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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. 167154

COA No. 355554

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

David Serges's Supplemental Brief

Maya Menlo (P82778)
Tabitha Harris (P71489)
Assistant Defenders

Counsel for David Serges

State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
Phone: (313) 256-9833
mmenlo@sado.org

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Introduction

The police arrested David Serges "on suspicion" of a brutal murder, without probable cause. The police knew only that Mr. Serges was a handyman who worked in the decedent's neighborhood and that he was addicted to heroin. The police interrogated Mr. Serges upon his arrest. He repeatedly denied harming the decedent.

The day after Mr. Serges's arrest, a detective went to the jail property room and, without a warrant, seized Mr. Serges's clothing and other possessions, and logged them as evidence of murder. This was an unconstitutional seizure.

The police submitted a request asking the prosecutor to charge Mr. Serges with murder. Their request was denied. Mr. Serges remained in jail on unrelated ordinance violations. The murder investigation continued without uncovering any compelling evidence against Mr. Serges. Nearly two months after arresting Mr. Serges, the police sent the pants they seized from the jail property room to the Michigan State Police (MSP) laboratory for forensic testing. The police did not have a search warrant, nor were their actions justified by an exception to the warrant requirement. Forensically testing Mr. Serges's pants for evidence of a crime was an unconstitutional search.

MSP found that a speck of blood on Mr. Serges's pants was consistent with the decedent's DNA. The prosecutor then approved the police's renewed request to charge Mr. Serges with murder.

The DNA evidence was the government's central piece of evidence against Mr. Serges. Mr. Serges's trial counsel did not consider moving to suppress the pants or the forensic testing results. Instead, trial counsel proceeded on a quickly and easily disproven theory that the decedent died from a household accident.

The evidence against Mr. Serges was thin. See *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 1 ("The lack of reliable evidence of guilt, aside from

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the DNA evidence, is unsettling."). Even when presented with the DNA evidence, the first jury hung.

Mr. Serges's second trial was the first COVID-era jury trial in Genesee County. The parties requested an adjournment, but the trial court forced the trial forward. In September of 2020, Mr. Serges was re-tried and convicted. He is serving life without the possibility of parole.

On appeal, Mr. Serges raised several issues, including that the police unconstitutionally seized and searched his pants and his trial counsel was ineffective for failing to seek suppression. The Court of Appeals remanded for an evidentiary hearing but ultimately affirmed Mr. Serges's conviction.

In its published 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 them 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 the Fourth Amendment's warrant requirement. And, as this Court admonished, "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).

The newly-minted 'custody exception' to the warrant requirement permits law enforcement to arrest people for minor offenses, seize whatever is in their possession, then 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.

The Court of Appeals opinion below gives police new license to seize presumptively innocent people's belongings from the jail property room

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without a warrant and to conduct warrantless searches of those items, including using 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 driving without proof of car insurance;
- Swabbing the inside of a wallet in search of invisible drug residue, where the owner of the wallet is arrested and jailed for trespassing; 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.

This Court must correct the Court of Appeals' far-reaching error and remand with instructions to suppress the evidence obtained through the unconstitutional seizure and search of Mr. Serges's pants.

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Statement of the Questions Presented

First Question

The officer in charge testified that Mr. Serges was arrested "on suspicion of homicide." Where police lacked probable cause to arrest Mr. Serges for homicide, should his pants be excluded as the result of an unreasonable seizure under US Const, Am IV and Const 1963, art 1, § 11?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Second Question

Assuming Mr. Serges was lawfully arrested, did the police violate his rights under US Const, Am IV and Const 1963, art 1, § 11, by seizing his pants and testing them for DNA without a warrant?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

Third Question

Trial counsel rendered ineffective assistance by failing to move to suppress the strongest evidence against Mr. Serges, which the police obtained by unconstitutionally seizing and searching Mr. Serges's pants?

Mr. Serges answers: Yes.

The Court of Appeals answered: No.

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Statement of Facts

A suspicious person

As Dallas Robinson was leaving his home on November 27, 2017, 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. The man greeted Mr. Robinson, said he was having car trouble, and asked what time Mr. Robinson would return 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. The strange man was not Mr. Serges. T V, 42, 58.

Later that morning, Mr. Robinson thought about his next-door 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.

Horrific bludgeoning leaves exceptionally bloody crime scene

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. There was blood spatter inside the house and on the side of the garage. T IV, 79, 172, 196, 197.

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 manner of death was blunt force injuries to the heard. T III, 144, 202. The medical examiner ruled Ms. Anderson's death a homicide and was "100%" confident about that determination. T III, 144, 202.

Mr. Serges became a "person of interest" in the homicide investigation because he was seen walking in the neighborhood a few

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days before Ms. Anderson's body was found. EH, 20.[1] Mr. Serges often did handywork in the neighborhood. T IV, 101.

The crime occurred sometime in a six-day window

The medical examiner could not determine when Ms. Anderson died. T III, 178. The estimated time of her death fell within a window of several days and could not be narrowed further. T III, 178.

Ms. Anderson was seen on video shopping at Kroger on the Wednesday before Thanksgiving. T VI, 36. Her body was discovered the Monday after Thanksgiving. T III, 116; T V, 41-44. The police reviewed many hours of video footage from throughout the neighborhood. The police observed that Mr. Serges was in the 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. See Appendix F; Appendix G. Neither the prosecution nor the defense called Ms. Durga as a witness at trial.

Critical fingerprint does not match Mr. Serges

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.

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[1] The February 1, 2023 evidentiary hearing transcript is referenced as "EH", followed by the page number.

For a timeline of key events, please see Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018), which was admitted at the evidentiary hearing. EH, 4. Joint Exhibits A-F are attached to the timeline and were also admitted at the evidentiary hearing. EH, 4. The parties later stipulated to the admission of Joint Exhibit G, the video of Mr. Serges's interview with police (without audio).

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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's fingerprints nor his DNA were found at the scene.

Police arrested Mr. Serges on a hunch

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, 22, 24. Detective Freeman admitted that the police report reflects that Mr. Serges was arrested on an outstanding warrant, not for murder. EH, 41. When he was arrested, Mr. Serges had one outstanding warrant. 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.

Detective Freeman interrogated Mr. Serges the same day he was arrested. EH, 23, 51. Mr. Serges told Detective Freeman he had injected heroin 30 to 45 minutes earlier. T VI, 50. Detective Freeman sat an arm's length away from Mr. Serges for over an hour. EH, 52. Detective Freeman testified that, during the interrogation, he was looking Mr. Serges over and examining him. PE, 45.

Detective Freeman was paying special attention to Mr. Serges's legs. EH, 54. Detective Freeman testified at trial that, while Mr. Serges was sitting alone in the interrogation room, he was "brushing the top of his legs off, which just based on my experience and my training. . . is a pretty good indicator of deception." T VI, 57.[2] Detective Freeman did not observe any blood on Mr. Serges's pants during the interrogation. PE, 45; EH, 27, 52-54.

At the evidentiary hearing in 2023, Detective Freeman testified for the first time that he did observe blood on Mr. Serges's pants "at some

[2] Mr. Serges challenged this testimony on appeal. See Mr. Serges's Application for Leave to Appeal, Issue II.

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point." EH, 26. The detective did not recall when he spotted the blood. EH, 27. He claimed it was "sometime at the office." EH, 27.



A still photograph of Detective Freeman (left) interrogating Mr. Serges (right). The video (without audio) was admitted as a stipulated exhibit, Joint Exhibit G, at the evidentiary hearing.

In response to questioning, Mr. Serges said he knew Ms. Anderson, did handyman work for her, and never did anything to harm her. PE, 44; T VI, 67. Mr. Serges could not recount his daily whereabouts accurately or consistently, which Detective Freeman found unsurprising, since Mr. Serges was both transient and dependent on heroin. T VI, 53, 72-73.

Police seized Mr. Serges's property from the jail

The day after Mr. Serges's arrest, Detective Freeman went to the Flint City Jail and seized Mr. Serges's property, including his pants, from the jail. EH, 42-43. Detective Freeman testified that, once taken from the jail, Mr. Serges's belongings were "secured in evidence", EH, 44, because he was arrested on suspicion of murdering Ms. Anderson. EH, 45. Detective Freeman did not get a warrant to seize Mr. Serges's property as evidence.

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Prosecutor denied police request to charge Mr. Serges

Detective Freeman testified that, within 48 hours of Mr. Serges's arrest, he submitted a warrant request for homicide to the prosecutor. EH, 27, 41. The prosecutor denied the request for lack of sufficient evidence. EH, 27, 41.

Mr. Serges remained in custody

Mr. Serges remained in jail on an unrelated bench warrant. EH, 42. The warrant was issued more than a year before his arrest, in September 2016, because he failed to appear for arraignment on an ordinance violation. See Joint Exhibit A (Register of Actions for 67th District Court Case No. 16F01452).

On January 18, 2018, Mr. Serges pleaded guilty to a reduced charge, an attempted ordinance violation. *Id*. He was sentenced to 45 days in jail with credit for time served. *Id*. He had served 50 days in jail[3]—more than the maximum penalty for the offense to which he pleaded guilty. *Id*.; Burton Crim Code § 130.02(C) (maximum penalty for an attempted violation is 45 days in jail).[4]

On January 17, 2018, the prosecutor authorized a complaint against Mr. Serges for a different ordinance violation. Joint Exhibit B (Register of Actions for 67th District Court Case No. 18F00053). Mr. Serges was arraigned on the new charge on January 18, 2018. The trial court set bond at $75,000 cash or surety—in a prosecution for a non-violent ordinance violation. *Id*. The court set a pre-trial hearing on March 15, 2018—two months out. *Id*.

On January 19, 2018, the police sent Mr. Serges's pants to MSP for testing. EH, 51.

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[3] Mr. Serges served 50 actual days. He would have been eligible for good time credit while in jail.

[4] Available at https://codelibrary.amlegal.com/codes/burtonmi/latest/burton_mi/0-0-0-2373#JD_130.02

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Police sent items for DNA testing

Fifty-one days after Mr. Serges's arrest, police sent the pants seized from Mr. Serges's jail property to the MSP lab for forensic examination and testing. EH, 34, 51. They did not get a warrant authorizing them to search his pants. When the police sent Mr. Serges's pants to MSP, he had not been charged with murder. Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018).

The police sent many items for testing before they sent Mr. Serges's pants. In December 2017, MSP biologists tested 11 items—including samples from a Raid can, a hammer, blood found at the scene, and clothing—and produced Lab Record 4. T V, 178-179. Next, MSP tested samples from a gray sweatshirt and produced Lab Record 7. T V, 190. None of these items linked Mr. Serges to the murder. T V, 183-191.

A speck of blood on Mr. Serges's pants was the government's key evidence against him

Mr. Serges's pants were not sent for testing until January 19, 2018. EH, 51. At the MSP lab, a biologist used a special tool to identify, illuminate, and magnify spots on Mr. Serges's pants. PE, 40; T III, 49; T V, 92. The biologist then tested numerous spots on his pants for the presence of blood. T V, 90-98. Several small spots on his pants tested positive for the presence of blood. T V, 95.

The biologist swabbed the stains and sent the swabs onward for DNA analysis. T V, 100. Then, a forensic scientist processed the swabs and conducted DNA testing. T VI, 10.

On the left leg of Mr. Serges's pants, MSP located and tested a stain that had one DNA contributor that was consistent with Mr. Serges. T VI, 14. On the right leg of Mr. Serges's pants, MSP located and tested a stain that contained a DNA mixture. T VI, 15. The major contributor was consistent with the decedent's DNA profile. T VI, 15. The minor contributor was insufficient for comparison. T VI, 15.

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On March 8, 2018, MSP completed its DNA testing report on the pants. On March 12, 2018, the prosecutor's office charged Mr. Serges with open murder. EH, 35, 42; Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018). At that point, Mr. Serges had been in jail for 103 days.

Other than the stain on his pants, no physical evidence linked Mr. Serges to the crime scene. T V, 78-110, 195. The prosecutor described the DNA from Mr. Serges's pants as "the central piece of evidence in this case." H 11/26/2018, 4.

Later, MSP tested more items—DNA from the handle of a hammer found at the crime scene, blood found on a chair, blood from two long-sleeve shirts, blood from a dark blue hooded sweatshirt, and a stain from jean shorts—and produced Lab Records 13, and 15. T V, 191-193. None of these items linked Mr. Serges to the murder. T V, 191-193.

At trial, the prosecutor introduced Mr. Serges's pants into evidence and described the bloodstain "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. The pants are pictured below.

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Mr. Serges's pants, labeled with the MSP item number, BP17-4370-15Ad, written in blue ink. Mr. Serges's 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's 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 the police seized from Mr. Serges and searched, pictured above, were "black jeans." T V, 90, 93.

First jury hung, second trial held during the pandemic

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

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Between the hung jury and re-trial, the COVID-19 pandemic turned the world upside down. Trial counsel moved to adjourn, arguing that Mr. Serges's trial could not be fair given the impact of COVID on prospective jurors and the trial process. 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's case was tried once already and thus the testimony was preserved. H 8/14/2020, 7-8.

The trial court denied the motion to adjourn. H 8/14/2020, 27. Mr. Serges's re-trial 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 policies. H 8/14/2020, 9-27.

Trial counsel argued the bludgeoning was an accident

The medical examiner testified that the injuries to the decedent's head were not caused by an accidental fall. T III, 197-199. She sustained "at least 11" injuries to her head, which was inconsistent with an accident. T III, 197. The location of those injuries—on the top of the decedent's head—also led the medical examiner to conclude that they were not accidental. T III, 197-198. The medical examiner testified that he was "absolutely", "100%" certain the death was a homicide. T III, 197-199, 202.

Due to the shape of the decedent's injuries, law enforcement believed that a hammer and a Raid can found at the scene were the murder weapons. T III, 163, 165; T V, 75; T IV, 180, 217; T VI, 34. Blood on both the hammer and the Raid can was consistent with the decedent's DNA profile. T V, 180, 185.

Trial counsel did not call any expert or lay witness to rebut the medical examiner's unequivocal testimony. Yet, trial counsel persistently argued that Ms. Anderson's death was caused by a household accident. See, e.g., T III, 51, 54, 55 (trial counsel's opening

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statement); T VI, 144-149, 161, 166-167 (trial counsel's closing statement). Trial counsel argued in closing, "Sadly, Mrs. Anderson died of an accident. She bounced around. She hit a few things on her head." T III, 167.

Trial counsel also argued that, if Mr. Serges had been present at the crime scene, there would have been "smears" and "puddles" of the decedent's blood on his pants. T VI, 149. The prosecutor pointed out that trial counsel's argument was pure conjecture:

> The defense would have you believe that, in this crime scene, if David Serges did this, he would have been covered with blood and that is not anything that any witness who took this stand told you. There were all kinds of witnesses who were experts and not one of them told you that. Not one. The only place you ever heard that is from the defense attorney and that is not evidence. We don't know, because none of these experts testified to that. Nobody asked that question. We don't know whether or not he would have been covered with blood.

T VI, 174-175.

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

On remand, trial counsel admitted he did not consider suppression

The trial court denied Mr. Serges's motion for new trial. Mr. Serges appealed to the Court of Appeals, which remanded to the trial court for an evidentiary hearing. The Court of Appeals limited the proceedings on remand to Mr. Serges's claim that trial counsel was ineffective for failing to seek suppression based on the illegal seizure and search of Mr. Serges's pants. *People v Serges*, unpublished order of the Court of Appeals, entered December 21, 2022 (Docket No. 355554).

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At the evidentiary hearing, Mr. Serges's 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. Mr. Clark said he did not consider moving to suppress the seizure and testing of Mr. Serges's 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," trial counsel did not give a responsive answer. EH, 16-17.

Trial counsel testified that he did not move to suppress was because he "assumed" when Mr. Serges's was arrested, "everything was taken care of that way." EH, 13. He indicated that the seizure and search of Mr. Serges's pants appeared to him to be constitutionally permissible. EH, 13. Trial counsel never spoke with Mr. Serges about any basis for suppressing the pants. EH, 70.

Trial counsel further explained that his strategy was to emphasize to the jury that the spot of blood on Mr. Serges's pants was small compared to the bloody scene and that there were "alternative ways" Ms. Anderson could have died. EH, 14.

Trial counsel testified that, if he "thought the pants were going to kill us", he would have investigated whether the pants could be excluded. EH, 17. He thought "the pants worked for us more than they did the prosecutor." EH, 17. He "embrac[ed]" the pants as part of his theory at trial. EH, 66.

The trial court denied Mr. Serges's motion for new trial on remand. The case returned to the Court of Appeals, which affirmed in a published opinion. Judge Swartzle authored a separate opinion, concurring dubitante. Mr. Serges filed an application for leave to appeal in this Court identifying several errors that rendered his trial unconstitutional and undermined the reliability of the verdict. This Court granted oral argument and supplemental briefing on one of those issues: trial counsel's failure to challenge the seizure and search of Mr. Serges's pants. *People v Serges*, __ Mich __; 20 NW3d 864 (2025).

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Arguments

I. The officer in charge testified that Mr. Serges was arrested "on suspicion of homicide." Where police lacked probable cause to arrest Mr. Serges for homicide, his pants should be excluded as the result of an unreasonable seizure under US Const, Am IV and Const 1963, art 1, § 11.

Issue Preservation and Standard of Review

Mr. Serges challenged the seizure of his pants in his motion for new trial and in his brief on appeal. This Court reviews the lower court's factual findings for clear error and its application of constitutional principles de novo. *People v LeBlanc*, 465 Mich 575, 579 (2002).

Discussion

When the police arrested Mr. Serges, they did not have a warrant to arrest him for murder. A warrantless arrest is per se unreasonable, "subject to several specifically established and well-delineated exceptions." *People v Champion*, 452 Mich 92, 98 (1996). "In order to lawfully arrest a person without a warrant, a police officer must possess information demonstrating probable cause to believe that a [felony] offense has occurred and that the defendant committed it." *Id.* at 115. See also *People v Gonzales*, 349 Mich 572, 575 (1957). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, 452 Mich at 115. A warrantless arrest is unconstitutional unless supported by probable cause. *United States v US District Court*, 407 US 297, 316-318 (1972). Neither mere presence nor association is sufficient to make out probable cause. *Sibron v New York*, 392 US 40, 62-63 (1968); *United States v Di Re*, 332 US 581, 587 (1948).

Detective Freeman testified that he arrested Mr. Serges "on suspicion" of homicide. EH, 22, 24. Detective Freeman explained that

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Mr. Serges was a "person of interest" because he was in the decedent's neighborhood on some of the days around Thanksgiving.[5] 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.

The day after Mr. Serges's arrest, Detective Freeman seized all of Mr. Serges's property—including his pants—from the jail property room and placed it into evidence. EH, 42-43. Detective Freeman did this because he believed Mr. Serges's property could be evidence of the decedent's murder. EH, 45. But Detective Freeman did not seek a warrant authorizing him to seize or search Mr. Serges's property. Nor did he obtain a warrant to arrest Mr. Serges for murder.

Detective Freeman testified that, within 48 hours of Mr. Serges's arrest, he submitted a warrant request asking the prosecutor to charge Mr. Serges with murder. EH, 27. The prosecutor denied the warrant request because it was not supported by sufficient evidence. EH, 27, 37-38. Mr. Serges remained in jail for ordinance violations. EH, 41-42. Two months after Mr. Serges's arrest, the police sent Mr. Serges's pants to the Michigan State Police (MSP) laboratory for forensic testing, without obtaining a warrant. EH, 51.

If Detective Freeman testified truthfully and Mr. Serges was arrested for murder on November 29, 2017, the police made a flagrantly illegal arrest, then conducted a flagrantly illegal search.[6] First, the police arrested Mr. Serges for homicide without probable cause. Then, after the prosecutor's office denied Detective Freeman's request to charge Mr. Serges with homicide for lack of evidence, the police tried to

[5] The time of Ms. Anderson's death fell within a window of six days around Thanksgiving (Wednesday to Monday) and could not be narrowed further. T III, 178. See also T VI, 36; T V, 44.

[6] If Mr. Serges was instead arrested on an unrelated bench warrant, the seizure of Mr. Serges's pants and forensic testing of the pants were nevertheless flagrantly illegal. Issue II of this Brief discusses the constitutional problems with that search.

find evidence to shore up their case. Their efforts included illegally searching Mr. Serges's personal effects.

Assuming Mr. Serges was arrested for murder, his arrest was not supported by probable cause. See *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 1 (the police "lacke[ed] probable cause of murder at the time of [Mr. Serges's] arrest"). The police had only what Judge Swartzle described as "vicinity evidence" against Mr. Serges:

> There were eye-witnesses putting [Mr. Serges] on the general scene within a day or so of the crime, but this was not particularly damning given that [Mr. Serges] had done numerous odd jobs for the victim. This 'vicinity' evidence was all that police had when [Mr. Serges] was arrested, and such evidence could hardly be said to amount to probable cause.

People v Serges, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 2.

When Detective Freeman arrested Mr. Serges "on suspicion" of murder, he knew only that Mr. Serges was a handyman and that he, like dozens or even hundreds of other people, was in the neighborhood on some of the six days on which the decedent could have been killed. EH, 21; T IV, 101-103. This was far less than would warrant a person of reasonable caution to believe that Mr. Serges brutally murdered the decedent. See *Gonzales*, 349 Mich at 575.

Both the timing and the purpose of Mr. Serges's arrest were inextricably linked to the murder investigation. EH, 20-22. Likewise, the police seized Mr. Serges's pants specifically as evidence of murder. EH, 45. Mr. Serges's arrest for murder was not supported by probable cause and was therefore unconstitutional. Any seizure or search stemming from an unlawful arrest is per se unreasonable and the fruits, including Mr. Serges's pants, must be suppressed. *People v Mersino,* 419 Mich 899, 900 (1984).

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II. Assuming Mr. Serges was lawfully arrested, the police violated his rights under US Const, Am IV and Const 1963, art 1, § 11, by seizing his pants and testing them for DNA without a warrant.

Issue Preservation and Standard of Review

Mr. Serges challenged the seizure and search of his pants in his motion for new trial and in his brief on appeal. This Court reviews the lower court's factual findings for clear error and its application of constitutional principles de novo. *LeBlanc*, 465 Mich at 579.

Discussion

The police lacked probable cause to arrest Mr. Serges for murder. For that reason alone, seizing and searching Mr. Serges's pants for evidence of murder was unconstitutional.[7] The police also lacked probable cause to believe that Mr. Serges's pants contained evidence of murder. For this additional reason, it was unconstitutional to seize his pants as evidence of murder, hold them for months, then search them for evidence.

"Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *Champion*, 452 Mich at 98. The government bears the burden to show that a warrantless seizure or search 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."). The

[7] Mr. Serges's 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).

police seized and searched Mr. Serges's pants without a warrant. The government cannot show that any exception to the warrant requirement justified the police conduct here.

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

When jail staff inventoried and held Mr. Serges's possessions, they were acting in a community caretaking and administrative capacity. The constitution permitted law enforcement to take temporary possession of Mr. Serges's property, in accordance with jail booking procedures, for safety and safekeeping. *Illinois v Lafayette*, 462 US 640, 644 (1983). Mr. Serges retained a possessory interest in his belongings. Had Mr. Serges been released on bond or otherwise, he would have been entitled to retrieve his property, including his pants.[8]

The unreasonable seizure here did not occur when jail staff collected Mr. Serges's items during booking. It occurred when Detective Freeman went to the jail property room the next day and confiscated Mr. Serges's possessions for evidentiary purposes. Detective Freeman, acting on a hunch and without a warrant, collected all of Mr. Serges's possessions from the jail property room and transferred them to an evidence locker at the Burton Police Department. EH, 42-25. By seizing Mr. Serges's property from the property room, Detective Freeman "converted what had been only a temporary deprivation of possessory interests into a permanent one." *United States v Jacobsen*, 466 US 109, 124-125 (1984).

Once seized from the jail property room, Mr. Serges's property was no longer available to him upon release. By taking Mr. Serges's possessions and storing them as evidence, the police "meaningfully interfere[d]" with Mr. Serges's possessory interest in his effects. See *Maryland v Macon*, 472 US 463, 469 (1985). This warrantless seizure was not within any of the "well-delineated exceptions" to the warrant

[8] Mr. Serges's 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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requirement. *Champion*, 452 Mich at 98. It was an unconstitutional trespass for the purpose of criminal investigation. *US v Jones*, 565 US 400, 406-407 (2012). The evidence obtained as a result of the seizure was inadmissible. *Mapp*, 367 US at 655.

B. Testing Mr. Serges's pants for DNA was a search.

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

Law enforcement sampled and tested Mr. Serges's effects to obtain DNA evidence for use in a criminal investigation. This was a trespassory physical intrusion into a constitutionally protected area—microscopic biological material embedded in Mr. Serges's personal effects—for investigatory purposes. See *Jones*, 565 US at 406-407; *Johnson v VanderKooi*, 509 Mich 524, 536-537 (2022).

Separately, Mr. Serges had a reasonable expectation of privacy in his clothing and the biological material contained on and within it. *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 obtain information from a constitutionally protected area. See *Kyllo v United States*, 533 US 27, 34 (2001).[9]

Forensically testing a person's clothing often reveals that person's DNA profile. Such testing could also reveal DNA profiles of the person's family, friends, and associates. It may also provide law enforcement

[9] 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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information about the person's whereabouts, like whether they have spent time in the woods, swimming in a lake, in a construction zone, or in the presence of certain chemicals. It could also inform the police about the person's hygiene and health, and about the type of work the person does. Forensic testing of one's clothing implicates myriad privacy interests.

Mr. Serges maintained a reasonable expectation of privacy in the forensic material on his clothing, even after his arrest. In *People v Carr*, this Court explained:

> [Mr. Carr] 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).

In *People v Custer*, the police seized photographs from Mr. Custer incident to his arrest, then visually inspected the photographs. This Court held that 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. This Court held it was permissible for officers to cursorily examine both sides of the photographs, but explicitly did "*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).

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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. See *People v Toohey*, 438 Mich 265, 276 (1991). Because Mr. Serges maintained some expectation of privacy in his clothing, the federal and state constitutions required the police to obtain a warrant before sending his pants to MSP for forensic testing.

In *People v Hughes*, this Court rejected the government's argument that a person loses all expectation of privacy in items seized from his person during a lawful arrest. *People v Hughes*, 506 Mich 512, 530 (2020) (declaring that argument "inapt"). 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's 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 ignored the relevant language from *Hughes* and held that, because Mr. Serges's 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 12. This is erroneous. See *Carr*, 370 Mich at 255; *Hughes*, 506 Mich at 531-532. While a "cursory examination" of Mr. Serges's pants would not be considered a search for constitutional purposes, *Custer*, 465 Mich at 343, what occurred here—transfer of the pants to police custody, then to the MSP laboratory, followed by a prolonged examination, extraction of biological material, and forensic testing of the pants—was plainly a search.

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The Court of Appeals went outside binding United States Supreme Court precedent and held that, once a person is in custody, the police forensically test their property for evidence of any crime. The Court of Appeals misapplied *Lanza v New York*, 370 US 139, 143 (1962), citing it 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 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 petitioner 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 *Lanza* opinion did not contain any holding related to the Fourth Amendment, and it did not address personal effects whatsoever. The Court of Appeals erred in relying on *Lanza*.

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 held that the Fourth Amendment permits shakedowns of prison cells in search of contraband. The Michigan Court of Appeals reached a similar conclusion in *People v Phillips*, 219 Mich App 159 (1996), where authorities searched and seized property from Mr. Phillips's jail cell. But this case did not involve evidence searched or

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seized in Mr. Serges's jail cell, which is government property. Rather, the police searched Mr. Serges's personal possessions. The search occurred long after jail staff had inspected and secured his belongings in the jail property room. Mr. Serges's possessions were not accessible to him or any other incarcerated person. And the search was not for contraband that could interfere with the safety and security of the jail. *Hudson* is inapposite.

C. Testing Mr. Serges's pants for DNA without a warrant was an unreasonable search.

The government cannot meet its burden to show that the warrantless search of Mr. Serges's pants was justified by a recognized exception to the warrant requirement. *Reed*, 393 Mich at 362.

i. Extracting and testing genetic material from Mr. Serges's pants was not a valid inventory search.

The inventory-search exception cannot justify the investigatory search that occurred here. *Toohey*, 438 Mich at 276. To determine whether a governmental intrusion is reasonable, a court must "balanc[e] its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v Prouse,* 440 US 648, 654 (1979). An inventory search is "incidental administrative step following arrest and preceding incarceration." *Lafayette*, 462 US at 644. It must be limited in scope: the purpose is to catalogue items, not to search for evidence. *Id*. at 646. An inventory search is reasonable because it furthers important governmental and individual interests—ensuring safety within the jail and safekeeping property—and the search is minimally intrusive. *Id*. at 642 (the officer who performed the inventory search testified that he was not seeking, and did not expect to find, evidence of a crime when he searched Mr. Lafayette's bag; rather, the officer was following standard procedure to inventory everything Mr. Lafayette had with him).

Assuming Mr. Serges was lawfully arrested, the police were permitted to take and inventory Mr. Serges's clothing "as part of the

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routine administrative procedure at a police stationhouse incident to booking and jailing" him. *Lafayette*, 462 US at 643. The inventory exception did not permit the police to remove Mr. Serges's personal property from the jail and place it in evidence. Nor did the inventory exception justify swabbing, extracting, or testing DNA from tiny stains on his pants. Subjecting Mr. Serges's clothing to a battery of forensic tests for the purpose of criminal investigation fell far outside the scope of any permissible inventory search.

ii. Extracting and testing genetic material from Mr. Serges's pants was not a valid search incident to arrest.

Extracting and testing samples from Mr. Serges's pants far exceeded the scope of a search incident to arrest. The constitution permits the police to search an arrestee and the area within their immediate control for weapons and instruments of escape. *United States v Edwards*, 415 US 800, 802-803 (1974). And, where probable cause exists, the police may search an arrestee and their control area for evidence of the crime of arrest. *Id.* at 805-806 (search of Mr. Edwards's clothing was valid search incident to arrest because police lawfully arrested Mr. Edwards and "had probable cause to believe that the articles of clothing he wore were themselves material evidence of *the crime for which he had been arrested*" (emphasis added)). See also *Carr*, 370 Mich at 256 (recognizing "the power of the police to search one lawfully arrested, for articles that may be used in evidence to prove *the charge on which the prisoner has been arrested*" (emphasis added)).

As discussed in Issue I, the police arrested Mr. Serges without probable cause that he killed the decedent. They also lacked probable cause to believe that Mr. Serges's clothing was "material evidence" of the murder. Detective Freeman interrogated Mr. Serges for over an hour, sitting an arm's length away, and did not observe any blood on Mr. Serges's pants. PE, 45; EH, 27, 52-54.

Within 48 hours of Mr. Serges's arrest, Detective Freeman submitted a request asking the prosecutor to authorize homicide charges against

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Mr. Serges. The prosecutor denied the warrant request. Detective Freeman should have known all along that the "vicinity evidence" police had on Mr. Serges fell far short of probable cause.[10] But he surely knew after the prosecutor denied his warrant request. Yet he continued to treat Mr. Serges's possessions as if they were the product of a lawful arrest for murder.

While Mr. Serges remained in jail, the police tried to build a case against him. For two months, the police came up empty-handed. When the police sent Mr. Serges's pants to MSP on January 19, 2018, they still lacked probable cause to arrest him for murder. Until MSP finished DNA testing Mr. Serges's pants on March 8, 2018, police had no compelling evidence against him.

Recognizing this, the trial court found that Mr. Serges was not arrested for murder—"he was taken into custody on an unrelated matter." 7/26/23 Hearing Transcript, 4. See also *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 2 (reviewing the trial court's findings and noting it is "an established fact that [Mr. Serges] was *not* initially arrested and held on suspicion of murder, but rather he was arrested and subsequently held on unrelated misdemeanor charges). Therefore, his belongings could not be searched incident to arrest for evidence of murder.

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

[10] See *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 2 ("such evidence could hardly be said to amount to probable cause").

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> search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

Arizona v Gant, 556 US 332, 339 (2009) (emphasis added), citing *Chimel v California*, 395 US 752, 763 (1969).

It is undisputed that the police seized Mr. Serges's belongings as evidence of murder, then searched Mr. Serges's pants for evidence of murder—not for evidence of an ordinance violation or failure to appear. Assuming Mr. Serges was arrested on an outstanding bench warrant for failure to appear for arraignment on an ordinance violation, the search-incident-to-arrest exception did not permit this search or seizure. See *Champion*, 452 Mich at 98.

The police sent Mr. Serges's pants to MSP for testing nearly two months after his arrest. EH, 51. See also Joint Exhibit AA (Stipulated Timeline of Key Events in 2017-2018). The delay further demonstrates that the search was not 'incident to arrest.'

This Court addressed a similar set of facts in *People v Trudeau*, 385 Mich 276, 282 (1971). While Mr. Trudeau was in custody for breaking into a post office, the police seized his shoe without a warrant and subjected it to forensic testing on the suspicion that he was 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 against him at trial. *Id.* at 278-279. This Court held that it was unconstitutional for the police to seize and search Mr. Trudeau'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.

The *Trudeau* Court acknowledged that there are booking and security measures "which must be taken by the police in processing a prisoner . . . and to assure the protection of the police and of other prisoners." *Trudeau*, 385 Mich at 281. Yet, this Court held that it was

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error to introduce evidence obtained by testing the shoes Mr. Trudeau was wearing when he was arrested.

The series of searches that occurred here was more invasive than the search in *Trudeau*. MSP tested Mr. Serges's pants for the presence of blood, swabbed the pants to obtain samples, then subjected those samples to DNA testing. Mr. Serges is plainly entitled to the same relief as Mr. Trudeau.

According to the Court of Appeals, the police can subvert *Trudeau* simply by seizing an item from the jail property room—without a warrant or justification—and logging it as evidence. This perverts the Fourth Amendment and article 1, section 11 of our Michigan Constitution. It is not at all what this Court intended in *Trudeau*.

The Court of Appeals inflated the search-incident-to-arrest exception beyond recognition. The opinion below effectively created a brand-new 'custody exception' to the warrant requirement. But only the United States Supreme Court can establish exceptions to the Fourth Amendment. This Court must intervene and correct the Court of Appeals' far-reaching error.

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. The rest of the evidence against Mr. Serges was circumstantial and unconvincing. Whether this error is characterized as plain error or ineffective assistance of counsel for failing to move to suppress, reversal is required.

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III. Trial counsel rendered ineffective assistance by failing to move to suppress the strongest evidence against Mr. Serges, which the police obtained by unconstitutionally seizing and searching Mr. Serges's pants.

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* hearing. See *People v Ginther*, 390 Mich 436 (1973). Ineffective assistance of counsel issues are reviewed de novo. *LeBlanc*, 465 Mich at 579, 582.

The federal and state constitutions guarantee Mr. Serges the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Here, where he was denied that right, relief is required. To prevail on a claim of ineffective assistance of counsel, Mr. Serges must show that "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 basis for counsel's decision). See also *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 hence the proceeding itself unfair, even if the errors of counsel cannot

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be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694.

Discussion

A. Trial counsel's failure to seek suppression was either a serious oversight or an unreasonable trial strategy. Either way, it was deficient performance.

Trial counsel acknowledged that the only evidence connecting Mr. Serges to the scene of the murder was the blood found on his pants. EH, 11. Trial counsel also admitted that he did not consider filing a motion to suppress that evidence. EH, 9. Trial counsel "assumed" the evidence obtained from Mr. Serges's pants was admissible since the pants were seized following his arrest. EH, 13.

Trial counsel never told Mr. Serges there was a constitutional basis to exclude the forensic evidence derived from Mr. Serges's pants, EH, 70, because he did not realize there was one. Counsel's failure to realize this was unreasonable because long-standing, binding caselaw would have supported the motion. See *Edwards*, 415 US 800; *Gant*, 556 US 332; *Carr*, 370 Mich 251; *Trudeau*, 385 Mich 276; *Custer*, 465 Mich 319.

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) (cleaned up). 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).

Trial counsel did not research whether there was a basis for suppression—he did not even consider filing a motion. EH, 9. Instead, he simply accepted that he would have to deal with the pants and

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incorporated them 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). Trial counsel failed to properly investigate and pursue an avenue to suppress the government's "the central piece of evidence", H 11/26/2018, 4, against Mr. Serges. This was quintessential deficient performance.

Trial counsel claimed that he had no desire to exclude the pants because "the pants worked for us more than they did the prosecutor," EH, 17. Trial counsel said this was because, if Mr. Serges killed the decedent, "he would have had to have been covered with blood." EH, 9-10. Trial counsel apparently believed that the decedent's blood on Mr. Serges's pants was helpful to the defense.

To evaluate whether trial counsel's purported strategy was reasonable, consider two scenarios:

> **Scenario 1:** The jury hears that the decedent's blood was found on Mr. Serges's 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 for the prosecutor to authorize an arrest warrant. EH, 27. The prosecutor likely dismisses the charges. If the case proceeds to trial, prosecutor presents no forensic evidence connecting Mr. Serges to the crime. The prosecutor asks the jury to convict Mr. Serges simply because he was the decedent's handyman and he was present in the neighborhood on some of the six days surrounding the crime. From the jury's perspective, the killer could just as easily have been any of the many people living in or passing through the decedent's densely-populated neighborhood. It is difficult to imagine such thin evidence surviving a motion for directed verdict, let alone leading to a conviction.

The decedent's blood on Mr. Serges's pants made him look more guilty, not less. It is undisputed that the decedent's blood on Mr. Serges's pants was the prosecution's strongest evidence against him. The

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prosecutor relied heavily on the pants as evidence of Mr. Serges's guilt. See, e.g., T VI, 132-133 ("But his pants have her blood on them. And there is no reasonable explanation for how that could be if he was not the one who killed her."). The government did not charge Mr. Serges until they had the DNA analysis of the pants.

Trial counsel's attempt to mitigate the damage caused by the forensic evidence does not make his trial strategy reasonable where he could have kept the evidence out entirely. It was only because trial counsel failed to move to suppress that he adopted a strategy of "embracing the pants." EH, 66. Had trial counsel moved to suppress, he would have been relieved of the obligation to explain why the decedent's blood was on Mr. Serges's pants. It was objectively unreasonable for trial counsel to choose Scenario 1 over Scenario 2.

Further, trial counsel did not support his theory by calling an expert, asking any of the prosecution's experts relevant questions, or introducing any evidence. As the prosecutor pointed out in closing, "The defense would have you believe that . . . if David Serges did this, he would have been covered with blood . . . There were all kinds of witnesses who were experts and not one of them told you that. Not one. The only place you ever heard that is from the defense attorney and that is not evidence. We don't know, because none of these experts testified to that. Nobody asked that question." T VI, 174-175.

Additional details in the record demonstrate that trial counsel's approach to this case was poorly reasoned, bordering on absurd. Despite conclusive evidence that the decedent was murdered, trial counsel argued that her death was accidental. The medical examiner testified that the decedent's injuries were totally inconsistent with an accidental fall. T III, 197-199, 202. He testified that he was "absolutely", "100%" certain the death was a homicide. T III, 144, 197-199, 202. Trial counsel did not call any expert to rebut the medical examiner's conclusion. Yet, trial counsel doggedly advanced a theory that the death was accidental and occurred when the decedent was alone. T III, 51, 54, 55; T VI, 144-149, 161, 166-167. Trial counsel's decision to pursue this strategy and ignore the suppression issue was deficient.

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In the middle of Mr. Serges's second trial, trial counsel brought a hammer, a block of wood, and a can of pest spray with him. T III, 5. The trial court asked trial counsel to explain the purpose of this "evidence." T III, 4. Trial counsel replied, "So I was going to go before the doctor [the medical examiner] and I was going to use the hammer and hit the wood and say, is this how hard he hit her. And this is the demonstration that I was going to make. . . . It would simply be smothering similar to see if we made similar marks." T III, 5. The prosecutor informed the court that this was her first time hearing that trial counsel intended to do this, and shared her concern that "we can't hit a block of wood and expect that we're going to get similar marks as we would if we hit a human head." T III, 6. Trial counsel later withdrew his request to use the "demonstrative evidence." T III, 123.

Trial counsel's overall approach to this case was unreasonable. His biggest mistake was failing to move to suppress. Trial counsel did not even consider moving to suppress the most incriminating evidence against Mr. Serges. His performance 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. It was objectively unreasonable for trial counsel not to move to suppress the most damning evidence against Mr. Serges where established caselaw would have compelled suppression.

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

The police unconstitutionally seized Mr. Serges's effects from the jail and then unconstitutionally searched them for evidence. The seizure and the subsequent searches were conducted without a warrant, and did not fall within a recognized exception to the warrant requirement. Trial counsel did not file a motion to suppress.

But for counsel's deficient performance, the strongest evidence against Mr. Serges would have been excluded. The prosecution was consistent—during pre-trial hearings, Mr. Serges's first trial, and his

second trial—in relying on the DNA from his pants as the most incriminating piece of evidence. In closing during Mr. Serges's first trial, the prosecutor reminded the jury:

> [T]his is the single most important [piece] of evidence in this case, and that is the pants that we have taken out and we have shown you, and I will show you again.

Trial 6/4/2019, 153-154.

During Mr. Serges's second trial, the prosecutor argued:

> Every single thing we took from Gail Anderson's house that had blood on it, every single piece of blood from that crime scene was Gail Anderson's blood. Everything. There's one exception, and that one exception becomes the one thing that David Serges could not outrun in this case and that is the pair of pants he has on his body.

T VI, 131-132.

"No other reliable evidence linked [Mr. Serges] with this crime, either directly or circumstantially." *People v Serges*, __ Mich App __ (2024) (Docket No. 355554) (Swartzle, J., concurring dubitante); slip op at 6. But for the illegally obtained DNA evidence, this case likely would have been dismissed before trial. Or, trial counsel would have prevailed on a motion for directed verdict. There is a reasonable probability of a different outcome.

Mr. Serges was prejudiced by trial counsel's failure to move to suppress. This Court should reverse and remand with instructions to suppress the evidence obtained through the seizure and search of Mr. Serges's pants.

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Conclusion and Relief Requested

For the reasons stated above, David Serges respectfully requests that this Honorable Court reverse and remand with instructions to suppress the evidence obtained through the seizure and search of Mr. Serges's pants.

Respectfully submitted,
State Appellate Defender Office
/s/ *Maya Menlo*
Maya Menlo (P82778)
Assistant Defender

Tabitha Harris (P71489)
Assistant Defender

Counsel for David Serges

State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
Phone: (313) 256-9833
mmenlo@sado.org

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