No. 08-1470 MAY 28 2009

In the Supreme Court of the United States

MARY BERGHUIS, Warden,
Petitioner,

v

VAN CHESTER THOMPKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkin's guilt allowed the State court to reasonably reject the claim.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Mary Berghuis, Warden of a Michigan correctional facility. The Respondent is Van Chester Thompkins, Jr., an inmate.

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The opinion of the Court of Appeals is published at 547 F.3d 572 (6th Cir. 2008). Appx 1a-37a. The Order of the United States District Court denying the petition is unpublished. Appx 39a-72a. The decision of the Michigan Court of Appeals affirming Thompkins's conviction is unpublished. Appx 74a-82a.

JURISDICTION

The federal district court reviewed the petition for writ of habeas corpus pursuant on 28 U.S.C. §2254(d). Following the denial of the petition, Thompkins appealed to the United States Court of Appeals for the Sixth Circuit. That Court, in an opinion filed November 19, 2008, reversed and directed the district court to grant the petition on two grounds: (1) that Thompkins's rights were violated under *Miranda*, and (2) Thompkins was denied the effective assistance of counsel. The State of Michigan filed a petition for rehearing and suggestion for rehearing en banc which was denied on February 24, 2009. Appx 38a. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the circuit court. 28 U.S.C. §2101(c). *See also* Sup. Ct. R. 13(1), (3) and Sup. Ct. R. 20. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment. The statute involved is 28 U.S.C. §2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The State of Michigan files this petition for writ of certiorari seeking an order vacating the opinion of the United States Court of Appeals for the Sixth Circuit in *Thompkins v. Berghuis*.[1] The Sixth Circuit determined that an interrogating officer is forbidden from attempting to persuade a criminal defendant to waive his *Miranda* rights after the defendant indicates an understanding of his rights but does not indicate a desire to assert or waive them. The opinion of the Sixth Circuit expands the right created in *Miranda v. Arizona* and runs contrary to 28 U.S.C. §2254(d)(1), which limits federal habeas review of State court convictions to what is already clearly established by Supreme Court law.[2] Nothing in the Constitution or this Court's jurisprudence prohibits an officer from continuing to speak to a defendant after he indicates an understanding of his rights but has not yet decided whether to invoke them. This error of the Sixth Circuit is particularly troubling because it creates this expansion of a constitutional rule in a habeas case arising out of State court conviction in which review is limited by §2254(d).

Miranda ensures that a defendant is informed of his rights to remain silent and to have the assistance of counsel in light of the coercion inherent in a custodial interrogation. Its function is fully served at the point a defendant is read his rights, indicates his understanding of those rights, and chooses not to assert them. Prohibiting a non-coercive communication between a police officer after the warnings have been given and understood but not invoked, adds a layer of prophylaxis not justified by *Miranda's* rationale. The coercion

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[1] *Thomkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

inherent in a custodial interrogation is negated by the understanding receipt of the warnings themselves. Non-coercive communications after an understanding receipt of the warnings do not involve any of the dangers *Miranda* was designed to overcome.

Adding the new layer of prophylaxis to *Miranda* without an adequate rationale is in itself sufficiently serious to merit review by this Court. Supreme Court Rule 10(a), (c). But here, the Sixth Circuit expanded the law in a habeas action arising from a State court conviction, which also is an important question of federal law. Its review of the claim should have been limited to whether the State court decision ran contrary to, or involved an unreasonable application of, clearly established Supreme Court law under §2254(d).

The Sixth Circuit also granted Thompkins habeas relief on his claim of ineffective assistance of counsel without limiting its review of the claim as required by §2254(d). The overwhelming evidence of Thompkins's guilt allowed the State court to reasonably reject this claim. This error, particularly when coupled with the Sixth Circuit's other error on the Fifth Amendment issue, warrants review by this Court.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Prelesnik v. Avery,* (08-1389); *Metrish v. Newman*, (08-1401); and *Berghuis v. Smith*, (08-1402). All four are murder cases, all published, all reaching final disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has

dramatic consequences for this case, by wrongly vacating Thompkins's murder conviction. This Court should grant this petition.

STATEMENT

A jury convicted Van Chester Thompkins of one count of first-degree murder, one count of assault with intent to commit murder, and several firearm offenses. The conviction results from an altercation in which he fatally shot one person and shot and wounded another. The surviving victim identified Thompkins and testified against him at trial. Thompkins confessed to a friend—the details of which were corroborated by physical evidence—and that friend also testified against him at trial. Thompkins's co-defendant also testified against him, stating that he heard the shots and saw Thompkins holding a semi-automatic weapon. After the crime, Thompkins fled to Ohio and attempted to change his identity. When he was arrested in Ohio he gave a false name. Appx 42a-46a.

The district court succinctly described facts surrounding Thompkins's interrogation by police following his arrest. Southfield Police Detective Christopher Helgert was the only person to testify regarding Thompkins's interrogation following his arrest in Ohio. Appx 46a. Helgert testified that after Thompkins was read his *Miranda* warnings, he neither requested an attorney nor indicated that he did not want to talk to the officers. The officers then spoke to Thompkins for approximately two hours and forty-five minutes. Helgert and his partner did most of the talking; Thompkins occasionally responded saying, "yeah," "no," or "I don't know." Appx 46a. Thompkins gave both verbal and non-verbal responses to questions including "eye contact," "a nod of the head," and "look[ing] up." Appx 5a.

Helgert testified that towards the end of the interview, he asked Thompkins if he prayed to God. Helgert testified that Thompkins said, "yes" and that his demeanor changed at this point in that he looked directly at Helgert with moistened eyes and confessed to the crime:

> Helgert then asked [Thompkins]: "Do you pray to God to forgive you for shooting that boy down?" Helgert testified that [Thompkins] answered "yes" and then looked down. The interview ended shortly thereafter. Appx 46a.

In his direct appeal, the Michigan Court of Appeals rejected Thompkins's contention that his *Miranda* rights were violated in an unpublished opinion. Appx 75a-76a.[3] The Michigan Supreme Court subsequently denied leave to appeal. Appx 73a.[4]

Subsequently, Thompkins filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in which he raised multiple claims, including his *Miranda* claim and a claim that he was denied the effective assistance of trial counsel. Appx 83a-91a. The district court denied the petition but granted a certificate of appealability. The Sixth Circuit found that these two claims were meritorious. The Sixth Circuit found that Thompkins's statement to police should have been suppressed because he never implicitly or explicitly waived his *Miranda* rights. It also found that Thompkins was denied the effective assistance of counsel for his counsel's failure to request a limiting jury instruction.

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[3] *People v. Thompkins*, Mich. Ct. App. No. 242478 (February 3, 2004).

[4] *People v. Thompkins*, 471 Mich. 866; 683 N.W.2d 676 (2004).

REASONS FOR GRANTING THE PETITION

In this habeas case from a State conviction, the Sixth Circuit erroneously extended the rule in *Miranda* in a manner that will prevent police officers from attempting to non-coercively persuade a defendant to cooperate after the defendant indicates his understanding of his rights but has not yet decided to invoke them. §2254(d) barred the Sixth Circuit from expanding *Miranda* in this manner.

Neither *Miranda* nor its progeny prohibit interaction between an officer and a defendant after warnings have been given and acknowledged but before the invocation of rights. *Miranda* was designed to protect a core value of the Fifth Amendment by preventing the police from obtaining an incriminating statement from a defendant during a custodial interrogation without first ensuring that the suspect understands his right to remain silent and his right to counsel. There is no constitutionally-based rationale to add another layer of protection to prevent police from attempting to non-coercively persuade a defendant to cooperate after the defendant has indicated his understanding of those rights, but has chosen not to exercise them.

After the warnings have been understandingly received, the coercion inherent in a custodial interrogation has been dispelled. The defendant can cease the questioning at any time if he chooses. The only issue remaining is whether the defendant's participation in the interview by the police is voluntary. There was nothing coercive about Thompkins's confession here. While the post-warning interview in this case lasted for more than two-hours, it did not contain any of the hallmarks of coercion: a single reference to Thompkins's guilty conscience produced an incriminating statement.

There was no Fifth Amendment violation. §2254(d) required the Sixth Circuit to limit itself to the body of already clearly established Supreme Court law, and it prevented the Sixth Circuit from expanding *Miranda's* coverage to prohibit the interaction that took place between Thompkins and the police in this case.

Additionally, the Sixth Circuit did not give adequate deference to the State court decision that Thompkins received the effective assistance of counsel. This case involved weighty evidence of Thompkins's guilt. It was not objectively unreasonable for the State court to have found that the failure of the trial court to read a limiting instruction to the jury did not result in prejudice.

I. The Sixth Circuit wrongly expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate after informing him of his rights, and the defendant did not invoke them but did not waive them.

The *Miranda* warnings build a fence around the Fifth Amendment by dispelling the coercion inherent in a custodial interrogation. When the warnings have been understandingly received, the inherent coercion has been accounted-for and what remains is the prohibition against obtaining a confession that is the product of force, threats or promises by the government.[5] The Sixth Circuit unjustifiably raised the fence by requiring even non-coercive communication to stop before a defendant invokes his right to remain silent. This is not supported by the Fifth Amendment, and the Sixth Circuit cannot create new rules in a habeas case.

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[5] *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991).

A. Miranda does not prohibit interaction between an officer and a defendant after warnings have been given but before the invocation of rights by the defendant.

The fundamental purpose of *Miranda* is "to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process."[6] It is the inherent "compulsion" that a custodial interrogation brings to bear upon a defendant that the *Miranda* warnings were designed to protect against.[7] When the warnings are given and understood this purpose is fully served. The rationale prohibiting communication after the invocation of the right to remain silent does not extend to a situation where the defendant has neither invoked nor waived his rights.

In the context of equivocal requests for counsel, this Court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue."[8] So too, just because a suspect *might* want to remain silent, the Fifth Amendment protection against

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[6] *Moran v. Burbine*, 475 U.S. 412, 426 (1986) ("*Miranda* attempted to reconcile [competing] concerns by giving the defendant the power to exert some control over the course of the interrogation"); *Oregon v. Elstad*, 470 U.S. 298, 308 (1985) ("Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities").

7 *Mathis v. United States*, 391 U.S. 1, 5 (1968); *Dickerson v. United States*, 530 U.S. 428, 435 (U.S. 2000) ("the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.")

[8] *Davis v. United States*, 512 U.S. 452, 462 (1994).

compulsory self-incrimination does not require communication to stop. Where a defendant has not decided to invoke his right to remain silent, the police are permitted to continue to talk with him. The coercion inherent in a custodial interrogation is alleviated by the understanding receipt of the warnings. And continued communication after that point does not render an otherwise non-coercive confession violative of the Constitution. The Constitution does not stop the police from speaking to someone who has been arrested once that person is informed of his rights. The Constitution only requires that the participation be voluntary.[9]

In *Connecticut v. Barrett*, this Court rejected the contention that a limited invocation of one's rights suffices to bar questioning where the defendant only agreed to give an oral statement to the police.[10] So too here, the fact that Thompkins was unwilling to sign the advice of rights form, and only orally stated that he understood them, does not indicate that he wished to invoke them. The only evidence offered to the State court demonstrated that Thompkins indicated an understanding of his rights, listened to the speech given by the officer, and then elected to cooperate when he made an incriminating statement. Thompkins's right to stop the interview remained unfettered throughout the interrogation process. The fact that Thompkins was unresponsive through much of the officer's attempt to persuade him to cooperate does not point to an invocation of the right to remain silent. This Court has made it clear that a suspect's refusal to answer particular questions is "not [an] assertion[] of his right to remain silent" because such a refusal does not amount to a request to terminate the interview altogether.[11]

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[9] *Blackburn v. United States*, 361 U.S. 199, 208 (1960).
[10] *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987).
[11] *Fare v. Michael C.*, 442 U.S. 707, 727 (1979).

The theory of *Miranda* is that "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."[12] The Constitution does not protect against freely-given confessions. Once a defendant is armed with knowledge of these rights, his choice whether to exercise his privilege to remain silent should be viewed as an act of free will.[13] That reasoning is wholly applicable in a case, such as this one, where the suspect never invokes his rights after expressing his understanding of them, and otherwise chooses not to cut-off his dialogue with the police. There was no coercion here. If a defendant is informed of and understands his rights but never invokes them, there is no reason to indulge in *Miranda's* presumption that his answers to any questions "cannot be other than the product of compulsion."[14]

In rejecting this analysis, the Sixth Circuit simply ignored first principles. Thompkins was read his rights, he understood them, and he never invoked them. A waiver of *Miranda* rights need not be explicit. This case is factually similar to this Court's decision in *North Carolina v. Butler*, in which this Court held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."[15] This Court explained that to show an implied waiver "mere silence is not enough," but that this "does not mean that the defendant's silence coupled with an understanding of his rights and a course of

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[12] *Moran*, 475 U.S. at 427.
[13] *United States v. Washington*, 431 U.S. 181, 188 (1977).
[14] *Miranda*, 384 U.S. at 474.
[15] *North Carolina v. Butler*, 441 U.S. 369 (1979).

conduct indicating waiver, may never support a conclusion that a defendant has waived his rights."[16]

The facts of this case evidence the need for this Court to clarify the standard at issue under the Fifth Amendment and *Miranda.* The Sixth Circuit mischaracterized *Butler* as a narrow exception to the requirement of an explicit waiver, and finding that because the facts of Thompkins's case did not fit within the narrow exception, that error must have occurred. But the *Butler* decision did not set forth the minimum requirements for a waiver.

The other circuits that examined similar cases did not reach this result. In *Gorham v. Franzen*, the Seventh Circuit held that the defendant had waived his *Miranda* rights where he indicated his understanding of his rights but did not initially waive them.[17] After hearing the evidence against him, the defendant made a statement, and the Seventh Circuit determined that his "failure to invoke clearly those rights, which defendant knew and understood, amounted to a waiver." Likewise the First and Fifth Circuit concluded that there was an implied waiver where immediately after a defendant indicated an understanding of his rights he made a statement without an express waiver.[18]

In contrast, the Sixth Circuit reasoned that Thompkins never waived his rights despite the fact that he indicated his understanding of his rights, occasionally responded to Halgert's statements, gave both verbal and non-verbal responses to questions, and then made an incriminating statement. The underlying principle of

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[16] *Butler*, 441 U.S. at 373.

[17] *Gorham v. Franzen*, 760 F.2d 786, 796 (7th Cir. 1985).

[18] See, e.g., *Bui v. DiPaolo*, 170 F.3d 232 (1st Cir. 1999); *United States v. Ogden*, 572 F.2d 501, 502 (5th Cir. 1978).

this analysis requires that a defendant make an affirmative waiver before the police may continue the interview. Neither the Fifth Amendment, nor this Court's *Miranda* jurisprudence requires this conclusion.

What occurred in this case was an interrogation that did not violate the Constitution or any of *Miranda*'s existing mandates. The warnings were given. They were understood by Thompkins. Thompkins did not assert his rights but had not decided whether to waive them either. The police then used a non-coercive speech to convince Thompkins to submit to questioning. The Sixth Circuit noted that during the speech, Thompkins occasionally nodded his head or gave short verbal responses. Appx 5a, 46a. And finally, Thompkins waived his rights by answering a single question. There is no evidence that Thompkins was "threatened, tricked, or cajoled" into this waiver.[19]

Thompkins's will was not overborne by the speech. Police appeals to the defendant's sympathies, such as the famous 'Christian burial speech' ploy, do not render a confession involuntary.[20] A one-sentence appeal to a defendant's conscience is far removed from the types of coercive conduct the Founding Fathers who drafted the Fifth Amendment had in mind.

Under the expansion of *Miranda* created by the Sixth Circuit in this case, police are prohibited from speaking to a defendant after he indicates he understands his rights but says nothing further. The effect of the Sixth Circuit decision is to create a rule that the police may not attempt to non-coercively persuade a

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[19] *Miranda*, 384 U.S., at 476.

[20] 2 LaFave, Israel and King, Criminal Procedure § 6.2 (c), p. 636 (3rd ed. 2007); *State v. Woods*, 632 S.E.2d 654 (Ga. 2006); *Nelson v. State*, 850 S.2d 514, 523 (Fla. 2003).

defendant to cooperate after he indicates he understands his rights. This requirement has not been previously imposed by this Court before, and the granting of certiorari is necessary to ensure the integrity of this Court's decisions.

B. § 2254(d) barred the Court of Appeals from expanding *Miranda*.

The Sixth Circuit expanded the *Miranda* rule in this case despite the fact that the issue arose in a habeas action from a State court conviction. In habeas actions review is limited to whether the State court decision involved an objectively unreasonable application of already existing and clearly established Supreme Court law.[21]

This Court has taken a very narrow view of what constitutes clearly established law. For example, in *Carey v. Musladin*, and *Wright v. Van Patten* it reversed grants of habeas relief because the legal basis for the claims could not be supported by this Court's precedent.[22] Here too, the Sixth Circuit went beyond the rights created by this Court's clearly established law.

In *Carey*, this Court reversed the Circuit Court's grant of relief when spectators wore buttons depicting the victim of a homicide because this Court had not yet confronted the effort of spectator-based conduct on the fairness of the trial. This Court followed *Carey* in *Wright*, finding that a claim could not be based on clearly established law because this Court had not previously held that a counsel's participation in a plea conference by speakerphone was a denial of counsel.

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[21] §2254(d).

[22] *Carey v. Musladin*, 549 U.S. 70 (2006); *Wright v. Van Patten*, 128 S. Ct. 743 (2008).

Similarly, nothing in this Court's decisions prohibit a police officer from attempting to convince a defendant to cooperate after he indicates an understanding of his *Miranda* rights, but has not decided yet whether to waive them or invoke them. With an absence of clearly established precedent forbidding what occurred in this case, the Sixth Circuit was required by §2254(d) to defer to the State court decision.

The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[23]

II. The Sixth Circuit did not give adequate deference to the State court decision that Thompkins received the effective assistance of counsel.

The Sixth Circuit also granted Thompkins relief on the ground that his counsel's failure to request a limiting jury instruction constituted prejudicial

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[23] See *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008)(the Sixth Circuit rejected the State court's determination that there was no prejudice on the claim of ineffective assistance of counsel because alibi testimony is always a jury question); *Newman v. Metrish*, 543 F.3d 793 (2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons); and *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

ineffective assistance of counsel. In doing so, it first erroneously examined the claim *de novo*, and then concluded that the contrary decision by the State court was objectively unreasonable.

The Sixth Circuit did not afford the State court decision the deference it was due under §2254(d). This Court has consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. Where a standard is at issue, State court decisions are given greater leeway:

> If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.[24]

In *Knowles v. Mirzayance*, this Court held that ineffective-assistance-of-counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably

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[24] *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

determine that a defendant has not satisfied that standard."[25]

When the State court in this case found that Thompkins was not prejudiced by his counsel's failure to request a limiting instruction, it was applying a broad constitutional standard. And because the evidence presented at trial against Thompkins was strong, it was not objectively unreasonable for the State court to conclude that there was no reasonable probability that the result of his trial would have been different had the instruction been requested.[26]

The trial court—which unlike the Sixth Circuit observed the testimony and evidence first-hand—recognized that the evidence against Thompkins was quite strong. The morning following the shooting, the surviving victim, Frederick France, positively identified Thompkins as the shooter and Purifoy as the driver from the surveillance photograph. France was 100% sure Thompkins was the shooter. Thompkins told another man that he had to "pop them niggers." Appx 42a-46a.

After the shooting, Thompkins fled the State for over a year and concealed his identify. Thompkins attempted to flee once again when he was eventually discovered in Ohio. When Thompkins was arrested in Ohio, he had on his person a non-operator's license, a social security card and a birth certificate, all in names different from his own. He insisted his name was a name other than his own. Appx 42a-46a. In Michigan, evidence of flight, which would include leaving the

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[25] *Knowles v. Mirzayance*, 556 U. S. ____ (2009).
[26] *Strickland v. Washington,* 466 U.S. 668, 694 (1984).

jurisdiction, is consciousness of guilt.[27] So is concealing one's identity.[28]

Thompkins was the owner or the primary operator of the van used during the murder which was "dumped" and "stripped" after the murder—only after the identifying gold rims and stereo were removed. Even if the jurors did not believe Thompkins was the shooter, he could have been convicted under an aider or abettor theory and the jury was so charged. Appx 42a-46a.

The Sixth Circuit erred in finding that Thompkins was prejudiced by his counsel's failure to request a limiting instruction, and it compounded its error by focusing on its own determination that prejudice occurred rather than focusing on whether the decision of the State court was reasonable.

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[27] *People v. Coleman*, 210 Mich.App. 1, 4; 532 N.W.2d 885, 887 (1995); *People v. Cutchall*, 200 Mich.App. 396, 401; 504 N.W.2d 666, 668 (1993).

[28] *Cutchall*, *supra* at 400.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Sixth Circuit should be reversed.

Respectfully submitted

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