice pursuant to M.C.L. § 768.20a(3), defense counsel never sought an independent psychiatric evaluation for his client and did not pursue an insanity defense at trial. **Instead, trial counsel, who was clearly aware of defendant's long history of mental illness, elected to forego the presentation of an insanity defense in order to argue the defenses of accident, self-defense and intoxication based on defendant's version of the events presented at trial.**

Here, trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant's testimony, was objectively unreasonable. Specifically, although defense counsel filed a notice of intent to present an insanity defense, he did not avail himself of the statutory entitlement to have an independent psychologist examine defendant to determine whether he was legally insane at the time of the acts in question. According to the affidavit of Dr. Steven Miller, an independent certified forensic examiner who conducted a post-conviction mental status evaluation, defendant was 'legally insane' at the time he murdered the victim. **Under these circumstances, trial counsel's decision to forego the insanity defense was a serious error that fell below an objective standard of reasonableness under the Sixth Amendment to the United States Constitution, not a matter of trial strategy.** See *Profitt v Waldron*, 831 F2d 1245 (CA 5, 1987) (finding that trial counsel was ineffective for failing to investigate the defendant's prior mental history for the presentation of an insanity defense). As defendant correctly points out, because his trial counsel did not sufficiently investigate the insanity defense by obtaining an independent evaluation to rebut the evaluation provided by the forensic center, he was not in a position to make a reasoned choice whether such a defense would succeed in this case.

RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3 (emphasis added).

B. The evidentiary hearing demonstrated that an insanity claim would have offered a substantial defense.

An independent psychologist examined Mr. Walker and concluded that he was legally insane at the time of the shooting. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 23-28.

In order for an accused to prove the affirmative defense of legal insanity, he must establish the following elements, mandated by statute in Michigan:

An individual is legally insane if, as a result of mental illness as defined in . . . section 330.1400a of the Michigan Compiled Laws, or as a result of being mentally retarded as defined in . . . section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.” MCL 768.21a.

The mental health code defines “mental illness” as “a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” MCL 440.1400(g).

The forty-six-year-old Mr. Walker had a lengthy and extensive history of mental illness. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 20-22; RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 39-41, 44. Mr. Walker had been in at least ten hospitals or treatment facilities over thirty years and had

received numerous diagnoses for schizophrenic type disorders. He had been prescribed antipsychotic medications since 1983. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 21-22; RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 39-41. Just months before the shooting, Mr. Walker had been involuntarily committed to a treatment facility. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 28.

Dr. Stephen Miller, Ph.D., L.P. testified that Mr. Walker was mentally ill at the time of the offense here, and his diagnosis was Schizo-affective Disorder (a form of schizophrenia), with a bipolar component to it. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 23. Dr. Miller further made clear that Mr. Walker's mental illness is a psychotic type of disorder. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 24. Mr. Walker would respond to hallucinations, interacting with the voices. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 26. As such, he suffered from a disorder that significantly impaired his capacity to recognize reality and significantly impaired his judgment and behavior in other respects. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 26. As a result of that mental illness, Mr. Walker lacked the substantial capacity to appreciate the nature and quality of his acts, lacked the substantial capacity to appreciate the wrongfulness of his conduct, and lacked the substantial capacity to conform his conduct to the

requirements of the law. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, p. 27.

In Dr. Miller's opinion, then, Mr. Walker was legally insane at the time of the offense, suffering from a settled condition of insanity. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 28, 42-43. Dr. Miller found that every element of a legal insanity defense was present. RE No. 1, Forensic Psychological Evaluation of Criminal Responsibility, Dr. Steven Miller. Even if at times Mr. Walker knew right from wrong, stressful events would still trigger an inability to understand the nature and quality of his actions. Dr. Miller felt that at the time Mr. Walker committed the offense, his understanding of right and wrong was substantially diminished. Apx 32-33, RE 11, Evidentiary Hearing Transcript 04/25/03, pp. 29-30, 54.

The prosecution's own expert, Dr. Fields, acknowledged in his report that whether Mr. Walker was reality-oriented and goal-directed in his behavior was a question for the trier of fact. RE No. 11, #4, Evidentiary Hearing Transcript 06/04/03, p. 14. Dr. Fields also acknowledged that Mr. Walker was involuntarily committed to Aurora for inpatient mental health treatment only months before the offense. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 43-44. Dr. Fields acknowledged that during his history of hospitalization, Mr. Walker had multiple diagnoses of Schizoaffective disorder, and more than seven suicide attempts. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 40-41. Indeed, when

Dr. Fields interviewed Mr. Walker in jail, a psychiatrist had prescribed antipsychotic medication. Dr. Fields recommended that Mr. Walker continue with these medications. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 32-35.

If the jury credited Dr. Miller's testimony, the verdict would have been not guilty by reason of insanity.

C. Where counsel offered deficient performance in failing to present an insanity defense, and an evidentiary hearing demonstrated the strength of the defense, the state court unreasonably applied federal law in finding no prejudice.

Absent counsel's deficient performance, there is a reasonably likely chance that Mr. Walker's trial would have the result of not guilty by reason of insanity. Whether Mr. Walker was guilty, not guilty by reason of insanity, or guilty but mentally ill, is a determination to be made by the jury. It was not for the Michigan Court of Appeals, nor a trial judge at a hearing, to determine what a jury would or would not actually conclude. *See Barker v Yukins*, 199 F3d 867, 874 (6th Cir. 1999); *Matthews v. Abramajtyis*, 319 F.3d 780, 790 (6th Cir. 2003). To do so would violate Mr. Walker's constitutional right to a trial by jury. US Const Am VI; *Sullivan v. Louisiana*, 508 U.S. 275, 77 (1993).

A qualified expert presented testimony and an evaluation which established every element of an insanity defense. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 23-28; RE No. 1, Forensic Psychological Evaluation of Criminal Responsibility. *See* MCL 768.21a. Without such an expert, Mr. Walker

was deprived of a viable trial defense – indeed, the only viable defense – and, as such, sufficient prejudice has been shown because the result of the trial was fundamentally unfair and unreliable. *Lockhart v. Fretwell*, *supra*, 506 U.S. at 369-370.

A state court’s finding of no prejudice where a trial attorney failed to investigate and offer a *legitimate* insanity defense is an unreasonable application of Supreme Court precedent:

We understand that psychiatry is an imperfect science at best. However, *Strickland* does not require absolute certainty - it only requires a probability sufficient to undermine confidence that the result of the proceeding is reliable. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The failure of the public defenders, the doctors, the probation officer, and the state courts in the handling of this case of an indigent and mentally ill defendant not only “undermine[s] confidence” in the reliability of the result; it might well signal a system that is in need of review and repair. Given Brown's extensive and well-documented battle with chronic schizophrenia, as well as Dr. Ferrell's report characterizing *Brown's crime as demonstrative of a “lack of logical, cohesive thinking” and the product of “the thought-distorting effects of schizophrenia,”* we refuse to countenance the appellate court's conclusion that the result of Brown's trial “would not have been different” had trial counsel taken the minimal time to secure his mental health records and properly inform the court of Brown's condition.

We conclude that Brown was prejudiced by his counsel's failure to investigate (e.g., talking to his family, securing his prison medical records), to request a hearing to determine his competency to stand trial, and to consider seriously the question of whether to enter a plea of not guilty by reason of insanity. The

Illinois Court of Appeals' decision to the contrary is an unreasonable application of the *Strickland* standard.

Brown v. Sternes, 304 F.3d 677 (7th Cir. 2002) (italics and underlining in original; bold emphasis added). Mr. Walker's case is identical. By focusing on trial counsel's evaluation of the insanity defense and making an independent evaluation of insanity, rather than recognizing the unreliable nature of the trial, the state court unreasonably applied *Strickland*. See also *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987) (granting habeas and finding prejudice where counsel failed to offer an insanity defense and present evidence of a prior adjudication of insanity); *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990); *Genius v. Pepe*, 50 F.3d 60 (1st Cir. 1995); *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998); compare *Knowles v. Mirzayance* ___ U.S. ___ ; 129 S.Ct. 1411 (2009) (reversing habeas grant based on lack of *deficient performance* for choosing not to raise an insanity claim).

As found by the Michigan Court of Appeals, counsel performed deficiently in failing to investigate and evaluate the defense of insanity. RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. A properly qualified expert then presented a finding of insanity based on Mr. Walker's thirty year history of hospitalization for mental illness, prior diagnosis of schizophrenia, an evaluation of the shooting, and an interview of Mr. Walker. Under these circumstances, the result of the proceeding was fundamentally unfair and unreliable due to counsel's deficient performance, and

prejudice is therefore presumed. *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993).

In affirming the trial court's finding that no prejudice came from counsel's unreasonable performance, the Michigan Court of Appeals made three basic findings: (1) that trial counsel justifiably rejected an insanity defense; (2) that an insanity defense would have been unsuccessful; and (3) that Mr. Walker clearly testified to and presented a substantial claim of self-defense. RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3. Each of these findings represents an unreasonable application of federal law.

First, the Michigan Court of Appeals found that trial counsel was justified in believing Mr. Walker would be unsuccessful in proving legal insanity:

Here, defendant failed to show that his trial counsel had reason to believe that defendant may have been suffering from a mental illness that rendered him legally insane at the time of the offense. MCL 768.21a(1). Although counsel believed that defendant was mentally ill, he did not think that defendant would be successful in proving his legal insanity. Before trial, defendant did not tell counsel that defendant was hearing voices at the time of the offense or that he blacked out. Instead, defendant had a good recollection of the incident and wanted to testify at trial that he acted in self-defense. The competency and criminal evaluation of defendant by Dr. Dexter Fields concluded that defendant was competent to stand trial and that he was not mentally ill at the time of the offense. Defendant appeared coherent during his interview with Dr. Fields and nothing in the police investigator's report or in defendant's narrative suggested that defendant appeared confused. Therefore, counsel believed that even if he could obtain an

independent evaluation to support defendant's insanity defense, it would not have had much effect on the jury's decision. Counsel was concerned about a compromise verdict finding defendant guilty but mentally ill. Because mental illness short of legal insanity does not relieve a defendant from criminal responsibility, *People v. Carpenter*, 464 Mich. 223, 237; 627 NW2d 276 (2001), defendant failed to show that he had a meritorious insanity defense, and thus, failed to show that counsel was ineffective for failing to present such a defense.

RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, pp. 2-3. This explanation for a lack of prejudice is an unreasonable application of federal law.

As found by a prior panel of the Michigan Court of Appeals, trial counsel's decision "not to pursue an insanity defense ... was objectively unreasonable," satisfying the first condition of *Strickland v. Washington*, *supra*. RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. Counsel failed to properly investigate, neglected to order an independent psychiatric evaluation, failed to offer the only defense with a chance of success, and instead pursued a nonsensical defense that contradicted the testimony of every witness at trial. The subsequent justification for counsel's decision not to raise an insanity defense by both the trial court and the Court of Appeals is irrelevant in light of the deficient performance finding.

By revisiting counsel's "objectively unreasonable" decision, the Court of Appeals failed to recognize that Dr. Miller's finding of insanity undermined confidence in the reliability of the trial. *Strickland*, *supra*. It is an unreasonable application of *Strickland* to first find deficient performance of counsel for failing to

pursue an insanity defense, but then to find no prejudice because trial counsel properly rejected this valid defense.

At best, the state court is finding a lack of prejudice by adopting counsel's theory that an independent evaluation would not have affected the jury, and a compromise verdict of guilty, but mentally ill might have been the result. Instead of making a proper prejudice finding based on the merits of the insanity defense, the Court of Appeals credits the evaluation of a trial attorney, who per the court, performed below an objective standard of reasonableness. Dr. Miller's legitimate finding of insanity undermined the confidence in the trial. Adopting counsel's opinion to the contrary instead of actually evaluating the validity of the insanity defense is an unreasonable application of the prejudice prong in *Strickland*.

Trial counsel himself noted the prejudice that resulted from not pursuing an insanity defense when he explained that this defense "would have been a battle of the experts. In addition, I think there would have been lay testimony available, as well, on the issue of insanity." RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, p. 111.

Second, the Court of Appeals noted that Mr. Walker failed to show a meritorious defense of insanity due to consciousness of guilt:

Further, defendant's actions, such as picking up the clip after the shooting, leaving the scene of the crime, going into the abandoned house and hiding the gun in a hole, suggest that defendant recognized the consequences of his

criminal behavior, and that his behavior was wrongful. The evidence further shows that defendant lied to police by giving them aliases on three different occasions. Even with Dr. Stephen Miller's testimony in favor of an insanity defense, in light of evidence that defendant had the consciousness of guilt, we conclude that there is not a reasonable probability that defendant had a likely chance of acquittal.

RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, p. 3. Here, the state court unreasonably applied federal law in finding no prejudice, because it took the fact-finding regarding consciousness of guilt and goal-directed behavior from the province of the jury.

Dr. Miller responded to this analysis of the court regarding “consciousness of guilt.” Per Dr. Miller, goal directed behavior such as hiding the weapon after a shooting has very little weight in a calculus and evaluation of insanity and criminal responsibility. Often the goal directed behavior is part of a patient’s delusion. Rather than make assumptions from behavior, an evaluator needs to make a cognitive assessment of the behavior based on clinical findings. Based on Mr. Walker’s history of mental illness and his interview of Mr. Walker, Dr. Miller would not characterize the behavior after the shooting as an acknowledgment of wrongdoing. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 38-40; RE No. 11, #1, Evidentiary Hearing Transcript 04/25/03, pp. 32-33, 55.

While relying on Mr. Walker’s behavior after the shooting to support the conclusion Mr. Walker was not insane, the prosecution expert made some similar

conclusions. Dr. Fields admitted that a person could exhibit goal directed behavior, but still be legally insane. Dr. Fields even admitted that somebody who behaved like Mr. Walker after the shooting, by hiding a gun and removing a clip from the scene, could be legally insane. RE No. 11, #2, Evidentiary Hearing Transcript 05/09/03, pp. 17, 27-29. Indeed, when Dr. Fields interviewed Mr. Walker about the shooting, Mr. Walker explained that a voice said to him, “The police are going to get you for the gun.” RE No. 1, Forensic Psychological Evaluation of Criminal Responsibility, Dr. Steven Miller, p. 9.

Accordingly, the impact of this “consciousness of guilt” evidence involving the actions of Mr. Walker in hiding the gun, removing the clip, and providing false names is one for the jury to evaluate. Either these actions represented behavior that was a part of Mr. Walker’s underlying delusion, or they represented consciousness of guilt and evidence of a lack of insanity. “The actual resolution of conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides.” *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003).

By simply adopting one interpretation of Mr. Walker’s actions after the shooting, the Michigan Court of Appeals unreasonably applied federal law for evaluating prejudice. *Strickland, supra*. Instead, the Court of Appeals should have

recognized that since the expert witness offered an alternative explanation for Mr. Walker's actions beyond consciousness of guilt, a jury could make the same finding of fact. This possibility undermines confidence in the outcome of the trial. *Strickland, supra.*

Finally, the Michigan Court of Appeals found that Mr. Walker:

alleged self-defense to his counsel and, at trial, defendant testified clearly and consistently in his own behalf that he acted in self-defense. As such, we are unable to conclude that counsel's decision to advance defendant's self-defense claim deprived defendant of a substantial defense.

RE No. 11, #8, Michigan Court of Appeals Opinion, 249406, p. 3. The Court of Appeals unreasonably applied federal law by again making a finding that is inapplicable in light of the conclusion of counsel's deficient performance, and irrelevant to a determination of prejudice.

In its initial opinion on the case, the Court of Appeals found that "trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant's testimony, was objectively unreasonable." RE No. 11, #5, Michigan Court of Appeals Opinion, 233494, p. 3. Therefore, the court erred in subsequently finding no prejudice because of a vigorous self-defense claim at trial. The Court of Appeals unreasonably applied federal law in making a determination regarding prejudice because counsel raised a

substantial defense, where the court already found such a defense “objectively unreasonable.”

Indeed, it is only the insanity claim that provides context to the objectively unreasonable self-defense theory based on Mr. Walker’s testimony. Multiple eyewitnesses observed Mr. Walker shoot Mr. Troup with no provocation and police confirmed that neither the victim nor Mr. Gaiter had a gun.

Mr. Walker described a sequence of events that nobody else observed. He testified that Gaiter and the decedent threatened to rob him, and he (Walker) pulled out a gun when one of the men bumped him. He claimed that Gaiter fired first, hitting Mr. Walker’s hand, inadvertently causing the gun to go off. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 91-95. However, the autopsy revealed that there were two bullets found in the decedent’s body, corroborating witness accounts that Mr. Walker fired at least twice. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 12-13, 31-32, 82-83, 122.

Both eyewitnesses testified that neither Gaiter nor Troup had a weapon that night. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 58, 84-85. It made little sense that Gaiter would have had one, as he asked the store employee for his gun so that he could chase and shoot Walker after he had left. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 34, 39, 58, 84-85. Police did not find any weapons near Gaiter or Troup, or any other indication that someone else had fired a weapon in the

store that night. RE No. 10, #12-13, Trial Transcript 02/27/01, pp. 67, 113; RE No. 10, #14-15, Trial Transcript 02/28/01, p. 39. Moreover, Mr. Walker never explained why he only fired at Troup, then simply walked away, when he believed that Troup was going for his gun and he did not know whether he had hit Troup. RE No. 10, #14-15, Trial Transcript 02/28/01, pp. 95-96.

Dr. Miller described Mr. Walker's account of the shooting as a combination of self-defense and an accident as a confabulation. Mr. Walker filled in the incomplete memory of the shooting with an incident several months prior, where two burglars shot him in the hand. RE No. 10, #20, Evidentiary Hearing Transcript 03/28/03, pp. 33-36, 45-46; RE No. 1, Forensic Psychological Evaluation of Criminal Responsibility, Dr. Steven Miller, pp. 10-11.

The fact that Mr. Walker testified "clearly and consistently in his own behalf that he acted in self-defense" provides perhaps the best indication of prejudice through counsel's objectively unreasonable decision not to offer and investigate an insanity defense. In a vacuum Mr. Walker testified to a false account of events. However, coupled with the diagnosis of Dr. Miller, he genuinely described the psychotic and delusional behavior that resulted from his insanity.

By making its own evaluation of the evidence, the Court of Appeals seized the role of the jury and thus unreasonably applied federal law. A properly qualified expert found Mr. Walker insane at the time of the shooting. Counsel's failure to offer

this substantial defense undermined the outcome of trial and demonstrated the prejudice to the defense. *Strickland, supra*. Although it is impossible to predict just how the jury would have ruled, Dr. Miller's evaluation and testimony indicated that a properly presented insanity defense would have allowed a jury to find Mr. Walker not guilty by reason of insanity.

In denying habeas, the district court stated that since the record contained evidence both harmful and helpful to Mr. Walker, the state court's conclusion finding no prejudice was reasonable. RE No. 17, Order Adopting Report and Recommendation, p. 7. However, the district court failed to recognize that this harmful and helpful evidence meant that the defense of insanity was a substantial one, and counsel's failure to present it made the trial "fundamentally unfair and unreliable due to counsel's deficient performance." *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993). The district court noted that "the court is reviewing whether the state court's decision on prejudice, which was based on a factual evaluation, was a reasonable application of *Strickland*." RE No. 17, Order Adopting Report and Recommendation, p. 8. Since the state court's decision involved evaluating the claims of competing experts and justifying counsel's already recognized deficient performance, it just such an unreasonable application of *Strickland*. The state court unreasonably applied federal law regarding prejudice for ineffective assistance of

counsel by going beyond a threshold finding that insanity provided a substantial defense.

It is an unreasonable application of *Strickland* to ignore this dynamic in evaluating prejudice. Here the trial court and Michigan Court of Appeals instead justified counsel's decision not to present an insanity investigation or defense; and made findings of fact to evaluate the insanity claim that should be left to a jury. Counsel's decision to pursue a frivolous claim of self-defense instead of a valid insanity defense undermined confidence in Mr. Walker's trial. In finding objectively unreasonable performance, but no prejudice from this dynamic, the state courts unreasonably applied federal law.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Petitioner-Appellant asks that this Honorable Court reverse the decision of the District Court below, and grant his petition for a writ of habeas corpus.

Respectfully submitted,

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Dated: April 26, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in F.R.A.P. 32(a)(7)(B). The foregoing brief contains 11,023 words and 1,003 lines of Times New Roman (proportional) 14-point type. The word processing software used to prepare this brief was Microsoft Word 2003 for Windows.

s/Jonathan Sacks
JONATHAN SACKS

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, this document was served on all parties or their counsel of record through the CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R.E. 1	Petition for Writ of Habeas Corpus, Attachment-Psychological Evaluation by Dr. Steven Miller
R.E. 10 (#10-11)	Trial Transcript 2/26/01 part 1-2
R.E. 10 (#12-13)	Trial Transcript 2/27/01 part 1-2
R.E. 10 (#14-15)	Trial Transcript 2/28/01 part 1-2
R.E. 10 (#16)	Trial Transcript 3/1/01
R.E. 10 (#17-18)	Sentencing Transcript 3/19/01
R.E. 10 (#20)	Evidentiary Hearing Transcript 3/28/03
R.E. 11	Evidentiary Hearing Transcript 4/25/03 part 1 (pp. 1-60), attached to Appellant's Brief as Appendix
R.E. 11 (#1)	Evidentiary Hearing Transcript 4/25/03 part 2
R.E. 11 (#2)	Evidentiary Hearing Transcript 5/9/03
R.E. 11 (#3)	Evidentiary Hearing Transcript 5/20/03
R.E. 11 (#4)	Evidentiary Hearing Transcript 6/4/03
R.E. 11 (#5)	Michigan Court of Appeals Opinion, #233494, 1/3/03
R.E. 11 (#8)	Michigan Court of Appeals Opinion, #249406, 3/22/05
R.E. 11 (#9)	Michigan Supreme Court Order, #128669, 9/28/05