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MIED (Rev 1/31/05) Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Eastern District of Michigan
Name (under which you were convicted): Teresa Ann Dunigan-Snell	Docket or Case No.:
Place of Confinement: Robert Scott Correctional Facility, 47500 Five Mile Road, Plymouth, Michigan 48170	Prisoner No.: 654431
Petitioner (include the name under which you were convicted) **TERESA ANN DUNIGAN-SNELL**	Respondent (authorized person having custody of petitioner) v. **CLARICE STOVALL**
The Attorney General of the State of Michigan	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: 9 th Circuit Court-Kalamazoo County-227 West Michigan Ave.-Kalamazoo, Michigan 49007

   (b) Docket or case number (if you know): C07000199-FC

2. (a) Date of judgment of conviction (if you know): July 02, 2007

   (b) Date of sentencing: August 16, 2007

3. Length of sentence: 7y to 20y and 39y to 60y

4. In this case, were you convicted on more than one count or of more than one crime?
   ☒ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
   Subpoenas-Perjury (MCL 767A.9(B) and Murder 2 nd Deg. (MCL 750.317) ABS

6. (a) What was you plea? (Check one)
   ☒ Not guilty ☐ Nolo contendere (no contest)
   ☐ Guilty ☐ Insanity plea

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Michigan Court of Appeals

(b) Docket or case number (if you know): 280522

(c) Result: Denied

(d) Date of result (if you know): October 23, 2008

(e) Citation to the case (if you know):

(f) Grounds raised: See Attachment A

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: Michigan Supreme Court

(2) Docket or case number (if you know): 137745

(3) Result: Denied

(4) Date of result (if you know): February 24, 2009

(5) Citation to the case (if you know):

(6) Grounds raised: See Attachment B

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules concerning this judgment of conviction in any state court? ☐ Yes ☒ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of result (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? ☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? ☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? ☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on you petition, application, or motion?

(1) First petition: ☐ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: See Attachment C

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment C

(b) If you did not exhaust you state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue in a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules? ☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: See Attachment C

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment C

(b) If you did not exhaust you state remedies on Ground Two, explain why: _____

(c) **Direct Appeal of Ground Two:**
(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**
(1) Did you raise this issue in a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules? ☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

_____

_____

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

_____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue in a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules? ☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

_____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust you state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

□ Yes □ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue in a motion for relief from judgment pursuant to Subchapter 6.500 of the Michigan Court Rules?

□ Yes □ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

□ Yes □ No

(4) Did you appeal from the denial of your motion or petition?

□ Yes □ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

□ Yes □ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

_____

_____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes □ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

_____

_____

_____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

_____

_____

_____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? □ Yes ☒ No

if "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

_____

(15). Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Jeffery M. Gagie (P49822), 303 Paw Paw St Ste 10, Paw Paw, MI 49079, (269) 415-0044

(b) At arraignment and plea: Jeffery M. Gagie (P49822), 303 Paw Paw St Ste 10, Paw Paw, MI 49079, (269) 415-0044

(c) At trial: Jeffery M. Gagie (P49822), 303 Paw Paw St Ste 10, Paw Paw, MI 49079, (269) 415-0044

(d) At sentencing: Jeffery M. Gagie (P49822), 303 Paw Paw St Ste 10, Paw Paw, MI 49079, (269) 415-0044

(e) On appeal: Patrick K. Ehlmann (P31644) 1411 N. Harrison Rd., East Lansing, MI 48823

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

Therefore, petitioner asks that the Court grant the following relief: that this Court Petition and APPOINT COUNSEL to represent me or any other relief to which petitioner may be entitled.

Signature of attorney (if any)

Address

Telephone number

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on

_____(Month, date, year).

Executed (signed) on 4-1-09 (date).

Signature of Petitioner-Teresa Ann Dunigan-Snell

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not

* * * * *

ATTACHMENT A

9(f).Grounds raised in the Michigan Court of Appeals:

ISSUE I

WAS DEFENDANT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HER ATTORNEY'S FAILURE TO OBJECT TO AN INSTRUCTION TO THE JURY THAT IT SHOULD FIND HER GUILTY IF IT FOUND THAT SHE HAD THE REQUISITE STATE OF MIND AND IF SHE "OR SOMEONE SHE HELPED CAUSED THE DEATH OF [THE VICTIM]. THAT IS THAT [THE VICTIM] DIED AS A RESULT OF INJURIES SUSTAINED IN THE ALLEGED ARSON FIRE" (AND SHE WAS ACQUITTED OF ARSON)?

ISSUE II

IF DEFENDANT'S CONVICTION FOR MURDER IS REVERSED, IS DEFENDANT ENTITLED TO RESENTENCING ON HER PERJURY CONVICTION?

ATTACHMENT B

9(g)(6). Grounds raised in the Michigan Supreme Court :

ISSUE I

WAS DEFENDANT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HER ATTORNEY'S FAILURE TO OBJECT TO AN INSTRUCTION TO THE JURY THAT IT SHOULD FIND HER GUILTY IF IT FOUND THAT SHE HAD THE REQUISITE STATE OF MIND AND IF SHE "OR SOMEONE SHE HELPED CAUSED THE DEATH OF [THE VICTIM]. THAT IS THAT [THE VICTIM] DIED AS A RESULT OF INJURIES SUSTAINED IN THE ALLEGED ARSON FIRE" (AND SHE WAS ACQUITTED OF ARSON)?

ISSUE II

IF DEFENDANT'S CONVICTION FOR MURDER IS REVERSED, IS DEFENDANT ENTITLED TO RESENTENCING ON HER PERJURY CONVICTION?

ATTACHMENT C

ISSUE I

WAS PETITIONER DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HER ATTORNEY'S FAILURE TO OBJECT TO AN INSTRUCTION TO THE JURY THAT IT SHOULD FIND HER GUILTY IF IT FOUND THAT SHE HAD THE REQUISITE STATE OF MIND AND IF SHE "OR SOMEONE SHE HELPED CAUSED THE DEATH OF [THE VICTIM]. THAT IS THAT [THE VICTIM] DIED AS A RESULT OF INJURIES SUSTAINED IN THE ALLEGED ARSON FIRE" (AND SHE WAS ACQUITTED OF ARSON)?

Supporting Facts:

This Court review a claim of ineffective assistance of counsel de novo. In a jury trial, Petitioner-Appellant Teresa Ann Dunigan-Snell was convicted of murder in the second degree, and perjury in an examination made pursuant to the stature authorizing investigative subpoenas.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. A defendant must also show that he was prejudiced by his attorney's errors to the extent that he was denied a fair trial and that a reasonable probability exists that, but for those errors, the result of the proceeding would have been different. A "reasonable probability" means a probability sufficient to undermine confidence in the outcome of the trial. A criminal defendant's right to the effective assistance of counsel is guaranteed by the Constitutions of the United States and of Michigan.

Petitioner relies only on the facts of records.

Petitioner Teresa Ann Dunigan-Snell was charged with first-degree (felony) murder, arson, and conspiracy to commit arson. The People's theory of the case was stated in their closing argument :

> Teresa, bear, Mike, Richie, and Marcel, each had a role in committing the fire. They aided and abetted each other. Together they knowingly created a high risk of death or great bodily harm and had to know that their actions would likely lead to that result. The natural tendency to setting a fire to a dwelling house was that someone could be hurt. They chose to disregard the likelihood of their actions would be death.

The evidence presented at trial supported only one conclusion : that George McCormack's death was caused by the house fire set by Lonnie Michael Warren.

In its closing instructions, the Court stated :

> The Petitioner is charged with the crime of first degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Petitioner or someone she helped caused the death of George McCormack. That is, Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street.
>
> Second, that the Petitioner had one of these three states of mind. She intended to kill or she intended to do great bodily harm to George McCormack, or she want only or willfully disregarded the likelihood of the natural tendency of her behavior to cause death or great bodily harm.
>
> Third, that at the time of the act that caused the death of Mr. McCormack, the Petitioner was committing or was helping someone else commit the crime of arson, burning of a dwelling.
>
> [The Court then defined arson, concluding by stating :]
>
> For the crime of first degree felony murder, the Petitioner must have been either committed (sic) the crime or (sic) arson burning of a dwelling house or helped someone else commit that crime. To help means to perform acts or give encouragement before or during the commission of the crime that aids or assists in its commission.
>
> At the time of giving aid or encouragement, the Petitioner must have intended the commission of the arson.
>
> Second degree murder. You may also consider the lesser charge of second degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Petitioner or someone she helped caused the death of George McCormack. That is, Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street.
>
> Second, that the Petitioner had one of these three states of mind. She intended to kill or she intended to do great bodily harm to George

> McCormack, or she want only or willfully disregarded the likelihood of the natural tendency of her behavior to cause death or great bodily harm.

Murder in the second degree, has the following elements : (1) a death, (2) the death was caused by an act of the petitioner, (3) the petitioner acted with malice, and (4) the petitioner did not have lawful justification or excuse for causing the death.

Petitioner does not contest the adequacy of the instruction concerning the state of mind element. He also does not contest the harmlessness (standing alone) of the failure to instruct that the evidence had to show that petitioner intended the offense or knew of the principal's intent when she provided assistance or encouragement constituting aiding or abetting. The instruction on causation was, however, severely and obviously flawed.

First, that the Petitioner or someone she helped caused the death of George McCormack. That is, Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street.

The first sentence, standing alone, is not wrong, but does not convey the requirements to convict on an aiding and abetting theory. It allowed the jury to convict Petitioner if she "caused the death" of the victim (as a principal). It also (standing alone) allowed conviction if "someone she helped caused the death of George McDonald". At no time was the jury instructed that the help she provided to "someone" must have had the effect of inducing the commission of the crime. At no time was the jury instructed that the help had to relate to the commission of the crime. It allowed conviction if someone she helped caused the victim's death. Counsel committed a serious error by not objecting to the failure of this instruction to inform the jury that the help she gave to the person(s) who committed the murder was given in an error to make the criminal venture succeed.

That error, however, pales in comparison to the failure to object to the second sentence : "That is that Mr. McCormack died as a result of injuries sustained in the

alleged arson fire at 18-12 Cameron Street". The introductory "that is" suggests that the second sentence was being used to convey the same principle conveyed in the first sentence. It obviously did not. Without consideration of the first sentence (which would be entirely justified, the Court having introduced the second sentence with "that is"), it informed the jury to convict if it found that Petitioner had the requisite state of mind and if it found that Mr. McCormack died as the result of the arson. It could easily do so without being convinced that Petitioner aided or abetted the arson which indisputably caused the victim's death.

The second sentence of the causation instruction clearly allowed a verdict of guilty without a finding that Petitioner aided or abetted in the murder, so long as it found that Petitioner helped someone and that the victim died as the result of the fire. This error might be overlooked by counsel (due to lack of focus) if the precise same error had not occurred in the felony murder instructions (but it did). This was a very serious error on a critical and disputed issue in the case. Given the jury's verdict (acquitting Petitioner of everything related to the cause of death, it cannot help but undermine confidence in the reliability of the verdict.

Where counsel fails to object to an erroneous instruction or fails to request a necessary one, courts have not been hesitant to find ineffective assistance where the failure results in prejudice.

No rational tactical purpose could support a decision not to object to the second of the causation instruction. It could not possibly help the petitioner and its tendency to lessen the prosecutor's burden by, essentially, eliminating the causation requirement (Petitioner never claimed that there was no arson or that the arson did not cause the victim's death) was obvious. When the instructions are read in their entirety, it is obvious that no other instructions addressed the subject in questions in a way that corrected the error stated in the questioned instruction; as a whole the instructions did not protect Petitioner's rights and did not fairly present the triable errors to the jury. The

instructions read as a whole did not include all elements of the offense.

It does not require speculation to conclude that it is reasonably probable that counsel's error affected the verdict. Had Petitioner been convicted of felony murder or of arson, it is likely that this court could honestly conclude that the erroneous instruction did not affect the jury's verdict. To reach that conclusion in this case (because Petitioner was acquitted of felony murder, arson, and conspiracy to commit arson), the Court would have to conclude that the jury disregarded the Court's instructions and delivered a compromise verdict or a sympathy verdict.

This Court and the Supreme Court have embraced the notion that prejudice or the harmlessness of an error can, in some cases, be determined by examining portions of a jury's verdict viewed in the factual context of a case. In the Supreme Court held that logically irreconcilable verdicts might be used to show prejudice where a jury was improperly instructed on a charge of which a defendant was acquitted.

This Court was held that it will presume that a jury followed a subsequent incorrect instruction even where a correct instruction had previously been given. The application of such a presumption is not entirely necessary in this case, because (1) the Court never gave a truly correct instruction in that it failed to instruct the jury (in the first sentence of the erroneous instruction) that it had to find that the help Petitioner gave to a person must have assisted them in committing the murder; and (2) the jury's acquittal on the arson charges indicates that it did not find that Petitioner aided or abetted the arson, the indisputable cause of the victim's death. Even without the presumption, the only rational conclusion based on the record is that Petitioner was likely prejudiced by the erroneous instruction.

In the instant case, Petitioner's involvement in the arson and resulting death of the victim was established exclusively through the testimony of accomplice witnesses. On the other hand, other evidence of Petitioner's animosity toward the victims was presented; from this evidence alone, jurors could have conclude that Petitioner had the

requisite state of mind for murder. If jurors accepted this evidence but were not convinced by the accomplice evidence, they still could have convinced Petitioner of second-degree murder based on the erroneous instructions. If this is an accurate conclusion regarding the jury's reliance on the evidence and instructions, the jury would have acquitted Petitioner of felony murder, arson, and conspiracy to commit arson. It did.

Petitioner anticipate that Plaintiff will argue that this Court should conclude that any error in the instructions was minor and probably not noticed by the jury's seemingly logically irreconcilable verdict, convicting Petitioner of murder but acquitting her of participating in the activity which indisputably caused the victim's death. This, it could br argued, was simply the result of the jury's not following the instructions and arriving at a verdict based on compromise or sympathy (but certainly not antipathy). Closely analogous arguments made in were condemned as "unduly speculative"; that Court held that a jury is presumed to follow the court's instructions.

The instruction on causation of (both first-and second-degree) murder was clearly erroneous and allowed conviction without proof of causation. No rational strategic purpose for failing to object can be posited. Assuming (as is proper) that the jury followed its instructions, Petitioner was clearly prejudiced. Her conviction for murder in the second degree must be reversed.

The error in this case is particularly disturbing since it appears extremely likely that a properly instructed jury would have acquitted her of murder in any degree. Reversing her conviction will not make her whole.

ISSUE II

IF DEFENDANT'S CONVICTION FOR MURDER IS REVERSED, IS DEFENDANT ENTITLED TO RESENTENCING ON HER PERJURY CONVICTION?

Supporting Facts:

The standard of review of criminal sentences outside the legislative guidelines range was recently described by the Supreme Court.(although the lead opinion was not joined by a majority of justices, all parts of it were endorsed by a "shifting" majority). The extent of the particular departure, i.e., the actual minimum sentence imposed, must be proportional to the circumstances of the offender and offense; its proportionally is reviewed for abuse of discretion.

If Petitioner's murder conviction is reversed, the scoring of PRV7 for her perjury conviction would be changed from 10 points (for one concurrent/subsequent conviction) to 0 points. This would change the guidelines range from 30-62 months to 12-25 months. Although the sentencing court imposed a minimum sentence of 84 months, it cannot be determined by this Court if the sentencing court would have imposed the same sentence without the score on PRV7. This Court cannot say that the same facts which justified a 22 month departure would justify a 59 month departure. If Petitioner's murder conviction is reverse, this Court should remand to the trial court for resentencing. Because the sentencing court has discretion in deciding on the extent of a departure, it must decide if a change in the guidelines range would warrant the same sentence (which is a greater departure).

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA ANN DUNIGAN-SNELL,

Defendant-Appellant.
_____/

Court of Appeals
File No. 280522

(On appeal from Circuit Court for Kalamazoo County; File No. 07-000199-FC; Hon. Pamela L. Lightvoet)

JEFFREY R. FINK (P31062)
KALAMAZOO COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

PATRICK K. EHLMANN (P31644)
Attorney for Defendant-Appellant
1411 N. Harrison Ave.
East Lansing, MI 48823-1801
(517) 324-9577
_____/

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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BASIS OF JURISDICTION OF THE COURT OF APPEALS

After a circuit court trial in this criminal case, a (final) judgment of sentence was entered on August 7, 2007. On August 24, 2007, Defendant's request for the appointment of counsel was filed with the Court. On September 4, 2007, that Court entered an order appointing counsel and claiming an appeal of right with this Court. That claim was mailed on the following day, and filed with this Court shortly thereafter.

This Court has jurisdiction of this appeal as an appeal by right pursuant to MCL 600.308(1)(a); see MCR 7.204(A)(1), MCR 7.204(A)(2)(a), and MCR 6.425(F)(3).

STATEMENT OF QUESTIONS PRESENTED

I. WAS DEFENDANT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT TO AN INSTRUCTION TO THE JURY THAT IT SHOULD FIND HIM GUILTY IF IT FOUND THAT SHE HAD THE REQUISITE STATE OF MIND AND IF SHE "OR SOMEONE SHE HELPED CAUSED THE DEATH OF [THE VICTIM]. THAT IS THAT [THE VICTIM] DIED AS A RESULT OF INJURIES SUSTAINED IN THE ALLEGED ARSON FIRE" (AND SHE WAS ACQUITTED OF ARSON)?

The trial court did not answer this question.

Defendant-Appellant says "yes".

II. IF DEFENDANT'S CONVICTION FOR MURDER IS REVERSED, IS DEFENDANT ENTITLED TO RESENTENCING ON HER PERJURY CONVICTION?

The trial court did not answer this question.

Defendant-Appellant says "yes".

STATEMENT OF FACTS

In a jury trial, Defendant-Appellant was convicted of murder in the second degree, MCL 750.317, and perjury in an examination made pursuant to the statute authorizing investigative subpoenas, MCL 767A.9(1)(b). She was sentenced, as an habitual offender (2nd felony), MCL 769.10, to concurrent prison terms of 39-60 and 7-20 years on those convictions.

Plaintiff claimed that Defendant aided or abetted and conspired with others in the arson fire of a home at 1812 Cameron Street in Kalamazoo on June 17, 2006, in which George McCormack was killed. Defendant claimed that she was not involved. She was acquitted of arson, conspiracy, and felony-murder.

At trial, Sergeant Timothy Kozal testified that, on the evening of June 17, 2006, he was dispatched to a house fire at 1812 Cameron Street. When he arrived, the house was on fire. He dragged Deb Jarchow away from the house; she had been burned (I Tr 125). He was told that she got out through a second-floor window and that a deceased person was on the second floor. The body in the upstairs bathroom was that of George McCormack (I Tr 130). George and Teresa Snell lived in a home at 1815 Cameron located across the street from the burned dwelling.

Doctor Michael Markey, a forensic pathologist, testified that he performed an autopsy on the body of George McCormack on June 19th. His body was "severely" burned; he died of smoke inhalation (I Tr 139).

Deborah Jarchow testified that she lived at 1812 Cameron;

Defendant lived at 1815 Cameron. They had initially been good neighbors. Several days or weeks before June 17th, Defendant told the witness not to look in Defendant's direction and called her a "bitch". Defendant's eleven-year-old grandson said to her, "'you are going to suck my dick one day, bitch'". The witness told him not to talk to her. Defendant "charged" into the witness's yard and the witness sprayed her with a hose (I Tr 147). George McCormack, who lived with the witness got in between them and told Defendant to leave the witness alone (I Tr 148). Defendant told the witness, "'You are a dead bitch, you messed with the wrong person'" (I Tr 149). Every day the week before the fire, Marcel (Defendant's son) and Kendale (Defendant's grandson) told the witness, "'we've got a 38 for you bitch, you are dead'" (I Tr 150). George McCormack had a verbal exchange with the same children. That night, Defendant and others tried to pull the witness out of her house. On Friday the 16th, George and the witness went out to dinner and came home about 11:40 p.m. The witness went upstairs and got ready for bed. When she entered her bedroom, it was in flames. The house was full of smoke. The witness "fell out" her second-story window (I Tr 157). She fractured "C7" and her collarbone, and suffered burns. George did not escape. (I Tr 157).

The witness had heard from Defendant that her daughter had an affair with Defendant's husband (I Tr 159).

Richie Edmonds testified that he is 16 and the son of Defendant's daughter, Ledesha Dunigan. On the 16th, he met Lonnie (Mike) Warren at a party. He went with Warren to a house at March

and Washington; Orlando (Bear) Edwards was there (I Tr 164). Orlando and Lonnie talked. Orlando told the witness to go with Lonnie and show him the house (across from his grandmother's) to be burned (I Tr 166). He went with Lonnie to his grandmother's house. There, the witness spoke with Carnisha and Marcel. Lonnie spoke with Defendant and Latoyia (I Tr 169). Lonnie told Latoyia that he was there to "do a favor for Bear" (I Tr 170). The witness saw Defendant and Lonnie talking. Defendant spoke to Marcel. Marcel went into the house and returned with a container of lighter fluid. He handed it to Defendant, who handed it to Lonnie (I Tr 171). The witness stayed on the curb; Lonnie went across the street and set the house on fire (I Tr 172). He saw Lonnie spray lighter fluid around the inner porch and set it on fire (I Tr 178). The flames at the house went high "immediately". Lonnie ran off the porch and he and the witness rode to Orlando's on the bicycle. They went to see Orlando to receive drugs as payment (I Tr 179). At first, Orlando said that the wrong house had been burned. He left, and gave Lonnie some crack when he returned; he told Lonnie to make sure that the witness got some of it (I Tr 180). He did. He had lied at an investigative subpoena proceeding. He had been charged with murder and arson. He reached a plea agreement. It called for a sentence of no more than six years. He had received a sentence of one year in juvenile detention, followed by one year on tether.

Latoyia Dunigan testified that she is 34; Defendant is her mother. She was at her mother's house on the evening of the 16th. She saw her nephew, Richie (Duke), and "Lonnie Mike Warren" arrive.

Lonnie said, "Bear sent him around here to do something" (I Tr 195). The witness left. When she returned, fire and police vehicles were at the house across the street. A few days later, she heard Defendant say, "nobody messes with her kids and, you know, that she had it done" (I Tr 197). She heard Defendant say it more than once (I Tr 198). Orlando Edwards was a friend of her brother, Keenan Dunigan (I Tr 198). She had lied in testimony at an investigative subpoena hearing. She pled guilty to perjury in which she promised to give truthful testimony and was promised she would not be sent to prison (I Tr 192, 201).

Kevin Streeter testified that he is a fire debris analyst for the State Police. He analyzed Exhibit 9 (shorts seized from Marcel Dunigan, II Tr 239); they showed the presence of an "isoparaffinic product" used in charcoal lighter fluids, paint thinner, and copier toners (II Tr 215).

Marcel Dunigan testified that he is 15. He had lied in his testimony at an investigative subpoena proceeding (II Tr 230). He had been charged with felony murder. He had pled guilty to arson and perjury and been sentenced, pursuant to a prosecutor's recommendation, to a prison term of six years and was incarcerated.

He lived at 1815 Cameron across from the Jarchow house. On Friday night, he was outside his house talking to his sister, Latoyia. His cousin, Richie, and Lonnie arrived on a bicycle (II Tr 232). Defendant came out of the house and talked to Lonnie. She told the witness to get lighter fluid. He did and handed it to her; she handed it to Lonnie (II Tr 234). He saw Lonnie go up to

the house, spread fluid on the porch, and ignite the fire (II Tr 235). Lonnie and Richie rode off on the bike. Later, he heard Defendant tell George Snell (his stepfather) that she "wanted it done" (II Tr 237). He had been sentenced to 6-20 years in prison. He identified Exhibit 9 as his shorts that had been taken by police (II Tr 245).

Brandy Leonard testified that Orlando Edwards was her friend (II Tr 250). She was involved in caring for the son of Mr. Edwards. In the early morning of June 17th, she was looking for Orlando to get money for food for his son. She was in the area of Jones or Cameron and Stockbridge Streets. She saw Orlando there on foot. The witness spoke with him and went to the apartment on Washington Street to wait for him. There, she saw Duke/Richie and Lonnie/Mike, as well as "the renter". When Orlando got back, he, Duke, and Mike had a "private conversation" (II Tr 254). Orlando knew Defendant.

Detective Michael Treu testified that Defendant testified in response to an investigative subpoena at the police station on October 17, 2006. Defendant was told that she could have an attorney and did not have to answer questions implicating her in a crime (II Tr 259). She was told she had no right to lie and was placed under oath. She testified that she had never heard of Lonnie Warren and that Marcel Dunigan knew nothing about the fire (II Tr 259). Plaintiff rested.

Defendant testified that she lived at 1815 Cameron. There, she developed a relationship with her neighbor, Deb Jarchow. Ms.

Jarchow frequently asked Defendant if Defendant knew someone Jarchow could buy drugs from. Their friendship deteriorated because Jamie, Jarchow's daughter, "had feelings for" Defendant's husband (II Tr 275). The week before the fire, Jarchow called the witness a "bitch". The witness then drove into Jarchow's driveway and Jarchow sprayed her with a hose. George McCormack threw a screwdriver at her son, Marcel; he threw it back at Mr. McCormack (II Tr 282). McCormack "got in [Marcel's] face" and shouted at him (II Tr 283). Before the fire in the evening, Richie Edmonds/Duke came to her house with another young man (II Tr 288-289). Her husband talked with Duke. She saw her husband holding a container; the young man with Duke made a "grab for the container" (II Tr 291). The young man was Lonnie Warren/Mike. Her husband passed the container to Warren. She went inside and went to her bedroom. Her husband came in, winked at her, and told her everything would be fine (II Tr 293). She heard "pop" sounds, ran downstairs, and saw the fire at 1812 Cameron. She denied making any statements about the fire and denied all involvement in setting it. She did not tell police officers that her husband gave a container to Lonnie (II Tr 312-313), due to her fear of her husband.

The jury was instructed on second-degree murder as a lesser offense of first-degree (felony) murder. She was acquitted of the arson-related charges and of felony-murder, but convicted of the lesser offense (as well as on the perjury charge).

I. WAS DEFENDANT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT TO AN INSTRUCTION TO THE JURY THAT

IT SHOULD FIND HIM GUILTY IF IT FOUND THAT SHE HAD THE REQUISITE STATE OF MIND AND IF SHE "OR SOMEONE SHE HELPED CAUSED THE DEATH OF [THE VICTIM]. THAT IS THAT [THE VICTIM] DIED AS A RESULT OF INJURIES SUSTAINED IN THE ALLEGED ARSON FIRE" (AND SHE WAS ACQUITTED OF ARSON)?

This Court reviews a claim of ineffective assistance of counsel *de novo*, *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797 (1994).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. A defendant must also show that he was prejudiced by his attorney's errors to the extent that he was denied a fair trial and that a reasonable probability exists that, but for those errors, the result of the proceeding would have been different, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). A "reasonable probability" means a probability sufficient to undermine confidence in the outcome of the trial, *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A criminal defendant's right to the effective assistance of counsel is guaranteed by the Constitutions of the United States and of Michigan, *Mitchell*.

Defendant relies only on the facts of record.

Defendant was charged with first-degree (felony) murder, arson, and conspiracy to commit arson. The People's theory of the

case was stated in their closing argument:

> Teresa, Bear, Mike, Richie, and Marcel, each had a role in committing the fire. They aided and abetted each other. Together they knowingly created a high risk of death or great bodily harm and had to know that their actions would likely lead to that result. The natural tendency to setting a fire to a dwelling house was that someone could be hurt. They chose to disregard the likelihood of their actions would be death. (II Tr 326)

The evidence presented at trial supported only one conclusion: that George McCormack's death was caused by the house fire set by Lonnie Michael Warren.

In its closing instructions, the Court stated:

> The Defendant is charged with the crime of first degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Defendant or someone she helped caused the death of George McCormack. That is, Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street.
>
> Second, that the Defendant had one of these three states of mind. She intended to kill or she intended to do great bodily harm to George McCormack, or she wantonly or willfully disregarded the likelihood of the natural tendency of her behavior to cause death or great bodily harm.
>
> Third, that at the time of the act that caused the death of Mr. McCormack, the Defendant was committing or was helping someone else commit the crime of arson, burning of a dwelling.
>
> [The Court then defined arson, concluding by stating:]
>
> For the crime of first degree felony murder, the Defendant must have been either committed (*sic*) the crime or (*sic*) arson burning of a dwelling house or helped someone else commit that crime. To help means to perform acts or give encouragement before or during the commission of the crime that aids or assists in its commission.
>
> At the time of giving aid or encouragement, the

> Defendant must have intended the commission of the arson.
>
> Second degree murder. You may also consider the lesser charge of second degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the Defendant or someone she helped caused the death of George McCormack. That is that Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street.
>
> Second, that the Defendant had one of these three states of mind. She intended to kill or she intended to do great bodily harm to George McCormack, or she wantonly or willfully disregarded the likelihood of the natural tendency of her behavior to cause death or great bodily harm.
>
> (II Tr 343-346)

Murder in the second degree, MCL 750.317, has the following elements: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death, *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); see also *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007).

Defendant does not contest the adequacy of the instruction concerning the state of mind element. He also does not contest the harmlessness (standing alone) of the failure to instruct that the evidence had to show that Defendant intended the offense or knew of the principal's intent when she provided assistance or encouragement constituting aiding or abetting; see *People v Beard*, 171 Mich App 538; 431 NW2d 232 (1988). The instruction on causation was, however, severely and obviously flawed.

> First, that the Defendant or someone she helped caused the death of George McCormack. That is that Mr. McCormack died as a result of injuries sustained in the

alleged arson fire at 18-12 Cameron Street.

The first sentence, standing alone, is not wrong, but does not convey the requirements to convict on an aiding and abetting theory. It allowed the jury to convict Defendant if she "caused the death" of the victim (as a principal). It also (standing alone) allowed conviction if "someone she helped caused the death of George McDonald". At no time was the jury instructed that the help she provided to "someone" must have had the effect of inducing the commission of the crime; see *People v Washburn*, 265 Mich 119; 280 NW 132 (1938). At no time was the jury instructed that the help had to relate to the commission of the crime. It allowed conviction if someone she helped caused the victim's death. Counsel committed a serious error by not objecting to the failure of this instruction to inform the jury that the help she gave to the person(s) who committed the murder was given in an effort to make the criminal venture succeed; see *People v Wright*, 99 Mich App 801; 298 NW2d 857 (1980).

That error, however, pales in comparison to the failure to object to the second sentence: "That is that Mr. McCormack died as a result of injuries sustained in the alleged arson fire at 18-12 Cameron Street". The introductory "that is" suggests that the second sentence was being used to convey the same principle conveyed in the first sentence. It obviously did not. Without consideration of the first sentence (which would be entirely justified, the Court having introduced the second sentence with "that is"), it informed the jury to convict if it found that

Defendant had the requisite state of mind and if it found that Mr. McCormack died as the result of the arson. It could easily do so without being convinced that Defendant aided or abetted the arson which indisputably caused the victim's death.

The second sentence of the causation instruction clearly allowed a verdict of guilty without a finding that Defendant aided or abetted in the murder, so long as it found that Defendant helped someone and that the victim died as the result of the fire. This error might be overlooked by counsel (due to lack of focus) if the precise same error had not occurred in the felony murder instructions (but it did). This was a very serious error on a critical and disputed issue in the case. Given the jury's verdict (acquitting Defendant of everything related to the cause of death, i.e., the arson), it cannot help but undermine confidence in the reliability of the verdict.

Where counsel fails to object to an erroneous instruction or fails to request a necessary one, courts have not been hesitant to find ineffective assistance where the failure results in prejudice, *United States v Span*, 75 F3d 1383 (CA 9, 1996); *Woodard v Sargent*, 806 F2d 153, 157 (CA 8, 1986); *Arrowood v Clusen*, 732 F2d 1364, 1371-1372 (CA 7, 1984); *United States v Alferahin*, 433 F3d 1148 (CA 9, 2006); *Cox v Donnelly*, 432 F3d 388 (CA 2, 2005); *Reagan v Norris*, 365 F3d 616 (CA 8, 2004); *Gray v Lynn*, 6 F3d 265 (CA 5, 1993).

No rational tactical purpose could support a decision not to object to the second sentence of the causation instruction. It

could not possibly help the defendant and its tendency to lessen the prosecutor's burden by, essentially, eliminating the causation requirement (Defendant never claimed that there was no arson or that the arson did not cause the victim's death) was obvious. When the instructions are read in their entirety, it is obvious that no other instructions addressed the subject in question in a way that corrected the error stated in the questioned instruction; as a whole the instructions did not protect Defendant's rights and did not fairly present the triable errors to the jury. See *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). The instructions read as a whole did not include all elements of the offense, *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003).

It does not require speculation to conclude that it is reasonably probable that counsel's error affected the verdict. Had Defendant been convicted of felony murder or of arson, it is likely that this Court could honestly conclude that the erroneous instruction did not affect the jury's verdict. To reach that conclusion in this case (because Defendant was acquitted of felony murder, arson, and conspiracy to commit arson), the Court would have to conclude that the jury disregarded the Court's instructions and delivered a compromise verdict or a sympathy verdict.

This Court and the Supreme Court have embraced the notion that prejudice or the harmlessness of an error can, in some cases, be determined by examining portions of a jury's verdict viewed in the factual context of a case. See *People v Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005). In *People v Graves*, 458 Mich 476, 488;

581 NW2d 229 (1998), the Supreme Court held that logically irreconcilable verdicts might be used to show prejudice where a jury was improperly instructed on a charge of which a defendant was acquitted.

This Court has held that it will presume that a jury followed a subsequent incorrect instruction even where a correct instruction had previously been given, *People v Shipp*, 68 Mich App 452; 243 NW2d 18 (1976). The application of such a presumption is not entirely necessary in this case, because (1) the Court never gave a truly correct instruction in that it failed to instruct the jury (in the first sentence of the erroneous instruction) that it had to find that the help Defendant gave to a person must have assisted them in committing the murder; and (2) the jury's acquittal on the arson charges indicates that it did not find that Defendant aided or abetted the arson, the indisputable cause of the victim's death. Even without the presumption, the only rational conclusion based on the record is that Defendant was likely prejudiced by the erroneous instruction.

In the instant case, Defendant's involvement in the arson and resulting death of the victim was established exclusively through the testimony of accomplice witnesses. On the other hand, other evidence of Defendant's animosity toward the victims was presented; from this evidence alone, jurors could have concluded that Defendant had the requisite state of mind for murder. If jurors accepted this evidence but were not convinced by the accomplice evidence, they still could have convicted Defendant of second-

degree murder based on the erroneous instructions. If this is an accurate conclusion regarding the jury's reliance on the evidence and instructions, the jury would have acquitted Defendant of felony murder, arson, and conspiracy to commit arson. It did.

Defendant anticipates that Plaintiff will argue that this Court should conclude that any error in the instructions was minor and probably not noticed by the jury. The error (they might argue) had nothing to do with the jury's seemingly logically irreconcilable verdict, convicting Defendant of murder but acquitting her of participating in the activity which indisputably caused the victim's death. This, it could be argued, was simply the result of the jury's not following the instructions and arriving at a verdict based on compromise or sympathy (but certainly not antipathy). Closely analogous arguments made in *Graves* were condemned as "unduly speculative"; that Court held that a jury is presumed to follow the court's instructions, p 486.

The instruction on causation of (both first- and second-degree) murder was clearly erroneous and allowed conviction without proof of causation. No rational strategic purpose for failing to object can be posited. Assuming (as is proper) that the jury followed its instructions, Defendant was clearly prejudiced. Her conviction for murder in the second degree must be reversed.

The error in this case is particularly disturbing since it appears extremely likely that a properly instructed jury would have acquitted her of murder in any degree. Reversing her conviction will not make her whole.

II. IF DEFENDANT'S CONVICTION FOR MURDER IS REVERSED, IS DEFENDANT ENTITLED TO RESENTENCING ON HER PERJURY CONVICTION?

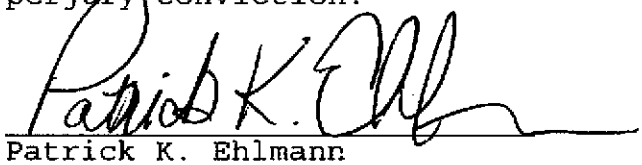
The standard of review of criminal sentences outside the legislative guidelines range was recently described by the Supreme Court in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003) (although the lead opinion was not joined by a majority of Justices, all parts of it were endorsed by a "shifting" majority). See *People v Lowery*, 258 Mich App 167, 169, fn 3; 673 NW2d 107 (2003). The extent of the *particular* departure, i.e., the actual minimum sentence imposed, must be proportional to the circumstances of the offender and offense; its proportionality is reviewed for abuse of discretion, *Babcock*.

If Defendant's murder conviction is reversed, the scoring of PRV7 for her perjury conviction would be changed from 10 points (for one concurrent/subsequent conviction) to 0 points. This would change the guidelines range from 30-62 months to 12-25 months. Although the sentencing court imposed a minimum sentence of 84 months, it cannot be determined by this Court if the sentencing court would have imposed the same sentence without the score on PRV7. This Court cannot say that the same facts which justified a 22 month departure would justify a 59 month departure. If Defendant's murder conviction is reverse, this Court should remand to the trial court for resentencing. Because the sentencing court has discretion in deciding on the extent of a departure, *Babcock*, it must decide if a change in the guidelines range would warrant the same sentence (which is a greater departure).

RELIEF REQUESTED

Defendant-Appellant prays that this Honorable Court reverse her conviction for murder in the second degree and remand to the trial court for resentencing on the perjury conviction.

January 25, 2008



Patrick K. Ehlmann
Attorney for Defendant-Appellant

State of Michigan Ninth Judicial Circuit Kalamazoo County	Judgment of Sentence Commitment to Corrections Department	Case No. C07000199FC

Ori: MI-390015-J | Court Address: 227 WEST MICHIGAN AVE. KALAMAZOO MI 49007 | Telephone No.: (269) 383-8837

FILED
AUG 07 2007
9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

The People of the State of Michigan v

Defn: TERESA ANN DUNIGAN
1815 CAMERON
KALAMAZOO MI 49001

CTN:	SID:	DOB:
39-07001115-01	1100497	12/23/54

Prosecuting Attorney	Bar No.
JEFFREY R FINK	P31062

Defendant Attorney	Bar No.
JEFFERY GAGIE	P49822

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 7/02/07 of the crime(s) as stated below:

Count	CONVICTED BY Plea	Court	Jury	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1			X	MURDER 2ND DEGREE F	750.317
4			X	PROS INVEST SUBP-PERJ LIFE OFF	767A.91B

___ 2. The conviction is reportable to the Secretary of State under MCL 257.732. The defendant's driver license number is:

IT IS ORDERED:

3. Defendant is sentenced to the custody of the Michigan Department of Corrections as stated below. This sentence shall be immediately executed.

Count	SENTENCE DATE	MINIMUM Yrs	Mos	Days	MAXIMUM Yrs	Mos	DATE SENTENCE BEGINS	CREDIT Mos	Days	OTHER INFORMATION
1	8/06/07	39			60		8/06/07		178	
4	8/06/07	7			20		8/06/07		178	

Defendant shall pay as follows: Restitution $303,041.12 Victim Fees $60.00
Court Costs $350.00 Atty Fees $1,760.00 State Fees $120.00
Total Costs $305,331.12

4. Court recommendation:

COUNT 4 RUNS CONCURRENT W/COUNT 1

8/07/07
Date

Judge Pamela L. Lightvoet Bar No.

Under MCL 769.16a, the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy Court Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DEFENDANT'S COPY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA ANN DUNIGAN-SNELL,

Defendant-Appellant.

UNPUBLISHED
October 23, 2008

No. 280522
Kalamazoo Circuit Court
LC No. 07-000199-FC

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right her jury convictions of second-degree murder, MCL 750.317, and perjury, MCL 767A.9(1)(b).[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from a house fire in Kalamazoo on June 17, 2006, which killed one resident and severely injured another resident. The fire was set by Lonnie Warren (who was convicted of first-degree murder for his role), with help from various individuals, including defendant's son, Marcel Dunigan, and her grandson, Richie Edmonds. However, according to the prosecution's theory of the case, defendant instigated the arson because she wanted to drive the victims, George McCormack and Deb Jarchow, out of their home and out of the neighborhood. Defendant's perjury conviction resulted from false answers defendant gave during an investigative subpoena proceeding.

On appeal, defendant argues that trial counsel rendered ineffective assistance by failing to object to the trial court's jury instruction on second-degree murder. We disagree.

Jury instructions are reviewed as a whole rather than piecemeal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not warrant reversal if they fairly

[1] Defendant was initially charged with felony murder, but was acquitted of that greater charge, as well as related charges of arson of a dwelling house and conspiracy to commit arson of a dwelling house.

present the issues to be tried and sufficiently protect the defendant's rights. *Aldrich, supra*; *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Acknowledging that counsel failed to object to the instruction, defendant raises this claim as one of ineffective assistance. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is "limited to mistakes apparent on the record." *Id.* "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of her ineffective assistance claim is limited to mistakes apparent on the record. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 71; 731 NW2d 411 (2007); *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "Malice" is defined as an act done 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. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). This last state of mind has also been described as "the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke, supra* at 464.

Defendant was charged under an aiding and abetting theory. The elements of aiding and abetting are: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra* at 757. Aiding and abetting includes all types of assistance given to a principal and all words or acts that may support the commission of a crime. *Id.*

In the instant case, we disagree with defendant's assessment of the trial court's instructions. When read as a whole, these instructions required the jury to find that the arson

caused McCormack's death, that defendant helped another commit the arson, and that she acted with malice, i.e., an intent to kill, to do great bodily harm, or a willful disregard of the likelihood of death or great bodily harm. Defendant's contention that the instructions would have allowed the jury to find her guilty if she assisted someone other than the arsonist, or with a crime other than the arson is without merit. The trial court's use of "someone she helped" clearly referred to defendant's alleged role as an aider and abettor to the arsonist Warren. The trial court's instructions prior to the second-degree murder instruction outlined the crime of arson and discussed aiding and abetting, and the trial court's next sentence clarified this point by requiring the jury to find that McCormack died of injuries sustained in the arson fire. Thus, because the trial court provided appropriate instructions, counsel's decision to not object did not constitute ineffective assistance. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that, if this Court reverses her murder conviction, she would then be entitled to resentencing on her perjury conviction. However, because this we affirm defendant's murder conviction we need not reach this issue.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

Order

Michigan Supreme Court
Lansing, Michigan

February 24, 2009

137745

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 137745
COA: 280522
Kalamazoo CC: 07-000199-FC

TERESA ANN DUNIGAN-SNELL,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the October 23, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

s0217

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 24, 2009

Corbin R. Davis
Clerk

CIVIL COVER SHEET FOR PRISONER CASES

Case No. 09-11476 **Judge:** Denise Page Hood **Magistrate Judge:** R. Steven Whalen

Name of 1st Listed Plaintiff/Petitioner:	**Name of 1st Listed Defendant/Respondent:**
Teresa Dunigan	Clarice Stovall
Inmate Number: 654431	**Additional Information:**
Plaintiff/Petitioner's Attorney and Address Information:	
Correctional Facility: Robert Scott Correctional Facility 47500 Five Mile Road Plymouth, MI 48170 WAYNE COUNTY	

BASIS OF JURISDICTION
- ☐ 2 U.S. Government Defendant
- ☒ 3 Federal Question

NATURE OF SUIT
- ☒ 530 Habeas Corpus
- ☐ 540 Mandamus
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions

ORIGIN
- ☒ 1 Original Proceeding
- ☐ 5 Transferred from Another District Court
- ☐ Other:

FEE STATUS
- ☐ IFP *In Forma Pauperis*
- ☒ PD Paid

PURSUANT TO LOCAL RULE 83.11

1. **Is this a case that has been previously dismissed?**
   ☐ Yes ☐ No
   ➢ **If yes, give the following information:**
   Court: _____
   Case No: _____
   Judge: _____

2. **Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)**
   ☐ Yes ☐ No
   ➢ **If yes, give the following information:**
   Court: _____
   Case No: _____
   Judge: _____