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STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DONALD WAYNE DAVIS,

Defendant-Appellant.
_____/

MSC No.

COA No. 343432

LC No. 16-40020 FC

GENESEE COUNTY PROSECUTOR
Attorneys for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Statement of Questions Presented

I. Did the trial court's closure of the courtroom to all members of the public except the decedent's grieving mother violate Donald Davis' right to a fundamentally fair trial and to a public trial? Was he denied his right to the effective assistance of counsel where his attorney failed to object to this trial format?

Court of Appeals answered "No."

Donald Wayne Davis answers, "Yes."

II. Did the erroneous introduction of an email Mr. Davis sent a detective inquiring about the terms of a potential plea bargain to prove Mr. Davis had a guilty conscious result in a miscarriage of justice where the prosecutor cited the email when he argued in closing that innocent people do not ask for plea deals?

Court of Appeals answered "No."

Donald Wayne Davis answers, "Yes.

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Judgment Appealed From and Relief Sought

Donald Davis seeks leave to appeal the published Court of Appeals opinion affirming his convictions, in which the majority held that the trial judge did not close his trial to the public when he ordered: "the only person allowed to watch this trial is the mother of the young man who died," and clarified that the order stood: "[f]or the remainder of the trial, all the way into next week." Before this order there had been three-to-ten people in the gallery. Because of the order, only the victim's advocate and the victim's mother were present during final three-and-a-half days of the trial. They were the only people present when the only witness who claimed to have personal knowledge that Mr. Davis was guilty testified, when the prosecutor introduced an email Mr. Davis sent a detective inquiring about a possible plea deal, when the prosecutor argued in closing that innocent people do not seek to plea bargain, and when the jury returned its verdict.

This Court should grant leave and reverse. If uncorrected, the majority opinion will allow Sixth Amendment claims to be defeated by evidence that has never before been relevant to whether a defendant enjoyed a public trial and by post hoc explanations from those responsible for the constitutional violation. Here, the majority found it relevant that the courtroom doors were not locked and Mr. Davis' family was not present when the judge issued the order. It was also persuaded by the judge's assertion during a remand hearing that he had misspoke, and only intended to bar those present in the gallery for the rest of the day, not all members of the public for the rest of the trial.

The dissent conducted a traditional public trial analysis and held that there is no legal distinction between an oral order closing the trial to the public and a physical lock on the courtroom door. As to prejudice, it concluded: "Given all that happened behind closed doors—most of the

witness testimony, arguments, instructions, and the rendering of the verdict—I find little to doubt that the closure seriously affected the fairness, integrity, and public reputation of this trial."

Mr. Davis also seeks leave to appeal the Court of Appeals' holding that the erroneous introduction of an email Mr. Davis sent a detective inquiring about the terms of a possible plea agreement to show consciousness of guilt was harmless because "[t]he evidence of defendant's guilt was substantial and the e-mail was of little probative value."

As it has in numerous other recent cases, the Court of Appeals again misapplied the harmless error standard. Evidence of Mr. Davis' guilt was not substantial. It came solely from the testimony of his purported accomplice, whose story changed substantially each time he told it, but who ultimately received a sentence agreement of less than five years for manslaughter in exchange for testifying that Mr. Davis was guilty of first degree murder.

The email's lack of probative value has no bearing on whether it was harmless; the manner in which it was utilized does. During closing the prosecutor cited the email and told the jury: "A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal." While the Court of Appeals judges know that the prosecutor's assertion was false, and know that a defendant's inquiry about the terms of a possible plea deal is not probative of his guilt, the jurors would not have known this. They would have assumed the prosecutor was accurately describing when and why criminal defendants charged with murder engage in plea negotiations; a subject he would presumably have a great deal of experience with. Given the lack of other evidence establishing Mr. Davis' guilt, the erroneous introduction of the email and the related argument resulted in a miscarriage of justice.

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Statement of Facts

I. The investigation into the death of Devonte Hanson

A security guard discovered the dead body of Devonte Hanson in the driver's seat of his car in a parking lot in the River Village Apartments. He died from two gunshot wounds. TII, 35-38. She called the police and helped them locate the surveillance footage. TII 43, 48.

Surveillance footage shows one black male get into the front passenger side of the vehicle and another black male get into the back passenger side of the vehicle. Px 46. A short time later, Mr. Hanson exits the vehicle, retrieves something from his trunk and then get back into the vehicle. TII 118-19. "Not long after, there was a lot of shaking in the vehicle. The male black that got in the front passenger side got out, and the male black that got in the rear passenger seat got out and they went back into the building." TII 119. The two men then "went in to the high rise through the front doors, proceeded through the lobby and went out of a back door and proceeded … from the high rise into the apartment complex located behind the high rise."

The security guard later testified she recognized Spencer Holiday as one of the two men in the footage, but did not recognize the other. TII 56-57. The footage does not appear sufficiently clear to identify either of the two men based on their facial features. Px 46, 47, 49.

The autopsy of Mr. Hanson showed that he had been killed by two gunshot wounds; one with an entrance wound on the left upper chest, which traveled "left to right and slightly front to back," and the other was another wound to the left side of the chest, which exited Mr. Hanson's right anterior chest. TII 103. When Mr. Hanson was found, he had $438.00 in cash in his pockets, and approximately 26.5 grams of marijuana in his trunk. TIII, 91-93, 153-54.

Mr. Holiday and Mr. Davis were both bound over for open murder, and various firearm related crimes. More than a year later, Mr. Holiday agreed to "provide truthful testimony as required by

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prosecutor consistent with interview by Detective Watson." In exchange, he would be allowed to plead guilty to felony firearm and to manslaughter with a sentence agreement of a minimum sentence of 64 months, and the open murder charge he was facing would be dismissed. TIV 15-16, 19. After Mr. Holiday testified against Mr. Davis at a preliminary examination hearing, the agreement was modified to lower the sentence agreement for his manslaughter conviction to 53 months. TIV 19.

II Donald Davis' Trial

Mr. Davis' trial itself lasted five days, but the evidence actually implicating Mr. Davis in the murder of Mr. Hanson was limited to a few pieces of evidence: the surveillance videos, the testimony of Spencer Holiday, the only person who identified Mr. Davis as one of the two men in the surveillance footage, and an email Mr. Davis sent to a detective asking if he was still interested in offering him 'a deal' in exchange for information in an unrelated case, which the prosecutor claimed demonstrated Mr. Davis' consciousness of guilt.

A. The trial court's decision to close the courtroom to everyone except the mother of the deceased after the jury complained that a woman identified outside of the jury's presence as the mother of the deceased's children was communicating with them

Mr. Hanson's mother, Monique Givens, was the prosecutor's first witness. Ms. Givens identified the car in the surveillance footage as belonging to her son, but mainly testified about how she learned that her son had been killed, and about seeing his body at the funeral home. TII 23-30.

Less than two hours after Ms. Givens finished testifying, the prosecutor announced that there had been inadvertent contact in the hallway outside of the courtroom between the jury and the family of Mr. Hanson. TII 87. When the trial court went back on the record after a recess, the trial court announced that a juror had complained that a woman, Daundria Frye, the mother of Mr. Hanson's children, had asked one juror if she worked at Hurley Hospital. TII 88-89. Without requesting input from the parties, the court announced:

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> I've got two choices. One is to find you in contempt of court and lock you up. … The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So, instead, I'm going to bar everyone from this courthouse except for the mother of Devante Ha[nson]. The rest of you leave. Don't come back.
> …
> The only person allowed to watch this trial is the mother of the young man who died. What foolishness. [TII 89-90]

When the prosecutor asked the trial court if it wanted to speak to the jury to determine whether there was a possibility they had been prejudiced by the interaction, it declined to do so because "I don't want to make the jury nervous." TII 91-92. Based on this ruling, the majority of the trial, including the crucial testimony of Spencer Holiday, was heard by the jury in the exclusive presence of the deceased's grieving mother and the victim's advocate. Understandably, Mr. Hanson's mother did not sit in stoic observation of the proceedings. Defense counsel had to place on record his objection to the atmosphere that the court's ruling had created:

> I understand it's very emotional for Mr. Hanson's mother also as well, but I don't think it's appropriate once the jury is walking by for she and the victim advocate to be hugging on each other and patting each other on the back at that point in time. I—it's still going on, the trial's still going on at this point in time, I don't want to influence the jury. I understand it's very emotional for her, but I have to place an objection to that sort of behavior when the jury is walking by. [TIII 79]

The court instructed Ms. Givens that she "needed to be very neutral," and moved on. TIII 79-80.

B. Spencer Holiday's Testimony

Mr. Holiday testified he met Mr. Davis, who was a friend of his brother James Elbert, only a day before Mr. Hanson's death. TIV 11. The next day, Mr. Holiday was at home in the River Village Apartments when Mr. Davis came over to see Mr. Elbert. TIV 9. A room over, he heard Mr. Davis tell Mr. Elbert that "he needed to find a lick," which Mr. Holiday understood to mean that he needed

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to find someone to rob. TIV 22-25. Mr. Holiday testified that he had shown his gun, a loaded .38 revolver, to Mr. Davis at some point prior to leaving the apartment that day. TIV 26-28.

Mr. Holiday testified that one or two hours after Mr. Davis arrived at the apartment, he decided to go to the convenience store down the street to purchase cigarettes from the store and marijuana from an individual who sold drugs outside the store. TIV 32-33. He told Mr. Elbert where he was going, and Mr. Davis followed him out the door when he left. TIV 33. In the elevator on the way down to first floor, Mr. Holiday claimed that Mr. Davis told him "he was looking for a lick," to which Mr. Holiday responded, "I don't know where no licks at. I don't hit licks." TIV 36, 38.

When the two men were outside of the River Village Apartments, Mr. Holiday told Mr. Davis that he was heading to the convenience store to purchase marijuana. Mr. Davis told him "my man's finna pull up with some weed so you might as well wait." TIV 40. About a minute later, Mr. Hanson pulled up in his car. He got out and said "he had some weed for sale." TIV 39, 41. Mr. Holiday got in the front passenger side of the car and Mr. Davis got into the backseat on the driver's side. TIV 43.

Mr. Holiday testified that Mr. Hanson got some marijuana out of the trunk of his car, got in on the driver's side, and showed the marijuana to him. Mr. Holiday told Mr. Hanson that what he was shown was not the kind of marijuana he wanted, so Mr. Hanson got out of the car and went to his trunk to get a stronger strain of marijuana. TIV 43-45. While Mr. Hanson was outside of the car, Mr. Holiday claimed that Mr. Davis said, "I'm about to get this nigga." In response, "I told him that there's cameras out here and I said are you trippin'?" TIV 47-48. When Mr. Hanson got back into the car he showed Mr. Holiday a bag containing a different strain of marijuana, which Mr. Holiday found acceptable. Mr. Holiday gave him a $20 bill and was given $15 back. TIV 49-50.

Mr. Holiday testified that at this point, Mr. Davis pulled his gun out and said "what's up with that shit." TIV 51. Mr. Holiday claimed that Mr. Davis' gun was pointed at the driver's seat headrest.

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Mr. Hanson then turned around and grabbed the gun and the gun went off. TIV 53. Mr. Holiday later testified that Mr. Hanson was "wrestling for the gun and it went off." TIV 64.

Mr. Holiday claimed that Mr. Davis then pointed the gun at him, and said "shoot him or I'm gonna shoot you. … [Then] I pulled my gun out and I closed my eyes and I shot." TIV 56-57

Mr. Holiday testified that Mr. Davis then told him to get out of the car, and then to his sister's apartment. TIV 60-61, 64-66. When they arrived, they went inside and into the basement. Mr. Davis "pulled his gun out on me and told me to give … my gun to him." Mr. Holiday complied, and Mr. Davis wrapped the gun in a white t-shirt. TIV 67-68. Mr. Holiday called Mr. Elbert, who picked both men up, took them to run an errand, and then took them to the club. TIV 70-73.

In contrast to his trial testimony, Mr. Holiday initially told the lead detective that "he heard a gunshot and then fired in the direction of the victim. … Mr. Spencer said he shot to protect … himself." TIV 136. The second time he was interviewed by the detective, Mr. Holiday again "said that while he was in the front seat he just fired into the back seat at the weed man," after Mr. Davis and Mr. Hanson had begun fighting. TIV 139-40. At no point during either interview did Mr. Holiday claim that Mr. Davis had pointed the gun at him or forced him to shoot Mr. Hanson, nor did Mr. Holiday claim that Mr. Davis had threatened him in any way. TIV 140. Mr. Holiday also told Ms. Watson he had no knowledge of a robbery being planned before "any of this happened." TIV 136.

Mr. Holiday also testified at the preliminary examination that Mr. Davis had no way of knowing that he had a gun, and that he had not shown his gun to Mr. Davis. PE III 16. Mr. Holiday hypothesized that this major inconsistency was because he was not on psychological medication the first time he testified. TIV 30.

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C. The prosecutor's introduction of Mr. Davis' email to demonstrate guilt

The jury was made aware of the terms of Mr. Holiday's plea agreement, as well as Mr. Holiday's prior inconsistent statements and testimony. If the jury doubted Mr. Holiday's trial testimony – the only evidence presented that supported a finding that Mr. Davis intended to rob Mr. Hanson and had a premeditated intent to kill Mr. Hanson – the prosecutor had an answer by way of an email Mr. Davis sent to Detective Baldwin while he was in jail, which the prosecutor told the jury demonstrated Mr. Davis' consciousness of guilt. The email stated: "THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME." (Appendix C)

Prior to trial, the prosecutor filed a motion seeking a ruling that this statement was admissible to show consciousness of guilt. At the motion hearing, the prosecutor argued the email should be admitted because MRE 410 does not specifically prohibit its introduction because a detective is not a prosecutor, and "[w]e assert it's tantamount to any defendant who states to any officer 'Hey, I did it. What kind of deal can I get though?' " 2/5/18, 3-4.

Mr. Davis' attorney explained to the trial court what occurred:

> At the conclusion of the [preliminary] examination, Detective Baldwin approached me and asked me if I would talk to Mr. Davis and see if he wished to talk to the police department about some information he may have about another case in exchange for possibly receiving assistance on this case … I relayed that information to Mr. Davis … He … told me he was going to think it over and he would let me know what he wished to do at that point. [2/2/18, 5]

Mr. Davis objected to admission of the email because it was not relevant:

> As far as the substance of the email itself, as far as whether it's consciousness of guilt at this point, Mr. Davis realizes that he is facing a murder charge, realized that [Mr. Holiday,] who lied to the police now has a deal where he is looking at doing manslaughter … and Mr. Davis I think did what any other person would do; hey, if you're giving

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> out deals let me know what I can do and see if I can help myself at this point in time. So, I don't believe it's an indication of guilt. [2/5/18, 6]

The trial court held that it was up to the jury to determine how to interpret the email, and granted the prosecutor's motion. 2/5/18, 6.

The prosecutor told the jury how it was to interpret this email in his opening statement: "When the evidence is in, it's gonna show his consciousness of guilt. Why ask for something if you are innocent?" TII 12.

In his closing argument the prosecutor advised the jury:

> These emails; I introduced these emails for consciousness of guilt, that's it. A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal. [TV 32]

Mr. Davis was found guilty of all counts and sentenced to life in prison.

III. Donald Davis' Appeal

Mr. Davis appealed and was granted remand to supplement the evidentiary record regarding the closure of the courtroom and his attorney's failure to object.

Major White, Mr. Davis' trial counsel, testified that before the judge ordered everyone but Ms. Givens to leave the courtroom and not come back, there were between three and ten people in the gallery. EH 6-7. The only people Mr. White recalled seeing in the gallery for the remainder of trial were Ms. Givens and the victim's advocate. EH 7-8.

Mr. White testified that he did not object to the judge's decision to close the courtroom to all members of the public except for Ms. Givens because he believed the jury would know that no one on the "victim's side" of the courtroom was there to support Mr. Davis, and "there would be no prejudice to my client because they wouldn't look at him and say he has no one here supporting him." EH 13. However, Mr. White acknowledged that it was never made clear to the jury which

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side of the gallery, if any, was the "victim's side" and which side was the "defense side". EH 15. The Court should take judicial notice that in Genesee County, the prosecution and defense both sit at the same table and there is nothing that would indicate that those supporting one party sit on one side of the gallery.

Mr. White testified that for the majority of the trial he could not see Ms. Givens from the defense table, and did not know what her demeanor was when he was not turned around and facing the gallery. EH 9, 14. He recalled objecting to her display of emotion, which he saw when the jury was leaving. EH 9.

Bryan Wooten, who dated Mr. Davis' mother for nine years and considers Mr. Davis a son, testified that he entered the courtroom during a recess, and saw a female officer and a lady with an oxygen mask in the gallery. EH 23-25. When Mr. Wooten sat down, Mr. Davis gestured for him to leave by pointing towards the door, so he left. EH 25. Mr. Wooten wanted to attend the trial for obvious reasons: "I wanted to be here for some type of support, you know? … I don't think he's a violent person. … I know he's not." EH 25-26.

The trial judge denied Mr. Davis'' motion for a new trial, based primarily on his view that his order had not closed the courtroom to the public:

> The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side so I ordered the courtroom emptied. But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. However, there was no one from the defendant's side to evict from the courtroom and the Court doesn't see any prejudice to him if his family were not present during the proceeding.
>
> I agree with Ms. Jurva that Ms. James' testimony is not relevant, nor is Mr. Wooten's. And so, the motion for the new trial is denied and the record is made for the Court of Appeals. [EH 34]

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Two of the Court of Appeals judges agreed with this assessment, and concluded that the courtroom was not truly closed, as the doors were not locked and Mr. Wooten was able to enter. The dissenting opinion would have granted Mr. Davis a new trial.

Mr. Davis now seeks leave to appeal, and ultimately a new trial.

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Arguments

I. The closure of the courtroom to all members of the public except for the decedent's grieving mother violated Donald Davis' right to a fundamentally fair trial, as well as a public trial. Mr. Davis was also denied his right to the effective assistance of counsel where his attorney failed to object to the closure order.

Issue Preservation and Standard of Review and

Mr. Davis' attorney failed to object to the trial court's decision to close his trial to all members of the public except for the decedent's mother.

Constitutional questions are reviewed de novo and any associated findings of fact are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579 (2002). Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, which is reviewed in the existing record. *People v Ginther*, 390 Mich 436, 443 (1973).

Discussion

On the first day of trial after jury selection, the trial judge ordered:

> I'm going to bar everyone from this courthouse except for the mother of Devante Harris (sic). The ret of you leave. Don't come back.
>
> UNIDENTIFIED SPEAKER: Judge, you did mean for the remainder of the trial correct?
>
> THE COURT: For the remainder of the trial, all the way into next week. … The only person allowed to watch this trial is the mother of the young man who died. [TII 90]

Mr. Davis' attorney said nothing at the time, but testified during an evidentiary hearing that he believed Mr. Davis benefitted from this ruling because the people in the gallery at the time were not related to Mr. Davis, and did not object to exclusion of Mr. Hanson's mother from the closure, because she had the right to be there. At the same hearing, the trial judge asserted that Mr. Davis' trial was not actually closed to the public because he had not meant what he said and because he had not ordered the bailiffs to lock the courtroom's doors or turn people away who entered.

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The State and Federal Constitutions guarantee defendants the right to a fair trial, a public trial, and the effective assistance of counsel. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 17, 20. Donald Davis was denied these rights where, in response to an apparent attempt by the mother of the decedent's children to tamper with the jury, the judge closed the trial to all members of the public except for the decedent's mother, and his attorney only objected to the predictable display of emotion by the mother in front of the jury, but did not object to the closure that ensured every juror would be focused on her tears.

A. The trial court's decision to close the courtroom to all members of the public except the decedent's mother requires automatic reversal

In *People v Vaughn*, 491 Mich 642 (2012), this Court held that unpreserved claims of violation of a defendant's constitutional right to a public trial were subject to plain error review. However, allowing the decedent's mother to be the only person present in the courtroom for the majority of the trial defies a plain error analysis.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself."" *Weaver v Massachusetts*, _US_; 137 S Ct 1899, 1907 (2017), quoting *Arizona v Fulminante*, 499 US 279, 310 (1991). Constitutional rights that are preserved absent personal waiver by the defendant, "constitute a narrow class of foundational constitutional rights that 'are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process.' " *Vaughn*, 491 Mich at 656, quoting *State v Butterfield*, 784 P2d 153, 156 (Utah, 1989). "The right to a public trial is of a different order because the violation of that right does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process." *Id.* at 657 (internal quotations omitted).

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Unlike closure of the trial to all members of the public, closure of the trial to all members of the public except the decedent's mother substantially diminishes the guilt-determining process. Ms. Givens' exclusive presence in the gallery for the majority of the trial, during the testimony of Spencer Holiday, during closing argument, and when the jury delivered its guilty verdicts had an immeasurable impact on the jury's interpretation of the testimony and understanding of its obligations. The trial court's decision affected not only Mr. Davis' Sixth Amendment right to an open trial, but to his due process right to a fair trial.

The jurors received no explanation for why Ms. Givens was the only person in the gallery when they returned from a recess on the first day of trial. They likely speculated that it was because they had notified the judge that a woman had asked a juror about where she worked, but they did not know who that woman was and were not told that she was not connected to Defendant Davis. The jurors did know who Ms. Givens was, and presumably understood that she sought justice for her son. The closure to everyone but the decedent's mother may have caused the jurors to believe that they themselves were in danger from the defendant, his family and/or his friends.

We will never know how the jury's ultimate verdict was affected by the powerful visual of a grieving mother sitting alone in the courtroom as the government presented evidence that Mr. Davis murdered her son. Because we cannot know, and because this visual pervaded Mr. Davis' trial, Mr. Davis' trial was fundamentally unfair, and a new trial should be granted automatically/

B. Even if the Court determines that the trial court's action should be reviewed for plain error, reversal is clearly required

Should the Court decline to deem the trial court's decision to allow only the decedent's mother to attend the trial the type of error that demands automatic reversal, Mr. Davis is still entitled to reversal and a new trial under the analysis required in a traditional appeal of an unpreserved violation of the defendant's right to a public trial.

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"*Carines* requires a defendant who has forfeited his claim of error to prove (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Vaughn*, 491 Mich at 663-64, citing *People v Carines*, 460 Mich 750, 763 (1999).

1. Mr. Davis' trial was closed to the public

In finding that Mr. Davis' trial was not closed to the public, the Court of Appeals broke with apparently every other jurisdiction when it held that a trial is not closed to the public when the trial judge prohibits all members of the public from entering the courtroom or watching the trial. Instead, the majority held that the public trial right is implicated only when the judge acknowledges that he truly intended to close the trial to the public and when the defendant can establish that the judge's order resulted in the courtroom doors being locked or bailiffs turning people away members of his family.

All other public trial cases that undersigned counsel is aware of have found that a courtroom is closed to the public when a judge orders the courtroom closed. See *Waller v Georgia*, 467 US 39 (1984) (finding violation of right to public trial after "the court ordered the suppression hearing closed to all persons," without discussing whether any member of the public was actually present when order issued, whether courtroom doors were locked, or whether bailiffs turned members of the public away); *Presley v Georgia*, 558 US 209 (2010) (finding public trial right violated when single person in gallery was ordered to leave during jury selection, with no indication that other members of the public were prevented from entering the courtroom thereafter and no discussion of the trial judge's intent when he issued the order); *People v Vaughn*, 491 Mich 642 (2012) (finding public trial right violated where court officer stated "folks you're going to

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have to clear the courtroom until after the selection of the new jury," even though "the record is unclear regarding how many people were subject to the court's order," and there was no indication that members of the public were prevented from entering the courtroom).

The record evidence is clear that Mr. Davis' trial was closed to the public. The trial judge said explicitly that only one member of the public was allowed to attend the trial:

> I'm going to bar everyone from this courthouse except for the mother of Devante Harris (sic). The rest of you leave. Don't you come back.
> ...
> UNIDENTIFIED SPEAKER: Judge, you did mean for the remainder of the trial correct?
>
> THE COURT: **For the remainder of the trial, all the way in to next week**. … **The only person allowed to watch this trial is the mother of the young man who died**. [TII 90 (emphasis added)]

Additionally, Mr. White testified that before the judge issued the order, there were three-to-ten people in the gallery, and afterwards, the only people in the gallery were Ms. Givens and the victim's advocate. Further, Mr. Wooten testified that he hoped to watch the trial, but could not because when he entered the courtroom, Mr. Davis signaled for him to leave. Mr. Davis apparently took the trial court's closure order literally.

The fact that Mr. Davis' family members were not present in the courtroom when Judge Neithercut ordered that the courtroom be closed has no bearing on whether Mr. Davis' right to a public trial was violated. *See*, *e.g.*, *Waller*, 467 US 39; *Vaughn*, 491 Mich 642 and *US v Simmons*, 796 F3d 409 (CA 6, 2015) (right to public trial violated where court excluded defendant's codefendants from trial during certain witnesses' testimony).

2. The trial court plainly erred by closing the court to all members of the public except the decedent's mother

To justify closing the courtroom to the public, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than

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necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller v Georgia*, 467 US 39, 48 (1984).

The trial court's interest in preventing Ms. Frye from further attempting to influence the jury was obviously legitimate and designed to protect the integrity of the verdict, as was its desire to avoid a delay in the trial so that a contempt hearing could take place. However, there were multiple reasonable and narrower alternatives that could have achieved this same result without closing the courtroom to all members of the public except the decedent's mother. These alternatives were clear and obvious, and the approach chosen by the trial court constituted plain error. *Carines*, 460 Mich at 763. There was no need to exclude any one other than Ms. Frye from the courthouse and there was no need to conduct a contempt hearing before resuming the trial. The court could have simply ordered Ms. Frye to leave the courthouse and not return until the verdict had been delivered. It could have also assigned a bailiff to accompany the jury as it exited and entered the courtroom. These are obvious alternatives to completely closing the courtroom and denying Mr. Davis his right to a public trial.

The trial court's decision to exclude Ms. Givens from its closure order made the error even more obvious and prejudicial.

3. The fairness and integrity of Mr. Davis' trial was seriously affected by the trial court's decision to close the trial to all members of the public except the mother of the decedent

Unlike many the recent public trial cases this Court has heard, the trial court in this case did not close the courtroom during voir dire or during the testimony of a minor witness. It closed the courtroom midway through the first day of trial in which proofs were offered, and kept it closed for the next three days of the trial until the jury had delivered its verdict. Unlike those cases in which the courtroom was neutrally closed to all members of the public, the trial court here excluded the decedent's mother from its order.

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The exclusive presence of the decedent's mother in the courtroom throughout the trial created an atmosphere that demanded justice for the deceased, and was at best silent as to the necessity of justice for the accused.

When the jurors returned from recess after reporting that a woman had asked one juror about her place of employment and Ms. Givens was the only individual in the gallery, they likely assumed that Ms. Frye was connected to Mr. Davis since Ms. Givens, who had just testified and identified herself as Mr. Hanson's mother, was not subject to the trial court's apparent sanction. The real possibility that the jury believed that an individual connected to Mr. Davis had tried to tamper with the jury was enough to render the trial completely unfair. Unlike engaging in plea bargaining, jury tampering is a very real indicia of consciousness of guilt.

The jury was concerned enough about Ms. Frye's question about a juror's place of employment to report it to the trial court. Because the trial court declined to voir dire the jury, we do not know what assumptions they had made about the purpose of her question. However, news articles, as well as popular films and television series depict countless stories of jurors in criminal cases being located away from the trial by the defendant's associates and threatened, bribed or killed.[1] Given the serious allegations against Mr. Davis, Ms. Frye's mere question about the juror's place of employment was likely viewed by at least some jurors as an attempt to intimidate. The assumption that associates of Mr. Davis were actively attempting to discover where they worked likely placed at least some jurors in real fear that they would be subject to further intimidation or actual physical violence. The

[1] *See*, *e.g.*, *The Sopranos: Eloise* (HBO television broadcast Dec. 1, 2002) (thugs depicted attempting to intimidate juror in trial of fictional mafia boss Junior Soprano by approaching juror away from the courthouse when he is with his family); *The Juror*, (1995) (while away from the court house, Alec Baldwin's character threatens to kill the juror portrayed by Demi Moore, as well as her son, unless she votes to acquit); *Purported mob boss greets juror by name outside trial*, New York Post (Feb. 8, 2018) *available at* https://nypost.com/2018/02/08/mob-boss-greets-juror-by-name-outside-courtroom/; *El Chapo Jurors Will Be Anonymous During Trial*, New York Times (Feb. 6, 2018) *available at* https://www.nytimes.com/2018/02/06/nyregion/el-chapo-jurors-trial-secrecy.html.

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remedy chosen by the trial court likely cemented the view that Ms. Frye was acting on behalf of Mr. Davis, and also likely led at least some members of the jury to believe that they could be in danger while in the courtroom. In this context, no reasonable juror could provide Mr. Davis the presumption of innocence to which he was entitled.

And we know that the court's order had additional effects. The record does not demonstrate the likely agony on Ms. Givens' face as she heard Mr. Holiday testify that he had murdered Mr. Hanson because Mr. Davis had threatened to murder him if he did not. It does not describe her reaction to hearing expert testimony about the cause of her son's death. It cannot relate the empathy and sense of obligation to Ms. Givens that was necessarily magnified by the fact that Ms. Givens was the only member of the public present to observe the prosecutor's proofs and judge the justice of the verdict it delivered.

We do know from the record that as the jury walked past the gallery to recess, Ms. Givens and the victim's advocate were "hugging on each other and patting each other on the back." 2/27/18, 79. With no one else present in the gallery, the juror's attention was necessarily focused on Ms. Givens and the pain she was experiencing. From counsel's objection, it is fair to assume that Ms. Givens did not stoically observe the prosecutor put on his proofs and make his closing argument. He only objected to what he saw, but testified that for the most part his back was to the gallery.

This situation the trial court created stacked the decks against Mr. Davis. The jury was constantly reminded of the trauma the government claimed Mr. Davis caused. Ms. Givens' exclusive presence in the courtroom would be akin to allowing photos of a murder victim's autopsy photos hung about the courtroom for the entire trial, but far more prejudicial. In a full courtroom, the presence of a grieving mother would not render the trial unfair, but because the courtroom was otherwise empty the trial was inherently unfair. To require Mr. Davis to serve a life sentence without the possibility of

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parole based on a verdict rendered following the trial and process that he received would seriously undermine the integrity of the trial and the verdict, and would undermine public confidence in our state's criminal justice system as one that is fair and neutral.

C. Mr. Davis was denied his right to the effective assistance of counsel where his attorney failed to object to the exclusion of all members of the public from the trial except for the mother of the decedent

"Under *Strickland v. Washington*[,466 US 668 (1984)], establishing ineffective assistance requires a defendant to show (1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9 (2018). This case is not like *Vaughn*, 491 Mich at 670, where this Court found that counsel's performance was not deficient in failing to object to closure of the court room during voir dire because "counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefitted defendant."

As discussed throughout this Application, the trial court's remedy to Ms. Frye's attempted tampering placed Mr. Davis at a disadvantage not only because he was forced to stand trial without the support of his loved ones, but also because Ms. Givens' exclusive presence likely put pressure on the jury to convict and made them fearful of the defendant. Counsel's failure to object to the trial court's exclusion of the public except for Ms. Givens was constitutionally unreasonable.

1. Counsel's failure to object was constitutionally unreasonable and not based on a reasonable trial strategy

During the evidentiary hearing, Major White testified that he did not object to the closure of the courtroom because he made a strategic calculation that it would be better for Mr. Davis if only Ms. Givens were permitted to view the trial because everyone in the courtroom at the time the order issued was on the "prosecutor's side" of the gallery and Mr. White did not know of any of Mr. Davis' family members who intended to attend the trial.

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While trial counsel's strategic decisions are entitled to deference under *Strickland*¸ such decisions must be based on "reasonable professional judgments." *People v Grant*, 470 Mich 477, 486 (2004). *See also People v Dalessandro*, 165 Mich App 569, 578 (1988) ("Although defense counsel presented reasons for his actions, his actions were not *sound* trial strategy as required by *Strickland*.").

The only statements that were attributed to Mr. Davis' trial counsel, Major White, while the trial court questioned Daundria Frye, ordered that only Ms. Givens could attend the remainder of the trial, and discussed with the prosecutor whether the jurors should be asked what Ms. Frye actually said to them, were: "Your Honor, may we approach?"; "Well it's still enough to sit there to cause some concerns, but I guess you worked it out. I understand why the concern (inaudible)"; and "(inaudible) with the Judge's decision."

Mr. White's failure to object could not be based in sound trial strategy because there is not a "prosecutor's side" and "defendant's side" of the gallery, and there is no plausible rationale for not objecting to the exclusion of Ms. Givens from the closure order, since she had already identified herself to the jury as Mr. Hanson's mother. While the Court of Appeals found it noteworthy "that the victim's mother had a statutory right to be present during the trial," every American had a constitutional right to be present during the trial, save for Ms. Frye, who forfeited that right. See *Richmond Newspapers, Inc v Virginia*, 448 US 555, 576 (1980). More importantly, Mr. Davis had the right to a public trial to "encourage[] witnesses to come forward and discourage[] perjury." *Waller*, 467 US at 46.

2. Counsel's failure to object to the closure of the courtroom to all members of the public except the decedent's mother resulted in a fundamentally unfair trial

In *Weaver*, the Supreme Court assumed without ultimately deciding that in establishing ineffective assistance of counsel, "relief still must be granted if the convicted person shows that

attorney errors rendered the trial fundamentally unfair," even if the defendant cannot establish that there is a reasonable probability that the result of the trial would have been different had counsel objected to the court's closure. *Weaver*, 137 S Ct at 1911.

This is a necessary and proper standard because it is far more difficult to quantify the likely impact that the closure of the court to the public had on the verdict than, for example, the impact that an alibi witness could have had or that the introduction of inadmissible evidence against the defendant likely had. Further, "the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion." *Id.* at 1911, citing *Strickland*, 466 US at 696. Alternatives to the "reasonable probability" standard already exist in classes of ineffective assistance of counsel claims where the likely impact of counsel's error is impossible to quantify. See, *e.g.*, *Cuyler v Sullivan*, 446 US 335 (1980).

This is so, in part, because of the interests the public trial right is designed to protect: assurance that the defendant "fairly dealt with and not unjustly condemned," keeping jurors "alive to a sense of their responsibility and to the importance of their functions," "ensuring that judge and prosecutor carry out their duties responsibly," and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller*, 467 US at 46, quoting *In re* Oliver, 333 US 257, 270, n 25 (1984) and *Gannett Co., Inc. v DePasquale*, 443 US 368, 380 (1979).

But Mr. Davis' trial was fundamentally unfair not only because the traditional protections of the public trial right were absent for the majority of the trial, but because of the exclusive presence of the decedent's mother.

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3. There is a reasonable probability that the result of the trial would have been different but for counsel's failure to object to the closure of the trial to all members of the public except the decedent's mother

In *Weaver v Masachusettes*, ___ US ___; 137 S Ct 1899, 1913 (2017) the Supreme Court opined that if "defense counsel errs in failing to object when the government's main witness testifies in secret, the defendant might be able to show prejudice with little more detail."

The only evidence presented at trial that Mr. Davis possessed a firearm, possessed ammunition, intended to rob Mr. Hanson, had a premeditated intent to kill Mr. Hanson, or shot Mr. Hanson came from the testimony of Mr. Holiday, which was provided in a courtroom that was closed to all members of the public except for the decedent's mother. Given this reality, closure of the courtroom throughout trial, but especially during Mr. Holiday's testimony, likely affected the jury's verdict, just as it likely affected Mr. Hanson's testimony. *See*, *e.g.*, *Waller v Georgia*, 467 US 39, 46 (1984) ("a public trial encourages witnesses to come forward and discourages perjury.").

This was not a trial in which Mr. Davis' convictions would have been assured even absent the procedural unfairness that resulted in the trial court's decision and counsel's failure to object to that decision. There was no physical evidence that Mr. Davis possessed a gun, intended to rob, intended to shoot, or did shoot Mr. Hansen. The videos were not of such sufficient quality/vantage point for jurors to identify Mr. Davis from viewing it. If the jury had not believed the contradictory testimony of Mr. Holiday, it could not have found Mr. Davis guilty beyond reasonable doubt of any crime he was convicted.

Given this, and given the likely pressure to deliver a guilty verdict that Ms. Givens' exclusive presence likely had, it is reasonably probable that had counsel objected to the remedy the trial court crafted in response to Ms. Frye's attempted tampering, the jury's verdict would have been different.

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II. The erroneous admission of an email Mr. Davis sent to a detective inquiring about her interest in a potential plea agreement, resulted in a miscarriage of justice. To the extent that the issue is not fully preserved, Mr. Davis was denied his right to the effective assistance of counsel.

Issue Preservation and Standard of Review

The prosecutor moved to admit an email Mr. Davis sent to a detective asking about the terms of a potential plea offer that had been relayed to him by his attorney to establish consciousness of guilt, and Mr. Davis' counsel objected to its admission because it was not relevant, but did not explicitly object on any other grounds. The trial court held that the email was relevant to consciousness of guilt and that it would be up to the jury to decide the weight to assign it.

Generally, "[w]hen the issue is preserved, [this Court] review[s] a trial court's decision to admit evidence for an abuse of discretion, but review[s] de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility." *People v Chelmicki*, 305 Mich App 58, 62; (2014). For unpreserved issues, this Court reviews for plain error affecting substantial rights and reverses where the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763. This Court reviews claims of ineffective assistance of counsel de novo, except any findings of fact are reviewed for clear error, based on the existing record. *People v Solloway*, 316 Mich App 174, 187–88 (2016); see *People v Williams*, 223 Mich App 409, 414 (1997)

A. A defendant's interest in learning the details of a potential agreement that would allow him to provide information about an unrelated matter in exchange for police "assistance" with the charges he is facing is not probative of consciousness of guilt

The trial court abused its discretion when it held the evidence that Mr. Davis had expressed interest in learning the specific terms of an offer that had been communicated to his attorney could be relevant to Mr. Davis' consciousness of guilt. Following the third preliminary examination hearing, during which Spencer Holiday testified against Mr. Davis, Detective Baldwin approached Mr. Davis'

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counsel and asked if Mr. Davis "wished to talk to the police department about some information he may have about another case in exchange for possibly receiving assistance on this case." 2/2/18, 5. Mr. Davis told his attorney he would need to think about it, when his attorney relayed this exchange to him. Mr. Holiday had just provided testimony that, if believed by the jury at trial, would put Mr. Davis in prison for the rest of his life. Mr. Davis had already been in jail for more than a year when he was offered "assistance on this case."

On January 8, 2018, Mr. Davis emailed Detective Baldwin from jail: "THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME".

The email was not probative of consciousness of guilt, as the prosecutor asserted. Any probative value it did have was substantially outweighed by the risk of unfair prejudice. The email was also inadmissible pursuant to MRE 408 and 410. See *People v Dunn*, 446 Mich 409, 415-16 (1994) ("Dunn had a subjective expectation to negotiate a plea at the time of the discussion, and that his expectation was reasonable given the totality of the objective circumstances. Shortly after his arrest, Dunn initiated communication with the detectives for the express purpose of negotiating a plea bargain with the prosecutor. The detectives encouraged him to talk so they could discuss the possibility of a plea with the prosecutor.").

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." According to the prosecution, the email was relevant because it demonstrated Mr. Davis' consciousness of guilt, which in turn, would make a fact of consequence (Mr. Davis' actual guilt) more likely than it would have been without the evidence.

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Defendants plead guilty to crimes they did not commit on a regular basis. Fifteen percent of all individuals exonerated in this country after being convicted were originally convicted by plea.[2] *Innocents Who Plead Guilty*, National Registry of Exonerations (11/24/15) <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>. A recent study by the National Bureau of Economic Research found that defendants who are denied or unable to post bond are 12% more likely to plead guilty than defendants who have been granted pre-trial release, which is a 27.5% change from the mean for detained defendants. Dobbie, Will, et al., *The Effects of Pre-Trial Detention on Conviction Future Crime, and Employment: Evidence from Randomly Assigned Judges*, NBER, 3 (Aug. 2016) <www.nber.org/papers/w22511.pdf>.

This email neither acknowledges guilt nor expresses any willingness to plead guilty to any charge in this case. Any rational person in Mr. Davis' position, regardless of his guilt or innocence, would be interested in what kind of police assistance was being offered in exchange for simply telling police what he already knew about an unrelated matter.

Good defense attorneys can provide good advice when they advise their innocent clients to plead guilty.[3] This is an unfortunate result of a criminal justice system that relies on evidence rather

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[2] The National Registry of Exonerations speculated that this number is likely lower than it should be. "A major reason that so few exonerations occur after guilty pleas is that defendants who plead guilty get much lighter sentences than those who go to trial," and "[n]obody has the resources to reinvestigate and relitigate the conviction of a defendant who was sentenced to probation or a year in county jail." National Registry of Exonerations *Guilty Pleas in "Group Exonerations"* <https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article2.pdf>.

[3] *See* Stein, Jeffrey D., *How to make an innocent client plead guilty*, Washington Post (1/12/18) <https://www.washingtonpost.com/opinions/why-innocent-peoplepleadguilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html?noredirect=on&utm_term=.a787ad8f9292> ("You lay out options for your client. You could go to trial, but that might mean waiting in jail for months, if not years, before a jury hears the case. ... The other option, you explain to your client, is to accept the plea offer. In some cases, the sentencing difference between accepting a plea and losing at trial can be a matter of decades. It's no wonder 95 percent of all defendants accept plea offers." The article also notes the cases of Wayne Washington, Bobby Johnson, Shawn Whirl, and Glenn Tinney; defendants who pled guilty to murder, who were later exonerated).

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than telepathy. Attorneys commit malpractice and render ineffective assistance when they fail to relay plea offers to their clients. *See* MRPC 1.4(a); *Missouri v Frye*, 566 US 134 (2012); *People v Walker*, 497 Mich 894 (2014).

To the extent the email was probative of anything beyond Mr. Davis' curiosity and desire to participate in his own defense, the email's value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462 (2008).

The theory of the email's relevance the prosecutor offered during the hearing on whether it would be admitted – that the email is "tantamount to any defendant who states to any officer 'Hey I did it. What kind of deal can I get though,' " 2/5/18, 3-4, – is not only false, it should have put the trial court on notice that the email would be used to confuse and mislead the jury, and unfairly prejudice Mr. Davis. This is what occurred. The trial court abused its discretion in admitting the email because it had no bearing on Mr. Davis' consciousness of guilt or any other matter relevant to the proceedings and also created a high risk of unfair prejudice.

During the hearing on the prosecutor's motion in limine to admit the email, it is apparent that Mr. Davis' counsel was concerned about the unfair prejudice that would result from the email's admission, but counsel did not explicitly cite Rule 403 or quote its language. Should the Court deem it necessary to even reach a decision on MRE 403, and question whether Mr. Davis' counsel was sufficiently vocal to preserve the MRE 403 argument, reversal would be warranted under both plain error[4] and an ineffective assistance of counsel standards[5].

[4] *Carines*, 460 Mich at 763.
[5] *Strickland*, 466 US at 687-688.

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B. Admission of Mr. Davis' email combined with the prosecutor's characterizations of the email to the jury resulted in a miscarriage of justice

Preserved, nonconstitutional errors necesssitate reversal when they have resulted in a miscarriage of justice. MCL 769.26. "[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495 (1999)

The improper introduction of the email combined with the prosecutor's repeated characterization of the email as tantamount to a confession, likely resulted in Mr. Davis' convictions.

The Court of Appeals was wrong when it found that were "substantial" evidence of Mr. Davis' guilt. The only evidence that Mr. Davis was guilty of any crime came from the contradictory testimony of Spencer Holiday, whose version of events changed substantially between his first police interview and the preliminary examination, and again between the preliminary examination and trial. Mr. Holiday offered no explanation for these omissions aside from taking psychotropic medication, and these inconsistencies should have created reasonable doubt as to Mr. Davis' guilt.

But the prosecutor, who is and would be considered an expert on plea bargaining in the eyes of a jury, told the jury that Mr. Davis' email to Detective Baldwin corroborated Mr. Holiday's testimony because only people who are guilty of murder enter into plea negotiations.

The prosecutor argued to the jury:

> he's trying to get a plea deal. Why is this important? When he evidence is in, it's gonna show his consciousness of guilt. Why ask for something if you are innocent? [TII 12]
> …
> These emails; I introduced these emails for consciousness of guilt, that's it. A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal. [TV 33]

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While the Court of Appeals was correct in finding "the email was of little probative value," this does not mean that prejudice that resulted from its introduction was not substantial. In addition to being explicitly utilized to purportedly establish that Mr. Davis is guilty and knows he is guilty, the email also indicated to the jury that Mr. Davis possesses knowledge of criminal activity for which he is not on trial and likely associates himself with the criminal element. The email, along with the testimony of Sergeant Lanning, who works at the Genesee County Jail, and who laid the foundation at trial for the introduction of the email, TIV 147-53, told the jury that Mr. Davis was incarcerated as he stood trial, obviating the prosecutor's need to shackle him or force him to wear jail garb during trial. *See, e.g., Estelle v Williams*, 425 US 501, 512 (1976) ("the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes.").

Whether trial counsel's objection to the introduction of the email was adequate to preserve the objection should not affect Mr. Davis' entitlement to a new trial because it is highly likely the email and the prosecutor's commentary on its meaning caused the jury to believe Mr. Holiday's testimony and to convict Mr. Davis of murder. A conviction that is based on the defendant's attempt to participate in plea negotiations and the lie that innocent people charged with murder do not discuss plea offers constitutes a miscarriage of justice and is the result of an error that seriously affected the fairness, integrity, and public reputation of the trial. Mr. Davis is entitled to a new trial.

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Judgment Appealed and Relief Sought

Donald Davis asks this Honorable Court to either grant this application for leave to appeal, or any appropriate peremptory relief it deems just and necessary.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Steven Helton
_____

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