NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD DAVID MARTIN, - Petitioner

vs.

PAT WARREN, Warden and
BILL SCHUETTE, ATTORNEY GENERAL - Respondent.

ON PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Ronald D. Martin, respectfully petitions the Supreme Court of the United States, for a Writ of Certiorari to review the Judgment of the Unites States Court of Appeal for the Sixth Circuit, S.Ct R-10. Rendered and entered in case #17-2086, in that Court on 4-24-2018, Ronald David Martin, vs. Randall Haas, Warden Which granted petitioner's Writ of Habeas Corpus from the United States District Court for the Eastern District of Michigan-Southern Division rendered and entered in docket #11-15034, in that Court on 8-14-2017, affirming petitioners conviction and sentence.

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JURISDICTION

Pursuant to 28 U.S.C. § 1257, this court may review by Writ of Certiorari the final judgment or decrees rendered by the highest court of each state. In this case, petitioner is requesting for this court to review the final decision of the United States Court of Appeals for the Sixth Circuit, denial of his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254, entered on 4-24-2018, No 17-2086. S.Ct R 10(C).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

QUESTIONS PRESENTED

WHETHER PETITIONER WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES, HIS RIGHT TO PRESENT A DEFENSE, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHERE THE TRIAL COURT DENIED "WITHOUT PREJUDICE" A PRETRIAL MOTION TO INTRODUCE EVIDENCE OF COMPLAINANT'S BIAS AND PRIOR SEXUAL ACTIVITY UNDER MICHIGAN'S RAPE SHIELD STATUTE, WHERE COUNSEL COUNSEL FAILED TO PROPERLY AND FULLY LITIGATE A REQUEST TO INTRODUCE THAT EVIDENCE, AND WHERE COUNSEL FAILED TO RENEW HIS MOTION TO INTRODUCE SUCH EVIDENCE AT THE CLOSE OF THE PROSECUTION'S CASE PER THE TRIAL COURT'S PRETRIAL ORDER; AND WHETHER PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL FAILED TO PROPERLY AND FULLY LITIGATE THIS CLAIM ON APPEAL, AND WHERE COUNSEL FAILED TO BRING THE TERMS OF TRIAL COURT'S PRETRIAL ORDER TO THE ATTENTION OF THE APPELLATE COURT'S ?

Petitioner answers this question "YES".

Respondent answers this question "NO".

Judge Rosen in the district court (as to ineffective assistance of trial and appellate counsel only) answered this question "YES", but questioned whether the issue had been exhausted in the state courts.

Judge Roberts (replacing the departing Judge Roberts) in the district court answered this question "NO".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Case chronology;

On May 28, 2009, following a trial by jury before the Honorable Colleen O'Brien in Oakland County Circuit Court, Petitioner Ronald Martin was convicted of five counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(b), and with four counts of criminal sexual conduct in the second degree MCL 750.520c(1)(b) On June 30, 2009, Mr. Martin was sentenced to concurrent terms of fifteen to thirty years as to the first degree CSC counts, and eight to fifteen years as to the second degree CSC counts.

On direct appeal, he filed his claim of appeal timely on July 16, 2009, his timely motion for new trial was denied in a written opinion entered by Judge O'Brien on January 5, 2010, and his conviction was affirmed in an unpublished opinion by the Michigan Court of Appeals on February 8, 2011, in Mich. COA #293129. His timely application for leave to appeal was denied by the Michigan Supreme Court on June 28, 2011, in Mich. S.C # 142782.

Thereafter, Petitioner filed a timely petition in the United States District Court for the Eastern District of Michigan under 28 U.S.C. § 2254 raising ; (a) A claim that he was denied the effective assistance of counsel at trial, (b) a claim that the trial court deprived him of his Confrontation Clause rights and his right to present a defense, and (c) a sentencing claim. That original petition was assigned to the Honorable Paul Rosen. After initially denying the petition on all grounds, Judge Rosen allowed petitioner to amend his petition to add reformulated trial and appellate ineffective assistance of counsel claims, and he held the amended petition in abeyance so that Petitioner could exhaust the amended claim in

the Michigan State Court. In his ruling Judge Rosen found that this was a "troubling" case, that petitioner "was failed by both his trial and appellate counsel", and that the loss of exculpatory evidence (at issue on this appeal) was a "potentially meritorious" claim which may very well have deprived petitioner of his "Constitutional right to present a defense". (See Judge Rosen's Order, APPENDIX A,)

Thereafter, on December 17, 2013, Petitioner filed his motion for relief from judgment in Oakland County Circuit Court, requesting for Judge O'Brien to revisit the trial motion, and raising the reformulated trial and appellate ineffective assistance claims, and that motion was denied by Judge O'Brien, without conducting an evidentiary hearing, on June 27, 2014. Both the Court of Appeals, in Mich. COA #324098, and the Supreme Court, in Mich. S.C #151338, denied leave to appeal.

Thereafter, on February 4, 2016, the order of abeyance was lifted by Judge Rosen, the federal habeas case was reopened. The parties filed supplemental and reply briefs, with Judge Victoria Roberts subsequently replacing the departing Judge Rosen on December 17, 2016. On August 14, 2017, Judge Roberts issued her opinion and order, denying the amended petition, and granted a certificate of appealability as to those aspects of petitioner's trial and appellate ineffective assistance of counsel claims that related to the "Stephen jail threat" issue, and as to Petitioner's related claims that he was denied his Confrontation Clause rights and his right to present a defense. In her opinion, Judge Roberts appeared to ignore completely Judge Rosen's earlier analysis of the strength and materiality of this claim, finding instead that other record evidence in the case would have rendered the claimed error harmless. Petitioner then filed his timely notice of

appeal in the U.S. Sixth Circuit Court of Appeals on September 6, 2017. On April 24,2018, the 6th Circuit Court affirmed the District Courts ruling see (APPENDIX B).

B. Case Facts;

1. Trial facts;

(a) Complainant's claim of Sexual Assault

The complainant, 15 year old Samantha Wainright, testified that her father, Ronald Martin, sexually abused her between February and September of 2008 including four acts of vaginal intercourse, one act of digital penetration of her vaginal, and a number of other instances in which he touched her breasts in a sexual way. (Wainright, Trial, Tr 5-22-09, pg 24-68). At trial, the complaint recounted the incidents as if by rote, using nearly identical language, insisting that during each and every incident, her father first asked permission, she said no, he assaulted her, he asked her if she was mad at him, and he asked her to promise not to tell any other member of the family. Samantha first told her friend Olivia Rammage, that her father had touched her inappropriately, without telling Olivia the whole story. Later, in October, Samantha told Olivia more about the Assaults, and with Samantha's permission and in her presence, Olivia told her mother, Carolyn Rammage. and Olivia then told Samantha's mother, Tammy Whitmore (TT, pg 70-73).

Facts regarding the complainant's motive to fabricate these allegations (never disclosed to the jury) are discussed below at Fact B-1(b) trial fact undermining complainant's credibility are discussed below at Fact §B-1(c).

(b) litigation of a Rape Shield exception and trial counsel's ineffective assistance prior to and during trial ;

In his Motion for new trial the Petitioner maintained that his defense counsel was ineffective for failing to litigate fully or properly the admissibility of

evidence under the Rape Shield statute, MCLA 750.520j, for failing to present available defense evidence regarding the complainant's unique motivation to make this false allegation of rape against her father, and for failing to renew trial, request during trial per "trial court order", and where the prosecutor re-opened the door to this testimony (TT, pg 600-707).

Post-trial, in an affidavit submitted in support of the motion for new trial, the petitioner explained that in the spring of 2008, the complainant confided in him that she was not a virgin and that in the past, she had been sexually active with an older boy (19-year old) name Stephen. The petitioner claims that he explained to Samantha at that time that because Stephen was an adult and Samantha was only 14, sex between the two was illegal, and the petitioner forbid Samantha from having contact with Stephen (Ronald Martin's Affidavit APPENDIX C).

Thereafter, during the summer of 2008, the petitioner and his family learned that Samantha had lied about attending a "sleepover" with a girlfriend, and that she had actually spent the night with Stephen. The petitioner again expressed his frustration with Samantha over her having continued, apparently sexual, contact with Stephen. After the sleepover incident, the petitioner discussed the situation with Samantha's mother, Tammy Whitmore and both parents decided that since Samantha was apparently sexually active, that she should be examined by a doctor. Samantha's examination by the doctor was with the petitioner's consent, and it was billed under the petitioner's insurance plan (See Affidavit of Ronald Martin's insurance billing, APPENDIX D).

Thereafter, (still during the summer of 2008), after a period of relative calm Samantha confided in Eric Sandmire (the life partner of the petitioner's twin

brother, Donald Martin), that she was still in contact with Stephen, that she had a "fake" name in her cell phone for him (Adrian or Aidan), and that Stephen's special ring tone was the tune of "Amazed" by Long Star. Sandmire informed the Petitioner of Stephen's special ring tone, and that same night, Samantha's cell phone rang, and it was the song "Amazed". The Petitioner answered Samantha's cell phone and the caller hung up. After the call, the petitioner confronted Samantha in Eric Sandmire presence, the Petitioner told Samantha that he knew it was Stephen calling, and he said to samantha; "I don't know how many times I have to tell you. You are not allowed to see him (Stephen). If you don't end it, I will, and he'll be in jail". (Per Affidavit of Ronald Martin, and Eric Sandmire).

After another short period of relative calm, the "Stephen" problem resurfaced again, in October of 2008, when Samantha asked if she could change her cell phone plan to the petitioners plan, and the petitioner advised her that he would consider it if her grades improved and if she stopped having contact with Stephen. Samantha responded "I have no use for you". Eric Sandmire was present during this incident. Samantha accused her father of raping her almost immediately after this last incident (Affidavit of Eric Sandmire, APPENDIX E)

In the affidavits submitted as part of the motion for new trial the petitioner and Mr. Sandmire explain that all of this information was conveyed to defense attorney, William Ziem, after the charges were filed in this case, but before trial Ziem filed a Motion to Allow Evidence of Complaining Witness Sexual Conduct (TT, pg 671-677), however, Ziem never articulated to the trial court the totality of the information described above. On the contrary, in his written motion, defense counsel's offer of proof was that "[a]ccording to the Police Report, Tammy Whitmore

the Complainant's mother states that Samantha had sex with an older guy a year and a half ago, and that this would give the Complaining Witness the ulterior motive to be untruthful and suggest that it was her father that was the person having sex with her (TT, pg's 672-676). as discussed below at Argument I, the written motion failed to articulate the totality of evidence that could be offered, and it failed to articulate the broader Confrontation Clause issue involved; the Petitioner's right to confront the complainant about a specific source of bias. In short, the Stephen evidence was relevant because the Petitioner threatened to put Stephen in jail. This fact was never conveyed to the Court in the written motion.[1] The trial court denied the motion "without prejudice", stating that it would "revisit the issue after hearing the prosecution's evidence at trial" (Trial Courts Order Denying Without Prejudice, the Petitioner's Motion to Admit Rape Shield Evidence Regarding Complainant's Prior Sexual Activity, APPENDIX F).

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[1] During the oral argument on the motion, defense counsel belatedly advised the court of only a portion of this evidence. Counsel argued that it was widely known within the family, and among Samantha's friends, that Samantha was sexually active with an adult male named Stephen.

> "My client confronted her about this ... [H]e confronted [her] and said look, if you don't stop having sex, I'm going to call the police ..."

(Defense Counsel, Motion Hearing, Tr 2-18-09, p-5). Counsel failed to mention, however, that this argument regarding Stephen persisted and was part of the "cell phone" fight the day before Samantha accused her father of rape, and he failed to disclose to the Court that there were witnesses to this threat by the Petitioner. Counsel did preserve this as a Confrontation Clause claim.

However, the complainant's sexual relationship with Stephen became even more relevant, for two additional reason's based upon testimony presented by the prosecution at trial. First, the prosecutor presented the testimony of the complainant's pediatrician, Dr. Stacy Gorman, who explained that on October 22, 2008, Samantha Wainwright was brought to the office by her mother, Tammy Whitmore, "with a complaint that [Samantha's] father had molested her", and that the molestation included sexual intercourse on four separate occasions dating back to February, 2008. Dr. Gorman explained that she did not perform a pelvic examination on Samantha because Samantha had a pelvic exam in August of 2008, Samantha told Gorman that the "last episode [was] when she came in in August", and consequently the doctor didn't feel the need to repeat it". (TT, pg-11). Based upon the complainant's report of molestation, Gorman called the Waterford Police Department and she filed a "3200" report for Child Protective Services.

Following Dr. Gorman's testimony about the pelvic exam there was a predictable flurry of juror questions, most of which the trial court deemed inadmissible, (TT, pg's 13-14).

The trial testimony from Care House's "lead forensic interviewer", Amy Allen, further demonstrated the relevance and materiality of the "Stephen jail threat" issue. Allen testified that a "multi-disciplinary team" -- including a detective, a prosecutor, Allen and a crisis counselor -- screens cases in which children make allegations of sexual assault. According to Allen, part of the team's "protocol" includes developing possible "alternative hypotheses", or alternative explanations about why this child is making this statement. (TT, pg's 101-104).In this case, Allen raised the possibility of an alternative hypotheses, and then intimated that

she and the "team" had ruled that out (without describing what that might be), finding no other reason possible why Samantha Wainwright would be making these statements about her father unless they were true.

Despite the fact that the testimony of Dr. Gorman and Amy Allen appeared to "open the door" to the trial court revisiting the Stephen jail threat evidence, defense counsel did nothing whatsoever to renew his earlier request, Worse, counsel presented an awkward, truncated account of the confrontation between Samantha and her father in October of 2008, explaining only that the rape allegation came on the heals of the Petitioner deciding not to put Samantha on his cell phone plan (TT, pg 129-131, and Sandmire, testimony, TT, pg's 116-118).[2] This redacted and essentially false account of the incident became the predictable subject of ridicule during the prosecution's closing argument. "Why would she lie ? .. [I]t's ludicrous to say that [it's] because her dad wouldn't let her change her cell phone plan"(Prosecutor Closing, TT, p-66).

Finally, Samantha's then-boyfriend Stephen Cartier submitted his own affidavit in connection with the motion for new trial, confirming virtually all of the claims made by the petitioner in this case. In it, Cartier confirms that he was involved in a relationship with Samantha for most of 2008; he confirms that he knows Samantha to be someone who will often manipulate a situation to get her own way,

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2 Samantha batted away the suggestion that the cell phone incident motivated the rape allegations, Samantha testified variously that I was fine with it. I already had a cell phone, and that "nothing else" made her angry during this time period of February of 2008 to August of 2008.

and that she does not have a reputation for being an honest person,[3] he explains that during arguments, Samantha would threaten to have him (Stephen) arrested for their sexual relationship; and he reports that he was aware in the summer of 2008 that Samantha was being taken to the doctor because of their sexual relationship. According to Cartier, Samantha never told Cartier that she was having sex with her father, and Samantha did not appear to be "traumatized" at all during that time period. Attorney Ziem never attempted to interview Cartier (Per Affidavit of Stephen Cartier, APPENDIX G).

(c) Trial facts undermining complainant's credibility;

The complainant's account of when, how, and where the charged acts of molestation have varied wildly over time. The complainant testified at trial that the molestations began in January or February of 2008, when her father was having marital difficulties with his then wife, the complainants step-mother Trish Martin The complainant testified that the first incident, a fondling, happened when she was in the Petitioner's Holly home, and that the Petitioners wife was at home when this occurred (Wainright TT, pg's 40-41). She claims that a second incident, a fondling of her breast, happened at the Holly home when the complainant's younger half-sister, Madison, was visiting her grandmother (TT, pgs 41-44). She claimed a third incident, sexual intercourse, happened at a Holiday Inn in about March or April of 2008, in their hotel bathroom, while Madison was asleep in the next room

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3. The complainant warns on her "MySpace" page, "I'm pretty easy to get along with but only if you don't start problems". (This statement was attached to petitioner's Brief on direct appeal).

(TT 90-96). She claimed that the fourth incident, also intercourse, happened at her "Uncle Don's" house (Donald Martin, the Petitioners twin brother), at the end of the summer, when both Don and his life partner, Eric Sandmire, were present in the home (TT, pg 52-59). She claimed the fifth incident a fondling, happened at her paternal grandmother's house when her grandmother and her little sister were home (TT, 59-62, 108-110). She claimed that the sixth incident intercourse, occurred at her Uncle Don's house, after the Petitioner tried to join Samantha in the shower and after sister Madison called on the phone asking for a ride, interrupting them briefly (TT, pgs 63-65, 113-118). She claimed that this last occurred after a family birthday party for "Dino" at the end of August of 2008 (TT, pgs 65-68, 118-119).

However, the complainant had participated in a formal transcribed interview with Care House forensic worker, Amy Allen, which contrasted significantly with her trial testimony. She told Allen that "everything started once her father moved in with Uncle Don" (which would actually be the "fourth" incident, according to her trial testimony). The complainant said nothing to Amy Allen about the two incidents in :January or February" that allegedly occurred at the Petitioners Holly home, where he lived with wife Trisha. As a result of his break up with Trisha, the Petitioner had moved in February of 2008 from the Holly home to the Waterford home of Don Martin and Eric Sandmire (TT, pgs 123-124, and Eric Sandmire, 111-112). Second, also in contrast to her trial testimony she told Amy Allen that during the hotel incident she was raped in the bed in the hotel bedroom (not the bathroom), with her sister present just a few feet away.[4] Third, also in contrast to her trial testimony as to

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4. The complainant also told Amy Allen that during this incident that was happening a few feet from her sister in the hotel bedroom, she was hitting the Petitioner, kicking him, crying, and asking to be taken home.

the shower incident at Uncle Don's at preliminary examination, the complainant had claimed that they "stopped" having sex when sister Madison called (TT 116-118).

The complainant testified that while the molestation in general made her "uncomfortable", she still went to her father's house, voluntarily, "all the time", and gave the choice of going to her father's house alone, or going to her grandmother's house (without her father) to be with her little sister, she chose the former. According to the complainant, her father was raping her, however, she preferred that to spending time with her sister because her sister would get her in trouble with her grandmother (TT, pgs 127,134-135). Perhaps most significant, the complainant insisted that she decided to disclose the molestation to protect Madison "so that my sister wouldn't have to go through the same thing" (i.e., molestation by their father) (TT, 71). However, the complainant admits that even after her father's sexual abuse of her was well underway, she went to court to testify on her father's behalf to get a personal protection order lifted that had prevented her father from being with little sister, Madison (TT, pgs 137-138).

REASON FOR GRANTING THE WRIT

Petitioner disagrees with the Sixth Circuit Court's ruling, because this court has long held that a defendant has a constitutional right to confront his accuser, and to present evidence in support of his version of the facts, the right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense Washington v Texas, 388 US 14, (1967). However Petitioner was deprived of this rights when prior to trial, William Ziem trial counsel, submitted and argued a pre-trial Motion, in Judge O'Brien's courtroom, requesting to allow prior sexual testimony in from the complainant, arguing that the Rape Shield Statute essentially says that you can't admit evidence of this type,

except under limited circumstances, and the circumstances we want to limit this under is not addressed in the statute. But it's addressed in case law. In People v. Hackett, the court stated that ;"We recognize in certain limited situation such evidence may not only be relevant but its admission may be required to preserve a defendants constitutional right to confrontation."At the conclusion of the hearing the Judge O'Brien stated; "All right. Let me take it under advisement, Okay ? I'll issue an order." However, Judge O'Brien never issued a order on the Motion.

In addition, the Petitioner have a constitutional right to have effective assistance of both trial, and appellate counsel, Strickland v Washington, 466 US 688 (1984); US. Const, Am VI ; Const 1963, Art 1 § 20. Petitioner claim that trial counsel failure to request for the judge to make a ruling on the Motion, constitute ineffective assistance of counsel, as the result, Petitioner was unfairly prejudice in his ability to present a defense, and to confront the complainant with prior statements.

Furthermore, appellate counsel failure to raise the constitutional violation raised herein on direct appeal also constitute ineffective assistance of counsel. In fact, US District Judge Rosen, ruled that this was a "troubling" case, that the Petitioner was failed by both his trial and appellate counsel, and that the loss of exculpatory evidence (at issue on this appeal) was a "Potentially meritorious" claim which may very well have deprived Petitioner of his constitutional right to present a defense. The judges ruling was the law of the case. However, it was overruled by US District Judge Roberts, as explained above. Based upon the forgoing and because this claim encompasses an important constitutional question that must be settled by this court, this Writ of Certiorari must be granted S.Ct R 10(c).

ARGUMENT

PETITIONER WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES, HIS RIGHT TO PRESENT A DEFENSE, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHERE THE TRIAL COURT DENIED "WITHOUT PREJUDICE" A PRETRIAL COURT MOTION TO INTRODUCE EVIDENCE OF COMPLAINANT'S BIAS AND PRIOR SEXUAL ACTIVITY UNDER MICHIGAN'S RAPE SHIELD STATUTE, WHERE COUNSEL FAILED TO PROPERLY AND FULLY LITIGATE A REQUEST TO INTRODUCE THAT EVIDENCE, AND WHERE COUNSEL FAILED TO RENEW HIS MOTION TO INTRODUCE SUCH EVIDENCE AT THE CLOSE OF THE PROSECUTOR'S CASE PER THE TRIAL COURT'S PRETRIAL ORDER AND APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL FAILED TO PROPERLY AND FULLY LITIGATE THIS CLAIM APPEAL, AND WHERE COUNSEL FAILED TO BRING THE TERMS OF THE TRIAL COURT'S PRETRIAL ORDER TO THE ATTENTION OF THE APPELLATE COURT'S.

Standard of review; A reviewing court must reverse a defendant's conviction based upon ineffective assistance of counsel where the defendant establishes that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudice defendant so as to deprive him or her of a fair trial.

(a) Michigan's Rape Shield statute;

In an effort to protect complainants in criminal sexual conduct cases from irrelevant questioning regarding prior sexual conduct while preserving a criminal defendant's right to confront and cross examine witnesses, the Michigan legislature enacted the rape shield statute, which prohibits the introduction of sexual history evidence under all but two circumstances. Specifically, MCLA 750.520(j) provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value;
>
> (a) Evidence of the victim's past sexual conduct with the actor;
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease.

(Footnotes omitted).

(b) Case law on Confrontation Clause challenges to rape shield statutes;

Both Michigan and Federal Courts have held consistently that rape shield statutes, such as that enacted in Michigan, cannot be interpreted so as to impinge upon an accused's right to confront witnesses or the right to present a defense. In Michigan v. Lucas, 500 U.S. 145 (1991), the United States Supreme Court reversed the Michigan Court of Appeals per se ruling that the notice requirement in Michigan rape shield law violated the Sixth Amendment in all cases where it was used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. Id. 146,149-153. The Court recognized that the Sixth Amendment right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."Id. at 149 (citation omitted) The Court emphasized, however, that restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve."

Following Lucas, the Ninth Circuit found that a state decision amounted to an unreasonable application of the Supreme Court's holding in Lucas where the lower court had barred defense evidence of an earlier rape, by someone other than the defendant, of a child sexual assault victim based upon Oregon's rape shield Statue. LaJoie v. Thompson, 217 F3.d 663 (9th Cir, 2000);

> Had the Oregon Supreme Court weighed the interests of [Petitioner's] particular case, it reasonably could have concluded only that the preclusion of the evidence of [The complainant's] past sexual abuse violated LaJoie's Sixth Amendment rights. The trial judge correctly found that some of the evidence was relevant to provide an alternate explanation of the medical evidence and therefore fit within one of the exceptions to the general prohibition of sexual behavior evidence.

> The prosecution relies on medical evidence of injuries to [the complainant] hymen, thus inviting the inference that [Petitioner] must have caused those injuries. Watkins, however, had been convicted of raping [the complainant]
>
> .... [Petitioner] could have probed the evidence of other sexual abuse to ascertain whether the hymenal injuries could have stemmed from that abuse
>
> [Petitioner] correctly contends that the jury convicted him without the benefit of the evidence of the past sexual abuse which, in several ways, tended to make it less likely that [Petitioner] had raped and sexually abused [the complainant].

217 F.3d at 669-671, citing United States v Begay, 937 F.2d 515,523 (10th Cir. 1991)(evidence of prior rape should not have been excluded under federal rape shield law where prosecutor relied upon medical evidence in attempting to establish defendants guilt). Similarly, in Lewis v Wikinson, 307 F.3d 413 (6th Cir. 2002), this Court granted habeas relief on Constitutional Clause grounds where the trial court had excluded defense evidence of statements including in the complainant's diary regarding her feeling about her prior sexual encounter with others, finding that the statements were relevant to the complainant's motives in making the allegations against the petitioner.

In his opinion in Mr. Martin's habeas case, Judge Rosen emphasized recent Sixth Circuit authority finding that evidence offered to show a witness's bias or motive against a defendant is afforded greater protection under the Confrontation Clause than an attack of a witness's general credibility,

> The former type of questioning tries to pinpoint a specific explanation for why a witness might be testifying falsely -- say that a rape accuser holds a preexisting grudge against the defendant and wants to see him suffer. The later type of questioning tries only to show that the witness had lied before and may be lying again. The Confrontation Clause protects a defendant's right to explore specific motivations, but it "does not require that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct."

Amended Opinion and Order Denying Petition for Writ of Habeas Corpus and Granting (Partial) Certificate of Appealability, n 3, Pg ID 869, relying upon Fuller v Woods, 528 Fed. Appx. 566, 570 (6th Cir. 2000).

Michigan court's have applied a similar analysis in weighing the defendant's right of confrontation against the complainant's right of privacy in a sexual assault case. For example, the Michigan Supreme Court has ruled that while a state trial court may have discretion in determine the extent of appropriate cross-examination there is a dimension of the Confrontation Clause that guarantees to a defendant a reasonable opportunity to test the truth of a witness's testimony People v Hackett 421 Mich 338 (1984); People v Paquette, 421 Mich 338, 347 (1984), citing Alford v United States, 282 U.S. 678 (1931).

Michigan's rape shield statute sets forth only two circumstances under which evidence of the complainant's prior sexual conduct is admissible. However, judicial decision have recognized that the accuseds federal and state constitutional guarantees must be accommodated through the admission of evidence involving a complainant's past sexual history in circumstances beyond those set in the rape-shield statue. People v Arenda, 416 Mich 1, 13-14(1982)

> The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. we recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation.

Hackett 421 Mich at 349 (citations omitted; emphasis supplied), See People v Mikula 84 Mich App 108, 111-115 (1986).

Michigan courts have also emphasized the importance of admitting liberally evidence which is probative of an incest victim's motive for fabricating charges against a parent. For example, in People v Mattice, 2004 WL 2451933 (Mich App

(unpublished and appended), the defendant had caught his daughter with two packs of cigarettes and a condom, and he confronted her about a boy named Justin. As here, the complainant's allegation of rape followed shortly thereafter. The Court ruled that the defendant's claim that he confronted the complainant about Justin did not implicate the Rape Shield statute at all, and should have been admitted by the trial court. The Court declined to reverse in Mattice, however, because the defendant had been allowed to introduce evidence that just prior to the allegation of incest, Justin had been banned from the house, that the defendant had slapped and punished his daughter for having cigarettes. As such, the barred evidence would have been cumulative.

In People v Morse, 231 Mich App 424 (1998), the Court held that prior sexual conduct evidence should be admitted where the defendant can show that (1) the proffered evidence is relevant, (2) the person can show that another person was convicted of criminal sexual conduct involving the complainant, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. Id. 437-438. Petitioner's claim substantially complied with all three of the Morse requirements. The proffered evidence was relevant because it demonstrated the complainant's bias against the defendant, it responded to Amy Allens alternative hypothesis testimony, and it responded to Dr. Gorman's unspoken, but implicit, suggestion that Samantha's August 2008 pelvic exam showed her to be sexual active. Second, while there was no conviction of another person for a sex crime in this case, the prosecutor agreed during the motion hearing that the family was widely aware that Samantha (a minor) and Stephen (an adult) were having sex, and Stephen now admits it. Third, the sexual acts involved in both the prior relationship with Stephen and the charged case are identical (i.e, sexual intercourse).

Moreover, like the foregoing case, this error was enormously prejudicial. The defendant was never truly able to confront the complainant's true motivations for falsely accusing him of these crimes. The loss of this evidence crippled the defense. The defense was left to rely on a strained, truncated explanation (ridiculed by the prosecutor in closing arguments) that the complainant was falsely accusing the defendant because he wouldn't put Samantha on his cell phone plan. Surgically excised from this explanation was the further fact that the defendant was threatening to jail Samantha's boy friend. The cell phone incident was just the end of a tense, month-long stand off between father and daughter over sex with the adult boyfriend. Judge Rosen agreed.

> ...[T]he less convincing motive presented at trial was that the complainant falsely accused Petitioner of raping her because he would not put her on his cell phone plan. In this Court's view, Petitioner's threat to jail Stephen was a critical element of his theory of defense that the complainant was motivated to falsify charges against him.
>
> .. Petitioner alleges that he repeatedly warned the complainant about having sex with Stephen during this time-frame, but the matter finally came to head in October of 2008 during the conversation about the cell phone when he again threatened to jail Stephen. The timing of the complainant's allegations and the threat to jail Stephen created a much more plausible motive for a false accusation than the mere fact that Petitioner would not put the complainant on his phone plan.
>
> If the case were tried before this Court, it likely would have found that Petitioner had a right to present this defense evidence, see Davis v Alaska, 415 US 308, 315-16 (1974)(a witness's motivation in testifying carries with it the constitutionally protected right of cross-examination); Lewis v Wilkinson, 307 F.3d 413,422(6th Cir. 2002)(statements in complainant's diary about sexual history with other man had substantial probative value as to her motive in pressing charges against the petitioner)(APPENDIX A__)

The loss of this evidence also crippled the defense in responding to Dr. Gorman and Amy Allen's testimonies. Because the state court never made a ruling on the Motion, and because of counsels failure to renew the request to introduce the Stephen jail threat evidence, jurors would necessarily have concluded that if Samantha showed signs during the pelvic exam of being sexually active, it could only have resulted

from sex with her father, because on other suspect were identified for the jury. Defense counsel also failed to offer an available response to Amy Allen's testimony suggesting that the "team" had ruled out alternative hypotheses as to why the complainant would be making these claims. In fact, there was an alternative hypothesis - the Stephen jail threat.

(b) The loss of exculpatory evidence was not harmless;

After the state court collateral proceedings, Judge Roberts replaced the departing Judge Rosen in the district court, and promptly proceeded to ignore Rosen's thoughtful analysis of the prejudice occasioned by the loss of the Stephen rape shield evidence. According to Judge Roberts, the probative value of the lost evidence was diminished because the Stephen jail threat was separated in time from complainant first reports of the molestation to friend Olivia. "[T]he record of the disclosure of the allegations undercuts the defense theory that they were made in retaliation for Petitioner's threat against [Stephen]. Samantha first told her friend about an incident months before the threat was made". (Opinion and Order Denying Petition for Writ of Habeas Corpus and Granting (Partial) Certificate of Appealability,) See (APPENDIX H, attached).

There are seven problems with Judge Roberts analysis. First, Judge Roberts ignores that even complainant's earlier reporting of molestation to Olivia was contemporaneous with, and inextricably tired to, Ronald Martin's outrage over the initial news that his daughter was sexually active with an adult named Stephen, and his actions in reining in Samantha while banishing Stephen. The situation escalated over the summer, with Petitioner insisting that complainant be seen by a doctor, with the complainant secretly continuing to see Stephen, with the complainant confiding in

Eric Sandmire (and Sandmire telling the Petitioner), culminating in October of 2008, with Petitioner threat to have Stephen jailed following immediately by complainant's report of incest to authorities. Judge Roberts analysis ignores that this situation - every parent's worst nightmare - was evolving over a period of months.

Second, best-friend Olivia had credibility problems of her own. Allegedly presented with the complainant's revelation of molestation in the spring of 2008, Olivia said nothing to her mother or anyone else until October of 2008. Olivia was a teenager and the complainant's best friend - a person, the defense could argue, who would vouch for her friend regardless whether or not she was telling the truth.

Thirdly, while prosecutors at any retrial of this case certainly would be free to make the factual argument suggested by Judge Roberts, above, all of this evidence belonged in the crucible of the adversarial process - in the hands of jurors who could assess credibility first hand and deliberate with each other as to the materiality of the new evidence and its effect on the case as a whole.

This error was not harmless. There was no genuine corroborating medical evidence in this case, and nothing that identified Petitioner as the person having sexual relations with the complainant. The medical testimony that was introduced by the prosecutor, in contrast, was completely misleading to jurors and was even more prejudicial because it left jurors with the impression that (a) the complainant was sexually active, and (b) she had a single sexual partner - her father. By all accounts (including Stephen's), the complainant was sexually active with Stephen during this precise time period, and consequently, neither the August (the first doctor) nor the October 2008 (second doctors) medical examinations proved Petitioners guilt. Third, Stephen avers that Samantha never appeared traumatized during this period and never told him her father was abusing her while the two were dating,

in an exceedingly close relationship seeing other every day (Stephen's Affidavit).

Furthermore, this case has all of the classic earmarks of a false allegation of sexual abuse by a troubled, manipulative teenager during a time period of litigation within the family over issues of child custody. Katherine Okla, an expert in evaluating the sexual allegations made by adolescent girls, explained in her affidavit (APPENDIX I), that evaluators in this case missed a series of obvious red flags indicative of a likely false allegation of incest in this case. During this precise time period, this family was going through significant conflict as a result of (a) the defendants break up with his then-wife, Trish, (b) the defendants separation from his daughter (the complainants half sister) Madison, and (c) a contested court hearing in which the complainant testified on her fathers behalf to have a personal protection order lifted as to Madison. Particularly as to this last factor, Petitioner maintains that the complainant would have been educated, as a result of that bitter litigation, of the devastation that can result from a false allegation that a father is unfit to live with his own child.

Also, by all accounts, Samantha was a manipulative teen who habitually fumed and plotted when she didn't get her way, even as to relatively insignificant issue. Stephen reported that "[d]uring my relationship with Samantha, I learned that she is someone who will often manipulate a situation to get her own way, and that she does not have a reputation for being an honest person (Per Stephen's Affidavit). According to her uncle, Donald Martin, the complainant would get mad if she did not get her way, and there was obvious jealousy of sister Madison, a "lover hate relationship" because Madison got to live full time with her father while Samantha had to live part time with her mother's familiy. (TT, pg 139-141). Perhaps most

had to live part time with her mother's family. (TT, pg 139-141). Perhaps most significant was the complainants immediate motivation for making a false complaint a fact that was completely ignored (or never known) by Amy Allen's Care House. By all accounts, Petitioner and the complainant had been in a months-long stand-off over the complainant's sexual relationship with Stephen Cartier, culminating in the Petitioner threatening to jail Stephen. The last explosion in this stand-off occurred the day before the complainant's allegations of incest - that the complainant would not be allowed on the petitioner's cell phone plan unless she stopped seeing Stephen. Samanatha's response to her father - "I have no use for you". Tellingly, the complainant warns on her "MySpace" page, "I'm pretty easy to get along with but only if you don't start problems." Consequently, the "perfect storm" of family turmoil, the complainant's manipulative personality, and a father's threat to jail the boy-friend, set the stage for this false incest accusation.

The complainant's wildly varying account of the alleged abuse to others itself undermines her credibility (See discussion supra at Fact §B-1(c)), and further demonstrates that the errors claimed herein were not harmless. A teenaged girl's first experience of being raped by her father on a hotel bathroom sink with her little sister in the next room is not something that would be "forgotten" or "overlooked" when reporting incest to her mother, yet the complainant made no mention of this incident when disclosing the alleged abuse to her mother. She told her mother that all of it happened at Uncle Don's house. (Wainright, Trial Tr pg 82). Also as to this significant incident, Samantha agreed that she gave a "completely different story" to Amy Allen at Care House, claiming that the rape happened in the bed next to her sister, not on the bathroom sink (TT, pg 94-100). Even the reporting of incest to Olivia's mother and her own mother was suspicious, she hid behind a door while Olivia told both women.

Expert Okla explains that "adolescents are recognized to be emotionally labile, she-focused, and often struggling with psychosexual issues of self-esteem and sexuality, in part driven by physical and hormonal changes." Their developing brains are prone to numerous emotional and behavioral changes including a tendency to seek stimulation and novelty, to react more strongly to stressful situations, and a greater proclivity to negative emotional reactions (See Affidavit of Okla p-4), referencing D.Poole, A.Warren, and N.Nunez (eds.) The Story of Human Development. New Jersey; Pearson Education, Inc. (2007). Petitioner maintains that this explains how the complaint could make a false incest accusation in a temporary explosion of anger, to serve her immediate interests, not realizing the far reaching consequences of such a false allegation, and not realizing that specific will be required by interrogating authorities. It also explains Samantha's wildly inconsistent accounts of the abuse forgetting when, where and how the abuse took place.

As to this issue, Expert Okla also disagrees with Amy Allen's "justification" for Samantha's bizarre "rote", cookie-cutter accounts of each of these incidents. Samantha was careful to include in each recitation how the Petitioner asked permission, she said no, and he proceeded anyway, always forcibly. Allen theorized at trial that Samantha may feel guilty that she allowed the abuse to occur and is "exaggerating" facts more properly indicative of a "forcible" rape. (Allen, Trial Tr pg 77-80). Okla, in contrast, attributes these suspicious details to an accusation that was suspicious to began with. "..[A]n unbiased investigator .. should consider the equally plausible interpretation that Samantha may have made a false allegation, never expecting it to go as far as it did, and was thus unable to provide consistent details because she didn't think that far ahead."

(c) Case law and analysis of trial and appellate ineffective assistance of counsel;

Counsel was Constitutionaly ineffective prior to trial, when in the written rape shield motion, trial counsel failed to mention the Stephen jail threat at all, and latter, during trial, when he failed to ask the trial court for permission to offer the Stephen jail threat evidence at the close of the prosecution's case.

According to Judge Rosen, Carole Stanyar prior attorney was also ineffective during the Petitioner's direct appeal for failing to raise an ineffective assistance of counsel challenge based specifically upon trial counsel's failure to revisit the Stephen jail threat issue at the close of the prosecutors case per the trial courts pretrial order. Instead, Rosen finds that on the direct appeal, attorney Stanyar only argued that trial counsel was ineffective for failing to argue that the prosecutors trial witnesses, Amy allen and Dr.Gordon, had "opened the door" to the admission of the defense evidence. This latter issue, Rosen finds, is distinct from the former issue. Rosen reasons that had the trial court simply been asked mid-trial, she may have allowed the Stephen jail threat evidence to be introduced on the basis of the complainant's testimony alone. Rosen concludes that "appellate counsel's omissions", in failing to frame the issue properly in failing to call attention to the wording of the order itself, "prevented the state appellate courts from considering potentially meritorious issues." (See Rosen's Order, APPENDIX A).[5]

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5. The state trial and appellate courts all appeared to disagree with Judge Rosen's analysis during the litigation of Petitioner's collateral appeal under MCR 6.500 At each phase of that appeal, the courts determined that this issue had already been presented during Petitioner's direct appeal. As such, contrary to Judge Rosen's findings, there would be no need to exhaust what was merely a reformulation of an already exhausted claim. Therefore, Judge Roberts did not find a failure to exhaust.

Based upon all of the foregoing, Petitioner contends that he was deprived of the effective assistance at trial and on appeal with respect to the proper litigation of this issue. The prejudice that ensued was nothing less than the loss of the right of Confrontation and the right to present a material defense - all of which deprived Petitioner of a fair trial and altered the outcome of these proceedings.

In Strickland v Washington, 466 US 668 (1984), this United States Supreme Court set forth a two-prong test for determining whether a habeas petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires showing that counsel made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment. Id. 687. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal.

The failure to investigate and competently present available material defense evidence constitutes ineffective assistance of counsel. Couch v Booker, 632 F.3d 241 (6th Cir. 2011). Moreover, the Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first appeal by right Evitts v Lucey, 469 US 387, 396-397 (1985). The Strickland standard also applies to claims of ineffective assistance of appellate counsel. See Whiting v Burt 395 F.3d 602,617 (6th Cir. 2005). Judge Rosen has effectively concluded in this case that both prongs of the federal constitutional standard have been satisfied, Rosen stated;

> In this troubling case, Petitioner was failed by both his trial and appellate counsel. Trial counsel's inaction resulted in the loss of an opportunity to have the trial court make a final ruling on the admissibility of critical defense evidence, and appellate counsel's omissions prevented the state appellate courts from considering potentially meritorious isseus.

> ... If the admissibility of this defense evidence was not resolved by the trial court's pretrial order with finality, then surely defense counsel was ineffective for failing to raise the issue again at trial, or at least counsel should have ascertained the bounds of what would have been allowed.

(Amended Opinion, pg 841,870). The sole reason Judge Rosen gave for not granting the petition for writ of habeas corpus under 28 U.S.C. §2254 was his mistaken belief that the state court have not yet had an opportunity to address the claim first. Id. at 870-871. See also Coleman v Thompson, 501 US 722, 731 (1991). As noted above, no other court agreed with that assessment.

In contrast, the U.S District Court, and the U.S. Sixth Circuit Court concluded that all of the claimed errors related to the Stephen jail threat issue were harmless for the reasons discussed above, Petitioner disagree and appeal their ruling.

RELIEF REQUESTED

WHEREFORE, based upon the foregoing facts and authority, the petitioner Ronald Martin, respectfully request for this Honorable Court to GRANT this Writ of Certiorari, where the petitioner's constitutional rights were violated.

Dated: 7-18-, 2018,

Ronald D Martin

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