STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MENAYETTA YEAGER, **No. 164055**

Defendant-Appellant.

Wayne County Circuit No. 17-008290-01-FC

Court of Appeals No. 346074

SUPPLEMENTAL BRIEF UPON DIRECTION OF THE COURT

[ORAL ARGUMENT REQUESTED]

FILED UNDER AO 2019-6

[On Appeal from the Court of Appeals,
Judges O'Brien, Cameron, and Beckering]

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research,
Training, and Appeals

Deborah K. Blair (P 49663)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Telephone: (313) 224-8861

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COUNTERSTATEMENT OF JURISDICTION

The Defendant does not include a statement of jurisdiction. The Court has jurisdiction to hear this appeal pursuant to MCR 7.303(B)(1).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

Trial counsel engages in sound trial strategy when he or she listens to his or her client and caters the defense to the expected testimony of the defendant. Here, the trial attorney argued that the defendant acted in self-defense because the Defendant testified that she was afraid of the victim and that is why she shot at him, and therefore, trial counsel did not request an instruction on voluntary manslaughter. Under the circumstances of this case was this sound trial strategy?

The trial court would answer this question, "No."
The Court of Appeals answered, "No."
The People answer, "Yes."
The Defendant answers, "No."

II.

Mere fear is not enough to lower murder to manslaughter; the state of mind must include heat of passion produced by adequate or reasonable provocation. Here, although the Defendant may have experienced emotional excitement after her boyfriend stole her minivan, this did not constitute the type of heat of passion that would lower murder to manslaughter. Therefore, was there a need to instruct on manslaughter in this case?

The trial court would answer this question, "Yes."
The Court of Appeals answered, "No."
The People answer, "No."
The Defendant answers, "Yes."

COUNTERSTATEMENT OF QUESTIONS PRESENTED (CONT.)

III.

Where a jury convicts a defendant of first-degree premeditated murder and not the lesser included offense of second-degree murder, the failure to instruct on voluntary manslaughter is harmless because the jury's finding of premeditation eliminates the possibility that malice was negated by the heat of passion. Here, the jury convicted the Defendant of first-degree premeditated murder and rejected second-degree murder. Therefore, does the jury's determination that the Defendant acted with premeditation render the foregoing of the voluntary manslaughter instruction harmless?

The trial court would answer this question, "No."
The Court of Appeals answered, "Yes."
The People answer, "Yes."
The Defendant answers, "No."

IV.

There is no good reason to overturn a Court of Appeals case when it is completely consistent with this Court's precedent. *People v Raper* is entirely consistent with this Court's holding in *People v Beach* – that an error in failing to instruct on a lesser-included offense is harmless when the jury had the option of a different lesser-included offense and rejected it in favor of the charged offense. Therefore, should *People v Raper* be overturned?

The trial court would answer this question, "Yes."
The Court of Appeals answered, "No."
The People answer, "No."
The Defendant answers, "Yes."

COUNTERSTATEMENT OF FACTS

The Defendant was convicted following a jury trial of first-degree premeditated murder[1] and felony firearm.[2] The Defendant was sentenced to life without the possibility of parole for first-degree murder, and the mandatorily consecutive two years for felony firearm.[3]

The facts of the trial are summarized as follows: In the early morning hours of August 27, 2017, the Defendant observed that her white Ford minivan had been stolen by her boyfriend, Jonte Brooks (the victim). According to the Defendant, Mr. Brooks had pushed her out of the vehicle and driven away, leaving her stranded on the street.[4] The Defendant asked LaBarren Borom, who lived in the vicinity, to take her to the gas station at Warren and Van Dyke where the victim told her he would return the minivan to her.[5] The victim then called back and changed the meeting location.[6] As the Defendant and Mr. Borom waited for the victim to arrive at the gas station, they saw the victim pull into the parking lot of the gas station.[7] The Defendant grabbed a gun and immediately started shooting at the minivan.[8] The victim pulled out of the parking lot and drove down the street.[9] The Defendant got back into Mr. Borom's truck and said, "follow that bitch."[10] Mr. Borom followed the white van but then decided to turn away to his house because he saw the police coming.[11] Meanwhile, the white minivan crashed into a wall

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[1] MCL 750.316.
[2] MCL 750.227b.
[3] 9/06/2018, 11 (5b).
[4] 8/15/2018, 18 (6b).
[5] 8/15/2018, 22-23 (7-8b).
[6] 8/15/2018, 24 (9b).
[7] 8/15/2018, 24 (9b).
[8] 8/15/2018, 24 (9b).
[9] 8/14/2018, 54 (10b).
[10] 8/14/2018, 33; 63 (11b; 12b).
[11] 8/14/2018, 34 (13b).

at the corner of Mack Avenue and Iroquois Street.[12] The victim died of a gunshot wound to the right upper back.[13] The Defendant fled the scene but turned herself into the police the next day.[14]

The Defendant testified that the victim (her boyfriend) had taken her minivan and refused to give it back.[15] The victim had threatened to kill her and Mr. Borom over the phone.[16] Mr. Borom pulled into a gas station and then the victim pulled into the gas station after them.[17] The Defendant claimed that she was going to get out and run but Mr. Borom handed her a gun.[18] At that point, she got out of the truck and shot at the minivan two or three times.[19] She claimed that she shot at the minivan because she was scared because she thought the victim was going to kill her that day.[20] She denied ever telling Mr. Borom to follow the victim.[21]

Defense counsel filed a timely claim of appeal in this case and a motion to remand in the Michigan Court of Appeals. The Court of Appeals remanded the case back to the trial court for an evidentiary hearing limited to the issue of whether defendant's trial counsel rendered ineffective assistance by failing to request an instruction on voluntary manslaughter as a lesser included offense to murder, in an order dated November 9, 2020. The *Ginther* hearing was conducted on Tuesday, August 31, 2021, via Zoom.[22] Following the hearing, the trial

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[12] 8/14/2018, 83-84; 128.
[13] 8/13/2018, 193 (14b).
[14] 8/15/2018, 38 (15b).
[15] 8/15/2018, 20 (16b).
[16] 8/15/2018, 23 (17b).
[17] 8/15/2018, 24 (18b).
[18] 8/15/2018, 24 (18b).
[19] 8/15/2018, 24 (18b).
[20] 8/15/2018, 24 (18b).
[21] 8/15/2018, 26 (27b).
[22] *People v Ginther*, 390 Mich 436 (1993).

court granted the Defendant a new trial, finding that trial counsel had rendered ineffective assistance of counsel for failing to request an instruction on voluntary manslaughter. The People filed a cross-appeal in the Court of Appeals. The Court of Appeals reversed the trial court in an unpublished opinion. The Defendant filed an application for leave to appeal to this Court, which ordered oral argument on the application on May 25, 2022. The Defendant filed her supplemental brief on August 10, 2022. This answer now follows.

ARGUMENT

I.

Trial counsel engages in sound trial strategy when he or she listens to his or her client and caters the defense to the expected testimony of the defendant. Here, the trial attorney argued that the defendant acted in self-defense because the Defendant testified that she was afraid of the victim and that is why she shot at him, and therefore, trial counsel did not request an instruction on voluntary manslaughter. Under the circumstances of this case this was sound trial strategy.

Standard of Review

The standard of review for claims of ineffective assistance of counsel is a mixed one of fact and law.[23] The factual determinations made by the trial court at the *Ginther* hearing are reviewed for clear error whereas the legal conclusions are reviewed *de novo*.[24] "Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions."[25] The United States Supreme Court has held that "in order to receive a new trial on the basis of ineffective assistance of counsel, a defendant must establish that 'counsel's representation fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[26] "When reviewing

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[23] *Mapes v Tate,* 388 F3d 187, 190 (CA 6,.2004).
[24] *Harries v Bell*, 417 F3d 631, 636 (CA 6, 2005).
[25] *People v Schrauben*, 314 Mich App 181, 189-190 (2016), citing US Const., Am. VI; Const. 1963, art. 1, § 20.
[26] *People v Vaughn*, 491 Mich 642, 669 (2012), quoting *Strickland v*

defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'"[27] "Next, the defendant must show that trial counsel's deficient performance prejudiced his defense—in other words, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[28] Counsel's performance should be evaluated at the time of the alleged error without the benefit of hindsight.[29] Matters of strategy that were not successful, in hindsight, do not constitute deficient performance.[30] When reviewing an ineffective-assistance-of-counsel claim, "the inquiry is not whether a defendant's case might conceivably have been advanced by alternate means." [31]

Discussion

The Defendant's trial attorney engaged in sound strategy by listening to his client's version of events and not requesting a voluntary manslaughter instruction in this case. Manslaughter is a necessarily included lesser offense of murder which must be instructed on only where there is evidence to support the instruction.[32] An inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense.[33]

Washington, 466 US 668, 688, 694 (1984).

[27] *People v Jackson* (On Reconsideration), 313 Mich App 409, 431 (2015), quoting *Strickland*, 466 US at 690.

[28] *People v Jackson*, 313 Mich App at 431 (quotation marks and citation omitted).

[29] *People v Grant*, 470 Mich 477, 487 (2004).

[30] *People v Unger*, 278 Mich App 210, 242-243 (2008).

[31] *People v Hieu Van Hoang*, 328 Mich App 45, 64 (2019).

[32] *People v Mendoza*, 468 Mich 527 (2003).

[33] *People v Cornell,* 466 Mich 335, 357 (2002); *People v Mendoza*, 468 Mich 527, 545 (2003).

Under Michigan law, second-degree murder can be reduced to voluntary manslaughter if the element of malice (i.e., the intent to kill, to commit great bodily harm, or to create a very high risk of death or great bodily harm) "is negated by the presence of provocation and heat of passion."[34] The standard jury instructions for voluntary manslaughter are as follows:

M Crim JI 16.8 Voluntary Manslaughter

> (1) [The defendant is charged with the crime of _____ / You may also consider the lesser charge of*] voluntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant caused the death of [*name deceased*], that is, that [*name deceased*] died as a result of [*state alleged act causing death*].
>
> (3) Second, that the defendant had one of these three states of mind: [he / she] intended to kill, or [he / she] intended to do great bodily harm to [*name deceased*], or [he / she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his / her] actions.
>
> [(4) Third, that the defendant caused the death without lawful excuse or justification.]

[34] *People v Mendoza*, 468 Mich 527, 540 (2003).

M Crim JI 16.9 Voluntary Manslaughter as a Lesser Included Offense of Murder

> (1) The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. For manslaughter, the following two things must be present:
>
> (2) First, when the defendant acted, [his / her] thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide.
>
> (3) Second, the killing itself must result from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

Failing to request a particular jury instruction can be a matter of trial strategy.[35] Trial counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases.[36] An all-or-nothing defense strategy is also a legitimate trial strategy.[37] Self-defense and manslaughter may not be legally

[35] *People v Dunigan*, 299 Mich App 579 (2013).
[36] *People v Unger*, 278 Mich App 210, 242 (2008).
[37] *People v Allen*, 331 Mich App 587, 610 (2020).

mutually exclusive defense theories; however, it is certainly within the range of competent representation to acknowledge that they are distinct legal theories, and that when argued at the same time could be confusing for a jury. The killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.[38] Whereas voluntary manslaughter requires "a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result."[39] A killing done in self-defense is completely justified resulting in no conviction at all.[40] Therefore, 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.[41]

Also, defense counsel understood that in order for the Defendant to be guilty of voluntary manslaughter, the killing must have been intentional with adequate provocation, and without time to cool down.[42] In this case, the Defendant testified both at trial[43] and at the evidentiary

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[38] *People v Heflin*, 434 Mich 482, 502 (1990).
[39] *People v Reese*, 491 Mich 127, 154 (2012).
[40] *People v Riddle*, 467 Mich 116 (2002).
[41] Prejudice for purposes of ineffective assistance of counsel is measured by an objective standard of reasonableness. *People v Ackley*, 497 Mich 381, 388 (2015).
[42] 8/31/2021, 39 (18b).
[43] At trial, the Defendant testified on direct examination as follows:

> Q. Okay. Why were you shooting at the van?
>
> A. I was scared.
>
> Q. Did you really think that Jonte was gonna kill you, that day?

hearing that she was afraid and did not mean to kill her boyfriend Jonte' Brooks and, thus, she did not possess the requisite mindset for voluntary manslaughter, which requires an intent to kill or intent to create a high risk of death.[44] Therefore, it could not constitute ineffective assistance for trial counsel not to request an instruction that was antithetical to the defense theory of the case and to his client's own testimony.

Had the Defendant not taken the stand in her own defense, defense counsel could have presumably argued a wide range of defenses or theories (such as, for example, even involuntary manslaughter). But the fact remains that the Defendant chose to testify and testified under oath at trial that she was afraid and did not want to cause harm to her boyfriend, but she thought that he was going to kill her.[45] As such, any discussion of voluntary manslaughter as an alternative theory is immaterial because it requires the examination of the trial attorney's performance to be erroneous only with the benefit of hindsight.[46] Had the trial attorney been successful and had the jury agreed with the Defendant's theory of self-defense, of course, none of this would need to be argued. 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.

A. Yes.

8/15/2018, 24 (9b).

[44] 8/15/2018, 29, 40 (19-20b); 8/31/2021, 66, 69 (21-22b).

[45] 8/15/2018, 24 (9b).

[46] Decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight. *People v Dunigan*, 299 Mich App 579, 589–90 (2013).

To prevail on a claim of ineffective assistance of counsel, a defendant bears a heavy burden to establish that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) but for counsel's error, a reasonable probability exists that the result of the trial would have been different.[47] A reasonable probability has been defined as one sufficient to undermine confidence in the outcome of the trial.[48] In this case, the absence of a jury instruction on voluntary manslaughter does not undermine the result of the trial where there was overwhelming evidence of the Defendant's guilt of first-degree premeditated murder. The Defendant shot at the victim's van seventeen times as it was driving away.[49] The shooting was captured on surveillance video that was admitted into evidence.[50]

Also, the Defendant, despite being under stress, had ample time to stop shooting at the minivan during the affray; that is, she had the opportunity to calm down before engaging in a form of street justice to get her van back. Instead of waiting for the police to arrive at the gas station, the Defendant took out the gun, exited the truck, pointed the gun, fired the gun, and ran after the minivan as it was driving away.[51] The Defendant shot at the minivan seventeen times.[52] That means that the 9 mm semi-automatic handgun that she used was likely emptied.[53]

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[47] *Strickland v Washington*, 466 US 668, 687 (1984).
[48] *People v Chenault*, 495 Mich 142 (2014); *Strickland*, 466 US at 694.
[49] A copy of People's trial exhibit 259, the MSP ballistics report, is attached in the People's Appendix (Item 5).
[50] 8/13/2018, 215 (23b).
[51] 8/14/2018, 33 (11b).
[52] There were seventeen shell casings found at the scene by police. 8/14/2018, 140-144 (24b-28b).
[53] Most semi-automatic handguns come standard with magazines that hold between 15 and 19 bullets with one in the chamber. The gas station attendant, Antonio Fortune, also told the 911 operator that the Defendant had emptied the clip. 8/14/2018, 15 (29b); People's exhibit 253.

The Defendant then got back into Mr. Borom's truck and told him to "follow that bitch."[54] After Mr. Borom told her no, that they need to go because the police were nearby, the Defendant's first reaction was "oh, my God, that was a green light store. We, we in trouble."[55]

Contrary to the Defendant's argument, there is no rule that a voluntary manslaughter instruction is always appropriate no matter what the evidence. What jury instructions are appropriate is always dependent on what evidence has been admitted at trial. In this case, given the testimony of the Defendant that she was only afraid of the victim and did not mean to hurt or kill him, there would be an insufficient basis upon which to request an instruction on voluntary manslaughter. Trial counsel is given wide latitude when it comes to determining the theory of defense and this will necessarily depend on what version of events is given to him or her by the defendant. The defense strategy obviously did not work out as well as counsel had hoped, but that was not because counsel was incompetent.[56]

Trial strategy is only one component of ineffective assistance of counsel inquiry. The Defendant must still demonstrate prejudice, that is, that there is a reasonable probability that absent the mistake the result of the proceeding would have been different.[57] Here, the Defendant cannot make that showing due to the fact that by finding the Defendant guilty of first-degree premeditated murder, the jury specifically found that the Defendant acted with malice aforethought and not in the heat of passion. The jury's rejection of the lesser included offense of second-degree murder[58] in favor of first-degree premeditated

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[54] 8/14/2018, 34 (13b).
[55] 8/14/2018, 34 (13b).
[56] *Harrington v Richter*, 562 US 86, 109 (2011).
[57] *Strickland v Washington*, 466 US 668, 700 (1984).
[58] The elements of second-degree murder are (1) a death, (2) caused by an act

murder[59] (after only approximately six hours of deliberations) reflected an unwillingness to convict on manslaughter. The malice contained in second-degree murder is the same malice contained in voluntary manslaughter, that is the intent (malice) is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[60] The only difference being that in voluntary manslaughter the malice is negated by adequate provocation.[61] By finding the Defendant guilty of first-degree murder, the jury implicitly rejected that the Defendant had the malice necessary for second-degree murder or manslaughter in favor of the much different premeditation necessary for first-degree murder. Therefore, regardless of the trial attorney's performance, the Defendant is still not entitled to a new trial.

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of the defendant, (3) with malice, and (4) without justification or excuse. *People v Werner*, 254 Mich App 528, 531 (2002).

[59] The elements of first-degree murder are (1) the intentional killing of a human being (2) with premeditation and deliberation. *People v Bass*, 317 Mich App 241 (2016)

[60] *People v Werner*, 254 Mich App 528, 531 (2002).

[61] *People v Mendoza*, 468 Mich 527, 540 (2003).

II.

Mere fear is not enough to lower murder to manslaughter; the state of mind must include heat of passion produced by adequate or reasonable provocation. Here, although the Defendant may have experienced emotional excitement after her boyfriend stole her minivan, this did not constitute the type of heat of passion that would lower murder to manslaughter. Therefore, there was no need to instruct on manslaughter in this case.

Standard of Review

The Defendant does not include a statement of the standard of review for this issue. Generally, what facts are necessary to justify the giving of a jury instruction are entrusted to the sound discretion of the trial court.[62] Jury instructions are reviewed as a whole to determine if they accurately and fairly presented the applicable law and the parties' theories to the jury.[63] Questions of law are reviewed *de novo*.[64]

Discussion

Fear is not a sufficient provocation capable of reducing murder to voluntary manslaughter. This writer was unable to find a single published Michigan case that has held that fear alone can reduce murder to manslaughter, and the Defendant also fails to cite to a published case in Michigan holding as such. If fear was converted into adequate provocation for purposes of the crime of voluntary manslaughter, every jury where the defendant claimed to have acted in self-defense would also have to be instructed on the crime of voluntary

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[62] *People v McKinney*, 258 Mich App 157, 163 (2003).
[63] *People v Kelly*, 423 Mich 261, 270-272 (1985).
[64] *People v Mendoza*, 468 Mich 527, 531 (2003)

manslaughter, even though that was never the defendant's theory of the case and there was no other evidence showing that the defendant acted in hot blood. This would be an untenable position which would fundamentally change the definition of manslaughter as it is commonly understood today. All reasonable people who must violently act in order to preserve their own life are afraid – this is not, however, evidence that they committed voluntary manslaughter.

In Michigan, the statutory provision on voluntary manslaughter, MCL750.321, prescribes only the penalty for the crime leaving the definition to be found at common law. At common law, murder is the unlawful killing of another living human being committed with malice.[65] One of the earliest cases to discuss the different degrees of murder was *Maher v People,* in 1862, where the Michigan Supreme Court ruled as follows:

> To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes the death; without the concurrence of both, the crime cannot exist; and, as every man is presumed innocent of the offense with which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense--to the malice as well as to the killing.[66]

From this understanding of homicide, four types of murder were recognized by the common law which also exist today: (1) intent to kill murder; (2) intent to do serious bodily injury murder; (3) depraved heart

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[65] *People v Aaron*, 409 Mich 672, 714 (1980).
[66] *Maher v People*, 10 Mich 212, 218 (1862).

murder; and (4) felony murder.[67] Voluntary manslaughter, MCL 750.321, is a codification of the concept that the malice necessary for murder is negated by sufficient provocation. "To reduce a homicide to voluntary manslaughter the factfinder must determine from an examination of all of the circumstances surrounding the killing that malice was negated by provocation and the homicide committed in the heat of passion."[68] The burden of proof to show provocation is on the defendant, and it must be shown by a preponderance of the evidence.[69]

Fear is not adequate provocation. A murder committed out of only fear is committed without malice:

> But murder is not always attended with the same degree of wicked design, or, to speak more accurately, with the same degree of malice. It may be committed in cold blood, and with much calculation, and it may be committed on a sudden impulse of passion, where the intent is formed and executed in the heat of blood, without any sufficient provocation to extenuate the degree of the offense to manslaughter. In both instances, and in the intermediate cases where the design is of greater or less duration, there is the actual intent to take life.[70]

"Voluntary manslaughter often involves a direct intent to kill, but the law reduces the grade of the offense because, looking at the frailty of human nature, it considers great provocations sufficient to excite the passions beyond the control of reason."[71]

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[67] *People v Aaron*, 409 Mich 672, 714 (1980).
[68] *People v Townes*, 391 Mich 578, 589 (1974).
[69] *People v Dards*, 230 Mich App 597, 604 (1998).
[70] *People v Scott*, 6 Mich 287, 293 (1859).
[71] *People v Scott*, 6 Mich 287, 295 (1859).

The Defendant's entire argument (that fear is sufficient provocation for purposes of voluntary manslaughter) relies on a footnote (incorrectly cited by the Defendant as footnote 4, when in fact it is footnote 3) in a case, *People v Townes*, from 1974, that has nothing to do with the facts of the instant case and was unnecessary to a determination of that case, so it is dicta.[72] *People v Townes* was a case where the defendant was convicted of second-degree murder, but the trial court incorrectly instructed the jury on both manslaughter (mixing-up the elements of involuntary manslaughter with voluntary manslaughter) and self-defense (incorrectly informing the jury that the defendant was the aggressor).[73] The facts of the case were that the defendant had entered a store owned by the decedent in order to confront one of the store's employees on a personal matter.[74] The decedent appeared with a gun and ordered the arguing parties out of the store.[75] The owner was subsequently shot and killed by the defendant under disputed circumstances. In *People v Townes*, the jury was incorrectly instructed on the law. The trial judge confused the instruction for voluntary manslaughter with the instruction for involuntary manslaughter, thus confusing the jury, which asked to be reinstructed on second-degree murder and manslaughter.[76] The court, when it instructed on self-defense, apparently focused on the defendant's conduct with respect to Odom McMillion (the employee) and erroneously assumed that if the defendant was at fault in provoking a disturbance in the tire store, he could then be held legally accountable as an aggressor for any response to his conduct, whether by McMillion

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[72] Defendant-appellant's brief, p. 9-10.
[73] *People v Townes*, 391 Mich 578, 588; 592 (1974).
[74] *Id.*
[75] *Id.*
[76] *People v Townes*, 391 Mich 578, 585-586 (1974).

or any other person. This was error because the defendant may only be held legally accountable as an aggressor for responsive conduct by another that is reasonably attributable to the defendant's own conduct.[77] Therefore, because of these erroneous jury instructions, the defendant was entitled to a new trial.

The correct quote of footnote 3 from *People v Townes* (relied on by the Defendant) is as follows: "The word 'passion' in the context of voluntary manslaughter describes a state of mind incapable of cool reflection. A defendant acting out of a state of terror, for example, is considered to have acted in the 'heat of passion.' *Commonwealth v. Colandro*, 231 Pa. 343, 80 A. 571 (1911); *Austin v. United States*, (overruled) 127 U.S.App.D.C. 180, 188, 382 F.2d 129, 137 (1967)."[78] As can be seen from the above quote, the case does not even use the word "fear," it uses the word "terror" which can have a whole host of meanings that are not fear.[79] Also, even the quoted section relies on a federal case from another jurisdiction that was later overturned (*Austin v United States* was later overruled by *United States v Foster*, 738 F 2d 1082 (DC Cir. 1986)).

Therefore, the footnote referring to "terror" as a basis for provocation was completely unnecessary to the determination of the case since the trial court had incorrectly mixed-up voluntary manslaughter with involuntary manslaughter and incorrectly instructed on self-defense. The result in *Townes* did not depend on definition of provocation that included only fear (or terror). Thus, the

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[77] *Townes*, 391 Mich at 592.
[78] *People v Townes*, 391 Mich 578, 589 (1974).
[79] The word "terror" has four listed definitions listed in the Merriam Webster dictionary, one of which includes "violence or the threat of violence used as a weapon of intimidation or coercion." *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/terror. Accessed 21 Sep. 2022.

footnote referring to "terror" as sufficient provocation is dicta. Black's Law Dictionary (7th ed.) defines obiter dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." Therefore, because the Defendant is unable to show any basis for the idea that fear alone is sufficient provocation for purposes of voluntary manslaughter, the Defendant's position is without merit.

III.

Where a jury convicts a defendant of first-degree premeditated murder and not the lesser included offense of second-degree murder, the failure to instruct on voluntary manslaughter is harmless because the jury's finding of premeditation eliminates the possibility that malice was negated by heat of passion. Here, the jury convicted the Defendant of first-degree premeditated murder and rejected second-degree murder. Therefore, the jury's determination that the Defendant acted with premeditation renders the foregoing of the voluntary manslaughter instruction harmless.

Standard of Review

The Defendant does not include a statement of the standard of review for this issue. Generally, the legal interpretation of the holding of a case is one of law, which is reviewed *de novo*.[80]

Discussion

The Defendant was properly denied a new trial under the rule of *People v Raper*.[81] In that case, the defendant was charged with first-degree murder. The jury was instructed on first-degree murder and second-degree murder and found defendant guilty of first-degree murder. On appeal, the defendant claimed it was ineffective assistance of counsel not to have requested the jury instruction on the lesser

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[80] "To the extent that a trial court's ruling ... involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is *de novo*." *People v Zitka,* 335 Mich App 324, 332 (2020), app den 507 Mich 960 (2021), and app den sub nom, *People v Hernandez-Zitka*, 507 Mich 960 (2021), and cert den sub nom, *Zitka v Michigan*, 142 S Ct 401; 211 L Ed 2d 215 (2021), quoting *People v Tanner*, 496 Mich 199, 206 (2014) (quotation marks and citation omitted).

[81] *People v Raper*, 222 Mich App 475 (1997).

included offense of voluntary manslaughter. The Court of Appeals in *People v Raper* held that the jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter:

> Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel.[82]

The same reasoning must apply here where the claim on appeal is identical. The holding of *People v Raper* has been cited with approval many times since it was issued 25 years ago in 1997.[83] In *People v Raper*, the Defendant was charged with first-degree murder, the jury was instructed on second-degree murder, and the jury convicted the Defendant of first-degree murder, thus displaying an unwillingness to convict on a lesser charge and making the failure to instruct on voluntary manslaughter harmless error.[84]

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[82] *People v Raper*, 222 Mich App 475, 483–84 (1997), citing *People v Launsburry,* 217 Mich.App. 358, 362 (1996).

[83] See, e.g., *People v Davidson*, COA unpublished decision, no. 336176, issued January 8, 2019; *People v Pagan*, COA unpublished decision, no. 325558, issued May 23, 2017; *People v Young*, COA unpublished decision, no. 324607 & 324608, issued March 10, 2016; *People v Lasley*, unpublished COA decision, no.322969, issued December 10, 2015; *People v Davis*, unpublished COA decision, no. 302401, issued April 17, 2012; *People v Keys*, unpublished COA decision, no. 277649, issued February 12, 2009.

[84] See, e.g. *United States v Frady,* 456 US 152, 174 (1982), where the defendant was convicted of first-degree premeditated murder but claimed on appeal that the jury should have been instructed on voluntary manslaughter: "Plainly, a rational jury that believed Frady had formed a "plan to kill ... a positive design to kill" with "reflection and consideration amounting to

The elements of first-degree premeditated murder (1) the intentional killing of a human being (2) with premeditation and deliberation.[85] MCL 750.316(1)(a) defines first-degree premeditated murder as any willful, deliberate, and premeditated killing. In contrast, voluntary manslaughter is defined as "a person who has acted out of a temporary excitement induced by adequate provocation and not from the deliberation and reflection that marks the crime of murder."[86] Thus, a finding of one state of mind necessarily precludes the other.

The jury was properly instructed on the elements of first-degree premeditated murder as follows:

> In count one, the defendant is charged with the crime of first-degree premeditated murder. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant caused the death of Jonte Brooks. That is, that Jonte Brooks died as a result of a gunshot wound.
>
> Second, that the defendant intended to kill Jonte Brooks.
>
> Third, that this intent to kill was premeditated. That is, thought out beforehand.
>
> Fourth, that the killing was deliberate, which means that the defendant considered the pros and cons of the killing, and thought about, and chose her actions before she did it. There must have been real and substantial

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deliberation," could not also have believed that he acted in "sudden passion ... aroused by adequate provocation ... causing him to lose his self-control." We conclude that, whatever it may wrongly have believed malice to be, Frady's jury would not have found passion and provocation[,]." *U S v Frady*, 456 US 152, 174; 102 S Ct 1584, 1597; 71 L Ed 2d 816 (1982).

[85] *People v Oros*, 502 Mich 229, 240 (2018).

[86] *People v Townes*, 380 Mich 678, 681-682 (1968).

> reflection for 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.
>
> It is for you to decide if enough time passed, under the circumstances of this case. *The killing cannot be the result of a sudden impulse, without thought or reflection.*
>
> Fifth, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.[87]

Since the jury was specifically instructed that in order to find the Defendant guilty of first-degree premeditated murder, they could not find that she acted on a sudden impulse without reflection, and, therefore, they would not have found that she killed in the heat of passion (manslaughter) in this case. That is, the jury, in finding that the Defendant acted with premeditation and deliberation, made an implicit finding that the requisite mindset for manslaughter did not exist. Juries are presumed to follow their instructions.[88]

The concept of harmless error for trial imperfections is codified in the Michigan Court Rules and by statute. MCR 2.613(A) provides the following:

> **(A) Harmless Error.** An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with

[87] 8/15/2018, 129-130 (emphasis supplied) (30b-60b).
[88] *People v Graves*, 458 Mich 476 (1998).

> substantial justice.[89]

The harmless error statute provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.[90]

The harmless error doctrine can be succinctly stated as that appellate courts should not reverse a conviction unless the error was prejudicial. Because the jury was instructed on the Defendant's theory of the case, that is, that she acted in self-defense, the harmless error doctrine should apply here.

It strains credulity to say that a jury that rejected a finding of willfullness and wantoness (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 a sudden impulse without thought or reflection. The finding of the jury that the Defendant acted with premeditation and deliberation implicit in the verdict of first-degree premeditated murder, forecloses the idea that the same jury would have somehow found that the Defendant did not act with premeditation and deliberation but acted instead suddenly in the heat of passion. Therefore, there was no prejudice caused to the Defendant by the lack

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[89] MCR 2.613.
[90] MCL 769.26.

of the voluntary manslaughter instruction and the Defendant is not entitled to a new trial.

IV.

There is no good reason to overturn a Court of Appeals case when it is completely consistent with this Court's precedent. *People v Raper* is entirely consistent with this Court's holding in *People v Beach* -- that an error in failing to instruct on a lesser-included offense is harmless when the jury had the option of a different lesser-included offense and rejected it in favor of the charged offense. Therefore, *People v Raper* should not be overturned.

Standard of Review

The Defendant does not include a statement of the standard of review for this issue. The issue of whether a case was wrongly decided or not is a question of law, which is reviewed *de novo*.[91]

Discussion

The holding of *People v Raper* need not be disturbed because it is legally sound. *Robinson v Detroit* set forth a multifactored test that this Court applies before overruling a precedent in order to provide respectful consideration to the cases decided by predecessors.[92] The first question is whether the earlier decision was wrongly decided.[93] But "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate."[94] Rather, "[c]ourts should also review whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned

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[91] *People v Tanner*, 496 Mich 199, 206 (2014).
[92] *Robinson v Detroit*, 462 Mich 439 (2000).
[93] *Id*. at 464.
[94] *Id*. at 465.

decision."[95] These criteria weigh in favor of not overruling *People v Raper*.

In this case, there has been no change in the law or the facts that would call the justification of the decision into question. Although the Defendant cites to *People v Mendoza* as somehow justifying the overruling of *People v Raper*, *People v Mendoza* was merely a codification of what was already the law.[96] *Mendoza* did not fundamentally change the definition of voluntary or involuntary manslaughter or of first-degree premeditated murder or second-degree murder. Rather, *Mendoza* merely clarified that where there is no evidence presented to justify an instruction on a lesser included offense of voluntary manslaughter it need not be given by the court.[97]

The Defendant also argues that *People v Richardson* supports a finding that *People v Raper* was wrongly decided, but *People v Richardson* is completely factually distinguishable from the instant case and from *People v Raper*. In *People v Richardson*, the defendant was convicted of first-degree premeditated murder and had requested an instruction on involuntary manslaughter. The defendant had testified at trial that he killed the victim but that it was result of an accidental discharge of a firearm and there was evidence that the defendant's acts were not intended to produce serious bodily harm.[98] The defendant testified that he pulled a rifle out of his car that he and the victim wrestled, and the gun went off and the victim fell to the ground while still holding on to the gun.[99] Consistent with the Defendant's theory of the case, the defense requested an instruction on involuntary

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[95] *People v Breidenbach*, 489 Mich 1, 15–16 (2011).
[96] Defendant-Appellant's brief, p. 28.
[97] *People v Mendoza*, 468 Mich 527 (2003).
[98] *People v Richardson*, 409 Mich 126 (1980).
[99] *People v Richardson*, 409 Mich 126, 133 (1980).

manslaughter and reckless discharge of a firearm, but both instructions were denied. The Court held that this was reversible error because the instruction was requested and because there was evidence presented which would have supported conviction of either of those lesser offenses.[100] Thus, the effect of the trial judge's refusal to instruct on the lesser offenses of involuntary manslaughter and reckless use of a firearm was to foreclose the jury's option to convict the defendant in accordance with his own testimony, evidence, and theory.[101] The key difference here is that it was not the Defendant's theory that she killed the victim in the heat of passion. Rather, it is very clear that the Defendant testified repeatedly, that the defense theory was one of only self-defense. Thus, the case has no applicability to the instant case.

In *People v Beach,*[102] this Court held (consistent with *Raper*) that the failure to instruct on a lesser-included offense is harmless error when the jury's rejection of an instructed-on lesser-included offense logically precluded a guilty verdict as to the *uninstructed* lesser. That is, in *Beach* there was a conspiracy between the defendant and her accomplice to take money from the victim. She was charged with, and convicted of, conspiracy to commit armed robbery, with the jury rejecting the lesser-included conspiracy to commit *unarmed* robbery. The defendant had also requested an instruction on conspiracy to commit larceny in a building, because it would have been reasonable to find that the perpetrators intended to obtain the victim's money secretly, rather than by force. Because a rational view of the evidence would have

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[100] *Id.* at 145.
[101] *People v Richardson*, 409 Mich 126, 141; 293 NW2d 332, 338 (1980), holding mod by *People v Beach*, 429 Mich 450 (1988).
[102] *People v Beach*, 429 Mich 450 (1988).

supported conspiracy to commit larceny in a building, the trial court erred in refusing the instruction.

Nevertheless, despite the error, this court affirmed defendant Beach's conviction because the jury's rejection of conspiracy to commit unarmed robbery, and instead convicting her of conspiracy to commit armed robbery, logically required the use of a weapon as part of the conspiracy. According to the *Beach* Court, "[i]mplicit in the jury's verdict in the case sub judice is a finding of a use of a weapon which indicates a greater use of force than would be the case in unarmed robbery."[103] Because the jury "had the choice of a lesser offense and rejected it in favor of conviction of a higher offense," the error in failing to instruct on an even lower offense was necessarily harmless.[104]

People v Raper follows this precise reasoning, and therefore should not be overturned. By rejecting second-degree murder in favor of premeditated murder, defendant's jury necessarily found that she deliberately "measure[d] and evaluate[d] the major facets of her choice" to shoot the victim.[105] Or, as the first-degree premeditated murder jury instruction puts it, defendant "considered the pros and cons of the killing and thought about and chose [his / her] actions before [he / she] did it. … The killing cannot be the result of a sudden impulse without thought or reflection."[106] Again, this finding by the jury rules out the possibility that defendant acted in the heat of passion, and the jury's rejection of second-degree murder confirms that it was not inclined to exercise leniency. *People v Raper* is good authority on these points and should not be discarded.

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[103] *Id.* at 492.
[104] *Id.* at 494.
[105] See *People v Oros,* 502 Mich 229, 240 (2018) ("to deliberate is to measure and evaluate the major facets of a choice or problem").
[106] M Crim JI 16.1.

Conclusion

For all the above reasons, the Defendant is unable to prove that she is entitled to a new trial. The Defendant was provided able counsel and received a fair trial. The fact that the Defendant's trial attorney listened to the Defendant's version of events and crafted a defense that matched that version of events was not a serious mistake and does not entitle the Defendant to a new trial. Also, the Defendant has not demonstrated that this alleged error (if there was one) undermined the result of the trial or made a different result reasonably probable. Prejudice only exists when correcting the alleged error would have produced a substantial likelihood of a different result.[107] The prosecution's evidence in this case was very strong – the Defendant was captured on surveillance video shooting seventeen times at the victim's van as it drove away and the Defendant told Labarren Barom to "follow that bitch," and pursue the victim, all consistent with premeditation and deliberation. Fundamental fairness dictates that the Defendant was properly found guilty of murder for her crime. The requisite prejudice does not exist in this case.

[107] *Harrington v Richter*, 562 US 86, 111-112 (2011). See also *Strickland v Washington*, 466 U S at 693, 104 S Ct 2052 (1984): "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." (internal citation omitted).

RELIEF REQUESTED

THEREFORE, the People respectfully request that this Honorable Court deny leave to appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research, Training,
and Appeals

/s/ *Deborah K. Blair*

DEBORAH K. BLAIR (P 49663)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Telephone: (313) 224-8861

Dated: September 21, 2022

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 8,893 countable words.

/s/ *Deborah K. Blair*

DEBORAH K. BLAIR (P 49663)
Assistant Prosecuting Attorney

[The People's Appendix is attached separately.]