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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

David Serges

Defendant-Appellant.

MSC No.

COA No. 355554

Genesee County Circuit Court
Case No. 18-042951-FC

Defendant-Appellant David Serges' Application for Leave to Appeal

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Judgment Appealed From and Relief Sought

The published opinion below gives police new license to seize presumptively innocent people's belongings from the jail property room without a warrant and to conduct warrantless searches of those items, including through the use of forensic technology, for evidence of crimes unrelated to the crime of arrest.

The Court of Appeals' holding permits the following warrantless searches, for example:

- Test-firing and performing toolmark examination on a lawfully owned handgun, where the gun belongs to a CPL holder who is arrested and jailed for a driving offense, unrelated to weapons;
- Swabbing the inside of a wallet for invisible drug residue, where the owner of the wallet is arrested and jailed for retail fraud; and
- Subjecting clothing to DNA analysis as part of a murder investigation, where the wearer is arrested and jailed for an unrelated ordinance violation, as was done here.

While Mr. Serges "remained jailed on unrelated misdemeanor charges", police took his clothing from the Genesee County Jail into custody as evidence in a murder investigation, and later sent it to the Michigan State Police for forensic analysis. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 2. A tiny speck of the decedent's blood was found on his pants. This became "the central piece of evidence" in the case against Mr. Serges. H 11/26/2018, 4. Mr. Serges' first trial ended in a hung jury; the second time around, he was convicted. "The lack of reliable evidence of guilt, aside from the DNA evidence, is unsettling." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 1.

In the opinion below, the Court of Appeals created a new exception to the warrant requirement—a 'custody exception.' According to the Court of Appeals, once a person is in custody, police can confiscate and search any property that was on or near their person upon arrest. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 12-13. But only the United States Supreme Court can establish exceptions to

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the warrant requirement, and binding precedent makes clear that privacy and possessory interests do not evaporate upon arrest. In *People v Carr*, this Court interpreted the Michigan Constitution and held, "Defendant was not stripped of his civil rights and his constitutional safeguards merely because he was serving a sentence in the county jail for an unrelated misdemeanor. It would be a dangerous rule of law and an invitation to circumvent the constitutional guaranty against unreasonable search and seizure were the citizen convicted of a misdemeanor and in jail, possibly in default of payment of a fine to be stripped of all his civil liberties." *People v Carr*, 370 Mich 251, 255 (1963). See also *People v Custer*, 465 Mich 319, 342-343 (2001) (arrest does not extinguish expectation of privacy in effects). In *People v Hughes*, this Court again noted that seizure of an item upon arrest does not eliminate one's reasonable expectation of privacy in the item, and the authority to search an item for one purpose does not justify a subsequent search for another purpose. *People v Hughes*, 506 Mich 512, 530-532, 547 (2020). The Court of Appeals then held Mr. Hughes' trial counsel was ineffective for failing to move to suppress the evidence obtained through the warrantless search. *People v Hughes*, 339 Mich App 99, 101 (2021).

Here, the Court of Appeals relied on *Lanza v New York*, 370 US 139, 143 (1962). *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 12-13. At issue in *Lanza* was the government's interception of a conversation in a jail visiting room, *Lanza*, 370 US at 141-142; the case had nothing to do with personal effects. In any event, the Court in *Lanza* did not create any applicable rule because it did not resolve the Fourth Amendment question. *Id*. at 144-146.

The newly-minted 'custody exception' to the warrant requirement permits law enforcement to arrest people for minor offenses, seize whatever is in their possession at the time, and later subject their property to searches and testing, based only on a hunch—or bias, or animus. It also incentivizes police to seize and retain an arrestee's belongings that have nothing to do with the crime of arrest, just in case the items later become relevant to some other investigation.

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This Court should grant leave or peremptory reversal to correct the Court of Appeals' far-reaching error, and ultimately grant Mr. Serges a new trial.

This Court should also address several other, significant errors:

- A detective testified that, based on his training and experience, Mr. Serges' body language indicated that he was lying when he denied involvement in the murder.
- The prosecutor misrepresented that the decedent's friend identified Mr. Serges as a man who came to the decedent's home, and that he was angry during that visit. The prosecutor also repeatedly argued that the decedent was last seen alive on Thanksgiving Day, talking to Mr. Serges, but a witness—whose testimony was never presented to the jury—saw the decedent alive on Saturday, by herself.
- The trial court denied trial counsel's request for a new jury panel after prospective juror announced that he had seen Mr. Serges in jail before trial.
- The trial court denied Mr. Serges' motion to adjourn trial, despite the prosecutor's agreement, forcing the case to trial in September 2020, when the COVID-19 pandemic was raging. Potential jurors could be exempted, before jury selection and off the record, if they had health concerns or caretaking responsibilities. This deprived Mr. Serges of his right to trial by a fair cross-section of the community.
- The COVID-19 related restrictions, which included requiring Mr. Serges to either wear a mask or sit six feet away from his attorney violated his rights to a fair trial and to confront the witnesses against him.
- Convening a jury during the COVID-19 pandemic, where the defense moved to adjourn trial and the prosecutor concurred with that request, created an unreasonably high risk of a coerced jury verdict.

Given the errors in this case and the scant evidence against Mr. Serges, the adversarial testing process was unreliable. Neither the public nor this Court can have confidence in the result. Mr. Serges is serving life in prison without the possibility of parole based on a trial that was not only "unsettling", but unacceptable.

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Statement of the Questions Presented

First Question

The police seized and searched Mr. Serges' property without a warrant in violation of the state and federal constitutions. The fruit was the prosecution's central piece of evidence against Mr. Serges. Was the use of illegally obtained evidence plain error that affected Mr. Serges' substantial rights? Alternatively, was trial counsel ineffective for failing to move to suppress?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Second Question

Was Detective Freeman's testimony regarding Mr. Serges' veracity plain error, and the prosecutor's elicitation of the testimony was prosecutorial error? Was trial counsel ineffective for failing to object?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Third Question

Was the prosecutor's argument improper because it was based on facts not in evidence and was contradicted by evidence she had in her possession? Was trial counsel ineffective for failing to object or otherwise address the misrepresentations?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

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Fourth Question

Did the trial court err in denying Mr. Serges' request for a new jury panel where the panel heard that Mr. Serges was in jail leading up to trial, thereby depriving him of his right to due process and the presumption of innocence?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Fifth Question

Did the COVID-era jury selection procedures deny Mr. Serges his state and federal constitutional right to trial by a fair cross-section of the community?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Sixth Question

Did requiring Mr. Serges to either wear a mask or sit six feet away from his attorney deny Mr. Serges his right to a fair trial and infringed his state and federal right to confront the witnesses against him?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Seventh Question

Did convening a jury during the COVID-19 pandemic create an unreasonably high risk of a coerced jury verdict?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

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Statement of Facts

As Dallas Robinson was leaving his home in the morning on November 27, 2017,—the Monday after Thanksgiving—a car pulled into his driveway behind his vehicle, blocking Mr. Robinson in. T V, 41. The driver was a man Mr. Robinson did not know. T V, 41.[1] The man greeted Mr. Robinson, mentioned having some car trouble, and asked what time Mr. Robinson would be back home. T V, 42. Mr. Robinson did not recognize the man and did not trust him. T V, 42. The man's behavior concerned Mr. Robinson. T V, 42.

Later that morning, Mr. Robinson thought about his neighbor, Gail Anderson. T V, 39. Mr. Robinson called Ms. Anderson repeatedly because he wanted to advise her of the unknown man's suspicious behavior. T V, 42-43. When Ms. Anderson did not answer his phone calls, Mr. Robinson went to her house to check on her. T V, 43-44. He found her dead on her kitchen floor and called the police. T V, 44.

When police arrived at the scene, there was blood on the exterior door, garage, interior walls, furniture, counters, cabinets, and floors. T III, 64-83; T IV, 159. The medical examiner testified that Ms. Anderson sustained injuries to her head, skull, and brain, as well as other bruises. T III, 138-142. The medical examiner could not determine what day Ms. Anderson died—her estimated time of death fell within a window of several days and could never be narrowed further. T III, 178.

The medical examiner ruled Ms. Anderson's death a homicide. T III, 144, 202. Mr. Serges became a "person of interest" because he was seen walking in the neighborhood a few days before Ms. Anderson's body was

[1] Mr. Robinson testified that the man who pulled into his driveway was not David Serges. T V, 42, 58. In addition, Mr. Robinson testified that the unknown man is African American. T V, 42. The jury would have been able to observe that David Serges is Caucasian.

found. EH, 20.[2] Mr. Serges often did handyman work in the neighborhood. T IV, 101.

Ms. Anderson was seen on video shopping at Kroger on the Wednesday before Thanksgiving. T VI, 36. She was found dead on Monday. T V, 41-44. The many hours of video footage police viewed showed Mr. Serges in Ms. Anderson's neighborhood on Thursday and Friday, but not on Saturday, Sunday, or Monday. T VI, 38-39; T VI, 82, 178.

Ms. Anderson's neighbor, Ashley Durga, told police that she saw Ms. Anderson checking her mail on Saturday. Neither the prosecution nor the defense called Ms. Durga as a witness at trial.

Ms. Anderson was known to carry cash with her, but officers found none in her wallet or purse. T IV, 18; T VI, 47. Police located a single fingerprint at the scene: on a card in Ms. Anderson's wallet. T VI, 149. The fingerprint did not belong to Mr. Serges. T VI, 151, 163. The police ran the print through state and federal fingerprint databases, but the databases did not return a match. T V, 151-152. It is unknown to whom this fingerprint belongs. T VI, 151, 163. Neither Mr. Serges' fingerprints nor his DNA were found at the scene.

Detective Eric Freeman, the officer in charge of the investigation, testified that, on November 29, 2017, Mr. Serges was arrested "[o]n suspicion of the homicide." EH, 20, 24. Detective Freeman admitted that

[2] The evidentiary hearing transcript is referenced as "EH", followed by the page number. At the evidentiary hearing, the parties stipulated to the admission of a timeline of key events, Stipulated Timeline of Key Events in 2017-2018, referenced as Joint Exhibit AA. Attached to the timeline were Joint Exhibits A-F. EH, 4. The parties later stipulated to the admission of Joint Exhibit G, the video of Mr. Serges' interview with police (without audio).

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the police report reflects that Mr. Serges was arrested on outstanding warrants[3], not for murder. EH, 41.

Detective Freeman interviewed Mr. Serges after he was arrested. EH, 23, 51. During the interview, Detective Freeman sat an arm's length away from Mr. Serges for over an hour. EH, 52. In 2018, Detective Freeman testified that, during the interview, he was looking Mr. Serges over and examining him. PE, 45. He was paying special attention to Mr. Serges' legs. EH, 54. Detective Freeman did not observe any blood on Mr. Serges' pants during the interview. PE, 45; EH, 27, 52-54.

At the evidentiary hearing in 2023, Detective Freeman changed course: he testified that he did observe blood on Mr. Serges' pants "at some point." EH, 26. He did not recall when he spotted the blood. EH, 27. He claimed it was "sometime at the office." EH, 27.

[3] Mr. Serges had one outstanding warrant for his arrest. See Joint Exhibit A (Register of Actions for 67th District Court Case No. 16F01452). The outstanding warrant was for failing to appear for arraignment on an ordinance violation.

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A still photograph from Detective Freeman's (left) interview with Mr. Serges (right). The video (without audio) was admitted as a stipulated exhibit, Joint Exhibit G.

Mr. Serges told Detective Freeman he had injected heroin 30 to 45 minutes before the interrogation began. T VI, 50. The detective testified that Mr. Serges seemed functional, so he saw no reason to stop the interview. T VI, 51.

Mr. Serges told police he knew Ms. Anderson, did handyman work for her, and never did anything to harm her. PE, 44; T VI, 67. Mr. Serges was unable to recount his daily whereabouts accurately or consistently, which the detective found unsurprising since Mr. Serges was both transient and dependent on heroin. T VI, 53, 72-73. After his interview with police, police held Mr. Serges in custody on the ordinance violation

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warrant. See Joint Exhibit A (Register of Actions for 67th District Court Case No. 16F01452).

The day after Mr. Serges' arrest, Detective Freeman seized Mr. Serges' property, including his pants, from the Flint City Jail. EH, 42-43. Detective Freeman testified that, once taken from the jail, Mr. Serges' belongings were "secured in evidence", EH, 44, because he had been arrested on suspicion of murdering Ms. Anderson. EH, 45.

Detective Freeman testified that, within 48 hours of Mr. Serges' arrest, he submitted a warrant request for homicide to the prosecutor. EH, 27, 41. He testified that the prosecutor denied the request. EH, 27, 41. There is no other evidence in the record of this warrant request.

Mr. Serges remained in jail on an outstanding warrant. EH, 42. The police sent numerous items to MSP for testing: items from the crime scene and articles of Mr. Serges' clothing that had been found in an abandoned house. EH, 33. None of these items connected Mr. Serges to the scene.

Nearly two months after Mr. Serges' arrest, police sent the pants seized from Mr. Serges' jail property to MSP for testing. EH, 34, 51. At the time, Mr. Serges was not charged with murder. He remained in jail for ordinance violations. See Joint Exhibit A (Register of Actions for 67th District Court Case No. 16F01452); Joint Exhibit B (Register of Actions for 67th District Court Case No. 18F00053).[4]

Detective Freeman testified that Mr. Serges' pants were in the "second batch" of items the Burton Police Department sent to the Michigan State Police Laboratory. EH, 33, 45. When confronted with MSP records, however, Detective Freeman acknowledged that his Department submitted requests to test items to the MSP Lab on

[4] The Court of Appeals took "judicial notice" of the Register of Actions for 67th District Court Case No. 18F00053. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 5 n 6. The Register of Actions was admitted into the record during the evidentiary hearing, and filed in the Court of Appeals, as Joint Exhibit B.

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November 27, 2017, EH, 46; December 1, 2017, EH, 48-49; December 7, 2017, EH, 48; January 12, 2018, EH, 50; and January 19, 2018. EH, 51.

Mr. Serges' pants were sent for testing on January 19, 2018. EH, 51. At trial, an MSP biologist named Samantha Hopcraft testified that she did every DNA testing report in this case except for one. T V, 178. Ms. Hopcraft initially received evidence related to this case in December 2017. T V, 178. She tested 11 items in her first report, Lab Record 4. T V, 179. For her second report, Lab Record 7, she tested samples from a gray sweatshirt. T V, 190. For her next report, Lab Record 13, she tested blood from a hammer handle, blood from a chair arm, and blood from a long sleeve shirt. T V, 191. For Ms. Hopcraft's last report, Lab Record 15, she tested blood from a dark blue hooded sweatshirt, blood from a long sleeve shirt, and possible blood from jean shorts. T V, 193. Another MSP biologist, Heather Goff, tested cuttings of a cigarette butt, possible blood from a boot, blood from a right jean leg, and blood from a left jean leg, and authored Lab Record 9. T VI, 8, 10.

On the pants the police seized from Mr. Serges the day after his arrest, MSP located and forensically tested a tiny speck of blood that matched the decedent's DNA. T VI, 15. After these results came in, a District Court judge signed a warrant for Mr. Serges' arrest for open murder. EH, 35, 42. None of the other tests linked Mr. Serges to the crime scene. T V, 78-110, 195.

At trial, the prosecutor who introduced the pants into evidence described the blood on Mr. Serges' pants as "one spot of blood, that we had to look with a special instrument to see, that he would never have seen with the naked eye". T VI, 136.

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Mr. Serges' pants, labeled with the MSP item number, BP17-4370-15Ad, written in blue ink. Mr. Serges' pants were admitted as People's Exhibit 123 at trial. T IV, 210. See also T V, 93-95. The prosecutor attached a photo of the pants to the People's Response to Mr. Serges' Motion for New Trial (After Remand).

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Stain from right jean leg that MSP found to match Ms. Anderson's DNA. See Joint Exhibit C, Lab No. BP17-4370 (Record No. 9, item BP17-4370-15Ae). The stain is barely visible against the black denim. It appears to be approximately one-quarter inch in length. It is longer than it is wide.

Detective Freeman testified at trial that he saw video of Mr. Serges wearing light-colored jeans on Friday. T VI, 39, 45. A neighbor testified that Mr. Serges was wearing "blue jeans" on Saturday. T IV, 103. The pants that the police seized from Mr. Serges and searched were "black jeans." T V, 90, 93. They cannot be fairly characterized as light or blue.

Mr. Serges' first jury trial began on May 29, 2019, and ended in a hung jury.

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Between the hung jury and retrial, the COVID-19 pandemic had swept the globe. Trial counsel moved to adjourn, arguing that Mr. Serges' trial could not be fair given the COVID-era circumstances. H 7/28/2020, 10-11; H 8/14/2020, 4. The prosecutor joined in the request and echoed trial counsel's concerns. H 8/14/2020, 7-8. The prosecutor noted that the People would not be prejudiced by an adjournment since Mr. Serges' case had been tried already and thus the testimony was preserved. *Id*.

The trial court denied the motion to adjourn. H 8/14/2020, 27. Mr. Serges' retrial was the first COVID-era jury trial in Genesee County. H 8/14/2020, 7. The Court retrofitted the courtroom with tempered glass, modified seating arrangements, adjusted the jury selection, exempted certain groups from jury service, and instituted mask-wearing and cleaning procedures to inhibit transmission of the virus. H 8/14/2020, 9-27; Appendix L (Supplemental Juror Screening Questionnaire).

Mr. Serges was convicted on September 23, 2020. He was sentenced to serve life in prison without the possibility of parole. He had no prior felony convictions. *PSIR*.

The trial court denied Mr. Serges' motion for new trial. The Court of Appeals remanded the matter to the trial court for an evidentiary hearing. The Court of Appeals limited the proceedings on remand to the claims in Issue I of Mr. Serges' Brief on Appeal, which are reflected in Issue I of this application.

At the evidentiary hearing, Mr. Serges' trial attorney, David Clark, testified that the only thing that tied Mr. Serges to the crime scene was the "small amount of blood on his right hip." EH, 11. But Mr. Clark did not consider moving to suppress the seizure and testing of Mr. Serges' pants. EH, 9.

When asked whether he recalled telling appellate counsel that he did not file a motion to suppress because he "just didn't think of it," Mr. Clark did not give a responsive answer. EH, 16-17. One reason he did not move to suppress was because he "assumed" when Mr. Serges' was

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arrested, "everything was taken care of that way," EH, 13—indicating that the seizure and search of Mr. Serges' pants appeared to him to be constitutionally permissible. Mr. Clark admitted that he never spoke with Mr. Serges about any basis for suppression. EH, 70.

Mr. Clark testified that his strategy was to emphasize to the jury that the spot of blood on Mr. Serges' pants was small compared to the bloody scene and that there were "alternative ways" Ms. Anderson could have died. EH, 14. Mr. Clark's theory at trial was that Ms. Anderson's death was an accident—despite the medical examiner's conclusion that the injuries to Ms. Anderson's head were inconsistent with an accidental fall and his testimony that he was "absolutely" certain the death was a homicide. T III, 144-145, 197-198.

Mr. Clark testified, that, if he "thought the pants were going to kill us", he would have spent more time looking to see if he could suppress this evidence. EH, 17. In response to the trial court's "leading questions", Mr. Clark agreed that he 'embraced' the pants as part of his theory at trial. 7/26/23 Hearing Transcript, 8.

The trial court denied Mr. Serges' motion for new trial on remand. The case returned to the Court of Appeals, which affirmed in a published opinion.

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Arguments

I. The police seized and searched Mr. Serges' property without a warrant in violation of the state and federal constitutions. The fruit was the prosecution's central piece of evidence against Mr. Serges. Mr. Serges was denied his constitutional right to the effective assistance of counsel when trial counsel failed to move to suppress.

Issue Preservation and Standard of Review

Mr. Serges raised this issue in his motion for new trial. This claim was the subject of a *Ginther*[5] hearing. Ineffective assistance of counsel issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579, 582 (2002).

To prevail on a claim of ineffective assistance of counsel, Mr. Serges must show "counsel's performance fell below an objective standard of reasonableness," and that he was prejudiced as a result. *Strickland v Washington,* 466 US 668, 687 (1984); *People v Armstrong*, 490 Mich 281, 288-90 (2011).

A purportedly strategic decision by trial counsel may nevertheless be unsound and constitute deficient performance. See *Kimmelman v Morrison,* 477 US 365, 386-387 (1986) (hindsight cannot be used to supply a reasonable reason for counsel's decision); *People v Trakhtenberg*, 493 Mich 38, 51-52, 55 (2012).

Mr. Serges is prejudiced where "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Strickland*, 466 US at 694; *People v Pickens*, 446 Mich 298, 314, 326 (1994). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. To demonstrate ineffective assistance requiring reversal, Mr. Serges "need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 US at 693 (emphasis added). "The result of a proceeding can be rendered unreliable, and

[5] *People v Ginther*, 390 Mich 436 (1973).

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hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694.

Discussion

a. Trial counsel's failure to move to suppress was either a serious oversight or unreasonable trial strategy. Either way, it was deficient performance.

Mr. Clark acknowledged that the only evidence connecting Mr. Serges to the scene of the murder was the blood found on his pants. EH, 11. Yet, he did not consider filing a motion to suppress that evidence. EH, 9. Mr. Clark believed the evidence obtained from Mr. Serges' pants was admissible since the pants were seized following his arrest. EH, 13. Mr. Clark never told Mr. Serges there was a constitutional basis to exclude the forensic evidence derived from Mr. Serges' pants, EH, 70, because he did not realize there was one.

Trial counsel is obligated to make "an independent examination of the facts, circumstances, pleadings and laws involved . . . This includes pursuing all leads relevant to the merits of the case." *People v Grant*, 470 Mich 477, 486-487 (2004) (internal quotation marks and citations omitted). A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. *Id*. at 486. A court cannot deem a decision strategic where it was made after a less than reasonable investigation. *Strickland*, 466 US at 691. And a court may not engage in a post hoc rationalization of the counsel's decision-making that contradicts the available evidence. *Harrington v Richter*, 562 US 86, 109 (2011).

Mr. Clark assumed that Mr. Serges' pants and the accompanying forensic evidence was admissible. Because he never considered that the evidence could be suppressed, he incorporated it into his theory. "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*." *Hinton v Alabama*, 571 US 263, 274 (2014). Mr. Clark's testimony

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demonstrated that he failed to properly investigate an avenue to suppress the prosecutor's most damaging evidence against Mr. Serges. This amounts to deficient performance.

Mr. Clark claimed that "the pants worked for us more than they did the prosecutor," EH, 17, and therefore he wanted Mr. Serges' pants to be admitted. Allowing the pants and the forensic analysis of them into evidence was a reasonable trial strategy only if the decedent's blood on Mr. Serges' pants made him look *less* guilty.

To evaluate whether Mr. Clark's purported strategy was reasonable, consider two scenarios:

> **Scenario 1:** The jury hears that the decedent's blood was found on Mr. Serges' pants. Trial counsel attempts to explain why the spot of blood does not incriminate Mr. Serges.
>
> **Scenario 2:** The pants and/or the forensic analysis of them are suppressed. The remaining evidence against Mr. Serges is scant—not even enough to support a finding of probable cause. EH, 27. If somehow the case proceeds to trial, the jury hears no forensic evidence connecting Mr. Serges to the crime. The jury is asked to convict Mr. Serges based on mere presence in the neighborhood on some of the six days surrounding the decedent's death. From the jury's perspective, the killer could just as easily have been any one of the many people living in or passing through the decedent's densely-populated neighborhood.

The decedent's blood on Mr. Serges' pants made him look more guilty, not less. Mr. Clark's attempt to mitigate the damage caused by the forensic evidence does not make his trial strategy reasonable. It was only because Mr. Clark failed to recognize the basis for suppression that he adopted a trial strategy of 'embracing the pants.' EH, 66. Had he moved to suppress, trial counsel would have been relieved of the obligation to explain the presence of the decedent's blood on Mr. Serges' pants.

It is undisputed that the decedent's blood on Mr. Serges' pants was the prosecution's strongest evidence against him. In fact, it was only

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after decedent's blood was discovered on his pants that a prosecutor was willing to sign a warrant for Mr. Serges' arrest. EH, 27. It was objectively unreasonable for trial counsel to choose Scenario 1 over Scenario 2.

Where Mr. Clark did not consider moving to suppress the most incriminating evidence against Mr. Serges, his performance was deficient. It was "constitutionally deficient because a sound defense strategy cannot follow an incomplete investigation of the case when the decision to forgo further investigation was not supported by reasonable professional judgment." *Trakhtenberg*, 493 Mich at 55.

b. Trial counsel's deficient performance prejudiced Mr. Serges.

But for counsel's deficient performance, "the central piece of evidence in this case", H 11/26/2018, 4, would have been suppressed. That is because police unlawfully seized Mr. Serges' effects from the jail and then unlawfully searched them for evidence. Both the seizure and the search were conducted without a warrant, and neither fall within a recognized exception to the warrant requirement.

i. Police unconstitutionally seized Mr. Serges' pants by collecting them from the jail.

When Mr. Serges was arrested, sheriff's deputies placed his belongings, including his clothing, in the jail property room. The following day, police went to the Flint City Jail, obtained his clothing, and held it as evidence. PE, 39; T III, 49.

Mr. Serges' clothing is an "effect" as that term is used in the Fourth Amendment, and a "possession" as in the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11. His clothing is thus protected against unreasonable searches and seizures by the government. Evidence obtained in violation of the rule against unreasonable searches and seizures is subject to the exclusionary rule. *Davis v Mississippi*, 394 US 721, 724 (1969); *Mapp v Ohio*, 367 US 643, 655 (1961).

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When the sheriff's deputies at the jail inventoried Mr. Serges' clothing, they were acting in a community caretaking and administrative capacity, taking temporary possession of Mr. Serges' property for safety and safekeeping purposes. See *Illinois v Lafayette*, 462 US 640, 646 (1983). Mr. Serges maintained a possessory interest in his belongings. See *Riley v California*, 573 US 373 (2014); *People v Custer*, 465 Mich 319 (2001). His clothing was initially held in the jail property room, to be returned to him upon his release, on bond or otherwise.

Police, acting on a hunch and without a warrant, collected Mr. Serges' property from the Flint City Jail and transferred it to an evidence locker at Burton Police Station. At that point, Mr. Serges' property was no longer available to him upon release. By seizing Mr. Serges' possessions and storing them as evidence, police "meaningfully interfere[d]" with Mr. Serges' possessory interest. See *Maryland v Macon*, 472 US 463, 469 (1985). When a person is arrested, his or her items are held for that person upon their release, unless the arrestee consents to release their property from the jail to a third party. Had Mr. Serges' posted bond, he would have been entitled to retrieve his property, including his pants.[6] But the police removed Mr. Serges' belongings from the jail property room, sent them to the lab, and searched them without a warrant. This seizure was an unconstitutional trespass for investigative purposes; the evidence obtained as a result

[6] Mr. Serges' bond was set at $5,000/10% cash or surety on November 30, 2017. See Joint Exhibit A (Register Actions for Case No. 16F01452). He was not charged with murder until March 12, 2018. See Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018).

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was inadmissible. *US v Jones*, 565 US 400, 406-407 (2012); *Mapp*, 367 US at 655.[7]

ii. Extracting and testing samples of Mr. Serges' pants was a search.

Following the warrantless seizure, police executed a series of searches upon Mr. Serges' property using forensic technology. PE, 40; T III, 49; T V, 90-98, 100; T VI, 10. Extracting and testing samples from Mr. Serges' clothing under both the common-law trespassory test and the reasonable-expectation-of-privacy test.

Law enforcement sampled and tested Mr. Serges' effects with the intent to obtain a DNA profile for investigatory purposes. This was a trespassory physical intrusion into a constitutionally protected area—microscopic material contained on his clothing—for investigative purposes. See *US v Jones*, 565 US 400, 406-407 (2012); *Johnson v VanderKooi*, 509 Mich 524, 536-537 (2022).

Further, Mr. Serges had a reasonable expectation of privacy in his clothing. *Katz v US*, 389 US 347 (1967); *People v Custer*, 465 Mich 319, 343 (2001). Mr. Serges did not "knowingly expose[] to the public" the results of forensic tests performed upon his pants. *Id.* at 351; *People v Whalen*, 390 Mich 672, 677 (1973). Extracting and testing samples from his clothing utilized technology not available to the general public to

[7] In his concurrence, Judge Swartzle analogizes to *Sheffield v United States*, 111 A3d 611, 622 (DC App, 2015). In *Sheffield*, the Court recognized the defendant's property interest in his clothes, but held that seizure of the clothes was justified by the plain view doctrine—the defendant's clothes were visibly bloody and stored in a biohazard bag at the hospital. *Sheffield*, 111 A3d at 620-621. Here, on the other hand, the blood on Mr. Serges' pants was not in plain view, nor was the incriminating nature of the blood immediately apparent. T VI, 46. The plain view doctrine is discussed further in subsection v.

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obtain information from a constitutionally protected area. See *Kyllo v United States*, 533 US 27, 34 (2001).[8]

In *People v Custer*, police seized photographs from the defendant incident to his arrest, then visually inspected the photographs. The Michigan Supreme Court held the lawful seizure of the photographs incident to Mr. Custer's arrest diminished but did *not* extinguish his reasonable expectation of privacy in the photos. *Custer*, 465 Mich at 342-343. The Court held it was permissible for officers to cursorily examine both sides of the photographs, but emphasized that "we do *not* conclude that, once the police lawfully seize an object from an individual, that individual's reasonable expectation of privacy in that object is *altogether* lost." *Id*. at 342 (emphasis in original). The *Custer* Court stressed that "our opinion in no way permits a Fourth Amendment 'search' incident to seizure." *Id.* at 343. See also *Riley v California*, 573 US 373, 392 (2014) (rejecting the proposition that a person loses all expectation of privacy in his effects upon arrest).

While police may visually inspect a lawfully seized item, mere lawful possession does not permit police to extract samples of that item and subject those samples to forensic testing. Because Mr. Serges maintained some expectation of privacy in his clothing, the federal and

[8] The United States Supreme Court has recognized that conducting chemical tests on blood samples, subjecting a person to a breath test, and the collection and testing of urine are all Fourth Amendment searches. *Skinner v Railway Labor Executives' Ass'n*, 616-617 (1989).

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state constitution each required the police to obtain a warrant before searching the pants.[9]

In *People v Hughes*, the prosecution argued that a person loses all expectation of privacy in items seized from his person during a lawful arrest, but this Court declared that argument "inapt." *People v Hughes*, 506 Mich 512, 530 (2020). This Court found that a lawful seizure does not eliminate a suspect's reasonable expectation of privacy in the item seized. *Id*. at 531-532 ("[*United States v*] *Edwards* itself did not hold that the mere fact an item was lawfully seized eliminated a suspect's reasonable expectation of privacy"). While the search in *Hughes* involved a cell phone rather than clothing, the underlying principles in *Hughes* govern here: the mere fact that an item is in police custody does not justify a forensic search of the item, and the authority to search an item for one purpose does not justify a search for a different purpose. *Id*. at 531-532, 547. On remand, the Court of Appeals held that Mr. Hughes' trial counsel was ineffective for failing to challenge the admission of the evidence obtained through the warrantless search. *People v Hughes*, 339 Mich App 99, 101 (2021).

Here, the Court of Appeals held that, because Mr. Serges' pants were "taken by the jail in relation to his lawful arrest," he "had no reasonable or justifiable expectation of privacy in them." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 9. This is erroneous. See *Carr*, 370 Mich at 255; *Hughes*, 506 Mich at 531-532. While a "cursory

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[9] The general rule is that a search is per se unreasonable unless conducted pursuant to a validly issued search warrant. *Katz v US*, 389 US 347 (1967). There are two reasons for the search warrant requirement: to protect citizens' rights from the law enforcement officers who are personally involved in the investigations and to ensure that a neutral and detached magistrate makes the determination of probable cause. *Coolidge v New Hampshire*, 403 US 443, 449, 455 (1967). While there are exceptions to the warrant requirement, the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure". *US v US District Court*, 407 US 297, 318 (1972) (citations omitted). While there are several well-delineated exceptions to the warrant requirement, none apply here.

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examination" of Mr. Serges' pants would not be considered a search for constitutional purposes, *People v Custer*, 465 Mich 319, 343 (2001), what occurred here—transfer of the pants to police custody, then to the MSP laboratory, followed by a prolonged examination and forensic testing of the pants using advanced technology—constituted a search.

The Court of Appeals relied on *Lanza v New York*, 370 US 139, 143 (1962), for the proposition that an arrestee has no legitimate Fourth Amendment privacy or possessory interest in personal effects. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 10. In *Lanza*, the petitioner claimed that he had a reasonable expectation of privacy in the contents of a conversation he had while in a jail visiting room. *Lanza*, 370 US at 141-142. The petitioner's brother was incarcerated at the time; the defendant was not. *Id*. at 139. The Supreme Court noted that "[t]he record does not make clear the precise circumstances under which the conversation in the jail between the petitioner and his brother was overheard and transcribed." *Id*. at 141. The petitioner was later convicted of one count of refusing to answer a legislative committee's questions. Some, but not all, of the questions the petitioner refused to answer pertained to the intercepted conversation. The Supreme Court noted that there was a potential standing issue, and that the Fourth Amendment did not apply because evidence of the intercepted conversation had never been introduced in a prosecution against the petitioner. *Id*. at 145. Ultimately, without resolving the standing or the Fourth Amendment issue, the Supreme Court upheld the petitioner's conviction because it rested on the petitioner's refusal to answer questions totally unrelated to the overheard conversation. *Id*. at 144-146. The Court's opinion in *Lanza* did not produce any holding related to the Fourth Amendment, and it did not address personal effects whatsoever.

The Court of Appeals also cited *Hudson v Palmer*, 468 US 517 (1984), in support of its conclusion that Mr. Serges lacked a reasonable expectation of privacy in his effects. In *Hudson*, the United States Supreme Court established that shakedowns of prison cells in search of contraband are permitted. The Michigan Court of Appeals reached a

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similar conclusion in *People v Phillips*, 219 Mich App 159 (1996), where authorities searched and seized property from the defendant's jail cell. Here, the government searched Mr. Serges' property, as opposed to a jail cell, which is government property. And the search here was not for contraband that could interfere with the safety and security of the jail. *Hudson* is inapposite.

"Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Borchard-Ruhland*, 460 Mich 278, 293-94 (1999), citing *Schneckloth v Bustamonte*, 412 US 218 (1973). The prosecutor has not met their burden to show that the seizure and search of Mr. Serges' pants was justified by a recognized exception to the warrant requirement. *People v Reed*, 393 Mich 342, 362 (1975) ("The burden is always on the state to show such an exception exists."); *People v Mayes (After Remand)*, 202 Mich App 181, 184 (1993) ("When a search is conducted without a warrant, the state bears the burden of showing that the search was justified by a recognized exception to the warrant requirement.").

iii. Extracting and testing samples of Mr. Serges' pants was not a search incident to arrest.

In the People's Response to Mr. Serges' Motion for New Trial (before remand) and in the People's Brief on Appeal, the prosecution acknowledged that Mr. Serges was "arrested for an outstanding warrant for failure to appear for arraignment on an ordinance violation". Brief in Support of People's Response to Defendant's Motion for New Trial, p 5; Plaintiff-Appellee's Brief on Appeal, p 6. The prosecution argued, in part, that the search-incident-to-arrest doctrine justified the seizure and testing of Mr. Serges' pants.

At oral argument in the Court of Appeals, the Court and the parties discussed that the crime of arrest matters—including because it impacts the scope of a search incident to arrest. When searching for evidence other than a weapon, law enforcement is limited to searching for evidence of the crime of arrest. *People v Trudeau*, 385 Mich 276, 282

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(1971)[10]; *People v Carr*, 370 Mich 251, 255 (1963); *United States v Edwards*, 415 US 800, 805-806 (1974) (upholding a search incident to arrest where the arrestee's clothing was "material evidence of the crime for which he had been arrested", and later repeating that the clothing was "evidence of the crime for which [he] was being held"). Indeed, if a search incident to arrest for one offense permitted law enforcement to search the arrestee's effects for evidence of *any* crime, there would have been no reason for the Court of Appeals to remand for an evidentiary hearing.

On remand, the prosecutor presented testimony from Detective Freeman that Mr. Serges was arrested for Ms. Anderson's murder: specifically, that Mr. Serges was arrested "[o]n suspicion of the homicide" and "lodge[d] on the suspicion for the homicide." EH, 20, 24. Mr. Serges was a "person of interest" because he was seen on camera in the decedent's neighborhood on some of the days around Thanksgiving.[11] EH, 20-21, 40. Notably absent from Detective Freeman's testimony was any claim that he had probable cause to arrest Mr. Serges for murder.

Detective Freeman was the officer in charge of this investigation and was responsible for reviewing all police reports. EH, 39. Detective Freeman acknowledged that the police report specifies that Mr. Serges

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[10] While Mr. Trudeau was in custody for breaking into a post office, police seized his shoe without a warrant and subjected it to forensic testing on the suspicion that he had been involved in an unrelated murder. *Id.* at 277-279. When the forensic test results implicated Mr. Trudeau, he was charged with murder, and the shoe and the forensic analysis were admitted at trial. *Id.* at 278-279. This Court held that it was unconstitutional for the police to seize and search the defendant's shoe while he was in custody for an unrelated charge. *Id.* at 280-281. The Court vacated his convictions and remanded for a new trial. *Id.* at 281. This Court explained that "an imprisoned felon does not lose his constitutional . . . right against unreasonable search and seizure" as to a separate offense. *Id.* at 281.

[11] The time of Ms. Anderson's death fell within a window of six days around Thanksgiving (Wednesday to Monday) and could never be narrowed further. T III, 178. See also T VI, 36; T V, 44.

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was arrested on outstanding warrants. EH, 41. Still, Detective Freeman maintained that Mr. Serges was arrested for murder. EH, 40-41.

If Mr. Serges was arrested for murder, his arrest was unconstitutional because it was not supported by probable cause, and any search incident to arrest was invalid. At the time police arrested Mr. Serges "on suspicion" of murder, they knew only that he was a handyman in the neighborhood and that he was present in the neighborhood on some of the six days on which Ms. Anderson could have been killed. EH, 21; T IV, 101-103. Neither mere presence nor association is sufficient to make out probable cause. *Sibron v New York*, 392 US 40 (1968); *United States v Di Re*, 332 US 581, 587 (1948). The police here had "suspicion" that Mr. Serges was involved in Ms. Anderson's death. EH, 20. But that suspicion did not justify a warrantless arrest.

Detective Freeman testified that, within 48 hours of Mr. Serges' arrest, after interviewing Mr. Serges, he submitted a warrant request for murder. EH, 27. The prosecutor denied the request for lack of sufficient evidence. EH, 27, 37-38. Mr. Serges remained in jail on an outstanding warrant. EH, 41-42.

Despite being denied a warrant, Detective Freeman seized Mr. Serges' clothing and effects from the property room at the Flint City Jail. Detective Freeman secured Mr. Serges' belongings into evidence at the police department because Mr. Serges had been arrested on suspicion of homicide. EH, 44-45.

Nearly two months after Mr. Serges' arrest, without a warrant, the police sent Mr. Serges' pants from the police department to MSP for testing. See Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018). MSP found that blood from a stain on Mr. Serges' pants was consistent with Ms. Anderson's DNA. Only after that finding, the prosecutor authorized a warrant for murder. The warrantless search produced evidence that allowed the police to clear the probable-cause threshold.

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If Mr. Serges was arrested for murder, his arrest was not supported by probable cause and was therefore unconstitutional. *United States v US District Court*, 407 US 297, 316-318 (1972). Any seizure or search conducted incident to an unlawful arrest is per se unreasonable and the fruits are inadmissible at trial. *People v Mersino,* 419 Mich 899, 900 (1984).

If, as the police report says, Mr. Serges was arrested on an outstanding warrant for an ordinance violation, the seizure and search of his clothing was likewise unconstitutional because no exception to the warrant requirement justified the intrusion. The search-incident-to-arrest exception permits only a search for weapons and for evidence of the crime of arrest. It is undisputed that Mr. Serges' pants were searched for evidence of murder, not of an ordinance violation.

Further, the government searched Mr. Serges' pants long after his arrest. But the search-incident-to-arrest exception is designed to prevent the arrestee from concealing or destroying evidence of the crime of arrest. *Arizona v Gant*, 556 US 332, 339 (2009); *Chimel v California*, 395 US 752, 762-763 (1969).[12]

At the time of the search and seizure, police had neither a warrant nor probable cause to arrest him for murder. When the police sent Mr. Serges' pants for testing, they were well aware that they lacked probable cause of murder—according to Detective Freeman, the prosecutor denied his initial warrant request. EH, 27, 37-38. Police knew Mr. Serges' presence in the neighborhood and the fact that he was a transient heroin user who could not accurately report his past

[12] The *Gant* Court explained, "That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding ***any evidence of the offense of arrest*** that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 US at 339 (emphasis added), citing *Chimel*, 395 US at 763.

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whereabouts did not amount to probable cause. Yet they went on an illegal fishing expedition and turned up evidence that was ultimately used to convict Mr. Serges.

iv. Extracting and testing samples of Mr. Serges' pants was not an inventory search.

The prosecutor has argued that the seizure and search of Mr. Serges' pants was justified by jail inventory procedures. Inventory searches are permitted "as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect." *Illinois v Lafayette*, 462 US 640, 643 (1983).

A jail inventory search is a "standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse". *Lafayette*, 462 US at 646 (citations omitted). Jail inventory searches serve the following governmental interests: to inhibit theft or careless handling of articles taken from the arrestee; to deter the arrestee from making false claims of theft; to prevent the arrestee from injuring himself or others with dangerous items on his person; and to aid authorities in ascertaining or verifying the arrestee's identity. *Id*.

While it would be proper for jail staff to seize obvious contraband from an arrestee, jail inventory procedures do not permit the government to subject an arrestee's effects to forensic analysis without a warrant. Here, the government searched Mr. Serges' pants long after the jail inventory process was complete, to investigate a crime—a purpose totally unrelated to the goals of an inventory search.

v. Extracting and testing samples of Mr. Serges' pants was not justified by the plain view doctrine.

The plain view doctrine permits seizure of an item where an officer is conducting an otherwise justified search and, while executing that search, comes "across a piece of evidence incriminating the accused." *Coolidge v New Hampshire*, 403 US 443, 466 (1971). The plain view doctrine "serves to supplement the prior justification—whether it be a

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warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.*

The plain view doctrine can justify only a seizure, never a search. *People v Champion*, 452 Mich 92, 101 (1996). Compare *People v Rivard*, 59 Mich App 530, 534-535 (1975) (seizure—not search—of sapphire ring was permitted under plain view doctrine where the ring was in police custody).

Detective Freeman's testimony that he saw blood on Mr. Serges' pants "at some point," EH, 26, is both dubious and insufficient to justify either the seizure or search that occurred here. Detective Freeman previously testified that, despite interviewing Mr. Serges for over an hour,—during which he sat an arm's length from Mr. Serges and visually examined him—he did not see any blood on Mr. Serges' pants. PE, 45; EH, 27, 52-54. This is particularly significant because, during the interview, Detective Freeman was paying special attention to Mr. Serges' legs. EH, 54.

Detective Freeman testified that Mr. Serges' legs were underneath a table during the interview. EH, 56. However, the interview video tape, Joint Exhibit G (still photograph provided above), demonstrates that Mr. Serges' legs were not concealed by the table. His pants were very dark in color and were dirty; a witness at trial testified that Mr. Serges' clothes were never clean and that he never washed his clothing, despite doing yard maintenance and other odd jobs. T IV, 121. A tiny spot of blood on his pants would not have been visible to the naked eye.

Detective Freeman claimed that Mr. Serges' pants were in the second batch of items sent to the lab when, in fact, they were sent in a much later batch. EH, 33, 45-51. If Detective Freeman had observed blood on

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the pants Mr. Serges was wearing when he was arrested on November 29, 2017, those pants would have undoubtedly been sent to the lab before January 19, 2018.

Detective Freeman's evidentiary testimony was inaccurate in other ways. Detective Freeman testified that he had seen footage of Mr. Serges in the neighborhood "over the weekend" before Ms. Anderson was found dead and that, on this footage, he observed Mr. Serges wearing the same outfit he was wearing when he was arrested. EH, 23. But Detective Freeman did not have any footage of Mr. Serges in the neighborhood on Saturday or Sunday. T VI, 38-39; T VI, 82, 178.

Detective Freeman also disavowed the police report, claiming that Mr. Serges was arrested for a reason different from what the police report reflects, even though it was his duty as officer in charge to review police reports. EH, 39-41. Given that more than five years passed between the investigation and the evidentiary hearing and that Detective Freeman has an incentive to justify his investigative tactics, this Court should not credit his testimony.

Even accepting Detective Freeman's testimony as true, he cannot identify when he saw blood on Mr. Serges' pants. He said he observed blood on Mr. Serges' pants "at some point." EH, 26. He added that it was "sometime at the office." EH, 27. Without specific, clear testimony about when Detective Freeman saw the blood, the prosecutor has not met its burden to show that the plain view exception to the warrant requirement justified the seizure here.

Further, it was not "immediately apparent", *Coolidge*, 403 US at 466, to Detective Freeman that the minuscule amount of blood on Mr. Serges' pants was incriminating. Detective Freeman testified at trial that he has encountered "many, many" people who are IV heroin users; that he has seen blood on heroin users' clothing before; and that seeing blood on Mr. Serges' was therefore not surprising. T VI, 46. The MSP evidence technician confirmed that it was common to see blood droplets on the clothing of people who inject drugs. T V, 110. Detective Freeman was aware that Mr. Serges was a heroin user and that he was transient. T

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VI, 72-73. The presence of a small amount of blood on Mr. Serges' pants was not incriminating. Further, the incriminating nature of the blood—that it matched the decedent's blood—was by no means "immediately apparent." The DNA match was only discovered after subsequent searches: extraction and multiple rounds of forensic testing. The plain view doctrine is therefore inapplicable and the seizure was unjustified.

Even if the plain view doctrine could have justified the seizure of Mr. Serges' clothing, it did not permit the subsequent warrantless searches of Mr. Serges' clothing. *Champion*, 452 Mich at 101 ("A fundamental characteristic of the doctrine is that it is exclusively a seizure rationale. No searching, no matter how minimal, may be done under the auspices of the plain view doctrine.").

c. Whether plain error or ineffective assistance of counsel, reversible error occurred.

The government obtained its central piece of evidence against Mr. Serges through the warrantless seizure and search of his effects. Admission of this evidence against Mr. Serges at trial violated his federal and state constitutional rights. US Const, Am IV; Const 1963, art 1, § 11. But for trial counsel's failure to move to suppress, there is a reasonable likelihood of a different outcome. US Const, Am VI; Const 1963, art 1, § 20. Whether this error is characterized as plain error or ineffective assistance of counsel for failing to move to suppress, the remedy is a new trial.

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II. Detective Freeman's testimony regarding Mr. Serges' veracity was plain error, and the prosecutor's elicitation of the testimony was prosecutorial error. Trial counsel was ineffective for failing to object.

Issue Preservation and Standard of Review

Mr. Serges raised this issue in his motion for new trial and in the Court of Appeals. In the Court of Appeals, he filed two motions requesting remand for an evidentiary hearing on this issue. The Court of Appeals remanded for a hearing only as to Issue I.

Because trial counsel did not object to the detective's testimony or the prosecutor's questions, appellate review is for plain error. *People v Callon*, 256 Mich App 312, 329 (2003); see also *People v Carines*, 460 Mich 750, 763-764 (1999).

Alternatively, this Court reviews de novo whether trial counsel was ineffective for failing to object, applying the *Strickland* test. *LeBlanc*, 465 Mich at 579; *Strickland,* 466 US at 668.

Discussion

Mr. Serges agreed to speak with police and repeatedly professed his innocence. In response to the prosecutor's targeted questions, the detective testified that Mr. Serges' body language during the interrogation was an "indicator of deception." T VI, 57. This was improper and trial counsel was ineffective for failing to object.

a. Improper testimony about Mr. Serges' veracity

Once Mr. Serges was in custody, the officer in charge, Detective Freeman, began an interview that was recorded using audio and visual equipment. T VI, 56. After talking with Mr. Serges for a while, Detective Freeman left the room momentarily and observed Mr. Serges on a monitor. T VI, 56-57. The prosecutor asked Detective Freeman whether Mr. Serges did "something unusual" at that point. T VI, 57. Detective Freeman responded that, while Mr. Serges was sitting alone in the interrogation room, he was "brushing the top of his legs off, which just

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based on my experience and my training. . . is a pretty good indicator of deception." T VI, 57. This testimony was improper.

Detective Freeman was not permitted to opine on Mr. Serges' guilt or his credibility and the prosecutor was not permitted to ask questions that elicited such an opinion.[13] "[I]t is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Freed v Salas*, 99 Mich App 300, 346 (2009) (citation omitted). The detective testified that Mr. Serges denied any involvement in Ms. Anderson's death, but that Mr. Serges' body language indicated he was being deceptive. T VI, 57. This amounted to impermissible opinion testimony that Mr. Serges was lying and that he was guilty.

Detective Freeman was not qualified as an expert and therefore was not permitted to give opinion testimony based on specialized knowledge of psychology and human behavior. MRE 701; MRE 702. Even if he had been qualified as an expert, his testimony about "indicator[s] of deception", T VI, 57, is inadmissible. An expert is forbidden from "expressing an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind". *People v McFarlane*, 325 Mich App 507, 523 (2018).[14] Moreover, proffered expert testimony that brushing one's clothing indicates deception would have been inadmissible because the prosecutor did not provide notice of expert testimony. Further, the prosecutor did not and could not make a showing reliability as required by MRE 702 and *Daubert v Merrell Dow*

[13] *People v Douglas*, 496 Mich 557, 583 (2014); *People v Musser*, 494 Mich 337, 348-349 (2013); *People v Row*, 135 Mich 505, 506-507 (1904); *People v Dobek*, 274 Mich App 56, 71 (2007); *People v Heft*, 299 Mich App 69, 81 (2012).

[14] Citing *People v Bynum*, 496 Mich 610, 630-633 (2014); *People v Peterson*, 450 Mich 349, 374 (1995); and *People v Christel*, 449 Mich 578, 580 (1995).

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Pharm, Inc, 509 US 579, (1993). Ample scientific literature demonstrates supposed lie detection techniques are unreliable.[15]

The testimony about indicators of deception was plain error and it was likewise plain error for the prosecutor to elicit it. The detective testified that Mr. Serges denied any involvement in Ms. Anderson's death, then used pseudoscience to conclude that Mr. Serges' denials were deceptive. This is a clear and obvious error where established Michigan forbids a witness from opining on another person's veracity. See, e.g., *People v Thorpe*, 504 Mich 230, 263-264 (2019) (finding that vouching by an expert invaded the province of the jury and constituted plain error); *People v Musser*, 494 Mich 337, 349 (2013) (affirming that "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial"); *People v Peterson*, 450 Mich 349, 369, 374 (1995) (affirming that "an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty").

Mr. Serges has a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. Const 1963, art 1, § 20. An important element of a fair trial is that only relevant and competent evidence is introduced against the accused. *Taylor v Kentucky*, 436 US 478, 485 (1978); *Bruton v United States*, 391 US 123, 131 (1968). The detective's testimony about Mr. Serges' veracity amounted to a statement that Mr. Serges was guilty. This affected Mr. Serges' substantial rights and his conviction must be reversed.

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[15] See Appendix G (Brennen and Magnussen, *Research on Non-verbal Signs of Lies and Deceit*, Frontiers in Psych (2020)) (both trained and untrained persons score below or at chance on lie detection; videotaped taped police interviews of suspects do not indicate any differences in demeanor between when suspect denies guilt and later confesses). Cf. *People v Barbara*, 400 Mich 352 (1977) (evidence relating to a polygraph examination is inadmissible due to lack of general scientific recognition of such tests and a lack of reasonable certainty).

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b. Trial counsel was ineffective in failing to object.

Alternatively, trial counsel was ineffective for failing to object. There was no legitimate strategic reason not to challenge the testimony that Mr. Serges was being deceptive when professing his innocence. This testimony was inadmissible and was harmful to the defense. Like the detective's testimony in *Musser*, Detective Freeman's testimony was seemingly objective evidence on which jurors could "hang their hat" because of the "undue weight that jurors may be inclined to place on police officers' statements." 494 Mich at 363 (2013). It was incumbent upon trial counsel to object to improper testimony that harmed his client.

There is a reasonable probability this error affected the trial's outcome. No eyewitnesses observed Ms. Anderson's death. The evidence against Mr. Serges was far from overwhelming. No evidence at the scene implicated Mr. Serges, and there was a plausible explanation for the presence of a tiny spot of decedent's blood on Mr. Serges' pants: he was her handyman and took out her trash, which contained medical supplies she used to treat her open wounds. T IV, 10, 25; T VI, 148. The speck of blood on Mr. Serges' pants was inconsistent with the enormous amount of blood in Ms. Anderson's home. Further, police found a mysterious fingerprint in Ms. Anderson's empty wallet, and Mr. Serges was excluded as the source of that fingerprint. T VI, 149, 151, 163. Mr. Serges denied harming Ms. Anderson—but the detective used pseudoscience to improperly discredit him.

During the interrogation, Mr. Serges was confused and disorganized as he tried to recount his daily activities in detail. T VI, 53, 72-73. This was not surprising since Mr. Serges was both transient and dependent on heroin. T VI, 73. The distinction between disorganized and deceptive is critical where Mr. Serges maintained his innocence throughout the interrogation. The detective's testimony that Mr. Serges showed signs of deceptiveness could have been a deciding factor for the jury. Without it, there is a reasonable probability of a different outcome. *Strickland*, 466 US at 693-694.

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The Court of Appeals found that trial counsel did not perform deficiently because he addressed the improper testimony on cross-examination. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 16. But counsel's trial strategy must be reasonable. *Trakhtenberg*, 493 Mich at 52-53). It is not a reasonable for trial counsel to allow the jury to hear inadmissible testimony that makes his client look deceitful and, therefore, guilty. Cross-examination is not an adequate substitute for preventing the testimony altogether.

There was nothing to be gained by allowing the detective's improper commentary on Mr. Serges' veracity. Failure to object was deficient performance. See *People v Hawkins*, 959 NW2d 179 (2021) (trial counsel's failure to object to police officer's testimony about witness credibility was ineffective assistance). If this Court feels expansion of the record is necessary to determine whether trial counsel's decision not to object was reasonable trial strategy, Mr. Serges requests remand for an evidentiary hearing. *Ginther*, 390 Mich 436.

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III. The prosecutor's argument was improper because it was based on facts not in evidence and was contradicted by evidence she had in her possession. Trial counsel was ineffective for failing to object or otherwise address the misrepresentations.

Issue Preservation and Standard of Review

Mr. Serges raised this issue in his motion for new trial and in the Court of Appeals. In the Court of Appeals, he filed two motions requesting remand for an evidentiary hearing on this issue. The Court of Appeals remanded for a hearing only as to Issue I.

Because trial counsel did not object, this Court reviews the prosecutor's improper arguments for plain error. *Callon*, 256 Mich App at 329; *Carines*, 460 Mich at 763-764.

This Court reviews de novo whether trial counsel was ineffective for failing to object. *LeBlanc*, 465 Mich at 579; *Strickland,* 466 US at 668.

Discussion

The prosecutor argued:

- Ms. Anderson was worried she had made Mr. Serges angry by declining to give him more work. T VI, 114-115.
- Ms. Anderson was last seen alive on Thanksgiving Day. T III, 36-37; T VI, 114, 135.
- The last time Ms. Anderson was seen alive, she was talking with Mr. Serges. T III, 36-37; T VI, 114, 135.

Each of these statements was a misrepresentation.

Mr. Serges' due process right to a fair trial was violated where the prosecutor used unfair tactics to gain an advantage. US Const, Ams V, XIV; Const 1963, art 1, §§ 17, 20; *Donnelly v De Christoforo,* 416 US 637, 642 (1974). It is the prosecutor's duty to seek justice, not merely a conviction, and it is her duty to seek a fair trial. *People v Jones*, 468 Mich 345, 354 (2003). An important element of a fair trial is that only relevant

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and competent evidence is introduced against the accused. *Taylor*, 436 US at 485; *Bruton*, 391 US at 131.

a. The prosecutor argued facts not in evidence.

Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282-283 (1995) (citation omitted). But prosecutors are not permitted to argue facts not in evidence. *People v Stanaway*, 446 Mich 643, 686 (1994).

In closing, the prosecutor told the jury:

> "Barb [the decedent's friend] testified that *David* [Serges] had come to the door in the week or so before she died and that she heard the conversation and that she told him, no, she didn't want any work done by him anymore. . . . But *she was worried that, that would make him angry* and she expressed that to Barb, that *she was concerned that would make him angry*." T VI, 114-115 (emphasis added).

This argument misrepresented Barb's testimony. Barb testified that she remembered someone coming to Ms. Anderson's house to ask for work, but she did not recognize the person; she only saw the top of their head and their "brown or dark brown" hair.[16] T IV, 20. The prosecutor told the jury Barb had identified the person as Mr. Serges, but she had not.

Barb testified that, after the unidentified person left, Ms. Anderson said that "[s]he was not going to give him any more money when he wasn't going to do the work that she asked him to" and "she said she

[16] The jury was able to observe that Mr. Serges is balding, has gray hair, and has very little hair on the top of his head.

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wasn't comfortable with him coming around anymore." T IV, 21-22.[17] The prosecutor told the jury the person at the door was David Serges, and that Ms. Anderson was "worried" she would make Mr. Serges "angry" by declining to give him a job to do. However, Barb testified that Ms. Anderson was dissatisfied with the work the unknown person did and therefore she was uncomfortable hiring him again. Barb did not testify that Ms. Anderson was worried about making the man angry.

The prosecutor's arguments were not reasonable inferences from Barb's testimony. The prosecutor spoke as though she were quoting Barb, beginning her statement this way: "Barb testified that David [Serges]. . . ." T VI, 114. What followed were misrepresentations that supported the prosecutor's theory and prejudiced Mr. Serges.

The Court of Appeals found that this was plain error, but concluded the error did not warrant reversal. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 17-18. The Court of Appeals' conclusion fails to account for the scant evidence against Mr. Serges and the impact of the other errors in this case. The case against Mr. Serges was based on circumstantial evidence. There were no eyewitnesses to the crime, and the speck of blood was the only forensic evidence linking Mr. Serges to the offense. A fingerprint in the decedent's wallet was tested and found not to match Mr. Serges. His first trial ended in a hung jury.

This was an extensive trial, increasing the jury's need to rely on the parties' summations. The prosecutor's statements painted an ominous picture: Mr. Serges had a temper and Ms. Anderson knew about it, and she was worried about what would happen since she did not offer him work. But Barb had no idea who was at the door that day, and Ms. Anderson felt at most cheated by the unknown person, not threatened.

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[17] It is worth noting that Barb's testimony about what Ms. Anderson told her was hearsay and does not fall within an exception. In the interest of justice, the prosecutor should have avoided arguments based on this hearsay testimony; instead, she emphasized the hearsay and added facts not in evidence to underscore its importance.

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The prosecutor's error affected Mr. Serges' substantial rights and he is entitled to reversal.

b. The prosecutor argued facts contradicted by a witness' statement.

The prosecutor repeatedly told the jury that the last time Ms. Anderson was seen alive, she was talking with Mr. Serges on Thanksgiving Day. T III, 36-37; T VI, 114, 135. But a witness saw Ms. Anderson alive on Saturday, checking her mail. Ashley Durga, one of the prosecutor's listed witnesses, T I, 23, told investigators she saw Ms. Anderson checking her mail in the afternoon on Saturday. The prosecutor ultimately did not call Ms. Durga to testify. Neither did trial counsel.

Ms. Durga's statement appears in the Investigator Notes and the Death Scene Investigation Report, both of which were provided to trial counsel as part of discovery. See Appendix H (Investigator Notes); Appendix I (Death Scene Investigation Report). Kevin Boaz, who testified for the prosecution, authored the Death Scene Investigation Report and referenced it during his trial testimony. T III, 106. Mr. Serges requested an evidentiary hearing on this issue three times—once in the trial court and twice in the Court of Appeals—so that he could make Ms. Durga's statements part of the record and take testimony from trial counsel about his failure to call Ms. Durga as a witness or otherwise address her statements. As offers of proof for each of his three motions, Mr. Serges appended Appendix H and Appendix I.

In both her opening and closing argument, the prosecutor told the jury that "the last time anyone saw Gail Anderson alive" was on Thanksgiving Day, on her porch talking to Mr. Serges. T III, 36-37; T VI, 114, 135. This supported the prosecutor's theory: since Ms. Anderson was last seen with Mr. Serges, he was probably responsible for her death. But this was a misrepresentation of the evidence police obtained. It was improper for the prosecutor to argue the last time anyone saw Ms. Anderson alive was on Thursday talking to Mr. Serges when the discovery in this case reflects that a neighbor saw Ms. Anderson

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checking her mail on Saturday. The prosecutor violated the requirement to seek justice when she jettisoned critical evidence that did not fit her theory. See *Jones*, 468 Mich at 354.

Like the prosecutor's other misrepresentations, this error prejudiced Mr. Serges and denied him the right to a fair trial. "The lack of reliable evidence of guilt, aside from the DNA evidence, is unsettling." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 1. Where the evidence against Mr. Serges was thin, this error affected the outcome of the proceedings. The remedy is a new trial or, at minimum, a remand for an evidentiary hearing on this issue.

c. Trial counsel was ineffective.

Trial counsel failed to object to the prosecutor's improper arguments or to address them in any way. Regarding Barb's testimony, trial counsel did not object, ask for a curative instruction, or correct the prosecutor's misstatements of Barb's testimony during his closing argument. There was no reasonable strategic reason for trial counsel's inaction.[18] Had trial counsel objected to the prosecutor's misstatements of Barb's testimony, the parties and the court could have revisited the testimony and would have easily agreed that Barb had not identified Mr. Serges, nor had she said Ms. Anderson was worried about angering whoever was at the door. No other witness testified that Mr. Serges was angry at Ms. Anderson or had any reason to be. Trial counsel's failure to address this error allowed the jury to believe Mr. Serges was angry with Ms. Anderson for not giving him more work to do, which supported the prosecutor's theory that he attacked her and stole her money. T VI, 114-115.

[18] The trial court speculated that trial counsel's decision not to object to the prosecutor's misrepresentations "may have been part of their trial strategy", but there was no evidence of this in the record, and the trial court denied Mr. Serges' request for an evidentiary hearing. Appendix V (Trial Court Order Denying Motion for New Trial), p 6.

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Trial counsel also failed to object to the prosecutor's argument that Ms. Anderson was last seen alive on Thursday, talking to Mr. Serges. Ashley Durga was on the prosecutor's witness list. Her statement that she saw Ms. Anderson checking her mail on Saturday was provided to counsel through discovery. And trial counsel had notice that the prosecutor intended to leave out Ms. Durga's version of events when the prosecutor made her opening statement. T III, 36-37.

Trial counsel did not call Ashley Durga as a witness. He did not examine any witness about the information obtained from Ms. Durga. And he never made a motion to prohibit the prosecutor from arguing that the last time anyone saw Ms. Anderson alive she was talking to Mr. Serges on Thanksgiving Day. It was objectively unreasonable to allow the prosecutor to misrepresent when Ms. Anderson was last seen alive, especially when it harmed Mr. Serges.

Trial counsel's error prejudiced Mr. Serges by bypassing evidence that tended to exculpate him. It is critical that Ms. Anderson was alive on Saturday checking her mail because the many hours of video footage police viewed showed Mr. Serges in Ms. Anderson's neighborhood on Thursday and Friday, but not on Saturday, Sunday, or Monday. T VI, 38-39; T VI, 82, 178. The prosecutor repeatedly argued that Mr. Serges was guilty and lying because he told police he had stayed home with a toothache on Friday, yet there was video of him in Ms. Anderson's neighborhood on Friday. T III, 46-48; T VI, 39, 61, 87, 115-116. But Mr. Serges' Friday whereabouts are a red herring. Ms. Anderson was seen alive on Saturday. Due to the prosecutor's errors and trial counsel's deficiency, that evidence was never presented to the jury.

In addition, the prosecutor's argument that Ms. Anderson was last seen talking with Mr. Serges was both untrue and prejudicial to Mr. Serges. The jury could easily infer that, since Ms. Anderson was last seen with Mr. Serges, he was probably responsible for her death. But Ms. Anderson was seen checking her mail two days after she was seen with Mr. Serges. It was improper for the prosecutor to argue the last time anyone saw Ms. Anderson alive was on Thursday talking to Mr. Serges when she had evidence to the contrary. As Mr. Serges' advocate,

it was trial counsel's duty to keep the prosecutor in check and to ensure that any evidence favorable to the defense was presented. If trial counsel had presented evidence that Ms. Anderson was seen checking her mail on Saturday, the jury would have had more than a reasonable doubt about Mr. Serges' guilt since there was no video showing Mr. Serges in the neighborhood on Saturday, Sunday, or Monday. There is a reasonable probability that, were it not for trial counsel's failure, the outcome of the trial would have been different.

The prosecutor's errors require reversal. Alternatively, trial counsel's failure to object or otherwise address the errors was ineffective assistance. The remedy is a new trial.

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IV. The trial court erred in denying Mr. Serges' request for a new jury panel where the panel heard that Mr. Serges was in jail leading up to trial, thereby depriving him of his right to due process and the presumption of innocence.

Issue Preservation and Standard of Review

Trial counsel preserved this error by asking for a new jury panel and moving for a mistrial. T I, 300; T II, 3-6.

As this issue was preserved and constitutional, review is de novo and this Court must decide if the error was harmless beyond a reasonable doubt. *People v McCuller*, 479 Mich 672, 681 (2007); *Carines*, 460 Mich at 774. This requires that the court examine the record thoroughly "in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 472 Mich 343, 348 (2005), citing *Neder v United States*, 527 US 1, 19 (1999). A reviewing court must examine the entire record when making a harmlessness determination, not just the evidence and theory put forward by the prosecutor. See *Chapman v California*, 386 US 18, 24 (1967). The prosecutor is required to prove that the error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 406 (1994).

Discussion

During jury selection, a prospective juror stated that he was employed as a deputy sheriff for Genesee County, that he worked in the jail, and that he saw Mr. Serges and trial counsel "[o]n a daily basis." T I, 259. The deputy said this in front of the entire jury panel. T I, 300. Trial counsel and the prosecutor agreed that that other prospective jurors' heads turned in reaction to what the deputy said; the prosecutor described that they "perked right up." T I, 301; T II, 3. In addition to the prospective jurors who were present in the courtroom, the prospective jurors seated across the hall also heard the remarks because voir dire was being streamed to them using a live audio and video feed. T I, 156-157; T II, 24.

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Trial counsel moved the court for a mistrial or a new panel of jurors. T I, 300; T II, 3-6. The prosecutor joined in the request to start over with a new jury panel. T II, 6-7. The trial court, however, denied the motion and proceeded with the existing jury panel. T I, 302; T II, 11.

Mr. Serges' right to due process encompasses the right to be presumed innocent. US Const, Am XIV; *Estelle v Williams*, 425 US 501, 503 (1976); Const 1963, art 1, § 17. For this reason, it would have been inherently prejudicial for Mr. Serges to be visibly shackled during trial or for him to appear before the jury in a jail uniform. *Holbrook v Flynn,* 475 US 560 (1986); *People v Rose*, 289 Mich App 499, 517 (2010), citing *Estelle*, 425 US at 504-05. It was likewise inherently prejudicial for the jury to hear that Mr. Serges was in jail leading up to trial. The fact that Mr. Serges was incarcerated pre-trial branded him with guilt in the eyes of the jury. *Holbrook,* 475 US at 569. It was impermissible for the prospective jurors to hear that Mr. Serges was in jail. *Id*.

The deputy's disclosure created a substantial risk that the jury viewed Mr. Serges as an "obviously guilty person." *Rose*, 289 Mich App at 518-519. There is no other plausible explanation for Mr. Serges being in jail than that he was arrested and held because authorities believed he was guilty and dangerous. As trial counsel pointed out, the error was particularly egregious because the detective would later testify that he interviewed Mr. Serges on November 29, 2017, and therefore the jury would know that Mr. Serges had been in jail for three years. T II, 4-5; T VI, 49. It was improper for the jury to have this information and it created an "unacceptable risk of prejudice" to Mr. Serges. *Holbrook*, 475 US at 561.

The jury should never have been informed that Mr. Serges was held in jail. This information impaired their ability to presume him innocent. The error was not harmless beyond a reasonable doubt where the evidence against Mr. Serges was not overwhelming. Justice requires a new trial where Mr. Serges is afforded the presumption of innocence.

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V. The COVID-era jury selection procedures denied Mr. Serges his state and federal constitutional right to trial by a fair cross-section of the community.

Issue Preservation and Standard of Review

Mr. Serges' trial counsel moved to adjourn trial on several grounds, including that the COVID-era restrictions would infringe Mr. Serges' right to an open minded, focused jury and, in turn, his right to a fair trial. See Appendix T (Brief in Support of Motion to Adjourn). Therefore, the issue is preserved. Appellate courts review claims of systematic exclusion of a distinctive group in jury venires de novo. *People v McKinney*, 258 Mich App 157, 161 (2003).

Mr. Serges raised this issue in his motion for new trial and in the Court of Appeals. See *People v Jackson*, 507 Mich 889 (2021) (remanding to the Muskegon Circuit Court for an evidentiary hearing to determine whether the defendant was denied his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community). The prosecutor did not oppose Mr. Serges' request for an evidentiary hearing. MH 7/26/21, 15.

In the Court of Appeals, he filed two motions requesting remand for an evidentiary hearing on this issue. The Court of Appeals remanded for a hearing only as to Issue I.

Discussion

Mr. Serges has a constitutional right to a jury drawn from a fair cross-section of the community in which his case is tried. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *Duren v Missouri*, 439 US 357, 358-358 (1979); *Taylor v Louisiana*, 419 US 522, 527 (1975). This requirement does not guarantee Mr. Serges a petit jury that mirrors the community and reflects the various distinctive groups in the population. *Id.* at 538. Rather, he is entitled to an opportunity for a representative jury: the pools from which juries are drawn must not systematically exclude distinctive groups and thereby fail to constitute a fair cross-section of the community. *Id.*; *People v Hubbard (After Remand)*, 217 Mich App

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459, 472-473 (1996), overruled on other grounds by *People v Harris*, 495 Mich 120 (2014).

Those most vulnerable to COVID-19 are the poor, elderly, racial and ethnic minorities, persons without insurance, and persons with pre-existing health conditions. The Court excused for cause those who were most vulnerable, resulting in the exclusion of portions of the community from the jury pool. See, e.g., T I, 36-37, 82, 94 (excusing jurors because they are anxious or fearful due to the virus); T I, 127 (excusing a juror who would suffer financial hardship if seated on the jury); Appendix J (Affidavit of Attorney David Clark).

Moreover, jurors were able to obtain exemptions without appearing at the courthouse—even before voir dire began, members of the community were exempted without counsel having the opportunity to evaluate who had been excused from the venire or what populations remained to be seated. T I, 36; Appendix J (Affidavit of Attorney David Clark).

At the time of Mr. Serges' trial, the Jury Management Office had the authority to exempt would-be venire members before they ever arrived at the courthouse. The Circuit Court adopted various new reasons for exemption from jury service in light of the pandemic, including having COVID symptoms, being a full-time caregiver for an elderly family member, and having young children to care for. See Appendix L (Supplemental Juror Screening Questionnaire).

Jurors were instructed that, if any of these factors applied to them, they could contact the Court to have their jury service re-scheduled. *Id*. These pre-trial exclusions are not part of the record in this case. At an evidentiary hearing, the Genesee Circuit Court Administrator and/or a member/s of the Jury Management Office would likely be necessary witnesses since they oversaw the pre-trial exemption process.

Jury selection is a critical stage of a criminal trial. *Gomez v US*, 490 US 858, 873 (1989). To uphold Mr. Serges' right to the effective assistance of counsel and to a properly selected jury, counsel must be

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able to participate in any process where would-be venire members are exempted from service. However, leading up to Mr. Serges' trial, the Jury Management Office had the authority to exempt venire members from service without informing the parties and their attorneys and without placing their decisions on the record. These exemptions occurred without any articulated standards. Mr. Serges and his trial counsel were unable to evaluate for themselves the sincerity and reasonableness of any juror's request and likewise were unable to object to the juror's excusal from service.

The exclusion of a certain group/s from the jury pool unconstitutionally impacted Mr. Serges' right to an impartial jury if "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 US at 364; *People v Bryant*, 491 Mich 575 (2012).

Distinctive groups: (1) are defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex); (2) have a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) have a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. *Willis v Zant*, 720 F2d 1212, 1216 (CA 11, 1983); *United States v Test,* 550 F2d 577, 584 (CA 10, 1976). The available facts and circumstances give rise to a presumption that the jury selection process resulted in systematic exclusion of various distinctive groups—e.g., political liberals, Black Americans, Hispanic Americans, poor citizens, and women—from Mr. Serges' jury venire. At an evidentiary hearing, Mr. Serges would establish the representation of these distinctive groups in the community as compared to their representation in the jury venire.

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Political affiliation is a distinctive group as defined above. For instance, political liberals make up a distinct group of people who have common attitudes and interests. The COVID-19 pandemic is a highly polarized and politicized crisis. Those who take the COVID-19 pandemic seriously are disproportionately political liberals. Appendix O *(Juror Attitudes and the Coronavirus*, US Legal Support (April 28, 2021)). Liberals were therefore more likely to be concerned about the virus and exempted from serving on Mr. Serges' jury based on that concern. On the other hand, political conservatives tend to be less worried about the virus. In September 2020, when Mr. Serges' case was tried, 68% of conservatives believed the seriousness of COVID-19 is generally exaggerated, compared to 19% of those who identified as 'middle of the road' and 13% of liberals. *Id*. at 5. Conservatives were therefore more likely to show up for jury duty and to be more comfortable performing the duties of a juror. Appendix P (GBAO, *Jury Trials in a (Post) Pandemic World – National Survey Analysis*, National Center for State Courts (June 22, 2020)).[19]

Further, the Pew Research Center found that those who identified as Republicans/Republican leaning were more comfortable attending indoor social events and going to salons than were those who identified as Democrats/Democrat leaning. Appendix Q (Doherty, Kiley, & Asheer, *Republicans, Democrats, Move Even Further Apart in Coronavirus Concerns*, Pew Research Center (June 25, 2020)), at 8. The Jury Management Office's broad exemption policy and the Court's excusal of prospective jurors who were fearful of contracting COVID-19 exempted people who took COVID-19 seriously from Mr. Serges' jury venire. This

[19] See also, Mark Curriden, *Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists*, Houston Chronicle, available at https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php [https://perma.cc/B4QU-RM4B] (July 2, 2020) (discussing a survey of 650 potential jurors in Houston and Dallas, which found that Black people were "30 percent more likely to qualify for a COVID-19 jury duty exemption, such as being in a high-risk category or working at a hospital, than white people," and were also more likely to face an economic hardship if required to serve as a juror during the pandemic).

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presumably resulted in disproportionate exclusion of liberal-leaning citizens because liberals took the virus more seriously and were therefore more cautious.

Jury diversity is essential so that biases held by individual jurors can be balanced by competing biases held by other jurors. A jury comprised disproportionately of conservatives is not balanced. Since Republicans generally identify with a "law and order" mentality and tend to side with prosecutors, "[a] systemic shift to more Republican jurors would arguably jeopardize the accused's rights to Due Process." Appendix R (Melanie D. Wilson, *The Pandemic Juror*, 77 Wash & Lee L Rev Online 65 (2020)), at 85.

In addition to exempting political liberals, the jury selection protocols likely disproportionately excluded would-be jurors of color. Professor Wilson of the University of Tennessee College of Law poses a critical question: "How can a petit jury be drawn from a representative cross-section of the defendant's community when the COVID-19 virus disproportionately discourages people of color or others from serving?" Appendix R at 85. The virus harms people of color in disproportionate numbers, while white people, Republicans and young people tend to be the least concerned about spreading or contracting the virus. *Id.*

The National Center for State Courts commissioned a survey of 1,000 potential jurors to explore attitudes and concerns about jury service during the pandemic. Appendix P (GBAO, *Jury Trials in a (Post) Pandemic World – National Survey Analysis*, National Center for State Courts (June 22, 2020)). The survey found African Americans are the least likely demographic to report to the courthouse or serve on a jury. Fewer than 25% of African Americans said they would feel comfortable reporting to the courthouse or serving on a jury. *Id.* at 4. By contrast, 50% of white people would feel comfortable reporting to the courthouse if summoned for jury duty. *Id.* at 4. More than 80% of younger, more conservative, and non-college educated white men said they would report for jury service if summoned. *Id.* at 7.

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The Pew Research Center found that, since April 2020, white adults' concerns about getting or spreading COVID-19 declined while the concerns of Black and Hispanic adults did not.[20] Appendix Q at 17. This suggests that, while white adults in general may have felt more comfortable reporting for jury duty as time passed, citizens of color did not experience the same shift and were still uncomfortable reporting.

It is unsurprising that people of color are less inclined than white people to appear for jury service during the pandemic, since there is a disproportionate burden of illness and death among racial and ethnic minority groups from COVID-19.[21] The virus has disproportionately affected ethnic and racial minorities along every axis: disparately high hospitalization rates, death rates, and job and wage loss rates.[22] Black and Hispanic workers are also more likely to work in "essential industries" than white workers, meaning not only that they are more likely to be exposed to the coronavirus, but also that they will be less

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[20] The reports by the National Center for State Courts and the Pew Research Center were published in June 2020 when there was no COVID-19 vaccine available to prospective jurors. The same was true at the time of Mr. Serges' trial in September 2020—there was no vaccine available.

[21] Centers for Disease Control and Prevention, *Health equity considerations and racial and ethnic minority groups* (July 24, 2020), available at https://stacks.cdc.gov/view/cdc/91049 (accessed May 30, 2024).

[22] Lopez et al, *Racial and Ethnic Health Disparities Related to COVID-19* (January 22, 2021), American Medical Association, available at https://jamanetwork.com/journals/jama/fullarticle/2775687 (accessed May 30, 2024); Duong et al, *Disparities in COVID-19 related outcomes in the United States by race and ethnicity pre-vaccination era* (September 7, 2023), Centers for Disease Control and Prevention, available at https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2023.1206988/full, (accessed May 30, 2024); Lopez et al, *Financial and health impacts of COVID-19 vary widely by race and ethnicity*, Pew Research Center (May 5, 2020) available at https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/ (accessed May 30, 2024).

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likely to take time off for jury duty.[23] All of these factors made Black and Hispanic people more likely to seek and receive exemptions under the procedures that were in place at the time of Mr. Serges' trial. Racial and ethnic minorities are a distinctive group in the community. *Bryant*, 491 Mich 575.

In addition, if the Jury Management Office granted any exemptions to "essential workers", these would likely disproportionately exempt those who are poor, Black, and Hispanic—which would also be constitutionally problematic.[24] The same is true for in-court exemptions—excusals based on economic hardship presumably excuse Black, Hispanic, and poor citizens disproportionately. See T I, 120-127 (the Court, during voir dire, excused a prospective juror whose wife was working less due to the pandemic and whose family, therefore, would suffer financial hardship if he were unable to work due to jury duty). Remand for expansion of the record is necessary to take testimony from the Jury Management Office staff members with knowledge of who was exempted from Mr. Serges' jury venire and why.

In addition, the trial court's policy permitting deferrals for caregivers and for parents of children who required help at home with remote schooling likely disproportionately—and unconstitutionally—excluded women from Mr. Serges' venire. Appendix L (Supplemental Juror Screening Questionnaire*)*. Appendix S (Amanda Taub, *Pandemic Will 'Take Our Women 10 Years Back' in the Workplace*, New York Times,

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[23] *Id*. ("Essential workers are inherently at higher risk of being exposed to COVID-19 due to the nature of their work, and they are disproportionately representative of racial and ethnic minority groups.")

[24] Hannah Van Drie & Richard V. Reeves, *Many Essential Workers Are in "Low-Prestige" Jobs*, The Brookings Institution, May 28, 2020, https://www.brookings.edu/blog/up-front/2020/05/28/manyessential-workers-are-in-low-prestige-jobs-time-to-change-ourattitudes-and-policies/ (reporting that essential workers "are typically lower paid" and "are disproportionately Black or Hispanic"); *Thiel v S Pac Co*, 328 US 217, 223-25 (1946) (rejecting jury selection process that excluded all "daily wage earners" from the jury pool as "discriminat[ion] against persons of low economic and social status").

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Sept 26, 2020) (reporting that women have disproportionately taken on extra responsibility for childcare during the pandemic); *Taylor v Louisiana*, 419 US 522, 535 (1975) (women are a distinctive group in the community; prospective jurors may not be exempted from service on the basis of gender). The survey commissioned by the National Center for State Courts revealed that 74% of men would report for jury duty, compared to just 59% of women. GBAO at 4. Women experienced more obstacles to serving on a jury during the pandemic, including parenting and caregiving responsibilities. GBAO at 2.

The elderly are also a distinctive group impacted disproportionately by COVID-19. Because elderly people are more likely to die from COVID-19, they are more likely to fear the virus and obtain an exemption from jury duty. Their high-risk nature and their ability to be excused prior to even showing up in court may have amounted to systematic exclusion. Given the circumstances, the representation of the elderly population in Mr. Serges' jury venire was likely not fair and reasonable in relation to the number of elderly persons in the community.

The unequal probabilities for jury service among different groups in this case resulted not due to random factors, but because of the systemic choice to convene a jury during the COVID-19 pandemic and the systematic choice to exclude those who were apprehensive about serving on the jury: this was a procedure in the jury selection process that functionally excluded members of certain groups. The jury selection procedures in place at the time of Mr. Serges' trial were unconstitutional because the Court excused potential jurors based on concerns about COVID-19 exposure and financial hardship due to the pandemic, infringing Mr. Serges' right to be tried by a jury drawn from a fair cross-section of the community.

Other courts have cited fair cross-section concerns when adjourning trials in the COVID-19 era. For example, a federal district court adjourned a criminal trial where defense counsel argued, among other things, that "the pandemic called into question the likelihood that the jury venire would be drawn from a fair cross-section of the community,

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particularly regarding the age, race and political affiliations of the venire." *US v Fortson*, Case No: 2:18 cr-416-WKW, 2020 WL 4059718 (MD Ala July 20, 2020), at 7-8.[25]

In *US v Young*, the court adjourned trial due to the pandemic, noting other courts were granting continuances due to the pandemic and voicing concern that "it is highly likely that, even if a jury is eventually selected, it would not reflect an adequate cross-section of society." *US v Young*, No. 19-cr-00496-CMA, 2020 WL 3963715 (D Colo, 2020). See also *US v Davis*, 487 F Supp 3d 1068, 1070 (D Colo, 2020) (adjourning trial, stating, "The court will experience difficulty, due to various public health directives and general health concerns, obtaining an adequate cross-section of the community for jury selection. . . ."); *US v Diaz-Nivar*, No. 20-CR-38-JD, 2020 WL 3848200 (D NH, 2020) (adjourning trial, in part due to "reduced ability to obtain an adequate spectrum of jurors."); *United States v Magana-Madrigal*, No. 3:20-CR-28-TAV-HBG, 2020 WL 2476470 (ED Tenn, 2020) (same); *United States v Magana,* No. 4:19-CR-00114, 2020 WL 2527041 (D Utah, 2020) (same). Here, however, the trial court denied Mr. Serges' motion to adjourn despite the prosecutor joining in the request.

Mr. Serges has demonstrated that various distinctive groups—e.g., political liberals, Black Americans, Hispanic Americans, poor citizens, and women—were likely underrepresented in his jury venire due to systematic exclusion, i.e., the jury selection procedures that were in place at the time of his trial. Mr. Serges requests this Court reverse based on the existing record, or remand for an evidentiary hearing so he

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[25] The court in *Fortson* adjourned trial even though the defendant "personally desire[d] for the trial to take place as soon as possible." *Id.* at 8. By contrast, Mr. Serges and his counsel requested an adjournment. H 7/28/2020, 10-11; H 8/14/2020, 4. The prosecutor joined in the request, voiced concerns about proceeding with the trial, and stated the People would not be prejudiced by an adjournment since Mr. Serges' case had been tried before and the testimony was preserved. Appendix U (People's Response to Defendant's Motion to Adjourn); H 8/14/2020, 7-8.

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can present testimony about distinctive groups that were excluded from the jury venire. He wishes to expand the record as to who was exempted by the Jury Management Office prior to trial, who was excused during voir dire, and whether the remaining venire constituted a fair cross-section of the community.

The Court of Appeals addressed this issue, in part, by noting that data on the racial composition of juries is not available. *People v Serges*, __ Mich App __ (2024) (Docket No. 355554); slip op at 22-23. First, this ignores that Mr. Serges' challenged the systematic exclusion of multiple groups, not just racial minorities, from the jury pool.

Second, this insulates a constitutional issue from review by taking a head-in-the-sand approach. As long as counties fail to keep adequate records, defendants will be unable to meet the existing legal requirements for a fair cross-section claim. "By perpetuating the misconception that courts have no responsibility to address causes of underrepresentation other than those inherent in the system itself, caselaw has created a functional safe harbor in which courts can ignore substantial minority underrepresentation in their own jury pools as long as they can plausibly deny actively contributing to the problem." Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L Rev 761, 764 (2011). See also *State v Dangcil*, 248 NJ 114, 131-132, 146 (2021) (directing the New Jersey Administrative Office of the Courts to begin collecting jurors' demographic information).

This Court should grant leave to re-evaluate the fair cross-section framework in light of county governments' failure to keep the records that would allow defendants to meet the existing legal requirements.

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VI. Requiring Mr. Serges to either wear a mask or sit six feet away from his attorney denied Mr. Serges his right to a fair trial and infringed his state and federal right to confront the witnesses against him.

Issue Preservation and Standard of Review

Trial counsel preserved this error in written and oral motions to adjourn. Appendix T (Brief in Support of Motion to Adjourn); H 8/14/2020, 3-4. Mr. Serges also raised this issue in a motion for new trial.

This issue raises a structural error, which requires reversal because it is "intrinsically harmful" and implicates foundational constitutional rights. *People v Duncan*, 462 Mich 47, 51-52 (2000).

If this Court does not view the error as structural, review is de novo and this Court must decide if the error was harmless beyond a reasonable doubt. *McCuller*, 479 at 681; *Carines*, 460 Mich at 774; *Anderson,* 446 Mich 392.

Discussion

Mr. Serges was faced with an unconstitutional choice: either confer with his counsel or be fully present and seen by the jury. H 8/14/2020, 5.

Mr. Serges has a right to the assistance of counsel at all critical stages of a criminal proceeding. *Montejo v Louisiana*, 556 US 778, 786 (2009). A meaningful attorney-client relationship requires that counsel and client are free to confidential discuss issues during all stages of trial, including jury selection, witness testimony, argument, and jury instruction. The American Bar Association Criminal Justice Standards for the Defense Function explain that such communication is both

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constitutionally mandated and fosters the relationship necessary to provide an adequate defense.[26]

To maintain his ability to confer with his counsel, Mr. Serges was required to wear a mask for the duration of his trial. He was unmasked for only a few brief moments. Appendix J (Affidavit of Attorney David Clark). Jurors, on the other hand, were not required to wear masks. Wearing a mask separated Mr. Serges from the jury, dehumanized him, and reduced juror empathy. Since the state's witnesses were not required to wear masks, jurors could more easily relate to the witnesses than to Mr. Serges. In addition, masks have become political, and the underlying politics cause a segment of the population to resent people who wear a mask.[27]

Due process requires courts to consider whether the appearance of the defendant will prejudice the jury, and to take care to avoid such prejudice. *Estelle v Williams*, 425 US 501 (1976); see also *Deck v Missouri*, 544 US 622 (2005). Our culture frequently associates masks with criminality. Indeed, the Fifth Circuit has held that wearing a bandana around one's face contributes to reasonable suspicion. *United States v Roberson*, 496 Fed Appx 390, 393-394 (CA 5 2012).

The requirement to wear a mask also infringed Mr. Serges' right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The United States Supreme Court has declared that "face-to-face

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[26] American Bar Association, *Criminal Justice Standards for the Defense Function*, available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (accessed May 30, 2024).

[27] See Ryan Lizza and Daniel Lippman, *Wearing a mask is for smug liberals. Refusing to is for reckless Republicans.* (May 1, 2020), available at https://www.politico.com/news/2020/05/01/masks-politics-coronavirus-227765 (accessed May 23, 2024). ("On the right, where the mask is often seen as the symbol of a purported overreaction to the coronavirus, mask promotion is a target of ridicule, a sign that in a deeply polarized America almost anything can be politicized and turned into a token of tribal affiliation.")

confrontation" is "the core of the values furthered by the Confrontation Clause." *Coy v Iowa*, 487 US 1012, 1017 (1988); see also *People v Jemison*, 505 Mich 352 (2020). Like the one-way screening device at issue in *Coy*, Mr. Serges' face mask violated his confrontation right because it enabled the witnesses "to avoid viewing appellant as they gave their testimony." *Id*. at 1020. The remedy is a new trial.

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VII. Convening a jury during the COVID-19 pandemic created an unreasonably high risk of a coerced jury verdict.

Issue Preservation and Standard of Review

Trial counsel preserved this error by moving to adjourn and raising this issue. Appendix T (Brief in Support of Motion to Adjourn); H 8/14/2020, 5. Mr. Serges also raised this issue in a motion for new trial.

Review of this issue is de novo and this Court must decide if the error was harmless beyond a reasonable doubt. *McCuller*, 479 at 681; *Carines*, 460 Mich at 774; *Anderson,* 446 Mich 392.

Discussion

Mr. Serges "has a right to a tribunal both impartial and mentally competent to afford a hearing." *Lowenfield v Phelps*, 484 US 231, 241 (1988). The jury must not be compelled to render a premature verdict. See *People v Walker*, 504 Mich 267, 277 (2019). Mr. Serges is entitled to an uncoerced verdict. *Lowenfield,* 484 US at 241. Trial counsel and the prosecutor agreed that, due to the COVID-19 pandemic, Mr. Serges' trial could not be accomplished in a manner that is fully consistent with these principles. Appendix T (Brief in Support of Motion to Adjourn); Appendix U (People's Response to Defendant's Motion to Adjourn).

Jurors cannot devote their full attention to the testimony and evidence while they worry about their own safety and that of loved ones. Nor can they be expected to remain neutral in these circumstances—it would be only natural to begrudge the defendant for insisting on a jury trial, given the health risk and increased inconvenience. And while the Court adopted a COVID-era provision that allowed jurors to deliberate in the courtroom itself, this deprived the jury of the normal close-knit, private feeling of deliberations.

Mr. Serges' jury was convened in September 2020. Jurors convened at this precarious time undoubtedly had divided attentions and loyalties. These tensions can manifest within the jury, as inattention to the evidence, or distraction, as jurors worry about their own well-being

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in a closed courtroom and a closed jury room. While counsel for both parties touched on these concerns during voir dire, the import of maintaining attention in close quarters becomes more obvious as the trial continues: jurors who initially thought they could manage the process may have begun to feel differently, particularly as the trial and deliberations extended for a total of seven days in court.

Jurors are instructed to consider other jurors' opinions, reconsider their own opinions, and to hold their own opinion even in the face of disagreement if they firmly believe their position. Yet, that process takes time, and time together in close quarters is the enemy of safety from COVID-19. These unique COVID-era factors undermined the deliberative process and deprived Mr. Serges of his constitutional right to a fair trial and of a verdict rendered by a fair and impartial jury.

To decide whether a verdict is coerced, a court considers "all the circumstances" facing the jury. *Jenkins v United States*, 380 US 445, 446 (1965). The "real question is whether the jury was required to deliberate an unreasonable length of time or for unreasonable intervals or was threatened with the prospect of such unreasonably length deliberations." *United States v Kimmel*, 777 F2d 290, 295 (CA 5 1985). Where the probability of serious illness increases with each minute of exposure, nearly any amount of time is an unreasonable length of time.

Cumulatively, the COVID-19 protocols undermined the value of the jury trial as a means for obtaining exoneration or acquittal upon less than proof beyond a reasonable doubt. Even if the prosecution failed to prove Mr. Serges guilty beyond a reasonable doubt, the jury may have convicted him for improper reasons: because the jury lacked the accumulated wisdom and experience of a diverse cross-section; because they felt prejudice toward Mr. Serges because he was wearing a mask; because they were too distracted by the virus and safety concerns to notice the holes in the prosecution's case; because they resented the Mr. Serges' insistence on a trial; or because the last hold-out juror surrendered her honest convictions to escape the high risk of infection. The remedy is a new trial.

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Conclusion and Relief Requested

For the reasons stated above, David Serges respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief the Court deems just and appropriate. If this Court does not feel it can grant relief on the existing record, Mr. Serges requests remand for an evidentiary hearing.

Respectfully submitted,
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