PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM J. HETHERINGTON,	)	
	)	
Petitioner,	)	**Case No._____**
	)	
v.	)	
	)	
HENRY N. GRAYSON, Warden,	)	
Parnall Correctional Facility,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254

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INTRODUCTION

For the past 16 years, Petitioner William Hetherington ("**Petitioner**") has been imprisoned after being convicted of the rape of wife, Linda Hetherington ("**Linda**") at a trial which blatantly deprived him of his most basic rights under the United States Constitution. The central jury issue was credibility. Petitioner and Linda were the sole witnesses to the alleged offense and the jury had to decide which of the two to believe. Both acknowledged having sex with each other. The sole issue was consent and Linda ultimately came away the victor on this issue, which also enabled her to win the custody battle over the Hetherington's three daughters and the family home in the divorce proceedings which occurred simultaneously with Petitioner's criminal trial. Petitioner contends in this Petition that his wife won this tug of war because the procedural playing field was improperly slanted in her favor as a result of the many constitutional violations which occurred.

First, Petitioner was denied his constitutional right to a fair trial under the Due Process Clauses of the Fifth and Fourteenth Amendments when the State failed to disclose material, central and exculpatory evidence to the defense as required by Brady v. Maryland, 373 U.S. 83 (1963). This includes the non-disclosure of exculpatory photographs of Linda, which failed to show the injuries which she testified that she had suffered at the hands of Petitioner, and which the lead investigating officer testified he had observed. The presence or occurrence of the alleged victim's injuries was critical because the sole issue in this spousal rape case was consent.

Second, Petitioner was denied his constitutional right to a fair and impartial trial under the Due Process Clauses of the Fifth and Fourteenth Amendments when bad acts testimony was admitted. The prosecutor elicited inadmissible testimony of Petitioner's prior bad acts including

allegations that he had been treated for drug and alcohol dependency, that he had used illegal drugs, and that he previously hit his wife. On top of that, the prosecutor elicited testimony that Petitioner was a transvestite and then suppressed, in violation of Brady, certain toy apparel items which would have allowed Petitioner to rebut this damaging character evidence. Petitioner's due process rights were further violated by the admission of highly prejudicial and irrelevant polygraph testimony, in which Linda stated that she took a lie detector test concerning an earlier allegation of spousal rape that she had made. Additionally, Petitioner suffered more due process violations when the State failed to make pre-trial disclosure of a tape-recorded statement of a key prosecution witness, who happened to be Petitioner's mother. The State also failed to disclose all the res gestae witnesses on the face of the information.

Equally significant was the denial of Petitioner's Sixth Amendment and Due Process Rights to a fair trial because of the ineffective assistance of his trial counsel and the failure to appoint counsel. At the preliminary hearing, defense counsel did not move for dismissal after the State failed to offer any evidence showing that Petitioner and his wife maintained separate residences or that a divorce had been filed - - elements of the Spousal Rape Statute under which Petitioner was charged. Petitioner's trial counsel also failed to object to the admission of clearly inadmissible evidence; failed to file motions to suppress illegally seized evidence; failed to request jury instructions on the fundamental elements of the charge at issue; and failed to properly preserve Petitioner's right to direct appeal. Moreover, Petitioner was improperly denied court-appointed counsel, an indigency hearing, and a timely trial transcript. Petitioner's due process rights were further violated because the court reporter who reported the trial was biased against Petitioner, having previously made a criminal complaint against him.

The Brady violations and the ineffective assistance of counsel are especially egregious in light of the fact that the trial amounted to a "he said, she said" credibility contest. These constitutional violations alone resulted in a conviction which is unfair, unconstitutional and unreliable. But there is more.

The trial court also made several errors which denied Petitioner his right to a fair and impartial trial under the Due Process Clauses of the Fifth and Fourteenth Amendments. First, the trial court failed to instruct the jury on each element of the crime. Second, the trial court gave an erroneous instruction which impinged on Petitioner's right to a unanimous verdict. Third, the trial court improperly excluded evidence of Petitioner's relationship with his wife in the weeks preceding the crime at issue, which would have rebutted Linda's claim that she was scared of Petitioner.

In addition to these errors, the sentenced imposed on Petitioner by the trial court constitutes cruel and unusual punishment in violation of the Eighth Amendment. The 15-30 year sentence was disproportionate with no stated reasons for the court's significant upward departure from the sentencing guidelines. It is also clear that the unduly punitive sentence imposed on Petitioner was handed down as a punishment for having exercised his constitutional right to a jury trial. Moreover, the trial court improperly considered remorse as a factor when sentencing Petitioner and did not permit Petitioner to read from a psychological report at the sentencing hearing.

Finally, Petitioner was denied his Fourteenth Amendment Due Process rights because the Spousal Rape Statute under which he was convicted was unconstitutionally vague and was enacted in violation of the Michigan Constitution.

For these reasons, which are described in more detail below, Petitioner asks this Honorable Court to grant his Petition for a Writ of Habeas Corpus and rectify these grave injustices.

STATEMENT OF FACTS

The facts supporting Petitioner's right to have a writ of habeas corpus granted in this matter are set forth below in three parts: (1) Part A reviews the pre-trial history of the case; (2) Part B summarizes the evidence at trial; and (3) Part C reviews post-trial proceedings.[1]

A. Pre-Trial Proceedings

This case began on September 24, 1985 when police in Burton, Michigan arrested Petitioner for the alleged rape of his then-spouse, Linda Hetherington ("**Linda**"). Petitioner was arraigned before Genesee County District Judge Harland Caswell on September 27, 1985. (Ex. 1). At that hearing, Petitioner indicated that he had retained counsel. Judge Caswell thereafter set Petitioner's bond at $250,000 and set a preliminary hearing before Judge Ronald Black on October 9, 1985.

Petitioner's first attorney, Barbara Menear ("**Menear**"), appeared at the October 9th hearing. (Ex. 2). Menear requested that Judge Black postpone the preliminary hearing and order Petitioner to undergo a competency evaluation. A finding of competency was made on January 29, 1986. (Ex. 3).

On February 26, 1986, attorney Terrance Sheehan ("**Sheehan**") announced his intention to replace Menear as Petitioner's counsel and a preliminary examination was scheduled for

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[1] Page references are to the trial transcript contained in Appendix I hereto, and exhibit references are to the numbered exhibits contained in Appendix II hereto.

February 26, 1986. (Ex. 4). However, on February 26, 1986, Sheehan requested another continuance because he had not yet been paid. Judge Black honored Sheehan's request and noted the following on the docket sheet:

> Confusion as to just who is [Petitioner's] attorney. T. Sheehan says he will represent [Petitioner] but has not received fee and will not represent [Petitioner] until pd. He says he will know this week and will call Amy and tell her. He asked for 1 week. I referred Def to Public Defender, with Protective Order, as a back up to Sheehan-in case he doesn't represent [Petitioner] to get case moving!

(Ex. 4).

The preliminary examination took place on March 5, 1986. The docket sheet reflects that on that same date, Sheehan formally substituted for Menear for purposes of the preliminary examination only. (Ex. 5). Probable cause was thereafter found and the case was bound over to Circuit Court on March 5, 1986. (Ex 6).

As the case proceeded into Circuit Court, Petitioner was unable to post bond and/or hire counsel. His indigency was principally due to his pending divorce, which commenced approximately four months before the incident in question. On August 2, 1985, the trial court in the divorce action, Judge Donald Freeman, entered an injunction precluding the parties from ". . . secreting, selling, assigning or disposing of any assets of the parties" during the pendency of the action. (Ex. 7). A judgment of divorce was not entered until March 23, 1987, months after Petitioner was convicted and sentenced. (Ex. 8). Therefore, during the course of Petitioner's criminal case, he was judicially restrained from liquidating personal property to post bond, hire counsel and otherwise defend himself.

Moreover, on October 7, 1985, Judge Freeman ordered Petitioner to pay weekly temporary child support in the amount of $100.00. (Ex. 9). Judge Freeman entered this order

upon a finding that Petitioner received net weekly sick leave benefits in the amount of $269.00. Therefore, in March 1986, Petitioner had less than $700.00 available each month to post bail, hire counsel and pay his other financial obligations.

On March 14, 1986, Petitioner was formally charged by information with First Degree Criminal Sexual Conduct in violation of MSA 28.788(2)(1)(f) (the "**Spousal Rape Statute**"). (Ex. 10). Arraignment on these charges occurred before Judge Thomas Yeotis on March 17, 1986. At the arraignment, Petitioner informed the court that he needed court-appointed counsel because of the aforesaid restraining and income deduction orders. (Ex. 11). The court denied this request because Public Defender Administrator Ivor Jones ("**Jones**") asserted that Petitioner was not indigent.[2] Trial was scheduled for June 1986.

Petitioner remained pro se for almost 60 days following his arraignment. The court record reflects that absolutely no motions, discovery, or other activity occurred on Petitioner's behalf during this time period. (Ex. 13). Moreover, during this two month period, Petitioner was denied access to a law library, was given no discovery by the State, and was permitted only ten minutes each week on the jailhouse phone to investigate his case. (Ex. 11).

On May 16, 1986, attorney David Wright ("**Wright**") entered his appearance as Petitioner's counsel in both the criminal and divorce actions. (Ex. 14). The court agreed to

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[2] Although attempts to secure the transcript of the March 17, 1986 arraignment have been made, this transcript cannot be located. However, various entries in the court record confirm that Petitioner was denied court-appointed counsel at the March 17 arraignment. A written demand for transcript that was filed on March 19, 1986 reflects that Petitioner was pro se at the time. (Ex. 12). Moreover, Jones acknowledged at an indigency hearing held in March 1987 that he had purposefully denied Petitioner counsel because he believed that Petitioner was not indigent. (Ex. 26, p. 5). Likewise, at another quasi-indigency hearing held on March 21, 1988, Judge Yeotis acknowledged that Petitioner had been denied court-appointed counsel. (Ex. 35, p.10).

continue the trial until August 27, 1986. Notwithstanding the additional time given to him to construct a defense, however, Wright proved to be less than a forceful advocate for his client. In toto, Wright filed two pre-trial motions: a motion for continuance of trial and a motion for reduction of bail. No other pre-trial motions were filed.

Indeed, it appears that Wright's strategy was to plead out Petitioner's case. Just before trial began on August 26, 1986, Wright delivered to Petitioner a plea agreement. (Ex. 15). Petitioner rejected the plea and opted instead to proceed to trial.

B. Trial

1. The State's Case In Chief

The following facts were proven during the course of the State's case in chief:

Linda and Petitioner were married in 1971. (T. 192). In 1978, Petitioner filed for divorce after his wife left the marriage for 30 days. (T. 196-97). While the divorce was pending, Linda accused Petitioner of rape. (T. 187, 199). Linda testified that this first charge was dropped after a day or two and that she thereafter resumed her marriage and bore a third child, her daughter Michelle, on November 28, 1982. (T. 199-202).

Marital trouble re-occurred a few years later. In April 1985, Linda traveled to the Bahamas to attend the wedding reception of a relative. (T. 204-05). Upon returning from that trip, she sued Petitioner for divorce and then returned to Florida where she remained incommunicado for three weeks. (T. 207-09).

When Linda finally returned to Michigan, she learned that Petitioner had obtained custody of the couple's three children. (T. 210). On June 29, 1985, only days before a scheduled hearing in which she was seeking custody of her children, Linda once again accused

Petitioner of rape. (T. 186, 214). Petitioner was thereafter arrested and remained incarcerated on that charge until the State dropped the matter in mid-August 1985. (T. 214, 224). As Petitioner languished in jail, Linda convinced the divorce court to give her custody of her children and the marital home. (T. 214, 224). Having lost custody of his home and children, Petitioner was compelled to take a room in his grandmother's home in Burton, where his mother lived. The alleged offense in this case is said to have occurred at this residence several weeks later.

Certain facts about the offense are not in dispute. In the early evening of September 24, 1985, Linda traveled to her mother-in-law's residence to pick up her youngest daughter. (T. 29-31,163-61). Linda was greeted at the door by her mother-in law, Oma Warden ("**Warden**"). (T. 38, 165). It is also undisputed that Linda voluntarily entered the residence and thereafter entered Petitioner's bedroom. (T. 38-39, 164-65). Here, however, the facts begin to diverge.

Warden testified that Linda had asked to enter her home. Specifically, Warden said that her daughter-in-law suspected, among other things, that Petitioner was hiding money and insisted on searching his bedroom. (T. 43).

Linda acknowledged that she had searched Petitioner's bedroom; however, she claimed that the idea was Warden's. Linda said that her mother in-law had told her that she had found drugs and money in Petitioner's room and invited Linda to look at what she had found. (T.165). The alleged rape is said to have occurred moments after Linda entered Petitioner's bedroom. Linda testified that as she searched Petitioner's room, he walked up from behind her and grabbed her. (T. 166). This testimony contrasted dramatically from that of Warden, who testified that she had observed Linda hugging Petitioner in the hallway. (T. 44). Warden testified that she left

the house at this point and went to visit a neighbor, Adolph Reinhart ("**Reinhart**"). (T. 47). At this juncture, the story became a classic "he said, she said."

Linda testified that Petitioner told her to put her hands behind her back and lay on the bedroom floor. (T. 168). According to her, Petitioner then placed a knee in her back, dragged her into the hallway and stuck his penis in her mouth. (T. 169-70). Thereafter, Linda said, Petitioner forced her to have sexual intercourse. (T. 170-71). Linda claimed that after intercourse, she was ordered to dress and she was then restrained with tape and belts. (T. 173). Notably, Linda testified that her mouth had been taped shut. (T. 173). She then said that Petitioner took her out the front door of the residence. (T. 173). She claimed that she broke free but that Petitioner caught her moments later and dragged her back into the residence. (T. 174-76).

Once inside the house, Linda claimed that Petitioner disrobed her and ordered her to take a bath. (T. 177). Significantly, Linda claims that Petitioner removed her black velour top by cutting off each sleeve. (T. 179). As she sat in the tub, unbound, Linda claims that Petitioner left the bathroom to talk with a neighbor, Reinhart. (T. 180). Linda claims that Reinhart was yelling, "Let me in." (T. 180). Despite having this opportunity to escape, Linda claims that she remained in the bathtub and did no more than hide one of her cut sleeves behind the toilet. (T. 179-80).[3]

According to Linda, Petitioner returned to the bathroom and joined her in the bathtub. (T. 181). Sometime later, Linda and Petitioner's older daughters, Rachel Hetherington

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[3] Linda indicated that Petitioner flushed his gloves, his underwear, and her underwear down the toilet. (T. 180). She said that he also tried to flush down her velour top but was not successful. (T. 180).

("**Rachel**") and Christal Hetherington ("**Christal**"), arrived at the residence with Linda's mother, Francis Carey ("**Carey**"). (T. 182). Linda testified that she dressed and attempted to leave. (T. 183). She claimed that she was hesitant to talk to the police because they had dropped the 1978 and June 1985 rape charges. (T. 185)[4]. Carey, however, refused to allow Linda to depart until the police were summoned. (T. 183-85).

No one witnessed the alleged assault on Linda. Therefore, the prosecution had to resort to circumstantial evidence to bolster her testimony. The most damaging evidence the State offered was a taped statement that Warden gave to the Burton Police Department the day following her son's arrest. (T. 58-59, 356, 360-89). This tape recording had not been disclosed to defense counsel in advance of the trial. (T. 58-59).

Warden's taped statement completely contradicted her in-court testimony. In summary, Warden stated that Linda had angered her son during a telephone call that occurred shortly before Linda arrived Warden's home. According to Warden's taped statement, before Linda arrived, Petitioner had asked Warden to tell Linda that she, Warden, had found cash and drugs in his room. (T. 378-79, 385). In her taped statement, Warden admitted telling Linda this when she arrived. (T. 386). Warden also stated on tape that her son grabbed Linda as she walked into his bedroom causing Linda to scream. (T. 387). Petitioner then ordered Warden to leave the room. (T.387). Fearing that Linda was going to be raped, Warden, according to her taped statement, walked to Reinhart's home and asked him to call the police. (T. 388-89). This tape was played for the jury and, notably, defense counsel made no objection to its introduction. (T. 57-58, 362-65).

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[4] Linda admitted that she had dropped the 1978 charge. (T. 187).

In addition to playing this tape, the prosecution also presented the testimony of a number of witnesses who were in the vicinity of Warden's home at or about the time of the alleged incident. Reinhart, Warden's neighbor, testified that Warden had indeed come to his home on September 24th to ask him to call the police. (T. 106-108). Warden, he said, told him, " I think there is trouble" and asked him to call the police. (T. 108-109). Reinhart said he walked over to Warden's residence and asked Petitioner what he was doing. (T. 109). Petitioner told Reinhart that he was doing ". . . 'nothing'. . .," and that he needed him to witness a document acknowledging that he and Linda were reconciling. (T. 109,115). Indeed, Reinhart said he did not detect any trouble whatsoever when he spoke to Petitioner and that he had observed Linda leave the Warden residence alone, enter her car to get something, and then re-enter the residence. (T. 110, 114, 127).

Rachel Hetherington also testified as a prosecution witness. Rachel recalled that on September 24, 1985 at approximately 6:00 to 6:30 p.m., Warden called her home inquiring about when Linda was going to pick up her younger sister, Michelle. (T. 275-76). Rachel thereafter called her mother at her boyfriend's home and advised her to pick up Michelle. (T. 277). Around 7:00 p.m., Carey stopped by Rachel's home and inquired where Linda was. (T. 278-79). Rachel testified that Carey decided to take her and her sister, Christal, to Warden's house to locate their mother. (T. 280). When they arrived there, Rachel said that she observed her mother coming out of a bathroom. (T. 280). Rachel observed that her mother looked angry, that her eyes were red, and that she bore a black mark on her lower face which looked like a scratch. (T. 281-82). Rachel said that she called the police because ". . .my mom is afraid of my dad and would not be there herself." (T. 281).

Carey followed Rachel as a witness. Carey acknowledged that she drove to Warden's home with Rachel and Christal to look for Linda. (T. 293-95). As she approached the front door of Warden's residence, Carey claimed that she found one of Linda's shoes in the driveway. (T. 296). Carey admitted that she did not see Linda in the Warden home. (T. 297). She nevertheless instructed Rachel to call the police because Linda would not be at the Warden home unless something was wrong. (T. 297). Carey first saw Linda after Linda left the residence. (T. 298). Carey observed that Linda was angry but not crying, that her hair was un-groomed and she had no apparent marks on her face. (T. 298).

The State then offered the testimony of several police officers and forensic specialists. Among them were Officers Mark Cunningham and Theresa Fitzgerald. Both officers testified that they had observed adhesive tapes marks across Linda's face shortly after they had arrived at the Warden residence. Cunningham testified these marks ran from ear to ear, were 2" wide, and red in color. (T. 314, 333).

Moreover, Cunningham testified that Warden authorized him to search her home. (T. 315-16, 486-488). During that search, Cunningham recovered from the bathroom a pair of scissors and a piece of black nylon material wrapped in tape. (T. 315-16). Both items were received in evidence without objection from defense counsel. (T. 318-20). Notably, the black nylon sleeve had not been disclosed to the defense prior to trial. The black nylon material was later matched to a sleeveless black velour shirt that police seized from Warden's residence on September 27, 1985. This search was conducted pursuant to a search warrant. (T. 347).

Sargent Len Accardo testified that he found the velour shirt in Petitioner's bedroom closet. (T. 347). Defense counsel made no objection to the introduction of this shirt into

evidence. (T. 350). Michael Wolner, a lab technician, later testified that he matched the black material found by Cunningham on September 24, 1985 with the missing right sleeve of the black velour shirt. (T. 461). Wolner also testified that he matched hair found on the shirt to Linda's. (T. 463).

2. The Defense Case

Following the denial of its motion for judgment of acquittal on the grounds that the prosecutor had not introduced evidence to show that a divorce was filed and that the two were living separately, which are elements of the Spousal Rape Statute (T. 534-540), the defense presented several witnesses, including Petitioner. Defense counsel began by introducing a tape recorded statement of Carey made by the police shortly after Petitioner's arrest. (T. 542). This testimony was not exculpatory in nature; rather, it buttressed the prosecution's contention that Petitioner had long been a source of trouble for Linda.

Following Carey's statement, defense counsel called William Carey and his girlfriend, Ellen Plumb. Both individuals testified that Linda had been abusive to her husband and daughters (T. 556-57, 564, 588), that she had long planned to leave her husband after the couple moved into their new residence in Grand Blanc (T. 565, 589), and that Linda continued to socialize with Petitioner after she sued him for divorce in 1985. (T. 558, 585).

Thereafter, Linda and Warden were recalled as a witnesses. Linda testified, among other things, that she had engaged in rough sexual play during her marriage (T. 600-02), and that she

had voluntarily accompanied Petitioner to Boblo Island Amusement Park after the divorce was filed because she had not been afraid of him prior to that time. (T. 631).[5]

Warden's testimony was nothing more than an attempt to explain away her taped statement. Warden testified that she was confused when she gave the statement because she was under the influence of pacemaker medicine (T. 648) and that she had meant to say that she had been threatened by her daughter-in-law rather than her son (T. 650, 662). Notably, Warden denied that she had consented to a search of her residence on September 24, 1985. (T. 652).

Petitioner was the last defense witness. He began his testimony by offering background about his marriage, stating that he and Linda were married in 1971 after a high school courtship. (T. 675). In 1978, Petitioner filed for divorce because Linda had been engaged in adulterous activity. (T. 678). Linda retaliated by filing a spousal rape charge. (T. 680). Linda dropped the charge before arraignment but not before Petitioner spent two days in jail. (T. 682). The couple thereafter reconciled and had their third child, Michelle. (T. 682). In 1980, Petitioner went on sick leave. He was declared fully disabled in 1985. (T. 685-87).

Petitioner confirmed that Linda left for Florida and the Bahamas in April 1985. (T. 687-91). Petitioner said that it was during this period that he had received divorce papers. (T. 691). Linda returned from her foray shortly before a May 31, 1985 custody hearing. (T. 691-92). Petitioner said that all parties agreed to postpone this hearing for one month in order to give his wife time to reconsider the marriage. (T. 692-93). The custody hearing was

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[5] Linda did claim, however, that Petitioner raped her the evening they returned from the amusement park. (T. 638). She admitted that she made this allegation shortly before the first child custody hearing in the divorce proceedings. (T. 610).

rescheduled until July 5, 1985. In the interim, Petitioner retained custody of the children and the marital home.

Petitioner testified that he and his wife continued to have sex during the reconciliation period. (T. 697). Indeed, he claimed they had sex up until June 29, 1985, just days before the rescheduled custody hearing. (T. 697). It was on June 29, 1985, Petitioner said, that Linda accused him of rape. He indicated that he and his family had traveled that day to Boblo Island Amusement Park. (T. 699). They missed the ferry to the Island and returned to their home in Grand Blanc after dropping their children at the movies. (T. 698-99). Petitioner said that he and his wife had consensual sex inside their home at that time. (T. 699). The following day, June 30, 1985, Linda alleged that she had been raped. (T. 700). Five days after making this allegation, Linda regained custody of her children for one week.

To counter the rape allegation, and particularly Linda's testimony that she feared him, Petitioner sought to establish that he and Linda continued to have a social relationship even after she made the rape allegation. For instance, Petitioner testified that during the week Linda had custody of the children, the children were cared for by him at his mother-in-law's home. (T. 703). Petitioner also testified that he and Linda had dinner together, with the children, nightly during this week. (T. 705). Petitioner sought to give other examples of his continued relationship with his wife during the month of July, but the court sustained the State's objection to this continued line of questioning. (T. 705-707).

Petitioner then testified that on July 31, 1985, police arrested him on the June 1985 rape allegation. (T. 707). On August 16, 1985, Linda received permanent custody of the couple's

children and the marital residence. (T. 707). On August 28, 1985, Petitioner was released from custody. (T. 708). Having lost his home and children, Petitioner moved in with his mother.

Petitioner then testified about the spousal rape allegation at issue. He stated that on the day in question, he found Linda in his bedroom searching through a drawer. (T. 717). Linda, he said, began to explain that she had caught her boyfriend cheating and that she could not cope with the children and her bills. (T. 718-20). She indicated that she wanted to reconcile and they then began to hug and kiss. (T. 718, 721). Warden witnessed parts of this then left the house with Michelle. (T. 721). Petitioner said that Linda then proceeded to give him oral sex. (T. 722). She then removed her clothes, climbed on top of him and the two proceeded to have sexual intercourse. (T. 723-24).

Petitioner went on to recount that after they finished having sex, Linda ran a bath and then began to discuss her debts as they bathed together. (T. 724-25). Petitioner told her that he did not have the money she thought he had, and Linda became upset. (T. 726). A short time later, Carey appeared at the residence. (T. 728). Carey, according to Petitioner, rushed the bathroom door and accused him of "getting" Linda again. (T. 729). Carey then ordered one of the girls to call the police. (T. 729). The police arrived a short time later and Petitioner was thereafter arrested. (T. 733).

The prosecutor's cross-examination of Petitioner was nothing short of a full-scale attack on character. During his cross-examination, the prosecutor elicited or intimated that: (1) Petitioner had been treated for alcohol and drug dependency (T. 742); (2) charges arising from the June 1985 rape allegation were then pending (T. 747); (3) Petitioner used marijuana and other drugs, included those taken through hypodermic needles (T. 757, 768-71); (4) Petitioner hit

his wife in the mouth in 1979 causing her to receive stitches (T. 758-59); (5) Petitioner offered his wife money to drop the pending charges (T. 761); (6) Petitioner had once handcuffed his wife to a towel holder (T. 766); and (7) Petitioner owns and wears woman's clothing (T. 767).

3. The State's Rebuttal

The prosecutor continued to assault Petitioner's character on rebuttal. Recalled as a prosecution witness, Linda testified that Petitioner had been physically abusive to her, and had hit her in the mouth five to six years earlier. (T. 776). To corroborate the prosecutor's intimation that Petitioner was a cross dresser, Linda testified that she found woman's clothing, high heeled shoes, and earrings in the garage of the couple's rental home, which she insisted belonged to Petitioner. (T. 780-81).

C. Post-Trial Proceedings

On September 5, 1986, the jury found Petitioner guilty as charged. (T. 869-70). On November 26, 1986, Petitioner was sentenced to 15-30 years in state prison. (Ex. 16). On that same date, the trial court advised Petitioner that he had 56 days from the date of sentencing to request court-appointed counsel to perfect his appeal. (Ex. 17). On December 29, 1986, Wright filed a Claim of Appeal in the Michigan Court of Appeals on behalf of Petitioner. (Ex. 18). On January 5, 1987, the Court of Appeals rejected the Claim of Appeal because defense counsel failed to file an entry fee of $50.00. (Ex. 19). In lieu of paying the filing fee, Wright moved, on February 16, 1987, to withdraw as Petitioner's counsel and requested the court to appoint new appellate counsel. (Ex. 20)[6]. While this motion was pending, Petitioner filed a pro se affidavit

[6] Wright affirmatively pled in his motion to withdraw "...that (he) recently learned that there are no funds available from Appellant, his family or any source to pay for the filing fee, trial transcript fees or attorney fees to petitioner to pursue appellant's appeal in the Michigan Court of

of indigency as well as various motions seeking production of transcripts and other legal documents at public expense. (Ex. 21). Petitioner's motion specifically requested the court to hold and allow him to attend an indigency hearing and, further, to appoint counsel to represent him at this hearing. (Ex. 21).

On March 3, 1987, the Court of Appeals again wrote Wright advising that his previously filed Claim of Appeal was defective because he had not filed a $50.00 filing fee or, alternatively, an order appointing appellate counsel. (Ex. 22). Wright once again failed to pay the $50.00 filing fee. On March 17, 1987, the trial court granted Wright's Motion to Withdraw. (Ex. 23). Ten days later, on March 27, 1987, Wright forwarded a copy of the Order of Withdrawal to the Court of Appeals. (Ex. 24). He did not enclose a filing fee, nor did he advise the Court of Appeals that Petitioner still had not been appointed appellate counsel.

On March 17, 1987, the same day Wright ceased being Petitioner's lawyer, the trial court denied all of Petitioner's then pending pro se motions including his affidavit of indigency. (Ex. 25). As part of its order denying these motions, the trial court stated that it was not satisfied that Petitioner was indigent and specifically ordered that Petitioner be brought before the trial court to explain his basis for indigency. (Ex. 25).

The trial court held an indigency hearing on March 23, 1987 to determine whether the trial court should appoint appellate counsel as well as trial counsel on the still pending 1985 rape case. (Ex. 26). Present at the hearing were Petitioner, Public Defender Administrator Jones and attorney John Yiannatji, who represented Petitioner in the 1985 case. Jones began the hearing by asserting that Petitioner was not entitled to appellate counsel because it was his understanding

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Appeals." (Ex. 20).

that Petitioner had a net monthly income of $500.00. (Ex. 26, pp. 3-4). Moreover, Jones conceded that he had deliberately denied Petitioner court-appointed counsel for the previous trial because he had labored under the same assumption about Petitioner's income. (Ex. 26, p. 4). Nevertheless, Jones said he would accede to the appointment of appellate counsel if Petitioner agreed to pay Genesee County $400.00 a month. (Ex. 26, pp. 3-4).

Petitioner advised the trial court that he could not undertake a $400.00 a month commitment because his income was both limited and irregular. (Ex. 26, p. 4). He advised the trial court that his disability checks had been irregular at best and that his assets had been frozen in the parallel divorce proceeding. (Ex. 26, pp. 3-4, 9, 11). The trial court then asked Petitioner to identify the source of his income. (Ex. 26, p. 5). Petitioner advised the trial court that he was not prepared to address this matter and desired to have an attorney speak for him on this issue. (Ex. 26 , p. 5). Nonetheless, the trial court insisted on proceeding and put Petitioner under oath. (Ex. 26, p. 11). Petitioner thereafter swore that he no longer had a $1,000.00 per month disability income and that he had been advised by his disability carrier that his claim for total and permanent disability had been denied. (Ex. 26, p. 12).

Notwithstanding Petitioner's testimony, the trial court agreed to appoint appellate and trial counsel only if Petitioner agreed to a $400.00 a month income deduction order. (Ex. 26, p. 15). Petitioner acceded to this condition. (Ex. 26, p. 15). Jones thereafter handed the trial court a written order immediately appointing Mr. Yiannatji as Petitioner's trial counsel in the pending 1985 case. (Ex. 26, pp.15-16 ; Ex. 27). Jones did not have a prepared order appointing appellate counsel; nevertheless, the trial court ordered Jones to promptly appoint appellate counsel, and Jones affirmatively responded that he would. (Ex. 26, pp. 15-17; Ex. 28).

Yet despite his assurances, Jones never appointed appellate counsel for Petitioner. Rather, two weeks after being ordered to appoint counsel, Jones wrote Petitioner that he was abating the appointment of appellate counsel until Petitioner returned an unspecified document to him. (Ex. 29). Petitioner answered Jones' letter on May 13, 1987 indicating that he was still awaiting the appointment of appellate counsel. (Ex. 30). On May 18, 1987, Jones wrote Petitioner that "[u]ntil the Court has ordered that an attorney be appointed for the purpose of appeal, you will not be represented by appointed counsel." (Ex. 31). No appellate attorney was ever appointed by Jones, and Petitioner's appeal was never filed. The Michigan Court of Appeals formally closed out Petitioner's appeal on November 6, 1987. (Ex. 32).

On January 26, 1988, almost ten months after Jones had been ordered to appoint Petitioner appellate counsel, attorney Rick Middleton entered an appearance in Genesee County Circuit Court as Petitioner's lawyer. (Ex. 33). Middleton thereafter filed one motion, a Motion for Production of Trial Transcripts. (Ex. 34). This motion, which was heard by the court on March 3, 1988, alleged that Petitioner lacked sufficient funds to pay Middleton's fees and pay for the trial transcript. (Ex. 34). The court thereafter ordered that the transcripts be produced to Petitioner at public expense provided that he give Genesee County a lien on a residence that he owned. (Ex. 35, pp. 9-10). Middleton did no further work on this case and was permitted to withdraw as Petitioner's counsel, upon his own motion, on June 12, 1989. (Ex. 36).

Petitioner continued to labor pro se but his efforts met fierce resistance from Jones as well as the Genesee County Prosecutor. After Middleton failed to act on his behalf, Petitioner filed, in the Michigan Court of Appeals, a pro se request for appointment of appellate counsel and production of transcripts. (Ex. 37). The Court of Appeals did not accept the pleading. (Ex.

38). In January 1989, Petitioner again requested the production of records concerning his case; however, Jones denied this request. (Ex. 39). In February 1989, Petitioner filed a renewed affidavit of indigency and request for production of documents, photos and transcripts at public expense. (Ex. 40). The trial court initially granted this motion. (Ex. 41). However, upon application by the State, and after conducting a hearing on June 12, 1989 at which Petitioner was not present, but during which it was somehow determined that he was not indigent, the trial court thereafter set aside this order. (Ex. 42). Petitioner vehemently objected to the set aside order because the hearing was conducted in his absence. (Ex. 43). Petitioner thereafter renewed his request for documents and transcripts but this motion was once again denied. (Ex. 44; 45).

In 1993, Petitioner, through pro bono counsel, petitioned the Michigan Court of Appeals to file a late appeal to challenge the validity of his sentence. The Michigan Court of Appeals denied this motion because insufficient copies of Petitioner's brief were filed. The motion was never thereafter refiled. Through pro bono counsel in 1998, Petitioner brought a Petition For Post-Conviction Relief in the trial court, which was denied. (Ex. 46). The Michigan Court of Appeals and the Michigan Supreme Court have further denied petitions for leave to appeal.

STATEMENT OF STANDARD OF REVIEW

The standard of review for a habeas petition is set forth in 28 U.S.C. § 2254(d). That section provides that the writ may be granted if a judgment which was adjudicated on the merits in state court:

> (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.

Id.

In Nevers v. Killinger, 169 F.3d 352, 360-61 (6th Cir. 1999), the Sixth Circuit approvingly cited several cases from other circuits for the proposition that the "contrary to" clause applies where the United States Supreme Court has set forth a "clear rule" requiring a certain result. If no such clear rule applies, the state court decision must be reviewed to determine whether it was an "unreasonable application" of Supreme Court precedent. Id. at 360-62.[7]

Significantly, Nevers was decided under the now rejected "subjective standard" of unreasonableness. Following Nevers, the United States Supreme Court decided Williams v. Taylor, 529 U.S. 362 (2000) (O'Connor, J., concurring), in which the Court instructed that § 2254(d)(1) defines two categories of cases in which a state prisoner may gain habeas relief. To gain habeas relief under the first category, involving state decisions "contrary to" federal law, a defendant must show that "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that "the state court decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. at 1523. Under the second category, involving the "unreasonable application of" federal law by a state court, a federal habeas court must ask whether the state court's application of clearly established federal law was "objectively reasonable." Id. at 1521. If the federal court finds that, viewed

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[7] As an example of when the "unreasonable application" prong applies, the Sixth Circuit cited a state court's conclusion that a constitutional error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1967). Nevers, 169 F.3d at 360. The Nevers court ultimately concluded that the Michigan Supreme Court's application of Chapman was unreasonable and that the state court's refusal to allow the defendant an opportunity to establish jury bias was "contrary to" established Supreme Court precedent. Nevers, 169 F.3d at 372-74.

objectively, the state court has correctly identified the governing legal principle from the Supreme Court's decisions "but unreasonably applie[d] that principle to the facts of the prisoner's case," it may grant the writ. Id. at 1523. Williams imposed an objective test, which was in fact more liberal than the previously employed subjective test. See Washington v. Hofbauer, 228 F.3d 689, 698 (6th Cir. 2000).

In Williams, the Supreme Court rejected the Fourth Circuit's definition of an "unreasonable application" of the law by reference to a "reasonable jurist." Id. at 1521-22. By implication, as the Sixth Circuit observed in Hofbauer, the standard of review under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("**AEDPA**"), 28 U.S.C. § 2244, which was set forth by the Sixth Circuit in Tucker v. Prelesnik, 181 F.3d 747, 753 (6th Cir. 1999) is also overruled. Hofbauer, 228 F.3d at 698. The Tucker court had stated that a writ will issue "if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists." Id.

Since the passage of AEDPA in 1996, this Court and the Sixth Circuit have had numerous occasions to review decisions of the Michigan Supreme Court and the Michigan Court of Appeals under these strictures. In a series of cases, both Courts have invalidated Michigan Court decisions under both the now rejected (and harsher) subjective test, see Tucker, 181 F.3d at 752; Nevers, 169 F.3d at 360-61; and Barker v. Yukins, 199 F.3d 867 (6th Cir. 2000), and the more liberal objective test, as set forth in Hofbauer, 228 F.3d at 698.

ARGUMENT

I. PETITIONER'S HABEAS CORPUS CLAIMS ARE PROPERLY BEFORE THIS COURT FOR REVIEW.

Petitioner's claims are properly before this Court for review. All of the jurisdictional prerequisites for maintaining the instant action have been met: (a) Petitioner is in custody within the meaning of 28 U.S.C. § 2254; (b) Petitioner has exhausted his state remedies within the meaning of 28 U.S.C. § 2254; and (c) Petitioner has not delayed in bringing this action or brought successive or multiple actions. As will be demonstrated below, the errors which were committed in Petitioner's case are of a constitutional dimension which affect the factual integrity of his conviction. Petitioner will also demonstrate that there are no procedural bars which prevent this Court from evaluating this action on the merits.

A. Petitioner Is In Custody Within The Meaning Of 28 U.S.C. § 2254.

Petitioner is a state inmate currently incarcerated at the Parnall Correctional Facility in Jackson, Michigan. He is serving a sentence of between 15-30 years on the charged offense. There are no other charges for which he is serving a sentence and he is not on bond for these charges. Therefore, there can be little doubt that Petitioner is in custody within the meaning of 28 U.S.C. § 2254. Jones v. Cunningham, 371 U.S. 236 (1963).

B. Petitioner Has Exhausted His State Remedies.

Although Petitioner's trial counsel failed to preserve his right of direct appeal and Petitioner was denied court-appointed appellate counsel, he has fully and fairly presented his claims for post-conviction relief to the state court. On January 26, 1998, Petitioner filed a Motion For Post-Conviction Relief in the Genesee County Circuit Court, which was denied by Judge Yeotis on March 31, 1998. On May 20, 1998, Judge Yeotis dismissed Petitioner's Motion

For Reconsideration. On November 19, 1999, Petitioner filed an Amended Application For Leave To Appeal in the Michigan Court of Appeals, which was denied on June 2, 2000. A Motion For Rehearing was filed on June 16, 2000 and denied by the Michigan Court of Appeals on July 25, 2000. On September 19, 2000, Petitioner filed a Delayed Application for Leave to Appeal in the Michigan Supreme Court, which was denied on June 26, 2001. Petitioner filed a Motion For Reconsideration on July 16, 2001, which was denied by the Michigan Supreme Court on September 25, 2001. Thus, while the Michigan Supreme Court denied leave to appeal, the Court was nonetheless given a full and fair opportunity to consider the claim. Smith v. Digmon, 434 U.S. 332, 333-34 (1978).

It should be noted that the issues were presented with explicit citation to the appropriate federal constitutional provision at issue and with reference to the appropriate federal case law on the subject.[8] Therefore, the exhaustion doctrine as interpreted by the Supreme Court in Anderson v. Harless, 459 U.S. 1 (1983) and Picard v. Connor, 404 U.S. 270 (1971), has been satisfied.

C. There Are No Rule 9 Questions Presented And The Petitioner's Petition Is Also Timely Under AEDPA.

There are no Rule 9 questions presented in this case. This is the Petitioner's first and only petition for federal habeas corpus relief. There has not been any undue delay in filing this Petition and there has been no prejudice to the state caused by any intervening time. Therefore,

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[8] Petitioner is not, however, limited to the scope of the development of the issues in state court. There is nothing in the exhaustion doctrine which precludes him from raising the issues at greater length or with greater factual development than he has presented in the state court. Vasquez v. Hillery, 474 U.S. 254 (1986).

Petitioner cannot foresee any such questions in this action. See Rule 9, Rules Governing Section 2254 Cases in the United States District Courts.

Similarly, this Petition is also timely under AEDPA, 28 U.S.C. § 2244(d)(1). Duarte v. Hershberger, 947 F. Supp. 146 (D.N.J. 1996). Accord Flowers v. Hanks, 941 F. Supp. 765 (N.D.Ind. 1996); Smith v. United States, 945 F. Supp. 1439 (D. Colo. 1996).

D. Cause And Prejudice

The issues presented in this Petition were timely presented to the state trial court. None of the issues presented were rejected based on a firmly established procedural default. Therefore, all issues raised in this Petition should be addressed on the merits by this Court.

E. None Of The Issues In This Petition Are Precluded Under The United States Supreme Court's Ruling In Stone v. Powell.

None of the issues presented in this Petition are precluded under the limitations imposed by the United States Supreme Court in Stone v. Powell, 428 U.S. 465 (1976). In Stone, the Supreme Court held that federal courts would not grant a habeas corpus petition to a state prisoner on the grounds that illegally seized evidence was admitted against him in a state proceeding, where that state provided the accused with a full and fair opportunity to litigate that issue. In subsequent decisions, the Supreme Court has held that Stone is limited to Fourth Amendment claims. See, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986) (claim that counsel was ineffective in failing to move to suppress evidence is still cognizable in habeas actions); Withrow v. Williams, 507 U.S. 680 (1993) (Stone does not bar Fifth Amendment challenges to the admissibility of a confession in state court under either Miranda or voluntariness theories). Indeed, the Supreme Court stated in Withrow that "[we have] repeatedly declined to extend the

rule in Stone beyond its original bounds." Withrow, 507 U.S. at 687. Since Petitioner does not assert a Fourth Amendment violation, the Stone rule is inapplicable here.

II. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE STATE FAILED TO DISCLOSE MATERIAL, CENTRAL AND EXCULPATORY EVIDENCE TO THE DEFENSE.

A. The Suppression Of Material Exculpatory Evidence Violates The Due Process Right To A Fair Trial.

The United States Supreme Court recognized long ago the right of the accused to receive exculpatory evidence in the possession of the State. Brady v. Maryland, 373 U.S. 83 (1963). The purpose of the Brady rule is "to ensure that a miscarriage of justice does not occur for it would be fundamentally unfair for the government to achieve a conviction through the concealment of evidence which undermines the strength of the government's case against the defendant." United States v. Presser, 844 F.2d 1275, 1281-83 (6th Cir. 1988). It is this type of fundamental unfairness that plagued Petitioner's trial and it is because of this constitutional unfairness that he currently petitions for relief.

The Supreme Court's decision in Brady places an affirmative duty on the prosecution to disclose material exculpatory evidence to the defense. 373 U.S. at 87-8. This does not include merely a duty not to hide what the prosecution already knows - - it includes a responsibility to find out and make available to the defense material exculpatory evidence. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's

responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."). In Brady, the Supreme Court set forth the basic rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87. The Supreme Court explained the rationale behind the basic rule in Brady was not to punish society for the misdeeds of the prosecutor, but rather to avoid an unfair trial to the accused. Id. See also United States v. Bagley, 473 U.S. 667, 675 (1985) (stating that the purpose of the Brady rule is "to ensure that a miscarriage of justice does not occur"); O'Guinn v. Dutton, 88 F.3d 1409, 1419 (6th Cir. 1996) (same); Presser, 844 F.2d at 1281. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87. See also Schlup v. Delo, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.").

The Supreme Court has not limited the Brady rule to situations in which the defense has made a pretrial request for specific evidence. See United States v. Agurs, 427 U.S. 97, 103-07 (1976). In Agurs, the Supreme Court held that the Brady rule applied to situations in which exculpatory evidence is in the possession of the prosecutor, but the defense counsel may not know of its existence. Id. at 106. See also Kyles, 514 U.S. at 433. In such cases, the defense may not have made a request for the exculpatory evidence at all, or the defense may have made a general request for exculpatory evidence or for Brady material. See Agurs, 427 U.S. at 106.

Thus, the State has an affirmative obligation to disclose exculpatory evidence that is material to the guilt or punishment of the accused, regardless of whether that evidence is requested by defense counsel. See Kyles, 514 U.S. at 433; Bagley, 473 U.S. at 682 (opinion of Blackmun, J.); Agurs, 427 U.S. at 111. Moreover, the disclosure requirements set forth in Brady apply even if police investigators fail to inform the prosecutor of the existence of exculpatory evidence. See Kyles, 514 U.S. at 438. The police's knowledge of exculpatory evidence is chargeable to the prosecutor. Id.; Evans v. Kropp, 254 F. Supp. 218, 222 (E.D.Mich. 1966). "The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437.

The State's obligation under Brady to turn over exculpatory evidence to the defense is crucial because failure to disclose such evidence can dramatically effect the outcome of a trial. The Supreme Court has noted that non-disclosure "not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." Bagley, 473 U.S. at 682 (opinion of Blackmun, J.). "In reliance on this misleading representation, the defense might abandon lines of independent investigation, defense, or trial strategies that it otherwise would have pursued." Id.

Despite the fact that federal law requires the State to disclose exculpatory evidence to the defense, critical exculpatory evidence was suppressed from the defense in this case. During his post-conviction investigation of this case, prior counsel propounded a Freedom of Information Act request on the Genesee County State Attorney's Office seeking access to its case file.[9] (Ex.

[9] As a state inmate, Petitioner was prohibited under Michigan law from making such a Freedom of Information Act request himself. See MCL 15.231 et. seq.

47). During the inspection of that file, prior counsel discovered several items of previously undisclosed exculpatory evidence. Most significant among them was a report ("**Report I**") authored by Burton Police Officer Mark Cunningham ("**Cunningham**") which indicated that Cunningham had photographed Linda's face at the crime scene (Ex. 48). These photographs (the "**Photos**") were obtained by prior counsel in May 1997 from the Burton Police Department's case file. The Photos, which remain in the custody of the Burton Police Department, had not been previously disclosed to the defense. (Ex. 11).

Also found in the prosecutor's file was a police report ("**Report II**") which memorializes the Burton Police Department's inspection of certain female apparel items from Linda in October 1985. (Ex. 49). Report II was never produced at trial. (Ex. 11). Prior counsel located some of these apparel items (the "**Apparel Items**") at the Burton Police Department during his inspection of that agency's case file. They included plastic earrings and a tube of what appeared to be play lipstick. Like Reports I, II, and the Photos, the Apparel Items had also not been disclosed to the defense.

For the reasons set forth below, the prosecutor's suppression of the Photos, Apparel Items and Reports I and II, was a clear violation of Petitioner's right to due process under Brady.

B. The Suppression Of Evidence That Exculpated Petitioner Violated His Right To A Fair Trial Under The Due Process Clause Because The Exculpatory Evidence Was Material.

The exculpatory evidence that was not disclosed to Petitioner's defense counsel meets the materiality requirements of the Brady rule. In a purely circumstantial case like this one, where the evidence was weak, contradicted and unreliable, materiality is clear. The Supreme Court has

established standards for determining when omitted evidence is material such that its suppression constitutes a violation of due process. See Bagley, 473 U.S. at 682 (opinion of Blackmun, J.). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id.; Kyles, 514 U.S. at 433; Agurs, 427 U.S. at 111-12. The Supreme Court defined a "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 676; Kyles, 514 U.S. at 433. See also Agurs, 427 U.S. at 111-12; Schledwitz v. United States, 169 F.3d at 1003, 1012 (6th Cir. 1999).

The Supreme Court has emphasized that the materiality standard as explained in Bagley "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S at 434. See also Schledwitz, 169 F.3d at 1011-12. The Supreme Court explained, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether, in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. See also Schledwitz, 169 F.3d at 1011-12; United States v. Frost, 125 F.3d 346, 383 (6th Cir. 1997) ("[A] Brady claim does not require a showing that introduction of the exculpatory evidence would have rendered the overall evidence insufficient to convict.") (quoting Kyles, 514 U.S. at 434-35); Hence v. Smith, 37 F. Supp. 2d 970 (E.D.Mich. 1999) ("The defendant . . . shows a violation of the Brady doctrine when he shows that the favorable evidence could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict."). As discussed in more detail

below, Petitioner's trial was not even close to fair, and its result is an unconstitutional, unjust and unreliable conclusion.

Significantly, the obligation to disclose evidence to the defense under the Brady rule includes impeachment evidence as well as exculpatory evidence. See Kyles, 514 U.S. at 433; Bagley, 473 U.S. at 676; Giglio v. United States, 405 U.S. 150, 154 (1972); Schledwitz, 169 F.3d at 1011. Impeachment evidence is defined as "evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Bagley, 473 U.S. at 676 (internal citations omitted); see also Presser, 844 F.2d at 1278 (same). The Supreme Court has held that "[w]hen the 'reliability' of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [referring to the Brady rule]." Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). Moreover, the Sixth Circuit has indicated that "depriving a defendant of the opportunity of utilizing damaging and impeaching evidence against an 'essential' witness should be considered in the due process analysis." Schledwitz, 169 F.3d at 1016. See also O'Guinn, 88 F.3d at 1419 (noting that the failure to turn over impeachment documents can leave trial counsel unable to effectively cross-examine or impeach witnesses, thus preventing a fair trial).

Here, it is clear that the withheld evidence was material and should have been disclosed to the defense. The photographs of Linda's face were both important impeachment evidence as well as affirmative evidence of innocence on the most critical issue at Petitioner's trial - - the use of force. Linda testified in great detail that he had been gagged and taped by Petitioner. (T. 173). Several witnesses corroborated this testimony. Officer Cunningham testified that he had

observed two inch wide red tape marks on both of Linda's cheeks at the crime scene. (T. 314). Notably, he said the marks extended from her mouth to her ears. (T. 314). Cunningham's partner, Officer Theresa Fitzgerald, also testified that she observed these marks on Linda's face. (T. 333).

The suppressed Photos directly contradict testimony given by Linda, Cunningham, and Fitzgerald. No horizontal tape marks or scratches appear on Linda's cheeks in the Photos. Indeed, prior counsel had the negatives of the Photos analyzed by forensic photographer John Valor ("**Valor**"), who was a respected criminalist with the City of Miami Police Department for 19 years and was the State of Florida's forensic photographer in the prosecution of serial killer Ted Bundy. Valor read the testimony of Linda, Cunningham, and Fitzgerald, and concluded, in an Affidavit attached hereto, that if the described marks had existed, they would have appeared in the Photos. (Ex. 50). Valor states that while the Photos appear to be blurred, the Photos nevertheless disclose tonal differences in Linda's skin. (Ex. 50). Thus, if two inch horizontal red marks had appeared on Linda's skin, they would have appeared in the Photos. They are not there. Accordingly, the Photos directly impeach Linda, Cunningham and Fitzgerald.

More significantly, the Photos are affirmative evidence of Petitioner's innocence. In addition to undermining the credibility of three key witnesses, the Photos corroborate Petitioner's testimony that he placed no tape on Linda's face. Thus, the Photos were not only impeachment evidence but direct corroborative evidence of Petitioner's version of events. Given that force was the central issue in this case, that the alleged presence of the tape marks was the sole evidence of force found on Linda's person and that these marks do not appear in the Photos,

it is quite apparent that the suppression of the Photos "undermines confidence in the outcome of the trial," thereby necessitating a new trial.

This conclusion is further buttressed by the prosecutor's suppression of the female Apparel Items that the Burton Police Department impounded from Linda, and Report II which memorialized her statements about her discovery of these items. Since no one other than Petitioner and Linda witnessed the alleged offense, the jury had to determine which of the two was more credible. The prosecution bolstered Linda's credibility by attacking Petitioner's character. Chief among these attacks was the suggestion that Petitioner was a cross-dresser. The issue first appeared in the prosecutor's cross-examination of Petitioner. After Petitioner denied that he wore women's clothing, the prosecutor recalled Linda in rebuttal who then testified that she had discovered women's clothing in the garage of a residence the couple owned and leased to others. Linda specifically testified that Petitioner owned these garments and that he was a cross-dresser.

As discussed below, this testimony should never have been permitted and the ensuing damage it caused to Petitioner's credibility cannot be overstated. Nevertheless, the harm done could have been thwarted had the State disclosed that it possessed some of the Apparel Items allegedly found by Linda as well Report II memorializing Linda's statements about these items. Had Petitioner known that the Burton Police Department possessed plastic earrings and toy lipstick, he could have introduced these items and argued that they were toys utilized by the couple's three daughters.

Additionally, had Report II been disclosed, it would have enabled Petitioner to discredit his wife's allegation that she had found the make-up and clothing at the couple's rental property.

Indeed, the report reflects that Linda had only reported finding firearms at the rental property. At the time of Report II, the clothing, jewelry and make-up were located in the basement of Linda's current residence . . . the same basement where her three daughters played. There was no mention in Report II that the Apparel Items were previously located at the rental property. Had the report been disclosed, Petitioner could have called its author in sur-rebuttal to testify to Linda's prior inconsistent statements regarding these items.

Clearly, the prosecutor's suppression of Report II and the Apparel Items wholly prevented Petitioner from offering anything more than a denial to what was a horribly demeaning allegation of sexual deviancy. Petitioner was painted as a sexual deviant simply because his wife Linda, who stood to gain exclusive custody of the couple's home and children as a result of Petitioner's conviction, attributed certain articles of clothing, make-up and jewelry to him. The disclosure of Report II and the Apparel Items would have enabled Petitioner to prove that the tools of his alleged deviancy were in fact his daughters' toys. More importantly, the disclosure of this evidence would have empowered Petitioner to prove the extent to which his wife would go to assure his conviction. Accordingly, like the suppression of the Photos and Report I which referenced the Photos, the suppression of Report II and the Apparel Items clearly "undermines confidence in the outcome of the trial."

Further, since evidence is material only if it undermines confidence in the outcome of the trial, "the omission must be evaluated in the context of the entire record." Agurs, 427 U.S. at 112. The suppressed evidence is to be considered collectively, not item-by-item. See Kyles, 514 U.S. at 436. See also Schledwitz, 169 F.3d at 1013 ("Taken individually, none of the . . . evidence [may] appear to raise a 'reasonable' probability that [defendant] was denied a fair trial.

However, as Kyles mandates, we must consider the collective exculpatory effect of the nondisclosed evidence."); Frost, 125 F.3d at 383 ("[C]ourts should evaluate the material effect of exculpatory evidence by examining the evidence collectively, not item-by-item."); O'Guinn, 88 F.3d at 1419 (6th Cir. 1996) (same).

When the cumulative effect of this material exculpatory evidence is analyzed in light of the circumstantial nature of the evidence presented against Petitioner at trial, it is clear that a writ should issue because Petitioner was denied his right to a fair trial under the United States Constitution.

III. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN BAD ACTS TESTIMONY WAS ADMITTED.

"Due process, at a minimum, requires that the state try an individual in an atmosphere free from unnecessarily prejudicial influences that prevent a defendant from receiving fundamental fairness." Handley v. Pitts, 623 F.2d 23, 26 (6th Cir. 1980) (Jones, J., dissenting). In general, the "prior misconduct of a defendant for which he does not stand indicted is not admissible at trial because of the danger of prejudice." Id. The Sixth Circuit has held that a defendant has been denied his constitutional right to a fair trial when the prosecutor makes references to a defendant's prior bad acts or makes other statements which "'invoke emotions which may cloud the jury's determination of the defendant's guilt.'" Martin v. Parker, 11 F.3d 613, 616-17 (6th Cir. 1993) (quoting United States v. Payne, 2 F.3d 706, 712 (6th Cir. 1993)). As the Sixth Circuit noted, the due process concerns are heightened in cases involving sexual abuse and other sex crimes "which exert an almost irresistible pressure on the emotions of the bench and bar alike. Because such cases typically turn on the relative credibilities of the defendant and

the prosecuting witness, however, a strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial." Id.

During his cross-examination of Petitioner, the prosecutor conducted nothing less than a full scale attack on Petitioner's character. Specifically, the prosecutor elicited testimony or intimated to the jury that: (i) Petitioner had a history of drug use, including marijuana and drugs taken via hypodermic needles (T. 757, T. 768-71); (ii) Petitioner had been treated for drug and alcohol dependency (T.742); (iii) charges were still pending from the June1985 rape allegation (T. 747); (iv) Petitioner had hit Linda in the mouth in 1979, causing her to receive stitches (T. 758); (v) Petitioner had once handcuffed his wife to a towel holder (T. 766); and (vi) Petitioner owned and wore women's clothing (T. 767).

The prosecution's elicitation of testimony as to Petitioner's drug use, his prior conduct in connection with Linda, and the intimation that he was a transvestite all constitute improper character evidence. Furthermore, because the trial itself essentially was a credibility contest, the improper admission of this evidence was so prejudicial as to deny Petitioner his right to a fair trial. See Martin, 11 F.3d at 617 ("where, as here, the evidence of guilt is at best conflicting, egregious prosecutorial misconduct of this kind rises to the level of a constitutional deprivation, denying the defendant a fundamentally fair trial").

Even a cursory examination of the information related to other alleged bad acts that was adduced or intimated by the prosecutor during the course of the trial reveals that this information could have been introduced for no proper purpose. Indeed, the only possible use the jury could have made of this improperly admitted evidence, none of which related to the charged crime for which Petitioner was on trial, was to infer that Petitioner was of disreputable character and that

he therefore was probably guilty, which is impermissible. See Handley, 623 F.2d at 27 ("In no federal or state case have prosecutors been permitted to question witnesses on prior bad acts without some evidence to prove the underlying insinuations." (Jones, J., dissenting).

For example, the prosecution attempted, during Petitioner's cross-examination and during its rebuttal case, to establish that Petitioner was a cross-dresser. (T. 767; T. 777-79). Obviously, whether Petitioner did or did not engage in cross-dressing does not make the question as to whether he forced his wife Linda to engage in sexual relations more or less probable. The only possible reason the prosecutor could have had for suggesting to the jury that Petitioner was a transvestite was to prejudice the jury against Petitioner in order to secure a conviction. This is clearly an improper attempt to introduce irrelevant and highly prejudicial evidence. Martin, 11 F.3d at 617.

Similarly, the prosecution's elicitation of testimony regarding Petitioner's prior drug use was irrelevant to the charges brought against him. Both Petitioner and Linda agreed that the sexual encounter upon which Linda's charges were based did occur; the only dispute that the jury was called upon to resolve was whether this encounter was forced or consensual. Petitioner's prior drug use and his treatment for that drug use necessarily had no logical relevance with respect to this single factual dispute, and admission of this testimony was clearly improper. Handley, 623 F.2d at 27 (Jones, J., dissenting).

Finally, the prosecutor's elicitation of testimony regarding Petitioner's prior relationship with his wife Linda, including an allegation that he had hit her forcibly in the mouth in 1979, had handcuffed her to a towel holder, and was the subject of another pending rape charge, was entirely improper. See Martin, 11 F.3d at 615 (prosecutor's elicitation of testimony from

defendant's adopted daughter that defendant had previously punched her in the face and knocked her to the floor was an improper attempt by the prosecutor to show that defendant acted in conformity with violent character, and contributed to the denial of a fair trial).

As discussed above, the only issue that the jury was called to resolve was whether the sexual encounter to which both Petitioner and his wife testified was consensual or coerced. The prosecutor was able successfully to portray Petitioner as a man with a history of violence and wife-beating by introducing testimony that was clearly inadmissible; furthermore, the jury was then permitted to infer from this improperly admitted testimony that Petitioner probably "acted in conformity therewith" and assaulted his wife on the night in question. Plainly, the introduction of this testimony during Petitioner's trial was improper.

Again, it must be reiterated that the trial of this case essentially devolved into a "he said, she said" dispute. Petitioner maintained at all times that his sexual encounter with his wife had been consensual; his wife maintained that she had been forcibly coerced. Thus, the jury was called upon to decide what was, in essence, a credibility contest. The jury's ability to resolve this dispute in a fair and impartial manner necessarily must have been affected by the prosecution's intimation that Petitioner was a cross-dresser, by the testimony regarding Petitioner's former drug use, and by the testimony regarding alleged other acts of violence perpetrated by Petitioner against Linda. In similar situations, the Sixth Circuit has held that the prejudice resulting from such bad acts testimony is so substantial that it cannot be considered harmless. See Martin, 11 F.3d at 617. Accordingly, Petitioner's constitutional right to a fair and impartial trial was compromised, and his conviction must be reversed and a new trial ordered.

IV. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN INADMISSIBLE POLYGRAPH TESTIMONY WAS ADMITTED.

The Sixth Circuit has recognized that the "use of a polygraph solely to bolster a witness' credibility is 'highly prejudicial,' especially where credibility issues are central to the verdict." United States v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995) (quoting Barnier v. Szentmiklosi, 810 F.2d 594, 597 (6th Cir. 1987)). Further, the Sixth Circuit has repeatedly found that the prejudicial effect of polygraph test results outweighs its probative value, because negative results presumably would not be disclosed, and therefore, the party offering them did not have an adverse interest at stake. Conti v. Commissioner of Internal Revenue, 39 F.3d 658, 663 (6th Cir. 1994); Barnier, 810 F.2d at 597; United States v. Harris, 9 F.3d 493, 502 (6th Cir. 1993); Wolfel v. Holbrook, 823 F.2d 970, 974 (6th Cir. 1987).

During the course of Linda's cross-examination by defense counsel, she attempted to bolster her credibility by referring to a "lie detector test" she had taken in connection with a prior charge of spousal rape that she had leveled at Petitioner. (T. 219). Because Linda's credibility was the crux of the criminal prosecution, the introduction of this inadmissible polygraph testimony was significantly prejudicial. Again, it bears repeating that Petitioner's trial was a credibility contest between him and his wife Linda. Where a witness' credibility provides the crux of a criminal prosecution, the Sixth Circuit has not hesitated to conclude that introduction of polygraph testimony to bolster that witness' credibility is highly prejudicial. See Sherlin, 67 F.3d at 1217. In the case at bar, Linda's credibility was improperly bolstered with allusions to polygraph testing. The admission of such highly prejudicial evidence entitles Petitioner to a new trial. A writ is clearly warranted.

V. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE STATE FAILED TO MAKE PRETRIAL DISCLOSURE OF CERTAIN EVIDENCE.

"[A] principal purpose of discovery is to advise defense counsel what the defendant faces in standing trial; it permits a more accurate evaluation of the factors to be weighed in considering a disposition of the charges without trial. While we cannot know whether such disclosure would in this case have led to disposition without trial, we do know that such disclosure does result in such dispositions in many cases." United States v. Lewis, 511 F.2d 798, 802 (D.C. Cir. 1975); United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969).

Prior to trial, Petitioner requested the State to produce all witness statements. (Ex. 50). Despite this request, the State never produced the tape statement of Oma Warden, Petitioner's mother. (T. 58-59). At trial, however, the State was permitted to introduce Warden's taped statement and play it for the jury. (T. 58-59, 356, 360-89). The taped statement was extremely damaging to Petitioner, and completely contradicted Warden's live testimony. (T. 50-51).

The trial court should have suppressed Warden's pretrial statement, since the State failed to disclose it prior to trial. The statement substantially damaged Petitioner's case. The State's refusal to comply with Petitioner's discovery request deprived him of a fair trial and deprived him of his constitutional right to due process, so that a writ must issue.

VI. PETITIONER WAS DENIED HIS SIXTH AMENDMENT AND DUE PROCESS RIGHTS TO A FAIR TRIAL BECAUSE OF THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL, THE FAILURE TO APPOINT COUNSEL, AND THE DENIAL OF A TIMELY TRIAL TRANSCRIPT.

The ineffective assistance of Petitioner's trial counsel, the failure to appoint counsel, and the denial of a timely trial transcript entitles Petitioner to a new trial, as he was denied his Sixth

Amendment and Due Process rights under the United States Constitution. Trial counsel for Petitioner failed to perform the most basic responsibilities required by a defense lawyer, including: (1) failure to move to dismiss the charges at the preliminary hearing; (2) failure to object to the admission of clearly inadmissible evidence; (3) failure to file motions to suppress illegally seized evidence; (4) failure to request jury instructions on the fundamental elements of the charge at issue; and (5) failure to properly preserve Petitioner's right to appeal. Moreover, Petitioner was improperly denied court-appointed counsel and a timely trial transcript.

The Sixth Amendment provides criminal defendants not merely with the right to counsel, but the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). The standard for determining ineffectiveness is whether: (1) counsel's performance was deficient; and (2) there was prejudice to the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if there was an error which deprived the defendant of the "counsel" as guaranteed by the Sixth Amendment. Id. at 687. Such an error has occurred when counsel's performance falls below an objective standard of reasonableness. Id. at 687-88. The prejudice required under Strickland is that counsel's conduct rendered the trial unfair, so that the outcome is unreliable. Id.; Blackburn v. Foltz, 828 F.2d 1177, 1186 (6th Cir. 1987); Jemison v. Foltz, 673 F. Supp. 1002, 1007 (E.D.Mich. 1987). The court in Blackburn interpreted the second prong of the Strickland test as "there is a reasonable probability that, absent the errors, the jury would have had a reasonable doubt regarding [the defendant's] guilt." 828 F.2d at 1186. See also Workman v. Tate, 957 F.2d 1339, 1346 (6th Cir. 1992). "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

Right from the start, Petitioner's counsel committed a myriad of extraordinary errors. At the preliminary hearing, the State failed to offer any evidence showing that Petitioner and his wife maintained separate residences or that a divorce had been filed - - both of which are elements of the Spousal Rape Statute under which Petitioner was charged. Even so, Petitioner's counsel, Mr. Sheehan, never moved to dismiss the charges based on failure to offer such evidence. (App. I; Preliminary Exam Transcript). Despite the fact that the State did not adduce any evidence regarding the "separate residence" element, the trial court nonetheless bound Petitioner over for trial. And because the court refused to appoint trial counsel following the preliminary hearing, Petitioner could not even seek interlocutory review of the court's decision binding him over for trial.[10]

Petitioner's trial counsel, Wright, made numerous critical errors. One of the worst was his failure to move to suppress the tape-recorded statement of Petitioner's mother, Warden, which had not been disclosed during discovery. Defense counsel should have objected, and suppressed the statement, rather than allowing his client to be doomed - - by his own mother - - in the minds of the jury.

Another major error committed by Petitioner's trial counsel was his failure to move to suppress the clothing allegedly found in Warden's bathroom. The police had found Linda's cut sleeve and velour top in the bathroom during an allegedly consensual search of Warden's residence on September 24, 1985 and the follow-up search on September 27, 1985 pursuant to a

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[10] As previously noted, Sheehan only entered a limited appearance for purposes of the preliminary hearing, and shortly thereafter, at Petitioner's arraignment. Petitioner's request for court-appointed counsel at his arraignment was denied. Petitioner remained unrepresented for almost 60 days following the arraignment.

warrant. These articles of clothing were the only physical evidence corroborating Linda's story. Defense counsel never should have allowed them to be introduced at trial, since the police searches violated Petitioner's Fourth Amendment rights.

As a resident of the Burton home, Petitioner had standing to challenge any search of the premises. See Minnesota v. Olson, 495 U.S. 91, 98 (1990); United States v. Pollard, 215 F.3d 643, 647 (6th Cir. 2000). Moreover, Warden testified that she had never consented to the search of the home. (T. 652). Accordingly, the search that resulted in the seizure of the cut sleeve was illegal. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Additionally, the warrant that was used to impound the velour top during the September 27, 1985 search was completely premised upon the seizure of the cut sleeve. (Ex. 51). Since the warrant was a fruit of the earlier illegal search, the evidence impounded pursuant to the warrant was itself excludable. See Wong Sun v. United States, 371 U.S. 471 (1963). Accordingly, the sleeve and velour top were obtained in direct violation of Petitioner's Fourth Amendment rights. Had defense counsel moved to suppress this evidence, the prosecution's case would have been limited to the biased oral testimony of the alleged victim. As the jury would likely have found reasonable doubt on the issue of consent, defense counsel's failure to file a motion to suppress directly undermined the reliability of the verdict.

Counsel was also ineffective in failing to assert the marital privilege as it applied to Linda's testimony. At the time of Petitioner's trial, the confidential communication privilege applied as set forth in People v. Hamacher, 432 Mich. 157, 161-62, 438 N.W.2d 43 (1989). That case barred one spouse from testifying as to any confidential communications made by one to the other during the marriage without the consent of the other. This privilege applied even if the

testimony is sought after the marriage. Id.[11] At the time of trial, the confidential communication privilege applied even to communications while one committed a crime against the other. Id.; see also Vermeulen, 432 Mich. at 38.

At Petitioner's trial, defense counsel should have precluded some very damaging testimony from Linda by asserting the privilege. She testified that Petitioner told her ". . . [he] had plans of chopping me up in little bitty pieces and flushing me down the toilet . . ." and that he had stated that ". . . he thought about pouring gas all over me and setting me on fire" and that "he was gonna take me out to meet my Maker." (T. 172-73). All of this was highly inflammatory. It hurt Petitioner's credibility and created heartfelt sympathy for Linda. This testimony should have been blocked.

Next, defense counsel did not object when the court failed to instruct the jury that in order to convict Petitioner under the Spousal Rape Statute, they must find that he and his wife were maintaining separate residences at the time of the alleged rape. The trial judge instructed the jury only as to the elements of penetration, personal injury, force and coercion. (T. 858-61). This error deprived Petitioner of his constitutional right to have the jury instructed on all elements of the crime under which he was charged. See In re Winship, 397 U.S. 358, 364

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[11] The spousal privilege in MCL 600.2162, unlike the confidential communication privilege, bars one spouse from testifying for or against the other spouse without the other's consent, but the spousal privilege is not applicable in cases of a crime committed against the children of either or both spouses or actions growing out of a personal wrong or injury done by one spouse to the other. Hamacher, 432 Mich. at 161. However, at the time of Hetherington's trial, the above exceptions did not apply to the confidential communication privilege. Id. at 165-66 (holding ". . . that the enumerated exceptions [under Section 2162] apply only to the general spousal privilege and not to the communication privilege."); accord People v. Vermeulen, 432 Mich. 32, 37-38, 438 N.W.2d 36 (Mich 1989). The Michigan Supreme Court in Hamacher found that the confidential communication privilege could be invoked by the defendant/husband in a prosecution for criminal sexual conduct with his stepdaughter.

(1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Glenn v. Dallman, 686 F.2d 418, 421 (6th Cir. 1982) ("The failure to instruct a jury on an essential element of a crime is error because it deprives the defendant of the right 'to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are.'") (quoting United States v. Natale, 526 F.2d 1160, 1167 (2d Cir. 1975)).

Lastly, trial counsel committed another error so serious that prejudice is presumed as a matter of law. He failed to perfect Petitioner's direct appeal following conviction. Counsel filed a notice of appeal, but it was dismissed due to counsel's failure to pay the $50 filing fee. This omission creates a presumption of ineffective assistance and constitutes a violation of due process. Evitts v. Lovey, 469 U.S. 387, 396 (1985). See also United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993) (because defendant's vital interest in liberty is at stake in a direct appeal, trial counsel's failure to perfect appeal as of right, once his client has requested an appeal, also constitutes total deprivation of the Sixth Amendment right to counsel, without regard to probability of success on appeal)."[12]

Moreover, after trial counsel's failure to perfect Petitioner's direct appeal, the court ordered the Public Defender Administrator, Jones, to appoint appellate counsel for Petitioner. Jones, however, ignored that express order. For his part, Petitioner followed up with written

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[12] In this type of case, a defendant need not show specific prejudice. Where counsel fails to file an appeal, courts have engaged in non-deferential review to determine whether the complete forfeiture of the right to an appeal was the product of an informed strategy. Courts have almost uniformly held that such failure constitutes ineffective assistance of counsel. See, e.g., Maselli v. Reincke, 261 F. Supp. 457 (D.Conn. 1966); Coffman v. Bomarr, 220 F. Supp 343 (M.D.Tenn. 1963); Simmons v. Beyer, 689 F. Supp. 432 (D.N.J. 1988).

reminders and pleas that appellate counsel be appointed. Yet, counsel was never actually appointed, Petitioner was never provided with a trial transcript at public expense and Petitioner's conviction was never reviewed on direct appeal - - a clear violation of his constitutional rights to appeal in a criminal case. See Griffin v. People of the State of Illinois, 351 U.S. 12 (1956); Burns v. State of Ohio, 360 U.S. 252 (1959); Draper v. State of Washington, 372 U.S. 487 (1963).

On top of that, the trial court also failed to hold an indigency hearing at which Petitioner was present to determine whether Petitioner was entitled to court-appointed appellate counsel and a trial transcript at public expense. See People v. Jeske, 128 Mich. App. 596, 601 (1983) (noting that where a challenge is made to defendant's indigency, "the matter is to be resolved at a hearing at which the prosecutor, defendant and defense counsel shall appear to aid the court's inquiry"); People v. Isaac, Order, Docket No. 102502 (Nov. 1, 1988) (Mich. App.) (Ex. 52). Accordingly, Petitioner was denied his constitutional right to the appointment of counsel to assist him in pursuing his appeal as of right. See Douglas v. California, 372 U.S. 353 (1963). Further, by the time Petitioner was finally able to procure a trial transcript in or about 1996[13] - - at private expense - - it was approximately ten years after his conviction. Such excessive delay is a clear due process violation. See Coe v. Thurman, 922 F.2d 528 (9th Cir. 1991); Guam v. Olsen, 462 F. Supp. 608 (Dist. Guam 1978)

Petitioner was also denied counsel at the front-end of this proceeding. At arraignment, the trial court refused to appoint counsel based on the finding that Petitioner had the ability to

[13] The trial transcript was incomplete in that it lacked the voir dire transcript, which Petitioner received subsequently.

pay for his defense. Based on this order, Petitioner remained incarcerated in a facility with no law library and which accorded him only limited phone access. He was completely deprived of the opportunity to prepare his case for trial until Wright filed his appearance almost two months later. The trial court's refusal to appoint counsel was plain error. Prior to the arraignment, on August 2, 1985, Judge Freeman, who was presiding over Petitioner's concurrently pending divorce action, specifically prohibited Petitioner from "secreting, selling, assigning or disposing of any assets" during the proceeding. Judge Freeman's order remained in force until March 23, 1987, well after Petitioner's conviction and sentencing.

Judge Freeman's order denied Petitioner access to his assets, yet Petitioner was denied court-appointed counsel because he supposedly had assets. Failure to appoint counsel for an indigent defendant in state-court proceedings violates the Sixth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

Moreover, through the course of these proceedings, Petitioner went through three different attorneys, each withdrawing due to lack of funds. This caused a complete lack of continuity in legal assistance and trial preparation, which constitutes a constructive denial of counsel, all of which is attributable to the failure to appoint counsel to Petitioner at the initial stages of this proceeding. Petitioner is clearly entitled to a new trial in light of these blatant Sixth Amendment violations. Accordingly, a writ should issue.

VII. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS DUE TO INSTRUCTIONAL ERRORS MADE BY THE TRIAL COURT.

A. The Trial Court's Failure To Instruct On Each Of The Element(s) Of The Crime Infringed On Petitioner's Constitutional Right To A Fair Trial.

Petitioner was charged and ultimately convicted of violating the Spousal Rape Statute, MSA 28.788(2)(1)(f), in connection with the alleged rape of his wife. At the time of his conviction, Section 28.788(2)(1)(f) permitted the State to prosecute cases of marital rape only where the couple maintained separate residences.[14] Accordingly, under the pre-1988 statute, the prosecution had to prove beyond a reasonable doubt that the couple was maintaining separate residences at the time of alleged rape and had legally filed for divorce.

At trial, however, the court failed to instruct the jury that in order to convict Petitioner, they must find that he and his wife were maintaining separate residences at the time of the alleged rape. The trial judge instructed the jury as to penetration, personal injury, force and coercion. (T. 858-61). Although Petitioner's counsel did not object to the instructions as read to the jury - - which is yet another example of ineffective assistance of counsel - - the patent error committed by the court warrants review.

In this regard, the trial court had not only the responsibility, but the absolute duty, to instruct the jury on each and every element of the crime charged. See Winship, 397 U.S.at 364; Glenn, 686 F.2d at 421. Moreover, the Sixth Circuit has stated that the failure to instruct the jury on essential elements of a crime "is not rectified solely because a reviewing court is satisfied after the fact of a conviction that sufficient evidence existed that the jury would or could have found that the state proved the missing element had the jury been properly instructed." Glenn, 686 F.2d at 421.

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[14] Section 28.788(2) was amended in 1988 entirely eliminating interspousal immunity thereby permitting prosecutions regardless of whether the victim and the defendant resided in the same household. See MSA 28.788(12) (Callaghan 1996). This amendment became effective on June 1, 1988 and applied prospectively.

Thus, the accused has an absolute right to a jury determination upon all essential elements of the crime charged, and the trial court must carefully ensure that there is no trespass on this fundamental right. See Winship, 397 U.S. at 364; Glenn, 686 F.2d at 421. In this regard, the instructions given to the jury must include each and every element of the particular crime. Glenn, 686 F.2d at 421. So fundamental is this principle that even where, as here, the Petitioner failed to object to a trial judge's failure to instruct the jury as to all elements of the crime charged, the conviction may still be challenged under the "plain error" doctrine because Petitioner cannot be charged under this statute (1974-1988) unless a divorce and/or separate maintenance has been filed. See United States v. Alt, 996 F.2d 827, 829 (6th Cir. 1993).

Moreover, the trial judge's instructional duties extend not only to the elements of a particular crime but to defenses as well, if there is evidence to support them. See Crawford v. Straub, 2001 WL 85871 at * 8 (E.D. Mich. Jan. 11, 2001) (Hood, J.) ("Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence."). This omission of the separate residence instruction deprived Petitioner of his right to a jury determination as to each element of the crime of marital rape. Under the pre-1988 criminal sexual conduct statute, the element of separate residences was the sine qua non for any prosecution of defendants in cases of alleged marital rape. Under such circumstances, it is evident that a trial court's failure to instruct on that element

"so infused the trial with unfairness as to deny due process of law" to Petitioner. Estelle v. McGuire, 502 U.S. 62, 75 (1991). Defendant is clearly entitled to a new trial.

B. The Trial Court Committed Additional Instructional Error That Denied Petitioner His Constitutional Right To A Fair Trial.

In additional to failing to instruct the jury on each element of the crime, the trial court committed other instructional errors that denied Petitioner his constitutional right to a fair trial . Although Petitioner was charged with only one count of criminal sexual conduct, the prosecution claimed that two separate acts of sexual penetration occurred: fellatio and intercourse. (Ex. 10). As noted above, Linda testified that Petitioner placed his penis in both her mouth and vagina. In its jury instructions, the court noted that there were both allegations of intercourse and oral sex, and that the jury could convict Petitioner if either or both acts were proven by a reasonable doubt. (T. 858-59). Yet, the jury was never instructed that it must unanimously agree on which sexual act was proven by a reasonable doubt. See Schad v. Arizona, 501 U.S. 624, 635 n. 5 (1991) (criminal defendant has a Sixth Amendment right to a unanimous verdict); United States v. Ramos, 861 F.2d 461, 465 (6th Cir. 1988). Thus, the court also committed instructional error in connection with the instruction on oral sex.

In People v. Yarger, 193 Mich. App. 532, 485 N.W.2d 119 (1992), the Michigan Court of Appeals addressed almost identical jury instructions on the first element of criminal sexual conduct. Yarger was charged in a single-count information with criminal sexual conduct, and the evidence adduced at trial revealed two different acts of penetration: fellatio and intercourse. Id. at 533-34. But the trial court failed to instruct the jury that it must unanimously agree as to the particular act of criminal sexual conduct. Id. Instead, the court in that case advised the jury that it could convict the defendant if the prosecution proved either of those two sexual acts beyond a reasonable doubt - - just as the trial court did in Petitioner's case.

In reversing the defendant's conviction, the Yarger court held that "error occurred when the jury was not instructed that it must unanimously agree on which act(s) was proven beyond a

reasonable doubt." Id. at 537. By making it impossible to discern which act of penetration that the defendant was found guilty, the Yarger court found that the instructions given by the trial court impermissibly infringed on the defendant's right to an unanimous verdict. Id. Subsequent courts construing the holding of Yarger have noted that failure to give a unanimity instruction can constitute harmful error. See People v. Cooks, 446 Mich. 503, 511, 521 N.W.2d 275, 279 (1994) ("it must be said that the failure to give a unanimity instruction is not always harmless").[15]

Although neither the failure to give a unanimity instruction nor the oral sex instruction would, standing alone, constitute reversible error, this is not the case of an isolated instructional error. Rather, there are three distinct errors, and the cumulative effect of these errors should not be deemed harmless as these errors deprived Petitioner of his constitutional right to a fair trial. A writ is plainly warranted.

VIII. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO INTRODUCE PROBATIVE, RELEVANT EVIDENCE IN HIS DEFENSE WHEN THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OF PETITIONER'S RELATIONSHIP WITH HIS WIFE IN THE WEEKS PRECEDING THE CRIME AT ISSUE.

A defendant has the absolute right to introduce relevant, probative evidence in his defense. See Rock v. Arkansas, 483 U.S. 44 (1987); Crane v. Kentucky, 476 U.S. 683 (1986); Delaware v. Van Arsdall, 475 U.S. 673 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). This includes the right to cross-examine witnesses

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[15] Petitioner recognizes that under the facts of this case, the failure to give an unanimity instruction, in of itself, would not necessarily constitute reversible error. See Cooks, 446 Mich. at 511.

fully. Davis v. Alaska, 415 U.S. 308 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis, 415 U.S. at 316-17. See also Van Arsdall, 475 U.S. 673; Chambers, 410 U.S. 284. As the Supreme Court noted in Washington, "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law." 388 U.S. at 19.

During the State's case in chief, Petitioner's daughter Rachel testified that she called the police because ". . . my mom is afraid of my dad and would not be their herself." (T. 281). Linda gave similar testimony. In an attempt to rebut this testimony, Petitioner attempted to depict the nature of his relationship with his wife in the two months preceding the alleged rape at issue. (T. 173). For instance, he sought to show that even after Linda accused him of rape in June 1985, she still permitted him to care for the children and that she continued to share meals with him and allow him to participate in family activities. (T. 173). As Petitioner proceeded to develop this testimony, the trial court, pursuant to the prosecutor's objection, ordered defense counsel to discontinue this line of questioning. This order directly violated Petitioner's right to due process.

Clearly, the trial court should have admitted evidence which contradicted the State's notion that Linda was afraid of her husband and would not have knowingly entered Warden's home had she known Petitioner was there. If the jury believed Rachel's testimony that her mother was afraid of her father, Linda's claim that Warden tricked her to come into the residence becomes far more plausible. Petitioner had the absolute right to rebut this testimony by

testifying to events and circumstances in the weeks and months preceding the alleged crime which run contrary to the notion that his wife was afraid of him. In refusing the introduction of such testimony, the trial court unfairly denied Petitioner the opportunity to rebut a key point of the prosecution's case. Washington, 388 U.S. at 19. A writ of habeas corpus should issue.

IX. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS WHEN THE STATE FAILED TO LIST ALL THE RES GESTAE WITNESSES ON THE FACE OF THE INFORMATION.

Under MSA 28.980(1), the prosecutor had an affirmative duty to use due diligence to endorse and produce all res gestae witnesses. See People v. Burwick, 450 Mich. 281, 287, 537 N.W.2d 813, 816 (1995)."[16] As the failure to due so may deny a defendant "fundamental fairness," the State's failure to list all res gestae witnesses may be considered in a federal habeas petition. See Thomas v. McLemore, 2001 WL 561216 at * 7 (E.D.Mich. 2001) (Borman, J.).

The res gestae witness rule encompasses more than eyewitnesses, but also includes those witnesses whose testimony may aid in the making of a fair presentation of the res gestae of the crime charged and may be necessary to protect the accused from being victimized by false accusations. People v. Baskin,145 Mich. App. 526, 532, 378 N.W.2d 535, 538 (1985). The Baskin court further refined the definition of a res gestae witness by explaining that it is

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[16] The amended version of this statute replaces the prosecutor's duty to indorse res gestae witnesses with the lesser responsibility of attaching a list of all res gestae witnesses known to the prosecutor who might be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers. See MSA 28.980(1) (Callaghan 1996). The amended statute went into effect on June 1, 1986 and applied prospectively, and thus does not apply in the instant case.

essentially any person who witnesses some event in the continuum of the criminal transaction and whose testimony will aid in developing a full disclosure of the facts. Id. In this regard, the res gestae rule serves three compelling interests: (1) protecting the defendant against false accusation; (2) preventing suppression of testimony favorable to the accused; and 3) ensuring the disclosure of all the circumstances. Id. at 539 (citations omitted).

At the time of Petitioner's conviction, the prosecution was obligated to use due diligence in locating, endorsing, and producing any res gestae witnesses. See Burwick, 537 N.W.2d at 816. Due diligence in this context required the prosecution to do "everything reasonable" in performing its obligations under the pre-1986 statute. See Baskin, 378 N.W.2d at 539. The prosecution in the instant case clearly failed to satisfy this burden. The evidence plainly established that at least three people with temporal proximity to the alleged crime were not endorsed as res gestae witnesses. The first, Olaf Bentley, was referred to throughout the trial. He had direct knowledge of Linda's state of mind as he was the last person with her before the alleged crime. The second was Petitioner's daughter, Christal Hetherington. Rachel Hetherington, Christal's sister, testified that Christal was with her when she discovered her mother and father together at Warden's residence. Given that Rachel was listed as a res gestae witness and that Christal saw as much as Rachel, Christal likewise should have been listed as a res gestae witness. The third was Margaret Reinhart, who was present while all of the parties were being interviewed in the Reinhart home. Because Petitioner was denied his constitutional right to a fair trial, a writ of habeas corpus should be granted.

X. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT REPORTER WHO REPORTED THE TRIAL WAS BIASED.

The United States Supreme Court has observed that a "court stenographer . . . is an officer of the court" and is "to record, as accurately as possible, what transpires in court." Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 436 (1993). To that end, it has been held that "it is contrary to the concept of a fair trial" to have as a court reporter one who has been harmed by a criminal act of an accused, as the court reporter "may be placed in a position which subjects him to some temptation if he is required to report the proceedings." United States v. Moeller, 1957 WL 4708 , 24 CMR 85, 86 (CMA.1957) (reversing conviction where defendant's accuser was also court reporter).

Here, the court reporter who reported Petitioner's trial failed to report to the court that she had previously made a criminal complaint against him. (Ex. 11). Although the reporter was not a complainant with respect to the issues for which Petitioner was being tried, that does not lessen the "possibility of prejudice and the appearance of evil" where the court reporter, a former neighbor and complainant against the defendant, has the sole responsibility for both recording and transcribing testimony, the accuracy of which is critical. See United States v. Yarbrough, 22 M.J. 138, 140 (CMA 1986). It is axiomatic that courts, officers of the court and court personnel should avoid even the appearance of impropriety. In re Probert, 411 Mich. 210, 308 N.W.2d 773 (1981). The reporter should not have been assigned to this case and her presence requires a new trial.

XI. PETITIONER'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Although the recommended sentencing guideline range for spousal rape was six to ten years, the trial court significantly departed from this range when it sentenced Petitioner to a term of imprisonment for 15-30 years. In so doing, the trial court failed to properly articulate its

reasons for this extreme upward departure. Consequently, Petitioner's sentence was disproportionate and invalid. Further, it appears that the sentence was extraordinarily harsh when compared to the final plea offer made to Petitioner by the prosecutor prior to trial, and the harshness of the sentence imposed by the trial court suggests that it was imposed as punishment for Petitioner's decision to stand trial.

A. Petitioner's Sentence Is Disproportionate.

In Solem v. Helm, 463 U.S. 277 (1983), the United States Supreme Court held that the Eighth Amendment prohibits sentences that are disproportionate to the crime committed. See also Harmelin v. Michigan, 501 U.S. 957 (1991); United States v. Marks, 209 F.3d 577 (6th Cir. 2000); United States v. Hopper, 941 F.3d 419 (6th Cir. 1991). Similarly, in adopting the guideline structure, the Michigan legislature intended that sentencing should be proportionate to the relative seriousness of the crime. See People v. Milbourn, 435 Mich. 630, 635, 461 N.W.2d 1, 2 (1990). Thus, as with federal sentencing guidelines, see United States Sentencing Commission Guidelines Manual, Ch.1, Pt. A, intro comment at 1.2, the rationale behind sentencing guidelines has been identified by the Michigan Supreme Court as the principle of proportionality, which requires that a criminal defendant receive a sentence that reflects the seriousness of the circumstances surrounding the crime committed. Id.

Although the guidelines do not require strict adherence, the trial court may only depart from the guideline range when the recommended sentence is an inadequate reflection of the seriousness of the crime committed. See, e.g, People v. Houston, 448 Mich. 312, 320, 532 N.W.2d 508, 511 (1995); Milbourn, 435 Mich. at 659-60. See also United States Sentencing Guidelines, § 5k2.0. In this regard, the sentencing guidelines aid in determining the

proportionality of the sentence. Houston, 448 Mich. at 320. And a departure should only occur when either the guidelines fail to take into account important sentencing factors, or particular factors are inadequately accounted for by the guidelines. Id. at 321; see also Benson, 200 Mich. App. at 604. Further, when departing, the trial court must articulate the reasons for the departure, and mere "boiler-plate" language will not suffice. Houston, 448 Mich. at 320; see also United States v. Kennedy, 893 F.2d 825 (6th Cir. 1990) (vacating sentence for failure to adequately explain departure from sentencing guidelines); United States v. Jackson, 921 F.2d 985 (10th Cir. 1990) (same). Here, although the trial court departed from the maximum sentencing guideline range by at least five years and as many as 20 years, it failed to indicate that any of the factors on which it relied were inadequately accounted for by the guidelines, or that guidelines failed to take those particular factors into account. This error was further compounded by the trial court's improper reliance on certain factors which it should not have considered.

In the Sentencing Information Report ("**SIR**"), the court justified the upward departure in large part due to Petitioner " . . . having no remorse whatsoever . . . [and] . . . having a Jekyll Hyde personality," and that he faced similar charges in a pending case. (Ex. 53). Michigan law prohibits a sentencing judge from considering a defendant's lack of remorse as a sentencing factor where the defendant has maintained his innocence. See People v. Spalla, 147 Mich. App. 722, 725, 383 N:W.2d 105, 107 (1985) ("It is impossible to have remorse if one does not have a sense of guilt."); See also People v. Hicks, 149 Mich. App. 737, 386 N.W.2d 657 (1986). The description of Petitioner's personality also fails to adequately explain or justify a five to 20 year departure from the recommended maximum sentence. Even more disturbing is the court's

improper consideration of the pending June 1985 spousal rape charge. In People v. Whalen, 412 Mich. 166, 169, 312 N.W.2d 638, 640 (1981), the Michigan Supreme Court held that a sentencing court may not assume a defendant's guilt from a charge which has not yet come to trial, and that to do so would be an improper consideration for sentencing purposes. From the face of the SIR, it is readily apparent that the trial court improperly assumed Petitioner's guilt from the June 1985 spousal rape charge and took that charge into account when sentencing him.

Further, the trial court also indicated at sentencing that it believed Petitioner "lied" during his testimony at trial. However, a trial court may only " . . . consider a defendant's own perjury in sentencing where there is a rational basis in the record for concluding that the defendant wilfully made a flagrant false statement on a material issue." Houston, 448 Mich. at 324; see also United States v. Phillips, 510 F.2d 134 (6th Cir. 1975) (holding that it was improper for a judge to consider the defendant a perjurer, when there is no evidence in the record to support that conclusion). Instead, the court merely opined that Petitioner lied, yet it did not cite a specific instance in the record where Petitioner was impeached or even contradicted by another witness. Rather, the court simply noted that it believed the complainant and did not believe Petitioner (App. I; Sentencing Hearing Transcript p. 26) - - a consideration clearly inappropriate for sentencing purposes. Id.; Phillips, 510 F.2d at 136.

Finally, the court erred when it did not permit Petitioner to read into the record a psychological report to rebut allegations made about him by the prosecutor. (App. I; Sentencing Hearing Transcript, p. 23). See Muhammad v. State of Texas, 46 S.W.3d 493 (Tx. App. 2001) (vacating sentence due to court's abuse of discretion in excluding expert psychological testimony).

B. Petitioner's Sentence Is Unduly Punitive.

Under the Fifth and Sixth Amendments, a defendant has a right not to plead guilty and a right to demand a jury trial. See United States v. Jackson, 390 U.S. 570 (1968). Accordingly, it is axiomatic that a defendant may not be punished for exercising his constitutional right to a jury trial. United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Government of the Virgin Islands v. Walker, 261 F.3d 370 (3d Cir. 2001); see also People v. Earegood, 12 Mich. App. 256, 262 n.4, 162 N.W.2d 802, 806 (1968), rev'd on other grounds, 383 Mich. 82, 85 (Mich. 1970). And the fact that a defendant has exercised this right " . . . should be given no weight in determining his sentence." Id. Before standing trial, Petitioner was offered a no contest plea and time served or probation; yet, after his trial, the court sentenced him to a minimum sentence of 15 years. The wide disparity between the plea offer compared to the actual sentence imposed, indicates that the court improperly took into consideration Petitioner's decision to stand trial, and that it meted out the sentence as punishment for that decision. Moreover, this disparity also shows that Petitioner received a disproportionate sentence.

In the event that this Court grants a writ of habeas corpus, then Petitioner is entitled to be resentenced by a different judge as result of the above sentencing errors. Where, as here, a defendant receives a disproportionate sentence, resentencing is an appropriate remedy, and the resentencing should be conducted by a different judge from the one who originally imposed the disproportionate sentence.[17] At the very least, resentencing is warranted.

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[17] See People v. Rosales, 202 Mich. App. 47, 49, 507 N.W.2d 776, 778 (1993) (holding that where defendant's sentence violated the principle of proportionality, the defendant should be resentenced by a different judge); see also People v. Fisher, 190 Mich. App. 598, 608, 476 N.W.2d 762 (1991), rev'd on other grounds, 442 Mich. 560 (1993).

XII. PETITIONER WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED WAS UNCONSTITUTIONALLY VAGUE AND WAS ENACTED IN VIOLATION OF THE MICHIGAN CONSTITUTION.

A. Section 520L Of The Criminal Sexual Conduct Statute Was Unconstitutionally Vague.

A penal statute violates a defendant's due process rights under the Fifth and Fourteenth Amendments if it is vague such that it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and capricious enforcement." Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The United States Supreme Court has set aside convictions in habeas corpus proceedings where the defendant was convicted under a state statute which was unconstitutionally vague and overbroad. See Gooding v. Wilson, 405 U.S. 518 (1972).

Here, Petitioner was convicted under Mich. Comp. Laws (MCL) § 750.520L ("**Section 520L**"), which, until June 1, 1988 provided: "A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has **filed** for separate maintenance or divorce." (Emphasis added). Thereafter, as of June 1, 1988, Section 520L was amended in pertinent part to provide, prospectively, that: "A person may be

charged and convicted under sections 529b to 520g even though the victim is his or her legal spouse." Id.

Neither Section 520L nor any other Michigan statute defined the term "filed" as used in the statute under which Petitioner was convicted. Indeed, the term "filed" has previously been challenged as vague in other statutes. See United States v. Lombardo, 241 U.S. 73, 76 (1916); Miller v. United States, 784 F.2d 728, 730 (6th Cir. 1986). The use of the word "filed" in Section 520L is similarly vague. Does the filing of a Petition To Show Cause Why A Divorce Should Not Be Granted mean that a divorce was "filed" within the meaning of Section 520L? Or is a divorce "filed" when the court so orders and when it is registered in the County Clerk's office? Petitioner suggests the latter is the correct definition as it reflects the "common and approved usage" of the word "filed" as MCL 8.3(a) directs. Significantly, Petitioner and Linda's divorce was not ordered by the court until May 20, 1986 (T. 154), and was not registered in the County Clerk's office until March 27, 1987 - - dates which show that a divorce was not "filed" until well after Petitioner was charged with violation of Section 520L and sentenced to 15-30 years imprisonment for violation of same. Further, the fact that the Michigan legislature subsequently amended Section 520L in 1988 to remove the "filed" language strongly suggests that the statute under which Petitioner was convicted lacked "sufficient definiteness" so that Petitioner's due process rights were violated.

Clearly, a writ should issue and Petitioner's conviction should be set aside as Section 520L was void for vagueness.

B. Section 520L Of The Criminal Sexual Conduct Statute Was Enacted In Violation Of The Michigan Constitution.

In Jackson v. Virginia, 443 U.S. 307 (1979), the United States Supreme Court reaffirmed that the responsibility of the federal courts in habeas corpus cases is not perfunctory, even in areas of central concern to the state. "As a defender and interpreter of constitutional protections our duty is to insure that the state provides the fundamental protection of due process of law when it seeks to deprive its citizens of liberty." Handley v, Pitts, 623 F.2d 23, 26 (6th Cir. 1980) (Jones, J., dissenting). To that end, the validity of a state statute under which a defendant was convicted is properly considered in a petition for writ of habeas corpus before the federal district court. As the Sixth Circuit observed in Staley v. Jones, state defendants' challenges of their respective convictions under the First, Fifth, Sixth and Fourteenth Amendments, and particularly constitutional challenges to the facial validity of state statutes, "'are allowed not primarily for the benefit of the litigant, but for the benefit of society - - to prevent the statute from chilling the . . . rights of other parties not before the court.'" 239 F.3d 769, 779 (6th Cir. 2000) (quoting Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984)). The Staley court held that the invalidity of a state stalking statute could be raised in a federal habeas petition. See also Gooding v. Wilson, 405 U.S. 518, 519-20 (1972) (defendant convicted under state statute prohibiting "opprobrious words or abusive language" could challenge facial overbreadth of statute in a federal habeas petition).

Here, Section 520L of the Criminal Sexual Conduct Statute under which Petitioner was convicted was enacted in violation of two Michigan constitutional provisions that were designed to prohibit hasty and ill-considered legislative acts. As set forth below, these defects render the statute in question no less invalid than the statutes in Gooding and Staley, albeit for violation of the Fourteenth Amendment.

The Michigan Constitution provides, at § 24, that "[no] law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content . . . ."

At § 26, the Michigan Constitution says: "No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof."

According to the 1974 House and Senate Journals, one version of the Criminal Sexual Conduct Statute was introduced as Senate Bill 1207 on February 28, 1974. It was passed by the House, with no mention of spousal rape, and sent to the Senate. It was changed substantially during its sojourn through the Senate in June and early July 1974, but there was still no mention of a new crime of spousal rape. Facing an end to the legislative session on July 12, 1974, as the House struggled to get a quorum, Representative Loren D. Anderson offered the spousal rape provision for the first time. It was introduced as an amendment. The spousal rape amendment, creating a new class of potential defendants, was rushed through on July 11, 1974, among 55 amendments to the "substitute bill."

The morning of July 12, 1974, as the legislative clock was about to strike midnight, the Senate took up the heavily amended bill. Senator Brown of the Judiciary Committee decried the passage of such a bill, without anyone on the Senate having had time to read it. Proponents of the legislation ". . . have raped the legislative process," he said. Several other senators spoke out against voting "blind" on the legislation, creating a "black mark on this Senate to pass legislation with such haste . . . ." (Senator Fleming, Senate Journal 7-12-74, pp. 1499-1500).

In United States Gypsum Co. v. Dep't of Revenue, 363 Mich 548, 110 N.W.2d 698 (1961), the addressed an amendment to a tax law which was added in haste, but which did not substantially change the original bill or make new law. The statute in that case was therefore upheld. Later, the Criminal Sexual Conduct Statute was upheld despite a constitutional challenge in People v. Clopton, 117 Mich. App. 673, 324 N.W.2d 128 (1982), and People v. Krauss, 156 Mich. App. 514, 402 N.W.2d 49 (1986). In Clopton, the defendant pled guilty following a plea bargain to third-degree criminal sexual conduct and to breaking and entering an occupied dwelling. He appealed on the ground that the entire Michigan Criminal Sexual Conduct Statute was not enacted in compliance with § 26 of the Constitution. The Clopton court found that the Criminal Sexual Conduct Statute, taken as a whole, was passed in a substitute version in harmony with the purposes of the original bill, and therefore was not a violation of the constitutional prohibition against hasty passage of new laws.

Krauss followed suit with Clopton. But looking at the spousal rape provision separately, as the radical new law that it was, it is clear that the legislature created a new animal in the dead of night, violating the five-day rule found in the Michigan Constitution. The five-day provision is in the Constitution for a reason. "A long history underscores an intent [in the Michigan Constitution] to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit." Anderson v. Oakland County Clerk, 419 Mich. 313, 353 N.W.2d 448 (1984).

The spousal rape law turns centuries-old social norms inside out. Up until that time, common law applied in Michigan. There was no such thing as spousal rape. People v. Hawkins, 157 Mich. App. 767, 771, 404 N.W.2d 662 (1987), rev'd, 428 Mich 903, 407 N.W.2d 366

(1987). The 1974 law created a new class of defendants out of whole cloth. It was introduced into the legislature by stealth amendment on the night of July 11, 1974 and passed the next morning.

The legislature's failure to abide by § 24 and § 26 of the Michigan Constitution in adopting the spousal rape law is a clear violation of Petitioner's right not to be deprived of his liberty without due process of law under the Fourteenth Amendment. This deprivation of constitutional guarantees affects not only Petitioner, but rather, as in Staley, the state's violation of the right to due process affects the rights of all other defendants convicted under this defective statute. A writ of habeas corpus is clearly warranted.

CONCLUSION

As the aforementioned facts demonstrate, Petitioner was repeatedly denied his constitutional rights before, during and after trial. Petitioner is entitled to relief in order to rectify these grave injustices.

WHEREFORE, Petitioner William J. Hetherington requests that this Court:

A. Issue a write of habeas corpus that Petitioner be brought before the Court to be discharged from his unconstitutional confinement and relieved of his unconstitutional conviction and/or sentence;

B. Conduct a hearing in which proof may be offered concerning the allegations of this Petition;

C. Order the respondents to file any responsive pleadings deemed just and appropriate;

D. Order such hearings as may be necessary to dispose of respondent's contentions prior to evidentiary hearing on this Petition;

E. Schedule filing for legal briefs and memoranda in support of the issues of law raised in this Petition so that the Court may be fully informed; and

F. Grant such other and further relief as may be appropriate.

Respectfully submitted,

_____

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Dated:_____