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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Menayetta Yeager

Defendant-Appellant.

MSC No. 164055

COA No. 346074

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

Menayetta Yeager's Reply Brief

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Arguments

I. Counsel's representation fell below an objective standard of reasonableness.

The prosecutor states that because Ms. Yeager did not mean to kill Mr. Brooks, and testified to the same, that her attorney could not pursue voluntary manslaughter. Prosecutor Brief, 14, 17, 18. According to the prosecutor, "sound strategy" is as simple as "listening to [one's] client's version of events." Prosecutor Brief, 14. But, whether "counsel's representation fell below an objective standard of reasonableness"[1] is not determined by one's client's description of the events underlying criminal charges. This Court rejected that argument in *People v LeBlanc*:

> In the real world, defending criminal cases is not for the faint of heart. Lawyers must fulfill ethical obligations to the court, zealously advocate the client's best interests (**which includes establishing that they, and not the client, are in charge of making professional decisions**), and protect themselves against grievances and claims of malpractice. [*People v LeBlanc*, 465 Mich 575, 592 (2002) (emphasis added) (citing *People v Mitchell*, 454 Mich 145, 171 (1997)].

Nevertheless, at the *Ginther* hearing, trial counsel testified to a near total shirking of his obligations in favor of, for example, relying on Ms. Yeager's family's desired defense strategy. GH, 43. Trial counsel also testified that he talked to Ms. Yeager about trial strategy while also trying to convince her to settle the case. *Id.* If counsel's strategy was based on absolute loyalty to Ms. Yeager's version of events and the chosen defenses of her non-lawyer family members, counsel's inexplicable decisions to tell the jury that the neighbor may have been a shooter, and the dead body recovered by police was someone other than Jonte Brooks, depart from that ill-advised route. GH, 44-47. Trial counsel's own testimony demonstrates that he did not thoughtfully consider all of the evidence in arriving at strategy. He abandoned his

[1] *Strickland v Washington*, 466 US 668, 688 (1984).

duties as defense counsel. ABA Standard 4-1.2 Functions and Duties of Defense Counsel.

The trial court and Court of Appeals correctly applied the first prong of the *Strickland* analysis when they kept "in mind that counsel's function, as elaborated in prevailing professional norms is to make the adversarial testing process work in the particular case." *Strickland*, 466 US at 690. Ms. Yeager's trial counsel failed to do so. On this point, Ms. Yeager, the trial court, the Court of Appeals' majority opinion, and the Court of Appeals' concurring opinion all agree.

And yet, the prosecutor presents another possible rationale to rehabilitate counsel's missteps: "from an objective viewpoint, the decision to request the jury instruction that would be more likely to result in an outright acquittal is preferable over a fifteen-year felony." Prosecutor Brief, 17. That is a cost-benefit analysis for Ms. Yeager to perform, after having received complete information. She never did. She never heard from trial counsel what second-degree murder or manslaughter were. GH, 65. Instead, she was assured an acquittal. GH, 65. The prosecutor offers a post-hoc rationalization of trial counsel's actions, which is not the same as applying an objective standard of reasonableness. That is done by considering the quality of the advocacy, consultation, knowledge, and skill "brought to bear." *Strickland*, 466 US at 688. Here, trial counsel fell below an objective standard of reasonableness across the board—his advocacy was inadequate, consultation nearly non-existent, and knowledge of the law far short of what is necessary to handle a capital case.

The prosecutor is doing precisely what she inaccurately accuses Ms. Yeager of: wielding the benefit of hindsight to achieve a desired outcome. Prosecutor Brief, 18 ("But now, standing convicted with the benefit of hindsight, the Defendant now regrets her protestations of fear and wishes she had testified differently. This, however, is not how ineffective assistance of counsel claims are properly evaluated.") Instead, this Court should find, as the trial court and Court of Appeals did, that counsel's representation fell below an objective standard of reasonableness.

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II. The jury instructions for first-degree murder, second-degree murder, and voluntary manslaughter do not preclude a finding that Ms. Yeager was prejudiced by counsel's ineffective assistance.

Ms. Yeager was emotionally excited and unable to calm down before fatally shooting her abusive boyfriend. Had a voluntary manslaughter instruction been requested, it would have been read, and there is a reasonable likelihood of a different outcome.

A. There are no emotional limitations on adequate provocation.

The prosecutor states, without support, that "[f]ear is not a sufficient provocation capable of reducing murder to voluntary manslaughter." Prosecutor Brief, 22. This is out-of-step with case law, the jury instructions, and public policy. Supplemental Brief, 10-11. Nothing delineates particular emotions eligible to cause emotional excitement. And, even if "[a]ll reasonable people who must violently act in order to preserve their own life are afraid," that does not restructure voluntary manslaughter into a killing while feeling "mere fear." Prosecutor Brief, 23.

The fear would have to rise to the level of "emotional excitement" wherein "passion" supersedes judgment. *See generally* M Crim JI 16.9. To receive the instruction for voluntary manslaughter, one must also present some rational evidence that that emotion or those emotions were "brought about by an adequate cause" *and* that the killing took place "before the defendant had a reasonable time to calm down." *Id*. It does not matter whether one loses "command of his passions….[and]reason had lost in part its sway" due to fear, fury, shame, or rage. *Maher v People*, 10 Mich 212 (1862). Manslaughter will remain the same crime it has been for centuries, where "the true test of manslaughter [is] that the homicide be committed in a sudden transport of passion arising upon a reasonable provocation, and without malice." *Maher v People*, 10 Mich 212 (1862). Because Ms. Yeager acted out of terror, she is entitled to a new trial with a voluntary manslaughter instruction.

B. A first-degree murder conviction does not preclude prejudice where there was a failure to instruct on voluntary manslaughter.

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The prosecutor also states that "it strains credulity to say that a jury that rejected a finding of willfulness and wantonness (second-degree murder) in favor of finding an intentional, premeditated, deliberate act (first-degree murder) would have found the acts to be a result of sudden impulse without thought or reflection." Such an assertion misconstrues the actual instructions and the case law.

There are two key distinctions between the first-degree murder instruction and voluntary manslaughter: one, the temporally-defined impulse of first-degree murder and two, the qualitative-centric impulse of voluntary manslaughter. These distinctions, coupled with the circumstances surrounding Ms. Yeager's actions, support a finding of prejudice under the second prong of *Strickland*.

First-degree murder requires deliberation. Deliberation cannot be the result of "*sudden* impulse without thought or reflection." M Crim JI 16.1(5) (emphasis added). The "sudden impulse" referenced in the jury instructions for first-degree premeditated murder is a temporal concept: "long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed." M Crim JI 16.1(5). As this Court recently held, "premeditation and deliberation may be established by an interval of time between the initial homicidal thought and the ultimate action" otherwise known as an opportunity for a "second look." *People v Oros*, 502 Mich 229, 242 (2018). While not a *sudden* impulse, deliberation can occur incredibly swiftly, "requir[ing] only a brief moment of thought or a matter of seconds." *Oros*, 52 Mich at 242-243 (2018) (citing 2 LaFave, Substance Criminal Law (3d ed), §14.7(a), p 650). This Court has cited the example of the time it takes a person to draw the weapon from his waistband and the instant he pulls the trigger. *Id* at 248 (citing *People v Waters*, 118 Mich App 176, 187 (1982)). That extraordinarily short time means that one did *not* act on "sudden impulse." If an individual has enough time to measure and evaluate the major facets of the decision to kill, then a jury could find that individual deliberated and premeditated.

That is what the jury found here. Ms. Yeager did not act on sudden impulse. The jury concluded Ms. Yeager had time to take a "second look." That there was sufficient evidence to support a finding that Ms. Yeager deliberated does not foreclose the reality that there is a reasonable

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probability of a different outcome if the jury had been instructed on voluntary manslaughter. One can be emotionally excited, as Ms. Yeager was here, for stretches of fifteen minutes or longer. Supplemental Brief, 12. Impulsive behavior amounting to voluntary manslaughter is not temporally limited in the way a sudden impulse is when contemplated for first-degree murder.

Impulsive behavior as contemplated by voluntary manslaughter considers the quality and clarity of the thoughts leading one to act on impulse. This is different than deliberation and premeditation. *Oros*, the Chief Justice explained, does away with the idea that deliberation is "of the requisite quality—namely, that the perpetrator's decision to kill was the product of deliberate thought—that he "measure[d] and evaluate[d] the major facets" of the decision to kill" and instead "understand[s] [deliberation] as merely acting intentionally or even voluntarily…". *People v Oros*, 502 Mich 229, 257-258 (2018) (McCormack, J, dissenting). Without a voluntary manslaughter instruction, "the jury could only speculate" as to the quality of Ms. Yeager's "second look." *Id*.

The jury instructions for voluntary manslaughter contemplate the quality of the accused's cognition. M Crim JI 16.9 is the only instruction that does so. It asks the jury whether the accused's cognition was "disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment." M Crim JI 16.9(2). The jury is instructed that "this emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse." M Crim JI 16.9(2).

M Crim JI 16.9 is for the exact situation presented here— an intentional killing, where the passage of time alone would permit a conclusion that it was also premeditated and deliberated, but where adequate provocation neutralizes that malice. Supp Brief, 30. *This* is the qualitative difference between the instructions for murder and the instruction for voluntary manslaughter as a lesser included offense of murder—the effect of provocation on cognition.

Although it is true that Ms. Yeager's jury found that she did not act on a *sudden* impulse, the jury was not given the opportunity to consider

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whether the events leading to Jonte Brooks' death were the result emotional excitement so great that it would render a reasonable person's cognition rash or impulsive. Despite its obvious presence and role in Ms. Yeager's decision-making, Ms. Yeager's jury was never instructed on her emotional excitement. Supp Brief 13, 23, 29, 30. Ms. Yeager was prejudiced by trial counsel's failure to request an instruction on voluntary manslaughter because "[i]f there ever was a heat of passion case, this is it." *Yeager*, unpub op at 1 (BECKERING, J, concurring). It is reasonably likely that if the jury would have been properly instructed, they would have found that while Ms. Yeager did not act on a sudden impulse, she was under such great emotional distress that her actions were the result of rash or impulsive decisions.

C. People v Beach and the cases it relies upon *compel this Court to find prejudice.*

In *Beach*, this Court wrote, "The existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the [harmless error] analysis." *Beach,* 429 Mich at 491. This Court then went on to provide litigants with guidance about when that rejection nevertheless results in harm in a first-degree murder case. First, the *Beach* court cited *Richardson* for the idea that the failure to instruct on a lesser-included offense prejudices an individual where that failure prevents an individual from introducing evidence or advancing a defense. *Id; Richardson,* 409 Mich at 141.

The prosecutor tried to dismiss *People v Richardson,* 409 Mich 126 (1980) as factually distinguishable from Ms. Yeager's case, but that ignores the legal rule that *Richardson* stands for: where the failure to give an instruction impedes an individual's defense, there is harm. *People v Richardson,* 409 Mich 126 (1980). That rule taken together with the analysis from *People v Rochowiak* underlies this Court's conclusions in *Beach.* Supplemental Brief, Sections III and IV. The prosecutor ignores *Rochowiak* entirely. When *Rochowiak* and *Richardson* were read together, this Court concluded that if the failure to instruct concerns a "state of mind" element, an individual has suffered prejudice because a court cannot be sure a jury had the information necessary to render the correct decision. *People v Rochowiak*, 416 Mich 235, 248-249 (1982); *Beach,* 429 Mich at 491-92.

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In crafting a categorical bar to prejudice, *Raper* ignored this precedent; *Raper* does not afford for prejudice where an individual cannot advance a defense—or where an individual's mental state is at issue. *Rochowiak* put it simply: "th[e] failure to give lesser offense instructions can never be harmless." *Rochowiak,* 416 Mich at 248. *Raper* is wrongly decided and must be overruled.

III. The stare decisis factors compel this Court to overrule *People v Raper* because it is poorly reasoned, rarely relied upon, and undermined by subsequent changes in the law.

In determining whether to overrule a prior case, this Court considers several factors. Foremost is the quality of a case's reasoning. *Robinson v City of Detroit,* 462 Mich 439, 463 (2006). This Court then reviews whether the decision at issue defies "practical workability"—whether upsetting reliance interests would work an undue hardship and whether changes in the law or facts no longer justify the questioned decision. *Id.* at 464. To assess the reliance interests at stake, this Court must determine if the "previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations" *Id.* at 466.

First, *Raper*'s reasoning is poor. As described in Section IV of Ms. Yeager's brief, the *Raper* panel dedicated just three sentences to its conclusion that a first-degree murder conviction renders the failure to instruct on voluntary manslaughter harmless. *People v Raper*, 222 Mich App 475, 483 (1997). And, the *Raper* panel ignored *Beach*'s case-by-case approach and prejudice framework. *People v Beach*, 429 Mich 450, 491-92 (1988).

Second, *Raper* has not fostered a reliance interest. This is due at least in part to the fact that *Raper*'s prejudice analysis is dicta. The *Raper* panel was clear: Mr. Raper's case did not warrant a voluntary manslaughter instruction. *Raper,* 222 Mich App at 483. Any further analysis about whether Mr. Raper was harmed by that failure was irrelevant to the holding, and the reasoning does not compel this Court to preserve the Court of Appeals' erroneous ruling.

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The prosecutor listed just six cases that cite *Raper* to argue that the failure to instruct on manslaughter is harmless. None of them are published. Two of those—*People v Davidson* and *People v Keys*—are about involuntary manslaughter, not voluntary manslaughter. In another three, *People v Young, People v Lasley,* and *People v Pagan,* the Court of Appeals panel applied a fact-intensive analysis required by *Beach* and found that the evidence did not warrant a voluntary manslaughter instruction. The prosecutor was able to find just one case in the last twenty-five years where counsel was ineffective for failing to request a voluntary manslaughter instruction, and *Raper* barred a prejudice finding.[2]

Ms. Yeager's case illustrates the reliance interests at stake. No one—not the trial court, the prosecutor, or Ms. Yeager's counsel—referenced *Raper* in Ms. Yeager's brief on appeal or at her *Ginther* hearing. The prosecutor did not argue *Raper* controlled until this case was before the Court of Appeals for the second time. If *Raper* was "so embedded, so accepted, so fundamental," surely the case would have been at the forefront of everyone's mind.

Finally, a change in law warrants overturning *Raper*. Before *Mendoza*, voluntary manslaughter was a cognate lesser-included offense of first-degree murder; after *Mendoza,* this Court held that it was a necessarily included lesser offense. *People v Mendoza,* 468 Mich 527 (2003). The prosecutor tried to dismiss that change as a "codification of existing law", but the holding has real implications for how voluntary manslaughter is proven at trial. A jury must no longer find a mitigating circumstance beyond a reasonable doubt. *People v Van Wyck,* 402 Mich 266, 269 (1978). This change undermines *Raper*'s doctrinal holdings because it reframes both the prosecutor's and jury's role in a criminal conviction. Malice is negated by the presence of provocation and heat of passion.

As Judge Beckering wrote in her concurring opinion in this case, and as the trial court correctly determined following a *Ginther* proceeding,

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[2] All unpublished cases referenced are supplied in the Prosecutor's appendix to supplemental pleading.

"[b]efore she spends the rest of her life in prison, she deserves a new trial." *People v Yeager*, unpub per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 346074), p (1)1 (BECKERING, J, concurring).

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Conclusion and Relief Requested

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

Respectfully submitted,



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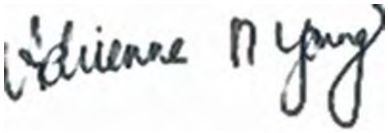
Respectfully submitted,



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