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STATE OF MICHIGAN
IN THE SUPREME COURT

MENAYETTA YEAGER,

Defendant-Appellant,

v.

STATE OF MICHIGAN,

Plaintiff-Appellee.

Case No. 164055

Wayne County Circuit Court
Case No. 17-8290-01-FC

MOAA SUPPLEMENTAL BRIEF

— Oral Argument Requested —

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Statement of Questions Presented

I. Did Ms. Yeager's fear constitute a "heat of passion," justifying a voluntary manslaughter instruction?

Trial Court answers, "Yes"

Court of Appeals answers, "No."

Court of Appeals concurrence answers, "Yes"

Menayetta Michell Yeager answers, "Yes."

II. Was trial counsel's strategy sound where it was based on a misunderstanding of relevant law?

Trial Court answers, "No"

Court of Appeals answers, "No."

Court of Appeals concurrence answers, "No."

Menayetta Michell Yeager answers, "No."

III. The decision in *People v Raper*, 222 Mich App 475 (1997) does not preclude a finding of prejudice in Ms. Yeager's case. Is it reasonably likely that had the jury been instructed on voluntary manslaughter, the result would have been different?

Trial Court answers, "Yes."

Court of Appeals answers, "No."

Court of Appeals concurrence answers, "Yes."

Menayetta Michell Yeager answers, "Yes."

IV. Alternatively, *People v Raper* was wrongly decided. If *Raper* was not implicitly overruled by *Mendoza*, should it be explicitly overruled here?

Trial Court made no answer.

Court of Appeals answers, "No."

Court of Appeals concurrence answers, "Yes."

Menayetta Michell Yeager answers, "Yes."

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Summary of the Argument

Menayetta Yeager was convicted of first-degree murder after killing her abusive boyfriend minutes after he seriously assaulted her and stole her car. After a *Ginther* hearing during which her trial counsel testified to his lack of familiarity with relevant law and its application to the facts of this case, the trial court granted Ms. Yeager a new trial. The trial court found that if the jury been instructed on voluntary manslaughter, there is a reasonable likelihood they would have reached a different outcome.

The Court of Appeals majority reversed the trial court, citing *People v Raper*, 222 Mich App 475 (1997). Judge Beckering concurred in the result but wrote separately that she would have held a conflict panel and found that *People v Raper*, 222 Mich App 475 (1997) was wrongly decided. The majority held that where a jury rejects second-degree murder, that reflects "an unwillingness to convict on a lesser included offense such as [voluntary or involuntary] manslaughter." *Id*. But *Raper* did not create a bright-line rule and instead requires a factually intensive analysis that the Court of Appeals shirked entirely.

Alternatively, as Judge Beckering wrote in her concurrence, *People v Raper*, 222 Mich App 475 (1997) was wrongly decided. "Before [Ms. Yeager] spends the rest of her life in prison, she deserves a new trial." *People v Yeager*, unpub per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 346074), p (1)1 (BECKERING, J, concurring).

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Statement of Facts

Jonte Brooks' death was the tragic result of a volatile domestic situation. Mr. Brooks and Menayetta Yeager dated for about a year. 8/14/18 TT, 9. During the last six months of their relationship, Mr. Brooks physically abused Ms. Yeager. 8/15/18 TT, 45.

On the evening of August 27, 2017, Ms. Yeager told Mr. Brooks she no longer wanted to be with him. 8/15/18 TT, 17. Mr. Brooks hit her in the face with a gun. 8/15/18 TT, 17. He punched Ms. Yeager. 8/15/18 TT, 17. Mr. Brooks pulled Ms. Yeager out of her van by her hair. 8/15/18 TT, 18. Mr. Brooks again punched and kicked Ms. Yeager, leaving her with a "nose bleed and busted mouth." 8/15/18 TT, 18, 38.

Mr. Brooks then took his gun and got into Ms. Yeager's van and chased her down in it. 8/15/18 TT, 19. Mr. Brooks tried to run Ms. Yeager over "three or four times." 8/14/18 TT, 26-27; 8/15/18 TT, 19. Then he drove away in the van.

Ms. Yeager called the police repeatedly. 8/15/18 TT, 19. Mr. Brooks pulled off and came back. 8/15/18 TT, 19. Ms. Yeager felt like she did not have anywhere to wait safely for the police. 8/15/18 TT, 41.

After speaking with police, Ms. Yeager called Mr. Brooks to try to convince him to come back to the area in hopes the police would catch him. 8/15/18 TT, 20.

Labarren Borom, who knew Ms. Yeager from the neighborhood, observed some of this assault. 8/15/18 TT, 36-37. He testified that Mr. Brooks was "all up on the grass…tryin' to run her over." 8/15/18 TT, 26-27. Mr. Borom saw Mr. Brooks threaten

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another neighbor that night. 8/14/18 TT, 48. When asked if Ms. Yeager's life was in danger that night, he responded "of course." 8/15/18 TT, 54.

Mr. Borom got in his truck and eventually caught up with Ms. Yeager, who was crying, and yelling about Mr. Brooks bringing her van back. 8/15/18 TT, 28. Ms. Yeager got into Mr. Borom's truck. 8/15/18 TT, 29. Mr. Borom overheard Mr. Brooks on the phone with Ms. Yeager repeatedly calling Ms. Yeager a "bitch." 8/14/18 TT, 43-45.

At first, Mr. Brooks agreed to meet Ms. Yeager at a gas station and return the van. Ms. Yeager and Mr. Borom went to that gas station, but Mr. Brooks did not show up. 8/15/18 TT, 22. Ms. Yeager again called Mr. Brooks, who said that he had seen her in a truck with a man. 8/15/18 TT, 22. Mr. Brooks said he was going to "kill [Ms. Yeager] and that ni—er." 8/15/18 TT, 22-23. Mr. Brooks repeated his threats to kill Ms. Yeager and Mr. Borom. 8/15/18 TT, 46.

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

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

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Distraught and in fear for her life, Ms. Yeager shot the gun towards the van Mr. Brooks was in. 8/15/18 TT, 24, 25, 29. She was not trying to kill Mr. Brooks and she did not want him to die. 8/15/18 TT, 42. She wanted Mr. Brooks to stop hurting her. 8/15/18 TT, 42.

"[A]t best, about fifteen minutes" passed between the time Mr. Brooks carjacked Ms. Yeager to the time Ms. Yeager shot at the van. GH, 41.

Ms. Yeager estimated she shot the van two or three times; because of her fear, her memory of the night was not clear. 8/15/18 TT, 24, 25, 29. She described the whole event as "devastating and emotional." 8/15/18 TT, 42. Mr. Borom remembered hearing at least five or six gunshots. 8/14/18 TT, 32. He believed Ms. Yeager "didn't even know what was happening." 8/14/18 TT, 59. He did not think he had witnessed anyone being shot. 8/14/18 TT, 53. A gas station employee remembered hearing 10 shots. 8/14/18 TT, 16. Police recovered 17 bullet casings at the gas station, all from the same gun. 8/14/18 TT, 184.

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

After shots were fired, Mr. Brooks sped off in Ms. Yeager's van. 8/14/18 TT, 54; 8/15/18 TT, 19. About five blocks away, Mr. Brooks crashed. 8/14/18 TT, 20. The damage to the van was extensive, and Mr. Brooks was bleeding from his mouth. But

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he was alive. 8/14/18 TT, 73, 95. Mr. Brooks was taken to a nearby hospital where he died from his injuries, including a gunshot wound. 8/14/18 TT, 90; 8/13/18 TT, 198. Police searched the van. They did not recover a weapon, but they did find two bottles of gin. 8/14/18 TT, 86, 167, 171. Mr. Brooks had a blood alcohol content of almost twice the legal limit and had marijuana in his system. 8/13/18 TT, 200.

The following day, Ms. Yeager turned herself in to police, accompanied by an attorney. 8/15/18 TT, 199. Her home and Mr. Borom's home were searched. No firearms or "indicia of firearms" were recovered. 8/15/18 TT, 197, 199. Mr. Borom pled guilty as an accessory after the fact and served less than two years in prison.[1] 8/14/15 TT, 25. After a three-day jury trial in the Wayne County Circuit Court before the Honorable Kevin Cox, the jury deliberated as to whether Ms. Yeager was guilty of first- or second-degree murder. After two days of deliberation including a request to review evidence, the jury reached a verdict: guilty of first-degree murder and guilty of felony-firearm. Ms. Yeager was sentenced to serve mandatory life in prison without the possibility of parole.

***

The Court of Appeals remanded Ms. Yeager's case to the Wayne County Circuit Court and directed the circuit court to hold "an evidentiary hearing and determine whether defendant denied the effective assistance of counsel. *People v Ginther*, 390 Mich 436 (1993)." The Court of Appeals limited the evidentiary hearing to "the issue of whether defendant's trial counsel rendered ineffective assistance of counsel by

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

failing to request an instruction on voluntary manslaughter as a lesser included offense to murder."

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

At the evidentiary hearing, the court asked its own questions of trial counsel and recalled details from trial. GH, 46-50. For example, the trial court noted that in closing argument, trial counsel posited that perhaps, Mr. Borom could have been the shooter. GH, 46. But, as the trial court summarized, there was "no evidence of that good Samaritan shooting at the victim…." GH, 46.

The trial court also observed that at trial, trial counsel argued that Mr. Brooks may still be alive, and the dead body in the morgue belonged to someone else. The court queried whether this compromised trial counsel's credibility in front of the jury. GH, 47. Most pointedly, the trial court asked counsel whether he argued to the jury that "Mr. Brooks actually did not die in this shooting, and that he maybe had awakened with a new lease on life, because he was not the victim?" Counsel said he had made that argument. GH, 48. The trial court again wondered what affect this had on his credibility in front of the jury.

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

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trial. Judge Cox explained that "had Mr. Humphrey not erred in failing to ask for the voluntary manslaughter instruction, there is, indeed, a reasonable likelihood, as defined by the case law, that a different outcome at trial would have occurred." 9/28/21 Ginther Hearing, 18-19.

The Wayne County Prosecutor's Office filed a cross- appeal stating that counsel was not ineffective. The prosecutor asked the Court of Appeals to reverse Judge Cox, citing for the first time *People v Raper*, 222 Mich App 475 (1997). The Court of Appeals, also citing *Raper*, "reverse[d] the trial court insofar as it held that defendant established a claim of ineffective assistance of counsel and awarded her a new trial." *People v Yeager*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 346074), p 9-10 (citing *Raper* at 483-484) ("The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser-included offense such as manslaughter. *People v Zak*, 184 Mich App 1, 16 (1990) … [D]efendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice.").

Judge Jane Beckering concurred in the result, stating that she would have held a conflict panel and found that *People v Raper*, 222 Mich App 475 (1997) was wrongly decided. Ms. Yeager appealed to this Court and was granted oral argument on the application.

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Issue Preservation and Standard of Review

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

Ms. Yeager was denied her right to the effective assistance of counsel where "counsel's performance was deficient," and where counsel's "deficient performance prejudiced the defense." US Const, Am VI; *Strickland v Washington*, 466 US 668, 694 (1984).

This Court reviews the constitutional issue de novo but defers to a trial court's findings of fact absent clear error. *People v LeBlanc*, 465 Mich 575, 579 (2002).

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I. Ms. Yeager's fear constituted a "heat of passion," justifying a voluntary manslaughter instruction.

a. Introduction

This Court's order for oral argument succinctly summarized the circumstances surrounding Ms. Yeager's state of mind as "fear…based on the decedent's physical assault of the appellant, carjacking of the appellant, and threats to the appellant." *People v Yeager*, 973 NW 2d 913 (2022). These circumstances justified a voluntary manslaughter instruction.

b. Fear can be adequate provocation to support a jury instruction on voluntary manslaughter.

The heat of passion necessary to justify a voluntary manslaughter instruction is not limited to circumstances involving anger. Fear can be provocation "sufficient to excite the passions beyond the control of reason." *People v Scott*, 6 Mich 287 (1859). Manslaughter is understood to be the law's rare "indulgence to the frailty of human nature." *People v Townes*, 391 Mich 578, 590 (citing *Maher v People,* 10 Mich 212 (1862)). That indulgence excludes no emotion in the full range of the human experience, save "wickedness of heart or cruelty." *Townes,* 391 Mich at 590 (citing *Maher v People,* 10 Mich 212 (1862)). This Court has already put this issue to rest: "A defendant acting out of a state of terror, for example, is considered to have acted in the 'heat of passion.'" *Id* at 590 n 4; see also, *People v Pouncey*, 437 Mich 382, 389 (1991) ("emotions so intense that they distort the defendant's practical reasoning.").

Like Michigan case law, our state's model jury instructions do not limit the type of emotion necessary to experience sufficient excitement. The jury instructions for voluntary manslaughter provide that the accused must be "disturbed by emotional

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excitement" and that the "emotional excitement must have been the result of something that would case a reasonable person to act rashly or on impulse." M Crim JI 16.9. To limit "emotional excitement" to only particular emotions is not only unsupported by the case law but would disparately exclude women from circumstances mitigating murder to manslaughter. *See generally*, Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 SCAR LWS 71, 102 n 136 (1992) ("Feminists have noted that while anger may describe the motivation of *men* who kill, it is a poor fit for women who are far more frequently motivated by fear…"), 44a.

Despite this Court having said as much in *Townes*, it is worth repeating here, nearly 50 years later: fear can rise to the level of heat of passion.

c. Ms. Yeager's fear constituted heat of passion.

What Ms. Yeager endured was sufficient to cause any "ordinary person of average disposition to act rashly or without due deliberation or reflect and from passion rather than judgment." *Maher v People*, 10 Mich 212, 219 (1862)). Ms. Yeager was provoked and as a result, profoundly fearful and intensely emotionally distraught at the time she fired the shots that fatally injured her abusive partner.

Minutes before this shooting, Mr. Brooks violently assaulted Ms. Yeager. He punched her, kicked her, and hit her in the face with his gun. He pulled her out of her van by the hair and drove off in it—returning repeatedly to chase after her and try to run her over. She called the police and called Mr. Brooks who screamed at her

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and threatened to kill her. 8/15/18 TT, 17, 18, 19, 41. She believed him. 8/15/18 TT, 43. Mr. Brooks terrified Ms. Yeager.

A comparison is illustrative. The quintessential example of provocation sufficient to mitigate a charge of murder to a voluntary manslaughter conviction is "the sight of a wife's adultery." Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 SCAR LWS 71, 72 (1992) (cleaned up); *See also, People v Eagen*, 136 Mich App 524, 527 (1984) (citing LaFave & Scott, Criminal Law Section 76, p 575); 34a. If the mere *observation* of one's spouse participating in a sex act would cause emotional distress sufficient to mitigate murder to manslaughter, surely the same can be said for one's *personal experience* of a domestic partner's repeated physical assaults, carjacking, verbal abuse, and death threats. *See generally*, Buchhandler-Raphael, Michal, Fear-Based Provocation 67 Am UL Rev 1719 (2018) (offering a critique on the male-centric concept of anger as provocation) 81a.

Importantly, too, insufficient time elapsed between the provocation and the shooting "for [Ms. Yeager's] passion to subside and the blood to cool." *Maher,* 10 Mich at 219. A reasonable time to calm down is not defined by a specific window of time but rather whatever time is necessary for "the blood to cool." *People v Hess,* 214 Mich App 33, 38 (1995).

Some limits are clear. For example, a total passage of time of nine hours between the provocation and the shooting was deemed a time frame during which a reasonable person could calm down. *People v Tierney,* 266 Mich App 687, 716 (2005).

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By contrast, Ms. Yeager's experience was one of ongoing emotional excitement. She was carjacked and abused "a short time" before the shooting. GH, 17. When the trial court asked trial counsel how much time elapsed from the initial assault until the shooting, counsel testified "at best, about fifteen minutes." GH, 41. He later "guesstimated" that it could have been as few as twelve minutes. GH, 42.

Fifteen minutes is insufficient time to calm down following an assault. *Hurd v People*, 25 Mich 405, 413 (1872) (Finding that the defendant had not cooled down during the 15 minutes between the time he was assaulted and the time he killed his assailant) (superseded by statute on other grounds, as recognized by *People v Koonce*, 466 Mich 515 (2002)).

It would be a mistake for this Court to put too much stock in a fifteen-minute cooling period, not only because of its objective brevity, but because to do so "is to fail to recognize what some battered women experience as a continuing 'state of siege'." Brief of Amicus Curiae National Clearinghouse for the Defense of Battered Women in Support of Beth Ann Markman, *Commonwealth of Pennsylvania v Beth Ann Markman* Docket No. 371, 2003, appended hereto (hereinafter "NCDBW Amicus") 194a-195a. "The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that 'the pattern of violence and abuse can be viewed as a single and continuing entity…thus, the battered woman's fear, vigilance, or perception that she has few options may persist…" NCDBW Amicus; 194a-195a. Ms. Yeager's testimony describing her memory of that day, and the lack thereof, indicates that she was in a state of ongoing psychological distress.

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Ms. Yeager was trying to leave an "abusive relationship" and was subjected to ongoing physical and verbal violence. 8/15/18 TT, 24. The assault did not end when Mr. Brooks drove off with Ms. Yeager's car—he continued to threaten Ms. Yeager's life until moments before she shot.

Ms. Yeager testified that she exited her neighbor's vehicle and "that's when it happened…the shooting." 8/15/18 TT, 24. She described the event as "devastating and emotional" and profoundly stressful. 8/15/18 TT, 42. Mr. Borom described Ms. Yeager as "hysterical." 8/14/18 TT, 60-61. She had lapses in memory and an overwhelming feeling of fear. 8/15/18 TT, 40. She could not recall how many times she discharged the gun. 8/15/18 TT, 39; GH, 75. At the *Ginther* hearing she testified that she still "can't think what I was thinking, at that moment, besides just bein' scared." GH, 75.

Ms. Yeager's thoughts were completely obscured by ongoing trauma. Malice was negated. As Judge Beckering observed, "[a]lthough decedent's taunts over the phone could not serve as adequate provocation, Brooks also physically assaulted defendant and attempted to run her over multiple times, including driving over people's lawns in an attempt to hit her, followed by carjacking and threats to kill her which kept her passions inflamed." *Yeager*, unpub op at 4 (BECKERING, J, concurring).

"If there was ever a heat of passion case, this is it." *Id* at 1. Ms. Yeager's fear of the decedent constituted adequate "heat of passion," justifying a voluntary manslaughter instruction.

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II. Trial counsel's strategy was not sound where it was based on a misunderstanding of relevant law.

a. Introduction

Trial counsel did not understand the law relevant to his chosen defense and its interplay with murder and lesser included offenses. Specifically, trial counsel did not understand voluntary manslaughter, a lesser included offense of murder and a likely outcome for the jury verdict here, had the jury been properly instructed. His representation fell far short of an objective standard of reasonableness. *Strickland*, 466 US at 688.

b. Ms. Yeager's was denied the effective assistance of counsel where her counsel did not understand the law fundamental to her case.

While reviewing courts are required to "indulge in a strong presumption that counsel's conduct falls within a range of professional assistance," they "may not engage in a post hoc rationalization of the counsels' decision-making that contradicts the available evidence." *People v Gioglio* (On Remand), 296 Mich App 12 (2012); vacated in part for resentencing, 493 Mich 864 (2012). The reasonable performance prong is an objective standard, *Strickland*, 466 US at 688, but it is somewhat malleable as it is considered under "prevailing professional norms." *Wiggins v Smith*, 539 US 510, 521 (2003). Where counsel's decision-making is guided by a misunderstanding of relevant law, there is per se deficient performance. *Hinton v Alabama*, 571 US 263, 273 (2014). If trial counsel is ignorant to "a point of law that is fundamental to his case" and failed "to perform basic research on that point" that is a "quintessential example of unreasonable performance." *Id* at 274.

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Ms. Yeager's counsel did not understand self-defense or the lesser included offenses of first-degree murder, or the interplay between the two. Ms. Yeager's trial counsel, like the trial counsel in *Hinton*, chose self-defense and failed to seek an instruction on a lesser-included offense not because of "any strategic choice, but on a mistaken belief." *Hinton*, 571 US at 273.

Trial counsel's strategy was guided by a legally incorrect conclusion: he believed self-defense was mutually exclusive from the defense of manslaughter because "she never intended to kill the decedent." GH, 38. Counsel testified that "manslaughter really wasn't on the table...because her perspective was she was in fear of her life" and "of course" Ms. Yeager's emotions were heightened. GH, 19, 21. Paradoxically, as the Court of Appeals concurrence provides, Ms. Yeager's is the very situation in which one would consider a manslaughter instruction. The jury instructions for voluntary manslaughter provide that manslaughter is appropriate where the accused's "thinking was disturbed by emotional excitement." M Crim JI 16.9. And further, manslaughter and self-defense are not mutually exclusive. *Yeager*, unpub op at 8 8a; *See*, *People v Lee*, unpublished opinion of the Court of Appeals issued April 14, 2016 (Docket No. 325039) (Gleicher, J., concurring) 6 ("the two defenses [(manslaughter and self-defense)] are not mutually exclusive."); 31a; *People v Millbrook*, 222 Cal App 4th 1122, 1138 (2014) ("in the usual case, a heat of passion instruction supplements the self-defense instruction."). Some jurisdictions even have a mandatory coupling of the two instructions. *People v Washington*, 962 NE2d 902, 917 (2012) ("when the evidence supports the giving of a jury instruction on self-

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defense, an instruction on second-degree murder[2] must be given as a mandatory counterpart. A failure to do so deprives the jury of the ability to make a factual determination as to whether the defendant had a subjective belief in the necessity for the use of force in self-defense but that belief was unreasonable.").

Additionally, trial counsel demonstrated a misunderstanding of the elements necessary for self- defense. Self- defense requires a jury to find that Ms. Yeager "honestly and reasonably believed that what she did was immediately necessary" and that she used "only as much force as she [thought] necessary at the time to protect herself." 8/15/18 T, 125-127. The prosecutor must then disprove self-defense beyond a reasonable doubt. However, trial counsel told the jury at closing that the prosecutor's only responsibility was to "show that Ms. Yeager was not in fear of her life." 8/15/18 TT, 88. This misrepresentation of self-defense focuses entirely on Ms. Yeager's emotional state and ignores the reasonableness of her chosen course of action. If the jury were to find Ms. Yeager experienced sufficient provocation but her actions were not necessary or reasonable, voluntary manslaughter would be a fitting verdict. And here, there was reason to believe the jury would find Ms. Yeager sufficiently provoked but her response unreasonable or unnecessary.

At the *Ginther* hearing, trial counsel continued to demonstrate a lack of understanding of the elements of self-defense. The jury was instructed that "a person can use deadly force in self-defense only where it is necessary to do so" and that they could consider whether the Ms. Yeager, who arrived at a gas station in a neighbor's

[2] "[W]hat is now second-degree murder was called voluntary manslaughter." *People v Washington*, 962 NE2d 902, 906 (2012).

vehicle, "could have safely retreated." 8/15/18 TT, 125-127. Though trial counsel testified that he understood Ms. Yeager to have been "in another whole vehicle…a situation of relative safety" before firing a gun 17 times in the direction of Mr. Brooks. (GH, 23), he testified that self-defense was appropriate because Ms. Yeager was "shootin' out of fear…because she was in fear for her life." GH, 32-33.

Taken as a whole, the circumstances surrounding the death of Mr. Brooks are facts that lend themselves to voluntary manslaughter, not self-defense. Regardless, counsel could have chosen to proceed with both a request for the voluntary manslaughter instruction and self-defense.

Choosing a course of action without knowledge of the relevant law is not an "all-or-nothing strategy." It is not strategy at all.

"[I]n a case in which a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Tierney*, 266 Mich App 687, 714 (2005). Because voluntary manslaughter is a lesser-included offense of murder and requires only a rational view of the evidence to support its reading, it follows that at minimum, for trial counsel to be effective in a capital case, he must understand the lesser included offenses of murder. Ms. Yeager's counsel did not.

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III. The decision in *People v Raper*, 222 Mich App 475 (1997) does not preclude a finding of prejudice in Ms. Yeager's case. It is reasonably likely that had the jury been instructed on voluntary manslaughter, the result would have been different.

a. Introduction

In *People v Raper*, 222 Mich App 475 (1997), the Court of Appeals held that when a jury convicts for first-degree murder conviction, there is not prejudice for the failure to instruct on manslaughter. That conclusion was limited to the facts of Mr. Raper's case. The Court applied a case-by-case analysis of prejudice, albeit in a very truncated manner. In this case, the Court of Appeals erroneously interpreted *Raper* as creating a bright-line rule. Had the Court of Appeals appropriately considered the facts of Ms. Yeager's case instead of applying a non-existent bar to relief, the Court of Appeals would have found that Ms. Yeager was prejudiced by counsel's failure to request an instruction on voluntary manslaughter.

b. *People v Beach* established a case-by-case analysis for evaluating whether the accused is entitled to a jury instruction on a lesser requested charge.

The Court of Appeals misread *Raper* as an absolute bar to relief. Such a strict, bright line rule contradicts this Court's holding in *People v Beach,* 429 Mich 450 (1988). There, this Court established that a case-by-case inquiry was required to determine whether the failure to request a jury instruction resulted in the ineffective assistance of counsel.

The facts underlying *Beach* began with an initial larceny of the decedent by Mr. Beach and his partner, Turner. *People v Beach,* 429 Mich at 456. Subsequently, Beach and Turner returned to the decedent's home intending to steal more money or

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other property. *Id*. In this second instance, a fight broke out during which Mr. Beach stabbed the decedent four or five times, killing him. *Id*.

This Court held that the failure to instruct the jury about conspiracy to commit larceny in a building constituted error; however, because the jury rejected the lesser included offense of conspiracy to commit unarmed robbery and convicted the defendant of the greater offense of conspiracy to commit armed robbery, the error was ultimately harmless. The Court determined that the jury's finding of guilt as to armed robbery precluded any likelihood that they would have convicted on an offense where force was not an element. This Court emphasized it was not establishing a bright-line rule: "[t]he existence of an intermediate charge that was rejected by the jury does not, of course, *automatically result* in an application of the [harmless error] analysis." *Id*. at 491 (emphasis added). Rather, "the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Id*. Put differently, the record needed to reflect some indicia that the jury's decision-making would have been influenced by the addition of the desired instruction.[3] Mr. Beach fell short of that.

In *Raper,* the Court of Appeals made quick work of this fact-intensive analysis, concluding in just a few sentences that the absence of a lesser offense instruction was harmless error. *Raper*, 222 Mich App at 483-484. In *Raper*, the decedent was driving his sister's car with Mr. Raper and another man, Mexicott, as passengers. *Id*. Outside

[3] Michigan is not alone in this fact-intensive, case-by-case analysis about jury instructions for lesser included offenses. *See* e.g. *People v Nolan*, 214 Ill App 3d 488 (1991); *People v Breverman*, 19 Cal 4th 142, 149 (1998).

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the presence of the decedent, Mexicott told Mr. Raper that they were going to kill decedent and take his car, and they then convinced the decedent to drive to a secluded area. *Id*.

When they arrived at the determined area and got out of the car, Mexicott instructed Mr. Raper to bring the gun that was in the car. *Id*. The three walked up a hill, and, out of decedent's hearing, Mexicott told Mr. Raper to "just take him out." *Id*. When Mr. Raper said, "I can't do it," Mexicott replied, "Well, I'll kill you." *Id*. Mr. Raper then went to where the decedent was standing and shot him twice. *Id*. The court determined that Mr. Raper was not entitled to a jury instruction on a lesser requested charge of voluntary and involuntary manslaughter. The jury found Mr. Raper guilty of first-degree murder. *Id*.

The court reasoned that "even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice." *Id*. at 483-484. The Court of Appeals did not create a bright-line rule. Yes, the Court of Appeals analysis was arguably inadequate or unhelpfully brief. But the Court of Appeals arrived at its conclusion only after considering the case presented against Mr. Raper. *People v Raper*, 222 Mich App 475, 483-484 (1997).

Because there was little to no evidence on the record that Mr. Raper was in a state of emotional excitement at the time of the killing, thus falling short of the requisite provocation for voluntary manslaughter, the lack of manslaughter

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instruction did not prejudice Mr. Raper. This analysis was intended to be limited to the facts of Mr. Raper's case. Indeed, the Court of Appeals was purposeful in using the term "defendant" and not "any defendant" or "all defendants" in its analysis.

The majority opinion below failed to conduct a case-by-case determination of prejudice and instead relied on a single line in *Raper*: "The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser offense such as manslaughter." *Raper*, 222 Mich App at 483-484; *Yeager*, unpub op at 7 ("The outcome here was that the jury found defendant guilty of first-degree murder, and in so doing rejected the lesser charge of second-degree murder…this is identical to the situation in *Raper*.") 7a.

c. Ms. Yeager was prejudiced by counsel's failure to request a voluntary manslaughter instruction.

The trial court correctly determined that there was a reasonable likelihood of a different result for Ms. Yeager had counsel requested and received an instruction for voluntary manslaughter.

Strickland holds that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. A reasonable probability is more than Ms. Yeager showing that her counsel's errors "had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 US at 693. However, the standard is *less than* "more likely than not." *Id.* ("…a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in this case."). The standard is *less than* "a preponderance of the evidence." *Id.* at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding

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itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). A "reasonable probability" equates to a "fairly good chance." *Bell v United States*, 854 F2d 881, 889 (CA 6, 1988).

The trial court found that "Ms. Yeager was emotionally excited…she was not calm when she shot the gun." 9/28/21 GH, 8. This shooting, the trial court found "was the result of a passionate decision to shoot." 9/28/21 GH, 18. The decision to shoot came soon after a series of physical assaults and verbal threats on Ms. Yeager's life. 9/28/21 GH, 18.

At trial and again at the *Ginther* proceeding, Ms. Yeager stated that while she was no longer being physically abused at the moment she shot the gun, Mr. Brooks was "verbally attackin' me, tellin' me things like he was gonna kill me…and I believed everything that Mr. Brooks said." GH, 66. Trial counsel testified that a carjacking occurred "a short time before the shooting." Ms. Yeager stated that, looking back, she "can't think what I was thinking at that moment, besides just being scared." GH, 75.

By the time Mr. Brooks arrived at the gas station, Ms. Yeager had yet to calm down. GH, 66. Ms. Yeager described her feelings at trial and again at the evidentiary hearing as "scared." GH 68-69. She only recalled shooting the gun "maybe twice," despite having fired seventeen shots. GH, 61, 75. She could not recall what she was thinking besides being "scared" and wanting Mr. Brooks to "stop." GH, 75. Ms. Yeager's overwhelming fear following substantial abuse after attempting to leave the relationship is consistent with others in her situation: "Separated women are about 25 times more likely to be assaulted by ex-mates and five times more likely to be

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murdered." *NCDBW Amicus*, 57; 191a. And Ms. Yeager's fear was informed by her "direct knowledge of [Mr. Brooks'] ability to carry out his threats." *NCDBW Amicus*, 62 (internal citations omitted); 198a. Ms. Yeager believed Mr. Brooks' threats: "I thought he was going to kill me." 8/15/18 TT, 24.

Mr. Borom's observations of Ms. Yeager at the gas station also support the conclusion that Ms. Yeager killed Mr. Brooks while under the heat of passion, which resulted from adequate provocation, and that there was no lapse of time during which she could have controlled her emotions. Mr. Borom described her as "hysterical." 8/14/18 TT, 60-61. But without a voluntary manslaughter instruction, the jury had no direction about how Ms. Yeager's emotional state may have compromised any malice aforethought.

This is the type of instructional error contemplated by this Court in *People v Rochowiak*, 416 Mich 235 (1982). In *Rochowiak*, Mr. Rochowiak was charged with and convicted of second-degree murder. *Id.* at 238. Although the trial court instructed the jury on involuntary manslaughter, Mr. Rochowiak requested an instruction on reckless use of a firearm because he claimed to be under the influence of drugs during the offense. *Id.* at 243. This Court found the failure to give the instruction to be prejudicial error. *Id.* It said, "Had the jury been instructed on reckless use, in addition to involuntary manslaughter, it might have better understood Mr. Rochowiak's theory and have returned a verdict of guilty of involuntary manslaughter." *Id.* at 247.

The *Rochowiak* court went on to conclude:

> that had the jurors been apprised of the third possibility on the spectrum of criminal responsibility, they might have

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> assessed [Mr. Rochowiak's] argument in a different light and with a better understanding of the gradations of responsibility in the law of homicide. Rather than viewing a verdict of guilty of involuntary manslaughter as one which would minimize the heinous nature of his act, they may have ascribed greater importance to the language 'wilful and wanton' as a grave and guilty state of mind distinguishing Rochowiak's actions from that of a careless and reckless person, and have settled upon the intermediate level of criminal responsibility.

Id. at 247-48.

Rochowiak stands for the fact that jurors see facts "in a different light" if instructed completely on one's state of mind; a jury would not necessarily view a crime as less heinous but rather better understand the state of mind in which it was committed.

And, helpfully, the *Rochowiak* Court articulated the instances where a failure to instruct is harmless. When "factual" elements inform the lesser included offense, like the existence of a weapon, a reviewing court ought to find an error harmless because a court can be sure of a jury's finding of fact. *Id.* at 248-49. On the other hand, where a "state of mind" element is in dispute, harmless error analysis is inapplicable. *Id.* Although Ms. Yeager was convicted of first-degree murder and her jury instructed on second-degree murder, *Rochowiak* is illuminating because Ms. Yeager's case rose and fell with the jury's contemplation of her state of mind. Plus, as the trial court held, an instruction on voluntary manslaughter was supported by the record at Ms. Yeager's trial. *Rochowiak* asks reviewing courts to look for two key elements to find prejudice for a failure to instruct on a lesser offense: (1.) A record that supports that an instruction would have been read and (2.) A jury focused on state of mind, not a

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physical element of the offense. In *Beach*, the court found the former but not the latter. Ms. Yeager's case has both. This is what distinguishes *Yeager* from *Raper*.

Mr. Raper's jury was instructed on first-degree murder and second-degree murder and the Court found no harm in the failure to instruct on manslaughter. *Raper* at 493. But the record seemingly did not support an instruction on voluntary manslaughter. There was evidence to support that Mr. Raper's decision to kill was premeditated and deliberated, not made in the heat of passion or as the result of adequate provocation. Mr. Raper's and Mexicott's discussion of the crime, luring the decedent to a secluded area, and exiting the car with a gun all provided sufficient time for calm premeditation and deliberation. *Id.* Second, a verbal threat to Mr. Raper's life alone is insufficient to establish adequate provocation. This Court has held that mere words will not generally constitute adequate provocation. *People v Pouncey,* 437 Mich 382, 389 (1991). Mr. Raper's mind was undisturbed by fear or hot blood. He was not prejudiced by the instructional error because the record lacked support for an instruction on a lesser offense.

Due to trial counsel's errors, Ms. Yeager's jury did not consider whether Mr. Brooks' life-threatening abuse would cause a reasonable person to act on instinct and out of passion, and ultimately, whether those circumstances partially excused the homicide. Had the jury been properly instructed, there is a reasonable likelihood of a different outcome.

Social science and case law bear this out. If given different sets of jury instructions, jurors will behave differently—even if the instructions are almost

identical. See Cicchini and White, "Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication" 117 Colum L Rev Online 22 (2017) (Observing jurors tasked with finding "the truth" are 50% more likely to convict than jurors asked to find "reasonable doubt"); 233a-246a. The way jurors are instructed matters.

With incomplete instructions, the jurors in this case wrestled with what outcome was appropriate. Ms. Yeager's jury deliberated for several hours across two days, requesting multiple exhibits like video footage of the shooting and 911 calls. 8/16/18 TT, 6. After receiving those exhibits, the jurors deliberated another five hours. Ultimately, they found Ms. Yeager intended to kill Mr. Brooks but the jury was erroneously denied the opportunity to consider the horrific circumstances that led to Ms. Yeager shooting Mr. Brooks—a day full of verbal and physical abuse.

With proper instructions, jurors could still believe Ms. Yeager intended to kill Mr. Brooks, but did so under great emotional distress. This Court should rule, as concurring Judge Beckering observed, "there is a reasonable probability that even though the jury would not find self-defense, if given the option it would have found Ms. Yeager guilty of voluntary manslaughter rather than first-degree murder." *Yeager*, unpub op at 12 (BECKERING, J, concurring).

Even if this Court disagrees that there is a reasonable likelihood of a different outcome, this Court can still grant relief under *Strickland* by determining that the trial was fundamentally unfair. Ultimately, the "focus of the inquiry should be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 US at 696. Trial counsel's representation of Ms. Yeager led to a fundamentally

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unfair trial. *Weaver v Massachusetts,* 137 S Ct 1899, 1911 (2017). The fundamental fairness standard is not limited structural errors alone. *Weaver*, 137 S Ct at 1911 (discussing automatic relief to defendants who raised race and gender issues). Ms. Yeager was not afforded meaningful representation. *People v Cronic*, 466 US 648, 657 (1984). Trial counsel did not understand the relevant law and presented preposterous theories to the jury, including that the body in the morgue may be that of someone other than Mr. Brooks. Trial counsel's representation of Ms. Yeager makes a mockery of the very standard *Strickland* seeks to uphold: "a fair trial is one in which evidence subject to *adversarial testing* is presented to an impartial tribunal for the resolution of issues defined in advance of the proceeding." *Strickland* at 685 (emphasis added). This Court can use this case as one to rule that an absence of adversarial testing, coupled with active undermining of the credibility of the defendant, warrants a new trial regardless of the likelihood of a different outcome at that new proceeding. The right to counsel is too "crucial" to rule otherwise. *Id.*

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IV. Alternatively, *People v Raper* was wrongly decided. If *Raper* was not implicitly overruled by *Mendoza*, it should be explicitly overruled here.

Introduction

In finding an absolute bar to prejudice in Ms. Yeager's case, the Court of Appeals cited *People v Raper*, which held that Mr. Raper's first-degree murder conviction rendered the failure to instruct on voluntary manslaughter harmless. If this Court reads *Raper* to have created a bright-line rule, that rule is legally unsound for two reasons. First, this Court's decision in *People v Mendoza*, 468 Mich 527 (2003), implicitly overruled *Raper*. And second, *Raper* was wrongly decided as it was premised on a misunderstanding of existing case law.

Discussion

As discussed above (see Issue III), in *Raper* the Court of Appeals dispensed with the requisite fact-intensive prejudice inquiry and concluded that because Mr. Raper had been found guilty of first-degree murder after the trial court instructed the jury on both first-degree and second-degree murder, he could not have been prejudiced by the failure to instruct on voluntary manslaughter:

> The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. *People v Zak*, 184 Mich App 1, 16 (1990). Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. [*Id.* at 483–84.]

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If this Court finds that this scant reasoning in *Raper* created an automatic bar to prejudice in Ms. Yeager's case, *Raper* should be overruled. If *Raper* is interpreted as creating a bright line rule, it is wrongly decided for two reasons.

First, this Court abrogated *Raper* over a decade ago. The Court of Appeals decided *Raper* six years prior to this Court's decision in *Mendoza*. *People v Mendoza,* 468 Mich 527 (2003). *Mendoza* altered the doctrinal underpinnings of *Raper*, and it also squarely contradicted the *Raper* Court's conclusion that a jury's finding of malice precludes a finding of prejudice where there's a failure to request a voluntary manslaughter instruction.

Before *Mendoza*, voluntary manslaughter was a cognate lesser-included offense of first-degree murder. A jury had to find some mitigating circumstance beyond a reasonable doubt to convict an individual of voluntary manslaughter. *People v Van Wyck*, 402 Mich 266, 269 (1978); *People v Perry*, 460 Mich 55, 61 (1999) ("Cognate lesser included offenses are those that share some common elements and are of the same class or category as the greater offense but have some additional elements not found in the greater offense."). This distinction altered the legal foundation on which *Raper* grounded its analysis.

Further, *Mendoza*'s explanation of the relationship between voluntary manslaughter and murder makes it so there can be prejudice when a jury was not instructed on voluntary manslaughter but convicted on first-degree murder. Yes, voluntary manslaughter does not require premeditation and deliberation, what is otherwise known as malice. *Id.* at 540. "The elements of voluntary manslaughter are

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included in murder, with murder possessing the single additional element of malice." *Id.* But, "[t]he element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion." *Id.* The provocation neutralizes the malice.

Mendoza clarified that voluntary manslaughter can be murder with malice—if the malice is negated by the presence of provocation and heat of passion. Without instruction on what constitutes voluntary manslaughter—and the crime's relationship to first-degree murder—a jury would not realize that adequate provocation may consume an individual during the small window of time needed to premediate and deliberate. *People v Leffew*, 508 Mich 625, 254 (2022) ("…jurors are presumed to follow their instructions.") Just as jurors would not "impute jury instructions from one defendant to the other" without first "being instructed to do so," a jury would not contextualize a heat of passion as negating the malice of first-degree murder without first being instructed to do so. *Id.*

Second, *Raper* ignored case law from this Court in reaching its decision. The *Raper* Court relied on one Court of Appeals' decision to reach its faulty conclusion: *People v Zak*. That was error.

In *People v Zak*, 184 Mich App 1 (1990), the Court of Appeals addressed whether an individual is prejudiced if a trial court fails to instruct on manslaughter after an individual is convicted of first-degree murder. The Court of Appeals held that even if there had been evidence to support an instruction, the jury was instructed on first- and second-degree murder and convicted on first-degree murder, "reflect[ing]

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an unwillingness to convict on manslaughter." *People v Zak*, 184 Mich App 1, 16 (1990).[4] To reach that conclusion, the Court in *Zak* relied on *Beach*. In so doing, it embraced a case-by-case approach to prejudice. See, section III, *supra*.

In support of its reasoning, the *Beach* Court cited two cases where this Court found prejudicial the failure to give an instruction on a lesser included offense of murder. *Id.* at 468-71. These two cases, *People v Richardson* and *People v Rochowiak*, illustrate how harm can manifest after a failure to instruct on a lesser-included homicide offense.

First, where the failure to give an instruction impedes an individual's defense, there is harm. *People v Richardson*, 409 Mich 126, 133 (1980), mod in part by *People v Beach*, 429 Mich 450, 471 n 9 (1988) to the extent it is inconsistent with Beach's harmless error approach and application. In *Richardson,* Mr. Richardson was convicted of first-degree murder after he killed a man with a rifle during a struggle with the victim and his brother. Mr. Richardson argued that the incident was an accident, but the trial court refused to instruct on involuntary manslaughter and reckless use of a firearm. *Id.* at 134. After finding the failure to instruct to be error,

[4] The Court of Appeals did not specify the type of manslaughter its conclusion was addressing. If this Court determines that the Court of Appeals was referring to all types of manslaughter or just voluntary manslaughter, then this Court must also overturn *People v Zak*. Voluntary manslaughter, the instruction that Ms. Yeager's jury should have received, is a killing "in the heat of passion…with adequate provocation…[without] time during which a reasonable person could control his passions." *People v Mendoza*, 428 Mich 527, 535 (2003). The malice element for homicide and voluntary manslaughter is the same, however, that element is negated by circumstances of adequate provocation. The conclusion in *Zak*, if applied to voluntary manslaughter, would run counter to *Mendoza*.

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this Court found the error prejudiced Mr. Richardson because it foreclosed the jury's option to convict Mr. Richardson in accordance with his own testimony, evidence, and theory. *Id.* at 141.

Second, an individual is harmed if a jury is asked to determine that individual's state of mind without the appropriate jury instructions. *People v Rochowiak*, 416 Mich 235 (1982). See *supra*. The Court in *Rochowiak* specifically cited the difference between murder and manslaughter as one such instance where state of mind comes into play. *Id.* As explained in *Mendoza*, a defendant's state of mind informs the distinction between first-degree murder and voluntary manslaughter. One crime requires malice; the other does not. A jury must be fully apprised first of the "gradations of responsibility in the law of homicide" before it can convict on first-degree murder.

The *Raper* court was wrong to use *Zak* to support its complete absence of analysis and outright bar to prejudice. *Beach* explicitly contemplated instances where the failure to instruct on manslaughter may harm an individual. And the instances considered by the Beach court—*Richardson* and *Rochowiak*—provide guidance to the lower courts looking to apply that case-by-case approach. As a result, to the extent that it creates a categorical bar to a prejudice finding, the Court of Appeals' opinion in *Raper* conflicts with this Court's precedent and was wrongly decided.

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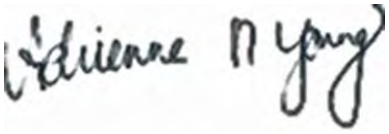
Request for Relief

Ms. Yeager respectfully requests that this Court reverse the Court of Appeals and remand to the circuit court for a new trial consistent with the circuit court's ruling following the *Ginther* proceedings.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE



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