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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

MENAYETTA YEAGER

Defendant-Appellant
_____/

Supreme Court No. _____

Court of Appeals No. 346074

Lower Court No. 17-8290-01-FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

ADRIENNE N. YOUNG (P77803)
Attorney for Ms. Yeager
_____

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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RECEIVED by MSC 2/10/2022 10:41:55 AM

Table of Contents

Index of Authorities i

Statement of Questions Presented iv

Statement of Facts 1

I. Trial counsel was ineffective for failing to request a manslaughter instruction which denied Ms. Yeager her right to a fair trial, her right to present a defense, and her right to a properly instructed jury. 8

II. The Court of Appeals in correctly reversed the trial court's holding that Ms. Yeager was prejudiced by counsel's ineffective assistance. The Court of Appeals incorrectly relied on *People v Raper* and this Court should expressly overturn *People v Raper* as wrongly decided in part for the reasons stated herein and in the Court of Appeals' concurring opinion. 15

III. Trial counsel was ineffective for failing to call an expert witness in Battered Spouse Syndrome. Ms. Yeager is entitled to a new trial. 26

Relief Requested 31

RECEIVED by MSC 2/10/2022 10:41:55 AM

Index of Authorities

Page(s)

Cases

Harrington v Richter, 562 US 86; 131 S Ct 770 (2011) 27
Hinton v Alabama, 571 US 263 (2014) 9
Maher v People, 10 Mich 212 (1862) 18
People v Armstrong, 490 Mich 281 (2011) 26, 27
People v Beach, 429 Mich 450 (1988) 18, 19, 20
People v Chapo, 283 Mich App 360 (2009) 27, 28
People v Christel, 449 Mich 578; 537 NW2d 194 (1995) 29, 30
People v Darden, 230 Mich App 597 (1998) 12
People v Dixon, 263 Mich App 393 (2004) 28
People v Fountain, 43 Mich App 489 (1972) 9
People v Ginther, 390 Mich 436 (1993) 5
People v Heflin, 434 Mich 482 (1990) 10
People v Hess, 214 Mich App 33 (1995) 20
People v Kelly, 186 Mich App 524 (1990) 28
People v LeBlanc, 465 Mich 575 (2002) 8, 26
People v Mendoza, 428 Mich 527 (2003) 16
People v Mendoza, 468 Mich 527 (2003) ..... iii, 12, 17, 18
People v Oros, 502 Mich 229 (2018) 17
People v Payne, 285 Mich App 181 (2009) 28
People v Pickens, 446 Mich 298 (1994) 26
People v Pouncey, 431 Mich (1991) 12
People v Pouncey, 437 Mich 382 (1991) 12, 13
People v Raper, 222 Mich App 475 (1997) ..... passim
People v Reese, 491 Mich 127 (2012) 11, 12
People v Scott, 6 Mich 287 (1995) 12, 13
People v Townes, 391 Mich 578 ..... 13, 18

RECEIVED by MSC 2/10/2022 10:41:55 AM

People v Townes, 392 Mich (1974) 18
People v Trakhtenberg, 493 Mich 38 (2012) 20, 24, 27
People v Wilson, 194 Mich App 599; 487 NW2d 822 (1992) 28, 29
People v Zak, 181 Mich App 1 (1990) 7
People v Zak, 184 Mich App 1 (1990) 15, 16
Ramonez v Berghuis, 490 F3d 482 (CA 6, 2007) 21
Strickland v Washington, 466 US 668 (1984) ..... passim
Tierney, 266 Mich App 687 (2005) 20
Tourlakis v Morris, 738 F Supp 1128 (SD Ohio, 1990) 28
US v Cronic, 466 US 648 (1984) 23, 25
Weaver v Massachusetts, 137 S Ct 1899 (2017) 23
Wiggins v Smith, 539 US 510 (2003) 22, 26

Statutes

Const 1963, art 1, § 20 26

Rules

MCR 7.211(C)(1) 26

Other Authorities

40 AMJUR HOMICIDE 49 13
M Crim JI 16.9 9

RECEIVED by MSC 2/10/2022 10:41:55 AM

Judgment Appealed From and Relief Sought

After a fundamentally unfair trial without the benefit of effective assistance of counsel, Menayetta Yeager was convicted of first-degree murder. As Judge Beckering wrote in her concurring opinion in this case, and as the trial court correctly determined following a *Ginther* proceeding, "[b]efore she spends the rest of her life in prison, she deserves a new trial." *People v Yeager*, unpub per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 346074), p (1)1 (BECKERING, J, concurring).

The Court of Appeals majority reversed the trial court's grant of a new trial citing *People v Raper*, 222 Mich App 475 (1997). The Court of Appeals held that where a jury rejects second-degree murder, that reflects "an unwillingness to convict on a lesser included offense such as [voluntary or involuntary] manslaughter." *Id.* But *Raper* was implicitly overturned by this court's decision in *Mendoza* or is wrongly decided and should be overturned. *People v Mendoza*, 468 Mich 527 (2003).

Ms. Yeager asks, as Judge Beckering, did, for this Court to "examine[] the legal integrity of the bright line rule in *Raper*." *Yeager*, unpub per curiam opinion at 7 (BECKERING, J, concurring). Her life depends on it.

RECEIVED by MSC 2/10/2022 10:41:55 AM

Statement of Questions Presented

I. Was trial counsel ineffective for failing to request a manslaughter instruction which denied Ms. Yeager her right to a fair trial, her right to present a defense, and her right to a properly instructed jury?

Court of Appeals answers, "No."

Menayetta Michell Yeager answers, "Yes."

II. Did the Court of Appeals incorrectly rely on *People v Raper* should this Court expressly overturn *People v Raper* as wrongly decided in part for the reasons stated herein and in the Court of Appeals' concurring opinion?

Court of Appeals answers, "No."

Menayetta Michell Yeager answers, "Yes."

III. Was trial counsel ineffective for failing to call an expert witness in Battered Spouse Syndrome? Is Ms. Yeager entitled to a new trial?

Court of Appeals answers, "No."

Menayetta Michell Yeager answers, "Yes."

RECEIVED by MSC 2/10/2022 10:41:55 AM

Statement of Facts

The death of Jonte Brooks was the tragic result of a volatile domestic situation. Jonte Brooks and Menayetta Yeager dated for about a year. 8/14/18 TT, 9. The last six months of their relationship, Mr. Brooks had become abusive "often". 8/15/18 TT, 45. Mr. Brooks' mother testified that her son could be aggressive. 8/14/18 TT, 11. Ms. Yeager's brother knew of Mr. Brooks to regularly carry a gun and be aggressive toward his sister. 8/15/18 TT, 12.

On August 27, 2017, Jonte Brooks brutally assaulted Menayetta Yeager. He punched her, hit her with his gun, and dragged her by her hair out of her own van. 8/15/18 TT, 17-18, 24-25. She recalled suffering a "nose bleed and busted mouth." 8/15/18 TT, 38. She looked "like somebody had beat her up." 8/14/18 TT, 35. Mr. Brooks tried multiple times to run Ms. Yeager over. 8/14/18 TT, 26-27; 8/15/18 TT, 19. Ultimately, he drove away in Ms. Yeager's van.

Ms. Yeager did not go straight the police station because she was "scared" and "didn't know what to do." 8/15/18 TT, 45. She did, however, call the police multiple times. 8/15/18 TT, 19. She told the police her van was stolen by Mr. Brooks. 8/14/18 TT, 79-81. She also told the police that Mr. Brooks tried to harm her but did not mention that he had hit her with his gun. 8/15/18 TT, 32. After speaking with police, Ms. Yeager called Mr. Brooks to try to convince him to come back to the area, in hopes the police would catch him. 8/15/18 TT, 20.

RECEIVED by MSC 2/10/2022 10:41:55 AM

Labarren Borom, who knew Ms. Yeager from the neighborhood, observed some of this assault. 8/15/18 TT, 36-37. He described Mr. Brooks as "all up on the grass…tryin' to run her over." 8/15/18 TT, 26-27. Mr. Borom saw Mr. Brooks threaten another neighbor that night. 8/14/18 TT, 48. He testified that "of course" Ms. Yeager's life was in danger that night. 8/15/18 TT, 54.

Mr. Borom got in his truck and eventually caught up with Ms. Yeager, who was down the street "cryin'" and was yelling about Mr. Brooks bringing her van back. 8/15/18 TT, 28. Ms. Yeager got into Mr. Borom's truck and together they went looking for Mr. Borom. 8/15/18 TT, 29.

When he picked her up, Mr. Borom heard Mr. Brooks on the phone with Ms. Yeager. 8/14/18 TT, 43-55. He was "callin' her all kind of bitches, and every kind of thing…talkin' mean stuff to her." 8/14/18 TT, 43-45. At first, Mr. Brooks agreed to meet Ms. Yeager at a gas station and return the van. She and Mr. Borom went to that gas station and Mr. Brooks did not show up. 8/15/18 TT, 22. Ms. Yeager again called Mr. Brooks, whosaid that he had seen her in a truck with a man. 8/15/18 TT, 22. Mr. Brooks said he was going to "kill [Ms. Yeager] and that ni—er." 8/15/18 TT, 22-23. Mr. Brooks told Ms. Yeager several times he was going to kill her and the person she was with. 8/15/18 TT, 46.

Mr. Borom drove Ms. Yeager to a different gas station and Mr. Brooks pulled in after them. 8/15/18 TT, 23. Mr. Borom heard Mr. Brooks continue to "taunt" Ms. Yeager as she asked him to return her van. 8/14/18 TT, 32.

RECEIVED by MSC 2/10/2022 10:41:55 AM

Ms. Yeager testified that Mr. Borom handed her a gun as she exited his truck. Prior to this, Ms. Yeager had never held a gun before; she knew nothing of guns or gun clips. 8/15/18 TT, 14, 45. Mr. Borom stated that he did not have a gun in his vehicle but also did not see a gun on Ms. Yeager. 8/14/18 TT, 40, 58, 62. Mr. Brooks did not exit the van. 8/14/18 TT, 57; 8/15/18 TT, 43. He started to pull away. 8/14/18 TT, 22.

Ms. Yeager testified she shot the gun towards the van that Mr. Brooks was in. 8/15/18 TT, 24. Ms. Yeager estimates she shot the van two or three times. 8/15/18 TT, 24. Her memory of the night was not clear because she was scared and was in fear for her life when she shot at the van. 8/15/18 TT, 25, 29. She described the whole event as "devastating and emotional." 8/15/18 TT, 42. When she shot at the van, she was not trying to kill Mr. Brooks and did not want him dead. 8/15/18 TT, 42. She wanted to defend herself. 8/15/18 TT, 42.

Mr. Borom heard at least 5 or 6 gunshots. 8/14/18 TT, 32. He believed Ms. Yeager "didn't even know what was happening." 8/14/18 TT, 59. He did not think he had witnessed anyone being shot. 8/14/18 TT, 53. A gas station employee testified to having heard 10 shots. 8/14/18 TT, 16.

Ms. Yeager returned to Mr. Borom's truck and he did not see a gun on her. 8/14/18 TT, 65. He described her as "hysterical, crying" when she came back to his truck. 8/14/18 TT, 60. He drove home, parked his truck, and she got out and walked away. 8/14/18 TT, 65; 8/15/18 TT, 26-27. The incident was recorded on the gas station video system.

RECEIVED by MSC 2/10/2022 10:41:55 AM

Mr. Brooks sped off in the van. 8/14/18 TT, 54; 8/15/18 TT, 19. About five blocks away, Mr. Brooks crashed the van. 8/14/18 TT, 20. The damage to the van was "pretty extensive" and Mr. Brooks was bleeding from his mouth, but he was alive. 8/14/18 TT, 73, 95. He had a blood alcohol content of almost twice the legal limit and had marijuana in his system. 8/13/18 TT, 200.

Mr. Brooks was taken to a nearby hospital and police searched the vehicle. They did not recover a weapon. 8/14/18 TT, 86, 171. Two bottles of gin were recovered. 8/14/18 TT, 167. Police observed what they believed to be bullet holes near the driver's seat. 8/14/18 TT, 86, 98. An evidence technician could not say for certain what caused the "suspected impacts." 8/14/18 TT, 158-159. Ms. Yeager recalled several holes in and around the driver's seat from Mr. Brooks' cigarettes. 8/15/18 TT, 29.

Mr. Brooks was pronounced dead later at the hospital. 8/14/18 TT, 90. The cause of death was ruled to be a gunshot wound to the back. 8/13/18 TT, 198. The shot was not from close range. 8/13/18 TT, 196. The manner of death was deemed a homicide. 8/13/18 TT, 199. Police recovered 17 bullet casings, all from the same gun. 8/14/18 TT, 184.

On August 28, 2018, less than 48 hours after the shooting, Ms. Yeager turned herself in to police, accompanied by an attorney. 8/15/18 TT, 199. Her home and Mr. Borom's home were searched. No firearms or "indicia of firearms" were recovered. 8/15/18 TT, 197, 199. Mr. Borom pled guilty as an accessory after the fact and served less than two years in prison.[1] 8/14/15 TT, 25. After a three-day jury trial in Wayne

[1] https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=440015

RECEIVED by MSC 2/10/2022 10:41:55 AM

County Circuit Court before Judge Kenny, the jury deliberated as to whether Ms. Yeager was guilty of first- or second-degree murder. The next day, they reached a verdict: guilty of first-degree murder of Jonte Brooks and guilty of felony-firearm. Ms. Yeager is now serving a sentence of life without the possibility of parole.

***

Ms. Yeager's former appellate counsel filed a brief on appeal raising two issues and Ms. Yeager filed a supplemental brief upon undersigned counsel being appointed. The Court of Appeals remanded her case to the Wayne County Circuit Court. The Wayne County Circuit Court was directed to hold "an evidentiary hearing and determine whether defendant was denied the effective assistance of counsel. *People v Ginther*, 390 Mich 436 (1993)." The Court of Appeals limited these proceedings to "the issue of whether defendant's trial counsel rendered ineffective assistance of counsel by failing to request an instruction on voluntary manslaughter as a lesser included offense to murder."

At the hearing, trial counsel testified that self-defense is mutually exclusive of voluntary manslaughter. GH, 34, 38. He testified that "manslaughter really wasn't on the table...because her perspective was she was in fear of her life" and "of course" Ms. Yeager's emotions were heightened. GH, 19, 21.

Additionally, the trial court asked its own questions of counsel, calling into question his credibility in front of the jury. GH, 46-50. For example, the trial court highlighted that in closing argument, trial counsel posited that perhaps, Mr. Labarren, the "good Samaritan" could have been the shooter. GH, 46. The trial court

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queried, "There's no evidence of that good Samaritan shooting at the victim…do you believe that could have compromised your credibility with the jury?" GH, 46. The trial court also observed, correctly, that at trial, counsel also argued that the prosecution was talking about a victim other than Mr. Brooks. In essence, they had the wrong body. The court again queried whether this compromised trial counsel's credibility in front of the jury. GH, 47. Most pointedly, the trial court asked counsel whether he argued to the jury that "Mr. Brooks actually did not die in this shooting, and that he maybe had awakened with a new lease on life, because he was not the victim?" Counsel said he had made that argument. GH, 48. The trial court again wondered what affect this had on his credibility in front of the jury.

On September 28, 2021, after a *Ginther* hearing and closing arguments and reviewing pre- and post- *Ginther* briefing, Judge Kevin Cox granted Ms. Yeager a new trial. Judge Cox explained:

> That is to say, more directly, more succinctly, that based upon this record, uh, the evidence, the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, Ms. Yeager was guilty of voluntary manslaughter, and not first degree murder.
>
> And because of that, this Court must find that, had Mr. Humphrey not erred in failing to ask for the voluntary manslaughter instruction, there is, indeed, a reasonable likelihood, as defined by the case law, that a different outcome at trial would have occurred.
>
> Uh, for these reasons, uh, based upon this record, uhm, the Court finds that a reasonable juror could find that, based on the evidence, that this defendant was guilty of voluntary manslaughter, and not first-degree murder.

RECEIVED by MSC 2/10/2022 10:41:55 AM

> And based on that, the Court must grant Ms. Yeager, uh, a new trial.

9/28/21 Ginther Hearing, 18-19.

The Wayne County Prosecutor's Office filed a cross- appeal stating that counsel was not ineffective and asking the Court of Appeals to reverse Judge Cox, citing for the first time, *People v Raper*, 222 Mich App 475 (1997). The Court of Appeals, also citing *Raper*, "reverse[d] the trial court insofar as it held that defendant established a claim of ineffective assistance of counsel and awarded her a new trial." *People v Yeager*, unpub per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 346074), p 9-10 (citing *Raper* at 483-484) ("The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser-included offense such as manslaughter. *People v Zak*, 181 Mich App 1, 16 (1990) … [D]efendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice.").

Now-federal district court Judge Beckering concurred in the result, stating that she would have held a conflict panel and found that *People v Raper*, 222 Mich App 475 (1997) was wrongly decided. Ms. Yeager now appeals to this Court.

RECEIVED by MSC 2/10/2022 10:41:55 AM

I. Trial counsel was ineffective for failing to request a manslaughter instruction which denied Ms. Yeager her right to a fair trial, her right to present a defense, and her right to a properly instructed jury.

Issue Preservation and Standard of Review:

Ms. Yeager preserved this issue by filing a motion to remand and brief in support in the Court of Appeals. A *Ginther* hearing was held pursuant to remand from that Court. This issue is preserved, and the record has been fully developed.

Strickland provides that to demonstrate entitlement to relief based on a claim of ineffective assistance of counsel:

> First, the defendant must show that counsel was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v Washington, 466 US 668, 687 (1984).

This Court reviews a trial court's findings of fact for clear error and rulings on law *de novo*. *People v LeBlanc*, 465 Mich 575, 579 (2002).

Discussion:

Trial counsel was ineffective for failing to request a manslaughter instruction. On this point, Ms. Yeager, the trial court, the Court of Appeals' majority opinion, and the Court of Appeals' concurring opinion all agree.

RECEIVED by MSC 2/10/2022 10:41:55 AM

While reviewing courts are usually required to "indulge in a strong presumption that counsel's conduct falls within a range of professional assistance," there have been clear carve outs for per-se unreasonable performance when an attorney demonstrates they do not know the relevant law. *Hinton v Alabama*, 571 US 263, 273 (2014) (finding deficient performance where counsel's understanding of the law was "wrong" and demonstrated his failure to "make even the cursory investigation of the state statute.") "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id*. at 274.

Here, trial counsel's understanding of the relevant law and how it applied to the facts was at best incomplete. Trial counsel misstated the law several times during his testimony at the *Ginther* hearing. He believed that self-defense is mutually exclusive of voluntary manslaughter. GH, 34, 38. He testified that "manslaughter really wasn't on the table...because her perspective was she was in fear of her life" and "of course" Ms. Yeager's emotions were heightened. GH, 19, 21. However, that is the very circumstance in which one would consider a manslaughter instruction, as the jury instructions provide that manslaughter is appropriate where "her thinking was disturbed by emotional excitement." M Crim JI 16.9.

Additionally, the evidence of aggression used to justify self-defense may also satisfy the degree of provocation required by voluntary manslaughter that causes the defendant to act out of passion instead of reason. *People v Fountain*, 43 Mich App 489

RECEIVED by MSC 2/10/2022 10:41:55 AM

(1972); *People v Wright*, unpublished opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 348118). In fact, the jury would have benefitted from having a reasonable alternative to a flawed self-defense theory that was more consistent with the heighted emotional state Ms. Yeager described. *People v Heflin*, 434 Mich 482, 503 (1990); *People v Lee*, unpublished opinion from the Court of Appeals issued April 14, 2016 (Docket No. 325039) (GLEICHER, J., concurring) 6 ("the two defenses [(manslaughter and self-defense)] are not mutually exclusive.")

Trial counsel was steadfast in his belief that self-defense was appropriate but also testified that he understood Ms. Yeager to have been "in another whole vehicle…a situation of relative safety" preceding her firing a gun 17 times in the direction of Mr. Brooks. GH, 23. He testified that self-defense was appropriate because Ms. Yeager was "shootin' out of fear…because she was in fear for her life" but also shared that "as [Jonte Brooks] was to pull out, [Ms. Yeager] shoots at the vehicle as it exited." GH, 32-33. Counsel's decision to focus exclusively on self-defense was not a reasonable trial strategy and showed a misunderstanding of the law and facts.

Given the facts of this case, trial counsels' failure to request a voluntary manslaughter instruction was objectively unreasonable. Trial counsel testified that he did not ask that the jury be instructed on this necessarily included lesser offense in part because Ms. Yeager intend to kill Mr. Brooks. GH, 35, 51. The Wayne County Prosecutor's Office adopted the same argument on cross-appeal in the Court below.

RECEIVED by MSC 2/10/2022 10:41:55 AM

True, Ms. Yeager testified unequivocally at the *Ginther* hearing: she did not intend to kill Jonte Brooks. GH, 67. Nevertheless, by Ms. Yeager's own testimony, she knew that shooting a gun in the direction of a human being could cause great bodily harm. GH, 73. By trial counsel's own understanding, Ms. Yeager was shooting "to get him away from her…. Her actions are in line with her feelings…get away from me." GH, 34. Further, Ms. Yeager's testimony is only part of the evidence the jury considered in deciding whether intent to kill was met beyond a reasonable doubt. Ms. Yeager was on trial for first-degree murder based on evidence she "chased after and shot seventeen times at Jonte Brooks." 8/15/18 TT, 66. The gas station attendant saw Ms. Yeager "start shootin' at the minivan. Go runnin' towards it, and the minivan was tryin' to drive off." 8/14/18 TT, 22. The incident was captured on video and that video was submitted into evidence.

Where a defendant participates in a shooting, there is a clear intent to create a very high risk of great bodily harm and that that will be a probable result of firing a gun. "That intent exists regardless of whether the shooting was justified in self-defense." *People v Reese,* 491 Mich 127, 155 (2012).

Understanding voluntary manslaughter was fundamental to this case because the circumstances under which Ms. Yeager shot Jonte Brooks were enough to obscure the judgment of an ordinary person.

Manslaughter is a lesser included offense of murder. *Mendoza,* 568 Mich at 533. A trial court is obliged to give an instruction on voluntary manslaughter as a lesser-included offense if requested and a "rational view of the evidence" supports the

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defense *Id. at* 541, and since "reasonable provocation is a question of fact for the factfinder." *People v Pouncey*, 437 Mich 382, 390 (1991).

Voluntary manslaughter requires the same intent as murder — or a purposeful action taken in self-defense:

> Both murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. **However, the element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion**.

People v Mendoza, 468 Mich 527, 540, citing *People v Scott*, 6 Mich 287, 295 (1995)(emphasis added).

Assessing whether there is sufficient provocation for voluntary manslaughter is an objective test:whether an ordinary person of fair average disposition would have been provoked under the circumstances." Gillespie Mich Crim L and Proc Practice Deskbook May 2021 (citing *People v Pouncey,* 431 Mich 382 (1991)).

Ms. Yeager described what happened in her testimony at trial—Mr. Brooks threatened her with a gun, punched and hit her, pulled her hair, stole her van, and then continued to verbally assault her and threaten her life over the phone. This necessarily constituted the type of provocation that would cause a reasonable person to act rashly and on instinct. See *Reese*, 491 Mich at 151-152 (explaining that malice is negated where intentional killing is accompanied "by some sudden and sufficiently violent provocation") and *People v Darden*, 230 Mich App 597, 604 (1998) (finding adequate provocation existed where defendant shot men after discovering their

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attempt to steal auto part from his yard and getting into a verbal argument with them).

Ms. Yeager's identified emotion at the time of the shooting was fear. Fear can be adequate provocation to ultimately support a jury instruction voluntary manslaughter.

The prosecutor argued, without support, that fear is "the opposite of hot blood or heat of passion." Cross-Appeal Brief; GH, 40, 68-69. But "fear" bordering on hysteria caused by historical and recent-in-time physical and emotional abuse qualifies as uninterrupted provocation "sufficient to excite the passions beyond the control of reason." *People v Scott*, 6 Mich 287 (1859). *People v Townes* puts this issue to rest: "A defendant acting out of a state of terror, for example, is considered to have acted in the 'heat of passion.'" *People v Townes*, 391 Mich 578, 590 n 4 (1974).

In *People v Pouncey*, 437 Mich 382, 389 (1991), this Court noted that the provocation necessary is one requiring "emotions so intense that they distort the defendant's practical reasoning." The *Pouncey* court contemplated emotions other than anger could constitute adequate provocation under the law when it explained that although Mr. Pouncey was "scared and confused" he was not "so inflamed he lost self-control." *Pouncey*, 437 Mich at 390 n 9. In fact, fear is a generally understood emotion within provocation jurisprudence because where "the victim places the defendant in fear of death or serious bodily harm" a voluntary manslaughter instruction may be justified. 40 AMJUR HOMICIDE 49, VII(B).

RECEIVED by MSC 2/10/2022 10:41:55 AM

If counsel believed, as the prosecutor proposed in the lower courts, that fear precludes a manslaughter instruction, that was an additional misunderstanding of the law sufficient to support a finding of deficient performance.

The evidence demonstrated beyond nearly all doubt that Ms. Yeager was overcome by passion when she fatally shot Mr. Brooks. Had the voluntary manslaughter instruction been requested, it would have been read.

Unfortunately, trial counsel was underprepared, misunderstood the relevant law, inadequately informed his client, and, then, by his own testimony, improperly deferred to her on a matter of strategy, and as the trial court drew out in its own line of questioning, took active steps to undermine his own credibility in front of the jury. GH, 46-50. His representation fell below an objective standard of reasonableness.

RECEIVED by MSC 2/10/2022 10:41:55 AM

II. The Court of Appeals in correctly reversed the trial court's holding that Ms. Yeager was prejudiced by counsel's ineffective assistance. The Court of Appeals incorrectly relied on *People v Raper* and this Court should expressly overturn *People v Raper* as wrongly decided in part for the reasons stated herein and in the Court of Appeals' concurring opinion.

Standard of Review and Issue Preservation:

See supra, Issue I.

Discussion:

The Court of Appeals incorrectly held that *Raper* controls the outcome of the second prong of the *Strickland* analysis. Mr. Raper, convicted by jury of first-degree murder, argued that his counsel was ineffective for failing to request lesser-included offenses of voluntary and involuntary manslaughter. *People v Raper*, 222 Mich App 475, 483 (1997). The Court of Appeals held that where a jury rejects second-degree murder, that reflects "an unwillingness to convict on a lesser included offense such as [voluntary or involuntary] manslaughter." *Id*. Therefore, Mr. Raper could not show that counsel's failure to request the instruction was prejudicial. *Id* at 483-484. In support of this conclusion, the *Raper* court cited *People v Zak*, 184 Mich App 1 (1990). But this conclusion was an improper extension of *Zak*.

In *Zak*, Mr. Zak argued that the trial court erred by failing to instruct the jury on *involuntary* manslaughter. First, the Court of Appeals found no evidence on the record to support such an instruction. Second, the Court of Appeals held that even if there had been evidence to support an instruction, the jury was instructed on first- and second-degree murder and convicted on first-degree murder, "reflect[ing] an

RECEIVED by MSC 2/10/2022 10:41:55 AM

unwillingness to convict on manslaughter." *People v Zak*, 184 Mich App 1, 16 (1990). This conclusion is sound. *Raper*'s extension to include voluntary manslaughter is not. The differences between voluntary and involuntary manslaughter support why.

This Court defined two forms of common law manslaughter: voluntary and involuntary. Voluntary manslaughter, the instruction that Ms. Yeager's jury should have received, is a killing "in the heat of passion…with adequate provocation…[without] time during which a reasonable person could control his passions." *People v Mendoza*, 428 Mich 527, 535 (2003). Involuntary manslaughter, the instruction requested by Mr. Zak at trial, is "an unintentional killing, without malice." *Id*. *Mendoza* goes on to explain that the malice element for homicide and voluntary manslaughter is the same, however, that element is negated by circumstances of adequate provocation. Involuntary manslaughter, on the other hand, requires a lesser mens rea than murder. *Mendoza*, 428 Mich at 540-541. Therefore, where a jury is instructed on first- and second-degree murder, a conviction of the former would preclude a possible conviction of *involuntary* manslaughter. The second-degree murder instruction requested by the prosecutor was not a sufficient alternative because emotional excitement does not negate the intent to kill, it negates malice.

Raper improperly extended *Zak* to voluntary manslaughter. Nevertheless, in dicta, the Court of Appeals majority stated that it did not believe *Raper* was wrongly decided. *Yeager*, unpub op at 9 n 9. In support of that argument, the Court of Appeals concluded that a person who commits voluntary manslaughter acts out of a heat of

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passion and thus, does not deliberate. But in so stating, the Court of Appeals completely ignored *Mendoza*. *Mendoza* explained that "the element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion. Thus, we conclude, the elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *Mendoza*, 468 Mich at 540. "Premeditation and deliberation characterize a thought process undisturbed by 'hot blood.'" 5:280, Premeditation defined, Gillespie Michigan Criminal Law and procedure with Forms Practice Deskbook (2021). In other words, an individual could premeditate and deliberate, both questions of fact for the jury[2], but if those processes are disturbed by adequate provocation, malice is negated.

The time it takes to premeditate and deliberate can be a matter of seconds, the time it takes to flip a victim over from face-down to on her back. *People v Oros*, 502 Mich 229 (2018). The jury may have determined that Ms. Yeager's time with Mr. Labarren and away from Mr. Brooks was sufficient to premediate and deliberate. However, her thoughts were completely obscured by ongoing trauma. As concurring Judge Beckering observed, "[a]lthough decedent's taunts over the phone could not serve as adequate provocation, Brooks also physically assaulted defendant and attempted to run her over multiple times, including driving over people's lawns in an attempt to hit her, followed by carjacking and threats to kill her which kept her passions inflamed." *Yeager*, unpub op at 4 (BECKERING, J, concurring)

[2] *People v Oros*, 502 Mich 229, 241 (2018).

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It is rare that the law reflects the realities of human nature, but here it does. "[O]ut of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted," even if the jury finds malice beyond a reasonable doubt, manslaughter recognizes how one's thoughts are compromised by hot blood. *Townes,* 391 Mich at 590 (citing *Maher v People,* 10 Mich 212 (1862)).

This conclusion from *Townes* is absent from the Court of Appeals majority's reliance on the same. The Court of Appeals cited *People v Townes* for the conclusion that "[a] defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by adequate provocation and *not from the deliberation* and reflection that marks the crime of murder." *Yeager*, unpub op at 9 n 9 (citing *People v Townes*, 392 Mich at 590 (1974) (emphasis added by the Court of Appeals). However, the two paragraphs preceding that quote are this Court's comparison between murder and voluntary manslaughter, where this Court explained that voluntary manslaughter "parallels the crime of murder" given the same malice components but "an examination of all the circumstances surrounding the killing [demonstrate that] malice was negated by provocation." *Id* at 589. This Court cited to an 1862 case wherein voluntary manslaughter was further explained as an intentional killing wherein "temporary excitement" disturbed "the control of reason." *Id*. (citing *Maher v People*, 10 Mich 212, 219-220 (1862)).

Although, *People v Mendoza* arguably implicitly overruled *Raper*, this Court should expressly overrule the same in this case.

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This Court's decision in *People v Beach* also dictates that this Court overrule *People v Raper*.

Concurring in the result, Judge Beckering observed that Raper conflicts with this Court's decision in *People v Beach*, 429 Mich 450 (1988). Unlike *Mendoza*, which came after *Raper*, *Beach* preceded *Raper* and *Zak*. Judge Beckering summarized *Beach* as follows:

> In *Beach*…our Supreme Court held that the failure to instruct the jury in regard to conspiracy to commit larceny in a building constituted error; however, because the jury rejected the lesser included offense of conspiracy to commit unarmed robbery and convicted the defendant of the greater offense of conspiracy to commit armed robbery, the error was ultimately harmless. In regard to the harmless error analysis, the Court explained that "[t]he existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the [harmless error] analysis." *Id.* at 491. Rather, "the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Id.* The Court further explained that implicit in the jury's verdict in that case was a finding concerning the use of a weapon. *Id.* at 492. The Court observed that "if [the jury] concluded that the defendant was not planning to use force, it could have and undoubtedly would have, found her guilty of the instructed lesser included offense of conspiracy to commit unarmed robbery." *Id.* at 490. As a result, the Court believed that the jury's verdict showed that the failure to provide an instruction concerning the conspiracy to commit larceny in a building was not prejudicial to the defendant because the jury had no reasonable doubt concerning the intended use of force. *Id.*

Judge Beckering concluded "the jury's rejection of second-degree murder does not 'necessarily indicate a lack of likelihood that the jury would have adopted' a verdict of manslaughter." *Yeager*, unpub op at 6. (BECKERING, J, concurring). Thus, *Raper*

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"impermissibly limits relief in cases involving instructional error." *Id*. More to the point, "*Raper* acts as an absolute bar to relief in circumstances such as those presented in this case." *Id*. Its holding then, not only conflicts with *Beach*, but with ineffective assistance of counsel jurisprudence at large, as these claims "are reviewed on the basis of the facts in each individual case." *Id*. For this reason, too, this Court should peremptorily, or following oral argument, overrule *People v Raper*.

The trial court correctly concluded that, but for counsel's ineffective assistance, there was a reasonable likelihood of a different outcome at trial.

The question presented to this Court is whether the trial court clearly erred when it determined that there was a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 US at 695. At the *Ginther* proceeding, the trial court's function was appropriately "limited," as the trial court was not permitted to base its decision on whether it would have convicted Ms. Yeager of an offense other than first-degree murder, but rather "whether there is a reasonable probability that the outcome would have been different." *Yeager*, unpub op at 8 (citing *People v Trakhtenberg*, 493 Mich 38, 51 (2012).

The trial court found that "Ms. Yeager was emotionally excited…she was not calm when she shot the gun." 9/28/21 GH, 8. A reasonable time to calm down is not defined by a specific window of time but rather whatever time is necessary for "the blood to cool." *People v Hess,* 214 Mich App 33, 38 (1995). Some limits are clear. For example, in *People v Tierney,* the Court held that where Mr. Tierney drove for three hours to get a gun, and nine hours passed between the provocation and the shooting,

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that was a time frame sufficient for a reasonable person could calm down. *Tierney,* 266 Mich App 687, 716 (2005). By contrast, Ms. Yeager's experience was one of ongoing emotional excitement. Ms. Yeager did not have time to calm down. The trial court properly found a reasonably probability that, at the very least, one juror would agree. *Ramonez v Berghuis*, 490 F3d 482, 491 (CA 6, 2007) ("[a]ll it would have taken is for 'one juror to have struck a different balance' between the competing stories.")

This shooting, the trial court found, "was the result of a passionate decision to shoot." 9/28/21 GH, 18. The decision to shoot followed what the trial court found to be "a serious and life-threatening event." 9/28/21 GH, 18.

At trial and again at the *Ginther* proceeding, Ms. Yeager stated that while she was no longer being physically abused, Mr. Brooks was "verbally attackin' me, tellin' me things like he was gonna kill me…and I believed everything that Mr. Brooks said." GH, 66. Trial counsel testified that a carjacking occurred "a short time before the shooting." During the shooting, Mr. Brooks remained in the van he had stolen from Ms. Yeager. GH, 17. Ms. Yeager believed she was going to the gas station to retrieve her stolen vehicle, not re-encounter her abuser who continued to threaten her over the phone. GH, 59. Ms. Yeager stated that, looking back, she "can't think what I was thinking at that moment, besides just being scared." GH, 75.

By her own testimony, Ms. Yeager had yet to calm down. GH, 66. Ms. Yeager described her feelings at trial and again at this proceeding as "scared." GH 68-69. She only recalled shooting the gun "maybe twice," despite having fired seventeen shots.

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GH, 61, 75. She could not recall what she was thinking besides being "scared" and wanting Mr. Brooks to "stop." GH, 75.

Mr. Borom's observations of Ms. Yeager at the gas station also support the conclusion that Ms. Yeager killed Mr. Brooks while under the heat of passion, which resulted from adequate provocation, and that there was no lapse of time during which a reasonable person could have controlled her passions. He described her as "hysterical." 8/14/18 TT, 60-61.

The trial court determined that "a reasonable juror could find that, based on the evidence, that this defendant was guilty of voluntary manslaughter and not first-degree murder." 9/28/21 GH, 19. There is more than a "fairly good chance" of a different outcome at trial. See, e.g. *Wiggins*, 539 US at 513.

Ms. Yeager's jury deliberated for several hours across two days, requesting multiple exhibits including video footage of the shooting and 911 calls. 8/16/18 TT, 6. Having received those exhibits, the jurors deliberated another five hours. Ultimately, the jury found Ms. Yeager intended to kill Mr. Brooks but was erroneously denied the opportunity to consider the horrific circumstances that led to Ms. Yeager shooting Mr. Brooks- a day full of verbal and physical abuse. The jury was erroneously denied the opportunity to consider whether Mr. Brooks' life-threatening abuse would cause a reasonable person to act on instinct and out of passion, and ultimately, whether those circumstances partially excused the homicide. The second-degree murder instruction requested by the prosecutor was not a sufficient alternative because emotional excitement does not negate the intent to kill, it negates malice. With proper

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instructions, jurors could still believe Ms. Yeager intended to kill Mr. Brooks, but did so under great emotional distress. The facts of the case make this conclusion almost inevitable.

Even if this Court disagrees that there is a reasonable likelihood of a different outcome, this Court can still grant relief under *Strickland* by determining that the trial was fundamentally unfair. Ultimately, the "focus of the inquiry should be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 US at 696. Trial counsel's representation of Ms. Yeager led to a fundamentally unfair trial. *Weaver v Massachusetts,* 137 S Ct 1899, 1911 (2017). She was not afforded meaningful representation. *People v Cronic*, 466 US 648, 657 (1984).

As argued above, counsel was ineffective for failing to request a voluntary manslaughter instruction. However, counsel also shirked his duties to Ms. Yeager in other ways.

Counsel testified that he discussed his strategy with Ms. Yeager and that she agreed to it. GH, 35. Ms. Yeager testified otherwise. Ms. Yeager described trial counsel as certain of his ability to obtain an acquittal by asserting self-defense. GH, 65. Ms. Yeager had not heard of voluntary manslaughter until after she had been convicted of murder and spoke with undersigned counsel. GH, 66. A client can only agree to a defense with complete information and trial strategy is squarely in the province of the attorney. MPRC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.") Further, even if Ms. Yeager had requested to pursue self-defense,

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which she disputes, trial counsel's duty of loyalty is not blind loyalty, it required him to "bring to bear such skill and knowledge as will rend the trial a reliable adversarial testing process." *Strickland*, 466 US at 688. "Defense counsel may not use trial strategy to insulate trial decisions if counsel cannot provide a reasonable basis for the chosen strategy, particularly where, as here, the strategy is chosen before conducting any reasonable investigation." *People v Trakhtenberg,* 493 Mich 38, 53 n 8 (2012).

Additionally, as the trial court drew out in its own line of questioning at the *Ginther* hearing, trial counsel took active steps to undermine his own credibility in front of the jury. GH, 46-50. For example, the trial court highlighted that in closing argument, trial counsel posited that perhaps, Mr. Labarren, the "good Samaritan" could have been the shooter. GH, 46. The trial court queried, "There's no evidence of that good Samaritan shooting at the victim…do you believe that could have compromised your credibility with the jury?" GH, 46. The trial court also observed, correctly, that at trial, counsel also argued that the prosecution was talking about a victim other than Mr. Brooks. In essence, they had the wrong body. The court again queried whether this compromised trial counsel's credibility in front of the jury. GH, 47. Most pointedly, the trial court asked counsel whether he argued to the jury that "Mr. Brooks actually did not die in this shooting, and that he maybe had awakened with a new lease on life, because he was not the victim?" Counsel said he had made that argument. GH, 48. The trial court again wondered what affect this had on his credibility in front of the jury. Finally, as the Court of Appeals concurrence

highlighted, trial counsel was arguable ineffective at pre-trial plea negotiations: "During his *Ginther* hearing, defense counsel explained that if he requested a voluntary manslaughter instruction, defendant may as well have taken the plea deal offered by the prosecution because defendant would then have to admit that she exited the truck with the intent to shoot and kill Brooks." *People v Yeager*, unpub op at 4 n 3 (BECKERING, J, concurring). Simply put, this is a situation wherein "counsel is available" but "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." *Cronic*, 466 US 648, 660-661 (1984).

Trial counsel's ineffectiveness was pervasive. He was underprepared, misunderstood the relevant law, inadequately informed his client, and then, by his own testimony, improperly deferred to her on a matter of strategy when she had incomplete information. Ms. Yeager's trial was fundamentally unfair.

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III. Trial counsel was ineffective for failing to call an expert witness in Battered Spouse Syndrome. Ms. Yeager is entitled to a new trial.

Issue Preservation

Ms. Yeager raised this issue in the Court below and there filed a motion to remand raising this issue. MCR 7.211(C)(1). This issue was not addressed at the *Ginther* hearing but is nevertheless preserved for this Court's review.

Standard of Review

Constitutional questions and ineffective assistance of counsel issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Discussion

The right to the effective assistance of counsel is well-established in Michigan and federal jurisprudence. US Const, Ams VI, XIV; *Strickland v Washington,* 466 US 668, 686 (1984); Const 1963, art 1, § 20; *People v Pickens,* 446 Mich 298, 310-311 (1994). To prevail on a claim of ineffective assistance of counsel, Ms. Yeager must first show that "counsel's performance fell below an objective standard of reasonableness," and that she was prejudiced as a result. *Wiggins v Smith,* 539 US 510, 521 (2003); *People v Armstrong*, 490 Mich 281, 289-290 (2011).

To establish prejudice, Ms. Yeager "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Ms. Yeager does not need to show that counsel's error more likely than not affected the outcome. *Id.* The result of a proceeding can be rendered unreliable, and the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have

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determined the outcome. A reasonable probability is sufficient to undermine confidence in the outcome. *Id.*

There is a presumption that trial counsel's assistance constituted sound trial strategy. *Armstrong,* 490 Mich at 289-290. However, counsel's performance is not insulated from review "by calling it trial strategy," rather "[c]ounsel always retains the 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v Trakhtenberg*, 493 Mich 38, 51-52 (2012), citing *Strickland,* 466 US at 690-691. A court must determine whether "strategic choices were made after less than complete investigation." *Id.*

Trial counsel "is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo,* 283 Mich App 360, 371 (2009). Counsel's performance may be constitutionally deficient where counsel fails to undertake investigations relevant to the defense. *Trakhtenberg*, 493 Mich at 51-52. Examples of such investigations include identifying the factual predicate of all charges, failing to consult or interview key witnesses who would have revealed weaknesses of the prosecutor's case, and failing to sufficiently develop the defense presented at trial. *Id.* at 53-54.

Another way an attorney can fail to meet his duties is by failing to consult with and call an expert when an expert's assistance would be critical to the defense. *Harrington v Richter*, 562 US 86, 106; 131 S Ct 770 (2011) ("criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both"); *See,*

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e.g., People v Dixon, 263 Mich App 393, 398 (2004); *People v Kelly*, 186 Mich App 524, 526-527 (1990). An attorney's failure to call a witness constitutes ineffective assistance when it deprives a defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190 (2009). A substantial defense is one that might have made a difference in the trial's outcome. *Chapo*, 283 Mich App at 371.

Trial counsel's failure to investigate or present expert testimony about Battered Spouse Syndrome as part of Ms. Yeager's defense fell below an objective standard of reasonableness.

Ms. Yeager was prejudiced by the failure to present expert testimony about Battered Spouse Syndrome (BSS).

This Court has held that expert testimony about Battered Spouse Syndrome can help the jury better understand the "complex behavior of a victim of the BSS." *People v Wilson*, 194 Mich App 599, 603-604; 487 NW2d 822 (1992). This Court limited the expert testimony on the syndrome itself, not whether a particular person suffers from it or acted because of it. *Id.* at 605.

In *Wilson*, the defendant wanted expert testimony on BSS in order to support her claim of self-defense. *Id.*at 600-601. Ms. Wilson had admitted that she shot the decedent while he slept, but only out of self-defense after years of abuse and recent death threats. *Id.* at 601. This Court summarized some of the features of BSS, including the phases of abuse: tension-building, acute battering, calm and loving behavior—a "continued cycle of violence and contrition." *Id.* at 603, quoting *Tourlakis v Morris*, 738 F Supp 1128, 1134 (SD Ohio, 1990). This Court also acknowledged that other jurisdictions rely on BSS "to explain the reasonableness of the battered spouse's

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perception that danger or great bodily harm is imminent, and also to rebut the prosecution's inference that the defendant could have left rather than kill the spouse." *Id.* at 604.

Here, trial counsel made similar arguments to those made in *Wilson*. Charged with murder, Ms. Yeager argued self-defense, and testified about the abusive nature of her relationship with Mr. Brooks.

The abuse and control was a central part of the defense case, as trial counsel mentioned it several times during his closing argument, saying that "Mr. Brooks was attackin' my client." 8/15/18 TT, 97. Trial counsel also tried, without success, to admit evidence of Mr. Brooks' prior acts against Ms. Yeager. 6/12/18 Motion hearing, 6/19/18 Motion hearing, 6/21/18 Motion hearing; and see Ms. Yeager's Brief on Appeal Issue I. During direct examination of Ms. Yeager, trial counsel had Ms. Yeager describe in detail the assault she endured on August 27, 2017. 8/15/18 TT, 17-19, 25. He asked her whether she was in "an abusive relationship" and she testified that she was. 8/15/18 TT, 24. She testified to her overwhelming fear for her life while she shot at her van. 8/15/18 TT 29, 42.

A BSS expert would have helped the jury contextualize this type of violence and evaluate Ms. Yeager's credibility. Expert testimony has been deemed helpful and relevant to explain a defendant's actions where there is: "prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse." *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995). Ms. Yeager fits these categories. She testified to

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approximately six months of abuse and the jurors questioned why, after such a brutal assault on August 27, 2017, Ms. Yeager would not go directly into a police station. As the expert noted in *Christel,* battered women's syndrome is not "easily conceptualized by a lay person." *Christel*, 449 Mcih at 588. Testimony from an expert would have been "relevant and helpful." *Christel*, 449 Mich at 580.

Failing to call an expert on battered spouse syndrome prejudiced Ms. Yeager's defense.

The prosecutor's entire closing called into question Ms. Yeager's credibility. It framed her as vindictive and vengeful and her acts a "revenge" killing. 8/15/18 TT, 108. But these are just the "[p]opular misconceptions about battered women" that need to be "put to rest." *Christel* at 588. Unlike the complainant in *Christel*, Ms. Yeager was still in the abusive relationship at the time of the incident. Although she had called the police, she never reported in person and never sought medical attention for her injuries. Her actions on August 27, 2017 were "incomprehensible to average people" as, seemingly, the cause of her hysteria had dissipated as soon as Mr. Brooks drove away. *Christel* at 598. That is simply not how the psychological trauma of battering works. And, while an expert could not label Ms. Yeager herself a battered woman an expert could explain why the effects of battering are enduring, even during periods of non-violence.

Simply put, the very actions the prosecutor used to emphasize premeditation and deliberation were actually more indicative of a traumatized woman trying to escape an abusive relationship. The jury never learned that but if they had, there is a reasonable likelihood of a different outcome at Ms. Yeager's trial.

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Request for Relief

Ms. Yeager asks that this Court peremptorily reverse the Court of Appeals, find that *People v Mendoza* repudiated *Raper*, and remand to the circuit court for a new trial consistent with the circuit court's opinion following the *Ginther* proceedings or any other relief it deems just.

Respectfully submitted,

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